STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF ADRIAN, Case No. C03 E-096
Public Employer-Respondent,

-and-

AMERICAN FEDERATION OF STATE, COUNTY,
AND MUNICIPAL WORKERS, COUNCIL 25,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Keller Thoma, P.C., by Richard W. Fanning, Jr., Esq., for the Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr., Esq., for the Charging Party

DECISION AND ORDER

On October 20, 2004, Administrative Law Judge Julia C. Stern issued her 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: _____

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APPEARANCES:

Keller Thoma, P.C., by Richard W. Fanning, Jr., Esq., for the Respondent

Miller Cohen, P.L.C., by Richard G. Mack, Jr., Esq., for the 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 and 423.216, this case was heard at Detroit, Michigan on September 22 and November 21, 2003, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by both parties on March 29, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The American Federation of State, County and Municipal Employees (AFSCME), Council 25 filed this charge against the City of Adrian on May 5, 2003. The charge alleges that on or about March 14, 2003, Respondent violated Sections 10(1) (a) and (c) of PERA by demoting Lori Green, an active supporter of the Charging Party during its campaign to organize Respondent's employees. Charging Party filed an amended charge on June 10, 2003. The amended charge alleges that Respondent violated Sections 10(1) (a) and (d) of PERA by suspending Robert Irish on May 20, 2003 because Irish testified at a Commission-conducted hearing on a representation petition filed by the Charging Party. During the hearing in this case, I granted Charging Party's motion to amend the charge to allege that Irish's suspension also violated Section 10(1) (c) of PERA.

Lori Green's Demotion

Facts:

Respondent hired Lori Green on October 28, 1996, as the administrative assistant in its Police Department (the department). Until the 1990s, a sworn police officer, an administrative sergeant, was assigned to run the department's office and supervise its clerical staff. After the 1970s, the administrative sergeant was assigned more and more duties requiring computer knowledge. Because it was difficult to find a sworn officer with the required skills, Respondent replaced the administrative sergeant with a civilian administrative assistant sometime in the 1990s. In 1994, Respondent promulgated a job description for the position of administrative assistant in the police department. The position required a bachelor's degree, with at least a minor in computers, and two years of related experience, or an equivalent combination of education and experience. Green was the second individual to hold the position.

In 2000, Respondent transferred the administrative assistant's supervisory responsibilities to a sworn lieutenant. In late 2000, the administrative assistant's responsibilities for the operation of the police department's computers were reduced after Respondent hired its first information technology director.

In about May 2001, unorganized employees of Respondent, including Green, began to discuss becoming unionized. Around the first week of June 2001, employees contacted the Police Officers Association of Michigan, formed the Adrian General Employees Association as an affiliate of that labor union, and began organizing. Green was an active supporter of the union. She hosted union meetings at her home and circulated union cards. After the employees started to organize, Green talked generally about the union and the organizing campaign with Lieutenant Tom Ray, Green's immediate supervisor. Green did not discuss the union with Police Chief Michael Martin at that time.

Martin testified that soon after he became police chief in December 2000, he began thinking about changes that might improve the efficiency of the department. Martin noted that Green was not performing many of the duties listed in the administrative assistant's 1994 job description, including evaluating work procedures, making recommendations to improve efficiency, preparing drafts of speeches, and making official presentations to staff or the general public. On June 23, 2001, Martin sent City Administrator George Brown a memo asking that the administrative assistant position be eliminated and replaced with a clerk/secretary. In his memo, Martin told Brown that the administrative assistant did not currently supervise anyone, did not perform executive or policymaking activities, and performed the same or similar work as the secretaries. Martin noted that the administrative assistant was paid about $4.00 per hour more than clerk/secretaries at the top of the pay scale, and he told Brown that he did not feel that the administrative assistant's higher salary was justified. Martin and Brown discussed the memo, and they agreed that Martin was too new to the department to undertake any kind of significant reorganization at that time.

The Adrian General Employees Association filed a petition to represent Respondent's unorganized employees on September 10, 2001 (Case No. R01 I-124). About the beginning of November 2001, Martin and Green had a conversation about morale in the department. It began when Martin asked his

secretary if she knew why a retiring employee did not want a retirement party. After Martin's secretary said that she did not know, Green went to Martin's office, shut the door, and said, "If you want the truth, I'll tell you the truth." At some point during their discussion, Green said to Martin, "You are the reason we are forming a union." Green could not recall Martin's response to this comment, except that Martin "was not happy about it."

Pursuant to a consent election agreement, the Commission conducted an election in Case No. R01 I-124 on December 21, 2001. The Adrian General Employees Association failed to get a majority of the votes cast. In the spring of 2002, Charging Party began organizing Respondent's employees. Green was involved in this organizing drive. Green held several union meetings at her house, and collected showing of interest cards. Green also telephoned employees at their homes to solicit their support for the union.

In December 2002, five civilian employees were working in the police department office – Green; two secretaries, including Martin's secretary; a clerk-typist, and a police cadet who performed part-time clerical work. On December 19, 2002, after learning that one of the secretaries planned to retire at the end of January, Martin sent Brown another memo requesting that he be permitted to eliminate the administrative assistant position and offer the vacant secretarial position to Green. As an explanation of his reasons, Martin attached a copy of his June 23, 2001 memo. Martin told Brown that he had not decided whether he wanted to replace the administrative assistant position with an administrative police sergeant or a confidential secretary, although he was leaning toward the latter. Although Brown encouraged Martin to consider the matter carefully, he told him that the decision was his to make.

Charging Party filed a petition for representation election on January 13, 2003 (Case No. R03 A-05). By mid-February, after a pre-election conference had been held, it became apparent that a hearing would be necessary to determine whether Robert Irish's position, library assistant III, should be included in the unit. Green talked openly to employees and to Lieutenant Ray about the hearing and her intention to be present.1

On February 18, 2003, Martin wrote Brown again:

> I request that the Administrative Assistant position be eliminated and the vacant Secretary I position be offered to Lori Green. Some of Lori's workload in her current position will be shifted to the new secretary position while other work (property management) will be shared with other personnel.

Around this same time, Respondent posted a vacant clerical position on bulletin boards in the police department and also advertised in the local newspaper. The position was described as having general secretarial duties. On March 13, 2003, Respondent conducted final interviews for the position. The following day, Friday, March 14, Green was called into Martin's office. In the presence of Ray, Martin gave Green a notice stating that her position of administrative assistant was being eliminated, and offering her

1 Charging Party subpoenaed Green for the March 19, 2003 representation case hearing, although she was not called to testify.

a vacant secretarial position. Green initially refused the offer.

On Monday, March 17, Green called Jack Lewis, Respondent's human resources director. Lewis told her that if she accepted the secretarial position, she would be placed on the highest step on the pay grade for that position. This translated to approximately $6,000 less per year than Green had earned as an administrative assistant.

On or about March 24, Respondent hired Janet Munday to fill the advertised secretarial position. On this same day, Green submitted a memo accepting the secretary position that had been offered to her. In her memo, Green asked Martin if he wanted her to physically relocate to the retired secretary's workstation. Martin told her to hold off until she got back. Green then left on a previously approved vacation. While she was gone, Martin decided that Munday should sit at Green's workstation because it was closer to files she would need. Munday's first day of work was to be the day Green returned from her vacation. However, Green extended her vacation three days due to a family funeral. When Green returned to work, she discovered that her computer files and voicemail messages had been deleted, her desk had been cleaned out and packed up, and her things put in a box at the smaller workstation formerly used by the retired secretary.

After her demotion, Green continued to do tasks - warrant entry and removal in the LEIN system, Freedom of Information Act (FOIA) requests, sex offender registration, crime data compilation, record processing - that together had formed the major part of her workload as administrative assistant. After her demotion Green was assigned more reports. She also was assigned to file, and to organize and label photos. Munday was assigned some of the duties that Green had performed as administrative assistant, including doing the payroll, issuing cash receipts and requisitions, managing inventory, and ordering office and other supplies. Responsibility for doing LEIN audits was transferred from Green to a police officer. Lieutenant Ray was assigned to do MICR reporting, formerly one of Green's duties. Martin took over responsibility for managing the property room, another of Green's former responsibilities.

Discussion and Conclusions of Law:

To establish a prima facie case of unlawful discrimination under Section 10(1)(a) or (c) of PERA, Charging Party must show: (1) employee union or other protected concerted 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 employer's actions. *Detroit Bd of Education,* 2003 MERC Lab Op _____ (Case Nos. C02 D-077 & CU02 D-017, decided May 19, 2003); *University of Michigan,* 2001 MERC Lab Op 40, 43; *Rochester School Dist,* 2000 MERC Lab Op 38, 42.

Green was an active supporter of Charging Party in 2002 and 2003, and she also took a leading role in the 2001 organizational campaign of the Adrian General Employees Association. Martin maintained that he was not aware of the latter until his conversation with Green in early November 2001. According to Martin, he did not know that there was union organizational activity taking place, or that Green was involved in it, when he first wrote to Brown on June 23, 2001 asking that Green's position be eliminated.

There is no direct evidence that Martin knew of Green's union activity on June 23, 2001, However, according to Green's unrebutted testimony, Lieutenant Ray did know of her support for the union at this time because she spoke to him about it. Absent specific evidence to the contrary, an employer agent's knowledge of union activity is attributed to other employer agents. *Ready Mixed Concrete Co*, 317 NLRB 1140, 1143-1144 (1995); *Van Dyke Crotty Co*, 297 NLRB 899, fn. 4 (1990); *Dr Phillip Megdal, DDS, Inc*, 267 NLRB 82 (1983). Likewise, according to Green's unrebutted testimony, she openly discussed her support for Charging Party with Ray after it became clear in February 2003 that there would be a hearing on Charging Party's petition. Thus, the evidence supports the inference that Martin knew when he demoted her on March 14, 2003 that Green supported Charging Party's organizational efforts.

However, I conclude that the record does not establish union animus on the part of Martin or other Respondent representatives. According to Green, when she told Martin in November 2001 that he was the reason that employees in the department were forming a union, he "was not happy about it." Green did not elaborate, and the record did not indicate whether Martin said he was "not happy" about the employees forming a union, or whether he was "not happy" about being told that he was the cause. In either case, an employer has the right to oppose the unionization of its employees; every statement by an employer criticizing or expressing a negative view of unions is not to be automatically construed as evidence of union animus. *City of St Clair Shores*, 2004 MERC Lab Op _____ (Case No.C00 K-201, decided May 26, 2004); *Swartz Creek Community Schools*, 1989 MERC Lab Op 264, 276 (no exceptions). I find Green's testimony that Martin "was not happy" when she told him he was the reason employees were forming a union insufficient to meet Charging Party's burden of showing Respondent's union animus.

Inferences of animus and discriminatory motive may be drawn from circumstantial evidence rather than direct evidence, including the pretextual nature of the reason's offered for the alleged discriminatory actions. *Volair Contractors, Inc*, 341 NLRB No. 98 (2004); *Tubular Corp of America*, 337 NLRB 99 (2001); *Fluor Daniel, Inc*, 304 NLRB 970 (1991). Charging Party asserts that Respondent offered no credible justification for Green's demotion, and that its claim that the department did not need her position was a pretext. Charging Party notes that Green's was the only position in the police department to be eliminated, that there was no evidence that the decision to eliminate her position was motivated by budget considerations, and that Green continues to perform many of her old job duties. It asserts that these duties, including operation of the LEIN system, require training and skills not possessed by other secretaries. Charging Party also points out that the timing of Green's demotion was suspiciously linked to her union activities. It cites these facts: (1) Martin allegedly first suggested that Green be demoted in June 2001, soon after Green began organizing on behalf of the Adrian General Employees Association; (2) Martin did not take any further action to demote Green until, at the height of Charging Party's organization campaign in December 2002, he allegedly wrote the second memo to Brown; (3) Martin wrote the February 18, 2003 memo announcing his decision to demote Green soon after Charging Party filed its election petition on January 13, 2003; (4) Green's actual demotion took place only a few days before the representation case hearing at which Green had indicated she would appear. Charging Party also suggests that the June 2001 and December 2002 memos may have been fabricated after the fact, pointing out that that Respondent did not call Brown to support Martin's testimony that he drafted these memos on or near those dates.

I do not agree with Charging Party that Respondent failed to show a credible explanation for Green's demotion. According to the 1994 job description, Respondent intended the position of administrative assistant in the police department to have a considerable number of nonclerical duties. In 2000, before Green had engaged in any union activity, Respondent removed Green's supervisory authority over other clericals in the department. It also hired an information technology director who took over some of her computer maintenance responsibilities. Between December 2000, when Martin became police chief, and March 2003, when she was demoted, Green performed clerical work requiring specific training and skills, including warrant entry in the LEIN systems and responding to FOIA requests. However, she did not perform many of the duties that Respondent expected the administrative assistant to perform when it wrote the job description in 1994. Martin made this point in his June 23, 2001 memo to Brown and again in December 2002. I find that Martin's argument that Green's actual job duties did not justify her substantially higher salary was not totally without grounds and cannot be considered pretextual. Moreover, Martin's actions after Green's demotion were consistent with his position that the department did not need an administrative assistant. Martin reassigned certain general clerical duties Green had performed, including payroll and the ordering of supplies, to Munday, a new and lower paid secretary. He also transferred duties that might be considered administrative, such as serving as the LEIN coordinator and managing the property room, to police officers.

Respondent also provided an explanation for the timing of Green's demotion. Martin testified that he began looking at ways to improve the department's functioning after he became chief in December 2000. When, six months later, he concluded that Green's position should be abolished, City Administrator Brown persuaded him not to take this action so soon after becoming chief. Martin put the issue aside. However, the retirement announcement of a department secretary in late 2002 prompted Martin to go forward with his plan to eliminate the administrative assistant position. He did not immediately demote Green in December 2002, because he had not yet decided what kind of position should replace the administrative assistant. However, while interviewing applicants for the clerical position made vacant by the secretary's retirement, Martin decided that, for the time being, the department should have three secretaries. Green's demotion was timed to coincide with the hiring of the new secretary, because Martin intended to redistribute work between the two positions. I find this explanation credible. I conclude, based on the discussion above, that Charging Party failed to demonstrate union animus on the part of Martin or any other Respondent agent, and that it did not meet its initial burden of showing that Green's union activity was a motivating factor in her demotion. I recommend, therefore, that the Commission dismiss Charging Party's allegation that Green's demotion violated Sections 10(1)(a) and (c) of PERA.

Robert Irish's Suspension

Facts:

Robert Irish was hired by Respondent to work in its library in 1985. In May 2003, Irish's classification was Library Assistant III. Irish was in charge of the library's computers. He handled interlibrary loans though the computer, and had other duties that required him to use the computer. Irish's job duties also included working at the circulation desk and supervising library pages.

Irish became active in the organizational campaign by the Adrian General Employees Association after he attended an organizational meeting at Lori Green's house in October 2001. At that meeting, Green asked Irish to get a general feeling of how employees at the library felt about the union. Irish then went around the library asking employees what they thought about the union. Irish did not speak to his supervisors, Library Director Jule Fosbender or Assistant Library Director Shirley Ennis, about the union. However, Fosbender testified that library staff members complained to her that Irish was "harassing" them about voting for the union during this period.

Before Irish became active in the 2001 organizing drive, he and Fosbender had several conversations about the amount of time Irish spent on the computer in the circulation office as opposed to performing his duties at the circulation desk. They also discussed his punctuality, his practice of leaving the library to pick up a lunch when he worked on Saturdays, what Fosbender thought was Irish's excessive use of sick time, and complaints by other employees that Irish frequently left the library to go home for lunch and then called to say he felt ill and would not be returning.2 However, Irish was not formally or informally disciplined for these offenses at this time.

On December 6, 2001, Irish was called to a meeting with Fosbender and Human Resources Director Jack Lewis. At the meeting, Fosbender told Irish that a special e-mail account he received through the library was for contact with other libraries and for library business, and that he was not to use it for personal purposes.3 Fosbender also informed Irish that his tardiness record was unacceptable. Irish told Fosbender that he believed that she had given him permission to come in late during the week in exchange for coming to the library on Sundays to bring the newspapers inside. Fosbender said that she had not intended for Irish to come in every weekend, and told him to stop. Irish then mentioned several Respondent rules that he believed were illegal, including the rule that library employees take their lunch breaks inside the building on Saturdays. Fosbender said she would check with Respondent's attorney about the legality of these rules. Fosbender and Irish also discussed Irish's work attire and his use of the phone for personal calls. On December 28, 2001, Fosbender gave Irish a letter summarizing their meeting and placed it in his personnel file.

As noted above, on December 21, 2001, the Adrian General Employees Association failed to get a majority of the votes cast in an election conducted by the Commission pursuant to the union's petition. Fosbender testified that after this election, library staff members complained to her that Irish had made remarks blaming them for the union's loss, and that after the election Irish was "always picking on them for one thing or another." Fosbender also received complaints from other employees that Irish spent too much time at the computer instead of at the circulation desk, and that he was doing personal work on the computer. Between December 2001 and May 2003, Fosbender reminded Irish several times of his responsibilities at the circulation desk. Fosbender also spoke to Irish again about his use of sick time and his leaving without telling other employees that he was not going to return after lunch.

Charging Party began its organizational campaign in June 2002. Thereafter, Irish urged library

2 Irish has a heart condition. Fosbender testified, however, that Irish's repeated absences disrupted the work schedule.
3 Irish received this account through the Woodlands library cooperative, an organization of Monroe County libraries. Irish testified that he disagreed with Fosbender, and that he considered this his personal e-mail account.

employees to support the union. After Charging Party filed its petition for a representation election on January 13, 2003, Respondent took the position that Irish's position was supervisory and should be excluded from the unit.

On March 7, 2003, Respondent distributed a policy entitled "Computer and Internet use and Security Policy" to all of its employees. The policy included the statement, "Employees must not use the Internet or City email for purposes that are illegal, unethical, harmful to the City, or nonproductive." Examples given included using excessive time for personal email, and transmitting or accessing offensive, harassing or fraudulent content. The policy stated that employees using the Internet or e-mail were responsible for ensuring that all their communications were for professional reasons, and that they did not interfere with their productivity or the productivity of others. The policy also included the following paragraph:

> All messages created, sent or retrieved over the Internet as well as internal mail systems are the property of the City of Adrian and may be regarded as public information. The City of Adrian reserves the right to access the contents of any messages sent over its facilities if the City believes, in its sole judgment, that it has a business need to do so.

Charging Party subpoenaed Irish to testify at the March 19, 2003 hearing regarding his supervisory status. Irish testified at the hearing in support of Charging Party's position that he was not a supervisor.4

After this hearing, Fosbender continued to receive complaints from other employees that Irish was spending too much time on the computer in the library office. Employees told Fosbender that they suspected him of doing personal work. Either Fosbender herself or Irish's co-employees found samples of party invitations that appeared to have been done by Irish on the computer in the circulation office. On May 14, 2003, Fosbender decided to go through Irish's e-mails from the beginning of March. Fosbender identified eleven personal e-mails that she found objectionable. Among these were slightly salacious e-mails between Irish and his wife, also an employee of Respondent, and forwarded off-color jokes, including two accompanied by graphic photographs. Fosbender also found an e-mail from Irish in which he commented that he had "a bitch, er boss, that wants everything done and up and running now." According to Fosbender, this particular e-mail was her main concern.

On May 20, 2003, Irish was called to a meeting with Fosbender and Lewis. Lewis showed Irish the e-mails Fosbender had retrieved. Irish admitted that he was not on break or lunch went he sent these e-mails. Lewis then told Irish that he should not be sending or receiving personal e-mail during work time. He also referred to some of the e-mails as "pornographic." Lewis showed Irish the e-mail referring to Fosbender as a "bitch," and told Irish that he was not going to allow employees to disparage, or to be insubordinate toward, department heads. Irish was notified that he was suspended indefinitely for violation of Respondent's computer and Internet use policy. Fosbender asked Irish to return the indoor and outdoor

4 On November 17, 2003, after the close of the hearing in the unfair labor practice case, the Commission issued a decision and direction of election in which it held that Irish's position was not supervisory. Charging Party failed to get a majority of the votes cast in the election conducted on December 18, 2003, and the Commission certified the results of this election on January 8, 2004.

keys to the library building.

On May 28, Lewis sent Irish a letter informing him that he was being given a 15-day disciplinary suspension without pay and being placed on a last chance agreement for violation of Respondent's Internet use and security policy, wanton and willful neglect in the performance of his assigned duties, insubordinate conduct, and dishonest actions. The letter indicated that Irish had: (1) used city facilities to transmit offensive material, including pornographic material and/or offensive stories or jokes; (2) used the e-mail to call his supervisor a derogatory name; (3) used the e-mail to send personal messages at times other than break or lunch periods; (4) deliberately refused to follow the City's computer and Internet use and security policy; and (5) used the e-mail for other than professional reasons.

When Irish returned to work on June 10, 2003, he was called to another meeting with Fosbender and Lewis. Fosbender handed Irish a two-page letter. This letter detailed problems with Irish's work performance, including taking too much time for lunch; leaving the building on Saturdays to buy lunch in contravention of instructions; leaving money in the library circulation office instead of putting it in the safe; not following the stated procedure for processing non-resident library cards, and telling other employees that they did not have to do so; making snide remarks and cutting comments to other employees; spending too much time at the computer in the circulation office rather than at the front desk; failing to tell other employees where he was going when he left the circulation desk; using the computer for personal tasks or to browse the web when he should have been helping at the circulation desk; and neglecting his responsibility to supervise the library pages.

After Irish returned from his suspension, he looked through all the e-mails sent or accessed from the computers in the library and never deleted. Irish located personal e-mails sent to and by numerous city employees, including Fosbender, Lewis and Police Chief Martin. Green asked other employees for examples of personal e-mails sent through Respondent's system from other employees, and gathered numerous examples, including jokes forwarded though distribution lists. None of these jokes included sexual references, although one contained the words "bullshit" and "ass kissing." Lewis admitted that "virtually every employee" had sent personal e-mails through Respondent's system.

Discussion and Conclusions of Law:

Section 10(1)(d) of PERA prohibits a public employer from discriminating against a public employee because he has given testimony under the Act. Section 10(1) (c) prohibits an employer from discriminating against an employee because of the employee's union activities. Beginning in October 2001, Irish actively attempted to persuade library employees to vote for the Adrian General Employees Association, and later supported Charging Party's organizational activity. Fosbender knew of Irish's union activity during the first union campaign because other employees complained to her about his "harassing" them about the union, although there is no specific evidence that these complaints occurred, or that Fosbender knew of Irish's union activity, prior to Fosbender's meeting with Irish on December 6, 2001. Fosbender testified that after the unsuccessful organizing attempt of the Adrian General Employees Association, library employees complained to her that Irish blamed them for the defeat. I find that Fosbender's testimony, together with the fact that Irish testified in support of Charging Party's position at

the March 19, 2003 hearing, justified the inference that Respondent knew Irish was a union supporter when it suspended him on May 20, 2003.

However, there is no evidence of hostility by Respondent toward Irish's act of testifying at the March 19, 2003 representation hearing, and no direct evidence of union animus on the part of Fosbender, Lewis, or any other Respondent agent in this case. As in Green's case, Charging Party relies on the circumstantial evidence of the timing of Irish's discipline in relation to his union activity, and asserts that the reasons given for Irish's discipline were pretextual.

Charging Party points out that the December 6, 2001 meeting at which Fosbender criticized Irish's conduct occurred shortly after Irish first became involved in union activity on behalf of the Adrian General Employees Association. As noted above, however, there is no evidence that Respondent knew of Irish's union activities on December 6. Charging Party also argues that the fact that Irish was suspended less than two months after testifying at the representation hearing, and in the middle of Charging Party's organizing campaign, is evidence of pretext. However, Fosbender provided a credible explanation for the timing of Irish's suspension when she testified that continued complaints from other library employees about the amount of time Irish spent on the computer caused her to go through Irish's e-mails.

Finally, Charging Party maintains that Respondent gave no credible explanation for suspending Irish in May 2003 for violation of Respondent's Internet and e-mail usage policies. Charging Party argues that it was common for employees to use Respondent's computers to send personal e-mails, and there was no indication that other employees had been disciplined for sending personal e-mails. It also asserts that the long delay between the conduct (i.e., the sending of the e-mails) and the imposition of discipline, and the severity of the discipline compared to the offense, indicates that the e-mails were a pretext for punishing Irish for engaging in union activity.

I do not agree with Charging Party that Respondent failed to show a credible explanation for Irish's suspension. Respondent admitted that its e-mail policy did not prohibit employees from sending personal e-mails. However, according to Respondent, Irish was suspended because of the content of his personal e-mails, including some containing off-color jokes with graphic pictures that Lewis felt were pornographic.5 There was no evidence that e-mails of this nature were so common on Respondent's system that other employees' e-mails would have come to Respondent's attention. Moreover, Fosbender had criticized Irish's work habits and attitude even before Irish first engaged in union activity in October 2001. Given their relationship, I find it credible that in May 2003 Fosbender would have taken serious offense at Irish's referring to her as a "bitch." For reasons discussed above, I find that Charging Party did not establish that Respondent used Irish's alleged misuse of the e-mail system as a pretext to discipline Irish for his union activity. I also conclude that Charging Party did not demonstrate that either Irish's testimony at the March 19, 2003 representation hearing or his union activity was a motivating factor in Respondent's decision to suspend him on May 20, 2003. I recommend, therefore, that the Commission dismiss Charging Party's allegation that Irish's suspension violated Sections 10(1)(a) (c) or (d) of PERA.

5 One of the reasons given for Irish's suspension was the fact that he had sent personal e-mails during working time, but there was no indication that Irish would have been suspended for this offense alone.

In accord with the findings of fact, discussion, and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated: _____