STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer - Respondent,

Case No. C10 F-130

- and -

ROBERT L. COLSTON III,
An Individual - Charging Party.
___________________________________/

APPEARANCES:

Andrew Jarvis, City of Detroit Law Department, for the Respondent

Robert L. Colston III, *In Propria Persona*

DECISION AND ORDER

On May 25, 2011, Administrative Law Judge Doyle O'Connor issued a Decision and Recommended Order 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 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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Edward D. Callaghan, Commission Chair

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Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: ____________

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C10 F-130

-and-

ROBERT L. COLSTON, III,
Individual-Charging Party.
____/

APPEARANCES:

Robert L. Colston, III, Charging Party appearing on his own behalf

Andrew Jarvis, City Law Department, for the Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). The following findings of fact, conclusions of law, and recommended order are based on the entire record, including both oral and written closing arguments by the parties.

The Unfair Labor Practice Charge:

On June 1, 2010, a Charge was filed in this matter by Robert L. Colston, III (Charging Party) asserting that Respondent City of Detroit had unlawfully retaliated against him for engaging in protected concerted activity. It was factually asserted that Colston received an unwarranted disciplinary suspension shortly after filing a grievance claiming a violation of the collective bargaining agreement regarding overtime assignments. I denied the City's pre-trial motion to dismiss and this matter was tried on October 6, 2010, at which time I denied the City's motion for judgment at the close of Charging Party's proofs, as there were material facts in dispute.

Findings of Fact:

Colston was employed by the City as a storekeeper for over 26 years. He had difficulty with his immediate supervisor Varene Williams. Colston believed that Williams was improperly reserving lucrative overtime work for a favored employee. Williams believed that Colston's work output was less, and of lower quality, than it should have been, regarding which she had counseled him several times.

On April 28, 2010, Colston submitted a grievance regarding the overtime dispute. On April 29, 2010, Williams issued a disciplinary suspension of Colston for poor work performance. Colston believed the discipline was in retaliation for the overtime grievance.

Williams' testimony was very credible and she established a pattern of deficient performance and of the Employer's prior unsuccessful efforts to secure adequate job performance from Colston. It is notable that Williams was new to the supervisory role and that Colston may have chafed at her greater scrutiny. It is equally notable that Williams, as supervisor, had the benefit of many years of performing the same type of work as Colston, as an assistant storekeeper, storekeeper & head storekeeper. I credit her testimony that she was dismayed by Colston's lack of work output. She testified credibly that an average storekeeper would competently process 10-20 requisitions per day, on average, that Colston's successor in the position carried on that level of work, and that Colston completed on average around 3 requisitions per day for a 30 day period she tracked.

The evidence established that it was Colston's standing responsibility to order supplies far enough in advance that they did not run out; that he failed to; that he was sent and received and opened an email of March 23, 2010, directly ordering him to order specific supplies; that he failed to do so; and that he was dishonest in denying having received the email, where the documentary evidence shows that Colston did receive and open the disputed email. I do not credit Colston's denial of having received the March 23, 2010 order.

I further credit the testimony of Williams that she was not even aware of the April 28th dated grievance regarding the overtime dispute when, on April 28, she prepared the April 29th suspension documents.

Discussion and Conclusions of Law:

Where materially adverse employment action has occurred, the elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action.[1] Anti-union animus can be established either by direct evidence or circumstantial evidence, including evidence of suspicious timing or pretext that fairly support the inference that the employer's motive was unlawful.[2] Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather,

[1] *Waterford Sch Dist v Waterford Federation of Support Personnel*, 19 MPER 60 (2006).
[2] *City of Royal Oak v Haudek*, 22 MPER 67 (2009).

the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn.[3]

At most, Colston presented arguable inferential proof of discriminatory intent, where the suspension seemingly followed close on the heels of his overtime grievance, coupled with his testimony that the very supplies he was disciplined for not ordering were in fact already ordered prior to the April 9, 2010, email complaining about his failure to order those very supplies. Mere temporal coincidence is not enough to establish intent; however, it may have legitimately led to Colston's deep suspicion that the pursuit of the overtime grievance was linked to the discipline over poor work performance.

The testimony persuasively established instead that the Employer had a good faith basis for concluding that the supply room should never have run out of critical supplies in the first place, which was one of Williams' specific criticisms of Colston's performance. Further, the mere seeming temporal link between the grievance filing and the suspension was destroyed by Williams' credible testimony that she was unaware of the grievance filing at the time she prepared the suspension papers. I do not credit Colston's effort to deflect blame by asserting that various requisitions were submitted by other employees after he failed to do so and that therefore no harm occurred, as he ignored the Employer's central expectation of him as storekeeper, that is, to stay on top of his supplies and routinely order in advance. The evidence does not establish that the Employer unreasonably seized on an isolated shortage of supplies as an excuse to discipline Colston; rather, it appears from the proofs that Colston was routinely deficient in his performance.

The Charging Party has not met his substantial burden of establishing that the disciplinary suspension decision was premised on unlawful bias. Therefore, the Charge alleging violations of Section 10(1)(a) &(c) must be dismissed.

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result. For the reasons set forth above, I recommend that the Commission issue the following:

RECOMMENDED ORDER

The Charge is dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 25, 2011

[3] *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707.