STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MACATAWA AREA EXPRESS TRANSPORTATION AUTHORITY,
Public Employer-Respondent,

Case No. C14 C-026
-and- Docket No. 14-003697-MERC

AMALGAMATED TRANSIT UNION LOCAL 836,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Peter H. Peterson, for Respondent

Law Office of Mark H. Cousens, by John E. Eaton, for Charging Party

DECISION AND ORDER

On October 31, 2014, Administrative Law Judge Travis Calderwood issued his 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: December 9, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

Case No. C14 C-026

MACATAWA AREA EXPRESS TRANSPORTATION AUTHORITY,
Public Employer – Respondent,

Docket No. 14-003697-MERC

-and-

AMALGAMATED TRANSIT UNION LOCAL 836,
Labor Organization – Charging Party.
_____/

APPEARANCES:

Miller Johnson, by Peter H. Peterson, for Respondent

Law Office of Mark H. Cousens, by John E. Eaton, 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 and 423.216, this case was assigned to Travis Calderwood, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (Commission). An evidentiary hearing was held on May 23, 2014, in Lansing, Michigan. Based upon the entire record, including the transcript of the hearing, exhibits and post-hearing briefs filed by the parties on or before August 20, 2014, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge:

On March 5, 2014, Charging Party, Amalgamated Transit Union Local 836 ("Union"), filed an unfair labor practice charge against Respondent, Macatawa Area Express Transportation Authority ("Authority"). The charge alleges that the Authority violated Section 10(1)(a) and (c) of PERA when it denied a request for unpaid personal time made by Christine Ferreira and subsequently terminated her because she did not return to work following that denial. Charging Party contends that the denial of Ferreira's leave request was done because of an anti-union animus which manifested from Ferreira's participation in a recent organizing campaign and subsequent bargaining for a first contract. Respondent states that the denial of Ferreira's leave

request, which resulted in her termination, was based solely on the business needs of the Authority.

Findings of Fact:

Authority Background and Organizational Efforts

In 2007, the Authority took over the transportation system previously operated by the City of Holland. The Authority provides transportation services, both fixed route buses and shared door-to-door "para-transit" rides to the City of Holland, Holland Charter Township, the City of Zeeland and Zeeland Charter Township. The Authority has an approximate annual ridership of 500,000. Prior to 2007, the City of Holland had contracted with various transit providers for all aspects of its transit services. From as early as 2002, ATC Van Corp was the contracted provider of those services. In 2005, the City changed vendors to MV Transportation. MV Transportation provided transit services for the City until sometime in 2007. Following the creation of the Authority in 2007, the Authority continued to contract with MV Transportation for operational staffing, including bus operators, dispatchers, utility personnel, and their supervisors. The non-supervisory employees of MV Transportation who performed services for the Authority were in a bargaining unit represented by the Teamsters Local 406 ("Teamsters").

The Authority's contract with MV Transportation was allowed to expire on June 30, 2010, which coincided with the expiration of MV Transportation's collective bargaining agreement with the Teamsters. The next day, July 1, 2010, the Authority began employing its own workforce to perform the transportation services previously provided by MV Transportation. As part of the transition from MV Transportation, the Authority invited all MV Transportation employees who were previously providing services to the Authority to apply for positions with it. Almost ninety-two percent (92%) of those individuals were hired by the Authority.[1] The Authority continued to recognize the Teamsters as the exclusive bargaining representative of all non-supervisory employees. Shortly after the transition from MV Transportation, the Authority and the Teamsters began negotiations for a first collective bargaining agreement.

On July 19, 2010, while negotiations were being held between the Authority and the Teamsters, former MV Transportation employee and then current Authority employee, Christine Ferreira, filed a Petition for Representation Proceedings with the Commission seeking to decertify the Teamsters as the non-supervisory employees' exclusive bargaining representative. The Authority provided employees information regarding its opposition to the Teamsters continued representation of those employees. On September 15, 2010, the Commission conducted an onsite election at the Authority's bus and dispatcher facility at which time the Teamsters was decertified as the employees' exclusive bargaining representative.

While it is undisputed that Ferreira's signature appears on the July 19, 2010, decertification petition and that Ferreira collected the necessary signatures and mailed the signatures and petition to the Commission, the parties disagree on whether Ferreira was encouraged or even helped by the Authority's Director, Linda LeFebre and its Operation

[1] It is unclear from the record whether this refers to those who applied or the entire MV workforce.

Manager, Katie Driesenga. Charging Party contends that sometime following the expiration of the Teamsters' contract on June 30, 2010, Driesenga approached Ferreira to determine whether Ferreira was interested in decertifying the Teamsters. Charging Party claims that following that conversation, LeFebre prepared the Petition for Election Proceedings that was later filed with the Commission and that Ferreira met with both LeFebre and Driesenga regarding certain procedural questions she had. Lastly, Ferreira provided testimony at hearing that during the September 15, 2010, on-site election at the Authority's 24th Street facility, representatives for the Authority congratulated her following the decertification by shaking her hand, saying "good girl" and even hugging her. The Authority, through testimony given by both LeFebre and Driesenga, denied encouraging or assisting Ferreira in the decertification effort. Furthermore, Driesenga who testified that she was present during the September 15, 2010, election, stated that she did not recall any Authority representatives giving Ferreira a hug. LeFebre, however, did recall congratulating Ferreira because "it was something [Ferreira] wanted and had worked hard for."

With regard to the circumstances surrounding Ferreia's filing of the decertification petition, I find the testimony of both Driesenga and LeFebre to be more credible. Both consistently denied any involvement, either by encouragement or assistance, with the decertification effort undertaken by Ferreira. Ferreira was not able to offer any corroboration regarding her claims. Furthermore, I do not find Charging Party's claims persuasive that Ferreira was "computer illiterate" and that the only way she could have completed the Commission's forms was with the assistance from LeFebre. It is at least equally plausible that Ferreira could have enlisted the help of anyone else in the completion of the forms. It is for these reasons, including the demeanor of LeFebre and Driesenga during their testimony, that I conclude neither of them encouraged or assisted Ferreira in her decertification attempt. Similarly, I find the testimony of LeFebre and Driesenga to be more credible with regard to the events that took place at the on-site election on September 15, 2010.

Following the Teamsters' decertification, the Authority approved a two percent (2%) pay increase for all employees who were previously covered by a union contract. In a memo dated September 27, 2010, the Authority indicated that it was able to provide the increase in pay thanks in part to the cost savings realized when it assumed the direct employment of its employees and also from cost savings realized as a result of not having to expend previously budgeted monies for "legal representation in possibly extended negotiations with the [Teamsters]."

Since the collective bargaining agreement expired on June 30, 2010, and the Teamsters were decertified as the employees' bargaining representative on September 15, 2010, the Authority issued an Employee Handbook. The most recent iteration of that Handbook indicates an issue date of May 2013. The Handbook contains policies covering both Family and Medical Act (FMLA) leave and unpaid personal leave. The unpaid personal leave policy expressed in the Handbook, Policy 604, was originally adopted on April 1, 2010, and revised on July 25, 2011. That policy provides the following:

> Eligible employees may ask for an unpaid personal leave of absence of up to one year to fulfil personal obligations.

> Regular full-time employees are eligible to request personal leave only after they have completed 180 calendar days of service. If you wish to take a personal leave, give a written request to your supervisor as far in advance as possible.
>
> The decision whether to grant a request for personal leave and the duration of the personal leave are within the sole discretion of the Authority. We will look at each request individually. The business priorities of the Authority must come first. We will make our decision based on a number of factors such as our business needs, workload, and staffing requirements during the requested time period.
>
> Subject to the terms, conditions, and limitations of the applicable plans, the Authority will provide health insurance benefits until the end of the month in which the personal leave begins. At that time, you will be responsible for the full cost of the benefits in order for coverage to continue. When you return from personal leave, the Authority will again provide those benefits according to the applicable plans.
>
> Your benefits, such as PTO or holiday benefits, will not accrue during a personal leave. When you return from leave, the benefits will start accruing again.
>
> When a personal leave ends, we will make every reasonable effort to return you to the same position if it is available or an available similar position for which you are qualified. However, the Authority cannot guarantee that you will be reinstated in all cases, nor can it guarantee that, if you are interested, you will have the same hours and/or bid line. If you do not come back to work promptly at the end of a personal leave, we will assume that you have resigned.

LeFebre testified at the hearing that when deciding whether to grant an employee's request for unpaid time, she considers the Authority's business needs, workload and staffing requirements, and looks at each request individually because the number of employees on FMLA or other leave varies.

Sometime in 2012, Authority bus operators contacted the Amalgamated Transit Union seeking collective representation. In January 2013, the Union, filed a petition with the Commission seeking a representation election. The Union sought to represent both full-time and part-time bus operators and utility workers. Undisputed testimony was provided at the hearing that, unlike in 2010, the Authority did not express any position or opinion regarding the pending representation election. In February of 2013, the Authority's bus operators and utility workers, through a Commission conducted election by mail, voted in favor of the Union. As a result of that election, Charging Party was certified as the exclusive bargaining representative for the bus operators and utility workers. Christine Cross, a bus operator for the Authority, testified that Ferreira was not initially involved in the 2013 organization efforts because those who were leading the effort "didn't trust [Ferreira] because of the fact how anti-union she was to get the Teamsters out." Nevertheless, sometime before the February 2013 election, Ferreira began attending the organization meetings.

After Charging Party was certified as the exclusive bargaining representative, bargaining commenced between the Union and the Authority for a first contract sometime in March or April of 2013. At the onset of negotiations, the Union's bargaining team consisted of Cross, Ferreira, one other Authority employee, two officers of the Local and one officer of the National. Ferreira attended just three bargaining sessions prior to going out on FMLA leave in June of 2013. There had been approximately 23 negotiation meetings total from March or April of 2013 through May of 2014.

Christine Ferreira

Christine Ferreira began working as a bus operator in Holland in 2002. Initially, Ferreira was employed by ATC Van Corp and later by MV Transportation. After the Authority assumed all control and responsibility for transit services previously provided by private contractors, Ferreira, like all of the former MV Transportation employees who had provided services to the Authority, was invited to apply for employment with the Authority. Ferreira became employed by the Authority on July 1, 2010. On July 19, 2010, Ferreira filed the Petition for Representation Proceedings with the Commission which resulted in the removal of the Teamsters as the exclusive bargaining representative for the non-supervisory operations Authority employees.

In 2011, Ferreira injured her shoulder in a work related incident and went on a short worker's compensation leave. Ferreira had surgery on her shoulder while on leave. Initially Ferreira was unable to perform the duties necessary to operate a bus following her surgery. This remained the case for some time. During this time, the Authority placed in her in a light duty role where she answered phones, scheduled rides, weeded flowers and did any other jobs or tasks the Authority could find for her to do. LeFebre testified that if an employee had been injured on the job and was released to restricted duty, the Authority would assign light duty assignments to that employee if such assignment was possible.

On June 11, 2013, Ferreira submitted a request to use FMLA leave because of a non-work related injury to her wrist. The Authority, in accordance to its FMLA policy, requested Ferreira to provide medical certification in support of her request. Following Ferreira's submission of the requested certification, the Authority approved the request for FMLA leave. Ferreira's FMLA leave began on June 11, 2013.

On August 19, 2013, Ferreira's doctor released her to return to work subject to restrictions which prohibited her from lifting more than five pounds and from strenuous or highly repetitive grasping/gripping with her right hand. Ferreira's restrictions would not allow for her to resume her duties as a bus operator and she remained on leave. On August 23, 2013, LeFebre sent a letter to Ferreira regarding her FMLA leave and its impending expiration. LeFebre testified that the letter sent to Ferreira was the same type of letter the Authority would have sent to other employees facing the expiration of approved FMLA leave. That letter stated:

> You have been off work since June 11, 2013 on Family Medical Leave Act (FMLA) from your job as a bus operator at the Macatawa Area Express for your own serious health condition. As if [sic] September 5, 2013 you have exhausted

> your FMLA of twelve (12) weeks in a "rolling" 12 month period measured backward from the date of any FMLA usage.
>
> Time off work of other reasons is subject to your available Paid Time Off (PTO) balance of other authorized leave as outlined in the Employee handbook. Taking Time off without sufficient PTO or other authorized leave is a violation of the Employer's policies.
>
> You will be required to return to work effective September 6, 2013. Please contact Katie Driesenga at [Omitted] to schedule a fit for duty physical and agility testing to be restored to employment. Your FMLA and accompanying benefits will cease to be effective as of September 6, 2013.

At some point between August 23, 2013, and September 4, 2013, LeFebre and Ferreira met to discuss the status of the latter's FMLA leave. LeFebre testified that Ferreira informed her that she was unsure of whether she would ever be able to return to driving a bus again. Ferreira requested during that discussion to extend her FMLA leave past the initial 12 weeks and believed such was possible under the Authority's FMLA policy. LeFebre explained that additional time off under FMLA past 12 weeks was only available to employees caring for military service members.

On September 4, 2013, Ferreira submitted a written request to LeFebre to extend her time off. That requested stated:

> I have used my 12 weeks of FMLA, and now I asking for extended time off. I am not sure how much more time I will need, so I am asking for 10 more weeks, but if everything is healed, and I have the use of my right hand, I may be able to return to work sooner.

During testimony, LeFebre indicated that she understood Ferreira's request to be for unpaid personal leave under Section 602 of the Employee Handbook, the Authority's personal leave policy.

LeFebre testified that at the time Ferreira made her request for unpaid leave there were six other employees on FMLA leave; John Mulac, Bill Dora, Christine Cross, Tom Lubben, Mark Forquer, and Esther Scheerhooren. According to LeFebre, four of those employees used intermittent leave throughout the year. Specifically, LeFebre testified that Cross, a bus operator, uses three days a year while Forquer, a dispatcher, uses one week a month and Scheerhooren, an information specialist, uses three or four days a month. LeFebre also testified that Lubben, whose position was not identified, uses one day a month. With regard to Mulac and Dora, LeFebre testified that they both took the full twelve weeks available under FMLA with Mulac going on leave at the end of June and Dora sometime in September.

A day or two after Ferreira submitted her request, Ferreira met with Driesenga and Assistant Manager Steve Bailey. After that, Ferreira was given a letter from LeFebre, dated September 6, 2013, that stated:

> You have been off work since June 10, 2013, on Family and Medical Leave Act ("FMLA") leave due to your own serious health condition. You have informed the Authority that you do not intend to return to work at the conclusion of your FMLA leave on September 5, 2013. As of that date, further time off work for medial or other reasons is subject to your available PTO Balance or other authorized leave. Taking time off work without sufficient PTO or other authorized leave to cover your absence is not permitted.
>
> You have requested an unpaid personal leave of an additional 10 weeks. The decision whether to grant a request for personal leave and the duration of the personal leave are within the sole discretion of the Authority. Each request is looked at individually. The decision is based on a number of factors such as our business needs, workload, and staffing requirements during the requested time period. The Authority has reviewed your request and decided not to grant it.
>
> You have exhausted all PTO and other authorized leave to which you are entitled. Accordingly, your continued absence from work beyond September 5, 2013, is unauthorized and inconsistent with the Authority's policies.
>
> In view of all the relevant circumstances, the Authority has decided to terminate your employment effective September 6, 2013.

LeFebre testified that she made the decision to deny Ferreira's leave request after she reviewed how many other employees were on FMLA leave or some other unpaid leave of absence as well as considering what the Authority's staffing and workload requirements would be for the next 10 to 12 weeks. LeFebre claims that she does not consider any disciplinary records or performance evaluations when determining whether to grant unpaid leave requests. LeFebre denied making her decision regarding Ferreira's leave request and subsequent termination based on Ferreira's support for the Union or her participation in Union activities; instead LeFebre stated she denied Ferreira's leave request on the basis of business needs, staffing requirements, and the fact that there were already six employees on FMLA. LeFebre went on to state that she was unsure if she had the employees who would be willing to work over-time to cover Ferreira's leave.

Other Employees

Charging Party presented testimony at the hearing identifying several Authority employees who had been either granted unpaid leave or placed on light duty following the expiration of their respective leaves. Specifically, Charging Party identified Brian Vanderhulst, a bus operator, who returned to a light duty assignment following the expiration of his FMLA leave; Laurie Barry, a bus operator who had been on leave for more than a year beginning in 2011; and Terry Stelhe, a part-time bus operator who took leave in December of 2013 and returned to work at the end of April or beginning of May in 2014. Additionally, Charging Party identified two office employees, Mark Forquer and Esther Scheerhooren, who were taking intermittent FMLA leave at the time Ferreira requested unpaid leave.

According to undisputed testimony provided by LeFebre, Vanderhulst was a bus operator who went off on FMLA leave and upon the expiration of that leave returned to a different position, whereupon he began training to replace a clerical aide who had recently announced her retirement. Furthermore, the Authority had decided that Vanderhulst had past experience that would allow him to fill in for Dispatchers and Road Supervisors.

LeFebre further testified that Laurie Barry was a bus operator who took FMLA leave in December of 2011 because of a serious health condition. Barry exhausted her FMLA lave in March of 2012 and requested unpaid personal leave through April 27, 2012. The Authority, through LeFebre granted that request along with two more requests which extended the leave until April 27, 2013. LeFebre stated that she granted those leave requests because there was only one other person on leave at the time of Barry's requests and because LeFebre had been informed by Barry's daughter that Barry would never be returning to work because of the seriousness of her medical condition. Upon the conclusion of Barry's third leave extension she resigned because of that medical condition.

Lastly, with regard to Stelhe, LeFebre indicated that he was a part-time bus operator and did not have any fixed schedule. According to LeFebre, part-time employees sign up to work their desired hours and days on a weekly basis and therefore the leave policy did not apply to them in the same way that is does with full time employees.

Discussion and Conclusions of Law:

Simply put, the Charging Party alleges that the Authority denied Ferreira's request for unpaid leave following the expiration of her FMLA leave as retaliation for Ferreira's participation in the recent organizing efforts and because of a general anti-union animus. To support these claims, Charging Party points to the past decertification of the Teamsters and the alleged encouragement and support given by both LeFebre and Driesenga to Ferreira in that process. Charging Party asserts the alleged comments made by Driesenga and LeFebre to Ferreira at the conclusion of the on-site election in 2010, including congratulations, is further evidence of anti-union animus.

Respondent categorically denies that anti-union animus played any role in its decision to deny Ferreira's request for unpaid leave and her subsequent termination. Rather, Respondent asserts that its decision to deny the leave request was based on its business needs and claims at the time that Ferreira made her request, there was a record number of employees out on FMLA leave, and that even if light duty work had been available, its policy was to use that for employees returning from a work related injury.

In order to establish a prima facie case of unlawful discrimination under PERA that resulted in an adverse employment action, a charging party must allege: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employees' protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006). If the charging party has alleged that the employer's unlawful

discrimination is motivated by anti-union animus, that party bears the burden of demonstrating that protected conduct was a motivating or substantial factor in the employer' s decision. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Southfield Pub Schs*, 25 MPER 36 (2011). Only after a charging party establishes a prima facie case of unlawful discrimination does the burden shift to the respondent to demonstrate with credible evidence that the same action would have taken place even in the absence of the protected conduct. *Michigan Educational Support Personnel Ass'n v. Evart Public Schools*, 125 Mich. App. 71, 74 (1983).

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. *City of Royal Oak*, 22 MPER 67 (2009). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. *City of Grand Rapids (Fire Dep' t)*, 1998 MERC Lab Op 703, 707. Instead, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Michigan Employment Relations Commission v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974).

While the timing of an employer's action in relation to the employee's union activity is one factor to be considered in determining motivation, close timing by itself does not establish discriminatory motivation. See *Macomb Twp. (Fire Dep' t.)*, 2002 MERC Lab Op 64, 73; *City of Detroit (Water and Sewerage Dep't)*, 1985 MERC Lab Op 777; *North Dearborn Heights Sch Dist*, 1983 MERC Lab Op 257. It logically follows that there must be other circumstantial evidence to support a conclusion that the temporal relationship was not mere coincidence.

Here, there is no question that Charging Party has established that Ferreira was engaged in protected activity by participating in the organizational efforts of 2012 and 2013 and later by being a part of the Union's bargaining team. Respondent has not disputed that such conduct was protected under PERA, nor has it disputed that it had knowledge of said protected activity as early as the first few bargaining sessions. While I concede that the timing of Respondent's actions, denying Ferreira's leave, who was a member of the bargaining team, while negotiations for a first contract were still ongoing, Charging Party has failed to establish anti-union animus on the part of management.[2] Ferreira and both LeFebre and Driesenga offered conflicting testimony regarding who did what during the decertification election in 2010, however, as explained above I find that the testimony by LeFebre and Driesenga to be more credible. Accordingly, I disagree with Charging Party's claim that Respondent's actions during the decertification of the Teamsters is evidence of an anti-union animus on the part of management.

I also do not agree with Charging Party's claims that Ferreira's treatment was different than other Authority employees and that such treatment is evidence of discrimination because of Ferreira's union activity. The employees identified by Charging Party who were treated differently than Ferreira were not similarly situated to Ferreira. Vanderhulst returned to work on light duty as part of training for a position change. It was clear to LeFebre that Barry was never

[2] The fact Ferreira took part in only three of the approximate twenty-three bargaining sessions that occurred between March or April of 2013, with those three happening before her initial FMLA leave in June 2013, lessens any weight that could be given to the timing issue.

going to return to driving again. Stehle was a part-time employee who was not required per Authority policy to request leave.

Lastly, because there has been no establishment of anti-union animus there is no need to address whether the termination would have taken place even in the absence of prohibited conduct. That notwithstanding, Respondent, through testimony by LeFebre, provided credible reasons and support for its actions.

In summary, I find that Charging Party has not established its prima facie case that Ferreira was discriminated against because of her protected activity or because of an anti-union animus. In accordance with the findings of fact and conclusions of law set forth above, I recommend that the Commission issue the following Order:

RECOMMENDED ORDER

The unfair labor practice charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Travis Calderwood
Administrative Law Judge
Michigan Administrative Hearing System

Dated: October 31, 2014