STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE STATE UNIVERSITY,
Public Employer-Respondent,

MERC Case No. C16 L-129
-and- Hearing Docket No. 16-034553

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 517M,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Sarah Luke, Assistant General Counsel, for Respondent

Daniel J. Ritter, Labor Relations Specialist, and Howard F. Gordon, Program Coordinator, for Charging Party

DECISION AND ORDER

On April 20, 2017, Administrative Law Judge Julia C. Stern issued her 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 either 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: June 8, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

WAYNE STATE UNIVERSITY,
Public Employer-Respondent,

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Docket No. 16-034553-MERC

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 517M,
Labor Organization-Charging Party.
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APPEARANCES:

Sarah Luke, Assistant General Counsel, Wayne State University, for Respondent

Daniel J. Ritter, Labor Relations Specialist, and Howard F. Gordon, Program Coordinator, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON MOTION TO DISMISS

On December 9, 2016, the Service Employees International Union, Local 517M, filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission), pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. The charge alleges that on June 20, 2016, Respondent disciplined Charging Party's chief steward, Anthony McKinnon, because of McKinnon's union activities. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

On January 25, 2017, Respondent filed a motion to dismiss the charge on the grounds that Charging Party had failed to allege facts sufficient to establish a *prima facie* case of unlawful discrimination. I denied the motion and a hearing was held before me on January 31, 2017. At the close of Charging Party's case, Respondent renewed its motion to dismiss. I directed Charging Party to file a written response, which it did on February 21, 2017.

Based upon the record in this case, including the testimony presented by Charging Party at the January 31, 2017, hearing, the documents entered into evidence at the hearing, Respondent's motions, and Charging Party's written response in opposition, I make the following findings of fact and conclusions of law and recommend that the Commission issue the

order below.

The Unfair Labor Practice Charge:

Anthony McKinnon is employed by Respondent as a custodial supervisor and is a member of a bargaining unit of supervisory custodial and grounds employees represented by Charging Party. McKinnon has been chief steward for that unit since 2011. Before becoming chief steward, he was president of the Charging Party's local affiliate.

In the fall of 2015, Respondent hired David Houle to replace Cheryl Lloyd as Associate Director of Custodial Services. Houle then became McKinnon's immediate supervisor. Diane Sevigny was hired to replace Donald Wrench as Director of Custodial and Grounds. Charging Party asserts that beginning in February 2016, Sevigny and Houle engaged in a series of actions, including, but not limited to, discipline, designed to intimidate McKinnon from pursuing his duties as steward. Except for a five-day suspension issued to McKinnon on June 20, 2016, all these actions occurred more than six months prior to the filing of the charge on December 9, 2016. Charging Party acknowledges that its charge was untimely filed as to all these actions except the suspension. However, it alleges that Respondent violated Section 10(1)(a) and (c) of PERA by suspending McKinnon because of his union activities. It also alleges that Houle's and Sevigny's actions prior to that date show a pattern of discrimination against McKinnon for his protected activity and demonstrate their antiunion animus.

Findings of Fact:

McKinnon has been a union representative for 23 of the 25 years he has been employed by Respondent as a custodian. After he became a custodial supervisor in 2006, McKinnon became president of Charging Party's local affiliate. In 2011, McKinnon and Carla Crawford, who was then the chief steward for the custodial and grounds unit, decided that they could serve their members more effectively by swapping offices. Since that time, McKinnon has been chief steward and Crawford has been the local president. During his tenure as steward, McKinnon has successfully pursued a number of grievances. These include a reprimand grievance filed in 2011 and a 2008 discharge grievance that resulted in a $90,000 backpay award.

Sevigny became Director of Custodial Services and Grounds in the early fall of 2015. Houle was appointed Associate Director of Custodial Services shortly thereafter. Houle served as the immediate supervisor for all Respondent's custodial supervisors and reported to Sevigny. Neither Sevigny nor Houle had worked in Respondent's custodial and grounds unit before their appointments. Shortly after Sevigny was hired, but before Houle came on board, Mark Allen, who Crawford identified as a Respondent vice-president and Sevigny's boss, told Crawford that he was going to hire an associate director of custodial services who "would take care of these people." At that time, Crawford was a custodial supervisor, although she later transferred to grounds. Crawford interpreted Allen's statement as a threat to crack down on, and perhaps fire, the senior custodial staff, including the supervisors.

Anthony Morton was employed by Respondent as a director of corporate philanthropy in the fall of 2015.

After learning that Sevigny, who was a former high school classmate, had been hired by Respondent, he phoned to congratulate her. After that, they had several brief telephone conversations. Sometime in the late fall of 2015, Morton and Sevigny ran into each other in a hallway at work. Sevigny talked about her new job, and commented to Morton that it was tough. According to Morton, Sevigny told him that it was part of her job to "straighten the area up." She also said that she had already gotten rid of some people, and that it would take at least two more years to "straighten up the mess."

Crawford testified that, as the local union president, she found Sevigny difficult to deal with. In contrast to the previous director, Sevigny reacted poorly when Crawford questioned any of Sevigny's actions. Because Houle and Sevigny were new, they were unfamiliar with certain requirements in the custodial supervisors' union contract, including that overtime should be assigned by seniority. Sevigny was also unaware that custodial supervisors were supposed to receive merit pay every year based on their work performance. According to Crawford, both she and McKinnon tried to instruct Sevigny and Houle on the terms of the contract. However, because they refused to listen, Charging Party ended up filing grievances. Crawford testified that Sevigny refused to consider Crawford's suggestions. As an example, Crawford explained that she suggested to Sevigny that she resume the prior director's practice of holding periodic meetings where custodial supervisors from the afternoon shift and custodial supervisors from the first shift could talk to one another. According to Crawford, Sevigny did not listen to what Crawford had to say but simply said that she was "not doing that."

Crawford also testified that after Sevigny and Houle were hired, Charging Party began getting grievances from its members for discipline handed out to custodial supervisors with 20 years or more seniority, a group which included McKinnon. Crawford testified that, based on her investigations, Sevigny was treating more senior custodial supervisors differently than newer employees. As an example, she testified that a supervisor with 10 years seniority was disciplined for a personal time clock violation even through other custodial supervisors who had been there less than a year were doing the same thing. She also testified, as discussed below, that while McKinnon was disciplined for failing to properly enforce the rule against custodians leaving their buildings early, other, less senior, supervisors had also failed to enforce this rule.

Custodial Time and Attendance Reporting

Each custodial supervisor supervises a crew of custodians on one of four shifts. McKinnon, who works first shift, supervises custodians at Scott Hall, which forms part of Respondent's medical school, and at several other buildings. Scott is the largest building for which McKinnon is responsible. McKinnon's office, and the time clock, is located at Scott. During all times pertinent to this charge, all custodians had identification cards and were required to swipe these cards through a device whenever they entered or left a campus building. At the beginning of their shift, all the custodians under McKinnon's supervision reported to Scott Hall and swiped and punched in there. The custodians assigned to Scott then went to their assigned areas within the building, while those working in other buildings went to their assigned buildings and swiped in there when they arrived. At the end of the shift, the process was reversed. In accord with the written policy discussed below, the custodians who worked at other buildings were allowed to leave their buildings up to ten minutes before the end of their shift so

that they could return to Scott before their shift ended. Respondent's time-keeping system recorded the time these custodians left their buildings to return to Scott and the times they swiped and clocked out at Scott at the end of their shifts.

The custodial supervisors, including McKinnon, also swiped whenever they entered or left a building. Since McKinnon left Scott to inspect his other buildings during his shift, his swipes tracked his location as he moved from building to building.

On January 9, 2015, the Associate Vice President for Facilities Planning and Management issued a revised time and attendance policy for custodial staff. The policy, which was four pages long, included these paragraphs:

> As a convenience, *employees may swipe in up to ten minutes before the beginning of a shift.* However, pay will not be altered by swiping in prior to the start of your shift. Swiping in early, or swiping out after the end of a shift, will not be treated as overtime or comp time for any purpose. Overtime must be approved in advance by management, and, when approved, will be measured according to recorded swipe times. [Emphasis added.]
>
> ** *
>
> Employees will continue to use their OneCard to swipe in at the beginning of the shift, for all building transfers and to swipe out at the end of the shift. The tardiness policy still applies for swiping in late for work. Employees are still responsible to start shifts at their scheduled start time (at the latest) to avoid being tardy. Unless previously requested and approved by the sector Custodial Supervisor, any swipe-in after the designated start time of a shift will be recognized as being tardy, and any swipe-out before the designated end time of a shift will be recognized as an unauthorized early departure. Employees will be docked pay for unauthorized tardiness and unauthorized early departures. . .
>
> ** *
>
> *Employees shall not leave or swipe out (via building transfer of their work area assignment) to return to their sector area of assembly more than 10 minutes before the designated end time of their shift*, inclusive of contractual provisions for wash up time. Employees that swipe out earlier, and are observed outside their work area assignment without prior approval from their supervisor, shall be subject to applicable progressive disciplinary action. [Emphasis added]
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> ** *
>
> At the end of each shift and/or specifically as directed by the management, Custodial Supervisors shall review the time sheets of their prospective sector as well as the sector they are covering to ensure proper time keeping methods are being followed.

> Custodial Supervisors are to monitor compliance with applicable University and contractual provisions regarding Time and Attendance policy, and to initiate applicable progressive disciplinary action against non-compliant employees in a timely fashion. For the purpose of this policy statement, timely fashion shall be defined as within seven (7) calendar days of the violation. If a supervisor fails to perform this fundamental supervisory responsibility, the supervisor shall be subject to applicable disciplinary action, however, *the University does not waive its right to issue discipline after seven (7) calendar days of a violation.* Supervisors shall review each employee's attendance history with the Department's Associate Director or Director on a monthly basis for policy compliance. Such review shall be so annotated in the supervisor's roll-book with the Associate Director's or Director's signature. [Emphasis in original].

The policy was directed to "custodial department employees." However, McKinnon testified that during a meeting with the former director, Wrench, the supervisors argued that the prohibition against swiping in more than ten minutes before the start of the shift should not apply to them. According to McKinnon, Wrench agreed to exempt the supervisors from this rule. This meeting occurred sometime before the policy was revised in January 2015. McKinnon liked to come in early and had swiped in a few more than ten minutes before the start of his shift on a more or less regular basis for years prior to the issuance of the revised policy. McKinnon did not change his practice after the revised policy was issued.

As noted above, the January 2015 Time and Attendance Policy stated that supervisors were to review each employee's attendance history with the Associate Director or Director on a monthly basis. Wrench and Lloyd had held monthly meetings with the custodial supervisors to discuss employee attendance. According to McKinnon, during these meetings the director or associate director and the custodial supervisor compared the time records from the computer system with the supervisor's records. If they spotted a time violation by a supervisor's subordinate, the supervisor would then prepare a disciplinary notice for the custodian. When Sevigny was appointed, she stopped the monthly attendance meetings. Instead, Sevigny held weekly staff meetings with the custodial supervisors to discuss general concerns.

Pattern of Alleged Discrimination against McKinnon
and the June 20, 2016, Suspension

On February 22, 2016, McKinnon went to Houle to complain about mistakes on his most recent paycheck. McKinnon told Houle that he had not been paid at all for one day during the pay period, and had been shorted one and one-half hours overtime pay. He also told Houle that he should have received a wage differential for covering an additional sector during that pay period.

The next day, February 23, 2016, McKinnon called Houle to ask if he had done anything about his short pay. Houle told McKinnon that he would start on the issues the following day. He also told McKinnon that "he shouldn't be so materialistic about his pay." McKinnon replied that Houle should tell this to McKinnon's wife. Later that day, Houle and McKinnon together went over McKinnon's time records for the month of February. These records showed that on eight

days that month, McKinnon had swiped in at Scott more than ten minutes before the start of his shift. Houle asked McKinnon if McKinnon knew that he should not swipe in more than ten minutes before his start time. According to McKinnon, he explained that he had always done this and that he thought the prohibition did not apply to supervisors. When Houle told McKinnon that the policy stated that no employee should swipe in more than ten minutes early, McKinnon said that he would stop swiping in early.

On February 24, 2016, McKinnon sent Houle an email stating that he felt that Houle wasn't taking McKinnon's missing wages seriously enough. Houle replied that he considered all employee pay matters of high importance and that he was working to resolve the issues with Sevigny. Sometime later, Houle told McKinnon that the date on which the wage differential was to start had been changed. A few days after that, Sevigny told McKinnon that Houle had not been fully trained to submit time, and that she would correct his pay issues. [1]

On February 29, 2016, Houle gave McKinnon what was titled a "second written reprimand for failure to follow instructions/ poor work performance – failure to adhere to FP&M Time and Attendance Policy." The discipline made reference to a "first written reprimand for failure to follow instructions/poor work performance" issued on December 15, 2014, but there was no information in the record about this reprimand. In the February 29 reprimand, Houle said McKinnon had violated the time and attendance policy by swiping in early. Houle also claimed in the reprimand that McKinnon had lied to Houle on February 23 by claiming that he had not received a copy of the time and attendance policy.

Charging Party filed a grievance over the reprimand. The grievance was settled on April 20, 2016, with an agreement to remove the discipline from McKinnon's file. However, the settlement stated that if McKinnon committed any additional failure to follow instructions/poor work performance infraction before February 28, 2017, the reprimand would be reinstated and Respondent could discipline McKinnon at the next level of progressive discipline.

Sometime in May 2016, McKinnon submitted a grievance for another custodial supervisor. On May 23, 2016, he had a meeting on the grievance with Sevigny at her office. After that meeting ended, Sevigny told him to remain. Crawford entered the room, having been directed by Sevigny to be there. Sevigny then asked McKinnon where he had been on a particular day (either May 10 or May 11). Sevigny had evidently looked at, or had been shown, McKinnon's swipe records and wanted to know why he had remained in Scott Hall for most of his shift on that day. McKinnon explained that there was a medical conference with doctors from all over taking place in Scott that day, and that he had spent most of the shift helping the custodians in Scott with the extra work. Accordingly, he had not visited his other buildings as usual. Sevigny then asked McKinnon questions about his daily routine, including how often he normally went to his other buildings and whether or not he inspected every area of every building during a shift. McKinnon and Crawford were then allowed to leave.

[1] According to McKinnon, his pay issues were not fully resolved until sometime in April 2016.

The suspension notice issued to McKinnon on June 20, 2016, cited, as the basis for the suspension, two infractions. The first was his failure to "promptly address multiple infractions of the time clock usage policy by multiple employees . . . in a timely manner." McKinnon's testimony at the hearing with regard to the series of events that lead to this allegation was as follows. On May 4, 2016, McKinnon was reviewing the time records of his subordinates when he noticed that a custodian had left her building to return to Scott more than ten minutes before the end of her shift. He spoke to the custodian, who told him that her building was so far away that she had to go to the parking structure and get her car to drive back to Scott. Later that day, McKinnon spoke to his custodians as a group and reminded them not to leave their buildings more than ten minutes before the end of their shift. McKinnon did not prepare disciplinary notices for any of his subordinates at that time.

McKinnon was very busy in May 2016. McKinnon had several special projects and was short staffed because more than half of McKinnon's subordinates had been granted some type of Family Medical Leave (FMLA). During the first two weeks of June 2016, McKinnon was off work to attend a union function and then because he was injured in a car accident. McKinnon returned to work on June 14. When he returned, he reviewed the time records of all his employees who were assigned to buildings other than Scott. He discovered that between May 5 and June 13, five custodians had left their buildings more than ten minutes before the end of their shifts on numerous occasions.[2] On June 14, McKinnon filled out disciplinary action forms for the five custodians, checking the box for a written reprimand. In the "facts supporting charges" box on each of these forms, McKinnon wrote the following:

> On 5/4/16 I informed you that you were leaving the building to [sic] early and reporting to the time clock. I told you you were not to leave until 1:50 pm. You are in violation of AWOL from your area. Continuing with the behavior will result in further discipline and could lead to your dismissal from the University.

For each individual, McKinnon then listed dates, beginning on May 5 and ending on June 13, on which they had left too early, and the times they had swiped out of their buildings on each of these dates. Two of the five employees had left early on 22 days during the period. A third employee had left early 15 times during the same period, a fourth had left early 13 times, and the fifth had left early five times.

McKinnon sent these disciplinary notices to Houle for approval on June 14. Later that day, McKinnon received an email from Sevigny in which she stated that she had been helping Houle with his work that day. She said that the disciplinary notices McKinnon had submitted needed more information, and that she had questions. She asked McKinnon whether, when he spoke with the employees on May 4, he gave them an opportunity to explain their side of the story or merely explained the "swipe policy" to them and, if so, whether this was the first time he explained the "swipe policy". Her email also said:

[2] The records of a sixth custodian also showed him returning to Scott more than ten minutes before the end of his shift. However, this custodian's work at his two buildings did not normally take a whole shift, and McKinnon had directed him to return to Scott whenever he finished his work. If that custodian returned to Scott early, McKinnon had him assist another custodian at Scott.

> The write-ups all also need to reflect that (and include a portion where) each employee was asked to explain their actions. Did that happen? Did you investigate each situation with the specific employee? If so, please include those results in the write-ups (i.e., when asked . .. your response was …). Also know that in addition to AWOL, if deemed inappropriate based on their reasoning, also constitutes an FFI (failure to follow instructions).

McKinnon did not reply to Sevigny's email or explain to her in person what had occurred on May 4. Instead, on the following day, McKinnon discussed the disciplinary notices with four of the five employees; the fifth was not at work that day. Two employees told him that they had misread the time clock, the third said she needed more time to get back to Scott before the shift ended, and the fourth said he or she had misunderstood the policy. McKinnon then rewrote the disciplinary notices. In the revised notices, McKinnon stated that he had asked each employee on June 15 why they continued to leave early, and he included their responses on the notices. He added a statement that this response was unacceptable. He also added the FFI violation to the AWOL violation on each form. Later that day, June 15, 2016, McKinnon resubmitted the disciplinary notices to Sevigny.

On June 16, Sevigny and Houle met with McKinnon and Crawford. Sevigny asked McKinnon about reports that he had been complaining about the custodians and supervisors on the other shifts to employees in his buildings. McKinnon replied that it was the building employees who were complaining. Sevigny also asked McKinnon about May 4 and why, if he had spoken to employees about their leaving early violations on May 4, he had waited until June 14 to draft the disciplinary notices. She also asked why the notices only contained dates after May 4. There is no indication in the record that McKinnon provided Sevigny with the explanation of what happened on May 4 that he gave at the hearing. Instead, McKinnon said he had not been to work in the month of June. Sevigny asked him about May. McKinnon admitted that he had been at work for most of May.

Prior to the June 16 meeting, Sevigny and McKinnon had exchanged a series of emails about complaints from building employees at Scott that the basement restrooms were not being properly serviced and why the custodian on McKinnon's shift was not regularly cleaning them. They discussed this issue again at the June 16 meeting. In brief, Sevigny had received several complaints from an employee at Scott about the cleanliness of the restrooms in the basement of the building. The employee had copied McKinnon on her emails to Sevigny registering the complaints, and had also spoken to McKinnon about them in person. It is clear from her emails that the building employee did not blame McKinnon for the problem; she thanked him in the emails for having a custodian clean the restrooms whenever she came to McKinnon to complain. Sevigny asked McKinnon why the custodian on his shift was not regularly cleaning all the restrooms within his sector. She showed McKinnon the job description for the custodian's sector, which included doing all the restrooms in the basement. McKinnon explained that he and Wrench had agreed in 2011 that it made more sense to have the basement restrooms done by custodians on the afternoon shift, after most of the building employees had left. McKinnon told Sevigny that these restrooms had been the responsibility of the afternoon shift for years and that the afternoon shift had been regularly servicing them until recently. He also said that whenever he received a complaint about the basement restrooms, he had his custodian clean them.

McKinnon told Sevigny that if Sevigny wanted McKinnon's shift to take over this responsibility, he would tell his custodian to do so.[3] Sevigny responded that if he knew that there were complaints that these restrooms were not being cleaned, he should have taken the initiative to make sure that they were regularly serviced.

On June 17, McKinnon resubmitted his written reprimand for the fifth employee, noting that when he asked the employee on June 17 about leaving early the employee said that he was leaving early because of construction and traffic around the building. An hour and a half later, Sevigny sent McKinnon this email:

> As you should know from our meeting this week, I have concerns about all of the write ups you did in this manner. I do not know how you (or the University) is going to defend your statements that you spoke to the individuals and gave them the opportunity to tell their side of the story on 5/4/16 yet the early transfers out occurred after that date. Please take a closer look at the document you sent me to understand what I am trying to explain.
>
> I think we need to revisit all of these documents that you sent me on the topic. The FFI, if proven, ought to be documented and disciplined [sic] but your timeline doesn't work. I suggest you speak to each of the custodians again on 6/20/16 or the earliest available date after that and ask them why their swipe history includes a variety of early transfers out. For each individual you are going to need to discuss the specifics of their time record. They all do deserve the opportunity to provide their reasoning.
>
> After those conversations, revise the documents so the timelines are reasonable and we can move forward with issuance.

On June 20, McKinnon talked to the five employees again about the dates that they had left early between May 5 and June 13. He redid the disciplinary notices to reflect the explanations they gave him on June 20 and resubmitted them later that day.

On June 20, McKinnon received a five-day suspension from Sevigny for "failure to follow instructions/poor work performance – failure to apply and enforce the FP&M Time & Attendance Policy." The notice of suspension was five pages long. It included a detailed account of Sevigny's and McKinnon's communications about the disciplinary notices McKinnon had submitted. It also included Sevigny's account of the June 16 meeting, including her discussion with McKinnon about the Scott Hall basement restrooms. In the reprimand, Sevigny also asked McKinnon, apparently for the first time, about why the sixth employee whose time records indicated that he had repeatedly left his buildings early had not been reprimanded. The suspension notice included the following summary paragraph:

[3] At the hearing, McKinnon said that he brought it to Houle's attention that the afternoon shift was supposed to do the basement bathrooms but was not doing it. Houle said he would take care of it. However, nothing in the record indicates that McKinnon mentioned this conversation to Sevigny.

> In totality, your responses are unacceptable because, as a Supervisor you are required to perform the essential functions of your job and must have the ability to follow and give instructions; interpret (understand) and comply with FP&M Department Time and Attendance Policy and Procedures and communicate earnestly with colleagues. Your failure to (1) promptly address multiple infractions of the time clock usage policy by multiple employees in your sector in a timely manner; and (2) your neglect of duties – failure to inspect and find quality issues with restroom cleanliness and pushing responsibility of the decision to have a custodian service it onto me, the Department Director, both constitute ongoing Failure to Follow Instructions and overall Poor Work Performance.

The suspension notice stated that McKinnon had received his first written reprimand for failure to follow instructions/poor work performance on December 15, 2014, and that his February 29, 2016, second written Reprimand was now reinstated because he had breached the condition of the grievance settlement, i.e., had again failed to follow instructions. Therefore, per the progressive discipline policy, McKinnon was now being suspended for five days.

The custodial supervisor on the afternoon shift at Scott Hall was not disciplined for failing to ensure that the basement restrooms at Scott were cleaned. Charging Party filed a grievance over McKinnon's suspension. In investigating the grievance, Crawford reviewed the time records of custodians working under other custodial supervisors. She discovered the following: on June 6 and June 7, 2016, a custodian working for a supervisor named Reeder had left his building early; a custodian working for a supervisor named Lloyd had left early on April 12, 2016; a third custodian working for a supervisor named Robinson had left early on April 27, 2016; and a fourth custodian working for Reeder had left early on June 7, 2016. Reeder, Lloyd and Robinson were all relatively recent hires. None of these three were disciplined for failing to properly enforce the time and attendance rules. Charging Party argued in the grievance procedure that this was evidence that Sevigny had treated McKinnon differently than other supervisors.

The parties agreed to admit, as a joint exhibit, copies of five written reprimands issued by Sevigny to custodial supervisors, other than McKinnon, in April, May, July, and November 2016, and January 2017. All of these reprimands were based in part on the supervisor's failure to properly enforce the time and attendance policy by monitoring his or her subordinates' swipes. None of these reprimands involved custodians leaving their buildings early to return to their time clock.

Discussion and Conclusions of Law:

Section 10(1)(c) prohibits a public employer from discriminating in regard to hire, terms or other conditions of employment to encourage or discourage membership in a labor organization. A finding that the employer's conduct violated Section 10(1)(c) requires a finding that the employer's motive was unlawful, i.e., that the motive behind the discriminatory act was to encourage or discourage union activity.

In order to establish a *prima facie* case of discrimination under § 10(1)(c) of PERA, a charging party must show, in addition to an adverse action or actions: (1) an employee's union or

other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. See, e.g., *Detroit Pub Schs*, 30 MPER 2 (2016); *Eaton Co Transp Auth*, 21 MPER 35 (2008). If a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *NLRB v Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981). Ultimately, however, the charging party bears the burden of proof. See *Waterford Sch Dist*, 19 MPER 60 (2006); *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

The first two elements above are not at issue. McKinnon is a long-time union representative with a history of actively representing his members. Respondent representatives, including Sevigny and Houle, were clearly aware that McKinnon was Charging Party's chief steward, even if they were not familiar with the details of all of McKinnon's previous grievance successes. However, in order to meet its burden of proof Charging Party must also demonstrate Respondent anti-union animus or hostility to McKinnon's exercise of his rights protected by PERA. It must, in addition, produce sufficient evidence to justify a reasonable inference that this animus or hostility was, at least in part, the cause of the adverse action(s).

Antiunion animus can be established 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). Here, Crawford testified that she experienced difficulty dealing with Sevigny over union issues, in apparent contrast to the previous director. However, it is well established that even employer statements that criticize or express a negative view of unions are not, by themselves, evidence of antiunion animus. *City of St Clair Shores*, 17 MPER 27 (2004). I find that the fact that Sevigny was unwilling to listen to or take suggestions from the union, and the fact that she persisted in taking actions that violated the terms of the collective bargaining agreement, were not indications of antiunion animus. Charging Party argues that Sevigny's statement that she was going to "clean up the mess" in the department also demonstrated antiunion animus. It does not. It appears that Sevigny may have been told by her supervisor, Mark Allen, that there were problems with the custodians' work and that she took this as a directive to be tougher than the previous director in enforcing rules and work standards. I note that even Charging Party president Crawford appears to have believed that Sevigny was targeting more senior supervisors, and not McKinnon in particular. Finally, Charging Party asserts that the Union and the "just cause" provisions of the collective bargaining agreement were an obstacle to Sevigny in her efforts to "clean up the mess" in the department by discharging custodial supervisors. However, there is no evidence here that Sevigny viewed the requirement that Respondent establish just cause for disciplining employees as a significant obstruction to her management of the department.

Charging Party argues that Sevigny's and Houle's actions toward McKinnon, beginning with the delay in resolving the errors on his February paycheck, show a pattern of hostility toward McKinnon's union activities prior to the June 20, 2016, suspension. I disagree. First, there are many reasons why errors on an employee's paycheck might take two months to resolve.

The fact that McKinnon complained to Houle about payroll errors on February 22, 2016, and that these errors were not fully corrected until April 16, 2016, does not, by itself, suggest that either the shorting of McKinnon's pay or the delay in correcting the errors were deliberate actions designed to intimidate him from performing his duties as steward. Charging Party did not offer any other evidence to support such a finding. Second, I do not agree with Charging Party that the fact that McKinnon was given no advance notice or opportunity to prepare before his May 23, 2016, investigatory interview suggests that Sevigny was targeting McKinnon because of his union activities. McKinnon was afforded union representation during that interview, and there is no indication in the testimony that he was prevented from consulting with Crawford or that she was barred from participating in that interview.

As indicated above, the timing of an adverse action relative to the employee's union or other protected activity is relevant to determining the employer's motive for the action where the timing is unexplained. As Charging Party points out, McKinnon received a written reprimand from Houle on February 29, 2016, shortly after he had complained to Houle about discrepancies in his paycheck. However, the timing of McKinnon's February 29 reprimand is explained by the fact that, as McKinnon testified, Houle noticed that McKinnon had been swiping in early when he and McKinnon went over McKinnon's time records in response to McKinnon's complaints about his check. Charging Party also points out that on May 23, 2016, Sevigny questioned McKinnon about several issues, including his movements on a particular day two weeks before, immediately after she and McKinnon had met to discuss a grievance McKinnon had filed on behalf of another employee. There is no explanation in the record for Sevigny's decision to conduct an investigatory interview of McKinnon immediately after they had met to discuss a grievance, although it is clear that this was not a spontaneous decision since Sevigny arranged in advance for Crawford to arrive after the end of the meeting. Since Respondent renewed its motion to dismiss after Charging Party had presented its evidence, Sevigny did not testify and did not provide an explanation for the timing of the interview. However, it is clear that suspicious timing is not normally sufficient, by itself, to establish that the employee's union activity was a motivating factor in the employer's decision. *Saginaw Valley State Univ*, 30 MPER 6 (2016); *City of Detroit (Water & Sewerage Dep't)*, 1985 MERC Lab Op 777, 780. I find that the mere fact that Sevigny scheduled McKinnon's investigatory interview after a grievance meeting does not raise the inference that the purpose of the interview was to intimidate him in his role as union steward.

Charging Party also argues that Sevigny's reasons for suspending McKinnon on June 20, 2016, were merely pretextual. A finding that the employer's stated reasons for an action were pretextual, i.e. without merit or not credible, may support a finding of unlawful motive even in the absence of direct evidence of antiunion animus. *Detroit Pub Schs*, supra. A finding of pretext, in this context, is a finding that the reasons given by the employer either did not exist or were not in fact relied upon by the employer. *Limestone Apparel Corp*, 255 NLRB 722 (1981). I conclude, however, that the facts as presented by Charging Party do not demonstrate that Sevigny's reasons for giving McKinnon the June 20, 2016, suspension were a mere pretext to discipline him for his activities as steward. One of the reasons given by Sevigny in the suspension notice was that McKinnon did not respond to the complaints of building employees that the restrooms in the basement of the Scott Hall were not being serviced by ordering a custodian on his shift to begin cleaning them on a regular basis. McKinnon explained to Sevigny that even though the position description for his shift included these restrooms, the former

director had assigned these restrooms to the afternoon shift some time ago. From what she said in the suspension notice, Sevigny appears to have accepted this explanation, but felt that McKinnon had a responsibility, once he was aware that these restrooms were not being adequately cleaned by the other shift, to have his custodian begin cleaning them regularly "so that the department was ahead of the complaints." As noted above, "pretext" means that the reasons given by the employer for the adverse action either did not exist or were not relied upon. I find that Sevigny had at least arguable grounds for disciplining McKinnon for this reason, and that there was nothing in the record to suggest that she did not rely on the reasons that she gave in the suspension notice. Whether or not Respondent had just cause to discipline McKinnon under these circumstances is not the issue.

The other reason given by Sevigny in the suspension notice was that McKinnon had failed to properly enforce the custodial time and attendance policy by failing to promptly address multiple infractions of the time clock usage policy by multiple employees in a timely fashion. The infractions, actually involving the swipe rule rather than the time clock, involved employees leaving their buildings too early to return to Scott Hall at the end of their shifts.

It is evident from the facts as presented by the Charging Party regarding this issue that McKinnon and Sevigny had communication problems. On June 14, 2016, McKinnon submitted disciplinary notices for five of his subordinates for approval by his superiors. These notices were confusing because they stated that McKinnon had talked to the five employees on May 4, 2016, and told them all that they had been violating the time and attendance policy by leaving their buildings too early to return to Scott. However, the dates of the violations McKinnon listed on the notices were all after May 4. Sevigny sent the notices back with an email asking McKinnon what he had said to the employees on May 4, asking him if he had given the employees a chance to explain their conduct, and telling him to record their responses. McKinnon's testimony at the hearing was that he had caught only one employee leaving early on May 4, and, contrary to what he wrote on the disciplinary notices, he did not tell all five that they had been leaving their buildings too early. Rather, he simply reminded the rest of his staff about the leaving early rule. However, McKinnon did not answer Sevigny's question about what he had actually said to the employees on May 4. He did not tell her that he did not ask four of the five employees to explain their conduct on May 4 because he had not caught them violating the rule on that date. He also did not tell Sevigny that he did not check the time records of the five employees between May 4 and June 14 to see if they were violating the leaving early rule, and, when he did check, discovered the multiple violations. Instead, on June 15, McKinnon spoke to each of the five employees individually, asked them about their multiple violations, recorded their responses on revised disciplinary notices, and resubmitted them. McKinnon and Sevigny met face-to-face on June 16. However, for some reason, possibly because he did not understand why Sevigny wanted to know, McKinnon still did not explain to her the entire sequence of events. I note that in Sevigny's email of June 17, she continued to ask McKinnon about May 4 and that she appears to still be confused about the series of events.

However, I note that McKinnon, by submitting the disciplinary notices for approval as he did on June 14, 2016, disclosed to Sevigny that four or five of his subordinates who worked at buildings other than Scott Hall had acquired the habit of leaving their buildings at the end of their shifts slightly earlier than Respondent's policy allowed. In the process, he also disclosed

that, at least during the month of May, he had not monitored these employees' time records diligently enough to catch these violations. By not monitoring his subordinates' time records more frequently, and by waiting so long to initiate disciplinary action against them, McKinnon, at least arguably, committed his own violations of the time and attendance policy. Once again, a finding that an employer's reasons are pretextual means that the reasons it gave for the adverse action either did not exist or were not relied upon. I find that Sevigny had at least an arguable basis for disciplining McKinnon for not properly enforcing time and attendance rules. As Crawford's investigation disclosed, other custodial supervisors had also failed to catch violations of the leaving early policy over the same period as McKinnon, and were not disciplined. However, according to Crawford's records, none of these other supervisors had more than one subordinate who violated the policy, and no subordinates who regularly did so. Even if Sevigny knew about these violations, McKinnon's situation was clearly different. I conclude that nothing in the record suggests that Sevigny disciplined McKinnon for reasons other than those she stated in the June 20 suspension notice.

In sum, I find that Charging Party did not establish antiunion animus on the part of either Sevigny or Houle and did not provide evidence sufficient to support a reasonable inference that McKinnon's union activities were even a motivating factor in Sevigny's decision to suspend him on June 20, 2016. I conclude, therefore, that Charging Party did not meet its burden of establishing a *prima facie* case that the suspension constituted unlawful discrimination against McKinnon for his union activities in violation of Section 10(1)(c) of PERA. I recommended, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: April 20, 2017