STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Public Employer-Respondent,

MERC Case No. C16 A-004
-and- Hearing Docket No. 16-001352

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

APPEARANCES:

Clark Hill PLC, by Marshall W. Grate and Grant T. Pecor, for Respondent

Jacobs, Burns, Orlove and Hernandez, by Taylor Muzzy, for Charging Party

DECISION AND ORDER

On January 27, 2017, Administrative Law Judge Julia C. Stern (ALJ) issued her Decision and Recommended Order in the above matter finding that Respondent Interurban Transit Partnership (Employer) violated § 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by issuing a thirty-day unpaid suspension to Louis DeShane for his conduct during a meeting of Respondent's Board on January 27, 2016. The ALJ also found that Respondent violated § 10 of PERA by refusing to allow DeShane to use union leave on February 5, 2016. The ALJ, however, concluded that the Employer did not violate its duty to bargain in good faith and recommended that all allegations in the charge filed by Amalgamated Transit Union Local 836 (Union) alleging violations of the duty to bargain be dismissed. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

Respondent filed exceptions and a brief in support of its exceptions to the ALJ's Decision and Recommended Order on February 21, 2017. After being granted an extension of time, Charging Party filed its brief in support of the ALJ's Decision and Recommended Order on March 31, 2017.

In its exceptions, Respondent contends that the ALJ erred by finding that it committed an unfair labor practice when it disciplined DeShane for his conduct during a meeting of its Board of Directors. Respondent further contends that the ALJ erred by finding that it committed an unfair labor practice when it denied union leave to DeShane because he was not a union officer.

In its brief in support, Charging Party contends that the ALJ's findings were based on applicable law and should be affirmed.

We have reviewed the exceptions filed by Respondent and find them to be without merit.

Factual Summary:

Following a review of the record in this matter, we adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order. We will not repeat the facts, except as necessary.

Background

The Respondent Employer provides transportation services, including bus service, for six communities in the Grand Rapids, Michigan area. The Union represents a bargaining unit of approximately 320 operators (drivers) and maintenance mechanics employed by the Employer. The Employer and Union were parties to a collective bargaining agreement that covered the period May 7, 2012 through June 30, 2015. On December 9, 2014, the parties began negotiations for a successor agreement, but have been unable, to date, to reach a new agreement.

Deshane's Conduct at the January 27, 2016 Board Meeting

Louis DeShane is employed by the Respondent Employer as a bus driver (operator). On January 27, 2016, Respondent's Board of Directors held a regularly scheduled public meeting in the second floor conference room of one of its buildings. Although operators do not work in that building, several bus drivers, including DeShane, Union President RiChard Jackson, and Union Vice-President Brent Majors, attended the meeting to express support for their union's position in contract negotiations. Seven to twelve non-employees also attended the meeting. The operators, including DeShane, and the non-employee supporters were dressed in shirts emblazoned with the union's logo. DeShane was not scheduled to work on the day of the meeting.

The agenda for the January 27 meeting began with a public comment session and concluded with an executive session at which board members were to discuss collective bargaining issues in private with their attorneys, in accordance with the Open Meetings Act.

During the public comment portion of the meeting, Jackson, DeShane, Majors, and another operator commented on the negotiations and, in particular, the dispute over whether the Respondent should continue to be required to maintain a defined benefit pension plan. DeShane specifically accused the Board of not wanting to negotiate. Jackson asked the Board if he and his members could be present during the executive session to be held at the conclusion of the meeting to discuss collective bargaining, he was told that they could not. As the meeting continued, Jackson, DeShane and the non-employees wearing shirts with the union's logo turned their chairs around so that their backs were facing the Board members.

After hearing public comments, the Board voted to go into executive session to discuss the negotiations, and Board Chairman Barb Holt asked that the room be cleared. DeShane and some other union supporters then moved to the front of the room, sat down on the floor, and

began loudly chanting slogans. One was "negotiate or retaliate." DeShane was the only employee of Respondent who participated in this demonstration. The Board meeting then came to a halt while DeShane and the other protesters remained sitting on the floor.

Approximately ten minutes after the demonstration began, Employer Chief Operating Officer Brian Pouget approached DeShane and told him that he needed to stop doing what he was doing. When DeShane did not reply, Pouget put his face closer to DeShane and told him that he was putting his job in jeopardy if he continued. DeShane told Pouget to talk to Jackson. Pouget then left the room and told Jackson what he had said to DeShane and what DeShane had said to him. Jackson then reentered the meeting room, walked over to DeShane on the floor, and told him that, while he did not agree with Pouget that DeShane's activities were not protected, Jackson did not want DeShane to be disciplined and DeShane should leave. DeShane got up and left the room with Jackson. Approximately five minutes elapsed between the time Pouget first approached DeShane and the time DeShane left the meeting room. After DeShane left the room, the other (non-employee) protesters continued to sit on the floor and chant. Respondent called the police and officers responded to the call but did not initially approach the protestors. After about 45 minutes, however, more police officers arrived and spoke to the protesters, who then got up and left the room. The Board then recommenced its meeting and held its executive session.

According to Pouget, he reviewed the law and concluded that the protesters had engaged in unlawful activity. Although Respondent asked the police to write up the incident and pursue legal action against the protesters, no action was taken.

On February 11, 2016, Respondent suspended DeShane indefinitely for "engaging in a sit-down protest after the Rapid Board of Directors voted to go into an executive sessions and for failing to stop the disturbance when instructed to do so." On February 25, 2016, DeShane's indefinite suspension was converted to a thirty day suspension for violating work rules prohibiting "disruptive activity in the workplace" and "insubordination and other disrespectful conduct." In addition to the suspension, DeShane was notified that since this was his second reprimand in a 12-month period, two additional reprimands of any nature prior to June 8, 2016, would result in his termination.

Denial of DeShane's Request for Union Leave

On February 4, 2016, Jackson sent Transportation Manager Steven Schipper an email requesting union leave for DeShane for February 5, 2016. Schipper was in a meeting with Pouget when he received Jackson's email. Schipper testified that he looked at the collective bargaining agreement, consulted with Pouget, and denied the request because DeShane was not a union officer.

The Unfair Labor Practice Charge

On January 13, 2016, the Union filed the instant charge alleging that the Employer violated its duty to bargain in good faith. On February 17, 2016, the Union amended this charge to allege that the Employer unlawfully interfered with DeShane's § 9 rights in violation of §

10(1)(a) of PERA and unlawfully discriminated against him in violation of § 10(1)(c) by disciplining DeShane for his actions at the previously discussed meeting of the Employer's Board of Directors. The Union also alleged that Respondent unlawfully discriminated against DeShane because of his union activities by denying his request to use union leave on February 6, 2016.

Discussion and Conclusions of Law:

A. Discipline of DeShane for the January 27, 2016 Incident

The ALJ concluded that Respondent unlawfully interfered with DeShane's § 9 rights in violation of § 10(1)(a) of PERA by issuing a thirty-day unpaid suspension to Louis DeShane for his conduct during a demonstration at a meeting of Respondent's Board on January 27, 2016.

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain, or coerce public employees in the exercise of rights guaranteed to them under § 9 of the Act. These rights include the right to engage in union activities and other "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." An employee's participation in a demonstration to protest his or her employer's conduct at the bargaining table is clearly union activity and participation in such a demonstration is normally protected. *Detroit Pub Schs*, 30 MPER 2 (2016). The instant case presents the issue of whether DeShane's conduct while engaged in this activity was of such a nature as to cause him to lose the Act's protection.

Respondent asserts that DeShane's participation in the demonstration was unprotected because it involved a sit-in demonstration that caused a disturbance at a public meeting.

Misconduct in the course of concerted activity, including insubordination, is not immune from discipline. See, e.g., *AFSCME, Michigan Council Local 574-A v City of Troy*, 185 Mich App 739, 744 (1990). The Commission, however, has previously recognized, in the cases that follow, that tempers may become heated and disorderly conduct occur in the course of grievance meetings, collective bargaining sessions and other activity protected by the Act, and that the protections afforded these activities under PERA would be illusory if employees were held to the same standards of conduct in these contexts as when dealing with their supervisors in the general workplace.

In *City of Detroit (Police Department)*, 1978 MERC Lab Op 1020, the Commission affirmed the finding of the ALJ that a police officer was engaged in concerted protected activity when his superior officer called him into his office and attempted to engage the police officer in a discussion of a grievance the officer had filed. The Commission agreed with the ALJ that the police officer did not lose the protection of the Act by refusing to discuss the grievance, pointing his finger at his supervisor, raising his voice, and telling the supervisor repeatedly to "read the grievance."

In *Unionville-Sebewaing Area Schs*, 1981 MERC Lab Op 932, the Commission held that an employer violated the Act by discharging the charging party for his conduct at a meeting

called by the employer's superintendent "to allow the employees to speak directly to him about their concerns." Prior to the meeting, the charging party and his co-workers had discussed some concerns that they wanted presented at the meeting, including wages, work schedules and seniority. During the meeting, the charging party complained about pay and, also, about his failure to receive a promotion and the employer's failure to follow seniority in awarding promotions. When the employer responded that "there was no seniority," the charging party angrily accused him of lying. When the employer began to speak again, the charging party rose from his seat and said that since no one was listening, "I guess the only thing I think I can do is hit you." The charging party did not move from his seat toward the superintendent. Affirming the finding of its ALJ, the Commission held that the employee was engaged in protected activity at the time of the incident and that his conduct during the meeting did not render him unfit for further service or remove him from the protection of the Act. Accordingly, the Commission concluded that the employee's subsequent discharge for insubordination was unlawful. It stated, at 934-935:

> Rude or insulting remarks, obstreperous comments, and other forms of rough language, are protected when made spontaneously in the course of concerted, otherwise protected, activity. [citations omitted]. Mere reference to an act of physical violence in the context of concerted protected activity does not, by itself, remove an employee from the Act's protection. The fact that objectionable remarks are made in the presence of other employees does not make such remarks unprotected when they are made in the course of protected concerted activity.

The NLRB has similarly afforded employees a great degree of latitude with respect to allegedly disorderly or offensive conduct occurring during the course of protected concerted activities.[1] The Board has repeatedly held that discourteous conduct while engaged in protected activity does not ordinarily justify disciplining an employee. *Max Factor & Co*, 239 NLRB 804, 818 (1978); *Postal Service*, 250 NLRB 4 (1980). An employee may be deprived of the protection of the NLRA for committing improprieties in the course of protected activity only in "flagrant cases in which the misconduct is so violent or of such serious character as to render the employee unfit for further service." *Bettcher Manufacturing Corp*, 16 NLRB 526, 527 (1948). See also *Crown Central Petroleum Corp v NLRB*, 430 F2d 724, 730 (CA 5, 1970).

In the present case, as noted by the ALJ, the January 27, 2016 demonstration at the Board meeting was for the purpose of protesting Respondent's bargaining conduct and was not part of an illegal strike or work stoppage. DeShane did not commit or threaten to commit violence while participating in the demonstration. DeShane was not forcibly removed from the Board meeting room by the police, was not arrested, and was not charged with either trespassing or exciting a disturbance in a public building.

[1] Board precedent is often given great weight in interpreting PERA in those cases where PERA's language is analogous to that of the NLRA. *Oakland Co*, 2001 MERC Lab Op 385, 389. See also *Gibraltar Sch Dist* v *Gibraltar MESPA-Transp*, 443 Mich 326, 335 (1993); *St Clair Intermediate Sch Dist* v *Intermediate Ed Ass'n*, 458 Mich 540, 559, (1998).

Although the demonstration temporarily prevented Respondent's Board from carrying out its normal business, DeShane's participation in the demonstration was brief. Moreover, DeShane did not refuse to obey Pouget's order to stop demonstrating and leave the room once advised by Jackson to obey the order. Although DeShane asked Pouget to consult with Jackson, there is no dispute that DeShane left the Board's meeting room approximately five minutes after Pouget ordered him to do so. Consequently, the Commission agrees with the ALJ that DeShane's conduct was not of a nature as to render him unfit for further service. Significantly, Respondent did not discharge DeShane and, according to the record, he was still employed by Respondent at the time of the hearing in this dispute.

Respondent also asserts that DeShane interfered with the right of its Board of Directors to hold an executive session. The Michigan Attorney General has previously addressed the actions that may be taken, under the Open Meetings Act, MCL 15.263, by a public body to exclude an unauthorized individual from a closed session if the individual intrudes upon the closed session and refuses to leave. In 1985-1986 Mich Op Att'y Gen 269 (1986), the Attorney General concluded that a public body may, if necessary, exclude an unauthorized individual who intrudes upon a closed session by either (1) having the individual forcibly removed by a law enforcement officer, or (2) by recessing and removing the closed session to a new location. See also *Regents of the Univ of Michigan v Washtenaw County Coalition Against Apartheid*, 97 Mich App 532 (1980). In the present case, DeShane and the other protesters did not have the right to remain in the meeting room during the Board's closed session. Consequently, they could have lawfully been removed, or the Board of Directors could have recessed the closed session and moved it to a new location without posting a public notice. DeShane's actions, therefore, did not prevent the Board from holding its executive session. Although DeShane's conduct delayed the start of the executive session, he promptly chose to desist when instructed to do so.

Although Respondent also argues that DeShane was given a thirty day unpaid suspension for violating its work rules, it is well established that an Employer's rules cannot be used to prohibit employees from engaging in protected concerted activities. *NLRB v Washington Aluminum Co*, 370 US 9, 17 (1962); *City of Detroit (Police Department),* 1978 MERC Lab Op 1020.

Consequently, in view of the previously-stated facts in this dispute, we believe that the ALJ properly concluded that Respondent violated § 10(1)(a) of PERA by issuing DeShane a thirty-day unpaid suspension for his conduct at the Board meeting on January 27, 2016. Nothing in this Decision, however, should be construed as transforming an employee's right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection" into a blanket license to engage in disorderly conduct. Misconduct in the course of concerted activity is not beyond an employer's right to discipline. *NLRB v Burnup & Sims*, 379 US 21 (1964); *AFSCME, Michigan Council Local 574-A v City of Troy,* 185 Mich App 739, 744 (1990); *North Ottawa Community Hospital*, 1982 Lab Op 555. In the present case, if DeShane had continued to refuse to leave the meeting room after being instructed to do so, the Commission would regard his activity as unprotected by the Act.

B. Denial of Request for Union Leave

The ALJ also found that Respondent violated § 10(1)(a) and (c) by applying Section 2.07 of the collective bargaining agreement to DeShane in a discriminatory manner when it denied his request for union leave on February 5, 2016.

According to Respondent, Section 2.07 of the agreement only applies to union officers and Deshane was denied leave because he was not a union officer.

Charging Party asserts that, prior to September 2015, non-union officers were allowed to use union leave and that Respondent changed its interpretation of Section 2.07 because of anti-union animus against Charging Party and against DeShane, in particular, as a union activist.

Section 2.07 of the collective bargaining agreement provides:

> Union Officers Special Days Off
>
> Employees called upon to transact business of the Union or Authority requiring their absence from duty shall, upon application (written, if practicable), be allowed to absent themselves from duty for a sufficient time to transact such business, provided the number applying for leave of absence shall not be so great as to be detrimental to the service obligations of the Authority. No employee shall engage in Union activities during working hours without permission from a Department Manager. Employees will not be paid when absent from duty to conduct Union business or represent Union members.

The elements of a prima facie case of unlawful discrimination under § 10(1)(c) of PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity (2) employer knowledge of that activity (3) anti-union animus or hostility toward the employee's protected rights and (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Saginaw Valley State Univ*, 30 MPER 6 (2016); *Taylor Sch Dist*, 28 MPER 66 (2015); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696.

In the present case, DeShane was a particularly active union supporter and the record establishes that Respondent recognized this and identified him as one of the leading employee union activists.

Additionally, the ALJ correctly found that the language of Section 2.07 is ambiguous. Although the title of Section 2.07 refers only to Union Officers, the language of the provision refers to "Employees called upon to transact business of the Union or Authority." The language of Section 2.07 does not unambiguously support Respondent's denial of DeShane's request for union leave.

According to the record, prior to September 22, 2015, Respondent applied this language as permitting employees who were not union officers to use unpaid union leave, subject to the

restriction in Section 2.07 that the number of employees using leave not interfere with Respondent's operations. Significantly, there was no evidence introduced that Respondent had ever denied a request for an employee who was not a union officer to use union leave.

Furthermore, Charging Party introduced copies of five emails in which Union President Jackson, on separate occasions, requested union time off for employees who were not union officers. These requests were either granted or not denied. Specifically, on September 15, 2013, Jackson asked Transportation Manager, Carl Woodson, for union leave for himself and three other operators: Sue Lyle, Chris Vanas, and Asim Majeed. Lyle, Vanas and Majeed were not union officers. There was no reply to that email, and the operators who were not union officers proceeded to take the time off without consequences.

On September 20, 2013, Jackson sent Woodson an email requesting union leave for two-and-one-half hours on September 25 for himself and operators Carry Sanders and Tammy Bixler. Sanders and Bixler were not union officers. Woodson replied by copying Jackson on an email to dispatch instructing it to schedule the operators off as requested. On November 12, 2014, Jackson requested union leave for the entire day on November 17, 2014 for himself, Charging Party Vice-President Majors, and operator Leon Carrico. Carrico was not at that time a union officer, but had been one in the past. On July 16, 2015, Jackson requested union leave for an operator, Jennifer Hall. Hall was not a union officer, and there was no indication in the record that she had ever been one. The November 12, 2014, and July 16, 2015, emails were directed to Pouget because the transportation manager position was vacant on both these dates. There was no written reply to either of these requests, and the employees took the time off without consequences. Finally, Charging Party introduced an email directed to Pouget and dated September 12, 2015, requesting union leave on various dates for Jackson, for Majors, and for DeShane. Pouget responded to Jackson thirty minutes later with a question about another issue and did not reference the request for union leave. Again, all three men, including DeShane, took the time off without consequences.

Although Respondent argues that this practice was contrary to its interpretation of Section 2.07, there is no evidence that Respondent ever put the Union on notice of its intent to apply what it regarded as the clear language of Section 2.07 notwithstanding the past practice regarding its application.

In sum, the Union provided numerous examples of employees who were not union officers who were allowed to use union leave. Because Respondent provided no legitimate explanation for its sudden decision to change its interpretation and application of Section 2.07, the ALJ properly concluded that this failure, coupled with the suspicious timing of the change, warranted a finding that Respondent's subsequent refusal to allow union leave to DeShane was motivated by anti-union animus. Anti-union animus can be established by direct evidence or circumstantial evidence. It is well settled that when a respondent's purported motives for its actions are found to be without merit or credibility, we may properly infer from the totality of the circumstances that the respondent was motivated by anti-union animus, even in the absence of direct evidence. *Detroit Public Schs*, 30 MPER 2 (2016), *Wayne Co*, 21 MPER 58 (2008). See also *Mason Co Rd Comm*, 22 MPER 22 (2009). Here, we conclude that the reason given by Respondent for denying DeShane's request for union leave is without merit or credibility.

Consequently, the ALJ properly determined that Respondent violated § 10(1)(a) and (c) by refusing to allow DeShane to use union leave on February 5, 2016.

We have also considered all other arguments submitted by the parties and conclude that they would not change the result in this case. For the reasons set forth above, and the reasons stated by the Administrative Law Judge, we find Respondent's exceptions to be without merit and agree with the Administrative Law Judge that Respondent violated § 10(1)(a) of PERA by issuing a thirty-day unpaid suspension to Louis DeShane and violated § 10(1)(a) and (c) by applying Section 2.07 of the collective bargaining agreement to DeShane in a discriminatory manner.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Natalie P. Yaw, Commission Member

Dated: July 12, 2017

Commissioner LaBrant, Concurring in Part and Dissenting in Part

I respectfully disagree with Commissioners Callaghan and Yaw and would reverse the finding of the ALJ that Respondent violated § 10(1)(a) of PERA by issuing Louis DeShane a thirty-day unpaid suspension because I do not believe that we should transform an employee's right to engage in "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection" into a license to engage in disorderly conduct.

Initially, I do not dispute that union members and representatives attending the public employer's board meeting, wearing shirts with the union logo, engaged in protected "concerted activity" under PERA.

Additionally, I do not dispute that union members and representatives speaking in the public comment period at the public employer's board meeting and stating to the board that the board "is not willing to negotiate" were engaged in protected "concerted activity" under PERA.

When the request, made during the public comment period, to allow union members and representatives to attend the board's closed executive session was denied, union members and representatives responded by turning their chairs around and sitting with their backs to the board members for the rest of the meeting. I do not dispute that this silent demonstration is protected "concerted activity" under PERA.

However, DeShane and some other union supporters at the close of the meeting moved to the front of the room and immediately sat down and began chanting "negotiate or retaliate." After forty-five minutes, police were finally able to persuade the union supporters to leave the room. Once the room was cleared, the public employer board could hold its closed executive session as permitted under the Open Meetings Act.

DeShane took part in this sit-down demonstration. After about five minutes of chanting, he was approached by his work supervisor who ordered him to cease. DeShane's response was to turn away from his supervisor and chant louder. After fifteen minutes into the sit-down, union representatives told DeShane he could receive sanctions from his employer and urged him to leave. DeShane after participating in the sit-down for fifteen minutes exited the room. The demonstration went on for another thirty minutes. DeShane was later disciplined by his employer for his insubordination.

I am not prepared to treat an act of civil disobedience, which could be classified as "exciting a disturbance at a public meeting" and punishable as a misdemeanor under MCL 750.170, as protected "concerted activity" under PERA. This demonstration was not some spontaneous *res gestae* done in the emotion and heat of the moment. It was planned.

I see no reason why previous Commission cases, never affirmed by the Michigan Court of Appeals, which are cited as giving broad leeway as to what constitutes protected "concerted activity," cannot be reversed in a later Commission ruling.

Consequently, I would dismiss the unfair labor practice charge relating to DeShane's suspension. I would, however, affirm, for the reasons given by the majority above, the ALJ's finding that Respondent violated § 10 of PERA by refusing to allow DeShane to use union leave on February 5, 2016.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Robert S. LaBrant, Commission Member

Dated: July 12, 2017

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Public Employer-Respondent,

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APPEARANCES:

Clark Hill PLC, by Marshall W. Grate and Grant T. Pecor, for the Public Employer

Jacob, Burns, Orlove and Hernandez, by Taylor Muzzy, for the Labor Organization

DECISION AND RECOMMENDED ORDER
(a) 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 on April 13 and April 14, 2016, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission (the Commission). Based upon the entire record, including post-hearing briefs filed by the parties on May 31, 2016, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge and Background:

The charge in this case was filed by the Amalgamated Transit Union, Local 836 (Charging Party or the Union), against the Interurban Transit Partnership (Respondent or the Employer) on January 13, 2016, and amended on February 17, 2016. The Employer provides public transportation services for six communities in the Grand Rapids, Michigan, area. It is governed by a Board of Directors made up of representatives of these communities. The Union represents a bargaining unit of Respondent's nonsupervisory employees which includes operators (drivers) and maintenance mechanics.

In December 2014, the parties began negotiations for a successor to a collective bargaining agreement that covered the term May 7, 2012, through June 30, 2015. As of the date the record closed in this case, the parties had been unable to reach a new agreement.

The Employer, as it was mandated to do as a condition of receiving financial assistance from the Federal Transit Administration under its "Section 13(c) agreement," agreed to enter into an interim successor agreement for a period of sixty days after the contract expired.[2] However, the Employer rejected the Union's request for a longer interim agreement. The parties' interim successor agreement expired at midnight on August 31, 2015.

In August and September 2015, both parties filed charges alleging that the other had engaged in bad faith bargaining. The Union's charge also alleged that the Employer violated Section 10(1)(a) of PERA by threatening employees with discipline for passing out leaflets regarding the contract dispute on the platform of the Employer's Central Station. The charges, Case No. C15 H-105/15-047304-MERC and Case No. CU15 I-025/15-052496-MERC, were consolidated and assigned to me. I heard the cases in September 2015. On July 14, 2016, I issued a Decision and Recommended Order recommending that the Commission dismiss all charges of bad faith bargaining. I also recommended that the Commission find that the Employer violated Section 10(1)(a) by promulgating and enforcing a rule prohibiting employees, under any and all circumstances, from distributing leaflets or other materials concerning wages, hours, or working conditions on the Central Station platform. Both parties filed exceptions to my recommendations. The exceptions are currently pending before the Commission.

The instant charge was filed and heard while the parties were awaiting my decision in Case Nos. C15 H-105 and CU15 I-025 and covers events occurring after the hearing on those cases had closed. The Union alleges in this charge that the Employer continued to bargain in bad faith over the issue of pensions. It also alleges that the Employer unlawfully interfered with employee Louis DeShane's Section 9 rights in violation of Section 10(1)(a) of PERA, and unlawfully discriminated against him in violation of Section 10(1)(c), by disciplining DeShane for his actions at a meeting of the Employer's Board of Directors held on January 27, 2016. Finally, it alleges that Respondent unlawfully discriminated against DeShane because of his union activities by denying his request to use union leave on February 6, 2016.

II. Findings of Fact:

A. Bargaining Over the Pension Issue

1. Negotiations Prior to September 2015

Although many issues remained at the time the record in this case closed, the most significant issue separating the parties throughout their contract negotiations has been pensions. All employees in the Charging Party's bargaining unit currently receive benefits under a defined benefit pension plan formally known as the "Interurban Transit Partnership and Amalgamated Transit Union Pension Plan" (the Plan). The Plan is administered by a board of trustees comprised equally of members appointed by Charging Party and members appointed by

[2] Section 13(c) of the Federal Urban Mass Transit Act (UMTA), 49 U.S.C. 5333(b), requires public transit providers, as a condition of receiving federal funding, to enter into so-called Protective Agreements with the unions representing their employees. These agreements must contain certain terms and must be approved by the U.S. Department of Labor. On November 2, 2011, Respondent and Charging Party entered into a supplementary Protective Agreement that required Respondent to enter into this interim successor agreement.

Respondent. Under the language of the Plan document, the plan sponsor, i.e., Respondent, must have the approval of Charging Party to amend the Plan except where the amendment is required to maintain the status of the Plan as a qualified plan under the Internal Revenue Service (IRS) Code. The Plan document also arguably requires mutual agreement by the parties to terminate the Plan except when the Employer and/or bargaining unit has ceased to exist.

As noted above, in December 2014, the parties began negotiations for a new collective bargaining agreement to replace the agreement with an expiration date of June 30, 2015. Under that collective bargaining agreement, Respondent contributed $1.00 per employee per hour worked to the Plan. Employees did not contribute to the Plan, and the Plan document prohibited such contributions. The collective bargaining agreement also contained this language:

> The parties agree to direct their representative trustees to instruct the Plan's actuary to base the calculation [sic] upon a minimum funding basis of twenty five (25) years.

Both parties presented their first written contract proposals at a negotiation session held on January 26, 2015. In that document, Respondent proposed, in general terms, to eliminate the current defined benefit plan and replace it with a defined contribution plan. In the negotiations that followed, Respondent contended that the Plan's unfunded liabilities had been increasing at a substantial and alarming rate over the last three years. Respondent provided a copy of the most recent actuarial report for the Plan to support this contention. As set out in my Decision and Recommended Order in Case No. C15 H-105/15-047304-MERC and Case No. CU15 I-025/15-052496-MERC, although Charging Party did not initially challenge Respondent's reading of the report, it eventually argued that Respondent was misinterpreting it. Charging Party also contended that the Plan was basically healthy and that the Plan's unfunded liabilities were manageable. Respondent made it clear to Charging Party that it wanted to remove the risk of investment loss that a defined benefit plan imposed upon it by moving to a defined contribution plan. Charging Party opposed the idea of either terminating the Plan or phasing it out, and all Charging Party's proposals throughout the negotiations were based on the Plan remaining the sole employee retirement vehicle.

On February 4, 2015, Charging Party proposed, as part of a package proposal, to increase Respondent's contribution to the Plan from $1.00 per hour to $1.10 per hour in the second year of the contract, and to $1.20 per hour in the third year. However, this proposal was withdrawn when it did not result in an agreement on the contract.

Respondent made its first specific proposal on pensions on April 8, 2015. On that date it proposed to replace the current pension provision with the following language:

> The Authority agrees to contribute five percent (5%) of each employee's total compensation into the employee's account under the Authority's established 457 plan.

> The Authority will convert the actuarial value of any existing benefits into a payment toward each employees' account under the Authority's established 457 plan.

According to Respondent, the five percent contribution as outlined in its proposal was more than it was currently contributing to employees' retirement in contributions to the Plan. However, it told Charging Party that it was willing to agree to increase its contribution in in exchange for Charging Party's agreement to move to a defined contribution plan. Charging Party rejected Respondent's proposal and argued that the proposal to convert the actuarial value of each employee's existing benefit into a lump sum payment to a 457 plan was inconsistent with the Plan document.

On May 7, 2015, during the parties' last bargaining session before fact finding took place, Respondent revised its pension proposal. The May 7, 2015, proposal provided Charging Party with two options. Option one was Respondent's April 8, 2015, proposal. Option two read as follows:

> (b) Freeze current plan so that no individual gains any additional years of service and replace Article XVIII (Pension) with the following:
>
> Article XVIII (Retirement Benefit)
>
> The Authority agrees to contribute five percent (5%) of each employee's total compensation into employee's account under the Authority established 457 plan.

As set out in my Decision and Recommended Order in Case No. C15 H-105/15-047304-MERC and Case No. CU15 I-025/15-052496-MERC, a fact finding hearing was held without Charging Party's participation, and the fact finder issued his report and recommendations, in the summer of 2015. The parties met for their first bargaining session after the fact finder issued his report on August 17, 2015. Respondent presented a new written proposal at this meeting, but its pension proposal was essentially the same as the proposal it gave Charging Party on May 7, 2015. At the end of the meeting, Charging Party made an oral proposal which it presented to Respondent the following day in writing. In this proposal, Charging Party proposed for the first time to amend the Plan to allow for employee contributions; its proposal specified that the Plan would be amended to comply with the IRS Code including, but not limited to, the inclusion of a provision that employee contributions be 100% vested. Specifically, it proposed that all full-time employees, effective the first payroll period after ratification/approval of the contract by both parties, contribute $.10 per hour worked, with the contribution rising to $.20 per hour effective September 1, 2016. Charging Party's new proposal also included an increase in Respondent's contribution to $1.10 per hour effective the first payroll period after ratification and $1.20 per hour worked effective September 1, 2016.

Respondent told Charging Party that its proposed employee contributions were not close to being sufficient to address the unfunded liability. It said that, assuming that the Employer's contribution remained unchanged, employees would have to contribute between $.80 and $1.00 per hour.

On August 19, 2015, Charging Party revised its August 17 proposal to increase the employee contribution to $.15 per hour upon ratification of the agreement and $.25 per hour effective September 1, 2016. It also proposed to change the vesting requirement from five to ten years for new hires.

2. Respondent's October 20, 2015, Proposal

Respondent's proposal on pensions remained the same as its May 7, 2015 proposal until October 20, 2015, when it presented a new proposal covering pensions only. The new proposal read as follows:

The ITP's preferred proposal is as follows:

(1) Freeze the current plan so that no individual gains any additional years of service going forward. In exchange for freezing the plan, the ITP would contribute five percent (5%) of each employee's total compensation into each employee's account under the Authority established plan. In addition, the following would occur:

(a) Individuals who have not yet vested would be able to vest, but would not accrue any additional years of service.

(b) The ITP would remain responsible to continue to fund previously accrued benefits.

The following scenarios are acceptable options:

(2) To allow employees to maintain the existing defined benefit plan, the parties can modify the plan to allow for employee contributions. Thereafter, the ITP and all employees would each contribute ($.90) per hour for all hours worked by the members of the bargaining unit. *Employee contributions shall be 100% vested minus investment losses.* There shall be no interest paid on any refunded employee contributions. [Emphasis added]

(3) Within 30 days following the effective date of the parties' agreement, all current employees must elect to remain in the current defined benefit plan going forward or to move to a defined contribution plan. The current defined benefit plan will be amended to allow for employee contributions and employees who elect to remain in the plan shall contribute one dollar ($1) per hour worked going forward. The ITP shall contribute one dollar ($1) to the defined benefit plan for each hour worked of those members remaining in the plan. *Employee contributions shall be 100% vested minus investment losses.* There shall be no interest paid on any refunded employee contributions. [Emphasis added]

For individuals electing to move to the defined contribution plan, and new hires, the following shall occur:

(a) Individuals who have not yet vested would be able to vest, but would not accrue any additional years of service.

(b) The ITP would remain responsible to continue to fund previously accrued benefits.

(c) The ITP shall contribute five percent (5%) of each employee's total compensation into each employee's account under the Authority established plan.

(4) The ATU can assume the role of plan sponsor and the overall plan administration. The ITP will no longer be involved as a trustee or otherwise. Going forward, the ITP shall contribute five percent (5%) of each employee's total compensation into each employee's account under the Authority established plan.

(5) As an option of last resort, should the Union continue to refuse the options available, the plan will be terminated and the parties can bargain over the impact of that occurrence.

In his report, the Plan's actuary had provided estimates of the "high," "mid-range" and "low" annual contributions required to pay off the Plan's unfunded liability over ten year, twenty-five year, and thirty year periods respectively. Respondent's counsel and chief negotiator, Grant Pecor, testified that ITP arrived at the amounts in option two by determining, using the actuary's calculations, that a contribution of $1.80 per hour per employee was required to pay off the Plan's current unfunded liability in ten years. The Employer than divided this contribution equally between Respondent and the employees. Because under option three some employees would not be contributing to the Plan, Respondent raised the amount of the contribution to $1 per hour for the employees and $1 per hour for the Respondent.

The October 20 meeting took place with a mediator. However, according to Employer Chief Executive Officer (CEO) Brian Pouget, the parties met face-to-face to allow the Employer to go over its proposal. None of the witnesses testified regarding the specifics of what the Employer said at that meeting, and it was not clear from the record whether in going over the proposal the Employer provided the Union with an explanation of how the Employer arrived at the contribution amounts in options two and three.

According to the testimony of Union President RiChard Jackson, the Union rejected option two because of the "minus investment losses" language problem discussed below, and the fact that the amount the Employer proposed to contribute was less than the amount it was currently contributing. Jackson did not explain why the Union rejected the other options, but its rejection of these options was consistent with its previous insistence that the Employer continue to provide a traditional defined benefit plan with 100% employee participation. As noted above, both option two and three of Respondent's proposal stated that employee contributions would be 100% vested "minus investment losses." The Union contends that in order to be a qualified plan under the IRS Code, employee contributions must be 100% vested, and that the inclusion of the "minus investment losses" language would disqualify the Plan. The Plan document, as currently written, requires the Plan to be a qualified Plan. Moreover, according to the Union, the failure to maintain the Plan's qualified status would have invalidated the Plan's tax-exempt status, resulting in, among other things, employees being required to pay income tax on the Employer's

contributions to the Plan and the Employer being required to pay payroll tax on these same contributions. This was why all the Union proposals which included an employee contribution stated that these contributions would be 100% vested, without any qualifying language.

Pouget testified that at the October 20 meeting the Union merely listened to the Employer's explanation of its proposal and then said that it needed time to look over the proposal and respond to it. There was no indication in the record that Charging Party explained any of its reasons for rejecting the proposal during the October 20 meeting.

3. Charging Party's November 13, 2015 Counterproposal

On November 13, 2015, Charging Party sent Pecor a counterproposal that covered the entire contract. The pension provision in the counterproposal did not increase the employee contribution from Charging Party's August 19 proposal. Respondent's proposed contribution during the first two years of the contract also remained the same as in Charging Party's August 19 proposal; $1.10 per hour worked for the first year of the contract and $1.20 per hour worked for the second year. However, the November 13 proposal included an increase in Respondent's contribution during the third year of the collective bargaining agreement to "the greater of $1.20 per hour worked by all employees or 5% of 'pay for all employees." Charging Party also proposed a new supplemental pension benefit, which the proposal described as follows:

> Supplemental Employee Pension Plan (SEPP) Effective upon ratification/approval by both parties, or at such other time as the parties may agree, a supplemental pension benefit recognizing only "future service" shall be established for full-time employees employed after the effective date of the SEPP. Any SEPP benefit shall be funded by contributions made to the SEPP by full-time employees in the amount of 1.0% of pay effective the first full payroll period that reflect the initial wage increase under this agreement, and additional 1.0% of pay effective with the first full payroll period that reflects the 2nd wage increase under this agreement, i.e., on or about September 1, 2016, and an additional .5% of pay effective with the full payroll period that reflects the 3rd wage increase under this agreement, i.e., on or about September 1, 2017 (a total of 2.5% over term as at such other date as the parties may agree.[3]

The proposal also included this language:

> When the Primary Pension Plan is funded at or above 100% for two consecutive plan years on a market value basis, employees' contributions to the Primary Pension Plan shall – at Local 836's option; (1) continue to be made to the Primary Pension Plan so that the accrual rate under the Primary Pension Plan may be increased; or (2) be redirected to the Supplemental Employee Pension Plan. Unless different assumptions are recommended by the Plan's actuary, with the advice of any actuary retained by Local 836, and adopted by a majority vote of

[3] The monthly retirement benefits of participants in the Plan are calculated using a formula derived from multiplying the participant's years of service by a fixed dollar amount set out in the Plan. Charging Party's proposal did not include a separate formula for determining the supplemental benefit.

> the Joint Pension Committee, the actuarial assumptions in place as of July 1, 2015, shall be used to calculate the funded ratio. It is the parties' intent that employee contributions to the Primary Pension Plan shall not be mandatory when the Primary Pension Plan is funded at 100% or higher.

In addition, Charging Party proposed, both for the primary and supplemental plans, that employee contributions be "picked up" by Respondent, considered an "employer" contribution for purposes of Section 414(h) of the IRS Code, excluded from employees' income, and paid directly by Respondent to the plans.

Finally, Charging Party proposed to make changes in the Plan's governance. These included moving the authority to select the Plan actuary from Respondent, as the Plan sponsor, to the Plan's trustees. Charging Party also proposed giving the trustees responsibility for all issues relating to the administration of the Plan, including benefit design, accrual rates, actuarial assumptions, and the appropriate estimated investment return to be used in the actuarial valuation of the Plan.

4. Respondent's November 16 response and Charging Party's November 20 Reply

After receiving Charging Party's November 13 proposal, Pecor discussed it with Pouget. On November 16, 2015, Pecor sent Charging Party a letter rejecting the November 13 counterproposal and objecting to Charging Party's introduction of new items. Pecor complained that Charging Party continued to propose an increase in Respondent's current contribution to the Plan, even though Respondent had rejected it, and that the new proposal actually included a larger increase in the third year of the contract. He also objected to the proposal to create a supplemental pension plan. The latter, Pecor believed, increased Respondent's exposure to potential unfunded liabilities. In addition, Pecor interpreted the proposal as withdrawing Charging Party's agreement that employees would make contributions to the Plan. Pecor told Charging Party that the counterproposal "completely ignored the options provided to the Union by which the ITP was willing to resolve the negotiations over the retirement benefits to be provided to the members of your unit going forward." The letter concluded with the statement that it appeared that the parties had already reached impasse and that the bargaining session scheduled for November 30 would be an exercise in futility. Pecor stated, however, that Respondent was willing to meet and discuss "any additional proposal Charging Party would like to make."

Charging Party counsel Taylor Muzzy replied to Pecor in a letter dated November 20. Muzzy maintained that the addition of a supplemental pension benefit would not expose Respondent to greater pension liability because it recognized future service only and was funded entirely by employee contributions. He also asserted that Charging Party had not withdrawn its prior offer to revise the Plan to allow for employee contributions, and suggested that Respondent had merely misunderstood Charging Party's proposal that Respondent "pick up" employee contributions by designating them as employer contributions, thereby allowing the contributions to be excluded from employees' taxable income in the year the contributions were made. Muzzy stated that he was "again" raising the issue of the inclusion of the "minus investment losses" language in Respondent's October 20 proposal, and asked Pecor to provide some legal authority

for the proposition that this could be part of a qualified plan. Finally, Muzzy complained about what he characterized as Respondent's summary rejection of Charging Party's counterproposal before the parties had even had the chance to discuss it at the bargaining table.

5. November 30, 2015, and January 11, 2016, Bargaining Sessions

The parties met again with the mediator on November 30. Present at this bargaining session was Joseph Burns, who had appeared on behalf of Charging Party at a previous bargaining session to discuss the pension issue. The parties first met separately with the mediator. The mediator then brought the parties together in a face-to-face session. During the face-to-face session, Burns asked questions about Respondent's October 20 pension proposal. He also objected to certain elements of that proposal, including the "minus investment losses" language. According to Pecor and Pouget, Pecor told Burns that if Burns had authority for his position that the language would cause the Plan to be disqualified, Respondent would reconsider its position and would be open to a counterproposal without that language. Charging Party President Jackson's testimony on this point was essentially the same, i.e., that Pecor told Charging Party to show him where it was illegal, and then invited Charging Party to submit a counterproposal. According to Jackson, however, Burns then told Respondent that he wanted to explain the new pension provisions in Charging Party's November 13 proposal, and Pecor said, "I think we've got it," or something to that effect. Pecor and Pouget both denied that Charging Party asked to be allowed explain its November 13 proposal. According to Pecor and Pouget, Charging Party merely asked Respondent if it had any questions about the proposal, and Respondent said it did not. After this, the parties went back to meeting separately with the mediator.

Pecor was not persuaded by the explanations Muzzy provided in his November 20 letter. For example, with respect to the proposal to have Respondent "pick up" employee contributions, Pecor testified that he understood that Charging Party was proposing that Respondent make contributions on the employees' behalf which would then, as employee contributions, be 100% vested with employees. Pecor explained that it was his understanding that all employee pension contributions were made with pre-tax dollars. Therefore, he did not believe Muzzy's explanation that unless there was an agreement for the Employer to "pick up" employee contributions, employee contributions to the Plan would be taxable. Pecor also did not agree with Charging Party that its proposed supplemental pension benefit would not result in increasing Respondent's unfunded pension liabilities. However, at the hearing Pecor explained that he did not ask Burns further questions about the details of Charging Party's pension proposal because "Charging Party did not want the [employee] contribution that would be required to get it resolved." According to Pecor, "Nothing they explained or said changed the fact that they, again, took what we already rejected and basically threw a bunch more stuff on there that wasn't acceptable and tried to get that as the deal."

On December 18, 2015, the parties received an updated actuarial report on the Plan. The report indicated, according to Pecor, that the Plan's unfunded liability had increased by more than a million dollars during the prior year. Pecor testified that this confirmed to Respondent that it could not agree to anything that did not result in paying off the entire unfunded liability within

10 years. The parties met again on January 11, 2016. Both parties agree that no progress was made.

B. DeShane's Conduct at the January 27, 2016, Board Meeting

DeShane is a driver or, as Respondent refers to them, an operator. Although not an officer of Charging Party, throughout the negotiations DeShane participated in numerous events held to publicize the dispute over the terms of a new contract. As discussed in my July 15, 2016, Decision and Recommended Order in Case No.C15 H-105/15-047304-MERC and Case No. CU15 I-025/15-052496-MERC, DeShane also passed out leaflets on the platform of Respondent' Central Station on several occasions and was threatened with discipline for this action. In addition, DeShane posted comments critical of Respondent on both Charging Party's and Respondent's Facebook pages.

In late January 2016, Respondent CEO Pouget was informed that a "fare strike" had been planned to take place on January 27. On that day, riders were to board Respondent buses but refuse to pay their fares in support of Charging Party's position at the bargaining table. Pouget testified that he was directed to a Facebook page titled Community Organization Coalition in West Michigan where the fare strike was discussed. DeShane had made numerous comments on the page, and Pouget concluded that he had created it. Pouget then drafted and distributed to operators a memo with instructions on how to respond if a fare strike occurred. On January 26, 2016, Charging Party President Jackson was handed a copy of this memo when he finished his route. He went to Pouget's office to discuss it. According to Jackson, he asked Pouget where he got his information and Pouget told him it was "all over social media." Pouget said that he did not know who organized the fare strike, but named three people – DeShane, another employee, and a non-employee – who Pouget believed were involved. Pouget then showed Jackson the Community Organization Coalition in West Michigan Facebook page and the comments on that page by these three people.

Respondent's Board of Directors held a regularly scheduled public meeting on January 27, 2016. The meeting was held, as usual, in the second floor conference room in one of the buildings located on Respondent's property. Operators do not work in that building or use it to check in or out of work. DeShane was not scheduled to work on the day of the meeting. Several of Respondent's operators, including Jackson, DeShane, and Charging Party Vice-President Brent Majors attended the meeting along with between seven and twelve other individuals, not employees, who supported Charging Party's position in the negotiations. The operators and their supporters were dressed in shirts emblazoned with Charging Party's logo.

The public comment segment of the meeting took place at the beginning. Jackson, DeShane, Majors, and another operator spoke about the negotiations and, in particular, the dispute over the pension. During his turn to speak, DeShane accused the Board of not wanting to negotiate. During the public comment segment, Jackson asked the Board if he and his members could be present during the executive session to be held at the end of the meeting to discuss collective bargaining. He was told that they could not. At some point during the meeting – it was not clear whether this was during the public comment segment or later – Jackson, DeShane and the non-employees wearing union shirts turned their chairs around so that their backs were facing

the Board members. The record did not indicate whether Majors or any other Respondent employee participated in this action.

After the regular meeting, the Board voted to go into executive session to discuss the negotiations. Board Chairman Barb Holt asked that the room be cleared. DeShane and some other union supporters moved to the front of the room, sat down on the floor, and began loudly chanting slogans. One was "negotiate or retaliate." DeShane was the only Respondent employee who participated in this demonstration. The Board chair announced that unless everyone left the room, the meeting would be adjourned, but DeShane testified that he did not hear the announcement. In any case, the Board meeting came to a halt while DeShane and the other protesters remained sitting on the floor.

Approximately ten minutes after the demonstration began, Pouget approached DeShane and told him that he needed to stop doing what he was doing. When DeShane did not reply, Pouget put his face closer to DeShane and told him that he was putting his job in jeopardy if he continued. DeShane told Pouget to talk to Jackson. DeShane testified that he understood that Pouget was ordering him to leave the room, but that he did not think that he had to obey this order given that he was on his own time and that the meeting was public. Jackson was at that time in the hallway outside the meeting room. Pouget left the room, went up to Jackson and told him what he had said to DeShane and what DeShane had said to him. Jackson then reentered the meeting room, walked over to DeShane on the floor, and told them that while he did not agree with Pouget that DeShane's activities were not protected, Jackson did not want DeShane to be disciplined and DeShane should leave. DeShane got up and left the room with Jackson. The parties agree that about five minutes elapsed between the time Pouget first approached DeShane and the time that DeShane left the meeting room. The other protesters continued to sit on the floor and chant. Police officers responded to Respondent's call, but did not initially approach the protestors. After about 45 minutes, however, more police officers arrived and spoke to the protesters, who then got up and left the room. The Board then recommenced its meeting.

According to Pouget, he reviewed the law and concluded that the protesters had violated both a state law and a city ordinance. Respondent asked the police to write up the incident and pursue legal action against the protesters, but no action was actually taken. Meanwhile, on February 11, 2016, Respondent suspended DeShane indefinitely for "engaging in a sit-down protest after the Rapid Board of Directors voted to go into an executive sessions and for failing to stop the disturbance when instructed to do so." According to the record, indefinite suspensions of employees were rare; the last such suspension had been issued to an operator who was accused of assaulting a passenger, pending investigation of the incident by police.[4] However, there had never been an incident involving an employee similar to the January 27 incident. On February 25, 2016, DeShane was given a thirty day unpaid suspension for violating work rules prohibiting "disruptive activity in the workplace" and "insubordination and other disrespectful conduct." In addition to the suspension, DeShane was notified that since this was his second reprimand in a 12-month period, two additional reprimands of any nature prior to June 8, 2016, would result in his termination per Respondent's policy.

[4] According to Pouget, the operator resigned before any disciplinary action was taken against her.

C. Denial of DeShane's Request for Union Leave

Section 2.07 of the expired collective bargaining agreement read as follows:

> Union Officers Special Days Off
>
> Employees called upon to transact business of the Union or Authority requiring their absence from duty shall, upon application (written, if practicable), be allowed to absent themselves from duty for a sufficient time to transact such business, provided the number applying for leave of absence shall not be so great as to be detrimental to the service obligations of the Authority. No employee shall engage in Union activities during working hours without permission from a Department Manager. Employees will not be paid when absent from duty to conduct Union business or represent Union members.

The record did not indicate whether this language was new in the 2012-2015 collective bargaining agreement or whether it was carried over from a previous agreement.

Union leave under Section 2.07 is unpaid. Charging Party reimburses employees on union leave for their time. Requests for leave under Section 2.07 are made by Charging Party's president, whether the leave is to be used by the president or by someone else. Charging Party President Jackson frequently requests union leave for himself, and the majority of all requests he has made have involved only him. When the request is for leave for an operator, the president emails the request to Respondent's transportation manager, with a copy to Pouget. Jackson does not usually provide an explanation of the reason for the request in his email. Jackson testified that sometimes the transportation manager sends Jackson an email confirming that the request has been granted, and sometimes the transportation manager merely adjusts the work schedule to accommodate the request; unless he hears otherwise, Jackson assumes the request has been granted.

On or about September 22, 2015, Jackson sent an email requesting that operators DeShane and Thomas Hemily, neither of whom were union officers, be granted union leave for September 24 and September 25, 2015. These were the dates of the hearing on the unfair labor practice charges in Case Nos. C15 H-105/15-047304-MERC and CU15 I-025/15-052496-MERC. Jackson received a response stating that the request was denied because employees other than Charging Party officers were not eligible for this leave.[5] It is not clear from the record to whom Jackson's request was directed or who sent the response. On or about September 27, 2015, Steve Schipper became the new transportation manager. Schipper had previously served as manager of transportation maintenance, where he supervised maintenance employees but not operators. On February 4, 2016, Jackson sent Schipper an email requesting union leave for DeShane for February 5, 2016. Schipper was in a meeting with Pouget when he received Jackson's email. Schipper testified that in his seven years as manager of transportation maintenance, he had never received a request from Jackson for union leave for a maintenance employee who was not a union officer.

[5] Both men did testify, and the charge, as amended, does not allege that Hemily and DeShane were unlawfully denied union leave for these dates.

According to Schipper, he looked at the collective bargaining agreement, consulted with Pouget, and denied the request on the basis the DeShane was not a union officer.

The parties disagree over whether, prior to September 22, 2015, it was Respondent's practice to allow employees who were not union officers to take leave under Section 2.07. There was no evidence introduced that Respondent had ever denied a request for an employee who was not a union officer to use union leave prior to September 22, 2015. Charging Party introduced copies of five emails in which Jackson, on separate occasions, requested union time off for employees who were not union officers. These requests were either granted or not denied. On September 15, 2013, Jackson asked then-transportation manager Carl Woodson for union leave for himself and three other operators, Sue Lyle, Chris Vanas, and Asim Majeed. Lyle, Vanas and Majeed were not union officers. There was no reply to that email, but, insofar as the record discloses, the operators who were not union officers took the time off without consequences. On September 20, 2013, Jackson sent Woodson an email requesting union leave for two-and-one-half hours on September 25 for himself and operators Carry Sanders and Tammy Bixler. Sanders and Bixler were not union officers. Woodson replied by copying Jackson on an email to dispatch instructing it to schedule the operators off as requested. On November 12, 2014, Jackson requested union leave for the entire day on November 17, 2014 for himself, Charging Party's vice-president Majors, and operator Leon Carrico. Carrico was not at that time a union officer but had been one in the past. On July 16, 2015, Jackson requested union leave for an operator, Jennifer Hall. Hall was not a union officer and there was no indication in the record that she had ever been one. The November 12, 2014, and July 16, 2015, emails were directed to Pouget because the transportation manager position was vacant on both these dates. There was no written reply to either of these requests, but the employees took the time off without consequences. Finally, Charging Party introduced an email directed to Pouget and dated September 12, 2015, requesting union leave for different dates for himself, for Majors, and for DeShane. Pouget responded to Jackson thirty minutes later with a question about another issue; Pouget did not reference the request for union leave. Again, all three men, including DeShane, took the time off without consequences.

However, Respondent asserts that Charging Party's emails merely demonstrate that Respondent was not consistent in enforcing the requirement of Section 2.07 that union leave be limited to union officers. In some of these cases, according to Respondent, it was aware that the non-officers had a legitimate reason for taking union leave and so decided to allow it even though they were not entitled to it. Pouget testified that Respondent was aware that the employees covered by the September 15, 2013, request were to testify at an arbitration hearing on that date. It was also aware that the November 12, 2014, request was made to allow the Carrico to testify at another arbitration hearing. Finally, it was aware that the September 20, 2013, request was made to allow these employees to attend a meeting of a joint union-management uniform committee. However, Pouget did not explain why Respondent rejected the request to allow DeShane and Hemily to use union leave on September 24 and September 25, 2015, when Respondent surely must have suspected that they would be testifying at an unfair labor practice hearing. I do not find Pouget's testimony that the decisions to grant the 2013 and 2014 requests were individual exceptions to a general rule to be credible. With respect to Jackson's July 18, 2015, and September 12, 2015, requests, Pouget, who was then doing double duty as CEO and transportation manager, testified that he simply failed to notice that the July 18,

2015, and September 12, 2015, requests covered employees who were not union officers. In addition to non-officer DeShane, the September 12, 2015, request, like the majority of Jackson's requests, also covered union officers. The July 18, 2015 request, however, was for only one employee, Jennifer Hall. This request should have stood out if for no other reason that it did not include Jackson. Although Pouget did not reply to Jackson's email requesting leave for Hall, Pouget had to notify the dispatcher to adjust her schedule for that day. I do not find it credible that Pouget, no matter how busy he was at that time, would have failed to notice that Jackson was requesting union leave for an operator who was not a union officer. Consequently, I do not credit Pouget's testimony as to why the employees covered by the July 18, 2015, and September 12, 2015, requests who were not union officers were allowed to use union leave.

III. Discussion and Conclusions of Law:

A. Alleged Failure to Bargain in Good Faith Over Pension Issue

Charging Party first alleges that Respondent bargained in bad faith by making a pension proposal on October 20, 2015, that violated the IRS Code and the Plan document. As noted above, Charging Party, at some point in the negotiations, explained to Respondent that its proposal to make employee contributions "100% vested minus investment losses" would cause the Plan to lose its qualified status under the IRS Code because the Code requires employee contributions to be nonforfeitable. Moreover, according to Charging Party, since the Plan document requires that the Plan "qualify in every aspect with the mandatory provisions of the Code relating to defined benefit plans," Respondent's October 20 pension proposal was inconsistent with the language of the Plan document. Charging Party asserts that it was incumbent upon Respondent to understand the consequences of its own proposal. According to Charging Party, Respondent's failure to research the implications of its proposal, and its refusal to revise its proposal after Charging Party raised the issue, demonstrates that Respondent was not engaged in good faith negotiations.

Second, Charging Party alleges that Respondent violated its duty to bargain in good faith by making a pension proposal that violated the collective bargaining agreement. As discussed in the facts, Respondent's October 20 proposal contained proposed employee and employer contributions that were based on paying off the Plan's unfunded liability within ten years. The expired collective bargaining agreement, however, required the Plan's actuary to base calculations "upon a minimum funding basis of twenty-five (25) years." The contribution required to pay off the unfunded liability over twenty-five years was, of course, a lower amount than the contribution required to pay it off over ten years. According to Charging Party, Respondent demonstrated its bad faith by basing its proposal on an amortization period of ten rather than twenty-five years.

I do not agree with Charging Party that Respondent's inclusion of the "minus investment losses" language in its October 20, 2015, pension proposal, or its refusal to revise its proposal, demonstrated Respondent's bad faith. Even if the introduction of this language into the Plan would have resulted in the Plan losing its qualified status under the IRS Code, the evidence does not indicate that Respondent intentionally added the language knowing that it would cause Charging Party to reject the proposal or that it insisted on the language in the face of Charging

Party's objection. I note that, although Charging Party's November 13, 2015, proposal omitted the "minus investment loss" language, Pecor did not mention this in his November 17, 2015, letter outlining Respondent's reasons for rejecting the November 13 proposal. Whether Charging Party had the obligation to back up its claims that the language would have disqualified the Plan or whether Respondent had the obligation to research the effects of the language is irrelevant because the record simply does not support a finding that Respondent would have insisted on the language if the parties had been able to reach agreement on the amounts employees and Respondent would contribute to the Plan.

I also do not agree with Charging Party that Respondent demonstrated its bad faith by using a ten year, instead of twenty-five year, amortization period to calculate its proposed employee and Respondent contributions to the Plan. Respondent had no obligation to agree to carry over into the new contract the provision in the expired contract requiring a twenty-five year amortization period. Moreover, Respondent had made it clear from the beginning of the negotiations that it was not concerned merely with slowing the increase in the Plan's unfunded liabilities. Rather, it also considered eliminating the Plan's unfunded liability as soon as possible to be a high priority; this was why it initially proposed terminating the Plan and paying the accrued value of employees' benefits into a 457 account and why it later proposed to freeze the Plan and move employees into a defined contribution arrangement for future service. Clearly, Charging Party could have argued, and perhaps did, that it was not reasonable, within the period of one collective bargaining agreement, to both shorten the amortization period and make the contribution of employees who had not previously contributed to the pension equal to Respondent's contribution. However, I conclude that Respondent did not demonstrate bad faith or an intention to avoid agreement by proposing or insisting on these conditions.

Third, Charging Party argues that Respondent bargained in bad faith by "summarily rejecting" Charging Party's November 13 pension proposal. As Charging Party admits, its November 13 proposal contained relatively complex provisions addressing employee contributions and the unfunded liability, along with establishing an additional employee benefit. According to Charging Party, it offered this as a counterproposal to Respondent's October 20 proposal since in that proposal Respondent, at least nominally, had finally expressed openness to maintaining the Plan if it could do so while reducing the unfunded liability. Charging Party argues that Respondent could not have given the proposal adequate consideration in the space of three days and without a single bargaining session. As an example, Charging Party notes that Pecor and Pouget gave different dollar figures at the hearing for the cost of Charging Party's proposal to increase Respondent's contribution in the last year of the contract to "the greater of $1.20 per hour worked by all employees or 5% of pay for all employees," suggesting that Respondent did not actually calculate the cost of this proposal. Charging Party also asserts that Pecor's November 16, 2015, letter, and Respondent's testimony at the hearing, indicated that Respondent did not, in fact, understand some of Charging Party's proposals. For example, Pecor failed to grasp, or admit that he grasped, why Charging Party's proposed supplemental pension benefit would not increase Respondent's pension liabilities. Charging Party also maintains that it did not withdraw its offer to have employees contribute to the Plan, and that Respondent, again, misunderstood what it meant by having Respondent "pick up" these contributions and did not understand the effect of failing to include this provision in the Plan.

It may or may not be true that Respondent's bargaining team did not understand all aspects of Charging Party's November 13 pension proposal. Charging Party may be correct in its claim that the supplemental pension benefit would have had no adverse impact on Respondent and that its proposal to have Respondent "pick up" the employees' contribution would have actually provided Respondent with a benefit. Nevertheless, in November 2015 the parties were still far apart on the issue of how much the employees and Respondent would contribute to the Plan. Charging Party's proposal for an employee contribution of $.15 per hour worked in the first year of the contract and $.25 in the second year was significantly below Respondent's proposed employee contribution of $.90 per hour, and the November 13 counterproposal did not increase it. Moreover, as Pecor noted in his November 16 letter, Respondent had previously rejected Charging Party's August 17 proposal that Respondent increase its contribution to $1.10 per hour worked to the Plan in the first year of the contract and $1.20 in the second. Far from being open to increasing that contribution, in its October 20 proposal Respondent had proposed a decrease in its contribution as a condition of keeping the existing Plan with 100% employee participation. Respondent may not have bothered to calculate the cost of Charging Party's proposal that Respondent contribute "the greater of $1.20 per hour worked by all employees or 5% of pay for all employees." However, it is clear that this amount, whatever it was, was significantly higher than what Respondent had proposed. The fact that Respondent did not want to engage in an extended face-to-face discussion of the other aspects of Charging Party's pension proposal when the parties remained far apart on the key issue of contribution amounts does not indicate that Respondent was unwilling to continue bargaining over the pension issue or to consider Charging Party's proposals in good faith and with an open mind. Moreover, as Respondent points out in its brief, if Charging Party believed that Respondent had failed to understand an essential aspect of its proposal, Charging Party could have asked the mediator to explain it.

I conclude that Respondent's October 20, 2015, pension proposal did not violate its duty to bargain in good faith. I also conclude that Respondent's rejection of Charging Party's November 13, 2015, counterproposal did not constitute a refusal to bargain and was not evidence that Respondent was unwilling to bargain in good faith over the pension issue. I conclude, therefore, that Charging Party's allegation that Respondent violated Sections 10(1)(a) and 10(1)(c) of PERA by its failure to bargain in good faith over the issue of pensions lacks merit and should be dismissed.

B. Discipline of DeShane for the January 27, 2016, Incident

Section 10(1)(a) of PERA makes it unlawful for a public employer to interfere with, restrain, or coerce public employees in the exercise of rights guaranteed to public employees under Section 9 of the Act. These rights include the right to engage in union activities and other "concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." Conduct which is "inherently destructive" of these rights may violate Section 10(1)(a) even in the absence of proof of unlawful employer motive. *New Buffalo Bd of Ed,* 2001 MERC Lab Op 47; *City of Detroit (Fire Department),* 1988 MERC Lab Op 561. See also *NLRB v Erie Resistor Corp,* 373 US 22 (1963). Discipline for conduct which is part of the *res gestae* of protected concerted activity falls into this category and does not require proof of unlawful motive. See *Detroit Pub Schs,* 22 MPER 89 (2009); *Midland Co Rd Comm,* 21 MPER 42 (2008) (no exceptions), and cases cited therein.

As the National Labor Relations Board (NLRB or Board) stated in *Consumers Power Co*, 282 NLRB 130, 132 (1986), where an employee is disciplined for conduct that is part of the *res gestae* of protected activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act, or of such character as to render the employee unfit for further service. The Commission has held that an employee engaged in otherwise protected activity may lawfully be disciplined under PERA only when his or her behavior is so seriously disrespectful of the employer as to seriously impair the maintenance of discipline and thereby render the individual unfit for future service. *Isabella County Sheriff's Dep't*, 1978 MERC Lab Op 168, 175-176 (no exceptions). Rude or insulting remarks for which an employee could legitimately be disciplined if made in the course of the daily working relationship are thus protected under PERA when made in the course of protected concerted activity. *Genesee Co Sheriff's Dept*, 18 MPER 4 (2005); *Baldwin Cmty Schs*, 1986 MERC Lab Op 513.

An employee's participation in a demonstration to protest his or her employer's conduct at the bargaining table is clearly union activity and participation in such a demonstration is normally protected. The demonstration at the January 27, 2016, Board meeting was for the purpose of protesting Respondent's bargaining conduct. The demonstration was not part of an illegal strike or work stoppage.[6] DeShane's participation, therefore, constituted union activity of the type protected by the Act unless his conduct during that demonstration was so egregious as to remove him from the Act's protection. DeShane did not commit or threaten violence while participating in the demonstration. The demonstration temporarily prevented Respondent's Board from carrying out its normal business. However, DeShane's participation in the demonstration was brief. Moreover, I find, contrary to Respondent, that DeShane did not refuse to obey Pouget's order to stop demonstrating and leave the room. Although DeShane asked to consult with Jackson first, the parties agree that DeShane left the Board's meeting room approximately five minutes after Pouget ordered him to do so.

Respondent, however, asserts that DeShane's participation in the demonstration was unprotected, first, because it was a sit-in demonstration; second, because DeShane committed a misdemeanor violation of MCL 750.170 by "exciting a disturbance," at a public meeting; and third, because the demonstration interfered with and delayed an executive session of Respondent's Board of Directors.[7] Respondent also asserts that DeShane was guilty of insubordination when he failed to obey Pouget's order to stop the demonstration.

In support of its claim that sit-in demonstrations are not activity protected by PERA, Respondent quotes the following paragraph from *Michigan State AFL-CIO* v *MERC,* 212 Mich App 472 (1995), *aff'd,* 453 Mich 362 (1996):

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[6] Section 1(j) of PERA defines a strike as "the concerted failure to report for duty, the willful absence from one's position, the stoppage of work, or the abstinence in whole or in part from the full, faithful, and proper performance of the duties of employment for the purpose of inducing, influencing, or coercing a change in employment conditions, compensation, or the rights, privileges, or obligations of employment."

[7] MCL 750.170 states:

Any person who shall make or excite any disturbance or contention in any tavern, store or grocery, manufacturing establishment or any other business place or in any street, lane, alley, highway, public building, grounds or park, or at any election or other public meeting where citizens are peaceably and lawfully assembled, shall be guilty of a misdemeanor.'

> Any public school employee, or indeed any citizen, who wishes to protest may do so by lawful means, such as informational picketing, passing out leaflets, or addressing the school board during a public comments. A citizen may also choose to protest by violating the law, e.g. *by staging a sit-in or other form of trespass.* When citizens do so, they must face the consequences of their actions, however laudable their motives. Public school employees now face the same situation in connection with disputes regarding their employment. They may protest the actions of the school district that they believe are unwise or illegal. If they do so by legal means, their actions are protected. However, if they do so by illegal means, whether by trespass or by strike, they must face the consequences. [Emphasis added].

The above paragraph was part of a discussion by the Court of the plaintiffs' argument that the legislative extension of the PERA's prohibition on strikes to strikes protesting unfair labor practices violated the First Amendment. Rejecting the argument that the extension was content-based, the Court pointed out that there remained lawful means of protesting an employer's unfair labor practices. The Court had no need to address whether an employee's participation in a "sit-in" demonstration on his employer's premises might constitute activity protected by PERA, and it did not do so. *Michigan State AFL-CIO* clearly does not stand for the proposition that participation in a sit-in demonstration is per se unprotected by PERA.

As Respondent points out, participation in a sit-in demonstration may constitute a misdemeanor violation of MCL 750.170. In *People v Mash,* 45 Mich App 459 (1973), the Court upheld the conviction of an individual for "exciting a disturbance" in a public building when he participated in a sit-in in a University of Michigan building that continued after regular closing hours and into the next morning. The evidence demonstrated that the defendant and other individuals were told to leave the building, first by the University president, and then by the police. After they refused a police order to leave, they were arrested. The issue in *Mash*, however, was whether the defendant's misdemeanor conviction should be upheld; no PERA issue was presented. In this case, DeShane was not forcibly removed from the Board meeting room by the police, was not arrested, and was not charged with either trespass or exciting a disturbance in a public building. Whether he could or should have been charged with either is not relevant here.

The conduct of DeShane and the other protestors did temporarily interfere with the Board's ability to conduct its business normally. A public body has an explicit right under the Open Meetings Act, MCL 15. 263, to have individuals who create a breach of peace at a public meeting excluded from the meeting. Such individuals may be forcibly removed by a police officer if they refuse to leave. In *Regents of the Univ of Michigan v Washtenaw County Coalition Against Apartheid*, 97 Mich App 532 (1980), the Court held that where an open meeting is disrupted to the extent that the public body cannot conduct its business, the public body may, as an alternative to having the police expel the disrupters, recess and reconvene the meeting in a new location, lock the door at the new location, and exercise discretion with respect to who it admits to the reconvened meeting. The Court concluded that as long as the meeting is reconvened within 36 hours and reasonable steps are taken to advise members of the public appearing at the meeting's original location of the change, the Open Meetings Act does not require the public body to provide written notice of the new time and place.

The Michigan Attorney General concluded, in a subsequent opinion, that this reasoning extended to situations where unauthorized persons refuse to leave a closed or executive session. In 1985-1986 Mich. Op. Att'y Gen 269 (1986), he concluded that a person intruding upon a closed session of a public body may be forcibly removed by a law enforcement officer or "the removal may be accomplished by recessing and moving the closed session to another location." It is clear that DeShane and the other protesters did not have the right, under the Open Meetings Act, to remain in the meeting room during the Board's closed session. Therefore, they could have lawfully been removed without violating the Open Meeting Act. However, whether DeShane's conduct on January 27, 2016, was conduct protected by Section 9 of PERA is an entirely different question.

As stated above, the purpose of the sit-down demonstration on January 27, 2016, was to protest Respondent's position at the bargaining table. DeShane's participation in the demonstration lasted only about fifteen minutes. Although he chanted loudly during those fifteen minutes, he did not commit or threaten violence. DeShane left the room voluntarily after being ordered by Pouget to do so. I conclude that, based on these facts, DeShane's conduct was not of a nature as to render him unfit for further service. I conclude, therefore, that Respondent violated Section 10(1)(a) of PERA by issuing DeShane the thirty-day unpaid suspension for his conduct at the Board meeting on January 27, 2016.

C. Denial of Union Leave

On September 22, 2015, Respondent denied a request by Jackson to allow DeShane to use union leave on two dates on which a hearing had been scheduled on their previous unfair labor practice charges. On February 4, 2016, it again denied a request to allow DeShane to use union leave on February 5, 2016. In both cases, Respondent asserted that under Section 2.07 of the contract, only union officers were allowed to use union leave. Charging Party asserts that prior to September 2015, non-union officers were allowed to use union leave and that Respondent changed its interpretation of Section 2.07 because of anti-union animus against Charging Party and against DeShane, in particular, as a union activist.

Charging Party asserts that although not a union officer, DeShane was, and was recognized by Respondent to be, a particularly active supporter of the union during the dispute over the terms of a new contract. Charging Party argues that the language of Section 2.07 of the expired contract plainly provides that union leave is available to "employees" and is not limited to union officers. According to Charging Party, this was both parties' interpretation of the contract until September 2015. Around the time Respondent changed its interpretation of the contract, Charging Party had ramped up its demonstrations and other protest activities in which DeShane was a prominent participant. Charging Party argues that by applying Section 2.07 differently to DeShane and denying him union leave, Respondent interfered with DeShane's Section 9 rights and discriminated against him because of his union activities in violation of Section 10(1)(c) of PERA.

The elements of a prima facie case of unlawful discrimination under Section 10(1)(c) of PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (4) suspicious timing or other evidence that

protected activity was a motivating cause of the alleged discriminatory action. *Saginaw Valley State Univ,* 30 MPER 6 (2016); *Taylor Sch Dist*, 28 MPER 66 (2015); *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. Although anti-union animus may be proven by indirect evidence, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Schoolcraft College,* 25 MPER 46 (2011); *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707. Only after a prima facie case is established does the burden shift to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Wright Line, A Division of Wright Line*, Inc, 662 F2d 899 (CA 1, 1981). See also *City of St Clair Shores,* 17 MPER 27 (2004); *North Central Cmty Mental Health Services,* 1998 MERC Lab Op 427, 436.

I agree with Charging Party that DeShane has been a particularly active union supporter, at least during the current contract negotiations. I also agree that the record establishes that Respondent recognized this and identified him as one of the leading employee union activists.

In this case, there is no direct evidence of anti-union animus. However, the timing of Respondent's denial of DeShane's first request to use union leave on September 24 and September 25, 2015, is suspicious, not only because the number of protests and demonstrations connected to the contract dispute increased around this time, but because the first request was for the scheduled dates of the unfair labor practice hearing on the prior charges. Presumably, Respondent either knew or suspected that the purpose of the leave was to allow DeShane to testify at the hearing. Suspicious timing, however, is not normally sufficient, by itself, to establish that the employee's union activity was a motivating factor in the employer's decision. *City of Detroit (Water & Sewerage Dep't),* 1985 MERC Lab Op 777, 780; *Macomb Twp (Fire Dep't),* 2002 MERC Lab Op 64, 73.

For reasons discussed in the facts, I discredited Pouget's explanations for why Respondent, prior to September 22, 2015, allowed employees who were not union officers to take union leave. A finding that a respondent's purported motives for its actions lack merit or credibility can be considered circumstantial evidence that the respondent was motivated by anti-union animus, even if the record contains no direct evidence of anti-union animus. *Detroit Pub Schs,* 30 MPER 2 (2016); *Wayne Co,* 21 MPER 58 (2008). See also *Shattuck Derm Mining Corp, (Iron King Branch) v NLRB,* 362 F2d 466, 470 (CA 9, 1966). I find the language of Section 2.07 of the parties' expired contract to be was ambiguous. However, Pouget's testimony to the contrary having been found not to be credible, the record indicates that prior to September 22, 2015, Respondent interpreted this language as permitting even employees who were not union officers to use unpaid union leave, subject to the restriction in Section 2.07 that the number of employees using leave not be so great as to interfere with Respondent's operations. Respondent provided no legitimate explanation for its sudden decision to change its interpretation of an expired contract and alter what had become an existing term and condition of employment. I conclude that this failure, coupled with the suspicious timing of the change, warrants a finding that Respondent's subsequent refusal to allow employees who were not union officers to use union leave was motivated by anti-union animus. I conclude, therefore, that Respondent violated Section 10(1)(a) and (c) by refusing to allow DeShane to use union leave on February 5, 2016. In accord with the findings of fact and discussion and conclusions of law set

forth above, I find that Respondent violated Section 10(1)(a) of PERA by issuing a thirty-day unpaid suspension to Louis DeShane for his conduct during a demonstration at a meeting of Respondent's Board on January 27, 2016. I also find that Respondent violated Section 10(1) (a) and (c) by refusing to allow DeShane to use union leave on February 5, 2016. I find Charging Party failed to establish that Respondent failed to bargain in good faith over the issue of pensions in violation of Sections 10(1)(a) and 10(1)(c) of PERA, and that this allegation should be dismissed. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Interurban Transit Partnership, its officers and agents, are hereby ordered to:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights to organize together or to form, join, or assist in a labor organization; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; negotiate or bargain collectively with their public employers through representatives of their own free choice, or refrain from any or all of these activities, as guaranteed by Section 9 of PERA.

2. Cease and desist from discriminating against employees in order to discourage their participation in union activity.

3. Take the following affirmative action to effectuate the purposes of the Act:

    a. Expunge from Louis DeShane's personnel file and records the thirty day suspension issued to him on February 25, 2016, and make him whole for any loss of pay he suffered as a result of his suspension, less his interim earnings, if any, for the period of his suspension, plus interest at the statutory rate of five percent per annum, computed quarterly.

    b. Until agreement is reached with the Amalgamated Transit Union Local 836 to restrict the use of union leave to union officers, allow employees who are not union officers to take union leave without penalty subject to other restrictions set out in Section 2.07 of the parties' expired contract.

    c. Post copies of the attached notice to employees at all places on the Employer's premises where notices to employees are customarily posted for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: January 27, 2017

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **INTERURBAN TRANSIT PARTNERSHIP** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights to organize together or to form, join, or assist in a labor organization; engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection; negotiate or bargain collectively with their public employers through representatives of their own free choice, or refrain from any or all of these activities, as guaranteed by Section 9 of PERA.

WE WILL NOT discriminate against employees in order to discourage their participation in union activity.

WE WILL expunge from Louis DeShane's personnel file and records the thirty day suspension issued to him on February 25, 2016, and make him whole for any loss of pay he suffered as a result of his suspension, less his interim earnings, if any, for the period of his suspension, plus interest at the statutory rate of five percent per annum, computed quarterly.

WE WILL, until agreement is reached with the Amalgamated Transit Union Local 836 to restrict the use of union leave to union officers, allow employees who are not union officers to take union leave without penalty subject to other restrictions set out in Section 2.07 of the parties' expired contract.

INTERURBAN TRANSIT PARTNERSHIP

By: _____

Title: _____

Date**:** _____

Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.
Case Nos. C16 A-004