STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

TRUE COPY

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Public Employer-Respondent in MERC Case No. C18 K-109,

-and-

AMALGAMATED TRANSIT UNION, LOCAL 836,
Labor Organization-Respondent in MERC Case No. CU18 K-039,

-and-

DONNELL HARVEY,
An Individual Charging Party.

APPEARANCES:

Clark Hill PLC, by Grant T. Pecor, for the Public Employer

Mark H. Cousens, for the Labor Organization

Cotton Law Center, by Daimeon Cotton, for Charging Party

DECISION AND ORDER

On September 20, 2019, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order[1] in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service, and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: NOV 27 2019

[1] MOAHR Hearing Docket Nos. 18-021369 and 18-021368

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STATE OF MICHIGAN
MICHIGAN OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

ORIGINAL

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Public Employer-Respondent in Case No. C18 K-109/Docket No. 18-021369-MERC,

-and-

AMALGAMATED TRANSIT UNION, LOCAL 836,
Labor Organization-Respondent in Case No. CU18 K-039/Docket No. 18-021368 MERC,

-and-

DONNELL HARVEY,
Individual-Charging Party. /

APPEARANCES:

Clark Hill PLC, by Grant T. Pecor, for the Public Employer-Respondent

Mark H. Cousens, for the Labor Organization-Respondent

Cotton Law Center, by Daimeon Cotton, for Charging Party Harvey

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On November 8, 2018, Donnell Harvey filed the above unfair labor practice charges with the Michigan Employer Relations Commission (the Commission) pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On April 23, 2019, in accord with Section 16 of PERA, the charges were heard for the Commission by Administrative Law Judge (ALJ) Julia C. Stern of the Michigan Office of Administrative Hearings and Rules (formerly the Michigan Administrative Hearing System). Based upon the entire record, including post-hearing briefs filed the Respondent Employer and by the Charging Party on June 6, 2019, I make the following findings of fact, conclusions of law, and recommended order.[1]

[1] Charging Party attached to his post-hearing brief a series of documents/proposed exhibits which he labeled a "separate record." Most of these documents were attached to Harvey's response to the Employer's previous motion for summary disposition which I denied in an interim order issued on

The Unfair Labor Practice Charges:

Harvey filed unfair labor practice charges against his former employer, the Interurban Transit Partnership (the Employer), and his collective bargaining agent, the Amalgamated Transit Union, Local 836 (the Union). Harvey was terminated from his employment as a bus operator on February 22, 2018, after he had an accident with his bus. The Union filed a grievance over Harvey's discharge on February 28, 2018. On April 24, 2018, after the Union's membership had voted to arbitrate the grievance, the Employer notified the Union that it was terminating Harvey again for reasons unrelated to the accident. The Employer did not notify Harvey directly of this action. The Union made a demand to arbitrate the February 28, 2018, grievance on May 8, 2018, and filed a separate grievance over the second termination. Shortly thereafter, however, the Union's executive board decided to withdraw its demand to arbitrate Harvey's February 28, 2018, grievance in light of the new allegations against him.

For most of the period between March and about July 5, 2018, Harvey was hospitalized with a serious illness; during some of this period, he was unable to communicate. Harvey first learned of the Union's decision to withdraw the arbitration demand in a conversation with Union President RiChard Jackson sometime in late June or early July 2018. Harvey also alleged, or appeared to allege, in his unfair labor practice charges that this conversation was also when he first learned of the Employer's new allegations and his second termination. However, as discussed in the fact section below, Jackson testified, and Harvey admitted on cross-examination, that Jackson sent Harvey a copy of the second discharge notice shortly after the Union received it in late April 2018.

At the time he was first terminated in February 2018, Harvey was serving as the Union's vice-president. Harvey asserts that both his terminations constituted retaliation against him for his actions as a Union officer. However, he acknowledges that his charge was not timely filed with respect to the February termination. Harvey alleges, however, that his second termination violated Section 10(1)(a) and (c) of PERA because it was in retaliation for his union activities and because it was caused by his filing a grievance over his first termination. That is, Harvey asserts that the Employer fabricated additional charges against him after he was terminated in order to persuade the Union not to arbitrate the grievance over that termination. Harvey also alleges that that his second termination violated the collective bargaining agreement because he was not notified of the second set of charges and not allowed to defend himself against those allegations before he was terminated.

February 22, 2019, but Harvey neither offered these documents into evidence at the hearing nor filed a motion to reopen the record to admit additional evidence after the hearing under Rule 166 of the Commission General Rules, R 423.166. This rule provides that additional evidence will not be admitted unless: (1) the additional evidence could not with reasonable diligence have been discovered and produced at the original hearing; (2) the additional evidence itself, and not merely its materiality, is newly discovered, and (c) the additional evidence, if adduced and credited, would require a different result. Since I conclude that none of these three requirements have been met, the documents attached to Harvey's post-hearing brief as a "separate record" are not included in the evidentiary record for this case.

Harvey's charge against the Union alleges that it violated its duty of fair representation under Section 10(2)(a) of PERA by withdrawing its demand to arbitrate Harvey's grievance without giving Harvey an opportunity to appeal that decision as required by the Union's bylaws.

History of the Proceeding:

On November 16, 2018, I consolidated the two charges and set them for hearing. I also directed the Union to file a position statement. Shortly thereafter, the hearing was adjourned without date at Harvey's request to allow him to find legal counsel.

On January 3, 2019, the Employer filed a motion for summary dismissal. The Employer asserted that after his February 22, 2018 termination, Harvey was no longer a "public employee" within the meaning of PERA. Therefore, the Employer argued, Harvey lacked standing to file a charge alleging that his second termination, or any act by the Employer occurring after his first termination on February 22, 2018, violated PERA. Alternatively, the Employer asserted that Harvey's charge should be dismissed because the Commission could not appropriately order any type of remedy. That is, the Employer argued that under the circumstances of this case, an order requiring the Employer to reinstate Harvey and pay him back pay would not be appropriate because it would put Harvey in a better position than he would have been had he not been terminated the second time. Harvey filed a response to that motion on February 5, 2019. On February 22, 2019, I issued an interim order denying the Employer's motion. I noted that unlawful discrimination under Section 10(1)(c) is not limited to discrimination against employees and concluded that because of the relationship between the second termination and Harvey's grievance, he had standing to file the charge. I concluded that it was unnecessary to address the issue of remedy at this stage and set a new hearing date.

At the beginning of the hearing on April 23, 2019, the Union made a motion to dismiss the charge against it on the basis that Harvey had not alleged facts sufficient to support his claim that the Union breached its duty of fair representation. I noted that Harvey had not alleged that the Union had acted out of an improper motive, but I denied the motion on the basis that I could not determine, from Harvey's pleadings alone, whether the Union's conduct might have been arbitrary. I then allowed the Union to make an offer of proof as to what Union President Jackson would testify if he was called as a witness. However, Jackson was subsequently called as a witness by the Employer, and his testimony included all the facts set out in the offer of proof. At the conclusion of the hearing, I indicated my intention to recommend to the Commission that Harvey's charge against the Union be dismissed based on my finding that the Union had made a reasoned, good faith decision not to arbitrate the February 28, 2018, grievance.

Findings of Fact:

Harvey was hired by the Employer as a bus operator in April 2001. Harvey was elected vice-president of the Union in 2014, reelected in 2016, and was vice-president when he was terminated in 2018. As vice-president, Harvey filled in for the president

when the president was not available. His duties as vice-president included filing grievances, investigating them, and resolving them as well as advocating for members in the pre-disciplinary process, duties also performed by the Union president and the first and second members of the Union's executive board. In his role as grievance representative, Harvey often dealt with Employer Transportation Manager Steve Schipper. According to Harvey, Schipper sometimes made disparaging remarks about grievances or grievants. For example, Harvey testified that Schipper once referred to a grievant as a "baby" for complaining about a matter at issue. However, Harvey did not testify that Schipper ever disparaged Harvey personally in connection with a grievance or that Schipper threatened him.

During his period as vice-president, Harvey was involved in several grievances where the issue was whether an operator's accident constituted a "preventable" or "major preventable" accident" under the Employer's disciplinary rules. The normal progression of discipline for a preventable accident under these rules is a verbal warning for the first accident and a suspension for a second preventable accident within a twelve-month period. Operators having three preventable accidents within a year, or a single major preventable accident, are subject to discharge. Harvey testified that he complained to the Employer about the fact that the Employer had no consistent definition of what constituted a "major" preventable accident.

Harvey's First Discharge

On February 13, 2018, Harvey and his bus were involved in an accident after Harvey entered an intersection and a car waiting in the intersection turned left into the bus's path. The driver of the car and a bus passenger were taken to the hospital and the bus was "totaled." On February 15, 2018, Schipper prepared a written reprimand which referred to the accident as a preventable, but not a major preventable, accident. The reprimand noted that this was Harvey's second preventable accident within one year. On February 20, 2018, however, before the Employer had served Harvey with the reprimand, Schipper prepared a second disciplinary notice discharging Harvey. This second notice recited that video of the accident showed that Harvey had entered the intersection on a yellow light and had not braked before the impact. While the reprimand had mentioned the fact that both vehicles were damaged and the second operator and a passenger suffered bodily injury, the discharge notice referred to the damage as "severe" and mentioned the fact that the accident disrupted passenger service. In addition to citing Harvey for involvement in a major preventable accident, the discharge notice cited him for violations of several other rules, including failure to maintain required standards of work, engaging in conduct that tends to create a safety hazard, and carelessness, negligence or reckless behavior in handling passengers or equipment. On February 22, 2018, the Employer gave Harvey the discharge notice, and, for reasons not explained in the record, also gave him the written reprimand.

On February 28, 2018, the Union, through Union President Jackson, filed a grievance asserting that the accident was not properly classified as preventable since the other operator was at fault and was ticketed. The grievance also argued that issuing two

separate disciplinary notices to Harvey for the same offense constituted double jeopardy. The grievance did not challenge the Employer's conclusion that the accident was a major one.

<u>Employer's Investigation of Operator Fare Box Misconduct</u>

According to the testimony of James Bunn, the Employer's Operations Technical Systems Administrator, sometime in early February 2018, the Employer received a complaint from a passenger that an operator had "done something weird" with the fare box on a bus. Bunn's decision to investigate this matter, according to his testimony, began a chain of events that eventually led to Harvey's second termination.

The normal price of a single ride ticket on an Employer bus is $1.75. The fare boxes on the Employer's buses include cash boxes that accept cash, including $1, $2, $5, $10, and $20 bills, as well as coins. The fare box, however, does not dispense change; passengers instead receive a change card that can be used for future rides. If a bill is ripped or faded, the fare box may not be able to read the denomination of the bill inserted into the box. When that occurs, the fare box ejects the bill, but brings up a message on its display screen that allows the operator to enter the correct denomination. When the bill is reinserted into the cash box, the fare box will register the amount, deduct the cost of a single fare and produce a change card. If a passenger wants to pay more than one fare with the bill, he or she inserts the change card again and the box deducts the cost of another fare. However, the fare box cannot distinguish unreadable currency from non-currency. That is, if another piece of paper, for example a bus transfer, is inserted into the cash box, the fare box will bring up the screen that allows the operator to "reclassify" it as a bill. If the piece of paper is then reinserted into the fare box, the box will produce a change card even though no actual money was deposited. The Employer knew that the fare box permitted this but, prior to April 2018, had no explicit rule or directive prohibiting operators from reclassifying non-currency as money.

Each time an operator reclassifies a fare, the Employer's system records the name and bus number of the operator, the date of the reclassification, and the amount entered by the operator. Reports on reclassification activity can be run from the system. However, the Employer does not routinely look at this data, and Bunn testified that prior to February 2018, he himself had never done so. After the passenger complaint in early February 2018, however, Bunn decided to run a report showing the number of bill reclassifications each of the Employer's drivers had processed over the course of a month. When Bunn looked at this second report, he noticed that one driver, hereinafter referred to as NY – not the driver about whom the complaint had been made – had done significantly more $20 reclassifications than the norm during the month.

On March 6, 2018, Bunn decided to run a bill reclassification report covering all the Employer's approximately 325 drivers for the entire 2017 calendar year. This report was entered into the record as an exhibit at the hearing. Nearly every driver had done some reclassifications during the year, but most of them were $1 reclassifications. The vast majority of drivers had done less than ten $20 reclassifications, or none at all.

Twelve had done between ten and fifty. Four drivers, however, attracted Bunn's attention. One had 77 $20 reclassifications, one had 189, one had 212, and the fourth, NY, had 501. Harvey was the driver with 212 $20 reclassifications. Although their number of $20 reclassifications was high, the number of $1 reclassifications done by these four drivers was within the norm for drivers as a group. Bunn reran the report so that it showed the names, and not merely the numbers, of these four drivers and immediately emailed the report to Schipper. Schipper and Bunn then decided that they would investigate the reclassifications done by these four drivers and try to find out what was going on. On the same day, or shortly thereafter, Bunn ran individual reclassification reports for each of the four drivers showing the dates on which each had done bill reclassifications between January 1, 2018, and mid-February 2018. The report Bunn ran on Harvey, which was entered into the record as an exhibit, covered the period January 1, 2018, through February 15, 2018. Harvey's report indicated that he had done twenty-one $20 reclassifications, seven $1 reclassifications, and no $2, $5 or $10 bill reclassifications during that time period.

The Employer has video surveillance cameras on most of its buses. These cameras typically hold about two to three weeks of activity in their memories; if the bus is out of service during those weeks the video will go back further. Bunn decided to try and find video for the four drivers that would match times and dates when, according to the system, they had done $20 reclassifications. As part of this effort, Bunn ran "transaction detail reports" for the four drivers for dates on which they had done reclassifications that might have been captured by video that still existed in early March 2018. Transaction detail reports provide a minute-by-minute account of fare box events on a particular bus on a particular day, but reclassifications are not recorded on these reports. The Employer ran transaction detail reports for Harvey for several dates, including February 15 and February 16, 2018, on which, according to the system, Harvey had done a $20 reclassification. On February 15, 2018, the transaction detail report indicated that at 4:54 am Harvey caused the box to produce a transfer, which should have indicated that a passenger had paid a fare, and that the fare box had then issued a change card for $18.25, indicating that it had taken in a total of $20 in revenue. The transaction detail report for February 16, 2018, showed this same series of events occurring on Harvey's bus at 5:16 am.

Bunn then asked for and was able to find video of Harvey covering those dates and times. On the video for February 15, a passenger gets on Harvey's bus, puts in a fare card, and goes to take her seat. Harvey enters something on the screen and pulls a transfer out of the fare box. He then inserts the transfer into the cash box, pulls it out when it is ejected, touches the screen again and feeds the transfer back into the box. The fare box then prints up a change card which Harvey pulls out of the box. No other passengers are on the bus or board the bus while he performs this series of actions. On February 16, 2018, Harvey is seen again sitting in the driver's seat of the bus and inserting a transfer into the cash box. He performs the same series of actions as the previous day, and places the change card on the dashboard of the bus. The video from both dates was played at the hearing and Harvey did not dispute this account of what he was shown doing.

The Employer found video of NY performing essentially the same series of actions as Harvey, but many more times; NY's documented transactions amounted to over a thousand dollars. It also found evidence that NY had gone into the bus storage garage and manipulated the fare box on an out-of-service bus. The Employer prepared a notice of discharge for NY and reported his conduct to the police department. On or about April 2, 2018, before that discharge notice was issued, but after NY and Jackson had looked at the videos, NY was allowed to submit a letter of resignation. Bunn testified that the Employer found no video evidence of improper activity by the other two drivers with high numbers of $20 bill reclassifications.

On April 19, 2018, Schipper sent out a memo to drivers announcing that all drivers were to immediately call dispatch before doing a $10 or $20 bill reclassification. Schipper told drivers that they could issue a "one-ride" ticket or voucher to a passenger until a road supervisor could meet them enroute. The memo also stated that other than to assist a customer placing money into the fare box, under no circumstances were drivers to accept cash from a customer or pay for a customer's fare, and that at no time should anything other than cash be inserted into the farebox's cash area.

Harvey's Second Termination

At the hearing, Harvey admitted that he had used bus transfers to create change cards and that he kept a supply of these cards on hand. Harvey explained that he did this to help passengers when his bus's fare box malfunctioned. For example, Harvey claimed that the fare box sometimes refused to produce a transfer even though the passenger had paid the correct fare or inserted a valid bus pass into the box. According to Harvey, when the fare box malfunctioned in this manner, he gave passengers change cards to use in place of a transfer. Harvey admitted that he could have called a route supervisor to meet his bus and deal with this problem but explained that the passenger might have to get off the bus and use his transfer before the route supervisor could get there. Harvey also testified that sometimes the fare box "cleared out" before the passenger had finished putting in his or her money, e.g., the passenger inserted $1.50 into the box and the fare box reset before the passenger could put in the last quarter. Harvey said that if that happened, he used a change card to pay the passenger's fare. Harvey admitted that the Employer gave drivers "one-ride" tickets and vouchers to hand out when the fare box malfunctioned, but testified that he sometimes ran out of "one-ride" tickets and that a voucher was not equivalent to a transfer because the passenger had to redeem the voucher. [2] Harvey denied ever using the change cards himself or selling them and asserted that he often ended up throwing them away at the end of the day.

Under the Employer's disciplinary policy, employees are subject to discharge for theft or attempted theft as a first offense. The policy also lists, as a separate violation, "failure to follow ITP procedures for collection and handling of fares." The penalty for a first offense for this violation is time off with pay and a written reprimand. Bunn and Schipper testified that the Employer viewed Harvey's actions on February 15 and 16 as

[2] A passenger given a voucher must take it to a service desk to exchange it for a fare card, but a change card can be inserted directly into the fare box.

theft, since change cards have actual value and could, at least hypothetically, be exchanged for cash. According to Bunn, it would be theft even if the change card was given away, because the Employer would still be defrauded out of fares it would otherwise have received. Schipper admitted that the Employer had suspended, not discharged, another employee who admitted passing out bus vouchers at a party. However, he distinguished this misconduct from Harvey's on the basis that there was no evidence that the vouchers were ever redeemed and, according to Schipper, a voucher, unlike a change card, had no cash value unless it is redeemed.

In March 2018, Harvey was hospitalized with a serious illness. Harvey remained hospitalized for most of the next few months until he was discharged on or about July 5, 2018. For part of that time Harvey was unable to communicate. On April 22, 2018, the Union's membership voted to arbitrate the grievance over Harvey's February 22, 2018, discharge. Harvey participated in that meeting by telephone and another Union member later called to give him the results of the vote.

On April 24, 2018, the Employer gave the Union a discharge notice which cited Harvey for multiple rule violations, including theft. The notice stated, "Six of these violations are dischargeable on the first offense. Mr. Harvey's employment previously was terminated on 2/22/18. Because he has grieved that employment termination, his employment is terminated again effective 2/22/18." According to the Employer, it did not know on April 24, 2018, that the Union had voted to arbitrate Harvey's termination grievance, and there was no evidence to the contrary. The Employer did not mail a copy of the April 24, 2018, discharge notice to Harvey's residence. However, Jackson testified, and Harvey admitted on cross-examination by Union's counsel, that Union President Jackson sent Harvey a copy of that notice shortly after the Employer sent it to the Union.

On May 8, 2018, the Union sent the Employer a letter demanding arbitration of the grievance it had filed over Harvey's first termination. It also, on the same date, grieved the second discharge, citing lack of just cause and violation of due process in that Harvey had not been given an opportunity to respond to the theft allegations. Jackson testified, without contradiction, that he spoke to Harvey and told him about this grievance, but that shortly thereafter Harvey became too incapacitated to speak on the phone. However, Jackson set up a meeting with Schipper about what had occurred. Jackson testified that he argued to Schipper that for an employee with Harvey's amount of service it was wrong "to look at something and assume the absolute worst." He also noted that Harvey had not had an opportunity to respond to the allegations. Jackson failed to persuade Schipper that Harvey's conduct was not theft. However, after their meeting, on May 15, 2018, the Employer sent the Union a letter stating that it was rescinding the second termination, at least temporarily, to allow Harvey the opportunity to respond to the allegations. The Employer set a deadline for Harvey to respond but moved the deadline forward when informed that Harvey was still unable to communicate.

As noted above, Jackson knew of the allegations against NY and of NY's resignation earlier that month and had been given a copy of the bill reclassification report indicating the number of reclassifications performed by each operator during 2017.

Jackson asked for proof that Harvey was guilty of theft, and the Employer permitted him to view the videos of Harvey from February 15 and February 16, 2018. Jackson testified that he believed Harvey's conduct to be contrary to the Employer's policy but did not immediately conclude that it was wrong. However, Jackson testified that he then discussed with the executive board the issue of whether to continue with the arbitration of Harvey's first discharge grievance in light of the new allegations. The board concluded that the Union could not win a grievance over the second discharge and that continuing with the arbitration would be futile because, even if the Union won that grievance at arbitration, the Employer would not return Harvey to work.

In late June or early July 2018, Harvey contacted Jackson to ask about the status of his grievance filed over his February 2018 termination. They talked about the theft allegations and Harvey's second termination. According to Harvey, Jackson told him that the second discharge resulted from the Employer deciding to "run an audit" on all the operators, that there were over 130 operators accused of the same thing, but that the Employer had him on camera two times. Harvey told Jackson that what he had done was not theft, and that all drivers did it. It appears from Harvey's testimony that Jackson also told him about the Employer temporarily rescinding the second termination until Harvey could come in and speak to the Employer in person about the allegations. However, as Harvey understood it, the Employer planned to terminate him again no matter what he said. Jackson also told Harvey that if the Employer terminated Harvey for theft, he would still be terminated even if the Union got his job back for the first termination. Therefore, Jackson explained, the Union was not going to arbitrate the grievance it filed on February 28, 2018.

On June 28, 2018, the Employer sent the Union a letter stating that the Employer had been made aware that Harvey could now communicate and set a deadline of July 6, 2018, for him to respond to the second set of allegations. On July 10, 2018, the Employer sent the Union another letter stating that since Harvey had failed to respond, it was reissuing the second termination notice. The Employer attached to the letter another copy of the April 24, 2018, discharge notice, this time dated July 10, 2018. The Employer's July 10, 2018, letter to the Union stated, "Mr. Harvey also remains terminated for the initial major preventable accident."

Discussion and Conclusions of Law:

Harvey's Charge Against the Employer

Statute of Limitations

Under Section 16(a) of PERA, the Commission is prohibited from finding an unfair labor practice occurring more than six months prior to the filing of the charge with the Commission and the service of a copy thereof upon the party against whom the charge is made. The statute of limitations contained in Section 16(a) is jurisdictional, cannot be waived, and is not tolled by the pursuit of other remedies. *Walkerville Rural Communities Sch*, 1994 MERC Lab Op 582; *Detroit Fed of Teachers Local 231, AFT,*

AFL-CIO, 1989 MERC Lab Op 882; *Detroit Public Schools*, 1982 MERC Lab Op 1058. A charge filed outside the statute of limitations is untimely and must be dismissed. The statute of limitations period begins to run when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe that the acts were improper or done in an improper manner. It is not necessary that the charging party know that these acts violated his or her legal rights. *Huntington Woods v Wines,* 122 Mich App 650 (1982).

The charges here were filed on November 8, 2018. Harvey's first termination occurred more than six months earlier, on February 22, 2018, and Harvey was informed of that action on the day it occurred. Thus, as Harvey acknowledges, the Commission is prohibited from finding that termination to be an unfair labor practice even though evidence pertaining to that termination was admitted into the record as background. Harvey's second termination, on April 24, 2018, also occurred more than six months before he filed the charges. However, although the Employer informed the Union of Harvey's second termination on that date, it did not mail the second termination notice to Harvey's home or otherwise communicate with him directly about this matter. As noted in the statement of charges above, Harvey alleged, or appeared to allege, in his charges that he first learned of his second termination during the conversation he had with Union President Jackson in late June or early July 2018. The Employer did not challenge the timeliness of the charge with respect to Harvey's second termination. During the hearing, however, both Harvey and Jackson testified that Jackson sent Harvey a copy of the second termination notice shortly after the Union received it from the Employer on April 24, 2018. Thus, the evidence established that Harvey did, in fact, know by the end of April 2018 that the Employer had issued a second termination notice that included allegations that he was guilty of theft. I find that the statute of limitations under Section 16(a) with respect to Harvey's second termination began to run when Harvey received a copy of the second termination notice. I conclude, therefore, that Harvey's charge against the Employer was untimely filed with respect to his second termination as well as his first and that the charge should be dismissed on this basis. Nevertheless, as the issue of timeliness was not raised at the hearing and Harvey did not have the opportunity to respond to it, I will also address the substantive issues raised by the charge.

Breach of Contract and Violation of Due Process Rights

Harvey alleges that his second termination violated the collective bargaining agreement because he was not notified of the second set of charges and allowed to defend himself against those allegations before he was terminated. However, PERA does not provide employees with an independent cause of action against their employer for breach of a collective bargaining agreement. *City of Lansing (Board of Water & Light),* 20 MPER 33 (2007); *Detroit Pub Schs,* 22 MPER 63 (2009) (no exceptions). The Commission also lacks jurisdiction to address an employee's claim that he has been denied his constitutional rights to due process. *Plymouth Educational Center,* 30 MPER 4 (2016). I find that Harvey's claim that his second termination violated his procedural rights under the collective bargaining agreement does not state a claim upon which relief can be granted under PERA.

Theft Allegations and Harvey's Second Discharge as Violations of Section 10(1)(c)

Section 10(1)(c) of PERA makes it unlawful for a public employer to "discriminate with regard to hire, terms, or other conditions of employment to encourage or discourage union membership." The elements of a prima facie case of unlawful discrimination under 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 the protected activity was a motivating cause of the alleged discriminatory action. *Taylor Sch Dist v Rhatigan*, 318 Mich App 617, 636 (2016); *Birmingham Pub Schs,* 33 MPER 12 (2019); *Saginaw Valley State Univ*, 30 MPER 6 (2016); *Utica Community Schs*, 28 MPER 11 (2014); *Grandvue Medical Care Facility*, 27 MPER 37 (2013); *City of Detroit*, 24 MPER 11 (2011); *Grand Valley State Univ*, 23 MPER 70 (2011); *Univ of Michigan,* 2001 MERC Lab Op 40, 43; *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. 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. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419; *MESPA v Evart Pub Sch*, 125 Mich App at 74.

Harvey served as Union vice-president for several years before his termination and, as such, was involved in the processing of grievances for Union members. These duties naturally resulted in his taking positions opposed to those of the Employer; one example was his insistence that the Employer should have a more specific definition of a "major" accident before disciplining operators for major preventable accidents. Harvey's actions as Union vice-president clearly constituted union activity protected by Section 9 of PERA, as did his pursuit of a grievance under the collective bargaining agreement challenging his own termination. The Employer, of course, knew of Harvey's activities as Union vice-president. It maintains that when it discharged Harvey the second time it was not yet aware that the Union had voted to arbitrate that grievance. However, the Employer clearly knew that the grievance had been filed and was not yet resolved. Thus, the elements of activity and knowledge were established. I also find that under the circumstances of this case Harvey's second termination constituted an adverse employment action since it caused the Union to change its decision to arbitrate Harvey's first termination grievance.

However, the fact that an employee suffered an adverse employment action after engaging in activities protected by the Act is not enough to establish a prima facie case of unlawful discrimination. Even if the employee's union activities are extensive and the adverse employment action occurred after the protected activity, the charging party must also show a causal connection between the employee's protected activities and demonstrate that the adverse action was motivated, either in whole or in part, by anti-union animus or hostility toward the employee's protected activities. *North Central*

Community Services, at 437; *City of Detroit (Community Economic Development Department)*, 1981 MERC Lab Op 585, 588.

Proof of motive can be based on direct evidence or inferred from circumstantial evidence based on the record as a whole. *Inkster Housing and Redevelopment Authority*, 23 MPER 21 (2010); *Fluor Daniel, Inc*, 304 NLRB 970 (1991); *Starbucks Corporation*, 354 NLRB No. 99 (2009). Circumstantial evidence of unlawful motive includes, but is not limited to, the timing of the adverse employment action(s) in relation to the protected activity, indications that Respondent gave false or pretextual reasons for its actions, failure by the employer to adequately investigate the misconduct, and the commitment of other unfair labor practices by the Respondent during the same period of time. *City of Royal Oak*, 22 MPER 67 (2009) (no exceptions); *Oaktree Capital Mgt*, 353 NLRB 1242, 1283 (2009); *Shattuck Mining Corp v NLRB*, 362 F2nd 466, 470 (CA 9, 1966). However, suspicious timing, standing alone, does not demonstrate that the adverse employment action was the result of anti-union animus. See, e.g., *Southfield Pub Schs* 22 MPER 26 (2009). As the Michigan Supreme Court stated in *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974), the Commission's finding of anti-union animus cannot be merely conjecture or speculation. Rather, the charging party must present substantial evidence from which a reasonable inference of anti-union motivation may be drawn.

There is no direct evidence of anti-union animus in this case. As a union officer responsible for representing members in disciplinary cases and in handling grievances, Harvey and the Employer were naturally on opposite sides on many issues. However, while Harvey testified that Schipper made disparaging remarks about grievances and grievants, Harvey did not allege that these remarks were directed at him as a union officer or that Schipper threatened him.

The fact that the Employer notified the Union of Harvey's second discharge two days after the Union membership voted to arbitrate his grievance is, on its face, suspicious. The Employer, however, asserted that it did not know about this vote when it sent the Union the second discharge notice on April 24, 2018, and no evidence was presented to contradict this assertion. As I noted above, the Employer did know on April 24 that Harvey had a grievance that was still pending; had that not been the case, there would have been no point in pursuing the new allegations since Harvey would have simply been an ex-employee. I find, however, that the timing of the second discharge notice was explained by the Employer's testimony about how the investigation into operator reclassifications began, how Harvey became part of it, and the timeline on which it proceeded.

Anti-union animus can also be inferred from a finding that the reasons the employer gave for its actions were either false, e.g. the employee did not do what the employer said he did, or pretextual, i.e., the reasons given as justification were not the real reasons reasons for the adverse employment action. *Limestone Apparel Corp*, 255 NLRB 722 (1981). A finding of pretext, for example, might be based on evidence that the employer failed to discipline another employee for the same conduct.

Harvey argues that the Employer's hostility toward Harvey's union activities was established by: (1) the fact that it discharged Harvey for a major preventable accident in February 2018, despite the fact that the other driver was determined to be at fault and received a ticket; (2) the fact that the Employer changed its initial categorization of the accident; and (3) the fact that Harvey was disciplined twice for the same accident. The record indicates that the Employer changed its assessment of the accident, and the level of discipline it warranted, after looking at video showing that Harvey entered the intersection on a yellow light without braking and therefore arguably contributed to the accident. Whether or not the Employer had just cause for discharging Harvey for this accident, the evidence does not establish the reasons it gave were false or prextual. As I noted in the facts above, there was no explanation in the record for why the Employer decided to give Harvey the notice of reprimand Schipper had previously prepared at the same time as his discharge notice. However, this does not change my conclusions that the Employer's reasons for discharging Harvey were not pretextual.

Harvey also argues that the Employer's anti-union animus and hostility toward Harvey's union activities was established by its disparate treatment of Harvey during its investigation into operators' reclassification activities. According to Harvey, while the Employer's system showed that most of its operators reclassified fares, the Employer only looked at video for two drivers, Harvey and NY. Second, the Employer had no evidence that Harvey used or exchanged the change cards he created or that, like NY, he intended to defraud the Employer out of fare money. Despite that fact, the Employer treated Harvey's offense as "theft," a dischargeable offense, rather than simply "mishandling bus cards," a lesser offense.

Harvey is correct that during the period the Employer chose to review, most of the Employer's operators reclassified fares as they are supposed to do when passengers attempt to pay but the fare box rejects their money. However, the Employer's investigation into fare box reclassifications, an investigation in which Harvey was not initially the target, disclosed that Harvey, along with NY and two other operators, processed substantially more $20 reclassifications than the Employer's other operators. Unless the fare boxes on the four operators' buses were malfunctioning at a much higher rate than those on other buses, these large discrepancies in the number of $20 reclassifications should not have existed. According to the unrefuted testimony of the Employer's witnesses, these discrepancies prompted the Employer to look for video of $20 reclassifications by all four operators, but it only found evidence of misconduct by Harvey and NY. Harvey may have been correct in asserting that he and NY were not the only operators who reclassified bills without money having been put in the cash box. However, I conclude that the Employer was not guilty of disparate treatment when it decided to only look for video of these four operators, and not the rest of its 300-odd drivers. As for the Employer's decision to charge Harvey with theft, it is true that the Employer did not have evidence that the change cards Harvey created were used to provide anyone with free bus rides. However, the Employer had no way to determine exactly what had become of the change cards that Harvey had created without putting money in the cash box or how many change cards Harvey had created in this fashion over time. Whether or not the Employer had just cause to discharge Harvey, his conduct was, at least arguably, a serious offense. I find that Harvey did not establish that the

Employer's reasons for discharging him the second time were false or pretextual, or that the Employer fabricated charges against him in order to persuade the Union not to arbitrate Harvey's initial discharge grievance.

It is the burden of the charging party to establish the elements of a *prima facie* case of unlawful discrimination. Only after that burden is met does the burden shift to the Employer to present evidence that the same action would have been taken even if the employee had not engaged in protected activity. As noted above, there is no direct evidence of anti-union animus in this case, the timing of the Employer's actions was explained in the record, and the evidence does not support a finding that Harvey was the victim of disparate treatment or that the reasons given by the Employer for either of his discharges were mere pretext. I find that Harvey did not establish that the Employer had anti-union animus or that anti-union animus motivated either of his two terminations.

As discussed above, I conclude that Harvey's charge against the Employer should be dismissed because it was untimely filed. I conclude that Harvey's claim that his second discharge breached the collective bargaining agreement does not state a claim upon which relief can be granted under PERA. Finally, I conclude that Harvey did not meet his burden of showing that the Employer's decision to him discharge him the second time was motivated, even in part, by anti-union animus. Based on these conclusions, I recommend that his charge against the Employer be dismissed.

<u>Charge Against the Union</u>

A union representing public employees in Michigan owes these employees a duty of fair representation under Section 10(2)(a) of PERA. The union's legal duty toward the employees it represents is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651, 679 (1984); *Eaton Rapids EA*, 2001 MERC Lab Op 131,134. Also see *Vaca v Sipes*, 386 US 171 (1967). A union is guilty of bad faith when it "acts [or fails to act] with an improper intent, purpose, or motive . . ." *Merritt v International Assn of Machinists and Aerospace Workers*, 613 F3d 609, 619 (CA 6, 2010), citing *Spellacy v Airline Pilots Assn*, 156 F3d 120, 126 (CA 2, 1998). "Arbitrary" conduct by a union was described by the Court in *Goolsby* as: (a) impulsive, irrational or unreasoned conduct; (b) inept conduct undertaken with little care or with indifference to the interests of those affected; (c) the failure to exercise discretion; and (d) extreme recklessness or gross negligence.

Although the union owes a duty of fair representation to every employee it represents, its primary duty is to its entire membership as a whole. *Lowe v Hotel Employees*, 389 Mich 123 (1973). If it acts in good faith and not from improper motives, e.g., personal hostility toward the member that has nothing to do with the merits of the dispute, a union has considerable discretion to decide how to handle and how far to proceed with a grievance. That is, it does not have to arbitrate every grievance but can weigh the likelihood of the grievance succeeding against the costs of the arbitration. See, e.g., *Ann Arbor Pub Schs,*16 MPER 15 (2003). A union's good faith decision not to

proceed with a grievance is not unlawful as long as that decision it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O ' Neill,* 499 US 65, 67 (1991); *City of Detroit (Fire Dep ' t),* 1997 MERC Lab Op 31, 34-35; *Int'l Union UAW Region 1,* 30 MPER 25 (2015) (no exceptions).

Harvey did not allege that the Union acted out of personal hostility or some other improper motive when it decided not to arbitrate the grievance it filed over his first termination. Harvey was terminated by the Employer on February 22, 2018, after having what the Employer decided was a "major preventable accident" with his bus. The Employer relied on a video showing that the light was yellow when Harvey entered the intersection and that he had not braked. The Union filed a grievance arguing that the accident was not preventable since the other driver was deemed by the police to be at fault and its membership voted to arbitrate the grievance. After the Employer notified the Union of its intent to terminate Harvey again for a different reason, i.e., to add new charges as a basis for discharge, the Union filed a second grievance. The Union's executive board, however, decided that the Union was unlikely to succeed in getting Harvey's job back in the face of these new allegations and the evidence the Employer had to support them. Therefore, the Union withdrew its demand to arbitrate. In doing so, the Union was exercising the discretion given to it by law. Whether the Union's assessment was correct is, therefore, not relevant. As I stated at the conclusion of the hearing, I find that the evidence in this case established that the Union made a good faith, reasoned decision to withdraw its demand to arbitrate Harvey's February 23, 2019, termination grievance.

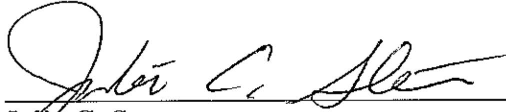
Harvey argues that the Union violated its own bylaws by withdrawing the demand to arbitrate without giving him an opportunity to appeal its decision. The Union disagrees. However, the Commission has long held that union bylaws and constitutions are internal union matters and that it has no jurisdiction to enforce their terms. *ATU Local 26,* 31 MPER 58 (2018); *ATU Local 26,* 30 MPER 22 (2016); *City of Battle Creek,* 1974 MERC Lab Op 698 (no exceptions); *Wayne Co Rd Commission,* 1974 MERC Lab Op 698 (no exceptions). Thus, even if the Union did act contrary to its bylaws, its breach of the bylaws was not a violation of PERA.

I conclude that, based on the absence of evidence that the Union acted in bad faith or was guilty of unlawful discrimination or arbitrary conduct, the Union did not breach its duty of fair representation toward Harvey and that Harvey's charge against the Union should also be dismissed.

RECOMMENDED ORDER

The charges filed by Donnell Harvey against his Employer, the Interurban Transit Partnership, and his collective bargaining agent, the Amalgamated Transit Union, Local 836, are dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION



Julia C. Stern
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: September 20, 2019