STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF INKSTER,
Public Employer-Respondent,

-and-

Case No. C12 E-086
Docket No. 12-000752-MERC

MICHIGAN ASSOCIATION OF PUBLIC EMPLOYEES,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Allen Brothers, PLLC, by David W. Jones, for Respondent

Pierce, Farrell, Tafelski & Wells PLC, by M. Catherine Farrell, for Charging Party

DECISION AND ORDER

On September 18, 2013, Administrative Law Judge Doyle O'Connor issued a Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Robert S. LaBrant, Commission Member

_____
Natalie P. Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF INKSTER,
Public Employer-Respondent,

-and- Case No.: C12 E-086
Docket No.: 12-000752 –MERC

MICHIGAN ASSOCIATION OF PUBLIC EMPLOYEES,
Labor Organization-Charging Party.

_____/

APPEARANCES:

M. Catherine Farrell, for the Charging Party

David W. Jones, for the Respondent

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

Pursuant to the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201 *et seq*, this case was assigned to Doyle O'Connor, of the Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission (MERC). This decision and recommended order is based upon the entire record, including the transcript of an evidentiary hearing and timely briefs filed by both parties:

The Unfair Labor Practice Charge:

On May 3, 2012, a Charge was filed in this matter by the Michigan Association of Public Employees (MAPE or Union) against the City of Inkster (Employer or City). At the time, MAPE represented a unit of civilian employees of the City police department. It was alleged that the Employer was then planning to unlawfully and unilaterally impose a significant change in health insurance coverage during the term of a collective bargaining agreement. The Employer promptly filed an Answer, in which it denied implementing any change to health insurance coverage or costs, unilaterally or otherwise, asserting to the contrary that it had merely attempted to initiate negotiations

with its several bargaining units in an effort to address the City's declining finances.

On June 15, 2012, an amended charge was filed which reiterated the assertion regarding the implementation of changes to health insurance and added substantive new claims. It was asserted that the Union sought injunctive relief in the circuit court, related to this dispute, and that while in court on May 11, 2012, the Employer's agent asserted that if the Union succeeded in getting injunctive relief then all members of the bargaining unit would be laid off. It was further alleged that on or about June 8, 2012, all members of the bargaining unit were laid off in retaliation for seeking the protection of the court, which such injunction proceedings a form of relief expressly provided for under PERA. The Employer filed an Answer in which it denied any wrongdoing and reiterated the denial of implementing or announcing any unilateral change. The Answer denied threatening the layoff of employees in retaliation for seeking injunctive relief and averred to the contrary that the Employer had merely projected the likelihood of imminent layoffs if the City did not secure the financial concessions it was seeking in bargaining. The Answer admitted that the four members of the MAPE police department civilian employees bargaining unit had been laid off, but averred that those layoffs were merely a part of City-wide layoffs which included the layoffs of 25 sworn police officers. The Answer to the amended Charged asserted that all of the layoffs were a result of the City's deepening financial crisis.

It is undisputed that during the relevant events, the City was operating under the terms of a Consent Agreement between it and the State, entered into under 2011 PA 4, MCL §§ 141.1501-1531, because of the City's financial conditions.

The matter was tried over several days of hearing and timely post-hearing briefs were filed by both parties.

Findings of Fact:

The City of Inkster was, in March of 2012, found by a State of Michigan appointed financial review team to be in a status defined by statute as one of "severe financial stress", resulting in the City coming under a consent agreement pursuant to 2011 PA 4. The City sought concessions from the Unions representing several bargaining units, including from MAPE.

According to its treasurer, as of September 2011, the City fund balance deficit was 2.9 million dollars, far in excess of the earlier projected deficit of 1.3 million dollars. As part of its deficit elimination plan, the City eliminated more than one-half of its employees. Among the approximately 80 employees whose positions were eliminated, 28 were employed in the police department, with 24

sworn officers laid off as well as the 4 civilian police department employees represented by MAPE.

One of the steps taken by the City prior to imposing mass layoffs was to announce on May 1, 2012 the imposition of a 20% employee premium sharing. The Employer went as far as holding an employee open enrollment meeting at which employees were directed to sign forms initiating the premium withholding. Prior to that time, and as required by the City-MAPE collective bargaining agreement, the City paid the entire premium for health insurance coverage under the Health Alliance Plan (HAP). At the meeting, it was also announced that significant and adverse changes would be made in the health insurance benefits, in addition to the employee premium share imposition. The City also sent a request, by phone and by mail, to MAPE to reopen its collective bargaining agreement for renegotiation. MAPE did not respond to the request to bargain in writing, but did decline to take part in concessionary bargaining.

MAPE notified the Employer of its objection to the announced unilateral imposition of health care premium sharing, on May 11th sought injunctive relief from the circuit court under PERA, and filed and pursued this unfair labor practice charge. The Employer abandoned its announced unilateral implementation of employee premium cost sharing and the employee payroll deduction authorization forms demanded of employees at the open enrollment meeting were never processed. The city treasurer instructed the human resources staff to not implement the premium cost share as to the MAPE unit as it was recognized that it would have been a breach of the collective bargaining agreement.

At the circuit court in conjunction with the injunctive relief proceedings of May 11th, there was a verbal exchange between the counsel for the parties. The Union characterized comments by the Employer's counsel as a threat that MAPE members would be laid-off if they did not agree to concessions. The Employer characterized the same comments, including that any success in securing an injunction would be a "pyrrhic victory", as rather a prediction that layoffs were inevitable if adequate concessions were not secured from the several bargaining units. The City was then in negotiations with the Teamsters and the Command Officers Association of Michigan and sought to include MAPE in the effort at renegotiation. MAPE did not take part in the negotiations and, although certain concessions were secured from the other units, mass layoffs occurred nonetheless. The court apparently did issue some form of injunctive relief related to the announced changes in health care insurance coverage and costs.

On May 18, a Union representative met with the then deputy chief of the police department. The Union representative testified that the deputy chief asserted that he had been told to get rid of the civilian police department employees.

Layoffs were announced on or about June 8, to be effective July 1, 2012. The MAPE police department civilian employees were all laid off, as were approximately 21 sworn officers. The duties performed by MAPE unit members included answering phones, dispatch, LEIN checks, taking criminal reports, and entering warrants. The duties of police department civilian employees could be performed by sworn officers who could also patrol the streets and effect criminal arrests, which were of course duties which the civilian employees could not perform. As the City put it, they needed people with guns and badges to answer runs. Employees were also laid off from the department of public services and the risk manager from the human resources department was also laid off.

Discussion and Conclusions of Law:

Where materially adverse employment action has occurred, the elements of a prima facie case of unlawful discrimination under PERA are: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist v Waterford Federation of Support Personnel*, 19 MPER 60 (2006). Anti-union animus can be established either by direct evidence or circumstantial evidence, including evidence of suspicious timing or pretext that fairly support the inference that the employer's motive was unlawful. *City of Royal Oak v Haudek*, 22 MPER 67 (2009). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't),* 1998 MERC Lab Op 703, 707. If a prima facie case is made, then the burden shifts to the employer to establish a non-retaliatory basis for the adverse employment action. See*, MESPA v Evert Schools*, 125 Mich App 71 (1983).

Here, the timing of the announcement of the layoffs of essentially the entire civilian workforce of the police department, on the heels of the Union's effort to seek remedies from MERC and from the Circuit Court, was suspect. Certainly the Union was engaged in protected activity on behalf of the unit, of which the Employer was necessarily well aware. However, mere suspect timing is not sufficient to support a claim. *Detroit Symphony*.

The Union points to the comment of the Employer's counsel in describing the issuance of the injunction as a "*pyrrhic victory*" as necessarily evidencing anti-union animus. To the contrary, such a comment can as easily be taken as a prediction rather than a threat. At the point of the court proceedings, both

sides were well aware that Inkster's financial situation was dire and that the pre-existing status quo could not continue and that all of the possible options were ugly. Labor relations is replete with lawful and appropriate harsh and tough talk, including the not-infrequent assertion by one side that the bargaining table, or litigation, tactics of the other side will inevitably result in a bad or worse outcome, often with specific predictions as to the likely bad outcome. The mere, and often rational, prediction of a bad outcome used to implore an opponent to compromise must be viewed in context to distinguish it from a threat of adverse action used to bludgeon an opponent. As must be recognized:

> The traditional bargaining obligation under PERA, and unfair labor practice charges raising such bargaining disputes, are resolved on what is essentially a reasonableness analysis, because the duty in collective bargaining is to "*bargain in good faith*", not to bargain to perfection, or without error, or without arguable flaw. It is to bargain in good faith.

See, *Decatur Schls,* C12 F-123 & C12 F-124 (ALJ O'Connor, 12/20/12); cited in *Watersmeet Township Schl Dist*, C13 B-020 (ALJ Peltz, 9/3/13).

I find no evidence, other than timing, that there existed any anti-union animus as a motivating factor in the layoff decision making. Mere timing alone of course is an insufficient evidentiary basis on which to make an adverse finding. See, *Southfield Public Schools*, 22 MPER 26 (2009). Here, based on the totality of the circumstances, I find that the prediction of an adverse outcome was just that and no more than that. The City sought to secure significant concessions from the several unions representing the multiple City bargaining units. Even with the concessions, very substantial and seemingly permanent layoffs occurred, including significantly in units which had granted concessions. The simple fact is that the City concluded that when wielding the blunt instrument of mass layoffs, the police department civilian employees were among the most expendable of City employees. That conclusion was objectively defensible.

While economic necessity is a common defense, it is of course not absolute. A claim that layoffs were based on financial exigencies can of course be a pretext. In *Parchment School District,* 2000 MERC Lab Op 110 (no exceptions) and in *Coldwater Community Schools*, 2000 MERC Lab Op 244, the Commission held that under Section 15(3)(f), whether a decision to subcontract was based on an employer's legitimate business concerns, or instead on its unlawful "desire to rid itself of the burden of dealing with the union" is a question of fact. *In Detroit Police Command Officers,* 23 MPER 85 (2010), the Commission properly relied on a significant body of precedent holding that even were a particular employer decision is ordinarily discretionary, it cannot

properly be upheld if in fact it was based on unlawful discriminatory intent. See also, *MERC v Reeths-Puffer School Dist, 391 Mich 253; Wayne County, 21 MPER 58 (2008); Grand Rapids, 1984 MERC Lab Op 118.* To make such a finding of pretext here where two dozen police officers were laid off simultaneously with the elimination of the collateral civilian work crew would strain credulity and is unwarranted by the proofs. The City acted decisively to significantly reduce its workforce and it eliminated non-essential positions, which included civilians in the police department. I find that the choice was a legitimate exercise of employer discretion and not a pretext to unlawfully retaliate against the Union or its members.

The Union appropriately asserts that the Employer's announced intent to unilaterally change both the funding and plan design of hits health insurance would have been unlawful if carried out. The decision was rescinded and the deduction authorizations were never implemented, albeit, in part as to this unit because its four members were no longer employed on the planned date of implementation. However, the Employer also backed away from implementing the announced changes unilaterally as to the other units which did continue to have members employed with Inkster and which were not involved in this case. The action of the Employer on May 1, 2012 of announcing the intended unilateral change was likely unlawful; however, the charge still fails to state a claim upon which any real relief could be awarded. No remedy could be fashioned for the announced, but never carried out, threat of a unilateral change, other than the posting of a notice, which would not be effective as to any current employees of Inkster, as all of the positions of the involved employees were eliminated. Ordering such a notice posting would be a pointless exercise, akin to the Cunard line trying to collect the full fare from the estate of an ill-fated stowaway on the *Titanic.*

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

RECOMMENDED ORDER

The Charge, as amended, is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Doyle O'Connor
Administrative Law Judge
Michigan Administrative Hearing System

Dated: September 18, 2013