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STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (WATER & SEWERAGE DEPT),
Public Employer-Respondent,

MERC Case No. C15 K-144

-and-

SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Steven H. Schwartz and Chelsea Ditz, for the Respondent

Jack W. Schulz, for the Charging Party

DECISION AND ORDER

On May 22, 2018, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order[1] in the above matter finding that Respondent, City of Detroit Water & Sewer Department [2] did not violate § 10(1)(a)(c) or (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(a)(c)(e). The ALJ found that Charging Party, Sanitary Chemists and Technicians Association (SCATA or Union), failed to establish that Respondent breached its duty to bargain or that it discriminated against Charging Party's three officers or the spouse of an officer because of the officers' union activity. The ALJ also concluded that the portions of the charge asserting that the Employer repudiated the contract were not timely filed and rejected SCATA's arguments that the statute of limitations had been tolled. The ALJ further found that SCATA did not make a timely demand to bargain over the effects or impact of the layoffs and the reduction in force on members of its bargaining unit, and that by failing to make a timely demand to bargain, SCATA waived its right to bargain over the selection procedures used for the new chemist classification. The ALJ found insufficient evidence of anti-union animus to support SCATA's claim that protected concerted activities were a motivating factor in the DWSD's decision not to select or recommend officers and certain members of the bargaining unit represented by the Union for the new chemist positions. The ALJ's Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA.

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[1] MAHS Hearing Docket No. 15-058913.

[2] As noted by the ALJ, the City of Detroit and its Water & Sewerage Department are not legally separate entities. In this Decision the Water & Sewerage Department is referred to as the DWSD, while the City of Detroit is referred to as the City or the Employer.

After receiving an extension of time in which to file its exceptions, Charging Party filed exceptions to the ALJ's Decision and Recommended Order on July 13, 2018. Respondent requested and was granted an extension of time in which to file its response to the exceptions and, on August 22, 2018, filed a brief in support of the ALJ's Decision and Recommended Order.

Upon reviewing the record and the exceptions filed by Charging Party, we find the exceptions to be without merit.

Factual Summary:

After a complete review of the record in this matter, we adopt the findings of fact set forth by the ALJ except for the differences listed herein.

A. Master Agreement

The most recent collective bargaining agreement covering the relationship between SCATA and the City of Detroit is a Master Agreement which was signed by the representatives of SCATA-UAW and the City on April 13, 2007. This contract was negotiated while SCATA was affiliated with the UAW. However, that relationship ended in 2011, and no new collective bargaining agreement has been reached between SCATA and the City of Detroit.

Article 53 of the Master Agreement set the terms for the duration, modification, and termination of that agreement and provides:

> This Agreement shall become effective upon the effective date of Resolution of Approval of the City Council as provided by law and shall remain in full force and effect until 11:59 p.m. June 30, 2008.
>
> If either party desires to modify this Agreement, it may give written notice to the other party during the month of February, 2008.
>
> In the event the parties fail to arrive at an agreement on wages, fringe benefits, other monetary matters, and non-economic items by June 30, 2008, this Agreement will remain in effect on a day-to-day basis. Either party may terminate the Agreement by giving the other party a ten (10) calendar day written notice on or after June 20, 2008.

Throughout this action, SCATA has contended that the Employer violated Section 53 of the Master Agreement because SCATA officers believed that the City had failed to send a letter terminating the contract as required by Section 53.

Barbara Wise Johnson, the City of Detroit's former labor relations director explained that the collective bargaining agreement between the City and the SCATA was to have expired on June 30, 2008. However, the parties had not reached a successor agreement by that date. Due to the City's financial crisis in 2009, the City was seeking to resolve its labor agreements. For those bargaining units with which the City had not been able to reach a successor agreement, the City wanted to terminate the contracts, and advise the respective bargaining units that the Employer

would no longer be collecting union dues. On or about October 9, 2009, Wise-Johnson sent a letter to that effect to SCATA which states in relevant part:

> Please be advised that pursuant to Article 53 Duration, Modification and Termination of the 2005-2008 collective bargaining agreement between the City of Detroit and U.A.W. Local 2334-S.C.A.T.A., the City hereby provides ten (10) days written notice of its intent to terminate the collective bargaining agreement as of October 19, 2009.

The letter explained that the City would no longer be collecting union dues and that the City would continue to arbitrate all pending and future grievances until a new collective bargaining agreement was reached. Further, it requested that the Union's representatives contact the City's labor relations department with available dates and times for future negotiations.

At the hearing in this matter, SCATA's president, Saulius Simoliunas recognized and acknowledged receipt of the October 9, 2009 letter from Wise-Johnson. Simoliunas argued that the letter from Wise-Johnson did not terminate the contract between DWSD and SCATA. He asserted that it terminated the 2005-2008 agreement and instituted the contract on a day-to-day basis with the exception that the Employer would no longer collect union dues. Simoliunas testified that the Employer stopped collecting dues sometime around October 2009. However, after that point, until at least sometime in 2012, SCATA continued to operate as though it were under the Master Agreement, using it for grievances, special conferences, negotiations and so forth without any change to the Union's activities.

B. Environmental Protection Agency Lawsuit against Detroit and DWSD

In 1977, the Environmental Protection Agency (EPA) initiated a federal court action against the City of Detroit and the Detroit Water and Sewerage Department (DWSD) alleging violations of the Clean Water Act, 33 USC §1251 et seq. with respect to wastewater. As of November 4, 2011, the matter had been pending for more than 34 years when the U. S. District Court Judge hearing the case at that time, the Honorable Sean F. Cox, issued an order aimed at providing the "least intrusive means of effectively remedying" the impediments to the City's and DWSD's compliance with the Clean Water Act.

In 2011, the DWSD had over 200 separate job classifications and its employees were members of 20 different bargaining units, each of which had its own collective bargaining agreement. Many of these units included both DWSD employees and employees within other City departments. In a November 4, 2011 order, Judge Cox required the City and DWSD to review the current employee job classifications and reduce the number of DWSD job classifications to increase workforce flexibility and to reduce or eliminate other impediments to the City's compliance with the Clean Water Act.

In his November 4, 2011 order, Judge Cox found that it was, therefore, necessary to "1) keep all current CBAs that cover DWSD employees in force, but strike and enjoin those current CBA provisions or work rules that threaten short-term compliance; and 2) Order that, in the future, the DWSD shall negotiate and sign its own CBAs that cover only DWSD employees, and prohibit future DWSD CBAs from containing certain provisions that threaten long-term compliance." To

that end, Judge Cox's order specified 13 additional requirements that were to be met by the City and DWSD, including the following which are relevant in this matter:

> 3. The DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees ("DWSD CBAs"). DWSD CBAs shall not include employees of any other City of Detroit departments. The director of the DWSD shall have final authority to approve CBAs for the employees of the DWSD.
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> * * *
>
> 8. The Director of the DWSD shall perform a review of the current employee classifications at the DWSD and reduce the number of DWSD employee classifications to increase workforce flexibility. Future DWSD CBAs shall include those revised employee classifications.
>
> 9 DWSD CBAs shall provide that promotions in the DWSD shall be at the discretion of management and based upon skill, knowledge, and ability, and then taking seniority into account.
>
> * * *
>
> 13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.

Upon the issuance of Judge Cox's November 4, 2011 order, the Employer determined that a separate human resources department should be created for DWSD. Around that time, in 2012, Terri Tabor Conerway was asked to head the new DWSD human resources department as the DWSD Organizational Development Director.

Based on Judge Cox's November 4, 2011 order, Respondent determined that it needed to negotiate collective bargaining agreements with the unions that did not have contracts with DWSD. Conerway sent notices to the negotiating teams for such unions, inviting them to schedule time slots for negotiations in the spring of 2012. Simoliunas received a letter from DWSD director Sue McCormick in April 2012 notifying him of a meeting scheduled between DWSD and union representatives to begin negotiations. Simoliunas attended a meeting on April 26, 2012 meeting along with representatives of several other bargaining units.

C. Suspension and Resumption of Detroit's Duty to Bargain

On April 4, 2012, due to financial difficulties, the City entered into a Financial Stability Agreement (FSA) with the State of Michigan under Public Act 4 of 2011 (PA 4), that among other things, suspended the City's duty to bargain with the unions representing City employees. Pursuant to that FSA, the City adopted City Employment Terms for All Non-Uniform Employees (CET). The CET provided "Any provisions in the most recently expired Collective Bargaining Agreements, memorandums of understanding, practices, and/or supplemental agreements that are

not expressly referenced to in this CET or any addendum and are inconsistent with the terms in this CET or any addendum are null and void as of the effective date of this CET." The CET was imposed on bargaining units that were not part of DWSD in early June 2012.

On February 29, 2012, a petition seeking the repeal of PA 4 was filed. As a result, Public Act 72 of 1990 (PA 72), which had been repealed by PA 4, came back into effect on August 12, 2012, while the referendum on PA 4 was pending. PA 72 allowed for the appointment of an emergency manager but did not authorize the suspension of the City's duty to bargain. At the November 6, 2012 general election, PA 4 was rejected by a majority of the electors. PA 72 remained in effect until it was replaced by Act 436 of 2012, the Local Financial Stability and Choice Act, which took effect on March 28, 2013. Under Act 436, the City's duty to bargain was suspended once more following the Governor's recognition of the City's continuing financial emergency and the appointment and confirmation of an emergency manager under Act 436.

In July 2013, the City petitioned for bankruptcy. As a result, a stay of proceedings against the City was issued by the bankruptcy court. The stay applied to unfair labor practice charges filed with the Commission as well as other actions.

On December 14, 2014, upon completion of the bankruptcy proceeding, Governor Snyder declared the City's financial emergency to have terminated. The suspension of the City's, and thus the DWSD's, duty to bargain then came to an end.

D. The Imposition of the CET on DWSD Employees

On June 27, 2012, the Board of Water Commissioners passed a resolution regarding DWSD collective bargaining agreements. The resolution noted the November 4, 2011 order of Judge Cox requiring DWSD to execute collect bargaining agreements with its employees in its own name. Further, the resolution noted, "Eighteen of the twenty collective bargaining agreements that covered DWSD employees would expire on June 30, 2012, with one additional agreement that has already expired and... The City of Detroit has provided notice to all of these unions of its intent to terminate those agreements upon expiration." Additionally, the resolution identified four unions with whom the Board of Water Commissioners had approved new collective bargaining agreements and stated that with respect to any union whose contract has expired without having a new ratified collect bargaining agreement, that union's terms and conditions of employment would include all terms and conditions of employment imposed by the City pursuant to the Financial Stability Agreement until (1) either a new collective bargaining agreement is ratified or (2) following a bargaining impasse, DWSD imposes its own terms and conditions of employment on that union.

On June 28, 2012, Conerway sent the representatives of the affected unions a copy of the Board of Water Commissioners' resolution by email. She sent a copy of the email to Simoliunas as the SCATA president.

On September 24, 2012, DWSD filed a motion requesting that Judge Cox clarify his November 4, 2011 order. On October 5, 2012, Judge Cox issued an order in which he declared the Board of Water Commissioners June 2012 resolution to be in accordance with the Court's November 4, 2011 order and to be effective and controlling until a further Court order to the contrary.

At the hearing in this matter, Simoliunas acknowledged receiving a copy of the June 27, 2012 resolution by the Board of Water Commissioners during the September 25, 2012 negotiation session with Steven H. Schwartz, DWSD's attorney and bargaining representative for these matters. Simoliunas recalled discussing the Board of Water Commissioners resolution with Schwartz and telling Schwartz that the resolution was not binding because it was not by the Detroit City Council. Simoliunas told Schwartz that the resolution of the water commissioners indicates that the Employer expected employees to accept the terms set by the Employer, but SCATA was not going to do that. Simoliunas testified that he accepted Judge Cox's November 4, 2011 order as binding but he and SCATA did not accept the Board of Water Commissioners' resolution.

On October 23, 2012, Conerway sent an email with an attached memorandum to the leadership of six unions, including SCATA, regarding the City of Detroit employment terms. Her memo states that the CET is in effect for DWSD employees who were members of the six unions to whom she sent the memo. The memo indicates certain changes to employee benefits as a result of the imposition of the CET including a 10% wage reduction scheduled to take effect in November 2012.

On October 24, 2012, Conerway sent a memo to DWSD employees who were represented by the six unions including SCATA. The memo informed the employees that the CET would apply to them and included a list of the changes that would be made to employees' terms and conditions of employment with the implementation of the CET. Those changes included the 10% wage reduction scheduled to take effect November 2012.

At the hearing, the SCATA officers acknowledged that they had been aware of the imposition of the CET towards the end of 2012, and at least one of them acknowledged having obtained a copy of it. They also acknowledged that they were aware of the implementation of the 10% wage cut, the reduction in vacation accrual, and other changes in their benefits resulting from the implementation of the CET near the end of 2012.

Additionally, the CET contained provisions addressing the grievance process, discipline, reductions in force, layoff, demotion, and recall. Of particular relevance to this matter is the provision of the CET on reduction in force, layoff, demotion, and recall. On those subjects, the CET provides in relevant part:

> 15. REDUCTION IN FORCE, LAY OFF, DEMOTION, AND RECALL
>
> A. The City reserves the right to reduce the work force.
>
> B. NOTICE TO THE UNION: Where practical, the City will provide advance notice to the Union who may receive such notice fourteen (14) days prior to issuance of any layoffs.
>
> C. ORDER OF REMOVAL: Reduction in force shall be by job classification in a City department. Within the department, the following categories of employees in the class shall be removed first in the following order.
>
> 1. Provisionally-hired employees.
> 2. Newly-hired employees who have not completed the probationary period.
> 3. Employees hired on a seasonal, temporary or other limited term basis.
> 4. Seniority employees who have recently been promoted into the class and have not completed the required trial period, and employees promoted to

the class on a limited-term basis. Such employees shall revert to the classification in the department from which they were promoted.

5. Seniority employees who are in the class on a permanent basis and have completed the required trial period. Such employees shall be removed from the class in accordance with their total City seniority and have those displacement rights described below.

* * *

F. EMPLOYEE RECALL, REEMPLOYMENT AND RESTORATION RIGHTS:

Employees will be recalled by seniority for available positions either: (a) in their current classification, or (b) in the classification in the same occupational series; provided they have prior year service in such classification within the last three (3) years and can perform the duties in the position they are recalled into. Specific recall and notification procedures shall be determined and modified by the Human Resources Department. Any Human Resources rules or procedures concerning employee recall shall not be interpreted to limit or impair the City's right to fill vacancies through transfer, promotion, or new hire in accordance with the Management Rights or the Transfer and Promotion provisions of this CET. Any existing Human Resource rules or procedures with conflicting provisions shall be modified to conform to this CET.

E. The Relationship between SCATA Officers and the Employer

It is undisputed that SCATA filed numerous grievances under the Master Agreement. Additionally, SCATA filed complaints against DWSD with the Michigan Department of Environmental Quality (MDEQ), the Environmental Protection Agency (EPA), and the Michigan Occupational Safety and Health Administration (MIOSHA).

On November 26, 2012, in their respective capacities as SCATA Vice President George Vannilam, and SCATA Secretary Jacob Kovoor sent an email to Nicole Cantello, of the EPA complaining about the analytical lab. The letter asserted that the lab had not been upgraded with state-of-the-art machinery or technology, that the lab supervisors were underqualified, that MDEQ had not been monitoring the analytical lab very regularly or strictly, that certain tests were not being run properly, and that the lab supervisor lacked adequate knowledge of chemistry.

1. Lunchroom Parties

Vannilam testified that his relationship with lab supervisor Michael Jurban was not a very good one, either personally or professionally. The lab was in a secured area and no one from the outside was allowed to come in. However, sometimes parties would be held in the cafeteria during the lunch break and individuals from the outside would attend, while other people were there having lunch. A few of the analytical chemists, their supervisors, and management like Jurban, and the assistant lab supervisor Joseph Peindl would be included in the parties. Vannilam knew about the parties because they normally started during the lunch break and he would see them when he went to the lunchroom to eat his lunch. Vannilam complained to Conerway about the parties. Vannilam questioned Jurban and Peindl a couple times about how they could take any

disciplinary action against individuals with whom they partied and asked whether they could manage those subordinates in an unbiased manner. Vannilam testified that all the analytical chemists, who attended the parties were selected for rehire as chemists in October 2015.

2. Complaints to McCormick

Vannilam sent a letter to Sue McCormick when she became the director of DWSD in 2012. In the letter he complained about unqualified chemists being hired and promoted. He asserted that a person who was recently promoted to a senior chemist position did not have sufficient training in chemistry. The letter to McCormick also complained that Michael Jurban was not a chemistry graduate, that Jurban was instrumental in promoting an unqualified individual to the senior analytical chemist position, and that Jurban ignored genuine concerns and complaints by the chemists. Vannilam also complained about the lack of expansion in the work in the analytical lab, the reduction in staff in the analytical lab, and the use of outsourcing for much of the chemical analysis.

Vannilam received a reply to the letter from McCormick stating that the things he had complained about would be looked at and addressed. Vannilam then wrote a second letter to McCormick acknowledging her response to his first letter and complaining about the interview process for promotion to senior water systems chemist, his initial inability to get any information on how he fared as a result of the interview, and the unfairness of Jurban, Vannilam had no evidence that McCormick had discussed either of his letters to her with Jurban. However, shortly after Vannilam sent the letter, he heard Jurban, Peindl and a senior chemist talking in front of him saying "these people are complaining that we don't know anything, we are not qualified."

When Jurban was asked on cross-examination whether he was aware that Vannilam contacted McCormick in January 2012 to state that Jurban was ignoring the complaints and concerns of the chemists, he did not recall the matter. However, Jurban admitted that if Vannilam had contacted McCormick, McCormick would have presented Vannilam's concerns to him.

3. Laboratory Explosion

Additionally, in his capacity as president of SCATA, Simoliunas contacted MIOSHA regarding an explosion in the analytical lab, regarding technicians doing work in the chlorination lab, and about five or six other incidents in that occurred in the three or four years prior to the hearing in this case. In each case, when Simoliunas contacted MIOSHA, they issued citations and monetary fines.

In November 2009, one of the senior chemists, Cheeramvelil had assigned one of the chemists that he supervised to do an analysis of organic chemical contents in the analytical laboratory. When the employee, a SCATA member, first conducted the test, a vessel ruptured during testing and broke, but the employee did not report it. A second incident occurred two days later, when Cheeramvelil assigned the same chemist to conduct a part of the same analysis. While doing the analysis, an unstable chemical reaction occurred causing an explosion that resulted in the rupture of the test tube with which the employee was working. The only one injured as a result of the second incident was the employee conducting the procedure; he cut his finger while in the process of cleaning up the test tube that had been broken in the explosion. The only property damage was the broken test tube.

Kovoor contended that Cheeramvelil had been negligent in having the employee continue the analysis after a minor explosion had occurred two days earlier when the same employee had been conducting part of the same analysis. According to Jurban, the employee who had been injured had not followed the safety protocol in the first incident by failing to report it.

As a result of those incidents, SCATA filed a report with MIOSHA, made complaints internally with DWSD, and complained to the EPA regarding the incident.

MIOSHA investigated both incidents and issued a citation and notification of penalty citing DWSD for a serious violation, proposing a penalty of $2450, and requiring the violation to be abated within a little over a month's time.

At that time, Michael Jurban was the laboratory supervisor. Jurban was not present at the lab on the day of the explosion and learned about the circumstances of the incident during the discussion with MIOSHA. Jurban received the MIOSHA inspection findings and recommendations which included a recommendation that DWSD retrain the supervisor and the employee on proper procedures prior to conducting an analysis of hazardous chemicals. The MIOSHA inspection findings contained further recommendations regarding the proper storage and maintenance of containers of ether solvent, which was the expired chemical involved in the explosion.

The DWSD safety office investigated the incident. The investigation was led by Steve Kopicki of the Employer's industrial waste facility and included representatives of Homeland Security. The investigation determined that the employee involved in the incident was following protocol but was using an older ether compound that had apparently been retained too long and had become unstable. Cheeramvelil was on duty and was the supervisor in the area at the time the explosion occurred. The investigation of the incident determined that Cheeramvelil was not at fault. After that incident, DWSD determined that the test in question would be assigned to an outside laboratory.

Jurban and Kopicki represented DWSD at a fine abatement meeting with MIOSHA. DWSD wanted to have the fine reduced and Kopicki took the lead on that discussion. Kovoor represented SCATA at the same meeting. Kovoor objected to MIOSHA reducing the fine because a SCATA member had been injured in the explosion.

When testifying at the hearing in this matter, Jurban recalled that Kovoor and another man were present on behalf of SCATA at the MIOSHA fine abatement meeting, and that SCATA argued that the fine should not be reduced. MIOSHA did not reduce the fine.

SCATA also sought the removal of Cheeramvelil from his supervisory position due to their belief that the explosion causing the injury to the SCATA member resulted from negligence by Cheeramvelil. SCATA wrote to the director of the DWSD asking her to remove Cheeramvelil from the senior chemist position. Cheeramvelil was not removed from his position.

Neither Cheeramvelil nor the employee involved in the explosion were disciplined because of the incident and both were hired for the new chemist position in October 2015.

4. Alleged Violation of National Pollutant Discharge Elimination System (NPDES) Permit

Kovoor also testified that in June 2009, they were involved in a special conference regarding a complaint against management. SCATA believed that DWSD was in violation of the plants' National Pollutant Discharge Elimination System (NPDES) permit. Under the permit, DWSD was supposed to analyze biochemical oxygen demand (BOD), total suspended solids, total phosphate, and ammonia taken. He testified that the permit required that this be done on a rotating basis and every day. However, DWSD had stopped performing that analysis on Saturdays and Sundays and held the samples until Mondays. Simoliunas, Kovoor, and Susan Sam attended the special conference on behalf of SCATA. Jurban, Peindl, plant manager J.R. Richards, and the human resources consultant, Maria Young, attended on behalf of DWSD. Jurban viewed SCATA's complaint as being about the elimination of Sunday overtime. He explained that under prior DWSD guidelines if an employee worked on their seventh day, they would be paid double time. Jurban believed that it was for that reason that SCATA filed the complaint about the elimination of BOD testing on Sundays. However, Jurban acknowledged that SCATA felt that the test was being compromised.

After the special conference, SCATA received the Employer's written response disagreeing with SCATA's contention that DWSD was in violation and refusing to resume having staff perform the analysis on weekends.

After receiving DWSD's response, SCATA sent a complaint to the MDEQ and to the EPA. MDEQ investigated the matter at DWSD and found that DWSD was not in violation. SCATA also contacted Wayne, Macomb, and Oakland Counties regarding issues with DWSD management. After making the complaint to MDEQ regarding the NPDES permit, Simoliunas, Vannilam, and Kovoor attended a MDEQ hearing in 2013, where they objected to the renewal of DWSD's NPDES permit. Jurban testified that he did not know of a SCATA complaint to MDEQ about DWSD's NPDES permit.

In 2012 or 2013, Vannilam also complained to the EPA about a BOD reading problem. He testified that the samples were read later than they were supposed to have been read to get valid results. Additionally, in 2014, SCATA sent an email to the EPA because the BOD analysis was not being done on the prescribed day. They complained of lack of training, understaffing, not following the EPA guidelines and standards, and having unqualified supervisors. Kovoor testified that they did not receive a written response from the EPA. Charging Party offered no evidence that the EPA informed DWSD of SCATA's email or that DWSD had any knowledge of the email to the EPA.

Jurban explained that the EPA does periodic inspections at the wastewater treatment plant roughly every four years. Jurban testified that when the EPA inspections occurred, he would participate in an opening conference with them at which they discussed the scope of the EPA's investigation. They would then proceed to do a physical inspection and then conduct a "reconciliation meeting" where the EPA would outline what they believed to be deficiencies.

Jurban did not recall a complaint to the EPA regarding BOD testing in 2014. Jurban also denied any recollection of a report of a BOD testing accident involving a particular chemist who had been mentioned at the hearing in this matter. Jurban acknowledged that there had been

challenges to DWSD's compliance with BOD requirements but there were no violations of which he was aware. Jurban testified that there were challenges because DWSD was going to stop doing BOD's on Sundays and the lab would be closed on Sunday. Therefore, they had to adjust how they did the BOD test. Jurban testified that DWSD did not need approval from the EPA to make that change because the procedure itself allowed for 48 hours from the time of sample collection to the time of sample testing.

5. Protest against EMA Contract

EMA is a private company that DWSD hired to conduct an analysis of DWSD's work and its job classifications as part of its effort to comply with Judge Cox's order to reduce the number of job classifications. Kovoor attended a City Council meeting on behalf of SCATA when a "no-bid contract for $48 million by EMA was approved by the water department." Kovoor made a statement to the Council meeting protesting the EMA contract and he gave a written statement to the Council and the DWSD representatives that were present. Simoliunas and Vannilam also spoke against the EMA contract. A couple of the DWSD executive board members were present. The City Council did not approve the EMA contract. Kovoor believed he was targeted from that day onwards. However, Jurban testified that he was unaware of SCATA's presence at the City Council meeting regarding the EMA contract.

6. Overtime by Supervisors

Kovoor charged that Cheeramvelil and some of his coworkers had fabricated overtime work. Kovoor testified that in 2011, he and Simoliunas complained about the supervisors' overtime to the director of DWSD, who ordered his assistant director, Sam Smalley to investigate. Kovoor and Simoliunas gave statements to Smalley during his investigation of the complaint. As a result of the investigation, Smalley required that overtime for senior chemists be personally preapproved by himself. Jurban knew that SCATA had taken some concerns about overtime to Smalley and acknowledged that the practice under which Smalley had to approve overtime before it could be worked began around 2011.

Cheeramvelil had been represented by SCATA when he worked as an analytical chemist. He also served as SCATA's financial Secretary from 1996 until 2008 or 2009. In 2009, Cheeramvelil was promoted to senior water chemist and left the SCATA bargaining unit. Cheeramvelil became an officer in the Senior Water Systems Chemists Association after he was promoted.

F. Bargaining for a Successor Collective Bargaining Agreement

SCATA and the City of Detroit negotiated for a new collective bargaining agreement between 2008 and 2012. However, they were unable to reach an agreement during that time. The parties went through mediation and began fact finding but did not complete the fact finding process as the City withdrew from fact finding upon the suspension of its duty to bargain.

Upon the issuance of Judge Cox's November 4, 2011 order, the City determined that a separate human resources department should be created for DWSD. In 2012, Terri Tabor Conerway was asked to head the new DWSD human resources department as the DWSD Organizational Development Director.

As a result of Judge Cox's November 4, 2011 order, the DWSD needed to negotiate collective bargaining agreements with the unions with which it did not have contracts. Therefore, Conerway sent notices to the negotiating teams for the unions that did not have collective bargaining agreements with DWSD, inviting them to schedule time slots for negotiations in the spring of 2012. To ensure that all union represented DWSD employees were covered by collective bargaining agreements with DWSD, negotiations began between DWSD and the unions whose bargaining units consisted of DWSD employees but whose contracts were with the City of Detroit. DWSD began negotiations with representatives of all the DWSD bargaining units around that time.

Simoliunas received a letter from DWSD director Sue McCormick in April 2012 notifying him of a meeting scheduled between DWSD and union representatives to begin negotiations. Simoliunas attended an April 26, 2012 meeting along with representatives of several other bargaining units.

On May 8, 2012, DWSD provided SCATA with a proposal for a new collective bargaining agreement, which was the same proposal that had been offered to other DWSD unions.

The Master Agreement was between the City of Detroit and SCATA-UAW, not between DWSD and SCATA. Therefore, Conerway sent emails to Simoliunas on May 13, 2012 and May 19, 2012 indicating the need to reach a new collective bargaining agreement between DWSD and the Union that would conform with the requirements of Judge Cox's order. Each email had an attachment that listed requirements set forth in Judge Cox's November 4, 2011 order and noted the provisions of the Master Agreement that the Employer had determined were affected by Judge Cox's order. The emails indicated that the parties were scheduled to meet to negotiate later that month.

Simoliunas acknowledged receiving the May 8, 2012 proposal from DWSD which provides in relevant part, "Compliance with Judge Cox's Order: all applicable sections of the collective bargaining agreement shall be amended to be in full compliance with Judge Cox's Order." When asked whether SCATA refused DWSD's proposal to put language relating to Judge Cox's order in a new collective bargaining agreement, Simoliunas acknowledged that the Union had rejected that proposal, but objected that he didn't understand what the proposal meant. Simoliunas testified that he was not clear about what was in Judge Cox's orders. He believed the City would interpret the judge's order as it wished. Simoliunas denied that the City had ever provided specific contract language with which they proposed to amend the collective bargaining agreement for the purpose of complying with the judge's orders.

The first negotiating session between DWSD and SCATA was May 24, 2012. Simoliunas and SCATA vice president George Vannilam were present as well as four other persons representing SCATA. Simoliunas was also in negotiations with DWSD in June 2012. Those meetings were the first times that he bargained with Schwartz. During those meetings, Simoliunas asserted that SCATA members were underpaid by 40%.

DWSD made a new proposal for healthcare to SCATA on September 25, 2012. SCATA did not agree to that proposal. DWSD also offered a new written proposal to SCATA setting the duration as July 1, 2012 to June 30, 2013 and covering such issues as health insurance; wages; early retirement; pension; compliance with Judge Cox's order; past practices; longevity pay; emergency manager language; hospitalization, medical, dental and optical insurance; vacation and

holiday time; and sick leave. Simoliunas testified that he recalled receiving that proposal for a "nine-month contract" and that SCATA did not accept the proposal because it was for nine months and contained many cuts. Amongst other changes, there was a 10% wage reduction, the elimination of longevity pay, and a reduction in vacation time for employees hired on or after February 11, 2010.

Simoliunas also received a copy of the June 27, 2012 resolution by the Board of Water Commissioners during the September 25, 2012 negotiation session with Schwartz. He discussed the resolution with Schwartz and told him that the resolution was not binding because it was not by the Detroit City Council. Simoliunas told Schwartz that the resolution of the Water Commissioners indicates that the Employer expected employees to accept the terms set by the Employer, but SCATA was not going to do that. Simoliunas testified that he accepted Judge Cox's November 4, 2011 order as binding but he and SCATA did not accept the Board of Water Commissioners' resolution.

In 2012, DWSD negotiated and reached an agreement with the Senior Water Systems Chemists Association. That union represented the employees who supervised the analytical chemists, who were represented by SCATA. That agreement eliminated the 10% pay cut that had previously been imposed when the CET was implemented by DWSD. The terms of the agreement between DWSD and the Senior Water Systems Chemists Association were proposed to SCATA on September 25, 2012. However, SCATA did not accept DWSD's proposal.

On or about December 9, 2013, to support the assertion that SCATA's members were being underpaid, Simoliunas gave Schwartz articles discussing American Chemical Society surveys of government chemists' wages. The articles are from 2009, 2010, and 2011.

On or about January 16, 2014, Simoliunas sent an email to Conerway, at her correct email address, and to McCormick. SCATA's proposal to the Employer set forth new terms for the type of work that the chemists in different classifications would perform. SCATA proposed to amend the current contract by providing that "Senior Chemists should not indulge in the regular analytical work generally assigned for the chemists" and that there would be a yearly rotation plan for analytical chemists that would allow chemists to get an opportunity to be trained in every group in the analytical laboratory. SCATA's proposal also demanded that only the U.S. EPA testing procedures or U.S. EPA approved testing procedures would be used in the chemical analyses. SCATA's proposal contained additional ideas that addressed such things as having the DWSD laboratories become self-supporting to generate revenue for DWSD and their assertion that the Michigan Department of Environmental Quality does not do an adequate job of analyzing DWSD chemical data. SCATA's proposal also contended that their salaries were $20,000 below the median annual salary and demanded that their salaries be raised to match national and regional norms in accordance with the American Chemical Society surveys of median salaries for government chemists in the Midwest. SCATA also objected to the requirement of state operators' licenses for chemists and insisted that SCATA members should be certified by the National Registry of Clinical Chemistry's certification program for environmental analytical chemists. Additionally, SCATA demanded that the supervisor/team leaders of the chemists must also be chemists. DWSD did not accept SCATA's proposal.

At that point, SCATA had not agreed to any of the Employer's proposals, including changing the language that DWSD had identified as subject to Judge Cox's order requiring its removal from the collective bargaining agreement.

SCATA's bargaining team met with DWSD on January 16, 2014, October 24, 2014, and October 8, 2015. Some of the meetings between DWSD and SCATA occurred while the City of Detroit was being administered by an emergency manager and, had no duty to bargain. However, DWSD representatives continued to meet to try to work out the terms of an agreement with the Union.

DWSD made a new proposal for retirement benefits and a proposal for hospitalization, medical insurance, dental care, and optical care on April 1, 2014. SCATA did not agree to either proposal. Also, on April 1, 2014, the Employer gave a proposal to SCATA assigning the new job classification of special projects technicians to the bargaining unit represented by SCATA. SCATA objected to the proposal because the position was at a lower wage than members of the bargaining unit currently received. Simoliunas asked Schwartz if there were any other titles that SCATA was being offered and was told that the special projects technician title was the only title being offered to SCATA.

On April 25, 2014 Conerway, sent a letter to Simoliunas inviting him to schedule an appointment so they could continue discussions regarding various economic and noneconomic employment terms and conditions.

On September 25, 2014, the Detroit emergency manager, Kevyn Orr, sent a letter to Simoliunas as president of SCATA. The letter included changes to the CET. Attached to the letter was a notice that the special projects technician position had been assigned to SCATA as well as several attachments setting forth additional terms and conditions of employment.

At the October 24, 2014 bargaining session, the parties were discussing reclassifying 237 positions into 57 positions when Simoliunas objected to SCATA's lack of input into the reclassification process and stated, "reclassification without negotiations is an unfair labor practice." Conerway testified that at that point there was no notice of layoffs.

On November 5, 2014, Schwartz and Simoliunas exchanged emails regarding placement of the new chemist classification into the bargaining unit represented by the Senior Water Systems Chemists Association and SCATA's rejection of the assignment of the special project technician position to its bargaining unit.

On February 6, 2015, Schwartz gave SCATA a proposal regarding work rules implemented on November 5, 2014. The proposal limited the union's ability to grieve certain disciplinary actions. SCATA considered the proposal but did not agree to it. Simoliunas testified that when he received the proposal, he had not seen the work rules to which it referred. However, he acknowledged that the employees in his bargaining unit would have received those work rules in November 2014.

The employer's attorney Schwartz, who represented DWSD at the bargaining table and at the hearing in this matter, asserted in a sidebar conference during the hearing that after "a series of meetings and proposals attempting to get to a contract and the parties never reached agreement on

anything, so when we get to 2015, why should there be, even though there was another meeting, at what point do you say there's no - - we can't get to agreement on the day of the week, so how are we going to get to agreement on it?"

G. Discussions Regarding the Employment of SCATA Members

A memo describing the Placement Eligibility Process (PEP) Phase II was emailed to DWSD's unions before it was released to the employees. DWSD also conducted labor-management meetings with all the unions. At these labor-management meetings, discussions included: when the layoffs would occur, how many layoffs would occur, when the unions would be notified of the layoffs, and other questions regarding the layoffs. At those meetings, DWSD discussed the placement process, and what would happen to employees who would not be placed.

SCATA vice president George Vannilam last worked for DWSD as an analytical chemist. Vannilam testified that City management held labor-management meetings with all the unions in the water department. Simoliunas, Kovoor, and Vannilam attended these meetings on behalf of SCATA. At those meetings, Conerway or McCormick would make a presentation as to key DWSD projects that were going on. Vannilam acknowledged that EMA findings were discussed at some of those meetings, including discussions of pilot programs that were to evaluate whether the work could be done more efficiently. At those meetings, different unions asked about whether there would be layoffs. On cross-examination, Vannilam acknowledged that he had attended a presentation in 2012 that EMA gave to the union leadership about their 90-day review. Vannilam admitted that during that presentation, EMA explained that DWSD could reduce its workforce by 81% over a five-year period. Vannilam also acknowledged most of the unions at DWSD argued that the reduction of the number of employees from 1900 in 2012, to 1500 or 1600 in 2015, meant that DWSD needed to add employees.

Based on what he heard from DWSD management at other labor-management meetings, Vannilam was under the impression that there would not be any layoffs from the analytical lab. Vannilam testified that at a meeting in the spring of 2015,[3] DWSD management talked about the plans for all the associations and labor unions except SCATA. Therefore, after the meeting, Kovoor and Vannilam approached Conerway and McCormick about the status of the analytical chemists. Kovoor and Vannilam each separately testified that both Conerway and McCormick indicated that there would not be layoffs for the chemists. Vannilam also testified that in 2013 or 2014, he was present when he asked Conerway about layoffs from the analytical lab. Vannilam testified that Kovoor and McCormick were there as well as Conerway and himself. Vannilam testified that he recalled the content of Conerway's response, which was that there would not be layoffs of chemists, but not her exact words.

Vannilam also testified that he learned about the self-assessments through word-of-mouth. He thought the self-assessments were to give qualified people the opportunity for promotions. He had heard from his lab supervisor, assistant lab supervisor, and senior chemist that the chemist

[3] On direct examination, Vannilam indicated that this conversation occurred in the spring of 2015. Days later, on cross-examination, Vannilam testified that a conversation occurred in 2013 or 2014, in which Conerway indicated that no chemist would be laid off. It is not clear whether Vannilam was referring to two separate discussions, or whether he was simply unsure of the date on which a single discussion occurred.

position would be reclassified into chemist I, II, and III with the II and III levels having much higher pay compared to the salary they were currently receiving.

Kovoor testified that he was never told by management what the reclassification self-assessments meant. He believed it was a process for him to be put in a chemist I or chemist II position because he had a D license and all the certifications and the experience. He believed that he was well-qualified to be put into a chemist II position. He testified that he was never instructed as to how the information that he included in the self-assessment would be used. He was never instructed that the self-assessments could result in SCATA members losing their jobs. He did not think he was at risk of losing his job.

Further, Kovoor testified that they were told that no chemists would be laid off. Kovoor testified that in 2015 after a labor management meeting, they talked with McCormick and Conerway, who said there was no problem with the chemists being laid off. Kovoor further testified that they were very short of chemists in the lab and they were doing a lot of overtime work. Kovoor testified that six or seven years before 2015, they used to have about 40 chemists but by 2015 they were down to 17 chemists due to attrition.

Kovoor testified that prior to receiving his layoff notice he had received no indications that he might be laid off. He further testified that neither DWSD nor any other entity associated with DWSD informed SCATA that chemists might be laid off.

Simoliunas testified that, prior to September 2015, no one from the City indicated that SCATA members could be laid off from work. He testified that the discussions they had with higher management always emphasized the need to hire more chemists. According to Simoliunas, there was never any indication that there would be layoffs of chemists because they were short on chemists. Simoliunas testified that when he was talking with Sue McCormick, about five months before he was laid off, she said he should not be concerned because he was not going to be laid off. Simoliunas also testified that James Urbanik, the plant manager, told him that there were no plans to lay off chemists. Simoliunas testified that he first learned that SCATA members were being laid off when he received the first letter listing the individuals scheduled for layoff. He was surprised when he received notice of his own layoff.

Conerway testified that in the labor-management meetings DWSD warned that although the Employer would prefer to reduce the work force through attrition, there "may be some" layoffs. Simoliunas, Kovoor, and Vannilam each attended some of the labor-management meetings. Conerway denied ever receiving anything in writing from SCATA asking to negotiate or discuss the PEP process. Conerway also denied ever telling Simoliunas, Kovoor, or Vannilam that there would not be any layoffs of chemists. She also denied ever hearing Sue McCormick, the DWSD director, or William Wolfson, the DWSD chief administrative officer and general counsel, say that there would not be any layoffs of chemists.[4]

Vannilam testified that he also had spoken casually to the assistant lab supervisor, Joseph Peindl about the situation and Peindl always told him that there would not be any layoffs for them.

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[4] We note that the ALJ found credible the testimony of Simoliunas, Kovoor, and Vannilam that Conerway had indicated there would be no layoff of SCATA members.

Kovoor also testified that Peindl told him that he and the other SCATA members would not be laid off because they had so much work and they were short on chemists.

Vannilam denied that he ever received notice that he could possibly be laid off as a result of the reorganization. He first learned of the possibility that he would be laid off when he received his layoff notice on September 30, 2015. Vannilam testified that he was surprised because he never thought there would be any layoffs and Jurban, Peindl, Conerway, and even McCormick, had said there would not be any layoffs from the analytical lab because the chemists were needed at that time. He testified that there was so much overtime in the analytical lab, that they were under the impression that no one would be laid off.

Michael Jurban was the sewage plant laboratory supervisor at the times relevant to this matter. The operations laboratory and the analytical laboratory were under his supervision. The SCATA bargaining unit was comprised of analytical chemists and water systems chemists working in the operations and analytical laboratories. Jurban confirmed Kovoor and Vannilam's testimony that the chemists in the analytical laboratory performed a lot of overtime work. Jurban testified that prior to October 2015, the analytical chemists were assigned weekly overtime as needed and that it could be worked on a voluntary basis. Jurban testified that, on average, 8 to 12 hours of overtime per week would be available for as many as three or four people.

Jurban also testified that he did not know that chemists were going to be laid off until the day the layoff notices were distributed. Although Jurban knew there were not enough of the new chemist positions for all the employees vying for those positions, he thought the employees who were not placed in the new chemist positions could be placed as special projects technicians or plant technicians.

H. The DWSD Reorganization

Conerway testified that the reclassification of positions at DWSD was prompted by Judge Cox's November 4, 2011 order to reduce the number of classifications in the department. Conerway acknowledged that the judge's order did not instruct DWSD to lay off employees.

Beginning in the fall of 2012, the Employer began planning to comply with Judge Cox's order to consolidate job classifications. DWSD, hired EMA, a private company, to conduct an analysis of DWSD and the way its employees worked. Based on that analysis, EMA made recommendations about how DWSD could become more effective and efficient through the reorganization. One of the initial recommendations from EMA was that DWSD substantially reduce its staff from approximately 2000 employees to 380. EMA led pilot teams, which included DWSD employees, on projects in various operations throughout DWSD. EMA made recommendations about how each operational unit should function, and which jobs should be in those units. EMA recommended processes that would increase the effectiveness of workflows. Some of the recommendations included combining tasks done by different classifications into a single classification. As a result, job classifications were restructured. It affected all 20 bargaining units at DWSD as well as non-union employees. The restructuring reduced the previous 257 job classifications to 57 new job classifications.

The pilot teams worked with human resources to write job descriptions and would review the new job descriptions prepared by human resources to ensure that the descriptions captured

everything the pilot teams intended to be included in those classifications. The job descriptions were then reviewed by the directors of the various areas within DWSD. Subsequently, binders containing the new job descriptions were provided to all union officials with the request that they review the job descriptions and let management know of any changes or concerns. Sometime during the fall of 2013, the new job descriptions were posted online; employees were invited to review them and give feedback. By December 30, 2013, the job descriptions for all the new classifications had been written and posted for review by employees by sometime in the fall of 2013, the job description for the new chemist position was available and posted for review by employees.

Some chemist duties were assigned to the newly created chemist position. Classifications represented by SCATA, classifications represented by the Senior Water Systems Chemists Association, and nonunion classifications were combined into the new chemist title, which DWSD assigned to the Senior Water Systems Chemists Association's bargaining unit. Other chemist duties that had been performed by persons in eliminated classifications were assigned to other newly created positions. As part of the reorganization 14 positions performing chemist duties were eliminated. Eleven former chemists were laid off.

Phase I of the placement eligibility process (PEP) covered non-union classifications, which were management or leadership employees. Phase II of the PEP dealt with employees in union-represented bargaining units and began in the spring of 2014.

A letter describing the PEP phase II was mailed to employees' homes, was emailed to employees, and was placed on the department intranet. The letter, dated May 8, 2014, advised employees that phase II of the DWSD Placement Eligibility Process was about to begin. According to the letter, as of Monday, May 12, 2014, eligible employees were able to obtain and submit placement assessments for consideration in the new DWSD job classifications that were represented by unions. It stated that "eligible employees" could "obtain and submit placement assessments for consideration in the new DWSD job classifications that are represented." It explained where employees could obtain the placement assessment, where they could find a classification design guide to assist them in determining which placement assessment form they were eligible to complete, and where they could obtain other information about the PEP. The letter also explained that "eligible employees" were required to participate in the process and that placement assessments must be submitted no later than 4:30 p.m. on May 26, 2014. It is to be noted that the letter does not define "eligible employees" nor does it expressly warn that employees who do not participate in the placement eligibility process could lose their jobs. It also does not warn that participation in the placement eligibility process does not guarantee continued employment. However, it advises that more information is available on the HR SharePoint portal. At that portal, employees could have obtained the description of the placement eligibility process document which provides "Eligibility does not guarantee placement into a new job classification."

Simoliunas testified that the other SCATA members filled out the self-assessment forms for the new chemist position. He testified that DWSD did not announce how the forms would be evaluated. The expectation of the SCATA membership was that completing the self-assessment form would result in their being sorted into one of the three different levels of the new chemist classification. They were under the impression that the new chemist classification was just going to be a consolidation of all the different levels of current chemist positions.

1. Special Projects Technician

On April 1, 2014, DWSD notified SCATA in a bargaining proposal that it had assigned the new job classification of special projects technician to SCATA. It also notified SCATA that the special projects technician classification was to be an "at will position" and was not necessarily exclusive to SCATA. The notice also indicated that the special projects classification would continue until, "in DWSD's judgment, there is no available work left to perform or it is no longer advantageous to DWSD's operations."

The special projects technician was a classification created to ensure that DWSD had sufficient personnel to handle all of its processes during the reorganization in case some of the planned changes to positions did not work out as expected. The special projects technician classification was offered to all the unions. The Employer intended the special projects technicians to remain in the same bargaining unit in which they had previously worked and to continue to perform work that they had done previously.

The special projects technicians that the Employer proposed to assign to SCATA were members of the SCATA bargaining unit who had worked as chemists but had not been assigned to the new chemist position. The special projects technicians who were to have been assigned to SCATA were to have been doing work that they were qualified for and already experienced in doing. This was discussed at the bargaining meeting between DWSD and SCATA on April 1, 2014. However, the SCATA representatives at the meeting were adamant about refusing to accept the special projects technician classification. No special project technicians were assigned to the SCATA bargaining unit.

Simoliunas testified that SCATA did not want the special projects technician in its unit because they saw it as contrary to PERA because the position was temporary. He explained that SCATA believed that accepting the special projects technician position into the bargaining unit would lead to SCATA's dissolution. Simoliunas testified that he told the Employer that they cannot make chemists into technicians and that doing so is "idiotic." According to Simoliunas, DWSD had proposed that all SCATA members would have been special plant technicians for nine or ten months before the selection process for the chemist position began. Simoliunas testified that the Employer also made some of the chemists in the plant, plant technicians. Simoliunas objected to the plan to make SCATA members special projects technicians in conversations with the DWSD director, Sue McCormick, with William Wolfson, and Robert Daddow of the Great Lakes Water Authority (GLWA). He also objected to plant technicians being assigned work that had previously been performed by chemists.

2. New Chemist Classification

At a meeting with SCATA, at some point on or before November 5, 2014, Schwartz, informed the SCATA bargaining committee that DWSD was doing a department-wide reorganization combining some 200 different job classifications into about 56 new job classifications, including the new chemist classification. In a November 5, 2014 email, Schwartz informed SCATA President, Simoliunas, that the new chemist classification had been assigned to the Senior Water Systems Chemists Association, the union that represented the senior chemists who supervised SCATA members.

To be qualified for the new chemist position, an employee was required to have a D license. However, the D license is not limited to professionally trained chemists. Individuals working in maintenance, engineering, or other disciplines may take the training courses for the state exam to get the D license. The job description for the new chemist position requires that chemists have "A valid Michigan driver's license and the ability to drive a motor vehicle on all terrain." The job description also states that for a level I, the lowest level of the new chemist position, the job requires the employee to collect the field samples.

3. The Placement Process for the New Chemist Classification

Jurban was employed by DWSD for over 42 years and worked his way up from water systems laboratory technician to sewage plant laboratory supervisor. Jurban testified that when he was at DWSD, he had been a member of the "current union that's challenging me now." He went on to explain that he had been a member of SCATA from the time he started at DWSD until he moved to the title of assistant sewage plant laboratory supervisor. Between 2012 and 2015, Jurban was not involved in any bargaining negotiations with SCATA and he did not sit in on any bargaining negotiations with the Senior Water Systems Chemists Association.

In June 2015, Jurban was the sewage plant laboratory supervisor and was over both the analytical and the operations laboratories. There were supposed to be two assistant sewage plant laboratory supervisors: one for the operations laboratory and one for the analytical laboratory. Joseph Peindl was the assistant sewage plant laboratory supervisor for the analytical laboratory but the position at the operations laboratory position was vacant. Jurban explained that since there was no assistant supervisor for the operations lab, he was indirectly the supervisor for that lab. Jurban testified that part of the reorganization plan was to allow all the chemists to perform tasks done in the analytical lab as well as those done in the operations lab. Although some of the tasks performed by the two labs were different, some tasks performed in the analytical lab, would sometimes overlap operations lab tasks. Jurban testified, however, that there are some tasks that are different for each area.

As of June 30, 2015, the organizational chart for the wastewater systems plant showed that in the operations lab, there were two senior water systems chemists, six water systems chemists, one assistant water systems chemist, one junior chemist, and one water systems lab aide. Jurban stated that at that time, in the analytical lab, there was one sewage plant laboratory supervisor, one assistant sewage plant laboratory supervisor, two senior lab chemists, 17 analytical chemists, one water system laboratory aide and one senior clerk. Between the two labs there was a total of 34 employees.

In 2015, Dave McNeely was the director of wastewater operations. McNeely would consult with Jurban regarding Jurban's staffing needs for the operations and analytical labs. As of June 2015, McNeely had only worked for DWSD for about three months. Since McNeely was not familiar with any of the individual chemists, he gave Jurban the task of recommending the people to be placed in certain chemist positions. When Jurban determined which individuals should be placed in chemist positions, he would make recommendations to McNeely. Jurban began placing people in August and September 2015. He received authorization to place 32 positions in operations or analytical lab assignments.

Part of the process that Jurban used to determine which applicant would be recommended was to determine the tasks to be done and then decide who among the available pool of applicants could perform those tasks. Jurban prepared a chart listing the individuals whom he believed could do the required tasks and gave that to McNeely. The chart indicated each listed employee's former title, new title, and general job functions. Jurban had supervised or managed every person on the list and completed the list indicating the skills that each person possessed. His decisions were based on knowing the employees for several years, knowing the reports they participated in, and receiving information through their direct supervisors. He did not consult with anyone other than McNeely at that stage and admitted that he did not make his decisions based on the self-assessment documents.

After employees were laid off, Jurban also made a similar list of the employees who were laid off on October 15, 2015. On that list, he also included "general job functions." Jurban testified that he did so because the list was his way of not losing track of how many people within a given area were laid off. Jurban testified that the job functions on that chart listed what those employees had been doing prior to the layoff. In explaining the reason for listing certain job functions on that chart, Jurban testified that the while the laid off employees may have performed other job functions in the past, the job functions listed were the ones that were still important. Jurban testified that he prepared the charts during July through October 2015.

4. Placement Considerations

Jurban testified that the work done in the analytical lab was quantitative chemistry. He testified that the tests performed were similar and explained that all chemists should be able to get a D license. He explained that a D license demonstrates a general knowledge of wastewater treatment plant operations. He testified that a D license includes an understanding of primary treatment, secondary treatment, the chemistry tests that are required for that, and the mathematics that are associated with it. He agreed that it was more valuable for chemist to have a D license than to not have one.

Jurban testified that Basma Saleh had been offered a position in the operations lab but chose to remain laid off. The chart prepared by Jurban indicates that Saleh's general job functions included purchasing, stock, and QA. When asked why those skills would be valued over metal testing or BOD testing, Jurban conceded that the chart was incomplete. He testified that Saleh also worked in the operations lab and had experience that was not reflected on the chart. However, Jurban testified that the information on the charts, indicating the job functions of each individual, is the information that he gave to McNeely.

Jurban admitted that he did not actually use the self-assessment forms when making his decisions. Although he spent a day at human resources reviewing the self-assessment forms and took notes on them and considered them in his recommendations, he picked the individuals based on his knowledge of them rather than the self-assessment.

Jurban testified that the minimum educational requirement for the new chemist position was a bachelors degree. Jurban acknowledged that there were no applicants for the chemist position in the analytical lab or the operations lab who did not meet the basic educational requirements. Therefore, he did not review their educational history on their self-assessment forms.

Jurban acknowledged sending an email to Mary Lynn Semegen suggesting that Basma Saleh talk to her. Jurban testified that he sent the email to Semegen because Saleh contacted him by email indicating that she had heard that there might be an opportunity there. He forwarded her email to Semegen. Jurban testified that he would do that for anybody. When asked why he didn't do that for everybody, Jurban responded that not everybody came to him for assistance. Jurban testified that he did not recommend Kovoor to Semegen because Kovoor did not come to him for assistance in finding a position. Jurban denied that Semegen ever reached out to him to ask which candidates she should consider for the open position in her plant in October 2015. Jurban testified that the only person he recalled sending to Semegen was Saleh.

Jurban acknowledged that Vijay Mahendra and Jose Lukose, continued to work as chemists in the analytical lab and were never laid off. Jurban testified that both of them had worked in GCMS and he had limited people with that skill set. Jurban testified that neither Simoliunas, Vannilam, Kovoor, nor Cicy Jacob had ever done any computer reporting or GCMS work.

Jurban denied that his failure to recommend Jacob, Vannilam, Simoliunas, and Kovoor was because of their previous complaints about him. He also denied that it was because of their complaints to the EPA or their complaints to the MDEQ. He testified that those matters were not a factor in his decision.

Jurban testified that between 2012 and 2015, the only two chemists who were suspended were Simoliunas and Kovoor. He acknowledged that both of those suspensions occurred well over a year prior to October 2015.

I. Layoffs

On September 24, 2015, Conerway sent a letter to Simoliunas, informing SCATA that two of the SCATA job classifications had been identified for elimination as of October 13, 2015. The letter further informed SCATA that an employee working as an analytical chemist, Simon Chackumkal, and two water systems chemists Patrice Hopkins and Simoliunas would be "displaced" effective October 13, 2015, as a result of the elimination of their job classifications. On September 29, 2015, Conerway sent an additional letter to Simoliunas stating that the analytical chemist and water systems chemist classifications were identified for elimination beginning October 23, 2015. The September 29 letter listed analytical chemists Simon Chackumkal, Cicy Jacob, Rosily Jais, Lissy Joseph, Bindu Kallumkal, Jacob Kovoor, Betty Korula, Annie Parayil, Abdul Rahman, George Vannilam and water systems chemists Anitha Kuriakose and Basma Saleh as employees who would be displaced on October 23, 2015, as the result of the elimination of their job classifications. Conerway sent a third letter to Simoliunas on September 30, 2015, which was revised to state that the analytical chemist and water systems chemist classifications had been identified for elimination beginning October 15, 2015, and that the employees identified on the September 29 letter as being displaced would be displaced effective October 15, 2015. Conerway testified that several of the individuals listed on those letters were recalled to new positions. However, she testified that she did not recall having any role in determining which individuals would be laid off or which would be recalled. Conerway testified that about a dozen employees in the various chemist titles were involuntarily laid off. Conerway acknowledged that the only chemists who were laid off were chemists in the wastewater plant. Chemists working in the freshwater plant were not laid off.

Conerway testified that in preparation for the layoffs in 2015 she followed the provisions of the CET rather than the Master Agreement.

1. George Vannilam

George Vannilam was first hired by the Detroit Water and Sewerage Department on January 23, 1989. His most recent position with DWSD was as an analytical chemist. At the time of his layoff, he was the second most senior analytical chemist. Vannilam has a masters degree in chemistry, and a masters of business administration with hazardous waste control as one of the core subjects. He also holds a professional certification called certified hazardous materials manager at the master level. Additionally, Vannilam teaches college chemistry courses and has done so for more than 35 years. While employed by DWSD, Vannilam was never suspended or disciplined and had no attendance issues.

At the time of his layoff from DWSD, Vannilam was the vice president of SCATA. He was first elected as a SCATA officer in 2011. In that capacity he would lead the membership in various activities, communicate to the membership about Union functions, and take part in Union activities such as bargaining or the grievance procedure.

Vannilam's job as an analytical chemist included analyzing wastewater treatment plant samples and industry waste samples collected from various industries in and around Detroit. Vannilam denied that his job duties ever required lifting over 20 pounds. However, Vannilam testified that occasionally, for a few minutes, it may be necessary to lift samples in 4- or 5-gallon containers which may weigh close to 20 pounds or so. He denied that there was ever a time in which all analytical chemists were lifting about 20 pounds at the same time. He also testified that he never drove as part of his job. Vannilam testified that in 2014 and 2015, he worked the day shift, starting around 7 a.m. and working until around 3:30 p.m.

Vannilam testified that the duties of the new chemist classification were similar to the job duties he performed as an analytical chemist. He believed he exceeded the requirements for the new chemist position. Vannilam testified that he completed the self-assessment form believing that he would be considered for a chemist II or III. However, he explained that he did not think the water systems chemists were doing work similar to that of the new chemist classification.

Vannilam listed Peindl as his supervisor on his self-assessment form. However, Vannilam's self-assessment form was reviewed by Kuriakose Cheeramvelil, whom Vannilam had described as "a senior analytical chemist who is not even supposed to be a chemist. . . Because he doesn't meet the minimum qualifications required to be a chemist." Vannilam had applied for the supervisory position in the analytical lab to which Cheeramvelil was promoted. Cheeramvelil also completed his own self-assessment for the new chemist position. At the time of the hearing, Cheeramvelil was working for the Employer in the new chemist I position.[5] Vannilam did not

[5] It appears that Cheeramvelil had a conflict of interest which should have precluded him from reviewing the self-assessment forms of the other applicants for the new chemist position. However, as previously noted, it was Jurban, not Cheeramvelil that was responsible for recommending which of the wastewater plant chemists should be placed in the new chemist position and Jurban indicated that he did not pay much attention to the information on the self-assessment forms.

know until the documents were reviewed in relation to this action that Cheeramvelil had reviewed his self-assessment.

Vannilam initially testified that he had not had any hostile interactions with Cheeramvelil. However, a few days later, Vannilam testified that his relationship with Cheeramvelil was not good because Vannilam had made many complaints about Cheeramvelil to Jurban and Peindl. Vannilam objected to Cheeramvelil assigning chemistry work to other members of the SCATA bargaining unit when the assigned work was something that Vannilam believed Cheeramvelil did not understand. Vannilam testified that he began making those complaints after Cheeramvelil began assigning chemistry work to other chemists. Vannilam testified that he also complained about Cheeramvelil's involvement in the explosion in the lab and filed a report with MIOSHA involving that incident. Vannilam complained about Cheeramvelil's involvement in the explosion because, according to Vannilam, Cheeramvelil had been notified of the first explosion prior to the time that the second explosion occurred. Vannilam denied filing any grievances regarding Cheeramvelil.

Vannilam learned he was being laid off when he was called to the office of the lab on September 30, 2015 and given notice.

Jurban testified that he did not recommend Vannilam for placement in the new chemist position because there were several people at the analytical lab that had a similar skill set and he could only keep so many. Jurban testified that he selected some people who already had the same skill set as Vannilam, but they also had other skill sets.

On the chart that he prepared listing the general job functions performed by the individuals who were laid off, Jurban listed Vannilam's general job functions as solids, phosphorus, and cyanide. Jurban testified that he did not recall whether Vannilam had trained Cheeramvelil on PCB. Jurban admitted that Vannilam also had experience doing BOD testing, as well as oil and grease.

Vannilam testified that he had experience in other job functions besides those listed by Jurban. He was trained and had functioned as a chemist in all areas in the analytical lab, except the spectrum analysis for heavy metals, which had been discontinued. He also had experience testing for PCBs. Vannilam explained that the PCB analysis is done by the workgroup called the trace organics group and he worked in that group for five or six years analyzing PCBs. Vannilam testified that when Cheeramvelil worked in the trace organics group, he trained Cheeramvelil to do PCB analysis. Vannilam testified that at one time, the lab had a policy to cross train everyone in each area, so everybody was sent to each group. That was how Vannilam received training in ICP. He also testified that he worked in the QA sections, in oil and grease, and in the BOD group. Vannilam testified that he had worked for a long time performing the oil and grease tests and had done those tests many times. He testified that he also worked in a position doing quality assurance for DWSD for a month or so.

Jurban denied stating that a factor in his recommendation of Cheeramvelil was that Cheeramvelil was a professor at Wayne County Community College. Jurban acknowledged knowing that Cheeramvelil was a professor but denied that Cheeramvelil's teaching was a factor in his recommendation. Jurban also acknowledged that he knew Vannilam was a chemistry professor at Wayne County Community College.

Vannilam testified that since his layoff, he had received no offers from DWSD to return to work.

Vannilam believed he had a more diverse range of work experience than one of the individuals who had been hired in the new chemist classification. He also believed that he had more experience and was more capable of doing better analysis than a second individual who had been hired in the new chemist classification. Vannilam also believed that his qualifications were better than those of a third individual who had been hired in the new chemist classification.

Vannilam testified that during the period of September and October 2015, when layoff notices were issued, he was never informed that there were open positions at the freshwater treatment plant. Vannilam testified that prior to his last day of work, there were no notification about openings at the freshwater plant or other work. On his last day of work, he did not know that he could apply for a chemist position in another DWSD department.

2. Cicy Jacob

Cicy Jacob was a member of SCATA and is married to Jacob Kovoor, the Secretary of SCATA. She worked for DWSD for 24 years, having been hired there on September 30, 1991. Her most recent position was as an analytical chemist in the wastewater plant laboratory. In that position she gained experience in working on the instrument dish and metals analysis; mercury analysis, which was like ICP; and atomic absorption. She was also experienced with all the chemistry and bacteria work. She has a bachelors degree "with chemistry, physics and math and a masters degree of technology for science and chemistry." She also has a wastewater operator D license, an environmental analytical certification from the National Registry of Certified Chemists, and a laboratory analyst grade one certificate from the Michigan Water Environment Association. Jacob testified that the D license is given by the State of Michigan Department of Environmental Quality and has a wastewater operator's license. At the time of her layoff, she was sixth in seniority out of 17 chemists. Jacob never had any disciplinary issues while employed at DWSD, was never suspended, and never had any attendance issues. Between 2012 and her layoff in 2015 Jacob did not hold any office with SCATA. She was laid off on October 14, 2015.

At the time of the DWSD reorganization she filled out the self-assessment form. She expected to be placed in a chemist II position given her licenses and certifications. It was her understanding that the self-assessment was to enable her to be evaluated based on their criteria and her credentials to determine whether she would be a chemist at level I, II or III.

Jacob learned that she was to be laid off on September 30, 2015, when her assistant lab supervisor, Joe Peindl gave her a letter saying that she would be laid off in two weeks' time. Before that she had no knowledge that she or any of the other chemists could potentially be laid off. Jacob felt she was more qualified than some of the individuals who were not laid off because most of them, unlike her, did not have licenses or masters degrees. She was never told why she was selected to be laid off.

Jacob testified that one of her former coworkers, Rosily Jais, had been recalled to work by the City, though Jais was less experienced than Jacob. Also, Jacob had trained Jais to perform the analysis work. Jacob contacted Conerway and Mary Lynn Semegen, a manager in the DWSD water quality division, asking to be considered for a position or to be recalled to a position.

On October 12, 2015, Jacob sent an email to Semegen asking to be considered for a water quality chemist opening and noting her credentials. Semegen informed her that the job had already been filled. Also, on October 12, 2015, Jacob sent a correctly addressed email to Conerway asking that she be considered for the water quality chemist opening at Water Works Park and listing her credentials. Jacob did not receive a response from Conerway. Jacob acknowledged that she had not applied for other positions with DWSD since her layoff and had not applied for positions with Great Lakes Water Authority.

When asked why he did not recommend that Jacob be placed in the new chemist position, Jurban testified that it was matter of having a balanced team with as much diversity as he could achieve in the operations lab and in the analytical lab. On the chart that Jurban prepared showing the general job functions of the individuals who had been laid off, Jurban only indicated oil and grease as Jacob's job functions. When questioned about Jacob's past work as a quality control chemist, performing quality analysis, and BOD testing, Jurban admitted that Jacob had BOD experience, but explained that, given the chart, it was not possible to list the huge array of job skills and he was looking at those skill sets that were still important in the lab.

Jurban acknowledged that Jacob had filed a grievance over being removed from quality assurance testing and that she had filed a complaint with either the EEOC or MERC regarding the issue. Jurban also acknowledged that Jacob had performed trace metal and mercury analysis in the past. Jurban testified that he did not think it was important to list those skills on the chart, since he had already selected other employees who would be able to do those kinds of tests. Jurban also acknowledged that Jacobs possesses a D license. Jurban acknowledged that the skills listed on the chart were the ones that he discussed with McNeely. Jurban testified that the skills listed on the chart identified the skills of those individuals that were still important to maintaining laboratory operations.

3. Jacob Kovoor

Kovoor was hired by DWSD in October 1991. He worked for DWSD until October 15, 2015. As secretary of SCATA, Kovoor participated in collective bargaining between 2009 and 2015.

Kovoor's most recent position was as an analytical chemist. He worked in the analytical lab that is part of the wastewater treatment plant. His supervisor was Kuriakose Cheeramvelil. At the time of his layoff, Kovoor was seventh from the top in seniority. He has a bachelors degree in chemistry and two years of graduate study in computer science. He has also received a National Registry of Certified Chemists Association certification and a laboratory analyst grade one certification from the Michigan Environmental Water Association. He also has a D license from the Michigan Department of Environmental Quality, for which he received congratulations from the DWSD director, McCormick by letter dated August 21, 2012. Kovoor testified that according to the new DWSD management guidelines, it was necessary to have a D license to advance to the chemist II position. For that reason, he got the D license. Kovoor has expertise in instrumentation analysis and used the ICP machine to analyze trace metals. He did the Mercury analyzer, performed troubleshooting for the instruments, and did all the analysis in the lab except for the GC analysis.

Kovoor learned about the possibility of reclassification in May 2014. The Employer put the self-assessment information on the website, and he applied for the new chemist position after he was told about it by a coworker. Kovoor learned about the reclassification self-assessments from his coworkers.

Kovoor considered the duties of the new chemist position to be similar to those of an analytical chemist. He believed that he had the qualities for the new chemist position and that he met and exceeded the requirements for the chemist level II position. Kovoor did not believe he was at risk of losing his job because he had a D license, he had 24 years of experience as an analytical chemist, he had the relevant certifications, his attendance was great, and he did not have any disciplinary record within the 12 month period mentioned on the self-assessment forms.

Kovoor identified two employees with less experience than himself who were permitted to perform the GC analysis. Kovoor had complained to Jurban, and to Peindl about being passed over for assignments to perform the GC analysis work, but his complaints "fell on deaf ears."

Kovoor had also complained to Peindl in 2011 about not getting training on the LIMS system. Peindl replied on March 8, 2013 to Kovoor's March 7, 2013 email requesting training on the LIMS system. Peindl denied Kovoor's request for training explaining that "at the present time it would not be economically sensible to train people on obsolete software. However, when we get our new LIMS system – which is in the purchasing process – everyone in the lab will be trained in the new LIMS." At the time of Kovoor's layoff, the same LIMS software was still in use.

Jurban admitted that Kovoor had asked to be trained on the LIMS system three or four years ago and confirmed that he did not assign Kovoor to be trained on the LIMS because they were hoping to get a new LIMS system that would allow them to train more people on it. He testified that there was no tutorial that would permit them to train someone on the old system. However, by the time of the hearing, DWSD had obtained the new LIMS system and planned that all employees would be trained.

Kovoor's self-assessment form was received by the Employer on March 23, 2014. His self-assessment form was reviewed by Cheeramvelil on July 31, 2014 on behalf of management.[6]

When Kovoor was asked at the hearing why he indicated that he had a year of experience in quality assurance/quality control, Kovoor testified that he did all the quality control while he was doing analysis of ICP and that he did quality control check standards. He further testified that for six years he was in charge of quality control for the ICP analysis.

Kovoor testified that he believed Cheeramvelil untruthfully indicated that he did not have the required quality control experience because of Cheeramvelil's involvement with the explosion and the overtime issue, both of which the SCATA officers had complained about.

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[6] Cheeramvelil also completed his own self-assessment for the new chemist position. Cheeramvelil was hired for the new chemist position for which both Kovoor and Vannilam had applied. It appears that Cheeramvelil had a conflict of interest which should have precluded him from reviewing the self-assessment forms of the other applicants for the new chemist position. However, it was Jurban, not Cheeramvelil who was responsible for recommending which of the wastewater plant chemists should be placed in the new chemist positions. Additionally, Jurban indicated that he did not pay much attention to the information on the self-assessment forms.

Kovoor testified that no disciplinary action was taken against him within the 12 months prior to his layoff. However, within the prior two years he had received a three-day suspension from Jurban.

Kovoor contended that when he represented a SCATA member at a meeting with the senior chemist, they fabricated a charge against him. He met with the senior chemist to object to the unfairness of the bargaining unit member's workload. He asked that the bargaining unit member be given extra time to finish the work because the work assigned to her could not be finished within the time allotted. The senior chemist disagreed and then gave Kovoor a three-day suspension for insubordination, alleging that Kovoor had become loud and disruptive. SCATA grieved the discipline on Kovoor's behalf. On February 19, 2013, SCATA filed a third step grievance on Kovoor's behalf, alleging that the Employer's action violated the just cause provisions of the Master Agreement. On March 1, 2013, Conerway sent a response to SCATA denying the grievance. Conerway's letter also noted that the City Employment Terms, rather than the Master Agreement, set forth the terms and conditions of employment. The grievance was scheduled for arbitration in 2013 but was stayed as the result of the City's bankruptcy and was never adjudicated.

Kovoor testified that he learned he was being laid off on September 30, when he was called into the conference room by Peindl and was given a layoff notice. He testified that he was both surprised and shocked by the layoff and subsequently asked Simoliunas to file a grievance and arbitrate the layoffs.

Kovoor identified two of his former coworkers who were hired for the chemist position that he had applied for. He asserted that he was more qualified than either of them because he has a D license and neither of them had a D license. He also testified that he trained one of them on all the instruments because he was senior to her and she did not have any analytical certifications like he has. Both individuals previously worked as analytical chemists at DWSD.

Kovoor testified that no one from DWSD told him why he wasn't hired instead of those who were. After his layoff he applied for three positions: he applied twice for a water systems technician at DWSD and later for a chemist position with Great Lakes Water Authority in May 2016. Kovoor received confirmation that his application had been received but he was never called for an interview. Kovoor was never provided with an explanation as to why he was not hired. Kovoor asserted that he was more than qualified for the water systems technician positions.

Kovoor testified that he had many negative interactions with Jurban, including SCATA's involvement in the aftermath of the explosion and regarding the overtime issue.

When Jurban was asked why he did not recommend Kovoor for a chemist position, he testified that they needed people with several skill sets. Jurban acknowledged that on the chart that he had created listing the skills of the employees who were to be laid off, the only skill he listed for Kovoor was BOD. According to Jurban, prior to his layoff it was Kovoor's job to perform tests in the BOD lab. Jurban explained that he had left Kovoor in the BOD lab because Kovoor had previously written to the director and objected to performing other assignments beyond the BOD lab. Jurban believed that Kovoor only wanted to do BOD's.

Jurban admitted that when he created the chart that lists the skills of the employees who were laid off, he did not refer to anything but was just drawing on his own memory. Jurban

acknowledged that Kovoor had worked in metal analysis prior to 2013 and had six years of experience in that field. However, Jurban stressed that because Kovoor had not worked on metal analysis in the three years since he began working on BOD's, Jurban did not believe that Kovoor had the current skill set to perform the test done by the metal group also known as the ICP group. Jurban acknowledged that Kovoor had been assigned to the metals group in May 2005. Jurban acknowledged that Kovoor had been removed from the ICP group but could not recall whether Kovoor filed a grievance regarding that matter.

Jurban testified that he may have known that Kovoor possessed a D license. He acknowledged that the D license was important in the new organizational development program for advancement within the current chemist series, and individuals who did not have a D license were allowed up to two years to obtain it. Jurban admitted that he recommended individuals without a D license for placement in the new chemist position. Jurban testified that having a D license demonstrates that the person has knowledge of wastewater treatment processes.

Jurban testified that the main factors that stood out in deciding that Kovoor would not be selected was that he had done only BOD for about three years and he had expressed unwillingness to be trained in other things. Jurban indicated that Kovoor's attitude was part of the consideration, not just Kovoor's actual skills.

4. Saulius Simoliunas

Simoliunas first began working for DWSD as a chemist in 1981. At that time, he performed research and was not working in the wastewater plant. He was moved to the plant about 10 years prior to his layoff. He last worked in the operations lab. Simoliunas was elected president of SCATA, for the second time, in early 2009. Simoliunas was laid off on October 14, 2015. After Simoliunas's layoff, he did not receive any offers to return to work at DWSD or at Great Lakes Water Authority.

Simoliunas did not fill out a self-assessment form. He didn't believe he needed to fill out the self-assessment because he believed he had received an accommodation as a result of his federal court action against DWSD.

Simoliunas told Jurban that he would not fill out the self-assessment form, but Simoliunas did not explain his reasons for refusing to complete the form and Jurban did not ask for his reasons. Simoliunas wrote to Conerway in human relations and to Wolfson, DWSD's chief operating officer, saying that he didn't have to fill out the self-assessment because they had to accommodate him on the day shift in accordance with the agreement in court.[7] Simoliunas testified that the only response he received to that correspondence was notice of his layoff. Simoliunas testified that with respect to the accommodations to which the Employer had agreed, he was never required to drive to Zug island because they collected much more than 20 pounds and he had a 20-pound

[7] The Employer had previously agreed to accommodate Simoliunas's medical restrictions by keeping him on the day shift, not requiring him to work overtime, not requiring him to handle chlorination or de-chlorination and not requiring him to lift in excess of 20 pounds. However, Simoliunas was required to drive to Zug Island, perform analyses and collect samples. With these accommodations, there were no changes to Simoliunas's salary, benefits, title, or work hours.

weight restriction. Simoliunas testified that he stopped driving when he turned 80 years old in 2013.

The job description for the new chemist position requires that chemists have "A valid Michigan driver's license and the ability to drive a motor vehicle on all terrain." The job description also states that for a level I, the lowest level of the new chemist position, the job requires the employee to collect the field samples.

Jurban testified that although Simoliunas did not fill out a self-assessment form, he did review Simoliunas's qualifications. Jurban had not been told that he could or could not hire someone who had not filled out the self-assessment form. Simoliunas failure to fill out the form was a consideration for Jurban, but it was not critical to his decision. Jurban testified that Simoliunas was less qualified than the individuals he recommended for the chemist position.

Jurban believed that Simoliunas was not physically able to do all the required functions in the lab. The lab's operations are 24 hours a day and seven days a week. Employees are required to work multiple shifts and must also have the ability to drive. Jurban was aware of Simoliunas' agreement with the City that did not require him to have a driver's license and permitted him to work only the day shift. Jurban testified that the analytical lab only operated five days a week, while the operations lab operated 24/7. Jurban explained that if a chemist assigned to the operations lab is off work, that person's position must be filled. If an employee was working on the first shift and the second shift employee did not report for work, the first shift employee was obligated to continue working through the second shift. Jurban testified that the fact that Simoliunas could not perform all the actual duties of a chemist was one of the factors considered in determining whether Simoliunas would be selected to fill one of the positions.

Jurban acknowledged that Simoliunas performed analytical work for 25 years and then worked in the operations lab for the remainder of his time with DWSD. Jurban also acknowledged that if Simoliunas worked in the analytical lab, day shifts would have been available for him as the analytical lab only worked on the day shift. Jurban also acknowledged that they limit which chemists in the analytical lab drive and that there were chemists working in the analytical lab who did not drive. Jurban then testified that he had not recommended Simoliunas for an analytical chemist job because he had not recently worked at the analytical lab and hadn't developed skill sets required at the analytical lab. However. Jurban acknowledged that he was sure Simoliunas could have learned to do the work in the analytical lab. Jurban further acknowledged that another employee had previously worked in the operations lab and had no prior experience in the analytical lab, but now works in the analytical lab.

Jurban had given Simoliunas a three-day suspension regarding an incident that had occurred a few years previously. SCATA filed an unfair labor practice charge in 2012 to challenge the suspension. The matter was heard by ALJ Stern, who also heard this matter, and was subsequently dismissed.

J. Layoff Grievance and Special Conference

After receiving the letter from DWSD giving notice of the layoffs from the SCATA bargaining unit, Simoliunas attempted to file a grievance regarding the layoffs on October 1, 2015. He attempted to send an email to Conerway grieving the layoffs and asking that they be rescinded.

Although Simoliunas had sent grievances by email in the past, his normal procedure for filing a grievance was to mail it and then hand-deliver it to the human resources department to get a copy time-stamped at the point of receipt. However, he sent the grievance of the layoffs by email because he had such a short time frame; the layoffs were scheduled for 13 days from the date of his receipt of the notice. When he sent the grievance by email to Conerway, he omitted Conerway's first initial from her email address. Although Simoliunas believed he had sent his correspondence to Conerway's correct email address, evidence produced at hearing established that her actual email address contained her first initial. Conerway denied ever seeing that email prior to the hearing in this matter.

Simoliunas, Vannilam, and SCATA's attorney, Mr. Nasser, met with DWSD representatives Conerway and Wolfson for a special conference on October 7, 2015. Kovoor testified that he was under the impression that the meeting between SCATA officers and DWSD representatives had been called because of the grievance he believed that SCATA had filed.[8] Kovoor acknowledged at the hearing that SCATA did not provide a written grievance to DWSD at the meeting. During that meeting, the SCATA representatives each argued that the layoffs should be rescinded and verbally requested arbitration, but they did not submit a written request for arbitration.

Conerway testified that her role in DWSD included processing grievances. She testified that if a union filed a grievance, the Employer's response would depend on what level the grievance was at and there was usually a hearing or a meeting with the union to discuss the matter. Conerway explained that if a union is unhappy with the Employer's response, the union can request arbitration. In that case, the City may respond by suggesting that the parties get together to prepare a list of arbitrators or the City may fail to respond. If the City does not respond, the union can move the arbitration forward on its own.

At the special conference, Conerway acknowledged that the SCATA representatives wanted to discuss the layoffs. Simoliunas objected that 50% of the chemists were laid off and that he had been told that the chemist title had been eliminated. Simoliunas stated that SCATA wanted management to rescind the layoff notice and give the jobs back to the chemists. However, he did not demand to bargain over the impact of the layoffs. Kovoor argued that he was more qualified than the employees who were being retained in the lab. He further noted that he had a D license and had it from 2012 onward, that he had the National Registry of Certified Chemists Certification, and that he has the Michigan Water Environment Association Certification. Kovoor also stated that the same thing applied to his wife, Cicy Jacobs. He pointed out that she also had 24 years of experience in the analytical lab and had a D license and was a certified environmental analytical chemist and that she is also certified by the Michigan Water Environment Association.

Kovoor complained that the people on the layoff list were from South India and were targeted and discriminated against even though they all had at least 20 years of experience and were more qualified than the people who were retained. Kovoor also stated that the employer was

[8] Under the CET, which was in effect at the time of the Special Conference, "Special Conferences for important matters including problems of health and safety and periodic discussions of substantial issues which are of concern to Union members may be arranged upon mutual agreement with the Union President and the Department head or his/her designated representative upon the request of either party." City Employment Terms for All Non-uniform Employees, Article 11.

targeting SCATA officers, noting that he was the SCATA secretary and George Vannilam, the SCATA vice president was also laid off. Moreover, Kovoor stressed that two junior analytical chemists were still employed when the SCATA officers had been laid off.

At that meeting, Vannilam asked Conerway how she justified those layoffs and objected that the reason for the layoffs had not been explained to them. He said that they had previously been meeting every month, but no hint of the layoffs had been given to them. He insisted that the laboratory's administration had indicated that everyone would be retained. However, Vannilam protested that only a few people were retained while most of the well-qualified chemists were laid off. Vannilam went on to protest that they had not been given any objective criteria for the layoffs and nothing had been communicated to them to allow them to determine that objective criteria were being followed. Vannilam further objected that the Employer had retained unqualified or underqualified people and laid off those who were qualified to do the work. Vannilam asked the management representatives at the meeting to tell them what criteria had been followed in selecting people who were laid off and why layoffs were needed since a great deal of overtime was being given to the employees. Vannilam said that the Employer had not given any basis for the layoff except the abolishment of the job classification.

Simoliunas also protested that the Employer had never said that the workforce would be reduced. He acknowledged that the Employer said they were eliminating a job title.

Wolfson promised that the Employer would investigate the issues raised by SCATA. He then asked the SCATA officers what else they would like from the Employer. Simoliunas responded that they wanted the Employer to look at all the things SCATA had brought up. Kovoor also asserted that there had been prevalent favoritism in the water department selection process and that no objective criteria had been used. Vannilam requested that the Employer look at the qualifications that an employee must have to work as a chemist and look at the education of the chemists that had been retained. He asserted that he had brought that concern to management many times but had not been given an answer. He also protested that no one in management would listen to them.

Simoliunas indicated that since they were going to be laid off the following Thursday there wasn't much time and that meeting was the "last grievance" meeting. Simoliunas asserted that they needed to choose an arbitrator by the following Tuesday because Wednesday was the last day of work for those who were being laid off.

Vannilam also asked to be told the criteria used in selecting individuals to be laid off. Conerway responded that everyone who was in the classification of analytical chemist or water systems chemist was laid off. Vannilam reiterated his request to know how the Employer distinguished between which employees were laid off and which ones were not. Conerway then differentiated between the choice to lay off workers and the choice to select workers for placement in an ongoing position.

Vannilam responded that the Employer indicated that employees would be told of any assessments of them that had been made, but none of the employees were aware of how they had been evaluated. Vannilam also asserted that the Employer had indicated that if there was disagreement about an employee's assessment it could be brought up for further evaluation or discussion but SCATA was not aware of that happening.

Kovoor further asserted that South Indian chemists were targeted and that that he and his wife were especially targeted because of their marital status, though they were more qualified than employees who had been retained. He further contended that the selection process had been tainted with favoritism. Vannilam contended that the selection process was also affected by nepotism and Kovoor asserted that it was affected by racism. Kovoor went on to argue that all the chemists who were born in America were retained but the naturalized citizens were thrown out. He contended that all of those laid off were from South India. Simoliunas asserted that some of those laid off, including himself, were filing complaints with the Michigan Department of Civil Rights.

The special conference ended after Wolfson reiterated his promise to investigate the issues raised by SCATA.

At no point in the special conference did any of the SCATA representatives request to bargain over the issues they raised, nor did they provide the DWSD representatives with a written grievance or a written request for arbitration.

On October 20, 2015, Simoliunas sent another email to Conerway at the wrong email address. With that email, he attempted to request arbitration of the grievance he had intended to file with the October 1 email. Conerway denied ever seeing the October 20 email prior to the hearing in this matter. Conerway also identified the letterhead on which grievances from SCATA were normally received. She testified that she did not receive a letter on SCATA letterhead demanding to arbitrate a grievance regarding the layoffs of chemists in October 2015. Conerway further denied having received a list of proposed arbitrators from SCATA or from the American Arbitration Association regarding a demand to arbitrate by SCATA with respect to the layoff of chemists in October 2015.

Conerway further testified that in October, November, and December 2015, she was the person responsible for administering grievances for DWSD and she did not receive a written grievance from SCATA, or its attorney, demanding to arbitrate the layoffs of chemists in October 2015. She further testified that her staff did not usually receive grievances from unions and that the grievances would usually go to her. However, she explained that if a grievance or arbitration demand had been received by someone else, her staff would have given it to her. Conerway testified that since she began working in DWSD human resources in 2012, DWSD had not told any union that it would not arbitrate a grievance.

The grievance procedure established by the CET provides as follows:

> **9.** GRIEVANCE AND ARBITRATION PROCEDURES
>
> A. Should any dispute arise between the City and the Union concerning the application or interpretation of this CET, an earnest effort shall be made to settle such dispute promptly in accordance with the following Grievance Procedure:
>
> Step 1. Employee, Supervisor and Steward
>
> Any employee having a grievance may report the same to his Supervisor and an endeavor shall be made to adjust the grievance between the employee and the Supervisor. If a satisfactory adjustment is not obtained, the employee may request a Steward, and the three

will attempt to resolve the matter. Where the matter involves imposition of disciplinary suspension or above, Step 1 does not apply and grievances shall be filed at Step 2.

Step 2. Department Head Level

If a satisfactory adjustment is not obtained under Step 1, the grievance shall be reduced to writing on a standard grievance form setting forth all facts believed to be relevant to the dispute, and the grievance shall be signed by the employee or employees involved. The written grievance must then be submitted to the Department Head. A meeting shall be held at a mutually convenient date and time to discuss the grievance. Up to two (2) Union Representatives, other than the Grievant, may attend the Step 2 meeting. Any resolution reached at this meeting shall be reduced to writing. The Department Head shall endeavor to furnish the Union with his/her written decision within fifteen (15) working days of the Step 2 meeting, excluding Saturdays, Sundays and holidays.

Step 3. Labor Relations Division Level

If a satisfactory adjustment is not obtained under Step 2, the Union may request a Step 3 meeting with the Labor Relations Director. Such appeal and request for a Step 3 meeting must be submitted in writing to the Labor Relations Director within five (5) working days from the receipt of the Department Head's Step 2 answer. Not more than two (2) Union Representatives may attend the Step 3 meeting, and the Labor Relations Director may designate members of his staff to represent the City. Any resolution reached at this meeting shall be reduced to writing. The Labor Relations Director or his or her designee shall endeavor to furnish the Union with his/her decision within thirty (30) working days of the Step 3 meeting.

Step 4. Arbitration

A. If a grievance is not settled after it has gone through Step 3 of the Grievance Procedure, the Union must file a written notice with the Labor Relations Director of appeal and intent to submit the dispute to arbitration. The Notice of Intent to Arbitrate must be filed within fourteen (14) calendar days of its receipt of the Labor Relation Director's Step 3 answer. If the Union fails to request arbitration in writing within this time limit, the grievance shall be deemed settled on the basis of the Step 3 answer and not eligible to go to arbitration.

** *.

B. A grievance shall be deemed untimely, settled and withdrawn unless a written Step 2 grievance is filed with the Department Head within five (5) working days (excluding Saturdays,

> Sundays and holidays) after the Grievant first knew, or should have known, of the facts giving rise to the grievance. Grievances concerning a continuing practice or continuing act of the Employer must be grieved within ten (10) working days of the date the Grievant first knew, or should have known, of the act or practice. Any extensions of these time limits must be agreed to by the City in writing.
>
> C. In the event the Employer fails to respond to a grievance or schedule a meeting within the time periods provided in any steps of the Grievance Procedure, said grievance shall be denied and the Union may make a written request that the grievance be referred to the next step.

We note that at step two of the CET grievance process, the grievance must be reduced to writing and submitted to the department head. If it is not resolved at step two, the department head must provide the union with a written decision. Step three of the process is handled by the labor relations division. The appeal must be submitted in writing with a request for a step three meeting. If the union is not satisfied with the step three decision, the union must file a written notice of appeal and intent to submit the dispute to arbitration with the labor relations director. There is no evidence in the record that SCATA submitted a written grievance or a written notice of intent to arbitrate a grievance regarding the layoffs of SCATA bargaining unit members.

K. Hiring by DWSD after October 2015

1. Mary Lynn Semegen

Mary Lynn Semegen became employed with DWSD in 1985 and is currently with the Great Lakes Water Authority as a water quality manager at the Waterworks Park plant. When she was last employed by DWSD, she worked at the Waterworks Park plant as a water quality manager. Semegen began working for DWSD as a microbiologist. She subsequently had the positions of senior chemist, senior principal chemist, and principal analytical chemist. She moved from that position to water quality manager. Semegen testified that she had been a member of SCATA and had also been a member of the Senior Water Systems Chemists Union.

Semegen has worked at the Waterworks Park plant, which handles freshwater treatment, since 2007. Prior to the reorganization, Waterworks Park had two analytical chemists who worked in water quality. Semegen acknowledged that several chemists were laid off from DWSD in October 2015. However, she testified that none were laid off from the water quality lab at Waterworks Park. The two chemists that were working under Semegen at the time of the reorganization had to reapply for their own jobs. Semegen reviewed their self-assessments and determined that they were more qualified than any of the others applying for those jobs.

An additional chemist was added to the water quality lab at Waterworks Park following October 2015. Semegen selected the person to fill the position from a list of names with which she had been provided. She testified that she was not aware of the position that she filled being

posted publicly. Nor was Semegen aware of the position being posted within DWSD. The person she selected to fill the position was Abdul Rahman.

On September 30, 2015, Semegen received an email from Rhonda Spencer, an HR staff person, that contained a list of individuals to be considered for the position. The list contained 11 names of individuals whom Spencer, indicated were scheduled to be laid off on October 14, 2015. In addition to Abdul Rahman, the list included Cicy Jacob, George Vannilam, Jacob Kovoor and several others. Semegen testified that she understood the list to include the names of employees who were scheduled for layoff but had not yet been selected for another position. The only name on the list that she recognized was George Vannilam. She recognized him because he had worked at the analytical lab when she was there. Semegen tried to contact some of the people on the list but was not able to get a hold of them when she telephoned the lab. She stressed that she needed provide the information as to whom she would hire to HR as soon as possible because they wanted her to fill the position by October 7, to ensure that was hired would remain on the payroll. However, she did not inform HR of her decision to hire Rahman until October 8. As a result, he was laid off and was not rehired until late October or early November.

Semegen reviewed all the self-assessments for the individuals on the list and contacted Jurban and Peindl to ask them to tell the people in their lab that there was a job opening at Waterworks Park in water quality and to give them her phone number. Semegen received an October 2, 2015 email from Jurban suggesting that Basma Saleh speak with her about the open position. Saleh emailed Semegen asking for information about the open position and providing her contact information. She also received a phone call from Rahman and an email from Rosily Jais. Semegen responded to an email from Jais providing her with information regarding the duties of the chemist position and indicated in that email that "this information is confidential." The exchange of emails between the Semegen and Jais occurred on October 6, 2015. On October 7, 2015, Semegen wrote to Peindl requesting assistance in finding the right person for the job. At that point she had already corresponded with Jais, Saleh, and Rahman, but apparently had not interviewed Rahman or Jais at that point.

Besides Abdul Rahman, Semegen also interviewed Jais and Saleh. Semegen testified that after she received the list from Rhonda Spencer, she spoke with Jurban, Peindl, and Cheeramvelil, but did not speak with anyone else about the laid off analytical chemists' qualifications. She admitted that their comments may have influenced her decision. However, Semegen testified that neither Jurban, Peindl, nor Cheeramvelil told her that there were individuals whom she should not hire.

In deciding which of the candidates to hire she looked at Rahman's resume, and his assessment. She considered the fact that he had a D license, a masters degree, and had done some microbiology work. She was also impressed by the fact that he visited the lab to see the lab and to talk to her. She selected Rahman over Jais or Saleh because she liked his resume, he had a microbiology background, he seemed willing to learn things, he was teaching chemistry at a community college, and he had taken the initiative to get his D license. She liked the fact that he had a microbiology background because most of the work done in the laboratory that she supervises involves microbiology.

Semegen received an email from Cicy Jacob on October 12, 2015 in which Jacob asked to be considered for the water quality chemist position. Semegen wrote back to Jacob on the same day explaining that the position had been filled.

2. Christopher Steary

Christopher Steary been employed by Great Lakes Water Authority, since January 1, 2016. In 2015, he was a senior water systems chemist with DWSD. He completed the self-assessment form and was originally placed as a team leader, but subsequently went back to a chemist position. In 2015, he advised the new plant manager, Jolisa McDay, on who the personnel were but had no direct role in placing people. He succeeded McDay in April 2016, as the plant manager.

After Steary became plant manager, he was involved in hiring a chemist to fill his former position. He learned from Cheeramvelil, Terry Daniel, the water operations director of the freshwater division, and Karen Darty of human resources, of Rosily Jais's interest in the position. He learned from Daniel that Jais had identified herself as wanting to be placed as a chemist at the Lake Huron plant. Steary testified that Cheeramvelil also telephoned him and recommended Jais. He also learned from Darty that Jais had been trying to get hired with Great Lakes Water Authority, after she was laid off by DWSD. Steary believed that Jais's employment with the analytical group indicated that she had skills needed to work in his freshwater facility. Steary also testified that no other individuals were identified or reached out to him at that time.

The vacancy filled by Jais was never posted because they were anxious to get someone hired and trained as quickly as possible. It had been difficult to find staff who lived in Port Huron, who were chemists, and who wanted to work in the water department. Jais was the only person interviewed for the position. Steary acknowledged that he may have seen a couple resumes immediately before or immediately after hiring Jais. However, his decision was based on the recommendations from Cheeramvelil and the other individuals with whom he had spoken about Jais.

Steary testified that there had been a vacant chemist position from January 1, 2016, until recently, but he had not been authorized to fill it until recently. Steary explained that at the time he worked as a chemist, there were only four chemists, including himself, at the Lake Huron plant. He testified that the first set of interviews for that position was held in January of 2017. Steary testified that when he began to look for someone to fill the fifth chemist position, he did not recall getting a list of chemists or analytical chemists that had been laid off in the previous year. He was given a group of resumes to review and did not recall receiving a resume from Jacob Kovoor. He only recalled receiving a resume from one person who identified himself as laid off from DWSD; that person was not one of the three SCATA officers or Cicy Jacob.

Steary was aware that a D license was a wastewater license, but he was not sure of the exact details. He was not looking for someone with a D license when he looked for candidates for the chemist position at the Lake Huron freshwater plant. He required someone with an F license, which is for freshwater chemists.

Discussion and Conclusions of Law:

A. Alleged Violations of Section 10(1)(e)

1. Charging Party's Repudiation Claim

Charging Party contends that the ALJ erred by finding that the statute of limitations on Charging Party's contract repudiation claim was not tolled. The charge in this matter was filed November 2, 2015, and asserts that Respondent failed to go to arbitration on SCATA's grievance over the layoffs of bargaining unit members after repeated requests. Charging Party's amended charge, filed December 9, 2016, asserts that the relationship between the parties was governed by a collective bargaining agreement on October 14, 2015, when a significant portion of Charging Party's members were laid off. Charging Party's amended complaint also contends that Respondent repudiated the Master Agreement when it failed to bargain with SCATA over the impact of the reduction of force and layoffs.

The evidence in the record establishes that Respondent sent a letter to Charging Party on October 9, 2009 stating:

> Please be advised that pursuant to Article 53 Duration, Modification and Termination of the 2005-2008 collective bargaining agreement between the City of Detroit and U.A.W. Local 2334-S.C.A.T.A., the City hereby provides ten (10) days written notice of its intent to terminate the collective bargaining agreement as of October 19, 2009.

The language in that letter is sufficient to terminate the Master Agreement under Article 53 of that agreement. SCATA's president Saulius Simoliunas recognized and acknowledged receipt of the October 9, 2009 letter from Wise-Johnson, Respondent's Director of Labor Relations at that time. Simoliunas argued at the hearing that the letter did not terminate the contract between the Employer and SCATA. He asserted that it terminated the 2005-2008 agreement and instituted the union contract on a day-to-day basis with the exception that the Employer would no longer collect union dues. Simoliunas acknowledged in his testimony that the Employer stopped collecting dues sometime around October 2009. Although Charging Party continued to ignore the effect of the Employer's October 9, 2009 letter, it is clear from the record and the terms of the Master Agreement that the October 9, 2009 letter effectively terminated the Master Agreement. Accordingly, there is no basis to find that the Master Agreement was repudiated.

After the expiration of a collective bargaining agreement, a public employer generally has a duty to continue to apply the terms of mandatory subjects of bargaining in the expired contract until the parties reach agreement or impasse. See e.g. *AFSCME Council 25 v Wayne Co*, 152 Mich App 87, 93-94 (1986). However, grievance arbitration is an exception to the general rule that mandatory subjects of bargaining survive contract expiration. See *Gibraltar Sch Dist v Gibraltar MESPA-Transp*, 443 Mich 326, 337, (1993); *Lake Co & Lake Co Sheriff*, 22 MPER 59 (2009). There is no statutory duty to arbitrate after the expiration of a collective bargaining agreement. *Gibraltar Sch Dist* at 345-346.

In this case, provisions of the parties' expired collective bargaining agreement continued to control mandatory subjects of bargaining, with the exception of grievance arbitration, until

provisions of the Master Agreement affecting mandatory subjects of bargaining were replaced by the CET. Since the provisions of the Master Agreement relating to arbitration did not survive the expiration of the Master Agreement, the alleged failure by Respondent to arbitrate a grievance regarding the 2015 layoffs under the Master Agreement is not a breach of the Employer's duty to bargain. There was no repudiation of the Master Agreement as the Master Agreement had expired, and the terms and conditions of the employment of Charging Party's members were subject to the CET. Therefore, in 2015, after Respondent's duty to bargain had resumed, the CET remained lawfully in place[9] despite the parties' unsuccessful efforts to negotiate a new contract.

2. Respondent's Alleged Refusal to Arbitrate a Grievance over the Layoffs

In its exceptions, Charging Party contends that the ALJ erred by failing to find that Respondent violated § 10(1)(e) of PERA based on Respondent's refusal to arbitrate a grievance over the layoffs with Charging Party. Charging Party asserts that even if there was no collective bargaining agreement between the parties, the imposed CET required the arbitration of grievances. Charging Party asserts that SCATA requested to arbitrate a grievance regarding the decision to lay off chemists and that Respondent refused that request.

The language of the CET applicable to the grievance process provides as follows:

> **10.** GRIEVANCE AND ARBITRATION PROCEDURES
>
> D. Should any dispute arise between the City and the Union concerning the application or interpretation of this CET, an earnest effort shall be made to settle such dispute promptly in accordance with the following Grievance Procedure:
>
> Step 1. Employee, Supervisor and Steward
>
> Any employee having a grievance may report the same to his Supervisor and an endeavor shall be made to adjust the grievance between the employee and the Supervisor. If a satisfactory adjustment is not obtained, the employee may request a Steward, and the three will attempt to resolve the matter. Where the matter involves imposition of disciplinary suspension or above, Step 1 does not apply and grievances shall be filed at Step 2.
>
> Step 2. Department Head Level
>
> If a satisfactory adjustment is not obtained under Step 1, the grievance shall be reduced to writing on a standard grievance form setting forth all facts believed to be relevant to the dispute, and the grievance shall be signed by the employee or employees involved. The written

[9] See *Wayne County*, 32 MPER 21 (2018). In *Wayne County*, the Commission rejected the union's argument that the terms and conditions of employment were controlled by the parties' last collective bargaining agreement which expired prior to the County's imposition of the County Employment Terms pursuant to the County's consent agreement with the State of Michigan under Act 436. After the expiration of the County's consent agreement with the State of Michigan and the resumption of the County's duty to bargain, the Commission concluded that the parties' relationship continued to be controlled by the County Employment Terms and the expired collective bargaining agreement would not spring back into existence.

grievance must then be submitted to the Department Head. A meeting shall be held at a mutually convenient date and time to discuss the grievance. Up to two (2) Union Representatives, other than the Grievant, may attend the Step 2 meeting. Any resolution reached at this meeting shall be reduced to writing. The Department Head shall endeavor to furnish the Union with his/her written decision within fifteen (15) working days of the Step 2 meeting, excluding Saturdays, Sundays and holidays.

Step 3. Labor Relations Division Level

If a satisfactory adjustment is not obtained under Step 2, the Union may request a Step 3 meeting with the Labor Relations Director. Such appeal and request for a Step 3 meeting must be submitted in writing to the Labor Relations Director within five (5) working days from the receipt of the Department Head's Step 2 answer. Not more than two (2) Union Representatives may attend the Step 3 meeting, and the Labor Relations Director may designate members of his staff to represent the City. Any resolution reached at this meeting shall be reduced to writing. The Labor Relations Director or his or her designee shall endeavor to furnish the Union with his/her decision within thirty (30) working days of the Step 3 meeting.

Step 4. Arbitration

A. If a grievance is not settled after it has gone through Step 3 of the Grievance Procedure, the Union must file a written notice with the Labor Relations Director of appeal and intent to submit the dispute to arbitration. The Notice of Intent to Arbitrate must be filed within fourteen (14) calendar days of its receipt of the Labor Relation Director's Step 3 answer. If the Union fails to request arbitration in writing within this time limit, the grievance shall be deemed settled on the basis of the Step 3 answer and not eligible to go to arbitration.

Inasmuch as the arbitration provision of the Master Agreement did not survive the termination of the Master Agreement, we agree that the applicable grievance and arbitration procedure was contained in the CET. Simoliunas attempted to file a grievance over the layoffs by email but failed to send the email to the correct email address. Indeed, there is no evidence in the record that SCATA provided timely written notice of its desire to grieve the layoffs to Conerway or any other DWSD manager with authority to act on that grievance. Accordingly, we find that the Employer did not receive a grievance over the layoffs.

Simoliunas also attempted to request arbitration over the grievance. However, as with his attempt to file the grievance, he failed to send the request for arbitration to the correct email address. SCATA failed to file a written grievance, or a written notice of intent to arbitrate a grievance, as required by the grievance process contained in the CET. Accordingly, we find no merit to Charging Party's argument that Respondent failed to arbitrate a grievance regarding the layoffs since the evidence in the record establishes that SCATA failed to file a grievance over the

layoffs. Without the filing of a written grievance, the grievance process under the CET does not require arbitration. Thus, there was no breach of the Employer's duty to bargain.

3. Whether Charging Party Received Notice and an Opportunity to Bargain Over the Effects of the Reorganization and Subsequent Layoffs

Charging Party contends that the ALJ erred by finding that Charging Party failed to make a timely bargaining demand regarding the impact of the reduction in force. Additionally, Charging Party contends that the ALJ erred by finding that Charging Party received adequate information to request to bargain over the Employer's decision to lay off members of the SCATA bargaining unit before the layoff was a *fait accompli.*

The Commission has long held that an employer seeking to make a change in a mandatory subject of bargaining must first notify the union and give the union an opportunity to bargain before implementing the change. *St Clair Co Intermediate Sch Dist*, 17 MPER 77 (2004); *City of Westland*, 1987 MERC Lab Op 793, 797.

It is well settled that reorganization decisions that eliminate positions and reassign job functions to existing or newly created positions are within the scope of management prerogative and are not a mandatory subject of bargaining. See *United Teachers of Flint v Flint Sch Dist*, 158 Mich App 138, 143 (1986); *City of Detroit*, 23 MPER 30 (2012); *City of Detroit Water & Sewerage*, 1990 MERC Lab Ops 34; 3 MPER 21035 (1990).

However, an employer may be required to bargain over the impact of its reorganization decision if the union makes a demand for bargaining over it. see, *Ishpeming Supervisory Employees, Local 128, AFSCME v Ishpeming*, 155 Mich App 501, 512 (1986); *City of Detroit*, 23 MPER 30 (2012). In *Ishpeming*, the court stated:

> Once the initial decision [to reorganize] has been made, the union has the ability to protect its members by bargaining regarding the impact of the decision. For instance, if any employees are to lose their jobs because of the reorganization, the union can bargain concerning the specific individuals who are to be laid off.
>
> *Ishpeming*, at 511.

In this case, the DWSD's duty to bargain over the impact of its reorganization decisions, was conditioned on an appropriate request to bargain by the Union. *City of Grand Rapids*, 22 MPER 70, (2009). *City of Dearborn*, 20 MPER 110 (2007). SCATA contends that throughout the period that the parties were bargaining for a new collective bargaining agreement, the Employer never provided any notice that the parties should bargain over the impact of possible layoffs. Where an employer has a duty to bargain, the employer is not required to initiate bargaining. *Local 586, Service Employees Int'l Union v Village of Union City*, 135 Mich App 553, 557 (1984). See also *Decatur Pub Sch*, 27 MPER 41 (2014); affirmed by Court of Appeals sub nom *Van Buren Co Ed Ass'n & Decatur Ed Support Pers Ass'n, MEA/NEA v Decatur Pub Sch*, 309 Mich App 630; 28 MPER 67 (2015); 2015 WL 1477849.

While an employer is not obligated to specifically inform a union that the union should seek to bargain over the impact of a reorganization, an employer must give the union notice of its pending decision and an opportunity to bargain over that decision. Where such notice is given, the employer has met its obligation and it is up to the union to make a demand for bargaining. *City of Grand Rapids*, 22 MPER 70 (2009).

Furthermore, although the DWSD had a duty to bargain over the impact of its reorganization decision, this duty is conditioned on an appropriate request to bargain by the Union. *City of Dearborn*, 20 MPER 110 (2007). In this case, the parties had been in negotiations throughout the reorganization. SCATA had received information that the DWSD was cutting its workforce. However, SCATA failed to demand bargaining over any impact issues. Thus, we agree with the ALJ that Charging Party did not make a demand adequate to trigger Respondent's duty to bargain over the impact of its reorganization decision.

SCATA also contends that the Employer gave no notice that there would be layoffs of employees in its bargaining unit. SCATA asserts that it was not aware that its members were subject to lay off until the actual layoff notices were received. Indeed, a union has no duty to demand bargaining if the bargaining subject is presented as a *fait accompli. Inter Urban Transit Partnership,* 21 MPER 47 (2008); *Allendale Pub Sch*, 1997 MERC Lab Op 183, 189; *City of Westland*, 1987 MERC Lab Op 793, 797. We have previously held that "the obligation to request bargaining is waived if such a request would have been either futile or the bargaining subject change was a fact accomplished when notification was received." *Wayne Co*, 29 MPER 1 (2015); *Intermediate Ed Ass'n/Michigan Ed Ass'n (IEA/MEA)*, 1993 MERC Lab Op 101, 106.

Testimony from SCATA officers Simoliunas, Kovoor, and Vannilam indicate that they were told by DWSD management between 2012 and the spring of 2015 that they did not have to worry about members of the bargaining unit being laid off. The ALJ found this testimony credible. Moreover, Jurban, the supervisor of the wastewater plant laboratories, who oversaw the work of SCATA members and was responsible for recommending employees to be placed in the new chemist classification, did not know until the day SCATA members were notified of their layoff that they were to be laid off.

Despite the verbal assurances from Conerway and McCormick that no chemists would be laid off, SCATA could have requested those assurances in writing or demanded bargaining over the issue. SCATA could have sought to bargain for a written commitment limiting layoffs from its bargaining unit or some other way to minimize the effects of any potential layoffs.

In its brief on exceptions, SCATA argues that "although the Placement Procedure was set up around May 2014, SCATA was never notified how the info would be used or that they were at risk to lose the jobs." Indeed, SCATA officers complained that they did not know how the information submitted through the PEP would be used. Employees had been informed that the information submitted on the self-assessment forms in the PEP would be used to determine whether they would be placed in the new job classification for which they were applying. How that information would be evaluated or by whom, may not have been clear to SCATA. While SCATA officers complained about not having that information, SCATA could have requested more information or demanded bargaining on that issue but never did so.

On November 5, 2014, SCATA was informed that the new chemist classification had been placed in the bargaining unit represented by the Senior Water Systems Chemists Association. SCATA officers and their members had been informed of the placement eligibility process which they were to use to apply for one of the new job classifications in May 2014. Most SCATA members applied for the new chemist classification.[10] However, since that position was being represented by the Senior Water Systems Chemists Association, it should have been evident to SCATA that members of the Senior Water Systems Chemists Association would also be competing for jobs in the new chemist classification. Since members of the Senior Water Systems Chemists Association supervised SCATA members, it should also have been evident to SCATA that there was a possibility that some of SCATA's members would not be hired in the new chemist classification. SCATA had already rejected the special projects technician classification for its membership. Therefore, it is not clear which, if any, of the new classifications SCATA anticipated that members not selected for the new chemist classification would be placed in.

Although DWSD had no duty to bargain from March 28, 2013 until December 14, 2014, SCATA and DWSD continued to bargain during that period and at least through sometime in February 2015. By the date that SCATA was informed that the new chemist position had been placed in the Senior Water Systems Chemists Association's bargaining unit, SCATA should have been aware that there was a possibility that some of its members would not be placed in the new chemist classification. The PEP and the discussions at the labor-management meetings made it clear that the old job classifications were being eliminated and employees had to be placed in one of the new classifications to continue employment. Since SCATA had rejected the special projects technician classification for its membership, there is no evidence that SCATA could be certain that its members who were not placed in the new chemist classification had any assurance of being placed in another of the new classifications. Given the likely displacement of some of its members, it was incumbent upon the Union to demand bargaining over the impact of the DWSD reorganization on its members. Even if SCATA believed that its members would not be laid off, some provision needed to be made for their continued employment in the event that they were not placed in the new chemist classification. Thus, even if SCATA waited until DWSD's duty to bargain was reinstated, after December 14, 2014, they had several months between that point and September 2015 when the layoff notices were issued in which they could have demanded to bargain. Nevertheless, SCATA failed to make a bargaining demand. When SCATA received the initial layoff notice, SCATA's only action was to attempt to grieve it. Conerway testified that she would have been willing to bargain with SCATA as late as the time of the October 2015 Special Conference. However, SCATA failed to make a bargaining demand. Therefore, we find that the ALJ did not err by finding that Charging Party failed to make a timely bargaining demand regarding the impact of the reduction in force. Additionally, we find no error in the ALJ's conclusion that Charging Party received adequate information to request to bargain over the DWSD's decision to lay off members of the SCATA bargaining unit before the layoff was a *fait accompli.*

[10] Indeed, there is no evidence in the record that any SCATA member applied for any of the new job classifications, other than the new chemist position, prior to the layoffs.

4. Application of the Seniority Provisions of the CET

Charging Party contends that the ALJ erred by failing to find that Respondent violated §10(1)(e) when it refused to follow the seniority provisions of the CET. Charging Party asserts that the CET requires layoffs and recalls to be done according to the CET seniority provisions seniority provisions of sections 15 (C) (5) and 16 (F)

Section 15(C)(5) of the CET provides:

C. ORDER OF REMOVAL: Reduction in force shall be by job classification in a City department. Within the department, the following categories of employees in the class shall be removed first in the following order.

1. Provisionally-hired employees.
2. Newly-hired employees who have not completed the probationary period.
3. Employees hired on a seasonal, temporary or other limited term basis.
4. Seniority employees who have recently been promoted into the class and have not completed the required trial period, and employees promoted to the class on a limited-term basis. Such employees shall revert to the classification in the department from which they were promoted.
5. Seniority employees who are in the class on a permanent basis and have completed the required trial period. Such employees shall be removed from the class in accordance with their total City seniority and have those displacement rights described below.

Section 15(C) dictates that a reduction in force shall be by job classification. In this case, the Employer determined that all existing job classifications would be eliminated and consolidated into fewer classifications that had broader scopes than the discontinued classifications. The employees represented by SCATA who were laid off, were not laid off as the result of a typical reduction in force. Their positions and all other positions held by DWSD employees prior to the DWSD reorganization had been eliminated. They were laid off because they were not hired for a newly created position.

Section 15(F) of the CET provides:

F. EMPLOYEE RECALL, REEMPLOYMENT AND RESTORATION RIGHTS:

Employees will be recalled by seniority for available positions either: (a) in their current classification, or (b) in the classification in the same occupational series; provided they have prior year service in such classification within the last three (3) years and can perform the duties in the position they are recalled into. Specific recall and notification procedures shall be determined and modified by the Human Resources Department. Any Human Resources rules or procedures concerning employee recall shall not be interpreted to limit or impair the City's right to fill vacancies through transfer, promotion, or new hire in accordance with the Management Rights or the Transfer and Promotion provisions of this CET. Any existing Human Resource rules or procedures with conflicting provisions shall be modified to conform to this CET.

As with 15(C), recall rights under 15(F) depend on the employee's job classification. In this case, the employees who were laid off could not be recalled to the classification in which they worked prior to their layoff as that classification no longer existed.

Accordingly, we find no merit to Charging Party's exception on this basis.

D. Alleged Violations of Sections 10(1)(a) and (c)

Charging Party contends that the ALJ erred by failing to find that Respondent violated §10(1)(a) and (c) when it failed to select Charging Party's officers and the spouse of one of the officers of the bargaining unit represented by Charging Party for the new chemist classification because Charging Party's officers engaged in protected concerted activities. Charging Party also contends that the ALJ erred by failing to find that Charging Party established that Respondent acted based on antiunion animus or hostility towards Charging Party's members' PERA-protected rights and that Charging Party established a prima facie case of discrimination. Charging Party contends that the ALJ erred by failing to find that Charging Party established that suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory actions satisfy a prima facie case of discrimination.

SCATA contends that "[o]f nearly 100 chemists throughout the Detroit Water and Sewerage Department... only six chemists remained involuntarily laid off – SCATA's President, Treasurer, Secretary, the wife of the Secretary, and only two other individuals." The Union also asserts that SCATA has a long history of concerted activity against the Employer. The Union further contends that the entirety of its union activity could be attributed exclusively to Saulius Simoliunas, George Vannilam, and Jacob Kovoor, the individuals serving as SCATA's president, vice president, and secretary, respectively, at the time of the layoffs.

1. Legal Standard to Be Applied

In order to establish a *prima facie* case of discrimination under Section 10(1)(c) of PERA, a charging party must show: (1) an employee's union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Detroit Pub Sch,* 30 MPER 2, (2016) ; *Grandvue Medical Care Facility,* 27 MPER 37 (2013); *City of Livonia* , 23 MPER 96 (2010),: *Eaton Co Trans Auth*, 21 MPER 35 (2008); *Waterford Sch Dist*, 19 MPER 60 (2006*);Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *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. Ultimately, however, the charging party bears the burden of proof. *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

A charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Michigan Employment Relations Comm v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. An essential element of a discrimination claim under PERA is anti-union animus.

Where a charging party has alleged that the employer has taken adverse action that was motivated by anti-union animus, the charging party must demonstrate that protected concerted activity was a motivating or substantial factor in the respondent's decision to take the action about which the charging party has complained. *Schoolcraft College Ass'n of Office Personnel, MESPA v Schoolcraft Cmty College*, 156 Mich App 754, 763 (1986); MESPA *v Evart Pub Sch*, 125 Mich App 71, 73-75 (1983); *Charter Twp of Plymouth,* 18 MPER 46 (2005). Even if the employee has engaged in extensive union activities, a *prima facie* case is not established unless there is evidence of a connection or link between the activities and the alleged discrimination. *Detroit Public Schools*, 16 MPER 29 (2003); *North Central Community Mental Health Services*, 1998 MERC Lab Op 427, 437; *City of Detroit (Community Economic Development Dept)*, 1981 MERC Lab Op 585, 588. Antiunion animus may be proven by indirect evidence, however mere suspicion or surmise will not suffice. The charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *City of St Clair Shores*, 17 MPER 27 (2004); *City of Grand Rapids Fire Dep't*, 1998 MERC Lab Op 703, 707. 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 antiunion animus, even in the absence of direct evidence. *Detroit Public Schools*, 30 MPER 2 (2016); *Wayne Co*, 21 MPER 58 (2008). See also, *Macatawa Area Express Transp Auth*, 28 MPER 53 (2014) (no exceptions); *Mason Co Rd Comm*, 22 MPER 22 (2009).

It is not necessary for a charging party to show antiunion animus by the respondent or to establish the other elements of discrimination to prove a violation of § 10(1)(a). However, the charging party must show that the respondent's actions objectively interfered with the charging party's exercise of protected concerted activity. *City of Saline*, 29 MPER 53 (2016). The test of whether the respondent violated § 10(1)(a) is whether the Employer's actions tend to interfere with the free exercise of protected employee rights. *City of Inkster*, 29 MPER 29 (2015) (no exceptions).

In its brief on exceptions, SCATA cites several occurrences of union activity involving Simoliunas, Vannilam, and Kovoor where one or more of the three complained to a governmental agency about DWSD, complained to DWSD management about circumstances at the workplace, filed grievances or otherwise challenged actions taken by DWSD. However, the Employer does not dispute the fact that Simoliunas, Vannilam, and Kovoor each engaged in protected concerted activity. Nor is it disputed that the Employer was aware of their involvement in protected concerted activity. The point in dispute is whether the Union offered sufficient evidence at hearing to establish that the Employer's decision to lay off these three individuals and Kovoor's spouse, Jacob, was motivated by their protected concerted activity.

At first glance, it appears suspicious that of the six chemists who remained involuntarily laid off three were SCATA officers and the fourth, Cicy Jacob, was the spouse of one of those officers. There is voluminous evidence in the record of the numerous grievances they filed, of the internal complaints they filed, and of the complaints they filed to state and federal agencies. There is also substantial evidence in the record of their inflexibility in bargaining. With respect to the latter, the Employer's attorney and bargaining representative expressed considerable frustration, during a sidebar conference at the hearing, over the parties' inability to make any progress towards reaching a new agreement after years of bargaining. Since, these actions by SCATA officers were taken to protect the interests of the members of the bargaining unit that they represented we would

find that DWSD committed an unfair labor practice in terminating their employment if there was evidence of a causal connection between their union activity and the termination of their employment. However, neither Conerway nor Schwartz, with whom SCATA bargained, had a role in recommending or selecting employees who would fill the new chemist position.

2. Jurban's Recommendations

The person who made the decision on whether the three officers and Jacob would be placed in one of the new chemist positions was McNeely. McNeely relied solely on recommendations made by Jurban. Jurban had been a member of SCATA from the time he started at DWSD, some four decades ago, until he moved to the title of assistant sewage plant laboratory supervisor.

Jurban did not participate in bargaining with SCATA and there is no evidence that Jurban was in any way adversely affected by the three SCATA officers' union activity. With respect to their complaints to various governmental agencies such as MIOSHA, MDEQ or the EPA, there is no indication that Jurban was in any way adversely affected by their complaints. Jurban denied that his failure to recommend Jacob, Vannilam, Simoliunas, and Kovoor was because of their previous complaints to the EPA or their complaints to the MDEQ. He further denied knowledge of their presentations to the City Council opposing the EMA contract. He testified that those matters were not a factor in his decision. The same is true with respect to the complaints made to McCormick about Jurban. While Jurban acknowledged that McCormick would have told him about any complaint that she received, he testified that he had no recollection of any such discussion.

It is apparent from Jurban's testimony, that his method for selecting the employees who would be placed in the new chemist position was based on his personal recollection of their skills and their experience with certain tasks. It appears that when he was considering their applications for the new chemist position, his recollection of the skills, training, and work experience of Simoliunas, Vannilam, Kovoor, and Jacob was somewhat flawed. However, there is no evidence that his failure to consider skills they possessed or his failure to list those skills on the chart that he furnished to McNeely was due to antiunion animus.

With respect to Simoliunas and Kovoor in particular, Jurban clearly determined that they were less desirable as employees than other candidates. Jurban considered Simoliunas inability to drive, his lifting restrictions, and his inability to work any shifts other than the day shift. With respect to Kovoor, Jurban indicated that Kovoor's attitude was part of the consideration, not just Kovoor's actual skills. Jurban explained that the main factors that stood out in deciding that Kovoor would not be selected was that he had done only BOD for about three years and he had expressed unwillingness to be trained in other things. This is somewhat contradicted by Kovoor's testimony, and Jurban's confirmation of that testimony, that Kovoor had requested and had been denied training on the LIMS system. It is also in conflict with Kovoor's testimony that he had complained to both Jurban and Peindl about being passed over for assignments to perform the GC analysis work. However, Charging Party failed to rebut Jurban's testimony that Kovoor had previously written to the director and objected to performing other assignments beyond the BOD lab. Where, as here, the employer is looking for employees with multiple skill sets and the ability and willingness to perform a variety of tasks, it is understandable that an employee who is restricting his work to one group of tasks would be considered less valuable than those employees willing to perform a variety of tasks.

Given Jurban's opinion of their abilities and work ethic, it appears likely that had Simoliunas, and Kovoor not been SCATA officers or otherwise involved in union activity, Jurban still would not have recommended that they be placed in the new chemist position.

After a careful review of the record, we find insufficient evidence to establish that the layoffs were illegally motivated by antiunion animus. Such a finding must be based on substantial evidence and not mere suspicion or innuendo. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). Charging Party has failed to demonstrate anti-union animus on the part of the Employer, or that a causal nexus existed between the employees' concerted activity and their layoffs. We note that at the Special Conference to discuss the layoffs, while the SCATA officers mentioned their suspicion that they were being laid off because of their union activity, they also repeatedly asserted the belief that their layoffs were due to their ethnicity.[11] Kovoor repeatedly argued that the Employer had selected them for layoff because they were from South India. For these reasons, we agree with the ALJ that there is insufficient evidence to find that the layoffs violated §10(1)(c) of PERA.

Moreover, while antiunion animus is not a factor under §10(1)(a) the fact that there is insufficient evidence to find that the Employer's failure to place the SCATA officers and Jacob in one of the new chemist positions was motivated by the union activity, indicates that there is no basis to find that their layoffs would have a chilling effect or otherwise restrain DWSD employees from engaging in protected concerted activities. Indeed, Charging Party failed to offer any evidence that the layoff of the three SCATA officers or Jacob had a chilling effect on their subsequent union activity or that of the remaining employees. Charging Party's officers continued their union activities after receiving their layoff notices. Charging Party has offered no evidence that other employees knew that all three of the SCATA officers were laid off or that the SCATA officers viewed their layoffs to be connected with their union activity. Charging Party offered no evidence that other employees had reason to fear that involvement in union activity could jeopardize their own employment.

Finally, Charging Party contends that the ALJ erred by concluding that there was no evidence in the record that other water treatment plants implemented the selection procedure differently. Indeed, while the wastewater plant had more chemists than chemist jobs, the freshwater plant had more jobs for chemists than it had chemist employees. Therefore, some difference in their procedures is to be expected. However, there is no evidence in the record that these differences were in any way due to anti-union animus.

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, we find the exceptions of Charging Party to be without merit and agree with the Administrative Law Judge that the evidence does not establish that Respondent violated Section 10(1)(a)(c) or (e) of PERA.

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[11] We do not address the claims made at the Special Conference that the layoffs were motivated by ethnicity, nationality or nepotism because this Commission has no jurisdiction over such claims.

ORDER

For the above reasons, we hereby adopt the Administrative Law Judge's Recommended Order as our final order in this case and dismiss the charges in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Dated: JUL 26 2019

TRUE COPY

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT (WATER & SEWERAGE DEPT),
Public Employer-Respondent,

Case No. C15 K-144
Docket No. 15-058913-MERC

-and-

SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION,
Labor Organization-Charging Party.
/

APPEARANCES:

Steven H. Schwartz and Chelsea Ditz, for the Respondent

Jack W. Schulz, for the Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard on six dates between April 12 and June 20, 2017, 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 brief filed by both parties on September 27, 2017, I make the following findings of fact, conclusions of law, and recommended order.

I. The Unfair Labor Practice Charge and History:

On November 2, 2015, the Sanitary Chemists and Technicians Association (Charging Party or SCATA) filed this unfair labor practice charge with the (the Commission against the City of Detroit (Water and Sewerage Department).[1] Until all its members were laid off or reassigned to other bargaining units in the fall of 2015, Charging Party represented a bargaining unit of nonsupervisory chemists employed by DWSD. SCATA represented chemists working in

[1] The City of Detroit and its Water & Sewerage Department are not legally separate entities. However, in this decision the Water & Sewerage Department is referred to as the DWSD, while the City of Detroit is referred to as the City.

both the DWSD's waste water and freshwater treatment operations. Included within this unit were the titles of water systems chemist, assistant water systems chemist, junior chemist, and analytical chemist. The transfer of Charging Party's members and their work to other bargaining units, including an allegation that the transfer was in retaliation for SCATA's refusal to agree to the DWSD's proposed terms for a new contract, was the subject of an earlier charge which was dismissed by the Commission in *City of Detroit (Water & Sewerage Dept),* 30 MPER 28 (2016) (no exceptions).

As discussed in the findings of fact below, in 2012 the DWSD began the process of consolidating its job classifications, which eventually resulted in its abolishing all 257 of its existing classifications and replacing them with 57 new ones. Eleven SCATA members were laid off effective October 15, 2015. The laid off members were those who were not selected for placement in any new classification, including the new classification of Chemist to which the majority of SCATA's work was transferred. In the instant charge, SCATA alleges that that Respondent violated its duty to bargain under Section 10(1)(e) of PERA by: (1) repudiating the parties' existing collective bargaining agreement by failing to follow provisions in the agreement requiring that employees be selected for layoff and recalled in order of seniority; (2) repudiating that contract by refusing to arbitrate a grievance filed over the October 15 layoffs; and (3) failing to provide SCATA with an opportunity to bargain over the impact of the layoffs, including the selection of SCATA members to fill the new Chemist positions and their recall from layoff as new positions in this classification were added.

Charging Party also alleges that the DWSD discriminated against SCATA officers, in violation of Section 10(1) (a) and (c) of PERA, in its selection of employees to fill the new Chemist positions. Thirteen SCATA members were originally scheduled to be laid off on October 15, 2015. This list included all three current SCATA officers, President Saulius Simoliunas, Vice-President George Vannilam, and Secretary Jacob Kovoor, and Cicy Jacob, Kovoor's wife. Two of the thirteen were offered new positions as Chemists before the effective date of the layoffs, and two others were offered positions but declined. Another two were recommended by their supervisors for an open Chemist position. The SCATA officers were not offered positions or recommended for them.

DWSD Sewage Plant Laboratory Supervisor Michael Jurban was the individual primarily responsible for selecting chemists to fill Chemist positions in the waste water treatment laboratories, where all three SCATA officers and Cicy Jacob worked. In addition, Jurban and Joseph Peindl, the Assistant Sewage Plant Laboratory Supervisor, were asked by a supervisor in a freshwater lab to recommend laid off chemists for a newly vacant Chemist position in that lab, and they did so. Charging Party presented evidence of a long history of union and other concerted protected activity by the SCATA officers prior to the fall of 2015, including complaints about Jurban himself. It alleges that Jurban's refusal to select the SCATA officers and Cicy Jacob over other less or equally qualified chemists to fill Chemist positions, and his and Peindl's failure to recommend them for the freshwater position, constituted retaliation against them for their protected activities. [2]

[2] Charging Party also alleged that the Great Lakes Water Authority (GLWA), which assumed responsibility for the DWSD's freshwater and waste water treatment operations on January 1, 2016, retaliated against the SCATA officers by refusing to recall or rehire them for Chemist openings, despite hiring at least one other laid off Chemist between

On April 29, 2016, Respondent filed a motion for summary dismissal of the charge. Charging Party filed a response in opposition to the motion on May 3, 2016. On August 24, 2016, I issued an interim order dismissing the motion on the basis that the facts then before me were either in dispute or insufficient to allow me to make a ruling on the issues. An evidentiary hearing was then scheduled. On January 17, 2017, before the hearing commenced, Respondent filed a second motion for partial summary disposition. I dismissed this motion in an interim order issued on February 28, 2017.

II. Findings of Fact – Duty to Bargain Allegations:

A. The 2007 Master Agreement

SCATA first became the bargaining agent for nonsupervisory chemists and related classifications in the DWSD and the City of Detroit Department of Health sometime before the late 1980s. In the mid-1990s, SCATA entered into an affiliation agreement with the United Auto Workers Union and its name changed to "SCATA UAW Local 2334." On September 15, 2011, SCATA members seeking to disaffiliate from the UAW filed a petition for representation election with the Commission. On December 5, 2011, the Commission, after conducting an election, issued a certification designating SCATA as the bargaining agent for this unit.

In April 2007, SCATA UAW Local 2334 and the City of Detroit entered into a collective bargaining agreement retroactive to 2005. This agreement was signed by City representatives, the officers of UAW Local 2334 (all of whom were chemists working for the DWSD), and the UAW Region 1 Director. I will hereinafter refer to that collective bargaining agreement as the "Master Agreement," or the "2007 Agreement."

Article 5 of the Master Agreement provided for binding arbitration as step five of the grievance procedure. Article 17 of the 2007 agreement included this language:

> If as a result of a reduction in force in the Water and Sewerage Department or Detroit Health Department, it is necessary to reduce the number of employees in a classification represented by the Union, such reduction in force shall be in accordance with the reduction in force provisions provided in Human Resources Department Rules which are in effect on the date this Agreement is signed . . . Employees with permanent status who have been laid off in a class from a City department shall displace employees of the same classification in those categories listed in Paragraph A of Section 2 in Rule X of the Rules on a City-wide basis. In addition, laid off permanent employees who have one or more years of classified

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May 2016 and the date of the hearing. Because Jurban continued to supervise the waste water laboratories as an employee of GLWA, I allowed the admission of some evidence about the GLWA's filling of Chemist positions. However, as I ruled at the hearing, since the GLWA was not a party to this proceeding whether the GLWA committed an unfair labor practices by refusing to recall or rehire the laid off SCATA officers was not before me. I note that the record is clear that the SCATA officers, had they been selected for Chemist positions, would not have been Respondent's employees after January 1, 2016. Thus, any backpay awarded would be limited to the period between their layoffs and January 1, 2016.

service shall displace other permanent employees in the same classification of lesser seniority on a City-wide basis; and if there are no lesser seniority employees in the same classification, shall have the right to displace less senior employees in a lower class in the same occupational series. . . Bargaining unit members who were laid off or demoted shall have such reemployment restoration rights as set out in Rule X. Such reemployment provisions do not apply to persons laid off and separated from City employment for a period of four years.

The 2007 Agreement included this duration clause:

This Agreement shall become effective upon the effective date of Resolution of Approval of the City Council as provided by law and shall remain in full force and effect until 11:59 p.m. June 30, 2008.

If either party desires to modify this Agreement, it may give written notice to the other party during the month of February, 2008.

In the event the parties fail to arrive at an agreement on wages, fringe benefits, other monetary matters, and non-economic items by June 30, 2008, this Agreement will remain in effect on a day-to-day basis. Either party may terminate the Agreement by giving the other party a ten (10) calendar day written notice on or after June 20, 2008.

Neither Charging Party nor the City gave notice to terminate the contract in 2008. Prior to the beginning of the hearing, the DWSD admitted that it had no evidence that the contract was ever terminated by notice. However, on the second day of the hearing, the DWSD presented a copy of a notice of termination dated October 9, 2009, sent from Barbara Wise Johnson, the City's labor relations director at that time, to Saulius Simoliunas, president of UAW Local 2334-SCATA. The letter stated that the City would continue to arbitrate grievances but would cease deducting union dues from employees' paychecks after the contract was terminated. Jacob Kovoor, SCATA secretary in 2009, testified that he collected and opened all mail sent to the SCATA office and that he never saw the October 9, 2009 letter. Charging Party challenged its authenticity. I admitted the letter, however, after Wise Johnson, now retired from City employment, appeared as witness and identified it. She also testified that similar letters were sent on this same date to sixteen other unions terminating contracts that, like SCATA's, had been extended on a day-to-day basis, because the City was at that time seeking concessions from its unions. In addition, Zechariah Gross, who was Wise Johnson's assistant in 2009 and was currently assistant to GLWA (and former DWSD) Human Resources Director Terri Conerway, testified that he typed and sent the sixteen letters in 2009. Gross also testified that sometime before the unfair labor practice hearing began he was instructed by Conerway to search the City's records for a termination letter. According to Gross, after the hearing had begun, he found the October 9, 2009 letter to SCATA along with termination letters sent to other unions on that date, in his own archived emails as an attachment to an email sent to him by the City's labor relations department in 2015.

Negotiations for a new contract to replace the Master Agreement took place sporadically between the City and UAW Local 2334-SCATA from 2008 to 2012. Tentative agreements were reached on some subjects, but the parties were unsuccessful in reaching a new agreement.

B. Federal District Court Order

On November 4, 2011, Federal District Court Judge Sean Cox issued an order in a case pending before him which included a number of directives to the DWSD designed to improve the operations of that department. Among these directives was an order requiring that all future collective bargaining agreements covering DWSD employees be negotiated and entered into by the DWSD itself and that these agreements not cover employees in other City departments. Since the SCATA unit at the time included employees in both the DWSD and Department of Health, Judge Cox's order effectively split the unit into two units. The instant charge involves only the unit of DWSD employees; it is not clear from the record whether SCATA continues to represent employees in the City's Health Department. Judge Cox's November 4, 2011, order also directed the Director of the DWSD to "perform a review of the current employee classifications at the DWSD and reduce the number of classifications to increase workforce flexibility." His order also struck and enjoined any provision in current DWSD collective bargaining agreements that allowed employees from outside the DWSD to bump into the DWSD based on seniority, directed that all promotions in the DWSD were to be "at the discretion of management and based upon skill, knowledge and ability, and then taking seniority into account" and struck and enjoined any current collective bargaining agreement provisions to the contrary. The November 4, 2011, order also included this paragraph:

> The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands from the changes ordered by this Court.

C. City's Consent Agreement and Bankruptcy

By the beginning of 2012, the City's financial situation was growing dire. In April 2012, the City entered into a consent agreement with the State of Michigan under the Local Government and School District Fiscal Accountability Act, 2011 PA 4. Under the terms of that statute, the consent agreement suspended the City's duty to bargain with its unions under Section 15(1) of PERA for the duration of the consent agreement.

On August 12, 2012, 2011 PA 4 was suspended pending the outcome of a referendum initiative to repeal it. At the election in early November 2012, 2011 PA 4 was repealed by referendum of the voters. The repeal had the effect of reviving a predecessor statute, the Local Government Fiscal Responsibility Act, 1990 PA 72. The earlier statute, 1990 PA 72, did not include any provision allowing for suspension of the duty to bargain. In December 2012, a third statute was enacted, the Local Financial Stability and Choice Act, 2012 PA 436. This statute took effect on March 23, 2013. Like 2011 PA 4, 2012 PA 436 contained a provision, Section 8(11), MCL 141.1548 (11), suspending a municipal employer's duty to bargain while it was covered by

a consent agreement. 2012 PA 436 also suspended the duty to bargain during the tenure of an emergency manager appointed under the statute, or while a municipality was "in receivership," for a period up to five years.

In early March 2013, Governor Rick Snyder confirmed the existence of a financial emergency in the City and appointed an emergency manager for the City under 1990 PA 72. He also reconfirmed the emergency manager's appointment under 2012 PA 436 after that statute took effect on March 28, 2013. These actions placed the City in "receivership," and had the statutory effect of suspending the City's duty to bargain while an emergency manager was in place for a maximum of five years. In July, 2013, the City filed a petition with the U.S. Bankruptcy Court. The Bankruptcy Court then issued a stay on proceedings against the City which included unfair labor practice charges filed with the Commission.

On December 14, 2014, upon completion of the bankruptcy proceeding, Governor Snyder declared the City's financial emergency to have terminated. The statutory suspension of the City's, and the DWSD's, duty to bargain then came to an end.

D. Imposition of the CET on the SCATA Unit

In late April 2012, the DWSD commenced negotiations with all its unions, including SCATA, to reach new collective bargaining agreements which covered only DWSD employees and which complied with the other directives issued by Judge Cox in his November 4, 2011, order. The DWSD informed the unions that its goal was to reach agreements with all bargaining units before July 1, 2012. The DWSD's chief negotiator was its counsel, Steve Schwartz, and DWSD Human Resources Director Conerway was also at the bargaining table.

On May 8, 2012, the DWSD and SCATA met and the DWSD presented SCATA with a bargaining proposal. During the May 8 meeting, the DWSD told SCATA that language from Judge Cox's November 4, 2011, order had to be inserted in the new agreement. Shortly thereafter, Conerway sent SCATA President Simoliunas a list of the changes in the 2007 Master Agreement that the DWSD believed were required by Judge Cox's order. At the May 8 meeting, SCATA argued strongly for a wage increase for its members. After the meeting, it provided the DWSD negotiation team with several surveys supporting its position that DWSD chemists were underpaid. The DWSD and SCATA held several negotiation sessions in May and June 2012. However, they not reach a new contract or a tentative agreement on any subject, including the incorporation of language from Judge Cox's order.

On June 27, 2012, the City of Detroit Board of Water Commissioners passed a resolution which recited that eighteen of the twenty collective bargaining agreements that covered DWSD employees would expire on June 30, 2012, "with one additional agreement that has already expired."[3] The resolution stated that the City had provided notice to all of these unions of its intent to terminate those agreements upon expiration. It also listed four unions, not including Charging Party, with which it was approving new collective bargaining agreements. The resolution stated:

[3] The resolution did not identify the parties to the "additional agreement that had already expired."

> ... *for any union whose contract has expired without having a new ratified collective bargaining agreement,* that union's terms and conditions of employment shall be deemed to include all terms and conditions of employment imposed by the City of Detroit pursuant to applicable law and the Financial Stability Agreement including Annex D and with the addition of terms required and/or prohibited by the November 4, 2011, order of the Honorable Sean F. Cox until such time as either (1) a new Collective Bargaining Agreement is ratified for that union or (2) DWSD reaches impasse and imposes its own terms and conditions of employment upon that Union. [Emphasis added]

On June 28, 2012, Conerway emailed a copy of the Board's resolution to officers of all the DWSD's unions, including SCATA President Simoliunas. After the Board's resolution, the DWSD continued negotiating with unions with which it had no contract. It subsequently reached agreement with additional unions, but not with SCATA.

On July 17 or 18, 2012, the City issued a document entitled "City Employment Terms Non-Uniform Employees," or CET. This document, which was in the form of a collective bargaining agreement, contained the terms and conditions of employment that the City was imposing on bargaining units of non-uniformed employees with which it did not currently have a collective bargaining agreement. At that time the City's duty to bargain under PERA was clearly suspended, as the City was covered by a consent agreement and 2011 PA 4 was still in effect. The CET contained a "management rights" provision that, among other things, announced the City's intention to unilaterally: (1) establish qualifications and methods for hire, transfer, assignment, position retention, and promotion in employment; (2) revise, create, combine, and/or eliminate classifications, duties or positions; (3) determine classification, status and tenure of employees; and (4) recruit, assign, and transfer employees to positions within the Department. Article 16 of the CET stated that "the City shall have the right to transfer and/or promote employees within any department or to any new department within its sole discretion."

The CET also included layoff and recall sections, Section 15(C)(5) and Section 16(F). Section 15(C)(5) stated that "reduction in force shall be by job classification in a City department" and that "seniority employees who are in the class on a permanent basis" were to be "removed from the class in accordance with their total City seniority." Section 16(F) read as follows:

> Employees will be recalled by seniority for available positions either: (a) in their current classification, or (b) in the classification in the same occupational series; provided they have prior year service in such classification within the last three years and can perform the duties in the position they are recalled into. Specific recall and notification procedures shall be determined and modified by the Human Resources Department. Any Human Resources rules or procedures concerning employee recall shall not be interpreted to limit or impair the City's right to fill vacancies through transfer, promotion, or new hire in accordance with the Management Rights or the Transfer and Promotion provisions of this CET. Any existing Human Resource rules or procedures with conflicting provision shall be modified to conform to this CET.

Among the management rights listed in the CET was the right to "establish wage and benefits for new and existing employees that achieve the goal of financial stability in City Government." After imposition of the CET, the City imposed a 10% wage cut on its non-uniformed employees who were not covered by existing collective bargaining agreements. DWSD employees, however, did not receive a wage cut at the same time as other City employees.

DWSD employees had not yet received the wage cut when SCATA and the DWSD met on September 25, 2012, and the DWSD presented SCATA with a new proposal for a contract covering a period of nine months. During this meeting, the DWSD gave SCATA's negotiating team a copy of the Board of Water Commissioners' June 27, 2012, resolution. SCATA told the DWSD bargaining team that the resolution was not binding because the Board of Water Commissioners was an unelected body and only the City Council had the authority to impose these changes. Insofar as the record indicates, SCATA did not convey to the DWSD during this meeting its belief that the resolution did not apply to it because it had an existing collective bargaining agreement.

On October 5, 2012, Judge Cox, in an order clarifying his November 4, 2011, order, declared that the Board of Water Commissioners' June 27, 2012, resolution was not in conflict with his November 4, 2011, order and "shall be effective and controlling until this Court orders otherwise." On December 14, 2012, Judge Cox issued a second order clarifying that it had been his intent on October 5 simply to confirm that his November 4, 2011, order "did not stand as an obstacle to the DWSD implementing the CET for DWSD employees – if permitted to do so under otherwise applicable law."

On October 24, 2012, Conerway sent a memo to the officers of five unions representing DWSD unions, including SCATA, notifying them that the CET was now in effect for members of their bargaining units. The memo announced changes that would be put into effect pursuant to the CET, including a 10% wage reduction to take effect at the beginning of November 2012. The following day, Conerway sent a more detailed memo about the changes to be made pursuant to the CET to employees in these bargaining units.

On or around the beginning of November 2012, all members of SCATA's bargaining unit had their wages reduced by 10%. Other changes implemented at that time included changes to the health insurance plan, a reduction in the multiplier for the defined benefit pension, the elimination of Election Day as a paid holiday, the lowering of the cap on accrual of vacation leave, the capping of sick leave banks at 300 hours, the elimination of longevity pay, and a reduction in the number of bonus vacation days. As discussed in the section below, on November 9, 2012, SCATA filed a grievance over the implementation of these new terms.

The DWSD and SCATA continued their negotiations for a new contract after the CET was implemented until sometime in early 2014. They did not reach a new contract or tentative agreements on any subject.

E. Charging Party's Challenges to the CET

On October 23, 2012, the same day as Conerway's memo announcing the implementation of the CET, SCATA's legal counsel sent a letter to Conerway on behalf of SCATA and two other unions objecting to the implementation of these changes on members of the unions' bargaining unit. The letter made a series of arguments for why the DWSD was legally prohibited from unilaterally imposing these new terms, including that the DWSD's bargaining duty was not currently suspended, However, it did not assert that the imposition of these new terms on SCATA members would constitute a breach of an existing contract.

On November 9, 2012, Simoliunas filed a grievance on behalf of SCATA over the imposition of the terms of the CET. The grievance read:

> Here comes the Union and files 3rd step grievance for imposition of CET on Sanitary Chemists and Technicians Assn.
>
> The imposition is unlawful since there was no impasse in negotiations. The City (DWSD) broke off the negotiations in fact finding sessions. The City had a duty to continue negotiations. The Union asks to remove CET from SCATA and return to negotiations.

A copy of a handwritten letter, dated December 13, 2012, and signed by Simoliunas, Vannilam, and Kovoor was admitted into the record. Conerway denied receiving this letter, but it was admitted after Simoliunas testified that, in addition to sending copies of the letter to DWSD Director Sue McCormick and Mayor Michael Duggan, he personally handed the letter to Conerway and Schwartz in a bargaining session held in January or February 2013. The letter read:

> SCATA insists that Master Agreement is in place rather than CET resolution by Detroit Board of Water Commissioners.

SCATA's grievance over the imposition of the CET, along with similar grievances filed by two other unions, was eventually heard by Arbitrator Paul Glendon in 2015. The DWSD argued to Glendon that the issues presented by the grievances were entirely legal, not contractual, in nature and thus the grievances were not arbitrable. In an award issued January 27, 2016, Glendon agreed that the grievances were not arbitrable, noting that there was no dispute about the meaning of any provision of any of the unions' collective bargaining agreements and that he lacked authority to determine whether the CET had been legally imposed on the grievants.

On June 29 and June 30, 2016, SCATA and another labor organization representing DWSD employees, the Association of Detroit Engineers (ADA), filed unfair labor practice charges alleging that the DWSD committed an unfair labor practice when it imposed the 10% wage reduction on their members in November 2012. The charge did not assert that the imposition of this wage cut on SCATA members violated an existing collective bargaining agreement. The DWSD filed a motion for summary disposition asserting that the charges were

untimely filed under Section 16(a) of PERA. It also asserted that it had no duty to bargain in November 2012, when it imposed the changes set out in the CET, because its duty to bargain was legally suspended at the time. In *City of Detroit (Dept of Water & Sewerage),* 31 MPER 9 (2017) (no exceptions), ALJ Travis Calderwood granted the motion to dismiss. He found that while it was not entirely clear whether the June 27, 2012, resolution by the Board of Water Commissioners acted as sufficient notice to the charging parties that the DWSD was going to impose the CET on its members, it was clear that the Charging Parties had knowledge of the alleged unfair labor practice at least by the time they filed grievances over the wage cut in October and November 2012. Since the charges were not filed until June 2016, long after the six month statute of limitations set out in Section 16(a) of PERA had expired, he held that the charges were untimely. ALJ Calderwood rejected the charging parties' argument that the statute was tolled until January 2016, when an order issued by Judge's Cox on December 15, 2015, resolving the issue of the Commission jurisdiction over unfair labor practice charges involving the DWSD became final. The charging parties argued to ALJ Calderwood that they were precluded by Judge Cox's November 4, 2011, injunction from filing their charges until January 2016. ALJ Calderwood found that this fact did not serve to toll the statute under Commission law. He also noted that charging parties had filed grievances over the implementation of the CET in September and November 2012 and proceeded to arbitration in 2015 on these grievances despite the November 4, 2011 injunction. Therefore, he recommended that the Commission dismiss the charges on statute of limitations grounds. The Charging Parties filed exceptions with the Commission, but withdrew them, and the Commission therefore issued an order adopting the ALJ's findings and recommendation.

F. DWSD's Elimination and Creation of New Classifications

In early 2012, after Judge Cox's November 4, 2011, order, the DWSD began a reorganization that included the consolidated of its classifications as directed by Judge Cox. This reorganization has been described in several previous Commission decisions, including *City of Detroit (Detroit Water & Sewerage Dept),* 29 MPER 62 (2016), and *City of Detroit (Water & Sewerage Dept),* 30 MPER 28 (2016) (no exceptions). In early 2012, the City hired an outside consulting firm, EMA, to conduct a 90-day review of DWSD's operations. After this initial review, EMA issued a report with a number of recommendations. In its initial report, EMA suggested that the DWSD could reduce the number of its employees by about eighty percent. In October 2012, the DWSD entered into a contract with EMA to prepare a more detailed plan for restructuring its operations. During 2013, design teams made up of EMA representatives and employee volunteers examined work processes and made recommendations as to which existing job classifications should be consolidated to increase workflow efficiency. At some point, the DWSD made the decision to abolish all existing DWSD classifications and consolidate them into fifty-seven new classifications. The DWSD decided which existing job titles would be "mapped" to which new classifications, and prepared job descriptions for each new classification. Each new classification had three levels and each job description included a "job progression chart" that described the education and/or experience requirements for each level, plus a list of abilities that employees should be able to demonstrate upon entering that level. That is, employees were supposed to have demonstrated the ability to do all level 1 tasks before entering level 1, and in order to progress to level 2 should be able to perform all level 1 tasks plus the level 2 tasks, and so on. In December 2013, the DWSD decided which of the unions representing its employees

would represent which new classifications. In late January or early February 2014, these unions were notified which of the new classifications, if any, they had been assigned to represent.

Some work that was currently being done by SCATA chemists was moved to the new Plant Technician classification. However, nonsupervisory chemist titles that had been represented by SCATA and supervisory chemist titles represented by the Senior Water Systems Chemists Association (SWSCA), along with some unrepresented titles, were "mapped" to the new Chemist classification and most of the work done by SCATA titles was assigned to the Chemist classification. The DWSD notified the SWSCA that it had been assigned to represent the Chemist classification. SCATA was not assigned to represent any new classifications.

On April 1, 2014, the DWSD presented SCATA with a proposal for a "special projects technician" classification. The Special Projects Technician classification was designed to absorb individuals currently employed by the DWSD who were not selected for any of the other new classifications. Employees placed in this classification were to be assigned any work that they were qualified to perform, until, in the DWSD's judgment, there was no available work to perform or it was no longer advantageous to DWSD's operations to keep them performing the work. Individuals placed into the Special Projects Technician classification would continue to work, at least for a period, and would not be laid off when their existing titles were eliminated. The April proposal stated that "the special projects technician is an at-will position and may not be exclusive to the bargaining unit." As proposed, SCATA would be the bargaining representative for Special Project Technicians who had previously been part of its unit but who were not placed in any other new classification. Members of other bargaining units who were not placed into new classifications would also have the title Special Projects Technician, but would continue to be represented by their original bargaining agent. The DWSD told SCATA representatives that Special Project Technicians might become Chemists if positions opened up. SCATA, however, objected to the idea of chemists being assigned to do non-chemist work and rejected the DWSD's proposal.

G. The Placement Eligibility Process

The DWSD developed a document entitled "Placement Eligibility Process (PEP)" to describe the process it intended to follow in selecting employees to fill its new classifications. On May 8, 2014, all DWSD employees represented by unions, including SCATA members, were sent a letter indicating that "Phase II" of the DWSD PEP was to begin, i.e. placement for classifications represented by unions and associations. The letter stated that on May 12, 2014, "eligible" employees, defined in the PEP as current employees of the DWSD, would be able to "obtain and submit Placement Assessments for consideration in the new DWSD Job Classifications that are represented [sic]." Employees were told how to obtain assessment forms and a "Classification Design Guide" to help them determine the classifications for which they were eligible. The letter also stated that "eligible employees are required to participate in this process." The letter sent to employees on May 8, 2014, did not mention the PEP document. However, the PEP document was available on the DWSD's intranet portal and the SCATA officers admitted seeing it. The DWSD also held monthly meetings with representatives of its labor organizations throughout the PEP process at which the unions could ask questions.

The Placement Assessment form consisted of a self-assessment form, or questionnaire. Each new classification had its own form. The form asked employees to list their education, qualifying work experience, pertinent licenses or certifications, and special skills or training. Employees were then asked to check "yes" or "no" as to whether they had the demonstrated ability to perform a list of tasks. The tasks were grouped by level as in the job description. The form included a space for "management," generally the employees' current supervisors, to check "agree," "disagree," or "NA" next to each employee response. Employees were not given an overall rating based on their or their supervisors' answers to these questions.

After employees submitted their placement assessment forms to DWSD's Human Resources office, that office checked each employee's absenteeism, tardiness, and disciplinary records. According to the PEP, the Human Resources office was then to sort the employees into four groups: (1) eligible employees who met the minimum qualifications with no suspensions or discharges and six or less occurrences of absences or six or less occurrences of tardiness within the previous 12 months; (2) eligible employees who met the minimum qualifications with no suspensions or discharges and seven to twelve occurrences of absences or seven to twelve occurrences of tardiness within the previous 12 months; (3) eligible employees with one or more suspensions, no discharges, thirteen or more occurrences of absences or thirteen or more occurrences of tardiness within the previous 12 months; (4) eligible employees who did not meet minimum qualifications. Human Resources then sent the assessment forms to the applicants' current supervisors. After the supervisors reviewed and completed the forms, they returned them to Human Resources. According to the PEP, an "assigned HR Generalist" and a "Selection Manager" were then to make actual placement decisions.

The PEP, under the heading "Transition Rules," stated as follows:

> Management's determination of qualifications of eligible employees will be accomplished through a combination of the following:
>
> A. An employee self-evaluation skill assessment checklist
> B. A supervisory skill assessment checklist
> C. An employee resume and/or interview assessment
> D. An evaluation of employee work performance and work record including discipline and attendance.
> E. The needs of the organization.

According to the SCATA officers, they believed the purpose of the PEP for chemists was to determine at which Chemist level a SCATA chemist should be placed. The three officers, Simoliunas, Kovoor and Vannilam, all testified that until late September 2015 when Human Resources notified them that their members, and they themselves, would be laid off in a month, they had no notice that SCATA employees would or might be laid off. In fact, they asserted that they were affirmatively told by the DWSD that there would be no layoffs of chemists. Simoliunas testified that during the bargaining that took place between SCATA and the DWSD in 2014, SCATA repeatedly asked the DWSD to hire more chemists because of the workload, and that there was never any mention by the DWSD in these negotiations of reducing the number of chemists. He also testified that in or around May 2015, DWSD Director McCormick told him

that "this," meaning the selection process, "didn't concern you because you are not going to be laid off." Finally, Simoliunas testified that the manager of the Waste Water Treatment Plant also told him, at different times during the process, that there were no plans to lay off chemists.

Both Vannilam and Kovoor testified that sometime in the spring of 2015, after one of the monthly labor management meetings during which other unions had raised questions about the possibility of layoffs in their units, they stopped DWSD Director McCormick and Vannilam asked, "What about the analytical chemists – you have not said anything about them?" McCormick then motioned for Conerway to come over, and Vannilam and Kovoor asked the same question of Conerway. Conerway said that there were no plans to lay off chemists. Conerway did not recall the incident Kovoor and Vannilam described and denied ever telling the SCATA officers that there would not be any layoffs of chemists. According to Conerway, during these monthly meetings with union representatives she talked in general about what would happen to employees that were not placed. According to Conerway, she said that, although the DWSD would like it to happen through attrition, there might be some layoffs.

Vannilam also testified that the chemists in the analytical lab were constantly asking their supervisors, including Peindl, about what they knew about the placement process and were assured by them that there would not be any chemists laid off.

Grievance and October 8, 2015 Special Conference, Demand to Arbitrate

As discussed below, at the end of September 2015, SCATA received a series of letters informing it that eleven members of its unit would be laid off effective October 15, 2015, due to the elimination of their classifications. On October 1, 2015, Simoliunas sent a grievance to Conerway via email. Conerway denied receiving this grievance and asserted that the address on the email was not correct. Copies of emails sent by Conerway in the record indicate that her email address incorporated her first initial, which the October 2, 2015, email omitted.[4] The grievance read:

> SCATA maintains that layoffs were injurious to Clean Water Act and Great Lakes, were random, had no objective criteria, were based on favoritism, were discriminatory against South Indians. SCATA asks that these capricious layoffs would be rescinded and more chemists would be hired to fill the depleted positions to uphold Clean Water Act.

On October 8, 2015, the parties met in what they agree was considered to be a special conference. William Wolfson, at that time the DWSD's director of operations, and Conerway represented the DWSD at the conference. Simoliunas, Kovoor and Vannilam all attended as representatives of SCATA. SCATA also brought an attorney to the conference, but the attorney said very little. Prior to the hearing on the unfair labor practice charge, it was clear that the parties disagreed over what had been said at this meeting, including whether SCATA officers had made a demand to bargain in any form during this meeting. As the meeting had been recorded by SCATA, the parties agreed to have a transcript made by a neutral party and, after

[4] Simoliunas testified that he usually mailed, or more frequently, hand-delivered grievances.

they had reviewed it, have this transcript made part of the record in lieu of testimony by witnesses. The conversation, as transcribed, is summarized below.

Simoliunas began the substantive portion of the meeting by making arguments against the layoff of any chemists. First, he argued that the DWSD had inaccurately stated that the chemist title had been abolished, because the majority of chemists were staying on as chemists. Second, he noted that operators, i.e., Plant Technicians, had been assigned to do chemists' jobs. He argued that this jeopardized the health and well-being of the DWSD's customers because: (1) the Clean Water Act requires accurate water testing; (2) operators without chemist qualifications could not be relied upon to perform accurate tests; and (3) chemists were being laid off while their work was being given to operators.

Kovoor spoke next. He asserted that both he and his wife had more experience, more certifications, and were more qualified than chemists who were being retained. Kovoor complained that no objective criteria had been used in the selection process and it was just based on favoritism. He also pointed out that all those laid off (except Simoliunas) were from southern India, and he accused the DWSD of discriminating against employees because of their ethnicity. Kovoor also accused the DWSD of targeting SCATA officers for layoff. He said that SCATA had repeatedly brought anomalies in the analytical lab to the DWSD's attention but that DWSD had refused to take any action to correct them. Finally, Kovoor complained he had been given to understand that everybody in the analytical lab would be retained, and then suddenly, without notice, the majority of the well-qualified chemists had in the lab had been told that they were being laid off.

Vannilam was the next to speak. He asked what criteria had been used to select chemists for placement. He said that "nothing had been communicated to the chemists," and that none of them had been able to see any objective criteria in the selection. Vannilam also noted that the staffing of the analytical lab had gone from more than forty analytical chemists to only sixteen. He said that the quality of the work in the analytical lab was suffering, and noted that the remaining analytical chemists had been receiving a lot of overtime. According to the transcript, Vannilam then asked, "On what basis you (unintelligible) job classification, what are the requirements, why the union has never been consulted about (unintelligible) involved?"

Wolfson then told the SCATA representatives that the DWSD would go back and consider their arguments, but that it was "a management right to control the management of the workforce." To that, Simoliunas responded that the DWSD had said that it was eliminating the chemist title, but never said that it was reducing the workforce. Wolfson then asked Simoliunas if the Clean Water Act specifically required that water analysis be performed by chemists, and if so, how the Act defined a chemist. Simoliunas said he was surprised that Wolfson did not know this but would provide the evidence. Addressing Wolfson, Kovoor said that in July a letter had been written to the Great Lakes Water Authority (GLWA), about favoritism in the selection process for chemists. Wolfson replied that the letter had been presented to the GLWA. [5]

Later in the meeting an exchange took place between Wolfson and Simoliunas about arbitrating SCATA's grievance over the layoffs. Simoliunas told Wolfson that since this was the

[5] There was no other reference to this letter in the record.

last grievance meeting before the layoffs were to take effect, and Wolfson had said that the DWSD was not going to "call anybody back," the parties had to choose an arbitrator immediately, before the layoffs went into effect. Wolfson asked if the SCATA officers wanted him to investigate the allegations they had made during the meeting. The SCATA officers replied that there was no time. Wolfson then asked if there was a grievance pending. According to the transcript, Conerway said "I think just what..." and the rest of her response was unintelligible.

Addressing himself then specifically to Conerway, Vannilam asked what criteria were followed in selecting people for layoff, or if no criteria were followed. Conerway responded that placement was "done based on the assessment and also based on the review of those assessments by the operational folks in each area." Vannilam replied that Conerway had said in a previous meeting that decisions on the assessments would be communicated to employees and that there would be an opportunity to dispute the assessments. Neither Conerway nor Wolfson responded to those assertions.

After the special conference, on October 20, 2015, Simoliunas sent an email to Conerway and Wolfson titled "We want to choose an arbitrator for our grievance of false reclassification of chemists and layoff of chemists." The email read. "We had a meeting with you and had no response from you. Thus, the next step is arbitration." The email was sent to Conerway at the same email address as the grievance, and Conerway testified at the hearing that she never received it. There was no indication in the record whether Wolfson received his copy of the email. According to Simoliunas, however, he called Wolfson and asked him why had had not responded to the email, and Wolfson said that he did not have to respond. When Simoliunas did not receive a response from Conerway to his October 20, 2015, email, SCATA filed the instant unfair labor practice charge. In its response to the charge, the DWSD then asserted that it had no obligation to arbitrate because the parties had no collective bargaining agreement.

III. Findings of Fact – Discrimination Allegations

A. SCATA Officers' History of Protected Activity

Saulius Simoliunas was first employed by the DWSD as a chemist in 1981. He holds a BS from Wayne State University and a doctorate from Columbia University. From about 2001 until his layoff, he worked as a water systems chemist in the operations laboratory located in the DWSD's Waste Water Treatment Plant. Waste Water Treatment Laboratory Supervisor Michael Jurban supervised the operations lab and spent the majority of his time at this location. Under Jurban were senior water systems chemists, represented by the SWSCA, who also supervised the water systems chemists in the operations laboratory.

Simoliunas first served as president of SCATA from 1988 to 1992, was president of SCATA-Local 2334 at different times during the period that SCATA was affiliated with the UAW, and has been president of SCATA since 2012. Simoliunas did not participate in the negotiation of the 2007 Master Agreement. However, Simoliunas served as SCATA's chief negotiator in the unsuccessful contract negotiations with the DWSD between 2012 and 2014.

George Vannilam was hired by the DWSD as a chemist in January 1989. Vannilam has a BS in chemistry, a master's degree in chemistry, a master's degree in business administration, and a post-graduate certification in hazardous waste control all from Wayne State University. Vannilam became SCATA's vice-president in 2011 or 2012 and held that office until his layoff in October 2015. Jacob Kovoor was hired as a chemist by the DWSD in 1991. Kovoor has a BS in chemistry and did two years of graduate study in computer science. Kovoor became SCATA secretary in May 2009 and continued to hold that office until he was laid off. At the time of their layoff, both Vannilam and Kovoor worked as analytical chemists in the waste water treatment analytical laboratory, as did Kovoor's wife, Cicy Jacob. Both the analytical lab and the waste water operations lab were under Jurban's supervision. However, Assistant Water Laboratory Supervisor Joseph Peindl, who reported to Jurban, supervised the analytical laboratory on a day-to-day basis. Under Peindl were senior analytical chemists, including Kuriakose Cheeramvelil, who also supervised the analytical chemists.

The operations laboratory operates 24-hours per day, seven days per week. The analytical chemists work a regular 40 hour week, Monday through Friday, with some overtime. Prior to 2009, the DWSD's practice was to schedule three or four analytical chemists per day, on a voluntary basis, to work overtime on Saturdays and Sundays. In 2009, the lab stopped scheduling chemists to work on Sundays. SCATA requested a special conference with the DWSD to complain about the elimination of this overtime for chemists. At the conference, SCATA argued to the DWSD that it was violating its discharge permit from the federal government by failing to analyze for certain compounds on a daily basis. The DWSD disagreed that that these tests needed to be done every day to remain in compliance with the permit. After the special conference, SCATA wrote to the Michigan Department of Environmental Quality (MDEQ), making the same argument that it had made to the DWSD. According to Jurban, the MDEQ agreed with the DWSD that there was no violation.

Kuriakose Cheeramvelil was promoted to the position of senior chemist in the analytical laboratory in 2009. Even though Cheeramvelil had been a SCATA officer before his promotion, SCATA protested his promotion on the grounds that he was not qualified for the position. Sometime later in 2009, a SCATA member suffered a minor injury in an explosion that occurred while he was conducting a test in the analytical laboratory. The SCATA member was under Cheeramvelil's direction at the time. This was the second time an explosion had occurred while this same chemist was performing this same test. Simoliunas individually, and also SCATA as an organization, filed a complaint with the Michigan Occupational Safety and Health Administration (MIOSHA) over this incident. In the complaint, SCATA alleged that Cheeramvelil had not provided the injured SCATA chemist with sufficient training to perform the test safely and had not supervised him properly. SCATA also wrote a letter to the DWSD's director around this same time requesting Cheeramvelil's removal from his position as senior chemist. Jurban acknowledged that he saw this letter. The MIOSHA complaint resulted in fines being assessed against the DWSD for various infractions, including the improper handling of one of the compounds used in the test. The DWSD petitioned to have the amount of the fine reduced, and a public hearing was held on the petition. SCATA officers Simoliunas and Kovoor appeared at the public hearing to voice their opposition to the reduction and to reiterate their complaints about Cheeramvelil.

At about the same time as the explosion in the lab in 2009, another complaint was filed with MIOSHA asserting that untrained operators were improperly being allowed to handle chlorine in the Waste Water Plant. Although the record does not indicate whether he filed this complaint, Simoliunas had previously complained to DWSD management that this work should be done by chemists. Simoliunas, representing SCATA, met with the MIOSHA inspectors when they came to investigate the complaint and urged them to find a violation. MIOSHA issued a citation or citations to the DWSD as a result of this complaint, although it is not clear whether fines were assessed.

In 2011, Simoliunas and Kovoor jointly complained to DWSD management that Cheeramvelil and other senior analytical chemists were assigning themselves unnecessary overtime in the analytical lab. An investigation was done and, as a result of the investigation, Jurban and Peindl were instructed to obtain approval from the DWSD's assistant director before approving any overtime for senior chemists in the analytical lab. According to Kovoor, shortly after this incident Peindl and Cheeramvelil took actions that Kovoor believed constituted retaliation against him for making this complaint. These included skipping over Kovoor's name when assigning overtime from the overtime equalization list and removing Kovoor's wife, Cicy Jacob, from her quality assurance assignment in the analytical lab. In addition, in the analytical lab each chemist normally receives a specific assignment for the day. Around the same time that Cicy Jacob was removed from her quality assurance assignment, Cheeramvelil and Peindl stopped giving Kovoor daily assignments on Tuesdays and Thursdays, instructing him instead to fill in or assist other chemists as needed during those days. According to Kovoor, he and Cicy Jacob filed grievances over all three of these actions, although Jurban denied knowing anything about the Tuesday and Thursday assignment issue.

In January 2012, after he had become SCATA Vice-President, Vannilam sent a lengthy letter to McCormick, who had recently been appointed Director of the DWSD. In this letter Vannilam complained that the DWSD was hiring, and especially promoting, chemists who did not have a bachelor's degree in chemistry or other bachelor's degree with a specialization in chemistry, the stated minimum educational qualifications for the job. Vannilam complained that of the six senior analytical chemists in the analytical lab at that time, only one had the proper degree. Vannilam also said that Jurban, the lab supervisor, did not himself meet the minimum educational qualifications for the job. Vannilam complained that one of the last two chemists promoted to senior chemist not only lacked the proper degree, but was significantly junior to other applicants, including Vannilam himself. Although Vannilam did not name him, it is clear from the rest of this letter that Vannilam was referring to Cheeramvelil. Vannilam went on to mention the explosion in the lab as an example of how promoting underqualified individuals was allegedly hurting the lab's performance. He told McCormick that one reason the DWSD had failed to attain full compliance with its federal permit was the "below-par leadership and biased favoritism exhibited by middle level managers and the callous nature of the upper level manager not to address these issues." Vannilam also said that that the pay scale for chemists should be raised so that the DWSD could attract qualified chemists, and that the work contracted to outside laboratories should be brought back to the DWSD lab to ensure that sufficient quality testing was performed. Vannilam received an acknowledgement of his letter from McCormick, although according to him she did not take any action on his complaints. Jurban testified that he did not

recall the letter. However, he acknowledged that if McCormick received correspondence about the waste water laboratories, she usually forwarded it to him for a response.

On May 21, 2012, Vannilam sent McCormick another letter complaining about the process used in the recent promotion of new senior chemists; Vannilam had again been an unsuccessful applicant for the position. In this letter, Vannilam complained again about favoritism and asked why there were not "clear cut criteria listed and announced to the candidates."

In November 2012, Kovoor and Vannilam sent an email to the federal Environmental Protection Agency (EPA) with a list of complaints about the way the analytical lab was being managed. As Vannilam had done in his letters to McCormick earlier that year, they complained that there was a lack of properly qualified chemists in the lab and that the laboratory supervisors were not properly qualified. In a reiteration of SCATA's 2009 complaint to the MDEQ, they complained that the lab was not complying with the requirement that certain substances be analyzed "as soon as possible," because they were not analyzed on Sundays. Although a copy of this email was entered into the record, there was no evidence that the EPA communicated these complaints to the DWSD.

In July 2012, Simoliunas received a three-day suspension for insubordination and "boisterous behavior causing undue attention and work stoppage" after he approached a senior chemist in the operations lab and repeatedly insisted that she answer his questions about why she was doing SCATA work. SCATA filed an unfair labor practice charge over this discipline and the charge was assigned to me for hearing. In *City of Detroit,* 30 MPER 9 (2016) (no exceptions), I held that because Simoliunas' exchange with the supervisor occurred in the middle of the lab and within earshot of other employees, and because he shouted at her and pursued her when she tried to leave the room, his conduct was not protected by the Act and that the DWSD did not violate PERA by disciplining him.

As discussed above, in 2012 the City contracted with a consulting firm, EMA, to assist the DWSD in consolidating its classifications as directed to do by Judge Cox. EMA's initial report suggested that the number of DWSD employees could be reduced by about eighty percent. In December 2012, the City Council was considering whether to approve a contract with EMA. Kovoor, Vannilam and Simoliunas were among the union representatives who appeared at the City Council meeting to oppose the contract. Jurban was not at this City Council meeting and denied being aware of the SCATA officers' presence at the meeting.

In February 2013, Kovoor received a three-day suspension. According to Kovoor, he was suspended for failing to finish his assignment on a day that he had attended a meeting with a supervisor as SCATA representative to discuss what SCATA believed was an unfair amount of work assigned to one of its members. According to DWSD's answer to the grievance, Kovoor filed over the suspension, on the day in question Kovoor demanded a meeting with a supervisor (not Cheeramvelil) to discuss his own work assignments and became loud and abusive when the supervisor directed him to put his complaints in writing.

Sometime later in 2013, Vannilam and Kovoor, on behalf of SCATA, made a series of complaints in writing to the DWSD director about operations in the analytical lab. These complaints echoed those made by Simoliunas and Kovoor to the EPA in 2012 and again included allegations that the senior chemists in the analytical lab and Jurban did not possess the education and qualifications needed for their positions. Vannilam and Kovoor did not get a response from the DWSD director to their written complaints and Jurban did not recall seeing the letter. According to Vannilam, after they submitted these complaints, Jurban and Peindl told senior chemists in the analytical lab that "these people" were complaining that the senior chemists were not qualified for their jobs. However, it was not clear from Vannilam's testimony whether he heard this firsthand or from other chemists.

In 2013, Kovoor filed a grievance after his request to Peindl that he be given training on the Laboratory Information Management System (LIMS) system was denied. The grievance complained that the LIMS work had been taken out of the normal assignment rotation and assigned permanently to one employee. The DWSD denied the grievance, stating that the LIMS system was outdated and scheduled to be replaced and that everyone would be trained on a new system once it was in place.

In January 2014, as noted above, job descriptions for the new DWSD classifications were distributed and unions were told what new classifications they would be representing. At that time, a group of chemists represented by SCATA and the SWSCA were assigned to chlorination/de-chlorination operations at the Waste Water Treatment Plant. When the new job descriptions were released, the chlorination/de-chlorination operation work was included as a duty of the new Plant Technician classification, a classification of employees working in the Waste Water Treatment Plant that did not require formal chemical education or training. Sometime around the end of January 2014, SCATA sent a letter both to McCormick and to an individual named Robert Daddow who was not identified in the record. The letter complained about the assignment of the chlorination/de-chlorination work to non-chemists. Although some other duties that had previously been performed by SCATA members were eventually assigned to the Plant Technician classification, the chlorination/de-chlorination work was returned to the Chemist classification. Jurban testified that he knew about the reassignment of the work to Plant Technician and then back to the Chemist classification; he did not indicate whether he knew SCATA had complained about this issue.

At the end of January 2014, Simoliunas, on SCATA's behalf, filed the unfair labor practice charge in *City of Detroit (Water and Sewerage Dept),* 30 MPER 28 (2016) as discussed above. This charge was dismissed on the DWSD's motion for summary disposition when no exceptions were filed to the ALJ's recommended decision on October 19, 2016.

For at least some tests done in the analytical laboratory, there is a schedule for when the test must be done, i.e. if a sample is collected on x date, the test must be done on date y. One of these tests is biological oxygen demand (BOD) analysis. In 2014, Kovoor was one of the chemists assigned to do BOD analysis. Sometime during that year, SCATA complained to Conerway, and then filed a complaint with the EPA, reporting that on two occasions the BOD test had not been done by the assigned employee on the correct date. The EPA conducted an

investigation, and the DWSD responded that these were isolated incidents attributable to one employee's mistakes. It is not clear whether this investigation resulted in a citation or fine.

Both Kovoor and Vannilam testified that they were treated differently than other chemists by Jurban, Peindl and the senior chemists in the analytical lab. As an example, they testified that for some time before the layoffs, Jurban, Peindl and the senior chemists had been holding parties, or gatherings, in the analytical lab cafeteria that included persons from outside the lab but excluded Kovoor and Vannilam. At some point, Kovoor and Vannilam complained to Conerway about this practice. It is not clear from the record whether this complaint was oral or in writing, or whether they ever spoke to Conerway about it. Jurban testified that when parties were held in the cafeteria, everyone was invited.

B. Selection of Chemists for Waste Water Operations and Labs

In June 2015, the DWSD employed chemists in both its freshwater and waste water operations. Managers in the DWSD freshwater plants were given the task of selecting chemists to fill the available Chemist positions. With one exception discussed below, all of the freshwater Chemist positions were filled with chemists already working in freshwater. A few chemist positions at the Springwells freshwater plant were eliminated, but, due to several retirements, only one freshwater chemist represented by SCATA, Simon Chackumkal, was laid off in October 2015. Chackumkal was chosen for layoff because he had made several unsuccessful attempts to obtain the State license required to work in a freshwater plant. Chackumkal was apparently not considered for a waste water Chemist position.

As indicated above, waste water operations include an operations laboratory and an analytical laboratory. The operations laboratory is located in the Waste Water Treatment Plant. The analytical laboratory is in a separate location. Both labs test and analyze samples from the waste water treatment process. In general, the two laboratories perform different kinds of tests, although there is some overlap. In June 30, 2015, before the DWSD began selecting chemists for the new Chemist classification, an organizational chart was prepared for the laboratories. According to this chart, at that time there were ten chemists assigned to the operations lab. In this group were two supervisory senior water systems chemists, six water systems chemists, one assistant water systems chemist and one junior chemist. Simoliunas was a water systems chemist in the operations lab. In the analytical lab, there were two senior analytical chemists, Cheeramvelil and Aruna Mandava, and seventeen analytical chemists. That is, according to the chart, there were 29 filled chemist positions in the waste water laboratories, in addition to the assistant laboratory position held by Peindl and the laboratory supervisor position held by Jurban. Kovoor, Vannilam, and Cicy Jacob were analytical chemists. According to the organization chart, each of the seventeen nonsupervisory analytical chemists were assigned to one of eight areas: biochemical oxygen demand (BOD), custody, solids, trace organics, gas chromatography and mass spectrometry (GCMS), quality assurance, metals (ICP), or oil and grease (O&G).

There were also other water systems chemists who were part of waste water operations and worked in the Waste Water Treatment Plant in June 2015, but did not work in the labs or report to Jurban. Among these were eight water systems chemists or senior water systems

chemists who worked in the chlorination/dechlorination area of the Waste Water Plant and several other water systems chemists who worked in the air filtration area or in compliance data reporting.

As noted above, on May 8, 2014, all unionized employees were sent letters instructing them to fill out self-assessment forms. Kovoor, Vannilam, and Cicy Jacob completed and submitted assessment forms for the Chemist position. Simoliunas did not because he believed he was excused from doing so. In about 2005, Simoliunas, who was approximately 71 years old at the time, filed an age discrimination suit against the City. As part of this suit, the City agreed to certain work accommodations for Simoliunas' existing medical conditions. The City agreed to keep him permanently on the day shift instead of requiring him to switch shifts, excused him from working overtime, and also excused him from assignments requiring him to lift over 20 pounds. Since the only work performed by water systems chemists that required heavy lifting involved driving to another location and picking up samples, Simoliunas was also effectively excused from driving. Simoliunas testified that he believed that these accommodations, which the City and DWSD had continued to honor, excused him from participating in the placement eligibility process. Simoliunas wrote to both Conerway and to another individual in DWSD Human Resources, explaining his position. Although he did not receive a response, Simoliunas decided not to fill out an assessment form.

After the assessment forms for the Chemist classification were submitted, DWSD Human Resources reviewed the records of each applicant to determine how many absences, incidents of tardiness, and disciplinary suspensions the applicant had within the 12 months prior to the beginning of the Phase II selection process. For the Chemist classification, Human Resources also prepared a table that indicated, for each applicant, whether he or she met each of the minimum qualifications for the position and whether he or she possessed a Michigan Freshwater 1 or 2 license or a Michigan Municipal Wastewater Treatment D license. The table also grouped the applicants into Groups A, B and D, with D being those not meeting the minimum qualifications. Applicants with suspensions or an excessive number of occurrences of absenteeism or tardiness within the twelve months preceding May 24, 2014 were placed in Group B. Kovoor, Vannilam and Cicy Jacob were in Group A. All the chemists eventually selected for positions in the waste water laboratories were also in Group A, except for one, Benedict Santiago, whose assessment form indicated that he had nine occurrences of absences with the past twelve 12 months.[6] No group was listed next to Santiago's name in the table. According to Conerway, this table was supposed to be sent to all managers selecting Chemists, but Jurban testified that he never saw it.

Human Resources sent the assessment forms for the Chemist classification to the employees' supervisors to complete. Senior Chemist Cheeramvelil completed the forms for Kovoor and Vannilam, and Cicy Jacob's form was completed by Senior Chemist Mandava. The parties agreed to admit as an exhibit all the assessment forms submitted by applicants for the Chemist classification. Both Cheeramvelil and Mandava disagreed with some of Vannilam's, Kovoor's and Cicy Jacob's assessments of their abilities. However, a comparison of their assessment forms with those of other applicants reveals no pattern. That is, Cheeramvelil did not

[6] Kovoor was in Group A, presumably because his 2013 disciplinary suspension was issued more than twelve months prior to May 24, 2014.

disagree more often with Kovoor's or Vannilam's favorable self-assessments than with the favorable self-assessments of other chemists. Nor was there any obvious difference between Vannilam's, Kovoor's and Cicy Jacob's assessment forms and those of the analytical chemists who were selected for Chemist positions, or between Vannilam's, Kovoor's and Cicy Jacob's assessment forms and those of the other analytical chemists who were not selected.

The supervisors completed the Chemist assessment forms and turned them in on or about the end of July 2014. However, the actual selection of individuals to fill the new Chemist positions did not begin until 2015. Waste Water Supervisor Michael Jurban was given the task of selecting the individuals to fill the Chemist positions in waste water operations, including positions in the labs. Jurban submitted his recommendations to Dave McNeeley, who was at that time in charge of the Waste Water Treatment Plant, and they discussed them. McNeeley, however, was at that time new to his position and did not personally know the chemists currently working in waste water; McNeeley accepted all of Jurban's recommendations.

Jurban explained the process he followed in selecting Chemists for the waste water operation positions. He testified that the process began with discussions between him and McNeely over how many Chemist positions would be assigned to waste water operations. As noted above, in June 2015, there were about nineteen chemist positions in the analytical lab. Jurban testified that under the original plan, as proposed by EMA, all the work currently performed in the analytical lab was to be sent to outside laboratories. Although some work was subsequently outsourced, the idea to eliminate the analytical lab was never adopted. According to Jurban, at that time he and McNeeley began their discussions the number of Chemist positions assigned to waste water was sixteen. Jurban testified that throughout the summer of 2015 and up until early October, he constantly pressed McNeeley to add more positions. As McNeeley obtained approval from DWSD management, positions were gradually added until a final number of 32 positions was reached in late September or early October 2015. The 32 positions included eight Chemist positions in chlorination/de-chlorination, and four chemists in miscellaneous support positions in the Waste Water Treatment Plant. It also included either eight or nine positions in the operations lab, and eleven or twelve in the analytical lab.

In about August 2015, Jurban began selecting Chemists to fill the positions that were then approved. As he obtained approval to increase the number of positions, Jurban selected additional Chemists to fill them. According to Jurban, he was told that all the eight chemists in chlorination/de-chlorination were to be given Chemist positions and continue doing the chlorination/de-chlorination work. Jurban said that for the positions in the labs, he began by making a list of all the tasks that needed to be done in the analytical lab and in the operations lab.[7] For the analytical lab, he selected at least one chemist whom he considered able to perform each required task in the lab; in the operations lab, all the chemists were able to perform the necessary tasks. According to Jurban, DWSD Human Resources did not send him the Chemist assessment forms completed by chemists who had been working in waste water operations. However, he went to the Human Resources office and looked them over. Jurban admitted, however, that he did not base his decisions about who could do which tasks on the assessment form. Rather, Jurban relied on his own knowledge of what each chemist was doing and had done

[7] Jurban's list of tasks did not correspond to the "demonstrated abilities" listed on the assessment form for the Chemist position. Rather Jurban's list was more specific to the job of analytical chemist or operations chemist.

in the past. According to Jurban, his knowledge came from direct observation, looking at the reports the chemists had signed off on, and conversations with their supervisors. Jurban testified that before he made his selections, he also talked to other people in the labs about what type of work each chemist had done.

Jurban used a baseball analogy to explain his selection process. He testified that just as the manager has to have a player capable of playing each position, he had to find a chemist capable of doing each task. All the Chemists Jurban selected for the analytical lab positions, the operations lab positions, and the miscellaneous positions in the Waste Water Plant were working at those locations when he selected them. Jurban gave preference to chemists with supervisory experience, and he selected all the senior chemists in both labs and Peindl for the new Chemist classification.[8] Jurban testified that when considering which chemist(s) with experience doing a particular task to select, he gave preference to the chemists who he believed had the broadest range of experience. For example, in selecting Chemists for the analytical lab, he chose chemists currently working in the analytical lab, but gave preference to those who had also worked in the operations lab. According to Jurban, among the chemists who had not worked in both labs, he gave preference to those with experience doing many tasks.

Jurban initially selected Peindl, Cheeramvelil, Mandava, and eight other nonsupervisory, analytical chemists for positions in the analytical lab. These chemists were Dilwara Begum, Pauline Julien, Jose Lukose, Vijay Mahendra, Nainesh Patel, Gayatri Pinnamaneni, Vincen Raju, and Mini Ramankutty. Jurban was asked to explain at the hearing, for each Chemist he selected, why he selected this person. Peindl, Cheeramvelil and Mandava were selected for their supervisory experience as well as their skills. Jurban testified that Begum was selected because she had experience in biomonitoring, an operations lab function. Raju and Patel were also selected because they had worked both in the analytical and operations labs. Lukose and Mahendra he selected because of their GCMS experience, and Julien because she was the only chemist, other than Mandava, trained in the LIMS system, which had not yet been replaced. Ramankutty he selected because, in addition to her skills, she had volunteered to work with EMA on the reclassification project, which Jurban felt demonstrated initiative. According to Jurban, he selected Pinnamaneni because, in addition to her skills, she never made a mistake in her work.

He did not select nine analytical chemists, including Cicy Jacob, Kovoor and Vannilam. Jurban denied that Kovoor's or Vannilam's union or protected activities played any part in his decision not to select them for new positions. In response to questions about why he did not select Vannilam or Cicy Jacob for a position, Jurban testified that he simply ran out of positions Jurban testified that Kovoor had a negative attitude, as demonstrated by the fact Kovoor "wrote letters to the director" whenever Jurban attempted to change his assignment from BOD testing. According to Jurban, due to his complaints about being reassigned, Kovoor had done only BOD testing during the past three years and his other skills were not current. According to Kovoor, however, both he and Cicy Jacob had repeatedly requested to be assigned to do GCMS analysis, but their requests were denied. In addition, as mentioned above, in 2013 Kovoor filed a

[8] The new classification system eliminated many supervisory positions, and Peindl's Assistant Laboratory Supervisor position was "mapped" to the Chemist classification. Jurban himself was placed in another new classification, Team Leader.

grievance after his request to Peindl that he be given training on the Laboratory Information Management System (LIMS) was denied. Kovoor did not explicitly deny that he had done only BOD or had resisted other assignments other than GCMS analysis and LIMS.

Kovoor and Cicy Jacob had twenty-four years of service and Vannilam twenty-six. The Chemist with the fewest years of service that Jurban selected for an analytical lab position had been employed by the DWSD for eighteen years. Jurban testified that he did not consider seniority in making his selection decisions, although at some point in the process he made a list of the hire dates of all the Chemists he had selected. According to Jurban, he decided that all the Chemists he had selected were "pretty much on an equal footing in the sense that they've all been with us for a number of years." Jurban also testified that all the Chemist applicants met the minimum educational requirements for Chemists as set out in the job description, which was a bachelor's degree with a major in chemistry or related science. He acknowledged that a master's degree was desirable for the position, but said that he did not give preference to chemists with advanced degrees; according to Jurban, a bachelor's degree was sufficient to perform all the Chemist tasks in the waste water laboratories.

At some point before the beginning of October 2015, Jurban prepared a series of excel charts with information about the applicants for the Chemist positions in waste water. Jurban testified that he updated the charts as he went through the selection process. One of these charts lists all the individuals he had selected for the analytical lab and the operations lab, the number of years each had been employed, and the general job functions he expected them to do or be able to do. Another chart lists the eight analytical chemists and three water systems chemists he did not select for Chemist positions, and the job functions that each had done or could be expected to do in the future. Although it was not entirely clear from the record, it appears that Jurban prepared the charge of job functions for chemists to be laid off *after* he had made his initial selections. When cross-examined, Jurban admitted that this chart did not list all the tasks that Kovoor, Cicy Jacob and Vannilam had performed, but only the tasks that they were either performing at the time or had performed in the recent past. Jurban was not questioned about the tasks he put on his chart for the other chemists who were not selected, and it was not clear from the record whether he also omitted tasks that these chemists had performed in the past.

On his chart of the skills the non-selected chemists could be expected to perform, Jurban listed Cicy Jacob as able to perform only oil and grease, but admitted that she also had BOD experience, trace metal and mercury analysis experience, and had worked in quality assurance for years. He listed Kovoor as able to perform only BOD, but admitted that he had done ICP (metal) testing in the past, and listed Vannilam as able to do "solids, phosphorus and cyanide," but admitted that Vannilam had also done PCB, BOD and oil and grease.

Jurban selected a senior water systems chemist and seven water systems chemists for Chemist positions in the operations lab. Jurban did not select Simoliunas or another water systems chemist, Basma Saleh. He filled the miscellaneous positions in the Treatment Plant with four of the chemists in those positions; he did not select Anitha Kuriakose, who had been working in this area, for a Chemist position.

Jurban testified that Simoliunas had told Jurban that he had not filled out an assessment form, but that Jurban did not believe that he was prohibited from selecting Simoliunas for an open position for that reason. Rather, Jurban testified that he did not select Simoliunas for a Chemist position in the operations lab, because, according to Jurban, Simoliunas' inability to drive or work shifts other than the day shift due to his agreement with the City meant that he could not perform all the duties of a Chemist in that lab. According to Jurban, he did not select Simoliunas for a position in the analytical lab because Simoliunas had never worked there.

On September 24, October 23, and October 24, 2015, the DWSD sent SCATA letters notifying it that effective October 15, 2015, the SCATA-represented positions of analytical chemist and water systems chemist would be eliminated. The letters listed employees who would be "displaced" as a result of the elimination of these classifications. Simoliunas, Anitha Kuriakose and Selah were listed as displaced from the water systems chemist classification, and eleven analytical chemists, including the freshwater chemist Chackumkal, Vannilam, Kovoor, and Cicy Jacob, were displaced from the analytical chemist classification.

Between the date of these letters and the effective date of the layoffs, several changes occurred. According to Jurban, one of the chemists he had selected for an operations lab position, Arlene Wells, had accepted a Plant Technician position and chose to remain in that position. According to Jurban, he then offered that position to the two water systems chemists on the layoff list, first to Saleh and then to Anitha Kuriakose, but they chose to remain on layoff. He then offered the position to Lissy Joseph, an analytical chemist on the layoff list who had previously worked in the operations lab, and she accepted it.

Jurban was also made aware of another Chemist position opening in the water quality lab at one of the DWSD's freshwater plants. Mary Lou Semegen, the manager of the water quality lab, had selected the chemists who worked for her to fill the Chemist positions in her lab when she learned, on September 28, that her lab would get an additional Chemist position. Semegen emailed Human Resources asking for a list of chemists who were scheduled to be laid off on October 15, and was given names of eleven individuals from the waste water labs. Neither Simoliunas nor Simon Chackumkal was on the list. Semegen obtained the assessments for the eleven and reviewed them. She then called Jurban, asked him if he knew anybody who was suitable, and asked him to make it known in the waste water laboratories that she had a position to fill. Jurban gave her three names from the list of employees to be laid off: Saleh and two analytical chemists, Rosily Jais and Abdul Rahman. According to Jurban, he provided Semegen with Saleh's name even though Saleh had turned down a position in the operations lab because Saleh had come to him to ask about the freshwater job. Kovoor and Vannilam testified, without contradiction, that Jurban did not make a general announcement in the analytical lab about the freshwater job or tell them about the opening. In early October, Semegen called Peindl to ask for recommendations. On October 7, Peindl emailed her three names from the layoff list: Jais, Lissy Joseph, and Annie Parayil. Semegen spoke to Jais on the phone. However, she selected Abdul Rahman who impressed her after he came in person to her lab to talk to her. In sum, by the date the layoffs took effect, two of the fourteen SCATA members who had been scheduled for layoff, Lissy Joseph and Abdul Rahman, had already been placed in new Chemist positions. Two others, Saleh and Anitha Kuriakose, had been offered Chemist positions but had turned them down. Two others, Jais and Parayil, had been recommended for Semegen's positions by Peindl and/or Jurban

but were not selected by her. Vannilam, Kovoor, Cicy Jacob, Simoliunas, one other analytical chemist and Chackumkal, the freshwater chemist, had neither been placed nor recommended for new positions by their supervisors.

In May 2016, Jais was hired by GLWA to fill a Chemist vacancy in a freshwater plant. The manager who hired her testified that he obtained her name from GLWA Human Resources and that Cheeramvelil also called him and said that he hoped Jais could get the job. Cicy Jacob testified that she believed that Parayil and one other laid off analytical chemist, Betty Korula, were also eventually hired by the GLWA but did not know the details. Jurban testified that the GLWA did not hire any chemist who had been laid off by the DWSD for positions in the waste water laboratories that opened up after the transition to GLWA.

Discussion and Conclusions of Law:

A. Repudiation of Contract

Charging Party alleges that the DWSD repudiated the 2007 Master Agreement by refusing to apply the provisions in that agreement requiring it to follow seniority in selecting employees for layoff, and to recall laid off employees when new positions opened up, in order of seniority. It also argues that because the 2007 Master Agreement was still in effect in October 2015, the DWSD was required to arbitrate the grievance SCATA filed over the October 15, 2015, layoffs.

The DWSD asserts that the 2007 Master Agreement expired or was terminated prior to October 2012, when the DWSD, during a period when its duty to bargain was suspended, lawfully imposed the terms of the CET on SCATA and on other unions that did not have current collective bargaining agreements. Those terms then became the status quo, the DWSD argues, and remained the status quo for the SCATA bargaining unit in October 2015 because SCATA and the DWSD had not entered into a successor to the 2007 Master Agreement. According to the DWSD, Section 15 of the CET provided that when there was a reduction in force *within a job classification,* the reduction would be done by seniority. However, Section 15 did not apply to DWSD's placement process, because employees were being selected to fill new job classifications. For the same reason, DWSD employees not selected to fill positions within a new classification did not have any automatic recall or bumping rights. According to the DWSD, under the CET the DWSD had a management right to establish the qualifications for new classifications and to select employees to fill them. Although the CET provides for binding grievance arbitration, the DWSD argues that it had no legal obligation to agree to arbitrate a SCATA grievance in 2015 because the parties had no collective bargaining agreement.

The Commission has a limited role in disputes involving breach of a collective bargaining agreement. *Genesee Twp*, 23 MPER 90 (2010) (no exceptions). An alleged breach of contract will constitute a violation of PERA only if a repudiation can be demonstrated. See e.g., *City of Detroit (Transp Dept),* 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1985); *Jonesville Bd of Ed*, 1980 MERC Lab Op 891, 900-901. The Commission finds repudiation only when (1) the contract breach is substantial, and (2) no bona fide dispute over interpretation of the contract is involved. *Plymouth-Canton Comm Sch*, 1984 MERC Lab Op 894, 897. A repudiation occurs when the actions of a party amount to a rewriting of the contract or a complete disregard

for the contract as written. *Central Michigan Univ*, 1997 MERC Lab Op 501, 507; *Cass City Pub Sch*, 1980 MERC Lab Op 956, 960. Here there is no dispute that the DWSD did not adhere to the layoff and recall provisions of the Master Agreement with respect to the October 15, 2015 layoffs, or that it refused to arbitrate the grievance SCATA filed over these layoffs.

However, pursuant to Section 16(a) of PERA, an unfair labor practice charge that is filed more than six months after the commission of the alleged unfair labor practice is untimely. The limitation contained in Section 16(a) of PERA is jurisdictional and cannot be waived. *Washtenaw Cmty Mental Health*, 17 MPER 45 (2004); *Police Officers Labor Council, Local 355*, 2002 MERC Lab Op 145; *Walkerville Rural Cmty Schs*, 1994 MERC Lab Op 582. The six-month period begins to run when the charging party knows, or should have known, of the alleged violation. *City of Detroit*, 18 MPER 73 (2005); *AFSCME Local 1583*, 18 MPER 42 (2005); *Huntington Woods v Wines*, 122 Mich App 650 (1983), aff'g 1981 MERC Lab Op 836.

I find that SCATA's repudiation allegations were untimely filed under Section 16(a) of PERA because the DWSD's alleged repudiation of the 2007 Master Agreement took place not in October 2015, but in late October 2012, when Conerway sent a memo to the officers of five unions representing DWSD unions, including SCATA, notifying them that the CET was now in effect for members of their bargaining units, or, at the latest, in early November 2012 when it implemented changes in terms and conditions of employment, including a 10% wage reduction, pursuant to the CET. As Commission ALJ Calderwood held in *City of Detroit (Dept of Water & Sewerage)*, 31 MPER 9 (2017) (no exceptions), SCATA was clearly aware in November 2012 that the wages of its bargaining unit members had been cut. Therefore, by November 2012, SCATA knew or should have known of the alleged repudiation of the 2007 Agreement.

I also find, based on the record before me, that SCATA also knew, or should have known, that the DWSD took the position that it did not have a binding contract with SCATA at the time these changes were implemented. On June 27, 2012, the Board of Water Commissioners passed a resolution that unambiguously declared the DWSD's intent to impose on any DWSD bargaining unit "whose contract had expired and did not have a new ratified agreement" any new terms and conditions of employment adopted by the City pursuant to its authority under the emergency manager statute then in effect. At a bargaining session held on September 25, 2012, the DWSD handed SCATA another copy of the resolution. Then, as noted above, on October 23, 2012, Conerway sent memos to SCATA and five other DWSD unions notifying them that the CET was now in effect for members of their bargaining units and summarizing the changes to be made pursuant to the CET to employees in these bargaining units. Based on these events, it was, or should have been, clear to SCATA that the DWSD did not recognize the 2007 Master Agreement as binding in 2012.

It appears, from the letter SCATA officers drafted on December 13, 2012, asserting that "the Master Agreement is in place rather than the CET resolution," that SCATA believed the 2007 Master Agreement to still be in force. Whether the 2007 Master Agreement was still binding in 2012, however, is irrelevant to the question of when the statute of limitations began to run on SCATA's repudiation of contract claim. Because I find that SCATA knew or should have known of the alleged repudiation when the changes implemented pursuant to the CET went into effect, I conclude that the statute of limitation on SCATA's repudiation claim began to run no later than the beginning of November 2012.

I find that neither Judge Cox's November 4, 2011, injunction nor the fact that the City had a consent agreement, tolled the statute of limitations. The November 4, 2011 order enjoined the Commission from exercising jurisdiction, and unions from filing unfair labor practice charges and grievances, over "disputes arising from the changes" Judge Cox had ordered. However, as ALJ Calderwood noted in *City of Detroit (Dept of Water & Sewerage),* 31 MPER 9 (2017) (no exceptions), Section 16(a) of PERA provides for the tolling of the statute of limitations in one instance only, i.e. when the person aggrieved was prevented from filing a charge by reason of service in the armed services. The Courts have created other tolling exceptions, but these exceptions are very narrow. See *Troy Sch Dist,* 16 MPER 34 (2003). I agree with ALJ Calderwood that the fact that in 2012 there may have been a question about the Commission's jurisdiction over the matter did not serve to toll the statute on the filing of a repudiation of contract claim. Moreover, as AJ Calderwood also noted, SCATA filed a grievance over the November 2012 wage cut even though SCATA itself was arguably enjoined from doing so.

I also find that the statute of limitations contained in Section 16(a) was not tolled by the fact that in November 2012 there was a legal question as to whether the DWSD's duty to bargain was suspended. As discussed above, the City's duty to bargain under PERA was suspended after the City had entered into a consent agreement with the State of Michigan pursuant to 2011 PA 4. On August 12, 2012, 2011 PA 4 was suspended pending the outcome of a referendum initiative to repeal it, and it was later repealed. Clearly, if the DWSD had no legal duty to bargain under Section 15(1) of PERA, its repudiation of the 2007 Master Agreement in November 2015 did not constitute an unfair labor practice under Section 10(1)(e) of PERA. However, just as SCATA filed a grievance in which it argued that the duty to bargain was not suspended, it could have made that argument in an unfair labor practice charge

I conclude that SCATA's allegation that Respondent repudiated the parties' collective bargaining agreement was untimely filed, and I recommend that the allegation be dismissed on this basis. I find it unnecessary to address any of the other arguments raised by the DWSD in response to this claim.

B. Refusal to Bargain over Effects or Impact of the Layoffs

Under PERA, a public employer's decision to reduce the number of its employees in a bargaining unit and lay employees off is a matter of managerial prerogative rather than a mandatory subject of bargaining. However, the employer retains a duty to bargain over the impact or effect of the layoffs on bargaining unit employees. This includes how employees are selected for layoff and whether the selection is based on seniority, as well as the effect on the workload and job duties of the remaining employees. *Metropolitan Council No 23 and Local 1277 AFSCME v City of Center Line,* 414 Mich 643, 661-663 (1982). See also *Ishpeming Supervisory Employees, Chapter of Local 128 v Ishpeming,* 155 Mich App 501 (1986) where the Court held that although the decision of an employer to eliminate jobs pursuant to a reorganization plan was within the scope of management prerogative and a permissive subject of bargaining, the impact of that decision, such as the ensuing determination of which specific employees to lay off, was a mandatory subject over which the union could demand to bargain.

Charging Party argues that the DWSD violated its duty to bargain by failing to provide the DWSD with sufficient notice of the October 15, 2015, layoffs to allow for meaningful bargaining over the impact of its decision to lay off its members. This included, according to SCATA, which of SCATA's members would be selected for or placed into the new Chemist classification since this determined who would be laid off. SCATA asserts that by the time it received notice that its members were to be laid off, the selection decisions were a fait accompli, and any demand to bargain would have been futile. SCATA also asserts that it made a demand to bargain on October 8, 2015, but that the DWSD refused.

A bargaining demand does not have to take any particular form or contain any specific wording, but the employer must know that a request is being made. *St Clair Intermediate Sch Dist*, 17 MPER 77 (2004); *Michigan State Univ*, 1993 MERC Lab Op 52, 63. As discussed above, a transcript prepared from a tape of this meeting made by SCATA was admitted into the record, and the discussion is summarized in my findings of fact. Although SCATA asserts in its brief that it demanded to bargain over the effects or impact of the layoffs during the special conference the parties held on October 8, 2015, I find nothing in the statements made by the SCATA officers in this meeting which the DWSD should have construed as a demand to bargain. The SCATA officers questioned the need for the elimination of chemist positions and the layoff of chemists. They repeatedly and angrily complained about the apparent lack of objective criteria in the selection of Chemists. They objected to the selection decisions that were made and accused the DWSD of discriminating against the SCATA officers because of their union activity and on other grounds; they also asserted that the decisions were based on simple favoritism. They complained that the chemists had been told they would be shown their assessments and have a chance to appeal them. Vannilam appears to have complained that Charging Party had not been involved in the selection process. Complaints and accusations, however, do not, by themselves, constitute a demand to bargain. Simoliunas told Wolfson that the parties had to hurry and select and arbitrator for the grievance he had filed over the layoffs. However, SCATA did not ask or demand further meetings or discussions over the layoffs or anything related to them. I find that SCATA did not make a demand to bargain over the impact or effect of the layoffs on October 8, 2015.

I agree with Charging Party that after the DWSD's duty to bargain under Section 15(1) was reinstated on December 14, 2014, the DWSD had a duty to bargain the impact of any layoffs that occurred thereafter as a result of its decision to eliminate its existing classifications and replace them with new ones. That included, in this case, the procedures and criteria used to select employees to fill positions in the new Chemist classification because members of SCATAs unit who were not placed in the Chemist or other new classification would be laid off when their old titles were eliminated. Moreover, in this case the selection of employees to fill the new Chemist positions occurred during and after the summer of 2015, well after the DWSD's duty to bargain was reinstated. I also agree with Charging Party that Judge Cox's November 4, 2011, order did not give the DWSD the right to unilaterally establish selection procedures and criteria. In his November 4, 2011, Judge Cox directed the DWSD to combine its existing classifications, and also set forth the criteria upon which the future selection of employees for promotion must be based. However, Judge Cox's order did not prescribe the procedures or criteria the DWSD was to use to select employees to fill positions in the new classifications it created.

However, even when an employer clearly has an obligation to bargain over a particular subject, that duty to bargain is conditioned on the union making a timely demand. *SEIU Local 586 v Village of Union City,* 135 Mich App 553 (1984); *City of Pontiac,* 22 MPER 46 (2009); *City of Grand Rapids* 22 MPER 70 (2009); *Holland Pub Sch,* 1989 MERC Lab Op 346, 355. A union waives its right to bargain when, after receiving adequate notice of a proposed change, it fails to make a timely demand to bargain. See, e.g., *Holland PS,* 1989 MERC Lab Op 346; *Leelanau County,* 1988 MERC Lab Op 590. I find that even if the selection decisions for the Chemist classification were a *fait accompli* by the end of September 2015, SCATA had sufficient notice of the procedures and the criteria the DWSD intended to use select employees for the new Chemist classification to demand to bargain over these issues before the selections decisions were made.

In May 2014, the DWSD began Phase II of its PEP, the phase that covered unionized employees. The PEP document, to which SCATA and the other unions had access through the intranet as of May 2014, provided basic outlines of how the selection process for the new classifications would work. After the employees filled out the placement self-assessment forms, Human Resources was to sort them into groups based on whether the employees met the minimum qualifications for the new classification for which they were applying, and their disciplinary and attendance records within the previous 12 months. The forms were then to be returned to the employees' current supervisor or manager to complete the assessment forms; this consisted of checking a box indicating whether the supervisor agreed with the employee's own assessment that he or she had or had not demonstrated the ability to do the various tasks listed on the form. The forms were then to be returned to Human Resources, and a human resources representative, or "HR Generalist," was to meet with a "Selection Manager" to make placement selections.

The PEP document stated that management's determination of qualifications of eligible employees would be based on: (1) the self-evaluation skill assessment checklist; (2) the supervisors' checklist; (3) resume and/or interview; (4) an evaluation of employee work performance and work record including discipline and attendance; and (4) the needs of the organization. Seniority or length of service was not included on the list. The list also did not specifically mention education beyond the minimum required for the classification as a factor to be considered. Although the PEP stated that management's determination of qualifications would be based on both the self-assessment checklist and the supervisors' checklist, it did not specifically require Selection Managers to give priority to applicants demonstrating the ability to perform all or the greatest number of level 1 tasks. Clearly, the PEP process, as described in the PEP document, gave Selection Managers and HR Generalists considerable discretion in making judgments about the candidates' relative qualifications.

I find that the PEP provided SCATA with adequate information about the procedures and criteria the DWSD intended to use to select employees for the Chemist classification to oblige SCATA to make a demand to bargain over these issues if it believed that the procedure was inadequate or that the selection criteria should be spelled out in more detail. Of course, when the PEP Phase II document was made available to SCATA and the other DWSD unions in May 2014, the City's and the DWSD's duty to bargain under Section 15(1) of PERA was suspended because the City was under the supervision of an emergency manager. Thus, the DWSD could

unilaterally establish the procedures and criteria for the process of selecting employees for the new classifications and had no obligation to respond to any demand by SCATA to bargain over these issues at that time. However, since the selection of Chemists did not take place before the summer of 2015, there was ample time between December 14, 2014 and the completion of the process for meaningful bargaining to take place. I conclude that SCATA waived its right to bargain over selection procedures and criteria in this case by failing to make a timely demand to bargain.

SCATA argues that it had no reason to believe that members of bargaining unit might by laid off as part of the placement process until it received the layoff letters in late September 2015. In fact, according to SCATA, it was assured by McCormick and Conerway that no chemists would be laid off. I credit the testimony of Simoliunas, Kovoor and Vannilam about what McCormick and Conerway told them. I find, however, that despite these statements, SCATA had sufficient conflicting information to give rise to an obligation on its part to demand to bargain over the selection procedures and criteria when it had the right to do so. First, the PEP document included this statement, "Eligibility (defined in the PEP as being a current DWSD employee) does not guarantee placement into a new job classification." The PEP document does not support the belief of the SCATA officers that the purpose of the PEP process was simply to determine at which level of the classification an employee should be placed, and there is no evidence in the record that anyone from DWSD management told them that this was its purpose. Second, at a bargaining session in April 2012, the DWSD presented SCATA with a proposal under which current SCATA members who *were not placed in any of the other new classifications* would become Special Projects Technicians and as such would continue to be represented by SCATA. Whether or not the DWSD had any specific plans to reduce the number of chemists at that time, the DWSD clearly anticipated that some current employees might not be placed in the classification to which their work had been "mapped." Finally, as the SCATA officers were well aware, EMA, the consulting firm retained by the DWSD to assist it in combining classifications, had recommended that the DWSD make substantial cuts in the number of its employees, and in the years preceding 2015 the DWSD had reduced the number of chemists in the waste water analytical laboratory. I find that the assurances made to the SCATA officers that the DWSD did not plan to lay off chemists did not relieve SCATA of its duty to make a demand to bargain over the procedures and criteria for selecting Chemists. I recommend, therefore, that the Commission dismiss Charging Party's allegation that the DWSD violated its duty to bargain over the effects or impact of the decision to lay off members of Charging Party's bargaining unit in October 2015.

C. Discrimination Against SCATA Officers in the Selection Process

As the Commission reiterated most recently in *Macomb Co*, 30 MPER 12 (2016), in order to establish a *prima facie* case of discrimination under Section 10(1)(c) of PERA, a charging party must show: (1) an employee' s union or other protected concerted activity; (2) employer knowledge of that activity; (3) antiunion animus or hostility to the employee' s protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. See, e.g.,*Eaton Co Transp Auth*, 21 MPER 35 (2008); *Macomb Twp (Fire Dep't)*, 2002 MERC Lab Op 64, 72; *Rochester Sch Dist*,

2000 MERC Lab Op 38, 42. Once a *prima facie* case is established, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place absent the protected conduct. *MESPA v Evart Pub Sch,* 125 Mich App 71, 74 (1983); *NLRB v Wright Line, a Division of Wright Line, Inc,* 662 F2d 899 (CA 1, 1981). Ultimately, however, the charging party bears the burden of proof. See *Waterford Sch Dist*, 19 MPER 60 (2006); *Olivieri/Cencare Foster Care Homes*, 1992 MERC Lab Op 6, 8-9.

As set out in the facts, Simoliunas, Vannilam and Kovoor, individually and collectively, had a history of engaging in concerted activities protected by the Act dating back at least to 2009. The record indicates that Jurban knew of many of these activities. In 2009, SCATA complained to the MDEQ that the DWSD was violating its discharge permit by failing to perform certain tests every day. Although this complaint did not on its face involve the working conditions of SCATA members, it was related to a SCATA complaint about the elimination of overtime for unit members on Sundays, as Jurban and the DWSD were well aware. After the 2009 accident in the analytical laboratory, Simoliunas and Kovoor, argued to MIOSHA that Senior Chemist Kuriakose Cheeramvelil's negligence caused the accident. Jurban knew both about SCATA's letter to the DWSD director requesting Cheeramvelil's removal and the fact that SCATA officers had appeared at the MIOSHA hearing to oppose a reduction in the fine. In this instance, as it did on other occasions, SCATA combined a complaint over a working condition, safety, with an attack on the competence of a supervisor. Jurban also knew, or might have suspected given Simoliunas' earlier complaints, that SCATA had a role in another MIOSHA complaint filed that year, the one concerning the handling of chlorine in the Water Treatment Plant.

Vannilam's January 2012 letter to McCormick also combined complaints about the qualifications and performance of the supervisors of the analytical lab, including Jurban himself, along with complaints about chemist pay and the outsourcing of work that could have been done in the analytical lab. Only Vannilam signed this letter, but Charging Party asserts that this letter was concerted activity because it was an outgrowth of discussions among the SCATA officers. I conclude the fact Vannilam incorporated many complaints previously made by SCATA, along with the fact that he was by that time the SCATA vice-president, is sufficient to establish that the complaints in this letter were, in fact, joint complaints and not made solely by Vannilam and on his own behalf. I draw the same conclusion about Vannilam's May 21, 2012, letter to McCormick complaining about the promotional process for senior chemists. I also find that although Jurban did not recall these letters, because McCormick routinely sent him copies of all correspondence about the waste water laboratories he did see them.

I conclude that the evidence is insufficient to support a finding that Jurban, or anyone from the DWSD, saw the email complaining about the management of the analytical lab that Kovoor and Vannilam sent to the EPA in November 2012. In late 2013, however, Vannilam and Kovoor repeated these complaints in a series of letters to McCormick, including complaints again about the senior chemists' and Jurban's lack of qualifications for their positions. Although Jurban did not recall seeing these letters, as noted above, he testified that McCormick routinely sent him copies of all correspondence about the wastewater laboratories.

Closer to the date of the alleged unfair labor practice, Jurban clearly knew about SCATA's complaint to the EPA in 2014 about mistakes made by an employee in the analytical lab. I also find that Jurban knew that the SWSCA, and not SCATA, was to be the bargaining representative for the new Chemist classification, and I do not credit Jurban's testimony that in the summer of 2015 he was unaware of the fact that SCATA was one of a handful of unions that had failed to reach a collective bargaining agreement with the DWSD after Judge Cox's 2011 order. I realize that Jurban, in his position of sewage plant laboratory supervisor, was not responsible for contract negotiations. However, the overwhelming majority of the employees under Jurban's supervision were in the SCATA bargaining unit. That Jurban had not at least heard of the difficult bargaining relationship between SCATA and the DWSD seems highly implausible. I also find it implausible that, as Jurban's testimony seems to imply, he was not aware at the time he was selecting chemists to fill the new positions that those SCATA members not selected would be laid off.

In 2011, Simoliunas and Kovoor jointly complained to DWSD management about the senior analytical chemists assigning themselves unnecessary overtime, and Peindl and Jurban approving this overtime. Here, SCATA was again complaining about the actions of supervision, including Jurban. However, Charging Party does not explain what relationship SCATA's complaint about possibly dishonest behavior by supervision bore to the wage or working conditions of its members. I find, therefore, that Charging Party failed to establish that this complaint was activity protected by Section 9 of PERA.

The record fails to show that Jurban knew of other concerted protected activities described in this record. Although Jurban admitted that he knew about the changes in the assignment of the chlorination/de-chlorination work, he did not testify that he knew the reassignment of the work to the Chemist classification was the result of SCATA's complaint to McCormick in January 2014. Since the chemists performing that work did not work in a waste water laboratory and were not under Jurban's supervision at that time, I find no reason to assume that McCormick sent him a copy of this complaint. I also find insufficient evidence to conclude that that Jurban knew about the unfair labor practice charge which Simoliunas filed in January 2014, or about Kovoor's and Vannilam's complaints to Conerway about being excluded by the supervisors from parties held in the analytical lab cafeteria. In addition, I find no basis to conclude Jurban knew that Kovoor, Vannilam and Simoliunas appeared at a City Council meeting in December 2012 to oppose the EMA contract.

As noted above, Charging Party has the burden of establishing that anti-union animus or hostility towards the employees' protected activities was at least a motivating factor in Respondent's decision not to select Simoliunas, Kovoor, Vannilam and/or Cicy Jacob to fill one of the available positions in the new Chemist classification. Both direct and circumstantial evidence can be considered in finding anti-union animus. Inferences of animus and discriminatory motive may be drawn from circumstantial evidence alone if that evidence is strong enough. See *Detroit Pub Schs,* 22 MPER 89(2009), citing *Volair Contractors, Inc,* 341 NLRB 673 (2004); *Tubular Corp of America,* 337 NLRB 99 (2001); and *Washington Nursing Home, Inc,* 321 NLRB 366, 375 (1966). Relevant circumstantial evidence of unlawful motivation includes timing, disparate or inconsistent treatment, and shifting or pretextual reasons being offered for the action. See *Real Foods Co,* 350 NLRB 309, 312 fn. 17 (2007).

The record here indicates that by the time the selection process for new Chemist positions began, the relationship between Vannilam and Kovoor on one hand, and Jurban and Cheeramvelil on the other, was not collegial. I credit Vannilam's and Kovoor's testimony that even if they were not "parties," Jurban and the analytical lab supervisors sometimes held gatherings in the lab cafeteria at which certain chemists, including Kovoor and Vannilam, were not welcome. However, both Kovoor's and Vannilam's concerted protected activity and their exclusion from Jurban's social gathering occurred over a lengthy period of time and neither timing nor any other circumstantial evidence links these events. As discussed above, it was not clear from Vannilam's testimony whether he personally heard Jurban and Peindl telling the senior chemists in the lab that "these people" had been complaining about their qualifications. Even if I were to credit his testimony, however, I conclude that this statement is too vague to constitute evidence of animus against Kovoor and Vannilam's protected activities.

As a group, the three SCATA officers and Cicy Jacob constituted 16% of the 24 nonsupervisory chemists working in the waste water laboratories in June 2015, just before the selection of chemists for the Chemist positions began. All three SCATA officers and Cicy Jacob were long-term employees with more than twenty years of experience each. Although both Simoliunas and Jacob had disciplinary suspensions on their record, both of these suspensions involved alleged misbehavior while attempting to discuss a working condition with a supervisor. Nothing in the employment record of the four raises any question as to their competence as chemists. The fact that none of the four were offered positions or recommended to Semegen when she had an open freshwater position is enough to raise a suspicion of disparate treatment based on their union activities. However, while this fact might be enough, coupled with other evidence, to demonstrate that the SCATA officers' protected activities was at least a motivating factor behind their non-selection, it is not, I conclude, sufficient by itself.

None of the factors the Commission traditionally uses to find an employer's stated reasons for its actions to be pretextual are present here. As noted above, timing is not a factor; the SCATA officers had a long history of protected activities, but none of these activities occurred near enough to the selection decision to give rise to a finding of suspicious timing. The DWSD's decision to abolish all existing positions and create new ones, and the PEP, had no precedent. The record did not indicate whether any area within the DWSD other than the waste water labs suffered a reduction in the number of available positions. Therefore, there was no evidence as to how managers other than Jurban chose candidates to fill a diminished number of positions, and thus no evidence that his decisions were more subjective than those made by other managers. Nor did the DWSD provide the SCATA officers with "shifting" explanations for why they were not selected. To the contrary, the first explanation they apparently received was Jurban's explanation at the hearing of how he conducted the selection process.

In an attempt to establish disparate treatment, Charging Party argues that Vannilam, Kovoor, and Cicy Jacob were all senior chemists who had performed a range of tasks in the analytical lab. It points out that even Jurban was forced to acknowledge that they had, over the course of their employment, done more tasks than Jurban listed for them on his chart. This chart, however, appears to have been prepared after Jurban had finished selecting Chemists, not as a selection tool. It is clear from Jurban's description of the process that in choosing among the chemists who had experience in performing a particular task in the analytical lab, he considered many factors, including the quality of their work as he judged it and whether he believed they

had a positive attitude. All these factors, however, were factors that Jurban was allowed, and possibly even required, to consider under the PEP. I conclude that the fact that Jurban admittedly omitted some tasks that Vannilam, Kovoor, and Cicy Jacob had performed during their employment from a chart that he prepared after he completed the selection process does not warrant discrediting his testimony that the SCATA officers' history of protected activity did not factor in his selection decision.

According to Jurban, he did not select Simoliunas for a position in the operations lab because, under his medical restrictions, Simoliunas could not work overtime or drive from the plant to pick up samples and bring them back, duties required for a Chemist in the operations lab. Contrary to the DWSD's claim Simoliunas' failure to fill out a PEP form is not why Jurban did not select him for a position, although I note that had Jurban's recommendation to select him been submitted to Human Resources, it might have been rejected for that reason. However, whether or not Jurban's refusal to select Simoliunas because of his medical restrictions violated some other statute, I see no reason to discredit Jurban's testimony that these restrictions, and not Simoliunas' protected activity, was the reason he failed to select Simoliunas for a Chemist position.

As discussed above, if a charging party produces evidence sufficient to support an inference that anti-union animus or hostility toward the employees' union activity was a motivating cause of the employer's action, the burden shifts to the employer to produce evidence of a legal motive and that it would have taken the same action in the absence of the protected activity. In this case, however, there is no direct evidence of anti-union animus and the circumstantial evidence of a discriminatory motive consists of the following: (1) the fact that SCATA officers had a long history of concerted protected activities; (2) the fact that in the course of that activity they frequently criticized their supervisors and DWSD management; and (3) the fact that by the summer of 2015, Kovoor and Vannilam did not have a collegial relationship with their supervisors, including Jurban; and (4) the fact that the SCATA officers were not selected or recommended for Chemist positions in proportion to their numbers. I conclude that this evidence is not sufficient to support the inference that the SCATA officers' union and other concerted protected activities were a motivating factor in the DWSD's decision not to select or recommend them for new Chemist positions. I conclude that Charging Party did not meet its burden of establish a *prima facie* case of unlawful discrimination. Since Charging Party did not establish a *prima facie* case, the DWSD did not have an obligation to demonstrate that it would have selected/recommended the chemists it did select even in the absence of the SCATA officers' history of protected activity. I recommend, therefore, that the Commission dismiss Charging Party's allegation that the DWSD discriminated against the SCATA officers in the selection process for the new Chemist classification because of their union or other protected concerted activities.

Based on the findings of fact and discussion and conclusions of law set forth above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 22, 2018