STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (FINANCE DEPARTMENT, INCOME TAX DIVISION),
Respondent-Public Employer in Case No. C98 I-190,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 2799,
Respondent-Labor Organization in Case No. CU98 I-47,

-and-

JEANNETTE (GARDNER) BURTON,
An Individual Charging Party.
_____/

APPEARANCES:

David J. Masson, Chief Assistant Council, for the Public Employer

Miller Cohen, PLC, by Gail Wilson, Esq., for the Labor Organization

Jeannette (Gardner) Burton, in pro per

DECISION AND ORDER

On August 26, 1999, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint. The Decision and Recommended Order of the ALJ was served on the interested parties in accord with Section 16 of the Act.

Pursuant to Rule 66, R423.466, of the General Rules of the Employment Relations Commission, exceptions to the Decision and Recommended Order of the ALJ were due on September 20, 1999. On September 17, 1999, Charging Party made a request for a one-month extension of time in which to file her exceptions. We granted the request and issued an order extending the time for filing exceptions to the ALJ's decision to October 20, 1999. No exceptions were filed during business hours on that date. Instead, Charging Party apparently attempted to file her exceptions by

placing them under the door of our Detroit office sometime after 5:00 p.m. We find that the exceptions were not timely filed. Our order granting the one-month extension explicitly provided that the exceptions "must be received at a Commission office *by the close of business*" on the specified date (emphasis supplied). Accordingly, we adopt the recommended order of the Administrative Law Judge as our final order and dismiss the charges in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

Dated:_____

STATE OF MICHIGAN
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In the Matter of:

CITY OF DETROIT (FINANCE DEPT, INCOME TAX DIV),
Public Employer-Respondent in Case No. C98 I-190

-and-

AFSCME LOCAL 2799,
Labor Organization - Respondent in Case No. CU98 I-47

-and-

JEANNETTE (GARDNER) BURTON,
Individual Charging Party.
_____/

APPEARANCES:

David J. Masson, Chief Asst. Corporation Counsel, for the Respondent Employer

Miller Cohen, PLC, by Gail Wilson, Esq., for the Respondent Labor Organization

Jeannette (Gardner) Burton, *in pro per*

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE
ON MOTIONS FOR SUMMARY DISMISSAL

Oral argument on this case was conducted at Detroit, Michigan, on June 7, 1999, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission, pursuant to charges filed by Jeannette (Gardner) Burton, an individual, against her employer, City of Detroit (Finance Dept.), and her labor organization, AFSCME Local 2799, under Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), and upon motions for summary dismissal filed by both Respondents. Based upon the facts set out in the charges and pleadings, including the exhibits attached thereto, the briefs, and the arguments made on the record on June 7, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA:

The Charges and History of This Proceeding:

The charge in Case No. C98 I-190 was filed on September 9, 1998 against the City of Detroit. The charge, as clarified, alleged that the Employer took a series of unfavorable actions against Burton in retaliation for her complaints, made in concert with other employees, against one of her supervisors. The actions alleged to constitute unlawful retaliation were: (1) the Employer's persistent refusal to pay Burton out-of-class pay for time Burton, a senior clerk, spent performing the duties of a principal clerk who was on sick leave; (2) the Employer's decision, announced on March 9, 1998 and almost immediately rescinded, to reassign Burton to a job where she would not receive any overtime; (3) Burton's permanent reassignment on August 28, 1999; (4) the Employer's failure to promote Burton to a principal clerk position.

The charge in Case No. CU98 I-47 was filed on September 11, 1998 against AFSCME Local 2799. This charge, as clarified, alleges that the Union violated its duty of fair representation by: (1) failing to process a grievance alleging that Burton's supervisor was engaging in abusive conduct; (2) failing to assist Burton in collecting out-of-class pay due to her; (3) failing to help Burton after she was removed from an overtime assignment on August 28, 1998; and (4) failing to assist Burton in obtaining a promotion to the position of principal clerk.

The two charges were consolidated for hearing. On November 12, 1998, the Respondent Union filed a motion for a bill of particulars. Burton filed a response to this motion on December 30, 1998. On January 11, 1999, I ordered the parties to attend a pre-hearing conference on February 4. At this conference Burton was asked to further clarify her allegations against the Respondents. After this conference, the Union filed a motion for summary disposition on March 2. On March 4, the Employer filed a similar motion. Burton filed a response to the Union's motion on March 18, and a response to the Employer's motion on April 2, 1999.

On May 11, 1999, I wrote the parties stating that I had concluded that, accepting all facts alleged by Burton in her pleadings as true, she had failed to state a valid claim against either Respondent under PERA. I stated that I had concluded that it was therefore unnecessary to conduct an evidentiary hearing in this matter. See *Smith v Lansing School Dist.,* 428 Mich 248 (1987). I noted, however, that under *Smith,* Burton was entitled to an opportunity for oral argument. In accord with Burton's request, oral argument on the Respondents' motions was held on June 7, 1999.

Facts:

Burton is employed by the City of Detroit, Finance Department, Income Tax Bureau. Her classification title is senior clerk. She is a member of a bargaining unit represented by the Union. Burton was assigned to the office audit section. However, in early 1998 Burton, along with several other clerical employees, was also assigned to process tax returns. Because of these extra duties, these employees regularly worked between one-half and two hours of overtime per day Monday through Friday, and also regularly worked on Saturdays.

On February 27, 1998, Burton and four other clerical employees in her area wrote a letter to the Director of the Income Tax Bureau, Loretta Neal, asking for a meeting "to discuss

issues/problems we are experiencing in Room 1220 of the Income Tax Department." The employees wanted to complain about what they considered rude and abusive behavior by their immediate supervisor, Dan Perry. On about March 3, the employees gave a copy of their letter to the Union president, Geraldine Chapman. On March 10, Neal and Chapman held a meeting to discuss the employees' complaints. Burton was present as the representative for the employees who had signed the letter. After the meeting Chapman filed a grievance demanding that Perry receive supervisory and/or sensitivity training, or that he be referred to an Employee Assistance Program. Meanwhile, on March 9, the head of the returns processing section notified Burton's supervisor, the head of the office audit section, that Burton was no longer needed to process returns. Burton immediately complained to her supervisor. Shortly thereafter she was told that she was "back on overtime," and Burton resumed working on tax returns.

On March 12, Burton approached Chapman to complain that she was still being harassed by Perry. Chapman told her to write down the dates and details of every incident as it occurred. Burton also asked Chapman about getting out-of-class pay for principal clerk work she had been performing. The employee with this classification title in Burton's area had been frequently absent, and Burton had been required to perform his duties. Chapman told Burton to write down the principal clerk work she was performing and to give her (Chapman) a copy. She also told Burton to submit a request for out-of-class pay to Neal.

Burton followed Chapman's directions. On April 27, Burton wrote Neal a letter asking to be paid out-of-class pay from June 7, 1997. Sometime between April 27 and mid- June 1998, Chapman met with Neal to discuss Burton's request. Burton was not present at this meeting. Neal told Chapman that she would agree to pay Burton for the principal clerk work Burton had performed. However, she also told Chapman that the principal clerk position was being abolished and the duties redistributed. After the meeting Chapman told Burton that "things were going her way." Burton, however, asked that a grievance be filed, and on June 8 Chapman filed a grievance demanding that Burton be compensated for all time she had spent performing out of class assignments. Chapman noted on the grievance that the department had said that the principal clerk position was being abolished. Chapman did not tell Burton that she had filed the grievance as Burton had requested, and Burton never asked Chapman about it. Chapman processed the grievance through the third step. She did not take the grievance further, however, because she believed the matter was settled. Despite Neal's promise to Chapman, Burton did not receive any out-of-class pay, or any notice that she was going to receive it. Because Burton had concluded that Chapman was not going to help her, she did not raise the matter with Chapman again.

On August 28, 1998, Burton was reassigned to a clerical position where she would not be processing returns, and, therefore, would not receive overtime. Burton complained to Chapman. She pointed out to Chapman that there were contractual workers processing returns. She also said that as long as the Employer was using contractual workers she (Burton) was supposed to be able to work overtime. According to Burton, "since she(Chapman), didn't do anything, I said (to myself), forget it." Burton did not specifically ask Chapman to file a grievance. On September 11, 1998, Burton filed the instant charge.

On December 13, 1998, after Burton's charges had been filed, Chapman wrote to Neal resubmitting the grievance concerning Burton's out-of-class pay. Neal did not answer until January 26, 1999. In her answer Neal said that she had agreed that Burton should be paid out-of-class pay from June 3, 1997 through February 6, 1998. Neal indicated that due to "other pressing matters," the necessary paperwork had not been submitted to the human resources department until December 15, 1998. Neal also stated that the principal clerk position had been abolished on February 9, 1998. Despite a "request for status change" signed by Neal in December 1998, Burton did not receive her money until June 11, 1999.

Discussion and Conclusions of Law:

Charge Against the Employer:

Burton's claim against her Employer is that it unlawfully retaliated against her for engaging in protected concerted activity under the Act. The Employer asserts in its motion for summary dismissal that the charge against it should be dismissed because Burton failed to allege facts sufficient to support a prima facie case of unlawful discrimination.

The elements of a prima facie case of unlawful discrimination under Sections 10(1)(a) or 10(1)(c) of PERA are: (1) employee union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's exercise of his of her protected rights; (4) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action. *Grandvue Medical Care Facility*, 1993 MERC Lab Op 686, 696. A party claiming unlawful discrimination by an Employer under the Act must, at a minimum, allege facts sufficient to support a prima facie case.

Here, Burton engaged in protected concerted activity by making complaints, with other employees, about her supervisor. The Employer knew about this activity. However, Burton did not allege facts which would support a finding that the Employer was hostile to her protected activity. In addition, she has not alleged any facts that would support a causal connection between her protected activity and the actions which she alleges were retaliatory. That is, Burton has asserted that she engaged in activity protected by PERA, and she has asserted that the Employer took certain actions that were unfavorable to her, but she has not alleged facts to show that these events were connected. For these reasons, I conclude that the Employer's motion for summary dismissal should be granted.

Charge Against the Union:

A union's duty of fair representation under PERA consists of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any, (2) to exercise its discretion with complete good faith and honesty, and (3) to avoid arbitrary conduct. *Vaca v Sipes*, 386 US 171,177 (1967); *Goolsby v Detroit*, 419 Mich 651, 664 (1984). "Bad faith" indicates an intentional act or omission undertaken dishonestly or fraudulently. *Goolsby*, at 679. "Arbitrary" conduct under this standard is defined as (1) impulsive, irrational or unreasoned conduct, (2) inept

conduct undertaken with little care or with indifference to the interests of those affected, (3) the failure to exercise discretion, or (4) extreme recklessness or gross negligence. *Goolsby*, at 682.

Burton first alleges that the Union breached its duty of fair representation by failing to process the grievance it filed after Burton and other employees complained about their supervisor's rude and abusive conduct. When these complaints were brought to her attention, Union President Chapman arranged a meeting between Burton and the bureau director, and it was agreed that the supervisor would apologize. Chapman filed a grievance, but did not process it because she thought the matter was settled. Two days later Burton complained to Chapman that the conduct was still continuing, but she did not mention the subject to Chapman again. There is no indication that Chapman was aware that Perry's conduct continued to be a problem, or that he had not apologized as agreed. The facts also indicate that Chapman met with Neal to discuss Burton's claim for out-of-class pay, that she filed a grievance in compliance with Burton's request that she do so, and that Chapman believed the matter had been settled in Burton's favor. There is nothing to indicate that Chapman knew Burton had not been paid. With respect to the third allegation, Burton complained to Chapman about being removed from overtime, but did not ask her to take specific action. Finally, it is undisputed that the Employer abolished the principal clerk position to which Burton had hoped to be promoted. Assuming that the Union could have filed a grievance over this action, Burton did not ask it to do so. I conclude that facts do not show that the Union acted in bad faith, impulsively, irrationally, or unreasonably in this case, that the Union's conduct in handling these matters was inept, or that the Union was guilty of gross negligence. I conclude, therefore, that the Union's motion for summary dismissal should be granted.

For reasons set forth above, and pursuant to Section 16 of PERA, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Both the motion for summary dismissal of the charge in Case No. C98 I-190 and the motion for summary dismissal of the charge in Case No. CU98 I-47 are hereby granted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____