STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (RECREATION DEPARTMENT),
Respondent-Public Employer,

Case No. C94 A-28

-and-

AMERICAN FEDERATION OF STATE, COUNTY
AND MUNICIPAL EMPLOYEES, COUNCIL 25, LOCAL 836,
Charging Party-Labor Organization.
_____/

APPEARANCES:

June C. Boyd, Assistant Corporation Counsel, for Respondent

L. Rodger Webb, Esq., for Charging Party

DECISION AND ORDER

On March 28, 2000, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above-entitled matter, recommending that Respondent take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____

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APPEARANCES:

June C. Boyd, Assistant Corporation Counsel, for the Employer

L. Rodger Webb, Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10), this matter came on for hearing at Detroit, Michigan, on November 7 and August 29, 1995, January 9, 1998, and March 4, 1999, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on January 31, 1994, by the American Federation of State, County, and Municipal Employees, Council 25, Local 836, alleging that the City of Detroit has violated Section 10 of PERA. Based upon the record, including briefs filed by the parties on or before July 17, 1999, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge and Background Matters:

The charges brought in the instant case stem from an earlier Commission order in Case No. C90 E-106, *City of Detroit (Recreation Dept)*, 1992 MERC Lab Op 474. In that case the Commission found that the Employer had violated PERA by unilaterally reclassifying duties of laid off bargaining unit employees and reassigning those duties to nonbargaining unit employees at lower pay. The Commission ordered Respondent to return to Charging Party's bargaining unit the work transferred to non-unit members; reinstate and make whole the seniority, benefits, and wages of the

seven laid off/ demoted swim instructors; and upon demand, bargain with AFSCME over the removal of work from the bargaining unit.

When the City failed to comply with the Commission order, Charging Party filed a complaint for summary enforcement with the Michigan Court of Appeals, which was granted on March 23, 1993. When the City failed to comply with the order, Charging Party filed a petition for citation of contempt. On November 10, 1993, the Court of Appeals denied AFSCME's petition on the ground that AFSCME had not demonstrated how the City's claimed compliance was inadequate.

By this charge, Charging Party is objecting to the Employer's failure to return to the status quo ante, and is in essence seeking compliance with the earlier Commission order rather than establishing a new unfair labor practice. See *Detroit Transportation Corp*, 1990 MERC Lab Op 566. The charge alleges the following:

> The City continues to adhere to its original determination to transfer work out of the 836 unit, and to eliminate unit work under the guise of dual classifications. The City has failed and refused to abide by the Commission's order, in these material respects:
>
> - the City has not returned the 836 unit work it had transferred to other unit employees; and
>
> - the City has not reinstated the seven laid off swim instructors, in that classification, and has not made them whole.
>
> These acts and failures to act violate the Act.

After this charge was filed in January of 1994, the parties met periodically and made repeated attempts to resolve the issues. They reached agreement in most areas, and agreed to the stipulated order set forth below. The issue remaining involves compensation allegedly due employee Sharon Marcotte. The City has paid Marcotte approximately $33,000 in back wages, longevity and COBRA payments, as well as reimbursement of sick and vacation banks. Her remaining claim involves interest which she asserts was lost on monies which she was required to utilize from her annuity with the City due to financial hardship.

Facts:

Sharon Marcotte began work with the City of Detroit on June 30, 1963. She became

a swim instructor in October of 1972. In that capacity she planned and organized the swimming program, trained staff to teach swimming, supervised staff as they functioned in the program, ordered supplies, made budget projections and performed other related duties. She earned approximately $28,000 annually. Marcotte was laid off in February of 1990. At that time she was offered a position as a lifeguard by the City but declined the position because it would only pay about $12,000 a year, less than half of what she made as a swim instructor.

After her layoff Marcotte collected unemployment insurance for six months. In August of 1990 she began a contract position with the Red Cross teaching CPR and first aid. Marcotte returned to work with the City as a building attendant in February of 1992, making approximately $20,000 annually. Pursuant to the Commission order she was reinstated to the position of swim instructor on June 23, 1993, and worked in that position until her retirement, effective June 1, 1994.

Marcotte testified that her layoff placed her in financial duress, requiring her to take certain actions resulting in financial losses. She testified that her loss of income necessitated that she utilize funds from her annuity with the City in order to make mortgage payments and purchase a car. Under the City's annuity program, employees may make contributions of a percentage of their wages to establish a retirement annuity. It is an interest bearing account managed by the City; the City does not make matching contributions. During her employment Marcotte contributed to the maximum extent which was 5%.

When Marcotte attempted to utilize some of her annuity funds, she was informed by individuals at the Pension Bureau that she could not make a partial withdrawal but had to withdraw the entire amount. Marcotte initially testified that she had $118,000 in her annuity; she withdrew $26,000 for expenses and rolled over $92,000 into an IRA. When informed that the City records showed a withdrawal of $107,055.81, she agreed to that figure and testified that she may not have taken out the whole $26,000, but just "what she had to." Marcotte testified that she rolled over $86,019.05 into an IRA with Standard Federal. The remaining amount of $21,036 she utilized for two major expenses, a house payment and a car.

With respect to the house payment, Marcotte first testified that she had a balloon payment due the year of her layoff and needed the money from her annuity to pay off her mortgage. In subsequent testimony, Marcotte indicated that she jointly owned the house with her mother and her mother had made the balloon payment in January 1988 of $13,148.51 as a "family loan." Prior to her layoff Marcotte had been attempting to pay her back. She first testified that she was paying her mother in cash at a rate of $200 per paycheck or $400 per month; she then corrected this figure to $200 per month. This continued for approximately 24 months, until her layoff in February of 1990; after that time she testified that she made small partial payments. Because it was a family loan, her mother was not charging her interest. Marcotte testified that she utilized $11,000 of the $21,036 withdrawn to repay her mother. According to Marcotte, she and her mother had originally agreed that if Marcotte could not make the payments they would have to sell the house to make up the money Marcotte borrowed from her.

With respect to the car expense, Marcotte testified that she had been driving a ten year old car with mileage of 150,000. According to Marcotte, the car was adequate when she worked in the City, but when she began work with the Red Cross she traveled more frequently and greater distances. She testified that in November 1990 she purchased a new truck, paying $9,772 in cash and financing the remaining $3,100. The vehicle purchase order from George Matick Chevrolet, Inc., and signed by Marcotte, reflects these figures, but has a date of November 12, 1992, which was after she returned to work for the City. Marcotte testified that the date was in error, but had no documentary evidence to correct the purchase order or to substantiate her testimony. Marcotte also testified that after she made two payments on the car loan, she was afraid that she would not be able to keep up the payments and made an additional withdrawal of $6,500 from her Standard Federal IRA to pay off the car and "other charges." This resulted in a 10% penalty of $650. Marcotte was unable to produce any records of her expenditure of those funds.

Marcotte invested the remaining $86,0195.05 of her annuity in an IRA at Standard Federal Bank in October of 1990 at a fixed rate of 7.350%. In November of 1992, Marcotte transferred funds amounting to $91,341.08 to the Ohio Company, investing it in an IRA. Marcotte acknowledged that her investment "did very well;" for the first year of her investment she netted a 16.6% return; the second year, 2l%. Contributions invested with the City of Detroit annuity averaged 7% interest.

Positions of the Parties:

Charging Party claims that due to financial duress as a result of her layoff, Marcotte was required to withdraw her annuity in order to obtain funds to retain her house and purchase a car. She is therefore entitled to the payment of interest on the money she withdrew from her annuity and expended for personal use, less the interest that the rolled over amount earned in her IRA with Standard Federal. By Charging Party's calculations, this amounts to $14,734.05. In addition, Marcotte seeks reimbursement for the tax penalty incurred after withdrawing an additional $6,500 from her Standard Federal IRA to pay off her car and other bills. Charging Party asserts that these damages are in the same category as the losses she sustained with regard to back wages, leave banks, medical expenses, and pension credits.

The Employer maintains that by utilizing her annuity to pay off her mortgage and purchase a car, Marcotte has not acted reasonably and has failed to mitigate her damages. Further, Marcotte offered inconsistent and contradictory testimony with respect to her use of these funds. The Employer also points out that due to the high return on Marcotte's investments after she drew down her annuity, she did not lose any interest but actually made a profit over what the City could have offered her. The Employer asserts that Marcotte has already been reimbursed for the amounts she would have invested in the annuity during her layoff; however the interest these funds would have earned was not included in the reimbursement. The Employer is therefore willing to reimburse Marcotte 7% interest on the amount she would have invested in her annuity had she not been laid off, which the Employer estimates at $1,731.79. The Employer also argues that Marcotte's unemployment compensation must be offset against her award of backpay and requests that Marcotte

reimburse the City $7,690 for unemployment compensation.

Discussion and Conclusions:

Under Section 16(b) of PERA, when a violation of the Act is found, the Commission has the power to order a party to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act. Its power in this regard is remedial, to restore the situation to that which would have been had the violation not occurred, and to make whole employees for earnings and other compensation lost as a result of the violation. Punitive or other damages are not awarded. See *Nick's Fine Foods*,1968 MERC Lab Op 307; *Sheriff of Washtenaw County*, 1968 MERC Lab Op 364. Evidence presented at compliance hearings must demonstrate actual losses by the employee immediately caused by the employer's unlawful action. *Bloomingdale Bd of Ed*, 1977 MERC Lab Op 1105; *Ecorse Public Schools*, 1991 MERC Lab Op 206. A remedy must be sufficiently tailored to expunge only the actual, and not merely speculative, consequences of the unfair labor practice. *Sure-Tan, Inc.*, 467 US 883, 116 LRRM 2857 (1984). The policy of the National Labor Relations Board, which the Commission uses as a guide in compliance cases, is reflected in Section 10530.1 of the NLRB Compliance Manual which states: "Backpay awards do not include punitive damages nor do they include compensation for collateral losses, such as from stress or credit problems."

There appears to be no Commission or NLRB precedent for the extraordinary relief sought by Charging Party in this case. In the opinion of the undersigned, Marcotte's problems with her house and car are personal matters only collaterally related to her loss of compensation from the City. Marcotte is seeking compensation for what could be characterized as credit problems, viewed by the NLRB as a type of collateral loss not included in a backpay award. Even assuming arguendo that such matters could be compensable, I find that Charging Party has failed to establish a compelling need for Marcotte to withdraw funds from her annuity for her personal use, but has simply made a claim of financial duress without supportive evidence.

Although her income was reduced, Marcotte was not totally without income during the period of her layoff; she collected unemployment insurance and worked for the Red Cross. There was no showing that she was about to lose the house, which was jointly owned with her mother. Her mother had already made the required balloon payment and Marcotte was gradually paying her back through an interest free family loan. With respect to the expenditure for the truck, as far as the record reveals, Marcotte's vehicle was in working order, admittedly with substantial mileage. More importantly, the vehicle which she claimed was necessary for her job with the Red Cross was purchased in 1992, after she had returned to work with the City. Her testimony that it was purchased in 1990 is not credible, given the purchase agreement introduced as an exhibit, signed by Marcotte, showing a purchase date of November 12, 1992. No justification for her additional withdrawal of $6500 has been demonstrated and no proofs offered as to her use of those funds.

While it is acknowledged that her layoff occurred several years ago and her recollection may be less than perfect, Marcotte's testimony as to her actions and payments was

shifting, vague and contradictory. Other than the vehicle purchase order, Marcotte was unable to produce any records of her expenditure of funds. Thus even had a financial need for her to utilize her annuity been demonstrated, no clear rationale for the amount of money withdrawn was provided, since Charging Party has not accurately demonstrated how the funds were spent.

I conclude that the losses claimed by Marcotte were not directly attributable to the Employer's unlawful action and therefore the Employer is not obligated to reimburse Marcotte for interest lost on the monies she chose to withdraw from her annuity for her personal use and benefit. I find that the Employer is liable for the 7% interest Marcotte would have earned on her annuity contributions for the period of her layoff, February 3, 1990 through March 13, 1992. The Employer's request for reimbursement of unemployment compensation is denied; recoupment of unemployment benefits is not a matter within the jurisdiction of the Commission. In accord with *NLRB v Gullett Gin Co,* 340 US 361, 27 LRRM 2230 (1951), Commission policy is well established that unemployment compensation will not be deducted from backpay awards. *Isabella County (Sheriff)*, 1982 MERC Lab Op 675, 677; *Reeths Puffer School Dist,* 1977 MERC Lab Op 450, 454; *Patricia Stevens Finishing School*, 1971 MERC Lab Op 776.

RECOMMENDED ORDER

As indicated above, the following order is recommended pursuant to the stipulation of the parties:

Respondent City of Detroit, its officers and agents are hereby ordered to:

1. Effective March 1, 1998, return to the AFSCME Council 25, Local 836 bargaining unit work transferred to non-unit members.

2. Effective March 1, 1998, reinstate the seven swim instructors in the Local 836 bargaining unit to perform the same work, on the same job specifications, with the same relationship with subordinate employees as prior to the layoff in January of 1990.

It is further ordered that the Employer reimburse Sharon Marcotte seven (7%) interest on the amount she would have invested in her annuity for the period of her layoff from February 3, 1990 to March 20, 1992.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Nora Lynch
Administrative Law Judge

DATED: _____