STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPT. OF WATER & SEWAGE)
Respondent- Public Employer

Case Nos. C02 A–001 &CU01 L-065

-and-

UAW, LOCAL 2334, SANITARY CHEMISTS AND TECHNICAL ASSOCIATION
Respondent- Labor Organization
-and-

PATRICE HOPKINS
An Individual Charging Party

_________________________________/

APPEARANCES:

Gwendolyn A. De Jongh, Esq., Assistant Corporation Counsel, for the Respondent Public Employer

Klimist, McKnight, Sale, McClow & Canzano, P.C., by William Karges, Esq., for the Respondent Labor Organization

Arnold E. Reed, Esq., for the Charging Party

DECISION AND ORDER

On May 22, 2003 Administrative Law Judge Julia Stern issued her Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

Dated______

STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (DEPT. OF WATER & SEWERAGE)
Public Employer-Respondent in Case No. C02 A-001

-and-

UAW, LOCAL 2334, SANITARY CHEMISTS AND
TECHNICAL ASSOCIATION
Labor Organization-Respondent in Case No. CU01 L-065

-and-

PATRICE HOPKINS
An Individual-Charging Party
____/

APPEARANCES:

Gwendolyn A. De Jongh, Esq., Assistant Corporation Counsel, for the Respondent Employer

Klimist, McKnight, Sale, McClow & Canzano, P.C., by William J. Karges, Esq., for the Respondent Labor Organization

Arnold E. Reed, Esq., 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 at Detroit, Michigan on September 23, 2002, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before December 4, 2002, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge

On December 28, 2001, Patrice A. Hopkins, a water systems chemist employed by the City of Detroit (the Employer), filed the charge in Case No. CU01 L-065 against her labor organization, UAW Local 2334, Sanitary Chemists and Technical Association (the Union). Hopkins alleged that in the fall of 2001, the Union violated its duty of fair representation by refusing to file a grievance for her and for other employees challenging the Employer's handling of an internal posting for the position of senior water systems chemist. Hopkins also alleged that the Union failed to communicate with her and handled her complaints in a perfunctory manner. Hopkins filed the charge in Case No. C02 A-001 against her employer, the City of Detroit (the Employer), on January 2, 2002. This charge alleges that the Employer violated Respondents' collective bargaining agreement in posting and filling vacancies for the senior chemist position.

Facts

Patrice Hopkins has been employed as a water systems chemist in the Employer's Department of Water & Sewerage (the department) since about 1994. Her position is part of a nonsupervisory bargaining unit represented by the Union. The senior water systems chemist (hereinafter senior chemist) position is a supervisory position, and is part of a bargaining unit represented by another union. The Employer usually fills senior chemist vacancies from among the ranks of water systems chemists. However, the only provision in Respondents' contract that applies to this type of promotion is Article 12(I):

> Promotions to senior level chemist positions which are outside the bargaining unit will be made at the discretion of the department director. The department shall determine the criteria and measures to be used to evaluate employees for such promotions which shall be based on merit, ability and the qualifications set forth in the class specifications. Employees in the bargaining unit will be given consideration for these promotional opportunities, but this provision does not preclude the department from recruiting personnel for these positions from other sources.

The Employer put up a posting for the senior chemist position in its water treatment plant on October 9, 2000. The Employer usually places job postings on a bulletin board in a locked glass case, and leaves additional copies nearby. In March 2001, however, a water chemist complained that he had not seen the posting. Union President David Sole determined that the posting might have been placed on a wall instead of in the locked case. At the time the employee complained, the Employer had not yet filled any of its senior chemist vacancies. Union Vice President Paul Lester met with the Employer. However, the Employer insisted that the posting had been done properly. Sole testified that because he saw no contract violation to grieve, he suggested to the employee who had made the complaint that he, and any other employee who had not seen the posting, write to the head of the water treatment plant. On March 27, 2001, fifteen water systems chemists, not including Hopkins, signed a petition stating that they had never seen the posting. After receiving this petition, the Employer agreed to repost the position. Delores Choice, a labor relations investigator in the department, testified that, because of a shortage of clerical personnel, she personally re-posted the senior chemist position in the locked case in the water treatment plant in April

2001.[1] On April 17, 2001, the Employer also sent individual letters to the 15 employees who had signed the March 27 petition stating that the posting was being reopened and that they would be given until April 28 to apply.

The job posting listed a number of experience and education prerequisites, including a "minimum of five years experience in conducting chemical, bacteriological and physical analysis of water samples and other materials association with water purification and wastewater treatment and disposal." The Employer, however, decided to interview all the water systems chemists who had applied for the senior position, including some who did not meet the posted experience requirements. In October 2001, the Employer promoted between eight and ten water systems chemists to senior chemist, and awarded temporary promotions to about eight others.[2] Some water chemists who did not have the experience listed in the posting received promotions. After the promotions were announced, a group of water chemists with less than five years experience who had not applied for the senior chemist position came to Sole complaining that they had been treated unfairly. These chemists maintained that they would have applied had they known that the Employer did not intend to adhere to the experience requirement.

Hopkins testified that she did not see the posting for the senior chemist position in October 2000. She also saw no posting in April 2001. According to Hopkins, she first discovered that there were senior chemist vacancies in October 2001, when she saw two water chemists with envelopes. Hopkins asked them how they had known to apply, and they told her that they had received letters to come to an interview. Hopkins then talked to other water chemists, and determined that at least four others had not seen any posting for the position.

On November 2, 2001, Hopkins wrote Sole a letter and simultaneously sent him an e-mail. Hopkins did not ask Sole to file a grievance, but voiced a number of complaints about the Employer's procedure for filling the senior position. Hopkins complained that the Employer had asked individuals to interview for the senior chemist position, including individuals who did not have the requisite experience. She also complained that at least two of the individuals selected to fill the vacancies had less experience with the Employer and less specialized experience than she had. Hopkins said that she felt that she had been discriminated against since she had not been made aware of the promotional opportunity or asked to interview. Hopkins also maintained that a number of unqualified employees had been appointed to work "out-of-class" as senior chemists.[3] Hopkins also complained that an interview spot had been held open for an employee until the employee returned from vacation, and that none of the female applicants for the position were selected.

---

1 Several employees, including Hopkins, later asked the Employer for a copy of the April posting, but the department's human resources office did not have a copy or a record of it.

2 Those receiving temporary promotions were to perform a hazardous materials response at a new facility. Their temporary promotions were to expire when this assignment ended, in about June 2002.

3 Employees assigned to work "out-of-class," remain a part of the bargaining unit, but are paid at a higher rate. The Employer's practice is to assign out-of-class work by seniority. Employees receiving temporary promotions become part of the bargaining unit, which includes the position to which they have been promoted.

On November 7, 2001, before he received either Hopkins' letter or her e-mail, Sole filed a policy grievance on behalf of the water chemists who had not applied because of the experience requirements in the posting. The grievance demanded that the position be re-posted. Respondents settled this grievance when the Employer agreed to interview any water systems chemist with less than five years experience who had not applied. Per this agreement, the Employer interviewed two water systems chemists on December 18, 2001.

Sole replied to Hopkins' November 4 letter on November 8. Sole explained that the position had been posted in October 2000, but that after the union members signed a petition complaining that they had never seen it, the Employer agreed to repost the position in the closed glass case. Sole informed Hopkins that he believed that the Employer had promoted, or was intending to work out of class, some chemists with less than five years experience, and that he had filed a policy grievance demanding that the promotions be stopped, reposted, and everyone who now desired to apply be given the opportunity. Sole told Hopkins that a water chemist who had applied at the proper time was on vacation when the interviews were scheduled; he was allowed to interview when he returned, but a position was not "held open" for him.[4] Finally, Sole told Hopkins that he did not have a list of all who applied, and had not seen scores to determine how female applicants had placed. He told her that he would request this information from the Employer.

Hopkins e-mailed and wrote to Sole again on November 10, before she received Sole's November 8 letter. Hopkins noted that an article in the Union newsletter on the promotions to senior chemist stated that the positions were posted a second time. Hopkins insisted that this was not true, and gave the names of four other individuals who had not seen a second posting. Hopkins said that instead of posting a second time, the Employer handed out letters to the people it wished to interview. Sole responded by e-mail on November 13 and by letter dated November 14. He told Hopkins that the other chemists she named must have seen one of the postings, since they all applied. Sole also said that he had been informed that three women applied for the senior chemist position. According to Sole's information, one withdrew her name, one received a promotion, and one was not qualified.

On November 14, 2001, seven chemists, including Hopkins, presented Sole with a "draft grievance" at a Union meeting. The chemists complained that the individuals selected for promotion and out-of-class positions did not meet the experience qualifications, that the position had not been posted, and that the application process was "reopened for selected individuals." They argued that although the Employer was allowed to set the criteria for promotion, it was required to follow the criteria in its posting. The chemists demanded to see a copy of the second posting. They requested that the "selection process for out of class and permanent senior chemist be reopened."[5]

---

4 Sole testified that, in fact, one position was kept open until the applicant could return from vacation to be interviewed. His scores were then compared with other applicants who had not already been selected for promotion.

5 Hopkins alleged that after this meeting, Sole told another union member that Hopkins was a "b----." Sole denied making this statement, and no evidence was presented to support Hopkins' claim.

On November 24, Hopkins e-mailed Sole. Hopkins complained again that a select group of individuals had been given a personal letter/ invitation to interview. She repeated her complaint that the criteria/seniority requirements for the position had been lowered. Hopkins also asked why, if there was a second posting, the new posting did not include the new requirements.

On November 26, Sole wrote separate letters to all the employees who had submitted the November 14 draft grievance, including Hopkins, and sent them by interoffice mail. He stated that his investigation disclosed that the senior position had been posted a second time. Sole told the employees that the Employer had sent notices to the employees who filed the written complaint/petition, but that there were no written invitations to apply. Sole said that the Employer was not using out of class for any of the promotions, but was designating them as temporary promotions. In these letters, Sole no longer took the position that if the Union's November 7 grievance was successful, anyone would be allowed to apply. Sole told three of the employees that they would be able to apply since they had less than five years experience. Sole informed Hopkins that he did not believe that there was any "discrimination" outside of the issue of the five years experience. Hopkins denied receiving this letter.

On November 28, Hopkins phoned Sole at his office. After this conversation, Sole sent Hopkins a letter stating that he had reviewed and investigated the other issues raised in the November 14 request for a grievance, and that he was not filing a grievance on these issues.

Discussion and Conclusions of Law:

Citing *Lowe v Hotel Employees Union,* 389 Mich 123, 152 (1973), Hopkins alleges the Union violated its duty of fair representation under PERA by making no efforts to resolve her complaints about the promotion process, ignoring these complaints, and treating them in a perfunctory manner. Hopkins also asserts that the Union violated its duty of fair representation as defined in *Goolsby v Detroit,* 419 Mich 651, 682 (1984), by arbitrarily refusing to file the "draft grievance" that she and other employees submitted to it on November 14, 2001. According to Hopkins, the Union made an arbitrary decision not to file the grievance which she and her co-workers presented to the Union on November 14, 2001. She also complains that Sole failed to respond to her questions at all or in a timely manner. Hopkins argues that the Union did not conduct a real investigation into whether the senior chemist position was actually posted. Instead, according to Hopkins, the Union allowed the Employer to send out letters to only a handful of selected individuals, most of whom were not even qualified under the position description. Hopkins was qualified, and she did not receive a letter.

In October 2001, after the Employer had announced the promotions, Hopkins learned that some employees had received individual letters notifying and/or inviting them to apply for the position. Based on what she had heard, Hopkins was concerned about the way the promotion process had been conducted. On November 2, she wrote to Sole outlining her concerns. Some of these concerns were based on a lack of information. Even though Hopkins did not see it, the record establishes that the Employer did repost the senior chemist position in April 2001. Moreover, the water chemists who received individual letters were those who had submitted the petition in March 2001. The Employer did not send personal letters only to

those employees whom it wished to promote. The Employer did not assign employees to work out-of-class, but rather invoked its right to institute temporary promotions. By November 26, when he informed Hopkins and the others who had submitted the "draft grievance," that he did not intend to file it, Sole knew that these concerns were not valid.

The Employer did, as Hopkins and the other employees asserted, promote water systems chemists who did not meet the experience requirements listed in the posting. However, Respondents' contract gives the Employer the discretion to determine the criteria for promotion to the senior position. It does not explicitly require the Employer to use any specific criteria, even if the criteria have been included in a job posting. In this case, the Union elected to address the apparent unfairness of the change in the experience requirement by demanding that the Employer interview employees who had not applied in reliance on the posting, rather than insisting that the Employer adhere to the experience requirements in the posting and rescind the promotions it had already announced. The course the Union chose provided no benefit to Hopkins or other individuals who met the original experience requirements. However, I conclude that the Union's response was reasonable, in light of the contract language. I conclude that the Union's refusal to file a grievance insisting that the Employer follow the experience requirements in the posting was not "unreasoned conduct." I also find that in refusing to file the employees' November 14 "draft grievance", the Union did not act impulsively or irrationally, that it was not guilty of "inept conduct undertaken with little care or with indifference to the interests of those affected," that it did not fail to exercise its discretion, and that it was not guilty of either extreme recklessness or gross negligence. See *Goolsby, supra,* at 682. For reasons set forth above, I conclude that the Union did not act arbitrarily in refusing to file this grievance.

I also find that the Union did not ignore Hopkins' complaints about the promotion process or treat them perfunctorily. The record indicates that Sole responded to Hopkins' inquiries in a timely manner and attempted to answer her questions.

Hopkins' charge against the Employer alleges only that it violated the Respondents' collective bargaining agreement. A violation of a labor agreement is not an unfair labor practice, per se. *Muskegon Co., Brookhaven Medical Care Facility,* 1995 MERC lab Op 657; *Detroit Wastewater Treatment Plant,* 1993 MERC Lab Op 716. The Employer remained a party in this case only because, to prevail on a claim of unfair representation, a charging party must establish a breach of the union's duty of fair representation and also a breach of the collective bargaining agreement. *Goolsby v Detroit,* 211 Mich App 214, 223 (1995); *Knoke v East Jackson Public School Dist.* 201 Mich App 480, 488 (1993). Since Hopkins has not shown that the Union violated its duty of fair representation, it is unnecessary to address her breach of contract claim.

For the reasons set forth above, I conclude that neither Respondent violated PERA in this case. I recommend that the Commission issue the following order:

RECOMMENDED ORDER

The charges are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____

Julia C. Stern
Administrative Law Judge

Dated: _____________