**STATE OF MICHIGAN**
**EMPLOYMENT RELATIONS COMMISSION**
**LABOR RELATIONS DIVISION**

In the Matter of:

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

Case No. C04 A-016

-and-

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, LOCAL 2920,
Labor Organization–Charging Party.

_____/

APPEARANCES:

Bruce A. Henderson, Esq., Assistant General Counsel, City of Detroit Law Department, for the Respondent

Robert E. Donald, Esq., for the Charging Party

**DECISION AND ORDER**

On October 1, 2004, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was 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

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Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

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Nino E. Green, Commission Member

Dated: _____

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APPEARANCES:

Bruce A. Henderson, Esq., Assistant General Counsel, City of Detroit Law Department, for the Respondent

Robert E. Donald, Jr., Esq., for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON MOTION TO DISMISS

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 July 8, 2004, before Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission. At the close of Charging Party's testimony, Respondent made a motion to dismiss the charge, and I indicated my intention to recommend that the Commission grant this motion. Based upon the entire record, including a post-hearing brief filed by Charging Party on August 25, 2004, I make the following findings of fact and conclusions of law, and recommend that the Commission dismiss the charge for the reasons set forth below.

The Unfair Labor Practice Charge:

On January 30, 2004, the American Federation of State, County and Municipal Employees, Local 2920, filed this charge against the City of Detroit on behalf of one of its members, Subrine Clabon. Clabon is employed by Respondent in its Water & Sewerage Department. Charging Party alleges that on December 12, 2003, Respondent unlawfully disciplined Clabon for engaging in activity protected by Section

9 of PERA. Respondent contends that Clabon was not engaged in protected concerted activity when she met with her supervisors on that day, and that it properly disciplined her for insubordinate conduct during that meeting.

Facts:

On about April 2002, Clabon was transferred to the position of timekeeper from another clerical position in the Water & Sewerage Department. Clabon's duties as timekeeper involved recording employees' time worked, including approved leave and overtime, so that employees' paychecks reflected their proper compensation. In December 2003, Clabon was a timekeeper in the Mechanical Maintenance Division. Her immediate supervisor was Renee Pritchett. Dilip Patel, head of the Mechanical Maintenance Division, was Pritchett and Clabon's supervisor.

As a timekeeper, Clabon was part of a bargaining unit represented by Charging Party. On September 12, 2002, Respondent and Charging Party held a special conference, at Charging Party's request, to discuss concerns of the timekeepers in the Mechanical Maintenance Division. According to Patel's written summary of the meeting, one of Charging Party's concerns was the "untimely submission of overtime letters," i.e., the failure of employees to give their timekeeper documentation that the overtime reflected on their time cards had been authorized. According to Patel's summary, he responded that timekeepers were to report "what the supervisor has initialed on the time card." The summary states, "Submission of the appropriate overtime letters will be the responsibility of the first line supervisor making the assignment."

In early December 2003, two employees on Clabon's payroll complained that overtime pay they had earned had not shown up in their paychecks. On December 12, 2003, Pritchett questioned Clabon about this overtime. Clabon told Pritchett that she had not recorded the overtime because she did not have the proper documentation. Pritchett said that Clabon should have recorded the overtime because Patel's signature had been on the timecard. Clabon responded that she had been told that, except for the assistant superintendent of the department and the superintendent's assistant, all employees had to submit overtime slips (i.e. letters) in order to be paid. Pritchett left to speak to Patel. When she returned, she told Clabon that Patel wanted to speak to her in his office. Clabon asked that union representatives be present at the meeting. Respondent agreed.

Clabon was given the opportunity to speak with the union representatives before the meeting with Patel. When the meeting began, Patel told Clabon and her union representatives that three employees had worked overtime and only one had been paid, and that he wanted to know why. Clabon explained that although Patel had initialed the time cards of all three employees, only one had submitted an overtime slip. One of the union representatives showed Patel a memo he issued on June 23, 2003, notifying employees that they would not be paid for any absences unless they submitted appropriate documentation to the timekeeper through their supervisors. The union representative argued that under this memo, Clabon was

not supposed to record overtime unless she had an overtime slip.1 Patel disagreed. He told Clabon that when she saw his signature on a time card, she was supposed to pay the employee. Clabon's union representatives asked Patel if he could give Clabon more specific instructions. Patel said that if Clabon saw anything out of the ordinary, she should check with him. Clabon became angry. Raising her voice, she said that this incident was not out of the ordinary, and that she was just following the rules. Clabon told her union representatives that they (Patel and Pritchett) were trying to "get her." One of the union representatives told Clabon to calm down. Clabon said, "I am not going to calm down." Clabon said that she was tired of "them bringing her in when there were other employees doing things wrong who were never disciplined." Patel told Clabon to lower her voice. Clabon continued to talk loudly. Patel then told Clabon that she was being insubordinate. Clabon said that she did not care, and that if Patel was going to give her a reprimand for insubordination, he could give it to her right then. Patel then left the room.

About 45 minutes later, Clabon and her union representatives were called to another meeting. Patel told Clabon that he was going to give her a three-day suspension for refusing his order to lower her voice. Clabon received this suspension later that same day. On December 16, 2003, Charging Party filed a grievance over the suspension.

Discussion and Conclusions of Law:

Section 9 of PERA protects the rights of public employees to "engage in lawful concerted activities for the purpose of collective negotiation or other mutual aid and protection." To be protected under this part of Section 9, employee activity must be both "concerted" and "for mutual aid or protection."

The filing of a grievance based on a provision of a collective bargaining agreement is protected activity under Section 9 because a collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection. *MERC v Reeths-Puffer School Dist,* 391 Mich 253, 261 (1974). The National Labor Relations Board (the Board) also holds that that an employee's honest and reasonable assertion of a right grounded in a collective bargaining agreement is an extension of the concerted action that produced the agreement, and thus is also "concerted" activity, even when the employee acts alone. *Interboro Contractors, Inc,* 157 NLRB 1295 (1966), *enf'd* 388 F2d 495 (CA 2, 1967). 2 In *NLRB v City Disposal Systems, Inc,* 465 US 822 (1984), the Supreme Court affirmed this interpretation of the meaning of "concerted" activity.

The Board has also held, however, that an employee does not gain the protection of the Act merely by making a complaint about working conditions that might benefit other employees. In *Meyers Industries (Meyers II),* 281 NLRB 882 (1986), the Board held that for complaints about working conditions to be "concerted," an employee not asserting a contract right must act with or on the authority of his fellow

1 Clabon testified that shortly after this memo was issued, Patel said in a meeting of timekeepers that employees had to submit documentation whenever they had time off or worked overtime, and that the time keepers were not to pay employees for such time without this documentation.

2 In *Reeths-Puffer,* fn 14, the Court cited *C & I Air Conditioning Inc,* 193 NLRB 933 (1971), an application of the NLRB's so-called "Interboro rule." The *Reeths-Puffer* Court stated, however, that it was not deciding the extent of the protection provided employees who have not yet filed a formal grievance.

employees, and not solely on his own behalf. The Board explained that its definition of "concerted" activity encompassed the lone employee complaining about working conditions after having been explicitly authorized by other employees to do so, the employee who presents a complaint to his employer after having discussed the issue with other employees, and the employee who acts alone to initiate group action. It held, however, that an individual's safety complaints to his employer and to a state agency were not "concerted," even though these complaints benefited his fellow employees, where there was no evidence that the individual acted or claimed to act on behalf of other employees. The Commission implicitly adopted the reasoning of the Board in *Wayne County,* 1993 MERC Lab Op 560, when it affirmed a finding of its administrative law judge based explicitly on *Meyers.* See also the decision of the administrative law judge adopting and applying *Meyers* in *City of Adrian,* 1985 MERC Lab Op 764, 768-769.

The meeting involving Clabon, her supervisors and her union representatives on December 12, 2003 was not a formal grievance meeting, There is no indication in the record that this meeting was required by, or held pursuant to, the terms of the collective bargaining agreement. Nor does Charging Party claim that Clabon's conduct was concerted because she was asserting a right under, or attempting to enforce, the collective bargaining agreement. Charging Party maintains, first, that Clabon's conduct was protected by Section 9 because she complained in the meeting about a condition of her employment, i.e. Respondent's allegedly inconsistent application of its work rules. Second, Charging Party argues that Clabon was engaged in concerted protected activity because the complaints she made in this meeting benefited all timekeepers. Finally, Charging Party asserts that Clabon's activity was protected because her union representatives participated in her complaints.

Charging Party's first two arguments are clearly without merit. First, as discussed above, individual complaints about working conditions are not protected by Section 9, which requires that the activity be concerted. Second, as held in *Meyers,* the fact that an individual's complaints about working conditions may benefit other employees does not make them concerted.

I find that Clabon's "complaints" at the December 12 meeting were made solely on her own behalf, and not on behalf of any other employee. On the morning of December 12, after a conversation with her supervisor Pritchett, Clabon was told that Patel wanted to see her in his office. Clabon asked for union representation, and her request was granted. Clabon's testimony indicates that Patel wanted to make it clear to Clabon that she was to record overtime appearing on a time card signed by a supervisor, and to chastise her for not recording the overtime on this occasion. Clabon's "complaints" were defenses of her actions, and claims that she was being treated unfairly. Clabon did not mention other employees' concerns, but accused Respondent of singling her out.

Of course, Clabon was not alone when she complained about her individual treatment at the December 12 meeting. Charging Party representatives, also employees of the Respondent, were present to defend her, and they supported her complaints of unfair treatment. There is, I believe, no dispute that Charging Party's representatives were engaged in activity protected by PERA when they spoke on Clabon's behalf at the December 12 meeting. However, only Clabon's conduct during that meeting is at issue here, and Clabon's sole concern was defending her own work performance. Charging Party did not cite any authority, and I can find none, to support its claim that an employee is engaged in concerted

protected activity when, at the employee's request, his union representative attends a meeting called by the employer to investigate a complaint about the individual employee's work and/or give the employee instructions regarding the performance of his duties. In my view, the fact that Charging Party representatives spoke on Clabon's behalf did not convert her individual complaints into the concerted activity that PERA protects. For this reason, and in accord with the findings of fact and conclusions of law set forth above, I conclude that Respondent did not violate Section 10(1)(a) of PERA by disciplining Clabon for alleged insubordination at a meeting between her and her supervisors on December 12, 2003. I recommend that the Commission issue the following order.

## RECOMMENDED ORDER

The charge is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _____