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

CITY OF DETROIT,
Respondent-Public Employer,

-and-

ASSOCIATION OF MUNICIPAL INSPECTORS,
Charging Party in Case No. C02 F-132,

-and-

PATRICIA L. GRACE,
An Individual Charging Party in Case No. C02 F-134.
_____/

APPEARANCES:

City of Detroit Law Department, by Kimberly D. Hall, Esq., for the Public Employer

L. Rodger Webb, P.C., by L. Rodger Webb, Esq., for Charging Parties

## DECISION AND ORDER

On July 21, 2005, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and 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

_____
Nora Lynch, Commission Chairman

_____
Nino E. Green, Commission Member

Dated: _____

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

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer,

-and-

ASSOCIATION OF MUNICIPAL INSPECTORS,
Charging Party in Case No. C02 F-132,

-and-

PATRICIA L. GRACE,
An Individual Charging Party in Case No. C02 F-134.
_____/

APPEARANCES:

City of Detroit Law Department, by Kimberly D. Hall, Esq., for the Public Employer

L. Rodger Webb, P.C., by L. Rodger Webb, Esq., for Charging Parties

## 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 December 17, 2003 and January 6, 2004, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission.[1] Based upon the entire record, including the transcript, exhibits and briefs of the parties filed on or before May 14, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On June 11, 2002, the Association of Municipal Inspectors (the Union) filed an unfair labor practice charge against Respondent, City of Detroit (Respondent or the Employer). The charge alleges that Respondent violated PERA by removing Patricia Grace from the position of supervising housing inspector and eliminating that position in retaliation for her participation in

[1] This matter was originally scheduled to be heard on October 8, 2002. The hearing was rescheduled numerous times at the request of the parties.

concerted activities. Grace file an identically worded charge against the City on June 12, 2002, and the cases were subsequently consolidated by the undersigned.

Findings of Fact:

Background: Grace's Selection for Promotion to Supervising Housing Inspector

Patricia Grace began working for the City of Detroit in 1963. In 1988, she took a position as a housing inspector (HI) in the Housing Division of the City's Building and Safety Engineering Department (B&SE). HI's are represented for purposes of collective bargaining by the Association of Municipal Inspectors, which was certified as bargaining representative on October 16, 2001. HI's are responsible for inspecting for-sale and rental properties within the City to ensure that they are up to code. HI's work under the direction of supervising housing inspectors (SHI), which is a promotional position for the HI's. SHI's oversee the work of the HI's in the field, process paperwork and handle customer complaints. SHI's are not represented by any labor organization.

In 1999, there were seven individuals employed by the Housing Division in the position of SHI: Larry Spigner, Eddie Parks, Michael Litak, John Martin, Gary Greene, William Walton and Barbara Douglas. In August of that year, Spigner died and Grace began working out of class as a SHI. The department subsequently declared a vacancy and posted the position. Grace applied for promotion to the vacant supervisor position, as did a number of other HI's. The position was not immediately filled and was reposted several times. In February of 2001, Grace interviewed for the SHI position and, on March 12, 2001, she was placed at the top of the eligibility list by the City.

On April 17, 2001, Grace learned from Assistant B&SE Director Amru Meah that she had been selected for promotion to the SHI position. That information was confirmed to Grace the following day by the Assistant Chief of the Housing Division, Steven Leggat, who told Grace that her start date would be April 23, 2001. Grace understood that technically she would still be working out-of-class as of that date pending the completion of the requisite status change paperwork to certify her in the supervisory position, and she continued to submit out-of-class payment requests to the City. While waiting for the paperwork to be completed, Grace regularly met with the HI's who were assigned to work under her direction, went to supervisory staff meetings, and attended the City's supervisory academy.

Between May and December of 2001, Grace made numerous inquiries to the City's human resources department and B&SE management concerning the status of her promotion and the whereabouts of the paperwork. In an e-mail dated May 17, 2001, Sonnie Robinson, an employee in Respondent's human resources department, wrote that Grace would be called in to sign the status change paperwork "as soon as I can get to it." On September 12, 2001, B&SE General Manager Jimmy Roberts sent an e-mail message to Grace in which he confirmed that Robinson had indeed been instructed to submit a status change on her behalf.

On December 11, 2001, Grace e-mailed B&SE Director Geni Giannotti seeking to find out whether her status change papers would be signed before the end of the year. Later that day, Grace was called into a meeting with Michael Taylor, the chief of the Housing Division, and told

that the vacant SHI position to which she had been selected for promotion had been eliminated effective November 30, 2001, and that she was to resume her duties as a HI immediately. Grace's final request for out-of-class payment as an acting SHI was dated December 11, 2001.

Grace testified that she was so devastated and humiliated at having to return to work as a HI that she became physically ill and had to seek counseling. She retired from employment with the City sometime in 2002. Grace testified that she would not have retired at that time had she been promoted to the SHI position.

The Alleged Protected Concerted Activity: SHI Wage Increase Campaign

When Grace began working out of class as a SHI in 1999, the SHI's were paid the same salary as the HI's whose work they directed. In June of 2001, the City Council approved wage adjustments for certain unrepresented supervisory positions within B&SE, including the SHI position. Pursuant to that adjustment, the annual salary of the SHI's was to increase by $5,800. However, before the adjustment took effect, the directors of the City's human resources and labor relations departments wrote to the City Council requesting that the wage adjustments be revised. With respect to the SHI position, they proposed that the adjustment be decreased by $2000.

The SHI's became aware of the proposed reduction in the wage adjustment sometime in July of 2001. After learning of the change, they met several times to discuss the issue, and Grace attended and participated in each of these meetings. The SHI's ultimately decided to petition the City Counsel to reinstate the $5,800 salary increase. Grace signed the petition on or about July 31, 2001, along with Douglas, Litak, Matin, Parks and Walton. The City Council agreed to consider the SHI's petition at a hearing on October 3, 2001. In anticipation of the hearing, the SHI's drafted a written statement to the City Council summarizing their position on the proposed salary reduction.

On August 3, 2001, B&SE General Manager Roberts sent an e-mail message to supervisors within the department in which he indicated that the proposed wage adjustments "which affect all of our titles, will continue to be held [up] based upon the disagreement over the pay of one position," presumably referring to the dispute over the SHI's salary increase. B&SE Director Giannotti was copied on Robert's e-mail message.

Grace testified that sometime during the fall of 2001, Taylor called a meeting with the SHI's at which he stated that Giannotti "could be very vindictive" and warned Grace about her involvement in the wage increase campaign. Parks corroborated Grace's testimony and added that Taylor also referred to Giannotti as "not a forgiving type person." At hearing, Taylor admitted that he spoke to Grace and cautioned her about signing the petition, but testified that he could not recall whether he referred specifically to Giannotti during the conversation. Taylor testified that he approached Grace about this matter because he was concerned that she was "vulnerable" and that "it wasn't her fight at that point" since her status change was still pending. Taylor asserted that the conversation in question took place between himself and Grace in May of 2001 and that no one else was present at the time.

On October 2, 2001, the day before the City Council was scheduled to consider the petition, Giannotti called a meeting with all of the SHI's, including Grace. During the course of the meeting, Giannotti vehemently expressed her objection to their efforts to restore the full $5,800 salary increase. Giannotti warned the group that if they continued with their campaign, she could eliminate one of the SHI positions. Giannotti also told the SHI's that if the City Council ultimately decided in their favor, she could lose the wage adjustment paperwork indefinitely.

Following the meeting with Giannotti, the SHI's and Grace met with Assistant B&SE Director Meah in an attempt to reach a settlement of the wage increase issue. Meah agreed that if the SHI's could come up with some type of certification program for the supervisory position, the department would give the SHI's the full $5,800 increase. All of the individuals who attended the meeting, including Grace, signed a memorandum of understanding (MOU) reflecting the terms of the proposed settlement. Grace also participated in subsequent discussions with Meah concerning the MOU. Despite these discussions, the MOU was never implemented.

The City's Justification for the Elimination of the SHI Position: Mandated Budget Cuts

Roberts testified that he first became aware of a problem with Grace's promotion sometime after September 12, 2001, when he was told by the human resources department that all status changes were being held up by the budget department because the City was having financial problems. Roberts contends that he knew at that time the SHI position for which Grace had been selected for promotion would not be filled.

On October 10, 2001, Respondent's mayor ordered all City departments to submit proposals to reduce their current 2001-2002 appropriations by at least five percent. The department heads were notified of this mandate that same day via a memo from the City's budget director. Pursuant to the memo, each department was required to submit its budget reduction proposal to the mayor no later than October 31, 2001. The minimum amount which B&SE department was required to eliminate was $1,229,127.

As general manager of B&SE, Roberts is responsible for all administrative functions of the department, including creating the budget and submitting it to Director Giannotti, the City's budget department and the mayor's office for final approval. With respect to the 2001 budget reduction, Roberts was assigned the task of reviewing the B&SE budget and making a recommendation to Giannotti as to how B&SE would comply with the Mayor's directive. The ultimate responsibility for the decision, however, remained with Giannotti.

At the time of the 2001 budget reduction, there were 67 vacant positions within B&SE, including 15 of the 53 budgeted housing inspector positions. The budget reduction proposal which was ultimately approved by Giannotti on October 24, 2001, called for the elimination of 17 of those vacant positions, resulting in a savings for the department of $1,313,426 for the 2001-2002 fiscal year, or $84,299 more than B&SE was required to cut. Roberts testified that B&SE always strives to exceed the minimum cuts required of the department whenever a budget reduction is ordered. In all, ten HI positions were eliminated as a result of the department's

budget cuts, as was the SHI position for which Grace had been selected. The savings generated by the elimination of the SHI position was $77,880. The SHI position was one of only two vacant positions which was being performed by an out-of-class employee at the time it was eliminated, and Grace was the only B&SE employee who lost a promotion as a result of the budget cuts.

Roberts testified that he personally made the decision to eliminate the SHI position, and that Giannotti's involvement consisted of merely reviewing and signing off on the proposal. Roberts asserted that the department had intended to fill the vacant SHI position when Grace was first selected for promotion, but that a subsequent reduction in the number of HI's obviated the need for the City to hire another supervisor. According to Roberts, there were 6 SHI's and 53 HI's working for the department in the spring of 2001 when Grace was selected for the vacant SHI position, which amounted to about a 10-1 ratio between supervisors and employees. Roberts testified that by September of 2001, the number of HI's had dropped to 38 due to promotions and attrition, leaving a 7-1 ratio of supervisors to employees.

Roberts testified that sometime in October of 2001, he instructed Taylor to notify Grace that the SHI position had been eliminated for budgetary reasons and that, as a result, she would not be promoted to the position. According to Roberts, Taylor failed to follow through on this directive. Roberts testified that when he discovered that Grace was still working out-of-class as a SHI in December of 2001, he called Taylor into his office to express his displeasure with Taylor's conduct and that he once again ordered Taylor to discuss the situation with Grace. Roberts vehemently denied that Grace's involvement in the supervisory wage campaign was in any way connected with the elimination of the SHI position.

Taylor testified that he too played a role in formulating the department's budget proposal in response to the Mayor's directive. Like Roberts, Taylor asserted that the SHI position was eliminated because of a reduction in the number of HI's. Taylor testified that although historically the department had never filled all 53 budget HI positions, there were 49 HI's working for the department around the time that Grace was selected for promotion to the SHI position. According to Taylor, the number of HI's dropped significantly by the time the budget cuts were ordered. However, on cross-examination, Taylor conceded that he could not recall exactly when the reduction in the number of HI's actually occurred.

Charging Parties dispute the staffing figures cited by both Roberts and Taylor, arguing that the number of HI's remained fairly stable between the time Grace was selected for promotion to SHI in the spring of 2001 and when the position was eliminated at the end of that year. Grace testified that there were between 38 and 40 HI's working for B&SE in 1999, and that there was no significant change in the number of HI's employed by the department from that time through her retirement in 2002. Parks testified that of the 49 housing inspectors listed on the department's 1998 organizational chart, 18 were no longer employed by the beginning of 2001. Union president Gary Watson, a HI with B&SE, testified that there were 38 HI's employed by the department as of January 22, 2001. According to Watson, that number dipped as low as 31 at one point, but generally remained fairly stable. In fact, a seniority list prepared by Respondent's labor relations department and introduced into evidence by Charging Parties lists 36 HI's working for the department as of January 22, 2001. Watson testified that there were

two additional HI's whose names were not reflected on the seniority list because they were new to the department when that list was created. Charging Parties also submitted into evidence an "Excelsior List" prepared by Respondent's labor relations department on July 20, 2001, in connection with a petition for representation election filed by the Association of Municipal Inspectors, which was seeking to represent the unit at that time. The list of bargaining unit members identified 38 individuals employed by Respondent in the HI position.

Discussion and Conclusions of Law:

Charging Parties contend that Respondent eliminated the SHI position to which Grace had been promoted in retaliation for her participation in the wage increase campaign, and that the City constructively discharged Grace by requiring her to return to work as a HI. The elements of a prima facie case of unlawful discrimination or retaliation under PERA are: (1) employee, union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; and (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. Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. Once the prima facie case is met by the charging party, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419. See also *MESPA v. Evart Public Schools*, 125 Mich App 71 (1983).

The first two elements of a prima facie case of unlawful discrimination have clearly been established. In July of 2001, Grace, along with Parks, Litak, Martin, Greene, Walton and Douglas, began a campaign to encourage Respondent to reinstate the $5,800 salary increase promised to them the prior month. Grace participated in meetings with the other SHI's and signed her name on a petition which was submitted to city council on July 31, 2001. She also took part in several meetings with management representatives, including Giannotti, Taylor and Meah, at which the wage increase issue was discussed. Based upon these facts, I conclude that Grace engaged in protected activity of which the Employer was aware. PERA does not require that employee activity be union activity in order to be protected under Section 9. That section merely requires that the activity be lawful, concerted, and for the purpose of either collective bargaining or mutual aid and protection. See e.g. *Village of New Haven*, 1992 MERC Lab Op 608, 634-636 (no exceptions).; *Capac Comm Schools*, 1984 MERC Lab Op 434, 448-450; *Genesee Christian Day Care Service*, 1982 MERC Lab Op 1660, 1661- 1662, 1667.

Respondent contends that there is no evidence in the record proving that it harbored animus toward Grace's protected concerted activities, or that the elimination of the SHI position was in any way motivated by her participation in the wage increase campaign. I disagree. When the campaign began in July of 2001, Grace had already been selected for promotion to the SHI position and was merely waiting for the paperwork to be completed. Later that summer or early fall, Taylor spoke with Grace about her involvement in the campaign. According to Grace,

Taylor remarked that Giannotti could be "very vindictive" and he cautioned her not to sign the petition. Parks testified that Taylor also referred to Giannotti as "not a forgiving type person." Notably, Taylor did not expressly deny making these statements. Rather, he testified that he could not recall whether he specifically referred to Giannotti during his conversation with Grace. Taylor did admit that he warned Grace about her participation in the campaign and that he considered her to be "vulnerable" at that time. Regardless of whether Taylor actually referred to Giannotti by name, the record clearly indicates that he was concerned about how Grace's involvement in the campaign might affect her pending promotion.

On October 2, 2001, Grace and the other SHI's were called into a meeting with Giannotti at which the director vehemently expressed her opposition to the ongoing campaign and warned that she could eliminate an SHI position if the group persisted in its efforts to have the wage increase reinstated. Giannotti also indicated that she could lose the paperwork if the wage increase were to be reinstated by city council. Shortly thereafter, on or about October 24, 2001, Giannotti signed off on the department's budget reduction proposal which resulted in the elimination of 17 vacant positions, including the SHI position for which Grace had been selected for promotion. The SHI position, which was budgeted for $77,880, was one of only two positions which was being performed by an out-of-class employee at the time, and Grace was the only employee who lost a promotion as a result of the budget cuts. The budget cuts proposed by the department exceeded the mandated five percent reduction by $84,299. In fact, the department could have retained the SHI position and still cut the budget by $6,419 more than the amount required by the Mayor. Based upon these facts, I conclude that Charging Parties have established a prima facie case that the SHI position for which Grace had been selected was eliminated because of her protected concerted activities.

As noted, once a prima facie case of unlawful discrimination has been established, the burden shifts to the Respondent to produce evidence that it would have taken the same action in the absence of protected conduct. In the instant case, Respondent contends that its decision to eliminate the SHI position was based upon legitimate budgetary considerations. However, Respondent failed to establish that these budgetary concerns were more than mere pretext. Although Giannotti was the director of the B&SE department and the individual ultimately responsible for making budget decisions on behalf of the department, the City failed to call her to testify in this matter. The Commission has held that an adverse inference may be drawn regarding any factual question to which a witness is likely to have knowledge when a party fails to call that witness if she may reasonably be assumed to be favorably disposed to the party. *County of Ionia and 64A Dist Court*, 1999 MERC Lab Op 523, 526; *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 541. I infer from the City's failure to call Giannotti that she would not have supported the City's contention that the SHI position was eliminated for budgetary reasons.

The City's principal witness with respect to the 2001 budget cuts was B&SE general manager Roberts. I did not find Roberts to be a believable witness; he was overly confrontational when answering questions on cross-examination, and his testimony concerning why the SHI position was targeted for elimination, while 50 other vacant positions were retained, was suspect. Roberts testified that there were 6 SHI's and 53 HI's working for the department when Grace was selected for promotion in the spring of 2001, which amounted to a ratio of

approximately one supervisor for every ten employees. According to Roberts, 15 HI's left the department during the following months, resulting in a supervisor-to-employee ratio of about 7-1, thus making the vacant SHI position expendable. However, the Union presented credible evidence demonstrating that number of HI's employed by the department remained fairly stable during the period in which the approval of Grace's promotion was pending. I credit the testimony of the Union's witnesses and, based upon this testimony, conclude that Respondent eliminated the SHI position not because of any sudden reduction in the number of HI's, but because of Grace's protected activities.

Although I find that Respondent violated PERA by eliminating the SHI position, there is insufficient evidence in the record to support a conclusion that the Employer's conduct in this matter was tantamount to a discharge. To establish a constructive discharge, Charging Parties must demonstrate that (1) the burden on the employee caused, and was intended to cause, a change in working conditions so difficult or unpleasant as to force her to resign; and (2) those burdens were imposed because of the employee's protected concerted activities. See *Delta-Menominee District Health Dept*, 1987 MERC Lab Op 964. An illegal constructive discharge will not be found where the employee resigned in the face of changed conditions without an adequate basis for concluding that the employee had been placed in an untenable and intolerable situation. *Sanilac County Community Mental Health Services Board*, 1975 MERC Lab Op 507; 516; *Clare County Sheriff's Dept*, 1974 MERC Lab Op 230.

In the instant case, the second element of a constructive discharge is established by virtue of Giannotti's threats to the SHI's and the subsequent elimination of the supervisory position. However, Charging Parties have failed to demonstrate that Respondent, by this conduct, made or intended to make working conditions so difficult for Grace that a reasonable person would have been forced to resign. Although Grace contends that she felt embarrassed and belittled as a result of having to work alongside employees she had previously supervised, it does not appear that she suffered any actual harassment or ridicule upon resuming her duties as an HI. Clearly, the loss of the promotion was upsetting to Grace. However, I am unable to conclude on these facts that her working conditions were so intolerable or undesirable that she was forced to resign.

In conclusion, I find that Respondent violated PERA by failing to promote Grace to the position of supervising housing inspector in retaliation for her participation in protected concerted activities and recommend that the Commission issue the following order:

## RECOMMENDED ORDER

Based upon the above findings of fact and conclusions of law, Respondent City of Detroit, its officers, agents and representatives are hereby ordered to:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights to organize together or form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective bargaining or negotiations or other mutual aid or protection or to negotiate or bargain collectively with their public employer through representatives of their own free choice, as guaranteed in Section 9 of PERA.

2. Cease and desist from discriminating against employees because they have engaged in lawful concerted activity for the purposes of collective bargaining or other mutual aid or protection.

3. Take the following affirmative action to remedy the unfair labor practices found herein and effectuate the policies of the Act:

    a. Make Patricia Grace whole for any loss of pay which she may have suffered by paying to her a sum equal to that which she would have earned from the date of discrimination, November 30, 2001, to the date of her retirement, less interim earnings, together with interest thereon at the statutory rate.

    b. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge

Dated: _____

## NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the CITY OF DETROIT, a public employer under the PUBLIC EMPLOYMENT RELATIONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

**WE WILL NOT** interfere with, restrain or coerce employees in the exercise of their rights to organize together or form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective bargaining or negotiations or other mutual aid or protection or to negotiate or bargain collectively with their public employer through representatives of their own free choice, as guaranteed in Section 9 of PERA.

**WE WILL NOT** discriminate against employees because they have engaged in lawful concerted activity for the purposes of collective bargaining or other mutual aid or protection.

**WE WILL** make Patricia Grace whole for any loss of pay which she may have suffered by paying to her a sum equal to that which she would have earned from the date of discrimination, November 30, 2001, to the date of her retirement, less interim earnings, together with interest thereon at the statutory rate.

**ALL** of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

**CITY OF DETROIT**

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.