STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WARREN CONSOLIDATED SCHOOLS,
Public Employer-Respondent in Case No. C03 K-236,

-and-

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1346,
Labor Organization-Respondent in Case No. CU03 K-048,

-and-

ALAN J. DUNHAM,
An Individual-Charging Party.
_____/

APPEARANCES:

O'Reilly Rancilio, P.C., by Gary J. Collins, Esq., for Respondent Employer

Miller Cohen, P.L.C., by Bruce A. Miller, Esq., and Richard G. Mack, Jr., Esq., for Respondent Labor Organization

Alan J. Dunham, *In Propria Persona*

DECISION AND ORDER

On January 19, 2005, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent Employer, Warren Consolidated Schools, violated Section 10(1)(a) and (c) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(a) and (c), and that Respondent Union, American Federation of State, County and Municipal Employees, Local 1346, violated Section 10(3)(a)(i), and (3)(b) when they maintained and enforced an unlawful superseniority provision in their collective bargaining agreement causing Charging Party, Alan J. Dunham, to be unlawfully removed from his carpenter/fabricator position in July 2003. The ALJ recommended that Respondent Employer be ordered to reinstate Dunham and that both Respondents make Dunham whole for any resultant loss of earnings or benefits with interest computed at the rate of six percent per annum. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with Section 16 of PERA. Respondent Union filed timely exceptions and a brief in support. Respondent Employer did not file exceptions, but filed a response to the Union's exceptions and a brief in support of the ALJ's Decision and Recommended Order.

In its exceptions, the Union contends that the ALJ erred in finding the grant of superseniority to executive board members to be unlawful and that Dunham would have been removed from his position even without the superseniority clause. Further, Respondent Union argues that Charging Party's claim was time-barred. The Union also argues that the ALJ erred when she recommended that Charging Party be returned to the position he held prior to his layoff, asserting that the proper interpretation of the collective bargaining agreement would not require that Dunham be returned to that position.

Factual Summary:

We accept the factual findings of the Administrative Law Judge and summarize them here as necessary. Charging Party was laid off from his position as a carpenter/fabricator and forced into a lower paid position because a member of the Union's executive board was granted superseniority pursuant to Article VIII, Section 6 of Respondents' collective bargaining agreement which states, in pertinent part:

> Preferential seniority will be given to collective bargaining committee, grievance committee and Union Officers against lay off and against major work reduction to the extent that these Union representatives will be the last to be substantially reduced or laid off within their respective Occupational Groups, provided that any Union representative involved herein is qualified to perform the job which is available. This provision is not intended to provide the Union representative with a promotion (more hours than normally scheduled).

The grievance committee is comprised of the local Union president, the chief steward, and the stewards representing the various occupational groups. It is the stewards' responsibility to determine whether action should be taken on an employee's complaint. Under Respondents' agreement, the first step of the grievance procedure provides for a meeting between the steward who finds cause for complaint and the appropriate supervisor. If the complaint is not resolved, it is reduced to writing; the steward and the chief steward then meet with an Employer representative. Should the matter proceed to the third step, the chief steward and the Union president meet with Employer representatives.

The Union's officers, including a president, vice president, recording secretary, secretary-treasurer, and five executive board members, comprise the governing body of the Union. These officers determine whether to advance a matter to arbitration. Executive board members review and discuss grievances at meetings held at the Union's offices. They also meet with the Union's membership at the schools. Occasionally, they meet with Employer representatives to discuss grievances.

In the spring of 2003, the Employer gave the Union a list of positions it planned to eliminate, including one carpenter/fabricator position. According to the Employer's May 2003 seniority list, Dunham had more seniority than Burgess, a member of the Union's executive board. However, the Employer and the Union agreed that Burgess was entitled to retain his position as a Union officer under the superseniority clause, and Dunham's position was eliminated.

Discussion and Conclusions of Law:

In *Grand Rapids Bd of Ed*, 1985 MERC Lab Op 802, we adopted the NLRB's holding and reasoning in *Gulton Electro-Voice*, 266 NLRB 406 (1983), stating that superseniority is unlawful when granted to union officials who do not perform steward-like or other on-the-job contract administration functions. The grant of unlawful superseniority to union officers unjustifiably discriminates against employees based on the extent of their participation in the union. See *Gulton Electro-Voice, Inc*, 266 NLRB 406. In *Grand Rapids Bd of Ed*, we held that union officials who collectively decided whether a grievance should be pursued were not entitled to superseniority because they did not make those decisions while on the job.

Here, we agree with the ALJ that the evidence fails to establish that executive board members perform contract administration duties that require their regular presence on the job. Moreover, they do not meet regularly with Employer representatives to discuss grievances during working hours. Consequently, Respondents violated PERA by unlawfully enforcing the contract provision granting superseniority to executive board members.[1]

The Union argues that the charge is untimely because Respondents adopted their unlawful superseniority clause more than six months prior to the filing of the charge. Further, the Union contends that Dunham was required to file his charge within six months of October 2000, the date that he became aware of the clause. The Union's reasoning would have us find that the period within which Dunham could file a charge expired before he suffered any injury. As noted by the ALJ, a similar argument was rejected by the National Labor Relations Board in *Arvin Automotive*, 285 NLRB 753 (1987). There, the Board found that with regard to charges of unlawful enforcement, the statutory period commences when a union officer exercises the unlawful superseniority. We find the arguments in *Arvin Automotive* persuasive and note that Michigan law provides that the limitations period begins when the aggrieved party "knows of the act which caused his injury, and has good reason to believe that the act was improper or done in an improper manner." *City of Huntington Woods v Wines*, 122 Mich App 650, 652, (1983). The act that caused Dunham's injury was his displacement as a result of Respondents' enforcement of the unlawful superseniority clause. The discriminatory displacement of Dunham occurred within the six-month statutory filing period. Therefore, we hold that the charge is timely.

The Union also contends that Dunham would have been displaced in the absence of the superseniority clause because he had the least maintenance group seniority. However, when Charging Party's position was eliminated, both the Union and the Employer agreed that he was being displaced by operation of superseniority under the contract. There is no indication in the record that the Union claimed otherwise prior to the hearing in this matter. Moreover, the Union's position as to Dunham's maintenance group seniority is disputed by the Employer. That dispute should be resolved through the parties' contractual grievance procedure.

[1] The ALJ also found that the granting of superseniority to the Union's vice-president, recording secretary, secretary-treasurer, and trustee was unlawful. We decline to adopt that finding insofar as the seniority of these officials was not at issue. However, the grant of superseniority to these officials may warrant reconsideration by Respondents in light of our decision regarding the Union's executive board members.

Inasmuch as Dunham was displaced from his carpenter/fabricator position as a result of the enforcement of the unlawful superseniority clause, the appropriate remedy is the restoration of the *status quo ante*; the ALJ correctly determined that Respondents must restore Dunham to the carpenter/fabricator position and make him whole for any loss resulting from his displacement from that position.

Further, we note that the correct statutory interest rate is five percent as prescribed by MCLA 438.31. *Solakis v Roberts*, 395 Mich 13 (1980); *Oakland Co Rd Comm*, 1983 MERC Lab Op 727; *Genesee Christian Day Care Service, Inc*, 1982 MERC Lab Op 1660. Having carefully considered all of the arguments set forth by Respondents, we adopt the Orders recommended by the ALJ as modified below:

ORDER

A. Respondent Warren Consolidated Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from:

a. Maintaining and enforcing a seniority clause in its collective bargaining agreement with Respondent Union, American Federation of State, County and Municipal Employees, Local 1346, according superseniority to executive board members who do not have steward-like duties.

b. Discriminating against Alan J. Dunham in violation of Section 10(1)(c) of PERA by laying him off or removing him from his position because of the above preferential seniority clause.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 9 of PERA.

2. Take the following affirmative action to effectuate the purposes of the Act:

a. Reinstate Dunham to the position of carpenter/fabricator from which he was laid off or removed on July 14, 2003.

b. Jointly and severally with Respondent Union make Dunham whole for any loss of earnings or benefits he may have suffered as a result of the unlawful discrimination against him, including back wages from July 17, 2003 to the date of his reinstatement to the position of carpenter/fabricator, less his other earnings for this period, but including interest at the rate of five percent per annum, computed annually.

c. Post the attached Notice to Employees at places on the Employer's premises where notices to employees are customarily posted for a period of thirty consecutive days.

B. Respondent American Federation of State, County and Municipal Employees, Local 1346, its officers, agents, and representatives, are hereby ordered to:

1. Cease and desist from:

a. Maintaining and enforcing a seniority clause in its collective bargaining agreement with Respondent Employer, Warren Consolidated Schools, according superseniority to executive board members who do not have steward-like duties.

b. Causing or attempting to cause Respondent Employer to discriminate against employees in violation of Section 10(1)(c) of PERA.

c. In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights protected by Section 9 of PERA.

2. Take the following affirmative action to effectuate the purposes of the Act:

a. Jointly and severally with the Respondent Employer make Alan J. Dunham whole for any loss of earnings or benefits he may have suffered as a result of the unlawful discrimination against him, including back wages from July 17, 2003 to the date of his reinstatement to the position of carpenter/fabricator, less his other earnings for this period, but including interest at the rate of five percent per annum, computed annually.

b. Post the attached Notice to Members at its union office, meeting hall, or any other place where its members regularly meet to transact union business, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Nora Lynch, Commission Chairman

_____

Nino E. Green, Commission Member

_____

Eugene Lumberg, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the **Warren Consolidated Schools** has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT maintain or enforce the preferential seniority clause in our collective bargaining agreement with the American Federation of State, County and Municipal Employees (AFSCME), Local 1346, to the extent that it accords superseniority to executive board members who do not have steward-like duties..

WE WILL NOT discriminate against employees by unlawfully applying the preferential seniority clause to lay off Alan J. Dunham or remove him from his position.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 9 of PERA.

WE WILL reinstate Dunham to the position of carpenter/fabricator from which he was laid off or removed on July 14, 2003.

WE WILL, jointly and severally with AFSCME Local 1346, make Dunham whole for any loss of earnings or benefits he may have suffered as a result of the unlawful discrimination against him, including back wages from July 17, 2003 to the date of his reinstatement to the position of carpenter/fabricator, less his other earnings for this period, but including interest at the rate of five percent per annum, computed annually.

WARREN CONSOLIDATED SCHOOLS

By: _____

Title: _____

Date: _____

This notice must be posted for a period of thirty 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, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

NOTICE TO MEMBERS

After a public hearing before the Michigan Employment Relations Commission, the **American Federation of State, County and Municipal Employees (AFSCME), Local 1346**, has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT maintain or enforce the preferential seniority clause in our collective bargaining agreement with the Warren Consolidated Schools to the extent that it accords superseniority to executive board members who do not have steward-like duties.

WE WILL NOT cause or attempt to cause the Warren Consolidated Schools to discriminate against employees in order to encourage union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights protected by Section 9 of PERA.

WE WILL, jointly and severally with the Warren Consolidated Schools, make Alan J. Dunham whole for any loss of earnings or benefits he may have suffered as a result of the unlawful discrimination against him, including back wages from July 17, 2003 to the date of his reinstatement to the position of carpenter/fabricator, less his other earnings for this period, but including interest at the rate of five percent per annum, computed annually.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, (AFSCME), LOCAL 1346

By: _____

Title: _____

Date: _____

This notice must be posted for a period of thirty 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, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

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APPEARANCES:

O'Reilly Rancillio, P.C., by Gary Collins, Esq., for the Respondent Employer

Miller Cohen, P.L.C., by Richard G. Mack, Jr., for the Respondent Labor Organization

Alan J. Dunham, in propria persona

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 March 3, 2004, 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 Respondents on or before May 4, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

On November 4, 2003, Alan J. Dunham, an individual, filed these charges against his employer, the Warren Consolidated Schools (the Employer) and his collective bargaining agent, the American Federation of State, County and Municipal Employees, Local 1346 (the Union) alleging

that Respondents violated Sections 10(1)(a) and (c) and Sections 10(3)(a)(i) and 3(b) of PERA by maintaining and enforcing an unlawful superseniority clause in their collective bargaining agreement. Dunham asserts that on or about July 14, 2003, he was laid off from his position as a carpenter/fabricator and forced into a lower paid position because Thomas Burgess, a member of the Union's executive board, was granted superseniority pursuant to this clause.

Facts:

The Collective Bargaining Agreement

The Union represents a bargaining unit of all non-instructional employees of the Employer, excluding noon aides, teachers' aides, secretaries and office clerical employees, and supervisors. The unit has approximately 325 members. It includes approximately fifty classifications (job titles) divided into five occupational groups.

Respondents are parties to a contract covering this unit for the term October 1, 2000 through June 30, 2005. The contract provides for both district-wide seniority, commencing with an employee's date of permanent hire, and occupational group seniority. An employee who moves between occupational groups retains the seniority he accumulates in each group.

Article VIII of the contract contains the layoff procedure. Article VIII, Section 7 states that when positions in a classification are eliminated, the "necessary number of least senior employees shall be removed from the affected classification." Employees so removed may then exercise bumping rights as set out in that section; bumping rights depend, in part, on occupational group seniority. Section 7 defines "occupational groups for layoff purposes only," although the section states that in "applying the layoff provision employees' seniority shall be their district seniority." Respondents disagree about what type of seniority should be used to select the employees to "removed" from a classification when positions within that classification are eliminated. The Employer maintains that employees should be "removed" in reverse order of their district seniority, while the Union asserts that the selection should be based on occupational group seniority.

Article VIII also contains a superseniority clause. Article VIII, Section 6 states:

> Preferential seniority will be given to collective bargaining committee, grievance committee and Union officers against lay off and against major work reduction to the extent that these Union representatives will be the last to be substantially reduced or laid off within their respective Occupational Groups, provided that any Union representative involved herein is qualified to perform the job which is available. This provision is not intended to provide the Union representative with a promotion (more hours than normally scheduled).
>
> Any employee, other than a day shift employee, who is elected President of the Local Union, may remove the person with the least seniority within his/her classification on the day shift. The person replaced will fill the position vacated by the President.

> Preferential seniority for one (1) Steward will be available during the summer recess should the department to which the steward is assigned be scheduled to work. This provision applies to departments operating on a ten (10) month basis.

The following Union officers have preferential seniority under the above provision: the president, vice-president, recording secretary, secretary-treasurer, trustee, five bargaining committee members, the five members of the Union's executive board, and twelve stewards including a chief steward.

Article VI of the Union constitution provides for a bargaining committee consisting of five individuals, one elected by each of the five occupational groups. Presumably the bargaining committee negotiates contracts, but the record contains no actual evidence regarding their duties. The duties of the president, vice-president, recording secretary, treasurer-secretary, and trustee are set out in the Union's constitution. The president presides at all meetings, is a member of all committees, including the grievance committee and the bargaining team, and has other duties prescribed by the constitution. The vice-president assists the president and performs all duties of the president in his or her absence or when the president is unable to serve. The recording secretary keeps minutes of meetings and prepares official correspondence. The secretary-treasurer handles the finances of the Union. The trustee is responsible for overseeing a semi-annual audit of the finances of the Union and any benefit plans associated with it. Aside from the president's role in the processing of grievances, which is described in Respondents' contract, the local constitution is the only evidence in the record of the duties performed by these officers.

The Union's grievance committee consists of the president, the chief steward, and eleven stewards elected by occupational group and shift. Under the contract it is the responsibility of the steward, when contracted by an aggrieved employee, to determine whether proper cause for a complaint exists. If the steward determines that the complaint has grounds, he or she meets with the employee's supervisor before a written grievance is filed. The steward and the chief steward meet with an Employer representative at step two of the grievance procedure, and the chief steward and union president meet with Employer representatives at the third step.

The executive board is the governing body of the Union under its constitution. Like the bargaining committee, the five executive board members are elected by occupational group. The duties of the executive board include determining, in consultation with the president and other members of the grievance committee, whether a written grievance will be filed and whether a grievance will advance to the next step of the grievance procedure. This includes, but is not limited to, the decision to take a grievance to arbitration. Each executive board member is expected to keep current with issues arising within his or her occupational group. Executive board members bring the concerns of their occupational groups to the attention of the other board members at meetings. Executive board members occasionally meet with Employer representatives to discuss these concerns.[2]

[2] Thomas Burgess testified that he met briefly with Employer representatives two or three times between his election as executive board member in March 2003 and the hearing in March 2004.

Dunham's "Layoff" and Attempts to File a Grievance

During the 2002-2003 school year, Alan Dunham, Thomas Burgess, and three other individuals worked for the Employer as carpenter/fabricators, a classification in the maintenance occupational group. Dunham was the executive board member for the maintenance group until Burgess defeated him for the position in March 2003.

In the late spring of 2003, the Employer gave the Union a list of several positions it decided to eliminate, including one carpenter/fabricator position. The Employer and the Union agreed that Burgess was entitled to retain his position as carpenter/fabricator under the superseniority clause.

The Employer's May 2003 seniority list indicated that Thomas Burgess had less district-wide seniority and less maintenance-group seniority than any other carpenter. According to this list, Dunham was next-to-last among the carpenters in district-wide seniority, but third in maintenance-group seniority.[3] After the Union disputed the Employer's calculation of some employees' occupational group seniority, Employer and Union representatives together went over the Employer's records and adjusted some seniority dates. It is unclear whether the Union challenged Dunham's occupational seniority date at that time.[4] Dunham's seniority date was not among those Respondents later agreed to change.

On June 10, 2003, Dunham received a letter from the Employer stating that his position as a carpenter had been eliminated and that he was being laid off. Dunham was also informed that a bump bid session had been scheduled for employees to exercise their bumping rights under the layoff language of the contract. Dunham was laid off on July 14. Effective July 17, 2003, he bumped into a roofer position, a lower-paid classification in the maintenance group that he previously held. Had Burgess been removed from the carpenter position, he would have bumped into a custodial position in the operations group.

During the bump bid session on June 16, Dunham discussed his situation with Dan Jouppi, the Employer's Director of Personnel, and Margaret Ewing, the Employer's Director of Employee Benefits. They informed Dunham that he was selected for layoff because of Burgess' position as Union executive board member. They also informed Dunham that the Union agreed with the Employer's interpretation of the superseniority provision.

On June 19, 2003, Dunham submitted a grievance over his layoff to the Union. The grievance was never filed with the Employer. On October 16, Dunham received a letter from the executive board stating that it reviewed his grievance "regarding superseniority" and determined that the grievance lacked merit. On October 31, 2003, Dunham appealed the Union's decision not to file a grievance. In his appeal, he asserted that the application of superseniority in his case violated PERA. He asked that the executive board members disqualify themselves and move the appeal to step two of the appeal procedure. Dunham's request to skip the first step of the grievance

[3] According to the Employer's list, Dunham had more maintenance-group seniority than Burgess and nine months more maintenance-group seniority than carpenter William Majewski.

[4] The Union maintained in the unfair labor practice proceeding that Dunham's maintenance group seniority date was wrong on the May 2003 seniority list. According to the Union, Dunham actually had less maintenance group seniority than Burgess.

appeal process was denied, and Dunham appeared before the executive board on December 1. On January 12, 2004, the executive board sent Dunham a letter denying his appeal "based on the contract language."

Discussion and Conclusions of Law:

Sections 10(1)(a) and (c) of PERA make it unlawful for an employer to discriminate in order to encourage union activity, and Sections 10(3)(a)(i) and 10(3)(b) make it unlawful for a union to cause an employer to discriminate in violation of this section. In *Dairylea Cooperative, Inc,* 232 NLRB 690 (1977), enf'd sub nom *NLRB v Teamsters Local 338,* 531 F2d 1162 (CA 2, 1976), the National Labor Relations Board (NLRB or the Board) addressed the lawfulness of superseniority clauses that give preferences to union officers under the parallel sections of the National Labor Relations Act (NLRA), 29 USC 150 *et seq*., Sections 8(a)(1) and (3) and 8(b)(1)(A) and (2). The Board noted that such clauses discriminate against employees for union-related reasons. It concluded, however, that steward superseniority furthers a legitimate statutory purpose by encouraging the continued presence of the steward on the job. The Board held that steward superseniority provisions limited to layoff and recall situations were presumptively valid, while superseniority provisions as to other job benefits were presumptively invalid.

In *Gulton Electro-Voice,* 266 NLRB 406 (1983), enf'd sub nom *Electrical Workers Local 900 v NLRB,* 727 F2d 1184 (CA DC, 1984), the Board held that the justification for the application of superseniority to stewards did not generally apply to all union officers, but only to those who performed steward-like duties. The Board stated, at 409:

> We will find unlawful those grants of superseniority extending beyond those employees responsible for grievance processing and on-the-job contract administration. We will find lawful only those superseniority provisions limited to employees who, as agents of the union, must be on the job to accomplish their duties directly related to administering the collective-bargaining agreement.

In *Gulton,* the Board specifically overruled its earlier decision in *Limpco Mfg Co,* 230 NLRB 406 (1977). In *Limpco,* the Board held that a union recording secretary was entitled to superseniority because her duties "bore a direct relationship to the effective and efficient representation of unit employees."

After *Gulton,* in *United States Steel Corp,* 268 NLRB 1187 (1984), the Board held that that the mere maintenance of an overly broad superseniority provision constituted an unfair labor practice under the NLRA, even if the provision had never been enforced. See also *Connecticut Limousine Service, Inc*, 235 NLRB 1350 (1978), in which the Board noted that the potential for improper use of a superseniority clause exists as long as the clause is in effect.

Section 10(b) of the National Labor Relations Act, similar to Section 16(a) of PERA, includes a six-month statute of limitations on the filing of charges that runs from the date of the alleged unfair labor practice. The NLRB settled the question of the application of the statute of limitations to the maintenance and enforcement of unlawful superseniority provisions in *Arvin Automotive,* 285 NLRB 753 (1987). It held that the 10(b) period begins running on enforcement allegations when a union officer exercises his or her unlawfully acquired superseniority. With

respect to maintenance allegations, the Board explicitly rejected the holding of the Eleventh Circuit Court of Appeals that the statute begins running at the time the contract containing the unlawful clause is executed. The Board held instead that is sufficient for Section 10(b) purposes that the clause have been unlawfully maintained during the six months preceding the filing of the charge.

In *Grand Rapids Bd of Ed,* 1985 MERC Lab Op 802, the Commission adopted the NLRB's holding and reasoning in *Gulton.* The Commission held that superseniority for layoff and recall purposes is unlawful when granted to union officers who do not perform steward or other on-the-job contract administration functions, and that the enforcement and maintenance of such a clause constituted unlawful discrimination to encourage union activity. The Commission concluded that to justify a grant of superseniority, the officer must be present on the job on a regular basis in order to perform his or her assigned grievance or contract administration duties. Citing *Inmont Corp,* 268 NLRB 1442 (1984),[5] as well as *Gulton,* the Commission found that union officers who collectively decided whether a grievance should be taken to the third step of the grievance procedure were not entitled to superseniority because they were not required to make these decisions while on the job.

The Union here argues that Dunham's charge is untimely because the statute of limitations under Section 16(a) of PERA began to run in 2000, when the Respondents entered into the collective bargaining agreement with the allegedly unlawful superseniority clause. As discussed above, the NLRB rejected this argument in *Arvin Automotive, supra.* I find, as the NLRB did, that it is an unfair labor practice for an employer or union to maintain an unlawful superseniority clause in their contract. I also conclude that the instant charge is not untimely under Section 16(a) of PERA because Respondents maintained the disputed clause in their contract during the six months prior to the filing of these charges on November 3, 2003.

While the Employer takes no position on the lawfulness of the superseniority clause, the Union maintains that it is lawful, at least as applied to members of its executive board. Under the NLRB's analysis as adopted in *Grand Rapids, supra,* a contract clause that grants stewards superseniority for layoff and recall purposes is presumptively lawful. Thus, the superseniority clause here is presumptively lawful to the extent that it protects stewards, including the chief steward, from layoff. However, under this same analysis, all other types of superseniority provisions are presumptively unlawful because they discriminate on the basis of union activity. The record here establishes that the union president participates in the grievance procedure at the third level. I find that the union president's presence on the job is necessary for her to accomplish her duties in relation to the administration of the collective bargaining agreement. By contrast, the record contains no evidence that the vice president, secretary-treasurer, recording-secretary, trustee, bargaining committee members, or executive board members perform contract administration duties that require their regular presence on the job.[6] The Union argues that the executive board members'

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[5] In *Inmont,* the NLRB held that union trustees who rendered informal opinions on matters involving contract interpretation; met twice each month, and on other occasions when the need arose, to discuss and resolve problems arising within the plant, including employee discharges, safety matters, and situations involving the removal of stewards; and decided by executive board vote whether fourth-step grievances should be taken to arbitration were not entitled to superseniority because they did not perform steward-like functions requiring the "immediacy of attention that stewards can offer."

[6] In International *Union of Electronic, Electrical, Technical, Salaried and Machine Workers, Local 663,* 276 NLRB 1043 (1985), the NLRB held that the application of superseniority to a union vice-president who substituted for the president in his absence was unlawful because the vice-president's grievance handling duties were sporadic and

continued presence on the job is necessary because they: (1) determine whether a grievance will be filed or moved to the next level of the grievance procedure, and (2) discuss the concerns of their operational group with Employer representatives. However, the evidence indicates that executive members only occasionally discuss workplace concerns with Employer representatives; there is no indication that they regularly settle grievances. As the Commission held in *Grand Rapids,* superseniority is not appropriate for union officers who, like the executive board members here, decide whether the union will proceed to the next step with a grievance but do not meet with Employer representatives to discuss grievances during working hours.

The Union also argues that superseniority for executive board members is justified because executive board members are elected to represent the interests of a particular occupational group. It points out that if Burgess had been removed from his position as carpenter, he would have had to bump to a custodian position, and thus would no longer have been a part of the maintenance group constituency he was elected to represent. In *Auto Workers Local 561 (Scovill, Inc),* 266 NLRB 952, 954, n 9, (1983), the NLRB held that a contract clause permitting stewards and officers with steward-like duties for a particular shift to remain on that shift was presumptively lawful because it was akin to layoff protection. However, in *Gulton, supra,* at 409, the NLRB made the following comments regarding union officers without steward-like duties:

> An officer's continued employment within the unit is not determinative of a union's ability to administer a collective bargaining agreement. Merely because an officer is laid off does not compel his or her renunciation of union responsibilities. Further, changes in union officers are not so disruptive to unit representation as to warrant a blanket conveyance of superseniority. Unions can and do routinely replace their officers through constitutional procedures without undue disruption to their ability to administer their collective-bargaining agreements.

For reasons set forth above, I conclude that Respondents violated PERA by maintaining a provision in their collective bargaining agreement that unlawfully granted superseniority to the Union's vice-president, recording secretary, secretary-treasurer, trustee, executive board members, and bargaining committee members.

I also find that Respondents unlawfully enforced this provision when the Employer laid off/removed Dunham from his carpenter position in July 2003. According to the Union, Dunham would have been displaced in any case because he was the carpenter with the least maintenance group seniority. However, the Employer told Dunham on June 16 that he was being laid off because Burgess had superseniority under the contract. Both Respondents agreed in July 2003 that Burgess was entitled to retain his position because of the superseniority clause. The Union apparently continued to take this position throughout Dunham's attempts to get it to file a grievance on his behalf; nothing in the record indicates that the Union ever told Dunham that his grievance lacked merit because he had less occupational group seniority than Burgess. I find that Dunham was laid off or removed from his carpenter position in July 2003 because of Respondents' superseniority clause. I conclude that Dunham's layoff or removal was unlawful because it resulted from

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intermittent. Thus, the fact that the vice-president occasionally performs the president's duties, including her grievance-handling responsibilities, does not justify superseniority for the vice-president.

Respondents' unlawful grant of superseniority to Union executive board member Thomas Burgess under Article VIII, Section 6 of their contract.

I find that as part of the remedy in this case, Respondents should be ordered to restore Dunham to the carpenter/fabricator position and make him whole for any earnings lost as a result of his displacement from this position. I note that if the Union believes that Burgess should not be laid off or displaced under Article VIII, Section 7 of the contract, it can file a grievance on Burgess' behalf after Dunham has been reinstated and compensated for his lost wages. Respondents' dispute over the proper interpretation of that section can then be resolved in the forum agreed to by the parties for the settlement of these types of disputes, the contractual grievance procedure.

In accord with the above findings of fact and conclusions of law, I recommend that the Commission issue the following order:

RECOMMENDED ORDER AGAINST EMPLOYER

Respondent Warren Consolidated Schools, its officers and agents, are hereby ordered to:

1. Cease and desist from:

   a. Maintaining and enforcing a seniority clause in its collective bargaining agreement with Respondent Union, American Federation of State, County and Municipal Employees, Local 1346, according superseniority to union officers, specifically the vice-president, recording secretary, secretary-treasurer, trustee, executive board members and bargaining committee members, who are not stewards and do not have steward-like duties.

   b. Discriminating against Alan J. Dunham in violation of Section 10(1)(c) of PERA by laying him off or removing him from his position because of the above preferential seniority clause.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Reinstate Dunham to the position of carpenter/fabricator from which he was laid off or removed on July 14, 2003.

   b. Jointly and severally with the Respondent Union make Dunham whole for any loss of earnings or benefits he may have suffered as a result of the unlawful discrimination against him, including back wages from July 17, 2003 to the date of his reinstatement to the position of carpenter/fabricator, less his other earnings for this period but including interest at the rate of 6% per annum, computed quarterly.

   c. Post the attached notice to employees "A" at places on the Employer's premises where notices to employees are customarily posted for a period of 30 consecutive days.

RECOMMENDED ORDER AGAINST UNION

Respondent American Federation of State, County and Municipal Employees, Local 1346, its officers, agents and representatives, are hereby ordered to:

1. Cease and desist from:

   a. Maintaining, enforcing, or otherwise giving effect to a seniority clause in their collective bargaining agreement with Respondent Employer, Warren Consolidated Schools, according superseniority to union officers, specifically the vice-president, recording secretary, secretary-treasurer, trustee, executive board members and bargaining committee members, who are not stewards and do not have steward-like duties.

   b. Causing or attempting to cause the Respondent Employer to discriminate against employees in violation of Section 10(1)(c) of PERA.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Jointly and severally with the Respondent Employer make Alan Dunham whole for any loss of earnings or benefits he may have suffered as a result of the unlawful discrimination against him, including back wages from July 17, 2003 to the date of his reinstatement to the position of carpenter/fabricator, less his other earnings for this period but including interest at the rate of 6% per annum, computed annually.

   b. Post the attached notice "'B" at its union office, meeting hall, or any other place where its members regularly meet to transact union business, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Dated:_____

Notice "A"

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, the **Warren Consolidated Schools** has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL NOT maintain or enforce the preferential seniority clause in our collective bargaining agreement with the American Federation of State, County and Municipal Employees (AFSCME), Local 1346, to the extent that it accords superseniority to union officers, specifically the vice-president, recording secretary, secretary-treasurer, trustee, executive board members and bargaining committee members, who are not stewards and do not have steward-like duties.

WE WILL NOT discriminate against employees by unlawfully applying the preferential seniority clause to lay off Alan J. Dunham or remove him from his position.

WE WILL reinstate Dunham to the position of carpenter/fabricator from which he was laid off or removed on July 14, 2003.

WE WILL, jointly and severally with AFSCME Local 1346, make Dunham whole for any loss of earnings or benefits he may have suffered as a result of the unlawful discrimination against him, including back wages from July 17, 2003 to the date of his reinstatement to the position of carpenter/fabricator, less his other earnings for this period but including interest at the rate of 6% per annum, computed quarterly.

WARREN CONSOLIDATED SCHOOLS

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, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510

Notice "B"

NOTICE TO MEMBERS

After a public hearing before the Michigan Employment Relations Commission, **the American Federation of State, County and Municipal Employees (AFSCME), Local 1346**, has been found to have committed unfair labor practices in violation of the Michigan Public Employment Relations Act (PERA). Pursuant to the terms of the Commission's order,

WE HEREBY NOTIFY OUR MEMBERS THAT:

WE WILL NOT maintain or enforce the preferential seniority clause in our collective bargaining agreement with the Warren Consolidated Schools to the extent that it accords superseniority to union officers, specifically the vice-president, recording secretary, secretary-treasurer, trustee, executive board members and bargaining committee members, who are not stewards and do not have steward-like duties.

WE WILL NOT cause or attempt to cause the Warren Consolidated Schools to discriminate against employees in order to encourage union activity.

WE WILL, jointly and severally with the Warren Consolidated Schools, make Alan J. Dunham whole for any loss of earnings or benefits he may have suffered as a result of his unlawful layoff or removal from his position on July 14, 2003, including back wages from July 17, 2003 to the date of his reinstatement to the position of carpenter/fabricator, less his other earnings for this period but including interest at the rate of 6% per annum, computed quarterly.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, (AFSCME), LOCAL 1346

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, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.