

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

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C04 J-272

-and-

TEAMSTERS LOCAL 214,
Labor Organization-Charging Party.

APPEARANCES:

Andrew Jarvis, Esq., Assistant Corporation Counsel, for the Respondent

Rudell & O'Neill, PC, by Wayne Rudell, Esq., for the Charging Party

DECISION AND ORDER

On December 5, 2006, Administrative Law Judge Julia C. Stern issued her 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

Christine A. Dardarian, Commission Chair

Nino E. Green, Commission Member

Eugene Lumberg, Commission Member

Dated: _____

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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, this case was heard at Detroit, Michigan on August 2, 2006, before Administrative Law Judge Julia C. Stern for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before September 18, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

Teamsters Local 214 filed this charge against the City of Detroit on October 18, 2004. Charging Party's bargaining unit includes employees of Respondent classified as vehicle operators in several City departments. The charge alleges that on or about April 4, 2004, Respondent violated Sections 10(1)(a) and (c) of PERA when it denied a transfer to Tanita Alexander, a vehicle operator I, "due to union issues."

Facts:

In early 2004, Tanita Alexander worked in Respondent's department of public works (DPW) as a vehicle operator I. She operated street maintenance equipment. On January 20, 2004, Alexander

submitted an application to Respondent's human resources (HR) department for a permanent transfer to a vehicle operator I position in either the department of transportation (DOT) or the department of parks and recreation. Alexander wanted a job that was less physically demanding and that was assigned more overtime. Under the collective bargaining agreement between Charging Party and Respondent, when a vacant unit position is filled, it is to be offered first to the eligible employee on the transfer list with the most seniority in that classification.

Respondent's Process for Filling Vacancies

The formal process to fill a vacant budgeted position within the City begins with a decision by the employing department that it wants to fill the vacancy.¹ The department, through the HR employees assigned to it, submits a personnel requisition form to the HR department. The requisition form includes the position's classification title, (e.g. vehicle operator I) and other information, including a code indicating the bargaining unit to which the position belongs, the salary range for the position, the division and location where the employee is to work and the name of the supervisor of that division. Each requisition form has a referral number.

After the requisition is prepared, an HR employee assigned to the department certifies on the form that the position sought to be filled is necessary to the operation of the department and that funds are available for the personnel requested. The requisition form is then sent to the budget department. The department generally has some idea whether the budget department will approve the requisition before it submits the requisition form. However, the budget department may approve the requisition right away, may hold it for some time before approving it, or may never approve it. After the budget department signs off on the requisition form, it is sent to the employment certification division of the HR department, which determines who should fill the vacancy. After it has completed this process, it notifies the successful candidate and fills out a form titled "notice of preferred certification" (also called "certificate") with the employee's name and other information and information about the position to be filled, including the referral number from the requisition form. The candidate picks up the certificate from the employment certification division, signs it, and returns it to HR employees in the department where the employee is to work. A HR manager in this department signs the certificate as the "appointing authority" and indicates on the form when the employee is to begin work. The certificate warns candidates not to give up their current position until they receive a starting date for their new position. The department keeps a copy of the certificate in the employee's personnel file, and the original is returned to the City's HR department to be placed in the employee's personnel file there. The process of filling a vacancy may take as little as two months or as long as two years.

Vehicle Operator I Vacancies in April 2004

On November 26, 2003, the DOT submitted a personnel requisition form (referral number 20-2003-002) for a vehicle operator I in its plant maintenance division. The budget department approved the requisition form for the plant maintenance division vacancy, and the employment certification division received the form on December 8, 2003. The DOT submitted another personnel requisition form (requisition number 20-2003-003) on November 26, 2003 for a vehicle

¹ There is a different process for requesting funds for a new, unbudgeted, position.

operator III in its materials management division. At some point, the words “or vehicle operator I” were handwritten on the form next to the typewritten words “vehicle operator III,” and other handwritten notations were made on the form. The record does not indicate who made these alterations or why.

In early April 2004, Sandy Vandergrift, an employee in the certification division, called Floyd Ware, Charging Party’s chief steward, and told him that two requisitions for vehicle operator I positions at the DOT had been approved. Vandergrift said that the certification division had only one employee, Alexander, on the transfer list for vehicle operator I. She asked for Ware’s advice on who should be assigned to the second position. Ware told Vandergrift that Charging Party had been seeking a transfer for Annette White, a vehicle operator I in the water department. Vandergrift agreed to prepare certificates for Alexander and White. Ware called Alexander to tell her that she was being transferred and explained the circumstances under which White was also receiving a transfer. Vandergrift phoned Karen Boggerty-Hairston, an HR representative at the DOT, to tell her that two requisitions for vehicle operator I positions at the DOT had been approved and that she was sending White and Alexander to her with their certificates. Vandergrift explained that Alexander’s name was on the transfer list while White’s was not, and that Alexander had more seniority than White. Although Boggerty-Hairston was an experienced HR representative, she had worked at the DOT for only about a month and had no knowledge of these particular personnel requisitions.

On April 5, White appeared at the certification division and was given a certificate to sign and take to the DOT. White’s certificate referenced referral number 20-2003-02. Later that day, White delivered her certificate and Boggerty-Hairston signed it as appointing officer. White asked Boggerty-Hairston if she could start her new position on April 19. According to Boggerty-Hairston, she contacted the plant maintenance division and obtained approval for White to start on April 19 before she signed White’s certificate. ²

Alexander came to the certification division on the morning of April 6. Alexander was given a certificate that referenced referral number 20-2003-03. Alexander picked up her certificate, signed it, and delivered it to a clerk at the DOT’s HR office. She asked for Elaine Tower, Boggerty-Hairston’s supervisor, but was told that Tower was not there. Alexander was given papers to fill out and went into a conference room to do so. At some point, probably before the two spoke, Boggerty-Hairston signed Alexander’s certificate with a starting date of April 19.³ Boggerty-Hairston testified that she called the materials management division to inform them that they had a new driver. She was told that the division wanted a vehicle operator III, not a vehicle operator I. According to Boggerty-Hairston, either shortly before or shortly after this conversation, she also called Ken Ong, the supervisor in the plant maintenance division whose name was on requisition form 20-2003-02. According to Boggerty-Hairston, Ong told her that he had cancelled his requisition for a vehicle operator I and reallocated the money to an electrical worker position. Boggerty-Hairston testified that she went to her supervisor, Elaine Tower, and reported what she had learned from the division supervisors. According to Boggerty-Hairston, she and Tower knew that

² Although Boggerty-Hairston had no clear recollection of the date, she apparently talked to the plant maintenance division on April 5, since she signed White’s certificate on that day.

³ Boggerty-Hairston’s signature is dated April 7. This is probably a mistake, since by April 7 Boggerty-Hairston had decided to cancel the certificate.

they could not fill a vehicle operator III position with an employee classified as a vehicle operator I and decided to cancel both Alexander's and White's certificates.

Boggerty-Hairston went to the conference room where Alexander was still filling out forms. Boggerty-Hairston testified as follows:

When I told Ms. Alexander that the department wanted a vehicle operator III instead of a vehicle operator I, she starting ranting and raving I'm going to my union this is going to be a union issue. I'm going to my union... Because [the division had said that they wanted a vehicle operator III] I had to go tell Ms. Alexander that we could not fill this position. We knew that Ms. White had less seniority than Ms. Alexander, so we had to cancel her as well. Because if I couldn't fill either of the positions I couldn't take Ms. Alexander and they hold both of the same titles [sic] over Ms. White.

Boggerty-Hairston testified about this conversation, "I remember getting very irate and my staff was a little concerned that she was going to the union."

Alexander had a different version of her conversation with Boggerty-Hairston. Alexander testified that Boggerty-Hairston came into the room and said that the position had already been filled and that Alexander was no longer needed. According to Alexander, she told Boggerty-Hairston, "They said that they had two positions open." Alexander testified that Boggerty-Hairston said that "the other lady" had come in the day before and filled out her paperwork and now the position was filled. Alexander was angry. She testified that she asked Boggerty-Hairston how they could fill the position with someone who had less seniority. According to Alexander, Boggerty-Hairston just said "because" or "for reasons" and walked out of the room. Alexander tried to follow, but could not find Boggerty-Hairston in the hallway. Alexander denied saying anything to Boggerty-Hairston about a union.

After Alexander left the DOT's offices, she called Ware and told him that by time she got to DOT the vehicle operator I position had been filled. She said that she believed that the DOT was not following the seniority provision in the contract. Ware called Boggerty-Hairston and left a message demanding an explanation of what had happened. Boggerty-Hairston returned Ware's call the next day. She told Ware that she "had orders to do it this way."

After Alexander left her office on April 6, Boggerty-Hairston wrote a memo to the water department stating that White's certificate had been cancelled. At 4:21 pm on April 6, Boggerty-Hairston sent the following e-mail to Vandergrift:

I am canceling the two certificates for the VO-I position you sent to D-DOT on April 7, 2004 [sic] due to Union issues surrounding Ms. Alexander. However, if there is VO-III on the list please fill the position with that person.

When asked by Respondent's counsel what she had meant by "union issues," Boggerty-Hairston testified:

When [Alexander] said I'm going to my union, I'm going to report this to my union, I knew that we were going to have a problem.

I find Alexander to be a more credible witness than Boggerty-Hairston. My finding is based in part on the demeanor of the witnesses. I also base my finding on the inconsistencies in Boggerty-Hairston's account of events. Boggerty-Hairston testified that she talked to the plant maintenance division and confirmed White's starting date before she signed White's certificate on April 5. She testified that when Alexander arrived at the DOT on April 6, she believed that she had positions for both Alexander and White. This was why, according to Boggerty-Hairston, she signed Alexander's certificate. She testified that she did not learn that there was no vehicle operator I vacancy in the plant maintenance division until she called Ken Ong, the supervisor of that division, and he told her that he had canceled his requisition for a vehicle operator I. However, Boggerty-Hairston did not explain why she made that call, since she had already spoken to plant maintenance and confirmed White's starting date. If Boggerty-Hairston knew when she talked to Alexander that she had no vehicle operator I positions to fill, it seems odd that she would be bothered by Alexander's threat to complain to her union. Of course, if Ong did not tell Boggerty-Hairston that he no longer had a vehicle operator I position, she should have told Alexander that she would be transferred to that position instead of the one on her certificate.

I see no reason to disbelieve Boggerty-Hairston's testimony that she called the materials management division to tell the supervisor that the division's vacancy was being filled on April 6 and was told that the division wanted a vehicle operator III. I do not believe, however, that Boggerty-Hairston spoke to Ong at that date. I find that Boggerty-Hairston told Alexander, as Alexander testified, that "the position," i.e. the plant maintenance position, had already been filled. At some point, however, it occurred to Boggerty-Hairston and her staff that they might have made a mistake and that Alexander might have a right under her union contract to the position for which they had just certified White. I find that rather than trying to correct this mistake, Boggerty-Hairston then decided to cancel both Alexander's and White's certificates. When she e-mailed Vandergrift later that day, she explained that she was canceling both certificates "due to union issues surrounding Ms. Alexander."

It is unclear from the record what happened to the vehicle operator I vacancy in the plant maintenance division. According to Respondent's records, plant maintenance submitted a personnel requisition for an electrical worker on February 24, 2004, but there is nothing to show a connection between this requisition and the division's earlier vehicle operator requisition. As discussed below, Respondent gave Charging Party a document showing that on April 24, 2004 there was one unfilled vehicle operator I position in the DOT, but the document does not indicate in which division it was located.

Grievance and Charging Party's Request for an Explanation of Respondent's Actions

Ware submitted a grievance over the cancellation of Alexander's transfer to Alexander's department, the DPW. The grievance was rejected at the second and third step on the grounds that the DPW had no jurisdiction over hiring for the DOT. On July 13, 2004, Ware had a fourth step grievance meeting with Brian Tennille, a representative from the Respondent labor relations department. Boggerty-Hairston was not at this meeting and Ware had not spoken to her since their

brief telephone conversation in April. Tennille told Ware that White's transfer had gone through, but that Alexander's certificate had been cancelled. Ware knew, however, that White's certificate had also been cancelled. Ware asked Tennille for an explanation of these events, but he could not provide one. In August 2004, Tennille gave Ware a fourth step written answer stating:

The certification division of the human resources department confirmed that the department of transportation canceled the requisition for the vehicle operator I position and they decided not to fill the position at this time. Based on the information and documentation provided by the department, the City does not see a violation of the contract in this case.

Tennille also sent Charging Party a copy of Boggerty-Hairston's April 6 e-mail to Vandergrift. After Charging Party received the fourth step answer and the e-mail, Charging Party representative Joseph Valenti called Tennille. He asked him what had happened to the other vehicle operator I vacancy, meaning the one to which White had originally been assigned. Tennille told Valenti that there was only one vacancy. He sent Valenti a document showing that there was one vacant budgeted vehicle operator I position in the DOT on April 24, 2004. After Valenti received the document, he spoke to Tennille again. He said that if there was a vacancy, it should have been filled by Alexander. Tennille did not respond. In the fall of 2004, Charging Party decided not to proceed to arbitration with its grievance and filed this charge instead. After the charge was filed, Respondent sent Valenti another budget document showing that by December 2004, the vacant vehicle operator I position in the DOT had been eliminated from the budget. By the time the instant unfair labor practice charge was heard in 2006, Alexander had received a transfer to a vehicle operator I position in the parks and recreation department.

Discussion and Conclusions of Law:

In order to establish a prima facie case of discrimination under Section 10(1)(c) of PERA, Charging Party must establish: (1) that the employee engaged in union or other protected concerted activity; (2) that the employer had knowledge of that activity; (3) union animus or hostility towards the employee's protected activity; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the alleged discriminatory actions. *City of St Clair Shores*, 17 MPER 76 (2004); *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 706; *Univ of Michigan*, 1990 MERC Lab Op 272, 288.

It is well established that when a public employee, acting in good faith, asserts an individual grievance based on a provision of a collective bargaining agreement, he or she is engaged in protected concerted activity within the meaning of Section 9 of PERA. A collective bargaining agreement is the result of concerted activities by the employees for their mutual aid and protection, and when an individual employee attempts to enforce a provision of that agreement he is asserting a "collective" right under a collective contract. *Michigan Employment Relations Commission v Reeths-Puffer School Dist*, 391 Mich 253, 261 (1974). An employee's initial statement to his employer to the effect that he believes a collectively bargained right is being violated is protected concerted activity because this type of action might serve as a natural prelude to, or an efficient substitute for, the filing of a formal grievance. As long as the employee's statement is based on a reasonable and honest belief that the contract is being violated, the statement is reasonably directed

toward the enforcement of a collectively bargained right, and the employee does not behave in a manner to remove his conduct from the protection of the Act, the activity is protected. *NLRB v City Disposal Systems, Inc*, 465 U.S. 822, 837 (1984).

On April 6, 2004, Alexander came to HR representative Boggerty-Hairston's office at the DOT to finalize her transfer to a position in that department. As discussed above, I credit Alexander's testimony that Boggerty-Hairston told her that the position had already been filled by someone else. Alexander knew that person to be White, and knew that White had less seniority. I credit Alexander's testimony that she angrily asked Boggerty-Hairston how she could fill the position with someone with less seniority. This question was in effect a statement to Boggerty-Hairston that Alexander believed her contractual rights had been violated, and Boggerty-Hairston understood it this way. There is no indication that Alexander engaged in any conduct during her discussion with Boggerty-Hairston that would remove her from the protection of the Act. I conclude that Alexander's statement was protected activity under Section 9 of PERA.

Here, the adverse action constituting the alleged unlawful discrimination was the cancellation of the vehicle operator I vacancy in the plant maintenance division of the DOT in April 2004. Alexander was given a certificate for a vehicle operator I position in the material management division of that department. As I found above, this position did not exist. However, Alexander, because of her seniority and her position on the transfer list, had the right to the first vacant vehicle operator I position Respondent filled in the DOT. Why did Respondent cancel the requisition for the vehicle operator I position in the DOT's plant maintenance division? As discussed above, I do not credit Boggerty-Hairston's explanation that the supervisor of that division told her that he no longer had a position, and there was no other evidence in the record that this position was eliminated before April 6, 2004. I find that the real explanation appears elsewhere in Boggerty-Hairston's testimony and in her e-mail to Vandergrift on April 6. Alexander appeared at the DOT offices on that date and angrily asserted her right under her union contract to any vacant vehicle operator I position. As Boggerty-Hairston testified, this made Boggerty-Hairston "very irate." It is not necessary, in order to establish a prima face case of unlawful discrimination, that the Charging Party show that a Respondent agent was ideologically opposed to unions. Evidence that Respondent was hostile to the employee's protected activity is sufficient. I conclude that Boggerty-Hairston decided to cancel the requisition for the plant maintenance vehicle operator I position so that Alexander would not get her transfer because Boggerty-Hairston was annoyed by Alexander's assertion of her contractual rights. As Boggerty-Hairston herself testified, this was what she meant when she told Vandergrift in the e-mail that she was canceling both requisitions "due to union issues with Ms. Alexander." I find that this action constituted unlawful discrimination in violation of Sections 10(1)(a) and (c) of PERA.

A remedial order in a case involving a violation of Section 10(1)(c) usually includes a make-whole order as well as an order requiring Respondent to cease and desist from its unlawful activity and to post a notice to employees admitting its conduct. The transfer Alexander sought was a transfer within the same job classification. Moreover, Alexander was eventually transferred, although she ended up in the parks and recreation department. Although it is not clear from the record whether Alexander actually suffered any monetary loss, I recommend that the Commission order Respondent to make Alexander whole for monetary losses she suffered as a result of the

unlawful discrimination. Any dispute over the existence or amount of this loss can be resolved in a compliance proceeding. Accordingly, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

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

1. Cease and desist from interfering with, restraining or coercing Tanita Alexander or other members of the bargaining unit represented by Teamsters Local 214 in the exercise of their rights to engage in union and other protected concerted activity for mutual aid and protection under Section 9 of the Public Employment Relations Act.
2. Cease and desist from discriminating against Tanita Alexander because of her union activity.
3. Take the following affirmative action to effectuate the purpose of the Public Employment Relations Act:
 - a. Make Tanita Alexander whole for all monetary losses she suffered as a result of Respondent's unlawful refusal to allow her to transfer to a vehicle operator I position in its department of transportation in April 2004.
 - c. Post the attached notice to employees in places on the Respondent's premises, including all places where notices are customarily posted, for a period of thirty consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Julia C. Stern
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **CITY OF DETROIT** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE 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 interfere with, restrain or coerce Tanita Alexander or other members of the bargaining unit represented by Teamsters Local 214 in the exercise of their rights to engage in union and other protected concerted activity for mutual aid and protection under Section 9 of PERA.

WE WILL NOT discriminate against Tanita Alexander because of her union activities.

WE WILL make Tanita Alexander whole for all monetary losses she suffered as a result of Respondent's unlawful refusal to allow her to transfer to a vehicle operator I positioning its department of transportation in April 2004.

All of our employees are free to form, join or assist in labor organizations and to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection.

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 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.