STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (WATER & SEWERAGE DEPARTMENT),
Public Employer-Respondent in Case No. C07 D-090,

-and-

UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL 2334, SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION
Labor Organization-Respondent in Case No. CU07 D-022,

-and-

RAJU K. MARKOSE,
An Individual-Charging Party.
_____/

APPEARANCES:

Bruce A. Campbell, Esq., and June C. Adams, Esq., City of Detroit Law Department, for the Public Employer

Maneesh Sharma, Esq., Associate General Counsel, UAW Legal Department, for the Labor Organization

Raju K. Markose, *In Propria Persona*

DECISION AND ORDER

On December 21, 2009, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondents have not engaged in and were not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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Maneesh Sharma, Associate General Counsel, UAW Legal Department, for the Labor Organization

Raju Markose, appearing on his own behalf

DECISION AND RECOMMENDED ORDER OF THE 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 assigned to David M. Peltz, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings and Rules, acting on behalf of the Michigan Employment Relations Commission (MERC). This case arises from unfair labor practice charges originally filed by Raju Markose on April 30, 2007 against his Employer, the City of Detroit, Water & Sewerage Department (hereinafter "the City" or "the Employer") and his Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), Local 2334, Sanitary Chemists and Technicians Association, (SCATA or the Union). As

discussed more fully below, Markose subsequently amended the charges on March 6 and March 24, 2008. Based on the entire record, including the transcripts and exhibits, I make the following findings of fact and conclusions of law.

Background and Procedural History:

The original charge in Case No. C07 D-090 alleged that the Employer had violated PERA by improperly implementing a modified work scheduled which had been agreed to by both the City and the Union in July of 2006. The charge asserted that the City applied the modified work schedule to only certain shifts so as to favor "Union leaders." In Case No. CU07 D-022, Markose asserted that the Union "did not properly respond" to his requests to file grievances regarding the City's implementation of the modified work schedule, the Employer's decision to test applicants for promotion and an allegedly "unfair" job transfer.

On June 8, 2007, SCATA filed an answer to the charge and a motion for summary disposition. In an order issued on July 13, 2007, I denied the Union's motion on the ground that there were outstanding questions of material fact which warranted resolution at an evidentiary hearing.

A hearing on the charges was scheduled for January 28, 2008. On that date, Charging Party indicated, for the first time, that he wished to amend his charge to include an allegation that City violated PERA by changing its established practice with respect to the distribution of overtime. Charging Party asserted that in January of 2007, the City began allowing any employee within the Water & Sewerage Department the opportunity to sign up for overtime work in the operations lab, whereas prior to that date, the staff of the operations lab was given priority for such work. Since this was a new allegation, I adjourned the hearing so as to give the City time to prepare its defense. Charging Party was directed to formally amend his charge in writing to include the overtime issue. In a letter to the undersigned dated March 6, 2008, Charging Party requested "to include the Over Times [sic] issues" in this case.

On March 24, 2008, Charging Party wrote to the undersigned complaining about a three-day suspension which he had received for "insubordination." In a letter dated March 26, 2008, I requested clarification from Markose regarding whether he intended for the March 24th communication to serve as an additional amendment to his charge against the City of Detroit. On April 17, 2008, Markose asserted that the three-day suspension was issued in retaliation for the unfair labor practice charge which he had filed against the City in this matter. Markose requested that the "retaliation and conspiracy issues" be considered part of this case.

Preliminary Matters at Hearing:

A hearing in this matter was scheduled for September 5, 2008. At the start of the hearing, Charging Party withdrew those portions of the charges which pertained to the City's implementation of a modified work schedule. In addition, I indicated that I would

be recommending summary dismissal of a number of Charging Party's other allegations for reasons set forth in detail on the record and summarized below:

A. Promotional Examination

Charging Party asserted that the Employer violated the Act by requiring that applicants take a written examination in order to be considered for promotion to positions within the support unit and the chlorination facility, and that the Union violated its duty of fair representation by failing to take action to compel the City to reverse its policy. Charging Party conceded, however, that the City implemented the testing requirement in 2005. In fact, Markose himself was turned down for a promotion that same year after he refused to take a written examination for promotion to a position as water system chemist in the quality assurance group. Yet, he did not file a charge regarding the testing requirement until March 30, 2007, approximately two years after the policy was implemented.

Pursuant to Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. The limitations period commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983). In the instant case, Markose clearly knew or should have known of the alleged unfair labor practices more than six months prior to the filing of the charge. Accordingly, I held that any allegations pertaining to the testing requirement were time-barred under Section 16(a) of the Act. Dismissal of the charge against SCATA was warranted based on the fact that there was no factually supported allegation of inaction by the Union during the six-month period preceding the filing of the charges.

B. Overtime

Next, I indicated that I would be recommending dismissal of Charging Party's assertion that the Employer unlawfully modified its established practice regarding the distribution of overtime. As noted, the overtime issue was raised by Markose for the first time on January 28, 2008. At that time, Markose theory was that the Employer violated PERA by changing its policy of giving priority for overtime work to employees assigned to the operations lab. On March 6, 2008, Charging Party amended his charge to include "the Over Times [sic] issues."[1]

At the hearing in this matter, Charging Party was asked to describe the overtime

[1] This allegation would likely have been dismissed as untimely under Section 16(a) of PERA had Charging Party not abandoned it in favor of a different theory. The change in the overtime policy was allegedly made by the City in January of 2007, more than six months prior to the date upon which Markose amended his charge to include this allegation.

issue in greater detail. He abandoned his prior theory and instead characterized the issue as pertaining to the City's decision to implement an overtime equalization policy, pursuant to which overtime work was awarded to whichever employee had worked the least number of total hours during the preceding twelve-month period. Markose asserted that the City's past practice had been to award overtime to whichever employee had gone the longest time without performing such work. I construed this allegation as an entirely new charge, factually unrelated to the overtime issue which Markose had raised earlier. For that reason, I held that Markose would not be permitted to present evidence regarding the equalization of overtime policy because the City had not had a full and fair opportunity to prepare a defense. Furthermore, I held that Markose had not stated a valid claim under PERA, since he had not alleged that the City's implementation of the new overtime policy was motivated by anti-union animus.

C. Retaliation

Similarly, I determined that Charging Party would not be allowed to proceed with his retaliation claim against the City. Markose had originally asserted that the City had acted unlawfully by suspending him for three days in March of 2008 because he had instituted proceedings under PERA. The Union successfully grieved that suspension and it was ultimately rescinded by the City. At the September 5, 2008, hearing, Markose asserted that it was not the suspension itself which he had intended to challenge, but rather it was the Employer's conduct toward him following the rescission of the suspension which actually formed the basis for his claim against the City. Markose stated on the record, "[The] suspension is not the issue, the retaliation is the issue." I refused to allow Charging Party to present evidence of retaliation occurring after the suspension on the ground that it was an entirely new allegation about which the City had not had an opportunity to prepare a defense.

D. Involuntary Transfer

As a result of the disposition of the above allegations, the only issue which remained outstanding, and on which testimony was taken, involved Charging Party's involuntary transfer or “rotation” from the chlorination facility to a position in the operations lab. Markose contends that the City violated PERA by requiring him to rotate to a different building at a time when there were other employees available who could have been assigned to work in the operations lab, and that the Union failed to represent him fairly in connection with the involuntary transfer.

Findings of Fact:

SCATA represents a bargaining unit which includes nonsupervisory chemists employed by the City of Detroit in its Water & Sewerage Department (DWSD). The most recent collective bargaining agreement between the City and SCATA covers the period 2005 to 2008. The management rights clause of the agreement, Article 2, provides, in pertinent part:

> A. The Union recognizes the prerogatives of the City to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority, which the City has not specifically abridged or modified by this Agreement are retained by the City.
>
> * * *
>
> B. Except as specifically set forth in this Agreement, the City retains the sole and exclusive right to manage all of its operations and facilities including but not limited to directing its working force of employees, deciding the number of and classification of employees needed to staff each facility (including overtime), to make assignments and reassignments . . . .

Chemists employed by the DWSD in its wastewater treatment plant are assigned to work in either the operations lab or the chlorination facility. The facilities are located across the street from each other, but are under the same management. In September of 2006, the DWSD began rotating employees between the two facilities in order to ensure that all chemists are properly cross-trained. New chemists are initially assigned to the chlorination facility. Approximately every four months, those chemists who have worked at the chlorination facility the longest are transferred to positions at the operations lab. The staff rotations were administered by Geoffrey LePlatte who, at the time of the events giving rise to this dispute, was the assistant sewerage lab plant supervisor for the DWSD at the Detroit wastewater treatment plant.

Markose has been employed by the City as a chemist since 1985 and is a member of the SCATA bargaining unit. Markose worked in the operations lab until 2004, when he was transferred to a position at the chlorination facility. In April of 2007, Markose received notice that he was scheduled to be rotated back to operations to make room for a new employee, Atul Patel, who was close to completing his training.

At hearing, Markose testified that he should not have been transferred because there were other employees who had been working at the chlorination facility longer, including Warren Macabebe and Henry Michalak. LePlatte disputed Markose's testimony concerning the scheduled order of staff rotation from the chlorination facility to the operations lab. LePlatte testified:

> The next person in line was Mr. Markose, and then Anitha Thomas. Mr. Macabebe was one of the newer people who was assigned [at chlorination] for training. And ……., your time in chlorination/dechlorination only begins after you are certified.
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> * * *
>
> [Michalak] was not [next in line]. Mr. Michalak was fired and he got his job back. In order to prevent -- allegedly there was an altercation between Mr. Michalak and someone else, that someone else worked at 9300 West Jefferson, and when we brought him back, we decided we would not have them working together for a while to cool things off. So we put Mr.

> Michalak in chlorination/dechlorination, we assigned [him] over there so we can keep these two gentlemen apart. He came after -- his rotation should be coming up soon, but not at that time. At that time, Mr. Markose was the one who was supposed to rotate, and then after that, Anitha Thomas.

Based upon his demeanor on the stand and the completeness of his account, I found LePlatte to be a reliable witness and credit his testimony with respect to the scheduled order of rotation in April of 2007.

Around the time that Markose was scheduled to rotate from chlorination to the operations lab, Michael Kayode, another chemist at the chlorination facility, needed to change to a position on the day shift so as to accommodate a family emergency. Because there was no employee within the chlorination facility with whom Kayode could exchange shifts, the Employer approved a temporary shift exchange with Faik Nasser, a chemist who was working in the operations lab. The shift exchange was scheduled to last until September of 2007.

Rather than transfer Kayode to Nasser's old position at the operation lab, LePlatte decided to assign both Kayode and Nasser to the chlorination facility. LePlatte testified credibly, and without contradiction, that the decision to handle the shift exchange in this manner was based on the fact that Kayode had recently been trained in the chlorination/dechlorination process, and LePlatte believed it was important that he be able to utilize that training immediately. The assignment of both Kayode and Nasser to the chlorination facility was made possible by the recent departure of Meera Sharma, a chemist who had previously applied for, and received, a transfer from the chlorination facility to a position elsewhere in the DWSD.

Markose contacted SCATA president David Sole and asked him to investigate whether the staff rotation and shift exchange had been handled properly and in accordance with the contract. According to Markose's understanding of how shift exchanges typically occurred within the DWSD, Kayode should have been transferred to Nasser's old position at the operations lab. Markose asserted that the transfer of Kayode to operations, along with the departure of Sharma, would have resulted in at least one vacancy at the chlorination facility, thereby circumventing the need for Markose to rotate to the operations lab at that time.

Sole assigned the investigation of Markose's complaints to Union steward Cathy Willey. Willey checked the senior chemist logs and other documentation in order to determine which chemists had worked at the chlorination facility the longest. She also discussed the issue with LePlatte and sought to determine whether his reasoning was arbitrary or discriminatory. She concluded that Markose was next in line to rotate out of chlorination and that the situation had been handled fairly. Wiley reported her findings to Sole by letter dated May 3, 2007.

At hearing, Sole explained that the staff rotation procedure is matter of managerial prerogative. According to Sole, the Union's role in that process is limited to

ensuring that the rotations are carried out in a fair and equitable manner. Based upon Willey's investigation, Sole concluded that there was no basis for filing a grievance on Markose's behalf. Although Sole conceded that the Employer's handling of the Kayode shift exchange was somewhat unusual, he testified that the Union was pleased that DWSD management had made an effort to accommodate the emergency situation of one of its members. Sole communicated the Union's decision not to take further action in a letter to Markose dated May 4, 2007.

Discussion and Conclusions of Law:

Charging Party contends that the City acted unlawfully in requiring that he transfer from the chlorination facility to a position in the operations lab in April of 2007. With respect to public employers, PERA does not prohibit all types of discrimination or unfair treatment, nor does the Act provide an independent cause of action for an employer's breach of contract or violation of other statutes. Rather, the Commission's jurisdiction with respect to public employers is limited to determining whether the employer interfered with, restrained, and/or coerced a public employee with respect to his or her right to engage in union or other protected activities. Absent a factually supported allegation that the Employer took action against an employee for engaging in conduct protected by Section 9 of PERA, the Commission is prohibited from making a judgment on the merits or fairness of the Employer's action. See e.g. *City of Detroit (Fire Dep't)*, 1988 MERC Lab Op 561, 563-564; *Detroit Bd of Ed*, 1987 MERC Lab Op 523, 524. In the instant case, Charging Party has failed to produce any evidence which would establish that the Employer's decision to rotate him to the chlorination facility was motivated by animus toward his union or other protected activities. Absent such an allegation, the Commission is foreclosed from making a judgment on the merits or fairness of the employer's action. Thus, dismissal of the charge against the City in Case No. C07 D-090 is warranted.

The charge against SCATA in Case No. CU07 D-022 must also be dismissed. A union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interests of all members without hostility or discrimination toward any; (2) to exercise its discretion in complete good faith and honesty, and (3) to avoid arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651 (1984). Within these boundaries, a union has considerable discretion to decide how or whether to proceed with a grievance, and must be permitted to assess each grievance with a view to its individual merit. *Lowe v Hotel Employees*, 389 Mich 123 (1973). Because the union's ultimate duty is toward the membership as a whole, a union may consider such factors as the burden on the contractual machinery, the cost, and the likelihood of success in arbitration. *Lowe, supra*. To this end, a union is not required to follow the dictates of the individual grievant, but rather it may investigate and present the case in the manner it determines to be best. *Detroit Police Lts and Sgts*, 1993 MERC Lab Op 729.

The Commission has "steadfastly refused to interject itself in judgments" over grievance and other decisions by unions despite frequent challenges by employees who perceive themselves as adversely affected. *City of Flint*, 1996 MERC Lab Op 1, 11. The

fact that an individual member is dissatisfied with the union's efforts or ultimate decision is insufficient to constitute a breach of the duty of fair representation. *Eaton Rapids Ed Assoc*, 2001 MERC Lab Op 131. The union's decision on how to proceed will not be held to be unlawful as long as it is not so far outside a wide range of reasonableness as to be irrational. *Air Line Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991); *City of Detroit, Fire Dep't*, 1997 MERC Lab Op 31, 34-35. To prevail on a claim of unfair representation, a charging party must establish not only a breach of the union's duty of fair representation, but also a breach of the collective bargaining agreement by the employer. *Goolsby v Detroit*, 211 Mich App 214, 223 (1995); *Knoke v East Jackson Sch Dist*, 201 Mich App 480, 488 (1993).

In the instant case, Charging Party asserted that Willey did not conduct a thorough and proper investigation of the events which occurred during and around the time that he was rotated to the operations lab. When asked at hearing why he believed that Willey did not examine the situation fairly, Charging Party opined that Willey may have had held a grudge against him because he had run against her in an internal Union election to select a delegate to attend the 2006 UAW Constitutional Convention in Las Vegas. Beyond that conclusory assertion, however, there is nothing in the record to suggest that the Union acted arbitrarily, discriminatorily or in bad faith with respect to Markose. To the contrary, the evidence establishes that the Union conducted a thorough investigation into the circumstances leading to Charging Party's rotation. Willey, acting at the direction of the Union president, researched the senior chemist logs and other documentation in order to determine which chemists had worked at the chlorination facility the longest. She also discussed the issue with LePlatte in order to ensure that the rotation was carried out in a fair and equitable manner. Sole reviewed Willey's report and concluded that there was no basis upon which to file a grievance. In fact, he believed that the Employer had acted laudably by attempting to accommodate the needs of another bargaining unit member who was facing an emergency situation. Sole promptly notified Markose of the Union's decision not to take further action on his behalf. Although Markose is apparently dissatisfied with that determination, there is nothing in the record to suggest that the Union acted arbitrarily, discriminatorily or in bad faith with respect to its representation of him. For that reason, I find that dismissal of the charge against the Union in Case No. CU07 D-022 is appropriate.

There has also been no showing that the City's decision to rotate Markose out of the chlorination facility in April of 2007 constituted a breach of the collective bargaining agreement between the City and the Union. The 2005-2008 contract explicitly grants to the City the sole and exclusive right to manage its operations and facilities, including the authority to direct its workforce, to decide the "number of and classification of employees needed to staff each facility" and to make assignments and reassignments. Both Sole and LePlatte testified as to their understanding that the rotation process is a matter of managerial prerogative. The Commission has long held that where an employer and a union concur as to the interpretation of the contract, their construction governs. *Saginaw Valley State Univ*, 19 MPER 36 (2006); *City of Detroit*, 17 MPER 47 (2004). Charging Party has not identified any contract provision which was even arguably violated by the

City's implementation of the rotation procedure. Therefore, I find that dismissal of the charge against the Union in Case No. CU07 D-022 is warranted on this additional basis.

For the above reasons, I hereby recommend that the Commission issue the following order.

RECOMMENDED ORDER

It is hereby recommended that the unfair labor practice charges in Case Nos. C07 D-090 and CU07 D-022 be dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

David M. Peltz
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____