STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C06 D-098

-and-

SENIOR ACCOUNTANTS, ANALYSTS AND APPRAISERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Andrew Jarvis, City of Detroit Law Department, for Respondent

Scheff, Washington & Driver, P.C., by George Washington, for Charging Party

DECISION AND ORDER

On August 31, 2009, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, City of Detroit (Employer or City), did not violate Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210. The ALJ found that Charging Party, Senior Accountants, Analysts and Appraisers Association (SAAA or the Union) failed to establish that anti-union animus was a motivating factor in Respondent's decision to lay off SAAA members. The ALJ also concluded that Respondent did not violate its duty to bargain in good faith when it implemented a reduction of work hours for the Union's members because the Charging Party had agreed to a provision giving Respondent the discretion to do so. The Decision and Recommended Order of the ALJ was served upon the interested parties in accordance with Section 16 of PERA. Charging Party requested and was granted an extension of time to file exceptions, and its exceptions were filed on October 23, 2009. Respondent did not file a response to the exceptions.

In its exceptions, Charging Party argues that the ALJ erred in recommending dismissal of the charges. It alleges that, contrary to the ALJ's conclusions, Respondent procured the agreement of Charging Party's president to certain provisions in a proposed contract by threatening unlawful unilateral action, thus, breaching its duty to bargain in good faith. SAAA asserts, therefore, that it never agreed to the implementation of Respondent's proposed plan. We have considered the arguments made in Charging Party's exceptions and find them to be without merit.

Factual Summary:

We adopt the findings of fact as set forth in the ALJ's Decision and Recommended Order and will not repeat them here, except as necessary. In 2005, Respondent's revenues were declining and it faced a budget deficit. As a means to address its budgetary problems, Respondent chose to offer two proposals to all of the unions with which it was negotiating contracts, except those representing uniformed employees. The proposals included a ten percent pay cut in the form of unpaid days off referred to as DOWOPs and a new health insurance plan, known as the Mercer Plan, that would decrease the Employer's costs.

Charging Party and Respondent began negotiating for a new contract in the fall of 2005 and agreed to extend their prior contract until July 1, 2006. They met regularly until January 2006, but failed to reach an agreement. Sometime prior to January 2006, Respondent changed its health insurance proposal to one that was more moderate than the Mercer Plan and was known as the Alternative Health Care proposal. The parties met a few times between January and May of 2006, and discussed the details of the new health care proposal.

In late March or early April, 2006, Respondent announced layoffs of bargaining unit employees in its Department of Water and Sewerage [DWS]. Charging Party claims that the layoffs were intended to pressure it to accept concessions. Respondent offered testimony that the layoffs were caused by a delay in the approval of rate increases made necessary by increased costs.

On May 15, 2006, the Employer's acting labor relations director, Barbara Wise-Johnson, sent a letter to Charging Party, and other unions with which Respondent did not have a current collective bargaining agreement, asking to meet as soon as possible for negotiations in order to effectuate cost-saving measures by July 1, 2006. Wise-Johnson's letter informed the unions that for the City to achieve the needed cost savings, its DOWOP and Alternative Health Care proposals needed to be in place by July 1, 2006. In her letter, Wise-Johnson warned that if an agreement was not reached in time to implement the Alternative Health Care plan by July 1, Respondent would go back to the Mercer Plan for its health care proposal and it may need to reduce the workforce by more than the ten percent previously proposed. On June 1, Respondent and Charging Party entered into a tentative agreement that included the Alternative Health Care plan and a memorandum of understanding (MOU) outlining how the DOWOPs were to be scheduled and their effect on overtime, sick pay, and other benefits. The parties' agreement limited the DOWOPs to a one-year term, and included a four percent wage increase to be implemented at the end of the contract, as well as certain language changes that had been proposed by Charging Party.

Charging Party presented the tentative agreement to its members, who voted against it by a margin of more than 2 to 1 on June 19. Four days later, Charging Party's president, Ronald Gracia, sent a letter to Wise-Johnson to notify Respondent that the tentative agreement had not been ratified and stating that its members working in grant-funded or enterprise-funded departments were opposed to the reduction in their work hours and pay because doing so would

not affect Respondent's general fund deficit. Gracia stated that had the provision for DOWOPs excluded non-general fund employees, the agreement would have been ratified.

Shortly thereafter, Gracia was contacted by Mayor Kilpatrick, who expressed concern about the Union's failure to ratify the tentative agreement. After rejecting Kilpatrick's suggestion that the matter be submitted for a second vote, Gracia explained the objections of bargaining unit members to DOWOPs for employees in grant-funded positions and enterprise agencies. Kilpatrick responded "Well, that can be fixed." A few days later, Gracia encountered Kilpatrick and explained that the parties' bargaining teams had not had any further meetings.

On June 29, Gracia received a fax from Respondent pointing out that its proposals and the tentative agreement that the parties had entered into were conditioned on achieving a ratified agreement by July 1, 2006. Respondent explained that as of the close of business on June 30, 2006, it would withdraw the Alternative Health Care proposal as well as other economic or non-economic incentives that had been made contingent upon the parties reaching an agreement by July 1. Respondent stated that it would, at that point, return to its official table position in which it proposed the Mercer Plan for health insurance, a ten percent reduction in work hours for the 2006 through 2007 fiscal year, and no wage increases. Respondent further stated: "If there is no agreement by July 1, 2006, the City will consider the parties to be at impasse and will so advise MERC. The City will then take all steps available to it to bring the matter to conclusion."

Just after receiving the fax from Respondent, Gracia contacted Wise-Johnson to protest that they were not close to impasse since they had not met to address the concerns raised in his June 23 letter. They discussed the possibility of reaching an agreement within the time remaining before July 1 and whether they could arrive at an understanding that there would be no DOWOPs for employees in enterprise and grant-funded positions.

On June 30, Gracia hand delivered a letter to Wise-Johnson discussing: the reason that the tentative agreement was rejected by the Union's membership; a subsequent effort to modify the language of the tentative agreement; procedural problems in scheduling another union membership meeting before the deadline; and other matters that the parties had apparently discussed during the course of negotiations. Gracia ended the letter by stating:

> Therefore the SAAA, by and through its President and Executive Board Officer, do hereby declare in the best interests of the membership all TA'd provisions of the 2005-2008 TENTATIVE AGREEMENT be imposed on July 1, 2006. This mutual understanding should hereby draw this matter to a close.
>
> In closing, the SAAA does expect that the employees situated in those departments and functions operated by non-general fund revenues will not be affected by DOWOPs consistent with existing language within this provision.

In response, Wise-Johnson sent a letter to Gracia stating that in accordance with his request, Respondent would impose the terms of the tentative agreement that the parties had reached on June 1. The letter, which was received by Gracia on July 6, noted the effective date of the healthcare benefit changes and the pay period in which the DOWOPs would commence.

On July 14, Gracia began to receive calls from bargaining unit members working in grant-funded positions complaining that they were going to be subject to DOWOPs. On July 17, Gracia sent a letter to Wise-Johnson asserting that the DOWOPs to which some of Charging Party's members were being subjected were contrary to the parties' understanding as stated in his June 30 letter. Upon receiving the letter, Wise-Johnson telephoned Gracia. According to Wise-Johnson's testimony, which was credited by the ALJ, Gracia told Wise-Johnson that the letter was written by Charging Party's vice president Susan Glaser, and that Wise-Johnson should not worry about the July 17 letter. The Alternative Health Care plan became effective for Charging Party's members on July 15, and the DOWOPs were imposed on some of Charging Party's members in grant or enterprise-funded departments but not on others.

Sometime after July 1, 2006, Respondent's city council ratified the June 30, 2006 tentative agreement. In 2007, Respondent submitted a draft contract to Gracia for signature which included a memo outlining the Alternative Health Care plan and a provision providing for a four percent wage increase effective June 30, 2008. Although Charging Party did not return the draft, its members received the four percent wage increase at the beginning of July 2008.

Discussions and Conclusions of Law:

In its exceptions, Charging Party contends that its agreement to accept the DOWOPs in grant and enterprise-funded departments resulted from Respondent's threat of unlawful unilateral action and is void under PERA. Indeed, Respondent's warning that it would return to its official table position prompted Charging Party's president to ask Respondent to impose the parties' tentative agreement even though it had been rejected by Charging Party's members. This, Gracia reasoned, was preferable to imposition of the Mercer Plan, the DOWOPs, and the loss of several incentives offered by the Employer in the tentative agreement, including the four percent wage increase at the end of the three-year contract. Charging Party's decision to ask Respondent to impose the tentative agreement was a reasoned choice between available alternatives.

Charging Party claims that the parties were not at impasse when the Respondent threatened unilateral imposition of terms of employment that it had proposed before the failed ratification of a tentative agreement more favorable to Charging Party's members. However, we find it unnecessary to decide this issue in light of the agreement into which these parties entered. Had the Charging Party not succumbed to what it now claims was an unlawful threat by the Respondent, a different result might be warranted. However, by agreeing to the terms of the tentative agreement reached at the bargaining table in order to avoid the imposition of more onerous terms, Charging Party made an election that we should not disturb.

Charging Party contends that there was no agreement as there was no meeting of the minds. It contends that it was adamantly opposed to the DOWOPs in grant and enterprise-funded departments and that both the mayor and the director of labor relations had indicated they were open to avoiding the DOWOPs in those departments. Charging Party argues that the June 30 letter in which it agreed to the City's proposal made it clear that its agreement did not include DOWOPs in the grant and enterprise-funded departments. In the June 30 letter, Gracia stated "In closing, the SAAA does expect that the employees situated in those departments and functions

operated by non-general fund revenues will not be affected by DOWOPs *consistent with existing language within this provision*." (Emphasis added.) We are hesitant to speculate about what Gracia meant in this sentence. Charging Party's position appears to be that the sentence meant that employees in grant and enterprise-funded departments would be exempt from the DOWOPs. However, given Respondent's actions: in writing to Gracia to inform him of the pay period in which the DOWOPs would begin; in carrying out the terms of the tentative agreement; in having its city council ratify the tentative agreement; and in preparing a formal copy of that agreement for Charging Party's execution, it is apparent that Respondent did not interpret the sentence that way. Moreover, Gracia's failure to clarify the point after he received Wise-Johnson's July 1 letter explaining when the DOWOPs would begin, as well as Gracia's actions in disavowing the July 17 letter, indicate that he understood the employees in grant and enterprise-funded departments were not exempt from the DOWOPs. Accordingly, we agree with the ALJ's conclusion that the parties formed a contract on the terms of their prior tentative agreement, which included the imposition of DOWOPs and left the choice of the bargaining unit positions that would be subject to DOWOPs to the Employer's discretion.

With regard to layoffs in the DWS, Charging Party asks us to find that they were for an unlawful purpose, a conclusion drawn by inference and asserted in the testimony of Charging Party's president. In light of testimony offered by Respondent providing a lawful explanation, we decline to disturb the ALJ's finding on this issue.

We have also considered all other arguments submitted by Charging Party and conclude that they would not change the result in this case. We affirm the ALJ's decision recommending that we dismiss the charge.

ORDER

The charges in this case are hereby dismissed in their entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Christine A. Derdarian, Commission Chair

_____
Nino E. Green, Commission Member

_____
Eugene Lumberg, Commission Member

Dated: _____

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

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C06 D-098

-and-

SENIOR ACCOUNTANTS, ANALYSTS AND APPRAISERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Andrew Jarvis, Esq., City of Detroit Law Department, for Respondent

Scheff, Washington & Driver, P.C., by George Washington, Esq., for Charging Party

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 April 28, 2009, before Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before July 20, 2009, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Senior Accountants, Analysts and Appraisers Association filed this charge against the City of Detroit on April 28, 2006. The charge was amended on November 15, 2006. The charge, as amended, alleges that in or around July 2006, Respondent violated Sections 10(1)(a) and (e) of PERA by unilaterally imposing a reduced work schedule for some of Charging Party's members without reaching either agreement or good faith impasse on this change in hours. Charging Party also alleges that Respondent violated Sections 10(1)(a) and (c) of PERA in April 2006 when it laid off seventeen of its members, allegedly to gain leverage in its contract negotiations with Charging Party and other unions. [1]

[1] In its brief, Charging Party also alleges that Respondent committed a separate violation of 10(1)(a) of PERA by unlawfully threatening, on June 28, 2006, to implement changes in working conditions even though the parties had allegedly not reached a good faith impasse. Since this allegation was neither included in the charge as filed nor raised at the hearing, I have not addressed it here.

Findings of Fact:

Respondent Demands Concessions from Its Unions

At the time of the events covered by the charge, Charging Party represented approximately 500 employees in nonsupervisory classifications in twenty-nine of Respondent's departments and offices, including the Department of Water & Sewerage (DWS.) The DWS is considered to be an "enterprise" department because, unlike "general fund" departments, its operations are funded by the sale of water and sewerage services rather than paid for from tax collections. Charging Party also represents employees whose wages and benefits are paid entirely from grants rather than from the general fund. These include employees in the Planning and Development Department and the Department of Human Services (DHS).

In mid 2005, Respondent was faced with declining revenues and a looming budget deficit. It decided to present the same two demands to all the unions with which it was negotiating contracts, except those representing uniformed employees. First, Respondent proposed to replace employees' existing health insurance plans with plans recommended by a consulting firm. In 2004, Respondent had hired the Mercer Corporation to make recommendations on health insurance. Mercer's recommendations, which became known as the "Mercer Plan," included premiums, deductibles, and co-pays that were much higher than employees paid under Respondent's existing plans. Second, Respondent demanded that employees take a ten percent pay cut in the fiscal year beginning July 1, 2006 in the form of unpaid days off. These days off without pay were referred to by the parties as "DOWOPs."

In June 2005, Respondent told Charging Party's president, Ronald Gracia, about Respondent's plan for DOWOPs. Gracia responded that Charging Party's membership would never accept DOWOPs because too many of them worked in grant and enterprise-funded departments and Respondent's deficit was in the general fund.

Charging Party and Respondent began negotiations for a collective bargaining agreement covering the period 2005-2008 sometime in the fall of 2005. The parties agreed to extend their existing contract until July 1, 2006. Respondent's bargaining team was headed by Barbara Wise-Johnson, then acting labor relations director. At that time, Wise-Johnson reported to Christine Beatty, chief of staff to Mayor Kwame Kilpatrick. Beatty attended the negotiating sessions between Respondent and Charging Party held prior to January 2006. Niles Sexton, from the labor relations division, was also part of Respondent's bargaining team. Gracia, who has been Charging Party's president since 1981, was Charging Party's chief spokesperson. The Mercer Plan and DOWOPs were Respondent's chief bargaining demands. Sometime before January 2006, Respondent made a new health care proposal, known as the Alternative Health Care proposal, that reduced existing benefits less severely than the Mercer Plan. The parties met regularly until January 2006, but could not agree on a contract. Between January and May 2006, the parties met only a few times, primarily to go over the details of the Alternative Health Care proposal.

Layoffs in the DWS

In late March or early April 2006, Respondent announced layoffs in the DWS. The layoffs, and demotions resulting from bumping, affected employees in several bargaining units. Among these were Charging Party's unit and a unit represented by AFSCME. Charging Party protested the layoffs, arguing that there was neither lack of work nor lack of funds in the DWS. On April 28, 2006, it filed the instant charge asserting that these layoffs violated PERA because Respondent's motive was to put pressure on Charging Party and other unions to accept Respondent's proposed concessions. At the hearing, Woodrow McCarty, assistant director of finance for the DWS, explained these layoffs as follows. In the spring of 2006, the DWS submitted a proposal for an increase in water rates to Respondent's City Council, primarily because the DWS' utility costs had increased. Rate increases are usually proposed in the spring and implemented, after the requisite notice to the DWS' suburban customers, on August 1. In 2006, approval of the rate increase was delayed. Eventually the increase was implemented about eleven days later than the DWS had planned for. In the spring of 2006, the DSW, anticipating this delay, decided to reduce its work force by five percent to make up the shortfall and ensure that it could make its debt service payments on time.

Respondent Sets a Bargaining Deadline

On May 15, 2006, Wise-Johnson sent a letter to all the unions representing non-uniformed employees with whom it did not have a collective bargaining agreement. Charging Party president Gracia received a copy of this letter, which read as follows:

> The City of Detroit is not alone in facing tough economic conditions; however, it will take a cooperative team effort from all of us to make the necessary changes in order to become financially solvent. As you are aware, we are seeking a ten-percent reduction in the hours of work and savings in health care costs from employees represented by your labor organization. Therefore, it is necessary to meet with you as soon as possible for negotiations in order to effectuate the necessary cost saving measures by July 1, 2006.
>
> As you are aware, the soaring cost of health care benefits has substantially contributed to the City's financial dilemma; therefore, a health care proposal based on a medical plan represented by Mercer, a nationally recognized health care consulting firm, has already been presented to the labor organizations. It is now time for difficult decisions to be made and to make such decisions more palatable, the City is now proposing a "City Alternative Health Care Proposal" as enclosed. This proposal modifies the contribution structure. In order to produce the necessary cost savings for the City, the ten-percent reduction in the hours of work and the "City Alternative Health Care Proposal" must be in place by July 1, 2006. Therefore, it is imperative that an agreement is reached immediately in order to allow sufficient time to reach a tentative agreement and ratification of the contract and also to conduct an open enrollment prior to the July 1, 2006 implementation schedule.

If an agreement is not reached in time to implement the alternative health care plan by the start of the fiscal year, this will result in the health care proposal based on a medical plan recommended by Mercer remaining as the City's table negotiating position. Also, failure to reach agreement for a ten-percent reduction in work hours may result in further reductions in force. These actions will be necessary in order to recoup lost savings that would have been generated if such proposals had been timely implemented.

Therefore, time is of the essence. It is our intention to wrap up negotiations for the 2005-2008 Master Agreement with your labor organization within the next few weeks and working together as a team will allow us to achieve this goal. This is possible because the only substantive changes the City is proposing to the collective bargaining agreement involve the aforementioned cost saving measures to pare down escalating health care costs and to stabilize personnel costs.

The Parties' Tentative Agreement and Aftermath

Between May 15 and July 1, 2006, Respondent engaged in negotiations with numerous unions and participated in several fact finding proceedings, including one with AFSCME. On June 1, Respondent and Charging Party entered into a written tentative contract agreement. The tentative agreement included the Alternative Health Care Plan and a memorandum of understanding (MOU) entitled "Wage Concessions." The MOU outlined how DOWOPs were to be scheduled and their effect on overtime, sick pay, longevity pay, etc. Per these provisions, departments could chose from among four DOWOP work schedules. Respondent also agreed in the MOU that during the DOWOP period – July 1, 2006 through June 30, 2007 – no bargaining unit employee currently on the City payroll would be laid off. The "Wage Concessions" MOU included the following provision:

Commitment to a Fair and Equitable Settlement

It is the City's goal and commitment to this Union to achieve a 10% reduction in scheduled work hours with all of our labor organizations. *However, due to circumstances such as providing essential services to the public which must be delivered in an immediate manner, services that must be provided on a 24 hour/7 day per week basis, or Act 312 status, it may not be possible to implement a 10% reduction in hours without severely impacting the service to, or jeopardizing the safety of, the public.* In these cases, the City will make every effort to achieve similar savings in other areas of employee overall compensation.

Employee[sic] who have previously taken the 10% reduction in scheduled hours and transferred or promoted into the SAAA bargaining unit and have completed a full year of reduced hours will not be subject to the 10% reduction as described herein.

The City further agrees that should the City reach an agreement with another non-Act 312 labor organization on a health care benefit plan that is more advantageous

> to the employee, such plan will be implemented for members of this Union. [Emphasis added.]

The parties also tentatively agreed to approximately seventy-five other items, including a four percent wage increase to be implemented at end of the contract term and certain changes in contract language that had been proposed by Charging Party.

As noted above, Charging Party has members in the DWS, which is funded by the sale of water and sewerage services, and members whose positions are funded from grants. The record does not indicate whether Respondent and Charging Party specifically discussed exempting these employees from the DOWOP requirement before the tentative agreement was reached. However, Gracia's June 30, 2006 letter to Wise-Johnson, set out in full below, suggests that Respondent may have told Charging Party that many of it members would not have to take DOWOPs even though the tentative agreement did not explicitly exempt any group or classification.

Charging Party held a ratification vote on the tentative agreement on June 19. The members present rejected the contract by a vote of more than two to one. On June 23, Gracia sent Wise-Johnson a letter stating that the tentative agreement had not been ratified. The letter stated that Charging Party had determined that the TA had been overwhelmingly rejected because Charging Party's members with grant-funded positions and employees of the DWS were adamantly opposed to reducing their work hours and pay since doing so would not affect the deficit in Respondent's general fund. Gracia told Wise-Johnson that but for the provision allowing DOWOPs for non-general fund employees, the agreement would have passed. He told Wise-Johnson that the membership had directed Charging Party to meet with the Respondent to resolve the issue which had caused the agreement to be rejected.

Shortly after Respondent received Gracia's letter, Gracia received a telephone call from Mayor Kilpatrick. Kilpatrick said that he had heard the results of Charging Party's ratification vote and was very disappointed in its outcome. He asked Gracia if he could take the proposal back for a second vote. Gracia replied that he thought this would be futile, particularly since the vote was not even close. He explained the objections of the employees in grant-funded positions and in enterprise agencies. Kilpatrick said, "Well, that can be fixed." Gracia replied that would be fine. This ended the conversation. When Gracia ran into Kilpatrick a few days later, he told the Mayor that Charging Party and Respondent's bargaining team had not had any further meetings.

On June 28, 2006, Respondent faxed a letter signed by Niles Sexton to Charging Party. Gracia first saw it on the morning of June 29. The letter read as follows:

> By written correspondence dated June 23, 2006, you notified this office that your membership did not ratify the tentative agreement as negotiated between the parties. As you know, the City's proposals and the tentative agreement(s) entered into were conditioned on achieving a ratified agreement by July 1, 2006. By letter dated May 15, 2006, the City advised of the importance of completing negotiations for the 2006-2008 Master Agreement by July 1, 2006 in order to

realize necessary cost savings through implementation of a ten-percent reduction in the hours of work and adoption of the "City Alternative Health Care Proposal."

Therefore, effective at the close of business, Friday, June 30, 2006, the City will withdraw the "City Alternative Health Care Proposal" from the table as well as any other economic or non-economic incentive offers made contingent upon the parties reaching an expedited agreement.

The City will return to its official table position with regard to health care, namely the medical plan recommended by Mercer, which has already been presented to all labor organizations. Further, the City wage proposals will be 0% for Fiscal Year 2005/2006; 10% reduction in work hours for Fiscal Year 2006/2007; 0% for Fiscal Year 2007/2009.

All the incentives placed on the table by the City for the purpose of reaching an agreement will be withdrawn. These incentives include, but are not limited to, the 4% wage increase at the end of the contract period, no lay off provisions for the duration of the concession period and the "me too" or protection clause. Moreover, the numerous other miscellaneous incentives offered in response to specific SAAA bargaining unit's request regarding:

Grievance Procedure
Seniority for Association Representatives
Reduction in Force
Sick leave
Flex Time
Association Time Off for Association Grievance Executive and;
Association Jurisdiction

will also be withdrawn.

Time has practically run out for the members of your labor organization to participate in the City Alternative Health Care Plan design. A decision has to be made now regarding the cost savings measure proposed by the City to reduce health care costs and to stabilize personnel costs. Any further delay may eliminate viable options that are presently available and beneficial to your labor organization. *If there is no agreement by July 1, 2006, the City will consider the parties to be at impasse and will so advise MERC. The City will then take all steps available to it to bring the matter to conclusion.* If you have any additional questions regarding this letter you may contact me at _____. [Emphasis added.]

Communications between Gracia and Wise-Johnson on June 29 and 30

Immediately after reading this letter, Gracia called Sexton and then, when he could not reach him, Wise-Johnson. Gracia told Wise-Johnson that he did not believe that the parties were

even close to impasse, since they had not met to address the concern raised in Gracia's June 23 letter. Wise-Johnson replied that they had to try and get some agreement by June 30. According to Gracia, he and Wise-Johnson had several other conversations on June 29. He testified that during their last conversation that day, he told Wise-Johnson that the time frame was too short because Charging Party could not possibly have another ratification meeting within forty-eight hours. Wise-Johnson asked him if he could agree to "all of these things" without a membership vote. Gracia replied in the negative, but said that if they had an understanding that there would not be any DOWOPs for employees in enterprise and grant-funded positions, they could "probably have some sort of agreement that would pass." According to Gracia, Wise-Johnson said that "she didn't have a problem with that," but wanted to think about it.

Gracia testified that on the morning of June 30, Wise-Johnson called him and said that if they did not have an agreement by the end of business that day, Respondent was going to pull all the tentative agreements off the table and implement its last best offer, which would include the Mercer Plan. Gracia did not testify to any other conversation between Wise-Johnson and himself on June 30.

According to Wise-Johnson, she and Gracia had several conversations on June 30. Wise-Johnson testified they spoke about requesting a fact finder's recommendation on the DOWOP dispute, and that Gracia came to her office and picked up copies of fact finders' recommendations that had recently been issued. Wise-Johnson denied telling Gracia that his members in enterprise and grant-funded positions would not get DOWOPs. According to Wise-Johnson, at 3:30 pm Gracia faxed her a memo in which he stated that Charging Party's executive board was making an "executive decision" that the "TA's successor agreement" be implemented effective July 1, 2006 in order to preserve the alternative health care plan and 4% wage increase.

Gracia denied sending this memo. I find it unnecessary to decide whether Gracia sent the memo since I conclude, for reasons set out in the discussion section of this opinion, that Gracia communicated this same message in the letter he hand delivered to Wise-Johnson's office at approximately 6:00 pm on June 30. Gracia and Wise-Johnson did not speak in person when Gracia arrived with the letter. Gracia's letter read as follows:

> Through written communication of June 23, 2006, this Union informed the City of Detroit of the results of a ratification vote held on June 19, 2006 on a successor agreement for the years of 2005-2008 based upon various TA'd provisions of the Labor Agreement consummated over multiple days and nights of negotiating.
>
> The overwhelming "No" vote by the membership of the SAAA, by definition, ordered its bargaining team, the SAAA Executive Board, back to the "table" in an attempt to resolve the stumbling block issues which were the causation of the negatory response on behalf of the members. Being the counterparty to these proceedings you are aware of such subsequent meetings being held to discuss resolution of these issues.
>
> It was determined by the Executive Board of the SAAA prior to formal adjournment of the meeting the primary cause for the rejection of the tentative

agreement was the provision for DOWOPs, specifically from the employee members who are located in grant-funded departments and/or positions and those located within the Water & Sewerage Department. Their logic and rationale for their vote in the negative is definitely true and on point; these functions are not part of the general fund of the City wherein lies the deficit and to apply DOWOPs to them is of no purpose with respect to that deficit and amounts to an inappropriate "broad brush" approach with this item. Other connected statements surround the prior layoff and attribution through retirements and resignations which have affected this bargaining unit since 2005; the point being that much has already been extracted from the general fund cost [sic] as it pertains to the SAAA. One cannot honestly dispute this fact. It is further noted the majority of this membership now resides within grant-funded departments and the Water & Sewerage Department (a non-general fund subsidized enterprise function – unlike DDOT which is heavily subsidized by the general fund.)

Furthermore, the members did not take much solace from the language embodied within the DOWOP provision that many of them would not be affected by DOWOPs for the reasons as previously stated. Another issue involved members who have been demoted and would be further subjected to DOWOPs – they strongly feel this is unfair and I agree with them on this point. On the health care issue, while there was some grumbling most understood that we have to get a handle on these costs and after over an hour of just dealing with this item alone and clarifying certain provisions and scenarios the majority felt comfortable with this particularly in light of the Mercer Plan in its unaltered state.

In the aftermath of the membership meeting the undersigned received a phone call from the Mayor who was obviously disappointed in the outcome. He further stated an idea that this same package be taken back to the membership. This is absurd!! I will not impugn my integrity or that of this Executive Board in doing any such thing. Not only does an idea like this bastardize the collective bargaining process it more importantly makes a mockery of the Public Employee Relations Act of this State. One cannot exhort the democratic process and then complain or vilify its result when it is exercised.

An attempt was made by the SAAA through a language modification to alleviate the most pressing problem. In the subsequent days afterwards we were informed through your office that this proposal was rejected by the Mayor's Office, for reasons connected to the "me too" provision with other unions. How short-sighted and non-understanding of what one is dealing with is a response such as this. If indeed other bargaining units have members in grant-funded or the Water & Sewerage Departments I fail to see how a "me-too" provision is compromised. The general fund is not affected. Or is the inclusion of a me-too clause attempting to create a "structural refusal" to bargain further by the City??

On June 28, 2006, the SAAA received a communication from your office informing us of your intent to withdraw all TA'ed provision and to declare

impasse resulting in unilateral imposition of DOWOPs and the Mercer Health Plan on or shortly thereafter July 1, 2006 unless agreement could be reached by the end of June 30, 2006. It was suggested to attempt accelerated fact-finding on this one item, but to get that accomplished by the end of the fiscal year was impractical as a matter of time.

In addition, due to our requirements within our Constitution and By-Laws we could not hold another meeting before mid-July regarding any changes from the previous tentative agreement. Our hands were tied, and absent an independent report of fact finding relative to another union which might address concerns which were of importance to our members, and being able to rely and make an informed and experienced decision on those issues there was nothing we could do prior to July 1, 2006.

On June 29 this office received a copy of a fact finder's report issued from the Michigan Employee [sic] Relations Commission in the matter involving the Detroit Building Trades Council. While reference was made to DOWOPs and other issues the SAAA felt there was not enough within the report to even attempt exercising an executive decision, which is a highly extraordinary action.

In the later afternoon of June 30, 2006 this office received numerous phone calls from anonymous parties informing us of the results of fact-finding in the AFSCME case from MERC. This office received an anonymous fax of pertinent sections of the report, its conclusions and recommendations. After gleaning over this information it was reasonably concluded from the evidence relative to another jurisdiction on similar matters that thought should be given to invoking an executive decision for the best interests of the members as a whole. The thinking involved accelerated impasse to preserve the Alternate Health Care Plan and the four percent increase not to mention the positive changes in the reduction-in-force language, sick leave, and flex time for selected groups in the SAAA. The alternative impasse scenario would result in an unpalatable health care plan, known as the Mercer Plan, with all other TA'd provisions becoming null and void, as stipulated from your June 28th communication.

It has been concluded, under these extraordinary circumstances and time constraints, that the probability of SAAA prevailing on any similar issues in contravention to what has been stipulated by the State Labor Department so far would be miniscule at best. Therefore the SAAA, by and through its President and Executive Board Officer, do hereby declare in the best interests of the membership all TA'd provisions of the 2005-2008 TENTATIVE AGREEMENT be imposed on July 1, 2006. This mutual understanding should hereby draw this matter to a close.

In closing, the SAAA does expect that the employees situated in those departments and functions operated by non-general fund revenues will not be affected by

DOWOPs consistent with existing language within this provision. [Emphasis added.]

Communications between the Parties after July 1 and Implementation of DOWOPS

On Thursday, July 6, Gracia received a letter from Wise-Johnson, dated Saturday, July 1, stating that Respondent would impose, as requested, all of the provisions of the 2005-2008 tentative agreement that was reached on June 1. The letter stated that the health care benefit changes would take effect on July 15, 2006 and the DOWOPs would begin with the pay period of July 17, 2006. Wise-Johnson also stated that Respondent would prepare a draft final contract covering the period July 1, 2005 through June 30, 2008. According to Gracia, he did not see a need to respond to this letter.

On July 13, Wise-Johnson sent out a memo to department directors about the DOWOPs. The memo included an updated list of unions that had agreed to the DOWOPs. Charging Party was on this list. The memo detailed the four scheduling options. The last paragraph of the memo reminded department directors that implementation of the DOWOP schedules was to be "based upon the operational needs of your department."

On July 14, Gracia began to receive phone calls from grant-funded employees in the DHS complaining that they were about to be placed on a DOWOP schedule. Gracia testified that he called Wise-Johnson, who, according to Gracia, said she would look into it. Over the next few days, Gracia and Charging Party vice-president Susan Glaser also received complaints about DOWOPs from employees in the Planning and Development Department and a few employees at the DWS.

On July 17, Gracia sent Wise-Johnson a letter stating that Charging Party had become aware that DOWOP schedules were being imposed on some of its members "in direct contravention to the stipulated understanding" as contained in Gracia's June 30 letter. The July 17 letter reminded Wise-Johnson that the membership had rejected the TA primarily because of the provision for DOWOPs for non-general fund employees.

Wise-Johnson testified that after she received the July 17 letter she telephoned Gracia. According to Wise-Johnson, she said, "What the h-ll does this mean?" She testified that Gracia told her that Glaser had sent this letter, and that he had not talked to her. Wise-Johnson testified that Gracia told her not to worry about it. Gracia denied having any conversation with Wise-Johnson about the letter. He also testified that although he was out of town on July 17, Glaser wrote the letter at his dictation. I credit Wise-Johnson's testimony, based in part of the demeanor of the witnesses. However, I also believe that Wise-Johnson's testimony that Gracia told her to disregard the July 17 letter was consistent with Gracia's statements about the parties' agreement in his June 30 letter.

The Alternative Health Care plan went into effect for Charging Party's members on July 15. DOWOPs were never actually implemented for Charging Party's members in the Department of Human Services. Members in some other grant-funded departments also never received

DOWOPs. In the Planning and Development department and in the DWS, some members were placed on a DOWOP schedule and some were not. Some who were placed on a DOWOP schedule remained on it for a relatively short period, while others continued on the schedule for a much longer period. Wise-Johnson testified that the decision whether or not to implement DOWOPs for individual positions was made by the department directors and that she had no role in this process. McCarthy testified that in the DWS, individual managers were given the discretion to decide whether to implement DOWOPs for customer service employees and employees working in 24-hour operations.

Sometime after July 1, 2006, Respondent presented the June 30, 2006 tentative agreement to Respondent's City Council for ratification, and it was approved. In 2007, Respondent prepared a draft contract covering the period 2005-2008 and sent it to Gracia for his signature. The "Wage Concessions" MOU was part of the draft agreement, as was a memo outlining the Alternative Health Care plan and a provision providing for a four percent wage increase effective June 30, 2008 at 11:59 pm. Charging Party did not return the agreement. Charging Party's members received a four percent wage increase at the beginning of July 2008.

Discussion and Conclusions of Law:

Charging Party alleges that Respondent's decision to lay off its members in the DWS in April 2006 violated Sections 10(1)(a) and (c) of PERA because Respondent's motive was to pressure Charging Party and AFSCME into reaching collective bargaining agreements on Respondent's terms. In effect, Charging Party asserts that since there was neither a lack of work nor a lack of funds in the DSW in 2006, Respondent could have had no legitimate reason to lay off its members. Respondent's response was that in the spring of 2006, the DWS acted preemptively to reduce its workforce to avoid the deficit it expected would result from the delayed approval of its water rate increase request.

In order to establish a prima facie case of discrimination under Sections 10(1) (a) and (c) of PERA, a charging party must show, in addition to an adverse employment action: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employee's protected rights; and (4) suspicious timing or other evidence that the protected activity was at least a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006); *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530, 551- 552. In the instant case, the layoffs took place after Charging Party had refused to agree to Respondent's demands at the bargaining table. However, Charging Party did not produce any direct evidence of anti-union animus or hostility toward its members because of Charging Party's rejection of Respondent's demand, or any direct evidence to connect the layoffs to what was taking place at the bargaining table. As noted above, circumstantial evidence, including the timing of an employer action, may be sufficient to show unlawful motive. In this case, however, Respondent provided a credible explanation for the timing of the layoffs which Charging Party did not attempt to rebut. I conclude that Charging Party did not meet its burden of demonstrating that Respondent's animus toward its members' exercise of their rights under Section 9 of PERA was a cause of the April 2006 layoffs in the DWS.

Charging Party also alleges that Respondent violated Sections 10(1) (a) and (e) of PERA by unilaterally imposing reduced work hours on its members without reaching either agreement or good faith impasse with Charging Party. While the decision to lay off is a managerial right and a permissive subject of bargaining, a public employer has the duty to bargain over whether to reduce the work hours of unit members as an alternative to laying employees off. *36th District Court*, 21 MPER 19 (2008); *Village of Union City*, 1983 MERC Lab Op 510, *rev'd on other grounds*, 135 Mich App 553 (1984). Respondent contends, however, that it imposed the reduced work hours – DOWOPs – on Charging Party's members because the parties had reached agreement on the terms of a contract that permitted Respondent to take this action.

There is no dispute that on June 19, 2006, Charging Party's membership rejected a tentative contract that allowed DOWOPs. It did so because members whose positions were not "general fund" positions objected to the DOWOPs. However, despite this rejection, Charging Party President Gracia notified Respondent, in the letter he delivered to Wise-Johnson on June 30, 2006, that he, as president and member of the executive board, and in the best interests of the membership, was "agreeing to the implementation of the 2005-2008 tentative agreement" on July 1, 2006. Gracia also stated in this letter that "this mutual understanding should hereby draw this matter to a close." I find that Wise-Johnson, as she indicated in her July 1 letter to him, reasonably interpreted Gracia's statement as indicating Charging Party's assent to a new contract covering the period 2005-2008 that incorporated all the terms of the June 10 tentative agreement rejected by the membership. Respondent then proceeded to put the terms of the June 10 tentative agreement, including the Alternative Health Care plan and the "Wage Concessions" MOU, into effect.

Charging Party asserts that Gracia did not agree to allow DOWOPs in grant and enterprise funded departments. However, the June 10 tentative agreement did not exempt grant and enterprise funded departments from DOWOPs. In the "Commitment to a Fair and Equitable Settlement" section of the MOU, the tentative agreement recognized that employees providing essential services and working in 24-hour operations might not be required to take DOWOPs, but did not limit Respondent's discretion to determine which employees would be exempt. This seems to be, in fact, why Charging Party's membership rejected the tentative agreement.

Charging Party maintains that the last paragraph of Gracia's June 30 letter was a confirmation of an agreement between himself and Wise-Johnson that, despite the language of the MOU, grant and enterprise funded employees would not have to take DOWOPS. However, the evidence does not establish that there was such an agreement. Between June 10 and June 30, Mayor Kilpatrick told Gracia that his members' problem with the DOWOPs could "be fixed." However, Kilpatrick was not Respondent's spokesperson in the negotiations, and his statement was not followed by a proposal from Respondent's negotiating team. According to the record, when Gracia proposed to Wise-Johnson in an individual conversation on June 29 that Respondent exempt the employees in the grant funded and enterprise departments, Wise-Johnson said that "she didn't have a problem with that, " but would have to think about it. Wise-Johnson and Gracia continued to discuss the issue the following day. However, Gracia did not testify that he and Wise-Johnson reached an agreement, and Wise-Johnson explicitly denied that she agreed to exempt the grant and enterprise funded employees from the DOWOPS.

In the last paragraph of his June 30 letter, Gracia wrote, "In closing the SAAA does expect that the employees situated in those departments and functions operated by non-general fund revenues will not be affected by DOWOPS *consistent with existing language within this provision."* As noted above, the "Wage Concessions" MOU recognized that some employees might not be required to take DOWOPs even though it did not exempt any category of employees from them. As an experienced labor negotiator, Gracia had to be aware that Charging Party could not bind Respondent by accepting an offer which Respondent had not made. I conclude that the last paragraph of the letter simply expressed Gracia's hope that Respondent would exercise its discretion in such a way that employees in the grant funded and enterprise departments would not end up with DOWOPs. As the record indicates, some of Charging Party's members did not, in fact, get DOWOPs.

The actions of Respondent and of Charging Party's members had put Gracia in an extraordinarily difficult position on June 30, 2006. His members had refused to ratify contract language on which Respondent was insisting. Respondent had set a deadline of July 1 for acceptance of its offer, and indicated that if the offer was not accepted before that date the offer would be withdrawn and it would declare impasse. If Gracia followed the directions of his members and demanded that Respondent return to the bargaining table, there was a real risk that the members would ultimately not only have to accept DOWOPS, but would also be stuck with the onerous Mercer plan. I find that in the letter he delivered to Wise-Johnson on June 30, Gracia told Respondent that he was exercising his authority as Charging Party's president to override the members' rejection of the tentative agreement rather than risk the consequences of rejecting Respondent's package offer. I further find that once Gracia communicated this to Respondent, he could not lawfully retract his acceptance any more than Charging Party could have rejected its acceptance after notifying Respondent that a tentative agreement had been ratified. I conclude that Respondent did not violate its duty to bargain in good faith in July 2006 when it implemented DOWOPs for some of Charging Party's members because the parties had reached agreement on terms, including the "Wage Concessions" provision, that allowed Respondent to take this action.

In light of my finding that Gracia agreed to Respondent's implementation of the tentative agreement, I find it unnecessary to address Charging Party's argument that the parties had not reached a good faith impasse when Respondent implemented the DOWOPs. Based on the findings of fact and conclusions of law set forth above, I conclude that Charging Party failed to establish that anti-union animus was a motivating factor in Respondent's decision to lay off Charging Party's members in the DWS in April 2006. I also conclude that Respondent did not violate its duty to bargain in good faith when it implemented DOWOPs for Charging Party's members in July 2006 because Charging Party had agreed to a provision giving Respondent the discretion to do so. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Dated: _____