STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

-and-

Case Nos. C12 I-175 &
CU12 I-039

SENIOR ACCOUNTANTS, ANALYSTS AND APPRAISERS ASSOCIATION,
Labor Organization-Respondent,

-and-

Docket Nos. 12-001585-MERC
12-001587-MERC

MARCELLA SLAPPY,
An Individual Charging Party.
_____/

APPEARANCES:

City of Detroit Law Department, by June C. Adams, for Respondent Public Employer

Audrey Bellamy, Acting President and Treasurer, for Respondent Labor Organization

Schmidt Law Services, by Lisa J. Schmidt, for Charging Party

DECISION AND ORDER

On May 30, 2013, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondents did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

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

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Edward D. Callaghan, Commission Chair

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Robert S. LaBrant, Commission Member

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Natalie Yaw, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer in Case No. C12 I-175; Docket No. 12-001585-MERC,

-and-

SENIOR ACCOUNTANTS, ANALYSTS AND
APPRAISERS ASSOCIATION,
Respondent-Labor Organization in Case No. CU12 I-039; Docket No. 12-001587-MERC,

-and-

MARCELLA SLAPPY,
An Individual Charging Party.
_____/

APPEARANCES:

June C. Adams, Assistant Corporation Counsel, for the Public Employer

Audrey Bellamy, Acting President and Treasurer, for the Labor Organization

Schmidt Law Services, by Lisa J. Schmidt, for the Charging Party

DECISION AND RECOMMENDED ORDER ON SUMMARY DISPOSITION

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 Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. Based on the pleadings and the transcript of the oral argument which was held on April 18, 2013, I make the following findings of fact and conclusions of law.

The Unfair Labor Practice Charges:

This case arises from unfair labor practice charges filed on September 5, 2012 by Marcella Slappy against her employer, the City of Detroit ("the City" or "the Employer") and her labor organization, Senior Accountants, Analysts and Appraisers Association ("SAAA" or "the

Union"). Charging Party alleges that she was laid off from her position as an accountant in the City's human services department in violation of a super-seniority clause in the collective bargaining agreement between Respondents and that she should have been recalled to a different position pursuant to that same contractual provision. Charging Party further contends that the City's actions were motivated by animus against her exercise of protected rights under PERA. With respect to SAAA, Charging Party alleges that the Union failed to take action on her behalf pursuant to the super-seniority clause because the Union president harbored hostility towards her.

In an order issued on October 11, 2012, Slappy was directed to show cause why the charges should not be dismissed on summary disposition. Slappy filed a response to the order to show cause on December 21, 2012. The parties appeared for oral argument before the undersigned on April 18, 2013. After considering the extensive arguments made by the parties, I concluded that there were no legitimate issues of material fact and that a decision on summary disposition was appropriate pursuant to Commission Rule R 423.165 (1). See also *Detroit Public Schools*, 22 MPER 19 (2009) and *Oakland County and Oakland County Sheriff v Oakland County Deputy Sheriffs Assoc*, 282 Mich App 266 (2009). Accordingly, I rendered a bench decision, finding that Charging Party had failed to state a valid claim under PERA as to either Respondent. The substantive portion of my findings of fact and conclusions of law are set forth below:

Findings of Fact:

> Charging Party worked at the time of the events giving rise to this dispute as an accountant in the human services department of the City of Detroit, and she served as a district representative for the Union, SAAA. On or about March 18, 2012, Charging Party was laid off as part of a wider move by the City of Detroit which resulted in essentially the entire human services department being closed; essentially everyone was laid off within the department. Charging Party was laid off and it's undisputed that she was not recalled to any position within the City of Detroit. She was offered a position in the finance department on September 17, 2012, but after having been offered the position, she was notified by the City that the position would not be made available to her because she was unfit for the position.
>
> It is also undisputed that Charging Party was previously convicted of a felony, and that Charging Party was working for the City at the time of the felony conviction. [The conviction] involved forgery [or] counterfeiting incidents, and there is an allegation from Charging Party that she was told by someone in human resources that [the conviction would not be an impediment to her continuing to work for the City as an accountant]. Charging Party asserts that she was allowed to remain in the finance department, but given a position which did not handle money.
>
> There is a super-seniority clause in the collective bargaining agreement between the parties which was in effect at the time of the events giving rise to the

dispute, that is Article 14, entitled "Seniority for Association Representatives." A copy of this provision was provided to the Commission by the City; at the same time, copies were given to the other two parties in this case, and there's no dispute that this is an accurate copy of the provision. I'm going to read that provision, the two paragraphs which . . . have been [relied upon] today. I'll read those into the record:

> (A) Notwithstanding their standing on the seniority list, in the event of a reduction in force, the officers of the association (the association president, the vice president I, the vice president II, the secretary, the treasurer, the designated grievance executive, the administrative representative) and all permanent association representatives who have been properly identified and serve pursuant to Article 6 (association representatives) shall be continued in their employment in their employing department providing any of the following conditions exist, and in the following order: (1) There continues to be a position in their current classification; (2) There is a position in any lower classification in their occupational series; (3) There is a position in a formerly held classification which is in the bargaining unit.
>
> (B) If any of the above-indicated association officers or association representatives are laid off by their department, they shall have priority in recall to available vacant positions in the classification in which they were laid off, any lower classification in their occupational series, or any formerly held classification which is in the bargaining unit.

I'll note finally that Charging Party, as I indicated earlier, was an SAAA district representative within the human services department. In that capacity, she previously filed an EEOC complaint on behalf of a unit member, and she took part in contract negotiations on behalf of the Union in 2012. And that concludes the facts, the material facts as I see them.

Discussion and Conclusions of Law:

Now let me state the applicable law in this case first, and findings with respect to the Employer. 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 the collective bargaining agreement. Rather, the Commission's jurisdiction with respect to claims brought by individual charging parties against public employers is limited to determining whether the employer interfered with, restrained and/or coerced an employee with respect to his or her right to engage in Union or other protected activities.

The elements of a prima facie case of unlawful discrimination for purposes of PERA are: (1) union or other protected activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility toward the employee's protected rights; (4) an adverse employment action taken by the employer, such as a discipline or demotion in status or responsibilities; and (5) suspicious timing or other evidence that protected activity was a motivating cause of the alleged discrimination. *Wayne County Sheriff's Dep't*, 21 MPER 58 (2008). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice; rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be drawn. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). Once a prima facie case is met, the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have taken place even in the absence of the protected conduct. The ultimate burden, however, remains with the charging party. *City of Saginaw*, 1997 MERC Lab Op 414, 419.

As noted, direct evidence of anti-union animus isn't necessary to establish a violation of the Act. Both anti-union animus and a casual link between it and the adverse employment action may be shown by circumstantial evidence. The timing of the adverse employment action in relation to the employee's union activity is circumstantial evidence of unlawful motive, and the closer the employer's action follows upon its learning of the union activity, the stronger that evidence becomes. However, suspicious timing is not, in and of itself, sufficient to establish that the employee's union activity was a motivating factor in the Employer's decision. *City of Detroit Water and Sewerage Dep't*, 1985 MERC Lab Op 777, 780. There must be other circumstantial evidence which supports the conclusion that the temporal relationship was not mere coincidence, such as an indication that the employer gave false or pretextual reasons for its actions, or the commitment of other unfair labor practices by the respondent at or during the same time. *University of Michigan*, 1990 MERC Lab Op 242, 249.

In the instant case, Charging Party asserts that the Employer, for discriminatory or retaliatory reasons, laid Charging Party off and refused to recall her, despite the fact that she had a right to recall under the contract. [F]irst and foremost, it's undisputed that Charging Party's entire department was essentially abolished as part of the Employer actions which led to Charging Party's layoff, and that in fact there were some 40 members of the bargaining unit who were laid off at that time, including the vice president of SAAA. The primary argument of Charging Party is based on Article 14 of the contract or the "super-seniority" clause.

Now, to start with, [although] this has not been specifically asserted by either Respondent, it is an issue which the Commission must nevertheless bring to light whenever faced with a possible illegal application of a clause such as this. With respect to super-seniority, the Commission has held in *Grand Rapids Board of Ed*, 1985 MERC Lab Op 802, adopting the NLRB's holding and reasoning in *Gulton*

Electro Voice, 266 NLRB 406 (1983), that super-seniority is unlawful when granted to Union officials who do not perform steward-like or other on-the-job contract administrative functions. The grant of unlawful super-seniority to Union officers unjustifiably discriminates against employees based on the extent of their participation in the Union. [I]n the *Grand Rapids* case that I just cited, [the Commission] held that union officials who collectively decided whether a grievance should be pursued were not entitled to super-seniority because they did not make those decisions while on the job.

[I]n a more recent case, *Warren Consolidated Sch*, 19 MPER 37 (2006), there was an argument that members of the [union's] executive board should have super-seniority applied to them, and the Commission rejected that, and I'll quote: "Here we agree with the ALJ that the evidence fails to establish that executive board members perform contract administration duties that require their regular presence on the job. Moreover, they do not meet regularly with Employer representatives to discuss grievances during work hours. Consequently, Respondents violated PERA by unlawfully enforcing the contract provision granting super-seniority to executive board members." The same principle was also recently restated in *City of Detroit –and- AFSCME Council 25, Local 542*, a decision issued by Judge O'Connor on March 11, 2011 in Case No. C09 L-241.

In the instant case, I asked Charging Party if she had evidence that she played any on-the-job role in contract enforcement, and the response was that . . . Charging Party had filed an EEOC complaint or something of that nature for another employee and that she served on the [Union's] contract negotiation team. Neither of those [duties] would qualify as on-the-job contract administration functions. An EEOC claim is not an enforcement of the collective bargaining agreement, nor [would] serving as a representative on a contract negotiation team. . . constitute [an] on-the-job contract administration function. So I think, as a starting point, had Respondents attempted to either prevent Charging Party's layoff or get her recalled based on the super-seniority provision, that [action would, in and of itself] have been unlawful under PERA as a discriminatory action toward other employees.

Now, even if the super-seniority provision which Charging Party relies upon had been [lawfully applied], there is no factually supported allegation that Charging Party was entitled to either keep her job or to be recalled based on that language. With respect to the layoff, the contract indicates that the provision applies in the "employing department." And I asked Charging Party's counsel if there was any evidence today in Charging Party's possession that there continued to be a position within her department in her current classification, in a lower classification in her occupational series, or in a formerly held classification. I was told [by Charging Party's counsel] that Charging Party had no evidence to establish that any of those positions existed at the time of the layoff.

With respect to the recall, other than the [vacant] position in the finance department, which we'll get to in a moment, Charging Party again indicated that she had no evidence which would show that there were any available vacant positions in the classification in which she was laid off, any lower classification in her occupational series, or any formerly held classification which is in the bargaining unit. Therefore, it would appear that both the layoff and the recall actions of the City were proper and [carried out] in accordance with Sections 14(A) and (B) of the contract. Given that the entire department was laid off and Charging Party has indicated that she has . . . no other evidence which would establish [anti-union] discrimination . . . I don't see how she can possibly establish a claim against the Employer.

With respect to the [vacant] position in the finance department, Charging Party admits [that she has a] felony conviction and she admits that at the time of the conviction, the Employer altered her job functions so that she wouldn't be handling money. There is no factually supported assertion that the position in the finance department which was made available in September of 2012 was one which did not require the handling of money. [Although] Charging Party asserts that she was told by someone in the HR department that a felony conviction essentially didn't matter . . . that individual is not here today to testify, and there's no indication that [such testimony] would constitute an admission by an employee of the human resources department. There's no indication that anyone from management made that statement.

And finally, we certainly have to look at labor relations in a larger context in all cases, and certainly I would not infer any discrimination under these circumstances where the job in question was in the finance department, the Charging Party had a [prior] felony conviction involving forgery and counterfeiting at the time this all occurred and at a time when the top leadership of the City was under indictment for financial crimes. I certainly could not infer any discriminatory motive for the City [having determined] that Charging Party was not fit for the [finance department] position.

Charging Party asserts that [anti-union animus may be inferred from the City's failure to disclose to her the reason why she was turned down for the vacant position within the finance department. It is undisputed, however, that she was told she was "unfit" for the position.] Charging Party was obviously aware of her own felony conviction, since it's undisputed [that] she pled guilty. I don't see there being any issue there as well. So despite having given a full and fair opportunity to establish a claim against the Employer, I don't see any factually based assertion which [if true, would establish that the City acted unlawfully under PERA in laying off Charging Party or by failing to recall her].

With respect to the charge against the SAAA, under Commission law, a union's duty of fair representation is comprised of three distinct responsibilities: (1) to serve the interest 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. *Vaca v Sipes*, 386 US 171 (1967); *Goolsby v City of Detroit*, 419 Michigan 651 (1984). The union's actions will be held to be lawful as long as they are not so far outside a wide range of reasonableness as to be irrational. *Airline Pilots Ass'n v O'Neill*, 499 US 65, 67 (1991). To pursue such a claim, the charging party must allege and be prepared to prove not only a breach of the duty of fair representation by the Union, but also a breach of the collective bargaining agreement by the Employer. *Knoke v East Jackson Sch*, 201 Mich App 480, 485 (1993).

The Commission has steadfastly refused to inject itself in judgments or agreements made by employers and collective bargaining representatives despite frequent challenge by employees. *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 Ass'n*, 2001 MERC Lab Op 131. Because the union's ultimate duty is toward the membership as a whole, the union is not required the follow the dictates of the individual employee, but rather it may investigate and take the action it determines to be best. A labor organization has the legal discretion to make judgments about the general good of the membership, and to proceed on such judgments despite the fact that they may be in conflict with the desires or interests of certain employees. *Lansing Sch Dist*, 1989 MERC Lab Op 210, 218.

In the instant case, I find that Charging Party has failed to adequately explain how the actions of the Union constitute a violation of PERA. There is no factually supported allegation which would establish that the Union acted arbitrarily, discriminatorily or in bad faith because, for the reasons I've already indicated, there was no breach of contract about which the Union could be faulted for not taking action. In addition to the fact that you have an arguably illegal super-seniority clause, [there is no factually supported allegation that the contractual provisions which Charging Party wanted the Union to enforce even applied to her situation so as to prevent her layoff or require her recall.] Therefore, even if, as Charging Party alleges, the Union president had some hostility towards her, there has simply been no [factually supported allegation suggesting that such] hostility played any role in [Charging Party] no longer being employed by the City of Detroit. Based on the allegations raised here today by Charging Party, I find that the charge against the Union also fails to state a claim under PERA.[1]

Based on the findings of fact and conclusions of law set forth above, I issue the following recommended order:

[1] The transcript excerpt reproduced herein contains typographical corrections and other minor edits for clarity purposes. The completed unedited transcript is maintained within the Commission case file.

ORDER

The unfair labor practice charges in Case Nos. C12 I-175; Docket No. 12-001585-MERC and CU12 I-039; Docket No. 12-001587-MERC are hereby dismissed in their entireties.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: May 30, 2013