STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

City of Detroit (Water and Sewerage Department),

Respondent,

Case No: C15K-144
Hon. Julia C. Stern

v.

Sanitary Chemists and Technicians Association,

Charging Party.

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CHARGING PARTIES' POST HEARING BRIEF

NOW COMES Charging Party Sanitary Chemists and Technicians Associations, Saulius Simoliunas, George Vannilam, Jacob Kovoor, and Cicy Jacob for their Post Hearing Brief and states and follows.

INTRODUCTION

Although this case involves several legal arguments and a significant amount of evidence, the heart of it is one simple concept—the Respondent prioritized removing dissidents over resolving long the long standing environmental issues during its reorganization. The Charging Party was kept in the complete dark about being potentially laid off and were never presented an opportunity to bargain the impact. Similarly, the Charging Party requested to arbitrate the layoffs but the request was ignored.

The Respondent also denied the existence of a collective bargaining agreement between the parties despite a long history of utilizing it and acknowledging it.

Further, despite spending millions on a placement procedure for objectively placing candidates in new positions, the placement procedure was completely ignored in the only area which actually laid off chemists, the waste treatment plant. Here, the placement of chemists was undeniably completed unilaterally by the subjective opinions of Waste Treatment Lab Manager Michael Jurban without reviewing any documents, discipline, attendance, or submitted employee self-assessments. Importantly, Jurban and his confidants despised Charging Parties Simoliunas, Vannilam, Kovoor, and Jacob. When analyzed Jurban's reasoning and logic in selections cannot be reasonably defended and contradicts itself. Once the dust settled, only six total chemists were involuntarily laid off—the entire SCATA elected board, a board member's wife, and only two other individuals. Notably, the other two received recommendations for positions at some point. A simple review of the credentials of the Charging Party demonstrates significantly greater seniority, education, experience, and trained skills than numerous of the individuals retained.

Shortly after the layoff, Respondent hired several chemists taking the amount to a level greater than before the reorganization. Charging Party members have applied for these positions and haven't even received interviews. Nor have they been recalled. The bias by Respondent against Simoliunas, Vannilam, Kovoor, and Jacob is self-evident.

STATEMENT OF FACTS

The Sanitary Chemists and Technician Association ("SCATA") has been the exclusive bargaining representative for a unit representing various water chemists within the Detroit Water and Sewerage Department ("DWSD") of the City of Detroit for several decades until the job titles within the bargaining unit were eliminated as a result of the facts discussed herein. The most recent

collective bargaining agreement ("CBA") between SCATA and the City of Detroit—DWSD is a Master Agreement dated 2005-2008 ("Master Agreement") ***(Exhibit 8)*** Although the Master Agreement "expired" in 2008, it contained a clause allowing for it to survive this date. Article 53 of the Master Agreement provides:

> "In the event the parties fail to arrive at an agreement on wages, fringe benefits, other monetary matters, and non-economic items by June 30, 2008, this Agreement will remain in effect on a day-to-day basis. Either party may terminate the Agreement by giving the other party a ten (10) calendar day written notice on or after June 20, 2008."

(***Exhibit 8;*** Tr. Vol 1 pg. 36) Thus, the Master Agreement would remain in effect past its expiration date on a day-to-day basis *unless* a new CBA was finalized *or* a party to the Master Agreement provided a ten-day written notice. It is Charging Party's position that this notice was never provided[1]. It is the testimony of each of Charging Party's individual members, the 2005-2008 Master Agreement between the parties was binding over the parties and utilized by both until the entire bargaining unit was either laid off or transferred into another bargaining unit winter 2015. (Tr. Vol 1 pg. 41) Notably, this position on the Master Agreement was shared by the Waste Treatment Lab Manager, Michael Jurban ("Jurban"), who testified that he always assumed there was a collective bargaining agreement in place between SCATA and Respondent. (Tr. Vol 4 pg 147) Further, as discussed in depth later herein, there is significant circumstantial evidence demonstrating that both parties continued to operate under the Master Agreement, including but not limited to, numerous filed grievances (***Exhibit 17, 18, 19, 70, 74, 75, 81***), requests for special conferences ***(Exhibit 78)***, unchallenged correspondence insisting the Master Agreement is in place ***(Exhibit 20)***, and several emails directly from Respondent's Human Resources Director Teri Conerway ("HR

[1] As discussed further herein, Respondent will introduce a document it purports to be such notice of termination. ***(Exhibit 66)*** However, undisputed testimony demonstrates that each of Charging Party's Board Members, Respondent's Human Resource Director, and even Respondent's counsel who acted as lead negotiator during subsequent bargaining had never seen the document prior to the hearing.

Conerway") in which she explicitly reference the Master Agreement and updates SCATA about how various Court Orders impacted the language of the Master Agreement.[2] ***(Exhibit 49, 50)***

Following 2008, the parties attempted to bargain a new contract at several different periods unsuccessfully. (Tr. Vol 1 pg 33) Conerway acknowledges the parties were bargaining at least until April of 2014. (Tr. Vol 6 pg 437) Documents demonstrate bargaining going much later. During bargaining, Respondent never presented a final best offer and impasse was never reached. (Tr. Vol 1 pg 130)

Union Activity

It cannot be reasonably disputed that SCATA has been one of the most active unions in regards to advocating for changes at DWSD and challenging several of the City of Detroit and DWSD's actions in regards to waste water treatment, safety and work conditions. However, the entirety of the union activity can be attributed exclusively to three individuals, Charging Parties Saulius Simoliunas ("Simoliunas"), George Vannilam ("Vannilam"), and Jacob Kovoor ("Kovoor"), (collectively with Cicy Jacob "Charging Parties") who served as elected President, Vice-President, and Secretary of SCATA for years and at the time of the layoffs. (Tr. Vol 3 pg. 14; ***Exhibit 77***[3]) Additionally, Simoliunas, Kovoor, and Vannilam were the representatives of SCATA at all monthly labor management meetings. (Tr. Vol 2 pg. 183) Notably, additional Charging Party Cicy Jacob is the wife to SCATA Secretary Kovoor and was also laid off as a result of her husband's frequent union activity adversarial to Waste Treatment Lab Manager Jurban and his circle. (Tr. Vol 1 pg 185)

[2] On May 13, 2012, HR Conerway sent a letter to SCATA discussing "Provisions of SCATA UAW #2334 2005-2008 CBA Affected by Court Order." ***(Exhibit 49)*** On May 19, 2012, HR Conerway sent another email to SCATA discussing the "impact of a November 4, 2011, Order on SCATA CBA." (Exhibit 50) Notably, the email specifically lists "Provisions of SCATA UAW #2334 2005-2008 CBA Affected by Court Order." ***(Exhibit 50 at pg. 2)***

[3] Treasurer Syed Parvez was not an active member in bargaining or grievances. Additionally, he was promoted out of the union prior to the reorganization and layoffs. (Tr. Vol 3 pg 50)

Prior to the layoff, the Charging Parties brought numerous concerns to Jurban's attention and none had been resolved. (Tr. Vol 2 pg. 271) SCATA frequently filed aggressive grievances and MERC Charges directed as resolving long standing issues. Jurban participated in all the grievance for which he was involved in some capacity. (Tr. Vol 6 pg. 395) Jurban testified directly to a few examples. First, Jurban testified of a challenge filed by SCATA involving the unequal distribution of overtime by supervisors. (Tr. Vol 4 pg 146) Specifically, SCATA reported that Senior Chemists, such as Kuriakose Cheeramvelil ("Kuriakose"), were abusing overtime. As a result, of SCATA's complaint overtime needed to approved by an outside manager. (Tr. Vol 4 pg 138)

In 2012, when Sue McCormick became Director of DWSD, Vannilam immediately sent her a letter on behalf of SCATA notifying her of several ongoing issues in the lab. ***(Exhibit 97;*** Tr. Vol 5 pg. 275) In the letter, Vannilam explicitly referenced Jurban as being incompetent and complaints being unresolved. (***Exhibit 97;*** Tr. Vol 5 pg. 277) McCormick responded acknowledging SCATA's complaints. (Tr. Vol 5 pg. 278) In response, Vannilam sent a second letter to McCormick stating that the problems are still prevalent and against references Jurban by name[4]. (Tr. Vol 5 pg. 281; ***Exhibit 98***)

The advocacy of Charging Party has extended far beyond the walls of DWSD as Simoliunas has organized meetings and conferences in the name of SCATA all over the country. (Tr. Vol 1 pg. 28) Further, SCATA made complaints to City Council regarding issues in DWSD. (Tr. Vol 5 pg. 286) SCATA complained to MIOSHA. (Tr. Vol 5 pg. 282-283) SCATA submitted statements to the Environmental Protection Agency ("EPA") challenging poor leadership—specifically Jurban. (Tr. Vol 5 pg. 287; ***Exhibit 99)*** Examples of these actions include the following:

[4] Although Jurban denied knowledge of the complaints directly, he later stated that any reports to McCormick would have been brought to his attention. (Tr. Vol 5 pg. 239)

- Jurban testified of his memory of SCATA filing a complaint with MDEQ regarding BOD testing and investigation was held in which he and the Charging Party participated. (Tr. Vol 4 pg 169-170) It is possible that this, or other reports from SCATA, are the MDEQ reporting directly referenced by Cox within his December 14, 2012 Order. ***(Exhibit 5 at pg. 3)***

- Testimony established that SCATA contacted MIOSA regarding untrained chemists pouring chlorine into the river. (Tr. Vol 1 pg. 137) MIOSHA came in and met with Simoliunas and the waste treatment plant manager (Jurban). (Tr. Vol 1 pg. 136)

- SCATA contacted MIOSHA regarding an explosion in the lab. (Tr. Vol 1 pg. 133-134) Concurrently, SCATA submitted a request to request to Respondent seeking the removal of Kuriakose for his connection to the incident. (Tr. Vol 2 pg. 196-198) Ultimately, MIOSHA fined DWSD as a result of the explosion partially because an employee was not properly trained. (Tr. Vol 4 pg 161, 164; Exhibit 92, 93) Jurban testified to his memory that Charging Party participated in the MIOSHA hearing adversarial to DWSD and requested that the fine not be reduced. (Tr. Vol 4 pg 166-167)

Notably, this is not an exhaustive list of protected activity by the Charging Party for which Respondent based its discrimination.

The Cox Order, The CET and Subsequent Bargaining

The present dispute largely arose from the conclusion of a thirty-four year federal case between the United States Environmental Protection Agency and the City of Detroit pertaining to the City' s compliance with the Clean Water Act, 33 USC § 1251 et seq. On November 4, 2011, Federal District Judge Sean Cox ("Cox") issued an order in that case requiring the City of Detroit and DWSD to take a number of actions that impacted collective bargaining between Respondent and its unions. ***(Exhibit 2)*** The order kept all existing collective bargaining agreements intact., but struck and enjoined the enforcement of certain collective bargaining agreement provisions[5]. ***(Exhibit 2)*** It is undisputed that Hon. Cox did not order the Respondent to lay anyone off and instead was to resolve long standing environmental issues with waste water treatment. (Tr. Vol 6 pg 444)

[5] Within his January 30, 2013 Order, Cox elaborates on his previous Order regarding negotiating CBAs exclusively with DWSD stating: "Those new DWSD-specific units must now negotiate new CBAs. But until they execute such agreements, this Court has expressly enjoined those few provisions of currently-existing CBAs that have been shown to impede compliance with the Clean Water Act and the DWSD's NPDES permits." ***(Exhibit 6 at pg. 10)***

Around or around April 4, 2012, the City entered its City Employment Terms for All Non-Uniformed employees (the "CET"). ***(Exhibit 10)*** The CET specifically states:

> "[a]ny provisions in the most recently expired Collective Bargaining Agreements, memorandums of understandings, practices, and/or supplemental agreements that are not expressly reference in this CET or any addendum and are inconsistent with the terms in this CET or any addendum are null and void as of the effective date of this CET."

(***Exhibit 10)*** In June 2012, the Board of Water Commissioners announced that if a union did not have a contract with just DWSD than the CET was being imposed (Tr. Vol 6 pg 402; ***Exhibit 52***) Respondent alleges the Board of Water Commissioners empowered the City to impose the CET on DWSD. (Tr. Vol 2 pg 125-126; ***Exhibit 52***) However, the Water Commissioners resolution specifically notes that it is only applicable to any union whose CBA had expired—which SCATA's Master Agreement had not due the continuation clause. ***(Exhibit 52; 8)*** According to Conerway, Cox ordered everyone to negotiate new agreements immediately even if they had a binding agreement at the time and any existing agreement was void. (Tr. Vol 6 pg 408-409) However, no such language within the CET or any of Cox's Orders exists. HR Conerway later admits that she did not consider whether or not the agreements were terminated but instead just focused on reaching a new agreement. (Tr. Vol 6 pg 413) SCATA disagreed and filed a grievance challenging the imposition of the CET because they had an existing CBA[6]. (Tr. Vol 2 pg 87; *Conerway,* Tr. Vol 6 pg 429; ***Exhibit 65***) The Respondent sent notice of its alleged implementation of the CET to several unions, including SCATA, on October 24, 2012. ***(Exhibit 100)***

SCATA never agreed to the terms of the CET. (Tr. Vol 1 pg 67) Following the issuance of the CET, SCATA drafted a letter and turned it in to Respondent affirmatively stating that their 2005-2008 Master Agreement was still binding and that the CET was not controlling over them. (Tr. Vol 1

[6] Ultimately the arbitrator ruled that it was an issue he had *contractual* authority to rule on. ***(Exhibit 68)***

pg 62-62; ***Exhibit 20***) The letter was drafted because the Respondent unilaterally cut SCATA members pay. (Tr. Vol 2 pg 91-92) Jacob Kovoor personally handed the document to Human Resources Manager Teri Conerway ("HR Conerway") (Tr. Vol 3 pg 41)

According to Conerway, the parties continued bargaining after this point but never reached an agreement. (Tr. Vol 6 pg 436) On May 8, 2012, Respondent made its first proposal of new contract terms to SCATA. ***(Exhibit 48)*** However, around this same time, a second slate of representatives presented themselves as the rightful officers of SCATA frustrating bargaining. It is Charging Party's position that this was an effort directly done by Jurban to undermine the Charging Party's Officers for previous protected union activity. Ultimately, the matter required a ruling from MERC to resolve the dispute. ***(Exhibit 26, 27, 30-32)*** During this period the Respondent refused to bargain with SCATA. ***(Exhibit 28)***

On or around November 5, 2014, Respondent's lead negotiator Steven Schwartz notified SCATA it intended to move all chemist titles to another union, Senior Water Systems Chemists, following the reorganization. ***(Exhibit 63 pg. 2)*** It assigned all SCATA to a newly created temporary position called "Special Project Technicians. ***(Exhibit 63)*** This deal was rejected.

Subsequently, the parties continued to exchange proposals and bargain but never were able to finalize a new CBA or reach impasse. ***(Exhibit 51; 55-62)*** Throughout this time Respondent never provided any notice that the parties should bargain over the impact of possible layoffs or that there would be layoffs at all. Conerway acknowledges the parties were bargaining at least until April of 2014. (Tr. Vol 6 pg 440)

<u>The Reorganization at DWSD</u>

As part of Cox Order, the Respondent was ordered to perform a review of its current employee classifications and reduce the number of classification. ***(Exhibit 2 at pg. 6 no.8)*** As a result,

all previous chemist titles were directed to a singular Chemist job title (herein referred to as "New Chemist Position[7]"). ***(Exhibit 16)*** The New Chemist Position job description is similar to that of an analytical chemist. (Tr. Vol 2 pg. 181-182) Importantly, the Cox Order did not instruct Respondent to lay off any employees. ***(Exhibit 2)*** This decision came from EMA, a private company brought in to investigate DWSD's staffing needs. (Tr. Vol 4 pg 59)

At some point, the Respondent set up its Placement Eligibility Process – Phase II ("Placement Procedure"). (***Exhibit 9)*** As a result, employees were able to download self-assessments online to complete. (Tr. Vol 2 pg. 180; ***Exhibit 1***) SCATA was never notified how the info would be used or that they were at risk to lose the jobs. (Tr. Vol 3 pg 64) In fact, Conerway, Senior Chemist Joseph Peindl and McCormick explicitly stated there would be no layoffs to SCATA according to Kovoor, Simoliunas, and Vannilam. (Tr. Vol 3 pg 65, 69) These Self-Assessments were to be reviewed by the employee's supervisor. ***(Exhibit 9)*** Additionally, the Human Resources Department was to submit the employees discipline and attendance history. ***(Exhibit 9)***

Generally, the Placement Procedure, when followed, established four different groups of employees based on minimum qualifications, discipline, and attendance records. ***(Exhibit 9)*** It is not necessary to spend a significant amount of time explaining the Placement Procedure as a reasonable argument that it was *actually* utilized within the Waste Treatment Plant cannot be made. Sadly, all objective reasoning established with the creation of the Placement Procedure was abandoned as well in exchange for clear favoritism and the subjective assessment of one man, Waste Treatment Lab Manager Jurban—a man with demonstrable hostility towards Simoliunas, Vannilam, Kovoor, and Jacob.

[7] For the sake of ease, the Parties agreed to this terminology on the record. (Tr. Vol 1 pg. 80)

Despite the establishment of an objective selection system, layoffs in waste treatment were done subjectively by Michael Jurban without utilizing any objective resources

The Placement Procedure was created to form an objective standard for selecting the most qualified individuals. (Tr. Vol 6 pg 447-448) Unfortunately, if there is one glaring certainty in this matter, it is that the Placement Procedure was not followed in the Waste Treatment Plant in regards to placement of individuals in the New Chemist Position and Layoffs.

Although the alleged "final" decision on hiring in waste treatment was allegedly made by recently retained Plant Manager McNeely ("McNeely"), McNeely only worked for DWSD for three months prior to the layoff and had no knowledge of the work, the employees, or any individual employee's ability to perform the work. (Tr. Vol 4 pg. 194-196) Therefore, it was Jurban who was tasked with placing certain people in chemist positions and made the recommendations to McNeely as to who to retain. (Tr. Vol 4 pg 62, 68, 94-95, 174) Indeed, all substantive decisions regarding the selection of individuals for layoff and placement in the New Chemist Position was completed Jurban.

According to Jurban, the actual placements of chemists in waste treatment to New Chemist Positions did not commence until within two months of the October 2015 layoffs. (Tr. Vol 4 pg 67) Jurban placed individuals based on what needed to get done and then allegedly selected individuals based on possessing those skills. (Tr. Vol 4 pg 69-71) It was Jurban who identified the tasks needed for New Chemists and who would fill these positions. (Tr. Vol 4 pg 70-73, 84) Jurban claims he was specifically looking for chemists who could do more than one thing[8]. (Tr. Vol 4 pg 119) However, the evidence does not support this sentiment.

[8] The hypocrisy of this statement is perhaps best demonstrated by the decision to recommend Basma Saleh. By the Jurban's own admission Basma skills largely involved stock room work. (Tr. Vol 4 pg 175; ***Exhibit 84***)

Importantly, Jurban *admitted* his selections were not based on the "objective" Self-Assessments, but instead *his own subjective opinions of individual's skills*[9]. (Tr. Vol 4 pg 84, 176-177, 181-182, 183[10]) Indeed, Jurban openly admitted that he never possessed the Self-Assessments and didn't utilize them. (Tr. Vol 4 pg 181-182) Jurban also did not review and discipline or attendance prior to his recommendations and that HR never presented him the information. (Tr. Vol 4 pg 180-181) Jurban characterized the process stating "...things happened fast and furious then." (Tr. Vol 4 pg 181) Jurban quipped that he tried to review the Placement Procedure but "it's a complicated process." (Tr. Vol 4 pg 183) Indeed, Jurban admits to considering two things in making selections, his own memory and the chart he made off his own memory of skills[11]. (Tr. Vol 4 pg 176-177) Jurban admits no documents were consulted in assembling the employee skill charts and they were created off the top of his head without consulting anything! (Tr. Vol 5 pg 225) Additionally, Jurban unambiguously testified of the following during the hearing on this matter:

1) It was Jurban who decided what tasks needed to be filled and who should be placed to satisfy those tasks. (Tr. Vol 4 pg. 70-71) All chemists recommended by Jurban were hired. (Tr. Vol 4 pg. 95)

2) Jurban did not base his decisions on the Self-Assessments at all, but instead created charts off his own assessment of applicants' skills off the top of his head. (Tr. Vol 4 pg. 82-84, 181-183)

3) Jurban did not review discipline or attendance prior to making his selections. (Tr. Vol 4 pg. 180-181)

4) All applicants met the minimal educational requirements so Jurban didn't review applicants' educational backgrounds at all. (Tr. Vol 4 pg. 184)

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[9] Jurban's ignorance of the Placement Procedure is not in a vacuum, DWSD Freshwater Operations Director Terry Daniel testified that he never reviewed the self-assessments also. (Tr. Vol 5 pg 343)

[10] *Attorney Schulz: "But ultimately would you agree that you picked the individuals based on your knowledge of them more than the assessments?"*
Jurban: "Yes." (Tr. Vol 4 pg 183)

[11] This "chart" was a large excel which contained all of the applicant chemists and their skills according to Jurban. The full version was never produced, however, several sub charts were submitted as ***Exhibits 87-90***.

Ultimately, 32 of the 32 chemists placed in the New Chemist position at Waste treatments were the exact individuals recommended by Jurban. (Tr. Vol 4 pg 61, 95, 174) Jurban also admits to consulting Kuriakose regarding the staffing decisions during placement. (Tr. Vol 4 pg 133) As discussed further herein, the placement and selection of those individuals for layoffs was based exclusively on the subjective opinions of Jurban—an individual who demonstrably had a contentious relationship with the Charging Party while favoring numerous others.

The Layoff of Charging Party

Initially, eleven (11) chemists were laid off (although most were recalled or offered other placements and opted to remain laid off). (Tr. Vol 4 pg 174; ***Exhibit 13, 15***) All chemist who were involuntarily laid off were SCATA members. (Tr. Vol 6 pg 446) Additionally, the only chemist who were laid off came from waste treatment. (Tr. Vol 6 pg 447) No chemist knew they, or any chemists, would be terminated prior to the initial notice of termination. ***(Exhibit 13, 15)*** Likewise, Jurban did not learn that any chemists would be laid off until a half hour before the layoff notices went out. (Tr. Vol 4 pg 197)

At the time of the layoff, and the period relevant to the matter herein, Simoliunas, Kovoor, and Vannilam were the elected SCATA board and only active members in bargaining, grievances, and advocacy. (Tr. Vol 2 pg. 156) Likewise, Simoliunas, Kovoor, and Vannilam were the representatives of SCATA at all monthly labor management meetings. (Tr. Vol 2 pg. 183) During the meetings, including August 2015, there was never any mention that chemists would be laid off. (Tr. Vol 2 pg. 183) In fact, McCormick and Conerway told SCATA there would be no layoffs at this time. (Tr. Vol 2 pg. 184,186)

When the dust settled, only six chemists remained laid off.[12] The entire elected board of SCATA and the Secretary's wife, Cicy Jacob, represent two-thirds (2/3) of the chemists laid off. Further, the other two individuals were at least recommended for other positions. ***(Exhibit 85)***

The Special Conference

On October 7, 2015, a special conference was held between the Charging Party and the Respondent to discuss the surprise layoff of the Charging Party and their submitted grievance. ***(Exhibit 91)*** According to Human Resources Manager Teri Conerway ("HR Conerway"), Charging Party argued that several employees hired for New Chemist Positions were not the most qualified. (Tr. Vol 6 pg 525) The conference was a farce. Respondent provided no responses to any of Charging Party's concerns or questions and instead provided a routine blanket statement that "they would be investigated" at a later time. ***(Exhibit 91)*** During this meeting Simoliunas requested to bargain over layoffs. ***(Exhibit 91)*** President Simoliunas also requested SCATA's grievance the layoffs be advanced to arbitration. (*Conerway;* Tr. Vol 6 pg 444; ***(Exhibit 91)*** Throughout the conference, Charging Party stressed urgency. However, their requests ignored. In all probability, the requests were likely futile as the decisions had already been finalized. The members of the Charging Party were collectively laid off on October 14, 2015.

Every laid off chemist besides Charging Party were offered positions, recalled, or placed elsewhere

Much like the layoffs, the individuals selected for recall were entirely subjective. The individual Charging Party members were shut out of recall opportunities as no internal notice went out to those displaced. (Tr. Vol 4 pg 11-12). Instead, recalls were also selected through the internal

[12] *See Exhibit 82 (List of Chemists Laid off to Semegen)* Testimony demonstrates that all but five names on this list have been 1) recalled or offered a position—Abdul Rahman, Lissy Joseph, Rosilay Jais, Betty Korela; or chose to remain laid off—Anitha Kuriakose and Basma Saleh (Tr. Vol 4 pg 121-123; ***Exhibit 83-84***).

recommendations of Jurban and Kuriakose. (Tr. Vol 4 pg 15). HR Conerway acknowledges that these jobs were not all posted. (Tr. Vol 6. Pg. 380).

Unlike waste treatment, all freshwater chemists who were not placed were notified of other positions or jobs they could apply for. (Tr. Vol 5 pg 360) The same courtesy was not extended to the Charging Party by Respondent. According to DWSD Freshwater Operations Director Terry Daniels, all previous chemists were placed in New Chemist Positions or other jobs by Fall 2015. (Tr. Vol 5 pg 355)

According to the Mary Lynn Semegen ("Semegen"), the Manager at Water Works Park on the "freshwater" side of DWSD, she only spoke to individuals who contacted her directly regarding open positions recalled following the October, 2015, layoff. (Tr. Vol 4 pg 7, 16, 23). Semegen did not base the hiring decision on any review of the self-assessments, disciplinary history or even consult HR. (Tr. Vol 4 pg 27-29l; *see also Conerway at* Tr. Vol 6 pg 389) Semegen simply went with who was recommended by Jurban and Kuriakose and assumed they had reached out to everyone. (Tr. Vol 4 pg 15, 34-35) Notably, "recall" opening in Freshwater was not posted internally or publicly. (Tr. Vol 4 pg 11-12) Ultimately, Semegen offered positions to Abdul Rahman and Rosilay Jais for an opening because she like the initiative that they came and spoke to her and "seemed eager to work." (Tr. Vol 4 pg 38) Semegen emailed at least Rosilay Jais and told her to keep the opening secret. (Tr. Vol 4 pg 18-19; ***Exhibit 83***). Egregiously, HR Conerway claims that this was handled pursuant to the Placement Procedure. (Tr. Vol 6 pg 386-387). Yet, also admits that HR had no role in the placement of these additional chemists after layoff. (Tr. Vol 6 pg 389.

The record clearly establishes that the Charging Parties were denied equal opportunity to apply for these jobs although they possessed requisite skills and licenses specifically cited by

Semegen as the "strong" factors she considered—D license, chemistry background, and teaching chemistry at a community college[13]. (Tr. Vol 4 pg 15, 38) Jurban admits providing only Rahman's name to Semegen and says he was happy to get *his* chemists placed. (Tr. Vol 4 pg 127)

Finally, the record shows that there are presently more chemists in waste treatment than there were prior to the layoff. (Tr. Vol 4 pg 139-140) Jurban admits that some of the laid off chemists have applied for these jobs but were not hired but is unsure if it was any of the Charging Parties[14]. (Tr. Vol 4 pg 141) The Charging Party members have testified to applying to these positions and not even receiving interviews. (Tr. Vol 3 pg 89; Tr. Vol 1 pg 197)

Procedural History with the Michigan Administrative Hearing System

On November 2, 2015, the Charging Party timely filed an unfair labor practice against Respondent[15]. On April 29, 2016, Respondent filed its *first* motion for summary dismissal of the Charge. ALJ Julia C. Stern ("ALJ Stern") issued an Interim Order on August 24, 2016, denying Respondent's Motion for Summary Disposition. Subsequently, Charging Party retained its present counsel. On December 9, 2016, the Charging Party submitted its Corrected Amended Charge clarifying that Charging Party alleges that Respondent violated PERA sections 10(1) (a, c, d, e), Section 15, and the parties' CBA. Specifically, the Respondent committed the following unfair labor practices:

1. Failure to provide notice and an opportunity to bargain over the October 14,2015, layoffs of members of SCATA and the selection of members to fill the new "Chemist" position;

[13] Sadly, Abdul Rahman does not actually teach chemistry at a community college. Yet, George Vannilam has taught chemistry at a college level consistently for around 35 years. (Tr. Vol 2 pg 155)
[14] The record shows Jacob Kovoor and Cicy Jacob have applied for these positions and were denied interviews.
[15] The Charging Party filed a prior separate charge against Respondent alleging Respondent violated its duty to bargain by unilaterally transferring SCATA members and their work to a newly created "Chemist" position represented by another union. This charge was dismissed on August 24, 2016. (Case No. C14 A-013)

2. The repudiation of the terms of an existing CBA between SCATA and Respondent when selecting the method, criteria, and procedure utilized for layoffs and for selecting which members would be reclassified into new positions;

3. Discrimination by Respondent against SCATA union officers, and the spouse of a union officer, when selecting which members would be laid off and/or selected for the new Chemist position; and

4. A refusal by Respondent to arbitrate a grievance regarding the layoffs.

The Respondent filed another Motions for Summary Disposition subsequent to the amending which was denied. The matter was heard in full commencing April 12, 2017 and lasting seven days until June 28, 2017.

ARGUMENT

Respondent's violations in this matter are generally separated into two categories: 1) failures by the Respondent to satisfy obligations owed to the Charging Parties in relation to bargaining, grievance procedure, and other contractual terms; and 2) discriminatory treatment against the individually named Charging Parties for previous protected activity.

I. The Master Agreement Was Binding between the Parties

Respondent's central argument to Charging Party's non-discrimination claims is that there was no existing CBA between the parties and therefore there was no duty to bargain and/or arbitrate regarding the impact of the layoffs and the methods for selecting Chemists. According to each of Charging Party's members, the 2005-2008 Master Agreement between the parties was binding over the parties and utilized by both until October 2015 when then the Respondent repudiated it. (Tr. Vol 1 pg. 41) Although the Master Agreement "expired" in 2008, it continued until a termination procedure was followed. Specifically, Article 53 of the Master Agreement provides:

> "In the event the parties fail to arrive at an agreement on wages, fringe benefits, other monetary matters, and non-economic items by June 30, 2008, this Agreement will remain in effect on a day-to-day basis. Either party may terminate the Agreement by giving the other party a ten (10) calendar day written notice on or after June 20, 2008."

(***Exhibit 8;*** Tr. Vol 1 pg. 36) Thus, the Master Agreement would remain in effect past its expiration date on a day-to-day basis *unless* a new CBA was finalized *or* a party to the Master Agreement provided a ten-day written notice. It is Charging Party's position no termination pursuant to this article or of any type ever occurred and therefore the Master Agreement was still controlling over the parties. Likewise, the Waste Treatment Lab Manager, Jurban, testified that he always assumed there was a collective bargaining agreement in place between SCATA and Respondent. (Tr. Vol 4 pg 147)

It is safe to assume the Respondent will allege the Master Agreement was terminated by several actions. However, the Respondent, specifically Conerway, is unable and unwilling to specify when it exactly alleges the Master Agreement ceased to be binding over the parties. (Tr. Vol 6 pg. 398-399) Initially, it was Respondent's position that the Master Agreement terminated when SCATA disassociated with the UAW. ***(****Affidavit of Conerway****; Exhibit 104 at 14)*** The Respondent may also advance the argument that the Master Agreement was terminated when SCATA voted to disaffiliate with the UAW in 2011. ***(Exhibit 23)*** However, SCATA was always told they continued to operate under the Master Agreement and continued to operate pursuant to the Master Agreement from that point on. (Tr. Vol 1 pg 43, 46-47) Notably, SCATA had a contract when they initially affiliated with the UAW and that contract continued to be recognized. (Tr. Vol 2 pg 157) The Respondent will allege that the events led to the creation of an entirely new entity. However, it was Vannilam who submitted the petition to MERC and it specifically states that the whole purpose of the election was to simply disaffiliate from the UAW. (Tr. Vol 2 pg 162-163; ***Exhibit 23***) Further, following the separation from the UAW some money remained with SCATA. (Tr. Vol 5 pg 326-327)

Next, Respondent will argue that the Master Agreement was terminated by an October 9, 2009, letter ***(Exhibit 66)*** allegedly drafted by former labor relations director Barbara Wise-Johnson

and mailed to SCATA by Zachariah Gross[16]. (Tr. Vol 7 pg. 551) Notably, no party to this case or substantive witness had ever seen this document prior to the hearing. HR Conerway served as director of human resources and participated in bargaining with SCATA from 2012 until present and *never saw the document before the hearing.* (Tr. Vol 6 pg. 399) Importantly, the document could not have arrived by mail to SCATA without being reviewed by Secretary Kovoor. Mr. Gross alleges he submitted the letter regular mail with no return receipt or certification. (Tr. Vol 7 pg. 593) It was sent to a locked mailbox in which only Kovoor possessed a key. (Tr. Vol 1 pg 144-145; Tr. Vol 3 pg 15) Kovoor testified credibly that ***Exhibit 66*** had never arrived in the mail. (Tr. Vol 3 pg 16-17)

Additionally, it must be noted that Conerway herself explicitly referenced the Master Agreement being binding and impacted by various court orders subsequent to the alleged termination letter and the separation from the UAW. On May 13, 2012, sent a letter to SCATA discussing "Provisions of SCATA UAW #2334 2005-2008 CBA Affected by Court Order." ***(Exhibit 49)*** On May 19, 2012, HR Conerway sent another email to SCATA discussing the "impact of a November 4, 2011, Order on SCATA CBA." ***(Exhibit 50)*** Notably, the email specifically lists "Provisions of SCATA UAW #2334 2005-2008 CBA Affected by Court Order." ***(Exhibit 50 at pg. 2)*** The language is a clear indication that Conerway felt the CBA was still binding at the time.

Finally, Respondent will likely allege that the Master Agreement was terminated by the imposition of the CET on June 27, 2012, when the Board of Water Commissioners ordered the CET apply to "any union whose contract has expired without having a new ratified collective bargaining agreement." (Tr. Vol 6 pg. 402; ***Exhibit 52)*** According to Conerway, this was a direct order to

[16] Notably, even if the document is determined to be valid and received by Charging Party, Ms. Wise-Johnson agrees that mandatory subjects of bargaining, such as wages, layoffs, etc... continued beyond the termination. (Tr. Vol 7 pg. 560)

negotiate new CBAs immediately even if there was a binding agreement which hasn't expired or been terminated. (Tr. Vol 6 pg. 408-409) However, Cox specifically ordered otherwise. ***(Exhibit 2, 6)*** Within his January 30, 2013 Order, Cox elaborates on his previous Order regarding negotiating CBAs exclusively with DWSD stating: "Those new DWSD-specific units must now negotiate new CBAs. *But until they execute such agreements, this Court has expressly enjoined those few provisions of currently-existing CBAs that have been shown to impede compliance with the Clean Water Act and the DWSD's NPDES permits*." (Exhibit 6 at pg. 10) Additionally, the Michigan Supreme Court previously held that:

> The enactment of an ordinance, however, despite its validity and compelling purpose, cannot remove the duty to bargain under PERA if the subject of the ordinance concerns the 'wages, hours or other terms and conditions of employment' of public employees. If the residency ordinance were to be read to remove a mandatory subject of bargaining from the scope of collective bargaining negotiations, the ordinance would be in direct conflict with state law and consequently invalid.

Detroit Police Officers Ass'n v City of Detroit, 391 Mich 44, 58 (1974) Applying ***Detroit Police Officers' Ass'n***, the Michigan Supreme Court in ***Local 1383 Int'l Ass'n of Fire Fighters v City of Warren*** stated that the court "has consistently held that PERA prevails over conflicting legislation, charters, and ordinances in the face of contentions by cities, counties, public universities and school districts that other laws or the Constitution carve out exceptions to PERA." 411 Mich 642, 655 (1981). Thus, it is unlikely that an ordinance, resolution, or statement from the Board of Water Commissioners can unilaterally terminate the Master Agreement contrary to the law established pursuant to PERA. Finally, HR Conerway later admitted that she did not consider whether or not the agreements were terminated but instead just focused on reaching a new agreement. (Tr. Vol 6 pg 413)

II. The Respondent Violated PERA by Repudiating the Master Agreement Between the Parties

MERC will find an unfair labor practice where a public employer's breach manifests a disregard for the parties' obligations under the collective bargaining agreement raising a breach to the level of repudiation. ***City of Detroit (Transportation Dept),*** 1984 MERC Lab Op 937, aff'd 150 Mich App 605 (1983). In order to find repudiation, the Commission must first find that: (1) the breach must be substantial; (2) have a significant impact on the bargaining unit; and (3) there must be no bona fide dispute over contract interpretation. ***Gibraltar Sch Dist***, 16 MPER 36 (2003); ***Plymouth-Canton Cmty Schs***, 1984 MERC Lab Op 894, 897. A repudiation of a collective bargaining agreement is still an unfair labor practice that the MERC is empowered to remedy. ***City of Detroit***, 1984 MERC Lab Op 937, *aff'd,* 150 Mich App 605 (1985) Members of a bargaining unit have a right to rely on the terms and conditions of employment defined by the collective bargaining agreement, including a right to expect that those terms will remain unchanged. ***Detroit Bd of Ed,*** 2000 MERC Lab Op 375, 377.

To demonstrate repudiation, one first must demonstrate that the breach was substantial. In the present case, the Respondent denies the existence of a contract altogether. Further, it openly admits to not following any language within the Master Agreement regarding Seniority and recalls. Second, the breach must have a significant impact on the bargaining unit in order to show unlawful repudiation. Here, the bargaining unit has been significantly impacted given that it impacts every individual in the unit who was laid off or placed. Next, there must be no bonafide dispute regarding contract interpretation. According to Simoliunas, the Respondent repudiated the Grievance Procedure and Section 17 of the Master Agreement as well as other clauses. (Tr. Vol 1 pg 128-129) Importantly, the Respondent does not attempt to dispute any contractual language, but instead

takes the position the Master Agreement was terminated. In the instant case, the test for repudiation is satisfied.

Notably, the Respondent argues that the CET is binding, however, the CET itself contained terms regarding seniority being applicable in a reduction of work force and employee recall. ***(Exhibit 10 pg. 15-16)*** There is no dispute these terms were not applied to the instant case.

III. **The Respondent Violated PERA by refusing to Arbitrate a Grievance related to the Layoffs**

A party's refusal to arbitrate a grievance under an existing contract which contains an arbitration clause is a violation of its duty to bargain in good faith. ***Maud Preston Palenske Memorial Library,*** 27 MPER 53 (2014) The Respondent's refusal to go to arbitration violated its bargaining obligation under Section 10(l)(e) of PERA.

Section 5 of the Master Agreement covers "Grievance Procedure" and allows for grievances to be arbitrated. (Tr. Vol 1 pg. 34-35; ***Exhibit 8 pg. 6)*** As noted above, the Respondent disputes the Master Agreement was still binding over the parties. For purposes of this claim, the contractual argument is somewhat irrelevant in that there is no dispute that Respondent was also obligated to arbitrate grievances brought by SCATA under the CET. ***(Exhibit 10 pg. 8)*** Indeed, HR Conerway freely admits to being aware that the CET provided for the arbitration of grievances. (Tr. Vol 6 pg 432-433)

The moment SCATA learned that individuals would be laid off they filed a grievance and a special conference was scheduled. (Tr. Vol 1 pg 103-105; ***Exhibit 21, 91***) HR Conerway admits that the special conference was scheduled in response to a grievance from Charging Party. (Tr. Vol 6 pg 440; ***Exhibit 91***) Further, it is undisputed the special conference did not resolve Charging Party's grievance. According to HR Conerway, once a grievance is heard and not resolved the next step is arbitration. (Tr. Vol 6 pg 394)

Importantly, Simoliunas specifically requested to arbitrate the grievance during the special conference stating[17]:

> Simoliunas: "What we really need to find out is that this is the special conference and since we are going to be laid off on Thursday, so we don't have much time here, *so also be – this is the last grievance meeting, and we are going to arbitration to choose an arbitrator*, because you are saying you are not going -- management rights to see what you have done…:
>
> Wolfson: You – you are – you are saying that you don't wish us to do an investigation?
>
> Simoliunas: How you doing investigation when we are going to be [laid off in] three days?
>
> Wolfson: You've raised a number – you've raised a number of issues, do you want us to look at those issues?
>
> Vannilam: That's the idea, but we want it to be expedited. This is an emergency situation.
>
> Simoliunas: *We have to choose the arbitrator.*
>
> Wolfson: Okay, once again –
>
> Simoliunas: *We have to choose the arbitrator by Tuesday because Wednesday is the last day of those people.*

(Exhibit 91 at pg. 23-24). Additionally, Simoliunas sent an unambiguous request to arbitrate the grievance via email to Conerway and Respondent General Counsel William Wolfson.[18] ***(Exhibit 22;*** Tr. Vol 6 pg 392). According to Simoliunas, he called Wolfson regarding the arbitration but was told that DWSD did not have to respond the request. (Tr. Vol 1 pg 121) When questioned

[17] HR Conerway unreasonably suggests that Simoliunas' request to arbitrate during the special conference was not a request to arbitrate but instead "notice that they were going to request to arbitrate. (Tr. Vol 6 pg 443) The suggestion is absurd and should be assigned no weight.

[18] Respondent disputes whether Charging Party submitted the emailed request to arbitrate to HR Conerway's correct address. However, there is no dispute this was sent to Respondent's General Counsel William Wolfson's correct email address. If it is concluded this email only went to General Counsel Wolfson, this alone should be viewed as an adequate request to arbitrate. Aside from being Respondent's General Counsel and tasked with handling arbitrations, Wolfson acted as the lead in the special conference regarding the grievance for which the Charging Party sought arbitrated. ***(See Exhibit 91)***

regarding Simoliunas' request to arbitrate the grievance at the special conference, HR Conerway stated the following:

> Schulz: At the time did you interpret that statement as SCATA's intent to arbitrate the grievance which we're meeting on?
>
> Conerway: Yeah, that's what they said, they're going to arbitrate.
>
> Schulz: Would you agree no arbitration occurred?
>
> Conerway: I would agree.

(Tr. Vol 6 pg 444)

According to Conerway, one the union files a request to arbitrate, the next step is for the city to respond and say "let's talk about an arbitrator, lets prepare a list of arbitrators." (Tr. Vol 7 pg 598) Further, Conerway testified that it was her role to be sure a grievance was scheduled, heard and the answer completed. (Tr. Vol 6 pg 394) Respondent has provided no explanation why this subsequent step never occurred or for its failure to arbitrate the Charging Party's grievance. According to Simoliunas, had SCATA been allowed to arbitrate they would have sought reinstatement of those laid off and back pay. (Tr. Vol 1 pg 120-121)

IV. **The Respondent Violated PERA by Failing to Bargain the Layoffs**

Under the Michigan Public Employment Relations Act (PERA), it is unlawful for a public-sector employer to fail to bargain collectively in good faith with a labor organization over mandatory subjects of bargaining like wages, hours, and other terms and conditions of employment. MCL § 425.215(1). A public-sector employer may not unilaterally change a mandatory subject of bargaining without providing the labor organization with notice and opportunity to bargain. ***Central Michigan Univ Faculty Ass'n v Central Michigan Univ***, 404 Mich 268, 277 (1978); ***Detroit police Officers Ass'n v Detroit***, 391 Mich 44, 54-55 (1974). Both refusal to bargain and unilateral changes are unlawful under MCL 425.215(1). It is well established

that under PERA a public employer's decision to reduce the number of its employees in a bargaining unit and lay them off is a permissive, and not mandatory subject of bargaining. However, while the initial decision to layoff is not a mandatory subject, an employer has an obligation to bargain over the impact of that decision, which may include whether layoffs will be based on seniority. ***Metropolitan Council No 23 & Local 1277, AFSCME v City of Center Line,*** 414 Mich 642, 661-662 (1982). Judge Cox's 2011 Order, specifically Labor Order #8, instructed Respondent to reduce the number of employee classifications. ***(Exhibit 2)*** It did not, however, instruct Respondent to reduce the number of its employees or any procedure for doing so.

Under PERA, these actions required bargaining. Thus, Respondent was required to provide notice and an opportunity to bargain over the layoff of Charging Party's unit members ***and*** which of Charging Party's Unit members would be reclassified or placed into the new Chemist position. Respondent's failure to provide notice, an opportunity to bargain, and its unilateral implementation of its procedures regarding layoff and reclassification were both were both unlawful under MCL 425.215(1). Additionally, the decision to layoff Charging Party's members certainly occurred during after the period in which bargaining was suspended. Governor Rick Snyder declared the City of Detroit's financial emergency to be over on December 14, 2014. The notifications regarding layoffs were not issued until September 24 and 30, 2015. ***(Exhibit 13, 14, 15)*** Further, According to Jurban, the dialogue of placement of chemists into New Chemist Positions did not begin until roughly June or July 2015. (Tr. Vol 4 pg 57) Thus, it is certain the decision to make layoffs, as well as the actual layoffs, occurred during a period where the Respondent owed Charging Party a duty to bargain pursuant to Section 15(1) of PERA. Further, as stated by former Labor Relations Director Barbara Wise-Johnson, certain mandatory subjects of bargaining continue beyond the termination of an agreement. (Tr. Vol 7 pg 560) The impact of layoffs is one of these mandatory subjects.

It is undisputed the parties never bargained the impact of the October 2015 layoffs. (Tr. Vol 6 pg 440) Here, the Respondent did not present the Charging Parties with an opportunity to bargain over the impact of the layoffs because the layoffs were concealed until layoff notices were issued and bargaining was futile[19]. ***(Exhibit 13, 15)*** Even Jurban, the Waste Treatment Plant Supervisor, was not aware that anyone would laid off until the date of the layoffs. (Tr. Vol 4 pg 61-62) The blur of the reorganization and layoffs is best demonstrated through Jurban's statement regarding keeping impactful news close to the chest stating:

> "It was hard at that time to separate rumor from truth, you know, so there was a lot of rumors going around that you're trying to not get people needlessly alarmed." (Tr. Vol 4 pg 134)

Charging Party immediately requested a conference regarding the layoffs as SCATA upon learning of them in late September 2015. ***(Exhibit 91)*** The special conference held between the parties was a total farce. Respondent's decision regarding layoffs and reclassification was finalized and bargaining further requests were futile. Nonetheless, Charging Party requested to bargain during the special conference[20]. Under PERA, a union has no duty to demand bargaining if the change is presented as *a fait accompli* and the demand would be futile. ***Interurban Transit Partnership,*** 21 MPER 47 (2008); ***Allendale Pub Sch,*** 1997 MERC Lab Op 183, 189; ***City of Westland,*** 1987 MERC Lab Op 793, 797.

[19] Notably, the NLRB has held it to be unlawful for an employer to conceal from the bargaining representative of its employees its intentions with respect to downsize future operations. ***Valley Mould and Iron Co***, 226 NLRB 1211 (1976). Specifically, the Board has held that an employer may not lawfully hide its intention to take drastic, unforeseeable action, in circumstances where such concealment occurred in circumstances preventing a union from taking steps through negotiation and economic action to protect represented employees. *Id.; see also* ***Royal Plating and Polishing Co, Inc***, 160 NLRB 990, 994 (1966); Standard Handkerchief Co, Inc, 151 NLRB 15 (1965). Respondent offers no evidence to support any claim that it discussed the layoff of chemists with Charging Party.

[20] Importantly, no specific format is required to constitute a bargaining request. Rather, an employer must know that a request is being made and there must be a statement or action by the employer that would constitute a refusal to honor the request. ***Macomb County***, 1998 MERC Lab Op 344; ***Michigan State University***, 1993 MERC Lab Op 52 at 63.

Therefore, Respondent violated its duty to bargain pursuant to Section 15(1) of PERA. According to Simoliunas, SCATA would have insisted on stricter educational requirements for the selection of the new chemist position. (Tr. Vol 1 pg 115-116) Instead, a standard was set in which all applicants with a bachelor in science met "minimum" educational requirements and the review of their educational requirements essentially ended there. (Tr. Vol 4 pg 184; ***Exhibit 16)*** Several individuals selected had degrees in fields outside of chemistry. (Tr. Vol 1 pg 116)

V. The Respondent Violated PERA When It Selected the Simoliunas, Vannilam, Kovoor, and Jacob for Layoff due to their Union Activity

The present charge, as filed, alleged that Respondent's unsupported failure to place Simoliunas, Vannilam, Kovoor, and Jacob, Respondent's subsequent treatment of these individuals during selection of laid off chemists for recall and placement in outside positions, the failure to recall Charging Party, and the subsequent denial of interviews and opportunity for Charging Party even though several positions opened up, were done to interfere with and in retaliation for Charging Party's Section 9 rights and constituted unlawful discrimination against him in violation of Section 10(1)(a) and (c) of PERA.

MCL 423.210(1)(a) provides that a public employer shall not "[i]nterfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9." Section 9, MCL 423.209(1)(a), provides, in part, that public employees may "engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection[.]" An employer may not discharge an employee for exercising rights guaranteed by section 9. ***Ingham County***, 275 Mich App at 143. MCL 423.210(1)(c) provides that a public employer shall not "[d]iscriminate in regard to hire, terms, or other conditions of employment to encourage or discourage membership in a labor organization." In order to establish a violation of Section 10(1)(c), Charging Party must present substantial evidence establishing that Respondent had an illegal motive for the action constituting the

unlawful discrimination. ***Lake Erie Transportation Commission***, 16 MPER 21 (2003); Rochester Sch Dist, 2000 MERC Lab Op 38, 42. However, proof of unlawful motive is not required for a violation of Section 10(1)(a). ***City of Inkster***, 26 MPER 5 (2012).

In ***Napoleon Cmty Sch,*** 1982 MERC Lab Op 14, the Commission adopted the test formulated by the National Labor Relations Board in ***Wright Line, Division of Wright Line, Inc***, 251 NLRB 1083 (1980), enf' d, 662 F2d 899 (CA 1, 1981), cert den, 455 US 989 (1982), for determining employer motivation when discriminatory action is alleged. *See also* ***City of Detroit (Housing Dep' t),*** 1989 MERC Lab Op 547 aff' d, unpublished opinion of the Court of Appeals, decided February 13, 1991 (Docket No. 119519); ***Walled Lake Cmty Sch***, 1985 MERC Lab Op 575. Under the Wright Line test, the charging party must first make a prima facie showing sufficient to support the inference that union or other protected concerted activity was a "motivating or substantial factor" in the employer' s decision to take action adverse to an employee, despite the existence of other factors supporting the employer' s actions. Once the prima facie case is met, the burden shifts to the employer to produce credible evidence 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. *See also* ***MESPA v Evart Pub Sch***, 125 Mich App 71 (1983).

a. Charging Party performed a significant amount of protected activity directly involving Respondent, specifically the decisionmaker Jurban, of which he was aware of

The Charging Parties had brought numerous concerns to Jurban's attention and none had been resolved. (Tr. Vol 2 pg. 271) Further, from 2011 until the present, no one besides Simoliunas, Kovoor, and Vannilam participated in bargaining on behalf of SCATA. (Tr. Vol 4 pg 44)

In 2013, Charging Party filed a grievance challenging Jurban and Respondent regarding overtime. (*Jurban,* Tr. Vol 4 pg 146) Specifically, Kovoor and Simoliunas notified management

that the senior chemists were stealing money through fabricating overtime to enrich themselves. As a result, WWTP Assistant Director Mr. Smalley notified Jurban that overtime for supervisors at the Analytical lab had to be pre-approved from Smalley's office. He appointed his representative Mr. Fresh as the enforcement officer of his new policy in 2013. (Tr. Vol 4 pg 138) Jurban acknowledges these events and that the approval of overtime was a direct result of a complaint by SCATA. (Tr. Vol 4 pg 146) According to Kovoor, the event left a lasting impression on Jurban, Peindl, Kuriacose. (Tr. Vol 3 pg 75-76, 80) In retaliation to the complaint, Kuriakose stopped providing Kovoor with assignments on Tuesdays and Thursdays and instead made him work as a floater and habitually skip him for overtime. (Tr. Vol 3 pg 80). Around the same time, Cicy Jacob was removed from her QC position resulting in a grievance. (Tr. Vol 3 pg 95) In another example, both Kovoor and Jacob complained to Jurban regarding being passed up for GC analysis by chemists with junior seniority. (Tr. Vol 3 pg 72)

Next, Concerted activity, which includes activity undertaken by one employee on behalf of others, is protected by PERA even in the absence of the participation or authorization of a labor organization. *See* ***City of Detroit (Police Dep't***), 19 MPER 15 (2006); ***City of Saginaw***, 23 MPER 106 (2010); ***Hugh H Wilson Corp v NLRB***, 414 F2d 1345, (CA 3, 1969). Individual action is concerted if "the concerns expressed by the individual are [a] logical outgrowth of the concerns expressed by the group." ***C & D Charter Power Systems, Inc***, 318 NLRB 798, 798 (1995), *citing* ***Mike Yurosek & Son***, 306 NLRB 1037, 1038 (1992), enf'd 53 F3d 261 (CA 9, 1995)[21].

In 2012, when Sue McCormick became Director of DWSD, Vannilam immediately sent her a letter on behalf of SCATA notifying her of several ongoing issues in the lab. ***(Exhibit 97;***

[21] Given the similarity between the language of §§ 9 and 10(1)(a) of PERA and § § 7 and 8(a)(1) of the National Labor Relations Act (NLRA), the Commission is often guided by Federal cases interpreting the NLRA. ***MERC v Reeths-Puffer Sch Dist***, 391 Mich 253, 260 (1974), ***Detroit Police Officers Ass'n v Detroit***, 391 Mich 44(1974) and ***Univ of Michigan Regents v MERC***, 95 Mich App 482, 489 (1980).

Tr. Vol 5 pg. 275) In the letter, Vannilam *explicitly referenced Jurban as being incompetent and complaints being unresolved.* (***Exhibit 97;*** Tr. Vol 5 pg. 277) McCormick responded acknowledging SCATA's complaints. (Tr. Vol 5 pg. 278) In response, Vannilam sent a second letter to McCormick stating that the problems are still prevalent and against references Jurban by name. (Tr. Vol 5 pg. 281; ***Exhibit 98***) Although Jurban denied knowledge of the complaints directly, he later stated that any reports to McCormick would have been brought to his attention. (Tr. Vol 5 pg. 239)

In Spring 2015, Respondent attempted to move several Operations Lab chemists into new "Waste Water Technician" titles. SCATA immediately opposed the suggestion. ***(Exhibit 63)*** SCATA, specifically Simoliunas, wrote a letter to Daddow insisting that Respondent allowed unskilled individuals to perform chemist work and that the actual chemists were being stripped of their chemist titles. (Tr. Vol 1 pg. 77) Daddow responded stating that he would contact Sue McCormick and two weeks later SCATA were given their chemist titles back. (Tr. Vol 1 pg. 88)

Next, Vannilam had previously complained regarding parties being held in the lab involving Jurban, Kuriakose and their allies in the lab. (Tr. Vol 5 pg. 272-273) According to Vannilam, all the chemist who attended these parties with Jurban were hired for New Chemist Positions. (Tr. Vol 5 pg. 274)

Charging Party is also being retaliated against for outspoken political advocacy on behalf of its members. The Sixth Circuit opined the following in regards to political advocacy protection under PERA stating:

> To represent their members effectively, public sector unions must necessarily concern themselves not only with negotiations at the bargaining table but also with advancing their members' interest in legislative and other "political" arenas . . . and hold that lobbying and similar "political" activities by a public employee union that are 'pertinent to the duties of the union as a bargaining representative . . .'"

NEA, MEA, Ferris Faculty Ass'n, 2 MPER P 20145 (6th Cir 1989) (quoting ***Robinson v. State of New Jersey***, 741 F2d 598 (3d Cir1984)). Most importantly, MERC has held that employees engage in "protected activity" when they advocate and engage in political activities that directly relate to immediate working conditions. ***City of Detroit***, 5 MPER P 13153 (1982).

Here, Charging Party made complaints to City Council regarding issues in DWSD on numerous occasions, including vocal opposition to the EMA contract which ultimately led to the layoffs. (Tr. Vol 5 pg. 286; Tr. Vol 3 pg. 44-46) Notably, DWSD board members were present. (Tr. Vol 3 pg. 46) Regardless, Charging Party brought these same complaints to Jurban and Peindl. (Tr. Vol 5 pg. 287) Charging Party also contacted the Wayne, Oakland, and Macomb County Chiefs complaining about management and suggestions for improvement. (Tr. Vol 3 pg 102)

In 2009, SCATA contacted MIOSHA regarding an explosion in the lab. (Tr. Vol 1 pg. 133-134) Concurrently, SCATA submitted a request to request to Respondent seeking the removal of Jurban confidant Kuriakose for his connection to the incident and for fears of safety in the lab[22]. (Tr. Vol 2 pg. 196-198; Tr. Vol 3 pg 52) The incident was the second of two explosions. (***Exhibit 92***) Kuriakose, the supervisor at the time, had already been warned of explosion risks after the first incident but negligently took no action. (Tr. Vol 5 pg. 297) Kovoor wrote the director of DWSD and stated that the violation resulted from Kuirakose's willful negligence. (Tr. Vol 3 pg 54) Ultimately, MIOSHA fined DWSD as a result of the explosion partially because an employee was not properly trained[23]. (Tr. Vol 4 pg 161, 164; Exhibit 92, 93) Jurban testified that Charging Party, specifically Simoliunas, Kovoor, and Vannilam, participated in the MIOSHA hearing adversarial to DWSD and requested that the fine not be reduced and that Kuriakose be removed. (Tr. Vol 4 pg

[22] Notably, Kuriakose reviewed the Self-Assessments of Vannilam and Kovoor even though he was not their supervisor, had frequent conflict with the Charging Party, and was applying for the same New Chemist Position. (Tr. Vol 2 pg. 194-196)

[23] This employee and his supervisor were both retained for New Chemist Positions. (Tr. Vol 4 pg 168)

166-167, 130-131; ***Exhibit 93***) This is not the only time Charging Party complained to MIOSHA regarding Respondent. (Tr. Vol 5 pg. 282-283) Charging Party also contacted MIOSA regarding untrained chemists pouring chlorine into the river. (Tr. Vol 1 pg. 137) MIOSHA came in and met with Simoliunas and the waste treatment plant manager (Jurban). (Tr. Vol 1 pg. 136)

Jurban testified of his memory of SCATA filing a complaint with MDEQ regarding BOD testing and investigation was held in which he and the Charging Party participated. (Tr. Vol 4 pg 169-170) Jurban represented the Respondent during the investigation. (Tr. Vol 3 pg 98) Charging Party alleged reported that the BOD testing was not being done properly and that testing results were being compromised. (Tr. Vol 4 pg 169) Kovoor specifically named Jurban and Peindl responsible for the issues. (Tr. Vol 3 pg 98) It is possible that this, or other reports from SCATA, are the MDEQ reporting directly referenced by Cox within his December 14, 2012 Order. ***(Exhibit 5 at pg. 3)***

In November 2012, SCATA, signed by Vannilam and Kovoor, submitted a complaint statement to the EPA lambasting the Waste Treatment Plant Analytical lab's leadership. ***(Exhibit 99)*** Within the statement, SCATA specifically discusses how the lab supervisor (Jurban) does not even have a chemistry degree and has no clue what he is doing. ***(Exhibit 99)***

b. <u>The Respondent's Treatment, timing and other evidence, demonstrates anti-union animus and the Respondent cannot offer any evidence reasonably supporting its decision therefore discrimination can be inferred from the facts</u>

Where discriminatory conduct is alleged, a charging party is required to demonstrate that protected conduct under PERA was a motivating or substantial factor in the employer' s action. ***Mich Ed Support Personnel Ass' n v Evart Pub Sch,*** 125 Mich App 71, 74; 336 NW2d 235 (1983). After charging parties' showing, the burden shifts to the employer to produce evidence that the same action would have taken place in the absence of the protected conduct. *Id.* Where the employer meets the burden of challenging charging party' s prima facie case, the burden shifts back to charging party. *Id.*

According to Jurban, it was the analytical lab that needed to reduce its number of chemists. (Tr. Vol 4 pg 62) Yet, within a year or so, the analytical lab hired more chemists and retains a greater number than prior to the layoff. (Tr. Vol 4 pg 139-140)

i. Respondent's decision to place other chemists over George Vannilam in New Chemist Positions is not supported by evidence

George Vannilam was hired as an analytical chemist in 1989 and has an extensive background in chemistry. (Tr. Vol 2 pg 148, 155) Vannilam possesses a master's degree in chemistry and has taught college level chemistry for around 35 years. (Tr. Vol 2 pg 155) Vannilam holds an MBA with Hazardous Waste Management as a core subject and is a Certified Hazardous Materials Manager (CHMM) certificate at the Master Level. ***(Exhibit 1.cccc)*** He has never received any discipline or had any attendance problems. (Tr. Vol 2 pg 155-156) At the time of the layoff, Vannilam was the Vice-President of SCATA. (Tr. Vol 2 pg 156)

Vannilam filled out a Self-Assessment with DWSD although he received no communication regarding the purpose of doing so. (Tr. Vol 2 pg 179-180, 182; ***Exhibit 1.cccc***) Like others, Vannilam filled out the Self-Assessment because he thought it was to determine what Class of Chemist he would be placed as. (Tr. Vol 2 pg 182-183) Vannilam was never notified he could potentially be laid off or was given the impression that it was possible. (Tr. Vol 2 pg 183) According to George, he was assured by Sue McCormick, Conerway, and his supervisor Joseph Peindl that no chemists would be laid off. (Tr. Vol 2 pg 184, 186, 193) Like the others, Vannilam first learned he was being laid off on September 30, 2015. (Tr. Vol 2 pg 202; ***Exhibit 15***)

Vannilam exceeded all the requirements for the New Chemist position. (Tr. Vol 2 pg 182). He was trained in all areas of the analytical lab and worked in the TC lab for five years analyzing PCB. (Tr. Vol 5 pg 288) He also performed BOD and oil and grease analysis. (Tr. Vol

5 pg 290) Notably, however, his assessment was reviewed by an individual Vannilam previously reported to the EPA, and MIOSHA relating to an explosion in the lab. (Tr. Vol 2 pg 194-199). Further, the chart created by Jurban utilized in selecting New Chemists listed Vannilam as only having Solids, Phosphate, and Cyanide. (***Exhibit 90)***. Vannilam was able to list numerous individuals retained for New Chemist positions that he was more skilled than or trained. (Tr. Vol 5 pg 299-302)

According to Jurban, he did not recommend Vannilam because he already selected multiple chemists with the same experience. (Tr. Vol 5 pg 236) But why was Jurban not viewing them concurrently rather than selecting them and looking at Vannilam? Jurban listed that Vannilam only had experience doing PCB testing, however openly admitted George had experience doing Oil and Grease testing and BOD testing but it was not considered or listed to be reviewed with McNeely. (***Exhibit 90;*** Tr. Vol 5 pg 236-237)

ii. Respondent's decision to place other chemists over Jacob Kovoor in New Chemist Positions is not supported by evidence

Jacob Kovoor was hired as an analytical chemist with DWSD in 1991 and was in the top seven chemists in regards to seniority. (Tr. Vol 3 pg 5,8) Kovoor had a bachelor's degree in chemistry and was certified by the National Registry of Chemists, Certified Chemists Association and the Michigan Environmental Water Association as a laboratory analyst. (Tr. Vol 3 pg 8-11; ***Exhibit 72***) Further, Kovoor possessed the requisite D License and the city congratulated him on the accomplishment. (Tr. Vol 3 pg 8, 12; ***Exhibit 71, 73***) By all metrics, Kovoor was qualified for the New Chemist Position and had experience in instrumentation, ICP and trace metals. (Tr. Vol 3 pg 70-72; ***Exhibit 94***)

Kovoor filled out a Self-Assessment because he thought it was to determine whether he would be placed as a Chemist I or II. (Tr. Vol 3 pg 63; ***Exhibit 1.hh***) Kovoor had no discipline

timely for consideration of his Self-Assessment/Placement. (Tr. Vol 3 pg 84-85) Further, Jurban acknowledged that no discipline was considered in the decision not to recommend Kovoor. (Tr. Vol 4 pg 149) Kovoor was shocked he was laid off and had no idea he could be potentially laid off. (Tr. Vol 3 pg 85-86) Kovoor never received an explanation why he was selected for layoff. (Tr. Vol 3 pg 88) Kovoor applied to be recalled and for several positions from the point of his layoff until about May 2016, but never received a single interview. (Tr. Vol 3 pg 88-89)

Despite his demonstrably superior qualifications, Jurban alleges he did not "recommend" (or select) Kovoor because he "had a less diverse skill set" than those retained. (Tr. Vol 5 pg 219) A simple review of the chart Jurban created regarding various chemist skills highlights this implicit bias against Kovoor. ***(Exhibit 90)*** In regards to considered skills, Jurban *only* listed that Kovoor had skills in BOD testing. (Tr. Vol 5 pg 220; ***Exhibit 90***) Yet, quickly acknowledges that Kovoor worked in the metal group for *six years* and tested trace metal but didn't list it. (Tr. Vol 5 pg 220-221). Jurban stated that he recommended another employee, Aruna Mandava because of her LIMS experience, but admits that Kovoor reached out years earlier seeking this training but was denied the training. (Tr. Vol 5 pg 231-232; ***Exhibit 79***) Yet, the same LIMS system is used at the date of the hearing. (Tr. Vol 5 pg 232)

Aside from acknowledging the entirely subjective nature of selection of chemists in waste treatment, the single most telling line of testimony during the hearing on this matter may be when Jurban unambiguously stated that he considered Kovoor's "attitude" in deciding not to place him as a New Chemist and not just his skills. (Tr. Vol 5 pg 227) This admission can easily be extended the decision to layoff each active union Charging Party—remove the troublemakers.

iii. Respondent's decision to place other chemists over Cicy Jacob in New Chemist Positions is not supported by evidence

Cicy Jacob worked with DWSD as an analytical Chemist for 24 years making her sixth in seniority out of seventeen chemists. (Tr. Vol 1 pg 183-184, 187) Ms. Jacob was a member of SCATA and the wife to SCATA Secretary Jacob Kovoor. (Tr. Vol 1 pg 185) Ms. Jacob possessed a Bachelors, a Master degree in chemistry, and was awarded a Wastewater Operator License by the State of Michigan. (Tr. Vol 1 pg 185, 187) Ms. Jacob was certified by the National Registry of Chemists after passing their competency exam. Ms. Jacob also the D License required to work in the New Chemist Position. (Tr. Vol 1 pg 185; ***Exhibit 33***) Ms. Jacob has no discipline or attendance issues on her record. (Tr. Vol 1 pg 187)

Ms. Jacob filled out a self-assessment but did so under the belief that it was to be placed as a Chemist II. (Tr. Vol 1 pg 187-188; ***Exhibit 1.w***). Ms. Jacob had no idea she could potentially be laid off until she received her layoff notice on September 30, 2015. (Tr. Vol 1 pg 190-191; ***Exhibit 15***) To date, she has never received an explanation as to why she was not selected or provided any interviews. (Tr. Vol 1 pg 191-192) Without question Ms. Jacob was more qualified than several individuals selected for New Chemist Positions. In fact, she even trained several individuals who were selected, including Rosilay Jais. (Tr. Vol 1 pg 192-193)

Jurban alleges he did not select Ms. Jacob because she too did not have diversity in skill set. (Tr. Vol 5 pg 239-240) Like the others, Jurban only listed a single skill, oil and grease, even though he admitted she had several other skills. (Tr. Vol 5 pg 240) Jurban admits she had BOD testing experience. (Tr. Vol 5 pg 240) Jurban admits she had performed trace metal and mercury analysis. (Tr. Vol 5 pg 250) He admits she worked in quality assurance for years and even that he remembered she filed a grievance when she was unwillingly taken away from the department. (Tr. Vol 5 pg 250) All of these skills were omitted from consideration and the Employee Skill

Chart. (Tr. Vol 5 pg 251; ***Exhibit 90***) When confronted, Jurban unreasonably suggests that he didn't add those skills because he had already selected individuals to perform those skills. (Tr. Vol 5 pg 251) Only two conclusions can be drawn from that statement: 1) Jurban selected people before considering anyone's skills; or 2) Jurban figured out how to place those you wanted then listed the skills of the remaining chemists. Both demonstrate implicit discrimination.

iv. Respondent's decision to place other chemists over Saulius Simoliunas in New Chemist Positions is not supported by evidence

Dr. Saulius Simoliunas started at DWSD in 1981 and had the high seniority of any chemist in the water treatment plant at the time of the layoffs. (Tr. Vol 1 pg 25-27) Simoliunas possesses a PHD in Chemistry. (Tr. Vol 1 pg 27). At all times relevant to this matter, Simoliunas served as President of SCATA and oversaw bargaining, grievances, and advocacy for the SCATA union. (Tr. Vol 1 pg 28, 31, 33-34)

It is documented and acknowledged by Respondent that Simoliunas received an accommodation from DWSD which allowed him to only work on the day shift and not be assigned overtime. (Tr. Vol 1 pg 29) Additionally, Simoliunas stopped driving around 2014, however he never had to drive as a Water Systems Chemist. (Tr. Vol 2 pg 7, 121-122) Jurban acknowledges knowing of these accommodations. (Tr. Vol 4 pg 104-105)

It is undisputed that Simoliunas did not fill out a Self-Assessment. (Tr. Vol 1 pg 94) However, no one told him he needed to fill out one to be considered for a job and he knew he risked not being considered for a position if he did not. (Tr. Vol 1 pg 95-96) Further, Simoliunas notified HR Conerway that he did not believe he was required to. (Tr. Vol 1 pg 94) Additionally, no disciplinary history was considered in the decision not to recommend Simoliunas for a New Chemist Position. (Tr. Vol 4 pg 149)

Importantly, Jurban *admits* that Simoliunas *was* considered for a position, but the actual reason he was not selected was allegedly because he was physically unable to perform the requirements of the job. (Tr. Vol 4 103-104, 143; Tr. Vol 5 pg 252) Yet, Jurban later admits that Simoliunas could have worked the accommodated schedule and really didn't have to drive. (Tr. Vol 4 pg 144) Also, that no chemists were ever pressured to work overtime. (Tr. Vol 5 pg 210) When confronted on this contradiction, Jurban shifted his alleged reason for not recommending Simoliunas to him not possessing the proper "skill set." (Tr. Vol 4 pg 145; Tr. Vol 5 pg 253) Within minutes, Jurban admitted Simoliunas performed analytical work for over 25 years and also worked in the operations lab. (Tr. Vol 5 pg 253) He also acknowledges Simoliunas wrote several of the lab protocols still utilized. (Tr. Vol 5 pg 253-254) Most importantly, Jurban hired another chemist, Rasikal Patel, directly out of the operations lab even though he has *never* worked in the analytical lab. (Tr. Vol 4 pg 145-146)

vi. The Subjective Bias of the Placement of Chemists in the Waste Treatment Plant is self-evident

It is well established above that those placed in New Chemist Positions were exclusively done so by the subjective opinions of Jurban who freely admits he did not follow the placement procedure. Additionally, HR Conerway admits that she played no role in those selected for New Chemist Positions by Jurban. (Tr. Vol 6 pg 389) Unfortunately, Jurban had numerous reasons for wanting to utilize this reorganization as an opportunity to remove those who have consistently challenged him, reported him, and sought his removal.

The contentious history between Jurban and Simoliunas, Kovoor, and Vannilam is well documented. Vannilam characterized the relationship as terrible professionally and personally. (Tr. Vol 5 pg. 271) The depth of Charging Party's poor relationship with Respondent, and

specifically Jurban, is well documented throughout this brief. However, a few additional capstones points are worth noting.

The most important fact regarding the layoff, is that after recalls, only six chemists were involuntarily laid off[24]. Four of these six individuals represent the entire elected board of SCATA and the Secretary's wife, Cicy Jacob. On the other hand, the most important document in demonstrating Jurban's bias against the Charging Parties is the Employee Skill Chart he created to explain placement recommendations to McNeely. ***(Exhibit 87-90)*** Importantly, Jurban allegedly listed the all of individual's skills which were important to him and was "entered at the time of my discussion with Mr. McNeely." (Tr. Vol 5 pg 241-244) Indeed, the documents are what Jurban showed McNeely when discussing who to place in New Chemist Positions. (Tr. Vol 5 pg 244) The bias is shown by the thorough inclusion of skills for *everyone* except the Charging Parties. As discussed above, Jurban openly admitted that the individual Charging Parties' possessed several of the sought-after skills listed *ad nauseam* for other chemists, but when referencing Charging Party Jurban claimed it was "not possible to clearly list a huge array, but I was looking at those skill sets that are still important to get accomplished in the lab." (Tr. Vol 5 pg 240) Yet, the *exact* skills he acknowledges the Charging Parties possess but are omitted *are listed for the other chemists in full.* ***(Exhibit 87-90)*** Further, Jurban admits that employees can be trained on various skills if they're assigned to it, but essentially treats the Charging Parties like beat old dogs. (Tr. Vol 5 pg 224)

[24] *See Exhibit 82 (List of Chemists Laid off to Semegen)* Testimony demonstrates that all but five names on this list have been 1) recalled or offered a position—Abdul Rahman, Lissy Joseph, Rosilay Jais, Betty Korela; or chose to remain laid off—Anitha Kuriakose and Basma Saleh (Tr. Vol 4 pg 121-123; ***Exhibit 83-84***). Aside from the Charging Party, the only other chemists laid off *anywhere in DWSD* were Annie Parayil and Bindu Kallumkal. However, these two were both at least recommended for positions at some point. ***(Exhibit 85 pg. 2)*** Collectively, Simoliunas, Vannilam, Kovoor, and Jacob were the *only* employees laid off and not recommended for other positions.

The bias is also demonstrated in light of how other plants handled potential layoffs. Unlike waste treatment, all freshwater chemists who were not placed were notified of other positions or jobs they could apply for. (Tr. Vol 5 pg 360) The same courtesy was not extended to the Charging Party by Respondent. According to DWSD Freshwater Operations Director Terry Daniels, all previous chemists were placed in New Chemist Positions or other jobs by Fall 2015. (Tr. Vol 5 pg 355)

vii. The Individual Charging Party Members are demonstratively more skilled than individuals hired

Jurban's reasoning in the selection of Vannilam, Kovoor, Simoliunas, and Jacob for layoff instead of chemists with less seniority, experience and skills is riddled with hypocrisy. First, Jurban explicitly testified that a chemist with a D license is more valuable than one without. (Tr. Vol 4 pg 150) Yet, the only New Chemist placed in the analytical lab who had one is Aruna Mandava—a senior chemist[25]. ***(Exhibit 87; Exhibit 1.mm)*** Meanwhile, Jacob Kovoor and Cicy Jacob possessed a D license and were laid off. ***(Exhibit 33, 71, 73)***

Next, the overwhelming majority, if not all, of individuals placed in New Chemist Positions were found to not be able to perform all of the skills they listed in their self-assessments at a competency of a Level 1 or 2. ***(See Exhibit 1 pg. 3-4 #of all retained New Chemists in Waste Treatment)*** Several others listed they could and their supervisors disagreed. ***Id.*** Yet, both Kovoor and Vannilam were found to be able to perform all required skills at a competency of Level 1 or 2. ***(Exhibit 1.hh; Exhibit 1.cccc)*** It's reasonable to assume Simoliunas

[25] The following individuals were placed as New Chemists Positions in the analytical lab without a D license: Dilawara Begum ***(Exhibit 1.d)***, Kuriakose Cheeramvelil ***(Exhibit 1.j)***, Lissy Joseph ***(Exhibit 1.x)***, Pauline Julien ***(Exhibit 1.v)***, Jose Lucose ***(Exhibit 1.kk)***, Vijay Mahendra ***(Exhibit 1.mm)***, Nainsh Patel ***(Exhibit 1.bbb)***, Joseph Peindl ***(Exhibit 1.eee)***, Gayatri Pinnamaneni ***(Exhibit 1.fff)***, Vincen Raju ***(Exhibit 1.kkk)***, and Mini Ramankutty ***(Exhibit 1.lll)***

could as well as he wrote the protocols utilized in the lab and had seniority over all other chemists.

Next, Jurban testified that he considers someone with a PHD or advanced degrees in chemistry more valuable than someone with a bachelor's degree in a non-chemistry science. (Tr. Vol 4 pg 183) Despite this, Jurban didn't look into anyone's educational background as everyone met the "minimum" educational requirements. (Tr. Vol 4 pg 184) Had he, Jurban would have realized Simoliunas, Kovoor, Vannilam and Jacob all have advanced degrees in chemistry. ***(Exhibit 1.hh, Exhibit 1.cccc; Exhibit 1.c)*** A significant portion of those retained for new chemist positions do not.

Individually, several of those retained for New Chemist Positions demonstrate bias in hiring as well. Jurban explicitly stated he factored in Mini Ramankutty's participation in the EMA organizational development in his decision to recommend her. (Tr. Vol 4 pg 116) This opportunity was not offered to the Charging Party.

Jurban recommended Pauline Julian because she can perform LIMS. (Tr. Vol 4 pg 116) Yet, denied Kovoor training on the same technology years prior because it was allegedly "obsolete." (Tr. Vol 4 pg 117; ***Exhibit 79***)

Jurban offered a New Chemist Position to Basma Salah even though her skills only involved purchasing and stock room. (Tr. Vol 4 pg 175; ***Exhibit 90; Exhibit 84***) However, Jurban adamantly insisted that it is easier to teach a stock room clerk how to do chemistry than a chemist to handle stock. (Tr. Vol 5 pg 212-214).

Jurban recommended Dilwara Begum, although he had significant attendance issues which would have placed him on a different class level under the Placement Procedure if it were actually followed. (Tr. Vol 3 pg 111-112; ***Exhibit 1.d; Exhibit 9***) Likewise, Jurban

recommended Raja Marcos even though he had nine occurrences and a suspension. (Tr. Vol 4 pg 179; ***Exhibit 1.oo***) In addition to these folks, Benedict Santiago (9 occurences; ***Exhibit 1.ss***), Mary C. Ryan (8 tardies; ***Exhibit 1.ooo***), Vijay Valencha (7 occurences and 4 tardies; ***Exhibit 1.bbb***), and Saiyad Ashifali (6 occurences and 7 tardies; ***Exhibit 1.c***) were placed even though they had excessive occurrences which would have placed them in a class beneath Simoliunas, Vannilam, Kovoor, and Jacob had the Placement Procedure actually been followed. ***(Exhibit 9)*** Each of these individuals was close with Jurban. None of the Charging Party had applicable discipline or attendance issues. ***(Exhibit 1.hh, Exhibit 1.cccc; Exhibit 1.c)*** Again, however, Jurban admits he never reviewed discipline or attendance even though it was required by the Placement Procedure. (Tr. Vol 4 pg 180-181; ***Exhibit 9)***

Jurban recommended Gayati Pinnameni because of a wide range of skills. (Tr. Vol 4 pg 114) However, admits she has never done any external quality sampling. (Tr. Vol 5 pg 256)

Jurban recommended Kuriakose because of his ability to multi-talk. (Tr. Vol 4 pg 110) However, confirms Kuriakose was the supervisor at the time of an explosion in the lab which led to an investigation by the EPA, MIOSHA, and the Department of Homeland Security and a fine. (Tr. Vol 4 pg 113)

viii. Continued violations demonstrate Respondent's intentions regarding layoffs in Waste Treatment

The record developed at the hearing also reflects that the same issues which led to the lawsuit with the EPA exist today. It is noted that this itself is not evidence that Respondent did not intend to remedy these longstanding issues as ordered by Cox, but instead an opportunity to remove its long-time adversaries within. However, one must inquire whether it is even reasonable to suggest that the actions taken by the Waste Treatment Plant, the exact site of the violations, can possibly be attributed to an effort to remedy the violations. How could

downsizing chemists in the location of the violation possibly resolve adequately testing issues and bring Waste Treatment in compliance? Why layoff Simoliunas, Vannilam, Kovoor, and Jacob when there are existing openings for chemists and the amount of chemist positions will increase to an amount greater than pre-layoff levels within a year? Why keep employees in the dark regarding efforts to get in compliance? Why not seek input from the unions as to their beliefs on how to resolve these issues?

VI. **The Respondent Violated PERA By Denying the Charging Parties Opportunities for Placement and Recall following the initial Layoff notice that it was providing to other employees due to their Union Activity**

The record show that several of the individuals initially listed for layoff were recalled or placed elsewhere in a secretive manner. These positions were not posted internally or publicly and notice was not provided to other affected employees, specifically the individual Charging Party members. (Tr. Vol 4 pg 11-12). HR Conerway acknowledges that these jobs were not all posted. (Tr. Vol 6. Pg. 380). Instead, recalls were also selected through the internal recommendations of Jurban and Kuriakose. (Tr. Vol 4 pg 15).

At least one employee was recalled to work at Water Works Park. According to Semegen, the Manager at Water Works Park, she only spoke to individuals who contacted her directly regarding open positions recalled following the October, 2015, layoff. (Tr. Vol 4 pg 7, 16, 23). She did not base the hiring decision on any review of the self-assessments, disciplinary history or even consult HR. (Tr. Vol 4 pg 27-29l; *see also Conerway at* Tr. Vol 6 pg 389) Semegen simply went with who was recommended by Jurban and Kuriakose and assumed they had reached out to everyone. (Tr. Vol 4 pg 15, 34-35) Ultimately, Semegen offered the open position to Abdul Rahman and Rosilay Jais because they "seemed eager to work" by showing initiative reaching out to her directly. (Tr. Vol 4 pg 38) Semegen emailed at least Rosilay Jais and told her to keep

the opening secret. (Tr. Vol 4 pg 18-19; ***Exhibit 83***). The record clearly establishes that the Charging Parties were denied equal opportunity to apply for these jobs although they possessed requisite skills and licenses specifically cited by Semegen as the "strong" factors she considered—D license, chemistry background, and teaching chemistry at a community college[26]. (Tr. Vol 4 pg 15, 38)

Alarmingly, Lake Huron Plant Manager Christopher Steary testified that there was an opening in Port Huron during the restructuring that wasn't filled until April 2016. (Tr. Vol 7 pg. 575-576) According to Steary, the Port Huron plant was "very short on chemist positions" and were "desperate to get someone in." (Tr. Vol 1 pg. 567) Ultimately, an individual was hired for the position. Steary quipped that he knew she was qualified because she came from the waste treatment analytical lab. (Tr. Vol 7 pg. 579) Yet, the individual Charging Party members, who also worked in the analytical lab for *decades* longer received no word of this opening and were not recommended or suggested by Jurban or Kuriakose.

Additionally, two analytical chemists, Jose Lukose and Vijay Mahendra continued to work as analytical chemists in the waste treatment plant without being laid off at all even though they had less seniority than each of the individual Charging Party chemists. (Tr. Vol 4 pg. 188)

During this period of recalls, Ms. Jacob specifically emailed Conerway and Mary Lynn Semegen seeking to be placed in opening. (Tr. Vol 1 pg 193-194; ***Exhibit 34-35***) She emailed Semegen when she learned that Respondent was secretly telling people to apply for open positions which were not posted anywhere but was informed the position was allegedly filled at that point. (Tr. Vol 1 pg 194; ***Exhibit 34***) She emailed Conerway and received no response at all. (Tr. Vol 1 pg 196; ***Exhibit 35***) Ms. Jacob has never been offered a single interview since her

[26] Sadly, Abdul Rahman does not actually teach chemistry at a community college. Yet, George Vannilam has taught chemistry at a college level consistently for around 35 years. (Tr. Vol 2 pg 155)

layoff despite several other chemists being recalled, placed elsewhere, and new hires coming in. (Tr. Vol 1 pg 197) Likewise, Jacob Kovoor applied to be recalled and for several positions following his layoff but has not received a single interview for any of them. (Tr. Vol 3 pg. 89)

Vannilam was never offered any subsequent employment following his layoff despite having significant skills and seniority to those recalled or hired. (Tr. Vol 5 pg. 299) Nor was Simoliunas, Kovoor or Jacob. It is without question the Master Agreement specified reductions of workforce and recalls to be done by seniority. ***(Exhibit 8)*** However, the CET also calls from recalls to be done according to seniority. ***(Exhibit 10 at pg. 17-18)*** Despite Respondent's insistence that the CET applied to the parties, this term was also ignored. Jurban openly admits seniority was not followed. (Tr. Vol 4 pg 78)

A simple review of the record demonstrates: 1) the placement of chemists in Waste Treatment was done subjectively by exclusively by Jurban; 2) Jurban has a demonstrable bias against Simoliunas, Vannilam, Kovoor, and Jacob; 3) Jurban was aware that Charging Party habitually sought his removal and filed complaints regarding his incompetence; 3) Jurban can present no reasonable facts defending his subjective selections in regards to placement in the New Chemist Positions, layoffs and recalls; and 4) the justifications provided by Jurban on the record are preposterous.

CONCLUSION

WHEREFORE, Charging Party requests that the Administrative Law Judge issue an order in favor of Charging Party on all counts and making Charging Party whole for all damages resulting from Respondent's violations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2017, I served a copy of the ***Charging Party's Post Hearing Brief*** upon Respondent's counsel, Steven Schwartz, via email and certified mail to Steven H. Schwartz & Associates, P.L.C. 26555 Evergreen Road, Suite 1240, Southfield, MI 48076.

/s/ Jack W. Schulz