STATE OF MICHIGAN

COURT OF APPEALS

DETROIT WATER AND SEWERAGE DEPARTMENT,

Respondent-Appellee,

v

SANITARY CHEMISTS AND TECHNICIANS ASSOCIATION, SAULIUS SIMOLIUNAS, GEORGE VANNILAM, JACOB KOVOOR, and CICY JACOB,

Charging Parties-Appellants.

UNPUBLISHED
October 22, 2020

No. 350171
MERC
LC No. 00-000144

Before: STEPHENS, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Charging parties Sanitary Chemists and Technicians Association ("SCATA"), Saulius Simoliunas, George Vannilam, Jacob Kovoor, and Cicy Jacob (collectively, "appellants") appeal as of right a decision and order issued by the Michigan Employment Relations Commission ("MERC"). MERC adopted the findings and conclusions of an administrative law judge ("ALJ"), who presided over an administrative hearing in this matter. MERC dismissed all of appellants' charges against respondent, Detroit Water and Sewerage Department ("DWSD"), finding them to be meritless. Finding no error warranting reversal, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the 2015 layoff of appellants Simoliunas, Vannilam, Kovoor, and Jacob (who is Kovoor's wife), all of whom were members or officers of SCATA and had been employed as chemists by DWSD. During the pertinent timeframe, Simoliunas was SCATA's president, Vannilam was its vice president, and Kovoor was its secretary. The relevant sequence of events in this case includes both Detroit's bankruptcy and lengthy federal litigation between the Environmental Protection Agency (EPA) and DWSD. As aptly summarized in MERC's order:

> In 1977, the [EPA] initiated a federal court action against the City of Detroit and [DWSD] alleging violations of the Clean Water Act, 33 USC §1251 et seq.

with respect to wastewater. As of November 4, 2011, the matter had been pending for more than 34 years when the U. S. District Court Judge hearing the case at that time, the Honorable Sean F. Cox, issued an order aimed at providing the "least intrusive means of effectively remedying" the impediments to the City's and DWSD's compliance with the Clean Water Act.

In 2011, the DWSD had over 200 separate job classifications and its employees were members of 20 different bargaining units, each of which had its own collective bargaining agreement. Many of these units included both DWSD employees and employees within other City departments. In a November 4, 2011 order, Judge Cox required the City and DWSD to review the current employee job classifications and reduce the number of DWSD job classifications to increase workforce flexibility and to reduce or eliminate other impediments to the City's compliance with the Clean Water Act.

In his November 4, 2011 order, Judge Cox found that it was, therefore, necessary to "1) keep all current CBAs that cover DWSD employees in force, but strike and enjoin those current CBA provisions or work rules that threaten short-term compliance; and 2) Order that, in the future, the DWSD shall negotiate and sign its own CBAs that cover only DWSD employees, and prohibit future DWSD CBAs from containing certain provisions that threaten long-term compliance." To that end, Judge Cox's order specified 13 additional requirements that were to be met by the City and DWSD, including the following which are relevant in this matter:

> 3. The DWSD shall act on behalf of the City of Detroit to have its own CBAs that cover DWSD employees ("DWSD CBAs"). DWSD CBAs shall not include employees of any other City of Detroit departments. The director of the DWSD shall have final authority to approve CBAs for the employees of the DWSD.
>
> * * *
>
> 8. The Director of the DWSD shall perform a review of the current employee classifications at the DWSD and reduce the number of DWSD employee classifications to increase workforce flexibility. Future DWSD CBAs shall include those revised employee classifications.
>
> 9[.] DWSD CBAs shall provide that promotions in the DWSD shall be at the discretion of management and based upon skill, knowledge, and ability, and then taking seniority into account.
>
> * * *
>
> 13. The Court enjoins the Wayne County Circuit Court and the Michigan Employment Relations Commission from exercising jurisdiction over disputes arising from the changes ordered by this

> Court. The Court also enjoins the unions from filing any grievances, unfair labor practices, or arbitration demands over disputes arising from the changes ordered by this Court.
>
> Upon the issuance of Judge Cox's November 4, 2011 order, the Employer [i.e., Detroit] determined that a separate human resources department should be created for DWSD. Around that time, in 2012, Terri Tabor Conerway was asked to head the new DWSD human resources department as the DWSD Organizational Development Director. [Alterations added; asterisks in original.]

At the time in question, SCATA did not have an active collective-bargaining agreement (CBA) with DWSD or Detroit:

> The most recent collective bargaining agreement covering the relationship between SCATA and the City of Detroit is a Master Agreement which was signed by the representatives of SCATA-UAW and the City on April 13, 2007. This contract was negotiated while SCATA was affiliated with the UAW. However, that relationship ended in 2011, and no new collective bargaining agreement has been reached between SCATA and the City of Detroit.
>
> Article 53 of the Master Agreement set the terms for the duration, modification, and termination of that agreement and provides:
>
> * * *
>
> In the event the parties fail to arrive at an agreement . . . 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.
>
> * * *
>
> Barbara Wise Johnson, the City of Detroit's former labor relations director explained that the collective bargaining agreement between the City and the SCATA was to have expired on June 30, 2008. However, the parties had not reached a successor agreement by that date. Due to the City's financial crisis in 2009, the City was seeking to resolve its labor agreements. . . . On or about October 9, 2009, Wise-Johnson sent a letter to that effect to SCATA which states in relevant part:
>
> > Please be advised that pursuant to Article 53 . . . of the 2005-2008 collective bargaining agreement between the City of Detroit and U.A.W. Local 2334-S.C.A.T.A., the City hereby provides ten (10) days written notice of its intent to terminate the collective bargaining agreement as of October 19, 2009.
>
> The letter explained that the City would no longer be collecting union dues and that the City would continue to arbitrate all pending and future grievances until

a new collective bargaining agreement was reached. Further, it requested that the Union's representatives contact the City's labor relations department with available dates and times for future negotiations.

At the hearing in this matter, SCATA's president, Saulius Simoliunas recognized and acknowledged receipt of the October 9, 2009 letter from Wise-Johnson.

* * *

Based on Judge Cox's November 4, 2011 order, Respondent determined that it needed to negotiate collective bargaining agreements with the unions that did not have contracts with DWSD. Conerway sent notices to the negotiating teams for such unions, inviting them to schedule time slots for negotiations in the spring of 2012. Simoliunas received a letter from DWSD director Sue McCormick in April 2012 notifying him of a meeting scheduled between DWSD and union representatives to begin negotiations. Simoliunas attended a meeting on April 26, 2012 meeting along with representatives of several other bargaining units.

* * *

On April 4, 2012, . . . the City entered into a Financial Stability Agreement (FSA) with the State of Michigan under Public Act 4 of 2011 (PA 4), that among other things, suspended the City's duty to bargain with the unions representing City employees. Pursuant to that FSA, the City adopted City Employment Terms for All Non-Uniform Employees (CET). The CET provided "Any provisions in the most recently expired Collective Bargaining Agreements, memorandums of understanding, practices, and/or supplemental agreements that are not expressly referenced to 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." The CET was imposed on bargaining units that were not part of DWSD in early June 2012.

On February 29, 2012, a petition seeking the repeal of PA 4 was filed. As a result, Public Act 72 of 1990 (PA 72), which had been repealed by PA 4, came back into effect on August 12, 2012, while the referendum on PA 4 was pending. PA 72 allowed for the appointment of an emergency manager but did not authorize the suspension of the City's duty to bargain. At the November 6, 2012 general election, PA 4 was rejected by a majority of the electors. PA 72 remained in effect until it was replaced by Act 436 of 2012, the Local Financial Stability and Choice Act, which took effect on March 28, 2013. Under Act 436, the City's duty to bargain was suspended once more following the Governor's recognition of the City's continuing financial emergency and the appointment and confirmation of an emergency manager under Act 436.

In July 2013, the City petitioned for bankruptcy. As a result, a stay of proceedings against the City was issued by the bankruptcy court. The stay applied to unfair labor practice charges filed with the Commission as well as other actions.

On December 14, 2014, upon completion of the bankruptcy proceeding, Governor Snyder declared the City's financial emergency to have terminated. The suspension of the City's, and thus the DWSD's, duty to bargain then came to an end.

* * *

On June 27, 2012, the Board of Water Commissioners passed a resolution regarding DWSD collective bargaining agreements. The resolution noted the November 4, 2011 order of Judge Cox requiring DWSD to execute collect bargaining [sic] agreements with its employees in its own name. . . . Additionally, the resolution . . . stated that with respect to any union whose contract has expired without having a new ratified collect bargaining agreement, that union's terms and conditions of employment would include all terms and conditions of employment imposed by the City pursuant to the Financial Stability Agreement until (1) either a new collective bargaining agreement is ratified or (2) following a bargaining impasse, DWSD imposes its own terms and conditions of employment on that union.

On June 28, 2012, Conerway sent the representatives of the affected unions a copy of the Board of Water Commissioners' resolution by email. She sent a copy of the email to Simoliunas as the SCATA president.

On September 24, 2012, DWSD filed a motion requesting that Judge Cox clarify his November 4, 2011 order. On October 5, 2012, Judge Cox issued an order in which he declared the Board of Water Commissioners June 2012 resolution to be in accordance with the Court's November 4, 2011 order and to be effective and controlling until a further Court order to the contrary.

* * *

On October 23, 2012, Conerway sent an email with an attached memorandum to the leadership of six unions, including SCATA, regarding the City of Detroit employment terms. Her memo states that the CET is in effect for DWSD employees who were members of the six unions to whom she sent the memo. The memo indicates certain changes to employee benefits as a result of the imposition of the CET including a 10% wage reduction scheduled to take effect in November 2012.

On October 24, 2012, Conerway sent a memo to DWSD employees who were represented by the six unions including SCATA. The memo informed the employees that the CET would apply to them and included a list of the changes that would be made to employees' terms and conditions of employment with the

implementation of the CET. Those changes included the 10% wage reduction scheduled to take effect November 2012.

At the hearing, the SCATA officers acknowledged that they had been aware of the imposition of the CET towards the end of 2012, and at least one of them acknowledged having obtained a copy of it. They also acknowledged that they were aware of the implementation of the 10% wage cut, the reduction in vacation accrual, and other changes in their benefits resulting from the implementation of the CET near the end of 2012.

Additionally, the CET contained provisions addressing the grievance process, discipline, reductions in force, layoff, demotion, and recall. Of particular relevance to this matter is the provision of the CET on reduction in force, layoff, demotion, and recall. . . .

* * *

It is undisputed that SCATA filed numerous grievances under the Master Agreement. Additionally, SCATA filed complaints against DWSD with the Michigan Department of Environmental Quality (MDEQ), the Environmental Protection Agency (EPA), and the Michigan Occupational Safety and Health Administration (MIOSHA).

On November 26, 2012, in their respective capacities as SCATA Vice President George Vannilam, and SCATA Secretary Jacob Kovoor sent an email to Nicole Cantello, of the EPA complaining about the analytical lab. The letter asserted that the lab had not been upgraded with state-of-the-art machinery or technology, that the lab supervisors were underqualified, that MDEQ had not been monitoring the analytical lab very regularly or strictly, that certain tests were not being run properly, and that the lab supervisor lacked adequate knowledge of chemistry.

* * *

Vannilam testified that his relationship with lab supervisor Michael Jurban was not a very good one, either personally or professionally. The lab was in a secured area and no one from the outside was allowed to come in. However, sometimes parties would be held in the cafeteria during the lunch break and individuals from the outside would attend, while other people were there having lunch. A few of the analytical chemists, their supervisors, and management like Jurban, and the assistant lab supervisor Joseph Peindl would be included in the parties. Vannilam knew about the parties because they normally started during the lunch break and he would see them when he went to the lunchroom to eat his lunch. Vannilam complained to Conerway about the parties. Vannilam questioned Jurban and Peindl a couple times about how they could take any disciplinary action against individuals with whom they partied and asked whether they could manage those subordinates in an unbiased manner. Vannilam testified that all the analytical

chemists, who attended the parties were selected for rehire as chemists in October 2015.

* * *

Vannilam sent a letter to Sue McCormick when she became the director of DWSD in 2012. In the letter he complained about unqualified chemists being hired and promoted. He asserted that a person who was recently promoted to a senior chemist position did not have sufficient training in chemistry. The letter to McCormick also complained that Michael Jurban was not a chemistry graduate, that Jurban was instrumental in promoting an unqualified individual to the senior analytical chemist position, and that Jurban ignored genuine concerns and complaints by the chemists. Vannilam also complained about the lack of expansion in the work in the analytical lab, the reduction in staff in the analytical lab, and the use of outsourcing for much of the chemical analysis.

Vannilam received a reply to the letter from McCormick stating that the things he had complained about would be looked at and addressed. Vannilam then wrote a second letter to McCormick acknowledging her response to his first letter and complaining about the interview process for promotion to senior water systems chemist, his initial inability to get any information on how he fared as a result of the interview, and the unfairness of Jurban[.] Vannilam had no evidence that McCormick had discussed either of his letters to her with Jurban. However, shortly after Vannilam sent the letter, he heard Jurban, Peindl and a senior chemist talking in front of him saying "these people are complaining that we don't know anything, we are not qualified."

When Jurban was asked on cross-examination whether he was aware that Vannilam contacted McCormick in January 2012 to state that Jurban was ignoring the complaints and concerns of the chemists, he did not recall the matter. However, Jurban admitted that if Vannilam had contacted McCormick, McCormick would have presented Vannilam's concerns to him.

* * *

In November 2009, one of the senior chemists, Cheeramvelil had assigned one of the chemists that he supervised to do an analysis of organic chemical contents in the analytical laboratory. When the employee, a SCATA member, first conducted the test, a vessel ruptured during testing and broke, but the employee did not report it. A second incident occurred two days later, when Cheeramvelil assigned the same chemist to conduct a part of the same analysis. While doing the analysis, an unstable chemical reaction occurred causing an explosion that resulted in the rupture of the test tube with which the employee was working. The only one injured as a result of the second incident was the employee conducting the procedure; he cut his finger while in the process of cleaning up the test tube that had been broken in the explosion. The only property damage was the broken test tube.

Kovoor contended that Cheeramvelil had been negligent in having the employee continue the analysis after a minor explosion had occurred two days earlier when the same employee had been conducting part of the same analysis. According to Jurban, the employee who had been injured had not followed the safety protocol in the first incident by failing to report it.

As a result of those incidents, SCATA filed a report with MIOSHA, made complaints internally with DWSD, and complained to the EPA regarding the incident.

MIOSHA investigated both incidents and issued a citation and notification of penalty citing DWSD for a serious violation, proposing a penalty of $2450, and requiring the violation to be abated within a little over a month's time.

At that time, Michael Jurban was the laboratory supervisor. Jurban was not present at the lab on the day of the explosion and learned about the circumstances of the incident during the discussion with MIOSHA. Jurban received the MIOSHA inspection findings and recommendations which included a recommendation that DWSD retrain the supervisor and the employee on proper procedures prior to conducting an analysis of hazardous chemicals. The MIOSHA inspection findings contained further recommendations regarding the proper storage and maintenance of containers of ether solvent, which was the expired chemical involved in the explosion.

The DWSD safety office investigated the incident. The investigation was led by Steve Kopicki of the Employer's industrial waste facility and included representatives of Homeland Security. The investigation determined that the employee involved in the incident was following protocol but was using an older ether compound that had apparently been retained too long and had become unstable. Cheeramvelil was on duty and was the supervisor in the area at the time the explosion occurred. The investigation of the incident determined that Cheeramvelil was not at fault. After that incident, DWSD determined that the test in question would be assigned to an outside laboratory.

Jurban and Kopicki represented DWSD at a fine abatement meeting with MIOSHA. DWSD wanted to have the fine reduced and Kopicki took the lead on that discussion. Kovoor represented SCATA at the same meeting. Kovoor objected to MIOSHA reducing the fine because a SCATA member had been injured in the explosion.

When testifying at the hearing in this matter, Jurban recalled that Kovoor and another man were present on behalf of SCATA at the MIOSHA fine abatement meeting, and that SCATA argued that the fine should not be reduced. MIOSHA did not reduce the fine.

SCATA also sought the removal of Cheeramvelil from his supervisory position due to their belief that the explosion causing the injury to the SCATA

member resulted from negligence by Cheeramvelil. SCATA wrote to the director of the DWSD asking her to remove Cheeramvelil from the senior chemist position. Cheeramvelil was not removed from his position.

Neither Cheeramvelil nor the employee involved in the explosion were disciplined because of the incident and both were hired for the new chemist position in October 2015.

Kovoor also testified that in June 2009, they were involved in a special conference regarding a complaint against management. SCATA believed that DWSD was in violation of the plants' National Pollutant Discharge Elimination System (NPDES) permit. Under the permit, DWSD was supposed to analyze biochemical oxygen demand (BOD), total suspended solids, total phosphate, and ammonia taken. He testified that the permit required that this be done on a rotating basis and every day. However, DWSD had stopped performing that analysis on Saturdays and Sundays and held the samples until Mondays. Simoliunas, Kovoor, and Susan Sam attended the special conference on behalf of SCATA. Jurban, Peindl, plant manager J.R. Richards, and the human resources consultant, Maria Young, attended on behalf of DWSD. Jurban viewed SCATA's complaint as being about the elimination of Sunday overtime. He explained that under prior DWSD guidelines if an employee worked on their seventh day, they would be paid double time. Jurban believed that it was for that reason that SCATA filed the complaint about the elimination of BOD testing on Sundays. However, Jurban acknowledged that SCATA felt that the test was being compromised.

After the special conference, SCATA received the Employer's written response disagreeing with SCATA's contention that DWSD was in violation and refusing to resume having staff perform the analysis on weekends. After receiving DWSD's response, SCATA sent a complaint to the MDEQ and to the EPA. MDEQ investigated the matter at DWSD and found that DWSD was not in violation. SCATA also contacted Wayne, Macomb, and Oakland Counties regarding issues with DWSD management. After making the complaint to MDEQ regarding the NPDES permit, Simoliunas, Vannilam, and Kovoor attended a MDEQ hearing in 2013, where they objected to the renewal of DWSD's NPDES permit. Jurban testified that he did not know of a SCATA complaint to MDEQ about DWSD's NPDES permit.

In 2012 or 2013, Vannilam also complained to the EPA about a BOD reading problem. He testified that the samples were read later than they were supposed to have been read to get valid results. Additionally, in 2014, SCATA sent an email to the EPA because the BOD analysis was not being done on the prescribed day. They complained of lack of training, understaffing, not following the EPA guidelines and standards, and having unqualified supervisors. Kovoor testified that they did not receive a written response from the EPA. [Appellants] offered no evidence that the EPA informed DWSD of SCATA's email or that DWSD had any knowledge of the email to the EPA.

* * *

Jurban did not recall a complaint to the EPA regarding BOD testing in 2014. Jurban also denied any recollection of a report of a BOD testing accident involving a particular chemist who had been mentioned at the hearing in this matter. Jurban acknowledged that there had been challenges to DWSD's compliance with BOD requirements but there were no violations of which he was aware. Jurban testified that there were challenges because DWSD was going to stop doing BOD's on Sundays and the lab would be closed on Sunday. Therefore, they had to adjust how they did the BOD test. Jurban testified that DWSD did not need approval from the EPA to make that change because the procedure itself allowed for 48 hours from the time of sample collection to the time of sample testing.

* * *

EMA is a private company that DWSD hired to conduct an analysis of DWSD's work and its job classifications as part of its effort to comply with Judge Cox's order to reduce the number of job classifications. Kovoor attended a City Council meeting on behalf of SCATA when a "no-bid contract for $48 million by EMA was approved by the water department." Kovoor made a statement to the Council meeting protesting the EMA contract and he gave a written statement to the Council and the DWSD representatives that were present. Simoliunas and Vannilam also spoke against the EMA contract. A couple of the DWSD executive board members were present. The City Council did not approve the EMA contract. Kovoor believed he was targeted from that day onwards. However, Jurban testified that he was unaware of SCATA's presence at the City Council meeting regarding the EMA contract.

* * *

Kovoor charged that Cheeramvelil and some of his coworkers had fabricated overtime work. Kovoor testified that in 2011, he and Simoliunas complained about the supervisors' overtime to the director of DWSD, who ordered his assistant director, Sam Smalley to investigate. Kovoor and Simoliunas gave statements to Smalley during his investigation of the complaint. As a result of the investigation, Smalley required that overtime for senior chemists be personally preapproved by himself. Jurban knew that SCATA had taken some concerns about overtime to Smalley and acknowledged that the practice under which Smalley had to approve overtime before it could be worked began around 2011.

Cheeramvelil had been represented by SCATA when he worked as an analytical chemist. He also served as SCATA's financial Secretary from 1996 until 2008 or 2009. In 2009, Cheeramvelil was promoted to senior water chemist and left the SCATA bargaining unit. Cheeramvelil became an officer in the Senior Water Systems Chemists Association after he was promoted.

* * *

On May 8, 2012, DWSD provided SCATA with a proposal for a new collective bargaining agreement, which was the same proposal that had been offered to other DWSD unions. The Master Agreement was between the City of Detroit and SCATA-UAW, not between DWSD and SCATA. Therefore, Conerway sent emails to Simoliunas on May 13, 2012 and May 19, 2012 indicating the need to reach a new collective bargaining agreement between DWSD and the Union that would conform with the requirements of Judge Cox's order. Each email had an attachment that listed requirements set forth in Judge Cox's November 4, 2011 order and noted the provisions of the Master Agreement that the Employer had determined were affected by Judge Cox's order. The emails indicated that the parties were scheduled to meet to negotiate later that month.

Simoliunas acknowledged receiving the May 8, 2012 proposal from DWSD which provides in relevant part, "Compliance with Judge Cox's Order: all applicable sections of the collective bargaining agreement shall be amended to be in full compliance with Judge Cox's Order." When asked whether SCATA refused DWSD' s proposal to put language relating to Judge Cox's order in a new collective bargaining agreement, Simoliunas acknowledged that the Union had rejected that proposal, but objected that he didn't understand what the proposal meant. . . .

The first negotiating session between DWSD and SCATA was May 24, 2012. Simoliunas and SCATA vice president George Vannilam were present as well as four other persons representing SCATA. Simoliunas was also in negotiations with DWSD in June 2012. Those meetings were the first times that he bargained with Schwartz. During those meetings, Simoliunas asserted that SCATA members were underpaid by 40%.

DWSD made a new proposal for healthcare to SCATA on September 25, 2012. SCATA did not agree to that proposal. DWSD also offered a new written proposal to SCATA setting the duration as July 1, 2012 to June 30, 2013 and covering such issues as health insurance; wages; early retirement; pension; compliance with Judge Cox's order; past practices; longevity pay; emergency manager language; hospitalization, medical, dental and optical insurance; vacation and holiday time; and sick leave. Simoliunas testified that he recalled receiving that proposal for a "nine-month contract" and that SCATA did not accept the proposal because it was for nine months and contained many cuts. Amongst other changes, there was a 10% wage reduction, the elimination of longevity pay, and a reduction in vacation time for employees hired on or after February 11, 2010.

Simoliunas also received a copy of the June 27, 2012 resolution by the Board of Water Commissioners during the September 25, 2012 negotiation session with Schwartz. He discussed the resolution with Schwartz and told him that the resolution was not binding because it was not by the Detroit City Council. Simoliunas told Schwartz that the resolution of the Water Commissioners indicates that the Employer expected employees to accept the terms set by the Employer, but SCATA was not going to do that. Simoliunas testified that he accepted Judge Cox's

November 4, 2011 order as binding but he and SCATA did not accept the Board of Water Commissioners' resolution.

In 2012, DWSD negotiated and reached an agreement with the Senior Water Systems Chemists Association. That union represented the employees who supervised the analytical chemists, who were represented by SCATA. That agreement eliminated the 10% pay cut that had previously been imposed when the CET was implemented by DWSD. The terms of the agreement between DWSD and the Senior Water Systems Chemists Association were proposed to SCATA on September 25, 2012. However, SCATA did not accept DWSD's proposal.

On or about December 9, 2013, to support the assertion that SCATA's members were being underpaid, Simoliunas gave Schwartz articles discussing American Chemical Society surveys of government chemists' wages. The articles are from 2009, 2010, and 2011.

On or about January 16, 2014, Simoliunas sent an email to Conerway, at her correct email address, and to McCormick. SCATA's proposal to the Employer set forth new terms for the type of work that the chemists in different classifications would perform. SCATA proposed to amend the current contract by providing that "Senior Chemists should not indulge in the regular analytical work generally assigned for the chemists" and that there would be a yearly rotation plan for analytical chemists that would allow chemists to get an opportunity to be trained in every group in the analytical laboratory. SCATA's proposal also demanded that only the U.S. EPA testing procedures or U.S. EPA approved testing procedures would be used in the chemical analyses. SCATA's proposal contained additional ideas that addressed such things as having the DWSD laboratories become self-supporting to generate revenue for DWSD and their assertion that the Michigan Department of Environmental Quality does not do an adequate job of analyzing DWSD chemical data. SCATA's proposal also contended that their salaries were $20,000 below the median annual salary and demanded that their salaries be raised to match national and regional norms in accordance with the American Chemical Society surveys of median salaries for government chemists in the Midwest. SCATA also objected to the requirement of state operators' licenses for chemists and insisted that SCATA members should be certified by the National Registry of Clinical Chemistry's certification program for environmental analytical chemists. Additionally, SCATA demanded that the supervisor/team leaders of the chemists must also be chemists. DWSD did not accept SCATA's proposal.

At that point, SCATA had not agreed to any of the Employer's proposals, including changing the language that DWSD had identified as subject to Judge Cox's order requiring its removal from the collective bargaining agreement.

SCATA's bargaining team met with DWSD on January 16, 2014, October 24, 2014, and October 8, 2015. Some of the meetings between DWSD and SCATA occurred while the City of Detroit was being administered by an emergency

manager and, had no duty to bargain. However, DWSD representatives continued to meet to try to work out the terms of an agreement with the Union.

DWSD made a new proposal for retirement benefits and a proposal for hospitalization, medical insurance, dental care, and optical care on April 1, 2014. SCATA did not agree to either proposal. Also, on April 1, 2014, the Employer gave a proposal to SCATA assigning the new job classification of special projects technicians to the bargaining unit represented by SCATA. SCATA objected to the proposal because the position was at a lower wage than members of the bargaining unit currently received. Simoliunas asked Schwartz if there were any other titles that SCATA was being offered and was told that the special projects technician title was the only title being offered to SCATA.

On April 25, 2014 Conerway, sent a letter to Simoliunas inviting him to schedule an appointment so they could continue discussions regarding various economic and noneconomic employment terms and conditions.

On September 25, 2014, the Detroit emergency manager, Kevyn Orr, sent a letter to Simoliunas as president of SCATA. The letter included changes to the CET. Attached to the letter was a notice that the special projects technician position had been assigned to SCATA as well as several attachments setting forth additional terms and conditions of employment.

At the October 24, 2014 bargaining session, the parties were discussing reclassifying 237 positions into 57 positions when Simoliunas objected to SCATA's lack of input into the reclassification process and stated, "reclassification without negotiations is an unfair labor practice." Conerway testified that at that point there was no notice of layoffs.

On November 5, 2014, Schwartz and Simoliunas exchanged emails regarding placement of the new chemist classification into the bargaining unit represented by the Senior Water Systems Chemists Association and SCATA's rejection of the assignment of the special project technician position to its bargaining unit.

On February 6, 2015, Schwartz gave SCATA a proposal regarding work rules implemented on November 5, 2014. The proposal limited the union's ability to grieve certain disciplinary actions. SCATA considered the proposal but did not agree to it. Simoliunas testified that when he received the proposal, he had not seen the work rules to which it referred. However, he acknowledged that the employees in his bargaining unit would have received those work rules in November 2014.

To effectuate the changes necessitated by Judge Cox's November 4, 2011 order—in particular the consolidation of job classifications and reduction in their number—DWSD employed a private consulting firm, EMA, which was tasked with conducting

> an analysis of DWSD and the way its employees worked. Based on that analysis, EMA made recommendations about how DWSD could become more effective and

efficient through the reorganization. One of the initial recommendations from EMA was that DWSD substantially reduce its staff from approximately 2000 employees to 380. . . . Some of the recommendations included combining tasks done by different classifications into a single classification. As a result, job classifications were restructured. It affected all 20 bargaining units at DWSD as well as non-union employees. The restructuring reduced the previous 257 job classifications to 57 new job classifications.

The pilot teams worked with human resources to write job descriptions and would review the new job descriptions prepared by human resources to ensure that the descriptions captured everything the pilot teams intended to be included in those classifications. The job descriptions were then reviewed by the directors of the various areas within DWSD. Subsequently, binders containing the new job descriptions were provided to all union officials with the request that they review the job descriptions and let management know of any changes or concerns. Sometime during the fall of 2013, the new job descriptions were posted online; employees were invited to review them and give feedback. By December 30, 2013, the job descriptions for all the new classifications had been written and posted for review by employees by sometime in the fall of 2013, the job description for the new chemist position was available and posted for review by employees.

Some chemist duties were assigned to the newly created chemist position. Classifications represented by SCATA, classifications represented by the Senior Water Systems Chemists Association, and nonunion classifications were combined into the new chemist title, which DWSD assigned to the Senior Water Systems Chemists Association's bargaining unit. Other chemist duties that had been performed by persons in eliminated classifications were assigned to other newly created positions. As part of the reorganization 14 positions performing chemist duties were eliminated. Eleven former chemists were laid off.

Phase I of the placement eligibility process (PEP) covered non-union classifications, which were management or leadership employees. Phase II of the PEP dealt with employees in union-represented bargaining units and began in the spring of 2014.

A letter describing the PEP phase II was mailed to employees' homes, was emailed to employees, and was placed on the department intranet. The letter, dated May 8, 2014, advised employees that phase II of the DWSD Placement Eligibility Process was about to begin. According to the letter, as of Monday, May 12, 2014, eligible employees were able to obtain and submit placement assessments for consideration in the new DWSD job classifications that were represented by unions. It stated that "eligible employees" could "obtain and submit placement assessments for consideration in the new DWSD job classifications that are represented." It explained where employees could obtain the placement assessment, where they could find a classification design guide to assist them in determining which placement assessment form they were eligible to complete, and where they could obtain other information about the PEP. The letter also explained that "eligible

employees" were required to participate in the process and that placement assessments must be submitted no later than 4:30 p.m. on May 26, 2014. It is to be noted that the letter does not define "eligible employees" nor does it expressly warn that employees who do not participate in the placement eligibility process could lose their jobs. It also does not warn that participation in the placement eligibility process does not guarantee continued employment. However, it advises that more information is available on the HR SharePoint portal. At that portal, employees could have obtained the description of the placement eligibility process document which provides "Eligibility does not guarantee placement into a new job classification."

Simoliunas testified that the other SCATA members filled out the self-assessment forms for the new chemist position. He testified that DWSD did not announce how the forms would be evaluated. The expectation of the SCATA membership was that completing the self-assessment form would result in their being sorted into one of the three different levels of the new chemist classification. They were under the impression that the new chemist classification was just going to be a consolidation of all the different levels of current chemist positions.

* * *

On April 1, 2014, DWSD notified SCATA in a bargaining proposal that it had assigned the new job classification of special projects technician to SCATA. It also notified SCATA that the special projects technician classification was to be an "at will position" and was not necessarily exclusive to SCATA. The notice also indicated that the special projects classification would continue until, "in DWSD's judgment, there is no available work left to perform or it is no longer advantageous to DWSD's operations."

* * *

The special projects technicians that the Employer proposed to assign to SCATA were members of the SCATA bargaining unit who had worked as chemists but had not been assigned to the new chemist position. The special projects technicians who were to have been assigned to SCATA were to have been doing work that they were qualified for and already experienced in doing. This was discussed at the bargaining meeting between DWSD and SCATA on April 1, 2014. However, the SCATA representatives at the meeting were adamant about refusing to accept the special projects technician classification. No special project technicians were assigned to the SCATA bargaining unit.

Simoliunas testified that SCATA did not want the special projects technician in its unit because they saw it as contrary to [the public employment relations act (PERA), MCL 423.201 *et seq*.,] because the position was temporary. He explained that SCATA believed that accepting the special projects technician position into the bargaining unit would lead to SCATA's dissolution. Simoliunas testified that he told the Employer that they cannot make chemists into technicians

and that doing so is "idiotic.". . . . Simoliunas objected to the plan to make SCATA members special projects technicians in conversations with the DWSD director, Sue McCormick, with William Wolfson, and Robert Daddow of the Great Lakes Water Authority (GLWA). He also objected to plant technicians being assigned work that had previously been performed by chemists.

* * *

At a meeting with SCATA, at some point on or before November 5, 2014, Schwartz, informed the SCATA bargaining committee that DWSD was doing a department-wide reorganization combining some 200 different job classifications into about 56 new job classifications, including the new chemist classification. In a November 5, 2014 email, Schwartz informed SCATA President, Simoliunas, that the new chemist classification had been assigned to the Senior Water Systems Chemists Association, the union that represented the senior chemists who supervised SCATA members.

To be qualified for the new chemist position, an employee was required to have a D license. However, the D license is not limited to professionally trained chemists. Individuals working in maintenance, engineering, or other disciplines may take the training courses for the state exam to get the D license. The job description for the new chemist position requires that chemists have "A valid Michigan driver's license and the ability to drive a motor vehicle on all terrain." The job description also states that for a level I, the lowest level of the new chemist position, the job requires the employee to collect the field samples.

* * *

Jurban was employed by DWSD for over 42 years and worked his way up from water systems laboratory technician to sewage plant laboratory supervisor. Jurban testified that when he was at DWSD, he had been a member of the "current union that's challenging me now." He went on to explain that he had been a member of SCATA from the time he started at DWSD until he moved to the title of assistant sewage plant laboratory supervisor. Between 2012 and 2015, Jurban was not involved in any bargaining negotiations with SCATA and he did not sit in on any bargaining negotiations with the Senior Water Systems Chemists Association.

In June 2015, Jurban was the sewage plant laboratory supervisor and was over both the analytical and the operations laboratories. . . .

Between the two labs there was a total of 34 employees.

In 2015, Dave McNeely was the director of wastewater operations. McNeely would consult with Jurban regarding Jurban's staffing needs for the operations and analytical labs. As of June 2015, McNeely had only worked for DWSD for about three months. Since McNeely was not familiar with any of the individual chemists, he gave Jurban the task of recommending the people to be

placed in certain chemist positions. When Jurban determined which individuals should be placed in chemist positions, he would make recommendations to McNeely. Jurban began placing people in August and September 2015. He received authorization to place 32 positions in operations or analytical lab assignments.

Part of the process that Jurban used to determine which applicant would be recommended was to determine the tasks to be done and then decide who among the available pool of applicants could perform those tasks. Jurban prepared a chart listing the individuals whom he believed could do the required tasks and gave that to McNeely. The chart indicated each listed employee's former title, new title, and general job functions. Jurban had supervised or managed every person on the list and completed the list indicating the skills that each person possessed. His decisions were based on knowing the employees for several years, knowing the reports they participated in, and receiving information through their direct supervisors. He did not consult with anyone other than McNeely at that stage . . . .

After employees were laid off, Jurban also made a similar list of the employees who were laid off on October 15, 2015. On that list, he also included "general job functions." Jurban testified that he did so because the list was his way of not losing track of how many people within a given area were laid off. Jurban testified that the job functions on that chart listed what those employees had been doing prior to the layoff. In explaining the reason for listing certain job functions on that chart, Jurban testified that the while the laid off employees may have performed other job functions in the past, the job functions listed were the ones that were still important. Jurban testified that he prepared the charts during July through October 2015.

* * *

Jurban admitted that he did not actually use the self-assessment forms when making his decisions. Although he spent a day at human resources reviewing the self-assessment forms and took notes on them and considered them in his recommendations, he picked the individuals based on his knowledge of them rather than the self-assessment.

Jurban testified that the minimum educational requirement for the new chemist position was a bachelors degree. Jurban acknowledged that there were no applicants for the chemist position in the analytical lab or the operations lab who did not meet the basic educational requirements. Therefore, he did not review their educational history on their self-assessment forms.

Jurban acknowledged sending an email to Mary Lynn Semegen suggesting that Basma Saleh talk to her. Jurban testified that he sent the email to Semegen because Saleh contacted him by email indicating that she had heard that there might be an opportunity there. He forwarded her email to Semegen. Jurban testified that he would do that for anybody. When asked why he didn't do that for everybody,

Jurban responded that not everybody came to him for assistance. Jurban testified that he did not recommend Kovoor to Semegen because Kovoor did not come to him for assistance in finding a position. Jurban denied that Semegen ever reached out to him to ask which candidates she should consider for the open position in her plant in October 2015. Jurban testified that the only person he recalled sending to Semegen was Saleh.

Jurban acknowledged that Vijay Mahendra and Jose Lukose, continued to work as chemists in the analytical lab and were never laid off. Jurban testified that both of them had worked in GCMS and he had limited people with that skill set. Jurban testified that neither Simoliunas, Vannilam, Kovoor, nor Cicy Jacob had ever done any computer reporting or GCMS work.

Jurban denied that his failure to recommend Jacob, Vannilam, Simoliunas, and Kovoor was because of their previous complaints about him. He also denied that it was because of their complaints to the EPA or their complaints to the MDEQ. He testified that those matters were not a factor in his decision.

Jurban testified that between 2012 and 2015, the only two chemists who were suspended were Simoliunas and Kovoor. He acknowledged that both of those suspensions occurred well over a year prior to October 2015.

* * *

On September 24, 2015, Conerway sent a letter to Simoliunas, informing SCATA that two of the SCATA job classifications had been identified for elimination as of October 13, 2015. The letter further informed SCATA that an employee working as an analytical chemist, Simon Chackumkal, and two water systems chemists Patrice Hopkins and Simoliunas would be "displaced" effective October 13, 2015, as a result of the elimination of their job classifications. On September 29, 2015, Conerway sent an additional letter to Simoliunas stating that the analytical chemist and water systems chemist classifications were identified for elimination beginning October 23, 2015. The September 29 letter listed analytical chemists Simon Chackumkal, Cicy Jacob, Rosily Jais, Lissy Joseph, Bindu Kallumkal, Jacob Kovoor, Betty Korula, Annie Parayil, Abdul Rahman, George Vannilam and water systems chemists Anitha Kuriakose and Basma Saleh as employees who would be displaced on October 23, 2015, as the result of the elimination of their job classifications. Conerway sent a third letter to Simoliunas on September 30, 2015, which was revised to state that the analytical chemist and water systems chemist classifications had been identified for elimination beginning October 15, 2015, and that the employees identified on the September 29 letter as being displaced would be displaced effective October 15, 2015. Conerway testified that several of the individuals listed on those letters were recalled to new positions. However, she testified that she did not recall having any role in determining which individuals would be laid off or which would be recalled. Conerway testified that about a dozen employees in the various chemist titles were involuntarily laid off. . . .

Conerway testified that in preparation for the layoffs in 2015 she followed the provisions of the CET rather than the Master Agreement.

* * *

George Vannilam was first hired by [DWSD] on January 23, 1989. His most recent position with DWSD was as an analytical chemist. At the time of his layoff, he was the second most senior analytical chemist. Vannilam has a masters degree in chemistry, and a masters of business administration with hazardous waste control as one of the core subjects. He also holds a professional certification called certified hazardous materials manager at the master level. Additionally, Vannilam teaches college chemistry courses and has done so for more than 35 years. While employed by DWSD, Vannilam was never suspended or disciplined and had no attendance issues.

* * *

Vannilam testified that the duties of the new chemist classification were similar to the job duties he performed as an analytical chemist. He believed he exceeded the requirements for the new chemist position. Vannilam testified that he completed the self-assessment form believing that he would be considered for a chemist II or III. . . .

* * *

Vannilam learned he was being laid off when he was called to the office of the lab on September 30, 2015 and given notice.

Jurban testified that he did not recommend Vannilam for placement in the new chemist position because there were several people at the analytical lab that had a similar skill set and he could only keep so many. Jurban testified that he selected some people who already had the same skill set as Vannilam, but they also had other skill sets.

On the chart that he prepared listing the general job functions performed by the individuals who were laid off, Jurban listed Vannilam's general job functions as solids, phosphorus, and cyanide. Jurban testified that he did not recall whether Vannilam had trained Cheeramvelil on PCB. Jurban admitted that Vannilam also had experience doing BOD testing, as well as oil and grease.

Vannilam testified that he had experience in other job functions besides those listed by Jurban. He was trained and had functioned as a chemist in all areas in the analytical lab, except the spectrum analysis for heavy metals, which had been discontinued. He also had experience testing for PCBs. Vannilam explained that the PCB analysis is done by the workgroup called the trace organics group and he worked in that group for five or six years analyzing PCBs. Vannilam testified that when Cheeramvelil worked in the trace organics group, he trained Cheeramvelil to do PCB analysis. . . . He also testified that he worked in the QA sections, in oil and

grease, and in the BOD group. Vannilam testified that he had worked for a long time performing the oil and grease tests and had done those tests many times. He testified that he also worked in a position doing quality assurance for DWSD for a month or so.

* * *

Vannilam testified that since his layoff, he had received no offers from DWSD to return to work.

Vannilam believed he had a more diverse range of work experience than one of the individuals who had been hired in the new chemist classification. He also believed that he had more experience and was more capable of doing better analysis than a second individual who had been hired in the new chemist classification. Vannilam also believed that his qualifications were better than those of a third individual who had been hired in the new chemist classification.

Vannilam testified that during the period of September and October 2015, when layoff notices were issued, he was never informed that there were open positions at the freshwater treatment plant. Vannilam testified that prior to his last day of work, there were no notification about openings at the freshwater plant or other work. On his last day of work, he did not know that he could apply for a chemist position in another DWSD department.

Cicy Jacob was a member of SCATA and is married to Jacob Kovoor, the Secretary of SCATA. She worked for DWSD for 24 years, having been hired there on September 30, 1991. Her most recent position was as an analytical chemist in the wastewater plant laboratory. In that position she gained experience in working on the instrument dish and metals analysis; mercury analysis, which was like ICP; and atomic absorption. She was also experienced with all the chemistry and bacteria work. She has a bachelors degree "with chemistry, physics and math and a masters degree of technology for science and chemistry." She also has a wastewater operator D license, an environmental analytical certification from the National Registry of Certified Chemists, and a laboratory analyst grade one certificate from the Michigan Water Environment Association. . . . At the time of her layoff, she was sixth in seniority out of 17 chemists. Jacob never had any disciplinary issues while employed at DWSD, was never suspended, and never had any attendance issues. Between 2012 and her layoff in 2015 Jacob did not hold any office with SCATA. . . .

At the time of the DWSD reorganization she filled out the self-assessment form. She expected to be placed in a chemist II position given her licenses and certifications. It was her understanding that the self-assessment was to enable her to be evaluated based on their criteria and her credentials to determine whether she would be a chemist at level I, II or III.

Jacob learned that she was to be laid off on September 30, 2015, when her assistant lab supervisor, Joe Peindl gave her a letter saying that she would be laid off in two weeks' time. Before that she had no knowledge that she or any of the other chemists could potentially be laid off. Jacob felt she was more qualified than some of the individuals who were not laid off because most of them, unlike her, did not have licenses or masters degrees. She was never told why she was selected to be laid off.

On October 12, 2015, Jacob sent an email to Semegen asking to be considered for a water quality chemist opening and noting her credentials. Semegen informed her that the job had already been filled. Also, on October 12, 2015, Jacob sent a correctly addressed email to Conerway asking that she be considered for the water quality chemist opening at Water Works Park and listing her credentials. Jacob did not receive a response from Conerway. Jacob acknowledged that she had not applied for other positions with DWSD since her layoff and had not applied for positions with Great Lakes Water Authority.

When asked why he did not recommend that Jacob be placed in the new chemist position, Jurban testified that it was matter of having a balanced team with as much diversity as he could achieve in the operations lab and in the analytical lab. On the chart that Jurban prepared showing the general job functions of the individuals who had been laid off, Jurban only indicated oil and grease as Jacob's job functions. When questioned about Jacob's past work as a quality control chemist, performing quality analysis, and BOD testing, Jurban admitted that Jacob had BOD experience, but explained that, given the chart, it was not possible to list the huge array of job skills and he was looking at those skill sets that were still important in the lab.

Jurban acknowledged that Jacob had filed a grievance over being removed from quality assurance testing and that she had filed a complaint with either the EEOC or MERC regarding the issue. Jurban also acknowledged that Jacob had performed trace metal and mercury analysis in the past. Jurban testified that he did not think it was important to list those skills on the chart, since he had already selected other employees who would be able to do those kinds of tests. Jurban also acknowledged that Jacobs possesses a D license. Jurban acknowledged that the skills listed on the chart were the ones that he discussed with McNeely. Jurban testified that the skills listed on the chart identified the skills of those individuals that were still important to maintaining laboratory operations.

* * *

Kovoor was hired by DWSD in October 1991. He worked for DWSD until October 15, 2015. As secretary of SCATA, Kovoor participated in collective bargaining between 2009 and 2015.

Kovoor' s most recent position was as an analytical chemist. He worked in the analytical lab that is part of the wastewater treatment plant. His supervisor was

Kuriakose Cheeramvelil. At the time of his layoff, Kovoor was seventh from the top in seniority. He has a bachelors degree in chemistry and two years of graduate study in computer science. He has also received a National Registry of Certified Chemists Association certification and a laboratory analyst grade one certification from the Michigan Environmental Water Association. He also has a D license from the Michigan Department of Environmental Quality, for which he received congratulations from the DWSD director, McCormick by letter dated August 21, 2012. Kovoor testified that according to the new DWSD management guidelines, it was necessary to have a D license to advance to the chemist II position. For that reason, he got the D license. Kovoor has expertise in instrumentation analysis and used the ICP machine to analyze trace metals. He did the Mercury analyzer, performed troubleshooting for the instruments, and did all the analysis in the lab except for the GC analysis.

Kovoor learned about the possibility of reclassification in May 2014. The Employer put the self-assessment information on the website, and he applied for the new chemist position after he was told about it by a coworker. Kovoor learned about the reclassification self-assessments from his coworkers.

Kovoor considered the duties of the new chemist position to be similar to those of an analytical chemist. He believed that he had the qualities for the new chemist position and that he met and exceeded the requirements for the chemist level II position. Kovoor did not believe he was at risk of losing his job because he had a D license, he had 24 years of experience as an analytical chemist, he had the relevant certifications, his attendance was great, and he did not have any disciplinary record within the 12 month period mentioned on the self-assessment forms.

* * *

Kovoor testified that he learned he was being laid off on September 30, when he was called into the conference room by Peindl and was given a layoff notice. He testified that he was both surprised and shocked by the layoff and subsequently asked Simoliunas to file a grievance and arbitrate the layoffs.

Kovoor identified two of his former coworkers who were hired for the chemist position that he had applied for. He asserted that he was more qualified than either of them because he has a D license and neither of them had a D license. He also testified that he trained one of them on all the instruments because he was senior to her and she did not have any analytical certifications like he has. Both individuals previously worked as analytical chemists at DWSD.

Kovoor testified that no one from DWSD told him why he wasn't hired instead of those who were. After his layoff he applied for three positions: he applied twice for a water systems technician at DWSD and later for a chemist position with Great Lakes Water Authority in May 2016. Kovoor received confirmation that his application had been received but he was never called for an interview. Kovoor

was never provided with an explanation as to why he was not hired. Kovoor asserted that he was more than qualified for the water systems technician positions.

Kovoor testified that he had many negative interactions with Jurban, including SCATA's involvement in the aftermath of the explosion and regarding the overtime issue.

When Jurban was asked why he did not recommend Kovoor for a chemist position, he testified that they needed people with several skill sets. Jurban acknowledged that on the chart that he had created listing the skills of the employees who were to be laid off, the only skill he listed for Kovoor was BOD. According to Jurban, prior to his layoff it was Kovoor's job to perform tests in the BOD lab. Jurban explained that he had left Kovoor in the BOD lab because Kovoor had previously written to the director and objected to performing other assignments beyond the BOD lab. Jurban believed that Kovoor only wanted to do BOD's.

Jurban admitted that when he created the chart that lists the skills of the employees who were laid off, he did not refer to anything but was just drawing on his own memory. Jurban acknowledged that Kovoor had worked in metal analysis prior to 2013 and had six years of experience in that field. However, Jurban stressed that because Kovoor had not worked on metal analysis in the three years since he began working on BOD's, Jurban did not believe that Kovoor had the current skill set to perform the test done by the metal group also known as the ICP group. . . .

Jurban testified that he may have known that Kovoor possessed a D license. He acknowledged that the D license was important in the new organizational development program for advancement within the current chemist series, and individuals who did not have a D license were allowed up to two years to obtain it. Jurban admitted that he recommended individuals without a D license for placement in the new chemist position. Jurban testified that having a D license demonstrates that the person has knowledge of wastewater treatment processes.

Jurban testified that the main factors that stood out in deciding that Kovoor would not be selected was that he had done only BOD for about three years and he had expressed unwillingness to be trained in other things. Jurban indicated that Kovoor' s attitude was part of the consideration, not just Kovoor' s actual skills.

* * *

Simoliunas first began working for DWSD as a chemist in 1981. At that time, he performed research and was not working in the wastewater plant. He was moved to the plant about 10 years prior to his layoff. He last worked in the operations lab. Simoliunas was elected president of SCATA, for the second time, in early 2009. Simoliunas was laid off on October 14, 2015. After Simoliunas's layoff, he did not receive any offers to return to work at DWSD or at Great Lakes Water Authority.

Simoliunas did not fill out a self-assessment form. He didn't believe he needed to fill out the self-assessment because he believed he had received an accommodation as a result of his federal court action against DWSD.

Simoliunas told Jurban that he would not fill out the self-assessment form, but Simoliunas did not explain his reasons for refusing to complete the form and Jurban did not ask for his reasons. Simoliunas wrote to Conerway in human relations and to Wolfson, DWSD's chief operating officer, saying that he didn't have to fill out the self-assessment because they had to accommodate him on the day shift in accordance with the agreement in court. Simoliunas testified that the only response he received to that correspondence was notice of his layoff. . . . Simoliunas testified that he stopped driving when he turned 80 years old in 2013.

* * *

Jurban testified that although Simoliunas did not fill out a self-assessment form, he did review Simoliunas's qualifications. Jurban had not been told that he could or could not hire someone who had not filled out the self-assessment form. Simoliunas['s] failure to fill out the form was a consideration for Jurban, but it was not critical to his decision. Jurban testified that Simoliunas was less qualified than the individuals he recommended for the chemist position.

Jurban believed that Simoliunas was not physically able to do all the required functions in the lab. The lab's operations are 24 hours a day and seven days a week. Employees are required to work multiple shifts and must also have the ability to drive. Jurban was aware of Simoliunas' agreement with the City that did not require him to have a driver's license and permitted him to work only the day shift. Jurban testified that the analytical lab only operated five days a week, while the operations lab operated 24/7. Jurban explained that if a chemist assigned to the operations lab is off work, that person's position must be filled. If an employee was working on the first shift and the second shift employee did not report for work, the first shift employee was obligated to continue working through the second shift. Jurban testified that the fact that Simoliunas could not perform all the actual duties of a chemist was one of the factors considered in determining whether Simoliunas would be selected to fill one of the positions.

Jurban acknowledged that Simoliunas performed analytical work for 25 years and then worked in the operations lab for the remainder of his time with DWSD. Jurban also acknowledged that if Simoliunas worked in the analytical lab, day shifts would have been available for him as the analytical lab only worked on the day shift. Jurban also acknowledged that they limit which chemists in the analytical lab drive and that there were chemists working in the analytical lab who did not drive. Jurban then testified that he had not recommended Simoliunas for an analytical chemist job because he had not recently worked at the analytical lab and hadn't developed skill sets required at the analytical lab. However. Jurban acknowledged that he was sure Simoliunas could have learned to do the work in the analytical lab. Jurban further acknowledged that another employee had

previously worked in the operations lab and had no prior experience in the analytical lab, but now works in the analytical lab.

Jurban had given Simoliunas a three-day suspension regarding an incident that had occurred a few years previously. SCATA filed an unfair labor practice charge in 2012 to challenge the suspension. The matter was heard by [the ALJ] who also heard this matter, and was subsequently dismissed. [Footnotes omitted.]

After receiving notice of the layoffs,

Simoliunas attempted to file a grievance regarding the layoffs on October 1, 2015. He attempted to send an email to Conerway grieving the layoffs and asking that they be rescinded. Although Simoliunas had sent grievances by email in the past, his normal procedure for filing a grievance was to mail it and then hand-deliver it to the human resources department to get a copy time-stamped at the point of receipt. However, he sent the grievance of the layoffs by email because he had such a short time frame; the layoffs were scheduled for 13 days from the date of his receipt of the notice. When he sent the grievance by email to Conerway, he omitted Conerway's first initial from her email address. Although Simoliunas believed he had sent his correspondence to Conerway's correct email address, evidence produced at hearing established that her actual email address contained her first initial. Conerway denied ever seeing that email prior to the hearing in this matter.

Simoliunas, Vannilam, and SCATA's attorney . . . met with DWSD representatives Conerway and Wolfson for a special conference on October 7, 2015. Kovoor testified that he was under the impression that the meeting between SCATA officers and DWSD representatives had been called because of the grievance he believed that SCATA had filed. Kovoor acknowledged at the hearing that SCATA did not provide a written grievance to DWSD at the meeting. During that meeting, the SCATA representatives each argued that the layoffs should be rescinded and verbally requested arbitration, but they did not submit a written request for arbitration.

Conerway testified that her role in DWSD included processing grievances. She testified that if a union filed a grievance, the Employer's response would depend on what level the grievance was at and there was usually a hearing or a meeting with the union to discuss the matter. Conerway explained that if a union is unhappy with the Employer's response, the union can request arbitration. In that case, the City may respond by suggesting that the parties get together to prepare a list of arbitrators or the City may fail to respond. If the City does not respond, the union can move the arbitration forward on its own.

At the special conference, Conerway acknowledged that the SCATA representatives wanted to discuss the layoffs. Simoliunas objected that 50% of the chemists were laid off and that he had been told that the chemist title had been eliminated. Simoliunas stated that SCATA wanted management to rescind the

layoff notice and give the jobs back to the chemists. However, he did not demand to bargain over the impact of the layoffs. . . .

Kovoor also stated that the employer was targeting SCATA officers, noting that he was the SCATA secretary and George Vannilam, the SCATA vice president was also laid off. . . .

* * *

Wolfson promised that the Employer would investigate the issues raised by SCATA. He then asked the SCATA officers what else they would like from the Employer. Simoliunas responded that they wanted the Employer to look at all the things SCATA had brought up. Kovoor also asserted that there had been prevalent favoritism in the water department selection process and that no objective criteria had been used. . . .

Simoliunas indicated that since they were going to be laid off the following Thursday there wasn't much time and that meeting was the "last grievance" meeting. Simoliunas asserted that they needed to choose an arbitrator by the following Tuesday because Wednesday was the last day of work for those who were being laid off.

* * *

Kovoor further asserted that South Indian chemists were targeted and that that he and his wife were especially targeted because of their marital status, though they were more qualified than employees who had been retained. He further contended that the selection process had been tainted with favoritism. Vannilam contended that the selection process was also affected by nepotism and Kovoor asserted that it was affected by racism. Kovoor went on to argue that all the chemists who were born in America were retained but the naturalized citizens were thrown out. He contended that all of those laid off were from South India. Simoliunas asserted that some of those laid off, including himself, were filing complaints with the Michigan Department of Civil Rights.

The special conference ended after Wolfson reiterated his promise to investigate the issues raised by SCATA.

At no point in the special conference did any of the SCATA representatives request to bargain over the issues they raised, nor did they provide the DWSD representatives with a written grievance or a written request for arbitration.

On October 20, 2015, Simoliunas sent another email to Conerway at the wrong email address. With that email, he attempted to request arbitration of the grievance he had intended to file with the October 1 email. Conerway denied ever seeing the October 20 email prior to the hearing in this matter. Conerway also identified the letterhead on which grievances from SCATA were normally received. She testified that she did not receive a letter on SCATA letterhead

> demanding to arbitrate a grievance regarding the layoffs of chemists in October 2015. Conerway further denied having received a list of proposed arbitrators from SCATA or from the American Arbitration Association regarding a demand to arbitrate by SCATA with respect to the layoff of chemists in October 2015.
>
> Conerway further testified that in October, November, and December 2015, she was the person responsible for administering grievances for DWSD and she did not receive a written grievance from SCATA, or its attorney, demanding to arbitrate the layoffs of chemists in October 2015. She further testified that her staff did not usually receive grievances from unions and that the grievances would usually go to her. However, she explained that if a grievance or arbitration demand had been received by someone else, her staff would have given it to her.

On November 2, 2015, Simoliunas initiated the instant MERC action on behalf of SCATA, filing a one-page, largely handwritten charge against DWSD on a standard form for such charges. In the initial charge, SCATA alleged only that DWSD's "[f]ailure to go to arbitration for layoffs of members after repeated requests" constituted an unfair labor practice under PERA.

Pursuant to former Mich Admin Code, R 792.11514 (since rescinded), the ALJ ordered SCATA to provide a more definite statement of its charge, including a statement of all relevant facts and dates. In reaction, Simoliunas filed a three-page, handwritten statement elaborating on SCATA's original charge and further alleging that DWSD had committed unfair labor practices by (1) laying off several SCATA members and "all officers . . . on September 30, 2015 . . . without prior notice or consultation with SCATA," with "no regard to seniority, ability, [or] professional recognition," (2) failing to respond to SCATA's requests to remediate such action following the special conference, and (3) failing to respond to SCATA's requests to mediate or arbitrate the matter.

DWSD filed two motions for summary disposition, both of which the ALJ denied. Thus, this matter ultimately proceeded to a seven-day administrative hearing. Following the hearing, the ALJ issued a 36-page opinion and recommended order stating her factual findings and recommending that MERC deny appellants' charges in full:

> The ALJ found that [SCATA] failed to establish that [DWSD] breached its duty to bargain or that it discriminated against Charging Party's three officers or the spouse of an officer because of the officers' union activity. The ALJ also concluded that the portions of the charge asserting that the Employer repudiated the contract were not timely filed and rejected SCATA's arguments that the statute of limitations had been tolled. The ALJ further found that SCATA did not make a timely demand to bargain over the effects or impact of the layoffs and the reduction in force on members of its bargaining unit, and that by failing to make a timely demand to bargain, SCATA waived its right to bargain over the selection procedures used for the new chemist classification. The ALJ found insufficient evidence of anti-union animus to support SCATA's claim that protected concerted activities were a motivating factor in the DWSD's decision not to select or recommend officers and certain members of the bargaining unit represented by the Union for the new chemist positions.

After appellants filed exceptions, the three-member MERC panel adopted the ALJ's findings in full "except for the differences" explicitly noted in MERC's order. The MERC panel rejected all of appellants' exceptions, determining them "to be without merit."

The instant appeal ensued.

II. ANALYSIS

On appeal, appellants raise several claims of error, which we review under varying standards. As our Supreme Court observed in *Macomb Co v AFSCME Council 25*, 494 Mich 65, 77; 833 NW2d 225 (2013):

> In a case on appeal from the MERC, the MERC's factual findings are conclusive if supported by competent, material, and substantial evidence[1] on the whole record. Legal questions, which include questions of statutory interpretation and questions of contract interpretation, are reviewed de novo. As a result, an administrative agency's legal rulings are set aside if they are in violation of the constitution or a statute, or affected by a substantial and material error of law. [Quotation marks, citations, and footnotes omitted.]

In performing such review de novo, an agency's statutory interpretation "is entitled to respectful consideration and, if persuasive, should not be overruled without cogent reasons"; however, a reviewing court may not simply "defer" to the agency's interpretation by ignoring the statutory text and the underlying legislative intent evinced thereby. *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 107-108; 754 NW2d 259 (2008). On the other hand, "[r]eview of an administrative agency's fact-finding is akin to an appellate court's review of a trial court's findings of fact in that an agency's findings of fact are entitled to deference by a reviewing court," as are the agency's credibility determinations. *Id*. at 101.

As a preliminary matter, we note that appellants have failed to frame several of their claims of error within the applicable standard of review. Without citing any authority indicating that an "abuse of discretion" standard applies to MERC decisions in the first instance, appellants repeatedly argue that MERC "abused its discretion" with regard to various factual findings or legal conclusions. Appellants also repeatedly argue that this Court should find "clear error" in MERC's factual findings. Indeed, they explicitly indicate that MERC's factual findings "are reviewed for clear error," citing in support one non-MERC decision, *City of Novi v Robert Adell Children's Funded Trust*, 473 Mich 242, 249; 701 NW2d 144 (2005). While the standard of review that applies to MERC's factual findings may be "[s]imilar" to the "clear error" standard, *Rovas*, 482 Mich at 101, the two standards are not identical. Unlike the judicially crafted "clear error" standard, see MCR 2.613(C), the standard of review that applies to an agency's factual findings is a statutory and constitutional construct, see Const 1963, art 6, § 28; MCL 423.216(e) ("The

[1] "Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence." *Mich Ed Ass'n Political Action Comm v Secretary of State*, 241 Mich App 432, 444; 616 NW2d 234 (2000).

findings of the commission [i.e., MERC] with respect to questions of fact if supported by competent, material, and substantial evidence on the record considered as a whole shall be conclusive."); *Macomb Co*, 494 Mich at 77 & n 22; *Mich Ed Ass'n Political Action Comm v Secretary of State*, 241 Mich App 432, 444; 616 NW2d 234 (2000) ("Substantial evidence is any evidence that reasonable minds would accept as adequate to support the decision; it is more than a mere scintilla of evidence but may be less than a preponderance of the evidence."). Despite appellants' faulty framing of their arguments, we will consider their claims of error under the appropriate standards.

A. ANTIUNION ANIMUS

Appellants argue that MERC "abused its discretion" and committed "clear error" by finding that appellants had failed to make the requisite showing of antiunion animus or hostility to support a prima facie claim of unlawful discrimination under § 10(1)(c) of PERA, MCL 423.210(1)(c). Paying due deference to the agency's credibility determinations, we find the disputed factual findings to be "conclusive" under MCL 423.216(e).

In *Taylor Sch Dist v Rhatigan*, 318 Mich App 617, 636; 900 NW2d 699 (2016), this Court utilized the test that MERC has developed to determine whether a violation of § 10(1)(c) of PERA has occurred, as follows:

> Section 10(1)(c) of the Act prohibits a public employer from discriminating against employees in order to encourage or discourage membership in a labor organization. The elements of a prima facie case of unlawful discrimination under PERA are, in addition to the existence of an adverse employment action: (1) union or other protected activity; (2) employer knowledge of that activity; (3) *anti-union animus or hostility toward the employee's protected rights*; and (4) *suspicious timing or other evidence that protected activity was a motivating cause of the alleged discriminatory action*. [Quotation marks and citation omitted; emphasis added.]

"Anti-union animus can be established either by direct evidence or circumstantial evidence, including evidence of suspicious timing or pretext that fairly support the inference that the employer's motive was unlawful." *City of Royal Oak v Haudek*, 22 Mich Pub Emp Rep 67 (2009) (Case No. C07 F-139).

With regard to § 10(1)(c) of PERA, appellants do not contend that MERC's summary of the relevant evidence and witness testimony is inaccurate. Rather, appellants take issue with the ultimate finding that the agency *derived* from such testimony, i.e., MERC's finding that appellants failed to demonstrate either "suspicious timing" or that antiunion animus or hostility was a motivating factor in DWSD's adverse employment actions against the individual appellants.

Appellants fail to recognize that, at root, MERC's decision in this regard was based on the ALJ's credibility determinations following the administrative hearing. Specifically, the ALJ credited Jurban's testimony concerning why he recommended certain chemists for retention and not others. Nor did the MERC panel disagree. Instead, after stating decidedly thorough findings of fact, MERC recognized:

At first glance, it appears suspicious that of the six chemists who remained involuntarily laid off three were SCATA officers and the fourth, Cicy Jacob, was the spouse of one of those officers. There is voluminous evidence in the record of the numerous grievances they filed, of the internal complaints they filed, and of the complaints they filed to state and federal agencies. There is also substantial evidence in the record of their inflexibility in bargaining. With respect to the latter, the Employer's attorney and bargaining representative expressed considerable frustration, during a sidebar conference at the hearing, over the parties' inability to make any progress towards reaching a new agreement after years of bargaining. Since, these actions by SCATA officers were taken to protect the interests of the members of the bargaining unit that they represented we would find that DWSD committed an unfair labor practice in terminating their employment if there was evidence of a causal connection between their union activity and the termination of their employment. . . .

* * *

The person who made the decision on whether the three officers and Jacob would be placed in one of the new chemist positions was McNeely. McNeely relied solely on recommendations made by Jurban. Jurban had been a member of SCATA from the time he started at DWSD, some four decades ago, until he moved to the title of assistant sewage plant laboratory supervisor.

Jurban did not participate in bargaining with SCATA and there is no evidence that Jurban was in any way adversely affected by the three SCATA officers' union activity. . . . Jurban denied that his failure to recommend Jacob, Vannilam, Simoliunas, and Kovoor was because of their previous complaints to the EPA or their complaints to the MDEQ. He further denied knowledge of their presentations to the City Council opposing the EMA contract. He testified that those matters were not a factor in his decision. The same is true with respect to the complaints made to McCormick about Jurban. While Jurban acknowledged that McCormick would have told him about any complaint that she received, he testified that he had no recollection of any such discussion.

It is apparent from Jurban's testimony, that his method for selecting the employees who would be placed in the new chemist position was based on his personal recollection of their skills and their experience with certain tasks. It appears that when he was considering their applications for the new chemist position, his recollection of the skills, training, and work experience of Simoliunas, Vannilam, Kovoor, and Jacob was somewhat flawed. However, there is no evidence that his failure to consider skills they possessed or his failure to list those skills on the chart that he furnished to McNeely was due to antiunion animus.

* * *

Given Jurban's opinion of their abilities and work ethic, it appears likely that had Simoliunas, and Kovoor not been SCATA officers or otherwise involved

> in union activity, Jurban still would not have recommended that they be placed in the new chemist position.
>
> After a careful review of the record, we find insufficient evidence to establish that the layoffs were illegally motivated by antiunion animus. Such a finding must be based on substantial evidence and not mere suspicion or innuendo. *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974). Charging Party has failed to demonstrate anti-union animus on the part of the Employer, or that a causal nexus existed between the employees' concerted activity and their layoffs. We note that at the Special Conference to discuss the layoffs, while the SCATA officers mentioned their suspicion that they were being laid off because of their union activity, they also repeatedly asserted the belief that their layoffs were due to their ethnicity. Kovoor repeatedly argued that the Employer had selected them for layoff because they were from South India. For these reasons, we agree with the ALJ that there is insufficient evidence to find that the layoffs violated §10(1)(c) of PERA. [Footnote omitted.]

Paying appropriate deference to the ALJ's ability to judge the credibility of the witnesses who appeared before her, it seems that MERC's above factual findings are "conclusive" under MCL 423.216(e). It is undisputed—and, in fact, appellants concede—that Jurban was the only decisionmaker who mattered with regard to which chemists DWSD retained during its reorganization. Among other things, Jurban testified that he (1) was a former member of SCATA; (2) counseled DWSD's management against outsourcing work that was performed by SCATA members and limiting the hours of SCATA chemists; (3) advocated, for several months after first learning about the planned layoffs in October 2015, against laying off chemists as part of the reorganization, also fearing that he might be laid off in the process; (4) partially succeeded in opposing the planned layoffs, convincing management to retain more chemists than it had originally planned; (5) based his recommendations about which chemists to retain primarily on his desire to retain a team of chemists who were competent in the "multiple skills" necessary to perform a broad array of "essential" tasks (e.g., "[s]ampling," "biomonitoring," "sodium hypochlorite solutions," "polymer testing," "wet weather testing," "primary testing," "secondary testing," "ICP," "LIMS," "quality assurance," "GCMS testing," "oil and grease," "BOD," and "phosphorous testing"); (6) spoke to most likely "everybody" employed in both of DWSD's labs "at one time or another" in an attempt to learn which chemists had various skills; (7) considered seniority as "one consideration" among many others; (8) made his recommendations as best he could in a somewhat rushed fashion, under "fast and furious" time pressure; (9) viewed the self-assessments that employees had completed but largely ignored them, instead relying mostly on his own recollection of each employee's skillset and his "years" of acquaintanceship with each; (10) continued to advocate for the retention of those chemists whom he had not recommended for retention or promotion, and sought to assist those displaced chemists who approached him with obtaining employment elsewhere; (11) was of the opinion that none of the chemists who were laid off "did anything wrong" or deserved to be terminated; (12) believed that advanced degrees were not necessarily a key factor to be considered, given that DWSD is "not a research facility"; (13) personally respected Simoliunas, thought he was "an intelligent individual," but believed that the older man lacked the physical capability to perform under the more demanding, "24/7" conditions that might be necessitated by the layoffs; (14) believed that Kovoor was unwilling to engage in "multitasking," preferring to perform only "BOD" testing; (15) decided not to recommend

Vannilam for retention because, although Vannilam had a diverse skillset that might have otherwise made him a suitable choice, those skills were already adequately represented by those whom Jurban had previously decided to recommend; (16) did not recommend Jacob for retention for similar reasons, i.e., because her retention would not have furthered the goal of maintaining "a balanced team" with a diverse skillset; and (17) admittedly might have been mistaken in his recollections concerning each individual chemist, including the individual appellants. Finally, when specifically asked by the ALJ, Jurban agreed that the individual appellants' prior complaints and grievances against him (and DWSD generally) "played no part in [his] decision" concerning which chemists he recommended for retention.

The ALJ credited such testimony as true, and we find no basis for second-guessing her related credibility judgment. Moreover, Jurban's relevant testimony represents "competent, material, and substantial evidence" that supports MERC's finding that appellants failed to make the requisite showing of antiunion animus or hostility to support a prima facie claim of unlawful discrimination under § 10(1)(c) of PERA. Hence, that finding is conclusively established and cannot be disturbed. See MCL 423.216(e).

Aside from § 10(1)(c) of PERA, appellants also argue that proof of unlawful or antiunion motivation is not required to support a claim under § 10(1)(a) of PERA, which provides that public employers may not "[i]nterfere with, restrain, or coerce public employees in the exercise of their rights guaranteed in section 9." MCL 423.210(1)(a). In support, appellants cite *City of Inkster v Inkster Fire Fighters Union, IAFF Local 1577*, 26 Mich Pub Emp Rep 5 (2012) (Case No. C09 J-203) ("The issue of whether §10(1)(a) has been violated is not determined by the employer's motive for the proscribed conduct or the employee's subjective reactions to it, but rather whether the employer's actions may reasonably be said to tend to interfere with the free exercise of protected employee rights."). However, as MERC recognized in *City of Inkster*, the three-prong test for whether an employer's actions constitute an unfair labor practice under § 10(1)(a) of PERA is set forth in *Ingham Co v Capitol City Lodge No 141 of the Fraternal Order of Police, Labor Program, Inc*, 275 Mich App 133, 141-142; 739 NW2d 95 (2007), as follows:

> Under the first prong of the test, we look at whether the employer's action adversely affected the employee's protected right to engage in lawful concerted activities under PERA. Under the second prong, we look at whether the employer has met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule. Finally, under the third prong, we balance the diminution of the employee's rights because of application of the rule against the employer's interests that are protected by the rule. [Footnotes and citations omitted.]

In analyzing that final prong, a reviewing court "must remain cognizant that it is the primary responsibility of the Board and not of the courts to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Id.* at 142 (quotation marks, citations, and brackets omitted).

In this instance, appellants offer no argument concerning the three-prong test from *City of Inkster* and *Ingham Co*. Appellants also fail to recognize that MERC *acknowledged* that antiunion animus was not an element of appellants' claim under § 10(1)(a) of PERA, reasoning as follows:

> [W]hile antiunion animus is not a factor under §10(l)(a)[,] the fact that there is insufficient evidence to find that the Employer's failure to place the SCATA officers and Jacob in one of the new chemist positions was motivated by the union activity, indicates that there is no basis to find that their layoffs would have a chilling effect or otherwise restrain DWSD employees from engaging in protected concerted activities. Indeed, Charging Party failed to offer any evidence that the layoff of the three SCATA officers or Jacob had a chilling effect on their subsequent union activity or that of the remaining employees. Charging Party's officers continued their union activities after receiving their layoff notices. Charging Party has offered no evidence that other employees knew that all three of the SCATA officers were laid off or that the SCATA officers viewed their layoffs to be connected with their union activity. Charging Party offered no evidence that other employees had reason to fear that involvement in union activity could jeopardize their own employment.

Because appellants fail to even *argue* that this Court should displace MERC's reasoned policy analysis concerning appellants' § 10(1)(a) charge, and we detect no reason for doing so, we reject appellants' claim of error under § 10(1)(a) of PERA. See *Ingham Co*, 275 Mich App at 142.

B. ARBITRATION DEMAND

Appellants next argue that MERC "abused its discretion" and committed "clear error" by finding that SCATA failed to take the necessary steps, under § 10 of the CET, to compel arbitration concerning the alleged unfair labor practices at issue here. Specifically, appellants argue that even if MERC was correct that Simoliunas's e-mailed arbitration request was sent to the incorrect e-mail address for Conerway, it nevertheless constituted a valid arbitration request under the CET because it was sent to DWSD's general counsel, William Wolfson. We disagree.

The CET unambiguously set forth the applicable requirements to file a grievance and request arbitration, as follows:

> 9. GRIEVANCE AND ARBITRATION PROCEDURES
>
> A. Should any dispute arise between the City and the Union concerning the application or interpretation of this CET, an earnest effort shall be made to settle such dispute promptly in accordance with the following Grievance Procedure:
>
> Step 1. Employee, Supervisor and Steward
>
> Any employee having a grievance may report the same to his Supervisor and an endeavor shall be made to adjust the grievance between the employee and the Supervisor. . . . *Where the matter involves imposition of disciplinary suspension or above, Step 1 does not apply and grievances shall be filed at Step 2.*
>
> Step 2. Department Head Level
>
> If a satisfactory adjustment is not obtained under Step 1, *the grievance shall be reduced to writing on a standard grievance form setting forth all facts believed*

to be relevant to the dispute, and the grievance shall be signed by the employee or employees involved. The written grievance must then be submitted to the Department Head. A meeting shall be held at a mutually convenient date and time to discuss the grievance. Up to two (2) Union Representatives, other than the Grievant, may attend the Step 2 meeting. *Any resolution reached at this meeting shall be reduced to writing*. The Department Head shall endeavor to furnish the Union with his/her written decision within fifteen (15) working days of the Step 2 meeting, excluding Saturdays, Sundays and holidays.

Step 3. Labor Relations Division Level

If a satisfactory adjustment is not obtained under Step 2, the Union may request a Step 3 meeting with the Labor Relations Director. *Such appeal and request for a Step 3 meeting must be submitted in writing to the Labor Relations Director within five (5) working days from the receipt of the Department Head's Step 2 answer*. Not more than two (2) Union Representatives may attend the Step 3 meeting, and the Labor Relations Director may designate members of his staff to represent the City. *Any resolution reached at this meeting shall be reduced to writing*. The Labor Relations Director or his or her designee shall endeavor to furnish the Union with his/her decision within thirty (30) working days of the Step 3 meeting.

Step 4. Arbitration

A. *If a grievance is not settled after it has gone through Step 3 of the Grievance Procedure, the Union must file a written notice with the Labor Relations Director of appeal and intent to submit the dispute to arbitration. The Notice of Intent to Arbitrate must be filed within fourteen (14) calendar days of its receipt of the Labor Relation Director's Step 3 answer. If the Union fails to request arbitration in writing within this time limit, the grievance shall be deemed settled on the basis of the Step 3 answer and not eligible to go to arbitration*.

* * *

B. *A grievance shall be deemed untimely, settled and withdrawn unless a written Step 2 grievance is filed with the Department Head within five (5) working days (excluding Saturdays, Sundays and holidays) after the Grievant first knew, or should have known, of the facts giving rise to the grievance. Grievances concerning a continuing practice or continuing act of the Employer must be grieved within ten (10) working days of the date the Grievant first knew, or should have known, of the act or practice.* Any extensions of these time limits must be agreed to by the City in writing.

C. *In the event the Employer fails to respond to a grievance or schedule a meeting within the time periods provided in any steps of the Grievance Procedure, said grievance shall be denied and the Union may make a written request that the*

> *grievance be referred to the next step*. [Order Appealed, pp 33-35.] [Emphasis added.]

Notably, appellants do not argue that MERC erred by concluding that this language was both unambiguous and applicable to the facts at bar. Assuming, without deciding, that because SCATA's grievance concerned layoffs, the union was excused from filing a "Step 1" grievance, the CET nevertheless required SCATA to fulfill the requirements of "Step 2" and "Step 3" before filing an arbitration request under "Step 4." In order to comport with "Step 2," SCATA was required to submit a written grievance "on a standard grievance form setting forth all facts believed to be relevant . . . and . . . signed by the employee or employees involved" to "the Department Head." Appellants do not argue, let alone present any evidence indicating, that Wolfson was the appropriate department head, that the written grievance was submitted on a standard grievance form, or that the grievance was "signed" by the SCATA employees who were involved. Nor have appellants presented any evidence that they followed the procedure for requesting a "Step 3" meeting by submitting a written request to DWSD's labor relations director. And even assuming, arguendo, that SCATA's failure to follow the procedures listed in Steps 2 and 3 could be excused on some basis, appellants fail to present any evidence that they ever complied with "Step 4" by submitting a written notice of intent to submit the dispute to arbitration with the labor relations director of appeal. Hence, we are unpersuaded that MERC's interpretation of the CET was erroneous or that we should disturb its factual finding that appellants failed to demonstrate that they took the necessary steps under the CET to file a grievance and request arbitration.

C. SENIORITY PROVISIONS

Appellants argue that MERC committed legal error by concluding that DWSD did not commit an unfair labor practice by failing to abide by the seniority-based-recall provisions in § 15(F) of the CET. We disagree.

Appellants' argument of this issue spans only slightly more than half a page—most of which consists of a quotation of § 15(F) of the CET—and appellants cite no legal authority in support of their position. Thus, we conclude that appellants have abandoned this issue. See *Mitcham v City of Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959); *Bill & Dena Brown Trust v Garcia*, 312 Mich App 684, 702; 880 NW2d 269 (2015) ("An issue is deemed abandoned when a party fails to cite any supporting legal authority for its position.").

In any event, we also find appellants' instant claim of error unpersuasive on the merits. This issue involves the proper interpretation of contractual provisions in the CET. As discussed in *Innovation Ventures v Liquid Mfg*, 499 Mich 491, 507; 885 NW2d 861 (2016):

> Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement. When interpreting a contract, our primary obligation is to give effect to the parties' intention at the time they entered into the contract. To do so, we examine the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written[.] [Quotation marks and citations omitted.]

"[C]ontracts must be read as a whole," *Kyocera Corp v Hemlock Semiconductor, LLC*, 313 Mich App 437, 447; 886 NW2d 445 (2015), giving "effect to every word, phrase, and clause," while taking pains to "avoid an interpretation that would render any part of the contract surplusage or nugatory," *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

The relevant portion of the CET, § 15(F), provides:

> F. EMPLOYEE RECALL, REEMPLOYMENT AND RESTORATION RIGHTS:
>
> Employees will be recalled *by seniority* for available positions *either: (a) in their current classification, or (b) in the classification in the same occupational series; provided they have prior year service in such classification within the last three (3) years and can perform the duties in the position they are recalled into.* Specific recall and notification procedures shall be determined and modified by the Human Resources Department. Any Human Resources rules or procedures concerning employee recall shall not be interpreted to limit or impair the City's right to fill vacancies *through transfer, promotion, or new hire in accordance with the Management Rights or the Transfer and Promotion provisions of this CET*. Any existing Human Resource rules or procedures with conflicting provisions shall be modified to conform to this CET. [Emphasis added.]

Based on its interpretation of this language, MERC rejected appellants' instant claim of error, reasoning:

> Section 15(C) dictates that a reduction in force shall be by job classification. In this case, the Employer determined that all existing job classifications would be eliminated and consolidated into fewer classifications that had broader scopes than the discontinued classifications. The employees represented by SCATA who were laid off, were not laid off as the result of a typical reduction in force. Their positions and all other positions held by DWSD employees prior to the DWSD reorganization had been eliminated. They were laid off because they were not hired for a newly created position.
>
> * * *
>
> As with 15(C), recall rights under 15(F) depend on the employee's job classification. In this case, the employees who were laid off could not be recalled to the classification in which they worked prior to their layoff as that classification no longer existed.

We agree with MERC's interpretation of the pertinent provisions of the CET. The first sentence of § 15(F) uses the disjunctive combination of "either" and "or" to list two clear alternatives for how an employee could be recalled following a layoff: "either: (a) in their *current classification*, or (b) in the classification in the same occupational series; *provided they have prior year service in such classification within the last three (3) years* and can perform the duties in the position they are recalled into." (Emphasis added.) It is undisputed that *all* relevant job classifications at DWSD were eliminated as part of the reorganization effort, and appellants

present no evidence indicating that any of the individual appellants performed work under one of the new job classifications before they were laid off. Ergo, after they were terminated, they could not be recalled into their "current classification" based on seniority, and because they had no prior service in the new classifications, they could not be recalled into those classifications based on seniority, either. Moreover, § 15(F) of the CET unambiguously reserved the right for DWSD's human resources department "to fill vacancies through transfer, promotion, or new hire[.]" Therefore, we perceive no error in MERC's interpretation or application of § 15(F) of the CET.

D. BARGAINING NOTICE

Finally, appellants argue that MERC "abused its discretion" and committed "clear error" by finding that DWSD provided appellants with sufficient notice of impending layoffs to provide SCATA with an opportunity to bargain with DWSD before the layoffs became a "fait accompli." We again disagree.

"Absent an impasse, neither party may take unilateral action with respect to a mandatory subject of bargaining," and doing so constitutes "an unfair labor practice" under § 10 of PERA. *United Auto Workers, Local 6888 v Central Mich Univ*, 217 Mich App 136, 138; 550 NW2d 835 (1996). "It has long been established that any matter that has a *significant* impact on wages, hours, or other terms and conditions of employment is subject to mandatory bargaining." *Oak Park Pub Safety Officers Ass'n v Oak Park*, 277 Mich App 317, 325; 745 NW2d 527 (2007) (*Oak Park*). "A condition of employment is subject to bargaining, but issues of policy are exclusively reserved to government discretion or management prerogative and cannot be made mandatory subjects of bargaining." *Id*. at 326.

"The determination of what constitutes a mandatory subject of bargaining under the PERA is to be decided case by case." *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 178; 445 NW2d 98 (1989). As a general rule, however, a public employer has no duty to bargain concerning its decision to eliminate positions "pursuant to a reorganization." *Id*. at 179; see also *Oak Park*, 277 Mich App at 326 ("issues of manpower or staffing levels generally have been determined to be managerial decisions that are not subject to mandatory bargaining"). Hence, appellants do not argue that DWSD was obligated to bargain concerning the decision to eliminate certain positions as part of the departmental reorganization necessitated by Judge Cox's November 4, 2011 order. Rather, appellants argue that DWSD was obligated to bargain concerning the "impact" of the reorganization and its related layoffs.

Appellants are correct that "the impact of such managerial decisions—on, for example, employee workload or safety—may result in conditions that come within the ambit of the phrase 'other terms and conditions of employment' that is subject to mandatory bargaining." See *Oak Park*, 277 Mich App at 326. Moreover, an employer generally must "provide the charging party with notice and an opportunity to bargain before making changes in the existing terms or conditions of employment[.]" *St Clair Intermediate Sch Dist v Intermediate Ed Ass'n/Mich Ed Ass'n*, 218 Mich App 734, 739; 555 NW2d 267 (1996). And although a union must generally make a "demand" to bargain in order to trigger the employer's duty to bargain, such a demand is unnecessary when the employer's unilateral decision has already been implemented, such that "a demand to bargain or negotiate by the charging party would have been futile[.]" *Id*. at 740.

Appellants contend that the "impact" of the managerial decisions surrounding DWSD's reorganization was sufficient to make the matter a subject of mandatory bargaining. Therefore, appellants contend, DWSD committed an unfair labor practice by failing to provide SCATA with sufficient notice of the reorganization—the planned layoffs in particular—and an opportunity to bargain. Assuming, without deciding, that appellants are correct that the matter was subject to mandatory bargaining, we find no basis to disturb MERC's finding that SCATA was afforded adequate notice and an opportunity to bargain.

To begin with, appellants ignore that this subject is specifically addressed in § 15 of the CET, which provides, in relevant part:

> A. The City reserves the right to reduce the work force.
>
> B. NOTICE TO THE UNION: *Where practical*, the City will provide advance notice to the Union who *may* receive such notice fourteen (14) days prior to issuance of any layoffs.
>
> C. ORDER OF REMOVAL: Reduction in force shall be by job classification in a City department. [Emphasis added.]

Appellants do not contest MERC's finding that throughout 2014 and 2015, i.e., after the CET became effective, SCATA engaged in collective bargaining with DWSD about the proposed job classifications that DWSD wished to impose on SCATA's membership. In other words, SCATA's leadership was well aware of the planned reorganization—several times rejecting DWSD's proposed job classifications—and the record also establishes that SCATA's leadership was aware of the CET and either did obtain a copy of it or could have done so. Combined with Judge Cox's pertinent orders, which were a matter of public record, DWSD's proposals for new job classifications and the pertinent provisions in the CET provided more than adequate notice of the fact that DWSD was planning a major reorganization that might involve layoffs. At any time during the collective bargaining that occurred in 2014 and 2015, SCATA could have requested that DWSD bargain with it concerning the impact that the reorganization would have on SCATA's membership. And appellants have presented no evidence indicating that DWSD would have refused to bargain over the matter. On the contrary, it is undisputed that even when DWSD's duty to bargain had been suspended as a result of Detroit's bankruptcy and the appointment of an emergency financial manager, DWSD nevertheless continued to bargain with SCATA upon request. For those reasons, we find no basis to displace MERC's finding that SCATA received adequate notice and opportunity to bargain regarding the reorganization and the possibility of layoffs.

Nor are we convinced that MERC erred by concluding that DWSD had no affirmative duty to initiate bargaining concerning the impact of the disputed layoffs. "While a public employer has a duty to bargain, that duty is not implicated absent a request by the employees to enter into negotiations." *Van Buren Co Ed Ass'n & Decatur Ed Support Personnel Ass'n, MEA/NEA v Decatur Pub Sch*, 309 Mich App 630, 641; 872 NW2d 710 (2015) (*Decatur Pub Sch*). As was true in *Decatur Pub Sch*, appellants do not challenge MERC's finding that they never made a request to bargain over the impact of the layoffs. See *id*. Hence, MERC did not err by finding no violation of DWSD's springing duty to collectively bargain. See *id*.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ David H. Sawyer
/s/ Jane M. Beckering