STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT, DETROIT HOUSING COMMISSION,
Respondent-Public Employer

-and- Case No. C01 I-186

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES, COUNCIL 25 AND LOCAL 23 and 2394
Charging Parties-Labor Organizations
_____/

APPEARANCES:

Miller, Canfield, Paddock and Stone P.L.C., by Leonard D. Givens, Esq., and John H. Willems, Esq., for the Respondent

Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C., by Renate Klass, Esq., for the Labor Organizations

ERRATA

On September 20, 2002, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above matter finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

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

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

ORDER

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

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

Maris Stella Swift, Commission Chair

Harry W. Bishop, Commission Member

C. Barry Ott, Commission Member

DATED:

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455(10) *et seq*., this case was heard in Detroit, Michigan on October 22, 2001, March 18, 2002, and April 10, 2002, by Administrative Law Judge Roy L. Roulhac for the Michigan Employment Relations Commission. This proceeding was based upon an unfair labor practice charge filed by the American Federation of State, County & Municipal Employees, Council 25 and Locals 23 and 2394 ("Union") against City of Detroit (" City"), Detroit Housing Commission ("DHC"). Based upon the record and post-hearing briefs filed by May 10, 2002, I make the following findings of fact, conclusions of law, and recommended order pursuant to Section 16(b) of PERA:

The Unfair Labor Practice Charge:

In its September 18, 2001 charge, as amended on October 19, 2001, the Union claims that the City and DHC violated Section 10 of PERA by refusing to bargain over the effects of plans to make DHC a

separate legal entity; bargaining directly with bargaining unit members; repudiating the collective bargaining relationship and obligations; unilaterally implementing terms and conditions of employment that had not been negotiated; and failing to provide information.

Findings of Fact:

The facts are essentially undisputed. The Union is the bargaining representatives for a number of employees employed by the City. Some are assigned to DHC. The City and Council 25 and the DHC and Local 2394, a supervisor unit, are parties to master agreements that contain successor clauses that provide for the agreement to be binding upon their successors and assignees in case of an ownership change by either party. The agreements also include provisions that cover layoffs, bumping, and transfer rights.

In 1995, the City notified the Union that it intended to separate what was then known as the Detroit Housing Department from the City. Initial discussions centered around making the Department autonomous in five areas – procurement (purchasing), human resources, management information systems, budget and law. In June 1996, the Legislature enacted Public Act 338 of 1996, which amended the Michigan Housing Facilities Act, MCL 125.651 *et seq*. It established housing commissions as distinct public bodies corporate with enumerated independent powers and authorities. Thereafter, in the fall of 1996, the City entered into a partnership agreement with the United States Department of Housing and Urban Development (HUD) to completely separate the DHC from the City and informed the Union that an ordinance was being drafted to effectuate the Agreement.[1] In January 1997, the Union demanded to bargain over the plan's effects. In addition to requesting a copy of the proposed separation ordinance, the Union's effects bargaining demand included a request that the ordinance incorporate the contract's successor clause, provisions to allow new DHC employees to remain in the City pension system, and the retention of seniority rights for employees who elected to remain City employees. The City agreed to research the possibility of DHC employees remaining in the City's retirement system and to comply with the other requests.

The parties next discussed and bargained over the separation issue in April 1998. The City provided the Union with a two-page list of contract provisions that it anticipated would require modification if DHC separated from the City. On June 15, 1998, the Union responded with a list of changes it deemed necessary. In a September 25,1998 letter, the City gave the Union written assurance that it would negotiate a complete agreement with the Union prior to presenting a separation ordinance to the Detroit City Council.[2]

In June 2000, two years later, DHC presented the Union with a draft memorandum of

[1]HUD funds, monitors, and regulates housing agencies throughout the country, including DHC. DHC had been on HUD's "trouble" list for a number of years and DHC's separation was designed to increase its operational efficiency.
[2]Several years earlier, the Detroit Institute of Arts' (DIA) separated from the City. Prior to the separation the parties negotiated a complete agreement and the City Council approved an agreement that permitted DIA employees to remain in the City's health and pension benefit systems.

understanding (MOU). The City declared that, pursuant to the amended housing act, DHC was a separate and independent entity. The City also informed the Union that a complete contract could not be negotiated prior to DHC's separation. The MOU provided that DHC would honor successor clauses of existing contracts; voluntarily recognize all transferred employees as bargaining unit members; negotiate contract provisions that required modification; honor existing agreements until new contracts were negotiated, or until existing contracts expired; allow employees to remain in the City's pension system and health plans; and honor employees' seniority rights; and transfer employees' accumulated leave to the DHC. It also provided for a 180-day election period for employees to return to City employment. The Union refused to execute the memorandum and maintained its position that a total agreement be negotiated before DHC's separation.

Six months later, in April 2001, DHC presented the Union with a second MOU. Its terms were essentially the same as set forth in the June 2000 MOU. It also provided that DHC may initiate negotiations for new agreements two years after the separation. The Union also refused to execute the second MOU, expressed its opposition to any form of separation, and maintained its position that a complete agreement be negotiated. During an April 6 meeting, the Union requested a list of City vacancies; a list of DHC employees and their prior classifications; and the amount of money that the DHC owed to the City's pension fund.

A month later, the DHC presented the Union with a statement of principles that it would comply with after separation. It forth its commitment to preserve employees' collective bargaining rights, wages and benefits, and to honor the existing collective bargaining agreements until new agreements were negotiated. In a May 9, 2001 letter, the Union indicated that it still opposed DHC separation and, therefore, could not support the statement of principles. On July 17, 2001, the City presented a proposed ordinance to the City Council to make the DHC, effective September 21, 2001, an independent entity. In a July 19, 2001 letter, the DHC director informed employees of DHC's separation plans and advised them of a mandatory July 23, 2001 meeting.

During the July 23 meeting, employees were given a 21-page booklet entitled, "Your Guidebook to a Seamless Transition." It contains a wide range of information regarding the consequences of accepting or rejecting employment with the DHC, including an 180-day election period to return to City positions; answers to commonly asked questions about separation; and benefits that employees would continue to receive as DHC employees.[3] Employees were also advised of DHC's commitment to honor existing agreements and negotiate new ones when those expire.

A few days later, on July 27, DHC employees were sent letters offering them an opportunity to continue in their present positions at the current rates of pay and benefits. Employees were advised that by accepting the offer. They were also told that continuation of their health and pension plans was contingent upon City Council approval, but if approval were not granted, they would receive comparable benefits.

[3] The booklet's benefits section indicates that employees would receive tuition reimbursement of $850 per year, and optical benefits of $75 on the first pair of eyeglass frames and 100% thereafter. The master agreements provide for tuition reimbursement that ranges from $600-850, and $75 for the first pair of frames and a 20% discount on the second pair.

Employees were given until September 21, 2001 to accept or reject the offers. During an August 6, 2001 meeting, the Union was informed of DHC's plan to create a new pension system and utilize the federal Consolidated Omnibus Reform Act (COBRA) for employee health coverage if employees were not allowed to remain in the City's systems. On the same date, the Union renewed its request for a list of vacancies and potential positions that employees might receive, and for information regarding pension contributions.[4] In an August 17, 2001, administrative bulletin, DHC informed employees of its contingency plan for health and pension benefits if City Council did not permit them to remain in the City's systems. On August 21, 2001, the Union informed the DHC that letters it sent to employees asking them to accept or reject employment offers was an unfair labor practice. In addition to asking the DHC to cease dealing directly with its members, the Union renewed its demand to bargain over the effects of DHC separation.

During individual and group meetings on August 29, 2001, representatives from the City's human resources department met with employees and listed their options if they elected not to become DHC employees. Employees reviewed documents that contained their job title, their union affiliation, housing titles and comparable citywide titles, and similar positions employees might qualify for if there were no City positions comparable to their existing titles. Employees were asked whether they thought they would continue their employment with the City. An information sheet was completed for each employee.

During the August 29 group meeting, employees were give a package of documents that outlined the consequences of accepting or rejecting employment with DHC; a six-month timeline for employees to exercise their options; a qualifying questionnaire for DHC employment, and answers to questions asked by employees during the July 23 group meeting. Employees were asked to sign information sheets that reflected potential transfers. According to the president of Local 23, information presented to employees had been discussed with the Union and Union representatives were invited to attend all of the employee meetings.

In September 2001, the City Council rejected the City's July 17, 2001request to approve an ordinance that would permit the DHC to become a separate employer. Instead, it approved an ordinance that declared that all employees assigned to the DHC, then or in the future, were City employees. On September 21, 2001, in response to a lawsuit filed by the Union (subsequently, the City Council joined the suit as a plaintiff), the Wayne County Circuit Court issued a temporary restraining order that prohibited the City from implementing its separation plan.

During the October 1 meeting, the Union renewed its April 2001 information request for a list of vacancies and comparable titles. It also requested copies of letters that were sent to DHC employees on July 19, and its answers to questions that were asked during the July 23, 2001 employee meeting. On October 4, the Union requested copies of employees' responses to the DHC's July 27 employment offer, and the bumping/employment position elections made by bargaining unit and non-bargaining unit members on August 29, 2001. The City provided the Union with most of the requested information on October 18.

[4] According to the Union staff representative, the DHC verbally responded to the Union's question regarding the amount of money that DHC owed to the City's pension fund.

However, it refused to disclose the identities of employees who responded to the July 27 employment offer and the potential transfer elections made by bargaining unit and non-bargaining unit members on August 29.

In the meantime, in an October 9, 2001 letter, the director of DHC advised employees that they were not required to make an election between City and DHC employment and that other documents and information they previously received was for informational purposes only. The employees were also told that, in the future, employees' terms and conditions of employment would be discussed and negotiated with the Union.

On November 15, 2001, the Wayne County Circuit Court found that the 1996 amendments to the Housing Act did not, by operation of law, sever the City of Detroit's employment relationship with DHC employees.[5] The same day, the Union wrote a letter to the City to reiterate the Union's position regarding continued discussions regarding the City's plan to separate DHC from the City. The Union noted that in view of the Court ruling in favor of its argument, any bargaining over the effects and rights of the planned separation "now becomes a moot point" and "may be counter productive." The Union expressed a willing to meet on collective bargaining issues other than matters pertaining to DHC's separation.

Conclusions of Law:

In its post-hearing brief, the Union claims that: (1) DHC failed to negotiate a complete agreement and the City failed to complete negotiations over the effects of separation; (2) the City and DHC bypassed the Union and dealt directly with its members by presenting to them and implementing terms that had never been negotiated with the Union; and (3) the City failed to provide requested relevant information. Section 15 of PERA requires employers to meet with unions at reasonable times and confer in good faith regarding wages, hours and other terms and condition of employment.

Successor Employer's Bargaining Obligation

The Union claims that DHC violated PERA by refusing to negotiate the terms of a complete collective bargaining agreement prior to its separation from the City. According to the Union, although the City and DHC concede that a complete agreement was negotiated prior to DIAs' separation, DHC inexplicably refused to negotiate a complete agreement prior to DHC's separation.

It is noted at the outset that when these proceedings were concluded, the DHC was a City department and was not a public employer within the meaning of PERA. It, therefore, did not have an

[5] In its order issued on January 25, 2002, the Court ruled that all employees who work and all persons who are hired to work at the DHC and all employees who are not represented by labor organizations are and shall remain employees of the City of Detroit and are and shall be participants in the City of Detroit pension, health and benefits plans through at least June 30, 2002. *AFSCME Council 25 and Locals 23 and 2394*, (Dkt No. 01-132280, 1/25/2002). On July 23, 2002, in *AFSCME Council 25, AFSCME Local 23, and AFSCME Local 2394 and Detroit City Council* v *City of Detroit and Detroit Housing Commission*, (Dkt. No. 241606), the Court of Appeals reversed the Circuit Court and held that, by operation of law, the 1996 amendments to the Housing Act severed the City's employment relationship with persons assigned to and employed by DHC, thereby making DHC a separate and autonomous entity.

obligation to bargain with the Union prior to becoming a successor employer. In addressing the bargaining obligation of a successor employer, the Commission has held that a successor employer's bargaining obligation begins when it takes over the operations of another employer; the majority of the new employees had been bargaining unit members employed by its predecessor; and the union makes a demand to bargain. See *City of Grand Rapids and Grand Rapids Housing Commission*, 1997 MERC Lab Op 359, fn.2, aff'd 235 Mich App 398 (1999), citing *West Michigan Community Mental Health System*, 1997 MERC Lab Op 271. The Union, other than claiming that the City refused to negotiate a complete agreement with it before DHC's separation as it did prior to the DIA's separation several years ago, provides no support for its allegation that either the DHC or the City violated PERA by refusing to negotiate a complete agreement prior to .

Bargaining Over the Effects of Planned Separation

In *Ecorse Board of Education* 1984 MERC Lab Op 616 and *Capac Community Schools*, 1984 MERC Lb Op 1195, the Commission held that a public employer must give the union an opportunity for meaningful bargaining over the effects of a management decision before that decision is implemented although the employer need not wait until the parties have bargained to impasse over the effects before implementing the decision itself. See also *City of Detroit, Department of Health*, 1991 MERC Lab Op 41. According to the Union, the City independently violated PERA when it failed to complete effects bargaining before implementing terms that were neither embodied in a collective bargaining agreement nor negotiated. The Union reasons that while the contracts include reduction-in-force, bumping and citywide displacement procedures, they contain no provisions that establish time periods for employees to make decisions regarding their employment status or for their participation in the City's pension and health plans.

There is no support in the record for the Union's position. On January 15, 1997, after the City announced its plan to separate the DHC from the City, the Union made a timely demand to bargain over the effects of the separation. The Union's initial bargaining request included a demand for a copy of the proposed ordinance before its presentation to the City Council and that the ordinance incorporate the contract's successor clause, allow DHC employees to remain in the City pension fund, and protect the seniority rights of employees who will continue their employment with the City. Thereafter, the parties met, corresponded, and exchanged information. In 1998, the parties shared their version of contract provisions they believed needed to be modified prior to separation and even agreed that a complete agreement would be negotiated prior to DHC's separation.

In June 2000 and April 2001, the City presented the Union with proposed memorandums of understanding that included time periods for employees to make decisions regarding their continued employment with the City or with the separated DHC, as well as commitments that DHC would honor the successor clauses of existing agreements, and negotiate new agreements for DHC employees after the separation. The Union, however, despite numerous meetings and exchanges of correspondence, refused to execute either memorandum, or offer alternatives, or execute or propose changes to the City's statement of principles. Rather, the Union engaged in a campaign to delay or derail DHC's separation through legal action and improperly insisted on bargaining a complete contract prior to DHC's separation.

Moreover, after the Court's November 15, 2001 ruling that the DHC was not a separate employer by operation of law, the Union declared that it was no longer interested in bargaining over the effects of separation and considered the matter moot. I conclude that over the six years that the parties have discussed DHC's separation, the Union has been given ample opportunity for meaningful bargaining over the effects of the City's decision to pursue separation. Compare *City of Detroit, Dept of Health*, 1991 MERC Lab Op 41.

Direct Bargaining and Bypassing Union

Charging Parties allege that the DHC and the City unlawfully bypassed the Union and dealt directly with bargaining unit employees between July 23, 2001 and August 29, 2001, by presenting and imposing upon them letters, notices, announcement of pre-election requirements; consequences of accepting or rejecting offers to continue employment at DHC; window periods for making elections; and time lines for placement in City positions. According to the Union, none of the terms and benefits offered to employees had been negotiated and was not included in the collective bargaining agreements.

An employer violates its duty to bargain in good faith when it bypasses the designated representative and attempts to negotiate directly with employees. The violation is premised on the theory that direct bargaining between an employer and its employees seriously undermines the authority of the union. *City of Dearborn*, 1986 MERC Lab Op 538, 541. The National Labor Relations Board has developed criteria to be used in determining whether an employer has engaged in direct dealing in violation of Section 8(a)(1) and (5) of the National Labor Relations Act. This criteria is useful in determining whether an employer violates its duty to avoid direct dealing under Section 10(1)(a) and (e) of PERA. The criteria developed by the NLRB are: (1) the Respondent communicated directly with union-represented employees; (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and (3) the communication with employees was to the exclusion of the union. *Permanente Medical Group*, 332 NLRB No. 106 at slip op. 2 (2000); *Southern California Gas Co.,* 316 NLRB 979, 982 (1995). The Board has noted that in any case involving an allegation of direct dealing, the inquiry must focus on whether the employer's direct solicitation is likely to erode "the union's position as exclusive representative." *Modern Merchandising*, 284 NLRB 1377, 1379 (1987). See also Chairman's Tanzman dissent in *Grand Rapids Public Schools*, 1986 MERC Lab Op 560 that was adopted by Court of Appeals in an unpublished decision (Docket No. 94109, April 26, 1988.)

I find no basis for finding a direct dealing violation by the City or by the DHC, a City department. Although the City communicated with bargaining unit members about changing terms and conditions of employment, I find that the Union's role, as the employees' exclusive representative, was not undermined. The record establishes that since 1995, when plans to separate DHC from the City were announced, the Union was kept informed of its separation plans and the City repeatedly reiterated DHC's commitment to honor the contract's successor clause.

The Unions' own witness testified that information discussed with employees had been either discussed with the Union or was included in the parties' collective bargaining agreements. I find that the City's discussions and statements to employees were part of its effort to implement separation plans over which the Union had been provided an opportunity to bargain and did not constitute unlawful direct dealing with bargaining unit members.

Duty to Provide Information

The Union's final claim is that City violated PERA by failing to timely and fully respond to Charging Party's information requests. The Commission has held that a collective bargaining representative is entitled to receive information requested that is relevant to its responsibility as a bargaining agent within a reasonable time, and that supplying such information after an unreasonable delay prior to the unfair labor practice hearing does not render the charge moot. *Detroit Board of Education*, 1992 MERC Lab Op 572, 576. An employer's delay of 2-3 months in responding to an information request has been found to violate PERA. *Detroit Public Schools*, 1990 MERC Lab Op 624, 627. The record establishes that the City did not respond to the Union's April 2001 request for list of vacancies and position titles until October 18, 2001, more than six months after the request was made, and only four days before the start of the unfair labor practice hearing. I also find that the City violated PERA by redacting the names of employees who responded to July 27, 2001, offers of employment and refusing to provide bumping/transfer responses that were provided by employees on August 29, 2001. Clearly, the information supplied by bargaining unit and non-bargaining unit members during the employee meetings is relevant to the Union in its effort to ensure that its members' bumping and transfer rights were properly protected.

I have carefully considered all other arguments raised by the parties and I conclude that they do not warrant a change in the result. I recommend, therefore, that the Commission issue the order set forth below:

RECOMMENDED ORDER

It is hereby ordered that the City of Detroit and the Detroit Housing Commission, their officers, agents, and representatives, shall:

A. Cease and desist from refusing to bargain with AFSCME Council 25 and Locals 23 and 2394 as the exclusive representatives of employees employed at the Detroit Housing Commission by engaging in excessive delay in responding to the Union's request for information that is relevant to the administration of the collective bargaining agreement and for failing to provide complete information.

B. Take the following affirmative active to effectuate the polices of the Act:

1. Upon request, promptly provide the bargaining agent with complete information that is relevant to the administration of the collective bargaining agreement.

2. Post, for thirty consecutive days, copies of the attached notice to employees in conspicuous places, including all locations where notices to employees are customarily posted.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Roy L. Roulhac
Administrative Law Judge

Dated: _____

NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION AFTER A PUBLIC HEARING IN WHICH IT WAS FOUND THAT THE CITY OF DETROIT, DETROIT HOUSING COMMISSION COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT, WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL, upon the request of the collective bargaining agent of our supervisory and non-supervisory, the American Federation of State, County and Municipal Employees, Council 25 and Locals 23 and 2394, bargain over terms of conditions of employment related to the Detroit Housing Commission's separation by supplying, without unreasonable delay, complete data necessary for the administration of the collective bargaining agreement.

City of Detroit

By _____

Dated: _____

(This notice shall remain posted for a period of thirty consecutive days and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P. O. Box 02988, Detroit, MI 48202-2988, (313) 456-3510).