STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

TAYLOR SCHOOL DISTRICT,
Respondent-Public Employer

-and- Case No. C01 B-36

SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), LOCAL 26M,
Charging Party-Labor Organization

_____/

APPEARANCES:

Gary P. King, Esq., Keller Thoma, P.C., for the Public Employer

Renate Klass, Atty, Martens, Ice, Geary, Klass, Legghio, Israel & Gorchow, P.C. for the Charging Party

DECISION AND ORDER

On July 9, 2002, Administrative Law Judge Nora Lynch issued her Decision and Recommended Order in the above-entitled 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 Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date that the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

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

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 the provisions of Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, MSA 17.455 (10), this matter came on for hearing at Detroit, Michigan, on July 27, 2001, before Nora Lynch, Administrative Law Judge for the Michigan Employment Relations Commission. The proceedings were based upon unfair labor practice charges filed on February 15, 2001, by the Service Employees International Union (SEIU) Local 26M, alleging that the Taylor School District had violated Section 10 of PERA. Based upon the record, including briefs filed on or before November 26, 2001, the undersigned makes the following findings of fact and conclusions of law, and issues the following recommended order pursuant to Section 16(b) of PERA:

The Charge:

The charge alleges the following:

Since August 17, 2000, the Employer has refused to provide information reasonably necessary to the administration of the collective bargaining agreement,

refused to bargain and has made unilateral changes in mandatory subjects of bargaining.[1]

Facts:

SEIU Local 26M represents a bargaining unit of all non-instructional personnel employed by the Taylor School District. The various categories of non-instructional employees are organized by divisions for salaries and other purposes. Secretarial employees comprise Division S. At the time of hearing, the latest collective bargaining agreement between the parties covered the period July 1, 1997 through June 30, 2001.

Under Article 22, Section 1 of the contract, bidding is the exclusive process for filling new and vacant positions. Bidding is also the exclusive process for exercising bumping rights when positions are eliminated, or if jobs occupied by incumbents undergo "a significant change in qualifications, duties, and/or responsibilities." This section also provides that "Upon the question of qualifications, the Taylor School District shall retain the *exclusive right to determine competence or incompetence of any applicant.*" [Emphasis added.] Section IV (11) of Article 22 covers seniority and qualifications in the bidding process:

> In the bidding procedure, a job shall be awarded to the bidder with the highest divisional seniority providing he/she meets the qualifications necessary for that position. For each position in the bargaining unit, the Board shall provide a job description that defines the qualifications required for that position. Such qualifications shall be *reasonable and job related*. Such qualifications shall be subject to challenge by the Union through the grievance procedure.[Emphasis added.]

In the summer of 2000, the District began a reorganization process affecting Division S secretaries in the Finance Department. In June of 2000, Superintendent Alan Dobrovolec met with SEIU Local 26M President John Armstrong. Dobrovolec proposed new job descriptions for several secretarial bargaining unit positions and gave the Union copies of the revised job descriptions. The positions involved were: accounts payable clerk III; bookkeeper I; finance department clerk II; insurance clerk II; payroll clerk I and II; purchasing secretary II; secretary I; switchboard II; and switchboard insurance II. The Employer also announced the elimination of the accounting secretarial position and the creation of a new position, general accounting assistant II. The revised job descriptions included a detailed list of duties and responsibilities for each classification, as well as a list of qualifications. For most of the positions the qualifications listed indicated that "higher level clerical skills" or "higher level problem solving skills" were required, as well as demonstrated computer skills, with knowledge of software such as Word and Excel. Two of the positions, secretary I and general accounting assistant II, referenced the use of the computer software Access/Power Point. Dobrovolec indicated that secretaries would be obligated to take and pass a competency test before being permitted to bid on the positions. The tests would be utilized only when the affected position was vacated and would not be used to

[1] At hearing, counsel for SEIU Local 26M indicated that the Union was not pursing the refusal to bargain or unilateral change aspects of the charge.

displace any current employee. The District had in the past used written tests to determine qualifications of applicants for unit positions.

The District utilized a private consulting firm, Plante & Moran, to develop the tests and began testing in August of 2000. After reviewing the revised job descriptions, the Union requested a meeting which was held on August 11, 2000. At that time Armstrong asked Dobrovolec a series of questions about the tests. Armstrong's notes of that meeting reflect that in response to questions regarding why testing was being conducted, Dobrovolec answered that there was a need for higher skills at the Board office and a reorganization was taking place. Armstrong asked how many different tests were being utilized; Dobrovolec responded that there was a battery of tests for each position, with different skill levels being tested. With respect to how jobs would be awarded, Dobrovelec answered that the employee's test performance and seniority would both be factors. Dobrovelec stated that new hires would be tested in the future. When asked questions about defining "higher level clerical skills" or "higher level bookkeeping skills," Dobrovolec did not elaborate, other than to state that tests were geared to skill level. Armstrong also asked several questions regarding the use of computer software such as Power Point and Access, which had been included in the qualifications for certain jobs. Dobrovolec was unable to respond to questions on how these systems would be used or how often. With respect to the Union's questions regarding training, he responded that training had been offered in the past. Armstrong testified that he was not satisfied with Dobrovolec's anwers, and felt that his responses were too general.

On August 17, 2000, Armstrong wrote to Dobrovolec requesting hard copies of all tests created for all Board office jobs as well as the results of any testing already performed. On August 23, the Union filed four grievances objecting to various aspects of the testing and bidding process. The grievance related to the instant case objected to the revised job qualifications on the basis that they were not "reasonable" and "job-related" under Article 22 of the contract, and requested as a remedy that the Employer stop arbitrary testing on unrelated programs on jobs.

Armstrong repeated his earlier request for the tests and test results in a September 1 letter to Dobrovolec. The District responded as follows on September 7:

> Please be advised the tests administered to Division S/Secretaries are confidential and used for Administration purposes. Therefore, the Administration will not release the information requested.
>
> Test results have been placed in the secretary's personnel file. We will be happy to release this information once we receive authorization from each of your members in writing, signed and dated stating it is acceptable to release information.

On September 15, 2000, the District sent a memo to all secretaries attaching an information packet from Plante & Moran concerning testing guidelines. The memo indicated that requests for testing appointments would be accepted during the first week of January, April, July, and October. Testing was to take place at the Board office after normal school hours; employees

were directed to call Marcie Sielski to schedule an appointment. The introduction to the attached document stated the following:

> The introduction of skills testing to the job bidding process is designed to assess employees' readiness for particular jobs, to identify relevant skill levels in various areas, and to communicate to employees any areas of weakness that need to be addressed.
>
> Because this process is new for everyone, it is likely to raise some normal questions and concerns. The following document is designed to address your questions so that you can better understand the process and be aware of how final decisions are to be made.
>
> We have outlined below, in a "Q & A" format, the procedures, guidelines, and timetables regarding the testing process. If you have questions that are not addressed here, please contact Marcie Sielski in Non-Certified Personnel.

The document explained when testing would take place, how often an employee could test, who devised the tests, and how minimum scores were established. Employees were informed that each job had a different list of tests and they could contact Marcie Sielski for a complete list of tests required for each job. It was also explained that Plante & Moran intended to review the effectiveness of the testing process once a year and changes could be effected based on this evaluation.

On October 6, Armstrong sent two letters to the Employer, directing one to Dobrovolec and one to Personnel. In his letter to Dobrovolec he asked whether the September 15 memo sent to the secretaries referred to the same tests taken in August, and whether the guidelines were an accurate description of the District's position on testing. Armstrong also directed a letter to Personnel, with a list of questions regarding the secretarial testing, substantially repeating the questions previously asked on August 11. On October 19, Dobrovolec responded to Armstrong as follows:

> This letter is in response to your letter, rather your list of questions, from October 6, 2000. As you are aware, most, if not all, of these questions have been answered. However, I shall summarize the District's position on this issue.
>
> It is our position that the District has the right to set qualifications for the various jobs in your entire bargaining unit. Further it is our position that we have the right given to us by the labor agreement to determine who meets the qualifications. We have a longstanding practice of enforcing these administrative rights in any number of positions in the various divisions in your bargaining unit.
>
> It is the District's duty to utilize the work force in the most efficient manner. Consequently, as job responsibilities change, adjustments must be made for a job or a department.

> With respect to the probationary period, it is the position of the District that this time is provided for an initial performance review of an individual entering a new position. It should be stressed that an individual entering a new position must first meet the qualifications of the position as determined by the District.
>
> Finally, as you are aware, new hires to the sub pool are tested. As you are also aware, this testing procedure is current under review.
>
> I believe this clearly states the District's position on the issues you have raised, and I look forward to further discussing these with you in the future.

On December 18, 2000, the District issued another memorandum to secretaries announcing the testing schedule and attaching guidelines which were almost identical to those sent in September. This memo included a list of tests for each position and a chart indicating the distribution of test scores.

On January 17, 2001, the Union sent another inquiry to the District. In that letter, Armstrong summarized the information requests to date, repeated his previous questions, and posed additional inquiries about the testing. He also asked several questions regarding the training provided to one bargaining unit employee, Jill Tyra, who had passed tests for the newly created general accounting position. Armstrong asked when Tyra received the training, had she been reimbursed, was she paid for hours lost or for her training time, did the Employer pay any costs or expenses related to this training, and were other employees offered training. He also asked for a copy of Tyra's work produced with Access and Power Point since August 22, 2000.

Dobrovolec responded on February 12. He indicated that the District was not obligated to produce copies of tests and would not do so, however he was enclosing the test results as requested. Dobrovolec also stated that the revised job descriptions previously given to the Union should serve to explain how positions had changed and the skills required. With respect to Tyra's training, Dobrovolec stated that her training resulted from the fact that she requested the training in her current position and most of the training occurred on work time. He also indicated that to produce copies of all of her work produced with Access and Power Point was burdensome and oppressive. Finally, Doborovolec stated that the District was under no obligation to provide its interpretation of the collective bargaining agreement or its rationale in reorganizing its operations and testing employees. The instant unfair labor practice charge was filed three days later.

The Employer proceeded with January and April 2001 testing and bidding. On May 8, 2001, the parties and their attorneys met in an effort to resolve the matters in dispute. At that meeting there was a point by point discussion of the questions the Union considered still outstanding; the Employer agreed to provide additional information by May 18. On May 9, the attorney for the Union wrote to the Employer's attorney confirming that the Union's additional questions were:

1. To what extent do the tests such as Microsoft Word, Microsoft Excel, Microsoft Access, etc, differ for each classification;

2. Are there "core" tests that are identical and universal; and

3. To the extent a higher degree of skill is required, does the District simply pose additional questions?

On May 18, the Superintendent sent a three-page letter with attachments to Armstrong responding in detail to the above questions as well as providing additional information with respect to the Union's previous inquiries. He explained that his correspondence of February 12 was in error to the extent that it stated that Tyra's training was obtained primarily on work time; he indicated that she had received no training on Power Point and had scheduled her own training on Access over the Christmas break. He enclosed logs of Access and Power Point files created by Tyra.

The Union again wrote to Dobrovolec on May 24, acknowledging the Union's agreement to postpone the unfair labor practice hearing set for May 25, and posing follow-up questions prompted by the information received from the District. Many of its inquiries concerned Tyra's training and a request for documents created in Power Point and Access. The District responded on June 7.

The grievances relating to the testing program were consolidated for hearing before arbitrator Alan Walt, who conducted hearings on the grievances on October 15 and November 20, 2001. The arbitrator issued his opinion and award on March 15, 2002.[2] With respect to the grievance charging that the changed qualifications were not "reasonable or job related," and the tests were therefore arbitrary, the arbitrator agreed with the Union. In his written opinion, the arbitrator reviewed the two general categories of testing. The first category was to test general problem solving or intellectual resources abilities by means of a standardized intelligence test. The second category was intended to test for specific job related skills. The arbitrator concluded that the standardized intelligence test which was not content specific could not be used to determine an employee's qualifications to bid on a job. With respect to the content specific tests, he found that that the tests violated Article 22(IV)(11). The arbitrator found that the Employer was testing for qualifications which may be required in the future. He therefore concluded that the tests went beyond qualifications necessary and required in the position as it presently exists, and therefore, were neither "reasonable" nor "job related." The award required that job descriptions which did not list all knowledge or skills necessary, required, reasonable or job related be revised and declared that results from tests previously administered were null and void.[3]

[2] The parties agreed that the award, which was issued after the close of hearing, would be part of the record in this case.

[3] The arbitrator also indicated in his factual discussion that when Plante & Moran's annual review of the testing process was performed in September 2001, testing for Power Point was eliminated from all position testing and the passing scores for Excel and Word were lowered.

Discussion and Conclusions:

The Union charges that the Employer systematically ignored, disregarded and refused to answer SEIU's information requests. While acknowledging that much of the information, other than the tests, was eventually furnished, the Union maintains that by its delay in supplying the requested information, the Employer violated PERA. The Employer asserts that it is under no obligation to provide copies of the tests, citing *Detroit Edison Co v NLRB*, 440 US 301, 100 LRRM 2728(1979), in which the Court found that the employer's need to keep job aptitude tests confidential outweighed the union's need for the information. As to the other information, the Employer argues that much of the information requested was already in the Union's possession, answered by the collective bargaining agreement, or readily ascertainable from the information already supplied. The Employer maintains that there was no inordinate delay in supplying the remaining information as charged by the Union.

In order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must supply in a timely manner relevant information which is reasonably necessary to the union's performance of its responsibilities, which include the administration of the contract and the processing and evaluation of grievances. *Wayne County*, 1997 MERC Lab Op 679, 683; *NLRB v Acme Industrial Co.,* 385 US 432, 64 LRRM 2069 (1967). Information relating to terms and conditions of employment, such as wages, job descriptions, and other information pertaining to bargaining unit employees is presumptively relevant. *Plymouth Canton Comm Sch*, 1998 MERCLab Op 545. A union's interest in information will not always predominate over other legitimate employer interests. Thus in *Detroit Edison, supra,* the U.S. Supreme Court ruled that the employer had demonstrated the need for secrecy with respect to tests and answer sheets in order to protect the integrity of the testing process and was under no obligation to furnish such information to the union. The Commission has indicated its agreement with the rationale expressed in *Detroit Edison, supra.* See *Wayne County, supra,* at 685; *Kent County & Sheriff*, 1989 MERC Lab Op 1008, 1014.

In this case, the Employer has a management right, which is specifically delineated in the collective bargaining agreement, to set qualifications for the various bargaining unit positions and to determine the competence of job applicants. The Employer informed the Union that it intended to utilize a testing program for future bids to accomplish this. There is no question that in order to represent its membership, and ensure the proper administration of the bidding process, the Union had the right to information regarding revised job descriptions and qualifications, as well as procedural aspects of the testing program. I find, however, in line with the precedent cited above, that the Employer was not obligated to provide the test questions and answers to the Union. Since the Employer intended to utilize these tests again, revealing the test contents would compromise the validity of the testing process. I find that the Employer had a legitimate and overriding interest in maintaining the confidentiality of this material and had no duty to supply the tests/answers to the Union.[4]

[4] Charging Party argues that under the circumstances of this case, the Commission should provide some mechanism for the Union to assess and evaluate the tests. It is noted, however, that pursuant to Article 22 of the contract, the Union may use the grievance procedure to challenge whether employees are being tested for qualifications which are "reasonable" and "job related," as it did in this case.

In reviewing the history of the Union's other information requests, I find that in most areas the Employer did provide the requested information in a timely fashion. At the August meeting it provided revised job descriptions, explained why testing was being conducted, and explained that there would be a battery of tests to address different skill levels. The September and December memos to secretaries explained the testing process in detail, including who devised the tests, how often employees could be tested, how minimum scores were established, and provided a testing schedule. The Employer continued to respond to information requests in October, January, and February, as well as additional information requests in May in an attempt to settle the unfair labor practice charge. As acknowledged by the Charging Party, by the time of the hearing, virtually all of the information had been supplied. The Charging Party, however, maintains that the Employer's inordinate delay in supplying information constitutes an unfair labor practice.

While I find that the Employer was generally responsive to the Union's requests, I agree with the Charging Party with respect to two of its information requests. I find that the Employer unreasonably delayed in furnishing employee test results to the Union, and likewise inordinately delayed in supplying the information initially requested regarding the use of the computer software Power Point and Access. Even though the Union's request for the test results was first made in August 2000, the Employer did not furnish this information to the Union until February of 2001. In *Detroit Edison, supra,* the Court did not require the disclosure of test results because the company had specifically promised confidentiality to the examinees. Nothing in the record suggests that the Employer here made such a promise. The Commission has consistently found that a union has the right to access personnel files for matters such as individual contracts, evaluations, and performance appraisals; an individual employee's consent is not necessary and a confidentiality defense does not apply. *Center Line School District*, 1976 MERC Lab Op 729, 737; *City of Pontiac*, 1981 MERC Lab Op 57; *City of Detroit*, 1992 MERC Lab Op 131, *Wayne County Intermediate Sch Dist*, 1993 MERC Lab Op 317, 325. I therefore find that the Employer had no right to condition the Union's access to the test results, and withholding such information for six months was an unreasonable delay in violation of Section 10(1)(e) of PERA. *Wayne County ISD, supra; Detroit Pub Sch*, 1990 MERC Lab Op 624.

I reach the same conclusion with respect to information regarding Power Point and Access. The Employer did eventually provide information regarding these programs. However, the Union had a right to explore the Employer's planned use of this software and the extent to which employees would be using it in the future. Even though the requirement impacted only two positions, the Union had a legitimate interest in this information in order to be fully informed and properly represent its members.[5]

Based on the above discussion, I find that by its delay in furnishing to the Union employee test results and data regarding the computer software Power Point and Access, the Employer has violated Section 10(1)(e) of PERA. It is therefore recommended that the Commission issue the order set forth below:

[5] The Union's concerns are substantiated by the fact that, as reflected in the arbitrator's decision, testing for Power Point was eliminated from all position testing in September 2001 and the passing scores for Excel and Word were lowered.

RECOMMENDED ORDER

It is hereby ordered that the Taylor School District, it officers, agents, and representatives shall:

A. Cease and desist from refusing to bargain with SEIU Local 26M as the exclusive representative of its non-instructional employees by engaging in excessive delay in the furnishing of data relevant to the administration of the collective bargaining agreement and to the processing of grievances.

B. Take the following affirmative action to effectuate the policies of the Act:

1. Promptly provide to the bargaining agent information requested relevant to the administration of the collective bargaining agreement and the processing of grievances.

2. Post copies of the attached notice to employees in conspicuous places at its place of business, including all locations where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSSION

_____

Nora Lynch
Administrative Law Judge

Dated _____

NOTICE TO EMPLOYEES

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

WE WILL, upon request of the collective bargaining agent of our non-instructional employees, the Service Employees International Union, Local 26M, supply without unreasonable delay, data necessary for the administration of the collective bargaining agreement or the processing of grievances.

TAYLOR SCHOOL DISTRICT

By: _____

Dated: _____

(This notice shall remain posted for a period of thirty (30) 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)