STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

KENT COUNTY AND KENT COUNTY SHERIFF,
Respondents-Public Employers,

Case No. C03 H-173

-and-

KENT COUNTY DEPUTY SHERIFF'S ASSOCIATION,
Charging Party-Labor Organization.
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APPEARANCES:

Miller, Johnson, Snell & Cummiskey, P.L.C., by Peter H. Peterson, Esq., for Respondents

Alison L. Paton, Esq., for Charging Party

DECISION AND ORDER

On February 14, 2005, Administrative Law Judge Julia C. Stern issued her Decision and Recommended Order in the above matter pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. On March 2, 2005, the Commission received a letter from Charging Party requesting that the charge be withdrawn. Charging Party's request is hereby approved. This Decision and Order and the Decision and Recommended Order of the Administrative Law Judge will be published in accordance with Commission policy.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

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Nino E. Green, Commission Member

Dated:____________________

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DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE

On August 13, 2003, the Kent County Deputy Sheriff's Association, which represents a bargaining unit of corrections officers employed by Kent County and the Kent County Sheriff, filed an unfair labor practice charge alleging that Respondents violated their duty to bargain in good faith under Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. Pursuant to Section 16 of the Act, the charge was assigned to Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission, for hearing. Based upon the stipulated record submitted by the parties in lieu of a hearing, and briefs filed on or before June 28, 2004, I make the following findings of fact and conclusions of law, and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge and Parties' Stipulations:

The charge, as amended on February 20, 2004, contained six separate allegations. On March 16 and April 15, 2004, the parties filed stipulations in which they agreed to bifurcate the charge and to submit a stipulated record in lieu of a hearing on allegations one, two and six. The stipulated record, consisting of depositions with exhibits, the transcript of an arbitration hearing with exhibits, and additional exhibits, was filed on April 26, 2004. On June 16, 2004, the parties filed a second supplemental stipulation to limit the

charge to allegation six. [1] Consequently, the following is the only allegation to be decided in this case:

> On a continuing basis, the employers are refusing to provide, and/or are failing to require its health insurance contractor PPOM to provide, all fee schedules/screens currently in effect; this information has been requested by the Union in connection with its pending grievance (scheduled for arbitration hearing on May 7, 2004) contending that the employers have violated Section 13.9 of the contract by adopting a new health insurance plan with PPOM, which new plan does not provide "the same or equivalent benefits" as required by Section 13.9 of the contract.

Facts:

The facts relevant to allegation six are as follows.

Section 13.9 of the parties' collective bargaining agreement states:

> The Employer reserves the right to select the insurance carrier or to establish a self-insurance health care program which will provide the same or equivalent benefits insofar as possible except as to the administration of such health care program.

Until January 2004, Respondents purchased health care insurance for their employees from Blue Cross/Blue Shield of Michigan (BCBS). Employees in Charging Party's bargaining unit could opt for the BCBS Traditional Plan or the BCBS Preferred Provider Plan (Community Blue). In early 2003, after soliciting bids from various health insurance companies, Respondents decided to switch to a self-insured plan. Respondent hired a private firm, Aon Consulting, to assist it in making the change.[2] On or shortly before September 12, 2003, Respondent announced to employees its intent to become self-insured and to enter into a contract with Preferred Provider Organization Midwest, LLC (PPOM) to provide health care services to Respondents' employees through PPOM's network of doctors and other providers. Respondent also hired J.F. Molloy and Associates as the third-party administrator for its plan. The new plan was to go into effect on January 1, 2004.

On September 17, 2003, Charging Party's counsel wrote to Marilyn Beemer, Respondent's compensation and benefits manager, requesting certain information relating to the new plan. The requested information included the following:

> The complete fee schedule for all services under the Midwest plan for in-network and out-of-network services; the complete fee schedule for all services under the existing BCBS Traditional Plan and under the existing BCBS Community Blue Plan for all services from

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1 The remaining allegations have been docketed as Case No. C03 H-173A.

2 Respondent Kent County was responsible for implementing the new insurance plan, and Charging Party directed its requests for information to the county. Therefore, references to "Respondent" in the singular in this decision are to Kent County.

participating and non-participating entities.[3]

On September 19, Charging Party filed a grievance asserting that the planned implementation of the new health care plan did not provide the "the same or equivalent benefits."

Respondents forwarded Charging Party's September 17 letter to Jon Snead, vice-president of Aon, and asked Snead to respond to it. Snead provided some of the information requested in the letter and asked Molloy to provide other information. Snead sent Charging Party's letter to Kelly Monterusso, PPOM's local marketing director, and Troy Dykstra, the salesperson for Respondent's account, and asked them to respond.[4] On October 1, Monterusso replied to Snead's request as follows:

> PPOM Fee Schedule: As noted above PPOM was asked to provide the complete fee schedule for all services that are contracted via the PPOM network. This information will not be released in its entirety because it is proprietary. Prior to being selected as the network for the Kent County members, there was an extensive study performed to compare the estimated costs using the PPOM network versus using the BCBSM PPO network. For the purpose of responding to this letter, PPOM will provide aggregate figures that apply to the geographical area if requested.

On October 16, 2003, Respondent sent Charging Party its formal response to the September 17 information request. Respondent provided all the information requested, except for the fee schedules. Respondent attached a copy of Monterusso's letter to its response.

On October 26, Charging Party sent Respondent a second letter requesting additional information regarding the new plan. In this letter, Charging Party also explained that it needed PPOM's fee schedule to determine the out-of-pocket costs to its members of Respondent's plan because the plan paid only a fixed percentage of the provider's fee for many services. According to Charging Party, the higher the fee paid to the provider, the larger the sum the employee would have to pay. Citing *City of Detroit,* 1988 MERC Lab Op 1001, Charging Party asserted that Respondent had the legal obligation to provide this information because the possessor of the information, PPOM, was Respondent's contractor. Charging Party warned Respondent that it intended to ask the arbitrator to draw an adverse inference from Respondent's failure to produce the fee schedule.

Respondent forwarded the October 26 letter to Snead, who forwarded it to Monterusso. PPOM responded with an e-mail from its legal counsel to Snead:

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3 A fee schedule shows the maximum amounts various health care providers will be compensated for particular procedures and services.

4 Snead also forwarded a copy of Charging Party's letter to BCBS. BCBS did not send Snead the requested fee schedules, but gave copies directly to Charging Party. BCBS fee schedules are accessible to the public on the BCBS web site.

PPOM will **MATCH** the fee screen [i.e. fee schedule] to any submitted by BCBSM with the following provisos:

1. All persons who receive the screen will agree to maintain confidentiality within their organization and will not disclose provider specific data to anyone.

2. Fee screens for specific facilities will be disclosed to a judge and/or arbitrator *in camera* for comparison.

The term *in camera* is a legal term which means "in chambers" or privately to the judge or arbitrator alone. This is often done in legal circles to protect confidential information or sensitive information which should not be published or made public.

Another alternative would be to agree upon a neutral third party to make the comparison. E.g., both BCBSM and PPOM will submit the requested information to an accounting firm (both use Deloitte & Touche) that will report on their findings. The accounting firm would enter into a confidentiality agreement with both BCBSM and PPOM. The accounting firm would not disclose provider specific information to anyone, but would summarize their findings. In such a case, the cost of the accounting firm could be split between the Union and the County.

I would not expect the Union to agree to either process. I believe that this is primarily an artifice. They are only mildly interested in the comparison and are much more interested in obtaining a presumption against PPOM which saves them the effort of actually looking at the numbers which may or may not be to their liking. [Emphasis in original.]

On December 18, 2003, Respondent sent Charging Party a letter with the new information it requested on October 26. The letter also included the above e-mail from PPOM, without its final paragraph.

Effective January 1, 2004, Respondent terminated its contracts with BCBS and implemented its new plan. The written agreement between Respondent and PPOM provided for termination without cause by either party upon sixty days notice, or for cause on ten days notice.

On February 3, 2004, Charging Party wrote to Respondent rejecting PPOM's offer to show its fee schedule to a third party. Charging Party stated that it needed to see the fee schedules to see what was being compared, and to determine whether it needed to provide explanatory testimony to the arbitrator. Charging Party offered to keep the fee schedules under "protective order," i.e. to promise that they would not be circulated to anyone except Charging Party's counsel, its executive board, and any witnesses or experts it might use for the arbitration, including a BCBS representative. Respondent forwarded this letter to Snead, who forwarded it to PPOM. On February 19, 2004, Respondent wrote to Charging Party stating that its proposal had been passed on to PPOM. PPOM did not respond.

Discussion and Conclusions of Law:

In order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must supply in a timely manner information requested by the union which will permit it to engage in collective bargaining and police the administration of the contract. *City of Detroit (Fire Dep't),* 16 MPER ¶ 40 (2003); *City of Battle Creek (Police Dep't),* 1998 MERC Lab Op 684, 687; *Wayne County,* 1997 MERC Lab Op 679. Respondent does not contest the relevance of PPOM's fee schedule to Charging Party's obligation to administer and enforce its collective bargaining agreement. It does not assert that this information was confidential. Rather, Respondent maintains that it could not provide the information because it did not possess it and, despite Respondent's repeated good faith efforts, PPOM refused to supply it.

Charging Party relies on *City of Detroit,* 1998 MERC Lab Op 1001 (no exceptions), for the proposition that an employer has the duty under PERA to provide a union with relevant information within the possession of its contractors. In *City of Detroit*, the union requested information about the employer's drug and alcohol testing policies and procedures. The employer replied that it did not have some of the requested information, and that it would not provide information in the possession of its contractors, i.e., the laboratories the employer hired to perform the testing. There was no indication that the employer asked the laboratories to provide the information. The Commission's administrative law judge (ALJ) held that the laboratories were acting as the employer's agents, and that the employer's "blanket refusal" to provide information in the laboratories' possession violated its duty to bargain in good faith.

City of Detroit was an ALJ decision, not a decision of the Commission. However, the holding in that case is consistent with decisions of the National Labor Relations Board (NLRB or Board) addressing an employer's obligations when a union requests relevant information that is in the hands of a third party. The NLRB holds that an employer has a duty to supply information relevant to the processing of a grievance where the information is not in the employer's possession, but where that information likely can be obtained from a third party with whom the employer has a business relationship. *Firemen & Oilers Local 288 (Diversy Wyandotte)*, 302 NLRB 1008, 1009 (1991). An employer has an affirmative obligation to make reasonable efforts to obtain relevant information from its contractors. *West Penn Power Co v NLRB,* 394 F3d 233, 245 (CA 4, 2005), enf'g in pertinent part *West Penn Power Co,* 339 NLRB 585 (2003). The employer must demonstrate that it has requested the information and that the information is unavailable to it. *United Graphics*, 281 NLRB 463, 466 (1986); *Doubarn Sheet Metal*, 243 NLRB 821, 824 (1979).

The parties disagree over whether Respondent made reasonable efforts to obtain the fee schedule from PPOM in this case. According to Charging Party, Respondent made little effort to obtain the information and handled Charging Party's repeated requests for the fee schedule in a cavalier, perfunctory manner. Charging Party suggests that instead of forwarding Charging Party's letters through Snead, Respondent should have communicated directly with PPOM. It also maintains that Respondent should have informed PPOM that Respondent had a legal duty under PERA to provide Charging Party with the fee schedule. Respondent's failure to take at least these steps, according to Charging Party, indicates that

Respondent's strategy was to make it as easy as possible for PPOM to refuse to provide the information.

According to Respondent, its repeated requests that PPOM provide its fee schedule constituted a reasonable effort to obtain the information. Respondent argues that the facts in this case are similar to those in *Pittston Coal Group, Inc,* 334 NLRB 690 (2001). In *Pittston,* the union requested information about employees working for one of the employer's subcontractors. The employer did not have the information and requested it from the subcontractor. The subcontractor refused, citing concerns for its employees' privacy and lack of relevancy. The Board held that under the circumstances, the employer had satisfied its obligation by showing that it had asked for the disputed information and that the subcontractor had refused. The Board stressed that there was no indication that there was a single employer, joint employer, agency, or alter ego relationship between the two companies. It also commented, at 693:

> [T] here is no apparent lawful means by which the Respondent could compel C & O to provide the information the Union requested, apart, perhaps, from threatening to terminate the contract. It is not clear, however, that the Respondent had a contractual right to terminate its contract with C & O because of the latter's refusal to provide the requested information. In any case, we are aware of no decision in which the Board ordered an employer to threaten contract action, much less to carry out such a threat, if the other employer still proved to be recalcitrant.

I find that Respondent did make a reasonable, good faith effort to obtain the fee schedule from PPOM. Charging Party requested a considerable volume of information about Respondent's new health care plan. Respondent forwarded Charging Party's requests to Aon, where Snead gathered the information. All the requested information, except the PPOM fee schedule, was provided in a timely manner. PPOM did not ignore Charging Party's request because it came to it through Aon, but responded promptly that it would not release the fee schedule because it was confidential business information. PPOM's proposal that the fee schedule be given to a third party is further indication that PPOM took Respondent's request seriously, even though Respondent had not communicated with it directly. Clearly, PPOM had its own reasons for refusing to turn over the fee schedule, including the desire to keep the information out of the hands of its competitor BCBS. Under the circumstances, Respondent had no reason to believe that anything short of threatening to terminate their business relationship would have induced PPOM to provide the fee schedule.

Unlike the contract in *Pittston Coal, supra,* Respondent's contract with PPOM allowed Respondent to terminate it for any or no reason, with appropriate notice. Even Charging Party does not suggest, however, that Respondents' obligation to bargain in good faith required Respondent to terminate or threaten to terminate its contract with PPOM because PPOM would not turn over its fee schedule. I conclude that Respondents did not violate their duty to provide Charging Party with information relevant to collective bargaining or enforcement of the contract in this case. First, the fee schedule was not in Respondent's possession. Second, Respondent made reasonable, good faith efforts to obtain the fee schedule from the third party, PPOM. These efforts were sufficient, under the circumstances, to satisfy Respondents' obligations under Section 10(1)(e) of the Act.

In accord with the findings of fact and conclusions of law above, I recommend that the Commission issue the following order.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge

Dated: _______________