STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT (PLANNING AND DEVELOPMENT DEPT),
Public Employer-Respondent,

Case No. C03 L-264

-and-

ASSOCIATION OF MUNICIPAL INSPECTORS,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Andrew Jarvis, Esq., Assistant Corporation Counsel, for the Respondent

L. Rodger Webb, Esq., for the Charging Party

DECISION AND ORDER

On April 6, 2005, Administrative Law Judge Julia Stern issued her Decision and Recommended Order in the above matter finding that Respondent has not engaged in and was not engaging in certain unfair labor practices, and recommending that the Commission dismiss the charges and complaint as being without merit.

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

_____
Nora Lynch, Commission Chairman

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Harry W. Bishop, Commission Member

_____
Nino E. Green, Commission Member

Dated: _____

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Andrew Jarvis, Esq., Assistant Corporation Counsel, for the Respondent

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DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

This case was heard on June 15, 2004, in Detroit, Michigan by Julia C. Stern, Administrative Law Judge for the Michigan Employment Relations Commission, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Based upon the entire record, including post-hearing briefs filed by the parties on or before November 9, 2004, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

The Association of Municipal Inspectors filed this charge against the City of Detroit on December 3, 2003. The charge was amended on December 11, 2003.[1] Charging Party represents a bargaining unit that includes housing rehabilitation specialists (HR specialists or specialists) in Respondent's Planning and Development Department (the department). Sometime between June and early November 2003, Charging Party Steward Phillip Sluma accessed a database in the department's computer system to collect information about another HR specialist's work production. Sluma gave this information to Jannie Warren, general manager of the department's housing division, in an attempt to persuade her that a third employee had been unfairly disciplined for failing to complete a work assignment. On November 21, Respondent suspended

[1] This charge was originally consolidated with another charge involving the same parties, Case No. C02 F-133A. The cases were severed with the parties' agreement.

Sluma for three workdays, allegedly for accessing the database without permission and for unauthorized use of department equipment. On November 19, Respondent issued a memo prohibiting HR specialists, under threat of discipline, from accessing the database without written authorization.

The charge, as amended, alleges that Respondent violated Sections 10(1) (a) and (c) of PERA by disciplining Sluma for his union activities. Charging Party also alleges that Respondent violated Sections 10(1) (a), (c) and (e) of the Act when it issued the November 19 memo.

Facts:

Sluma became an HR specialist in the department's housing division in 1999. The department administers federal housing rehabilitation grants for low-income residents. HR specialists write specifications for home repair work to be performed by private contractors, supervise the repairs, and certify that the work has been completed.

Charging Party was certified as the bargaining representative for the HR specialists in October 2001, and Sluma became its steward. On about February 2, 2003, Respondent issued a ten-day suspension to Said Mahmoud, an HR specialist, for failing to clear up a backlog of uncompleted lead risk assessments after being specifically ordered to do so in a memo from his supervisor. At that time the parties had not yet entered into their first contract, and no formal grievance procedure was in place. However, after meeting with Sluma, Warren agreed to cut the suspension to five days. Charging Party was not satisfied with this result, but was unable to persuade Warren to rescind the discipline.

In the early summer of 2003, two HR specialists complained to Sluma that they had been assigned to complete lead risk assessments on cases assigned to another specialist, Eric Johnson. The memo to Mahmoud had also been addressed to Johnson. Wondering why Johnson had not been disciplined, Sluma asked the two HR specialists for the paper files for Johnson's cases. After finding the files to be incomplete, Sluma decided to use the computer at his workstation to access the electronic case files on the department's home repair tracking database.

Whether Sluma was authorized to access this database at all is in dispute. Gloria Cole, who supervised HR specialists until she retired in July 2002, created the home repair database in about 1997 as a management tool to track her specialists' workloads and productivity. Cole's database eventually came to be used by all HR specialist supervisors and managers. The home repair database includes pertinent information for each contract, including the HR specialist assigned to it. HR specialists provide their supervisors with periodic updates on the status of the contract, and the supervisors input the information into the database.

The software needed to access the home repair database was initially installed only on the computers of Cole and her assistant. Cole testified that in 1999, with the approval of then-housing division manage Leah Vest, she began making her office computer available to specialists so that they could check the accuracy of the information on their cases on the database. According to Cole, the database was password-protected so that employees outside the

housing division could not access it. However, according to Cole, she gave out her password freely to HR specialists and supervisors within the division with Vest's approval. Sluma testified that Cole gave him the password shortly after he became a specialist. According to Cole, she personally encouraged specialists to access the database and add information where it was missing. She also told HR supervisors and specialists at monthly staff meetings that they could and should access the database for this purpose. Sometime before Cole retired, Respondent installed the software necessary to access the database on the computers of all the HR specialists. HR supervisors continued to use the same one password, based on Cole's name, until the incident that provoked this charge. According to Cole, the database was never considered off limits to HR specialists during her tenure as an HR supervisor.

Respondent presented three witnesses to support its claim that Sluma was not authorized to access the database. The first, Dana Moon, is the manager to whom the HR supervisors report. Moon did not work in the department between 1998 and August 2002. Moon testified that to his knowledge, only housing division supervisors and managers were ever authorized to access the housing repair database. He testified that at some time prior to November 2003, he became aware that HR specialists were accessing the database. According to Moon, he asked HR supervisors Walter Ostrowski and Henry Bright why this was happening. Both told him that they had authorized a specialist (not Sluma) to input data for them in their absence. Moon testified that he told them that, effective immediately, nobody could access the database except supervisors and himself.

The second witness, Connie Reno, became an HR specialist in about 1998 and a supervisor in November 2002. Reno testified that he did not know the housing repair database password when he was an HR specialist and that he did not recall Cole divulging the password or saying that anyone could have access to the database. He also testified that it was his understanding "from the onset" that it was a management tool. Reno did not give the password to any of his subordinates.

The third witness, Bright, became an HR supervisor in December 2001. Between 1995 and December 2001, he was a specialist. Bright did not recall attending monthly or weekly meetings with Cole and did not recall Cole giving out the password to the housing repair database. Bright testified that Moon gave him the password sometime after Bright became a supervisor. According to Bright, he gave the password to one of his subordinates so that he could input information when Bright was away or on vacation. Bright testified that Moon initially told him that it was okay to do this, but later told him that specialists should not access the database. Bright testified that since the fields in the database are not locked, specialists could change information in the files to cover up the fact that they had not completed their work on time if they were allowed access to the database.

I find Cole, who is neither a current employee of the City nor a former member of Charging Party's unit, to be a credible witness. I credit her testimony that in 1999 she distributed the password to the home repair database to any specialist who was interested and, with the then-division manager's approval, encouraged both supervisors and specialists to access the database. I find that, as Sluma testified, he obtained the password to the database from Cole in 1999.

I note, however, that Cole's testimony was that she encouraged the specialists to access the database to check the accuracy of information on their cases. Nothing in Cole's testimony indicates that she told the specialists to whom she gave the password that they were authorized to look at the files of cases assigned to other specialists.

Sluma found complete information on the cases he was researching in the home repair database. Sluma believed that the data showed that both Johnson and Mahmoud had failed to comply with the memo's directive, even though Johnson had not been disciplined. Sluma printed the files and took them to a meeting of Charging Party's executive board. After discussing the issue at several meetings, the board directed Sluma to meet with Warren and show her the information.

On November 18, 2003, Sluma and Mahmoud met with Warren. Sluma showed Warren the printout from the database. Warren was angry. She asked Sluma "how he dared bring this information into her office and denigrate" Johnson. She accused Sluma of conducting a "smear campaign" against Johnson and violating his obligation to represent him. Warren told Sluma that she believed he had committed an unfair labor practice. Warren also asked Sluma what right he had to access the database and get the information.

On November 19, Moon, at Warren's instruction, issued a memo to all housing division personnel. The memo stated that, effective immediately, any employee accessing the home repair database without written authorization from Warren or Moon would be "subject to severe disciplinary action." (Emphasis in original). Later that day, Respondent changed the password. It also removed the software that allowed access to the database from the computers at the specialists' workstations.

After receiving the memo, Sluma stopped Moon as he was walking by Sluma's cubicle and told Moon that he was concerned that he would be disciplined for accessing the database. Sluma explained to Moon that his purpose in reviewing the cases had not been to attack Johnson. Sluma testified that Moon told him that he did not have to worry because as far as Moon knew "there was nothing in place that said that Sluma could not access the database." Moon did not recall making this statement, but he agreed that there was no written policy prohibiting specialists from accessing the database. Moon testified that after he was instructed to issue the November 19 memo, Sluma tried to explain to him that he had accessed the database only to get information to try to get Mahmoud's suspension reversed. According to Moon, he told Sluma that it was not proper for him to access the database, and that if he needed information he should come to Moon and ask for it. Sluma admits that sometime after November 19 Moon told Sluma that if he made a request in writing to access the database for union purposes, it would be granted.

On November 20, Warren sent Sluma an e-mail again accusing him of attempting to undermine Johnson or tarnish his reputation. Warren also told Sluma that he was not authorized to have access to the database, and that she and Moon would be looking into the matter. On November 21, Sluma was given a three-working day suspension for unauthorized use of department equipment and using a management database without authorization from supervision.

Charging Party filed a grievance over Sluma's suspension. Warren denied the grievance on the basis that Sluma had "inappropriately used proprietary internal information in an attempt to negatively implicate another member of the AMI bargaining unit." A third step grievance meeting was held on January 12, 2004 with the department's human resources manager, Patra Hill. In her January 15 letter denying the grievance, Hill stated that Sluma was not authorized to access the home repair database and had not received permission from management. She concluded, therefore, that Sluma was guilty of violating a departmental rule prohibiting the unauthorized use of department facilities or equipment. The grievance was also denied at the fourth step by Respondent's labor relations department. The letter denying the grievance at this step stated that Sluma violated Respondent's electronic communications systems (ECS) policy by using Respondent's system for reasons unrelated to Respondent's official functions.

Respondent introduced a copy of its ECS policy, and the parties stipulated that the policy applied to accessing the housing repair database. Although Sluma did not recall receiving it, all Respondent's employees are supposed to have received a copy of this policy. In the policy, Respondent reserves the right to cancel or restrict an authorized user's access to its electronics communications system. The "acceptable usage" section states that authorized users must use the system in an "honest, ethical and legal manner." Authorized users are specifically prohibited from using Respondent's access to the Internet for matters not related to any official City function, or using the system for advertising, commercial purposes or solicitation. The policy requires department directors to define and monitor use for matters not in the performance of an official City function.

Discussion and Conclusions of Law:

Sluma's Discipline

Section 10(1)(c) of PERA, like Section 8(a)(3) of the National Labor Relations Act (NLRA), 29 US 151, et seq., prohibits an employer from discriminating against employees because of their union activities. It is well established that employers violate these provisions when they discipline union stewards because of their conduct as stewards in processing grievances, policing the collective bargaining agreement, or for engaging in other activities as union steward. *McGuire and Hester*, 268 NLRB 265 (1983); *Pacific Coast Utilities Service, Inc,* 238 NLRB 599 (1978); *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028 (1976). A steward is protected by the Act in performing his steward functions, unless his conduct is "extraordinary, obnoxious, wholly unjustified, and departs from the res gestae of the grievance procedure." *Union Fork and Hoe Co,* 241 NLRB 907, 908, (1979).

However, removing private information from an employer's files for union purposes without approval is not activity protected by the Act. In *Roadway Express, Inc,* 271 NLRB 1238 (1984), the National Labor Relations Board (NLRB or Board) held that an employee who copied bills of lading from his employer's files and gave them to his union was not engaged in protected activity, despite the absence of a specific company rule prohibiting this conduct. The Board noted that the presence or absence of a rule is a factor to be considered in determining whether an employee's conduct is protected, but is not determinative. It concluded that the documents in that case were clearly in private files to which the employee had no proper access. More

recently, a Board administrative law judge held, in *Cook County Teachers Union*, 2000 WL 33664223 (2000), that a secretary employed by a union was not engaged in protected activity when, after being told that the directory was for official business only, she gave her own bargaining representative a copy of a directory listing the names, home addresses and telephone numbers of employer officials. By contrast, in *Gray Flooring*, 212 NLRB 668, 669, (1974), the NLRB held that an employee who copied names and addresses of employees to give to a union from note cards left near the schedule roster was engaged in protected activity. The Board based its conclusion on the following facts: (1) the employer had had no announced policy concerning the use of the note cards by employees prior to the incident; (2) the cards were not maintained in a place or manner that would indicate management considered them to be of a private or confidential nature; and (3) there was nothing in the nature of the information on the cards to suggest to anyone that management considered the cards to be confidential or private. See also *Ridgely Mfg Co*, 207 NLRB 193 (1973) (employee who memorized the names of employees from timecards displayed in plain view to give to the union was engaged in protected concerted activity because the timecards were information available to all employees in the course of their work relationship.)

When Sluma met with Respondent representatives regarding Mahmoud's discipline, Sluma was performing a usual function of a steward. His conduct was thus protected, even though there was no collective bargaining agreement in effect at that time that required Respondent to have just cause for disciplining a unit member. Sluma also engaged in protected activity when he investigated the circumstances of Mahmoud's discipline to determine whether Respondent had treated Mahmoud the same way as similarly situated employees. The critical issue here is whether Sluma continued to have the protection of the Act when he accessed the files in the home repair database in the course of his investigation.

In this case the information Sluma retrieved from the database was not "private" or "confidential," in the strict sense, since some or all of it was probably a "public record" under the Michigan Freedom of Information Act (FOIA), MCL 15.231 et seq. However, Respondent's argument is not that Charging Party would not be entitled to the information upon making a proper request. Rather, it maintains that that Sluma wrongfully accessed the database without permission. Whether Sluma's conduct was protected turns, I believe, on whether Sluma knew or should have known when he accessed the database to look at Johnson's case files that he was not authorized to do so.

When Cole was developing the database, she encouraged specialists to access the database and check the information on their own cases. She gave the password to specialists who were interested in doing this. Respondent had no written policy setting out who was authorized to access the database, and never specifically informed the specialists that information in the database was confidential or off limits. However, as Cole testified, the database was developed as a management tool to monitor the HR specialists' productivity. HR supervisors, not the specialists, inputted information into the database. The information was not in plain sight of employees, as was the case with the information in *Gray Flooring*, supra, or *Ridgely Mfg Co*, supra, but was in a database that only HR supervisors regularly accessed. When Cole encouraged specialists to access the database, it was for the purpose of checking the accuracy of information on their own cases. There is no evidence that specialists were ever informed that they had the

right to access the database to look at information on other employees' case files, or that it was the practice for specialists to do so. I conclude, based on these facts, that Sluma should have known when he accessed the home repair database to look at Johnson's case files that he was not authorized to do this without specific permission. I find, therefore, that Sluma was not engaged in activity protected by Section 9 of PERA when he accessed this database without specific permission for the purpose of looking at Eric Johnson's case files.

Charging Party also argues that Respondent's stated reasons for disciplining Sluma - unauthorized use of a management database and misuse of Respondent's equipment – were a pretext to punish him for his vigorous efforts on Mahmoud's behalf. I conclude, however, that Respondent established that it had legitimate reasons for preventing its specialists from having unsupervised access to the home repair database, including making sure that they did not change information in their own or other specialists' case files without authorization or monitor other employees' work. I find, therefore, that even if Warren's hostility toward Sluma's representation of Mahmoud was a motivating cause of Sluma's suspension, Sluma's accessing the database was its "but for" cause. See *MESPA v Evart Pub Schs*, 125 Mich App 72, 74 (1983); *City of St. Clair Shores*, 17 MPER ¶ 76 (2004); *Residential Systems Co*, 1991 MERC Lab Op 394, 405.

The November 19, 2003 Memo

Charging Party alleges that Respondent's November 19, 2003 memo violated both Section 10(1) (c) and (e) of PERA.

Work rules and the disciplinary penalties for violating them are mandatory subjects of bargaining. See, e.g., *City of Garden City*, 1986 MERC Lab Op 901; *Oakland County Road Comm*, 1983 MERC Lab Op 1. In this case, however, Respondent has reserved the right under its ECS policy to cancel, restrict or otherwise change an authorized user's access to its electronics communications system. I find, therefore, that Respondent did not alter the specialists' terms and conditions of employment by withdrawing their authorization to access the home repair database pursuant to this policy. Although the disciplinary penalty for accessing the database without permission is also a mandatory subject of bargaining, there is not enough information in the record for me to conclude that Respondent unilaterally imposed or altered an existing penalty for this offense. I conclude that Charging Party did not demonstrate that Respondent violated Section 10(1)(e) of PERA by issuing the November 19, 2003 memo without first giving Charging Party an opportunity to demand bargaining.

Charging Party also argues that the November 19 memo violated Section 10(1)(c) of PERA because it was motivated by Warren's union animus. I find, however, that even if Warren's animus was a "motivating cause" of the memo, Respondent established that it had legitimate, nonpretextual reasons for eliminating the specialists' access to the database and that it would have done so, once this access came to its attention, even if Sluma had not pursued his representation of Mahmoud. I conclude, therefore, that Respondent did not violate Sections 10(1) (a) or (c) when it issued the November 19, 2003 memo prohibiting HR specialists from accessing the database without written authorization.

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

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge

Date: _____