STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MIDLAND PUBLIC SCHOOLS,
Respondent-Public Employer,

-and- Case No. C06 A-015

MIDLAND CITY EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Thrun Law Firm, PC, by Donald J. Bonato, Esq., for the Respondent

White, Schneider, Young & Chiodini, PC, by Michael M. Shoudy, Esq., for the Charging Party

DECISION AND ORDER

On January 29, 2007, Administrative Law Judge Doyle O'Connor issued his 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 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

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: _____

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APPEARANCES:

Donald J. Bonato, for the Respondent

Michael M. Shoudy, for the Charging Party

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 and 423.216, this case was heard at Lansing, Michigan on October 16, 2006, before Doyle O'Connor, Administrative Law Judge (ALJ) for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before December 4, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On January 24, 2006, Midland City Educational Support Personnel Association, MEA/NEA (MCESPA or Association) filed the charge in this matter, which asserts that the Midland Public Schools (Employer or Board) violated the Act by failing to properly provide requested information and, separately, by refusing to bargain in good faith over the effects of the elimination of a job classification.1

1 A portion of the charge, which alleged a violation of Section 10(1)(c) of PERA, was withdrawn without objection prior to the hearing.

Findings of Fact:

In August of 2005, the Employer decided to eliminate a position of “handyman”. Later that year the Employer eliminated the remaining handyman position, effectively eliminating the classification. A contractual grievance was pursued regarding the status of Association member Bill Johnroe, who was transferred from his handyman position to the lower paid position of “cleaning custodian”. The Association sought information from the Employer in the course of investigating and processing that grievance, and later sought bargaining over the effects of the decision to eliminate the unit positions. The unfair labor practice charge ensued.

The parties met regarding the grievance on September 28, 2005. At that meeting, MEA Uniserv Director Fred Baker gave a written request for information to Midland Human Resources Director Phil Bedford. Baker's letter dated September 28, 2005, requested “personal contracts or offers of employment for [nine specific named individuals], both before and after job transfers/demotions." This request for information or documents was consistent with the theory advanced by the Association in its grievance that the Employer in the past had, when eliminating positions, protected incumbent employees from any wage reduction, even if the employees were transferred or demoted as a result of the elimination of their positions. Baker testified that he also verbally explained, at that meeting, the type of information he was seeking through his written request. While at the hearing Bedford denied any recollection of that verbal exchange, I credit Baker's version, in part as it is consistent with Baker's contemporaneous letter of October 12, 2005, which described the verbal exchange and which was not challenged in Bedford's several contemporaneous written replies to Baker.

On October 7, 2005, Bedford refused to provide the requested information. His letter denying the request asserted that the information was not relevant to members of the bargaining unit, or to the pending grievance. His letter noted that only one of the nine individuals was a member of the Association. His letter asserted that, because the information request “was made during a grievance hearing, the district has no obligation to provide you with this information based on your suspicion of a contract violation.” Bedford's letter criticized Baker for purportedly damaging the relationship between the parties by requesting such information. Bedford did not seek any clarification of the request for information.

On October 12, 2005, Baker submitted a second written request for the information, which explained Baker's basis for believing the information relevant and recounted the discussion of the Association's theory at the prior grievance hearing. Baker noted that the failure to comply would result in the filing of an unfair labor practice charge and that the requested documents would in any case be available to Baker under the Freedom of Information Act (FOIA).

On October 20, 2005 Bedford again denied Baker the documents, asserting that a request under the Public Employment Relations Act was not “the appropriate vehicle". Bedford went on to treat the request as if made under the Freedom of Information Act, and to deny that the requested documents existed. As later events disclosed, Bedford was only able to deny the existence of the documents by treating the generic description used by Baker in making his request as if it provided the formal title of specific documents that were sought.

On October 25, 2005, Baker made his third written request for the documentation, this time pursuant to the FOIA, and this time describing his request more broadly as "salary documentation" regarding the same listed individuals. Baker additionally provided Bedford with applicable citations to case law under the Michigan FOIA. In a letter of October 28, 2005, Bedford asserted that the documents had been compiled and would be provided only upon payment of $71.10 to cover the supposed actual "cost of copying, materials, labor charges, and postage". Baker paid the demanded costs and received seven pages of documentation from the individuals' personnel files at a charge of just over ten dollars per page. The packet contained information on only four of the nine individuals in question, even though the Employer acknowledged that at least four others were, or had been, employees.2 Five of the seven pages consist of one-page agreements signed by the Employer and by the individual employee commemorating that individual's prospective annual salary and fringe benefits.

In an e-mail message dated January 17, 2006 Baker, on behalf of the Association, demanded that the Employer bargain over the effects of the elimination of the handyman position. Bedford responded tersely " I am in receipt of your request". Baker took that response as an indication that Bedford did not intend to act on the demand to bargain and the unfair labor practice charge was filed on January 20, 2006. On that same day, Bedford responded again to Baker's demand to bargain, indicating that "upon further thought and discussion", the district was willing to bargain over the impact of the restructuring. Bedford testified that his second message was sent subsequent to consultation with other board officials and with legal counsel.

The parties in fact met on January 26, 2006 and the Association presented a written proposal, which would have had the effect of red-circling the transferred/demoted employee so that his prior wage rate would not be reduced. While the Association described its proposal at that meeting, the Board representatives asked no questions and offered no response. On February 1, 2006, Douglas Fillmore, the director of facilities, responded in writing to the Association's January 26, proposal, indicating that "After careful consideration, we respond 'no' to the proposal and do not offer any counterproposal". The letter relied upon the assertion that the Board had the contractual authority to eliminate positions and transfer or demote the affected individuals. The letter did not further address the question of bargaining over the impact of the Board's decision to eliminate positions.3 At the hearing, Bedford testified that he believed that the Board's actions regarding the elimination of the handyman position, and the transfer with reduced pay of Jonroe, were within the Board's contractual management rights.

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2 The Employer asserted that one of the listed individuals had never been employed under the name given by the Association.

3 At hearing, the employer objected to evidence related to the meeting on January 26, and subsequent events, on the theory that events post-dating the filing of the charge were irrelevant to the question of whether or not the Employer had refused to bargain in good faith at the request of the Association. The objection was overruled. The Association sought to amend the charge to expressly include events subsequent to the January 20 filing date. That request was taken under advisement. Both parties fully addressed the January 26 meeting and subsequent events in the testimony, documentary evidence, and post-hearing briefs.

Baker testified that he sought no further negotiations with the Board over the effects of the elimination of the handyman classification subsequent to the February 1, 2006 letter, as he had concluded from the course of conduct that the Employer was unwilling to negotiate in good faith.

Discussion and Conclusions of Law:

The Information Request Claim

Charging Party contends that Respondent violated PERA by failing to properly respond to its requests for information. It is well established that in order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must supply requested information which will permit the union to engage in collective bargaining and to police the administration of the contract. *Clairmount Laundry*, 2002 MERC Lab Op 172; *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384. Where the information sought relates to discipline or to the wages, hours, or working conditions of bargaining unit employees, the information is presumptively relevant and will be ordered disclosed unless the employer rebuts the presumption. *City of Detroit, Department of Transportation*, 1998 MERC Lab Op 205; *Wayne County*, *supra*. See also *E.I. DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538 (CA 6, 1984). When seeking information regarding employees outside the bargaining unit, there is no presumption of relevance and the union must affirmatively show the relevance of the requested information to bargaining issues in order to establish the right to such information. *SMART*, 1993 MERC Lab Op 355; *City of Pontiac*, 1981 MERC Lab Op 57. In either instance, the standard applied is a liberal discovery-type standard. The employer has a duty to disclose the requested information as long as there exists a reasonable probability that the information will be of use to the union in carrying out its statutory duties. *Wayne County*, *supra; SMART*, 1993 MERC Lab Op 355, 357. See also *Pfizer, Inc*, 268 NLRB 916 (1984), enforced 763 F2d 887 (CA 7, 1985).

The duty to provide information is a part of the statutory duty to bargain in good faith. As noted by the Supreme Court in *DPOA v Detroit*, 391 Mich 44 (1974):

> The primary obligation placed upon the parties in a collective bargaining setting is to meet and confer in good faith. The exact meaning of the duty to bargain in good faith has not been rigidly defined in the case law. Rather, the courts look to the overall conduct of a party to determine if it has actively engaged in the bargaining process with an open mind and a sincere desire to reach an agreement . . . . In essence the requirements of good faith bargaining is simply at the parties manifest such an attitude and conduct that will be conducive to reaching an agreement.

The information sought here was relevant to the pending grievance over the treatment of the displaced handyman, as the Association sought to establish a prior practice by this Employer,

regarding individuals whose jobs had been eliminated in a reorganization, of demoting them without a reduction in pay.4

Here, the employer did not respond in good faith to the request for information. In his first denial letter of October 7, Bedford relied on a series of specious excuses for not providing the information, while expressly claiming to rely on MERC case law. First, Bedford asserted that the information was not relevant to members of the bargaining unit represented by MCESPA. In fact, as Bedford was aware at the time, the Association's argument in the pending grievance was that the Employer was not acting consistent with past practice, as exemplified by the prior treatment of the nine predominately non-unit employees on whom information was requested. Second, Bedford asserted that the information regarding arguably similarly situated employees was not relevant to the specific grievance regarding which information was requested. It is clear that information need only be relevant to bargaining or the administration of the contract, and not to any particular pending case. *Wayne County, supra*. Third, Bedford asserted, without any basis, that the district need not provide information, because it was requested "during a grievance hearing."

The Association explained the relevance and again requested the information, which was denied again by Bedford in his letter of October 20, in which he asserted that PERA was not "the appropriate vehicle" through which the Association should request information from the Employer. Bedford suggested that he was willing to treat the Association's request under the provisions of the FOIA, but then falsely asserted that the requested information did not exist. Bedford accomplished his false denial of the existence of the documents by placing the Association's generic description of the requested information in quotation marks. While it is true that there were no documents carrying the titles suggested by Bedford, the district did have readily available documents that clearly met the description utilized by the Association.

The Association's third request was made pursuant to the FOIA, as Bedford had directly refused to produce documents pursuant to PERA. Bedford's October 28 response to the FOIA request asserted that the requested information had been compiled and would be delivered upon payment of $71.10.5 The Association paid the demanded expense, and received much less than promised. Bedford produced documentation as to only four of the nine individuals regarding whom information had been requested. As to those individuals, the documents which were produced clearly fell within the description used by the Association of "personal contracts or offers of employment", as the documents are signed agreements between the district and individual

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4 The Employer prevailed in arbitration on the grievance, with the arbitrator finding that the Association had failed to meet its evidentiary burden to establish "a past practice or course of conduct which has been consistently followed for a sufficient duration…to lead to the inevitable conclusion that such a binding past practice is established by mutual consent."

5 Where a union's request entails compiling specific information in the employer's possession, rather than producing existing documents, PERA allows the Employer to require that the parties bargain in good faith over the cost of duplication or compilation of the requested data, grant the Union access to the necessary files, or bargain over other means of providing the information. *Michigan State University*, 1986 MERC Lab Op 407, 409. Assuming any charge would have been appropriate for producing seven pages of documentation, the Employer ignored its obligation to bargain over the expense, instead demanding prior full payment of unexplained and seemingly excessive charges.

employees, indicating their annual salary and benefit packages. Even though these documents did not have the precise title "personal contract" or "offer of employment", or any other title for that matter, the documents clearly functioned as agreements between the Employer and individual employees covering their conditions of employment and should have been produced in response to the first PERA request. No documentation was provided as to the other five individuals, even though by then the Association was requesting generic "salary documentation". The only explanation given for the failure to provide documentation as to the remaining five individuals was that there was no record or information "as requested." The district admittedly employed at least four of those remaining individuals, and it therefore must have had, and withheld, some documentation of their salaries, which was at least arguably relevant to the Association's claim that a consistent prior practice had existed.

The Employer denied an obligation to provide the information, falsely asserted the information did not exist, objected to the Association seeking the information under PERA, required the Association to resubmit its request under FOIA, charged the Association more than ten dollars a page for the handful of personnel file records produced without bargaining over the cost, and ultimately withheld much of the requested information. I find that the Employer did not respond to the request for information in good faith, and has thereby violated Section 10(1)(e) of the Act regarding the information request.

The Failure to Bargain Claim

While reorganization plans that eliminate positions are a management prerogative and are therefore not mandatory subjects of bargaining, employers are required to bargain in good faith with their employees' bargaining agent regarding the impact of such plans. *Local 128, AFSCME* v *Ishpeming*, 1985 MERC Lab Op 687, aff'd in part, 155 Mich App 491. To determine whether a party has bargained in good faith, we examine the totality of the circumstances to decide whether a party has approached the bargaining process with an open mind and a sincere desire to reach an agreement. *City of Springfield*, 1999 MERC Lab Op 399, 403; *Unionville-Sebewaing Area Schs,* 1988 MERC Lab Op 86; *Kalamazoo Pub Schs,* 1977 MERC Lab Op 771, 776.

The Association presumed that Bedford's terse e-mail of January 17 was a rejection of its demand to bargain over the effects of the elimination of the handyman classification. While Bedford's immediate response could have merely been an innocent confirmation of receipt, the Association's conclusion was reasonable, and was seemingly confirmed by Bedford's later e-mail of January 20, in which he agreed to meet only after "further thought and discussion."

The parties met on January 26, the Association made its proposal, and the Employer asked no questions and made no immediate response. The Association expressly invited a counter-proposal form the employer. The Employer's written response of February 1 rejected the Association's proposal, and pointedly noted that the Employer had no counter-proposal. The Association likewise reasonably concluded that the Employer's response to the information request, its perfunctory conduct in the meeting, and its written response after the meeting, indicated that in fact the Employer had no intention of bargaining and had merely engaged in a sham to give the appearance

of minimal compliance with the Act. Based on this conclusion, the Association sought no further formal bargaining on the matter.6

In assessing whether a party has fulfilled its bargaining obligation, the Commission has always been mindful of the language of Section 15, which states that agreement or concessions cannot be compelled. However, I find that the Employer's agents did not approach this particular dispute with an open mind and a sincere desire to reach an agreement. *Ida Pub Schs,* 1996 MERC Lab Op 211, 215; *Center Line Pub Schs*, 1976 MERC Lab Op 729, 733; *Lake Michigan College*, 1974 MERC Lab Op 219 aff'd *Lake Michigan Federation of Teachers v Lake Michigan College*, 60 Mich App 747 (1975). See also, *HK Porter v NLRB*, 397 US 99 (1970); *NLRB v American National Insurance Co,* 343 US 395 (1952). The duty to bargain in good faith includes more than merely showing up for a single bargaining session. Good faith bargaining required that the Employer meet with the Association and listen to and discuss its proposals regardless of whether or not the Employer believed that an agreement could ultimately be reached. *Gibraltar School District*, 1993 MERC Lab Op 493, 499-500. That did not occur here.

Here, the Employer's conduct supported the Association's reasonable conclusion that the Board did not intend to bargain in good faith. The information request and the demand for bargaining both related to the Employer's decision to eliminate the handyman classification. While the Employer had the contractual and statutory right to eliminate the classification, it did not have the right to ignore the Association's request for information, mislead the Association as to the existence of the information, refuse to meet regarding the effects of the decision, or to meet in a perfunctory fashion without giving any real consideration to the Association's proposal. Based on the totality of these circumstances, I find that the Employer violated Section 10(1)(e) of the Act regarding the demand for bargaining over the effects of the elimination of the handyman classification.

RECOMMENDED ORDER

Midland Public Schools, its officers, agents, and representatives shall:

1. Cease and desist from refusing to bargain in good faith with the Midland City Educational Support Personnel Association, MEA/NEA by refusing to timely, completely, and in good faith respond to the Association's requests for information.

2. Cease and desist from refusing to bargain in good faith with the Midland City Educational Support Personnel Association, MEA/NEA by refusing to negotiate in good faith regarding the effects of the elimination of the handyman classification.

3. Take the following affirmative action necessary to effectuate the purposes of the Act

    a. Timely, completely, and in good faith respond to future, or renewed, requests by the Association for documents or information.

6 The Association did further pursue the related Johnroe grievance.

b. Reimburse the Association for the costs improperly charged for documents requested in this matter.
c. Upon demand by the Association, meet and negotiate in good faith regarding the effects of the elimination of the handyman classification.
d. Posted the attached notice to employees in a conspicuous place for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Doyle O'Connor
Administrative Law Judge

Dated: _____

NOTICE TO ALL EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, MIDLAND PUBLIC SCHOOLS, a public employer under the PUBLIC EMPLOYMENT RELATONS ACT (PERA), has been found to have committed unfair labor practices in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT

Refuse to bargain in good faith with the MIDLAND CITY EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA by refusing to timely, completely, and in good faith respond to the Association's requests for information.

Refuse to bargain in good faith with the MIDLAND CITY EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, MEA/NEA by refusing to negotiate in good faith regarding the effects of the elimination of the handyman classification.

WE WILL

Timely, completely, and in good faith respond to future or renewed requests by the Association for documents or information.

Upon demand by the Association, meet and negotiate in good faith regarding the effects of the elimination of the handyman classification.

Reimburse the Association for the costs improperly charged for documents requested in this matter.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

MIIDLAND PUBLIC SCHOOLS

By:_____

Date:_____ Title:_____

This notice must be posted for thirty (30) consecutive days and must not be altered, defaced or covered by any 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 Building, 3026 W. Grand Blvd, Suite 2-750, Detroit, MI 48202-2988. Telephone: (313) 456-3510.