STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF LANSING,
Public Employer-Respondent,

Case No. C07 I-207

-and-

TEAMSTERS LOCAL 580,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Sue Graham, Labor Relations Manager, City of Lansing, for Respondent

Rudell & O'Neill, PC, by Wayne A. Rudell, Esq., for Charging Party

DECISION AND ORDER

On October 6, 2008, Administrative Law Judge Julia C. Stern 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 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: _____

STATE OF MICHIGAN
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES
EMPLOYMENT RELATIONS COMMISSION

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On September 11, 2007, Teamsters Local 580 filed the above charge with the Michigan Employment Relations Commission against the City of Lansing pursuant to Section 10 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210. The charge alleged that Respondent violated its duty to bargain in good faith by unilaterally removing bargaining unit work from Charging Party's unit and assigning it to employees outside the unit, including employees designated by Respondent as temporary or contract employees. The charge also alleged that Respondent unlawfully failed to provide Charging Party with information it requested about these work assignments in order to properly represent its bargaining unit in the grievance procedure and in contract negotiations.

The charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules pursuant to Section 16 of the PERA. A pre-hearing conference was held on February 28, 2008. On April 28, Charging Party filed an amended charge. On May 20, Charging Party filed a motion for order to show cause/motion for partial summary disposition of its allegation that Respondent violated its duty to provide information. On May 29, I issued an order to Respondent to show cause within three weeks of the date of my order why it should not be found to have violated its duty to bargain in good faith. Respondent did not respond to my order. Thereafter, at Charging Party's request, I bifurcated the charge and scheduled oral argument on its motion for

summary disposition.1 On July 2, after I had notified the parties of my decision, Respondent filed a response to my May 29 order. Oral argument was held on July 9, 2008. Based on the facts as set out below, and the arguments made by the parties in their pleadings and at oral argument, I make the following findings and recommend that the Commission issue an order as follows.

Facts:

Since Respondent did not file a timely response to the May 29 order to show cause, the following facts as set out in the charge and amended charge are taken as true for purposes of this proceeding. Charging Party represents two bargaining units of employees of the City of Lansing. One unit consists of supervisory employees, the other is a nonsupervisory unit commonly known as the clerical, technical and professional bargaining (CTP) unit. The most recent contracts covering both units expired on January 31, 2007. In December 2006, the parties began negotiating successor agreements.

Section 2 of the CTP collective bargaining agreement specifically excludes seasonal, part-time, temporary, and contract employees from the bargaining unit. Section 2 describes seasonal, temporary and contract employees as follows:

> A. Seasonal Employees. A seasonal employee is an employee who is hired for a limited duration and whose employment is not of a permanent nature, but it is contemplated that they shall work a normal work week while employed. Seasonal employees can be utilized for predictable, recurring seasonal peak work loads or special projects. A seasonal employee is defined under this agreement to be an employee who performs bargaining unit work and who generally works full time but for a period not to exceed one hundred and twenty (120) work days or one thousand hours, whichever is shorter, in a one year period. A seasonal may work more than a regular 40 hour schedule provided that said overtime work is not so assigned for the purpose of avoiding overtime work by regular full time staff. Seasonal employees are not represented by the Union nor are seasonal employees covered under the terms and conditions of this Agreement.
>
> C. Temporary Employees. Temporary help is a service agency or individual contract employee. Temporary help may provide services under the following conditions:
>
> > 1. Temporary help may be utilized whenever there are compensated or unpaid absences of regular full time employees. Such temporary help may only be utilized until the incumbent returns full time.
> >
> > 2. Temporary help may be utilized whenever there is a vacancy in a funded position. Such temporary help may be utilized only until the position is filled. If filling of a vacancy is not completed within one hundred twenty (120) calendar days after payroll clearance, such temporary help shall be terminated

1 Case No. C07 I-207 now encompasses only the information allegations. The remaining allegations of the charge will be separately heard as Case No. C07 I-207A.

> unless the City provides written explanation to the bargaining unit of extenuating circumstances beyond the City's control. If this is concurred with by the bargaining unit, an extension shall be granted. This subsection only applies if there are referred [sic] bargaining unit members.
>
> 3. Temporary employees may be utilized for special projects with the prior concurrence of the bargaining unit.
>
> 4. Temporary help may work more than a regular 40 hour schedule provided said overtime work is not so assigned for the purposes of avoiding overtime work by regular full time staff.
>
> D. Contract Employees. Contractual employees are special purpose non-covered employees who do not occupy a full time permanent position and who perform a variety of special duties which are contracted on an individual basis, including but not limited to special activities and leisure time services. Contractual employees are not represented under the terms and conditions of this agreement.

For some period preceding the most recent contract negotiations, Respondent had been reducing the number of employees in both units by attrition. During negotiations, Respondent told Charging Party that it lacked the funds to fill these positions and also that there was a possibility that additional employees would be laid off. Charging Party informed Respondent that, under these circumstances, it expected Respondent to notify it and explain the circumstances whenever Respondent used a nonunit person to perform bargaining unit work.

In early 2007, Charging Party received information that Respondent had hired a number of individuals as temporary and/or contract employees to perform bargaining unit work. On August 6, 2007, Charging Party's secretary treasurer, Mike Parker, filed a grievance protesting Respondent's use of contract or any other kind of nonunit employee to perform unit work. He also sent Respondent the following request for information:

> In order to represent the bargaining unit in the above mentioned grievance I will need you to provide me with the following information. The information is being requested for the current and the last fiscal year.
>
> 1. A list of all temporary, contract, and seasonal employees, including those covered by an individual contract. Please including [sic] the date they were hired by the City, department that they are working in, and a description of the work they are performing.
>
> 2. A copy of all individual contracts.

On or about August 10, 2007, Respondent gave Charging Party copies of temporary employment contracts between Respondent and ten individuals. The contracts all stated that the individual's employment was "temporary, part-time and at-will." Each contract was for a specific term, included the department to which the individual was assigned, and referenced an attachment

describing the employee's duties. However, most of the contracts sent to Charging Party did not include attachments, and the contracts themselves did not describe the work the employees were doing. Respondent also gave Charging Party two spreadsheets with information about individuals employed through temporary placement agencies. According to the document, the employees listed on a one-page spreadsheet entitled "Current Temporary Placements 2006" began their temporary assignments between 4/19/06 and 5/14/07. The "Current Temporary Placements" spreadsheet had fourteen names, with some individuals listed twice. The spreadsheet gave start and end dates for each employee. The list included position titles for some, but not all, of the names. It also included reasons for hiring (e.g., position vacant, extra election help, filling in for someone on maternity leave) for some, but not all, of the employees. The spreadsheet did not describe the work the employees were doing. The second spreadsheet, titled "Temporary Placement Roster," listed four names, their position titles, their departments, and their start and end dates. According to the spreadsheet, the four employees on this list started work on 4/18/07, 5/18/07, 6/8/07, and 8/13/07.

Parker and Sue Graham, Respondent's labor relations manager, met in September 2007, shortly after the unfair labor practice charge was filed, to discuss Parker's information request. During this meeting, Graham promised to provide Parker with a "detailed analysis" explaining why each of the ten contract employees had been hired as contract employees.

On December 27, having not received anything more from Graham, Parker sent her a written request for the following additional information:

> In order to represent the bargaining unit in the above referenced charge I will need you to provide me with copies of all Personnel Action Forms for FY 2006 and 2007 for the following individuals: [eleven names listed]
>
> Please provide me with a list and a copy of any and all individual contracts signed with any temporary or contract employees since August 2007.

On January 9, 2008, Graham sent Parker copies of individual employment contracts for ten of the eleven individuals named in the December 27 letter, with a note that Respondent had no record of the eleventh person. Some of these contracts had been sent to Parker in August. She also sent contracts for six additional individuals and a spreadsheet entitled "Temporary Employee Placement Roster." The latter contained the same information as the "Current Temporary Placements" spreadsheet Graham sent to Parker in August, but covered employees hired from temporary placement agencies between 4/18/07 and 10/29/07.

On February 28, 2008, I held a pre-hearing conference on the unfair labor practice charge. At this conference, Respondent told Charging Party that it did not generate personnel action forms for employees on temporary contracts. The parties reviewed the individual employment contracts that Respondent had provided to Charging Party in August 2007 and January 2008. Respondent's representatives explained the circumstances surrounding the hiring of some of these individuals, but had no information other than the contracts themselves for other individuals. One of the contracts was between Respondent and Noah Bradow. Bradow's status as a member of the bargaining unit had previously been the subject of an earlier unfair labor practice charge that resulted in an agreement to place Bradow in Charging Party's unit. At the pre-hearing conference, Charging Party asserted that

Bradow was performing the same or similar work as a temporary employee that he had performed at the time Respondent agreed to put him in the bargaining unit. Charging Party explained that it needed the dates that all the contract employees had first been hired by Respondent in order to determine whether there were other employees who had previously been considered permanent but were now being employed as temporary employees outside the unit. It also said that it needed copies of any personnel action forms Respondent had for the contract employees, including Bradow, in order to trace their employment history. Graham agreed to review Respondent's files and meet again with Parker to answer his questions. After the pre-hearing conference, a hearing on the unfair labor practice charge was scheduled for July 8 and 9 to allow the Respondent time to gather the information and present it to Charging Party before the hearing.

On March 26, Charging Party sent Graham two letters. One stated that it had not yet received any of the information it had requested on February 28, and asked for an explanation of why this information had not been provided. The second letter detailed the information that Charging Party believed it had requested but had not been provided. This letter stated:

> Through a letter dated December 27, 2007, Local 580 requested that the City provide additional information and documentation that was referenced in it. Among the information and documentation that does not appear to have been provided yet is:
>
> 1. The information and documentation requested in the August 6, 2007 letter for both the then current and the prior fiscal year.
>
> 2. The date each of the temporary contract employees, seasonal employees or employees covered by an individual contract was hired. This would include not just the date the employee was accepted or became a temporary contract employee, a seasonal employee, or an employee covered by an individual contract. This means the date they were first hired, which, for example, with respect to Noah Bradow would be long before arrangements were made for him to work under the terms of a Contract Employee Agreement that states it would be effective August 6, 2007.
>
> 3. A description of the work being performed by each temporary contract employee, each seasonal employee, and each employee covered by an individual contract. This is particularly true because virtually none of the Contract Employee agreements that reference an Attachment A had such a document attached to them when they were provided to Local 580. If no distinction exists in the work they had been performing in comparison to that performed by CTP bargaining unit employees, a simple answer to that effect would be acceptable. If some such distinctions in the work they had been performing does exist that makes any difference, each one should be clearly stated.
>
> 4. A copy of each "Attachment A" stated to have been attached to a Contract Employee Agreement.

5. A copy of the detailed analysis referenced in September 2007.

6. Copies of the Personnel Action Forms that pertain to those listed in the December 27, 2007 letter. For example some must exist at least for Noah Bradow in light of the representations you have made and his prior continuous employment with the City.

The City has not yet refused to provide these kinds and types of information and documentation. This letter requests that these kinds and types of information and documentation be made available to Local 580. They will be used for purposes or reasons referenced in my other correspondence.

If the City intends to refuse to make some of all of these kind and types of information and documentation available to Local 580, then by written response to me identity each kind and type of information or documentation it will refuse to make available and each reason why the City will refuse to do so.

On April 2, 2008, Respondent sent Charging Party the following response:

We are in receipt of your requests for information dated March 26, 2008. Unfortunately, Sue Graham, the Labor Relations Manager for the City of Lansing, is on leave and will be away from the office to attend to personal matters. At this time, we respectfully request an extension for our response to your requests. Ms. Graham is scheduled to return to work the week of April 7, 2008. It is our hope to have our responses to you shortly thereafter.

On April 3, Parker sent Graham a letter discussing the parties' upcoming mediation sessions and stating that Charging Party needed the information set out in its March 26, 2008 letter, as well as information about health care costs it had requested on March 18, before these sessions. As of July 9, 2008, Respondent had not followed up on Respondent's April 2 letter, sent Charging Party any additional information or explained whether or when it intended to do so.

Discussion and Conclusions of Law:

It is well established that in order to satisfy its bargaining obligation under Section 10(1) (e) of PERA, an employer must supply in a timely manner requested information which will permit the union to engage in collective bargaining and to police the administration of the contract. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. 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 (Dept of Transportation)*, 1998 MERC Lab Op 205; *Wayne Co*, *supra*. See also *EI DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538 (CA 6, 1984). Information about employees outside the bargaining unit is not presumptively relevant. *City of Pontia*c, 1981 MERC Lab Op 57. Where the information concerns matters outside the bargaining unit, the burden is on the union to demonstrate relevance. See, e.g., *Schrock Cabinet Co*, 339 NLRB 182 (2003). However, 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; 115 LRRM 1105 (1984), enforced 763 F2d 887 (CA 7, 1985).

An employer's unreasonable delay in furnishing relevant information is as much a violation of its duty to bargain as a refusal to provide the information at all. *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). There is no per se rule for unreasonable delay. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. *West Penn Power Co.*, 339 NLRB 585, 587 (2003); *Woodland Clinic*, 331 NLRB 735, 737 (2000); *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). The complexity and extent of information sought, its availability and the difficulty in retrieving the information are all factors to be considered in determining whether the delay is unreasonable. *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). However, when a union makes a request for relevant information, the employer has a duty to supply it in a timely fashion or adequately explain why the information was not furnished. *Beverly California Corporation f/k/a Beverly Enterprises*, 326 NLRB 153, 157 (1998). Even if a union's request is ambiguous or overbroad, an employer cannot simply refuse to comply, but must request clarification and/or comply with the request to the extent it encompasses necessary and relevant information. *In re Lexus of Concord, Inc*, 330 NLRB 1409, 1417 (2000); *Keauhou Beach Hotel*, 298 NLRB 702 (1990). If a union requests information which the employer does not keep in the form requested, the employer must, at the minimum, either grant the union access to its records or bargain in good faith over the cost of compiling the information. *Plymouth Canton Cmty Schs,* 1998 MERC Lab Op 549, 556; *Green Oak Twp,* 1990 MERC Lab Op 123; *Michigan State Un*iv, 1986 MERC Lab Op 407, 409.

In the instant case, seasonal, temporary and contract employees are excluded from both Charging Party's bargaining units. The collective bargaining agreement covering the CTP unit described the appropriate use of each of these types of employees. In August 2007, December 2007, February 2008, and March 2008, Charging Party requested information about Respondent's use of seasonal, temporary and contract employees for the purpose of determining whether Respondent was using these employees to replace permanent bargaining unit positions. As Charging Party explained, it needed this information to determine whether to file grievances and/or address the issue at the bargaining table. As discussed above, information about nonunit employees is not presumptively relevant. However, I find that Charging Party satisfied its obligation to show the relevance of this information to its duty to enforce the contract and engage in collective bargaining.

In August 2007, Charging Party requested lists of all temporary, contract and seasonal employees employed during the 2006 and 2007 fiscal years, their departments, the dates they were hired by the City, and descriptions of the work they were performing, as well as copies of individual contracts. Respondent responded promptly with lists of names and copies of contracts, but it did not supply Charging Party with the most significant piece of information – descriptions of the work the employees were doing. It also did not provide the dates these employees were first hired. At a meeting in September 2007, Respondent promised to provide Charging Party with an explanation of why it had hired the ten contract employees, but it never did so. In December 2007, Charging Party requested additional information – personnel actions forms and copies of any individual contracts signed after August 2007. In January 2008, Respondent sent Charging Party the new employment

contracts and the names of other employees hired from temporary placement agencies after August 2007. It did not, however, provide Charging Party with descriptions of the work these employees were performing or explanations of why they were hired. Charging Party also requested copies of personnel action forms. According to Respondent, personnel action forms do not exist for temporary employees. However, Respondent did not tell Charging Party that this was why none were supplied. At the February 28 pre-hearing conference, Charging Party explained that it wanted copies of any existing personnel action forms for any employee identified by Respondent as a temporary, seasonal, or contract employee in order to determine whether these employees had previously held permanent positions. Charging Party also reiterated its desire for an explanation of the circumstances under which each of these employees was hired. Almost a month elapsed after the February 28 conference without any further communication between the parties on this issue. On March 26, Charging Party sent Respondent another request for the dates each of the temporary employees was first hired and a description of the work they were doing. It also requested an explanation of the circumstances under which certain contract employees were hired, and copies of any personnel action forms pertaining to them. Respondent replied in writing that it would respond after April 7, when Graham returned. However, as of July 9, 2008, Respondent had neither supplied the information nor provided an explanation for its failure to do so.

Respondent asserts that Charging Party continues to request information that it knows does not exist, i.e., the attachments to the employment contracts and personnel actions forms for contract employees. However, in August 2007 and again in March 2008, Charging Party asked for a description of the duties performed by each individual considered to be a temporary, seasonal or contract employee. Even if the attachments referenced in the employment contracts did not exist, Respondent had an obligation to supply Charging Party with information about the work being done by the contract employees, as well as the employees on the other lists. Moreover, at the February 28, 2008 pre-hearing conference, and later in its March 26, 2008 letter, Charging Party explained that it was requesting any personnel action forms Respondent maintained on file for specific individuals working as contract employees in 2006 and 2007 to determine whether these individuals had ever been permanent employees. As noted above, if an employer does not supply relevant information requested by a union, it has an obligation to provide the union with an explanation of why it has not done so. If no personnel action forms existed for any of these employees, Respondent had an obligation to inform Charging Party of this fact. I find that Respondent neither supplied Charging Party in a timely manner with requested information necessary to police its contract and engage in collective bargaining nor provided Charging Party with an adequate explanation of why it had not done so. I conclude that by this conduct Respondent violated its duty to bargain in good faith under Section 15 of the Act.

When a party is found to have violated its duty to provide information, the usual remedy is an order requiring the party to provide the information and to post a notice to its employees or members notifying them that it has been found guilty of committing this unfair labor practice. Charging Party argues that such an order is insufficient to remedy the unfair labor practice in this case. It points out that almost a year has elapsed since it made its initial request for information in August 7, 2007, and that it has still not been given all the information it requested at that time. Moreover, Respondent also failed to provide information requested by Charging Party in December 2007 and February and March 2008 that would have allowed Charging Party to determine if

Respondent was improperly using individuals designated as temporary, contract or seasonal to replace permanent bargaining unit employees. Charging Party points out that Respondent never told Charging Party that any of this information was privileged or confidential, that it did not understand what Charging Party was asking for, or that its requests were too burdensome. According to Charging Party, the Commission should infer from Respondent's conduct that the information it should have given Charging Party would have been adverse to Respondent's interests. Charging Party asks the Commission to find that that an "unrebutted presumption [sic] has been established" that this information is adverse to Respondent's position in the underlying unfair labor practice charge, now Case No. C07 I-207A. It seeks a remedial order in this case that prohibits Respondent from presenting any of the information it failed to give Charging Party in response to its February and March 2008 information requests as evidence in Case No. C07 I-207A. Finally, Charging Party requests that Respondent be ordered to pay Charging Party's costs and attorney fees.

In *Detroit Pub Schs*, 2002 MERC Lab Op 201, an administrative law judge's decision adopted by the Commission when no exceptions were filed, a union successfully argued that the employer's failure over a six month period to respond to its repeated requests for a list of the new employees in its bargaining unit required a make-whole remedy. The parties' collective bargaining agreement did not contain a union security clause, and the administrative law judge found that the employer's failure to give the union a list of new employees deprived the union of the opportunity to solicit new members. The administrative law judge, in recommending that the union be reimbursed for dues that would have been paid by employees eligible to become members during the period that Respondent withheld the list, noted that the employer not only failed to respond to the information request, it offered no explanation for its failure to respond. However, I am not aware of any case in which either the Commission or the National Labor Relations Board has precluded an employer from putting on evidence in defense to an unfair labor practice charge because that employer previously failed or refused to provide that information to the union. In any case, whether Respondent should be permitted to introduce information it withheld from Charging Party into evidence in Case No. C07 I-207A is an issue that should be addressed when, and if, it seeks to do so. As to Charging Party's request that Respondent be ordered to pay its costs and attorney fees, the Court of Appeals has held that PERA does not authorize the Commission to award attorney fees. *Goolsby v City of Detroit*, 211 Mich App 214, 224-225(1995).

Based on findings set forth above, I find that Respondent violated Section 10(1) (e) of PERA by failing to provide Charging Party with relevant information in a timely fashion. I recommend that the Commission grant Charging Party's motion for summary disposition and that it issue the following order:

RECOMMENDED ORDER

Respondent City of Lansing, its officers and agents, are hereby ordered to:

1. Cease and desist from refusing to provide Teamsters Local 580 with information that is relevant and necessary to its role as the bargaining agent for employees of Respondent.

2. Take the following affirmative action to effectuate the purposes of the Act.

a. Provide Teamsters Local 580, to the extent that it has not already done so, with the following information:

1. Complete lists of all individuals employed by the City as seasonal, temporary or contract employees and excluded from the Teamsters Local 580 bargaining units during the 2006 and 2007 fiscal years and from August 2007 to date.

2. The date each individual on these lists was first employed by the City in any capacity.

3. A description of the work performed by each of the individuals on these lists and the City department(s) in which they worked.

4. An explanation of why Respondent hired the ten individuals whose contracts were provided to Charging Party on or about August 10, 2007 as contract employees.

5. Any personnel action forms issued in 2006 or 2007 for the individuals listed in a letter from Mike Parker to Sue Graham dated December 27, 2007.

b. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
State Office of Administrative Hearings and Rules

Date: _____