STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer - Respondent,

-and-

PONTIAC SUPERVISORS ASSOCIATION OF ENGINEERS,
Labor Organization - Charging Party in Case No. C05 H-170,

-and-

PONTIAC SUPERVISORS ASSOCIATION OF ENGINEERS,
PONTIAC EDUCATIONAL SECRETARIES ASSOCIATION,
PONTIAC FOREMAN'S ASSOCIATION, AND
UNITED SKILLED MAINTENANCE TRADE EMPLOYEES,
Labor Organizations - Charging Parties in Case No. C05 J-260.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Ann L. VanderLaan, Esq., for the Respondent

Lee and Associates, P.C., by Michael K. Lee, Esq., and Erika Pennil, Esq., for Charging Parties

DECISION AND ORDER

On February 6, 2009, Administrative Law Judge Peltz issued his 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

_____
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
EMPLOYMENT RELATIONS COMMISSION
STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Respondent-Public Employer,

-and-

PONTIAC SUPERVISORS ASSOCIATION OF ENGINEERS,
Charging Party-Labor Organization in Case No. C05 H-170,

-and-

PONTIAC SUPERVISORS ASSOCIATION OF ENGINEERS,
PONTIAC EDUCATIONAL SECRETARIES ASSOCIATION,
PONTIAC FOREMAN'S ASSOCIATION, AND
UNITED SKILLED MAINTENANCE TRADE EMPLOYEES,
Charging Parties-Labor Organizations in Case No. C05 J-260.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Ann L. VanderLaan, for Respondent

Lee and Associates, P.C., by Michael K. Lee and Erika Pennil, for Charging Parties

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 Detroit, Michigan on May 16, 2006, September 6, 2006 and March 24, 2007 before David M. Peltz, Administrative Law Judge (ALJ) of the State Office of Administrative Hearings & Rules, on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript, exhibits and post-hearing briefs filed by the parties on or before July 20, 2007, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charges:

This case comes before the Commission on an unfair labor practice charge filed by the Pontiac Supervisory Association of Engineers (PSAE) on August 16, 2005 and by the PSAE, the Pontiac Educational Secretaries Association (PESA), the Pontiac Foreman's Association (PFA) and the United Skilled Maintenance Trade Employees (USMTE) on October 31, 2005. In the charges, the Unions assert that Respondent Pontiac School District breached its duty to negotiate in good faith and repudiated its collective bargaining obligations by implementing "draconian" layoffs of unit personnel shortly after contracts with three of the bargaining units were executed. Charging Parties further contend that Respondent violated PERA by communicating directly with employees regarding the school district's alleged budget deficit. Finally, the charge alleges that Respondent violated its duty to bargain by refusing to provide information requested by the Unions concerning the district's finances. At the start of the hearing in this matter, the Unions moved to amend the charges to add an allegation that Respondent failed to bargain over the impact of the layoffs on unit members. I granted the motion to amend, over Respondent's objection.

Findings of Fact:

There are eleven bargaining units representing employees of the Pontiac School District, including Charging Parties PSAE (engineers), PESA (secretaries), PFA (foremen) and USMTE (maintenance and trade employees, including electricians, painters, plumbers and roofers). Charging Parties are all affiliated with the Michigan Education Association (MEA), as is the Pontiac Education Association, which represents the school district's teachers and instructional staff. The Unions are part of the 7-C Coordinating Council, a coalition of MEA bargaining units representing employees of the school district.

In early 2005, the school district began preparing its budget for the 2005-2006 fiscal year, which was scheduled to begin July 1, 2005. Due to a projected decline in student enrollment and other factors, the district forecasted a $12 million budget deficit for the 2005-2006 fiscal year. Terry Pruitt, Respondent's assistant superintendent for business services, proposed to the school board that the district privatize the work of various noninstructional employees, including secretaries, engineers, custodians, food service employees, foreman and security officers. Pruitt estimated that the privatization plan, which he referred to as a "migration" of support services, would save the school district approximately $4 million per year.

As Respondent was exploring the possibility of privatizing its support services, it was, at the same time, negotiating new collective bargaining agreements with several of its labor organizations, including those represented by Charging Parties. The first MEA units to settle their agreements with the school district were the teachers and administrators unions. Those agreements were reached at the end of 2004 and served as

precedent for subsequent contracts. With the exception of the PSAE, all of the Charging Party unions settled their contracts with the school district in the spring of 2005.[1]

A new contract for the PESA was ratified by the bargaining unit members in February of 2005 and approved by Respondent the following month. The PESA agreement covered the period 2004 to 2007. Under Article 15, Section A of the agreement, Respondent is authorized to make "necessary" reductions in the work force as long as it first discusses the layoffs with PESA's negotiating committee and gives the affected employees thirty days notice before such action is to take place. According to the PESA president, there were no discussions during the contract negotiations about the school district facing a financial shortfall.

The PFA bargaining unit settled its contract with the school district in April of 2005. During bargaining, there was some discussion about the school district's financial problems. In fact, the Union agreed to modify its health insurance coverage in an attempt to help reduce the strain on the district's budget. In exchange for that concession, bargaining unit members were to receive a one-percent raise for each year of the three-year contract. The Union also agreed to replace the no-layoff provision which had been included in the prior contract with language giving the school district the right to make necessary staff reductions after (1) providing the Union with the opportunity to meet with the superintendent and (2) giving affected employees ten days notice of the layoffs, except when the layoffs are caused by circumstances beyond the control of the school board.

Negotiations on the USMTE contract began in 2004 and concluded in May of 2005, when unit members ratified a new collective bargaining agreement. Although Pruitt repeatedly told the Union during the negotiations that the district was short on money, the new contract ultimately included a 1.5 percent wage increase for USMTE members. According to Pruitt, the district agreed to the wage increase out of sense of "fairness" to its employees and because the school board members did not fully understand the true scope of the district's financial crisis. Pruitt testified that the wage increase was consistent with increases in other collective bargaining agreements negotiated around that time, including contracts for the teachers and administrators bargaining units.

As part of the new agreement, the USMTE acquiesced to the Employer's proposal to remove a no-layoff provision that had been included in the prior contract and replace it with a staff reduction clause which is essentially identical to that agreed to by the PESA and described above. Pruitt testified credibly, however, that Respondent had not actually made any decision about layoffs in the spring of 2005 and that he proposed the new language simply to give management some flexibility in dealing with the district's financial situation. According to Pruitt, the privatization or "migration" plan was Respondent's primary focus at that time:

[1] The PSAE was still in negotiations with the school district at the time of the hearing in this matter. When bargaining began in June of 2005, the school district told the Union that it needed to consider making cuts.

> [I]t was always at least in the back of my mind that, at some point in time, we were going to have to face the financial facts of life that the District really didn't have the resources to continue the way we were, but at that point, there were lots of different options that we were looking at and talking about.
>
> You know, we certainly hadn't settled on layoffs as the final plan because . . . when we got to June 20 or whenever we put that in front of the Board, layoffs was not the option that we offered the Board. You know, we offered the labor migration option . . . with the proviso that we were trying to protect as many employees as possible . . .
>
> [T]o say that layoffs were not something that was being considered, I mean, I'd be less than honest if I didn't say that yes, that was certainly something in the back of our minds, but it was not, at that point, the first option.

In early June of 2005, the school board authorized the preparation and issuance of requests for proposals (RFPs) to private vendors in connection with the privatization plan. At the board's insistence, each of the RFPs required that any third-party vendor selected by Respondent to provide support services hire current employees of the school district at the same wage levels they were guaranteed under their respective collective bargaining agreements. Around this time, the superintendent met with the Unions to discuss the school district's budget deficit and the administration's privatization proposal. Thereafter, the MEA and the 7-C Coordinating Council launched a campaign to fight the privatization plan.

At a public school board study session on June 10, 2005, Pruitt gave a presentation to the board chronicling the school district's financial situation. Pruitt explained that the district was facing a $12 million budget deficit due to declining enrollment, increasing health care and retirement benefit costs and a stagnant foundation allowance. Pruitt set forth in detail the administration's plan to balance the budget, which included $4 million in costs savings from privatization, as well as building closures and reductions in administration and teacher staffing.

On June 14, 2005, representatives of Charging Parties met with the administration to discuss the budget situation. During the meeting, the Unions rejected the school district's proposal for a 20 percent across the board wage reduction for each of its units. However, at least one of the Unions offered to loan the school district two sick days, provided that Respondent return three sick days to employees at a later date. In addition, Charging Parties presented a list of possible alternatives to privatization. The list included recommendations such as an early retirement incentive, the closure of school buildings, the sale of properties owned by the school district and a hiring freeze, beginning with the administration.

At a public meeting on June 20, 2005, the school board voted to adopt the administration's budget proposed for the 2005-2006 school year, which including $4 million in cost-savings from privatization or "migration." However, by a vote of 7-0, the school board voted down the administration's recommendation to privatize support services. Instead, the school board directed the superintendent and the administration to meet with the Unions and return with alternative recommendations for addressing the budget deficit. At that time, the school district's expenditures were exceeding revenues by about $900,000 per month.

On June 22, 2005, the superintendent sent letters to each of Charging Parties' presidents regarding what she described as "an unprecedented financial crisis." The superintendent requested that the Unions engage in immediate discussions with representatives of the school board "on the need for reductions in the operational costs of the School District and how your bargaining unit can contribute to the accomplishment of the costs reductions necessary to avoid incurring a deficit for the 2005-2006 school year." Also on June 22nd, the superintendent sent a letter to every employee of the school district. In the letter to employees, the superintendent wrote:

> As you may already know, the School District of the City of Pontiac is facing an unprecedented financial crisis which requires unprecedented measures for reduction in its operational costs to avoid a substantial deficit. Michigan law prohibits a public school district from incurring a deficit.
>
> The members of the Board of Education have given us an opportunity to engage in discussion with each bargaining unit on the need for reductions in the operational costs of the school district.
>
> Currently, we need to cut $12M from the budget for the 2005-2006 school year due to escalating costs of retirement, health and other benefits coupled with decreased state funding. I believe it's fair for all of us to share in this dilemma. I WANT YOU HERE AND I WANT YOU WORKING.
>
> You will hear from your union president very soon. I am expecting to hear from your president after he/she has had an opportunity to get your input.
>
> Your understanding and consideration in this regard will be greatly appreciated.

The superintendent sent a similar letter to the school districts "stakeholders", a group which includes parents, staff and other members of the community. In the letter, dated June 28, 2005, the superintendent described the school district's financial situation, referenced the steps the district had already taken to address its budget problems, and restated Respondent's commitment to the education of its students. The superintendent also wrote, "Since about 82% of the budget is related to employee costs, the board has

given us additional time to meet with each of the bargaining units to address alternatives to meet the $10.5 million needed to balance the budget for the upcoming year." The letter concluded with an invitation to the stakeholders to contact the administration with "questions, thoughts or ideas" regarding the district's finances.

MEA Uniserv Director Tanya Muse formally accepted the superintendent's invitation to meet for the purpose of discussing the school district's financial condition on June 28, 2008. On July 1st, the superintendent wrote to Muse offering five possible meeting dates, all of which were in early July. A meeting was set for July 8, 2005. Two days before the scheduled meeting, Muse notified the superintendent that Charging Parties did not wish to go forward with the meeting until the Unions had the opportunity to conduct additional research which would enable them to craft "a comprehensive plan that would be in the best interest of the School District, the students and employees." On July 13, 2005, Pruitt wrote to each of Charging Parties' presidents with an invitation to join the school board and the superintendent in a "negotiations session with members of the administrative team to discuss FY 2005-2006 budget challenges and your members' recommended solutions." Pruitt sent follow-up letters to the each of the Unions on July 20th, once again inviting the presidents to participate in negotiations with members of the administrative team.

The parties finally met to discuss the school district's financial situation on July 25, 2005. At that meeting, Pruitt detailed the district's budget problems and provided the Unions with financial information that had previously been presented to the school board at its pubic meeting on June 10th, including copies of the 2005-2006 budget. Pruitt indicated that privatization or "migration" was still an option and that he would attempt to convince the board to reconsider its decision regarding that plan. Charging Parties made it clear that they were opposed to privatization. Instead, they made several alternative recommendations for addressing the district's budget deficit, including the closure of two school buildings, the elimination of overtime, an early retirement incentive for all employees and the use of money from trust funds to balance the budget.[2] The Unions codified those recommendations in a letter to the superintendent following the meeting. In that letter, dated July 29, 2005, the Unions also requested certain information from the school district, including documentation concerning any costs savings associated with recent changes in health insurance and the privatization of bus services. Charging Parties also requested "any backup information which documents these figures and which supports the district's stated contention that it needs to cut $12.3 million in order to balance the 2005-2006 budget."

Following the July 25th meeting, Respondent immediately began implementing an early retirement plan as proposed by the Unions. However, the school district took no

[2] At the time, Respondent maintained a trust fund with money which the school district had received as part of the settlement of various lawsuits. The school board used the interest from the fund to pay for athletic programs and other services. In addition, the board passed a resolution each year authorizing the withdrawal of money from the fund to cover budget deficits. In 2003, the trust fund totaled between $10 and $15 million. The fund had been entirely depleted by the end of the 2005-2006 school year.

action regarding any of the Unions' other recommendations. At hearing, Pruitt explained that the proposals set forth by the Unions failed to offer any quantifiable cost savings to the district. On August 1, 2005, Pruitt sent letters to each of Charging Parties' presidents requesting a "definitive proposal regarding cost concessions." Attached to the letters were documents which itemized targeted savings for each bargaining unit of 20 to 25 percent and various proposals for achieving those cost saving targets, including decreases in wages and benefits and staff reductions.

On August 3, 2005, the Employer sent a letter to the USMTE president summarizing the various cost savings measures previously enacted by the school district. The letter also set forth a new proposal to assist the district in meeting its targeted savings. In the letter, Respondent proposed "a two-tier option in which existing employees would remain in the union, but new employees to the district would not be part of the union." Although the letter was purportedly from Pruitt, it was actually signed by his second-in-command, David Massoglia. At hearing, Pruitt testified credibly that he was out of town when the letter was drafted and mailed and that the document misstated the Employer's position regarding the two-tier wage proposal. According to Pruitt, the district never intended to propose that newly hired employees be excluded from the bargaining unit, but rather that all new hires begin at the lowest level of the salary schedule for their respective positions. Upon returning to town, Pruitt met with Charging Parties' presidents and clarified the Employer's position regarding the two-tier wage proposal.

In late July and early August of 2005, the Unions submitted a series of information requests to Respondent under the Freedom of Information Act (FOIA). The school district responded to the FOIA requests by submitting a packet of information to the Unions on August 19, 2005. The information requested by the Unions and provided by the Employer included: (1) RFP's for labor migration; (2) a budget presentation for 2005-2006; (3) documentation regarding cost savings resulting from the privatization of transportation and food services; (4) copies of various contracts; (5) a lease for the "Frost" property; (6) documentation relating to "EITF"; and (7) a summary of payments made to the Thrun Law Firm. The Unions' August 10, 2006 request for certain "savings documentation" was rejected by the school district on the ground that such information did not exist. Charging Parties did not dispute that assertion or attempt to clarify its request.

During the weekend of August 20-21, 2005, the superintendent, Pruitt and members of the school board met with representatives of the Unions, including the presidents of Charging Parties, for further discussions regarding the school district's financial situation. At the meeting, Pruitt revealed that Respondent had recently learned of an additional $5.1 million in expenses which it had incurred during the 2004-2005 fiscal year, but which had not been posted until after the completion of the district's annual audit. Respondent anticipated that most of these expenses would likely be recurring, thus resulting in a budget deficit of more than $17 million for the 2005-2006 fiscal year. Following the meeting, Muse sent a letter to the superintendent thanking her for "the effort and time that you and your staff spent in order to provide this information." In the letter, Muse indicated that MEA staff was in the process of

analyzing the information provided by the district so that the parties could meet and "discuss ways to work collaboratively in addressing the financial problems of the district."

The school board held a public study session on September 13, 2005 for the purpose of updating members regarding the school district's finances. In attendance at this meeting was Lora Perkins, the new Uniserv director for the district's MEA bargaining units. During the meeting, Pruitt recommended to the board that it take immediate action to resolve the budget problems. As part of his presentation, Pruitt submitted a proposed list of layoffs, including the following positions within Charging Parties' bargaining units: 2 foremen, 7 skilled trades employees, 18 security employees, 21 secretaries, 10 engineers, 20 media aides and an unspecified number of media assistants. At hearing, Pruitt testified, "I tried clearly to paint the picture [to the school board] that, you know, unless we consider layoffs at this point, you will have dug the hole so deep that you'll never be able to get out of it."

On or about September 19, 2005, the administration once again met with various MEA representatives, including Charging Parties' presidents, to discuss the budget situation. During the meeting, Pruitt provided the Unions with a document summarizing the $5.1 million in recurring expenses by category, along with a 42-page list identifying the specific expenditures made by the district during the 2004-2005 fiscal year. The recurring expenditures included $774,000 in capital repairs and expenditures, $669,000 for unemployment compensation, $509,000 in legal fees, $498,000 in utility costs, $167,000 for overtime and maintenance, $300,000 for employee fringe benefits, $579,000 for food service and athletic subsidies, $419,000 in technology expenditures and $383,000 due to higher than anticipated costs for substitute teachers.

Sometime after the September 19th, meeting, the administration allowed Charging Parties to conduct an on-site inspection of the school district's financial records. Among the documents examined by the Unions that day were a computer-generated ledger listing all of the district's financial transactions and expenditures, along with supporting documentation and individual invoices. Before the inspection began, Pruitt conducted a "mini-training session" with the Unions' representatives regarding how to interpret the ledger. The Unions were also allowed to examine check registers maintained by the district. The inspection lasted approximately 4-5 hours.

Charging Parties were not satisfied with the information which the district had provided and questioned the severity of the budget crisis. Eugene Jackson, president of the USMTE unit, testified that the on-site inspection was not helpful because the Unions were given a "stack of books that we'd have to go over and try to decipher where the $5.1 million was spent." Muse testified:

> We did not find that the District was in such terrible financial shape where they were not going to be able to meet their obligations that they had currently bargained and negotiated with the contracts. When we went through the books, when we went through the financial records, the audits,

> the budgets, we saw that they did have the money there; they just misspent it on other things that it shouldn't have been spent on.
>
> * * *
>
> We were given what the money was used for, but we weren't given the rationale as to why the money was spent, especially when it was spent without board approval.

On September 21, 2005, the presidents of the Unions wrote a joint letter to the superintendent addressing the school district's budget situation. Although Charging Parties conceded in the letter that the district was facing financial difficulties, the Unions attributed the problems to mismanagement of the budget by the administration as opposed to any external factors. The Unions expressed concern that Respondent was still considering privatization and reiterated their earlier recommendations on dealing with the budget situation, such as the closing of buildings and the merging of programs. The letter concluded with an offer from the Union presidents to discuss with their members the possibility of lending the district one sick day per member during the 2005-2006 school year.

On October 4, 2005, the MEA submitted to the school district four separate FOIA requests for financial information. Specifically, the Unions requested: (1) documents pertaining to 94 vendors utilized by the district; (2) items in the summary of major budget variances, previously provided to the Unions on September 19, 2005; (3) purchase orders and invoices relating to vendors 3483 and 7505; and (4) copies of contracts between Respondent and ServiceMaster, Serviceworks and Aramark. By letter dated October 11, 2005, the school district requested a ten-day extension for the production of the information as provided for in MCL 15.235(2)(d).

On October 10, 2005, the school board held another public work-study session, once again with Perkins in attendance. During his presentation, Pruitt warned the board that the school district's expenditures were exceeding its revenues by $922,000 per month and that the district would be in deficit by February of 2006 if the board did not take immediate action. Pruitt asked the board to reconsider privatization or approve layoffs. After Pruitt's presentation, Perkins addressed the board and voiced Charging Parties' opposition to privatization. She told the board that the membership of the Unions would prefer layoffs to privatization, since the collective bargaining agreements in effect at that time contained specific provisions governing layoff and recall.

On October 11, 2005, Perkins made a written request for a report on the school meals program covering the 2004-2005 school year. The school district provided that information to Perkins six days later. At around the same time, Pruitt responded in writing to Charging Parties' October 4, 2005 FOIA request. In the letter, Pruitt estimated that the cost of providing that information to the Unions would be approximately $6,186.86. Pruitt requested from the MEA a good faith deposit in the amount of $3,093.43 as purportedly authorized by FOIA, MCL 15.234(3).

On October 13, 2005, the school board held a special public meeting at which a resolution was approved authorizing the superintendent to layoff as many support employees as necessary to bring the district's projected expenditures within the projected revenues available to it. The resolution directed the superintendent to ensure that the layoffs are in conformity with the parties' collective bargaining agreements and to report to the board's finance subcommittee the names of the employees who will be laid off, the job positions that are affected and the projected expense reductions that are anticipated to occur as a result of the layoffs. The district's teachers were not affected by the layoffs due to the fact that Respondent had already eliminated forty teaching positions in June of 2005, and because the administration expected further savings to result from the elimination of substitute teacher positions.

On October 17, 2005, the school district conducted a series of meetings with the presidents of the PSAE, PFA and USMTE bargaining units formally notifying them of the impending layoffs, including the names of employees whose positions were to be eliminated. A layoff notification meeting for the PESA unit was held the following day, October 18th. Layoffs of PSAE, PFA and USMTE bargaining unit members became effective on November 1, 2005. The PESA layoffs went into effect on December 12, 2005. Of the 28 employees in the PSAE unit, eight were laid off. Four out of five positions in the PFA unit were eliminated, while the USMTE unit was reduced by 13 positions. In the PESA bargaining unit, 34 out of 82 members lost their jobs with the school district. Thereafter, the PSAE and the USMTE filed a series of grievances challenging the layoffs, each of which was ultimately denied at arbitration.

On October 24, 2005, Perkins sent a letter to Pruitt acknowledging that she had received a copy of a "three year plan for Aramark" and that this was a "sufficient response" to Charging Parties' earlier request for information pertaining to ServiceMaster, Serviceworks and Aramark. With respect to the other information sought by the Union on October 10th, Perkins requested an itemized account of the costs to the school district associated with complying with the information request, along with a copy of the district's policies and procedures regarding costs for FOIA requests.

On October 25, 2005, Pruitt met with Perkins and other MEA representatives to review the district's financial records and to discuss the outstanding information requests. At the meeting, Perkins told Pruitt that the MEA was considering altering the scope of its information requests due to the substantial costs involved. Following the meeting, Pruitt sent a letter to Perkins indicating that the Unions' October 10th FOIA request was "granted insofar as non-exempt documentation exists which is responsive to the requests." However, Pruitt reiterated his position that a good faith deposit of $6,186.86 would be required in order for the school district to provide the information. Pruitt ended the letter by indicating that the district was awaiting the Unions' decision regarding "possible changes to your FOIA requests." Thereafter, Perkins sent a letter back to Pruitt restating her request for an itemization of charges and a copy of the school district's FOIA policies and procedures.

The administration met with Perkins and representatives from the PSAE bargaining unit on two occasions in October of 2005 to discuss how the work of the

remaining engineers would be performed following implementation of the layoffs. On or about October 27, 2005, the school district presented a draft reorganization plan to the PSAE. The plan was revised and finalized based upon input from the PSAE. Assistant superintendent Tommaleta Hughes testified, "The engineer's group said that they thought they had a better idea of how we could render these services, and so we said that's fine then. . . . The way [the PSAE] set it up really was a better way, and so we went with their proposal."

The administration also met with representatives of the PESA unit following the announcement of the layoffs. During a series of meetings in November of 2005, the parties discussed issues relating to the reorganization, including the impact of the layoffs on the remaining unit employees. On or about November 16, 2005, the school district presented a draft restructuring and consolidation plan to the PESA and sought the Union's input regarding its contents. On November 28, 2005, Respondent and the PESA signed a letter of agreement regarding the posting of vacant positions during the period preceding implementation of the layoffs.

Representatives of the PFA bargaining unit never requested to meet with Respondent following the October 17, 2005 layoff notification meeting. The president of the USMTE bargaining unit, Eugene Jackson, contacted the school district following the announcement of the layoffs and sought to negotiate over the number of bargaining unit positions which were scheduled for elimination. Jackson testified that he offered to "sit and talk about the amount of – the 13 people they said that were being laid off." Jackson testified that he also raised concerns about the safety of the remaining USMTE members and that he wrote a letter to management regarding those issues. However, Charging Parties did not produce a copy of the letter during the hearing in this matter. Hughes testified credibly that Charging Parties never demanded to bargain the impact of the layoffs.

On or about November 3, 2005, Pruitt provided Perkins with a copy of the school district's FOIA policies and procedures. In a letter accompanying that document, Pruitt indicated that based upon a recent conversation between the parties, he believed that the MEA had either received, or was no longer seeking, the September 15, 2005 summary of major budget variances and information pertaining to the district's contracts with ServiceMaster, Serviceworks and Aramark. Pruitt indicated that the revised estimate for responding to the remaining information requests for purchase orders and documents relating to specific vendors was $179 per vendor or $5,828.86 total for all of the information.

On November 9, 2005, the school district acknowledged receipt of a FOIA request from the MEA for a general fund statement of revenues, expenditures and recurring expenses and the 2005-2006 budget. Pruitt responded to the information request by letter dated November 18, 2005. Pruitt estimated that the cost of responding to that request would be approximately $1,037.00 and indicated that the school district was seeking a good faith deposit of $518.50 before providing the information.

The school district continued to seek concessions from Charging Parties in an effort to restore some of the positions which had been eliminated. On November 29, 2005, Respondent sent a letter to the presidents of each of the Unions requesting proposals on concessions. The PSAE was the only bargaining unit which responded to the district's request. In letter dated December 9, 2005, the president of the PSAE referred to a list of "potential concessions and cost savings" which had been previously submitted to the administration in July of 2006.

On January 4, 2006, the school district sent a letter to the MEA's new Uniserv Director for the Pontiac School District, Willie Matthews, Jr., acknowledging receipt of a December 12th FOIA request for "overtime information." The district requested payment of $38.16 for costs associated with compliance with the request. The record is silent with respect to whether Respondent provided the information to the Unions.

Discussion and Conclusions of Law:

Although Charging Parties set forth numerous arguments at hearing and in their post-hearing brief concerning the conduct of the school district throughout the 2004-2005 school year, it is apparent that this case is, at its core, an attempt by the Unions to collaterally attack Respondent's decision to reduce the size of its work force for purposes of managing its budget. Both the Commission and the Courts have held that a public employer has an inherent right to determine the size of its work force and to reduce its work force. *AFSCME Local 1277 v City of Center Line*, 414 Mich 642 (1982); *Benzie County*, 1986 MERC Lab Op 55, 59. As the ALJ noted in *Swartz Creek Community Schools*, 1994 MERC Lab Op 223, 231, the decision to reduce the work force for economic reasons goes to the very essence or heart of an employer's ability to operate. It is well-settled that an employer's decision to reduce the size of its work force or reorganize positions within a bargaining unit is within the scope of managerial prerogative and is not a mandatory subject of bargaining. See e.g. *Ishpeming Supervisory Employees, Local 128, AFSCME v City of Ishpeming*, 155 Mich App 501, 508-516 (1986), aff'g in part 1985 MERC Lab Op 687.

While it is clear that there is no bargaining obligation with respect to the decision to layoff employees, a public employer does have a duty to bargain over the impact of that decision. See e.g. *Ishpeming Supervisory Employees*; *Ecorse Bd of Ed*, 1984 MERC Lab Op 615. However, an employer is not required to bargain to impasse the impact of the layoffs prior to the implementation of that decision. *City of Detroit*, 1994 MERC Lab Op 476, 483 (no exceptions); *Kalamazoo County Sheriff*, 1992 MERC Lab Op 63. Moreover, it is the union's obligation to request bargaining over impact or effects issues. *Kalamazoo*; *Service Employees, Local 586 v Village of Union City*, 135 Mich App 553 (1984). Although a bargaining demand need take no particular form in order to be effective, the employer must know that a request is being made. *Michigan State University*, 1993 MERC Lab Op 52, 63, citing *Clarkwood Corp*, 233 NLRB 1172 (1977). A statement that an issue is negotiable or even a protest of an employer's action does not

constitute a proper demand to bargain. *Id*. See also *NLRB v Rural Electric Co*, 296 F2d 523 (CA 10, 1961); *NLRB v Barney's Supercenter, Inc*, 296 F2d 91 (CA 3, 1961).[3]

At the start of the hearing in this matter, the Unions moved to amend the charges to include an allegation that the school district violated PERA by refusing to bargain the impact of the 2005 layoffs. I granted the amendment over Respondent's objection. However, despite three days of hearing and the submission of more than sixty exhibits, the record contains no evidence of any clear and unequivocal demand to bargain over the impact of the layoffs by Union representatives coupled with a refusal to do so on the part of the school district. When USMTE president Eugene Jackson contacted the Respondent after the layoffs were announced and requested a meeting, he did so for the purpose of convincing the school district to reduce the number of layoffs in his unit, rather than in an attempt to negotiate over impact issues. Although Jackson testified that he later discussed safety concerns with members of the administration, his testimony regarding such discussions was vague and unconvincing. Moreover, the letter which Jackson purportedly wrote to the Employer concerning these alleged safety concerns was never introduced into evidence at the hearing in this matter. In any event, the mere reference to concerns about employee safety does not constitute a proper demand to bargain over the effects of the layoffs for purposes of PERA.

Similarly, the record does not establish that Respondent violated its duty to bargain under Section 10(1)(e) of PERA with respect to the other Unions involved in this matter. It is undisputed that the PFA never demanded effects bargaining or even requested to meet with the school district regarding the reductions in staff. Respondent did hold a series of meetings with the PSAE and PESA bargaining units to discuss how the work would be performed following the announcement of the layoffs. The recommendations of the PSAE were ultimately incorporated into the school district's final reorganization plan for the engineers, while discussions with the PESA resulted in a letter of agreement concerning the posting of vacant positions. There is no evidence suggesting that either the PSAE or the PESA ever raised any other impact or effects issues over which Respondent refused to bargain, nor have the Unions identified any such issues in their post-hearing brief. To the extent that other issues may have existed, it appears that the Unions simply failed to purse them or make any proposals to the Employer. I conclude that the school district properly negotiated with the Unions concerning any impact or effects issues actually raised by the Unions and that Charging Parties waived their right to bargain over any other impact issues which may have existed at the time by their failure to make a timely and proper demand.

The Unions next contends that Respondent breached its duty to negotiate in good faith by announcing and implementing the layoffs not long after new collective bargaining agreements were ratified by the PFA, PESA and USMTE bargaining units. Charging Parties assert that the school district entered into these agreements without any

[3] In construing PERA, the Commission and the Courts look for guidance to the construction placed on analogous provisions of the National Labor Relations Act (NLRA), 29 USC 151 *et seq*, by the NLRB and the federal courts. *Rockwell v Crestwood School Dist Bd of Ed*, 393 Mich 616, 636 (1975); *Demings v City of Ecorse*, 423 Mich 49, 56-57 (1985).

intention of fulfilling them, and that Respondent acted unlawfully in failing to disclose its true intention during bargaining, which was to erode the bargaining units. The Unions cite the fact Pruitt proposed the removal of no-layoff provisions from the PFA and USMTE contracts as evidence to support its contention that the school district negotiated in bad faith.

Although the Commission has not considered this issue, the National Labor Relations Board (NLRB) and the federal courts have held that it is unlawful for an employer to conceal from the bargaining representative of its employees its intentions with respect to future operations. *Valley Mould and Iron Co*, 226 NLRB 1211 (1976). Specifically, the Board has held that an employer may not lawfully hide its intention to take drastic, unforeseeable action, in circumstances where such concealment occurred in circumstances preventing a union from taking steps through negotiation and economic action to protect represented employees. *Id.* See also *Royal Plating and Polishing Co, Inc*, 160 NLRB 990, 994 (1966); *Standard Handkerchief Co, Inc*, 151 NLRB 15 (1965). However, the Board has refused to find a violation of the Act absent evidence that the employer made a final and fixed determination to take action adverse to employee interests and failed to disclose that decision so as to deter the Union from bargaining over the effect of that action on employees. *Valley Mould and Iron Co, supra* at 1213. See also *General Truck Drivers, Chauffeurs, Warehousemen and Helpers of America, Local 957*, 264 NLRB 807 (1982) (an employer has no obligation under the Act to disclose all contemplated, studied or deliberated actions that might be decided upon and implemented after a new contract has been executed).

In the instant case, the contracts negotiated by the parties in early 2005 contain provisions attempting to define the authority of management to implement layoffs and the rights of employees in the event that staff reductions should occur. For the Unions to now argue that they were surprised when management exercised its rights under those provisions is disingenuous at best. A party who presumes that language to which it voluntarily agrees at the bargaining table will not be invoked during the term of the agreement does so at its own peril. There is nothing in the record to suggest that Respondent made any false representations to Charging Parties during negotiations concerning either its financial situation or the possibility of layoffs, nor is there any evidence that the school district had made any final decision to implement layoffs at the time it entered into agreements with PESA, PFA and USMTE. To the contrary, Pruitt testified credibly that although layoffs were in the back of his mind during negotiations, the administration was focused on other solutions for solving the district's budget problems at that time, and that it was not until after the school board rejected the privatization plan that Respondent began to seriously contemplate staff reductions. Under such circumstances, I find that the school district did not bargain in bad faith by failing to disclose, during negotiations, the possibility that staff reductions might occur following execution of its contracts with Charging Parties.

I also find no merit to Charging Parties' assertion that the school district violated its bargaining duty by proposing a two-tier wage structure under which all new employees would be hired into non-bargaining unit positions. Although Respondent sent a written proposal to that effect to the president of the USMTE on August 3, 2005, Pruitt

testified credibly and without contradiction that the letter was drafted and transmitted while he was out of town and that the document misstated the Employer's actual bargaining position. According to Pruitt, the district never intended to propose that newly hired employees be excluded from the bargaining unit, but rather that all new hires begin working for the district at the lowest level of the salary schedule. The record indicates that Pruitt met with Charging Parties' presidents upon his return and that he clarified the Employer's position regarding the two-tier wage proposal. I conclude that no PERA violation can be established on these facts.

Next, the Unions contend that the superintendent's letters to employees and stakeholders constituted unlawful direct bargaining. Once a union is designated or selected for the purposes of collective bargaining by a majority of public employees in a unit appropriate for such purposes, that union is the exclusive representative of these employees for purposes of collective bargaining in respect to rates of pay, wages, hours or other conditions of employment. *Huron Sch Dist*, 1990 MERC Lab Op 628, 634. An employer violates the duty to bargain and unlawfully bypasses the union when it confers a benefit upon employees or otherwise changes conditions of employment without going through the employees' exclusive bargaining representative. *Pontiac Sch Bd of Ed*, 1994 MERC Lab Op 366, 374; *Birmingham Bd of Ed*, 1985 MERC Lab Op 755. For example, in *St Clair Cmty College*, 1979 MERC Lab Op 541 (no exceptions), the ALJ held that the employer violated its duty to bargain by sending faculty members a letter containing contract proposals which it had not yet submitted to their union.

Not all communications between an employer and employees are unlawful. An employer may communicate factual information regarding the status of negotiations or its position at the bargaining table, provided that it does so in a non-coercive manner and without disparaging the bargaining agent. *MEA v North Dearborn Heights Sch Dist*, 169 Mich App 39, 45-46 (1988); *Jackson County*, 18 MPER 22 (2005). A union fails to meet its burden of proof of direct dealing where the employer communicates with employees for the purpose of providing information relating to planned or actual changes in operations or procedures, the employees are offered nothing and are not requested to make an agreement. *City of Grand Rapids*, 1994 MERC Lab Op 1159; *North Ottawa Community Hosp*, 1982 MERC Lab Op 555. For example, the Commission has refused to find a direct dealing violation where the employer distributed information to employees describing its plan to reorganize city services and soliciting questions from them concerning the planned changes. *City of Madison Heights*, 1980 MERC Lab Op 146.

In the instant case, the superintendent wrote to employees on June 22, 2005 and to the school district's stakeholders on June 28th. Prior to these communications, Respondent had already made public the fact that it was facing a budget crisis and that it was considering the privatization of noninstructional support services. The MEA then launched a vigorous and ultimately successful campaign opposing the privatization plan. In this context, there can be no dispute that the entire school community, including the Unions and their members, were well aware of the district's financial woes by the time the superintendent wrote to employees and stakeholders. In these letters, the superintendent merely reviewed the district's financial problems and reiterated its

commitment to balancing the budget. There is no indication that Respondent sought to circumvent Charging Parties or to give employees a greater say than the Unions with respect to how the financial situation should be addressed. To the contrary, the superintendent specifically indicated in both letters that the administration would be discussing the district's financial situation with Charging Parties' presidents. In her June 22nd letter, she noted that employees should expect to hear from their bargaining representatives regarding these issues. At no point did the superintendent make any proposal or offer any benefit to employees, nor did she request that they enter into any agreement with the district with respect to their terms and conditions of employment. Accordingly, I find nothing in the record to support Charging Parties' claim of direct dealing.

I also find that Respondent did not violate its duty to provide information to Charging Party in this case. In order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must timely supply requested information to permit the union to engage in collective bargaining and to police the administration of the contract. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Pub Sch*, 1995 MERC Lab Op 384, 387. 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, SMART*, 1993 MERC Lab Op 355, 357. See also *Pfizer, Inc*, 268 NLRB 916 (1984), enf'd 763 F2d 887 (CA 7 1985). Information relating to terms and conditions of employment, such as wages, job descriptions, and other information pertaining to bargaining unit employees is presumptively relevant and the employer must provide it unless it rebuts the presumption. *Plymouth Canton C S*, 1998 MERC Lab Op 545; *City of Detroit, Dep't of Transp*, 1998 MERC Lab Op 205.

Where a union makes a request for information which is not presumptively relevant, the employer has no duty to provide such information unless and until the union demonstrates the relevance of the information, or the facts surrounding the request are such as to make the relevance of the information plain. *Island Creek Coal Co*, 292 NLRB 480, 490 (1989), enf'd 899 F2d 1222 (CA 6, 1990); *Ohio Power Co*, 216 NLRB 987 (1975), enf's 531 F2d 1381 (CA 6, 1976). Information about employees outside the bargaining unit is not presumptively relevant. *City of Pontiac*, 1981 MERC Lab Op 57. Financial information is not presumptively relevant. *Sunrise Health & Rehabilitation Ctr*, 332 NLRB No. 133 (2000); *STB Investors, Ltd*, 326 NLRB 1465, 1467 (1998). Information pertaining to matters of managerial prerogative, including the decision to layoff unit members, is not presumptively relevant, nor is information pertaining to the subcontracting of bargaining unit work. *Challenge-Cook Bros of Ohio*, 282 NLRB 21 (1986), enf'd 843 F2d 230 (CA 6, 1988); *AATOP LLC, d/b/a Excel Rehabilitation and Health Ctr*, 336 NLRB No. 10, fn 1 (2001), enf'd 331 F3d 100 (CA DC, 2003).

An employer has no duty under PERA to respond to an inappropriate request for information or to provide information that does not exist. S*tate Judicial Council*, 1991 MERC Lab Op 510, 512. See also *Kathleen's Bakeshop LLC*, 337 NLRB 1081 (2002). When a union requests information that the employer does not keep in the form requested, the employer must, at a minimum, grant the union access to its files or bargain

in good faith over the allocation of the cost of compiling the specific information requested. *Michigan State Univ*, 1986 MERC Lab Op 407; *Green Oak Twp*, 1990 MERC Lab Op 123, 125-126. If an employer claims that compiling the data will be unduly burdensome, it must assert that claim within a reasonable period of time after the request is made, and not for the first time at the unfair labor practice hearing. *Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v NLRB*, 711 F2d 348, 353, (CA DC 1983).

Even assuming that the financial information sought by Charging Parties in this matter was presumptively relevant, the record does not establish that Respondent violated its duty to bargain in good faith. The school district's finances were discussed in detail at the many school board meetings held in the spring and summer of 2005, and extensive documentation relevant to those discussions was either provided to the Union representatives at those meetings or made available later. On August 19, 2005, the school district, in response to several FOIA requests, provided the Unions with a packet of financial information which included RFP's, contracts and a summary of charges for legal services. The following month, the district provided the Unions with additional financial documentation, including a detailed list of expenditures for the 2004-2005 fiscal year. When Charging Parties sought more information concerning those expenditures, Respondent allowed them to conduct an on-site review of its records and cooperated with the inspection by training union representatives in the interpretation of the data. With respect to the Unions' later requests for information concerning specific purchase orders and vendors, the school district responded by providing Charging Parties with cost estimates associated with the production of the documentation. It is undisputed that the Unions did not pay the good faith deposit sought by the district or make any demand to bargain over these costs. The district had no duty to compile and copy the information free of charge, nor did Respondent have any obligation to justify its charges in advance or offer to bargain about them. *Green Oak Twp, supra*. Accordingly, I find that Respondent substantially complied with its bargaining obligations under Section 10(1)(e) of PERA.

I have carefully considered all other arguments asserted by the parties in this matter and have determined that they do not warrant a change in the result.[4] For the forgoing reasons, I recommend that the Commission issue the order set forth below:

[4] In its post-hearing brief, Charging Party asserts that following implementation of the layoffs, the school district rehired some of its members to work as "substitutes." According to the Unions, these individuals now perform bargaining unit work, but they do not receive union wages and benefits and are not considered part of Charging Parties' units. The Unions did not set forth this allegation in its charges, nor did they seek to amend the charges to include such an allegation before, during or immediately after the hearing in this matter. Accordingly, I consider this allegation to be outside the scope of this proceeding. In any event, Respondent's witnesses testified credibly that substitutes, including laid-off employees, have been used only to fill-in for employees who are absent due to illness or vacation.

RECOMMENDED ORDER

The unfair labor practice charges are dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated: _____