STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

WAYNE COUNTY,
Public Employer-Respondent,

Case No. C09 C-001

-and-

WAYNE COUNTY SHERIFFS LOCAL 502,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Wayne County Labor Relations Division, by James Oleksinski, Esq., for Respondent

Sachs Waldman, by John R. Runyan, Esq., for Charging Party

DECISION AND ORDER

On May 29, 2009, 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

_____
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

In the Matter of:

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WAYNE COUNTY SHERIFFS LOCAL 502,
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APPEARANCES:

James Oleksinski, Esq., Wayne County Labor Relations Division, for Respondent

Sachs Waldman, by John R. Runyan, Esq., for Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On March 2, 2009, the Wayne County Sheriffs Local 502 filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC or the Commission) against Wayne County. The charge alleged that Respondent violated Sections 10(1)(a) and (e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210, by refusing to provide Charging Party with information requested by it on January 15 and January 27, 2009. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the State Office of Administrative Hearings and Rules.

On March 4, 2009, pursuant to my authority under Rules 165(1), 2(f) and (3) of the Commission's General Rules. AACS 2002 423.165, I issued an order to Respondent to show cause why an order should not be issued finding it guilty of violating its duty to bargain in good faith by refusing to provide the requested information. Respondent filed a response to my order and a motion for summary dismissal of the charge on April 9, 2009. On April 20, 2009, Charging Party filed a response to the motion. Based on undisputed facts as set forth in the charge and pleadings, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The charge reads as follows:

> Since on or about February 13, 2009, the above-named employer has and continues to refuse to bargain in good faith by refusing to produce disciplinary and drug test documents of bargaining unit employees, requested by the Charging Party to show disparity of treatment in the discharge of a bargaining unit employee in connection with the arbitration of that employee's discharge grievance.

Facts:

Charging Party represents a bargaining unit of nonsupervisory sheriff's deputies employed jointly by Respondent Wayne County and the Wayne County Sheriff. Members of Charging Party's unit are subject to random drug testing. On July 14, 2008, Respondent was notified that a unit member's random drug screen had returned a positive result for two illegal substances. In accord with the disciplinary procedures set out in Charging Party's contract, Respondent provided the employee with a statement of charges and scheduled a hearing for August 11, 2008. In advance of the hearing, Respondent provided Charging Party with copies of, or gave it the opportunity to review, all documents that Respondent intended to use at the hearing and in any arbitration that might follow. It also gave Charging Party a list of potential witnesses. A Charging Party representative spoke on the employee's behalf at the August 11 hearing. At the end of the hearing, Respondent gave the representative a notice terminating the employee's employment effective that day.

On August 13, 2008, Charging Party filed a grievance on the employee's behalf. The parties met on August 15, 2008, but were unable to resolve the grievance. On September 3, 2008, Respondent issued a written grievance answer concluding that discharge was the appropriate penalty "based on the totality of facts and circumstances of this matter, including the severity of the grievant's misconduct vis-à-vis his former classification (i.e. police corporal)." Charging Party then filed a demand to arbitrate.

> On January 15, 2009, Charging Party sent Respondent the following letter:
>
> Pursuant to the County's bargaining obligation under the Public Employment Relations Act, please promptly provide to the undersigned attorney for Local 502 the following records and information, which are necessary so that the Union may adequately prepare for the upcoming arbitration hearing in this matter:
>
> A copy of all drug testing records and disciplinary records/history for the following members/former members of the Local 502 bargaining unit:
>
> [Four names]
>
> If there is anything which the County will not or cannot promptly provide, please immediately inform me and state the reasons therefore. I am enclosing a copy of *City of Detroit*¸ 1988 MERC Lab Op 1001, which is one of the many cases requiring an employer to furnish information to a union in order to enable it to properly prepare for an arbitration if the information is relevant – under a broad

discovery standard – to the grievance scheduled for arbitration. These cases also demonstrate that the information must be furnished promptly.

On January 27, 2009, Charging Party sent a second letter requesting the same type of information for a fifth current or former unit member.

Section 12 of the County Employees' Civil Service Act, MCL 38. 412, requires a county civil service commission to keep "service records" of employees, including a record of their military or naval experience and "such other matters as may have a bearing on promotion, transfer or discharge." The statute states that "service records" and employees' records "shall be confidential and not open for public inspection."

Respondent has several written policies governing the disclosure of employment information. It has a policy that states that the County will respond to requests for verification of employment by supplying only the title of the employee's position, dates of employment and compensation received, and that other information from an employee's personnel record will not be disclosed without either a court order or a release of information form signed by the employee. It also has a policy prohibiting its employees from disclosing any "personal or private information related to any active or former employee." Finally, it has a written policy governing the release of information to and communication between County employees and persons represented by lawyers, or the lawyers themselves, concerning civil matters involving the County or County related activities of present or former employees.

On February 13, 2009, Respondent sent Charging Party the following response to its January requests:

> The Wayne County Labor Relations Division is in receipt of your requests, dated January 15, 2009 and January 27, 2009, for the drug testing records and disciplinary records/history of five (5) current or former employees of the County of Wayne who are current or former members of SEIU Local 502.
>
> After carefully reviewing the above-cited communications, the County is compelled to take issue with your requests because to the extent that the information sought is available, it would only be through employee civil service/personnel files. Pursuant to state statute, (i.e. MCL 38.412) information contained in employee civil service files must be kept confidential unless there is either consent to disclosure by the affected employee(s) or a court of appropriate jurisdiction orders disclosure. Please be advised that the County takes its statutory obligation to protect the confidentiality of employee civil service files as serious [sic] as it does its bargaining obligations under the Public Employment Relations Act. That said, the County will promptly honor your requests for the employee records upon receipt of consent disclosure forms executed by each of the affected employees.

Discussion and Conclusions of Law:

In order to satisfy its bargaining obligation under Section 10(1) (e) of PERA, a public 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 County*, *supra*. See also *EI DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538; (CA 6, 1984). 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, including investigating and preparing for an arbitration case. *Wayne County*, *supra; SMART*, 1993 MERC Lab Op 355, 357; *City of Detroit*, 1988 MERC Lab Op 1001 (no exceptions). The National Labor Relations Board (NLRB) has held that information about discipline imposed on a union's unit members over a period of time is presumptively relevant; the union must demonstrate relevance in order to obtain this type of information about nonunit members, although the liberal discovery standard applies. *Grand Rapids Press*, 331 NLRB 296, and cases cited therein at 299 (2000); *Crittenton Hospital*, 343 NLRB 717, 721 at fn 3 (2004).

The employer may rebut a presumption of relevance by demonstrating a legitimate confidentiality interest which would be damaged by disclosure of the information to the union. *Michigan State Univ*, 1986 MERC Lab Op 407. In *Kent Co*, 1991 MERC Lab Op 374 and *City of Battle Creek*, 1998 MERC Lab Op 684, the Commission held that witness statements and internal memos collected by employers during investigations of employee misconduct fall within the confidential information exception. Compare, *Plymouth-Canton Community Schs*, 1998 MERC Lab Op 545, in which the Commission held that a union investigating a grievance over the discipline of one of its members was entitled to copies of letters sent to the employer by other employees complaining about him, as the employer failed to demonstrate that there was any real risk that the complaining employees might be subject to retaliation.

Even when the employer demonstrates a substantial confidentiality interest, it cannot simply ignore the union's request. Rather, it must formulate a reasonable accommodation of its concerns and the union's need for the information. *Borgess Medical Center*, 342 NLR 1105 (2004); *Tritac Corp*, 286 NLRB 522, 522 (1987).

Here, Charging Party asked for drug testing and discipline records for five members (or ex-members) of its bargaining unit in order to demonstrate that a grievant was disparately disciplined for his offense. Respondent does not dispute the relevance of this information. Rather, it argues that it is prohibited by statute and by its own policies from disclosing the requested information, and that it complied with its legal obligation under PERA by providing Charging Party with all the documents that it intends to rely upon at the arbitration. It also argues that it reasonably accommodated Charging Party's need for the information by suggesting that it obtain signed releases from the five employees and ex-employees whose records were

involved.

It is well established that PERA is the dominant law regulating public employee labor relations in Michigan. *Rockwell v Crestwood School Dist*, 393 Mich 616, 629, (1975). See also, *Local 1383, International Ass'n of Fire Fighters, AFL-CIO v City of Warren*, 411 Mich 642, (1981); *Central Michigan University Faculty Ass'n v Central Michigan University*, 404 Mich 268, 273 (1978). When there is a conflict between PERA and another statute, PERA prevails, diminishing the conflicting statute *pro tanto. Detroit Bd of Ed*, 417 Mich 268, 280 (1983). See also *Civil Service Commission for Wayne County v Wayne County Bd of Supervisors*, 384 Mich 363, 373, (1971), discussing the interaction between PERA and the County Civil Service Act. It is also clear that public employers cannot avoid their obligations under PERA by enacting policies, including charter provisions and local ordinances, which purportedly release them from their duty to bargain. *City of Warren*, at 655.

I find that PERA and MCL 38. 412 do not conflict because the latter requires only that employee records be kept "confidential and not open to public inspection." The fact that these records are "confidential" does not mean that no one except the employees themselves may have access to them. Clearly, Respondent's representatives may examine them when necessary, although they are not to be made available to the public. Charging Party, as the employees' current or former exclusive bargaining representative, is not the "public." I conclude that Respondent is not prohibited by MCL 38.412 from providing Charging Party with the records it requested.

Respondent also argues that it satisfied its obligation to provide information under PERA by giving Charging Party access to all the documents in its possession that Respondent intends to use at the arbitration. Respondent asserts that *Salt River Valley Water Users Association v NLRB*, 769 F2d 639 (CA 9, 1985), a case cited by the Commission in passing in *Kent Co, supra*, supports its position that it does not have to give Charging Party access to other information from employee files. In *Salt River Valley*, two unit employees received different degrees of discipline for their participation in the same incident. The union filed a grievance on behalf of the employee who received the more severe discipline, and sought information from the second employee's file in an attempt to demonstrate that the first employee's discipline was unfair. The NLRB, and the Court of Appeals, held that the union was entitled to all the information that it had actually requested, which was "all records pertaining to disciplinary actions and performance reviews *or* records on which the employer intended to rely on in the grievance or arbitration procedure concerning termination of the grieving employee." [Emphasis added]. As discussed above, in *Kent Co* the Commission held that an employer was entitled to withhold witness statements and investigative reports collected during an investigation of employee misconduct because the employer had a substantial legitimate interest in keeping this information confidential. Neither *Kent Co* nor *Salt River* stands for the proposition that when a union seeks information from other employees' personnel files to demonstrate that a grievant's discipline was unusually harsh, the employer need only provide information that the employer itself intends to use at the grievant's arbitration.

Neither the Commission nor the NLRB have held that an employer has a legitimate interest in keeping employee disciplinary records confidential from the union representing these employees. In *Crittenton, supra*, the NLRB held that the employer was required to provide a

union investigating the discharge of a unit employee with information that included the names of all unit employees disciplined for absenteeism during the past three years, the dates and description of each discipline, and the amount of absences leading to discipline. Although the employer argued that its policy required a signed release from each employee before releasing this information, the NLRB adopted the finding of its administrative law judge, at 743-744, that the employer had not shown a legitimate and substantial confidentiality interest in not disclosing information about bargaining unit employees to their exclusive bargaining representative.

The records Charging Party requested presumably include positive drug test results and other information of a sensitive nature. However, I find that Respondent did not have a legitimate interest in keeping these records from the employees' collective bargaining representative. I conclude, therefore, that Respondent violated its duty to bargain in good faith by refusing to provide Charging Party with the information it requested on January 15 and January 27, 2009 in a timely manner.

I note that Respondent also argued that it proposed a reasonable accommodation by giving Charging Party the opportunity to view the records upon obtaining signed releases from the employees. However, assuming arguendo that Respondent had a legitimate claim of confidentiality for the records, I find that Respondent did not fulfill its duty to formulate a reasonable accommodation.[1] Respondent's proposal requires Charging Party to seek out and obtain signed releases from five individuals. As Charging Party points out in its response, some of the individuals for whom Charging Party has requested records are no longer employed by Respondent and their whereabouts are unknown. The "accommodation" Respondent proposed, therefore, is clearly unworkable. Moreover, even if they do not object to Charging Party viewing their records, the individuals involved, particularly those who are no longer employed, have no particular incentive to cooperate, for example, by returning a release form mailed to them. In its response to Respondent's motion, Charging Party indicates its willingness to enter into a confidentiality agreement or stipulated protective order under which the requested records, marked "confidential," would be kept in the care of Charging Party's counsel, disclosed only to employees or counsel and/or a party, potential witnesses and consultants, and used only for purposes of the preparation, mediation, facilitation and hearing of the arbitration case. An agreement or order of this type would help ensure that the individuals' disciplinary records, including the results of their drug tests, would be protected while allowing Charging Party to compare their treatment with that of the grievant.

In accord with the findings of fact and conclusions of law set forth above, I find that Respondent violated Sections 10(1)(a) and (e) of PERA, and I recommend that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Wayne County, its officers and agents, are hereby ordered to:

[1] The Commission has repeatedly held that an employer cannot require signed releases from individual employees before releasing nonconfidential information from their personnel records to their union. *SMART,* 1985 MERC Lab Op 316 (no exceptions) (leave of absence requests); *City of Pontiac,* 1981 MERC Lab Op 57, 63-65 (no exceptions) (merit pay information); *Centerline Pub Schs,* 1976 MERC Lab Op 729 (individual teacher contracts).

1. Cease and desist from refusing to provide Wayne County Sheriffs Local 502 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. Furnish Wayne County Sheriffs Local 502 with drug testing records and disciplinary records/history for members/former members of the Local 502 bargaining unit as requested by it on January 15 and January 27, 2009:

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

Dated: _____