STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISON

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent

Case No: C08 L-250

-and-

ASSOCIATION OF MUNICIPAL ENGINEERS,
Labor Organization-Charging Party
_____/

APPEARANCES:

Dwight Thomas, Labor Specialist, for Respondent

Vinod Sharma, AME President, for Charging Party

DECISION AND ORDER

On October 5, 2010, Administrative Law Judge (ALJ) David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent, City of Detroit, (Employer or City), did not violate Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.201- 423.217. The ALJ held that Charging Party, the Association of Municipal Engineers (AME) failed to adequately demonstrate that the Employer breached its duty to bargain in good faith by not providing certain information alleged to be necessary for contract administration and collective bargaining. Specifically, the ALJ concluded that the information requested by Charging Party had either already been provided by Respondent or was not germane to the legitimate interests of the Union. The ALJ also reasoned that AME's conduct was intended to "harass" the Employer and to "willful[ly] disregard" the City's established procedures for making information requests under PERA. The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. After requesting and receiving a time extension, Charging Party filed exceptions to the ALJ's conclusions on November 30, 2010. Respondent also received a time extension and filed its response to the exceptions on December 21, 2010.

In its exceptions, Charging Party alleges that the ALJ erred in concluding that it failed to establish that Respondent had breached its duty to bargain in good faith. Charging Party questions the ALJ's impartiality and refutes any contention that it

engaged in abusive conduct by filing the information requests to the City. Charging Party also contends that Respondent routinely sought to prevent it from obtaining pertinent information, in part, by assessing exorbitant fees for providing the requested materials.

In its response to the exceptions, the Employer supports the ALJ's conclusions as being unbiased and fair. It asserts that all of AME's information requests were handled in accordance with established protocols, and that any fees charged for document production were reasonable and permitted by the law. Finally, the Employer asserts that Charging Party failed to explain how the requested information concerning non-bargaining unit employees was relevant to AME's issues.

After careful review of the entire record, including hearing transcripts, AME's exceptions and the Employer's response, we find that the exceptions lack merit.

Factual Summary

Unless otherwise noted, we adopt the factual findings and legal conclusions set forth in the ALJ's Decision and Recommended Order and will not repeat them here, unless necessary.

Respondent and Charging Party were parties to a collective bargaining agreement covering a group of licensed engineers employed by the city of Detroit and exclusively represented by AME. During 2007-08, the parties were engaged in contract and grievance negotiations on various matters. In 2008, AME made several information requests to Respondent's law department under both PERA and the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*. Charging Party, however, failed to submit any of the combined requests to the City's labor relations department.[1] Respondent repeatedly cautioned AME, as in times prior, that unless PERA-based information requests were submitted to labor relations department they might not be answered since the law department does not process PERA information requests. AME nonetheless disregarded these warnings and continued to submit the combined FOIA/ PERA requests to the law department only.

In responding to the information requests, Respondent either (a) willingly provided the relevant information once AME paid a reasonable fee for production of the materials; (b) denied the request as being presumptively irrelevant because it involved details on non-bargaining unit members; or (c) failed to provide presumptively relevant information because AME refused to negotiate on its share of the expense to compile the not-readily available materials. AME objected and filed this charge and an amended charge alleging a breach of Respondent's duty to bargain in good faith for not providing the requested information. Respondent refuted the claim asserting that the denied requests were proper due to AME's inability to demonstrate the relevancy of the non-

[1] Per the ALJ's findings, the labor relations department eventually learned of the PERA information requests after receiving AME's initial charge.

bargaining unit information, or AME's unwillingness to share in the cost of compiling certain materials.

Discussion and Conclusions

This matter is before the Commission on an alleged unfair labor practice charge brought by AME against the City of Detroit for not providing certain requested information. Conversely, Respondent asserts that it legitimately denied the requests because either the information was irrelevant to AME or Charging Party refused to share in the production costs of the materials.

It is well settled that a public employer under Section 10 (1)(e) of PERA must bargain in good faith and timely supply relevant information pertaining to its members when requested by a union. This duty imposes on the employer an obligation to disclose the requested information as long as there is reasonable probability that the information would be of use to the union in carrying out its statutory duties. *Mundy Twp*, 22 MPER 31 (2009). Information relating to wages, job descriptions and other similar materials pertaining to a union's bargaining unit members is presumptively relevant, absent a showing by an employer that rebuts the presumption. *Detroit Ass'n of Ed Office Employees*, 22 MPER 19 (2009). Where the sought after information is deemed relevant, employers must minimally permit the union access to its files or bargain in good faith over the allocation of the costs to compile the requested information. *Michigan State Univ,* 1986, MERC Lab Op 407, 411.

Conversely, a party's request for information that is not presumptively relevant need not be provided unless the requestor reasonably demonstrates the relevance of the materials to its bargaining purpose. *City of Grand Rapids*, 22 MPER 70, 255 (2009). A party is not required to honor a request for irrelevant information nor provide materials that do not exist. *State Judicial Council,* 1991 MERC Lab Op 510, 512. Also, if compiling the relevant materials would be unduly burdensome, a party must assert that claim within a reasonable time period from the initial request. See *Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v NLRB,* 711 F2d 348, 353, (CA DC 1983).

Under the facts here, we agree with the ALJ's conclusion that Charging Party failed to establish that the City breached its duty to furnish relevant information necessary for the Union to engage in collective bargaining. Charging Party requested and received a portion of materials from Respondent that was readily available and after AME paid the necessary fees for production. Respondent also supplied, in good faith, additional information to AME that it deemed was beyond the scope of its bargaining obligation under PERA. We conclude that the City substantially met its obligations under PERA in its handling of AME's information requests.

We also agree that the factual record before the ALJ supports that Charging Party's own counterproductive actions led to much of the complained of delay and denials by the City. For instance, AME's continued disregard of the established protocol

when submitting information requests severely hampered the City's prompt processing and likely approval of the PERA-based information requests. Charging Party then refused to reply or negotiate on the amount that it should contribute toward the expense of compiling certain materials that were not readily available or maintained by the City. Finally, AME made no effort to provide Respondent with an explanation as to the relevance of the non-bargaining unit information that it sought to obtain. In light of such conduct, overall, we find it difficult to surmise any meaningful purpose or intent of AME's actions, other than to possibly frustrate the bargaining process between it and Respondent. We concur with the ALJ that AME acted unreasonably and contrary to any beneficial purpose sanctioned by the Act when it continued to submit PERA information requests to the law department while consistently ignoring the City's repeated instructions for obtaining approval of such requests.

Charging Party also asserts that the ALJ's lack of impartiality led to his "erred" conclusions. However, nothing contained in AME's pleadings substantiate these conclusory statements of misconduct by the ALJ. In fact, after reviewing the record, we do not find anything that suggests that the ALJ acted inappropriately toward either party. Accordingly, we dismiss Charging Party's allegation of partiality by the ALJ. Finally, we have considered the remaining arguments raised in AME's exceptions and find that they would not change the outcome here.

For the abovementioned reasons, this Commission dismisses Charging Party's exceptions and adopts the decision and recommended order of the Administrative Law Judge.

ORDER

The unfair labor practice charge against Respondent is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

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Christine A. Derdarian, Commission Member

Dated: _____

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

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer,

Case No. C08 L-250

-and-

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

APPEARANCES:

Vinod Sharma, President, for Charging Party

Dwight Thomas, Labor Specialist, for Respondent

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On December 12, 2008, Charging Party Association of Municipal Engineers (AME) filed an unfair labor practice charge against the City of Detroit. The charge, as amended on March 26, 2009, alleges that the City violated its duty to bargain in good faith by failing or refusing to provide information requested by the Union for the purpose of "grievances and contract negotiations."

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 assigned to David M. Peltz, Administrative Law Judge (ALJ) for the State Office of Administrative Hearings & Rules, acting on behalf of the Michigan Employment Relations Commission. Based upon the entire record, including the transcript of hearing, exhibits and post-hearing briefs filed by the parties on June 23, 2009, I make the following findings of fact, conclusions of law and recommended order.

The Unfair Labor Practice Charge and Procedural History:

The original charge filed by AME in this matter concerns a June 3, 2008 request for information pertaining to layoffs which occurred in the City of Detroit's Department of Water and Sewerage (DWSD) in May of 2006. On January 12, 2009, Respondent moved to dismiss the charge, in part, on the ground that the City properly responded to the information request(s) when it notified Charging Party on July 1, 2008 that the

documents requested by the Union do not exist. In an order issued on January 14, 2009, I directed the Union to show cause why the charge should not be dismissed.

Charging Party filed replies to the order to show cause on January 22, 2009 and January 27, 2009. On March 29, 2009, the City filed a second motion for summary disposition, once again asserting that the requested information had already been supplied to the Union. I issued an order denying the motion to dismiss on March 5, 2009. An evidentiary hearing was scheduled in this matter for April 13, 2009.

On March 26, 2009, the Union filed an amended charge setting forth five additional instances in which the City allegedly violated its duty to provide information requested by Charging Party. The amended charge referenced information requests allegedly submitted by the AME on October 30, 2008, December 9, 2008, December 11, 2008, February 26, 2009, and March 5, 2009.

Prior to the hearing, Respondent moved to dismiss the amended charge on the ground that its labor relations division had only recently learned of the additional information requests because they had been sent to the wrong City department by the Union. After taking oral argument on the matter, I denied the City's motion to dismiss. However, I held that the Union would not be permitted to present evidence concerning the new allegations until after Respondent had an opportunity to review the amended charge and prepare a defense. Accordingly, an additional day of hearing was scheduled for May 6, 2009.

The parties each filed post-hearing briefs in this matter on June 23, 2009. On June 8, 2010, Charging Party filed a motion to reopen the record for the purpose of introducing additional exhibits. The City filed a response in opposition to the motion on June 29, 2010.

Findings of Fact:

Background

Charging Party represents a bargaining unit comprised of employees working in the DWSD as senior associate engineers. On July 19, 2006, AME President Vinod Sharma transmitted a request for information to the supervising counsel for the freedom of information (FOIA) division of the City's law department. Several months later, on or about January 31, 2007, Dwight Thomas, a specialist in the human resources department, labor relations division, forwarded the following response to Sharma:

> On numerous occasions in the past, you have sent FOIA/PERA Request(s) to the City of Detroit Law Department. **THE CITY OF DETROIT LAW DEPARTMENT DOES NOT RESPOND TO PERA REQUESTS.** On each occasion in the past, the FOIA Section has sent you an invoice for the cost associated with your FOIA request. Upon receipt of the invoice, you have responded that you should not have to pay

> for the records pursuant to PERA. The FOIA Section will continue to treat your FOIA/PERA request as a **FOIA Request ONLY, not as a PERA REQUEST**.
>
> In the future, if you are requesting documents pursuant to **PERA, DO NOT SEND YOUR REQUEST TO THE LAW DEPARTMENT. All** PERA Requests for information pertaining to bargaining or administration of the contract should be forwarded directly to the labor relations Director. [Emphasis in original.]

Information Request No. 1: Rescission of 2006 Layoffs

On March 19, 2008, Sharma made a written request under both the Michigan Freedom of Information Act (FOIA), MCL 15.231 *et seq*. and PERA for "all the paperwork and reasoning associated with the May 2006 layoffs/demotions that were rescinded in DWSD." Sharma indicated in the letter that the Union needed the information for "contract negotiations and grievance hearing." The letter was addressed to "Supervising Counsel, FOI Section, City of Detroit."

Thomas responded to the information request approximately two weeks later. In a letter dated April 7, 2008, Thomas asserted that the City was not in possession of any documents listing the reasons an employee may have had his or her layoff/demotion rescinded. Citing the Commission's decision in *Green Oak Township*, 1990 MERC Lab Op 123, Thomas indicated that the City would compile such information for the Union provided that the parties bargain in good faith over the allocation of the cost of doing so. Thomas closed the letter by listing his telephone number and inviting Sharma to contact him if he had any questions.

The Union did not respond to the City's request to bargain over the cost of compiling the requested documentation. In fact, there was no further correspondence between Sharma and the City's labor relations division regarding Charging Party's March 19, 2008 information request.

On April 13, 2008, Assistant Corporation Counsel Monique L. Smith wrote to Sharma concerning the information request. The letter identified Smith as an attorney in the City's FOIA division and was captioned "RE: Freedom of Information Request Dated March 19, 2008." In the letter, Smith asserted that the Union's request for information had been denied pursuant to MCL 15.233(1) for the reason that it did not "sufficiently describe the requested record so as to enable the City to locate the documents that were being sought." The letter also contained instructions for instituting an appeal under FOIA.

Following additional communications between Sharma and Smith concerning the information request, the Union made a payment to the City in the amount of $3.95 for the cost of copying twenty-two pages of documents which were provided to Sharma on or about May 22, 2008. The documents consisted of letters from May of 2006 notifying

individual DWSD employees that their layoffs had been rescinded. Sharma responded by letter dated June 3, 2008 in which he complained to Smith that the information provided to the Union was nonresponsive because it did not include an explanation of why each employee was returned to work. On July 1, 2008, Smith notified Sharma that the Union's "supplemental" information request had been denied under FOIA.

Information Request No. 2: Staffing Levels

Sharma asserts that, in a letter dated October 30, 2008, he requested that the City provide Charging Party with information concerning the number of budgeted, filled and vacant engineering positions within the DWSD.[2] The request was purportedly made pursuant to both FOIA and PERA. On October 31, 2008, the City provided the Union with a "Monthly Transaction Report" dated October 31, 2008. The eight-page document allegedly identifies each position within the DWSD and indicates the names of each employee holding particular positions and/or the number of vacant positions within a given classification. Sharma received an additional reply dated January 27, 2009, which was not made part of the record in this matter or described in detail by any witness.

Information Request No. 3: Personnel Records

On December 9, 2008, Sharma wrote to the "Supervising Counsel, FOI Section" requesting, under both FOIA and PERA, employment records associated with the initial hiring and promotions of 14 past and present DWSD employees, none of whom were members of Charging Party's bargaining unit. As examples of the type of information requested, Sharma listed educational qualifications, starting date and title, promotion dates, salaries, job applications and documentation concerning interviews and evaluations. According to the letter, the purpose of the request was "the negotiation of contract and grievances."

Following the transmission of the December 9, 2008 information request, Sharma engaged in back and forth correspondence with Celesta Campbell, an attorney in the City's FOIA division. Campbell notified Sharma that in order to receive the information, the Union would have to pay $68.92 for the time and cost of responding to the request.

The City's labor relations division did not learn of the Union's request for personnel records until on or about March 26, 2009, when it was included as an attachment to the Union's amended charge in this matter. Thomas responded to the request by letter dated April 9, 2009. In the letter, Thomas referred back to his earlier directive that the Union transmit all PERA requests to the labor relations division and indicated that the request for personnel records had been denied on the ground that there

[2] Sharma testified that he sent the October 30, 2008 request to both the FOIA and labor relations divisions of the City of Detroit. However, the Union failed to produce a copy of the actual request at hearing. For that reason, and because the evidence in this matter overwhelmingly demonstrates the Union's manifest refusal to initiate information requests with the labor relations division, I do not credit Sharma's testimony with respect to the October 30, 2008 request.

had been no demonstration of relevancy by the Union. Thomas' reply reads, in pertinent part:

> In correspondence forwarded to you by this writer, dated January 31, 2007, (Exhibit A) you were informed that PERA Request [sic] should be sent to the labor relations Director, not to the FOIA Section of the Law Department. However you continue to send FOIA/PERA Request [sic] directly to the Supervising Counsel of the FOI Section without forwarding a copy of the request to labor relations. When you do not receive a response of your liking from the FOIA Section of the Law Department, you then file an Unfair Labor Practice Charge alleging the City has failed to respond to your PERA Request.
>
> Your December 9, 2008 PERA Request seeks information regarding non-bargaining unit employees . . . . When seeking information regarding employees outside the bargaining unit, there is no presumption of relevance and the union must affirmatively show the relevance of the requested information to bargaining issues in order to establish the right of such information.

The letter concluded with an accurate summary of Commission precedent with respect to a public employer's duty to provide information concerning non-unit employees. That same date, Thomas sent a second letter to Sharma in which he asserted that the December 9, 2008, information request was duplicative of a prior inquiry to which the City had already replied.

Sharma did not respond to Thomas with a specific explanation of the Union's theory of relevancy. Rather, by letter to Thomas dated April 24, 2009, he wrote that the City's protestations concerning relevancy were "of no value" and asserted generally that the Union needed the information for "bargaining, grievance handling, fact finding and contract negotiation, etc." Sharma characterized the City's attempt to charge the Union for providing the information as "totally unacceptable." Sharma wrote that Charging Party would pay a copying charge only if the City first provided the Union with an opportunity to inspect the documents to determine whether they were relevant and, therefore, worth purchasing.

Thomas replied to Sharma by letter dated April 27, 2009. Once again, Thomas took issue with the Union's repeated attempts to link FOIA and PERA requests. Thomas explained that the request for the Union to pay a copying fee was made by the law department as permitted under FOIA, whereas the objection to the relevancy of the request was asserted by the labor relations division in accordance with Commission case law. Thomas further explained that if any information was disclosable under PERA, the Union would be obligated to bargain over the cost of compiling and copying the records, with payment in full required before the City would make the records available for review.

Sharma responded to Thomas two days later. Once again, Sharma failed to set forth any specific argument as to the relevancy of the request for information or respond in any meaningful fashion to the issues raised by Thomas. Rather, Sharma merely asserted, without further explanation, that PERA "does not automatically exclude documents which may be related to my union." Sharma also repeated his contention that the Union would not pay any fee for information without having first been afforded the opportunity to review the documents.

At hearing, Sharma testified the Union needed the employment records to prove that the City was hiring unqualified individuals for non-bargaining unit administrative or managerial positions. He conceded, however, that there is no language in the expired AME contract governing the issue of promotions to managerial positions outside the unit.[3]

Information Request No. 4: Fiscal Savings

On December 11, 2008, Sharma sent a letter to the City's FOIA division seeking documents establishing the amount of money Respondent saved during the 2005-2006, 2006-2007 and 2007-2008 fiscal years as a result of the layoffs of DWSD employees, and from the imposition of a 10-percent reduction in working hours within the Department during that same three-year period. Additionally, the Union requested information concerning "how much extra money was spent on promotions, out of class [assignments] and overtime in the DWSD during this period." The letter indicated that the request was being made pursuant to both FOIA and PERA.

Thomas did not learn of the December 11, 2008 request until he received a copy of Sharma's letter as an attachment to the Union's amended charge, which is dated March 26, 2009. Thomas responded to the request on April 9, 2009. Thomas' letter states, in pertinent part:

> Based on the specificity of your request, there is no document that shows an analysis of cost saving from the fiscal years 2005-2006 through 2007-2008. As you are aware, the 10% reduction was only for the fiscal year 2006-2007. Your requests seeks information for a three (3) year period. As for the layoffs, I am awaiting a response from the department to see if such a document exists. I will forward a response to you upon receipt of a response for [sic] the department.

Sharma responded to Thomas on April 29, 2009, disputing the City's assertion that the ten percent reduction in work hours was in effect for only one year. Sharma

[3] It is worth noting that by the time of Thomas' April 9, 2009 letter, a MERC ALJ had already issued a Decision and Order recommending the dismissal of a charge pursued by AME related, in part, to this same dispute over the hiring and qualifications of non-unit managerial employees, with that charge dismissed by the Commission in an order issued on April 29, 2009. See *City of Detroit*, 23 MPER 30 (2009).

asserted that the reduction went into effect at different times, depending on when a particular labor organization agreed to accept the change.

At the May 6, 2009 hearing in this matter, Sharma asserted that the requested information was necessary to enable the Union to prove that the City did not actually save any money as a result of the layoffs and reduction in working hours. Sharma testified that he never received any financial data or other correspondence from Thomas regarding the reduction in work hours. However, Charging Party failed to establish that the City was actually in possession of any information concerning that issue which it could have provided, and there is no reliable evidence in the record suggesting that City employees in other bargaining units were in fact subject to a reduction in work hours during the three-year period referred by Sharma in his December 11, 2008 request.

Information Request No. 5: Wages and Overtime Records

The Union's fifth information request was dated February 26, 2009. That request, which Sharma sent to the City's FOIA section, sought information, under both FOIA and PERA, pertaining to the wages and overtime earnings for all DWSD employees during the 2005-2006, 2006-2007 and 2007-2008 fiscal years. Sharma asserted that the information was necessary for "contract and grievance negotiations." Thomas did not learn of the request until the Union filed its amended charge in this matter.

Thomas responded to Sharma by letter dated March 25, 2009. The response states, in pertinent part:

> Your request for payroll registers from fiscal year 2005-2006, 2006-2007 and 2007-2008 is a very voluminous and time consuming request that has to be compiled and redacted. Based on the man hours it will take to compile the requested information the parties will have to negotiate a fee for the retrieval, compiling, redacting and copying of your requested documents. Pursuant to MERC case law, when a municipality has to compile documents they are entitled to negotiate a reasonable fee.
>
> * * *
>
> If you have any questions, please feel free to contact me at [the] telephone number listed below.

Sharma did not pay a fee to the City, nor did he call Thomas to schedule negotiations over the cost of compiling and providing the requested information. Rather, in a letter to Thomas dated April 27, 2009, Sharma denied that the request was voluminous and cited prior instances in which the City responded to arguably similar requests. Sharma asked that Thomas identify the specific documents in the City's possession and that he specify "what you want to negotiate." He closed the letter by demanding that Thomas either provide the requested information or make the documents available so that the Union could compile the information itself.

Information Request No. 6 – Employment Records for Manager Positions

On March 5, 2009, Sharma sent a letter to the City's FOIA division requesting personnel records for employees working in the following DWSD positions: Manager I, Manager II and General Manager. Sharma indicated that he was seeking information such as educational qualifications, starting date and title, promotion dates, salaries, job applications and documentation concerning interviews and evaluations. The information was requested under both FOIA and PERA.

Thomas learned of the request at the time he received the Union's amended charge. On March 25, 2009, Thomas wrote to Sharma and explained that because the request pertained to non-bargaining unit employees, AME had the burden of affirmatively establishing the relevance of the information to bargaining issues. Thomas cited pertinent Commission case law in support of his position that an affirmative showing of relevancy by the Union was required.

Sharma did not respond to Thomas' letter. Nevertheless, on April 9, 2009, Thomas forwarded to Sharma a list of employees holding the positions described in the Union's information request. After receiving the list, Sharma contacted Thomas and complained that certain information had been redacted from the document. Less than a week later, on or about April 25, 2009, Thomas once again responded to the original request by sending Sharma a document setting forth the pay range for the various DWSD manager positions. Around that same time, Thomas sent Sharma a letter indicating that the aforementioned documents had been sent to the Union as a show of "good faith" despite the City's position that the requested information was not subject to disclosure under PERA because it related to non-unit employees.

Discussion and Conclusions of Law:

Motion to Reopen the Record

On June 10, 2010, the Union filed a motion to reopen the record to introduce a letter allegedly sent to Sharma by Monique Smith of the City's FOIA division on May 28, 2009, as well as a reply thereto from the AME dated June 15, 2009. Smith's letter concerns the Union's March 5, 2009 FOIA request for the personnel records of individuals employed in the DWSD as Manager I, Manager II and General Manager. In her letter, Smith wrote that the City was prepared to provide 236 pages of documents to the Union upon the receipt of payment in the amount of $435.12 as reimbursement to Respondent for the cost of complying with the request. The letter cites Section 10 of FOIA as authority for the collection of the fee by the City.

Rule 166 of the General Rules of the Michigan Employment Relations Commission, 2002 AACS, R 423.166 provides:

A motion for reopening the record will be granted only upon a showing of all of the following:

(a) The additional evidence could not with reasonable diligence have been discovered and produced at the original hearing.

(b) The additional evidence itself, and not merely its materiality, is newly discovered.

(c) The additional evidence, if adduced and credited, would require a different result.

The Smith letter constitutes a response from the City to the Union's request for information under FOIA. As explained more fully below, only those communications between the Union and the labor relations division, the Employer's designated recipient of requests for information under PERA, are relevant to the question of whether the City fulfilled its statutory obligation to bargain in good faith under the Act. In fact, the record already contains several responses by the City's labor relations division to the Union's March 5, 2009 request. Accordingly, the evidence Charging Party seeks to admit would not affect the results in this case. Moreover, the Smith letter is dated May 28, 2009, while Sharma's response is dated June 15, 2009. The Union obviously had the Smith letter in its possession before it filed its post-hearing brief in this matter on June 23, 2009, yet it waited almost a year before bringing the document to the attention of the undersigned. I find that the Union has not established any basis upon which to reopen the record in this matter.

Information Requests

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 Community Sch*, 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'd, 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. *State 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).

A refusal or unreasonable delay in supplying relevant information is an unfair labor practice. *Oakland University*, 1994 MERC Lab Op 540; *Wayne County ISD*, 1993 MERC Lab Op 317. The Commission has not articulated the precise time for employers to respond to information requests. However, it has found violations of the Act in cases where the delay has ranged from 2-3 months to 9 months. See *Detroit Public Schools*, 1990 MERC Lab Op 624; *City of Detroit Police Dept*, 1994 MERC Lab Op 416. See also *Detroit Public Schools*, 2002 MERC Lab Op 201 (no exceptions).

In making the information requests which are the subject matter of the present dispute, Charging Party relied upon both PERA and FOIA. However, the Union transmitted each of the requests to the City's FOIA section only, thereby ignoring the Respondent's directive, as communicated by Thomas in December of 2007, that all PERA inquires be transmitted directly to the City's labor relations division. Where, as here, the public employer is a large, institutional entity with many departments and agencies, it is entirely reasonable for the employer to designate a specific division, section or individual as the recipient of PERA-based information requests and to expect that labor organizations will comply with that procedure. Here, Sharma contends that he sent the requests to the FOIA division exclusively because, based upon his prior experience as a Union officer, the FOIA division was typically more responsive than the labor relations division. Even if true, the Union may not engage in self-help by sending information requests to a recipient of its own choosing and then complain to the Commission when the requests are not handled to the Union's satisfaction. Moreover, it

entirely appropriate for the City's FOIA division to have responded to the Union's FOIA requests by providing only those documents which the Employer was obligated to provide under that statute.

With respect to the conduct of the labor relations division, the record overwhelmingly establishes that the City substantially complied with its bargaining obligations under Section 10(1)(e) of PERA. Thomas responded to each of the Union's information requests, usually within days of learning of their existence. Thomas provided various documents to Sharma, some of which he turned over despite his stated belief that the City had no duty under PERA to disclose such information. Where documents were not provided, Thomas explicitly set forth the reason for the denial with appropriate citation to Commission case law. With respect to several of the requests, Thomas correctly explained that since the requested information related to individuals outside of the AME bargaining unit, the Union must affirmatively show the relevance of the information to bargaining or contract administration issues in order to be entitled to receive it. Rather than respond with a specific argument as to relevancy, Sharma offered vague and conclusory explanations as to why Charging Party was seeking the information. In fact, it was not until the hearing in this matter that the Union made any real attempt to disclose the various theories underlying its requests, and even then, Charging Party failed to establish a reasonable probability that the information would be of use to it in carrying out its statutory duties.

For example, Charging Party contends that it has the right to examine the personnel records of various non-bargaining unit supervisory and managerial employees in order to substantiate its suspicion that the City is hiring unqualified individuals to perform such work. It is well established that the qualifications of job applicants are not mandatory subjects of bargaining, see e.g. *Detroit Police Officers Association v Detroit*, 391 Mich 44 (1974); *Huron School District*, 1991 MERC Lab Op 309 (no exceptions), and the Union failed to establish any connection between the background qualifications of individuals in positions above members of Charging Party's unit in the supervisory hierarchy and any possible topic of bargaining or contract administration. Rather, this information request appears related to the longstanding effort by Sharma to interfere with the City's decision-making process regarding the hiring of managerial level employees over which it owes no bargaining duty to the AME. [4]

Similarly, I can see no merit to Charging Party's claim that it needed information concerning the 2006 layoffs and reduction in work hours in order to prove that those actions did not result in any savings to the City. First, the layoffs and reduction in work hours took place several years before the request for information was made. Furthermore, as noted above, 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. *City of Detroit*, 23 MPER 30 (2009); *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.

[4] This is seemingly the same dispute over the hiring and qualifications of non-unit managerial positions previously raised by the AME in *City of Detroit*, 23 MPER 30 (2009).

See also *Detroit Public Schools*, 17 MPER 14 (2004) (no exceptions) (employer did not violate PERA by refusing to provide the Union with requested information pertaining to layoffs of bargaining unit members, citing *Challenge-Cook Bros, supra*.) With respect to the ten-percent reduction in work hours, it remains unclear how information regarding cost savings would be relevant or useful to the Union, given that the AME and other labor organizations voluntarily agreed to subject their members to the change.

The record indicates that there was only one information request which did not result in either the disclosure of documents by Thomas or an explanation from the labor relations division to the Union as to why the information would not be provided. In response to Charging Party's December 11, 2008 information request for documents pertaining to the 2006 layoffs, Thomas indicated to Sharma that he was waiting for a response from another department and that he would forward any information he received to the AME. At the May 6, 2009 hearing, Sharma testified that he never heard back from Thomas. However, Thomas only learned of the existence of the request on or about March 26, 2009, less than two weeks prior to the hearing. Under such circumstances, I no PERA violation has been established.

In conclusion, I find that Charging Party has failed to prove that the City breached its duty to furnish, in a timely manner, relevant information necessary for the Union to engage in collective bargaining and contract administration. To the contrary, Charging Party's conduct in this matter, including its willful disregard for the procedures established by the City pertaining to the transmission of information requests under PERA, leads me to conclude that the actual intent of the AME, or perhaps Sharma himself, in making the requests was to harass the Employer in pursuit of claims previously addressed by the Commission and which appear to have no relation to the legitimate interests of the Union. Were it not for *Goolsby v Detroit*, 211 Mich App 214, 224 (1995), a decision which the Commission has urged the Court of Appeals to reconsider, I would follow MERC's earlier decision in *Wayne-Westland Community Sch Dist*, 1987 MERC Lab Op 381, aff'd sub nom *Hunter v Wayne-Westland Community Sch Dist*, 174 Mich App 330 (1989) and award attorney fees and costs to Respondent as compensatory damages, as I find that Sharma and the AME have engaged in an intentional pattern of abuse of MERC's processes.

For the above reasons, I hereby recommend that the Commission issue the following order.

RECOMMENDED ORDER

The unfair labor practice charge in Case No. C08 L-250 is hereby dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge

Dated: _____