STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Public Employer-Respondent,

-and-

Case No. C04 H-215A
Docket No. 13-008515-MERC
(compliance)

PONTIAC EDUCATION ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Secrest, Wardle, by Dennis R. Pollard and Mark S. Roberts, and Clark Hill, PLC, by Ann L. Vanderlaan, for Respondent

Law Offices of Lee & Correll, by Michael K. Lee and Erika P. Thorn, for Charging Party

DECISION AND ORDER

On July 1, 2014, Administrative Law Judge David M. Peltz issued his Decision and Recommended Order in the above matter finding that Respondent has failed to comply with the Commission's Order issued on September 20, 2010. The ALJ recommended that the Commission grant Charging Party's request for an order requiring that Respondent take specific action in compliance.

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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: August 15, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

PONTIAC SCHOOL DISTRICT,
Respondent-Public Employer,

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PONTIAC EDUCATION ASSOCIATION,
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APPEARANCES:

Secrest, Wardle, by Dennis R. Pollard and Mark S. Roberts, and Clark Hill, PLC, by Ann L. Vanderlaan, for Respondent

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DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

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 Michigan Administrative Hearing System, acting on behalf of the Michigan Employment Relations Commission. The proceedings were based upon a request for compliance hearing filed on August 6, 2013, by the Pontiac Education Association. The request alleges that the Pontiac School District has failed to comply with a decision issued by the Commission on September 20, 2010. Based upon my conclusion that there are no material issues of fact in dispute, I hereby issue the following recommended order on summary disposition.

Background:

On March 10, 2009, ALJ Doyle O'Connor issued a Decision and Recommended Order in Case No. C04 H-215 finding Respondent Pontiac School District to have violated Section 10(1)(e) of PERA by refusing to bargain over the subcontracting of work previously performed by the job classifications of occupational therapist and physical therapist, both of which were part of the bargaining unit represented by Charging Party Pontiac Education Association. ALJ O'Connor concluded that the work performed by the occupational and physical therapists did not constitute noninstructional support services

within the meaning of Section 15(3)(f) of the Act and, therefore, the school district's decision to layoff the therapists effective August 31, 2004, and subcontract their work was not a prohibited subject of bargaining. As a remedy, the ALJ recommended that Respondent be ordered to take certain actions to effectuate the purposes of the Act, including the following:

> 2(a). Terminate, effective no later than the beginning of the 2009-2010 school year, any outside contractual arrangement to provide occupational or physical therapy services in the Pontiac Schools.
>
> 2(b). Offer reinstatement, effective no later than the beginning of the 2009-2010 school year, to Roseanne Bartush, Annmarie Kamman, Cindy Field, Donna Carrion, Karen Cosgrove, Kathy Hasty, Elaine Wade, and Janet Henderson as Pontiac School District-employed occupational and physical therapists.
>
> 2(c) Make whole Roseanne Bartush, Annmarie Kamman, Cindy Field, Donna Carrion, Karen Cosgrove, Kathy Hasty, Elaine Wade, and Janet Henderson for all lost wages, benefits, seniority credits and the like, with a setoff for wages and benefits earned by each employee with Pontiac Schools as a result of the temporary recall to employment in the fall of 2004, and with liability for lost wages and benefits to end as of January 18, 2005, with statutory interest at the rate of 6% per annum on all sums owned in wages and benefits.
>
> 2(d). Post and seek to fill as bargaining unit positions any occupational and physical therapist positions to the extent that the work continues to be performed.
>
> 2(e). Maintain the occupational and physical therapist positions as bargaining unit positions to the extent that the work continues to be performed.
>
> 2(f). Once the pre-existing status quo has been restored by returning the work to the bargaining unit employees, offer to bargain with the union prior to any future consideration of the subcontracting of any work, other than regarding "noninstructional support services.

Respondent filed exceptions to the ALJ's decision and, on September 20, 2010, the Commission adopted the Decision and Recommended Order of the ALJ as its final order in the case. The school district then appealed that decision to the Michigan Court of Appeals, which affirmed the Commission on January 5, 2012. Respondent's application for leave to appeal with the Michigan Supreme Court was denied in an order issued on September 26, 2012. After Respondent had exhausted its appeals, it offered recall to the employees who had been laid off in the fall of 2004. The former therapist positions were returned to the bargaining unit effective December 16, 2012.

On or about May 1, 2013, counsel for Charging Party sent a letter to Timothy Gardner, the school district's General Counsel and Director of Human Resources, demanding that Respondent make back payments to the former therapists consistent with the Commission's order. The letter included a break down of the amounts owed to each of the former therapists, as well as a demand that the district reimburse the Union in the amount of $57,751.43 for the loss of dues which would have been paid had the therapist work not been removed from the bargaining unit. In a letter dated May 2, 2013, Gardner responded by indicating that the school district stood "ready to pay back pay to the laid off employees" provided that the affected employees produced "records of their lost wages, including records of income from other employment" during the period in question." Gardner rejected the request for union dues on the basis that the Commission decision did not provide for such a remedy.

After additional correspondence between the parties failed to result in payment of back pay to the former therapists, Charging Party filed its request for compliance with the Commission on August 6, 2013 and, at the same time, served a copy of the request on the school district.[1] Pursuant to Rule 177, R 423.177, of the General Rules and Regulations of the Employment Relations Commission, Respondent had ten days in which to file an answer to the request for compliance. No answer was received within that time period, nor did the school district seek any extension of time in which to file its responsive pleading.

In an order issued on August 23, 2013, I directed Respondent to file an answer specifically addressing the issues raised by the Union in its request for compliance. Pursuant to that order, the school district's answer was due in a Commission office by no later than the close of business on September 3, 2013. Once again, the school district failed to file any pleading or request an extension by the specified due date. Rather, by letter dated September 5, 2013, Respondent's counsel asserted that, due to a change in address, the August 23, 2013 order was not received until September 4, 2013. The school district finally filed an answer to the request for compliance on September 9, 2013. The answer asserted that the school district could not pay back pay as required by the Commission's September 20, 2010, order because the Union had failed to provide income records for the employees to whom such pay was owed.

On September 18, 2013, I issued a supplemental order directing the parties to appear for a pretrial conference on November 19, 2013. Pursuant to that order, both the Union and the school district were required to take the following steps prior to the scheduled conference:

> By no later than thirty (30) days prior to the pretrial conference, Charging Party shall provide to Respondent's counsel written documentation which specifically and in detail shows, for each employee for whom back pay is owed, the back pay periods broken down by

[1] Pursuant to Rule 174, R423.174, the case was transferred to the undersigned due to the retirement of ALJ O'Connor in October of 2013.

> calendar quarters, the specific figures and basis of computation of gross back pay, and the interim earnings and expenses for each quarter, the net back pay due, and any other pertinent information. With respect to interim earnings, Charging Party shall include pay stubs or other records or, if none are available, sworn affidavits from each employee.
>
> If Respondent disputes the accuracy of the figures supplied by Charging Party or the premises upon which they are based, Respondent shall, by no later than fourteen (14) days prior to the pretrial conference, notify Charging Party in writing of the basis for such disagreement and shall provide to Charging Party's counsel its own calculations with respect to the disputed amount(s). **Respondent is directed to immediately make the required payment to any employee about whom there is no dispute over the amount of back pay owed.** [Emphasis in original.]

There is no dispute that Charging Party provided to the school district certain written documentation concerning back pay and interim earnings pertaining to each of the former therapists, including a break down of back pay and union dues allegedly owed by calendar quarters and the basis for computation of gross back pay. Claims for medical and other expenses allegedly owed by the school district to affected employees were supported by receipts and copies of checks. With respect to interim earnings, the Union provided to Respondent copies of pay stubs and, for certain employees, W2 forms and sworn affidavits. In addition to seeking back pay for each of the former therapists and union dues, Charging Party demanded that the school district reimburse Karen Cosgrove in the amount of $4,582.58 to cover the interest on a loan which Cosgrove took out to purchase retirement service credits following her layoff. The Union asserted that Cosgrove needed to purchase the service credits in order to ensure that she would receive full health benefits when she eventually retired.

Pursuant to the supplemental order issued on September 18, 2013, the school district was supposed to respond to the written documentation provided by the Union by no later than November 5, 2013. By letter dated November 4, 2013, the school district sought a thirty-day extension of time in which to file its response. The district asserted that the extension was necessary because the pertinent information was almost ten years old and because many of the documents were "in storage and not readily accessible." In addition, Respondent claimed that the situation was "compounded by the lack of administrative staff presently employed who are knowledgeable about the subject events and substantial reductions in staff necessary to locate and review the documentation due to the District's substantial, current financial deficit." Charging Party opposed any extension and, in an order issued on November 7, 2013, I denied the school district's request on the following basis:

> It is clear that Respondent has been aware of the existence of this dispute for some time. The Commission issued its Decision and Order requiring the school district to pay back pay to Charging Party's members on September 20, 2010. The Court of Appeals affirmed the Commission's

> decision in an order issued on January 5, 2012, and the Supreme Court denied leave to appeal that decision on September 26, 2012. The documents provided by Charging Party in connection with this matter indicate that the Union first requested payroll records from the school district on November 20, 2012, and that Charging Party submitted to the school district a formal demand for payment on March 28, 2013. In addition, Respondent has had almost three months from the date the compliance request was filed and two months from the date of my September 18, 2013, order in which to locate and procure the documents relevant to this dispute.

The school district filed its response to the documentation submitted by Charging Party on November 12, 2013. In its response, the school district asserted that it was still in the process of reviewing the payroll records supplied by the Union, as well as its own files pertaining to the former therapists, and that a response "quantifying the amount of the back pay liability for the affected employees" would be forthcoming. Respondent once again rejected the Union's request for dues on the basis that the Commission's original decision in this matter did not provide for such a remedy. Respondent also disputed the Union's claim that the school district was obligated to reimburse former employee Cosgrove for the purchase of retirement service credits.

A prehearing conference was held on November 19, 2013, during which the Union indicated that it was no longer seeking relief on behalf of former therapist Janet Henderson. At the conference, the school district repeated its objection to Charging Party's demand for back dues, but did not dispute the Union's back pay calculations with respect to Donna Carrion and Cynthia Field. In addition, Respondent accepted the amount of back pay sought by the Union for Roseanne Bartush, Annmarie Kamman and Elaine Wade. However, the school district argued that its obligation to make those former employees whole ended at the time each of the former therapists began working elsewhere in a permanent or full-time capacity. With respect to Kathy Hasty, Respondent objected to the demand for back pay on the basis that there was an alleged break in employment between when Hasty was laid off from the Pontiac School District and the time she began working for a subcontracting agency. At the close of the conference, I summarized the positions of the parties on the record and directed the school district to file a brief supporting its claim that the attainment of permanent or full-time work cuts of an employer's liability for back pay.

Following the prehearing conference, Respondent issued checks to Carrion and Field based upon the Union's back pay calculations as set forth before the undersigned. It is undisputed that the school district did not make any payments into the Michigan Public School Employees' Retirement System (MPSERS) on behalf of either former employee.

On December 23, 2013, Charging Party filed supplemental documentation, including affidavits from each of the affected employees, a revised back pay calculation for Cosgrove and additional documentation concerning the issue of interim earnings. Five days later, on December 27, 2013, the school district filed a reply to the Union's claims

for back pay and other relief, along with a request for oral argument. In its reply, the school district withdrew its objection to paying back pay for the period after the former therapists had secured outside employment, but resurrected its claim that there was insufficient documentation to establish the specific back pay amounts owed to Cosgrove, Wade, Kamman and Bartush:

> Respondent concedes, after researching the NLRB precedents, that if the employees secured permanent employment following their lay off but prior to the January 18, 2005 offer of recall by Respondent but earned less in wages with their new employers they would be entitled to the negative difference in earnings. The concern remains with the lack of documentation supplied to support the differential in earnings.
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> * * *
>
> Given that Respondent is unable to verify the wages of the remaining employees, absent consents from them to secure verifications from their successor employers which they have chosen not to accede to, Respondent cannot confirm the present amounts of their claims to back wages, either through their affidavits or consents to verify the amount of their claims.

On January 6, 2014, Charging Party filed a supplemental response to the school district's reply brief. In its response, the Union referenced documentation previously submitted in support of its back pay calculations, including proof of interim earnings via W2 forms, paycheck stubs, invoices and sworn affidavits. In addition, the Union asserted that the payments made by Respondent to Carrion and Field did not comply with the Commission's Decision and Order in this matter because the school district failed to make payments into the MPSERS retirement system on behalf of the two former therapists.

The school district filed a response to the Union's supplemental brief on January 31, 2014. While conceding that the former affected employees had in fact submitted sworn affidavits as proof of their interim earnings, Respondent argued that additional information was still needed. Specifically, Respondent continued to insist that the former therapists provide written consent allowing the school district access to employment records maintained by the various employers for whom each of them worked after they were laid off by the Pontiac School District. With respect to the payments made to Carrion and Field, Respondent promised that it would consult with MSPERS to determine whether retirement contributions are permissible.

On February 26, 2014, the school district submitted a supplemental response brief on the issue of retirement contributions. In the brief, Respondent asserted that it had followed up with MPSERS and had been informed that the school district could not make retirement contributions on behalf of any of the former therapists:

> First [the school district] was informed that a public school employer cannot make a MPSERS contribution on its portion of the retirement contribution (i.e. absent the employees' commensurate obligation to pay the required Member Investment Plan (MIP) Contribution to MPSERS) unless the employees were presently employed at the time the contribution is paid. Thus, given the fact that the employees in question have not been employed by Respondent Employer for over 8 years, it is not possible for Respondent to make a MPSERS contribution at this late point in time.

No documentation was provided to support the legal conclusions set forth within the school district's supplemental response brief, nor did Respondent identify the individual or individuals from MPERS with whom its representatives purportedly consulted.

On May 22, 2014, the Union submitted a copy of a letter from the Office of Retirement Services (ORS) to the school district regarding Respondent's obligations to make retirement contributions on behalf of the former therapists. The letter, which was written by Mary Staley, an Employer Reporting Analyst with ORS, concludes that payment for back wages pursuant to the Commission's Decision and Order constitutes compensation for purposes of retirement contributions:

> The Michigan Public School Employees Retirement Act, 1980 PA 300, defines compensation reportable toward retirement as ". . . *the remuneration earned by a member for service performed as a public school employee*." The Michigan Public School Employees Retirement System may recognize remuneration earned by a member when no service has been performed in certain instances only.
>
> ORS can recognize remuneration paid to a member as the result of a third-party decision involving a wrongful action award granted for the purposes of making the member whole for lost wages and/or benefits. Case No. C04 H-215 is a third-party agreement granting compensation for the purpose of making [Roseanne Bartush, Annmarie Kamman, Cindy Field, Donna Carrion, Karen Cosgrove, Kathy Hasty and Elaine Wade] whole for lost wages and/or benefits.
>
> Please provide our office with a bi-weekly breakdown of the wages and hours [each of the affected employees] would have received during the period in question.
>
> Once the breakdown is received, ORS will review the amounts to verify the employees' wages for that period are consistent with their previously reported wages, and to determine if the wages and hours are included in their accounts.
>
> ORS will notify the school when the data is approved and request any adjustments be submitted with your bi-weekly records through the

> Employer Reporting Website, if needed. The appropriate employer and member contributions due on the mitigated amounts would be payable at that time, thus making the member's account whole for retirement. [Emphasis in original.]

Following receipt of the ORS letter, I convened a telephone conference call with the school district's attorney, Dennis Pollard, and Erika Thorn, counsel for the Union. During the conference, which was held on May 23, 2014, Pollard confirmed that his client had been made aware of the ORS letter and that Respondent did not dispute the legal conclusions set forth therein. Pollard indicated that the school district would supply the requested information to ORS and make the retirement contributions for Carrion and Field as soon as possible.

Although both the Union and the Employer initially requested oral argument on the compliance issues, the parties agreed to waive oral argument by letter to the undersigned dated February 21, 2014. On June 10, 2014, just prior to the issuance of this decision, Charging Party moved to withdraw its claim that the school district reimburse the Union for the loss of dues and its assertion that Respondent must recompense Cosgrove for interest on the loan which she took out to purchase MPSERS service credits. By email dated June 11, 2014, Respondent indicated that it had no objection to the Union's motion. Accordingly, Charging Party's motion to withdraw these claims was granted.

Also just prior to the issuance of this decision, Respondent sent a letter to the undersigned indicating that the school district had finally located some of the documentation from its archives to which the school district had originally alluded in its November 4, 2013 extension request. Respondent asserted that it was still searching for additional information, but that it hoped to submit a response soon with the "objective" of verifying the number of days the affected employees were recalled during the period July 1, 2004 to January 18, 2005. By email dated June 11, 2014, I notified the parties that I would not accept any additional documentation or briefing in this matter. In so holding, I noted that the issuance of a decision was imminent and that Respondent had never previously indicated that there was any dispute regarding the number of days worked by the former therapists following their recall.

Discussion and Conclusions of Law:

When a violation of PERA is found, the Commission has the authority under Section 16(b) to order a party to take such affirmative action, including reinstatement of employees with backpay, as will effectuate the policies of the Act. Its power is remedial, to restore the situation to that which would have been had the violation not occurred and to make employees whole for earnings and other compensation lost as a result of the violation. *Univ of Michigan*, 2001 Mich Lab Op 295, 297, citing *Nick's Fine Foods*, 1968 MERC Lab Op 307 and *Sheriff of Washtenaw County*, 1968 MERC Lab Op 364. As part of the remedial order in its original decision in this matter, the Commission directed

Pontiac School District to make the former therapists whole for their losses, except as to the setoffs stipulated by the parties.

Although Respondent issued checks to Donna Carrion and Cindy Field after the Union filed its request for compliance, there is no dispute that the school district has not made any payments to Roseanne Bartush, Annmarie Kamman, Karen Cosgrove, Kathy Hasty or Elaine Wade for back wages as required by the Commission in its September 20, 2010 remedial order. Respondent asserts that it has not complied with that part of the order because the Union has failed to provide sufficient documentation establishing the amount of interim wages and benefits earned by the former therapists during the period in question. Specifically, the school district now contends that the affected employees must provide written consent allowing Respondent access to employment records maintained by the various employers for whom each of them worked after they were laid off by the Pontiac School District.

The Commission rules governing compliance proceedings are set forth in Rule 177, R 423.177. That rule provides, in pertinent part:

> (1) If, at any time after entry of a commission order or entry of a final court judgment enforcing a commission order, a controversy exists between the parties concerning compliance with the order which cannot be resolved without a formal proceeding, the prevailing party may request that the commission conduct a hearing on such issues.
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> * * *
>
> (4) Each respondent alleged in the request to have compliance obligations shall, within 10 days of service on it of the request, file an original and 4 copies of an answer thereto with the commission, together with proof of service of copies of such documents on all other parties. The answer shall specifically admit, deny, or explain each and every allegation set forth in the request, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross back pay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the request or the premises upon which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (5) If the respondent fails to file any answer to the request within the time prescribed by this rule, then the commission may, either with or without taking evidence in support of the allegations set forth in the request for compliance and, without further notice to the respondent, enter an appropriate order. If the respondent files an answer to the specification but

> fails to deny any allegation set forth in the request in the manner required by subrule (4) of this rule, and the failure to deny is not adequately explained, then such allegation shall be deemed to be admitted to be true, and may be found by the commission without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

In the instant case, the request for compliance was filed by the Union on August 6, 2013. Pursuant to Rule 177(4), the school district's answer was due in a Commission office by the close of business on August 16, 2013. However, no answer was filed by the school district by that date, nor did Respondent contact my office to request an extension of the filing deadline. In an order issued on August 23, 2013, I directed Respondent to file an answer specifically addressing the issues raised by the Union in its request for compliance. Pursuant to that order, the school district's answer was due in a Commission office by no later than the close of business on September 3, 2013. Once again, Respondent did not comply with the filing deadline or request an extension of time in which to file its response. Rather, by letter dated September 5, 2013, Respondent's counsel asserted that, due to a change in address, the August 23, 2013 order was not received by the school district until September 4, 2013. The letter did not, however, deny that Respondent was timely served with a copy of the initial compliance request, nor did the school district adequately explain why it failed to comply with the time requirements set forth in Rule 177(4).

The school district finally filed its answer on September 9, 2013, more than one month after the Union first filed the request for compliance. Although the answer addressed the allegations set forth in the request for compliance, Respondent failed to specifically state the basis for its disagreement with the Union's computation of gross back pay or set forth in detail the district's position with respect to its own calculations. Rather, the school district asserted that it could not pay back pay as required by the Commission's September 20, 2010, order because the Union had failed to provide income records for the employees to whom such pay was owed.

Rule 177(5) specifically authorizes the Commission to enter an appropriate order if Respondent fails to file a timely answer to the request for compliance or fails to properly deny any allegation set forth in the request. In the instant case, Respondent did not file a timely answer to the request despite having been given two opportunities in which to do so, and the answer which it did eventually file did not deny any of the allegations set forth in the request in the manner required by Rule 177(4). For this reason alone, I conclude that an order requiring the school district to make the affected employees whole using Charging Party's interim earning calculations is appropriate in this matter without regard to the sufficiency of the supporting documentation supplied by the Union.

Notwithstanding Respondent's failure to comply with Rule 177, I conclude that the school district must make payments based upon the interim earning calculations submitted by Charging Party. At the November 19, 2013, prehearing conference,

Respondent accepted the amount of back pay sought by the Union for Roseanne Bartush, Annmarie Kamman and Elaine Wade.[2] Counsel for the school district confirmed on the record that with respect to interim earnings for those employees, the only issue which remained pertained to Respondent's argument that its liability ended when the former therapists began working elsewhere in a permanent or full-time capacity. Respondent withdrew that claim on December 27, 2013. Although Respondent later attempted to resurrect the question of whether the documentation supplied by the Union was adequate, I find that the school district waived any further consideration of that issue.

Even assuming arguendo that the school district had properly preserved that issue, I would nevertheless find that the information provided by Charging Party was more than sufficient to establish the interim earnings of each of the affected employees. There can be no dispute that the Union has, throughout the course of this compliance proceeding, supplied the school district with written calculations and supporting documentation pertaining to each of the former therapists, including a break down of back pay owed by calendar quarters, the basis of computation of gross back pay and copies of receipts and checks relating to additional expenses incurred by the former therapists while they were laid off. With respect to interim earnings, the Union provided to Respondent copies of pay stubs, W2 forms and sworn affidavits. The Union later supplemented that information with additional affidavits and other documentation.

In the event of a dispute concerning back pay, the policy of the National Labor Relations Board (NLRB), which the Commission uses as a guide in compliance cases, is to obtain documentation whenever appropriate of interim earnings and adjustments to gross backpay needed to determine net backpay. NLRB Compliance Manual §10550.1. By supplying to the school district pay slips and W-2 forms, Charging Party provided what the NLRB deems the "most common" form of documentation of interim earnings for purposes of compliance proceedings under the National Labor Relations Act (NLRA), as amended 29 USC § 151. While information from current or former interim employers may be useful in determining interim earning amounts, the NLRB does not require the submission of such information on compliance, in part, based upon the Board's recognition that contacting interim employers for earnings information could adversely affect the discriminatee's current employment relationship. NLRB Compliance Manual § 10550.4.

Respondent has not, at any point throughout the course of these proceedings, set forth any factually supported allegation which, if true, would raise a legitimate dispute as to the accuracy of the Union's calculations or the authenticity of the supporting documentation. In the event of a dispute concerning the amount of interim earnings, the burden is on the employer who committed the unfair labor practice to prove interim earnings and other facts that may mitigate the loss resulting from its unlawful action.

[2] As previously noted, Respondent did raise an issue at the conference with respect to whether there was a break in service between the time Kathy Hasty worked for the school district and when she began interim employment. Respondent was directed to file documentation supporting its position concerning Hasty. However, no such documentation was ever received, nor did the school district raise the issue again in any of its subsequent pleadings.

NLRB Compliance Manual § 10550.1, citing *Mastro Plastics Corp*, 136 NLRB 1342, 1346 (1962). See also *Minette Mills, Inc*, 316 NLRB No. 159; *Florida Title Co*, 310 NLRB 609 (1993). I find that Respondent has failed to meet its burden of establishing facts proving that the Union's interim earning calculations are erroneous or that they should otherwise be reduced. Accordingly, I conclude that Respondent must make payments to the affected employees in the amounts specified by the Union.

The Commission's original order required Respondent to pay the affected employees interest at the statutory rate of 6%. By agreement of the parties, the remedial order included a setoff for the brief period during which some or all of the affected employees were recalled, and with a cutoff of back pay as of January 18, 2005. As a result, the calculations submitted by the Union on compliance factored in the 6% interest only for the period during which Respondent's back pay obligation accrued. I find that the circumstances warrant an order requiring the school district to pay interest at the statutory rate beginning from September 20, 2010, the date the Commission issued its Decision and Order, through the date that the school district made or makes each of the affected employees whole for their losses. The former therapists were entitled to payment for back wages and benefits immediately upon the issuance of the Commission's decision. Although Respondent appealed that decision to the Court of Appeals and later sought leave from the Supreme Court, there is nothing in the record indicating that the school district sought or received a stay from either tribunal. The school district's obligation to make the affected employees whole has continued unabated throughout this compliance proceeding.

I have carefully considered all other arguments set forth by the parties in this matter and conclude that they do not warrant a change in the result. Accordingly, I recommend that the Commission issue the order set forth below.

RECOMMENDED ORDER

Based upon the above findings of fact and conclusions of law, Respondent Pontiac School District, its officers, agents, and representatives are hereby ordered to:

1. Make Rosanne Bartush whole for the loss of pay and benefits in the amount of $10,149.62, plus interest accrued from September 20, 2010 to the date of payment at the statutory rate of 6% annum.

2. Make Karen Cosgrove whole for the loss of pay and benefits in the amount of $13,511.59, plus interest accrued from September 20, 2010 to the date of payment at the statutory rate of 6% annum.

3. Make Annmarie Kamman whole for the loss of pay and benefits in the amount of $16,476.43, plus interest accrued from September 20, 2010 to the date of payment at the statutory rate of 6% annum.

4. Make Kathy Hasty whole for the loss of pay and benefits in the amount of $6,482.03, plus interest accrued from September 20, 2010 to the date of payment at the statutory rate of 6% annum.

5. Make Elaine Wade whole for the loss of pay and benefits in the amount of $7,931.23, plus interest accrued from September 20, 2010 to the date of payment at the statutory rate of 6% annum.

6. Pay interest at the statutory rate of 6% to Donna Carrion and Cynthia Field for the period between the issuance of the Decision and Order of the Michigan Employment Relations Commission on September 20, 2010, though the date that payment of back wages and benefits were made to Carrion and Field at the statutory rate of 6% annum.

7. Provide the Office of Retirement Services with a bi-weekly breakdown of the wages and hours for Rosanne Bartush, Karen Cosgrove, Annmarie Kamman, Kathy Hasty, Elaine Wade, Donna Carrion and Cynthia Field, during the period in question and fully comply with any subsequent requests for adjustments from the Office of Retirement Services.

8. Make contributions to the retirement accounts of Rosanne Bartush, Karen Cosgrove, Annmarie Kamman, Kathy Hasty, Elaine Wade, Donna Carrion and Cynthia Field on the mitigated amounts as determined by the Office of Retirement Services.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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David M. Peltz
Administrative Law Judge
Michigan Administrative Hearing System

Dated: July 1, 2014