STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer,

-and- MERC Case No. C17 G-067

DETROIT FIRE FIGHTERS ASSOCIATION, LOCAL 344,
Charging Party-Labor Organization.
_____/

APPEARANCES:

LaKena Crespo, Assistant Corporation Counsel, for Respondent

Legghio & Israel, P.C., by Christopher P. Legghio and Megan B. Boelstler, for Charging Party

DECISION AND ORDER

On April 30, 2019, Administrative Law Judge Calderwood issued his Decision and Recommended Order[1] 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

Edward D. Callaghan, Commission Chair

Robert S. LaBrant, Commission Member

Natalie P. Yaw, Commission Member

Issued: JUN 10 2019

[1] MOAHR Hearing Docket No. 17-015269

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

In the Matter of:

CITY OF DETROIT,
Respondent-Public Employer,

Case No. C17 G-067
Docket No. 17-015269-MERC

-and-

DETROIT FIRE FIGHTERS ASSOCIATION, LOCAL 344,
Charging Party-Labor Organization.
_____/

LaKena Crespo, Assistant Corporation Counsel, for Respondent

Legghio & Israel, P.C., by Christopher P. Legghio and Megan B. Boelstler, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

On July 21, 2017, the Detroit Fire Fighters Association, Local 344 (Charging Party or Union), filed the above unfair labor practice charge with the Michigan Employment Relations Commission (Commission) against the City of Detroit. (Respondent or City). Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA),1965 PA 379, the charge was assigned to Administrative Law Judge Travis Calderwood of the Michigan Office of Administrative Hearings and Rules.

Unfair Labor Practice Charge and Procedural History:

Charging Party's initial filing set forth two separate distinct allegations. First, Charging Party claimed that on or about June 2, 2017, the City violated Sections 10(1)(a) and (e) of the Act by "polling" members of the bargaining unit regarding a pending grievance. Second, Charging Party asserts that the City violated Sections 10(1)(a) and (e) of the Act with its refusal to provide the Union with information regarding promotions in the EMS division that it requested under the Act on April 25 and May 26, 2017.

A hearing in this matter was scheduled for August 21, 2017, but later adjourned at the request of the Respondent. During a telephone conference held on August 21, 2017, in place of the hearing, the City indicated that it had, or would very soon, provide information responsive to the Union's request. A hearing was set for September 27, 2017.

Over the next several weeks, emails went back and forth between the parties and on September 20, 2017, the City produced a small batch of documents consisting of twenty-two (22) pages. On September 21, 2017, I received an email from Charging Party's attorney indicating that

the City was intending to provide additional documents. The Union also requested that the hearing be adjourned for several weeks; the City opposed the request. A telephone conference was scheduled for the next day, September 22, 2017.

During the September 22, 2017, telephone conference, the parties indicated their intention to settle the unfair labor practice charge, or at least a portion thereof. Given the parties' intention, the hearing was adjourned to October 25, 2017, with another telephone conference set for October 12, 2017.

During the October 12, 2017, telephone conference the parties indicated that they had reached a settlement as it related to the first allegation, i.e., the "polling" of unit members.[1] Moreover, the parties agreed to stipulate to facts necessary so that the allegations predicated on an employer's duty to furnish information could be decided without a hearing.

Both parties prepared draft stipulations of fact and provided the same to my office on November 3, 2017. A telephone conference was scheduled for November 21, 2017; however, at the appointed time, I was unable to get the City's attorney on the line for the call. I then sent an email to the parties in which I indicated that I was reviewing the draft stipulation of facts and would provide them a version that, in my opinion, would allow me to render a decision without a hearing; said draft was provided to the parties on November 22, 2017.

This matter languished for several months following the parties' inability to reach an agreement as it pertained to the stipulated facts. After several months without communication from the parties, my office issued an order regarding the inactive case file in which I directed a response as to whether the parties wished to proceed lest the case be administratively closed. On August 8, 2018, I received a request from Charging Party's attorney indicating that the parties wished for the case to remain adjourned without date as they were working towards an agreement on the stipulated facts. On October 19, 2018, my office received the parties' stipulation of facts. Briefs were filed by the parties on November 30, 2018.

Stipulation of Facts:

1. On April 25, 2017, DFFA requested, by email, that the City of Detroit, Detroit Fire Department provide "the names and dates of DFFA members promoted to the ranks of Captain and Lieutenant for the EMS Division" and "[t]he assignments and work locations along with shift hours for the members affected."

2. On May 26, 2017, DFFA filed, by email, Grievance 09-17 over the Department's EMS Promotions. That grievance stated as the remedy sought:

[1] Charging Party indicated during the call that it would provide a stipulated order regarding the "polling" allegations, and in fact did so. However, its not customary practice for ALJs hearing cases on behalf of the Commission to sign such orders. As such, and as I indicated in an email sent to the parties on November 21, 2017, I consider the "Partial Stipulated Award" signed by both parties as a withdrawal of that portion of the charge relating to the "polling" allegations.

DFFA requests the names and dates of the employees promoted to the ranks of Captain and Lieutenant for the EMS division; the criteria for promotion; and the assignments, work locations, and shift hours for the members affected. DFFA further requests copies of all documents that were used in consideration for said promotions.

3. DFFA filed an unfair labor practice charge on July 18, 2017, against the City/Department alleging that the City/Department violated Section 10(1)(a) and (e) of PERA by (1) polling unit members regarding Grievance 09-17, and (2) by failing to provide the information requested in the April 25, 2017, information request and the May 26, 2017, grievance.

4. On September 15, 20, 22, 27, 28, and 29, and October 2, 2017, the City/Department provided the information as set forth below:

   a. On September 15, 2017, the City/Department provided, by email, the names and dates of the individuals promoted to the ranks of Captain and Lieutenant for the EMS Division, shift and work location for the individuals promoted, and the job postings for EMS Supervisor Grade II and Assistant EMS Supervisor Grades I and II. On that same day, the City/Department emailed, "it is unclear what is meant by the word assignments. Please clarify." On September 21, 2017, October 12, 2017, and October 20, 2017, the City/Department and DFFA conferred about the requests, documents, produced, and redactions. The City clarified that assignments were included in the provided information.

   b. On September 20, 2017, the City/Department provided, by email, the following: Oral Appraisal Key for the positions of Assistant Emergency Medical Service Supervisor GR-I, Assistant Emergency Medical Supervisor Grade-II, and Emergency Medical Services Supervisor-Grade II; Writing Proficiency Test Rating Sheet for EMS Supervisor Grade-II; and the Interview Guide for Assistant EMS Supervisor Grade I/II which included the Dimensions subject area but redacted the actual interview questions and all interview notes.

   c. On September 22, 2017, the City/Department provided, by email, additional documents, which included, the Assistant EMS Supervisor Grade-II: job posting; a list of applicants who applied; a list of eligible applicants; scores for each applicant; applications; and applicants' scored interview guide.

   d. On September 27 and 28, 2017, the City/Department provided, by email, additional applications and interview guides of applicants who applied for the position of Assistant EMS Supervisor Grade-II.

   e. On September 29, 2017, the City/Department provided, by email, additional documents, which included the last remaining applications of applicants who applied for the position of Assistant EMS Supervisor Grade-II; and, for

the position of Assistant EMS Supervisor Grade-I, the job posting, list of applicants, list of eligible applicants, and each applicants' application, score and scored interview guide.

f. On October 2, 2017, the City/Department provided, by email, additional documents, which included, the EMS Supervisor Grade-II: the job posting; a list of the eligible applicants with rank and score; each eligible applicants' application, Oral Appraisal Rating Sheet, and writing assignment and score; and the Universal Interview Questions.

5. The City/Department redacted many of the documents it provided as it contends that the information is privileged.

6. The DFFA contends that as part of its information request, it requested unredacted documents, including: (1) all interview and application questions and answers; (2) all interview notes, whether part of individual or group assessments; and (3) any General Rules or HR Rules regarding oral interviews; and (4) writing assignments and responses.

7. The City/Department has provided the requested documents and information listed under numbers 1, 2 and 4 of Paragraph 6 but redacted the information as it contends that the information requested is privileged.

   The City/Department contends that the information requested under number 3 of Paragraph 6 was provided to DFFA when it emailed the interview guide, which lays out instructions on how to conduct an interview and evaluate the candidate.

8. On or around November 9, 2017, the parties agreed to settle the "polling" portion of the DFFA's July 18, 2017, charge against the City.

Additionally, attached to the above stipulations of facts were three documents. First is the April 25, 2017, email from Union Vice President William Harp that stated in its entirety:

> The DFFA is in the process of investigating a grievance. Please forward the names and dates of DFFA members promoted to the ranks of Captain and Lieutenant for the EMS division [and] The assignments and work locations along with shift hours for themembers [sic] affected.

Second is a May 26, 2017, grievance filed by the Union on behalf of "all affected members" over the "DFD's EMS Promotions." The grievance identified as the remedy sough the following:

> DFFA requests the names and dates of the employees promoted to the ranks of Captain and Lieutenant for the EMS division; the criteria for promotion; and the assignments, work locations, and shift hours for the members affected. DFFA further requests copies of all documents that were used in consideration for said promotions.

The third, and last document, was the Partial Stipulated Award as described above.

Discussion and Conclusions of Law:

The City argues that the Union's need for the information it has withheld does not override the City's "legitimate and substantial interest in maintaining its confidentiality." To this point, the City claims in its brief that the questions sought by the Union are in fact its Universal Interview Questions which are used by the City's Human Resources Department in interviewing candidates for positions in all City departments. The City claims that the disclosure of this information would cause it to "discard the current questions and require a constant revamping of the interview process, creating unnecessary cost and time consuming work." Moreover, the City points out, disclosure could affect the City's ability to judge an applicant's "ability to perform" because answers provided during the interview process "would be less candid and self-critical thinking would be diminished."

Charging Party, in its brief in support of its charge, focuses much of its efforts on pointing out that the City had, throughout this process, never articulated on what basis it claimed confidentiality as to the interview questions and answers. The Union goes on to argue that, even if a legitimate confidentiality interest can be established such that it is not entitled to physical copies of the documents at issue, it should at a minimum be allowed to view the same.

It is a long-held principle that an employer subject to PERA, in order to satisfy its bargaining obligation under Section 10(1)(e) of Act, must supply in a timely manner information requested by the union which will permit the bargaining representative to engage in collective bargaining and police the administration of its collective bargaining agreement. *Wayne Co,* 1997 MERC Lab Op 679; *Ecorse Pub Schs,* 1995 MERC Lab Op 384. While the Commission has not articulated the precise time for employers to respond to information requests, its approach in determining whether an employer's delay violates PERA appears to focus on the circumstances of each case. In *Detroit Public Schools*, 1990 MERC Lab Op 624, the Commission found that "[w]aiting two and three months for information that should be readily available to the Respondent is unreasonable." While, in *Keego Harbor*, 28 MPER 24 (2014), charging party requested information on July 2, 2010 and Respondent provided some of the information on August 25, 2010, the first day of the hearing. There, while the employer did take steps to provide the information on the first day of hearing, the Commission nonetheless found that the information was not provided "with completeness and reasonable promptness." Moreover, in *City of Lowell*, 28 MPER 62 (2015), the Commission found a violation based upon a delay of a little over a month, finding significant that the information requested was not provided until after the filing of the unfair labor practice charge.

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 will be ordered disclosed unless the employer rebuts the presumption. *City of Detroit (Dept of Transportation),* 1998 MERC Lab Op 205; *Plymouth Canton Cmty Schs*, 1998 MERC Lab Op 545. Under Supreme Court precedent, the standard applied is a liberal discovery-type standard. See *NLRB v Acme Indus Co,* 385 US 432 (1967). 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 Co*; *SMART,* 1993 MERC Lab Op 355, 357. The employer may rebut the presumption by demonstrating a legitimate confidentiality interest which would be damaged by disclosure of the information. See *Wayne County,* 28 MPER 31 (2014), citing to *Michigan State Univ,* 1986 MERC Lab Op 407. The confidential exclusion should not be interpreted too narrowly. *Mundy Twp*, 22 MPER 31 (2009); *City of Battle Creek (Police Dep't),* 1998 MERC Lab Op 684.

The Supreme Court in *Detroit Edison Co v NLRB*, 440 US 301 (1979), addressed whether under the National Labor Relations Act (NLRA), an employer violated its duty to furnish information pursuant to that Act when it refused to release the aptitude questions and answers it used when screening internal candidates for promotions. The initial dispute between the employer and union seeking the information arose as part of a grievance challenging the employer's decision to reject several internal candidates for a position on the basis that none had scored as "acceptable" under the tests and the employer therefore filled the open position with outside candidates.[2] While the National Labor Relations Board (NLRB) initially found that the employer had committed an unfair labor practice by withholding the information and ordered the information turned over to the union, the Court disagreed, and stated:

> Throughout this proceeding, the reasonableness of the Company's concern for test secrecy has been essentially conceded. The finding by the Board that this concern did not outweigh the Union's interest in exploring the fairness of the Company's criteria for promotion did not carry with it any suggestion that the concern itself was not legitimate and substantial. Indeed, on this record-which has established the Company's freedom under the collective contract to use aptitude tests as a criterion for promotion, the empirical validity of the tests, and the relationship between secrecy and test validity-the strength of the Company's concern has been abundantly demonstrated. The Board has cited no principle of national labor policy to warrant a remedy that would unnecessarily disserve this interest, and we are unable to identify one.

While the Court's decision in *Detroit Edison Co, supra,* was issued in 1979, it does not appear that the issue addressed therein was considered substantively under PERA until 1989, with *Kent County,* 1989 MERC Lab Op 1008 (no exceptions). In that case the ALJ, in consideration of *Detroit Edison Co,* the ALJ, in recommending that the charges against the employer be dismissed stated:

> The *Detroit Edison* case is one that should be followed by the Commission. The record discloses that the test as made by the undersheriff was an ongoing test which would be completely destroyed if the test questions were given to the Union or disclosed through any accident, design, or for any reason to the Union membership that might possibly be taking the test.

The Commission would go on to adopt the ALJ's decision and recommended order, without discussion and/or analysis when neither party filed exceptions.

---

[2] Also at issue in *Detroit Edison Co* was the employer's refusal to provide test scores and/or results without first receiving releases from the examinees.

While the Court's precedent in *Detroit Edison Co,* was relied upon, for other reasons, in several Commission adopted decisions following *Kent County*, it was not until the Commission's Decision and Order in *Wayne County,* 1997 MERC Lab Op 679 (1997), albeit in dicta, that the Commission actually voiced any position as to the release of test questions. There, while not necessary to the decision, the Commission, in referencing *Detroit Edison Co,* stated, "[a]lthough not raised as an issue by the parties, we also note that disclosure of aptitude tests to a labor organization may impinge upon an employer's interest in test secrecy."

The Court's decision in *Detroit Edison Co*, as it relates to test scores, was again referenced by the ALJ in *Taylor School District,* 2002 MERC Lab Op 248 (no exceptions). The ALJ in that case, while finding that the employer was obligated to provide the results, or scores, from a test used to evaluate internal applicants for certain job classifications following a reorganization, nonetheless held that the withholding of the actual test questions and/or answers did not violate the Act. The ALJ stated at 254:

> There is no question that in order to represent its membership, and ensure the proper administration of the bidding process, the Union had the right to information regarding revised job descriptions and qualifications, as well as procedural aspects of the testing program. I find, however, in line with the precedent cited above, that the Employer was not obligated to provide the test questions and answers to the Union. Since the Employer intended to utilize these tests again, revealing the test contents would compromise the validity of the testing process. I find that the Employer had a legitimate and overriding interest in maintaining the confidentiality of this material and had no duty to supply the tests/answers to the Union.

In *County of Macomb,* 28 MPER 30 (2014), the Commission was finally able to consider and address the Court's decision in *Detroit Edison Co* as it related to the confidentiality of test questions and/or corresponding answers. In that case, the union was requesting copies of interview questions and answers to those questions. The ALJ, finding a distinction between the request for test questions and answers, as was the case in *Detroit Edison Co,* and the present dispute over interview questions and answers, held that the interview questions and answers were not protected from being disclosed. The ALJ noted that if the employer were to disclose the information, it would likely have to revise the questions and, also that turning over the interviewers' notes about the candidates' responses "may lead to hard feelings toward the interviewers if the notes contain negative comments about candidates." The preceding issues notwithstanding, the ALJ determined that such concerns were "not sufficient to override" the union's need for the information. The Commission, in reversing the decision of the ALJ, when addressing the distinction drawn by the ALJ between test questions and interview questions, stated:

> The distinction between test questions and interview questions drawn by the ALJ is unfounded. We find that it is the nature of the information sought to be protected that is determinative, not the precise words or semantics used. Interview questions are, in purpose and effect, "test questions" upon which an applicant' s qualifications for a position are based.

The Commission went on to find merit with the employer's argument that it would not only have to revise the interview questions if disclosed, it would have to stop using "written interview questions altogether" if it had to disclose the same to the union. The Commission noted that were the employer to do so, the "action arguably would lead to a less standardized promotional process, contrary to the desires of [the union]."[3]

Here it is clear to the undersigned that there exists a reasonable probability that the information sought by the Union would be useful to it in satisfying its statutory duties. However, I find that the City has established a legitimate confidentiality interest, albeit theoretical in nature, that would be damaged, in the manner described above, by disclosure of the information. For this reason, I find that Employer is not obligated under the Act to provide the Union with the copies of the interview questions and/or answers to those questions.

Addressing the Union's alternative request for remedy, that it be allowed to view the interview questions and answers, I note that the argument is based upon the Commission's consideration, in *County of Macomb,* of the ALJ's rejection of the employer's offer to compromise by allowing the union to view the information, but not copy it, as untimely and "not sufficient." I note however, that whatever favorable treatment or discussion the Commission may have given the notion that the employer was prepared to allow the union to view information, it nonetheless reversed the decision of the ALJ, dismissed the case in its entirety, and did not order that the union be permitted to view the information. As such, I will not order that the City permit the Union to view the information.

While I have determined that the information remaining outstanding, i.e., testing/interview materials, is protected from disclosure under the Act, that fact does not excuse the City's complete disregard of its duty to provide information "with completeness and reasonable promptness." See *Keego Harbor, supra.* Here the Charging Party made the initial request for information on April 25, 2017. Charging Party then filed a grievance seeking to compel production of the information. Finally, Charging Party filed the present charge on July 18, 2017. Despite the preceding, it was not until September 15, 2017, that the City even began to partially comply with the request. Moreover, to the extent that some of information, as addressed above, has subsequently been determined to be protected from disclosure, it does not appear from the stipulations of fact that the City, prior to this proceeding, ever attempted to communicate the reason for its withholding of said information. For these reasons I find that the City's delay in providing the information it did provide was not reasonable under the Act. Furthermore, I find that the City's failure to provide its justification as to why it would not provide the information ultimately deemed protected was also unreasonable under the Act.

I have considered all other arguments as put forth by the parties and conclude such does not warrant a change in my findings. As such, I recommend that the Commission issue the following order.

---

[3] The Commission, in making its decision, also relied upon the employer's argument that disclosure of the interview questions was exempt from Disclosure under the state's Freedom of Information Act (FOIA), Public Act 442 of 1976. See MCL 15.243(1)(k) and (m).

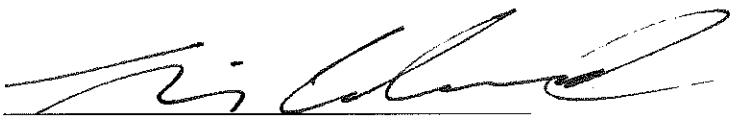
Recommended Order

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

1. Cease and desist from refusing to provide Detroit Fire Fighters Association, Local 344, with information that is relevant and necessary to its role as the bargaining agent for employees of Respondent.

2. 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



Travis Calderwood
Administrative Law Judge
Michigan Office of Administrative Hearings and Rules

Dated: April 30, 2019

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE WITH THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION (COMMISSION) BY THE **DETROIT FIRE FIGHTERS ASSOCIATION, LOCAL 344**, THE COMMISSION HAS FOUND THE **CITY OF DETROIT** TO HAVE COMMITTED AN UNFAIR LABOR PRACTICE IN VIOLATION OF THE MICHIGAN PUBLIC EMPLOYMENT RELATIONS ACT (PERA). PURSUANT TO THE TERMS OF THE COMMISSION'S ORDER,

WE HEREBY NOTIFY OUR EMPLOYEES THAT:

WE WILL cease and desist from refusing to provide Detroit Fire Fighters Association, Local 344, with information that is relevant and necessary to its role as the bargaining agent for employees of Respondent.

WE WILL provide Detroit Fire Fighters Association, Local 344, with information that is relevant and necessary to its role as the bargaining agent for employees of Respondent in a complete and timely manner.

CITY OF DETROIT

By: _____

Title: _____

This notice must be posted for a period of thirty (30) consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, Michigan 48202. Telephone: (313) 456-3510.

Case No. C17 G-067; Docket No. 17-015269-MERC