STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF DETROIT,
Public Employer - Respondent,

-and- Case No. C11 J-173

SENIOR ACCOUNTANTS, ANALYSTS & APPRAISERS ASSOCIATION,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Cynthia Johnson, Labor Relations Specialist, City of Detroit, for the Respondent

Scheff, Washington & Driver, P.C., by George B. Washington, for the Charging Party

DECISION AND ORDER

On August 9, 2012, Administrative Law Judge Julia C. Stern issued a Decision and Recommended Order in the above-entitled matter, finding that Respondent has engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist and take certain affirmative action as set forth in the attached Decision and Recommended Order of the Administrative Law Judge.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of Act 336 of the Public Acts of 1947, as amended.

The parties have had an opportunity to review this Decision and Recommended Order for a period of at least 20 days from the date the decision was served on the parties, and no exceptions have been filed by any of the parties to this proceeding.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts as its order the order recommended by the Administrative Law Judge.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Robert S. LaBrant, Commission Member

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **CITY OF DETROIT** TO HAVE COMMITTED UNFAIR LABOR PRACTICES 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 NOT discipline or otherwise discriminate against employees because they have engaged in lawful concerted activity for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights as guaranteed by Section 9 of PERA, including the right to discuss grievances and potential grievances with their union representatives.

WE WILL rescind the suspension issued to Gwendolyn Flowers on September 28, 2011; remove all references to this suspension in Flowers' personnel file and other records; make Flowers whole for pay lost as a result of the suspension by paying her a sum equal to that which she would have earned during the suspension, plus interest at the statutory rate of five (5%) per cent per annum; and make her whole for any loss of benefits, including accrued leave time, she incurred as a result of the suspension.

As a public employer subject to PERA, we acknowledge that all of our employees are free to organize together, to form, join or assist in labor organizations, and to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection.

CITY OF DETROIT

By: _____

Title: _____

Date: _____

This notice must be posted for a period of 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. C11 J-173.

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

CITY OF DETROIT,
Public Employer-Respondent,

Case No. C11 J-173

-and-

SENIOR ACCOUNTANTS, ANALYSTS AND
APPRAISERS ASSOCIATION,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Cynthia Johnson and Kuryakin Rucker, City of Detroit, for Respondent

George B. Washington, for Charging Party

DECISION AND RECOMMENDED ORDER
OF
ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on December 13, 2011 before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the transcript of testimony, the exhibits admitted at the hearing, and the arguments made by the parties at the hearing, I make the following findings of fact and conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The Senior Accountants, Analysts, and Appraisers Association filed this charge against the City of Detroit on October 12, 2011. Charging Party represents a bargaining unit of Respondent's employees which includes employees in Respondent's Budget Department. On September 7, 2011, Gwendolyn Flowers, an employee in the Budget Department and member of Charging Party's bargaining unit, forwarded an email she received in the course of her duties to the personal email addresses of Charging Party's president and vice-president. On September 28, 2011, Flowers was suspended for five working days for allegedly violating a departmental rule against releasing confidential information to the public without permission. Charging Party asserts that the email was related to a potential grievance and that Flowers was engaged in

activity protected by §9 of PERA when she forwarded copies of the email to her union representatives. It alleges that Flowers' discipline therefore violated §§10(1)(a) and (c) of PERA.

Findings of Fact:

Gwendolyn Flowers is a senior budget analyst in Respondent's Budget Department. The Budget Department is a small department with nineteen employees. Flowers began working for the Budget Department in 1997. Beginning in about 2009, she was assigned to the budget teams for several of Respondent's departments, including the Department of Health and Wellness Promotion (DHWP). Budget teams are responsible for formulating and overseeing the budgets of their departments. Flowers' duties included compiling budget information and providing it to managers in her assigned departments.

In September 2011, Flowers' immediate supervisor was Angela Barr. However, after Flowers was assigned to work on the department budget teams, she also had frequent interactions with Donna McAlister, the general manager of the Budget Department. Between 2009 and September 2011, Flowers repeatedly received from McAlister what Flowers believed was unfair criticism of her work. According to Flowers, McAlister's expectations for her were too high. According to McAlister, Flowers "required a lot of coaching." Although Flowers had not received any formal discipline during the two years she had been working under McAlister, Flowers testified that she was nevertheless concerned that she was being "set up." Flowers, who is a Charging Party steward, discussed these concerns with both Charging Party President Susan Glaser and Charging Party Vice-President Greg Murray several times prior to September 2011.

Around September 1, 2011, Flowers received a request from the DHWP to carry over $300,000 from its 2010-2011 budget to its 2011-2012 budget. According to Flowers, after Flowers told a DHWP representative that there were no funds to transfer, McAlister came to Flowers and told her to find out why the money was not there. According to McAlister, Flowers brought the request to her and asked her what to do with it, and McAlister told Flowers to check to see if this was a valid request. Both agree that Flowers reported to McAlister that there was no money in the DHWP's general fund account because Respondent's Finance Department had charged this account for employee services in July 2011, after the beginning of the 2011-2012 fiscal year. Flowers and McAlister both testified that these services should have been charged to the DHWP's grant fund account; according to McAlister, the charge was probably made to the general fund account because the DHWP had reported that there were no funds in the grant fund account at that time. The record indicates that the problem was eventually corrected and the charge made to the correct account. After this was done, the DHWP's general fund account was no longer in deficit and the budget carryover request was approved.

Flowers testified that McAlister already knew when she asked Flowers to check on it that there was no money in the DHWP's general fund account, and that McAlister also knew why there was no money in the account. Flowers testified that she felt McAlister was attempting to blame her in some way for the situation, and she characterized McAlister's directive that she "find out why the money was not there" as harassment.

Late in the day on September 1, Flowers was copied on an email sent by McAlister to a manager in the DHWP addressing the request for the budget carryover. Other people, including Budget Department Director Pamela Scales, were also copied on the email. McAlister's email read:

> Budget Dept is in receipt of the subject matter requesting to balance forward $300,000 from Apprn 00068 FY 10-11. The apprn ended in an operating deficit of $1.2M. Therefore there is $0 funding available to balance forward.
>
> We note that the $300,000 was reflected in the 10-11 Budget and the funds were encumbered in July 11 impacting FY 11-12 Budget.
>
> Again, apprn 00068 ended in a deficit of $1.2M. The deficit is primarily due to an IPO Payment for Purch Serve Ctrl Staff $1.5M hitting the General Fund (1000) v Grant Fund 3601. This transaction was processed/agreed by the Finance Dept. According to the Health Dept there was $0 available in the grant fund.

On September 2, 2011, Flowers met in person with Charging Party President Susan Glaser to discuss Flowers' concerns about McAlister's treatment of her. One of the incidents they discussed was McAlister's directive to Flowers to find out why there was no money in the DHWP general fund account.

On September 7, 2011, Flowers forwarded McAlister's September 1 email to Glaser's personal (non-City) email account and to the personal account of Charging Party vice-president Murray. Flowers appended this comment, "See the Health Department really does not have the money. She was harassing me for nothing." Flowers testified that she did not realize that the September 1 email contained anything that might be considered either secret or important. I credit her testimony on this point. As discussed above, the email discussed what all the intended recipients, including Flowers, understood to be a technical problem caused by a charge made to an incorrect account. I find it credible that Flowers, who appeared in her testimony to be somewhat unsophisticated, would not have recognized that a statement that the DHWP had an operating deficit of $1.2 million might be considered confidential information.

At some point before September 28, and by unidentified means, a reporter obtained a copy of McAlister's September 1 email. The reporter sent a copy of the email to the Mayor Dave Bing's press secretary and asked him about it. The press secretary then contacted Budget Director Scales and forwarded the email to her. At Scale's request, Respondent's information technology personnel did a search to determine if any of the recipients of the original email had forwarded it to anyone else. They discovered that Flowers had forwarded the email to Glaser and Murray.

On September 28, 2011, Flowers received a 10 day/5 working day suspension for releasing confidential information without permission. The disciplinary fact sheet accompanying the discipline stated that the email contained confidential information, that Flowers was copied on the email as part of her work responsibilities, and Flowers did not request permission from anyone above her in the supervisory hierarchy of the department as departmental policy required.

The fact sheet stated that Flowers had violated "the confidential information provision in the Human Resources Handbook" by forwarding the email to non-city email addresses without permission. However, the only other reference in the record to this provision was Respondent's counsel's statement, during her closing argument, that in giving Flowers the suspension the Budget Department had followed the guidelines in the Human Resources handbook for the offense of releasing confidential information without permission.

Both McAlister and Scales testified that a Budget Department employee is not supposed to show internal documents or work product produced within the Department to individuals outside the Department without the Department's permission, unless the employee is working with that individual on some pending matter. However, there is no dispute that in September 2011 the Budget Department did not have any written departmental rule or policy addressing the disclosure by employees of either confidential information or internal documents. As noted above, the "confidential information provision in the Human Resources handbook" was not made part of the record, and Respondent did not introduce evidence of any other Respondent-wide policy addressing the release of confidential information or internal documents.

Flowers testified that she did not know if the Budget Department had a rule about not discussing the work of the department with outsiders. She testified that when she first came to work in the Budget Department in 1997, someone might have said something to her about the confidential nature of working in the Budget Department. However, she did not recall what she was told. She did not recall having any other conversation with a supervisor about this topic

McAlister's testimony was as follows:

> Respondent's Counsel: … The issue of confidentiality in the budget department, how important is that?
>
> McAlister: It's very important. And with any budget team that we have within the budget department we always stress that the information that we have here is confidential and should not be shared with anyone outside of the budget department.
>
> C: Has that ever been discussed with your staff?
>
> M: Yes.
>
> C: How often?
>
> M: Well, Gwen being new when she came onto my team, if I may, as she indicated, I always stress because she said she did not know, you know, about the workings of the teams so I always make sure individuals know and understand that when you come on a budget team this is what is expected within the budget department, that this information is not to be shared. Because we're developing the budget, and so we don't want any information to get out that's not accurate.

Discussion and Conclusions of Law:

Respondent asserts that the "charge should be dismissed and referred to the grievance procedure because it is a grievable issue." PERA, however, does not permit the Commission to defer to private arbitration a decision on the merits of an unfair labor practice claim. *Detroit Fire Fighters Ass'n, Local 344, Intern Ass'n of Fire Fighters v City of Detroit*, 408 Mich 663 (1980). Charging Party's claim here is not that Flowers' discipline was unfair or without just cause. Rather, it asserts that by disciplining her, Respondent interfered with Flower's exercise of her statutory rights under §9 of PERA and discriminated against her because of her union activity. This statutory claim is properly before the Commission and the merits of the claim must be decided by the Commission.

Respondent also asserts that the charge should be dismissed because the email Flowers forwarded to Glaser and Murray had "nothing to do with wages, hours, or terms and conditions of employment." Section 9 of PERA provides that "(i)t shall be lawful for public employees . . . to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection." Section 9 is patterned on §7 of the National Labor Relations Act (NLRA) 29 USC 150 et seq., The National Labor Relations Board (NLRB) has held that activity is concerted under §7 of the NLRA if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I),* 268 NLRB 493 (1984), revd sub non *Prill v NLRB,* 755 F 2d 941 (CA DC 1985), cert denied 474 US 948 (1985), on remand *Meyers Industries (Meyers II),* 281 NLRB 882 (1986), affd sub nom *Prill v NLRB,* 835 F 2d 1481 (CA DC 1987), cert denied 487 US 1205 (1988). For communications among employees to be protected concerted activity, these communications must look toward or have some relation to group action; "mere griping" among employees is not protected activity. See *Mushroom Transportation Co v NLRB,* 330 F2d 683, 685 (CA 3 1964); *Asheville School Incorporated,* 347 NLRB 877, 881 (2006). However, an employee who consults his or her union representative about a problem with a supervisor is normally not merely complaining, but rather seeking advice about an actual or potential grievance.

In early September 2011, Flowers, correctly or incorrectly, feared that McAlister might be planning to discipline her for poor work performance. On September 2, Flowers discussed the September 1 incident with Glaser because Flowers, correctly or incorrectly, believed that McAlister had been criticizing her work and wanted Glaser's advice. The email Flowers forwarded to Glaser and Murray was related to that discussion in that Flowers believed it exonerated her. I conclude that Flowers' discussion with Glaser, and the forwarding to Glaser of an email that might be relevant to a grievance if Flowers were to be disciplined, was concerted activity within the meaning of §9.

Respondent argues that Flower's conduct in forwarding the email was unprotected because she released confidential information to persons outside the budget department not authorized to receive it without the permission of her supervisors. According to the record, in September 2011, the Budget Department had no written rule or policy addressing the disclosure of confidential information or internal documents to individuals outside the department. A work rule or policy, however, need not be in writing to be valid. The first question, I find, is whether

the information in the September 1 email was so clearly confidential that, with or without a rule, Flowers either knew or should have known that it should not have been passed along to anyone outside the department. The subject of the email was a technical snafu that could be and eventually was corrected. Flowers, from her position within the department, understood this, although someone outside the department might not. As noted above, I credit Flowers' testimony that she did not realize that the email contained information that could be considered secret. I also find that the information that it contained was not so clearly confidential that she should have realized that the email should not have been shown to anyone outside the department.

Respondent asserts, however, that in September 2011 there was a rule in the Budget Department that employees were not to show internal documents of any sort or work product produced within the department to individuals outside the department without the department's permission, unless the employee was working with that individual on some pending matter. According to Respondent, this rule was understood by employees even though it had not been put in writing.

In *Ingham Co v Capitol City Lodge No. 141 of the Fraternal Order of Police, Labor Program, Inc,* 275 Mich App 133 (2007), a union steward was disciplined for faxing a copy of an internal departmental memorandum to the union's attorney without seeking permission to do so. The department had a written rule, of which the union steward was admittedly aware, which read in part as follows:

> No Departmental documents to include, but not limited to, reports, photographs, memos, and official records shall be released to the public without authorization and in compliance with the Freedom of Information Act.

The Court of Appeals concluded in *Ingham Co* that the steward's conduct in seeking the advice of the union's attorney regarding the lawfulness of the memorandum was concerted activity under §9 of PERA. It found, however, that this conduct was not protected. It stated, at 141-142:

> To analyze whether an employer can lawfully apply an employment rule to discipline an employee for engaging in what would otherwise be a protected activity under § 9 of PERA, we apply a three-part test. Under the first prong of the test, we look at whether the employer's action adversely affected the employee's protected right to engage in lawful concerted activities under PERA. Under the second prong, we look at whether the employer has met its burden to demonstrate a legitimate and substantial business justification for instituting and applying the rule. Finally, under the third prong, we balance the diminution of the employee's rights because of application of the rule against the employer's interests that are protected by the rule.

The Court concluded that the employer's action in that case did not adversely affect the employee's right to engage in lawful concerted activities because, under the rule, the steward could have requested authorization to give the attorney the memorandum and, if authorization

was denied, her union could have obtained it under either PERA or the Freedom of Information Act. It also concluded that the employer, a sheriff's department, had a legitimate and substantial interest in ensuring uniformity in the handling of potentially sensitive internal documents, and that this interest outweighed the steward's right to engage in protected activity under §9. It noted that the employer, and not the employee, was in the position to assess the propriety of releasing a particular document. On this point, the Court stated, at 150:

> A law enforcement agency must be able to control the distribution of its internal documents to maintain its effective operation. As the county and the sheriff point out, allowing members of a law enforcement organization to release internal documents without authorization in the hopes that they can later justify their actions by invoking their rights to engage in union activity would impermissibly threaten public safety, officer safety, and jail security. Once the information is released, the bell has been rung and the damage suffered may be grave. Given these risks, we cannot expect the sheriff to assess its employee's conduct in hindsight. Employees cannot be expected to discern which types of documents are acceptable for release and which are not—that is the sheriff's job to execute with the benefit of foresight on how the release of such information will bear on the sensitive interworkings of the law enforcement agency.

The Court also concluded that the union and its counsel were "members of the public" under the rule since they were not employees of the sheriff's department.

The *Ingham Co* case involved a law enforcement agency. However, other types of public employers, including Respondent's Budget Department, might be able to demonstrate a legitimate and substantial business justification for instituting and applying a rule prohibiting their employees from releasing internal documents to nonemployees, or to employees outside a particular department, without prior authorization. However, it is unnecessary for me to address this issue because, I conclude, the record does not establish that Respondent had such a rule in its Budget Department in September 2011. Both McAlister and Scales testified that it was their expectation that employees would not show any internal document or work product to individuals outside the department without approval, but neither cited even one instance in which this "rule" was communicated to employees. As indicated in the excerpt from the transcript quoted above, McAlister testified that she told both Flowers and other employees that the "information that we have here" is confidential and not to be shared with those outside the budget department. However, the "information we have here" could apply to everything from the most sensitive budget target figures to mundane matters such as the number of employees in the department or reams of paper in the supply room. There is simply no evidence in the record that prior to September 7, 2011 employees in the Budget Department had been instructed to obtain the approval of their supervisors before showing any internal departmental document to individuals outside the department.

§10(1)(a) of PERA prohibits a public employer from interfering with, restraining, or coercing public employees in the exercise of their §9 rights. The latter, as discussed above, includes the right to discuss a grievance or potential grievance with a union representative. I conclude that in the absence of a written or oral rule or policy that at least reasonably

communicates what type of information or documents should be considered confidential, an employer's discipline of an employee for sharing information or a document with his or her union representative in the course of discussing a potential grievance inhibits and interferes with its employees' exercise of an important §9 right. I also conclude, as discussed above, that no such written or oral rule or policy was in effect for employees in Respondent's Budget Department on September 7, 2011. I conclude, therefore, that Respondent violated §10(1)(a) of PERA when it disciplined Gwendolyn Flowers on September 28, 2011 for forwarding her supervisor's September 1, 2011 email to her union representatives on September 7, 2011, and that this discipline also constituted discrimination against Flowers for engaging in union activity in violation of §10(1)(c) of PERA. I recommend, therefore that the Commission issue the following order.

RECOMMENDED ORDER

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

1. Cease and desist from:

   a. Disciplining or otherwise discriminating against employees because they have engaged in lawful concerted activity for the purpose of collective bargaining or other mutual aid or protection.

   b. Interfering with, restraining or coercing employees in the exercise of their rights as guaranteed by Section 9 of PERA, including the right to discuss grievances and potential grievances with their union representatives.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Rescind the suspension issued to Gwendolyn Flowers on September 28, 2011; remove all references to this suspension in Flowers' personnel file and other records; make Flowers whole for pay lost as a result of the suspension by paying her a sum equal to that which she would have earned during the suspension, plus interest at the statutory rate of five (5%) per cent per annum; and make her whole for any loss of benefits, including accrued leave time, she incurred as a result of the suspension.

   b. Post copies of the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees in the bargaining unit represented by the Senior Accountants, Analysts and Appraisers Association are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____

NOTICE TO EMPLOYEES

AFTER A PUBLIC HEARING, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND THE **CITY OF DETROIT** TO HAVE COMMITTED UNFAIR LABOR PRACTICES 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 NOT discipline or otherwise discriminate against employees because they have engaged in lawful concerted activity for the purposes of collective bargaining or other mutual aid or protection.

WE WILL NOT interfere with, restrain or coerce employees in the exercise of their rights as guaranteed by Section 9 of PERA, including the right to discuss grievances and potential grievances with their union representatives.

WE WILL rescind the suspension issued to Gwendolyn Flowers on September 28, 2011; remove all references to this suspension in Flowers' personnel file and other records; make Flowers whole for pay lost as a result of the suspension by paying her a sum equal to that which she would have earned during the suspension, plus interest at the statutory rate of five (5%) per cent per annum; and make her whole for any loss of benefits, including accrued leave time, she incurred as a result of the suspension.

As a public employer subject to PERA, we acknowledge that all of our employees are free to organize together, to form, join or assist in labor organizations, and to engage in lawful concerted activity through representatives of their own choice for the purpose of collective bargaining or other mutual aid and protection.

CITY OF DETROIT

By: _____

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Case No. C11 J-173.