STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

PLYMOUTH-CANTON COMMUNITY SCHOOLS,
Respondent-Public Employer,

Case No. C97 E-109

-and-

PLYMOUTH-CANTON ADMINISTRATORS ASSOCIATION,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Errol Goldman, Esq., for Respondent

Mark H. Cousens, Esq., for Charging Party

DECISION AND ORDER

On April 29, 1998, Administrative Law Nora Lynch issued her Decision and Recommended Order in the above case, finding that Respondent Plymouth-Canton Community Schools violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1947 PA 336, as amended, MCL 423.210(e); MSA 17.455(10)(1)(e), by refusing to provide Charging Party Plymouth-Canton Administrators Association with information relevant and necessary to the administration and enforcement of its collective bargaining agreement, and by failing to bargain over the allocation of costs for the documents which were provided to the Union.

Respondent filed timely exceptions to the Decision and Recommended Order of the Administrative Law Judge on May 22, 1998. Charging Party filed a brief in support of the recommended order on June 11, 1998.

Background:

This case arises from the demotion of Paul Reeves, an administrative employee of the Plymouth-Canton Community Schools since 1986 and a member of a bargaining unit represented by Charging Party. Following the demotion, Charging Party requested that Respondent provide the Union with copies of all letters sent to the central office pertaining to Reeves during the 1995-1996 school year. As more fully set forth in the recommended order, Respondent did not formally acknowledge the request until January 21, 1997, more than two months after the Union first wrote

to the school district. Three days later, Respondent provided the Union with redacted copies of letters from students and parents and assessed a charge of $25.58 for the documents. In addition, the Employer offered to copy Reeves' personnel file for an unspecified fee. Respondent refused to provide copies of the letters from staff members on the ground that such information was exempt under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*; MSA 4.1801(1) *et seq.* During the following months, the Union made several more attempts to obtain copies of the staff letters. However, the Employer refused to provide the information on the ground that disclosure was not warranted under either the FOIA or PERA.

On May 27, 1997, the Union filed the instant unfair labor practice charge alleging that Respondent breached its duty to bargain in good faith under PERA by failing to supply information required by Charging Party to properly evaluate and pursue a grievance. The Administrative Law Judge agreed and ordered Respondent to provide the Union with full and complete copies of all letters sent to the Employer during the 1995-1996 school year pertaining to Reeves, to bargain with Charging Party with respect to any costs involved, and to post the appropriate notice.

Discussion and Conclusions of Law:

On exception, Respondent argues that the Administrative Law Judge erred in concluding that the Union was entitled to copies of all letters received by the school district during the 1995-1996 academic year pertaining to Paul Reeves. In addition, the Employer excepts to the Administrative Law Judge's determination that it unilaterally set the fees for the requested information. After carefully reviewing the transcript and documentary evidence submitted by the parties, we find Respondent's exceptions to be without merit and affirm the Administrative Law Judge's findings of fact and conclusions of law.

It is well-established that in order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must supply in a timely manner requested information which will permit the union to engage in collective bargaining and to police the administration of the contract. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. This obligation may extend to information necessary for the processing of grievances. *NLRB v ACME Industrial Co*, 385 US 432, 436, 64 LRRM 2069 (1967); *SMART*, 1993 MERC Lab Op 355. Where the information sought concerns the wages, hours or working conditions of bargaining unit employees, the information is presumptively relevant and will be ordered disclosed unless the employer itself rebuts the presumption. *City of Detroit, Department of Transportation*, 1998 MERC Lab Op ___ (4/7/98); *Wayne County, supra*. See also *E.I. DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538; 117 LRRM 2497 (CA 6, 1984). The standard applied for relevancy is a liberal discovery-type standard. The employer has a duty to disclose the requested information as long as there exists a reasonable probability that the information will be of use to the union in carrying out its statutory duties. *Wayne County, supra; SMART*, 1993 MERC Lab Op 355, 357. See also *Pfizer, Inc*, 268 NLRB 916; 115 LRRM 1105 (1984).

Respondent contends that the Union was not entitled to the letters because the information request was based on a mere suspicion of a contract violation. In support of this contention, the Employer relies on our decision in *City of Pontiac*, 1981 MERC Lab Op 57. In that case, we held

that the employer was not obligated to disclose salary information concerning school administrators because the union had failed to make a minimal initial showing that a contract violation had taken place. The documents at issue in *City of Pontiac*, however, pertained to employees outside the bargaining unit. In the instant case, the Union sought copies of all letters received by the Employer during the 1995-1996 school year concerning Paul Reeves, a member of the bargaining unit represented by the Plymouth-Canton Administrators Association. Therefore, the information was presumptively relevant and the Union was under no obligation to demonstrate its pertinence to bargainable issues.

Moreover, we agree with the Administrative Law Judge that Respondent failed to rebut the presumption of relevancy with respect to the requested information. The evidence establishes that the Union made the request as part of its investigation of two potential grievances. The first grievance challenged the disciplinary demotion of Paul Reeves on the ground that the Employer failed to comply with language in the contract relating to employee evaluations. The other possible grievance involved allegations that the superintendent had solicited letters from parents and staff members critical of Reeves. Although the Employer asserts that the letters were not a factor in its decision to demote Reeves to the position of assistant principal, the evidence suggests otherwise. Reeves was given a negative performance rating at approximately the same time the letters were received by the Employer. As noted by the Administrative Law Judge, the performance rating focused heavily on Reeves' relationship with parents, teachers and students. More importantly, Reeves testified at the hearing that the superintendent repeatedly referred to the letters as the basis for the demotion during a series of meetings which occurred in June of 1996. Significantly, the Employer offered no evidence to rebut this allegation. Under such circumstances, we believe that there existed a reasonable probability that the information would have been of use to the Union in carrying out its statutory duties.

As proof that the information was not a factor in the decision to demote Reeves to the position of assistant principal, the Employer refers to the fact that the letters were not part of his personnel file. According to Respondent, the *Bullard-Plawecki Employee Right to Know Act*, MCL 423.501 et seq.; MSA 17.62(1), prohibits an employer from making a disciplinary decision based on information which is not contained in an employee's personnel file. It is true that the Act defines "personnel record" as a record containing any and all information that identifies the employee, to the extent that the record "is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation, or disciplinary action." MCL 423.501(2)(c); MSA 17.62(1)(2)(c). Contrary to Respondent's assertion, however, *Bullard-Plawecki* does not per se preclude an employer from taking disciplinary action against an employee on the basis of information improperly excluded from an employee's personnel record. Rather, the Act merely prohibits the use of such information in "judicial or quasi-judicial proceedings," and even then, only if the judge or hearing officer makes the determination that the information was intentionally excluded from the personnel record and the employee objects or is not given a reasonable time to review the information. MCL 423.502; MSA 17.62(2). In any event, the fact that the information was not kept in Reeves' personnel file in no way establishes that the letters were not considered by the Employer. The possibility exists that Respondent simply failed to comply with

Bullard-Plawecki in making the decision to demote Reeves. For the same reason, we reject Respondent's reliance on a provision in the parties' collective bargaining agreement requiring the Employer to maintain only one official file for each administrator.

Respondent also relies on *Bullard-Plawecki* in support of its decision to withhold the staff letters from the Union. According to Respondent, the Act precludes an employer from disclosing confidential information during the course of an investigation into allegations of misconduct or during the time the employer is holding confidential information in a separate file. However, the purpose of *Bullard-Plawecki* is to protect the employee, not the employer. Moreover, Section 10 of *Bullard-Plawecki*, MCL 423.510; MSA 17.62(10), states that the Act shall not be construed to diminish a right of access to records as provided under the FOIA "or as otherwise provided by law." Thus, *Bullard-Plawecki* does not limit a union's right to information to which it is lawfully entitled under other statutes. It is well-established that PERA is the dominant law regulating public employee labor relations and prevails over other statutes to the extent that they conflict. See *Rockwell v Crestwood School District*, 393 Mich 616 (1975) (1976); *Detroit Board of Education*, 1986 MERC Lab Op 121, 123. Accordingly, PERA, and not *Bullard-Plawecki*, controls what information an employer is obligated to supply to the representative of its employees. *City of Detroit (Department of Transportation)*, 1998 MERC Lab Op ___ (4/7/98).

Respondent next challenges the Administrative Law Judge's determination that the Employer failed to comply with its bargaining duty under PERA by redacting the names of parents and students from the letters which were provided to the Union. The Employer argues that disclosure of such information would have violated the Family Education Rights and Privacy Act (FERPA), 20 USC 1232g.[1] Yet, Respondent did not rely on FERPA as a justification for refusing to fully comply with the information request in its pre-charge correspondence with the Union, and the applicability of the Act was not raised as an issue at the hearing or referred to by the Employer in its post-hearing brief. Moreover, Respondent's exceptions do not comport with Rule 66 and 67, R 423.466 and R423.467, of the General Rules of the Employment Relations Commission with regard to this issue. FERPA is not mentioned in the exceptions themselves, and the Employer fails to cite any relevant case law or specific provisions of the Act in its brief in support of exceptions. Under such circumstances, we believe the issue has been waived. In so holding, we express no opinion as to whether documents falling within the Act's definition of "education records" may be exempt from disclosure under PERA.

Next, Respondent argues that it had no duty to provide copies of the letters to the Union because the documents fell within the realm of the confidentiality exception to the general obligation to release information under PERA. The confidentiality exception was clarified by this Commission

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[1] FERPA conditions federal education funding on maintaining the privacy of "education records other than directory information. 20 USC 1232g(b)(2). For purposes of FERPA, education records consist of those records, files, documents, and other materials that contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 USC 1232g(a)(4)(A).

in *Kent County Sheriff*, 1991 MERC Lab Op 374, 377, in which we found that the employer had not violated its duty to disclose information under PERA when it refused to provide the union with witness statements or its own internal memos concerning an investigation into employee misconduct. In that case, we indicated that internal investigations conducted for the purpose of determining whether or not there was employee misconduct fall within the confidential exception to an employer's duty to provide information under Section 10(1)(e). In so holding, we expressed our agreement with the Sixth Circuit Court of Appeals in *Ascaro, Inc. v NLRB*, 805 F3d 194, 123 LRRM 2985 (CA 6, 1986), and expressed concern that witnesses may be reluctant to give statements absent assurances that their statements will not be disclosed, at least until after the investigation and adjudication are completed. See also *Ecorse Public Schools*, 1995 MERC Lab Op 384, 388. According to Respondent, the same exception applies in the instant case because the letters sought by the Union pertain to an investigation into allegations of sexual harassment by Reeves against a fellow staff member at the Bentley Elementary School. However, there is no evidence in the record to substantiate this assertion. The Employer did not refer to any such investigation in its correspondence with the Union, nor were the sexual harassment allegations set forth in Reeves' performance evaluation. Furthermore, the Employer did not call any witnesses to testify at the hearing, and none of the Union witnesses spoke to the issue of sexual harassment. Although the Employer did refer to the confidentiality exception in its post-hearing brief, it did so only in connection with the issue of protecting staff members at the Bentley Elementary School from retaliation by the Union. Under these circumstances, we believe that Respondent has waived any issue relating to the applicability of the confidentiality exception.[2] For the same reason, we reject Respondent's argument that the information sought was exempt from disclosure under Section 13(1)(b)(i) of the FOIA, MCL 15.243(1)(b)(i); MSA 4.1801(13)(1)(b)(i), because it involved documents compiled as part of a criminal investigation.

Next, Respondent argues that the Administrative Law Judge erred in finding no basis upon which to conclude that staff members would be retaliated against by members of the bargaining unit if the letters were disclosed to the Union. In support of this contention, the Employer refers to the fact that employees at the Bentley Elementary School were "so overwrought" by Reeves that they

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[2] In its brief on exception, the Employer relies on Union Exhibit #1 to establish the applicability of the confidentiality exception. The document in question is a letter dated January 9, 1997, from Union president Judy Stone to superintendent Charles Little requesting copies of "all letters that were sent to central office during 1995 and 1996 regarding Paul Reeves." However, the letter makes no reference to sexual harassment charges or any related investigation. Another letter from Stone to the superintendent does refer to a grievance which was filed against Reeves by the PCEA. In addition, there are references to unspecified allegations pertaining to Reeves in several of the redacted letters which were disclosed to the Union. However, none of these documents establish that the Employer was conducting an investigation into allegations of sexual harassment involving Reeves, nor do they in any way suggest that the individuals who authored the redacted letters did so under the belief that the documents would remain confidential pursuant to such an investigation. We believe that it would be inappropriate to apply the confidentiality exception in this case based solely on these vague and unexplained statements.

asked the school district to call in a mediator to remedy the situation. We fail to see how that fact has any relevance given that Reeves is no longer employed at the school. Similarly, the mere fact that the Union has members throughout the district does not, in and of itself, prove that the employees who wrote the letters are at risk of being discriminated against based on their involvement in this matter.[3] Absent evidence of some substantial and compelling reason for keeping the identity of the staff members confidential, we cannot say that the information sought by the Union in this case is exempt from disclosure on the basis of confidentiality.

Next, Respondent contends that the Administrative Law Judge erred in ignoring testimony establishing that the Union had access to the names of the staff members who authored the letters. We disagree. The fact that requested information is available from employees does not relieve an employer of its obligation to furnish the same relevant information to the bargaining agent upon request. *City of Detroit (Fire Department)*, 1988 MERC Lab Op 1001, 1009; *City of Pontiac*, 1981 MERC Lab Op 57, 64. In any event, there is nothing in the record to indicate that the Union could have learned the names of these employees from an alternative source. Even if the anonymous staff member who informed Reeves of the campaign to solicit the letters was privy to that information, there is no evidence suggesting that he or she was willing to reveal the names to Charging Party.

Respondent further argues that the Administrative Law Judge deprived the Employer of the opportunity to rebut hearsay testimony when she concluded that the name of the staff member who informed Reeves of the campaign to solicit letters was not relevant to any issue in this case. We disagree. First, it should be noted that testimony concerning information the Union received from the anonymous staff member was not hearsay because it was not offered to prove the truth of the matter asserted; i.e. that the superintendent did in fact hold a meeting with staff members at which he solicited letters pertaining to Reeves. Rather, the Union elicited the testimony to explain why it initially decided to make the information request. See MRE 801(c). In any event, we agree with the Administrative Law Judge's finding that the identify of the staff member is irrelevant to the question of whether the Employer breached its duty to bargain under PERA.

Finally, Respondent excepts to the Administrative Law Judge's determination that it violated PERA by unilaterally calculating the costs of copying and compiling the letters. The Employer contends that it acted legally by setting the fees in accordance with the provisions of FERPA, *Bullard-Plawecki* and the FOIA. Once again, we disagree. Because the information request at issue in this case was made pursuant to PERA, these other statutes are simply irrelevant. Where the union's request entails compiling specific information in the employer's possession, PERA requires that the employer bargain in good faith over the cost of duplication or compilation of the requested data. *Michigan State University*, 1986 MERC Lab Op 407, 409. Cf. *Green Oaks Twp*, 1990 MERC Lab Op 123, 126 (no PERA violation where the employer gave the union the opportunity to examine the requested documents in person without charge and provided information necessary for the union to estimate the cost of having the employer duplicate the documents). Accordingly, we agree with

[3] Of course, these employees are statutorily protected to the extent that such discrimination were to occur.

the Administrative Law Judge's determination that Respondent committed an unfair labor practice by failing to bargain with the Union over the allocation of costs.

ORDER

Pursuant to Section 16 of the Act, we hereby adopt the recommended order of the Administrative Law Judge as our order in this case.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____