STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF BENTON HARBOR,
Public Employer-Respondent,

Case No. C15 D-048
-and- Docket No. 15-021455-MERC

MICHIGAN AFSCME COUNCIL 25
AND ITS AFFILIATED LOCAL 1433,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Bittner Hyrns Daly & Riemland P.C., by Randy S. Hyrns, for Respondent

Kenneth J. Bailey, Staff Attorney, AFSCME Council 25, for Charging Party

DECISION AND ORDER

On June 19, 2015, Administrative Law Judge Julia C. Stern issued her 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

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: July 29, 2015

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

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APPEARANCES:

Bittner Hyrns Daly Riemland Racht, P.C., by Randy S. Hyrns for Respondent

Kenneth J. Bailey, Staff Attorney, AFSCME Council 25, for the Charging Party

DECISION AND RECOMMENDED ORDER
OF ADMINISTRATIVE LAW JUDGE
ON SUMMARY DISPOSITION

On April 2, 2015, Michigan AFSCME Council 25 and its affiliated Local 1433 filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against the City of Benton Harbor pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS).

On April 16, 2015, pursuant to my authority under Rule 1513 of the administrative rules of the Michigan Administrative Hearing System, R 792.11513, I issued an order to Respondent to show cause in writing why it should not be found to have violated its duty to bargain in good faith under PERA by refusing to provide Charging Party with information it requested on November 25, 2014, and on February 5, 2015, pertaining to the discharge of a member of Charging Party's bargaining unit. On May 15, 2015, Respondent filed a timely response to my order. On June 11, 2015, Charging Party submitted an additional statement and update on the status of the charge. Based on the facts set out in the charge and pleadings and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

The Unfair Labor Practice Charge:

The charge alleges that Respondent violated §10(1)(a) and (e) of PERA by, first, failing to respond in a timely fashion to Charging Party's November 25, 2014, request for certain documents and, second, by refusing, on February 13, 2015, to provide Charging Party with these documents and additional documents requested by Charging Party on February 5, 2015.

Facts:

Charging Party is the collective bargaining agent for a bargaining unit of Respondent's employees. Respondent and Charging Party are parties to a collective bargaining agreement covering this unit which expires on June 30, 2015. On October 17, 2014, Respondent terminated the employment of a member of Charging Party's bargaining unit. On October 27, 2014, Charging Party filed a grievance. The grievance cited language in the contract stating that upon the discharge of a unit member for just cause, Respondent is required to provide the employee and "the chief steward and/or president" with notice of the discharge and the specific reasons therefore. The grievance asserted that Respondent failed to provide this notice to the union president. On November 10, 2014, Respondent denied the grievance on the grounds that it was not timely filed under the contractual grievance procedure and on the grounds that it had provided the chief steward with the requisite written notice.

On November 25, 2014, Charging Party presented Respondent with a written request for: (1) a copy of the terminated employee's personnel file; (2) copies of any suspensions previously issued to him; and (3) a copy of his termination letter or discharge document. Respondent did not provide the requested documents or respond to the request.

On or about December 18, 2014, Charging Party notified Respondent of its intent to arbitrate the October 27, 2014, grievance. On or about January 14, 2015, Charging Party sent Respondent an email again requesting the terminated employee's personnel file and a copy of his termination letter. Respondent replied in an email on January 15, 2015, asking the purpose of the request since Charging Party did not have a pending grievance.

On or about February 5, 2015, Charging Party sent Respondent a written request for: (1) a copy of the work orders allegedly not completed by the discharged employee that were used as the basis for his termination; (2) a copy of the policy or process for completing work orders that was in place at the time the discharged employee was employed; and (3) a timeline of how often the employee's supervisors followed up with members of the unit regarding the status of work orders assigned to them. On February 13, 2015, Respondent sent Charging Party the following reply:

> On behalf of the City of Benton Harbor, in accordance with Public Employee Privacy Laws, the Management of the City of Benton Harbor is precluded from providing any/all employee personnel records unless such a request is

> accompanied by a signature release of the individual employee whose personnel records are being requested.
>
> As for the additional records requested by AFSCME Council 25 . . . the City of Benton Harbor doesn't have a current grievance on file for . . . ; therefore, we are under no duty or obligation to expend precious City of Benton Harbor labor hours and resources in a non-grievance exercise.

In its June 11, 2015, response, Charging Party confirmed that Respondent had not provided any of the information that Charging Party had requested. Charging Party further stated that one of the main purposes of the requests was to collect information that would enable AFSCME Council 25's arbitration review panel to decide whether to arbitrate the October 27, 2014 grievance.

Discussion and Conclusions of Law:

In order to satisfy its obligation to bargain under §10(1)(e) of PERA, a public employer must supply in a timely manner requested information which will permit the union to engage in collective bargaining and police the administration of the collective bargaining contract. *Wayne Co,* 1997 MERC Lab Op 67; *Ecorse Pub Schs,* 1995 MERC Lab Op 384, 387. Where the information sought relates to the wages, hours or working conditions of bargaining unit employees, the information is presumptively relevant and the employer will be ordered to disclose it unless the employer rebuts the presumption. *City of Detroit, Dept of Transp,* 1998 MERC Lab Op 250; *Wayne Co, supra.* See also *E.I. DuPont de Nemours & Co v NLRB,* 744 F2d 536, 538 (CA 6, 1984.) Information regarding the discipline of unit employees is presumptively relevant. *Leland Stanford Junior University,* 307 NLRB 75 (1992); *Booth Newspapers,* 331 NLRB 296 (2000). The standard applied is a liberal discovery-type standard. The employer has a duty to disclose the requested information as long as there exists a reasonable probability that the information will be of use to the union in carrying out its statutory duties. *Wayne Co, supra; SMART,* 1993 MERC Lab Op 355, 357.

An employer has no duty under PERA to provide information that does not exist. *State Judicial Council,* 1991 MERC Lab Op 510, 512. See also *Kathleen's Bakeshop LLC,* 337 NLRB 1081 (2002). When a union requests relevant information that the employer does not keep in the form requested, the employer must, at a minimum, grant the union access to its files or bargain in good faith over the allocation of the cost of compiling the specific information requested. *Michigan State Univ,* 1986 MERC Lab Op 407; *Green Oak Twp,* 1990 MERC Lab Op 123, 125-126; *City of Detroit,* 26 MPER 2 (2012) and *City of Detroit,* 18 MPERC 78 (2005). If an employer claims that compiling the data will be unduly burdensome, it must assert that claim within a reasonable period of time after the request is made. *City of Detroit,* 26 MPER 2, *supra,* citing *Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v NLRB,* 711 F2d 348, 353, (CA DC 1983).

As noted above, information pertaining to the discipline of unit employees is considered presumptively relevant. In its February 15, 2015, response to Charging Party's requests for information, Respondent asserts that it is precluded, by "Public Employee Privacy" laws, from providing Charging Party with a copy of the terminated employee's personnel file without a

signed release from the employee. However, neither this letter nor Respondent's response to my order to show cause cites the law or laws it references. [1]

Respondent also asserted in its February 15, 2015, letter that it had no obligation to provide the information requested by Charging Party on February 5, 2015, because there was no pending grievance over the termination. Clearly, Respondent's position is that there is no pending grievance because the October 27, 2014 grievance was not timely filed and because the grievance did not allege that Respondent lacked just cause to discharge the employee, but merely asserted, incorrectly, that Respondent did not provide proper notice of the termination. As indicated by Charging Party's December 18, 2014, letter, Charging Party disagrees with Respondent on these points. It is well established that both these questions – timeliness and the scope of the grievance – are issues properly left to an arbitrator when the union and employer have agreed to an arbitration provision that does not explicitly exclude the dispute. See *Brown v Holton Pub Sch*, 397 Mich 71, 73 (1976); *Ottawa Co v Jaklinski*, 423 Mich 1, 22 (1985). I find that Respondent has not rebutted the presumption that the information Charging Party sought about the discharge of its bargaining unit member was relevant to Charging Party's performance of its statutory obligations.

As noted above, Respondent did not have an obligation to provide Charging Party with information that did not exist. If Respondent did not have the information in the form requested, and compiling the information entailed a significant cost, it had the obligation to bargain in good faith with Charging Party over sharing the cost of compiling the information. In either case, however, Respondent had the obligation to tell Charging Party its reasons for failing to provide the information.

I conclude that Respondent violated its obligation to bargain in good faith under §10(1)(e) of PERA by failing and refusing to provide Charging Party with the information it requested on November 25, 2014 and February 5, 2015. I recommend, therefore, that the Commission issue the following order.

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[1] Section 13(1) of the Michigan Freedom of Information Act (FOIA), MCL 15.243, contains a list of items exempt from disclosure under that statute, including the following:

> (a) Information of a personal nature if public disclosure of the information would constitute a clearly unwarranted invasion of an individual's privacy.
>
> . . .
>
> *(l)* Medical, counseling, or psychological facts or evaluations concerning an individual if the individual's identity would be revealed by a disclosure of those facts or evaluation, including protected health information, as defined in 45 CFR 160.103.

In *Bradley v Saranac*, 455 Mich 285 (1997), the Supreme Court held that performance appraisals and disciplinary complaints contained in personnel files is not information "of a personal nature" so as to make these files exempt from disclosure. But see, *Michigan Federation of Teachers v Univ of Mich*, 481 Mich 657 (2008) (employees' home addresses and phone numbers are information of a personal nature within the meaning of that subsection.) As noted above, Respondent did not explicitly cite either the FOIA or any other statute.

RECOMMENDED ORDER

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

1. Cease and desist from failing and refusing to provide AFSCME Council 25 and its affiliated Local 1433 with information relevant to the performance of its duties as bargaining agent for employees of Respondent

2. Take the following actions to effectuate the purposes of the Act:

   a. Furnish AFSCME Council 25 and its affiliated Local 1433 with the information it requested on November 25, 2014, and February 5, 2015, including but not limited to a copy of the personnel file of the member of the union's bargaining unit terminated on October 17, 2014, and a copy of this individual's termination letter.

   b. 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

_____

Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: June 19, 2015

NOTICE TO EMPLOYEES

UPON THE FILING OF AN UNFAIR LABOR PRACTICE CHARGE BY Michigan AFSCME COUNCIL 25 AND ITS AFFILIATED LOCAL 1433, THE MICHIGAN EMPLOYMENT RELATIONS COMMISSION HAS FOUND **THE CITY OF BENTON HARBOR** 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 NOT refuse to provide AFSCME Council 25 and its affiliated Local 1433 with information relevant to the performance of its duties as the bargaining agent for employees of Respondent.

WE WILL furnish AFSCME Council 25 and its affiliated Local 1433 with the information it requested on November 25, 2014, and February 5, 2015, including but not limited to a copy of the personnel file of the member of the union's bargaining unit terminated on October 17, 2014, and a copy of this individual's termination letter.

As a public employer under the PERA, we are obligated to bargain in good faith with representatives selected by the majority of our employees with respect to rates of pay, wages, hours of employment or other conditions of employment. This obligation includes the duty to provide these representatives, in a timely fashion, with information relevant to its duties to engage in collective bargaining, police the collective bargaining agreement, and represent its members.

CITY OF BENTON HARBOR

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. C15 D-048/15-021455-MERC