

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

In the Matter of the PERA Salary
Determinations Affecting Retired and
Active Employees of the City of Duluth

Allen Johnson, et al., Petitioners

**ADDENDUM TO PETITIONERS'
MEMORANDUM IN SUPPORT OF
PETITIONERS' MOTION TO
COMPEL DISCOVERY**

OAH Docket No. 4-3600-2080902

Petitioners submit this Addendum in support of their Motion to Compel Discovery from the City of Duluth. The City has objected to each of the Demands for Production of Documents submitted by Petitioners. Those Demands for Production are set forth below, together with Petitioners' response to the City's objections.

1. All of the documents identified, referred to, and/or relied upon in City of Duluth's Answers to Interrogatories, which Interrogatories have been served on you contemporaneously herewith.

RESPONSE: This demand simply refers to topics raised in the Interrogatories. If the Judge concludes that the topics should be set forth specifically in the Demands for Production, then Petitioners request that they be allowed to amend Demand No. 1 to incorporate each topic raised in the Interrogatories.

2. Copies of any and all statements obtained by City of Duluth.

RESPONSE: The request for statements obviously applies to the present dispute over contributions to PERA and how they should be treated. A request for statements is a standard discovery request. Discovery of statements is specifically acknowledged in MRCP 26.02(d). Statements are defined there as being written statements or recordings or transcriptions of oral statements. For example, there may be written or tape recorded statements made by persons regarding their recollection of events, or contemporaneously made in connection with the investigations or other events of this matter. People might state their belief regarding what compensation was to be included in PERA. Persons may have made statements regarding their recollection of statements made by other persons. Given the City of Duluth's clear knowledge of the subject of the present litigation and the Investigation completed by Kim Hall on behalf of the City, the City surely knows what kinds of statements are requested and further clarification is not needed. If further clarification is needed by the Court, Petitioners can make that further clarification.

3. Any relevant documents or papers which would help describe, identify, indicate, explain or clarify the City of Duluth's position or PERA's defenses or claims.

RESPONSE: This is clearly relevant. Although the City of Duluth is not a present party to this action, it negotiated the contracts that provided compensation on PERA benefits to the Petitioners. The City also responded to the Office of State Auditor when the issue of deferred compensation was questioned in the audit in 2001 and convinced the State Auditor of the legality of the City's practice. Any documents that set forth the City's position, or PERA's defenses or claims, clearly are relevant. These matters go back to approximately 1996 and extend to the future. The City also completed an investigation by Kim Hall in 2007 which is relevant. If there are particular documents which the City identifies and claims are protected by the attorney-client privilege, then the City should identify those documents in the appropriate log and those documents can be reviewed by the Court in camera if necessary. Request No. 3 is a proper request.

4. A copy of any written investigations reports, whether prepared by you or other persons in any way relating to the allegations in the Petition for Review, specifically including the investigation prepared by Kim Hall.

RESPONSE: The City is not a party to this matter. It is not for the City to determine the scope of discovery. The City asserts that an investigation by Kim Hall is not relevant. Petitioners disagree. Given the broad scope of discovery, both Kim Hall's investigation, and any other investigations or reports relating to the allegations in the Petition for Review, should be produced. The City has provided no factual support that there is pending or threatened litigation, and the City has chosen not to participate in this proceeding. If there is private data on individuals, that private data can be redacted. That is not a basis to not produce the documents. The City's investigation may disclose the history of negotiations, the construction intended by the parties, understandings of communications to and from PERA and other matters that may be relevant here. This is a proper request within the scope of discovery and the issues framed by PERA.

5. All other documents or tangible evidence which related to the subject matter of this litigation, but have not been specifically requested in the foregoing paragraphs, and specifically those documents or things referred to in City of Duluth's Answers to Interrogatories.

RESPONSE: This is a more broad request, dealing with documents that may have been identified in responding to the Interrogatories. If necessary, the Petitioners can clarify this to incorporate the Interrogatory topics into this demand. However, the Interrogatories are referenced so that should not be necessary.

6. Identify and produce all documents relating to inquiries to PERA by the City of Duluth, or by PERA to the City of Duluth, regarding the characterizations of deferred compensation or family health coverage or personal leave days as salary between July 1, 1994, and the current date, specifically including any inquiries as follows:

- (a) Inquiries in 1995 by Karl Nollenberger, Bryan Brown, or by anyone on their behalf.
- (b) Any inquiries by the State Auditor in 2000 and/or 2001, including by Wayne Parsons or his representative, or Greg Mutchler.

- (c) Contact by the City of Duluth to PERA in July 2007 relative to a change in practice by the City in reporting deferred compensation contributions, family health coverage or personal leave days as eligible salary.
- (d) Letter from the City of Duluth to PERA dated September 15, 2008, notifying PERA of a change in reporting by the City of Duluth of deferred compensation, family health coverage, personal leave days, or other amounts.

RESPONSE: The City says that it will only provide documents in its possession from July 2007 forward, it will not provide older documents, or other documents other than those identified. The City makes a broad objection that this is not discoverable information and is unduly burdensome. The inquiries are rather narrowly focused. Specific documents or investigations are identified. The City is disingenuous if it is claiming that it does not know what is referenced. The City has been investigating these matters for years. The City should produce the documents that clearly do exist. The existence of other documents that may be harder to locate is not an excuse to not produce the documents that clearly do exist and are known to exist.

The City claims that attorneys' notes in connection with any communication with PERA are protected attorney work product. Communications with PERA are not protected. If the attorneys made notes of communications with PERA, the Judge can review those and determine whether they truly are protected.

The City notes that there may be litigation between the Petitioners and the City. There is no current litigation, and the City has chosen not to participate in this proceeding. That is not a reason to refuse the discovery. The discovery is relevant to the present proceeding.

7. Identify and produce all city payroll reports provided by the City of Duluth to PERA between January 1, 1995 and date of retirement for the following employees: Paul Ostman, Terry Purcell, Mark Behning, John Edwards, Doug Michog, Doug Belanger, Dave Salvesson, Dave Wedin, Dennin Bauers, L. J. Harvey, Jim Charbonneau and William L. Johnson. (These reports may be on Form PW-00250 or its predecessors or successors.)

RESPONSE: The City did not object to this demand.

8. Identify and produce all documents in your possession related to the July 2007 change in practice by the City of Duluth in reporting to PERA deferred compensation, family health coverage, personal leave days, or other amounts as eligible salary.

RESPONSE: This also is proper. The City of Duluth apparently did make a change in practice in July of 2007. The change in practice needs to be identified. If there are reasons for the change in practice present in the City of Duluth's documents, then that is also relevant to the present case. If documents exist regarding prior practice of the City and understandings of the City regarding matters at issue, then those documents are also relevant. It should be noted once again, that the City has been aware of these issues for several years. The City surely knows what kinds of documents are being requested and it should not be that difficult to obtain and produce those documents.

9. Identify and produce all correspondence, notes or communications between the City of Duluth and PERA on September 15, 2008, relating to a change in reporting by the City of Duluth of deferred compensation, family health coverage, personal leave days, or other amounts.

RESPONSE: The City did not object to this demand.

10. All notes, memos, or written documentation by Karl Nollenberger and/or Bryan Brown related to labor negotiations where deferred compensation was added to the Fire Department contract, believed to be 1994 or 1995.

RESPONSE: This also is clearly relevant. PERA notes that the relevant issues go back to at least 1996. The contract provisions first arose in the 1994 contract. Mr. Brown was functioning as a labor negotiator, not an attorney in that setting. These documents go back to 1994 and 1995. The intent and understanding of the parties is relevant to the present case. Some of the documents may have been made public either at public meetings such as City Council meetings or in negotiation sessions. Just the fact that there was a communication from Mr. Brown to the City does not necessarily make such communication an attorney-client privileged document. The confidentiality of labor negotiations under the Open Meeting Law expires once the contract is settled. Those documents should be produced and the Judge can determine whether they are privileged.

Any notes or communications by Mr. Nollenberger are not privileged. He was not an attorney. His notes were gathered in notebooks located on the credenza in the office of the Chief Administrative Officer as recently as April 30, 2008.

The City claims that labor negotiations information is all protected non-public data under Minn.Stat. § 13.37. However, that statute provides that the data is only non-public if it is a management position on economic or non-economic names that have not been presented during the collective bargaining process. Therefore, information that was presented is public data. The information is discoverable. The Judge should determine whether information from 1994 or 1995 can possibly be claimed as non-public since the contract negotiations in question were 14 years ago and the current contracts are completely different. This is discoverable information.

11. Identify and produce e-mail from the City of Duluth Auditor to the PERA account information management division, specifically an e-mail from July 31, 2007, relating to deferred compensation, family health coverage, personal leave days, or other amounts.

RESPONSE: The City did not object to this demand.

12. Provide a copy of the letter from September 2008 from the City of Duluth to PERA regarding characterization of deferred compensation, family health coverage, personal leave days, or other amounts as salary.

RESPONSE: The City did not object to this demand.

13. Identify and produce any communications between PERA and the City of Duluth from September 2008 to the present relating to the characterization of deferred compensation, family health insurance, personal leave days, or other amounts as salary. Include:

- (a) Who was included in the contact, including their name, business address, telephone number and e-mail address.
- (b) The substance of the contact between the individuals.
- (c) The date and location of the contacts.
- (d) Whether there are any notes or correspondence including e-mail evidencing the contact. Provide copies of any documents relating to said contact.

RESPONSE: The City has stated that it will produce at least some of these documents. Insofar as it may have documents that it refuses to produce, the identity of those documents should be put in a log and given to Petitioners. The log and the documents that are not produced should be given to the Judge for review to determine if they are subject to production. Such documents include any documents which are claimed to be under attorney-client privilege.

14. Provide copies of any communications including e-mails, letters and notes of telephone conversations between PERA and any of the following individuals on behalf of the City of Duluth related to deferred compensation as salary: Les Bass, Todd Torvinen, Jackie Morris, Jeanie Scott, Marilyn Kroll, Elaine Hansen, Bryan Brown, John Hall and Genie Stark.

RESPONSE: The City refuses to produce that information. It claims that past history is not relevant. That is not correct. The requested communications should be produced. It should not be that difficult for the City to search for those records, given its recent investigations into these matters. It likely has already done so. E-mails should not be that difficult to search given that the names of the individuals are identified clearly. Insofar as Mr. Brown is both a plan recipient and was a former attorney for the City, if there are claims of attorney-client privilege, those documents should be identified on a log and given to the Judge for review, together with giving a copy of the log of documents to Petitioners.

15. All payroll earnings records from January 1, 1997 through date of retirement for the following employees: Paul Ostman, Terry Purcell, Mark Behning, John Edwards, Doug Michog, Doug Belanger, Dave Salvesson, Dave Wedin, Dennin Bauers, L. J. Harvey, Jim Charbonneau and William L. Johnson.

RESPONSE: The City did not object to this demand.

16. Any written policies of the City of Duluth from 1995 to present related to deferred compensation.

RESPONSE: The City did not object to this demand.

17. Any written opinions by the Duluth City Attorney or other attorneys received by the City of Duluth related to the Petition for Review in the above matter.

RESPONSE: As noted earlier, if there are documents which are claimed to be subject to attorney-client privilege, a log should be prepared of those documents. The log should be given to Petitioners. The log and the documents should be given to the Judge. The documents may or may not be subject to the attorney-client privilege since the City has yet to provide any factual basis that any such opinions relate to pending or threatened litigation. For example, if a documents was given to the City Council or the Mayor in a manner such that it was public, then the document would not be privileged. Certainly if the document was provided to the City Council in an open meeting, it would not be privileged. The mere fact that a document may be prepared by one of the attorneys for the City, does not alone make the document privileged.

18. All communications within the City of Duluth including e-mails, memos, and notes of employees and public officials relating to the issues raised in the Petition for Review, specifically including, but not limited to, the following employees: Les Bass, Todd Torvinen, Jackie Morris, Jeanie Scott, Marilyn Kroll, Elaine Hanson, Bryan Brown, John Hall and Genie Stark.

RESPONSE: The individuals are specifically identified. The issues relating to this matter have been clearly identified. Therefore, the City's claims of lack of specificity are not valid. The documents sought go back through the period that is relevant here, back to 1994. Insofar as there may be documents that the City cannot reasonably find, then the City should describe the procedure that would have to be followed and the reason why that is burdensome. The City may already have such documents in its possession, given its review of these matters for several years and its internal investigation by Kim Hall in 2007 and the response to the State Auditor in 2001. The City's objection is not a reason to not produce the documents that can be readily produced. Moreover, in the more recent years when the City presumably stored many or all of its communications in electronic form, such as e-mail, searches for these names in the electronic records is not unduly burdensome.

As noted earlier, communications with the attorney of the City may or may not be privileged communications. Bryan Brown is a Petitioner. Any communications with attorneys which are claimed to be privileged should be listed in a log. The log should be given to the Petitioners. The Judge should be given the log and the documents so the Judge can determine if the documents should be produced.

THE CITY'S REQUEST FOR COMPENSATION

The Petitioners submit that the City should not be entitled to compensation for the documents that it can produce without an undue burden. The City was a party to the collective bargaining agreements. The City characterized the compensation over time. The City apparently now claims that it made a mistake. The City is not an innocent bystander. Moreover, the documents requested from the City should not be for the most part unduly burdensome to produce. It is expected that many of them are already present in readily locatable files. The City has been reviewing these matters for several years now and Kim Hall completed the City's own internal investigation.

If the City is claiming undue burden, trouble and expense in producing some documents, the City should at least outline the procedures to be followed and the expected expenses of locating those documents. Petitioners may be able to assist in locating documents without substantial cost to the City. The City's blanket request for compensation should be denied. The City is not entitled to compensation it would not receive if the City were a party to this proceeding.

Dated: _____

/s/
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