

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

**MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO COMPEL DISCOVERY**

Allen Johnson, et al., Petitioners

OAH DOCKET NO. 4-3600-2080902

Petitioners submit this Memorandum in support of their Motion to Compel Discovery from the City of Duluth. Petitioners submit that the City of Duluth is not properly responding to the subpoena issued by Chief Administrative Law Judge Raymond R. Krause and served upon the City on October 21, 2009. The subpoena and its attached Interrogatories and Request for Production of Documents were due on November 19, 2009. The City of Duluth served its Motion Objecting to the Subpoena on November 16, 2009, three days before production was due.

**AUTHORITY FOR DISCOVERY FROM THE CITY OF DULUTH
AND AUTHORITY FOR THIS MOTION**

Proceedings before the Administrative Law Judge are governed by the Minnesota Administrative Procedure Act and by the applicable rules. Rule 1400.6700 deals with discovery in administrative proceedings. Subd. 2 of that Rule provides that all discovery permitted under the Minnesota Rules of Civil Procedure shall be permitted in administrative proceedings. Consequently, reference should be made to the Minnesota Rules of Civil Procedure as regards the scope of discovery.

Rule 1400.6700, Subd. 2 provides that parties seeking discovery should seek a Motion before the Administrative Law Judge in order to resolve discovery disputes. This Motion therefore is properly brought before the Administrative Law Judge.

**SCOPE OF DISCOVERY UNDER THE
MINNESOTA RULES OF CIVIL PROCEDURE**

MRCP 26.02 deals with the scope of discovery. That Rule effectively provides that the scope of discovery shall be liberally construed. Discovery shall be permitted of things which may lead to admissible evidence.

The Rule regarding the scope of discovery should be liberally construed in favor of broad discovery. Larson v. Ind. School Dist. No. 314, 305 Minn. 358, 358 N.W.2d 744 (1975).

It is well established that the scope of discovery is very broad. The scope of discovery extends to inadmissible evidence, if the information sought appears reasonably calculated to lead to discovery of admissible evidence. Ramsey Co. v. S.M.F., 289 N.W.2d (Minn. 1980). Discovery has the objective of encouraging the exchange of information prior to trial and to discourage and prevent unjust surprise and prejudice at trial. Gale v. Co. of Hennepin, 609 N.W.2d 1887 (Minn. 2000); Gebhard v. Niedzwicki, 265 Minn. 471, 122 N.W.2d 110 (1963).

MRCP 26.02(a) provides that “parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party, seeking discovery, or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial, if that information appears reasonably calculated to lead to the discovery of admissible evidence.”

The term “relevant” has been defined to include any matter that “bears on or that reasonably could lead to other matter that could bear on any issue that is or may be in the case. Oppenheimer

Fund, Inc., v. Sanders, 473 U.S. 340, 98 U.S.C. 2380, 57 L.Ed.2d, 253 (1978). A party should disclose evidence even if it may be within the knowledge of the person seeking the information. Boldt v. Sanders, 261 Minn. 160, 111 N.W.2d 225 (1961).

Consequently, it is not required that the information sought in discovery itself is admissible. It is only required that the information may lead to the discovery of admissible evidence. This is a very broad scope of discovery.

It is not for the City of Duluth to determine the scope of discovery, particularly where the City has chosen not to participate in this proceeding as a party. It is not for the City of Duluth to determine ahead of time whether the production of records before 2007 may lead to the discovery of admissible evidence. This case is still in the stage of discovery. The Court has not made rulings on the potential relevance of any documents or other evidence before the year 2007. PERA's Statement of Issues references facts back to 1996.

Petitioners are entitled to the general information sought in discovery. Petitioners are certainly willing to try to work with the City of Duluth to minimize inconvenience to the City of Duluth. However, it should be noted that the retirement benefits of a large number of present and former employees of the City of Duluth are at stake in this matter. This matter involves both a large number of retirees and active employees and a substantial sum both individually and cumulatively. Therefore, discovery should be allowed as liberally permitted by the Rules in order to protect the interests of this large number of people and the substantial sums involved in this matter.

NATURE OF THE OBJECTIONS BY THE CITY OF DULUTH

Petitioners have reviewed the objections of the City of Duluth. It appears that the objections fall generally into the following categories.

1. Objections as to form. The City of Duluth objects to answering Interrogatories. It argues that interrogatories to non-parties are not permitted and that Petitioners can only take depositions or seek documents from the City of Duluth;

2. The City of Duluth claims that some records are protected under attorney-client privilege. This applies only to limited records;

3. The City of Duluth claims that any records before the year 2007 are not discoverable. The City claims that records before the year 2007 are not relevant to the present proceeding. However, that is not the position of the Petitioners. The contracts and negotiations regarding the contracts in the present matter, and the repayment sought from the Petitioners by PERA go back to at least 2001 and apparently back to 1996. The negotiations and contracts go back earlier, to at least the year 1996. Questions regarding audits, and other PERA knowledge of audits, etc., go back to at least the year 2001 and possibly earlier. Issues revolving around the precise nature of the contracts and how they are applied to statutory language go back to at least 1996. Questions regarding the administration of the contracts and the salary and benefits involve those applied to the applicable statutes go back to at least 1996. As will be discussed in further detail, the Petitioners submit that this information from before 2007 is potentially relevant and is discoverable.

I. OBJECTIONS TO THE FORM OF PETITIONER'S DISCOVERY

The City objects to Interrogatories submitted by the Petitioners. Petitioners agree that the Minnesota Rules of Civil Procedure do not specifically provide for Interrogatories for non-parties. Petitioners could simply note the depositions of a number of present and former City employees. That would be expensive and time consuming. Petitioners thought that the use of Interrogatories would be a more efficient and less expensive way of trying to gather some of the requested

information regarding the City and its records.

Moreover, the City concedes that Demands for Production of Documents can be served on third parties. In this respect, see specifically MRCP 30.01. That Rule specifically allows discovery of third party witnesses. See also MRCP 45.01. This Rule specifically allows for Demands of Production of Documents to be made of third parties.

Although the Rule itself only directs the production of documents, etc., copying is also recognized as part of that Rule. See Herr and Haydock, Minnesota Practice Volume 1A, note to Rule 45.02, author's comment 45.6: "Rule 45.02 plays an important part in Discovery. Rule 34 provides for the inspection and copying of the items for parties to an action. Rule 45 allows a party to obtain the production of documents for inspection and copying from non-parties. Many of the procedures and limits of Rule 34 as defined by case law are applicable to Rule 35 Subpoenas Duces Tecum." This comment recognizes that Rule 45.02 also does allow for the copying of documents that are produced.

Consequently, there is no doubt that Petitioners are entitled to the production of documents from the City of Duluth. Some of the Demands for Production of Documents refer back to the Interrogatories. Those Demands for Production of Documents could be redrafted to specifically request the noted information, in the Demand for Production of Documents, instead of this reference to the Interrogatories. If this would help the City of Duluth, Petitioners would gladly redraft those particular Demands for Production. The Documents requested will be the same. Petitioners submit that the City of Duluth should simply provide the requested information, whether the information request is detailed in the Demand for Production or in the referenced Interrogatory.

II. DOCUMENTS WITHIN THE CLAIM OF ATTORNEY-CLIENT PRIVILEGE

The Petitioner seek a variety of documents which may lead to the discovery of admissible evidence.

The City of Duluth claims that some of the documents requested are subject to the attorney-client privilege. It refers to documents drafted by one of the Petitioners, retired City Attorney Bryan Brown. There may also be documents drafted by other attorneys. Since Bryan Brown is a retiree of the City and a Petitioner in this proceeding any privilege claim must be very narrowly drawn. Communications between Mr. Brown and the City Council or PERA or others, would not be privileged. The City of Duluth appears to object to any and all such documents, whether or not they are just internal documents in the nature of attorney to client communications. The scope of the attorney-client privilege is narrow for lawyers representing government entitles, and the City has the specific burden to show how any documents may actually be privileged, since none are related to pending or threatened litigation, and the City has chosen not to participate in this proceeding.

The Petitioners request that the City produce all communications from Mr. Brown or other attorneys in the City Attorney's office related to the issues raised in this proceeding. If the City claims any such documents are privileged due to pending or threatened litigation, it is requested that the Judge perform an in camera inspection in order to determine if those documents are in fact subject to the attorney-client privilege.

The Petitioners have also requested copies of all investigations performed by the City of this issue. An investigation was performed by Kim Hall for the City during 2007 or 2008. Hall is not an attorney. There may be other investigations or studies performed by the City. These other documents should be produced.

MRCP 26.02 (c) deals with trial preparation materials. This Rule specifically provides that documents prepared in anticipation of litigation, or for trial, are discoverable. This includes documents prepared by the other party's attorneys, as long as attorney-client privilege is not violated. Discovery of trial preparation materials is allowed "only upon showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is not able without undue hardship to obtain the substantial equivalent of the materials by other means."

It is believed that there are documents that City has, reviewing the legal and factual issues involved in the present case. Petitioners have no direct access to those materials. Those materials should be produced, if they do exist.

III. THE CITY'S CLAIMS THAT DOCUMENTS BEFORE 2007 ARE NOT RELEVANT

The City apparently claims that all documents before 2007 are not "relevant." It is not for the City as a non-party to decide what is relevant. The Petitioners claim that documents as far back as perhaps 1997, and possibly even earlier are relevant to the present issues. The Judge has not determined that the documents before 2007 are not relevant. There are issues of contract formation and interpretation. There are issues of promissory estoppel, waiver, laches, etc. The history of these matters is relevant. It does relate to issues raised in the case.

Reference should be made to the Statement of Issues from PERA. The Statement of Issues includes many different claims and defenses. The Statement of Issues provided by PERA includes promissory estoppel, waiver, laches and statute of limitations as issues raised. That clearly is an issue in the case. The history of these claims clearly is at issue and is discoverable.

The Statement of Issues of PERA refers back to 1996. Petitioners also have raised issues that refer back to 1996. Those documents from before 2007 clearly are relevant and are subject to discovery.

THE CITY'S CLAIMS OF UNDUE BURDEN

The City claims that producing the requested documents would be an undue burden. At a minimum, the City should produce the documents that it does have readily at hand. The City has been aware of the issues raised in this matter for many years. There were audits back in approximately 2001 dealing with this issue. There were contracts going back to at least 1996 or 1997 dealing with these issues. There apparently have been reviews of these matters in the City records and among City personnel for a number of years.

As regards the documents which may be difficult to pull out, the Petitioners are willing to work with the City in identifying the documents and in selecting those documents. Insofar as the documents are not privileged, the Petitioners would probably be willing to work with the City by allowing the Petitioners access to the City's records and allowing the Petitioners to select those records that are desired for review, copying, etc. The City has made no effort to identify any such documents to assist the parties and the Judge in this determination. The City cannot rely on a blanket refusal.

The City apparently is not willing to abide by the clear language of MRCP 45.01(a)(3), the Rule which allows subpoenas for the production of documentary evidence. The Rule clearly provides that the subpoena may command a person "produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified." The Rule does not specifically provide for copying, but copying of course is permitted with Discovery, otherwise the Discovery of documents would be meaningless. The City, and Petitioner's attorney are all familiar with procedures for copying documents that attorneys and

clients work out, including the cost. At this point, the City has not even identified the volume of documents which might be relevant. The costs of copying may or may not be an issue, and that will not be known until the volume of documents produced is known.

If the City continues to claim that it would be a burden to produce some of those documents, the City should identify the specific documents which would be a burden to produce, the work that would be necessary to produce those documents, and the approximate time and cost that it would take the City to produce those documents.

It also might be noted, that although the City is not a party in this matter, the City is intimately involved with these matters. It is the City which negotiated the contracts with the Petitioners. It is the City that represented that the compensation at issue could be treated as promised in the contracts. It was the City which was audited regarding those PERA contributions. It was the City which was obligated to make the contributions pursuant to the Contracts. The City is intimately involved in these matters yet has chosen to remain uninvolved in the litigation. If the Judge determines these items were incorrectly treated as salary, that is all, or substantially, the fault of the City.

It also should be noted the City is a municipality. Its records are public records. This is not a matter of a private corporation having to search through its confidential business records. Except for possible claims of attorney-client privilege regarding internal advice given by City Attorneys to the City in pending or threatened litigation, all of the other documents should be public documents, available to anyone even without litigation and even without a subpoena.

CONCLUSION

Petitioners submit that the Judge should compel the City of Duluth to produce the requested documents. Its defenses and objections are not well founded. To the extent that there may be issues of attorney-client privilege regarding selected documents, Petitioners request the City be required to prove its pending or threatened litigation exception, and required to produce the documents for an in camera inspection. The City's opinion as a non-party of the scope of the litigation does not have any bearing on the scope of discovery permitted. If the Court desires that the Petitioners redraft their Demand for Production of Documents so as to incorporate the discovery requested in the Interrogatories, the Petitioners certainly will do so. The result will be the same. The City of Duluth should produce the requested documents. The City, at this time, should produce all of the documents which it can readily provide.

If the City continues to claim an undue burden, the City should give more detail regarding those claims of burden so that it can determine whether the documents should be produced, and if the Petitioners can help reasonably reduce any unreasonable burden on the City.

Petitioners have also filed herewith and incorporate by reference an "Addendum" which addresses each specific discovery request and the City's objection.

Dated: November 25, 2009.



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