

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE PUBLIC EMPLOYEES RETIREMENT ASSOCIATION

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

Allen Johnson et al., Petitioners

OAH Docket No. 4-3600-2080902

CITY OF DULUTH'S RESPONSE TO MOTION TO COMPEL DISCOVERY

INTRODUCTION

The City of Duluth's ("City") involvement in this case began when Petitioners represented by Elizabeth Storaasli served a subpoena demanding that the City, a nonparty, answer interrogatories and produce documents. The City filed an objection to the subpoena with the Office of Administrative Hearings ("OAH"). Petitioners did not respond to the objection and the objection is currently pending before the Administrative Law Judge ("ALJ"). On December 8, 2009, the City received a courtesy copy of Petitioners' motion to compel discovery, which sought an order requiring the City to respond to the subpoena. In the interest of judicial economy, the City incorporates herein and relies upon its Memorandum of Law Objecting to Subpoena Issued in Favor of Elizabeth Storaasli in response to the motion to compel discovery, along with the following:

**MOTION TO COMPEL DISCOVERY THAT SEEKS INFORMATION BEYOND THE
SCOPE OF THIS PROCEEDING MUST FAIL**

The jurisdiction of the OAH and ALJ is set forth under the Minnesota Administrative Procedure Act, Minn. Stat. Ch 14. A party seeking discovery may bring a motion before the ALJ, but the party has the burden of showing that the discovery is needed for the proper presentation of the party's case. Minn. Rule 1400.6700, Subp. 2. All privileges at law are recognized. *Id.* In order to prevail, Petitioners must show that they need the discovery for the presentation of their case in this administrative proceeding.

Petitioners concede that there is no authority to order a nonparty to answer interrogatories. Petitioners admit that the City is not legally required to answer interrogatories. As there is no

authority for the discovery they seek, this part of their motion must fail as a matter of law.

In its Order denying Petitioners' motion to join the City, the ALJ found that the Office of Administrative Hearings does not have jurisdiction over Petitioners' contractual relationship with the City and their claims involving labor contract administration. Despite the ALJ's ruling, Petitioners continue to seek information relating to the actions or non-actions of the City, including the privileged opinions and work product of its attorneys, that is beyond the scope of this administrative proceeding.

What the City knew or when it knew it has no bearing on the determination of whether the deferred compensation benefit is PERA eligible salary. The actions or inactions of the City cannot change the law. Petitioners are clearly trying to conduct discovery for claims, which must be brought in another forum. Petitioners fishing expedition for documents immaterial to the adjudication of the issue in this administrative proceeding should not be tolerated.

PROCESS FOR DATA UNDER MN DATA PRACTICES ACT

In Document Request Number 4, Petitioners seek a copy of any investigative report "relating to the allegations in the Petition for Review". Documents responsive to this request, if any, may contain private data on an individual protected under Minn. Stat. §13.43.

The Minnesota Government Data Practices Act, Minn. Stat. §13.03, Subd. 6, sets forth the process by which a person may seek access to not public data. This process applies to a motion to compel discovery before an ALJ. *Id.* First, the person must establish that the data are discoverable. In other words, Petitioners must demonstrate a need for the data. Petitioners cannot do so because any data, to the extent it exists, is immaterial to the issue in controversy. Even if they can make the requisite showing, the ALJ must determine whether the benefit to the Petitioners outweighs the harm to any privacy and confidentiality interests. This may require an in camera review of the data along with notice to the subject of the data. If appropriate, the ALJ may also issue a protective order to assure proper handling of the data. Petitioners' motion must be denied.

BURDEN TO CITY AND COSTS INVOLVED

On November 19, 2009, the City notified Petitioners that documents not subject to objection were available for review. These documents resulted primarily from a search of electronically stored data, and included various e-mails, correspondence and numerous payroll records. Petitioners' counsel reviewed those documents several days later and requested copies. The City provided copies at a cost to Petitioners and additional documents wait to be picked up.

If the City is ordered to produce other documents, if any, responsive to Petitioners' document requests, it will be required to physically examine approximately thirty-five (35) bankers boxes stored by the finance office and administration. The City will need to dedicate staff time and resources to review these materials, some of which are less than ideally organized. It is overly burdensome to require the City to examine these boxes for documents, which are outside the scope of this proceeding. At a minimum, the City is entitled to charge its costs for searching and

retrieving the documents, along with compiling of the documents, within a reasonable amount of time. See Minn. Stat. §13.03, Subd. 3(c).

PERSONAL LEAVE ISSUE RESOLVED

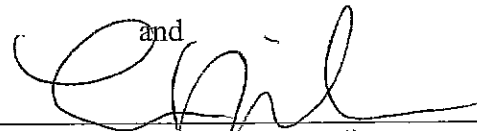
Finally, the City understands by copy of a letter dated November 23, 2009, from Jon K. Murphy, Attorney for the PERA Board of Trustees, to the parties (with a copy to the ALJ), that “PERA intends to issue amended determinations which would treat the cash-out of personal leave days as “salary” for PERA purposes.” Mr. Murphy further notes that the parties will enter into a stipulation to resolve the issue. The personal leave issue is resolved and Petitioners cannot show any need for documents relating to that issue.

CONCLUSION

For these reasons, the City requests that the Petitioners’ motion to compel discovery, including attorney fees, be denied.

Dated this 23rd day of December, 2009.

GUNNAR B. JOHNSON, City Attorney

and


LISA D. WILSON (#231174)
Assistant City Attorney
Attorneys for Defendant
CITY OF DULUTH
410 City Hall
411 West First Street
Duluth, Minnesota 55802
(218) 730-5490