

Metro Bureau Executive Board Meeting – October 11, 2019**INVESTIGATIVE REPORTS AND THE DUTY TO DISCLOSE**

The Public Employment Relations Act (“PERA”) requires a public employer to supply requested information in a timely manner in order to satisfy its duty to bargain in good faith. Supplying the requested information permits the union to engage in collective bargaining and to police the administration of the labor contract. However, the Michigan Employment Relations Commission (“MERC”) has held that internal investigative notes, reports, and witness statements pertaining to the allegations of a public employee’s misconduct fall within a confidential information exception to the general obligation to disclose. Thus, an employer does not need to disclose such investigatory documents to the union.

I. PERA’s Disclosure Requirement

Section 10(1)(e) of PERA requires an employer to give requested information to the union in order to effectively engage in collective bargaining and to police the administration of the contract. MCL 423.210(e); *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. Under federal law, this obligation may extend to information necessary for the processing of grievances. *NLRB v ACME Industrial Co*, 385 US 432, 436 (1967). 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. *EI DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538 (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. *SMART*, 1993 MERC Lab Op 355, 357.

II. Exception to PERA’s Disclosure Requirement

Although it is the employer’s obligation to provide requested information to the union, MERC has noted that confidentiality concerns outweigh a union’s need for records pertaining to internal investigations. MERC’s rationale is that concerns over disclosure of information that is uncovered during an investigation interferes with carrying out a thorough investigation. Rather, it is essential that internal investigations into allegations of misconduct by public employees proceed without the impediment of concerns that the information uncovered may be subject to disclosure.

Kent County (Sheriff), 1991 MERC Lab Op 374, 377, involved a request for internal investigative disciplinary reports which the employer had relied upon in disciplining two deputies for alleged violations of departmental policy. The reports contained statements and observations from witnesses and the accused, as well as reviews of relevant policies, rules, regulations and laws pertaining to the violations. After reviewing Commission precedent and prior decisions of the National Labor Relations Board (“NLRB”) and the US Court of Appeals for the Sixth Circuit, **MERC concluded that “internal investigations conducted for the purpose of determining whether or not there was employee misconduct, fall within the confidential information exception.”** *Id.* at 377.

Kent was later re-affirmed in *City of Battle Creek (Police Department)*, 12 MPER 3008 (1998), where officer David Broxholm was terminated following an investigation into allegations that he committed multiple departmental rule violations, including sexual assault and abuse of authority. Broxholm grieved his termination, and the union requested all information relied upon by the employer in connection with the discharge, “including statements and reported prepared by complaint, witnesses, employees, supervisors and department heads. However, the employer refused to disclose any witness statements or internal investigative materials on the ground that such information was for internal use only and, pursuant to *Kent*, not subject to disclosure under PERA. The union later filed an unfair labor practice charge alleging that Respondent had breached its duty to bargain in good faith under PERA by failing to supply information required by Charging Party to properly evaluate and pursue the grievance.

MERC noted first that under *Michigan State University*, 1986 MERC Lab Op 407, 409, a public employer has no duty to disclose internal investigation report and witness statements because those documents are exempt from disclosure under the confidentiality exception to the general obligation of an employer to furnish information. MERC then noted that because “there is no dispute that the information request [by the Union] pertained to an internal investigative file, Respondent had no duty to make the materials available to the Union.” In doing so, MERC explicitly rejected the NLRB precedent which contains a test of “balancing the employer’s interest in keeping the information confidential with the union’s need for information to adequately represent its members.” MERC explained that an “NLRB-type balancing test would prove unworkable with regard to disputes arising between public sector employers and labor organizations.” In order to effectively balance competing interests, the administrative law judge or MERC would need to conduct a hearing and access the information, which would then create a public record under Section 7a(2) of the Labor Relations and Mediation Act. *See* MCL 423.27. Moreover, MERC noted that its confidentiality exception ruling comports with the Freedom of Information Act (“FOIA”) statute, which exempts from mandatory disclosure the internal affairs investigation records of law enforcement agencies. *Newark Morning Ledger Co v Saginaw County Sheriff*, 204 Mich App 215 (1994).

Importantly however, MERC noted that the union is not entirely without access to witness statements “at some future date.” *City of Battle Creek (Police Department)*. In keeping with NLRB precedent, MERC agreed that should an employer “call its informants as witnesses in the arbitration proceeding, there is no longer a need to keep their identities or their statements secret.” Thus:

If the three witnesses identified in the police chief’s letter of allegation testify at the arbitration hearing, as the Employer has indicated that they will, the Union is entitled to those portions of the witness statements which relate to that testimony. Similarly, Charging Party is under an obligation to provide Respondent with copies of prior statements made by any witness who testifies at the arbitration hearing on behalf of the Union. *Id.*

Thus, a public employer who names witnesses on an arbitration list or plans to call them as witnesses at a hearing must provide the portions of the witness statements regarding the testimony made to the union officers before the hearing.

III. Conclusion

As discussed above, MERC has held 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 PERA. Similarly, the FOIA treats witness statements and investigatory notes as exceptions to disclosures, and thus it does not provide the union a viable alternative route to such information. It must be noted, however, that in the event that the employer calls an informant as a witness in an arbitration hearing or other formal proceeding regarding the disciplined employee, the employer must then, upon demand, provide the union with the witnesses’ prior statement and investigatory notes pertaining thereto. It is advisable to check Board of Education policies and pertinent collective bargaining language that could impact these general legal principles.

4852-7523-6777, v. 1