STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

CITY OF BATTLE CREEK (POLICE DEPARTMENT),
Respondent-Public Employer,

Case No. C97 J-221

-and-

POLICE OFFICERS LABOR COUNCIL,
Charging Party-Labor Organization.
_____/

APPEARANCES:

Varnum, Riddering, Schmidt & Howlett, LLP, by John Patrick White, Esq. and Mary C. Bonnema, Esq., for the Public Employer

John A. Lyons, P.C., by Barton J. Vincent, Esq., for the Labor Organization

DECISION AND ORDER

On June 26, 1998, Administrative Law Judge Roy L. Roulhac issued his Decision and Recommended Order in the above case, finding that Respondent City of Battle Creek (Police Department) violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1947 PA 336, as amended, MCL 423.210(e); MSA 17.455(10)(1)(e), by refusing to provide Charging Party Police Officers Labor Council (POLC) with information relevant and necessary to the administration and enforcement of its collective bargaining agreement.

Respondent filed timely exceptions to the Decision and Recommended Order of the Administrative Law Judge and a request for oral argument or, in the alternative, a request for hearing, on August 3, 1998. Pursuant to Rule 66, R423.466 of the General Rules of the Employment Relations Commission, a brief in support of the recommended order of the Administrative Law Judge was due on August 17, 1998. In response to a timely request by the Union for an extension of time to file a brief in support of the recommended order, we extended the due date until August 27, 1998. However, no brief was filed on or before that date. Rather, we received Charging Party's brief in support of the recommended order on August 28, 1998. The proof of service indicates that the brief was mailed on August 26, 1998. In accordance with Commission Rule 71, R423.471, it is well-established that the date of filing of exceptions and briefs in support thereof is the date the document is received, not the date posted. See *Frenchtown Charter Township*, 1998 MERC Lab Op 106, 110. In a letter dated September 9, 1998, we notified Charging Party that the brief was not timely filed and gave the Union ten days in which to file a motion for retroactive extension setting forth good cause

for the delay. To this date, no such motion has been received. Accordingly, Charging Party has waived its right to have its brief in support of the recommended order of the Administrative Law Judge considered by this Commission.

After reviewing the exceptions, we find that oral argument would not materially assist us in deciding this case. Therefore, Respondent's request for oral argument is hereby denied. Because we conclude that the information requested by Charging Party is not subject to disclosure under any circumstances, Respondent's request for a hearing is also denied.

Background:

The facts in this case were stipulated to by the parties and, therefore, are not in dispute. David Broxholm was an officer with the City of Battle Creek Police Department and a member of a bargaining unit represented by the POLC. He was terminated by Respondent following an investigation into allegations that he had committed multiple departmental rule violations, including sexual assault and abuse of authority. On December 23, 1996, Broxholm filed a grievance alleging that his discharge was without just cause. Thereafter, the Union requested all information relied upon by the Employer in connection with the discharge, including statements and reports prepared by complainants, witnesses, employees, supervisors and department heads. Ultimately, Respondent provided the POLC with the police chief's letter of allegation which set forth, in detail, the nature of the allegations against Broxholm, including the identities of the complainants. In addition, the Union was provided copies of Broxholm's response to the letter of allegation, as well as the police chief's letter of termination. 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 County (Sheriff)*, 1991 MERC Lab Op 374, 377, not subject to disclosure under PERA.

An arbitration hearing regarding the Broxholm grievance was scheduled for November 16, 1997. On that date, the Union renewed its request for copies of the internal investigative report and witness statements. Once again, Respondent refused to provide the requested information. However, the City notified the arbitrator and the POLC that it intended to call the three witnesses identified in the police chief's letter of allegation to testify at the hearing. The arbitrator adjourned the hearing to allow the Union to file an unfair labor practice charge regarding the information request.

On November 21, 1997, the Union filed the instant 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. The Administrative Law Judge agreed and ordered Respondent to provide the Union with its internal investigation file and witness statements obtained in connection with the termination of officer Broxholm.

Discussion and Conclusions of Law:

It is well-established that in order to satisfy its bargaining obligation under Section 10(1)(e) of PERA, an employer must supply in a timely manner requested information which will permit the

union to engage in collective bargaining and to police the administration of the contract. *Wayne County*, 1997 MERC Lab Op 679; *Ecorse Public Schools*, 1995 MERC Lab Op 384, 387. This obligation may extend to information necessary for the processing of grievances. *NLRB v ACME Industrial Co*, 385 US 432, 436, 64 LRRM 2069 (1967); *SMART*, 1993 MERC Lab Op 355. 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. *City of Detroit, Department of Transportation*, 1998 MERC Lab Op ___ (4/7/98); *Wayne County*, *supra*. See also *E.I. DuPont de Nemours & Co v NLRB*, 744 F2d 536, 538; 117 LRRM 2497 (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. *Wayne County*, *supra; SMART*, 1993 MERC Lab Op 355, 357. See also *Pfizer, Inc*, 268 NLRB 916; 115 LRRM 1105 (1984), enforced 763 F2d 887 (CA 7, 19985).

In the instant case, Respondent does not dispute the relevancy of the requested information. Rather, the City argues that it had no duty to disclose the 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. We first recognized the existence of such an exception in *Michigan State University*, 1986 MERC Lab Op 407, 409, in which we noted, without elaboration, that an employer is not required to provide the bargaining representative with information which is confidential or readily accessible to the public. Several years later, in *Kent County*, *supra*, we clarified what type of information falls within the realm of the confidential information exception. That case 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 Sixth Circuit, we concluded that "internal investigations conducted for the purpose of determining whether or not there was employee misconduct, falls [sic] within the confidential information exception." *Id.* at 377.

In concluding that the City of Battle Creek violated its bargaining obligation, the Administrative Law Judge found the instant case to be factually distinguishable from *Kent County*. The Administrative Law Judge characterized our decision in *Kent County* as having been based on the fact that the employer presented evidence proving that disclosure of the requested materials would have destroyed or diminished its ability to conduct an internal affairs investigation. Finding the record in the instant case entirely devoid of such evidence, the Administrative Law Judge concluded that Respondent was in violation of Section 10(1)(e) of PERA. In so holding, however, the Administrative Law Judge interpreted our decision in *Kent County* too narrowly. In that case, we held that internal investigative disciplinary reports, including witness statements, are exempt from disclosure as a matter of law. *Kent County*, *supra* at 377. See also *Plymouth-Canton Community Schools*, ___ MERC Lab Op ___ issued 9/16/98 (Case No. C97 E-109); *Ecorse Public Schools*, 1995 MERC Lab Op 384. Therefore, any factual differences which may exist between the instant case and *Kent County* with regard to possible adverse affects on the Employer are immaterial. Because there

is no dispute that the information request pertained to an internal investigative file, Respondent had no duty to make the materials available to the Union.

Similarly, we disagree with the Administrative Law Judge's reliance on federal law. In *Anheuser-Busch, Inc*, 237 NLRB 982; 99 LRRM 1174, 1177 (1978), the NLRB found that the pre-arbitration disclosure of witness statements would advance neither the grievance nor the arbitration process. Accordingly, the Board concluded that the general obligation to honor requests for information does not encompass the duty to furnish witness statements themselves "without regard to the particular facts of [the] case." *Id.* The Board recently reaffirmed the *Anheuser-Busch* doctrine in *Pennsylvania Power & Light Co*, 301 NLRB No. 138; 136 LRRM 1225, 1228 (1991). Therefore, the Administrative Law Judge erred in concluding that the witness statements at issue in the instant case would be subject to disclosure under the National Labor Relations Act (NLRA), 29 USC 150 *et seq*.

It is true that the NLRB has no per se rule with regard to the disclosure of other information related to disciplinary investigations, such as internal investigative files, lists of witnesses' names and addresses, and summaries of witness statements. Rather, the Board requires a balancing of the employer's interest in keeping the information confidential with the union's need for information to adequately represent its members. *N.J. Bell Telephone Co*, 300 NLRB 42; 135 LRRM 1241 (1990), enforced 936 F2d 144;137 LRRM 2739 (CA 3, 1991); *Pennsylvania Power & Light Co, supra; United Technologies Corp*, 277 NLRB 584; 121 LRRM 1290 (1985). See also *Detroit Edison Co v NLRB*, 440 US 301, 303 (1979). Federal precedent is to be given great weight in interpreting PERA, at least where PERA's language is identical to that of the NLRA. However, this Commission is not bound to follow its "every turn and twist," *Northpointe Behavioral Healthcare Systems*, 1997 MERC Lab Op 530; *Marquette County Health Department*, 1993 MERC Lab Op 901, and we see no reason to retreat from our decision in *Kent County*. It is essential that internal investigations into allegations of misconduct by public employees proceed unencumbered by concerns that information uncovered therein will be subject to disclosure.

In so holding, we note 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 the competing interests, this Commission, or the Administrative Law Judge designated to conduct the hearing, would need access to the requested information and, therefore, it would become part of the public record. Section 7a(2) of the Labor Relations and Mediation Act, 939 PA 176, as amended by 1965 PA 282, MCL 423.27; MSA 17.454(29), provides that any "writing prepared, owned, or used, in the possession of, or retained by the commission in the performance of an official function *shall be made available to the public*." Accordingly, the documents would be subject to disclosure even if we determined that the Union's need for the information outweighed the Employer's interest in keeping the information confidential. It should also be noted that our ruling in this case is consistent with Section 13(1)(t)(ix) of FOIA, MCL 15.243(1)(t)(ix); MSA 4.1801(13)(1)(t)(ix), which exempts from mandatory disclosure the internal affairs investigation records of law enforcement agencies. See *Newark Morning Ledger Co v Saginaw County Sheriff*, 204 Mich App 215 (1994).

Although Respondent did not violate PERA in refusing to provide the Union with the requested information, we wish to emphasize that Charging Party may nevertheless be entitled to the witness statements at some future date. As noted, the *Anheuser-Busch* doctrine applies to the *pre-arbitration* disclosure of witness statements. The NLRB has acknowledged that once the employer calls its informants as witnesses in the arbitration proceeding, there is no longer a need to keep their identities or their statements secret. *Pennsylvania Power & Light Co, supra*, 136 LRRM at 1229, n 16. See also *Tuf Flex Glass*, 262 NLRB 445; 110 LRRM 1357 (1982) (once a witness has testified on direct examination about matters covered in an affidavit purportedly protected by the attorney-client privilege, neither the employer nor the employee can realistically assert a further interest in keeping its contents confidential). We agree with this distinction. 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.

For the reasons stated above, we reject the findings and recommendations of the Administrative Law Judge in this case. We conclude that Respondent did not violate PERA by refusing to provide the Union with the requested information.

ORDER

The unfair labor practice charges in this case are hereby dismissed.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Maris Stella Swift, Commission Chair

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Harry W. Bishop, Commission Member

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C. Barry Ott, Commission Member

Date: _____