STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

COUNTY OF MACOMB,
Public Employer-Respondent,

Case No. C11 L-215
-and- Docket No. 11-000652-MERC

MICHIGAN AFSCME, COUNCIL 25, AFL-CIO,
AND ITS AFFILIATED LOCAL 411,
Labor Organization-Charging Party.
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APPEARANCES:

McConaghy & Nyovich, P.L.L.C., by Timothy McConaghy, for Respondent

Shawntane Williams, Staff Counsel, Michigan AFSCME Council 25, for Charging Party

DECISION AND ORDER

On December 6, 2013, Administrative Law Judge (ALJ) Julia C. Stern issued her Decision and Recommended Order in the above matter finding that Respondent, Macomb County, breached its duty to bargain under § 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379 as amended, MCL 423.210(1)(e), by failing and refusing to provide information to Charging Party, AFSCME Council 25. Specifically, Charging Party requested the written interview questions used by Respondent in the selection process for the promotional position of Custodian I, in Respondent's Department of Facilities and Operations. Charging Party requested the information to facilitate its processing of a grievance on behalf of a bargaining unit employee who was denied the promotion. In response to Charging Party's request, Respondent claimed the questions were exempt from disclosure under § 13(1)(k) and (m) of the Michigan Freedom of Information Act (FOIA), MCL § 15.243. The ALJ concluded that Respondent violated § 10(1)(e) of PERA and recommended that the Commission order Respondent to cease and desist from failing or refusing to provide Charging Party with the requested information, and to post a notice of the PERA violations to employees for thirty days. The ALJ's Decision and Recommended Order was served upon the interested parties in accordance with § 16 of PERA.

After twice requesting and receiving an extension of time in which to file its exceptions, Respondent filed exceptions to the ALJ's Decision and Recommended Order on February 21, 2014. Charging Party did not file a response to the exceptions.

In its exceptions, Respondent alleges that the ALJ erred in ordering the disclosure of the written interview questions. Respondent asserts that the interview questions are not related to the wages, hours, and working conditions of bargaining unit employees and, therefore, are not presumptively relevant. Instead, Respondent maintains that the interview questions are confidential and, as such, are exempt from disclosure under FOIA. Respondent also contends that the ALJ erred by not giving credence to Respondent's offer to Charging Party to view the interview questions without copying the questions. In addition, Respondent takes issue with the fact that the ALJ's order did not contain any protection against the disclosure of the interview questions to future applicants.

We have considered the arguments made in Respondent's exceptions and find them to have merit.

Factual Summary:

We adopt the facts as found by the ALJ and summarize them here only as necessary.

On or about November 2010, Respondent posted an opening for a Custodian I position, considered a promotion for certain bargaining unit employees. Respondent interviewed five applicants for the position. The interviewers used written questions and forms entitled "Employment Interview Report" to select two employees for the promotion. Unit employee Paulette Green applied for but was denied the position, and Charging Party filed a grievance on her behalf based on Article 27 (C) of the collective bargaining agreement which provides:

> Promotions to a higher classification shall be based on qualifications. Posted qualifications being equal, seniority shall prevail.

Charging Party claimed that because Green met the posted qualifications and had the highest seniority, she should have received the promotion. Charging Party took the position that the interview process had been subjective in violation of Article 27 (C), which prompted the request for the written interview questions and any attendant notes made by the interviewers, among other documents. Respondent complied with Charging Party's requests in all respects except for the interview questions, which Respondent offered to disclose for viewing but not copying. Respondent's refusal to provide physical copies of the interview questions to Charging Party is the only issue remaining before the Commission.

Discussion and Conclusions of Law:

Duty To Provide Interview Questions

In order to satisfy its bargaining obligation under § 10(1)(e) of PERA, an employer must supply requested information which will permit the union to engage in collective bargaining and police the administration of the contract. *City of Detroit*, 21 MPER 48 (2008); *Clairmount Laundry*, 2002 MERC Lab Op 172; *Wayne Co*, 1997 MERC Lab Op 679; *Ecorse Pub Sch*, 1995

MERC Lab Op 384. Where the information sought relates to discipline or to wages, hours, or working conditions of bargaining unit employees, the information is presumptively relevant and will be ordered disclosed unless the employer rebuts the presumption. *City of Detroit, (Dep't of Transport),* 1998 MERC Lab Op 205; *Wayne Co*. See also *E.I. DuPont de Nemours & Co v NLRB,* 744 F2d 536 (CA 6, 1984).

The employer has a duty to disclose requested information as long as there is a reasonable probability that the information will be of use to the union in carrying out its statutory duties. *City of Detroit,* 21 MPER 48 (2008). Where a union makes a request for information which is not presumptively relevant, the employer has no duty to provide such information unless and until the union demonstrates the relevance, or the facts surrounding the request are as such as to make the relevance of the information plain. *City of Detroit,* 25 MPER 23 (2011); *Island Creek Coal Co,* 292 NLRB 480 (1989). Further, a union's interest in the information will not always predominate over legitimate employer interests. *Taylor Sch Dist,* 2002 MERC Lab Op 248.

Exceptions to the employer's duty to provide information exist where the requested information could be either confidential or readily available to the union from other sources. *Michigan State Univ,* 1986 MERC Lab Op 407. The Commission has taken the position that the confidential exclusion should not be interpreted too narrowly. *Mundy Twp,* 22 MPER 31 (2009); *City of Battle Creek (Police Dep't),* 1998 MERC Lab Op 684. For example, where the employer has demonstrated the need for confidentiality regarding employee tests and answer sheets to protect the integrity of the testing process, the employer has no obligation to provide that information to the union. *Detroit Edison Co v NLRB,* 440 US 301 (1979).

In this case, Respondent has effectively rebutted Charging Party's presumption of relevance by asserting a confidentiality exclusion premised on the language in § 13(1)(k) of FOIA:

> (k) Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure.

The ALJ's decision in the present case turns on a narrow, limited interpretation of "test questions and answers," concluding that because Charging Party seeks disclosure of interview questions and notes, its request does not fall within the parameters of § 13(1)(k).[1] In making this ruling the ALJ found that the facts in the present case did not mirror those in *Detroit Edison* or *Taylor Sch Dist, 2002 MERC Lab Op 248.* The ALJ in *Taylor*, at 254, held:

> There is no question that in order to represent its membership, and ensure the proper administration of the bidding process, the Union had the right to information regarding revised job descriptions and qualifications, as well as procedural aspects of the testing program.

[1] Ironically, in its first two requests for information, Charging Party asked for test scores and test questions.

> I find, however, in line with the precedent cited above, that the Employer was not obligated to provide the test questions and answers to the Union. Since the Employer intended to utilize these tests again, revealing the test contents would compromise the validity of the testing process. I find that the Employer had a legitimate and overriding interest in maintaining the confidentiality of this material and had no duty to supply the tests/answers to the Union.

The distinction between test questions and interview questions drawn by the ALJ is unfounded. We find that it is the nature of the information sought to be protected that is determinative, not the precise words or semantics used. Interview questions are, in purpose and effect, "test questions" upon which an applicant's qualifications for a position are based. Therefore, we agree with Respondent's assertion that there is no meaningful, substantive difference between written test questions, excluded as a matter of law under FOIA, and written interview questions.

Even accepting the ALJ's conclusion that Respondent's interview questions are not "test questions and answers," that is not the end of the inquiry or analysis in this case. In fact, we find probative the phrase "other examination instruments or data used to administer…public employment…" contained in the § 13(1)(k) exemption. Clearly, interview questions fall within this broad category.

Subsection (m) of § 13(1) also supports Respondent's position that the interview questions are exempt from disclosure. That provision states:

> (m) Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. This exemption does not constitute an exemption under state law for purposes of section 8(h) of the open meetings act, 1976 PA 267, MCL 15.268. As used in this subdivision, "determination of policy or action" includes a determination relating to collective bargaining, unless the public record is otherwise required to be made available under 1947 PA 336, MCL 423.201 to 423.217.

We conclude that Respondent's written interview questions constitute a communication that is preliminary to Respondent's final determination regarding which employees received the promotion. Moreover, and as discussed further herein, the determination relates, in the broadest sense, to collective bargaining, but the information sought is not otherwise required to be disclosed under PERA.

Regarding Charging Party's claim that Respondent's interview process cannot be subjective according to Article 27(C), we find that provision to be silent on the issue of subjectivity. While an employee's seniority is an objective element in the promotional process, we disagree with Charging Party that subjective considerations are disallowed. There would be no need for interviews to be held if the subjective impressions of management were prohibited. Applicants would have no reason and no opportunity to impress the interviewer and demonstrate why he or she should receive the promotion. See *Kent Co*, 1991 MERC Lab Op 374, relying on *Asarco, Inc. v NLRB*, 805 F.2d 194 (6th Cir. 1986) (investigative reports which contain an employer's self-critical thinking would be less candid if the employer were forced to disclose reports, particularly where the union has available all relevant factual information).

Respondent is also correct in its assertion that the requested information was readily available to Charging Party from other sources, namely, the Employment Interview Reports. The Reports were sufficiently informative to address Charging Party's "subjectivity" concern.

In *Kent Co & Sheriff*, 1989 MERC Lab Op 1008, 1014, the Commission affirmed the ALJ's decision holding that:

> The *Detroit Edison* case is one that should be followed by the Commission. The record discloses that the test as made by the undersheriff was an ongoing test which would be completely destroyed if the test questions were given to the Union or disclosed through any accident, design, or for any reason to the Union membership that might possibly be taking the test.

In this case, the ALJ concluded that Respondent did not establish that creation of a new set of interview questions would be unduly burdensome, which sets the present case apart from *Detroit Edison*, *Taylor,* and *Kent Co & Sheriff*. The ALJ did state, however, that:

> It is likely that if Respondent is required to disclose the questions it provided to individuals who interviewed candidates for the custodian I position, it will have to revise these questions before the next round of interviews. In addition, turning over the interviewers' notes about the candidates' responses may lead to hard feelings toward the interviewers if the notes contain negative comments about candidates.

Even with this acknowledgement of potential adverse consequences from full disclosure of the questions, Respondent asserts in its exceptions that it would be forced to stop using written interview questions altogether should it be required to produce them to Charging Party. This action arguably would lead to a less standardized promotional process, contrary to the desires of Charging Party.

Further, in *Kent Co & Sheriff*, the employer's promotional process contained an oral examination, i.e., interviews, with law enforcement board members. The ALJ noted that one of

the board members was actually in the bargaining unit and therefore, the charging party could simply inquire of its member what questions were asked of the applicants. Although in the present case there is no evidence to suggest that any of the interviewers were in the bargaining unit, nothing precludes Charging Party from asking unit members who applied for the promotion what questions were asked of them in the interviews. As stated by the ALJ in *Kent Co & Sheriff*, at 1016, "When the promotional procedure was negotiated the Charging Party should have requested procedures covering the availability of the information it is seeking under the guise of a refusal to bargain, assuming it does not already have such information." We agree.

Respondent's Offer to Compromise

Respondent's exceptions challenge the ALJ's rejection of its offer to compromise with Charging Party as both untimely and "not sufficient." Respondent's offer to permit the union leadership to *see* the interview questions, but not be provided physical copies of the questions, was reasonable. The offer satisfied Charging Party's request for information while preserving the confidentiality of the questions by limiting to whom the questions are disclosed. Limiting visual review of the questions to union representatives provided a reasonable safety net for Respondent. It reduced the possibility of improper leaks of the information throughout the bargaining unit which could taint future promotional interviews. Notably, the ALJ, in ordering Respondent to provide copies of the questions to Charging Party, did not address Respondent's concern about leaks or sharing of the questions to bargaining unit members outside the union leadership.

Nothing in PERA requires a respondent to provide physical copies of requested information to satisfy its duty to bargain. See e.g., *Wayne Co (Airport Dep't)*, 2002 MERC Lab Op 241 (union did not allow charging party to make copies of information, but where it allowed her to view promotion eligibility list, no breach of duty of fair representation where charging party did not prove that the union refused to allow her to see the list).

Nor does FOIA mandate that requested documents be both disclosed and copied. MCL § 15.233(3) provides:

> A public body shall furnish a requesting person a reasonable opportunity for inspection and examination of its public records, and shall furnish reasonable facilities for making memoranda or abstracts from its public records during the usual business hours. A public body may make reasonable rules necessary to protect its public records and to prevent excessive and unreasonable interference with the discharge of its functions. A public body shall protect public records from loss, unauthorized alteration, mutilation, or destruction.

By its express terms, subsection (3) requires only an opportunity for inspection and examination and does not require production of copies of the requested documents. Moreover, it permits the responding public body to take measures to protect its records from unauthorized

use. In *Detroit Edison*, the Court embraced the employer's insistence that disclosure of employee test scores be conditioned upon the receipt of releases from the examinees.

Charging Party has not explained or demonstrated why physical copies of the questions and any notes contained therein are necessary to police the contract and pursue Green's grievance. In any event, there is no statutory language either in FOIA or in PERA mandating that Respondent provide physical copies of the interview questions to Charging Party.

Finally, while the ALJ found that Respondent's offer of compromise was untimely, the Commission has not articulated the precise time for employers to respond to information requests. *City of Detroit*, 25 MPER 23 (2011). Moreover, unlike the facts in *City of Detroit*, Respondent *did* promptly and unequivocally object to the request for interview questions. Only in its July 7, 2011 request did Charging Party specifically request that information. Respondent denied that request on July 18, 2011 and cited FOIA § 13(1)(k) and (m) as the reason for non-disclosure.

As the Court in *Detroit Edison* stated, at 318, "The Board's position appears to rest on the proposition that union interests in arguably relevant information must always predominate over all other interests, however legitimate. But such an absolute rule has never been established, and we decline to adopt such a rule here. There are situations in which an employer's conditional offer to disclose may be warranted. This we believe is one." Respondent has offered the information for review. That is all that is required.

We, therefore, reverse the Decision and Recommended Order of the ALJ and issue the following Order.

ORDER

The Charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

/s/
Edward D. Callaghan, Commission Chair

/s/
Robert S. LaBrant, Commission Member

/s/
Natalie P. Yaw, Commission Member

Dated: September 26, 2014

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MACOMB COUNTY,
Public Employer-Respondent,

Case No. C11 L-215
Docket No. 11-000652-MERC

-and-

MICHIGAN AFSCME COUNCIL 25, AFL-CIO, AND ITS AFFILIATED LOCAL 411,
Labor Organization-Charging Party.
_____/

APPEARANCES:

McConaghy & Nyovich, P.L.L.C., by Timothy K. McConaghy, for Respondent

Shawntane Williams, Staff Counsel, Michigan AFSCME Council 25, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE ON SUMMARY DISPOSITION

On December 13, 2011, Michigan AFSCME Council 25, AFL-CIO, and its affiliated Local 411, filed the above unfair labor practice charge with the Michigan Employment Relations Commission (the Commission) against Macomb County, pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216. Pursuant to Section 16 of PERA, the charge was assigned to Julia C. Stern, Administrative Law Judge (ALJ) for the Michigan Administrative Hearing System.

The Unfair Labor Practice Charge:

Charging Party represents a bargaining unit of employees of Respondent. The charge, as filed on December 13, 2011, alleges that Respondent violated §10(1)(e) of PERA by failing and refusing to provide Charging Party with information it requested to process a grievance on behalf of a unit employee who was denied a promotion.

On January 13, 2012, pursuant to Rule 165 of the Commission's General Rules, 2002 AACS, R 423.165, I issued an order directing Respondent to show cause in writing why Respondent should not be found to have committed an unfair labor practice by refusing or failing to provide the documents Charging Party had requested on July 7, 2011. On February 14, 2012, Respondent submitted, in response to my order, a letter to Charging Party's counsel confirming

that Respondent had, by that date, provided Charging Party with all the documents it had requested, except for copies of written questions used in the interview process. Respondent's letter also stated that the parties were currently involved in negotiations over production of the written questions. On the basis of these representations, Respondent requested, and was granted, additional time to file a brief in response to my order if these negotiations proved unproductive. According to communications received from counsel for both parties, the parties continued to discuss settlement until June 27, 2012, when Charging Party requested that the charge be placed back on the docket.

On July 14, 2012, Respondent submitted a response to my January order to show cause asserting that there were no material disputes of fact and that the charge should be summarily dismissed. In this pleading, Respondent asserted that it had no obligation to provide either the written questions or any notes taken by the interviewers regarding the responses to these questions. On September 20, 2012, after I had scheduled a hearing on this matter, Charging Party communicated to me that the only issue remaining to be decided was whether Respondent was required to provide the interview questions and the notes. It also agreed there were no material disputes of fact requiring an evidentiary hearing. Charging Party was granted permission to file a reply to Respondent's response to the order to show cause. I then told the parties that I would treat Respondent's July 14, 2012 response, and Charging Party's reply to this response, as reciprocal motions for summary disposition. On January 31, 2013, Charging Party filed its reply to the response.

Based upon the facts as set forth below and not in dispute, I make the following conclusions of law and recommend that the Commission issue the following order.

Facts:

Article 27(C) of the parties' 2008-2011 collective bargaining agreement stated:

> Promotions to a higher classification shall be based on qualifications. Posted qualifications being equal, seniority shall prevail.

In early November 2010 or shortly before, Respondent posted a vacancy for a unit position, custodian I. Paulette Green and at least one other unit employee submitted applications for the position, which constituted a promotion for them. On November 10, 2010, Respondent interviewed Green and one other applicant. On February 9, 2011, possibly after posting the position again, Respondent interviewed three more applicants. Each candidate was interviewed by three interviewers, and the same three interviewers interviewed all five candidates.

Each interviewer filled out a form, titled "Employment Interview Report," for each candidate. The form required the interviewer to rate the candidate on eight separate criteria: job related education; job related experience; job related knowledge; communication/interpersonal skills; problem solving/decision making skills; project management skills; teamwork; and insight and alertness. In accord with the instructions on the form, the interviewers gave each candidate a score from one to five for each of these criteria. The employment interview report provided guidelines for how to do this. The scores given were based in part on the answers that the

applicants provided during their interviews. However, the interviewers were instructed to use all the information available to them in scoring the candidates. Respondent describes the employment interview report in its pleadings as a consolidation of all available information concerning the candidate.

The score for each of the criteria was then adjusted in accord with a weighting formula provided on the form. For example, job related experience and knowledge were each given a 20% weight, while job related education was given only a 5% weight. The adjusted scores were then totaled and averaged, so that each applicant had a final score.

Respondent provided the interviewers with a set of written questions to ask during the interviews. Respondent has used these questions before when filling the custodian I position, and it was Respondent's intent to use them again when filling the position. The written questions did not correlate specifically to a single criterion. At least some of the interviewers made notes about the candidates' responses to these questions, either on the question sheet or on a separate sheet of paper.

Sometime between February 11 and February 25, 2011, two of the five candidates were promoted to custodian I. Green was not selected, even though she had the highest seniority of the five candidates. On February 25, 2011, Charging Party filed a grievance on Green's behalf. In discussions with Respondent, Charging Party took the position that Green should have been awarded the position because she met all the posted qualifications and had the most seniority. Charging Party was told that the promoted employees "interviewed better."

On February 25, Charging Party filed out a form entitled "information request for grievance investigation," and submitted it to Respondent. The form requested the test scores for all the applicants and any and all information utilized to determine which applicants would be granted the promotions, including applications, job history, education and job skills information for the two successful job applicants as well as Green. Respondent provided some information in response to this request, although it did not disclose the interview scores. On July 7, 2011, Charging Party, citing PERA, sent a letter to Respondent's human resources director asking specifically for the questions utilized during the interview process and copies of the employment interview reports, as well as any and all other information used to determine who would be the successful applicant.

On July 19, 2011, Charging Party received a response to its July 7 letter from Respondent's corporation counsel. In the letter, which characterized the July 7 letter as a request for documents under the Freedom of Information Act (FOIA), MCL 15.231 et. seq., Respondent stated that the request for the questions asked during the interview process was denied because these questions were exempt from disclosure under §13(k), (l) and (m) of that Act.[2] Charging

[2] Section 13(k) exempts from disclosure, "Test questions and answers, scoring keys, and other examination instruments or data used to administer a license, public employment, or academic examination, unless the public interest in disclosure under this act outweighs the public interest in nondisclosure."

Section 13(m) exempts "Communications and notes within a public body or between public bodies of an advisory nature to the extent that they cover other than purely factual materials and are preliminary to a final agency determination of policy or action. This exemption does not apply unless the public body shows that in the particular

Party's request for the employment interview reports was denied on the basis that, according to the letter, Respondent could not identify a document with that title.

On October 4, 2011, and again on November 2, 2011, Charging Party sent follow up letters in which it asserted that its representatives had been told, during discussions of Green's grievance, that each applicant received a score for each question asked during their interviews. It stated that it was seeking both the questions and the corresponding scores applicants received. It also stated that it did not agree that this information was confidential. The letter reiterated that Charging Party was seeking the employment interview reports, and noted that Respondent had previously provided Charging Party with documents with this title in connection with another grievance.

In January 2012, after the charge had been filed and I had issued an order to show cause, Respondent provided Charging Party the employment interview reports for all five applicants for the custodian I position showing the scores each applicant received. The two successful candidates were the two applicants with the highest scores on their employment interview reports. Respondent offered to allow Charging Party representatives to look at the interview questions without receiving a copy, but Charging Party rejected this offer as insufficient.

Discussion and Conclusions of Law:

In order to satisfy its bargaining obligation under §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 police the administration of the contract. *Wayne Co*, 1997 MERC Lab Op 679; *Ecorse Pub Schs*, 1995 MERC Lab Op 384, 387. Where the information sought relates to discipline or to the wages, hours or working conditions of bargaining unit employees, the information is presumptively relevant and will be ordered disclosed unless the employer rebuts the presumption. *City of Detroit, Department of Transportation*, 1998 MERC Lab Op 205; *Wayne Co*, supra. See also *E.I. Du Pont de Nemours & Co. v. NLRB*, 744 F2d 536, 538 (CA 6, 1984). If information is not presumptively relevant, the union must demonstrate relevance in order to obtain the information. *Traverse City Pub Schs*, 1969 MERC Lab Op 395 (no exceptions); *City of Pontiac*, 1981 MERC Lab Op 57, 62 (no exceptions); *SMART*, 1993 MERC Lab Op 355. However, the standard applied 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 Co; SMART* at 357. See also *Pfizer, Inc*., 268 NLRB 916 (1984), enf'd 763 F2d 887 (CA 7, 1985).

In a recent decision, *American Baptist Homes of the West*, 359 NLRB No. 46 (2012), the National Labor Relations Board (NLRB) reiterated that test is whether the requested information is of "probable" or "potential" relevance. *Transport of New Jersey*, 233 NLRB 694, 694 (1977). As the NLRB further explained in *Pennsylvania Power*, 301 NLRB 1104, 1105 (1991), "the information need not be dispositive of the issue between the parties but must merely have some bearing on it." In general, information that aids a union in its proper performance of its duties as

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instance the public interest in encouraging frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure."

the collective bargaining representative of its employees, including information that the union needs to determine whether to take a grievance to arbitration absent settlement, is relevant. *NLRB v Acme Industrial Co*, 385 US 432 (1967).

Here, Charging Party argues that Article 27 of the collective bargaining agreement bars subjective judgments of an applicant's qualifications. Charging Party asserts that the interview questions, as well as any notes taken by the interviewers about the applicants' responses to these questions, are both relevant and necessary because they were part of the process of determining who would receive the promotion and demonstrate the subjective nature of this process.

Respondent, however, argues that it should be allowed to keep the interview questions, and the notes made by the interviewers, confidential. Respondent argues that requiring it to provide Charging Party with copies of interview questions that it has used before and intends to use again would destroy the legitimacy of the interview process because these questions might come into the hands of applicants who would gain an unfair advantage from the opportunity to prepare for the interview. It points out that test questions used to administer public employment examinations are generally exempt from disclosure under §13(k) of FOIA. It also argues that requiring disclosure of written interview questions would discourage employers from providing interviewers with standardized written questions, and that standardized interview questions add more consistency and fairness to the interview process. With respect to the notes made by the interviewers, it argues that "subjective communications that precede a final employment decision," should be considered confidential, pointing to §13(m) of the FOIA. [3]

In *Wayne Co,* 23 MPER 43 (no exceptions), I held that the fact that documents are exempt from disclosure under one or more of the FOIA exceptions does not mean that a public employer may not be required to provide them to the union that represents its employees under PERA. However, as both the Commission and the NLRB have recognized, a union's interest in arguably relevant information does not always prevail over other interests. When the employer asserts a legitimate and substantial interest in keeping the information confidential, this interest must be balanced against the union's need for the relevant information. *Detroit Edison Co* v *NLRB*, 440 US 301, 318-320 (1979). In *Detroit Edison,* the Supreme Court held that the employer's interest in keeping job aptitude tests it had developed confidential outweighed the union's need for the information. In *Kent Co and Kent Co Sheriff*, 1989 MERC Lab Op 1008 (no exceptions), and *Taylor Sch Dist,* 2002 MERC Lab Op 248 (no exceptions), ALJs applied *Detroit Edison* to find employers to be justified in refusing to provide unions with the questions from a test used to fill unit positions. In both of these cases, the employers intended to use the questions again, and both employers asserted that revealing the test questions would jeopardize the future integrity of the testing process. In both cases, the ALJs concluded that the employers had demonstrated a legitimate and substantial interest in maintaining the confidentiality of the test questions which overrode the unions' interest in obtaining the information.

In this case, however, the questions Charging Party requested are interview questions, not test questions, answers or scoring keys used in an examination. In addition, Respondent does not specifically assert that so much effort was involved in devising the interview questions that

[3] Presumably these notes were kept by Respondent as part of its files, rather than discarded, since Respondent has not asserted that it no longer has them.

creating another set would be unduly burdensome. This distinguishes this case from *Detroit Edison*, where the employer had created an objective measurement for validating the tests by comparing test results to supervisors' ratings. It also distinguishes this case from *Taylor*, where the employer had hired a consultant and *Kent Co and Kent Co Sheriff*, where the employer had used the test, and adjusted it, over an extended period of time.

Under *Detroit Edison* and its progeny, when an employer seeks to withhold relevant information as confidential, the issue is whether the employer has demonstrated a legitimate interest in keeping the information confidential which is substantial enough to override the union's interest in obtaining the information. That is, contrary to what Respondent claims in its response to the order to show cause, the issue in this case is not whether Respondent must provide the written interview questions in response to any future grievance that challenges a promotion decision. Rather, the issue is whether Respondent was required to provide the questions under these circumstances. It is likely that if Respondent is required to disclose the questions it provided to individuals who interviewed candidates for the custodian I position, it will have to revise these questions before the next round of interviews. In addition, turning over the interviewers' notes about the candidates' responses may lead to hard feelings toward the interviewers if the notes contain negative comments about candidates. I conclude, however, that these factors are not sufficient to override Charging Party's need for the questions and notes to demonstrate, in settlement discussions or to an arbitrator, that the process of judging the candidates' qualifications in this case was impermissibly subjective. Although Respondent, belatedly, offered to give Charging Party representatives the opportunity to view the questions and notes, I conclude that this was not sufficient to meet Respondent's obligations to provide the information to Charging Party in a timely manner. I recommend, therefore, that the Commission issue the following order.

RECOMMENDED ORDER

Respondent Macomb County, its officers and agents, are hereby ordered to:

1. Cease and desist from failing or refusing to provide Michigan AFSCME Council 25, AFL-CIO and its affiliated Local 411 with information requested by it on July 7, 2011 relevant to its duty to police its collective bargaining agreement and represent its members, including the questions used in interviews to fill a custodian I position in its bargaining unit in February 2011, and notes, if any, made by interviewers about the applicants' responses to these questions.

2. Take the following affirmative action to effectuate the purposes of the Act:

   a. Provide Michigan AFSCME Council 25, AFL-CIO and its affiliated Local 411 with the documents set out in paragraph 1.

   b. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to unit employees are customarily posted, for a period of thirty (30) consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: December 6, 2013