STATE OF MICHIGAN

COURT OF APPEALS

INGHAM COUNTY and INGHAM COUNTY SHERIFF, Respondents-Appellants, v CAPITOL CITY LODGE NO. 141 OF THE FRATERNAL ORDER OF POLICE, LABOR PROGRAM, INC., Charging Party-Appellee.	FOR PUBLICATION April 3, 2007 9:05a.m. No. 263956 MERC LC No. 03-000089 Official Reported Version

Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

SCHUETTE, J. (*dissenting*).

I respectfully dissent from the majority opinion of my distinguished colleagues, Chief Judge Whitbeck and Judge Bandstra.

We may not disturb the legal conclusions of the Michigan Employment Relations Commission (MERC) "unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Grandville Muni Executive Ass'n v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996), citing MCL 24.306(1)(a) and (f). Further, this Court "should give due deference to the agency's expertise and not displace an agency's choice between two reasonably differing views." *West Ottawa Ed Ass'n v West Ottawa Pub Schools Bd of Ed*, 126 Mich App 306, 313; 337 NW2d 533 (1983).

The majority holds that Detective Siegrist was not adversely affected by being disciplined by the sheriff. I disagree. Our Supreme Court has held that "an employee may not be [disciplined] for attempting in good faith to enforce a right claimed under a collective bargaining agreement." *Michigan Employment Relations Comm v Reeths-Puffer School Dist*, 391 Mich 253, 265; 215 NW2d 672 (1974). Disciplining Detective Siegrist for giving the memorandum to the union's attorney most certainly had an adverse effect on her ability to engage in concerted activity under the public employment relations act (PERA), MCL 423.201 *et seq.* Requiring her to file under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, would have alerted the sheriff to her efforts to communicate with the union's attorney and hindered her ability to seek legal advice in confidence without having to first alert a potentially adverse party.

The facts of this case present an issue of first impression for this Court regarding the application of PERA. Our Supreme Court has stated that when "construing the PERA, this Court frequently looks to the interpretation of analogous provisions of the [National Labor Relations Act] by the federal courts." *Grandville, supra* at 436. The majority opinion relies on *Texas Instruments Inc v Nat'l Labor Relations Bd*, 637 F2d 822 (CA 1, 1981), in its determination to reverse MERC. While *Texas Instruments* has some legal utility, it is factually quite different from this case.

In *Texas Instruments*, the employment of six employees belonging to a group called the "Union Organizing Committee" was terminated for distributing union leaflets to fellow employees at a Texas Instruments plant in an effort to organize a union. These leaflets had been anonymously mailed to the group's post office box and contained information from a highly confidential wage survey. Texas Instruments, as a major defense contractor dealing with sophisticated electronic products, had a well-developed internal security system to protect sensitive and confidential information. *Id*. at 825. The wage surveys in question were classified as "strictly private," and company policy was to terminate anyone who deliberately disseminated such information to unauthorized persons. *Id*. at 825-826. The discharged employees filed a grievance under § 7 of the National Labor Relations Act (NLRA), 29 USC 157, which is the federal counterpart to § 9 of PERA, MCL 423.209.

In its analysis, the United States Court of Appeals for the First Circuit adopted and applied the three-part test set forth in *Jeannette Corp v Nat'l Labor Relations Bd*, 532 F2d 916 (CA 3, 1976). "The test laid out in Jeannette is for the most part based upon an approach developed by the [United States] Supreme Court in the Fleetwood Trailer and the Great Dane Trailers cases . . . ." *Texas Instruments, supra* at 827; see also *Nat'l Labor Relations Bd v Fleetwood Trailer Co*, 389 US 375, 378; 88 S Ct 543; 19 L Ed 2d 614 (1967), and *Nat'l Labor Relations Bd v Great Dane Trailers, Inc*, 388 US 26, 33-34; 87 S Ct 1792; 18 L Ed 2d 1027 (1967). MERC has adopted the three-part test from *Jeannette* and relied on it in deciding the present case. This Court must defer to an enduring statutory construction by MERC in cases interpreting sections of PERA not previously dealt with by this Court. *Grandville, supra* at 437, citing *Southfield Police Officers Ass'n v Southfield*, 433 Mich 168; 445 NW2d 98 (1989).

In *Texas Instruments, supra* at 828, although the discharged employees were engaged in protected activity, the First Circuit, quoting the National Labor Relations Board's decision, stated that "'because of the highly technical and defense-related material it handled, [Texas Instruments] has in general shown that it has serious security interests which it justifiably is seeking to protect.'" The general validity of the rule was not the issue; rather, it was the appropriateness of its application to the conduct of the employees, just as in the present case. *Id*. The First Circuit specifically stated that "'employees are entitled to use for self-organizational purposes information and knowledge which comes to their attention in the normal course of work activity and association but are not entitled to their Employer's private or confidential records.'" *Id*. at 830, quoting *Ridgely Mfg Co v Durban*, 207 NLRB 193, 196-197 (1973).

This case is similar to *Texas Instruments* in that there is a substantial security interest in making sure that employees do not disseminate confidential information because of the sensitive nature of the sheriff's work. However, where the two cases differ materially is how the documents were obtained, the nature of the documents, and the scope and purpose of their

dissemination. In this case, the memorandum in question was circulated to all the detectives and received by them in the normal course of their work. On the other hand, the documents in *Texas Instruments* were obtained anonymously and not through voluntary dissemination by the employer, as in the case at bar. Another key distinction from *Texas Instruments* is the fact that the memorandum in this case was not labeled as confidential nor would the information contained in the memorandum have led Detective Siegrist to reasonably believe that the information was confidential. Also, Detective Siegrist did not widely distribute the memorandum to other employees, as was the case in *Texas Instruments*, and her activity did not constitute an act of disloyalty or insubordination because she was merely performing her role as union president in good faith and not seeking to undermine her employer's operations.

My distinguished colleagues in the majority hold that even if disciplining Detective Siegrist adversely affected her right to engage in lawful concerted activities under PERA, the sheriff had a legitimate and substantial business justification for instituting and applying the rule. I disagree. The majority relies on *Texas Instruments* for establishing a substantial interest for the sheriff in keeping certain information confidential. I have a different view of *Texas Instruments*. The First Circuit stated that the burden of showing a substantial business justification "'falls on the employer to demonstrate "legitimate and substantial business justifications" for his conduct,'" and not just for the rule itself. *Texas Instruments supra* at 827 (citations omitted). Although the sheriff is entitled to institute such a rule, he was required to show a legitimate and substantial business justification for applying it to Detective Siegrist when he restricted her right to engage in protected concerted activity under PERA. The majority does acknowledge "that the release of a memorandum pertaining to wearing a pager off duty does not conceivably prejudice the sheriff's ability to protect the public." *Ante* at ___. Therefore, the sheriff did not carry his burden of showing a substantial business justification for applying the rule to Detective Siegrist in this situation.

The majority also distinguishes this case from *Texas Instruments* on the basis of the fact that the memorandum was not labeled as confidential and holds "that any internal documents produced by the sheriff's department, and circulated internally only, are deemed confidential by simple virtue of the sheriff's work rule prohibiting release of any internal documents without prior authorization." *Ante* at ___ (emphasis omitted). This holding sweeps too broadly in the sense that the sheriff can effectively eliminate the rights of his employees granted to them by the Legislature under PERA by promulgating and rigidly applying such an expansive internal work rule. The sheriff certainly has an interest in keeping documents confidential, but if the Legislature had intended that organizations such as the sheriff's department could override statutorily granted rights through internal rules, then it would have expressly stated so.

I would affirm the MERC decision.

/s/ Bill Schuette