H.E. NO. 2020-9

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NORTHFIELD,

Respondent,

-and-

Docket No. CO-2019-093

GOVERNMENT WORKERS UNION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the City of Northfield’s (City) motion to compel more specific responses to its written discovery requests, and denies without prejudice the City’s motion to compel a deposition. The Government Workers Union (GWU) objected to the discovery requests and deposition, arguing that the information/documents sought were not potentially relevant and that a deposition was unnecessary. The Hearing Examiner found that the information sought is potentially relevant. The Hearing Examiner also found that at this time, given that GWU offered to provide more specific responses within a reasonable time, the City failed to demonstrate good cause for the deposition.

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GOVERNMENT WORKERS UNION,

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Appearances:

For the Respondent, Grace, Marmero & Associates, LLP, attorneys (Kathleen M. Bonczyk, of counsel)

For the Charging Party, David Tucker, President

HEARING EXAMINER'S DECISION ON MOTION TO COMPEL DISCOVERY

On October 3, 2018, Government Workers Union (GWU) filed an unfair practice charge against the City of Northfield (City). The charge alleges that on or about September 25, 2018, the City violated subsections 5.4a(1), (5), and (7)[1] of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it unilaterally changed its smoking policy.

1/ These provisions prohibit public employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative"; and "(7) Violating any of the rules and regulations established by the commission."

On February 28, 2020, the Director of Unfair Practices (Director) issued a Complaint and Notice of Pre-Hearing with respect to GWU's 5.4a(1) and (5) claims; the Director declined to issue a complaint with respect to GWU's 5.4a(7) claim. On March 19, 2020, the City filed an Answer with Affirmative Defenses denying that it violated the Act. From March 31 through May 1, 2020, the parties engaged in discovery including propounding and responding to interrogatories and notices to produce.

On May 8, 2020, the City filed a motion to compel more specific responses to its written discovery requests and to compel the deposition of GWU's President, David Tucker (Tucker). On May 11, 2020, GWU indicated that it intended to oppose the motion. On May 12, 2020, I scheduled oral argument via telephone conference call for May 18, 2020. On May 15, 2020, GWU filed opposition to the motion and objected to oral argument; in the alternative, GWU requested that oral argument be held in-person. Also on May 15, 2020, I denied GWU's request for in-person oral argument based, in part, upon the Commission's "COVID-19 - Continuation of PERC Operations & Guidance to Parties, Attorneys and Customers" memorandum (which cancelled all in-person conferences and hearings scheduled from March 16, 2020 through May 29, 2020); and, when I offered to resolve the City's motion on the papers, GWU indicated that it would participate in oral argument.

On May 18, 2020, the City’s counsel and Mr. Tucker engaged in oral argument during a telephone conference call. The City explained each discovery request at issue and GWU explained its respective objections. I provided the parties with my tentative determination on each item, and GWU represented that it would comply with my directives. At the conclusion of oral argument, GWU offered to provide amended answers to interrogatories and amended responses to the notice to produce – consistent with my direction – by/before the close of business (5:00 p.m.) on May 22, 2020.

STANDARD OF REVIEW

N.J.A.C. 1:1-10.1, entitled “Purpose and function; policy considerations; public documents not discoverable,” provides:

> (a) The purpose of discovery is to facilitate the disposition of cases by streamlining the hearing and enhancing the likelihood of settlement or withdrawal. These rules are designed to achieve this purpose by giving litigants access to facts which tend to support or undermine their position or that of their adversary.
>
> (b) It is not ground for denial of a request for discovery that the information to be produced may be inadmissible in evidence if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> (c) In considering a discovery motion, the judge shall weigh the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret and oppressiveness. Except

> where so proceeding would be unduly prejudicial to the party seeking discovery, discovery shall be ordered on terms least burdensome to the party from whom discovery is sought.
>
> (d) Discovery shall generally not be available against a State agency that is neither a party to the proceeding nor asserting a position in respect of the outcome but is solely providing the forum for the dispute's resolution.

"Our system of discovery is designed to make available information that is reasonably calculated to lead to relevant evidence concerning the respective positions of the parties" and "[a] litigation strategy that features surprise to the adversary is no longer tolerated." Young v. Latta, 123 N.J. 584, 597-598 (1991). See also New Jersey Court Rule 4:10-2.[2/]

2/ R. 4:10-2 provides in pertinent part:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature custody, condition and location of any books, documents, electronically stored information, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information

(continued...)

N.J.A.C. 1:1-10.2, entitled "Discovery by notice or motion; depositions; physical and mental examinations," provides in pertinent part:

> (a) Any party may notify another party to provide discovery by one or more of the following methods:
>
> 1. Written interrogatories;
> 2. Production of documents or things, including electronically stored information provided that a party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. The party from whom discovery is sought shall demonstrate that the electronically stored information is not reasonably accessible because of undue burden or cost;
> 3. Permission to enter upon land or other property for inspection or other purposes; and
> 4. Requests for admissions.
>
> * * *
>
> (c) Depositions upon oral examination or written questions and physical and mental examinations are available only on motion for good cause. In deciding any such motion, the judge shall consider the policy governing discovery as stated in N.J.A.C. 1:1-10.1 and shall weigh the specific need for the deposition or examination; the extent to which the information sought cannot be obtained in other ways; the requested

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2/ (...continued)
sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought.

> location and time for the deposition or examination; undue hardship; and matters of expense, privilege, trade secret or oppressiveness. An order granting a deposition or an examination shall specify a reasonable time during which the deposition or examination shall be concluded. The parties may agree to conduct depositions without the necessity of filing a motion; however, the taking of any depositions shall not interfere with the scheduled hearing date.
>
> (d) A party taking a deposition or having an examination conducted who orders a transcript or a report shall promptly, without charge, furnish a copy of the transcript or report to the witness deposed or examined, if an adverse party, and, if not, to any adverse party. The copy so furnished shall be made available to all other parties for their inspection and copying.

ANALYSIS

Written Discovery Requests/Responses

The City maintains that GWU "has refused to properly respond to [its] discovery requests." GWU asserts that the motion "seeks information not relevant to the issues in this case." The discovery requests at issue, the parties' respective arguments, and my determinations are set forth below:

> **City Interrogatory (Rog) No. 1** - Identify any and all persons you have advised whether verbally or in writing that Respondent's Clerk wrote up a public works employee for not adhering to their interpretation of the policy (for his conduct prior to the new policy language being issued) and employees were refusing to honor the changes.

> **<u>GWU Answer to Rog No. 1</u>** - The GWU objects that this request is not relevant to the issues in this case, being a Charge of unilateral change. Why is Ms. Bonczyk so obsessed with an employee written notice that is not related to the Charge itself? This is not a disciplinary appeal matter.

The City maintains that GWU's answer is "defensive and completely non-responsive" to this interrogatory. The City argues that this interrogatory "is relevant [because] GWU has alleged that the City interfered with the right of workers and is asking the Commission to require the City to cease and desist from interfering with the rights of employees." The City also argues that this interrogatory "is . . . relevant to the City's defenses to the GWU's allegations [because] the City vehemently denies that it has interfered with the rights of its workers as the GWU claims" and "[c]ombined with other evidence, it is anticipated this discovery may reveal a pattern and practice of bad faith by the GWU." In opposition, GWU maintains that "written corrective action against a worker" is "not relevant to the elements of the charge under consideration by the Commission."

I find that Rog No. 1 "appears reasonably calculated to lead to the discovery of admissible evidence." <u>N.J.A.C</u>. 1:1-10.1(b); <u>R</u>. 4:10-2(a). On March 11, 2020, Mr. Tucker sent an email to an assistant for the City's counsel, copying me, which provides in pertinent part:

> Attached are some email communications between the GWU Business Agent and [prior counsel] regarding the subject matter of the Charge. In addition, he spoke to her (and I spoke to her) a few times by phone trying to resolve this matter. In the end,[prior counsel] and Northfield maintained they simply "clarified" the Policies and Procedures and did not change them and therefore they had no obligation to bargain over changes or effects. When it was clear they would not negotiate, I filed the Charge. It was getting dramatic at the time because the Clerk wrote up a public works employee for not adhering to their interpretation of the policy (for his conduct prior to the new policy language being issued) and employees were refusing to honor the changes.
>
> [City's Br., Ex. C.]

GWU, having raised the issue of the City Clerk disciplining employees for failing to comply with the City's smoking policy, cannot now claim that discipline related to the City's smoking policy is outside the scope of discovery and/or irrelevant. See Young v. Latta, 123 N.J. at 597-598. Accordingly, GWU is directed to provide a substantive, amended answer to City Rog No. 1.

> **City Rog No. 4** - Have you communicated with any member of Respondent's supervisory or management team either verbally or in writing concerning the matters at issue in this ULP? If your response is "yes," please advise (1) the date(s) of such communication(s), (2) identify the name(s) of the supervisor or manager you communicated with, (3) who, if anyone, else was present during these communication(s) and (4) what was discussed and (5) what was stated.

> **GWU Answer to Rog No. 4** - Yes. Dates unknown. Superintendent Qwin Vitale; no one else present; discussed working conditions (I speak to Mr. Vitale regularly regarding workplace concerns). Yes. Labor Counsel (former) Nicole Curio; Rafael Valentin present; discussed the Charge; several dates and times, unknown. Ms. Curio admitted the unilateral change was made. Also Labor Counsel (former) Nicole Curio; December 5, 2018, 10:00 a.m., at PERC Officers; Bryan Markward and Marisa Koz present. Ms. Curio (accompanied by Clerk Mary Canesi) admitted the unilateral change was made. Her defense was it was intended to be a 'clarification' not an actual 'change.'

The City asserts that "[o]n or about April 30, 2020, Tucker advised the hearing officer and [the City's counsel] in an email that a representative of the City contacted him to discuss the instant cause of action and to arrange for a meeting"; however, "GWU failed to include any information relative to this conversation" despite the fact that "GWU's discovery responses are dated May 1, 2020." The City requests that GWU be "direct[ed] . . . to provide details as to this alleged communication . . . [because] [i]t is anticipated that this discovery may further reveal the bad faith exhibited by GWU." In opposition, GWU maintains that "post-charge communications" are "not relevant to the charge . . . [because] it requests unrelated information that happened a year and a half after the charge was [filed]."

I find that Rog No. 4 "appears reasonably calculated to lead to the discovery of admissible evidence" particularly given that

the City has agreed to limit the scope of its interrogatory to the period February 28, 2020 through the present, with particular emphasis surrounding April 30, 2020. N.J.A.C. 1:1-10.1(b); R. 4:10-2(a). On April 30, 2020, Mr. Tucker sent an email to the City's counsel and me which provides in pertinent part:

> For full disclosure, I received information from the municipality that Ms. Bonczyk was no longer continuing as labor counsel and the City was willing to meet with the GWU. That is the nature of my request for a postponement.

GWU, having raised the issue of communications he may have had with the City regarding the instant matter, cannot now claim that those communications are outside the scope of discovery and/or irrelevant. The City is entitled to know whether GWU has communicated verbally or in writing with anyone within the City's "supervisory or management team" (e.g., Council members, Mayor, Manager, etc.) about the underlying unfair practice charge. See Young v. Latta, 123 N.J. at 597-598. Accordingly, GWU is directed to provide an amended answer to City Rog No. 4 that encompasses the period February 28, 2020 through the present, with particular emphasis surrounding April 30, 2020.

> **City Rog No. 5** - With respect to allegations set forth in Paragraph 4 of the ULP, what damages in specificity do you claim have been sustained?
>
> **GWU Answer to Rog No. 5** - Employees are required to work under conditions contrary to those guaranteed by their employment

> contract. Breach of Contract is asserted.
> The NJEERA laws were violated.

The City asserts that "[i]n the relief sought section of the [unfair practice charge], the GWU demands that the City compensate the Union and bargaining unit employees for the damages of their unlawful actions"; however, "[n]othing in [GWU's answer] provides any information concerning the alleged monetary damages the GWU is claiming here or the compensation it is seeking." The City requests that GWU be "ordered to respond as to the monetary losses it claims has been sustained here and what monetary damages it is seeking from the City." In opposition, GWU maintains that with respect to "damages[,] [n]o financial losses are asserted."

I find that Rog No. 5 "appears reasonably calculated to lead to the discovery of admissible evidence." N.J.A.C. 1:1-10.1(b); R. 4:10-2(a). The City is entitled to know whether GWU is seeking any monetary damages. GWU has conceded that "no financial losses are asserted." See GWU's Br. at 2. Accordingly, consistent with this concession, GWU is directed to provide an amended answer to City Rog No. 5.

> **City Request for Production (RFP) No. 4** - Any and all documents regarding any corrective action taken by Respondent against any employee of Respondent concerning the smoking policy.
>
> **GWU Response to RFP No. 4** - The GWU objects that this request is not relevant to these

> proceedings, being a Charge of unilateral change.

The City argues that this request for production "is relevant [because] GWU has alleged that the City interfered with the right of workers and . . . is asking the Commission to require the City to cease and desist from interfering with the rights of employees." The City also argues that this request for production "is . . . relevant to the City's defenses to the GWU's allegations [because] the City vehemently denies that it has interfered with the rights of its workers as the GWU claims." In opposition, GWU maintains that "evidence of corrective action against employees" is "not relevant to the elements of the charge under consideration by the Commission."

For the same reasons set forth above regarding City Rog No. 1, I find that RFP No. 4 "appears reasonably calculated to lead to the discovery of admissible evidence." N.J.A.C. 1:1-10.1(b); R. 4:10-2(a). Accordingly, GWU is directed to produce any/all documents responsive to City RFP No. 4.

> **City RFP No. 5** - Any and all documents in support of Petitioner's President David Tucker's written statement to counsel for Respondent in which he copied Joseph Blaney, assistant to the Director of UPR, alleging in pertinent part the following: ". . . the Clerk wrote up a public works employee for not adhering to their interpretation of the policy (for his conduct prior to the new policy language being issued) and employees were refusing to honor the changes."

> **GWU Response to RFP No. 5** - I assume this is in reference to your request – and Amanda Gresko's March 9 email request for background information that I responded to with a 'Reply All' response therein providing you with some background information unrelated to the Charge. The GWU objects that this request is not relevant to the issues in this case, being a Charge of unilateral change.

The City asserts that "[i]f the employee who Tucker claims was written up was, for instance suspended, this would clearly be a part of damages sustained and constitutes even more reason why this evidence is necessary and must be produced." The City argues that this request for production "is relevant [because] GWU is claiming . . .that the City has allegedly interfered with the rights of the City's workers and . . . is asking the Commission to require the City to cease and desist from interfering with the rights of employees." The City also argues that this request for production "is . . . relevant to the City's defenses to the GWU's allegations [because] the City vehemently denies that it has interfered with the rights of its workers as the GWU claims." The City maintains that "[t]his evidence is also necessary [because] it goes to one of the City's defenses that [it] did not bargain in bad faith and that the instant [unfair practice charge] was prematurely filed by the GWU" given that "Tucker admits that he stepped in and refused to permit 'Rafael', the GWU representative who was communicating with the

City through former counsel, to come before City Council as he stated he would in September 2018 to discuss the smoking policy." In opposition, GWU maintains that "written disciplines" are "not relevant to the elements of the charge under consideration by the Commission."

For the same reasons set forth above regarding City Rog No. 1, I find that RFP No. 5 "appears reasonably calculated to lead to the discovery of admissible evidence."[3/] N.J.A.C. 1:1-10.1(b); R. 4:10-2(a). Accordingly, GWU is directed to produce any/all documents responsive to City RFP No. 5.

> **City RFP No. 8** - Any and all documents evidencing any complaints made by you including by David Tucker to any person, organization or agency including but not limited to PERC concerning the Respondent's Clerk from 2015 to date.
>
> **GWU Response to RFP No. 8** - The GWU objects that this request is not relevant to the issues in this case, being a Charge of unilateral change.

The City argues that this request for production "is relevant [because] GWU is claiming . . .that the City has allegedly interfered with the rights of the City's workers and . . . is asking the Commission to require the City to cease and desist from interfering with the rights of employees." The City also argues that this request for production "is . . . relevant

3/ City RFP No. 5 appears to be duplicative of City RFP No. 4. As such, GWU's production related to RFP No. 5 may in fact be duplicative of its production related to RFP No. 4.

to the City's defenses to the GWU's allegations [because] the City vehemently denies that it has interfered with the rights of its workers as the GWU claims." The City maintains that "this evidence will help the City prove that if anyone has negotiated in bad faith, it is the GWU through the actions of Tucker" because it is anticipated that "this discovery may show Tucker and/or the GWU have made prior unfounded claims against the Clerk . . . ." In opposition, GWU maintains that "evidence of prior complaints concerning [the] City's Clerk" are "not relevant to the elements of the charge under consideration by the Commission."

I find that RFP No. 8 "appears reasonably calculated to lead to the discovery of admissible evidence" particularly given that the City has agreed to limit the scope of its request for production to unfair practice charges involving/concerning the City Clerk that have been filed by GWU with the New Jersey Public Employment Relations Commission (PERC) during the period 2015-2020. N.J.A.C. 1:1-10.1(b); R. 4:10-2(a). In its Answer, the City raised the following Affirmative Defenses:

> 5. The Charging Party's Complaint is properly dismissed and/or relief sought should be denied as the Charging Party acted in bad faith in filing the Complaint in the instant cause of action.
>
> 6. The Charging Party's Complaint is properly dismissed and/or relief sought should be denied as the Charging Party acted in bad

> faith subsequent to filing of the Complaint in the instant cause of action.
>
> 7. The Charging Party's Complaint is properly dismissed and/or relief sought should be denied as the Charging Party made false and/or misleading statements of material fact to the Commission's hearing examiner with knowledge that the statements made were false and/or misleading and/or were made with reckless disregard for the truth, and further has filed and/or refused to retract these false and/or misleading statements when requested by the Respondent.

The City is entitled to know whether GWU has previously asserted a claim against the City Clerk at PERC in order to establish its Affirmative Defense(s). Moreover, during oral argument, GWU conceded that it has filed an unfair practice charge(s) involving/concerning the City Clerk in the past, but withdrew the charge(s) during processing. Accordingly, consistent with this concession and the City's delimitation (unfair practice charges involving/concerning the City Clerk that have been filed by GWU with PERC during the period 2015-2020), GWU is directed to produce any/all documents responsive to City RFP No. 8.

Deposition

The City argues that "Tucker's deposition is necessary in order to properly evaluate this case and defend against the allegations raised by Tucker on behalf of the GWU." The City maintains that it "has been required to expend unnecessary costs resulting from Tucker's multiple evasive discovery responses as referenced above during a[n] . . . emergency when resources are

especially precious." The City asserts that "the amount of damages the GWU has already pled in the [unfair practice charge] is something that should be readily accessible to the GWU" but "the GWU has operated to keep the City in the dark as to this important matter through its failure to state in discovery [responses] the amount of damages it feels has been sustained." The City contends that despite Tucker "claim[ing] in writing to the hearing officer" that "written discipline . . . was allegedly issued by the Clerk," GWU "refuse[s] to produce [this discovery] after making a point of raising this matter" which has resulted in the City "absorb[ing] costs associated with proffering [the underlying written discovery requests]." The City claims that "Tucker went out of his way to make the matter of this written discipline relevant as he intentionally reported to the hearing officer and the [City's counsel] that an employee was written up by the Clerk in response to questions raised by the [City's counsel] that bore no relationship to Tucker's written allegations"; and "[h]aving so made this serious allegation, Tucker has refused ever since to produce the written warning or retract this assertion and admit no such written warning was ever issued." The City argues that "in light of the foregoing, Tucker's deposition is at this time necessary" because he "has revealed a pattern of evasive conduct . . . [and] the interests of justice require that [the City] be permitted to question

Tucker under oath." The City maintains that it "will suffer prejudice if it is unable to take Tucker's deposition [because] it will be required to proceed with te defense of this action against the GWU who has played 'hide the ball' concerning evidence relevant to the GWU's claims, the relief it seeks, and the City's defenses . . . ."

In opposition, GWU argues that "[t]here is no process under the Rules of Unfair Practices that permit depositions and, notwithstanding depositions are unnecessary because the answers provided to the discovery production and interrogatories are clear and unequivocal . . . [and] conform to the rules." GWU maintains that "[n]o clarification via deposition is reasonably necessary to identify the elements and evidence of the dispute."

At this time, I find that the City has failed to demonstrate good cause for Mr. Tucker's deposition. See N.J.A.C. 1:1-10.2(c). During oral argument, GWU offered to provide amended answers to interrogatories and amended responses to the notice to produce – consistent with my direction – by/before the close of business (5:00 p.m.) on May 22, 2020. Should GWU fail to comply, the City may renew its motion to compel Mr. Tucker's deposition.

ORDER

The City of Northfield's (City) motion to compel Government Workers Union (GWU) to provide more specific responses to the City's written discovery requests is granted. GWU shall provide the following responses by/before **5:00 p.m. on May 22, 2020**:

City Interrogatory (Rog) No. 1 - GWU is directed to provide a substantive, amended answer.

City Rog No. 4 - GWU is directed to provide an amended answer that encompasses the period February 28, 2020 through the present, with particular emphasis surrounding April 30, 2020.

City Rog No. 5 - GWU is directed to provide an amended answer consistent with its concession that no monetary damages are sought.

City Request for Production (RFP) No. 4 - GWU is directed to produce any/all responsive documents.

City RFP No. 5 - GWU is directed to produce any/all responsive documents.

City RFP No. 8 - GWU is directed to produce any/all responsive documents (i.e., unfair practice charges involving/concerning the City Clerk that have been filed by GWU with the New Jersey Public Employment Relations Commission during the period 2015-2020).

The City's motion to compel the deposition of GWU's President, David Tucker (Tucker), is denied without prejudice.

/s/ Joseph P. Blaney
Joseph P. Blaney
Hearing Examiner

DATED: May 18, 2020
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-4.5, -4.6 this ruling may only be appealed to the Commission by special permission in accordance with N.J.A.C. 19:14-4.6.

Any request for special permission to appeal is due by May 26, 2020.