

I.R. NO. 96-27

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
(DEPARTMENT OF LABOR AND
DEPARTMENT OF TREASURY),

Respondent,

-and-

Docket Nos. CO-96-280
and CO-96-298

COMMUNICATION WORKERS OF AMERICA,

Charging Party.

SYNOPSIS

On May 20, 1996, a Commission Designee ordered the State of New Jersey to provide information relevant to a department disciplinary hearing to the CWA, although certain information was claimed by the State to be confidential. The State and CWA had an existing agreement which provides that if the union requests information that the State believes to be confidential, it agrees to provide a sanitized copy of the requested documents whenever possible. However the State did not attempt to provide a sanitized copy of the request document. It was held that since the information was needed for an upcoming disciplinary hearing, the nature of the harm would be irreparable. The State was ordered to provide a sanitized copy of the documents to the CWA.

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Appearances:

For the Respondent,
Deborah T. Poritz, Attorney General
(Michael L. Diller, Sr. Deputy Attorney General)

For the Charging Party,
Weissman and Mintz, attorneys
(JudiAnn Chartier, of counsel)

INTERLOCUTORY DECISION

On March 21, 1996, the Communications Workers of America filed an unfair practice charge against the State of New Jersey (Department of Labor) alleging that the State violated N.J.S.A. 34:13A-5.4(a)(1) and (5)^{1/} by refusing to supply relevant

^{1/} These subsections 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."

information which CWA needed to represent unit member Carolyn Carmen in a department disciplinary hearing. The unfair practice charge was accompanied by an order to show cause.

On April 8, 1996, the Communication Workers of America filed a second unfair practice charge alleging that the State of New Jersey (Department of Treasury) violated N.J.S.A. 34:13A-5.4(a)(1 and (5) by refusing to supply relevant information which CWA needed to represent unit members Barry Giordano and Raymond Gillick in a department disciplinary hearing. This unfair practice charge was also accompanied by an order to show cause.

Both orders were executed and ultimately heard on April 25, 1996.

Carolyn Carmen was served with a notice of hearing on a minor disciplinary action. The notice stated that the State sought to impose a five-day suspension for neglect of duty in 11 specific cases handled by Carmen. The CWA seeks to review the 11 case files but the State has refused to supply them to the CWA.

Barry Giordano and Raymond Gillick received preliminary notices of disciplinary action from the Department of Treasury. A disciplinary hearing was scheduled for both men. The notices stated that the State sought to suspend Giordano for 20 days and Gillick for 10 days. The CWA has asked the State to supply it with a list of witnesses as well as an investigatory report concerning the conduct of Giordano and Gillick. The State has refused to furnish this information.

The State has argued in the case of Carolyn Carmen that it has already provided the Union with numerous other documents it requested and the 11 files are no longer in its possession, but were forwarded to the Federal Social Security Administration. It argues that the burden is on the Association to show why this information is needed.

The State argues that Giordano and Gillick are aware of the individuals who may testify against them and it further claims that since the investigatory report was prepared by the Department's Office of Criminal Investigation, it is a privileged document. Criminal investigation office reports are prepared with the possibility of transmittal to the State Police for a criminal investigation, although that did not happen here. The State claims it is not the policy of the Division of Taxation to reveal reports from its Office of Criminal Investigation. The State cites several cases in support of its position,^{2/} but none of them address the Act's duty to supply information.

The State agreed to adjourn the disciplinary hearings scheduled for April and May, 1996, pending the issuance of this decision.

^{2/} Nero v. Hyland, 78 N.J. 213 (1978) which upholds an exception to the right to know law, N.J.S.A. 47:1A-1; River Edge Savings & Loan Ass'n. v. Hyland, 165 N.J. Super. 540 (App. Div. 1979), cert. den. 81 N.J. 58 (1979) where the State did not have to reveal the name of an informant; and Greenspan v. State, 174 N.J. Super. 332 (App. Div. 1980) where confidential information was not released to a moving party in a suit claiming damages rising out of investigation of medicaid program. The moving party had the right to an administrative hearing to avail himself of the source of information.

The CWA contends that the harm here is irreparable. Although it concedes that it could challenge major disciplinary action imposed against Giordano and Gillick in a de novo hearing before an Administrative Law Judge, if their penalty is reduced to a minor disciplinary sanction, there is no automatic right of review. Under the collective negotiations agreement between the State and CWA, a minor disciplinary action could be brought before the joint Labor Management Panel to seek arbitration. However, it is up to this three-member, tripartite committee to determine if a given minor discipline can be arbitrated. Therefore, the pending department hearings might be the only hearings for the three affected employees.

A Stipulation of Settlement entered into between the parties to settle a prior dispute, provides in pertinent part:

1. The State recognizes that for the Communications Workers of America, AFL-CIO to fulfill its statutory obligations as the majority representative of employees in the Administrative/Clerical, Professional, Primary level Supervisors and Higher Level Supervisory negotiations units, the Union is entitled to obtain, upon request, relevant and non-confidential information. Such information includes, but is not limited to, documents upon which management relies in support of disciplinary actions imposed upon unit employees.

The State agrees to provide the Union with copies of employee personnel files, provided the employee authorizes the Union to receive such information. In addition, the Union shall have the right to review employee personnel files provided the employee is accompanied by a union representative.

3. All information to which the Union is entitled under the terms of this Agreement shall be provided as soon as possible after the Union requests said information.

4. If in response to a Union request for information the State asserts a claim of confidentiality, the State agrees to provide sanitized copies of requested documents whenever possible.

The standards that have been developed by the Commission for evaluating interim relief requests are similar to those applied by the Courts when addressing similar applications. The moving party must demonstrate that it has a substantial likelihood of success on the legal and factual allegations in a final Commission decision and that irreparable harm will occur if the requested relief is not granted. Further, in evaluating such requests for relief, the relative hardship to the parties in granting or denying the relief must be considered. Crowe v. DeGioia, 90 N.J. 126 (1982); Op. of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Op. of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975).

The Commission has consistently held that the refusal to supply a majority representative with information necessary to represent employees is an unfair practice. An employer must supply requested information to the majority representative provided it is potentially relevant and it will be used by the union to fulfill its statutory duties. This right, however, is not absolute. The duty to disclose turns on the specifics of the particular case. State of

N.J. (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988) [App. Div. Dkt. No. A-2047-87T7 (12/27/88)]; Shrewsbury Board of Education and Shrewsbury Borough Teachers Association, P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981); c.f. Lakewood Bd. of Ed. and Lakewood Ed. Ass'n, I.R. No. 95-22, lv to app. den. App. Div. Dkt. No. AM-1115-94T1 (7/10/95)] [I.R. No. 95-22 enforced, Law Div. Dkt. No. OCN-L-1436-95; app. withdrawn App. Div. Dkt. No. A-5590-95T1 (7/21/95)].

The cases cited by the State have limited precedential value. It is not disputed that an employee representative does not have an absolute right to confidential information. Here, however, the State entered into an agreement that, when the State asserts a claim of confidentiality it "agrees to provide sanitized copies of requested documents whenever possible".

Nevertheless, it now refuses to supply a sanitized document claiming it has an "internal policy" not to release such reports. No attempt was made to sanitize the Division of Taxation's investigative report. Nor does the State claim it cannot provide a sanitized copy of the investigative report, rather, it claims that this is a privileged document. This position is a repudiation of the language of the parties agreement.

Moreover, the fact that the requested information may be in the possession of the affected individuals does not remove the

general obligation to provide to the majority representative information relevant to contract administration. New Jersey Transit, P.E.R.C. No. 89-127, 15 NJPER 340 (¶20150 1989).

In the case of Carolyn Carmen, there is no question but that the 11 files, which form the basis of the disciplinary action, are relevant in her disciplinary hearing; the State has simply stated in oral argument that it would be a hardship to retrieve these files.^{3/} It never introduced affidavits or other evidence in support of this claim. Such an unsupported argument carries little weight.

These matters may never go before an arbitrator or an Administrative Law Judge; this may be the only opportunity for the union to represent these employees. Since these hearings will probably take place before the Commission can render a decision, I believe that the harm to the CWA is irreparable. The CWA has a right to review the requested information. Since the State refuses to release it, the CWA has a substantial likelihood in prevailing on the law and facts before the Commission. Given that the employer has the right to sanitize confidential documents, no hardship to the State has been demonstrated if interim relief is granted.


Accordingly, I will ORDER the State to supply the specific information requested; that is, the investigatory report concerning

^{3/} The CWA maintains this type of file is routinely transmitted back and forth between the State and the Social Security Administration.

Giordano and Gillick, (that report may be supplied in a sanitized condition), as well as a list of witnesses that may be called at the disciplinary hearing and the 11 files which were cited in Carmen's notice of discipline.

If the State does experience difficulty in providing the requested information, the State may make a specific application to be relieved of its obligation(s) under this order.

BY ORDER OF THE COMMISSION



Edmund G. Gerber
Commission Designee

DATED: May 20, 1996
Trenton, New Jersey