

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE  
BOARD OF TRUSTEES,

Respondent,

-and-

BCC SUPPORT STAFF ASSOCIATION/  
NJEA, INC.,

Charging Party.

Docket No. CO-2009-272

SYNOPSIS

A Commission Designee denies an application for interim relief on a charge alleging that the College refused to supply requested information the Association needed to process a step two disciplinary grievance contesting the termination of an employee. The College asserted confidentiality and deliberative process privilege as its reason for refusing to give the Association its investigative report as well as other information pertaining to an allegation of sexual harassment. The Designee finds that there is no substantial likelihood of success because the College's confidentiality concerns and assertion of deliberative process privilege do not establish the Association's statutory right to the information sought. Also, the College's concerns must be weighed against the competing concerns of the Association to attain all relevant information to effectively represent the employee. These interests are more appropriately considered in a full plenary hearing. Finally, the release of a sexual harassment investigative report during the processing of a disciplinary grievance is a novel issue lacking Commission precedent. It is therefore not appropriately decided in a full plenary hearing.

Additionally, even if it is likely that the Association is entitled to all or part of the material it seeks, there is no irreparable harm demonstrated. The Association has received certain relevant information. It can seek to subpoena the extra information from the arbitrator. Also, in the event the Association is successful in this unfair practice proceeding, a possible remedy, if warranted, is to order the release of the information and a new arbitration hearing.

I.R. NO. 2009-21

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Appearances:

For the Respondent, DeCottis, Fitzpatrick, Cole and  
Wisler, LLP, attorneys (Avis Bishop-Thompson, of  
counsel)

For the Charging Party, Bucceri and Pincus, attorneys  
(Sheldon H. Pincus, of counsel)

INTERLOCUTORY DECISION

On February 5, 2009, the Bergen Community College Support Staff Association/NJEA, Inc. (Charging Party or Association) filed an unfair practice charge against the Bergen Community College Board of Trustees (Respondent or College). The charge alleges that, despite repeated requests, the College refused to supply it with information and/or documents it needed to process a step two disciplinary grievance contesting the termination of an employee. The College's conduct allegedly violated 5.4a(1)

and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

The charge was accompanied by an application for interim relief seeking an order requiring the College to produce the requested documents and/or information and a request for a restraint prohibiting the further processing of the grievance until the Association receives the requested documents and/or information and has sufficient time to review same.

On February 6, 2009, I issued an Order to Show Cause, specifying February 25, 2009 as the return date for argument at the Commission's Newark offices. I also directed the College to file an answering brief together with opposing certifications. On February 20, the College filed its response. On the return date, the parties appeared in person and argued their cases. The following facts appear.

The College and the Association are parties to a collective negotiations agreement effective from July 1, 2007 through June 30, 2011. The Association represents a broad-based unit of regularly employed full-time and part-time employees in various

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<sup>1/</sup> 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."

titles including, among others, groundskeepers. Article XXVII provides for a four-step grievance procedure ending in advisory arbitration. Regarding the grievance at issue here, the parties are at Step 2 before the Director of Human Resources, James Miller. Step 3 is before the College President.

On October 12, 2008, the Foundation for Autism Training and Education (FATE) rented the College's facilities to hold a walk-a-thon and fair. Midwood Park High School students served as volunteers at the event. Groundskeepers Keith Mitchell and Tom Jessie were assigned by the College to work overtime, assisting with maintenance and garbage collection.

Three days after the event, on October 15, EEO Compliance Officer/Executive Assistant to the President Raymond Welch was advised by Professor Constance Lee, the College's cultural affairs coordinator, that an incident occurred during the fair/walk-a-thon between Mitchell and a student volunteer that implicated inappropriate conduct. Lee's complaint triggered an investigation under the College's "Policy Prohibiting Sexual Harassment" and "Complaint Process for Sexual Harassment".

The complaint process provides that once a written complaint is filed with the executive assistant to the president an investigation is commenced. The executive assistant may do the investigation or delegate it. The written complaint includes the description of the harassing behavior, name of the respondent,

when and where the harassing behavior occurred, what effect the behavior had on the complainant, who witnessed the behavior, if applicable, and to whom the complainant spoke about the behavior, if applicable.

When the investigation is complete a report is submitted to the executive assistant, if s/he has not done the investigation, and based on the report, the executive assistant determines whether a violation of the College's Sexual Harassment Policy has occurred and what, if any, sanctions should be imposed. The report together with the recommended sanctions is then sent to the dean or vice-president of the respondent's unit. The dean or vice-president together with the executive assistant determine what sanctions are appropriate and notify the respondent of the results of the investigation and sanctions. Notification is also made to the complainant. The policy provides that the respondent/employee may grieve the discipline or termination.

In a section entitled "Confidentiality", the complaint process provides:

The College shall maintain confidentiality to the extent possible within the requirements of conducting reasonable investigations. Only those who have a need to know will be told the identity of the parties to a complaint. In some instances, a complainant may choose to take no action or to defer action until a later date in order to maintain anonymity. In these instances, the College reserves the right to limited disclosure and to take appropriate action in

order to ensure the safety and well being of other members of the College Community.

Between October 15 and 20, 2008, Welch conducted an investigation, interviewing by telephone several individuals, including Mitchell, the FATE Coordinator Linda Bogan, several of the College's Office of Public Safety employees (Sgt. Mruzinski as well as Officers Morrison, Rivera and Citakian), the mother of the alleged victim, and Midwood High School Counselor Karen Biondo.

A pre-termination meeting took place on December 5, 2008. In attendance were Mitchell, NJEA Uniserv Representative Richard Comerford and the College's Director of Human Resources James Miller. During the meeting, Miller referenced certain complaints and statements that prompted an investigation of the October 12 events.

By letter dated December 5, 2008, the College advised Mitchell of his termination effective immediately. Specifically, Mitchell was terminated because (1) his conduct on October 12 negatively affected his value as a member of the college community, (2) he neglected his assigned duties, and (3) he made false statements during the course of the college's investigation.

On December 5, 2008, Comerford requested via e-mail that Miller provide certain information regarding the Mitchell situation, including Midwood H.S. Counselor Karen Biondo's

complaint; Welch's complete investigation report and conclusions; statements of Mitchell's immediate supervisor, Mr. Knowlton; Professor Constance Lee's complaint; all reports filed by the College's Office of Public Safety; a list of the dates, times and number of interviews that had been conducted by the College with Mitchell and by whom; and copies of all written notifications since October 12 to the Association of the Mitchell interviews and of requests for representation by Mitchell at the interviews.

On December 6, 2008, the Association filed a grievance alleging that Mitchell's termination was without just cause and failed to apply progressive discipline in violation of Article XVII of the parties' collective agreement. Also, the Association asserted that the College denied Mitchell union representation during a meeting with Miller and that the College withheld documents and/or information requested by the Association and pertaining to the Mitchell matter.

On December 8, 2008, Association President Albert Legge also requested that Welch provide full disclosure of all information pertaining to Keith Mitchell's grievance. As a follow-up, on December 9, 2008, Legge submitted a "Request for Government Record" under the Open Public Records Act (OPRA) for all material pertaining to the Keith Mitchell matter. The OPRA request was denied by Welch on December 22, 2008 citing the exclusion of such information under N.J.S.A. 47:1A-1.1 as a public record because

it is information generated on behalf of a public employer in connection with a sexual harassment complaint or with any grievance filed by or against an individual.

Having received none of the information and/or documents demanded earlier, Comerford renewed his demand on December 17, 2008. He also requested additional documents and/or information, namely the Office of Public Safety investigation report, the report of Mitchell's immediate supervisor Knowlton, and any outside video tapes from cameras trained on the October 12 event.

On December 22, 2008, the College responded to Comerford's requests providing the Public Safety investigation report, a list of dates of interviews and requests for representation by Mitchell, and advised that there were no video tapes of the October 12 event. Based on this response, Comerford, on that same day, renewed his requests for the remainder of the information and/or documents requested earlier. He added a request for new documents, including the transcripts or notes of interviews with individuals - Biondo, Knowlton, Bogen, Makowski and the Public Safety employees (Sgt. Mruzinski, Officers Morrison, Citakian and Rivera)- as well as a copy of Welch's interview of Mitchell.

Thereafter, on January 7, 2009, the College provided a copy of the Biondo complaint, all reports filed by the Office of Public Safety, and the Mruzinski interview transcript.



The outstanding information and/or documents requested by the Association in its Order to Show Cause are the following:

(1) a copy of the College's EEO Compliance Officer's (Welch) complete report and conclusions regarding his investigation of the matter;

(2) a copy of the statement made by Mitchell's immediate supervisor;

(3) a copy of the complaint filed by the College's Events Director (Lee);

(4) copies of all written notifications since October 12, 2008 to the Association of such interviews and of requests for representation by Mitchell at said interviews;

(5) the investigation report of Mitchell's immediate supervisor;

(6) transcription or notes of the interview of K. Biondo;

(7) transcription or notes of the interview of H. Knowlton;

(8) transcription or notes of the interview of L. Bogen;

(9) transcription or notes of the interview of complainant's mother;

(10) the Department of Public Safety interviews with Messrs. Morrison, Citakian and Rivera; and

(11) the Mitchell interview undertaken by the College's EEO Compliance Officer, R. Welch.

At oral argument, the College agreed to provide the complaint of Professor Lee (see no. 3 above). Also, the College asserted that Mitchell's immediate supervisor, H. Knowlton, did not conduct an independent investigation as requested in the Association's information demand (see no. 5 above). It also appears that the College either agreed to provide or has already supplied copies of all written notifications of interviews with Mitchell and requests for representation by Mitchell at his interviews (see no. 4 of Association demands).

No documents were provided with the parties submissions - e.g. Welch's report. It is also unclear from the parties submissions what is contained within that report. For instance, the College at oral argument appeared to suggest that all of the interviews requested by the Association in conjunction with this matter are contained within Welch's report.

#### ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v.

Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

In Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235, 236 (¶12105 1981), the Commission, relying on federal precedent, held that an employer must supply information to a majority representative if there is a probability that the information is potentially relevant and that it will be of use to the union in carrying out its representational duties and contract administration which includes grievance processing. Moreover, in State of New Jersey (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752, 754 (¶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), the Commission further explained that relevance is liberally construed. The information need only be related to the union's function as the collective negotiations representative and appear reasonably necessary for the performance of this function. Relevance is determined through a discovery-type standard; therefore, a broad range of potentially useful information is allowed to the union for effectuation of the negotiations process. See generally, Hardin and Higgins, The Developing Labor Law at 856, 859 (4<sup>th</sup> ed. 2001); NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967); J.I. Case Co. V. NLRB, 253 F.2d 149 (7<sup>th</sup> Cir. 1958). A refusal to supply relevant

information constitutes a refusal to negotiate in good faith and violates N.J.S.A. 34:13A-5.4a(5).

A union's right to receive information from an employer is not absolute. The employer is not required to produce information clearly irrelevant or confidential. The duty to provide information is evaluated on a case-by-case basis. State of New Jersey (OER), 13 NJPER at 754. Various types of information, however, particularly information concerning terms and conditions of employment and names and home addresses of unit employees, are presumptively relevant. See University of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996). The party asserting confidentiality interests has the burden of proof. NLRB v. U.S. Postal Service, 888 F.2d 1568 (11<sup>th</sup> Cir. 1989), enforcing 289 NLRB 942 (1988).

Here, the Association seeks various information relevant to its processing of its grievance regarding the termination of Keith Mitchell. There is no doubt that this information is relevant to the disciplinary action. The College based its termination decision on the findings made in the Welch report. Access to the College's investigative findings would undoubtedly assist the Association in evaluating Mitchell's case and help the Association in representing Mitchell. Additionally, if the Association has a more complete understanding of the College's case, it may permit a resolution of the Mitchell grievance at the

lowest level of the grievance procedure rather than requiring the parties to seek advisory arbitration - the final step in the contractual grievance process. The College asserts that the Welch report, which contains Welch's opinions, advice and recommendations, is confidential and protected as part of the College's deliberative process privilege. Although the Association makes a compelling argument for release of the materials it requested, it has not demonstrated that it has a statutory right to that information in light of the College's assertion of confidentiality and deliberative process privilege.<sup>2/</sup>

The deliberative process privilege applies to document(s) generated prior to a decision; the document(s) must be deliberative in nature, containing opinion, recommendations, or advice about the decision. "In such circumstances, the government's interest in candor is the 'preponderating policy' and, prior to considering specific questions of application, the balance is said to have been struck in favor of non-disclosure." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000).

The Association seeks the complete Welch investigation report, containing, among other items, his interviews with witnesses and the alleged victim and his recommendations and

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<sup>2/</sup> During oral argument, however, the College agreed to release Professor Lee's complaint to the Association.

opinions. Purely factual material is not protected by the deliberative process privilege. Id. The College concedes that the Welch report contains some purely factual information, which - at minimum - requires an in camera review of the information and/or documents sought. However, the documents at issue here are not before me nor would it be appropriate in this proceeding to conduct such a review. It is appropriate, therefore, that the College's confidentiality concerns and assertion of deliberative process privilege be weighed against the competing concerns of the Association to attain all relevant information to effectively represent Mitchell in a disciplinary grievance. These interests are more appropriately considered in a full plenary hearing.

The Association and College cite cases recognizing that no blanket privilege attaches to such an investigative report. Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997) and Christy v. Salem, 366 N.J. Super. 535 (2004). These cases establish that determinations must be made on a case-by-case basis relative to sanitizing the documents to prevent release of potentially privileged information. Again, the documents sought are not before me and if they were an in camera review of the information and/or documents would be inappropriate in this proceeding.

In order to obtain interim relief, the moving party must demonstrate a substantial likelihood that it will succeed on the

merits of its case. The cases cited by both parties are distinguishable from the matter before me, as neither are related to the release of a sexual harassment investigative report during the processing of a disciplinary grievance. Therefore, absent Commission precedent, I cannot conclude that the Association has a substantial likelihood of succeeding in proving its statutory right to the information requested. Interim relief is not the place to resolve the competing interests asserted by the Association and College.

Even if it is likely that the Association is entitled to all or part of the material it seeks, there is no irreparable harm demonstrated. Harm becomes irreparable in circumstances where the Commission cannot fashion an adequate remedy which would return the parties to the conditions that existed before the commission of any unfair practice at the conclusion of the processing of the unfair practice charge. City of Newark, I.R. 2006-3, 31 NJPER 250 (¶97 2005).

Here, the parties are engaged in processing a grievance contesting the termination of Mitchell. The College has given the Association certain relevant information, such as the Office of Public Safety report, the names of witnesses and the alleged victim, and the complaint (e-mail of Professor Lee). Assuming the Association is not successful at Steps 2 or 3 of the grievance procedure, it can seek to subpoena the additional

information, including the Welch report containing the actual interviews he conducted with the witnesses and/or alleged victim from the arbitrator.

N.J.A.C. 19:12-5.10 states that a grievance arbitrator has subpoena power in accordance with N.J.S.A. 2A:24-1 et seq. Indeed, the grievance arbitrator may be better equipped to identify the potentially relevant information which should be provided to the party making such a request. To ensure that no party is prejudiced by not having adequate information necessary to prepare and present its case, it may be appropriate for the arbitrator to conduct a hearing on such procedural matters before addressing the underlying merits of the dispute. Borough of Sayreville, I.R. No. 2001-6, 27 NJPER 66 (¶32029 2000). Moreover, at the conclusion of this unfair practice proceeding, if a violation of our Act is found, one possible remedy, if warranted, is to order the release of the information and a new arbitration hearing.

The Association also contends that Mitchell is without a job and, therefore, a paycheck. It suggests that by not ordering the release of the requested information immediately and forcing it to wait until arbitration, Mitchell will continue to suffer the loss of income. Numerous Commission cases establish that a money remedy at the end of successful litigation is not the basis to establish irreparable harm, absent some other extenuating

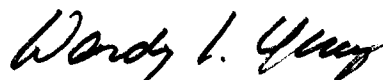


circumstance. See, Newark Bd. of Ed., IR No. 83-15, 9 NJPER 253 (¶14116 1983); Boro. of Closter, P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (irreparable harm found where change in health carrier and increased co-pay for prescription drugs implicated not only money damages, but supported that employees might chose to forego getting needed medications due to increased costs) and City of Vineland, I.R. 81-1, 7 NJPER 324 (¶12142 1981) (unilateral change in terms and conditions of employment during negotiations establishes irreparable harm even where money damages remedy at end of litigation).

Accordingly, because the Association has failed to establish that it has a substantial likelihood of prevailing on the merits in a final Commission decision or that it would be irreparably harmed, its application for interim relief is denied. The charge will be forwarded to the Director of Unfair Practices for processing

## ORDER

The application for interim relief is denied.



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Wendy L. Young  
Commission Designee

DATED: March 9, 2009  
Trenton, New Jersey