

D.U.P. NO. 97-13

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

STATE OF NEW JERSEY
(DEPARTMENT OF HUMAN SERVICES),

Respondent,

-and-

Docket No. CO-96-55

C.W.A., AFL-CIO,

Charging Party.

SYNOPSIS

The Director of Unfair Practices refuses to issue a complaint on an unfair practice filed by the CWA against the State (Department of Human Services). The CWA alleged that the State had improperly disciplined an employee who used a confidential client report without authorization as exculpatory evidence in her disciplinary hearing.

The Director finds that the parties have negotiated a procedure whereby CWA may request confidential information relevant to disciplinary actions. Therefore, the unauthorized use of such information is not an exercise of rights protected by the Act.

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Appearances:

For the Respondent,
Peter Verniero, Attorney General
(Michael L. Diller, Deputy Attorney General)

For the Charging Party,
Weissman & Mintz, Attorneys
(Judianne Chartier, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 21, 1995, CWA filed an unfair practice charge and amendments on April 8, 1996, against the State of New Jersey, Department of Human Services, alleging violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3).^{1/} CWA asserts that

^{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. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

the State disciplined Sharon Estrow on May 10, 1995, for the unauthorized use of confidential information in a disciplinary action against her.

Estrow is a Family Service Specialist II with the Department of Human Services, Division of Youth and Family Services. She regularly uses confidential documents concerning her DYFS clients. On March 2, 1995, the department conducted a disciplinary hearing on charges that Estrow had failed to ensure that a client was capable of assuming custody of her child. At the hearing, Estrow's CWA representative submitted the client's confidential psychological evaluation as exculpatory evidence in her behalf.

On May 10, 1995, Estrow was given a second discipline for disclosing the confidential report to her union representative without obtaining the proper authorization in violation of DYFS policy. Section 1204 of the policy requires that client case records be authorized for release before they leave the control of the case worker and Section 1207.2 states that confidential psychological reports may not be used without the permission of the author.^{2/} This was Estrow's second violation of the policy.

^{2/} The policy was adopted pursuant to State and federal statutory and regulatory provisions requiring client confidentiality. See N.J.S.A. 9:6-8.10(a) and (b), N.J.S.A. 30:4-24.3, N.J.A.C. 10:129-1 et seq.; and federal provisions at 45 C.R.F. 205.50 and 45 C.F.R. 1340.149(i).

CWA argues that Estrow's second discipline was improper. It asserts that Estrow's use of information necessary to defend herself in a disciplinary hearing is protected activity.

It is not disputed that Estrow has a right to information relevant to defending herself at the disciplinary hearing. See 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). Here however, the issue is whether the use of that relevant information without authorization is protected by the Act.

In Beckley Appalachian Hospital, 318 N.L.R.B. No. 65 (1995), 150 LRRM 1158 (1995),^{3/} the National Labor Relations Board found that a nurse had not engaged in protected activity when she obtained confidential patient records from her co-workers for use in her disciplinary appeal. The Hospital had a policy prohibiting the unauthorized use of patient information. The Board acknowledged that the employer had a "strong and compelling interest in protecting the confidentiality of patient records," subject to negotiated limitations.

That compelling need to protect client confidentiality exists here too. Here, the parties have negotiated a procedure

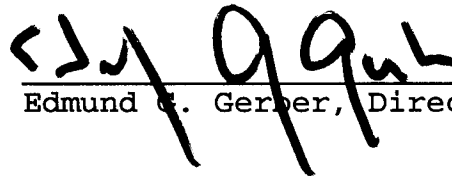
^{3/} The Commission has long been guided by federal precedent interpreting the Labor Management Relations Act in its application of the New Jersey Employer-Employee Relations Act. See Lullo v. International Association of Firefighters, 55 N.J. 409 (1970).

whereby CWA may request relevant, confidential information, including "documents upon which management relies in support of disciplinary actions imposed upon unit employees."^{4/} Paragraph 4 of the agreement states that the State will provide "sanitized copies" of confidential documents "whenever possible". Estrow or her union representative could have made a request for the documents. Estrow could have used the documents and still satisfied the State's need to preserve confidentiality. Under these circumstances, the State's discipline of Estrow for her failure to seek approval did not interfere with Estrow's exercise of rights protected by the Act.^{5/}

Accordingly, I find that the Commission's complaint issuance standard has not been met and I will not issue a complaint on the allegations of the charge. N.J.A.C. 19:14-2.2, 2.3.

The unfair practice charge is dismissed.

BY ORDER OF THE DIRECTOR
OF UNFAIR PRACTICES


Edmund G. Gerber, Director

DATED: August 19, 1996
Trenton, New Jersey

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- ^{4/} The agreement between the State (Department of Human Services) and CWA, is dated October 6, 1986.
 - ^{5/} If the State refused to provide the documents, that might have been an unfair practice. State of New Jersey (Treasury and Labor) and CWA, I.R. No. 96-27 22 NJPER 299 (127111 1996).