

H.E. NO. 2013-18

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

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2012-003

FRATERNAL ORDER OF POLICE
NEWARK LODGE NO. 12,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a motion for summary judgment in favor of a majority representative, based upon an unfair practice charge alleging that a public employer refused to supply information and documents necessary to process disciplinary grievances contesting the discipline of unit employees, violating 5.4a(5) and (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The employer asserts that the requested information is protected from disclosure by confidentiality and deliberative process privileges.

The Hearing Examiner determined that under the undisputed facts, the information sought is relevant to the majority representative in order to effectively process its grievances. The Hearing Examiner found that the public employer did not supply facts to support its claim that the information sought was confidential. He also found that the deliberative process privilege does not excuse the public employer from its duty to provide information related to the grievance.

A Hearing Examiner's Decision on Motion for Summary Judgment which resolves all the issues in a complaint becomes a recommended decision, pursuant to N.J.A.C. 19:14-4.8. A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Anna Pereira, Corporation Counsel
(Alison Brown-Jones, Assistant Corporation Counsel)

For the Charging Party,
Markowitz & Richman, attorneys
(Stephen C. Richman, of counsel)

DECISION ON
MOTION FOR SUMMARY JUDGMENT

On July 5, 2011, and August 15, 2011, the Fraternal Order of Police, Newark Lodge No. 12 (FOP) filed an unfair practice charge and amended charge against the City of Newark (City). The charge alleges that on or about June 1, 2011 the City [repeatedly] refused to supply it with information and/or documents necessary to process contractual grievances on behalf of unit employees who have alleged discrimination, coercion, and harassment by the City. The FOP alleges that the City's failure to provide the

requested information violates 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On April 4, 2012, the Director of Unfair Practices issued a Complaint and assigned the matter to me for hearing. On May 18, 2012, the City filed an Answer, asserting that the information requested falls within the advisory communication exception set forth in The Open Public Records Act (OPRA) N.J.S.A. 47:1A-1.1, et seq.^{2/} On December 6, 2012, the FOP filed a Notice of Motion for Summary Judgment with the Chair of the Public Employment Relations Commission (Commission) pursuant to N.J.A.C. 19:14-4.8, along with a brief and supporting documents. On December 27, 2012, the City filed a letter brief opposing the FOP's Motion. On January 3, 2013 the Commission referred the motion to us.

I have reviewed the parties' briefs and supporting documents submitted in this matter. I have also reviewed the Statement of Facts as stated in the FOP's brief, which the City does not

^{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; and (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."

^{2/} OPRA provides that certain government records are exempt from disclosure.

dispute and relied upon in its own brief. Based upon the record, I make the following:

FINDINGS OF FACT

1. On or about January 28, 2010, the FOP filed a contractual grievance on behalf of police officer Landre Johnson (Johnson) alleging that Sergeant Omar Diaz (Diaz) acted in a harassing, coercive, and discriminatory manner in levying discipline against Johnson.

2. The FOP also filed grievances on behalf of Detectives Walter Melvin (Melvin) and Alice Wilkins (Wilkins) that contested discipline levied against those officers and made similar allegations against Diaz.

3. Johnson, Melvin, and Wilkins also contemporaneously filed complaints against Diaz with the Internal Affairs Department and the City's Office of Affirmative Action.

4. Arbitration hearings concerning the grievances were scheduled, but the parties agreed to postpone the hearings because the parties believed that other departmental proceedings involving Diaz might affect the Johnson, Melvin, and Wilkins grievances.

5. On December 7, 2010, Diaz was administratively charged with, inter alia, conduct unbecoming, relating to an incident where Diaz admitted to having a problem with Johnson and other employees.

6. In a letter dated June 1, 2011, the FOP requested that the City provide information acquired as a result of the investigation conducted, pursuant to the complaint filed by Johnson against Diaz, by the City's Office of Affirmative Action and the disposition of any such investigation relative to Johnson's grievance. The FOP sought such information in order to process the grievance filed by Johnson, which was still active.

7. In a letter dated July 26, 2011, the FOP again requested that the City provide information acquired as a result of the investigation conducted by the City's Office of Affirmative Action, pursuant to the complaints filed by Melvin and Wilkins against Diaz. The FOP sought such information in order to process the grievances filed by Melvin and Wilkins, which were still active.

8. The City has not supplied the information requested by the FOP.

ANALYSIS

Summary judgment must be denied if material factual issues exist. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995); Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74-75 (1954). If the facts are not disputed, however, and the movant is entitled to judgment as a matter of law, the motion must be granted. Brill. N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other

documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross motion for summary judgment may be granted and the requested relief may be ordered.

The parties agree that the FOP requested information gathered from investigations of incidents relating to allegations made by its members and that the City has refused to provide the information requested. In these circumstances, I find that no genuine issue of material fact requires a plenary hearing.

The issue is whether the FOP is entitled to the requested documents as a matter of law. To answer this question, a threshold determination must be made regarding the relevancy of the information requested.

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. 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 1997) aff'd NJPER Supp. 2d 198 (¶177 App. Div. 1988); Shrewsbury Bor. Bd. of Educ. and Shrewsbury Bor. Teachers Ass'n, P.E.R.C. No. 81-119, 7 NJPER 235, 236 (¶12105 1981). Relevance is liberally construed. Morris Cty. and Morris Coun. No. 6, NJCSA, IFPTE,

AFL-CIO, P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), aff'd 371 N.J. Super. 246 (App. Div. 2004), certif. den. 182 N.J. 427 (2005). 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. Id., 371 N.J. Super. at 256. Relevance is determined through a discovery-type standard; a broad range of potentially useful information is allowed to the union for effectuation of the negotiations process. See, NLRB v. Acme Indus. Co., 385 U.S. 432, 437 (1967); Proctor & Gamble Mfg. Co. v. NLRB, 603 F.2d 1310, 1315 (8th Cir. 1979). A refusal to supply potentially relevant information may constitute a refusal to negotiate in good faith and violate 5.4a(5) and derivatively a(1) of the Act. See In re Univ. of Medicine and Dentistry of New Jersey, 144 N.J. 511 (1996); Burlington Cty. Bd. of Chosen Freeholders and CWA, P.E.R.C. No. 88-101, 14 NJPER 327 (¶19121 1988), aff'd NJPER Supp. 2d 208 (¶183 App. Div. 1989).

In this case, the City conducted investigations into the conduct of Diaz as a result of the complaints filed by Johnson, Melvin and Wilkins. The City's investigative findings, which among other things, may have revealed statements made by witnesses unknown to the FOP, could have potentially assisted the FOP in evaluating and processing the grievances that were filed on behalf of unit employees contesting discipline received from

Diaz. I find that the information requested by the FOP is relevant to its ability and duty to represent its members through the grievance process.

The City first argues that the disputed information was gathered in confidence as part of an investigation, and therefore must be categorized as confidential in nature so witnesses "will speak freely and openly . . ." (City Brief at 3). The City maintains that the documents' confidentiality excuses it from a duty to produce them, despite their relevance, because a union's right to receive relevant information from an employer is not absolute.

Generally, an employer is not required to produce confidential information. State of New Jersey (OER) and CWA. The duty to provide information claimed to be confidential is evaluated on a case-by-case basis. Id. at 754. The party asserting a confidentiality interest bears the burden of proof. NLRB v. United States Postal Serv., 888 F.2d 1568 (11th Cir. 1989).

Courts balance the competing interests in each case to determine if relevant information should be disclosed. Payton v. New Jersey Turnpike Authority, 148 N.J. 524, 542 (1997). In Payton, our Supreme Court concluded that the public interest in eradicating employment discrimination outweighs the public interest in maintaining the confidentiality of internal sexual

harassment investigations. Id. The Payton Court explained that confidentiality, like other privileges, is disfavored. Id., 148 N.J. at 539.

The Court in Payton also observed that the confidentiality privilege does not offer "blanket" protection; it rather ". . . applies selectively depending on the nature of the materials involved." Id. at 542. For example, the Court recognized that where highly personal information is involved, as in the particular context of sexual harassment investigations, there may be "legitimate concerns for confidentiality." Id.; see also, Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (excusing employer's failure to disclose to union information regarding employees' psychological aptitude tests in preparation for grievance arbitration because disclosure would reveal sensitive information bearing on employees' competencies). If the employer's disclosure will reveal information that could reasonably be expected to enable harassment or retaliation, the confidentiality privilege may bar disclosure. N. Indiana Pub. Serv. Co. and Local Union No. 12775, 347 NLRB 210, 179 LRRM 1305 (2006) (employer's interview notes of a supervisor's misconduct towards employees confidential where the subject of the investigation allegedly threatened deadly violence).

Applying these principles to this matter, I conclude that the confidentiality privilege does not bar release of the

disputed documents and the FOP was entitled to them in order to effectively process the grievances alleging discrimination, coercion, and harassment. The City has not provided any facts that the information requested contains highly personal information that should be protected from disclosure. Absent such facts, I find that the City did not meet its burden, and its interest in protecting its investigative process is outweighed by the FOP's interest in representing its members through the grievance procedure. See Payton.

The City also asserts that it did not violate the Act because the deliberative process privilege excuses it from its duty to provide information related to the grievance. The deliberative process privilege aims ". . . to establish a qualified privilege for governmental deliberative process materials because the government, like its citizens, needs open but protected channels for the kind of plain talk that is essential to the quality of its functioning." In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 88 (2000) (internal quotations omitted). To qualify for the privilege, the document must be both "pre-decisional" and "deliberative, containing opinions, recommendations, or advice regarding agency policies." Id. at 84-85.

Not all government decision processes are protected by the privilege. The privilege should be narrowly construed. Redland

Soccer Club, Inc. v. Dep't of the Army of the United States, 55 F.3d 827, 856 (3d Cir. 1995). More specifically, "[t]he [p]rivilege is properly limited to 'communications relating to policy formulation at the higher levels of government; it does not operate indiscriminately to shield all decision-making by public officials.'" Scott v. Bd. of Educ. of E. Orange, 219 F.R.D. 333, 337 (D.N.J. 2004) (quoting Grossman v. Schwarz, 125 F.R.D. 376, 381 (S.D.N.Y. 1989)). For example, the privilege does not protect "purely factual material," meaning factual information that does not "reveal the nature of the deliberations that occurred during" an agency's decision-making process. In re Liquidation of Integrity Ins. Co., 165 N.J. 75, 85 (2000); Educ. Law Ctr. v. New Jersey, 198 N.J. 274, 295 (2009). Nor does the privilege apply to the "routine operating decisions" of a government agency. Scott, 219 F.R.D. at 338 (concluding the privilege does not protect the deliberations leading up to Board of Education's decision to terminate Board employee).

The governmental agency initially bears the burden of showing that the documents it seeks to protect meet these two requirements. In re Liquidation of Integrity Ins. Co., 165 N.J. at 88. Once met, the presumption is against disclosure. Id. However, the government's significant interest in protecting the integrity of its deliberations can be overcome by showing a substantial or compelling need for the material. Id. Courts

must apply a balancing test between the public interest in non-disclosure and a party's need for the material, considering the following factors: (1) the relevance of the evidence; (2) the availability of other evidence; (3) the government's role in the litigation; and (4) the extent to which disclosure would hinder frank and independent discussion regarding contemplated policies and decisions." Id. at 85-86.

Copies of the investigations relating to the grievances filed in this case fall outside the scope of the privilege because the documents contain purely factual material. No facts have been presented to support a claim that the investigations reveal anything other than witnesses' retelling of events and factual findings.

The investigation documents also fall outside the scope of the privilege because their content does not implicate an important public policy. The information is unprotected by the privilege because it merely provides an overview of the incident gathered from interviews and analyzes whether the incident constituted inappropriate conduct.

Under 5.4a(1) and (5) of the Act, the City had a duty to provide the disputed documents to the FOP for the purpose of processing the grievances alleging harassment, coercion, and discrimination. The City did not meet its burden of establishing that the confidentiality and deliberative process privileges

shield the disputed documents from production. Therefore, its failure to produce the disputed documents violated 5.4a(1) and (5) of the Act. Consequently, I grant the FOP's motion for summary judgment.

CONCLUSIONS OF LAW

The City of Newark violated 5.4 a(5) and (1) of the Act when it refused to produce, upon demand by the FOP, information necessary to process grievances that alleged harassment coercion, and discrimination. Specifically, the City violated the Act by refusing to produce information related to an investigation into misconduct by Sergeant Omar Diaz.

RECOMMENDED ORDER

1. The FOP's motion is granted.
2. The City is ordered to:
 - A. Cease and desist from:
 - 1.) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to provide information requested by the FOP necessary to process grievances; specifically, information requested by the FOP on June 1, 2011 and July 26, 2011;
 - 2.) Refusing to negotiate in good faith with the FOP concerning terms and conditions of employment of employees in its unit, particularly, by refusing to provide information

requested by the FOP necessary to process grievances alleging harassment, coercion, and discrimination, specifically information requested by the FOP on June 1, 2011 and July 26, 2011.

B. Take the following action:

1.) Provide all information to the FOP, specifically, interview notes and investigative reports relating to allegations made by Johnson, Melvin, and Wilkins against Sergeant Omar Diaz and the FOP may use the information in its processing of the grievances related to this matter;

2.) Post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such, on forms to be provided by the Commission, will be posted immediately upon receipt thereof and after being signed by the Respondent's authorized representative will be maintained by it for at least sixty (60) consecutive days. Reasonable steps will be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials; and,

3.) Within twenty (20) days of receipt of this order, notify the Chair of the Commission what steps the Respondent has taken to comply with this order.



Timothy Averell
Hearing Examiner

DATED: May 21, 2013
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by June 3, 2013.



NOTICE TO EMPLOYEES

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to provide information requested by the FOP necessary to process grievances alleging harassment, coercion, and discrimination; specifically, information requested by the FOP on June 1, 2011 and July 26, 2011.

WE WILL cease and desist from refusing to negotiate in good faith with the FOP concerning terms and conditions of employment of employees in its unit, particularly, by refusing to provide information requested by the FOP necessary to process grievances alleging harassment, coercion, and discrimination, specifically, information requested by the FOP on June 1, 2011 and July 26, 2011.

Docket No. CO-2012-003

City of Newark
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372