H.E. NO. 2021-6

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

In the Matter of

STATE OF NEW JERSEY
(KEAN UNIVERSITY),

Respondent,

-and- Docket No. CO-2018-299

COUNCIL OF NEW JERSEY STATE COLLEGE
LOCALS, AFT, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner granted a motion for summary judgment in favor of the Council of New Jersey State College Locals, AFT, AFL-CIO (the Council) and denied a motion of summary judgement filed by the State of New Jersey, Kean University (the University) arising from an unfair practice charge. In the charge, the Council alleges that on or around June 4, 2018, the University refused to provide documents it requested on May 25, 2018, relating to the Charging Party's investigation into whether the University violated the non-discrimination provisions of the parties' collective negotiations agreement (CNA or contract) when it decided not to hire an adjunct faculty member for the Fall 2018 semester who previously advised the University of her cancer diagnosis and treatment in the Fall of 2017. The Hearing Examiner found that the information requested was relevant to the Council's investigation of a potential contract violation, and that the Respondent failed to establish that its refusal to furnish the requested information did not violate the Act. The Hearing Examiner concluded that the merits of a potential grievance had no bearing upon the Respondent's statutory duty to provide relevant information, and that the requested information was not confidential. Assuming any of the requested information implicated a legitimate and substantial confidentiality interest, the University was obligated to seek an accommodation of the Union's need for the requested information and failed to do so.

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,
Gurbir Grewal, Attorney General
(Paul Nieves, Deputy Attorney General)

For the Charging Party,
Mets Schiro and McGovern, LLP, attorneys
(Kevin P. McGovern, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 22, 2018, the Council of New Jersey State College Locals, AFT, AFL-CIO (Charging Party or Council) filed an unfair practice charge with the New Jersey Public Employment Relations Commission (Commission) alleging that the State of New Jersey, Kean University (Respondent or University) violated subsection 5.4a(1) [1/] of the New Jersey Employer-Employee Relations Act,

1/ This provision prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the
(continued...)

N.J.S.A. 34:13A-1 et seq. (Act). The Charging Party alleges that on or around June 4, 2018, the University refused to provide documents it requested on May 25, 2018, relating to the Charging Party's investigation into whether the University violated the non-discrimination provisions of the parties' collective negotiations agreement (CNA or contract) when it decided not to hire an adjunct faculty member for the Fall 2018 semester who previously advised the University of her cancer diagnosis and treatment in the Fall of 2017.

On March 2, 2020, a Complaint and Notice of Pre-Hearing issued. The University filed its Answer on March 30, 2020, and its Amended Answer on April 16, 2020. In its Answer, as amended, the University admitted that the Council made an information request and that the University refused to produce any of the information. However, it denied violating the Act, asserting that the Council was not entitled to the requested information.

On October 16, 2020, the parties both filed motions for summary judgment, together with supporting exhibits, affidavits,[2/] and briefs. On October 30, 2020, the Council filed

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1/ (...continued)
rights guaranteed to them by this act."

2/ The Charging Party provided two affidavits from adjunct faculty member Runae Wilson, and one from the President of KUAFF, Marie Krupinski. Respondent did not provide any affidavits or certifications from anyone other than its counsel certifying that the documentary exhibits provided
(continued...)

its reply brief, with a supplemental affidavit. On November 2, 2020, the University filed its reply brief.[3/] On November 15, 2020, the Commission referred the motions to me for a decision. N.J.A.C. 19:14-4.8.

Pursuant to N.J.A.C. 19:14-4.8(e), summary judgment will be granted:

> [i]f 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 . . . is entitled to its requested relief as a matter of law . . . .

Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995) sets forth the standard to determine whether a "genuine issue" of material fact precludes summary judgment. The fact-finder must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party." Id. While credibility determinations require a plenary hearing, the court in Brill explained that "[t]he import of our holding is that when the evidence is so one-sided that one

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2/ (...continued)
were unaltered and may have been exchanged between the parties.

3/ Although the Respondent filed a reply brief, the brief itself only contains a response to the Charging Party's Statement of Material Facts from its initial motion, and does not contain any additional legal analysis or arguments.

party must prevail as a matter of law, the trial court should not hesitate to grant summary judgment." Id. (internal quotations omitted). Applying these standards and relying on the parties' motions for summary judgment and reply briefs, I make the following:

FINDINGS OF FACT

1. The Charging Party is the majority representative of a negotiations unit of adjunct faculty employed by nine (9) state colleges and universities, including the Respondent Kean University.

2. The Kean University Adjunct Faculty Federation (KUAFF or Local) represents adjunct faculty at the University and is a constituent member of the Council.

3. The parties signed a collective negotiations agreement (CNA or contract) that covered the period of July 1, 2015, through June 30, 2019.

4. Article II of the CNA, entitled "NON-DISCRIMINATION" provides in pertinent part as follows:

> The STATE and the UNION agree that the provisions of this Agreement shall apply equally to all employees. The STATE and the UNION agree that there shall be no intimidation, interference or discrimination because of . . . disability, physical handicap . . . .

Article II does not expressly provide that violations of its provisions are subject to advisory arbitration.

5. Article VI of the CNA sets forth the grievance procedure, which culminates in binding arbitration. To achieve the prompt, fair and equitable resolution of grievances, the Article requires that "relevant and necessary information, material and documents concerning any grievance" be produced within fifteen (15) business days of the written request. Section B of Article VI provides the following definition of a grievance:

> A grievance is an allegation by an employee or the UNION that there has been:
>
> 1. A breach, misinterpretation or improper application of terms of the Agreement; or
> 2. An arbitrary or discriminatory application of, or failure to act pursuant to, the applicable policies or rules of a Board of Trustees or applicable regulations or statutes which establish terms and conditions of employment.
>
> There shall be no right to grieve management's decisions and related procedures to employ or not employ adjunct faculty in connection with either initial or subsequent employment. Decisions to cancel courses which were scheduled to be taught, discipline, and academic judgments also are not grievable.

Step One of the grievance procedure further provides that "grievances alleging a breach, misinterpretation or improper application of the terms of this Agreement that relate to employment, re-employment, discipline or academic judgement

cannot be appealed to arbitration." Step One of the grievance procedure does not expressly limit the right to file a grievance on such claims.

6. Runae Wilson was employed by the University as an adjunct faculty member during the Fall 2017 and Spring 2018 semesters. She had been previously employed in that role for roughly ten years.[4/]

7. As a member of the adjunct faculty, Wilson was represented by the Local and covered by the CNA.

8. In the Fall 2017, Wilson was diagnosed with cancer and began chemotherapy. She continued teaching during this time and the Spring 2018 semester.

9. On November 2, 2017, Wilson sent an email to the University's Dean of the Psychology Department, Lauren Mastrobuono, with the subject line "Requested Letter." Although the email was sent from a relative's account, the message was clearly signed by "Runae Edwards-Wilson." She wrote "[r]egarding the attached letter, I think I will only need December 15 off."

4/ The parties characterize her employment history differently. The Charging Party claims that Wilson remained continuously employed during the ten (10) years preceding May 2018 since she was consistently rehired. Respondent asserts that Wilson was not continuously employed because she was rehired under separate contracts and "upon information and belief" did not work during the summers. Wilson's affidavit establishes that she was employed as an adjunct for twenty (20) semesters prior to May 2018. (Charging Party Summary Judgment motion Wilson Aff. Para. 1)

The referenced attachment was a letter from Wilson's radiation oncologist, in which he advised that Wilson was scheduled to undergo radiation therapy the next month through January 2018.[5/]

10. At some point in May 2018, Wilson was informed that she would not be hired for the Fall 2018 semester, and that the reason she was not being rehired was due to low student evaluation forms (SIR's) relative to other faculty in the psychology department.

11. Wilson also called and emailed Dean Mastrobuono to further explore a teaching appointment for the Fall 2018 semester. In a May 14, 2018, email, Dean Mastrobuono responded to Wilson. Dean Mastrobuono wrote "[u]nfortunately, I do not have any of the courses that you indicated on your request form available." She further acknowledged receiving Wilson's phone message, and advised that she would be available to speak with Wilson until 4:30pm that day. Dean Mastrobuono responded from the same email address that Wilson had used in her November 2, 2017, communication regarding her leave request for radiation therapy and accompanying medical letter.

5/ Respondent represented in its submissions that it is not clear from the Charging Party's affidavits and exhibits that Kean actually received this email. However, Respondent does not claim that the Kean email address used for Mastrobuono was incorrect or provide any specific basis for doubting its receipt. More fundamentally however, there is no dispute that an email regarding Wilson's medical condition was sent to the psychology department dean before Wilson was informed that she would not be hired for the Fall 2018 semester.

12. John Venezia and Marie Krupinski at all relevant times served as the KUAFF's grievance officer and president, respectively. After receiving Dean Mastrobuono's response, Wilson contacted Venezia to ask for assistance in finding out more about why she had not been rehired and could not get a class for the Fall 2018 semester. In May 2018, Venezia advised Krupinski of Wilson's concerns. Upon the advice of counsel, Krupinski authorized Venezia to make a demand for documents for the purpose of determining whether the University had violated Article II of the contract by not hiring Wilson for the Fall 2018 semester.

13. At all relevant times, Ken Green has been employed as the University's Labor Counsel. On May 25, 2018, Venezia sent Labor Counsel Green an email attaching a letter requesting documents regarding the University's decision not to hire Wilson for the Fall 2018 semester.[6/] In his letter, Venezia advised that Wilson had been informed that her student evaluation forms (SIR's) were comparatively low to other department faculty members, and that her classes were not available for the Fall 2018 semester. Venezia wrote:

6/ Venezia's letter also explained that Wilson had revealed her cancer diagnosis to the University during the Fall 2017 semester but was able to continue teaching. (Respondent SJ Motion Ex. B; Charging Party SJ Motion Krupinski Aff. Ex.C) Respondent's factual assertion to the contrary in its motion appears to be a typographical error. (Respondent SJ Motion Statement of Facts para. no. 3)

> Article II of the Statewide contract governing the employment of adjuncts at Kean prohibits discrimination on the basis of disability. Obviously, we are concerned by both the timing of Ms. Wilson's non-reappointment, given her diagnosis, and with the potentially shifting reasons given by the University in that regard. Therefore, we would request that your office provided the following information to the union with the next ten (10) business days:
>
> (a) All student evaluation forms (SIR's) for faculty in the Psychology Department for the Fall 2017 and Spring 2018 semester;
> (b) A list of classes taught by Mr. [sic] Wilson during the Fall 2017 and Spring 2018 semesters;
> (c)A list of classes being offered within the Psychology Department for the Fall 2018 semester;
> (d) The name of each faculty member teaching each class offered within the Psychology Department for the Fall 2018 semester, and the date that each said faculty member was assigned to teach said class.

Venezia also expressly invoked the KUAFF's right under public sector law to request and receive information pertaining to contract administration and enforcement.

14. In a June 4, 2018, email to Venezia, Labor Counsel Green denied the information request. Green wrote:

> I am in receipt of your letter dated May 25, 2018 seeking, inter alia, information under Article II of the agreement. Consistent with my understanding of applicable law, your letter has been forwarded to Affirmative Action for whatever, if any, action is deemed appropriate.

> As to your letter, please be advised that your letter seeks information regarding appointment/non-appointment issues related to adjunct R. Wilson. Please be advised that there was no non-reappointment of adjunct Wilson and as such the request is denied. Further, please be advised that adjuncts are not entitled to continuing employment with the University and low SIRIIs [sic] and/or classes being unavailable are both legitimate reasons taken separately or together to hire adjunct Wilson. Finally, please be advised that, assuming the foregoing is inaccurate, it is my position that any information being requested is pertaining to a discrimination complaint and therefore confidential.

15. Neither the KUAFF or the Council filed a grievance alleging a violation of the contract regarding an Article II violation.

16. Respondent maintains the "New Jersey State Policy Prohibiting Discrimination in the Workplace." (Respondent SJ Motion Ex. E, hereinafter the State Anti-Discrimination Policy) It is a "zero tolerance" policy that includes disability among the protected categories. It directs state agencies to follow certain procedures regarding the reporting, investigating and remediation of discrimination complaints. It requires that investigations be conducted promptly and thoroughly. A written record of the complaints received must be maintained, and the investigative results also must be forwarded to the agency head for a final decision regarding whether there was a violation. It

also generally requires confidentiality, providing in pertinent part as follows:

> [a]ll complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained through the investigatory process.

17. In Wilson's affidavits, she stated that she never filed a complaint alleging discrimination with the University. Wilson also stated that since May 25, 2018, she has never been contacted by anyone employed by Respondent, including anyone from Respondent's Affirmative Action office, to conduct an interview about her concerns or to share any information regarding the decision not to hire her for the Fall 2018 semester. Wilson never received any results from any investigation on that subject and never was advised that any such report would be forthcoming. Wilson represented that she has been available for discussion both in-person and by email while she has taught at the University for the past few semesters.

ANALYSIS

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). An employer violates this subsection if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. UMDNJ-Rutgers

Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987)(additional citations omitted). The charging party need not prove actual interference with the exercise of statutory rights. Id.; See also Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). This provision will also be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed. and Lakehurst Ed. Ass'n, P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004), aff'd 31 NJPER 290 (¶113 App. Div. 2005).

Under section 5.4a(5)[7/] of the Act, public employers are prohibited from "[r]efusing 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 . . . ." Generally, a refusal to provide relevant information to the majority representative constitutes a refusal to negotiate in good faith, in violation of Section 5.4a(5). In re Univ. of Medicine and Dentistry of New Jersey, 144 N.J. 511, 530-531 (1996) (citing State of New Jersey (Office of Employee Relations)), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), aff'd NJPER Supp. 2d 198 (¶177 App. Div. 1988)); see also, State

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7/ Although the charge did not specifically cite a violation of Section 5.4a(5), refusals to provide relevant information under the Act and in private sector labor law are considered to be a violation of the duty to negotiate in good faith. Accordingly, I will analyze the case under this subsection.

of New Jersey (Dept. of Higher Ed.), P.E.R.C. No. 87-149, 13 NJPER 504, 505 (¶18187 1987). A public employer must "provide its employees' union with the information that the union needs to evaluate the merits of an employee's complaint about employer conduct unless such information is 'clearly irrelevant or confidential.'" Id. at 531 (quoting State of New Jersey (Office of Employee Relations)), supra. The right to relevant information is not absolute as "the duty to disclose turns upon the circumstances of the particular case." State of New Jersey (Office of Employee Relations), supra (internal quotations omitted).

In determining relevance in the information request context, the Commission and courts have consistently been guided by labor law precedent developed in the private sector.[8/] See Morris Cty. and Morris Council 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), cert. den. 182 N.J. 427 (2005) (explaining that the Commission has applied decisional law developed in the private-sector under the National Labor Relations Act for information request disputes). Information concerning employees

8/ As our Supreme Court has recognized, precedents under the unfair practice provisions of the federal National Labor Relations Act guide the agency in interpreting the Act. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 159 n.2 (1978); Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Ed. Secretaries, 78 N.J. 1, 9 (1978).

in the negotiations unit and their terms and conditions of employment is considered presumptively relevant. Id. (home addresses of unit employees presumptively relevant). See also Disneyland Park, 350 NLRB 1256, 1257 (2007); Sands Hotel & Casino, 324 NLRB 1101, 1109 (1997). Therefore, to avoid liability under the Act, the employer bears the burden of establishing that it was not obligated to furnish the presumptively relevant information that was sought. If the requested information is not related to the terms and conditions of employment for unit employees, then the union has the burden of establishing the relevance of the requested information. See Disneyland Park, 350 NLRB at 1257.

Moreover, "relevance in this context is analyzed under a discovery-type standard, not a trial-type standard, and therefore a broad range of potentially useful information should be disclosed to the majority representatives. . . ." Mt. Holly Tp. Bd. of Ed., P.E.R.C. No. 2019-006, 45 NJPER 103 (¶27 2018) (citing NLRB v. Acme Indus. Co., 385 U.S. 432 (1967)). Under this standard, relevancy does not turn on the merits of the underlying dispute. NLRB v. Acme Indus. Co., 385 U.S. at 437-438. Instead, it requires only a "probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its statutory desires and

responsibilities." Id. at 437. See also Sands Hotel, 324 NLRB at 1109.

The Charging Party asserts that Respondent violated the Act because the requested information was potentially relevant to its grievance investigation regarding whether Ms. Wilson was discriminated against on the basis of disability or handicap in violation of Article II's non-discrimination provisions. It asserts that although Article VI of the CNA prohibits it from filing a grievance contesting Respondent's hiring decisions, it may grieve to advisory arbitration the issue of whether Respondent violated Article II.[9/] The Charging Party contends that the requested information was directly related to the representations Respondent had made regarding why Ms. Wilson would not be hired for the Fall 2018 semester. Since Ms. Wilson had been informed that she had relatively low student evaluations compared to others in the psychology department and that her requested courses were not available, the Charging Party's request for student evaluation forms for psychology department faculty and the various information related to the psychology

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9/ It also notes that Article VI of the CNA requires the Respondent to provide "relevant and necessary information" that it requests in connection with any grievance. Since the instant dispute arises from the statutory obligation of public employers and majority representatives to provide information, I do not rely on this contractual right to information to reach my conclusion.

department's class offerings would assist in evaluating those representations.

The Charging Party further contends that Respondent did not meet its burden of establishing that the requested information is confidential. It contends that Respondent's claim that the requested information is confidential because it pertains to a discrimination complaint is baseless, as Ms. Wilson never filed a complaint against Respondent, and the Charging Party did not file a grievance on her behalf under Article II's non-discrimination provisions. Citing City of Newark, H.E. 2013-18, 40 NJPER 44 (¶18 2013), it asserts that confidentiality claims regarding information requested by a union pertaining to members' discrimination allegations have been rejected.

Lastly, the Charging Party contends that the right of majority representatives to investigate and file grievances alleging unlawful discrimination would be rendered meaningless if public employers can refuse to provide relevant information regarding such claims. While it recognizes that the State Supreme Court's decision in Teaneck Bd. of Ed. v. Teaneck Teachers Assoc., 94 N.J. 9 (1983) prohibits union grievances alleging employment discrimination to proceed to binding arbitration, the Charging Party also emphasizes that the court specifically acknowledged the potential benefits of such claims proceeding to advisory arbitration. Therefore, it asserts that

granting Respondent's motion for summary judgement would effectively undo the rights afforded to unions and their members under Teaneck, supra.[10/]

Respondent argues that the Charging Party was not entitled to the requested information. It first asserts that adjunct faculty have no right to reappointment and are hired on a semester basis. Citing Article VI of the CNA, it notes that there is no right to grieve management's employment decisions. Therefore, it reasons that absent a right to reappointment, the Charging Party cannot seek any documents to challenge Respondent's decision not to hire Ms. Wilson. It also claims that the Charging Party can only conduct an investigation into discrimination "within the context of remedying a contract violation." Since the time for filing a grievance has lapsed,

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10/ In addition to Teaneck, supra, the Charging Party also relies on Rutgers University, P.E.R.C. No. 98-109, 24 NJPER 165 (¶29081 1998) where the Commission denied Rutgers' request for a restraint of binding arbitration of a grievance contesting the nonappointment of a lecturer and the denial of a related information request, where the lecturer alleged gender discrimination motivated its decision. However, in that decision there were facts indicating that the parties may have agreed to review such determinations through advisory arbitration, while in the instant matter there is no mention of advisory arbitration in the CNA or any other evidence of such an agreement. I also do not read Teaneck, supra, to provide a general right to advisory arbitration. However, as the below analysis makes clear, a majority representative's statutory right to relevant information does not depend on the right to proceed to binding or advisory arbitration or even the merits of a potential grievance.

Respondent maintains that a contractual remedy is no longer available.

Additionally, since the Charging Party alleged disability discrimination, Respondent claims that it was required to forward the matter to the Affirmative Action department for investigation and that releasing sensitive and confidential information to the Charging Party might have compromised the investigation and violated the State's Anti-Discrimination Policy. It explains that under that policy, it is required to investigate any claims of discrimination due to protected status, such as disability.

Lastly,[11/] the Respondent contends that some of the document demands made by the Charging Party were improper. It claims that student evaluation forms "are part of an anonymous, confidential process." It cites Section XV(H) of the CNA in support of its position, which limits the access of personnel files "to those individuals directly involved in the administration, analysis or evaluation of professional personnel." It contends that releasing the student evaluations would be improper because other employee organizations may object, and that the University could not guarantee that such information would not become public.

11/ Respondent also contends that the Charging Party's contractual right to information does not entitle it to the requested information. However, since this case involves the Respondent's statutory obligation to provide relevant information, I do not consider this argument as it would require me to interpret the contract's language and does not ultimately resolve the unfair practice claim.

Respondent further claims that the request for the list of classes taught by Ms. Wilson during the Fall 2017 and spring 2018 semesters is "so frivolous as to be reasonably construed as being harassing in nature" because Wilson knew what classes she taught in previous semesters and would have access to that information.[12/]

In its reply brief, the Charging Party asserts that it has a right to pursue Article II grievances to advisory arbitration and that Article II's non-discrimination provisions would be effectively read out of the contract if Article VI's prohibition against grieving Respondent's hiring decisions entitled Respondent to deny information requests that seek to investigate discriminatory motives. It notes that Respondent did not cite to any legal authority in support of the proposition that public employers can refuse to produce relevant information if it pertains to discrimination allegations. It disputes that the time to file a grievance has expired since it could not have reasonably known whether Respondent violated Article II because Respondent refused to provide relevant information that would enable it ascertain whether there was evidence of a

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12/ Beyond its confidentiality arguments, Respondent did not specifically address the "propriety" of providing the remaining documents to the Charging Party, i.e., the list of classes being offered in the psychology department for the fall 2018 semester and the names of the faculty members teaching those classes as well as the date each member was assigned to teach those classes.

discriminatory motive. Additionally, it maintains that the timeliness of a grievance would be an issue for an arbitrator to decide, and therefore, cannot serve as a basis to withhold relevant information. It notes that policy considerations also weigh against recognizing a right to withhold relevant information where a grievance has expired since it would incentivize public employers to refuse information requests to run out the clock on the time to file a grievance. Relying on Ms. Wilson's affidavits, the Charging Party maintains that Respondent did not conduct any investigation into whether Wilson was discriminated against because she was never contacted by anyone from Respondent's Affirmative Action department since the information request was made years ago. Given that the documents were not part of any genuine investigation, Respondent was required to produce the requested information.

I find that all of the information the Charging Party requested in its May 25, 2018, email to Labor Counsel Green was relevant. The list of classes taught by Ms. Wilson for the Fall 2017 and Spring 2018 semesters is presumptively relevant since it pertains to the work performed by a unit employee. The remaining categories of information were also clearly relevant because they are directly related to the two justifications that Respondent provided to Ms. Wilson in declining to hire her for the Fall 2018 semester. The SIR's for faculty would have enabled the Charging

Party to verify the Respondent's claim that Ms. Wilson had relatively low student reviews. The class offerings for the psychology department for Fall 2018 and the identities of and assignment dates for faculty members assigned to teach those classes would have enabled the Charging Party to verify the Respondent's claim that the courses Ms. Wilson sought to teach were not available. Since the requested information was tailored to the justifications that Respondent provided, it clearly would have been useful in ascertaining whether there was a discriminatory motive prohibited by Article II and easily satisfies the broad discovery-type standard for relevance.

Having established the information's relevance, the burden falls to the Respondent to establish that Labor Counsel Green's failure to furnish the requested information did not violate the Act. As discussed in further detail below, Respondent did not meet its burden.

Labor Counsel Green's justification that the Charging Party was not entitled to the information because "there was no non-reappointment of adjunct Wilson" and that adjuncts are not entitled to continuing employment fails since the absence of a contractual right to reappointment does not necessarily excuse Respondent from its statutory duty to provide relevant information regarding a potential violation of another contractual provision. Although Counsel Green expressly

recognized that the Charging Party sought information regarding a potential Article II violation, he provided no explanation for his view that the lack of a right to continuing employment excused him from providing relevant information regarding discrimination allegations under Article II. And as the Charging Party correctly noted, Respondent provides no case law in support of such a proposition.

While Article VI of the CNA prohibits grievances regarding its hiring decisions, nothing in the CNA clearly[13/] prohibits the filing of a grievance regarding discrimination claims arising under Article II, which expressly prohibits discrimination against unit employees on the basis of disability or physical handicap. Employers and employee organizations are entitled to obtain information from one another that would be of potential use in evaluating whether a contract provision was possibly violated. Mt. Holly Tp. Bd. of Ed., supra. This is true even

13/ To the extent the Respondent's argument regarding Article VI could be understood as asserting a waiver defense, such a defense would also be unpersuasive. Contractual waivers of statutory rights must be clear and unambiguous. Red Bank Reg. Ed. Ass'n v. Red Bank Reg. Bd. of Ed., 78 N.J. 122, 140 (1978). There is no language in the CNA that clearly forfeits the right of the Charging Party to file grievances for Article II non-discrimination violations, even if that grievance relates to a hiring determination. In fact, Step One of the grievance procedure outlined in Article VI appears to contemplate that grievances contesting violations of the terms of the CNA that "relate to" managerial prerogatives like hiring or discipline can be processed short of arbitration.

when the grievance may ultimately be without merit[14/] or there may be no viable contractual recourse available. See NLRB v. Acme Indus. Co., supra; Postal Service, 303 NLRB 502 (1991)(employer obligated to provide requested information where related grievance was untimely); Dow Chemical Co., 2003 NLRB LEXIS 696, *1 (N.L.R.B. October 22, 2003) (employer required to provide requested information relating to employee discharge pursuant to a last chance agreement); Endo Painting Service, 360 NLRB 485 (2014) (employer required to provide requested information regardless of whether the related grievances were permissible under the contract). Respondent does not cite any Commission cases where the statutory duty to provide potentially useful information turned upon the merits or available defenses in a contract dispute.[15/] Since the Charging Party acted, pursuant to its statutory responsibilities, to investigate a possible violation of Article II that it may have a right to grieve (albeit not to binding arbitration), it was entitled to the

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14/ For this reason, Respondent's argument that it is not required to provide the requested information because the time for filing a grievance has lapsed also fails since timeliness goes to a grievance's merits.

15/ Similarly, the right to information does not depend on the ability of the requesting party to obtain information through other means. Again the touchstone is relevancy, broadly construed. See Mt. Holly Tp. Bd. of Ed., supra. Thus, the ability of the Charging Party to potentially obtain from Ms. Wilson a the list of courses she previously taught does not excuse Respondent from providing that information.

requested information, and Article VI's prohibition against grieving hiring determinations did not entitle Respondent to refuse to provide it.

Labor Counsel Green's defense that the requested information is confidential since it pertains to a discrimination complaint also fails because it is untethered to any certified facts and unsupported by law. Labor Counsel Green provided no certifications in this matter, even though he would be the representative who would have personal knowledge of facts that would help verify the existence of the complaint, such as the date he forwarded the Charging Party's communication, or the name of the Affirmative Action representative to whom he forwarded it. There also are no certified facts from any Affirmative Action representative with personal knowledge about the status of any investigation that was undertaken in response to Labor Counsel Green's referral of the Charging Party's communication. Respondent cannot meet its burden of establishing confidentiality given the bare factual record it provided.

Even assuming there was a bona-fide investigation that ensued following Labor Counsel Green's referral, the plain text of the State Anti-Discrimination Policy does not require that "any information" pertaining to a discrimination allegations is confidential, as Labor Counsel Green claimed in his email. While the State Anti-Discrimination Policy directs that "confidentially

shall be maintained through the investigatory process" it expressly recognizes that confidentiality considerations give way where it is not practical or appropriate. It does not assert that any information that could be considered during an investigation is necessarily confidential, like a list of classes previously taught by an adjunct, future class offerings, or the identities of the faculties teaching courses.[16/] There is simply no support for the type of blanket confidentiality claimed by Labor Counsel Green in his email under the plain text of the State Anti-Discrimination Policy.

Moreover, case law has repeatedly recognized that an employer is still required to furnish requested information if its confidentiality interests are outweighed by the union's need for the information. City of Newark, H.E. 2013-18, 40 NJPER 44 (¶18 2013) (finding city was required to provide information resulting from its investigation of discrimination allegations by unit members where no facts indicated disclosure would reveal confidential information); Mt. Holly Tp. Bd. of Ed., P.E.R.C. No. 2019-006, 45 NJPER 103 (¶27 2018) (employer obligated to provide employee names with their corresponding health insurance coverage

16/ If any information pertaining to a possible discrimination complaint were confidential under the State Anti-Discrimination Policy, then Respondent presumably would have violated its confidentiality restrictions if it informed students what psychology courses were being offered in the Fall 2018 semester and who was teaching them.

and costs). See also Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) (explaining that in evaluating claims of confidentiality, the Board balances the union's need for the information against "legitimate and substantial" confidentiality interests).

Recognized confidentiality interests in the information request context have been described as follows:

> that which would reveal, contrary to promises or reasonable expectations, highly personal information such as individual medical records or psychological test results; that which would reveal substantial proprietary information, such as trade secrets; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses, and that which is traditionally privileged, such as memoranda for pending lawsuits.

Detroit Newspaper Agency, 317 NLRB 1071, 1073 (1995). Even where an employer articulates a legitimate and substantial confidentiality interest, it cannot fulfill its statutory duty by refusing to provide the information, but instead must make an offer that would accommodate its interest and the union's interests. See Borgess Medical Center, 342 NLRB 1105, 1106 (2004) (citing U.S. Testing Co.v. NLRB, 160 F.3d 14, 21 (D.C. Cir. 1998)).

Applying these principles, Respondent has not carried its burden to establish a legitimate and substantial confidentiality interest. It merely speculates that releasing the requested

information "may compromise" an investigation that may not exist, and does not specifically explain how information, like class offerings, would risk doing so. The only information that could conceivably raise confidentiality concerns, are the SIRs, which was not part of the basis for Labor Counsel Green's initial denial.[17/] However, there are no facts offered that support the view that disclosure of student evaluations would reveal highly personal information, proprietary information, or could reasonably be anticipated to lead to harassment or retaliation.[18/] See Mt. Holly Tp. Bd. of Ed., supra (finding employer failed to provide any reasonable basis to fear that furnishing requested

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17/ Additionally, confidentiality interests raised for the first time at legal proceedings are untimely, and thus do not excuse a failure to provide relevant information. Detroit Newspaper Agency, 317 NLRB at 1072. Labor Counsel Green failed to raise any confidentiality concerns arising from the student evaluations, and instead relied only on an asserted confidentiality interest arising from the Charging Party's discrimination concerns. Moreover, there are no facts indicating (and the Respondent makes no claim) that the student evaluation forms are the type of highly personal information that would give rise to a legitimate and substantial confidentiality interest.

18/ Respondent provides no legal support for its claim that contractual obligations with the Charging Party and other employee organizations excuse it from disclosing student evaluations under the Act. Assuming such contractual restrictions were of sufficient weight to constitute a legitimate and substantial confidentiality interest, it still would have been obligated to accommodate the Charging Party's need for the information. And once again, Labor Counsel Green did not raise any contractual considerations when he refused the entirety of the Charging Party's information request. Detroit Newspaper Agency, 317 NLRB at 1072.

healthcare information would lead to harassment or public disclosure). Given the absence of any basis to believe that the disclosure of the requested information gives rise to legitimate and substantial confidentiality concerns, the Charging Party's interest decidedly outweighs the Respondent's interests. The record is also clear that Labor Counsel Green made no effort to accommodate the Charging Party's need for the information with the confidentiality interest he asserted regarding what he characterized to be a discrimination compliant, as he would have been legally required to do assuming he had articulated a legitimate and substantial confidentiality interest.

Accordingly, I find that Respondent violated section 5.4a(5) and derivatively a(1) of the Act when Labor Counsel Green refused to provide the requested information. Therefore, I grant the Charging Party's motion for summary judgment, and deny the Respondent's motion for summary judgment.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That State of New Jersey (Kean University) 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 failing to provide relevant information needed to investigate a potential contract violation; and

2. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment in that unit, particularly by failing to provide relevant information needed to investigate a potential contract violation.

B. Respondent, State of New Jersey (Kean University) take the following affirmative action:

1. Within thirty (30) days of a final agency decision in this case, provide the following information to Council of New Jersey State College Locals, AFT, AFL-CIO as requested in its May 25, 2018 communication to State of New Jersey (Kean University):

> a. All student evaluation forms (SIR's) for faculty in the Psychology Department for the Fall 2017 and Spring 2018 semester;
>
> b. A list of classes taught by Ms. Wilson during the Fall 2017 and Spring 2018 semesters;
>
> c. A list of classes offered within the Psychology Department for the Fall 2018 semester; and
>
> d. The name of each faculty member teaching each class offered within the Psychology Department for the Fall 2018 semester, and the date that each said faculty member was assigned to teach said class.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by

the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

6. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with employees by such means.[19/]

7. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this Order.

19/ I take administrative notice that the State is under a public health emergency due to COVID-19, and consequently unit employees may be working remotely. Thus, the remedial effect of a notice posting in the workplace will likely be undermined. Dissemination of an electronic notice posting has been routinely included as relief under the NLRA for many years since employers increasingly communicate with employees using electronic means. See Pacific Bell, 330 NLRB 271 (1999). Moreover, broader dissemination is particularly warranted where, as here, the Charging Party's ability to obtain relief may have been foreclosed due to the Respondent's unlawful conduct. For these reasons, I recommend the electronic distribution of the notice posting if the Respondent customarily communicates with its employees by such means. But see Government Workers Union, P.E.R.C. No. 2018-5, 44 NJPER 80 (¶25 2017) (modifying hearing examiner's recommended order to eliminate requirement that union provide a link to a copy of the notice on its website).

/s/ Christina Gubitosa
Christina Gubitosa
Hearing Examiner

DATED: February 12, 2021
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 March 1, 2021.

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 failing to provide relevant information needed to investigate a potential contract violation; and

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment in that unit, particularly by failing to provide relevant information needed to investigate a potential contract violation.

WE WILL take the following affirmative action:

1. Within thirty (30) days of a final agency decision in this case, provide the following information to Council of New Jersey State College Locals, AFT, AFL-CIO as requested in its May 25, 2018 communication to State of New Jersey (Kean University):

a. All student evaluation forms (SIR's) for faculty in the Psychology Department for the Fall 2017 and Spring 2018 semester;

b. A list of classes taught by Ms. Wilson during the Fall 2017 and Spring 2018 semesters;

c. A list of classes offered within the Psychology Department for the Fall 2018 semester; and

d. The name of each faculty member teaching each class offered within the Psychology Department

Docket No. CO-2018-299 State of New Jersey (Kean University)
(Public Employer)

Date: February 12 2021 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) 292-9830

for the Fall 2018 semester, and the date that each said faculty member was assigned to teach said class.

WE WILL post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

WE WILL distribute the notices electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if we customarily communicate with employees by such means.

WE WILL notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this Order.