

D.U.P. NO. 2024-15

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

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Respondent,

-and-

Docket No. CO-2024-014

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 68,

Charging Party.

SYNOPSIS

The Director of Unfair Practices dismisses an unfair practice charge filed by the International Union of Operating Engineers, Local 68 against the Township of Bloomfield. The charge alleged the Board violated section 5.4a(5) and, derivatively, 5.4a(1) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it failed to produce an investigation report requested by the union. The Director determined the report to be both irrelevant and confidential.

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Appearances:

For the Respondent,
Antonelli Kantor & Rivera, attorneys
(John J.D. Burke, of counsel)

For the Charging Party,
Kroll Heineman Ptasiwicz & Parsons, attorneys
(Seth B. Kennedy, of counsel)

REFUSAL TO ISSUE COMPLAINT

On August 3, 2023 the International Union of Operating Engineers (Union or Local 68) filed an unfair practice charge against the Township of Bloomfield (Township). The charge alleges that the Township refuses to provide relevant and necessary information for the Union to represent its members. Specifically, the Township refuses to provide the Union with a copy of an investigative report that was produced following an investigation conducted by the Township after receiving multiple hostile work environment complaints made by unit members against a non-bargaining unit supervisor in the Department of Public

Works (DPW). The Union claims by not producing the investigative report, the Township has violated section 5.4a(5) and, derivatively, 5.4a(1)^{1/} of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.

The Township denies that it has violated the Act and maintains that the report is an internal and confidential document, which includes but is not limited to sensitive and private statements made by witnesses. Furthermore, the Township maintains that the investigative report is not relevant to the Union's execution of its statutory duties and therefore the Union is not entitled to the report. The Township further asserts that the matter is moot because the supervisor has been reassigned and transferred out of DPW.^{2/}

The Commission has authority to issue a complaint where it appears that a charging party's allegations, if true, may

^{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. (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/} The Union was served a copy of the Township's position statement on September 25, 2023, and responded that the matter is not moot because the former supervisor still visits DPW often and advises the current supervisor on how to supervise the department. The Union did not respond regarding the relevance of the report.

constitute an unfair practice within the meaning of the Act. N.J.S.A. 34:13A-5.4(c); N.J.A.C. 19:14-2.1. The Commission has delegated that authority to me. Where the complaint issuance standard has not been met, I will decline to issue a complaint. N.J.A.C. 19:14-2.3; CWA Local 1040, D.U.P. No. 2011-9, 38 NJPER 93 (¶20 2011), aff'd P.E.R.C. No. 2012-55, 38 NJPER 356 (¶120 2012).

I find the following facts.

The Association is the exclusive majority representative of DPW Maintenance Division employees employed by the Township. The Board and Association are parties to a collective negotiations agreement that expired on December 31, 2023.

On April 17, 2023, the Assistant Township Administrator, Kimberly Duva (Duva), received a complaint from DPW Supervisor, Frank Simone (Simone), alleging that the temporary interim DPW Director, Thomas Icolari (Icolari), had created a hostile work environment.^{3/} More specifically, it was alleged that Icolari acted in a manner that was unprofessional, hostile, verbally abusive, and confrontational. Furthermore, it was alleged that

^{3/} Icolari is not a Local 68 member. He was a Confidential Assistant to the Township Administrator and was temporarily assigned to supervise DPW until the Township could hire a new Director. Since the filing of this charge, the Township hired a permanent DPW Director and Icolari has been transferred out of DPW and no longer supervises Local 68 members.

Icolari created an uncomfortable environment by flirting with Assistant DPW Director, Samantha DePalma (DePalma).

On April 19, 2023, Duva received a similar complaint from Local 68 members, Mike Greco (Greco) and Frank Giamo (Giamo), filed on behalf of the entire Local 68 membership. This complaint alleged that Icolari conducted himself in a hostile and verbally abusive manner, that several employees felt targeted by Icolari and DePalma, and that Icolari and DePalma created an uncomfortable work environment.

Upon receipt of these complaints, the Township conducted an investigation in April and May 2023. After speaking with several employee witnesses, the Township concluded that the allegations were unfounded. At the conclusion of the investigation, the Township prepared an internal investigative report detailing statements made by the witnesses, factual findings, and legal conclusions. According to the Township, several witness statements included sensitive and confidential information, and employees provided information with the expectation that their statements would only be reviewed by the Township's high-level administrators. The Union does not dispute these assertions.

The Association claims that it is entitled to the investigative report while the Township maintains that the report is confidential and not relevant to Local 68's statutory duties.

ANALYSIS

N.J.S.A. 34:13A-5.4(a)(5) prohibits public employers from "refusing to negotiate in good faith with a majority representative concerning terms and conditions of employment." An employer's refusal to provide a majority representative with information that the union needs to represent its members constitutes a refusal to negotiate in good faith. UMDNJ, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996).

The issue before me is whether Local 68 is entitled to the investigative report 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 if there is a probability that the information is potentially relevant and that it will be of use to the representative in carrying out its statutory duties. State of N.J. (OER), 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). 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. However, a union's right to receive

information from an employer is not absolute. The employer is not required to produce information clearly irrelevant, confidential or which it does not control or possess. State of New Jersey (OER), 13 NJPER at 754.

In this instance, I do not find the investigative report is potentially relevant or helpful to Local 68 in carrying out its statutory duties. There are no pending grievances, lawsuits, or disciplinary matters that relate to the underlying allegations that were investigated and deemed to be unfounded. Furthermore, the subject of the investigation was not a bargaining unit member, is no longer assigned to the DPW, and no longer supervises bargaining unit members. Moreover, Local 68 does not allege or assert any potentially relevant purpose served by accessing the report. Consequently, I find the internal investigative report to be irrelevant.

However, even if the report was relevant, the Township's assertion that the report is confidential is persuasive. 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 has 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. Bergen County

College, H.E. No. 2013-6, 39 NJPER 260 (¶89 2012); 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 was confidential where the subject of the investigation allegedly threatened deadly violence).

Applying these principles to this matter, I conclude that the confidentiality privilege would bar the release of the investigative report. The investigative report contains personal information involving DPW employees' experiences and feelings towards coworkers and the environment in DPW. Multiple employees made statements contradicting the allegations made by their coworker complainants, and did so with the expectation that their statements would only be disclosed to Township administrators. Should the report be disclosed to Local 68, it is reasonable to think that these employees could be subject to some level of harassment or retaliation. Consequently, even if the report was relevant, maintaining the document as confidential outweighs the need for disclosure.

ORDER

The unfair practice charge is dismissed.

/s/ Ryan M. Ottavio
Ryan M. Ottavio
Director of Unfair Practices

DATED: March 27, 2024
Trenton, New Jersey

**This decision may be appealed to the Commission pursuant to
N.J.A.C. 19:14-2.3.**

Any appeal is due by April 8, 2024.