I.R. NO. 2020-17

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-2020-254

CWA LOCAL 1014,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief, finding that the union did not demonstrate irreparable harm when the public employer refused or failed to provide requested relevant information in advance of a fitness-for-duty psychological examination it ordered of a negotiations unit employee. The employee had been placed on administrative leave with pay, pending the examination and had not been served any notice of a pending disciplinary action (pursuant to Civil Service regulations).

The Designee determined that these circumstances differed materially from those in City of Newark, I.R. No. 2002-9, 28 NJPER 229 (¶33082 2002) where disclosure of the requested materials was ordered.

I.R. NO. 2020-17

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-2020-254

CWA LOCAL 1014,

Charging Party.

Appearances:

For the Respondent, Brown & Connery, attorneys (Michael J. DiPiero, of counsel)

For the Charging Party, Spear Wilderman, PC, attorneys (James Katz, of counsel)

INTERLOCUTORY DECISION

On March 17, 2020, CWA Local 1014 (CWA) filed an unfair practice charge against Camden County Board of Chosen Freeholders (County), followed the next day with an application for interim relief, a brief, exhibits and certifications. The charge alleges that on March 6, 2020, the County advised a collective negotiations unit employee, Shawnda Peterson-Rouse (Rouse), that beginning on March 9th, she was being placed on administrative leave with pay and required her to report for a fitness-for-duty examination with psychiatrist Dr. Stephen Neff on March 26th at 3 p.m. She was advised that her failure to cooperate, ". . . could adversely affect her employment." The charge alleges that CWA

immediately requested from the County, ". . . any and all reports which the County relied upon regarding its decision to send Ms. Peterson-Rouse to such an extraordinary examination;" her personnel file; copies of any discipline notices sent to her; and copies of all documents it intended to send to Dr. Neff. The charge alleges that the requested documents are "absolutely necessary" for CWA to effectively represent Rouse. The charge alleges that the County agreed to postpone the examination until April 7, 2020,[1/] in light of the COVID-19 health emergency, but has refused to provide any of the requested documents or information. The County's conduct allegedly violates section 5.4a(1) and (5)[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

CWA seeks an order enjoining the County from refusing to timely provide the requested and relevant documents and information in connection with Rouse's fitness-for-duty examination and directing the County to provide it the relevant

---

1/ The fitness-for-duty examination was again rescheduled to April 28, 2020.

2/ These provisions prohibit public employers, there 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.

documents and information. CWA also seeks an order directing the County to cease and desist from violating the Act.

On March 19, 2020, I issued an Order to Show Cause, setting forth dates for the submission of the County's response, CWA's reply and for argument in a telephone conference call. In the interim, the County agreed to postpone the fitness-for-duty examination until April 28, 2020 and due dates for written submissions were adjusted by consent. On April 10, 2020, the parties argued their respective cases in a telephone conference call.

The following facts appear:

CWA represents a broad-based collective negotiations unit of County employees. Its most recent collective negotiations agreement (CNA) with the County extended from January 1, 2013 through December 1, 2018 (CWA Exhibit A). The CNA includes a grievance and arbitration provision (Article XXIV); a "just cause" provision (Article XXVII); and an "equal treatment provision," prohibiting discrimination against unit employees on account of race, among other things (Article XXIII).

On September 20, 2016, the County promulgated a "Fitness for Duty" policy and procedure permitting it to, ". . . require any employee to undergo [a medical fitness to return to duty] evaluation in order to ascertain whether the employee can perform the essential duties of his/her job." According to the policy,

employees required to have a fitness for duty examination will be required to sign a HIPPA authorization/release so the County physician can examine his/her medical records. The procedure also advises that failure to comply with the policy and procedure can subject the employee to discipline (County Exhibit A).

Rouse was hired by the County in 2018 as a clerk 1 and assigned to the Board of Taxation. Her title is included in CWA's unit (Rouse cert., para. 2). She is the only African-American employee of six employees in the Board offices (Rouse cert., para. 3; Binowski cert., para. 4).

On an unspecified date in summer, 2019, Rouse filed a complaint under the County's Affirmative Action Policy, claiming that she was subject to a racially hostile work environment and discriminatory practices. She more specifically claimed that on several occasions, the last one in June, 2019, County employees left bananas on her Board office desk and in July, 2019, during a lunch when chicken was being eaten, Tax Administrator Diane Hesley, Rouse's supervisor, ". . . made a remark regarding 'dark meat' and how she prefers 'white meat'" (Rouse cert., para 4). Also in the summer of 2019, Rouse complained to CWA about the racially hostile work environment.

On or about November 6, 2019, following an investigation, a specified attorney wrote a letter on law firm letterhead to Rouse advising that an investigation revealed, ". . . insufficient

evidence to sustain the charge that you have been subjected to a racially hostile work environment," specifically noting that, "the issues concerning 'bananas' and 'dark meat' do not appear to have anything to do with race" (CWA Exhibit A, Rouse cert., para. 6).

On December 5, 2019, Rouse filed a complaint with our State's Division on Civil Rights (DCR) (Dkt. No. ED08RK-67733) and with the U.S. Equal Employment Opportunity Commission (EEOC) (that in turn advised that it would not process her charge until the DCR completes its case processing) (CWA Exhibit B).

On January 8, 2020, the County filed a "position statement" with the EEOC, denying any evidence of racial discrimination, pursuant to its investigation by "outside counsel" (CWA Exhibit C). It averred in its response,

> Complainant has accrued a large amount of occurrences related to attendance. Her claims of racial discrimination were raised only a few days after she received a fourth verbal and first written warning for these occurrences.

The "position statement" explained that Department of Taxation employees, ". . . would often bring fresh fruit from a local food truck to share with other staff" and that Rouse, ". . . had asked for bananas on occasion." Staff members, ". . . subsequently left a banana on her desk once or twice based on the assumption that she liked them." The County also wrote that Hesley brought to the office one day a "Royal Farms" chicken to

share with the staff and ". . . simply expressed that she preferred the white meat of chicken over dark meat." It also denied any discriminatory intent by excluding Rouse from certain Board of Taxation meetings, explaining that Rouse is employed by the Department of Taxation - a separate entity - and none of her job duties required her to attend Board meetings (CWA Exhibit C).

Finally, the County asserted that Rouse was provided "verbal warnings" for lateness on March 22, 2019, June 12, 2019, June 19, 2019, and August 23, 2019. Three days later, Rouse notified the County of her affirmative action complaint, according to the statement of position.

County Director of Human Resources Catherine Binowski certifies that, ". . . beginning in January, 2020, a number of her co-workers reported erratic behavior from Ms. Peterson-Rouse," more specifically, "the observed behavior escalated to the point where co-workers and a supervisor expressed concern that Peterson-Rouse may become violent" (Binowski cert., para. 5, 6).

On March 6, 2020, Director Binowski issued a letter to Rouse advising that [she] ". . . received reports of incidents involving your actions that created a cause for safety concern." The letter advises Rouse that she is being placed on "an administrative leave of absence with pay effective March 9, 2020" and that "a fitness-for-duty examination is warranted." It

directs her to report to Dr. Stephen Neff at a designated time on March 26, 2020 and that her failure to cooperate "could adversely affect [her] employment" (CWA Exhibit D).

Later on that date, CWA Counsel wrote to Binowski, requesting by March 9th, ". . . any and all reports which the County relied upon regarding its decision to send [Rouse] for such an extraordinary examination, as well as her personnel file" (CWA Exhibit E). On March 15, 2020, CWA Counsel emailed Binowski, reiterating his earlier request to postpone the fitness-for-duty examination until Rouse visits a psychologist or psychiatrist of her choosing and demanding to be provided the documents requested (CWA Exhibit F). On March 17, 2020, CWA Counsel emailed Binowski, again reiterating his previous demands on behalf of CWA (CWA Exhibit G).

The County has refused to provide any of the documents or information CWA has requested (certif. of Garren Steiner, CWA President, para. 17). On March 17, 2020, Binowski wrote to Rouse, advising that the fitness-for-duty examination had been rescheduled to April 7, 2020 (CWA Exhibit F).

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain 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. DeGioia, 90 N.J. 126, 132-134, (1982); Whitmeyer 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).

A public employer must supply information to a majority representative if it is "potentially relevant" and will be of use to the union in carrying out its statutory duties. Relevance in this context is determined under a discovery-type standard, not a trial-type standard. Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12109 1981); NLRB v. Acme Industrial Co., 385 U.S. 432, 437, 64 LRRM 2069 (1967). Relevance is liberally construed. A refusal to provide potentially relevant information constitutes a refusal to negotiate in good faith, violating section 5.4a(5) and (1) of the Act. 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); 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). Also, the relevant information sought must be timely provided to the union. See City of Newark, I.R. No. 2002-9, 28 NJPER 229

(¶33082 2002).

CWA notes that it doesn't contest the County's prerogative to conduct the fitness-for-duty examination. The Commission has found such a managerial prerogative, even in an instance affecting a non-uniformed unit employee. City of Millville, P.E.R.C. No. 2012-21, 38 NJPER 198 (¶67 2011). See also, City of Elizabeth, P.E.R.C. No. 2001-33, 27 NJPER 34 (¶32017 2000); City Jersey City, P.E.R.C. No. 88-33, 13 NJPER 764 (¶18290 1996).

Even if I assume that CWA's request for information and documents in advance of the fitness-for-duty examination doesn't impinge on the County's prerogative to conduct that examination, I am not persuaded that CWA has demonstrated irreparable harm, a necessary component of its application for relief.

Irreparable harm will be found in an unfair practice case where the Commission is unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case. Caldwell Tp., I.R. No. 2000-12, 26 NJPER 193 (¶31078 2000); Essex Cty., I.R. No. 99-23, 25 NJPER 317 (¶30136 1999).

CWA asserts that only if it's provided the requested information before the examination will it, ". . . be in a position to determine the legitimacy of the examination; advise Rouse concerning her options relating to the examination and to fulfill its representational functions" (brief at 15).

CWA relies on City of Newark. There, a police officer was

ordered to undergo psychological testing, pursuant to results of a performance "point assignment system." The officer complied, after which he was ordered to surrender his weapon and shortly thereafter received a notice of discipline that also scheduled a disciplinary hearing. The officer then filed a grievance contesting the City's directive to report for the psychological examination and the order to surrender his weapon. A few days later, the majority representative sought from the City, ". . . information so that it could represent [the employee] in the grievance and disciplinary hearing." Among the items sought (and which the City didn't provide) were "the basis of the City's decision to send the employee for the psychological examination;" his personnel and disciplinary records; and any other relevant information the City used in its disciplinary decision. Some, but not all the requested information was provided to the union at the "show cause" proceeding.

The Designee determined that the union, ". . . cannot meet its obligation to fairly represent the unit member in both the disciplinary proceeding and the grievance without such relevant information" and that "its defense of the employee in these matters could be irreparably compromised if it does not receive the materials in sufficient time to prepare its case." The Designee found that the standard for interim relief had been met, ordered both the production of all requested materials, and a

postponement of disciplinary proceedings for a specified period to give the union time to prepare a defense.

In this case, by contrast, no notice of disciplinary action issued, nor is one contemplated if Rouse is determined to be "fit." Accordingly, it appears (unlike City of Newark) there is no "case" for which CWA now needs to prepare. The County also concedes that if Rouse doesn't pass the examination, it will provide all requested materials to CWA. CWA has not averred in its moving papers that Rouse has a due process right to challenge in advance the administering of the fitness-for-duty examination that might otherwise warrant an interim order. Though I do not doubt that the ordered examination is personally "invasive" to Rouse, I am not persuaded that CWA has demonstrated irreparable harm under the applicable standard. Accordingly, I deny the application for interim relief.

The charge shall be processed in the normal course.

/s/ Jonathan Roth
Jonathan Roth
Commission Designee

DATED: April 15, 2020

Trenton, New Jersey