

P.E.R.C. NO. 94-60

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

UNIVERSITY OF MEDICINE AND  
DENTISTRY OF NEW JERSEY (SCHOOL  
OF OSTEOPATHIC MEDICINE),

Respondent,

-and-

Docket No. CO-H-92-20

COMMITTEE OF INTERNS AND RESIDENTS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants reconsideration and reaffirms its decision in P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993). In that decision, the Commission found that the University of Medicine and Dentistry of New Jersey (School of Osteopathic Medicine) ("UMDNJ") violated the New Jersey Employer-Employee Relations Act by denying the Committee of Interns and Residents ("CIR") the right to represent employees at investigatory interviews that they reasonably believed might lead to discipline and by denying CIR information about disciplinary actions. On reconsideration, the Commission finds that the Family and Educational Privacy Right Act, 20 U.S.C. §1232g, does not prevent UMDNJ from providing CIR with information about an intern's termination.

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Appearances:

For the Respondent, Fred De Vesa, Acting Attorney General  
(Vicki A. Mangiaracina and Barbara A. Harned, Deputy  
Attorneys General)

For the Charging Party, Carol G. Dunham, attorney

DECISION AND ORDER

On July 12, 1993, the University of Medicine and Dentistry of New Jersey (School of Osteopathic Medicine) ("UMDNJ") moved for reconsideration of, and a stay of the order in, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993). In that decision, we found that UMDNJ had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by denying the Committee of Interns and Residents ("CIR") the right to represent employees at investigatory interviews that they reasonably believe might lead to discipline and by denying CIR information about disciplinary actions.

Steven Tenner was an osteopathic intern employed by UMDNJ. He was a member of a collective negotiations unit represented by

CIR and covered by a collective negotiations agreement between UMDNJ and CIR. Tenner was suspended and then terminated, allegedly for "academic or medical reasons." During the proceedings leading to his termination, CIR sought to represent Tenner and sought information about his status. UMDNJ refused CIR's request, stating that CIR has no role in the process if a suspension is for academic or medical reasons.

In its motion for reconsideration, UMDNJ argues that an intern is both a student and an employee and that Tenner was terminated for academic, not disciplinary reasons. It contends that we have come "perilously close to trammeling [on its essential] freedom" to determine who may be admitted to study. UMDNJ further argues that we should have addressed its concern that releasing Tenner's records to CIR would have subjected UMDNJ to a loss of federal funds under the Family and Educational Privacy Right Act, 20 U.S.C. §1232g ("FERPA"). Finally, UMDNJ suggests that we have expanded the scope of the Weingarten<sup>1/</sup> doctrine to permit a union to invoke the employee's right to representation.

On July 26, CIR filed a reply opposing reconsideration. It claims that by leaving open the question of what contractual procedures applied to Tenner's discipline, we preserved any

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1/ NLRB v. Weingarten, 420 U.S. 251 (1975).

agreed-upon distinctions between how academic and disciplinary matters would be reviewed. CIR asserts that we simply assured that CIR would have proper notice and information before UMDNJ acted to discipline an intern. CIR further asserts that FERPA does not apply to interns and residents and has attached a letter saying so from LeRoy S. Rooker, Director, Family Policy Compliance Office, Office of Human Resources and Administration, United States Department of Education. That letter, a response to a letter from CIR's counsel, states that it has long been that Office's policy that records maintained by teaching hospitals relating to interns and residents are not education records subject to FERPA. As such, FERPA would not keep a teaching hospital from providing CIR information about a medical resident or intern. Finally, CIR asserts that UMDNJ misread our holding on the Weingarten issue.

On August 2, 1993, UMDNJ objected to consideration of Rooker's letter because it was not part of the record below. It asked, however, that if we consider the letter, it should be permitted to reply.

On August 13, 1993, CIR responded that the Rooker letter was attached to its post-hearing brief in accordance with a directive from the Hearing Examiner that the matter be addressed through legal argument. CIR relies on the letter, not as evidence of any fact in issue, but as a legal opinion.

We granted UMDNJ's request to reply to Rooker's letter and, on October 8, 1993, we received that submission. UMDNJ argues that

interns are employees of UMDNJ solely by virtue of their status as students and are therefore covered by FERPA. It contends that Rooker's letter addresses records kept by a teaching hospital, such as Kennedy Memorial Hospital - University Medical Center where Tenner worked, not by an educational institution such as UMDNJ.

Reconsideration will be granted only for "extraordinary circumstances." N.J.A.C. 19:14-8.4. We grant reconsideration to clarify any misunderstandings and to assure UMDNJ that we have considered all its arguments.

In our first opinion, we found that whatever the employer's reasons, its decisions to suspend, place on probation, and terminate Tenner were disciplinary. Because these personnel actions were disciplinary, they triggered Tenner's statutory right to representation and CIR's statutory right to information to determine whether its collective negotiations agreement had been violated. These statutory rights do not prevent the employer from making any academic judgments or indeed any personnel decisions -- they simply ensure that Tenner's majority representative can represent him fairly and can have access to relevant information in doing that.

UMDNJ contends that our holding obliterates the distinction between academic and disciplinary matters. To the contrary, we specifically avoided interpreting the disciplinary review procedures negotiated by the parties. We held only that when UMDNJ acts to terminate an intern's employment, it has a statutory duty to respond to the majority representative's request for information about that

action and to grant the employee's request for representation if it wishes to go forward with an investigatory interview. This case is limited to those situations.

UMDNJ argues that interns are students, as well as employees, and therefore it has no obligation to provide information or provide representation when a disciplinary action is based on academic or medical reasons. We disagree. Because interns are employees, they are entitled to the minimum statutory rights associated with union representation. By virtue of their employment, interns are also furthering their educational objectives and fulfilling licensing requirements. Those additional factors may create additional rights and responsibilities under other sources of authority, but they do not nullify the rights interns have as public employees under the Act.

UMDNJ also argues that we did not consider the applicability of FERPA. UMDNJ raised this issue before the Hearing Examiner, but not before us. Nevertheless, we will consider it now.

FERPA does not prevent UMDNJ from providing CIR with information about Tenner's termination. FERPA denies federal funds to educational institutions that have a policy or practice of releasing personally identifiable information in education records. 20 U.S.C.A. 1232g(b)(2). Education records do not include records relating to an individual who is employed by an educational institution, 20 U.S.C.A. 1232g(a)(4)(B)(iii), unless the individual is employed as a result of his or her status as a student, 34 C.F.R.

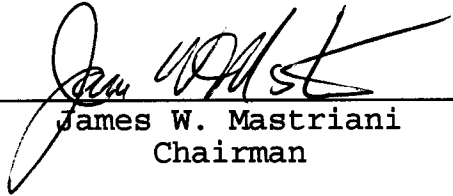
§99.3. UMDNJ claims that interns are employees solely by virtue of their status as students at the University. CIR has submitted a letter from the federal agency that administers FERPA stating that interns and residents are not students whose teaching hospital records are protected by FERPA. UMDNJ has responded that it is an educational institution, not a teaching hospital, and that the letter does not address its status. But UMDNJ has not explained why the records of an intern employed by a university affiliated with a hospital should be treated any differently than the records of an intern employed by a teaching hospital directly. Based on the record before us and our review of the relevant statutes and regulations, we find no basis for concluding that FERPA precludes UMDNJ from providing information about the discipline of an intern to that intern's majority representative.

Finally, UMDNJ misreads our original opinion to suggest that a union can, on behalf of a unit employee, invoke that employee's Weingarten right to union representation. We did not find that UMDNJ violated Tenner's Weingarten rights; and we did not order any remedy related to a refusal to provide a Weingarten representative. In fact, we specifically declined to resolve the dispute over whether Tenner actually requested representation. Instead, we found that UMDNJ violated the Act by refusing on a blanket basis to allow CIR to represent any employees at investigatory interviews that they reasonably believe might lead to discipline. Accordingly, we issued a limited order: UMDNJ should cease and desist from that blanket refusal.

ORDER

Reconsideration is granted. P.E.R.C. No. 93-114 is reaffirmed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Bertolino, Goetting, Grandrimo, Regan, Smith and Wenzler voted in favor of this decision. None opposed.

DATED: December 14, 1993  
Trenton, New Jersey  
ISSUED: December 15, 1993