P.E.R.C. NO. 2020-60

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

CAMDEN COUNTY BOARD OF
CHOSEN FREEHOLDERS,

Respondent,

-and- Docket No. CO-2020-254

CWA LOCAL 1014,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants the CWA's request for reconsideration of a Commission Designee's decision denying interim relief on its unfair practice charge against the County. The CWA's charge alleges the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by refusing to supply it with certain documents that are necessary for it to effectively represent a unit member who has been placed on administrative leave and ordered to undergo a psychiatric fitness-for-duty examination. The Commission finds that the CWA has established extraordinary circumstances warranting reconsideration based on the unit member's imminent fitness-for-duty examination and the irreparable harm to both the unit member and the CWA from the County refusing to supply information potentially relevant to the CWA's ability to fairly evaluate its options for challenging the examination and any discipline that ensues from refusing to take it or from its results. The Commission finds that the County offered no compelling reason for its refusal to supply the requested documents, and that its unilateral control over the timing of the release of information to the CWA is damaging to the labor relations process and violates its duty under the Act to supply information. The Commission grants interim relief and orders that the County supply the CWA with the requested information at least 10 days prior to the unit member's fitness-for-duty examination.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

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

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

DECISION

On April 21, 2020, CWA Local 1014 (CWA) moved for reconsideration of I.R. No. 2020-17, 46 NJPER 489 (¶109 2020). In that decision, a Commission Designee denied the CWA's request for interim relief pending a final decision in its unfair practice charge against the Camden County Board of Chosen Freeholders (County). The CWA's unfair practice charge alleges that the County violated sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by refusing to supply it with certain documents that are necessary for it to effectively represent a collective negotiations unit employee (S.R.) who the County placed on paid administrative leave and ordered to report for a psychiatric

fitness-for-duty examination. The charge alleges that the County refused to provide any of the following requested documents or information: any reports relied upon by the County in its decision to send S.R. to the psychiatric fitness-for-duty examination; copies of disciplinary notices sent to her; her personnel file; and copies of all documents it intended to send to the assigned psychiatrist, Dr. Neff. The CWA's interim relief application sought an order enjoining the County from refusing to timely provide the requested and relevant documents and information regarding S.R.'s fitness-for-duty examination and directing the County to provide the relevant documents and information and cease and desist from violating the Act. Finding that the CWA did not demonstrate that irreparable harm will occur if the requested relief is not granted, the Designee denied the CWA's application for interim relief.[1/]

FACTS

The CWA represents a broad-based unit of County employees. The County and CWA are parties to a collective negotiations agreement (CNA) effective from January 1, 2013 through December 31, 2018. On September 20, 2016, the County promulgated a "Fitness for Duty" policy and procedure permitting it to require

1/ As the Designee's finding of no irreparable harm was dispositive of the CWA's application, the Designee did not make any findings regarding the other Crowe v. DeGioia, 90 N.J. 126 (1982) factors necessary for granting interim relief.

any employee to undergo a medical fitness for duty evaluation to ascertain whether they can perform their essential job duties. The policy requires that any employee ordered to have a fitness-for-duty examination sign a HIPAA[2/] authorization/release so the County physician can examine the employee's medical files. The policy also advises that failure to comply with the policy and procedures can subject the employee to discipline.

S.R. is a CWA unit member who was hired by the County in 2018 as a Clerk 1 and assigned to the Board of Taxation. She is the only African-American employee of six employees in the Board offices. In summer 2019, S.R. filed a complaint under the County's Affirmative Action Policy alleging that she was subject to a racially hostile work environment and discriminatory practices. After the County's outside counsel investigated and found insufficient evidence of a racially hostile work environment, S.R. filed a complaint with the New Jersey Division on Civil Rights (DCR) and the U.S. Equal Employment Opportunity Commission (EEOC) on December 5, 2019.

County Director of Human Resources Catherine Binowski certifies that in January 2020, some of S.R.'s coworkers reported erratic behavior from S.R. that escalated to the point where

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2/ HIPAA refers to the national HIPAA Privacy Rule (promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996) that establishes standards for protecting individuals' health records and other personal health information.

coworkers and a supervisor expressed concern that S.R. may become violent. By letter of March 6, 2020, Director Binowski placed S.R. on an administrative leave of absence with pay effective March 9, 2020 due to "reports of incidents involving your actions that create a cause for safety concern." The letter directed S.R. to report to Dr. Stephen Neff on March 26, 2020 for a fitness-for-duty examination and advised her that failure to cooperate "could adversely affect [her] employment."[3/]

By letter of March 6, 2020, CWA Counsel wrote to Director Binowski requesting that the County supply, by March 9: "any and all reports which the County relied upon regarding its decision to send [S.R.] for such an extraordinary examination, as well as her personnel file" and "copies of any documents that the County intends to send to Dr. Stephen Neff in connection with the examination." The CWA also requested copies of any prior discipline issued to S.R. The County has refused to provide any of the documents or information requested by CWA.

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3/ CWA Counsel's brief states that due to the COVID-19 (coronavirus) State of Emergency in Camden County and New Jersey, the fitness-for-duty examination was rescheduled to April 7, 2020, and was again rescheduled to April 28, 2020. CWA Counsel states that the psychiatric fitness-for-duty examination on April 28 would violate the State of Emergency orders. As of this decision, it is unknown whether S.R.'s fitness-for-duty examination has been rescheduled or postponed indefinitely pending the lifting of COVID-19 related restrictions.

Director Binowski certifies that "the County has never provided discovery to the CWA or any other collective negotiations unit before sending an employee for a fitness for duty examination." She certifies that if the fitness-for-duty examination results in adverse action against S.R., the County will provide the CWA "with the basis for such action and all due process afforded by the Civil Service and the Collective Negotiations Agreement, including but not limited to the basis for the fitness for duty examination." There is currently no disciplinary action pending against S.R. arising from the matter that prompted the County's order that she take a leave of absence and submit to a fitness-for-duty examination.

CWA Local 1014 President Garren Steiner certifies that a psychological fitness-for-duty examination is extremely invasive of an employee's personal privacy, requires disclosure of highly sensitive information, and can have a profound effect upon the employee personally, professionally, and economically. Steiner certifies that the documents requested by the CWA are relevant and necessary for it to properly perform its duty to effectively represent S.R.'s employment interests, and to ensure unit members are treated fairly and equitably by the County.

CWA counsel certifies that in 2019, he represented the only other CWA unit member ("Employee X") subjected to a psychiatric fitness-for-duty examination in the 16 years he has represented

the unit. He certifies that prior to Employee X's fitness-for-duty examination, the County provided him with copies of the complaints from coworkers regarding Employee X's behavior.[4/] Employee X was required to disclose all her medical and psychological records to the County's chosen psychologist. Employee X's psychological report included intimate information regarding her personal background and family life going back to childhood. Eight days after the County's receipt of Employee X's psychological report, it gave her 10 days to either resign in good standing or be terminated. The CWA intervened and the County agreed, in lieu of termination, to place Employee X on a 3-6 month unpaid medical leave of absence including completion of an Employee Assistance Program prior to returning to work.

ARGUMENTS

The CWA asserts that reconsideration is warranted because by finding no irreparable harm and denying interim relief, the Designee's decision denied the CWA access to the requested documents prior to the S.R.'s psychiatric examination, and such documents are necessary to evaluate S.R.'s legal and contractual options and the validity of the County's actions. Specifically, the CWA argues that the Designee's decision prevents it from determining whether there are grounds to file a grievance, seek injunctive relief before Civil Service, or advise S.R. on other

4/ Binowski was not the Human Resources Director at that time.

options including whether to refuse to take the exam. It contends that neither the County nor the Designee challenged the relevance of the requested information to the CWA's ability to carry out its representational duties. The CWA argues that without the requested information, it cannot adequately represent S.R. regarding her psychiatric fitness-for-duty examination.

The CWA asserts that there does not need to be an active grievance or issuance of discipline for there to be irreparable harm. It argues that the Commission has never held that a union's document request is predicated upon whether it has already filed a grievance. The CWA contends that it has yet to file a grievance precisely because it has been denied the documents necessary to evaluate the validity of the County's examination and S.R.'s contractual rights. It asserts that it has a right to challenge whether a fitness-for-duty examination has been improperly ordered based on violation of the CNA's Equal Treatment clause.[5/] The CWA argues that the potential impact of a coerced psychiatric examination is extraordinary, noting the last employee subjected to such an examination was given just 10 days to resign or be terminated.

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5/ The CWA cites New Jersey State Parole Board, H.E. No. 2012-8, 38 NJPER 380 (¶128 2012) for the proposition that the decision to send an employee for a fitness-for-duty examination can violate the Act if done in retaliation for protected activity.

The CWA asserts its representation of S.R. includes advising her on whether to refuse the examination because her situation raises serious issues about whether the examination is justified. It argues that the Designee's decision precludes it from evaluating the legitimacy of the information and credibility of the sources relied upon for the Count's ordering of the examination, thereby preventing it from advising her whether to subject herself to the examination. The CWA contends that its receipt of the documents prior to the examination will not harm the County, which claimed it will furnish the documents to the CWA after the examination (if S.R. is found unfit for duty). Therefore, it asserts that the County's failure to provide the documents prior to the examination allows it to manipulate when the information is available and will cause significant harm to the CWA's ability to fulfill its representational obligations.

The County asserts that reconsideration must be denied because the CWA has failed to establish the extraordinary grounds to reverse the Designee's decision. It argues that the CWA has failed to establish irreparable harm, and therefore the Designee's decision denying interim relief must be upheld. The County contends that the CWA was unable to show there would be irreparable harm by allowing the fitness-for-duty examination to occur in the absence of pre-examination discovery. It does not dispute that the CWA will be entitled to discovery in advance of

any adverse action taken as a result of a negative fitness-for-duty examination. The County asserts that the Designee correctly reasoned there was no irreparable harm where the union would be able to receive all discovery and due process following the examination. It notes that there is currently no grievance pending or any other legal challenge filed by the CWA.

The County contends that given its managerial prerogative to order a fitness-for-duty examination, it does not have to justify its basis to the CWA. It asserts there was no evidence provided as to how a fitness-for-duty examination without any further action causes irreparable harm to S.R. or the CWA. The County notes that S.R. is already represented by her personal attorney who by letter of March 31, 2020 notified the County that she will not participate in the examination.

Finally, the County asserts that the Civil Service procedure referenced by the CWA in its brief is not applicable until after an employee is notified that the employer intends to take action. The County contends that it would first need to determine that S.R. is unfit for duty, then provide her written notice of any action it planned to take against her, and then S.R. could file interim relief to challenge the factual basis of an immediate suspension without pay pending a hearing. It therefore asserts

that the Civil Service process available to S.R. is not harmed by the lack of discovery at this stage.[6/]

ANALYSIS

N.J.A.C. 19:14-8.4 provides that a motion for reconsideration may be granted only where the moving party has established "extraordinary circumstances." In City of Passaic, P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004), we explained that we will grant reconsideration of a Commission Designee's interim relief decision only in cases of exceptional importance:

> In rare circumstances, a designee might have misunderstood the facts presented or a party's argument. That situation might warrant the designee's granting a motion for reconsideration of his or her own decision. However, only in cases of exceptional importance will we intrude into the regular interim relief process by granting a motion for reconsideration by the full Commission. A designee's interim relief decision should rarely be a springboard for continued interim relief litigation.
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> [Ibid.]

For the reasons discussed below, we find that the CWA has submitted facts sufficient to establish irreparable harm. We find that this is a case of exceptional importance based on the exigent circumstances surrounding the imminent fitness-for-duty

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6/ The CWA offered an alternative interpretation of Civil Service regulation N.J.A.C. 4A:2-2.5 as authorizing an interim relief appeal of S.R.'s suspension. For purposes of this decision, we need not make a finding regarding the parties' conflicting interpretations of the timing and availability of this particular Civil Service procedure.

examination and the CWA's ability to fairly evaluate various options for challenging the exam and any discipline that ensues from refusing to take it or from its results. We find that the County's refusal to comply with the Act's requirement to supply the CWA with information potentially relevant to effective representation of its members is extraordinary under these circumstances and damaging to the labor relations process due to its unilateral control over the timing of the flow of information, as it offered no substantive defense for its refusal to supply the information and has conceded that it will supply the information only after the examination if S.R. is found unfit for duty. We therefore grant the CWA's motion for reconsideration. Based on our application of all the Crowe factors, we grant interim relief.

To obtain interim 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, 90 N.J. at 132-134; Whitmyer 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).

Public employers generally have a non-negotiable managerial prerogative to order employees to undergo fitness-for-duty examinations. See, e.g., City of Millville, P.E.R.C. No. 2012-21, 38 NJPER 198 (¶67 2011); New Jersey Transit, P.E.R.C. No. 2007-15, 32 NJPER 317 (¶132 2006); City of Elizabeth, P.E.R.C. No. 2001-33, 27 NJPER 34 (¶32017 2000); State of New Jersey, P.E.R.C. No. 96-55, 22 NJPER 70 (¶27032 1996); City of Jersey City, P.E.R.C. No. 88-33, 13 NJPER 764 (¶18290 1996). However, the procedures to be utilized for implementing an employer's right to determine fitness-for-duty are mandatorily negotiable and legally arbitrable, and the discipline that may result from a fitness-for-duty examination is subject to review through arbitration or an applicable alternative statutory appeal process such as Civil Service. Bridgewater Tp., 196 N.J. Super. 258, 262 (App. Div. 1984); IFPTE, Local 194A v. Burlington County Bridge Comm'n, 240 N.J. Super. 9, 25-26 (App. Div. 1990), certif. denied, 122 N.J. 183 (1990); N.J. Transit Corp., 2010 N.J. Super. Unpub. LEXIS 53 (App. Div. 2010); Town of Phillipsburg, P.E.R.C. No. 88-86, 14 NJPER 245 (¶19091 1988); Wyckoff Tp., P.E.R.C. No. 2000-106, 26 NJPER 308 (¶31125 2000); Atlantic County Sheriff's Office, P.E.R.C. No. 2005-28, 30 NJPER 444 (¶147 2004); and

Rutgers University, P.E.R.C. No. 2020-52, 46 NJPER 522 (¶116 2020).

In this case, the CWA does not contest the County's prerogative to conduct a fitness-for-duty examination, but seeks that the County supply it with certain requested information and documents underlying the County's reasons for ordering S.R. for a psychological examination.

It is well settled that a public employer has a duty to provide a majority representative with information relevant to contract administration. 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). 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 in violation of subsections 5.4a(1) and 5.4a(5) of the Act. UMDNJ; Morris Cty., 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); Mt. Holly Bd. of Ed. et al., P.E.R.C. No. 2019-6, 45 NJPER 103, 104 (¶27 2018); and City of Newark, P.E.R.C. No. 2015-64, 41 NJPER 447 (¶138 2015). 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. UMDNJ;

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, unions are entitled to a broad range of potentially useful information. UMDNJ; see also NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967); Proctor & Gamble Manufacturing Co. v. NLRB, 603 F.2d 1310, 1315 (8th Cir. 1979). The employer is required to produce information unless it is clearly irrelevant, confidential, or not in its control or possession. UMDNJ; State of N.J. (OER).

In this case, the requested information includes disciplinary notices sent to a unit member, S.R., who the County has ordered to undergo a psychiatric fitness-for-duty examination, as well as any reports relied upon by the County in its decision to order the examination and copies of documents it intends to send to the doctor conducting the examination. The County does not dispute the potential relevance of the CWA's requested information to its duty to represent S.R. Nor does the County aver confidentiality concerns or that the documents are not in its possession. In fact, the County states that it will provide the CWA with the requested information if S.R.'s examination results in a determination that she is unfit for duty. The County has provided no compelling justification for

withholding the documents now. Accordingly, we find that the CWA has demonstrated a substantial likelihood of success in a final Commission decision on the merits.

We next consider irreparable harm, which was the focus of the parties' arguments because it was the dispositive factor in the Designee's analysis. Harm becomes irreparable in circumstances where the Commission cannot fashion an adequate remedy which would return the parties to the conditions that existed before the commission of any unfair practice at the conclusion of the processing of the unfair practice charge. City of Newark, I.R. No. 2006-3, 31 NJPER 250 (¶97 2005); Atlantic City Bd. of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003); and Sussex Cty., I.R. No. 2003-13, 29 NJPER 274 (¶81 2003).

Depending on the facts presented, Commission Designees have found irreparable harm for failing to timely produce potentially relevant information. In City of Newark, I.R. No. 2002-9, 28 NJPER 229 (¶33082 2002), the Designee found irreparable harm if the employer did not provide the union with information needed to represent an employee in a grievance challenging the employer's order for him to report for a psychological examination and in a disciplinary hearing for termination resulting from that exam. The Designee reasoned that without the requested information, the union "cannot meet its obligation to fairly represent" the unit member in the grievance and the disciplinary hearing, and that

the union's defense of the unit member "could be irreparably compromised if it does not receive the materials in sufficient time to prepare its case." Id.

In State of N.J. (Treasury and Labor), I.R. No. 96-27, 22 NJPER 209 (¶27111 1996), the Designee found irreparable harm if the employer did not supply the union with copies of the documents that formed the basis of a Department of Labor employee's five-day suspension that the union was challenging in a departmental disciplinary hearing. The Designee reasoned that because "this may be the only opportunity for the union to represent" the employee (the contract provided that a Labor Management Panel would have to approve arbitration of minor discipline), and the hearing "will probably take place before the Commission can render a decision," the harm to the union was irreparable. The Commission denied the State's motion for reconsideration to the extent that it challenged the Designee's finding of irreparable harm and grant of interim relief for the Labor employee. State of New Jersey (Dept. of Treasury), P.E.R.C. No. 97-32, 22 NJPER 372 (¶27196 1996).[7/]

7/ The Commission vacated a portion of the Designee's order concerning the union's document requests on behalf of the Department of Treasury employees involved in the case. Based on the State's asserted confidentiality concerns regarding the production of an investigative report concerning potential criminal activity, the Commission granted the motion for reconsideration as it pertained to the Treasury employees, determining that "CWA's statutory

(continued...)

It is also not necessary for a formal grievance or disciplinary process to have already been filed for a Designee to find irreparable harm and grant interim relief concerning a failure to timely provide potentially relevant information. In Franklin Tp., I.R. No. 2006-19, 32 NJPER 135 (¶62 2006), the Commission Designee granted the union's request for interim relief as to requested documents detailing the new health insurance plan and the pre-existing plan. The Designee ordered the employer to produce the requested documents "now because they are sought by the PBA in connection with its prosecution of its unfair practice charge, and may also be relevant to the possible submission of a grievance to binding arbitration pursuant to the parties' agreement."

Here, the fitness-for-duty examination, and the reasons behind it, have the very real potential to profoundly alter S.R.'s employment situation and career. Although the County states its willingness to supply the documents if S.R.'s examination results deem her unfit for duty, the only other unit employee who the County ordered to submit to such an examination was provided only a brief period after receiving the results to resign or be terminated. Thus, the facts indicate that the

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7/ (...continued)
right to receive this report is not so clear at this point that the employer should be required to surrender it before its confidentiality concerns are considered in a final decision."

ramifications of the examination for S.R. could be swift and significant. Given that possibility, it is not unreasonable for the CWA to preemptively seek any potentially relevant information concerning the County's basis for ordering the examination.

Moreover, the County has provided no compelling reason why it cannot or should not provide the requested information prior to the examination, rather than afterwards. In contrast, the CWA has demonstrated its urgent and legitimate representational interest in obtaining the requested documents now in order to fairly evaluate whether, when, and how to challenge the examination and any discipline stemming from its results or from failure to take it. In In re Williams, 443 N.J. Super. 532 (App. Div. 2016), a Civil Service employee was suspended for six months for refusing to take a psychiatric fitness-for-duty examination, but the Appellate Division reversed the suspension, holding that such an examination should never be ordered absent a reasonable belief, through direct observation or reliable information received from credible sources, that the employee's perceived medical condition is affecting his or her work performance, or the employee poses a direct threat. In the previous case of Employee X in 2019, the CWA was provided with the complaints about the employee prior to the fitness-for-duty examination, and the CWA ultimately negotiated a settlement of a lengthy suspension in lieu of termination. Here, whether in preparation

for a grievance challenging the order, in anticipation of defending a disciplinary action for failing to take the examination or for the results of the examination, or for any pre-examination attempts to negotiate with the County to avoid or modify the order for examination, the CWA's access to the requested information could prevent irreparable harm to S.R. specifically, but also to the CWA's ability to effectively represent its members in the face of employer actions.

We find that the County's refusal to supply the requested documents prior to the examination, but willingness to supply them afterwards, is unjustified and harmful to the labor relations process. The County's obligation to supply the CWA with documents potentially relevant to performance of its representational duties should not depend on its determination of when to supply the documents vis-à-vis the timing of employment actions or its estimation of the CWA's options for challenging such actions. Accordingly, we find that the CWA has demonstrated irreparable harm if the County does not supply the requested information prior to S.R.'s fitness-for-duty examination.

Finally, to grant interim relief, the public interest must not be injured and the relative hardship to the parties in granting or denying relief must be considered. We find that there is little to no hardship to the County if ordered to supply the documents now so that the CWA has time to consider them prior

to S.R.'s psychiatric examination, as it has not claimed any confidentiality concerns or suggested it does not possess them, and it has conceded that it will supply the documents after the examination, if S.R. is deemed unfit. In contrast, we find that there would be comparably great hardship to the CWA caused by denying it access to the documents underlying the County's ordered examination in a timely manner to allow it to evaluate its options to challenge the examination and/or its results. As to the public interest, we find that it is furthered by adhering to Act's principles of good faith negotiations, which requires the parties to supply information relevant to contract administration and fulfillment of representational duties.

ORDER

The County is ordered to provide the CWA, at least 10 days prior to her fitness-for-duty examination, with the following requested documents or information: any reports relied upon by the County in its decision to send S.R. to the psychiatric fitness-for-duty examination; copies of disciplinary notices sent to her; her personnel file; and copies of all documents it intended to send to the assigned psychiatrist.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: June 25, 2020

Trenton, New Jersey