

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,  
DEPARTMENT OF HUMAN SERVICES,

Respondent,

-and-

Docket No. CO-H-98-142

COMMUNICATIONS WORKERS  
OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the State of New Jersey (Department of Human Services). The Complaint was based on an unfair practice charge filed by the Communications Workers of America, AFL-CIO. The charge alleges that the State violated the New Jersey Employer-Employee Relations Act, when it refused to produce information requested by CWA to represent employees at disciplinary hearings. The information was contained in files kept by the Division of Youth and Family Services. The Commission concludes that N.J.S.A. 9:6-8.10a provides that the release of the information requested by CWA should be considered by the officer hearing the disciplinary appeal and not the Commission.

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, John J. Farmer, Jr., Attorney General  
(Stephan M. Schwartz, Deputy Attorney General)

For the Charging Party, Weissman & Mintz, attorneys  
(Judianne Chartier, of counsel)

DECISION

On October 27, 1997, the Communications Workers of America, AFL-CIO filed an unfair practice charge against the State of New Jersey, Department of Human Services. The charge alleged that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (5),<sup>1/</sup>

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<sup>1/</sup> 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."

when it refused to produce information requested by CWA to represent employees at disciplinary hearings. The information was contained in files kept by the Division of Youth and Family Services ("DYFS").

A Complaint and Notice of Hearing was issued on April 17, 1998. The State filed an Answer denying that it had committed an unfair practice by not producing the requested information. It asserted, in part, that the information sought was confidential under N.J.S.A. 9:6-8.10(a), a statute governing the release of information in DYFS records.

The parties waived a hearing and stipulated the record for submission to the Commission directly. Their numbered stipulations follow:

1. CWA is the majority representative of State employees in four negotiations units: administrative/clerical, professional, primary level supervisors, and higher level supervisors.

2. On or about October 27, 1997, CWA filed the above unfair practice charge, alleging violations of N.J.S.A. 34:13A-5.4(a)(1) and (5). Specifically, CWA alleged the State violated the Act by refusing to produce information requested by the Union to represent employees Florence Wisn and Crete Gordon at disciplinary hearings.

3. On or about January 31, 1998, CWA filed an amendment to the charge to include the refusal to produce documents requested to represent employee Michelle Richards.

4. On or about March 26, 1998, CWA filed a second amendment to the charge to include the refusal to supply documents requested to represent employee Robert Fiorini.

5. On or about June 29, 1998, CWA and the State agreed that the instant dispute is appropriate for summary disposition. The parties further agreed to use the facts pertaining to employee Crete Gordon as the "test case."

6. Crete Gordon is employed as a Supervising Family Service Specialist II at the DYFS Mercer District Office.

7. On or about July 30, 1997, DYFS issued a Notice of Official Reprimand to Crete Gordon, alleging incompetency or inefficiency. (Attached as Exhibit A).<sup>2/</sup> On September 15, 1998, the Official Reprimand was amended to reflect new specifications. (Attached as Exhibit A2).

8. The summary of charges attached to the notice referenced four separate case files.

9. On or about September 25, 1997, CWA Local 1039 representative Ev Liebman sent an information request to Employee Relations Coordinator Harold Young. (Attached as Exhibit B).

10. Liebman asked Young to produce sanitized copies of the four case files referenced in the disciplinary notice; copies of all investigative reports, reviews, memos or other written materials prepared by DYFS or outside agencies concerning the four case files; copies of the district office monthly reports; copies

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<sup>2/</sup> The exhibits attached to the stipulations are not attached to this decision.

of Crete Gordon's annual performance evaluations; and any documents to be used at the hearing.

11. By letter dated September 29, 1997, Young scheduled the disciplinary hearing for October 30, 1997. (Attached as Exhibit C).

12. Enclosed with Young's letter was a copy of the investigation summary (initially attached to the disciplinary notice) and copies of Crete Gordon's performance evaluations.

13. On or about October 24, 1997, Liebman advised DYFS by telephone of the Union's intent to postpone the October 30, 1997 hearing date pending resolution of the discovery issues.

14. By letter dated October 27, 1997, Liebman confirmed the postponement.

15. By letter dated October 31, 1997, Young advised Liebman that DYFS would not produce the four requested case files because "the Division has a statutory obligation to protect the confidentiality of these records." (Attached as Exhibit D). The letter stated, however, that DYFS would release relevant sections after it completed its review of the files. The letter did not mention CWA's request for the investigative reports.

16. By letter dated November 25, 1997, Liebman responded to Young's October 31, 1997 letter. (Attached as Exhibit E). Liebman requested an additional postponement of the disciplinary hearing for Crete Gordon due to the outstanding discovery issues.

17. On or about February 17, 1998, Young sent Liebman sanitized portions of the regional assessments from the four case files referenced in the disciplinary notice. (Cover Letter Attached as Exhibit F).

18. By letter dated February 25, 1998, Liebman advised Young that the materials did not satisfy CWA's information request. (Attached as Exhibit G). Liebman repeated her request for complete copies of the case files (referenced in the disciplinary notice), copies of all investigative reports, and the monthly management reports.

19. The parties (through counsel) subsequently agreed that Liebman would inspect the case files and investigative reports at the DYFS office. Liebman would then identify those documents the Union required in order to represent Crete Gordon at her disciplinary hearing. The parties further agreed that after Liebman finished her review of the files and identified the documents, the Deputy Attorney General would review the materials to determine if they were privileged not otherwise subject to disclosure.

20. Liebman made four separate visits to the DYFS office for the purpose of reviewing the requested materials. She identified documents in each case file that CWA needs to represent Crete Gordon in the disciplinary hearing. By letter dated December 1, 1998, the State advised CWA that it was in the process of copying the requested materials, and it further provided the Union with a copy of its witness list. (Attached as Exhibit H).

21. By letter dated January 6, 1999, the State advised CWA that it would produce copies of the case file documents identified by Liebman, at a cost of forty-six dollars and ten cents (\$46.10). (Attached as Exhibit I). CWA has not yet reimbursed DYFS for these statutory costs. N.J.S.A. 47:1A-2.

22. In a separate letter, also dated January 6, 1999, the State advised CWA that three documents requested by Liebman "were confidential investigative reports and other internal written material concerning one or more of the four case files...." (Attached as Exhibit J). The State maintains that the three documents are subject to the privilege of confidentiality that attaches under N.J.S.A. 9:6-8.10(a), and further maintains that any disclosure of information from these three documents is subject to the procedure established under the statute. Per N.J.S.A. 9:6-8.10(b)(14) the hearing officer presiding at the disciplinary proceeding for the appeal of Gordon, must make a finding that disclosure of the disputed material was "...necessary to make a determination..."

23. The State asserts that in this matter there is no option for negotiation between the Union and DYFS for the release of the requested documents. This is so because the statute preempts the disclosure process by establishing the privilege of confidentiality. Then the statute mandates a procedure by which the Union may petition the hearing officer for a determination as to whether the requested documents are necessary to resolve the issues.

24. The State argues that the Public Employment Relations Commission does not have jurisdiction to decide this case, because it lacks subject-matter jurisdiction over the issue and under NJPEERA lacks authority to fashion a remedy.

25. [The stipulations repeat the preceding paragraph here.]

26. The State also maintains that the documents referred to in paragraph 22 are investigative reports prepared for discussion and deliberation of the Department's Child Death and Critical Incident Review Board. The State further asserts that proceedings and records of the Board's deliberations are privileged from disclosure under the Board's regulation, N.J.A.C. 10:16-3.6, and that disclosure of pre-decision documents prepared or reviewed by the Board in their deliberations are privileged from disclosure. The three identified documents contain opinions, recommendations or advice which led to the final Board report, and are therefor, according to the State, privileged from disclosure.

27. CWA no longer requests a copy of the September 30, 1998 memorandum by Fred Lowe to Hal Young (¶2(a)). CWA continues to maintain that the Child Death Summaries, otherwise known as BREQA (DYFS Bureau of Research Evaluation and Quality Assurance) reports, contain exculpatory information and are necessary for the representation of Crete Gordon in the disciplinary hearing. The State argues that the claim of "exculpatory information" must be tested through the established statutory procedure: CWA must make



an application to the hearing officer conducting the disciplinary hearing, and only the hearing officer, by law, can order the disclosure of confidential information.

28. The BREQA report contains the following information: case data, including the names of all pertinent family members and friends; a list of agencies involved in the investigation; an overview of the case; a comprehensive analysis of the actions taken by DYFS and its employees; and an evaluation of the actions taken by DYFS and its employees. The State maintains that the CWA already has the "case data." The analysis and evaluation of DYFS actions are privileged from disclosure, as deliberations preceding the release of the Board's summary report.

29. CWA will accept a redacted (sanitized) copy of the reports. CWA representatives will sign a confidentiality agreement, due to the sensitive nature of the materials it requests.

A public employer generally has a statutory duty to provide information relevant to representational duties. In re UMDNJ, 144 N.J. 511 (1996); State of New Jersey (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). But that duty does not require the production of documents held to be confidential. State of New Jersey (Dept. of Treasury), P.E.R.C. No. 97-32, 22 NJPER 372 (¶27196 1996). See also Detroit Edison Co. v. NLRB, 440 U.S. 301, 100 LRRM 2728 (1979); Hardin, The Developing Labor Law at 668-672 (3d ed. 1992).

The parties' stipulations reflect a conscientious effort to narrow the dispute as much as possible. We commend that effort and encourage the parties to keep working in the same spirit in future disputes.

The State issued a written reprimand to Crete Gordon, a Supervising Family Services Specialist II, specifying alleged deficiencies in supervising four investigations. Gordon has appealed the reprimand and a departmental hearing is to be held on her appeal. The State has supplied all documents requested by CWA in connection with that appeal except two BREQA reports prepared for the Child Death and Critical Accident Review Board. CWA will accept redacted reports and sign a confidentiality agreement.

N.J.S.A. 9:6-8.10a provides, in part:

a. All records of child abuse reports...; all cooperation obtained by [DYFS] in investigating such reports..., and all reports of findings forwarded to the central registry...shall be kept confidential and may be disclosed only under the circumstances expressly authorized under subsections b., c., d., e. and f. herein. The division shall disclose information only as authorized under subsections b., c., d., e., and f. of this section that is relevant to the purpose for which the information is required, provided however, that nothing may be disclosed which would likely endanger the life, safety, or physical or emotional well-being of a child or the life or safety of any other person or which may compromise the integrity of a division investigation or a civil or criminal investigation or judicial proceeding. If the division denies access to specific information on this basis, the requesting entity may seek disclosure through the Chancery Division of the Superior Court.....

Nothing in this act shall be deemed to permit the disclosure of any information deemed confidential by federal or State law.

It is not disputed that the BREQA reports are covered by subsection a.

The parties further appear to agree that paragraph b(14) provides the only possible statutory basis for an exemption from subsection a's confidentiality requirement. Paragraph b(14) provides that DYFS may release the records and reports referred to in subsection a to:

(14) Any person or entity conducting a disciplinary, administrative or judicial proceeding to determine terms of employment or continued employment of an...employee.... The information may be disclosed in whole or in part to the appellant or other appropriate person only upon a determination by the person or entity conducting the proceeding that the disclosure is necessary to make a determination.

The State argues that only the officer conducting the hearing on the disciplinary appeal may make the determination of necessity required under paragraph b(14) as a prerequisite to release of the BREQA reports while CWA argues that the Commission is the "person or entity conducting the proceeding" and thus authorized to make that determination. We agree with the State that the application for release of information at this time must be made to the officer hearing the disciplinary appeal. That is the plain sense of the statutory text. It is also the logical place to vest that power given the statutory presumption of confidentiality. Any determination to release a document must be

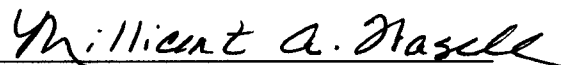
based on a determination of necessity, not just relevance, and must take into account the specific nature of the information sought in light of the specific circumstances and issues presented. The person actually hearing this minor disciplinary appeal is best positioned to scrutinize the request for information and to determine the necessity for its release. Should the matter proceed to arbitration, the arbitrator would presumably have the power to make a b(14) determination.

Given this ruling, we dismiss the Complaint. We do not consider the State's alternative contention that the BREQA reports are products of an agency's deliberative process and hence privileged. That issue can be considered by the person hearing the disciplinary appeal.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
Millicent A. Wasell  
Chair

Chair Wasell, Commissioners Buchanan, Madonna, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. None opposed.

DATED: June 29, 2000  
Trenton, New Jersey  
ISSUED: June 30, 2000