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State of New York Public Employment Relations Board Decisions from December 29, 2005

New York State Public Employment Relations Board

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Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ERIE COUNTY WHITE COLLAR UNIT,

Charging Party,

- and -

CASE NO. U-24659

COUNTY OF ERIE and ERIE COMMUNITY COLLEGE,

Respondent,

- and -

ADMINISTRATORS ASSOCIATION OF ERIE COMMUNITY COLLEGE, LOCAL 3300 UNITED AUTO WORKERS,

Intervenor.

NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL BAMBERGER of counsel), for Charging Party

SAELI & TOLLNER, PC (SARAH E. TOLLNER of counsel), for Erie Community College

KATHLEEN E. O'HARA (ERNEST J. GAWINSKI of counsel), for Respondent

SAMUEL WILLIAMS, for Intervenor

BOARD DECISION ON MOTION

On October 5, 2005, the Erie Community College (College) filed exceptions to a decision of an Administrative Law Judge (ALJ) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Erie County White Collar

Unit (CSEA), finding that the College and the County of Erie (County), as a joint employer, violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when work performed by CSEA unit employees was unilaterally transferred to non-unit employees.[1] Thereafter, CSEA filed the instant motion to dismiss the exceptions, arguing that the College is not a party to the proceeding, having no status as a sole entity, and is, therefore, precluded from filing exceptions under §213.2 of PERB's Rules of Procedure (Rules). The College responded that the College is a public employer and as such is a party to the proceedings, pursuant to §200.5 of the Rules. Neither the County nor the Intervenor has responded to either CSEA's motion or the College's response.

Section 200.5 of the Rules defines a "party" as:

> The term *party*, except as otherwise provided in this Chapter, shall mean any person, organization or public employer filing a charge, petition or application under the act or this Chapter; any person, organization or public employer named as a party in a charge, petition or application filed under the act or this Chapter; or any other person, organization or public employer whose timely motion to intervene in a proceeding has been granted.

Section 213.2(a) of the Rules provides that:

> (a) Within 15 working days after receipt of a decision, report, order, ruling or other appealable findings or conclusions, a party may file with the board an original and three copies of a statement in writing setting forth exceptions thereto or to any other part of the record or proceedings. An original and three copies of a brief in support thereof shall be filed simultaneously as a separate document. A copy of such exceptions and briefs shall be served upon all other parties and proof of such service shall be filed with the board.

At issue here is whether a community college is a party, within the meaning of the Rules, entitled to file exceptions with the Board. We find that it is.

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[1] The work was transferred to employees in the unit represented by the Administrators Association of Erie Community College, Local 3300, United Auto Workers (Intervenor).

Only a party may file exceptions with the Board to a decision of an ALJ or the Director of Public Employment Practices and Representation (Director).[2] A public employer is defined by the Rules as a party. We have repeatedly found that a community college, either a regionally sponsored or a County sponsored community college, is a public employer. In *Jefferson County Community College,*[3] we determined that "a county-sponsored community college is a separate legal entity and a joint employer with the sponsoring county of the employees who work for the community college because control over the terms and conditions of employment of those employees is shared." We based our analysis on our earlier decision in *Genesee Community College and County of Genesee,*[4] where we found that "§209.3(f) of the Act has specifically referenced a community college as one of the Act's several 'public employers'."[5] The College fits the definition of public employer set forth in §201.6(a) of the Act in that it is an instrumentality of government exercising governmental powers under the laws of the state. Indeed, we could not find the County and the College to be a joint employer if the College was not itself a public employer.[6]

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[2] *United Transp. Union, Local 1440 (Imbriale)*, 35 PERB ¶3055 (1998).

[3] 26 PERB ¶3010, at 3018 (1993), *confirmed sub nom. Jefferson County v PERB*, 204 AD2d 1001, 27 PERB ¶7010 (4th Dept), *leave to appeal denied*, 84 NY2d 804, 27 PERB ¶7014 (1994).

[4] 24 PERB ¶3017, at 3035 (1991).

[5] *Compare* Act, §§ 209.3(f) and 209.3(e).

[6] *See Niagara Frontier Transp. Auth.*, 13 PERB ¶3003, at 3004 (1980). "The jurisdiction of this Board extends to a 'joint public employer of public employees' (footnote omitted), but not to employees of a joint employer**,** one part of which is a private employer**.**"

As the College is a public employer, it is, by virtue of the language of §200.5 of the Rules, a party. A party may file exceptions with the Board.[7] In fact, we have, on other occasions, accepted pleadings from both a county and a community college, in cases where they were determined to constitute the joint employer.[8]

Based on the foregoing, we deny CSEA's motion to dismiss the College's exceptions. CSEA's time to file a response to the College's exceptions is, therefore, extended to seven working days from receipt of this decision.[9]

SO ORDERED.

DATED: December 29, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

[7] Rules, §213.2(a).

[8] *See Nassau Community Coll. Fed'n of Teachers, NYSUT, AFT*, 30 PERB ¶3003 (1997); *Jefferson Community Coll.*, *supra*, note 3.

[9] Rules, §213.3.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

- and -

CASE NO. U-24919

STATE OF NEW YORK (OFFICE OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES - BROOKLYN DEVELOPMENTAL DISABILITIES SERVICE OFFICE),

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN CRAIN of counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (MAUREEN SEIDEL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Office of Mental Retardation and Developmental Disabilities-Brooklyn Developmental Disabilities Service Office) (State or OMRDD) to a decision of an Administrative Law Judge (ALJ) finding that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act). The improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) alleged that on March 1, 2004, the State refused to provide the information sought by CSEA to investigate and defend disciplinary charges that the State had brought against two unit employees.

EXCEPTIONS

The State excepts to the ALJ's decision on the facts and the law. CSEA has filed a response that supports the ALJ's decision. Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ, but modify the remedy.

FACTS

The facts are set forth in the ALJ's decision and are repeated here only as necessary to address the exceptions.[1]

On March 15, 2004, CSEA filed an improper practice charge, as amended, alleging that on January 22, 2004, CSEA contacted Marie Gillen, an OMRDD representative in the Bureau of Employee Relations, and requested a copy of employee interviews and witness statements, as well as other relevant information, obtained during the investigations that resulted in notices of discipline against Lynette Copp and Jerome Elliot.[2]

On October 10, 2003, OMRDD had served Copp with a Notice of Discipline (NOD) alleging that on June 9, 2003, while employed as a Developmental Aide, she committed client abuse and neglect thereby resulting in a charge of misconduct. Based upon her work record, OMRDD proposed terminating her employment as the penalty.[3]

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[1] 38 PERB ¶4513 (2005).

[2] The improper practice charge, as amended, sought copies of employee interviews, witness statements and other relevant information for Marcelyn Thomas, Angie Rogers and Jermaine Grayson, as well as Copp and Elliot. At the hearing, CSEA further amended the charge by limiting it to Copp and Elliott.

[3] Joint Exhibit # 3.

On November 11, 2003, OMRDD had served Elliott with a NOD, alleging that on October 25, 2003, while employed as a Developmental Aide, he was insubordinate, thereby resulting in a charge of misconduct and incompetency. Based upon his work record, OMRDD proposed terminating his employment as the penalty.[4]

Subsequent to receiving the NODs, CSEA moved in Supreme Court, County of New York, for an order directing the Executive Director of OMRDD's Brooklyn Developmental Disabilities Services Office (DDSO) to deliver to the disciplinary arbitration hearing scheduled for January 20, 2004, the following documents:

1. The patient records, including medical and clinical records, incident reports (Form OMH 147), change of shift reports and "fresh air" list, and communication books, of all those patients or former patients who will be called to testify at the arbitration hearing of Lynette Copp; and

2. The patient records, including medical and clinical records, incident reports (Form OMH 147), change of shift reports, and "fresh air" list, and unit communications books of patient (Z B), with all references of her current address and telephone being redacted, for the period January 9, 2003 through June 23, 2003, whether or not she is called to testify, with the duly appointed arbitrator, Mary Jane Bolter, reviewing the records *in camera* and disclosing all relevant and material records to counsel for CSEA and the representative of the Office of Mental Retardation and Developmental Disabilities (OMRDD).

Supreme Court granted the motion dated January 8, 2004. On March 1, 2004, Gillen responded to CSEA's January 22, 2004 request for information and advised that she was unable to comply with the request because the information was confidential and not subject to discovery pursuant to Education Law (EL) §6527, subdivision 3 which states that:

> Neither the proceeding nor the records relating to performance of a medical or a quality assurance review function . . . including the

[4] Joint Exhibit #4.

> investigation of an incident reported pursuant to section 29.29 of the mental hygiene law, shall be subject to disclosure under article thirty-one of the civil practice law and rules except as hereinafter provided or as provided by any other provision of law.

CSEA contends that the records from the Quality Assurance investigation conducted pursuant to Mental Hygiene Law §29.29[5] were not provided to the arbitrator.

Robert Foody, Deputy Counsel to OMRDD, testified that, with regard to quality assurance, Mental Hygiene Law §29.29 provides that a Quality Assurance investigation must be conducted whenever an incident report has been completed. Foody explained that Quality Assurance is an aspect of OMRDD that ensures that programs are run and proper care is given. OMRDD has Quality Assurance staff that monitors the care extended by OMRDD and private providers. When an incident occurs, a Quality Assurance investigation is conducted to take corrective action. Foody also noted that

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[5] Section 29.29, entitled "Incident report procedures", provides that:

> The commissioners of the offices of mental health and mental retardation and developmental disabilities of the department shall establish policies and uniform procedures for their respective offices for the compilation and analysis of incident reports. Incident reports shall, for the purposes of this chapter, mean reports of accidents and injuries affecting patient health and welfare at such departmental facilities. These policies and procedures shall include but shall not be limited to:
>
> 1. The establishment of a patient care and safety team at the facility level which shall include but not limited to a: physician, nurse, social worker and therapy aide, to investigate and report to the facility director on:
>
> (i) suicides or attempted suicides;
> (ii) violent behavior exhibited by either patients or employees;
> (iii) frequency and severity of injuries incurred by either patients or employees;
> (iv) frequency and severity of injuries occurring on individual wards or in buildings at such facility;
> (v) patient leave without consent; or
> (vi) medication errors.

EL §6527 specifically provides that investigations conducted pursuant to Mental Hygiene Law §29.29 are confidential and are not subject to discovery, pursuant to the CPLR. Foody stated that the only investigation done by a facility with regard to an incident involving a consumer is the Quality Assurance investigation. There is no independent investigation done by Human Resources personnel.

Ellen Schusterson, Director of Employee Relations at OMRDD, testified that all NODs generated by the DDSOs are sent to the Employee Relations office. She also stated that, when an incident occurs involving a consumer, there are no separate investigations taking place.

Article 33 of the collective bargaining agreement between the State and CSEA describes the procedure to be followed in disciplinary matters.[6] Any unresolved grievances proceed to arbitration.

Judith Graham, Director of Institution Human Resource Management at Brooklyn DDSO, testified that she and the treatment team leader conduct the Quality Assurance investigation and that she maintains the original records in the Quality Assurance file. She keeps a copy of the file in her office and the reports are never placed in the employee's personnel file.

DISCUSSION

CSEA alleges in its charge that it contacted Gillen and requested copies of interviews and witness statements as well as other relevant information obtained during the investigations into the conduct of Copp and Elliot that resulted in the NODs. CSEA further alleges that Gillen refused to provide the requested information and that it was not available from any other source but the State. Therefore, CSEA asserts, the State's

[6] Joint Exhibit #5.

refusal to provide CSEA with the requested information violates §209-a.1(d) of the Act. OMRDD's position is that this information is privileged under EL §6527 and, therefore, not subject to disclosure, in an employee NOD arbitration.

The ALJ relied upon our decision in *Board of Education, City School District of the City of Albany*[7] for authority to direct OMRDD to provide CSEA with a copy of the investigative files relating to the Copp and Elliott arbitration as requested by CSEA. In *City of Albany*, *supra*, we determined that an employee organization is entitled to receive information that is necessary for the administration of the parties' collective bargaining agreement, including the investigation of grievances. This right, however, is balanced by the "rules of reasonableness, including the burden upon the employer to provide the information, the availability of the information elsewhere, the necessity therefore, the relevancy thereof and, finally, that the information supplied need not be in form requested as long as it satisfies a demonstrated need."[8] The ALJ found that CSEA had met the criteria set forth in *City of Albany*, *supra*, and rejected the defenses raised by the State.

A refusal to provide information is typically the subject of a charge alleging a refusal to negotiate under §209-a.1(d) of the Act.[9] This includes the obligation on the part of the employer to provide information relevant to a union's investigation of the

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[7] 6 PERB ¶3012 (1973).

[8] *Id.* at 3030.

[9] *See County of Erie and Erie County Sheriff,* 36 PERB ¶4510, *aff'd* 36 PERB ¶3021 (2003), *confirmed sub nom. County of Erie and Erie County Sheriff v PERB*, 14 AD3d 14, 37 PERB ¶7008 (3d Dept 2004). *See also Town of Evans*, 37 PERB ¶3016 (2004); *Schuyler-Chemung-Tioga Bd. of Coop. Ed. Services*, 34 PERB ¶3019 (2001); *State of New York (Dept of Health and Roswell Memorial Institute)*, 26 PERB ¶3072 (1993).

merits of a grievance.[10] Pursuant to our decision in *City of Albany,* CSEA has a right, under the Act, to obtain the investigative files requested in its January 22, 2004 letter, unless there is merit to the State's defense.

The State relies upon a decision of the New York Court of Appeals in *Katherine F. v State of New York*, 94 NY2d 200 (1999), in support of its position that the requested information is exempt from disclosure pursuant to EL §6527(3). *Katherine F.*, *supra*, involved a claimant's request for incident records from a State hospital. That case involved a lawsuit seeking damages for sexual abuse on behalf of a minor patient at a State facility. The Court held that the requested documents were exempt from disclosure because EL §6527(3) exempts three categories of documents from the discovery provisions of the CPLR. They are:

1. Records relating to medical review and quality assurance functions;

2. Records reflecting "participation in a medical/dental malpractice prevention program"; and

3. Reports required by the Department of Health pursuant to New York Public Health Law §2805-1, including incident reports prepared pursuant to New York Mental Hygiene Law §29.29. (p. 204)

The information requested in this case relates not to a matter governed by the CPLR but to a disciplinary proceeding. The provisions of EL §6527(3) given effect by the court in *Katherine F*, *supra*, therefore, are inapplicable.

The State also relies upon a recent decision involving the same Brooklyn DDSO, *Rolon v Uschakow*, No. 16800/04 (Sup Ct Kings County 2004), wherein Rolon sought to discover certain clinical records of patients as well as the State's entire investigative reports in defense of a NOD. Supreme Court ruled that the need for maintaining the

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[10] *County of Erie, supra*, note 9 at 3064.

confidentiality of the patient's records must be balanced against the concern for the petitioner's rights and any adverse impact on her reputation, livelihood and future employment. In such a case, Supreme Court found that confidentiality must yield to the petitioner's right to conduct an effective defense to the disciplinary action.[11]

Supreme Court determined that it was for the trial court to rule upon the competency and admissibility of such evidence. The Court noted the limitations on discovery set forth in EL §6527(3) and its policy to enable psychiatric hospitals to ameliorate the cause of untoward incidents through unfettered investigation.

Nevertheless, Supreme Court struck a balance between confidentiality and due process and ordered that the records sought by Rolon be produced to the arbitration hearing on the NOD for an *in camera* review to determine its materiality and relevancy to the disciplinary charges. In addition, the Court directed the hospital to produce all the records/documents it claimed were exempt to the Court for an *in camera* inspection together with an explanation of the reasons why such records/documents should be exempt under EL §6527(3).

We disagree with OMRDD's interpretation of Education Law §6527(3). It is clear that disclosure of the information sought is not prohibited when it is provided for by any other provision of law. In addition, Mental Hygiene Law §33.13 expressly declares that the procedure to obtain a consumer's clinical records "shall not be construed to affect existing rights of employees in disciplinary proceedings . . . ."

In *Town of Evans*,[12] we recently found that while privilege may be a valid basis to support an employer's refusal to provided information that would otherwise be covered

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[11] *See also Goohya v Walsh-Tozer*, 292 AD2d 384 (2d Dept 2002).

[12] *Supra*, note 9.

by a *City of Albany*, *supra*, request for information, it was the employer's burden to demonstrate that the information was exempt from disclosure as attorney work product or material prepared for litigation or was confidential based upon some other rule, statute or case law. In *County of Erie and Erie County Sheriff*,[13] a case involving complaints of sexual harassment against an employee, we agreed that an employer must be extremely sensitive to the confidentiality concerns of complainants in sexual harassment and misconduct investigations. But we held that the rights of the accused and the entity charged with representing the accused unit member must also be considered. We have held before that complaints against an employee, upon which an employer bases its decision to discipline or discharge the employee, even though considered "confidential", may be the subject of a request for information from the employee organization and may be required to be produced.[14]

We find that the demand for the requested information may be relevant and necessary to properly defend Copp and Elliott at the disciplinary grievance arbitration. We are mindful, however, of the need to balance the rights of the parties in the investigation and defense of a disciplinary grievance with the need to protect certain confidential patient records. CSEA's right to the requested information is not unfettered. We find that this right is subject to an *in camera* review by the arbitrator in order to prevent a State-operated hospital from using otherwise privileged information as a shield, as well as a sword, with which to discipline an employee.

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[13] *Supra,* note 9.

[14] *State of New York (Dept of Health and Roswell Memorial Institute*), 26 PERB ¶3072 (1993).

Based upon the foregoing, we deny the State's exceptions and modify the ALJ's order to the extent that it gives CSEA direct access and exclusive and confidential use of OMRDD's investigative files relating to the Copp and Elliott arbitration as requested by CSEA in its January 22, 2004 letter. We direct authorized representatives of OMRDD to deliver the requested investigation file(s) to the arbitrator assigned to the disciplinary hearing for Copp and Elliott for an *in camera* inspection consistent with our decision. As modified, the ALJ's decision and order are affirmed.

SO ORDERED.

DATED: December 29, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Office of Mental Retardation and Developmental Disabilities) (State) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the State shall:

Forthwith provide a copy of the investigative files relating to the Copp and Elliot arbitration, including all employee interviews and witness statements given during the investigation, as requested by CSEA in its January 22, 2004 letter, to the arbitrator assigned to the disciplinary hearing for Copp and Elliot for an *in camera* inspection.

Dated . . . . . **By** . . . . . .
(Representative) (Title)

State of New York
(Office of Mental Retardation
and Developmental Disabilities)

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.