

In the Matter of SHERIFF'S OFFICE OF MIDDLESEX
COUNTY

and

INTERNATIONAL BROTHERHOOD OF CORRECTIONAL
OFFICERS

Case No. MUP-2754

28. *Relationship Between c. 150E and Other
Statutes Not Enforced by Commission*
67.16 *other defenses*
67.162 *preemption by other legislation*
67.3 *furnishing information*
76.1 *defenses*
82.12 *other affirmative action*

December 31, 2003

Allan W. Drachman, Chairman
Hugh L. Reilly, Commissioner

Kenneth V. Desmond, Jr., Esq. *Representing the Sheriff's
Office of Middlesex County*
Lawrence D. Humphrey, Esq. *Representing the
International Brotherhood of
Correctional Officers*

DECISION¹

STATEMENT OF THE CASE

On July 26, 2000, the International Brotherhood of Correctional Officers (Union) filed a prohibited labor practice charge with the Labor Relations Commission (Commission) alleging that the Sheriff's Office of Middlesex County (Employer) had violated Sections 10(a)(5) and (1) of M.G.L. c. 150E (the Law). Pursuant to Section 11 of the Law and Section 15.04 of the Commission's Rules, the Commission investigated the charge and, on May 30, 2001 issued its own Complaint of Prohibited Practice alleging that the Employer had failed to bargain in good faith by failing to provide the Union with relevant information that is reasonably necessary for the Union to perform its duties as the collective bargaining representative for certain correction officers. The Employer filed an answer to the complaint on June 1, 2001.

The Commission scheduled the case for hearing on August 27 and 28, 2001 before Ann T. Moriarty, Esq., a duly designated Commission hearing officer. However, on August 28, 2001, the parties filed stipulations of fact and exhibits in lieu of the evidentiary hearing. The Employer and the Union filed briefs on September 21, 2001 and September 27, 2001 respectively. On February 28, 2003, the hearing officer issued recommended findings of fact based on the evidentiary record including the Commission's complaint, the Employer's answer, and the stipulated facts and the exhibits.

FINDINGS OF FACT

Neither party challenged the Hearing Officer's Recommended Findings of Fact. Therefore, we adopt them in their entirety and summarize the relevant portions below.

The Middlesex County Sheriff (Employer) is a public employer within the meaning of Section 1 of the Law. The International Brotherhood of Correctional Officers (Union) is an employee organization within the meaning of Section 1 of the Law. The Union is the exclusive collective bargaining representative for certain employees working in the Employer's Middlesex House of Correction and Middlesex Jail in the position of correction officer. At all relevant times, Philip Waldron (Waldron) was a member of the Union's bargaining unit.

The Employer and the Union are parties to a collective bargaining agreement (the Agreement) effective from July 1, 1997 through June 30, 2000. Article IV of the Agreement provides for a grievance-arbitration process. Article XIII of the Agreement provides:

ARTICLE XIII NONDISCRIMINATION

Section One. The Employer and the Union agree that neither the Employer nor the Union, nor any representatives thereof, will discriminate in any way against employees covered by this Agreement because of membership or non-membership in the Union.

Section Two. It is the continuing policy of the Employer and the Union that, as required by law, there shall be no discrimination with regard to race, color, religious belief, national origin, age, sex, and/or disability, except for where a bona fide occupational qualification exists.

Article IX of the Agreement, in part, provides:

ARTICLE IX JOB POSTING AND BIDDING

Section Five. If in the opinion of the Sheriff or his designees there are no qualified applicants from within the Sheriff's Office, the Sheriff may award the job as he, in his exclusive judgement determines. In the event that no one in the bargaining unit who applies for a position is qualified, then the employees with the top six seniority who had been determined unqualified for the position may request a meeting in writing within ten (10) days of the posting of that determination through the Union with the Special Sheriff to review his/her qualifications. The Special Sheriff shall meet with each individual as requested as soon as a practical thereafter and the position shall not be awarded until the conclusion of these meetings.

Job Posting - Classification Supervisor - Bid # 002

On or about December 12, 1997, the Employer posted a job vacancy announcement, Bid # B002, for the position of classification supervisor. On or about December 5, 1997, Waldron applied for the posted position of classification supervisor. On or about February 19, 1998, the Employer notified Waldron that another candidate had been selected for the posted classification supervisor position.

1. Pursuant to 456 CMR 13.02(1), the Commission has designated this case as one in which the Commission issues a decision in the first instance. 456 CMR 13.02(2).

Nondiscrimination Grievance - Bid # 002

In or about February 1998, the Union filed a grievance on behalf of Waldron alleging that the Employer had denied Waldron the position of classification supervisor on the basis of his disability, in violation of Article XIII of the Agreement and the Affirmative Action Program Policy and Procedure (the nondiscrimination grievance).² The grievance could not be resolved at the lower steps of the grievance process. On or about April 4, 1998, the Union referred the nondiscrimination grievance to arbitration under the terms of the Agreement. On or about April 9, 1998, Lawrence D. Humphrey, Esq. (Humphrey), Counsel for the Union, filed a demand for arbitration with the American Arbitration Association (AAA). An arbitration hearing was scheduled for October 8, 1998, but the parties agreed to postpone the hearing and it was rescheduled for April 6, 1999.

By letter dated March 5, 1999 directed to Kenneth V. Desmond, Jr., Esq. (Desmond), Deputy Chief Legal Counsel for the Middlesex Sheriff's Office, Humphrey requested the following information:

Re: *IBCO and Middlesex Sheriff's Office*

Grievant: Philip Waldron

In order to adequately represent the IBCO in the above-referenced matter, kindly forward to me the following information:

1. Philip Waldron's complete personnel file and any other file relating to, concerning, and referring to him, whether kept in or by the Sheriff's Department, Middlesex County, the Commonwealth, or any supervisor.
2. The complete personnel file and any other file relating to, concerning, and referring to the successful candidate for the position of Classification Supervisor, the position for which Mr. Waldron applied in or about December 1997, whether kept in or by the Sheriff's Department, Middlesex County, the Commonwealth, or any supervisor.
3. The complete personnel file and any other file relating to, concerning, and referring to each and every applicant for the position of Classification Supervisor, the position for which Mr. Waldron applied in or about December 1997, whether kept in or by the Sheriff's Department, Middlesex County, the Commonwealth, or any supervisor.
4. All documents relating to, concerning, and referring to any disciplinary action taken against Philip Waldron, the successful candidate, and each and every applicant for the position of Classification Supervisor the position for which Mr. Waldron applied in or about December 1997.
5. All documents relating to, concerning, and referring to the Sheriff's Department's policies regarding performance appraisals.
6. All documents relating to, concerning, and referring to Philip Waldron's work performance, including but not limited to evaluations, self evaluations, merit reviews, and salary reviews, and all documents relating to, concerning and referring to promotions, transfers, training, ratings, accommodations, praise, and criticism.

7. All documents relating to, concerning, and referring to the successful candidate's work performance, including but not limited to evaluations, self evaluations, merit reviews, and salary reviews, and all documents relating to, concerning and referring to promotions, transfers, training ratings, accommodations, praise, and criticism.

8. All documents relating to, concerning, and referring to each and every applicant's (identified in request 3) work performance, including but not limited to evaluations, self evaluations, merit reviews, and salary reviews, and all documents relating to, concerning and referring to promotions, transfers, training, ratings, accommodations, praise, and criticism.

9. All job postings, announcements, requisitions, descriptions, or other documents relating to, concerning, and referring to the job responsibilities, duties, and qualifications for the position of Classification Supervisor in or about December 1997.

10. All documents relating to, concerning, and referring to the job responsibilities, duties, and qualifications for each position held by Philip Waldron during his employment with the Middlesex Sheriff's Department.

11. All documents relating to, concerning, and referring to each and every claim for workers' compensation or the like filed by Philip Waldron during his employment with the Middlesex Sheriff's Department.

12. Philip Waldron's, the successful candidate's, and each and every applicant's application and resume for the position of Classification supervisor posted in or about December 1997.

13. Describe with specificity the decision not to select Philip Waldron for the position of Classification Supervisor that was posted in or about December 1997, including but not limited to, the date of the decision, the method by which he was notified of the decision and the identity of the person who notified him, each and every reason he was not selected, the identity of each person who had a role in the decision and a description of each person's role, the identity of the person(s) who made the final decision not to select him and provide all documents that would reflect any of the information requested here.

14. Describe with specificity the decision to select the successful candidate for the position of Classification supervisor that was posted in or about December 1997, including but not limited to, the date of the decision, the method by which he was notified of the decision and the identity of the person who notified him, each and every reason he was selected, the identity of each person who had a role in the decision and a description of each person's role, the identity of the person(s) who made the final decision to select him and provide all documents that would reflect any of the information requested here.

15. Any documents relating to, concerning, and referring to any communications, whether written or oral, between Philip Waldron and each and every representative of the Middlesex Sheriff's Department and Middlesex County regarding Mr. Waldron's application and nonselection for the position of Classification Supervisor.

16. Describe with specificity and provide all documents relating to each and every disability of Philip Waldron, the successful candidate, and each and every applicant for the position of Classification Supervisor that was posted in or about December 1997.

2. The record does not contain the employer's Affirmative Action Program Policy and Procedure.

17. All policies, procedures, rules, regulations, directives, and other documents both of the Middlesex Sheriff's Office and Middlesex County relating to, concerning, and referring to affirmative action for disabled individuals that were in effect prior to and during the period from December 1997 through February 1998.

18. All documents relating to, concerning, and referring to the Middlesex Sheriff's Office's and Middlesex county's policies and procedures regarding the employment of individuals with disabilities.

19. All documents relating to each and every charge or complaint of discrimination or unfair treatment on the basis of disability filed by Philip Waldron submitted by the Middlesex Sheriff's Department to the Massachusetts Commission Against Discrimination and/or the Equal Employment Opportunity Commission.

20. All documents which you intend to introduce at arbitration.

21. The names of all witnesses of the Middlesex Sheriff's Office.

By letter dated March 9, 1999, Desmond responded to Humphrey's March 5, 1999 request as follows:

Re: *NAGE/IBCO and Middlesex County Sheriff's Office*

Grievant: Philip Waldron

In response to your request for documents in regard to the Waldron arbitration, please find some of the requested documents, specifically Philip Waldron's personnel file.

On or about March 15, 1999, the arbitration hearing was rescheduled from April 6, 1999 to October 26, 1999.

On September 21, 1999, Humphrey sent a follow-up letter about the Union's information request dated March 5, 1999. Humphrey's September 21, 1999 letter directed to Desmond states, in part:

Re: *IBCO v. Middlesex Sheriff's Office*

AAA No. 11 390 00771 98

Grievant: Philip Waldron

Arbitration in the above-referenced matter is scheduled for October 12, 1999. On March 5, 1999, I submitted a request for information to you (see enclosed document). In response to my request, I have received only one item, Mr. Waldron's personnel file. [Text omitted.]

While I believe the following request are already encompassed in my previous request of March 5, 1999, and, therefore, are not new requests, I want to make clear that I am requesting the following documents:

1. The complete sick leave and disciplinary records of Philip Waldron and the successful candidate.
2. The Affirmative Action Policy and procedures in effect in December 1997.
3. The worker's compensation file for Philip Waldron.
4. The identity and job description of the EEO/Affirmative Action Officer and a record of all training received by the EEO/Affirmative Action Officer by December 1997.

5. The identity of all employees who have been hired or promoted as a result of the Middlesex Sheriff's Office's Affirmative Action Policy for the disabled.

The arbitration was rescheduled from October 26, 1999 to March 28, 2000, and again rescheduled from March 28, 2000 to November 14, 2000.

On July 26, 2000, Humphrey on behalf of the Union, filed this charge of prohibited labor practice with the Commission (MUP-2754). On or about August 4, 2000, Desmond forwarded to Humphrey the documents the Employer had sent to Union counsel Lisa Pellegrino (Pellegrino) on or about September 17, 1999, regarding Classification Supervisor Job Bid # B002. Desmond's August 4, 2000 letter states:

Re: MUP-2754

In regards to the above referenced matter, please find the enclosed documents which were originally forwarded accidentally to Lisa Pellegrino. I am sorry for any confusion this might have caused. I previously did not contact you because I believed that the documents were in your possession. Please do not hesitate to call me with any questions you might have surrounding this matter.³

On or about August 9, 2000, the Employer responded to the Union's March 5, 1999 request. That August 9, 2000 response consists of a copy of the Union's March 5, 1999 letter with hand-written notations next to each of the Union's twenty-one (21) numbered requests for information as follows:

1. already given
2. no
3. no
4. see pers file
5. see IBCO contract
6. see pers folder
7. no
8. no
9. ok
10. see pers folder
11. see pers folder
12. see posting
13. see contract
14. see contract
15. ?
16. no
17. no [illegible] as of 7-[illegible]
18. policy
19. may be obtained from complainant or MCAD

3. The record does not include or identify the documents Desmond enclosed with his August 4, 2000 letter.

20. ?

21. ?

By letter to Humphrey dated August 28, 2000, Desmond responded to the Union's March 5, 1999 request for information. That August 28, 2000 response, in relevant part, provides: ⁴

RE: *IBCO and Middlesex Sheriff's Office*

Grievant: Philip Waldron

Pursuant to your records request, please consider this a formal response from the Middlesex Sheriff's Office to each of your twenty-one (21) requests. The Middlesex Sheriff's Office responds exclusively on its behalf and does not undertake to respond for Middlesex County or the Commonwealth of Massachusetts or provide documents NOT in its possession, custody or control. The responses to the grievant's requests are as follows:

Response to Request Number One (1):

Enclosed please find a copy of the grievant's personnel file.

Response to Request Number Two (2):

OBJECT. The Middlesex Sheriff's Office declines to provide any requested documentation in its possession, custody or control pursuant to M.G.L. c. 66, s.10; M.G.L. c. 4, s. 7(26)(c), the Fair Information Practices Act and in accordance with the holding of *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792 (2000).

Response to Request Number Three (3):

OBJECT. The Middlesex Sheriff's Office declines to provide any requested documentation in its possession, custody or control pursuant to M.G.L. c. 66, s.10; M.G.L. c. 4, s. 7(26)(c), the Fair Information Practices Act and in accordance with the holding of *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792 (2000).

Response to Request Number Four (4):

See enclosed personnel file of grievant for documents pertaining to the grievant. To the extent that the request seeks records of disciplinary action against the successful candidate for Classification Supervisor or each and every applicant for that position, the Middlesex Sheriff's Office **OBJECTS** and declines to provide such records under authority of M.G.L. c. 4, s.7(26)(c); the Fair Information Practices Act and in accordance with the holding of *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792 (2000).

Response to Request Number Five (5):

Enclosed is relevant IBCO contract provision ("Section Fourteen") and Policy and Procedure 242 ("Employee Evaluations").

Response to Request Number Six (6):

See Response to Request number One (1).

Response to Request Number Seven (7):

OBJECT. The Middlesex Sheriff's Office declines to provide any requested documentation in its possession, custody or control pursuant to M.G.L. c. 66, s.10; M.G.L. c. 4, s. 7(26)(c), the Fair Information Practices Act and in accordance with the holding of

Wakefield Teachers Association v. School Committee of Wakefield, 431 Mass. 792 (2000).

Response to Request Number Eight (8):

OBJECT. The Middlesex Sheriff's Office declines to provide any requested documentation in its possession, custody or control pursuant to M.G.L. c. 66, s.10; M.G.L. c. 4, s. 7(26)(c), the Fair Information Practices Act and in accordance with the holding of *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792 (2000).

Response to Request Number Nine (9):

Enclosed is the Job Posting.

Response to Request Number Ten (10):

See Response to Request Number One (1).

Response to Request Number Eleven (11):

See Response to Request Number One (1); Employer's First Report of Injury form for a 6/29/88 injury to the grievant; Employee's Statement form; Statement of Department Head Kevin Downs; fully executed Medical Release; Duty Report; correspondence dated October 26, 1988 and March 3, 1989.

Response to Request Number Twelve (12):

See Response to Request Number One (1); List of Bids; and Bid forms. As to the rest of the request, the Middlesex Sheriff's Office declines to provide the rest of the sought after information under M.G.L. c. 66, s.10; M.G.L. c. 4, s. 7(26)(c), the Fair Information Practices Act and in accordance with the holding of *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792 (2000).

Response to Request Number Thirteen (13):

See Policy and Procedure 201 ("Selection and Hiring"). As to the rest of the request, the Middlesex Sheriff's Office declines to provide the rest of the sought after information under M.G.L. c. 66, s.10; M.G.L. c. 4, s. 7(26)(c), the Fair Information Practices Act and in accordance with the holding of *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792 (2000).

Response to Request Number Fourteen (14):

See Response to Request Number Thirteen (13). In addition, see Policy and Procedure 203 ("Equal Opportunity and Affirmative Action").

Response to Request Number Fifteen (15):

See contents of enclosed "blue" folder. To wit, various correspondence from various agencies and persons involved with the subject incident.

Response to Number Sixteen (16):

See Medical Records of Philip Waldron. **OBJECT.** The Middlesex Sheriff's Office declines to provide any other requested documentation in its possession, custody or control pursuant to M.G.L. c. 66, s.10; M.G.L. c. 4, s. 7(26)(c), the Fair Information Practices Act and in accordance with the holding of *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792 (2000).

Response to Number Seventeen (17):

4. Desmond's August 28, 2000 letter restates the Union's request by numbered paragraph with the Employer's response below each numbered paragraph.

See Responses to Requests Numbers Thirteen (13) and Fourteen (14). Given the previous disclaimer as to the scope of the Middlesex Sheriff's Office's responses, please be informed that County government ended in 1997.

Response to Number Eighteen (18):

See Responses to Requests Numbers Thirteen (13) and Fourteen (14).

Response to Number Nineteen (19):

See contents of enclosed "blue" folder. To wit, various correspondence from various agencies and persons involved with the subject incident.

Response to Number Twenty (20):

See Documents or information provided in Responses to Requests Numbered One (1) through twenty-one (21).

Response to Number Twenty-One:

The Middlesex Sheriff's Office intends to call Marty Gabriella.

In or about October 2000, the arbitration was placed in abeyance until this matter relating to the requested information was resolved.

The Commission's complaint alleges that the Employer has failed to provide the Union with the following information:

- i) any of the information referred to in numbered paragraphs 2, 3, 7, and 8 of the Union's March 5, 1999 request for information;
- ii) the records of disciplinary action against the successful candidate for classification supervisor and each and every applicant for that position referred to in numbered paragraph 4 of the Union's March 5, 1999 request for information;
- iii) the job applications and resume for the successful candidate and each and every applicant referred to in numbered paragraph 12 of the Union's March 5, 1999 request for information;
- iv) the information referred to in numbered paragraphs 13, 14, 17, and 18 of the Union's March 5, 1999 request for information, except for Policy and Procedure 201 regarding selection and hiring; and
- v) documents related to the disability of the successful candidate and each and every applicant for the position of classification supervisor referred to in numbered paragraph 16 of the Union's March 5, 1999 request for information.

Job Bidding Process Grievance - Bid # 002

On or about December 30, 1998, the Union filed a grievance signed by Waldron alleging that the Employer had not adhered to the contractual job posting and bidding requirements for the classification supervisor position, Bid # B002, in violation of Article IX, Section 5 of the Agreement (the job bidding grievance). The grievance could not be resolved at the lower steps of the grievance process. On or about January 20, 1999, the Union referred the job bidding grievance to arbitration under the terms of the Agreement. On or about January 20, 1999, the Union filed a demand for arbitration with the AAA. An arbitration hearing regarding the classification

supervisor Bid Job # B002, AAA No. 11 390 00110 99, the job bidding grievance, was scheduled for September 23, 1999.

By letter dated September 1, 1999 to Desmond, Pellegrino, on behalf of the Union, requested the following information:

RE: Classification supervisor Bid Job B002

Pursuant to MGL c. 150E, the International Brotherhood of Correctional Officers requests the following, so as to adequately prepare for arbitration in the above referenced matter.

1. A copy of the job posting for the classification supervisor Bid Job B002.
2. Curricula vitae of all respondents to the posting and any and all other documents submitted by any and all job candidates, including but not limited to: job applications, diplomas, certificates, awards, achievements, and commendations for the above-referenced position.
3. Any and all correspondence between the employer and any and all of the job candidates for the above referenced position.
4. Any and all notes taken by the employer during any and all interviews conducted regarding the above referenced position.
5. Any and all documents regarding the seniority listing as of the date of the application cut-off for the above referenced position.

On September 15, 1999, Pellegrino sent a follow-up letter to Desmond about the Union's September 1, 1999 request for information. Pellegrino's September 15, 1999 letter referenced: "Arbitration # 11 390 0110 99, Grievance: Philip Waldron - Job bidding and posting violation." Desmond responded to Pellegrino by letter dated September 16, 1999. That September 16, 1999 response, in part, provides:

RE: Arbitration No. 11-390-00110-99, Grievant: Philip Waldron

In reference to the above matter please be advised that upon receipt of your initial request for documents dated 9-1-99 I was on vacation in California and did not receive it until my return to work September 13, 1999. At that time I contacted you because your request failed to identify the arbitration number or the grievant's name. Having received that information from you on 9-16-99 I will make an expeditious attempt to gather said documents and forward them to you as soon as possible.

On September 17, 1999, the Employer, through Martin Gabriella, Deputy Superintendent, Human Resource Division, responded to Union Counsel Pellegrino's September 1, 1999 request for information by providing documents relating to the Classification Supervisor Bid Job # B002.⁵ The Employer's September 17, 1999 letter transmitting the documents, and the facsimile transmission sheet reference "Classification Supervisor Bid Job # B002.

OPINION

The issue presented in this case is whether the Employer failed to bargain in good faith by failing to provide the Union with:

5. The Employer's September 17, 1999 facsimile transmission sheet indicates that the Employer transmitted a total of about 70 pages to the Union in response to

Pellegrino's September 1, 1999 request for information. However, the record does not include or identify the documents the Employer provided to the Union.

1) the complete personnel files, work performance records, discipline records, job applications and resumes, and records relating to the disability of the successful candidate and each applicant for the classification supervisor position that the Employer posted in December 1997;

2) specific information about both the decision not to select Waldron and the decision to select the successful candidate for the classification supervisor position;

3) all policies, procedures, rules, regulations, directives, and other documents relating to affirmative action for disabled individuals that were in effect prior to and during the period from December 1997 through February 1998, and all documents relating to the Employer's policies and procedures about the employment of individuals with disabilities.

For the following reasons, we conclude that the Employer has refused to bargain in good faith with the Union by: 1) failing to provide the Union with certain requested information that is not statutorily exempt from public disclosure; and, 2) failing to provide the Union with certain other requested information in a manner consistent with its statutory confidentiality claims. Therefore, the Employer has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

Public Employer's Obligation to Provide Information

If a public employer possesses information that is relevant and reasonably necessary to a union in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the union's request. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1148, 1149 (1981). The union's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining including contract negotiations and contract administration. *Boston School Committee*, 24 MLC 8, 11 (1998), citing *Boston School Committee*, 10 MLC 1501, 1513 (1984). This right extends to information that is relevant to a party's evaluation of whether to file and pursue a grievance. *Boston School Committee*, 8 MLC 1380, 1382 (1981).

The Commission's standard in determining whether the information requested by the Union is relevant is a liberal one, similar to the standard for determining relevance in civil litigation discovery proceedings. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC at 1141. Information about terms and conditions of employment is presumptively relevant and necessary for a union to perform its statutory duties. *City of Lynn*, 27 MLC 60 (2000), citing *Higher Education Coordinating Council*, 23 MLC 266, 268 (1997). As the exclusive collective bargaining representative of correction officers, the Union has a duty to investigate and make reasoned judgments about the relative merits of employees' grievances. *Quincy City Employees Union, H.L.P.E.*, 15 MLC 1340, 1355-56 (1989), *aff'd sub nom. Pattison v. Labor Relations Commission*, 30 Mass. App. Ct. 9 (1991), *fur rev den.* 409 Mass. 1104 (1991). Moreover, the Union's statutory right to information is integral to its duty to police and enforce the terms of the collective bargaining agreement including the Employer's compliance with the contractual nondiscrimination provision, Article XIII of

the parties' collective bargaining agreement. *Worcester School Committee*, 14 MLC 1682, 1685 (1988).

The record establishes that the Employer and the Union are parties to an Agreement effective from July 1, 1997 through June 30, 2000. Further, the Agreement contains a grievance-arbitration process and a nondiscrimination provision. The record also establishes that, in or about February 1998, the Union filed a grievance on behalf of Waldron alleging that the Employer had denied Waldron the position of classification supervisor on the basis of his disability, in violation of the nondiscrimination provision of the Agreement and the Employer's Affirmative Action Program Policy and Procedure. The Union filed a demand for arbitration, and by letter dated March 5, 1999, the Union requested information related to that grievance. In its first response to this request, the Employer provided the Union with a copy of Waldron's personnel file, but nothing further. On September 21, 1999, the Union sent the Employer a follow-up to its first request, and on August 4, 2000, after the Union filed this charge of prohibited practice, the Employer provided the Union with additional documents.

The Employer further responded to the Union's March 5, 1999 information request on August 9, 2000 with short, hand-written notations on copy of the Union's March 5, 1999 request. The Employer's notations indicated in some instances where the information could be located, whether it had already been provided, and a "no" indicating that the Employer would not provide the information. On August 28, 2000, the Employer provided the Union with a more complete response to its March 5, 1999 request stating for the first time the reasons that it would not provide the Union with certain requested information.

Public Employer's Defenses - Failure to Provide Requested Information

The Employer does not challenge the Union's contention that the requested information is relevant and reasonably necessary for the Union to evaluate the merits of Waldron's grievance. Rather, the Employer first defends its conduct in failing to timely provide the Union with certain requested information by stating that a good faith mistake occurred when it provided information to the Union on two grievances without realizing their subject matter distinctions. The record demonstrates that, on August 4, 2000, the Employer provided the Union with certain information that it had provided previously to another Union attorney in September 1999 on a grievance arising out of the same classification supervisor position, Bid #002. However, the record also establishes that the Employer has not provided the specific information at issue in this case, as evidenced by the Employer's August 28, 2000 further response to the Union's March 5, 1999 information request. Therefore, even if the Commission was inclined to consider a public employer's good faith mistake defense to a failure to timely provide information, that defense is misplaced here because the Employer has refused to provide the disputed information.

The Employer also contends that the parties' dispute is a discovery dispute that does not warrant the protections of the Law. The Employer argues that the arbitrator is the appropriate person to determine the propriety or scope of non-disclosure of documents in a pending arbitration matter, not the Commission. In the Employer's

view, to resolve this discovery dispute, the Union should have approached the arbitrator with its concerns rather than filing a charge with the Commission. According to the Employer, it would trivialize the purposes of the Law and undermine the arbitrator's power to fairly adjudicate the grievance for the Commission to hold otherwise. We disagree.

It is well established that a union is entitled to relevant information that is reasonably necessary to its determination whether or not to pursue a grievance to arbitration. *Board of Higher Education*, 29 MLC 169, 171 (2003) and cases cited. The relevance of the information is determined by the circumstances that exist at the time the union makes the request, not at the time an arbitrator vindicates the union's right to the information. *Id.*; *City of Somerville*, 29 MLC 1999 (2003) and cases cited. Here, the Union requested information on March 5, 1999, after it had filed for arbitration, but in advance of the scheduled arbitration date. As discussed below, the Commission has concluded that some of the requested information is relevant and reasonably necessary for the Union to perform its duties as the exclusive representative of correction officers, including Waldron. When the Employer provides the information in a manner consistent with this decision, the Union will be in a better position to evaluate the merits of Waldron's grievance and may decide not to proceed with the arbitration. We will not foreclose that possibility. Contrary to the Employer's position, our resolution of the issues presented in this case benefits the grievance-arbitration process by enforcing an employer's obligations under the Law before any party incurs the time and expense of arbitration. As the Supreme Court stated in *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 438, 64 LRRM 2069, 2071 (1967), "arbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims."

Application of the Relevancy Standard to the Union's Request for Information

Applying the Commission's relevancy standard to the facts here, we first find that the Union's request for a copy of the successful candidate's complete personnel file is overly broad. Although personnel files do contain information that is relevant to the grievance at issue, personnel files also usually contain information that is not relevant and reasonably necessary to the Union's assessment of the merits of Waldron's grievance, like payroll deductions, an employee's choice of health plans, and the like. However, we do find that information about the successful candidate's employment history, education, qualifications, job performance information like evaluations and merit awards, disciplinary records, promotions, transfers, training ratings, the application and resume for the position of classification supervisor posted in or about December 1997, and disability records⁶, documents also usually found in an employee's personnel file, are relevant and reasonably necessary for the Union to compare the successful candidate's qualifications for the position with Waldron's qualifications, and to compare the successful candidate's work record with Waldron's work record.

The Union also requested the same or substantively similar information for each applicant for the classification supervisor position that it has requested for the successful candidate. The Union argues that all candidates for the position, including the successful candidate and Waldron, are an appropriate grouping of similarly situated employees for comparison to assess the merits of the grievance. We have reviewed carefully the Union's stated rationale, but we are not persuaded that all the requested information for each applicant is relevant and reasonably necessary for the Union to evaluate the merits of Waldron's grievance. However, we do find that each applicant's job application and resume for the classification supervisor position posted in or about December 1997, and documents relating to the disability of each applicant fall within the Commission's standard. This information may demonstrate that other applicants had either weaker or stronger credentials for the classification supervisor position than Waldron and/or the selected candidate. After reviewing this information, the Union may be in a better position to show the relevancy and reasonable necessity of further information about other applicants' employment history and work record.

The Union's request for information about the decision to select the successful candidate and the decision not to select Waldron, including the date of the decision, the method of notification, the identity of the person who notified the individuals, the identity of the persons involved in the decision and a description of each person's role, the identity of the person(s) who made the final decision, and all documents reflecting this information are also relevant and reasonably necessary to the Union's assessment of the Employer's conformance with its own published procedures and policies regarding the filling of positions, as well as the integrity of the evaluation process of the qualifications and work record of the successful candidate and Waldron. Finally, all the Employer's policies, procedures, rules, regulations, directives, and other documents relating to affirmative action for disabled individuals in effect prior to and during the period from December 1997 through February 1998, and all documents relating to the Employer's policies and procedures regarding the employment of individuals with disabilities are relevant and reasonably necessary for the Union to assess if the Employer's employment decision here conforms with the Employer's published policies.

Public Employer's Statutory Defenses - Failure to Provide Requested Information

Once a union has established that the requested information is relevant and reasonably necessary to its duties as the employees' exclusive representative, the burden shifts to the employer to establish that it has legitimate and substantial concerns about disclosure and that it has made reasonable efforts to provide the union with as much of the requested information as possible, consistent with its expressed concerns. *Board of Higher Education*, 26 MLC 91, 93 (2000), citing *Boston School Committee*, 13 MLC 1290, 1294-1295 (1986); *Adrian Advertising a/k/a Advanced Advertis-*

6. The Union's request relating to the disability of the successful candidate and each and every applicant is framed in the Commission's complaint as documents relating to the disability of those persons. The record does not demonstrate that the Union is seeking medical documentation or medical information about an em-

ployee's disability. Therefore, although we determine that the Employer should provide the requested disability records to the Union, that disclosure is subject to certain safeguards and redaction of all medical documentation and medical information.

ing, 13 MLC 1233, 1263 (1986), *aff'd sub nom. Despres v. Labor Relations Commission*, 25 Mass. App. Ct. 430 (1988). If an employer advances legitimate and substantial concerns about the disclosure of information to a union, the case is examined on the facts contained in the record. *Boston School Committee*, 13 MLC at 1295. The employer's concerns are then balanced against the union's need for the information. *Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court*, 11 MLC 1440, 1443-44 (1985), citing, *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1139 (1981) (Commission adopted the balancing test approach used by the United States Supreme Court in *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 100 LRRM 2728 (1979)). Absent a showing of great likelihood of harm flowing from a disclosure, however, the requirement that a public employer provide an exclusive bargaining representative with relevant information necessary for it to perform its duties overcomes any claim of confidentiality. *Greater Lawrence Sanitary District*, 28 MLC 317, 318-319 (2002), citing, *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC at 1143-1144 (1981).

Citing M.G.L. c. 66 s. 10, M.G.L. c. 4, s. 7 (26)(c), the Fair Information Practices Law, and the holding in *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792 (2000), the Employer argues that it has a legal duty to safeguard certain documents and information that would, if released, violate the privacy interests of its employees. The Union argues that the Employer waived its right to assert confidentiality objections because the Employer did not assert those objections in a timely manner. See, *Commonwealth of Massachusetts*, 12 MLC 1590, 1598 (1986) (employer failed to timely object to furnishing budgetary information). See also, *Detroit Newspaper Agency*, 317 NLRB 1071, 1072-1074 (1995) (employer must timely raise confidentiality claims to trigger a balancing test). The rationale for requiring a party to raise confidentiality claims in a timely manner is to enable the parties to enter into discussions to accommodate those concerns. *Id.*, citing, *Tritac Corp.*, 286 NLRB 522 (1987).

Here, the record establishes that the Employer first notified the Union that it would not provide certain requested information on the basis of specific legal exemptions on August 28, 2000, over sixteen months after the Union first requested the information on March 5, 1999. The Union's waiver argument would likely be persuasive if the requested information at issue fell within an employer's proprietary interests. Here, however, the statutory privacy interests raised by the Employer exist primarily for the benefit of the public employees. Therefore, we shall address the Employer's

confidentiality defenses to the extent they implicate employees' statutorily protected privacy interests.

If an employer raises statutory defenses to its failure to provide a union with requested relevant information, the Commission reviews the cited statutory provisions in light of the employer's obligation under the Law. If the requested information is not exempt from disclosure under the cited statutes, it must be furnished to the union unless there exist other legitimate and substantial concerns that outweigh the union's need for the information. *Board of Trustees, University of Massachusetts (Amherst)*, 8 MLC 1148, 1149-1152 (1981). The resolution of statutory concerns raised by an employer may require harmonizing statutory schemes, each of which protects a significant public interest. *Id.* Like *Board of Trustees, University (Amherst)*, *supra*, resolution of this issue involves harmonizing M.G.L. c. 66, Section 10⁷ (the Public Records Law), which protects the public interest in disclosure of materials maintained by government that are of public concern, M.G.L. c. 66A,⁸ the Fair Information Practices Act (FIPA), which safeguards individuals against unwarranted invasions of their personal privacy, and M.G.L. c. 4, Section 7 Twenty-sixth (c)⁹ (the Personnel Files Exemption) with the Law.

Here, all of the information sought by the Union is a public record subject to disclosure under the Public Records Law unless the records fall within the Personnel Files Exemption to the Public Records Law. See, *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. 792, 796 (2000) quoting, *Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co.*, 414 Mass. 609, 614 (1993). There are two categories of records exempt from disclosure under the personnel files exemption, "personnel and medical files or information" and "other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy." *Wakefield Teachers Association v. School Committee of Wakefield*, 431 Mass. at 796-797, citing, *Globe Newspaper Co. v. Boston Retirement Bd.*, 388 Mass. 427, 434 (1983). The phrase "relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy" modifies only the second category of records. *Id.*

In *Wakefield*, the Supreme Judicial Court determined that:

While the precise contours of the legislative term 'personnel [file] or information' may require case-by-case articulation, it includes, at a minimum, employment applications, employee work evaluations, disciplinary documentation, and promotion, demotion, or termination information pertaining to a particular employee. These

7. General Laws c. 66, Section 10, provides in relevant part:

"(a) Every person having custody of any public record, as defined in clause Twenty-sixth of section seven of chapter four, shall, at reasonable times and without unreasonable delay, permit it, or any segregable portion of a record which is an independent public record, to be inspected and examined by any person, under his supervision, and shall furnish one copy thereof upon payment of a reasonable fee."

8. General Laws c. 66A, Section 1 defines "personal data" as:

Any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual; provided, however, that such information is not contained in a public record, as defined in clause twenty-sixth of section seven of chapter four ...

9. General Laws c. 4, Section 7, Twenty-sixth, states in relevant part:

" 'Public Records' shall mean all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, unless such materials or data fall within the following exceptions in that they are: ... (c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy ..."

constitute the core categories of personal information that are “useful in making employment decisions regarding an employee.” *Oregonian Publ. Co. v. Portland Sch. Dist. No 1J*, 329 Or. 393, 401 (1999). It would distort the plain statutory language to conclude that disciplinary reports are anything but “personnel [file] or information.” See *Globe Newspaper Co. v. Chief Med. Examiner*, *supra*.

In contrast, information like an employee’s name, home address, date of birth, social security number, base pay, and overtime pay, even though they are “personal” to a particular individual, are not useful in making employment decisions regarding an employee. Therefore, these documents fall within the “other materials or data relating to a specifically named individual” category of the personnel files exemption. *Id.* at 799-800, and cases cited. See e.g., *Pottle v. School Comm. Of Braintree*, 395 Mass. 861, 865 (1985) (names, home addresses, and job classifications of all school employees are not exempt from public disclosure because it would not publicize “intimate details” of a “highly personal” nature); *Hastings & Sons Publ. Co. v. City Treasurer of Lynn*, 374 Mass. 812, 817-818 (base salaries and overtime payments of employees released); *Reinstein v. Police Comm’s of Boston*, 378 Mass. 281, 284, 293 (1979) (disclosure of reports of discharge of weapons by police officers not exempt from disclosure).

Applying the Supreme Judicial Court’s holding in *Wakefield*, to the facts in this case, the Commission concludes that all the Employer’s policies, procedures, rules, regulations, directives, and other documents relating to affirmative action for disabled individuals in effect prior to and during the period from December 1997 through February 1998, and all documents relating to the Employer’s policies and procedures regarding the employment of individuals with disabilities are not exempt from disclosure under the Personnel Files Exemption. These policies and procedures are not core categories of personal information that are useful in making employment decisions, nor are they personal to a particular employee. They are public records incorporating the Employer’s policies in these areas. Therefore, the Employer’s stated statutory confidentiality claims are without merit, and it is unnecessary for the Commission to harmonize the Personnel Files Exemption with the Law.¹⁰

Next, the Union’s request for information about the decision to select the successful candidate and the decision not to select Waldron, including the date of the decision, the method of notification, the identity of the person who notified the individuals, the identity of the persons involved in the decision and a description of each person’s role, the identity of the person(s) who made the final decision, and all documents reflecting this information are not core categories of personal information that are useful in making employment decisions. Although this information may arguably fall within the second category of the personnel files exemption, applying the case law developed in this area, the Commission concludes that the release of this information is not exempt from public disclosure because it would not publicize “intimate details” of a

“highly personal” nature. Therefore, the Employer’s stated statutory confidentiality claims relating to this information are also without merit, and there is no need for the Commission to harmonize the Personnel Files Exemption with the Law. The remainder of the requested information about the successful candidate and each applicant for the classification supervisor position, which the Commission has found to be relevant and reasonably necessary for the Union to evaluate the merits of Waldron’s nondiscrimination grievance, is statutorily exempt from public disclosure. However, even though documents may be exempt from public disclosure, an employer’s obligation to provide a union with relevant and reasonably necessary information for the union to perform its duties as employees’ exclusive bargaining representative can be met in a manner consistent with the purposes of the Public Records Law and the Personnel Files Exemption. *Board of Higher Education*, 29 MLC 169 (2003) (employee’s disciplinary note given to union subject to certain conditions to decide whether to continue to process an employee’s grievance) and cases cited. Here, if the Employer provides the information subject to the safeguards below, the Union’s need for the information that falls within the Personnel Files Exemption outweighs the statutory confidentiality claims raised by the Employer on behalf of the employees. Further, the release of the information to the Union subject to the safeguards below harmonizes all applicable statutory schemes by enforcing the employer’s obligation to bargain in good faith under the Law while protecting public employees against the public disclosure of documents that fall under the Personnel Files Exemption of the Public Records Law. *Id.* at 171-172. See, *City of Boston*, 22 MLC 1698 (1996) (employee’s internal affairs division file provided to Union counsel with certain safeguards to defend employee in a disciplinary proceeding).

CONCLUSION

For the reasons stated above, we conclude that the Employer has refused to bargain in good faith with the Union by: 1) failing to provide the Union with certain requested information that is not statutorily exempt from public disclosure; and, 2) failing to provide the Union with certain other requested information in a manner consistent with its statutory confidentiality claims. Therefore, the Employer has violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law.

REMEDY

In *Board of Higher Education*, 29 MLC 169 (2003), the Commission ordered safeguards on the release of an employee’s disciplinary note to a union in response to a request for information to process and pursue grievances. In crafting those safeguards, the Commission used as models two cases that ordered safeguards on the release of information that would otherwise be exempt from disclosure under the Public Records Law pursuant to M.G.L. c. 4, Section 7 (26)(f). *Boston Police Superior Officers Federation v.*

10. In its August 28, 2000 response to the Union, the Employer did refer the Union to two policies, Policy and Procedure 201 (“Selection and Hiring”) and Policy and Procedure 203 (“Equal Opportunity and Affirmative Action”). However, the Employer also adds the confidentiality claims to that section of its response. Absent an

affirmative statement from the Employer that there exist no other policies or procedures, we have addressed this part of the Union’s information request in this decision.

Boston, 414 Mass. 458 (1993) and *City of Boston*, 22 MLC 1698 (1996). Following these models, we order the following safeguards on the release of the information exempt from public disclosure under the Public Records Law.

The Employer shall:

1. Redact the social security number and all medical information, including but not limited to the names of treating physicians and other medical information directly stating diagnosis, treatment, and medication, from the information kept in the successful candidate's personnel file about the successful candidate's employment history, education, qualifications, job performance information like evaluations and merit awards, disciplinary records, promotions, transfers, training ratings, disability records, and the application and resume for the position of classification supervisor posted in or about December 1997, and provide this redacted information to the Union's counsel.

2. Redact the employee's name and substitute a code for that name on each applicant's job application and resume for the position of classification supervisor posted in or about December 1997 and on each such applicant's disability records, except for those of the successful candidate, and further redact from those records the employee's social security number and all medical information including but not limited to the names of treating physicians and other medical information directly stating diagnosis, treatment, and medication, and provide this redacted information to the Union's counsel.

The Union's counsel shall:

1. Take all reasonable measures to insure that the redacted documents are used solely to evaluate the merits and to pursue, if appropriate, Grievance AAA No. 11 390 00771 98, except with the consent of the Employer. Reasonable measures shall include, but not be restricted to:

- a) confining access to the documents to those persons whose access is necessary to evaluate and to pursue, if appropriate, Grievance AAA No. 11 390 00771 98;
- b) producing only those copies essential to obtain the participation of persons necessary to evaluate and to pursue, if appropriate, Grievance AAA No. 11 390 00771 98;
- c) numbering any copies that are made and tracking the access of necessary persons to the documents;
- d) obtaining certifications from all persons with access to the documents that they have not and will not discuss or otherwise disclose the contents of the documents to anyone who has not also certified that they acknowledge and adhere to these restrictions; and
- e) obtaining and returning all numbered copies at the conclusion of the case to the Employer's counsel, unless an agreement is reached on alternative reasonable document-handling procedures.

Information subject to disclosure under the Public Records Law is not subject to the above safeguards.

ORDER

WHEREFORE, IT IS HEREBY ORDERED that the Sheriff's Office of Middlesex County shall:

1. Cease and desist from:

a) Failing to bargain in good faith with the Union as the exclusive collective bargaining representative of certain correction officers by refusing to provide information that is relevant and reasonably necessary to the Union's assessment of whether to pursue a nondiscrimination grievance filed by the Union on behalf of correction officer Philip Waldron (Waldron).

b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under the Law.

2. Take the following affirmative action that will effectuate the policies of the Law:

a) Provide the Union's counsel with all the Employer's policies, procedures, rules, regulations, directives, and other documents relating to affirmative action for disabled individuals in effect prior to and during the period from December 1997 through February 1998, and all documents relating to the Employer's policies and procedures regarding the employment of individuals with disabilities.

b) Provide the Union's counsel with information about the decision to select the successful candidate and the decision not to select Waldron for the position of classification supervisor posted in or about December 1997, including the date of the decision, the method of notification, the identity of the person who notified the individuals, the identity of the persons involved in the decision and a description of each person's role, the identity of the person(s) who made the final decision, and all documents reflecting this information.

c) Redact the social security number and all medical information, including but not limited to the names of treating physicians and other medical information directly stating diagnosis, treatment, and medication, from the information kept in the successful candidate's personnel file about the successful candidate's employment history, education, qualifications, job performance information like evaluations and merit awards, disciplinary records, promotions, transfers, training ratings, disability records, and the application and resume for the position of classification supervisor posted in or about December 1997, and provide this redacted information to the Union's counsel, who shall take all reasonable measures, as described in the remedy section of this decision, to insure that the documents are used solely to evaluate the merits and to pursue, if appropriate, Grievance AAA No. 11 390 00771 98, except with the consent of the Employer.

d) Redact the employee's name and substitute a code for that name on each applicant's job application and resume for the position of classification supervisor posted in or about December 1997 and on each such applicant's disability records, except for those of the successful candidate, and further redact from those records the employee's social security number and all medical information including but not limited to the names of treating physicians and other medical information directly stating diagnosis, treatment, and medication, and provide this redacted information to the Union's counsel, who shall take all reasonable measures, as described in the remedy section of this decision, to insure that the documents are used solely to evaluate the merits and to pursue, if appropriate, Grievance AAA No. 11 390 00771 98, except with the consent of the Employer.

e) Post in conspicuous places where employees represented by the Union usually congregate, or where notices are usually posted, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

f) Notify the Commission within ten (10) days of receipt of this decision and order of the steps taken to comply with this order.

SO ORDERED.

MLRC Administrative Law Decisions—2004

NOTICE TO EMPLOYEES

The Massachusetts Labor Relations Commission (the Commission) has decided that the Sheriff's Office of Middlesex County (the Sheriff's Office) has violated Section 10(a)(5) and, derivatively Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (Chapter 150E), the Public Employee Collective Bargaining Law, by failing to provide the International Brotherhood of Correctional Officers (the Union) with certain information that is relevant and reasonably necessary for the Union to fulfill its duties as the employees' exclusive collective bargaining representative.

WE WILL NOT fail and refuse to bargain in good faith with the Union by failing and refusing to provide information relevant and reasonably necessary to the Union's assessment whether to file and pursue a grievance(s) on behalf of bargaining unit members.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of their rights under Chapter 150E.

WE WILL provide the Union with certain information under the safeguards in the Commission's order.

[signed]

For the Sheriff's Office of Middlesex County

* * * * *