In the Matter of BOSTON PUBLIC HEALTH COMMISSION

and

SEIU, LOCAL 888

Case No. MUP-08-5279

67.15 union waiver of bargaining rights
67.3 furnishing information

June 16, 2011
Marjorie F. Wittner, Chair
Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Fatema Fazendeiro, Esq. — *Representing the Boston Public Health Commission*

David B. Rome, Esq. — *Representing SEIU, Local 888*

DECISION ON APPEAL OF HEARING OFFICER DECISION[1]

Summary of the Case

On November 2, 2010, a duly-designated Department of Labor Relations (Department) Hearing Officer issued a decision in the above-referenced matter. The Hearing Officer concluded that the Boston Public Health Commission (Employer or BPHC) had violated Sections 10(a)(5) and (1) of MGL c. 150E (the Law) by requiring SEIU, Local 888 (Union) to provide it with a signed employee waiver before releasing a personnel file containing relevant and reasonably necessary information that the Union had requested in connection with a pending grievance.[2] In so holding, the Hearing Officer rejected the Employer's argument that the Union had waived its right to receive employee personnel files without a written employee authorization.

Pursuant to Section 11 of the Law and 456 CMR 13.15, the BPHC filed a timely notice of appeal of the Hearing Officer's decision, challenging certain findings and conclusions of law. Both the Employer and the Union filed supplementary statements. The Commonwealth Employment Relations Board (Board)[3] has reviewed the record and the parties' supplementary statements and affirms the Hearing Officer's decision in its entirety.

Findings of Fact

In its supplementary statement, the BPHC objects to portions of the Hearing Officer's findings. After reviewing the record and the BPHC's challenges, the Board adopts the parties' stipulations of fact and the Hearing Officer's findings and summarizes the relevant portions below.

Background

This matter concerns the Union's request for the entire personnel file of a bargaining unit member (Grievant), whom the BPHC hired as a Floater Counselor on January 21, 2007. The Grievant became a member of the bargaining unit represented by the Union upon hire. Approximately one year later, by letter dated February 15, 2008, the Employer offered the Grievant a transfer opportunity to a counselor position at the Long Island Shelter. The transfer letter indicated that, "[t]here is also a 3 month performance probationary period associated with this transfer." The Grievant accepted the transfer.

Article 29 of the parties' collective bargaining agreement (CBA) states in pertinent part:

> An employee who has completed his/her six month probationary period shall be allowed to challenge the imposition of any disciplinary action pursuant to the provisions of the grievance and arbitration procedure.... A new employee must complete a six month probationary period. An employee who changes positions must complete a three month probationary period.

By letter dated April 24, 2008, the Employer notified the Grievant that he was discharged from his "probationary employment" in the counselor position. On April 29, the Union responded, asserting a contractual right to grieve the termination. The Union argued that, although the Transfer Letter stated that the grievant was subject to a "performance-based" probationary period, the termination letter did not indicate that the termination was performance-based.

The Employer denied the grievance at Step 1 and the Union forwarded it to Step 2. On June 4, 2008, the BPHC sent the Union a response stating it would not process the grievance because the Grievant was a probationary employee at the time of discharge. The June 4 response further stated that the Grievant had been terminated for engaging in "serious misconduct" toward a female co-worker. The Union filed for arbitration, but the Employer refused to arbitrate the grievance.

Information Request

On July 21, 2008, the Union sent the BPHC a request for the Grievant's personnel file in connection to its grievance. Shortly thereafter, Union counsel Harold Jones (Jones) and BPHC Director of Labor Relations David Susich (Susich) discussed the request. Susich told Jones that the Union had to provide a written waiver from the grievant before the BPHC would release the entire personnel file to the Union. Susich stated alternatively that the Grievant could request the file himself. Jones protested, stating that the Union did not need the Grievant's authorization to receive the file. During their conversation, Susich and Jones did not discuss the relevancy of the information requirement or why the Union had requested the entire file. Susich also did not refer to a prior prohibited practice settlement agreement (described below) or offer to provide specific documents from the Grievant's file if the

1. Pursuant to Chapter 3 of the Acts of 2011, the Division of Labor Relations' name is now the Department of Labor Relations.

2. The full text of the Hearing Officer's decision is reported at 37 MLC 95 (2010).

3. References in this decision to the Board include the former Labor Relations Commission.

Union narrowed its request. Jones ended the meeting by stating that he needed to confer with other individuals and would get back to Susich.

Jones contacted the Grievant and secured his written authorization, which he submitted to the BPHC, together with a letter explaining the Union's position that the authorization was not legally required. The BPHC sent the Union a copy of the Grievant's personnel file on July 31, 2008. The Union subsequently decided not to pursue the grievance, but filed the instant prohibited practice charge on August 12, 2008.

Written Authorization Past Practice

Susich was hired as Director of Labor Relations in February 2000. Before Susich was hired, the Employer provided the personnel files of employees Michael Glynn (Glynn) and Hermione Paul (Paul) to the Union at the Union's request, without requiring Glynn or Paul to provide a written request or authorization.[4] After Susich was hired, he only released complete personnel files upon receipt of the affected employee's written authorization. He did not however require an employee's written authorization if the Union's request was limited to certain documents within the file. Sometimes the Union provided a copy of the authorization with its request. Other times, the employee filed the request directly.

The Union protested Susich's written authorization policy on at least one occasion.[5] In 2000, Glynn, in his capacity as Union representative, filed a prohibited practice charge (Case No. MUP-2741) alleging that the Employer had unlawfully conditioned the release of the information on obtaining written authorization from two separate grievants. At some point during the charge's processing, the Union and the Employer discussed how to resolve it. During their settlement discussions, Susich told Glynn that while he recognized the Union's right to certain information, the BPHC would only provide an entire employee personnel file if the employee at issue authorized the release. The parties subsequently settled this charge in August 2000, but Susich and Glynn did not agree to follow any specific procedures for information requests in the future. Rather, the settlement agreement provided for the Union to withdraw Case No. MUP-2741 and related grievances. The settlement further required the Employer to remove certain written warnings from the affected employees' personnel files. The Settlement Agreement's final paragraph states: "This Agreement constitutes the parties' entire agreement, shall not constitute precedent and shall not be altered, modified or amended except by written agreement of the parties."

Opinion

In its Supplementary Statement, the Employer challenges the Hearing Officer's finding and legal conclusion that the Grievant's entire personnel file was relevant and reasonably necessary to the Union to prosecute the grievance. While the Employer does not dispute that the Grievant's personnel file contains relevant documents, the Employer claims it was error for the Hearing Officer to conclude that the entire personnel file was relevant and reasonably necessary without having seen it.

We disagree for two reasons. First, the Law does not require the Board to inspect the requested documents before ruling on their relevancy. To the contrary, in *City of Boston*, 61 Mass. App. Ct. 397 (2004), which the Employer erroneously cites for this proposition, the Appeals Court upheld the Board's conclusion that the disputed document was relevant and reasonably necessary to evaluate a grievance, even though the Board had not conducted an *in camera* review of the document. *Id.* at 400-401.[6]

This stands to reason. As a practical matter, unions making information requests do not know the contents or substance of the requested documents. The Board recognizes a union's limited knowledge by applying a liberal standard in determining the relevancy of information requests. *Board of Higher Education*, 26 MLC 92, 92 (2000). The Board, moreover, deems information about bargaining unit members' terms and conditions of employment presumptively relevant and necessary for an employee organization to perform its statutory duties. *City of Lynn*, 27 MLC 60, 61 (2000).

Second, contrary to the BPHC's argument, the Hearing Officer did not hold that the entire personnel file was relevant and reasonably necessary to the Union's performance of its statutory duties. Rather, applying the liberal standards set forth above, she held that the Union's information request was likely to yield information concerning the Grievant's probationary status and disciplinary history that would assist the Union in probing or challenging the Employer's procedural and substantive challenges to the grievance. In so holding, the Hearing Officer acknowledged that the

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4. The Employer challenged this finding on the grounds that it was based solely on former Union representative Michael Glynn's testimony, which it claims Susich refuted. However, Susich did not refute that the BPHC provided these personnel files without Paul's and Glynn's written authorization. Rather, Susich testified that their personnel files did not contain the *Union's* written request for their release. However, there is no evidence, and the Employer does not claim, that the Union must put information requests in writing before the Employer will respond to them. Accordingly, we decline to disturb the Hearing Officer's findings, which were supported by substantial evidence. The Employer also claims that the Hearing Officer ignored Susich's testimony about a third employee, DePina. Although Glynn testified that the BPHC provided DePina's file without obtaining a written release, Susich testified that he found DePina's written release in DePina's personnel file. However, the Hearing Officer made no findings regarding the release of DePina's file. Accordingly, there is no reason address this credibility issue.

5. The Employer challenges the Hearing Officer's finding that Union representative Maurice Penn (Penn) disputed Susich's written release policy on at least one occasion. Although the Hearing Officer made this finding, she alternatively concluded that, even assuming Penn acquiesced in the provision of written employee releases, the Union did not waive its statutory right to receive complete personnel files without having to provide such releases. For the reasons stated below, we agree with this conclusion, and therefore need not resolve this credibility dispute.

6. While the Appeals Court held that the Board erred by not reviewing the document *in camera*, it did so only with respect to the Board's ruling that the City had not established any likelihood of harm flowing from the disclosure of the document, not with respect to the Board's threshold ruling that the document was relevant and reasonably necessary. 61 Mass. App. Ct. at 399-400. In addition, in *City of Boston*, the City requested the Board to conduct an *in camera* inspection if the Board found the document relevant and reasonably necessary. *Id.* at 402. By contrast, in this case, the BPHC never made or offered to make the document available to the Hearing Officer through an *in camera* inspection or otherwise.

Grievant's personnel file may have contained materials that had no bearing on the arbitrability or merits of his termination grievance but declined to speculate as to its contents. We perceive no error in the Hearing Officer's reasoning or conclusion, particularly where, as the Hearing Officer found, neither party made nor offered to make the personnel files' contents available to her. *Compare Bristol County Sheriff's Department*, 32 MLC 76, 79 (2003) (concluding that information in personnel file pertaining to employment history, transfer, etc. was relevant and reasonably necessary for union to process grievance even though personnel file may also have contained certain irrelevant documents) with *City of Boston*, 61 Mass. App. Ct. 400, 402 (Board abused discretion where the City requested an *in camera* review of document, and Board ruled, without conducting the review, that City had not established any likelihood of harm flowing from the document's disclosure); *See also Cambridge Health Alliance*, 36 MLC 130 (2010) (hearing officer conducted *in camera* review of disputed document after the union's contested motion for such review was allowed).

The Employer also claims that the Hearing Officer's holding disregards the employee's privacy rights under Massachusetts public records law. However, once a union has established that the requested information is relevant and reasonably necessary to its duties as the 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 at 93. The Board, with judicial approval, requires employers to harmonize their statutory obligations and to provide the exempt information through the use of certain judicially-approved safeguards. *Bristol County Sheriff's Office*, 28 MLC 113, 121 (2001), *aff'd Sheriff of Bristol County*, 62 Mass. App. Ct. 665 (2004). Here, there is no evidence that the Employer engaged in any type of discussion regarding its privacy or confidentiality concerns with the Union, by, for example, identifying sensitive information, or proposing safeguards for limiting dissemination of private information. Rather, it simply insisted that the Union provide an employee release before it would provide Grievant's personnel file. As the Hearing Officer found, this was insufficient to satisfy its burden to make reasonable efforts to provide the Union with as much of the requested information as possible, consistent with its legitimate concerns. *Board of Higher Education*, 26 MLC at 93. We agree and affirm this aspect of the Hearing Officer's decision for all the reasons stated therein.

The Employer also argues that the Hearing Officer erred as a matter of law by not finding that Jones' conduct breached a duty to bargain in good faith. In essence, the Employer argues that Jones' insistence on the whole file, without explanation or discussion, followed by provision of the requested release, foreclosed it from engaging in the required dialogue. However, for the reasons stated above, and in note six of the Hearing Officer's decision, we agree that Jones' conduct did not prevent the Employer, who knew the file's contents, from describing it or seeking further information about Jones' request.

Finally, the Employer argues that the Hearing Officer erred as a matter of law by concluding that the Union did not waive its statutory right to receive an employee's personnel file without a written release because the Union had followed this practice for eight years without exception or dispute. This argument is flawed, however, because it confuses the past practice analysis the Board uses to determine whether an employer has made an unlawful unilateral change to terms and conditions of employment with the analysis it uses to determine whether a union has waived a statutory right. In unilateral change cases, to determine whether there has been an actual change in past practice that required the employer to give the union notice and an opportunity to bargain before making the change, the Board analyzes the combination of facts upon which the alleged practice is predicated, including whether the practice has occurred with regularity over a sufficient period of time so that it is reasonable to expect that the practice will continue. *Town of Chatham*, 21 MLC 1526, 1531 (1995). In this case, the Employer claims that a past practice established pursuant to these criteria also establishes a waiver of the Union's statutory right to information. Where statutory rights are concerned, however, it is not enough for the parties' practice to occur regularly or over a period of time. Rather, it must meet the higher waiver standard set forth in the Hearing Officer's decision - the waiver must be clear and unmistakable, fully explored and consciously yielded. *Town of Scituate*, 16 MLC 1195, 1199, n. 10 (1989). Regarding waiver of the statutory right to receive information in particular, the Board will not find a waiver unless the evidence shows a specific and intentional agreement to limit the union's right to information. *Commonwealth of Massachusetts*, 11 MLC 1440, 1443 (1980).

We affirm the Hearing Officer's conclusion that the record contains no such specific and intentional agreement. The Employer argues that the Hearing Officer erred by relying on the CBA's silence on this issue, despite addressing other information matters and the fact that the parties' settlement of Case No. MUP-2741 does not impose this requirement. However, in *Commonwealth of Massachusetts*, the Board found no specific and intentional agreement to waive a union's statutory right to information even where the parties' contract actually contained a provision conditioning the union's right to receive portions of a personnel record on receipt of an employee's written authorization. 11 MLC at 1443. The Board found the clause ambiguous, to the extent it could be read both to limit the union's statutory right to receive the relevant information, and to enlarge it by enabling the union to obtain information that was neither relevant nor necessary to contract administration. *Id.* Given this ambiguity and without any clarifying bargaining history, the Board declined to interpret this clause as an absolute waiver of the union's right to receive relevant and reasonably necessary information. *Id.*

The absence of any analogous contract or settlement provision in the record on appeal provides an even stronger basis to reject the Employer's waiver argument here. The Employer would have us find a clear and unmistakable agreement from various exhibits the Employer submitted, in which the Union attached employee authorizations to its written personnel file requests. There is nothing in these requests stating or even suggesting that the Union intended to waive its statutory rights to obtain the information with-

out the authorizations. As the Union notes, the right to relevant information under the Law belongs to the union, not to the affected individual, and there may be times when a union wishes to process a grievance in spite of the individual's wishes. Therefore, the fact that the Union in this case provided written employee releases in the past does not mean that its failure or inability to do so in the future forever bars it from seeking to enforce its statutory rights in the absence of a specific and intentional agreement to do so.

Conclusion

For the foregoing reasons, we affirm the Decision and Order of the Hearing Officer in its entirety.

Order

WHEREFORE, based upon the foregoing, it is hereby ordered that the Boston Public Health Commission shall:

1) Cease and desist from:

a) Failing to bargain in good faith by requiring the Union to obtain an employee's written authorization before giving the Union a complete employee personnel file where the Union requests the personnel file, and the personnel file is relevant and reasonably necessary for the Union to fulfill its duties as the exclusive collective bargaining representative.

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 purposes of the Law:

a) Post in all conspicuous places where members of the Union's bargaining unit usually congregate, or where notices are usually posted, including electronically, if the Employer customarily communicates with these unit members via intranet or email, and display for a period of thirty (30) days thereafter, signed copies of the attached Notice to Employees.

b) Notify the Board in writing of the steps taken to comply with this decision within ten days of receipt of the decision.

SO ORDERED.

APPEAL RIGHTS

Pursuant to MGL c. 150E, Section 11, decisions of the Commonwealth Employment Relations Board are appealable to the Appeals Court of the Commonwealth of Massachusetts. To claim such an appeal, the appealing party must file a notice of appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision. No Notice of Appeal need be filed with the Appeals Court.

NOTICE TO EMPLOYEES

A hearing officer of the Massachusetts Division of Labor Relations has held that the Boston Public Health Commission (BPHC) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E by failing to bargain in good faith by requiring a signed employee waiver prior to providing SEIU, Local 888 (Local 888) with information that is relevant and reasonably necessary for Local 888 to perform its duties as an exclusive representative.

The BPHC posts this Notice to Employees in compliance with the hearing officer's order.

WE WILL NOT fail to bargain in good faith by requiring a signed employee waiver prior to providing Local 888 with information that is relevant and reasonably necessary to its role as the exclusive bargaining representative.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed Section 2 of the Law.

[signed]
Boston Public Health Commission

[dated]

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