COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR RELATIONS

In the Matter of	*	
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COMMONWEALTH OF MASSACHUSETTS/ SECRETARY OF ADMINISTRATION AND FINANCE/ DEPARTMENT OF CHILDREN AND FAMILIES	*	Case No. SUP-17-5896
	*	Date Issued: August 24, 2018
and	*	
	*	
SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 509	*	

Hearing Officer:

Will Evans, Esq.

Appearances:

Patrick Butler, Esq. - Representing the Commonwealth of Massachusetts

James Hykel, Esq. - Representing the SEIU, Local 509

HEARING OFFICER DECISION

Summary

The issue in this case is whether the Commonwealth of Massachusetts, acting through the Secretary of Administration and Finance for the Department of Children and Families, (Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to provide the Service Employees International Union, Local 509 (Union) with information that is relevant and reasonably necessary for the Union to execute its duties as the exclusive collective bargaining representative. I find that the Employer violated the Law in the manner alleged.

Statement of the Case

On March 27, 2017, the Union filed a charge with the Department of Labor Relations (DLR), alleging that the Employer had engaged in prohibited practices within the meaning of Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law. The Employer filed a response to the charge on April 28, 2017. A duly designated DLR investigator conducted an investigation of the matter on June 22, 2017. On June 29, 2017, the DLR investigator issued a Complaint alleging that the Employer violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of the Law by failing to provide the Union with information that is relevant and reasonably necessary for the Union to execute its duties as the exclusive collective bargaining representative. On or about July 5, 2017, the Employer filed an Answer to the Complaint, admitting to certain allegations and denying certain others.

After a pre-hearing conference on March 27, 2018, I, Will Evans, a duly designated Hearing Officer employed by the DLR, conducted a hearing on April 24, 2018, at which both parties had the opportunity to be heard, to examine witnesses and to introduce evidence. On June 8, 2018, the parties filed post-hearing briefs. Upon review of the entire record, including my observation of the demeanor of the witnesses, and in consideration of the parties' arguments, I make the following findings of fact and render the following opinion.

Stipulated Facts

1. The Commonwealth of Massachusetts, acting through the Secretary of Administration and Finance and the Department of Children and Families (DCF), is a public employer within the meaning of Section 1 of the Law.

2. The Service Employees International Union, Local 509 (SEIU or Union) is an employee organization within the meaning of Section 1 of the Law.

3. The DCF and SEIU are parties to a collective bargaining agreement entered into on July 1, 2014.

4. The Judge Baker Children Center houses the Child At-Risk Hotline (Hotline), a statewide after-hours emergency response system.

5. Pamela Fitzpatrick (Fitzpatrick) is the Acting Director of Labor Relations for the Executive Office of Health and Human Services (EOHHS) Office of Children, Youth and Families.

6. Gina DiResta (DiResta) was an employee of the Department. Her title was Social Worker II.

7. On November 7, 2016, Ms. DiResta was placed on administrative duties pending an investigation into her actions while working a shift on the Hotline.

8. On January 20, 2017, the Union orally requested that DCF provide it with a copy of Lynch-Bartek's internal investigation report.

9. On February 10, 2017, Ms. Fitzpatrick sent a settlement agreement to Mr. Cole.

10. On February 14, 2017, Mr. Cole sent an e-mail to Ms. Fitzpatrick, requesting a copy of the Lynch-Bartek investigation report.

11. On February 17, 2017, Mr. Cole sent an e-mail to Ms. Fitzpatrick requesting the report.

12. On February 22, 2017, Mr. Cole again requested Lynch-Bartek's report. He also signed a Settlement Agreement suspending Ms. DiResta for five (5) days and removing her from the Hotline.

13. DCF has not provided a copy of the requested report.

14. On February 24, 2017, Ms. DiResta was suspended for five (5) days.

15. On February 27, 2017, DCF formally executed the settlement agreement providing for Ms. DiResta's suspension and removal from the Hotline.

16. On March 27, 2017, the Union filed a charge of prohibited practice against DCF.

Findings of Fact[1]

DCF is a child protection agency within the EOHHS, and is under the jurisdiction of the Commonwealth's Executive Office of Administration and Finance. DCF has offices across the Commonwealth, including one in Haverhill, Massachusetts. Certain DCF staff members are assigned to the Hotline and trained to assess the urgency of each call and to elicit critical information regarding children who may be at risk. In a situation where a child is at imminent risk, an emergency response is initiated with DCF staff conducting the investigation. In some instances, the DCF staff member will respond by going to the client's home, a hospital or police station, if necessary.

On October 8, 2016, DiResta was assigned to the Hotline. After receiving a call regarding a drug overdose involving a DCF parent, DiResta investigated the matter in and around Haverhill. DiResta was accompanied by her boyfriend Robert Morin (Morin), a police officer in Salem, New Hampshire. On or about November 7, 2016, DiResta was given written notice that she was being assigned to administrative duties based on allegations that she had breached client confidentiality. Diane Lynch-Bartek (Lynch-Bartek), a DCF case investigator, was assigned to conduct an investigation into DiResta's actions on October 8, 2016. Lynch-Bartek met with and interviewed several DCF employees of the Haverhill office regarding DiResta's actions on October 8, 2016. She also met with and interviewed DiResta.

On November 7, 2016, Morin appeared at the DCF office in Haverhill and asked to speak to DiResta's supervising manager. Morin was informed that he was not a

[1] The DLR's jurisdiction in this matter is uncontested.

subject of the investigation and asked to leave the premises.[2] No evidence was introduced that Morin appeared belligerent or aggressive, or refused to leave. Nevertheless, Fitzpatrick was informed that Morin's unprompted appearance had raised safety concerns amongst the staff at the Haverhill office.

On December 20, 2016, Morin sent an eight page letter to DCF Commissioner Linda Spears regarding the investigation into DiResta's actions on October 8, 2016. He wrote that DCF's actions towards DiResta "will not play well in the court of public opinion" and that "the competency of your administrative staff is in question." Further, he wrote that "I find the performance of your administrative staff to be alarming" and implied that an employee in the Haverhill office was not disciplined for fear of a discrimination claim. Although Morin expressed his displeasure regarding the DFC's investigation of DiResta, he made no actual threats to the safety and security of the workplace or staff. Morin's letter was forwarded to Fitzpatrick. The Employer still had concerns about Morin, but took no action to prohibit him from returning to the office and did not contact his employer in Salem.

On January 17, 2017, Lynch-Bartek issued a report to Scott Scholefield (Scholefield), the Director of Case/Special Investigations, making certain findings regarding DiResta's conduct on October 8, 2016. Lynch-Bartek did not offer, however, any recommendation regarding whether or not DiResta should be disciplined. On or about January 20, 2017, Cole made an oral request for a copy of Lynch-Bartek's report to Fitzpatrick while meeting with her about other matters. On January 23, 2017,

[2] In his statement, Morin described the conversation with DCF staff as "cordial" and did not indicate that he was asked to leave. Morin stated, "I asked her if she would be kind enough to ask Chris to call me. She stated she would. I thanked her for her time and left the building."

Fitzpatrick received a copy of Lynch-Bartek's report from Scholefield. Based on the information contained in the report, the Employer decided that DiResta would be disciplined for her actions. Shortly thereafter, Fitzpatrick contacted Cole and they began discussing potential settlement options. Over the next few weeks, Fitzpatrick and Cole had several discussions regarding the matter, as the Employer was considering terminating DiResta's employment.

On or about February 10, 2017, Cole and Fitzpatrick concluded settlement discussions and proposed that DiResta would be suspended for five days, rather than terminated, for her conduct on October 8, 2016. Later that day, Fitzpatrick sent an email to Cole with a proposed settlement agreement for the Union to review. Cole did not ask for any changes or corrections to the settlement agreement. On February 14, 2017, Cole sent an email to Fitzpatrick, which stated, in part, the following:

> As you know, Diane Lynch-Barteck (sic) conducted a CIU investigation on this matter. Via a proposed settlement agreement Ms. DiResta will be permanently removed from the hot line and receive a five (5) day suspension. Based on the resulting disciplinary action issued by DCF to Ms. DiResta the Union is requesting a copy of the investigation report written by Ms. Lynch Barteck (sic).

Fitzpatrick did not respond to Cole's February 14, 2017 email. On February 17, 2017, Cole emailed Fitzpatrick and again requested a copy of Lynch-Bartek's report. In his email, he stated that the Union was "willing to agree to reasonable conditions of disclosure related to the release of Ms. Lynch-Bartecks (sic) report to the Union." Fitzpatrick did not respond to Cole's February 17, 2017 email; however, she believed Cole to mean that a redacted copy of Lynch-Bartek's report might be acceptable to the Union.

Although Cole never received a copy of Lynch-Bartek's report, he advised DiResta to settle because she risked termination and loss of health insurance at a time when she was undergoing medical treatment.[3] On Feb 22, 2017, the Union signed and forwarded a settlement agreement memorializing the terms of DiResta's suspension and re-assignment. The parties agreed, in part, to the following:

> [3] The Union and Ms. DiResta agree to withdraw any and all grievances, complaints and appeals that may have been filed against the Department or any of its employees in any forum. The Union and Ms. DiResta individually agree that neither will institute any new appeal, grievance or complaint against the Department or its employees by or on behalf of Ms. DiResta pertaining to the incidents contained in the above-referenced suspension letter in any forum.
>
> [4] The Union and Ms. DiResta individually agree to accept the terms of this Settlement Agreement as full and final settlement of any and all claims arising from the incidents giving rise to this matter.

On the same day, Cole contacted Fitzpatrick and again requested a copy of Lynch-Bartek's report. On February 27, 2017, Fitzpatrick signed the settlement and sent it back to the Union. Fitzpatrick also contacted her office's legal unit and asked if she was required to provide the report now that the parties had signed the settlement. She was advised that she did not have to provide the report. Accordingly, Fitzpatrick informed the Union that, as the matter had been fully resolved and an agreement executed, she would not turn over Lynch-Bartek's report. The settlement agreement, the suspension letter and the November 7, 2016 reassignment letter were placed in DiResta's personnel file; Lynch-Bartek's report was not.

In or around December 2017, DiResta was again accused of breaching client confidentiality by accessing a client file that she was not assigned. Prior to the start of

[3] The settlement agreement indicated that DiResta signed on February 17, 2017.

the formal investigation into the matter, DiResta resigned from her position with DCF, effective on January 12, 2018. Had DiResta not resigned, the Employer would have reviewed Lynch-Bartek's report, for progressive discipline purposes, to determine whether DiResta's conduct in December 2017 was similar to conduct for which she was previously suspended.

Opinion

If a public employer possesses information that is relevant and reasonably necessary to an employee organization in the performance of its duties as the exclusive collective bargaining representative, the employer is generally obligated to provide the information upon the employee organization's request. Higher Education Coordinating Council, 23 MLC 266, 268, SUP-4142 (June 6, 1997). The employee organization's right to receive relevant and reasonably necessary information is derived from the statutory obligation to engage in good faith collective bargaining, including both grievance processing and contract administration. Boston School Committee, 10 MLC 1501, 1513, MUP-4468 (April 17, 1984). The Commonwealth Employment Relations Board's (CERB) standard in determining whether the information requested by an employee organization is relevant is a liberal one, similar to the standard for determining relevancy in civil litigation proceedings. Board of Higher Education, 26 MLC 91, 92, SUP-4509 (January 11, 2000); Board of Trustees, University of Massachusetts at Amherst, 8 MLC 1139, 1141, SUP-2306 (June 24, 1981). Information about terms and conditions of employment of bargaining unit members is presumptively relevant and necessary to an employee organization to perform its statutory duties. City of Lynn, 27 MLC 60, 61, MUP-2236, 2237 (December 1, 2000). The relevance of the requested

information must be determined by the circumstances that existed at the time when the exclusive bargaining representative made the request. Id.

A. Relevant and Reasonably Necessary Information

On January 20, 2017, the Union made its first request that DCF provide it with a copy of Lynch-Bartek's report. At the time, the parties had not executed a settlement agreement, and the Union needed the information to determine whether to pursue a grievance on DiResta's behalf. The CERB repeatedly has recognized that a union is entitled to information that permits it to determine whether or not it should pursue a grievance. City of Boston, 29 MLC 165, 167, MUP-2483 (March 6, 2003). Although the Union requested the information again on February 14, 17 and 22, the Employer failed to provide it. Cole advised DiResta to settle, even though he lacked the information, because she risked termination and loss of health insurance at a time when she was undergoing medical treatment.

In its defense, the Employer argued that, until it executed the settlement agreement, it "never definitively stated that [it] would not be providing the report." This argument is specious since the Employer failed to respond to the request and, more importantly, failed to provide the requested information to the Union. An employer may not simply ignore a request for relevant and reasonably necessary information and, after forcing a union to file a prohibited practice charge to obtain the information, argue that its conduct was lawful since it never definitively refused to provide the information. Such actions by an employer would undermine the Law and subject the parties to unnecessary litigation. Additionally, as the CERB has consistently held, an employer may not unreasonably delay providing requested information that is relevant and reasonably necessary to the employee organization's responsibilities as the exclusive

collective bargaining representative. Boston School Committee, 24 MLC 8, MUP-1410, 1412 (August 26, 1997).

Next, the Employer argued that the information was not relevant and reasonably necessary since the parties had entered into a settlement agreement resolving the dispute over DiResta's discipline. This argument ignored the fact that the Union made at least four requests for the information prior to the full execution of the settlement agreement on February 27, 2017. The First Circuit has dismissed a similar argument made by an employer, writing that "[t]he relevance of requested information must be determined by the circumstances that exist at the time the union makes the request, not by the circumstances that obtain at the time an agency or a court finally vindicates the union's right to divulgement. Were the law otherwise, an employer would have a perverse incentive to drag its feet, and a union could lose deserved rights through the ticking of the clock and the delay inherent in the adjudicatory process." Providence Hosp. v. NLRB, 93 F.3d 1012, 1020 (1st Cir. 1996) (citing NLRB v. Arkansas Rice Growers Coop. Ass'n, 400 F.2d 565, 567 (8th Cir. 1968); Mary Thompson Hosp., 292 N.L.R.B. 1245, 1250 (1989), *enforced*, 943 F.2d 741 (7th Cir. 1991)). Accordingly, the Employer cannot rely on the execution of the February 27, 2017 settlement agreement as a defense for failing to reply to a request for relevant and reasonably necessary information made initially on January 20, 2017, and again on February 14, 17 and 22.

The Employer argued further that, after full execution of the settlement agreement on February 27, 2017, the Union was foreclosed from requesting Lynch-Bartek's report, based on the following language contained in the settlement agreement:

> The Union and Ms. DiResta individually agree to accept the terms of this Settlement Agreement as full and final settlement of any and all claims arising from the incidents giving rise to this matter.

While I acknowledge that, in Cambridge Public Health Commission, 33 MLC 15, MUP-03-3881 (June 23, 2006), the CERB found similar language in a settlement agreement to limit an employer's obligation to provide information, the present situation is distinguishable. The employer in Cambridge had provided nearly all of the information requested by the union for bargaining purposes, except for the employer's "position regarding a hypothetical scenario involving overtime." Given that the parties in Cambridge had resolved the underlying collective bargaining dispute and achieved stable and continuing labor relations, the CERB found it would not effectuate the purposes of the Law to find a violation. In the present situation, however, the Union is not seeking the Employer's opinion on an issue related to bargaining, but rather relevant and reasonably necessary information to represent its bargaining unit members faced with discipline. Not only did the Union need the information after February 27, 2017 for the general purpose of advising members on potential discipline for a breach of confidentiality, but also for representing DiResta in a subsequent disciplinary proceeding for allegedly engaging in similar conduct. See Sheriff of Bristol County v. Labor Relations Commission, 62 Mass. App. Ct. 665, 671, 818 N.E.2d 1091, 1096 (2004) (a union may still have a valid need for information beyond settlement of the present case). By failing to provide the requested information, the Employer undermined the Union's ability to advise its members and to determine whether DiResta's subsequent conduct in December 2017 was similar to that found in Lynch-Bartek's report. As the Employer acknowledged, the information contained in the report could be used to determine whether to apply progressive discipline against DiResta.

B. Legitimate and Substantial Concerns

Once a union has established that the requested information is relevant and reasonably necessary to its duties as the exclusive bargaining 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 (citing Boston School Committee, 13 MLC 1290, 1294-1295, MUP-5905 (November 2, 1986); Adrian Advertising a/k/a Advanced Advertising, 13 MLC 1233, 1263, UP-2497 (November 6, 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 CERB will examine the facts contained in the record. Boston School Committee, 13 MLC at 1295. The employer's concerns are then balanced against an employee organization's need for the information. Commonwealth of Massachusetts, Chief Administrative Justice of the Trial Court, 11 MLC 1440, 1443-1444, SUP-2746 (February 21, 1985) (adopting 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 disclosure, however, the requirement that a bargaining representative be furnished with relevant information necessary to carry out its duties overcomes any claim of confidentiality. Greater Lawrence Sanitary District, 28 MLC 317, 318-319, MUP-2581 (April 19, 2002).

In the present case, the Employer argued that its concerns regarding the safety and security of its employees outweighed the Union's need for the information. Specifically, the Employer stated that Morin "appeared" to threaten the safety of the

workplace by going to the DCF's Haverhill office on November 7, 2016 and asking to speak to management staff about the investigation, and by sending a letter to Commissioner Spears questioning the competency of staff and implying that an employee was not disciplined because the agency feared a discrimination claim. While I do not condone Morin's actions, no evidence was introduced that Morin posed an actual threat to the safety or security of the workplace or to DCF staff. To the contrary, the evidence suggested that Morin left DCF's Haverill office without incident when asked. No witness testified that Morin was belligerent or aggressive, or refused to leave. In his letter to Spears, Morin expressed his displeasure over DFC's investigation of DiResta, but he made no threats to safety. While the Employer might still have had concerns about Morin, it took no action to prohibit Morin from returning to the office and did not contact Morin's employer in Salem.

The Employer also contended that releasing Lynch-Bartek's report would create a chilling effect and make employees reluctant to participate in future investigations. This argument was unpersuasive since the mere possibility of a chilling effect does not override an employee's organization right to information. Commonwealth of Massachusetts, 11 MLC at 1443-1444 (rather than merely articulating concerns about the disclosure of information, an employer must produce evidence in support of its contentions). Furthermore, when an employer has concerns about the confidentiality of information requested by a union, it has an obligation to initiate a discussion to explore alternative ways to permit the union access to the necessary information. City of Boston, 22 MLC 1698, 1709, MUP-9605 (April 26, 1996). Here, the Employer initiated no such discussions, even in response to Cole's February 17, 2017 email suggesting that a redacted copy of Lynch-Bartek's report might be acceptable. If the Employer had

explored with the Union alternative ways to release the report (e.g., including such safeguards as redaction and/or limited dissemination), it might have satisfied its obligation to provide relevant and reasonably necessary information, while addressing its concerns about safety and chilling effect. See, e.g. Bristol County Sheriff's Office, 28 MLC 11, 122, MUP-1820 (October 10, 2001), aff'd sub nom., Sheriff of Bristol County, 62 Mass. App. Ct. at 665 (2004) (harmonizing Chapter 150E with the investigatory materials exemption by providing requested information to the union with safeguards). Based on the facts contained in the record, the Employer did not demonstrate that its legitimate and substantial concerns outweighed the Union's need for the information.

Conclusion

For the reasons stated above, I conclude that the Employer violated the Law by failing to provide the Union with information that is relevant and reasonably necessary for the Union to execute its duties as the exclusive collective bargaining representative.

ORDER

WHEREFORE, based upon the foregoing, it is hereby ordered that the Employer shall:

1. Cease and desist from:

   a) Failing and refusing to bargain collectively in good faith with the Union by failing to provide the Union with information that is relevant and reasonably necessary for the Union to execute its duties as the exclusive collective bargaining representative.

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

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

   a) Provide a copy of Lynch-Bartek's report involving DiResta.

   b) Post immediately 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.

c) Notify the DLR in writing of steps taken to comply with this decision within ten (10) days of receipt of this decision.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETS
DEPARTMENT OF LABOR RELATIONS

WILL EVANS
HEARING OFFICER

APPEAL RIGHTS

The parties are advised of their right, pursuant to M.G.L. c.150E, Section 11, and 456 CMR 13.19, to request a review of this decision by the Commonwealth Employment Relations Board by filing a Notice of Appeal with the Executive Secretary of the Department of Labor Relations not later than ten days after receiving notice of this decision. If a Notice of Appeal is not filed within ten days, the decision shall become final and binding on the parties.

NOTICE TO EMPLOYEES

POSTED BY ORDER OF A HEARING OFFICER OF THE MASSACHUSETTS DEPARTMENT OF LABOR RELATIONS AN AGENCY OF THE COMMONWEALTH OF MASSACHUSETTS

A Hearing Officer of the Massachusetts Department of Labor Relations has held that the Commonwealth of Massachusetts, acting through the Secretary of Administration and Finance for the Department of Children and Families, (Employer) violated Section 10(a)(5) and, derivatively, Section 10(a)(1) of Massachusetts General Laws, Chapter 150E (the Law) by failing to provide the Service Employees International Union, Local 509 (Union) with information that is relevant and reasonably necessary for the Union to execute its duties as the exclusive collective bargaining representative.

Chapter 150E gives public employees the right to form, join or assist a union; to participate in proceedings at the DLR; to act together with other employees for the purpose of collective bargaining or other mutual aid or protection; and, to choose not to engage in any of these protected activities. The Employer assures its employees that:

- WE WILL NOT refuse or fail to provide the Union with information that is relevant and reasonably necessary for the Union to execute its duties as the exclusive collective bargaining representative;
- WE WILL NOT in any like manner, interfere with, restrain and coerce employees in any right guaranteed under the Law;
- WE WILL provide to the Union a copy of the report at issue in SUP-17-5896.

_____ _____

Employer Date

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED OR REMOVED

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. Any questions concerning this notice or compliance with its provisions may be directed to the Department Labor Relations, Charles F. Hurley Building, 1st Floor, 19 Staniford Street, Boston, MA 02114 (Telephone: (617) 626-7132).