STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF RHODE ISLAND STATE LABOR RELATIONS BOARD -AND- THE CITY OF CRANSTON	CASE NO: ULP-5744

DECISION AND ORDER

TRAVEL OF CASE

The above entitled matter comes before the Rhode Island State Labor Relations Board (hereinafter "Board") as an Unfair Labor Practice Complaint (hereinafter "Complaint") issued by the Board against the City of Cranston (hereinafter "Employer") based upon an Unfair Labor Practice Charge (hereinafter "Charge") dated December 20, 2004 and filed on December 22, 2004 by the International Brotherhood of Teamsters, Local 251.

The Charge alleged violations of R.I.G.L. 28-7-13 (6) and (10) as follows:

> "Respondent has failed and refused to bargain in good faith by adhering to a policy that requires the bargaining agent to obtain an employee's consent before providing the bargaining agent access to a personnel file.

Following the filing of the Charge, an informal conference was held on January 21, 2005, in accordance with R.I.G.L. 28-7-9. On June 28, 2005, the Board issued its complaint. The Employer filed an answer on July 6, 2005. A formal hearing was held on August 11, 2005. Representatives from the Union and the Employer both had ample opportunity to examine and cross-examine witnesses and present documentary evidence. Upon conclusion of the formal hearing the parties submitted written briefs. In arriving at the Decision and Order herein, the Board has reviewed and considered the testimony, evidence, oral arguments and written briefs submitted by the parties.

FACTUAL SUMMARY

The factual issues underlying the within case are not in dispute. In October 2004, the Employer terminated Mr. David DeNuccio from employment. The Union grieved Mr. DeNuccio's termination. Pursuant to its representation of Mr. DeNuccio, the Union wrote to the Employer's Personnel Director on October 26, 2006 and requested that the Employer forward Mr. DeNuccio's personnel file and any and all evidence regarding his termination. (Union Exhibit #3) In response to this request, the Employer wrote to the Union as follows:

> "I have reviewed your written request for a copy of David DeNuccio's personnel file. The personnel file is confidential and cannot be released to you without the written consent of Mr. DeNuccio. Please contact him and have him mail or drop off a letter indicating that he authorizes the release of the file to you. Please feel free to contact me if you have any questions."

Thereafter, the Union did track down Mr. DeNuccio and obtained a written consent and the personnel records were released. A series of correspondence between the Union and the Employer followed this initial letter in which the Employer steadfastly maintained its position that no examination of an individual employee's personnel file could take place by the Union, without prior written consent of the employee. It was this position which ultimately resulted in the filing of the within charge.

POSITIONS OF THE PARTIES

The Union argues that the Employer's blanket refusal to release personnel records absent written consent serves to frustrate the Union's statutory duty to represent its members and that the Employer's refusal to bargain over this policy constitutes a violation of the duty to bargain.

The Employer argues that it did not violate the Labor Relations Act by refusing to release the personnel records upon the Union's request, and that by its refusal the Employer was simply upholding the contract, the Employer's Civil Service Rules and Regulations, the City Charter, and several state and federal laws.

DISCUSSION

The Union's case starts with an analysis of the Employer's statutory duty to provide relevant information to a Union to permit the Union to fulfill its obligations as the exclusive bargaining representative in handling grievances. The Employer's rebuttal to this argument is grounded in privacy protections.

The issue presented in this case, whether the Union has a right to access personnel files, absent consent by individual employees, is one which this Board does not recall addressing, at least in recent years. The Union relies on a series of National Relations Labor Board cases for its position that the Employer has a statutory duty to provide access to information:

"It is well established that 'an employer is obligated to supply requested information that is potentially relevant and will be of use to the Union in fulfilling its responsibilities as exclusive bargaining representative. Roseburg Forest Products Co. 331 NLRB 999, 1000 (2000). The purpose of this rule is to enable the union to understand and intelligently discuss the issues raised in grievance handling and contract negotiations. Rivera-Vega v Conagra, 70 F.3d 153, 158 (1st Cir 1995). Information relating to wages, hours and other terms and conditions of employment is presumptively relevant and necessary for the Union to perform its obligations. Roseburg, supra. While the right to obtain relevant information is not unfettered, the party asserting confidentiality bears the burden of proof. Roseburg, supra. "(Union Brief pgs. 6-7)

In Roseburg, an Employer provided a less senior employee a position which had been subject to seniority bidding, in violation of the contract. The Employer defended its actions by claiming that it provided the bid position to the less senior employee in an attempt to make a "reasonable accommodation" under the Americans with Disabilities Act (hereinafter "ADA"). In order to adequately process the grievance filed by the more senior employees, the Union requested access to the less senior employee's personnel file, including his medical records, in order to determine whether the Employer's defense was legitimate. In resolving the case in favor of the Union, the NLRB cited its 1991 decision in Pennsylvania Power Co., 301 NLRB 1104, 1105-1106:

> "In dealing with union requests for relevant, but asserted confidential information, the Board is required to balance a union's need for the information against any 'legitimate and substantial' confidentiality interests established by the employer.The appropriate accommodation necessarily depends on the particular circumstances of each case. The party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket prohibitions will not. Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation. This, when a Union is entitled to information concerning which an employer can claim a partial confidentiality interest, the Employer must bargain toward an accommodation between the Union's informational needs and the employer's justified interests."

In Roseburg, the Employer had claimed that the release of medical information would violate the ADA, however, the NLRB noted that the equal Employment Opportunity Commission ("EEOC") had issued an opinion letter indicating that the ADA permits an Employer to give a Union, in its role as collective bargaining representative, medical information necessary to the ADA reasonable accommodation process to enable the Employer and the Union to make reasonable accommodation determinations consistent with the ADA.

In finding that the Employer in Roseburg had violated the National Labor Relations Act, the NLRB held:[1] "in light of the Union's request for relevant and necessary information, the Respondent was required to either provide the information promptly or to attempt to accommodate its confidentiality concerns and the Union's need for information." Roseburg at 1002, citing GTE Southwest Inc. 329 NLRB No. 57 slip op. at 2 (1999).

In this case, the Union was seeking a copy of an individual employee's records. The Employer, rather than making any attempt to comply with the Union's request, simply issued a blanket refusal of the request and directed the Union to first seek a written release from the individual employee. The Employer's first defense for its refusal to release the information is that it was merely complying with the terms negotiated by the parties and incorporated into the collective bargaining agreement regarding privacy of records.

The Union's response is that, it, as the exclusive bargaining representative, enjoys a special statutory relationship with bargaining unit

[1] It is noteworthy that the Employer in Roseburg also required the written consent of individual employees before it would divulge any information pertaining to the employee's medical condition.

members which confers upon the Union, both rights of obligations insofar as it concerns the representation of the bargaining unit members. The Union argues that Chapter 2 of Title 38 of the Rhode Island General Laws, Access to Public Records Act, (hereinafter "APRA") limits members of the general public from accessing certain personnel information, but in no way limits the Union from access to personnel records. Moreover, even if the APRA somehow limited the Union from accessing personnel records (which was not conceded by the Union), the Employer refused to release even the information to which members of the public are entitled. "The Employer had an obligation to seek an accommodation with Local 251 by attempting to redact or delete information arguably barred by disclosure and releasing the remaining portions." (Union Brief. p. 12)

The Employer further argued that the Collective Bargaining Agreement (hereinafter "CBA") specifically states that the City's Civil Service Rules and Regulations and City Charter, now existing, are incorporated by reference as if fully set forth herein, and that the Civil Service Rules and Regulations and Section 15.07, of the City Charter, requires that certain personnel records are not public and therefore cannot be released to the union. The Board has examined the CBA, the Civil Service Rules, and the section of the City Charter cited by the Employer, and finds no reference, whatsoever, to a certified collective bargaining representative's rights to personnel files. The Board finds that as the certified collective bargaining representative, the Union does enjoy a special statutory status as to the employees of the bargaining unit and their relationship with their Employer and their relationship to other bargaining unit members. As stated by the NLRB in New Jersey Bell Telephone Co., 289 NLRB 318 (1988): "One of the consequences of collective bargaining is that it subordinates the particular interests of individual employees to the collective interest of the unit." Id at 319.

This Board finds, however, that a Union's access to personnel records, in the absence of an employee waiver, should be and is hereby limited when the access sought would reveal information of a highly sensitive or confidential nature, without relevance to the necessary information. As is often the case, the Board looks to and relies upon the federal case law for direction on this issue.

In Detroit Edison Co., v NLRB, 440 U.S. 301, 99 S.Ct. 1123, (1979), the United States Supreme Court used a three (3) factor test in carving out an exception to the general rule that Employers must disclose all relevant employee information upon a Union's request for information pertaining to grievances. In doing so, the Court recognized a limited exception for information that is confidential in nature. These factors are:

1) The sensitive nature of the information sought;
2) The minimal burden that a requirement of employee consent would impose on the union;
3) The lack of evidence that the Employer had fabricated concern for employee confidentiality only to frustrate the union in the discharge of its responsibilities. Id at 319. 99 S Ct at 1132.

The Court engaged in a balancing test and determined in that case that the possible impairment of the Union's function in processing grievances is more than justified by the interests served in conditioning disclosure on the consent of the very employees whose grievances were being processed. Id at 319.

In New Jersey Telephone Co, 289 NLRB 318, 1988, the NLRB distinguished the facts set forth from an earlier case involving the same Employer and its refusal to provide records pursuant to an "Employee Privacy Protection Plan", which provided that the Company would not release personal information about its employees to persons outside the Company without employee authorization. In the Union's first challenge under the denial of access to records to it, the Third Circuit held that the Employer did not commit an unfair labor practice by refusing to disclose personal information to Union without employee consent because: (1) information contained in records was sensitive and confidential in nature, (2) the requirement of employee consent permissibly placed minimal burden on Union and there was no evidence that the privacy plan had been enacted to frustrate the Union in its role as employee representative. New Jersey Bell Telephone Co. v NLRB, 720 F.2d 789, 1983. It should be noted that in this first New Jersey Bell Telephone case that the Union had directed the employees to not execute releases, which would have permitted the Union the

access it received. In the second case, decided in 1988, the employees executed the releases, even as to confidential information, and still the Employer refused to provide all the requested information. In this second New Jersey Telephone case, the Board stated:

> "with regard to the Respondent's position that it should be able to deny request for relevant information simply because its privacy plan requires employee consent, we find no support in Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979) on which the Respondent relies for any such blanket claim of confidentiality ...Moreover, the mere fact that an employee does not give formal consent—or might even object—to the disclosure of information does not in itself constitute grounds for refusing to provide such information when it is relevant to the bargaining representative's performance of its representational duties." Id at 319.

In this case, the Employer never made any effort to undertake any balancing and immediately took the position that all information contained in Mr. DeNuccio's personnel file was non-disclosable to the Union, without the employee's consent. Fortunately, the Union was in fact able to locate and obtain the employee's consent and was able to obtain the information necessary to represent him. However, as is clear from the letters sent from the Employer to the Union, the Employer absolutely refused to even consider the possibility that the Union had a right to information, irrespective of any employee's consent. During the formal hearing, the Employer's representative, Ms. Bello, attempted to posture her refusal as one relating to protecting the employee's medical privacy. (TR. p. 78, lines 12-15) However, upon cross-examination, she acknowledged that she never inquired whether the Union was, in fact, seeking medical information. In fact, the record is abundantly clear that all Ms. Bello did was to issue a blanket refusal to release any records without written employee consent and to continue to stand by that blanket refusal, regardless of the entreaties made to her. She never attempted to ascertain the information actually contained in the file and whether there was any information of a sensitive nature that may be withheld. This type of blanket refusal is a prohibited practice under federal law and we accordingly adopt that position under state law as well.

Since the refusal in this case had not resulted in any lasting impact to the Union or Grievant, (because of the Union's ability to obtain employee consent)

there is no actual remedy available. However, since this is the type of activity that is susceptible to repetition, the Employer is hereby ordered to cease and desist from relying on blanket prohibitions for access to personnel files by certified bargaining representatives and to bargain with the union over future access to personnel files.

FINDINGS OF FACT

1) The City of Cranston is an "Employer" within the meaning of the Rhode Island State Labor Relations Act.
2) The Union is a labor organization which exists and is constituted for the purpose, in whole or in part, of collective bargaining and of dealing with employers in grievances or other mutual aid or protection; and, as such, is a "Labor Organization" within the meaning of the Rhode Island State Labor Relations Act.
3) In October 2004, the Employer terminated Mr. David DeNuccio from employment. The Union grieved Mr. DeNuccio's termination. Pursuant to its representation of Mr. DeNuccio, the Union wrote to the Employer's Personnel Director on October 26, 2006 and requested that the Employer forward Mr. DeNuccio's personnel file and any and all evidence regarding his termination.
4) In response to this request, the Employer wrote to the Union as follows: "I have reviewed your written request for a copy of David DeNuccio's personnel file. The personnel file is confidential and cannot be released to you without the written consent of Mr. DeNuccio. Please contact him and have him mail or drop off a letter indicating that he authorizes the release of the file to you. Please feel free to contact me if you have any questions."
5) Thereafter, the Union did track down Mr. DeNuccio and obtained a written consent and the personnel records were released. A series of correspondence between the Union and the Employer followed this initial letter in which the Employer steadfastly maintained its position that no examination of an individual employee's personnel file could take place by the Union, without prior written consent of the employee.

CONCLUSIONS OF LAW

1) The Union has proven by a fair preponderance of the credible evidence that the Employer committed a violation of R.I.G.L. 28-7-13 (6) and (10) by issuing a blanket prohibition against access of a grievant's personnel file by a Union when it was engaging in its representational capacity for a grievant.

ORDER

1) The Employer is hereby ordered to cease and desist from relying on blanket prohibitions for access to personnel files by certified bargaining representatives and to bargain with the union over future access to personnel files.

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BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF RHODE ISLAND STATE LABOR RELATIONS BOARD -AND- CITY OF CRANSTON	CASE NO: ULP-5744

NOTICE OF RIGHT TO APPEAL AGENCY DECISION PURSUANT TO R.I.G.L. 42-35-12

Please take note that parties aggrieved by the within decision of the RI State Labor Relations Board, in the matter of ULP No. 5744 dated 3-26-07, may appeal the same to the Rhode Island Superior Court by filing a complaint within thirty (30) days after 3-26-07.

Reference is hereby made to the appellate procedures set forth in R.I.G.L. 28-7-29.

Dated: MARCH 26, 2007

By: Robyn H. Golden
Robyn H. Golden, Administrator

ULP- 5744

RHODE ISLAND STATE LABOR RELATIONS BOARD

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Ellen L. Jordan, Member (Dissent)

John R. Capobianco, Member

Elizabeth S. Dolan, Member (Dissent)

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: MARCH 26, 2007

By: Robyn H. Golden, Administrator

ULP-5744