

State of Maryland
State Higher Education Labor Relations Board

In the matter of)	
)	
<i>American Federation of State, County</i>)	
<i>& Municipal Employees, Maryland Council 3</i>)	SHELRB ULP
)	Case No. ULP 2014-04
Petitioner,)	
)	
v.)	
)	
<i>William B. Pugh,</i>)	
<i>Assistant Director, Staff Relations</i>)	
<i>University of Maryland College Park</i>)	
)	
Respondent.)	
)	

DECISION AND ORDER

Procedural History

On February 21, 2014, the American Federation of State, County, and Municipal Employees, Maryland Council 3, Local 1072 (“AFSCME”) filed an unfair labor practice complaint with the State Higher Education Labor Relations Board (“SHELRB” or “Board”) against the University of Maryland College Park (“UMCP”). The Charge alleged that UMCP refused to bargain in good faith, in violation of State Personnel & Pensions Article (“SPP”) § 3-306(a)(8), by refusing to provide AFSCME with information it requested as part of its processing of a grievance involving the termination of Thomas Swift, a bargaining unit member.

On March 27, 2014, UMCP filed a motion to dismiss, to which AFSCME responded on July 17, 2014. In accordance with Board regulations, COMAR 14.30.07.04F, the Executive Director conducted an investigation of AFSCME’s complaint. At the request of the Executive Director, the parties submitted additional filings. The Executive Director subsequently issued a recommendation to the Board that the parties appear for oral argument to address questions arising from AFSCME’s complaint. Oral argument was held before the Board on December 17, 2014. The parties filed post-argument briefs on February 10, 2015.

Statement of Facts

At all times relevant, AFSCME and UMCP were parties to a Memorandum of Understanding (“MOU”) covering regular full-time and part-time UMCP employees in the exempt bargaining unit.

On December 13, 2013, UMCP notified Thomas Swift by letter that his appointment as a Supervisor with the School of Architecture was being terminated. UMCP advised Swift that under “*USM Bylaws, Policies and Procedures of the Board of Regents, Policy On Separation for Regular Exempt Employees, VII-1.22.III (2000)*,” he was entitled to six months’ written notice of the termination, during which period he would be on administrative leave.

On December 20, 2013, Swift, represented by AFSCME, filed a grievance concerning his termination. Swift alleged that his termination violated Article 15 of the MOU because it did not constitute progressive discipline and was without cause. Swift also alleged that his termination violated the grievance procedure set forth in Education Article § 13-201 *et seq.*, which is incorporated in the MOU pursuant to Article 16.

AFSCME made two separate information requests related to the Swift grievance, one on December 20, 2013 and the other on January 28, 2014. In its first request, AFSCME requested information related to Swift’s employment history. Relevant to the analysis below, number 6 of AFSCME’s first request states, “All documents which the University intends to use to prosecute, justify, or defend its decision to terminate Mr. Swift.”

In its second request, AFSCME requested the following:

1. Identify each and every employee who has been in the exempt unit and who has been separated from employment under the authority of USM Policy VII-1.22 within the last five (5) years.
2. For each employee who the University has sought to separate pursuant to USM Policy VII-1.22 within the last five (5) years, provide a copy of each and every letter, memorandum, email, and/or other correspondence to the affected employee announcing and/or effectuating the separation.
3. For each employee who the University has sought to separate pursuant to USM Policy VII-1.22 within the last five (5) years, provide a copy of each and every settlement agreement, resignation agreement, and/or letter of resignation, for each affected employee whether completed and executed or not.
4. A copy of all bargaining notes created or held by the University and/or its agents during the bargaining cycle for the 2010-2013 MOU which relate to or reference Article 15 (“Disciplinary Action”).
5. A copy of any and all correspondence from the University to the Council and/or the Local regarding USM Policy VII-1.22.
6. A copy of any and all correspondence from the University to the Council and/or the Local regarding Article 15 of the parties’ current or past MOUs.
7. A copy of any and all bargaining proposals from the University to the Council and/or the Local regarding Article 15 of the parties’ current or past MOUs.

By letter dated February 5, 2014, UMCP acknowledged receipt of the January 28, 2014 request and sought clarification regarding AFSCME's need for the information. By letter dated February 19, 2014, UMCP advised AFSCME that documents responsive to AFSCME's first request were available for "inspection and copying," at 25 cents per page.¹ UMCP claimed that documents requested under number 6 of AFSCME's first request were "confidential and privileged, and protected from disclosure by the attorney client privilege...." UMCP also advised that it was continuing to search for documents responsive to AFSCME's second request.

By letter dated March 11, 2014, UMCP advised AFSCME that it had located documents responsive to AFSCME's second request. UMCP reiterated that it considered items 1-4 in the second request subject to non-disclosure as confidential and privileged but at the same time advised that it was prepared to provide the personnel records after "redacting them to remove personally identifiable employee personnel information...." Regarding items 5-7, UMCP asserted that responsive documents were "already in AFSCME's possession and control since AFSCME was a party to all requested documents." UMCP also advised in its March 11 letter that based on the amount of time required to locate and redact documents responsive to AFSCME's second request UMCP was charging AFSCME a fee of \$2,757.76 and would make the documents available upon receipt of a check in that amount.

Analysis

The Maryland State Personnel and Pensions Article (the "SPP") defines "collective bargaining" to include, *inter alia*, good faith negotiations toward the "administration of terms and conditions of employment" (SPP § 3-101(c)(2)). A labor organization that has been certified as the employees' representative serves as the exclusive bargaining agent for all employees in the bargaining unit. (SPP § 3-407(2)). The Act imposes the duty to bargain in good faith on both the State and the certified labor representative, and makes it an unfair labor practice ("ULP") for either party to refuse to bargain in good faith. (SPP §3-306(a)(8)(State ULP); SPP §3-306(b)(5) (labor organization ULP)).

Under the SPP, the duty to bargain in good faith includes the duty of the State employer to furnish information to the union that is needed to perform its representative duties, including the processing of grievances. *See AFSCME MD v. Department of Budget and Management*, SLRB Case No. 10-U-04 at 15 (Sept. 16, 2010). This holding follows the well-established federal labor law principle applicable to private sector employers that was first recognized by the U.S. Supreme Court in *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956)(employers have an obligation to furnish relevant information to union representatives during collective bargaining negotiations), and extended in subsequent federal court and National Labor Relations Board ("NLRB") decisions to include providing information needed in the administration of the collective bargaining agreement. *See, e.g., J.I. Case Co. v. NLRB*, 253 F.2d 149, 153 (7th Cir. 1958)("collective bargaining is a continuing process which, '[a]mong other things, involves day to day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by

¹ At oral argument, counsel for AFSCME indicated that UMCP eventually declined to charge a copying fee. (Oral Argument Transcript at page 12).

contract”) (quoting *Conley v. Gibson*, 355 U.S. 41, 46 (1957)); *Metlox Mfg. Co.*, 225 NLRB 1317, 1326 (1976) (“an employer fails to bargain in good faith, and thereby violates Section 8(a)(5) and (1) of the Act, if he refuses to furnish a union with potentially relevant information necessary to the proper performance of the Union’s statutory representative function of processing grievances”). Other state labor boards interpreting the duty to bargain under public sector collective bargaining laws have adopted this principle.²

As explained below, we conclude that UMCP’s response to AFSCME’s first request for information was not a refusal to bargain in good faith under SPP § 3-306(a)(8). With respect to AFSCME’s second request for information, we conclude that UMCP violated SPP § 3-306(a)(8) by withholding documents responsive to numbers 1 and 2 until AFSCME paid a fee charged by UMCP and by failing to provide documents responsive to numbers 5-7. UMCP must immediately provide documents responsive to numbers 1 and 2, with redactions of personal identifying information, and numbers 5-7 of AFSCME’s second request. We further hold that based on the record presented, UMCP may charge a fee as specified below but may not withhold the documents until receipt of AFSCME’s payment. AFSCME, not having sought to bargain over the fee originally charged and not having presented any evidence or any contention that the fee is unreasonable, must pay that fee, if it chooses to accept the documents.

I. AFSCME’s First Request for Information

UMCP responded to AFSCME’s first request by making responsive documents available for inspection and copying. This is a sufficient manner of responding. “The Respondent’s obligation is to provide the information it has available, to compile it, or to give the Union access to the records from which it can reasonably compile the information.” *Yeshiva Univ.*, 315 NLRB 1245, 1248 (1994). Also, “[i]t is well settled that an employer is not obligated to furnish relevant information in the exact form requested by the employees’ representative. Rather, ‘[i]t is sufficient if the information is made available in a manner not so burdensome or time-consuming

² Other collective bargaining laws are interpreted similarly. *See, e.g., W. Hartford Bd. of Educ. v. Connecticut State Bd. of Labor Relations*, 460 A.2d 1255, 1258 (Conn. 1983) (“The school board-employer has the statutory duty to bargain in good faith with the certified representative of the teachers....This duty requires an employer to provide relevant information that is needed by the representative for the proper performance of his duties.”); *Application of Civil Serv. Employees Ass’n, Inc. Local 1000, AFSCME, AFL-CIO v. State of New York Pub. Employment Relations Bd.*, 823 N.Y.S.2d 326, 333 (Sup. Ct. 2006) *aff’d sub nom. Civil Serv. Employees Ass’n v. New York State Pub. Employment Relations Bd.*, 847 N.Y.S.2d 280 (N.Y. App. Div. 2007) (“PERB has consistently held that an employer’s duty to bargain in good faith under the Taylor Law (Civil Service Law § 209-a(1)(d)) includes an obligation to provide information relevant to a union’s investigation of the merits of a grievance”).

AFSCME did not waive its right to relevant information necessary to the performance of its representative duties by agreeing to incorporate, in Article 16 of the MOU, the grievance procedure in Education Article §§ 13-201 *et seq.* *See Procter & Gamble Mfg. Co. v. N.L.R.B.*, 603 F.2d 1310, 1318 (8th Cir. 1979) (“For there to be a waiver of a right to information, the language used must be clear and unmistakable. Likewise, there must be a conscious relinquishment by the Union, clearly intended and expressed to give up the right.”) (citations omitted). Accordingly, we disagree with UMCP that AFSCME’s statutory right to information is limited by the grievance procedures in Education Article § 13-203.

as to impede the process of bargaining.” *Roadway Exp.*, 275 NLRB 1107, 1107 (1985). UMCP’s manner of making the information available for inspection and copying was not so burdensome or time-consuming as to impede the grievance process.

UMCP refused to provide documents responsive to number 6 of AFSCME’s first request on grounds that the documents requested are confidential and privileged. Here, AFSCME requested, “All documents which the University intends to use to prosecute, justify, or defend its decision to terminate Mr. Swift.” The wording of this request is overly broad to encompass confidential and privileged information, including attorney work-product. Accordingly, we conclude that UMCP did not violate SPP § 3-306(a)(8) by failing to provide documents responsive to number 6 of AFSCME’s first request. *See Nat’l Broad. Co., Inc. & Am. Fed’n of Television & Radio Artists, AFL-CIO*, 352 NLRB 90, 101 (2008) (union’s right to information does not extend to information that “delves into Respondent’s strategy and preparation in litigating the arbitration”).

UMCP’s response to AFSCME’s first request was delayed by approximately two months. An unreasonable delay in providing relevant information is a violation of SPP § 3-306(a)(8). What constitutes an unreasonable delay depends upon the facts of each case. UMCP received AFSCME’s second request five weeks after receiving the first request. It gave an initial response to AFSCME’s second request approximately one week later, on February 5, and its letter of February 19 included both a full response to AFSCME’s first request and at least a partial response to AFSCME’s second request. On these facts we do not find that UMCP’s delay in responding to the first request violated SPP § 3-306(a)(8).

II. AFSCME’s Second Request for Information

UMCP disputes the relevance of the information requested in numbers 1-3. “It is well established that an employer must provide a union with requested information ‘if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees’ exclusive bargaining representative.’” *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984). Information related to disciplinary actions taken against similarly situated employees generally is relevant to a union in processing a grievance concerning employee discipline. *See, e.g., Washington Gas Light Co.*, 273 NLRB 116, 117 (1984) (employer “breached its collective-bargaining obligation” when it refused to provide records of disciplinary actions relating to current and former employees, except as records contained references to medical problems); *Pfizer, Inc.*, 268 NLRB 916, 919 (1984) (“In order to determine whether rules have been applied evenhandedly it is necessary to compare the employment history of employees disciplined for the same rule violations.”).

Under this relevancy standard, we conclude that the information requested in numbers 1 and 2 is relevant. With respect to the information requested in number 3, we are not persuaded that the information bears the same relevance. Moreover, the information is likely to include information of a highly confidential nature, such as settlement terms, that cannot be adequately protected by redaction. Accordingly, UMCP is not required to provide documents responsive to number 3.

UMCP argues that the Maryland Public Information Act, General Provisions Article § 4-311 (hereinafter referred to as “PIA”), prohibits the State from disclosing to AFSCME any of the personnel records sought in the second request.³ Section 4-311(a) provides, in part, that a custodian shall deny inspection of a personnel record of an individual, including an application, a performance rating, or scholastic achievement information.

Section 4-304 of the PIA provides that “Unless otherwise provided by law, a custodian shall deny inspection of a public record, as provided in this part.” Section 4-304 applies to the prohibition against disclosure of personnel records in § 4-311. As explained above, UMCP has a statutory duty to bargain in good faith, which includes the duty to provide information relevant to an exclusive labor representative in the performance of its duties. As such, disclosure of personnel records pursuant to fulfilling this statutory duty is not prohibited by the PIA.

UMCP has raised a legitimate confidentiality interest in the personnel records. “[W]hen a union is entitled to information concerning which an employer can legitimately claim a partial confidentiality interest, the employer must bargain toward an accommodation between the union's information needs and the employer's justified interests.” *Pennsylvania Power Co.*, 301 NLRB 1104, 1105-06 (1991). In this regard, UMCP previously informed AFSCME that it was prepared to provide the personnel records after “redacting them to remove personally identifiable employee personnel information...” Based on the record before the Board, AFSCME did not respond to UMCP’s proposed resolution of the confidentiality issue or seek to bargain about the form of UMCP’s production. We find that based on these facts, UMCP did not fail to bargain in good faith by notifying AFSCME that it would produce the requested documents with redactions.

It is necessary to balance AFSCME’s right to relevant information and UMCP’s confidentiality interests. *Detroit Newspaper Agency*, 317 NLRB 1071, 1074 (1995) (“the Board is required to balance a union's need for the information against any legitimate and substantial confidentiality interests”). We conclude, on the record before us, that a proper balance is struck by ordering UMCP to provide immediately to AFSCME documents responsive to numbers 1 and 2, with redaction of personal identifying information.⁴

We next address numbers 4-7 of AFSCME’s second request. The parties dispute whether it is University Policy VII-1.22 or Article 15 of the MOU that governs Swift’s termination. In this context, the information requested by AFSCME under numbers 5-7 is relevant, and documents responsive to these requests must be disclosed immediately, even if AFSCME already possesses them. *Columbia Coll. Chicago & Part-Time Faculty Ass'n at Columbia Coll. Chicago-Illinois Educ. Ass'n/National Educ. Ass'n*, 360 NLRB No. 122 at *2 (2014) (“The Board has consistently held that the duty of an employer to provide relevant requested information in its possession is not excused by the fact that the union could obtain the information elsewhere.”).

³ At oral argument, counsel for AFSCME acknowledged that the information requested in numbers 1-3 of its second request constituted personnel records. (Oral Argument Transcript at page 17).

⁴ Identification by assigning a number or some other anonymous marker to each employee is permissible.

By failing to provide information requested in numbers 5-7 of AFSCME's second request UMCP violated SPP § 3-306(a)(8).

With respect to number 4, UMCP argues that responsive documents could reveal negotiation strategies and matters protected by the attorney-client privilege. UMCP has legitimate confidentiality concerns. Balancing these concerns against any relevance in the information requested by AFSCME, we conclude that UMCP is not required to provide documents responsive to number 4.

III. UMCP's Fee

Relying on the authority of the PIA, UMCP informed AFSCME that it would provide documents responsive to AFSCME's second request after AFSCME reimbursed it in the amount of \$2,757.76, which was UMCP's cost of "tracking down responsive documents and redacting them to remove personally identifiable employee information." (UMCP Motion to Dismiss, Exhibit I).

UMCP is obligated to provide documents responsive to AFSCME's information requests, consistent with this Decision. We find that UMCP may charge AFSCME a reasonable fee for the costs incurred in searching for, retrieving, redacting, and producing responsive documents. *See O & F Machine Products Co.*, 239 NLRB 1013, 1020 (1978) ("It has long been held that employers may require unions to enter into reasonable arrangements for the compilation of data requested by the unions, including the bearing of additional costs to the employer for furnishing the requested information. Respondent's request that the Union pay half of the expense of securing this vesting data was reasonable and did not violate the Act.").

We further find that UMCP's reference to the PIA as guidance in an attempt to recover costs is reasonable. The fee charged by UMCP, however, is subject to bargaining, provided that the union seeks to bargain about the matter. The record reveals that when UMCP informed AFSCME of the fee, the University asked AFSCME if it was agreeable to paying the fee. There is nothing in the record that indicates that AFSCME ever responded to UMCP or that it sought to bargain about the reasonableness of the fee. We, therefore, find that UMCP did not refuse to bargain with AFSCME regarding the fee.

UMCP provided information on the components of the fee and how the fee was calculated. AFSCME did not challenge the reasonableness of the calculation; rather, AFSCME argued that UMCP cannot lawfully charge a fee. We, therefore, find that the fee charged by UMCP is reasonable.

Although we have found that UMCP could lawfully charge a fee for the production and that UMCP's fee is reasonable, we find that UMCP's withholding of relevant documents until after AFSCME paid the fee was inconsistent with the State's obligation under the SPP to produce the responsive documents. To comply with its statutory obligation, UMCP was required to produce the documents, with the necessary redactions, together with an invoice to AFSCME for costs incurred (since AFSCME chose not to bargain about the fee). The withholding of the documents by UMCP pending payment of the fee violated its duty to bargain in good faith under SPP § 3-306(a)(8).

UMCP must immediately provide AFSCME the documents that it has withheld responsive to numbers 1 and 2 of AFSCME's second request. If AFSCME chooses to accept the documents, it must pay the fee as previously calculated by UMCP, except that it need not pay any fee incurred by UMCP in responding to number 3 of AFSCME's second request.

ORDER

IT IS HEREBY ORDERED THAT:

1. UMCP and its agents and representatives shall cease and desist from failing or refusing to provide information requested by AFSCME which is necessary and relevant to AFSCME in performing its representational duties and shall immediately provide the information requested by AFSCME, in accordance with the Board's Decision.
2. If AFSCME chooses to accept documents responsive to numbers 1 and 2 of its January 28, 2014 information request, it shall pay UMCP a fee as previously calculated by UMCP, except that it is not required to pay a fee incurred by UMCP in responding to number 3 of AFSCME's request of January 28, 2014.
3. Except as otherwise determined in accordance with the Board's Decision, the Unfair Labor Practice Petition in Case No. ULP 2014-04 is dismissed.

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD

Annapolis, MD

Issue Date: September 2, 2015



Karl K. Pence, Chair

Appeal Rights

Any party aggrieved by this action of the Board may seek judicial review in accordance with Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222.