National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: March 16, 1998

TO: Michael Dunn, Regional Director, Region 16

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Work Services Corporation, Case 16-CA-18988

530-6067-6067-3300, 530-6067-6067-5200, 530-6067-6067-6017, 530-6067-6067-8200

This Section 8(a)(5) case was submitted for advice on whether the Union is entitled to information regarding the nature of any discipline imposed by the Employer upon a supervisor for having sexually harassed a unit employee.

The parties' bargaining agreement contains a non-discrimination clause requiring the Employer to abide by all Equal Employment Laws including Title VII of the Civil Rights Act of 1964. In addition, the Employer has a separate, internal policy against sexual harassment. This written policy states that "investigations will be completed with due regard for confidentiality to ensure protection of the complainant and the accused."

The Employer investigated a sexual harassment complaint from a unit employee against a named supervisor. After that investigation, the Employer advised the employee and the Union that the Employer had determined that the supervisor had violated the Employer's sexual harassment policy. The Union asked what sanctions the Employer was taking against the supervisor. The Employer replied that this information was "confidential," and asked the Union to explain how the information was relevant. The Union replied that it needed to know whether the Employer's sexual harassment policy "had meaning." Despite repeated requests from the Union, the Employer refused to advise the Union the nature of the supervisor's discipline, or even whether it disciplined the supervisor at all.

We conclude that (1) the Union has sufficiently demonstrated that the requested information is relevant to its representative function; and (2) the Employer's asserted need for confidentiality is outweighed by the Union's need to protect unit employees by ascertaining the effectiveness of the Employer's sexual harassment policy.

A union is entitled to requested information which is relevant to its role as bargaining representative and "reasonably necessary" to the performance of that function.[1] Information concerning unrepresented employees is not presumptively relevant; the union must affirmatively demonstrate the relevance of such non-unit information.[2] However:

under the standard of relevancy as applied by the Board and the courts, it is sufficient that the union's claim for information be supported by a showing of "probable" or "potential" relevance. Furthermore, the fact that the information . . . may, as here, in part relate to employees outside the scope of the unit it represents does not necessarily justify an employer's refusal to provide such information.[3]

It is well settled that the conduct of a supervisor toward unit employees is a legitimate matter of union concern.[4] An employer's discriminatory conduct against unit employees also encompasses a mandatory subject of bargaining, underscored by the bargaining agreement clauses in the instant case requiring the Employer to abide by all Equal Employment Laws, including Title VII of the Civil Rights Act. The Board has explicitly stated that "concerns by a union about possible discrimination in the workplace ... are relevant to the union's representational function."[5] More specifically, the elimination of sexual discrimination in the workplace is a mandatory subject of bargaining.[6]

We first conclude that the instant information is relevant and necessary to the Union's representative function regarding discrimination against unit employees in the workplace. The requested information concerns a remedy for workplace discrimination; it is beyond cavil that it is a matter of legitimate union concern. The Employer argues that the information is

not relevant because the Union cannot file a contractual grievance protesting the nature of any supervisory discipline. Although it does appear that the supervisor here is subject to discipline for having violated the Employer's internal sexual harassment policy, arguably the parties' bargaining agreement also has been violated. The information is therefore relevant because the Union has a legitimate interest in learning whether the Employer's internal policy against harassment is effective, or to file a grievance. The lack of effective discipline against the instant supervisory misconduct may suggest that the Employer's policy is insufficient to protect unit employees and needs replacement or supplementation. In other words, this information is relevant and useful to the Union for seeking, in negotiations, a bargaining agreement provision more effectively combating workplace discrimination.[7] Also it would not be necessary to file a grievance if the arguable contract violation was effectively remedied.

Second, we conclude that the information should be supplied because the Employer's asserted need for confidentiality is outweighed by the Union's need for information potentially helpful in eliminating workplace discrimination. The Board has limited claims of "confidential information" to:

that which would reveal, contrary to promises or reasonable expectations, highly personal information, such as individual medical records or psychological test results; that which would reveal substantial proprietary information . . . ; that which could reasonably be expected to lead to harassment or retaliation, such as the identity of witnesses; and that which is traditionally privileged, such as memoranda prepared for pending lawsuits.[8]

In United States Postal Service, supra, involving a union seeking to obtain a notice of supervisory discipline, the ALJ, adopted by the Board, found that the employer's claimed need for confidentiality was outweighed by the union's need to discover potential disparate treatment. The ALJ noted the employer failed to show a "clear past practice of confidentiality", i.e., that it had informed supervisors that their files were confidential, or that supervisors had requested such confidentiality. The ALJ also noted that the supervisor's misconduct "should have reasonably led him to anticipate any consequences of his verbal assault would become public knowledge." Id at 434. Finally, the ALJ noted that the union was not seeking access to the supervisor's entire personnel file, but sought only the supervisory discipline, viz., an action letter warning the supervisor about his misconduct.

In the instant case, the Employer similarly has failed to show prior promises of privacy, or reasonable expectation of confidentiality from supervisors, regarding supervisory discipline for misconduct against unit employees. The Employer's harassment policy explicitly promises only that "investigations will be completed with due regard for confidentiality." The policy thus does not assure that post-investigatory disciplinary decisions will be confidential. Against this backdrop, the Union is seeking information which could show the effectiveness lack of effectiveness of the Employer's sexual harassment policy protecting unit employees. In sum, the Region should argue that the Employer's confidentiality interest is outweighed by the Union's need for this information.[9]

B.J.K.

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[1] See, e.g., NLRB v. Item Co., 220 F.2d 956 (5th Cir. 1955); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

[2] See, e.g., Adams Insulation Co., 219 NLRB 211 (1975); United States Postal Service, 307 NLRB 429 (1992).

[3] Temple-Eastex, Inc., 228 NLRB 203 (1977).

[4] See, e.g., Hoytuck Corp., 285 NLRB 904, note 3 (1987): "employee protest regarding the selection or termination of a supervisor who has an impact on employee working conditions is protected", citing Dobbs Houses, Inc., 135 NLRB 885, 888-89 (1962).

[5] Hertz Corp., 319 NLRB 597, 599 (1995).

[6] Jubilee Mfg. Co., 202 NLRB 272 (1973).

[7] Compare United States Postal Service, supra, where information concerning supervisory discipline was also found relevant, in circumstances where the union suspected disparate treatment between supervisors and unit employees. Although that ground of relevance, disparate treatment, is not present in this case, the Union has established another ground, viz., the need to know whether it should seek more effective prevention of workplace discrimination.

[8] Detroit Newspaper Agency, 317 NLRB 1071, 1073 (1995).

[9] The Employer may claim that revealing the nature of supervisory discipline would be unnecessarily embarrassing and would make the supervisor less effective. In Detroit Newspaper Agency, supra, the union sought an environmental report which might reveal serious workplace hazards. The Board noted that strong language in the report might well embarrass the Employer, but "preventing such embarrassment has little claim to confidentiality." Id at 1075.