STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 199, Complainant, and BROADLAWNS MEDICAL CENTER, Respondent.	CASE NO. 100036

RULING AND ORDER

Before me in this prohibited practice proceeding are (1) SEIU's motion to compel discovery, (2) Broadlawns' motion to limit discovery and for protective order, and (3) Broadlawns' motion to strike SEIU's resistance to Broadlawns' motion to limit discovery/for protective order. The parties presented arguments on the motions in a telephonic hearing on November 18, 2015.

I. Motion to strike

Broadlawns' motion to limit discovery was electronically filed and served on October 8, 2015, and on October 18 SEIU filed its resistance to the motion and its brief in support of the resistance. Broadlawns argues that the resistance and supporting brief should be stricken because they were not filed within the 7-day period specified in Iowa Rule of Civil Procedure 1.431(5).

Even assuming that the rules of civil procedure governing motion practice in the courts is applicable to this prohibited practice complaint, and further assuming that a motion to strike is appropriate here, where the filings at issue are not pleadings (*see* Iowa R. Civ. P. 1.434*)*, Broadlawns' motion is without merit.

Rule 1.431(5), upon which Broadlawns relies, provides that within seven days after service of a resistance to a motion, the moving party may serve a reply and concise reply brief. This rule has no applicability to SEIU's filings, which were not in reply to a resistance filed by Broadlawns.

SEIU's filings were a resistance to Broadlawns' motion to limit discovery and a supporting brief. They are addressed by rule 1.431(4), not rule 1.431(5). Rule 1.413(4) provides that, unless otherwise ordered, a party opposing a motion shall file a written resistance within 10 days after the motion has been served, and may serve a brief in support of the resistance.

SEIU filed and served its resistance to Broadlawns' motion and its supporting brief on the tenth day after service of the motion upon it. Thus, even if governed by Iowa R. Civ. P. 1.431, SEIU's filings were timely. Broadlawns' motion to strike is DENIED.

II. Motions to compel and limit discovery

The thrust of SEIU's underlying complaint is that Broadlawns committed a prohibited practice when it constructively discharged RN Billie Kucharo, a surgical nurse, purportedly due to her violation of Broadlawns' cell phone use policy but in fact due to her having engaged in activities protected by chapter 20. The complaint is thus one in which PERB applies the "dual motive" or "*Wright Line*" analysis adopted by the NLRB in *NLRB v. Wright Line,* 251 NLRB 1083 (1980), and later upheld by the U.S. Supreme Court in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 103 Sup.Ct. 2469, 76 L.Ed.2d 667 (1983).

In a *Wright Line* case like this, the complainant must initially establish a *prima facie* case that the employee's protected conduct was a motivating factor in the employer's action. In the absence of direct evidence of such motivation, a *prima facie* case may be established circumstantially by a complainant showing (1) the existence of protected activity by the employee, (2) knowledge of that activity by the employer, and (3) union animus. Proof of these elements warrants at least an inference that protected conduct was a motivating factor in the adverse personnel action and that a violation of the statute has occurred. If the employer cannot rebut the *prima facie* case, it must demonstrate that the same personnel action would have taken place for legitimate reasons regardless of the protected activity. *Id.*

Evidence which would tend to establish or refute the existence of Broadlawns' union animus is thus of significant relevance in this case, absent an admission by Broadlawns that Kucharo's protected conduct was a motivating factor in her forced resignation. Evidence tending to show that the employer would or would not have taken the same action for legitimate reasons notwithstanding the protected activity is also relevant.

Prohibited practice proceedings are "contested cases" within the meaning of Iowa Code section 17A.2(5). Discovery procedures applicable to civil actions are available to parties in contested cases before an agency. Iowa Code § 17A.13(1).

Division V of the Iowa Rules of Civil Procedure govern those discovery procedures. Rule 1.501, in addition to providing for discovery by interrogatory or

request for the production of documents, instructs that the discovery rules are to be liberally construed, administered and employed so as to provide the parties access to all relevant facts.

Iowa R. Civ. P. 1.503(1) addresses the broad scope of discovery available:

> **1.503(1)** *In general.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, the identity and location of persons having knowledge of any discoverable matter, and the identity of witnesses the party expects to call to testify at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Both SEIU's motion to compel discovery and Broadlawns' motion to limit it arise from SEIU's discovery requests that Broadlawns provide it with certain information or documents.

Broadlawns has provided SEIU with some of the requested material, and SEIU does not challenge Broadlawns' representation that other requested documents are not in Broadlawns' possession or do not exist. But the employer has refused to comply with seven of SEIU's requests, and both of the pending motions address those refusals. SEIU seeks an order that all the requested materials or information be provided. Broadlawns asks that SEIU be denied discovery of some items, and that I conduct an *in camera* review of the others to

determine their relevancy. It further seeks my issuance of a protective order concerning any items which it is required to produce.

A central theme in Broadlawns' resistance to SEIU's requests is its argument that in order to obtain discovery, SEIU must first show a reasonable basis to believe the documents and information sought likely contain information relevant to an element of its claim and must advance some good-faith basis demonstrating how the records/information is reasonably calculated to lead to admissible evidence. It cites *Fagen v. Grand View University,* 861 N.W.2d 825 (Iowa 2015) in support of the proposition that such a showing is now required in order to obtain discovery.

Fagen v. Grand View involved a defendant's request for the privileged mental health records of a plaintiff whose claim against the defendant included damages for mental pain and mental disability. In its opinion the Court did announce its adoption of a protocol which balances a patient's right to privacy in his or her privileged mental health records against an alleged tortfeasor's right to discover evidence relevant to the plaintiff's damage claims. It did not announce a narrowing of the scope of discovery generally, or a pre-disclosure protocol applicable to the discovery of materials which are not even alleged to be privileged. I consequently view *Fagen v. Grand View* and its pre-disclosure protocol as inapplicable to the dispute at hand.

The merit of SEIU's underlying prohibited practice complaint hinges in large part on the question of employer motivation. SEIU needs to show that Kucharo's protected conduct was a motivating factor for Broadlawns forcing her

resignation. SEIU could make such a showing directly, through the introduction of evidence like a "smoking gun" recording or document which itself establishes improper employer motivation, or circumstantially by showing Kucharo's protected activity, employer knowledge and the employer's union animus. Because union animus may be inferred from a broad variety of factors, including an employer's expressed hostility toward unionization or the disparate treatment of other employees, a broad range of materials could contain evidence relevant to the presence or absence of animus. The fact that the employer may be required to establish that it would have taken the same action for legitimate reasons even had the protected activity not occurred—another aspect of the issue of employer motivation—does nothing to narrow the broad range of materials which are relevant to the subject matter of SEIU's claim and thus within the scope of discovery.

SEIU seeks an order compelling discovery of:

(1) copies of email correspondence or notes from any meetings between hospital administrators and any nursing manager regarding Kucharo and 10 other named SEIU-represented employees who have engaged in protected activities;

(2) copies of the personnel files for those 11 employees;

(3) copies of meeting notes from any meeting regarding Kucharo with surgery physicians, nursing managers, and hospital administrators;

(4) names of and current or last known contact information for all physicians who worked with Kucharo since 2005;

(5) names of employees who have been disciplined for a violation of the cell phone policy, including the level of discipline imposed on each employee;

(6) copies of statements from Kucharo's coworkers who witnessed her on the phone, and

(7) names of employees who witnessed Kucharo on the phone.

All of these materials are logical sources of information relevant to one or more of the issues or potential issues in this case, albeit some more obviously than others. For instance, the names of other employees disciplined for violations of Broadlawns' cell phone policy, and the level of discipline imposed, are so plainly relevant here (where the policy's violation is the claimed basis for Kucharo's forced resignation) that one wonders why this is a disputed item. The relevance of the identities and contact information of physicians who worked with Kucharo is less plainly apparent, but the scope of discovery includes the identity and location of persons having knowledge of discoverable matter. It is certainly foreseeable that one or more of these physicians may have heard, seen or received statements or writings which are relevant to the issue of employer motivation and thus discoverable.

With the one limited exception discussed below, I conclude that all of the information or documents requested by SEIU are within the scope of discovery in this case.

However, Iowa R. Civ. P. 1.504 provides that the court may enter an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Protective orders designed to prevent the unnecessary

dissemination of confidential information or documents containing such information have been entered in a number of PERB cases. *See, e.g., UE and Storm Lake Cmty. School Dist.*, 11 PERB 8248; *SEIU and State (Regents)*, 04 PERB 6506. Although they shall be provided to SEIU, the information and documents produced in response to three of its requests are likely, if not certain, to contain information which would be deemed "confidential" were it sought by a member of the public, rather than by a litigant pursuing discovery. The potential for the indiscriminate use or handling of information or documents normally shielded from public view, prior to their possible introduction as evidence at a contested case hearing, could result in unwarranted public disclosure. In order to protect the subject of the information or document from potential annoyance or embarrassment, the information and documents produced in response to the requests numbered 1, 4 and 5 in the listing set out above shall not be disclosed to others while in possession of SEIU's counsel of record, except under the terms and conditions set forth in the order below.

Also warranting less-than-unrestricted disclosure to SEIU are the personnel files of the 10 employees other than Kucharo (request number 2 in the list above). While some documents reasonably anticipated to be contained in those files, such as disciplinary notices, performance evaluations and grievance-related materials are relevant to the subject matter and discoverable, other items likely included are not. For instance, personal information about an employee or an employee's spouse or dependents, such as social security numbers and the

employee's elections between available insurance options, would appear to have no relevance to the subject matter of the underlying case.

Consequently, the personnel files identified in SEIU's request, other than Kucharo's, shall be submitted for my *in camera* review and identification of any documents which need not be provided to SEIU, or which shall be provided with specified redactions. The purpose of this *in camera* review is primarily to identify those documents which need not be produced because, due to their nature and type, they are plainly not relevant to the subject matter of the complaint. Requiring the disclosure of documents not so identified does not, however, mean that I have determined that the actual content of a document is in fact relevant to any issue in the case, much less that I have found it to be of probative value. The actual relevance and probative value of any document offered into evidence at hearing are matters to be determined upon objection at hearing and in my consideration of the record ultimately made. All documents disclosed from these personnel files following *in camera* review shall be subject to the terms of the protective order set forth below.

The information or documents identified in the three remaining requests (items 3, 6 and 7 in the list above) are specific to Kucharo, the SEIU member on whose behalf the complaint was brought, and shall be disclosed to SEIU without qualification or restriction.

ORDER

SEIU's motion to compel discovery is accordingly GRANTED. Broadlawns'

motion to limit discovery/for protective order is GRANTED in part and DENIED in part.

Broadlawns shall, within 15 days, cause the personnel files identified above, or complete, true and accurate copies thereof, to be delivered to the undersigned for *in camera* review.

Broadlawns shall, within 15 days, provide SEIU with true and accurate responses to its requests for information identified in items 4, 5 and 7, and shall produce and provide SEIU's counsel of record with the opportunity to inspect and copy the documents identified in items 1, 3 and 6, in accordance with Iowa R. Civ. P. 1.512(2)(d).

The information provided in response to requests 4 and 5, and documents produced in response to request 1, as well as any additional documents disclosed following *in camera* review of the personnel files, shall not be disclosed to others while in SEIU's counsel's possession, except under the following terms and conditions:

1. The persons permitted access to the information or documents (hereinafter "materials") subject to this order shall be limited to Billie Kucharo, SEIU representative Audra Schmidt, SEIU's counsel of record, their immediate support staffs, and potential witnesses to whom disclosure of the materials is reasonably required for investigation (including further discovery), evaluation, preparation, or hearing of the complaint.

2. All persons, other than SEIU's counsel of record, shall first execute the

statement attached hereto as ATTACHMENT A prior to being given access to any of the materials subject to this order.

3. The materials subject to this order shall be used solely for the investigation, evaluation, preparation for hearing, and hearing of the prohibited practice complaint and shall be used for no other purpose by any person permitted access pursuant to paragraph 1 above.

4. SEIU's counsel shall store the materials subject to this order in a secure place, taking reasonable precautions to prevent their unauthorized disclosure.

5. The materials subject to this order may be reproduced only to the extent reproduction is necessary for the investigation, evaluation, preparation for hearing and hearing of the prohibited practice complaint or any associated intra-agency or judicial review proceedings. A record of the number of copies made of each item shall be maintained and provided to Broadlawns' counsel of record at the conclusion of proceedings on the prohibited practice complaint, whether concluded by settlement, voluntary dismissal, final PERB adjudication or by a district or appellate court in proceedings for judicial review of the PERB decision.

6. Not later than 40 days following the conclusion of proceedings on the prohibited practice complaint as described in the preceding paragraph, SEIU's counsel of record shall return the materials subject to this order to Broadlawns' counsel of record, including all copies, summaries or abstracts of the materials (excluding work product of SEIU's counsel) and all statements executed pursuant to paragraph 2 above. The return shall be accompanied by the certification of

SEIU's counsel that the materials are, in fact, all existing copies, summaries or abstracts thereof to the best of counsel's knowledge. To the extent the contents of materials subject to this order have been incorporated into counsel's work product, such work product shall be retained in a confidential file and, prior to disclosing any work product containing such information, counsel shall provide 20 days' notice of intent to disclose by first class mail to Broadlawns' counsel of record in order to afford counsel the opportunity to enjoin disclosure.

DATED at Des Moines, Iowa, this 29th day of February, 2016.

Jan V. Berry
Administrative Law Judge

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STATEMENT

I have read and understand the protective order entered by the Administrative Law Judge in this case on February 29, 2016, and execute this statement pursuant thereto. My access to and utilization of the information or documents subject to that order will be solely for the purposes authorized by the order and, except as permitted by the order, I will not disclose to any person or entity any information I obtain as a result of my access to such information or documents.

Dated:_____ Signature: _____

Printed name: _____

Address: _____

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ATTACHMENT A