UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
BRANCH OFFICE
SAN FRANCISCO, CALIFORNIA

LEGAL SERVICES OF NORTHERN CALIFORNIA

and Case 20–CA–32863

NORTHERN UNITED LEGAL ASSISTANCE WORKERS, NATIONAL ORGANIZATION OF LEGAL SERVICES, UAW LOCAL 2320

Lucile Lannan Rosen, San Francisco, Calif., for the General Counsel.
Mary K. Nebgen, of *Orrick Herrington & Sutcliffe*, Sacramento, Calif., for Respondent.
Elizabeth Fiekowsky, Cotati, Calif., Regional Organizer, for the Charging Party.

DECISION

Statement of the Case

JAMES M. KENNEDY, Administrative Law Judge: This case has been submitted to the Division of Judges upon a joint motion of the parties who seek a decision based upon a hearing waiver and formal stipulation of facts signed on April 28, May 25 and May 29, 2006. The factual stipulation was signed by all parties on May 25, 2006. In addition, each party has filed a so-called "Statement of Position" accompanying the stipulation. Associate Chief Administrative Law Judge Mary M. Cracraft granted the motion on June 6, 2006 and assigned the case to me for decision.

Northern United Legal Assistance Workers, National Organization of Legal Services, UAW Local 2320 (the Union or Charging Party), filed the underlying unfair labor practice charge on January 20, 2006. The Regional Director for Region 20 issued the complaint on March 23, 2006. It alleges that Legal Services Of Northern California (Respondent) violated §8(a)(5) and (1) of the National labor Relations Act (NLRA) by failing to comply with the Union's demand to produce the severance agreement (or severance "package") between it and its former employee, Kimberley Dovey. The complaint further asserts that the Dovey severance agreement is "necessary for, and relevant to, the Union's performance of its duties as the exclusive collective bargaining representative of the [represented employees]." Respondent's answer agrees that the Union holds §9(a) status and is the employees' exclusive collective bargaining representative. [1] Respondent's answer, however, denies that the Union requested

[1] The collective bargaining contract shows the unit to include staff attorneys, legal graduate assistants, paralegals, legal secretaries, administrative support clerks and receptionists.

Dovey's separation agreement; it asserts that the Union demanded the Dovey separation "package." It also denies that the package is necessary for the Union's performance of its representational duties. Affirmatively, it asserts the package to be confidential.

Pursuant to an order issued by the Associate Chief Administrative Law Judge, all parties have timely filed briefs in support of their respective positions. They have been carefully considered. Based upon the pleadings and the stipulation of facts, I hereby make the following findings:

Jurisdiction

Based on the stipulation, Respondent, Legal Services of Northern California, is a California corporation with an office and place of business in Sacramento. It provides free legal services to clients in 23 counties in Northern California. During the 12-month period ending December 31, 2005, [2] Respondent's gross revenues exceeded $250,000, and during the same period it purchased and received at its Sacramento facility goods valued in excess of $2500 which originated outside California. Accordingly, Respondent at all material times, has been an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act. Furthermore, the stipulation recites that the Union is a labor organization within the meaning of §2(5) of the Act.

The Operative Facts

The stipulation sets forth some of the operative facts. It first recites that Dovey was a bargaining unit employee until she agreed to, and executed, the Separation Agreement on July 15. It also sets forth the correspondence between the Union and Respondent which constitutes the demand under scrutiny here and the manner in which the nature of the demand shifted.

Specifically, on July 29, Laurel Blankenship, the Union's president, wrote Respondent's executive director Gary Smith a letter in which she initially asserted that Dovey's 'severance package' had been reached without the Union's knowledge or involvement. She suggested that Respondent's conduct may have breached the good faith bargaining obligation under §8(d) of the Act as constituting improper direct dealing over matters reserved by law to the Union. Blankenship thereupon asked for a copy of the 'package.'

Smith responded on August 15 by e-mail. Inter alia, he said: "I have reviewed the concerns raised in [the July 29 letter] in connection with the resignation of a staff member. Although issues of confidentiality and the employee's privacy rights preclude me from discussing the manner in detail, I can assure you that the employee's decision was entirely voluntary, and that no one from [ ] management pressured, requested, or suggested in any way that the employee resign. After the employee approached [management] and notified the Managing Attorney (Herb Whitaker) of her intent to resign, [Respondent] did not engage in any improper "direct dealing" with an employee whatsoever with respect to any "terms and conditions of employment." He closed by correcting a perceived misimpression to the effect that one of Respondent's office managers had participated in the discussion with the employee concerning her resignation. He said those discussions were only between the employee (Dovey) and the Managing Attorney.

On September 12, Blankenship e-mailed Smith to remind him that he had not responded to the July 29 request for copies of the agreement between Respondent and Dovey.

Separately, but also on September 12, Blankenship wrote Smith, repeating her request for the information demanded in the July 29 letter. It specifically requested copies of "any and

[2] Unless otherwise noted, all dates are 2005.

all documents signed by [Respondent] and/or employee Kim Dovey (signed during July 2005) regarding termination of her employment, severance pay relating to her termination of employment and/or release of claims." By September 12, it would appear the Union was no longer asserting that unlawful direct dealing had occurred, but now it wanted the signed documents which reflected her termination, her pay and any release of claims. It ended by asserting that it had "the right to this information."

It should be observed here that there is no contention that Dovey has filed any grievance, much less one concerning her departure from employment.

Smith replied to both by e-mail on September 20 saying: "As I stated in my e-mail message of August 15th... [Respondent] has not executed any agreements with Kim Dovey (or any other [union] member) pertaining to the terms or conditions of their employment."

In addition, a document under seal has been presented for my review, and I have reviewed it *in camera*. Although not specifically stated in the stipulation, it would appear that Respondent, at least, and perhaps the General Counsel (but not the Charging Party) are aware of its contents. Without breaking the seal of confidentiality, I can make the following observations about its contents: 1. the document is titled "Separation Agreement;" 2. it constitutes Dovey's resignation; 3. it recites that she has been paid her earned salary, vacation pay and any other amounts owed through the termination date; 4. it provides for a lump sum in exchange for a release of any tort claims arising from her employment, listing various statutes [3] and common-law theories which might support such a claim; 5. it includes a limited nondisclosure clause barring her from advising others concerning the terms of the agreement, along with certain exceptions, such as being required by law to disclose its terms and also allowing her to disclose those terms to her spouse, her attorney, her accountant and any other professional advisor who might need the information. It provides Respondent with a legal remedy if she were to breach the nondisclosure clause.

Nevertheless, the nondisclosure portion of the agreement is not reciprocal. It does not in any way bar Respondent from revealing either the agreement itself or its terms, even if such a revelation were somehow to negatively impact Dovey. Neither is there any agreed-upon consequence if it were to do so.

Respondent, like the other parties, filed a position statement together with the factual stipulation. Although not evidence or an evidence substitute, [4] it nonetheless provides a context for its defense. In the position statement it observes that Dovey resigned because she had become the victim of another employee's having revealed certain personnel information about her. Whether Dovey resigned due to such a happenstance is not a consideration here.

Nonetheless, the position statement illuminates the reason for the tort claim waiver set forth in the Dovey separation agreement. If another employee reveals material in an employee's personnel file, whether publicly or only to co-workers, that conduct may well be grounds for a successful invasion of privacy suit in tort by the wronged employee under the tort's "public disclosure of private facts" or the "intrusion upon one's affairs" subcategories. (See any treatise on Torts for a full explication.) In California, the situs of this case, there is a state

[3] The NLRA is not among the statutes listed.

[4] Respondent's brief inappropriately refers to an affidavit provided to the Regional Office which is not a part of the stipulation. That portion of its brief has not been considered.

constitutional provision which protects its people from such incursions. [5] Respondent was prudent to seek a waiver from Dovey since it might well have been liable to her, under principles of *respondeat superior*, for the injustice committed upon her by the other employee.

Legal Analysis

This case arises under the general legal matrix that an employer must supply, upon appropriate demand, information to the employees' statutory representative information which is relevant to either the collective bargaining or the representational processes. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). See also *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965), enfg. 145 NLRB 152 (1963). Claims of confidentiality and privilege can insulate the employer in some circumstances. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979). In that event, the burden of rebutting the producibility and of proving confidentiality or privilege is on the employer. *E.I. du Pont de Nemours, & Co*., 346 NLRB No. 55 (February 27, 2006); *Wayne Memorial Hospital*, 322 NLRB 100, 104 (1996); *Washington Gas Light Co.*, 273 NLRB 116 (1984); *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976) and others.

The initial issue is whether the General Counsel has demonstrated that Dovey's severance agreement is producible under ordinary standards.

It is fair to first observe that the Union really didn't know what it was seeking when it wrote its initial letter. It was operating under the belief that something approaching undermining its status had occurred. It thought that there had been direct dealing and was seeking evidence of it. As Smith responded, its view shifted, apparently deciding that it needed the underlying document to determine what had actually happened. [6] Smith's indirect reply did not give the Union much comfort, though Smith clearly denied that he had encroached into the field reserved for the collective bargaining agent. From the Charging Party's perspective, Smith's statement: ["As I stated in my e-mail message of August 15th... [Respondent] has not executed any

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[5] See Article I, Section 1 of the California Constitution, the declaration of rights, which reads: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and *privacy.*" See also the various invasion of privacy statutes which California has legislated and which provide for a cause of action. Some of its prohibitions are criminal in nature, such as those against wiretapping. In fact, California Penal Code §631, though aimed primarily at communication systems, probably covers office computer network searches where one merely the views the private material. Section 632 is even broader.

A very recent example demonstrating the importance of this privacy right may be seen in *Kearney v. Salomon Smith Barney*, __ Cal.4th __; __ Cal.Rptr.3d __ ; 2006 WL 1913135 (July 13, 2006), where the California Supreme Court found the Georgia branch office of a brokerage house which also does business in California, and which had relied on Georgia law to permit one-party telephone eavesdropping, to be subject to the above-cited California law, using the governmental interest analysis in determining the choice of law to be applied. This, in my opinion, demonstrates how strongly the California courts will enforce California privacy rights, reaching even into conduct partially committed in another state.

[6] In its brief, the Charging Party has renewed its claim that Respondent's conduct qualifies as unlawful direct dealing. Since the complaint does not allege such a violation, the issue will not be pursued here. However, I direct the Union to the first proviso of §9(a) of the Act which permits employees to present grievances to their employer and have them adjusted without the intervention of their bargaining representative so long as the adjustment is not inconsistent with the collective bargaining contract.

agreements with Kim Dovey (or any other [union] member) pertaining to the terms or conditions of their employment,"] relied too much on a legal conclusion. There were no facts to support it, even if Smith was correct. Had Smith told the Union what the agreement actually accomplished, he would have stood a better chance of persuading it that he had not interfered with its representative status.

Smith's reply only generated more interest. Yet, instead of picking up the phone and explaining their respective interests, where a resolution might have been reached, each party decided to remain at distance, standing on their own legal niceties. This approach is not conducive to a mature relationship. Surely both sides need to work on improving communications. That failure took the matter to the Board.

For the Board to order the agreement turned over to the Union, it must be shown to be relevant to either the collective bargaining process or to the Union's role as the employees' collective bargaining representative. At the outset, it can be said that there are two types of relevance, presumptive and non-presumptive. Insofar as normal bargaining matters are concerned, they will be deemed presumptively relevant if they fall within the parameters of §8(d) of the Act as a "wages, hours or terms and conditions of employment" issue. [7] Where the demand seeks presumptively relevant data the employer is deemed to understand its obligation promptly to provide such material. Its failure to do so breaches the §8(d) bargaining obligation unless it can effectively rebut the presumption. Nevertheless, some other legitimately needed information, not presumptively relevant, might be producible in the same way if the Union satisfactorily explains that it is pertinent, or if relevance is evident from circumstances.

Producibility in cases where the Union is seeking to perform its representational duties becomes a little more problematic because there are many instances where relevance to that function is not readily apparent. Generally, the more readily apparent relevant material is that sought by a union to oversee its collective bargaining contract or to seek information relating to a grievance. These usually stay in the realm of self-evident relevance or its significance can be easily be inferred. Where the information being demanded is actually relevant but its import is not reasonably discernible from the demand, producibility becomes problematic, at least until the union specifically demonstrates relevance in the face of the employer's opposition. Specifically, see *American Stores Packing Co.*, 277 NLRB 1656, 1659 (1986); *Emery Industries*, 268 NLRB 824, 825 (1984); *Leonard B. Herbert Jr. & Co.*, 259 NLRB 881, 883 (1981), enfd. 696 F.2d 1120 (5th Cir. 1983); *Western Massachusetts Electric Co.*, 228 NLRB 607, 623 (1977), enfd. as modified 573 F.2d 101 (1st Cir. 1978).

As can be seen, the Union here demanded a copy of Dovey's 'severance package,' first explaining that it believed it was the product of an unlawful direct dealing within the meaning of §8(a)(5). Although it seemed to later have moved away from its 'direct dealing' theory, it never explicated its need for the information. [8] It simply claimed it had "the right to this information." Yet, rather clearly there was no bargaining purpose, since the contract will not expire until 2008. Therefore, bargaining for a new contract cannot be presumed. See, *Emery Industries*, supra.

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[7] Sec. 8(d) [Obligation to bargain collectively] For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and *confer in good faith with respect to wages, hours, and other terms and conditions of employment*, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, ... " [Italics supplied.]

[8] The stipulated record does not describe whether the Union's position shift was ever transmitted to Respondent. If not, Respondent would have been left to think that direct dealing was the issue, not the terms of the severance package.

Nor did it cite a contract policing purpose. No employee had complained and if the Union was concerned about proper wages being paid, it could simply have asked for Dovey's payroll records. Instead, it sought Dovey's 'severance package' and said nothing about its reasons. That suggests the Union seeks the information to carry out its representational duties. And, of course, that is what the General Counsel's complaint-stated theory is. Yet even the General Counsel has not stated what the Union's representational purpose is here.

The question raised, therefore is, how the does production of Dovey's separation agreement have relevance to its duties as the collective bargaining representative? There is no evidence that the Union is seeking to represent Dovey in any dispute. If the Union sees its duty as representing the whole of the bargaining unit, such a scope has never been stated. One might surmise that it seeks information concerning Dovey's waiver of the tort claim. But that is not a 'wage, hour or term and condition of employment' subject matter. It is only a private affair between a potential plaintiff and a potential tortfeasor who happen to be in an employer-employee relationship at the time the presumed tort occurred. Consequently, the waiver is only concerned with remedying a matter unrelated to Dovey's collectively-bargained employment relationship. [9] The Union's only representational concern is how employment is regulated; [10] it can have no concern over a tort which has no connection to that regulatory plan.

It is Dovey who putatively suffered the tort. Of course she was free to ask the Union for advice about her tort claim if she wished, but here she clearly did not think she needed outside help and chose not to seek it. But Dovey's only issue, once she decided to waive her tort claim, was to negotiate an amount that would satisfy her personal sense of how she had been wronged. That is not a wage or term and condition of employment and no party has cited a case holding that it is. My research has not found one, either. Certainly it is not a payment in exchange for work.

Therefore, the Union has no duties to perform regarding this tort, not even how or if, it was remedied. That is a matter between the plaintiff and the defendant. The Union simply has no role to play.

Furthermore, the Board has held, as Respondent argues, that employers do not violate §8(a)(5) and (1) of the Act when they condition receipt of enhanced severance benefits upon the employee's execution of a general release of liability. Specifically, see *Phillips Pipe Line Co.*, 302 NLRB 732 (1991). There, the Board observed that it had earlier held general releases of liability have too attenuated a link to actual terms and conditions of employment to constitute, in and of itself, a mandatory subject of bargaining, citing *Borden, Inc*., 279 NLRB 396, 399 (1986). It did observe that fact patterns have occurred where the mandatory and nonmandatory subjects became so intertwined as to treat the nonmandatory matters as if they were mandatory. Even so, there is no contention that such entangling has occurred here. In fact, the Board has also said that where the union has not indicated with specificity the relevance of the material which it seeks, it will not sift through the information to determine its relevance. *Automation & Measurement Div., The Bendix Corp.*, 242 NLRB 62 (1979). Indeed, that duty rests with the Union, not the Board. *American Stores Packing Co.*; *Emery Industries*,; *Leonard*

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[9] Cf., *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399 (1988), where the Supreme Court held that a union-represented employee's wrongful discharge tort complaint, under a theory of retaliation for filing a workers compensation claim, was not preempted by the Act as the collective bargaining agreement was not implicated and did not need to be interpreted. Similarly here, neither the collective bargaining agreement nor the union's status as the employees' bargaining agent are implicated in Dovey's decision to settle a potential tort claim.

[10] See *J.I. Case Co. v. NLRB*, 321 U.S. 332, 335 (1944). There the Court observed that a collective bargaining agreement regulates employment, comparing it to a trade agreement.

B. Herbert Jr. & Co.; *Western Massachusetts Electric Co.*, all supra. Also, *Bohemia, Inc.*, 272 NLRB 1128, 1129 (1984). Similarly, the Charging Party here has failed to describe the relevance of the material sought with the requisite specificity.

It should also be noted that here, as in *BP Exploration (Alaska)*, 337 NLRB 887 (2002), the Union insisted upon the actual document, not the information contained in the document. This insistence did not inform Respondent of what the Union's purpose was. Respondent believed it had the right to keep the substance of the agreement private. Aside from whether its belief was well-founded, it also knew that the tort settlement provision was not something which the Union could demand as presumptively relevant to any legitimate union purpose or need. It was, therefore, privileged to keep its terms private until the Union explained its purpose. But the Union never has; instead, it filed the unfair labor practice charge.

Accordingly, I conclude that Respondent is not obligated to provide the Dovey 'separation package' to the Charging Party. Neither it nor the General Counsel has demonstrated that its contents are relevant to any union duty to its represented employees.

In the event that the Board declines to agree with my findings concerning Respondent's right to await proof of relevance, it will then face Respondent's defense that Dovey's separation package need not be disclosed because of its confidential nature. It is therefore appropriate to deal with that issue in order to avoid a remand on the point. *West Penn Power Co.*, 339 NLRB 585 (2002).

However, Respondent has not presented any facts which warrant treating the severance package as confidential. The only fact which even suggests that Dovey wishes her severance agreement to be confidential is actually one which serves Respondent's self-interest, not hers. She has been silenced by the terms of the agreement, but she is not the one to whom the Charging Party's demand is directed. She hasn't been asked and it is her privacy interest which we must consider, not Respondent's.

My *in camera* review of the agreement demonstrates rather clearly that nothing found therein evidences her desire to keep the terms of the agreement confidential. It is only Respondent, the drafter, which asked for nondisclosure – by her, not by it; the duty the agreement imposes on her is designed not to protect her, but to protect Respondent. Accordingly, Respondent does not, because it cannot, point to any privacy interest which Dovey has sought to protect. Respondent cannot claim to be Dovey's protector. It has no standing to do so.

And, since the only confidential interest it is protecting is its own, the burden to demonstrate that the matter is confidential to it rests upon Respondent. See *Detroit Edison Co.* and *du Pont*, both supra, and cases cited. It has not met that burden whatsoever. Similarly, the facts do not demonstrate that Respondent has sought to accommodate whatever confidentiality defense it can muster. See, for example, the type of accommodation made in *National Steel Corp.*, 335 NLRB 747, 748 (2001), cited in *du Pont*. There is no evidence that it has responded to the Union by proposing to supply something less than the severance agreement itself. I find that curious since Respondent has carefully parsed the request for the information as a 'package' rather than the agreement itself. It clearly sees the difference between the underlying material and the agreement itself. Despite its recognition that there may be room for providing something less than the agreement itself, it never made such a proposal. I recognize that may well be the product of its failing to see beyond the Union's initial claim that the separation agreement was improper direct dealing. Nevertheless, its claim of confidentiality is not factually supported.

Accordingly, I find that Respondent has failed to demonstrate that Dovey's separation agreement is a confidential document. Therefore, it cannot invoke the defense of confidentiality. To the extent that confidentiality has been raised as an affirmative defense, it is rejected.

Yet, the fact remains that the Union has failed to demonstrate that the "separation agreement" is relevant to its duty as the exclusive collective bargaining representative of the bargaining unit employees. The complaint should be dismissed.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of §2(2), (6) and (7) of the Act.

2. Northern United Legal Assistance Workers, National Organization of Legal Services, UAW Local 2320 is a labor organization within the meaning of §2(5) of the Act.

3. The General Counsel has failed to prove that the severance agreement between Respondent and its former employee Kimberly Dovey has any relevance to either collective bargaining or to the Union's duties as the employees' collective bargaining representative.

4. Respondent has not engaged in the unfair labor practices as alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [11]

ORDER

The complaint is dismissed.

James M. Kennedy
Administrative Law Judge

Dated, Washington, D.C., August 7, 2006.

[11] If no exceptions are filed as provided by §102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in §102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.