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STATE OF COLUMBIA  
DEPARTMENT OF ADMINISTRATIVE HEARINGS

OPINION MEMORANDUM

TO: Pearl Morton, Chief Counsel

FROM:

DATE: July 30, 2015

RE: Opinion Memorandum for Mr. Field regarding Barker v. Department of Administrative Hearings

In response to Mr. Field's inquiries regarding the Unfair Practices Charge filed against our Department with the Columbia Public Employment Relations Board (CPERB) by former employee, Kristina Baker, who was terminated for just cause, I have prepared this memorandum to help understand where the law stands on Mrs. Baker's contentions and also regarding the question about remedies.

**A. Are Ms. Barker's allegation legally meritorious?**

**1) Interference with Right of Representation by Failure to Give Notice of Subject Matter**

Ms. Baker contends that the practices held by the CPERB in failing to explain the subject matter of the investigatory interview scheduled on July 7, 2015 violate her right of representation.

CPERA, Section 15 provides employees the right in choosing their own representation. Section 7 of the National Labor Relations Act (NLRA) provides the same rights, however the language in that section states "right to bargain collectively through representatives of their choosing." The court in *Roginson v. Columbia* explained that the CPERA is modeled after the NLRA. This is important because decisions that are rendered interpreting NLRA are also applicable to the CPERA.

In interpreting NLRA, the court in *Weingarten* held that Section 7 (applicable to CPERA Section 15) created the statutory right of an employee to union representation at any investigatory interview.

The letter sent to Mrs. Barker by Mr. Field gave her notice of the interviewing and explained that she was entitled to representation of her choosing. It appears that Mr. Field did not deprive her of her right to be represented by counsel.

However the court in *Pacific Telephone and Telegraph Company v. National Labor Relations Board* the court held that the securing of information as to the subject matter of the interview is no less within the scope of the right held within *Weingarten*.

Despite, Mr. Field giving Ms. Barker notice of the interview and the opportunity to have counsel present, the court has determined that that is not enough to allow for proper representation found within the meaning of Section 7. Ms. Barker had the right to know the allegations or the subject matter against her prior to the interview.

Therefore by failing to give Mrs. Barker information as to the subject matter held against her violated the Section 7 right to counsel at an investigatory interview.

## **2) Interference with Right to Engage in Concerted Activities**

Mrs. Baker contends that the letter issued to her on July 7, 2015 stating that in all investigations of employee misconduct, the employee is prohibited from discussing any disciplinary matter with any other employee other than their representative is a violation of her right to engage in concerted activities.

Under Section 15 of the Columbia Public Employment Relations Act (CPERA) state employees shall have the right to form, join and participate in the activities of employee organizations of their choosing for the purposes of the representation on all matters of employer-employee relations. In interpreting the CPERA the court in *Roginson v. Columbia* explained that CPERA is modeled after the NLRA. The NLRA, Section 7 grants employees the right to engage in concerted activities.

Mrs. Baker's contention falls within the Section 15; as a matter of law she has the right to discuss matters regarding her employment with her peers. However, the intention behind the notice was not to restrict her freedom to engage with her peers but specifically so that would not have time to contact her business-partner Renato Humphrey and possibly advise him that they had been caught.

In *Banner Health System and James Navarro* a case regarding a confidentiality agreement, the NLRA Board held that a blanket prohibition is unlawful. However to minimize the impact of Section 7 the burden falls on the employer to establish whether there is a legitimate business justification that outweighs employee's Section 7 rights. The board gave the following factors:

### **(i) Whether any given investigation witnesses needed protections**

Here, Mr. Fields has a legitimate interest in protecting Terrie Dayton, a peer who

had confronted Ms. Barker but was aggressive and threatened that Ms. Dayton would be sorry if she didn't mind her own business. Ms. Dayton witnessed the unlawful conduct of Barker by using state resources and creating transcripts for her own personal business. When Ms. Dayton approached Mr. Field she was very fearful of the repercussions and asked that he maintain their conversation in confidence.

Mr. Field could let the judge know at the informal settlement conference of August 6, 2015 that he had a legitimate interest in preserving Mrs. Dayton confidence.

It is likely that the judge would be inclined to accept this explanation.

**(ii) Evidence was in danger of being destroyed**

Here, Mr. Field discovered that Ms. Barker had been working from her desk and found two large piles of files under her desk involving depositions she prepared for a "Barker Court Reporting Services" in lawsuits unrelated to her work at the Department.

If Mr. Field had not prohibited her from speaking to her co-workers, it is high probable that she would have managed to remove the evidence from her computer and from under her desk.

It is likely that because the evidence was quite demonstrative against her and it was within her ability to destroy or have an accomplice destroy it for her, that the evidence would not be available to lawfully dismiss her from her position.

**(iii) Testimony was in danger of being fabricated or cover-up**

Here, Mrs. Barker was also working with Renato Humphrey, another hearing

reporter. If Ms. Barker would have been given the opportunity to speak with him, they could have managed to fabricate a story.

The judge is likely to agree with this argument.

Therefore, although Mr. Field general practice of prohibiting persons from speaking to employees about disciplinary matters violates an employees Section 7 right of engagement, the court could likley find that in this instance there is a legitimate interest in preserving evidence. Mr. Field's will meet the burden by establishing these facts.

**B. If unfavorable decision, what remedies would be available?**

In the event, that there is an unfavorable decision issued against the Department of Columbia Public Employment Relations Board, what remedies are available?

**GOOD CAUSE DISCHARGE**

Section 10(c) of the NLRA states that no Board shall require the reinstatement of any individual as an employee who has been suspended or discharged or the payment to him of any back pay if such individual was suspended or discharged for cause. In *Pacific Telephone*, the court made an interpretation of the NLRA by stating that although the board doesnt have the authority to reinstate for cause, if the discharge was due to asserting the Weingarten right, then reinstatement.

Mrs. Barker was terminated based on the conduct she performed during her employment. A stated within Allan Lennox's memo to Mr. Feild. There had been various complaints about Ms. Barker's work even by judges whom she was assigned to work under. Her conduct was causing a huge backlog within the system.

Additionally, her dishonesty about the outside work she was compiling while working for the state is grounds for a dismissal.

Therefore since good cause can be established, based on Section 10 of NLRA the board shall not reinstate Mrs. Barker or grant her back pay.

### **APPROPRIATE REMEDY BY THE BOARD FOR VIOLATION**

Section 19.5 of the CPERA grants the Board the exclusive jurisdiction to determine what remedy is necessary when an unfair practice is justified.

In *Columbia State Employees' Association v. Columbia Department of Mental Health*, the court held that since there was a violation of CPERA, the state employer was required to, within 10 days of service of the decision, post a "Notice" of the violation in an area where notices are customarily placed. The "Notice" was given by the Board explaining what violation the state agency had violated and how they violated it.

Here, the Board will likely provide CPERB will a Notice indicating that they violated Section 15 of the CPERA, analogous to Section 7 of the NLRA by failing to provide employees with notice of the subject matter of an interview where they have the right to have counsel present.

Therefore, it is likely that the Board will provide the notice to CPERB to post within 10 days of service of a decision for all employees to read. The notice will have to be maintained for 30 consecutive days.

### **CONCLUSION:**

1. CPERB violated Section 19.5 of the CPERA, analogous to Section 7 of the NLRA, by not providing Ms. Barker with the subject matter of the interview because as in *Pacific Telephone* the subject matter falls within Section 7.
2. It is likely that CPERB did not violate her right to engage in concerted activities

