GOVERNMENT OF THE DISTRICT OF COLUMBIA
PUBLIC EMPLOYEE RELATIONS BOARD

In the Matter of:	
DEBORAH CHISHOLM,	
Complainant,	PERB Case Nos. 99-U-32 and 99-U-33
v.	Opinion No. 761
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 20,	
Respondent.	

DECISION AND ORDER

The matter before the Board is a Joint Request for Subpoena requested by the Complainant Deborah Chisholm[1] ("Complainant" or "Ms. Chisholm") and the American Federation of State, County and Municipal Employees, D.C. Council 20 ("AFSCME" or "Union"). The subpoenas are being requested in the remedy phase of an Unfair Labor Practice matter in which the Board previously issued a Decision and Order.[2] In that decision, Opinion No. 656[3], the Board found that the Union

[1]Ms. Chisholm was employed as a Social Service Representative for the D.C. Department of Human Services. Her job entailed processing applications for emergency assistance, including Temporary Assistance for Needy Families (TANF), food stamps, and Medicaid benefits for the Income Maintenance Administration of the D.C. Department of Human Services ("DHS").

[2]The Union also made an individual request for other documents on July 25, 2003. Those documents included, *inter alia,* files of complaints regarding Complainant, a Salazar Corrective Action Plan ("Salazar") dated September 8, 1997, and Memoranda regarding twenty six (26) clients for whom Complainant failed to process benefits in violation of Salazar. (IR at page 4).

(continued...)

committed an unfair labor practice by breaching its duty of fair representation in its handling of Ms. Chisholm's grievance arbitration concerning her termination.

In the remedy phase of this matter, the Complainant must prove by a preponderance of the evidence that she would have prevailed on the merits of her grievance in the arbitration proceeding concerning her termination.[4] To aid her in proving her case, she is seeking copies of the seventy-nine (79) client case files, for which she was terminated. The Union is seeking copies of the same files in order to prove that she would *not* have prevailed at arbitration.

The Agency is seeking to prevent the release of the files on the basis of privacy and confidentiality concerns raised by the TANF, Health Insurance Portability and Accountability Act of 1996 (HIPPA), and Medicaid privacy provisions. Specifically, the Agency asserts that it: (1) should not be directed to produce the files; and (2) can be required to do so only by Court Order, after its refusal to comply with the Board's subpoena. Finally, the Agency contends that "out of an abundance of caution and to avoid any violation of the privacy provisions," the client files should not be released

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[2](...continued)
The Agency responded to that particular subpoena request by stating its willingness to produce the documents covered by the Union's July 25th request, to the extent that those documents do not contain information protected by District of Columbia and federal confidentiality provisions. (Hearing Examiner's Interim Report (IR) at pg. 5).

[3] Opinion No. 656 dealt with an unfair labor practice complaint filed by the Complainant, Deborah Chisholm, against the District of Columbia Office of Labor Relations and Collective Bargaining (OLRCB), the American Federation of State, County and Municipal Employees (AFSCME), D.C. District Council 20 and the American Federation of State, County and Municipal Employees (AFSCME), Local 2401. Specifically, the Complainant alleged that OLRCB violated D.C. Code § 1-617.04 (a)(1), (3) and (5) (2001 ed.) by conspiring with AFSCME to have her arbitration canceled. In addition, the Complainant asserted that AFSCME, Local 2401 and AFSCME, D.C. District Council 20 (Council 20 or Union) violated D.C. Code §1-617.04(b)(1) (2001 ed.) by canceling the arbitration after the arbitration process had begun. The relief sought by the Complainant includes backpay with benefits, front pay with benefits, attorney fees and costs. The Complaint was dismissed against AFSCME, Local 2401 and the Office of Labor Relations and Collective Bargaining. However, the Board found that AFSCME, Council 20 committed an unfair labor practice, but did not make a finding on the appropriate remedy. Instead, the Board ordered a hearing in order to determine the appropriate remedy.

[4]Specifically, the Complainant is seeking to prove that she was *not terminated for just cause.*

to either party. (IR at pg. 6). Furthermore, the Agency claims that "the parties' objectives can be reached through other means, i.e., the testimony of Complainant's supervisor." (IR at pgs. 5-6).

The Board's Executive Director referred the parties' subpoena requests to a Hearing Examiner for a determination on the issue of whether the confidentiality requirements under TANF, Medicaid, and HIPPA prevent the release of the requested client files and whether a court Order was required. In addition, the Hearing Examiner was to decide what action, if any, the Board should take to enforce subpoenas issued on July 11 and 25, 2003.[5] The Hearing Examiner issued an Interim Report and Recommendation (IR) in which she made the findings that follow in the paragraphs below.

The Hearing Examiner compared the language contained in each of the confidentiality provisions (TANF, Medicaid, and HIPPA) and determined that there was no bar to releasing the client files.[6] In addition, the Hearing Examiner found that the confidentiality provisions in all three Acts[7] provided exceptions for releasing the files. Specifically, the Hearing Examiner determined that the confidentiality provisions of TANF, Medicaid and HIPPA provided exceptions which allowed files to be released: (1) in connection with administration of the aid and (2) in *investigations* concerning the administration of the aid.[8] The Hearing Examiner concluded that a hearing as to

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[5] These subpoena requests were made by the Complainant and AFSCME. The parties are seeking copies of documents and portions of case files under the maintenance and control of DHS.

[6]The Hearing Examiner's detailed analysis and interpretation of the confidentiality language in the TANF, Medicaid, and HIPPA provisions will not be outlined in detail in this Opinion. However, we note that a thorough discussion of the Hearing Examiner's findings may be found on pages 6-9 of the Hearing Examiner's Interim Report and Recommendation. Pages 6-9 of the Hearing Examiner's Report are attached to this Opinion.

[7]TANF, Medicaid, and HIPPA and their confidentiality/privacy provisions were analyzed and compared by the Hearing Examiner. See, D.C. Code §4-209.04 "Confidentiality of Information"; 42 CFR, Subchapter C, Part 431, Subpart F (42 CFR 431.301-302); 45 CFR Parts 160 and 164 (45 CFR §164.512(e)(1)(I), respectively.

[8] For example, the privacy provisions of TANF provide that the use or disclosure of information concerning applicants and recipients of TANF shall be limited to purposes directly relating to the administration of TANF, defined by the statute to include disclosure "*for purposes of providing services for applicants and recipients; [or]...any investigation...or civil proceeding conducted in connection with the administration of TANF*." *(See, D.C. Code §4-209.04 and IR*

(continued...)

whether there was *just cause* for dismissal of an employee responsible for the delivery of statutory benefits qualifies under both of the criteria for permissible disclosure. Furthermore, the Hearing Examiner found that the confidentiality of information provisions do not pose an obstacle to the Agency's compliance with the Board's subpoena. Finally, the Hearing Examiner found that due process requires that the Complainant have adequate access to case files which formed the basis of her termination.

In view of the above, the Hearing Examiner recommended that the Board order: (1) the subpoenaed files be redacted of all identifying information by DHS; (2) a code for identifying files used in this proceeding be developed by DHS personnel or by default by the Hearing Examiner; and (3) that copies of the client files thereafter be made available to the parties by DHS. In addition, the Hearing Examiner recommended that the client files, in their redacted form, be: (1) marked and maintained as confidential and (2) returned to DHS at the completion of all proceedings. Finally, the Hearing Examiner recommended that DHS be directed to deliver to the parties, no later than twenty (20) days after the issuance of a Board order, any other subpoenaed materials. This would include, for example, Complainant's personnel file, or other documents not subject to client confidentiality concerns and which were not previously made available to the parties.

The Board has reviewed the findings and conclusions of the Hearing Examiner and find them to be reasonable, persuasive and consistent with the law. Furthermore, the Agency provided no support for its contention that a court order is required before it can produce the subpoenaed case files. Therefore, we adopt the recommendation of the Hearing Examiner in its entirety. Finally, in the event that the Agency refuses to produce the documents, we are prepared to take appropriate steps to enforce the subpoenas pursuant to D.C. Code §1-605.02(16)(2001 ed.).

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[8](...continued)
at pg. 6).

ORDER

IT IS HEREBY ORDERED THAT:

1. The Department of Human Services (DHS) comply with the Board's subpoenas issued on July 11, 2003 and July 25, 2003.

2. DHS shall redact the subpoenaed files of all individual identifying information, including names, addresses, social security numbers, and all other identifying information.

3. DHS shall make copies of the redacted client files and that they be made available to the parties within twenty (20) days after the issuance of the Board's Order. DHS should also deliver to the parties, no later than twenty (20) days after the issuance of this Board Order, any other subpoenaed materials, eg. Complainant's personnel file, not subject to client confidentiality concerns and not previously made available to the parties.

4. DHS mark the redacted files "confidential" and the American Federation of State, County, and Municipal Employees, District Council 20 and the Complainant's counsel (hereinafter "parties") maintain the confidentiality of the files .

5. The parties return the files to DHS after the completion of the proceeding concerning the appropriate remedy.

6. Within thirty (30) days of the issuance of this Decision and Order, DHS shall provide the Board with written notice concerning the steps that it has taken to comply with paragraphs 1-4 of this Order.

7. Within thirty (30) days after the issuance of a Final Decision and Order in this matter, the parties shall provide the Board with written notice regarding the steps they have taken to comply with paragraph 5 of this Order.

8. Pursuant to Board Rule 559.1, this Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD
Washington, D.C.

November 24, 2004

it to do so. Response pp 4-5. The Agency suggests that "out of an abundance of caution and to avoid any violation of the privacy provisions," the client files should not be released to either party and that "the parties objectives can be reached through other means, i.e. the testimony of Complainant's supervisor." Id.

The Agency does not expressly refuse to comply with the subpoena, the necessary predicate for a Board application for judicial enforcement of its subpoena, but makes two procedural proposals. First, that should I determine that the subpoena must be complied with, "the matter should be referred to the Superior Court of the District of Columbia, as required by the federal medicaid regulations for a judicial determination of the relationship between the new privacy provisions and the medicaid and TANF rules governing disclosure of protected information." Alternatively, the Agency states that should I determine that the interests of the Department can adequately be protected by "redacting the applicant-identifying information that cannot be legally disclosed... supervisory and management personnel in the TANF and medicaid programs would perform the required redaction as set forth in any PERB order ... [but] respectfully requests that any disclosure of identifying information of any applicant whose file has been subpoenaed be disclosed only pursuant to a court order setting forth the extent and method of redaction." Response pp.5-6.

In their Joint Request for Enforcement of Subpoenas (Jt Request), Complainant and the Union (the Requesting Parties) argue that all three of the confidentiality requirements to which the Agency refers - the Confidentiality of Information provisions of TANF (D.C. Code sec.4-209.04); Medicaid Regulations (42 CFR Subchapter C, Part 431, Subpart F, Response Attachment 2),and the recently issued HIPAA regulations (45 CFR 164) allow for the disclosure of subpoenaed documents under the circumstances presented here. Jt Request p.3-4. They note that in March 2003, the Union requested the Agency to enter into a qualified protective order to maintain confidentiality, but that the Agency had refused to agree, and that a modified Stipulated Protective Order is attached to the Joint Request.[11]

DISCUSSION AND CONCLUSIONS

Confidentiality Requirements under TANF

D.C. Code Section 4-209.04 "Confidentiality of Information", provides that the "use or disclosure of information concerning applicants and recipients of TANF... shall be limited to purposes directly relating to the administration of TANF," defined by the statute to include disclosure "for purposes of providing services for applicants and recipients; [or] ... any investigation... or civil proceeding conducted in connection with the administration of." TANF.

[11] The proposed Stipulated Protective Order, Jt Request, Attachment 5, provides for the maintenance of confidentiality of the record documents and their return at the close of the proceedings, or alternatively for redaction, by the parties or the Hearing Examiner in order to remove any confidential information.

The Agency states that "arguably" but "without conceding this to be the case....the Department's charges against Complainant that resulted in her termination from employment involve the administration of the program" Reponse, p.4. It appears clear to me that a hearing as to whether there was just cause for dismissal of an employee responsible for the delivery of statutory benefits qualifies under both of the criteria for permissible disclosure, and that the Confidentiality of Information provisions do not pose an obstacle to the Agency's compliance with a PERB subpoena or, as I recommend below, a PERB order directing compliance. I conclude, however, that individual identifying information in the client files is neither relevant nor necessary to the pending inquiry as to whether there was cause for Complainant's termination, and thus does not satisfy the statutory requirement that disclosed information be directly related to providing of services or an investigation of the administration of the TANF program. Accordingly, I conclude that the legal requirements and the interests of all concerned can best be served by the inclusion in PERB's order of a direction that DHS undertake the redaction from client files of all individual identifying information. Such redaction will serve to protect the DHS clients who are the intended beneficiaries of the confidentiality requirements and protect the DHS from feared exposure to penalties or civil liability.

Medicaid Confidentiality Requirements

The Agency states that under Medicaid regulations "any medical information associated with an applicant for medicaid benefits must be disclosed only under court order. Attachment 2....[and that] under Medicaid regulations, an administrative order requiring the Department to disclose protected information is not tantamount to a court order." Response p.4, underlining in the original. The Agency provides no specific citation, and I found no such provision in the portions of the Medicaid regulations excerpted as Attachment 2 to the Response, nor in the referenced Medicaid regulations, 42 CFR, Subchapter C, Part 431, Subpart F.

The Medicaid regulations require that a state plan for administering Medicaid benefits[12] "restrict the use or disclosure of information concerning applicants and recipients to purposes directly related to administration of the plan...." which "include (c) Providing services to recipients; and (d) Conducting or assisting an investigation ... related to the administration of the plan." , 42 CFR 431.301-302. The restrictive language is in all material respects the same as that found in the TANF confidentiality provisions. I thus conclude that an inquiry into whether there is cause for the termination of a DHS employee responsible for the delivery of Medicaid benefits is directly related both to "[p]roviding services for recipients" and "[c]onducting an investigation related to the administration of the plan," and that disclosure for that purpose is permissible. As with TANF, I further conclude that individual identifying information in the files is neither necessary nor directly related to the conduct of the pending proceeding, and should be redacted by DHS.

[12] The District of Columbia qualifies as a State under the Medicaid structure, and the DCDHS as the agency responsible for administering the plan.

HIPAA Confidentiality requirements

The recently issued HIPAA regulations, 45 CFR Parts 160 and 164, which establish, inter alia, "Standards for Privacy of Individually Indentifiable Health Information" provide that

> [a] covered entity may use or disclose protected health information without the written authorization of the individual... or the opportunity of the individual to agree or object... in the situations covered by this section, subject to the applicable requirements of this section....
>
> (e) Standard: disclosures for judicial and administrative proceedings:
> (1) Permitted disclosures. A covered entity may disclose protected health information in the course of any judicial or administrative proceeding:
> (i) In response to an order of a court or administrative tribunal, provided that the covered entity discloses only the protected health information expressly authorized by such order....
>
> 45 CFR section 164.512(e)(1)(i).[13]

Notwithstanding the Agency's stated concern that the HIPAA regulations are recently issued and "untested," Response 4-5, it seems clear to me that PERB has authority under the above quoted provision to issue an order permitting and requiring the disclosure of otherwise protected files, under conditions discussed below, and that DHS can safely comply with such an order. The Agency nevertheless contends that the matter should be "referred to the Superior Court of the District of Columbia, *as required by the federal medicaid regulations* for a judicial determination of the relationship between the new privacy provisions and the medicaid and TANF rules governing disclosure of protected information." Response, p.5, emphasis supplied. Once again, the statement as to Medicaid regulations is made without citation. As discussed above, I see no conflict between the confidentiality requirements of TANF, Medicaid and HIPAA, all of which, as I read them, permit disclosure pursuant to a PERB order in the circumstances of this case. Accordingly, I see no reason why PERB should seek an advisory judicial opinion before issuing an order in this proceeding.

The question remains whether having the power to do so, PERB *should* issue an order requiring compliance with the subpoenas. Under PERB's current rule, the Complainant bears the burden of establishing in this proceeding that she would have

[13] The regulations further provide for disclosure in response to a subpoena that is not accompanied by an order of a court or an administrative tribunal under specified conditions, including a "qualified protective order" issued by a court or administrative tribunal, or a stipulation of the parties to specified conditions of confidentiality. 45 CFR sec. 512(e)(1)(ii). In the circumstances of this case, a stipulation by the parties seems an unlikely option, and as discussed below, I recommend that PERB's order include the specified protective requirements.

prevailed if the arbitration had not ended prematurely. That being the case, it seems clear to me that due process requires that she have adequate access to the client files that were referenced as the bases for her termination. By the same token, the Union requires such access to respond to Complainant's claim of injury.[14] However, as stated above, I see no reason why the files cannot serve the purposes of this proceeding while stripped of any information that would identify individual clients, and every reason, including the legal imperatives discussed above, why that should be done.

RECOMMENDATION

For the reasons discussed above, I recommend that the Board direct that individual identifying information, including, names, addresses, social security numbers and all other identifying information be redacted from the subpoenaed client case files by supervisory and management personnel in the DHS TANF and Medicaid programs; that a code for identifying the files for use in this proceeding be developed by DHS personnel, or by default by the Hearing Examiner, and that copies of the client files thereafter be made available to the parties by DHS.[15] In an excess of caution, I further recommend that the client files, in their redacted form, nevertheless be marked and maintained as confidential when used in this proceeding, and returned to DHS after completion of all proceedings. I further recommend that DHS be directed to deliver to the parties, no later than 20 days after issuance of a Board order, any other subpoenaed materials, e.g., Complainant's personnel files, not subject to client confidentiality concerns and not previously made available to the parties.

January 8, 2004

Carmel P. Ebb
Hearing Examiner

[14] I give no weight to the statement by counsel for Complainant in a September 5 teleconference that he did not need the files to prove his case. See Response, p. 5. Whether the statement represented a misunderstanding of Complainant's burden, or an alternate theory of entitlement, see Jt. Req., note 2., it was quickly withdrawn.

[15] In effect, I am recommending what the Arbitrator urged five years ago, see note 8, supra.

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order in PERB Case No. 99-U-32 and 99-U-33 was transmitted via Fax and /or U.S. Mail to the following parties on this 24th day of November, 2004.

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