BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE

WILLIAM REEVES,	)	
Grievant	)	**DOCKET NO. 97-02-116**
v.	)	
FAMILY COURT OF THE STATE OF	)	
DELAWARE,	)	**ORDER ON MOTION TO DISMISS**
Agency	)	
	)	

BEFORE Katy K. Woo, Chairperson, Robert Burns, Vice Chairperson, Dallas Green, Member, constituting a quorum of the Merit Employee Relations Board pursuant to 29 Del. C. Section 5908(a).

WHEREAS, on the 15th day of May, 1997, there came before the Board a request by the grievant, William Reeves, for an administrative subpoena to compel the Family Court to produce: (1) the tape of a visitation hearing in Family Court that resulted in the grievant's being held in summary criminal contempt, which was the basis for the termination of his employment; and (2) copies of the personnel files of other Family Court employees who have been suspended or terminated for criminal conduct or violations or for tardiness.

The Family Court opposed the request for a subpoena. The State contends that the tape is merely cumulative, because, under the Family Court Rules, the grievant has already been provided with a transcript of the hearing in which he was cited for summary criminal contempt. The State also contends that the only purpose for which grievant seeks the tape is to try to collaterally attack the criminal contempt order, since the grievant did not appeal that order to a higher court. As for the requested personnel records, the State argues that those records are privileged and confidential, citing the Delaware Freedom of Information Act and the Family Court Civil Rules.

The Board finds that the only purpose which the tape might serve is to call into question the propriety of the Family Court's finding grievant in summary criminal contempt. This was underscored by his counsel's argument at the haring, in which he stated that the tape was important to show whether his client had "snickered" or audibly hit the table in front of him with his hand. The Board will not entertain any argument that tries to collaterally attack the criminal contempt order of the Family Court. See Taylor v. Hatzel & Buehler, Del. Supr., 258 A.2d 905 (1969)

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(failure to exercise statutory right of appeal precludes collateral attack); accord Seaford Feed Co. v. Moore, Del. Super., 1989 WL 48692 (Apr. 19, 1989) (Ridgely, Pres. J.). The grievant's remedy concerning the contempt order was to appeal to a higher court. He did not, and he cannot now try to use this proceeding to challenge the judgment of criminal contempt against him. The Board therefore denies the grievant's request for an administrative subpoena to produce the tape, since it is not relevant to the issues that are to be decided by the Board on the merits of the termination of his employment.

As for the Family Court personnel records, the Freedom of Information Act, 29 Del. C. Ch. 100, does not prohibit their disclosure. Although Section 10002(d)(1) of FOIA exempts personnel files if disclosure would be unwarranted invasion of privacy, "information available under the FOIA is not necessarily unavailable through discover." Friedman v. Bach, Halley Stuart Shields, Inc., 738 F.d. 1336, 1344 (D.C. Cir. 1984).

In re Subpoena Duces Tecum of Gillespie, Iowa Supr., 348 N.W.2d 233 (1984), a teacher whose contract had not been renewed tried to subpoena the school board's evaluations of all other teachers in the system made by the superintendent or principal within the last three years. The Iowa Supreme Court held that "'[w]e do not believe the legislature intended [the state Freedom of Information Act] to be applicable to administrative subpoenas.... "'348 N.W.2d at 237 (quoting Iowa Civil Rights Commission v. City of Des Moines, Iowa Supr., 313 N.W.2d 491, 495 (1981). The state supreme court noted that the "federal courts have applied the same rationale when the custodian of public records has sought to invoke similar exceptions in the federal Freedom of Information Act." Gillespie, 348 N.W.2d at 237 (and citations therein). "This does not mean, however, that the court upon remand is without power to protect" the other teachers "from unnecessary injury or damage," for example, by way of a protective order or an In camera inspection to exclude material "that is not only embarrassing but irrelevant to the issues before the board." Id. See also Equal Employment Opportunity Commission v. University of Notre Dame Du Lac, 715 F.d. 331, 335 (7th Cir. 1983) (tenure review materials redacted "to delete from the files the names and any and all identifying feature of the academicians who participated In the respective tenure peer reviews"; EEOC also required to sign a confidentiality agreement).

Family Court Civil Rule 90.1 does not have any application here. Subsection (c) of that rule provides that "[a]ll records of proceedings before the Court shall be private and shall be open or available to anyone except (1) the Court and its staff, or (2) the parties and their attorneys, or (3)

other courts and public agencies, ..." Rule 90.1 was intended to protect the personal privacy of litigants before the Family Court in matters involving divorce, custody, child support, visitation, and other matters over which the Court has original jurisdiction. It cannot be cited as a shield to prevent discovery of records of the internal administration of the Court, such as personnel records, particularly in an administrative proceeding in which the Family Court is a respondent alleged to have violated the Merit Rules. See Pusey v. Delaware Alcoholic Beverage Control Commission, Del. Supr., 596 A.d. 1367 (1991). To deny the grievant access to potentially relevant materials in the possession of the Family Court would be to risk a denial of due process in the preparation of his case.

The Board, however, does not mean to suggest that any personnel records produced by the Family Court to the grievant will be relevant to his case. That is to say, it remains to be seen whether the Board will admit any such records into evidence at a hearing on the merits, or will decide whether those records have any relevance to the issue of just cause.

The Board is extremely sensitive to the privacy interests of other Family Court employees (past and present) whose personnel records might be disclosed as a part of this administrative process. The personnel exception under FOIA, though not controlling, reflects a legislative "judgment that certain delineated categories of documents may contain sensitive data which warrants a more considered and cautious treatment." Friedman, 738 F.d. at 1344. Accordingly, the Board will exercise its authority under 29 Del. C. Section 5944 to require the Family Court to produce to the grievant's counsel copies of those portions of the personnel records reflecting disciplinary action taken against Family Court employees who since 1988 have been terminated or suspended for criminal conduct, subject to the following protections:

1. Counsel for the Family Court will redact the personnel records so as to include only those portions that reflect suspension or termination for criminal conduct, blacking out any names, social security numbers, or other identifying information that might disclose the identity of the employee;

2. Prior to providing the redacted records to the grievant's counsel, the Family Court will notify the other employee(s) in writing that the redacted records are being produced in response to a subpoena by the Board unless, within ten days of the date of the notice letter, the employee files a motion to quash in the Superior Court and serves that motion on the Family Court and its counsel, in which case counsel for the Family Court shall promptly notify the Board and its counsel; and

3. Prior to receiving the redacted records, grievant's counsel shall draft a confidentiality agreement, to be signed by the grievant, his counsel, counsel for the Family Court, and counsel for the Board, undertaking not to disclose the contents of those records to anyone or to use those records for any purpose other than for presenting grievant's case before the Board and in any subsequent appeal. The confidentiality agreement will be sent to the Board's and the Family Court's counsel for their review in draft form prior to execution.

In order to expedite this discovery process, the Board directs the Family Court to inspect their personnel files for responsive documents, and to send notice letters to any affected employees by June 16, 1997. The grievant's counsel shall draft a proposed confidentiality agreement for review by the Board's and the Family Court's counsel by that same date. If no employee moves to quash, then the Family Court shall produce the redacted documents by July 1, 1997, after the execution of the confidentiality agreement.

IT IS ORDERED that the request for an administrative subpoena duces tecum is denied in part and granted in part, subject to the conditions outlined in this order.

Katy K. Woo, Chairperson

Robert Burns, Vice Chairperson

Dallas Green, Member

Original: File

Copies: Grievant
Agency
Agency's Representative
Merit Employee Relations Board
State Personnel Office (3 copies)

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