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**======== Start of Answer #1 (1499 words) ========**

**OPINION MEMORANDUM**

To: Mr. George Field
Fm: Applicant
Da: July 30, 2015
Re: Baker v. Department of Administrative Hearings

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As you've requested, the following is an opinion memorandum to help determine whether either of Ms. Baker's allegations is legally meritorious and what, if any remedies would be available should finding(s) ultimately issue against the Department.

Also, just as a recommendation, I suggest that we be prepared to give an employee under an investigatory review what information we can give them, instead of refusing them all of their request and giving them nothing. And, instead of the current policy of prohibiting employees from discussing matters under investigation, we should make a determination on a case-by-case basis as to whether there's a legitimate business justification for confidentiality.

## DISCUSSION

### A. Ms. Baker's Allegations

**1. Department Interefered with Ms. Baker's and the Union's Right to Representation by Refusing to Provide Ms. Baker with Requested Information Before Her Investigatory Interview.**

**RIGHT TO UNION REPRESENTATION AND THE SECURING OF INFORMATION**

In Columbia, a state employee has a right to union respresentation at a meeting with his superiors held with a significant purpose to investigate facts to support disciplinary action and may not be dismissed for attempted exercise of that right. Roginson. Further, the securing of information as to the subject matter of the interview is no less within the scope of that right. Pacific Telephone. The information provided need be nothing more than that which provides the representative and the employee the opportunity to become familiar with the employee's circumstances. Ibid. The employer does not have to reveal its case, the information obtained or even the specifics of the misconduct to be discussed. Ibid. A general statement as to the subject matter of the interview that identifies to the employee and his representative the misconduct for which discipline may be imposed will suffice. Ibid.

Here, in our specific situation with Ms. Baker, at the investigatory interview Special Investigator Justine Israel and Supervisor Allan Lennox refused to provide Baker and her union representative the specific topics, the list of questions, and the nature of any charge(s) of impropriety that the interview encompass. Ms. Israel stated only that the subject matter and potential disciplinary charges would become evident from the line of questioning in the interview.

Under the above law, Ms. Israel and Mr. Lennox's refusal was likely inappropriate because not only did they refuse what was requested, there was a refusal to provide anything at all. What they should have done to satisfy the securing of information standard would be to deny what they did not have to provide, such as the nature of the charges and the list of questions, but provide what would of sufficed, such as the specific topics because that is what falls

possibly under the employee's circumstances that the employee and union were trying to get acquinted with.

We could possibly put up an argument that the "specific topics" have nothing to do with the "employees" circumstances. But the fact that every one their requests to secure information was refused is not going to look good. And just as a note for the future, we should probable be prepared with the information we can give the employee and their representation, so we can give it to them along with refusals we may have for their requests.

**Conclusion**

By refusing their every request and not at least giving them the specific topics that likely did involve the employees' circumstances, we likely interered with Ms. Baker's union representation because the securing of information falls within that employee's rights.

**2. Department's Infererence with Ms. Baker's Right to Engage in Concerted Activity by Having and Applying a Blanket Policy Prohibiting Ms. Baker from Speaking to Anyone but Her Representative.**

**CONCERTED ACTIVITIES**

Pursuant to Section 7 of the Act, employees have the right to engage in concerted activities. NLRA Sec. 7. An employer may not, without violating Section 8(a)(1), discipline or otherwise threaten, restrain or coerce employees because they engage in protected concerted activities. NLRA Sec. 8(a)(1). Central to the protections provided by Section is the employee's right to communicate to co-workers about their wages, hours, and other terms and conditions of employment. Banner Health. To justify a prohibition on employee discussion of ongoing investigations, an employer must show that it has a

legitimate business justification that outweighs employees' Section 7 rights. Ibid. No legitimate and substantial justification, however, exists where an employer routinely prohibits employees from discussing matters under investigation. Ibid.

Here, in our specific situation with Ms. Baker, we likely interfered with Ms. Baker's right to engage in concerted activity by maintaining and enforcing a policy prohibiting employees from discussing employee disciplinary matters, including ongoing investigations of employee misconduct. The law only gives the employer one justification for prohibiting an employee from discussing ongoing investigations with other employees and that's if they can show that is has a legitimate business justification that outweighs the employees rights. But the law will take away that justification if the employer "routinely" prohibits employees from discussing matter under investigation. That's what we have done here.

By maintaining and enforcing a policy prohibiting employees from discussing employee disciplinary matters, including ongoing investigations of employee misconduct, with their co-workers, under the law, we are "routinely" prohibiting employees from exercising their Section 7 rights. And as such, even if we did have a legitimate business justification that we could show that outweighed the employee's Section 7 rights, we would be stripped of that justification because the courts think there is no legitimate or substantial justification that outweighs an employees Section 7 rights.

Just as a suggestion, instead of maintaining and enforcing the current prohibition, we should look to determining if there should a prohibition on a case by case basis.

**Conclusion**

The Departnments current policy, that it "maintains" and "enforces," violates Ms. Baker's right to concerted activity because it "routinely" prohibits employees from

exercising their Section 7 rights and can never be a "legitimate and substantial justification."

**B. Available Remedies (If Any)**

According to the State of Columbia's Public Employment Relations Board's "Unfair Practice Charge," Ms. Baker requests reinstatement, back pay, restoration of benefits, and all remedies that in the view of the Columbia Public Employment Relations Board will effectuate the purposes of the Columbia Public Employmnet Relations Act.

**REINSTATEMENT AND BACK PAY**

Under Section 10(c) of the Act, "No order of the 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." NLRA Sec. 10(c). And, where employees are clearly discharged for cause and not for attempting to assert their Weingarten rights by requesting union assistence at an investigatory interview, Section 10(c) precludes an order of pack pay and reinstatement. Pacific Telephone.

Here, in our specific case with Ms. Baker, we will not have to reinstate her or pay her back pay because she was terminated with cause for the theft of state resources when when she on 16 occassions called in sick while she was working at another job as a court reporter, and when she used the states resources, including hours, equipment, to transcribe deposition for her own business. These are all sufficient causes for discharge.

**Conclusion**

Ms. Baker will not have to be reinstated or paid back pay because she was discharged for the cause of stealing state resources and the above intereferences with her rights to union representation and concerted activities are separate issues with their own remedies.

**COLUMBIA PUBLIC EMPLOYMENT RELATIONS BOARD REMEDY - ORDER TO POST CEASE AND DESIST "NOTICE TO EMPLOYEES"**

Section 19.5 of Columbia Public Employment Relations Act, gives the Board "the power to issue a decision and order directing an offending party to cease and desist from from all unfair practice. CSEA. Accordingly, pursuant to Section 19.5, the board has the power to order the Departments director and represenatives, within 10 work days of service of their decision, to post at all work locations where notices are customarily placed places copies of CEASE AND DESIST: "NOTICE TO EMPLOYEES" (Appendix), signed by an authorized agent. Ibid. Posting must be maintained for up to 30 consecutive days. Ibid.

Here, and unfortantely, we will have to post "CEASE AND DESIST" "NOTICES TO EMPLOYEES" for our above interferences with Ms. Baker's Section 7 rights.

**CONCLUSION**

As you've requested, the above is a determination of whether either of Ms. Baker's allegations is legally meritorious and what, if any remedies would be available should finding(s) ultimately issue against the Department.

And again, just as a recommendation, I suggest that we be prepared to give an employee under an investigatory review what information we can give them, instead of refusing them all of their request and giving them nothing. And instead of the current policy of prohibiting employees from discussing matters under investigation, we should make a determination on a case-by-case basis as to

whether there's a legitimate business justification for confidentiality.

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Question #1 Final Word Count = 1499

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