

STATE OF CONNECTICUT  
OFFICE OF PUBLIC HEARINGS

CHRO ex rel. James Brule, Douglas R. Eitelman,  
David Bruce Sloman, Stephen Warner, and Dawn  
Wynkoop,  
Complainants

CHRO Nos. 0840032,  
0840162, 0840243  
0840031, 0840000

v.

NERAC, Inc. and Kevin Bouley,  
Respondents

May 9, 2014

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**RULING ON RESPONDENT'S MOTION FOR ARTICULATION**

**I.**

**Summary**

On April 11, 2014, Complaint filed a Request for an Expedited Ruling (Request) enforcing two previous motions to compel rulings granted by this tribunal. On December 17, 2012, this tribunal orally ordered the respondent to allow a forensic examination proposed by the CHRO and Complainants' expert, of respondent's servers that may contain the emails of Mr. Harger and Kevin Blackwell and of Mr. Harger's hard drive. Complainants requested again, in their April 11, 2014, motion for expedited ruling, a specific order endorsing the protocol and use of a key word search list, proposed by the CHRO and Complaints, to be used by their consultant in the forensic examination. The expedited request motion attached exhibits that included a series of email correspondence between the parties, which this tribunal took into consideration when granting the complaint's request. More than ten (10) days elapsed prior to the granting of the expedited request on April 22, 2014. The expedited request for the use of the CHRO and Complainants' protocol and key word search list, for use by the

forensics consultant on the examination of the email accounts of Messrs. Harger and Blackweel on NEARC's server and the former hard drive of Mr. Harger **was GRANTED**.

On April 24, 2014 Respondent's filed, for a third time, a motion questioning this tribunal's third motion compelling the respondent to comply the complainant's discovery request regarding e-mails between NERAC employees, Mr. Harger and Mr. Blackwell. The latest motion was a Motion for Articulation. On May 2, 2014, the Commission and complaints' filed a response to the Respondent's Motion for Articulation requesting that this tribunal re-set forth the scope of its April 22, 2014 ordering the examination of Mr. Harger and Mr. Blackwell's email. Based on the reasons set forth below, this ruling **GRANTS** the complainants and Commission's request to compel respondent's production, specifically, of NERAC's server and Mr. Harger's hard drive for the forensic search of evidence in accordance with complainant's and Commission's protocol, including the key word search.

## II.

### LAW

The conference summary orders, in all five of the original individual complainants, state that a Motion to Compel may be ordered if the moving party certifies that good faith attempts have been made to resolve: "1) why the opposing party has failed to comply with the discovery requests or; 2) the differences concerning the subject matter of the objection and that the parties have been unable to reach an agreement. The Presiding Human Rights Referee **may act upon the motion without**

**further pleading by the responding party.”** (emphasis added) This tribunal granted complainants and Commission’s motions to compel production of the above-described emails in a written order issued on July 19, 2012, orally on the record, at the public hearing on December 17, 2012 and on April 22, 2014 endorsing the use of Complainants’ and Commissions forensic protocol and key word search.

*Connecticut General Statute § 4-177c. Contested cases. Documents. Evidence. Arguments. Statements, provides:*

“(a) In a contested case, each party and the agency conducting the proceeding shall be afforded the opportunity (1) **to inspect and copy relevant and material records, papers and documents not in the possession of the party or such agency**, except as otherwise provided by federal law or any other provision of the general statutes, and (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved.

(b) Persons not named as parties or intervenors may, in the discretion of the presiding officer, be given an opportunity to present oral or written statements. The presiding officer may require any such statement to be given under oath or affirmation” (emphasis added)

*Regulations of Connecticut State Agencies §46a-54-83a, Powers and duties of the presiding officer, provides:*

“(a) The presiding officer shall have full authority to control the contested case proceeding, to receive motions and other papers, to administer oaths, to admit or to exclude testimony or other evidence and to rule upon all motions and objections. **A presiding officer may, on his or her own or upon motion by a party, subpoena witnesses and compel their attendance for the purpose of providing testimony or producing physical evidence or both.** Such authority shall vest in the presiding officer upon appointment by the chief human rights referee. (emphasis added)

(b) The presiding officer, in the exercise of reasonable discretion, may exclude from the hearing room any witness not testifying, and may exclude from attendance or participation in the proceeding any person

who engages in improper conduct during the hearing as provided in section 1-232 of the Connecticut General Statutes.

(c) The presiding officer may continue a hearing or conference from day to day or adjourn it to a later date or to a different place by appropriate notice to all parties and intervenors. Such notice shall be posted on the door of the hearing room if the change is made within twenty-four (24) hours of the scheduled hearing.”

*Regulations of Connecticut State Agencies §46a-54-89a.* Disclosure of documents provides in relevant part that:

“(a) Each party shall be afforded the opportunity to inspect and copy relevant and material records, papers and documents not in the possession of the party, except as otherwise provided by applicable state or federal law.

**(b) If a party fails to comply with an order of the presiding officer regarding a request for disclosure or production, the presiding officer may issue a non-monetary order. The order may include:**

**(1) An order that the matters that are the subject of the request for production or disclosure shall be established in accordance with the claim of the party requesting such order; and**

**(2) An order prohibiting the party who has failed to comply from introducing designated matters into evidence.” (Emphasis added)**

### III.

#### Decision

The statutes and regulations confer wide discretion to the presiding referee to the control the hearing procedure and the production of evidence. On July 19, 2012 this tribunal granted the Commission’s and Complainants’ Motion to Compel the respondent to produce “any and all statements, affidavits, documents or notes by

Wayne Simpson, Manager to Kevin Bouley or any other employee Manager of NERAC that are[sic] in any way discuss or describe discrimination or bias at NERAC.”<sup>1</sup> On December 17, 2012, Mr. Harger testified at hearing under oath, that he sent Mr. Blackwell emails, which were not produced due to an alleged corrupted hard drive. This tribunal, on the recorded ordered the respondents to allow a forensic examination by complainant’s expert of any of NERAC’s electronic devices that reasonably may contain Mr. Harger’s email or where the respondent is uncertain of what is contained on the devices.

For the third time this tribunal ordered, on April 22, 2014, the respondent to allow a forensic examination of the respondent’s server and Mr. Harger’s hard drive. This examination was limited to the email accounts of Mr. Harger and Mr. Blackwell and the use of complainant’s protocol and key word search. The protocol proposed by the complainants and the Commission is more than reasonably calculated to lead to admissible evidence of discrimination based on Mr. Harger’s testimony that he emailed Mr. Blackwell regarding the complainants’ employment. It is now almost two years since the granting of complainants’ and Commission’s original motion to compel and the respondent has not complied with this tribunal’s orders.<sup>2</sup> **It is now ordered, specifically, the use of complainant’s protocol and keywords that include the use**

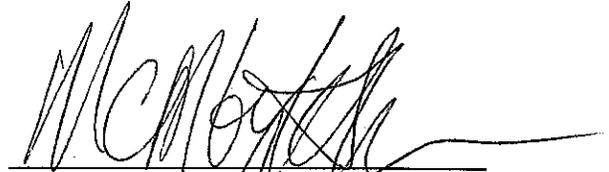
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<sup>1</sup> The Tribunal’s ruling stated in relevant part “Limited to the years 2004 to the present. Relevant as to pretext and remedies. [Respondent] Must specifically demonstrate how compliance is overly burdensome. *Culkin v. Pitney Bowes, Inc.*, 225 F.R.D. 69, 70-71 (D.Conn. 2004.) The term bias is commonly used to mean prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.

<sup>2</sup> Respondent filed an untimely appeal in January 2013, in which was denied, that took this case out of the Office of Public Hearings jurisdiction for a period of time.

**of surnames of employees and complainants, as well as the term Family Medical Leave Act (FMLA). Respondents have until May 14, 2014, to schedule with the complainants and the Commission, the dates for forensic examination by the complainant's expert. Further delay may result in sanctions, a subpoena or both.**

It is so ordered this 9<sup>th</sup> day of May 2014.



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Michele C. Mount  
Presiding Human Rights Referee

cc.

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Alix Simonetti, Esq. – via email only  
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