The State of New Hampshire

ROCKINGHAM COUNTY **SUPERIOR COURT**

Seacoast Newspapers, Inc.

v.

City of Portsmouth

Docket No.: 218-2018-CV-01254

ORDER

Plaintiff has brought this action seeking disclosure of a specific document in defendant's possession pursuant to RSA 91-A, New Hampshire's Right-to-Know Law. In 2015, the City of Portsmouth terminated the employment of Aaron Goodwin with the Portsmouth Police Department. Pursuant to his collective bargaining agreement, Mr. Goodwin filed a grievance, seeking to be reinstated. The matter ultimately went to arbitration. At some point in 2018, the arbitrator issued a decision.[1] On October 25, 2018, a reporter employed by plaintiff submitted a written request to the City seeking a copy of the arbitrator's decision. The City responded that it would not release the decision, based upon the position taken by the Portsmouth Ranking Officers Association, NEPBA Local 220 ("the Union")—Mr. Goodwin's union representative—that

[1] As an independent matter, a copy of the arbitrator's decisions was submitted to the court for *in camera* review. At the hearing, plaintiff's counsel argued that the decision ought to be reviewed in the presence of parties' counsel pursuant to the procedure set forth in Petition of Keene Sentinel, 136 N.H. 121 (1992). However, Keene Sentinel "set forth procedures and standards to be used when a member of the public or the media seeks access to *sealed court records*." Id. at 130 (emphasis added). The case does not provide for access to and review of any document submitted for *in camera* review. Moreover, the court notes that plaintiff's counsel has already been provided a copy of the arbitrator's decisions, subject to a protective order. (See Def.'s Mot. *In Camera* Review, ¶ 4.) Therefore, the court sees no reason to conduct a separate review of the decision in the presence of counsel.

the decision was exempt from disclosure pursuant to RSA 91-A:5, IV. The instant petition followed. The court held a final hearing on December 13, 2018.

"The purpose of the Right-to-Know Law is to 'ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.'" New Hampshire Civil Liberties Union v. City of Manchester, 149 N.H. 437, 438 (2003) (quoting RSA 91-A:1). The law "furthers our state constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." New Hampshire Right to Life v. Director, New Hampshire Charitable Trusts Unit, 169 N.H. 829, 839 (2016). However, "[t]he Right-to-Know Law does not guarantee the public an unfettered right of access to all governmental workings." Professional Firefighters of New Hampshire v. Local Government Center, Inc., 159 N.H. 699, 707 (2010).

RSA 91-A:5, IV provides for several exemptions from the general requirement of disclosure, two of which have been identified by the parties as being relevant to the instant case. First, the statute exempts "[r]ecords pertaining to internal personnel practices." RSA 91-A:5, IV. Second, the statute exempts "personnel . . . files whose disclosure would constitute invasion of privacy." Id. "Although the statute does not provide for unrestricted access to public records, [the court] resolve[s] questions regarding the Right-to-Know Law with a view to providing the utmost information in order to best effectuate these statutory and constitutional objectives." CaremarkPCS Health, LLC v. New Hampshire Department of Administrative Servs., 167 N.H. 583, 587 (2015). "As a result, [the court] broadly construe[s] provisions favoring disclosure and interpret[s] the exemptions restrictively." Id.

With respect to the first exemption, the Supreme Court has noted that the terms "internal" and "personnel" modify the word "practices," "thereby circumscribing the provision's scope." Reid v. New Hampshire Attorney General, 169 N.H. 509, 522 (2016). Looking to guidance from federal case law analyzing the Freedom of Information Act, the Supreme Court has determined that the term "personnel" "general[ly] . . . relates to employment," specifically "rules and practices dealing with employee relations or human resources . . . [including] such matters as hiring and firing, work rules and discipline, compensation and benefits." Id. at 523. The Court also defined "internal" as "existing or situated within the limits . . . of something." Id. (citing Webster's Third New International Dictionary 1180 (unabridged ed. 2002)). Therefore, "[e]mploying the foregoing definitions, [the Supreme Court] construe[d] 'internal personnel practices' to mean practices that 'exist[] or [are] situated within the limits' of employment." Id. Personnel practices are also considered "internal" if carried out by someone other than the employer if it is done on the employer's behalf. Id. (citing Hounsell v. North Conway Water Precinct, 154 N.H. 1, 4–5 (2006) (finding police internal affairs investigation report authored by outside investigators that were hired by the precinct constituted "internal personnel practice")).

The New Hampshire Supreme Court reaffirmed its holdings in Reid in Clay v. City of Dover, 169 N.H. 681 (2017). In that case, the plaintiff sought disclosure of rubric forms utilized by a committee appointed by the Dover school board to evaluate applicants for an open superintendent position. Clay, 169 N.H. at 683–84. The trial court found the rubric forms were not exempt from disclosure because they did not "deal with personnel rules or practices as that term is used in the Right-to-Know Law." Id. at 684.

On appeal, the Supreme Court reversed. The Court held that "the completed rubric forms relate[d] to hiring, which is a classic human resources function." Id. at 686. "Thus, they pertain[ed] to 'personnel practices' as that term is used in the Right-to-Know Law." Id. The Court also found that the rubric forms were "internal" because "they were filled out by members of the school board's superintendent search committee on behalf of the school board, the entity that employs the superintendent." Id. at 687.

Here, the arbitrator's award was the result of a grievance procedure set forth in the collective bargaining agreement ("CBA") between the Portsmouth Police Commission and the Union. The CBA provides that "any major disciplinary actions (i.e., written warning, suspension or dismissal) taken against any member of the Portsmouth Police Department covered by this Agreement will be subject to the grievance procedure." (Union's Opposition, Ex. 1 ¶ 3(B).) Under that procedure, an employee may file a grievance that is subject to escalating review by the deputy chief of police, the chief of police, and the commission. (Id., ¶ 35.) If that initial process does not satisfy the employee's grievance, the matter may be submitted to arbitration before an arbitrator chosen by the parties or selected in accordance with the rules of the American Arbitration Association. (Id.) The arbitrator is bound by the terms of the CBA. (Id.) The decision of the Arbitrator is final and binding upon the Association, the Commission, and the aggrieved employee who initiated the grievance. (Id.)

Just as hiring is a classic human resources function, Clay, 169 N.H. at 686, so too is firing. In this case, where an employee challenges the basis of their termination, the evaluation of whether said termination was improper is a logical extension of that human resources function. The arbitration, in turn, was an extension of a purely internal

grievance process set forth in the CBA. The process was conducted internally and was performed for the benefit of Mr. Goodwin and his former employer. Therefore, it bears all the hallmarks of an internal personnel practice.

Plaintiff argues this exemption does not apply because Mr. Goodwin was no longer employed by the police at the time of his grievance. The court disagrees and notes that a similar argument was raised in Clay. The plaintiff in Clay argued the rubric forms did not pertain to "internal" personnel practices because "no employment relationship exist[ed] between the applicant and the school board." Id. at 687. However, the Supreme Court found that because Clay involved hiring, "it [was] immaterial that there [was] no employment relationship between the applicants and the City." Id. at 688. "The information provided by the applicants to the superintendent search committee was gathered in the course of the hiring process, a process that was internal to the search committee and conducted on behalf of the superintendent's employer." Id. As noted above, the arbitration at issue here constitutes an internal personnel practice for the same reasons, albeit for firing instead of hiring.

Because the arbitrator's decision constitutes an internal personnel practice, it is automatically exempt from disclosure pursuant to RSA 91-A:5, IV. See id. (noting that in Reid, the Supreme Court explained that no balancing test is performed for documents relating to internal personnel practices). As a result, the court need not conduct a separate analysis regarding whether the arbitrator's order is exempt as a "personnel . . . file whose disclosure would constitute invasion of privacy." RSA 91-A:5, IV. Accordingly, the court finds in defendant's favor on plaintiff's Right-to-Know claim.

SO ORDERED.

__January 30, 2019___
Date

__/s/ Amy B. Messer_____
Amy B. Messer
Presiding Justice

Clerk's Notice of Decision
Document Sent to Parties
on 02/08/2019