Labor & Employment Issues
In Focus

Pitta LLP
For Clients and Friends
December 20, 2018 Edition

POLICE OFFICER PERSONNEL RECORDS NOT SUBJECT TO DISCLOSURE UNDER FREEDOM OF INFORMATION LAW

In a split 5-2 decision, the New York State Court of Appeals found that New York State Civil Rights Law § 50-a prohibits the disclosure of police officer personnel records in response to a Freedom of Information Law ("FOIL") request, except in very limited circumstances. *In the Matter of New York Civil Liberties Union v. New York City Police Department*, 2018 NY Slip Op 08423. (Dec. 11, 2018).

In August 2011, the New York Civil Liberties Union ("NYCLU") submitted a FOIL request to the New York City Police Department ("NYPD") seeking 10 years' worth of internal NYPD adjudications of officer disciplinary proceedings. After the NYPD largely denied the records request, the NYCLU commenced a CPLR article 78 proceeding, seeking disclosure of the withheld records. Although the trial court initially ordered the NYPD to redact identifying information from the records, to notify affected officers of the redaction, and to produce the records pursuant to the FOIL request, the Appellate Division reversed unanimously and dismissed the proceeding, granting NYCLU leave to appeal.

Writing for the majority, Justice Garcia affirmed the decision of the Appellate Division. Public Officers Law § 87(2), the primary section of FOIL, requires that all New York State and City agencies "make available for public inspection and copying **all records**…" (emphasis added). Despite this broad mandate, however, there are several enumerated exemptions on which an agency may rely to refuse disclosure of records. The first enumerated exemption, contained in Public Officers Law § 87(2)(a), are records or portions thereof that "are specifically exempted from disclosure by state or federal statute."

In denying the FOIL request, NYPD relied on § 87(2)(a)'s exemption and identified New York State Civil Rights Law § 50-a as an applicable state statute that exempted disclosure of the records. New York State Civil Rights Law § 50-a provides that "[a]ll personnel records [of police officers] used to evaluate performance toward continued employment or promotion…shall be considered confidential and not subject to inspection or review without the express written consent of such police officer…except as may be mandated by lawful court order." Additionally, there is a specific procedure for determining when such records may be disclosed pursuant to court order, whereby the judge contemplating disclosure first must allow interested parties an opportunity to be heard; must determine there is sufficient basis to request records; must review the records *in camera*; must determine that the records are "relevant and material" to the subject action; and only then make those relevant and material parts of the record available to the requester.

In its analysis, the majority found that the records requested by the NYCLU were personnel records covered by Civil Rights Law § 50-a and explained that the statute was "designed to protect police officers from the use of their records as a means for harassment and reprisals…" (internal quotations omitted). The protection afforded by Civil Rights Law § 50-a is

broad, the majority determined, and not limited to the context of actual or potential litigation, as argued by the NYCLU. On the contrary, the procedure for court-ordered disclosure of records protected by Civil Rights Law § 50-a is **only** available in the context of pending litigation. Since, in the context of NYCLU's FOIL request, the requested records were not "relevant and material" to pending litigation, the records were not subject to disclosure. The majority opinion also rejected the NYCLU's argument that both the policy of public disclosure under FOIL and the policy of protection of personnel records under Civil Rights Law § 50-a could be satisfied by redacting identifying information from police officer records. In the majority's view, this was a "straightforward application" of the two statutes, "which mandate confidentiality and supply no authority to compel redacted disclosure."

In addition to the majority opinion authored by Judge Garcia, Judges Rivera and Wilson each authored dissenting opinions. In her dissent, Judge Rivera explained that the legislature had expressed a strong public policy of favoring disclosure in the context of FOIL which could accommodate the concerns that motivated the protections afforded to officers by Civil Rights Law § 50-a by redacting any personal information from disclosed records. Agreeing with Judge Rivera's dissent, Judge Wilson further reasoned that, since the records being sought were products of NYPD disciplinary trials that were open to the public, confidentiality had been waived and there was no basis to prevent them from being disclosed.

NATIONAL LABOR RELATIONS BOARD SEEKS TO REDUCE TIMELINE IN CASE-HANDLING

On December 10, 2018, the National Labor Relations Board (the "NLRB" or "Board") released its Strategic Plan for Fiscal Years 2019-2022. The Board's Plan focusses on accelerating the processing time for unfair labor practice charges and representation cases, explaining that "[o]ver the years, the amount of time it takes for cases to be processed and for resolutions to be reached has increased and backlogs of cases have developed. This initiative has been developed to reverse these trends."

Specifically, the Strategic Plan sets as one of its goals a 20% increase in timeliness in case processing of unfair labor practice charges over the next four years. The agency is aiming to resolve unfair labor practice charges by 5% less time each year. The Strategic Plan also focusses on increased efficiency during all stages of unfair labor practice adjudication including (1) the investigation of a charge, (2) the period between the issuance of a complaint and resolution by an administrative law judge, (3) the period between the issuance of the decision by an administrative law and a Board Order, and (4) the period between a Board order and closing of a case.

The 20% decrease is based on reducing the current the 106-day average it now takes the NLRB's regional offices to process unfair labor practice charges to 85 days by the end of fiscal year 2022. The NLRB memo described a "disturbing trend" of the NLRB taking longer and longer to resolve labor disputes. It noted that in the 1980s, the NLRB's regional offices took between 44 and 55 days to bring complaints based on new charges. They now take a median of 128 days. The NLRB blames the delays on 1996 changes to how the board categorizes cases and how it excuses delays. These changes, which assigned target processing times based on cases' significance and gave loose deadlines for offices to resolve them by the end of the months in which these target dates fell, gave offices too much leeway to excuse tardiness even as they took in fewer cases. The NLRB proposed to speed up the system by giving the

regional offices flexibility "to develop their own case management systems." However, there is widespread skepticism that these goals are achievable while the NLRB is offering buyouts and reducing its staff. The NLRB employed about 3,000 full-time workers in 1980 but had fewer than 1,500 full-time equivalent staff as of last year, according to NLRB statistics.

Even if the goals are achievable, as with many things in this Administration, unions should view these changes with trepidation, as quicker resolutions of unfair labor practice charges likely means less thorough investigations since Unions have fewer resources to meet strict deadlines and may not be able to timely marshall their evidence, more anti-Union decisions may result.

Conversely, the Strategic Plan also outlines the NLRB's objective to increase its efficiency in the resolution of representation cases. The Strategic Plan specifically outlines the NLRB's objective to increase the percentage of representation cases resolved within 100 days following the filing of an election petition. This objective seems to continue the Obama era approach toward rapid elections. A shorter time period from the filing of a petition to a union election means the employer has less time to undermine the union's organizing efforts.

While the Strategic Plan also includes vague and nonspecific goals such as "achieving organizational excellence" and "managing agency resources efficiently," these goals provide little concrete guidance on the NLRB's strategic objectives over the next four years. The real news lies in the NLRB's specific and measurable goals to increase efficiency of both unfair labor practices and representation proceedings—both a positive and negative sign for unions.

NLRB AND NMB MAY BE PARTING AT JURISDICTIONAL CROSSROADS OVER AIR AND RAIL CARRIER CONTRACTORS

In a recent pair of cases, the National Labor Relations Board ("NLRB") clarified when it will assert jurisdiction over entities in the airline and rail industry, for which jurisdiction could also arguably arise under the Railway Labor Act ("RLA"). *ABM Onsite Services-West, Inc*., 367 NLRB No. 35 (Nov. 14, 2018); *American Sales and Management Organization, LLC*, 367 NLRB No. 42 (Dec. 4, 2018). The standard is increasingly important due to ongoing and successful union organizing at airports.

The RLA, enacted in 1926, governs labor relations for rail and air carriers, and the National Mediation Board ("NMB") administers the statute. Subsequently, Congress passed the National Labor Relations Act ("NLRA"), which regulates the majority of private sector workers but specifically excludes individuals subject to the RLA. The increased use of contractors in local airports, however, has highlighted a gray area between the statutes. This is important because the statutes contain notable differences; the RLA requires bargaining units to be system-wide, rather than facility-by-facility, and creates procedural barriers rendering it more difficult for unions to strike.

The NMB adopted a two-part test to determine jurisdiction over a non-carrier. First, the NMB considers whether the employer performs work that is traditionally performed by carrier employees. If so, the NMB evaluates whether the employer is directly or indirectly owned or controlled by, or under common control with, a carrier or carriers. The NMB established six factors for consideration: (1) the extent to which the carrier controls the manner in which a company conducts its business; (2) access to the company's operations and records; (3) the

carrier's role in personnel decisions; (4) the carrier's degree of supervision; (5) the carrier's control over training; and (6) whether the employees at issue are held out to the public as employees of the carrier.

During President Obama's administration, the NMB began elevating the importance of the "carrier control over personnel decisions" factor. The NLRB, in light of its policy to grant "substantial deference" to NMB advisory decisions, followed suit. In 2017, the D. C. Circuit Court of Appeals criticized the NLRB and NMB for departing from the earlier balanced six-factor test without explanation. On remand, and after President Trump appointed a Republican majority to the NMB, the NMB eliminated heightened significance of any one factor. Member Puchala dissented, contending that the old test produced results whereby almost any company in contract with an air carrier could be found subject to the RLA.

In *ABM Onsite*, the NLRB deferred to the NMB advisory opinion reaffirming the balanced six-factor test. Applying the reconstituted test, the NLRB agreed with the NMB's conclusion that RLA jurisdiction was appropriate in that case. However, shortly thereafter in *American Sales*, the NLRB made a somewhat surprising decision to not seek an advisory opinion from the NMB and instead concluded that a unit of bag jammer technicians and dispatchers at the Portland International Airport is subject to the NLRA. The NLRB noted that it maintained independent authority to decide jurisdiction and found that five of the six factors weighed against RLA control. The NLRB determined that the contractor maintained responsibility for deciding how it provided services to the carriers, administered its own personnel decisions with isolated exceptions, trained and uniformed its own employees, and provided sole supervision over those employees. The Board concluded that those factors outweighed the fact that the carriers had access to the contractor's records.

As previously noted, Member Puchala suggested that the six factor test will result in almost every airline contractor subject to the RLA. If she proves to be correct, *American Sales* will merely constitute an outlier and unions will have a more difficult time organizing and representing airport workers. At this point, though, *American Sales* offers a glimmer of hope for unions that the NLRB will take a more proactive and inclusive posture in deciding RLA jurisdictional disputes.

23-AND-SHE GINA DISCRIMINATION CLAIM DISMISSED AGAINST STATE EMPLOYERS

A part-time nurse at the Oklahoma Veterans Department saw her Genetic Information Nondiscrimination Act ("GINA)" lawsuit dismissed as barred by state immunity provisions of the 11th Amendment. *Leming v. Oklahoma Dept. of Veterans Affairs*, No. 5:18-cv-00348 (W.D. OK, Nov. 13, 2018).

Lisa Leming took time off to care for her ailing son suffering from neurofibromatosis, a genetic disorder causing nerve tumors, and then for herself suffering from related stress, which led to her discharge. Leming sued the state, alleging that her discharge violated GINA, the Americans With Disabilities Act ("ADA") and the Family Medical Leave Act ("FMLA"). Oklahoma moved to dismiss on the defense that the 11th Amendment to the U.S. Constitution granted the state immunity from federal law suits. U.S. District Court Judge Timothy DeGiusti largely agreed, dismissing all claims except one for child care under the FMLA.

Although the 11th Amendment grants immunity to states, "Congress may abrogate a state's sovereign immunity by appropriate legislation when it acts under Section 5 of the Fourteenth Amendment." GINA, which prohibits discrimination "against any employee . . . because of genetic information with respect to the employee" defines "employee" to include a "State employee" but does not expressly invoke Fourteenth Amendment abrogation. Joining only two other district courts to have addressed this issue, in Maryland and New Jersey, the Oklahoma federal district court found no such Congressional intent in GINA. "GINA was not accompanied by findings of historical discrimination by state employers on the basis of genetics," explained Judge DeGuisti. "Further, there is no showing that GINA was congruent or proportional to any harm to be remedied." Accordingly, the 11th Amendment constituted an impermeable membrane against GINA lawsuits.

Leming's ADA and FMLA claims did little better, though Congress did pass these statutes with express 11th Amendment abrogation language. The Supreme Court has ruled Congress exceeded its authority under Section 5 of the 14th Amendment in extending ADA to states. And the Supreme Court had limited the FMLA abrogation language to family-care provisions, not self-care provisions. Accordingly, of all of Leming's claims, only her claim to care for her ailing son survived.

Happy Holidays and All the Best For the New Year!

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