THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Case No. 2019-0135

Seacoast Newspapers, Inc.
Plaintiff-Appellant

v.

City of Portsmouth
Defendant-Appellee

ON APPEAL FROM THE A DECISION OF THE NEW HAMPSHIRE SUPERIOR COURT, ROCKINGHAM COUNTY, NO. 218-2018-CV-01254

BRIEF OF PARTY-IN-INTEREST NEW ENGLAND POLICE BENEVOLENT ASSOCIATION, LOCAL 220

By its lawyer,

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STATEMENT OF FACTS AND OF THE CASE

Aaron Goodwin was an employee of the Portsmouth Police Department and, therefore, the City of Portsmouth ("City") for more than ten years. (App. II at 70-71). After serving as both Patrol Officer and Detective for several years, Goodwin was promoted to Police Sergeant in January 2014. (Id.). He served in that capacity until his termination in June 2015 based on alleged misconduct occurring beginning in 2010. (Id. at 71, 79, 80-81).

At the time of his termination, Goodwin was a member of a bargaining unit represented by the Portsmouth Police Ranking Officers Association, New England Police Benevolent Association, Local 220 (hereinafter, "Local 220"). (App. I at 14). Local 220 is the sole and exclusive certified bargaining representative of all permanent employees holding a rank above that of Patrolmen in the Portsmouth Police Department. (Id. at 21-22). Local 220, with the City of Portsmouth, is a party to a collective bargaining agreement ("CBA"), which governs the terms and conditions of bargaining-unit employees' employment, including discipline and dismissal. (Id. at 22-24). The CBA provides that "[n]o permanent employee shall be disciplined except for just cause, and that any major disciplinary actions (i.e., written warning, suspension or dismissal) . . . will be subject to the grievance procedure." (Id. at 22). The comprehensive grievance procedure includes consideration by the Deputy Chief of Police, the Chief of Police, and the Police Commission, before ending in arbitration--each level to determine the ultimate question

of whether the City had "just cause" for its decision to discipline or discipline an employee. (App. I at 22, 24).

Following Goodwin's termination, the Union filed a grievance with the City which resulted in an arbitration proceeding. (Add. at 28). The Arbitrator issued the final Award in 2018. (Add. at 28).

Seacoast Newspapers, Inc. ("Seacoast Newspapers") thereafter requested a copy of the Award from the City. (Add. at 28). The City declined to provide the Award and this Petition pursuant to RSA 91-A to compel production of the Award by the City followed. (App. I at 1). Local 220 successfully moved to intervene in the case to challenge the production. (App. I at 14-15, 33). Following hearing, the Court denied the Petition and found that, "[b]ecause the arbitrator's decision constitutes an internal personnel practice, it is automatically exempt from disclosure pursuant to RSA 91-A:5, IV." (Add. at 32). This Appeal followed.

SUMMARY OF ARGUMENT

This Court should adhere to its long-standing precedent that categorically excludes records, such as the labor arbitration award at issue in this case, from disclosure under the Right-to-Know law. The appellant newspaper offers no compelling or proper justification to overturn this Court's reasoned interpretation of RSA 91-A. The legislature has tacitly approved this Court's precedent and amended the Right-to-Know law numerous times without correcting or addressing this Court's express interpretation of legislative intent in Union Leader Corp.

v. Fenniman, 136 N.H. 624 (1993). Moreover, the issue is the subject of current pending legislative activity and is therefore held particularly firm within the grip of stare decises. Applying the facts to the law, it is clear that the arbitration award sought by the newspaper pertains to "internal personnel practices" and are therefore exempt from disclosure pursuant to RSA 91-A:5.

ARGUMENT

III. THE TRIAL COURT PROPERLY APPLIED THE EXEMPTION FOR "INTERNAL PERSONNEL PRACTICES" IN RSA 91-A:5

a. Summary of Applicable, Long-Standing Law

At issue in this case is RSA 91-A:5, which provides an exemption to the Right-to-Know law for:

> Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

RSA 91-A:5, IV.

The analysis of this Court's treatment of RSA 91-A:5, IV begins with Union Leader Corp. v. Fenniman, 136 N.H. 624 (1993) and Hounsell v. N. Conway Water Precinct, 154 N.H. 1 (2006). Despite the Appellant's hallow urgings, both cases

remain good law, were correctly decided and compel the affirmance of the trial court's order.

In Fenniman, the plaintiff newspaper requested disclosure of "certain investigatory documents under the control of" the Dover Police Department and its chief. 136 N.H. at 625. The documents in question were generated and "compiled during an internal investigation of a department lieutenant accused of making harassing phone calls." Id. The Court, as a matter of first impression, found that the police investigatory at issue files at issue were exempted from disclosure as they "plainly 'pertain[] to internal personnel practices' because they document procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice." Id. at 626.

In support of its conclusion, the Court extensively analyzed the legislature's intent in enacting RSA 91-A:5, IV. The Fenniman Court observed as follows:

> At the same time the legislature was considering passage of what is now RSA 516:36, II (Supp.1992), it was also overhauling RSA chapter 91-A into its modern form. . . . Moments after Representative Donna Sytek gave the judiciary committee's report on the Right-to-Know bill, . . . she gave a report from the same committee on what is now RSA 516:36, II (Supp.1992). Speaking in favor of the latter bill, she stated: "[It] provides that proceedings of internal police investigations may not be introduced as evidence in a civil suit other than a disciplinary action. Protection for these files, *which will remain confidential under the Right-to-Know law* will encourage thorough investigation and discipline of dishonest or abusive police officers." . . .

> Representative Sytek's remarks indicate an assumption that RSA chapter 91-A exempted police internal investigatory files from public disclosure. As there have been no relevant changes to the Right-to-Know Law since 1986, we must honor the expressed intent of the legislature as expressed in the statute itself and reverse the superior court's ruling. Although we have often applied a balancing test to judge whether the benefits of nondisclosure outweigh the benefits of disclosure, . . . such an analysis is inappropriate where, as here, the legislature has plainly made its own determination that certain documents are categorically exempt.

Id. at 627 (internal citations omitted) (emphasis in original). Accordingly, the Court refused to allow disclosure of the records.

Thereafter, in Hounsell, the Court considered whether an investigative report prepared by outside investigators hired by the water precinct was properly subject to disclosure under the Right-to-Know law. 154 N.H. at 2-3. More specifically, the case involved an investigation following an allegation by an employee "that he had been threatened and harassed by a co-worker," the precinct's legal counsel retained outside investigators to investigate the allegations. Id. at 2. The investigators interviewed witnesses and then prepared a report containing a summary and "findings and recommendations." Id. This Court upheld the trial court's refusal to produce the investigative report, holding as follows:

> We agree with the trial court that the Hunt-Alfano report concerned "internal personnel practices." It is undisputed that the precinct retained Hunt and Alfano to investigate a complaint that [employee] had threatened and harassed a co-

> worker. During the investigation, the precinct placed [the employee] on paid leave, and the investigation could have resulted in disciplinary action. Thus, as in Fenniman, the Hunt-Alfano report, which was generated in the course of an investigation of claimed employee misconduct, was a record pertaining to "internal personnel practices."

Id. at 4. The Court expressly rejected the plaintiff's contention that "the investigation lost its 'internal status' because . . . the precinct contracted with outside investigators." Id. at 5. Importantly, the Court reiterated one principle, legislatively adopted policy--first recognized in Fenniman--underlying the exemption:

> that the disclosure of records underlying, or arising from, internal personnel investigations would deter the reporting of misconduct by public employees, or participation in such investigations, for fear of public embarrassment, humiliation, or even retaliation.

Id.

Two recent cases round out the Court's most relevant analysis regarding RSA 91-A:5, IV. In Reid v. N.H. Attorney Gen., 169 N.H. 509 (2016), the Court considered whether records related to the Attorney General's investigation into alleged wrongdoing by a former county attorney was subject to exemption from disclosure pursuant to RSA 91-A:5, IV. The Reid Court set about to more precisely define the term "internal personnel practices." Id. at 522. In this regard, the Court cited with approval a United States Supreme Court case defining "personnel" as "the selection, placement, and training of employees and

. . the formulation of policies procedures, and relations with [or involving] employees or their representatives." Id. (quoting Milner v. Dep't of Navy, 562 U.S. 562, 569 (2011)). "[A]n agency's personnel rules and practices, for purposes of for purposes of exemption 2 of the FOIA, are its rules and practices dealing with employee relations or human resources. . . . They concern the conditions of employment in federal agencies--such matters as hiring and firing, work rules and discipline, compensation and benefits." Id. at 522-23 (quoting Milner, 562 U.S. at 570) (internal quotations omitted). The Court then concluded that "internal personnel practices" are "practices that "exist or are situated with the limits of employment." Id. at 523 (internal quotations and citations omitted).

Importantly, the Reid Court reaffirmed its holdings from Fenniman and Hounsell that investigations and documents surrounding individual employee misconduct are a "personnel practice" under the categorical exemption. Id. at 523. The Court, however, clarified "that [to be 'internal' and therefore within the purview of the exemption] the investigation must take place within the limits of an employment relationship." Id. After finding that the county attorney was not an "employee" of the attorney general and that the relationship between the attorney general and a county attorney "lacks the usual attributes of an employer-employee relationship," the Court concluded that the requested investigatory records did not fall within the "internal personnel practices" exemption of RSA 91-A:5, IV. Id. at 525.

Instead of the categorical exemption from production afforded by the "internal personnel practices" exemption, the issue was analyzed under the balancing test portion of RSA 91-A:5 that exempts "personnel, medical . . . and other files whose disclosure would constitute invasion of privacy." Id. at 526. Because the trial court's decision had been based exclusively on the "internal personnel practices" exemption, the Court remanded the case for the parties to litigate the balancing test. Id. at 527.[1]

Most recently, in Clay v. City of Dover, 169 N.H. 681 (2017), this Court again considered the reach of the

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[1] The Court provided guidance for the parties and the trial court in applying this balancing exemption. The determination of whether the materials are subject to the exemption for "personnel . . . files whose disclosure would constitute an invasion of privacy" requires a two-part analysis of: "(1) whether the material can be considered a "personnel file" or part of a "personnel file"; and (2) whether disclosure of the material would constitute an invasion of privacy." Reid, 169 N.H. at 527. Whether disclosure triggers an invasion of privacy requires its own three-part test as announced by the Court:

> First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. . . . Second we address the public's interest in disclosure. . . . Finally, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure.

Id. at 528-29.

"internal personnel practices" categorical exemption.[2] In Clay, the petitioner sought production of written evaluation forms completed by members of the defendants' search committee during evaluation of candidates for the position of superintendent. Id. at 683. The Court noted that the forms related to hiring "which is a classic human resources function." Id. at 686. The Court also concluded the forms were "internal" and expressly rejected the plaintiff's contention that the forms were not internal because no employment relationship existed between the candidates and the defendant school district. Id. at 688. The Court found the distinction "immaterial" as the documents were generated during the hiring process, which was internal to the search committee and conducted on behalf of the superintendent's employer. Id.

b. The Award requested in this case squarely falls within the categorical exemption as records pertaining to internal personnel practices.

1) The Award is a record pertaining to personnel practices.

Documents pertain to personnel practices where, in general, they relate to "employment." Reid, 169 N.H. at 523 (holding an investigation into employee misconduct is a personnel practice). There can be no meaningful dispute that the Award relates to Goodwin's employment; indeed, it

[2] In doing so, the Court, again, reaffirmed that the "internal personnel practices" exemption is a categorical one—refusing to consider petitioner's argument to the contrary because Reid "foreclose[d] that contention." Clay, 169 N.H. at 685.

dealt with the "quintessential" personnel practice of discipline and dismissal. Fenniman, 136 N.H. at 626 ("These files plainly 'pertain[] to internal personnel practices' because they document procedures leading up to internal personnel discipline, a quintessential example of an internal personnel practice."); see Reid, 169 N.H. at 525 (analyzing authority to "hire or fire" in determining whether employer-employee relationship exists).

In order to avoid this inevitable conclusion, Seacoast Newspapers argues that because the Award was issued after Goodwin's termination, it cannot be exempt as a record pertaining to internal personnel practices. Applnt. Br. at 24-25. This argument lacks as much in logic as it does in support. Most obviously, the corollary argument has already been outright rejected by this Court. In Clay, 169 N.H. at 688, this Court unequivocally stated that it was "immaterial" that there was no existing employment relationship between the applicant and employer because the case "involve[d] hiring." Id. ("Because this case involves hiring and not investigation into misconduct, it is immaterial that there is no employment relationship between the applicants and the City."). There is no rationale reason--and the Appellant assuredly does not assert one--why the result would be any different in the context of firing, as opposed to hiring.

2) The Award clearly took place within the employment relationship and, therefore, are records pertaining to internal personnel practices.

The Seacoast Newspapers' claim that the Award was not issued within the confines of the employment relationship

is without merit. Goodwin was an employee of the City and a member of Local 220, a bargaining unit certified pursuant to RSA 273-A. All terms and conditions of Goodwin's employment were negotiated through collective bargaining with Local 220. The CBA, which is between only the City and Local 220, exists only within that employment relationship.

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." (App. Vol. I at 22). The grievance procedure provides for review by the deputy chief of police, the chief of police and the police commission. The final decision on the grievance ultimately is made by binding arbitration because the City has agreed to delegate the ultimate decision of whether there was just cause for discipline--among other issues--to an arbitrator retained by the City and Local 220. (Id. at 23-25); see Appeal of Campton Sch. Dist., 138 N.H. 267 (1994) (stating there is no requirement that grievance procedure have final and binding step by entity other than employer). The arbitrator is bound by the terms of the CBA. (Id.). The decision of the arbitrator is binding upon the City, Local 220 as the employee's representative, and the employee. (Id.). As the trial court held:

> 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.

(Add. at 4-5); see also, Reid, 169 N.H. at 522 (defining "personnel" as including "relations with [or involving] employees or their representatives.")(emphasis added).

In Hounsell the petitioners argued that the subject investigation "lost its 'internal status' because . . . the precinct contracted with outside investigators. . . ." 154 N.H. at 5. The Court soundly rejected the contention that the mere presence of an outside contractor in internal personnel practices defeated the "internal" status of the report. Id. In Reid, the Court clarified that to be "internal" the personnel activity "must be conducted by, or as in Hounsell, on behalf of the employer . . ." After finding no employment relationship in Reid, the Court determined that the "internal" element could not satisfied because, unlike Hounsell, the investigation was not conducted on behalf of the employer. 169 N.H. at 529. The Court further explained:

> In Hounsell, the precinct's legal counsel "retained" the outside third parties "to investigate [an employee's] complaint of harassment" by a co-worker. The implication is that the outside investigators neither initiated the investigation nor conducted it for their own purposes, but rather, that they acted solely on behalf of the precinct.

Id. at n. 5.

Here, the arbitrator did not initiate the grievance procedure nor conduct it for her own benefit. Rather, she acted solely for the benefit of the employee, his statutorily sanctioned representative (the Union) and the employer. Her involvement is a result of the City's voluntary agreement in the CBA to use a third party to make a personnel decision. Ultimately, the use of the arbitrator, like the investigator in Hounsell, does not defeat the internal status of the Award. For these reasons, this Court should reject the Appellant's contention and find that the arbitration proceeding is an internal personnel practice.[3]

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[3] The cases cited by Seacoast Newspapers for the proposition that arbitrations are per se outside of the employment relationship as independent adjudications are inapposite. Applnt. Br. at 24. In Lutz v. City of Philadelphia, 6 A.3d 669, 674 (Pa. 2010), the court was construing a state statute that included an exemption for "exhibits entered into evidence at an arbitration proceeding, a transcript of the arbitration or the opinion," "[i]n the case of the arbitration of a dispute or grievance under a collective bargaining agreement," but specifically stated the exemption "shall not apply to the final award or order of the arbitrator." Id. (quoting 65 P.S. § 67.708(b)(8)(ii)). Compelled by this statute, the court concluded that the final award--which it noted was generally separate from the opinion itself--was not exempt. Id. Similarly, in Doe v. Dep't of Mental Health, Mental Retardation, and Substance Abuse Serv., 669 A.2d 422 (Me. 1997), the court was construing a state statute that exempted "complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary actions," but specifically stated "[i]f disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is

IV. THIS COURT SHOULD NOT DISTURB ITS HOLDINGS IN FENNIMAN, HOUNSELL OR THEIR PRODEGY.

The Court is "bound by the law as set forth in [its] past cases." Ridlon v. N.H. Bureau of Sec. Reg., No. 2018-0035, 2019 WL 3311343, at *6 (N.H. July 24, 2019). "The doctrine of stare decisis demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." Ford v. N.H. Dep't of Transp., 163 N.H. 284, 290 (2012) (quoting Jacobs v. Dir., N.H. Div. of Motor Vehicles, 149 N.H. 502, 504 (2003)). "[W]hen asked to reconsider a holding, the question is not whether [the Court] would decide the issue differently de novo, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." Id. (quoting State v. Quintero, 162 N.H. 525,539 (2011)). To the contrary, "[j]udges are not at liberty to follow prior decisions that are well-reasoned and discard those that are not." Quintero, 162 N.H. at 439. "Indeed, principled application of *stare decisis* requires a court to adhere even to poorly reasoned precedent in the absence of 'some special reason over and above the belief that a prior case was wrongly decided.'" Id. (quoting State v. Gubitosi, 152 N.H. 673, 678 (2005)).

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completed." Id. at 424 (quoting 5 M.R.S.A. § 7070(2)(E)(Supp. 1996)).

As a result, the Court will overturn its precedential decisions only after considering the following four factors:

> (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Id. None of these factors weigh in favor of this Court overturning decades worth of precedent merely for the sake of changing the result in this case.[4]

Seacoast Newspapers' superficial application of these factors boils down to no more than a disagreement with the reasoning of this Court in Fennimen and Hounsell. That is flatly insufficient to call for the upending of decades of precedent.[5] See Quintero, 162 N.H. at 540 ("While poor

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[4] Moreover, this Court's holdings in Fennimen and Hounsell are clearly not unworkable, and Courts have applied them approvingly for more than a decade and as recently as this year. See, e.g., Berry v. N.H. Dep't Corr., No. 2018-0411, 2019 WL 1177924, at *2 (N.H. Feb. 28, 2019); Clay, 169 N.H. at 686-87; Montenegro v. City of Dover, 162 N.H. 641, 649-50 (2011); Duquette v. Forest, No. 2004-0760, 2005 WL 8142450 (N.H. Dec. 5, 2005); Pivero v. Largy, 143 N.H. 187, 191 (1998).

[5] Indeed, even if this Court were to echo the critical sentiment of the Reid Court in regard to the reasoning and conclusions drawn in Fenniman and Hounsell, there is no legitimate basis for overturning such decisions without more.

reasoning does trigger the stare decisis analysis, poor reasoning is not a separate factor to consider when determining whether special justification for departing from precedent exists."). In any case, the decisions were decided correctly in light of the stated legislative intent as discussed at length in Fenniman.

Moreover, where cases center on statutory construction, as is the case here, "considerations of *stare decisis* weigh heavily . . . [because the legislative body] is free to change this Court's interpretation of its legislation." Pearson v. Callahan, 555 U.S. 223, 233 (2009) (quoting Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)); Watson v. United States, 552 U.S. 74, 83 (2007) ("A difference of opinion within the Court . . . does not keep the door open for another try at statutory construction, where stare decisis has 'special force [since] the legislative power is implicated, and Congress remains free to alter what we have done.'" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)).

In the face of Seacoast Newspapers' empty pleas for this Court to correct what it believes the legislature did or did not intend in enacting RSA 91-A:5, the legislature has assuredly spoken. RSA 91-A:5 has been amended no less than eight times since this Court rendered its decision in Fenniman. See 2019, 54:1, eff. Aug. 4, 2019; 2018, 91:2, eff. July 24, 2018; 2016, 322:3, eff. Jan. 1, 2017; 2013, 261:9, eff. July 1, 2013; 2008, 303:4, eff. July 1, 2008; 2004, 147:5; 246:3, 4; 2002, 222:4; 1993, 79:1. (Add. 38-40). This fact militates against any argument that this

Court incorrectly interpreted the legislatures intent. See State v. Etienne, 163 N.H. 57, 76 (2011) ("A further indication of the legislature's intent not to abrogate the longstanding requirement of reasonable necessity is found in the actions the legislature has undertaken in the wake of Warren. The legislature has amended RSA 627:4 twice since Warren, and the amendments did not vitiate our holding that the deadly force provision implicitly required reasonable necessity. . . . The legislature's decision not to amend the pertinent provisions of RSA 627:4 in light of Warren indicates the legislature's adoption of our long-standing interpretation of the statute."); State v. Moran, 158 N.H. 318, 323 (2009) ("If we had incorrectly construed the statute in [our earlier interpretation thereof], the General Court would presumably have clarified the text in the course of the five subsequent amendments."); State v. Deane, 101 N.H. 127, 130, 135 A.2d 897 (1957) ("The statute on which this repeated practical construction has been placed by the Bench and Bar, has been re-enacted by the Legislature without change in RSA 502:24, and constitutes a legislative adoption of its prior judicial interpretation." (quotation omitted)); 2B N. Singer & J.D. Singer, Statutes and Statutory Construction § 49.5, at 35 (7th ed. 2008) ("[P]rinciples of *stare decisis* weigh heavily in favor of a judicial interpretation, since the legislature has power to change the law from what a court has construed it to be." (quotation omitted)); id. § 49.5, at 107 ("If the legislature has amended portions of a statute, but has left intact the portion sought to be

construed, the legislature has declared an intent to adopt the construction placed on the statute by the administrative agency."); id. § 49.10, at 142-44 ("Where action upon a statute or practical and contemporaneous interpretation has been called to the legislature's attention, there is more reason to regard the failure of the legislature to change the interpretation as presumptive evidence of its correctness. Likewise, legislative action by amendment or appropriations with respect to other parts of a law which have received a contemporaneous and practical construction may indicate approval of interpretations pertaining to the unchanged and unaffected parts of the law.").

Moreover, the Court should be particularly cautious of disturbing the holdings in Fenniman, Hounsell and their progeny given the current legislative activity surrounding the issue. In the most recent 166th Session of the General Court, House Bill 153 "relative to circumstances under which police officer disciplinary records shall be public documents" was introduced. (Add. at 34-35). In pertinent part the amended legislation, entitled "AN ACT relative to circumstances under which police officer disciplinary records shall be public documents" seeks to amend RSA 106-L by inserting the following:

106-L:5-a Certain Records Subject to Right-to-Know Law.

> I. In this section, "disciplinary records" mean complaints, charges or accusations of misconduct, replies to those complaints, charges, or accusations, and any other information or materials that have resulted in final disciplinary action.

> II.(a) Upon completion of an investigation, any record which includes a finding that a law enforcement officer subject to this chapter discharged a firearm which led to death or serious injury shall be a public record under RSA 91-A.
> (b) Any disciplinary record in which there has been a final adjudication of a matter involving a law enforcement officer subject to this chapter who was found guilty of sexual assault as defined in RSA 632-A, or in which there was a sustained finding of dishonesty by a law enforcement officer including perjury, false statements, filing false reports destruction, or falsifying or concealing evidence, shall be a public record under RSA 91-A.
>
> III. Nothing in this section shall limit the ability of a public agency or public body, as defined in RSA 91-A:1-a, to withhold the names, addresses, dates of birth, and other personal information of victims or other private persons where disclosure of such information would constitute an invasion of privacy under RSA 91-A:5, IV.

2019-0374h, February 7, 2019 (Add. at 35). The legislation clearly presupposes that the categorical exemption applies to records of the type sought herein and confirms the court's interpretation of the legislative history as discussed in Fenniman. Moreover, the bill contemplates release of certain of these records only upon final adjudication such as in an arbitration proceeding. As of the date of this brief the bill had been Re-referred. Add at 36-37; Senate Journal 17, 23 May 2019 at 537 (explaining rereferral to committee because of an unidentified "ongoing court case" and "the need for further examination of the consequences of the language").

"*Stare decisis* is the essence of judicial self-restraint." Quintero, 162 N.H. at 539. This Court should exercise particular restraint from reframing the legislature's intent in RSA 91-A:5, where the legislature has amended the statute myriad times over the years and is currently legislating a bill pending before it involving this very issue. This Court should allow our tripartite government to work as it is intended and refrain from overturning its long-standing precedent and rewriting RSA 91-A:5.

V. TO THE EXTENT THAT THIS COURT FINDS THAT SOME BALANCING OF INTERESTS IS NECESSARY, THE MATTER MUST BE REMANDED.

To the extent that this Court reaches the conclusion that some balancing of interests is necessary, it must remand the case for further consideration by the trial court. Here, because the trial court's decision was "based exclusively on the 'internal personnel practices' exemption, and it is not evident that the court considered whether any of the disputed materials were exempt as 'personnel . . . files whose disclosure would constitute invasion of privacy'" consideration of that issue must be done on remand. Reid, 169 N.H. at 527. At that time, the parties would address the various factors inherent in the balancing test including, significantly, the weight and impact of RSA 105:13-b(III) (confidentiality of police personnel files).

CONCLUSION

For the foregoing reasons, Local 220 respectfully requests that this Court AFFIRM the order of the Trial Court.

Respectfully submitted,
Party-in-Interest, NEPBA Local 220
By its lawyer,

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August 7, 2019

REQUEST FOR ORAL ARGUMENT

The Union respectfully requests to participate in oral argument and requests fifteen minutes be allocated to it. Peter Perroni will argue for the Union.
/s/ Peter J. Perroni 8/7/19

STATEMENT OF COMPLIANCE

I hereby certify that the brief complies with Supreme Court Rule 16(11) and that the brief contains 5764 words according to MS Word (not including addendum). I also certify pursuant to Supreme Court Rule 26(7) that this brief complies with Supreme Court Rules 26(2)-(4).
/s/ Peter J. Perroni 8/7/19

CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2019, I provided a true copy of the foregoing via the Court's electronic filing system on Richard Galiuso, Esq., Gilles Bissonnette, Esq. and Thomas Closson, Esq. /s/ Peter J. Perroni 8/7/19

ADDENDUM TABLE OF CONTENTS

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

General Court of New Hampshire - Bill Status System

Docket of HB153

Docket Abbreviations

Bill Title: relative to circumstances under which police officer disciplinary records shall be public documents.

Official Docket of **HB153.**:

Date	Body	Description
12/27/2018	H	**Introduced** 01/02/2019 and referred to Judiciary **HJ 2** P. 39
1/9/2019	H	Public Hearing: 01/23/2019 10:00 am LOB 208
1/31/2019	H	Full Committee Work Session: 02/06/2019 10:00 am LOB 208
2/5/2019	H	Executive Session: 02/12/2019 10:00 am LOB 208
2/14/2019	H	Committee Report: Ought to Pass with Amendment **#2019-0374h** for 02/27/2019 **(Vote 16-3; RC) HC 13** P. 31
2/28/2019	H	Special Order to 03/07/2019 Without Objection **HJ 7** P. 62
3/7/2019	H	Amendment **#2019-0374h**: AA VV 03/07/2019 **HJ 8** P. 45
3/7/2019	H	**Ought to Pass with Amendment** 2019-0374h: MA VV 03/07/2019 **HJ 8** P. 45
3/19/2019	S	Introduced 03/14/2019 and Referred to Judiciary; **SJ 9**
4/5/2019	S	**Hearing:** 04/11/2019, Room 103, SH, 01:20 pm; the committee will meet at 1:00 p.m. or 30 minutes following the end of session; **SC 17A**
5/15/2019	S	Committee Report: Rereferred to Committee, 05/23/2019; Vote 5-0; CC; **SC 23**
5/23/2019	S	Rereferred to Committee, MA, VV; 05/23/2019; **SJ 17**

NH House	NH Senate

HB 153 - AS AMENDED BY THE HOUSE

7Mar2019... 0374h

2019 SESSION

19-0094
01/04

HOUSE BILL **153**

AN ACT relative to circumstances under which police officer disciplinary records shall be public documents.

SPONSORS: Rep. Berch, Ches. 1; Rep. K. Murray, Rock. 24

COMMITTEE: Judiciary

AMENDED ANALYSIS

This bill makes certain records concerning law enforcement officers which have been subject to the right-to-know law.

Explanation: Matter added to current law appears in **bold italics.**
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.
7Mar2019... 0374h 19-0094
01/04

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Nineteen

AN ACT relative to circumstances under which police officer disciplinary records shall be public documents.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 New Section; Certain Disciplinary Records Subject to Right-to-Know Law. Amend RSA 106-L by inserting after section 5 the following new section:

106-L:5-a Certain Records Subject to Right-to-Know Law.

I. In this section, "disciplinary records" mean complaints, charges or accusations of misconduct, replies to those complaints, charges, or accusations, and any other information or materials that have resulted in final disciplinary action.

II.(a) Upon completion of an investigation, any record which includes a finding that a law enforcement officer subject to this chapter discharged a firearm which led to death or serious injury shall be a public record under RSA 91-A.

(b) Any disciplinary record in which there has been a final adjudication of a matter involving a law enforcement officer subject to this chapter who was found guilty of sexual assault as defined in RSA 632-A, or in which there was a sustained finding of dishonesty by a law enforcement officer including perjury, false statements, filing false reports destruction, or falsifying or concealing evidence, shall be a public record under RSA 91-A.

III. Nothing in this section shall limit the ability of a public agency or public body, as defined in RSA 91-A:1-a, to withhold the names, addresses, dates of birth, and other personal information of victims or other private persons where disclosure of such information would constitute an invasion of privacy under RSA 91-A:5, IV.

2 Effective Date. This act shall take effect January 1, 2020.

May 23, 2019
Nos. 16-17

STATE OF NEW HAMPSHIRE

Web Site Address: www.gencourt.state.nh.us

First Year of the 166th Session of the New Hampshire General Court

Legislative Proceedings

SENATE JOURNAL

ADJOURNMENT – MAY 15, 2019 SESSION
COMMENCEMENT – MAY 23, 2019 SESSION

2019-1967s

AMENDED ANALYSIS

This bill changes the definitions of solar energy systems and wind-powered energy systems for purposes of determining assessed value for real estate exemptions. The bill also allows cities and towns to adopt a property tax exemption for electric energy storage systems.

HB 496, establishing a committee to identify the requirements needed to commit New Hampshire to a goal of at least 50 percent renewable energy for electricity by 2040.
Re-refer to Committee, Vote 5-0. Senator Bradley for the committee.

This bill establishes a committee to undertake an analysis of the requirements that would have to be considered if New Hampshire were to commit to the goal of providing at least 50 percent renewable energy for electricity only to residents and businesses by the year 2040. Legislation is currently moving forward to increase the percentage obligations under the Renewable Portfolio Standard, or RPS. The committee felt this bill was not required at this time.

EXECUTIVE DEPARTMENTS AND ADMINISTRATION
HB 113, relative to qualifications for and exceptions from licensure for mental health practice.
Ought to Pass, Vote 5-0. Senator Cavanaugh for the committee.

This bill allows experience as a master licensed alcohol and drug counselor to qualify as experience for licensure as a clinical social worker, clinical mental health counselor, or marriage and family therapist. The bill also clarifies the mental health license exemption for psychotherapy activities and services of psychologists and master licensed alcohol and drug counselors. Implementing this change will make it easier for individuals to qualify for licensure with relevant experience, while maintaining appropriate safeguards for the industry.

JUDICIARY
HB 153, relative to circumstances under which police officer disciplinary records shall be public documents.
Re-refer to Committee, Vote 5-0. Senator Carson for the committee.

This bill would make certain records concerning law enforcement officers subject to the right-to-know law. Due to the ongoing court case regarding this matter and the need for further examination of the consequences of the language the Committee asks for support in the motion of Re-Refer.

HB 155, relative to procedures for determining and disclosing exculpatory evidence in a police officer's personnel file.
Re-refer to Committee, Vote 5-0. Senator Carson for the committee.

This bill would require a determination of whether information in a police officer's personnel file constitutes exculpatory evidence and would allow a police officer who has information determined to be exculpatory evidence in his or her personnel file to have an opportunity to challenge the disciplinary finding. The Committee asks for support of a Re-Refer motion in order to allow for the completion of the relevant ongoing court case prior to making a determination about this language.

HB 189-FN, establishing an exemption from criminal penalties for child sex trafficking victims.
Ought to Pass, Vote 5-0. Senator Chandley for the committee.

This bill exempts juvenile victims of human trafficking from prosecution for certain conduct chargeable as a criminal offense which was committed as a result of being trafficked. The bill also allows juvenile victims of human trafficking to petition to vacate a delinquency adjudication resulting from participating in conduct that was the direct result of being trafficked. Implementing this change will help these children feel safe coming forward, giving them more support and opportunity to escape from their captors without fear of prosecution.

The question is on the adoption of the Consent Calendar. Adopted.

REGULAR CALENDAR

EDUCATION AND WORKFORCE DEVELOPMENT
HB 631, establishing a deaf child's bill of rights and an advisory council on the education of deaf children.
Ought to Pass with Amendment, Vote 4-0. Senator Ward for the committee.

Revised Statutes Annotated of the State of New Hampshire
Title VI. Public Officers and Employees (Ch. 91 to 103) (Refs & Annos)
Chapter 91-a. Access to Governmental Records and Meetings (Refs & Annos)

N.H. Rev. Stat. § 91-A:5

91-A:5 Exemptions.

Effective: August 4, 2019
Currentness

The following governmental records are exempted from the provisions of this chapter:

I. Records of grand and petit juries.

I-a. The master jury list as defined in RSA 500-A:1, IV.

II. Records of parole and pardon boards.

III. Personal school records of pupils, including the name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the assessment under RSA 193-C:6.

IV. Records pertaining to internal personnel practices; confidential, commercial, or financial information; test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examinations; and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy. Without otherwise compromising the confidentiality of the files, nothing in this paragraph shall prohibit a public body or agency from releasing information relative to health or safety from investigative files on a limited basis to persons whose health or safety may be affected.

V. Teacher certification records in the department of education, provided that the department shall make available teacher certification status information.

VI. Records pertaining to matters relating to the preparation for and the carrying out of all emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

VII. Unique pupil identification information collected in accordance with RSA 193-E:5.

VIII. Any notes or other materials made for personal use that do not have an official purpose, including but not limited to, notes and materials made prior to, during, or after a governmental proceeding.

IX. Preliminary drafts, notes, and memoranda and other documents not in their final form and not disclosed, circulated, or available to a quorum or a majority of the members of a public body.

X. Video and audio recordings made by a law enforcement officer using a body-worn camera pursuant to RSA 105-D except where such recordings depict any of the following:

(a) Any restraint or use of force by a law enforcement officer; provided, however, that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

(b) The discharge of a firearm, provided that this exemption shall not include those portions of recordings which constitute an invasion of privacy of any person or which are otherwise exempt from disclosure.

(c) An encounter that results in an arrest for a felony-level offense, provided, however, that this exemption shall not apply to recordings or portions thereof that constitute an invasion of privacy or which are otherwise exempt from disclosure.

XI. Records pertaining to information technology systems, including cyber security plans, vulnerability testing and assessments materials, detailed network diagrams, or other materials, the release of which would make public security details that would aid an attempted security breach or circumvention of law as to the items assessed.

Credits

Source. 1967, 251:1. 1986, 83:6. 1989, 184:2. 1990, 134:1. 1993, 79:1. 2002, 222:4. 2004, 147:5; 246:3, 4. 2008, 303:4, eff. July 1, 2008. 2013, 261:9, eff. July 1, 2013. 2016, 322:3, eff. Jan. 1, 2017. 2018, 91:2, eff. July 24, 2018. 2019, 54:1, eff. Aug. 4, 2019.

N.H. Rev. Stat. § 91-A:5, NH ST § 91-A:5

Current through Chapter 175 of the 2019 Reg. Sess. Some statute sections may be more current, see credits for details.

Editor's and Revisor's Notes (17)

HISTORICAL AND STATUTORY NOTES

Amendments--2019. Paragraph XI: Added.

--2018. Paragraph III: Added ", including the name of the parent or legal guardian and any specific reasons disclosed to school officials for the objection to the assessment under RSA 193-C:6 ".

--2016. Added par. X.

--2013. Paragraph I-a: Inserted.

--2008. Introductory paragraph: Inserted "governmental".

Paragraph V: Deleted ", both hard copies and computer files," following "certification records".

Paragraph VIII: Inserted "but not limited to," and substituted "governmental proceeding" for "public proceeding".

Paragraph IX: Substituted "the members of a public body" for "those entities defined in RSA 91-A:1-a ".

--2004. Introductory paragraph: Chapter 246:3 substituted "following records" for "records of the following bodies".

Paragraphs I and II: Chapter 246:3 inserted "Records of" at the beginning.

Paragraph VII: Added by ch. 147:5.

Paragraphs VIII and IX: Added by ch. 246:4.

--2002. Paragraph VI: Added.

--1993. Paragraph V: Added.

--1990. Paragraph IV: Inserted "videotape sale or rental" following "library user" in the first sentence.

--1989. Paragraph IV: Inserted "library user" following "welfare" in the first sentence.

--1986. Paragraph IV: Amended generally.