THE STATE OF NEW HAMPSHIRE
SUPREME COURT
Case No. 2019-0135

Seacoast Newspapers, Inc.
Plaintiff – Appellant
v.
City of Portsmouth
Defendant – Appellee

Rule 7 Mandatory Appeal from the New Hampshire Superior Court, Rockingham County
Case No. 218-2018-CV-01254

BRIEF FOR PLAINTIFF – APPELLANT

Attorneys for Plaintiff-Appellant

Richard C. Gagliuso, NH Bar No. 874
Bernstein, Shur, Sawyer & Nelson, P.A.
670 N. Commercial Street, Suite 108
P.O. Box 1120
Manchester, NH 03105-1120
rgagliuso@bernsteinshur.com
(603) 623-8700

Gilles R. Bissonnette, NH Bar No. 265393
Henry R. Klementowicz, NH Bar No. 21177
American Civil Liberties Union of NH
Concord, NH 03301
gilles@aclu-nh.org
henry@aclu-nh.org
(603) 224-5591

June 21, 2019

Oral Argument by: Richard C. Gagliuso

TABLE OF CONTENTS

TABLE OF CASES……...……..3

TABLE OF STATUTES AND OTHER AUTHORITIES……...……5

QUESTIONS PRESENTED……6

STATUTES INVOLVED IN THE CASE……...8

STATEMENT OF FACTS AND OF THE CASE……...…9

SUMMARY OF THE ARGUMENT……11

ARGUMENT……..…14

I. THE EXEMPTION IN RSA 91-A:5 FOR "INTERNAL PERSONNEL PRACTICES" HAS BEEN MISCONSTRUED AND WAS NOT INTENDED TO INCLUDE PERSONNEL RECORDS PERTAINING TO AN INDIVIDUAL EMPLOYEE……....14

II. THE ARBITRATION AWARD IS NOT A RECORD OF AN "INTERNAL PERSONNEL PRACTICE" AS PREVIOUSLY CONSTRUED BY THIS COURT BECAUSE THE ARBITRATOR WAS AN INDEPENDENT TRIBUNAL WHOLLY OUTSIDE THE CONFINES OF THE PORTSMOUTH POLICE DEPARTMENT ……20

III. THE ARBITRATOR AWARD IS NOT A RECORD OF AN "INTERNAL PERSONNEL PRACTICE" AS PREVIOUSLY CONSTRUED BY THIS COURT BECAUSE THE AWARD WAS NOT MADE IN THE CONTEXT OF AN EXISTING EMPLOYMENT RELATIONSHIP……..…21

IV. THE PUBLIC INTEREST IN DISCLOSURE OF THE ARBITRATION AWARD FAR OUTWEIGHS ANY PRIVACY INTEREST OF THE FORMER PORTSMOUTH POLICE OFFICER WHOSE EMPLOYMENT WAS TERMINATED……...22

CONCLUSION…….26

REQUEST FOR ORAL ARGUMENT…….27

ORDER OF JUSTICE MESSER DATED JANUARY 30, 2019…….29

TABLE OF CASES

Burton v. York County Sheriff's Dep't, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004)……25

Department of Air Force v. Rose, 425 U.S. 352, 369-370 (1976)……...16, 17

Deseret News Pub. Co. v. Salt Lake County, 182 P.3d 372 (Utah 2008)…….….26

Doe v. Dept. of Mental Health, Mental Retardation, and Substance Abuse Services, 699 A.2d 422 (Me. 1997)……...21

City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C., 4 So.3d 807, 809-10, 821 (La.Ct.App. 2008)…….25

Clay v. City of Dover, 169 N.H. 681 (2017)…….22

Ford v. N.H. Dep't of Transp., 163 N.H. 284, 290 (2012)……....19

Getman v. National Labor Relations Board, 450 F.2d 670, 678 (D.C. Cir. 1971)……16

Goode v. N.H. Legis. Budget Assistant, 148 N.H. 551, 554 (2002)……..…14

Herald Co. v. Kent County Sheriff's Depart., 680 N.W.2d 529 (Mich.Ct.App. 2004)…….26

Hounsell v. North Conway Water Precinct, 154 N.H. 1 (2006)……..…7, 12, 15

Lambert v. Belknap County Convention, 157 N.H. 375 (2008)……24

Lamy v. New Hampshire Public Utilities Comm'n, 152 N.H. 106 (2005)……...…24

Lutz v. City of Philadelphia, 6 A.3d 669, 676 (Pa. Cmwlth. 2010)……..21

Mans v. Lebanon School Board, 112 N.H. 160 (1972)……...17, 24

Milner v. Department of the Navy, 562 U.S. 562, 570 (2011)……....17, 18

NHCLU v. City of Manchester, 149 N.H. 437, 442 (2003)……..26

Orford Teachers Ass'n v. Watson, 121 N.H. 118, 427 (1981)……..……14

Palmer v. Driggers, 60 S.W.3d 591 (Ky.Ct.App. 2001)……....26

Petition of State, 159 N.H. 456, 457 (2009)……..…14

Predisik v. Spokane School Dist. No. 81, 346 P.3d 737 (Wash. 2015)…….24

Prof. Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 709 (2010)……....25

Reid v. New Hampshire Attorney General, 169 N.H. 509 (2016)……12, 15, 20, 21, 22, 24, 26

Robinson v. Wichita State Univ., No. 16-2138-DDC-GLR, 2018 WL 836294, at *21 (D. Kan. 2018)……..25

Union Leader Corp. v. N.H. Housing Fin. Auth., 142 N.H. 540, 546 (1997)…….…..14

Union Leader Corp. v. New Hampshire Retirement System, 162 N.H. 673 (2011)……..….24, 25

Union Leader Corp. v. Fennimen, 136 N.H. 624 (1993)…….……..7, 12, 14, 23

Winnacunnet Co-op. Sch. Dist. V. Town of Seabrook, 148 N.H. 519, 525-526 (2002)……...14

WMUR v. N.H. Dep't of Fish and Game, 154 N.H. 46, 48 (2006)……...…24

TABLE OF STATUTES AND OTHER AUTHORITIES

RSA 91-A……..14, 15, 16

RSA 91-A:4…….8, 14, 26

RSA 91-A:5……..……..8, 14

RSA 91-A:5, IV……...6, 14, 16, 20, 22, 23, 26

5 U.S.C.A. §552(b)……17

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the trial court erred in holding that an arbitrator's decision relating to a grievance filed by a former employee of the City of Portsmouth, whose employment had been terminated, was exempt from disclosure pursuant to the provisions of RSA 91-A:5, IV as an internal personnel practice. *See Petition of Seacoast Newspapers, Inc. for Access to Public Records ("Petition")*, Appendix, Volume I,[1] at 3-5; *Transcript of Final Hearing ("Transcript")*, Apx. Vol. I, at 35-39.

2. Did the court below err in ruling that the 2018 decision of an arbitrator, relating to a grievance filed by a former police officer of the City of Portsmouth, was an "extension of a purely internal grievance process," and therefore, an "internal personnel practice" within the meaning of RSA 91-A:5, IV, where the arbitration proceedings took place before an independent arbitrator not employed by or affiliated with the City? *Petition,* Apx. Vol. I, at 3-5; *Transcript,* Apx. Vol. I at 35-39, 47-48.

3. Did the court below err in ruling that the 2018 decision of an arbitrator, relating to a grievance filed by a former police officer of the City of Portsmouth whose employment was terminated in 2015, was an "internal personnel practice" within the meaning of RSA 91-A:5, IV, where the arbitration proceedings took place years after the police officer's employment had terminated? *Petition,* Apx. Vol. I at 3-5; *Transcript*, Apx. Vol. I at 35-39.

4. Did the court below err in ruling that the 2018 decision of an arbitrator, relating to a grievance filed by a former police officer of the City of Portsmouth, was an "internal personnel practice" within the meaning of RSA 91-A:5, IV, without balancing the public interest in disclosure against the privacy interest, if any, of the former police officer? *Petition,* Apx. Vol. I at 3-5; *Transcript*, Apx. Vol. I at 38-39.

5. Did the court below err in ruling that the 2018 decision of an arbitrator, relating to a grievance filed by a former police officer of the City of Portsmouth challenging his termination in 2015, was an "internal personnel practice" within the meaning of RSA 91-A:5, IV, as opposed

[1] This Brief is accompanied by an Appendix, hereinafter referred to as "Apx.," in two volumes. The first volume ("Vol. I") contains pleadings and orders in the Superior Court as well as a hearing transcript. The second volume ("Vol. II") consist of the Arbitration Award at issue in this case.

to the independent adjudication of the merits of the former officer's claim? *Petition,* Apx. Vol. I at 3-5; *Transcript*, Apx. Vol. I at 35-36.

6. Should this Court reconsider *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006)? *Transcript*, Apx. Vol. I at 35-36.

STATUTES INVOLVED IN THE CASE

RSA 91-A:4, I Minutes and Records Available for Public Inspection

Every citizen during the regular or business hours of all public bodies or agencies, and on the regular business premises of such public bodies or agencies, has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies, and to copy and make memoranda or abstracts of the records or minutes so inspected, except as otherwise prohibited by statute or RSA 91-A:5….

RSA 91-A:5 Exemptions

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

IV. Records pertaining to internal personnel practices; … and personnel, medical, welfare, library user, videotape sale or rental, and other files whose disclosure would constitute invasion of privacy….

STATEMENT OF FACTS AND OF THE CASE

Procedural History

On or about October 25, 2018, Elizabeth Dinan ("Dinan"), a reporter employed by Seacoast Newspapers, submitted a written request to the City seeking access to a copy of the Award. (Apx. Vol. I at 7.)

On or about October 31, 2018, Attorney Thomas M. Closson, representing the City, responded in writing to Dinan's request and advised her that the City was not prepared to release the Award in light of the position opposing disclosure taken by the Union. (*Id.* at 9-10.)

On or about November 13, 2018, Seacoast Newspapers filed in the Rockingham County Superior Court the Petition seeking an order requiring the City to disclose the Award and make it available for public inspection, as well as an award to Seacoast Newspapers of its costs and reasonable attorney's fees. (*Id.* at 3.)

On or about December 11, 2018, the City filed an Answer to the Petition stating that it did not object to the relief requested by Seacoast Newspapers with the exception of its request for legal expenses, and citing Attorney Closson's October 31, 2018 letter to Dinan. (*Id.* at 11.) The following day, the Union filed a Motion to Intervene together with an Opposition to the Petition, citing and attaching excerpts from the CBA. (*Id.* at 14.) The Union's Opposition relied on the exemptions in RSA 91-A:5, IV for "internal personnel practices" and for "personnel … files whose disclosure would constitute invasion of privacy." (*Id.* at 16.)

A hearing was held on December 13, 2018 before the Honorable Amy B. Messer, who heard offers of proof and arguments by Seacoast Newspapers, the City and the Union. (*Id.* at 31.) Counsel for the City affirmed the City's position that the Award should be made public, stating: "I can't imagine a case in New Hampshire in the last 20 years that has garnered more public attention than this case. The public's interest in finding out how this matter was ultimately resolved is extremely high, and outweighs any concern that former Ofc. Goodwin would have in a privacy interest regarding the claim." (*Id.* at 41.)

On December 17, 2018, the City filed a Motion to Permit Submission of the Award to the Court under seal for *in camera* review, indicating the assent of Seacoast Newspapers and the Union. (*Id.* at 26.) Upon the granting of that Motion, counsel for the City delivered a copy of

the Award to counsel for Seacoast Newspapers, on the condition that the Award would remain confidential and "for attorneys eyes only." (*Id.* at 64.)

On January 30, 2019,[2] the Court (Messer, J.) issued an Order (the "Order") finding that the Award was an "internal personnel practice" within the meaning of RSA 91-A:5,IV, and therefore, denying the relief requested in the Petition. This appeal followed.

[2] The Order was transmitted to the parties by Notice of Decision dated February 8, 2019.

SUMMARY OF ARGUMENT

The trial court ruled in this case that the Award of an independent arbitrator with respect to the merits of a grievance filed by a former Portsmouth police officer was a record of an "internal personnel practice" within the meaning of RSA 91-A:5, IV, and that it was therefore categorically exempt from disclosure; i.e., without balancing the public's interest in disclosure against any countervailing privacy interests.

As a threshold matter, the court below improperly characterized the Award as a "personnel practice." The trial court's ruling relied on prior opinions of this Court which had held that actions taken by public employers in connection with the employment of particular individuals were "personnel practices." Seacoast Newspapers maintains that these cases misconstrued this exemption in the Right-to-Know Law, which was derived from a similar provision in the Federal Freedom of Information Act, and improperly confused it with a separate exemption for "personnel … files whose disclosure would constitute invasion of privacy." As federal case law makes clear, "personnel practices" is a term more properly understood to refer to rules, procedures and policies of a government agency pertaining to personnel matters, as distinct from the records that pertain to an individual's employment. That is, "personnel practices" refers to matters of general applicability to human resources or employment, while "personnel files" refers to matters related to a particular employee. Accordingly, the Award was not accurately characterized as a "personnel practice."

The trial court further improperly determined that the Award was an "internal personnel practice" by reasoning that it was an "extension of a purely internal grievance process set forth in the CBA." To the contrary, the arbitration process was the last step in a process dictated by the CBA for the purpose of permitting disciplined employees to challenge the City's actions and obtain an independent review of such actions. While certain aspects of that process might be considered "internal," the final step of arbitration was a substitute for review by a court, which certainly would not have been considered "internal" to the Portsmouth Police Department. Moreover, the arbitration proceeding took place after Goodwin's dismissal and, therefore, outside the realm of an existing employment relationship. Under this Court's existing precedents, the Award could not be considered an "internal personnel practice."

Even if this Court were to find that the Award does constitute an "internal personnel practice," however, the trial court then failed to determine whether disclosure would be

appropriate by balancing the public interest in disclosure against any competing privacy interests. As the City itself acknowledges, there is a compelling public interest in disclosure of the Award. Nonetheless, the trial court failed to recognize this interest and then to determine whether any countervailing privacy interests existed, and if so, whether such interests were outweighed by the public interest in disclosure. While this failure was understandable in light of the prior decisions of this Court, the characterization of "internal personnel practices" as a categorical exemption is inconsistent with a long line of cases mandating a balancing of interests in cases where competing interests are at stake. Indeed, this Court, in *Reid v. New Hampshire Attorney General*, 169 N.H. 509 (2016), cast serious doubt on whether these prior decisions, specifically *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993) and *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006), were correctly decided. *Reid*, 169 N.H. at 519-20, 522.

To be clear, Seacoast Newspapers submits that these two decisions were incorrectly decided. The *Fenniman* and *Hounsell* decisions undermine the legislative purpose of Chapter 91-A and Part I, Article 8 of the New Hampshire Constitution—namely, to inform the public of what government actors are up to—by categorically depriving citizens of information like disciplinary records and internal audits funded by taxpayers even where the public interest in disclosure is immense and where the privacy interest is nonexistent. The "internal personnel practices" exemption has been routinely relied upon, since *Fenniman* and *Hounsell,* by government entities to withhold vital information that would significantly inform the public, including the circumstances under which police officers and other government employees have been terminated or disciplined for misconduct in their official capacity. Accordingly, even if the Court adheres to its prior interpretation of "internal personnel practices," this Court should now overrule *Fenniman* and *Hounsell*, which declined to employ a balancing test in determining whether the "internal personnel practices" exemption applies in a given case.

Application of the balancing test in this case leads to a clear and certain result. As many courts have held, a public employee disciplined by his employer can hardly be said to have a privacy interest in the fact that he was disciplined. Even if such an interest existed, it would be far outweighed by the public's compelling interest in knowing the details of the employee's conduct and the manner in which the employing agency responded to it.

Requests for records like the Award are more appropriately handled under the exemption for "personnel … files whose disclosure would constitute invasion of privacy," which the Court has recognized is subject to a balancing of competing interests. Regardless of which exemption is considered, however, the balancing test leads to the same certain result.

ARGUMENT

I. THE EXEMPTION IN RSA 91-A:5 FOR "RECORDS PERTAINING TO INTERNAL PERSONNEL PRACTICES" HAS BEEN MISCONSTRUED AND WAS NOT INTENDED TO INCLUDE PERSONNEL RECORDS PERTAINING TO AN INDIVIDUAL EMPLOYEE.

At the outset, it must be recognized that the general rule embodied in RSA 91-A, commonly referred to as the "Right-to-Know Law," is that governmental records are public and subject to disclosure. RSA 9-A:4. The statute contains, in RSA 91-A:5, certain exceptions to this general rule, but in keeping with the stated statutory purpose of affording the public the greatest possible access to public records and proceedings, this Court has repeatedly held that exemptions from disclosure are to be construed narrowly. *See, e.g., Goode v. N.H. Legis. Budget Assistant*, 148 N.H. 551, 554 (2002); *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997); *Orford Teachers Ass'n v. Watson*, 121 N.H. 118, 427 (1981).

This Court has also long and often held that, in construing any statute, all of its terms must be accounted for so as to avoid any language being deemed superfluous. *See, e.g., Petition of State*, 159 N.H. 456, 457 (2009); *Winnacunnet Co-op. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 525-526 (2002). This rule of statutory interpretation presumably applies with equal force in construing RSA 91-A.

Two exemptions contained in RSA 91-A:5 call these rules of construction into play. The statute exempts from disclosure "[r]ecords pertaining to internal personnel practices." It further exempts "personnel … files whose disclosure would constitute invasion of privacy." The distinction between these two exemptions may not be immediately clear, as they both appear to refer to records relating in some fashion to "personnel." Nevertheless, we are guided by the mandate that they be construed narrowly, and by the necessity of according each of them independent meaning so as to avoid one or the other being deemed superfluous.

At least since 1993, this Court has interpreted the "internal personnel practices" exemption in a manner that arguably violates both of these rules of construction. In *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), this Court held that records pertaining to an internal investigation into the conduct of a police lieutenant accused of making harassing phone calls constituted "records pertaining to internal personnel practices" within the meaning of RSA 91-A:5, IV. At least so far as the opinion reveals, the Court did not consult case law from other

jurisdictions interpreting other open records laws. Rather, the Court simply explained: "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." *Id.* at 626. What the Court failed to explain was how this interpretation of "records pertaining to internal personnel practices" distinguished it from "personnel … files." Nevertheless, the Court concluded that it was unnecessary to weigh competing interests in disclosure, since the legislature had made its own policy judgment and made such records "categorically exempt from disclosure." *Id*. at 627.

The Court adhered to its prior interpretation of "internal personnel practices" in *Hounsell v. North Conway Water Precinct*, 154 N.H. 1 (2006), where it relied on *Fenniman* to hold that records of an investigation of a harassment complaint conducted by outside parties concerned "internal personnel practices." Again, the Court declined to consider the issue in the context of the "personnel files" exemption or to consider case law from other jurisdictions.[3]

Ten years after *Hounsell*, the Court had occasion to re-examine these two exemptions in RSA 91-A:5. In *Reid v. New Hampshire Attorney General*, 169 N.H. 509 (2016), the Court revisited its decisions in *Fenniman* and *Hounsell* and was clearly uncomfortable with what it found. The Court explicitly noted that, in *Fenniman*, it "did not examine whether a broad, categorical interpretation of 'internal personnel practices' might render the exemption for 'personnel … files whose disclosure would constitute invasion of privacy' in any way redundant or superfluous." *Id.* at 520. At the same time, the Court seemed to lament the fact that it had failed to consult decisions from other jurisdictions with similar statutes, noting that the exemptions contained in the Federal Freedom of Information Act (the "FOIA") were similar to those contained in RSA 91-A. *Id*.

[3] To the best knowledge of Seacoast Newspapers and its counsel, there is nothing in the legislative history of the Right-to-Know Law which supports the statutory interpretation underpinning *Fennimen* and *Hounsell*. The *Fenniman* Court did look to the 1986 legislative history of another statute, RSA 516:36, to bolster its holding that the "internal personnel practices" exemption under RSA 91-A:5, IV operated as a categorical exemption. *Fenniman*, 136 N.H. at 627. The Court's apparent reliance on the legislative history of RSA 516:36, however, was misplaced, as it shed no light whatsoever on the history of RSA 91-A or, in particular, on the 1967 enactment of the "internal personal practices" exemption in RSA 91-A:5, IV.

Indeed, as the Court noted in *Reid*, the FOIA contains an exemption for matters "related solely to the internal personnel rules and practices of an agency." The Court conceded that its prior interpretation of the "internal personnel practices" exemption in RSA 91-A:5, IV had been "markedly broader" than the U.S. Supreme Court's interpretation of its federal counterpart, *Id*. at 521, while acknowledging that it had departed from its "customary Right-to-Know Law jurisprudence by declining to interpret the exemption narrowly and declining to employ a balancing test in determining whether to apply the exemption." *Id*. at 520. Consequently, the *Reid* Court declined to extend *Fenniman* and *Hounsell* beyond their own factual contexts and returned to its "customary standards for construing the Right-to-Know Law." *Id.* at 522.

Seacoast Newspapers accepts the Court's implicit invitation in *Reid* to urge this Court to revisit its prior interpretations of the "internal personnel practices" exemption and to consult with decisions from other jurisdictions, and particularly those of the U.S. Supreme Court construing the FOIA's counterpart exemption.

In *Department of Air Force v. Rose*, 425 U.S. 352, 369-370 (1976), the Court examined the FOIA exemption for "internal personnel rules and practices of an agency" in the context of its legislative history and in relation to another exemption for "personnel … files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." These two FOIA exemptions are so close to their Right-to-Know Law counterparts as to suggest strongly that New Hampshire's exemptions must have been modeled after the FOIA exemptions or, at the very least, drafted with the federal versions in mind. This conclusion is buttressed by the legislative history of RSA 91-A. The two FOIA exemptions were adopted with the passage of the FOIA in 1966. *Id.* at 362; *Getman v. National Labor Relations Board*, 450 F.2d 670, 678 (D.C. Cir. 1971). The bill that became New Hampshire's Right-to-Know Law was passed in 1967 and contained the exemptions for "[r]ecords pertaining to internal personnel practices" and "personnel, medical, welfare, and other files whose disclosure would constitute invasion of privacy" which exist today. (*See* Apx. Vol. I at 77.) Their language tracked, nearly but not quite verbatim, the federal exemptions. Rep. Bednar, who sponsored HB 28 which became the Right-to-Know Law, expressly invoked the federal law in his testimony before the Senate Judiciary Committee in March of 1967. (Apx. Vol. I at 66.)

The genesis of the FOIA exemption for "internal rules and practices," as explained in *Rose*, is illuminating. The exemption was adopted as an effort to narrow the sweep of an

exemption in the Administrative Procedure Act for "internal management" matters. *Rose*, 425 U.S. at 363. "[T]he general thrust of the exemption is simply to relieve agencies of the burden of assembling and maintaining for public inspection matter in which the public could not reasonably be expected to have an interest." *Id.* at 369-370. The Senate Report ultimately accepted as reliable by the Supreme Court stated: "Examples of [the internal rules and practices of an agency] may be rules as to personnel's use of parking facilities or regulations of lunch hours, statements of policy as to sick leave, and the like." *Id*. at 363; *see also, Milner v. Department of the Navy*, 562 U.S. 562, 570 (2011) ("An agency's 'personnel rules and practices' are its rules and practices dealing with employee relations or human resources…. [A]ll the rules and practices in Exemption 2 share a critical feature: They concern the conditions of employment in federal agencies – such matters as hiring and firing, work rules and discipline, compensation and benefits."). In short, this exemption was designed to be narrow and to include only internal rules and practices governing employee relations, not information concerning the employment history of particular individuals.

Like the Right-to-Know Law, the FOIA contains a separate exemption for "personnel files." Exemption 6 in the FOIA exempts "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of privacy." *5 U.S.C.A. § 552(b)*; *cf. RSA 91-A:5, IV* ("personnel, medical … and other files whose disclosure would constitute invasion of privacy."). The Court in *Milner* defined "personnel file" as "the file 'showing, for example, where [an employee] was born, the names of his parents, where he has lived from time to time, his … school records, results of examinations, [and] evaluations of his work performance.'" *Milner*, 562 U.S. at 570 (citing *Rose*, 425 U.S. at 377) In *Rose*, the Supreme Court analyzed this exemption and ruled that the "unwarranted invasion of privacy" element required a balancing of public and private interests much like the test adopted by this Court in *Mans v. Lebanon School Board*, 112 N.H. 160 (1972) and applied in numerous cases since that time. *Id.* at 372-373.

Clearly, Congress was not thinking of information related to particular employees when it adopted the exemption for "internal rules and practices of an agency." Such information, the Supreme Court has recognized, falls instead within the "personnel files" exemption where a balancing of competing interests is required. Yet, upon the adoption of nearly identical

exemptions in New Hampshire in 1967, those exemptions came to be construed quite differently and in a way that confused them and made the "personnel file" exemption largely redundant.

Seacoast Newspapers contends that this Court, in *Fenniman* and again in *Hounsell*, misapprehended the "internal personnel practices" exemption and departed, without justification, from the apparent purpose and scope of the exemption as demonstrated by its FOIA counterpart. Respectfully, as the Court recognized in *Reid*, what the Court in *Fenniman* should have done was to recognize that, consistent with the FOIA, the exemption for "internal personnel practices" is inapplicable to the individual disciplinary employee records at issue there and instead considered the issue under the exemption for "personnel … files whose disclosure would constitute invasion of privacy." This would have respected the clear distinction between the two exemptions and led to the application of the balancing test adopted by this Court in cases where competing interests are at stake. It would have avoided, in fact, the dilemma recognized in *Reid*, where the Court seemed to realize that its prior, erroneous interpretation of one exemption had put it on a collision course with the plain meaning of another.

Indeed, in hindsight, it seems implausible that the legislature, through the "internal personnel practices" exemption, would have categorically exempted from public disclosure records pertaining to the performance and discipline of public employees. *Cf. Milner*, 562 U.S. at 562. It is difficult to conceive of any issue in which the public has a more legitimate interest than how well the people whose wages are paid by public tax dollars are doing their jobs. The notion that the legislature intended to shield this information from public scrutiny *in all cases*, without regard to what countervailing public interests are at stake, is hard to accept or understand. And yet, this is the intent attributed to the legislature by this Court in *Fenniman* and *Hounsell*.

Had the Court consulted available federal case law, it surely would have arrived at an entirely different interpretation of "internal personnel practices" and focused instead on the "personnel files" exemption in analyzing employment issues related to particular individuals. This would have led to such issues being considered and decided based on the balancing test adopted by this Court in *Mans* and applied in numerous cases since that time.

Seacoast Newspapers is not unmindful of the principle of *stare decisis*, and it appreciates this Court's reluctance to overrule or depart from established precedent in any area of the law. As the Court has articulated the principle of *stare decisis*, however, overruling *Fenniman* and

Hounsell appears to be appropriate and justified. "[W]e will overturn a decision only after considering: (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." *Ford v. N.H. Dep't of Transp*., 163 N.H. 284, 290 (2012).

In this case, the Court's interpretation of "internal personnel practices" has proven unworkable because it has created confusion surrounding the distinction between this exemption and that for "personnel ... and other files whose disclosure would constitute invasion of privacy." As a consequence, public agencies in New Hampshire have routinely relied on the former exemption in protecting personnel files and taken advantage of the categorical gloss placed upon it by this Court. This has meant, of course, that many records in which the public has a compelling interest have not seen the light of day.

The second factor enumerated in *Ford*, i.e., whether or not overruling *Fenniman* and *Hounsell* would create a "special hardship" due to past reliance on them, would appear to be inapplicable here. Issues related to the disclosure of information contained in personnel files are highly fact-sensitive, and regardless of how they have been decided in the past, they are best decided going forward by application of the public interest/private interest balancing test that will apply if the correct exemption is utilized. As to the third factor identified in *Ford,* the law has already developed, as *Reid* makes clear, so as to have limited the holdings of *Fenniman* and *Hounsell* to their facts.

Most importantly, as Seacoast Newspapers has demonstrated, *Fenniman* and *Hounsell* were based on an unsupported interpretation of the two exemptions in question. Accordingly, if the Court is convinced that the Right-to-Know Law has been misinterpreted and that there is nothing to be gained by perpetuating this misinterpretation, then Seacoast Newspapers respectfully asks this Court to correct the error and adopt a more sensible and workable interpretation of these two exemptions, and one which will apply the well-established balancing test in determining whether records related to public employee performance and discipline should see the light of day.

This Court need not be concerned that overruling *Fenniman* and *Hounsell* will lead to a flood of private employee information becoming public. All overruling *Fenniman* and *Hounsell* will do is ensure that requests for access to personnel files are addressed with reference to the correct exemption, which means that they will be subjected to a balancing analysis where the public interest in disclosure is balanced against any governmental or individual privacy interest in nondisclosure. Where the public interest in disclosure is low and the countervailing privacy interest is high, the government will be permitted to withhold this information. Thus, private employee information can and still will be protected.

As the above analysis makes clear, the Award at issue here is not a record of an "internal personnel practice" at all. It has nothing to do with agency rules or practices related to employment. Rather, it is a record of the final stage in a CBA grievance process instituted by a particular public employee in response to specific employee discipline. Accordingly, the plaintiff's request for access to the Award must be considered with reference to the Right-to-Know Law's exemption for "personnel … files whose disclosure would constitute invasion of privacy," which means that the public interest in disclosure must be balanced against any discernable privacy interest. The application of this balancing test is addressed below.

II. THE ARBITRATION AWARD IS NOT A RECORD PERTAINING TO AN "INTERNAL PERSONNEL PRACTICE" AS PREVIOUSLY CONSTRUED BY THIS COURT BECAUSE THE ARBITRATOR WAS AN INDEPENDENT TRIBUNAL WHOLLY OUTSIDE THE CONFINES OF THE PORTSMOUTH POLICE DEPARTMENT.

In denying the Petition of Seacoast Newspapers, the trial court relied upon the exemption in RSA 91-A:5, IV for "[r]ecords pertaining to internal personnel practices." As set forth above, Seacoast Newspapers contends that the Award was not a record of a "personnel practice" at all, as the term is properly construed. If the Court concludes that it *was* a personnel practice, however, it was not an "*internal* personnel practice."

In *Reid*, this Court adopted the dictionary definition of "internal;" i.e. "existing or situated within the limits … of something." 169 N.H. at 523. The Court clarified that, in order for an investigation to be considered "internal," "the investigation must take place within the limits of an employment relationship. In other words, the investigation must be conducted by, or … on behalf of, the employer of the investigation's target." *Id*. Applying this definition, the

Court held that the Attorney General's investigation into the Reams matter was not internal because the Attorney General was not Reams' employer. *Id.* at 525-526.

The Award at issue here is even more removed from the past employment relationship between Goodwin and the City of Portsmouth. Here, an independent arbitrator was appointed pursuant to the CBA, which called for the parties to "endeavor to agree upon a mutually acceptable Arbitrator," or in the absence of such agreement, for the selection of the Arbitrator "in accordance with the rules of the American Arbitration Association." (Apx. Vol. I at 24.) The CBA further provided that the "decision of the Arbitrator …shall be final and binding…." (*Id*. at 25.) It is clear, therefore, that the arbitrator was the final arbiter of the dispute between Goodwin and the City, and that the parties selected arbitration as an alternative to litigation.

Had the final step in the grievance process been litigation, it is difficult to conceive of the Union arguing, or the trial court finding, that court proceedings were simply "an extension of a purely internal grievance process set forth in the CBA." (*See* Order attached hereto, at 36-37.) Nevertheless, the trial court ruled that the arbitration process substituted for litigation was part of an internal personnel practice. (*Id.*)

Seacoast Newspapers submits that the Award was not issued by or on behalf of the City, and that the independent adjudication of the merits of Goodwin's claims cannot, under any circumstances, be viewed as "within the limits of an employment relationship." *See, e.g., Lutz v. City of Philadelphia*, 6 A.3d 669, 676 (Pa. Cmwlth. 2010) (grievance arbitration awards were "formal legal adjudications" not exempt from disclosure); *see also, Doe v. Dept. of Mental Health, Mental Retardation, and Substance Abuse Services*, 699 A.2d 422 (Me. 1997). Accordingly, even if the Award is considered a record pertaining to a personnel practice, it cannot be considered a record of an *internal* personnel practice.

III. THE ARBITRATION AWARD IS NOT A RECORD PERTAINING TO AN "INTERNAL PERSONNEL PRACTICE" AS PREVIOUSLY CONSTRUED BY THIS COURT BECAUSE THE AWARD WAS NOT MADE IN THE CONTEXT OF AN EXISTING EMPLOYMENT RELATIONSHIP.

Similarly, the Award was not issued within the limits of an employment relationship because the employment relationship between Goodwin and the City had long since ended by the time the Award was issued. That is, while the Award may have *related to* a prior employment relationship, it was not issued within the limits of such a relationship.

The trial court cited *Clay v. City of Dover*, 169 N.H. 681 (2017) for the proposition that it was immaterial that no employment relationship existed at the time of the Award. In this respect, however, the trial court extended the reach of *Clay* well beyond its facts and its reasoning. In *Clay*, this Court found it immaterial that there was no existing employment relationship "[b]ecause this case involves hiring and not investigation into misconduct." Clay, 169 N.H. at 162. In extending this reasoning to "firing instead of hiring," the trial court failed to recognize that the grievance process actually entailed an independent review of the City's disciplinary action against Goodwin, rather than "firing."

In *Reid*, this Court held that an outside investigation into employee misconduct could not constitute an "internal personnel practice." It would be anomalous to conclude that subsequent steps in the grievance process were part of an internal personnel practice if an outside investigation leading to employee discipline is not such a practice. For this purpose, hiring and the review of an independent arbitrator at the conclusion of a grievance process are not analogous, and the rationale employed by this Court in *Clay* does not translate to Goodwin's termination and subsequent grievance. Seacoast Newspapers respectfully submits that the Award was the result of an outside review of the City's disciplinary action and well outside the bounds of any employment relationship.

IV. THE PUBLIC INTEREST IN DISCLOSURE OF THE ARBITRATION AWARD FAR OUTWEIGHS ANY PRIVACY INTEREST OF THE FORMER PORTSMOUTH POLICE OFFICER WHOSE EMPLOYMENT WAS TERMINATED.

As set forth above, and as this Court itself has recognized, the question of whether the Award is subject to public disclosure should be analyzed with reference to the exemption for "personnel … files whose disclosure would constitute invasion of privacy," and not the "internal personnel practices" exemption. *See Reid,* 169 N.H. at 526 ("… whether the disputed material may be withheld should more properly be addressed under the portion of RSA 91-A:5, IV that exempts 'personnel, medical, … and other files whose disclosure would constitute invasion of privacy.'"). To the extent "personnel files" are implicated here, this Court must balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. *Id.* at 528.

This Court affirmed in *Reid* that the determination of whether the "personnel files" exemption applies "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." *Id.* at 527. In turn, whether disclosure of public records would constitute an invasion of privacy requires a separate three-step analysis adopted and utilized by this Court in numerous cases where privacy interests may be implicated. *Id.* at 528.

The first prong of this analysis is by no means a foregone conclusion. The Union has argued that "the Award constitutes a personnel file disclosure of which would constitute invasion of privacy." (Apx. Vol. I at 18.) Even assuming, however, that a copy of the Award may have ended up in a physical personnel file at the Portsmouth Police Department, there is nothing about the Award that suggests it is inherently a personnel record. The Award may pertain to Goodwin's prior employment by the City, but again, if the grievance process dictated by the CBA had called for litigation rather than arbitration of the grievance, there would appear to be little doubt that a court order would not be a "personnel file." Rather, it would be simply the outcome of litigation related to an employment matter. Seacoast Newspapers submits that the Award of an independent arbitrator in place of a court order likewise is not a personnel file, and that the City may not withhold the Award on that basis.

Even if this Court were to find, however, that the Award is indeed part of a "personnel file" for this purpose, it is clear under *Reid* that the application of this exemption in RSA 91-A:5, IV entails a balancing of the public interest in disclosure against any countervailing privacy interests.

This Court heretofore has not balanced the competing interests in disclosure of records deemed to pertain to "internal personnel practices," because it has found that the legislature has made its own policy judgment and determined that such records are categorically exempt. *See, e.g., Fenniman*, 136 N.H. at 627. Even if the Court were to adhere, however, to its past, admittedly broad interpretation of the exemption for "[r]ecords pertaining to internal personnel practices," Seacoast Newspapers urges the Court to abandon its prior view that "internal personnel practices" is a categorical exemption that allows no room for the balancing of competing interests. The Court signaled in *Reid* that it was prepared to consider the adoption of this test for purposes of the "internal personnel practices" exemption, and Seacoast Newspapers contends that doing so would be consistent with the Court's Right-to-Know Law jurisprudence over the past fifty years.

Regardless of how the Court arrives at the conclusion that a balancing test should be conducted – whether by applying the exemption for "personnel … files whose disclosure would constitute invasion of privacy" or by construing "internal personnel practices" more narrowly – the outcome of the test in this case is not in doubt. It must be noted at the outset that the balancing of competing interests starts with the balance tipped heavily in favor of disclosure. *See, e.g*., *Reid*, 169 N.H. at 532 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a heavy burden to shift the balance toward nondisclosure.") (citations omitted); *WMUR v. N.H. Dep't of Fish and Game*, 154 N.H. 46, 48 (2006). Indeed, the City itself agrees with Seacoast Newspapers that this Court *should* order disclosure.

The first step in the balancing test is to determine whether there is a privacy interest at stake that would be impacted by the disclosure. *See Union Leader Corp. v. New Hampshire Retirement System*, 162 N.H. 673 (2011); *Lamy v. New Hampshire Public Utilities Comm'n*, 152 N.H. 106 (2005); *Lambert v. Belknap County Convention*, 157 N.H. 375 (2008). The Court in *Reid* recognized legitimate privacy interests in co-workers and other witnesses who have cooperated in an investigation. *Reid*, 169 N.H. at 529. The Court did not clearly identify, however, such privacy interests on the part of public employees who were the subject of such investigations.

Seacoast Newspapers submits that Goodwin has no privacy interest whatsoever in the details or the assessment of his performance as a public employee. The information sought here does not constitute "intimate details ... the disclosure of which might harm the individual," *see Mans*, 112 N.H. at 164, or the "kinds of facts [that] are regarded as personal because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*, 169 N.H. at 530. Seacoast Newspapers is not seeking, for example, medical or psychological records in an officer's personnel file.

Other courts have roundly rejected the notion that public employees have a privacy interest with respect to the performance of their duties. In *Predisik v. Spokane School Dist. No. 81*, 346 P.3d 737 (Wash. 2015), for example, the court held that administrative leave letters that identified school district employees as subjects of pending investigations regarding alleged misconduct did not implicate a privacy interest under Washington's Public Records Act. *Id*. at 741-742. The Court concluded that a public employee has a right of privacy only in matters of

private life, and that a public employer's investigation into misconduct that occurs on the job is "freely exposed to the public." *Id*. The Court reasoned that "[p]ublic employees are paid with public tax dollars and, by definition, are servants of and accountable to the public. The people have a right to know who their public employees are and when those employees are not performing their duties." *Id*.; *see also, Robinson v. Wichita State Univ.*, No. 16-2138-DDC-GLR, 2018 WL 836294, at *21 (D. Kan. 2018) (noting that "public officials do not have a right to privacy for the manner in which they conduct themselves in office"); *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C*., 4 So.3d 807, 809-10, 821 (La. Ct. App. 2008) (holding the public interest in records of an investigation into police officers' use of excessive force trumps officers' privacy interest; "[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *Burton v. York County Sheriff's Dep't*., 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure).

It is time to abandon the notion, to the extent it exists in New Hampshire, that public servants have privacy interests in the way they perform their responsibilities. As the cases cited above make clear, public officials and employees have no legitimate privacy interest in their own job performance. This is not to suggest that such individuals check all rights of privacy at the door when they accept public office or employment. There are aspects of their lives that remain private, in which the public has no legitimate interest. But the idea that those charged with protecting the public's interest, and particularly those compensated with public funds, have legitimate privacy interests in the way they do their jobs is anathema to good government in a democratic society. In the parlance of RSA 91-A, there is no countervailing privacy interest at stake in this case, and certainly none that outweighs the public's need to know the outcome of the grievance process that examined Goodwin's conduct and the Department's response to it.

By contrast, this Court and many others have recognized the strong public interest in disclosure of records reflecting the performance of public employees and officials, especially law enforcement. *See, e.g., New Hampshire Retirement System*, 162 N.H. at 684 ("…Union Leader seeks to use the information to uncover potential governmental error or corruption. We cannot say that there is no public interest in such a use."); *Prof. Firefighters of N.H. v. Local Gov't Ctr*., 159 N.H. 699, 709 (2010) ("Public scrutiny can expose corruption, incompetence, inefficiency,

prejudice and favoritism."); s*ee also, e.g., Palmer v. Driggers,* 60 S.W.3d 591 (Ky. Ct.App. 2001) (recognizing a legitimate public interest in "knowing the underlying basis for a disciplinary charge against a police officer charged with misconduct"). As this Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of information pertaining to its government activities." *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003).

This Court has also recognized the strong public interest in knowing whether a government investigation has been thorough and accurate. *Reid,* 169 N.H. at 532. In *Deseret News Pub. Co. v. Salt Lake County*, 182 P.3d 372 (Utah 2008), the Court ordered the release of a lengthy investigative report on the grounds that the reports fairly communicated "a genuine question about the propriety of the manner in which Salt Lake County officials monitored their workplace and responded to evidence of sexual misconduct." *Id*. at 383. In *Deseret News*, it was not the target of the investigation but rather the officials who investigated and responded to it whose performance in office was illuminated. *See also, Herald Co. v. Kent County Sheriff's Dept.*, 680 N.W.2d 529 (Mich. Ct. App. 2004) (holding that internal investigative reports of law enforcement officials must be disclosed where the reports contain information bearing on the issue of preferential treatment and the issue of how State Police deal with off-duty misconduct.)

CONCLUSION

The Award is and must be held to be a public record subject to disclosure under RSA 91-A:4, as no statutory exemptions apply. The exemption in RSA 91-A:5, IV for "records pertaining to internal personnel practices," properly construed, is inapplicable because "internal personnel practices" are not "personnel files." The exemption for "personnel … files whose disclosure would constitute invasion of privacy" is likewise inapplicable, because the Award is not part of a personnel file. Even if the Award were part of Goodwin's personnel file, however, no legitimate countervailing privacy interest has been articulated which would outweigh the compelling public interest in its disclosure.

For the foregoing reasons, plaintiff/appellant Seacoast Newspapers respectfully asks this Honorable Court to (i) reverse the Order of the Rockingham County Superior Court, (ii) hold that the Award is a public record which must be disclosed forthwith to Seacoast Newspapers and the public; and (iii) to award Seacoast Newspapers its costs and reasonable attorney's fees in an amount to be determined.

REQUEST FOR ORAL ARGUMENT

Seacoast Newspapers believes that oral argument would assist this Court in addressing what appears to be an issue of first impression under New Hampshire's Right-to-Know Law with respect to arbitration awards in a labor context. This is especially true given that Seacoast Newspapers has asked this Court to consider overruling or departing from its prior interpretation of a critical exemption in the Right-to-Know Law for "internal personnel practices."

Accordingly, Seacoast Newspapers respectfully requests oral argument before the full Court. Seacoast Newspapers designates Richard C. Gagliuso, Esquire to be heard at oral argument.

RULE 16 (3) (i) CERTIFICATION

I hereby certify that the appealed decision is in writing and is hereto appended to the brief.

*/s/ Richard C. Gagliuso*_____
Richard C. Gagliuso

Respectfully submitted,
Seacoast Newspapers, Inc.

By their attorneys,
Bernstein, Shur, Sawyer & Nelson, P.A.

Dated: June 21, 2019

*/s/ Richard C. Gagliuso*_____
Richard C. Gagliuso, Esq., Bar No. 874
670 N. Commercial Street, Suite 108
PO Box 1120
Manchester, NH 03105-1120
(603) 623-8700
rgagliuso@bernsteinshur.com

Respectfully submitted,

Dated: June 21, 2019

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq., Bar No. 265393
Henry R. Klementowicz, Esq. (Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
(603) 224-5591
gilles@aclu-nh.org
henry@aclu-nh.org

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this brief complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this brief complies with New Hampshire Supreme Court Rule 16(11), which states that "no other brief shall exceed 9,500 words exclusive of pages containing the table of contents, tables of citations, and any addendum containing pertinent texts of constitutions, statutes, rules, regulations, and other such matters." Counsel certifies that the brief contains 7733 words (including footnotes) from the "Questions Presented" to the "Conclusion" sections of the brief.

s/ Richard C. Gagliuso
Richard C. Gagliuso, Esq.

CERTIFICATE OF SERVICE

I hereby certify that I provided a true and exact copy of the foregoing to Thomas M. Closson, Esquire, counsel for City of Portsmouth via the New Hampshire Supreme Court's electronic filing system on June 21, 2019.

/s/ Richard C. Gagliuso
Richard C. Gagliuso

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