New York State
Public Employer Labor Relations Association Inc.

April 2024 www.nyspelra.org

Annual Training Conference

It is almost time for the 49th Annual Training Conference. Conference Registration and Hotel information is now available on the NYSPELRA website at www.nyspelra.org. The Agenda is chockfull of up-to-date and practical topics. The keynote speaker is Olu Burrell who will kick off our 2 ½ days in lovely Saratoga Springs with a presentation entitled: "From IDEA to ABIDE: How to lead and live through Courageous Conversations." The Conference will continue with practical implementation presentations addressing the struggling employee under the ADA and necessary reasonable accommodation; understating Workers Compensation laws in NYS; employee corrective action; and much more.

Lisa Baisley Receives NPELRA Prestigious President's Award

NYSPELRA is thrilled to announce that our very own Lisa Baisley was awarded the prestigious President's Award at the 2024 NPELRA Annual Training Conference in Savannah Georgia. The President's Award is granted in recognition of an individual is dedication, contribution, devotion, and valuable service to the Association in fostering its purpose and goals. Blaise Lamphier, NPELRA Immediate Past President selected Lisa for the Award. NYSPELRA congratulates Lisa Baisley on this well-deserved recognition.

Release of a Sexual Harassment Investigation upon a FOIL request

All governmental records are presumptively available to the public pursuant to the Freedom of Information Law ("FOIL") (*Public Officers Law* §84, et seq.). *Gould v. NY C. Police Dep't*, 89 N.Y.2d 267 (1996). In furtherance of this policy and enumerated stance, blanket exemptions are generally construed negatively by courts. *Matter of Capital Newspapers Div. of Hearst Corp. v. Burns*, 67 N.Y.2d 562, 569 (1986). Therefore, "exemptions are to be narrowly construed, with the burden resting on the agency to demonstrate that the requested material indeed qualifies for exemption." *Matter of Hanig v. State of New York Dep't of Motor Vehicles*, 79 N.Y.2d 106, 109 (1992). "Only where the material requested falls

squarely within the ambit of one of [the] statutory exemptions may disclosure be withheld." *Matter of Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979).

One such exemption is contained within *Public Officers Law* §87(2)(a), which exempts material pursuant to state or Federal Law. Pursuant to *CPLR* §4503, communications between attorneys and their clients that were rendered in furtherance of legal services being provided are deemed privileged. As such, courts have held that documents may be entirely withheld where they are "primarily and predominantly legal in nature and, in their full content and context, were made to render legal advice or services." *Matter of Rye Police Ass'n v. City of Rye*, 34 A.D.3d 591, 824 N.Y.S.2d 163 (2d Dep't 2006). This would include communications related to the factual underpinnings of a given issue "as facts are the foundation of legal advice, the attorney-client privilege protects communications between an attorney and his or her client that convey facts relevant to a legal issue under consideration, even if the information contained in the communication is not privileged." *Matter of Gilbert v. Office of the Governor of the State of NY*, 170 A.D.3d 1404, 96 N.Y.S.3d 724 (3d Dep't 2019). As such, where the information contained within a correspondence or memorandum includes factual information "relevant to counsel providing legal advice regarding the" issue, it may be withheld. *Id*. Such information would include documents utilized to formulate a response of the client, even when the issue is of a "nonlegal matter". *Matter of Shooters Comm. On. Political Educ., Inc. v. Cuomo*, 147 A.D.3d 1244, 47 N.Y.S.3d 512 (3d Dep't 2017), citing, *Rossi v. Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 593-594 (1989). This privilege has also been applied by the courts to "human resource investigation[s]." *Matter of Spring v. Cnty. of Monroe*, 141 A.D.3d 1151, 36 N.Y.S.3d 330 (4th Dep't 2016) (Court withheld a portion of a record that involved a "chronological explanation" of events that were determined through an investigation).

The primary purpose and context of a sexual harassment investigative report is to furnish the municipality with the facts necessary to assess its legal responsibilities pursuant to New York Law and its own internal policies. The facts discussed within the report and the associated analysis of those facts are clearly to accomplish just that. Additionally, even if there is outside counsel who could be viewed as a consultant, the material was prepared by an attorney in order to allow the ultimate decision-maker to render a decision. As was discussed in dicta within *Austin v. Purcell*, 103 A.D.2d 827, 478 N.Y.S.2d 64 (2d Dep't 1984), a public entity seeking advice from outside legal consultants could create a privilege that could overcome *FOIL*. Therefore, it may be possible to claim privilege does attach to the report so long as privilege has not been waived.

Public Officer Law §87(2)(g)(i) creates an exemption related to intra-agency material, so long as that material is a non-final determination and is non-factual or statistical tabulations in nature. This exemption should not be construed to allow for complete withholding of a document, but instead, allowing for redaction. The purpose behind this exemption is to "protect the deliberative process of the government by ensuring that persons in an advisory role [will] be able to express their opinions freely to agency decision makers" *Matter of Xerox Corp. v. Town of Webster*, 65 N.Y.2d 131, 132 (1985). Although not enumerated within the statute, "factual data" has been defined by the courts as "objective information, in contrast to opinions, ideas, or advice exchanged as part of the consultative or deliberative process of government decision making." *Gould v. NY City Police Dep't*, 89 N.Y.2d 267 (1996); *Matter of Shooters Comm. On Political Educ., Inc. v. Cuomo*, 147 A.D.3d 1244, 47 N.Y.S.3d 512 (3d Dep't 2017). Material created, instead, to assist a decision maker in arriving at their decision may be withheld. *Xerox Corp. v. Webster*, 65 N.Y.2d 131, 132 (1985). Where documents, or portions thereof, relate solely to "opinions, advice, evaluations, recommendations[,] other subjective material," "policy formulations, conclusions," "discussions," "deliberations," or "proposals," that material may be withheld. *Rome Sentinel Co. v. City of Rome,* 174 A.D.2d 1005, 572 N.Y.S.2d 165 (4th Dep't 1991); *Oyster Bay v. Williams*, 134 A.D.2d 267, 520 N.Y.S.2d 599 (2d Dep't 1987); *Matter of Shooters Comm. On Political Educ., Inc. v. Cuomo*, 147 A.D.3d 1244, 47 N.Y.S.3d 512 (3d Dep't 2017). In essence, if non-disclosure would avoid hindering the "government agency['s] deliberative functions," withholding those documents may be possible. *Oyster Bay*, 134 A.D.2d 267, 520 N.Y.S.2d 599 (2d Dep't 1987).

As can be discerned from the above, the cases involving this exemption are extremely fact specific, even inconsistent at times. Below is a breakdown of certain cases with possible applicability.

- *Sinicropi v. Cnty. of Nassau*, 76 A.D.2d 832 (2d Dept 1980): The court held that "intra-agency memoranda concerning the investigation of [an employee's] performance as a probation officer, notes and communications made in preparation of her hearing and the transcript of the hearing" could be withheld as "predecisional intra-agency memoranda." The court in that matter reasoned that the material was not "reflective of final agency policy or determinations and, as such, [] exempt from disclosure."

- *McAulay v. Bd. of Educ*., 61 A.D.2d 1048, 403 N.Y.S.2d 116 (2d Dep't 1978): A report made by the hearing panel in the evaluation process of a

teacher was properly withheld as intra-agency material. The Court reasoned the report and related documents were pre-decisional material and not the final determination of the Chancellor, who was the final decisionmaker. Furthermore, there was no evidence that the Chancellor adopted "the reasoning as his own" should they adopt the reasoning and conclusion of the report.

- *Matter of Spring v. Cnty. of Monroe*, 141 A.D.3d 1151, 36 N.Y.S.3d 330 (4th Dep't 2016): "The hearing transcript found in the confidential record at pages 75 through 82 constitutes pre-decisional intra-agency material and is also exempt from FOIL disclosure."

- *Matter of Russo v. Nassau Cnty. Community Coll.,* 81 N.Y.2d 690, 699 (1993): A report made by outside legal consultants was withheld as it was used as part of "an internal decision-making process."

- *Austin v. Purcell*, 103 A.D.2d 827; 478 N.Y.S.2d 64 (2d Dep't 1984): The court withheld a report that was made by an outside legal consultant that reviewed whether a county should engage in a certain litigation. The court determined that the report was merely to assist the decisionmaker in rendering the final decision.

- *Buffalo News v. Buffalo Muni. Housing Auth*., 163 A.D.2d 830, 558 N.Y.S.2d 364 (4th Dep't 1990): Court ordered disclosure of various disciplinary records of employees, stating "[e] mployee discipline is clearly relevant to the work of the agency and, thus, access to these records should be granted." The request, although subject to redactions involving privacy concerns, sought "employee's name, address, job title, the specific charges brought, the disposition of the charges, the penalty imposed, and the level at which the case was adjudicated."

- *Matter of Pasek v. NYS Dep't of Health*, 151 A.D.3d 1250, 56 N.Y.S.3d 627 (3d Dep't 2017): This case dealt with a FOIL request related to an investigation conducted by the Department of Health ("DOH") in which DOH made conclusions that were based on a consultant's report. The court held that the vast majority of a consultant's report was exempt from disclosure as it constitutes pre-decisional intra-agency material. The only portion of the report the court ordered disclosed was "the first paragraph describing the medical treatment that was thereafter analyzed." In regard to

the full investigation by DOH, the court indicated the allegations should be disclosed as factual data, as well.

- *NY 1 News v. Office of the President*, 231 A.D.2d 524, 647 N.Y.S.2d 270 (2d Dep't 1996): This matter dealt with a FOIL request seeking an investigative report involving the "President" of Staten Island making inappropriate racial remarks. The court held that the report had to be disclosed because the report was "relied upon and **incorporated**" into his final determination, which fully adopted the report's findings. As the report became intertwined with the final determination, there could be no valid argument claiming it was not the final determination.

Under much of the precedent above, much of a harassment investigative report could be redacted. Recommendations and analysis would fall under this standard as they would be clear opinion. The only caveat is whether the municipality fully adopted, incorporated, and relied upon the report in making its final determination. The main area of issue would relate to the witness statements. Under previous case law, there is the possibility that summaries of the statements could be deemed as factual data. The allegations themselves and procedural background would appear to be mandatory disclosures.

Public Officers Law §89 allows for redaction related to personal privacy protections. Under certain cases, information that would "cause serious pain or embarrassment" could also be redacted, in additional to what is enumerated within *Public Officers Law* §89.

Certain arguments exist that would allow withholding or redaction of a sexual harassment investigative report. The inquiry is fact intensive.

[By: Nathaniel J. Nichols, Esq., Roemer Wallens Gold & Mineaux, LLP]

Accommodation under ADA Applies to Remote Workplace

Without even an attempt at the interactive process to determine whether a requested accommodation would be agreed to, the employer denied the request. The EEOC filed suit against the employer *[EEOC v. Digital Arbitrage, Inc. d/b/a Claudbeds, Civil Action No. 1:23-cv-11856].*

The employer was an international remote first technology company. A prospective applicant sought and applied for the position of "Remote IT Administrator." The duties involved internal IP support, guidance and/or assistance

to the Company's worldwide employees. The applicant was viewed as so well qualified that he was offered an interview. Before the interview took place the applicant requested accommodation as he was deaf and would need to use a sign language interpreter to communicate. The Company denied the request, cancelled the interview, and terminated the opportunity for employment. The Company gave as the basis for these actions that "verbal communication and hearing were job requirements for the position in a remote setting." The EEOC's suit was premised upon the position that "the protection of the ADA applies with equal force to in-person and remote workplaces [as well as] their hiring process. The EEOC is committed to ensuring individuals who are deaf or hard of hearing enjoy equal employment opportunities." The EEOC representatives went on to state:

> This lawsuit seeks to vindicate the statutory rights of this applicant who was denied the good faith interaction required by the ADA --- and seeks to educate employers on the many available technologies that individuals who are deaf and hard of hearing utilize to effectively communicate via remote means.

Ultimately, the Employer entered into a Consent Decree which included requisite training, policy development, the hiring of an interpreter service, preparation of a "reasonable accommodation policy," and payments to the applicant who faced discrimination of $150,000.00. The employer was enjoined from;

(a) Failing to provide reasonable accommodation to qualified employees and applicants with hearing related disabilities, absent undue hardship or otherwise provided for under the ADA;
(b) Failing to engage in the interactive process with qualified applicants with hearing-related disabilities to explore possible reasonable accommodations for such applicants; and
(c) Refusing to hire qualified individuals with hearing-related disabilities on the basis of their disability in violation of the ADA.

Negotiation Update

City of Albany: The City of Albany (the "City") and the Albany Police Supervisor's Association, made up of the Police Department's Sergeants and Lieutenants, entered into a four-year collective bargaining agreement for the term January 1, 2023 - December 31, 2026. The parties met in (4) bargaining session and (4) days of mediation to fine tune the deal. In addition to operational and contract language modification, the expansion of the definition of "immediate

family" in the bereavement leave setting to include "domestic partner," the addition of Juneteenth as a holiday, economic parameters of the four-year deal take into account:

- Increased Cleaning Allowance by $25.00
  (over the life of the agreement)
- Convert longevity pay to a percentage "above the Sergeant's 1st year base wage."
- Increase to Command (rank) Differential:
- Sergeants from $2,050.00 to $ 2,576.00
  (over the 4-year term)
- Lieutenants from $2,450.00 to $2,975.00
  (over the 4- year term)
- Add a new provision for "Educational Payment" for levels of degree (Associates, Batchelor's, Master's Degree)
- Wages: 2023 (fully retro): 3.0%
  2024: 3.0%
  2025: 3.0%
  2026: 3.0%

Town of New Paltz: The Town at New Paltz and the New Paltz Police Association, Inc., comprised of both police officers and dispatchers, entered into a collective bargaining agreement effective January 1, 2024 – December 31, 2028. The parties overhauled the discipline procedures providing, when feasible and consented to, for full adjudication by the Chief of Police (police officers only). In the alternative, an employee (dispatcher or police officers) can proceed pursuant to NY Civil Service Law, § 75 or binding arbitration (but not both).

The parties also clarified the "training recovery costs" to require a commitment to the Town for a period of three (3) years of service. If a recruit in the Basic Course at the Municipal Training School terminates employment with the Town, that recruit "shall be responsible to reimburse the [Town] for all related costs incurred…[but will] not include any wages paid." For a police officer who completes Training School and begins service, but

> ….terminates….employment between thirteen (13) and twenty four (24) months shall reimburse [the Town] $15,000.00.

> ….terminates….employment between twenty five (25) and thirty six (36) months shall reimburse….$10,000.00.

If the police officer does not continue the commitment to the Town, and costs have been incurred for field training and "Phase II of the basic course of study," reimbursement of those costs is also detailed in the agreement.

The Town agreed to one additional personal leave day for dispatchers as well as one additional day for a bereavement necessitated leave.
As for wages adjustments for both police officers and dispatchers:

- 1/1/2024: $2,250.00 market adjustment, plus 3.0%
- 1/1/2025: 3.5%
- 1/1/2026: 3.5%
- 1/1/2027: 3.25%
- 1/1/2028: 3.25%

Finally, the employees agreed to a health insurance contribution to be phased in over the life of the agreement, with a contribution of 5% of premium in 2024, going up to 8% of premium by 1/1/2028. Anyone hired after 1/1/2026 "will pay in retirement the same percentage [the employee was] contributing [at the time of retirement]."

City of Buffalo: The City of Buffalo (the "City") and the Police Benevolent Association ("PBA") entered into a collective bargaining agreement dating back to 2021. The Fiscal year for the City is July 1 – June 30. The contract term will be July 1, 2021 – June 30, 2025. By way of background, the parties were in Interest Arbitration. The Award was not issued until July of 2022. The City considered vacating the Award but ultimately proceeded to meet in negotiations for this contract.

Through the negotiation process that began in the Fall of 2022, the parties agreed:

- *Health Insurance*: changed the requirement of contribution toward health insurance premium from four (4) years of service to ten (10) years of service. This change to extend the year of service requirement was effective [ratification date] January 16, 2024.

- *Longevity:* Effective in each year of the agreement, each longevity step was increased by $20.00.

- *Performance Evaluations*: "routine evaluations shall be conducted at a maximum of 4 times per year, not to exceed 1 evaluation every 3 months" [change was from "may" to "shall"] – with a retraining component, as necessary.

- *Residency:* The Parties restored the City's residency requirement such that all Employees hired after January 16, 2024, shall be domiciled residents of the City of Buffalo at time of hire and shall remain so domiciled for seven years. This provision shall remain in effect "until the end of the contract's term on June 30, 2025.

- *Wage:* Effective and retro to July 1, 2021: 3.0%
  - Effective and retro to July 1, 2022: 4.0%
  - Effective and retro to July 1, 2023: 4.0%
  - Effective and retro to July 1, 2024: 4.0%

Past Practices

*"*Whether a past practice exists depends on whether it was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the effected unit employees that the practice would continue;" so holds the court in the *Matter of County of Rockland, et al., v. NYS PERB, et. al., __A.D.3d __(2024 N.Y. Slip Op. 1216 N.Y. App Div 2024), (3rd Dept 2024)*(citations omitted). By way of background, the County and its various union are parties to collective bargaining agreements. The health insurance language, in relevant part, and in sum and/or substance, states that the County would pay for 100% of the premium costs for an eligible individual "for coverage under a core plus medical and psychiatric enhancements as described in the NYS Insurance Plan." Note that since at least 1989, the at-issue employees had never had to pay a co-pay for prescription drugs. This fact remained so even when the County switched from being self-insured to being in a formal outside-administered health plan. Despite this long standing "practice" the County maintained that it interpreted the contractual language quoted above to mean that it was only obligated to pay toward the premium but not for any drug component. PERB and the Appellate Division disagreed:

> [The County's] assertion that employees could not have reasonably expected that full coverage for prescription drugs would continue because such practice is inconsistent with the terms of the… agreements in without merit.
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> As PERB found…the relied upon provision [of the agreements]…do not speak to prescription drug copayments…there is nothing in the … agreements that discusses the issue of copayments for prescription drugs [and]…nothing…making it reasonably clear that [the County] would not provide the prescription drug benefits.
> [citation omitted]

Contact NYSPELRA

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Please let us know your thoughts and opinions of the NYSPELRA Newsletter.

In addition, you are encouraged to forward to Jack or to Elayne Gold [egold@rwgmlaw.com] any article, information from your municipality, agency, or school district relating to Arbitration Awards (grievance arbitration, discipline, etc.), Fact Findings, contract settlements, etc. for inclusion in future editions of our Newsletter.

Check our website for the latest NYSPELRA information: www.nyspelra.org