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An Employee's Right to Union Representation During Investigatory Interviews

by Sharon N. Berlin and Richard K. Zuckerman

On October 2, 2002, the New York State Public Employment Relations Board ("PERB" or "Board") issued a ruling in *Transportation Workers Union of America, Local 100 v. New York City Transit Authority*[2] that directly affects the manner in which many public employers handle issues involving employee interviews. Specifically, the Board, resolving for the first time a long-standing split in decisions by PERB Administrative Law Judges, held that an employee has the right to union representation during an investigatory interview that may reasonably be expected to lead to discipline. The Board's decision was issued after legislation did not pass in 2001 and the Governor's veto of legislation in 2002 that would have provided all public employees with essentially the same right.[3]

The Transit Authority Case

In the *New York City Transit Authority* case, the employer directed an employee to respond in writing on an employer form to an allegation that the employee had made a racial remark to a co-worker. Upon the employee's request, the employee was given the opportunity to meet with a union representative while he completed the form. Thereafter, the employer, concerned that the union representative either wrote or influenced the employee's written communications, directed the employee to complete another form in the presence of his supervisor while in a locked office. Union representatives attempted to enter the office but were denied access by the employer.[4]

The union filed an improper practice charge with PERB alleging that the employer had violated sections 209-a.1(a) and (c) of the Public Employees' Fair Employment Act when it denied the employee's request for union representation when he was required to complete the form.[5] Relying on the United States Supreme Court's decision in *National Labor Relations Board v. Weingarten*,[6] the ALJ found that the employer had violated section 209-a.1(a) of the Act.[7] In *Weingarten,* the Supreme Court had found that an employee has a statutory right to request union representation prior to participating in an employer interview that the employee reasonably fears may result in discipline. PERB adopted the Supreme Court's reasoning that:

"It is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview that may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action."[8]

The employer filed exceptions to the ALJ's decision and argued that the ALJ had improperly relied on *Weingarten.* PERB affirmed the ALJ's decision. The Board ruled that ". . . an employee has the right to union representation during an investigatory interview which may reasonably lead to discipline."

Implications of the Decision

While the full scope of the implications of the Board's decision still have to be fleshed out, municipalities can take some guidance based upon the private sector *Weingarten* decision and its progeny.

1. Coverage of the Decision

PERB's decision appears only to apply to employees represented by a union and thus not to those who have been designated as managerial and/or confidential or who are not covered by a bargaining unit. If PERB decides to follow relevant National Labor Relations Board (NLRB) precedent, though, the reach of the decision may be further extended. This is because the NLRB, applying *Weingarten,* recently granted non-union employees the same representational right as that granted to organized employees during investigatory interviews.[9]

2. Relationship to Statutory and Collectively Bargained Rights to Representation

The right to union representation during an investigatory interview that may reasonably lead to discipline is fundamentally the same right as that already statutorily granted to those employees covered by New York Civil Service Law Section 75.[10] There will likely be no need to change the public employer's practices for those employees.

The right created by *Transit Authority* is similar, but not identical, for employees not covered by Section 75. Under prevailing NLRB precedent, the employer does not have to tell the affected employee of his/her right to *Weingarten* protections. Also, unlike the situation with employees covered by Section 75, written notice need not be given to the employee prior to commencing the interview.

It is unclear what impact this Taylor Law-based right will have on existing contractual entitlements regarding union representation in disciplinary interviews. It is likely, though, that the new entitlement will be held to supplement, rather than supercede, existing contractual rights.

3. Investigatory Interviews

The right only applies to "investigatory interviews" that "may reasonably lead to discipline." The right does not apply where, for example, the decision to impose discipline has already been made and is merely being announced to the employee.

4. The Right to a Specific Representative

If the employee requests a particular union representative and he or she is available, the employer would be well advised to allow the representative to partake in the interview. Under the progeny to *Weingarten,* employees have the right to specify the union representative they wish to have present and the employer must comply with the request absent special or extenuating circumstances.[11]

(Continued on page 4)

Inside...

Civil Service, Police Liability and Land Use to Highlight Section Meeting

On January 23, 2003, in conjunction with the 126th Annual Meeting of the New York State Bar Association, the Municipal Law Section will present a full-day continuing legal education program at the Marriott Marquis Hotel in New York City. The program has been approved for up to 6 credit hours in practice management or areas of professional practice.

Thursday morning's program will begin with a presentation entitled "Land Use Update." Recreational uses, temporary regulatory takings and municipal regulation of signs and billboards will be discussed. Daniel A. Spitzer, Esq., Hodgson, Russ LLP, Buffalo; Henry Hocherman, Esq., and Adam L. Wekstein, Esq., Shamberg Marwell Hocherman Davis & Hollis, P.C., Mount Kisco will be the speakers. The second component of the morning program, entitled "Police Liability/Insurance Disclaimers/Section 1983," will be presented by Richard B. Golden, Esq., Burke, Miele and Golden LLP, Goshen. Completing the morning program will be a presentation entitled "Hot Topics: Institutional Reform Litigation Against State and Local Government." Ross Sandler, Esq., Center for New York City Law, New York Law School will be the speaker.

The afternoon program will consist of a two-part presentation entitled "A Primer on Civil Service Law and Property Rights" moderated by Sharon N. Berlin, Esq., Rains & Pogrebin, P.C., Mineola. The first part will be an introduction and overview of the Civil Service Law and the Taylor Law. Speakers on that subject will be Fredrick H. Ahrens, Jr., Esq., Steuben County Attorney, Bath and Richard K. Zuckerman, Esq., Rains & Pogrebin, P.C., Mineola. The second part of the presentation, entitled "Privacy Issues in the Municipal Law Workplace," will be presented by Peter A. Bee, Esq., Bee, Ready, Fishbein, Hatter and Donovan, LLP, Mineola and Norma G. Meacham, Esq., Whiteman Osterman and Hanna, Albany.

The Section will also hold its Annual Meeting luncheon with a prominent featured speaker.

Officials instrumental in planning this conference include Municipal Law Section Chair Linda S. Kingsley, Esq., Corporation Counsel, City

(Continued on page 4)

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The Application of The Freedom of Information Law In The Aftermath of 9/11

by Robert J. Freeman

The need for attempting to guarantee safety and security is a primary function of government, and certainly the government must have the ability to withhold records when disclosure could interfere with its proper law enforcement functions or impair its ability to protect the public from harm. The Freedom of Information Law (Public Officers Laws §§84-90) provides government agencies in New York with the ability to do so.

As a general matter, the Freedom of Information Law, in terms of its intent and much of its language, is based largely on common sense: in essence, it requires that records maintained by government be made available, except those records or portions of records which if disclosed would result in some sort of harm or detriment. Most of the grounds for denial appearing in §87(2) describe a potentially harmful effect of disclosure that the Legislature sought to avoid.

Dealing effectively with terrorism is unquestionably critical, and the existing exceptions appear to provide government with the ability to protect against inappropriate or injurious disclosures in the aftermath of September 11.

Perhaps of greatest significance is §87(2)(f), which permits an agency to withhold records or portions thereof which if disclosed "would endanger the life or safety of any person." Although an agency has the burden of defending secrecy and demonstrating that records that have been withheld clearly fall within the scope of one or more of the grounds for denial [see §89(4)(b)], in the case of the assertion of that provision, the standard developed by the courts is somewhat less stringent. In citing §87(2)(f), it has been found that:

"This provision of the statute permits nondisclosure of information if it would pose a danger to the life or safety of any person. We reject petitioner's assertion that respondents are required to prove that a danger to a person's life or safety will occur if the information is made public (see, *Matter of Nalo v. Sullivan*, 125 A.D.2d 311, 312, *lv* denied 69 N.Y.2d 612). Rather, there need only be a *possibility* that such information would endanger the lives or safety of individuals...."[emphasis mine]. *Stronza v. Hoke*, 148 A.D.2d 900, 901 (3d Dept. 1989).

The principle enunciated in *Stronza* has appeared in several other decisions. See, *Ruberti, Girvin & Ferlazzo v. NYS Division of the State Police*, 218 A.D.2d 494 (3d Dept. 1996); *Connolly v. New York Guard*, 175 A.D. 2d 372 (3d Dept. 1991); *Fournier v. Fish*, 83 A.D.2d 979 (3d Dept. 1981); and *McDermott v. Lippman*, Supreme Court, New York County, NYLJ, January 4, 1994. Additionally, it was determined in *American Broadcasting Companies, Inc. v. Siebert*, 110 Misc.2d 744 (Sup. Ct. N.Y. Co. 1981) that when disclosure would "expose applicants and their families to danger to life or safety", §87(2)(f) may properly be asserted. Also notable is the holding by the Appellate Division in *Flowers v. Sullivan*, 149 A.D.2d 287 (2d Dept. 1989) in which it was held that "the information sought to be disclosed, namely, specifications and other data relating to the electrical and security transmission systems of Sing Sing Correctional Facility, falls within one of the exceptions." *Id.* at 295. In citing §87(2)(f), the Court stated that:

"It seems clear that disclosure of details regarding the electrical, security and transmission systems of Sing Sing Correctional Facility might impair the effectiveness of these systems and compromise the safe and successful operation of the prison. These risks are magnified when we consider the fact that disclosure is sought by inmates. Suppression of the documentation sought by the petitioners, to the extent that it exists, was, therefore, consonant with the statutory exemption which shelters from disclosure information which could endanger the life or safety of another." *Id.*

In short, although §87(2)(f) refers to disclosure that *would* endanger life or safety, the courts have clearly indicated that "would" means "could."

A second exception relevant in preventing harmful effects of disclosure in a law enforcement context is §87(2)(e), which authorizes an agency to withhold records that:

"are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures."

Based on the foregoing, it is clear that an agency may withhold records when disclosure would interfere with an investigation.

Just as important is the ability to withhold criminal investigative techniques and procedures under subparagraph (iv) of §87(2)(e). In the leading decision regarding that provision, a case involving a request for the office manual prepared by the Special Prosecutor for Nursing Homes, the Court of Appeals stated that "[t]he Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe." *Fink v. Lefkowitz*, 47 N.Y.2d 567, 573 (1979). In its discussion of the matter, the Court found that:

"The purpose of this exemption is obvious. Effective law enforcement demands that violators of the law not be apprised of the nonroutine procedures by which an agency obtains its information (see *Frankel v. Securities & Exch. Comm.*, 460 F.2d 813, 817, cert den 409 U.S. 889). However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution.

"To be distinguished from agency records compiled for law enforcement purposes which illustrate investigative techniques, are those which articulate the agency's understanding of the rules and regulations it is empowered to enforce. Records drafted by the body charged with enforcement of a statute which merely clarify procedural or substantive law must be disclosed. Such

(Continued on page 3)

Municipal Briefs

Appellate Practice

Under CPLR §5519(a)(1), service by a governmental entity "upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal." Assuming that the governmental entity's appeal to an intermediate appellate court is not successful, the stay continues for five more days after service upon the appellant of the adverse order with notice of entry. CPLR §5519(e). When a further appeal or motion for leave to appeal is filed within that five day period, the stay continues until five days after service of notice of entry of the order determining the appeal or motion, provided that if the motion for leave to appeal is granted, the stay continues until five days after the appeal is determined. *Id.*

Nevertheless, failure to file a further appeal or motion for leave to appeal within the five day safe harbor provided by CPLR §5519(e) does not preclude the governmental entity, whose original automatic stay has lapsed, from subsequently obtaining a new automatic stay under CPLR 5519(a) by filing a notice of appeal or motion for leave to appeal. However, during the period after the expiration of the CPLR §5519(e) stay and prior to obtaining a subsequent stay by initiating a second level appeal, the government appellant remains vulnerable in a proper case to enforcement of the judgment against it. *Summerville v. City of New York*, 97 N.Y.2d 427 (2002).

In reaching this result, the Court opined that its interpretation was "fully consistent with our prior treatment of these stay provisions." Further, the Court observed:

"Our holding also fosters the public policy underlying CPLR §5519(a)(1) - - to stabilize the effect of adverse determinations on governmental entities and prevent the disbursement of public funds pending an appeal that might result in a ruling in the government's favor (citations omitted)."

Open Meetings Law

Site inspections of property by a planning board conducted for the purpose of "observation and acquiring information" in connection with a pending application for subdivision approval on that property are not public meetings subject to the Open Meetings Law. *Matter of Riverkeeper, Inc. v. Planning Board of the Town of Somers*, __Misc.2d__ (Sup. Ct. West. Co. 2002).

Petitioner, a non-profit environmental organization dedicated to protecting water quality in the New York City Watershed, was denied permission by a property owner to attend a site visit by the Somers Planning Board at a 628.5 acre parcel which was the subject of a proposed residential subdivision application. Alleging that the site visit was a public meeting, convened for the purpose of conducting public business, Petitioner sought an order pursuant to the Open Meetings Law establishing its right to be notified and to attend any such site visits by the Planning Board in connection with this application. In opposition, the property owner argued that a site visit is not a meeting within the Open Meetings Law since no attendance is taken, no minutes are kept and no business is conducted. Nor, the property owner maintained, does the Open Meetings Law compel a land owner to open its private property to the public.

Citing *Matter of City of New Rochelle v. New York State Public Service Commission*, 150 A.D.2d 441 (2d Dept. 1989) and advisory opinions of the Committee on Open Government (OML-AO-2578; OML-AO-2272), the Court denied Petitioner's application. The rationale underlying these opinions is that a site visit on private property conducted solely for the purpose of observation and acquiring information to better understand an application is not a public meeting within the scope of the Open Meetings Law. However, according to the cited administrative opinions, discussions or deliberations regarding such observation should occur during public meetings. Indeed, the Court noted that Petitioner would not be "excluded from participating in the open public process regarding the proposed site development and is expected, pursuant to its stated mission, to contribute substantially to that process."

Public Streets

Recent amendments to Town Law §130, Village Law §6-632 and General City Law §38-a establish a procedure to enable a property owner whose property encroaches upon a public street or roadway to petition the municipal legislative body for a license to continue the encroachment. A public hearing is required and written notice must be given to property owners within 500 hundred feet of the petitioner's property. Upon a determination that the encroachment will not adversely impact the use of the street or roadway, the legislative body, or any agency or department of the municipality designated by the legislative body for such purpose, may grant a license to continue the encroachment. The license is subject to revocation if the encroachment must be removed to provide for a proper and safe use of the public street or roadway.

Prior to these amendments, encroachment of an exterior building wall into the public right-of-way was limited to six inches. As detailed in the State Senate's Memorandum of Support for the legislation, in many instances, walls of buildings encroach more than six inches within the public right-of-way but pose no threat to the traveling public since they are set back many feet from the traveled portion of the public street or road. Absent any authority to grant the property owner the right to maintain the encroaching wall, the

(Continued on page 4)

FOIL

(Continued from page 2)

information in the hands of the public does not impede effective law enforcement. On the contrary, such knowledge actually encourages voluntary compliance with the law by detailing the standards with which a person is expected to comply, thus allowing him to conform his conduct to those requirements (see *Stokes v. Brennan*, 476 F.2d 699, 702; *Hawkes v. Internal Revenue Serv.*, 467 F.2d 787, 794-795; Davis, Administrative Law [1970 Supp], section 3A, p 114).

"Indicative, but not necessarily dispositive of whether investigative techniques are nonroutine is whether disclosure of those procedures would give rise to a substantial likelihood that violators could evade detection by deliberately tailoring their conduct in anticipation of avenues of inquiry to be pursued by agency personnel (*see Cox v. United States Dept. of Justice*, 576 F.2d 1302, 1307-1308; *City of Concord v. Ambrose*, 333 F. Supp 958)."

In applying those criteria to specific portions of the manual, which was compiled for law enforcement purposes, the Court found that:

"Chapter V of the Special Prosecutor's Manual provides a graphic illustration of the confidential techniques used in a successful nursing home prosecution. None of those procedures are 'routine' in the sense of fingerprinting or ballistic tests (see Senate Report No. 93-1200, 93 Cong 2d Sess [1974]). Rather, they constitute detailed, specialized methods of conducting an investigation into the activities of a specialized industry in which voluntary compliance with the law has been less then exemplary.

"Disclosure of the techniques enumerated in those pages would enable an operator to tailor his activities in such a way as to significantly diminish the likelihood of a successful prosecution. The information detailed on pages 481 and 482 of the manual, on the other hand, is merely a recitation of the obvious: that auditors should pay particular attention to requests by nursing homes for Medicaid reimbursement rate increases based upon projected increase in cost. As this is simply a routine technique that would be used in any audit, there is no reason why these pages should not be disclosed." *Id.* at 573.

As the Court of Appeals has suggested, to the extent that the records in question include descriptions of investigative techniques which if disclosed would enable potential lawbreakers to evade detection or endanger the lives or safety of law enforcement personnel or others [see also, §87(2)(f)], a denial of access would be appropriate.

A third exception of significance is especially relevant with respect to risk assessments and similar analyses prepared to gauge vulnerability. Records of this nature fall within 87(2)(g) pertaining to "inter-agency or intra-agency materials", the provision that essentially codified the "deliberative process" privilege. The Court of Appeals in *Gould v. New York City*, 89 N.Y.2d 267, 276 (1996), held that the exception regarding those materials is "to safeguard internal government consultations and deliberations", and "to protect the deliberative process of the government by ensuring that persons in an

(Continued on page 4)

Union Representation

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5. The Role of the Union Representative

Under prevailing NLRB precedent, the representative is to be present in a representational and not a confrontational capacity. The employer may refuse to let the representative speak during the interview, although the employee may request to meet privately with the representative.

6. Employers Need Wait Only for A Reasonable Period of Time for the Representative to Appear

Finally, under private sector precedent, the employer need wait only a "reasonable" period of time for a representative to arrive. Reasonableness is defined by the specific factual circumstances.

Conclusion

For many public employers, the rights created by the Board in *Transit Authority* only codify existing practices. Others, though, will have to change their practices to reflect this decision or risk having their disciplinary decisions vacated by PERB or another reviewing entity.

[1] Ms. Berlin and Mr. Zuckerman are partners in the law firm Rains & Pogrebin, P.C., with offices in Mineola and New York City. They represent public and private sector employers in labor and employment law matters.

[2] 35 PERB ¶3029 (2002).

[3] A.10288 (2002); A08741 (2001).

[4] The Board's decision does not indicate whether the employee requested representation when he was asked to prepare the second statement. The Administrative Law Judge's decision found that the employee's request for representation when he was asked to prepare the first written statement was an implicit request for continuing representation, although there is no reference to a specific request by the employee for a representative to be present when he wrote the second statement. 35 PERB &ð 4563 (ALJ 2002).

[5] Section 209-a.1(a) makes it an improper practice for a public employer to deliberately interfere with, restrain or coerce public employees in the exercise of their rights under the Act. Section 209-a.1(c) makes it an improper practice for a public employer to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization.

[6] 420 U.S. 251 (1975).

[7] Given the finding on the first charge, the ALJ did not reach the section 209-a.1(c) issue.

[8] 420 U.S. at 257.

[9] *Epilepsy Found. of N.E. Ohio v. NLRB,* 331 N.L.R.B. No. 92, 164 L.R.R.M. 1233 (2000), *conf'd,* 268 F.3d 1095 (D.C. Cir. 2001).

[10] Civil Service Law Section 75 provides, among other things, that an employee who at the time of questioning appears to be a potential subject of disciplinary action has the right to representation by his/her union representative and that (s)he must be notified in advance, in writing, of this right. If the employee requests representation,a reasonable period of time must be afforded for the employee to obtain representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee.

[11] *Anheuser-Busch, Inc.,* 337 N.L.R.B. No. 2, 170 L.R.R.M. 1206 (2001).

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(Continued from page 3)

advisory role [will] be able to express their opinions freely to agency decision makers." By their nature, risk analyses and assessments represent opinions, advice, recommendations and often conjecture, all of which may be withheld under 87(2)(g). It is also noted that records prepared by consultants for agencies may be characterized as "intra-agency" materials that fall within the coverage of 87(2)(g).

The fourth provision in the Freedom of Information Law that is particularly relevant in the context of terrorist or similar activity is based on the Committee on Open Government's first legislative priority offered in its 2000 report to the Governor and the Legislature. That recommendation specifically addressed the security of records and came to fruition through the approval of a new exception to rights of access, 87(2)(i). Until recently, a description of an agency's security procedures concerning the protection of its records would not, if disclosed, compromise the ability to guard against unauthorized access. Even if written procedures were available, without the first key to unlock the door to the room in which the records were stored, and more importantly, without the second key needed to unlock the filing cabinet, records could be protected with reasonable certainty. In contrast, today's disclosure of an agency's security procedures could result in devastating attacks and incursions on agencies' electronic information systems. The use of the key to unlock the door or filing cabinet, being physically present, is no longer necessary; an electronic attack can emanate from anywhere.

The recent amendment to the rights of access in the Freedom of Information Law provides state and local government with a means of denying access when the security of electronic information systems may be threatened. Specifically, the new language of §87(2)(i) states that an agency may deny access to records when disclosure "would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures."

In sum, the Freedom of Information Law provides government with the ability to deny access in the context of security when reality warrants a denial of access.

Robert J. Freeman is the Executive Director for the Committee on Open Government. Mr. Freeman has worked for the Committee since its creation in 1974 and was appointed executive director in 1976.

Municipal Briefs

(Continued from page 3)

encroachment becomes a cloud on title. With its alienability restricted, the encroaching property was often abandoned, burdening the municipality with lost tax revenues and the cost of removing the abandoned property.

The amendments do not impair the municipality's right to the land upon which the encroachment is situated. Nor does it confer any right or claim against the municipality by virtue of the encroachment. Rather, by conferring upon the property owner a temporary or conditional right to maintain the encroachment, the legislation enhances the encroaching property's value, promotes its alienability, assures the continued payment of taxes and avoids the threat of abandonment.

Section Meeting

(Continued from page 2)

of Rochester and Program Chair Howard Protter, Esq., Jacobowitz & Gubits, Walden. For reservations and further information, please contact the New York State Bar Association at (518) 463-3200.

Look for the "New" *Municipal Lawyer*

Negotiations are under way between the Edwin G. Michaelian Municipal Law Resource Center of Pace University and the New York State Bar Association to convert the *Municipal Lawyer* into a magazine format with expanded content and enhanced graphics. As currently envisioned, the publication would be issued quarterly, beginning with the Spring of 2003. The publication would also appear on the Section's website. Under the proposal being discussed, the State Bar Association would assume responsibility for the production and distribution of the *Municipal Lawyer* at a reduced cost to the Municipal Law Section and Pace University. The publication would continue to be a joint publication of the State Bar and the Municipal Law Resource Center of Pace University.

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