

LABOR RELATIONS



Police Discipline Record Release: Upheld but Temporarily Stayed

ERIC D. ENGELMAN, *Esq.* and JENNIFER ROSELLE, *Esq.*, *Genova Burns*

The Superior Court of New Jersey, Appellate Division recently issued a unanimous decision upholding Directive 2020-5 and Directive 2020-6 amending the New Jersey Attorney General’s Internal Affairs Policy & Procedures (IAPP), which governs police internal affairs investigations in New Jersey.

The Attorney General issued both Directives in June 2020 in response to the national demands for law enforcement accountability and reform following the death of George Floyd. The Appellate Division’s decision consolidated five appeals brought by New Jersey law enforcement officer unions and interest groups challenging the validity of the Directives.

Facts

Directive 2020-5 requires all New Jersey law enforcement agencies to publish records of law enforcement officers receiving disciplinary penalties of termination, demotion, or a suspension of more than five days. The information must be published at least annually, include the officer’s name, a summary of the misconduct, and the penalty imposed. The Directive requires publication of final discipline issued during the 2020 calendar year by December 31, 2020. Directive 2020-5 also permits county and municipal law enforcement agencies to publish similar information regarding earlier incidents that resulted in major discipline.

Directive 2020-6 expands the publication requirements for law enforcement agencies within the New Jersey Department of Law and Public Safety, the Division of State Police, the Division of Criminal Justice, and the Juvenile Justice Commission. Those law enforcement agencies are also required to publish certain disciplinary information that occurred within the past 20 years. Directive 2020-6 required 7 days’ notice to the officers prior to publication by July 15, 2020.

The Appellate Division’s ruling

Open Public Record Act Analysis The Court rejected Petitioners’ arguments that the Open Public Records Act (OPRA) prohibited release of the discipline records under the Directives because this was not an OPRA case. The case was not about denial of access to governmental records to a third

party, but an effort to “block the Attorney General’s efforts to make more transparent the secluded internal affairs process” in law enforcement. While recognizing this was not an OPRA case, the Court noted that in general, OPRA excepts personnel records from the definition of governmental record.

The Appellate Division nonetheless upheld the release of the information under the Directives. The Court reasoned that OPRA and related Executive Orders permit the disclosure of personnel records when required by “another law.”

...This reflected a fundamental difference between law enforcement officers and other public employees; law enforcement officers are held to a higher standard of conduct.

Looking at the statutory construct, the Court noted that the Legislature empowered the Attorney General to impose rules and regulations for the conduct of the Department of Law and Public Safety. Those rules have the force of law. Accordingly, the Court concluded these Directives were “another law” which permitted release of the information under both OPRA and the Executive Orders.

The Court further rejected the Petitioners’ argument that the Directives violated confidentiality expectations under OPRA and the Executive Orders. Every version of the IAPP required some disclosure of personnel information that would ordinarily be barred by OPRA or Executive Order. In part, this reflected a fundamental difference between law enforcement officers and other public employees; law enforcement officers are held to a higher standard of conduct.

Given the level of power afforded to police officers, they are subject to more scrutiny and have a lower expectation of privacy, including with their own disciplinary records. This long-standing recognition, the need for public confidence in its officers, and the long-reserved discretion afforded to the Attorney General did not support a claim the Directives violated officers’ privacy expectations.

Retroactivity The Appellate Division further rejected claims that the Directive’s retroactive application constitute prohibited ex post facto rules. First, ex post facto prohibitions apply to criminal laws. Second, this claim only attaches when a law changes. Here, the Attorney General exercised discretion he was afforded under longstanding statutes. Coupled with the recognition that police officers are held to higher standards of conduct with lower expectations of privacy, the Court did not find any constitutionally vested right upon with the Directives infringed.

Due Process and Equal Protection

The Court similarly did not find substantive and procedural due process violations as claimed by Petitioners. First, the Court rejected contentions that the officers’ substantive due process rights were violated given the compelling public interest to release records, officers’ reduced expectations of privacy, and every version of the IAPP issued since

2000 stating the Attorney General could order release of the disciplinary records.

Likewise, the Court found the officers were not deprived equal protection under the law; the distinction between police officers and public employees was not impermissibly arbitrary nor the distinction between officers in the Department of Law and Public Safety and local law enforcement agencies. Also, any procedural due process entitlements were afforded to the officers by virtue of being able to participate in the disciplinary hearing process.

Notice Requirements Although the Court did not address arguments for individual claims based on the record before it, the Court also ordered an expansion of the notice provisions pursuant to Directive 2020-6. The Court believed Directive 2020-6’s seven-day notice requirement was too short for a police officer to act on the notice. Accordingly, the Court expanded the notice requirement to 14 days under

Directive 2020-6 and strongly urged the Attorney General to issue similar requirements for local governments seeking to disclose historical information.

Bottom line

The Appellate Division upheld the Directives but created a limited stay of its decision’s effect to allow Petitioners time to appeal. Since that time, the Attorney General notified the Supreme Court of New Jersey that while it considers whether to grant certification to hear an appeal, the State will not publish any reports under the Directives.

The State represented there would be no release of records at least until November 30, 2020. At press time, if the Supreme Court had not made a decision on whether to hear the appeal by November 30, the State would hold the records until a decision is made. In the event the Supreme Court grants certification, the Attorney General agreed that the State will not publish any reports until the Supreme Court resolves the case on its merits.

The Election is over.
The votes have been counted.
And you’ve been elected!

Start your term in Municipal Government on the right foot.
Sign up for the League’s training programs today.

**Orientation for Municipal Officials
Who Are Newly Elected,
Reelected, Or Experienced**



Saturday, January 9, 2021
Webinar—Your Computer

Saturday, January 23, 2021
Webinar—Your Computer

This orientation for municipal officials who are newly elected, reelected, or experienced is fast paced and designed to quickly bring officials up-to-date on important municipal issues. The newly elected officials will get a thorough overview of their major areas of responsibility, key contacts at the State level, and important sources of information and assistance.

REGISTRATION FEE: Member \$90.00* Non-Member \$110.00

**Member Rate: Includes Municipalities, State, County, Local Governments, and Municipal Utility Authorities*



For more information,
click the QR code or visit
www.njlm.org/seminars