

# ***Dep't of Correction v. Victor***

OATH Index No. 388/15, mem. dec. (Feb. 3, 2015)

Respondent's motion to redact name of correction officer from OATH decision is denied, as reports and recommendations issued by OATH, an independent tribunal, are not "under the control" of the Department of Correction and thus do not fall within the confidentiality provisions of section 50-a of the Civil Rights Law.

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## **NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS**

*In the Matter of*  
**DEPARTMENT OF CORRECTION**  
*Petitioner*  
*-against-*  
**AUBREY VICTOR**  
*Respondent*

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### **MEMORANDUM DECISION**

**FAYE LEWIS**, *Administrative Law Judge*

Pending before me is an employee disciplinary proceeding referred by petitioner, the Department of Correction, pursuant to section 75 of the Civil Service Law. Trial was conducted before me on December 5, 2014. Respondent moved at trial for redaction of his name from any published report and recommendation, asserting that such information is confidential under section 50-a of the New York State Civil Rights Law. The trial record was left open until January 12, 2015, for the parties to submit legal memoranda on the issue. My report and recommendation as to liability for the misconduct charged remains *sub judice*.

In its letter brief, filed on December 24, 2014, respondent asserts that the "plain language" of section 50-a requires that his identity be shielded from any document that is disclosed to the public. Respondent seeks redaction of his name "and any other identifying personal and personnel information," which was not specified, from any document disclosed to the public (Resp. letter brief at 2). In its response, filed on January 12, 2015, petitioner opposes respondent's request for redaction, based upon its interpretation that Civil Rights Law section 50-a(4) provides an exclusion from confidentiality in this case.

Respondent's motion is essentially a motion under section 1-49(d) of this tribunal's rules, which provides that all decisions will be published without redaction unless the presiding administrative law judge finds that legally recognized grounds exist to omit information from a decision. 48 RCNY § 1-49(d) (Lexis 2014). Respondent asserts section 50-a as the legal basis for omitting his identity from publication.

For the reasons below, respondent's motion is denied.

First, the plain language of section 50-a does not support the contention that it encompasses reports and recommendations issued by OATH. In relevant part, section 50-a provides:

All personnel records used to evaluate performance toward continued employment or promotion, **under the control** of any police agency or department of the state or any political subdivision thereof . . . and such personnel records under the control of a sheriff's department or a department of correction of individuals employed as correction officers . . . shall be considered confidential and not subject to inspection or review without the express written consent of such police officer . . . [or] correction officer . . . except as may be mandated by lawful court order.

Civ. Rights Law § 50-a (Lexis 2014) (emphasis added). In order to fall within the scope of section 50-a, documents pertaining to correction officers must be "personnel records used to evaluate performance toward continued employment or promotion," and they must also be "under the control" of "a department of correction."

OATH is not "a department of correction." Nor are reports and recommendations issued by OATH records "under the control" of the Department of Correction.

Section 50-a was first enacted in 1976 to exempt certain documents relating to police officers from disclosure under the Freedom of Information Law (Public Officers Law, art. 6). In 1981, the law was amended to extend its confidentiality provisions to additional uniformed officers. As respondent notes, internal disciplinary records have been held to constitute personnel records used to evaluate performance toward continued employment or promotion within the meaning of section 50-a. *See Daily Gazette Co. v. Schenectady*, 93 N.Y.2d 145 (1999) (settlements of internal disciplinary cases within police department files found to be personnel records covered by section 50-a); *see also Prisoners' Legal Services v. New York State Dep't of Correctional Services*, 73 N.Y.2d 26 (1988) (internal inmate grievance records

concerning a correction officer required to be kept confidential under section 50-a). These cases all involved documents under the control of either a police department or a department of correction.

Respondent's argument overlooks that OATH is an independent tribunal under the City Charter, and that OATH's records, even if they relate to employee performance, are not "under the control" of the Department of Correction, and thus are not subject to the confidentiality provisions of section 50-a.

OATH was established by Executive Order No. 32 in 1979 and was made a Charter agency in 1988 as part of the Charter revisions that enacted the City Administrative Procedure Act ("CAPA"). Among CAPA's primary reforms was the adoption of minimum standards for the conduct of administrative hearings and the establishment of OATH as the City's presumptive and independent tribunal. Charter § 1048(1) (Lexis 2014). As noted by the Charter Revision Committee:

[t]he purpose of formalizing OATH in the charter is to establish an independent adjudicative body that can be a resource to agencies in conducting their adjudications, while at the same time establishing an independent structure outside of the agency to provide an unbiased assessment of the matters to be adjudicated.

Report of the Charter Revision Commission, Vol. 2 at p. 103 (April 1989). To enhance decision-maker impartiality, the City Charter revisers granted OATH administrative law judges five-year terms, terminable only for cause after a hearing. Charter § 1049(1)(a).

Thus, OATH functions as an independent tribunal, adjudicating the cases that come before it. The fact that OATH issues reports and recommendations to agencies which refer cases to it, including the Department of Correction, does not transform OATH into an entity subordinate to or under the control of those referring agencies. To the contrary, the City Charter explicitly vests OATH's administrative law judges with authority over the cases which the tribunal adjudicates, including authority to administer oaths, examine witnesses, rule upon offers of proof, receive evidence, and oversee and regulate discovery procedures; subpoena the attendance of witnesses and the production of books, records, or other information; regulate the course of the hearing in accordance with applicable rules; dispose of procedural requests or similar matters; make recommended or final findings of fact or decisions, determinations or

orders, as authorized by law; and take any other action authorized by law or agency rule. Charter § 1049(3).

The City Charter further mandates that OATH's chief administrative law judge "establish rules for the conduct of hearings . . ." Charter § 1049(2). Rule 1-49(a), promulgated under this authority, provides that OATH trials are to be open to the public, unless the presiding administrative law judge finds "a legally recognized ground exists for closure . . . or unless closure is required by law." OATH makes its decisions and reports and recommendations publicly available by posting them on its website. OATH also distributes its decisions to the Center for New York City Law at New York Law School, which publishes them at <http://www.nyls.edu/cityadmin>, and to LEXIS/NEXIS, which publishes OATH decisions, including those involving correction officers, going back to 1992.

OATH's conduct of public hearings and publication of decisions arising from those hearings is in accordance with New York law. "Under New York law, there is a broad presumption that the public is entitled to access to judicial proceedings and court records." *Mosallem v. Berenson*, 76 A.D.3d 345, 348 (1st Dep't 2010) (vacating order which sealed from public disclosure a set of exhibits which defendants alleged contained confidential business information) (citations omitted). The Court of Appeals has held that the "presumption of openness" applies to administrative hearings, given the "strong public policy in this State of public access to judicial and administrative proceedings." *Herald Co., Inc. v. Weisenberg*, 59 N.Y.2d 378, 381-82 (1983) (unemployment insurance board hearings are open absent a specific claim of confidentiality). OATH's publication of its reports and recommendations without redaction furthers the public interest in transparency and open government, as petitioner points out in its letter brief in opposition to respondent's motion.

In asserting that section 50-a applies to OATH's decisions, respondent cites *Sharrow v. State*, 216 A.D.2d 844 (3d Dep't 1995), in which the Third Department, without discussion, found an arbitration determination to fall within the ambit of section 50-a. Respondent contends that OATH's decisions are akin to arbitration determinations. This is mistaken. There is no reason to believe that *Sharrow* could be applied to OATH, considering OATH's independent stature under the City Charter and its judicial nature.

Respondent additionally asserts, “at the very least, the discussion and publication of [correction officers’] disciplinary histories is clearly protected [and] should be shielded from disclosure to the public” (Resp. letter reply at 2, Jan. 12, 2015). Respondent’s argument overlooks that discussion of prior disciplinary record is routinely included within reports and recommendations issued by OATH under section 75 of the Civil Service Law. OATH discusses prior disciplinary history because it is important for purposes of penalty. Such discussion is an integral part of OATH’s adjudicatory function. Like any other portion of an OATH report and recommendation, the penalty portion is an OATH record, under the control of OATH.

Petitioner makes an alternate argument against redaction, pursuant to section 50-a(4) of the Civil Rights Law. However, section 50-a(4) applies in a different context: to provide access to personnel records to public prosecutors and other law enforcement officials and governmental agencies that need the records to further their official functions. *See Daily Gazette*, 93 N.Y.2d at 154; *see also Green v. Safir*, 255 A.D.2d 107 (1st Dep’t 1998) (Public Advocate entitled to substantiated Civilian Complaint Review Board complaints and case files of potential discipline based on complaints by the public).

In sum, OATH’s reports and recommendations are OATH records, produced by OATH in fulfillment of its fundamental City Charter mandate to serve as an independent adjudicatory tribunal for City agencies. OATH’s decisions are not “under the control” of the Department of Correction, and thus are not subject to the confidentiality provisions of section 50-a. Accordingly, respondent’s motion that his name and “any other identifying personal and personnel information” be redacted from any published decision is denied.

Faye Lewis  
Administrative Law Judge

February 3, 2015

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