Dep't of Correction v. Johnson

OATH Index No. 1663/19, mem. dec. (Sept. 12, 2019)

Motion to prohibit publication of OATH report and recommendation denied as untimely. Moreover, based on its plain wording, section 50-a of the Civil Rights Law does not apply because OATH, an autonomous agency and independent tribunal, is not "under the control" of the Department of Correction. Respondent also failed to overcome the broad presumption in favor of public access to OATH proceedings.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
-against-
SHONTA JOHNSON
Respondent

MEMORANDUM DECISION

KEVIN F. CASEY, *Administrative Law Judge*

Pending before me is an employee disciplinary proceeding referred by petitioner, the Department of Correction ("DOC"), against respondent, Correction Officer Shonta Johnson. Civ. Serv. Law § 75. At a five-day trial, which ended on July 3, 2019, DOC relied on testimony from six witnesses and documentary evidence. Respondent testified in her own behalf, called two other witnesses, and presented documentary evidence.

Midway through trial, Johnson sought to ban publication of the report and recommendation to be issued by this tribunal, the Office of Administrative Trials and Hearings ("OATH"), on the ground that results of a disciplinary proceeding are confidential personnel records under section 50-a of the Civil Rights Law (Tr. 488). Johnson acknowledged that OATH had denied the same claim brought by another correction officer in a case that was then pending before the Appellate Division, First Department (Tr. 488). *Dep't of Correction v. Victor*, OATH Index No. 388/15, mem. dec. (Feb. 3, 2015), *aff'd*, Index No. 100890/15 (Sup. Ct. N.Y. Co. May 29, 2018) (Hagler, JSC), *appeal dismissed*, 174 A.D.3d 455 (1st Dep't 2019).

Opposing Johnson's request, DOC argued that the motion was untimely and that *Victor* was correctly decided, binding precedent (Tr. 488-89). Based on the plain wording of section 50-a of the Civil Rights Law, DOC asserted that OATH's reports and recommendations were not confidential because OATH is not under DOC's control (Tr. 489). DOC further emphasized the broad presumption in favor of public access to OATH proceedings (Tr. 489-90). I reserved decision on Johnson's motion (Tr. 491).

After receipt of post-trial memoranda, where Johnson requested a ruling on her motion prior to issuance of the report and recommendation, the record was closed on July 24, 2019. On August 7, 2019, Johnson sought an order to show cause to prohibit publication of OATH's report and recommendation, which has not yet been issued. *See* CPLR Art. 78. That proceeding was resolved when this tribunal agreed to rule on Johnson's motion prior to issuing the report and recommendation on the underlying disciplinary matter and to give Johnson sufficient time to seek further relief. *Johnson v. NYC Office of Trials and Hearings*, Index No. 101212-19 (Sup. Ct. N.Y. Co. Aug. 7, 2019) (Madden, JSC).

For the reasons below, Johnson's motion to prohibit publication of the report and recommendation is denied.

Johnson's request is untimely

As DOC correctly notes, OATH's rules require that motions be made as early in the proceedings as possible. *See* 48 RCNY § 1-34(a) ("Delay in presenting [a pre-trial] motion may, in the discretion of the administrative law judge, weigh against the granting of the motion"). Johnson seeks to prohibit publication of a report and recommendation. That would be an unprecedented and a dramatic departure from 25 years' of OATH's practice. It is exactly the type of motion that should have been made well before trial.

Instead, Johnson waited until the third day of trial. Before going on the record, Johnson's counsel mentioned the possibility of redacting Johnson's name from the report and recommendation. After going on the record, I summarized counsel's request, noted that a similar issue was presently pending in the Appellate Division, First Department, and invited the parties to address the issue on the next trial date (Tr. 359). On the next trial date, Johnson's counsel clarified that he was moving to ban publication of the report and recommendation in any form,

including the internet, on the ground that the results of the disciplinary proceeding were confidential under section 50-a of the Civil Rights Law (Tr. 488).

When Johnson first raised the subject of confidentiality, the matter had been pending at OATH for more than four months, the trial had been posted on OATH's calendar, and there had been two days of public trial. Prior to trial, Johnson never sought a protective order or made any claim of confidentiality. Johnson raised concerns about confidentiality only after both sides had made opening statements, four witnesses had testified about the charges at length, and DOC had introduced more than two dozen exhibits in evidence. Though the report and recommendation had not yet been issued, the belated nature of Johnson's request undercuts her claim of confidentiality. *See Mosallem v. Berenson*, 76 A.D.3d 345 (1st Dep't 2010) (vacating a sealing order in a civil lawsuit, the reviewing court noted, "Despite defendants' purported concerns about the release of documents, they did not act with haste in moving to seal").

Section 50-a does not apply because OATH is not under DOC's control

Even if Johnson had made a timely motion to prohibit publication of the report and recommendation, her reliance on section 50-a is misplaced. As Johnson concedes, this tribunal previously rejected a similar claim by a correction officer in *Victor* (Tr. 488). There, ALJ Lewis looked at the plain wording of section 50-a and summarized OATH's purpose, history, and role as an independent tribunal under the City Charter. *Victor*, OATH 388/15 at 2-3. ALJ Lewis concluded that section 50-a did not prohibit publication of OATH reports and recommendations because OATH is not under the control of DOC. Noting that New York's broad "presumption of openness" extends to administrative hearings, ALJ Lewis found that "OATH's publication of its reports and recommendations without redaction furthers the public interest in transparency and open government . . . ." *Id*. at 4.

Denying Victor's Article 78 petition, Justice Hagler reviewed ALJ Lewis's interpretation of section 50-a and summary of OATH's history, and found that the conclusion, that OATH was not under DOC's control, was neither arbitrary nor capricious. Justice Hagler further held that cases cited by Victor were inapposite. *See, e.g., Matter of Prisoners' Legal Services Prisoners' Legal Services v. NYS Dep't of Correctional Services,* 73 N.Y.2d 26 (1988) (internal inmate grievance records concerning a correction officer are covered by section 50-a); *Sharrow v. State*, 216 A.D.2d 844 (3d Dep't 1995) (stating, in passing, that arbitration determination was subject

to section 50-a, without discussing how matter was referred to an arbitrator, terms of the arbitration agreement, or scope of arbitrator's authority). The Appellate Division dismissed Victor's appeal of Justice Hagler's decision as moot because the report and recommendation at issue had been publicly available for several years. 174 A.D.3d 456.

Based on *Victor*, this tribunal has continued to find that section 50-a does not apply to OATH reports and recommendations. *See, e.g.*, *Dep't of Correction v. Mohr*, OATH Index No. 724/17 at 3 (June 9, 2017), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2017-870 (Dec. 21, 2017). DOC agrees with OATH (Tr. 489). Despite receiving an opportunity to do so, Johnson offered no factual or legal basis for a different result.

As DOC acknowledges, *Victor* is consistent with the plain wording of section 50-a. In relevant part, the statute 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 2019) (emphasis added). Thus, to fall within the scope of section 50-a, documents pertaining to correction officers must be "under the control" of "a department of correction."

Significantly, section 50-a provides greater protection for police officers than correction officers. When first enacted in 1976, section 50-a only applied to police officers' personnel records. *See Daily Gazette Co. v. City of Schenectady*, 93 N.Y.2d 145 (1999) (settlements of internal disciplinary cases in police department files found to be personnel records covered by section 50-a). Five years later, the Legislature amended the statute to include correction officers. However, unlike the provision for police officers, which included personnel records "under the control" of "any police agency or department of the state or any political subdivision thereof," the amendment for correction officers only covered personnel records that were under the control of "a sheriff's department or a department of correction." OATH is not a sheriff's department or

department of correction. And OATH's records, including its reports and recommendations, are not "under the control" of DOC.

For 40 years, OATH has been New York City's independent tribunal. Established by executive order in 1979, OATH was made a Charter agency in 1988. NYC Charter § 1048(1) (Lexis 2019). One of the main reasons for making OATH an autonomous, independent agency was to establish "an independent structure outside of the agency to provide an unbiased assessment of the matters to be adjudicated." Report of the Charter Revision Committee, Vol. 2 at 103 (April 1989).

OATH administrative law judges are not agents of DOC. An agency relationship exists when "an agent acts on the principal's behalf and subject to the principal's control, and the agent manifests consent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (2006). *See Basic Books, Inc. v. Kinko's Graphics Corp*., 758 F. Supp. 1522, 1546 (S.D.N.Y. 1991), citing *Mazart v. State*, 109 Misc. 2d 1092, 1099 (N.Y. Ct. Cl. 1981) ("There can be no agency relationship where the alleged principal has no right of control over the alleged agent"). Though DOC refers matters to OATH for adjudication, that does not give DOC any right of control over OATH or its administrative law judges.

OATH has its own budget, its own physical plant, and its own commissioner. To enhance impartiality, the Charter grants OATH administrative law judges five year terms, terminable only for cause after a hearing. Charter § 1049(1)(a). To enhance professionalism and independence, OATH administrative law judges are prohibited from participating in political activities and have adopted the standards of the Code of Judicial Conduct of the State of New York and the City Code of Judicial Conduct for Administrative Law Judges. 48 RCNY app. A; 22 NYCRR, Ch. I, Sub. Ch. C, Part 100.

Administrative law judges at OATH adjudicate a wide range of disputes, including employee disciplinary matters, license revocation proceedings, and alleged violations of the Loft Law, the City's Human Rights Law, consumer and worker protection laws, campaign finance laws, contract disputes, and preliminary hearings in vehicle forfeiture cases. Section 1049(3) of the Charter authorizes administrative law judges 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; and make recommended or final findings of fact.

The Charter also mandates that OATH's chief administrative law judge "establish rules for the conduct of hearings . . . ." Charter § 1049(2). Based on that authority, OATH has longstanding rules providing for public access to its proceedings and documents. Section 1-49(a) of OATH's rules mandates that OATH trials are 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." "Unless the administrative law judge finds that legally recognized grounds exist to omit information from a decision, all decisions will be published without redaction." 48 RCNY § 1-49(d). OATH's reports and recommendations are publicly available on our website, as well as the website of the Center for New York City Law at New York Law School, which publishes them at http://www.nyls.edu/cityadmin, and they are also available on LEXIS/NEXIS.

DOC has no control over OATH's staffing, funding, or operations. And DOC does not have any control over which administrative law judge will be assigned to each trial. Most importantly, DOC does not control who has access to OATH's records. Indeed, OATH was deliberately created as a separate, independent agency to avoid being under the control of other agencies.

OATH is also much different than other tribunals, such as the Civilian Complaint Review Board ("CCRB"). *See, e.g., Luongo v. Records Access Officer, Civilian Complaint Review Bd.*, 150 A.D.3d 13 (1st Dep't 2017) (finding that summary of CCRB records, indicating the number of substantiated complaints against a police officer, were personnel records covered by section 50-a). To begin with, as noted, section 50-a is broader for police officers and covers personnel records in possession of any government agency; for correction officers, section 50-a only applies to personnel records in the control of sheriff offices and departments of correction. Moreover, as explained in *Luongo*, CCRB's sole function is to investigate and prosecute four types of complaints against police officers. *Id*. at 17. After investigating a complaint, CCRB determines whether it is "substantiated" and submits its findings and disciplinary recommendations to the police commissioner. The officer against whom the complaint is filed is entitled to a hearing conducted by a high-ranking police official. Under a Memorandum of Understanding ("MOU") between CCRB and the Police Department, CCRB prosecutes the

complaint at the Police Department. The MOU expressly states that "Documents provided to CCRB by NYPD or created by CCRB pursuant to this MOU that are by law police personnel records are therefore confidential pursuant to NYS Civil Rights Law § 50-a." *Id*. at 18. Though CCRB is a separate agency, it has limited jurisdiction, it investigates and prosecutes complaints against police officers, and, most critically, the Police Department has explicitly retained control of personnel records possessed or created by CCRB.

In contrast, OATH is an independent and completely autonomous tribunal, it has broad jurisdiction, and it does not investigate or prosecute complaints against officers or any other agency's employees. Unlike DOC, which refers disciplinary matters for adjudication to OATH, the Police Department retains control over documents provided to CCRB and created by CCRB. There is no agreement with DOC that limits OATH's ability to publish its own decisions and reports and recommendations. Indeed, in opposing Johnson's motion, DOC disavows any control over OATH's documents.

Johnson has failed to overcome the broad presumption in favor of public access guaranteed by the federal and state constitutions

An independent ground for denying Johnson's motion is that banning publication of the report and recommendation would violate the public's right of access to OATH proceedings.

The First Amendment guarantees a qualified right of access to government proceedings and records. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980); *Danco Lab., Ltd. v. Chemical Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 6 (1st Dep't 2000) (finding that First Amendment right of access to court proceedings includes court records). Unlike the Sixth Amendment, the First Amendment "does not distinguish between criminal and civil proceedings; nor does it distinguish among branches of government." *NY Civil Liberties Union v. NYC Transit Auth*., 684 F.3d 286, 300-01 (2d Cir. 2011) (holding that the First Amendment guarantees the public a presumptive right of access to Transit Authority's administrative proceedings where alleged violations of rules for use of public transportation facilities are adjudicated). To determine whether the First Amendment guarantees access to a particular proceeding, courts apply a two-part "experience" and "logic" test. First, courts look at the history of the proceeding and "consider [] whether the place and process have historically been open to the . . . public." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986). Second,

courts consider logic to determine whether public access "plays a significant positive role in the functioning of the particular process in question." *Id.; see also N .Y. Civil Liberties Union v. NYC Transit Auth.*, 684 F.3d at 299 (applying "experience and logic" test to administrative proceedings). Based on experience and logic, the public has a First Amendment right of access to OATH's reports and recommendations.

OATH has a long, unbroken history of public access to its proceedings. For 40 years, OATH proceedings have been open to the public. As noted, OATH's rules require proceedings to be open to the public and decisions to be published. OATH reports and recommendations are posted on our website, OATH decisions from 1990 to date are also available at New York Law School's website, and Lexis/Nexis includes OATH cases involving disciplinary hearings for correction officers going back to 1992.

For the "logic" step of the First Amendment analysis, the relevant inquiry is whether "public access . . . plays a particularly significant positive role in the actual functioning of the process." *Press-Enterprise*, 478 U.S. at 11. Secret proceedings breed suspicion and cynicism. *See Richmond Newspapers, Inc.*, 448 U.S. at 572 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."). Public access to criminal and civil proceedings "enhances the quality and safeguards the integrity of the fact-finding process." *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 606 (1982). Among its many benefits, public access discourages perjury, restrains potential abuse of power, educates the public, and promotes fairness. *See Richmond Newspapers* 448 U.S. at 569; Bentham, J., *Writings on the Poor Laws* at 277 (Quinn ed. 2001) ("the more strictly we are watched, the better we behave"). All of those benefits of public access apply with full force to OATH's reports and recommendations.

Publicly available OATH reports and recommendations are a valuable resource for city agencies and its employees. For example, they provide guidance on what types of behavior amount to misconduct. When a correction officer is cleared of misconduct, public access to OATH's report and recommendation helps clear the officer's name. *See OATH Judge Rules On Behalf of a Correction Officer*, available at Koehler & Isaacs LLP website. https://koehler-isaacs.com.

OATH's reports and recommendations also provide a window into the workings of the Department of Corrections and other institutions. *See, e.g.,* Dwyer, *A Move to End Transparency*

for New York's Jails, N.Y. Times, Jan. 28, 2016. The public has a compelling interest in the adjudication of disciplinary charges against correction officers and other civil servants. When such an employee is found to have committed misconduct, that is the public's business.

The decision in *Victor* vividly illustrates the value of publishing OATH's reports and recommendations. There, a correction officer was accused of using excessive force against a teenage inmate on Rikers Island by hitting him in the face and "stomping on the inmate's head three times as the inmate was lying on the floor, causing physical injury." *Victor*, OATH 388/15 at 1. The officer claimed that the inmate attacked him without provocation. Rejecting the officer's testimony, ALJ Lewis found key parts of it to be "incredible." *Id*. at 11-12. Publication of *Victor* and other reports and recommendations sheds light on the workings of our jails and informs the public debate about reforming those institutions.

To prohibit publication of the report and recommendation in this case would be an unwarranted and unprecedented restriction of OATH's role as an independent tribunal. Making reports and recommendations for correction officers secret would undermine transparency and accountability. It would also destroy the precedential value of OATH findings on agency policy and employee behavior. Notably, the Court of Appeals has held that if a document is covered by section 50-a, it cannot be disclosed, even in redacted form, in response to a FOIL request. *See, NY Civil Liberties Union v. NYC Police Dep't*, 32 N.Y.3d 556, 568 (2018).

Besides violating the First Amendment, prohibiting publication of OATH's reports and recommendations would be contrary to "the strong public policy in this State of public access to judicial and administrative proceedings." *Herald Co. v. Weisenberg*, 59 N.Y.2d 378, 381 (1983) (finding, based on state policy, that unemployment insurance hearings are presumptively open); *see also Herald v. Bd. of Parole*, 131 Misc.2d 36, 49 (Sup. Ct. Onondaga Co. 1985) (finding, based on New York State public policy as well as First Amendment grounds, that parole revocation proceedings are presumptively open to the press and public); *see also*, *O'Neill v. Oakgrove Const., Inc*. 71 N.Y.2d 521, 529 (1988) (noting that Article I, section 8 of New York's Constitution provides broader protection than the First Amendment and is consistent with New York's long tradition of "providing the broadest possible protection" to the gathering and circulating news about public events).

In sum, OATH is not a department of correction. And OATH is not under DOC's control. Thus, OATH's reports and recommendations are not "under the control" of a

department of correction and not subject to the confidentiality provisions of section 50-a. Accordingly, respondent's motion to prohibit publication of the report and recommendation resulting from her disciplinary trial is denied. In accordance with the terms of resolution of Johnson's Article 78 proceeding, I will defer issuing the report and recommendation until October 15, 2019.

Kevin F. Casey
Administrative Law Judge

September 12, 2019

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