STATE OF NEW YORK
SUPREME COURT

COUNTY OF WAYNE

In the Matter of The Application of GENEVA PRINTING CO. and DONALD C. HADLEY,

Petitioner,

-against-

VILLAGE OF LYONS, NEW YORK; JOHN J. DASHNEY, as Mayor of the Village of Lyons, New York; and CORRINE COMELLA, as Records Access Officer of the Village of Lyons, New York,

Respondents.

APPEARANCES:

NIXON, HARGRAVE, DEVANS & DOYLE (Robert C. Bernius of counsel) for Petitioners.

RICHARD C. WUNDER, Village Attorney, for Respondents.

ROEMER AND FEATHERSTONHAUGH (Marjorie E. Karowe of counsel) for Intervenors, Village of Lyons Unit, Wayne County Chapter, Local 859, Civil Service Employees Association.

DECISION

The issue here is whether New York State's Freedom of Information Law (Public Officers Law, Article 6, §84 et seq) entitles the press to ascertain the result of a disciplinary action against a public employee even though the matter was concluded by a settlement which the municipality involved agreed would remain confidential. For the reasons which follow the court now holds that it does.

This CPLR Article 78 proceeding in the nature of mandamus, authorized by Public Officers Law §89, sub.4, par. A, is brought by the petitioner, Geneva Printing Company, to review under the scrutiny of the Freedom of Information Law (FOIL) the determination by public officials for the Village of Lyons denying disclosure of the final determination of the Robert Wykle arbitration hearing of

December 6, 1979. The arbitration hearing resulted from a grievance filed by the union representing village employees disputing the Village's intention to discipline Wykle, the Assistant Suprevisor of the Water and Sewer Department for the Village of Lyons. The misconduct specified in the charges brought against Wykle was the performance by him of a private job for pay while on Village time. Coincidentally, Wykle was also the head of the Village's employee union.

Before the hearing was completed the Village and the Village of Lyons Unit, Wayne County Chapter, Local 859 of the Civil Service Employees Association, (Union), on behalf of Wykle, entered into a settlement of the charges. It was agreed by the parties to the settlement and ratified by Wykle that the Village would not release information pertaining to the settlement agreement.

The union has steadfastly maintained that confidentiality of the terms of the agreement was a precondition to the union's and Wykle's assent to the settlement and waiver of their right to proceed to a final arbitration decision.

Following this resolution of the arbitration hearing, petitioner through its managing editor, Hadley, requested that the records relating to the settlement be made available. Although phrased as a request for "any and all records of the final determination of the....arbitration hearing....", there is no question but what was sought was more than to be informed by what method the matter was resolved. The request covers the actual terms of the settlement.

Petitioner is the publisher of the Finger Lakes Times, an evening newspaper with a circulation of 19,000 that includes Wayne

County of which Lyons is the county seat. The paper had previously published an article detailing the charges asserted against Wykle.

Petitioner's request was denied, initially by the Village's Record Access Officer, then, following an appeal from that decision, by the Village's Mayor. It argues that under FOIL the village is compelled to produce the material sought.

Petitioner's position finds support in the advisory opinion rendered in this matter by the Committee on Public Access. The committee, statutorily created (Public Officers Law §89), has among its duties the issuance of advisory opinions, guidelines and rules and regulations to further the implementation of FOIL throughout the state. On this occasion the Committee advised the Mayor that none of the three statutory exemptions relied upon by the Village applied to this situation. Additionally, it alerted the Village to the burden placed upon it in sustaining its denial. Nevertheless, the Village persisted in its refusal to accede to the petitioner's request.

"Since the committee is the State agency charged with administering the Freedom of Information Law, its interpretation of the statute, if not irrational or unreasonable, should be upheld. (Matter of Sheehan v. City of Binghamton, 59 AD2d 808, 809, supra)" (Miracle Mile Associates v. Yudelson, 68 AD2d 176, 181; also see Machacek v. Harris, 431 NYS 2d 927, 929)

The union, by an Order to Show Cause, sought leave of the court to intervene in this matter insisting that it and its member employee could be adversely affected and that the Village did vigorously oppose the petition. The court, having been persuaded that the Village did not adequately represent the union

and its member with regard to all the issues at stake, granted the union's motion. (CPLR §§1012 [2], 7802 [D]) Accordingly, the court received the union's answer to the petition and its memorandum of law in support thereof.

Although Wykle did not seek permission to intervene, appended to the union's answer is his affidavit opposing disclosure. Therefore, the court is convinced that his interests are adequately protected.

Intervenor's answer contains nine affirmative defenses to the petition, which, upon examination, may be consolidated into five distinct defenses. They are:

1) that the record is protected from discovery by the common law privilege;

2) that the record is exempted from disclosure by Public Officer's Law section 87, sub'd.2,par. b., as an unwarranted invasion of personal privilege;

3) that the record is exempted from disclosure by Public Officer's Law section 87, subd. 2, par. c, since disclosure would impair present or imminent collective bargaining negotiations;

4) that the denial of access was proper as the records are not final determinations. (Public Officer's Law section 87, subd. 2, par. g;

5) that the petition is brought on prematurely.

It is the intervenor's contention that the common law privilege, which attaches to "confidential communications between public officers, and to public officers, in the performance of their duties, where the public interest requires that such confidential communications or sources should not be divulged." (People v. Keating,

286 App. Div. 150, 153; Cirale v. 80 Pine St. Corp., 35 NY2d 113, 117) applies here. The union argues that the harm apparent to the public interest if the negotiated settlement should be disclosed contrary to its express terms would be that it would seriously hamper the settlement of public sector labor disputes prior to arbitration. The union insists that the public interest is benefitted by maintaining harmonious relationships between government and its employees. Also, the union points to the expense the public is saved by the resolution of the dispute prior to arbitration.

After some doubt as to whether the common law privilege remained intact after the passage of the Freedom of Information Law (see Cirale v. 80 Pine St. Corp., supra.; Young v. Town of Huntington, 88 Misc.2d 632, 639, 640; Farrell v. Village Board of Trustees of the Village of Johnson City, 83 Misc.2d 125, 128), it now appears settled by the Court of Appeals that the common law privilege has been pre-empted by the Freedom of Information Law. (Matter of Doolan v. Board of Cooperative Educational Services, Second Supervisory District of Suffolk County, 48 NY2d 341, 347; see also City of New York v. Bustop Shelters, Inc., 104 Misc. 2d 702, 711). It is now incumbant on those opposing disclosure to identify the specific exemption under FOIL which excepts the subject records from disclosure.

In any event, even if the court were to apply the common law rule it would find that on the balance the public interest is best served not by concealing the disposition of these matters. Rather, the citizen's right to know that public servants are held accountable when they abuse the public trust outweighs any advantage that

would accrue to municipalities were they able to negotiate disciplinary matters with its employee with the power to suppress the terms of any settlement.

In this regard the public policy is expressed in §84 of the Public Officers Law which provides in pertinent part:

> "The legislature hereby finds that a free society is maintained when government is responsive and responsible to the public, and when the public is aware of governmental actions. The more open a government is with its citizenry, the greater the understanding and participation of the public in government.
>
> ...The people's right to know the process of government decision making and to review the documents and statistics leading to determinations is basic to our society. Access to such information should not be thwarted by shrouding it with the cloak of secrecy or confidentiality.
>
> The legislature therefore declares that the government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government in accordance with the provisions of this article."

For these reasons the common law privilege can not withstand the public's right to know the result reached by settlement in the village's disciplinary action.

Turning then to the statutory exemptions relied upon by the intervenor under section 87, subd.2 of the Public Officers Law, it must be noted that the burden rests squarely upon those opposing access to agency records to establish that it is excepted by a provision contained in section 87, subd. 2 of the Public Officers Law from the general rule of FOIL that "all records" are subject to disclosure. (Public Officers Law §89, subd.4, par.b; Matter of Westchester Rockland Newspapers v. Kimball, 50 NY2d 575; Matter of Doolan v. Board of Cooperative Educational Services, Second Supervisory Dist. of Suffolk Co., 48 NY2d 341, 346)

When disclosure will constitute an unwarranted invasion of privacy under §87 (2)(b) is further delineated by Public Officers Law §89 (2)(b). Three of the cited examples are claimed by the union to apply. They are subparagraph i, which protects from disclosure "employment, medical or credit histories or personal references of applicants for employment.", subparagraph iv, which provides an exemption from disclosure for "information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it" and subparagraph v, which also provides an exemption for "information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency."

The court reads §89 (2)(b)(i) narrowly to except from disclosure only employment histories, medical histories, credit histories and personal references of applicants for employment. Thus it has no application to these records as Wykle is an employee not an applicant for employment. In any event, petitioner does not seek to inspect the employee's personnel file. His request is limited to ascertaining the terms of a settlement entered into by public officials with a public employee. Petitioner is entitled to ascertain the outcome of the Village's disciplinary action even though the record later became part of the employee's personnel file.

The application of the other two personal privacy provisions relied on by the union fail for identical reasons. Both have as a basic premise to their operation the condition that the information concern matters of a personal nature. The records that

petitioner requests can not be so classified. They deal with a matter of public concern, that being a public employee's accountability for misconduct. Moreover, assuming the objectors had made a factual demonstration of an unwarranted invasion of privacy (see Matter of United Federation of Teachers v. New York City Health & Hospitals Corporations, 104 Misc.2d 623, 625), nevertheless they have not met the conjunctive requirement of both provisions because the information unquestionably relates to the ordinary business of the village. (see Matter of Gannett Co., Inc. v. County of Monroe, 45 NY2d 954, affirming 59 AD2d 309; Matter of MacHacek v. Harris, 431 NYS2d 927, 929). The discipline of public employees and the compiling of records to reflect the result of the disciplinary actions are essential, routine functions of government at all levels. (see, generally Matter of Gannett Co., Inc. v. County of Monroe, 59 AD2d 309, 312)

With regard to the claim that disclosure would impair present or imminent collective bargaining negotiations the court finds the contention to be devoid of any substance to support it. (see Matter of the United Fed. of Teachers v. New York City Health and Hospital Corporation, 104 Misc.2d 623, 625; Contracting Plumber Cooperative Restoration Corp. v. Ameruso, 105 Misc.2d 951, 953; contrast Cohalan v. Board of the Bayport-Blue Point School Dist., 74 AD2d 812)

At best the intervenor has alleged that the effect of ordering disclosure will be to discourage future confidential settlements. The settlement of employee grievances arising out of disciplinary actions brought by the municipality will remain a viable option, notwithstanding a finding that the FOIL removes the prospect for

a "cloak of secrecy" surrounding the terms of the settlement.

Granted, that it is firmly established that disciplinary actions against a public employer may, by agreement between the public employer and employee, be resolved by arbitration (see Binghamton Civil Service Forum v. City of Binghamton, 44 NY2d 122, 131-132), nonetheless the parties do not enjoy unbridled power in the range of terms that may be agreed upon. So it is with the settlement of disputes prior to a submission to arbitration.

The scope of permitted and encouraged bargaining and arbitration is limited by plain and clear prohibition found in statute or decisional law, and may be further restricted by considerations of objectively demonstrable public policy. (Matter of Union Free School Dist. No. 2 of Town of Cheektowaga v. Nyquist, 38 NY2d 137, 143; Matter of Susquehanna Val. Cent. School Dist. at Conklin [Susquehanna Val. Teachers' Assn.], 37 NY2d 614; Matter of DePaulo [City of Albany], 72 AD2d 662.)

In Board of Education v. Areman, (41 NY2d 527), the Court of Appeals in concluding that a provision in a collective bargaining agreement which bargained away the board of education's right to inspect personnel files was unenforcable as contrary to statutes and public policy stated: "Boards of education are but representatives of the public interest and the public interest must, certainly at times, bind these representatives and limit or restrict their power to, in turn, bind the public which they represent. (at p. 531).

A similar restriction on the power of the representatives for the Village of Lyons to compromise the public right to inspect public records operates in this instance.

The agreement to conceal the terms of this settlement is

contrary to the FOIL unless there is a specific exemption from disclosure. Without one, the agreement is invalid insofar as restricting the right of the public to access.

No automatic exemption is granted merely because the records relate to an aspect of bargaining between the public employer and the employee's union. The court finds that in light of FOIL, the parties could not have entertained the reasonable expectation that it was permissible to conceal the results of the Village's disciplinary action. The settlement should have been drawn with the limitations contained in FOIL on restricting free access in mind.

Respondent and intervenor have failed to substantiate their claim that disclosure will be inimical to future collective bargaining.

The reports sought by petitioner are clearly final determinations so that the exemption contained in §87(2)(g)(iii) for inter-agency or intra-agency materials which are not final agency policy or determination, does not apply. Intervenor and respondent have argued that only the Record of Settlement constitutes the final determination. That paper, signed by the arbitrator, merely notes that as a result of the settlement, entered into subsequent to the commencement of a hearing, the matter was closed.

It is the terms of the settlement, not just a notation that a settlement resulted, which comprise the final determination of this matter. The public is entitled to know what penalty, if any, the employee suffered. (see Walker v. City of New York, 64 AD2d 980; Matter of Poole v. Nyquist, 89 Misc.2d 705; Farrell v. Village Bd. of Trustees of the Village of Johnson City, 83 Misc.2d 125.)

The reports are manifestly not pre-decisional material which are purely reflective, advisory or deliberative in nature. These types of material would merit an exemption. (see Sinicropi v. County of Nassau, 76 AD2d 832; Matter of McAulay v. Board of Educ., 61 AD2d 1048, aff'd. 48 NY2d 659; cf. Matter of Miracle Mile Mall v. Yudelson, supra, at pp. 181, 182.)

The instant records are the decision or final determination of the village, albeit arrived at by settlement with the intervenor and its employee. The Record of Settlement does not screen them from disclosure.

Moreover, the subject record contains factual information, thus the exemption permits access. (Public Officers Law, section 87, subd.2, par.g (i); Matter of Miracle Mile Mall v. Yudelson, supra. at p. 181; Matter of Dunka v. Goldmarle, 54 AD2d 446, 448, 449, affd. 43 Ny2d 754).

Prior to final disposition of the charges of misconduct against a public employee the argument is well taken that §87(2)(g) applies to exempt from disclosure the nature of the charges, investigations and recommendations of hearing panels. (Matter of Herald Co. v. School Dist. of the City of Syracuse, 430 NYS2d 400, 404.)

Finally, intervenor maintains that disclosure would be premature until the party exercises his right to arbitration of the dispute and a final determination is then made by the arbitrator. It claims that a determination by this court that disclosure is mandated will entitle the employee to rescission of their settlement agreement and return him to the status quo before the agreement. Therefore, intervenor insists a final determination will not be made until a full arbitration hearing is had and a decision rendered. At that time intervenor argues the petitioner could

then apply for disclosure of the final determination.

The court disagrees with this contention. Petitioner is entitled to disclosure immediately irrespective of whether the union or its employee is entitled to rescission. Petitioner has the right to know the terms of the accommodation that was reached with intervenor and Wykle.

In any event, the court is not in a position to rule whether the effect of this decision, presuming the village complies with it, will render the contract void and entitle the intervenor to rescission. (see 10 NY Jur., Contracts §184). The court is unaware of the full terms of the agresment. Furthermore, it may be that the proper forum to resolve any dispute that eventuates between the village and the union as an outgrowth of this decision is arbitration. (see City of Buffalo v. American Federation of State, County and Municipal Employees, ___AD2d_____, [Fourth Dept., February 13, 1981]).

Accordingly, the opinion of the Committee on Public Access is affirmed and the petition granted.

Submit judgment.

Dated: March 25, 1981

John J. Conway
Supreme Court Justice