OPINION OF THE PUBLIC ACCESS COUNSELOR

MAREK MAZUREK (SOUTH BEND TRIBUNE)
Complainant,

v.

MISHAWAKA POLICE DEPARTMENT,
Respondent.

Formal Complaint No.
22-FC-73

Luke H. Britt
Public Access Counselor

This advisory opinion is in response to a formal complaint alleging the Mishawaka Police Department violated the Access to Public Records Act.[1] Patrick Hinkle filed an answer on behalf of the Department. In accordance with Indiana Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on May 4, 2022.

[1] Ind. Code § 5-14-3-1–10.

BACKGROUND

This case involves a dispute over the Mishawaka Police Department's (MPD) denial of access to certain portions of a former employee's personnel file.

On April 28, 2022, Marek Mazurek (Complainant), a reporter for the *South Bend Tribune*, filed a public records request with the MPD seeking the following:

- A personnel file for former Mishawaka Assistant Police Chief Bryan Fox which includes the factual basis of him being placed on paid administrative leave in November 2021.
- A personnel file for former Mishawaka Assistant Police Chief Bryan Fox which includes the factual basis for his retirement from the Mishawaka Police Department effective April 5, 2022.

That same day, MPD denied Mazurek's request. In doing so, MPD acknowledged that the Access to Public Records Act (APRA) requires disclosure of the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged. Even so, MPD asserted that none of those considerations applied to the former employee's situation. Instead, MPD maintains the employee retired while on paid administrative leave so any material related to his departure would not be disclosable.

As a result, Mazurek filed a formal complaint with this office. Mazurek disputes MPD's rational for the denial, arguing that a period of administrative leave that lasts for five months is tantamount to a suspension, as the employee is

not permitted to perform their job for an extended period. Furthermore, he insists that retirement after a 5-month leave period should be considered the functional equivalent of a discharge, which would require a factual basis to be disclosed.

On May 10, 2022, MPD filed an answer to Mazurek's complaint. MPD argues Mazurek is requesting a factual basis for an action that does not require a factual basis to be kept within an employee's personnel file. Specifically, MPD asserts that former Assistant Chief Bryan Fox was not suspended, demoted, or discharged. Instead, he voluntarily retired while he was on paid administrative leave.

ANALYSIS

1. The Access to Public Records Act

The Access to Public Records Act (APRA) states that "(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information." Ind. Code § 5-14-3-1. The Mishawaka Police Department (MPD) is a public agency for purposes of APRA; and therefore, subject to its requirements. *See* Ind. Code § 5-14-3-2(q). As a result, unless an exception applies, any person has the right to inspect and copy the agency's public records during regular business hours. Ind. Code § 5-14-3-3(a).

Indeed, APRA contains mandatory exemptions and discretionary exceptions to the general rule of disclosure. *See* Ind. Code § 5-14-3-4(a) to -(b).

2. Personnel files of public employees

A noteworthy exception to APRA's general rule of disclosure is the exception for personnel files of public employees.

APRA provides public agencies with the discretion to withhold most of these records from public disclosure. *See* Ind. Code § 5-14-3-4(b)(8).

Yet, solidly embedded in the discretionary exception for personnel files of employees and applicants is an exception—to the exception—that provides the following:

> (A) the name, compensation, job title, business address, business telephone number, job description, education and training background, previous work experience, or dates of first and last employment of present or former officers or employees of the agency;
>
> (B) information relating to the status of any formal charges against the employee; and
>
> (C) the factual basis for a disciplinary action in which final action has been taken and that resulted in the employee being suspended, demoted, or discharged.

Id. In effect, the legislature provided public agencies with the discretion to withhold personnel records of public employees, but not to withhold the information set forth in subsections (A), (B), and (C). That means, upon receiving a proper request, a public agency must disclose the factual basis for a disciplinary action in which final action has been taken that resulted in an employee being suspended, demoted, or discharged.

Indeed, this distinguishes public employees from their private sector counterparts. Private sector employees enjoy a broader privacy expectation regarding their employment compared to public employees. This is, at least in part, because public employees are civil servants and ultimately accountable to the public at large. *See* Ind. Code § 5-14-3-1.

2.1 Disclosure of a factual basis

APRA requires public agencies to disclose the factual basis for any disciplinary action in which final action has been taken that results in an employee being suspended, demoted, or discharged.[2]

In effect, there is a three-prong test to trigger the creation and disclosure of a factual basis under APRA. A factual basis is required when the following elements exist:

1) Disciplinary Action; and
2) Final Action; that results in
3) Suspension, Demotion, or Discharge.

Notably, APRA does not define the terms *factual basis*, *disciplinary action*, *final action*, *suspension*, *demotion*, or *discharge*. As a result, this case requires an interpretation of the statute by this office.

Our legislature vested this office with the power to "issue advisory opinions to interpret [Indiana's] public access laws."[3]

[2] Ind. Code § 5-14-3-4(b)(8).
[3] Ind. Code § 5-14-4-10(6).

> (U)ndefined words and phrases in a statute must be given their plain, ordinary and usual meaning. Words and phrases in a statute are given their plain and ordinary meaning unless they are technical words and phrases having a peculiar and appropriate meaning in the law requiring definition according to their technical import.
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> In order to determine the plain and ordinary meaning of words, courts may properly consult English language dictionaries.

Walling v. Appel Service Company, Inc. 641 N.E.2d 647, 649 (Ind. Ct. App. 1994) [Citations omitted.] quoting *Ashlin Transportation Services., Inc. v. Indiana Unemployment Ins. Board*, 637 N.E.2d 162, 167 (Ind. Ct. App. 1994).

2.2 Disciplinary action

To satisfy the first prong of the factual basis test there must be a disciplinary action. The term *disciplinary action* is not defined under APRA. Indeed, reasonable minds may—and frequently do—disagree about what constitutes a disciplinary action in this context.

Administrative leave is commonly used, and rightfully so, to investigate allegations of wrongdoing without punishing the employee if the allegations are not immediately apparent or substantiated. It removes any immediate potential danger to the agency while preserving the due process rights of the employee.

Here, it is unclear the purpose of this administrative leave. Depending on the context, it could have been disciplinary, but not necessarily. Non-compulsory paid leave would indeed be unusual.

But to conclude that administrative leave is always non-punitive is folly. Even in the context of emergency services – police, fire, and ambulance - courts have encountered underlying factual circumstances where involuntary personnel actions masqueraded as optional.

For instance, in *City of Evansville v. Conley.*,[4] the Court drew a line between personnel actions taken under duress versus situations where actions were truly voluntary. Coerced actions would not be non-compulsory. *Id.* at 578. The Indiana Attorney General reaffirmed this position in Advisory Opinion 2018-12.

2.3 Final action resulting in suspension, demotion, or discharge

The next two prongs of the factual basis test are whether there is final action that results in a suspension, demotion, or discharge. These terms again are not statutorily defined under APRA.

As noted above and in *Opinion of the Public Access Counselor*, 17-FC-181 (2017), the term final action, is defined by the intent of the administrative leave. The operative consideration is the intent of management. If administrative leave is purely investigatory, it is not final disciplinary action. One litmus test is whether the agency has contemplated reinstatement—that is, if allegations are unsubstantiated, would the employee have the option to return.

If, however, administrative leave is merely pretext for negotiating a coerced resignation, it is the final action itself. Causation is an underlying principle here. Did the employee

[4] 661 N.E.2d 570 (Ind. Ct. App. 1996).

effectuate an adverse act or deed to cause the employer to react?

To be sure, there is no bright-line timeframe for administrative leave considered to be investigatory although the commonly accepted standard appears to be 30 days. While that is not a hard and fast rule, five months is out of the ordinary. MPD should be mindful that a lengthy administrative leave is nothing short of a five-month paid vacation on the taxpayers' dime.

What is more, specifically in the context of law enforcement, a five-day administrative leave can be considered punitive and subject to judicial review. *See* Ind. Code § 36-8-3-4.

Although final action to suspend, demote, or discharge can indeed be stayed by an underlying investigatory purpose – and in turn stay the necessity of the issuance of a factual basis – administrative leave cannot be used as red herring to distract the public while a convenient arrangement can be negotiated for public relations purposes.

Therefore, administrative leave can be investigatory and precautionary, or it can be punitive and the statutory equivalent to suspension pending termination. That determination is fact sensitive and based upon the underlying circumstances.

2.4 Voluntary resignations

MPD contends that resignations do not trigger the disclosure of a factual basis under APRA. Essentially, MPD contends the resignations are not the result of a disciplinary ac-

tion; and thus, no factual basis is required because the employee voluntarily and mutually consented to resign their position.

Once again, the word "voluntary" is not defined in statute. Its dictionary definition is "proceeding from the will or from one's own choice or consent" or "unconstrained by interference."[5] In no acceptable context does "voluntary" imply coercion or an ultimatum.

More specifically, the Seventh Circuit Court of Appeals has held that a constructive discharge occurred when it was "undisputed by both parties that had the employee not resigned he would have been terminated immediately." *Kodish v. Oakbrook Terrace Fire Prot. Distr.*, 604 F.3d 490, 502 (7th Cir. 2010). "Like coerced resignation, constructive discharge is treated in law as the equivalent of outright discharge, for reasons too obvious to dwell on." *Patterson v. Portch*, 853 F.2d 1399, 1406 (7th Cir. 1988).

Put another way, constructive discharge can occur when 'the handwriting [was] on the wall' and the axe was about to fall." *EEOC v. Univ. of Chicago Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002).

Using MPD's logic, a factual basis would likely never need to be created so long as an affected employee accepts the terms of a negotiated agreement after the fact. This *"nothing to see here"* approach could ostensibly always be invoked under the auspices of "a change in direction" or "administrative review."

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[5] Merriam-Webster.com, *Voluntary*, https://www.merriam-webster.com (last visited April. 12, 2018).

But as the courts instruct us, the legislature does not intend to enact a statute that is meaningless or a nullity. "[W]e do not presume that the Legislature intended language used in a statute to be applied illogically or to bring about an unjust or absurd result." *Anderson v. Gaudin*, 42 N.E.3d 82, 85 (Ind. 2015) (internal quotation omitted).

A factual basis, no matter how uncomfortable or inconvenient to craft and produce, will eventually have to be rendered by a public agency of any significant size. No amount of clever statutory maneuvering can overcome that inevitability.

This office declines the invitation to interpret the factual basis provision of APRA in way that encourages the legislature's intent to be easily dodged. Granted, a factual basis is not required in every personnel action involving public employees. Still, there are times where the law requires a public agency to disclose a factual basis. Because this office does not receive testimony under oath or authenticated evidence as a result of discovery, some complaints can be uniquely problematic for purposes of reaching a conclusion. But there is certainly enough underlying circumstantial support in the current situation to make a recommendation.

The bottom line is a public agency cannot short circuit APRA's factual basis requirement by surreptitiously designating all adverse personnel actions involving a public employee as: non-disciplinary; non-final; or merely resignations.

CONCLUSION

Based on the foregoing, it is the opinion of this office that the City of Mishawaka should reevaluate its denial consistent with this opinion. If the resignation was truly voluntary, so be it. If, however, there was no intention of reinstating the employee and the administrative leave and subsequent discharge was disciplinary in nature, a factual basis needs to be provided upon request.

Luke H. Britt
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