PERSONNEL RECORDS AND NAME CLEARING HEARINGS

Personnel Records

Introduction

If a record is made or received in connection with the business of the government, it is a public record, open to inspection and copying by anyone who wants to see it. That's what the state's Public Records Law says in North Carolina General Statues ("G.S.") Chapter 132, especially G.S. § 132-1 and § 132-6. There are exceptions, however, some records created by the government are not open to public inspection: criminal investigation records, student records, medical records and others, including most state and local government personnel records.

The North Carolina General Assembly first enacted personnel privacy protections in 1975 and only for state, municipal and county employees. The municipal and county personnel privacy statutes – G.S. §§ 160A-168 and 153A-98 respectively – are identical. They are similar to, but not identical to the personnel privacy act for state employees – G.S. §§126-22 – 126-29. Over the years, the General Assembly has passed additional statutes providing for personnel privacy for other types of local government employees. Again, while they basically follow the same structure and grant the same kinds of protections, they are all a little bit different from one another, so watch out! It is important to be sure you are consulting the correct statute for your organization.

The relevant personnel privacy statutes are:

- State employment G.S. §§ 126-22 – 126-29
- Municipal employment G.S. § 160A-168
- County employment G.S. § 153A-98
- Community colleges: G.S. §§ 115D-27 – 115C-30
- Water and sewer authorities G.S. § 162A-6.1
- Area mental health authorities: G.S. § 122C-158
- Public health authorities: G.S. § 130A-45.9
- Public schools: G.S. §§ 115C319 – 115C-321
- Public hospitals: G.S. §§ 131E-257.2

Note that county social services and health department employees are covered by the county personnel privacy statute – G.S. § 153A-98. They are not state employees even if they are covered by the State Human Resources Act.

Note: Much of the material in this handout is based on a paper Bob Joyce prepared for an earlier offering of this course.

There is no personnel privacy statute covering the employees of councils of governments or any other local entity other than those listed here. There is no good reason for that and is probably because no one ever asked the General Assembly to pass one.

There is also no good reason to have so many different personnel privacy statutes. My guess is that it is simply a reflection of the fact that different constituencies asked the General Assembly for a personnel statute at different times.

At the back of this document you will find each of the personnel privacy statutes relevant to the folks enrolled in this class. Behind them, you will find links to personnel record retention schedule issued by the N.C. Department of Cultural Resources for each organization.

Things Common to Most of the Personnel Privacy Statutes

1. ***A document is part of the personnel file even if it is not in a manila folder in a file cabinet.***

> "[A]n employee's personnel file consists of **any information in any form** gathered by the [employer] with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, 'employee' includes former employees of the [employer]."

This is the exact language used in the city, county, water and sewer authority, area authority and public hospital statutes. The state employee, community college and public school statutes define personnel file the same way, but use slightly different language. Also, the state employee, community college and public school statutes explicitly protect the information of applicants, as well as of current and former employees. On the handling of applicant information by cities and counties, see below.

2. ***Most of the information in a personnel file is confidential, in contrast to government records generally.***

> Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a [employer] are subject to inspection and may be disclosed only as provided by this section.

Again, this is the exact language in the various local government and public hospital personnel privacy statutes. The state employee, community college and public school employee statutes say the same thing using slightly different language.

3. Some information in the personnel file is always open to the public:

1) Name
2) Age
3) Date of original employment or appointment to the service.
4) The terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the [employer] has the written contract or a record of the oral contract in its possession.
5) Current position
6) Title
7) Current salary
8) Date and amount of each increase or decrease in salary with that [employer]
9) Date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification with that [employer].
10) Date and general description of the reasons for each promotion with that municipality.
11) Date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the [employer]. If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the [employers] setting forth the specific acts or omissions that are the basis of the dismissal.
12) The office to which the employee is currently assigned.

The content and the language is the same in all of the statutes except for the public hospital statute. The public hospital statute omits the provisions about reasons for each promotion and omits section 11 in its entirety. It also has additional provisions making public the educational and licensure credentials of medical staff and the total compensation of hospital executives.

4. The employee is entitled to see (almost all of) their own personnel file.

> "The employee or his duly authorized agent may examine all portions of his personnel file except (i) letters of reference solicited prior to employment, and (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to his patient."

The only difference among the personnel privacy statutes is that the community college, public school and public hospital statutes omit the exception for information about a disability that a physician would not disclose to the patient.

5. ***Supervisors with active authority over employees are entitled to see those employees' personnel files.***

This is true across the personnel privacy statute – supervisors right up to the top of the "chain of command" may have access to an employee's personnel file.

6. ***Other governmental officials may have access where access is 'necessary and essential to the pursuance of a proper function" of that official.***

True across all the statutes. Of course, the federal, state or local government official seeking access to an employee's personnel file must have a job-related need to see the material.

7. ***Files of applicants are confidential in their totality – at least in cities, counties, water and sewer authorities, area mental health authorities and public hospitals because there definition of employees are the same as in the case discussed below.***

> In the early 1990s, a local newspaper wanted the names of everyone being considered for the job of county manager in Yadkin County, North Carolina. The North Carolina Supreme Court held that the name of each candidate was part of the personnel file of that candidate because each candidate could be considered an "applicant for employment" and because the personnel records law governing county employees applied to applicants. But the county personnel records statute went on to apply the portion authorizing public disclosure of name, salary, and so forth, only to "employees," which the statute defined to include "former employees of the county" but not applicants. Because the privacy parts of the statute covered applicants, but the disclosure parts did not, the court held that no information at all – not even names – could be released about candidates for the job of manager – or any other job. *See Elkin Tribune v. Yadkin County Board of County Comm'rs*, 331 N.C. 735 (1992).

Its hard to say how this decision applies to community colleges and public schools because their statutes do not define "employee" to include former employees but not applicants. My best guess is that if the court were to consider the matter, it would find protection for community college and public school employees as well. After all, both statutes say that employees, former employees and applicants for employment are **not** subject to public inspection as authorized by the open meetings law. The statutes then go on to list what is open to disclosure and under what circumstances otherwise confidential information may be revealed.

The state personnel privacy statutes, on the other hand, defines employee to include "any current State employee, former State employee, or applicant for State employment." But it then goes on in various subsections to name either employees, former employees and applicants ***or*** employees and former employees. So again, the result seems to be that the files of applicants are

confidential and subject only to the exception allowing inspection of the file by the applicant themselves.

8. In special circumstances, confidential personnel information may be disclosed.

> "The [manager/authority/ president/superintendent/state agency department head] with the concurrence of the [council/board/board of trustees] may inform any person of the employment or nonemployment, promotion, demotion, suspension or other disciplinary action, reinstatement, transfer, or termination of an employee and the reasons for that personnel action. Before releasing the information, the [employer] shall determine in writing that the release is essential to maintaining public confidence in the administration of [employer] services or to maintaining the level and quality of [employer] services. This written determination shall be retained and is a record available for public inspection and shall become part of the employee's personnel file."

This provision appears in all the personnel privacy statutes with the sole exception of the public hospital statute.

9. Must a North Carolina public employer create written dismissal letters (which would become public under all of the personnel privacy statutes) when it dismisses an employee for disciplinary reasons?

It depends on the employer and the type of employee. The State Human Resources Act requires that employers give SHRA employees a written notice of dismissal setting forth the acts and omissions giving rise to the dismissal. So state employees and county employees covered by the SHRA must receive such a letter. Otherwise, we would look to an individual employer's personnel policy or, in the case of community colleges, to the employee's contract. The essence of at-will employment, however, is that an employer may dismiss an employee for any reason at any time or for no reason at all. An employer does not have to provide an at-will employee with a reason, much less with a letter setting forth the reason. To require all government employers to provide a letter setting forth the reasons for dismissal would eliminate at-will employment, which was hardly the General Assembly's intent.

10. When and under what circumstances must we require a name-clearing hearing? Must we always provide one when giving a letter setting forth the reasons for dismissal since that will be a public document?

See the next section.

A final tip: In responding to requests for personnel information that is not open to the public and does not fit within one of the exceptions, say this: "The law prohibits me from disclosing the information you have requested." Don't say: "I can't talk about this because it is a personnel matter."

Disclosure and the Name-Clearing Hearing

The Fourteenth Amendment to the U.S. Constitution provides that the government may not "deprive any person of . . . liberty . . . without due process of law." "Liberty," like "property," (also protected by the Fourteenth Amendment), has a broad meaning. It means more than just staying out of jail.

Liberty Interest in Engaging in Life's Ordinary Occupations

The term "liberty" incudes the right "to engage in the common occupations of life, unfettered by unreasonable restrictions" imposed by the government.[1]That right is abridged when the government "unfairly imposes some stigma or disability that will itself foreclose the freedom to take advantage of employment opportunities." In one North Carolina case, a veteran dining room manager alleged that her liberty interest was violated when her supervisor publicly disclosed his belief the manager was supplying alcohol to painters at work in the building for them to drink on the premises. That public statement by the supervisor, made in connection with the manager's dismissal, would apply a stigma to the manager if left uncontested, making it difficult for her to obtain new employment.

In another case, the North Carolina Supreme Court said that the procedural protections of due process apply when:

- the accuracy of the reason for dismissal is contested, and
- there is some public disclosure of the reason, and
- it is made in connection with the termination of employment or other employment actions.[2]

The federal Fourth Circuit Court of Appeals has said that the due process requirement applies when the government's statements about its employee

- placed a stigma on the employee's reputation, and
- were made public by the employer, and

[1]*See Presnell v. Pell*, 298 N.C. 715, 724 (1979) (internal quotation marks and citation omitted). *See also Board of Regents v. Roth*, 408 U.S. 564, 573 (1972).
[2]*See Crump v. Bd. of Educ.*, 326 N.C. 603, 614 (1990). *See also Williams v. Johnston County Bd. of Educ.*, No. 5:95-CV-621-B02 (E.D.N.C. 1996).

- were made in conjunction with the employee's termination or demotion, and
- were false.[3]

Stigma

It is important to keep in mind that only dismissal for reasons that are likely to affect the employee's standing in the community or foreclose the opportunity for future employment implicate an employee's liberty interest. Statements that impugn an employee's ethics, honesty, or morals may form the basis of a liberty interest claim, if false, but reasons that have to do with an employee's job performance do not. Statements about an employee's incompetence, that the employee is not good at his job or that an employee is inattentive to their duties do not give rise to a protected liberty interest. The mere fact that an employee is being dismissed, that their contract is not being renewed or that they are not being rehired does say anything about their reputation, honor or integrity.[4]

So, for example, when a police chief commented publicly on the dismissal of two officers, saying that their services did not meet the standards of the department, the Fourth Circuit found that the comment was not so damaging as to infringe on the officers' liberty interest. The court observed, "Certainly, a person who has been fired may be somewhat less attractive to other potential employers, but it would be stretching the concept too far to conclude that a person's liberty interest is impaired merely because he has been discharged."[5]

In another Fourth Circuit case, a deputy sheriff fired after the death of a jail inmate sued his county employer for deprivation of his liberty interests when the county executive said on television that the deputy was being forced to retire because of mismanagement at the jail. As the Fourth Circuit put it, "public employee's liberty interests are not implicated by harm to reputation alone . . . .To implicate a constitutionally protected liberty interest, defamatory statements must at least 'imply the existence of serious character defects such as dishonesty or immorality that might serious damage [the plaintiff's] standing and associations in his community or foreclose his freedom to take advantage of other employment opportunities."[6]

Notice and Hearing

When all the elements set forth by the North Carolina Supreme Court or the Fourth Circuit are present, due process requires notice and a hearing. As the North Carolina Supreme Court held, "[W]here [the government] publicly and falsely accuses a discharged employee of dishonesty, immorality, or job-related misconduct, considerations of due process demand that the employee

[3]*See Sciolino v. City of Newport News*, 480 F.3d 642, 646 (4th Cir. 2007).
[4]*See Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972).
[5]*See Bunting v. City of Columbia*, 639 F.2d 1090, 1094 (4th Cir. 1981).
[6] *See Zepp v. Rehrmann*, 79 F.3d 381, 387-88 (4th Cir. 1996).

be afforded a hearing in order to have an opportunity to refuse the accusation and remove the stigma to his reputation."[7]

Due Process

The scope of the process that is due to protect an employment liberty interest is more modest and ill-defined than the process due to protect the property interests granted by a statute or ordinance that provides that employees may only be dismissed for good cause. The purpose of the due process hearing, the United States Supreme Court has said, is to provide the person an opportunity to clear his or her name. Once that has happened at the hearing, the employer is free to deny the person future employment. In fact, the hearing may even come after the termination of employment (or other adverse action), because the focus of the liberty interest is on *future* employment opportunities.[8] But while the hearing may come after the termination, the federal Fourth Circuit Court of Appeals made clear in the case mentioned above that the hearing must be offered before the stigmatizing, false information is made public. "An opportunity to clear you name after it has been ruined dissemination of false, stigmatizing charges is not meaningful," the court said.[9]

Protection for All Employees

The due process protections of this liberty interest apply equally to all public employees – at-will employees, probationary employees, and employees with property interests in their jobs.

A Complication from the Personnel Records Statutes

One of the provisions that is found in all the personnel records statutes says that in the case of a dismissal for disciplinary reasons, a written notice setting forth the specific acts or omissions that were the basis for the dismissal is a public document. In other words, if the government employer terminates an employee for disciplinary reasons and gives to the employee a letter stating what those reasons are, that letter is "a public document." It must be shown to whoever wants to see it.

Let's take an example. Suppose a local news media outlet asks to see such a letter regarding a terminated employee. The government employer would be obligated to turn it over. Does the requirement for a due process name-clearing kick in? Recall that there are four criteria:

1. stigma on the employee's reputation that is
2. made public by the employer and
3. made in conjunction with the employee's termination or demotion, and

[7] *See Presnell*, 298 N.C. at 724.
[8] *See Presnell*, 298 N.C. at 724.
[9] *See Sciolino*, 480 F.ed at 653.

4. is false.

In this example, number 3 is clear. The termination letter is certainly in conjunction with a termination. And number 2 is clear. The letter has been turned over the newd media because the personnel privacy statutes require it.

If the employer does not provide the opportunity for a name-clearing hearing before turning the letter over to the news media, the terminated employee can sue (and win) if they can show that the letter was stigmatizing and that something in it was false.

This is just what happened in a 2018 case involving law enforcement officers dismissed from the Village of Bald Head Island. After the officers received their dismissal letters, they asked for a hearing. The town did not give them one. Then a newspaper asked for copies of the letters. The town handed them over in accordance with the personnel privacy statutes. The Fourth Circuit held that the reason set forth for dismissal were both stigmatizing and false and ruled in favor of the terminated employees.[10]

Does that mean you should give each employee dismissed for disciplinary reasons and provided with a letter explaining why an opportunity for a name-clearing hearing? It seems so. But take comfort, not every employee will take you up on it.

And SHRA employers, remember: even though you must give written notice of the reason for dismissal when the dismissal is for ineffective job performance, that notice is not subject to disclosure under the personnel privacy statutes. Another reason why dismissal for poor performance doesn't require a liberty interest hearing!

[10]*See Cannon v. Village of Bald Head Island*, 891 F.3d 489 (4th Cir. 2018).