

*H. De RAYTO*  
*(F.Y.I.)*



MICHAEL D. SCHRUNK, District Attorney for Multnomah County  
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June 20, 1996

Bob Young  
Staff Writer  
Willamette Week  
822 SW 10th Avenue  
Portland, OR 97205

Liana Colombo, Esq.  
Deputy City Attorney  
Temporary City Hall  
1400 SW 5th Avenue, Room 600  
Portland, OR 97201

Re: Petition of Bob Young for Willamette Week  
Dated June 7, 1996  
to disclose certain records of the City of Portland

Dear Mr. Young and Counselor Colombo:

On this public records petition, ORS 192.410 et seq., petitioner Bob Young, acting for Willamette Week newspaper, requests the District Attorney to order the City of Portland to disclose certain specified records generated in the course of a labor arbitration between the City of Portland and Portland Fire Fighters Association Local 43 (the Union) regarding grievant James Harder, whose employment as a fire fighter was terminated allegedly for just cause on March 10, 1995. The records sought to be disclosed are the City's brief, pages 24 - 45; the Union's brief, pages 155 - 222; City exhibits 20 - 21 (now moot, having been voluntarily released to petitioner); Union exhibits 24-28 (photos of Harder), 81 - 102 (records of various employment discipline cases of employees other than Mr. Harder), and Union exhibit 73 (a psychological evaluation of the grievant).

At the outset, it is notable that the city has voluntarily disclosed substantial portions of the requested pages of the City and Union briefs. However, the city has deleted (by black-marking) various references and passages affecting many of the pages released to petitioner. We have examined all of these city deletions by comparison with a master copy provided by the city. The deletions in question

virtually all involve the identifying exhibit numbers and names of previously disciplined employees, and in some cases descriptions of the particular acts of misconduct for which these other employees were disciplined (or ultimately not disciplined), as occurred in each case. These particular pages of the City and Union briefs mostly discuss cases of employees accused of misconduct on past occasions, not involving Mr. Harder in any way, based upon the Union exhibits 81 - 102, also sought to be disclosed upon this petition. The relevance of union exhibits 81 - 102 to the labor arbitration was that they were offered in support of the Union's contention that the firing of Harder violated recognized principles of "progressive discipline" and avoidance of "disparate treatment" considered relevant to determining whether an employer's termination of an employee actually is for "just cause."

This was a very substantial labor arbitration proceeding involving ten days of hearings and testimony, a 65-page brief submitted for the City, a 235-page brief submitted for the Union, about 65 documentary or physical exhibits submitted by the City, and about 76 documentary or physical exhibits submitted by the Union. On May 17, 1996, Arbitrator John H. Abernathy issued his 154-page ARBITRATOR'S OPINION AND AWARD, which found that the City did not have just cause for the termination of James Harder and ordered the grievant's reinstatement with back pay and lost benefits. The arbitral opinion and award has been made public and petitioner has a copy of it.

The facts out of which the arbitration arises are fully detailed in the arbitral opinion and award. Additionally, petitioner has also fully aired the basic facts of the precipitating incident in an article he just published, "Axed," Willamette Week, volume 22, No. 33 (June 19, 1996), at p. 16 ff. (lead story with front-page photo). A detailed discussion of the underlying facts is unnecessary: essentially, Mr. Harder got into an escalating traffic-jam dispute with two ladies traveling in another vehicle on a highway many miles from Portland or Multnomah County while off-duty. According to the arbitrator (based partly upon admissions by the grievant), Harder beat upon the windows of the other vehicle and called the ladies various obscene and improper names in a state of apparent exasperation. Harder was charged with eight misdemeanor or traffic offenses and was convicted upon a plea of no contest for the crime of Intimidation in the Second Degree, one element of that crime being that the defendant committed one of various prohibited acts "...because of the [defendant's] perception of the other's race, color, religion, national origin or sexual orientation...." ORS 166.155. Harder maintained at the arbitration hearing that the evidence did not in fact support that he acted with a discriminatory intent, although it was uncontested that his actions on the occasion in question clearly were inappropriate. The arbitrator concluded that the alleged discriminatory motivation had not been proved to his satisfaction. The arbitrator also concluded that the city had not shown that this off-the-job conduct would affect Harder's performance of job-related duties, nor was there sufficient evidence that his ability to work with his co-employees would be adversely affected.

Precisely because the arbitrator reached the above-stated conclusions, he found it unnecessary to discuss in his 154-page opinion and award those cases of past discipline (or non-imposition of discipline) related to other employees, as reflected in union exhibits 81 - 102 and as discussed among the pages of the City and Union briefs, disclosure of the deleted portions of which petitioner seeks here. If the arbitrator had deemed these cases of other-employee discipline to be essential to his decision, their relevance would have been as support for the union's effort to show that other employees who allegedly had committed misconduct similar to, or more serious than, that of Mr. Harder had not been disciplined by the ultimate penalty of termination for just cause. Thus, the other-employee discipline incidents discussed in the briefs and reflected in union exhibits 81 - 102 ultimately were deemed irrelevant to the arbitral award.

The city has claimed exemption of the deleted portions of the Union and City briefs, and the entirety of union exhibits 81 - 102, under the public records law exemption for "A personnel discipline action, or materials or documents supporting that action...." ORS 192.501(12). This is a "conditional" exemption which may be overcome if it is shown that "...the public interest requires disclosure in the particular instance..." ORS 192.501. So far, appellate court decisions have furnished very little guidance respecting how the "public interest" balance is to be struck where discipline has been imposed upon a public employee, City of Portland v. Rice, 308 Or 118, at 124, Note 5, 775 P2d 1371 (1989) (personnel discipline action exemption does not apply where no discipline has been imposed, but where discipline has been imposed "The policy intended by the legislature, which we enforce, protects the public employee from ridicule for having been disciplined but does not shield the government from public efforts to obtain knowledge about its processes.")

We conclude that no sufficiently substantial public interest requires the disclosure of the deleted portions of the City and Union briefs which discuss these incidents; nor does the public interest require disclosure of the documents relating to these incidents in Union exhibits 81 - 102. We have considered that substantial information about these incidents has been disclosed by the edited portions of the City and Union briefs already released to petitioner; none of the other employees involved in past discipline cases has any direct involvement in the events which led to Harder's criminal charge and conviction; and the arbitrator did not rely upon any analysis of these collateral other-employee incidents in arriving at his decision. Moreover, it is of the very nature of these other-employee incidents that they are past incidents, not involving either allegation or proof of current employee misconduct. For these reasons, and lacking any significant guidance from judicial decisions on the subject, we conclude that the objective of the personnel discipline action exemption which would spare public employees from useless ridicule for past conduct outweighs any present need for publicly airing the limited, deleted particulars withheld from the relevant pages of the City and Union briefs, or the material contained in union exhibits 81 - 102.

Letter to Bob Young and Liana Colombo, Esq.

It is likewise relevant to our decision that a labor arbitration generally is not a public event. The City Attorney's Office has informed us that the arbitrator determined that this arbitration was private and that only limited personnel, such as union representatives (the union being a party to the proceeding), witnesses, and attorneys were permitted to attend. In particular, we are informed that the personnel present during the discussion of the other-employee past discipline cases were limited to the attorneys for the parties, the grievant (Mr. Harder) and one or two of the leading officials of the union. Thus, there was a reasonable effort made to preserve the confidentiality of this material. In fact, the Union was given access to many of the records which resulted in its submission of Union Exhibits 81 - 102 only pursuant to the arbitrator's STIPULATED PROTECTIVE ORDER (dated January 5, 1996) (copy attached as exhibit A). This Order committed the Union not to disclose or release any of these documents except to use them for purposes of the arbitration proceeding and obligated the Union to return the documents when the arbitration was concluded.<sup>1</sup>

We also will deny disclosure of union exhibit number 73, which is a psychological evaluation of grievant Harder prepared for purposes of the arbitration. This document is a classic example of personal information such as might be maintained in a medical or other similar file, exempt from disclosure per ORS 192.502(2). Although the grievant obtained this evaluation for use as an exhibit in the arbitration, the arbitration was, as we have discussed above, conducted under circumstances of limited access and preservation of confidentiality, excepting, of course, the public release of the ARBITRATOR'S OPINION AND AWARD. Nor does it appear from our review of the entire corpus of documents submitted to us that union exhibit 73 had any special importance to the arbitrator's decision or otherwise had such significance as would establish that "...the public interest by clear and convincing evidence requires disclosure in [this] particular instance.\*\*\*\*" (Emphasis added). ORS 192.502(2).

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<sup>1</sup> A labor arbitration is not like a court proceeding, to which the public has a constitutional right of access, Oregon Constitution Art. I, Section 10, State ex rel Oregonian V. Deiz, 289 Or 277, 613 P2d 23 (1980); thus, documents do not automatically become publicly available merely because they are offered as exhibits in a labor arbitration.

To the extent that one or more of the cases described in Exhibits 81-102 (or the related partially deleted references to those exhibits in the city and union briefs) may be characterized as cases in which discipline was not imposed, the "discipline action exemption" would not apply, ORS 192.501(12), City of Portland v. Rice, supra; but we find that that information is "personal information" exempt from disclosure because no sufficient public interest has been shown by "clear and convincing evidence" that its disclosure is required in this "particular instance," for the same reasons discussed in the text above, ORS 192.502(2).

Letter to Bob Young and Liana Colombo, Esq.


Likewise, we deny disclosure of union exhibits 24 - 28, which are personal photos of Mr. Harder at various ages of his life. It is apparent that petitioner had Mr. Harder's cooperation in obtaining several photographs (as published in Willamette Week, supra); and Mr. Harder is free to release other photos to petitioner if he wishes to do so. The photos used in the arbitration proceeding are personal information and there is no public interest requiring their release in this "particular instance." ORS 192.502(2).

Finally, the request for disclosure of City exhibits 20 and 21, as noted above, is moot, as the city has voluntarily disclosed those exhibits.

ORDER

For the reasons explained, it is now ordered that the petition of Bob Young for Willamette Week dated June 7, 1996 for disclosure of records is denied respecting those deleted portions of the City brief, pages 24 - 45, and Union brief, pages 155 - 222 submitted IN THE MATTER OF THE ARBITRATION BETWEEN CITY OF PORTLAND, OREGON AND PORTLAND FIRE FIGHTERS ASSOCIATION LOCAL 43 (James Harder Discharge Grievance); denied respecting union exhibits 81 - 102 (other employee past discipline cases); denied respecting union exhibits 24 - 28 (photographs of Mr. Harder at various ages); and also denied regarding union exhibit 73 (psychological evaluation of grievant); and the petition for disclosure of city exhibits 20 - 21 is moot.

Very truly yours,

  
MICHAEL D. SCHRUNK  
District Attorney  
Multnomah County, Oregon

Attachment.

MDS:kg

96-06

IN THE MATTER OF THE ARBITRATION  
BEFORE ARBITRATOR JOHN H. ABERNATHY

CITY OF PORTLAND )  
 )  
 )  
 and ) STIPULATED PROTECTIVE ORDER  
 )  
 )  
 PORTLAND FIRE FIGHTERS )  
 ASSOCIATION, LOCAL NO. 43, IAFF )  
 (James Harder Grievance) )

Arbitrator John Abernathy granted the request of Portland Fire Fighters Association to review, in-camera, the official personnel file and Bureau disciplinary file for several current and former Bureau employees. On January 2, 1996, Arbitrator Abernathy granted Portland Fire Fighters Association's request for the attached records. The City strenuously objected to the release of any disciplinary records without a showing of probable or possible relevance to the issues before the arbitrator. Arbitrator Abernathy ordered the City of Portland to produce the requested records to Robert Reid, attorney for the Association. These documents are being produced to the Association subject to the following conditions:

1. The documents being disclosed to the Association shall be used solely for the purpose of this litigation;
2. The Association's attorneys shall not reveal, disclose, release or otherwise display these documents, or the information contained in these documents, to any other person for any other purpose, except to PFFA President, Randy Leonard, and PFFA

EXHIBIT A<sup>2 11</sup>

Secretary/Treasurer, Tom Chamberlain, who also will be bound by the requirements of this Protective Order;

3. The Association agrees not to offer any of these documents into evidence without first resolving with the City's attorney, Liana Colombo, and/or the arbitrator, if necessary, whether it is appropriate for any such documents to be sealed;

4. The Association will return these documents (including all copies made by the Association for the purpose of this litigation) to the City Attorney's Office at the conclusion of this arbitration; and

5. For the Association's ease in identifying the documents subject to this Protective Order, the City will stamp the first page of all such documents "Confidential."

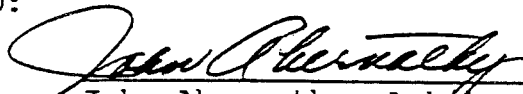


Robert Reid  
Of Attorneys for Portland  
Fire Fighters Association  
Dated: 1-5-96



Liana Colombo  
Deputy City Attorney  
Of Attorneys for City of Portland  
Dated: 1-5-96

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IT IS SO ORDERED:



John Abernathy, Arbitrator