
OPINION OF THE PUBLIC ACCESS COUNSELOR

BOB SEGALL,
Complainant,

v.

CARMEL CLAY SCHOOLS,¹
Respondent.

Formal Complaint No.
18-FC-34

Luke H. Britt
Public Access Counselor

BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging Carmel Clay Schools (“CCS”) violated the Access to Public Records Act² (“APRA”). Attorney David R. Day filed a response on behalf of CCS. In accordance with Indiana

¹ The *Indianapolis Star* filed a substantively similar formal complaint against CCS. That complaint is hereby incorporated by reference because a legitimate question remains about whether the newspaper submitted a document request to CCS or simply asked questions by and through a reporter.

² Ind. Code §§ 5-14-3-1 to -10

Code § 5-14-5-10, I issue the following opinion to the formal complaint received by the Office of the Public Access Counselor on February 20, 2018.

BACKGROUND

This case involves a request for public records connected to the departures of two top administrators at Carmel Clay Schools (“CCS”), who each left their positions in January of 2018 after spending three months on paid administrative leave.

The story begins on October 9, 2017, when the CCS board put Superintendent Dr. Nicholas Wahl on paid administrative leave “pending a review of district leadership.” Two days later, the district also put its Director of Human Resources, Corrine Middleton, on paid administrative leave.

On October 10, 2017, WTHR submitted a request to CCS seeking, in relevant part, the following:

[F]actual basis for disciplinary actions involving Dr. Nicholas Wahl and Corrine Middleton. This includes, but is not limited to, suspension, demotion, or termination details during their employment with Carmel Clay Schools.

Notably, the school board had engaged in a series of executive sessions to discuss job performance of employees prior to placing both administrators on administrative leave.

On January 12, 2018, after an approximate 90 day administrative leave period, CCS announced that it had accepted Superintendent Wahl’s resignation. Ten days later, CCS also announced its acceptance of Middleton’s resignation.

On January 24, 2018, CCS denied WTHR's request for a factual basis on the matter.

In the denial, CCS stated:

There has been no disciplinary action taken against either Dr. Wahl or Ms. Middleton that resulted in suspension, demotion, or discharge so there are no records that meet this request.

WTHR and Senior Investigator Reporter Bob Segall contend the administrative leave was disciplinary in nature and the categorization of a "voluntary resignation" is untrue. Buttressing this argument is the existence of a confidentiality agreement prohibiting both parties from talking about the events leading up to the resignations. What is more, the School Board's President explicitly stated a relationship—which may or may not have been a policy violation—between the departing employees was a factor in the "ongoing review."

On January 25, 2018, Segall renewed WTHR's January 12 request and reminded CCS that the Access to Public Records Act ("APRA") requires a public agency to provide the specific statutory exemption that authorizes the denial of a public records request. At the time of filing the formal complaint, Segall had not received a response to the renewed request.

CCS denies that it violated APRA. For starters, CCS challenges the sufficiency of WTHR's complaint under Indiana Code section 5-14-5-7. Next, CCS argues placing an employee on administrative leave does not require development of a factual basis. Finally, CCS contends that resignations do not trigger development of a factual basis under APRA.

ANALYSIS

At issue in this case is whether Carmel Clay Schools (“CCS”) is required to disclose a factual basis about the departure of two top administrators in accordance with the Access to Public Records Act (“APRA”).

1. Office of the Public Access Counselor

For starters, it may be helpful to remind both parties of the purpose of this Office. The legislature established this Office and the position of Public Access Counselor (PAC)³ to interpret Indiana’s public access laws and provide advice to the public and agencies. *See* Ind. Code § 5-14-4-10. The legislature also specifically empowered the PAC to “to issue advisory opinions.” Ind. Code § 5-14-4-10(6).

Importantly, Indiana’s public access laws are not limited to APRA and the Open Door Law (“ODL”), but rather any other state statute or rule governing access to public meetings or public records. *See* Ind. Code § 5-14-4-3(3).

To the extent that another law outside of the ODL or APRA intersects with public access considerations, this Office will address it. This includes personnel matters to the extent the issues relate to Indiana Code section 5-14-3-4(b)(8) including those matters discussed below.

The legislature also vested the PAC with certain investigative authority based on the express language of Indiana Code section 5-14-5-5, which requires public agencies to cooperate with in any investigation or proceeding concerning formal complaint procedure.

³ Ind. Code § 5-14-4-5.

The end result is a legal opinion that is intended to be advisory—and educational—in nature. Advisory opinions are not binding legal mandates. Even so, the Indiana Supreme Court has noted that the PAC’s advisory opinions “serve a vital government service.”⁴ What is more, the Indiana Court of Appeals observed that in “absence of case law or adequate statutory authority, [it] should give considerable deference to the opinions of the Public Access Counselor.” *Anderson v. Huntington*, 983 N.E.2d 613, 618 (Ind. App. 2013).

The Indiana General Assembly was clear that APRA is not intended to be strictly or conservatively construed as is evident in Indiana Code section 5-14-3-1. Instead, the Act is to be liberally interpreted in favor of transparency and openness with a presumption of disclosure.

APRA’s provisions are not intended to be an exhaustive comprehensive compendium to every conceivable factual scenario in the day-to-day operations of State and local government. Thus, when the PAC addresses an issue, the Office does not serve as a fact-finder, but does nonetheless consider the factual circumstances presented by the parties in the analysis. Each formal complaint is different and the analyses therein are not intended to be absolute.

2. The Access to Public Records Act (“APRA”)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-

⁴ *ESPN, Inc. v. Univ. of Notre Dame Police Dep’t*, 62 N.E.3d 1192, 1196 (Ind. 2016).

14-3-1. Further, 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.” *Id.* There is no dispute that Carmel Clay Schools (“CCS”) is a public agency for the purposes of the APRA; and thus, subject to the Act’s disclosure requirements. *See* Ind. Code § 5-14-3-2(q)(6).

Therefore, unless otherwise provided by statute, any person may inspect and copy CCS’ public records during regular business hours. *See* Ind. Code § 5-14-3-3(a).

Still, APRA contains both mandatory and discretionary exceptions to the general rule of disclosure. Specifically, APRA prohibits a public agency from disclosing certain records unless access is specifically required by state or federal statute or is ordered by a court under the rules of discovery. *See* Ind. Code § 5-14-3-4(a). In addition, APRA lists other types of public records that may be excepted from disclosure at the discretion of the public agency. *See* Ind. Code § 5-14-3-4(b).

2.1 Personnel Files of Public Employees and Applicants

A noteworthy exception to the rule of disclosure under APRA is the exception regarding personnel files of public employees and files of applicants for public employment.

In truth, APRA provides public agencies with the *discretion* to withhold these records from public disclosure. Ind. Code § 5-14-3-4(b)(8) (emphasis added).

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 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 in regard to 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.

2.11 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.⁵

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.

The 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 Indiana Code section 5-14-3-4(b)(8) by this Office.

As set forth above, our legislature has vested the Public Access Counselor with the power to “issue advisory opinions to interpret [Indiana’s] public access laws.”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.

In order to determine the plain and ordinary meaning of words, courts may properly consult English language dictionaries.

⁵ Ind. Code § 5-14-3-4(b)(8).

⁶ Ind. Code § 5-14-4-10(6).

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).

2.12 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.

Here, CCS’ progressive discipline policy expressly states that if the school board finds the facts support the use of discipline, it may impose a *penalty* which may include, but not be limited to one or more of the following:

- A. Verbal counseling/oral warning in which a verbal conference between the employee and his/her supervisor is held.
- B. A written warning which is a formal notice of a performance problem or unwillingness to follow established policy. This notice serves as a warning that continued infractions will not be tolerated and may result in recommendation for discharge.
- C. Probation for a period of time determined by the supervisor in connection with the written warning.
- D. *Administrative leave with pay.*
- E. Suspension without pay imposed in compliance with the applicable Indiana statutes.

F. If progressive discipline does not prevent a recurrence of the behavior; then cancellation of contract may be imposed in compliance with applicable Indiana statutes

See (<http://policy.ccs.k12.in.us/policies/637>, last visited April 6, 2018) (emphasis added). Despite this, CCS argues that its action to place the Superintendent and the Director of Human Resources on administrative leave with pay was not a disciplinary action. CCS argues that a review of leadership is not discipline. Curiously enough, CCS declares in its staff discipline policy that paid administrative leave *is* disciplinary action. Thus, CCS' argument is unpersuasive.

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.

But to say administrative leave is always absolutely non-punitive is folly. Even in the context of education, courts have encountered underlying factual circumstances where paid administrative leave is punitive and disciplinary.

For instance, in *Smith v. Board of School Trustees of Monroe County Community School Corp.*,⁷ school administrators put a teacher on administrative leave with pay after an outburst at department meeting—including loud, threatening, obscenity-laced comments—and directed the teacher to receive counseling, suspended him from school property and cam-

⁷ 991 N.E.2d 581, 584 (Ind. Ct. App. 2013).

pus, prohibited him from attending district sponsored activities and events, and put his employment status under review. In a letter confirming the teacher's administrative leave and other restrictions, the school administration further stated that "any violation of these directives would result in further disciplinary action, including termination."⁸

Still, when a public agency's staff discipline policy unequivocally states that paid administrative leave is a disciplinary action, the inquiry is satisfied by the agency's own definitional terms.

2.13 Final Action Resulting in Suspension, Demotion, or Discharge

The next two prongs of the factual basis test is whether the result of a final action is a suspension, demotion, or discharge. These terms again are not statutorily defined under APRA or Title 20 of the Indiana Code.

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 school district 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 compulsory resignation, it is the final action itself. Causation is an underlying principal here. Did the employee

⁸ 991 N.E.2d at 584.

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, as CCS rightfully acknowledges, three months is out of the ordinary. CCS should be mindful that a 90 day administrative leave is nothing short of a three month paid vacation on the taxpayers' dime.

In the context of law enforcement, for example, 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 a factual basis – administrative leave cannot be used as red herring to distract the public while a politically savvy arrangement can be negotiated.

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.

2.14 Voluntary Resignations

Alternatively, CCS contends that resignations do not trigger the disclosure of a factual basis under APRA. Essentially, CCS contends the resignations are not the result of a disciplinary action; and thus, no factual basis is required because the two administrators voluntarily and mutually consented to resign their positions.

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.”⁹

In no acceptable context does voluntary imply coercion or an ultimatum.

From an instructive, if not precedential standpoint, the Seventh Circuit Court of Appeals, in the context of Title VII claims, recognizes two forms of constructive discharge:

In the first form, an employee resigns due to alleged discriminatory harassment.

...

The second form...occurs when an employer acts in a manner so as to have communicated to a reasonable employee that she will be terminated.

Chapin v. Fort Rohr Motors, Inc., 621 F.3d 673, 679 (7th Cir. 2010). More specifically, the Seventh Circuit 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 be found when ‘the handwriting [was] on the wall’ and the axe was about

⁹ Merriam-Webster.com, *Voluntary*, <https://www.merriam-webster.com> (last visited April. 12, 2018).

to fall.” *EEOC v. Univ. of Chicago Hosps.*, 276 F.3d 326, 332 (7th Cir. 2002).

Using CCS’ 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.”

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.

Finally, while it is not proof positive that wrongdoing occurred, CCS did subsequently pass policy prohibiting workplace relationships with subordinates which lends even more weight to the contention that the administrative leave and eventual coerced resignations were disciplinary in intent.

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 that 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 AND RECOMMENDATIONS

Based on the foregoing, it is the opinion of the Public Access Counselor that Carmel Clay Schools should have provided a factual basis as all reasonable interpretations of the information provided suggest it ultimately discharged two of its top administrators for disciplinary reasons.

A handwritten signature in black ink, appearing to read 'LH Britt', with a stylized flourish at the end.

Luke H. Britt
Public Access Counselor