Right to Know Advisory Committee
Access to Disciplinary Records of Public Employees Subcommittee
RECOMMENDATIONS & PROPOSED DRAFT STATUTORY CHANGES REFLECTING SUBCOMMITTEE RECOMMENDATIONS

The Access to Disciplinary Records of Public Employees Subcommittee is chaired by Senator Anne Carney. Subcommittee members are Amy Beveridge, Lynda Clancy, Julie Finn, Michael Gahagan, Representative Thom Harnett, Judy Meyer, Cheryl Saniuk-Heinig and Eric Stout.

The subcommittee met three times: October 20, November 15 and November 17, 2022. The Subcommittee reviewed the treatment of public employee disciplinary records under the Freedom of Access Act and applicable record retention schedules, and it looked at the impact of collective bargaining agreements on the disposition of these records. Based on their discussions, the Subcommittee makes the following recommendations.

Recommendation One:

Recommend a statutory change and the revision of the record retention schedules applicable to state, county, and municipal employee personnel records to ensure that collective bargaining agreements cannot override the Freedom of Access Act (FOAA) and to establish a retention period for disciplinary actions of 20 years. Consideration should be given, however, to the level of discipline and the retention period may be shorter for less serious conduct.

Recommendation Two:

Enact legislation to amend state and county employee personnel records statutes in Title 5, section 7070, subsection 2, paragraph E and Title 30-A, section 503, subsection 1, paragraph B, sub-paragraph 5, to align with the municipal employee personnel record statute in Title 30-A, section 2702, subsection 1, paragraph B, sub-paragraph 5 by including the following sentence: "The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action."

Recommendation Three:

Enact legislation to ensure that responses to FOAA requests for "personnel records" include records that have been removed from the personnel file and are otherwise retained.

Recommendation Four:

Recommend that the State Archivist and Maine Archives Advisory Board use standardized language related to record retention in schedules developed for public bodies and consider the inclusion of definitions of terms such as "remove," "purge" and "destroy" when they are used in record retention schedules. Legislative proposals related to record retention and collective bargaining agreements should also use standardized language and define terms such as "remove," "purge" and "destroy."

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Sec. 1. 5 MRSA §95-B, sub-§ 7 is amended to read:

7. Disposition of records. Notwithstanding any collective bargaining agreement or other employment contract that provides for the removal, destruction or purging of records, ~~R~~ecords may not be destroyed or otherwise disposed of by any local government official, except as provided by the records retention schedule established by the State Archivist pursuant to section 95-C, subsection 2, paragraph A, subparagraph (3). Records that have been determined to possess archival value must be preserved by the municipality.

Sec. 2. 5 MRSA §7070, sub-§2, paragraph E is amended to read:

E. Except as provided in section 7070-A, complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the Bureau of Human Resources shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this paragraph, "final written decision" means:

(1) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(2) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days;

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Sec. 3. 30-A MRSA §503, sub-§1, paragraph B, sub-¶ 5 is amended to read:

(5) Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the county shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this subparagraph, "final written decision" means:

(a) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(b) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; and

Sec. 4. 30-A MRSA §2702, sub-§1, paragraph B, sub-¶ 5 is amended to read:

(5) Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the municipality shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this subparagraph, "final written decision" means:

(a) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(b) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; and

Sec. 5. Revision of record retention schedules. The State Archivist shall revise the record retention schedules applicable to state and local government personnel records to provide that final written decisions relating to disciplinary action must be maintained for a period of 20 years notwithstanding any collective bargaining agreement or other employment contract to the contrary. The schedules may provide for a shorter retention period of no less than five years for final written decisions relating to less serious conduct or disciplinary action as described in the schedule. The schedules must use consistent terminology related to records that are not retained and provide definitions for terms used in the schedule such as “remove,” “purge” and “destroy.”

SUMMARY

Section one states that local government records may not be disposed of unless in accordance with record retention schedules established by the State Archivist.

Sections two, three, and four amend the statutes governing state, municipal and county employee personnel records to require that, in response to Freedom of Access Act requests for final written decisions, the responding public body provide records in its possession or custody regardless of the specific file location.

Section five directs the State Archivist to revise the record retention schedules applicable to state and local government personnel records to require that final written decisions relating to disciplinary action be maintained for a period of 20 years or a lesser period depending on the severity of the conduct or disciplinary action. It also requires that the schedules utilize consistent terminology and define terms related to the disposition of records.