SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 3
NASSAU COUNTY

In the matter of the Application of

SHERIFF OFFICERS ASSOCIATION, INC.
***EX REL.* PAULA JACKSON,**

Petitioner,

RETURN DATE: 8/31/12
SEQUENCE NO.: 003

for an Order and Judgment pursuant to
NY CPLR Article 75

INDEX NO.: 13113/10

- against -

COUNTY OF NASSAU,

Respondent.

The following papers read on this petition (numbered 1-3)

Notice of Motion.....1
Affirmation of Liam L. Castro, Esq.....2
Petitioners' Memorandum of Law in Opposition To the County's Motion to Unseal Certain Records in a Criminal Proceeding.....2A
Reply Affirmation.....3

BACKGROUND

In this proceeding to compel arbitration of an employment grievance, the COUNTY OF NASSAU (the "COUNTY") moves for an order directing that the testimony of Paula Jackson in the Grand Jury proceedings and criminal trial in the *Matter of People v. Paula Jackson*, Docket No. 2011NA001007 (collectively, the "Criminal Proceedings") be unsealed and that the COUNTY be entitled to a copy of it for use in connection with the underlying arbitration.

The facts are undisputed. Petitioner SHERIFF OFFICERS ASSOCIATION, INC. ("ShOA") is an incorporated labor union, and the certified bargaining representative of

uniformed corrections officers who are employed by the Nassau County Sheriff's Department (the "Sheriff's Department"). Paula Jackson ("Jackson"), a corrections officer and member of ShOA, was terminated from employment effective May 19, 2010, based upon alleged violations of Sheriff's Department rules and regulations, including, among other things, developing or maintaining a personal relationship with an inmate in custody at the Nassau County Correctional Facility. Petitioner filed a grievance on behalf of Jackson, and brought this proceeding to compel arbitration of the grievance. The COUNTY opposed the petition and sought to stay arbitration, pending a criminal investigation of the conduct underlying Jackson's termination. By Short Form Order dated November 30, 2010, this Court directed the COUNTY to proceed with the arbitration. In the interim, however, criminal charges had been brought against Jackson, and petitioner withdrew its demand for arbitration pending the outcome of the Criminal Proceedings. On April 9, 2012, Jackson was acquitted of all criminal charges.

Petitioner then sought to proceed with the arbitration of the grievance. The COUNTY brought the instant motion to unseal the transcripts of the Criminal Proceedings, limited to Jackson's testimony, claiming that the testimony is necessary to defend the arbitration and the termination of Jackson from employment.

The COUNTY argues that it is entitled to unseal the records pursuant to certain statutory grounds for unsealing set forth in **Criminal Procedure Law ("CPL") §160.50(1)**, and pursuant to the Court's "inherent authority" as articulated by the Court of Appeals. Petitioner argues, essentially, that none of the statutory grounds applies, and that the COUNTY, acting in its capacity as a public employer, is not entitled to obtain sealed criminal records for use in disciplinary proceedings.

DISCUSSION

Statutory Grounds for Unsealing

The general rule established by statute is that, unless the court determines that the interests of justice require otherwise, the records of a criminal action or proceeding shall be sealed upon a termination in favor of the accused. *See* **CPL §160.50(1); Matter of Joseph M. v. New York City Board of Education,** 82 NY2d 128. The statute enumerates six categories of persons or agencies that may obtain the records under specified circumstances. **CPL §160.50(1)(d).** The exceptions to the sealing requirement are narrowly defined and strictly construed. **Matter of Hynes v. Karassik,** 47 NY2d 659, 663. *See also* **Matter of Katherine B. v. Cataldo,** 5 NY3d 196. They are limited to:

(1) a prosecutor, in connection with certain proceedings in marijuana cases. **CPL §160.50(1)(d)(i)**;
(2) A law enforcement agency, if the agency demonstrates that the interest of justice requires that the records be made available to it. **CPL §160.50(1)(d)(ii)**;
(3) any state or local officer or agency with responsibility for the issuance of gun licenses, when the accused has applied for such a license. **CPL §160.50(1)(d)(iii)**;
(4) the New York State Division of Parole, when the accused is on parole supervision and the arrest occurred while the accused was on parole. **CPL §160.50(1)(d)(iv)**;
(5) any prospective employer of a police officer or peace officer, in relation to an application for employment as such. **CPL §160.50(1)(d)(v)**; and
(6) the probation department responsible for supervision of the accused, when the arrest occurred while the accused was on probation. **CPL §160.50(1)(d)(vi)**.

The COUNTY argues that it is entitled to unseal the records of the Criminal Proceedings pursuant to subdivisions (ii) [law enforcement agency], (iii) [firearms licensor] and (v) [employer of peace officer].

Law Enforcement Agency - CPL §160.50(1)(d)(ii). The COUNTY asserts that the Sheriff's Department, which operates the Nassau County Correctional Facility, is a law enforcement agency entitled to the records of the Criminal Proceedings in the interests of justice. The COUNTY argues: "when it is considered that Jackson was terminated for serious staff misconduct affecting the safe and secure operation of the Nassau County Correctional Facility, which in and of itself is a paramilitary organization responsible not only for the security of inmates but also for the safety of the public and employees it is obvious that justice requires the release of the records. Reply Aff., ¶14.

The Court does not agree. It is well-settled that "when a police department conducts a disciplinary proceeding concerning one of its own employees, it acts as a public employer, rather than a 'law enforcement agency,' and the exception contained in **CPL §160.50(1)(d)(ii)** is therefore inapplicable." **Matter of City of Elmira v. Doe,** 39 AD3d 942, 943, citing **Matter of New York State Police v. Charles Q,** 192 AD2d 142, 144, *aff'd* 85 NY2d 571. The Appellate Division in **Charles Q**, while recognizing the police department's obligation to protect the public from an unfit employee, found that "no less compelling an obligation rests upon the employers of school teachers, play-ground attendants, child protective service workers and numerous other public employees," for whom no access to sealed records is provided. 192 AD2d at 144. The COUNTY urges this Court to "revisit" **Charles Q** (and, by implication, **Doe**), arguing that it is wrongly decided. *See* Reply Aff., ¶¶10-14. This Court, however, finds no basis to contravene governing authority directly applicable to the issue at hand.

Firearms Licensing - CPL §160.50(1)(d)(iii). The COUNTY invokes this subdivision, although it does not assert that the Sheriff's Department is an agency responsible for the issuance of gun licenses. Instead, the COUNTY argues that by seeking to be reinstated as a corrections officer, Jackson is "implicitly seeking lawful authority to carry and/or possess a firearm pursuant to her status as a peace officer." Aff. in Support, ¶ 10. The statutory grounds for unsealing have been precisely and narrowly drawn, reflecting the Legislature's concern for the potential detriment to one's reputation and employment prospects that often flows from having been subjected to criminal process. **Matter of Hynes [Karassik],** 47 NY2d at 663. *See also* **Matter of Katherine B.,** 5 NY3d at 202. By its terms, **CPL §160.50(1)(d)(iii)** applies only to a person or agency responsible for the issuance of gun licenses, and only in the context of an application for a such a license. It does not apply to any public employer, on the ground that the use of a firearm may be incidental to the accused's employment. The holding urged by the COUNTY would extend the grounds for unsealing beyond the scope articulated by the statute, and would run afoul of both the judicial call for strict construction and the legislative intent to protect the accused.

Prospective employer of a peace officer - CPL §160.50(1)(d)(v). The COUNTY depicts itself as a "prospective employer," and the arbitration sought by ShOA as an "application for employment," based upon the premise that Jackson has not been employed by the COUNTY since her termination in 2010, and that the arbitration seeks Jackson's employment as a peace officer. This literal and over-broad interpretation of "prospective employer" was rejected by the Appellate Division in **Charles Q**. *See* 192 AD2d at 144-145. The COUNTY ignores the reality that the grievance process seeks to reinstate Jackson's employment, not to begin it anew. Among other things, insofar as the grievance arbitration could result in the retroactive restoration of Jackson's compensation and benefits, it is distinguishable from the "application for employment" context contemplated by **CPL §160.50(1)(d)(v)**. Following the principle of narrow construction, the Court cannot find that the "prospective employer" exception applies here.

Inherent Authority

In the absence of specific statutory underpinnings, the Court of Appeals has articulated an inherent authority to unseal criminal records "in rare and extraordinary circumstances when necessary to serve fairness and justice." **Matter of City of Elmira [Doe],** 39 AD3d at 944, citing **Matter of Dondi,** 63 NY2d 331, 338; **Matter of Hynes [Karassik],** 47 NY2d 659, 664. The COUNTY's appeal to inherent authority in this case, however, is unavailing. Since **Matter of Dondi** was decided in 1984, the Court of Appeals has confined such authority to the specific context present in **Dondi**. The Court has held that there is no inherent authority outside of the limited circumstance in which

the Appellate Division exercises its responsibility for the investigation and discipline of attorneys. **Id.** *See* **Matter of Katherine B.,** 5 NY3d at 203; **Matter of Joseph M.**, 82 NY2d at 134. The Court of Appeals reasoned that finding such inherent power generally, in other contexts, would subvert the statutory scheme. **Matter of Joseph M.**, 82 NY2d at 134.

Further, even if such "inherent authority" were available, the COUNTY has not justified its use by providing a "compelling demonstration" of necessity. The COUNTY has not shown that the information sought by unsealing is "not otherwise available by conventional investigative means," or that Jackson is presently unavailable for questioning. **Matter of New York State Police [Charles Q],** 192 AD2d at 145. The Court notes and believes that the growth in privacy protection supports the contention that the usefulness of criminal records for impeachment purposes is not a sufficient basis for unsealing. **Id.**

Waiver

By casting itself in a defensive posture with respect to the grievance arbitration at issue here, the COUNTY implicitly raises the question of whether or not Jackson has waived the protection of **CPL §160.50.** It is well settled that "where an individual commences a civil action and affirmatively places the information protected by CPL 160.50 into issue, the privilege is effectively waived." **Wright v. Snow,** 175 AD2d 451. *See also* **Commercial Union Ins. Co. v. Jones,** 216 AD2d 967. The privilege "may not be used as a sword to gain an advantage in a civil action." **Rodriguez v. Ford Motor Co.,** 301 AD2d 372.

Insofar as neither of the parties has addressed this issue, the Court will not belabor it here. Suffice it to say that the Court does not find that Jackson's privilege has been waived in the context of the underlying arbitration sought by petitioner. On the record presented, it does not appear that Jackson has affirmatively placed her criminal record at issue, or that she is invoking the privilege to gain an advantage other than the one intended by the legislature; that is, the protection of exonerated individuals from the potential stigma and consequences associated with criminal prosecutions, particularly in the area of employment. *See* **Matter of Joseph M.**, 82 NY2d at 134; **Matter of City of Elmira [Doe],** 39 AD3d at 945.

A public employee generally is entitled to the protection of **CPL §160.50** in the context of disciplinary proceedings brought by the public employer. *See* **Matter of City of Elmira [Doe],** 39 AD3d 942; **Matter of Scott D.,** 13 AD3d 622 (both cases holding that there was no waiver of the privilege in the disciplinary proceeding, even though the

employee had brought a separate civil action for affirmative relief, and the facts underlying the arrest were relevant to both the civil action and the disciplinary proceeding). The underlying arbitration at issue here is an extension of the disciplinary proceedings commenced by the COUNTY. *See* Collective Bargaining Agreement, Section 10. DISCIPLINARY PROCEDURES (providing for a multi-step disciplinary process, which culminates in binding arbitration) [Petitioner's Exh. A.]. Thus, petitioner's demand for arbitration (and corresponding application to compel) does not, in and of itself, bring about a waiver of the protection afforded by **CPL §160.50.**

CONCLUSION

The Court has considered the remaining contentions of the parties and finds them to be without merit. Based upon the foregoing, it is

ORDERED, the motion of the COUNTY for an order directing that the transcript of the testimony of Paula Jackson in the Criminal Proceedings be unsealed is **denied.**

This constitutes the Order of the Court.

Dated: 11/30/12

J.S.C.

ENTERED
DEC 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE