



Policing The Police In Misconduct Class

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In litigating police misconduct cases, frequently the issue of the discoverability of a miscreant police officer's personnel file and records of an internal investigation of the officer or the incident in question becomes an issue. The defense will claim the records are privileged pursuant to Public Officers Law Sec. 87 (2)(g). This article addresses the discoverability of these records.

Civil Rights Claims

When the plaintiff has claimed Civil Rights Violations, pursuant to 42 U.S.C. 1983, the materials are discoverable. In *Ramos v. City of New York*, 285 A.D.2d 284 (1st Dept. 2001), the Appellate Division reversed the lower court (in part) for failing to allow appropriate discovery. The appellate court held that:

In view of the Federal constitutional gravamen of Sec. 1983 cases, we are governed by Federal law in determining discovery motions notwithstanding possibly more restrictive State law norms, especially involving law enforcement records (*Svaigsen v. City of New York*, 203 A.D.2d 32; *King v. Conde*, 121 F.R.D. 180). Federal law has allowed in such civil rights cases for much more liberal discovery of recollections and documentation of prior complaints and police history, subject to appropriate redaction to protect informers or privacy.... 285 A.D.2d at 306-307.

In *Svaigsen v. City of New York*, 203 A.D.2d 32, 33 (1st Dept. 1994), the court allowed disclosure of Internal Affairs Unit records and interviews. Personnel files are similarly discoverable and not governed by New York Civil Rights Law Sec. 50-a. *Mann v. Alvarez*, 242 A.D.2d 318, 320 (2nd Dept. 1997). The complete and entire personnel file to be disclosed includes probationary evaluation reports, employee performance reports, performance rating reports, supervisor's evaluation reports, pre-promotional reports, application for appointment and declaration of pending criminal action and constitutional oath upon appointment. *Duwall v. City of New York*, N.Y.L.J. March 22, 1999, P. 29, Col. 4 (Sup. Queens, J. Polizzi).

Negligence Claims

While the records are not automatically discoverable where the plaintiff has only asserted

negligence claims, if the defendant is attempting to assert the claim of privilege, it has the burden of proving this claim. The defendant must establish what, if any, reports exist, who made them, when they were made, to whom they were made and why they were made in order to lay the foundation for its claim of privilege. In other words, the court requires proof of an evidentiary nature. Defense counsel's affirmation alone is insufficient to sustain their burden. *Pinkans v. Hulett*, 156 A.D.2d 877 (3rd Dept. 1989); *Bras v. Atlas Construction Corp.*, 153 A.D.2d 914 (2nd Dept. 1989). See, *Vivitorian Corp. v. First Cent. Ins. Co.*, 203 A.D.2d 452 (2nd Dept. 1994).

In a case involving claims of police misconduct, frequently the evidence of a smoking gun involving the instant incident or prior incidents is in the miscreant officer's personnel file or the Police Department's internal investigation records (IAD or CCRB). These files may contain evidence that proves that the defendant was on notice of its employee's misconduct. The defendant must meet its burden of articulating particularized and specific justification for shielding such documents. *Gould v. New York City Police Department*, 89 N.Y.2d 275 (1996); *In re Fink v. Lefkowitz*, 47 N.Y.2d 567 (1979); *In re Cromwell v. Ward*, 183 A.D.2d 459 (1st Dept. 1992).

The plaintiff is entitled to these records where plaintiff has claimed negligent hiring, training, supervision, monitoring and retention. *McCrink v. City of New York*, 296 N.Y. 99 (1947); *Sullivan v. Smith*, 198 A.D.2d 749 (3rd Dept. 1993); See, PJI 2: 240; *Haddock v. City of New York*, 75 N.Y.2d 478 (1990). A failure to have competent employees is clearly actionable. See, *Sosa v. Ideal Elevator Corp.*, 216 A.D.2d 128 (1st Dept. 1995); *Meder v. Miller*, 173 A.D.2d 392 (1st Dept. 1991).

Prior incidents bear on the issue of notice regarding the officer's need for training in the appropriate use of force. See, *McCummings v. New York City Tr. Auth.*, 81 N.Y.2d 923, 927-928 (1993), cert. denied, 510 U.S. 991; *Wyatt v. State of New York*, 176 A.D.2d 574, 576-577 (1st Dept. 1991). Thus, CCRB reports that disclose notice of prior incidents, are discoverable. *Flores v. City of New York*, 207 A.D.2d 302 (1st Dept. 1994). Clearly the plaintiff is entitled to training materials where a claim of inadequate training is being made. *Meistinsky v. City of New York*, 285 App. Div. 1153, aff'd, 309 N.Y. 998 (1956).

Moreover, the Early Warning Psychological records of the police officer may also be discoverable. *Bonsignore v. City of New York*, 683 F.2d

635, 637 (2d Cir.1982), aff'd, 521 F. Supp. 394 (S.D.N.Y. 1981). In *Bonsignore*, the motion court found, after a jury verdict was returned in plaintiff's favor, that *Bonsignore* exhibited many of the characteristics that were supposed to flag disturbed officers so that they could receive psychological help. (supra, 521 F. Supp. at 398). There was reason for the Police Department to have reasonably anticipated that the police officer was unfit to carry a gun or that he would injure himself or someone else.

The internal determination that a police officer violated internal rules is admissible evidence. *Collins v. City of New York*, 11 Misc. 2d 76, aff'd, 8 A.D.2d 613, aff'd, 7 N.Y.2d 822 (1959).

In Camera Review

However, before the court permits disclosure of the officer's personnel file and its Internal Affairs Division investigation, an in camera review by the court of the records may be necessary, so that truly privileged records that are not germane may be redacted by the court. *Rodriguez v. City of New York*, 137 A.D.2d 436 (1st Dept. 1988); *Walker v. City of New York*, 64 A.D.2d 980 (2nd Dept. 1978); *Cox v. New York City Housing Authority*, 105 A.D.2d 663 (1st Dept. 1984); *Laurence v. City of New York*, 118 A.D.2d 758 (2nd Dept. 1986); *Becker v. City of New York*, 162 A.D.2d 488 (2nd Dept. 1990); *Svaigsen v. City of New York*, 203 A.D.2d 32 (1st Dept. 1994); *Melnitsky v. City of New York*, N.Y.L.J. November 23, 1998, P. 31, Col. 4 (Sup. NY, J. Braun); *In re Prisoners' Legal Services v. N.Y.S. Dept. of Correctional Services*, 73 N.Y.2d 26 (1988); *Spadaro v. Balesteri*, 237 A.D.2d 507 (2nd Dept. 1997), lv. to app. dis., 90 N.Y.2d 935 (1997); *Estrada v. New York City*, N.Y.L.J. October 22, 1999, P. 31, Col. 4 (Sup. NY, J. Friedman) (clearly materials in CCRB file relating to the subject incident are all discoverable); *Abdelfattah v. City of New York*, January 11, 2001, P. 29, Col. 2 (Civil NY, J. Samuels).

Conclusion

Plaintiff's counsel should note that carrying a gun and wearing a uniform is a privilege, not an excuse, and that only a jury equipped with all of the relevant facts may properly police the police.