STATE OF NEW YORK
SUPREME COURT: ERIE COUNTY

BUFFALO POLICE BENEVOLENT ASSOCIATION, INC., And BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCAIATION, INC., LOCAL 282, IAFF, AFL-CIO,

Petitioners/Plaintiffs

vs.

MEMORANDUM DECISION AND ORDER

Index No. 807664/2020

BYRON W. BROWN, in his official capacity as Mayor of the City of Buffalo; BYRON C. LOCKWOOD, in his official capacity as commissioner of the Buffalo Police Department; the BUFFALO POLICE DEPARTMENT; WILLIAM RENALDO, in his capacity as commissioner of the Buffalo Fire Department; and, the BUFFALO FIRE DEPARTMENT,

Respondents/Defendants

and

JAMES KISTNER,

Intervenor/Respondent

BEFORE: **HON. FRANK A. SEDITA, III, J.S.C.**

APPEARANCES: **JOHN J. GILMOUR, ESQ. & DANIEL M. KILLILEA, ESQ.**
Attorneys for Petitioners/Plaintiffs

CORPORATION COUNSEL FOR THE CITY OF BUFFALO
Attorneys for Respondents/Defendants
William C. Matthewson, Esq. of counsel

STEPHANIE A. ADAMS, ESQ.
Attorney for Intervenor/Respondent

FRANK A. SEDITA, III, J.

The principal issue before the court is whether to enjoin the Respondents from releasing certain information contained in the disciplinary files of City of Buffalo police officers and firefighters.

§50-a of the NY Civil Rights Law (50-a) was repealed on June 12, 2020. Enacted in 1976, 50-a provided, in relevant part, that personnel records used to evaluate the performance of police officers and firefighters could not be publicly disclosed unless the officer/firefighter consented to it or a court ordered it. Soon after the repeal of 50-a, the Buffalo Common Council requested that the Buffalo Police Department turn over information concerning complaints of police officer misconduct. The Buffalo Police Benevolent Association (PBA) filed a grievance, under its collective bargaining agreement with the City of Buffalo, to prevent the release of this information. This lawsuit -- a Petition pursuant to CPLR Articles 75 and 78, combined with a Declaratory Judgment action -- was commenced by the filing of an Order to Show Cause application on July 22, 2020.

Petitioners sought declaratory, injunctive and provisional relief, based upon seven causes of action set forth in the Verified Petition of Buffalo PBA President John Evans. More specifically, the court is being asked to declare that any future decision to publicly release any information concerning "unsubstantiated and pending allegations," as well as those concerning, "settlement agreements entered into before June 12, 2020," would violate collective bargaining agreements entered into between the City of Buffalo and its police and firefighter unions; would violate

Petitioners' due process and equal protection rights; and, would otherwise be arbitrary, capricious and mistaken.

Petitioners emphasize that they are not seeking to block the public disclosure of information concerning proven instances of police misconduct. They are instead seeking protection from the irreparable reputational harm that would result from the disclosure of unsubstantiated allegations; i.e. alleged instances of misconduct that were not proven to be true or turned out to be unfounded or demonstrably false. Petitioners note that members of many other occupations and professions are afforded statutory protection from the disclosure of unsubstantiated allegations made against them. 50-a had afforded similar statutory protections to police officers and firefighters.

Petitioners believe their disciplinary records should remain secret, despite the repeal of 50-a, because a privacy interest in the confidentiality of information contained in the records is recognized at common law. According to Petitioners, a "judicial consensus" in this regard pre-dates and is independent of the statutory protection once afforded by 50-a. Petitioners contend that in light of these remaining common law protections for their own occupations, as well as statutory protections in place for those in "similarly situated" occupations, the release of any unsubstantiated or pending allegations lodged in their personnel files would violate their due process and equal protection rights, as guaranteed by the Federal and State Constitutions.

Respondents objected to neither the issuance of a show cause order nor the imposition of a temporary restraining order. Respondents then filed an Answering Affirmation, additionally consenting to the injunctive relief sought by Petitioners.

James Kistner promptly filed a motion to intervene. Mr. Kistner is the plaintiff in an ongoing federal lawsuit, alleging mistreatment at the hands of City of Buffalo police officers. The defendants in the federal case allegedly refused to release their disciplinary files, even for the limited purpose of discovery. The basis for that refusal was none other than the TRO issued in this action. Mr. Kistner wished to intervene because he was being directly and substantially impacted by the TRO. Mr. Kistner also suggested a conflict of interest existed, noting that the City of Buffalo Corporation Counsel represented both the defendants in the federal lawsuit as well as the Respondents in this one. Mr. Kistner then went on to list several legal arguments that he would assert if named a party.

Mr. Kistner's principal contention strikes at the very heart of the Petitioners' case theory. Petitioners suggest the collective bargaining agreements and common law precedents which shield the disclosure of police disciplinary files fill the vacuum caused by the repeal of 50-a. Mr. Kistner suggests that no such vacuum exists by pointing to what both named parties neglect to mention: that state statutes governing freedom of information (FOIL) requests were amended simultaneous to the repeal of 50-a. For example, Public Officers Law §86(6)(a), now provides law enforcement disciplinary records that must presumptively be disclosed, include "***any*** record created in furtherance of a law enforcement disciplinary proceeding [including] complaints,

allegations, and charges against an employee" (emphasis supplied). In other words, there exists clear statutory authorization for release of the very information that Petitioners seek to enjoin.

Respondents changed course and filed a CPLR 3211 motion to dismiss. Respondents now oppose Petitioners' request for injunctive relief. Respondents contend that disclosure of unsubstantiated allegations is neither automatic nor inevitable and cite statutory due process protections that remain in place. They point out that Public Officers Law §87(2)(b), for example, still authorizes FOIL officers (like Respondents) to refuse disclosure of records that would "constitute an unwarranted invasion of personal privacy." Respondents emphasize that they comprehend their statutory duties under FOIL as well as their contractual duties under the CBA; that they have yet to release anything to anyone; and, that Petitioners haven't even come close to exhausting their administrative remedies.

Exhaustion of remedies is one of the devices by which the courts prevent premature or unnecessary resort to their jurisdiction, particularly where an administrative remedy is provided by statute, by regulations, or by contract. It is rooted in the principle that a reviewing court usurps an agency's function when it sets aside an administrative determination upon grounds not yet presented, thus depriving the agency of the opportunity to consider the matter, make its ruling, and state the reasons for its decision. The exhaustion rule, however, is not an inflexible one. It is subject to important qualifications. It need not be followed, for example, when an agency's action is challenged as either unconstitutional or wholly beyond its grant of power. *Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52.

It would be error for the court to consider whether the Respondents, in their capacity as FOIL officers, acted or might act arbitrarily or capriciously. *Spring v. County of Monroe,* 141 A.D.3d 1151. It would also be inappropriate for the court to speculate as to how the Respondents might rule on the disclosure requests before them, what they might exempt or whether those rulings or disclosures would be consistent with or inconsistent with the lawful provisions of any collective bargaining agreements. These questions would presumably be answered when Respondents make their disclosure rulings and Petitioners, should they wish to challenge those rulings, pursue their available administrative remedies. Accordingly, Respondents' motion to dismiss, made pursuant to CPLR §3211, is GRANTED as to the Petitioners' first, fourth, fifth and sixth causes of action and corresponding claims for declaratory relief.

Petitioners' remaining claims are premised on the notion that the release of any information concerning unsubstantiated and pending allegations would be violative of their constitutional rights. Since release of that information is now authorized by new amendments to the Public Officers Law, Petitioners are, by implication, challenging the constitutional validity of the new statutes themselves (as opposed to what a FOIL officer might or might not decide to do down the road). Mindful of the admonition that the court's role is to determine only whether the facts as alleged fit within any cognizable legal theory, Respondent's motion to dismiss the second cause of action (alleged due process violation) and third cause of action (alleged equal protection violation), on procedural grounds, is DENIED.

The question remaining is whether injunctive relief, premised upon Petitioners' due process and equal protection claims, is warranted.

The standard of judicial review for the grant of injunctive relief differs substantially from that required on a motion to dismiss. When considering a motion to dismiss, the court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference. *Murmane Building Contractors, LLC v. Cameron Hill Construction, LLC,* 159 A.D.3d 1602. By contrast, a party seeking to enjoin or prohibit someone from doing something, has the burden of demonstrating, by clear and convincing evidence (1) a substantial likelihood of success on the merits (2) irreparable injury in the absence of injunctive relief and (3) a balance of the equities in its favor. *Nobu Next Door, LLC v. Fine Arts Housing, Inc.,* 4 N.Y.3d 839. Injunctive relief is viewed as a drastic remedy that is not routinely granted. *Eastview Mall LLC v. Grace Homes, Inc.* 182 A.D. 3d 1057. Petitioners have the burden of satisfying all three prongs of the test and must do so by clear and convincing evidence; i.e. evidence or proof that makes it highly probable that what a party claims is true or will actually happen. *Monto v. Ziegler,* 183 A.D.3d 1294.

At the core of this case, is Petitioners' dismay that FOIL officers will release unfiltered information that serves not to inform but to defame, especially when revealed to those whom already view police officers with disdain. The prospect of such irreparable harm is viewed as especially inequitable given the fact that members of so many other occupations and professions -- including lawyers and judges -- are protected by statutes that prevent the disclosure of misconduct allegations made against them, unless and until they are actually proven to be true.

There is indeed a consistent thread throughout the law that distinguishes bare allegations from allegations proven by credible evidence, better known as "facts." Allegations, in general, are much easier to make than to prove. Misconduct allegations, in particular, are sometimes the product of an accuser feeling embarrassed or feeling insulted or feeling intimidated by the accused, as opposed to any actual wrongdoing by the accused. Allegations are also at times the product of less than laudable motives, such as secondary gain. Perhaps the most frightful aspect of allegations is their power to destroy. This seems particularly acute today, when so many receive their information from social media, where a keyboard is often wielded as a cudgel. It is a sad reality that in the modern world, all that is required to malign is an agenda, an audience and an accusation.

Although Petitioners make compelling arguments regarding irreparable harm and the imbalance of the equities, the court does not sit as one of equity. It sits as a court of law and it must therefore follow the law. More to the point, it must hold the Petitioners to their burden of proving, by clear and convincing evidence, that they have a substantial likelihood of success on the merits of their equal protection or due process claims.

What Petitioners find objectionable is specifically authorized by statute. Public Officers Law §86(6)(a) defines as presumptively disclosable any record created in furtherance of a law enforcement disciplinary proceeding, including allegations, regardless of whether they were substantiated or unsubstantiated. Curiously, Petitioners fail to address why these statutory mandates give constitutional offense, instead tying their due process and equal protection claims to the imagined vacuum left by the repeal of §50-a, coupled with speculation as to what FOIL

officers might do or could do in the future, and the constitutional consequences of those yet-to-be-made decisions.

Regardless of one's thoughts about the wisdom of the statute, the anti-law enforcement bias of many of those who supported it, or its pernicious unintended consequences, the fact remains that it is the law of this state and it can only be set aside by a court when it clearly offends the Federal or State Constitutions. Gazing into a crystal ball to divine what municipalities and their FOIL officers might do in the absence of 50-a is not a basis for the court to overturn a statute passed by both houses of the Legislature and enacted into law by the Governor. Indeed, it is well-settled that the acts of the Legislature are entitled to a strong presumption of constitutionality and that the Petitioners bear the ultimate burden of overcoming that presumption by demonstrating the amendment's constitutional invalidity beyond a reasonable doubt. *American Economy Insurance Co. v. State of New York,* 30 NY3d 136, 149 (2017); *Matter of Murtaugh,* 42 AD3d 986 (4th Dept. 2007).

What Petitioners essentially seek -- a pre-emptive strike that will serve as a blanket prohibition on the release of any and all information regarding any complaint deemed "unsubstantiated" -- is not merely drastic remedy, it is an inappropriate one. Petitioners advance no persuasive arguments as to why the controlling statutes violate due process, equal protection or any other provision of the Federal and State Constitutions. Petitioners have thus fallen well short of demonstrating a likelihood of success on the merits of their remaining claims and prayers for relief. Accordingly Petitioners' request for declarative relief and injunctive relief is DENIED in all respects and the TRO is vacated.

Finally, it should be noted that the court's rulings do not mean that police disciplinary records -- whether requested by the Buffalo Common Council or whether demanded by some other entity by some other method -- shall be released or must be released. The court is not mandating or otherwise authorizing the public release of any particular records. That decision will presumably be made by the Respondents in accordance with the provisions and exemptions set forth in the Public Officers Law, including §87(2)(b).

The foregoing shall constitute the decision and order of this court.

Dated: October 9, 2020

HON. FRANK A. SEDITA, III, J.S.C.