

Discovery - Pa. R.C.P. 4011(c) - Background Investigation Reports - Public Records

1. A letter obtained from a former employer as part of a background investigation to determine eligibility and suitability for employment is privileged so as to preclude discovery under Pa. R.C.P. 4011(c).

2. Communications received from a former employer as a result of a background investigation by a prospective public employer as part of its official duties are not public records under "The Right to Know Law", Act of June 21, 1967, P.L. 390, 65 P.S. Sect. 66.1 et seq.

3. Section 46177 of The Borough Code, Act of February 1, 1966, P.L. 581, as amended, 53 P.S. Sect 46177 does not require personal background reports to be open for public inspection.

David C. Cleaver, Esq., Attorney for Plaintiff, Richard L. Hovis

David A. Wion, Esq., Attorney for Defendant, the Borough of Steelton Civil Service Commission

Daniel W. Long, Esq., Attorney for Defendant, Donald R. Pryor, Borough of Waynesboro

OPINION AND ORDER

EPPINGER, P.J., April 17, 1978:

On April 2, 1976, the petitioner, Richard L. Hovis (Hovis) applied for a position of Patrol Officer for the Borough of Steelton. The Civil Service Commission for the Borough of Steelton (Commission), as part of the application process, sent a request for background investigatory information on Hovis to his former employer, the Borough of Waynesboro Police Department. Information of Hovis was provided by Chief of Police Donald R. Pryor (Pryor) by a letter dated April 22, 1976. Hovis was not placed on the eligible list.

Hovis instituted a defamation suit against Pryor and the Borough of Waynesboro. During pre-trial discovery, the Commission was asked to provide Hovis with the information received from the Borough, specifically Pryor's letter. The Commission refused, claiming that the information sought was privileged under Pa. R.C.P. 4011(c) and not discoverable. The question of the discoverability of this letter is now before the court on a rule to show cause.

NEW FEATURE

At a recent meeting of the Board of Directors of Franklin County Legal Journal, action was taken approving, on a six month trial basis, the inclusion of a one page law related book review article, once each month, in the advance sheets. The commentator will be Dr. Hugh E. Jones, Associate Professor of Government at Shippensburg State College. Dr. Jones received his B.A. at Lehigh University, his M.A. at Duke, and his Ph.D. at Johns Hopkins University. His doctoral thesis was entitled, "Confirmation of Charles Evans Hughes as Chief Justice". He is also the author of a dissertation entitled, "Defeat of the Nomination of Abe Fortas as Chief Justice". Dr. Jones' first review, concerning the book, "Simple Justice", will appear in one issue sometime during June, 1978. Dr. Jones is volunteering this service to us without compensation, as a means of informing members of the Bar and other persons interested, of current biographical and other law related works of importance he comes across in his own profession.

We welcome this input into our publication from one of our subscribers and hope that you will find it to be a worthwhile additional feature.

MANAGING EDITOR

It is the Commission's position that public policy requires that investigatory information must be privileged information to insure that candid replies will be received concerning job applicants' qualifications. Hovis presents three arguments supporting disclosure of the letter. He argues that Federal law would support a disclosure of this information if this had been a federal rather than a local agency under Sect. 552a (d) (1) of the Federal Privacy Act, 5 U.S.C. Sect 552a (d)(1), as amended. But subsection (k), within that same section, permits agency heads to promulgate rules to exempt from disclosure requirements investigatory material compiled solely for the purpose of determining eligibility for Federal employment. 5 U.S.C. Sect. 552a (k). Thus, the Federal law recognizes the need for confidential investigatory employment information. Furthermore, a suggestion that we follow federal legislation by analogy to make available such records indicates that there is no other existing authority in Pennsylvania for obtaining the information.

Hovis also asserts that the "Right to Know Law" governs this situation as the letter falls within the definition of a public record which is to be open for examination and inspection. Act of June 21, 1957, P.L. 390, as amended, 65 P.S. Sect 66.1-66.4. Hovis fails to note, however, that within that very definition of "public record", there is a proviso stating:

... That the term "public records" shall not mean any report, communication, or other paper, the publication of which would disclose the institution, progress or result of an investigation undertaken by an agency in the performance of its official duties, ... 65 P.S. Sect 66.1(2).

As the letter was a result of a background investigation of Hovis by the Commission as part of its official duty of determining eligibility and suitability for employment, disclosure is not mandated under this statute.

Hovis also cites the Borough Code, Article XI, section J, Sect. 1177 which provides in part:

... All recommendations of applicants for appointment received by the Commission shall be kept and preserved for a period of 5 years, and all such records ... shall be open to public inspection and subject to reasonable regulation. Act of Feb. 1, 1966, P.L. 581, as amended, 53 P.S. Sect 46177.

This section refers to public inspection of recommendations of applicants as distinguished from

investigation reports. This distinction is important as recommendations are usually solicited by the applicant while the Commission initiated the background investigation. The difference in the nature of these documents leads us to find sect.46177 inapplicable to this factual situation.

There does not appear to be any authority permitting the discovery or requiring the disclosure of investigatory information. Given the public policy arguments for according confidentiality for such reports and the specific exemptions of investigation materials, found in both State and Federal statutes, we find that Pryor's letter providing background investigation of Hovis is privileged so as to preclude discovery under Pa. R.C.P. 4011(c).

There remains a question as to whether this privilege was waived when a secretary of the Commission showed Hovis his file which contained Pryor's letter. A communication ceases to be privileged if the privilege is waived by the person benefited by the existence of the privilege. 5A Anderson Pa. Civil Practice sect. 4011.222. Here, the privilege runs between Pryor and the Commission. There are no allegations nor a showing that a secretary in the office of the Commission has any authority to waive the Commission's privilege. Without such authority, the privilege has not been waived by one who has been benefited by the privilege. Determining the privilege to be waived in this manner would run counter to the aforementioned public policy of according confidentiality to the information. Accordingly, absent a showing of authority, the secretary's action will not act to waive the Commission's privilege.

ORDER OF COURT

Now, April 17, 1978, the rule to show cause is discharged.

DEVILBISS v. ROYER, C.P., Franklin County Branch, A.D. 1977-466

Replevin - Pleading - Preliminary Objections - Demurrer - Measure of damages - Averment of ownership - Motion to Strike - Double Recovery - Motion for a more specific complaint - Pa. R.C.P. 1073.1 - Itemized value.

1. Preliminary objections in the form of a demurrer will not be sustained in a replevin action on the basis that the averment of ownership is by an alleged breach of an agreement, nor will they be sustained on the basis that an improper measure of damages is sought.