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Md. high court weighs if MPIA requires disclosure of supervisor's notes

By: Steve Lash Daily Record Legal Affairs Writer May 7, 2018

ANNAPOLIS – Maryland's top court heard competing slippery-slope arguments Monday as it considered whether a state agency supervisor's personal notes about an employee must be disclosed to the worker under the Maryland Public Information Act.

Attorney Timothy F. Maloney, pressing the Montgomery County employee's case, told the Court of Appeals the MPIA's goal of transparency would be frustrated if supervisors could simply place personnel information in their private folders and label them as personal notes to make them exempt from disclosure.

"The implication of that throughout the government is frightening," Maloney said.

But Erik L. Barron, arguing for the county, said compelling disclosure would invade the privacy of supervisors, who should be entitled to keep secret their notes about meetings with employees. Such notes serve only to help jog the supervisors' memories and are not part of the official personnel file, Barron told the high court.

Requiring the disclosure of these reminders would be "an offense to all supervisory municipal employees and their personal privacy," Barron said. "Any musings on the job would be subject to disclosure."

Several Court of Appeals judges wondered aloud about a possible middle ground to prevent any slippery slope toward governmental secrecy or lost personal privacy.

They said perhaps the controversial notes could be reviewed privately by the administrative or trial judge to determine if they should be released in whole or part to the worker, who in this case has filed a grievance against the county after receiving low marks during an employment review.

But the lawyers responded the reviewing judge would still have to decide whether the supervisor's notes were essentially personnel records, subject to disclosure, or mere musings that should be kept private.

At issue before the high court is whether Bernadette Lamson, a longtime employee of the Montgomery County attorney's office, is entitled under the MPIA to notes her supervisor, Silvia Kinch, kept in her personal moleskin journal. These notes include a chronological record of Kinch's meetings with clients and the attorneys she supervises, as well as make reference to Lamson's responses to work assignments, according to papers filed with the high court.

Both the Montgomery County Circuit Court and the intermediate Court of Special Appeals have upheld the county's denial of Lamson's MPIA request for the documents, prompting her appeal to the high court.

Pressing Lamson's appeal, Maloney urged the Court of Appeals to disregard whether the supervisor took the notes to jog her memory or that she put the documents in a personal journal along with private papers. Rather, the court must focus on the "character" of the notes, which Kinch wrote in her capacity as Lamson's supervisor and which pertained to Lamson, Maloney said.

"There is only one reason she took those notes," added Maloney, a principal at Joseph, Greenwald & Laake P.A. in Greenbelt. "She was acting as a public government supervisor."

Barron, by contrast, urged the court to regard the documents as being in the personal journal of someone who just happens to be a supervisor,

"Not everything that someone does in a supervisory role is public," said Barron, a partner at Whiteford Taylor & Preston LLP in Bethesda.

But Judge Robert N. McDonald was skeptical about Barron's characterization of the notes as benign and personal, saying they certainly did not pertain to Kinch's membership in "a book club" with Lamson.

Judges Sally D. Adkins and Shirley M. Watts said that even if the notes were merely intended to jog Kinch's memory, those memories related not a personal matter, such as a shopping list, but to her duties as Lamson's supervisor.

"Isn't she keeping them (the notes) to aid in a governmental purpose?" Watts asked.

Barron responded the notes were neither a governmental record nor required to be taken for supervisory purposes. Rather, Kinch took the notes for the personal and "informal" purpose of helping her perform her job and are not subject to MPIA disclosure, he said.

The Court of Appeals is expected by Aug. 31 to render its decision in the case, *Bernadette Fowler Lamson v. Montgomery County, Md.*, No. 67, September Term 2017.