131st MAINE LEGISLATURE

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Legislative Document **No. 1397**

H.P. 892 House of Representatives, March 28, 2023

An Act to Implement the Recommendations of the Right To Know Advisory Committee Concerning Records of Disciplinary Actions Against Public Employees

Reported by Representative MOONEN of Portland for the Joint Standing Committee on Judiciary pursuant to the Maine Revised Statutes, Title 1, section 411, subsection 6, paragraph G.

Reference to the Committee on Judiciary suggested and ordered printed pursuant to Joint Rule 218.

ROBERT B. HUNT
Clerk

Be it enacted by the People of the State of Maine as follows:

Sec. 1. 5 MRSA §95-B, sub-§7, as amended by PL 2019, c. 50, §10, is further amended to read:

7. Disposition of records. ~~Records~~ Notwithstanding any collective bargaining agreement or other employment contract entered into on or after January 1, 2024 that provides for the removal, destruction or purging of records, records may not be destroyed or otherwise disposed of by any local government official, except as provided by the records retention schedule established by the State Archivist pursuant to section 95-C, subsection 2, paragraph A, subparagraph (3). Records that have been determined to possess archival value must be preserved by the municipality.

Sec. 2. 5 MRSA §7070, sub-§2, ¶E, as amended by PL 1997, c. 770, §1, is further amended to read:

E. Except as provided in section 7070-A, complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the Bureau of Human Resources shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this paragraph, "final written decision" means:

(1) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(2) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days;

Sec. 3. 30-A MRSA §503, sub-§1, ¶B, as amended by PL 2019, c. 451, §2, is further amended by amending subparagraph (5) to read:

(5) Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it

imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the county shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this subparagraph, "final written decision" means:

(a) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(b) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; and

Sec. 4. 30-A MRSA §2702, sub-§1, ¶B, as amended by PL 2019, c. 451, §3, is further amended by amending subparagraph (5) to read:

(5) Complaints, charges or accusations of misconduct, replies to those complaints, charges or accusations and any other information or materials that may result in disciplinary action. If disciplinary action is taken, the final written decision relating to that action is no longer confidential after the decision is completed if it imposes or upholds discipline. The decision must state the conduct or other facts on the basis of which disciplinary action is being imposed and the conclusions of the acting authority as to the reasons for that action. If an arbitrator completely overturns or removes disciplinary action from an employee personnel file, the final written decision is public except that the employee's name must be deleted from the final written decision and kept confidential. If the employee whose name was deleted from the final written decision discloses that the employee is the person who is the subject of the final written decision, the entire final written report, with regard to that employee, is public. In response to a request to inspect or copy the final written decision in accordance with Title 1, section 408-A, the municipality shall produce the final written decision in its possession or custody whether located in a personnel file or in another location.

For purposes of this subparagraph, "final written decision" means:

(a) The final written administrative decision that is not appealed pursuant to a grievance arbitration procedure; or

(b) If the final written administrative decision is appealed to arbitration, the final written decision of a neutral arbitrator.

A final written administrative decision that is appealed to arbitration is no longer confidential 120 days after a written request for the decision is made to the employer if the final written decision of the neutral arbitrator is not issued and released before the expiration of the 120 days; and

Sec. 5. Revision of record retention schedules. The State Archivist shall revise the record retention schedules applicable to state and local government personnel records as follows.

1. Except as provided in subsections 2 and 3 and notwithstanding any collective bargaining agreement or other employment contract entered into on or after January 1, 2024 to the contrary, final written decisions relating to disciplinary action must be maintained for a period of 20 years.

2. For final written decisions relating to less serious conduct or disciplinary action as described in the schedules, the schedules may provide for a shorter retention period of no less than 5 years.

3. For final written decisions relating to law enforcement employee disciplinary actions that could be used to impeach the credibility of the law enforcement officer if the law enforcement officer is a witness in a criminal case, the schedules may provide for a retention period of more than 20 years.

4. The schedules must use consistent terminology related to records that are not retained and provide definitions for terms used in the schedule such as "remove," "purge" and "destroy."

SUMMARY

This bill implements the recommendations of the Right To Know Advisory Committee related to records of disciplinary actions against public employees.

The bill provides that, notwithstanding any collective bargaining agreement or other employment contract entered into on or after January 1, 2024 to the contrary, local government records may not be disposed of except in accordance with record retention schedules established by the State Archivist.

The bill amends the statutes governing state, municipal and county employee personnel records to require that, in response to Freedom of Access Act requests for final written decisions, the responding public body provide the records in its possession or custody regardless of the specific file location in which the final written decision is located. The bill also requires the final written decisions applicable to state and county employees to state the conduct or other facts on the basis of which the disciplinary action is being imposed and the conclusions of the state or county employer as to the reasons for that action. Similar language is already included in the statute governing municipal employee personnel records.

The bill directs the State Archivist to revise the record retention schedules applicable to state and local government personnel records to require that final written decisions relating to disciplinary action be maintained for a period of 20 years or a lesser period depending on the severity of the conduct or disciplinary action. The State Archivist may increase the retention period beyond 20 years for final written decisions relating to law enforcement employee disciplinary actions that could be used to impeach the credibility of

the law enforcement officer if the law enforcement officer is a witness in a criminal case. It also requires that the schedules use consistent terminology and define terms related to the disposition of records.