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MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

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Termination for Spousal Jealousy

Adverse employment action that has sexual attraction as its motivation is action that is deemed by our courts (both on a State and Federal level) to be gender based and, therefore, constitutes unlawful gender discrimination.

Charles and Stephanie are husband and wife. They are also the co-owners of Wall Street Chiropractic and Wellness ("WSCW") located in New York City. Charles hired Dilek to be a yoga and massage therapist for the company. Charles (who oversaw the day-to-day operations of WSCW), was Dilek's direct supervisor. Dilek was regularly praised by customers and Charles for her work performance. Dilek, in her complaint, alleges that her work relationship with Charles was always "purely professional." She further alleges that Charles had told her "that his wife [Stephanie] might be jealous of [her] because [Dilek] was too cute." About four months later, Dilek received a text message from Stephanie

> You are NOT welcome any longer at [WSCW]. DO NOT ever step foot in there again and stay the [expletive] away from my husband and family!! And remember I warned you.

Shortly thereafter, (on the very same day, in fact) Charles emailed Dilek stating

> You are fired and no longer welcome in our office. If you call or try to come back, we will call the police.

The complaint filed in court by Dilek never mentions that she was the subject of sexual harassment. The Court

> inferred that [Charles] was motivated to discharge [Dilek] … to appease his wife's unjustified jealousy and … [Stephanie] was motivated to discharge [Dilek] by that same
>
> jealousy. Thus, each defendant's motivation to terminate [Dilek's] employment was sexual in nature.

Edwards v. Nicolai, 153 A.D.3d 440 (1st Dept. 2017)

Interest Arbitration: Nonmandatory Subjects

The County of Montgomery and the Montgomery County Sheriff (as a Joint Employer) were headed to Interest Arbitration with the Montgomery County Sheriff's PBA. PERB held that the PBA had violated the Taylor Law when it submitted to the Interest Arbitration Panel certain negotiation proposals that are not arbitrable under the law.

When deputy sheriffs and their Employer proceed to Interest Arbitration (after failing to reach a successor collective bargaining agreement) the law requires that only those matters "directly related to compensation" be submitted for resolution (NYS Civil Service Law § 209.4(g)). Over the years, PERB has, through its case law, established a test for determining whether a negotiation proposal is or is not "directly related to compensation." In New York State Police, PERB first detailed its thoughts:

> The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole, predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent *directly* relates to compensation. A demand has compensation as its sole, predominant or primary characteristic only when it seeks to effect some change in amount or level of compensation by either payment from the [Employer] to or on behalf of an employee or the modification of an employee's financial obligation arising from the employment relationship (e.g., a change in an insurance copayment). If the effect is otherwise, then the relationship of the demand becomes secondary and indirect and the subject is, therefore, excluded from the scope of compulsory arbitration …§ 209.4(g).

30 PERB ¶ 3013, 3028 (1997); confirmed, 30 PERB ¶ 7011 (1997). By way of further explanation, PERB has maintained that

> … each proposal must be examined separately to discern whether its sole, predominant or primary characteristic is a modification in the amount or level of compensation.

County of Orange, 44 PERB ¶ 3023, 3080 (2011). PERB notes in the Montgomery County case that "[W]here a bargaining proposal contains two or more inseparable elements, i.e., a unitary demand, at least one of which is nonmandatory the entire proposal is deemed nonmandatory." The Union's proposals and PERB rulings in the Montgomery County case are as follows:

- Union Proposal No. 4 addressed the work day and work week. The proposal sought to establish a process for assignment of overtime for patrol, by seniority, and by location. PERB held that the proposal "…exclusively relates to overtime procedures to determine who among the unit employees would be eligible … while the proposal would have an effect on the overtime compensation … that effect is … indirect." 49 PERB ¶ 4568 (2017);

- Union Proposal No. 10, Section 2 pertains to modification to the GML § 207-c procedure currently in the CBA. That proposal, in part, sought to limit the scope of information that would be subject to release under the Medical Release Form utilized when seeking GML benefits. PERB held that "because the proposal addresses subjects not directly related to compensation (such as the content of the medical information provided) it is non-arbitrable," Id., citing Chenango County Law Enforcement Association, 50 PERB ¶ 3005, 3025 (2017);

- Union Proposal No. 10, Section 9 sought to modify the GML procedure language concerning contractual benefits continued (and not continued) for one out on GML status. The proposal states "all contractual benefits to be continued for up to one (1) year. Thereafter, the employee would be provided with base wages (salary), longevity, shift differential, etc. …"

PERB found that although the demand contained some items that were arguably directly related to compensation, requiring "all contractual benefits to be continued for up to one (1) year" could "include benefits beyond those directly related to compensation such as the accumulation of sick leave." PERB concluded that this was a "unitary demand" and that it was not arbitrable.

Notice Requirements Regarding Paid Family Leave Even If You Don't "Opt-In"

Although public employers are not required to provide NYS paid family leave benefits, those employers which currently offer voluntary disability benefits must nonetheless notify both the Workers' Compensation Board ("Board") and their own employees whether or not they will be providing family leave benefits. The regulation which sets forth this requirement (12 N.Y.C.R.R. § 380-10.2) states that if employers are offering voluntary disability benefits on December 1, 2017, they **must make those notifications prior to December 1, 2017**. If the employer is bargaining the benefits with any of its unions, the employer also needs to notify the Board that it is extending the benefits to those employees when an agreement is reached (see 12 N.Y.C.R.R. § 380-10.1), regardless of whether that employer provides voluntary disability benefits.

Save the Date

PERB, together with Cornell ILR and the Scheinman Institute on Conflict Resolution will hold "The Taylor Law at 50" Conference. The event will be held in Albany on May 10-11, 2018.

Welcome

RWGM welcomes the return of attorney Ben Heffley, Esq. Ben will be working with our Labor Relations Team, focusing on litigation.

Farewell

RWGM bids a farewell to attorney Geneve F.M. Lung, Esq. who has decided to move to the West coast to be closer to family. We wish her all the best in her future endeavors and know she will be successful.