Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

13 Columbia Circle
Albany, New York 12203
(518) 464-1300
www.rwgmlaw.com

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.

Summer 2014

NYSHIP: VESTED STATUS

A 53 year old, 30-year employee abruptly resigned from public employment. He asked the employer to provide him with non-contributory "retiree" health insurance as provided for in the applicable collective bargaining agreement ("CBA"). The employer denied his request, arguing, among other things, that he was not "retired" because he had neither submitted his retirement application to the New York State Retirement System, nor was he collecting a pension. The employer deemed the resignation as just that: a separation from service. A grievance ensued and is headed to Arbitration.

In the above scenario, the employer provides, to certain employees, health care benefits through the New York State Health Insurance Plan ("NYSHIP"). Pursuant to Section 3.14 of NYSHIP's Manual for Participating Agencies, the covered employee, here also the now former employee, can continue receiving health care benefits until they are eligible to retire. The caveat is that the employee must pay the full monthly NYSHIP premium to the employer, or maintain NYSHIP coverage as either a dependent or active employee with another participating NYSHIP employer. In the case above, if the now former employee continues uninterrupted coverage until he turns 55, he would be entitled to the non-contributory retiree health insurance under the CBA as a result of NYSHIP's established policy.

Under the NYSHIP policy, an employee terminating employment before retirement age is eligible for continuous coverage as a "vestee" if they (1) are a vested member of a NYS retirement system; (2) fall within the class or category to which the employer provides coverage under the CBA; (3) met the employer's minimum service requirement; and (4) terminated employment within 5 years of the date on which he or she is entitled to receive a retirement allowance if the employer establishes this as a requirement.

The first 3 categories are straightforward. The fourth is somewhat confusing. NYSHIP's interpretation of this category is that an employer can adopt a policy through negotiation or resolution (however, this subject is mandatorily negotiable) that an individual becomes a vestee only if they separate from service between the ages of 50 and 55. Without this category, an individual can actually separate at age 48, pay the full premium or be covered as a dependent or active employee with another NYSHIP participator until age 55 and then request retiree health insurance from the former employer. This interpretation is not supported by a plain reading of Section 3.14; however, this is NYSHIP's interpretation.

The advice here is to be cognizant of not only NYSHIP's "Vested Status" policy, but all other NYSHIP policies when negotiating issues related to health insurance.

SIGN-IN/SIGN-OUT POLICY: IS IT NEGOTIABLE?

A County wants to implement a policy whereby correctional officers working off-site and receiving overtime compensation would be required to complete a daily work log documenting their activity. PERB has addressed a public employer's unilateral implementation of mandatory sign-in/sign-out or work log policies. Despite an employer's right and responsibility to monitor the presence of its employees, these policies are mandatorily negotiable if they call for new or increased employee participation in the creation and maintenance of records. An employer's obligation under the Fair Labor Standards Act ("FLSA") to track the overtime hours worked by employees does not excuse an employer's violation of this duty to bargain. An exception to this rule exists where the newly implemented policy does not materially alter the level of employee participation which is already required of employees under an existing work-rule or practice. An employer may also defend a "failure to bargain" improper practice charge by demonstrating that it did, in fact, negotiate the issue, for example, by pointing to language in the applicable collective bargaining agreement ("CBA") authorizing its action. The language of such a contract clause must specifically address the subject matter at issue to successfully defend the improper practice charge. Determining whether an employer's proposed policy violates this bargaining obligation requires consideration of the existing time-keeping or activity recording practices, as well as the express language of the applicable CBA. The employer must also be mindful of the impact of the rule on

other terms and conditions of employment, which can trigger a bargaining obligation, such as employee discipline or compensation.

Now, let's get a bit more specific:
PERB has consistently confirmed that employers have an absolute right to record and track the presence of staff. However, a public employer may not unilaterally require employee participation in creating these records without negotiating the issue.

The purpose of the procedure the County (in our example) seeks to implement relates specifically to Sheriff's Department corrections officers working overtime off-site. The source of employees' rights to overtime compensation is the FLSA. 29 U.S.C. §§ 207, *et. seq.* Even though the FLSA is applicable to public employers, PERB has rejected argument that the requirements imposed by that act on employers to keep track of employee time may be passed on to the employees by requiring increased participation in the recording of employee time. *Newburgh Enlarged City Sch. Dist.*, 20 PERB ¶ 3053 (1987) ("The recordkeeping requirements of the FLSA do not justify management's unilateral delegation of its responsibilities to the unit members.") While valid management concerns, the requirements of the FLSA regarding compensation for overtime hours worked does not serve to allow employers to circumvent the PERB case law regarding increased employee participation in recordkeeping procedures. *Id.*

An exception to the principle has been established where there is an existing work rule, policy, or requirement that employees maintain records of their times of arrival and departure or work activity. In that case, the manner of the implementation of that policy is within the management prerogative and may be modified unilaterally; *however*, where a new policy or practice is implemented which increases the amount of employee participation required, it must be negotiated.

The language of a clause in a negotiated agreement sufficiently waives the obligation to negotiate an otherwise negotiable issue "only if it specifically authorizes the employer to take action on the precise subject matter in issue."

For example, in *Hampton Bays School District*, PERB found that, although the following management rights clause addressed the implementation of new policies (requiring only that the employee organization be given notice of such new policies), the language was too ambiguous as to its intended purpose to permit a school district to unilaterally impose a "sign-in" procedure:

> "The Association shall receive copies of any new written policies affecting terms and conditions of employment of the persons in the unit adopted by the Board within ten (10) days of such adoption. The Association shall receive copies of such written administrative procedures implementing Board policy within three (3) school days of the date of promulgation."

10 PERB ¶ 4596 (1977). In contrast, PERB addressed a clause in *County of Orange*, which stated "[t]he employer shall have the right to install time clocks in any department." 45 PERB ¶ 4595 (2012). PERB dismissed the improper practice charge brought against the employer after it implemented a new work rule requiring use of time clocks by all its employees on the basis that this provision evidenced satisfaction of the employer's duty to negotiate the issue. *Id.*

As a final consideration, even where an employer's action falls within an exception to the duty to bargain, employers should be cautious that a new method or procedures for tracking employee time or whereabouts does not implicate other terms and conditions of employment, which can independently trigger an employer's obligation to bargain. PERB has noted that a sign-in/sign-out work rule which creates disciplinary implications for the employee may give rise to a bargaining obligation, even independent of the record-keeping issue. Similarly, the Board has noted that a work rule which varies the starting time or length of the work day may constitute change to the terms and conditions of employment which would require negotiation. The rationale? Compensation is expressly made a mandatory subject of bargaining by the terms of the Taylor Law, and PERB has noted that a work rule which effects or changes an employee's overtime opportunities could, therefore, require negotiation.

Decision-Maker: Civil Service Law § 75

Civil Service Law § 75 ("CSL § 75") establishes the framework and law concerning disciplining a public employee for misconduct and/or incompetence. Municipal entities can negotiate to replace CSL § 75 with binding disciplinary arbitration – a process in which the final and binding decision is rendered by a mutually selected arbitrator. However, in those instances where CSL § 75 remains the sole mechanism for discipline, the statute provides that the "appointing authority" will issue the disciplinary charges and specifications. Once the matter proceeds to a Hearing, the Hearing Officer, in accordance with the law, issues a Report and Recommendation on the

matter to the Appointing Authority. In the final step of the case, the Appointing Authority issues a Determination. The Appointing Authority is that individual who has the authority to remove or otherwise discipline a particular employee. However, an Appointing Authority who prefers charges against the employee and testifies at the disciplinary hearing, or is otherwise involved in the initial investigation or the underlying incident(s), must disqualify themselves from reviewing the Hearing Officer's recommendations and from making the final determination. *See e.g. Matter of Martin v. Platt*, 594 N.Y.S.2d 398 (N.Y. App. Div. 1993).

In the event that disqualification of the Appointing Authority is required, or advisable under the circumstances, delegation must be made to a "duly qualified individual authorized to act during the absence or inability of the [disqualified decision-maker] to act and not previously involved in the proceedings or charges." *Id.* Courts consistently hold the disqualified Appointing Authority does not have unfettered discretion in making this appointment. *Matter of Gomez v. Stout*, 13 N.Y.3d 182 (N.Y. 2009); *Matter of McComb v. Reasoner*, 815 N.Y.S.2d 665 (N.Y. App. Div. 2006). Courts look to the provisions of the governing law of the municipality (in most cases, a county or city charter or code) which direct the Appointing Authority to designate a deputy to act for him in situations where he is absent or unable to perform his duties. *Id.* Courts require designation of final decision-making authority be made to this deputy whenever such a provision exists, *unless* that deputy was also personally involved in the matter as described above. *Id.*

Should the Deputy also be disqualified, what should the municipal entity do? Earlier Appellate Division cases upheld delegations to general positions within the municipality to ensure an impractical decision-maker was appointed. *See, e.g. Reasoner*, 815 N.Y.S.2d 655 (upholding delegation to City Mayor where both the Budget Director and Chief Deputy Budget Director required disqualification); *Matter of Reed v. Town of Huntington*, 589 N.Y.S.2d 58 (App. Div. 1992) (upholding delegation to Personnel Officer where Town Supervisor required disqualification); *Matter of Chisolm v. Copeland*, 813 N.Y.S.2d 667 (N.Y. App. Div. 2006) (upholding delegation to the City Clerk where Commissioner of Management Services required disqualification). However, the most recent Court of Appeals decision on this issue held that when a disqualifying conflict exists, § 75(2) requires that delegation be made "within the governmental department's chain of command." *Gomez*, 13 N.Y.3d at 186-187. The Appellate Division relied on *Gomez* in invalidating a delegation by the Commissioner of the employee's department to the Commissioner of another county department because the Commissioner "had no supervisory authority over the petitioner." *Matter of Roosa v. Belfiore*, 895 N.Y.S.2d 131 (App. Div. 2010).

It is crucial that delegation be made to the proper authority, because the Appellate Division has held that improper delegation or disqualification constitutes a fundamental jurisdictional defect. A disciplinary action suffering from such a defect will be voided and the *status quo ante* restored pending a proper hearing. That is, where the outcome of a hearing later ruled defective was termination of the employee, the employee will be reinstated and awarded back pay and benefits (less any compensation they earn elsewhere during that time or unemployment benefits received) from the time of the improper removal until such time as a proper jurisdictional hearing and determination can be rendered.

FMLA Points of Interest

***** Hours Worked: Calculation of the hours of service requirement under the FMLA is determined by the same rules and principles used to determine "hours worked" under the FLSA for payment of overtime compensation. 29 U.S.C. § 2611(2)(C). "Hours worked" under the FLSA does not include time spent on paid or unpaid leave. *Robbins v. Bureau of Nat'l Affairs,* 896 F. Supp. 18, (D.D.C. 1995). The *Robbins* Court held that:

> Under FLSA standards, an employee only gets credit toward FMLA 'hours of service' requirement if the employee actually worked the hours in question. The FLSA clearly states that 'payments made for occasional periods when no work is performed due to vacation, holiday, illness…and other similar causes' are not considered compensation for 'hours of employment.' 29 USC § 207(e)(2). Similarly, payments – 'approximately equivalent to the employee's normal hourly rate' – made for comparable periods are not compensation for 'hours of work.' 29 CFR § 778.218…Applying these standards to the FMLA, paid vacation and sick time are not considered 'hours of service' within the meaning of 29 USC § 2611 (2)(C). If paid leave is not considered 'hours of work,' it follows logically that unpaid leave should not be considered 'hours of work' as well. *Id.* at 21.

NOTE: The conclusion may differ if there is a negotiated CBA provision which states that "sick, vacation, and/or personal leave will be considered as time worked for purposes of overtime calculation."

***** Requests to Extend FMLA: A covered employer *must* grant FMLA leave up to the moment of time statutorily required by the Act (either 12 or 26 weeks, depending on the qualifying circumstances), when such leave is requested by or otherwise granted to an eligible employee for a qualifying circumstance. An employer may only deny an FMLA request if the employer determines that the employee is not eligible, or that the asserted circumstances do not qualify as a basis for FMLA leave.

Once an employee has exhausted their 12 (or 26) weeks of leave for the designated 12 month period under FMLA, the employer is not required by that Act to grant a request for leave in excess of the statutorily allotted period. However, there are several other considerations which must be taken into account when determining whether to grant extension of leave requests. Employees seeking FMLA benefits often qualify for additional protection under other federal statutory schemes, including the American's with Disabilities Act and the Pregnancy Discrimination Act, which may entitle them to additional leave. The FMLA does not supersede any provisions of state or local law which provide greater leave rights, so the employer must also consider whether state law applies which entitles the employee to additional leave, including New York State Human Rights Law. Finally, Section 403 of the FMLA articulates that the Act is not intended to discourage employers from adopting more generous policies, so the employer should consider any internal employer leave policies or the applicable collective bargaining agreement in deciding whether to grant additional leave. Lastly, if the employee's leave is caused by an injury or disability sustained on the job, the employer must comply with the requirements of the New York State Disability and Workers' Compensation Law throughout the leave process.

GML § 72-c-Reimbursement for Police Training

New York's General Municipal Law at § 72-c was quietly amended during the 2011 State Legislature Session. Prior to being amended, if a rookie police officer left his employer soon after undergoing Police Academy training, a municipality who hired the rookie was liable to the prior employer for reimbursement of the cost of training provided that the initial employer had a population of "ten thousand or less." Under the guise of **"mandate relief"** the State Legislature eliminated the population threshold. The impact? Well, in mid-2014, the City of New York actually sent bills to various towns in Rockland, Westchester, and Orange Counties (among others), seeking approximately $50,000.00 (on average from each contacted municipality) in reimbursements.

The ultimate liability may vary, as the state law allows prorating based upon an express formula; further, one or both employers (that is, the initial and subsequent), may have successfully negotiated language into the applicable collective bargaining agreement which requires the employee to bear all or some of the reimbursement costs. (NOTE: this was the same Chapter Law - - L.2011 C.97 - - which repealed GML § 207-m, which provided guaranteed raises to Police Chiefs.)

Training

RWGM offers managerial/supervisory level training, some of which may be covered by your Retainer Agreement with our Firm. Many of you have already taken advantage of this service. For those of you who have not yet done so (or for those employers seeking additional training), we offer the following training:

- Employee Corrective Action (with or without a discussion of the important role of Performance Evaluation)
- Anti-Harassment (focusing on prohibited forms of discrimination, municipal policy, and case law)
- Collective Bargaining and the Labor Management Process (a "how to" session working within the confines of applicable labor agreements)
- Handling Contract Grievances
- Understanding the Family Medical Leave Act (and its application in your workplace)
- Workplace Violence (discussion of your policy and its impact on the workplace)
- The Taylor Law (an overview)