

## 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 2011*

#### **APPELLATE COURT RULES PERSONNEL OFFICER MAY RECOVER PAYMENTS FROM INDIVIDUAL SCHOOL BOARD MEMBERS AND SCHOOL OFFICIALS FOR PAYING SCHOOL DISTRICT EMPLOYEE WHO WAS ILLEGALLY APPOINTED IN VIOLATION OF THE CIVIL SERVICE LAW.**

*Background:* In August 2005 a local School District appointed J.G. to the position of Director of School Facilities, Operations and Transportation on a provisional basis pending a Civil Service examination. J.G. subsequently took and passed the Civil Service examination but the eligible list established on December 9, 2005 ranked him number 23 out of 26 candidates. The School District, however, continued J.G.'s provisional appointment beyond the Civil Service Law § 65 (3) statutory period and disregarded the eligible list. Despite demands by the Personnel Officer that the District terminate the provisional appointment of J.G., the District continued the employment and then created new positions within the District to which it appointed J.G. and also attempted to employ J.G. as a consultant performing the same duties as the provisional position. During the District's maneuvering, which lasted over 18 months, the Personnel Officer demanded that the District discontinue J.G.'s employment and warned them that they would be subject to personal liability under Civil Service Law §§ 100, 101 & 102 for violating the Civil Service Law. The Personnel Officer further warned the District that he would deny payroll certification for J.G. In June of 2007, the District created a new position of Director of School Facilities, Operations and Transportation and again appointed J.G. on a provisional basis. The Personnel Officer again demanded that the District remove J.G. as a provisional as his appointment was a flagrant and continuing violation of the Civil Service Law. The District removed J.G. from the position in August 2007 but subsequently, in December 2007 the District reappointed J.G. to the position on a permanent basis by unfairly disqualifying the other candidates ranked above J.G. for the position.

After appointing J.G. to the position of Director of School Facilities, Operations and Transportations, in December 2007, the District immediately filed an Article 78 petition against the Personnel Officer seeking to compel him to certify the illegal appointment of J.G., accept certification of the payroll relating to J.G. and to prohibit the Personnel Officer from taking legal action against the District for violating the Civil Service Law. The matter subsequently reached the Appellate Division Second Department and in January 2009 the Appellate Division Second Department ruled that the School District acted illegally in appointing J.G. since the Personnel Officer has the statutory authority to determine qualifications for appointment and to determine the eligible list most appropriate for the position to be filled.

*Current Case:* In June 2009, the Personnel Officer filed a complaint against the District seeking to recover the illegal payments made to J.G. in violation of the Civil Service Law. The District's motion to dismiss the complaint was denied and the District appealed to the Appellate Division Second Department. The complaint was filed against the District Board of Education, the former superintendent, the seven individual District board members, as well as three school administrators who were involved in certifying payroll. The District sought to dismiss the complaint on the basis that the Board of Education was not "an officer or officers by whom the person or persons receiving the payments were made" under Civil Service Law § 100. The Court agreed and dismissed the complaint with respect to the School District Board of Education. However, with respect to the individual defendants, the Appellate Division found that they were all officers as defined in Civil Service Law § 102-2 (officers by whom non-party J.G. was appointed in violation of the provisions of law and of rules made in pursuance of law). The Court further found that the superintendent of schools, the interim superintendent who served as the chief executive officer, the business manager, and the assistant business manager were all "officers signing or countersigning or

authorizing the signing or countersigning of any warrant for the payment of salary or compensation distributed to non-party J.G. contrary to the provisions of Civil Service Law § 100” (Civil Service Law § 102[2]). In denying the District’s motion to dismiss the complaint the Court further held that the defendants failed to submit documentary evidence conclusively establishing that the salary and compensation allegedly paid to J.G. was properly certified by the Civil Service Department or municipal commission having jurisdiction, as required by Civil Service Law § 100(1)(a).

The District also sought to dismiss the complaint on the basis that the Personnel Officer did not timely serve a notice of claim pursuant to Education Law § 3813(1). The Court, however, found that “an action commenced pursuant to Civil Service Law § 102(2) is an action to vindicate a public interest to which the notice of claim requirement in Education Law § 3813(1) does not apply”. The Court further found that the one year statute of limitations in Education Law § 3813(2-b) did not apply. The Court stated, “All of the public policy considerations for finding that Education Law § 3813’s notice of claim requirement is inapplicable to this action are equally valid with respect to the statute of limitations set forth in § 3813(2-b)”. The Court further explained, “As this is an action to recover upon a liability, penalty or forfeiture created or imposed by statute, a three year statute of limitations is applicable.” Therefore, the Court determined that the Personnel Officer’s action to recover sums allegedly illegally paid to J.G. would be for those sums paid on or after June 2, 2006. The amount allegedly paid totaled over \$200,000. The Court further found that there was no merit to the District’s argument that the Personnel Officer could not recover funds paid to J.G. on or before April 9, 2007 since the Personnel Officer had “expressly extended J.G.’s provisional appointment until that date”. The Court explained, “Contrary to the defendants’ contention, the plaintiff is not required, nor does he have the authority, to extend or terminate provisional appointments. It is the obligation of the appointing authority to terminate all provisional appointments within two months following the establishment of an appropriate eligible list for filling vacancies. The power of the Civil Service Department and municipal commissioner lies in their ability to withhold certification ‘from an entire payroll or from any item or items therein’” (Civil Service Law § 100[1][a]). The Court further found that the defendants failed to submit documentary evidence conclusively establishing that the payments made to J.G. on or before

April 9, 2007 were properly certified as required by Civil Service Law § 100(1)(a).

The denial of the District’s motion to dismiss allows the Personnel Officer to proceed with the lawsuit to recover the salary and compensation paid to J.G. in violating of the Civil Service Law. Eldridge v. Carmel CSD, et al., 2011 NY Slip Op 02620 (2<sup>nd</sup> Dept. March 29, 2011).

## **FEDERAL REGULATIONS CONCERNING COMMERCIAL DRIVERS AND TESTING FOR CONTROLLED SUBSTANCE USE**

The procedures employers must follow for controlled substance testing for CDL holders operating commercial motor vehicles are contained in Part 382 of Title 49 of the Code of Federal Regulations.

An employer may require a CDL holder to submit to a controlled substances test when the employer has reasonable suspicion that the CDL holder has reported for or remained on duty requiring the performance of safety sensitive functions having used a controlled substance. Such reasonable suspicion must be based on specific, contemporaneous, articulable observations concerning the appearance, behavior, speech or body odors of the CDL holder. The observations may include indications of the chronic and withdrawal effects of controlled substances. The person who forms a reasonable suspicion from such observations must be a supervisor who has been trained on the physical, behavioral, speech and performance indicators of probable use of controlled substances.

The federal regulations also mandate that CDL holders submit to random controlled substance testing as required. Such tests should be unannounced. An employer cannot permit a CDL holder that refuses to submit to such a test to perform safety sensitive functions. A refusal to submit to a random test includes the failure to appear within a reasonable time after being directed to do so by an employer and the failure to cooperate with any part of the testing process.

In relation to controlled substances that are prescription or over-the-counter drugs, CDL holders may perform safety sensitive functions when using such controlled substances pursuant to the instructions of a licensed medical practitioner who has advised that the substance will not adversely affect the ability to safely operate a commercial motor vehicle.