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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.

Summer 2012

OPEN MEETINGS LAW AND EXECUTIVE SESSION

The Appellate Division, 4th Judicial Department, had the recent opportunity to clarify court thinking on motions by a legislative body to move its meeting into Executive Session. In Zehner v. Board of Education of Jordan-Elbridge Central School District, 91 A.D. 3d 1349 (4th Dept. 2012), the Court held that a violation of the Open Meetings Law will occur when the entity fails to

> Identify with particularity the topic to be discussed [in Executive Session]…since only through such identification will the purposes of the Open Meetings Law be realized.

citing to Daily Gazette v. Cobleskill, 111 Misc. 2d 303, 304 (Sup. Ct., Schoharie Co. 1981); Gordon v. Village of Monticello, 207 A.D. 2d 55 (1996). The Court instructs that "it is insufficient to merely regurgitate the statutory language."

Based on this ruling it is recommended that motions for Executive Session be clear as to the subject at hand. Although we would maintain, for example, that the motion need not name the employee who may be the specific subject for Executive Session, the motion could be

> move to Executive Session to discuss an employee's work history and matters which may be the basis for disciplinary action.

When moving to Executive Session to address pending litigation, we suggest that the specific name of the litigation be stated (i.e. "X" vs. "Y") and that "strategies" will be discussed. Finally, when the issue of collective bargaining is to be addressed, the motion for Executive Session could state

> to discuss pending negotiations with the ____ Union as to terms and conditions to be addressed at the bargaining table.

MEDIATION: NEW NEGOTIATION PROPOSALS

In Village of Wappinger Falls, decided in 2007, PERB held that

> the submission of a proposal to interest arbitration that is presented for the first time at Mediation and is not reasonably related to the subject matter of the negotiations and/or the discussions during mediation, may under the totality of the circumstances violate [PERB's Rules of Procedure].

40 PERB 3020 (emphasis added).

In its Town of Ulster ruling (U-31103, decided by the Board on 6/12/12), PERB explains that

> Mediation, an essential component of the impasse procedure…constitutes a continuation of negotiations where parties may continue to exchange proposals and counterproposals [citing, Bd. Of Ed. Of the City Sch. Dist. of NY, 45 PERB 3026 (2012)].

PERB cautions, however, that mediation

> is not…a forum for a party to expand the scope of the impasse to be determined later at interest arbitration or fact finding

(emphasis added). Finally, PERB tells the parties that the determination as to what proposal may have a "reasonable relationship" is based upon all of the circumstances of the bargaining.

DISQUALIFICATION FROM REVIEW AND IMPLEMENTATION OF HEARING OFFICER'S RECOMMENDATION IN SECTION 75 PROCEEDINGS

In a 4-3 decision, the New York Court of Appeals recently considered issues that arose from a disciplinary proceeding under Section 75 of the Civil Service Law. Baker v. Poughkeepsie City School District, 18 N.Y. 3d 714 (2012).

The petitioner in the case was terminated from his employment as business manager of a school district after a hearing was held under Section 75; the Board of Education adopted the hearing officer's finding of guilt on eight charges and recommendation that he be terminated. The petitioner then commenced an Article 78 proceeding to challenge the Board's determination.

The Appellate Division Third Department had sent the matter back to the Board to review the hearing officer's findings and recommendations, holding that two Board members who had testified at the disciplinary hearing and then voted to uphold the petitioner's termination should have recused themselves from voting in the final determination. The Court of Appeals considered what involvement, if any, individuals involved in the disciplinary process should have in reviewing the hearing officer's recommendations and acting upon the charges.

The Court held that testifying in a disciplinary proceeding will not *automatically* require disqualification from involvement in the final action taken; however, where an individual is "personally or extensively involved in the disciplinary process" that individual "should disqualify themselves from reviewing the recommendations of the hearing officer" (citing to Matter of Ernst v. Saratoga County, 234 A.D. 2d 764, 767 (3rd Dept. 1996)). The Court's rationale was quite simple: "a testifying witness [for example] reviewing recommendations and acting upon the charges permits that person to pass upon his or her 'own credibility as a witness'…; [recusal] is only required where the testimony…directly supports or negates the establishment of the charges preferred. Such testimony renders the decision-maker personally involved…and partial."

The Court noted that such disqualification would not be appropriate where the involvement of the individual concerned was necessary, for example where without them there would be insufficient votes for any disciplinary action to be taken.

The dissent in this case raises the potential problems that the majority ruling may create, noting that it enables attorneys to disqualify certain members of governing boards who they expect will vote against their clients by subpoenaing them to testify at a Section 75 hearing. From an employer's point of view, the best practice to avoid potential problems of this nature is to seek to ensure that a successful disciplinary action can be brought with testimony from individuals who will not be involved in the final determination process.

TERMINATIONS UNDER CSL §§ 71 AND/OR 73

You may have believed that as long as an absent employee (whose absence is for a one year period and either a Workers' Compensation injury leave or non-work disability leave) is afforded notice of the municipal intent to separate them from service [see, Cooke v. City of Long Beach, 247 A.D. 2d 538 (2nd Dept. 1998) and Matter of Wickwire, 648 N.Y.S. 2d 263 (S. Ct. Onondaga Co. 1996)] and afforded the opportunity for a hearing prior to the separation that this would be sufficient to comply with Civil Service Law §71 or §73; however, PERB would maintain that such action by the municipality is insufficient to meet its bargaining obligation under the Taylor Law.

In Town of Wallkill, 44 PERB 4529 (3/14/11), ALJ Burritt reminded the parties that "the Board has long held that a public employer's exercise of the discretion granted pursuant to CSL §71 to terminate an employee after a year's absence is a mandatory subject of negotiations (citing, Town of Cortland, 30 PERB 3031 (1997), confirmed by 30 PERB 7012 (S. Ct. Westchester Co. 1997))." This is true, says PERB, because "CSL §71 permits, but does not require termination…" (emphasis added) and that since the NYS Legislature did not indicate any "intent to exempt an employer from a duty to bargain concerning such termination" the duty remains. ALJ Burritt conceded that the Board had not had the opportunity, to date, to directly rule on the negotiability of a termination procedure under CSL §73; however, the ALJ held that

> CSL §73 states that an employee may be, not must be, terminated after one year's continuous absence

(emphasis added). Because CSL §73, like CSL §71, has no Legislative intent (express or implied) to alleviate the

municipal entity from its duty to bargain, the termination "procedure" is negotiable.

Further complicating municipal action under CSL §§ 71 and 73 are a line of court cases stating that certain provisions of the NY State Civil Service rules are applicable to local municipal decisions to invoke the statutory authority of CSL §71 and/or §73. In Cooke v. City of Long Beach, 247 A.D. 2d 538 (2d Dept. 1998), the Appellate Division held that because the City of Long Beach had not provided notice of the impending termination to the employee "at least 30 days prior to [his termination] pursuant to 4 NYCRR §5.9 (c)(2)" the termination was void. The Fourth Department of the Appellate Division also maintained that the State Civil Service rules are applicable to a local government setting. In LaJoie v. County of Niagara, 239 A.D. 2d 908 (4th Dept. 1997) the court noted that since the County did not provide the requisite State articulated notice to the employee the termination is void.

> The [County] failed to notify [the employee], upon the commencement of leave, concerning the duration of such leave and its effect on her employment. In particular, the [County] failed to notify the [employee] that she would be terminated if she failed to return to work within one year. [The County's] failure to give such notice violated 4 NYCRR 5.9(b) and 21.8 (a)(2), as well as the requirements of due process.

Id @ 909. The Court went even further to say that even though the County had its own adopted rules on the matter, they were irrelevant and could not supercede state regulations.

4 NYCRR §5.9 (the relevant NYS Rule) states, in pertinent part:

> § 5.9 Restoration to duty from workers' compensation leave, termination of service upon exhaustion or termination of workers' compensation leave, or reinstatement following termination due to disability arising from occupational injury or disease
>
> (a) Applicability. These rules shall govern procedures for restoration to duty from workers' compensation leave, termination of service upon exhaustion or termination of workers' compensation leave, reinstatement to service, or entitlement to placement upon a preferred eligible list, for all State employees who are subject to section 71 of the Civil Service Law.
>
> (b) Notice upon granting workers' compensation leave. After notice that payment of compensation has begun, and no later than the twenty-first day of absence due to an occupational injury or disease as defined in the Workers' Compensation Law, the appointing authority shall notify the employee in writing of the effective date of beginning of that leave; the right to leave of absence from the position during continued disability for one year unless extended; the right to apply to the appointing authority to return to duty pursuant to subdivision (d) of this section at any time during the leave; the right to a hearing to contest a finding of unfitness for restoration to duty; the termination of employment as a matter of law at the expiration of the workers' compensation leave; and the right thereafter to apply to the Civil Service Department within one year of the end of disability for reinstatement to the position if vacant, to a similar position, or to a preferred list pursuant to section 71 of the Civil Service Law and subdivision (e) of this section.
>
> (c) Termination of service upon exhaustion or termination of workers' compensation leave.
>
> (1) Upon the exhaustion of leave for disability resulting from an occupational injury or disease as defined in the workers' compensation law, or upon termination of such leave upon a finding that the disability is of such a nature as to permanently incapacitate the employee from performance of the duties of the position, the service of the employee shall be terminated as a matter of law.
>
> (2) However, no such termination of service, if not the result of a hearing, shall be effective until 30 days from the service upon the employee, in person or by mail, of a notice of such impending action, which shall notify the employee of the proposed effective date of the termination; the right to apply to the appointing authority pursuant to subdivision (d) of this section for reinstatement to duty if medically fit; the obligation to submit to a medical examination to determine fitness to perform the duties of the position, the right to

a hearing to contest a finding of unfitness for restoration to duty; and the right after termination of employment to apply to the Civil Service Department within one year of the end of disability for reinstatement to the position if vacant, to a similar position, or to a preferred list, pursuant to section 71 of the Civil Service Law and subdivision (e) of this section.

(3) The final notice of termination shall notify the affected employee of the right to apply to the Civil Service Department within one year of the end of disability for reinstatement to employment or a preferred list pursuant to Civil Service Law, section 71 and subdivision (e) of this section.

Despite the regulation's clear statement of applicability "for all State employees…" (emphasis added to §5.9(a)), we advise proceeding with caution. In addition, the cases cited addressed termination pursuant to CSL §71 (leave for workers' compensation cases); the courts, arguably, would apply the same criteria to matters arising under CSL §73.

In closing, unilateral creation by a municipal entity as to what process will be afforded to the post one year absent employee, will be held, when challenged, to be a failure to bargain in good faith. A failure to follow the state rules for separation would likewise void municipal action.

RETALIATION FOR PARTICIPATION IN INTERNAL EMPLOYER INVESTIGATION

A New York federal appeals court recently addressed the question of whether participation in an internal workplace investigation of a sexual harassment complaint prior to any such complaint being filed with the Equal Employment Opportunity Commission (EEOC) constitutes a 'protected activity' under Title VII of the Civil Rights Act of 1964 (Title VII).

In Townsend v. Benjamin Enterprises, 697 F.3d 41 (2d Cir. 2012), the Second Circuit considered a case in which the plaintiff was employed as the Human Resources Director of the defendant corporation, a private sector employer. After receiving a complaint from another employee of sexual harassment by the company's Vice-President, who was also a corporate shareholder and the husband of the President, the plaintiff began to conduct an internal investigation concerning the allegations. Before the investigation could be concluded, she was fired by the company's President.

The plaintiff brought a claim under Title VII alleging that this termination was in retaliation for her participation in the investigation. Her claim was dismissed in federal district court, where the Magistrate Judge concluded that as the investigation was not connected to any formal EEOC charge, it did not qualify as protected activity under Title VII, and the plaintiff was therefore not entitled to protection against retaliation under Title VII.

The Second Circuit examined the language of Title VII and case law from other federal courts and concluded that protected activity in the context of participation in an investigation was limited to an investigation that occurs in conjunction with or after the filing of a charge with the EEOC, and not an internal employer investigation. The Court therefore upheld the district court's dismissal of the plaintiff's Title VII claim.

Although this case took place in the private sector, it nevertheless highlights an important distinction for Title VII purposes between investigations conducted pursuant to the filing of an EEOC charge and other internal investigations, a distinction of which both public sector employers and employees should be aware.

However, it should also be noted that such a distinction may not apply where an employer has an internal anti-discrimination and harassment policy which prohibits retaliation against anyone assisting in an investigation of a complaint filed pursuant to this policy. This issue was not addressed in Townsend, but in such circumstances employees would be protected from retaliation by the policy itself rather than Title VII, unless the policy was drafted in such a way as to incorporate the exact language used in Title VII regarding 'protected activity'. We would advise against such limitation.

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RWGM wishes to send out a warm congratulations to **Emily and Mark Bond** on the birth of their son, **Nicholas Daniel**…a congratulations to **Aurelia and Aaron Mensh** on the purchase of their first home…and a congratulations and best wishes to **Amanda Davis Twinam** on her enrollment in the Masters of Public Health program at the University at Albany.