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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 2017

REALLOCATION OF SALARY GRADES: A NON-MANDATORY SUBJECT OF BARGAINING

Reallocation of salary grades is a non-mandatory subject of bargaining because reallocation is related to the mission of a government, and is inherently tied to the level and quality of a government's service.

Unions have made successful and unsuccessful attempts in pursuing improper practice charges for reallocations of salary grades under § 209-a.1(a) and § 209-a.1(d) of the Civil Service Law (a/k/a – The Taylor Law). Public Employment Relations Board (PERB) decisions have wavered on this issue, but the courts stand firm when asked to intervene and review. Under the Taylor Law, if a particular subject relates to the terms and conditions of employment, it becomes a mandatory subject of bargaining. *Evans v. Newman*, 71 A.D.2d 240 (3d Dept 1979), affd, 49 N.Y.2d 904 (1980). After the enactment of the Taylor Law, salary allocation remained outside the terms and conditions of employment. *Id*. Section 24 of Chapter 158 of the Laws of 1970 provides that the "the legislature finds and declares that allocations and reallocations to salary grades of positions in the classified service of the state are not terms and conditions of employment under Article 14 of the Civil Service Law." *Id*., at 244. The court in *Evans v. Newman* found that "salary grade allocations should not be within the scope of collective negotiations, nor within the purview of factfinders' considerations and is exclusively controlled by Article 8 of the Civil Service Law." *Id*. The court argued that if such subject was mandatory, allocation of manpower would be significantly hampered if negotiation over allocation to salary grades was mandatory. *Id*. "Allocation of positions to salary grade is primarily related to the mission of an employer and not to terms and conditions of employment," and any determination otherwise is in error. *Id*., at 247. The Union appealed the *Evans* decision, but the decision was affirmed and adopted by the Court of Appeals.

Building upon the precedent in *Evans*, PERB re-examined the allocation/reallocation issue in 1982 in *County of Tompkins* where the Board determined that "allocation decisions are part of the mission of government and thus not a mandatory subject of negotiation." 15 PERB ¶ 3092 (1982). The Board noted that allocation and reallocation are essential aspects of the level and quality of service that are to be provided by the employer, and a public employer should not be compelled to negotiate over such decisions because these are not mandatory subjects. *Id*. What seemed to be a settled issue, began to appear unsettled some years later.

An ALJ reached a conclusion opposite to *Evans* in 1990, reaching an unsupported determination as to how reclassifications of salary grades should be viewed, stating that "the Board in *Tompkins* provided no explanation as to the reallocation process and was not dispositive on the issue because the decision only reached a determination on the allocation of a new position." *County of Niagara*, 23 PERB ¶ 4534 (1990). The ALJ seemingly created a new criterion for reallocation, stating that "where the existing position has not been substantially altered, no unilateral action may occur to change the salary grade," because such a change is a change to compensation which stands in violation of the Act. *Id*. The ALJ asserted that only when a position has been substantially altered so as to create a new position, may an employer unilaterally reallocate the job to another salary grade. *Id*.

Another ALJ issued a similar decision in 1996, stating that when the existing position has not been substantially altered, no unilateral action may be taken to reallocate the grade as such would effectively be a change in compensation. *Town of Lancaster*, 29 PERB ¶ 4547 (1996). Later that year, the Board issued another decision on this subject, where the dispositive question became whether the County's reallocation of unit employees to a higher salary grade was mandatorily negotiable. *County of Monroe*, 29 PERB ¶ 3060 (1996). In reaching its decision, the Board drew upon familiar precedent in *Evans* and *Tompkins*. The Board noted that certain aspects of the decision in *Evans* were unique to positions in the unified court system, but nonetheless stated that the Board in *Tompkins* saw *Evans* as "a general statement of the law whose applicability was not restricted to the parties of that case." *Id*. The Board admitted that there was nothing in *Evans* and *Tompkins* that distinguished allocation from reallocation, but still concluded that it was bound by *Evans*, and that reallocations to salary grades are non-mandatory subjects and wage increases are simply by-products of a non-mandatory subject. *Id*.

Unsettled by the decision in *County of Monroe*, the Union appealed the decision to the Appellate Division. The Appellate Division ultimately concluded that PERB's decision to allow the County to reallocate certain employees to a higher salary grade was not a mandatory subject of collective bargaining, was not arbitrary and capricious, and not an abuse of discretion. *Civ. Serv. Employees Ass'n Inc., Local 1000, AFSCME, AFL-CIO v. State of New York Pub. Empl. Relations Bd.*, 248 A.D.2d 882, 884 (3d Dep't 1998). The court noted that "not all matters are subject to mandatory negotiation," and was satisfied with PERB's analysis of *Tompkins* and *Evans* to determine that the reallocation of salary grades is not a term or condition of employment. *Id*. The court further found that such a decision was not motivated by an improper motive on the County's part, and was solely motivated by the County's need to provide competitive salaries for the reallocated positions to correct recruitment and retention problems. *Id*.

Best Practices for Providing References for Former Employees

Employers are often faced with the dilemma of fielding a call from a prospective employer requesting a reference for a former employee with a less than glowing employment history. Former employers have several options in responding to these inquiries – all of which come with their own pros and cons to be considered by the employer when deciding how to address these reference requests.

Employers may be tempted to provide negative references for employees who had performance issues or engaged in misconduct. Depending on the circumstances, employers often feel an obligation to warn prospective employers about criminal behavior which occurred while the individual was employed, or conduct that they believe poses a safety concern.

There have been circumstances where the former employer has been sued for failing to disclose negative information regarding a serious safety concern or liability issue. However, these cases are rather rare. Where an employee separates from service under circumstances which the employer believes would warrant disclosure to prospective employers, we encourage the employer to discuss the issue with labor counsel upon separation (do not wait until you get the reference check call).

On the flip side, employers have faced charges of defamation or retaliation for providing negative references. In order to assert defamation, the former employee would need to prove that the employer provided certain information to prospective employers, and that the information was untrue. Courts have also found that providing a negative reference for an employee who asserted claims of discrimination or harassment against the employer, or exercised their rights under such statutes as the FMLA or ADA, could constitute unlawful retaliation if the employee can demonstrate these actions were intended to interfere with the employee's ability to secure subsequent employment.

In other circumstances, employers may be tempted to provide positive references for former employees, either because such praise is warranted, because the person providing the reference feels bad doing otherwise, or where there may be employment litigation pending or anticipated with respect to the ex-employee (for example, if the employer is facing a wrongful termination claim), and the employer seeks the employee to secure other employment so that their wages will be offset against any potential damages.

Here too, the employer faces some potential pitfalls. If, for example, an employer provides a positive reference for a former employee who resigned in order to avoid imminent disciplinary action for poor performance, the employer may create a discrepancy between the employee's performance reviews or evaluations and the positive review to the prospective employer. Although well-intentioned, this can create an issue if the former employee makes any future claims of discrimination or retaliation against the employer and the Personnel File is subject to inspection.

In light of these potential concerns, employers have chosen to adopt uniform reference policies. Many employers provide prospective employers only with the person's dates of employment, title, and salary. A neutral reference policy helps to avoid the disclosure of potentially problematic information. Establishing a clear and uniform policy is helpful. The employer may wish to designate one (and only one) individual who is authorized to provide references on behalf of the employer (generally the personnel officer or human resources director.) If other individuals are permitted to provide references (for example, department heads), the employer should ensure that these individuals are trained periodically on the employer's policy to ensure clarity and uniformity. Employees should also be made aware of any such policy so they know what to expect in the event they separate from service and are seeking employment elsewhere.