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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 – July 2015

UNION'S REFUSAL TO PROCEED TO INTEREST ARBITRATION

The Public Employment Relations Board (the "PERB") in *City of Yonkers*, 46 PERB § 3027 (2013), expressly left open the question of whether an employee organization's refusal to consent to interest arbitration breaches the duty to negotiate in good faith, which would result in a waiver of the right to arbitrate, or to continue to negotiate over the two years that would have been covered by the interest arbitration award.

In 2014, the City of Ithaca petitioned for interest arbitration to resolve a negotiation impasse between the police bargaining unit and the City; the parties' CBA that expired on December 31, 2011. The police bargaining unit informed the PERB it would not consent to interest arbitration. The interest arbitration would have covered 2012 and 2013. The PERB then notified the parties it would not process the City's interest arbitration petition. The police bargaining unit then demanded to "restart" negotiations for, at least, the two year period that would have been covered by the interest arbitration award. The City, in response, filed an improper practice charge alleging that the police bargaining unit breached the duty to negotiate in good faith by refusing to arbitrate. (PERB Case No. U-34078) In particular, the City alleged that, the police unit waived the right to arbitrate, or negotiate, over the two years that would have been covered by the interest arbitration award. As such, claims the City, the status quo would be imposed for 2012 and 2013. In other words, there would be no pay raises or any other benefit changes. The matter proceeded to hearing and the parties have filed post-hearing briefs.

The City's main arguments supporting the position that the refusal to arbitrate constitutes a waiver are: (1) allowing a party to refuse to arbitrate and require negotiations to "restart" destroys the finality that interest arbitration was enacted to bring to the negotiations process and causes absurd results; (2) by refusing to arbitrate the employee organization chose to "stand on the terms of the prior agreement" which is an irrevocable decision; (3) like legislative imposition, a party's refusal to participate in the legislatively established process results in the status quo being imposed; and (4) allowing a party the right to refuse to arbitrate nullifies the changes to interest arbitration regarding "fiscally eligible municipalities" by allowing the party to delay arbitration until a municipality's financial condition improves.

The parties stipulated to the hearing record, which consisted of the Charge and the police bargaining unit's Answer. The matter is now in the Administrative Law Judge's hands to issue a decision. We will keep you posted as this matter progresses.

EXECUTIVE SESSION: LAWFUL ENTRY

The eight statutory grounds (Public Officers Law § 105) on which a public body may lawfully enter Executive Session are:

- Matters which will imperil the public safety if disclosed;
- Any matter that may disclose the identity of a law enforcement agent or informer;
- Information relating to current or future investigation or prosecution of a criminal offense that would imperil effective law enforcement if disclosed;
- Discussions involving proposed, pending or current litigation;
- Collective negotiations pursuant to the Taylor Law;
- The medical, financial, credit or employment history of a particular person or corporation,

or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation (the "personnel" exception);
- The preparation, grading or administration of exams;
- The proposed acquisition, sale or lease of real property or the proposed acquisition, sale or exchange of securities, but only when publicity would affect the value of those things.

Merely reciting the statutory language of Public Officers Law § 105 in a motion to enter Executive Session is insufficient. The motion must include reference to the subject(s) to be discussed and be sufficiently detailed to enable members of the public to ascertain whether there is a proper basis for entry into Executive Session. An aggrieved party may file an Article 78 proceeding challenging a public body's entrance into Executive Session. A court which finds that the public body has failed to comply with these motion requirements may declare actions taken in the improperly commenced Session void and may award attorney's fees to the challenging party. It is therefore important for the public body to ensure it provides the public with sufficient detail when making a motion to enter Executive Session.

Executive Session may be entered into in order to discuss collective negotiations with employee organizations encompassed under the Taylor Law. The exception (to an open meeting) cannot be applied to discussions of contracts outside the Taylor Law, such as negotiations of administrative contracts for non-union officials. There has not yet been a definitive court decision or advisory opinion determining whether this provision requires that the employee organization and municipality be currently "at the table." In the absence of judicial guidance, the Committee on Open Government advises that if the question arose, Executive Session should properly be held "only to the extent that public discussion would in some way adversely affect the negotiations or the financial interests of the [municipal] taxpayers."

Since the term "negotiations" can include a wide range of subject areas, the motion to enter Executive Session on this ground should make it clear that the negotiations to be discussed involve negotiations pursuant to the Taylor Law. (Ex. "I move to enter into executive session to discuss the collective bargaining negotiations involving the police unions.")

While often referred to as the "the personnel [matters] exception" the word "personnel" does not actually appear in the Law. Some personnel issues may be properly considered in Executive Session, but the wording of this provision is more limited and does not automatically include all personnel matters. There are also matters which have nothing to do with personnel which may be discussed in private under the provision. This provision is intended to protect the personal privacy of *particular* persons or corporations. The Committee on Open Government has advised that it was not intended to shield discussions of personnel matters generally, or in relation to policy considerations or concerns.

For example, the NYS Appellate Division, Third Department held that a Village Board of Trustees was permitted to discuss, in Executive Session, the evaluation of two specific individuals who were then acting as part-time Village Attorneys. See, *Gordon v. Village of Monticello,* 207 A.D.2d 55 (3rd Dept., 1994), *rev'd in part on other grounds,* 87 N.Y.2d 124 (N.Y. 1995.) However, the discussion then shifted to the option of creating the position of full-time Village Attorney and the fiscal impact of doing so, which the Court held went "beyond the permissible bounds" of the basis for the executive session. Similarly, the Second Department held that a Town Board's discussion of the possible termination of post-retirement health insurance benefits while in Executive Session violated this provision. Even though the Town's action would immediately affect only one particular person, the court held it was a policy decision applicable to all individuals who enter into the class of retirees and should not have been discussed to the exclusion of the public. See, *Weatherwax v. Town of Stony Point,* 97 A.D.2d 840 (2nd Dept., 1983.)

The motion to enter into Executive Session under this provision does not have to identify the person by name. For example, "I move to enter into executive session to discuss the employment history of a particular person(s)" would be sufficient motion language. However, stating simply that the discussion pertains to a "personnel matter" or "personnel issues" is insufficient. If the discussion pertains to a vacant position, the motion should include reference to the particular position. If the discussion pertains to a disciplinary action against a particular employee, the motion does not need to include reference to the individual's name or job title.

LEAVE FOR CANCER SCREENING: APPLICABLE TO LESS THAN FULL-TIME EMPLOYEES

NYS Civil Service Law § 159-C provides to public employees the right "for a sufficient period of time, not to exceed four [4] hours on an annual basis, to undertake a screening for prostate cancer." The reference in the law to "employee" states that "every public officer, employee of the state, employee at any county, employee of any community college," etc. … There is no limitation in the law as to the number of hours the employee must work in order to receive the mandated statutory benefit. The law goes on to maintain that "the entire period of leave … shall be excused leave and shall not be charged against any other leave such public officer, employee … is otherwise entitled to." (emphasis added) Whether the "employee" is entitled to leave accruals (that is, part-timers may not be entitled to leave, per se) is not dispositive of whether the leave is to be granted. In other words, the leave for prostate cancer screening is to be afforded to every employee without charge to time --- and without consideration to the employee's status as per diem, part-time, or full-time.

The same would be true for the granting of leave ("sufficient … time, not to exceed four [4] hours on an annual basis") to undertake screening for breast cancer (see, Civil Service Law, § 159-b).

NO WORK, NO PAY

An employee of the New York State Office of Information and Technology was investigated for claiming to have worked approximately 1,100 hours when in fact, he was not at work; he was home selling counterfeit goods! The Office of the State Inspector General, together with the State Attorney General, indicted the employee on various felony counts, including 53 counts of "offering a false instrument for filing" – his time and attendance reports. The filing of these false reports amounted to over $38,000.00 in "theft of state services."

The employee ultimately plead guilty to "4th degree larceny" for his time and attendance theft, resigned from his position with the Office of Information Technology, made restitution to the State for the $38,000.00 and was sentenced to five (5) years' probation.

DENIAL OF FMLA LEAVE REQUEST WHEN REQUESTED CERTIFICATION IS NOT PROVIDED

An employer is statutorily permitted to require that a request for FMLA leave by an employee be supported by a certification issued by the health care provider of the eligible employee and that certification shall be provided in a timely manner. 29 U.S.C. § 2613(a). For foreseeable leave, an employer shall give notice to the employee that certification of the serious health condition is required at the time the leave is requested. 29 C.F.R. § 825.305(b). For unforeseeable leave, the employer shall give notice to the employee that certification of the serious health condition is required within five business days after the leave commences. Id. After adequate notice is provided, the employee must provide the employer the certification within 15 calendar days after the employer's request, unless not practicable despite the employee's diligence and good faith efforts, or the employer provides more than 15 calendar days to return the certification.

Furthermore, where an employee fails to provide certification in a timely manner an employer may deny FMLA coverage until the required certification is provided. 29 C.F.R. § 825.313(a), (b). In *Caskey v. Colgate-Palmolive Co.*, the court upheld the employer's denial of FML where the employee failed to provide the required certification in a timely manner. 438 F.Supp. 954, 964 (S. D. Ind. 2006). The employee was given 15 days to provide certification, then an additional day and still failed to provide the certification; thus, the court held that "If an employer requests a medical certification for absences and the employee never produces the certification, the absences need not be treated as FML." *Caskey*, 438 F. Supp. at 964 (internal citations omitted); *see also Washington v. Fort James Operating Co.*, 110 F.Supp.2d 1325, 1332 (D. Or. 2000) (the court concluded that "an employer may deny FMLA leave where the employee has failed to timely submit the required certification unless timely submission was not reasonably possible under the employee's particular facts and circumstances." Id.) *see also Uema v. Nippon Exp. Hawaii, Inc.*, 26 F. Supp.2d 1241, 1247 (D. Haw. 1998) (holding that "the employee must provide requested certification within the time frame specified by the employer, which time frame must be at least fifteen calendar days, unless it is not practicable … to do so despite the employee's diligent good faith efforts."