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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.

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BODY MODIFICATIONS

Although the implementation of a dress code is generally a mandatory subject of negotiation, in the case of paramilitary personnel such as law enforcement, dress requirements have been found to be nonmandatory. Village of Waverly, 21 PERB ¶ 4560 (1988). Village of Waverly concerned the appearance of police officers in court. The PERB Administrative Law Judge considered the Village's unilateral implementation of a policy provision stating that an officer had to appear in "the regulation uniform unless assigned in civilian dress and then in suitable business attire". It was held that the Village had not violated the Taylor Law. *Id*. at 4649.

In general, the following balancing test is employed to determine whether a unilaterally promulgated work rule violates the Taylor Law –

> If it is faced with an objectively demonstrable need to act in furtherance of its mission, the employer may unilaterally impose work rules which are related to that need, but only to the extent that its action does not significantly or unnecessarily intrude on the protected interests of its employees. Thus, we must weigh the need for the particular action taken against the extent to which that action impacts on the employees' working conditions. County of Montgomery, 18 PERB ¶ 3077 at 3167 (1985).

As stated in City of Buffalo, when PERB has dealt with the issue of dress codes for paramilitary personnel such as police, "management concerns have been determined to be preeminent". Buffalo Police Benevolent Association, Inc. v. City of Buffalo, 23 PERB ¶ 4559, 4635 (1990). PERB cases involving police and dress requirements have primarily concerned issues such as badges, hatbands and nameplates and have focused on the employer's interest in identifying employees as police officers – see County of Suffolk, 39 PERB ¶ 4603 (2006).

Other legitimate management concerns would be:

- *Public Confidence:* New York courts have recognized that a police department has a powerful interest in "the maintenance of a disciplined and efficient police department in which the policeman in uniform maintains a standard of appearance that connotes public confidence, acceptance and respect". Greenwald v. Frank, 70 Misc. 2d 632, 639 (Nassau County Sup. Ct. 1972).[1]

- *Good Relations with the Public:* Having a goal to "eliminate any appearance that may be misconstrued as offensive…when interacting with the public and representing the Department". This has been recognized as a legitimate government interest in the context of a case concerning the right to equal protection and a police department order that personnel cover tattoos that are deemed offensive – *see* Inturri v. City of Hartford, 365 F.Supp.2d 240, 251 (D. Conn., 2005).

- *Safety Issues*: In Malverne v. Malverne Police Benevolent Ass'n, 72 A.D.2d 795 (2d Dept. 1982) the Appellate Division, in a matter involving an officer who was prohibited from wearing a neck chain, granted the village's application for a stay of arbitration upon public policy grounds. The Court reasoned that safety considerations were involved as a neck chain could be used as a weapon against a police officer in circumstances where they meet with physical resistance. The Court also noted that anything that involves the safety of a police officer necessarily also affects the quality of protection afforded to the public. *Id.* at 795-96. A similar argument can be made in relation to body piercings, which may be ripped from a police officer's body in the course of a physical confrontation, thereby potentially having an impact on the officer's safety and, in turn, the protection of the public.

- *Freedom of Speech Considerations:* Another issue raised by a body modification policy is whether it can withstand a potential First Amendment challenge.

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[1] Greenwald concerned an Article 78 proceeding brought by a policeman who alleged that a departmental rule concerning grooming standards for hair was arbitrary and capricious. The Court held that the rule was constitutionally valid and that while in uniform, a policeman does not have a constitutional right to determine his own appearance.

In Kelley v. Johnson, 425 U.S. 238 (1976) the Supreme Court considered a challenge under the First and Fourteenth Amendments to the constitutionality of an Order by the Commissioner of a police department concerning hair grooming standards for police officers. The Court found that regulations of police officers' internal affairs should be given wide latitude and will only be found to be unconstitutional if it can be shown that there is no rational connection between the regulation and a legitimate interest, such as the promotion of safety of persons and property.

In Inturri v. City of Hartford, (cited earlier) at p. 251, five police officers brought an action challenging provisions of their department's regulations giving the Chief of Police authority to order officers to "cover tattoos that are deemed offensive and/or presenting an unprofessional appearance". Pursuant to this regulation, each officer had been ordered to cover tattoos on their arms depicting a spider web, a tattoo which was found to often have racist connotations. The Court found that the Police Chief's actions in this case were rationally related to the department's legitimate interest in "fostering harmonious race relations both within the department and within the community". *Id.* at 251. *See also* Zalewska v. County of Sullivan, 316 F.3d 314, 322 (2d Cir. 2003) – ("safety, professionalism, and a positive public image are legitimate interests for the county to pursue").

The unionized employee may raise a challenge to any body modification order. Said challenge may be on past practice grounds, failure to negotiate and/or impact of the new policy. Consult with your labor relations professional if you are faced with such a challenge.

IMPLEMENTATION OF SMOKING BAN

PERB has long held that a rule limiting smoking to specified areas is mandatory. Steuben-Allegany BOCES, 13 PERB ¶ 3096 (1980). Smoking prohibitions affect terms and conditions of employment. Oneonta City Sch. Dist., 24 PERB ¶ 3025 (1991); Rush-Henrietta Cent. Sch. Dist., 21 PERB ¶4513 (1988), *aff'd*, 21 PERB ¶ 3023, *aff'd in pertinent part*, 151 A.D.2d 1001 (4th Dept. 1989). Moreover, there is no statute or policy preempting the Municipal duty to negotiate a smoking policy affecting *outdoor* Municipal property. In fact, the only statute applicable is Public Health Law §1399-o, also known as the Clean Indoor Air Act of 1990. By its terms, the Act prohibits smoking in any ***indoor*** place of employment, and does not generally discuss *outdoor* places of employment. Therefore, the subject of smoking on all Municipal property is not preempted by any statutory or regulatory scheme. *See* Newark Valley Cent. Sch. Dist., 24 PERB ¶ 3037 (1991), *aff'd*, 83 N.Y.2d 315 (1994).

Attempts have been made by public employers to justify the unilateral implementation of a smoking policy on the basis that such policies are applicable to the public and thus nonmandatory. However, PERB has consistently rejected this justification with regards to smoking policies. *See* Steuben-Allegany BOCES, (holding that smoking restrictions equally applicable to nonunit personnel did not render the restriction nonmandatory); Geneva City Sch. Dist., 27 PERB ¶ 4620 (1994) (opining that the smoking policy was more directed at employees rather than at the public). In County of Niagara, 21 PERB ¶ 3014, 3031 (1988), PERB stated "reliance on fire safety concerns to justify the unilateral imposition of a total ban on smoking in an employer's facility or in particular locations in the facility can only be proper if based on objectively demonstrable need." A public employer must be able to demonstrate that employees are only incidentally affected by the smoking ban. *See* Rush-Henrietta Cent. Sch. Dist., 21 PERB ¶4512. Most smoking bans are directed primarily at employees, especially since it is this group of people that an employer has the ability to control and discipline for violations. *See* County of Niagara, 20 PERB ¶ 4616 (1987). A smoking ban also affects employees' use of their free time while on the job. Id.

REPLACING FULL-TIME POSITION WITH PART-TIME EMPLOYEES

In Town of Woodbury (45 PERB ¶ 4503 (2012)), PERB found that the replacement of a full-time employment position with two part-time positions violated the Taylor Law. In this case, upon a vacancy arising in the position of full-time court clerk, the Town decided that there was not sufficient available work to require a full-time employee. It therefore took the decision to eliminate the full-time position and create two part-time court clerk positions.

The ALJ held that when an employer unilaterally splits full-time positions into part-time positions it must be determined whether the positions are the same or substantially similar. If they are, the employer's action affects wages and hours of work and is a mandatory subject of negotiation.

In this case, the ALJ found that the duties formerly performed by the full-time court clerk were substantially similar to the duties now performed by the two part-time court clerks and that there had been no change in the nature or level of services being provided by the Town. He therefore held that the Town's action had violated the Act and ordered that the Town restore the full-time court clerk position.

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