Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

13 Columbia Circle
Albany, New York 12203
(518) 464-1300
www.rwgmlaw.com

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.

Winter 2013

GML BENEFITS PRORATED

A Town police officer had been on General Municipal Law, Section 207-c ("GML §207-c") status since 1995. In or about 2010 this police officer returned to light duty work as authorized by her treating physicians and following direction of an Arbitrator. The police officer worked three hours per day on Monday, Wednesday and Fridays for a total of 9 hours each week. The remainder of her work schedule was GML §207-c status; that is 31 hours were paid in a separate paycheck, GML tax free and 9 hours were subject to traditional taxation as "hours worked." The Town determined that due to the fact that this police officer only worked a portion of the work week (24% of a total week of work), that she was only entitled to 24% of any negotiated contractual benefit.

Despite the fact that the collective bargaining agreement ("CBA") did not contain any language concerning prorating of benefits for those not working full duty (nor did the CBA address part-time work) the Town prorated the police officer's vacation, sick, personal and holiday leave benefits and further prorated the officer's clothing allowance.

The police officer grieved the matter of the proration of her benefits. The Town maintained that it was a matter of equity and logic that one working 24% of full time should only be entitled to 24% of benefit time; further, it argued that as the CBA defines the "standard workweek" as an "eight (8) hour day/40 hour week", then all negotiated benefits and the granting of same, must be based upon that standard. As such, proration of benefits was appropriate.

In Town of Kent PBA and the Town of Kent (AAA Case No. 15 390 00092 12; Award dated October 18, 2012), Arbitrator Tom Rinaldo, holding for the Town, ruled that the parties' CBA defines the standard work week (see above) and as the "benefits [of sick, vacation, personal and holiday leave] are all predicted on the concept of an eight hour work day" grievant cannot be entitled to 100% of the benefits stated in the CBA as she 'is not working [the CBA's] standard work week but only a fraction …, therefore the Arbitrator finds it entirely consistent with the language [of the CBA] for the Town to have prorated her benefits in the manner that it did." In Arbitrator Rinaldo's words, to do anything else would be to give the grievant a "windfall" and provide her with benefits that [other] officers must work a 'standard work week' to obtain. On the payment of the clothing allowance, Arbitrator Rinaldo found this benefit is not contingent upon working a 'standard work week' and as such the grievant was entitled to her full clothing allowance.

Reasonable Accommodation

In the NYS Division of Human Rights complaint of Elsner v. Town of Colonie (DHR Complaint No. 10143913) we find that a municipality cannot be held liable for failing to provide unending accommodation to one who is continually unable to work all of the hours or aspects of their job provided the municipality works with this individual to attempt to accommodate the disability.

In the herein case, Mr. Elsner worked for the Town of Colonie since 1989 as a Public Safety Dispatcher ("PSD"). In September 2004 after being diagnosed with anxiety, Mr. Elsner's treating physician requested that Mr. Elsner's work be limited to 5 days per week for no more than 8 hours each day. Although all dispatchers are subject to mandatory overtime, recall and/or on-call, the Town preliminarily excused Mr. Elsner from these negotiated job duties. Mr. Elsner's doctor extended the diagnosis and restrictions continually through 2007. Thereafter, Mr. Elsner had undergone surgery for a neck ailment which kept him out of work from January 2008 through November 6, 2008. Mr. Elsner returned to doctor ordered restricted work (4 hr/day) which the Town accommodated through June 22, 2009. At that point the Town, after advise and recommendation from an independent medical evaluation, began Civil Service Law §72 proceedings. Mr. Elsner responded with filing

a complaint with the EEOC, arguing that the Town "was discontinuing his reasonable accommodation and was putting him out of work due to his disability" among other claims. The Town put all further CSL §72 proceedings on hold pending the EEOC complaint outcome. By May 2010 Mr. Elsner's doctor fully released him but with an 8 hour/day work 5 day/week limit; that is, no overtime work. The Town's doctor examined Mr. Elsner and recommended a transition to full and complete work, including the essential function of undertaking mandatory overtime, recall and on-call duties as required of all public safety dispatchers. Mr. Elsner refused this proposed work arrangement. Note that the Town's other dispatchers were forced to undertake extra duty based upon Mr. Elsner's continuing accommodation; morale declined, and the co-workers were disgruntled – so much so that Mr. Elsner's own Union, CSEA, filed a class action grievance on behalf of all other public safety dispatchers claiming that the Town was "creating a forced overtime issue that has to be covered by [Elsner's] co-workers;" the basis of the grievance was undue hardship, imposing on personal (off duty) freedoms, child care and selected issues. Mr. Elsner again responded by a DHR complaint.

The DHR after considering the history of the accommodations provided by the Town found that the "credible evidence does not support [Elsner's] allegations --- no actions attributed to [the Town] were motivated by or determined by discriminatory animus Since working all aspects of the dispatcher job, including mandatory overtime, recall and on-call were essential functions". The DHR further found that "The Town has no obligation under the Human Rights Law to provide a permanent accommodation that would eliminate the essential function, or duty, of being available for overtime, on call, and recall."

Reasonableness, Relevancy and Necessity: Responding to Union's Information Demand

PERB has continually maintained that a public employer has a continuing obligation to: "provide, upon the [Union's] request, information that is necessary for the preparation for collective negotiations and information that is necessary for the administration of a contract, including the investigation of grievances."

In the matter of Dutchess United Educators and Dutchess Community College and County of Dutchess (PERB Case No. U-296112, ALJ Wlasuk, June 29, 2012) PERB notes, however, that some limitation will be placed on what otherwise would appear to be the unfettered requirement to provide to the Union whatever it seeks [See, Management Rights, Winter 2010]. The "three primary limitations [are]: reasonableness, which includes the burden on the responding party; relevancy and necess[ity]." ALJ Wlasuk, in the herein matter, explains that the public employer has the right to seek and obtain some specificity as to the information when an information request appears broad and/or vague. Here, the Union sought, among other things, "information for … the administration of [its] collective bargaining agreement" and went on to request the names of retirees with corresponding health insurance plan. The employer maintained that as the Union does not represent retirees, the provision of such information was neither reasonable, relevant nor necessary for administration of any Union responsibility. The Union never provided to the Employer any information or clarification as to why it sought the retiree data.

The IP Charge was dismissed.

Status Quo and First Time Contract

The Lieutenants and Captains in the Ulster County Sheriff's Office sought to organize as a bargaining unit. In March of 2008 the newly formed Union wrote to the County/Sheriff requesting recognition by the Employer. By resolution of April 9, 2008 the Employer granted voluntary recognition. On or about September 10, 2008 the Ulster County Legislature passed a Resolution that provided to unrepresented non-unionized County employees, wage and benefit increases retroactive to January 1, 2008. The Resolution covered both the 2008 and 2009 fiscal years and provided 3.5% wage adjustments and same longevity modifications.

Although all Legislative resolutions are timely posted on the County's web page and reported in one or more of the local newspapers, the Union alleged that it first learned of this 'wage' resolution in March of 2010. The Union then wrote to the County stating its position that it would concur that there is no entitlement to any 2009 wage/longevity modification; however: "On January 1, 2008 we were still non-Union managers covered by the [County] Personnel Policy Manual", and entitled to the 2008 wage and benefit changes.

The County's Personnel Department was clear that it did not agree: "Given the fact that at the time of the

[September 2008] Resolution you were part of a collective bargaining unit charged with responsibility to negotiate on behalf of [your] members for 2008 and thereafter, you were not eligible for … nor entitled to" any of the modifications made by the September 2008 Resolution of the County Legislature.

PERB Administrative Law Judge Wlasuk agreed with the County's position. She found that there was no established compensation system which automatically goes into effect each fiscal year. (*See*, Village of Belmont, 34 PERB 3008 (2001)). Here we have a Resolution of the Legislature covering set and specific years, enacted after the Union was recognized (upon its request) as a separate and distinct bargaining unit. The County was therefore required to maintain "status quo" until negotiations resolved the 2008 compensation for this new unit. "Generally, an employer's obligation to maintain the status quo begins on the date it is presented with a bona fide representation question and continues to the date a wage and benefit package is fixed by collective negotiations with the newly recognized or certified employee organization. [Citations omitted.] Any changes in the status quo during this time violate the Act, even without a specific finding of animus, because such conduct interferes with fundamental statutory rights to representation afforded to public employees under the Act. [Citations omitted.] This is because "[s]uch changes in employment conditions inherently chill employees in their protected right to seek representation through an employee organization of their own choosing, influence the employees' choice of bargaining agent, and distort any collective negotiations resulting from the certification of a bargaining agent. [Citation omitted.]" County of Ulster and Ulster County Sheriff, PERB Case No. U-29865 (dated September 27, 2012). The ALJ found no violation and dismissed the Charge. The Union has filed exceptions.

Job Description: Qualification Specificity

A civil service job description generally will contain an overview of the job, examples of duties, knowledge and experience and minimum qualifications for employment. It is the position of the NYS Court of Appeals that "both due process and fundamental fairness require that a qualification or requirement of employment be expressly stated [in the civil service job description] in order for an employer to bypass the protections afforded by the Civil Service Law or a collective bargaining agreement and summarily terminate an employee." In the Matter of Brian Lutz v. Krokoff and the City of Albany (Case No. 514607, decided November 21, 2012) the Court was presented with the situation where Police Officer Lutz was arrested and plead guilty to a DWI offense; he lost his driver's license. Police Chief Krokoff notified Officer Lutz that possession of a valid driver's license was a minimum police officer qualification for employment with the Albany Police Department. Officer Lutz admitted to the Chief that he had his license suspended pending prosecution and revoked due to this failure to undergo a chemical test at the scene of his DWI arrest. Chief Krokoff, invoking the NYS Public Officers Law, terminated Officer Lutz for failing to maintain a minimum employment qualification. The issue of concern to the Court, however, was that the City of Albany's Police Officer job description does not list, as a minimum qualification for employment, the need to possess a valid driver's license. The Court acknowledged that the City's job description category of "Full Performance Knowledge, Skills, etc. …" requires the "ability to operate an automobile." That was, however, insufficient to the Court for it to infer the need for a valid license. The Court rationalized that this "could simply be a skill desirable for the position, rather than a necessary prerequisite to employment." The Court held Officer Lutz's termination with a hearing to be "both arbitrary and capricious and contrary to law" in that any minimum qualification should, in the Court's opinion, be "clearly and expressly set forth" in the civil service job description.

It is, based upon this decision, advisable for you to review each job description to insure specificity as to any and all minimum qualifications of employment.

RWGM WELCOME: We want to Welcome Anna Remet, Esq. to our Labor Relations Team.