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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.

Winter – February 2015

POLICE DISCIPLINE: NEGOTIABLE OR NOT?

As our readers will recall, the NYS Court of Appeals has ruled that where there is a state law, such as the NYS Town Law (§ 155), or Village Law (§ 8-804), or there is some pre-Civil Service Law §75 enacted City or County code concerning police discipline, then and under those circumstances, discipline of police officers is a prohibited subject of negotiations (see Town of Wallkill v. Town of Wallkill CSEA, Inc., 19 N.Y.3d 1066 (2012)).

It came as no surprise that in the 2014 Legislative session, the NYS Legislature passed Bill No. S7801; the purpose of the legislation was to annul the Court's ruling, thereby ensuring that police discipline would be statutorily subject to collective bargaining - - that is, a municipality would have no power to adhere to the State, Village, Town or other special law concerning police discipline.

We can report that on January 30, 2015, the Governor "pocket vetoed" the legislation. The Wallkill ruling remains the "law of the land."

FOOD ALLERGIES AND REASONABLE ACCOMMODATIONS

An employee approaches his immediate supervisor "requesting" that the supervisor put forth a memorandum to all of the staff "informing them that a co-worker has a severe shellfish allergy and that henceforth no one is permitted to bring in and/or eat in the workplace any shellfish." Should or must this "request" be accommodated?

By way of background, a food allergy could constitute a "disability" under the federal Americans with Disabilities Act ("ADA"), which would entitle the employee to a reasonable accommodation (if one is available that would not impose an undue hardship on the employer.) To qualify as disabled, the person's condition or impairment "must substantially limit one or more major life activities" – and eating and breathing, for example, are specifically listed as life activities; these are the life activities most commonly cited in association with a food allergy. The ADA definition only requires that the condition substantially affect a major life activity when active, even if it is normally under control, controlled by medication, and/or is only episodic.

When an employee requests an accommodation for a disability that is not obvious, the employer can request medical documentation to support the claim that the food allergy rises to the level of a disability, and clarify the functional limitations it imposes. This might be advisable under the facts of this case because it will help determine not only whether the allergy qualifies, but also provide more clarity about the severity of the allergy, which can assist in determining the appropriate accommodation. For example, some, but not all allergies are so severe that the person would be in danger

of having a reaction if the allergy-causing food is even in their vicinity, rather than actually ingested. There *may* be a more reasonable accommodation available for an allergy that is less severe than a full building ban on shellfish (perhaps limiting those foods to certain areas, banning them only on certain floors or in certain offices, moving the employee's work space to an area farther from food storage areas, etc.). It may be helpful to ask the employee for suggestions regarding the accommodation to be provided, but the employer is not required to provide the specific accommodation the employee requests. The employer has to engage in an "interactive process" with the employee to arrive at an accommodation that is reasonable and effective and will not impose an undue hardship.

If the employee does have a disability, requests an accommodation, and the employer does nothing, the employer will be in violation of the ADA. The employer can ask for medical documentation to confirm, but once the disability has been confirmed, the employer has to engage in the interactive process to arrive at a reasonable accommodation. They cannot ignore a reasonable accommodation request.

If it is determined that some action needs to be taken in the form of a memo or some other notice to employees, it is common for employers to also include a plan or instructions to follow if a co-worker does experience a reaction at work.
The following is a link to an informal EEOC guidance on chemical sensitivities which, while not precisely on point, summarizes the employer's role in these situations fairly well and might be helpful. Go to http://www.eeoc.gov/eeoc/foia/letters/2007/ada_chemical_sensitivity_oct_1_2007.html

INTERNS ARE "VOLUNTEERS"

There is a standard for public employers (different from their private sector counterparts) for determining whether an intern's services are being provided in a volunteer capacity and not as an employee. The federal Fair Labor Standards Act ("FLSA") has carved out a separate, more generous exception for the public sector. Under the FLSA, a person is a volunteer and not an employee (subject to minimum wage and overtime requirements) if (1) they volunteer to perform services for a public agency (which includes municipal employers); (2) they do not receive compensation for those services (or receive only reasonable expenses or a nominal fee); and (3) the services are not the same type of services as the individual is otherwise employed to perform for the agency. 29 USC 203(e)(4)(A). The FLSA regulations clarify that a person will be considered a volunteer "who performs services for the public agency for civil, charitable or humanitarian reasons" without the promise or expectation of compensation for the services rendered. 29 CFR 553.101. The services must be offered freely without pressure or coercion. Id. If the employee is otherwise employed by the public agency, they are not permitted to "volunteer" to perform services of the same type as those they are employed to perform. Id. This caveat is intended to avoid a situation where an employer could treat some of an employee's hours as "volunteer" work to circumvent compliance with the overtime/minimum wage requirements.

WHO SHOULD SUPERVISE THE INMATES?

The San Francisco Sheriffs Department ("SFSD") instituted a policy that

prohibited male deputies from supervising female inmates who were housed in the County Jail. The SFSD maintained that such a policy would serve to "prevent sexual misconduct between male deputies and female inmates, [and] protect the privacy of female inmates …" Not happy with the policy, a group of both male and female deputies challenged it in federal court alleging violation of Title VII – sex gender discrimination. The "harm" to the excluded deputies was an arguable loss of preferred shift selection and regular days off earned by seniority, as well as a potential loss of overtime compensation. In response, the SFSD stated that the policy was a "bona fide occupational qualification reasonably necessary to the normal operation" of the [SFSD]. Although a lower court dismissed the lawsuit, upon appeal the Federal 9th Circuit Court of Appeals sent the matter back to the trial court for the gathering of additional support. It was the 9th Circuit's belief that although the policy could be claimed to be "reasonably necessary," the SFSD failed to establish that excluding all male deputies was a "legitimate proxy" for excluding only those deputies that posed a threat of committing sexual misconduct. The Court was also concerned that the SFSD had not shown "that non-discriminatory, alternative approaches had been genuinely considered and determined not to have been viable." Anderson v. City and County of San Francisco 757 F.3d 1017 (9th Cir., 2014).

Moral: Even where a reasonable "bona fide" exception exists to support gender-based employment decisions, some courts will want solid, unequivocal proof to support a deviation from established discriminatory protections.

CIVIL SERVICE LAW §75: CONSIDERATION AND ADOPTION OF HEARING OFFICER RECOMMENDATION

In a Civil Service Law §75 ("CSL §75") proceeding, charges are heard before a Hearing Officer selected and appointed by the Employer/Appointing Authority. That Hearing Officer, after a full hearing on the charges, will, in accordance with the law, issue findings of fact and a Recommendation as to penalty. The Appointing Authority is free to accept or reject those recommendations. However, if the Appointing Authority is intimately involved with the preparation of the charges and/or with the hearing itself, the Appointing Authority must recuse itself (him/her) from the decision-making process. In Birch v. County of Madison, et al., the Appellate Division had the opportunity to revisit this concept. 123 A.D.3d 1324 (3d Dept 2014). The Court reconfirmed that "individuals who are personally or extensively involved in the disciplinary process should disqualify themselves…" Matter of Baker v. Poughkeepsie City School District, 18 N.Y.3d 714, 717-18 (2012). Instances when disqualification is not automatic include the "hiring of an investigator and being aware of the result of that investigation before bringing charges…" Birch at 1326-1327; general characterization of the [Appointing Authority's] concern about the employee's continued employment pending case outcome. Id. at 1327; involvement of an attorney to give counsel to the Appointing Authority throughout the entire process. Id. In all of these instances, the Court gives the Appointing Authority a "presumption of integrity." Id., citing Matter of Donlon v. Mills, 260 A.D.2d, 971, 974 (3d Dept. 1999)(See also, Management Rights, Summer 2014).

WELCOME

RWGM would like to welcome Matt Ryan, Esq. to our Labor Relations Team. Matt

has been working in the labor relations-public sector field for 13 years and will be a welcome addition to our team!