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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.

Spring 2013

TIER V: COURT OF APPEALS RULES ON IMPACT TO POLICE OFFICERS AND FIREFIGHTERS

In Matter of City of Yonkers v. Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO, 2013 N.Y. Slip. Op. 02162 (2013) and Matter of City of Oswego v. Oswego City Firefighters Assn., Local 2707, 2013 N.Y. Slip. Op. 02163 (2013), the Court of Appeals determined that municipalities are not required under certain conditions to cover a newly hired [police officer or] firefighter's Tier V retirement system contribution even where an expired collective bargaining agreement ("CBA") states otherwise.

In 2009, in response to the fiscal crisis, the State of New York legislatively, and with the Governor's approval, enacted legislation which mandated a change to employee contributions toward their pensions. Prior to enactment of this landmark law, police officers and firefighters, being automatically enrolled in Tier 1 or 2 (regardless of date of hire), were afforded the negotiated opportunity to have the employer contribute toward the cost of the employee's pension. Many municipalities and their public safety uniformed unions negotiated CBA language stating that the employee would be enrolled in a "noncontributory" pension plan; that is, the employer would pay the employee's share. By enactment of the Tier V (and ultimately the Tier VI) law, this practice of noncontributory plan enrollment can cease; in creating Tier V, effective January 2010, the State Legislature required new Retirement System police officers and firefighters to contribute 3% of their salaries towards their pensions. In the cities of Yonkers and Oswego, the CBAs required that each respective municipality cover the employee's contribution in full. Citing the new law and the fact that the CBA at issue had expired, the cities refused to cover pension contribution costs for new employees, enrolled in Tier V. The Unions grieved the decision citing the "Triborough Doctrine" (that all aspects of an expired CBA continue in force until a successor is negotiated) for the proposition that the CBA was still "in effect", rendering the municipalities liable to cover the pension contribution costs.

Even though Oswego and Yonkers took different paths through their respective proceedings, the Court of Appeals' result was the same: the CBA, in each matter, was found not "in effect" for Tier V purposes. Thus, the Unions' demand that the municipalities cover the 3% contribution amounted to an impermissible attempt at negotiating and granting retirement benefits not expressly provided under State Law, which (the Court held) violates Civil Service Law § 201(4) and Retirement and Social Security Law § 470. In the Court's opinion, a "non-contributory plan does not outlast the expiration of the agreement." City of Yonkers, supra. The result of these decisions is that municipalities cannot cover the Tier V (or Tier VI) contributions of firefighters and police officers hired after January 9, 2010.

It is imperative that you carefully review a police officer/firefighter's date of hire and the date the CBA was executed before any final determination is made concerning pension cost contributions. Further, we advise writing to the NYS Retirement System to obtain a written confirmation as to whether a specific police officer or firefighter is impacted by the Court's ruling (with which the State Comptroller concurs).

FMLA UPDATE

In our Winter 2009 issue of **Management Rights**, we wrote about the 2008 federal Family and Medical Leave Act (FMLA) amendments, which were effective as of January 1, 2009. Of particular significance in those amendments was the addition of entitlements for "Covered Servicemember Leave," and "Qualifying Exigency Leave," for military families. Following the 2009 amendments and subsequent rulemaking processes, on February 6, 2013, the U.S. Department of Labor Wage and Hour Division ("WHD") issued final regulations, effective March 8, 2013 ("2013 Regulations"). These regulations include updates to some of the 2008 regulations affecting military families. We summarize and highlight only some of the more relevant and pertinent changes. We refer you to the WHD's Side-by-Side comparison document, which provides a chart comparing the 2008 and 2013 regulations. This document is available at: www.dol.gov/fmla/2013rule/comparison.htm. (We also suggest you visit the WHD page on FMLA for other

relevant guidance documents and fact sheets. This site is available at: www.dol.gov/whd/fmla/index.htm.)

Qualifying Exigency Leave:

The 2013 Regulations provide revised definitions for the terms "military member" and "active duty." The definition of "military member" (previously defined as a "covered military member") now includes members of the National Guard and Reserves, as well as the Regular Armed Forces. (29 C.F.R. § 825.126(a)(2).) Further "covered active duty" (previously defined as "active duty") requires deployment to a foreign country. (29 C.F.R § 825.126(a)(1).) Additionally, the "Rest and Recuperation" period under Qualifying Exigency Leave has now been expanded from five (5) to fifteen (15) days. (29 C.F.R. § 825.126(b)(6)(ii).)

The 2013 Regulations have added an additional reason for Qualifying Exigency Leave. This category is for "parental care leave," and allows eligible employees to take leave to care for a military member's parent who is incapable of self-care when care is necessitated by the military member's covered active duty. This category covers an employee's request for leave to include activities such as arranging for alternative care, providing care on an immediate need basis, attending to admissions or transfers at care facilities, and meeting with facility staff about the military member's parent. (29 C.F.R. § 825.126(b)(8).)

Military Caregiver Leave:

The 2013 Regulations have expanded the definition of a "covered servicemember" to include "covered veterans who are undergoing medical treatment, recuperation, or therapy for a serious injury or illness." A "covered veteran" is defined as "an individual who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran." (29 C.F.R. § 825.127(b)(2).) Note that the time period from October 28, 2009 to March 8, 2013 is excluded from this amendment.

Additionally, the 2013 regulations have expanded the definition of "serious injury or illness" (which is defined differently than a "serious health condition" under FMLA) for a covered servicemember. This definition now includes an injury or illness incurred in the line of duty while on active duty in the Armed Forces, *and* an injury or illness aggravated in the line of duty. (29 C.F.R. § 825.127(c)(1).) The 2013 Regulations also provide categories of serious injury or illness for "covered veterans." (29 C.F.R. § 825.127(c)(2)).

Other Modifications:

Included among the other revisions contained in the 2013 Regulations is the clarification that absence due to or necessitated by the Federal USERRA-covered military service (for all military members) *must* be counted in determining an employee's eligibility for FMLA. (29 C.F.R. § 825.110(b)(2)(i).) Also clarified are minimum increments of leave - an employer must track FMLA leave using the smallest increment of time used for other leave (to a maximum of one hour). However, time may be tracked in shorter increments than other types of leave. Further, an employer may not require an employee to take more leave than necessary. (29 C.F.R. § 825.205(a).)

In conjunction with the new regulations, covered employers are required to display a new poster. This poster was required as of March 8, 2013. Therefore, if you do not have the document displayed, do so immediately; we have attached a copy to this issue of **Management Rights**.

WORLD TRADE CENTER INJURY/ILLNESS

The NYS Retirement and Social Security Law ("RSSL") states, in pertinent part, that:

> If any condition or impairment of health is caused by a qualifying World Trade Center condition…it shall be presumptive evidence that it was incurred in the performance and discharge of duty and the natural and proximate result of an accident…unless the contrary be proved by competent evidence.

(Section 363(g)1.(a), as amended). The statute goes on to likewise create a rebuttable presumption of duty injury or illness for those involved with "World Trade Center rescue, recovery or cleanup operations;" retroactive disability retirement benefits may be awarded (§ 363(g)2.(a), as amended).

Port Authority Police Officer Tom Cardno was working his assignment at JFK Airport when, on September 11, 2001, he (with several coworkers) was dispatched to the World Trade Center ("WTC") to assist in the search for survivors. He stayed at the WTC for approximately 12 hours and subsequently returned to his work at JFK. He thereafter worked normal shifts, with extended hours, for almost two years. In 2003, Cardno's treating physician diagnosed Cardno with chronic inflammatory bowel disease; note that in 1998 this same treating physician had diagnosed Cardno with ulcerative colitis.

After missing work on many days and having to be placed on administrative leave, Cardno applied for accidental disability retirement, performance of duty disability retirement, ordinary disability retirement and

WTC accidental disability retirement (the latter in accordance with RSSL § 363(g)1.(a)).

The NYS Retirement System granted only the ordinary disability retirement. After a formally requested and held hearing, the Retirement System Hearing Officer found that although the WTC disability provisions apply to Cardno, the Retirement System rebutted the presumption and [that Cardno] "failed to demonstrate" a "causal connection" between his disability and his work at the WTC site. The Comptroller concurred and Cardno filed an Article 78 Petition (Cardno v. NYS and Local Retirement System, 2013 N.Y. Slip Op. 02437 (3d Dept. 2013)). The Court upholds the Comptroller's determination.

The presumption found in the WTC Disability Retirement statute is a rebuttal one; in other words, the NYS Retirement System bears the burden of proving that despite the claim, there is credible and competent evidence (medical or otherwise) to rebut the statutory presumption (see RSSL § 363 (g)1.(a)).

Cardno claimed that the stress of his 12 hour tour of duty at the WTC on September 11th, combined with the stress of working extended shifts at JFK thereafter, caused his condition; Cardno further claimed that "the stress of performing extended security patrols at JFK following the terrorist attacks [of 9/11] was comparable to the stress experienced by workers performing 'rescue, recovery or cleanup operations'." Cardno, supra.

The Court found these claims "flawed" in that "JFK does not fall within the geographic area comprising the World Trade Center site" as defined by the State law at RSSL §§2.36(e) and (f), which provide very specific geographic parameters for a claim. (Id.) The Court further found that Cardno has a preexisting, progressive condition (dating back to 1998) and that Cardno's own medical expert/treating physician could not conclusively relate the stress associated with 9/11 to the ultimate disability. (Id.)

The NY State Court of Appeals recently heard its first WTC related disability retirement cases. In two of the three matters the Court found that the police officers were entitled to the benefits sought based upon the competent medical causal relationship established together with the failure by the NY City Police Pension Fund (akin to the NYS Retirement System) to meet its burden of rebutting the statutory presumption (Bitchatchi v. Board of Trustees of the NYC Police Department Pension Fund; Maldonado v. Kelly; Macri v. Kelly, collectively 20 N.Y.3d 268 (2012)).

FOLLOW UP

In the "Winter 2012" Newsletter there appeared an Article entitled "Status Quo and First Time Contract." The case discussed was County of Ulster and Ulster County Sheriff, (45 PERB 4601.) On December 19, 2012 the PERB Board upheld the ALJ's decision noting that:

> It is well settled than an employer violates §§209-a.1(a) and (c)…when it fails to maintain the ***status quo*** after it is presented with a ***bona fide*** question of representation. This obligation [to maintain the ***status quo***] continues until a negotiated agreement… is reached with the newly recognized or [PERB] certified [Union]….

The exceptions filed by the Union were denied and the County's actions upheld (45 PERB 3054.)

THE APPELLATE DIVISION, THIRD DEPARTMENT REAFFIRMS THE WEIGHT OF A SHERIFF'S JUDGMENT IN DISCIPLINE MATTERS.

"Great leeway" is accorded to a law enforcement agency's penalty determination and such a determination will not be overturned unless the "penalty is so disproportionate [to the offense] as to be shocking to one's sense of fairness." Matter of Pell v. Bd. of Educ. of Union Free School Distr. No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester Co. 34 N.Y.2d 222, 235 (1974). In Matter of Knox v. Van Blarcum, 2013 N.Y. Slip. Op. 02447 (3d Dept. 2013), the Appellate Division, Third Department reaffirmed this principle in holding that the conduct of a law enforcement official, here a Correction Officer, is to be held to a higher standard when evaluating the appropriate disciplinary penalty to be imposed for acts of misconduct.

In this case from the Ulster County Sheriff's Office, the Civil Service Law ("CSL") §75 Hearing Officer recommended a three (3) week suspension as the disciplinary penalty for a Correction Officer found guilty of assaulting a handcuffed inmate he was supervising at the time. Sheriff Van Blarcum, however, determined that termination was the appropriate penalty. On appeal to the court, the Correction Officer challenged the penalty only.

On review, the Appellate Division held that "[e]ven if there is mitigating evidence that could support a different result – such as petitioner's otherwise unblemished record of service during his 10 years as a correction officer – we may not substitute our judgment for that of the Sheriff." Knox, supra. In reviewing the Sheriff's judgment, the Court recognized that his termination decision did not shock one's sense of fairness given the employee's position as a Correction Officer and member of the Emergency Response Team, that injury was caused to the handcuffed inmate and the Correction Officer's failure to take responsibility for his actions.

EMPLOYEE RIGHTS AND RESPONSIBILITIES UNDER THE FAMILY AND MEDICAL LEAVE ACT

Basic Leave Entitlement

FMLA requires covered employers to provide up to 12 weeks of unpaid, job-protected leave to eligible employees for the following reasons:

- for incapacity due to pregnancy, prenatal medical care or child birth;
- to care for the employee's child after birth, or placement for adoption or foster care;
- to care for the employee's spouse, son, daughter or parent, who has a serious health condition; or
- for a serious health condition that makes the employee unable to perform the employee's job.

Military Family Leave Entitlements

Eligible employees whose spouse, son, daughter or parent is on covered active duty or call to covered active duty status may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

FMLA also includes a special leave entitlement that permits eligible employees to take up to 26 weeks of leave to care for a covered service-member during a single 12-month period. A covered servicemember is: (1) a current member of the Armed Forces, including a member of the National Guard or Reserves, who is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness*; or (2) a veteran who was discharged or released under conditions other than dishonorable at any time during the five-year period prior to the first date the eligible employee takes FMLA leave to care for the covered veteran, and who is undergoing medical treatment, recuperation, or therapy for a serious injury or illness.*

***The FMLA definitions of "serious injury or illness" for current servicemembers and veterans are distinct from the FMLA definition of "serious health condition".**

Benefits and Protections

During FMLA leave, the employer must maintain the employee's health coverage under any "group health plan" on the same terms as if the employee had continued to work. Upon return from FMLA leave, most employees must be restored to their original or equivalent positions with equivalent pay, benefits, and other employment terms.

Use of FMLA leave cannot result in the loss of any employment benefit that accrued prior to the start of an employee's leave.

Eligibility Requirements

Employees are eligible if they have worked for a covered employer for at least 12 months, have 1,250 hours of service in the previous 12 months*, and if at least 50 employees are employed by the employer within 75 miles.

***Special hours of service eligibility requirements apply to airline flight crew employees.**

Definition of Serious Health Condition

A serious health condition is an illness, injury, impairment, or physical or mental condition that involves either an overnight stay in a medical care facility, or continuing treatment by a health care provider for a condition that either prevents the employee from performing the functions of the employee's job, or prevents the qualified family member from participating in school or other daily activities.

Subject to certain conditions, the continuing treatment requirement may be met by a period of incapacity of more than 3 consecutive calendar days combined with at least two visits to a health care provider or one visit and a regimen of continuing treatment, or incapacity due to pregnancy, or incapacity due to a chronic condition. Other conditions may meet the definition of continuing treatment.

Use of Leave

An employee does not need to use this leave entitlement in one block. Leave can be taken intermittently or on a reduced leave schedule when medically necessary. Employees must make reasonable efforts to schedule leave for planned medical treatment so as not to unduly disrupt the employer's operations. Leave due to qualifying exigencies may also be taken on an intermittent basis.

Substitution of Paid Leave for Unpaid Leave

Employees may choose or employers may require use of accrued paid leave while taking FMLA leave. In order to use paid leave for FMLA leave, employees must comply with the employer's normal paid leave policies.

Employee Responsibilities

Employees must provide 30 days advance notice of the need to take FMLA leave when the need is foreseeable. When 30 days notice is not possible, the employee must provide notice as soon as practicable and generally must comply with an employer's normal call-in procedures.

Employees must provide sufficient information for the employer to determine if the leave may qualify for FMLA protection and the anticipated timing and duration of the leave. Sufficient information may include that the employee is unable to perform job functions, the family member is unable to perform daily activities, the need for hospitalization or continuing treatment by a health care provider, or circumstances supporting the need for military family leave. Employees also must inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified. Employees also may be required to provide a certification and periodic recertification supporting the need for leave.

Employer Responsibilities

Covered employers must inform employees requesting leave whether they are eligible under FMLA. If they are, the notice must specify any additional information required as well as the employees' rights and responsibilities. If they are not eligible, the employer must provide a reason for the ineligibility.

Covered employers must inform employees if leave will be designated as FMLA-protected and the amount of leave counted against the employee's leave entitlement. If the employer determines that the leave is not FMLA-protected, the employer must notify the employee.

Unlawful Acts by Employers

FMLA makes it unlawful for any employer to:

- interfere with, restrain, or deny the exercise of any right provided under FMLA; and
- discharge or discriminate against any person for opposing any practice made unlawful by FMLA or for involvement in any proceeding under or relating to FMLA.

Enforcement

An employee may file a complaint with the U.S. Department of Labor or may bring a private lawsuit against an employer.

FMLA does not affect any Federal or State law prohibiting discrimination, or supersede any State or local law or collective bargaining agreement which provides greater family or medical leave rights.

FMLA section 109 (29 U.S.C. § 2619) requires FMLA covered employers to post the text of this notice. Regulation 29 C.F.R. § 825.300(a) may require additional disclosures.

For additional information:
1-866-4US-WAGE (1-866-487-9243) TTY: 1-877-889-5627
WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Wage and Hour Division

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