Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

Management Rights Newsletter

A Labor Relations newsletter for our clients designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

Spring 2020 Edition

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The RWGM Newsletter is published every quarter. All past and present Newsletters are available on our website at http://rwgmlaw.com/news/labor-newsletters/

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COVID-19

COVID-19 has overtaken our lives at this moment; it is, however, giving us each the opportunity to spend more time with family (who live on our household), opportunity to learn new or fine-tune our technological abilities and the opportunity to be create (on a professional and personal level) to maintain personal interactions.

We wish all of you and your loved ones endless health. Be safe and wash your hands!

Your Labor Team here at RWGM have kept you up-to-date on the often daily changes to State and Federal regulations and Executive Orders. We have sent out several updates and analysis and practical tips. We have also published "Q&A" format notices which address the numerous and various issues raised by clients and colleagues. Helpful websites for your reference include:

https://coronavirus.health.ny.gov/home

https://www.cdc.gov/coronavirus/2019-ncov/

https://www.eeoc.gov/ - [publications of Note: "The ADA, the Rehabilitation Act and COVID-19" and various "Newsroom" links on the website – especially the Q&A of 3/27/2020]

https://www.governor.ny.gov/ (for all issued Executive Orders regarding COVD-19)

https://www.dol.gov/agencies/whd/pandemic/ffcra-questions

Google: "Obtaining an Order for Mandatory or Precautionary Quarantine under Governor Cuomo's new COVID-19 Paid Sick Leave Law" (this is a "how-to" guide produced by the NYS Department of Labor and the Department of Health

PRESERVATION OF EVIDENCE

In Sanchez v. City of New York, et al., the Appellate Division, First Department reminds us of the importance of preservation of evidence in what is, or arguably could become, a litigated matter. In NYC, a police car chase ensued which resulted in an accident. Prior to the accident there was audio communication between the NYPD officers (in vehicles) and Dispatch. The pre-recording was destroyed despite the fact that the injured party's Notice of Claim indicated that the communication may play a role to support the claim against the NYPD/City of NY. The Court held that this destruction was an error that could be given an "adverse inference" against the defendant and should be sanctioned. (3/18/20; 2020 NY Slip Op 01970)

DESIGNATION OF FMLA FOR GML STATUS EMPLOYEES

Law Enforcement Officers and Firefighters who are injured or taken ill by virtue of performing their duties may be eligible for and entitled to benefits under the NYS General Municipal Law (§ 207-c and § 207-a, respectively). Once granted GML status, the Officer/Firefighter receives 100% of their salary, including longevities and all negotiated wage adjustments (among other benefits which may be provided by a negotiated agreement), until such time as their incapacity has ceased. The individual on GML is usually under medical care and is not at work; often the condition is "serious." Many employers have not simultaneously placed a GML status employee on FMLA leave – is that appropriate? An opinion of the US Department of Labor holds that FMLA designation should be made concurrently and simultaneously with the GML status designation (FMLA 2019-3-A).

FML is federally authorized unpaid leave for certain qualifying events, including the serious health condition of the employee which interferes with performance of the essential duties of the employee's position, where the employee is under medical care, and/or where the employee may need some type of "accommodation," such as reduced work hours or duties. The FMLA-designated employee may elect to use paid accrued leave, or it may be required by employer policy or negotiated agreement. GML is statutorily paid leave, granted for a serious health condition of the employee where they would generally be under medical care and/or in need of a modified work assignment/hours. The DOL has maintained that

> Once your employer has enough information to determine that an employee's leave request qualifies for FMLA leave, your employer must designate the leave as FMLA leave. As noted in WHD Opinion Letter FMLA2019-1-A, once an eligible employee communicates a need to take leave for an FMLA-qualifying reason, an employer may not delay designating such leave as FMLA leave, and neither the employee nor the employer may decline FMLA protection for that leave. *See* WHD Opinion Letter FMLA2019-1-A, at *1; *see also* 29 C.F.R. § 827.700(a) ("[T]he rights established by the Act may not be diminished by any employment benefits or program" including a CBA); WHD Opinion Letter FMLA2003-5, 2003 WL 25739623, at *2 (Dec. 17, 2003) ("Failure to designate a portion of FMLA-qualifying leave as FMLA would not preempt … FMLA protections …"). This is the case, for instance, even if the employer is obligated to provide job protections and other benefits equal to or greater than those required by the FMLA pursuant to a CBA or state civil service rules. *See* 29 U.S.C. §§ 2652-53; 29 C.F.R. § 825.700.

The employee cannot "disclaim" the FMLA designation or seek for it to be held in abeyance for some potential future need. "FMLA applies in addition to or along with an employer's policies or any CBAs."

Arguments that the GML benefit is a "better benefit" than that provided by the FMLA have not prevailed.

Funeral or Bereavement Leave

Many Collective Bargaining Agreements include provisions for bereavement leave. Likewise, Employee Handbooks and employer policy may contain similar leave allowances. Section 79-n of the NYS Civil Rights Act may add to those allowances:

> No employer who extends to its employees funeral or bereavement leave for the death of an employee's spouse or the child, parent or other relative of the spouse shall deny the same leave to an employee for the death of the employee's same-sex committed partner or the child, parent or other relative of the committed partner. For the purposes of this section, same-sex committed partners are those who are financially and emotionally interdependent in a manner commonly presumed of spouses.
> (added L.2010, c. 423, §, eff. Oct. 29, 2010.)

Improper Practice Charge against Employer: Violations of 209-a.1 (a), (c) and (g)

The Improper Practice Charge alleges violations of Sections 209-a (1)(a),(c) and (g) of the Taylor Law. Those sections provide that it "shall be an improper practice for a public employer or its agents deliberately (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two of this article for the purpose of depriving them of such rights; … (c) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization; … (g) to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action."

The hypothetical facts include that the employees were to receive uniform shirts, both long and short sleeved. The long-sleeved ones arrived and employees were directed to wear them in accordance with the agreement on uniforms. The short-sleeved shirts had not yet come in to the employer. Some employees took the position that they wanted to wear short-sleeved shirts, said they would wear their old shirts and would not wear the long-sleeved ones. The employer reminded them to wear them and the refusal continued. The Charge alleges, in essence, that the Employer disciplined bargaining unit members after they requested union representation during a disciplinary interview. Two of those members had also previously participated in contract negotiations. In addition to the discipline, the members were denied the union representation they requested. The Charge alleges that other employees were not disciplined for the same conduct.

Below will discuss the proof necessary for each element of the charge.

I. Sections 209-a (1)(a) and (c)

Subsections (a) and (c) present related issues. At the root of both is the allegation that the Employer is attempting to interfere with or discourage union participation through discriminatory discipline.

In general, in order to establish a charge of unfair practice, the charging party must prove that "it was engaged in activities protected by the Taylor Law and that the party charged had knowledge of and acted because of those activities." Greenburgh No. 11 Union Free Sch. Dist. V. Kinsella, 253 A.D.2d 46, 50 (3d Dep't 1999).

The dispute here will revolve around the third element of the above test: whether the Employer disciplined the members because of their participation in protected activities. If the charging party can prove a prima facie case of improper motivation, the burden shifts to the employer to establish its actions "were motivated by legitimate business reasons." Matter of Hudson Val. Community Coll. V. NY State Pub. Empl. Relations Bd., 132 A.D.3d 1132, 1134 (3d Dep't 2015). The union must establish some nexus between the protected activity and the decision to discipline the employees. Civ. Serv. Empl. Assn., Local 1000 v. NY State Pub. Empl. Rels. Bd., 295 A.D.2d 668, 670 (3d Dep't 2002)

Of note, if an employer's actions were motivated by anti-union animus, it is irrelevant whether legitimate cause otherwise existed. *See* Civ. Serv. Empl. Assn., Local 1000 v. NY State Pub. Empl. Rels. Bd., 276 A.D.2d 967, 969 (3d Dep't 2000).

These analyses are largely fact-specific, and can turn on either direct or circumstantial evidence. Factors considered in past cases include whether the decision maker him or herself harbored anti-union animus (Civ. Serv. Empl. Assn., Local 1000 v. NY State Pub. Empl. Rels. Bd., 8 A.D.3d 796 [3d Dep't 2004]); whether other facts distinguished the disciplined employees from employees, such as prior disciplinary records (Civ. Serv. Empl. Assn., 295 A.D. 2d at 670); and the temporal relationship between the protected activity and the employment action (Patrolmen's Benevolent Ass'n v. City of New York, 196 Misc. 2d 396 [N.Y. Sup. Ct. 2003]).

Further factual investigation will certainly be required in this case. It appears from the allegations in the Charge that the employees who were *not* disciplined for wearing older uniform shirts were also members of the bargaining unit. This would seem to cast doubt on the claims that those disciplined were singled out for union membership. However, was there discipline, or even disciplinary questioning? Nevertheless, the close temporal proximity between the members asking for representation and the issuance of the disciplinary notices (if accurate) could pose a troubling issue for the Employer.

II. Section 209-a (1)(g)

This subsection makes it an improper practice to deny a member representation at the time of questioning when it reasonably appears the employee may be subject to discipline. In general, an employee is entitled to representation if the interview "is calculated to form the basis for taking discipline or other job-affecting actions because of past misconduct or incompetence." Matter of N.Y.S. Correctional Officers and Police Benevolent Ass'n, 42 PERB P4552 (2009) (internal quotation marks omitted).

To prove a violation of this subsection, the charging party must show by a preponderance of the evidence that "a demand for representation was made by a public employee; the employer failed to permit or refused to afford the employee organizational representation during questioning by the employer; and at

the time of the employer's questioning, it reasonably appeared that the employee may have been the subject or target of potential disciplinary action." Matter of Communications Workers of America, AFL-CIO, 46 PERB P4567 (2013).

The threshold for entitlement to representation is low. Matter of N.Y.S. Correctional Officers and Police Benevolent Ass'n, 43 PERB P3031(2010). However, the right to representation does not attach to meetings or discussions limited to counseling, training, evaluations or updates on job assignments, but may attach if such a meeting "metamorphosizes into questioning about an employee's conduct or omissions in a context that makes it reasonably appear" that the employee may be subject to discipline. Id. In such a case, a violation of the act occurs where an employee requests representation and the questioning continues without him or her being afforded it. 46 PERB ¶ 4567.

More investigation is likely necessary to evaluate the merits of the Charge under the hypothetical presented. If the interview alleged was truly intended to be disciplinary in nature, and the members were denied representation, there may be a violation. If, however, a non-disciplinary discussion "metamorphosized," the critical issues will be when it became reasonably apparent the individuals may be the subject of discipline in relation to when they requested representation, and whether the interview continued after that request.

NYSPELRA Annual Training Conference

This year's NYSPELRA Annual training Conference is scheduled for Wednesday, July 15, 2020 through Friday, July 17, 2020. Please save the date. As of this writing, the Conference is still set to take place in Saratoga Springs. Topics include:

- COVID-19: Lessons Learned
- Arbitration Review: Panel Presentation, Insights from Practitioners Around the State
- FLSA Update: New Regulations
- PERB Update
- Ethics and much more…

WELCOME

Please join us in welcoming Nathaniel Nichols to the RWGM Labor Team.

We wish you all wellness and are here to answer all of your questions and concerns on COVID-19. Here's to peaceful days ahead.

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OSC Local Government and School Accountability
Common Issues and Responses
April 3, 2020 (Updated from 3/25/2020)

We understand that local governments are facing very challenging situations. The information below is intended to provide a quick response to some general questions. Do not hesitate to reach out to OSC for more assistance. This document may be updated from time to time as necessary.

If I have a question, who should I contact?
We do not want to miss the opportunity to hear from you about any issues your government may be facing. See https://www.osc.state.ny.us/localgov/contact.htm for our contact information.

Due to COVID-19 and executive orders reducing the workforce, are staff available to provide technical assistance?
Yes, while LGSA Regional Offices are currently closed, most of our staff is working remotely. If you are unable to reach a person by phone, leave a message and we will return calls. We are also available by email at: localgov@osc.ny.gov

Will planned training events be rescheduled/delivered remotely?
OSC has canceled a number of training events in the near term. In the interim, we will work to provide training remotely where possible. Check our website at https://www.osc.state.ny.us/localgov/academy/index.htm for more information.

Audits

Is LGSA engaging new audits?
No, at this time we are not engaging new audits.

What is happening with LGSA audits that are underway?
To the extent possible, auditors will continue audit work. In some cases, auditors are working with some entities that are able to continue their operations. Auditors are sensitive to the current situation and are working with each auditee to determine the best course of action.