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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 2017

UNION'S REFUSAL TO PROCEED TO INTEREST ARBITRATION - UPDATE

Much has transpired since we last reported to you in our July 2015 Management Rights regarding the interesting issue arising out of the City of Ithaca (City) and the City of Ithaca Police Benevolent Association's (PBA) dispute over the PBA's refusal to proceed to interest arbitration for 2012 and 2013. You will recall that the PBA refused to consent to the compulsory interest arbitration process upon the City's Petition for Interest Arbitration, which would have resulted in an award covering the term January 1, 2012 to December 31, 2013. Following the PBA's refusal to consent to interest arbitration, the City sought to open negotiations for years beyond 2012-2013. The PBA refused to open negotiations unless the parties negotiated over 2012-2013. The City then filed an improper practice charge ("IPC") alleging that the PBA failed to negotiate in good faith because the PBA waived the right to negotiate over 2012-2013 having refused to proceed to interest arbitration for those years.

On August 5, 2015, the Administrative Law Judge (ALJ) issued a decision regarding the IPC. The ALJ held that the PBA did not waive its right to proceed to interest arbitration by refusing to participate in the process when the City was the party who had petitioned for interest arbitration. The ALJ reasoned that to constitute a waiver there must be an "[i]ntentional relinquishment of a known right with both the knowledge of its existence and an intention to relinquish it." (*City of Ithaca v. Ithaca Police Benevolent Assn.*, 48 PERB ¶ 4601). The ALJ further held that nothing in the Taylor Law nor PERB case law supports a conclusion that a union waives its right to proceed to interest arbitration by refusing to proceed to arbitration upon an employer petitioning for the same. The ALJ dismissed the charge. The City filed Exceptions (an appeal) to the ALJ's decision. On November 15, 2016, the PERB Board issued its decision (*City of Ithaca v. Ithaca Police Benevolent Assn.*, 49 PERB ¶ 3030) affirming the ALJ, but holding that the City satisfied its duty to negotiate in good faith for 2012 and 2013 by exhausting all avenues for negotiation and conciliation. The Board reasoned that the finality that interest arbitration was enacted to achieve was effectively thwarted by the PBA exercising its right to stand on the *status quo*. The Board went on to state that

> Although no accord was actually reached here, the record is clear that the City exhausted all available avenues for negotiation and conciliation, thereby satisfying its duty to negotiate in good faith under the Act for the applicable duration of an interest arbitration award, which we find here to the presumptive default period of two years from the expiration of the previous agreement, that is, calendar years 2012 and 2013.

Nevertheless, on December 2, 2016, the PBA petitioned for interest arbitration for the 2012-2013 period! The City served a Response and filed an improper practice "Scope" charge alleging in both the Response and Charge that the City satisfied its duty to negotiate in good faith and that the PBA may not, accordingly, proceed to interest arbitration for 2012-2013. The City requested in its Response that the Director of Conciliation deny the PBA's Petition for Interest Arbitration given that the City satisfied its duty to negotiate in good faith. The Director agreed and "denied" the PBA's petition in a letter ruling dated December 23, 2016. The PBA filed Exceptions to the Director's letter. The City's "Scope" Charge was placed on hold pending the Board's decision on the PBA's Exceptions to the Director's ruling.

On April 10, 2017, the Board issued its decision (*City of Ithaca v. Ithaca Police Benevolent Assn.*, IA2014-002/M2013-105, April 10, 2017). The Board reversed the Director finding that the Director was without power to issue a decision that did not relate to a petitioner's "eligibility" for interest arbitration. The Board reasoned

that the City's duty satisfaction defense to proceeding to interest arbitration was an "arbitrability" determination that must be made by an ALJ under Section 205.6 of PERB's Rules of Procedure in the context of an improper practice "Scope" charge. The Board, therefore, held that the Director did not have the authority to dismiss the PBA's Petition for Interest Arbitration. The Board did not address the glaring substantive issue that has remained undecided since the Board's decision (49 PERB ¶ 3030) was issued back in July 2015; that is, what effect does the PBA's refusal to proceed to interest arbitration and the City's having satisfied its duty to negotiate in good faith have on the arbitrability of the 2012 and 2013 time period?

The takeaway from this decision is that the ALJ assigned to the City's current and pending improper practice "Scope" charge must now decide what effect the City's duty satisfaction has on the PBA's ability to proceed to arbitration for 2012 and 2013. Procedurally, the Board has made it clear that a party asserting the duty satisfaction defense in the context of an interest arbitration proceeding must do so through an improper practice charge. Stay tuned…

SALARY HISTORY INQUIRIES

Earlier this year the City of Philadelphia, Pennsylvania enacted legislation that would prohibit private sector employers from inquiring about an applicant's salary history; applicants can also not be made to supply their wage history as a condition of employment. The law's articulated purpose is to "close the wage gap between men and women [with the ultimate effect of] ending wage discrimination." In New York State, Governor Cuomo (in January 2017) issued an Executive Order that prohibits State agencies from asking about an applicant's current or prior salary; however, once a conditional offer of employment is made, the applicant may be asked to supply the information. NYS calls this the

> Promise … to advance principals of social justice, affirm NY's progressive values and set a national standard for protecting against all forms of discrimination."

The State of Massachusetts, in the summer of 2016, enacted the Massachusetts Pay Equity Act (effective in 2018) whereby it will be unlawful for employers to compensate men and women at different rates for "comparable work."

The law defines "comparable work" as "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions."

In the City of New York, Mayor DeBlasio is about to sign into law similar legislation that amends the City's Human Rights Law by making it an unlawful discriminatory practice for an employer to inquire of any applicant or the applicant's current or former employer(s) as to salary history.

Philadelphia faced much opposition to the institution of its law. The law was to take effect in mid-May of 2017, but on April 19, 2017, a Judge in the Eastern District of Pennsylvania granted the Chamber of Commerce's Motion and stayed the implementation of the law until the legal challenge could be resolved. The Chamber of Commerce is arguing that Philadelphia's law is a violation of the First Amendment, as it restricts an employer's speech, where the law is highly speculative in claiming it will lessen or stop wage disparities caused by gender discrimination. The City of Philadelphia has decided that it will not move to enforce the law pending the outcome of the challenge. Stay tuned …

RWGM SPEAKING ENGAGEMENTS

NYS Conference of Mayors – May 8, 2017, "Labor Relations Potpourri" with Elayne Gold.

County Attorneys Association of the State of New York– May 23, 2017, "Recent Developments in Public Sector Labor Law" with Earl Redding and Elena Pablo.

NYS Sheriffs Association – Annual Undersheriff Training Conference, "GML § 207-c, FMLA and Employee Corrective Action" with Elayne Gold.

NYSPELRA

The NYS Public Employer Labor Relations Association Annual Conference is set for July 19-21, 2017, in Saratoga Springs, New York. It is the perfect opportunity to fine-tune your labor relations/personnel skills, and to network with colleagues. Visit our website, rwgmlaw.com, or let RWGM know if you would like additional information.