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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.

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GRANDPARENTS AND FMLA

Can a grandparent be granted leave under the FMLA to care for a drug-addicted grandchild when that grandparent stands "in loco parentis?" It appears the grandparent/employee is eligible for leave to care for the child under the FMLA provision providing for leave to care for a son or daughter with a serious health condition.

The FMLA defines "in loco parentis" as those with day-to-day responsibilities to care for and financially support a child. 29 CFR 825.122(d)(3).

The FMLA allows an eligible employee to be granted leave to care for a spouse, son or daughter, or parent if such individual has a serious health condition. The Act itself, as well as the implementing regulation, clearly states that an employee in loco parentis for a child qualifies for leave as if that child were their own son or daughter, regardless of whether a biological or legal relationship exists.

- The term "son or daughter" means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability;

- For purposes of FMLA leave taken for birth or adoption, or to care for a family member with a serious health condition, son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is either under age 18, or age 18 or older and "incapable of self-care because of a mental or physical disability" at the time that FMLA leave is to commence.

Based on this statutory language, the grandparent qualifies for leave.

TERMINATION OF EMPLOYEE WITH AN UNBLEMISHED RECORD

A special education Aide who worked for Madison County's Maine-Endwell Central School District requested approval for 2 specific days off from work, days which would have extended a school holiday. The Aide's request for said leave was denied. The denial:

- stated that she should not take these requested days off "under any circumstances"
- warned the aide "Don't take sick time. Don't not come in."

Nevertheless, and despite this clear instruction, the Aide went on a trip to the Dominican Republic and was not in the Country or at work on the days in question (the ones she was denied as "leave"). However, from the Dominican Republic, the Aide sent an email to her employer indicating she was taking the denied days as "family sick days."

The Aide was brought up on disciplinary charges and after a Civil Service Law §75 proceeding with a recommendation for termination, she was terminated from employment.

The Aide challenged the denial claiming that the penalty imposed was too severe and that mitigating factors, if properly considered, would lead to a lesser penalty.

The Third Judicial Department of the New York State Appellate Division, in Castle v. Maine-Endwell Central School District, 111 A.D.3d 1221(3rd Dept. 2013) reminded the litigants that "it is not the role of this Court to either second guess the administrative agency or substitute its own judgment for the action taken."

In upholding termination and reviewing the mitigating factors articulated by the employee, the Court held that

> contrary to petitioner's assertion, the record reflects that both the Hearing

> Officer and the [school] Board gave due consideration to the mitigating factors present here – namely, petitioner's consistently positive performance evaluations, her lack of a prior disciplinary record, her family's dependence upon her employment as a source of income/health insurance and, finally, the fact that she made arrangements for a substitute to cover her classes on the days she elected to be absent. As this Court has observed, however, "even a long and previously unblemished record does not foreclose dismissal from being considered as an appropriate sanction" for demonstrated misconduct (Matter of Rogers v. Sherburne-Earlville Cent. School Dist., 17 AD3d 823, 824-825 [2005] [internal quotation marks and citation omitted]) – particularly where, as here, an employee openly defies an employer's express directive. As there is ample evidence to support the finding that petitioner's absence "was a well-planned event taken in direct contravention of a direct order," we cannot say that the penalty of termination is shocking.

OUT OF TITLE COMPENSATION

New York State Civil Service Law § 61(2) prohibits out-of-title work assignments. N.Y. Civ. Serv. Law §61(2) ("No person shall be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during continuance of a temporary emergency situation, no person shall be assigned to perform duties of any position unless he has been duly appointed.") Case law has clarified that this does not ban all work performed outside an employee's normal duties. An out-of-title work assignment exists where the employee is regularly assigned or compelled to perform the duties of a higher grade, without a concomitant increase in pay, frequently and for extended periods of time and in the absence of an emergency circumstance. See, e.g., Caruso v. Mayor Village S. Glens Falls, 719 N.Y.S. 2d 141 (3d Dept. 2000). In order to be characterized as out-of-title work, the employee must be assigned to duties which are not appropriate to their current title and which are not similar to or a reasonable outgrowth of those duties listed in the employee's job specifications. Haubert v. Governor's Office of Employee Relations, 284 A.D. 2d 879 (3d Dept. 2001); City of Saratoga Springs v. City of Saratoga Springs Civil Service Com'n, 935 N.Y.S.2d 677 (3d Dept. 2011). Performing duties within the employee's specifications which overlap with those of a higher title does not constitute performance of out-of-title duties. Curtiss v. Angello, 269 A.D. 2d 675 (3d Dept. 2000).

There is no statutory guidance on the rate of pay which must be assessed for valid out-of-title work. Arbitration Awards interpreting collectively negotiated language regarding out-of-title pay indicate that when the collective bargaining agreement does not provide a formula for calculating out-of-title pay but the duties coincide with the job specifications of an existing title, the employee is compensated at the rate of pay for that title. Where the duties being performed do not match the job specifications of any existing titles, at least one Appellate Division has upheld an arbitrator's authority to create a "new" rate of compensation based on the reasonable value of the out-of-title duties performed. City of New York v. District Council 37, AFSCME, AFL-CIO, 2008 N.Y. Misc. LEXIS 9229 (Sup. Ct. 2008), *aff'd* 74 A.D.3d 676 (1st Dept. 2010) In City of New York, the First Department held that where there is no dispute that the duties performed were "hybrid" out-of-title duties, the arbitrator is not limited to awarding pay at a rate for a title which exists under the parties' collective bargaining agreement (absent an express limitation on the arbitrator in the collective bargaining agreement to that effect). Id. Therefore, the court held, "..[T]he arbitrator properly directed the parties to negotiate; when the negotiations reached an impasse, the arbitrator properly invited the parties to submit proof of the value of the out-of-title services performed, including their last best offers; and, on that basis, fashioned fitting and necessary relief" by assigning a rate of compensation to the services which did not correspond to any existing title's rate of pay. Id.

IRS MILEAGE RATE FOR 2014

The IRS has set the 2014 standard mileage rate at 56¢/mile "for all miles of business use." (See IRS Notice 2013-80)

RWGM NEWS

- Congratulations to Adam Meyers for being promoted to an RWGM Partner.

- Special thanks to RWGM Associate Elena Pablo for her contribution to this edition of Management Rights.