Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

13 Columbia Circle
Albany, New York 12203
(518) 464-1300
www.rwgmalaw.com

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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Stay Of Arbitration Granted

In County of Sullivan v. Teamsters Local 445, et al (Index #1391-2015; RJI # 52-36941-2015), the Sullivan County Supreme Court held that the "Union failed to demonstrate that there is a reasonable relationship between the subject matter of the [grievance] … and the general subject matter of the CBA." In so holding, the Court granted the County's Motion to Stay the Union's filed Demand for Arbitration.

By way of background, a receptionist ("Ms. N.") at the County's Department of Motor Vehicles, filed a grievance when her boss, the County Clerk, disabled the telephone at her workstation so that she could not make any outgoing calls. This action was taken by the County Clerk based upon the operational needs of the Department, primary among them, the necessary and appropriate (in the opinion of the County) action to stem the number of complaints from customers to the DMV who indicated that Ms. N. was on personal calls and inattentive to incoming customers. On behalf of Ms. N., the Union filed a grievance claiming, among other things, discrimination and "disparate treatment" as other similarly situated DMV employees retained the ability to make outgoing calls from the office telephones located at their workstations. The grievance was denied at each of the negotiated grievance steps finding no merit to the arguments raised, no violation of any negotiated contractual provisions and that "the parties did not agree to arbitrate claims" of discrimination (if this was even one rising to the level of such a claim), and that there is no right for employees to make outgoing telephone calls from a County telephone.

When deciding whether to stay a Demand for Arbitration the courts, over the years, have established a two-part "test":

> 1. May the parties arbitrate the at-issue matter; and if so,
>
> 2. Whether the parties have agreed to submit the at-issue grievance to arbitration.

See, Matter of Acting Sup. Of Schools of Liverpool Central School District, 42 N.Y.2d 509 (1977). The arbitration provision of the at-issue Sullivan County CBA states that an Arbitration is

> [a]ny disagreement arising as to the manner of interpretation or application of this Agreement, or right claimed to exist thereunder, except an allegation of discrimination covered by the County of Sullivan Affirmative Action Plan Grievance Procedure.

In following the guidance from another NY Court of Appeals case, the court explored "…whether there is a reasonable relationship between the subject matter of the dispute and the general subject matter of the CBA. If there is none, the issue, as a matter of law, is not arbitrable." (Citing In re. Bd. of Educ. Of Watertown City School District, 93 N.Y.2d 132 (1999)).

The Court looked next at the CBA express provisions covering discrimination. Although the CBA addressed all of the same "protected classes" found in the County's Affirmative Action plan, the negotiated agreement also included in the definition of "discrimination" any act based upon "other non-merit factors." In the Court's opinion,

therefore, there is no contracted prohibition to proceeding to Arbitration if there is some "reasonable relationship" to the CBA. After exploring the other cited (by the parties) provisions of the CBA, the Court, in granting the County's Motion, noted that:

> …despite the broadly written arbitration clause, the CBA does not contain any language either expressly or implicitly addressing … whether an employee is entitled to have outgoing telephone access. Therefore, the Court finds that the determination … limiting … outgoing phone calls does not bear a reasonable relationship to the … CBA and … is not arbitrable.

FLSA Impact Upon Meal Breaks for Correction Officers

In a recent decision, Sandra Babcock (the "Plaintiff"), is a corrections officer for Butler County, Pennsylvania (the "County"). Ms. Babcock alleged that the County failed to sufficiently compensate her and other officers similarly situated for overtime in violation of FLSA. Babcock v. Butler County, 806 F.3d 153 (3d Cir. 2015). The question before the Third Circuit is whether a portion of time for a meal period is compensable under the FLSA. This case focuses on the fact that the CBA between Butler County and the corrections officers "provides that corrections officers work eight and one-quarter hour shifts that include a one hour meal period, of which forty-five minutes are paid and fifteen minutes are unpaid."

Ms. Babcock argues that because she is not permitted to leave the premises without permission during meal time (to be available to respond to any emergencies), she may not nap during her break, has to remain in uniform, and has to stay in her assigned district, that she was not relieved from her job duties and the meal period was predominantly benefiting the employer. The County argues that the corrections officers' meal periods were not compensable work because the officers received the predominant benefit of the meal period.

The "predominant benefit" test, as adopted by the Federal Courts asks "whether the officer is primarily engaged in work related duties during meal periods." Under this test, "the essential consideration in determining whether a meal period is a bona fide meal period or a compensable rest period, is whether the employees are, in fact, relieved from work for the purpose of eating a regularly scheduled meal." In applying this test the Court found for the County, holding that the corrections officers' were not primarily engaged in work-related duties during this 15 minute period and thus receive the predominant benefit of this time.

According to this case, in order for break/meal time to be compensable, an employee must be engaged in work or required to eat at their desk/work space. The Third Circuit took into consideration the presence of the CBA between the corrections officers and the County. However, although taken into consideration, the CBA will be deemed "relevant," but not dispositive in determining with whom the predominant benefit lies. As such, it is significant to evaluate the CBA and how/if it addresses meal times for correctional officers. If a CBA is silent on this issue, the matter will not be automatically dismissed. Again, note that under the Court analysis, the CBA is meant to be taken into consideration in conjunction with the other facts in evaluating who receives the predominant benefit of an uninterrupted meal time.

In conclusion, as long as the corrections officers are enjoying uninterrupted meal breaks during their 8 hour shifts, the time should not be compensable. As was the case in Babcock, even if there are restrictions on this meal break, such as needing permission to leave the premises, this time may still be considered predominantly beneficial to the employee. Therefore, as long as there is a past/current practice of allowing corrections officers uninterrupted meal breaks, where they are not required to sit at their workspace or engage in any employment duties, regardless of whether the CBA expressly addresses this or not, it should not be compensable under the FLSA. Note, however, because this is a recurring issue in the Federal court system, it may be advisable to expressly address this issue in the negotiated CBA.

Expanded Anti-Discrimination Legislation

In October of 2015, Governor Andrew Cuomo signed legislation and promulgated regulations which expanded discrimination protections to forbid discrimination based upon gender identity, and "familial status," and granted pregnant women greater protections and accommodations for pregnancy-related conditions. The New York State Human Rights Law ("NYSHRL"), a.k.a. "NY Executive Law," prohibits discrimination and harassment based on a person's sex. The expanded regulations now cover gender identity (9 NYCRR § 466.13). These regulations, effective as of January 20, 2016, add gender identity, transgender status and gender dysphoria to the meaning of "sex" under NYSHRL. Although discrimination against transgendered individuals has been forbidden in New York State since 2009 pursuant to an Executive Order, the Executive Order only provided protection to state workers. With the implementation of the new regulations, public and private employers, housing providers, businesses, creditors and others are forbidden from discriminating against or harassing anyone based on their gender identity.

In the context of employment, the regulations ensure that employers shall not make any employment decisions (including hiring, promoting, terminating, or any other

accommodation or condition of employment) based on the employee's/applicant's gender identity. "Gender identity" is defined as having or being perceived as having a gender identity, self-image, appearance, behavior or expression whether or not that gender identity, self-image, appearance, behavior or expression is different from that traditionally associated with the sex assigned to that person at birth. The regulations further define a "transgender" person as an individual who has a gender identity different from the sex assigned to that individual at birth. "Gender dysphoria" is defined as a recognized medical condition related to an individual having a gender identity different from the sex assigned at birth.

It is recommended that based upon the expanded regulations, employers review their current anti-discrimination and anti-harassment policies to determine whether gender identity, transgender, and gender dysphoria are included as part of "protected class"—and if not, we advise that all policies be revised accordingly. Furthermore, if you have in place a "dress code" we recommend the altering of said code, as necessary.

In addition to the new regulations, New York passed legislation protecting persons from discrimination based on their "familial status." Effective January 19, 2016, "familial status" is defined in NY Executive Law § 292(26) and is incorporated into NY Executive Law § 296 as a protected class. Pursuant to the statute, "familial status" is defined as (a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual not yet eighteen years of age, or (b) one or more individuals, not yet eighteen, being domiciled with (1) a parent or another having legal custody of such individual(s) or (2) the designee of such parent. As such, employers are now prohibited from making any employment decisions based on an individual's familial status.

Finally, Governor Cuomo signed a bill which adds "pregnancy-related conditions" to the state law requiring employers to provide reasonable accommodations to covered employees. NY Human Rights Law currently requires an employer to provide a reasonable accommodation to a disabled employee/applicant, unless doing so would impose an undue burden. The new legislation would amend the state law (NY Executive Law §§ 292 & 296) to require an employer to provide such accommodation to an employee/applicant with a disability or "pregnancy-related condition." It is no longer sufficient for employers to have a bright-line rule under which pregnant employees must fit in order to receive accommodations. Employers must now reasonably accommodate each pregnant employee's conditions and limitations on a case-by-case basis (despite previous or current policies which provided leave for employees who cannot perform essential job functions without accommodations, or granting light-duty only for those employees with work-related injuries or injuries sustained on the job).

Identification Badges

Let's say you had, in the past, issued identification badges for your municipal employees, but for some reason, many employees were not generally using them. Can you reissue the badges and require the employees to utilize them? Certainly you can, especially if the municipality seeks to institute the requirement as a safety measure. Further, such a requirement may be unilaterally implemented.

PERB has held, on substantially similar facts, that such a requirement is a non-mandatory subject of bargaining and therefore may be unilaterally implemented by a public employer. The decision, Middle County Central Sch. Dist., 30 PERB ¶ 4556 (1997), addressed an employer requirement that all staff and personnel be required to wear a photo identification card. The employer in this PERB case asserted that the requirement was intended to ensure that staff are able to identify individuals on the employer's premises who are not employees, and to know the identity of other employees whom they encounter. The PERB ALJ held that this safety interest outweighed the potential employee interests, which include employee comfort, expense to the employee, privacy and potential disciplinary implications. PERB utilized its "balancing test."

In our situation, the municipality has already agreed to provide the badges at the municipality's cost, so there would be no issue as to employee cost. As to the claim of "discomfort," PERB decisions have found that ID badges can be worn in ways which do not significantly affect the employee's comfort, such as around their neck. As to privacy, PERB has held that public employees do not currently enjoy anonymity from other employees or members of the public. The ALJ further stated that the fact the employees' names appear under their pictures on the ID badges "has little intrusive effect." Therefore, this privacy interest would be unlikely to tip the scales in favor of the employee interests, unless the municipality's ID badges include more extensive personal information than name and photo. Finally, to the extent that failure to comply with the ID badge requirement would subject an employee to discipline, PERB has held that the "ancillary consequence" of discipline does not transform an otherwise non-mandatory rule into a mandatory subject.