Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

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

SUMMER 2018

THE UNITED STATES SUPREME COURT RULES ON AGENCY FEE QUESTION

In the Spring 2018 Management Rights Newsletter we detailed some amendments to existing law by bill that requires employers to undertake specific notice regarding union membership, withdrawal of union membership and access to new employees by unions. All of that remains intact, at least at this point in time, even in light of the recent U.S. Supreme Court ruling in the Janus case. In short, the Court ruled (in a 5-4 determination), that it is unconstitutional to mandate the payment of agency fees, as doing so impinges on the right of free choice and freedom of association (or non-association).

At least one of our employers has brought to our attention an issue not previously discussed nor covered by law. Since 1977, when the agency fee law in New York became effective, the amount of money paid to a certified bargaining agent was/is the same regardless if the individual is a "member" of the organization or is an agency fee payor. Because no distinction is made, employers may have simply began deducting "dues" or "fees" (both in the same amount) from an employee's pay without differentiating whether their employee was a member of the union as evidenced by a membership authorization card filed with the employer or they were simply an agency fee payor, which required no notification from the employee. It did not matter which category the bargaining unit member was in previously. Now that the "agency fee" has been determined to be unconstitutional, we have a different situation. If, as an employer, you have maintained a roster of individuals who have actually filed a membership/dues deduction authorization card with you and you also have maintained a file of those individuals who have not submitted such membership evidence, you have a handy record of those individuals who have consciously determined not to be a member of their bargaining representative. Effective immediately, you can discontinue making deductions from their paychecks. We would suggest notifying the union by giving them the names of the individuals for whom no authorization is on file. In another scenario, an employer might not have maintained an accurate record of which employees are members and which are agency fee payors on the belief that this distinction really did not matter. In that scenario, it would seem that there are two options available to the employer. If the employer has no membership dues deduction card on file, it can simply cease making payroll deductions for those individuals and notify the union of same. An alternative, and the recommended approach, would be to continue making payroll deductions and notifying the union of the individuals for whom no authorization for membership cards are on file, and indicating to the union that unless a membership authorization card is filed within a short period of time, the "dues deduction" will cease.

Lastly, you may anticipate that most of the public sector labor organizations will reach out to interact with the employers where they are certified to represent a bargaining unit and, further, that they plan on indicating to the employer, the records they have regarding membership enrollment and agency fee payors.

As always, if you have any questions concerning this matter, please contact RWGM.

NYS NEW LAWS ON SEXUAL HARASSMENT PREVENTION POLICIES

REMINDER: The State enacted amendments to various State statutes pertaining to gender-based discrimination. Now is the time to be certain your

Municipal/School District Policy is in compliance with the statutory mandates. RWGM is ready to review your policy and assist in the necessary modifications.

Also, in the event your entity does not now have a Policy on the prevention of harassment in the workplace, we advise that you contact RWGM immediately, as the new laws do require employers to have such a policy.

Finally, the new State law mandates annual sexual harassment training for all employees.

WORKERS' COMPENSATION BENEFITS FOR "VOLUNTEERS" AND RELATED CONSIDERATIONS

Although volunteers for non-profit organizations are completely excluded from Workers' Compensation coverage in New York, the same is not necessarily true for municipal volunteers. Whether the volunteer will be considered an "employee" covered by the municipality's Workers' Compensation policy is a fact-specific inquiry to be made based on consideration of the following criteria: (1) the right to control the claimant's work; (2) the method of payment; (3) the right to discharge the "volunteer"; (4) the furnishing of equipment; and (5) the relative nature of the work. The fact that the individual is not paid a salary does not on its own preclude a finding that the individual is an employee. For example, the Workers' Compensation Board found that a volunteer coach at a municipal school district was an "employee" despite the fact that he was not paid a salary where: he filed an application for volunteer work with the district, was appointed by the district, and could presumably be fired by the district; he reported to a district employee who assigned his responsibilities; he attended matches and tournaments on behalf of the district; all of the equipment he used in the performance of his duties was provided by the district; and the duties he performed were very similar to those activities performed by paid employees. (Granville Central School District, 2006 WL 1332636, May 3, 2006). In other cases, the Workers' Compensation Board has found that volunteers were "employees" where the employer provided workers' compensation coverage for paid workers performing the same duties; the employer furnished the volunteer with their equipment; had the ability to hire and fire the volunteer; provided non-salary "compensation" in the form of free benefit passes; and had the right to set the work schedule. (Id.) The municipality/school district would need to look closely at the duties that the volunteer is performing, its similarity to work performed by paid employees, whether any equipment is furnished or any forms of "other" compensation or benefits are provided, and the ability to control and direct the volunteer in order to determine whether the work assignment would require Workers' Compensation coverage.

The similarity between the duties the volunteer performs and the duties performed by paid employees is also an important consideration in determining whether the use of the volunteer could constitute improper transfer of bargaining unit work. To determine whether the transfer of unit work gives rise to a bargaining obligation, PERB makes a two-part inquiry: (1) whether the work at issue has been exclusively performed by unit employees, and (2) whether the reassigned tasks are substantially similar to those previously performed by unit employees. Niagara Frontier Transportation Auth., 18 PERB ¶ 3083 (1985). If both criteria are met, there has been a violation unless the qualifications for the job have been changed significantly. Id. Before the employer expands the duties assigned to the volunteer, careful consideration needs to be paid to whether the expanded duties include any previously performed exclusively by bargaining unit members.

DEFENSE AND INDEMNIFICATION OF POLICE OFFICER

General Municipal Law § 50-j provides for defense and indemnification of police officers (in general) when the police officer is subject to suit; provided, however, that the police officer's conduct occurred "in the proper discharge of [the officer's] duties and within the scope of his employment" [emphasis added]. General Municipal Law § 50-l provides this same general protection more specifically to Nassau County police officers. The NY Court of Appeals has had recent opportunity to rule on the meaning of the phrase "in the proper discharge of … duties." In Lemma v. Nassau County Police Officer Indemnification Board, et al., [2018 NY Slip Op 04382, decided June 14, 2018], the Court maintained that, based upon new facts, a determination to reverse a prior granted defense and indemnification is neither arbitrary nor capricious nor irrational.

Police Officer Lemma [P.O. Lemma] had been a Police Officer since 1987. In March of 2005 he was assigned to investigate a robbery. Two months after

the investigation commenced it was concluded, in May 2005, with an arrest of Raheem Crews ("Mr. Crews"). Within a few days, P.O. Lemma interviewed another potential suspect who admitted he was involved in the robbery. More importantly, this suspect told P.O. Lemma that Mr. Crews was incarcerated at the time of the robbery. Although P.O. Lemma verified that Mr. Crews was, in fact, in jail, he told no one. Mr. Crews remained detained for four (4) months until, in September of 2005, he was arraigned, at which time his attorney established that Mr. Crews was in prison on the date of the robbery. Mr. Crews was released and the charges dismissed.

Mr. Crews took legal action against P.O. Lemma. The Nassau County Police Indemnification Board (the "Board"), being unaware that P.O. Lemma had known facts which would have exonerated Mr. Crews, offered to and did represent and indemnify P.O. Lemma in the litigation. The Board, in deciding to represent and indemnify, found that "any actions taken by [P.O. Lemma] that might give rise to liability were within the scope of [P.O. Lemma's] employment and a proper discharge of his duties." (Id.)

Fast forward to the year 2009 when P.O. Lemma was deposed in Mr. Crews' litigation. For the very first time, P.O. Lemma "revealed" that he had known, within a few days from arresting Mr. Crews, that Mr. Crews could not have been involved in the robbery as he was in jail. P.O. Lemma, during his deposition, stated, "I kept it to myself and … let the chips fall where they may." The Board reopened its review of the matter and held not one, but two hearings, to give P.O. Lemma the opportunity to be heard on his actions or inactions. The Board revoked its prior grant of defense and indemnification to P.O. Lemma. In his Article 78 Petition challenging that determination, P.O. Lemma argued that

> The phrase 'proper discharge of duties' did not mean that the act itself must be proper, but only that it occurred while the officer was engaged in police work, making it synonymous with the phrase 'scope of employment.'

The Supreme Court and the Appellate Division both denied the Petition, holding that GML § 50-l

> Gives the [Board] the responsibility to determine if an officer's conduct occurred 'in the proper discharge of his duties and within the scope of his employment' and the Board rationally concluded [P.O. Lemma's] conduct was not 'proper.'

The Appellate Division added

> …the Board rationally interpreted General Municipal Law § 50-l to limit defense and indemnification, reasoning that the word 'proper' was 'added … to exclude indemnification for intentional misconduct.'

The Court of Appeals affirms the lower court rulings, holding

> …the statute permits the Board to consider the propriety of the officer's action in determining whether defense and indemnification is appropriate …
>
> * * *
>
> [The NYS Legislature] intended to condition indemnification on the propriety of police conduct – their aim was not to immunize all conduct.