Roemer Wallens Gold & Mineaux LLP
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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.

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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/

For any further information about the articles in this newsletter, please call Elayne Gold at (518) 464-8291.

DIVISION OF HUMAN RIGHTS FINDS NO DISABILITY DISCRIMINATION

Employee "SM" began in May of 2016 as an intern for Greene County, working in the County Mental Health Center ("GCMHC"). By September of 2016 she was a contract employee to the County, still working with the GCMHC. In 2018, SM sought to be an actual County employee and applied for a Mental Health Specialist position with GCMHC. When recommended for the job she underwent the required (of all new hires) pre-employment physical, drug screening and background check. SM was offered the position but sought a starting salary at Step 2. The Director informed SM that the starting salary level was at Step 1, but she would inquire if there was any flexibility.

SM alleged, in a discrimination complaint filed with the NYS Division of Human Rights ("DHR"), that she was told she would be hired at the Step 2 salary level, and if that was not her conditional offer of employment, then the pre-employment physical was "entirely prohibited by law;" and as such, she argued, the drop to a Step 1 salary level was discrimination based on disability. The facts presented to the DHR did not support SM's claims. The DHR found that all new hires, according to the negotiated agreement with CSEA, begin at Step 1 and although the Director may have indicated that she could try to get a higher wage, it was very unlikely.

Further, the County hired SM after she completed the pre-employment physical. The DHR concluded that "this strongly implies that if [the County] was aware of … medical conditions, it does not harbor discriminatory animus based on disability."

Finally, the DHR found that "all employees in [SM's] job title … are required to undergo the same physical examination. It is not an unlawful discriminatory practice to require employees to undergo a pre-employment physical and there is no evidence that [SM] was treated any differently than any other employee under the same circumstances."
(DHR on Complaint of Sharon G. Miller v. Greene County, Mental Health Center, Case No. 10195226, dated November 9, 2018)

Retirees Do Not Have Perpetual Health Insurance Protections

In *Bruckman, et al. v. NYS Thruway Authority, et al.*, the Third Department found that retirees of the Thruway Authority do not have a right to "lifetime individual health insurance at no cost," nor did such no cost coverage become vested or an enforceable contract upon retirement. (159 A.D.3d 1177 (3rd Dept., 2018)

When the petitioners retired (pre-2015) from the NYS Thruway Authority ("NYSTA") the employer's retiree health insurance policy maintained that retirees would not have to make any contributions toward individual health coverage. In November of 2015, the NYSTA Board resolved to revise its longstanding policy (last revised in 1976) and would now require "retirees who had been retired for less than 25 years, and whose health insurance premium contribution rates were not covered by a negotiated agreement, to contribute six percent (6%) of the cost of premiums for individual coverage." Each retiree in this case had held a management or confidential position and health insurance in retirement was not addressed by any negotiated agreement. Although the retirees argued that the policy in place at the time of retirement "constituted a unilateral offer for lifetime cost-free insurance," the Court disagreed:

> A municipal resolution is … a unilateral action that is temporary in nature and thus it does not create any vested contractual rights [citations omitted here] … [S]uch resolutions do not create private contractual or vested rights but merely declare a policy to be pursued until the legislative body shall ordain otherwise [citations omitted here].

Finding nothing in NYSTA's prior resolutions intending to or explicitly extending any "offer" to these retirees, the petition was dismissed.

Confidentiality Under NYS Civil Rights Law § 50-a

Civil Rights Law § 50-a broadly provides that all personnel records used to evaluate the performance of a law enforcement officer, firefighter or corrections officer are confidential. Per the statute, these records are not subject to inspection or review without the consent of the officer in question or court authorization. In *Matter of New York Civil Liberties Union v. New York City Police Dept.*, 2018 N.Y. Slip Op 08423, the NYS Court of Appeals took a strict view of § 50-a, confirming that these personnel records cannot be disclosed under the Freedom of Information Law ("FOIL") even if they are redacted to remove identifying personal information. It further held that a court could only consider ordering disclosure of those records in the context of ongoing litigation.

In New York City, claims of police misconduct are investigated by the New York City Civilian Complaint Review Board ("CCRB"). If it finds a complaint substantiated, it refers it to the NYPD for disciplinary action. The NYPD may then issue charges against the officer and adjudicate those charges in its own internal forum. Following a hearing, the administrative judge issues a "Draft Report and Recommendation," which a Deputy Police Commissioner then finalizes and forwards to the Police Commissioner. The Commissioner issues a final determination outlining the charges, their disposition, and the penalty to be imposed.

In this case, the New York Civil Liberties Union ("NYCLU") submitted a FOIL request seeking copies of the final reports and recommendations in matters where the CCRB substantiated a complaint, along with the final disposition of each charge. The NYPD largely denied the requests, asserting that it used the information to evaluate the continued employment of the department's officers, so Civil Rights Law § 50-a prohibited its disclosure. The NYCLU sued and the lower court ordered that the documents could

be disclosed with all identifying information redacted. The Appellate Division reversed, but granted leave to appeal to the Court of Appeals.

After finding that discipline records of the type requested fell within § 50-a's ambit, the Court of Appeals held that the letter of the law only permitted their disclosure with the permission of the officer, or by court order during ongoing litigation. Moreover, the Court held that a court may only order disclosure of those portions of the records it determines are relevant and material to the action before it. The employer has no discretion to circumvent § 50-a, or expedite the procedure by merely redacting identifying information.

The Court denied the NYCLU's request for documents as it was not made in the context of litigation and dismissed its action. Any loosening of Civil Rights Law § 50-a's requirements, the Court noted, would have to come from the NYS Legislature.

Training 2019

Recently, we emailed our annual training letter to all RWGM clients who have the option to receive training on various topics included in their retainer agreement with the Firm. Please be sure to review the information we sent, as there are some changes, and give us a call, or send an email if you have any questions.

For those clients who do not have training included in a retainer agreement, we are happy to send you the information about what we offer, and can still accommodate your needs. Give us a call or send an email and we can discuss the options available. Contact Elayne Gold, Esq. at egold@rwgmlaw.com, Karen Pelland at kpelland@rwgmlaw.com, or call (518) 464-8291.