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/

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FOIL – TESTIMONY IN POLICE DISCIPLINARY HEARING

Under NYS Civil Rights Law § 50-a, a police officer's personnel records that are used to evaluate performance toward continued employment shall be deemed confidential and are not subject to disclosure under the Freedom of Information Law ("FOIL"). The FOIL "fact pattern" in question seeks the testimony of a specific witness in a police officer's disciplinary hearing. The disciplinary hearing under the Collective Bargaining Agreement ("CBA") allows an arbitrator to make the final decision regarding guilt and penalty (i.e., just cause), including the evaluation of any witness' testimony. Is the witness' testimony exempt from disclosure under the FOIL? Short answer: Yes, as it appears that the witness' testimony would have been used by the arbitrator to determine guilt and the measure of penalty to be meted out, if any.

A Police Officer for the Municipality was served with disciplinary charges seeking to impose a disciplinary penalty upon the officer. The officer appealed the proposed disciplinary action to arbitration under the CBA. Under Article 7 of this CBA, the arbitrator has the power to "uph[old]" the penalty, which necessarily requires a determination whether the officer is guilty and whether the penalty is appropriate, i.e., is there just cause.

The matter proceeded to hearing, which included producing witnesses' testimony, among other things. The arbitrator did not render a decision, but instead, the parties settled the matter. The settlement resulted in the officer's separation from service. *Note*: The fact that the officer is no longer employed is of no consequence to the § 50-a analysis.

The issue here is whether the testimony adduced at the disciplinary hearing is exempt from disclosure under FOIL because of the Civil Rights Law § 50-a.

In the recent Court of Appeals case, *Matter of New York Civil Liberties Union v. New York City Police Dept.*, 2018 LEXIS 3479, if information requested under FOIL constitutes a personnel record within the meaning of FOIL, the information is deemed confidential and may not be disclosed in any way, even if redacting the information could destroy the reference to all personally identifiable information.

With this in mind, if the specifically requested witness testimony constitutes a personnel record within the meaning of Civil Rights Law § 50-a, it *shall* not be disclosed under FOIL. This necessitates an analysis of whether the transcript is a personnel record within § 50-a's meaning.

Under Civil Rights Law § 50-a, information constitutes a personnel record if it is used to "evaluate [the officer's] performance toward continued employment." The location or custodian of the information is of no consequence (*Prisoners' Legal Services of N.Y. v. N.Y.S. Dept. of Correctional Serv's*, 73 NY2d 26 [1988]). Rather, it is the nature of the information that determines whether the information qualifies as a personnel record under § 50-a.

In *Matter of New York Civil Liberties Union*, the Court of Appeals held that disciplinary decisions are "quintessential 'personnel records' protected by Civil Rights Law § 50-a" because the records are "replete with factual details regarding misconduct allegations, the hearing judge's impressions and findings, and any punishment on officers – material ripe for 'degrad[ing], embarrass[ing], harass[ing] or impeaching the integrity of [an] officer." (Id. citing *Daily Gazette*, 93 NY2d at 158).

In *Madison v City of New York*, 2008 NY Misc. LEXIS 4403 (Sup. Ct. NY Co. 2008), the court held that that transcripts from police officer disciplinary hearings meet the *prima facie* definition of a personnel record covered by § 50-a because a disciplinary action concerns the evaluation of the officer's continued employment.

In *Matter of Carnavale v City of Albany*, 68 AD3d 1290 (3d Dept 2009), a plaintiff, suing the City as a result of a police-involved car chase, sought police officers' statements given during the internal affairs investigation into the matter. The court denied the request reasoning that the interviews were performed to determine whether disciplinary action against the officers involved in the chase was warranted. Given this, the court exempted the records from disclosure under Civil Rights Law § 50-a.

In our fact pattern, the transcript in-issue resulted from the Officer appealing a disciplinary action taken by the Municipality. The appeal was to arbitration. Under the terms of the CBA the arbitrator's jurisdiction is *de novo (*discipline is for just cause and the arbitrator may uphold the disciplinary action.). The logical extension of the power to uphold the discipline leads to the conclusion that the arbitrator must determine guilt, and whether the penalty is appropriate.

Like *Madison*, the transcript on its face concerns and contains information that would be used in determining the officer's future employment. The testimony was elicited in a disciplinary hearing under circumstances where the arbitrator must evaluate whether disciplinary action is or was warranted. Certainly, the arbitrator will rely on the testimony in reaching a conclusion.

The analysis now must turn to the specific information contained in the testimony. Like *Carnavale,* a detailed review of the transcript and the context the transcript arose from further supports that it is a personnel record within the context of Civil Rights Law § 50-a.

A review of the testimony demonstrates that it is replete with references to the Officer's alleged misconduct and criminal convictions. The testimony also concerns the evidence gathered that may or may not support the charges. This is all material that the arbitrator had to rely on in determining whether there was "just cause" to discipline the Officer.

Finally, it can be said that the transcript information can be used to harass or degrade the officer. A finding that it could be used for this purpose is required for § 50-a to apply. Certainly, the facts leading up to a police officer's discipline have the potential of being used to harass, degrade, or impeach the integrity of the officer.

The transcript is a personnel record within the meaning of Civil Rights Law § 50-a and is wholly exempt from disclosure under FOIL – as noted above, redaction to dispense with any identifiable personal information does not render 50-a inapplicable.

DISQUALIFICATION OF APPLICANT FOR CIVIL SERVICE POSITION

Under certain circumstances, Section 50.4 of the NYS Civil Service Law allows for the disqualification of applicants for positions and/or those who become eligible for appointment after the examination. Among these criteria is the disqualification of one who

> is found to lack any of the established requirements for admission to the examination or for the appointment to the position for which she applies (subpart (a)).

In any event, prior to disqualification such an individual must be "given a written statement of the reasons [for the disqualification] and afforded an opportunity to [explain] and submit facts in opposition …"

In our scenario, an applicant for the position of deputy sheriff is required to submit to a background check, physical fitness testing, and, in accordance with notice on the examination announcement, is to submit to a psychological testing component. The applicant was found by the testing psychologist to be "unsuitable for the position of deputy sheriff."

The courts of our state have uniformly held that a municipal civil service commission will be "afforded wide discretion" in the appointment of eligibles and that "such discretion is particularly necessary in hiring police officers to whom higher standards of fitness and character may be applied." Further, provided the exercised discretion is not irrational, arbitrary or abusive, "the results of [a] psychological evaluation" may be relied upon in support of disqualification. Lastly, it has been held that a civil service commission may refuse to certify an eligible for appointment who is found to lack any of the established requirements – as here provided for in the examination announcement.

THE FEDERAL DEPARTMENT OF LABOR ISSUES NEW PROPOSED RULES

Regular Rate of Pay: On March 28, 2019, the DOL detailed a proposed rule that is intended to clarify and update the rules which govern what type(s) of payment is to be included and/or excluded when calculating the "regular rate of pay" for purposes of obtaining an employee's "overtime" rate (See 29 CFR part 778).

The Federal Fair Labor Standards Act ("FLSA") generally requires the payment of overtime pay of at least 1 ½ times an employee's regular rate of pay for those hours worked in the excess of forty (40) in a given workweek.

The Wages and Hours Division of the DOL has proposed to clarify the current regulations in an attempt to "confirm that employers may exclude the following from an employee's regular rate of pay:"

- that the cost of providing wellness programs, onsite specialist treatment, gym access and fitness classes, and employee discounts on retail goods and services may be excluded from an employee's regular rate of pay;
- that payments for unused paid leave, including paid sick leave, may be excluded from an employee's regular rate of pay;
- that reimbursed expenses need not be incurred "solely" for the employer's benefit for the reimbursements to be excludable from an employee's regular rate;
- that reimbursed travel expenses that do not exceed the maximum travel reimbursement permitted under the Federal Travel Regulation System regulations and meets other regulatory requirements may be excluded from an employee's regular rate of pay;
- that employers do not need a prior formal contract or agreement with the employee(s) to exclude certain overtime premiums described in sections 7(e)(5) and (6) of the FLSA; and
- that pay for time that would not otherwise qualify as "hours worked," including bona fide meal periods, may be excluded from an employee's regular rate unless an agreement or established practice indicates that the parties have treated the time as hours worked.

The proposed rule also seeks to give clarification as to what should be included:

- payment for meal periods only where the parties have treated (either via practice or formal agreement) meal time as "hours worked";
- call-back pay not to include the minimum payment, but only the compensation for those hours actually worked);
- payments that are "compensation for hours worked."

If you wish to comment on this proposal, you may do so by May 28, 2019 at www.regulations.gov (rulemaking docket RIN 1235-AA24).

Overtime Eligibility: On March 7, 2019, the DOL announced (once again) a proposed rule change impacting who is and when they are eligible for FLSA overtime.

Currently, the FLSA exempts employee's earning more than $455 per week on a salary basis from overtime *if* they perform certain types of duties (known as the "white collar" exemptions or "professional executive and administrative" exemptions.) The DOL *proposed* a new rule which would increase the salary level from $455 per week ($23,660 per year) to $679 per week (equivalent to $35,208 per year.) The rule also proposes an increase in the salary threshold for the "highly compensative employees'" exemption from $100,000 annually to $147,414. It would also allow employers to count non-discretionary bonuses and incentive payments (including commissions) paid regularly toward satisfying up to 10% of the salary level. This would include contractual longevity or other contractual bonuses, among other monies paid.

If the proposed rule is adopted, employees earning less than $35,208 will very likely be eligible for overtime, regardless of their duties. Employees earning more than this amount would still need to be performing those administrative, executive, or professional duties. There is no proposed change to the tests to determine whether the employee's duties meet these criteria.

This may sound familiar to those of you who recall that the prior DOL administration proposed a similar rule which would have raised the salary thresholds even higher than those detailed in the current proposal. That rule never went into effect due to litigation over the legality of the rule changes.

The current proposed rule is subject to a 60-day "notice and comment" period, during which interested parties can share thoughts on the proposed rule. These comments will be considered before the rule can proceed to formal adoption. The rule is not in effect at this time, but it is important for employers to be aware of these potential changes in the near future. RWGM will keep our clients apprised of when/if the new rules are put in place.

If you wish to comment on this proposed notice of rulemaking, you may do so at www.regulations.gov (rulemaking docket RIN 1235-AA20).

Joint Employers: On April 1, 2019, the DOL proposed "to revise and clarify the responsibilities of employees and joint employers to employees" as same is governed under the FLSA. Apparently, no change has been made to existing rules in this regard since 1958!

The FLSA defines "joint employer status" to mean (for FLSA purposes):

> Any additional individual or entity who is jointly and severally liable with the employer for the employee's wages. (emphasis added)

The DOL has submitted new *proposed* rules aimed at clarifying the rules and responsibilities of employers to employees of joint employers. Joint employer relationships are permissible under the Department's rules where the employer and joint employer are both responsible for the employee's wages and ensuring that they are paid in accordance with the law, including minimum wage and overtime requirements. In order to have employers be clear on these responsibilities, the Department proposed a four-factor test to determine whether an employer is considered a joint employer responsible for the employee's wages. The test would look at whether the potential joint employer has the power to:

- Hire or fire the employee;
- Supervise and control the employee's work schedules or conditions of employment;
- Determine the employee's rate and method of pay; and
- Maintain the employee's employment records.

The proposed rule will be subject to a 60-day "notice and comment" period, and those comments will be reviewed before the rule can proceed to formal adoption. RWGM will keep clients apprised of the status and when/if the proposed rule goes into effect.

If you wish to comment on this proposed notice of rulemaking, you may do so by June 10, 2019 at www.regulations.gov (rulemaking docket RIN 1235-AA26). Note that unless the "joint employer" is responsible for wages at least in part, for the at-issue employee, this proposal may be inapplicable to your entity.

NEW YORK STATE PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

NYSPELRA's 45th Annual Summer Training Conference is set for July 17-19, 2019, in Saratoga Springs, New York. This year's agenda includes Investigation Techniques, PERB Update, Arbitrator

Review and Negotiations "How-To." Keep an eye out for all your conference materials and pertinent information.

TRAINING 2019

Remember to contact Elayne Gold or Karen Pelland to schedule your 2019 training. Your RWGM retainer agreement states how many days your municipality or school district are offered for training.

VOTING RIGHTS UPDATE

The NYS Election Law has, for some time (section 3-110), allowed an employee who claimed "insufficient time to vote" because of work to have 2 hours off, without loss of pay, to vote in the election. The enacted legislation, among other changes, extends the time to three (3) hours of leave. Further, the law (prior to the change) calculated the "sufficient time off to vote" based on the opening and closing of the polls and the work shift. Although the law USED to provide for "4 consecutive hours either between the opening of the polls and the beginning of the work shift, or between the end of the work shift and the closing of the polls," that language HAS BEEN DELETED. The current modification provides that the "employee shall be allowed time off for voting only at the beginning or end of [the] work shift, as the employer may designate, unless otherwise mutually agreed" deleting any reference to "sufficient time off to vote." Instead, the law provides that an employee may "take off so much working time as will enable him or her to vote." This means that the employee is not automatically entitled to the full 3 hours off, but only to that reasonable amount of time that will "enable" time to vote.

The law also requires an employee who requires time to vote to provide notice under specific time frames.

Questions remain unanswered in the law, pre and post amendment, as to whether an employee can be made to charge voting time to leave accruals. Also unanswered by the language of § 3-110 is whether the employer can require (without negotiation) proof that the employee used the requested time off with pay to actually vote.

Let's look at another recent statutory enactment for some guidance. A law enacted a few years back allows employees time off with pay for cancer screening (CSL § 159-b). When the law was first enacted it left open the question of using leave accruals/being required to do so. The law was amended the very next legislative session to specifically say that "the entire period of the leave of absence granted (for screening) shall be excused leave and shall not be charged against any other leave…" There is not much case law that accompanied § 3-110, Election Law; what exists dates back to the 1950's and 1960's! The only guidance is that the employee gets time off and "that no deductions shall be made from usual salary and wages of the voter…"

For now, we advise that the leave time of one "requiring" time off to vote NOT be charged to leave accruals. As for proof that the employee actually voted, well, perhaps policy (negotiated or otherwise) would require proof for jury duty and cancer screening; Election Law voting rights requirements have been in place for many years. Has your entity ever required proof? If not, we advise caution, as the new requirement may be a mandatory subject of bargaining.

The final Election Law "update" provides that polling hours will now be 6:00 a.m. to 9:00 p.m. for all primaries, general, and special elections statewide. The law is effective immediately.