Roemer Wallens Gold & Mineaux LLP
Counsellors at Law

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.

Summer 2019 Edition

IN THIS ISSUE:

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.

13 Columbia Circle
Albany, New York 12203
www.rwgmlaw.com

RECOUPMENT OF OVERPAYMENT

What can the Municipality do in the event it overpaid monies to an employee? Can it merely recoup it through a unilateral payroll deduction? Can it "bill" the employee for the monies "owed?"

Although the NYS Labor Law has a provision pertaining to recoupment (NYS Labor Law § 193; 12 N.Y.C.R.R. part 195), it is not applicable to public sector municipalities or school districts. Further, there are additional constraints on local entities seeking to recoup an overpayment: 1. The issue is mandatorily negotiable, and 2. the NYS Court of Appeals has held that there must be some due process procedural protections afforded to the employee in order to confirm that the amount being recouped is accurate and legitimate.

As to the first issue, PERB has found that the subject of recoupment of wages is a mandatory subject of bargaining under the Taylor Law ('the Act"). *City of Albany*, 23 PERB ¶ 4531 (1990), *exceptions dismissed as untimely*, 23 PERB ¶ 3027 (1999), *aff''d* 24 PERB ¶ 7004 (Sup. Ct. Albany County 1991) Although the Board dismissed the City's subsequent exceptions on procedural grounds, it noted that if it had reached the merits it would have affirmed the ALJ's decision that a unilaterally implemented recoupment procedure violated the Act. If there is no negotiated procedure for recoupment in place, this is something that the City would need to negotiate with the union before implementing such a procedure.

On the second issue, the Municipality must provide the employee/union with an opportunity to challenge (or at least review) the amounts being recouped if the employee believes there is an error in the amount, or the fact that it was overpaid in the first place. The Court of Appeals has acknowledged that there are circumstances in which a public employer may institute a recoupment remedy, but only when sufficient procedural protections are afforded. *Leirer v. Caput*o, 81 N.Y.2d 455 (Ct. App. 1993.) In this case, a Comptroller's audit determined that an employee had submitted time sheets and been paid for hours for which she was not, in fact, at her workstation. The Comptroller unilaterally sought to recoup the overpaid wages.

The Court of Appeals acknowledged the importance of audits and other forms of verification by public employers in light of the concern over the expenditure of public funds, but refused to sanction such audits, citing them as "self-executing weapons." The Court stated that an employer could not unilaterally implement the recoupment procedure where the amount at-issue was disputed by the employee and no quasi-judicial safeguards were put in place, noting that the procedures used in the audit were "seriously flawed in that no tribunal was convened, no witnesses were sworn, no testimony was taken by anyone, no arbitration was conducted, and no contract was relied upon."

Injury in the Performance of Duty

NYS General Municipal Law § 207-c (for law enforcement personnel) and § 207-a (for fire fighter personnel) provide for the payment of the full amount of salary or wages when the employee is injured/taken ill "in the performance of duty." The employer, once "GML status" is granted, will also be liable for medical and hospital expenses related to the injury/illness. The employee, in addition to being "in the performance of duty" must, pursuant to prevailing caselaw, establish a direct causal relationship between the duties performed and the resulting injury/illness.

Sullivan County Deputy Sheriff RR was working the midnight shift with a partner ("CM"). The two stopped at a convenience store at which Deputy CM purchased a snack. Deputy CM proceeded to use his privately owned pocket knife to open his snack when the knife became jammed and would not close. Deputy RR took out his own personal pocket knife and, in an attempt to unjam the other knife, cut his hand causing severe damage. Note that the record established that there were no set or mandated meal breaks. The record also established that pocket knives are not Sheriff's Office issued equipment, but Deputies are allowed and encouraged to have one.

The GML claim submitted by Deputy RR was denied, and then appealed to a Hearing Officer under a County Local Law. The Hearing Officer found that the injury, although severe, was not one incurred during the performance of duty within the meaning of the GML. The recommended conclusion was adopted by the County – GML status was denied.

Deputy RR appealed to the Sullivan County Supreme Court which directed the County to award GML status to Deputy RR. The County appealed to the Appellate Division, which affirmed the Supreme Court finding:

> … Officers [carried] a knife to assist them with various tasks, such as cutting seatbelts or cutting down people who attempted suicide by hanging … County Sheriff's … regularly carried a personal knife. This … clearly establishes the utility of carrying a functioning knife while on duty and the necessity of fixing the jammed knife so that [Deputy RR] and his partner could safely respond to their next call.
>
> Under these circumstances we find that a direct causal relationship exists between … job duties and injuries and that the Hearing Officer's findings to the contrary are not supported by the record.
>
> Indeed, in finding no causal relationship the Hearing Officer erred by placing too much emphasis on the fact that the … pocket knife jammed during the course of opening a snack while ignoring the safety concerns of responding to a call without first fixing the defective knife.

In the Matter of Sullivan County Patrolman's Benevolent Assoc., et al. v. County of Sullivan, et al., (Case No. 527951, Appellate Div. 3rd Dept. June 20, 2019)

NEW YORK STATE BANS SALARY HISTORY INQUIRIES

A new law was enacted prohibiting employers in New York State from inquiring about, or relying upon, the wage or salary history of an employee or applicant. The new law applies to New York State employers including governmental entities. The following are prohibited under the new law:

- relying on an applicant's wage or salary history in deciding whether to offer employment or deciding the salary to offer;
- requesting or requiring an applicant or employee's salary history as a condition to be interviewed or considered for employment or a promotion;
- seeking an applicant or employee's wage history from a current or former employer; and
- refusing to hire, promote, or otherwise retaliating against an applicant or employee based on their salary history, their refusal to provide salary history, or because they have filed a complaint alleging a violation of this law.

An employee may voluntarily disclose this information (for example, for purposes of negotiating an increased salary), and an employer can verify salary history if the employee provides their salary history after a salary offer has been made to support a higher wage than has been offered.

Several jurisdictions in New York already have similar laws in place, including New York City, Westchester County, Albany County and Suffolk County. The new law will not diminish any rights of applicants or employees under these laws, but any additional protections in the state law will likely be deemed applicable in these jurisdictions.

The law will become effective in January 2020.

Employers should review all current hiring and promotion materials, forms, interview questions and other practices to ensure that none ask for salary history information. Employers are also advised to train all employees who are involved in reviewing or hiring applicants or employees for promotion to ensure they are aware of the new prohibitions.

NYS LEGISLATURE – 2019 LEGISLATION OF INTEREST

A highlight on some relevant legislation after the close of session on June 20, 2019 - few bills of interest which were passed by both houses, while some others we have been tracking did not progress through (notably, a bill regarding retiree health insurance and a bill regarding selection of a Section 75 hearing officer). **The bills passed by both houses are awaiting transmittal to and action by the Governor:**

- DISCRIMINATION/HARASSMENT:
    - Extend human rights law to all employers in the state regardless of size
    - **Eliminate the severe or pervasive standard** for harassment cases (replace with "subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one of the protected categories")
    - **Roll back an employer's ability to utilize the "Farragher/Ellerth defense"** by providing that the employer can be liable for harassment even if the employee did not report the conduct to the employer (provide that the employer's affirmative defense can

be that the conduct "does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences")
- Allow for punitive damages and attorney's fees (discretionary) for employment discrimination cases
- Extend some elements of last year's sexual harassment laws to all forms of discrimination and harassment (employer responsibility for non-employee harassment; prohibition on non-disclosure agreements; prohibition on mandatory arbitration clauses)
- Extend the time limit to file a DHR complaint to three years for sexual harassment only

A separate bill which would have extended all of the elements of last year's sexual harassment laws to all forms of discrimination and harassment (offender reimbursement, mandatory training and policy, no non-disclosure agreements, non-employee harassment, no mandatory arbitration clauses) passed the Assembly and remains in committee in the Senate.

- A bill amending the Labor Law to prohibit discrimination based on employee or dependent's reproductive health decisions (This would apply to public employers.)
- A bill clarifying that the requirement to reasonably accommodate religious beliefs/practices applies to religious clothing/facial hair.
- A bill clarifying that "pregnancy related conditions" include lactation, requiring employers to make reasonable accommodation.

- RETIREMENT AGE

A bill that would raise the mandatory retirement age from 62 to 65 for members of the NYS Police and Fire Retirement system covered under Section 384.

- WORKPLACE VIOLENCE

A bill which would make public schools subject to Labor Law 27-b, workplace violence prevention, requirements.

Two bills of interest which did not progress through both houses:

- SECTION 75 HEARING OFFICERS

A bill calling for mutual selection of Section 75 hearing officers passed the Senate and is on the floor calendar for a vote in the Assembly.

- RETIREE HEALTH INSURANCE

A retiree health insurance bill prohibiting the diminution of retiree health benefits below the level at their retirement has not made it out of committee in the Senate or Assembly.

HOSTILE WORK ENVIRONMENT CLAIMS CAN BE RAISED UNDER THE AMERICANS WITH DISABILITIES ACT

The Second Circuit Court of Appeals has confirmed what courts in New York have held for some time: an employee can bring a claim alleging a hostile work environment based on their disability under the Americans with Disabilities Act ("ADA"). In *Fox v. Costco Wholesale Corp.*, 2019 U.S. App. LEXIS 6714 (2nd Cir., Jan. 10, 2018), an employee suffered from Tourette's Syndrome which caused verbal and physical tics, as well as obsessive-compulsive disorder. Co-workers mocked his condition, often in plain

view of supervisors and upper-level managers. The employee also alleged that he was reprimanded for behavior that others were not reprimanded for and was denied materials necessary to perform his duties after he filed a complaint with the New York State Division of Human Rights. These actions exacerbated his condition and caused additional stress and anxiety, requiring him to take extended medical leave.

The Second Circuit affirmed that there was not sufficient evidence for various claims, including disparate treatment, failure to accommodate, or retaliation for various reasons. However, the Court did find that there was evidence that the employee was subjected to a hostile work environment based on his disability. Although many circuit courts have found hostile work environment claims to be permissible under the ADA, the 2nd Circuit had yet to rule on that particular issue. The Court confirmed that such claims can be brought under the ADA in the same way they might arise under other laws, such as Title VII of the Civil rights Act, which prohibits discrimination on the basis of race, sex, religion, color and national origin.

See you at the NYSPELRA 45th Annual Training Conference
July 17-19, 2019
Saratoga Springs, NY.
For more information please visit: www.nyspelra.org