

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.

Winter (January) 2021 Edition

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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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We hope all of you are safe and well as Covid-19 continues its impact on New York State.

Be sure to look for RWGM Covid-19 updates through periodic Bulletins. The most recent RWGM Bulletins address NYS Department of Health and CDC protocols for returning to work following a positive test (Client Bulletin 2021-1 issued January 21, 2021) and NYS paid Covid-19 sick leave (Client Bulletin 2021-2 issued January 28, 2021).

JUNETEENTH HOLIDAY

Last year, Governor Cuomo, via Executive Order, declared June 19th a State holiday in order to “commemorate Black and African American freedom and achievements...” Several local governments around the State also declared a one-time 2020 “Juneteenth” holiday to its workforce.

On October 14, 2020, the Governor signed into law an amendment to NYS General Construction Law (Section 24) to include as a “public holiday...the nineteenth of June.”

Holidays declared by the Governor and State Legislature (or federal government) are not automatically paid days off for municipal employees. Holidays – as with any time off – are a mandatory subject of negotiations. As such, the June 19th “holiday” is not to be unilaterally imposed nor automatically granted upon union demand.

CSL § 71 – NO NEED TO NEGOTIATE PROCEDURE

In Matter of City of Long Beach v. NYS PERB, the 2nd Department of the Appellate Division held there is no obligation

on the employer to negotiate any procedure prior to undertaking a Civil Service Law §71 proceeding to separate someone from service who has been out of work for a cumulative period of one year.

In this case, an injured firefighter went out of work beginning on November 13, 2014 and was still out of work a year later. The City of Long Beach notified the firefighter that he would be separated from service under the state law, a hearing would first be held, and that he had the right to fully participate in this hearing. He was to respond to the notice in order to proceed with a pre-separation hearing. It appears the firefighter did not respond to the notice. His union requested that the City engage in bargaining a procedure for the implementation of CSL §71. When the City refused, the union filed an Improper Practice Charge for a failure to bargain in good faith over a term and condition of employment. PERB agreed with the Union and the City appealed. Although the Supreme Court held a violation of the law had occurred, the Appellate Division reversed.

The Appellate Division notes that there is generally a presumption in favor of bargaining, but that presumption is overcome where the State Legislature has removed the matter from mandatory negotiations. The Court found CSL §71's interpretation

is one of pure statutory construction dependent only on accurate apprehension of legislative intent [with] little basis to rely on any special competence of PERB. [citations omitted].

The Appellate Division concludes that CSL§71 declares that an employee

be entitled to a leave of absence for at least one year

and that the Legislature directed the Department of Civil Service to promulgate rules to implement the law.

The Department...has promulgated implementing regulations...including detailed procedures for notifying an employee of an impending termination following the expiration of that one-year period and the right to a hearing...

Here, the specific directives of [CSL] §71 and 4 NYCRR 5.9 leave no room for negotiations.

[187 AD 3d 745(2nd Dept. 2020)]

FOIL REQUEST FOR PUBLIC SAFETY PERSONNEL AND DISCIPLINARY RECORDS

On June 12, 2020 the State of New York repealed §50-a of the Civil Rights Law thereby opening up to inspection previously protected law enforcement and public safety personnel files. Together with the repeal, the State modified certain aspects of the Freedom of Information Law (FOIL) to enhance the release of information. The State courts and Committee on Open Government continue to review FOIL requests for public safety materials on a case-by-case basis.

City of Schenectady Police Officer Brian Pommer's personnel file was the subject of a FOIL request by a local newspaper. Police Officer Pommer had made an arrest in which he was accused of the use of excessive force. In an attempt to prevent release of certain aspects of the at-issue personnel records, the

Schenectady PBA brought an Article 78 proceeding seeking a declaratory court ruling. Schenectady PBA, et al. v. City of Schenectady, et al.; 202 NY Slip Op. 34346(U), Schenectady Sup. Ct., Dec. 29, 2020. In addition to seeking for the Court to prevent release of certain records, the PBA also asked the Court to order redaction of “any and all references to conduct which was uncharged, unfounded, unsubstantiated, settled without discipline and/or otherwise resolved or exonerated.” [Id. @ p. 5] The specific at-issue records included

- Counseling Notice related to a call responded to for domestic violence;
- Notice of potential charges (in draft – never signed, dated or served) of how a call was handled;
- Settlement Agreement from a served Notice of Discipline (related to handling of COVID-19 restrictions among a gathered group).

The Court maintained that legislative intent was quite clear – all is to be subject to release unless found to be squarely within an exemption of FOIL such as invading personal privacy. The PBA argued that the listed documents can serve no public interest if disclosed. The Court did not agree and held:

This Court is hard pressed to find that any of these particular documents fall within the types of records to which [the law] ascribes a right of “personal privacy.”

* * *

There is simply no ambiguity...as to the legislature’s instructions when responding to FOIL requests. In terms of public access, it is of little consequence that [the] records contain unsubstantiated charges or mere allegations of misconduct. Where counselling pertains to job performance, or allegations relate to public duty, such records are publicly accessible...regardless of reputational injury or validity.

[Id. @ p. 12]. The Court reminds us that “public employees have less entitlement to privacy than do non-public employees...where records relate to performance of public duties, no privacy right exists... It is unavailing as a basis to deny disclosure that an officer may not have had a full and fair opportunity to contest any misconduct charge.” [Id. @ p. 13].

Finally, the court concludes that “the public right of access to records under FOIL cannot be bargained away in collective bargaining between management and labor.” (Id. @ p. 15)

The Court felt it important to state that this decision should be based on the facts presented and thereby be “narrowly construed.” WATCH for Appeal.

IRS MILEAGE RATE

The IRS mileage reimbursement rate for 2021 is 56 cents per mile driven for business use. The monies paid as reimbursement are to cover costs of gasoline and the wear and tear attributed to vehicle use.

NYS PAID SICK LEAVE

As reported in the Fall 2020 Newsletter, New York State paid sick leave is not an obligation of local government; there is no requirement to afford this leave and in fact, such paid sick leave cannot be granted without collective bargaining.

EMERGENCY PREPAREDNESS PLAN

On Labor Day, Governor Cuomo signed legislation requiring all public employers to create plans to adequately protect workers in the event of another state disaster emergency involving a communicable disease. The plans (known as “operation plans”) would apply to both the state and localities, including school districts. Plans must be submitted to unions and labor management committees within 150 days, and plans need to be finalized on April 1, 2021.

Operation plans must include:

- List and description of positions considered essential;
- Descriptions of protocols to follow to enable all non-essential employees to work remotely;
- Description of how employers would stagger work shifts to reduce overcrowding;
- Protocols for PPE;
- Protocol for when an employee is exposed to disease;
- Protocol for documenting hours and work locations for essential workers;
- Protocol for working with essential employees’ localities for identifying emergency housing if needed;
- Any other requirement determined by the New York State Department of Health, such as testing and contact tracing.

Plans must be submitted to the unions for review. The Department of Labor will also create an online portal for public employees to report violations of health and safety rules for communicable diseases, including COVID-19.