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.

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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 our office at (518) 464-8291.

We here at RWGM hope you are all safe and well…and if able, vaccinated successfully. It has been a long haul and we hope that there will soon be a time for full in-person meetings, conferences, and simple get-togethers.

UPDATE ON GPS AND DASHBOARD CAMERAS

Installation and use of GPS monitoring is a management right. PERB has held that the employers' decision to use certain equipment is non-mandatory where there was no increase in employee participation and no greater privacy intrusion than if a supervisor were sitting in the car with them. There is a management right to know where its property is located, whether or not an employee is on duty. PERB finds that the mere fact that a new work rule may also have a disciplinary component does not create a bargaining obligation.

The use of video surveillance, however, might raise different questions. Nanuet Union Free Sch. Dist., 45 PERB ¶ 3007 (2011) is still the leading case on that issue. PERB held that video surveillance is generally mandatorily negotiable because it "bears a direct and significant relationship to working conditions. It requires employees to be participants and it intrudes on their interests in job security, privacy and personal reputation." However, each case requires a fact-specific examination of the employer and employee interests. If, for example, videotaping is integral to the employer's core mission, it may be found to be non-mandatory – as in a correctional facility.

Clearinghouse: Federal Mandate Pertaining to CDL Holders and Employers

The Federal law pertaining to CDL's was amended so that effective January 6, 2020, a Drug and Alcohol Clearinghouse is established. Employers of CDL holders are required to inquire whether current and prospective employees are prohibited from performing safety sensitive functions such as operating

equipment or vehicles needing a CDL certified/licensed operator. The clearinghouse has as its (statutorily) stated purpose the mission of "real-time information about CDL driver drug and alcohol program violations." Each CDL holder must complete a consent "to conduct a [limited or full] query…to determine whether drugs or alcohol violation information about me exists in the clearinghouse." If an employee refuses to execute and provide consent, the law requires that the employee be removed from all safety sensitive functions. Although the federal law mandates participation, there may be a very limited obligation on the part of the employer to "bargain" the impact of the federal mandate. To learn more about the clearinghouse we refer you to 49 CFR §382.701 et seq; see also https://www.truckinginfo.com.

Marijuana Becomes Legal in New York State

On March 31, 2021 New York State Governor Andrew Cuomo signed into law the "Marijuana Regulation and Tax Act" (Ch. 92, L 2021 - A01248-A /S00854-A)." The law establishes a Cannabis Control Board with the Office of Cannabis Management to oversee all aspects of the legalization. The Law has several components to address the levels of legal possession, sale and growth of legal marijuana, municipal opt-out allowances and many related issues. RWGM is conducting its analysis of the law to better report to our clients its impact upon negotiated substance abuse testing policies, and specific application to federal CDL covered departments; practical aspects pertaining to law enforcement; etc. Please stay tuned for our report.

Civil Service Law §75: Participation of Appointing Authority

The Appointing Authority for the municipality, school or library district should not be the decision maker in a Civil Service Law §75 proceeding when that individual also provided testimony or evidence at the §75 proceeding.

In the Matter of Ilana Morgan v. Warren County, et al., 191 AD3d 1129 (App. Div. 3rd 2021), the 3rd Department of the Appellate Division reminded parties that

> Although involvement in the disciplinary process does not automatically require recusal…individuals who are personally or extensively involved in the disciplinary process should disqualify themselves from reviewing the recommendations of a Hearing Officer and from acting on the charges. (citations omitted)
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> * * *
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> When an officer institutes charges of misconduct and testifies at the ensuing hearing, that officer, in the interest of fairness, must disqualify himself or herself from reviewing the Hearing Officer's recommendations and rendering a final determination. (citations omitted)

In the case, the County's Attorney, who was also the Supervisor of the employee preferred the §75 charges after issuing to the employee a termination notice. The Supervisor also appointed the Hearing Officer and testified as a witness at the proceeding. The Supervisor, after the hearing, issued a Determination. Based upon the specific facts, the Court concludes that "[i]n view of [the] extensive

personal involvement, [the Supervisor] should have disqualified herself from acting on the charges." (citations omitted)

Resignation and Impact on DCJS Reporting Requirements

Pursuant to New York State Executive Law §845(2), all governmental entities that employ law enforcement officers are mandated to report changes in employment status to the New York State Division of Criminal Justice Services ("DCJS.") DCJS issued implementing regulations (See 9 NYCRR 6056.2(g)) to include a definition of "removal for cause" – one of the areas requiring reporting. The regulation defines "removal for cause" as a removal [or change in employment status] for "incompetence or misconduct" where such removal occurs:

> (1) pursuant to:
>
> > (i) a hearing held under section 75 of the Civil Service Law;
> >
> > (ii) a collective bargaining agreement, or any general, special or local law, or charter provision in accordance with section 76 of the Civil Service Law; or
> >
> > (iii) any other applicable law; or
>
> (2) by an employee's resignation or retirement while a disciplinary process has commenced pursuant to paragraph (1) of this subdivision which may result in removal [emphasis supplied].

In Kitto v. City of Albany, Department of Police, et al., (Supreme Court Albany County, March 12, 2021, Hon. Christina L. Ryba), the Court had opportunity to interpret this law and its implementing regulation.

Kitto was a Police Officer for the City. He was involved in an off duty shooting incident in Utica. The Oneida County District Attorney found the shooting to be "deemed justified and resulted in no homicide charges;" however, Kitto was charged with the crime of "patronizing a prostitute in the third degree."

The City of Albany's official investigation surrounding the incident culminated in disciplinary charges against Kitto for conduct unbecoming; visiting prohibited establishments and carrying a firearm. The penalty sought was termination from employment. The charges were issued by the Police Chief.

Meanwhile, the Oneida County District Attorney and Kitto were working on a tentative plea deal which would include, as a condition of the plea, that Kitto resign from his position with Albany's Police Department.

Kitto's Police Union was working with the City of Albany's counsel to effectuate a resignation in exchange for the disciplinary charges being dismissed. No writing of any agreement to this "exchange" ever took place. Kitto tendered his resignation – effective "on the close of business on May 13, 2019." On May 14, 2019, Kitto entered the plea agreement with Oneida County.

On June 19, 2020, the Albany Police Department notified DCJS that "Kitto's employment as a Police Officer ceased effective May 14, 2019" and noted the resignation fell under DCJS Regulation as defined in 9 NYCRR 6056.2 (g). DCJS notified Kitto on July 19, 2020 that as he was "removed for cause," his Police Basic Training Certificate was invalid. Kitto brought an Article 78 claiming he had resigned, no charges were pending and therefore DCJS regulations were not applicable.

The Court found that although Kitto resigned, the disciplinary charges were still pending at that time. The Court further maintained that "it is undisputed that…the Chief of Police possessed the sole authority to withdraw the disciplinary charges" and there needs to be "competent evidence…to establish" that the charges were withdrawn and/or a written agreement that "the resignation was without cause."

> If [Kitto] sought to ensure that his disciplinary record with DCJS reflected a "resignation" instead of "removal for cause," he was required to either go through the disciplinary process and clear any misconduct from his record, or obtain written verification from the Albany Police Department that the disciplinary charges were indeed withdrawn by the Chief of Police prior to tendering his resignation.