



New York State  
Public Employers Labor Relations Association Inc.

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[www.nyspelra.org](http://www.nyspelra.org)

The 41<sup>st</sup> Annual Training Conference was well-attended, informative and produced one of the most interesting conferences in years. There were 121(!) attendees with 18 of those being “first timers.” We all left smarter and having networked with colleagues who will remain an important part of our work lives. Thank you all.

The NYSPELRA Board of Directors elected at our Annual Meeting, serving for 2015-2016 are:

- President – Michael Volforte, Esq.
- Kurt D. Gustafson, Esq. – President-Elect
- Peter Troiano – Past President
- John J. Kalinkewicz – Secretary/Treasurer
- Lisa M. Baisley – Vice President – Region I
- Elayne G. Gold, Esq. – Vice President – Region II
- John F. Corcoran, Esq. – Vice President – Region III
- Kathleen O’Hara, Esq. – Vice President – Region IV
- John Mancini, Esq. – At-Large
- Terry O’Neil, Esq. – At-Large
- Louis R. Giardina – At-Large
- John P. Talerico – At-Large
- William L. Holcomb – Ex-Officio

Another highlight and proud moment was the selection by our membership and Board of Jack Kalinkewicz to receive the 2015 Holcomb Award. Jack is currently the NYSPELRA Secretary, responsible for coordinating our activities throughout the year and ensuring we have smooth operations and prompt member feedback. Jack recently retired from Saratoga County, serving in various positions with his last as the Saratoga County Personnel Director. We are proud to have Jack as a NYSPELRA member.

Congratulations Jack, and thank you for your service to NYSPELRA and the public sector community.

## **NEWS**

### **LIMITATIONS TO THE PROTECTIONS OF NYS CIVIL RIGHTS LAW § 50-a**

NYS Civil Rights Law at § 50-a maintains, in relevant part, that:

All personnel records used to evaluate performance toward continued employment or promotion, under the control of any police agency or department of the state or any political subdivision thereof ... and such personnel records under the control of a sheriff's department or a department of correction of individuals employed as correction officers ... shall be considered confidential and not subject to inspection or review without the express written consent of such police officer ... except as may be mandated by lawful court order.

(see § 50-a.1)

Municipal police agencies would generally give a very strict construction to the meaning of these words; in that regard police agencies will not release certain information unless court directed to do so. Case law does, for the most part, support such actions. However, a New York City court recently held that Section 50-a of the Civil Rights Law did not provide sufficient basis for an agency to withhold records regarding police officer misconduct requested under the Freedom of Information Law ("FOIL.") *Luongo v. Records Access Officer*, 15 N.Y.S.3d 636, (Sup. Ct. N.Y. County, Jul. 17, 2015.)

The subject FOIL request was made by the Legal Aid Society for records of the Civilian Complaint Review Board ("CCRB") pertaining to the NYPD officer who was videotaped applying a chokehold to arrestee Eric Garner in 2014, which resulted in Mr. Garner's death. The request sought a "summary" of CCRB's records indicating the number of substantiated complaints against the officer and any CCRB recommendations made to the NYPD based on those complaints. The CCRB denied the request based on Section 50-a, which states, as indicated above, that "all personnel records used to evaluate the performance toward continued employment or promotion" of police officers are confidential and not subject to review without the consent of the officer or a court order.

The court nonetheless ordered disclosure of the material. The court first found that the CCRB failed to prove that the requested summary was a “personnel record” within the meaning of Section 50-a. Further, the court found that even if the requested summary was a “personnel record,” disclosure was still required. The court cited the fact that the request was limited to such “rudimentary” information that there would be little risk of harm to the officer, and that the CCRB had previously disclosed the same type of information upon request.

Last year, the New York State Committee on Open Government (the agency responsible for administering the FOIL) called for outright appeal of Section 50-a, or at least an amendment to substantively limit the scope of material that can be withheld under the provision. *Annual Report to the Governor and State Legislature: Celebrating 40 Years of the Freedom of Information Law and the Committee on Open Government...More to Be Done*, State of New York Committee on Open Government, December 2014, <http://www.dos.ny.gov/coog/pdfs/2014AnnualReport.pdf>. Although the court in *Luongo* stopped short of expanding its ruling outside the specific facts of this case, the decision may indicate a shift toward narrower judicial interpretation of the protection afforded by Section 50-a. Much attention has been focused on the issue of police discipline in light of recent high-profile police brutality cases. The *Luongo* decision may serve as a step toward increased public access to and transparency in the process of police discipline. (Submitted by Elena P. Pablo, Esq.)

### **COST OF IGNORING HARASSMENT COMPLAINTS**

On August 13, 2015, the Appellate Division, Third Department decided in the *Matter of Rensselaer County Sheriff's Department v. New York State Division of Human Rights, et. al.*, that former Rensselaer County (the “County”) Corrections Sergeant Lora Abbott Seabury (“Ms. Seabury”) is entitled to damages in excess of **three million dollars (\$3,000,000.00+)** as a result of workplace sexual harassment. The decision is significant for many reasons, not the least of which is the total size of the judgment and that Ms. Seabury is entitled to damages consisting of the pension **she would have received absent the harassment.**

The applicable facts of this case are that in September 2010, Ms. Seabury filed a complaint with the New York State Division of Human Rights (the “DHR”) alleging, among other things, that she was subjected to sexual harassment by male coworkers at the County Correctional Facility. The complaint details that Ms. Seabury reported a colleague for sleeping on the job and for previously sexually harassing her by unwanted grabbing of her buttocks and breasts. After the colleague was suspended following her report, Ms. Seabury began enduring daily harassment by the colleague’s friends who

called themselves “the boys club”. The harassment was of a retaliatory and sexual nature.

Ms. Seabury routinely reported these incidents to her supervisor, Captain Hal Smith (“Capt. Smith”). Capt. Smith failed to reprimand any of the boys club. Instead, he told Ms. Seabury “to be strong”, “be tough”, “boys will be boys” and “you know how those boys are”. He further suggested that Ms. Seabury speak to one of the alleged harassers regarding a change in assignment for another female who also complained of workplace harassment.

Despite the daily harassment, Ms. Seabury continued to work as she hoped to become the first female sergeant to retire from the correctional facility. As a seventeen (17) year employee, she needed only eight (8) more years to receive a pension based on twenty-five (25) years of service. However, Ms. Seabury was unable to endure the daily harassment and eventually separated from employment.

Following a DHR hearing, the Administrative Law Judge determined that Ms. Seabury was entitled to \$300,000.00 for pain and suffering, more than \$340,000.00 for past and future lost wages and damages for a lost pension that Ms. Seabury would have received had she continued to work until reaching 25 years of service. In total, the DHR awarded Ms. Seabury damages of approximately \$2 million.

Both Ms. Seabury and the County appealed the ultimate DHR decision. The Appellate Division decided not to reduce the \$300,000.00 pain and suffering award because it was “reasonably related to the wrongdoing”. It further determined that the County was not entitled to an offset of the back pay and future earnings award based upon future workers’ compensation benefits. The court reasoned that there would be a double punishment upon Ms. Seabury if the County could apply an offset as well as a lien for the same amount of earnings.

Importantly, the Appellate Division agreed with the DHR that awarding Ms. Seabury damages for a lost pension “make[s] the victim whole for injuries suffered as a result of discriminatory employment practices.” Ms. Seabury presented evidence of the relevant portions of her collective bargaining agreement to establish what her final three full years of employment average salary would have been. Accordingly, the Appellate Division’s decision increased the award, which included several hundred thousand dollars in interest, against the County to more than \$3 million in damages.

This Decision is significant for a number of reasons. First, there is a finding that a supervisor failed to report sexual harassment and retaliation. This failure imposes strict

liability upon the County. Second, the supervisor turned “a blind eye” to the complaints apparently because those complaints were about the “boys club”. Third, Ms. Seabury was able to establish that but for the harassment, she would have continued to work until retirement eligibility. As a result, “to make her whole”, she is entitled to not only those earnings, but a pension. These damages place a significant burden upon a County. Fourth, even though Ms. Seabury may not have filed a complaint with the Personnel Department or County management, she did complain to a supervisor, consistent with the County’s anti-harassment policy. As a result, the County is liable.

LESSON: it is imperative that on-going supervisory training in anti-harassment and discrimination policies be held. It is also imperative that these policies be updated to reflect the current laws.

(Earl T. Redding, Esq.)

## **CONTRACT SETTLEMENT UPDATES**

### **WAYNE COUNTY CORRECTIONS**

The County of Wayne/Wayne County Sheriff successfully concluded collective bargaining in May 2015 with the Wayne County Sheriff’s Employees Association, which represents a unit of about 60 full-time correction officers and correction sergeants, for a new 5 year contract. An earlier tentative agreement reached in January 2015 was rejected by the union’s rank-and-file which resulted in a resumption of negotiations; the parties successfully negotiated the following:

- Contract term: January 1, 2015 – December 31, 2019

- Base Salaries/Wages:

1/1/15 – 2.25% across-the-board (ATB)

1/1/16 – 2% ATB

1/1/17 – 2% ATB

1/1/18 – 2% ATB

1/1/19 – 2% ATB

Retroactivity limited to those employees still employed with the Wayne County Sheriff’s Office at the time of ratification and retirees who worked in 2015.

- Overtime Compensation: The current compensatory time off option for overtime work will be eliminated effective January 1, 2017.

- Health Insurance Reopener: New language added such that upon demand of the County, the parties will reopen negotiations on the sole subject of health insurance if the County is likely to incur, and desires to avoid, the payment of monetary penalties to the federal government under the federal Affordable Care Act.
- Sick Leave Benefit Upon Termination of Employment: Effective 1/1/16, the County and Union agreed to eliminate the right of the unit employees to apply the value of accrued but unused sick leave to the payment of retiree health insurance premiums. This give-back was in consideration for a new benefit providing each employee who has completed at least ten (10) years of continuous service with the County and whose employment with the County is terminated by reason of: (1) retirement; or (2) resignation; or (3) layoff; or (4) death, a right to be paid for up to one-thousand hours (1,000) hours of accrued but unused sick leave at a rate of sixty-five (65%) of the value of the sick leave at the time of termination of employment. The new benefit is intended to discourage excessive use of sick leave by the employees.

### YATES COUNTY CORRECTIONS

The County of Yates/Yates County Sheriff successfully concluded collective bargaining in August 2015 with the Law Enforcement Officers Union, AFSCME Council 82, which represents a unit of about 64 full-time correction officers, dispatchers and other civilian personnel, for a new 3 year contract:

- Contract term: January 1, 2015 – December 31, 2017
- Base Salaries/Wages:
  - 2015 – 0% on schedule. Step movement only.
  - 2016 – 0% on schedule. Step movement only.
  - 2017 – 2% Across-the-board plus step movement.

Starting rate of pay for the title of Correction Officer also frozen for 2017.

- Overtime Compensatory Time Off: Compensatory time for employees hired prior to April 16, 2012: employees may continue to elect to take compensatory time off in lieu of overtime pay subject to the following accumulation and use caps: 84 hours per year for all corrections positions for 2015, and 120 hours per year for all other positions for 2015. These annual limits shall be reduced to 80

hours for all corrections positions for 2016 and 2017, and 110 hours for all other positions for 2016 and 2017.

Compensatory time for employees hired on or after April 16, 2012: employees may continue to elect to take compensatory time in lieu of overtime pay subject to the following accumulation and use caps: 42 hours per year for all positions.

The employees receive payment at the end of each year for unused compensatory time calculated on the basis of the employee's hourly rate of pay in effect on December 31 of each year.

- Health Insurance: The Union's agreement to the two 0% wage adjustments for 2015 and 2016 was in consideration for the County's agreement to continue unchanged the existing health insurance plan and employee/employer premium contribution levels. The County had proposed to replace the existing PPO style plan with a high deductible health plan in conjunction with health reimbursement accounts (HRAs).

#### **CITY OF ALBANY DISPATCHERS**

The City of Albany and its Communications (aka "Dispatch") unit were operating under a Collective Bargaining Agreement which, by its terms, had "expired" on December 31, 2009. After Fact Finding the parties proceeded to Legislative Hearing. Before the City's Common Council undertook legislative imposition, the City and its Dispatchers, represented by Council 82, reached agreement. The terms are similar to that supported by the Fact Finder (back in August 2013), except for the issue of retroactivity:

- Wages

Effective January 1, 2010:	1%
Effective July 1, 2010:	1%
Effective January 1, 2011:	1%
Effective July 1, 2011:	1%
Effective January 1, 2012:	1%
Effective July 1, 2012:	1%
Effective January 1, 2013:	1%
Effective July 1, 2013:	1.5%

Retroactive pay will only be paid for work performed on or after 1/1/2013.

Effective in 2014, the union agrees to a wage freeze.

- Health Insurance

Effective upon ratification by the Union, those employees currently enrolled in the Extended and Wrap Around Health Insurance plans (the “Cadillac Plans”) will leave said plans and enroll in either the City’s PPO or the CDPHP plans available. These plans include higher prescription drug co-payments (note: all individuals contribute 10% toward premiums while family plan employees contribute 25%).

Please let us know your thoughts and opinions of the NYSPELRA Newsletter.

In addition, you are encouraged to forward to Jack or to Elayne Gold [egold@rwgmlaw.com] any article, information from your municipality, agency, or school district relating to Arbitration Awards (grievance arbitration, discipline, etc.), Fact Findings, contract settlements, etc. for inclusion in future editions of our Newsletter.

**Contact NYSPELRA**

NYSPELRA

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**Check our website for latest NYSPELRA information: [www.nyspelra.org](http://www.nyspelra.org)**