NYSPELRA Newsletter: December 2005

IN REMEMBRANCE OF TONY RUSSO AND HAROLD NEWMAN

Tony Russo, the dynamic and energized former head of the Office of Labor Relations for the City of New York and a co-founder of this Association, died in early December at the age of 88. His addresses before this Association's Annual Training Conferences remain legendary.

Rumor has it that Tony had left public school after the 5th grade when one day the teacher instructed that 2+2 was 4 and then the next day insisted that 3+1 was 4. Concluding that the teach had no clue, he bailed. He began his career with the City as a clerk in the Sanitation Department and retired as the Director of Labor Relations, having worked during the terms of Mayors Abe Beame and Ed Koch.

It is also with regret reported that Harold Newman, the former Director of Conciliation for the Public Employment Relations Board who later became its Chair for several years died in Florida in late November. Harold was a skillful mediator and his service as both as the Director of Conciliation and as Chair was appreciated by both labor and management representatives.

For those fortunate to have crossed their paths, their dedication to their responsibilities and their integrity in doing so is most appreciated.

LEGISLATIVE UPDATE

The Governor has approved this bill that was recently delivered to him. Details regarding bill text and voting records for any bill can be obtained off a search engine for either "nys assembly" or "nys senate". Find the link for bills and enter the bill number, preceded by the reference to the house in which it was introduced. State statutes are also available from either site.

• S. 5379-B, will authorize PERB to remedy an employer's refusal to comply with a cease and desist order issued in connection with an improper practice violation and to include, to the extent the Board deems appropriate, the authority to make employees whole for the loss of pay and/or benefits resulting from the violation of the cease and desist order and the underlying improper practice by providing that any agreement between the parties be given retroactive effect to the date on which the improper practice was found to have commenced. Chapter 761, effective December 20. Editor's note: Since the Board has a plenary authority to remedy improper practices and since the amendment references unfair labor practices, something that does not exist under the Taylor Law, and since a review of the last 3 years of Board decisions reveals no instances of an employer refusal to comply with a cease and desist order from PERB, we once again have a remedy for a nonexistent problem.

DRAFTING AN EFFECTIVE AND ENFORCEABLE "LAST CHANCE AGREEMENT"

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Public employers are often faced with the difficult task of determining the appropriate discipline for an employee who has violated its work policies or procedures. This dilemma most frequently arises when the employee's misconduct is serious enough to warrant termination or demotion but where mitigating circumstances suggest leniency. In such cases, employers often determine it is in their best interests to suspend or fine the employee together with a warning that future violations will result in the imposition of the harsher penalty, immediate termination. This warning is often memorialized in a written agreement called a "Last Chance Agreement" which the employee is required to execute in lieu of the imposition of the harsher penalty. These types of settlement agreements are also sometimes referred to as a "Return to Work Agreement" or a "Letter of Conditional Employment".

Traditionally, New York's courts have upheld the penalties outlined in an agreement where the employee knowingly and voluntarily entered into the agreement and employers did not act in bad faith in enforcing them. Wolfe v. Jurczynski, 241 AD2d 88, 671 NYS2d 864 (1998), where the 3rd Department refused to find that a police lieutenant's resignation was improperly coerced because he had voluntarily entered into the agreement which provided that, if he failed to comply with its terms to the satisfaction of the chief of police, he could be dismissed immediately without a hearing; McGough v. State of New York, 243 AD2d 983, 664 NYS2d 630 (3rd Dept. 1997), upholding a correction sergeant's demotion where he had voluntarily waived his right to a disciplinary hearing for future violations during a one-year disciplinary evaluation period and the employer did not act in bad faith in enforcing the agreement; and Abramovich v. Board of Education 46 NY2d 450, 414 NYS2d 109 (1979), upholding a tenured teacher's discharge without a hearing where the teacher previously waived his right to one pursuant to a prior disciplinary settlement agreement.

The courts have uniformly enforced these agreements, notwithstanding their harsh results, based on the reasoning that the parties voluntarily entered into the agreement and it is not the court's role to redraft their deal. Partlow v. Blue Coral-Slick 50, unreported, (2005), where Ohio's Court of Appeals upheld an agreement, notwithstanding the plaintiff's argument that it violated the Americans with Disabilities Act because the employee was terminated not for his alleged disability and/or rehabilitation efforts, but rather for failing to comply with the terms of the agreement itself and Golson-El v. Runyon, 812 F.Supp. 558, 561 (E.D. Pa.), aff'd 8 F3d 811 (3d Cir. 1993), construing a last chance agreement in favor of the employer because to do otherwise would "discourage their use by making their terms meaningless".

However, in order for an agreement to truly be enforceable and effective, it must be carefully drafted. Von Roll Isola USA and Int'l Union of Electronic, Electrical, Salaried, Machine & Furniture Workers, 304 AD2d 934, 758 NYS2d 698 (3rd Dept. 2003) and McGough, cited above. Specifically, the agreement should be crafted in clear and plain language, be brief and not contain legal or arcane vocabulary, thereby enabling the employee to easily comprehend it. Additionally, the agreement should:

1. identify the inappropriate conduct the employee engaged in by and state that the employer has the right to terminate or demote etc. for those actions;

2. obtain an acknowledgment from the employee that his/her misbehavior could have resulted in his/her immediate termination or demotion etc., but employment was continued only as a result of the employee entering into the agreement;

3. clearly identify the types of future behavior that will result in immediate termination or demotion etc.;

4. state how long the employee will be subject to the restrictions and the probationary period set forth in the agreement;

5. clearly identify the person or procedure that will determine whether the employee engaged in the proscribed conduct;

6. set forth any other requirement(s), i.e. successfully pass random drug tests, that the employee must comply with during the last chance period;

7. state that the employee had the opportunity to consult with counsel regarding the terms of the agreement and had a reasonable amount of time to review it before signing it and indicate that the employee has knowingly and voluntarily entered into the agreement; and

8. indicate that the employee has knowingly and voluntarily entered into the agreement.

Unfortunately, public employers often have difficulty obtaining all of these terms without substantial negotiations. This is due to the fact that public sector unions realize that if all of these provisions are contained in an agreement, the employee will be deemed to have waived his/her right to appeal a subsequent disciplinary action at arbitration or otherwise. See Von Roll Isola USA, cited above, recognizing that the terms of an agreement can supersede and supplement the arbitration provisions contained in the parties' collective bargaining agreement. As such, public employers must exercise persistence and care in drafting these agreements since a failure to obtain proper language could enable an employee to circumvent the attempt to provide a last chance to correct inappropriate behavior.

Going forward, in order for public employers to ensure that their last chance agreements are truly effective and enforceable they must carefully negotiate and draft their terms. Where questions arise during this process, public employers should seek advice from counsel in order to ensure they really only give their wayward employees one last chance.