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MUNICIPALITIES PREVAIL BEFORE THE COURT OF APPEALS IN SCOPE OF BARGAINING CASES

Several municipalities have recently successfully argued cases in the Court of Appeals regarding matters involving the scope of negotiations. In Matter of the Arbitration between Buffalo PBA and City of Buffalo, 4 NY3d 660, 797 NYS2d 410 (2005), the Court held that an award of an arbitrator which denied the Police Commissioner the authority to select from 1 of the top 3 on a civil service eligibility list to fill a vacancy should be vacated because it violated public policy. The arbitrator had relied on contractual language which provided that all conditions or provisions beneficial to unit employees that were currently in effect and which were not specifically addressed in the agreement shall remain in effect for its duration. The union claim, accepted by the arbitrator and lower courts, was that this language required the City to continue a long-standing practice whereby the Commissioner appointed only the top ranked candidate on a list. The lower courts and the arbitrator had relied on language contained in a 1997 Court of Appeals decision involving the Buffalo Board of Education in which the Court held that a public employer could agree to waive its statutory authority to choose from among 1 of the top 3 on a civil service list without violating public policy. But in this case, the Court instead held that public policy requires that police administrators retain their 1 of 3 authority because filling a vacancy in the department involved the safety of the community. The Court held that, absent compelling evidence that the Police Commissioner made a conscious decision to relinquish that authority, a fact which was part of the Buffalo Board of Education case, the authority to select from among the top 3 eligibles could not be bargained away nor restricted by arbitration.

On March 28, the Court held in cases involving the City of New York and the Town of Orangetown that a demand to modify police discipline procedures contained in a statute or charter provision other than Civil Service Law §75 was a prohibited subject of bargaining. The cases arose when both municipalities refused to honor negotiated language involving discipline provisions in the City Charter and the Rockland County Police Act, respectively. The unions involved sued and the Court of Appeals weighed in with its interpretation of the proper treatment of special police disciplinary provisions and the State's strong and sweeping policy in support of collective bargaining under the Taylor Law. The Court noted it had often stressed the latter policy and had made clear the presumption that all terms and conditions of employment are subject to mandatory bargaining, something which cannot easily be overcome. On the other hand, the Court noted that its prior decisions excluded some subjects from collective bargaining as a matter of policy, even where no statute explicitly did so. But the Court held that the police discipline provisions constituted an explicit public policy favoring management authority over police disciplinary matters. Citing a decision it issued in 1888, the Court noted that it had emphasized the quasi-military nature of a police force and had held that a question pertaining solely to the general government and discipline of the force must, from the very nature of things, rest wholly in the discretion of police administrators. Noting that the public interest in preserving official authority over the police remains powerful and citing the Buffalo decision noted above, the Court upheld the municipal refusal to honor contractual language varying a special police discipline provision. Bottom line: those subject to a special law or charter provision regarding police discipline need not honor a negotiated alternative.

And in another decision issued March 28 involving the City of Poughkeepsie, the Court upheld a decision of the Public Employment Relations Board (PERB) deeming a union demand to have an arbitrator review a municipal §207-a decision to be a nonmandatory one. In a decision issued 6

years ago, the Board reviewed a demand to have an arbitrator issue a de novo ruling upon review of a municipal §207-a decision and held that it was nonmandatory since the review process was being sought as a substitute for an Article 78 proceeding in which a court does not issue a de novo determination, but instead determines whether a municipal decision is supported by substantial evidence. The union involved tweaked the demand and resubmitted it in negotiations without the reference to a de novo review. When the union included the demand in a petition for compulsory arbitration, the City filed an improper practice charge and PERB again held the demand to be nonmandatory, recognizing that a failure to limit the scope of an arbitrator's review meant that a de novo one would occur. The Court deferred to the Board's determination because its decision had been issued within the scope of its expertise, namely, interpreting the application of the Taylor Law to the scope of negotiations for parties subject to its jurisdiction. The decision would be totally applicable to a similar demand for arbitral review of a municipal §207-c determination.

HEIGHTENED RISK BILLS INTRODUCED

Legislators have introduced bills in each house of the Legislature to limit eligibility for benefits under General Municipal Law §207-c to injuries and illnesses incurred in the performance of police duties which involve heightened risks associated with such work. Assembly Member Kevin Cahill (A. 2120) and Senator Catharine Young (S. 6496) are the sponsors. It is incumbent upon municipal officials from those localities having personnel potentially eligible for §207-c benefits to contact the bill sponsors and your legislators to convey support for these bills. Refer to the Assembly and Senate web pages to obtain the e-mail addresses of members and their mailing address, if contact is preferred by regular mail. These bills will obviously be heavily opposed by police unions. No favorable consideration will be provided by State legislators, absent a description from local officials of the potential lucrative municipal disability benefit provided by this section of law, combined with examples of instances in which benefits have been provided as a result of the current status of the law for injuries that are casual in nature.

UNEMPLOYMENT INSURANCE: DISQUALIFYING MISCONDUCT

Elayne Gold, a partner in the Albany law firm of Roemer Wallens and Mineaux LLP and a NYSPELRA Board member, has contributed this article. Among other concentration areas, the firm focuses on the representation of management in public and private sector employment matters, including the negotiation and administration of labor agreements and the litigation of civil rights complaints, as well as FLSA and ADA actions.

An employee who quits employment will, under most circumstances, not be qualified or entitled to unemployment insurance. Employees who are terminated or otherwise separated from service are also, under most circumstances, entitled to unemployment benefits. There are, however, exceptions to these general rules.

Absenteeism. An employee who has been previously warned and progressively disciplined is terminated for excessive absenteeism. The employee gave inconsistent testimony as to why he was absent and failed to provide any supportive medical evidence. The Department of Labor held, and the Appellate Division concurred, that such an employee has engaged in "disqualifying misconduct" and unemployment insurance benefits were denied. Matter of Miller, 9 AD3d 567 (3rd Dept. 2004); Matter of Schnabel, 307 AD2d 572 (3rd Dept. 2003).

Computer Misuse. The U.S. Postal Service has a personnel policy for computer use which prohibits access to inappropriate sites. An employee showed sexually explicit images that were on his computer screen to a co-worker. When the co-worker walked away, the employee

attempted to physically stop him. There was evidence that the employee had received notice about the policy of prohibiting inappropriate use of the computer. The Appellate Division found that "it is well-settled that violating a known policy of an employer can constitute disqualifying misconduct for unemployment benefit eligibility purposes." Matter of Barcene, 6 AD3d 855 (3rd Dept. 2004); Perry, cited above. Furthermore, "offensive behavior in the workplace can also be grounds for disqualifying misconduct. . ." Matter of Ferro, 283 AD2d 828 (3rd Dept. 2001). The Postal Service employee was therefore denied benefits. Matter of Manno, 8 AD3d 869 (3rd Dept. 2004). See also Matter of Claim of Graham, 305 AD2d 922 (3rd Dept. 2003) and Claim of Barcene, 6 AD3d 855 (3rd Dept. 2004) (where employee was warned regarding use of workplace computer, had been given copy of policy, and had nevertheless accessed the internet for sexually explicit e-mails, unemployment benefits will be denied for disqualifying misconduct.)

Job Requirements. Another postal worker lost the right to obtain unemployment benefits when he failed to continue to meet a job requirement. This employee had a job which required that he have a reliable and safe vehicle for the delivery of the mail and his vehicle had to be able to pass Postal Service inspection. The employee was given an opportunity to report for duty with an acceptable vehicle. When he failed to do so, he was deemed no longer qualified for his job and terminated. When he applied for unemployment, it was denied because the employee had been justifiably terminated for misconduct. The Appellate Division upheld the denial of benefits finding that "it is well established that an employee's failure to comply with his employer's reasonable [work] rules can constitute misconduct that disqualifies the employee from receiving unemployment insurance." Matter of Martin, 10 AD3d 763 (3rd Dept. 2004). See also Matter of Claim of Cooper, 305 AD2d 894 (3rd Dept. 2003) (where the employee refused to sign a medical release which was required to justify her several week absence from work. The employee claimed she did not want to disclose the nature of her illness. She was terminated and unemployment benefits were denied for her failure to follow a reasonable work rule. Note that the disclosure would have been to those "in the need to know" and otherwise kept confidential.)

Alcohol Abuse. Alcoholism cannot, by itself, excuse misconduct and an employee properly terminated from employment may be disqualified from receiving unemployment. After progressive discipline for absenteeism and tardiness

specifically for the employee's failure to notify employer of the absence or lateness, the employee was terminated. Unemployment benefits were denied by the Department of Labor and the denial was upheld. The court stated that alcoholism may excuse what would otherwise be disqualifying misconduct if substantial evidence establishes that 1) the claimant is an alcoholic, 2) the disease caused the misbehavior for which the [claimant] was terminated, and 3) the claimant was available for and capable of employment. In re Finn, 307 AD2d 509 (3rd Dept. 2003). Although no one contested that the claimant was an alcoholic, the employee was terminated for failure to notify (and not because he was absent); he knew notification was required and furthermore was not available to come to work. Under these circumstances, unemployment benefits will be denied.

A SUPPLEMENTAL §207-a PAYMENT REQUEST MUST BE INDEPENDENTLY REVIEWED

A firefighter had been denied benefits under General Municipal Law §207-a (1) when he fell from a ladder while cleaning the firehouse. That section of law establishes a municipal disability benefit system for firefighters who might be injured or taken ill in the performance of work duties. Should there be an inability to report to work as a result of the disability, the individual is entitled to receive the full amount of regular salary or wages in addition to necessary medical treatment. The municipal contention at the time was that the injury was not incurred in the performance of any heightened risk duties associated with firefighting. The denial was upheld in

arbitration. The individual filed for a work-related disability retirement and, when it was granted, petitioned the municipality for §207-a(2) benefits. That section of the law allows a municipality to discontinue the payment of the full amount of regular salary or wages if a work related disability retirement were to be granted. The municipality instead would be obligated to pay a supplemental pension that is equivalent to the difference between exit salary and the "zero option" pension that, regardless of which option was selected by the retiree. Because of the original denial of §207-a benefits, the municipality summarily denied the request for a supplemental payment. The individual sued over that denial and an appellate court held that once a work-related disability retirement is secured by a firefighter, a municipality has an obligation to make an independent assessment of a request for the supplemental payment. The fact that a work-related disability retirement has been granted must be taken into consideration in deciding whether supplemental §207-a(2) benefits should be provided, but the court noted, however, the decision by the State Comptroller that the disability incurred was work-related was not controlling on the municipality. Viscomi v. Village of Herkimer, 23 AD3d 1049, 803 NYS2d 873 (4th Dept. 2005).

THE IRS CHANGES ITS RULE ON TAXATION OF §207-a/§207-c PAYMENTS

The Internal Revenue Service issued a final rule, effective December 15, to eliminate taxation of payments made to police officers and paid firefighters under §207-a and §207-c of the General Municipal Law. Such payments are no longer subject to deductions for Social Security and Medicare taxes, whereas previously, they were subject to those tax deductions for 6 months following an injury, if the payments continued for that long. The §207-a/§207-c payments were never subject to State or federal income tax withholding. As a result of the change. the gross payment will be the net payment.

Those who may have made a tax deduction on a §207-a or §207-c indemnity payment should reimburse the individual or individuals affected and issue a new 2005 Form W-2 to reflect the tax reduction. If Form 941 has been filed with an incorrect Social Security and Medicare tax deduction, a correction can be made with the next Form 941 filing which should be accompanied by the explanatory Form 941-C. Because there is an employer obligation to match the amount of the employee Social Security and Medicare tax deduction, the IRS rule change will result in a potential refund of payments made in the latter part of December 2005 and a future municipal tax reduction of 7.65% of the dollar amount of the §207-a or §207-c payment.