NYSPELRA Newsletter: November 2006

NEW STATE LAW AIMS TO COMBAT PUBLIC EMPLOYER WORKPLACE VIOLENCE

This article has been written by NYSPELRA member Terry O'Neil and Colin M. Leonard, attorneys with Bond, Schoeneck & King, PLLC . The firm has a long history of representing municipalities and school districts throughout the State and has approximately 160 lawyers in offices in Syracuse, Buffalo, Albany, Manhattan, and Garden City, Long Island. Mr. O'Neil is resident in the firm's Garden City office. His practice includes collective bargaining, arbitration, employment discrimination and litigation, wage-hour matters, ERISA, and OSHA. He has authored numerous law review articles, is an Adjunct Professor at St. John's University Law School , and was a co-editor of the first treatise on Public Sector Labor Law published by the State Bar Association. Mr. Leonard is resident in the firm's Syracuse office, working on various employment-related matters, including §75 proceedings, collective bargaining with public sector unions, discrimination matters, grievance arbitrations, compulsory interest arbitration proceedings, and retiree health insurance matters. The firm's attorneys frequently provide risk management training and can assist in developing a written workplace violence prevention program as well as providing the required annual employee training. The conclusions expressed are those of the authors.

A new State statute will require public employers to develop and implement a program to prevent workplace violence. Effective March 4, 2007, the new law requires a public employer to: 1) evaluate workplaces to assess the risk of violence; 2) develop a written workplace violence prevention program; and 3) implement an annual employee training program concerning workplace violence issues. The law also requires public employers to implement a system for employees to report serious violations of the employer's workplace violence protection program or to report other imminent dangers in the workplace. Where the public employer fails unreasonably to correct the problem, the reporting employee may request that the NYS Department of Labor conduct an inspection of the premises.

The law, codified as §27-b of the Labor Law, applies to all public employers, including state and local governments, public authorities, public benefit corporations and any other governmental agency or instrumentality thereof. The requirement to develop a written workplace violence prevention program and to implement an employee training program, as more fully described below, applies only to public employers who employ at least twenty (20) full time, permanent employees. The new law does not apply to school districts, which are required to maintain their own school safety plans pursuant to §2801-a of the Education Law.

Risk Evaluation. The law requires that all public employers (even those that do not employ twenty (20) or more full time permanent employees) evaluate the presence of risk factors or workplace situations that may put employees at risk of occupational assaults and homicides. The law contains a non-exclusive list of factors which an employer must consider:

- Do the employees work in the public setting? (e.g., social services workers, police officers, firefighters, teachers, public transportation drivers, health care workers and service workers);
- Do the employees work at night or early morning?
- Do the employees exchange money with the public?

- Do the employees work alone or in small numbers?
- Is there uncontrolled access to the workplace?
- Are there areas of previous security problems at the workplace?

Written Workplace Violence Prevention Program. Public employers who employ twenty (20) or more full time permanent employees also must develop and implement a written workplace violence prevention program. The written program must include: 1) a list of the risk factors identified by the employer in its risk evaluation process described above; and 2) a description of the methods the employer will use to prevent occupational assaults and homicides. The law contains a non-exclusive list of the prevention methods an employer may implement:

- Making high-risk areas more visible to more people;
- Installing good external lighting;
- Using drop safes or other methods to minimize cash on hand;
- Posting signs stating that limited cash is on hand;
- Providing training in conflict resolution and nonviolent self-defense responses; and
- Establishing and implementing a reporting system for incidents of aggressive behavior.

Employee Information and Training Program. Public employers who employ twenty (20) or more full time permanent employees must make the written workplace violence prevention program available, upon request, to employees and their designated representatives (i.e., union officials), and also must implement an employee information and training program on the risks of occupational assaults and homicides in the workplace. This training program must occur at the time of initial assignment and annually thereafter. The training program must include, at a minimum, the following: 1) a description of the measures employees can take to protect themselves, including the specific procedures implemented by the employer to protect employees (e.g., appropriate work practices, emergency procedures, use of security alarms and other devices); and 2) a description of the details of the workplace violence prevention program developed and implemented by the employer.

Reporting System for Serious Violations. The law also requires the implementation of a reporting system for employees to use if they believe a serious violation of the employer's workplace violence prevention program exists or an imminent danger otherwise exists. According to the new law, an employee must report the matter to his or her supervisor by written notice. The employer must be given a reasonable opportunity to correct the matter. The requirement to provide written notice to a supervisor does not apply where an imminent danger or threat exists with respect to a specific employee (or general health of a patient in the health care setting) and the employee reasonably believes in good faith that reporting to the supervisor would not result in corrective action. Where an employee has reported an issue and the public employer has not corrected the matter after a reasonable period of time, the employee (or employee representative) may request that the Labor Department conduct a workplace inspection. A request to the Department for an inspection must: 1) be in writing; 2) state with reasonable particularity the grounds for the requested inspection; and 3) be signed by the employee or employee's representative. The law only requires that the Department provide a copy of the request for an inspection to the public employer no later than the time of the inspection. Therefore, an inspector may arrive with no prior notice to the employer. In addition, upon request by the employee, the Department may withhold the name of the employee or employee representative who requested the inspection on the copy provided to the employer at or before the time of inspection. A representative of the employer and an employee representative must be given an opportunity to accompany Department of Labor officials during the inspection. Furthermore, the Department of Labor is not limited to conducting an inspection only with respect to the particular alleged violation, but "may inspect any other area of the premises in

which he or she has reason to believe that a serious violation" exists. The law also authorizes the Department to conduct an inspection of an employer's premises on its own initiative, without a prior request from an employee or an employee representative. Finally, the law requires the Department to adopt rules and regulations implementing the statutory provision by July 3, 2007. It has not yet provided any draft or initial regulations with respect to this new law.
No Retaliation. The law also prohibits an employer from retaliating against an employee who has: (1) reported an alleged serious violation to a supervisor; (2) requested an inspection by Department of Labor officials; or (3) accompanied Department of Labor officials during the inspection.

Given the effective date of March 4, 2007, public employers will have a very short window to ensure compliance with this new legislation.

PERB DECISIONS

The following decisions have been issued by either the Public Employment Relations Board or its staff. Any summary that might be of interest should be reviewed as to the facts and circumstances of the case to assure the decision might be applicable to circumstances in which you may have an interest. In addition, any decision by an ALJ should be researched to ascertain its subsequent disposition, if in fact an appeal to the Board was made, and, if it was, further researched to determine if a court appeal followed. Email your editor, John Galligan, at galli14@earthlink.net for a copy of any decision summarized. Use the PERB web site, www.perb.state.ny.us where summaries of decisions issued since 1986 can be obtained and the agency's forms can be downloaded.

- a harm which occurs at a later date as a result of an improper practice does not serve to extend the period within which an improper practice charge must be filed. February 13 ALJ decision in NYC Board of Education;
- an employer has no obligation to bargain over a matter which is the subject of an untimely improper practice charge alleging a failure to negotiate in good faith. February 13 ALJ decision in NYC Board of Education;
- a bargaining unit employee filing an improper practice charge alleging a breach of his or her employee organization's duty of fair representation has the burden to prove that the union acted arbitrarily, discriminatorily, or in bad faith. January 12 ALJ decision in District Council 37;
- with respect to the adjudication of an improper practice charge alleging a unilateral transfer of exclusive bargaining unit work, the initial essential questions are whether 1) whether the work had been performed exclusively by bargaining unit employees and 2) be reassigned tasks are substantially similar to those previously performed by the unit employees. If the answer to both these questions is yes, there has been a bargaining violation unless the qualifications for the work have been significantly changed. If there has been no significant change in job qualifications, the loss of unit work by the unit employees is sufficient to find a bargaining violation. February 3 Board decision in Honeoye CSD;
- for the purposes of defining the type of an inroad into bargaining unit work which would not destroy exclusivity, the term "occasional" has come to mean limited in time and scope when compared to the manner in which unit employees perform unit work. However, where a supervisor performs unit work as needed when unit employees are busy performing other work or when short staffing occurs, a regular and open performance of unit work by the supervisor destroys bargaining unit exclusivity. February 3 Board decision in Honeoye CSD;

- under §208(2)(b) of the Civil Service Law, a union is entitled to unchallenged representation status until 7 months prior to the expiration of a written agreement. This section of law further provides that an agreement having a term in excess of 3 years shall be treated as an agreement for a term of 3 years. The Board has previously held that the reference to the "term" of the agreement is most reasonably read to mean the prospective term of the agreement, excluding any period of retroactivity. As the result of an agreement reached in October 2004 and in effect from July 1, 2003 to June 30, 2007, the month in which a challenging union would timely file a petition for certification would be November 2006. January 27 ALJ decision in East Rockaway UFSD;
- a union has a right to request information needed for collective negotiations. Such negotiations occur not only in the context of a union seeking to enter into a bargaining agreement with an employer, but also with respect to negotiations over wages, hours, and other terms and conditions of employment that do not necessarily result in a negotiated agreement. A union's demand for information related to a mandatory subject of bargaining, but except for the few limited reasons, must be honored. Such information permits a union to effectively negotiate with an employer and also respond to its members regarding its plans in response to actions undertaken or contemplated by an employer. The fact that a request for information might occur outside of collective negotiations for a successor agreement is irrelevant. February 13 ALJ decision in NYC Board of Education;
- a decision to eliminate overtime is not a mandatory subject of negotiation. February 16, 2005 ALJ decision in Wayne County; and
- in adjudicating an improper practice charge alleging employer retaliation against a bargaining unit member for having exercised Taylor Law rights, three elements must be proven: employee involvement in a protected activity is a; knowledge by the employer of that activity; and adverse action against the employee because of that activity. Employer knowledge is only attributable to a decision-maker and not simply an agent of the employer. February 17 ALJ decision in NYS Department of Health.