NYSPELRA Newsletter: April 2007

GOVERNOR VETOES A BILL MAKING DISCIPLINE A MANDATORY SUBJECT

In issuing his first veto, the Governor refused to endorse a bill which would have overridden a 2006 decision of the Court of Appeals which held that charter provisions and special laws relating to discipline could not be bargained, and if they had been, the resulting contractual provisions were null and void. A similar bill had been vetoed last year by the former Governor.

The bill, S. 1301, would have made disciplinary procedures a mandatory subject of negotiation, supposedly superseding any charter provision and clearly superseding any special statute addressing discipline, and would have retroactively re-established any expired contractual provision or arbitration award addressing disciplinary procedures. The Governor specifically objected to the retroactive provisions of the bill, asserting that such could have reopened an unknown number of cases involving disciplinary penalties that may have already been imposed under a charter provision or a special statute. The veto message also noted that, where no charter provision or special statute addressed disciplinary procedures, a demand over such a matter would be a mandatory subject of negotiation. Concluding that the inconsistency made little sense, the Governor requested that unions and municipalities seek an acceptable alternative.

Practically all municipalities other than counties and the State with a special statute addressing trooper discipline, would have been affected, due to the existence of a charter provision or a statute addressing, to an overwhelming degree, the discipline of police officers. While the rationale for such special treatment of police officer discipline may not be readily apparent, some of these laws and charter provisions have been in existence for nearly a century, a reflection of a concern that police officers be held accountable for their conduct to elected officials or to administrators directly responsible to elected officials. Interestingly, with but few exceptions, the discipline of no other class of public employees has merited a similar statutory or charter recognition.

The bill was vetoed on April 17. The suggestion that representatives of those affected by the vetoed bill meet to explore alternatives was ignored by the unions pursuing the bill. Instead, reflective of their collective rush to overturn the Court of Appeals decision and the accommodation accorded them in the Legislature, a new bill, S. 5295, was introduced in the Senate on April 25 which addressed the Governor's concern about possibly reopening cases which may already have been settled in accordance with a special statute or charter provision. And, in the wonder of wonders department, the bill was placed on a May 1 committee agenda for consideration. The vetoed bill had a total of 3 votes in both houses in opposition it. Expect a similar outcome with the new bill. Editor’s note: it is submitted that any inconsistency is de minimus for some of the reasons noted above. Some municipalities with disciplinary charter provisions, failing to recognize or contend that a demand for a disciplinary alternative was not negotiable, have negotiated a contractual disciplinary procedure which the Court of Appeals held to be null and void. All cities have one and approximately 11 villages still operate under their original charter enacted by the Legislature more than 100 years ago. Those members from cities, please email your editor at galli14@earthlink.net indicating whether any special discipline provisions were included in the original charter or added later by a charter amendment, the year

of the first appearance of the provisions and, if discernible, any reason why. Huddle with your historian.

ANOTHER LOCAL MANDATE WILL SOON BE SENT TO THE GOVERNOR

Both houses of the State Legislature have passed another local government mandate, this one amending Civil Service Law, §58. That law currently requires that municipalities with a police department having more than 4 full-time members maintain the office of chief of police, provided that position was in existence in August of 1985. The bill, A. 2935, would extend the police chief requirement to police departments having more than 8 part-time members and mandates that the position of police chief be full-time. Should the bill be signed into law, municipalities on Long Island, for instance, that might happen to be covered by the bill can anticipate an additional annual expenditure of approximately $150,000 in salary alone, should there currently be no chief in a police department.

Those affected should send a reaction to David Nocenti; Counsel to the Governor; State Capitol - Room 225; Albany, NY 12224 or send a fax to him at 518/474-8099. To the right of the inside address, identify the bill being written about and indicate that a veto is being recommended. Voting records on any bill can be obtained from either the Senate or Assembly web sites by entering a bill number that has been passed by either house and checking its status.

SECTION 207-c COURT DECISIONS

On March 27, the Court of Appeals issued two decisions involving police officers and §207-c of the General Municipal Law. The plaintiff and the defendant in the two cases were the same, Park v. Kapica. One decision affects only municipalities in Westchester and Rockland counties that are subject to special police acts. A police officer had been ordered to return to work on the ground that he had recovered from a knee injury incurred in the performance of police duties. He objected and requested a hearing. A hearing officer was designated to hear the appeal. The officer sued, contending that, under the Westchester County Police Act, disciplinary hearings were required to be heard by the legislative body and therefore, there was no authority to designate a hearing officer. The Court correctly discerned that what was being heard was a question of whether the municipal return-to-work order was justified and that discipline in no way was involved with such an issue. Citing due process concerns, the Court upheld the municipal decision to designate a hearing officer, despite explicit statutory language that the legislative body hear the case.

The decision in the other Kapica case affects all municipalities involved with §207-a or §207-c of the General Municipal Law. The issue was whether a municipality could recover payments made to an individual under §207-c after the date that a return to work order was issued, but the directive was unsuccessfully appealed. In addition to terminating §207-c payments on the date the appeal was denied, the municipality sought to recover payments made from the date of the original return to work order. The Court held that the statute contained no recovery language and therefore the municipality had no right to seek such a recovery. In so deciding, the Court chose to ignore the expenditure of municipal funds made during the pendency of an appeal of a §207-c decision, when the appeal was unsuccessful. The correct outcome should have been that no one should have gained an advantage by appealing a 207 decision.

In McCaffrey v. Town of East Fishkill, 2007 WL 926475, the 2nd Department held that the monetary disability payment afforded a police officer under §207-c could not be reduced by a

Social Security disability payment afforded the individual for the same disability. The decision drew heavily upon the legislative history of General Municipal Law §207-a, a similar disability benefit for paid firefighters. The court noted that in a recent §207-a amendment, several parties had advised the Governor, prior to his signing the bill, that a receipt of the full §207-a monetary disability payment and the Social Security disability payment was possible.

PERB DECISIONS

These decisions have been issued by 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 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 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 can be obtained and the agency's forms can be downloaded.

- a decision to eliminate a governmental service or to eliminate a position are nonmandatory subjects of negotiation because a public employer has a unilateral right to determine to what extent service will be provided to the public. Similarly, a change in the number of individuals deemed necessary to perform a certain task is a nonmandatory subject. June 13 ALJ decision in Village of Cattaraugus; and
- a unit clarification petition seeks only a factual determination as to whether a particular job title is within the scope of the bargaining unit which a union filing the petition represents. In a unit placement petition, the petitioning union seeks to have an unrepresented position which is not in the bargaining unit it represents placed in the unit as being the most appropriate placement pursuant to the statutory uniting criteria of the Taylor Law. In effect, a placement proceeding is a mini-representation proceeding. August 7 ALJ decision in Fashion Institute of Technology.

UPDATED MEMBER LIST INCLUDED

An updated member list is included with this month's Newsletter. Please email changes to your editor, John Galligan, at galli14@earthlink.net should a correction be in order.
In addition, the postal service will not deliver mail to an address that lacks a street name and number. Forget about any common name for your work location. Should your mail label or listing be one of those few, please email the correction.