New York State
Public Employer Labor Relations Association Inc.

FALL (October) 2024 Newsletter

www.nyspelra.org

Annual Training Conference Roundup

The 49th Annual Training Conference, held in lovely, historic Saratoga Springs was by all accounts a success. The 126 attendees came to learn, network, and share their experiences, ideas and support for one another.

2024-25 NYSPELRA Board (as elected at the annual Business Meeting)

- Past President: Carin Perkins
- President: Mary Scarpine
- President Elect: Lori Alesio
- Secretary Treasurer: Jack Kalinkewicz

- Region 1: Terry O'Neil
- Region 2: Elayne G. Gold
- Region 3: John Corcoran
- Region 4: Matt VanVessem

Board Members At-Large: Mike Volforte
John Mancini
Amanda Cortese-Kolasz
Christopher Putrino

Congratulations To All!

HOLCOMB Award 2024

Since 2003 the NYSPELRA has awarded the William C. Holcomb Award recognizing public service in the field of labor relations. The recipient of the Holcomb Award is a labor relations and/or human resources professional who's principal and substantive responsibilities are in the field of public sector labor relations. The Holcomb Award recipient has a record of leadership, and an accomplishment skill set, with long term dedication to public service.

The 2024 Holcomb Award was presented to Board Member Matthew VanVessem. Matt served with the City of Buffalo, Office of Corporation Counsel for over 7 years before working in the private sector where he continued to provide guidance to his public sector management/labor relations clientele. In 2021 Matt joined the Niagara Frontier Transit Authority as the Director of Labor Relations. Matt served two terms as the NYSPELRA President, getting us through the pandemic and remains on the NYSPELRA Board today.

Join us in a heartfelt CONGRATULATIONS to Matt!

Looking Ahead

In the Summer of 2025 NYSPELRA will be celebrating its 50th Annual Training Conference! The ATC will be held in Saratoga Springs in early July 2025; watch for exact dates to be provided in the months ahead.

Legislation and New Statutes Impacting Public Sector Labor Relations:

In follow up to John Mancini's presentation, some of the legislation addressed has been signed into law:

- A6146-B (see also S-05500-B) amends FOIL (§87 of The NYS Public Officers Law): When the municipality/school

district/agency receives a "request for public employees disciplinary records" the employee must be notified; the public entity, by virtue of this legislation [Signed September 4, 2024 as Chapter 302] is mandated to "develop a policy to notify the public employee" that the employee is the subject of a FOIL request for release of these records. The legislation does not provide language as to what this policy should look like. Check with your municipal attorney and/or Labor Counsel for additional guidance.

Editor's Note: It is conceivable that adding this "notice" requirement to your existing FOIL policy is sufficient; that is, there is no need for a stand-alone policy. Whether PERB finds this "policy" to be negotiable remains to be seen. However, the mere fact of providing "notice" seems within management's obligation to comply with the express language of the law.

- A9935 (see also, §08948) Provides for an amendment to Civil Service Law §72. Section 72 is the statutory provision, which, among other things, authorizes the public sector employer to direct the public employee to undergo a medical (physical or psychological) examination when, in the employer's supported-with-facts position, due to this nonwork related incapacity, the employee is unable to perform the essential duties of the job. Section 72 is a complex statute with a good number of checks and balances. Chapter 306, signed into law on September 4, 2024 (effective January 1, 2025) requires not only the current notice as to the basis for directing the employee to undergo a medical examination, but will now also require that the employee receive

> copies of any written, electronic or other communication by the appointing authority to a medical officer or any other entity regarding the claim that such employee is unable to perform their duties. If after the examination it is determined that the employee is unfit and will be placed on a

> leave of absence, the employee must be notified in writing and [provided with] complete copies of all of the documentation, reports and records relied upon by the medical officer during their examination, including any documents, reports and correspondence sent to the appointing authority at the conclusion of the examination.

Moving Expenses Stipend

What are the legalities of offering a stipend for moving expenses to applicants who accept offers of employment in titles which are represented by a union upon hire? (There is a New York statute authorizing the appointing authority to offer reimbursement for moving expenses to applicants accepting employment with the state in a position for which there is a shortage of qualified candidates (N.Y. Finance Law 204), but the statute does not extend to municipalities). Below are a few of the considerations which are relevant and the background law for each.

- Negotiated MOA vs. Resolution - The first issue is whether such a benefit could be enacted through legislative resolution, memorandum of agreement (MOA) with the union which represents the at-issue title(s), or by some other means. PERB has long held that a union only represents employees, and not applicants. Therefore, if the benefit is one being offered purely prior to the individual's entry into the union-covered title, the issue may not need to be negotiated with the union. However, if the benefit or any conditions of receipt extend into the period of employment, then it would need to be negotiated with the union (discussed further below).

If the benefit is not enacted by a MOA with the union, then the action would require resolution of the legislative body. Payments made by a

municipality which are not expressly authorized by statute, local law, resolution, or pursuant to a collective bargaining agreement or other contract may be deemed impermissible gifts of public funds in violation of the New York State Constitution (Article VIII, Section 1). Even if enacted by legislative resolution, payments can still be challenged if the municipal body lacked statutory or other authority to issue the payments.

As an example, NYS County Law § 205 authorizes a County's legislative body to set compensation for employees paid from County funds. However, it has been held by courts and the New York State Comptroller that additional compensation fixed as a reward for services already rendered and fully compensated, such as a bonus or a retroactive pay increase, generally constitutes a mere gratuity and an improper gift of public moneys. It is not a gift, however, if compensation is presently earned but withheld until the completion of a period of service, as an inducement to continued competent and faithful service. One particular Comptroller Opinion notes:

> We have, for example, expressed the opinion that, pursuant to a local government's authority to adopt local laws relating to the compensation and welfare of its officers and employees (see, NYS Municipal Home Rule Law §10 [1][ii][a][1]), a local government may establish an employee performance evaluation plan under which identifiable criteria are fixed and made known to employees prior to the performance of services and are applied by supervisors in evaluating employees, with specified amounts paid as a result of a given performance rating. We have noted that such payments are distinguishable from an outright bonus payment gratuitously made as additional compensation for past services already rendered.

There does not appear to be a specific court decision or Comptroller Opinion on the topic of moving expense stipends. However, based on the foregoing, it appears the stipend for moving expenses could be enacted by County resolution as a form of employee compensation pursuant to NYS County Law § 205 so long as it is done prospectively

before services are rendered. Additionally or alternatively, if the bonus was tied to successful completion of a period of service or served as inducement for continued service before such service was rendered, Comptroller Opinions support the idea that these moving expense payments would not constitute impermissible gifts of public funds.

- Conditions on Receipt of the Stipend - Dependent on the amount the prospective employer is contemplating being offered and the number of employees to whom it is expected to be extended, the prospective employer may want to consider including condition(s) on receipt. For example: the benefit must be paid back by the employee in the event they leave service within a certain period of time (a month, a year, prior to the end of the probationary period, etc.). PERB suggested in an early decision that if the refund is required in the event that the employee resigned or voluntarily separated from their position, this may be considered a pre-hire inducement to the applicant to take the position and remain for one year, and would not need to be negotiated. County of Tompkins, 10 PERB 3066 (1977). This was never formally solidified in subsequent opinions, although there have been some other "pre-hire inducement" cases. However, if the benefit would need to be reimbursed even upon involuntary separation, PERB definitively held this makes the benefit one provided for successful completion of a term of employment and would be negotiable.

In *Matter of Newark Valley Cardinal Bus Drivers, NYSUT/AFT/AFL-CIO, LOCAL 4360*, 35 PERB ¶3006(2002), PERB determined that a demand to bargain over the cost of pre-hire applicants' fingerprinting was non-mandatory and was, instead, a pre-hire inducement. The Board stated that an economic concern for applicants that involved the public at-large, instead of the unit, was not a subject requiring negotiation as it was not a term and condition of employment. It is unclear whether the moving expenses bonus would be deemed more akin to this type of pre-hire inducement. It varies from the *Newark Valley* case to the extent the benefit is not being offered to all pre-hire applicants, only those who accept the position and incur moving expenses.

[Submitted by: Elena P. Pablo, Esq., Partner, Roemer Wallens Gold & Mineaux, LLP]

Minimum Manning : A Job Security Clause

The City of Long Beach (the "City") has a fire department that is a combination of volunteers and paid members. Among the paid members are 19 firefighters, 3 lieutenants and 1 captain, all of whom are in the same bargaining unit (the "Union"). The paid members typically operate an engine and an ambulance. The most recent collective bargaining agreement between the City and the Union covered the period of July 1, 2004 through June 30, 2010 ("CBA;" the terms of the CBA have been continued pursuant to the Triborough Amendment). Since 2010, the New York State Comptroller's Office has maintained that the City was in significant / moderate fiscal stress, or susceptible to fiscal stress, designating it the most fiscally-stressed municipality in the entire state by 2018. In 2020, the City's financial condition was so dire that when the City went to Interest Arbitration with the police, the Panel awarded the police 0% raises for the 2 years in question ("PBA Interest Arbitration Award").

In 2021, the City planned to hire additional firefighters. The City entered into a memorandum of agreement ("2021 MOA") with the Union wherein the Union agreed to the following clause: "A minimum of 4 firefighters working per shift including at least one fire officer together on the Engine will be maintained at all times." The clause did not contain a sunset provision.

Between the 2021 MOA and February 7, 2024, the City had been assigning 4 paid firefighters to an engine and 2 to an ambulance. However, due to rising and unsustainable overtime costs, the City issued Order 24-001 which reduced staffing on the ambulance from 2 to 1. The engine and ambulance began responding together to EMS calls, and when necessary, 1 firefighter would be temporarily reassigned from the engine to the ambulance.

The Union filed a grievance alleging that, by temporarily reducing the number of firefighters on the engine from 4 to 3, Order 24-001 violated the manning provision in the 2021 MOA and Article II(C) of the CBA, which states: "The City shall recognize the members of the [Union] as the primary emergency response unit, including EMS, EMS transportation, fire suppression, and hazardous materials incidents." The City denied the grievance at all steps in the grievance procedure, and the Union filed a demand for arbitration. In response, the City filed a Petition for a Stay of Arbitration ("Petition") on the ground that enforcing the provisions of the 2021 MOA and the CBA's Article II(c), would violate public policy. More specifically, the City argued that the provisions are job security clauses which do not satisfy the criteria set forth by the Court of Appeals in *Johnson City* to be enforceable. *Matter of Johnson City Professional Firefighters Local 921 v. Village of Johnson City*, 18 N.Y.3d 32 (2011). The City's job security clauses argument is premised upon the fact that in order to comply with the provisions, the City must maintain a minimum compliment of paid firefighters, such that a certain number of firefighters need not fear losing their jobs; the manning clause from the 2021 MOA was effectively ensuring that there would be 4 firefighters on the engine, requiring the City to maintain a minimum compliment of at least 16 paid firefighters. The Court agreed, concluding that based on Court of Appeals precedent in *Johnson City*, the manning clause is a job security provision.

As for Article II(C) of the CBA, the City argued that by requiring the City to recognize the Union as the "primary emergency response unit," the City must maintain enough firefighters to do so. Consequently, a certain number of firefighters need not fear losing their jobs, thereby rendering the recognition clause a "job security clause". The Court concurred.

As held by the Court of Appeals in *Johnson City*, a job security clause violates public policy and is unenforceable, unless the clause meets certain criteria. 18 N.Y.3d at 37. To be valid and enforceable, such

clause must: (1) be explicit; (2) be limited to a reasonable period of time; and (3) not be negotiated during a legislatively declared financial emergency between parties of unequal bargaining power. *Id.* (quoting *Burke v. Bowen*, 40 N.Y.2d 264, 267 (1976)).

The City argued that, when it agreed to the manning clause in the 2021 MOA and to the Article II(C) of the CBA, it did not explicitly and unambiguously bargain away its right to eliminate, terminate, or lay off workers for budgetary, economic or other reasons. The Court agreed and found that the clause was not explicit. On that ground alone, the grieved provisions are unenforceable. The City also argued that the clauses are unenforceable because they were not limited to a reasonable duration. Indeed, there is no sunset provision for the manning clause in the 2021 MOA, and Article II(C) of the CBA has already been in effect since at least 2004. On that ground alone, the grieved provisions are unenforceable. Finally, the Court found that, at a minimum, the 2021 MOA "was plainly negotiated during a period of fiscal distress." On that ground alone, the manning clause in the 2021 MOA is unenforceable.

The impact of the Decision cannot be overstated. While the Decision will likely be appealed to not only the Appellate Division, Second Department, but also the Court of Appeals, if it is upheld, employers could rely on this ruling to cease, under similar circumstances, to complying with minimum manning provisions.

[Submitted by the attorneys of record: Terrance O'Neil, Esq. and Emily Iannucci, Esq., Members, Bond, Schoeneck & King, PLLC]

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.

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