



New York State
Public Employer Labor Relations Association Inc.

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NO-LAYOFF CLAUSE: ARBITRABLE OR NOT?

The Village of Johnson City (the “Village”) and its Firefighter’s Union negotiated contract language stating:

- A. The Village shall not lay-off any member of the bargaining unit during the term of this contract.
- B. The Village shall not be required to “back fill” hire additional members to meet staffing levels of expired agreement.

Thereafter the Village Board, citing budgetary concerns, voted to abolish, among others, six (6) firefighter positions. The Firefighter’s Union filed a grievance based upon the above cited contract language. The Village denied the grievance and when the Union demanded Arbitration, the Village sought a stay in Supreme Court.

Both the Supreme Court and the Appellate Division denied the Motion to Stay holding that the no-layoff clause was subject to grievance arbitration due to the CBA’s broad grievance and arbitration provisions. The Village took the matter up to the New York State Court of Appeals which, in a 4-3 ruling, held that “not all job security clauses are valid and enforceable, nor are they valid and enforceable under all circumstances.” Matter of Johnson City Professional Firefighters Local 921 v. Village of Johnson City, 18 N.Y.3d 32, 36 (2011). The Court went on to hold that

A purported “job security” clause that is not explicit in its terms is violative of public policy

* * *

...the no lay-off clause in this CBA is not arbitrable because it is not explicit, unambiguous and comprehensive

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The term “lay off” is undefined in the CBA --- the clause does not comprehensively prohibit the Village from abolishing firefighter positions and ... [h]ad the Union desired that its members be protected from the elimination of firefighter positions, it could have bargained for such protections

[Id. at p. 37-38.] The Court of Appeals contrasted the Village’s case with Yonkers Federation of Teachers, 40 NY2d, 268 (1976) where the Court found arbitrable the following “job security” contract provision:

During the life of this contract no person in the bargaining unit shall be terminated due to budgetary reasons or abolition of programs but only for unsatisfactory job performance and provided for under the Tenure Law.

GML § 207-M REPEALED

Prior to amendment in 2011, the NYS General Municipal Law contained a provision which afforded to police chiefs certain automatic wage adjustments tied to any wage and benefit increases negotiated with the Police Union. Specifically, the Chief was to receive in addition to “other compensation” an increase of “at least the same dollar amount of the base salary increase received by” the next subordinate ranking officer who was a member of the bargaining unit (GML § 207-m). This law was REPEALED by Chapter 97 of the Laws of 2011 as part of the tax cap legislation. The purported rationale for repeal was to afford municipalities some “mandate relief.”

VIDEO SURVEILLANCE BY EMPLOYER

Recently, in Town of Clarkstown (44 PERB 4625), PERB held that the installation of video surveillance cameras in work areas of the Town's highway garage was in violation of the Taylor Law. The Town argued that its decision to install cameras was prompted by concerns over protecting its assets, and that PERB had previously held that municipalities were privileged to install such cameras by virtue of their accountability for public funds and obligation to supervise their employees.

The ALJ declined to follow the previous PERB decision cited by the Town, and instead cited a decision of the NLRB holding that the installation and use of video cameras to monitor employee performance and behavior implicates employee job security and is little more than an enhanced investigatory tool to ascertain employee misconduct. The ALJ found that when balancing the Town's interest in protecting their assets against the constant video monitoring of employee work performance and behavior and the possible disciplinary consequences of such monitoring, the balance of interest was in favor of employees' interest in job security. Disciplinary concerns were implicated due to the Town's statement that video footage obtained could be used as evidence in a disciplinary proceeding concerning employee misconduct.

Accordingly, the ALJ held that the Town had violated the Taylor Law when it failed to negotiate the installation and use of the video cameras and ordered that they cease operating the video cameras until the issue had been negotiated; further the Town was prohibited from using any images they had obtained.

Given that there is now conflicting case law on this subject, this is unlikely to be the last time the issue is before PERB. This case also did not reach the issue of employee privacy interests, which also may be implicated when video surveillance is involved. It therefore remains to be seen how this area of the law will develop in the future. No exceptions were filed.

MANDATE RELIEF

A topic which continues to plague all municipal entities is the imposition by the State of unfunded mandates. We hear talk of the relief that the Governor and Legislature plan to give; often times there is, however, no specifics as to which specific mandate will be relieved. Here is a sampling of the legislation now

pending on the broad topic of mandate relief; there is no way to know, at this point in time, what action, if any, the referenced Bills will receive. We recommend that if one of these is of special interest to you, please read the entire legislation, the Sponsor’s memo in Support and any related commentary. This additional information can be found at: <http://assembly.state.ny.us/leg/>

Bill Number	Sponsor	Summary
A5305	Murray	Requires a three year moratorium on unfunded mandates from the legislature. Repeals existing unfunded mandates identified by the Governor's Mandate Relief Commission.
A7053	Miller	Requires that the state fund any program which imposes a mandate upon municipal corporations or school districts with exceptions.
A7906	Farrell	Enacts the comptroller's 2011 mandate for fiscal reform act; relates to contents of the state budget and the capital financing and program plan (part A); establishes the New York state asset/infrastructure council (part B); relates to limitations on state-funded debt; relates to public authority board members and repeals article 5-B of the state finance law relating to state-funded debt (part C).
A8150	Morelle	Enacts the "unfunded mandate reform act"; authorizes the governor to submit an unfunded mandate reform plan to the legislature when it is in the public interest.
S2199A	Saland	Requires that the state fund any program which imposes a mandate upon municipal corporations or school districts with certain exemptions.
S4477	Martins	Relates to real property tax relief and local government mandate reform; requires municipal corporations to consider the real property tax impacts of public employee contracts and relates to the arbitration panel's requirements when resolving disputes in the course of collective negotiations.
S4479	Martins	Establishes the real property tax relief and local government mandate reform act. Amends the monetary cap for separate specifications on public works projects.
S5758A	Skelos	Relates to school district and local government tax levies and exemptions, and to the imposition of a sales and compensating use tax; mandate relief.

TIER VI [Ch. 18, L.2012 “AKA” – A9558/S6735]

On March 16, 2012, the Governor signed Tier VI Legislation. Below is the summary from the press release.

- **New Employee Contribution Rates:** The new tier increases employee contribution rates in a progressive fashion to ensure lower paid state and local workers are not seriously affected. Employee contribution rates vary depending on salary:

\$0 - \$45,000: 3%
\$45,000 - \$55,000: 3.5%
\$55,000 - \$75,000: 4.5%
\$75,000 - \$100,000: 5.75%
\$100,000+: 6%

These rates remain substantially lower than the large majority of similar state systems around the country. The new tier impacts only newly hired employees. Existing employees and retirees retain all benefits.

- **Increase of the Retirement Age:** The pension reform includes an increase in the retirement age from 62 to 63 and includes provisions allowing early retirement with penalties. For each year of retirement prior to 63, employee pension allowances will be permanently reduced by 6.5%.
- **Readjustment of Pension Multiplier:** Under Tier VI, the new pension multiplier will be 1.75% for the first 20 years of service, and 2% starting in the 21st year. For an employee who works 30 years, their pension will be 55% of final average salary under Tier VI, instead of 60% under Tier V. This readjustment brings New York more in line with most other states and will save billions of dollars for taxpayers and local governments.
- **Vesting:** Under Tier VI, employees will vest after 10 years of service.
- **Protect Local Governments From State Pension Sweeteners:** The agreement requires the state to pre-fund any pension enhancers, ensuring that these costs are no longer passed to local governments.
- **Adjustments to Final Average Salary Calculation to Help Reduce Pension Padding:** The agreement changes the time period for final average salary calculation from 3 years to 5 years. To limit how much overtime can be used to determine an employee's pension, pensionable overtime for civilian and non-uniformed employees will be capped at \$15,000 plus inflation, and for uniformed employees outside of New York City capped at 15% of base pay. Tier VI puts in

place new anti-spiking measures which cap growth in salary used to determine pension allowances at 10% for all employees statewide. These reforms will take major steps toward addressing instances of abuse and pension padding. Tier VI also eliminates lump sum payments of unused sick and vacation time from the calculation of final average salary.

- **Voluntary and Portable Defined Contribution Option:** The legislation includes an optional defined contribution plan for new non-union employees with salaries \$75,000 and above. In the modern economy, employees often change jobs multiple times and need pension portability. Many states, the federal government, and most private employers provide some form of defined contribution plans to their employees. The state will make an 8% contribution to employee contribution accounts. Currently, SUNY and CUNY offer such an option through TIAA-CREF that has been successful and popular. This is a voluntary option for those employees who prefer the portability and vesting feature not available with defined benefit options, and will help attract top talent to state government.
- **Adjustments to SUNY/CUNY TIAA-CREF Plan:** Under Tier VI, SUNY and CUNY employees who elect the TIAA-CREF plan will receive an employer contribution of 8% of salary for the first 7 years of service and 10% thereafter.
- **Limiting Number of Sick and Leave Days that Can Pad Pensions:** Tier VI reduces by half- from 200 to 100- the number of sick and leave days that can be used for retirement service credit.
- **Salary Reform:** Previous tiers allowed salaries from an unlimited amount of employers for calculating retirement benefits. Tier VI allows only two salaries for the calculation.
- **Limiting Pension Benefit of High Paid Employees:** For new higher paid employees, the amount earned above the Governor's salary (currently \$179,000) will not be eligible for pension calculation under Tier VI.

38th ANNUAL NYSPELRA CONFERENCE

Our Summer Training Conference will soon be here. We will meet in Saratoga Springs beginning on Wednesday, July 18, 2012. The Sessions begin at 9:30 a.m. As usual, our Conference will be an enjoyable and educational

experience. This year we will provide discussion and presentation on many pressing and important topics:

- Diversity in the Workplace
- FLSA Implications in the Electronic Age
- ADA: Update
- Civil Service Law §§ 71, 72, and 73
- GPS Surveillance in the Workplace

And of course, we will have our traditional and “past practice” topics of

- Arbitrator Review
- Taylor Law Update

We look forward to seeing you all in July.

Contact NYSPELRA

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Please let us know your thoughts and opinions of the NYSPELRA Newsletter. In addition, please forward to Jack or to Elayne Gold [egold@rwingmlaw.com] any information, including Arbitration Decisions, contract settlements, etc. that you would like to share with your colleagues.