NYSPELRA Newsletter: December 2003

COURT OF APPEALS ENDS USE OF HEIGHTENED RISK STANDARD IN DETERMINING LAW ENFORCEMENT DISABILITY BENEFITS

On December 2, the Court of Appeals decided Theroux v. Reilly and several other cases, all of which involved denials of claims by law enforcement personnel for the municipal disability benefits of §207-c of the General Municipal Law. The denials were based upon conclusions that although the injured claimants were on duty when injured, they were not engaged in any activity involving heightened risks associated with criminal justice system duties. Under §207-c, if some one employed in various law enforcement capacities is injured when working, the municipal employer is responsible for all necessary medical care. That liability is usually transferred to the workers' compensation system by covering law enforcement personnel under the comp system. In addition, should an injured individual be unable to report to work because of the injury, the municipal employer is responsible for continuing the full amount of regular salary or wages until either a disability retirement or a recovery occurs. Should neither one occur, the payment of the full amount of regular salary or wages continues until the individual reaches the mandatory retirement age associated with the particular retirement plan that the individual has selected.

The issue in the cases before the Court was what standard should be used when deciding §207-c benefit claims. The municipalities involved had used a heightened risk standard, requiring that a claimant be engaged in some heightened risk activity involving law enforcement. A unanimous Court held that was incorrect. Instead, all that need be shown by a claimant is a causal connection between a law enforcement duty and an injury. Applying such a standard, that an injury may have occurred during work hours would be insufficient to secure §207-c benefits. Consequently, some one on duty, but injured while engaged in a personal pursuit, would not be eligible for §207-c benefits.

LEGISLATIVE UPDATE

The Governor has recently acted on these bills of interest to public employers:

- A. 5187, which will allow any bargaining unit consisting of deputy sheriffs to petition PERB to request compulsory arbitration of a bargaining impasse. To be excluded from any compulsory arbitration would be bargaining demands addressing discipline procedures and investigations or eligibility for and assignment to details and positions. Chapter 696, effective November 15, 2003; and
- A. 7192, which would have allowed bargaining units consisting of county correction officers and deputy sheriffs to petition PERB to request compulsory arbitration of a bargaining impasse. Veto 183, October 4.

Use either the NYS Assembly or the NYS Senate web site to secure information about the status of any bill. Both allow a search of bill status and downloads of a

bill's text and the introductory memo that was submitted by its sponsor(s). www.senate.state.ny.us is the Senate site with a link to "Bills and Laws" which has a listing in numerical order of all chapters enacted in 2003 and all bills vetoed.

PERB DECISIONS

The following are summaries of decisions which have been issued by either the Public Employment Relations Board (PERB) or its staff. Any summary that might be of interest should be reviewed as to the facts and circumstances of the case, in the event your editor may have not correctly summarized it. In addition, any decision reported below that can be appealed to the Board should be researched to ascertain its subsequent disposition, if in fact an appeal was actually made, and further researched to determine if a court appeal occurred. E-mail John Galligan at galli14@earthlink.net for a copy of any decision summarized. Check the PERB web site www.perb.state.ny.us at which summaries of decisions issued since 1986 can be obtained and forms can be downloaded.

- employee use of employer vehicles for personal use is a mandatory subject of negotiation. June 3 ALJ decision in Nassau County;
- a unilateral discontinuation of a past practice involving a mandatory subject of negotiation amounts to a failure to negotiate in good faith. June 3 ALJ decision in Nassau County;
- there are several statutory criteria that may be utilized to determine whether an employee is a managerial one and over the years, the Board has interpreted them. An employee who "formulates policy" is one who individually selects from among several options to decide which shall be the objectives of a public employer in fulfilling its mission or regularly participates in the process by which such decisions are reached. An employee who "participates in labor negotiations" must be a direct participant in preparing employer demands and bargaining positions and be actively involved in negotiations. An employee who has a "major role in administering a labor agreement" must have the authority to exercise independent judgment in making changes in the employer's procedures or methods of operation as required when implementing an agreement. An employee who has a "major role in personnel administration" must have the authority to exercise independent judgment and fundamental control over the direction and scope of the employer's mission. A confidential employee must act in a confidential capacity to a managerial employee who is not a policy maker or have access to labor relations information that would be inappropriate to be disclosed to bargaining unit members or their representatives. May 15 ALJ decision in Town of Ramapo;
- under the Taylor Law, both of the parties in a bargaining relationship have a well-established duty to provide on request the other party with information that would aid in the analysis of bargaining demands and in reactions to them. June 19 ALJ decision in Buffalo Board of Education;
- as is the case with any statutory right, it is only relinquished if there is a clear and unmistakable waiver. A failure to exercise the right in the past never amounts to a waiver of it. June 19 ALJ decision in Buffalo Board of Education;
- when a charge is filed alleging a unilateral change in a past practice involving a mandatory subject of negotiation, the analysis focuses upon the specific

nature of the alleged practice and its extent. To prove that a practice existed, the charging party must show that it was unequivocal and uninterrupted for a sufficient length of time so as to create a reasonable expectation among unit employees that it would continue. June 3 ALJ decision in Nassau County;

- when a union officer directs coworkers to ignore an agreement reached between the union and their employer, such conduct amounts to a repudiation of the agreement and is illegal under the Taylor Law. May 13 decision of the Director of Public Employment Practices and Representation in Town of Clarkstown;
- while a past practice is generally viewed as one that affects an entire bargaining unit, that is not an absolute rule. A practice that is specific to a title would also create an enforceable right. June 3 ALJ decision in Nassau County;
- a demand to bargain over the use in a disciplinary proceeding of footage from a workplace area video camera is a mandatory subject of negotiation. May 14 ALJ decision in Niagara Frontier Transit Metro System;
- it is the Board's policy to not defer to the contractual grievance procedure improper practice charges alleging employer interference with employee Taylor Law rights. May 15 ALJ decision in NYC Transit Authority; and
- the theory of a "continuing violation" has been recognized for some types of improper practice charges, but not those alleging either an employer interference with an employee's Taylor Law rights or anti-union employee discrimination. June 30 Board decision in NYS Department of Insurance.