NYSBA SPRING 2004 | VOL. 18 | NO. 2

Municipal Lawyer

# Public Sector Labor and Employment Law Update

By Sharon N. Berlin and Richard K. Zuckerman

## I. Recent Court Decisions

### A. Employee Benefits May Favor Older Workers

In *General Dynamics Land Systems, Inc. v. Cline,*[1] the United States Supreme Court upheld provisions in a collective bargaining agreement that limited the company's obligation to provide health benefits for subsequent retirees to then-current workers who were at least 50 years old, and rejected claims that the provisions violated the Age Discrimination in Employment Act and state law. Employees who were at the time between age 40 and 50 had claimed that the agreement unlawfully discriminated against them based on their age. The EEOC agreed and Cline subsequently sued for age discrimination. The District Court dismissed, reasoning that there was no cause of action for reverse age discrimination and holding that the ADEA did not protect younger workers from discrimination in favor of older workers. The Sixth Circuit Court of Appeals reversed, reasoning that the ADEA's prohibition on discrimination was clear and that, had the Act been intended to protect only older workers against younger workers, it would have so specified. The Supreme Court held that the ADEA's text, structure, purpose, history and relationship to other statutes showed that the statute was not intended to stop an employer from favoring older employees over younger ones.

### B. General Municipal Law § 207-c Does Not Require a Heightened Risk Standard

General Municipal Law § 207-c governs work-related disability benefits for police officers, correction officers and deputy sheriffs. In *Theroux v. Reilly,*[2] the Court of Appeals reversed Appellate Division orders in three separate Article 78 proceedings in which the lower courts had upheld denials of applications for General Municipal Law § 207-c benefits after applying a "heightened risk" requirement. The *Theroux* Court found that, in order to be eligible for § 207-c benefits, a covered employee need only prove a "direct causal relationship between job duties and the resulting illness or injury."

In so doing, the Court's decision effectively returned the state of the law on General Municipal Law § 207-c to its pre-*Balcerak* condition. In 1999, the Court of Appeals had issued a decision in *Balcerak v. County of Nassau,*[3] which was subsequently interpreted by the lower courts to require municipal employees to prove that they had been injured while performing a task related to the heightened risks and duties in law enforcement in order to receive § 207-c benefits.

### C. Firing a Teacher for Being a Member of the North American Man/Boy Love Association Does Not Violate the Teacher's First Amendment Rights

*Melzer v. Bd. of Educ. of the City Sch. Dist. of the City of New York*[4] involved an action pursuant to 42 U.S.C. § 1983, brought by a former high school teacher who was a member of the North American Man/Boy Love Association (NAMBLA), a group that advocates sexual relations between men and boys. The teacher alleged that his termination for belonging to NAMBLA violated the First Amendment's protection of unpopular speech and association rights.

In order to determine whether the teacher's First Amendment rights were violated, the Second Circuit Court of Appeals applied the *Pickering*[5] balancing test, which requires a court to "balance the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[6]

The Court held that, although the teacher's freedom to associate with and advocate for NAMBLA is protected by the First Amendment, the City Board of Education met its burden under *Pickering* by demonstrating that the teacher's association, and degree of involvement, with NAMBLA caused disruption to the school's mission and operations justifying the Board's actions in terminating him. In so doing, the court reasoned as follows:

> Melzer's position as a school teacher is central to our review. He acts *in loco parentis* for a group of students that includes adolescent boys. *See Vermonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 655, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). At the same time, he advocates changes in the law that would accommodate his professed desire to have sexual relationships with such children. We think it is perfectly reasonable to predict that parents will fear his influence and predilections. Parents so concerned may remove their children from the school, thereby interrupting the children's education, impairing the school's reputation, and impairing educationally desirable interdependency and cooperation among parents, teachers, and administrators. The Board contends as well that parental concern would compromise the competitive position of this high school vis-à-vis other elite high schools in New York City. While not a central concern, this also matters.[7]

The teacher argued that this amounts to a "heckler's veto" and that community reaction could not dictate whether his constitutional rights were protected. The Court disagreed:

> Yet, Melzer's position as a teacher leaves him somewhat beholden to the views of parents in the community. Parents are not outsiders seeking to heckle Melzer into silence, rather they are participants in public education, without whose cooperation public education as a practical matter cannot function. Any disruption created by parents can be fairly characterized as internal disruption to the operation of the school, a factor which may be accounted for in the balancing test and which may outweigh a public employee's rights. In consequence, we do not perceive an impermissible heckler's veto implicated in this case.[8]

### D. District Did Not Conduct an Unlawful Search and Seizure of Items in Suspended Teacher's Classroom

In *Shaul v. Cherry Valley-Springfield Central School District,*[9] the Second Circuit affirmed a finding of the District Court for the Northern District of New York that dismissed a teacher's claim that his Fourth Amendment rights had been violated by an illegal search and seizure of items in his classroom. The Court found that the teacher had no reasonable expectation of privacy once he: (1) had been suspended and barred from his classroom; (2) surrendered his keys to the classroom at the same time he declined to retrieve his personal property from the classroom; and (3) had been afforded a second opportunity to remove personal items from the classroom.

### E. Union's Duty of Fair Representation Extends to Retired Teachers Who Retire During the Term of an Expired Collective Bargaining Agreement

In *Baker v. Bd. of Educ., Hoosick Falls Central Sch. Dist.,*[10] the Appellate Division, Third Department upheld a denial of a motion to dismiss a complaint. In so doing, the Court found that the teachers' association had breached its duty of fair representation when it failed to represent retired teachers in negotiations for a collective bargaining agreement that applied retroactively to include time while the teachers were still employed. The collective bargaining agreement included retroactive pay increases only for current employees. The Court held that there is a continuing nexus between a retiree's former employment and negotiations over terms and conditions that will be retroactively applied to those periods of active employment. As a result, the union had a continuing duty to represent the retirees in negotiations for the new retroactive collective bargaining agreement. In so doing, the Appellate Division did not take heed of an amicus brief filed by the Public Employment Relations Board ("PERB"), in which PERB argued that there is no duty to bargain for the same level of benefits for retirees as for active employees.

### F. Paid Leave for Religious Observances Upheld

In *Maine-Endwell Teachers' Assoc. v. Bd. of Educ. of the Maine-Endwell Central Sch. Dist.,*[11] the Appellate Division, Third Department found constitutional a collective bargaining agreement's provision of paid days off for religious observances. The contract provided teachers with up to three paid days for religious observances, yet the district denied two teachers' requests for paid leave. The Appellate Division held that the paid leave provision did not offend the Establishment Clause because the provision did not advance religion by forcing members of the union to profess a religious belief. Since the provision did not state which religious holidays could be invoked, the

Court found the clause to be a reasonable accommodation of religious beliefs.

### G. Court Nullifies Stipulation Requiring Teacher to Retire

In *Cohen v. Klein*,[12] the Court held that a stipulation signed by a teacher pursuant to which the teacher agreed to retire instead of facing Education Law § 3020-a disciplinary charges had no effect where the teacher rescinded it before it was signed by all the parties. The Court found that, even if the stipulation was an executory accord, it was not enforceable because the teacher signed it under the mistaken belief that it was revocable and the district would not suffer any prejudice if the stipulation was not enforced.

### H. Public Policy Exception Applied to Vacate Arbitration Award

In *Dowleyne v. New York City Transit Authority*,[13] the Appellate Division, First Department applied the public policy exception and vacated an arbitration award. Dowleyne had worked as a bus driver for the Transit Authority for 14 months when she was required to undergo a random drug test pursuant to federal Department of Transportation requirements. Dowleyne was unable to produce an adequate amount of specimen and had no causal medical condition. The Transit Authority deemed this as a refusal to take the test in violation of the applicable regulations, imposed a pre-disciplinary suspension and informed Dowleyne that it intended to fire her. An arbitration panel refused to allow the Transit Authority to discipline her.

The Appellate Division, First Department applied the public policy exception to the general rule prohibiting judicial interference with an arbitration award and vacated it. The Court found that strong public policy considerations, embodied in the express terms of Department of Transportation regulations, militate against allowing anyone who does not comply with random drug testing procedures from performing safety sensitive functions.

### I. Suspended Principal's Rights Not Violated When He Was Banned From School Property

*Pearlman v. Cooperstown Central School District*,[14] School principal was suspended and banned from school property pending a disciplinary hearing on charges that he had an inappropriate relationship with a student. Principal brought suit claiming the suspension violated his right to due process. The District Court for the Northern District of New York ruled that the school district did not violate the principal's due process or First Amendment rights when it suspended him prior to the Education Law § 3020-a disciplinary hearing and forbade him from entering onto school property without the superintendent's permission. The Court pointed out that Education Law § 3020-a specifically provides for suspension with pay during the pendency of a hearing. The Court also held that there is no state law that provides anyone unfettered access to school property.

## II. PERB Update

### Managerial/Confidential: Anticipated Duties

#### *Town of Ulster*[15]

Designation of employee as confidential is proper if the relevant duties are part of the employee's job description, even if the employee has not yet performed any confidential duties because the employee has not yet had a chance to do so.

### Subjects of Bargaining

#### *Poughkeepsie Professional Fire Fighters' Ass'n*[16]

The question of whether it is a mandatory subject of bargaining to demand submission of an initial determination of eligibility for General Municipal Law § 207-a benefits to arbitration was held by PERB to be non-mandatory. On review, the Supreme Court vacated PERB's decision and found the demand to be a mandatory subject of negotiation. An appeal is pending in the Third Department.

### Discrimination: Relevant Evidence

#### *County of Erie and Erie County Community College.*[17]

A county violated its duty to bargain when a non-unit employee assumed the supervisory duties of unit employees who were temporarily transferred to other shifts.

The county also violated Civil Service Law §§ 209-a.1(a) and (c) when a supervisor threatened an employee with loss of his job for filing an improper practice charge and the county's director of labor relations threatened to end a scheduling accommodation for another employee, stating "we don't accommodate people who bring us to PERB." The comments were made at the conclusion of a PERB pre-hearing conference. Since PERB policy normally makes statements and settlement discussions at a prehearing conference inadmissible in a hearing, the county argued, unsuccessfully, that these comments could not form the basis for an anti-union charge. PERB found that the comments were not protected by this policy, as they were not in the nature of settlement discussions but rather at the conclusion of the conference and outside of the presence of the ALJ.

### Duty to Bargain

#### *County of Erie*[18]

A public employer has a duty to provide information relevant and necessary to a union's administration of a collective bargaining agreement, including the investigation of grievances. This duty includes complaints against an employee, upon which an employer bases its decision to discipline or discharge the employee, even though the complaints are considered confidential. Thus, the Board ordered disclosure of an EEO report and those parts of an internal affairs report that summarized the background of the complaint against the employee and his statements to the investigator.

#### *International Union of Operating Engineers, Local 409*[19]

Union had duty to disclose to employer information about salaries of workers that the unit employees hired to clean the employer's physical plant, when information requested was not covered by the collective bargaining agreement and was reasonably necessary for negotiations.

## III. Recent Legislation

The Fair and Accurate Credit Transactions ("FACT") Act was signed into law by President Bush on December 4, 2003. Under the Act, an employer who uses a third party to conduct a workplace investigation no longer needs to follow the consent and disclosure requirements of the Federal Fair Credit Reporting Act if the investigation involves suspected misconduct, a violation of law or regulations, or a violation of any pre-existing written policies of the employer.

Chapter 696 of the Laws of 2003 was signed by Governor Pataki on November 5, 2003. Chapter 696 authorizes public employers to enter into written agreements to extend Civil Service Law § 209(4) compulsory interest arbitration provisions to deputy sheriffs, except as to issues relating to disciplinary procedures and investigations, or eligibility and assignment to details and positions.

Chapter 90 of the Laws of 2003 extends until June 30, 2005, Civil Service Law §§ 209-a(4) and (5)'s injunctive relief provisions in improper practice cases.

## Endnotes

1. __ U.S. __, 124 S. Ct. 1236 (2004).
2. 1 N.Y.3d 232, 771 N.Y.S.2d 43 (2003).
3. 94 N.Y.2d 253, 701 N.Y.S.2d 700 (1999).
4. 336 F.3d 185 (2d Cir. 2003), *cert. denied*, 2004 WL 323395 (Feb. 23, 2004).
5. *Pickering v. Board of Ed. of Township High School Dist. 205, Will County*, 391 U.S. 563 (1968).
6. *Id.* at 568.
7. 336 F.3d at 199.
8. *Id.*
9. 2004 WL 585764 (2d Cir.).
10. 3 A.D.3d 678, 770 N.Y.S.2d 782 (3d Dep't 2004).
11. 3 A.D.3d 685, 771 N.Y.S.2d 246 (3d Dep't 2004).
12. Supreme Court, New York County, July 9, 2003, N.Y.L.J., July 10, 2003, 19 (col. 2).
13. 309 A.D.2d 583, 765 N.Y.S.2d 361 (1st Dep't 2003) *leave to appeal granted*, (Feb. 24, 2004).
14. N.D.N.Y., August 2003.
15. 36 PERB ¶ 3001 (2003).
16. 36 PERB ¶ 3014 (2003), *annulled*, 36 PERB ¶ 7016 (Alb. Co. Sup. Ct. 2003), *appeal pending*.
17. 36 PERB ¶ 3035 (2003).
18. 36 PERB ¶ 3021 (2003).
19. 6 PERB ¶ 3034 (2003), *appeal pending*.

**Sharon Berlin and Richard Zuckerman are partners in Lamb & Barnosky, LLP, a full-service law firm based in Melville, New York. Sharon and Rich are members of the firm's labor and employment and municipal law departments.** **They wish to acknowledge and thank their associate Mara Harvey for her assistance with this article.**

**Catch Us on the Web at WWW.NYSBA.ORG/MUNICIPAL**