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OLR BULLETIN

1. NOTEWORTHY ARBITRATION AND BOARD DECISIONS

Broad language in an employee manual and evidence of a past practice are enough to establish an enforceable five-minute grace period for lateness. *FDNY and DC37*, OCB Case Nos. A-14661-13 and A-14464-13. As part of its implementation of CityTime in 2007, the Fire Department mistakenly applied a five-minute grace period to several civilian prevailing wage titles. The grace period is found in the Citywide Agreement, which does not apply to the prevailing wage titles in question. FDNY's time and leave manual appeared to grant all FDNY civilian employees the five-minute grace period, but also advised that the terms of any applicable collective bargaining agreement would supersede the manual. In 2011, FDNY discovered its error and ended the grace period. The Unions representing the prevailing wage employees filed a grievance. At arbitration, the arbitrator restored the grace period to the employees for three reasons. First, the arbitrator credited the Union's testimony that the workers had actually received the grace period prior to 2007. Second, the employee manual appeared to grant the benefit to the employees. Third, nothing in the applicable bargaining agreements prohibited a grace period.

NY Appellate Division upholds an arbitration award recognizing the Sanitation Department's right to restructure the workforce, reassign supervisors, and increase the supervisors' work load. *In Re Sanitation Officers Ass'n v. The City of New York*, Index 151155/13, 1st Dept. (Dec. 16, 2014). In the underlying arbitration, the Union challenged the decision of the Department of Sanitation to significantly reduce the number of section supervisors and increase the work load and geographic responsibility of the remaining supervisors. Prior to the layoffs, the supervisors oversaw seven collection trucks operating in a single geographic section. After the layoffs, the supervisors oversaw 12 trucks operating in more than one section. The arbitrator concluded that under the collective bargaining agreement and the New York City Collective Bargaining Law the Department had the right to reduce the number of supervisors and "reallocate[e] the supervisory work to the remaining employees." The Union appealed the arbitrator's award to a trial court that subsequently vacated the award. The Department then appealed the case to the Appellate Division, which disagreed with the trial court and upheld the original arbitrator's decision. The Appellate Court noted that the Union could still insist on bargaining over the effect of the new work allocation.

Discharge grievance is dismissed because the Union did not pursue the claim for 11 years. *SSEU Local 371 and the New York City Commission on Human Rights*, OCB Case No. A-8868-01. In 2001, the Commission on Human Rights discharged the grievant, without disciplinary charges, for not reporting certain aliases and criminal convictions on his job application. The Union filed a grievance and request for arbitration. In June 2003, an arbitrator began the hearing. The Union cancelled two subsequent hearing dates scheduled for later that same year. In 2004, the Union did not respond to a letter from the arbitrator warning that he would consider the matter closed unless he received a response from the Union. In 2014, at the Union's request and over the City's objection, the Office of Collective Bargaining appointed a new arbitrator to the case. The new arbitrator dismissed the case, finding that the Union's 11-year delay in pursuing the grievance was inexcusable, and the delay harmed the Commission by significantly increasing the potential back pay liability if the grievance was sustained.

Reinstated employee is not entitled to back pay because she did not diligently search for a job after her discharge. *SSEU Local 371 and ACS*, OCB Case No. A-12609-07. In 2007, the Administration for Children's Services discharged the employee, a child protective specialist responsible for investigating cases of neglect, after she was charged with felony possession of a controlled substance. The employee was arrested at her boyfriend's apartment where drugs were discovered. She maintained that she was not aware that drugs were in the apartment. The Union and ACS agreed to hold in abeyance the grievance contesting the employee's discharge pending the outcome of her criminal case. In 2010, the District Attorney dropped the charges against the employee, and the grievance progressed to arbitration. The arbitrator decided there was insufficient evidence that the grievant knew about drugs in the apartment, and therefore she was entitled to get her job back. However, grievant was not entitled to back pay from the period of her discharge to the date the arbitration began because she could not produce any evidence or documentation of her search for employment. The arbitrator explained, "Grievant has not demonstrated that she used reasonable diligence to seek employment or to mitigate the employer's back pay liability."

Two long-term employees discharged for theft are entitled to reinstatement, but not back pay. *DC37 Local 924 and DOHMH*, OCB Case Nos. A-14557-14; A-14459-14. The Department of Health and Mental Hygiene discharged two employees, with 17 and 18 years of service and clean work records, when several months after storm Sandy they removed seven air conditioners from a warehouse (and returned them on the following day, at the department's direction). The employees argued that they received permission from another non-supervisory employee who had keys to the warehouse and who occasionally signed work orders. The arbitrator concluded that the employees did not follow departmental procedures for claiming "relinquished" property and instead foolishly obtained permission from someone they sincerely but incorrectly believed was a supervisor. In light of all of these facts, the arbitrator reinstated the employees but did not award any back pay.

2. Grievance Handling Memo: **Revising an Employee Manual Without Breaking the Rules**

OLR is often asked for advice on making changes to the rules found in an agency's employee manual. Making changes can be challenging because they must not involve **mandatory subjects of bargaining**, and they must not conflict with a host of existing collective bargaining agreements and citywide rules and regulations. Based on its experience, the legal staff at OLR has prepared the following summary of the most common issues that arise when an agency is contemplating a change to its employee manual.

In general:

- In collaboration with OLR, ensure that the proposed change does not conflict with:
 - An applicable collective bargaining agreement
 - An existing, unwritten binding past practice (for more on identifying past practices, see OLR's September 2014 Bulletin.)
 - The Citywide Agreement
 - DCAS time and leave rules
 - Applicable law
- Consider the practical effect of the rule change on employees. *Even if the change does not trigger a duty to bargain with the union, the agency may still be obligated to bargain over the effect of the change.*
- Consider how the employees and unions might react to the proposed change. Are there any mutual interests that the parties can identify that make the revision acceptable to all?

Time and Leave issues:

- Most time and leave issues are mandatory subjects of bargaining and cannot be implemented without the agreement of the union.
- Time and leave policies for civilian, non-prevailing wage employees must conform to the Citywide Agreement.
- Specific time and leave rules found in individual unit agreements take precedence over the Citywide Agreement.
- If the employee manual applies to employees in many different unions, some of whom are not covered by the Citywide Agreement or who may have unique time and leave rules, make sure the manual addresses the rules for each group separately and specifically.

Performance Evaluations:

- Management has the unilateral right to determine the criteria used for evaluating employee performance. Management can add to and subtract from the list of criteria.
- Changing the procedure for evaluating employee performance is a mandatory subject of bargaining, and cannot be altered unilaterally. For example, management must bargain with the union about adding or eliminating steps in the evaluation process.

Dress and Appearance Codes:

- As a general rule, dress codes and appearance standards are mandatory subjects of bargaining that management cannot implement or change unilaterally.

- Requiring employees to wear a uniform and the design of the uniform are management rights.
- If a uniform requirement is adopted, management must bargain with the union about who is responsible for providing or laundering the uniform, and the amount of any uniform allowance.

Disciplinary procedures:

- Changing an existing disciplinary procedure is a mandatory subject of bargaining.
- What constitutes a disciplinary procedure is interpreted broadly. For example, the Board of Collective Bargaining has found that the elimination of a previously valid defense to disciplinary charges is part of disciplinary procedure and must be bargained.

3. LEGAL DEVELOPMENTS IN LABOR RELATIONS AND HUMAN RESOURCES

Private sector employees may use company email for union activities. The National Labor Relations Board (NLRB) ruled last month in Purple Communications that employees have the right to use an employer’s email system to engage in union activities, including organizing, and to discuss the terms and conditions of their employment with their co-workers.

The ruling is limited to email, and does not apply to other forms of electronic communication or social media. The ruling applies equally to unionized and non-union workplaces.

If a company allows employees to use its email system during work time, the NLRB determined the company must also permit the employees to use email for protected communications during non-work time. The NLRB also suggested that if the company permits its employees to send personal emails during work time, the company must also permit its employees to send union-related emails during work time.

Purple Communications reverses a 2007 NLRB decision that recognized the right of companies to restrict employees’ use of company email for union purposes without also eliminating their right to use the email for other, personal purposes. The NLRB decided last month that its 2007 decision “was clearly incorrect,” did not recognize that email was the “primary means of workplace discourse,” and “undervalued” employees’ “core” federal rights “to communicate in the workplace about their terms and conditions of employment.”

4. BY THE NUMBERS

OLR STEP III ACTIVITY

Step III	2011	2012	2013	2014
Pending cases as of 12/31	346	419	487	579
Cases filed in the year	709	604	695	743
Cases with a final disposition in the year	914	527	626	651

OLR STEP IV ACTIVITY

Step IV	2011	2012	2013	2014
Pending cases as of 12/31	1313	1305	1394	1214
Cases filed in the year	298	202	225	194
Cases with a final disposition in the year	286	214	140	515

5. BENEFITS UPDATE

Flu Vaccine Campaign a Success, Program Extended

The Mayor's Office, in collaboration with the Office of Labor Relations, launched a free Flu Vaccination Campaign to ensure that City employees had easy access to a flu shot. The program began November 10, 2014 and continued through the end of the year.

The campaign gave employees several ways to get a free flu vaccination:

- At a participating doctor's office
- In a participating pharmacy
- At an Advantage Care Physician
- At worksite based "clinics"

During the course of the campaign, 3,000 NYC workers received their flu shot at one of 68 worksite clinics which were "hosted" by more than 20 agencies. While we are awaiting final numbers from the other sources of vaccinations, preliminary data indicates that over 10,000 vaccines were administered as part of this program.

Due to the success and the importance of increasing vaccination rates, the program has been extended. NYC employees can still get a free vaccine at participating pharmacies, the Advantage Care Physician sites and participating doctors' offices. Please promote and encourage your staff to get their flu shots to keep themselves, their family and their community healthy.

Promote Employee Financial Security, Help Employees Use Their Benefits More Effectively

OLR's Employee Benefits Program, working with agency-based HR benefit representatives, can bring information about Health Benefits, Deferred Compensation, and Flexible Spending directly to your employees at their work sites. Representatives from the Health Benefits Program and Certified Financial Planner Professionals within the Deferred Compensation Plan are available to visit work-sites to deliver informational seminars, financial planning seminars and interactive roundtables. Call Kathryn Charles at (212) 306-7268 for more information.

New York City Employee Assistance Program (NYC EAP)

The NYC EAP is designed to assist employees and their families who are experiencing a wide range of personal problems. Areas of services include marital or family conflict, mental health or emotional stress, problems with alcoholism and substance abuse, elder care, and traumatic events.

Working with the EAP can greatly improve the health and wellbeing of employees and their family members. The NYC EAP offers all employees and their families non-discriminatory counseling, information, and referrals to help resolve personal problems efficiently and confidentially.

All EAP counselors are Master level, NYS Licensed Mental Health professionals. For additional information on our services or to schedule an orientation for your agency, call 212-306-7660 and ask for either Kevin Bulger or Tim Sheahan.

The New York City Employee Assistance Program is located at 250 Broadway, 28th floor. The office is open Monday- Friday, 8am-7pm.