MBM Education News

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HON. R. STANTON WETTICK, JR. RULES ALLEGHENY COUNTY BASE YEAR ASSESSMENT SYSTEM IS UNCONSTITUTIONAL

Judge R. Stanton Wettick has entered his Opinion and Order in the case of _James C. Clifton, Charles and Lorrie Cranor, husband and wife, and Roy Simmons and Mary Lisa Meier, husband and wife v. Allegheny County_, No. GD 05-28638 and _Kenneth Pierce and Stephanie Beechaum v. Allegheny County, Pennsylvania, Daniel Onorato its Chief Executive and Deborah Bunn its Chief Assessment Officer_ No. GD 05-28355. Judge Wettick ruled that the Allegheny County base year assessment system implemented for tax year 2006 is unconstitutional since it is in violation of the Uniformity Clause of the Constitution of the Commonwealth of Pennsylvania. Pursuant to the provisions of the Constitution of the Commonwealth of Pennsylvania, tax assessments must be uniform. In analyzing the base year assessment system, Judge Wettick determined that the system is in violation of the uniformity clause since it results in underassessments for properties located in appreciating areas and overassessments for properties located in depreciating areas. In coming to this conclusion, Judge Wettick analyzed the range between the market values and assessments through the Commonwealth and found them to be unacceptable, resulting in significant inequality and an unconstitutional lack of uniformity. Because the ruling involved a statewide issue (constitutionality of the use of a base year method of assessment), Judge Wettick reasoned that Allegheny County should not be governed by reassessment standards that do not apply to Pennsylvania's other 66 counties. Therefore, in the interest of justice, the Order provided that Allegheny County was to continue to assess property in the same manner as all other counties (i.e., utilizing the current base year system), while the anticipated appeal of the Order is pending in the Pennsylvania Supreme Court. However, he did order countywide reassessments for tax years 2009 and 2010. Judge Wettick's Order can be viewed on the Maiello, Brungo & Maiello website (www.mbm-law.net).

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EVALUATIONS OF ADMINISTRATORS DO NOT CONSTITUTE ADJUDICATIONS

Questions are sometimes raised concerning the rights of school administrators or other Act 93 employees to enforce their rights under an applicable employment agreement or Act 93 agreement. By way of contrast, a professional employee who is unhappy with a rating received or other perceived loss of a benefit promised by an applicable Collective Bargaining Agreement may file a grievance under that Agreement, and is otherwise entitled to a hearing before the School Board if demoted in pay or position. But what sort of appeal rights, if any, does an administrator or Act 93 employee have if he or she receives an unfavorable review or is otherwise unhappy with a term or condition of employment?

The Allegheny County Court of Common Pleas addressed this issue recently in the case of Dr. Pamela Pulkowski v. Mt. Lebanon School District. In that case, the Plaintiff was employed by a school district as an Associate Superintendent. Salary increases for administrators were determined by a written program appended to the Act 93 Agreement. The program calculated a particular administrator's raise in accordance with the performance rating received by the administrator. Administrators who were rated as having "far exceeded expectations" would receive a 5% increase, while those rated as "meeting expectations" would receive a 3.5% salary increase, and those who were rated as "did not meet expectations" would not receive any salary increase.

The Plaintiff received a year-end evaluation of "did not meet expectations" and no salary increase. She appealed the evaluation to the Superintendent, as she was permitted to do under District procedure. After the Superintendent affirmed the evaluation, the Plaintiff appealed to the Board of School Directors, but the Board declined to review the matter.

From there, the Plaintiff filed an appeal to the Court of Common Pleas on the basis that the Board's decision to deny hearing her appeal, which effectively upheld the evaluation and, by extension, the denial of a raise, constituted an "adjudication" which could be appealed under the Local Agency Law. The School District and its Board of School Directors filed preliminary objections to her appeal and claimed that she had not set forth a legal cause of action entitling her to relief.

Judge R. Stanton Wettick, Jr., in an Opinion and Order issued on October 16, 2006, concluded that the Plaintiff's negative evaluation and resultant salary freeze did not constitute an adjudication, and thus there was no appealable issue before the Court. Judge Wettick referred specifically to the definition of "adjudication" set forth in the Local Agency Law, which states that an adjudication is any "… decision … affecting personal or property rights, privileges, immunities, duties, liabilities or obligations" of an individual. Judge Wettick held that the unsatisfactory rating and the pay freeze it compelled did not affect the Plaintiff's property rights because she was not automatically entitled to a salary increase under the contract, nor did any of the applicable laws provide for a right to a salary increase under the law. The Court noted that the School Code provides protection only for professional employees who are demoted either in pay or position, and noted that a salary freeze is neither a demotion in rank nor a reduction in pay. The Court reasoned that if denying the Plaintiff

Education News

the highest pay raise set forth in the Act 93 Agreement constituted an "adjudication" or denial of property rights, then by extension, 25 of the District's other 29 administrators who failed to receive the maximum amount of pay increase set forth in the Act 93 Agreement could similarly argue that they suffered a loss of property rights giving rise to a right of appeal.

In deciding that there had been no adjudication, the Court reviewed several other cases involving public employees claiming they had received an adjudication following the denial of some supposed benefit. In each such case, Pennsylvania appellate courts have consistently found that where there was no denial of a benefit promised or secured by statute there was no adjudication giving rise to an appeal under the Local Agency Law. Similarly, the Court reasoned that because the contingent salary increases set forth in the Act 93 Agreement under which the Plaintiff worked were not a legally protected right under applicable statutory law, the denial of that salary increase following an unsatisfactory evaluation did not constitute an adjudication, and thus the Plaintiff was not entitled to file an appeal under the Local Agency Law. The Court granted the preliminary objections of the School Board and District, and dismissed Plaintiff's Complaint.

The decision in the (Pulkowski) case makes clear that Act 93 employees do not enjoy rights superior to other professional employees, either by operation of the School Code or by reason of their status as administrators. Any additional rights which administrators may have are conferred to them by the particular contract or Act 93 Agreement under which they are employed.

HOUSE BILL 184

House Bill 184 was introduced on February 1, 2007 and was referred to the Committee on Labor Relations on that date. Representative Solobay is the primary sponsor. Representative Belfanti, the secondary sponsor, also serves as the chairman of the Committee on Labor Relations. This summary of House Bill 184 is based on a review of the legislation as well as a conversation with Representative Solobay.

According to Representative Solobay, in the past, non-educational workers who were not covered by an annual salary contract were eligible to receive unemployment compensation benefits. At one point, teachers attempted to claim unemployment compensation benefits, which resulted in the passing of legislation which exempted all school employees from eligibility for such benefits. The basis for the legislation is to provide the opportunity to employees who perform services "in an ancillary administrative capacity" to claim unemployment compensation benefits during holidays and summer breaks.

House Bill 184 provides that employees who perform services in an ancillary administrative capacity are eligible to apply for and receive unemployment compensation benefits. The term "service performed in an ancillary administrative capacity" is defined as follows:

(iii) For purposes of clause (2) and this clause, the term "service performed in an ancillary administrative capacity" means service rendered by a substitute teacher who does not have a contract with an educational institution for an academic year, semester or specific portion thereof, and service involving primarily, noneducational or nonprofessional, administrative duties that are subject to supervision or control by instructional, research or principal administrative personnel, including, but not limited to, service as a cafeteria worker, school bus operator, janitor or security guard.

Generally speaking, the non-educational or nonprofessional services listed in this definition are not subcontracted out to other parties, and in most cases the workers performing the listed services are in a collective bargaining unit. Employees in a collective bargaining unit or other employment agreement are not eligible to apply for and receive unemployment compensation benefits for holiday breaks and summer breaks pursuant to House Bill 184. The complexities involving substitutes who are placed out of a pool by an intermediate unit or other type of consortium were also discussed. Representative Solobay acknowledged that the concept of including substitute teachers was a new one, and that he would have to discuss the matter with the Department of Labor & Industry to come to an understanding as to how the charges associated with an unemployment compensation claim would be allocated in that type of situation.

House Bill 184 is in committee at this time. In the event the bill comes out of committee, passes the House and Senate, and becomes law, it may result in additional costs to a school district, depending on the types of employees employed by the school district. For a copy of House Bill 184 please visit our website mbm-law.net or call our offices to speak with an attorney.

PENNSYLVANIA LEGISLATURE SEEKS TO CLOSE SCHOOL BUS WIRETAP LOOPHOLE

In the Spring/Summer 2006 issue of Education News, we wrote on the subject of whether or not to conduct audio surveillance on school buses. As you may recall, a controversy arose last year after the Pennsylvania State Police suggested that school districts and transit carriers who record audio, as well as video, on school buses may be committing a violation of the state's Wiretap Act. In response, the Allegheny County District Attorney stated that his office would not prosecute school districts or transit companies for Wiretap Act violations where audio is recorded, provided that (1) the school district formally adopts a policy permitting audio surveillance on school buses; (2) the school district provides an annual notice to students and parents informing them of the audio recording policy; and (3) a conspicuous sign is placed on school buses informing passengers that audio recording is taking place.

Recently, legislation has been introduced in the Pennsylvania State House of Representatives which would resolve this issue with finality. HB 797, as presently stated, would permit audio recording on any school bus transporting children to and from school or to and from a school-related activity, without there being any question of the Wiretap Act being violated. The statute's protection would not apply in circumstances where school buses are used to transport other groups of people for non-school-related purposes.

HB 797 was referred to the State House Judiciary Committee on March 19, 2007 and is presently awaiting consideration. We will update you regarding the status of this legislation in future editions of this newsletter.

THIRD CIRCUIT AFFIRMS RETIREMENT INCENTIVE EXCLUSION FROM AGE DISCRIMINATION STATUTE

In a recent decision, a panel of the United States Court of Appeals for the Third Circuit upheld a proposed EEOC rule which exempts certain retirement benefit incentives from application of the Age Discrimination in Employment Act ("ADEA"). This is very good news for school districts seeking to negotiate contracts or incentives which offer health care to retirees until they reach Medicare eligibility.

By way of background, it was a common practice for public employers to structure certain retirement incentives in a way which would provide health care benefits to retirees until they became eligible for Medicare. However, in a 2000 case involving the Erie County Retirees' Association, the Third Circuit found that these types of incentives violate the ADEA because an incentive providing health benefits until Medicare eligibility provides fewer benefits to older individuals who are closer to reaching the threshold. Under this interpretation, unless the employer agreed to provide "equal benefit or equal cost" to all employees electing a retirement package, regardless of their age, an incentive tied to Medicare eligibility would violate the ADEA. As a result, school districts were forced to move away from providing retirement benefits to the date of Medicare eligibility, and instead were forced to adopt other, less desirable criteria, such as providing incentives that provide each retiree a set number of years of health insurance, regardless of need.

The EEOC, in response to the decision, proposed a regulation which would exempt from the ADEA "the practice of altering, reducing or eliminating employer-sponsored retiree health benefits when retirees become eligible for Medicare or a state-sponsored retiree health benefits program." The proposed regulation was an attempt to overrule the decision in the Erie County case and restore as lawful retirement incentives which provide benefits to Medicare eligibility.

The AARP filed an action similar to the Erie County case and in response the District Court declared the EEOC's rule violative of the ADEA and entered a permanent injunction against the implementation of the proposed rule. Following the injunction, the U.S. Supreme Court decided an unrelated case and held that a prior rule-making act of an agency can supersede an earlier judicial interpretation of a statute unless the prior judicial interpretation left no room for further rule-making on the part of the agency. In short, this permitted the EEOC to make a rule reversing the Erie County decision.

With this precedent in hand, the District Court reversed its earlier decision, revoked its permanent injunction, and granted summary judgment in favor of the EEOC upholding the validity of the new rule, and the Third Circuit affirmed. The Courts determined that the EEOC was within its authority to determine whether the ADEA should apply to employer-sponsored benefit plans. Under the terms of the ADEA, the EEOC is able to grant limited exemptions from the Act's prohibitions, and the Courts found that the proposed rule qualified. Further, the Courts noted that because employers are not required to provide retiree health benefits, incentives based on the date of Medicare eligibility were extended with an intent of broadening coverage available to individuals, and that they did not violate the spirit of the ADEA. The Courts held that the proposed rule was narrowly drawn to meet the goals of the ADEA, that it served the public interest, that it was not arbitrary or capricious, and upheld it as a proper exercise of the EEOC's rule-making power.

There is still the possibility that the AARP may seek to appeal to the U.S. Supreme Court to have the decision overturned. We will update you in future editions of this newsletter concerning whether an appeal is accepted for review.

In the meantime, assuming the decision stands, school districts will be able to negotiate or implement retirement incentives in the same fashion as they did prior to the Erie County case in 2000. That is to say, it will be permissible for employers to agree to provide retirees medical benefits until the date of Medicare eligibility despite the fact that this may provide unequal benefits among potential retirees. School districts will be getting back a valuable bargaining chip.