THE BOARD REPORT

PROPER INVESTIGATION IS KEY TO ADA COMPLIANCE

As you know, there are a variety of state and federal statutes which protect the rights of employees. It is vitally important that school districts conduct investigations concerning employee misconduct in a fashion that is both thorough and proper under all applicable laws. A recent exchange between the Equal Employment Opportunity Commission (EEOC) and the National School Board Association (NSBA) concerning the Americans with Disabilities Act (ADA) exemplifies this point. Under the ADA, a school district may be required to offer a reasonable accommodation to an employee with a disability. The obligation to address an employee's disability is often triggered by the employee providing evidence of the claimed disability. But what, if anything, should a school district do where an employee acts in an improper, unusual or unprofessional manner that resembles behavior commonly associated with a disability?

The EEOC posed the following scenario to NSBA and asked for input from the Council of School Attorneys (COSA): Two teachers act in the same unprofessional and unusual manner. The teachers' supervising principal knows that one teacher suffers from bipolar disorder, but knows nothing about the other's mental health. Would the principal's investigation into the two teachers' actions be different in any fashion? Could both teachers be asked whether their behavior was the result of their mental health condition?

A NSBA staff attorney responded to the EEOC's hypothetical and reported that in the overwhelming opinion of the COSA attorneys, the principal should not ask the other employee whether he or she is suffering from a disability. Under the ADA, it is the employee's obligation to provide information regarding a disability or medical condition that affects the employee's job performance. In addition, an employer asking whether employee conduct is based upon a disability may offend the employee and may well be pointless if the employee's condition is undiagnosed or otherwise unknown to the employee.

Furthermore, it may violate the ADA for a supervisor to ask an employee if they have a disability in circumstances where there is merely unusual, unprofessional behavior but no knowledge or evidence of a disability. The ADA prohibits discrimination against employees or employee candidates who either have a qualifying disability <u>or who are regarded</u> by the employer as having a disability. If the employer treats the individual as a disabled person, the individual may have an ADA claim regardless of whether they are actually disabled. If a school district representative asks an employee whether he or she has a disability, in the absence of any knowledge or information to that effect, it may provide evidence that the person is "regarded" as having a disability by the district. Further, asking an employee if he or she has a disability might run afoul of the ADA's prohibition against an employer inquiring into the nature or severity of a disability unless such inquiry is job-related and consistent with business necessity.

As a result, school officials and supervisors should not inquire into whether an employee has a disability unless and until the employee makes that condition known. To do otherwise places the district in a precarious position of diagnosing an employee's potential disability, which may have implications under the ADA.

Instead, districts should continue to carry out their obligations under the ADA by responding to instances where employees provide evidence of a qualifying disability. In investigating employee misconduct, districts should focus foremost on the conduct at issue, and ask open-ended questions which permit employees to bring forth explanations for their conduct. Employees should be encouraged to provide any relevant information in connection with instances of unusual or unprofessional behavior, but the obligation to raise the issue of a disability and to seek an accommodation should remain with employees.

Employee Misconduct Investigations • Labor & Employment Negotiation
Independent Hearing Officer • Student Disciplinary Actions
Special Education • Construction Project Services

MB&M Maiello Brungo & Maiello, LLP
Attorneys At Law

*Built on Integrity, Proven by Performance*SM

412.242.4400 • mbm-law.net

PENSION REFORM BECOMES A REALITY

On November 23, 2010, Governor Rendell signed what is now Act 120 of 2010 which contains significant revisions to the Pennsylvania School Employees Retirement System (PSERS) which impact both employers and employees.

Of most significance to school districts is the creation of "collars" or limits on the annual increases in the school district's contribution rates. For 2010-2011, the employer contribution rate is 5.64% of total compensation for all current employees. For the next three fiscal years, the employer contribution rates will be 8.72% for 2011-2012, 12.22% for 2012-2013, and 16.71% for 2013-2014. Unfortunately, beginning with 2014-2015, it is projected that school districts will face 21 years of rates over 20% and 27 years of double digit rates. These projections are based on the assumption that PSERS assets will earn 8% each year. The contribution rates will fluctuate to the extent that there are more adverse or more favorable investment returns. For example, for the fiscal year ending June 30, 2010, the return on PSERS investments was 14.59%.

For the first time for employees, there will be a shared risk element for all new employees that directly connects the PSERS' investment performance with the employee contribution rate. New employees hired after June 30, 2011 must pay a shared risk contribution rate of 0.5% for every 1% that the actual rate of return is less than the assumed rate. This shared risk contribution rate only applies to new employees. However, to minimize the impact of the shared risk contribution rate, there is a 2% cap. For an employee in the T-E class hired after June 30, 2011, the total combined employee contribution rate will be no less than 7.5% and no greater than 9.5%. Those hired after June 30, 2011 who elect to be in the T-F class to obtain the 2.5% accrual benefit rate will have a contribution rate with a minimum of 10.3% and a maximum of 12.3%. However, if the PSERS' actuarial funded status is 100% or greater, the new employee shared risk contribution rate drops to 0%, but the employee will still be required to pay either 7.5% or 10.3%.

The Act also implements significant revisions to superannuation and employee vesting. In determining the superannuation age, the Act now requires either age 65 with at least three years of service or a combination of age at retirement and years of service totaling 92, with at least 35 years of accrued service. Regarding vesting, current employees may vest with only five (5) eligibility points while new employees hired after June 30, 2011 will only vest with ten (10) or more eligibility points. Also, the Act requires employees who are eligible to purchase service credits to make the purchases at the present value at the full actuarial cost of the increase. The only exceptions are purchase of service credits for intervening and non-intervening military service. Finally, the Act, limits the defined benefit to 100% of the member's final average salary.

While Act 120 provides some relief to school districts and brings much needed adjustments to the employee contribution rate structure, depending on the return on PSERS investments, future legislative revisions may still be necessary.

MB&M Maiello Brungo & Maiello, LLP
Attorneys At Law

Built on Integrity, Proven by Performance SM

412.242.4400 • mbm-law.net