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PUBLIC POLICY AGAINST ILLEGAL DRUG USE SLAMS THE DOOR ON REINSTATEMENT

In the March 2008 edition of MB&M Education News, we discussed a Pennsylvania Supreme Court decision which impacted the standard of review for arbitration decisions involving school employees. The case of ***Westmoreland Intermediate Unit No. 7 v. Westmoreland Intermediate Unit No.7 Classroom Assistants Education Support Personnel Association, PSEA/NEA*** involved the discharge grievance of a classroom aide with 23 years service who was found passed out in a bathroom stall. The aide was partially undressed with a non-prescribed Fentanyl patch on her back. The school went under a full-scale security alert when the bathroom could not be accessed because the aide had locked herself in and passed out. The arbitrator found that the IU's decision to discharge the aide lacked just cause, and the IU appealed. The case worked its way to the Pennsylvania Supreme Court, which held that arbitration awards can now be reviewed under a "public policy" standard which asks whether the arbitrator's decision violates a settled public policy. The Supreme Court remanded the case to the lower courts to determine whether the arbitrator's decision violated public policy.

On remand, the case was first heard by the Westmoreland County Court of Common Pleas, which held that the arbitration decision did not violate public policy, and the IU appealed. The Commonwealth Court has now held that the arbitrator's decision reinstating the employee does violate public policy and upheld the aide's termination.

The IU argued before the Commonwealth Court that the aide's reinstatement, given her history of drug abuse, would pose a significant risk of harm to the students, and thus public policy was violated. The Court first addressed whether there was a well-defined and explicit public policy, and second, whether that policy had been violated.

Regarding the first question, the Court held that there is a public policy in favor of educating children concerning the danger of drugs and also against allowing individuals under the influence of drugs to play any role in the supervision or instruction of students. The Court cited School Code provisions requiring safety measures and discussed the mentoring role played by school personnel. The Court took notice of studies concerning the effects of tolerated drug use upon children and made reference to the various criminal laws and programs devoted to combating drug use and, in particular, adolescent drug use.

The Commonwealth Court disagreed with the lower court's conclusion that reinstating the aide did not violate this public policy. The Court held succinctly that the reinstatement of an employee who had reported to work under the influence of non-prescribed controlled drugs was a clear violation of public policy. In a dissenting opinion, Judge Friedman took issue with the Court's conclusions and stated that while the aide's conduct on the day in question certainly violated public policy, the arbitrator's conditional reinstatement of the aide did not.

As a result of this decision, a new standard of review of arbitration awards for violating a clearly-stated public policy has emerged.

OUR NEGOTIATIONS ARE AT AN IMPASSE: WHERE DO WE GO FROM THERE?

It is not unusual for School Districts to find themselves at an impasse in contract negotiations. In today's economic climate, Districts strive to hold the line on the ever escalating personnel and benefit costs which comprise a significant portion of their budgets. At this time, if your District is still embroiled in protracted negotiations, the prior contract has probably expired, and the District and Union are operating under the status quo. For an in depth review of concerns while operating under the status quo, please refer to the Summer 2009 edition of Education News posted on our website at www.mbm-law.net. This article outlines the alternatives available to the District if negotiations are unlikely to result in a new contract in the near future.

For a District with its fiscal year ending on June 30, the deadline for one party to request fact-finding was April 10. However, other scenarios where fact-finding may occur include:

- At any time by mutual agreement of the parties, except during mandatory arbitration; or

- At any time by the Labor Board, except during the period between a notice to strike and the conclusion of the strike. When the Labor Board does not initiate fact-finding prior to a strike, it must issue a report with its rationale upon request of either party.

Another alternative available to the District is nonbinding arbitration. Voluntary arbitration may be requested by either party by written notice to the Bureau of Mediation, Labor Board and the other party at any time prior to mandatory arbitration, except it cannot be required during fact-finding. The other party must indicate if it agrees within 10 days of notification. Mandatory arbitration is required where a strike or lockout will prevent the District from providing 180 days of instruction by the last day of school on the school calendar or by June 15, whichever is later.

The specific features of Act 88 fact-finding and arbitration may be reviewed in the news section of our website at www.mbm-law.net. If you wish to have this information sent via email, contact ll@mbm-law.net

Despite all efforts, a strike may be unavoidable. If a strike occurs, the following may be of benefit:

- If the Union strikes once and unilaterally returns to work, the Union can only strike once more during the school year.
  The Union must give the District a minimum of 48 hours written notice before a strike.

- Strikes are prohibited:
  - ◊ Prior to conclusion of 48-hour notice by the Union.
  - ◊ During fact-finding or arbitration processes.
  - ◊ If in the nature of a selective strike.

- During a legal strike, the District may only use individuals who were actively employed by the District during the prior 12 months.

- The District may use any persons when the Union has rejected the arbitrator's determination or the strike will prevent the completion of 180 days of instruction by June 15 or the end of the school year.

- In the event the Union is on a strike for an extended period that would not permit the District to complete the 180-day school year by June 30, the Secretary of Education may petition for an injunction in the County Common Pleas Court to provide for the required period of instruction.

- Pursuant to its equitable powers, the Court may order the District and Union to participate in court-monitored negotiations as part of an injunction pursuant to Act 88. Accordingly, the court may require Board Members to be present at court-monitored negotiation sessions.

Careful preparation and documentation of the District's position will increase the likelihood of a more favorable outcome in either Act 88 fact-finding or arbitration. MBM has provided guidance in navigating and surviving Act 88 fact-finding and arbitration and is prepared to respond to any questions your District may have.

EXPANSION OF ADA EXPOSURE: DANGER AHEAD!

On September 25, 2008, President Bush signed the ADA Amendments Act (the "ADAAA") which took effect on January 1, 2009 and substantially enlarged the number and scope of individuals who are "qualified individuals with a disability." The Act emphasizes that the definition of disability shall be construed in favor of broad coverage to the maximum extent permitted by the Act.

The amendments significantly expand the definition of "major life activities." While the ADA originally defined major life activities to include functions such as seeing, hearing, breathing, walking, thinking, sleeping and working, the amendments to the ADA include activities such as reading, writing, concentrating, lifting and bending. The amendments also include an individual's ability to perform major bodily functions, including proper functioning of the digestive, nervous, respiratory, endocrine, and reproductive systems, as well as impairments affecting the brain, bladder, bowel and normal cell growth. In addition, an impairment that substantially limits one major life activity need not limit another major life activity in order to be considered a disability. Significantly, a person with an impairment that is episodic or in remission (such as cancer) is still considered a disabled individual under the ADA, provided that the impairment would substantially limit a major life activity when active. Also, under the amendments, mitigating measures are not considered in determining whether an individual has an impairment which substantially limits a major

life activity. Such mitigating measures include medication, medical supplies, equipment, low vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs, hearing aids and cochlear implants or other implantable hearing devices, mobility devices or oxygen therapy equipment and supplies.

Finally, the ADA amendments now provide that an employer violates the ADA merely by regarding an employee as having a physical or mental impairment, regardless whether that impairment is perceived by the employer to substantially limit one or more of the employee's major life activities as provided under the original ADA. As a result, the "regarded as" provision of the ADA is now very broad. The only impairments that will not fall within the scope of the "regarded as" prong of the ADA are those impairments that last six months or less.

With the substantial expansion of potential liability under the ADA, School Districts should take immediate action to assure that they are in compliance. The ADA amendments will result in more employees and job applicants being covered by the ADA, more types of conditions will be covered and the protections afforded under the amended ADA will expand significantly. To limit liability, Districts should immediately:

- Review and revise Board policies and practices, especially as they relate to the interactive process between District Officials and an employee with a disability;
- Develop procedures to assist in finding and implementing reasonable accommodations when they become necessary;
- When a request for a reasonable accommodation from an employee is received, engage in the interactive process with the employee, regardless whether medication, aides or other mitigating measures may be available to the employee; and
- As in the past and most importantly document – document – document.

Michael L. Brungo, a partner with MB&M recently presented to SMC Business Councils on the impact of the ADA Amendments on September 17, 2009. If you have concerns whether your District is compliant with the new ADA Amendments, Mr. Brungo is available for ADA training to either District Officials or Board Members.

U.S. SUPREME COURT HOLDS STRIP SEARCH OF STUDENT UNCONSTITUTIONAL

At the end of its 2008-2009 term, the U.S. Supreme Court decided a case which implicates the constitutional rights of students with regard to searches and may impact the way in which schools investigate suspected misconduct. In ***Safford Unified School District #1 et al. v. Redding***, the Court heard an appeal concerning a 13 year-old female 8th grade student from Arizona who was strip-searched by school officials who were looking for prohibited prescription medications.

In October 2003, Savana Redding was escorted from her math class by the assistant principal. At the school office, the assistant principal confronted her with a school planner containing knives, lighters and a cigarette and some banned prescription pills. Savana admitted the planner was hers, but said that she had lent it to another student and that all of the contraband belonged to someone else. The assistant principal told her that he had received a report that she was giving pills to other students, which she denied. The assistant principal obtained Savana's consent to search her backpack for contraband, but nothing was found. The male assistant principal instructed a female administrative assistant to take Savana to the school office, where her outer clothing was searched by the administrative assistant and the female school nurse. When nothing was found, Savana was asked to remove her clothing, and then to pull her bra and underwear away from her body to demonstrate that there were no pills hidden in them. She complied with the requests, and no pills were found.

Savana's mother filed suit in federal court and argued that Savana's Fourth Amendment rights against unlawful searches and seizures were violated by the strip search. The District argued that no violation occurred because the school officials had reasonable suspicion that Savana was providing prohibited medications to fellow students, and the Court agreed. A three-judge panel of the Ninth Circuit Court of Appeals affirmed that finding. On appeal for rehearing, however, the full Ninth Circuit held that the search was not justified and was unconstitutional. The U.S. Supreme Court agreed to hear the case.

Since 1985, the law concerning search and seizure rights of students within the school setting has rested upon the U.S. Supreme Court decision of ***New Jersey v. T.L.O.*** In that case, the Court held that a search of a student's person may take place if the search is justified by a reasonable suspicion held by a school official that there are grounds to believe the student has committed misconduct, but the search is only permissible if not unnecessarily intrusive given the age or gender of the student. This standard has been applied in Pennsylvania and elsewhere since that time, but the Supreme Court's decision in Redding clarifies how the standard is applied.

By an 8-1 margin, the Supreme Court held that the strip search of Savana violated her Fourth Amendment right to be free from unlawful searches. The Court held that the Assistant Principal had a reasonable suspicion to question Savana and to search her backpack and outer clothing in response to the report that she was distributing prescription drugs, but the search should have been limited to those areas. There had been no report that the contraband pills were being hidden in the student's undergarments to justify the extremely intrusive search that occurred. Further, while the risk of imminent and significant danger to students or staff might justify an intrusive search such as a strip search, the school could not show that there was any such immediate risk requiring a strip search to be conducted.

While it is unlikely that your District has employed strip searches, the Redding case is a caution to school officials to avoid conducting strip searches of students under any circumstances unless presented with a situation where imminent risk of danger is present. It is advisable, wherever possible, to leave all but the most basic of student searches to law enforcement personnel.

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IS YOUR SCHOOL DISTRICT A PRIME CANDIDATE FOR A MERGER?

MB&M guided the Center Area and Monaca School Districts through the intricacies of the first voluntary merger in Pennsylvania since the 1960's and was named Solicitor of the newly-formed Central Valley School District. In analyzing whether your school district might benefit from a voluntary merger, consider the following questions:

1. Has your district experienced a stagnant or declining tax base or student population over a period of recent years?
2. Has a shrinking student population led to the reduction of curriculum offerings, extracurricular activities or the closing of facilities?
3. Is there another district contiguous to yours which might have resources that would be of mutual benefit if a merger occurred? For example, a district with a growing residential tax base and stagnant commercial tax base might benefit from a merger with a district with opposite characteristics, or a district with renovated elementary facilities and outdated secondary facilities might benefit from merging with a district with the reverse.

If you believe your District could benefit from a merger, Maiello, Brungo & Maiello is available to answer your questions. Please visit our website www.mbm-law.net for more information.

"KILL LIST" MUST BE CREDIBLE TO SUPPORT EXPULSION

Often school officials must determine whether a statement or writing is a threat, and if so, what punishment is appropriate. Commonwealth Court will soon consider the difficult determination of whether a student poses a real danger to the school community.

In ***Shelby L. Jones et al. v. Gateway School District***, the Allegheny County Court of Common Pleas reviewed the expulsion of an eighth grade female student. The student had a handwritten list titled "People to Kill," which included her classmates and teacher. Upon learning that the student had the list, she was suspended, provided a Hearing and then was expelled by the Board.

Common Pleas Judge Friedman granted the student's appeal and returned her to the classroom. The Judge noted that the student kept the list on her person, never showed it to anyone and never published it on the internet. Further, the student did not threaten any of the individuals on the list, had no prior suspensions or history of disciplinary problems. On this basis, the Judge concluded that no actual terroristic threats had been made. The Judge further noted that in response to finding the note, the District did not lock down its schools or implement significant additional safety measures and the "threatened" children and teacher continued to come to school. Judge Friedman concluded that the District did not regard the student as dangerous, and could not have reasonably believed the "Kill List" constituted a credible threat: "The evidence of record was undisputed and was that the actions complained of – causing disruption in the school – were not those of Shelby, but rather, those of Gateway."

The District filed an appeal from Judge Friedman's ruling to the Commonwealth Court. When decided, this case may provide some guidance to School Districts in designing and enforcing their codes of student conduct regarding threats made by students. In a time when bomb threats seem all too frequent and School Districts are hesitant to be viewed as doing too little to prevent school violence, it is timely for a Pennsylvania appellate court to weigh in on how credible a threat must be before it can be met with expulsion. We will update the status of this case in future editions of MB&M Education News.