VEDDER PRICE

Public Employer Bulletin

A review and analysis of emerging developments affecting public sector employees

If you have questions regarding any article in this bulletin, please contact James A. Spizzo (312/609-7705), Lawrence J. Casazza (312/609-7770) or any other Vedder Price attorney with whom you have worked.

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"ME TOO" ARBITRATION RESULT SIGNALS CAUTION FOR EMPLOYERS

Arbitrator Elliott Goldstein recently ruled in favor of the City of Quincy and against Quincy Firefighters Local No. 63 in an arbitration brought by the Union to enforce the parties' "me too" clause. The Arbitrator held that the Union failed to prove the police unit had achieved a better economic settlement than that gained by the firefighters. Accordingly, the firefighters' union was not entitled to reopen economic negotiations to achieve what was viewed as "parity" with the police.

The facts of the case are not complicated. In their current three-year bargaining agreement, the City and union included a so-called "me too" clause, giving the union the

right to claim additional wages if the City's subsequent negotiations with its police union produced certain results. Subsequently, the City settled with the police, and the firefighters claimed the right to reopen negotiations. The City disagreed and the matter proceeded to arbitration.

At the threshold, the parties in arbitration disagreed as to whether the City's four-year police contract triggered the "me too" clause. The City argued that the "me too" provision was clearly intended to apply only if the City and its police union bargained a three-year contract (which they did not), while the union claimed that the four-year police contract fell within the "me too" language.

On the merits, the City argued that the police contract did not result in a higher percentage wage and benefit increase for members of that unit than the firefighters received under their Agreement. The Union argued that the total gains for the first three years of the police contract were one percent higher than those attained by the firefighters, and requested an additional one percent increase in third-year wages under the Agreement.

During the course of a two-day hearing, the Arbitrator received testimonial and documentary evidence presented by the parties. He analyzed the evidence and ruled as a threshold matter that (a) the union could invoke the "me too" clause notwithstanding the fact that the police unit had agreed to a four-year Agreement, and (b) the union failed to show that the police unit achieved a settlement for the first three years of its contract term better than that achieved by the firefighters. Once the Arbitrator ruled that the union failed to show the economic gains enjoyed by the police unit exceeded the firefighters' gains, the final issue in the case, which would have been in the nature of interest arbitration, became moot.

The Arbitrator opined that his decision was based upon the intentions of the parties exhibited at the bargaining table. The Arbitrator based his approach on the teaching of *City of Brook Park*, 109 LA 801 (1997), finding that in cases of this nature the parties are bound by the understandings they reach in the underlying negotiations. For example, the evidence established that during collective bargaining the City and Union calculated the value of the firefighters' settlement in a particular way. These calculations did not include certain valuations which each party later sought to establish at arbitration. The Arbitrator accordingly

declined to accept the later-added "gloss" to the parties' respective calculations.

Specifically, Arbitrator Goldstein declined to embrace statistical evidence offered by the City establishing the actual value of various components of the economic settlement and their "real life" costs. Some of these valuations had not been calculated during bargaining because the underlying data did not yet exist, and, hence, it was impossible to do so. The Arbitrator was equally reluctant to accept the union's valuation of a new, pension-related benefit where that calculation was at odds with the parties' understanding of its value reached in bargaining. For better or worse, in reaching his decision the Arbitrator strictly adhered to reasoning used by the parties during negotiations.

While this decision presented an acceptable "bottom line" result for management, the Arbitrator's analysis of the evidence clearly sends a cautionary signal to the wary negotiator. Management negotiators faced with a union proposal to adopt a "me too" clause should bear in mind the following suggestions:

- Notwithstanding possible assurances from your Union bargaining team that it seeks a "me too" clause merely as insurance that the employer will play fair, a clause of this kind may present far more trouble that it is worth. You can face costly and time-consuming challenges by the Union when it inevitably seeks to enforce its rights under the clause.

- Drafting the typical "me too" clause is not a simple task. If you agree to include such a clause in your Agreement, draft it with the utmost care. Spell out in detail the parties' specific understandings concerning, e.g., the range of permissible comparables, the value(s) assigned to the economic agreement, and when the clause applies or does not apply. Moreover, language should be included detailing the methodology the parties must use to calculate the economic agreement and its comparable(s). Failure to do so leaves to the Arbitrator decisions which you may otherwise assume have already been made.

- The record of negotiations leading up to the

adoption of a "me too" clause must be clear and unambiguous. Meeting notes should detail the representations of the parties concerning the base economic settlement. If possible, the parties should initial, or "T.A.," the valuations assigned to each element of the deal as it evolves. The same careful record should be made of the subsequent comparable negotiations. Economic valuations made therein should, of course, be consistent with the methodology set forth in the "me too" clause.

The City of Quincy was represented by Vedder Price attorneys Jim Spizzo (312/609-7705) and Paul Gleeson. Please contact Jim or any Vedder Price attorney with whom you have worked for further information.

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U.S. SUPREME COURT LIMITS LIABILITY UNDER TITLE IX FOR TEACHER HARASSMENT

In a decision hailed by educators nationwide, the United States Supreme Court held that a school district may be held liable under Title IX of the Education Amendments of 1972 ("Title IX") for the sexual harassment of a student by one of the district's teachers only where an official of the district with authority to institute corrective measures has actual notice of the teacher's misconduct and is deliberately indifferent to it. *Gebser v. Lago Vista Independent School District*, No. 96-1866, 1998 WL 323555 (June 22, 1998).

Title IX prohibits sexual discrimination in educational programs and activities receiving federal financial assistance and authorizes administrative agencies that disburse educational funds to enforce this prohibition. In addition to administrative enforcement, the United States Supreme Court has previously held that a student sexually harassed by a teacher can sue a school district for monetary damages under Title IX. *Franklin v. Gwinnett County Public School*, 503 U.S. 60 (1992). The *Franklin* Court, however, did not define the circumstances under which the district would be held liable. Since that time, federal courts, as well as the U.S. Department of Education's Office of Civil Rights, have disagreed as to which of the following three general standards should be

used to determine whether a school district may be liable for sexual discrimination under Title IX: (1) a strict liability standard, in which a district will be liable every time a teacher sexually harasses a student, (2) a constructive knowledge standard, in which a district will be liable if it knew or should have known about the harassment but failed to stop it, or (3) an actual knowledge standard, in which a district will be liable if it had actual knowledge of the sexual harassment but did nothing to stop it.

The *Gebser* Court resolved this dispute and found that the actual knowledge standard should apply. In doing so, it referred to statutory language limiting the ability of an administrative agency to initiate enforcement proceedings against a school district until the agency advises an appropriate person of the violation and determines that voluntary compliance is unobtainable. The Court explained that the purpose of this limitation is to "avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures." The Court then reasoned that it would be "unsound" to require notice and an opportunity for voluntary compliance under the administrative enforcement provisions but not have similar limitations imposed where judicial enforcement is sought.

While providing clarification as to which standard should be used in determining liability, the *Gebser* decision provides little advice as to how to apply it. The Court states that a school district will not be liable unless a "school district official" or "appropriate person" under Title IX who has "authority" to "institute corrective measures" has actual notice. It does not, however, give any guidance as to how one can determine who has this authority. For example, if disciplinary measures can only be approved by the Board of Education, must the Board have actual knowledge? Also, the Court limits liability to only those circumstances where the school district official is "deliberately indifferent" to the misconduct. Other than to state that refusing to take any action would constitute deliberate indifference, the Court offers no direction as to what actions a school district should take to avoid such a finding. Thus, while the *Gebser* Court set a high standard for holding a school district liable for a teacher's sexual harassment of a student, uncertainty still exists as to when that standard has been met.

Accordingly, school districts should take steps to minimize any potential liability for sexual harassment. Many of these steps are already mandated by Title IX. For example, Title IX requires school districts to have a policy expressly prohibiting sex discrimination. Either this or a separate policy should specifically address sexual harassment, including examples of the conduct that constitutes sexual harassment. Title IX also requires school districts to have grievance procedures for promptly and equitably resolving complaints of sex discrimination and sexual harassment. The Office of Civil Rights recommends that these procedures include the following:

- Notification to students, parents, and employees of the procedure, including where complaints may be filed;
- Application of the procedure to complaints alleging harassment by employees, other students, or third parties;
- Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
- Designation of time frames for the major stages of the complaint process;
- Notice to the parties of the outcome of the complaint; and
- Assurances that the school will take steps to prevent recurrence of any harassment and to correct any discriminatory effects on the complainant and others.

Title IX also commands school districts to designate at least one individual to coordinate its Title IX responsibilities and to notify its students and employees of that designation. To ensure that students and employees are aware of this designation, school districts should identify the individual and the individual's business address and telephone number in their sex discrimination policies and grievance procedures and have copies of the policies and procedures available at various locations within the school district and included in a student handbook or similar document.

Please contact James A. Spizzo(312/609-7705) or any other Vedder Price attorney with whom you have worked for further information on this topic.

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ILLINOIS APPELLATE COURT FURTHER DEFINES SUPERVISORY STATUS

A union organizing attempt by Attending Physicians ("Attendings") employed at Cook County Hospital has been rejected by the Illinois Appellate Court. By a vote of 2-1, the First District Court affirmed a ruling of the Illinois Local Labor Relations Board (the "Board") that Cook County Hospital Attendings met the definition of "supervisor" under the Illinois Public Labor Relations Act (the "Act") and so were exempt from the coverage of the Act. As a result, the Union seeking to represent them could not petition the Board to hold a representation election among the Attendings. *National Union of Hospital and Health Care Employees, American Federation of State, County and Municipal Employees (Doctors' Council of Cook County Hospital) v. County of Cook (Cook County Hospital) and Illinois Local Labor Relations Board*, No. 1-96-2690 (1998).

The *Cook County Hospital* decision is relevant for any public employer questioning whether a position is supervisory in nature.

Cook County Hospital is a teaching hospital operated by Cook County, Illinois. The Hospital employs approximately 200 Attendings. While these Attendings have ultimate responsibility for patient care, they spend roughly 80% of their time teaching the more than 500 Residents participating in the Hospital's graduate medical education programs, monitoring and directing the care the Residents provide to the patients, and guiding their professional development.

Most courts interpreting the Act have adopted a four-part test for determining whether an employee is a supervisor: (1) whether the employee's principal work is substantially different from that of his or her subordinates; (2) whether the employee has authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote,

discharge, direct, reward, or discipline employees, to adjust their grievances, or to effectively recommend such action; (3) whether the employee consistently uses independent judgment in performing one or more of the above tasks; and (4) whether the employee spends a majority of his or her time handling the above tasks. (The method of applying this final prong which does not apply in police supervisor determinations is in some dispute. The Board has taken the position that the time spent performing supervisory functions must exceed time spent performing all nonsupervisory functions (*Northwest Mosquito Abatement District*, 13 PERI 2042 (ISLRB 1996), while at least one appellate court has adopted a "significant allotment" approach which looks at whether the proportion of the worker's time spent performing supervisory functions exceeds the amount of time spent performing any other nonsupervisory function. *State of Illinois, DCMS v. Illinois State Labor Relations Board*, 278 Ill. App. 3d 79, 662 N.E.2d 131 (Ill. App. 4th Dist. 1996).)

The key issue in the *Cook County Hospital* case was whether, in directing the Residents, the Attendings were exercising independent judgment in the interests of the Hospital, or whether the direction they provided was merely based on their superior skills and technical expertise. An Administrative Law Judge had concluded that the latter was the case, and that they were therefore not supervisory employees. The Board reversed this ruling, and the Union appealed.

The Appellate Court upheld the Board, rejecting the Union's claim that the Attendings were not acting in the Hospital's interest in directing and training the Residents. It observed that "virtually all supervisors have authority over their portion of an operation because of the Employer's conclusion that they have greater skill and experience," noting the Hospital's role as a teaching hospital and that it had specifically assigned the teaching function to the Attendings. It also stressed that, by the Attendings' direction of Residents as they provided patient care and in the Hospital's education programs, the Hospital was able to fulfill its mission of providing efficient and economical health care to the indigent. Thus, ruled the Court, the direction Attendings provide Residents is in their employer's interest and makes them supervisory employees who are exempt from the coverage of the Act.

In reaching its decision, the Appellate Court distinguished an earlier Illinois Supreme Court decision concerning the supervisory status of fire department lieutenants. In *City of Freeport v. Illinois State Labor Relations Board*, 135 Ill. 2d 488 (1990), the Supreme Court found fire department lieutenants not to be supervisors, notwithstanding their direction of firefighters at fire scenes. The Supreme Court explained that "any direction which the lieutenants give to firefighters… is derived from their superior skill, experience and technical expertise and therefore does not require the use of independent judgment" in the interests of the employer "as required by the statute." As the *Cook County Hospital* court explained, the difference between the fire lieutenants and the Hospital Attendings is that the fire lieutenants function as lead persons, playing an active role in extinguishing each fire, while the Attendings function as guides and mentors, providing little direct patient care themselves but instructing and observing the work of the Residents as they care for the patients — a role given to them based upon their skill and expertise, but carried out in the Hospital's interest and according to the Hospital's policies nonetheless.

While decided in the health care context, the *Cook County Hospital* decision has potentially broader application. Under this decision, an employee not otherwise excludible from the bargaining unit may qualify as a supervisor if he or she spends a substantial amount of time guiding and directing the work of more junior employees. Where this is the case, employers may be able to prevent such an employee's inclusion in a bargaining unit or remove the employee's position (and therefore the employee) from the bargaining unit by way of a timely unit clarification petition brought, *e.g.*, following a change in the mix of duties assigned to the position. *See*, *e.g.*, *SEDOL Teachers Union v. Illinois Educational Labor Relations Board*, 276 Ill. App. 3d 872 (1st Dist 1995) (unit clarification process may be used (1) to remove statutorily excluded employees from a bargaining unit, (2) to resolve ambiguities concerning the unit placement of individuals who come within a newly established job classification or who fall within an existing job classification that has undergone recent substantial changes, or (3) to resolve ambiguities resulting from changes in statutory or case law).

Cook County Hospital was represented by Vedder Price attorneys Larry Casazza (312/609-7770) and Mike Cleveland (312/609-7860). Should you desire further

information about the case or the subject of public employee union organizing, and supervisory status issues in particular, please contact Larry, Mike, or any Vedder Price attorney with whom you have worked.

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GOOD FAITH DOUBT OF MAJORITY STATUS NO DEFENSE TO REFUSAL TO BARGAIN CHARGE

The Illinois State Labor Relations Board ("Board") recently held in *County of Woodford* that an employer's good faith belief that a majority of its employees no longer want to be represented by their Union is not a valid defense to a charge that the County unlawfully refused to bargain.

In May 1995, after a secret ballot election, the Board certified the American Federation of State, County and Municipal Employees, Council 31 ("AFSCME") as the exclusive representative of certain Woodford County employees. AFSCME and the County then began bargaining. In the fall of 1996, a bargaining unit employee circulated a petition among unit employees. The petition stated that the employees no longer wanted to be represented by AFSCME. A majority of the bargaining unit employees signed the petition and gave it to the County. The County then informed AFSCME that it had a good faith doubt as to AFSCME's continued majority status and consequently was no longer obligated to bargain.

AFSCME filed an unfair labor practice ("ULP") charge with the Board alleging that the County acted unlawfully by withdrawing recognition from AFSCME and refusing to bargain. Relying on principles of federal labor law under the National Labor Relations Act, the Administrative Law Judge ("ALJ") found in favor of the County and dismissed the charge. The ALJ noted that under the National Labor Relations Act an employer has a valid defense to a refusal to bargain charge if it demonstrates that its discontinuation of bargaining is founded on objective considerations giving rise to a reasonable, good faith belief that the Union has lost its majority status. The ALJ found that the County made this showing by virtue of the employee-sponsored petition

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signed by a majority of the bargaining unit employees.

The Board reversed the ALJ. Its reasoning hinged on fairly technical language differences between the National Labor Relations Act and the Illinois Public Labor Relations Act. The Board found that under the federal law the duty to bargain exists when a union is "designated *or selected by the employees*" (emphasis added), whereas under the state law the duty to bargain exists when the union is "designated by the Board." From this, the Board reasoned that neither public sector employees nor employers may determine a union's exclusive representative status — only the Board can. Thus, a public employer's duty to bargain ceases only when the Board takes action to determine that the Union involved is no longer the exclusive representative of the bargaining unit employees. This may be in response to a decertification petition or a Union's disclaimer of interest, or after the election of a rival union.

So what does *County of Woodford* mean for public employers? Most important, if faced with a petition like the one in *County of Woodford* or other objective evidence that a Union has lost its majority status, public employers must continue to recognize the union and bargain in good faith. The Union will maintain its exclusive representative status unless and until the employees approach the Board to decertify the union or replace it with a rival.

One favorable aspect of *County of Woodford* is that the Board reaffirmed its existing principle that the duty to bargain does not begin until the Board certifies the Union as the exclusive representative of employees. Thus, if the circumstances in *County of Woodford* were reversed and unrepresented employees presented their employer with a petition showing majority support for a Union, the employer would not be obligated to recognize and bargain with that Union unless and until the Board issued a certification of the Union's majority status after a secret ballot election.

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LABOR BOARD ADDRESSES DEFERRAL TO ARBITRATION

In a recent decision, the Illinois State Labor Relations Board (the "Board") clarified when an unfair labor practice ("ULP") charge may be deferred to arbitration. In *State of Illinois and Illinois Federation of Public Employees*, 14 PERI ¶ 2005 (ISLRB 1998), the Board held that ULP charges are properly deferred to arbitration only when:

1. a question of interpretation or application of a contract provision or arbitral award is central to the dispute;

2. the dispute arises within the established collective bargaining relationship with no evidence of employer enmity to employees; *and*

3. the employer has credibly asserted a willingness to arbitrate.

However, when the dispute involves compliance with, rather than interpretation of, an arbitral award, deferral to the arbitrator who made the original award is inappropriate.

Illinois Federation of Public Employees involved a work schedule dispute between the State of Illinois Environmental Protection Agency (the "EPA") and the Illinois Federation of Public Employees (the "Union"). The dispute was grieved to arbitration. The arbitrator, having found both the Union and the EPA at fault, entered an award ordering the parties to negotiate in good faith the terms of the work schedule change. The parties then engaged in bargaining. The EPA attended two bargaining sessions, gave the Union relevant financial and other data, and negotiated over and made counterproposals to the Union's proposals. Nevertheless, the Union filed an ULP charge claiming the EPA failed to comply with the arbitral award, thereby violating the § 10(a)(4) statutory duty to bargain in good faith. The Executive Director of the ISLRB determined that the current dispute involved interpretation of the prior arbitral award and deferred the ULP to the arbitrator.

The Board disagreed. The Board recognized that deferring ULP charges to arbitration promotes the legislative policy

that arbitration is the preferred method of resolving disputes over the meaning and application of a collective bargaining agreement (or arbitral award). However, this was not such a dispute because neither party claimed it did not *understand* the arbitrator's award. Rather, the disputed issue was whether the recent negotiations engaged in by the parties satisfied the requirements of the award. The Board pointed out that the arbitrator could resolve the current dispute only by reviewing factual and legal issues which were not previously presented to him, *i.e.*, the EPA's actions in bargaining after the arbitral award. The Board accordingly held that where, as here, an arbitral award is not ambiguous and a dispute arises as to whether a party has complied with its terms, the compliance matter is a new dispute.

Moreover, the Board ruled, even assuming that interpretation of the arbitral award was the disputed issue, deferral was inappropriate because the EPA did not agree to arbitration. Thus, the dispute did not satisfy either the first or the third prerequisite to deferral. Accordingly, filing an ULP charge and then asking the Board to defer to arbitration was not an option available to the Union. Instead, the Union had to choose between: (1) filing a new grievance regarding the new dispute, or (2) filing a ULP charge with the Board, as the Union did, claiming that the EPA had violated the statutory good faith bargaining requirement.

Finally, with respect to the ULP charge itself, the Board held that noncompliance with an award issued pursuant to a negotiated grievance procedure violates the statutory good faith bargaining requirement only when noncompliance is so egregious that it repudiates the collective bargaining process. Because the EPA's conduct — attending bargaining sessions, providing information, and negotiating over proposals and counterproposals — was not sufficiently egregious to repudiate the collective bargaining process, the ULP charge was dismissed.

Please contact Jim Spizzo (312/609-7705) or any other Vedder Price attorney with whom you have worked for further information on this topic.

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