MLC Commentary January 2019-March 2019

Leo J. Peloquin, Esq,
Norris, Murray and Peloquin, LLC

Prohibited Practice

In Retaliation Cases, Timing, Communication and Specificity Matter The Most

In *University of Massachusetts Dartmouth*, 45 MLC 136 (March 19, 2019) Hearing Officer Kendrah Davis found that UMASS Dartmouth retaliated against Donald King (King) for engaging in protected, concerted activity including filing a grievance and trying to enforce his contractual right to take FMLA leave. Just one day after the Union filed for a demand to arbitrate his FMLA leave grievance, King received his 2013-2014 evaluation which indicated "marginal" and "unsatisfactory" ratings despite that, in all of his prior evaluations, King received "very good" and "outstanding" reviews. King was also subject to scrutiny by the new director. The director questioned King's use of FMLA leave calling it "disgusting" and "disrespectful" to his co-workers, and told him she was not a "fan of unions." UMASS also deviated from its own past practice of having evaluations completed by King's direct supervisor.

The Hearing Officer determined that the UMASS retaliated against King by giving him negative evaluation ratings which disqualified him from receiving a salary increase. Although UMASS provided legitimate, non-discriminatory reasons for conducting the evaluation, the Union was able to show that but for the filing of the grievance, King would not have received the negative ratings. The Hearing Officer's findings were based on the following factors: (1) a lack of communication to King that he was at risk of receiving a negative performance evaluation, (2) the timing of the negative evaluation in relation to King's FMLA grievance, (3) UMASS's deviation from its practices for conducting evaluations, and (4) the additional scrutiny applied to King's request for FMLA leave.

As this decision demonstrates, timing, communication and specificity are everything. Employers must proceed with extreme caution when evaluating an employee who has engaged in concerted activity. Do not over scrutinize. Identify and document specific concerns and communicate to employees if they are at risk of receiving a negative evaluation. This evidence can be extremely helpful in rebutting allegations of retaliation.

Employer Bargaining Obligations

No Duty To Bargain Over Food Guidelines That Resulted In Mere Inconveniences

While an employer must bargain over new working conditions of employment, this does not extend to cases where the impact is *de minimis*. In *City of Boston*, 45 MLC 126 (March 15, 2019) (*James Sunkenberg, Hearing Officer*), the Employer implemented Food Guidelines, which placed restrictions on consuming food and drink in the operations room that did not previously exist. The Guidelines were issued in response to a complaint about the unsanitary nature of the operations room. The Guidelines were meant to ensure that equipment remained "clean and free from debris," and to avoid attracting rodents and pests. Pursuant to the Guidelines, employees were prohibited from consuming food in the operations room and had to use the designated area located across the hall instead. The Guidelines also required supervisors consuming beverages in the operations room to use spill proof containers. The Union filed a prohibited practice charge, claiming that the Guidelines were implemented without providing notice to it. The Hearing Officer determined that the Employer did not violate the law, finding that the Guidelines were not mandatory subjects of bargaining. Specifically, the Hearing Officer found that the Employer's interest in preserving expensive electronic equipment and avoiding attracting pests outweighed any mere inconvenience that resulted to the supervisors by having to drink out of a spill proof container or walk across the hall to eat while on duty.

City Had To Bargain Over New Fitness For Duty Policy

In *City of Newton*, 45 MLC 106 (January 30, 2019) Hearing Officer James Sunkenberg found that the Employer violated the law by imposing a fitness for duty policy as a condition of continued employment without giving the Union notice and an opportunity to bargain over the criteria and procedures for imposing fitness for duty examinations. While the Employer's Code of Conduct may have authorized fitness for duty examinations under certain circumstances, it never exercised that authority over bargaining unit members with notice to the Union. In the three instances where the Employer did exercise this discretion, the Union did not have notice of it. The Employer also argued that fitness for duty examinations are not a mandatory subject of bargaining, but the Hearing Officer disagreed. While the Employer may have nonbargainable managerial prerogative to employ healthy police officers, the standards and methods by which it makes this determination are mandatory subjects of bargaining.

Motion To Defer To Arbitration

Post-Arbitration Award Deferral Denied Where Issue Was Not Fully Resolved By Award

Where an arbitration award decides on an issue presented in a prohibited practice charge, the CERB will defer to the award upon finding that the issue required contract interpretation, the arbitration proceedings were fair and regular, all parties had agreed to be bound, and the award is not clearly repugnant to the purposes of the Law. Alternatively, where a prohibited practice charge is fully resolved by an arbitration award, the prevailing party may raise the doctrine of issue preclusion as a defense. In either case, there

must be a showing that the arbitration award fully resolved the issue. It is not enough to argue that the issues were merely considered by the arbitrator. For instance, in *Boston School Committee*, 45 MLC 121 (March 5, 2019) Hearing Officer Susan L. Atwater rejected the City's motion to defer to arbitration and application of issue preclusion where the arbitrator merely considered, but never fully decided, whether the City violated a ground rule.

In *Springfield School Committee*, 45 MLC 117 (February 20, 2019), the parties agreed at the investigation to submit the first count of the Union's charge to arbitration, but not the second count. Subsequent to the arbitration hearings, the DLR Investigator decided to defer both counts to arbitration. The Union then filed a motion at the DLR to reinstate both counts but was denied by the Investigator. On appeal, the CERB affirmed the Investigator's denial of the Union's motion to reinstate the first count of its charge where the arbitration award fully resolved it and met all other post-award deferral requirements. However, the CERB allowed the Union's motion as to the second count upon finding that the parties agreed not to take this charge to arbitration where the arbitration award did not fully resolve this count, the Union could not have timely presented this count at arbitration to comply with the Investigator's ruling, and the Employer repeatedly raised procedural defenses to arbitration. ■