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MUNICIPAL LAW

BY JEFFREY D. FRIEDLANDER

City Employees: First Amendment Rights, Drug Testing, Illegal Strike

As the employer of more than a quarter-million municipal workers, the city is often subject to suit by employees and unions and, occasionally, brings actions on its own behalf as an employer.

The Law Department's Labor and Employment Law Division represents the city in its capacity as employer in cases dealing with employee discipline, allegations of discrimination, collective bargaining agreements, and other civil service and labor matters. The division also provides ongoing counsel on labor and employment matters to the city's Office of Labor Relations (OLR), and other city agencies.

The division has recently handled several particularly noteworthy cases involving the First Amendment rights of city employees, the prerogatives of management in drug testing of employees, and the consequences to unions and employees of engaging in an illegal strike.

Campaign Buttons

In early October, the United Federation of Teachers (UFT), which is the collective bargaining representative for teachers and other school employees, sought an injunction to prevent the enforcement of a chancellor's regulation which prohibited teachers from wearing campaign buttons in school facilities, prohibited the posting of campaign materials on bulletin boards and the use of the internal school mail system to distribute campaign materials. The UFT claimed that the regulation violated the teachers' rights under the First Amendment and under the state Constitution. The UFT relied primarily on the U.S. Court of Appeals for the Second Circuit's decision in James v. Board of Education of the Central School District of Addison, 461 F.2d 566 (2d Cir. 1977), which overturned the suspension of a school teacher for wearing a black armband as a protest against the Vietnam War. The court in that case had applied the balancing test set forth in Pickering v. Board of Education, 391 U.S. 563 (1968), which held, essentially, that the First Amendment permits the restriction of a public employee's speech on matters of public concern only if such speech would be deleterious to the efficient operations of the government employer or would inhibit the ability of the employee to perform his job.

The UFT contended that the passive wearing of campaign buttons and the posting and distribution of campaign materials would not impact on the operations of the schools or the ability of teachers to do their jobs.

In opposition to the application for the temporary restraining order and preliminary injunction, division attorneys argued on behalf of the Department of Education that the appropriate analysis begins with the Supreme Court's decision in Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1984). In Hazelwood, the Court held that "school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community" and ruled that school officials, rather than the federal courts, should determine what speech is inappropriate in the classroom. Id. at 267. The concern expressed by the Supreme Court in Hazelwood and by Department of Education officials in this case was that the speech at issue could be viewed as bearing the imprimatur of the school system.

U.S. District Judge Lewis A. Kaplan of the Southern District of New York denied the injunction with respect to the wearing of campaign buttons and the posting of campaign materials on bulletin boards that are in areas in view of students, but also enjoined the Department of Education from prohibiting the distribution of campaign materials through the internal mail system. Weingarten v. Bd of Education, 2008 U.S. Dist. LEXIS 832566 (S.D.N.Y. Oct. 17, 2008). Analyzing the case under Hazelwood and its progeny, the court found that there is a "clear relationship between the regulation and the defendants' legitimate interest in avoiding both the inevitable misperceptions on the part of a minority [of students] and, perhaps even more important, in avoiding the entanglement of their public educational mission with partisan politics." The court concluded that the chancellor's regulation "reflects a good faith judgment by the defendants in their professional capacities about the impact of teachers' political campaign buttons in the school[.]"

The UFT did not appeal the denial of the preliminary injunction. However, it appears that it will proceed with the action, which seeks a permanent injunction.

Drug Testing

On Aug. 1, 2005, the New York city Police Department (NYPD) expanded the use of hair follicle testing, instead of urine analysis, as its method for random drug tests of police officers and supervising officers. The Patrolmen's Benevolent Association, the Detectives Endowment Association, the Sergeant's Benevolent Association and the Captain's Endowment Association, all representing uniformed members of the NYPD, filed improper practice petitions with the New York City Board of Collective Bargaining (BCB), claiming that the expansion of hair follicle testing was a mandatory

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subject of collective bargaining under Civil Service Law Article 14 (Taylor Law).

The Office of Labor Relations responded by noting that hair testing had already been in place at the NYPD and that, in accordance with the Court of Appeals' holding in Patrolmen's Benevolent Ass'n v. Public Employment Relations Board, 6 NY3d 563 (2006), such testing was a prohibited subject of bargaining. The BCB rejected OLR's position, ruling that the expansion of hair follicle testing was a mandatory subject of bargaining, and on Dec. 4, 2006, issued adverse decisions and orders prohibiting the expanded use of hair follicle testing.

The NYPD immediately complied with the BCB decision by returning to urine testing for its random drug tests, but also asked the Law Department to appeal the BCB orders and to seek a preliminary injunction to restrain their enforcement so that the NYPD could continue with hair follicle testing of randomly selected uniformed members of the NYPD. Division attorneys filed an appeal of the BCB orders and an application for a preliminary injunction pending the court's decision on the merits. The city contended that hair follicle testing was part of the investigatory procedures employed by the police commissioner in determining whether disciplinary action was warranted and, thus, squarely fell within the police commissioner's discretion under Patrolmen's Benevolent Ass'n, supra.

Justice Lottie Wilkens of the New York State Supreme Court, New York County, granted the city's petition, finding that drug testing was related to the police commissioner's disciplinary authority and, therefore, was a prohibited subject of bargaining. *In re City of New York v. Patrolmen's Benevolent Assn.*, 2007 N.Y. Misc. LEXIS 8803 (Sup. Ct., N.Y. Co. Dec. 27, 2007).

On appeal, however, the First Department disagreed and reinstated the BCB order, finding that investigations were distinct from discipline and, therefore, the Court of Appeals ruling in Patrolmen's Benevolent Ass'n was inapplicable. In re City of New York v. Patrolmen's Benevolent Assn., 2008 N.Y. App. Div. LEXIS 7631 (1st Dept Oct. 16, 2008). The city is seeking leave to appeal the decision to the Court of Appeals.

Transit Strike

Although the city was not the employer and was not a party to the New York City Transit Authority's litigation against the Transit Workers Union (TWU) relating to the 2005 transit strike, the city was granted amicus status to participate in proceedings concerning the TWU's application for reinstatement of its dues check-off privileges.[1]

The state's Taylor Law prohibits strikes by public employees, and one of the statutory penalties imposed on the TWU after the strike was revocation of its ability to automatically receive union dues deducted from its members' paychecks, known as the "dues checkoff privilege." *New York City Transit Authority v. Transp. Workers Union*, 2006 N.Y. Misc. LEXIS 4046 (Sup. Ct., Kings Co. 2006). Justice Theodore Jones, then of the Kings County Supreme Court, who imposed the revocation, further held that the TWU could seek reinstatement of the checkoff privilege if it demonstrated compliance with the Taylor Law and affirmed that it did not have a right to strike. Id. The TWU's appeal of that order was denied. 37 AD3d 679 (2d Dept. 2007).

The TWU subsequently applied for reinstatement of its dues checkoff privilege by submitting, inter alia, an affidavit which the city, appearing as amicus, considered inadequate because it merely acknowledged that the Taylor Law prohibits public employees from striking. The court agreed and declined to reinstate the checkoff privilege, and further ordered that, to succeed in its application, the TWU must submit affidavits from every board member stating that the union did not have the right to strike. New York City Transit Authority v. Transp. Workers Union, 18 Misc.3d 414 (Sup. Ct., Kings Co. 2007). The TWU appealed.

The Second Department agreed that the TWU had not satisfactorily acknowledged that it did not have a right to strike and upheld the lower court's order denying reinstatement of the checkoff privilege. However, the Appellate Division held that affidavits from each member of the executive board were not required. New York City Transit Authority v. Transp. Workers Union, 55 AD3d 699 (2d Dept. Oct. 14, 2008). Thereafter, the TWU reapplied for reinstatement of the checkoff privilege and submitted an affidavit from its president, Roger Toussaint, as well as a resolution passed by a majority of the executive board unequivocally stating that the union recognized that it did not have a right to strike. As a result of the new submissions, the city did not oppose reinstatement of the dues checkoff privilege, and the privilege was reinstated.

Trials

To illustrate the trial work and the breadth of the matters handled on a day-to-day basis by the Labor and Employment Law Division, it is useful to look at one recent week in which division attorneys received four favorable jury verdicts. Three of the four verdicts were returned in the U.S. District Court for the Southern District of New York.

In *Scott v. New York city Police Department*, 16,000 present and former NYPD police officers and detectives asserted various violations of the Fair Labor Standards Act (29 U.S.C. §201 et seq.), including claims that the NYPD fails to pay overtime for amounts less than 15 minutes and improperly disregards compensation differences between shifts in calculating the overtime rate, and sought approximately $135 million in overtime compensation.

Division attorneys, working with attorneys from Seyfarth Shaw LLP, which handled the case for the city prior to trial, won a significant victory saving the city most of the amount claimed when U.S. District Judge Shira Scheindlin of the Southern District of New York decertified one claim in the

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collective action and the jury rejected two other claims. The court had decided two claims in favor of the plaintiffs on summary judgment in August 2008. Judge Scheindlin will decide damages on those two claims after hearing additional expert testimony.

Clarke v. Department of Health and Mental Hygiene was another action brought under the Fair Labor Standards Act. In *Clarke*, five public health sanitarians, who are responsible for conducting restaurant inspections, sought compensation for time spent at home mapping routes for the next day and for time spent commuting from their homes to their first inspection sites. The plaintiffs advanced the claim that, simply because they traveled from their homes with a bag containing equipment necessary to conduct the inspections, they were working during their commutes and should be compensated for the time.

Based on the evidence presented by division attorneys, which showed that the bag containing the equipment carried by plaintiffs was not heavy or burdensome, the jury found that they were not entitled to be compensated for their commuting time, and U.S. District Judge Gerard E. Lynch of the Southern District of New York dismissed their claim for compensation for mapping their routes.

In *Pannakadvil v. New York City Health and Hospitals Corp.*, a hospital laboratory technician alleged that he was denied a promotion in retaliation for prior complaints alleging discrimination based on his national origin. Division attorneys successfully proved that he was not as qualified as the employee who was promoted, and the jury returned a verdict for defendants in this trial before U.S. District Judge Robert P. Patterson of the Southern District of New York.

In *Leigh v. Department of Education*, tried before Judge Nina Gershon in the U.S. District Court for the Eastern District of New York, David Leigh, a mathematics and computer science teacher hired into the Department of Education's teaching fellows program, claimed he was terminated after one year because of alleged discriminatory animus against immigrants on the part of his supervisor, himself an immigrant.

Division attorneys demonstrated that Mr. Leigh was instead dismissed due to his poor teaching strategies and resistance to feedback and suggestions from his supervisors.

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1. The city withdrew its own lawsuit, seeking injunctive relief against striking transit workers and the TWU and damages to compensate for the fiscal and economic losses sustained by the city as a result of the strike, after the strike had ended. *City of New York et al. v. O'Brien et al.*, Index No. 37797/05 (Kings Co.).