New England Consortium of State Labor Relations Agencies

Connecticut • Maine • Massachusetts • New Hampshire • New York • Rhode Island • Vermont

NECSLRA Summer Conference – Friday, July 11, 2014

Portsmouth Sheraton-Harborside Hotel - 250 Market Street, Portsmouth New Hampshire

SCHEDULE

8:00 – 8:45 a.m.	***Registration & Continental Breakfast***
8:45 – 9:00 a.m.	**Welcome/Program Introduction**
9:00 – 10:15 a.m. (Plenary Session)	**Affordable Care Act – Current and Future Impact on Public Sector Labor Relations/Negotiations**
10:30 to 11:45 a.m. (Concurrent Workshops)	**I. Labor-Management Approaches to Addressing Expanding Social Media Issues in the Workplace.**
	II. Union Organizing & Election Trends in New England States
	III. Negotiations 101
Noon to 1:15 p.m.	***LUNCH – Hot Buffet (Included in Registration)***
1:30 to 2:45 p.m. (Concurrent Workshops)	**I. Innovations in Grievance Processing to Reduce Backlogs & Expedite Resolution**
	II. Ethical Issues in Negotiations, Grievances, and Unfair Labor Practice Cases
	III. Art & Science of Arbitration – Film by two-time Emmy Award Winner Carol M. Rosenbaum
3:00 to 4:15 p.m. (Plenary Session)	**Bullying in the Workplace**

Program Detail on Next Page

Visit www.nh.gov/pelrb and www.sheratonportsmouth.com for Registration Form and Hotel Information

Affordable Care Act - Current and Future Impact on Public Sector Labor Relations/Negotiations

9:00 a.m. Plenary Session - Panel: *Eric Cioppa, Superintendent, Maine Bureau of Insurance; Donna DeSimone Buckley, Esq., Consultant, Massachusetts Teachers Association; & Joseph P. McConnell, Esq., Morgan Brown & Joy, Boston, Massachusetts.*

ACA's present and future impact on the public sector workplace in general and on negotiations in particular. Panel will share their experiences and observations and provide insight and guidance about what the future holds and possible pitfalls and benefits yet to come.

Labor-Management Approaches to Addressing Expanding Social Media Issues in the Workplace

10:30 a.m. Concurrent Workshop - Panel: *Shawn Keenan, Esq., General Counsel, Maine Education Assoc./NEA and Peter Lowe, Esq., Brann & Isaacson, Lewiston, Maine*

Social media is playing an ever expanding role in everyday life and in the workplace. New technology can be a help and a hindrance in the workplace. Panel will discuss bargaining about social media and the broad range of impacts it has in the workplace on privacy, discipline, productivity and how we do our jobs.

Union Organizing & Election Trends in New England States

10:30 a.m. Concurrent Workshop - Panel: *Representatives from State Labor Boards & Agencies*

Agency representatives will discuss notable trends in areas of organizing, unit composition, and elections.

Negotiations 101

10:30 a.m. Concurrent Workshop – Panel: *Matthew H. Upton, Esq., Drummond Woodsum, Portsmouth, New Hampshire; Richard E. Molan, Esq., Molan, Milner Krupski, PLLC, Concord, New Hampshire; and Helen Bowler, Esq., Hearing Officer, Mediator, Arbitrator, Massachusetts Dept. of Labor Relations*

Effective bargaining depends on an understanding and mastery of the fundamentals. This panel will share its collective experience by examining the negotiation process and its aftermath.

Innovations in Grievance Processing to Reduce Backlogs & Expedite Resolution

1:30 p.m. Concurrent Workshop – Panel: *Cindy Montgomery, Chief Counsel, Maine's Office of Employee Relations; Julie Armstrong, Counsel, Maine's Office of Employee Relations; and Tim Belcher, Chief Counsel, Maine State Employees Association, SEIU Local 1989*

Ethical Issues in Negotiations, Grievances, and Unfair Labor Practice Cases

1:30 p.m. Concurrent Workshop – Panel: *Thomas M. Closson, Esq., Jackson Lewis, Portsmouth, New Hampshire; Peter Perroni, Esq., Nolan Perroni & Harrington, LLP Manchester, New Hampshire; and Marjorie Wittner, Esq., Chair, Commonwealth Employment Relations Board, Massachusetts Department of Labor Relations*

The panel will guide you through identification and analysis of ethical issues arising in negotiations, grievances, and unfair labor practice proceedings.

Art & Science of Arbitration – Film by two-time Emmy Award Winner Carol M. Rosenbaum

1:30 p.m. Concurrent Workshop – Panel: *Elizabeth Neumeier, Esq., Arbitrator-Mediator and Commonwealth Employment Relations Board member*

A documentary look at arbitration featuring interviews with prominent arbitrators. Post film discussion.

Bullying in the Workplace – Plenary Session

3:00 p.m. Plenary Session: *David Yamada, Suffolk University Law Professor & New Workplace Institute Director (author of Healthy Workplace Bill)* **Workplace bullying is an anathema in the workplace but for the most part is beyond the scope of existing employment laws. Professor Yamada will share and explain the need for legislative action like the Healthy Workplace Bill and will discuss other strategies compatible with the public sector workplace and existing contractual relationships.**

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Morning Schedule

8:00 – 8:45 a.m. Registration & Continental Breakfast
Ballroom Lobby

8:45 – 9:00 a.m.
Grand Ballroom Welcome/Program Introduction

9:00 – 10:30 a.m.
Grand Ballroom (Plenary Session) Affordable Care Act – Current and Future Impact on Public Sector Labor Relations & Negotiations

ACA's present and future impact on the public sector workplace in general and on negotiations in particular. Panel will share their experiences and observations and provide insight and guidance about what the future holds and possible pitfalls and benefits yet to come. *Eric Cioppa, Superintendent, Maine Bureau of Insurance; Donna DeSimone Buckley, Esq., Consultant, Massachusetts Teachers Association; & Joseph P. McConnell, Esq., Morgan Brown & Joy, Boston, Massachusetts.*

10:30 -10:40 a.m. Break

10:40 to 11:55 a.m. (Concurrent Workshops)

Harbor's Edge Room (lobby level) Labor-Management Approaches to Addressing Expanding Social Media Issues in the Workplace.

Social media is playing an ever expanding role in everyday life and in the workplace. New technology can be a help and a hindrance in the workplace. Panel will discuss bargaining about social media and the broad range of impacts it has in the workplace on privacy, discipline, productivity and how we do our jobs. *Shawn Keenan, Esq., General Counsel, Maine Education Assoc./NEA and Peter Lowe, Esq., Brann & Isaacson, Lewiston, Maine.*

Prescott Room (lower level) Union Organizing & Election Trends in New England States

Agency representatives will discuss notable trends in areas of organizing, unit composition, and elections. *Tim Noonan, Vermont Labor Relations Board; Katherine Foley, Connecticut State Board of Labor Relations; Robyn H. Golden, Rhode Island State Labor Relations Board.*

Amphitheater (lobby level) Negotiations 101

Effective bargaining depends on an understanding and mastery of the fundamentals. This panel will share its collective experience by examining the negotiation process and its aftermath. *Matthew H. Upton, Esq., Drummond Woodsum, Portsmouth, New Hampshire; Richard E. Molan, Esq., Molan, Milner Krupski, PLLC, Concord, New Hampshire; and Helen Bowler, Esq., Hearing Officer, Mediator, Arbitrator, Massachusetts Dept. of Labor Relations.*

Afternoon Schedule

Noon to 1:15 p.m.
Grand Ballroom — *LUNCH – Hot Buffet (Included in Registration)*

1:30 to 2:45 p.m. (Concurrent Workshops)

Harbor's Edge Room (lobby level) — Innovations in Grievance Processing to Reduce Backlogs & Expedite Resolution

Cindy Montgomery, Chief Counsel, Maine's Office of Employee Relations; Julie Armstrong, Counsel, Maine's Office of Employee Relations; and Tim Belcher, Chief Counsel, Maine State Employees Association, SEIU Local 1989.

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14TH ANNUAL CONFERENCE OF THE NEW ENGLAND CONSORTIUM OF STATE LABOR RELATIONS AGENCIES - JULY 11, 2014

THE AFFORDABLE CARE ACT – CURRENT AND FUTURE IMPACT ON PUBLIC SECTOR LABOR RELATIONS AND NEGOTIATIONS

Eric Cioppa, Superintendent, Maine Bureau of Insurance;

Donna DeSimone Buckley, Esq., Consultant, Massachusetts Teachers Association;

Joseph P. McConnell, Esq., Morgan Brown & Joy, Boston, Massachusetts.

Employer Shared Responsibility/Penalty

TO OFFER OR NOT TO OFFER – THAT IS THE QUESTION…

- Under ACA an employer does NOT have to offer insurance coverage. And failure to offer alone does not create a penalty.

- BUT for a Public Employer-under state law-probably, the answer is YES. Many states offer public sector employees better coverage options than the ACA.

Employer Shared Responsibility/Penalty

Under PPACA

- Offer coverage to full-time employees who work 30+ hours per week.
- Is not required to cover spouse as part of group coverage.
- Is required to cover only 95% of full-time employees and dependents

Example of State/Municipal Law M.G.L. Ch.32A and 32B

- Employee eligible for employer insurance at 20+ hours per week.
- “Spouse” included in definition of “Dependent” and is covered.
- All eligible employees and dependents must be offered coverage.

WHEN MIGHT THERE BE A PENALTY?

The ACA establishes *possible* penalties on employers, but multiple conditions must be met before penalties will actually be applied.

An employer could *potentially* face a penalty if it fails to offer affordable coverage with a certain minimum value to at least 95% of full-time employees and their dependents, defined as children up to age 26.

Possible Employer Penalties Under the Affordable Care Act in 2014

Not a Large Employer				
No penalty possible				

Possible Employer Penalties Under the Affordable Care Act in 2014

Not a Large Employer	Large Employer Does Not Offer Coverage to FT Employees and Their Dependents			
No penalty possible	No full-time employees receive federal financial support for exchange-based coverage			
	No penalty possible			

Possible Employer Penalties Under the Affordable Care Act in 2014

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The number of full-time employees (minus 30), multiplied by $2,000
The number of full-time employees who receive federal fin. support, multiplied by $3,000</td></tr>
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What's considered affordable?

How does an employer know whether the coverage it offers is affordable?

- If an employee's share of the premium for employer-provided coverage would cost the employee more than 9.5% of that employee's annual household income, the coverage is not considered affordable for that employee.

Annual Salary	**$20,000**	**$20,000**	**$20,000**	**$20,000**	**$20,000**
9.5% of Salary	**$1,900**	**$1,900**	**$1,900**	**$1,900**	**$1,900**
Individual Premium/Year	$9,000	$9,000	$9,000	$9,000	$9,000
Contribution Split	90/10	80/20	70/30	60/40	50/50
Employee Share of Premium	**$900**	**$1,800**	**$2,700**	**$3,600**	**$4,500**
Eligible to Apply for Insurance at Exchange	No	No	Yes	Yes	Yes

Safe Harbors

The three affordability safe harbors are:

- the Form W-2 wages safe harbor,
- the rate of pay safe harbor, and
- the federal poverty line safe harbor.

SAFE HARBORS

- These safe harbors are all optional.
- An employer may use one or more of the safe harbors only if the employer offers its full-time employees and their dependents the opportunity to enroll in minimum essential coverage under an eligible employer sponsored plan that provides minimum value for the self-only coverage offered to the employee.
- An employer may choose to use one or more of the safe harbors for all of its employees or for any reasonable category of employees, provided it does so on a uniform and consistent basis for all employees in a category.
- If an employer offers multiple healthcare coverage options, the affordability test applies to the lowest-cost self-only option available to the employee that also meets the minimum value requirement

Indexing of Affordability and Penalties

The final IRS regulations do not directly address the indexation of affordability and penalties.

Both the 9.5 percent affordability threshold and the $2,000 and $3,000 annualized penalty amounts should be indexed for 2015 and subsequent years, but the regulations didn't mention what the indexation percentages would be.

In a related document, the IRS did mention that the 2014 postponement of the penalty provisions to 2015 did not postpone the projected inflation adjustment of the employer penalty amounts.

BARGAINING ISSUES…

- Changes to premium splits?
- Attempts to reduce hours to avoid having to offer coverage?
- Is offering cheaper coverage – low cost plan – which usually means higher OOP costs –really a viable option for either the employer or the employee?
- Other thoughts?

INTENDED CONSEQUENCES?

With health care reform we get:

- Universal coverage
- Deemed “affordable” for an individual anyway
- Higher OOP costs intended to produce more aware and discerning health care consumers - as has been said “have some skin in the game.”

UNINTENDED CONSEQUENCES?

But we also get:

- “Your plan is governed by the ACA – not the Affordable Deduction Care Act.”
- Lower paid employees who are not eligible for Medicaid can “afford” coverage” but cannot afford to use it.
- Pressures on salary
- If unable to afford to use insurance - not necessarily a healthier workforce or population

Some Resources

Kaiser Family Foundation Website:

www.kff.org

The IRS Website:

On February 10, 2014, the Department of the Treasury and Internal Revenue Service released the final regulations related to the ACA's employer penalty provisions.

http://www.irs.gov/uac/Affordable-Care-Act-Tax-Provisions-Home

Interesting Article on Private Sector Trends

http://mobile.nytimes.com/2014/05/26/us/irs-bars-employers-from-dumping-workers-into-health-exchanges.html?_r=1&referrer=

CADILLAC TAX

Cadillac Tax – What is it?

A tax that penalizes companies offering high-end heath care plans to their employees.

- Beginning in 2018, a 40% nondeductible excise tax will be imposed on companies that provide high-cost health care coverage.
- The projected tax for the Maine State Employees Health Plan in 2018 is estimated at $20 million.

2018 Annual Value Limits

- Employee-only: **$10,200**
- Other than employee-only: **$27,500**

Includes:

- Employer and employee-paid premiums
- Employer contributions to Health Savings Accounts (HSAs) or Flexible Spending Accounts (FSAs)

Cadillac Tax – What is its Purpose? (cont.)

To slow cost growth

&

To help finance the Affordable Care Act (ACA)

REDUCE:

Employer incentive to overspend on health plans

and

Employee incentive to overuse services

"Rapidly exploding health costs are driven partly by overconsumption by Americans who have 'little skin in the game' thanks to low co-pays and deductibles." http://www.governing.com/blogs/fedwatch/gov-obamacare-cadillac-tax-choices.html

Employer Sponsored Insurance (ESI) tax subsidy **costs the government $250 billion annually.**

The Cadillac Tax

Will Change the Way Employers Offer Health Coverage

Based on plan size defined in the tax…

in 2018, about 16% of employer sponsored plans will be affected.

Because the threshold is linked to inflation, not health care costs (which historically increase at a much faster rate)…

more plans will be subject to the tax each year.

If healthcare spending continues to grow at approximately 6% per year (the historical average, though it has grown at a lower rate in recent years)…

the Cadillac tax will swallow 75% of employer sponsored plans by 2029.

The Cadillac Tax

Will Change the Way Employers Offer Health Coverage (cont.)

- Most obvious strategy for lowering employer contributions is to pass costs to employees:
  - higher employee premiums, higher deductible plans, removing employer contributions to HSAs and FSAs, increasing co-pays and coinsurance, or just decreasing covered services

- Some employers are responding with innovative cost-reduction strategies:
  - expanding their disease-management programs to effectively target and reduce employees' chronic conditions, using reference pricing and paying health-related travel costs to send employees to hospitals and other providers with better track records for quality care and health outcomes

Will Health Savings Accounts (HSAs) for Public Employees Catch On?

Health Savings Account (HSAs) are tax-free financial accounts that are designed to help individuals save for future health care expenses.

To be eligible for an HSA, Enrollee:

1. Must also be covered by a qualified "high-deductible" health insurance policy (HDHP)
    - 2014 participants in qualified HDHPs must pay the first $1,250 of their medical expenses ($2,500 for family coverage) before insurance benefits begin
2. Cannot be covered by any other health insurance plan
3. Cannot be enrolled in Medicare
4. Cannot be claimed as a dependent on someone else's tax return

Will Health Savings Accounts (HSAs) for Public Employees Catch On? (cont.)

2014 HSA financial amounts and limits:

$3,300 maximum annual contribution with self-only HDHP

$6,550 maximum annual contribution with family HDHP

2014 HDHP out-of-pocket expense limits:

$6,350 maximum for self-only

$12,700 maximum for family

- Annual contribution limit includes both employer and employee contributions
- Family HDHP limit is for both spouses' HSAs combined

Hoosiers Health Savings Account

In 2006 Indiana added a consumer-directed health option (HSA) to the conventional plans available to state employees.

- **In 2010, over 70% of state workers chose the HSA option**
- **The state deposits $2,750 per year**
  - into an account controlled by the employee
- **Unused funds in the accounts are the workers' permanent property**
  - as of March 2010 total unused funds = $30 million
- **The state shares further health care costs up to a maximum out of pocket cost of $8,000 for employees who use their entire account balance**
  - about 6% in 2009

Hoosiers Health Savings Account (cont.)

- **State employees enrolled in the consumer driven plan saved more than $8 million in 2010**
  - compared to workers enrolled in the PPO alternative
- **Only 3% of HSA customers have opted to switch back to the PPO**
- **Indiana saved $20 million because of the HSA option**
  - Mercer calculated the state's total costs are being reduced by 11% solely due to the HSA option
- **Significant changes in behavior have lowered cost. In 2009 state workers with the HSA visited emergency rooms and physicians 67% less frequently and were more likely to use generic drugs**
  - compared to co-workers with traditional PPO coverage
- **Overall, participants in the HSA ran up only $65 in cost for every $100 incurred by their associates under the PPO coverage**
  - Mercer found no evidence that HSA members are more likely to defer needed care

Employee Wellness Programs

Federal law generally prohibits health insurance plans from discriminating based on health factors. However, special rules exist to allow employers to make financial incentives part of their wellness programs – provided they follow certain guidelines.

In 2012

- 63% of all employers offered a wellness program
- 87% with more than 200 employees planned to add to or strengthen their incentive programs

There are two types of Wellness Incentive Programs that are allowed:

- Participatory Wellness Programs
- Health Contingent Wellness Programs

Participatory Wellness Programs

Participatory Wellness Programs either do not provide rewards of any kind, or do not require participants to satisfy any standard relating to a health factor. They must be made available to all similarly-situated individuals.

Examples

- Subsidized gym membership
- Reward for participating in a diagnostic screening
  - regardless of the result
- Subsidized smoking cessation program
  - regardless of whether the individual quits smoking
- Reward for attending an optional health education seminar

Health Contingent Wellness Programs

Health Contingent Wellness Programs provide a reward to an individual for completing a requirement related to a health factor.

Two types of Health Contingent Wellness Programs:

Activity only – Individuals simply need to participate, they don't need to achieve any particular outcome. Examples include walking or diet programs.

Outcome based – Individuals may be rewarded for their healthy status, or may receive a reward for satisfying a condition related to a health factor (targeting, for example smoking, healthy BMI, or healthy cholesterol, etc.).

Such programs do not violate federal discrimination rules if they meet all five of the following requirements:

Health Contingent Wellness Programs (cont.)

Required Factors of ACA Compliant Health Contingent Programs:

1. Opportunity to Qualify: Individuals must be given an opportunity to qualify for the program at least once per year.
2. Size of Reward: Total reward for all the plan's wellness programs must not exceed 30% of the cost of coverage (or up to 50% for tobacco cessation).
3. Reasonably Designed: Program must have a reasonable chance to promote health and prevent disease.
4. Reasonable Alternative: If an employee cannot meet a health standard because it is unreasonably difficult due to a medical condition, or is medically inadvisable, the employer must offer a reasonable alternative or waive the requirement for receiving the reward.
5. Disclosure of Alternative: Whenever the program benefits or terms are presented, the "Reasonable Alternative" must be included.

DETERMINING FULL-TIME STATUS UNDER THE ACA

WHO IS A FULL-TIME EMPLOYEE?

- Under the ACA, **a full-time employee is "an employee who is employed on average at least 30 hours of service per week."**
- An employer must be able to identify its full-time employees and ensure they are offered coverage that is affordable and of at least minimum value

How to determine 30 hours threshold?

- You can count by the hour
- Or use a day's worked equivalency – crediting the employee with 8 hours of service for each day of work, regardless of how much work is performed on that day
- ***But what about your part-time professional staff? When will they be considered full time***?

TIME PERIOD FOR DETERMINING FT STATUS LOOK BACK PERIOD

- IRS allows “look back” period
- Employers can determine each employee’s full-time status by **looking back** at a “standard measurement period” of **not less than three (3) and not more than twelve (12) consecutive months** to determine whether the employee averaged at least 30 hours of service per week.

STABILITY AND ADMINISTRATIVE PERIOD

- If the employee is determined to be full-time based on the standard measurement period, then the employee would be treated as full time during the subsequent "**stability period**" of at least six (6) consecutive months or whatever the length of the measurement period was

- And the employee will be treated as full time during this stability period REGARDLESS of how much he or she works during the stability period

- Employers may also use a "**90 day administrative period**" before starting the stability period

BREAK PERIODS

- An employer must determine the average hours of service per week for the employee during the measurement period **excluding** the break period and use that average as the average for the entire measurement period **OR**

An employer must treat employees as credited with hours of service for the employment break period at a rate equal to the average weekly rate at which the employee was credited with hours of service during the weeks in the measurement period that are NOT part of an employment break period.

Negotiations 101 Workshop

This panel of experienced labor negotiators will take you through the basic steps of the collective bargaining process from preparation for negotiations through mediation, when talks break down. For new and veteran negotiators alike, come and gain insights into the process and hear our panelists discuss some of the trending issues in bargaining right now.

I. Introduction and overview of the collective bargaining process
   i. Preparation
   ii. Stakeholders
   iii. Ground Rules
   iv. Drafting of Proposals
   v. Tentative Agreements
   vi. Putting the Package together

II. The Mediation Process when talks break down
   i. Role of the Mediator
   ii. Impasse

III. Trending Issues in Collective Bargaining
   i. The end of the "Grand Bargain"?
   ii. Health Insurance
   iii. Collaboration
   iv. Wages and other benefits

Negotiations 101: A Mediator's Perspective

By Helen M. Bowler
Massachusetts Department of Labor Relations

As a veteran negotiator and now mediator, I not only witness behaviors and tactics that get the parties into trouble but have been guilty of some of them myself! Here are some fundamental Do's and Don'ts of collective bargaining:

Know the Law, but Don't Flaunt the Law

It is incumbent upon a negotiator to understand the relevant statutes and collective bargaining law to represent his/her client; however, there is nothing more off putting that for an advocate to pontificate about the law to a group of lay bargaining unit members that have little interest or knowledge of the intricacies of legal theory. Save it for the hearing officer or judge!

Don't Save Every Issue for Successor Negotiations

Collective bargaining doesn't just take place every three years when the contract cycle is up. Your actions in dealing with problems and grievances on a daily basis set the tone for negotiations. Trust and confidence in the parties and the process are set well in advance of negotiations.

Prepare, Prepare, Prepare

There is nothing that can replace good, solid preparation before you get to the bargaining table. Know your issues inside and out. Better still, be fully informed and educated on the other party's issues, as well.

Don't Assume

Maintain flexibility at the bargaining table. Ask questions. Listen to the answers you get back. You may be closer to an agreement than you think!

Be Hard on the Issues and Soft on the People (Or It's all about the Relationships, Stupid!)

Separate out your feelings about the other side and focus on the issues. Nothing is ever gained by personally attacking the other party except a lot of hurt feelings that can stand in the way of an agreement.

Know when to Be Quiet and Listen

It's ok to listen. Negotiators spend too much time thinking of what to say next rather than listening to what the other party is communicating in language, both spoken and non-spoken.

Negotiations is not a Competitive Sport

The goal is a contract. Enough said.

Develop a Realistic Set of Aspirations and Expectations

Work with those you represent to be realistic in what they can achieve. It is much easier to do this from the outset that after the tenth bargaining session when you are not making any headway.

Don't Confuse Confidence with Arrogance

As a negotiator, you should project confidence, but remember there is a fine line between confidence and arrogance.

Know when to Hold, and when to Fold

As the song says, there are times when you can move negotiations forward by dropping an issue or modifying a position. Don't be afraid to make an occasional bold move.

Facing up to the Boss

As an advocate, there are times when most of your negotiations are with your own client. Remember, they are paying you to give them good advice and they will respect you for it in the long run.

Is it Really All about the Money?

Sometimes. But look for other low cost issues that can gain goodwill and help build an agreement.

R-E-S-P-E-C-T

Give it and you will receive it.

The Road to Negotiations
Potholes, Pitfalls and Bridge Building

By: Richard E. Molan, Esq.

As location, location, location is to real estate, preparation, preparation, preparation is to collective bargaining negotiations. There simply can be no substitute for preparing well to accomplish the ends of collective bargaining that are a beneficial collective bargaining agreement.

My years of experience of negotiating collective bargaining contracts, leads me to believe that there are three essential prongs of preparation that are required to be successful in reaching an agreement that is beneficial to both sides of any negotiations. Those prongs are establishing goals; statistical preparation; and probably most importantly, preparing your team for table negotiations.

While it would seem a basic premise that before entering negotiations you should establish goals that you desire to reach, it is often surprising that union members and management alike often approach negotiations without having established clear goals for what it is they want to accomplish in a new or successor contract. As often, parties have general goals in mind such as increase pay or benefits or reducing costs or resolving work place issues, but they fail to clearly identify what the desired end result will be. As a consequence, negotiations often take a more shotgun approach to negotiations rather than a laser point discussion of important issues. This only leads to frustration, which just as often results in questioning the other parties' motives and desire to reach agreement. The more precise the issues, with an idea as to how to resolve those issues, allow for early identification of issues and direct the negotiations towards resolving those issues.

Once each parties' goals have been identified, it makes it a lot easier to fulfill your own objectives and to try to accommodate the needs of the opposing party. Labor negotiations are not a zero sum game and parties have to be realistic as to how to try and meet legitimate goals set by their counterparts.

In developing goals, one has to apply tests of realism, such as the friends and family test. If your goals fly in the face of expectations of reasonable people, you can be sure that they are probably unreasonable. Developing a goals list is not developing a wish list, it is developing goals that are realistic and are attainable. Comparing your goals to those of other groups in your community or in your region are often useful. Trying to reach for the optimum, while it may be a pleasing notion to you and to those you represent, it only raises expectations which make reaching an agreement that much more difficult to accomplish.

The second prong relates to information gathering. Just simply making demands at the bargaining table without any statistical, economical, or financial backup is simply reminiscent of when your parent told you the reason they wanted you to do something is "because I said so". In any collective bargaining negotiations, there are a multitude of layers of information that are available and useful. Basic considerations ought to be unit statistics, namely the composition of the unit; dates of hire; where they fall on a pay scale; along with quantifying their years of experience; and classifications. This is all information that you should gather prior to negotiations. Additional information on leave balances; the statistical make up of the health insurance program (i.e. number of employees in the various plans); and any other information necessary to support specific contractual demands, such as uniforms and the like make for a more pervasive argument.

Because health insurance is such an important focal point of negotiations everywhere, knowing more information about the unit's health insurance plan is an absolute necessity. Negotiators need to know the current plan costs; the costs and benefit levels of other plans; and comparison with other comparable benefit plans; as well as a historical history of yearly increases. One of the most useful pieces of data that both parties often ignore are utilization studies that are made available by the health plan carrier. Unit costs are consistently anecdotally blamed on high emergency room use or various types of procedures. A utilization study will define the extent of use of procedures and providers. The use of this important date allows the parties to make rationale and informed decisions over the level of healthcare benefits rather than accepting anecdotal information that is most often totally inaccurate.

Statistical information also includes comparisons of wages and benefits with other similar departments and bargaining units, as well as other bargaining units in the municipality or state jurisdiction. It is useful, if possible by agreement, to establish a recognized labor market by which you can consistently compare wage and benefit data year-to-year. Most negotiators include the utilization of standardized data such as the Consumer Price Index and a community income statistics in their anaylsis.

Financial information about cities, towns and states are so readily available today that it is easy to accumulate information about the entities with which you are bargaining. Necessary tools and information are budgets, collection rate of taxes, revolving fund balances, property valuations, and building permits. Much of this information, both on an actual and historical basis is available in the consolidated accounting and financial statements issued by public entities at every level.

One of the most useful documents overlooked by union negotiators is review of a public entities' latest bond prospectus. Each bond prospectus provides both actual and historical information with respect to every economic indicator that is applicable to community and its financial and economic outlook.

Reviewing grievances, arbitrations and any other issues that have risen between the parties over the previous contract period, are quite useful in determining whether or not the contract language as it exists is clear and accomplishes what the parties believe their agreement to be.

Finally, team preparation may be the most important element of all. Gathering a group of team members without preparing them on a emotional and cultural level will only do a disservice both to them and to the process. By emotional preparedness, I mean making them aware of how the process works and what to expect during the course of negotiations and what to expect as to the outcome of negotiations. When individuals agree to participate in negotiations their knowledge of the process is usually limited and their perceptions, probably established more on the basis of how they believe these negotiations are supposed to operate from films and workplace stories rather than on reality. Most employee members have their own perceptions of management and management's goals, which have or have not a basis in reality and those perceptions have to be overcome in order to have productive negotiations. It is a responsible position to prepare them well for, what is often times, less than a dynamic process. Ensuring that the individuals who are to negotiate understand principles of negotiation, such as directness, honesty, and respect, will aid in negotiations rather than mindlessly entering into adversarial discussions that will only produce poor results.

By stressing the fact that collective bargaining negotiations are a business, not a personal, process will help individuals adjust to the idea that this is not an 'Us against them' process, but rather seek to make it a process by which both sides accomplish as many of their goals as possible to create a long lasting relationship.

It is equally important to stress that there are cultural perceptions and values that play a large role in negotiations. Identifying your perceptions and outlooks, be it economic or noneconomic and contrasting those with the other side is a useful process. Trying to identify the other side's goals and developing early responses will not only speed along negotiations, but help focus on the real issues that are to be determined at the table.

One has to recognize that the parties do not always have the same perspective in terms of a long-term and a short-term view and its effects. Employees tend to think longer term over a career versus elected managers who, understandably, think on an electoral cycle. Understanding that divide and accepting that you have to deal with those types of issues makes it a lot less frustrating if time is spent ahead of negotiations to take those factors into consideration.

Since we are talking about dealing with negotiations in the public sector, one cannot overlook the importance of the political factors involved. There are several elements that can clash when trying to formalize goals and reconciling your goals with your counterparts. The politics of the local union as well as community politics will play a large role in assessing what is obtainable and reasonable. Recognizing that elected officials operate on a political basis, you have to be prepared to try and meet as many as their needs as possible, while not sacrificing your own fundamental goals and values.

Negotiations do not function in a vacuum in the public sector and community outreach and relationships with the public are always of paramount importance. How you are viewed in the community may well establish what are obtainable goals for success at the bargaining table and should not be overlooked.

A properly prepared negotiations team will always produce superior results.

Union Organizing & Election Trends

In the New England States

Katherine Foley, Connecticut State Board of Labor Relations
Robyn Golden, Rhode Island State Labor Relations Board
Timothy Noonan, Vermont Labor Relations Board
Marjorie Wittner, Massachusetts Employment Relations Board

New England Consortium of State Labor Relations Agencies
14th Annual Summer Conference
July 11, 2014
Portsmouth Sheraton Harborside Hotel

Legislation Enacted in Vermont Extending Collective Bargaining Rights and Establishing Agency Fee Requirements

Timothy Noonan, Executive Director
Vermont Labor Relations Board
July 2014

The 2013 and 2014 legislative sessions in Vermont were unusually busy ones for labor relations legislation. Three significant bills supported by unions were enacted into law. The legislation extended collective bargaining rights to a large number of individuals and established agency fee requirements.

Agency Fee Requirement

One of the passed bills amended the then-existing five Vermont labor relations statutes – the State Employees Labor Relations Act, the Municipal Employee Relations Act, the Labor Relations for Teachers Act, the Judiciary Employees Labor Relations Act, and the private sector State Labor Relations Act – to provide that employees in a bargaining unit represented by an employee organization as exclusive bargaining representative are required to pay agency fees to the representative. The passed bill was signed by the Governor on May 20, 2013.

The agency fee may not exceed 85 percent of the amount of union dues. The fee is to be deducted in the same manner as dues are deducted from the wages of members of the employee organization, and "shall be used to defray the costs of chargeable activities."

The agency fee legislation further provides that the employee organization shall indemnify and hold the employer harmless from any and all claims stemming from the implementation or administration of the agency fee. The legislation amends four of the applicable statutes to provide that "nothing . . . shall require an employer to discharge an employee" who does not pay the fee, while under the remaining statute, the Municipal Act, an employer is not required to discharge an employee who does not pay the fee unless the employer and exclusive bargaining agent have agreed to require the fee to be paid as a condition of employment.

An employee organization may not charge the fee unless it provides nonmembers with: 1) an audited financial statement that identifies and divides expenses into chargeable and non-chargeable activities; 2) an opportunity to object to the amount of the fee, with any amount reasonably in dispute to be placed in escrow; and 3) prompt arbitration by the Vermont Labor Relations Board or arbitrator (depending on the statute) to resolve any objection over the amount of the fee.

One late addition to the agency fee bill addressed the contract ratification process. It provides that "employees of the bargaining unit shall meet and discuss whether employees who have chosen not to join the employee organization shall be allowed to vote on the ratification of any collective bargaining agreement . . . After discussion, employees that are members of the employee organization shall vote on whether to allow employees who have chosen not to join the employee organization to vote on the ratification of any collective bargaining agreement." Another late addition to the bill provides that an "employee organization shall use any increased revenue resulting from the implementation of this act solely for the purpose of moderating its existing membership dues."

The act relating to payment of agency fees took effect on June 30, 2013, and applies to employees on the date following the expiration date stated in the collective bargaining agreement in effect on June 30, 2013.

Prior to passage of this bill, the five Vermont labor relations statutes provided that agency fees constituted a mandatory subject of bargaining. Vermont joins a small number of states who require non-union members of represented bargaining units to pay an agency fee, rather than making agency fees a subject of bargaining.

Independent Direct Support Providers Labor Relations Act

The second bill enacted into law created Vermont's sixth collective bargaining statute, an act relating to independent direct support providers who provide home and community services to elderly and disabled persons. The bill was signed by the Governor on May 24, 2013. An independent direct support provider means: 1) any individual who provides home and community-based services to a service recipient who receives such services under the Choices for Care Medicaid waiver, the Attendant Services Program,

the Children's Personal Care Service Program, the Developmental Disabilities Services Program, or any successor program or similar program subsequently established; and 2) the individual is employed by the service recipient, shared living provider (provides support for one or two people who live in his or her home), or surrogate.

The act grants independent direct support providers the right to bargain collectively with the State of Vermont through their chosen representative, pursue grievances through their exclusive bargaining representative, and to refrain from such activities. Petitions are filed with the Vermont Labor Relations Board for election of a collective bargaining representative. The statute provides that there shall only be one statewide bargaining unit for independent direct support providers, and that a representation election conducted by the Board shall be by mail ballot.

Mandatory bargaining subjects are limited to: 1) compensation rates, 2) workforce benefits, 3) payment methods and procedures, 4) professional development and training, 5) collection and disbursement of dues and fees to the exclusive representative, 6) procedures for resolving grievances against the State, provided that the final step of any negotiated grievance procedure, if required, shall be determination by the Labor Relations Board, and 7) access to job referral opportunities within covered programs. The act states that "a collective bargaining agreement shall not infringe upon any rights of service recipients or their surrogates to hire, direct, supervise, or discontinue the employment of any particular independent direct support provider."

The act provides that independent direct support providers shall not be considered state employees for purposes other than collective bargaining. It further states they "shall not be eligible for participation in the State Employee Retirement System or health care plan solely by virtue of bargaining under this chapter."

If the parties reach an impasse in negotiations, the act provides successively if necessary for mediation, fact-finding, and selection by the Labor Relations Board between the parties' last best offers. The Board decision is subject to appropriations by the legislature. The act specifies unfair labor practices of labor organizations and the State of Vermont, and provides for the Labor Relations Board adjudicating charges alleging such practices.

Upon enactment of the law, AFSCME filed an election petition in May 2013 to represent the approximate 7,500 providers covered by the law. SEIU filed a petition a few weeks later to intervene in the election. After election details had been worked out among the two unions, the State of Vermont and the Labor Relations Board, SEIU withdrew its intervenor petition shortly before the Board issued a notice of election. The Board then issued a revised notice of election and conducted a mail ballot election for the providers to decide whether they wished to be represented for exclusive bargaining purposes by AFSCME.

The Board mailed ballots in September 2013 to 7,573 providers. This was by far the largest number of eligible voters in any election ever conducted by the Board. The ballots were returned over the following three weeks, and were counted by the Board in early October. AFSCME prevailed in the election by a vote of 1,412 – 566. The Board certified AFSCME as the exclusive bargaining representative of the providers on October 21, 2013.

AFSCME and the State began negotiations for a first collective bargaining agreement in December 2013. A two-year agreement was signed in May 2014, with an effective starting date of July 1, 2014. It provides for, among other things: 1) a wage increase in July 2014 of 2.5%, or to $10.80 per hour, whichever is higher; 2) a reopener for the second year of the agreement to negotiate certain issues, including compensation rates and financial workplace benefits; 3) a grievance procedure culminating in final determination by the Labor Relations Board; 4) establishment of a cooperation committee to deal with a number of issues, including professional development training and retirement concerns; and 5) deduction of a collective bargaining service fee from providers who are covered under the agreement and are not union members.

Early Care and Education Providers Labor Relations Act

The third bill was enacted into law this year and creates Vermont's seventh collective bargaining statute, an act relating to early care and education providers. The act grants collective bargaining rights to licensed home child care providers, registered home child care providers, and legally exempt child care providers who have an agreement with

the State Department for Children and Families to accept a subsidy payment from the State to assist families in paying for child care services.

The act grants the child care providers the right to bargain collectively with the State of Vermont through their chosen representative, pursue grievances through their exclusive bargaining representative, and to refrain from such activities. The act provides that the child care providers shall be considered state employees for the purpose of collective bargaining but not for any other reason. It further states they "shall not be eligible for participation in the State Employee Retirement System or the health insurance plans available to Executive Branch employees solely by virtue of bargaining under this chapter."

A child care provider or a labor organization may file a petition with the Vermont Labor Relations Board for election of a collective bargaining representative. Alternatively, the State may voluntarily recognize a labor organization as representative of the providers if the labor organization demonstrates majority support and no other employee organization seeks to represent the providers. The statute provides that there shall only be one bargaining unit for the child care providers covered by the act.

Mandatory bargaining subjects are limited to: 1) child care subsidy reimbursement rates and payment procedures, 2) professional development, 3) the collection of dues, 4) agency fees, and 5) procedures for resolving grievances. The act specifies that it does not alter or infringe upon the rights of: 1) a parent or legal guardian to select and discontinue child care services of any provider; 2) a provider to choose, direct and terminate the services of any employee that provides care in that home; or 3) the Judiciary or General Assembly to make modifications to the delivery of State services through child care subsidy programs.

If the parties reach an impasse in negotiations, the act provides successively if necessary for mediation, fact-finding, and selection by the Labor Relations Board between the parties' last best offers. The Board decision is subject to appropriations by the legislature. The act specifies unfair labor practices of the State of Vermont and the exclusive representative of child care providers, and provides for the Labor Relations Board adjudicating charges alleging such practices.

On June 16, subsequent to the act going into effect on June 5, the Labor Relations Board issued Rules of Practice applicable under the act. A labor organization has not filed a petition to represent the child care providers as of the date this paper was written in early July.

TITLE 40
Human Services

CHAPTER 40-6.6
Quality Family Child Care Act

§ 40-6.6-1 Short title. – This chapter shall be known and may be cited as the "Rhode Island Quality Family Child Care Act of 2013."
History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-2 Definitions. – As used in this chapter, the following terms shall have the meanings set forth herein, unless the context in which such terms are used clearly indicates to the contrary:

(1) "CCAP" means "Child Care Assistance Program" the program administered by the department of human services that provides financial assistance to families for child care.

(2) "CCAP family child care provider" means an individual who:

(i) Participates in CCAP as a department of human services CCAP approved provider; and

(ii) Is either licensed by the department of children, youth and families to provide child care services in the provider's own home, or license exempt but approved by the department of human services to participate in CCAP.

(3) "Provider organization" means an organization that includes CCAP family child care providers and has as one of its purposes the representation of CCAP family child care providers in their relations with the state.

(4) "Provider representative" or "representative" means a provider organization that is certified as the exclusive negotiating representative of CCAP family child care providers as provided in § 40-6.6-9.

(5) "Director" means the director of the department of administration.
History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-3 Child Care Assistance Program Parent Advisory Council. – (a) There is established a Child Care Assistance Program Parent Advisory Council. The council shall consist of seven (7) members, six (6) of whom shall be the parents or guardians of children who participate or have participated in CCAP within the two (2) years previous to being appointed to the advisory council. The director of the department of human services or his or her designee shall serve on the council and act as its chair. A majority of members of the council shall constitute a quorum for the transaction of any business.

(b) The council members shall be appointed for three (3) year terms. Two (2) shall be appointed by the governor, two (2) by the speaker of the house of representatives, and two (2) by the president of the senate.

(c) The council shall advise the governor and the director, or his or her designee, and any provider representative regarding issues relating to the quality, affordability, and accessibility of child care offered through CCAP. In particular, the council shall make recommendations regarding:

(1) Strategies for improving quality, affordability, and access to child care for CCAP families; and

(2) The structure of the CCAP program, including, but not limited to, the application and renewal process, eligibility rules and standards, and family co-payment levels.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-4 Right of CCAP family child care providers to choose provider representative; subjects of negotiation. – (a) CCAP family child care providers may, in accordance with the procedures set forth in § 40-6.6-9, choose a provider organization to be their provider representative and to negotiate with the director, or his or her designee, over the terms and conditions of CCAP family child care providers' participation in CCAP, including, but not limited to: (1) Expanding training and professional development opportunities; (2) Improving the recruitment and retention of qualified CCAP family child care providers; (3) Reimbursement rates and other economic matters; (4) Benefits; (5) Payment procedures; and (6) A grievance resolution process.

(b) Notwithstanding the above, all matters within the scope of the department of children, youth and families (DCYF) child care licensing regulations and the DCYF's regulatory authority over child care licensing shall be excluded from and not subject to negotiations and/or the collective bargaining process as recognized in this section. DCYF's authority to initiate licensing action pertaining to family child care providers shall be exclusively governed by provisions in § 42-72.1-6 and chapter 42-35.

(c) Notwithstanding the above, CCAP family child care providers must first be qualified as CCAP family child care providers by the department of human services and must operate in conformance with the relevant sections of 42-12 of the general laws and regulations promulgated by the department.

(d) The director shall work in consultation with the secretary of the executive office of health and human services as well as the director of the department of human services regarding the terms and conditions of CCAP family child care providers' participation in CCAP including, but not limited to, the terms and conditions in subsection (a) above.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-5 Good faith negotiations. – It shall be the obligation of the director, or his or her designee, to meet and confer in good faith with the provider representative within thirty (30) days after receipt of written notice from the provider representative of the request for a meeting for bargaining purposes. This obligation shall include the duty to cause any agreement resulting from the negotiations to be reduced to a written contract.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-6 Unresolved issues; impasse procedures. – In the event that the provider representative and the director, or his or her designee, are unable to reach an agreement on a contract, or reach an impasse in negotiations, the procedures of §§ 36-11-7.1 through 36-11-11 shall be followed.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-7 Economic aspects of contract subject to legislative appropriation. – Any aspects of a contract requiring appropriation by the federal government, the general assembly, or revisions to statutes and/or regulations shall be subject to passage of those state or federal appropriations or statutory and/or regulatory revisions.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-8 Duty to represent all CCAP family child care providers fairly; service charge and deductions. – (a) A provider organization certified as the provider representative shall represent all CCAP family child care providers in the state fairly and without discrimination, without regard to whether or not the CCAP family child care providers are members of the provider organization.

(b) Each CCAP family child care provider may choose whether to be a member of the provider organization; provided, however, that after a first contract is ratified, the provider representative shall be authorized to collect from non-member CCAP family child care providers a service charge as a contribution

toward the negotiation and administration of the written contract. The service charge shall not exceed the regular dues paid by CCAP family child care providers who are members of the provider representative. The state shall deduct the service charge, membership dues, and any voluntary deductions authorized by individual CCAP family child care providers, from the payments to CCAP family child care providers.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-9 Certification and decertification of provider organization. – (a) Petitions to certify a provider organization to serve as the provider representative of CCAP family child care providers, petitions to intervene in such an election, and any other petitions for investigation of controversies as to representation may be filed with and acted upon by the labor relations board in accordance with the provisions of Chapter 7 of Title 28 and the board's rules and regulations; provided that any valid petition as to whether CCAP family child care providers wish to certify or decertify a provider representative shall be resolved by a secret ballot election among CCAP family child care providers, for which the purpose the board may designate a neutral third party to conduct said secret ballot election.

(b) The only appropriate unit shall consist of all CCAP family child care providers in the state.

(c) The cost of any certification election held under this section will be split equally among all the provider organizations that appear on the ballot.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-10 Unfair practices. – It shall be unlawful for the state to do any of the acts made unlawful under § 28-7-13. It shall be unlawful for the provider representative to do any of the acts made unlawful under § 28-7-13.1. Any alleged violation of this provision may be filed with the labor relations board as an unfair labor practice and considered and ruled upon in accordance with chapter 7 of title 28 and the board's rules and regulations.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-11 CCAP family child care providers not state employees. – Nothing in this chapter shall be construed to make CCAP family child care providers employees of the state for any purpose, including for the purposes of eligibility for the state employee pension program or state employee health benefits.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-12 Right of families to select, direct, and terminate CCAP family child care providers. – Nothing in this chapter shall be construed to alter the rights of families to select, direct, and terminate the services of CCAP family child care providers.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-13 Strikes not authorized. – CCAP family child care providers shall not engage in any strike or other collective cessation of the delivery of child care services.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

§ 40-6.6-14 State action exemption. – The state action exemption to the application of state and federal antitrust laws is applicable to the activities of CCAP family child care providers and their provider representative authorized under this chapter.

History of Section.
(P.L. 2013, ch. 456, § 1; P.L. 2013, ch. 465, § 1.)

2013 -- S 0794 SUBSTITUTE A

LC01749/SUB A

STATE OF RHODE ISLAND

IN GENERAL ASSEMBLY

JANUARY SESSION, A.D. 2013

AN ACT

RELATING TO HUMAN SERVICES - QUALITY FAMILY CHILD CARE ACT

Introduced By: Senators Goodwin, Jabour, Pichardo, Crowley, and Ruggerio

Date Introduced: March 27, 2013

Referred To: Senate Labor

It is enacted by the General Assembly as follows:

SECTION 1. Title 40 of the General Laws entitled "HUMAN SERVICES" is hereby amended by adding thereto the following chapter:

CHAPTER 6.6

QUALITY FAMILY CHILD CARE ACT

40-6.6-1. Short title. – This chapter shall be known and may be cited as the "Rhode Island Quality Family Child Care Act of 2013."

40-6.6-2. Definitions. – As used in this chapter, the following terms shall have the meanings set forth herein, unless the context in which such terms are used clearly indicates to the contrary:

(1) "CCAP" means "Child Care Assistance Program" the program administered by the department of human services that provides financial assistance to families for child care.

(2) "CCAP family child care provider" means an individual who:

(i) Participates in CCAP as a department of human services CCAP approved provider; and

(ii) Is either licensed by the department of children, youth and families to provide child care services in the provider's own home, or license exempt but approved by the department of human services to participate in CCAP.

(3) "Provider organization" means an organization that includes CCAP family child care providers and has as one of its purposes the representation of CCAP family child care providers

in their relations with the state.

(4) "Provider representative" or "representative" means a provider organization that is certified as the exclusive negotiating representative of CCAP family child care providers as provided in section 40-6.6-9.

(5) "Director" means the director of the department of administration.

40-6.6-3. Child Care Assistance Program Parent Advisory Council. – (a) There is established a Child Care Assistance Program Parent Advisory Council. The council shall consist of seven (7) members, six (6) of whom shall be the parents or guardians of children who participate or have participated in CCAP within the two (2) years previous to being appointed to the advisory council. The director of the department of human services or his or her designee shall serve on the council and act as its chair. A majority of members of the council shall constitute a quorum for the transaction of any business.

(b) The council members shall be appointed for three (3) year terms. Two (2) shall be appointed by the governor, two (2) by the speaker of the house of representatives, and two (2) by the president of the senate.

(c) The council shall advise the governor and the director, or his or her designee, and any provider representative regarding issues relating to the quality, affordability, and accessibility of child care offered through CCAP. In particular, the council shall make recommendations regarding:

(1) Strategies for improving quality, affordability, and access to child care for CCAP families; and

(2) The structure of the CCAP program, including, but not limited to, the application and renewal process, eligibility rules and standards, and family co-payment levels.

40-6.6-4. Right of CCAP family child care providers to choose provider representative; subjects of negotiation. – (a) CCAP family child care providers may, in accordance with the procedures set forth in section 40-6.6-9, choose a provider organization to be their provider representative and to negotiate with the director, or his or her designee, over the terms and conditions of CCAP family child care providers' participation in CCAP, including, but not limited to: (1) Expanding training and professional development opportunities; (2) Improving the recruitment and retention of qualified CCAP family child care providers; (3) Reimbursement rates and other economic matters; (4) Benefits; (5) Payment procedures; and (6) A grievance resolution process.

(b) Notwithstanding the above, all matters within the scope of the department of children, youth and families (DCYF) child care licensing regulations and the DCYF's regulatory authority

over child care licensing shall be excluded from and not subject to negotiations and/or the collective bargaining process as recognized in this section. DCYF's authority to initiate licensing action pertaining to family child care providers shall be exclusively governed by provisions in section 42-72.1-6 and chapter 42-35.

(c) Notwithstanding the above, CCAP family child care providers must first be qualified as CCAP family child care providers by the department of human services and must operate in conformance with the relevant sections of 42-12 of the general laws and regulations promulgated by the department.

(d) The director shall work in consultation with the secretary of the executive office of health and human services as well as the director of the department of human services regarding the terms and conditions of CCAP family child care providers' participation in CCAP including, but not limited to, the terms and conditions in subsection (a) above.

40-6.6-5. Good faith negotiations. – It shall be the obligation of the director, or his or her designee, to meet and confer in good faith with the provider representative within thirty (30) days after receipt of written notice from the provider representative of the request for a meeting for bargaining purposes. This obligation shall include the duty to cause any agreement resulting from the negotiations to be reduced to a written contract.

40-6.6-6. Unresolved issues; impasse procedures. – In the event that the provider representative and the director, or his or her designee, are unable to reach an agreement on a contract, or reach an impasse in negotiations, the procedures of sections 36-11-7.1 through 36-11-11 shall be followed.

40-6.6-7. Economic aspects of contract subject to legislative appropriation. – Any aspects of a contract requiring appropriation by the federal government, the general assembly, or revisions to statutes and/or regulations shall be subject to passage of those state or federal appropriations or statutory and/or regulatory revisions.

40-6.6-8. Duty to represent all CCAP family child care providers fairly; service charge and deductions. – (a) A provider organization certified as the provider representative shall represent all CCAP family child care providers in the state fairly and without discrimination, without regard to whether or not the CCAP family child care providers are members of the provider organization.

(b) Each CCAP family child care provider may choose whether to be a member of the provider organization; provided, however, that after a first contract is ratified, the provider representative shall be authorized to collect from non-member CCAP family child care providers a service charge as a contribution toward the negotiation and administration of the written

contract. The service charge shall not exceed the regular dues paid by CCAP family child care providers who are members of the provider representative. The state shall deduct the service charge, membership dues, and any voluntary deductions authorized by individual CCAP family child care providers, from the payments to CCAP family child care providers.

40-6.6-9. Certification and decertification of provider organization. – (a) Petitions to certify a provider organization to serve as the provider representative of CCAP family child care providers, petitions to intervene in such an election, and any other petitions for investigation of controversies as to representation may be filed with and acted upon by the labor relations board in accordance with the provisions of Chapter 7 of Title 28 and the board's rules and regulations; provided that any valid petition as to whether CCAP family child care providers wish to certify or decertify a provider representative shall be resolved by a secret ballot election among CCAP family child care providers, for which the purpose the board may designate a neutral third party to conduct said secret ballot election.

(b) The only appropriate unit shall consist of all CCAP family child care providers in the state.

(c) The cost of any certification election held under this section will be split equally among all the provider organizations that appear on the ballot.

40-6.6-10. Unfair practices. – It shall be unlawful for the state to do any of the acts made unlawful under section 28-7-13. It shall be unlawful for the provider representative to do any of the acts made unlawful under section 28-7-13.1. Any alleged violation of this provision may be filed with the labor relations board as an unfair labor practice and considered and ruled upon in accordance with chapter 7 of title 28 and the board's rules and regulations.

40-6.6-11. CCAP family child care providers not state employees. – Nothing in this chapter shall be construed to make CCAP family child care providers employees of the state for any purpose, including for the purposes of eligibility for the state employee pension program or state employee health benefits.

40-6.6-12. Right of families to select, direct, and terminate CCAP family child care providers. – Nothing in this chapter shall be construed to alter the rights of families to select, direct, and terminate the services of CCAP family child care providers.

40-6.6-13. Strikes not authorized. – CCAP family child care providers shall not engage in any strike or other collective cessation of the delivery of child care services.

40-6.6-14. State action exemption. – The state action exemption to the application of state and federal antitrust laws is applicable to the activities of CCAP family child care providers and their provider representative authorized under this chapter.

SECTION 2. This act shall take effect upon passage.

LC01749/SUB A

EXPLANATION

BY THE LEGISLATIVE COUNCIL

OF

AN ACT

RELATING TO HUMAN SERVICES - QUALITY FAMILY CHILD CARE ACT

***

This act would establish the Quality Family Child Care Act with a parent advisory council and it would provide for the rights of Child Care Assistance Program providers, certification of provider organizations and conflict resolution with provider organizations.

This act would take effect upon passage.

LC01749/SUB A

Excerpts from Massachusetts General Laws and MA Department of Labor Relations' Regulations Pertaining to Written Majority Authorization.

M.G.L. c. 150E, §1, as amended by Chapter 120 of the Acts of 2007: "Written majority authorization", writings signed and dated by employees in the form of authorization cards, petitions, or such other written evidence that the commission finds suitable, in which a majority of employees in an appropriate bargaining unit designates an employee organization as its representative for the purpose of collective bargaining and certifies the designation to be its free act and deed and given without consideration. Employee signatures shall be dated within the 12 months preceding the date on which the writings are proffered to establish majority and exclusive representative status within the meaning of section 4.

M.G.L. c. 150E, §4, as amended by Chapter 120 of the Acts of 2007. Notwithstanding any other provision of this section, the commission shall certify and the public employer shall recognize as the exclusive representative for the purpose of collective bargaining of all the employees in the bargaining unit an employee organization which has received a written majority authorization, but this shall apply only when no other employee organization has been and currently is lawfully recognized as the exclusive representative of the employees in the appropriate bargaining unit. Whenever an employee organization proffers evidence that it has received a written majority authorization, the employee organization and the public employer shall agree upon a neutral to conduct a confidential inspection of the evidence of a written majority authorization. If within 10 days the employee organization and the public employer do not agree upon a neutral, the commission shall act as the neutral. The neutral shall verify the employee organization's majority support within the appropriate bargaining unit and report the results of its inspection in writing to the parties and, if the verification was conducted by an agreed neutral, to the commission, which shall in turn certify the results to the parties in writing. The commission shall establish rules and procedures for the prompt verification of evidence of a written majority authorization, which rules shall include safeguards to protect the privacy of individual employee choice, and which shall further provide that, absent exceptional cause, the verification procedure shall not last longer than 30 days after the appointment of the neutral or after the assumption by the commission of the duties of the neutral.

14.12: continued

(5) The record in any hearing conducted pursuant to 546 CMR 14.12 shall include the statement of objections or the statement concerning the eligibility of challenged voters, the responses thereto, and the tally of ballots, in addition to the applicable material specified in 456 CMR 14.09.

14.13: Runoff Elections

(1) The Commission may conduct a runoff election when a valid election results in no choice receiving a majority of the valid ballots cast. No runoff election shall be conducted while objections to the election are pending. If all eligible voters cast valid ballots in an election involving two or more labor organizations and 50% voted for one labor organization while 50% voted for another labor organization, the Commission will conduct a runoff election between the two labor organizations which each received 50% of the votes. If all eligible voters cast ballots in a runoff election involving two or more labor organizations, the Commission may decline to conduct a second runoff election absent evidence that a further runoff election would be likely to produce a different result than the prior election.

(2) Employees who were eligible to vote in the election shall be eligible to vote in a runoff election unless the Commission determines otherwise.

(3) The ballot in a runoff election shall provide for a selection between the choices receiving the largest and second largest number of votes in the prior valid election.

14.14: Re-run Elections

(1) The Commission may declare an election invalid and may order another election providing for a selection from the choices afforded in the previous ballot in the following situations:

(a) The ballot provided for a choice among two or more employee organizations and "neither" or "none" and the votes are equally divided among the several choices; or,

(b) The number of ballots cast for one choice in an election is equal to the number cast for another choice but less than the number cast for the third choice (which did not receive a majority of valid votes cast); or,

(c) A runoff ballot provided for a choice between two employee organizations and the votes are equally divided (*see* 456 CMR 14.13(1));

(d) The Commission concludes that the results of the prior election are invalid due to objectionable conduct of the election or objectionable conduct affecting the results of the election.

(2) Upon the conclusion of either a re-run or a runoff election, the provisions of 456 CMR 14.12 shall govern, insofar as applicable.

14.15: Reinvestigation of Certification

For good cause shown, the Commission may reinvestigate any matter concerning any certification issued by it and, after appropriate hearing, may amend, revise or revoke such certification.

14.16: Revocation of Certification

An employee organization currently certified to represent a bargaining unit may request the Commission to revoke its certification by filing a written request accompanied by a statement that the employee organization disclaims all interest in continued representation of the bargaining unit. A copy of the request shall be served simultaneously on the employer of the bargaining unit.

14.17: Deferral to AFL-CIO No Raiding Procedure

In any petition filed under 456 CMR 14.03 by an employee organization affiliated with the AFL-CIO seeking to represent a bargaining unit represented at the time of filing by another employee organization affiliated with the AFL-CIO, any party may request the Commission to defer processing the case for 30 days to permit the employee organizations to use the settlement provisions of the AFL-CIO no-raiding procedure. Such a request must be filed with the Commission within ten days following receipt of notice that the petition has been filed, or at least three days prior to the date of the scheduled hearing on the petition, whichever is earlier. Upon written request by any party the Commission may extend the 30-day deferral period. Copies of any request must be served upon all parties to the case.

14.18: Intervention

(1) Any employee organization, including the incumbent exclusive representative, if any, wishing to appear on any ballot or be deemed a necessary party to any agreement for consent election shall file a motion to intervene setting out the same information as required in a petition filed pursuant to 456 CMR 14.03. Except for good cause shown, all motions to intervene filed under 456 CMR 14.18 must be filed within 30 days of the date of the Commission's Notice of Hearing. Any incumbent exclusive representative who does not file a motion to intervene in accordance with 456 CMR 14.18 shall be deemed to have disclaimed interest in representing the employees in the petitioned-for bargaining unit and shall not appear on any ballot or be deemed a necessary party to any agreement for consent election.

(2) Any motion filed under 456 CMR 14.18 must be accompanied by the showing of interest required in 456 CMR 14.05.

(3) Pursuant to 456 CMR 12.02: *Service: When Required*, any party filing a motion to intervene under 456 CMR 14.18 shall serve a copy of its motion on each of the parties named in the original petition and any other intervenors.

14.19: Certification by Written Majority Authorization

(1) In initiating a petition for certification by written majority authorization, the employee organization shall file with the Division a petition, on a form approved by the Division, containing the following information:

(a) The correct name, address, and affiliation of the employee organization and the name and address of its representative designated for the purpose of collective bargaining;

(b) The correct name and address of the employer and, where known, the name and address of its representative designated for the purpose of collective bargaining;

(c) A full description of the bargaining unit claimed to be appropriate, including job titles and the approximate number of employees;

(d) A statement that the bargaining unit claimed to be appropriate complies with all the provisions of M.G.L. 150E, § 3 and 456 CMR 14.07;

(e) A statement that the employee organization has received a written majority authorization, as described in 456 CMR 11.09: *Written Majority Authorization*, from a majority of the employees in the proposed appropriate bargaining unit;

(f) A statement that no other employee organization has been and currently is lawfully recognized as the exclusive representative of the employees in the appropriate bargaining unit;

(g) A statement that the employee organization is in compliance with M.G.L. c. 150E, §§ 13 and 14; and

(h) Any other relevant facts that may be required by the Division.

(2) The Petition for Certification by written Majority Authorization must be served on the Employer in accordance with 456 CMR 12.02: *Service: When Required*; in addition, the Division shall make the Employer aware of such Petition when the Division requests the names and addresses of the members of the proposed bargaining unit for purposes of verification.

14.19: continued

(3) Upon filing and docketing of a petition for certification by written majority authorization, the Division shall prepare and serve a notice upon the parties that shall include information about the Petitioner and the proposed petitioned-for bargaining unit and advise the parties that they may agree upon a neutral to determine the validity of the written majority authorization.

(4) Within ten days from the date with the Division, the employee organization shall notify the Division whether the employee organization and the employer have agreed upon a neutral other than the Division (outside neutral) or whether the Division shall act as the neutral. If the employee organization fails to provide this notice to the Division, the Division shall act as the neutral. If the parties agree upon an outside neutral, the employee organization shall notify the Division of the outside neutral's name, address, phone and fax numbers, and e-mail address.

(5) Immediately upon selection of an outside neutral or designation of the Division as the neutral and in no event later than three days from selection or designation, the employer shall provide the neutral with a list containing the full names and titles of the employees in the proposed bargaining unit. If the employer does not supply this information to the neutral within the specified timeframe, the neutral shall determine the sufficiency of the written majority authorization based upon information provided by the employee organization. The employee organization shall provide this information to the neutral within two days from the date that the employer's information was due.

(6) Employees eligible for inclusion on the list referred to in 456 CMR 14.19(5), shall be employees who were employed on the filing date of the petition for written majority authorization. Any challenges to the inclusion or exclusion of a name on the list shall be filed by the employee organization or the employer with the neutral within three days of the presentation of the list to the neutral.

(7) Any challenges to the validity of the written majority authorization shall be filed with the neutral immediately upon his/hers/its selection or designation and in no event later than three days from the selection or designation.

(8) As part of the verification process detailed in 456 CMR 14.19(9) and (10), the neutral shall determine whether a majority of employees on the list referred to in 456 CMR 14.19(5), have signed valid written majority authorizations and whether there are a sufficient number of challenges referred to in 456 CMR 14.19(6) and (7), to affect the result of the written majority authorization process. If the number of challenges referred to in 456 CMR.14.19(6) and (7), is insufficient to potentially affect the result, then the neutral shall dismiss the challenges. If the number of challenges referred to in 456 CMR 14.19(6) and (7), is sufficient to potentially affect the result, the neutral shall investigate and resolve the challenges. The challenging party shall bear the burden of proving the validity of a challenge.

(9) If an outside neutral conducts the verification of written majority authorization, the outside neutral shall report in writing, on a form proscribed by the Division, the results of the confidential inspection, which shall comply with the Division's procedures, to the parties within 20 days, or less, of his/her/its selection as a neutral and shall also report the result in writing to the Division within that same time period. Along with the report of the inspection, the outside neutral shall provide to the Division all documentation that the outside neutral relied upon in conducting his/her/its confidential inspection, including, but not limited to, evidence of written majority authorization and resolution of challenges. Upon receipt of the outside neutral's written report and valid documentation of written majority authorization demonstrating that the petitioning employee organization has majority support in an appropriate, currently unrepresented bargaining unit, the Division shall certify the results to the parties in writing.

14.19: continued

(10) If the Division acts as the neutral and conducts the verification of written majority authorization, the Division shall report the results of the confidential inspection to the parties in writing within 30 days from the date of its selection or designation as the neutral. Within this same timeframe, the Division shall certify the results of its confidential inspection to the parties in writing provided that the valid documentation of written majority authorization demonstrates that the petitioning employee organization has majority support in an appropriate, currently unrepresented bargaining unit.

(11) In no event shall the Division issue a certification as described in 456 CMR 14.19(9) and (10), until the employee organization is in compliance with M.G.L. c. 150E, §§ 13 and 14.

(12) In no event shall the verification process detailed in 456 CMR 14.19(9) and (10), last longer than 30 days after the selection or designation of the neutral absent exceptional cause. Exceptional cause may include, but is not limited to:

(a) resolving challenges to the employee eligibility list and to the validity of written majority authorizations; and

(b) allowing the petitioning employee organization a reasonable period of time, not to exceed seven days, to become in compliance with M.G.L. c. 150E, §§ 13 and 14.

14.20: Bars to Petitions for Certification by Written Majority Authorization

(1) Withdrawal Bar. Except for good cause shown, no written majority authorization petition shall be entertained in a same or similar bargaining unit within which, after the selection or designation of a neutral, but before the verification process, the petitioner withdrew from a prior written majority authorization petition within the preceding six months, or withdrew a petition filed under the provisions of M.G.L. c. 150E, § 4.

(2) Verification/Election Year Bar. Except for good cause shown, no written majority authorization petition shall be entertained in a same or similar bargaining unit within which a neutral has conducted a written majority authorization verification process in the preceding 12 months, or within which a valid election has been held in the preceding 12 months.

(3) Certification Year Bar. Except for good cause shown, no written majority authorization petition shall be entertained in a same or similar bargaining unit represented by a bargaining representative certified through the written majority authorization process or a valid election process in which the Division has issued a certification within the preceding 12 months.

14.21: Intervention in Written Majority Authorization Cases

Intervention shall not be permitted in written majority authorization cases. Before the Division issues a certification, written majority authorization petitions shall be dismissed and the Division will investigate questions of representation pursuant to M.G.L. c. 150E, § 4 under the following circumstances:

(a) If an employee organization files a representation petition for the same or a similar bargaining unit to the one described in a pending written majority authorization petition;

(b) If an employee organization files a written majority authorization petition for the same or a similar bargaining unit to the one described in a pending representation petition; or

(c) If an employee organization files a written majority authorization petition for the same or a similar bargaining unit to the one described in a pending written majority authorization petition

REGULATORY AUTHORITY

456 CMR 14.00: M.G.L. c. 23, § 9R and c. 150E, § 3.

FY 2008 and FY 2009
WRITTEN MAJORITY AUTHORIZATION CERTIFICATIONS*

Size of Unit	Municipal		State		Private		Total	
	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS
Under 10	5	23	0	0	1	9	6	32
10-24	11	160	0	0	0	0	11	160
25-49	3	159	0	0	0	0	3	159
50-74	2	126	0	0	0	0	2	126
75-99	0	0	0	0	0	0	0	0
100-149	2	243	0	0	0	0	0	243
150-199	0	0	0	0	0	0	0	0
200-499	0	0	0	0	0	0	0	0
Total	**23**	**711**	**0**	**0**	**1**	**9**	**24**	**720**

* Note: The number of certifications represents the number of petitions filed that resulted in the Division issuance of a certification. Over FY 2008 and FY2009, overall, parties filed a total of 35 written majority authorization petitions. The DLR did not issue a certification in 11 cases either because the DLR dismissed the petition or the petitioner withdrew the petition.

FY 2010
WRITTEN MAJORITY AUTHORIZATION CERTIFICATIONS*

Size of Unit	Municipal		State		Private		Total	
	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS
Under 10	5	40	2	13	0	0	7	53
10-24	5	76	0	0	0	0	5	76
25-49	5	161	0	0	0	0	5	161
50-74	3	199	0	0	0	0	3	199
75-99	0	0	0	0	0	0	0	0
100-149	0	0	0	0	0	0	0	0
150-199	0	0	0	0	0	0	1	155
200-499	0	0	0	0	0	0	0	0
Total	**18**	**476**	**0**	**0**	**0**	**0**	**21**	**644**

* Note: The number of certifications represents the number of petitions filed that resulted in the Division issuance of a certification. Over FY 2008 and FY2009, overall, parties filed a total of 35 written majority authorization petitions. The DLR did not issue a certification in 11 cases either because the DLR dismissed the petition or the petitioner withdrew the petition.

FY 2011
WRITTEN MAJORITY AUTHORIZATION CERTIFICATIONS*

Size of Unit	Municipal		State		Private		Total	
	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS
Under 10	5	40	2	13	0	0	7	53
10-24	5	76	0	0	0	0	5	76
25-49	5	161	0	0	0	0	5	161
50-74	3	199	0	0	0	0	3	199
75-99	0	0	0	0	0	0	0	0
100-149	0	0	0	0	0	0	0	0
150-199	0	0	0	0	0	0	1	155
200-499	0	0	0	0	0	0	0	0
Total	**18**	**476**	**0**	**0**	**0**	**0**	**21**	**644**

* Note: The number of certifications represents the number of petitions filed that resulted in the Division issuance of a certification. Over FY 2008 and FY2009, overall, parties filed a total of 35 written majority authorization petitions. The DLR did not issue a certification in 11 cases either because the DLR dismissed the petition or the petitioner withdrew the petition.

FY 2012
WRITTEN MAJORITY AUTHORIZATION CERTIFICATIONS*

Size of Unit	Municipal		State		Private		Total	
	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS
Under 10	6	34					6	34
10-24	5	86					5	86
25-49								
50-74								
75-99	2	157					2	157
100-149								
150-199								
200-499								
Total	**13**	**277**					**13**	**277**

* Note: The number of certifications represents the number of petitions filed that resulted in the Department issuance of a certification. In FY 2012 a total of 19 written majority authorization petitions were filed. The DLR did not issue a certification in 6 cases either because the DLR dismissed the petition or the petitioner withdrew the petition.

FY 2013
WRITTEN MAJORITY AUTHORIZATION CERTIFICATIONS*

Size of Unit	Municipal		State		Private		Total	
	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS	CERTS	CARDS
Under 10	7	41					7	41
10-24	2	32					2	32
25-49								
50-74								
75-99								
100-149	1	115					1	115
150-199								
200-499								
Above 500	1	1943					1	1943
Total	**12**	**2164**					**12**	**2164**

* Note: The number of certifications represents the number of petitions filed that resulted in the Department issuance of a certification. In FY 2013 a total of 22 written majority authorization petitions were filed. The DLR did not issue a certification in 10 cases either because the DLR dismissed the petition or the petitioner withdrew the petition.

Department of Labor Relations (formerly LRC)

LABOR RELATIONS COMMISSION
In the Matter of TOWN OF WAREHAM and UNITED STEELWORKERS OF AMERICA

Case No.: **WMAM-08-1016**
Parties: **In the Matter of TOWN OF WAREHAM and UNITED STEELWORKERS OF AMERICA**

Board Members Participating:
Marjorie F. Wittner, Chair

Elizabeth Neumeier, Board Member
Harris Freeman, Board Member

Appearing:
Michelle E. Randazzo, Esq.- Representing the Town of Wareham
Laurie R. Houle, Esq. - Representing the United Steelworkers of America
Decision Date: **January 21, 2010**

DECISION UPON REINVESTIGATION OF CERTIFICATION

Statement of the Case

On September 9, 2008, the United Steelworkers (Union) filed a written majority authorization petition with the Division of Labor Relations (Division) seeking to represent a bargaining unit of employees employed by the Town of Wareham (Town). The petition covered twenty-two administrative and technical employees in personnel grades 1-7, including four employees holding the title of "Administrative Assistant."

On November 6, 2008, the Division notified the parties that it had been designated as the neutral by default pursuant to M.G.L. c. 150E, s. 4 (the Law) and Division Rule 14.19(4), 456 CMR 14.19(4). On November 10, 2008, the Town provided the Division with a list of names of the incumbents in the positions sought to be included in the bargaining unit. In the same letter, the Town informed the Division that it believed that the following four Administrative Assistant titles were confidential employees within the meaning of Section 1 of M.G.L. c. 150E and therefore should be excluded from the bargaining unit: Administrative Assistant (Selectmen); Administrative Assistant (CEDA); Administrative Assistant (Personnel); and Administrative Assistant (Police).[1] The Town further noted that two of the Administrative Assistant positions, CEDA and Personnel, were vacant. The number of contested titles was insufficient to affect the results of the written majority petition.

Accordingly, on April 13 2009, pursuant Section 4 of M.G.L. c. 150E, as amended by Chapter 120 of the Acts of 2007, and 456 CMR 14.19 (8), the Division issued a Certification of Written Majority Authorization certifying the Union as the exclusive representative of the following bargaining unit of employees:

> All full-time and regular part-time salaried administrative, technical employees 1-7. (see attached list.) EXCLUDED: Positions of persons: 1) under the direction and control of the School Committee, 2) elected officials; 3) employees within the jurisdiction of a collective bargaining unit duly recognized by the employer, 4) seasonal or temporary employees.

Appendix I to this decision contains a full list of all the titles in the unit, including the title of Administrative Assistant.

On October 28, 2009, the Town filed a Motion for Reconsideration and Reinvestigation of the Certification seeking to exclude the Administrative Assistant (Police) and Administrative Assistant (Selectmen) positions because they are confidential employees within the meaning of Section 1 of the Law. The Union filed its opposition to the motion on November 24, 2009.

Pursuant to Division Rule 14.15, 456 CMR 14.15, for good cause shown, the Board "may reinvestigate any matter concerning any certification issued by it and, after appropriate hearing, may amend, revise or revoke such certification." The Board has granted motions to reinvestigate certifications issued pursuant to the written majority process, in circumstances where, as here, challenges presented by a party during the written majority authorization investigation are insufficient to affect the outcome of the process. Town of Harwich, 35 MLC 188 (2009). The possible inclusion of confidential employees who may be found to be managerial or confidential employees constitutes good cause to reinvestigate the certification issued on April 13, 2009. Id.

Based on the facts provided by the parties, which were not in material dispute, the Board determines that, generally, the title "Administrative Assistant" is appropriately included as part of this administrative/technical

unit. The Board also concludes that, based on the information provided by the parties, the incumbents in those positions are not confidential employees within the meaning of Section 1 of the Law. The Town's request to exclude these titles is therefore denied.

Statement of Facts[2]

Administrative Assistant to the Town Administrator

Interim Town Administrator John Sanguinet (Mr. Sanguinet) first began working for the Town in January 2008 as the Administrative Assistant to the Board of Selectmen/Town Administrator. In June 2008, the Board of Selectmen appointed him to serve as the Interim Town Administrator. Under the Town charter, the Town Administrator is the chief administrative officer of the Town, responsible for the day-to-day operations of the Town. In that capacity, he engages in collective bargaining on behalf of the Town and prepares responses to Step 2 grievances.

Ms. Green is the only administrative staff person who provides support to Mr. Sanguinet. Although there is a dispute over Ms. Green's exact title,[3] Ms. Green contends and the Town does not dispute that, Ms. Green provides little or no support to the Board of Selectmen. She does not attend Board of Selectmen meeting or executive sessions nor does she have access to minutes from the Board's executive sessions. Rather, Ms. Green serves mainly as Mr. Sanguinet's administrative assistant. In that capacity, her duties include answering his phones, documenting residents' complaints and processing payments for tickets and health insurance. She also maintains personnel files.

With respect to labor relations matters, Ms. Green does not attend negotiating sessions, attend grievance meetings, or type or see any bargaining proposals. Mr. Sanguinet types his own grievance responses, occasionally giving them to Ms. Green to edit for grammar only. He does not do this on every occasion, but when he does, Ms. Green formats the response on Town letterhead and sends it to the recipients.

Mr. Sanguinet claims that he has "on occasion, engaged in informal strategy sessions regarding collective bargaining scenarios" with Ms. Green, but provides no further details about these sessions. Ms. Green admits that, on occasion, she has asked Mr. Sanguinet how bargaining is going, but denies any further discussions regarding collective bargaining matters.

Administrative Assistant to the Chief of Police

Thomas Joyce (Chief Joyce) served as the Department's full-time Chief of Police until August 1, 2008, when Richard Stanley was appointed as the part-time Interim Chief of Police.

Cassandra Cassidy (Ms. Cassidy) has been the Administrative Assistant in the Police Department (Department) for about six years. She shares her office with a lieutenant who serves as the Department's Chief Executive Officer. Their office, which has its own door, is adjacent to the Chief's office. They can hear the Chief of Police's conversations if both office doors are open, but not if one or both doors are closed.

Ms. Cassidy's duties include maintaining Department personnel files for the police department; answering phones; responding to record requests and typing correspondence for the Chief, including disciplinary letters. Ms. Cassidy has a key to a locked filing cabinet in the Chief of Police's office that contains sensitive information such as internal affairs investigations, staff meeting notes, and promotion notices. On occasion, the Chief has asked her to copy something from these files while he is out of the office. Ms. Cassidy has access to the Chief of Police's correspondence. She also had access to Chief Joyce's email password, but Interim Chief Stanley has not given her his password or asked her to review his email.

Collective bargaining with the police unions is conducted by the Town Administrator with the Chief of Police in attendance. Ms. Cassidy does not attend collective bargaining sessions or type bargaining proposals. From time to time, Chief Joyce asked Ms. Cassidy for her opinion on ways to improve the Department, but she does not know what, if anything, became of the suggestions she made. Chief Joyce also asked Ms. Cassidy to cost out bargaining proposals, such as how much money a layoff would save. Ms. Cassidy does not know whether or how Chief Joyce used this information, nor did she recommend bargaining proposals.

The Chief of Police is responsible for rendering police union grievance decisions at Step One. Ms. Cassidy does not attend grievance meetings, but she typed and sent Chief Joyce's Step One grievance responses. She has not dealt with any grievances since Chief Stanley assumed the interim post.

Decision

Section 1 of M.G.L. c. 150E defines a confidential employee as one who directly assists and acts in a confidential capacity to a person or persons otherwise excluded from coverage under this chapter. The Board has construed

this statutory language to cover those individuals who have a direct and substantial relationship with an excluded employee that creates a legitimate expectation of confidentiality in their routine and recurrent dealings. Town of Medway, 22 MLC 1261, 1269 (1995). Only employees who have significant access or exposure to confidential information concerning labor relations matters, management's position on personnel matters or advance knowledge of the employer' collective bargaining proposal are excluded as confidential. Fall River School Committee, 27 MLC 37, 39 (2000). The Board has construed this exception narrowly, to preclude as few employees as possible from collective bargaining rights, while not unduly hampering the employer's ability to manage its operations. Silver Lake School Committee, 1 MLC 1240, 1243 (1975).

As a preliminary matter, we note that because the positions of Administrative Assistant (CEDA) and Administrative Assistant (Personnel) are vacant, we do not consider the unit placement of those employees. The only issue before us is whether the Town Administrator's Administrative Assistant and the Administrative Assistant to the Chief of Police are confidential employees within the meaning of the Law, warranting their exclusion from the bargaining unit recently certified by the Division.

The Town Administrator's Administrative Assistant

The parties' submissions reflect that Ms. Green reports directly to and receives all assignments from, the Interim Town Administrator, and not the Board of Selectmen. There is therefore no basis to conclude that Ms. Green has a direct and substantial relationship with the Board of Selectmen and we find none. Thus, we confine our analysis to whether Ms. Green acts in a confidential capacity to the Town Administrator.

For purposes of this analysis, we shall assume, and neither party contests, that the Interim Town Administrator is a managerial employee who is otherwise excluded from collective bargaining under Section 1 of the Law. Therefore, the issue to be decided is whether the incumbent in this position has a continuing and substantial relationship with the Interim Town Administrator such that there is a legitimate expectation of confidentiality in their routine and recurring duties.

The record reflects that Ms. Green's exposure to confidential labor relations materials is limited to when she occasionally edits Mr. Sanguinet's draft grievance responses for grammatical errors before they are sent to the parties. She does not type these responses or perform this duty on a regular basis. Ms. Green has also engaged in informal discussions with Mr. Sanguinet regarding on-going negotiations. Even assuming that Mr. Sanguinet revealed confidential information during such discussions, this is not the sort of routine and recurrent exposure to confidential labor relations information that the Board requires in order to exclude an employee from collective bargaining rights. For example, in Fall River School Committee, 27 MLC 37 (2000), the Board determined that secretaries to the Assistant Superintendent and Superintendent of Schools were confidential employees based on their significant and advance knowledge of collective bargaining information. In that case, the secretaries' regular duties included typing bargaining proposals, attending bargaining strategy sessions and attending school committee executive meetings. Id. at 38-39. See also Town of Provincetown, 31 MLC 55 (2004) (secretary to police chief who typed bargaining proposals excluded as confidential employee). In contrast, in City of Everett, 27 MLC 147 (2001), the former Commission determined that the personnel and benefits technician who typed correspondence and maintained grievance and personnel files was not a confidential employee because she did not have significant access or exposure to confidential information. More recently, the Board determined that certain computer IT technicians were not confidential employees because their access to confidential labor relations information was only potential or occasional and not routine. Springfield Housing Authority, 36 MLC 61 (2009).

Based on the informal and sporadic nature of Ms. Green's exposure to labor relations materials, the same result that we reached in Springfield Housing Authority should obtain here. The fact that the Interim Town Administrator has transmitted his own grievance responses without use of the Administrative Assistant indicates that this position's inclusion in the unit would not hamstring the employer's operations. See Town of Milton, 8 MLC 1234, 1236 (1981). Moreover, although Ms. Green has access to employee personnel files, it is well-established that access to sensitive materials like financial data, personnel records or medical records and audits, without more, does not necessarily make an employee confidential. Id. Accordingly, we conclude that the Town Administrator's Administrative Assistant is not a confidential employee within the meaning of Section 1 of the Law and this position will remain in the

unit that the Division of Labor Relations certified on April 13, 2009.

Administrative Assistant to the Chief of Police

Ms. Cassidy's relationship with Interim Chief Stanley entails a greater degree of exposure to confidential labor relations materials than Ms. Green has.[4] Specifically, Interim Chief Stanley states and the Union does not refute that, the Chief depends on his administrative assistant to assist him in "developing bargaining proposals, including costing out various scenarios in advance of bargaining strategy decisions." The Union disputes that this is a confidential function. Citing Millis School Committee, 22 MLC 1081, 1085-1086 (1995), it argues that the costing out duties that Ms. Green performs are more mechanical in nature than strategic and, therefore, insufficient to render this title confidential.

In Millis, the former Commission stated that costing out collective bargaining proposals does not ordinarily require the employee's exclusion from collective bargaining if there is no evidence that the employee's duties would give him or her advance notice of the employer's position at the bargaining table. Id. Under the analysis set forth in Millis, an employee is confidential only if his or her access to the financial information makes it obvious what the employer would offer during negotiations with the union. Id.

Here, as Interim Chief Stanley's affidavit reflects, Ms. Cassidy costs out bargaining proposals "in advance of bargaining strategy decisions." The proposals she works on are therefore not the Town's final bargaining proposals, but potential proposals that will require more discussion before being finalized. Ms. Cassidy is not involved in preparing these proposals, does not know how the information she provides is going to be used and does not recommend a bargaining position after performing the calculations. Under these circumstances, we do not find that Ms. Cassidy's costing out duties are confidential functions. Id. at 1086 (citing Nauset Regional School District, 5 MLC 1684, 1688 (H.O. 1979), aff'd 6 MLC 1293, 1294 (1979) (principals' secretaries not confidential employees even though they typed the proposed budgets and bargaining proposals the principals submitted to the Superintendent of Schools, because the budgets were then revised by the Superintendent or School Committee, and the collective bargaining proposals were not necessarily incorporated into the School Committee's final proposals)).

The Town further argues that Ms. Cassidy's access to Interim Chief Stanley's mail correspondence, and office conversations, which contains confidential personnel and labor relations information, makes her a confidential employee. However, Ms. Cassidy's affidavit reflects that she does not have access to Chief Stanley's email password and does not see or type bargaining proposals or other correspondence relating to bargaining. Although she typed Step One grievance responses for Chief Joyce, as of November 2009, she had not encountered a grievance since August 2008, when Interim Chief Stanley took office. In addition, the Chief can prevent his assistant from overhearing his conversations by shutting his office door. Therefore, without further information from the Town on the type of confidential labor relations information that Ms. Cassidy encounters on a routine basis, we are unable to conclude that she is a confidential employee within the meaning of Section 1 of the Law.[5]

Conclusion

For the foregoing reasons, we find that the Administrative Assistant to the Town Administrator and the Administrative Assistant to the Police Chief are not confidential employees within the meaning of the Law. Consequently, they shall remain in the unit that the Board certified on April 13, 2009.

SO ORDERED.

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD
/s/MARJORIE F. WITTNER, CHAIR
/s/ELIZABETH NEUMEIER, BOARD MEMBER
/s/HARRIS FREEMAN, BOARD MEMBER

APPENDIX 1
LIST OF TITLES INCLUDED IN BARGAINING UNIT CERTIFIED BY WRITTEN MAJORITY AUTHORIZATION

Administrative Support/Technical Grades 1 through 7

- Animal Control
- Librarian
- Library Assistant
- Van Driver-Council on Aging
- Outreach Cobra-Council on Aging

Economic Dev Clerk
Harbormaster Assistant
Social Day Care Director
Animal Control Officer
Administrative Assistant
Chief Assessing Clerk
Assessor Assistant
Building Inspector
Conservation Agent
Economic Dev Grant Mgr

Electrical Inspector
Health Agent Inspector
Plumbing Inspector
Assistant Treasurer/Collector

---

[1] Pursuant to Division Rule 14.19(6), an employer or employee organization must file any challenges to the inclusion or exclusion of a name on the list with the neutral within three days of the presentation of the list to the neutral.

[2] These facts are based on the affidavits of Interim Chief of Police, Richard M. Stanley (Chief Stanley); Interim Town Administrative John Sanguinet (Mr. Sanguinet); Susan Green (Ms. Green), Administrative Assistant to the Town Administrator and Cassandra Cassidy (Ms. Cassidy), Administrative Assistant to the Police Chief. Because there is a dispute over Ms. Green's exact title, see note 3, below, the Board has not relied on the job description provided for that title, but instead, relies on Mr. Sanguinet's and Ms. Green's descriptions of the job duties of the position.

[3] The Union asserts that Ms. Green's title is Administrative Assistant to the Town Administrator. The Town claims that her title is Administrative Assistant to the Board of Selectmen, but asserts that she serves both the Interim Town Administrator and the Board of Selectmen. Her actual title is not relevant to the decision here because in determining whether a position is managerial or confidential, the Board looks at the actual duties and responsibilities of the position, and not merely its title. Town of Agawam, 13 MLC 1364, 1368 (1984). There is no dispute that Ms. Green performs little or no services for the Board of Selectmen.

[4] For purposes of this analysis, we shall assume, and no party disputes that the Interim Chief of Police is a managerial position excluded from collective bargaining rights under the Law.

[5] Should these duties change in the future, the Town is free to file a CAS petition to address the changed duties.

End Of Decision

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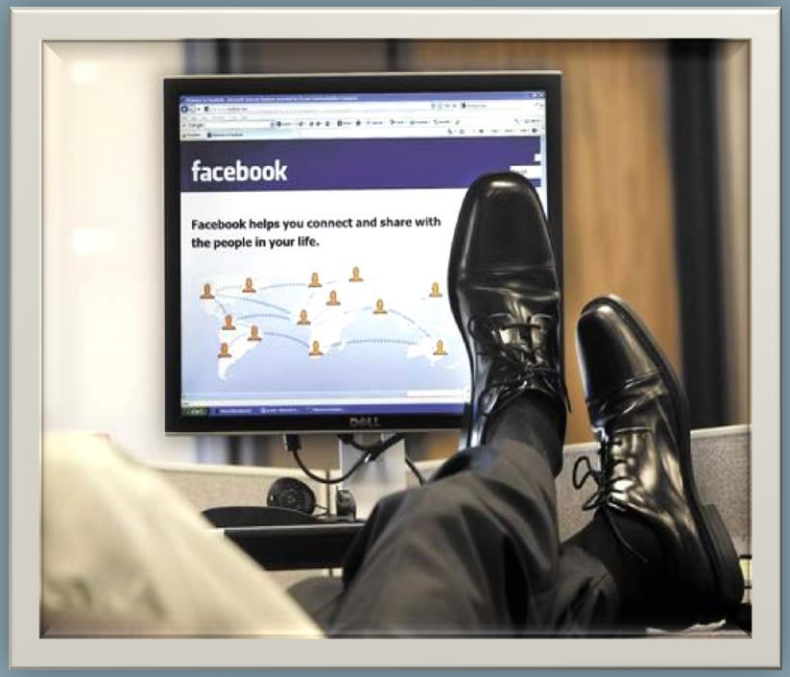
EMPLOYEES ONLINE

SOCIAL NETWORKING & ELECTRONIC COMMUNICATIONS

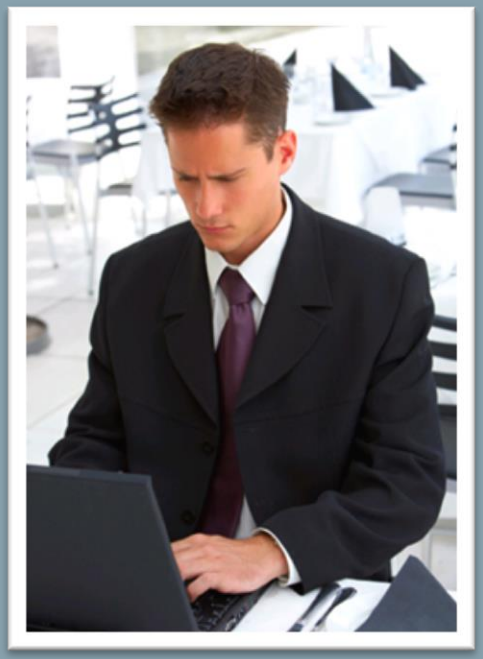


NEW ENGLAND CONSORTIUM OF STATE LABOR RELATIONS AGENCIES

JULY 11, 2014

Peter D. Lowe, Brann & Isaacson, 184 Main Street, Lewiston, Maine 04240; Tel. (207)786-3566; Email - plowe@brannlaw.com

Introduction



- Texting, blogging, posting and tweeting
- Thousands of blogs are created every hour
- The use of social networks such as Facebook and Twitter and others has exploded

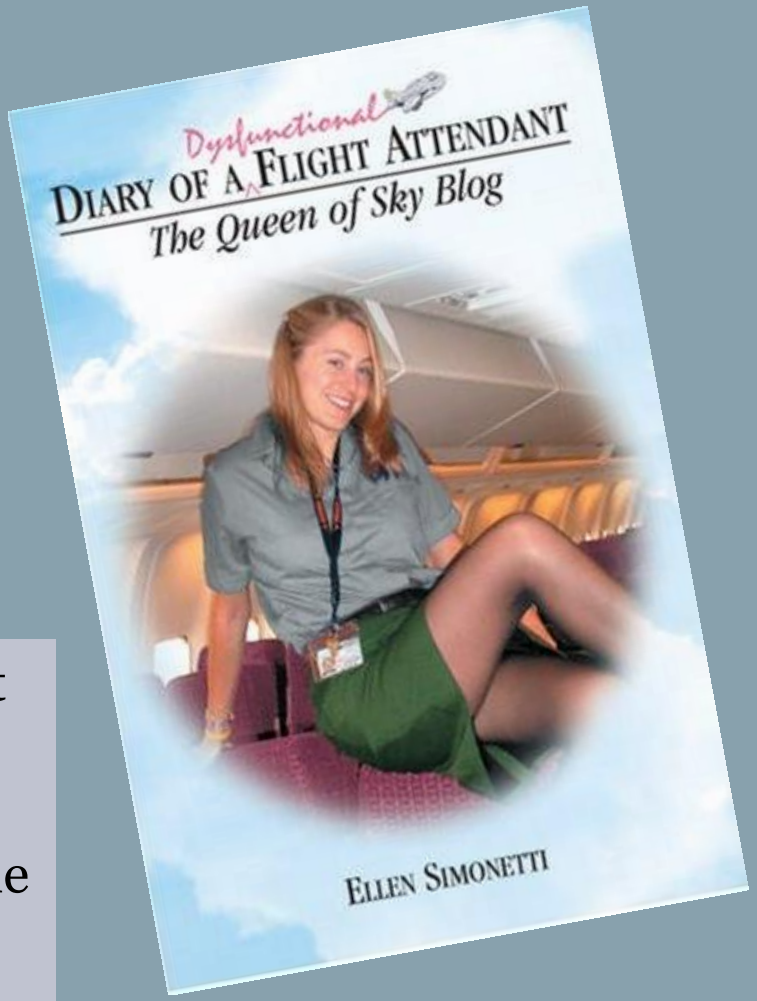
Are blog and social network postings outside work our business?

Should you monitor the web activities of applicants and employees?

Employees Online

- An employee's online activity presents several risks to employees:
  - Disclosure of confidential information
  - Damage to the Employee and Employer's reputations
  - Liability for defamation posted by employees
  - Negative or harassing comments about co-workers or supervisors
  - Wasting company time and loss of productivity

The Sky-High Blogger



Simonetti v. Delta – Simonetti alleged that Delta fired her for posting provocative pictures of herself in her Delta uniform on her blog, while male employees who did the same were not punished, constituting gender discrimination.

Personal Social Media Use

- How does an employer address personal social media use outside of work?
- Some policy ideas:
  - Only applies to personal use when it relates to the business
  - Advise employees that your corporate code of conduct applies to these communications
  - Identify confidential information, and require non-disclosure
  - Require personal social media use to be off the clock
  - Prohibit conduct that violates copyright
  - Describe unacceptable content (racist, sexist, threatening, etc.)
- Check out Yahoo's policy: http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf

A Word of Caution

- First Amendment Rights for public sector
- Some blogging and other forms of communication both outside and inside work are protected under the National Labor Relations Act

NLRA Protections for Non-Union Employees

"Employees shall have the right to self-organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

29 U.S.C. section 157 ("NLRA")

Facebook as Protected Concerted Action

- Dawnmarie Souza posted very nasty comments about her supervisor on her Facebook
- Coworkers commented on Souza's status
- After she was terminated, the NLRB sued the employer for interfering with concerted activity relating to the terms and conditions of Souza's employment
- The NLRB declared the company's social media policy a violation of the NLRA

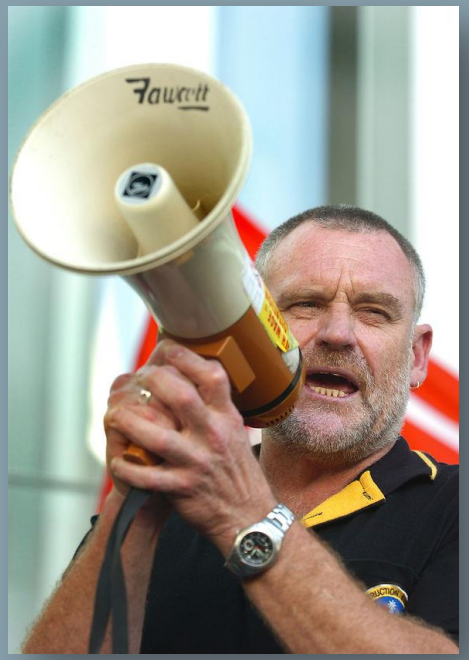
Facebook as Protected Concerted Action

- The case settled for an undisclosed amount
- As part of the settlement, the employer had to revise its policies, including:
  - Its policy barring workers from criticizing the company or supervisors in online communications
  - Its policy prohibiting employees from talking about the company on the internet without permission
  - Make clear that employees may discuss pay and other working conditions

NLRA Protected Concerted Activity

WATCH FOR:

- The employee who purports to speak on behalf of others;
- Petitions;
- Complaints on behalf of, or discussions among, employees about working conditions, wages, discipline, etc.



IS IT MY BUSINESS?

Fact Pattern: Tom gossips on his blog that Ann, a co-worker, is a prima donna and wants to be the center of attention.

*The Twist: Tom complains that his boss, Leslie, wrote him up once again; and points out that his friend, "Dot Com", was also called to her office last week, and blogs "what does she have against people from India?" He goes on to write "hit me up if you've had trouble with the b****."*

Online Monitoring

- Currently, **78%** of all employers use some type of surveillance system.
  - Storing and reviewing computer files: 36%.
  - Video-recording employees: 15%.
  - Recording and reviewing phone calls: 12%.
  - Storing and reviewing voice mail: 8%.
- The ACLU estimates that employers eavesdrop on about 400 million telephone calls annually
- Personal communications at work can prove costly

Monitoring Employee Communications

- **Why Monitor?**
  - Employees communicate with customers
  - Assess customer communications and employee performance
  - Protects from trade secret theft, discrimination, defamation and copyright claims

Monitoring Employee Communications
Federal Law

- **Electronic Communications Privacy Act (ECPA)**
  - Applies to all businesses whose operations affect interstate or foreign commerce
  - Protects wire, oral, and electronic communications from intentional and unauthorized interception, access, and disclosure
- **Definitions:**
  - "Wire" – telephone (including voicemail)
  - "Oral" – spoken by a person with the expectation that it is not subject to interception
  - "Electronic" – email (internal and external)
  - "Interception" – use of a device to intercept a communication during transmission

Monitoring Employee Communications
ECPA Continued

- **Exceptions:**
  - Employers have the right to intercept and monitor when done in the ordinary course of business using an extension telephone or other equipment
  - Monitoring within the ordinary course of business must be for a legitimate business purpose, routine and with notice
  - Providers of communication systems are excepted from the interception requirements
  - Consent: Communications may be intercepted if one party has consented to the interception of the communication

Monitoring Employee Communications
State Privacy Law

- **Common Law Privacy:**
  - Most states recognize a common law claim by employees for the "unreasonable intrusion into the seclusion of another"
- **State Privacy Statutes:**
  - Most states have passed communications privacy statutes. While many states track the requirements of ECPA, some have stricter standards--including consent of all parties to the interception
- **State Constitutional Protections:**
  - With a few notable exceptions, private employers are not bound by these constitutional requirements

Employee Chatter

Conversation started 2004-2-13 8:40:57AM

ida_dunhim (8:40:57): Hey cuz, I'll be off line for a week or two. My boss is taking this pc and I'm getting upgraded. I need to uninstall some proggies before my boss gets this pc, messenger being one of them I will still be able to get my e-mails, and of course you can call anytime. Love ya

ida_dunhim (3:41:04): #electrolux
ida_dunhim (3:41:12): sheesh can not even type today
ida_dunhim (3:41:16): or spell
ida_dunhim (3:41:36): too many interuptions with my chatting, gotta find a new job
ironic_8b49 (3:41:59): LOL, you sound like Dale now
ida_dunhim (3:42:21): Dale?
ironic_8b49 (3:43:30): a friend who says his job is interferring with is chatting
ida_dunhim (3:43:53): is/his, I see I'm contgeous
ironic_8b49 (3:45:30): yep must of got it from you he does live up in Lewiston
ida_dunhim (3:46:10): does he chat?

Minimize Liability – a Monitoring Policy

- **Policy Requirements**:
  - Make it clear that employees have no expectation of personal privacy when they use company owned systems
  - Communications will be monitored periodically. Once it becomes apparent that a phone call is personal, the monitoring will cease, and the matter will be addressed as a performance issue
  - Explain whether use of systems for personal purposes is permissible, and to what degree. Disclose if personal communications are subject to monitoring
  - Establish standards for respectful workplace communications and enforce this policy if violations are discovered
  - Describe consequences for policy violations
  - Provide an unmonitored line for personal calls if they are otherwise prohibited at work

The Courts Weigh In

- Quon v. Arch Wireless & City of Ontario, *560 U. S. _____* - 08-1332 (*2010*)
  - Police officer used city-provided pager to send sexually explicit text messages
  - Computer use policy did not explicitly cover pagers
- Appeals Court overturned city's discipline
- Supreme Court found that the search was lawful

Social Networking and Background Checks

- Survey found 56% of employers use social networking to screen applicants
- Wealth of information available on-line in the public domain
- Questions of reliability and liability

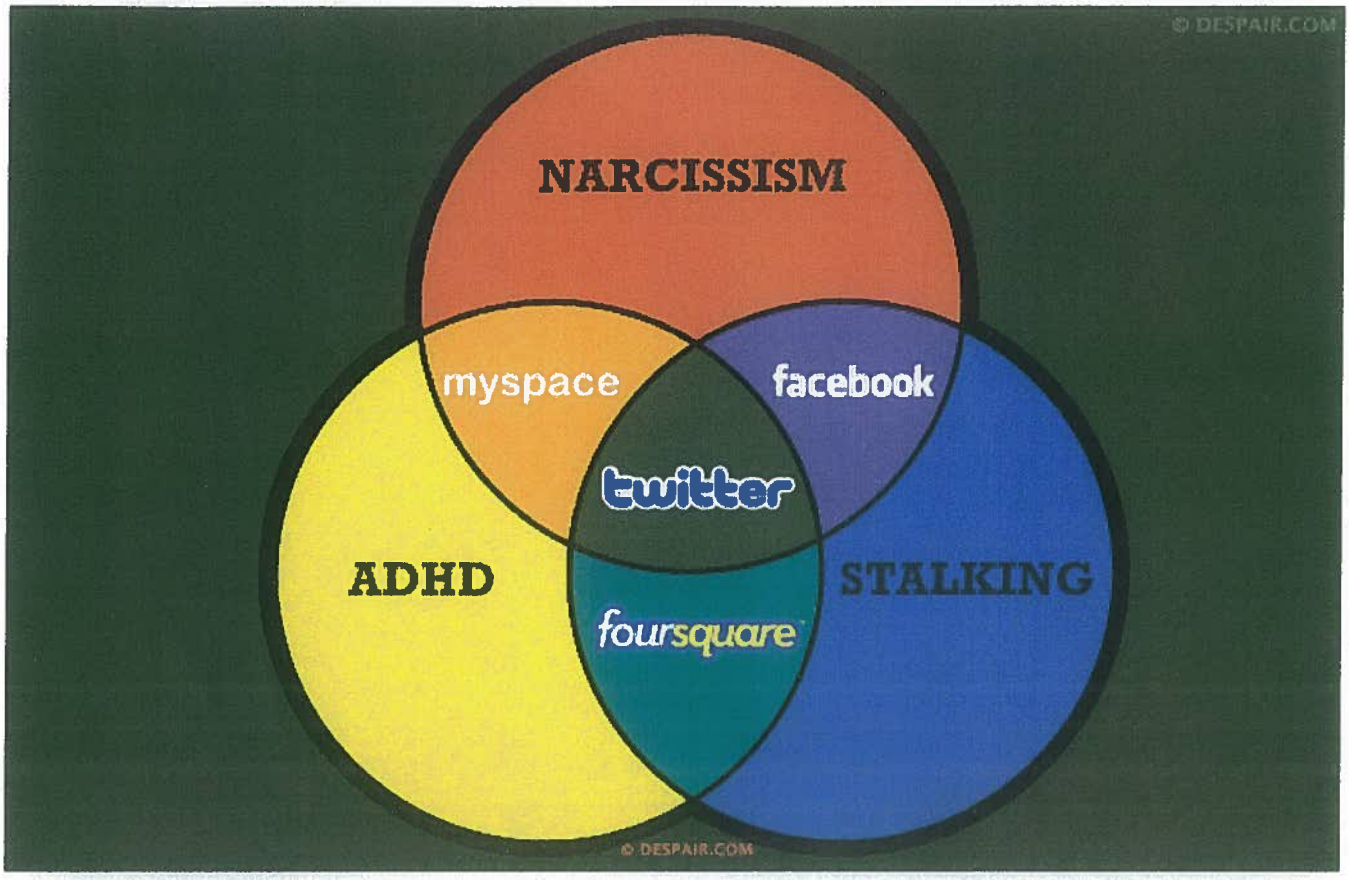
Discrimination

- Profiles are likely to disclose applicant information that you would never seek on your application:
  - Age
  - Physical/mental conditions
  - Sexual orientation
  - Alcohol and drug use
- Access to social networks for some, but not all applicants presents obvious risks

Guide to Pre-Employment Inquiries

- **DON'T ASK**:
  - About nationality, lineage, birthplace, native or primary language, how acquired ability to speak foreign language, former name, length of residency in US, membership in clubs or fraternities
  - For a photograph with application
  - Questions about date of birth or age (except over 18), dates of graduations
  - About religious affiliation or holidays observed
  - About race, skin or eye color, or arrest record
  - About pregnancies or family status
  - About sexual orientation, gender identity, relationship between household members, name of spouse
  - About any physical or mental impairments, addiction problems, need for a reasonable accommodation, height or weight
  - Whether applicant has received or applied for WC benefits or has been injured on the job

Questions???



The Social Media Tee

A gorgeous, 8-color masterpiece which captures ever so brilliantly the three behavioral disorders propelling the continued phenomenal growth of today's most widely-trafficked social media sites. And at the intersection of the dysfunctional forces of Narcissism, ADHD, and Stalking resides today's fastest growing social media experiment of all- Twitter.

And speaking of Twitter, in an effort to spread the word to that audience which needs this t-shirt more than all others, Despair is once again having a **Retweeting** contest. We'll be giving away **Ten free Social Media** tees to a random set of ten Twitterers who Retweet the following entry:

> **DESPAIR.COM unveils Social Media Tee for Narcissists,Stalkers & ADHD set http://cli.gs/WMPPTD (RT for chance to win 1 of 10)**

The 10 winners will be announced via my Twitter on Thursday afternoon.

But hold on- as timely as that t-shirt is, Despair's unveiling yet another new DespairWear masterpiece- our Government Motors Tee!

Suggestions for Appropriate Use of Technology

Computers, internet, e-mail, text messages, cell phones, i-Pods, and tiny digital cameras have changed our lives. Most school employees use technology to improve communication and instruction, but a few school employees have lost their jobs because they used technology inappropriately.

Whenever you face a dilemma about whether using technology is appropriate, analyze the situation by changing it to an "old-fashioned" method of communication. For example, if you are deciding whether to send a text message to a student, ask yourself if it would be appropriate to send a similar letter to the student.

Review your district's internet and technology use policy. Find out if your district limits use of school computers, personal e-mail, and cell phones by employees.

Think before you send. Technology is quick. If you would not say something directly to a person, then do not send it to that person in an e-mail. Take a moment to review any e-mails or text messages before you send them. Check to see if you clicked on "reply," or on "reply all." Check the message to determine whether it should be sent to a personal e-mail address rather than a school e-mail address.

Avoid sending or forwarding messages to a huge list of people at school. If you would not say it out loud at a staff meeting, do not send it to everyone on campus. Avoid sending jokes or cartoons to a wide distribution list. You may think it is funny; someone else may think it is offensive.

Do not use the school computer to communicate or view anything that you do not want your boss or your mother to read. Most deleted e-mails and computer information can be recovered by a computer technician. School district internet policies usually prohibit profanity, ethnic slurs, sexual content and photos, and harassment. Public schools expect teachers to be role models for students and to conduct themselves with decorum, decency, and integrity. If you should not say something at work, then you also should not communicate it by e-mail or text messages at work or on school computers. You should not bring a sexy magazine to school, and similarly you should not look at sexy Web sites at school or on school computers.

Be cautious about letting others use your school computer. Log off your school computer before you let a student or anyone else use it.

Keep communications professional. Use a school e-mail address to communicate school information to students and parents. Avoid sarcasm and name-calling. Be cautious about giving students your personal telephone numbers, e-mail addresses, and web pages. Remember that you are the student's teacher, coach, or club sponsor. You must be the "grown-up." You can be friendly, but you are not the student's friend or peer.

Keep personal information private. If you use an online social networking site, such as FaceBook or MySpace, set your profile as private so that only your close friends and family can view it. Do not post your address, telephone number, work site, birth date, or social security number online.

Remove inappropriate materials from your Web sites or blogs. Delete suggestive photographs, sexy innuendos, and anything else that can be used against you. Students and parents may view information on these sites.

Google your name. This can help you locate that old Web site you may have had in college, and also help you locate any fake profiles someone may have created about you. Search www.blogpulse.com and similar sites for information about you on computer blogs.

Be wary about writing online about your work. It is best not to discuss your work or supervisor even if you are using false names. Someone may see your impulsive, sarcastic rant, and you could be disciplined or fired. Above all else, do not discuss your students online. You might inadvertently disclose student information that is protected by FERPA (Family Educational Records and Privacy Act).

Do not use a school computer or school e-mail addresses to influence an election. Do not use a school computer to send or forward communications that ask others to vote for or against a candidate or that ask for money or volunteer time to help a candidate. Use your home computer and e-mail addresses.

Report unsolicited, inappropriate e-mails to the technology coordinator or your supervisor.

Be aware that students can misuse technology at school.

(avoidtechtrouble052308)

POTENTIAL BLOGGING PROBLEMS

BLOGS THAT CONTAIN:

- Personal and intimate information
- Criticism of school officials, students and staff
- Sexual, racial or profane remarks
- Pictures of student
- Pictures of drinking, drug use or inappropriate behavior (hazing, acts of violence, sexual)

QUESTIONS

Are educators subject to discipline or discharge if they blog about the following:

- **The war?**
- **Political candidates?**
- **Abortion?**
- **Gay rights?**

CONSIDERATIONS

- Is the subject a matter of public or private concern?
- Will the blog disrupt operation of the school and/or the education process?
- Are the freedom of speech interests of the employees outweighed by the educational interests of the employer?

ADVICE

- Limit access to your blog to "friends" only
- Monitor postings and remove those that are offensive.
- Do not blog about school activities staff or students
- Be attentive to not disrupting workplace
- Do not blog about anything that will harm your employer's reputation or interfere with your ability to do your job.
- Avoid personal, intimate subjects
- Remember that litigation allows discovery of the names of anonymous bloggers

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New England Consortium of
State Labor Relations Agencies
July 11, 2014

SOCIAL MEDIA IN THE WORKPLACE

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As employees have embraced social media, it has challenged employers with new legal concerns, including NLRA claims for violating an employee's right to engage in concerted activities, use for screening applicants, endorsements or products or services by employees, and constitutional protections for public sector employees. This memorandum provides an overview of some of these legal issues.

I. CONCERTED ACTIVITY & SOCIAL MEDIA

Background

> "Employees shall have the right to self-organization . . . And to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection."

The applicability of this protection in the National Labor Relations Act ("NLRA"), is obvious when employees are picketing for higher wages, but what about when they are bashing their supervisors on Facebook? The National Labor Relations Board ("NLRB") has released several reports on social media cases. It has paid considerable attention to the breadth of employer policies and routinely found workplace policies to be illegal. It has also challenged discipline and terminations and found that employees' social media use is protected concerted activity.

Case Studies

Name Calling on Facebook

Dawnmarie Souza worked as a dispatcher for a Connecticut ambulance company, AMR. AMR had a social media policy that prohibited employees from posting disparaging comments about AMR or its employees, and making statements about AMR without permission.

AMR investigated Dawnmarie in response to a customer complaint and she was declined union representation at the meeting. In response, Dawnmarie posted nasty remarks on her Facebook page, calling her supervisor a "dick' and "scumbag," and commented she "love[d] how the company allows a 17 to become a supervisor." "17" is a code for a patient who is mentally disabled. Facebook friends and coworkers commented on her post.

Dawnmarie was terminated. The NLRB took the position that her comments on Facebook were protected concerted activity. The case was settled.

More Name Calling on Facebook

A Walmart employee posted the following on his Facebook wall:

- Employee: Wuck Falmart! I swear if this tyranny doesn't end in this store they are about to get a wakeup call because lots are about to quit!
  - Coworker 1: bahaha like!:)
  - Coworker 2: What the hell happens after four that gets u so wound up???Lol
  - Employee: You have no clue, Jane, our assistant manager is being a super mega puta! Its retarded I get chewed out cuz we got people putting stuff in the wrong spot and then the customer wanting it for that price. That's false advertisement if you don't sell it for that price. I'm talking to the store manager about this shit cuz if it don't change Walmart can kiss my royal white ass!

Walmart scolded the employee for his posts, and he subsequently deleted them from Facebook. Was Walmart justified?

Facebook Complaints About Job Conditions

A bartender at JT's Porch Saloon & Eatery disliked the bar's policy that waitresses didn't have to share their tips with the bartenders. He complained about this with a coworker, who agreed that it sucked. Some months later he had a Facebook conversation with his stepsister. When she asked how his night went, he complained again about the tip policy, and that he hadn't had a raise in five years. He also called the bar's customers "rednecks" and said that he hoped they choked on glass as they drove home drunk. No coworkers participated in the conversation.

The bar's owner fired the bartender via Facebook message. Were the bartender's complaints protected?

Patient Complaints Online

A recovery specialist worked at a residential facility for homeless people. During the overnight shift one day, she posted the following conversation on her Facebook wall:

- Employee: Spooky is overnight, third floor, alone in a mental institution, btw Im not a client, not yet anyway.
  - Friend 1: then who will you tell when you hear the voices?
  - Employee: me, myself and I, one of us had to be right, either way we'll just pop meds until they go away! Ya baby!
  - Employee: My dear client ms 1 is cracking up at my post, I don't know if shes laughing at me, with me or at her voices, not that it matters, good to laugh
  - Friend 1: That's right but, if she gets out of hand, restrain her.
  - Employee: I don't need to restrain anyone, we have a great rapport, im beginning to detect when people start to decompensate and she is the sweetest, most of our peeps are angels, just a couple fogt some issues. Im on guard don't worry bout a thing!
  - Friend 2: I think you'd look cute in a straitjacket, heh heh heh …

Neither of the friends were coworkers.

She was terminated in part because the facility is "invested in protecting people we serve from stigma" and it was not 'recovery oriented' to use clients' illnesses for her amusement. Did the employer violate the NLRA?

Takeaways

When drafting social media policies, take care that they are not overbroad and impinge on protected speech. Try to avoid absolute prohibitions, such as preventing all disparaging speech or all references to the company or management. Be careful about confidentiality language that is too broad.

When making an employment decision based on social media conduct, consider the following:

- The place of the "discussion";
- The subject matter;
- Nature of the employee's outburst; and
- Whether the outburst was provoked by an unfair labor practice.

Protected speech might include:

- Where an employee acts with the authority of coworkers and seeks to initiate, induce, or prepare for group action or brings group complaints to management.
- The employee's activities are the logical outgrowth of collective employee concerns.

Speech might not be protected where:

- An employee is acting solely on his own behalf.
- The employee is engaging in "mere griping" and not "group action."
- A comment is 'so opprobrious as to lose the protections" of the NLRA. This might happen, for example, where name-calling is accompanied by threats of violence.

II. ONLINE SEARCHES & BACKGROUND CHECKS ON APPLICANTS

With the wealth of information online, it might be tempting to check out an applicant through a simple google search. Some people don't restrict access to their social media profiles and pictures and comments online may be revealing about an applicant's judgment and behavior. The Maryland Department of Public Safety and Correctional Services even went so far as to require applicants to disclose their Facebook password so that the Department could search their social media pages and ensure that applicants had not been engaged in criminal activity.

The ACLU claimed that this violated the Stored Communications Act ("SCA"). The SCA prohibits the unauthorized access to stored electronic communications. The argument by the ACLU was that because applicants were forced to give up their passwords, the Department's access was not voluntarily authorized. These legal issues did not get tested in the courts because the employer lost the public relations battle, and was forced to change its policy. As a consequence of such a broad policy, some state legislatures have enacted legislation that would prevent an employer from requiring employees or applicants to turn over passwords.

Without access to passwords, there is still a lot of personal information available to employers. You are better off not knowing certain things about your applicants. For example, it might be unwise for you to know that an applicant:

- Has strong religious beliefs.
- Is a member of the Tea Party.
- Has a history of breast cancer in her family.
- Has a disability.
- Has family that comes from Iraq.
- Is much older than he looks.
- Is married to a person of the same sex.

On the other hand, on-line content might reveal that your applicant is quite different from the varnished image shown on his resume and application. His postings may show a lack of respect, dangerous behaviors and intolerance. In the worst case scenario, you might have learned about his propensity for violence.

III. FTC ADVERTISING RESTRICTIONS

What better way to get your business' name out there than to have your employees' blog about you and give your products favorable reviews online. As good as this sounds, if your employees do not follow strict guidelines, you could wind up in hot water with the Federal Trade Commission ("FTC").

The FTC polices false advertising and misleading communications. It has recently turned its attention to "flogs" (fake blogs) and "astroturfing" (seemingly objective customer reviews that are in fact advertising). In one enforcement action, the FTC targeted an online public relations firm, Reverb. In order to boost sales of some of its clients gaming apps, it had employees post favorable reviews. The FTC took the position that these posts were misleading because they appeared to come from ordinary consumers rather than an interested party.

The FTC and Reverb eventually settled their dispute, with Reverb agreeing to:

- Prohibit employees from endorsing products of Reverb's clients without disclosing their interest in the product;
- Take steps to remove existing employee reviews that did not disclose the employee's interest;
- Maintain documentation of its compliance efforts for five years; and
- To distribute and obtain employee acknowledgement of receiving the FTC settlement.

If you are in the business of selling products or services, you should definitely consider including guidelines and limitations on advertising and reviews by your employees. Consider:

- Setting parameters for reviews and comments;
- Explain the reason for the limitations;
- Offer sample reviews and posts that adequately disclose an employee's interests in a product or service.

IV. CONSTITUTIONAL ISSUES FOR PUBLIC EMPLOYERS

Public employers such as schools, municipalities, and state and federal governments have added concerns when it comes to employee online activity. As governmental entities, public employers have to be careful about violating employee's First Amendment free speech rights and their Fourth Amendment privacy rights.

Free Speech

The [policeman] . . . may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.

This quote reflects the fact that although public sector employees enjoy broad protection for their First Amendment free speech rights, those protections are not limitless. For an employee's speech to be protected, it must generally:

- Address a matter of public concern. Whether a statement is of public concern is evaluated based on its context, form, and content. Speech relating to political or social issues is likely to qualify as public. Therefore, a disparaging comment on the fitness of an elected official to lead is likely protected, but the quality of the cafeteria food might not be.
- Not be delivered in the employee's official capacity. Public employers generally have the right to limit what an employee says in his capacity as an employee. Therefore, if a fire chief complains to the press, while in uniform and on duty, about funding and budget cuts, his speech might not be protected. However, if he makes those statements out of uniform and off duty to a group of concerned citizens organizing a ballot referendum, his speech is more likely to be protected.

Privacy Rights

Searches and seizures of property or information of governmental employees might be unconstitutional if it is unreasonable. Some considerations on whether a search is reasonable include:

- Whether the employee has a reasonable expectation of privacy in the seized information. This is where well-crafted policies may give you the right to lawfully search employee material. Electronic use policies should clearly outline what information you are entitled to review, when, and for what reasons. Policies might include review of email, cell phones, pagers, and computers.
- Whether the monitoring itself is reasonable. If the monitoring is limited in scope and duration solely to accomplish work-related goals, then it is more likely to be protected. Again, laying out under what circumstances and for what reasons employee communications may be reviewed will help establish the reasonableness of any search or monitoring.

V. ELECTRNOIC COMMUNICATIONS PROTECTIONS

Even private employers need to be cautious when monitoring or retrieving employee's electronic communications. We already briefly discussed the SCA, which works in conjunction with the Electronic Communications Privacy Act ("ECPA"). The ECPA prohibits the interception of electronic communications while in transit from the sender to the receiver. The SCA, on the other hand, prohibits the unauthorized access of stored communications. Generally, the ECPA poses few problems to employers unless they are intercepting communications in transit – it does not apply to old emails, texts, online posts, etc.

The SCA, however, does apply to, for example, stored emails. Fortunately, there are a few exceptions that make it easier for employers to monitor stored communications:

- Consent – the most obvious exception is where an employee consents to the monitoring and access to stored communications. Again, strong policies are key to fitting within this exception.
- Course of business – the second exception is for communications made in the ordinary course of business. Courts typically look at the content of the message (is it work-related content), whether the extent of the monitoring is reasonable, and whether the employee has notice of the monitoring.
- Service provider- access by a service provider is not prohibited by the SCA. Courts in some jurisdictions have interpreted this exception liberally. For example, the Ninth Circuit held that a police department could access text messages stored in the department's system because the department "provided" the text system. The Third Circuit applied the same reasoning to an employer's email server.

TRIPARTITE/EXPEDITED ARBITRATION PROCESS

MAINE STATE EMPLOYEES ASSOCIATION, SEIU LOCAL 1989 AND STATE OF MAINE

Presentation to the New England Consortium of State Labor Relations Agencies

2014 Annual Conference

Timothy Belcher, General Counsel, MSEA/SEIU Local 1989

Cynthia Montgomery, Chief Counsel, Maine Office of Employee Relations

Julie Armstrong, Counsel, Maine Office of Employee Relations

Introduction

The State of Maine Office of Employee Relations ("OER") and the Maine State Employees Association ("MSEA") implemented the current system of expedited arbitration in 1999, adapting a system that was in place in New York between the state and the CSEA. We borrowed less heavily from other arrangements we knew about, and from other legal and administrative forums. Our goal was to streamline our arbitration procedure by using a tripartite panel to actively manage cases, and to incorporate mediation as an integral part of the process. We refer to the process as "Tri-ex," a contraction of "tripartite" and "expedited."

At the time we implemented Tri-ex, the parties had some twenty years of experience in collective bargaining, with cases being assigned to in-house counsel once they reached arbitration. As a general rule, cases were heard by ad hoc arbitrators selected through the AAA. We had permanent panels for reclassification and non-selection or promotional grievances, and for a few years we had incorporated a mediation step in all cases. The process remained cumbersome, expensive, and the delays were simply unacceptable to both parties.

Although today a majority of our arbitrations go through the Tri-ex process, we continue to use ad hoc arbitrators for the more difficult cases, including terminations or complex legal or factual questions. We also use a separate process for reclassification arbitrations. The Tri-ex system is best suited for lower level disciplinary cases and relatively straightforward contract disputes. It is ill-suited for truly contentious and divisive cases with very high stakes for the parties.

The Process

The parties have selected two neutral arbitrators to hear Tri-ex cases, both of whom are familiar to the parties and our contracts. Both are experienced arbitrators and mediators and are comfortable playing both roles with the same case. Our current process is to set a schedule

of one hearing day a month for the entire year, and then to plug cases into the calendar as they come up. The neutrals sit on panels with two partisan panelists -- one senior representative of each party who is generally an attorney.

Prior to arbitration, grievances are heard at the third step by a Labor Relations Specialist at the Office of Employee Relations, who listens to presentations by the departmental human resource professionals and field representatives from the union. If a grievance is not resolved at this step, after OER issues its 3rd step decision, the union submits the case to its grievance committee and, if approved for arbitration, then places the case on the next available time slot for a Tri-ex pre-hearing meeting. The union then sends out a hearing notice for that date, and gives alternate days that may be available if a witness or advocate has a conflict. The parties are given a short time to respond, and once an acceptable date is found the hearing is confirmed. We schedule two pre-hearing meetings per day.

The Pre-hearing meeting

The advocates at Tri-ex are usually the MSEA field representative who handled the grievance at the lower steps and the OER Labor Relations Specialist who heard the case at the third step. These advocates are expected to communicate with each other prior to the pre-hearing meeting to exchange documents and identify preliminary issues.

During the pre-hearing meeting, the parties first meet with the panel in open session, exchanging documents and making opening statements. The parties can also raise any other unresolved preliminary issues or disputes at this time. In addition, the tri-partite panel members may meet separately to discuss how to clarify or manage the case.

Following the open session, the parties, including their partisan panelists, move to separate rooms, and the neutral will mediate the dispute. If the mediation is unsuccessful, the case is then scheduled for hearing on an open day with the same arbitrator.

The Hearing and Decision

If the case goes to hearing, it is heard by the neutral in a panel format. The hearing itself is generally similar to normal ad hoc arbitration, except that the case is perhaps better prepared and the issues have been narrowed. In some cases, however, the panel has actively managed the case to avoid unnecessary litigation. The panel has, for example:

1. asked the parties to reach stipulations on uncontested issues;

2. agreed that the neutral would issue a decision on the facts and arguments presented at the pre-hearing;

3. bifurcated the process to address potentially dispositive legal issues before bringing in witnesses;

4. directed the parties to present their most important witnesses or evidence first, then reconvened to decide whether to permit additional evidence; or

5. advised the parties to focus their presentation on the questions that will really matter.

At the end of the hearing, the parties generally close orally. The neutral arbitrator will issue a short written decision and award, usually sharing a draft with the panelists before it is issued. The panelists will generally offer minor edits that may help clarify the award or address tangential issues, and then the neutral issues a final decision.

Additional Information

The parties and the neutrals are well aware of the pitfalls of assigning an arbitration hearing and decision to someone who has acted as a mediator. The neutral cannot be as forceful with the parties as he or she could if acting as a mediator only, and will often have appeared to have taken sides by the end of a mediation process. One solution would have been to have the case switch to the other neutral for a hearing, but we would have lost some of the efficiencies achieved through the pre-hearing process. We would recommend that whichever approach the parties take, the decision needs to be made in advance and applied to all cases.

In our Tri-ex process, each party's partisan panelist is generally the most experienced advocate for that side, usually the party's lawyer. The cases are presented by advocates who have less experience or legal training, but more knowledge of the case itself. The partisan panelist may intervene if a legal issue arises, if the advocate runs into trouble, or if the advocate just needs some advice or assistance. This structure has allowed the parties to use non-lawyer advocates, saving the cost and time of having lawyers review and prepare each case, while still ensuring that lawyers are available to address issues that may arise.

From MSEA

Prior to the start of the Tri-ex process, from 1986 until 1999 the average age of cases decided by an arbitrator had reached as much as 30 months, and had never dropped below 15 months. After the first year of the Tri-ex process, the Union did an internal analysis to determine its effect, and learned that the age of cases decided in that first year dropped to the shortest time since 1986. In addition, the union's expenditures for arbitration were also at their lowest point in a decade. We have not carried that analysis forward to date, and we have faced

problems in some years, particularly when one or the other party was facing staffing changes. Absent complications, however, cases are generally reaching at least the first arbitration hearing or the pre-hearing in the Tri-ex process within a year of the filing of the grievance.

This process was part of a cultural shift within the union, moving away from the concept that that it is service organization or legal insurance plan that guarantees its members the most aggressive possible litigation for every case that an individual member wants us to bring forward. Instead, the union sees the contract as the product of collective bargaining, ratified by the members, and enforced by the union on behalf of all members, subject of course to the duty of fair representation. As such, the union has established grievance committees to review every case prior to arbitration. While the committees are eager to help the members, they will withdraw cases that have no merit or run against union policy. In addition, the union recognizes that members want and need a prompt opportunity to be heard and to resolve their cases, and that full blown arbitration after years of delay is often no justice at all. Finally, while the parties often disagree passionately or even angrily, both sides need to trust that the other side is ultimately prepared to honor the contract, and will behave honestly behind closed doors with the neutral during the mediation process.

From the State

The Tri-ex procedure has had a profound impact upon the State's Office of Employee Relations. A few years prior to instituting the new process, OER was staffed by a Director, Chief Counsel, three staff attorneys, three Labor Relations Specialists, and two administrative staff. During the mid-to-late 1990's, significant budget cuts resulted in the loss of one attorney, one specialist, and one legal secretary. Given the already significant arbitration backlog, we looked for ways continue to do our work with fewer staff members and, perhaps, to reduce the backlog. Adding a mediation step was helpful but we wanted to achieve more significant results, so we looked for other ways to improve the process. We were invited by our counterparts in New York State to visit and observe their successful expedited process. Because of MSEA's above-described philosophy of providing all employees with the most aggressive representation possible, MSEA was reluctant to get involved in any grievance procedure that would reduce the amount of "process" employees received. They did, however, agree to visit New York with us In January of 1998 to learn more about New York's expedited process, and to meet with representatives of the New York OER and the union, CSEA. Following that trip, we and MSEA began discussions about what our process might look like, and in 1999, Tri-ex was born.

Although OER has since lost its Director and another staff attorney due to a staff reduction, grievance backlogs and processing times for Tri-ex and ad hoc arbitration are significantly lower than they were when we had twice as many staff members. In order to

make this process succeed, like MSEA, the State has had to go through a culture change. We have endeavored to develop an understanding on the part of our client agencies that there is significant value in resolving grievances in a mutually agreeable manner, even when the chances of success at arbitration are high. Once viewed as a sign of weakness by some, settlement is now often viewed as a smart business decision, both financially and in furtherance of workplace harmony.

SELECTED ABA MODEL RULES OF PROFESSIONAL CONDUCT

Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or

reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Rule 1.7 Conflict Of Interest: Current Clients

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules [SELECT SECTIONS]

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

Rule 1.9 Duties To Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction knownto the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believesis false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an *ex parte* proceeding, a lawyer shall inform the tribunal of all material factsknown to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 3.4 Fairness To Opposing Party And Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonablydiligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

Rule 3.5 Impartiality and Decorum of the Tribunal

A lawyer shall not:

(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order;

(c) communicate with a juror or prospective juror after discharge of the jury if:

(1) the communication is prohibited by law or court order;

(2) the juror has made known to the lawyer a desire not to communicate; or

(3) the communication involves misrepresentation, coercion, duress or harassment; or

(d) engage in conduct intended to disrupt a tribunal.

Rule 3.7 Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

Rule 4.2 Communication With Person Represented By Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Rule 4.3 Dealing With Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know

that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Rule 4.4 Respect For Rights Of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

NECSLRA Summer Conference – Friday, July 11, 2014

Ethical Issues in Negotiations, Grievances, and Unfair Labor Practice Cases

Thomas Closson, Esq.
Peter Perroni, Esq.
Marjorie F. Wittner, Esq.

HYPOTHETICALS

1. Negotiations between the Town of Mayberry and the Mayberry Police Union have not proceeded smoothly. The parties have spent months at the table trying to hammer out a deal, to no avail.

In an effort to settle a contract, legal counsel for the Town has consulted with her negotiating team, and has been given the authority to make another package proposal to the Union. Although framed as a "last ditch, take it or leave it" proposal, the Town's counsel knows that her negotiating team still has a little more room to move (if necessary) on both wages and health insurance.

As has been the case throughout the parties' negotiations, the Town's counsel decides to email this latest written proposal to the Union's counsel. Unfortunately, unbeknownst to the Town's counsel, her email inadvertently includes a memo outlining the confidential comments and negotiating strategy of her negotiating team. Additionally, the "red lined" version of the proposed contract emailed by the Town's counsel also includes embedded meta-data that although not facially apparent to the Union's counsel, is easily accessed by his 8 year old son.

What should the Union's counsel do with the confidential memorandum and the embedded meta-data? What ethical obligations, if any, are implicated? Has the Town's counsel violated any of her ethical obligations? (1.1, 1.6, 1.15, 4.4, 5.1, 8.4)

2. Peter Prevaracator is counsel for the Town of Bluffton. He is the Town's Chief Negotiator in labor negotiations with the Town's DPW Union.

In preparing for negotiations, Attorney Prevaracator is advised by the Mayor that the Town wants to achieve, but ultimately will not insist on, health insurance concessions. According to the Mayor, these concessions would likely save the Town $100,000. Further, according to the Mayor, the Town also wants to change employee vacation accrual rates. According to the Mayor, the change in accrual rates will save the Town another $50,000.

In an early negotiation session with the DPW Union, Attorney Prevaracator makes the following statements at the negotiating table, to the Union's Attorney and negotiating team:

- "The Mayor will never support a deal that doesn't include health insurance concessions."

- "The health insurance concessions we are requesting will save the Town millions."

- "This is the best deal you are going to see from us."

Additionally, in response to questions from the Union's attorney about the expected cost impact of the proposed change in vacation accrual rates, Attorney Prevaracator pretends not to hear the question, and provides no response.

Does any of Attorney Prevaracator's conduct raise any ethical issues? (4.1)

3. You regularly perform legal work for Clam Diggers Local 225, a duly established local bargaining unit of the International Association of Clam Diggers. Mike Shovel is the Business Manager of Local 225 and your regular contact. Local 225's bylaws vest the responsibility for the day-to-day operation of the Union in the Business Manager. The Local is party to a collective bargaining agreement (CBA) with Chowda Corp. The CBA contains a four-step grievance procedure culminating in binding arbitration. Only the Union can elect to take a grievance to arbitration.

This week you received an email from Business Manager Shovel with an attached grievance package and a Demand for Arbitration already filed by the Local with the American Arbitration Association. The grievance involves the termination of Local 225 member Danny Littleneck for allegedly leaving his assigned rake location for long periods of time on multiple work days. Shovel's email states as follows:

> *Please handle this grievance for us -- arbitrator selection list is due back next Friday. Local will pay all bills at the usual rate. Between you and me, I really think Littleneck is a jerk and can't even stand to be in the same room with him. I certainly don't want him lingering around the Union hall so please meet him at your office. All my stewards feel the same way so you are on your own with this guy -- just tell me when it's over.*

Just as you finish scanning the email, you receive a text message from a number you don't recognize. It reads:

> *Hey lawyerface -- its Danny Littleneck -- the Clamdiggers told me that you are my lawyer for my case against the Chowda Corp. They gave me your cell. I need an appointment pronto cause I got to get back on the flats soon. I'm glad you are helping me because I don't want any of those losers from the Union knowing my business. I think they all hate me since I ran for business manager last year and flirt with their wives at the Christmas Party! LOL! YOLO!*

How should you proceed?

Who is the client?
What disclosures are necessary?
What are practical steps to avoid problems? (1.13, 1.6)

4. You have successfully represented a police patrolmen's union in the arbitration of a grievance involving the widely publicized termination of a police officer from employment with a mid-size municipality. The issue at the hearing was whether there was just cause for terminating the officer for falsifying her time sheet. The arbitrator found no just cause for the termination and therefore sustained the grievance and returned the officer to her position. In his opinion, the arbitrator was extremely critical of many of the employer's witnesses including the Deputy Chief of Police and the Assistant City Manager. The arbitrator determined that these City employees and others had conspired to remove the officer from her position and then lied both internally and to news outlets regarding the allegations against her.

The grievant was thrilled with the work you did at the arbitration hearing and has asked you to represent her in a civil claim against the City, the Deputy Chief, the Assistant City Manager and possibly others. The President of the Union has a good working relationship with the Deputy Chief of Police and the Assistant City Manager and regularly works successfully with these management employees to adjust grievances and other issues involving the membership of the Local.

Can you take the grievant's civil case? (1.13, 1.7)

5. Prior to the start of a discharge hearing, Sam Smoothie, business representative for a unit of state university food service workers, approached the Arbitrator Norm Neutral and remarked, out of earshot of the University's representative: "I've got a total dog - I don't expect to win this one. This loser's got a disciplinary record a mile long." The arbitrator, before whom Sam had appeared on many occasions, stared sadly at Sam and said, "Sam, really - you know better than to say something like that to me…. I'm just going to pretend we never had this conversation." Before the hearing began, however, Arbitrator Neutral thought the better of it and disclosed to University counsel Ivy Tower what Sam had told him and his response - that he would not consider Sam's opinion of the grievance when deciding the case. Neither Ivy nor Sam subsequently voiced any objections to the arbitrator's continued service in the case.

What is the arbitrator's duty in such a case, with respect to disclosure to the grievant and any decision he may make to withdraw from the case? Does it make a difference if the arbitrator suspects that the University and the Union are colluding to have him sustain the discharge? What if the University objected to his continued service? What if the grievant had protested? (Code of Prof. Resp. for Arbitrators of Labor Management Disputes, 1.A. 1, 1.C.1, 2.A.2)

6. Deidre Diligent is an attorney with the state's Office of Labor Relations. She investigates and prosecutes unfair labor practice charges. One late Friday afternoon in July, she receives a phone call from Paul Paralegal. Deidre knows that Paul recently stopped working for Emerson, Lake and Palmer, a law firm that represents Capital City in many cases before the agency, but she doesn't know whether he resigned or was asked to leave. Paul tells Deidre that certain key records that ELP submitted to the OLR in connection with a charge against Capital City, which Deidre investigated and which is scheduled for hearing in two weeks, were materially altered prior to submission. Deidre has many questions for Paul, including how he learned of this, and whether ELP knew about the alleged alternations. However, the OLR recently provided ethics training for its staff, so Deidre bit her tongue, politely told Paul she did not want to hear anything further, and ended the call.

1. Should Deidre call Paul back and seek further information from him regarding the allegedly altered documents;
2. Should Deidre call Emerson, Lake and Palmer and tell them about Paul's call?
3. Should Deidre tell Hilda Hearing Officer, who will be hearing the case - is it ok to do it ex parte?
   (ABA Model Rules 1.6, 3.3, 3.4, 3.5, 4.2, 4.3, 4.4)

CODE

OF PROFESSIONAL RESPONSIBILITY FOR ARBITRATORS OF LABOR-MANAGEMENT DISPUTES

OF THE
NATIONAL ACADEMY OF ARBITRATORS
AMERICAN ARBITRATION ASSOCIATION
FEDERAL MEDIATION AND CONCILIATION SERVICE

As amended and in effect September 2007

FOREWORD

This "Code of Professional Responsibility for Arbitrators of Labor-Management Disputes" supersedes the "Code of Ethics and Procedural Standards for Labor-Management Arbitration," approved in 1951 by a Committee of the American Arbitration Association, by the National Academy of Arbitrators, and by representatives of the Federal Mediation and Conciliation Service.

Revision of the 1951 Code was initiated officially by the same three groups in October, 1972. The following members of a Joint Steering Committee were designated to draft a proposal:

Chair
William E. Simkin

Representing American Arbitration Association
Frederick H. Bullen
Donald B. Straus

Representing Federal Mediation and Conciliation Service
Lawrence B. Babcock, Jr.
L. Lawrence Schultz

Representing National Academy of Arbitrators
Sylvester Garrett
Ralph T. Seward

The proposal of the Joint Steering Committee was issued on November 30, 1974, and thereafter adopted by all three sponsoring organizations. Reasons for Code revision should be noted briefly. Ethical considerations and procedural standards were deemed to be sufficiently intertwined to warrant combining the subject matter of Parts I and II of the 1951 Code under the caption of "Professional Responsibility." It also seemed advisable to eliminate admonitions to the parties (Part III of the 1951 Code) except as they appear incidentally in connection with matters primarily involving responsibilities of arbitrators. The substantial growth of third-party participation in dispute resolution in the public sector required consideration, as did the fact that the arbitration of new contract terms had become more significant. Finally, during the interval of more than two decades, new problems had emerged as private-sector grievance arbitration matured and became more diversified.

In 1985, the provisions of 2 C. 1. c. were amended to specify certain procedures, deemed proper, which could be followed by an arbitrator seeking to determine if the parties are willing to consent to publication of an award.

In 1996, the wording of the Preamble was amended to reflect the intent that the provisions of the Code apply to covered arbitrators who agree to serve as impartial third parties in certain arbitration and related procedures, dealing with the rights and interests of employees in connection with their employment and/or representation by a union. Simultaneously, the provisions of 2 A. 3. were amended to make clear that an arbitrator has no obligation to accept an appointment to arbitrate under dispute procedures adopted unilaterally by an employer or union and to identify additional disclosure responsibilities for arbitrators who agree to serve under such procedures.

In 2001, the provisions of 1 C. were amended to eliminate the general prohibition of advertising, along with certain qualifying statements added in 1996, and replace them with a provision that permits advertising except that which is false or deceptive.

In 2003, 1 C. was amended further to reflect that the same standard applies to written solicitations of arbitration work, but that care must be taken to avoid compromising or giving the appearance of compromising the arbitrator's neutrality.

In 2007, a new 6 E. was added and the previous 6 E. was re-designated 6 F. The purpose of the revision was to make clear that an arbitrator does not violate the Code by retaining jurisdiction in an award over application or interpretation of a remedy.

NOTE: From time to time, the Committee on Professional Responsibility and Grievances of the National Academy of Arbitrators prepares Advisory Opinions relating to issues arising under the Code which are adopted upon approval by the Academy's Board of Governors. These Advisory Opinions can be found on the Academy's website: naarb.org.

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PREAMBLE

Background

The provisions of this Code deal with the voluntary arbitration of labor-management disputes and certain other arbitration and related procedures which have developed or become more common since it was first adopted.

Voluntary arbitration rests upon the mutual desire of management and labor in each collective bargaining relationship to develop procedures for dispute settlement which meet their own particular needs and obligations. No two voluntary systems, therefore, are likely to be identical in practice. Words used to describe arbitrators (Arbitrator, Umpire, Impartial Chair, Chair of Arbitration Board, etc.) may suggest typical approaches, but actual differences within any general type of arrangement may be as great as distinctions often made among the several types.

Arbitrators of labor-management disputes are sometimes asked to serve as impartial third parties under a variety of arbitration and related procedures dealing with the rights and interests of employees in connection with their employment and/or representation by a union. In some cases these procedures may not be the product of voluntary agreement between management and labor. They may be established by statute or ordinance, *ad hoc* agreement, individual employment contract, or through procedures unilaterally adopted by employers and unions. Some of the procedures may be designed to resolve disputes over new or revised contract terms, where the arbitrator may be referred to as a Fact Finder or a member of an Impasse Panel or Board of Inquiry, or the like. Others may be designed to resolve disputes over wrongful termination or other employment issues arising under the law, an implied or explicit individual employment contract, or an agreement to resolve a lawsuit. In some such cases the arbitrator may be referred to as an Appeal Examiner, Hearing Officer, Referee, or other like titles. Finally, some procedures may be established by employers to resolve employment disputes under personnel policies and handbooks or established by unions to resolve disputes with represented employees in agency shop or fair share cases.

The standards of professional responsibility set forth in this Code are intended to guide the impartial third party serving in all of these diverse procedures.

Scope of Code

This Code is a privately developed set of standards of professional behavior for arbitrators who are subject to its provisions. It applies to voluntary arbitration of labor-management disputes and the other arbitration and related procedures described in the Preamble, hereinafter referred to as "covered arbitration dispute procedures."

The word "arbitrator," as used hereinafter in the Code, is intended to apply to any impartial person, irrespective of specific title, who serves in a covered arbitration dispute

procedure in which there is conferred authority to decide issues or to make formal recommendations.

The Code is not designed to apply to mediation or conciliation, as distinguished from arbitration, nor to other procedures in which the third party is not authorized in advance to make decisions or recommendations. It does not apply to partisan representatives on tripartite boards. It does not apply to commercial arbitration or to uses of arbitration other than a covered arbitration dispute procedure as defined above.

Format of Code

Bold Face type, sometimes including explanatory material, is used to set forth general principles. *Italics* are used for amplification of general principles. Ordinary type is used primarily for illustrative or explanatory comment.

Application of Code

Faithful adherence by an arbitrator to this Code is basic to professional responsibility.

The National Academy of Arbitrators will expect its members to be governed in their professional conduct by this Code and stands ready, through its Committee on Professional Responsibility and Grievances, to advise its members as to the Code's interpretation. The American Arbitration Association and the Federal Mediation and Conciliation Service will apply the Code to the arbitrators on their rosters in cases handled under their respective appointment or referral procedures. Other arbitrators and administrative agencies may, of course, voluntarily adopt the Code and be governed by it.

In interpreting the Code and applying it to charges of professional misconduct, under existing or revised procedures of the National Academy of Arbitrators and of the administrative agencies, it should be recognized that while some of its standards express ethical principles basic to the arbitration profession, others rest less on ethics than on considerations of good practice. Experience has shown the difficulty of drawing rigid lines of distinction between ethics and good practice, and this Code does not attempt to do so. Rather, it leaves the gravity of alleged misconduct and the extent to which ethical standards have been violated to be assessed in the light of the facts and circumstances of each particular case.

1

ARBITRATOR'S QUALIFICATIONS AND RESPONSIBILITIES TO THE PROFESSION

A. General Qualifications

1. **Essential personal qualifications of an arbitrator include honesty, integrity, impartiality and general competence in labor relations matters.**

   An arbitrator must demonstrate ability to exercise these personal qualities faithfully and with good judgment, both in procedural matters and in substantive decisions.

   a. Selection by mutual agreement of the parties or direct designation by an administrative agency are the effective methods of appraisal of this combination of an individual's potential and performance, rather than the fact of placement on a roster of an administrative agency or membership in a professional association of arbitrators.

2. **An arbitrator must be as ready to rule for one party as for the other on each issue, either in a single case or in a group of cases. Compromise by an arbitrator for the sake of attempting to achieve personal acceptability is unprofessional.**

B. Qualifications for Special Cases

1. **When an arbitrator decides that a case requires specialized knowledge beyond the arbitrator's competence, the arbitrator must decline appointment, withdraw, or request technical assistance.**

   a. An arbitrator may be qualified generally but not for specialized assignments. Some types of incentive, work standard, job evaluation, welfare program, pension, or insurance cases may require specialized knowledge, experience or competence. Arbitration of contract terms also may require distinctive background and experience.

   b. Effective appraisal by an administrative agency or by an arbitrator of the need for special qualifications requires that both parties make known the special nature of the case prior to appointment of the arbitrator.

C. Responsibilities to the Profession

1. **An arbitrator must uphold the dignity and integrity of the office and endeavor to provide effective service to the parties.**

    a. To this end, an arbitrator should keep current with principles, practices and developments that are relevant to the arbitrator's field of practice.

2. **An arbitrator shall not make false or deceptive representations in the advertising and/or solicitation of arbitration work.**

3. **An arbitrator shall not engage in conduct that would compromise or appear to compromise the arbitrator's impartiality.**

    a. Arbitrators may disseminate or transmit truthful information about themselves through brochures or letters, among other means, provided that such material and information is disclosed, disseminated or transmitted in good faith to representatives of both management and labor.

4. **An experienced arbitrator should cooperate in the training of new arbitrators.**

2

RESPONSIBILITIES TO THE PARTIES

A. Recognition of Diversity in Arbitration Arrangements

1. **An arbitrator should conscientiously endeavor to understand and observe, to the extent consistent with professional responsibility, the significant principles governing each arbitration system in which the arbitrator serves.**

    a. Recognition of special features of a particular arbitration arrangement can be essential with respect to procedural matters and may influence other aspects of the arbitration process.

2. **Such understanding does not relieve an arbitrator from a corollary responsibility to seek to discern and refuse to lend approval or consent to any collusive attempt by the parties to use arbitration for an improper purpose.**

3. **An arbitrator who is asked to arbitrate a dispute under a procedure established unilaterally by an employer or union, to resolve an employment dispute or agency shop or fair share dispute, has no obligation to accept such appointment. Before accepting such an appointment, an arbitrator should consider the possible need to disclose the existence of any ongoing relationships with the employer or union.**

    a. If the arbitrator is already serving as an umpire, permanent arbitrator or panel member under a procedure where the employer or union has the right unilaterally to remove the arbitrator from such a position, those facts should be disclosed.

B. Required Disclosures

1. **Before accepting an appointment, an arbitrator must disclose directly or through the administrative agency involved, any current or past managerial, representational, or consultative relationship with any company or union involved in a proceeding in which the arbitrator is being considered for appointment or has been tentatively designated to serve. Disclosure must also be made of any pertinent pecuniary interest.**

    a. The duty to disclose includes membership on a Board of Directors, full-time or part-time service as a representative or advocate, consultation work for a fee, current stock or bond ownership (other than mutual fund shares or appropriate trust arrangements) or any other pertinent form of managerial, financial or immediate family interest in the company or union involved.

2. **When an arbitrator is serving concurrently as an advocate for or representative of other companies or unions in labor relations matters, or has done so in recent years, such activities must be disclosed before accepting appointment as an arbitrator.**

   An arbitrator must disclose such activities to an administrative agency if on that agency's active roster or seeking placement on a roster. Such disclosure then satisfies this requirement for cases handled under that agency's referral.

   a. It is not necessary to disclose names of clients or other specific details. It is necessary to indicate the general nature of the labor relations advocacy or representational work involved, whether for companies or unions or both, and a reasonable approximation of the extent of such activity.

   b. *An arbitrator on an administrative agency's roster has a continuing obligation to notify the agency of any significant changes pertinent to this requirement.*

   c. When an administrative agency is not involved, an arbitrator must make such disclosure directly unless the arbitrator is certain that both parties to the case are fully aware of such activities.

3. **An arbitrator must not permit personal relationships to affect decision-making.**

   Prior to acceptance of an appointment, an arbitrator must disclose to the parties or to the administrative agency involved any close personal relationship or other circumstance, in addition to those specifically mentioned earlier in this section, which might reasonably raise a question as to the arbitrator's impartiality.

   a. Arbitrators establish personal relationships with many company and union representatives, with fellow arbitrators, and with fellow members of various professional associations. There should be no attempt to be secretive about such friendships or acquaintances but disclosure is not necessary unless some feature of a particular relationship might reasonably appear to impair impartiality.

4. **If the circumstances requiring disclosure are not known to the arbitrator prior to acceptance of appointment, disclosure must be made when such circumstances become known to the arbitrator.**

5. **The burden of disclosure rests on the arbitrator. After appropriate disclosure, the arbitrator may serve if both parties so desire. If the arbitrator believes or perceives that there is a clear conflict of interest, the arbitrator should withdraw, irrespective of the expressed desires of the parties.**

C. Privacy of Arbitration

1. **All significant aspects of an arbitration proceeding must be treated by the arbitrator as confidential unless this requirement is waived by both parties or disclosure is required or permitted by law.**

   a. Attendance at hearings by persons not representing the parties or invited by either or both of them should be permitted only when the parties agree or when an applicable law requires or permits. Occasionally, special circumstances may require that an arbitrator rule on such matters as attendance and degree of participation of counsel selected by a grievant.

   b. *Discussion of a case at any time by an arbitrator with persons not involved directly should be limited to situations where advance approval or consent of both parties is obtained or where the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification.*

      A commonly recognized exception is discussion of a problem in a case with a fellow arbitrator. *Any such discussion does not relieve the arbitrator who is acting in the case from sole responsibility for the decision and the discussion must be considered as confidential.*

      Discussion of aspects of a case in a classroom without prior specific approval of the parties is not a violation provided the arbitrator is satisfied that there is no breach of essential confidentiality.

   c. *It is a violation of professional responsibility for an arbitrator to make public an award without the consent of the parties.*

      An arbitrator may ask the parties whether they consent to the publication of the award either at the hearing or at the time the award is issued.

      (1) If such question is asked at the hearing it should be asked in writing as follows:

      "Do you consent to the submission of the award in this matter for publication?

      ( ) ( )
      YES NO

      If you consent you have the right to notify the arbitrator within 30 days after the date of the award that you revoke your consent."

      It is desirable but not required that the arbitrator remind the parties at the time of the issuance of the award of their right to withdraw their consent to publication.

(2) If the question of consent to the publication of the award is raised at the time the award is issued, the arbitrator may state in writing to each party that failure to answer the inquiry within 30 days will be considered an implied consent to publish.

d. It is not improper for an arbitrator to donate arbitration files to a library of a college, university or similar institution without prior consent of all parties involved. When the circumstances permit, there should be deleted from such donations any cases concerning which one or both of the parties have expressed a desire for privacy. As an additional safeguard, an arbitrator may also decide to withhold recent cases or indicate to the donee a time interval before such cases can be made generally available.

e. *Applicable laws, regulations, or practices of the parties may permit or even require exceptions to the above noted principles of privacy.*

D. Personal Relationships with the Parties

1. An arbitrator must make every reasonable effort to conform to arrangements required by an administrative agency or mutually desired by the parties regarding communications and personal relationships with the parties.

a. *Only an "arm's-length" relationship may be acceptable to the parties in some arbitration arrangements or may be required by the rules of an administrative agency. The arbitrator should then have no contact of consequence with representatives of either party while handling a case without the other party's presence or consent.*

b. *In other situations, both parties may want communications and personal relationships to be less formal. It is then appropriate for the arbitrator to respond accordingly.*

E. Jurisdiction

1. An arbitrator must observe faithfully both the limitations and inclusions of the jurisdiction conferred by an agreement or other submission under which the arbitrator serves.

2. A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, must be accepted by the arbitrator as removing further jurisdiction over such issues.

F. Mediation by an Arbitrator

1. **When the parties wish at the outset to give an arbitrator authority both to mediate and to decide or submit recommendations regarding residual issues, if any, they should so advise the arbitrator prior to appointment. If the appointment is accepted, the arbitrator must perform a mediation role consistent with the circumstances of the case.**

   a. Direct appointments, also, may require a dual role as mediator and arbitrator of residual issues. This is most likely to occur in some public sector cases.

2. **When a request to mediate is first made after appointment, the arbitrator may either accept or decline a mediation role.**

   a. *Once arbitration has been invoked, either party normally has a right to insist that the process be continued to decision.*

   b. *If one party requests that the arbitrator mediate and the other party objects, the arbitrator should decline the request.*

   c. *An arbitrator is not precluded from suggesting mediation. To avoid the possibility of improper pressure, the arbitrator should not so suggest unless it can be discerned that both parties are likely to be receptive. In any event, the arbitrator's suggestion should not be pursued unless both parties readily agree.*

G. Reliance by an Arbitrator on Other Arbitration Awards or on Independent Research

1. **An arbitrator must assume full personal responsibility for the decision in each case decided.**

   a. *The extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing.*

   b. When the mutual desires of the parties are not known or when the parties express differing opinions or policies, the arbitrator may exercise discretion as to these matters, consistent with the acceptance of full personal responsibility for the award.

H. Use of Assistants

1. **An arbitrator must not delegate any decision-making function to another person without consent of the parties.**

    a. *Without prior consent of the parties, an arbitrator may use the services of an assistant for research, clerical duties, or preliminary drafting under the direction of the arbitrator, which does not involve the delegation of any decision-making function.*

    b. *If an arbitrator is unable, because of time limitations or other reasons, to handle all decision-making aspects of a case, it is not a violation of professional responsibility to suggest to the parties an allocation of responsibility between the arbitrator and an assistant or associate. The arbitrator must not exert pressure on the parties to accept such a suggestion.*

I. Consent Awards

1. **Prior to issuance of an award, the parties may jointly request the arbitrator to include in the award certain agreements between them, concerning some or all of the issues. If the arbitrator believes that a suggested award is proper, fair, sound, and lawful, it is consistent with professional responsibility to adopt it.**

    a. *Before complying with such a request, an arbitrator must be certain of understanding the suggested settlement adequately in order to be able to appraise its terms. If it appears that pertinent facts or circumstances may not have been disclosed, the arbitrator should take the initiative to assure that all significant aspects of the case are fully understood. To this end, the arbitrator may request additional specific information and may question witnesses at a hearing.*

J. Avoidance of Delay

1. **It is a basic professional responsibility of an arbitrator to plan a work schedule so that present and future commitments will be fulfilled in a timely manner.**

a. *When planning is upset for reasons beyond the control of the arbitrator, every reasonable effort should nevertheless be exerted to fulfill all commitments. If this is not possible, prompt notice at the arbitrator's initiative should be given to all parties affected. Such notices should include reasonably accurate estimates of any additional time required. To the extent possible, priority should be given to cases in process so that other parties may make alternative arbitration arrangements.*

2. **An arbitrator must cooperate with the parties and with any administrative agency involved in avoiding delays.**

    a. *An arbitrator on the active roster of an administrative agency must take the initiative in advising the agency of any scheduling difficulties that can be foreseen.*

b. *Requests for services, whether received directly or through an administrative agency, should be declined if the arbitrator is unable to schedule a hearing as soon as the parties wish. If the parties, nevertheless, jointly desire to obtain the services of the arbitrator and the arbitrator agrees, arrangements should be made by agreement that the arbitrator confidently expects to fulfill.*

c. *An arbitrator may properly seek to persuade the parties to alter or eliminate arbitration procedures or tactics that cause unnecessary delay.*

3. Once the case record has been closed, an arbitrator must adhere to the time limits for an award, as stipulated in the labor agreement or as provided by regulation of an administrative agency or as otherwise agreed.

a. *If an appropriate award cannot be rendered within the required time, it is incumbent on the arbitrator to seek an extension of time from the parties.*

b. If the parties have agreed upon abnormally short time limits for an award after a case is closed, the arbitrator should be so advised by the parties or by the administrative agency involved, prior to acceptance of appointment.

K. Fees and Expenses

1. An arbitrator occupies a position of trust in respect to the parties and the administrative agencies. In charging for services and expenses, the arbitrator must be governed by the same high standards of honor and integrity that apply to all other phases of arbitration work.

An arbitrator must endeavor to keep total charges for services and expenses reasonable and consistent with the nature of the case or cases decided.

Prior to appointment, the parties should be aware of or be able readily to determine all significant aspects of an arbitrator's bases for charges for fees and expenses.

a. *Services Not Primarily Chargeable on a Per Diem Basis*

By agreement with the parties, the financial aspects of many "permanent" arbitration assignments, of some interest disputes, and of some "ad hoc" grievance assignments do not include a per diem fee for services as a primary part of the total understanding. *In such situations, the arbitrator must adhere faithfully to all agreed-upon arrangements governing fees and expenses.*

b. *Per Diem Basis for Charges for Services*

(1) *When an arbitrator's charges for services are determined primarily by a stipulated per diem fee, the arbitrator should establish in advance the bases for application of such per diem fee and for determination of reimbursable expenses.*

Practices established by an arbitrator should include the basis for charges, if any, for:

(a) hearing time, including the application of the stipulated basic per diem hearing fee to hearing days of varying lengths;
(b) study time;
(c) necessary travel time when not included in charges for hearing time;
(d) postponement or cancellation of hearings by the parties and the circumstances in which such charges will normally be assessed or waived;
(e) office overhead expenses (secretarial, telephone, postage, etc.);
(f) the work of paid assistants or associates.

(2) *Each arbitrator should be guided by the following general principles:*

(a) *Per diem charges for a hearing should not be in excess of actual time spent or allocated for the hearing.*
(b) *Per diem charges for study time should not be in excess of actual time spent.*
(c) *Any fixed ratio of study days to hearing days, not agreed to specifically by the parties, is inconsistent with the per diem method of charges for services.*
(d) *Charges for expenses must not be in excess of actual expenses normally reimbursable and incurred in connection with the case or cases involved.*
(e) *When time or expense are involved for two or more sets of parties on the same day or trip, such time or expense charges should be appropriately prorated.*
(f) *An arbitrator may stipulate in advance a minimum charge for a hearing without violation of (a) or (e) above.*

(3) *An arbitrator on the active roster of an administrative agency must file with the agency the individual bases for determination of fees and expenses if the agency so requires. Thereafter, it is the responsibility of each such arbitrator to advise the agency promptly of any change in any basis for charges.*

Such filing may be in the form of answers to a questionnaire devised by an agency or by any other method adopted by or approved by an agency.

Having supplied an administrative agency with the information noted above, an arbitrator's professional responsibility of disclosure under this Code with respect to fees and expenses has been satisfied for cases referred by that agency.

(4) *If an administrative agency promulgates specific standards with respect to any of these matters which are in addition to or more restrictive than an individual arbitrator's standards, an arbitrator on its active roster must observe the agency standards for cases handled under the auspices of that agency, or decline to serve.*

(5) *When an arbitrator is contacted directly by the parties for a case or cases, the arbitrator has a professional responsibility to respond to questions by submitting the bases for charges for fees and expenses.*

(6) *When it is known to the arbitrator that one or both of the parties cannot afford normal charges, it is consistent with professional responsibility to charge lesser amounts to both parties or to one of the parties if the other party is made aware of the difference and agrees.*

(7) *If an arbitrator concludes that the total of charges derived from the normal basis of calculation is not compatible with the case decided, it is consistent with professional responsibility to charge lesser amounts to both parties.*

2. **An arbitrator must maintain adequate records to support charges for services and expenses and must make an accounting to the parties or to an involved administrative agency on request.**

3

RESPONSIBILITIES TO ADMINISTRATIVE AGENCIES

A. General Responsibilities

1. **An arbitrator must be candid, accurate, and fully responsive to an administrative agency concerning qualifications, availability, and all other pertinent matters.**

2. **An arbitrator must observe policies and rules of an administrative agency in cases referred by that agency.**

3. **An arbitrator must not seek to influence an administrative agency by any improper means, including gifts or other inducements to agency personnel.**

    a. It is not improper for a person seeking placement on a roster to request references from individuals having knowledge of the applicant's experience and qualifications.

    b. Arbitrators should recognize that the primary responsibility of an administrative agency is to serve the parties.

4

PREHEARING CONDUCT

1. **All prehearing matters must be handled in a manner that fosters complete impartiality by the arbitrator.**

   a. The primary purpose of prehearing discussions involving the arbitrator is to obtain agreement on procedural matters so that the hearing can proceed without unnecessary obstacles. If differences of opinion should arise during such discussions and, particularly, if such differences appear to impinge on substantive matters, the circumstances will suggest whether the matter can be resolved informally or may require a prehearing conference or, more rarely, a formal preliminary hearing. When an administrative agency handles some or all aspects of the arrangements prior to a hearing, the arbitrator will become involved only if differences of some substance arise.

   b. *Copies of any prehearing correspondence between the arbitrator and either party must be made available to both parties.*

5

HEARING CONDUCT

A. General Principles

1. **An arbitrator must provide a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument.**

   a. *Within the limits of this responsibility, an arbitrator should conform to the various types of hearing procedures desired by the parties.*

   b. An arbitrator may: encourage stipulations of fact; restate the substance of issues or arguments to promote or verify understanding; question the parties' representatives or witnesses, when necessary or advisable, to obtain additional pertinent information; and request that the parties submit additional evidence, either at the hearing or by subsequent filing.

   c. *An arbitrator should not intrude into a party's presentation so as to prevent that party from putting forward its case fairly and adequately.*

B. Transcripts or Recordings

1. **Mutual agreement of the parties as to use or non-use of a transcript must be respected by the arbitrator.**

   a. *A transcript is the official record of a hearing only when both parties agree to a transcript or an applicable law or regulation so provides.*

   b. An arbitrator may seek to persuade the parties to avoid use of a transcript, or to use a transcript if the nature of the case appears to require one. *However, if an arbitrator intends to make appointment to a case contingent on mutual agreement to a transcript, that requirement must be made known to both parties prior to appointment.*

   c. If the parties do not agree to a transcript, an arbitrator may permit one party to take a transcript at its own cost. The arbitrator may also make appropriate arrangements under which the other party may have access to a copy, if a copy is provided to the arbitrator.

   d. Without prior approval, an arbitrator may seek to use a personal tape recorder to supplement note taking. The arbitrator should not insist on such a tape recording if either or both parties object.

C. Ex Parte Hearings

1. **In determining whether to conduct an ex parte hearing, an arbitrator must consider relevant legal, contractual, and other pertinent circumstances.**

2. **An arbitrator must be certain, before proceeding ex parte, that the party refusing or failing to attend the hearing has been given adequate notice of the time, place, and purposes of the hearing.**

D. Plant Visits

1. **An arbitrator should comply with a request of any party that the arbitrator visit a work area pertinent to the dispute prior to, during, or after a hearing. An arbitrator may also initiate such a request.**

   a. *Procedures for such visits should be agreed to by the parties in consultation with the arbitrator.*

E. Bench Decisions or Expedited Awards

1. **When an arbitrator understands, prior to acceptance of appointment, that a bench decision is expected at the conclusion of the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise.**

   a. *If notice of the parties' desire for a bench decision is not given prior to the arbitrator's acceptance of the case, issuance of such a bench decision is discretionary.*

   b. *When only one party makes the request and the other objects, the arbitrator should not render a bench decision except under most unusual circumstances.*

2. **When an arbitrator understands, prior to acceptance of appointment, that a concise written award is expected within a stated time period after the hearing, the arbitrator must comply with the understanding unless both parties agree otherwise.**

6

POST HEARING CONDUCT

A. Post Hearing Briefs and Submissions

1. **An arbitrator must comply with mutual agreements in respect to the filing or nonfiling of post hearing briefs or submissions.**

   a. An arbitrator may either suggest the filing of post hearing briefs or other submissions or suggest that none be filed.

   b. When the parties disagree as to the need for briefs, an arbitrator may permit filing but may determine a reasonable time limitation.

2. **An arbitrator must not consider a post hearing brief or submission that has not been provided to the other party.**

B. Disclosure of Terms of Award

1. **An arbitrator must not disclose a prospective award to either party prior to its simultaneous issuance to both parties or explore possible alternative awards unilaterally with one party, unless both parties so agree.**

   a. Partisan members of tripartite boards may know prospective terms of an award in advance of its issuance. Similar situations may exist in other less formal arrangements mutually agreed to by the parties. In any such situation, the arbitrator should determine and observe the mutually desired degree of confidentiality.

C. Awards and Opinions

1. **The award should be definite, certain, and as concise as possible.**

   a. When an opinion is required, factors to be considered by an arbitrator include: desirability of brevity, consistent with the nature of the case and any expressed desires of the parties; need to use a style and form that is understandable to responsible representatives of the parties, to the grievant and supervisors, and to others in the collective bargaining relationship; necessity of meeting the significant issues; forthrightness to an extent not harmful to the relationship of the parties; and avoidance of gratuitous advice or discourse not essential to disposition of the issues.

D. Clarification or Interpretation of Awards

1. **No clarification or interpretation of an award is permissible without the consent of both parties.**

2. **Under agreements which permit or require clarification or interpretation of an award, an arbitrator must afford both parties an opportunity to be heard.**

E. Retaining Remedial Jurisdiction

1. **An arbitrator may retain remedial jurisdiction in the award to resolve any questions that may arise over application or interpretation of a remedy.**

    a. Unless otherwise prohibited by agreement of the parties or applicable law, an arbitrator may retain remedial jurisdiction without seeking the parties' agreement. If the parties disagree over whether remedial jurisdiction should be retained, an arbitrator may retain such jurisdiction in the award over the objection of a party and subsequently address any remedial issues that may arise.

2. **The retention of remedial jurisdiction is limited to the question of remedy and does not extend to any other parts of the award. An arbitrator who retains remedial jurisdiction is still bound by Paragraph D above, entitled "Clarification or Interpretation of Awards," which prohibits the clarification or interpretation of any other parts of an award unless both parties consent.**

F. Enforcement of Award

1. **The arbitrator's responsibility does not extend to the enforcement of an award.**

2. **In view of the professional and confidential nature of the arbitration relationship, an arbitrator should not voluntarily participate in legal enforcement proceedings.**

Rule 4.1: Truthfulness in Statements to Others

Transactions With Persons Other Than Clients
Rule 4.1 Truthfulness In Statements To Others

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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Comment on Rule 4.1

Transactions With Persons Other Than Clients
Rule 4.1 Truthfulness In Statements To Others - Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Statements of Fact

[2] This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document,

affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

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NEW HAMPSHIRE BAR ASSOCIATION
Ethics Committee Opinion 2008-2009/4

Disclosure, Review and Use of Metadata in Electronic Materials

Rule References:
Rule 1.1
Rule 1.6(a)
Rule 4.4(b)
Rule 5.1
Rule 5.3

Subjects:
*Attorney-Client Relationship
*Client Communications
*Confidentiality
*Inadvertent Disclosure
*Conduct Towards Opponent

Annotation

Electronic materials sent and received by lawyers in modern law practices contain hidden information called "metadata," which may contain confidential information relating to representation of a client. Both sending and receiving lawyers share ethical obligations to prevent disclosure of such confidential information.

Lawyers sending electronic materials to opposing counsel are ethically required to take reasonable care to avoid improper disclosure of confidential information contained in metadata, including appropriate training and education on reasonable measures that can be taken to reduce the likelihood of improper disclosure of confidential information through transmission of metadata. There can be no *per se* rule on what constitutes reasonable care in transmission of metadata, as the facts and circumstances of each case will dictate the reasonableness of protective measures taken by sending lawyers.

Receiving lawyers have an ethical obligation not to search for, review or use metadata containing confidential information that is associated with transmission of electronic materials from opposing counsel. Receiving lawyers necessarily know that any confidential information contained in the electronic material is inadvertently sent, triggering the obligation under Rule 4.4(b) not to examine the material. To the extent that metadata is mistakenly reviewed, receiving lawyers should abide by the directives in Rule 4.4(b).

This opinion does not address electronic materials subject to discovery or subpoena under applicable rules of court or law.

Introduction

In modern legal practice, lawyers routinely send and receive e-mails and other materials in electronic form from opposing counsel and other parties. Electronic documents are sent and received during the course of negotiations, due diligence reviews, litigation, investigations and other dealings. E-mails and other electronic documents inevitably contain "embedded" information commonly referred to as "metadata." Metadata is "information about information" not ordinarily visible on the computer screen that describes the history, tracking or management of an electronic document.

Some metadata is automatically lodged within the document by software, such as the date and time the document was produced, and can be accessed simply by right-clicking on it with a computer mouse. Other types of metadata are produced by word processing programs that allow users to "redline" changes to a document or to embed comments, which may or may not pop up as the cursor is moved over them. If metadata is "mined" by use of readily available computer programs, it can show, among other things, the changes made to a document during its drafting, as well as comments made by various reviewers of the document. Metadata may, therefore, reveal client confidences, litigation and negotiation strategy, legal theories, attorney work product and other legally privileged and confidential information that was never intended to be communicated by the sender. This raises ethical issues for both the sending and receiving lawyers.

The Ethics Committee believes it appropriate to provide guidance to New Hampshire lawyers on ethical obligations regarding transmission, receipt and use of metadata under the New Hampshire's Rules of Professional Conduct. This opinion addresses both the ethical obligations of the sending lawyer to prevent the disclosure of metadata containing confidential information when transmitting electronic materials and the ethical obligations of the recipient lawyer with respect to searching for, reviewing and using metadata found in electronic materials. The Committee's view is that both sending and receiving lawyers share ethical obligations to preserve confidential information relating to representation of clients and that it is impermissible for New Hampshire lawyers to seek to review or use metadata received from opposing counsel.

In assessing the ethical obligations of both the sending and receiving attorneys with respect to metadata, the Committee does not address electronic documents subject to discovery or subpoena under applicable rules of court or law. Discovery of electronic materials raises separate issues and rules that go beyond the scope of this opinion.

Discussion

Ethical Obligations of Lawyers Sending Electronic Materials

Exchange of electronic documents is an essential part of modern law practice. At the same time that advances in technology permit users to access metadata that may relate to another lawyer's representation of a client, the ethical obligation imposed upon lawyers to avoid such disclosures remains unchanged. Protection of client confidences is one of the most significant obligations imposed upon lawyers and forms the core of the attorney-client relationship. Rule 1.6(a) provides that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)." As stated in this Committee's comment to Rule 1.6, [t]he disclosure of client confidences is an extreme and irrevocable act." The confidentiality rule applies not only to matters communicated in confidence by the client, but also to all information related to the representation, whatever its source. *See* 2004 ABA Model Rule Comment [3].

There is general consensus among jurisdictions reviewing the ethical obligations of lawyers who send electronic materials to opposing counsel that they are ethically required to take reasonable care to avoid improper disclosure of confidential information contained in metadata. *See, e.g.,* ABA Formal Op. 06-442 (2006); FL Bar Ethics Op. 06-02 (2006) ("A lawyer who is sending an electronic document should take care to ensure the confidentiality of all information contained in the document, including metadata"); NY Bar Ethics Op. 782 (2004) ("a lawyer must exercise reasonable care to ensure that he or she does not inadvertently disclose his or her client's confidential information"). The Ethics Committee agrees that a sending lawyer who transmits electronic documents or files has a duty to use reasonable care to guard against disclosure of metadata that might contain confidential information. However, the Committee also believes that what constitutes reasonable care will depend upon the facts and circumstances, including the subject matter of the document, whether there have been multiple drafts of the document with multiple commenting parties, whether the client has commented on the document and other relevant factors. Thus, there can be no *per se* rule on transmission of metadata.

Lawyers should consider the duty to provide competent representation under Rule 1.1, as well as the general requirement under Rules 5.1 and 5.3 that lawyers make reasonable efforts to ensure that their firms, including lawyers and non-lawyers, conform to the Rules. In general, lawyers should be reasonably informed about the types of metadata that may be included in documents when they are transmitted electronically and the steps that can be taken to remove it, if necessary. Lawyers should stay abreast of technological advances and potential risks of transmission through appropriate training and education. In the Committee's view, lawyers should acquire, at the very least, a basic understanding of the existence of metadata embedded in electronic documents, the features of the software they have used to generate the document and any practical measures that may be taken to limit the likelihood of transmitting metadata or to purge the documents of sensitive information. This view is generally shared by other jurisdictions that have reviewed this subject. *See, e.g.,* ME Bar Ethics Op. 196 (2008).

The Committee recognizes that, as a result of rapid technological advances, some lawyers are generally unaware of the myriad of ways that client confidences may be disclosed in the form of metadata that accompanies electronic documents and files. However, unless lawyers obtain a reasonable understanding of the risks inherent in the use of technology in transmitting and receiving electronic materials that may contain confidential information, they risk violating their ethical obligations to clients. Of course, this does not mean that lawyers must necessarily purchase expensive computer software to ensure that metadata is removed or "scrubbed" from documents in all cases. In most circumstances, lawyers can limit the likelihood of transmitting metadata containing confidential information by avoiding its creation during document drafting or subsequently deleting it, as well as by sending a different version of the document without the embedded information through hard copy, scanned or faxed versions. *See, e.g.,* ABA Formal Op. 06-442 (2006). Simply substituting a scanned version of sensitive documents may be adequate in most circumstances.

Ethical Obligations of Lawyers Receiving Electronic Materials

In reviewing the ethical obligations of a lawyer who receives metadata from opposing counsel, the Committee considered the variety of circumstances under which metadata might be received and reviewed. For example, in the context of negotiating a contract, a sending lawyer might intend the receiving lawyer to search and review red-lined comments in a draft document or to review underlying formulas used to create a spreadsheet. Conversely, a sending lawyer may send a draft contract that includes a client's comment on "bottom line price" that the lawyer either was unaware existed in metadata contained within a document or that the lawyer had unsuccessfully attempted to eliminate. In the latter set of circumstances, the sending lawyer may have exercised reasonable care in avoiding disclosure of client confidences through transmission of metadata but was either unsuccessful or unaware of the receiving lawyer's purposeful efforts to uncover confidential information that may provide an advantage during negotiations. There is also the possibility that receiving lawyer may use sophisticated software to reveal or recover information not revealed by most programs.

New Hampshire's Rule 4.4(b), Respect for Rights of Third Persons, was amended in 2008 to provide guidance to lawyers who receive confidential information from opposing counsel or third persons, as follows:

> * * *
>
> (b) A lawyer who receives materials relating to the representation of the lawyer's client and knows that the material was inadvertently sent shall promptly notify the sender and shall not examine the materials. The receiving lawyer shall abide by the sender's instructions or seek determination by a tribunal.
>
> * * *

New Hampshire's Rule 4.4 varies from the American Bar Association's (ABA's) Model Rule in several respects: by substituting "materials" for "document" to make clear that electronic information is covered; by replacing "reasonably should know" with "knows" to create an objective standard; and by adding a new second sentence to specify the obligations of the receiving attorney with regard to inadvertently sent materials. *See* 2008 New Hampshire Comment to Rule 4.4. These differences are significant in light of the ABA's conclusion, shared by a number of jurisdictions, that there is no express ethical prohibition against a receiving lawyer reviewing or using opposing counsel's metadata. *See* ABA Formal Op. 06-442 ("unless other law requires otherwise, a lawyer who receives an inadvertently sent document ordinarily may, but is not required to, return it unread, as a matter of professional judgment"). The ABA and several other jurisdictions have tended to avoid the issue of whether disclosure of confidential information is presumably inadvertent, preferring instead to apply a literal reading of the rule prohibitions. The Committee rejects this approach, for the reasons set forth below.

While most jurisdictions agree that sending attorneys must take reasonable precautions to prevent inadvertent disclosure of confidential information in the form of metadata, there is a split on whether it is permissible for attorneys to review or use metadata received from their opponents. For example, in concluding that the Model Rules of Professional Conduct generally do not prohibit review or use of metadata, the ABA concluded that "the Rules do not contain any specific prohibition against a lawyer's reviewing and using the embedded information in electronic documents." ABA Formal Op. 06-442 (2006). Maryland has followed the ABA on this point, concluding that "there is no ethical violation if the recipient attorney reviews or makes use of the metadata without first ascertaining whether the sender intended to [send it]. MD Bar Ethics Op. 2007-09 (2007).

The District of Columbia has articulated a view that the receiving lawyer is prohibited from reviewing metadata sent by an adversary *only* where there is actual knowledge of inadvertence: "[W]e believe that mere uncertainty by the receiving lawyer as to the inadvertence of the sender does not trigger an ethical obligation by the receiving lawyer to refrain from reviewing the metadata ...". DC Bar Ethics Op. 341 (2007). Colorado adopted a variation of the ABA view, concluding that receiving lawyers may ethically search for and review metadata, but adding that the receiving lawyer should know that any confidential information transmitted with the metadata was transmitted inadvertently unless confidentiality was waived. CO Bar Ethics Op. 119 (2008). Pennsylvania has not adopted a conclusive view, deciding instead that each attorney must exercise moral judgment under the principles of the Rules under particular factual situations. PA Bar Ethics Op. 2007-500 (2007).

The Committee believes that all circumstances, with the exception of express waiver and mutual agreement on review of metadata, lead to a necessary conclusion that metadata is "inadvertently sent" as that term is used in Rule 4.4(b). In addition, because no lawyer would intentionally send confidential information in violation of Rule 1.6, the receiving lawyer necessarily "knows" that the information has been inadvertently sent. The objective standard dictates a conclusion that receipt of confidential information in the form of metadata is the result of inadvertence, just as receipt of attorney notes stapled to draft documents would necessarily be the result of inadvertence. As a result, Rule 4.4(b) imposes an obligation on the receiving lawyer to refrain from reviewing the metadata.

The Committee does not ascribe to the view that the lack of an express prohibition in the Rules defines the extent of a receiving lawyer's obligations. The Committee believes that purposefully seeking to unearth confidential information embedded in metadata attached to a document provided by opposing counsel implicates the broad principles underlying the Rules, including the strong public policy in favor of maintaining client confidentiality. In the Committee's view, there is a shared responsibility on both sides to protect the attorney-client privilege through imposition of a receiving lawyer's obligation to refrain from reviewing confidential information that can be nothing other than "inadvertently sent." *See* Rule 4.4(b) (2008).

Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.

The Committee also rejects the ABA's notion that sending lawyers can avoid harm to their clients by negotiating confidentiality agreements in advance if there is any concern about misuse of metadata. *See* ABA Formal Op. 06-442 (2006). While such agreements may be effective tools in the context of litigation and discovery and are expressly sanctioned under court rules, they are not as effective in transactional settings. There is often no way to effectively retract confidential information, once learned, especially if it involves the subject matter of negotiations. Therefore, unless receiving lawyers have a sound basis to believe that the information was intentionally sent or there has been an express waiver of confidentiality, receiving lawyers should not take steps to review or to use metadata embedded in documents received from opposing counsel. To the extent that metadata is unintentionally reviewed, receiving lawyers should abide by the directives set forth in Rule 4.4(b).

The Committee's interpretation of the New Hampshire Rules is consistent with those jurisdictions that have rejected the ABA conclusion that metadata can be ethically accessed. These jurisdictions include New York, Florida, Alabama and Maine. In 2001, the New York State Bar Association Committee on Professional Ethics concluded that a lawyer may not search for or review metadata in electronic documents, relying principally on a lawyer's ethical obligation to refrain from dishonest, fraudulent or deceitful conduct, as well as conduct prejudicial to the administration of justice. NY Bar Ethics Op. 749 (2001). New York also concluded that "the use of computer technology in the manner described above constitutes an impermissible intrusion on the attorney-client relationship in violation of the Code." *Id.* Interestingly, New York viewed mining of metadata to be a "deliberate act by the receiving lawyer, not carelessness on the part of the sending lawyer, which would lead to the disclosure of client confidences and secrets." *Id.*

Since New York's opinion was issued, Florida, Alabama and Maine have followed the same or similar reasoning in concluding that receiving lawyers cannot review or use metadata. *See* FL Ethics Op. 06-2 (2006) (It is the recipient lawyer's concomitant obligation ... not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient"); AL Bar Ethics Op. 2007-02 (2007) ("the receiving lawyer also has an ethical obligation to refrain from mining an electronic document"); ME Bar Ethics Op. 196 (2008) ("an attorney may not ethically take steps to uncover metadata embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated").

Conclusion

New Hampshire lawyers who either send or receive electronic materials share an ethical obligation to preserve confidential information relating to representation of clients. Sending lawyers must take reasonable care to avoid improper disclosure of confidential information that may be hidden within metadata accompanying electronic materials sent to opposing counsel. It is impermissible for receiving lawyers to search for, review or use confidential information in the form of metadata that is associated with transmission of electronic materials from opposing counsel. This does not preclude opposing counsel from reaching mutual agreement on review of metadata.

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Promoting Healthy, Productive, and Socially Responsible Workplaces

WORKPLACE BULLYING AND THE LAW

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New England Consortium of State Labor Relations Agencies
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Disclaimer and Notice: This material is provided for informational purposes only and is not intended as a substitute for the advice of an attorney.

I. Workplace Bullying 101

A. Definition

Workplace bullying can be defined as the deliberate, often-repeated, health-harming mistreatment of an employee by a supervisor or co-worker(s), through direct and indirect means. It is *not* a bad day at the office, a conflict or disagreement between co-workers, or an unpleasant instance of incivility or disrespectful behavior

B. Common bullying behaviors

- false accusations of mistakes and errors
- hostile glares and other intimidating non-verbal behaviors
- yelling, shouting, and screaming
- exclusion and the "silent treatment"
- withholding resources and information necessary to the job
- behind-the-back sabotage and defamation
- use of put-downs, insults, and excessively harsh criticism
- unreasonably heavy work demands designed to ensure failure

C. Frequency -- According to 2014 Workplace Bullying Institute/Zogby national survey, 7 percent currently experiencing workplace bullying, 27 percent have experienced it during their worklives.

D. Who are the Targets? Who are the Aggressors?

- Subordinates targeted more than peer-level or supervisors
- Women bullied more than men
- Men bully more than women
- High, medium, and low performers may be targets
- Aggressors: Situational vs. psychopath (est. 1% of population) or almost psychopath (est. 10% of population)

E. Harm to Organizations

- Lower morale and productivity
- Higher attrition, absenteeism, and "presenteeism" (i.e., withdrawal)
- Higher risks of workplace violence
- Higher employee benefit costs & potential liability
- On rare occasions, bad publicity

F. Harm to Workers and their Families

- In a study by communications professors (Tracy, Lutgen-Sandvik, and Alberts, 2006), bullying targets' accounts of their work experiences were "saturated" with references to "beating, physical abuse, and death."
- Stress disorders of all types, including PTSD-type symptoms
- Clinical depression
- Cardiovascular disease
- Impaired immune systems
- Gastrointestinal symptoms
- Life and career altering decisions about whether to stay in or leave a job
- Negative residual impacts on children, spouses, other family members

II. Potential Legal Claims and Benefit Issues[1]

A. Employer Liability Issues

- Discriminatory harassment – e.g., bullying motivated by target's protected class status, with behavior evidencing bias
- Disability discrimination – e.g., where bullying creates or exacerbates a mental disability
- Retaliation and whistleblowing claims – especially bullying as a form of retaliation for filing an unlawful employment practice claim or reporting illegal conduct
- Tort liability -- subject to workers' compensation exclusivity
  a. Intentional Infliction of Emotional Distress
  b. Defamation
  c. Assault, Battery, and False Imprisonment

[1] Case law and statutory discussions and citations for many subjects in this section are contained in my law review articles on workplace bullying, as listed at the end of this outline.

- Employer policies and handbooks – especially where policies cover generic harassment

Bottom line so far: These potential claims and sources of protections have proven wholly inadequate as legal responses to workplace bullying. Many, if not most targets do not have grounds for legal relief.

B. Labor Relations

- CBAs: Provisions re abusive supervision
- CBAs: Bullying as constructive discharge
- CBAs: Bullying as good/just cause for discharge
- Concerted activity
- Mainly public sector: Workplace violence policies, municipal/county anti-bullying policies, grand jury investigative reports

C. Potential Individual Liability

- Intentional infliction of emotional distress – especially with deep-pocket individual
- Intentional interference with the employment relationship – possibility in states where co-employee interference is actionable
- Defamation claims – where employee defames co-worker
- Discriminatory harassment – possibility of being an individual defendant

D. Employee Benefits (Private and Public)

- Workers' Compensation -- Covers injuries arising out of and in the course of employment, in some states including intentionally inflicted emotional harm, tho so-called "mental>mental" claims are often contested.
- Health Insurance Premiums – Greater use of health insurance for stress-related physical and psychiatric illnesses.
- Unemployment Insurance – Intolerable working conditions may constitute constructive discharge exception to "voluntary quit" standard.
- Disability Benefits – Individual is eligible when she can show fundamental impairment in performing normal life activities.
- Family and Medical Leave – Bullying targets invoking FMLA rights to get away from abuse.

E. Legally-Related Developments

- Introduction of the Healthy Workplace Bill (see below)
- 2014 developments (as of mid-June): Tennessee enacts legislation directing a public commission to develop a model anti-bullying policy for public employers; similar legislation in New Hampshire awaits the Governor's signature.
- County grand jury reports
- Municipal and county anti-bullying policies & proclamations

- Ballot measures
- Workplace bullying policies covering public workers
- EPLI policies
- Professional associations (e.g., Joint Commission)
- Legal scholarship
- Influence of other disciplines and occupations

F. Healthy Workplace Bill

In terms of proposals for law reform, the most significant development has been state legislative consideration of versions of the Healthy Workplace Bill, model legislation I have authored that:

- Provides targets of severe workplace bullying with a civil claim for damages;
- Creates liability-reducing incentives for employers to act preventively and responsively toward bullying behaviors;
- Includes anti-retaliation protection.

Responses and Developments

- Introduced in some 25 states since 2003; not yet enacted
- Bills active in approx.12 state legislatures currently
- Massachusetts – In the 2011-12 session, the HWB advanced to Third Reading in the House (eligible for floor vote); in the 2013-14 session, it has moved to Second Reading as of May 2014.
- Illinois -- In March 2010, a version of the HWB covering public employees was approved by the Illinois State Senate by a 35-17 vote.
- New York -- In May 2010, the New York State Senate passed the HWB by a 45-16 vote that included strong bipartisan support.
- Puerto Rico – In 2014, a version of the HWB was passed by both houses of the legislature, only to be vetoed by the Governor.
- Grassroots "Healthy Workplace Advocates" groups
- Growing labor support
- Business sector opposition

To Learn More

My articles and writings

Freely downloadable without charge at:
http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=506047, including:

- David C. Yamada, *Workplace Bullying and Ethical Leadership*, JOURNAL OF VALUES-BASED LEADERSHIP (2008)

- David C. Yamada, *Emerging American Legal Responses to Workplace Bullying*, TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW (2013)

- David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-Year Progress Report and Assessment*, COMPARATIVE LABOR LAW & POLICY JOURNAL (2010)

- David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMPLOYEE RIGHTS AND EMPLOYMENT POLICY JOURNAL 475 (2004)

- David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, GEORGETOWN LAW JOURNAL (2000)

Minding the Workplace blog at: http://newworkplace.wordpress.com

- Commentary on employee relations, workplace bullying, employment law & policy, etc.
- Named one of the Top 50 workplace blogs by a leading organizational psychology website, with some 500,000 page views since its launch in late 2008.

Additional Resources

The Workplace Bullying Institute
http://www.workplacebullying.org
(I have worked with WBI on a *pro bono* basis since 1998.)

American Psychological Association, Center for Organizational Excellence
https://www.apaexcellence.org/resources/special-topics/workplace-bullying
(I served as a subject matter expert to the APA on the development of this resource page.)

Gary Namie & Ruth Namie, *The Bully-Free Workplace* (2011) (for employers)

Gary Namie & Ruth Namie, *The Bully at Work* (rev. ed. 2009) (for bullying targets)

Maureen Duffy & Len Sperry, *Overcoming Mobbing: A Recovery Guide for Workplace Aggression and Bullying* (2014)

About David Yamada

DAVID C. YAMADA is a Professor of Law and Director of the New Workplace Institute at Suffolk University Law School in Boston. Professor Yamada is an internationally recognized authority on the legal, public policy, and organizational implications of workplace bullying. He wrote the first comprehensive analysis of workplace bullying and American employment law (*Georgetown Law Journal*, 2000), and variations of his model anti-bullying legislation (named the "Healthy Workplace Bill") have been introduced in some 25 American state legislatures. He is a frequent keynote speaker and presenter at national conferences and is widely quoted and cited in articles on workplace bullying. Professor Yamada's educational background includes a J.D. from New York University School of Law and an M.A. in Labor & Policy Studies from SUNY-Empire State College.