

The Ultimate Backup

A Client News Bulletin

RAINS, LUCIA & WILKINSON LLP

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ARBITRATION COST SHARING PROVISIONS DECLARED UNCONSTITUTIONAL

If your collective bargaining agreement provides for final and binding arbitration of disciplinary grievances, then it more likely than not also contains a cost-sharing provision. Such provisions usually state: "The fees and expenses of the arbitrator and of a court reporter shall be shared equally by the City and the aggrieved employee or Association."

With the publication on July 14, 2005 of the decision in *Florio v. City of Ontario*, 05 C.D.O.S. 6192, such provisions are now deemed **unconstitutional**. This means that labor associations and their individual members no longer have to contribute to the arbitrator's fees and expenses for discipline appeals. Rather, the employer is now required to bear the entire cost.

In *Florio*, a police dispatcher appealed her employment termination under a MOU provision that required the cost of the hearing officer's services to be shared equally between the City and the employee. After losing the hearing, the employee sued the City to recover the \$3,290 she paid as her share of the hearing cost.

The court concluded that a cost-sharing provision could have a "chilling effect" on an employee exercising the right of appeal. For public agencies, the appeal right is governed by constitutional due process principles. Thus, the court reasoned, a cost-sharing provision may have a negative impact on the employee's due process right to a meaningful hearing and is, therefore, unconstitutional.

So, while labor associations and their individual members may still be required to bear the cost of their own presentation at the disciplinary appeal hearing, they are no longer required to pay any portion of the arbitrator's fees and costs.

It is the recommendation of this office that associations with arbitration cost-sharing provisions immediately contact their legal counsel so the public agency can be put on notice that the cost-sharing provision is unconstitutional and can no longer be enforced.

Putting the public agency on notice generally involves invoking the separability clause contained in the collective bargaining agreement. Those provisions usually state that "in the event any provision of this agreement is declared by a court of competent jurisdiction to be illegal or unenforceable, that provision shall be null and void, but such nullification shall not affect any other provisions of this agreement, all of which other provisions shall remain in full force and effect."

The attorneys at Rains, Lucia & Wilkinson LLP stand ready to assist you with this and any other issues that impact your collective bargaining rights. For more information, please do not hesitate to contact us.

This issue of the Ultimate Backup Newsletter, along with past issues and other important information, can be found on our website at www.RLWlaw.com.

Pleasant Hill

2300 Contra Costa Boulevard, Suite 230
Pleasant Hill, CA 94523
PH: 925.609.1699 FX: 925.609.1690

Sacramento

2485 Natomas Park Drive, Suite 340
Sacramento, CA 95833
PH: 916.646.2860 FX: 916.646.2861

San Jose

333 West Santa Clara Street, Suite 800
San Jose, CA 95113
PH: 408.287.3803 FX: 408.286.3161

Santa Rosa

2300 Bethards Drive, Suite F
Santa Rosa, CA 95405
PH: 707.576.8954 FX: 707.526.4018