RAINS, LUCIA & WILKINSON LLP

COLLECTIVE BARGAINING UPDATE

AN ULTIMATE BACKUP NEWSLETTER SUPPLEMENT
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PUBLIC AGENCIES MUST MEET AND CONFER BEFORE RE-ASSIGNING WORK OUTSIDE THE BARGAINING UNIT TO REDUCE COSTS

In these difficult economic times, many public agencies afflicted with serious budget crises are implementing cost cutting proposals that involve the reassignment of duties away from sworn personnel to temporary hires, retirees, or other persons outside the public safety bargaining unit. These proposals may dramatically reduce the amount of work available to members of the bargaining unit, and should be carefully examined by labor associations.

There is no doubt that the assignment of work to individuals outside your bargaining unit is subject to the meet-and-confer requirements of Government Code § 3504. In *Building Material and Construction Teamsters' Union Local 216 v. Farrell* (1986) 41 Cal. 3d 651, the California Supreme Court held that an employer's unilateral decision to eliminate bargaining-unit positions and reassign bargaining-unit work to non-unit employees, without giving prior notice to or meeting and conferring with the unit representative, violated the meet-and-confer provisions of the Meyers-Milias-Brown Act. In that case, the Supreme Court specifically stated:

> It is clear that the permanent transfer of work away from a bargaining unit often has a significant effect on the wages, hours, and working conditions of bargaining-unit employees [citations omitted] . . . . Courts have found violations of the duty to bargain, for example, when an employer has transferred bargaining-unit work to an independent contractor . . . or to established or newly hired employees outside the bargaining unit. . . .

41 Cal. 3d at 658.

In *Dublin Professional Fire Fighters, Local 1885 v. Valley Community Services Dist.*, (1975) 45 Cal. App. 3d 116, 119, a public employer unilaterally adopted a new policy requiring the use of temporary employees for overtime work, effectively depriving the regular employees of their customary priority in seeking such work. Because the workload and compensation of the regular employees were affected, the court held that section 3505 required the community service district to meet-and-confer with the employee representatives before the new policy could be implemented.

Because the assignment of work outside the bargaining unit is properly subject to the meet-and-confer obligations of the Meyers-Milias-Brown Act, a public agency is required to provide "reasonable" *advance* written notice to the Association of its proposed changes. Gov. Code § 3504.5. Once notice is received, it is incumbent on the Association to request to meet-and-confer about

the proposed change; failure to make that request amounts to a waiver of the right to meet-and-confer. *Stockton Police Officers Assn. v. City of Stockton*, 206 Cal.App.3d 62, 65-66 (1987).

Assuming that the request to meet-and-confer has been made, the parties are obligated to meet-and-confer in good faith in an effort to reach agreement. Gov. Code § 3505. Any agreement following negotiations would become binding on the parties once ratified by the City Council. Gov. Code § 3505.1; *Glendale City Employees Assn. v. City of Glendale*, 15 Cal.3d 328, 334-335 (1975).

NEW LABOR CODE PROVISION EXPANDS SICK LEAVE RIGHTS

Effective January 1, 2003, Labor Code section 234 prohibits an employer from disciplining an employee for using sick leave in any year (up to six months accrual) to care for a child, parent, spouse or domestic partner.

"HOLIDAY IN LIEU" PAY MUST BE INCLUDED IN THE FLSA "REGULAR RATE" FOR OVERTIME PURPOSES

RLW's managing partner, **Alison Berry Wilkinson**, whose expertise is routinely called upon to resolve FLSA-related issues, has discovered that many public agencies still refuse to include "holiday in lieu" pay as part of the regular rate for FLSA overtime.

Holiday "in lieu" pay often appears as percentage of base pay paid each pay period to compensate for holiday time, whether or not the employee works on the established holidays. Because the percentage pay bump is received as part of the officer's regular paycheck, the holiday "in lieu" pay qualifies as "regular pay" and must be calculated as such when figuring the employee's FLSA overtime rate of pay.

Employees covered by the FLSA who work more than the specified maximum time periods must receive pay at a rate of at least time and one-half their regular rate of pay for the excess hours worked. 29 U.S.C. § 207(a). The FLSA does not define "regular rate" as merely the employee's salary. Rather, Section 7(e) of the Act specifically provides that "regular rate" means "all remuneration for employment paid to, or on behalf of, the employee ..." 29 U.S.C. § 207(e).

The following types of remuneration must be taken into account in computing the employee's regular rate under the FLSA:

- Shift differentials (*Thomas v. Howard University Hospital*, 39 F.3d 370 (D.C. Cir. 1994);
- Payments for achieving certain levels of certification, such as POST certificates;
- Educational incentives;
- Longevity premiums (*Schmitt v. State of Kansas*, 844 F.Supp. 1449 (D. Kan. 1994));
- Hazardous duty pay (*Featsent v. City of Youngstown*, 859 F.Supp. 1134 (N.D. Ohio 1993), *reversed on other grounds* 70 F.3d 900 (6th Cir. 1995)); and,
- Specialty assignment pay (*Thomas v. Howard University Hospital, supra*).

This list is not exhaustive, but illustrative.

Normally, holiday pay is excluded from the regular rate because it is generally paid only in the pay period in which the holiday falls. However, for those agencies that compensate with holiday pay in a set, fixed sum every pay period, that payment "in lieu" of additional compensation for working a specific holiday is referred to as "holiday in lieu" pay and must be included in the FLSA overtime rate.

Holiday in lieu pay has only recently become a widespread practice. Consequently, public agencies have been slow to look beyond the general principle that holiday pay is not to be included in the regular rate for the purposes of calculating overtime premiums.

But the holiday in lieu concept fits precisely into the category of pay that is required to be included in the regular rate, which refers to the rate actually paid the employee for the normal, non-overtime workweek for which he is employed. *Featsent v. City of Youngstown,* 859 F.Supp. at 1136. If an employee regularly receives on each paycheck a specific sum, then it qualifies for inclusion in the regular rate for overtime purposes.

"The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the workweek, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact." *Walling v. Youngerman-Reynolds Hardwood Co.,* 325 U.S. 419, 424, 65 S.Ct. 1242, 1245, 89 L.Ed. 1705 (1945)." *Local 246 Utility Workers Union of America v. Southern California Edison Co.,* 83 F.3d 292, 297 (9th Cir. 1996).

Indeed, in a little known September 30, 1999 Letter Ruling, the Department of Labor answered the following question:

Q: Firefighters who work for City D on 24-hour shifts are not entitled to take holidays. Instead, they receive "in lieu of holiday pay." The firefighters receive 5% of their base pay as "in lieu of holiday pay" each and every biweekly pay period. The firefighter gets the 5% if he works the holiday, if he does not work the holiday, and even if there is no holiday in the pay period. Thus, a firefighter gets the same 5% added to each paycheck regardless of whether he works every holiday in the year or no holidays in the year. Under the circumstances, must the "in lieu of holiday pay" be included when calculating the regular hourly rate of pay?

A: Yes, the 5% "in lieu of holiday pay" must be included when calculating the employee's regular hourly rate of pay.

See, Fair Labor Standards Handbook, App. III, Page 292 (October 2001).

Recently, RLW has succeeded in securing prospective and retroactive increases in the overtime rate in jurisdictions that have adopted "holiday in lieu" payment plans. If you believe your agency is entitled to increased overtime under similar circumstances, please contact RLW managing partner Alison Berry Wilkinson for assistance.

PIEDMONT POA GETS FIVE YEAR CONTRACT

The Piedmont Police Officers Association, with the assistance of RLW lead negotiator **Leo Tamisiea**, recently signed a five (5) year contract that provides its members with raises of 7% for officers and 13% for Sergeants in the first year. Raises of between 2 and 5 percent will be received thereafter depending on the consumer price index.

Due to the Association's steadfast insistence on improvements to its retirement plan, the POA was able to negotiate the PERS 3% at 55 benefit beginning on January 1, 2004, with an adjustment to 3% at 50 PERS benefit beginning on December 31, 2007 (the last day of the contract).

To obtain this contract, the POA worked closely with the Firefighters Association (led by RLW lead negotiator **John Noble**). Both groups threatened job actions and ballot measures, as the process wound through negotiations, mediation, and direct bargaining with the City Council and City Manager.

The POA was also successful in getting the City to pay the first 18% of the yearly cost increases for health care beginning in 2004, with the remainder split between the City and the POA. This means that for 2004 the City will pay the total cost of PERS Health, as the premium increases for 2004 only amounted to 17%. The POA also agreed to a similar cost-splitting measure for the PERS retirement benefit. The POA will split only those costs that rise above 37%.

The POA was also successful in getting the City to agree to a 3-12 schedule plan on a trial basis, and to increase uniform allowance and POST pay.

REDWOOD CITY POA GETS NEW MOU DESPITE DIFFICULT ECONOMIC TIMES

The Redwood City Police Officers Association settled a three (3) year contract in June 2003, after a full year of difficult negotiations, culminating in three months of mediation. The very difficult economic times presented a unique challenge to improving benefits for the membership. The POA negotiating committee, led by RLW lead negotiator **Leo Tamisiea**, worked themselves ragged to improve salaries and benefits.

The end result -- the membership will receive a 6.51% pay increase retroactive to September 1, 2002 and the 3% at 50 PERS retirement benefit, paid for by the City, effective on July 1, 2004, along with increases to the LTD benefit.

The POA negotiating team, comprised of Ray Fowler, Erin Hogan, John Harp, Carmine Golotta, John Gunderson, and Leo Tamisiea, should be commended for their efforts to overcome the current severe economic climate.

SAN MATEO SHERIFF'S SERGEANT'S ASOCIATION IMPROVES RETIREMENT BENEFITS

The San Mateo Sheriff's Sergeant's Association, led by RLW lead negotiator **Leo Tamisiea**, recently negotiated an improved retirement benefit. The sergeants received the 3% at 55 benefit effective July 6, 2003, and the 3% at 50 benefit effective January 1, 2005.

SEBASTOPOL POLICE ASSOCIATION NEGOTIATES SUCCESSOR MOU

The Sebastopol Police Association negotiated a successor memorandum for a one year term through June 30, 2004, with an immediate two percent increase and a one percent increase effective April 1, 2004. The Association was assisted by RLW lead negotiator **John Noble**. In addition, the Association members achieved improved medical benefits, canine incentives, and bilingual pay. The Association also obtained a new policy permitting retirees to purchase medical coverage with unused sick leave.

ARBITRATION VICTORY GRANTS ALAMEDA POA AND PMA RETIREES FULLY PAID MEDICAL BENEFITS FOR LIFE

When the City of Alameda unilaterally capped the police retiree medical benefit at the Kaiser rates, the Alameda Police Officers Association and the Alameda Police Managers Association filed its first grievance ever in its long labor history. The arbitration of that grievance before Matthew Goldberg, which was handled by RLW managing partner and APOA lead negotiator **Alison Berry Wilkinson**, resulted in the reinstatement of a fully-paid medical benefit for the life of any police retiree.

Back in 1991, the City wanted to transfer all public safety employees to the Public Employees Retirement System (PERS). After substantial negotiations, the transfer was completed, and the following language was implemented and incorporated into all subsequent MOUs:

> Medical Insurance
>
> For 1082 retirees and future Public Safety retirees who are currently members of one of the City sponsored health plans, the City **shall** contribute the health plan costs, at the one-party or two-party rate as the case may be....

In 1991 when the agreement was adopted, the only two "city-sponsored" health plans were Kaiser and HealthNet. Subsequent to the agreement, the City provided PERS Health coverage, which allowed for a multitude of additional providers, all of whom were paid in full by the City.

Suddenly, in 2001, the City was faced with skyrocketing costs for retiree medical health care due to a large number of retirements after the Alameda POA, with the assistance of lead negotiator **Alison Berry Wilkinson**, obtained the PERS 3% at 50 benefit.

As a result, the City *unilaterally* decided to cap the retiree medical benefit at the Kaiser premium rate, because that was the "City-sponsored" plan in existence back when the 1991 agreement was executed. Consequently, many retirees found themselves obligated to pay unanticipated costs of anywhere from $150 to $800 in medical premiums.

The Associations succeeded in re-securing the fully paid retiree medical benefit through contract enforcement arbitration proceedings before Arbitrator Matthew Goldberg. In this contract enforcement grievance, both the Alameda Police Officers and Police Management Associations were represented by RLW managing partner **Alison Berry Wilkinson**.

NEW PERS MEDICAL RATES EFFECTIVE IN 2004

On June 18, 2003, the PERS Board voted to set the new medical rates for all plans for next year. All rates are effective January 1, 2004.

Medical costs continue to rise faster than any other part of the economy. The new rates increase the basic plan costs by 16.7 to 18.4 % next year. This is a substantial increase, but only half of the amount of the other plans – Kaiser, Blue Shield, and Western Health Advantage (WHA). WHA, which is only available in the Sacramento area, has announced rate increases ranging between 32 and 34 percent, whereas the two PERS PPOs actually took a minor reduction of just over one percent for next year.

R.T.F.M.O.U.

By: Todd Simonson[1]

My father-in-law is an astute businessman with a rather blunt way of imparting advice to anyone who cares to listen. Normally, his unsolicited wisdom goes in one ear and out the other for he is a cantankerous old Brit who loves to debate anything for any reason. To respond or even make eye contact during one of his monologues is his invitation to engage you in what can often become a heated, and usually pointless, discussion of irrelevancies. However, there are times when he hits the nail on the head and leaves you with a pithy saying that can be applied to a variety of situations.

His latest sage advice came while he was droning on about how a subcontractor had tried to take advantage of him somehow over the language in their written agreement. The snippet that I caught was: "...then I said to him, 'you'd better jolly well R.T.F.C.'" His pregnant pause after this apparently profound revelation silently begged me to ask what the heck he was talking about. So, I broke my own rule, made eye contact and asked him.

"Read The F---ing Contract!" was his response. It was a simple and catchy saying (and with a swear word to boot) much better than most of his sayings, and it applied universally to many of the disputes that employees have with their employers, a situation in which labor lawyers often find themselves. In our specific line of work the acronym could be tweaked to read "R.T.F.M.O.U." or "Read The F---ing Memorandum of Understanding", for the plain language in that document will almost always have some bearing on the dispute at issue. A recent example comes to mind.

In Santa Clara County, a Sheriff's sergeant recently decided to take his PERS retirement a few months earlier than he had originally planned primarily because of some rather harsh discipline which had been imposed for alleged misconduct. Pursuant to applicable sections of the

[1]Reprinted from the March 2002 Newsletter

Memorandum of Understanding, the sergeant was to receive 50% of the balance of his sick leave bank (a sum, in this case, in excess of $20,000) "*upon death, retirement or resignation in good standing.*" The Sheriff, as had apparently been successfully (and unlawfully) done in past cases, withheld the sick leave payout from the sergeant, forcing him to file a grievance over the interpretation of the aforementioned language.

The Sheriff argued that the modifier "in good standing" used in the M.O.U. not only applied to resignation, but to retirement as well, thus allowing her to deny the sick leave payout. We argued that if her interpretation was accepted, then one would also have to die "in good standing" in order for that person's family to receive the money, likely not the intent of the parties who originally drafted that language. We also pointed out that the County's Merit System Rules defined "in good standing" only in the context of resignation, not retirement, another strong indicator of the intent of the drafters of the clause at issue. In essence, we told the Sheriff to "R.T.F.M.O.U." Not surprisingly, the County capitulated soon after the grievance was filed and paid the sergeant for his sick leave accruals, allowing him to finally cut the last cord with the Sheriff's Department that he had faithfully served for nearly 30 years.

The lessons taken from this set of circumstances will continue to apply well into the future. First, labor negotiators should remain ever-watchful for even the most minor changes in pre-existing language offered by the employer, because there is probably a reason behind the offer. For instance, in our above example, the County could attempt to simply sneak "in good standing" after the word "retirement" during a future M.O.U. negotiation, thus allowing the Sheriff to make a stronger argument for withholding the sick leave accrual of other employees in a similar situation as our sergeant.

Second, if there is an ambiguity in the language of the contract, chances are that it has come up in the past (as it had in this case) and has been decided one way or another. Associations would do well, if possible, to keep a record of such disputes so that future members might be able to take advantage of the precedent set by prior decisions. If we had possessed information of a favorable past decision regarding the language at issue here, the filing of a grievance would probably not have been necessary and the County would have paid without a fight. Past practices of the employer can be a very effective tool in such cases.

Finally, even if the employer cites several examples of prior decisions against the employee regarding contract language, such as occurred in our example, it does not necessarily follow that the employer is correct. Chances are that previous employees had simply not contested the interpretation of the Sheriff and had retired without receiving the monies that were rightfully theirs under the M.O.U. Too often, employees take the word of the employer as gospel without question. To prevent this, every employee should have their own copy of their M.O.U. for reference. It is the document that controls everyday issues like salary, vacation, sick leave and all the other benefits that your Association has fought for over the years. If a dispute arises over a work-related issue it is the first place an employee ought to look for guidance. Remember, when in doubt R.T.F.M.O.U.

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