



CLIENT ADVISOR

CERB Affirms Town's Broad Cell Phone Policy Must Be Bargained Because It Went Beyond Safety

In September, we informed you that the Department of Labor Relations (DLR) had ruled that a Town had to bargain to agreement or impasse before it could implement a new cell phone policy. Town of Plymouth, 40 MLC 65 (2013). On January 30, 2014, the Commonwealth Employment Relations Board (CERB) rejected the Town's appeal, but left open the possibility that it might allow an employer to implement, without bargaining, a narrowly drawn policy focused solely on safety.

Citing a balancing test that the DLR had endorsed for a cell phone policy that was unsuccessfully challenged by correctional officers in 2002, the Town asserted that its core managerial interest in preventing deadly accidents caused by distracted employees greatly outweighed the union's right to bargain over implementation of the policy. CERB distinguished the correctional officers case on the basis that it involved specialized safety concerns inherent in prison work. Further, CERB

noted that Plymouth's policy went well beyond addressing safety considerations.

Besides prohibiting cell phone use while operating Town vehicles or equipment, it disallowed the possession or use of cameras/camera phones in the workplace without specific authorization, limited the use of Town-issued phones for personal business, and limited the making or taking of personal calls at work, with a violation of any part of the policy carrying with it discipline, up to and including discharge. CERB wrote, "Under these circumstances, the Board declines to parse portions of the Cell Phone Policy or to separately analyze fragments, such as the ban on use of Town-owned cell phones while operating Town-owned vehicles, to determine whether application of the balancing test would require a different result had the Town issued a policy more limited in scope and targeted to these safety considerations."

Injured Police Officer Can Be Dismissed For Refusing Employer-Ordered MRI

Employers frustrated with injured police officers and firefighters who obstruct efforts to get them back to work, or retire, will applaud the recent Superior Court decision upholding the dismissal of a Lawrence Police Department ("LPD") officer. Bistany v. Civil Service Commission and City of Lawrence, Essex Superior Court No. 2013-00726-A. The officer defied the City's efforts to determine whether, after three years collecting 41-111F benefits, she had reached a medical endpoint and should return to work or retire. When the officer's neurosurgeon said that he could not answer the permanent disability question without an updated MRI, the LPD ordered her to submit to the test. The officer refused, arguing that the City was trying to dictate her medical treatment. The City dismissed her for disobeying the order, and the Civil Service Commission ruled that the City had just cause to do so.

In upholding the dismissal, the Court noted that the officer had a financial incentive to delay forced retirement because 41-111F provided 100% of her pay while she would receive only 72% of her pay for a disability retirement. The Court went on to state that an MRI was merely a diagnostic test and that, by ordering the test, the LPD was not overruling her desire to treat her injuries with physical therapy rather than surgery. Further, the Court agreed with the Commission that "although the LPD does not have authority to dictate an officer's medical care, the LPD has the right, in order to properly manage its personnel and budget, reasonably to require certain information necessary to enable it to evaluate [the officer's] future employment status."

STUDENT DISCIPLINE

The new student discipline law becomes effective on July 1, 2014. Proposed regulations are available for comment and review on the DESE's website.

Once final, school districts will need to revise and update their policies to comply with the new law and regulations.

CLP is available to answer questions about the new law, proposed regulations, and its impact on school policies and procedures.

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