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THE PUBLIC SECTOR LEADER

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UNDERSTANDING ACT 111

by: Christopher Gabriel

It's that time of year again! Back from the holidays and looking forward to the new challenges ahead. If you have labor contracts that expire in 2019, that means getting ready for collective bargaining. For police officer and/or firefighter contacts, you will have to understand Act 111 to get it right.

Like Act 195, Act 111 contains a mandatory schedule to which the parties must adhere. Bargaining must begin at least six (6) months before the start of the employer's fiscal year (which generally means June 30 for public entities whose fiscal year ends December 31). The employer is not required to commence negotiations before that date. If negotiations do not resolve the contract, the Act 111 bargaining process culminates in binding interest arbitration. A bargaining impasse is deemed by law to occur if a settlement is not reached within thirty (30) days from the day on which negotiations commenced. This is the case regardless of the number of negotiation meetings that occur, if any. This is different from Act 195, which requires at least one meeting between the parties to be attended by a state mediator from the Pennsylvania Bureau of Mediation.

For better or worse, the practical effect of this is that police officer unions often begin and end by giving a list of demands over which they do not really negotiate, preferring instead simply to arbitrate the dispute. The arbitration proceeding replaces the employees' right to go on strike on the theory that certain public-safety personnel cannot be allowed to walk off the job, but nevertheless need to have a means of resolving their labor disputes.

A demand for arbitration may be made by either party at any time after an impasse is reached, but it must be made at least one hundred ten (110) days before the start of the employer's fiscal year (typically September 12 assuming the fiscal year ends December 31). The demand must be in writing and specify the issues in dispute. Ordinarily it is the police officers who demand arbitration. When this happens, the employer is required to respond within five (5) calendar days to identify its issues in dispute. This must also be done in writing. These timetables are mandatory and the failure to comply may result in waiver, meaning that individual issues or even the entire right to go to arbitration may be lost.

If the case goes to arbitration, a panel of three (3) Arbitrators hears the dispute. Each party has the right to choose one Arbitrator, and a third, neutral Arbitrator is mutually agreed upon by the parties. Typical Act 111 interest arbitration hearings last just one day, but complicated cases can take more than that.

All article citations can be found at www.cfwws/psleader.

THE COUNTY & MUNICIPAL BEE

THE RIGHT WAY TO BARGAIN

AROUND THE COMMONWEALTH

REGULATING AIRBNB

NEW YEAR'S RESOLUTIONS

SOLICITOR'S CORNER

After the hearing is concluded, the arbitrators will have one or more meetings privately, known as "executive sessions." Those meeting are used to put together the language of the final award, which is issued as soon as possible after the entire process is complete.

We have had great results in recent Act 111 interest arbitrations, and advise municipalities to seek negotiated settlements and/or arbitration awards with wages in the 2.0% to 2.5% range, coupled with substantial savings on items like health care and pension benefits. If you have contracts expiring in 2019, please call us so that we can help you begin planning now for negotiations.

THE COUNTY & MUNICIPAL BEE!

We are happy to announce that this February we will launch a new e-newsletter called The County and Municipal Bee.

The Bee will come out three times a year (February, May and August) and will feature interviews of county and municipal officials on subjects of interest to local government. In addition, each issue of **The Bee** will feature "Ten Questions" with a labor arbitrator. In this segment, we will have a brief profile of a labor arbitrator who regularly hears grievance and interest arbitration cases for PA local governments. The arbitrator will then be asked a series of nine questions by **The Bee**. The tenth question in each interview will be an "audience submitted question."

The first issue of **The Bee** will discuss the challenge of providing adequate firefighting services across Pennsylvania with the Manager of the City of DuBois, John "Herm" Suplizio, Butler County Commissioner Kevin Boozel, and The Pennsylvania Boroughs Association Senior Director of Education and Sustainability, Ed Knittel. In addition, **The Bee** will profile Arbitrator Robert A. Creo, and ask him "Ten Questions."

To have your questions for Arbitrator Creo considered for the "audience submitted question," please email them right away to thebee@cfwws.com.

COLLECTIVE BARGAINING SAVES YOU MONEY (IF YOU DO IT RIGHT)

By: Stephanie Fera

The first quarter is a time for reviewing your collective bargaining agreements and preparing for negotiations if any of them expire at year's end.

Often the cost of bargaining is foremost in the minds of the elected officials. Taking the time to consider the actual dollars and cents of it all is well worth it. Settling contracts quickly and saving money on the bargaining process can be short-sighted and cost your municipality much more in the long term. To really do it right, you should expect to invest some time and money up front, because preparation and knowing your rights can result in considerable savings over the life of your contracts and beyond.

Many times municipalities and their employees have come to expect their contracts to settle with 3% increases each year, and you may be able to reach an agreement relatively quickly if that is what you want to do. In fact, if settling for a 3% increase in wages each year is your goal, you might be able to save all of the cost of bargaining because the employees and their union likely will accept that, very generous offer quickly.

For 300 employees earning $20/hour, an extra 1% wage increase will cost an additional $773,997 over a three-year contract term.

Consider, however, saving just 1% in each contract year. If your employees are starting with an hourly rate of $20.00 per hour, at the end of three years, 2% increases will result in a new hourly rate of $21.22 compared to $21.85 with 3% annual increases. That does not seem like a huge difference, but it is significant when you consider both the size of your workforce and the time-value of money. An employer with 300 full-time employees making $20.00 per hour who pays a 3% increase rather than a 2% increase, will pay an extra $773,997 over the three-year contract term. That amount will continue to compound year after year (meaning you pay it again and again, and it keeps growing, forever).

Let's look at another example. The chart below compares total wages for 50 employees earning $15.00 per hour over three years. **The extra 1% costs $96,750.**

Year	Total Wages 2% Increase	Total Wages 3% Increase	Difference
2020	$1,591,200	$1,606,800	$15,600
2021	$1,623,024	$1,655,004	$31,980
2022	$1,655,484	$1,704,654	$49,170
TOTAL	**$4,869,708**	**$4,996,458**	**$96,750**

The theory holds no matter what the size of your workforce. Even a small borough or township with just a few employees will see substantial costs overtime if they are too generous in their labor settlements. In nearly every scenario, those extra (unnecessary) costs dwarf the cost of doing things correctly in the beginning. When you consider also that the wage number is just the easiest example to use, not the only issue where good decisions and bargaining experience can save money, you begin to realize the value of experienced labor counsel. Healthcare, pensions, paid time off, schedules, job duties, the ability to have working supervisors, there are many issues that can shrink (or balloon) the bottom line. Doing it right saves money, and the difference is huge. Having an experienced labor lawyer on your side can save your municipality money as well as help you avoid other pitfalls in bargaining.

There are **training opportunities for municipal managers and elected officials available**. CFWW+S will give sex harassment and discipline and write-up trainings for municipal officials at the following places and times. January 4, Kittanning, Armstrong County; January 25, Wellsboro, Tioga County; and March 22, Somerset, Somerset County. These are our most popular trainings. Contact Christopher Gabriel at 412-328-5853 to RSVP or to get more information.

If you are tired of the 'same old, same old' games on **PELRAS Friday**, hop in the car and pop down to Somerset and see us instead!

Act 99 of 2018. Amended The Pennsylvania Borough Code to permit borough councils to enter into contracts or make purchases without advertising, bidding or price quotations for specified maintenance and emergency related purposes. Boroughs should contact their solicitors or other legal counsel for advice on this important change.

Three new enactments, (Act 135-137 of 2018) amended the Borough Code, Third Class City Code, First Class Township Code, and other municipal laws to require those entities to publish financial information from the annual, audited financial statements and to tell the public where those documents can be accessed for review. Municipalities should ask their solicitors to make sure they are complying with this new requirement.

WHERE IS IT?

Lions and Tigers and Chainsaw Bears, oh my! This is a picture of some of the offerings at one of Pennsylvania's most unique (and totally awesome) festivals. It takes place this year on April 25-29, 2019 in one of the State's most iconic little boroughs.

Can you guess where it is?
(Find the Answer on the last page.)

SOLICITOR'S CORNER:

REGULATING AIRB&B

And Other Short-Term Rentals Through Zoning

By: John Rushford

House sharing can provide a great benefit to short-stay travelers and property owners. The practice, however, presents several issues for local municipalities. For example, a typical issue is handling noise and parking complaints from the neighbors of short-term rental properties. Borough councils and township boards of commissioners, with assistance from their municipal solicitor, are often challenged to come up with a system to regulate this new short-term rentals issue.

Attempts to regulate short-term rentals most often begin through enforcement of a local zoning ordinance. A typical municipal zoning ordinance might establish where a hotel or bed and breakfast may be operated as a principal permitted use or by special exception within certain zoning districts. The Pennsylvania Commonwealth Court, however, has held that a short-term rental use for a residence is distinguishable from a hotel or bed and breakfast. The court has recently reversed four trial court decisions and held in favor of property owners' operation of short-term rentals, where the local zoning ordinance did not specifically address a short-term rental use.

In one of these cases, *Slice of Life, LLC v. Hamilton Twp. Zoning Hearing Board*, the property owner did not live at the property and used it solely as an income-producing short-term rental. The township zoning officer issued an enforcement notice, citing the owner for violating the zoning ordinance by operating the single-family dwelling as "transient lodging."

The trial court upheld the zoning hearing board's denial of an appeal of the enforcement notice. The Commonwealth Court reversed and held that the owner's use of the property was consistent with its existence as a single-family dwelling.[1] Because the township zoning ordinance did not define the terms "single family," "transient tenancy" or "transient lodging," the court held that the ordinance was ambiguous and should be interpreted in favor of the owner and against any restriction on his use of the property. In February 2018, the Pennsylvania Supreme Court accepted an appeal of the Commonwealth Court's reversal.[2]

The Pennsylvania Supreme Court's forthcoming opinion, in this case, will be instructive to municipalities in confirming whether zoning ordinances should be amended to address short-term rental uses. As of this date, no decision has been issued. Look out for more information on this in future issues of The Public Sector Leader. In the meantime, many municipalities are heeding the advice of the Commonwealth Court, which stated in *Slice of Life* that "[e]nterprises such as Airbnb have expanded the possible uses of single-family dwellings and a township can address such uses in the zoning ordinance."[3] In other words, if a municipality is concerned about the existence of short-term rentals within its borders, it should proactively regulate their existence through amendments to the zoning ordinance clarifying the definition of single-family dwelling to exclude short-term rentals.

In addition to the zoning ordinance, a municipality can regulate issues with short-term rental properties through enforcement of its parking or noise control ordinances. And stand-alone ordinances also can be enacted to regulate permitting and inspection of homes that are marketed as short-term rentals.

Lastly, Counties that have a hotel tax can require that all owners operating short-term rentals register for the collection of County's Hotel Room Rental Tax. Allegheny County currently requires the tax and in 2016 it amended its Hotel Room Rental Tax ordinance to allow for booking agents such as Airbnb to collect and remit the required hotel room rental tax directly on behalf of the homeowner. This tax is governed by the County Code under 16 P.S. § 1770.12 for Second Class and Second Class A Counties. The hotel tax for third through eighth class counties is governed by 16 P.S. 1770.10.

If you need help navigating AirBNB and other short-term rentals in your municipality give us a call.

All article citations can be found at www.cfwws/psleader.

A LIST OF NEW YEAR'S RESOLUTIONS FROM SCHIRNHOFER V. PREMIER COMP SOLUTIONS, LLC[4]

By: Neva L. Stotler

Lessons from the *Schirnhofer* case provide salient reminders for employers and legal counsel—a virtual top three list of New Year's resolutions for employers in 2019. This case, after years of litigation, is scheduled for trial in early 2019 in the U.S. District Court, Western District of Pennsylvania, on the employee's claims under the American's with Disabilities Act and the Pennsylvania Human Relations Act. The employer is a Pittsburgh company for which employee, Schirnhofer worked as a billing clerk. Schirnhofer alleges that she is disabled with PTSD, affecting her ability to communicate, was denied a reasonable accommodation of additional breaks and thereafter terminated because of the request. The employer denied the accommodation and asserted different reasons for the termination.

Resolution No. 1: Make an effort to familiarize yourself and your employees with the ADA.

The Americans with Disabilities Act, 42 U.S.C. 12101-12117, passed during President George H.W. Bush's administration, remains the most sweeping disability legislation on the books. It was significantly amended in 2008 (Americans with Disabilities Act Amendments Act, "ADAAA") to broaden the definition of disability, to identify specific conditions that are as a matter of fact disabilities, and to send a clear and concise message to employers that the process of determining whether an employee is disabled is not meant to be a long, protracted or burdensome process for employees. In short, if an employee can be reasonably accommodated, then provide the accommodation, says the Federal government. Yet, the ADA remains a law that is often last on employers' lists to understand and implement.

In *Schirnhofer*, the employee suffered from PTSD and was being informally accommodated by her direct supervisor with extra breaks. Once HR realized this, it was reported to ownership who indicated a formal FMLA or accommodation request was required. All indications are that the employee provided the employer with information from a therapist that she suffered from PTSD, but the employer doubted she was disabled and summed up the request to a scam to get extra smoke breaks. That the additional breaks were being accommodated within the operations of the business makes denying the accommodation an uphill battle.

When a request for accommodation is made, the law requires that you go through a process. The process is as important as the result. That is to say you must undergo an interactive process to determine whether there is an appropriate accommodation. There may not be, or there may be a different or modified accommodation. For instance, granting an extra break, but prohibiting that break from being used to smoke, may make sense. In *Schirnhofer*, it is alleged that they skipped the process altogether, which is a violation of the federal and state laws.

Policies and training can help educate employers and employees on the ADA and to manage these requests effectively.

Resolution No. 2: Be cautious about providing advice outside your wheelhouse.

It is often tempting as lawyers to be jacks of all trades and masters of none, to be concerned about referring our clients to other lawyers who may have more specific experience, or to be too complacent to do the research often required to learn new areas or update the old. As an employer you should be sure you have competent and experienced counsel advising you on these important employee issues.

In *Schirnhofer*, it is alleged that the employer's legal counsel provided advice that failed to consider the impact of the 2008 amendments on counsel's legal analysis. It is alleged that legal counsel cited cases decided prior to the ADAAA, leading to an incorrect analysis relative to Schirnhofer's disability and accommodation request. EEOC regulations, guidance and the 2008 definition of disability leave little doubt that PTSD is a disability. To fail to address an accommodation request based on the analysis that PTSD is not a disability is a risky proposition. Premier's HR employee provided ADA guidance to ownership, politely questioning the advice of legal counsel. The guidance provided indicated that communication is a major life activity and PTSD is certainly a disability according to the ADAAA and the EEOC. The HR employee encouraged ownership to go back to legal counsel just in case it would be helpful, but to no avail. The input of the HR staff did not redirect legal counsel. And, of course, the HR staff's communications to ownership were produced for the benefit of trial. The employer/owner when deposed, doubled down and testified that she did not read the information from her HR employee, but she passed it along to her attorney, that stuff was above her head, and "that's what [she] pay[s] him for." The ADA requires employers to understand and execute on the requirements of the law and regulations. Damages in the *Schrinhofer* case, if any, will be assessed against the employer, not the lawyer.

Resolution No. 3: Avoid knee jerk reactions. Human resource decisions often involve a marathon and not a sprint.

The complaint alleges Schirnhofer requested an accommodation in January 2014 for two additional 10 minute breaks and provided support from her therapist. In late January, the request was denied with no further discussion or clarification, e.g. no interactive process. On February 5, 2014, Schirnhofer was informed that she was being terminated because she was "smoking in the stairwell" and for a violation of the employer's social media policy. There were mere days between the request for accommodation and the termination. For an employee, it is impossible not to connect the two, and for an employer it is difficult to defend the time between the protected activity and termination of employment.

It is not unusual that discipline and a disability request happen within a close time frame. It is not ideal, even for the most adroit employer. But here are some considerations. A request for accommodation should be dealt with separately from discipline—separate meetings, intentionally structure conversations to avoid confusing the issues, and separate documentation. Regarding discipline, it's the time for patience. Use a progressive process, consider prior discipline and evaluations. Be thorough in your investigation and documentation of conduct and be aware of how you have treated other employees in similar circumstances. If you can defend a termination based upon the information gathered and the termination is important to business operations, proceed. If not, process the accommodation request and use a lesser form of discipline to document conduct or performance missteps.

It is uncertain what the outcome of the *Schirnhofer* case will be—settlement, verdict. However, several things are certain: 1) a lot of money will have been spent to achieve an outcome, and 2) the employer could have done things substantially differently had it had the benefit of your New Year's Resolutions.

All article citations can be found at www.cfwws/psleader.

WHERE IS IT ANSWER:

This is the Annual Chainsaw Carvers Rendezvous in beautiful Ridgway, Elk County, PA. (Hat tip to Elk County Commissioner Jan Kemmer for the photo!)

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Christopher Gabriel, Editor

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