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THE PUBLIC SECTOR LEADER

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WHEN CAN EMPLOYEES QUIT THE UNION?

by: Stephanie Fera

In the wake of the U.S. Supreme Court's decision in *Janus v. AFSCME* eliminating fair share fees for non-union members, we have received an increase in questions from our clients asking when their employees may quit the union and what that means for them.

The first question has a clear answer. The Pennsylvania Public Employee Relations Act (Act 195) provides that employees who have joined a union must remain members of the union for the duration of the collective bargaining agreement, but they may resign during a period of "fifteen days prior to the expiration of any such agreement.[1]" Most collective bargaining agreements have a provision which confirms that rule. Therefore, any employee who wishes to leave the union, will have to wait until 15 days before his or her current collective bargaining agreement expires. For employers with collective bargaining agreements expiring December 31st, employees would have to give notice of their resignation to the union between December 16 and December 31.

What quitting the union means to the employee is an issue which is a little murkier. Under Act 195, the union remains the exclusive representative for all employees in the certified bargaining unit. Section 606 provides:

> Representatives selected by public employees in a unit appropriate for collective bargaining purposes shall be the exclusive representative of all the employees in such unit to bargain on wages, hours, terms and conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have them adjusted without the intervention of the bargaining representative as long as the adjustment is not inconsistent with the terms of a collective bargaining contract then in effect: And, provided further, That the bargaining representative has been given an opportunity to be present at such adjustment.[2]

In *Janus*, Supreme Court rejected the premise that the unions would refuse to serve as the executive representative without agency fees, and also confirmed that neither the employer nor the union could enter collective bargaining agreements which provide different benefits than those given to non-members. Therefore, the union remains the exclusive representative for wages, hours, and terms and conditions of employment, but employees who are not union members are not permitted to vote to ratify the agreement.[3]

Furthermore, if the collective bargaining agreement provides that only the union may appeal a grievance to arbitration, the individual employee will lack standing to pursue the grievance independent of the union.[4] The question really becomes, will the union continue to represent non-member employees when disputes arise under the collective bargaining agreement?

Unions have the duty of fair representation to all employees in the bargaining unit—members and non-members alike. That is not changed by the elimination of the fair share fees.[5] Furthermore, the Court points out that representation of non-members in grievance proceedings is not always done solely for the benefit of the employee, but

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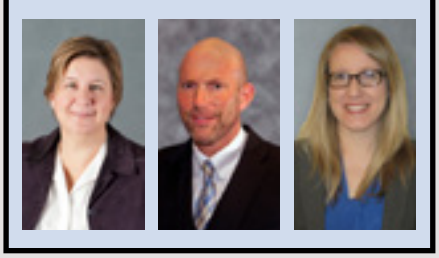

instead is done to further the union's interest and to retain control over the terms of the collective bargaining agreement.

However, the Court also noted that the burden created by having to represent non-members could potentially be eliminated by means other than the imposition of fair share fees—namely, by requiring nonmembers to pay for the union representation in grievance proceedings or other similar arrangements. Unions are actively discussing this issue, and we are likely to see a variety of benefit packages offered to non-paying members. Some may attempt to entice them to join, others will limit their benefits. Time, and probably some litigation, will tell how that process shakes out. The Public Sector Leader will keep you up-to-date on these developments.

CELEBRATING ONE YEAR AT CFWW+S

It's hard to believe, but it has been one year since we moved our county and municipal labor and employment practice. Here's some of what we've been up to in the last year:

We have been involved in negotiating dozens of collective bargaining agreements for municipalities and county governments. That work has yielded great results for our clients and we find that contracts are settling for wage increases of about **2.25% on average**. That has been coupled with either new wage tiers for new hires that are significantly below the wages paid to incumbents and/or big savings in health insurance (typically in the form of increased deductibles or removing working spouses from the plan).

Cities, **Townships**, and **Boroughs**, in 2019 we want to help you with **your police and fire Act 111 bargaining and/or Interest Arbitration** and also with your **public works and clerical contracts**. If you have Act 111 or Act 195 contracts expiring at the end of 2019, contact us soon so that we can get started after the new year.

CALL US FOR DETAILS - 412.328.5853 OR VISIT - WWW.CFWWS.COM/COMPARE

NEW U.S. DEPARTMENT OF LABOR OPINION LETTERS

Offer Guidance On No-Fault Leave Policies And Other Topics

By: Stephanie Fera

Many may not know that the Wage and Hour Division of the U.S. Department of Labor issues guidance in the form of opinion letters on the Fair Labor Standards Act (FLSA), the Family Medical Leave Act (FMLA), and other laws that it enforces. Employers can not only search previously issued opinion letters, but they can also request a letter to address their particular circumstances.[6] The opinion letters focus on the facts presented and an employer must represent that they are not seeking an opinion addressing an issue the WHD is currently investigating or for use in any pending litigation.

Recently the Wage and Hour Division issued one of these opinion letters on the subject of whether an employer's no-fault attendance policy violates the FMLA.[7]

No-fault leave policies are becoming more frequent with employers battling sick leave abuse and knowing the DOL's stance on this topic is important as you craft your policies.

The employer's policy addressed in the Opinion Letter (FMLA2018-1-A) utilized a point system. Employees would accrue points for tardiness and absences. However, employees would not accrue points for certain absences, including FMLA protected leave, vacation, workers' compensation, and other specified reasons. Employees who accrued eighteen points would automatically be terminated.

The points would remain on an employee's record for twelve months of "active employment," a term which was not defined, and an employee would return from an FMLA or workers' compensation-related leave with

the same number of points that he or she had accrued when the leave commenced.

The WHD opined that the policy did not violate the FMLA, because the removal of points was recognized as a reward for working and thus an "employment benefit." As long as all types of equivalent leave (e.g. worker's compensation leave) were treated the same, there was no violation of the FMLA with this type of policy, because the "employee neither loses a benefit that accrued prior to taking the leave nor accrues any additional benefit to which he or she would not otherwise be entitled."

Despite this seemingly simple guidance, employers must nevertheless keep in mind that the EEOC has for several years also been on the lookout for no-fault leave policies, which seek to limit the amount of leave an employee can take *no matter what the situation*. Many employers still have policies indicating that the maximum allowable leave is one year (or some other amount) at which time an employee who cannot return to work will be terminated. The EEOC has made clear that this type of policy violates the employer's obligation to engage in the interactive process to find a reasonable accommodation under the ADA. This rule, together with the Wage and Hour Division's new guidance on no fault leave policies provide ample reason to have your policies reviewed by legal counsel.

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AROUND THE COMMONWEALTH

The United States Department of Labor updated their FMLA forms on September 4th, which reflect a new expiration date of August 31, 2021. It was a procedural change and the forms are identical to the old forms aside from the new date, but employers should use the updated / current forms, which are available on the DOL's website at https://www.dol.gov/whd/fmla/forms.htm.

The state Department of Labor and Industry submitted proposed regulations, published in the Pennsylvania Bulletin on June 23, to increase the salary level used to determine overtime eligibility, raising the threshold from the federal minimum of $23,660 annually to $47,892 by 2022 with automatic updates every three years thereafter. The proposed changes further include significant revisions to what are known as the "duties tests," which are also used to determine eligibility. The public comment period on these proposed changes closed on August 22, and it remains to be seen whether the change will, in fact, become law beginning in 2019.

An increasing number of counties are expressing interest in leaving the State Civil Service System. At **CFWW+S** we are working with several counties on this effort. If your county might be interested please call us.

There is great interest in a summit-type meeting with the Administrative Office of the Pennsylvania Courts and county commissioners to discuss a dispute resolution process when issues arise during collective bargaining. Stay tuned to the PS Leader for details on this developing story, which should be of great benefit to all counties and their courts.

WHERE IS IT?

This whimsical fountain inspired by the Eugene Field poem, "Wynken, Blynken, and Nod" (originally titled, "Dutch Lullaby") has been located in one Pennsylvania town since its dedication in 1938.

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

SOLICITOR'S CORNER:

THE PENNSYLVANIA SUPREME COURT DECISION

In *Gorsline v. Board of Supervisors of Fairfield Township* Strikes A Blow To Drillers

By: John Rushford

In a 4-3 opinion authored by Justice Donohue the Pennsylvania Supreme Court reversed a decision of the Commonwealth Court authorizing gas wells as a conditional use in a District zoned residential.

Inflection Energy, LLC ("Inflection") submitted to the Board a "Zoning and Development Permit Application" (the "Application") seeking permission for a "drilling, completion, production and operation of multiple gas wells" use on a 59.877-acre parcel of land located on Quaker State Road in Montoursville, Pennsylvania and owned by Donald and Eleanor Shaheen (the "Shaheen Pad"). The Shaheen Pad is located in Fairfield Township's R-A district. The Application proposed to improve the existing farm access road with a stone access drive from Quaker State Road/T-855 to the pad site, a level pad, wellhead, and a temporary water impoundment area with sediment and erosion controls.

As the Ordinance does not identify "drilling, completion, production and operation of multiple gas wells" as a permitted or conditional in the R-A district, the township zoning officer referred Inflection's Application to the Board for further consideration pursuant to section 12.18 of the Ordinance, sometimes referred to as its "savings clause."

This clause provides that where the use is "neither specifically permitted or denied" and an application is made by an applicant to the Zoning Officer for such a use, the Zoning Officer shall refer the application to the Board of Supervisors to hear and decide such request as a conditional use. The use may only be permitted if:

12.18.1 It is similar to and compatible with the other uses permitted in the zone where the subject property is located;

12.18.2 It is not permitted in any other zone under the terms of this Ordinance; and

12.18.3 It in no way is in conflict with the general purposes of this Ordinance.

This section specifically provides that that, "the burden of proof shall be upon the applicant to demonstrate that the proposed use meets the foregoing criteria and would not be detrimental to the public health, safety and welfare of the neighborhood where it is to be located."

The central issue in this appeal was whether the Board erred in finding, and the Commonwealth Court erred in affirming, that Inflection satisfied the requirement in subsection 12.18.1 that the proposed use was "similar to" other uses allowed in the R-A district.

The Supreme Court upon review of record determined that Inflection did not identify any use allowed in the R-A district that it considered to be "similar to" the drilling and operation of industrial shale gas wells.

The Court found the Board's findings lacked any specific findings that there was any permissible use in the R-A district that it found to be similar to the use proposed by Inflection. The Court also dismissed Inflection's argument that that it should be treated as a public utility or essential service. Both of these uses require the applicant to be municipality or a public utility. Inflection is a private for-profit business.

The take away here is that a municipality cannot just allow drilling anywhere. Detailed findings of fact are a must.

SUPREME COURT NOMINEE: BRETT M. KAVANAUGH

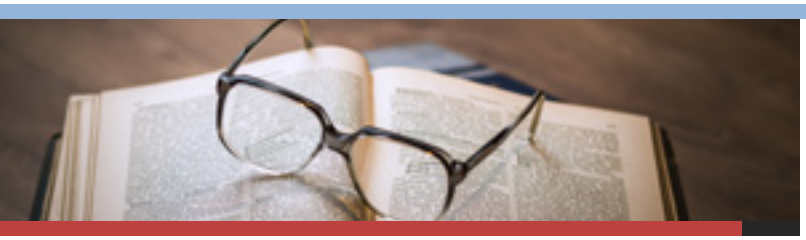
By: Lynne L. Finnerty

Brett M. Kavanaugh is a former clerk to the recently retired Justice Anthony M. Kennedy. He later joined Kenneth Starr at the Office of Independent Counsel and helped write the 1998 Starr Report to Congress. Kavanaugh worked in the White House for five years in the George W. Bush Administration. In 2003 Kavanaugh was nominated by George W. Bush to the United States Court of Appeals for the District of Columbia Circuit. However, he was not confirmed until three years later, because of concern by Democratic Senators that he would not rule in an unbiased fashion. In 2006, by a vote of 57-36, he was confirmed by the Senate to the United States Court of Appeals for the District of Columbia Circuit.[8]

The D.C. Circuit's caseload rarely contains cases directly concerning local government. It follows that Kavanaugh's track record regarding issues relevant to local government is sparse. However, there are some notable decisions. For example, in Wesby v. District of Columbia, Kavanaugh's dissent from the Court's decision not to rehear a case en banc points to a leniency in favor of police officers as opposed to those who were subject to arrest.[9] In Wesby, Kavanaugh's dissent argues that the police officers should have been granted qualified immunity, and sets forth several scenarios, one of which includes speculation without any evidence about the state of mind of the Defendants which Kavanaugh concludes could have provided probable cause to arrest the Defendants.[10] Kavanaugh's position on the First Amendment, and his willingness to uphold or strike down local laws restricting free speech, is not entirely clear. For instance, in Mahoney v. Doe, Kavanaugh authored a concurrence upholding an ordinance which prohibited an anti-abortion activist from "chalking" the ground in front of the White House.[11] However, in U.S. Telecom Association v. Federal Communications Commission, Kavanaugh argued in a concurrence that the net neutrality rule impermissibly infringed on an internet service providers' editorial discretion and violated the First Amendment.[12]

During the next term of the Supreme Court, the Court will consider a land use case and determine whether the Court should reconsider prior precedent that requires property owners to exhaust state court remedies in order to ripen federal takings claims.[13] If confirmed to the lifetime position as a Supreme Court Justice, Kavanaugh will have the opportunity to participate in that case and other cases that could overrule prior precedent and create law for an entire generation.

As we go to print, the Kavanaugh nomination has been thrown into turmoil by numerous allegations of sexual misconduct by several women. Important developments will be covered in the next issue of the PS Leader.



UNDERSTANDING SECTION 1620 OF THE COUNTY CODE

By: Christopher Gabriel

The County Code is a relatively old statute, with many of its parts remaining unchanged for nearly 90 years. Section 1620 was part of the original enactment, but was amended when Pennsylvania's collective bargaining laws were passed in the late 1960's and early 1970's. That amendment, and the subject of county collective bargaining for employees who report to the row officials or to the judges of the courts of common pleas, has proved very difficult to navigate. This decades-old problem is coming up with increasing frequency because Pennsylvania's courts, in an effort to bolster the notion of a "Unified Judicial System" have recently taken a much more active role in negotiations. The Administrative Office of the Pennsylvania Courts (AOPC) has advised the common pleas judges in the last several bargaining cycles to insist that their rights be protected. Ensuring that this is done in a way that does not derail the county's effort to settle the contracts is critical, and not always easy.

When it was originally enacted, section 1620 of the County Code merely stated that the salaries of county officers would be fixed by law, and the salaries of county employees would be set by county salary boards. That remains the case today, but after Act 111 and Act 195 were enacted in 1968 and 1970, Section 1620 was amended to say that county commissioners would be responsible for representation proceedings before the Pennsylvania Labor Relations Board (PLRB), and they would also handle the collective bargaining on behalf of the row officers and the courts. The General Assembly directed, however, that these responsibilities were "in no way" to affect the "hiring, discharging, and supervising rights" of the row officers and judges. That directive has proved much easier to say—or write into law, than it has been to understand and follow in practice.

In the last 40 years, there has been a near-constant string of lawsuits arising from disputes between row officials or judges on the one hand, and county commissioners on the other, seeking to clarify who has the responsibility and authority to handle one matter or another touching on employee terms and conditions of employment. From those cases we know that the courts and the counties are viewed as joint employers of court-appointed employees, and that commissioners (and not the judges or row officers) have exclusive authority to engage in collective bargaining.[14] We know that in doing so, commissioners are required to consult with the judges and row officers about the negotiations, and that the commissioners are not supposed to agree to any provision to which those other officials object on the basis of an infringement of their "hire, fire, supervise" rights.[15] We also know that while both judges and row officers have 1620 rights protecting their authority from the collective bargaining process, the judges also enjoy an extra layer of constitutional protection not available to the row officials because the courts are a separate and equal branch of the State's government.[16]

There are two new developments that county commissioners should understand. First, AOPC has taken a more active role in advising the common pleas judges about how to assert their 1620 rights. This has not gone smoothly, and often the first indication counties have that the courts will insist on language changes to the collective bargaining agreement comes at the very end of bargaining. Unfortunately, that is often after everything has been hashed out with the union and so presents an enormous problem in terms of time and effort for commissioners and their representatives. The most common experience of this new participation by the courts has therefore unfortunately been demands by judges that they get language changes that are mostly consistent with black letter law, but that are somewhat unmoored from the practical reality of how collective bargaining agreements actually get worked out. Fortunately, however, the second new development has been that the lawyers at the AOPC (who are the ones advising the judges about 1620 in the first place) have been very willing to discuss matters and to work with representatives of the commissioners to resolve matters in a way that both protects the legal rights of the judges and can practically be achieved.

To that end, there is an effort underway to begin a long-term conversation between representatives of the county commissioners and AOPC so that the parties can seek to address 1620 concerns well before negotiations begin and to provide commissioners and judges with a place to go when disputes arise between them. In future issues of the Public Sector Leader we will provide updates on how that effort is proceeding.

WHERE IS IT ANSWER:

This statue was donated by the Honorable Fred W. Bailey in memory of his wife Elizabeth to Wellsboro, Tioga County. It sits on the town green across Main Street from the courthouse.

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Christopher Gabriel, Editor

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