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LAW REPORT

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Do You Know Where Your Ethics Ordinance Is? State Officials and Employees Ethics Act Now in Force

The State Officials and Employees Ethics Act (the "Act"), 5 ILCS 430 (Public Acts 93-0615 and 93-0617), has been in effect for employees and elected and appointed officials at state agencies (including community colleges and universities) since its passage late last year. The Act also requires local governments, including school districts, to adopt — within six months after the effective date of the Act — restrictions on gift-taking (Article 10) and political activity (Section 5-15) that are at least as strict, if not more, than the requirements for state government.

According to the Attorney General's calculations, which are based on the passage of the initial Act, May 19, 2004 was the deadline for adopting the applicable provisions of the Act. The Attorney General has drafted a model ordinance, along with an explanatory summary, which can be accessed from the Attorney General's website: www.ag.state.il.us. The Illinois Municipal League (IML) also has chimed in with its own draft ordinance, located on its website: www.iml.org. The Illinois Association of School Boards (IASB) similarly has prepared a draft ordinance. Each has taken a different approach, based upon the Act and the perceived needs of the jurisdictions involved.

Most local governments are only now preparing the appropriate ordinances and policies to implement the Act. Others are still not completely aware of what the Act provides and what they are required to do. A discussion of the Act's provisions and open issues follows.

Restrictions on Prohibited Political Activity

Section 5-15 of the Act, one of the prohibitions local governments must adopt, restricts what is characterized as "prohibited political activity." Under Section 5-15, not only are employees banned from engaging in "prohibited political activity" during work hours, but employees and elected or appointed officials may not require other employees to participate in political activities: (1) as part of their job or during time off compensated by the public employer; (2) as a condition of employment; or (3) in exchange for additional compensation. There are fifteen different categories of prohibited political activity set forth in the Act, which can be summarized as follows: (1) participating in political meetings, demonstrations or events; (2) soliciting contributions for political fundraisers or events; (3) soliciting anything of value intended as a campaign contribution; (4) planning or conducting public opinion polls in connection with campaigns or political organizations; (5) assisting at the polls on election days; (6) soliciting votes for a particular candidate (or for or against a referendum), circulating petitions on behalf of a candidate, or making contributions on behalf of a candidate for elective office; (7) distributing campaign literature, campaigning for elective office or working on any campaign for elective office; and (8) serving as a delegate to a political party convention. Employees also are prohibited from intentionally misappropriating government property or resources for prohibited political activity.

Restrictions on Gifts: Gift Ban Act Revisited

The Act rescinded the old State Gift Ban Act and reincorporated it in a revised form as Article 10, which is the second provision local governments must include in their local ordinances or policies. Except as otherwise provided in the Act, no officer, member or employee shall intentionally solicit or accept any gift from any "prohibited source" or in violation of any federal or state statute, rule, or regulation. This ban applies to and includes the spouse of and immediate family living with the officer, member or employee.

The new gift ban provision makes major changes in the area of what gifts are acceptable. For example: (1) the number of gift exceptions set forth in the old Gift Ban Act are condensed from 22 to 12; (2) the express exception for gifts of rounds of golf or tennis has been eliminated; and (3) a $75 per calendar day cap has been added to the exception for gifts of food or drink consumed on the premises from which they were purchased or prepared or catered. The revisions, however, continue to permit the receipt of items from any one prohibited source during any calendar year having a cumulative total value of less than $100.

Other Provisions of Note

The Act contains many provisions directed only at state employees or, to the extent local government entities are effected, the Act does not require the passage of a separate local policy. For example, the Act contains a prohibition against "revolving door" hiring at the state level. Legislators and certain other elected and appointed state officials must adhere to a number of restrictions on their activity as well. There are also new prohibitions on persons and their spouses and immediate family members who live with them from serving on boards, commissions, task forces or authorities created by state law or by executive order.

What the Act Says about Enforcement, Policies, and Training For State Employees

For state agencies, the Act contains several provisions designed to assist in its enforcement. First, it creates ethics commissions and inspectors general with subpoena power for both the legislative and executive branches. These groups and individuals will work to detect any wrongdoing by elected officials and state government agencies and offices, and are given the power to impose fines and recommend discipline against those who violate the law. Workers who do disclose any violation of the law or other wrongdoing will be protected by new, tougher whistleblower provisions.

Violations of Section 5-15, the prohibited political activities provision, and making false reports under the Act constitute a Class A misdemeanor. Violations of Article 10, the gift ban prohibitions, constitute a business offense punishable by a fine of at least $1001 and up to $5,000. Employees who violate Section 5-15 or Article 10 also are subject to discipline or discharge.

The Act also places affirmative obligations on State agencies with regards to issuing policies, posting notices and training. Section 5-5 of the Act requires certain agencies, including the Board of Higher Education and the Community College Board (for state employees of universities and community colleges respectively), to adopt personnel policies addressing the Act which include policies relating to work time requirements, documentation of time worked, documentation for reimbursement and travel on official state business, compensation, and the earning or accrual of state benefits for all state employees. State agencies also must post a notice of state employee protections under the Act. State employees must participate in annual ethics training, with new hires and newly elected or appointed officials receiving the training within the first six months of hire or taking office.

Enforcement, and Training Requirements for Local Governments

Many questions remain to be resolved as to how the Act is to apply to local governments. The Act only requires that local governmental regulations on gift-taking and political activity be at least as strict, if not more, than the requirements for state employees. This raises issues for many local governments, including school districts, which lack the statutory authority to make violations of their ordinances or policies a criminal act. Does the "at least as strict" proviso apply to the penalties as well? Are fining and discipline sufficient? Perhaps, but perhaps not. The Attorney General has taken the position that the Act gives all local governments the authority to make violations regarding prohibited political activity a criminal offense. The Attorney General also takes the position that each local government — as opposed to local state's attorneys — are responsible for prosecuting such violations. Whether a court will agree remains to be seen.

The Act does not require that local governments adopt ethics commissions or appoint ethics officers, although the Attorney General recommends that they do. Each local government should adopt some fair process to address violations, whether or not it is an ethics commission, and an ethics officer would help employees and officials navigate the Act.

The Act also does not require that local governments train their employees and officials, although we highly recommend that they do. Ethics training for all employees and elected and appointed officials should be a key component of insuring early understanding and compliance. Given the Act's complexity and the potential fall-out from an elected official or high level employee being found in violation of the Act, and the potential liability for whistleblower violations, such training should not be ignored.

Going Forward

Whether a local government works from the examples out in the public domain, or prepares its own unique ordinance, each jurisdiction needs to develop and implement an ordinance/policy sooner rather than later. Each jurisdiction will have to choose its own path as to the open issues. Should you require assistance in reviewing a draft ordinance, preparing the ordinance, addressing the open issues, training employees and officers, or working out any impact or effects bargaining issues with your unions, please do not hesitate to contact your Seyfarth attorney.

District Required Not To Fingerprint Employees

Rossville-Alvin Community Unit School District No. 7[1]

The IELRB overruled the Administrative Law Judge's recommended decision in which she had determined that the employer-school district did not violate the IELRA through its policy of fingerprinting new employees. The District had notified the union of a plan and, although the union submitted a bargaining request, the District unilaterally implemented the fingerprinting procedure. The IELRB rejected the ALJ's conclusion that the District maintained no bargaining duty because an applicant did not become an educational employee until a background check was satisfactorily completed.

The IELRB followed the case law from the National Labor Relations Board in finding that the applicants qualified as educational employees because they had been placed on the payroll and had begun performing

work for the District. Thus, the fingerprinting of job applicants involved a mandatory subject of bargaining. Under a *Central City* analysis, the benefits of bargaining over a district's fingerprinting policy outweighed the burdens that bargaining would impose on the District's authority, according to the IELRB. That Board concluded that the District's refusal to bargain in good faith over a mandatory subject of bargaining violated provisions of the IELRA. The IELRB therefore directed the District to cease and desist from its unfair practice and to bargain, upon request, with the union.

Interest Arbitration Reviewed and Residency Allowed

The First District Illinois Appellate Court issued a brief decision reviewing an interest arbitration award involving Calumet City and the Illinois Fraternal Order of Police. This decision reflects a growing body of case law in Illinois addressing the level of deference to which an arbitration is entitled in an interest arbitration proceeding. The message that is being passed down from the Appellate Court is that the courts have a very limited role in reviewing interest arbitration decisions and that in all but the most egregious cases, an interest arbitration award will stand.

In *City of Calumet City v. Illinois Fraternal Order of Police Labor Council*,[2] the City of Calumet City and the FOP were unable to agree on the terms of a successor collective bargaining agreement covering the City's police officers. The parties submitted a total of 17 issues to interest arbitration (13 economic and four non-economic issues), and the arbitration panel adopted the union's proposal on 12 of the issues.

The City appealed the panel's award in its entirety to the circuit court, which affirmed the award. The City then further appealed three of the 12 issues to the Appellate Court. The issues specifically on review before the court were the panel's ruling: 1) to lift the residency requirement and to permit officers to live within a 20-mile radius; 2) to grant employees the right to elect to submit any disciplinary dispute in excess of five days to grievance arbitration; and 3) to permit officers to use their official uniforms, indicia and equipment in secondary employment.

While the City raised challenges that the arbitration proceedings did not conform to the statutory requirements of the Illinois Public Labor Relations Act, the court rejected such arguments based on record evidence that the City voluntarily stipulated to various procedural aspects. Substantively, the City contended that residency is not a mandatory bargaining subject and that the arbitration panel acted arbitrarily and capriciously in issuing its award. The court took guidance from its earlier decision in *Town of Cicero v. Illinois Association of Firefighters*[3] in which it determined that residency is a mandatory bargaining subject and established a test for applying the "arbitrary and capricious" standard in the interest arbitration context.

An interest arbitration award may be found to have been issued arbitrarily and capriciously if it: "1) relies upon factors that the legislature did not intend for the panel to consider; 2) entirely fails to consider important aspects of the problem; or 3) offers an explanation for its decision that runs counter to the evidence or that is so implausible that it could not be ascribed to a difference in view of the product of the panel's expertise."[4] The court reviewed the arbitration panel's application of the statutory factors to the evidence introduced in support of the union's residency proposal (which permitted the officers to reside within a 20-mile radius of the City) and concluded that the reasoning did not reflect an arbitrary and capricious decision. Record evidence existed to support the conclusion that safety considerations supported the expansion of the residency area and that such expansion would not compromise the police department's ability to meet its operational objectives.

The City also contended that the IPLRA prohibits an award permitting officers to submit discipline of more than five days to grievance arbitration. The court relied on Illinois precedent to conclude that as a home-rule jurisdiction, the City could provide for an alternative review of discipline, other than through a board of fire and police commissioners. In other words, as a home rule jurisdiction, the City had the authority to provide for disciplinary procedures that conflicted with the framework set out in the Board of Fire and Police Commissioners Act. The court further determined that since the City voluntarily entered into a collective bargaining unit with the union, pursuant to which disciplinary matters were a mandatory subject of bargaining, the arbitration panel had the authority to issue the award it did.

The court finally addressed the City's argument that the arbitration panel's award concerning use of City uniforms, indicia and equipment outside of City employment violated the Private Detective Act. The court summarily concluded that the City is not covered by that Act. On balance, this decision reiterates the limited judicial review of interest arbitration awards and suggests that as long as an interest arbitration panel's analysis relates to the statutory requirements of Section 14 of the Public Labor Relations Act, the award will not be overturned by the courts.

Attorneys' Activities

On February 26, 2004, Jim Baird and Amanda Sonneborn spoke to a group of Village managers and administrators at the Illinois City/County Management Association Winter Conference in Peoria on Personnel Issues for Small Communities.

Jim Baird also spoke to the Northern Illinois Alliance of Fire Protection Districts on February 14, 2004 regarding the Legal

Activities, cont'd from page 3

Update on Labor Relations, Contract Negotiations and Promotion Act Issues. Ron Kramer and Ed Bergmann also spoke at this conference. Ron presented on the new State Ethics Act and Ed spoke on FLSA issues.

Ron Kramer and Jill Leka served as instructors at the Illinois Institute for Continuing Legal Education's "Conducting Employment Investigations" training in March.

On February 26, 2004, Bob Smith spoke at the Illinois Public Employer Labor Relations Association's Spring Training Conference regarding Union organizing trends and developments, with a particular emphasis on "card check" recognition efforts.

Jill Leka presented in Chicago on March 5th and Collinsville on March 12th for the ISBA Labor & Employment Law Update on New Legislation.

Abby Rogers spoke on the Card Check challenges in Bloomington to the IML Home Rule Attorneys on March 12th.

Elaine Fox gave a presentation to the Council in Management on "Deciphering Whether Your Employee Has a Serious Health Condition" on March 25th.

Bob Smith spoke at the National Public Employer Labor Relations Association's Annual Training Conference in Washington, D.C. concerning the "Negotiation of Contractual EEO Clauses" on March 31st.

Jim Baird spoke at the NPELRA on Advanced Bargaining Practices and Techniques in Washington, D.C. on March 29th.

Bob Smith spoke at the National Employment Law Institute's Annual Advance Level Human Resources Conference in Chicago on "Workplace Privacy" on May 13th.

Elaine Fox and Marc Jacobs presented on "Hot Human Resources Topics for Healthcare Employers" for the Illinois Society of CPA on May 13th.

Upcoming Activities

July 8, 2004: Seyfarth Shaw LLP will be hosting a Breakfast Briefing on State Officials and Employee Ethics Act. To register, visit www.seyfarth.com/events.

July 27, 2004: Elaine Fox and Marc Jacobs will be presenting a full-day program on "Employee Discharge and Documentation in Illinois" through Lorman Education Services.

Endnotes

1 *Rossville-Alvin Community Unit School District No. 7 v. NEA, IEA, Rossville-Alvin Educational Association*, 19 PERI 158 (IELRB 2003).

2 No. 01 CH 1363 (1st Dist. Nov. 26, 2003)

3 IAFF Local 717, 338 Ill.App.3d 364 (2003),

4 *City of Calumet City*, slip op. at 7, *citing Town of Cicero*, 338 Ill.App.3d at 372.

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