



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

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Hot Topics

Attorney Spotlight

What School Officials Need to Know about Tax Certioraris & PILOT Agreements

Joseph G. Shields, Esq.

Given the increasing financial strains being placed on School Districts these days, it is becoming increasingly important for Districts to protect their tax bases by taking an active role in tax certiorari proceedings and granting businesses Payment-In-Lieu-of-Tax (PILOT) agreements. In order to do so, it is critical for Board members and School Administrators to understand some basic principles associated with these matters.

Tax Certioraris

In a tax certiorari proceeding, a taxpayer seeks to lower (or eliminate) its real property assessment. If the taxpayer is successful, the reduced assessment has a dual impact on a School District – first, the reduction of assessment results in an increase of the school tax rate, and second, the School District is required to issue a tax refund to the taxpayer.

Too often, School Districts will allow a Town or other municipality to defend, negotiate and settle these cases, without having a “seat at the table.” This can be a costly mistake. We recommend that Districts set up procedures to carefully evaluate these tax cert cases, utilizing the expertise of their business officials and their school attorneys. The goal of this process should be to decide on a case-by-case basis whether it makes financial sense for the District to “intervene” or join the tax cert proceeding to assist in its defense.

PILOT Agreements

A PILOT Agreement, on the other hand, is typically offered by a county

Industrial Development Agency (“IDA”) as a financial incentive to attract, retain, and expand businesses within their jurisdiction. A PILOT Agreement usually involves the IDA taking legal title to the real and/or personal property involved in the project. Since the IDA is not required to pay taxes on any property it holds title to under its jurisdiction, the tax savings can then be passed on to the assisted business.

Unlike tax certiorari proceedings, School Districts are only granted limited authority with respect to PILOT agreements. Generally speaking, a School District does not have power to “stop” a PILOT Agreement.

However, in the event that an IDA chooses to deviate from its Uniform Tax Exemption Policy to grant a PILOT, it must send a notice to the Superintendent of Schools. **Be on the lookout for these notices.** Should you receive one, contact your school attorney as soon as possible. Your School District may have rights which, if exercised, may result in your District receiving significantly more revenue from the transaction.

School Districts should also maintain good working relationships with the county and municipal governments within its borders. These cordial relations may be the best opportunity a School District has to affect or at least get advance notice of future PILOT agreements.

If you have any questions regarding tax certiorari proceedings or PILOT agreements, please do not hesitate to contact us at 315-437-7600.



Joseph G. Shields, a partner and member of the firm’s Management Committee, has 20 years of experience in representing school districts and private sector clients in complex legal matters. Mr. Shields represents school districts in all aspects of Education Law, including all phases of capital construction projects from preparation of the bid documents, selection of responsible bidder to dispute resolution.

Mr. Shields also counsels clients on protecting school districts’ real property tax base by defending complex commercial tax certiorari proceedings and negotiating payment-in-lieu-of-tax (“PILOT”) agreements on behalf of school district clients. In addition to his practice, he lectures on matters relating to Education Law and other topics several times each year. Mr. Shields serves on the Board of Directors of the New York State Association of School Attorneys, is a member of the New York State Bar Association and is admitted before the New York State Courts and Federal District Courts.

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Personnel Issues**U.S. Dept. of Labor Creates Smartphone App For Employees to Track Hours and Challenge Employer Wage Payment and Recordkeeping Practices**

The U.S. Department of Labor (DOL) recently announced the launch of an application for smartphones which is designed to let employees independently track the hours they work and determine the wages they believe they are owed. Specifically, the app allows users to track regular work hours, break time and any overtime hours.

Most school districts' non-certified, non-instructional staffs are paid according to a union contract which specifies how much an employee is paid per hour, and how much they receive for each overtime hour worked. Now, employees utilizing this app can track what they believe are all the hours (regular and overtime) that they work. If their records do not match a district's time-keeping and payroll records, employees are encouraged by the app to contact the DOL to investigate.

According to the DOL's news release regarding the app, "[t]his new technology is significant because, instead of relying on their employers' records, workers now can keep their own records. This information could prove invaluable during a Wage and Hour Division investigation when an employer has failed to maintain accurate employment records." Secretary of

Labor Hilda L. Solis added, "This app will help empower workers to understand and stand up for their rights when employers have denied their hard-earned pay."

It is unclear at this point how the DOL plans to use this information during an investigation of employee claims about unpaid wages or failure to maintain accurate employment records. However, as noted above, the DOL has said that the app information could be "invaluable" in such situations, suggesting that the information will be viewed as credible evidence.

Given the potential for the widespread use – and possible abuse — of this app, employers (especially those in New York) must be prepared. Under New York law, for example, if an employer does not have accurate time records for an employee, the State DOL will presume that any records that an employee produces are accurate, unless the employer can refute that presumption with convincing evidence to the contrary. This often comes into play when an employee has been misclassified as exempt from the overtime pay requirements of the Fair Labor Standards Act (FLSA). As you might imagine, this app could be misused by an employee to claim wages owed for

many hours (and particularly, overtime hours) not actually worked over a period of years.

In addition, the new app could effectively end the long-standing DOL wage and hour enforcement principle which allows employers to exclude, from total hours worked, small increments of time that cannot be effectively tracked by an employer's time-keeping methods (the so-called "de minimus" rule). With the DOL's new app, employees will almost certainly be keeping track of those small increments of time just after clocking in or just before quitting time.

Employers should work closely with their employment attorneys to make sure that all employees are properly classified as exempt or non-exempt under the FLSA and that accurate time records are kept for all employees (for whom records must be kept under State and Federal law). Consistent and meticulous adherence to proper wage payment and record-keeping practices will be the only way to effectively combat the likely abuse of the new app.

If you have any questions regarding the foregoing or need further assistance in this regard, please feel free to contact us.

Commissioner's Corner**Summer School Programs:****What to Do and Not to Do about Student Discipline and Attendance**

With summer school rapidly approaching, we wanted to remind our clients of several key rulings and other guidance from the Commissioner of Education on how to handle the discipline of students who are attending summer school and the basic rules regarding participation in summer school programs.

Student Discipline

The following are some key points to remember when disciplining students

during summer school:

- The procedures set forth in Education Law §3214 regarding student discipline are not applicable to students attending summer school. (*Appeal of Michael L.* 38 EDR 84 (1998)). However, disciplinary action cannot be imposed on a student attending school in complete disregard of due process. (*Goss v. Lopez*, 419 U.S. 565 (1975))

- Minimal due process requires that an individual be afforded "an opportunity to appear informally before the person or body authorized to impose discipline and to discuss the factual situation underlying the threatened disciplinary action." (*See, Matter of O'Connor v. Bd. of Education*, 65 Misc. 2d 40 (1970))

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Commissioner's Corner

Summer School Programs: What to Do and Not to Do about Student Discipline and Attendance (cont'd)

In other words, the Commissioner of Education has held that attendance at summer school programs is voluntary, not compulsory. Accordingly, contrary to the dictates of Education Law §3214, a principal or other administrator could suspend a student for all of summer school. With that said, however, you must provide summer school students and their parents with a minimal due process conference to discuss the underlying factual incident and the proposed penalty.

Attendance Guidelines

As set forth in the State Education Department's *Handbook for Summer*

School Administrators and Principals, remember that "when a school district operates a summer school or participates in a BOCES regional summer school, all resident students, including public, nonpublic and home-schooled students, are entitled to attend the district's summer school program. For the purpose of summer school instruction, a resident nonpublic school student is not considered to be an enrollee of the nonpublic school (4 EDR 230). A school district or BOCES **cannot** charge resident students fees for any part of the district's program offered to meet high school diploma requirements. However, students must meet

any academic requirements for a particular course."

If you have any questions regarding discipline of students or attendance during summer school, please do not hesitate to contact us at 315-437-7600.

**Free Webinar on
Bullying, The Internet,
Discrimination & Free Speech**

**Thursday, June 2, 2011
12:00 noon - 1:30 pm**

For more information or to register visit www.ferrarafirm.com.

Civil Service Issues

Unemployment Insurance Implications of Reduction in Hours for Civil Service Employees

A recent decision of the Appellate Division, Third Department, held that a reduction in hours of a civil service employee's position does not trigger the rights under Civil Service Law §80 that apply when a position is "abolished or reduced in rank or salary grade". This principle applies if the hours are not reduced so far as to make the position "part-time" under the applicable civil service rules. *Schoonmaker v. Capital Region BOCES*, 80 A.D.3d 965 (3d Dept. January 18, 2011), *lv. app. denied*, 2011 WL 1584868 (April 28, 2011).

If a position is reduced, but still involves work for at least four days per week and/or earnings of at least \$405 per week, then an employee who remains on the job is not eligible for unemployment insurance benefits. In order to be eligible for unemployment insurance benefits, a person must have enough

"effective days" of "total unemployment". A person is not eligible for unemployment insurance benefits if the employee works at least four days in a week. Also, a person is not eligible for unemployment insurance benefits if the employee earns an amount which is equivalent to at least the highest benefit rate under the law (currently \$405 per week). Labor Law §523; *Matter of Robinson [Commissioner of Labor]*, 75 A.D.3d 1030 (3d Dept. 2010); N.Y. State Dept. of Labor, Unemployment Insurance Information for Claimants, page 9, available at <http://www.labor.state.ny.us/formsdocs/ui/TC318.3e.pdf>.

If a position is reduced to fewer than four days per week and less than \$405 per week, the employee may remain on the job and apply for partial unemployment insurance benefits. A person who works 3 days in a week may receive

benefits of 1/4 of the employee's full rate; a person who works 2 days in a week may receive 1/2 of the employee's full rate; a person who works 1 day in a week may receive 3/4 of the employee's full rate. Unemployment Insurance Information for Claimants (cited above).

It has been held that a claimant who voluntarily left her employment without good cause may be denied unemployment insurance benefits if the claimant left her job because of her dissatisfaction with the reduced earnings that would result from the cut in her work week. She could have stayed employed and supplemented her earnings with partial unemployment insurance benefits. *Matter of Orenstein [Hartnett]*, 173 A.D.2d 1029 (3d Dept. 1991).

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Civil Service Issues**Unemployment Insurance Implications of Reduction in Hours (cont'd)**

In general, dissatisfaction over a reduction in work hours is not considered to be good cause for leaving employment. *Matter of Ebisike [Commissioner of Labor]*, 306 A.D.2d 777, *lv. app. denied*, 100 N.Y.2d 514 (2003). (That case involved a reduction of the claimant's weekly work hours from 35 to 26 1/4, which was a reduction of 25%.)

However, a claimant is not disqualified from receiving benefits for not accepting employment when "the wages or compensation or hours or conditions offered are substantially less favorable to the claimant than those prevailing for similar work in the locality, or are such as tend to depress wages or working conditions". Labor Law §593(2)(d). This depends on the specific facts.

For example, in one case, the claimant began working for the employer for

\$6.80 per hour, five days per week, eight hours per day. The employer later began paying for her health insurance. Several years later, the claimant's rate of pay was increased to \$11 per hour, but her hours were reduced. Her hours were initially reduced to four days per week and then to three days per week. She was then advised that the employer would no longer pay for her health insurance and she resigned. The Unemployment Insurance Appeal Board and the Appellate Division determined that there was a substantial decline in the terms and conditions of the claimant's employment from the time she initially started working for the employer which provided good cause for her to leave her employment. They also concluded that the claimant did not refuse an offer of suitable employment without good cause. The offer made to claimant required her to perform the same duties she performed prior to her resignation at a salary of \$7 per hour,

three days per week, with no health insurance. This offer was substantially less favorable than the terms of her employment prior to her resignation and she was not required to accept it. *Matter of Knoblauch [Mark Custom Recording - Sweeney]*, 239 A.D.2d 761 (3d Dept. 1997).

It is interesting to note, however, that the Unemployment Insurance Law requires a person who is still unemployed after receiving 13 weeks of benefits to accept any job (he/she can perform) which pays at least 80% of his/her previous salary, assuming that that amount is not less than the prevailing wage for that job. Failing to accept such employment would result in that individual losing eligibility for benefits. See Labor Law §593(2).

If you have any questions, please do not hesitate to contact us at 315-437-7600.

Upcoming Events

<u>Attorney(s)</u>	<u>Date(s)</u>	<u>Location/Event/Program</u>
Miles Lawlor Charles Symons	6/2/11	Webinar on <i>Bullying, The Internet, Discrimination & Free Speech</i> (register at www.ferrarafirm.com)
Susan Johns	6/3/11	Client In-Service Program on <i>Section 504</i>
Eric Wilson	6/4/11	New York State Association of School Attorneys, 11th Annual School Attorney Law Conference, The Sagamore Hotel, Bolton Landing, NY - <i>Consolidation: Is Less Really More?</i>
Don Budmen	6/13/11	Client In-Service Program on <i>Social Networking Issues for Parents/Students</i>
Dennis Barrett Eric Wilson	6/30/11	Client In-Service Program on <i>Annual Professional Performance Reviews ("APPR")</i>

Please note that "Client In-Service" programs are being provided to particular clients at their request. If you are interested in having us present a program for you, please contact us so we can schedule one to suit your needs.