PELRAS UPDATE
Public Employer Labor Relations Advisory Service

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Mandatory Overtime as an Essential Job Function Under the Americans with Disabilities Act

by Robert Vernon, Esq.

The Eighth Circuit recently upheld the principle that mandatory overtime could be recognized as an essential job function, meaning that a disabled employee could not request to avoid working overtime as a reasonable accommodation under the Americans with Disabilities Act (the "ADA").

In *McNeil v. Union Pacific Railroad Co.*, the employee worked as a critical call dispatcher at Union Pacific's 24-hour dispatch call center, where her job included responding to calls related to incidents on or near railroad property to help ensure employee and public safety. In order to guarantee that this position was consistently covered, Union Pacific had a written policy that dispatchers were not allowed to end their shift until they were relieved by the next shift's dispatcher. Also, a dispatcher's shift was color-coded to represent overtime expectations for the employee. Depending on which color shift the dispatcher was scheduled to work, the dispatcher may be expected to work up to four additional hours either before or after their scheduled shift if another employee failed to show up to work.

McNeil was off work on disability leave for several months. When she attempted to return to work, McNeil and her physician requested an accommodation under the ADA of working only morning shifts with no overtime. McNeil did not provide an end date for this accommodation, and did not provide any medical records indicating when this restriction would end. Union Pacific determined that it could not make an accommodation of not requiring McNeil to work overtime for an indefinite period of time, and could not identify a reasonable accommodation that would allow McNeil to safely return to work in her assigned position.

McNeil argued before the Court that working overtime was not an "essential function" of her job as a dispatcher, and because of this, Union Pacific should be forced to accommodate her no overtime request. The Court disagreed, recognizing that Union Pacific had

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established guidelines stating that overtime was "mandated" and had schedules including "multiple layers of redundancy to ensure staff availability for overtime work." The court noted that if a dispatcher was unable to work overtime, then either other employees would have to work overtime more often, or the safety of Union Pacific's operations would be impaired.

The Court further rejected McNeil's argument that Union Pacific's willingness to accommodate a "no overtime" schedule for a temporary, two month, period demonstrated that overtime was not an essential function. The Court recognized that a temporary reprieve from overtime was a limited burden on the Company, different from a permanent or indefinite accommodation. Union Pacific's willingness to accept a temporary restriction on overtime did not mean they had to bear the different and greater burden of a permanent accommodation.

The Eighth Circuit's ruling is part of a trend in federal courts to recognize that under the ADA, overtime can be considered to be an essential function of a job. *See also, Gavurnik v. Home Properties*, 712 Fed. Appx. 170 (3d Cir. 2017) (and cases cited therein). The Court recognized several relevant factors to consider whether overtime was essential to a particular job, including: (1) written job descriptions prepared before advertising and interviewing applicants for the job, (2) the frequency and amount of time spent on the job when overtime was required, and (3) the consequences of not requiring the employee to work overtime.

Employers must keep in mind, however, that an employee with a "serious health condition" who is eligible for intermittent leave under the Family and Medical Leave Act ("FMLA"), may use leave to be excused from mandatory overtime if the leave is consistent with his/her certified serious health condition. *See* 29 CFR § 825.205(c). Employers with questions regarding mandatory overtime and medical excuses, including leave under the FMLA, should consult with legal counsel, and should also ensure that mandatory overtime is clearly spelled out in the "essential functions" section of the applicable job description.

Pennsylvania Supreme Court Rules that Working Part-time is not Dispositive of Termination Protections for Police

by Julie A. Aquino, Esq.

The Pennsylvania Supreme Court recently issued a decision that broadens the protections afforded to part-time police officers in boroughs. *Deforte v. Borough of Worthington,* 212 A.3d 1018 (Pa. 2019). This decision suggests that either the Borough Code or the Police Tenure Act protections extend to part-time police officers regardless of whether they were hired through a civil service process.

The Borough of Worthington in Armstrong County employed four part-time police officers, including its Chief of Police at the time, DeForte. The Borough discharged DeForte and a patrol officer, Townsend, without a pre-disciplinary or post-disciplinary hearing. Both were part-time employees and each simultaneously worked for another jurisdiction. Neither were hired through the civil service process. DeForte and Townsend alleged in their lawsuit, among other claims, that they should have been provided with removal protections afforded under either the Borough Code's civil service provisions or the Police Tenure Act. The District Court dismissed their claims, holding that neither civil service nor the Police Tenure Act applied, and DeForte and Townsend appealed to the Third Circuit Court of Appeals. The Third Circuit requested that the Pennsylvania Supreme Court interpret the Borough Code and the Police Tenure Act with respect to part-time police officers.

The civil service provisions of the Borough Code apply to police forces of at least three (3) "members."

8 Pa. C.S. § 1171. The term "member" is not defined, but the term "police force" is defined in relevant part as "organized and operating as prescribed by law, the members of which devote their *normal working hours* to police duty…." 8 Pa. C.S. § 1170 (emphasis added). The Police Tenure Act applies to all Second Class Township police forces, as well as Borough and First Class Township police forces of no more than two "members," and its removal protections apply only to "regular full time police officers." 53 P.S. §§ 811-812.

Both the Borough Code and the Police Tenure Act prohibit suspension, demotion or termination without cause, as specified in the statutes, and afford covered employees with a pre-disciplinary and post-disciplinary hearing. The lower court in *Borough of Worthington* determined that civil service did not apply due to the size of the Borough's police force, and that the Police Tenure Act did not apply because the Borough employed no full time police and DeForte and Townsend were part-time officers.

The Pennsylvania Supreme Court reasoned that the Police Tenure Act and the Borough Code "dovetail" so that "borough police forces which are not governed by the Borough Code – on the grounds that they have fewer than three members – are covered by the Tenure Act." *Borough of Worthington*, 212 A.3d at 1023. The Court determined that the General Assembly intended to "fill the gap created by virtue of the Borough Code's failure to extend its protections to borough police forces with fewer than three members." *Borough of Worthington*, 212 A.3d at 1023. When calculating the size of a police force for determining which statute applies, the Court held that the employer should use the "normal working hours" criteria, and that part-time status is not dispositive.

While the Court left many questions unanswered, the decision is intended to afford part-time officers with protection under either civil service or the Police Tenure Act, at least to those part-time officers who devote their "normal working hours" to the employer. As a result, Pennsylvania Boroughs – and potentially other municipal entities – should no longer assume that part-time officers do not have due process protection with respect to suspension, demotion or discharge, although questions remain regarding the number of hours, and regularity of hours, a part-time officer must work in order to be entitled to those protections.

Although the Police Tenure Act's removal procedures only apply to full time officers by the plain language of the statute, the Court stated in a footnote that part-time officers may "under some circumstances, be considered as having full-time employment where they are available to work on a full-time basis." *Borough of Worthington*, 212 A.3d 1021, n. 4. On the other hand, officers who fall into the category of "extra police officers" remain excluded from coverage under civil service, and presumably under the Police Tenure Act, although the exact line of demarcation between an "extra police officer" and a part-time officer who devotes "normal working hours" to the employer remains an open question.

What about the *hiring* process for part-time officers? The Court left unanswered the question of whether part-time officers must be hired through civil service. The Court opined in a footnote that whether an officer was hired through civil service is not necessarily dispositive of whether just cause and due process protections should be applied upon dismissal. *Borough of Worthington*, 212 A.3d at 1025, n. 8.

Lastly, although the Court specifically limited its decision in *Borough of Worthington* to boroughs, the rationale used to extend civil service protections to part-timer officers in cases of dismissal, suspension or demotion likely extends to other municipal statutes. All local governments that employ part-time police officers should consult with their labor counsel or solicitor regarding the impact of this recent decision on their employment practices.

Pennsylvania Clean Slate Law — What it Means for Employers

by Julie A. Aquino, Esq.

In 2018, the Pennsylvania Clean Slate Law was enacted and created an automated computerized process to seal arrests that did not result in convictions within 60 days, summary convictions after 10 years, and certain second and third-degree misdemeanor convictions if there are no subsequent misdemeanor or felony convictions for a period of 10 years after the time of conviction. Under the Clean Slate law, some first degree misdemeanor offenses can also be sealed by petition. For an offense to be automatically sealed, all court fines must have been paid. Importantly, the Clean Slate Law does not allow for record sealing of more serious offenses such as murder, kidnapping, sexual offenses, weapons charges, and child endangerment. A complete list of offenses excluded from sealing is located at 18 Pa.C.S. § 9122.1.

The automatic sealing process under the Clean Slate Law began in June 2019, and according to the Pennsylvania Bar News, about 7.5 million of 30 million eligible criminal records have been sealed. The remainder of the eligible criminal records are on track to be sealed by the end of June 2020. See Pennsylvania Bar News, Volume 29, No. 18 (Sept. 23, 2019). Sealed records are hidden from public view, but are visible to law enforcement agencies and employers who use FBI background checks. 18 Pa.C.S. § 9122.5.

Employers should be aware that job applicants are permitted to respond to questions about criminal convictions that have been sealed as if the offense did not occur. 18 Pa.C.S. § 9122.5. If the job applicant is required to undergo a FBI background check, such as the background clearance required under the Child Protective Services Law, then the offense will still appear. In these circumstances, the job application should be clear and direct the applicant to report all offenses, including those that have been sealed.

Most job applications require applicants to disclose information about their criminal convictions. Under the Pennsylvania Criminal History Records Information Act ("CHRIA"), employers may only use a misdemeanor or felony conviction to disqualify an applicant where the conviction relates to the applicant's suitability for the position applied for. 18 Pa.C.S. §9125. Under the Clean Slate Law, certain misdemeanors now will be sealed and do not have to be reported by the applicant unless the applicant must undergo an FBI background clearance. Employers may want to consider customizing employment applications based on whether the position applied for has "direct contact" with minors and thus requires an FBI background clearance under the Child Protective Services Law, in order to avoid confusion about whether sealed convictions should be disclosed on the job application. Campbell Durrant attorneys are available to assist you with reviewing job applications and with questions regarding compliance with the Child Protective Services Law, CHRIA and the Clean Slate Law.