S T A T E O F N E W Y O R K

680

2009-2010 Regular Sessions

I N S E N A T E

January 12, 2009

Introduced by Sens. LARKIN, GOLDEN, GRIFFO, LEIBELL -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the civil service law, in relation to retaliatory actions by public employers taken against public employees

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 75-b of the civil service law, as added by chapter 660 of the laws of 1984, paragraph (a) of subdivision 2 as amended by chapter 899 of the laws of 1986, is amended to read as follows:

S 75-b. Retaliatory action by public employers. 1. For the purposes of this section the term:

(a) "Public employer" or "employer" shall mean (i) the state of New York, (ii) a county, city, town, village, or any other political subdivision or civil division of the state, (iii) a school district or any governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit corporation, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state.

(b) "Public employee" or "employee" shall mean any person holding a position by appointment or employment in the service of a public employer, except judges or justices of the unified court system and members of the legislature.

(c) "Governmental body" shall mean (i) an officer, employee, agency, department, division, bureau, board, commission, council, authority or other body of a public employer, (ii) employee, committee, member[,] or commission of the legislative branch of government, (iii) a representative, member or employee of a legislative body of a county, town, village, or any other political subdivision or civil division of the state, (iv) a law enforcement agency or any member or employee of a law

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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enforcement agency, or (v) the judiciary or any employee of the judiciary.

(d) "Personnel action" shall mean an action affecting compensation, appointment, promotion, transfer, ELIMINATION OF JOB TITLE OR CLASSIFICATION, assignment, reassignment, reinstatement or evaluation of performance.

2. (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation, which violation creates and presents a substantial and specific danger to the public health or safety, OR WHICH COULD REASONABLY BE EXPECTED TO LEAD TO ENDANGERING THE WELFARE OF A MINOR, INCLUDING BUT NOT LIMITED TO PHYSICAL, MENTAL OR SEXUAL MISUSE OR ABUSE; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. "Improper governmental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his OR HER employment, and which is in violation of any federal, state or local law, rule or regulation.

(b) Prior to disclosing information pursuant to paragraph (a) of this subdivision, an employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall [provide] HAVE PROVIDED the appointing authority or designee a reasonable time to take appropriate action, unless (I) there is imminent and serious danger to public health or safety, OR (II) SUCH VIOLATION COULD REASONABLY BE EXPECTED TO RAPIDLY LEAD TO ENDANGERING THE WELFARE OF A MINOR, INCLUDING BUT NOT LIMITED TO PHYSICAL, MENTAL OR SEXUAL MISUSE OR ABUSE. For the purposes of this subdivision, an employee who acts pursuant to this paragraph shall be deemed to have disclosed information to a governmental body under paragraph (a) of this subdivision.

3. (a) Where an employee is subject to dismissal or other disciplinary action under a final and binding arbitration provision, or other disciplinary procedure contained in a collectively negotiated agreement, or under section seventy-five of this title or any other provision of state or local law, OR THE ELIMINATION OF JOB TITLE OR CLASSIFICATION THAT UNIQUELY FITS AND SINGLES OUT SUCH EMPLOYEE and the employee reasonably believes THAT SUCH dismissal [or], other disciplinary action, OR ANY OTHER ADVERSE PERSONNEL ACTION would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a defense before the designated arbitrator or hearing officer. The merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision of the matter. If there is a finding that the dismissal [or], other disciplinary action, OR OTHER PERSONNEL ACTION is based [solely] PRIMARILY on a violation by the employer of such subdivision, the arbitrator or hearing officer shall dismiss or recommend dismissal of the disciplinary proceeding, as appropriate, and, if appropriate, reinstate the employee with back pay, and, in the case of an arbitration procedure, may take other appropriate action as is permitted in the collectively negotiated agreement.

(b) Where an employee is subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse personnel actions and which contains a final and binding arbi-

tration provision to resolve alleged violations of such provisions of the agreement and the employee reasonably believes that such personnel action would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a claim before the arbitrator. The arbitrator shall consider such claim and determine its merits and shall, if a determination is made that such adverse personnel action is based on a violation by the employer of such subdivision, take such action to remedy the violation as is permitted by the collectively negotiated agreement.

(B-1) WHERE AN EMPLOYEE IS THE SUBJECT OF AN ADVERSE PERSONNEL ACTION, SUCH AS THE ELIMINATION OF A JOB TITLE OR CLASSIFICATION THAT UNIQUELY FITS AND SINGLES OUT SUCH EMPLOYEE, AND ACTION IS NOT AN ADVERSE PERSONNEL ACTION THAT IS SUBJECT TO A HEARING, AND THE EMPLOYEE REASONABLY BELIEVES THAT SUCH PERSONNEL ACTION WOULD NOT HAVE BEEN TAKEN BUT FOR THE CONDUCT PROTECTED UNDER SUBDIVISION TWO OF THIS SECTION, SUCH EMPLOYEE MAY BRING AN ACTION OR PROCEEDING IN A COURT OF COMPETENT JURISDICTION TO PROHIBIT SUCH PUBLIC EMPLOYER FROM TAKING SUCH ACTION. THE COURT SHALL CONSIDER SUCH CLAIM AND DETERMINE ITS MERITS; PROVIDED, THAT THE PUBLIC EMPLOYER MAY PRESENT EVIDENCE THAT THE ADVERSE PERSONNEL ACTION WAS TAKEN INDEPENDENTLY OF THE EMPLOYEE'S CONDUCT PURSUANT TO SUBDIVISION TWO OF THIS SECTION. A CLAIM OF AN INDEPENDENT, ADVERSE PERSONNEL ACTION BY A PUBLIC EMPLOYER MUST BE PROVEN BY THE AFFECTED EMPLOYEE BY A PREPONDERANCE OF THE EVIDENCE. THE COURT MAY AWARD REASONABLE ATTORNEYS' FEES, COSTS, AND DISBURSEMENTS TO A PREVAILING PLAINTIFF EMPLOYEE.

(c) Where an employee is not subject to any of the provisions of paragraph (a) or (b) of this subdivision, the employee may commence an action in a court of competent jurisdiction under the same terms and conditions as set forth in article twenty-C of the labor law.

4. Nothing in this section shall be deemed to diminish or impair the rights of a public employee or employer under any law, rule, regulation, or collectively negotiated agreement or to prohibit any personnel action which otherwise would have been taken regardless of any disclosure of information.

S 2. This act shall take effect immediately.