



# GOVERNMENT EMPLOYEE RELATIONS



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**REPORT**

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**HIGHLIGHTS****Egyptian-Born TSA Employee Unable to Link Suspension to Bias**

To prevail under the mixed-motive theory, an employee must challenge any "objective" evidence that he or she was not qualified for the job at the time of the allegedly discriminatory employment act, the Third Circuit holds in a case of first impression. **Page 1007**

**Proposal on Reimbursement for Canceled Leave Inappropriate**

The Puerto Rico National Guard was not required to bargain over a proposal to reimburse employees' expenses if leave previously granted is canceled by the agency, because the proposal is not an "appropriate arrangement" under the Federal Service Labor-Management Relations Statute, the D.C. Circuit holds. **Page 1009**

**Suspicion Not USERRA Defense for Delay in Reservist's Re-Employment**

The Nashville, Tenn., police department's delay in re-employing a returning Army reservist based on a suspicion that he was dishonest in describing or documenting his military service violated the Uniformed Services Employment and Reemployment Rights Act, the Sixth Circuit holds. **Page 1008**

**Promotion Decision Not Arbitrable, Subject Not Delegable**

A Rhode Island teachers' union could not pursue to arbitration a grievance over the decision to promote one teacher over another, because not only did the collective bargaining agreement not provide for arbitration of the matter, but state law prevented the school district from delegating its authority to collective bargaining, the Rhode Island Superior Court determines. **Page 1016**

**Administrator Entitled to Qualified Immunity From Free Speech Claims**

The chief administrator of the Massachusetts Office of the Chief Medical Examiner is entitled to qualified immunity from a former employee's claim that his termination violated the First Amendment to the U.S. Constitution, the First Circuit holds. **Page 1011**

**Court Nixes U.S. House Staffer's Firing Case; Remark No Proof of Bias**

An African American executive assistant and scheduler for a Texas congresswoman could not show that she was fired because she was black or age 46 even though the congresswoman expressed interest in hiring a staffer of Asian descent and later replaced the black assistant with a younger Asian American woman, a federal court in Washington rules. **Page 1013**

**Special Master Determines Own Jurisdiction on Police Issues**

A special master appointed to deal with race discrimination in the Bridgeport, Conn., police department had authority to determine the scope of his jurisdiction, the Second Circuit notes. **Page 1010**

**FEDERAL NEWS**

**COMPENSATION:** Federal agencies beginning Sept. 25 will be able to grant more pay to employees in positions requiring a very high level of expertise in a scientific, technical, professional, or administrative field that are critical to the agency's mission, under an OPM final rule. **Page 997**

**BENEFITS:** A final rule from OPM implements, effective Sept. 25, the dental and vision benefits program for federal employees. **Page 997**

**STATE AND LOCAL NEWS**

**COLLECTIVE BARGAINING:** A tentative agreement has been reached on a four-year contract for some 23,000 New York City police officers. **Page 1001**

**COMPENSATION:** Salaries for state government professionals registered a modest 2.4 percent increase from 2007 to 2008, according to the American Federation of Teachers' ninth annual Public Employees Compensation Survey. **Page 1005**

**HEALTH BENEFITS:** The Rhode Island Supreme Court's chief justice orders AFSCME Council 94 and state Gov. Donald L. Carcieri (R) into mediation and holds in abeyance implementation of a controversial executive order on state employee health insurance contributions. **Page 1002**

## Overtime/Compensation

### **San Diego Police Officers Lose at Trial, File Grievance on Overtime, Pay Claims**

**A** group of San Diego police officers Aug. 22 filed a class action grievance against the city, claiming that they were not compensated for pre- and post-shift activities, that they were required to work through meal and rest breaks without compensation, and that they were not properly reimbursed for the cost of maintaining and replacing their uniforms, according to a statement from their attorneys, The Petersen Law Firm in Costa Mesa, Calif.

The grievance, citing the officers' memorandum of understanding with the city, was filed after an Aug. 19 ruling from the U.S. District Court for the Southern District of California that dismissed the officers' contract claims for failure to exhaust the grievance process (*Abbe v. San Diego*, S.D. Cal., No. 05cv1629 DMS (JMA), 8/19/08).

**Three Separate Claims.** The grievance makes three claims regarding compensation-related practices that the officers argue violate the MOU.

According to The Petersen Law Firm's Aug. 22 statement, the first claim focuses on the performance of "many hours of integral and indispensable pre- and post-shift duties per week that were not compensated," including preparing for roll call; shift wrap-up briefings; preparing for inspections; report writing; completing activity logs; loading and unloading patrol vehicles; preparing for court appearances; cleaning weapons and gear; collecting, returning, and maintaining equipment; on-site donning and doffing of gear and uniforms; traveling to and from court; and range certification.

The grievance also alleges that officers consistently have been interrupted during or worked through their breaks—or code 7s—without being given premium pay for that time. "These were not isolated violations but occurred frequently, and continue to occur, given the nature of a police officer's duties and the need for prompt and immediate action," the firm said.

Finally, the grievance asserts that the officers were not properly reimbursed for the maintenance and replacement of their uniforms. While the city paid the amounts specified in the MOU, it has treated the reimbursements as taxable wages, and so the amount actually received by the officers is insufficient to cover the cost of maintenance and replacement, the statement noted.

**Original Lawsuit in 2005.** The original class action complaint, filed in August 2005 on behalf of some 1,500 officers, claimed violations of the federal Fair Labor Standards Act, California labor law, and the MOU. Judge Dana M. Sabraw in May 2005 dismissed the state law claims but found dismissal of the FLSA claims regarding pay for pre- and post-shift activities improper because of factual issues (45 GERR 671, 6/5/07).

In November 2007, Sabraw ruled that the city was entitled to a partial exemption from the overtime claims under 29 U.S.C. § 207(k), which allows law enforcement agencies to require officers to work 43 hours per week before having to pay overtime. She therefore held that the city was entitled to a three-hour per week off-

set of the officers' claimed wages because their claims were based on a 40-hour workweek.

In the same decision, Sabraw held that the officers' time spent donning and doffing their uniforms and equipment was not compensable under the FLSA.

The Aug. 19 ruling dismissed the officers' claim that the grievance procedure was "inadequate," thus excusing them from the exhaustion requirement pursuant to *Glendale City Employees' Ass'n v. Glendale*, 15 Cal. 3d 328 (1975). Sabraw, however, found that case distinguishable because the grievance procedures there were established unilaterally by a city ordinance rather than a collectively bargained MOU, and it applied to all city employees regardless of union affiliation.

In addition, the court granted summary judgment to the city on its argument that several hundred officers did not work the requisite 43 hours per week—or 156 hours per year—and so their overtime claims should be dismissed.

**City Avoiding \$50 Million in Liabilities.** The San Diego city attorney's office in an Aug. 21 statement said that, as a result of the ruling, the city "will avoid potential liabilities that were estimated by the plaintiffs to be in excess of \$50 million." It noted that the remaining overtime claims will proceed to trial in January 2009.

In his firm's statement announcing the grievance, Managing Partner Greg Petersen said, "We look forward to the City's response to these issues. They come as no surprise to the City of San Diego since it has been involved in litigation on these very issues for more than two years."

BY LAURA D. FRANCIS

Full text of the court's Aug. 19 opinion is available at <http://op.bna.com/gr.nsf/r?Open=lfrs-7j7jzr>.

## Health Benefits

### **Alabama Program for State Employees Seeks to Raise Awareness of Risk Factors**

**A**labama is seeking to encourage participation in state employee wellness programs by assessing its 37,500 employees a \$25-per-month premium for health insurance that is refundable for employees who agree to screening for common risk factors, William Ashmore, chief executive officer of the State Employees' Insurance Board, told BNA Aug. 26.

Under the program, effective Jan. 1, 2010, all state employees will be assessed the \$25 premium. But employees have until Nov. 30, 2009, to submit baseline readings for blood pressure, cholesterol, glucose, and body mass index, qualifying them for a monthly \$25 discount also effective Jan. 1, 2010. The baseline readings can be obtained by participating in SEIB's wellness program or through the submission of a physician certification form, according to the board's Web site.

Effective Jan. 1, 2011, employees will be eligible to continue receiving the discount if they meet one of the following conditions:

- The employee has been deemed not at risk by the board based on the reported health risk factors.
- The employee has been deemed at risk by the board, but has (1) submitted a physician's certification stating either that he or she has a medical condition that

prevents the employee from improving the health risk factor or that he or she has been counseled regarding the health risk factor, (2) participated in and/or completed a board-approved wellness program, or (3) reported "acceptable improvement" in the health risk factor.

**Employees at Risk.** According to Ashmore, the program's primary purpose is to educate employees about risk factors. The state has determined that between 10 and 15 percent of state employees are at risk for at least one of the conditions, and the board believes that alerting those employees and providing them with information on improving their health will encourage them to make changes, he said.

The state currently charges state employees who smoke \$24 per month in health insurance fees, Ashmore noted. Unlike those fees, which are levied on all employees who continue to smoke, he said, the new program provides the offsetting \$25 discount to all employees who either participate in board-approved wellness programs or provide physician's certifications indicating that they have received counseling from their physician, regardless of whether or not there is improvement in their condition. "Acceptable improvement"—the other way of obtaining the \$25 discount for those who do not see a physician or participate in a wellness program—means any improvement in the baseline conditions that are of concern, even if small, Ashmore said.

Only active employees are covered by the program, Ashmore added, explaining that spouses, children, and retirees are not covered.

Contrary to some news reports, he said, the program will not penalize employees who are in good health despite body mass index readings that appear to indicate a health risk. Although the cut-off point for body mass index is 35, for example, a weight lifter with a BMI above 35 would not be penalized if his or her nurse or physician indicated that the employee was in good health, Ashmore said.

**Employee Group Sees 'Misconceptions.'** Glenn Parker, an attorney with the Alabama State Employees Association, which supports the new program, told BNA Aug. 25 that many people have "misconceptions about what the policy does."

The program, he said, is "not penalizing anyone who goes to the wellness program or their own doctor once a year," regardless of whether or not they are successful in improving their health condition.

Ashmore and Parker both said that the board worked with ASEA in developing the policy.

According to 2007 data from the federal Centers for Disease Control, Alabama (30.3 percent) ranks second behind only Mississippi (32.0 percent) in the prevalence of obesity among adults.

BY LOUIS C. LABRECQUE

For more information on the program, go to <http://www.alseib.org/HealthInsurance/SEHIP/pdf/WellnessProgram/WellnessPremiumDiscounts2008.pdf>.

## Compensation

### State Employee Salaries Up 2.4 Percent, AFT Says; Inflation Outpacing Pay Raises

Salaries for state government professionals registered a modest 2.4 percent increase from 2007 to 2008, according to the American Federation of Teachers' ninth annual Public Employees Compensation Survey, released Sept. 1 and measuring pay rates effective as of March 1.

The 2.4 percent increase—the average across the 45 occupations surveyed—was less than the inflation rate, 4 percent, for the time period surveyed, and significantly less than the previous year's average increase of 5.7 percent (45 GERR 1050, 9/18/07), according to AFT.

It also was lower than the increase in overall state spending for fiscal year 2008, estimated at 5.1 percent by the National Association of State Budget Officers, AFT said.

Salary changes from 2007 to 2008 ranged from a low of -2.6 percent to a high of 5.8 percent among the 45 jobs surveyed. The highest-paying jobs were senior psychologists (\$71,010), attorneys (\$67,985), senior environmental engineers (\$66,576), and senior economists (\$65,804). The lowest-paying jobs were data-processing clerks (\$26,801), correctional officers (\$36,495), licensed practical nurses (\$37,803), and family support specialists (\$37,885).

**Salaries Lag Behind Private Sector.** For the ninth consecutive year, AFT said, the salaries of most state-employed professionals trailed those of their private sector counterparts.

This year, the union said, private sector salaries exceeded state employee salaries in 20 of the 24 job classifications in which comparisons were made. In 12 jobs, the gap was 30 percent or more, with the biggest discrepancies found in occupations that require highly specialized education and skills: geologists (102 percent), attorneys (97 percent), economists (59 percent), and chemists (52 percent).

Across all 24 classifications, private sector salaries are, on average, 26 percent higher than those of state employees, AFT said, asserting that the private-public salary gap could exacerbate the recruitment and retention challenges that states already face.

"We face the threat of a crippling brain drain in state government if we don't get serious about paying public employees what they're worth," AFT President Randi Weingarten said in a statement. "It's not uncommon for private sector employees to earn twice as much as their public sector counterparts. What message does this send about how we value the public sector?"

**Salaries and Collective Bargaining.** For the ninth consecutive year, AFT said, its salary report found that collective bargaining is a key factor in reducing the private-public sector salary gap.

For example, the union said, foresters in collective-bargaining states earn 18 percent more than their noncollective-bargaining counterparts, licensed practical nurses earn 15 percent more, and economists earn 14 percent more. The study shows a collective-bargaining advantage in 42 of 45 occupations surveyed. In 25 job classifications, the advantage is 10 percent or more, AFT said.