

PERSONNEL MANAGEMENT TRAPS FOR THE COUNTY COMMISSIONER

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Public sector personnel law is frequently described as a mine field. Our courts and administrative agencies often proclaim that they will not permit themselves to be used as a personnel law ombudsman, second-guessing public sector personnel decisions. Despite these disclaimers that is exactly the role they often play. Public sector personnel management is replete with litigation, complaints to administrative agencies, grievances and arbitration, and threats to file these actions. This occurs far more often in the public than in the private sector. Public sector job applicants and employees have far more rights than their private sector counterparts. They are also more aware of their rights than are employees in the private sector. Public sector employees are organized into unions at rates 6, 7 and 8 times the percentage rates seen in the private sector. There is a significant group of able plaintiffs' attorneys who virtually specialize in representing public employees. All of these are factors helping to create that mine field.

During your term you will likely have to deal with row offices and courts which take the side of their employees in opposition to your efforts at personnel cost controls, rational collective bargaining agreements, and improved management. During this term you will find that County personnel management problems have been made more difficult to correct because County supervisors have failed to do their job of documenting poor performance and progressively disciplining employees who deserve discipline. Almost certainly you will find it necessary to deal with meaningful allegations of: sexual harassment; use of County computers to access

pornographic websites; and rampant sick leave abuse. During your term certain Unions will make exorbitant demands to change the existing collective bargaining agreement and will proceed to arbitration if you do not concede. You are highly likely to find yourself named, individually, in civil rights lawsuits. This will generate adverse publicity which you will not be able to counter very effectively as the legal system takes years to bring the matter to a head. Be warned that, as you wander through this potential blitz of personnel issues, there are traps. Eight key ones are described below. The nature of these traps is often counter-intuitive – so take care. And, note that these “traps” are not discussed in order of importance. Each of them is fully capable of mortally wounding the unwary.

TRAP # 1 – HELPING PEOPLE OBTAIN COUNTY EMPLOYMENT

There is nothing wrong with directing someone interested in County employment to the personnel office or to an appropriate civil service testing venue. But, all kinds of problems begin to arise when a County Commissioner attempts to seriously leverage the hiring process. This is particularly true when the jobs at issue are middle and low level supervisory jobs, and rank and file jobs. For example:

The County is an equal employment opportunity employer. This means it is committed to giving every qualified person, not just persons with access to a Commissioner, an equal and fair opportunity to achieve County employment. When hiring becomes personally, rather than professionally, directed difficult to defend EEO litigation can easily result.

Pennsylvania’s Veterans Preference Law imposes much broader obligations on governments than is usually understood. Veterans Preference rights are implicated when Commissioners pressure for the hiring of a particular individual. Today, veterans are well aware

of their rights and are willing to pursue them legally. Veterans preference litigation also carries with it a huge embarrassment factor.

When employees are hired through a professional mechanism references are demanded and are checked. This necessary caution often goes by-the-board when the applicant is coming from “outside” the standard system for hiring. Most County jobs are supported by a job description. A well-done job description is protection for an employer. For example, it offers substantial protection from Americans With Disability Act litigation. A pressured hiring typically does not take into account whether the employee has the qualifications required by the job description. Important background information on an applicant, perhaps a criminal history, typically comes to light when the hiring process is professional, but remains undiscovered when it is personal. The professional hiring process provides Commissioners with the answer to these traps.

Applicants who obtain jobs because they “knew someone” are very likely to survive a probationary period even if they demonstrate incompetence or a horrible attitude. What supervisor is going to discipline and recommend the dismissal of an employee who received his job because of the intervention of a County Commissioner? Experience has demonstrated that employees who got their job as a favor are disproportionately trouble. And, they are just as likely to be trouble for the Commissioner who pushed for their employment as they are for the unfortunate foreman who has to deal with them daily. The public has the idea that County employment remains heavily in debt to the patronage system. The fact is that most “friendly” hires are not “political” hires but simply result from an effort by a Commissioner to help out an individual or family he knows or which is down on its luck. Just remember, your next door

neighbor's 27 year old son who is not a veteran and who still lives at home is not likely to be the best employee who can be found for a particular County position.

**TRAP #2: *YOUR BELIEF THAT YOU HAVE A GOOD RELATIONSHIP
WITH THE UNION***

Most counties are heavily organized and it does make sense to have sound labor relations. However, sound labor relations are not built on personal relationships. They are built on a mutual respect for positions that, even when they are in conflict, can be understood as rational. The proper model for good labor relations is the business model. This involves arms-length dealing, reasonable flexibility, and a willingness to listen to another point of view. You cannot expect the Union, or its leadership, to simply, and quickly, join you in achieving a fair and equitable bargaining result. It has a different constituency, and a different point of view, than do you. Unions, and the members they represent, honestly believe that public sector employees remain underpaid and underappreciated. They are blowing smoke when they seek 8% across the board increases, but this is not the case at 5% even though the average County taxpayer received only a 2.5% compensation increase. Commissioners inexperienced in collective bargaining, who erroneously equate good labor relations with friendly personal relations, can easily find themselves trapped. They pay more than they should pay (thus negatively impacting other bargaining and arbitration awards in their county and in surrounding counties) as a way of purchasing a relationship.

Clues that this relationship component are overwhelming the tenets of good bargaining include: (1) Allowing the Union to go around the County's designated bargaining team to negotiate directly with one or more County Commissioners; (2) Commissioner reliance on such phrases as "early bird bargaining;" "win-win bargaining;" and "I have talked to bargaining unit members and they assure me that they will never strike and if a strike is called they will cross the picket line;" and (3) improving on a "last, best final offer" after the Union has rejected that offer.

Commissioners who put excessive emphasis on their relationship with the Union also tend to be overly afraid of arbitration. Contract arbitration is far from perfect. It has the potential to produce bad results. However, it is not the disaster some have made it out to be. In fact, over the last several years, we have found that it is often possible to achieve positive and needed results in contract arbitration where those results could not be achieved at the bargaining table. A County which thoroughly and properly prepares for interest arbitration has an excellent chance of achieving some reasonable and appropriate goals. No county should be so afraid of contract arbitration that it gives away more, at the bargaining table, than is reasonable. Doing so will not result in a permanently positive relationship with the Union. In fact, it will most likely have the opposite result. When a County pays too much to avoid arbitration or to maintain a certain type of relationship, and when it fails to hold the line on a last, best, final offer, it simply teaches the Union that a bargaining strategy of always going back to the well, always demanding more, being slow to reach agreement, will produce benefits for the Union's membership.

When bargaining there is no need to be afraid and no need to beg. Your goal at the bargaining table should be to produce a result which is fair to all constituencies and rational. The relevant constituencies are taxpayers, users of County services, the Court, the row offices, and the County and the Union as institutions, and the employees. All of these constituencies are important. From management's standpoint a rational labor agreement will deal successfully with two major issues: Personnel costs and the ability to manage the County effectively. A reasonable focus on those two points will, in the end, create the kind of management-labor relationship which is the one County's should be striving to achieve.

TRAP #3 – THE TIMING OF ADVERSE PERSONNEL DECISIONS
AND THE ISSUE OF RETALIATION

Public sector employees have 1st, 4th, 5th and 14th Amendment rights which private sector employees do not have. In other words, they have speech, association, privacy, due process, and equal protection rights which do not apply to private sector employment. They cannot be adversely treated in response to their lawful exercise of these rights. For example, a County public works employee can publicly criticize the worthiness of a successful bidder, insinuating that the bidder was successful only because he made a political contribution to one or more of the Commissioners. A private sector employee who launched that kind of attack on his employer would likely find himself fired and without legal recourse. But, it would be a serious mistake for the County to abruptly fire such an employee. The abruptness would create procedural due process problems. The firing would create issues under the 1st Amendment (Freedom of Speech) and under the Pennsylvania Whistleblower Act. If the employee were civil service protected, or protected by a collective bargaining agreement, he would have viable claims before the State Civil Service Commission or to a grievance arbitrator. All of these types of claims would fall under the general rubric of alleging retaliation. The key evidence that they were retaliatory would be the temporal connection (i.e., the timing) between the public complaint and the dismissal.

This timing issue can appear in many guises. An employee who suffers an adverse personnel action (discipline, demotion, furlough, transfer, negative evaluation, etc.) after filing a worker's compensation, employment discrimination, unlawful harassment, whistleblower, or grievance claim will have viable causes of action and multiple forums in which to bring those causes of action. Similarly, an employee who is adversely dealt with shortly after seeking or

entering into a Family and Medical Leave Act leave or a leave related to an Americans With Disabilities Act claim will have a strong case for retaliation. Union officials, even where they are County employees, when they function as Union officials, have the right to aggressively assert the position of the Union. Such an official cannot with impunity physically threaten a County Commissioner. But, you cannot fire him for calling you, in the context of collective bargaining or a grievance arbitration meeting, a “bozo who doesn’t know what he’s doing.” If you did terminate the individual for having such bad manners you would receive an unfair labor practice charge, and a grievance, claiming unlawful retaliation for engaging in protected activity.

In all of these cases and examples the party who will be deciding what is true is a third party – it is an arbitrator, a jury, a Civil Service Commission, the Pennsylvania Labor Relations Board, etc. You may know, in your heart, that your actions were not retaliatory. You may be personally convinced that evidence of the employee’s incompetence, insubordination, abuse of sick leave, and improper conduct demonstrated, beyond any reasonable doubt, that the employee deserved to be dismissed. But, that is not how it will likely look to the third party adjudicator. The third party adjudicator will observe that all of these factors existed before the employee called you a name, blew the whistle, applied for his Family and Medical Leave Act leave, etc., yet nothing had been done. The third party adjudicator will observe that what was new was the employee’s complaint. It will also observe that the discipline/dismissal/demotion occurred close in time to this complaint. Based upon these two facts, the adjudicator is likely to conclude that you engaged in unlawful retaliation. This will result in the employee receiving a cleaned up record, a make whole order, and it may well result in his receiving punitive damages, costs and attorney’s fees.

Do not fall into this trap. Be very aware of how the timing of an adverse employment decision will look to a third party where the relevant employee recently engaged in activity in which he had a legal right to engage. This is true (that is, the trap exists) even if you are firmly convinced that the employee has not complained in good faith or has “set you up” so that he can make the retaliation argument. If the background record supports your analysis you may be able to aggressively move forward – but usually this is not the case (usually the employee has not been subject to prior discipline, or adverse annual employment evaluations, or other kinds of remediation).

***TRAP #4 – FOCUSING ON TECHNICAL SKILLS WHEN
PROMOTING OR HIRING SUPERVISORS***

There is an understandable logic to the thought that the County Director of Maintenance should be someone who could, if he had to, skillfully operate a backhoe, forklift, or heavy dump truck. It may well seem important that such an individual have meaningful experience dealing with subcontractors, estimating certain kinds of construction costs, reading blueprints, and effectively using a variety of hand tools. No one would deny that these technical skills, and others, would be of great value to a maintenance supervisor.

That having been said, if your supervisors are selected based primarily on their demonstration of longevity and/or technical skills then the supervisory hiring process needs to be rethought. Dick Butkus was a supremely talented football player. His record as a football coach was not enviable. Earl Weaver was insufficiently skilled to become a major league baseball player. Yet, he is one of modern baseball’s greatest managers. What we want from supervisors, more than anything else, is sound personnel management. We want them to select, train, praise, teach, discipline, counsel, organize, direct, and supervise the workforce assigned them so that it functions capably. This means that when we select supervisors the foremost emphasis should be

on their personnel management skills. Obviously, a maintenance supervisor has to know the difference between a hammer and a jackhammer. But, he does not have to be the best asphalt spreader the County has ever had.

Modern personnel management requires planning, recordkeeping, and at least a passing knowledge of those activities which can create legal difficulties. In the “old” days the idea of “writing up” an employee did not exist. Today, a supervisor who is unwilling, or effectively unable, to write up an employee is incompetent. When persons are interviewed as part of the process of selecting a supervisor the focus of the interview should be on their personnel management skills. To be an effective supervisor one must be willing to separate one’s self from the workforce being supervised. If one wants to be “one of the boys” then one does not have what it takes to be an effective supervisor.

The single thing that a Commissioner can do to make his job easier is to put in place effective managers and supervisors. A Commissioner, or more correctly a Board of Commissioners, cannot minutely manage County operations. If they want to develop the reputation of leading a well-managed County then they will force themselves to hire supervisors with sound personnel management skills even if that means passing over employees who have demonstrated loyalty, longevity and significant technical skill during the course of their employment.

**TRAP #5 – BELIEF IN THE VALUE OF
ANNUAL PERSONNEL PERFORMANCE EVALUATIONS**

It is fair to ask: How can anyone be opposed to annual personnel performance evaluations? In theory they are totally defensible. In theory they involve goal setting, analysis of the degree to which goals have been achieved, a fair appraisal of performance effectiveness

(as measured against job descriptions and the performances of other employees), and they create needed communication opportunities between supervisors and the supervised.

In practice, in our experience, these beneficial aspects of annual performance evaluations rarely happen. Instead, what occurs is the employment equivalent of grade inflation. Few employees are rated, across the board, average, satisfactory or worse. Instead, in most categories, the overwhelming majority of County employees are rated excellent or above average. Employees who are, in a few discreet categories, rated as below average, needs improvement, or having poorly performed are, nevertheless, rated satisfactory overall. Taken all together, the typical rating of employees in a County department fails to demonstrate the true gap between the few really excellent employees and the rest of the workforce. County employees are as subject to the Bell Curve as is the workforce generally. A relatively few employees give truly outstanding performances and a relatively few employees are insufferably bad. The great majority of employees fall at, or little ways above or below, the mean. We have never seen annual evaluation results which reflect that fact.

These observations are as true regarding social service employees, where annual evaluations are legally mandated, as they are for any other category of County employee. And, whether the reference is to social service, clerical, blue collar, security, correction officer, nursing home, or any other category of County employee, the flawed application of these performance review systems has serious implications. What is the incentive for an employee inclined to give the County truly excellent performance when that effort receives the same rating as a less able performance? Of course, an employee who is disciplined for poor performance, insubordination, a bad attitude, etc. will always points to the ten years of positive performance evaluations she was given prior to the implementation of the discipline. This can be devastating

rebuttal evidence, and it is particularly effective evidence in one of those timing/retaliation cases discussed earlier.

This situation occurs for a number of reasons. Your supervisory corps was probably promoted out of the rank and file workforce and is reluctant to be critical of persons viewed as friends and colleagues. Supervisors will rate employees having terrible attendance records as being good employees on the theory that when they are present their work is more than adequate. Managers often conclude that giving an employee a positive evaluation, rather than the evaluation truly earned, will act as encouragement to the employee to behave as rated. Of course, this never works, but it is a justification we have been repeatedly given for inflated performance evaluations. Supervisors have also told us that, because performance evaluations have no practical impact on an employee's tenure or compensation, they see no reason why they should create an enemy with a negative evaluation. They have also told us, repeatedly, that they were not elevated to a supervisory position to fill out forms.

If the traps just described are to be avoided one of two things has to happen. First, except where legally required, the County could dispense with, or not implement, annual performance evaluations. Alternatively, the County could insist that supervisors take annual performance evaluations seriously. This would require disciplining supervisors, demoting supervisors, and responding to supervisors economically, who consistently rate everybody as doing a satisfactory to excellent job. It would mean drilling into the supervisory workforce the idea that you were promoted, primarily, to manage personnel and giving out accurate employee evaluations is an important part of that. Towards this end effective employment evaluations will require that supervisors be forced to use a form which requires them to write in sentences and paragraphs rather than simply circle numbers or words. This alternative is the better choice but, to be honest

about it, we have seen very little evidence that County management has the will, over the long term, to insist upon meaningful and accurate employment evaluations.

TRAP #6 – *PUNISHING DISLOYALTY*

Elected officials and high-ranking public sector managers often state that, above all other things, they value loyalty. An elected official, or high-ranking public sector manager, who can be quoted as having made such a statement has created for himself a significant legal risk. This is because the concept of “whistleblowing” is applicable to public sector employment to a degree unheard of in the private sector. In the private sector a corporate CEO cannot, with legal impunity, require illegal acts from his subordinates. But, if they accuse him of managing the corporation in a manner that is wasteful or reflects “wrong-doing” they can be dismissed without legal recourse. This is not true in the public sector. Pennsylvania has a Whistleblower Law which encourages public employees to make good faith reports of waste or wrong-doing. Note that these reports do not have to be accurate – they only have to be made in good faith. Under Pennsylvania’s Whistleblower Law an employee who can prove he was dismissed for reporting waste for wrong-doing will be made whole economically, have the right to his job back, and will be awarded costs and attorney’s fees (and the proof is often nothing more than the timing of the dismissal). In addition, it is likely that such an employee will have a civil rights claim against the municipality and the individuals responsible for his termination. This is because federal civil rights law, under the guise of the First Amendment, also protects public sector whistleblowers.

It seems sensible to many people, particularly elected officials and high-ranking managers, that a public employee who has a complaint about the operation of the County should first make the complaint internally. Going “outside” without first giving the County notice of the issue, and a fair opportunity to fix the problem, seems profoundly disloyal and unfair. In fact,

some counties make rules against such activities. These rules are not enforceable. In fact, they are *per se* evidence that the County has a policy in opposition to the public policy reflected in the Whistleblower Law. Once an employee is perceived as disloyal, or as conducting himself in an unfair accusatory manner, the tendency is to demote, transfer, discipline, layoff, or otherwise deal severely with the employee. The Whistleblower Law, and federal civil rights law, prohibits such retaliatory activity. Employees who issue reports of alleged waste or wrong-doing in effect create a protective barrier around themselves. Counties and County officials ignore this protective barrier only at great risk. One of the games played by an employee who perceives himself headed towards severe discipline is to attempt to turn himself into a whistleblower. It is entirely possible to respond effectively to this tactic, but this must be done with planning and finesse, not with a sledgehammer. Do not fall into the “loyalty” trap.

TRAP #7 – POLITICAL PERSONNEL DECISION-MAKING

For the overwhelming bulk of County jobs patronage-based decision-making is unlawful. This has been the case for many years. It was made unlawful by the United States Supreme Court which decided, in a series of cases, that basic public sector employment could not lawfully be impacted by political considerations. This means that almost all County employees cannot be hired, fired, promoted, demoted, transferred, reassigned, furloughed or recalled for political reasons.

This concept of “political” includes political party affiliation, but it is also much broader than that. It, for example, is applicable to intra-party loyalties and affiliations. These rulings derive their legitimacy from First Amendment theory. Our Supreme Court has deemed that public employees have a right to exercise political speech, and to engage in political association, without being punished for the exercise of these Constitutional rights. A public employee who

proves that he has been mistreated for the exercise of his First Amendment rights (including the right not to actively participate in the political process) will be entitled to make whole relief, punitive damages, costs and attorney's fees.

There is an exception to this general rule. It is an important exception, but it is also a narrow exception. Political affiliation is a legitimate requirement for some public sector jobs. For example, a County Commissioner should be able to successfully make the argument that his/her top aide needs to be a close political affiliate. Of course, if that Commissioner testifies under oath that political affiliation is not a requirement for this job then the Commissioner has trapped himself. He will not be able to dismiss that top political aide based upon a belief that the aide has become a political turncoat. A maintenance foreman who puts political signs in his yard supporting a slate of candidates who lose cannot be the subject of political retaliation. It is not possible to successfully make out, before a court of law, the theory that political affiliation or loyalty is an essential part of the foreman's job. Of course, poor performance by that foreman can justify adverse personnel action directed against him. But, an incoming Board of County Commissioners would be wise not to attempt to argue that this poor performance was obvious to them within the first five days of their administration. This goes back to the retaliation/timing discussion. A maintenance supervisor who sulks and otherwise misbehaves because his "side" lost can be dismissed, but only upon the creation of a record demonstrating poor performance.

A good argument can be made that a newly elected Board of Commissioners ought to be permitted to "clean house." This argument would be grounded in the proposition that such a "housecleaning" is what the voters sought when they elected a new regime. That having been conceded, please note that THE UNITED STATES SUPREME COURT HAS NOT

ACCEPTED THAT RATIONALE. A newly elected Board of Commissioners has no legal right to “clean house,” and attempting to do so will lead to litigation that the County cannot win.

TRAP # 8 – A LACK OF PATIENCE

At every turn, impatience in personnel management is punished and patience is rewarded. Endless patience is not required, but a lack of patience produces disasters. Labor arbitrators and the State Civil Service Commission require that, except in the most extreme circumstances, discipline be progressive. This means that discipline must, typically, progress from written reprimands through suspensions and demotions to dismissal. Dealing with non-productive employees who set themselves up to be whistleblowers, who act to give themselves First Amendment protection, and who hide behind being a union steward, requires patience. Abrupt, negative, personnel decisions aimed at such individuals will give them the leverage they need to claim that they are victims of retaliation.

Sexual harassment complaints, and similar harassment complaints, must as a matter of law be taken seriously. The United States Supreme Court has required that they be “promptly and thoroughly investigated” and that appropriate “remedial” actions take place if merit is found in the claim. Among the required remedial actions is protecting the complaining party, or those associated with her, from retaliation. These types of claims cannot be swept under the rug, or pushed to a hurried and unsatisfactory conclusion. They must be patiently investigated.

It is maddening to many people that the collective bargaining process takes so long and requires so many meetings. They cannot understand why it is so difficult to get to the critical issues and be done with them.

This desire to quickly get to the bottom line works to the disadvantage of the County. First, the law regarding collective bargaining agreements is unusual. Unlike most contracts,

collective bargaining agreements do not “expire” on their expiration date. Instead, both parties have an obligation to continue to function under the old terms and conditions of employment so long as there is neither a strike nor lockout. The most common circumstance in which this “rule” impedes County management occurs where the County is in a good position to reduce its healthcare costs but must continue to maintain status quo until there is an agreement. In most other circumstances it either benefits the County to have an extended contract, or it is of little moment.

Second, the desire to quickly conclude collective bargaining tends to encourage “early bird” negotiations and repeatedly feel-good references to “win-win” bargaining. In our experiences these are catch phrases for paying very dearly for the right to claim good labor relations and non-contentious bargaining. Collective bargaining results are extremely important. They dictate what will be County personnel costs which mean they also dictate the level of services which can be provided and the level of taxation which will be imposed upon the citizenry. Good collective bargaining requires strong preparation, a willingness to draw and maintain reasonable lines, and a great deal of patience. Do not be in a hurry. A bad collective bargaining agreement is worse than no collective bargaining agreement. Collective bargaining agreements tend to resolve at the last minute because of human nature, and not because the managerial bargaining team is inept or does not know what it is doing. If any Commissioner believes that he can involve himself in collective bargaining for the purpose, and with the result, that he will make it seriously more rational and “speedy” then he is overestimating his ability to have an impact without “giving the store away,” and underestimating the value of letting the process work its magic.

If there is a place to be impatient, in personnel management, it is with supervisors and managers who fail to do the things which need to be done in order to effectively deal with incompetent employees, persons who abuse sick leave, insubordination, a lack of effort, or any of the other factors which demand the attention of a good supervisor. And, there are certainly circumstances when it is appropriate to quickly bring the hammer down (use of drugs in the workplace, threats of workplace violence, sabotage of equipment, theft of County cash, etc.) But, outside of these types of situations it is almost always best, to achieve effective personnel management, to take things at an even and patient pace. One thing you can count on – the recidivism rate for truly horrible employees approaches 100%. They will keep giving you an opportunity to build a record and deal forcefully with them.