

1999

PUBLIC SECTOR LABOR LAW
Final Examination

Instructions:

This package contains two fact patterns and a question drawn from each fact pattern. The examination package will contain the identical fact patterns and a question drawn from each fact pattern. The examination will begin at 11:00 A.M. and end at 1:30 P.M. on Saturday, December 4, 1999 (in class). It is a closed-book examination. You may NOT use any books or notes.

You may add facts that are reasonably based on the facts in the examination. If there are any inconsistencies, I apologize. Reconcile any inconsistencies any way you wish, but be sure to explain any assumptions you make.

Remember, the best examination will identify and fully discuss the issues raised by the fact patterns. You need not cite to specific cases, but you should recite the appropriate standards and rules of law that we discussed in class. Remember your fictional audience. Do not take anything for granted.

Fact Pattern #1

Grover's Corner is a small community in northeast Massachusetts; population approximately 13,000. It is governed by a Board of Selectmen, with an open Town Meeting. George Gibbs is the business manager and runs the Town's day-to-day operation. Below is a list of all Town employees:¹

Selectmen's Office

Business Manager
Administrative Assistant
Clerical (part-time)
Custodian

Assessor's Office

Principle Assessor
Clerical
Clerical (part-time)

Accountant's Office

Accountant
Clerical (part-time)

Council of Aging

Director
Clerical
Bus Driver/Custodian (part-time)
Nutrition Site Manager

Treasurer's Office

Treasurer
Assistant Treasurer
Clerical
Clerical (part-time)

Police Department

Chief
Deputy Chief
Lieutenant
Sergeant (3)
Patrol Officer (11)
Clerical
Custodian (part-time)

Collector's Office

Collector
Assistant Collector
Clerical

Fire Department

Chief
Deputy Chief
Lieutenant (3)
Fire Fighter/EMT (16)

Clerk's Office

Clerk
Assistant Clerk
Clerical

Department of Public Works

Superintendent
Ass't Superintendent (2)
Administrative Assistant
Laborer (14)

Registrar's Office

Registrar (3)

¹except School Department Employees.

Miscellaneous

There are also six (6) committees/boards in Town, including the finance committee, the conservation committee, the capital improvement committee, the historic committee, the board of appeals, and the planning board. Each committee/board has a budget for clerical support and is permitted to pay a recording secretary \$10.00 per hour to attend meetings and transcribe minutes. Although some committees/boards are very active, others meet only occasionally (2-3 times per year).

Many Town employees are already represented by various unions. Below is a list of those unions and a description of the bargaining unit(s) they represent:

International Association of Fire Fighters

All full-time and regular part-time fire fighter/EMT's, excluding the fire chief and the deputy fire chief.

International Brotherhood of Police Officers

Unit A

All full-time and regular part-time police patrol officers, excluding the police chief, the deputy police chief, lieutenants, and sergeants.

Unit B

All full-time and regular part-time police superior officers, including lieutenants, and sergeants, but excluding patrol officers, the police chief and the deputy police chief.

American Federation of State, County, and Municipal Employees

All full-time and regular part-time laborers in the Department of Public Works, excluding the superintendent, the assistant superintendents, and the administrative assistant.

National Association of Government Employees

All full-time and regular part-time custodians.

Massachusetts Library Staff Association

All full-time and regular part-time library employees, excluding the director and the custodian.

On January 2, 1997, the Grover's Corner Municipal Employees Association (the Association) filed a petition with the Labor Relations Commission seeking to represent a bargaining unit described as:

All full-time and regular part-time clerical and technical employees in the Town of Grover's Corner, including the administrative assistant to the Board of Selectmen, the assistant treasurer, the assistant collector, the assistant clerk, the registrars, the bus driver, nutrition site manager, and nurse in the Council on Aging, the administrative assistant in the Department of Public Works, and all committee recording secretaries.

The petition specified that there were twenty-six (26) employees in the petitioned-for unit and the petition was supported by eight (8) "Show of Interest" cards.

Many Town employees testified at the hearing. Their testimony can be summarized as follows:

George Gibbs

George Gibbs has been the Town's business manager for ten (10) years and is familiar with the job duties of all Town employees. Clerical employees in the Town are assigned to various departments. They answer the telephone, type, and file. With the exception of the administrative assistant in the Department of Public Works, clerical employees often fill in for each other on vacations and cover lunch breaks.² The positions require a high school education and general office skills.

²The administrative assistant in the DPW does not fill in for other clerical employees because she works out of the DPW garage, which is across Town.

Because the Town Collector and Town Clerk are elected positions, the Collector's and Clerk's Offices are actually run by the assistant collector and assistant clerk, respectively, who have both been with the Town for more than fifteen years. The assistant collector and assistant clerk recommend applicants to fill vacant clerical positions. They also evaluate employee performance and recommend salary increases.

The Town has almost no control over the committee recording secretaries. Although the Board of Selectmen has sign-off authority on all selections, they have never refused to approve a selection and the confirmation process is really pro-forma.

The Nurse in the Council on Aging is not a Town employee. She works pursuant to a contract for services and is paid monthly from the Town's vendor account (Town employees are paid weekly). She is not covered by the Town's group health insurance policy and does not receive holiday, sick, or vacation pay. The Town does not withhold federal or state income taxes from her check, does not pay employer taxes, or cover the nurse under its workers' compensation policy. On cross-examination, Gibbs admitted that the nurse works a set schedule (although part-time) and, if she is sick, she is expected to report to the director of the Council on Aging. Gibbs also admitted that the director occasionally directs the nurse to make a "house call" to a client (most of the nurse's duties are performed at the Senior Center).

Emily Webb

Emily Webb is the administrative assistant to the Board of Selectmen. She reports directly to the Board and is responsible for taking the minutes of the Selectmen's meetings, including some meetings conducted in executive session.³ She also types all correspondence, including letters to various unions and various collective bargaining agreements. On cross-examination, Ms. Webb admitted that she does not type collective bargaining proposals and does not know the content of those proposals until they are presented to the union.

Joe Crowell

Joe Crowell is the assistant treasurer, but considers himself the "co-treasurer." Both he and the treasurer have Master's Degrees in Public Administration, with a concentration in municipal finance. Crowell makes decisions about how to manage the Town's funds, including how and where to deposit long- and short-term investments. Although Crowell never makes a decision without consulting with the treasurer, the treasurer never seems to make a decision without consulting with Crowell. Crowell also considers the treasurer's office a "team," with each employee knowing his or her job and working without supervision. However, on cross-examination, Crowell stated that he is an employee at will and could be terminated by the treasurer. He also admitted to disciplining a clerical employee in the treasurer's office a few years ago.

³The Selectmen also conduct some meetings in executive session without her. However, because she is not invited to those meetings, she does not know what topics are discussed.

Rebecca Gibbs

Rebecca Gibbs is the Nutrition Site Manager. She has a Master's Degree in Nutrition and is responsible for evaluating and managing the nutritional needs of the Town's senior citizens. Although she reports to the director of the Council on Aging, Ms. Gibbs does not discuss each case with the director. Rather Ms. Gibbs is given a budget to work with and, as long as she does not exceed that budget, she has complete authority to purchase services and supplies.

Following the hearing, the Association filed a charge of prohibited practice. The investigation revealed the following facts:

On the day after the hearing, Emily Webb wore a "Union - Yes" button to work. When George Gibbs saw the button, he became very angry and told her to "take that damn button off." When Webb protested, Gibbs told her to take the button off or go home. When faced with taking the button off or being sent home, Webb took the button off. She really did not think that Gibbs would send her home, but she took the button off "to avoid trouble." A personnel by-law prohibits wearing buttons or other slogans that are "offensive," and last year a DPW laborer was reprimanded for wearing a "take this job and shove it" hat.

The following week, Emily Webb and Rebecca Gibbs were having lunch and discussing the "union thing." Eventually, the conversation turned to health benefits. Webb stated that she believed that the Town should offer family-plan coverage to Gibbs's boyfriend, who had lived with her for more than five years. Webb also told Gibbs that she thought that the union might be successful in getting such a benefit.

When Webb reported to work the next day, George Gibbs called her to his office and told her that he had an important assignment for her. She was to report to the Town Hall basement and catalogue the Town's vital records from the 1800's. He also told her that the job could last at least a month, and possibly even beyond the union election. When Webb asked why her, Gibbs responded "why not you?" Ironically, later that day, Gibbs received a copy of a new state regulation that required the work. When Gibbs went to check on Webb's progress, he told about the new regulation.

Fact Pattern #2

Three years have now passed since the Association won the election and became the certified collective bargaining representative of a bargaining unit of clerical employees. The Association and the Town are parties to a collective bargaining agreement covering the period July 1, 1997 through June 30, 2000. Article 14 of that agreement, entitled "Health Insurance," states, in part:

Bargaining unit members shall be entitled to enroll in any of the Town's group health insurance plans and the Town shall contribute 75% toward the premium of any such plan.

In September 1999, the Town offered Blue Cross/Blue Shield Master Medical and a number of Health Maintenance Organization (HMO) plans and, consistent with Article 14 of the parties' agreement, contributed 75% toward the cost of those plans. In November 1999, George Gibbs received the following letter:

November 1, 1999

**George Gibbs
Business Manager
Grover's Corner, Massachusetts**

Dear Mr. Gibbs:

Our records indicate that enrollment in Blue Cross/Blue Shield Master Medical has dropped below the minimum participation rate of 20%. Accordingly, we will be unable to offer Blue Cross/Blue Shield Master Medical to the Town of Grover's Corner after December 31, 1999.

Sincerely,

**Simon Stimpson
Account Executive**

Gibbs sent a copy of the letter to all of the unions that represent Town employees and offered to bargain. On the same day (the letters crossed in the mail), the Association sent the following letter to Gibbs:

November 1, 1999

**George Gibbs
Business Manager
Grover's Corner, Massachusetts**

Dear George:

With the end of our first collective bargaining agreement approaching, the Association seeks to begin negotiations over the terms of a successor agreement. Kindly forward any proposals you may wish to discuss to me at your earliest convenience.

Sincerely,

**Emily Webb
President
Grover's Corner Municipal Employees Association**

In response, Gibbs wrote:

November 5, 1999

**Emily Webb
President
Grover's Corner Municipal Employees Association**

Dear Emily:

Just a short note to clear up a couple of things. First, the Town is more than willing to negotiate with the Association over the terms of a successor collective bargaining agreement. However, because the Finance Committee has not yet completed its projections for FY01, I suggest that we put off any negotiations until March 2000. Second, my letter dated November 1, 1999, was an offer to bargain over Blue Cross's decision to cancel Master Medical. I believe the subject should be bargained apart from the main collective bargaining agreement negotiations. If you refer to Blue Cross's letter dated

November 1, 1999, they plan to cancel Master Medical effective January 1, 2000.

Sincerely,

George Gibbs
Business Manager

Despite Gibbs's suggestion that the parties begin negotiations in March 2000, the parties actually began negotiating the terms of a successor collective bargaining agreement on November 10, 1999. At the first meeting, Gibbs offered a 1% across-the-board salary increase for all members of the bargaining unit and stated that he was pretty firm on the wage term and "didn't see much room for movement." In response, Webb told him to shove the 1% and that the Association would have no counter offer until the Town came up with something they could work with.

In the meantime, Gibbs was becoming concerned about costs and productivity. In November 1999, he hired a personnel consulting firm to analyze the job duties and write position descriptions for all Town employees. When the Association learned of the project, it immediately demanded copies of "all reports submitted to the Town" by the personnel consulting firm.

On the morning of November 28, 1999, as Webb was walking to Town Hall from her car, she noticed a video camera mounted at the top of one of the light poles in the parking lot. She did not think much of it until, later that day, she received a telephone call from the administrative assistant at the Department of Public Works and learned that cameras had been installed all over Town.

When Webb questioned Gibbs about the cameras, he said nothing. A couple hours later, Gibbs went to see Webb and the following exchange occurred:

GIBBS: Please come to my office, we need to discuss something.

WEBB: Is it about the Union or just me?

GIBBS: Just you.

WEBB: I want to bring a Union representative with me.

GIBBS: You don't need one.

WEBB: If you are going to interrogate me, I want a witness.

GIBBS: I am not going to interrogate you.

WEBB: You're a liar.

GIBBS: Emily, I said I am not going to interrogate you.

WEBB: I'm not coming.

GIBBS: Fine.

Following the exchange, Gibbs handed Webb the following memorandum:

TO: Emily Webb

From: George Gibbs

Date: November 28, 1997

RE: Written Warning

On November 27, 1999 at approximately 5:01 P.M., you were seen leaving Town Hall with a box of paper clips. As you know it is against work rules to pilfer office supplies. You are hereby warned that this behavior is unacceptable and that further unacceptable behavior will result in additional discipline up to and including discharge.

Gibbs also issued another warning to Webb for insubordination for refusing to meet with him.

Later that evening, Webb brought the warning up at an Association meeting. She stated that she believed she was disciplined unfairly and stated that the Association should hire a lawyer and "fight this thing all the way to the Supreme Court." One of the other members told Webb that she got caught red-handed and should just accept the consequences. The conversation became heated when another member expressed his view that a \$0.75 box of paper clips is not worth the two or three thousand dollars it could take to arbitrate the grievance. Another member opined that it might not be a good idea to antagonize Gibbs during successor contract negotiations. A third member agreed and added "Hey Emily, If you pay your dues, maybe we'd have the money to hire you a lawyer." Ultimately, the members voted not to take the grievance to arbitration.

MASSACHUSETTS SCHOOL OF LAW

LABOR LAW

FINAL EXAM, DECEMBER 16, 1992

PROFESSOR FREDERICK T. GOLDER
617-592-4000

Hypothetical Case I

Local 2 of the Bean Workers of America began a campaign to organize the workers of the S.O. Bean Company of Atlanta, Georgia.

In February 1992, the plant manager met with ten union supporters. The union supporters assert that the plant manager threatened them with loss of their jobs, and promised them increased pension benefits if the union were defeated.

On May 16 a meeting open to all Bean employees and their families was held at the plant auditorium. Certain employees who opposed the union were seated prominently and featured as speakers. All of the speakers at the meeting opposed the union. They warned of strikes, plant closure, and loss of jobs and benefits. No union supporter was allowed to speak at the meeting.

The union lost an NLRB election on May 29. The union filed unfair labor practice charges, but they were dismissed by the NLRB. The NLRB did order a second election.

In June 1992, Local 2 filed a Civil Rights Act suit under 42 USC Section 1983, which provides a federal remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." The complaint sought relief for violations of rights set forth under Section 7 and 9 of the Taft-Hartley Act and of the First Amendment Rights of Free Speech and Association. Pendent relief under Georgia Law was also sought. The complaint sought declaratory and injunctive relief, compensatory damages, punitive damages, and attorney's fees.

You have been retained by the S.O. Bean Company to defend them against this claim. What defenses are available to your client? What course of action would you recommend? and why? Are there any ethical issues involved?

Hypothetical Case II

Joan Wright comes to you to represent her. She provides you the following facts:

Joan went to work for the S.O. Bean Company on June 1, 1992. On July 16, 1992 she reached her thirty-first day of employment. The Collective Bargaining Agreement ("CBA") provides for a "thirty (30) day probationary period (60 days if mutually agreeable to extend probation)." Discharge during the "thirty (30) day probationary period" is not "a matter of grievance". Employees who complete the prescribed period become "members of the Union".

On July 16, 1992, the president of Local 2 of the Bean Workers of America ("Local 2") welcomed her as a union member and gave her a union card. The union president told her that there was no truth to the rumors that the probationary period might be extended for her and other employees hired about the same time.

During her thirty-day probationary period, Joan had missed one day of work because of illness.

On July 17, she telephoned her supervisor to report that she was having trouble with her car. He told her to wait 30 minutes for him to pick her up. She walked home after waiting for him for over an hour.

On July 18, Joan received a written warning as a "no report-no show". She protested and spoke to a union representative about filing a grievance.

On July 19, Joan attended a Local 2 monthly meeting. After the meeting, she asked the union president about her July 18 warning. The union president told her that he was following up on the matter.

On July 20, Local 2's business committee met with the plant manager. Eventually, it was agreed that the probationary period for Joan and the other people hired with her should be extended retroactively. Joan's work performance was discussed briefly, and the plant manager noted that she had been absent from work twice.

All members of the Local 2 committee except one, agreed to extend the probationary period. The one dissenting member said that union cards had been given out, and that Joan had attended

a union meeting and had initiated a grievance. On July 24, Joan injured her knee at home. A physician told her she would be unable to work, and she telephoned her supervisor to report her absence.

On July 25, Joan went to the plant on crutches to present written medical excuses and to request a medical leave of absence. The plant manager told her to return the next day. She did and was fired for missing too many days from work.

Joan spoke with the union president, who said he would try to work things out. The union president did talk to the plant manager but did not investigate the matter further, did not pursue the warning grievance, nor did he pursue any of the issues involved in the discharge.

Joan Wright comes to you for legal advice. What remedies are available to her? What course of action would you recommend to her? and why?

Hypothetical Case III

A substance-abuse policy negotiated by an employer and a union is set forth in a letter of understanding which prescribes "immediate discharge" for reporting to work "under the influence" of drugs and states that an employee is "under the influence" when "test results show the presence of a controlled substance."

A machine attendant was ordered to submit to a drug test after she pierced her finger on a pin. On returning to the plant, she told her supervisor that she expected to be fired because her urinalysis would be positive for marijuana. After the employer received the lab report showing that the test was positive for cocaine, the employee was discharged.

She grieved the discharge, and the employer agreed to re-evaluate her eligibility for re-employment if she participated in an out-patient drug-rehabilitation program. She attended only seven of the first twelve sessions, however, and failed to acknowledge her substance abuse problem. The employer subsequently denied her grievance. The union contended that the grievant should be reinstated because the drug-and-alcohol policy was never explained to her, the employer failed to consider her seniority and good work record, and it did not weigh the fact that she remained drug free after entering the rehabilitation program.

The employer argued that the grievant had actual and constructive knowledge of the drug policy, and that the discharge was warranted under the clear language of the policy. The employer also added that her failure to complete the rehabilitation program showed a lack of responsibility.

You have been selected to arbitrate this discharge grievance. Please write a decision in this case, and provide the rationale for your decision.

MASSACHUSETTS SCHOOL OF LAW

LABOR LAW

FINAL EXAM, DECEMBER 13, 1990

PROFESSOR FREDERICK T. GOLDR
(617) 592-4000

Hypothetical case 1

The Koff Company promulgated a no-smoking policy. The Union, the Greater Association of Security Personnel, filed a grievance asserting that smoking had been allowed in approximately 50% of the plant areas and that 32% of the employees smoked. The Union asserted that the new rule was a unilateral change in working conditions and would adversely affect many employees, and therefore must be negotiated.

The Company took the position that elimination of smoking would benefit both the company and the employees. The employer further asserted that employees worked in close proximity to each other and that non-smokers are directly affected by smoking. The employer also asserted that a ban on smoking would reduce health insurance costs. The employer produced records to show that group health insurance costs had tripled in the past ten years, even though the average size of the work force had decreased.

The parties have not been able to resolve their differences, and the case is now scheduled for arbitration. The Union has asked you to represent them at the arbitration proceeding.

What issues would you present to the arbitrator? What arguments would you present to the arbitrator? Do you see any ethical problems? If yes, how would you resolve them?

Hypothetical Case 2

AL Stressor is an employee of the Koff Company. He learned that a Christmas Party was to be given for employees of one of the plants, and he attempted to learn who was in charge of the party so that he could offer to play the piano or organ there. The people he approached were not responsive, and he left the work area without incident.

According to the employer, it received a call from the supervisor of the plant who said that the employee's contacts with the workers at the plant were a "nuisance." The employer investigated, and allegedly learned that the employee had been loitering about the plant administrative offices, copying the names and telephone numbers of female employees. The employee also allegedly asked the workers at the plant "personal questions" concerning the Christmas party and their phone numbers.

The employer gave the employee a disciplinary notice suspending him for five days because of "poor work performance, creating a nuisance for employees, and sexual harassment and/or unwanted contact of employees."

The employee filed a grievance under the collective bargaining agreement, and as a result the Union negotiated a reduction of the five-day suspension to a two-day suspension, and had the notice revised to refer to "harassment" rather than to "sexual harassment." Following that incident the employer sent a disciplinary notice to the employee accusing the employee of "falsification" of a time card. The employee had entered a day of sick leave on his card, although he had not provided a doctor's excuse for his absence. Because the doctor's excuse requirement had been made known to the employee, his supervisor regarded the time card entry as a falsification. The Union was able to negotiate a change of disciplinary notice by deleting the reference to "falsification" and instead the disciplinary notice was changed to state "malingering" and ignoring "required policy/procedures."

Al is not satisfied with the steps taken by his Union, and he seeks legal advice from you.

What course of action would you recommend and why? What defenses would you expect the employer to raise and why?

Hypothetical Case 3

Since 1968, the Management-Rights Clause of the Koff Company's collective bargaining agreement has included the right "to subcontract" and subcontracting is also exempt from the arbitration provision.

During negotiations that preceded prior collective bargaining agreements the Union unsuccessfully sought to restrict or eliminate the right to subcontract maintenance work. The Union filed a number of subcontracting grievances between 1981 and 1988, and there were five strikes in support of those

Helen 82-8739

grievances.

In January 1990, the Union filed a grievance protesting the subcontracting that occurred during the latest peek. The Union demanded a list of the subcontractors used, the jobs they performed, the cost of individual jobs, and the identities of the bidders on these jobs. The employer provided some of the information, but refused to supply the cost information. The Union asserted that it needed the cost information to process its grievance and also to prepare for negotiations of a new collective bargaining agreement to replace the one that was scheduled to expire in May 1990.

The Union also went on strike. The Company offered two years of extra seniority for the striking employees if they would return to work and hired some new permanent replacements. When the strike ended, three of the striking employees were replaced by employees who had less seniority, but who had returned during the strike and gained the extra two years of seniority.

The Union filed unfair labor practice charges against the Employer asserting that the employer was not bargaining in good faith and had discriminated against the striking employees by offering two years of seniority to get the strikers to return to work.

You are the NLRB. Please provide your rulings and rationale for your rulings.

ALL ANSWERS MUST BE IN YOUR EXAM BOOKLETS!