GO AHEAD AND GRIEVE:
FILING A GRIEVANCE DOES NOT WAIVE AN INDEPENDENT LAWSUIT

By Matthew A. Peluso, Esquire

All law enforcement officers are familiar with filing a grievance under their collective bargaining agreement ("CBA"), their employee handbook or the civil service rules, depending on which of those procedures primarily control the terms of their employment. However, many law enforcement officers are under the mistaken impression that the disposition of their grievance (whether positive or negative) prohibits them from also pursuing an independent tort action against their employer and supervisors under statutes such as the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1, *et seq.* or Conscientious Employee Protection Act ("CEPA"), *N.J.S.A.* 39:19-1, *et seq.*

Most CBAs contain a grievance and/or arbitration clause, which sets forth the procedures and "steps" of the grievance process from filing through disposition. CBAs applicable to law enforcement officers in this state often define a "grievance" as:

> "Any complaint, difference or dispute between the employer and any employee with respect to the interpretation, application or violation of any of the provisions of this [CBA] or any applicable rule, regulation or policies, agreement or administrative decisions affecting any employee(s) covered by this [CBA] which governs terms and conditions of employment."

Further, most CBAs protecting law enforcement officers also include a specific preservation of existing statutory rights clause. This type of clause usually reads something like the following:

> "Unless a contrary intent is expressed in this [CBA], all existing benefits, rights, duties, obligations, and conditions of employment applicable to any employee covered by this [CBA] pursuant to any rules, regulations, instructions, memorandum, directive, statute or otherwise shall not be limited, restricted, impaired, removed or abolished."

When read together, the two types of typical CBA clauses set forth above establish that a "grievance" filed by a law enforcement officer under a CBA is purely a "*contractual*" dispute, which does not prohibit that same officer from also pursuing separate *tort*-based legal action in a court of law against his/her employer and/or supervisor(s) for example, racial, age or gender discrimination, sexual harassment, retaliation, or a hostile work environment. As the Supreme Court of New Jersey held in *Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n,* 94 N.J. 9 (1983), a discrimination claim is not subject to binding arbitration.

Rather, as held by a federal court in New Jersey, the grievance procedure and "steps" set forth in most CBAs applicable to law enforcement officers are merely an administrative process that officers are often required to exhaust before they can pursue their independent statutory claims in court. *See Fregara v. Jet Aviation Business Jets*, 744 F.Supp. 940 (D.N.J. 1991). There is a longstanding policy behind the limited scope of grievance hearings: Such administrative proceedings cannot provide a proper forum for a full determination on the merits of private tort or statutory causes of action, including, but not limited to, discrimination cases under the LAD and retaliation cases under CEPA. *See Nicholson v. CPC Intern., Inc.*, 877 F.2d 221 (3rd Cir. 1989).

Also, in *Scotch Plains-Fanwood Bd. of Ed. v. Scotch Plains-Fanwood Educ. Ass'n*, 139 N.J. 141 (1995), the Supreme Court of New Jersey held that a hearing officer or arbitrator's authority to decide a grievance filed by a public employee is solely determined by the controlling CBA. Accordingly, a hearing officer or arbitrator cannot exercise greater authority than the CBA confers on them. Even the parties themselves in a public arbitration cannot give the arbitrator greater discretion than the CBA allows. *See Communication Workers of America, Local 1087 v. Monmouth County Bd. of Social Services, 96* N.J. 442 (1984). Thus, in the absence of any specific language in a CBA, a law enforcement officer must explicitly and knowingly waive his/her civil rights before they can be prohibited from bringing a separate lawsuit.

In *Alexander v. Gardner-Denver Co.*, 414 U.S. 36 (1974), the United States Supreme Court specifically addressed the issue of waiver of an employee's federal civil rights: "We must decide under what circumstances, if any, an employee's statutory right to a *trial de novo* under Title VII [the federal discrimination statute] may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." Under the controlling CBA in *Alexander,* all disputes between the employee and employer were required to be submitted to a multi-step grievance procedure and, if any dispute still remained unresolved, the matter was to be remitted to compulsory and binding arbitration.

In *Alexander,* the highest court in the country held that an "individual does not forfeit his private cause of action [for statutory discrimination] if he first pursues his grievance to final arbitration under the nondiscrimination clause" of a CBA. The Court further ruled that:

> "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a [CBA]. By contrast, in filing a lawsuit under [a statutory scheme], an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence. And certainly no inconsistency results from permitting both rights to be enforced in their respectively appropriate forums."

The courts in New Jersey have applied the ruling in *Alexander* to employees in this state. In the case of *Gras v. Assoc. First Capital Corp.,* 346 N.J.Super. 42, 54 (App. Div. 2001), *certif. denied* 171 N.J. 445 (2002), the Appellate Division of New Jersey ruled that any alleged waiver of an employee's right to pursue an independent tort claim must be clear and explicit. In *Quigley v. KPMG Peat Marwick, LLP,* 330 N.J.Super. 252, 271 (App. Div.), *certif. denied* 165 N.J. 527 (2000), the Appellate Division ruled that a "clause depriving a citizen of access to the courts should clearly state its purpose, especially where the choice is to arbitrate disputes rather than litigate them."

In Garfinkel v. Morristown Obstetrics & Gynecology Assocs., 168 N.J. 124, 127 (2001), the New Jersey Supreme Court held that an employment agreement's arbitration clause was insufficient to constitute a waiver of the plaintiff's remedies under the LAD because the Court would not assume that employees intended to waive their statutory rights unless the employment agreement at issue stated such a waiver "in unambiguous terms." *In Grasser v. United HealthCare Corp.,* 343 N.J. Super. 241, 250 (App. Div. 2001), the Appellate Division relied on *Garfinkel* when it ruled that the employee in that case had not agreed "to arbitrate all statutory claims arising out of the employment relationship or its termination."

The case law cited above also applies to law enforcement officers covered by CBAs. CBAs in this state usually do not contain clear and unambiguous waiver provisions that prohibit an officer from filing a discrimination, sexual harassment, retaliation or hostile work environment lawsuit in federal or state superior court against their employer even when they have availed themselves of the grievance procedure set forth in the CBA or employee handbook.

Similar reasoning applies in the context of a discrimination claim brought by a civil service employee under New Jersey's Employer-Employee Relations Act, *N.J.S.A.* 11A:2-13. In *Hennessy v. Winslow Twp.,* 183 N.J. 593 (2005), a disabled state employee requested a departmental hearing to challenge her notice of termination. The hearing officer agreed with the State and terminated the employee. Instead of appealing her termination to the Merit System Board, which she could have done under N.J.A.C. 4A:2-2.8(a), the employee filed a state court lawsuit under the LAD.

The Supreme Court in *Hennessy* ruled that the disabled employee had not waived her right to file an LAD lawsuit specifically because she had elected not to pursue an administrative appeal of her termination to the MSB. "Her decision to forego an administrative remedy at that stage and to seek instead a judicial forum for her LAD claim was hers to make" and, accordingly, "[p]reclusion is not warranted in these circumstances because of the stage at which the plaintiff shifted gears from the administrative channels of review available to her, to the judicial forum that she preferred."

Thus, unless a law enforcement officer separately executes a written waiver in which he/she clearly and knowingly gives up their right to bring an independent tort-based lawsuit against their employer relating to the disputed conduct, the state, county or local municipality employing that officer cannot claim that the grievance hearing or contractual arbitration provisions contained in the controlling CBA or the civil service statute alone prohibit the filing of any such lawsuit.

Since, under both federal and New Jersey state law, an employee can pursue a grievance and yet still preserve his/her right to sue their employer over allegedly wrongful conduct, the voluntary and unnecessary waiver of that independent right could have serious and permanent negative consequences for any employee. Therefore, prior to even contemplating, nonetheless executing, any such significant waiver of rights, a law enforcement officer should consult with both their local union representatives and a private employment law attorney with experience in this type of dispute.

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