LEGAL MAILBAG – FEBRUARY 8, 2024

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The "Legal Mailbag Question of the Week" is a regular feature of the CAS Weekly NewsBlast. We invite readers to submit short, law-related questions of practical concern to school administrators. Each week, we will select a question and publish an answer. While these answers cannot be considered formal legal advice, they may be of help to you and your colleagues. We may edit your questions, and we will not identify the authors.
Please submit your questions to: legalmailbag@casciac.org.

Dear Legal Mailbag,

As a faithful reader of "Legal Mailbag," I read with interest the letter last week about restorative practices (Legal Mailbag 2-1-24) , and I appreciate Legal Mailbag's clarification of what school officials can and cannot do in disciplining students. Giving students cleaning materials and making them clean up the graffiti that they create seems only fair. However, mightn't there be a union problem here? Can the custodians union complain about this practice?

My father was a union type, and on occasion he would tell me about "bargaining unit work" and how important it is for union members to protect their work and not let others do their work and, ultimately, take their jobs. Cleaning up after students is one of the responsibilities custodians have, and I wonder whether the school district is giving bargaining unit work to students. Where does it end? Can school officials ask students to sweep floors or empty wastebaskets instead of getting suspended?

Signed,
Union Vigilance

Dear Vigilance:

Thank you for being a faithful reader of Legal Mailbag, which is happy to respond to your question. Your father was correct in telling you that union employees have the right to protect their jobs. But that right is not absolute, and Legal Mailbag questions whether the protections for bargaining unit work even apply to the situation addressed last week.

The State Board of Labor Relations has long held that moving work performed by members of one bargaining unit to another bargaining unit or to a private entity, a practice referred to as "contracting out," is a mandatory subject of negotiation unless the applicable collective bargaining agreement expressly permits such action. *Plainville Board of Education*, Decision No. 1192 (St. Bd. Lab. Rel. 1974). That means that an employer must negotiate with the affected union if it proposes to contract out bargaining unit work, *i.e.*, reassign work done by members of a bargaining unit to someone else.

In 1995, the State Board of Labor Relations clarified this holding in a key case, *City of New Britain*, Dec. No. 3290 (St. Bd. Lab. Rel. 1995). Now, if a public employer proposes subcontracting or transfer of work from a bargaining unit, it must negotiate over the change with the unit that is affected if three tests are met: (1) the work in question is bargaining unit work, (2) the subcontracting or transfer of the work at issue varies significantly in kind or degree from what had been customary under past established practice, and (3) the subcontracting or transfer of work in question has a demonstrable adverse impact on the bargaining unit.

Legal Mailbag notes that the requirement to negotiate over proposals to contract out bargaining unit work means that the impasse resolution procedures in MERA (the "Municipal Employees Relations Act") apply. If the issue is not resolved promptly through negotiations, the parties must then proceed to binding arbitration to resolve the dispute thirty days after "the date the parties to an existing collective bargaining agreement commence negotiations to revise said agreement on any matter affecting wages, hours, and other conditions of employment. . . ." Conn. Gen. Stat. § 7-473c(b). Accordingly, an arbitration panel may have the final say in such matters.

Significantly, there is no exception in the contracting out rules for actions of volunteers. If a school board wishes to permit volunteers to perform work otherwise performed by members of a bargaining unit, it must negotiate with the applicable union before taking such action. The result of such negotiations will depend upon the facts and circumstances of the situation, but almost certainly the union will want to protect the jobs of its members.

As important as these principles are, Legal Mailbag does not believe that the custodians union could object to the restorative practice described here last week. Under the *City of New Britain* rule, the union would have to show that asking students to clean up their own messes is a change in practice that "has a demonstrable adverse impact on the bargaining unit." Such restorative interventions are presumably ad hoc and limited in number. Presumably, there would be no reduction in custodial positions or hours as a result of this practice, and thus there would be no adverse impact on members of the custodians bargaining unit. Indeed, if the union were ever to complain that students are cleaning up their own graffiti, school officials may wish simply to say "you're welcome" in response.