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New Guidance on Performance Based Contracts

by Eric P. Nelson

Performance based efficiency contracts, also referred to as energy conservation contracts, permit school districts to finance certain energy conservation measures by capturing the cost savings resulting from their implementation. In order to finance these improvements beyond the current fiscal year, Oklahoma law requires that the cost savings resulting from the performance based efficiency contract be guaranteed each year during the term of the agreement and that the savings be sufficient to offset the annual cost of the contract. If savings in any contract year are insufficient to pay the contract's cost, the guarantor must reimburse the school district for the amount of any guaranteed savings not realized.

The Attorney General has issued a new opinion addressing the calculation of cost savings in these performance based contracts. The opinion addresses the common practice of using "capital cost avoidance" and "stipulated savings" when calculating the savings the parties expect to realize from implementation of the energy conservation measures. Capital cost avoidance refers to the anticipated cost of replacing property with a limited life expectancy. For example, when high efficiency HVAC equipment is a part of the energy conservation measures and existing equipment is nearing the end of its useful life, the routine cost of replacing aging equipment has often been added to the savings calculation. This avoided cost of replacement is then capitalized over the useful life of the equipment or the term of the agreement, whichever is less. The Attorney General concluded that only operating costs may be included within the calculation of cost savings under a performance based efficiency contract.

The use of stipulated savings is a common practice used to avoid the requirement of measuring actual savings in each year of the term of a performance based contract. School districts are often asked, for example, to stipulate to the savings resulting from the replacement of lighting fixtures. If the wattage of existing lighting fixtures is reduced by half, the energy savings anticipated as a result from a

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lighting retrofit can be calculated to a mathematical certainty given various assumptions with respect to usage and cost of electricity. Oklahoma law requires that performance based contracts include an annual measurement of the actual savings resulting from the implementation of the energy savings measures. Further, the actual savings must be guaranteed during each year of the contract term. The use of stipulated savings, according to the Attorney General, acts to override these statutory requirements by substituting the parties' expectations as to the contract's effect for actual measurement.

". . . the cost of all performance based efficiency contracts must be wholly offset by savings in operating costs resulting from implementation of the energy conservation measures."

Following this opinion, the cost of all performance based efficiency contracts must be wholly offset by savings in operating costs resulting from implementation of the energy conservation measures. These savings must be measured, verified and documented during each year of the term of the contract. Those savings must be guaranteed during each year of the contract term, and any shortfalls must be reimbursed by the guarantor.

School Districts Prevail in Challenges under Senate Bill 2XX

The Mid-Del School District and the Harrah School District have prevailed in lawsuits alleging that they violated SB 2XX, the law passed by the Oklahoma Legislature in 2006 that granted a $3,000 raise to every public school teacher in Oklahoma. The cases were filed by each school district's association of classroom teachers. The two associations alleged that in addition to requiring a $3,000 raise, SB 2XX also required all school districts to grant the step increase specified in the state minimum salary schedule. The associations based this argument on language in SB 2XX that stated that the $3,000 raise "shall be in addition to, and not as a replacement for, the step increase indicated" on the state minimum salary schedule. In the Mid-Del case, the association also alleged that the School District violated SB 2XX by dividing the $3,000 raise into a $2,790 salary increase and paying an additional $210 of the teachers' portion of the mandatory contribution to the Oklahoma Teachers' Retirement System.

The School Districts contended that because they had negotiated salary schedules with the associations that paid more than the salaries specified on the state minimum salary schedule, the School Districts were not required to pay the step increases specified on the state minimum salary schedule. The School Districts argued that the quoted language from SB 2XX applied only to those teachers who were compensated pursuant to the state minimum salary schedule and not a collectively bargained salary schedule paying higher salaries. The School Districts pointed out that all of their eligible teachers received the step increase specified on their negotiated salary schedules.

The District Court of Oklahoma County granted summary judgment to the School Districts, and the associations appealed. In May of 2009, the Oklahoma Court of Civil Appeals affirmed both summary judgment rulings.

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The court held that the purpose of the language in SB 2XX on which the teachers relied was to prevent step increases from being eradicated in the process of giving the $3,000 raise. The court explained that for teachers who collectively bargain, such as those employed by the Mid-Del School District and the Harrah School District, there is no "indicated" step increase. The court stated that "teachers and school districts can collectively bargain for any number of pay formats, with the only limitations being that the teachers can make no less than the amounts provided in the minimum salary schedule." Accordingly, SB 2XX did not require school districts to pay the step increase specified in the state minimum salary schedule if the school districts had negotiated agreements with teacher organizations paying *more* than the state minimum salary.

The court also agreed that SB 2XX was not violated by paying part of the $3,000 raise as a salary increase and part through paying the teachers' portion of the Oklahoma Teachers' Retirement System contribution. Because the statutory definition of "fringe benefits" excludes only that portion of the OTRS contribution required to be paid *by the school district*, a school district's payment of the *teacher's* portion of the OTRS contribution qualifies as a "fringe benefit." The court pointed out that the Oklahoma Legislature has consistently stated in the state minimum salary schedule that the amounts indicated may be paid "in salary and/or fringe benefits."

The Oklahoma Supreme Court has now declined the plaintiffs' requests that it review the decisions of the Oklahoma Court of Civil Appeals. The cases are therefore concluded.

"The appellate court also agreed that SB 2XX was not violated . . ."

J. Douglas Mann and **Jerry A. Richardson** of Rosenstein Fist & Ringold represented the Mid-Del School District and the Harrah School District throughout both cases.

Bulletin: Tenth Circuit Rules on Oklahoma Immigration Law

On February 2, 2010, the Tenth Circuit issued its decision in the federal case involving Oklahoma House Bill 1804, the state's immigration bill. Last year, a federal district court enjoined portions of the legislation, effectively prohibiting the enforcement of key provisions. The state defendants appealed the trial court's injunctions, and in its recent decision, the court of appeals upheld two aspects of the injunction while lifting another.

Specifically, the Tenth Circuit lifted the trial court's injunction of Section 7(B) of the Act. That section forces businesses who contract with Oklahoma public employers (such as school districts) to use an electronic verification system, as opposed to I-9s, to verify the work authorization status of their employees.

The Tenth Circuit upheld the injunction of Section 7 (C), which makes it a sanctionable, discriminatory practice for an employer to terminate an authorized worker while retaining an employee that the employer knows or reasonably should know is unauthorized to work. The court also upheld Section 9 of the Act,

ROSENSTEIN FIST & RINGOLD

TULSA OFFICE:
525 S. MAIN, SUITE 700
TULSA, OKLAHOMA 74103
PHONE: 918.585.9211
FAX: 918.583.5617
TOLL FREE: 800.767.5291

OKLAHOMA CITY OFFICE:
2801 N. LINCOLN BLVD., SUITE 224
OKLAHOMA CITY, OKLAHOMA 73105
PHONE: 405.521.0202
FAX: 405.521.1515
TOLL FREE: 888.414.5291

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which requires contracting entities to verify the work eligibility of their individual independent contractors or withhold certain taxes from those independent contractors. Otherwise, the contracting entity is liable to the State for the money not withheld.

The Tenth Circuit has granted the parties additional time to file requests for the rehearing, so this decision may not be the final word. We will issue more guidance and detailed analysis regarding the court's decision in a subsequent edition of this newsletter.

Announcement

RFR is pleased to announce that it has expanded its practice to include representation of municipalities. If your city is looking for a city attorney, contact us.

RFR SPEAKER SHOWCASE

John Moyer will make a presentation at the Oklahoma State Department of Education's New School Board Member Workshop at the Clarion Meridian Convention Center in Oklahoma City on April 17. His topic will be "Termination of Employment and Related Issues."

Andrea Kunkel will speak to the Oklahoma Directors of Special Services group at the Wyndham Garden Hotel in Oklahoma City on April 29. She will discuss recent developments in special education law.

Bryan K. Drummond will speak at the Oklahoma Municipal Clerks and Treasurers Institute in Stillwater on March 17 about "Agendas and Minutes."

Mr. Drummond will also make two presentation at the OSSBA Spring Mini Conference in Norman on March 27. He will speak about "Evaluations and Plans for Improvement" and "Reductions in Force and Terminations."

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We welcome your comments, criticisms and suggestions. Correspondence should be directed to Rosenstein, Fist & Ringold, 525 South Main, Seventh Floor, Tulsa, Oklahoma 74103-4508, or call us at (918) 585-9211 or 1-800-767-5291. Our FAX number is (918) 583-5617. Help us make *Chalkboard* an asset to you.