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School Administrators Association *of* New York State

Employment Termination & Position Abolishment in Uncertain Times



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**Employment Termination & Position Abolishment
in Uncertain Times
Fourth Edition**

*This publication was written by the
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for the benefit of SAANYS members.*

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EMPLOYMENT TERMINATION & POSITION ABOLISHMENT IN UNCERTAIN TIMES

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EMPLOYMENT TERMINATION & POSITION ABOLISHMENT IN UNCERTAIN TIMES

I

Introduction

The threat of termination is one of the most emotional and disturbing employment events encountered by our members. It may occur regardless of, or even in spite of, the member's exemplary work performance history. Unfortunately, regardless of tenure or other permanent job status, no one is immune to termination. While a member's first defense is always direct and personal SAANYS legal assistance, this booklet is designed to describe generally the legal processes involved in termination and members' related legal rights. Because each situation is unique, however, **legal advice appropriate in any particular instance is beyond the scope of this booklet.** Therefore, please consult a SAANYS attorney should you be faced with termination. In addition, as resignation irrevocably severs many legal rights, never resign from a position under duress absent prior discussion with a SAANYS attorney. Often, careful legal analysis and advocacy either reveals resignation is unnecessary or results in a more favorable negotiated settlement.

School districts and BOCES may pursue employee termination either for disciplinary reasons or for budgetary or programmatic reasons. The applicable legal provisions and responsive strategies governing either basis of involuntary employment termination depend on the position's legal category and the employee's legal appointment status. For nearly all SAANYS members, the position category is either: (1) a position requiring professional certification or licensure or (2) a position requiring appointment from a civil service list. In general, the legal appointment status for individuals whose positions require certification is either probationary or tenured; for civil service appointees, generally it is provisional, probationary, temporary, or permanent.

For certificated employees, an additional caveat may be helpful. Although certificated individuals generally are not referred to as civil service employees, in fact, as public employees they are subject to the civil service merit system. However, Civil Service Law §35(g), consistent with the constitutional merit and fitness mandate, provides for the certification process to establish competence for education professionals. The civil service category for which this method is available is known as the unclassified service. Thus, administrators and supervisors, as well as teachers, are civil service employees whose positions have been placed

in the unclassified service category. As such and by law, rules for their appointment and status are governed by New York Education Law and the implementing regulations of the commissioner of education. As these unclassified employees qualify for their positions by achieving professional certification, they are generally known as “certificated” staff.

All other school district and BOCES employees are placed in the broad civil service category known as the classified service, which is divided into four subcategories. SAANYS members generally are in the competitive class subcategory, the permanent appointment to which requires qualification by civil service assessment or test. These employees are known generally as “civil service” staff.

For both certificated and civil service staff, the legal rights and processes for disciplinary and for budgetary or programmatic termination vary depending on whether the employee has achieved permanent status. Such status must be preceded by a probationary period, during which time minimal rights and processes apply. For certificated staff, permanent status is known as tenure. For civil service competitive staff, permanent status is known, appropriately, as permanent. Obviously, neither tenure nor permanent civil service status precludes termination either for disciplinary or for budgetary or programmatic reasons. However, termination of tenured or permanent staff for any reason is governed by extensive statutory and regulatory provisions.

In addition to these statutory and regulatory protections, collective bargaining agreements and individual employment contracts may provide additional rights and processes for termination proceedings. Because any such rights are contractual, they exist only when the parties have negotiated and agreed to them, and generally only when they have been agreed to and implemented prior to the particular termination proceeding.

The following sections describe the principal aspects of the termination processes and the related employee rights. The sections are organized by position categories and by appointment status. For convenience of reference, SAANYS members are referred to as “administrators” regardless of their actual titles, such as supervisor, director, specialist, or technician.

II Certified, Tenured Administrators

Employment security rights of tenured staff are tied inextricably to tenure. Unfortunately, the tenure process sometimes results in ambiguity which adversely affects tenure rights, but which may not be apparent until tenure rights are invoked. Therefore, it is important to understand the legal framework in which tenure is granted, maintained, and forfeited. Thus, our description of termination proceedings and related employee rights of certificated, tenured administrators begins with an overview of tenure.

Tenure Areas

Perhaps the most contentious and troublesome tenure issues occur when districts fail to establish clear and consistent tenure areas. Tenure area confusion arises because no statutory or regulatory framework establishes administrative tenure areas, unlike the rigid teacher tenure categories specified by regulation.¹ Because administrative tenure areas are not specified by regulation, districts are free to create their own tenure categories. They may place all administrators in a single, broad tenure area, place each administrator in a distinct area, or establish any other tenure area arrangement.²

This freedom may result in vague, undefined tenure assignments. It also allows districtwide tenure inconsistency over time, in which subsequent appointments to seemingly identical positions are placed in different tenure areas.³

The freedom to define tenure areas may result in counterintuitive layoff determinations. Assume a district with two elementary schools appoints one of those school principals to a tenure area of Elementary School Principal, K-5, but later appoints the other principal to a tenure area of general administrator, to which the district has also assigned a middle school principal and a curriculum director. In that case, the first appointment is to a single position tenure area and the latter appointment is to a multiple position general tenure area. Should the principal receiving the latter appointment be the least senior person in the general administrative tenure area, he or she would be displaced if any of the three general administrative tenure positions are abolished, but not if the other elementary principal position is abolished. In that case, the more senior elementary principal would be displaced and the less senior elementary principal retained.

Administrative tenure areas are determined at the time of appointment and may not be changed later absent the administrator's consent.⁴ The tenure

area is usually specified in the appointment letter and in the school board resolution making the probationary appointment. Because tenure area placement and tenure seniority would determine any future layoff order, it is important that both the probationary appointee and the unit leadership confirm that the tenure area is properly specified in both documents. All administrators should permanently retain a copy of his or her probationary appointment letter and the board resolution.

A subsequent involuntary tenure area transfer is unlawful because it violates the incumbent's constitutional due process property right to the existing tenure area position. The right derives from the district's stated tenure intention.⁵ Because tenure termination extinguishes due process property rights, permitting districts to restructure tenure areas unilaterally would vitiate members' due process and tenure protections. As tenure is the linchpin of job security, it cannot be arbitrarily revoked and, similarly, members should never abandon it thoughtlessly or under duress.

Given the lack of statewide, uniform administrative tenure areas, situations periodically arise in which a district's original tenure structure is ambiguous. Then, the actual tenure area may be determined by the district's historical policy and intent as evident in other tenure appointments.⁶ Tenure area ambiguity ultimately is resolved by interpreting the ambiguity broadly, on the premise that the district had the power and responsibility to specify a narrower tenure area if it had so intended.⁷ In such cases, unless the district's historical policy and intent indicate otherwise, placement in the broad, general administrative tenure area is presumed.

For example, in one case the district alleged that by listing in the appointment letter the particular schools to which the employee would be assigned rather than specifying a tenure area, it had created a narrow tenure area encompassing only those assignments.⁸ Upon appeal, it was held the assignment listing alone was insufficient to limit the tenure area to those specific assignments. The principle is that a district's claim of a narrow tenure area must be supported by more than inadvertent language; instead, a conscious intent must be shown in order to avoid by default a broader tenure area.⁹ Conscious intent of a narrow tenure area might be shown by affidavits, organizational charts, and job descriptions.¹⁰

Tenure Qualifying Time and Service

Administrative probationary appointments made before July 1, 2015 must be for a term of three years pursuant to Education Law §3012(1)(b). After making the three-year probationary appointment, however, the district may award tenure at any time during the three-year period, prior to the end of the probationary term.¹¹

Under new legislation, probationary appointments made on or after July 1, 2015 must be four years in duration. Building principals and similarly situated BOCES personnel in charge of programs within BOCES (hereinafter “principals”) who are subject to the Annual Professional Performance Review (APPR) legislation under Education Law §3012-d are now statutorily required to meet certain criteria before tenure may be awarded. Specifically, they must be rated either Effective or Highly Effective on their APPR evaluations in three out of the four probationary years, including the fourth year. In addition, the affected principal cannot be rated Ineffective in his or her fourth and final year of probation. While meeting the evaluations criteria is to be a significant factor in making a tenure determination, by statute neither successful ratings nor the pendency of an appeal of a rating shall stand in the way of an employer’s right to deny tenure.

Neither prior tenure credit, that is, “Jarema” credit, nor prior substitute service may shorten the applicable probationary appointment period. However, acting status service in an unencumbered position, as opposed to a temporary appointment, is credited toward the probationary term. The distinction between acting and temporary status is between filling a vacant position in an acting capacity or, instead, substituting for another administrator “temporarily unable to perform the duties on a short-term basis because of sickness, leave of absence, or similar reasons.”¹² As only service in a vacant, permanent position contributes to probationary credit, temporarily performing the duties of another person occupying the position precludes service credit.¹³

Administrators, unlike teachers, do not retain prior tenure upon accepting a different position in a different tenure area. (For teachers, regulations provide for retaining tenure while continuously employed by the tenure granting district, regardless of whether the employee begins work in a new tenure area.¹⁴ While the teacher may then acquire a second tenure area, the earlier tenure area is retained so long as they continue to work at least .4FTE in the previous tenure area.)

In order to qualify for administrative tenure, over fifty percent of the probationary experience must consist of duties in the particular administrative tenure area.¹⁵ This precludes an administrator from earning tenure in a second administrative tenure area while serving in another administrative tenure area. This differs from regulations governing teachers by which they may earn a second tenure area by serving at least forty percent time in the second tenure area.

Although administrators do not retain prior tenure when serving full-time in a new administrative probationary period, they may earn dual admin-

istrative and teaching tenure should the new probationary period consist of more than fifty percent administrative duties and at least forty percent teaching assignments.¹⁶

Transfer Within Tenure Area

Although a tenured administrator may not be transferred involuntarily to any position outside the existing tenure area, he or she may be transferred involuntarily to any other position within the same tenure area.¹⁷ A position arguably is outside the former tenure area when it shares fifty percent or less of the same duties.¹⁸ Given the subjectivity of the fifty percent analysis, however, additional criteria are frequently used to assess whether positions are in the same or a different tenure area. These other criteria include “the kind, quality, and breadth” of the comparative duties and the skills and experience required for each position.¹⁹ A significant, additional factor is whether the two positions require the identical certification.²⁰

Layoff Procedure: Seniority

New York State Education Law mandates that districts follow specific procedures when terminating certificated staff.²¹ This includes the obligation to shuffle schedules to avoid layoffs, although by the nature of their work this provision generally is applicable for administrators only in special cases.²² Termination requires a board resolution abolishing the position and identifying the tenure area of the position abolished. However, position abolishment alone fails to terminate the incumbent’s rights to employment, salary, and benefits. The district first must identify the individual to be laid off, who is not necessarily the position’s incumbent. The person laid off will be the least senior person within the tenure area of the abolished position.

As layoff order is governed by seniority within tenure area, administrators’ tenure determinations are crucial. Paid service seniority within the affected tenure area is the sole criterion for establishing layoff order. Seniority rights apply to probationary as well as to tenured personnel.

Seniority is calculated from the date of original appointment to the particular tenure area – as opposed to the particular position – from which the position is being abolished. Prior service in other tenure areas is not credited toward seniority in the current tenure area. Seniority includes time in an acting or interim capacity in the same tenure area provided the position was not encumbered by another employee on leave. But it excludes substitute service in the same tenure area, as well as time on temporary assignment outside of the tenure area, such as an acting

assignment.²³ Part-time service is excluded from the calculation unless it was performed at the district's request following service in a full-time position, or unless the collective bargaining agreement provides seniority credit for part-time service.²⁴

Service need not be consecutive to be included in the seniority calculation, but voluntary service breaks, such as by resignation or retirement, ordinarily void seniority earned prior to the voluntary break, whereas involuntary service breaks permit crediting the prior service. Unpaid leave is excluded from total seniority. However, contractual and collective bargaining agreements may provide for seniority calculations to include service prior to a voluntary service break.²⁵

When full-time service of two or more individuals is equal, their respective seniority ranking is determined by their respective appointment dates. If the appointment dates are the same, rank is determined next by board appointment sequence. If the appointments were made in the same resolution, then rank is determined by any method the district finds reasonable, such as the comparative dates on which the employment contracts were signed or submitted, or even the individuals' respective salaries.

There is a limited exception to the last in, first out rule. Pursuant to Education Law §211-f, schools designated to be either failing or persistently failing may be handed over to a receiver, who will be in control of curriculum and staffing decisions within the failing school. These are the schools potentially in the most need for intervention. Depending on how long the school has been designated by the state to be a failing school, the receiver may be the superintendent of schools or an outside third party. In either case, the designated receiver has the sole authority to, without approval of the board of education, abolish positions, change salaries to entice and hire qualified educators, and/or fire ineffective educators. In the event that the receiver decides to abolish positions, layoffs are designated by tenure area; however, the person laid off is controlled by their evaluation ratings within the tenure area and not their length of service. In other words, ineffective educators will be the first ones to be laid off in the schools. Those who are laid off are entitled to be placed on the preferred eligibility list; however, they cannot be recalled to the failing school. Further, if an educator has two consecutive Ineffective ratings prior to their position being abolished, they are not considered to have been an employee in "good standing" pursuant to the statute and are ineligible to be recalled to any position within the district.

Layoff Procedure: Displacement

A tenured person whose position is abolished has the right to displace the person with the least seniority in the same tenure area. In this respect, administrators have less potential recourse than teachers. Whereas administrators forfeit tenure in any prior area upon appointment to a new tenure area, a teacher may retain prior tenure if certified for and appointed to a second tenure area. In such case, a teacher with second tenure status may displace a less senior teacher in the second area should the teacher be the least senior person in the current tenure area. In contrast, as administrators must forfeit any prior tenure upon probationary appointment to a new tenure area, they necessarily lack rights to displace less senior staff in any earlier tenure area.

As districts always retain authority to assign work within tenure areas, the work to be performed by the individual whose position was abolished and who displaced a less senior person may not necessarily be the same work performed by the displaced, less senior person. The seniority right is to a position in the tenure area, not to any particular duties.

Preferred List

New York State

Any certificated person excessed because of position abolishment is placed on a preferred eligible list for recall to any similar position for seven years.²⁶ A similar position is one in the same tenure area and in which more than fifty percent of the duties are the same. The most senior person on the preferred list is entitled to appointment to any similar full-time or part-time position.²⁷ Callback ranking is determined by seniority within the district rather than by length of service in the tenure area.²⁸ An administrator's prior district service in a different administrative tenure area or as a teacher is credited for preferred list standing only. Thus, an individual with less service in a tenure area would have preference over another with more service in that area if the first individual had more total service in the district, even though the additional service was in a different tenure area.

In all but what are defined by Education Law as large city school districts, an excessed administrator ordinarily is placed on a preferred list for seven years.²⁹ However, a district may decline to place an administrator on a preferred list if the employee's record has not been one of faithful, competent service.³⁰

On recall, the employee must be paid not less than her/his prior salary. Further, an administrator retains rights to reappointment to the same tenure area even if she or he accepts appointment in the interim to a different tenure area or refuses reemployment.³¹

Eligibility for Newly Created Positions

The former incumbent of a previously abolished position is entitled, without salary or benefit reduction, to a newly created position in the same tenure area that has similar duties to the abolished position.³² The former incumbent also may have rights to a vacant, existing position that has become similar to the abolished position by incorporating duties of the abolished position.

Similarity here is measured identically as when assessing whether positions are in the same tenure area. The analysis starts with determining whether more than half of the new position's duties are similar to those of the previous position.³³ In assessing duty similarity, relevant factors are the "kind, quality, and breadth" of the duties, skills, and experiences required, and the certification needed, for each position. Also, similarity may be established if the duties of the new position reasonably could have been part of the prior position.³⁴ Recent decisions by the commissioner of education have given great deference to the employer assigned tenure areas and analysis of the similarity of duties by the employer.³⁵

A predetermination hearing is required upon request in those instances in which the nature of a position being abolished is similar to the duties, qualifications, and certifications for a proposed new position in the same tenure area.³⁶ Even if unsuccessful, the hearing is useful to obtain evidence for any necessary, subsequent legal proceeding. Should another person be appointed to the allegedly similar position, the preferred list former employee should file a notice of claim against the district and file an appeal to the commissioner of education within thirty days.

Pretextual Termination

A pretextual termination occurs when a district abolishes a position allegedly for budgetary or programmatic reasons when, in fact, the motive is disciplinary. Education Law precludes substituting position abolishment for disciplinary removal. The remedy is litigation to return the employee to work. Typical evidence of pretextual position abolishment includes prior threats of discipline, including letters of counseling, and prior employer suggestions that the employee retire or apply for positions elsewhere. Those or similar indications of potential future action always should be documented contemporaneously in case they are necessary later to support one's rights.

Disciplinary Termination

Discipline is the imposition of a penalty. It is distinguished from letters of counseling, which consist of guidance and recommendations rather than discipline. Districts are free to issue letters of counseling without restriction, but only may impose penalties or remedial work, such as additional training, through the disciplinary process. A district may not reassign an employee for disciplinary reasons absent the 3020-a process.³⁷ Administrators may be disciplined for private conduct occurring off school grounds when the conduct affects the performance of work duties or if, by public attention, the conduct impacted the administrator's ability to do his or her work.³⁸

Discipline and disciplinary termination of tenured administrators are governed by Education Law §3020-a and §3020-b (discussed below in a separate section involving the dire consequences of a principal receiving multiple consecutive years of Ineffective ratings on her or his APPR evaluations) implementing regulations at 8 NYCRR 82-1, *et. seq.*, unless alternate procedures have been incorporated previously into the applicable collective bargaining agreement. Should a tenured administrator face discipline, he or she should immediately contact SAANYS. After receiving advice, he or she may elect in writing to use those alternate procedures instead of the statutory ones; however, the choice as to which procedure to use is solely at the discretion of the administrator.³⁹ As most collective bargaining agreements do not include alternate procedures, §3020-a/3020-b is the common process by which tenured administrators may be disciplined or terminated for disciplinary reasons.

The only exceptions to the statutory or collective bargaining agreement alternate disciplinary processes are the mandatory termination provisions for certain criminal behavior. An administrator may be summarily terminated absent the 3020-a hearing upon criminal conviction of a sex offense, a violent felony committed against a child, or upon felony conviction of certain fraud offenses.⁴⁰ Any such conviction results in mandatory revocation of the administrator's certification, absent which the administrator is barred by law from public school employment.

As termination for reasons of position abolishment is not subject to the more rigorous 3020-a process, occasionally districts attempt to use the position abolishment process pretextually to remove a tenured administrator for disciplinary reasons, as discussed above. Such attempts are strictly forbidden and should be opposed aggressively.⁴¹

The 3020-a process begins with the filing of charges with the district clerk. Charges are allegations purportedly warranting discipline or termination. Although charges are usually filed by the superintendent or the district's

attorney, anyone, including parents, community members, and colleagues, may file charges. However, the mere filing of charges is of no disciplinary consequence unless a majority of the fully constituted board of education votes probable cause exists to initiate the 3020-a/3020-b process. Charges may not be brought more than three years after the acts complained of unless the act was a crime when committed.⁴²

Upon majority board vote that probable cause exists, the board must provide the tenured administrator with a written statement specifying the charges, the maximum penalty it will impose should the administrator not request a hearing, and the maximum penalty it will seek should the matter proceed to hearing and the administrator be found guilty.⁴³ The employee may be suspended with pay pending the hearing and determination, except that suspension is without pay only when the administrator has pled guilty to or been convicted of certain felony drug crimes or physical abuse of a minor or student, and the 3020-a charges are at least partly based on the events underlying that plea or conviction.

It is crucial that the administrator responds in a timely manner after receiving the statement of charges. Her or his response must be given to the district clerk within ten days of receiving the statement of charges, must be in writing, and must invoke the administrator's request for a hearing. Failure to comply with this strict requirement forfeits the administrator's right to the hearing, thus permitting the district to impose its punishment without an opportunity to be heard.⁴⁴

The hearing officer in the disciplinary proceeding is chosen by mutual agreement of the parties from a list provided by the State Education Department. If the parties are unable to agree on a hearing officer, the official is appointed by that agency. The hearing process resembles a trial and includes an opportunity to be represented throughout the process, during evidence disclosure, and opportunity to subpoena and cross-examine witnesses.⁴⁵ The hearing must be private unless the employee requests timely that it be public. Testimony is taken under oath and the entire proceeding is transcribed. Pursuant to statute, the hearing must be concluded within 125 days of the charges being filed, unless good cause is demonstrated for the delay. The hearing officer then issues a written opinion finding whether each charge is proven or not, and if proven, what is the appropriate penalty. Penalties are limited to "a written reprimand, a fine, suspension without pay, or dismissal."⁴⁶ Only one of the penalties may be imposed, although remedial actions such as counseling may also be ordered.

The above description of the disciplinary process for tenured administrators is obviously a brief, general overview. As discipline and the potential

for discipline are some of the most disturbing career events a tenured administrator may encounter, it is crucial members obtain SAANYS legal assistance immediately in the event of any investigation or upon receiving a statement of charges. Administrators should never participate in a district investigation without representation and never ignore notice of charges. Delaying a required response may forfeit their most important rights, and unnecessary or inappropriate admissions will be held against them. While they must report to any investigation interview or be subject to insubordination, they are legally entitled to refuse to answer any question that could reasonably lead to discipline. The right against self-incrimination in a public education setting is commonly referred to as “cadet rights.”⁴⁷ They are entitled also to a reasonable delay of the interview until they can obtain representation. Involving a SAANYS attorney immediately also increases the leverage an employee will have in dealing with the district.

Termination Based upon APPR Ratings

Principals are subjected to further potential termination based upon incompetence, as demonstrated by their APPR ratings. Education Law §3020-b permits school districts to file disciplinary charges based upon incompetence for principals (not other administrative titles) who have been rated Ineffective for two consecutive years and *requires* the filing of charges for classroom teachers and principals who have been rated Ineffective for three consecutive years. It further provides that either two consecutive Ineffective ratings or three consecutive Ineffective ratings constitute prima facie proof of incompetence. Such prima facie proof can only be overcome by clear and convincing evidence in the event of two consecutive Ineffective ratings and may only be overcome through a showing of fraud in the case of three consecutive ratings.

III Certified, Probationary Employees

The probationary period for administrators, other than principals, appointed before July 1, 2015 is three years and four years for those appointed as of July 1, 2015.⁴⁸ However, after appointment to the probationary period, a district may appoint administrators, except for building principals, to tenure at any time during the probationary period.⁴⁹ In order to obtain tenure on or after July 1, 2015, principals must be rated at least Effective in three out of the four probationary years on their APPR evaluations.

Because probationary employees lack due process property rights to their job except as may be provided for in an applicable collective

bargaining agreement, they may be dismissed at any time for any reason.⁵⁰ Probationary employment permits no statutory tenure expectation. For this reason, it is important to pursue timely interim supervisory evaluations to document work performance and to initiate tenure expectancy discussions. Should tenure later be denied, the earlier written evaluations may be useful for future job applications. Previously negotiated contractual provisions may provide the basis for a fourth/fifth probationary year absent adherence to contractual evaluation provisions, a useful incentive to motivate timely district compliance.

Although lacking due process property rights, probationary employees do have due process liberty rights in their future employability. Therefore, if the district publishes stigmatizing allegations in conjunction with termination, and if the employee denies the allegations, the employee is entitled to a name-clearing hearing.⁵¹ Placement of defamatory allegations in the now former employee's personnel folder qualifies as publication. Neither reinstatement nor damages, however, are available remedies. The hearing provides only a public opportunity to refute defamatory allegations.

Termination Either for Disciplinary or for Budgetary or Programmatic Reasons

New York State

Lacking due process property rights to their jobs, probationary employees may be dismissed at any time for any legal reason. They are entitled, however, to certain limited, statutory procedural notice protections regardless of whether termination is for any reason, including disciplinary, budgetary, or programmatic reasons.⁵² The protections are available even in instances of position abolishment because they attach to any termination, regardless of basis. In either case, termination must follow a specific procedure and notice provided to the affected administrator that their job is terminated through position abolishment. A probationary administrator whose position has been abolished but doesn't receive notice of the board's termination of his/her position is entitled to continue receiving salary and benefits until such time as he or she is terminated; position abolishment alone does not terminate the position's occupant.

Termination Based on Denial of Tenure

When a probationary administrator is denied tenure, the required procedures consist of certain limited notice requirements, provision to receive upon request written reasons for dismissal, and an opportunity for the employee to respond. A probationary employee may be terminated only upon proper notice and subsequent school board resolution. First, the

district must notify the probationary employee of the intended termination at least thirty days before the school board acts on the superintendent's recommendation.⁵³ Then, the probationary employee may request written reasons for the proposed termination at least twenty-one days before the proposed board action.⁵⁴ Written reasons must be provided to the employee fourteen days before the proposed termination.⁵⁵ The employee may respond then in writing to the district clerk no later than seven days before the proposed termination.⁵⁶ In addition to the above notice and time requirements, the terminated employee is entitled to another thirty days' termination notice after the board of education termination resolution.

Obtaining written documentation of the reasons for termination may be useful later in employment interviews in other districts. In addition, the optional employee's response may be useful for ensuring a final good impression with district decision makers in a position to serve as the employee's future references. On the other hand, as the district's written reasons for termination provided in response to the member's request may well be placed in the employee's personnel folder and thereby be available to future potential employers, the member may prefer to preclude the inclusion of possibly disparaging comments by not requesting the reasons for termination.

New York State

IV

Civil Service Permanent, Competitive Employees

NYS Civil Service Law Sections 80 and 81 govern layoff and preferred list procedures for all noncertificated state and local government employees. This includes most SAANYS civil service members employed either by colleges, school districts, or a BOCES. In addition to the state Civil Service Law, each local (county or city) civil service commission may adopt rules implementing those laws in their particular jurisdiction, provided the local rules are not inconsistent with the state laws and they are approved by the NYS Civil Service Commission.⁵⁷ The local rules are often available on the county or city civil service websites. Because this booklet is intended for statewide distribution, the analysis below focuses on the mandatory state provisions and does not address any supplemental, jurisdictionally specific rules. As the local rules may provide additional relevant provisions, it is important that SAANYS members with civil service status be aware of them as well.

When an occupied civil service position is eliminated, the permanent incumbent of the position may have rights to assume an equivalent or lower level position, or to resume service in an unrelated position in which he or she served previously. Those options, when they exist, are known generally

as “bumping” and “retreat.” They are unavailable, however, for a work hour reduction to less than full-time, but which the local civil service rules do not define as part-time status.⁵⁸

Bumping and retreat are governed, first, by the title of the eliminated position and, second, by the layoff unit in which it is located. For SAANYS members, the layoff unit is almost always the entire school or BOCES entity, regardless of whether it extends beyond other government jurisdictional boundaries, such as towns, cities, or counties. In other words, every division and component of a BOCES district extending over several counties is still a single layoff unit.

When one of several positions with the same title is abolished, the individual occupying the position abolished is not necessarily the individual whose employment will be terminated. Instead, the individual to be displaced is identified by the adjusted seniority of all individuals holding the same title within the layoff unit. Generally, the least senior person is displaced. However, any temporary, provisional, and probationary incumbents must be laid off before any permanent incumbents. Only then are permanent employees subject to layoff. Among permanent incumbents, those blind or with veteran or disabled veteran status are given job retention preference. Absent those preferences, the least senior employee in the same title in the same layoff unit is subject to layoff. Thus, the individual doing the work of the particular position to be abolished is not necessarily the person displaced.

Seniority among permanent civil service incumbents is determined by date of original appointment and by total service. Generally, seniority is credited from the date of the individual’s original permanent, competitive appointment to the classified service of the government jurisdiction in which the position to be abolished is located. Thus, for layoff seniority purposes, the first permanent, competitive appointment date is the appointment to any such position in any layoff unit within the government jurisdiction.⁵⁹ However, any service break exceeding one year will exclude service prior to the break from being included in the total service seniority computation. The incumbent of the abolished position then may displace others according to the rules below.

Bumping and Retreat

“Bumping” is a colloquial term for an incumbent’s movement from a position to be abolished to another position of the same title in the same layoff unit occupied by an incumbent with less seniority. Presumably the two positions have the same salary range, in which case the displaced

person retains the same salary step placement as he or she had in the equivalent position. If several positions exist, the incumbent merely replaces the least senior of the several other incumbents. If no other positions with the same title exist in the layoff unit, or if the person whose position is to be abolished is the least senior of all incumbents in that title, he or she may then claim the position of the least senior person in the next lower competitive title in the direct promotion line, if any exist. The displaced person assumes the equivalent salary step within the new position's lower salary range. Similarly, a person displaced by the occupant of the abolished position would claim the position of the least senior person in the next lower title in the direct promotion line if the position to be abolished was the only position within that title.⁶⁰

Movement to the next lower competitive title requires the positions to be in a direct promotion line in the same layoff unit such that the service in the lower title generally is a precursor for promotion to the higher title, and the next lower position must also be in the competitive class. Obviously, this option is unavailable if no lower title exists. Also, no right exists to occupy a vacant position absent the agency's approval.

Retreat is the opportunity to displace the least senior person in any classified service, lower salary grade, or competitive title in the same layoff unit previously held in a permanent capacity by the individual whose permanent position was abolished. The prior position need not be the same title as the abolished position nor in a direct promotion line to it.⁶¹ Retreat is unavailable if the displaced individual previously did not hold permanent status in another title.

A displaced person may not pick and choose among available options. Instead, to the extent they are available, they are offered only in sequence. **The employee's refusal of the first available option precludes his or her consideration for any other subsequent possibility.** Thus, an individual who refuses to "bump" a colleague in an identical title is laid off, regardless of whether the employee would otherwise qualify for a lower level title in the same promotion line, or for retreat to a former title.

Preferred List

A laid off person who neither rejected nor was offered a position by the displacement process is placed on a preferred list for four years from the layoff date. The person's rank on the list is established by that person's seniority compared to the seniority of any other individuals on the same list. The rank, therefore, is not static. As the preferred list must rank individuals by seniority, any given individual's rank will decrease should

an individual with greater seniority be added to the list. The individual with greater seniority will assume a higher list ranking and remain on the list longer than the earlier placed, now less senior individual.

Should an opening occur later in the same title in the same layoff unit, the preferred list must be used to fill the position. Only the highest ranking individual on the list may be considered for the position. The civil service commission may not certify more than the single individual at the top of the seniority ranked list as eligible for the position. The agency's only choice is to hire that person or to leave the position vacant. The commonly known "rule of three" required for appointment from a competitive list plays no role in preferred list hiring.

An individual on a preferred list who declines reappointment from it to a similar position at the same salary in the same layoff unit is removed from the preferred list. Then, the next lower ranked person may be interviewed for the position; if no other individuals are included in the preferred list, the list ceases to exist. The consequence for SAANYS members is that refusal of a position in the same title, but with different work duties, forfeits future preferred list opportunities. Even if the employee is restored to his or her title from the preferred list, the duties may differ.

New York State

Disciplinary Termination

Section 75 of the Civil Service Law generally governs involuntary termination or discipline of a classified, permanent, competitive class employee. However, a collective bargaining agreement may provide additional protections, either as alternatives to or modifications of the Section 75 process. Additional protections, such as mandatory arbitration, are worthy future collective bargaining goals if they are not part of your current contract.

The statutory protection from arbitrary removal or penalty is also available for many noncompetitive employees with at least five continuous years of service in positions other than those designated confidential or those influencing policy. The law's strengths are that it provides employees the right to legal representation, confines charges to recent behavior, requires the charges to be detailed, and limits termination to only the initially charged behavior. The section's weaknesses, however, are significant: the employer's agent functions as the hearing officer and the hearing officer's decision is advisory only, permitting the employer to terminate the employee regardless of the hearing officer's recommendation.

The requirement that charges be sufficiently detailed to enable an adequate defense is particularly useful because it forecloses generalized complaints.

Substantive, detailed, specific allegations facilitate a fact-based defense. The requirement that termination be predicated on the initial charges precludes termination based on new assertions made during the process.

The proceeding generally must be commenced within eighteen months of the alleged incompetency or misconduct. Exceptions to this rule are the shorter one-year period for competitive employees designated as confidential, and the exclusion of any time limit if the charges, if proven in a court, would constitute a crime.

Notice and Right to Counsel

Two of the statute's most significant due process protections are mandatory notice and right to counsel. A potential disciplinary termination usually is commenced by an agency investigation, including an employee interview. When the agency realizes the investigation may result in disciplinary proceedings, the interview must be preceded by written notice advising the employee of the right to representation during the interview. Reasonable time must be provided for the employee to obtain the representation. Evidence obtained in violation of this right may be excluded from the hearing process.

New York State

Should the investigation lead to charges, the agency must provide the employee a written copy of the charges. The employee must be given an opportunity to respond in writing, which he or she must submit within eight days. In addition, notice of another type is a factor in any ultimate penalty assessment – that is, whether the employee had prior notice the charged behavior was prohibited. Also relevant is whether progressive discipline was invoked in prior instances.

Suspension

The employee subject to discipline may be suspended without pay for a maximum of thirty days pending further investigation and the hearing. Continued suspension beyond thirty days must be with pay, except for delays willfully the result of the employee. Should the employee ultimately be exonerated, or penalized by less than a thirty-day suspension without pay, the employee is entitled to recover as much of the pay for which he or she was not penalized, minus any unemployment insurance benefits received for that period.

Hearing Process

The hearing is conducted by a hearing officer selected by the agency; at the agency's sole option, the person selected may be an agency administrator. The hearing officer may hear testimony and consider evidence, after which he or she makes a written finding of fact and recommendation as to guilt or innocence on each charge, and, if finding guilt, a recommendation for specific discipline.

The hearing officer's determination is advisory only, and may be accepted or rejected by the agency, which may make its own determination of guilt or innocence and impose its own penalty, including dismissal.

The penalty imposed following hearing (whether by the hearing officer or the agency, should it reject the hearing officer's recommendation) is limited to those specifically provided for in the statute: reprimand, a fine not to exceed \$100, suspension without pay for a maximum of two months, demotion, or dismissal. Only one of the penalties may be imposed. Collective bargaining agreements may replace or modify the Section 75 penalties. A collectively bargained for wider range of penalties is generally in the mutual interest of both parties as it facilitates progressive discipline.

The employee may appeal any adverse determination as provided for by Section 76 of the Civil Service Law. Appeal may be made either to the applicable civil service commission or by an Article 78 court proceeding. Appeals to the commission must be made within twenty days after receipt of the written hearing determination. While unlikely, courts have sometimes overturned harsh Section 75 penalties as disproportionate.⁶²

Contractual Provisions

Employee organizations recognized pursuant to the Taylor Law may negotiate alternative disciplinary procedures to replace or to modify Section 75 provisions. Any such changes or modifications shall apply only to proceedings in which charges have not been filed as to the change or modification. Employee-favorable modifications typically include the substitution of mandatory arbitration for advisory arbitration and provision for a wider range of penalties short of termination.

V Provisional and Probationary Competitive Civil Service Employees

Provisionally appointed civil service employees lack constitutional due process rights to their jobs. In legal terms, this is the absence of a property right to the position and is consistent with the absence of statutory job guarantees. Such employees may be dismissed without recourse for any legal reason or for no reason at all. Thus, such individuals are not entitled to a Section 75 hearing. An individual appointed in a probationary capacity from a civil service list fares little better, having property rights only after the expiration of the probationary period if the individual was not dismissed during that period, regardless of whether the agency ratified the permanent appointment.

Both probationary and provisional status employees, however, have a due process liberty right in certain narrow circumstances. This is a right to a name-clearing hearing in those instances in which, in conjunction with termination, the employer publicizes stigmatizing allegations the employee denies. Placement of defamatory allegations in the now former employee's personnel folder qualifies as publication. Neither reinstatement nor monetary damages, however, are available remedies in a name-clearing hearing. All that is provided is a forum for the terminated employee to counter the allegations.

Collective bargaining agreements, as well as individual contracts, may provide additional due process protections for civil service employees in permanent, provisional, or probationary status.

VI PERB Related Issues

Employee terminations and layoffs may impact PERB jurisdictional matters. These concern not the terminated employee, but the bargaining unit of which he or she was a member. In difficult budget times, it is not unusual to encounter situations that warrant impact bargaining, such as a transfer of bargaining unit work or workload increases.

Impact Bargaining

An employer has the duty to negotiate the impact of nonmandatory managerial decisions on mandatory topics of bargaining.⁶³ A common example is where the employer chooses to reduce staffing (a nonmandatory topic of bargaining), but that decision has an impact on the workload

(a mandatory topic of bargaining) of remaining unit members. If you are uncertain as to whether or not the initial decision is on a nonmandatory or mandatory topic of bargaining or whether it impacts a mandatory topic of bargaining, please contact the SAANYS Legal Department for a fact-specific analysis.

Even where an employer's decision on a nonmandatory topic does in fact impact a mandatory topic, the duty to engage in impact bargaining does not arise until the demand to negotiate has been made.⁶⁴ The demand need not be in any particular form or language as long as it is in writing and reasonably understood to be a request for bargaining. Once the demand has been made to the employer, negotiations regarding impact should commence. If the employer refuses to negotiate, the next step would be to file a notice of claim (see Education Law §3813) as a precursor to an improper practice charge. However, the filing of a notice of claim is no longer a condition precedent to filing an improper practice charge before PERB. SAANYS still recommends filing the notice as it may lead to successful resolution of the labor dispute prior to commencement of the formal charge. The improper charge would allege the employer's failure to negotiate in good faith. Bad faith negotiations have been defined as either a failure to negotiate at all, or after the commencement of negotiations, a failure to meet within a reasonable time with reasonable frequency or failure to confer in good faith in respect to terms and conditions of employment. Whether or not one is acting in good faith is a matter of intention gleaned from overall conduct.⁶⁵

Impasse Proceedings

Impasse is the point at which no further progress in negotiations may be expected despite reasonable efforts on the part of the parties. The impasse proceedings that are applicable to collective bargaining negotiations during an open contract period are the same ones that apply to impact bargaining. Impasse may be declared by either party, but not until sufficient time has passed for the parties to fully consider proposals in an attempt to reach agreement.⁶⁶ PERB's unwritten rule is that it will reject any declaration of impasse where the parties have not held at least three collective bargaining sessions. Thus, if the parties have negotiated three times and have no reasonable likelihood of settlement, the next step is mediation.

SAANYS will assist units in filing for mediation by completing the necessary forms and including the required attachments. PERB then assigns a mediator, typically giving the mediator authority to meet with the parties up to three times (additional meetings are sometimes granted

by PERB). The mediator is cloaked with confidentiality,⁶⁷ and speaks with both parties separately and the parties together in an effort to broker a resolution. Ultimately, the mediator has no authority to dictate a resolution.

If mediation is unsuccessful, the next step is fact-finding. Upon the request of either party, PERB shall appoint a fact-finding board of not more than three people, but typically PERB appoints a single person to serve as the fact finder.⁶⁸ The fact finder may hold hearings, take sworn testimony, receive documentary evidence, or accept stipulations in lieu of a hearing.⁶⁹ The fact finder then issues a report, which is advisory only.⁷⁰ If both parties accept the report of the fact finders, this equates to a settlement. A rejection of the report by either party brings the process back to square one. Unfortunately, there is no statutory or regulatory finality for units of school administrators. However, PERB may appoint a “super conciliator” after unsuccessful fact-finding (a second attempt at mediation),⁷¹ but that is unlikely in an impact bargaining situation. SAANYS has advocated for a Last Offer Binding Arbitration process that would be applicable to administrative units, but until passed by the New York Legislature what has been described above is the state of the law.

Transfer of Bargaining Unit Work

New York State

Transfer of bargaining unit work, sometimes referred to as “subcontracting,” is when work performed exclusively by bargaining unit employees (or work that is substantively similar) has been transferred outside of the bargaining unit. An example would be the transfer of classroom observations to “teacher leaders” from administrative bargaining unit staff. This violation of the Civil Service Law must be vigilantly safeguarded by bargaining units.

To prevail upon an improper practice charge regarding transfer of bargaining unit work, the petitioner needs to establish exclusivity of function (bargaining unit members alone performed the function alleged to have been transferred) and that there are “discernable boundaries” surrounding that function, which is to say that the function may be clearly defined. Lastly, the petitioner must establish that there have not been significantly changed qualifications for the job. If there has been a significant change in job qualifications, then a balancing test is invoked weighing the comparative interests of the public employer and the unit employees.⁷²

As noted above, an improper practice charge used to require that a notice of claim be filed within ninety days of when the transfer occurred. However, that requirement is no longer required by PERB. Regardless, the improper practice charge must be filed within 120 days (the 90-day and 120-day time

periods run concurrently). The clock begins to run when the unit was told of the changes or when the changes began, whichever is later.

Workload

An employer's assignment to a unit employee of new work within the inherent nature of the duties previously performed but resulting in a substantial workload increase requires negotiations. This applies when the new work and old work must be completed in the same time frame as the old work alone had to be completed. Such additional work may expand a unit member's workday or workweek, which triggers a mandatory topic of bargaining. Such workload issues may involve a separate improper practice charge of a unilateral change in work hours or workweek.

Yet, an increase in the amount of work does not necessarily affect terms and conditions of employment because the added work may be spread over a period of time without any pronounced change in the day-to-day work obligations. It is only when employees are required to accomplish significantly more work in the course of a workday that there may be a violation.⁷³

We know that a more likely situation is an incremental increase in administrative responsibilities, which is called "work creep." Any given additional assignment may not in and of itself give rise to a substantial and significant increase in the level of workload, but the cumulative effect of several new assignments may represent a substantial and significant increase in the employee's workload. Such an evolution of workload does not preclude an improper practice charge, but does make its prosecution more difficult.

Conclusion

SAANYS attorneys can advise and assist the unit in filing and presenting such matters to PERB. Of course, advising the district beforehand that the resulting impact is unacceptable may preclude the attempt, or even preclude the position abolishment. Even when outcomes are uncertain, the pursuit of a plausible cause of action often increases a unit's leverage in attaining an acceptable outcome.

CITATIONS

- ¹ 8 NYCRR 30-1.1 *et. seq.*; *Appeal of Moore*, 15 Ed. Dept. Rep. 475, 477 (1976).
- ² *Bell v. Bd. of Ed. Vestal CSD*, 61 NY2d 149 (1984).
- ³ *Appeal of Durso*, 19 Ed. Dept. Rep. 72 (1979).
- ⁴ *Schlick v. Bd. of Ed. Mamaroneck*, 227 Ad2d 407 (2nd Dept. 1996); *Appeal of Caruana*, 41 Ed. Dept. Rep. 227 (2001).
- ⁵ *Steele v. Bd. of Ed.* 40 NY2d 904 (1976).
- ⁶ *Matter of Moore v. Bd. of Ed.* 116 Ad2d 273, 275 (2nd Dept. 1986).
- ⁷ *Appeal of Allen*, 36 Ed. Dept. Rep. 299 (1997); *Appeal of Cipriano*, 32 Ed. Dept. Rep. 302 (1992); *Appeal of Durso*, 19 Ed. Dept. Rep. 72 (1979); see also *Appeal of Caruana*, 41 Ed. Dept. Rep. 227, 228-29 (2001).
- ⁸ *Appeal of Durso*, 19 Ed. Dept. Rep. 72 (1979).
- ⁹ *Bell v. Bd. of Educ. Vestal CSD*, 61 NY2d 149 (1984); see also *Appeal of Wills*, 49 Ed. Dept. Rep. 147.
- ¹⁰ *Appeal of Donato*, 41 Ed. Dept. Rep. 246, 251 (2001); *Appeal of Cipriano*, 32 Ed. Dept. Rep. 302 (1992).
- ¹¹ *Appeal of Allen*, 40 Ed. Dept. Rep. 372 (2000).
- ¹² *McManus v. Bd. of Ed. Hempstead UFSD*, 87 NY2d 183, 189 (1995).
- ¹³ *Appeal of Yastion*, 33 Ed. Dept. Rep. 639 (1994).
- ¹⁴ 8 NYCRR 30.10.
- ¹⁵ *Maine-Endwell Teachers Ass'n v. Maine-Endwell CSD*, 92 Ad2d 1052 (3rd Dept. 1983).
- ¹⁶ *Appeal of Pearse*, Ed. Dept. Rep. _ (2010) (Decision No. 16, 159).
- ¹⁷ *Appeal of Rabeler*, 46 Ed. Dept. Rep. 382 (2007).
- ¹⁸ *Coates v. Ambach*, 52 Ad2d 261, 263 (3rd Dept. 1976).
- ¹⁹ *Appeal of Donato*, 41 Ed. Dept. Rep. 246, 250 (2001).
- ²⁰ *Appeal of Donato*, 41 Ed. Dept. Rep. 246, 251 (2001); *Brown v. Bd. of Ed. Morrisville-Eaton CSD*, 211 Ad2d 733 (3rd Dept. 1995); *Appeal of Davis*, 39 Ed. Dept. Rep. 275, 277 (1999).
- ²¹ Educ. Law §§2510, 3013.
- ²² Educ. Law §2510; *Wilcox v. New Lebanon CSD*, 31 Ed. Dept. Rep. 363 (1992).
- ²³ Educ. Law §§2509(1)(b), 2573(1)(b), 3012(1)(b).
- ²⁴ School Law at 11:48.
- ²⁵ *Board of Ed. v. Lakeland Fed'n of Teachers*, 51 Ad2d 1033 (2nd Dept. 1976).
- ²⁶ Educ. Law §3013.
- ²⁷ *Appeal of Stanzione*, 47 Ed. Dept. Rep. 341 (2008).
- ²⁸ Educ. Law §§2510(3)(a), 2585(4), 3013(3)(a).
- ²⁹ Educ. Law §§2510(3)(a), 3013(3)(a), 2585(4).
- ³⁰ *Appeal of Kozak*, 40 Ed. Dept. Rep. 284, 289 (2000).
- ³¹ *Appeal of Stanzione*, 47 Ed. Dept. Rep. 341 (2008).
- ³² *Kelly v. Ambach*, 83 Ad2d 733 (1981).
- ³³ *Coates v. Ambach*, 52 Ad2d 261 (3rd Dept. 1976); *Greenspan v. Dutchess BOCES*, 96 Ad2d 1028 (1983); *Appeal of Heath*, 37 Ed. Dept. Rep. 544 (1998).
- ³⁴ *Elmendorf v. Windham-Ashland-Jewett CSD*, 36 Ed. Dept. Rep. 308 (1997). See generally *Greenspan v. Dutchess BOCES*, 96 Ad2d 1028 (2nd Dept. 1983).

- ³⁵ *Appeal of Slater*, 56 Ed. Dept. Rep. 17,006 (2017); *Appeal of Slater*, 56 Ed. Dept. Rep. 17,017 (2017); *Appeal of Bradley*, 56 Ed. Dept. Rep. 17,018 (2017).
- ³⁶ *Davis v. Mills*, 98 NY2d 120 (2002); *Appeal of Elmendorf*, 36 Ed. Dept. Rep. 308 (1997).
- ³⁷ *Appeal of Dillon*, 43 Ed. Dept. Rep. 333 (2004).
- ³⁸ *Ellis v. Ambach*, 124 Ad2d 854 (1986).
- ³⁹ *Kilduff v. Rochester CSD*, 25 N.E.3rd 916 (N.Y. 2014).
- ⁴⁰ Educ. Law §§305(7-a) and (7-b); 3020-a(2)(b).
- ⁴¹ *Appeal of Jordan*, 37 Ed. Dept. Rep. 487 (1998); *Verdon v. Dutchess BOCES*, 47 Ad3d 941 (2008).
- ⁴² Educ. Law §3020-a(1).
- ⁴³ Educ. Law §3020-a(2)(a).
- ⁴⁴ Educ. Law §3020-a(2)(d).
- ⁴⁵ Educ. Law §3020-a(c).
- ⁴⁶ Educ. Law §3020-a(4)(a).
- ⁴⁷ Bd. of Ed. City of N. Y. v. Mills, 250 A.d.2d 122 (2nd Dept. 1998).
- ⁴⁸ Educ. Law §3012(1)(b).
- ⁴⁹ *Appeal of Allen*, 40 Ed. Dept. Rep. 372 (2000).
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- ⁵¹ *Hampton Bays v. PERB*, 62 Ad3d 1066 (3rd Dept. 2009); *Averback v. New Paltz CSD*, 147 Ad3d 152 (3rd Dept. 1989).
- ⁵² *Lezette v. Bd. of Ed. Hudson*, 35 NY2d 272 (1974).
- ⁵³ Educ. Law §3031(a); see also *Tucker v. Bd. of Ed.*, 82 NY2d 274 (1993).
- ⁵⁴ Educ. Law §3031(a).
- ⁵⁵ Id.
- ⁵⁶ Id.
- ⁵⁷ Civil Service Law §20, 80(6).
- ⁵⁸ *Schoonmaker v. Cap. Reg. BOCES*, 80 Ad3d 965 (3rd Dept. 2011).
- ⁵⁹ Civil Service Law §80(1).
- ⁶⁰ Civil Service Law §80(6).
- ⁶¹ Civil Service Law §80(6).
- ⁶² *James v. Hoosick Falls*, 93 Ad3d 1131 (3rd Dept. 2012).
- ⁶³ Lackawanna Central School District, 28 PERB ¶13023 (1995).
- ⁶⁴ State of New York (Department of Social Services), 26 PERB ¶4675 (1993).
- ⁶⁵ County of Wayne, 14 PERB ¶13092 (1981).
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- ⁶⁷ Civil Service Law §205.4(b).
- ⁶⁸ Civil Service Law §209.3.
- ⁶⁹ Civil Service Law §205.5.
- ⁷⁰ Civil Service Law §209.3(b).
- ⁷¹ Civil Service Law §209.3(d).

⁷² Niagara Frontier Transportation Authority, 18 PERB ¶3083 (1985).

⁷³ The County of Rockland, 31 PERB ¶4530 (1998); New Rochelle Housing Authority, 21 PERB ¶3054 (1998).





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