A Reasonable Disciplinary Penalty Under the Circumstances *is a 442-page volume available as a large, paperback print edition and as an electronic book [e-book], focusing on determining an appropriate disciplinary penalty to be imposed on an employee in instances where the employee has been found guilty of misconduct or incompetence.*

A Reasonable Disciplinary Penalty Under the Circumstances

A Reasonable Disciplinary Penalty Under the Circumstances

A Concise Guide to Penalties That Have Been Imposed on Public Employees in New York State Found Guilty of Selected Acts of Misconduct

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Introduction

Modern disciplinary procedures seek to correct undesirable employee behavior and to rehabilitate the worker. The term "progressive discipline" is often used to describe this effort, especially in connection with contract disciplinary procedures involving arbitration. Simply stated, unless the offense is found to constitute "egregious misbehavior," the penalty of dismissal is unlikely to be imposed for a first, or even a second, offense.

Except in cases involving egregious misbehavior, progressive discipline theory emphasizes behavior modification to rehabilitate the worker by imposing increasing severe penalties for repeated employee misbehavior in recognition of the economic cost to the employer of losing and replacing a trained employee.

The philosophy of progressive discipline makes it incumbent on the employer to be reasonable in assigning penalties. Courts in New York State have consistently recognized the importance of using progressive discipline.

Rulings by the New York State Supreme Court, the Appellate Division of the Supreme Court, and the Court of Appeals, New York State's highest court, suggest an employer's in assigning severe penalties for certain "first offenses" may not survive judicial review. At the same time, courts recognize that every disciplinary situation is different and are pre-disposed to accord "much deference" to the employer's determination regarding the penalty to be imposed [Ahsaf v Nyquist, 37 NY2d 182], especially with respect to quasi-military organizations such as a police department or a similar law enforcement agency [Kelly v Safir, 96 NY2d 32].

In Gradel v Sullivan Co. Public Works, 257 A.D.2d 972, the Appellate Division upheld the employer imposing a greater penalty that the one recommended by the hearing officer as there was ample evidence in the record to support the employer's decision.

In short, courts are reluctant to substitute their judgment for that of the employer on the fairness of penalties, but will do so if the penalty appears grossly unfair -- the standard established in Pell v Board of Education, 34 NY2d 222.

The Pell Standard

What's fair? The seminal case in New York State regarding standards of fairness is the Pell decision [Pell v Board of Education, 34 NY2d 222].

Pell stands for the proposition that a penalty imposed must be proportionate to the offense and not be "shocking to one's sense of fairness." This is a high standard. Although it is common for employees to challenge penalties as shocking to one's sense of fairness, courts almost always uphold the disciplinary penalty imposed by the employer.

What kind of penalties qualify as "shocking to one's sense of fairness" in the eyes of state courts? Such penalties as:

Terminating an employee for being absent without proper authority and failing to document his absence, where the employee involved had an exemplary employment record and had suffered a stroke while visiting relatives in Egypt. [Selim v NYC Transit Authority, 220 AD2d 515]

Terminating an employee for failing to turn in his keys when ordered. [Maher v Hayduk, 218 AD2d 700]

Dismissal of a tenured elementary school principal with an "unblemished record for over 15 years" for failing to accurately track revenues and expenditures, and concealing deficits, while serving as a probationary Assistant Superintendent for Business. The court said his acts were "isolated incidents in his career and did not involve moral turpitude or fraud." [Perotti v Pine Plains CSD, 218 AD2d 803, leave to appeal denied 88 NY2d 802]

Terminating a school bus driver who used excessive force to deal with unruly students but who had just received a very positive work evaluation. [Ross v Oxford Academy & CSD, 187 AD2d 898, leave to appeal denied, 81 NY2d 705]

Suspending an employee for 30 days without pay for engaging in conduct that may result in a safety hazard. [Smith v Hager, 185 A.D.2d 612]

Demoting an employee for sleeping on duty on two occasions, although a hearing officer found the employee's supervisor had "condoned" such conduct and the hearing officer had recommended a suspension without pay for three weeks. [Stapleton v La Paglia, 207 AD2d 945]

Terminating a corrections officer who used excessive force against a prisoner while going to the aid of a fellow officer who has struggling with the inmate. An administrative law judge had recommended a penalty of suspension without pay for 60 days. [Allman v Koehler, 161 A.D.2d 114]

Dismissal of a 17-year employee who failed to report her intended absence on two occasions. "The maximum sanction that could be supported by this record is a suspension without pay for a period of two weeks," the court said. [Rathburn v Onondaga County Library, 90 AD2d 971]

Court Review

Essentially an appointing authority or an arbitrator determines the penalty to be imposed on an individual found guilty of disciplinary charges alleging a particular act or omission.

Judicial and quasi-judicial bodies may be asked to determine if the penalty imposed on individuals found guilty of the offenses was reasonable under the circumstances. Only certain circumstances, however, may the employer appeal a penalty if it feels the penalty is not harsh enough.[1]

One example of such an appeal is the somewhat extraordinary case of Greenburgh CSD #7 v Sobol, 237 A.D.2d 721.

In Greenburgh, a hearing panel found a teacher guilty of a number of specifications set out in charges alleging "inappropriate remarks and inappropriate physical contact" with female students by the teacher. The penalty imposed by the hearing panel: suspension without pay for one and one-half years.

The Greenburgh Central School District #7 challenged the §3020-a hearing panel's decision by appealing to the State Commissioner of Education and later the courts. [This decision was made under the "old" Section 3020-a that was in effect prior to a revision in 1994.]

The Appellate Division said it would apply Pell standard to determine whether the penalty is too lenient. Finding the penalty neither arbitrary nor capricious, the Appellate Division sustained it. The court said that the underlying facts, coupled the absence of charges ever having previously been filed against the teacher during his 21-year career, supported the Commissioner's determination that the penalty imposed was proportionate to the offenses for which the teacher was found guilty.

The authority of an arbitrator to modify the disciplinary penalty proposed by the employer was a significant issue in Communication Workers of Am., Local 1170 v Town of Greece, 85 AD3d 1668. Here the arbitrator sustained various disciplinary charges against a Town of Greece police sergeant and determined that "[t]he Town had just and sufficient cause to demote" the Sergeant. The arbitrator further determined, however, that a permanent demotion was unreasonable and arbitrary, and converted the proposed penalty to a demotion for a term of one year.

The CWA asked Supreme Court to confirm the arbitration award while the Town asked the court to vacate the award in part on the ground that the award exceeded the scope of the arbitrator's authority.

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[1] §75 provides that the appointing authority or its representative ultimately determines guilt and the penalty to be imposed. Accordingly, only the employee would appeal an adverse decision. If, for example, a "Step 2" grievance decision granting the employee's grievance is made by the supervisor but the appointing authority disagrees with the determination, it could not appeal the supervisor's ruling. It is only in situations where a third party, i.e., an arbitrator or an independent hearing panel, makes the final disciplinary determination and imposes the penalty that it would be possible for the appointing authority to challenge the decision. In contrast, a determination of "not guilty" of one or more charges or a finding of "guilty" of one or more charges and the penalty imposed on an individual subject to disciplinary action pursuant to §3020-a of the Education Law may be appealed by either party or, in some instances, both the employer and the employee.

Supreme Court sustained Greece's motion to vacate the award and remanded the matter to the Town for its imposition of a new penalty.

In response to CWA's appeal, the Appellate Division held that Supreme Court erred in vacating that part of the arbitration award reducing the penalty to a demotion for a term of one year and remitted the matter "to the Town for reconsideration of the penalty to be imposed upon" the Sergeant and confirmed the arbitration award.

The Appellate Division said that an arbitrator's award may be vacated on the ground that an arbitrator exceeded his or her power "only where the arbitrator's award violates a strong public policy, is irrational or clearly exceeds a specifically enumerated limitation on the arbitrator's power."[2]

The Court explained that "It is well established that "an arbitrator has broad discretion to determine a dispute and fix a remedy and that any contractual limitation on that discretion must be contained, either explicitly or incorporated by reference, in the arbitration clause itself'," citing Matter of State of New York [Dept. of Correctional Servs. Council 82, AFSCME], 176 AD2d 1009, lv denied 79 NY2d 756. Further, the Appellate Division pointed out that "To exclude a substantive issue from arbitration, therefore, generally requires specific enumeration in the arbitration clause itself of the subjects intended to be put beyond the arbitrator's reach."

Specifically the court decided that the underlying collective bargaining agreement [CBA] authorized the arbitrator to determine that the imposed punishment is "unreasonable, arbitrary or capricious" and if so found, the CBA specifically provides that, "where the penalty imposed is found to be unreasonable, arbitrary or capricious," the arbitrator may make a determination "with respect to the penalty imposed upon the grievant . . . ."

The Appellate Division pointed out that while the CBA does not explicitly authorize an arbitrator to substitute an appropriate penalty upon determining that the penalty imposed by the Town is unreasonable, arbitrary or capricious, there is likewise no such "specifically enumerated limitation on the arbitrator's power."

Accordingly, the court conclude that the arbitrator did not exceed his authority in modifying the grievant's penalty from a permanent demotion to a demotion for a term of one year.

In contrast, the arbitrator does not have the power to modify an arbitration award that has been judicially confirmed.[3] When a final arbitration award has been rendered finally resolving the dispute between the parties, and the award has been judicially confirmed, a judgment enforceable by the courts has been

[2] Courts have also vacated an arbitration award where it is determined that the award "violated strong public policy." See Ford v CSEA, 94 AD2d 262, in which the court addresses the critical question of the power of an arbitrator to render a decision which impacts on or affects a public policy.

[3] Kalyanaram v New York Inst. of Tech., 91 AD3d 532.

entered (*see* CPLR 7514)," the arbitrator is *functus officio*,[4] "without power to amend or modify the final award."

[4] ***Functus officio*** means "having performed his office." Where, as in Kalyanaram, there has been a final judicial determination concerning the matter, the arbitrator no longer has jurisdiction.

Lawful Penalties

Lawful penalties under Section 75 are:

Reprimand

Fine not to exceed $100

Suspension without pay not to exceed two months

Demotion in grade or title

Dismissal

There are other State statutes vesting powers in public employers similar to those set out in §75 of the Civil Service Law.

For example, §155 of the Town Law and §137 of the Second Class Cities Law sets out procedures for taking disciplinary action against a police officer or firefighter employed by the jurisdiction while §8-804 of the Village Law addresses initiating disciplinary actions against members of a village police force. These provisions set out the lawful penalties that may be imposed on employees being discipled pursuant to such law.[5]

Under Section 75 these penalties are mutually exclusive. For instance, if the employee is found guilty of one or more of the charges and specifications, the employer may impose for a single offense a penalty of suspension without pay or a reprimand, but not both. [Sinnott v Finnerty (2nd Dept, 1985) 113 AD2d 836]

However, multiple penalties are possible for multiple offenses [See, for example, Wilson v Sartori, 70 AD2d 959].

There are other possible exceptions to the prohibition on "multiple penalties" being imposed on an individual.

In Seabrook v New York, NYS Sup. Ct., Ia Part 5, Justice Stallman[6], a case involving efforts to curb chronic absenteeism, the court considered the unilateral adoption of an employer policy that provided that any employee who was out sick more than 12 days in a 12-month period (excluding absences for certain specified reasons), would be deemed to be guilty of "chronic absenteeism" and could lose of one or more of the following discretionary benefits and privileges:

1. Assignment to a steady tour;

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[5] See, also, McKinney's Unconsolidated Law §1041 which addressed the removal of police officers in the competitive class and Chapter 360 of the laws of 1911 addressing certain terms and conditions of employment affecting police officers.

[6] Not selected for publication in the Official Reports.

2. Assignment to a specified post or duties;

3. Access to voluntary overtime;

4. Promotions;

5. Secondary employment;

6. Assignment to preferential/special units or commands; and

7. Transfers.

The Union sued, contending that the policy violated §§75 and 76 of the Civil Service Law.

The Union's theory: The policy imposes disciplinary sanctions without providing the individual with the notice and hearing required by Section 75 as a condition precedent to initiating a disciplinary action.

The court dismissed the Union's petition, holding that the mandates set out in §§75 and 76 were inapplicable because the penalties set out in the policy do not include any of the sanctions or penalties set out in CSL Section 75(3) with respect to a correction office deemed to be a "chronic absentee."[7]

Justice Stallman said that CSL §75 specifically limits the imposition of disciplinary penalties to those set out in the section. The employer may not impose penalties exceeding those set by statute. As an example of this principle, Justice Stallman cited Cepeda v Koehler, 159 AD2d 290.

In Cepeda the court held that a penalty consisting of forfeiture of 15 vacation days plus the payment of $1,500 fine violated the penalty provisions of Section 75, which only sanctions the imposition of a "single penalty" from among those enumerated.

In another multiple penalty case, Matteson v City of Oswego, 186 A.D.2d 1017, the Appellate Division overturned the penalties imposed by the appointing authority and remanded the matter for the imposition of a new, appropriate penalty.

Oswego had imposed the following penalties on Matteson: (1) suspension without pay for 30 days; and (2) demotion to a lower grade position; and (3) restitution of $3,699.48.

The Appellate Division held that the penalty meted out was contrary to law in that "the imposition of multiple penalties was improper" under §75.3 of the Civil Service Law.

In contrast, in cases involving the imposition of a penalty by an arbitrator pursuant to a "contract disciplinary procedure" the courts have held that the only limitations on the penalty to be imposed is the

[7] In contrast, it could be argued that the imposition of any penalty given in response to misconduct requires a pre-imposition hearing in accordance with Section 75 and then only the Section 75 penalties may be imposed if the individual is found guilty of the charge[s]. The mischief implicit in the Seabrook rationale is that an appointing authority could by simply imposing a "non-Section 75" sanction on an individual escape having to provide the employee with administrative due process.

sound judgment of the arbitrator. Rarely are arbitrators limited as to the penalties or combination of penalties they can assign.

Recommending Penalties

In the New York State public service employers have the burden of proposing penalties, determining penalties or both. It is normal procedure after a disciplinary investigation for the employer to write a letter to the employee that specifies disciplinary charges, and typically such a letter will include a proposed penalty.

Under Section 3020-a an arbitrator or a panel of arbitrators will consider the evidence and the penalty proposed and make a binding decision as to the penalty imposed. Under Section 75 the decision to impose a penalty remains with the employer; hearing officers only make findings of fact and a recommendation as to the penalty to be imposed.

What should an employer consider in proposing or setting a penalty?

1. Employment record. The employee's personnel history may be considered in setting a penalty, provided the employee is advised that this will be done and is given an opportunity to comment on the contents of his or her file. [See Bigelow v Trustees of the Village of Gouverneur, 63 NY2d 470; Doyle v Ten Broeck, 52 NY2d 625]. Relevant questions include: Is this the employee's first offense of this nature, or is there a pattern of offenses? Has the employee been disciplined or served with disciplinary notice in the past?

Notably, a series of petty offenses by a single individual may have a cumulative impact in the setting of a penalty. In fact, courts have approved the dismissal of an employee for a series of misdeeds that if considered individually would not have been viewed as justifying termination.[8]

For example, a bus driver was terminated after he reported 30 minutes late to a scheduled class on customer service. While that might seem excessively harsh, the Appellate Division upheld the penalty because the driver was simultaneous found guilty of threatening a supervisor. He was also found guilty of operating his bus ahead of schedule in one instance. A state Supreme Court Justice noted that Robinson had been given a warning and a reprimand prior to being served with the four formal disciplinary charges and "a total of five violations in so short a time weighs heavily here" [Robinson v NYC Transit Authority, not selected for publication in the Official Reports].

2. Taylor Law agreements. Does the controlling collective bargaining agreement set penalties for this type of offense? Does it provide for harsher penalties for repeated offenses?

3. Employer's records and history. Does the employer have any written guidelines on how certain offenses will be handled? Were other employees who committed similar misconduct subject to disciplinary action? What penalties were imposed for similar offenses involving other employees?

4. Employee's awareness of the issue. Was the employee told of the expected standard of behavior or performance? Was there any change or improvement?

[8] See, for example, Shafer v Board of Fire Commr., Selkirk Fire Dist., 2013 NY Slip Op 04414.

5. Mitigating circumstances. If the employer is aware of any mitigating circumstances, these should be considered [See below for examples of "mitigating circumstances considered by arbitrators and the courts.]

6. Decisions by other jurisdictions. What penalty was imposed for similar offenses by other jurisdictions? If challenged, were they sustained by the courts and for what reasons. Although every disciplinary situation is unique, research into similar cases is appropriate and can inform the decision-maker on setting of penalties.

7. Relevant laws. In certain cases laws compel dismissal if the employee is found guilty of charges in a judicial forum. Section 30 of the Public Officers Law, for instance, operates to remove a public officer from the position without any reference to any administrative proceeding by the employer -- if the public officer has been convicted of a felony or a crime involving the violation of the individual's oath of office. In such cases the employee is not entitled to any administrative due process. The legal argument here is that the individual did receive due process in the criminal proceeding, so due process has not been denied.

Considering the Individual's Employment History in Disciplinary Actions

The Section 75 hearing officer admitted the accused employee's performance evaluations during the proceeding at the request of the appointing authority, indicating that the evaluations would be considered in determining the penalty the hearing officer would recommend if he found the employee guilty of one or more of the disciplinary charges.

The question raises a number of issues, including the following:

1. May such records be introduced into the record at the disciplinary hearing?

2. If the employee is found guilty of charges unrelated to adverse material in his or her personnel record, may the hearing officer use such information to recommend a penalty to be imposed by the appointing authority?

3. If the employee is found guilty of charges related to an adverse comment in his or her personnel records should further consideration be barred on the grounds of "double jeopardy?"

Introducing the employee's personnel record:

In Scott v Wetzler, 195 AD2d 905, the Appellate Division, Third Department rejected Scott's argument that he was denied due process because the Section 75 hearing officer allowed evidence concerning his performance evaluations to be introduced during the disciplinary hearing.

The court said that "such evidence was relevant to the determination of an appropriate penalty," noting that Scott was allowed an opportunity to rebut these records and to submit favorable material contained in his personnel file.

Considering the personnel record:

Having introduced the employee's personnel records, for what purpose(s) may they be used?

In Bigelow v Village of Gouverneur, 63 NY2d 470, the Court of Appeals said that such records could be used to determine the penalty to be imposed if:

1. The individual is advised that his or her prior disciplinary record would be considered in setting the penalty to be imposed, and

2. The employee is given an opportunity to submit a written response to any adverse material contained in the record or offer "mitigating circumstances."

In some instances, the individual's personnel record may serve to mitigate the penalty imposed.

For example, in Principe v New York City Dept. of Educ., 20 NY3d 963, the Court of Appeal, Judge Smith dissenting, said that Appellate Division [94 AD3d 43] "correctly determined that the penalty of termination imposed on petitioner was excessive in light of all the circumstances."

The Appellate Division had decided that "Given all of the circumstances, including the educator's "spotless record as a teacher for five years and his promotion to dean two years prior to the incidents at issue," the penalty excessive and shocking to [its] sense of fairness, citing the Pell Doctrine [Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222]."

Is Criticism Discipline?

In Holt v Board of Education, 52 NY2d 625, the Court of Appeals ruled that performance evaluations and letters of criticism placed in the employee's personnel file were not "disciplinary penalties" and thus could be placed there without having to first hold a disciplinary proceeding.

In other words, the appointing authority's placing correspondence critical of the employee's conduct or performance in his or her personnel file did not constitute discipline.

The basic rule set out in Holt is that a statutory disciplinary provision such as Section 75 of the Civil Service Law does not require that an employee be given a hearing or permitted to grieve every comment or statement by his or her employer that he or she may consider a criticism.

In contrast, alleged "constructive criticism" may not be used to frustrate an employee's right to due process as set out in Section 75 of the Civil Service Law, Section 3020-a of the Education Law or a contract disciplinary procedure.

As the Commissioner of Education indicated in Fusco v Jefferson County School District, CEd, 14,396, decided June 27, 2000, and Irving v Troy City School District, CEd 14,373, decided May 25, 2000: Comments critical of employee performance do not, without more, constitute disciplinary action. On the other hand, counseling letters may not be used as a subterfuge for avoiding initiating formal disciplinary action against a tenured individual.

What distinguishes lawful "constructive criticism" of an individual's performance by a supervisor and supervisory actions addressing an individual's performance that are disciplinary in nature? This could be a difficult question to resolve.

As the Court of Appeals indicated in Holt, a "counseling memorandum" that is given to an employee and placed in his or her personnel file constitutes a lawful means of instructing the employee concerning unacceptable performance and the actions that should be taken by the individual to improve his or her work.[9]

In the Fusco and Irving cases the Commissioner of Education found that "critical comment" exceeded the parameters circumscribing "lawful instruction" concerning unacceptable performance.

In Fusco's case, the Commissioner said that "contents of the memorandum" did not fall within the parameters of a "permissible evaluation" despite the school board's claim that the memorandum was "intended to encourage positive change" in Fusco's performance.

The Commissioner noted that the memorandum "contains no constructive criticism or a single suggestion for improvement." Rather, said the Commissioner, the memorandum focused on "castigating [Fusco] for prior alleged misconduct."

[9] In Trupiano v Board of Educ. of E. Meadow Union Free School Dist**.,** 89 AD3d 1030, the Appellate Division held that placing a counseling memo in the teacher's personnel file as a §3020-a disciplinary penalty was within the arbitrator's power and did not violate public policy.

In Irving's case, a school principal was given a letter critical of her performance and the next day reassigned to another school where she was to serve as an assistant principal.

The Commissioner ruled that these two actions, when considered as a single event, constituted disciplinary action within the meaning of Section 3020-a of the Education Law.

Sometimes an individual alleges that he or she has been subjected to "double jeopardy" because a "counseling memorandum" was placed in the individual's personnel file and later disciplinary charges involving the same event(s) are served upon the individual. Does including or incorporating the events set out in the counseling memorandum as charges constitute "double jeopardy?"

No, according to the Court of Appeal's ruling in Patterson v Smith, 53 NY2d 98.

In Patterson the court said that including charges concerning performance that were addressed in a counseling memorandum was not "double jeopardy." The court explained that a "proper counseling memoranda" contains a warning and an admonition to comply with the expectations of the employer. It is not a form of punishment in and of itself.[10]

Accordingly, case law indicates that giving the employee a counseling memorandum does not bar the employer from later filing disciplinary charges based on the same event. Further, the memorandum may be introduced as evidence in the disciplinary hearing or for the purposes of determining the penalty to be imposed if the individual is found guilty.

The employer, however, may not use the counseling memorandum or a performance evaluation to avoid initiating formal disciplinary action against an individual as the Fusco and Irving decisions by the Commissioner of Education demonstrate.

Indemnification

Managers in the public service should be aware that they may be held personally liable for the payment of damages won by an employee who has been unlawfully dismissed from his or her position, unless the managers are able to claim indemnification under Section 17 or Section 18 of the Public Officers Law.[11]

Section 17 of the Public Officers Law provides for the defense and indemnification of State officers and employees, and certain others, if they are sued as the result of their performing, or not performing, an official duty.

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[10] Further, an employee's personnel record may be considered in determining an appropriate penalty, which record could include "counseling memoranda." Dundee Central School District v Douglas Coleman, Supreme Court Yates County 2011 NYSlipOp 31144(U) [Not selected for publication in the Official Reports]

[11] In addition, §19 of the Public Officers Law applies in criminal actions and provides for the State to pay reasonable attorneys' fees and litigation expenses incurred by or on behalf of an officer or employee of the State as the employer in his or her defense of a criminal proceeding in a State or Federal court

Section 17 states:

The state shall indemnify and save harmless ... in the amount of any judgment obtained ... in any state or federal court ... or the amount of any settlement ... or shall pay such judgment or settlement; provided, that the act or omission from which such judgment or settlement arose occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless or pay prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing on the part of the employee.

Section 18 of the Public Officers Law provides for the "defense and indemnification of officers and employees of public entities" other than the State where the jurisdiction has adopted a local law or taken other appropriate action to confer the benefits available under Section 18 upon its officers and employees.[12]

Under both §§17 and 18, however, the key to claiming representation and indemnification is that the individual was acting within the scope of his or her employment.

The jurisdiction's chief legal officer typically determines whether or not the individual was acting within the scope of his or performance of official duties.

Expiration of a Penalty

The Commissioner of Education was asked to resolve an interesting, but rare, penalty issue -- what happens if the penalty imposed is a suspension without pay and the individual is in jail during part of the "period of the suspension?" [Manning v Warsaw CSD, CEd 14071]

The Warsaw Central School District had served disciplinary charges against a tenured teacher, William Manning, Jr., related to his alleged operating a motor vehicle under the influence of alcohol.

Following a disciplinary hearing and an appeal, on November 22, 1994 former Commission of Education Sobol issued a decision and imposed a penalty of suspension without pay for two years. The decision was sustained by a State Supreme Court justice [Manning v Sobol, August 7, 1995, Not selected for publication in the Official Reports].

[12] §18 of the Public Officers Law permits a public entity to adopt a local law, by-law, resolution, rule or regulation to indemnify and save harmless its employees from liability in the event there is a judgment against them resulting of an act or omission as a result of the individual acting within the scope of his or her public employment or duties. However, a public entity, for the purposes of §18, means a county, city, town, village or any other political subdivision or civil division of the state, a school district, a BOCES or other entity operating a public school, a college, community college or university, a public improvement or special district, a public authority, commission, agency or a public benefit corporation. It also includes "any other separate corporate instrumentality or unit of government." See, also, See Informal Opinions of the Attorney General; 2011-9..

Manning, however, was incarcerated in the Wyoming County jail on July 19, 1994. Because he was "unavailable" to work, the district changed his pay status from suspension with pay pending resolution of the Section 3020-a action to suspension without pay effective July 19, 1994.

Released from prison and claiming that his two-year suspension without pay commenced on November 22, 1994, Manning advised the district that he intended to return to work on November 22, 1996.

The District said that the two-year suspension period commenced on March 21, 1995, when he was released from prison and therefore he could not return to work earlier than March 21, 1997. Manning appealed.

Commissioner of Education Richard P. Mills said that the two-year suspension imposed by former Commissioner Sobol commenced when Manning was released from incarceration since allowing the suspension to run concurrently with his incarceration "nullifies a portion of the suspension, since [Manning] could not work during that period in any event."

The Commissioner rejected Manning's claim that he was entitled to back salary from November 22, 1996, holding that to do so would abrogate the degree of discipline deemed appropriate by former Commissioner Sobol.

Whistleblower Protection

Disciplinary action may not be used to retaliate against a worker because the employee "blew the whistle." Section 75-b of the Civil Service Law prohibits an employer from taking any adverse personal action against an individual because the employee disclosed information regarding "improper action" by an employer or the employer's violation of a law, rule or regulation where the violation involves a danger to the public's health or safety.

In addition to prohibiting termination or other disciplinary action, the employer may not take any adverse personnel action against the individual involving compensation, appointment, promotion, transfer, assignment, reinstatement to a position or in the evaluation of the worker's performance.

The United States Supreme Court has established a two-prong test with respect to claims of dismissal in retaliation for "whistle blowing" [Conrick v Myers, 461 U.S. 1l38]. To win, the individual must prove that:

(1) the speech is protected; i.e., the speech involved a matter of public concern; and

(2) that the protected speech was a substantial factor in motivating the termination. Courts have declined to provide whistleblower protection in cases in which they determined that the matter involved a purely personal concern.[13]

[13] Under the First Amendment, public officers and employees typically enjoy "protected speech" in connection with their public comments concerning a State or municipal employer's activities that are a matter of public concern. In contrast, speech by a public officer or employee that merely addresses a personal concern such as the individual's personal unhappiness working for the public employer or for a particular supervisor, or related to the individuals'

The public interest is also a factor. Section 75-b of the Civil Service Law, provides that a public employer "shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information regarding a violation of law ... which violation creates and presents a substantial and specific danger to the public health or safety...."

This does not mean that a whistleblower has carte blanche to engage in misconduct and go unpunished. Section 75-b.4 states that nothing in the section "shall be deemed to ... prohibit any personnel action which otherwise would have been taken regardless of any disclosure of information."

Court rulings suggest that when a "whistle blower" defense is offered or anticipated, the charging party will have to present evidence that its reasons for disciplining the employee are not pre-textual.

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particular position, work assignments or working conditions, or the individual's personal disagreement concerning the internal operations of the department or agency, that do not rise to the level of speech concerning a "public interest," does not involve "protected speech" within the meaning of the First Amendment.

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