

Discipline of Employee Miscreants:
A Civil Service Law Section 75 Primer

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Introduction

While the vast majority of public employees arrive on time for work, (and *actually arrive* for work more often than not), perform their job duties in a competent manner, and refrain from cursing or punching their co-workers and/or supervisors, there are, of course, the occasional few who don't do the things they should, and do the things they shouldn't. For purposes of this presentation, let's call them "employee miscreants."

What to do about employee miscreants who cause havoc in the workplace and headaches for personnel administrators and employers? Too often, the reaction of the harried personnel administrator or employer is one of the following choices: (1) Ignore the problem, or (2) Off with their heads.

These are not good choices.

Instead, it is imperative for public employers and their administrators and supervisors to be familiar with the provisions of Civil Service Law Section 75, which is the statute which spells out the employee rights and employer responsibilities as regards the discipline of certain employees.¹

What follows is intended as something of a brief "how to" guideline for handling discipline problems in the public sector workplace, specifically, in the school setting. It is not the answer to every question—that's why school boards retain school attorneys—but it should serve as a useful first resource for those charged with maintaining an effective work force.

I. Civil Service Law Section 75

A. Who is Covered

- (i) Permanently appointed competitive class employees
- (ii) Permanently appointed non-competitive class employees with five or more years of continuous service in the non-competitive class

¹ It should be noted at the outset that this outline does not deal with the discipline of school district employees such as teachers, teaching assistants, administrators and any employee holding a State Education Department professional certification. The discipline of these professional ("certificated") employees is governed by NY Education Law Section 3020-a..

- (iii) Permanently appointed employees in any civil service jurisdictional class who are either exempt volunteer firemen, or honorably discharged veterans who served in time of war.²

Note: Simply because an employee is part-time does not necessarily disqualify him/her from section 75 coverage. A part-time employee is eligible for section 75 protection so long as he/she has a permanent appointment to one of the positions noted above.

B. Who Is Not Covered

- (i) Labor Class employees
- (ii) Non-Competitive employees with fewer than five years' continuous service
- (iii) Exempt Class employees (These titles are specifically identified by the civil service commission, and generally are employees who serve "at the pleasure of" the appointing authority)
- (iv) Teachers, Teacher Assistants, Administrators: These are covered under Education Law §3020-a.
- (v) Superintendents: Covered by individual employment agreement.

Note: Not everyone is entitled to the panoply of rights provided under Section 75. When in doubt as to a particular employee's civil service class, check the civil service form (CS 39) regarding his /her appointment. In addition, always check applicable collective bargaining agreements, as certain agreements specifically grant Section 75 rights to employees who would not otherwise be eligible.

C. Employee's Rights Under Section 75

- (i) Right to have union representation during questioning.
- (ii) Right to written notice of charges.
- (iii) Right to answer charges in writing within eight days.
- (iv) Right to a hearing on the charges before "the officer or body having power to remove the employee, or by a deputy or other person designated in writing for that purpose."
- (v) Right to cross-examine witnesses, and to present witnesses and evidence in his/her defense.
- (vi) Right to a stenographic record of the hearing, free of charge.
Civ. Svc. L. §75.2

Caveat re. Union Representation

² "Time of war" includes service during World War I; World War II; Korean hostilities (6/27/50 - 1/31/55); Vietnam hostilities (2/28/61- 5/7/75); Lebanon hostilities (6/1/83 - 12/1/87); Grenada hostilities (10/23/83 - 11/21/83); Panama hostilities (12/20/89 - 1/31/90); Persian Gulf hostilities (8/2/90 - end of hostilities). Civ. Svc. L. §85 subd. 1.(a), (b), and (c). To qualify under the Lebanon, Grenada, or Panama hostilities, the individual must show receipt of the appropriate armed forces expeditionary medal for the region.

Where it reasonably appears that an employee may be the subject of disciplinary action, it is an improper employer practice under the Taylor Law³ to refuse to permit an employee the right to have a union representative present during questioning. If a union representative is not immediately available, the employer must allow reasonable time for the employee to obtain such representation. Civ. Svc. L. §209-a.1(g).

Additionally, the employer is required to notify the employee in writing of the right to have union representation in such circumstances. Civ. Svc. L. §75.2. Note that the statute gives the employee the right to a *union representative* during questioning: not an attorney.

Caveat re. Appointment of Hearing Officer

Where the appointing authority opts to designate a hearing officer to conduct the hearing (always the recommended course for a board of education), the Board must appoint the hearing officer by Board resolution at a public Board meeting.⁴ Civ. Svc. L. §75.2 Failure to do so will invalidate any subsequent hearing on the ground that the hearing officer lacked jurisdiction. (See attached sample Board resolution.)

Suspension Without Pay Pending Hearing

Section 75 authorizes an employer to suspend an employee without pay for 30 days pending the hearing and determination of the charges. It is important to note that within the 30 days, the hearing must be held and concluded and a decision rendered by the appointing authority: otherwise, the employee is entitled to be restored to the payroll.

D. The Hearing

- (i) The burden of proof is on the employer.
- (ii) The charges must be proven by “substantial evidence.” “Substantial evidence” has been defined as proof that “...a reasonable mind may accept as adequate to support a conclusion or ultimate fact.” *WEOK Broadcasting Corp. v. Planning Board of Lloyd*, 79 NY 2d 373 (1992).
- (iii) At the conclusion of the hearing, and following the submission of closing arguments or written briefs, the hearing officer will issue a written report which will include the hearing officer’s findings of fact (which may include findings on the credibility of witnesses) on each of the charges, and a recommendation as to penalty.

E. Penalties

Civil Service Law section 75 penalties are limited to the following:

- (I) reprimand; or
- (ii) fine not to exceed \$100; or
- (iii) suspension without pay for a period of not more than two months; or

³Civ. Svc. L. §§200 - 214

⁴The resolution need not identify the employee who is the subject of the disciplinary hearing.

- (iv) demotion in grade and title; or
- (v) dismissal.

Note that these penalties are mutually exclusive: the Board may not impose more than one of the above sanctions, nor may it devise its own penalty.

F. The Board's Responsibilities

- (i) Following the hearing, the Board must review the charges, transcript, exhibits, closing briefs in an executive session.
- (ii) The Board, as a body, must determine guilt or innocence on each charge, and if guilty, the appropriate penalty.
- (iii) The Board is responsible to notify the employee in writing of its determination and the implementation of penalty, if any.
- (iv) If the employee is found guilty, the Board must file a copy of the transcript and the Board's determination with the civil service commission having jurisdiction.

Note: The Board's deliberations occur in executive session; however, the Board's determination must be adopted via Board resolution in public session. It is not necessary that such resolution identify the employee; the Board can simply refer to the "the Employee named in Confidential Attachment A." (See attached sample Board resolution.) It should be noted, though, that the confidential attachment will become part of the Board minutes and is subject to disclosure pursuant to a Freedom of Information Law request.

The Board need not accept all---or any---of the hearing officer's findings of fact, and may instead make its own findings, both as to guilt and penalty. However, in doing so, the Board must specify the record evidence upon which the Board is basing each of its findings of fact. *Collins v. Parishville-Hopkinton C.S.D.*, 681 NYS 2d 132, (Third Dept., 1998) (where Board failed to specify factual findings to support its determination of guilt, court annulled Board's decision to terminate bus driver); *see also, Simpson v. Wolansky*, 38 NY 2d 630 (1975) (court remanded case to appointing authority for a new determination where appointing authority relied on matters not in the record in finding employee guilty of charges of sexual contact with a resident of mental health facility).

G. Appeal

- (i) An employee may appeal the determination to the Civil Service Commission having jurisdiction. Civ. Svc. L. § 76
- (ii) An employee may appeal by filing a petition in Supreme Court pursuant to CPLR Article 78.⁵

⁵The Commissioner of Education plays no part in the administration of discipline regarding civil service appointees.

Note: The scope of review on an appeal of a section 75 is limited to whether there is substantial evidence to support the charge(s). In general, disciplinary sanctions following an administrative hearing will not be overturned by a reviewing body unless the penalty is so severe as to be shocking to one's sense of fairness. *Pollman v. Fahey*, 106 AD2d 771, 483 NYS 2d 805 (Third Dept., 1984); *Rutkunas v. Stout*, 8 NY 3d 897, 834 NYS 2d 73 (2007) (where parks department employee's misconduct jeopardized the health and safety of co-workers and the public, termination was not so shocking as to require reversal, notwithstanding the fact that the employee had no prior disciplinary record.)

II. Non-instructional Employees Ineligible for Section 75

A. Civil Service appointees who are not eligible for Section 75 and who are not afforded any type of procedure under a collective bargaining agreement can be dismissed without a hearing.

CAVEAT: Even with this category of employee, the employer may not discipline or dismiss an employee for an illegal reason, e.g., based on race, gender age, disability. Such actions may well lead to a complaint being filed against the employer with the federal Equal Employment Opportunity Commission and/or the New York State Division of Human Rights.

B. Where the employer has reason to believe that an employee who is not eligible for Section 75 or other disciplinary procedure has engaged in misconduct sufficient to warrant the employee's termination, it is recommended that the employee be given an opportunity to respond to the allegations/proof of misconduct.

NOTE: It is recommended that the employee's union representative be present at such meeting. Assuming that the employee is unable to provide a satisfactory response to the allegations of misconduct, the employee should be advised that a recommendation for termination will be forwarded to the Board of Education.⁶

III. Name-Clearing Hearing

A name-clearing hearing is a post-termination procedure whereby an employee who has been terminated seeks to nullify stigmatizing information concerning his/her termination.

A. Who Is Entitled to A Name-Clearing Hearing

- (i) Section 75 eligible employees
- (ii) Employees ineligible for Section 75
- (iii) Unionized employees

⁶ Only the Board of Education, as the appointing authority, can actually terminate an employee of the school district.

- (iv) Management employees
- (v) Full-time employees
- (vi) Part-time employees
- (vii) Permanent employees
- (viii) Non-permanent employees

B. What Triggers the Right to a Name-Clearing Hearing

- (i) Where the reason for a public employee's termination is one which would tend to injure the employee's good name, reputation, honor or integrity. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Lentlie v. Egan*, 61 NY 2d 874 (1984); and
- (ii) The employer publicly discloses stigmatizing statements concerning the employee.

Note: The purpose of a name clearing hearing is to protect an individual's opportunity to obtain future employment. This does not mean that every employee who is terminated for disciplinary reasons is entitled to a name-clearing hearing. On the contrary, the procedure is limited to those situations where the discharging employer has made a *public* disclosure of stigmatizing reasons for the employee's termination. Statements that an employee's job performance was unsatisfactory do not give rise to a right to a name-clearing hearing; however, public disclosure that an employee was insubordinate will entitle the former employee to a name-clearing hearing. *Lentlie v. Egan*, supra.

PRACTICAL TIPS REGARDING EMPLOYEE DISCIPLINE

1. Take appropriate steps to ensure that expectations of employee performance are made clear to the employee — including job duties, attendance, and conduct.

These should be spelled out to the employee, early and often. Make sure the employee is given a copy of pertinent District policies (e.g., re. sexual harassment), receives training regarding such policies, and maintain proof that the employee actually received the policy and training. Management should make clear to employees what their expectations are with respect to use of leave time.

2. Make supervisors part of the process.

Supervisors need to be told what management's expectations are for their performance, too. Management needs to recognize that merely passing a promotional exam does not automatically endow a new supervisor with the skills necessary to become an effective supervisor. Thus, when an employee is appointed or promoted to a position where he/she is responsible for supervising and evaluating other employees, it is important that someone higher in the pecking order takes the time to spell out to the supervisor what the supervisor is expected to do.

3. Progressive discipline is the preferred method of dealing with employee misconduct.

Unless the employee has engaged in egregious misconduct, it is generally better for an employer to follow a course of progressive discipline. After all, the object is to develop a reliable work force, not to see how many employees you can successfully terminate.

4. Note poor performance in writing.

While every criticism of an employee's performance need not be reduced to writing, by the same token, it is unacceptable to allow a problem to continue without written comment until noting it in an annual evaluation. (*And, it is important for employees to receive an annual evaluation, annually.*) At a minimum, supervisors should make a note to themselves when the supervisor has had an occasion to correct an employee's performance verbally.

5. Properly document in writing any counseling session with an employee.

Repeated failure by the employee to correct his/her performance, or the commission of a serious act of misconduct (including poor attendance) should be addressed in a counseling session between the employee, the employee's supervisor, and the building principal and/or the District's personnel administrator. The employee should be notified in writing of the opportunity to have a union representative present.

A counseling session should always be followed by a written counseling letter summarizing the substance of the counseling session, and concluding with a series of *directives*—not “recommendations” or “suggestions”—for the employee to improve his/her performance. The counseling letter should contain a line for the employee to sign acknowledging that the employee has received a copy of the counseling letter, and that a copy will be placed in the employee's personnel file.

Remember: If it didn't happen in writing, it didn't happen.

SAMPLE RESOLUTION
APPOINTING SECTION 75 HEARING OFFICER
AND SUSPENSION OF EMPLOYEE

BE IT RESOLVED that the Board of Education of the [] School District hereby appoints [_____, Esq.], to serve as hearing officer with respect to disciplinary charges brought against the employee named in Confidential Attachment "A" pursuant to Civil Service Law §75.

BE IT FURTHER RESOLVED that the employee named in Attachment "A" be suspended without pay for a period of thirty days pending hearing and determination of said charges.

NOTE: Confidential Attachment "A" should simply contain the name of the Employee.

**SAMPLE BOARD RESOLUTION FOLLOWING SECTION 75 HEARING:
DETERMINATION OF SECTION 75 CHARGES**

BE IT RESOLVED that upon a review of the findings of fact and recommendations of the duly appointed hearing officer in the Civil Service Law § 75 disciplinary proceeding against the employee named in confidential attachment "A", and upon a review of the record of the hearing, the hearing transcript, the exhibits submitted on behalf of the District and the employee, and upon review of the closing arguments submitted on behalf of the employee and the District, the Board of Education of the _____ School District hereby adopts the finding that respondent is guilty of 14 of the 16 charges preferred against him and upon such finding of guilt, adopts the penalty of termination; and

BE IT FURTHER RESOLVED that effective October 17, 2009, the Employee's service as a District employee is hereby terminated; and

BE IT FURTHER RESOLVED that the district clerk is hereby directed to provide a copy of this resolution and the entire record of the hearing with the _____ County Civil Service Commission.