

Laws and rules applicable in laying off NYS public employees .

Layoff, Preferred Lists and Reinstatement

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Layoff, Preferred Lists and Reinstatement

A Concise Guide to the Laws, rules and regulations, and
selected court and administrative decisions, concerning
New York State as an employer and its political
subdivisions and school districts

by

Harvey Randall with Eric D. Randall

Revised Edition - 2011

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Early retirement

Blistein v St. John's College, 74 F.3d 1459

Across New York State there is rampant speculation that the State and municipal employers will be authorized to offer "early retirement incentives" to individuals in an effort to reduce their respective work forces while avoiding or limiting layoffs.

Offering early retirement to some but not all employees could trigger claims of discrimination under a number of laws. The Blistein case and several other cases illustrate the standards courts use to judge the legality of limited early retirement offers.

In the Blistein case, the U.S. Circuit Court of Appeals, Fourth Circuit, examined the question of whether an early retirement incentive violates the federal Age Discrimination in Employment Act [ADEA] if it is offered only to individuals who have attained a certain age.

The Court concluded that such a plan cannot be used as evidence to prove an ADEA charge. Blistein, a St. John's College staff member, elected to accept the College's offer of certain "early retirement incentives." He then sued, claiming that his "early retirement" violated ADEA because "but for his age" he could not retire early.

The Court said that Blistein failed to establish a *prima facie* case of unlawful discrimination based on age because ADEA specifically excludes voluntary early retirement incentives from its coverage.

While age was a critical factor in Blistein's eligibility for early retirement incentives, this could not be used as evidence to sustain a finding of age discrimination under ADEA.

Another issue that should be considered in connection with retirement incentives involves plans that require employees to sign a "waiver" as a condition of receiving the incentive. The Greece Central School District negotiated such a provision with the Greece Teachers Association.

Could such a "condition precedent" be viewed as violating the Age Discrimination in Employment Act or the Older Workers Benefit Protection Act? Courts generally have held that to survive judicial scrutiny, it must be shown simply that the employee made a knowledgeable and voluntary decision to accept the incentive.

Limiting eligibility for early retirement incentive by work location can also be an issue.

In *Fletcher v Kroger, Co.*, 18 PRep 1707 a U.S. Circuit Court of Appeals examined a private sector employer's decision to offer early retirement benefits to employees at specified locations and not to all employees.

The Court viewed this as a "plan design decision" and said it did not violate the Employee Retirement Income Security Act. A selective early retirement plan might not be viable in the public sector, however, unless it also meets the "equal protection" mandates of the U.S. Constitution.

In Public Employees Retirement System of *Ohio v Betts*, 492 US 158, the U.S. Supreme Court ruled that a benefit plan that varies benefits by age is unlawful only if it is shown that the plan is a subterfuge, -- i.e., the plan was adopted with the intent to discriminate against older individuals with respect to appointment and promotion, dismissal, compensation or other terms and conditions of employment.

Disclosure of incentive plans may be a consideration. In *Mullins v Pfizer, Inc.*, 23 F.3d 663, the U.S. Circuit Court of Appeals, Second Circuit [NY] said that an employee who retired one month before Pfizer offered its employees a more generous "early retirement benefit" could sue under ERISA.

Mullins claimed that he was misled by Pfizer when, in response to a question concerning whether additional benefits would be made available to early retirees, he was advised that no such additional benefits would be offered.

What about eligibility for unemployment insurance? In *Sarna v Sweeney*, Appellate Division, the Appellate Division held that if an employee elects to accept an early retirement incentive, he or she is ineligible for unemployment insurance benefits because the individual "voluntarily left her employment without good cause" when he or she accepted the retirement incentive.

Early retirement incentives

Auerbach v Harborfields, USDC EDNY 95CV-866

A school district and a teacher organization negotiated an early retirement incentive. The incentive, not unlike those negotiated by other school districts, was available only to:

- a. Teachers with at least 20 years of service who elected to retire upon reaching age 55; and

b. Teachers over 55 years of age who elect to retire upon completing their 20th year of service.

The incentive, negotiated pursuant to the Taylor Law, provided that teachers who qualified and retired would receive \$12,500 as a "terminal payment," and, in addition, would be paid for all of their unused accumulated sick leave credits. Did this incentive violate the Age Discrimination in Employment Act [ADEA]?

Fourteen Harborfields Central School District teachers thought that it did. They sued the District, contending that ADEA required that the retirement incentive negotiated by the District and the Union be paid regardless of when a teacher retired.

Judge Thomas C. Platt rejected the teachers' theory. The decision states that the "employer's motivation" for agreeing to the incentive was not based on age but rather on "seniority." He said that completion of 20 years of service was the critical element, not age. Accordingly, there was no ADEA violation.

The decision commented that Congress intended that ADEA "... help employers and workers find ways of meeting problems arising from the impact of age and employment."

Here, said the Court, "the retirement incentive helps induce voluntary retirement of the most expensive workers while avoiding involuntary layoffs [of the less senior, and presumably lower paid employees]." Noting that the fourteen teachers had neither been denied their retirement benefits nor compelled to retire, Judge Platt held:

As a matter of law, a plaintiff cannot make out a *prima facie* disparate impact claim if the factor motivating the employer is some feature other than the employee's age.

Clearly there is some correlation between age and seniority. Here, however, Judge Platt decided that age and seniority were "analytically distinct." The incentive plan was judged to be based on factors "other than age (although related to age)"

There have been a number of rulings concerning "early retirement incentives."

In *Lyon v Ohio Education Association*, 53 F.3d 135, the U.S. Circuit Court of Appeals, Sixth Circuit, held that a public retirement plan negotiated by the Ohio Education Association could provide one class of employees [here younger workers] with greater benefits than it provides other, older classes of employees, so long as there was no

intentional discrimination even though the plan actually had a discriminatory impact on the older employees.

On a related issue, is an individual who accepts an early retirement incentive eligible for unemployment insurance? New York's Appellate Division affirmed an Unemployment Insurance Appeals Board ruling that an individual who accepted an early retirement incentive was disqualified for unemployment insurance benefits [*Sarna v Sweeney*].

Why? Because Sarna "voluntarily left her employment without good cause" when she accepted the retirement incentive.

[Eligibility for certification from a preferred list for appointment to new position](#)

Elizabeth Markow-Brown v Port Jefferson UFSD, Comm. of Ed.; Decision No. 15,333

"Where the board of education abolishes a position requiring certification as instructional or noneducational in nature and creates in lieu thereof a noneducational position which does not require educational certification, the former incumbent of the educational position has no claim on the newly created noninstructional position"
<http://www.counsel.nysed.gov/Decisions/volume45/d15333.htm>

[Employees' rights upon the take-over of a BOCES program](#)

Matter of Valentine, Comm. Of Ed. Decision 13,977

Elizabeth Valentine, a tenured "general special education teacher," was at Step 9 of the BOCES salary schedule when the North Tonawanda City School District decided to "take-back" some of its students and expand its special education program.

Valentine, whose name was placed on a preferred list, was told that she would be appointed by North Tonawanda in accordance with §3014-b of the Education Law.²⁹ subject to the approval of the school board.

On August 23, 1996 BOCES wrote Valentine to advise her that she would be recalled from the preferred list effective September 1, 1996. Valentine, however, declined

²⁹ §3014-b provides that an excessed BOCES teacher shall retain his or her former salary grade, tenure status and sick leave credits.

BOCES' offer.

On September 11, 1996, North Tonawanda, advised Valentine that the board voted (1) to appoint her as a probationary special education teacher; (2) to place her in Step 7 of its salary plan, which was less than BOCES Step 9, and (3) would not "carry-over" her 82.5 days of sick leave credit. She signed the notice of probationary appointment sent to her by North Tonawanda, with the notation "[m]y signature does not waive any rights I may have under §3014-b."

Valentine appealed to the Commissioner, contending under §3014-b that she was entitled to be appointed as a tenured teacher at Step 9 and that North Tonawanda should transfer over all of her accumulated sick leave credits because the district "took back a program formerly operated by BOCES" and her employment by North Tonawanda was the consequence of that decision. North Tonawanda, on the other hand, argued that BOCES had recalled Valentine prior to September 1, 1996, which appointment she declined to accept, and thus her employment by North Tonawanda was not pursuant to §3014-b, but as a new probationary employee, and that it had so advised her.

The Commissioner ruled that Valentine became an employee of the North Tonawanda City School District "by virtue of its take back of the BOCES program and that [Valentine's] status as a §3014-b hire was not extinguished by BOCES' August 23, 1996 recall letter." The Commissioner pointed out that §3014-b is triggered by two events: first, a take back by a district of a BOCES service or program and, second, a layoff of a BOCES teacher whose position is eliminated because of the take back.³⁰

According to the ruling, Valentine enjoyed this "vested" benefit in May 1996 when the District decided to take back its students [or June 30, 1996, at the latest, Valentine's last day of service with BOCES] and no action by the school board was required to effect her appointment.

Whether Valentine should be paid at Step 9 or at Step 7 involved other considerations, however. The district argued that Valentine should be credited only with her six years of actual service with BOCES and not with the "prior service at another school district" that BOCES had credited and thus it was only required to pay her at the Step 7 level.

³⁰ §3014-b provides that "at the time of such takeover by the school district [the teacher] shall be considered an employee of such school district, with the same tenure status he maintained in such board of cooperative education services."

The Commissioner disagreed, noting that “the statute does not say length of service in such [BOCES], it specifically uses the word “credited.” This, he said, is exactly what happened in this situation -- BOCES credited Valentine with an extra two years of service. He ruled that the District had to recognize Valentine’s status as a tenured teacher, at Step 9, and credit her with her BOCES accumulated sick leave credits. <http://www.counsel.nysed.gov/Decisions/volume38/d13977.htm>

Employment of retirees

Freda v Board of Education, 224 A.D.2d 360

Layoffs, early retirement options and "superannuation" retirements have created a pool of employable individuals receiving a retirement allowance from a New York State public retirement system. Public employers and retirees should understand that there are a number of special factors to keep in mind when a person who is receiving a retirement allowance from a public retirement system is employed by a public employer.

In New York State, the relevant considerations are set out in §§210 through 216 of the Retirement and Social Security Law.

The key provisions concerning the reemployment of a person receiving a retirement allowance from a public retirement system of this State are:

§210, which defines the "retired person" for the purposes of reemployment in the public service.

§211, which describes the procedure and the requirements that must be met in order to avoid a reduction of an individual's retirement allowance upon his or her reemployment in the public service.

§212, which allows a retired public employee to earn up to a certain amount, currently \$30,000, upon reemployment in the public service without having to obtain a "§211 approval."

There are no limitations on the amount that a retiree who is sixty-five years of age or older may earn upon reemployment in the public service.

Generally the risk incumbent in reemployment of an individual receiving a retirement allowance from a public retirement system of this State is not borne by the public

employer but rather the employee.³¹ If an retiree is reemployed by a public agency and fails to file certain forms or obtain required approvals, he or she may lose some or all of their retirement benefits. This is illustrated by the Freda case.

Mario A. Freda retired from the New York City police department and subsequently accepted a position with the New York City Board of Education. A Board of Education employee assured him that his police pension would not be reduced as a result of his employment by the Board. Freda, however, neither applied for nor obtained a "§211 waiver" prior to his employment by the Board or at any time thereafter.

Some fourteen years later this omission was discovered and the New York City Police Pension Fund claimed that it had overpaid Freda more than \$100,000 in retirement benefits. When the Police Pension Fund attempted to recoup this overpayment, Freda sued, seeking a court order to prevent this. Essentially Freda contended that the doctrine of "estoppel" barred the System from recapturing the overpayment.

The Appellate Division affirmed a lower court's ruling dismissing Freda's petition. The Court said that the "doctrine of estoppel" can only be applied against a governmental entity if failure to apply the doctrine would defeat a right legally and rightfully obtained." (emphasis added)

Here, said the Court, it could not be deemed that these overpayments "were rightfully obtained" given the fact that Freda had failed to obtain the waiver specifically provided for by statute. The implication here is that had Freda obtained the §211 waiver, he would have been able to avoid any reduction of his retirement allowance notwithstanding his employment by the Board.

Significantly, the Appellate Division said that even if Freda had been given assurances by a Board of Education employee that his employment by the Board would not adversely affect his retirement benefits as he claimed, any such assurances or statements made by employees of the Board of Education cannot bind another entity such as the Police Pension Fund.

A retiree should discuss the impact of such reemployment with a representative of his or her retirement system to determine if accepting such an employment would require a reduction of his or her retirement allowance and if such is the case, how much of a

³¹ Annuities paid by TIAA and, or, CREF pursuant to an "Optional Retirement Plan" are not retirement benefits paid by a public retirement system of this State. See, for example, Education Law §396.

reduction would result. Another consideration: reemployment could reduce the amount of Social Security benefits otherwise payable to the individual.

Enforcing statutory rights

Marino v Hauppauge UFSD, 262 AD2d 321

If a public employee claims that some action by his or her employer violated his or her statutory rights, may the employer insist that the issue be resolved by the employee filing a grievance under a Taylor Law contract grievance procedure? No, said the Appellate Division in the Marino case.

Frank Marino sued his employer, the Hauppauge Union Free School District, alleging that the district had violated his rights under §3013 of the Education Law by reducing his annual salary by \$4,148.³² The district persuaded a State Supreme Court judge to dismiss Marino's complaint, contending that Marino complaint should be resolved under the grievance procedure set out in the Taylor Law agreement then in place.

The Appellate Division overturned the lower court's dismissal of Marino's Article 78 action. The Appellate Division noted that the collective bargaining agreement did provide a grievance procedure to resolve "any dispute between the parties concerning the interpretation of the terms and conditions of [the] agreement". However, said the court, Marino had not raised any issue relating to the terms and conditions of his employment as set out in the agreement. What he was attempting to do was to "vindicate rights conferred upon him by Education Law §3013(1)."

The courts have consistently ruled that the statutory rights of teachers whose positions are abolished pursuant to either §§3013 or 2510 of the Education Law may not be changed by a collective bargaining agreement.

For example, in *Szumigala v Hicksville Union Free School District*, 148 AD2d 621, 539 NYS2d 83, the Appellate Division, citing *Cheektowaga v Nyquist*, 38 NY2d 137, held that a seniority clause in a Taylor Law agreement violated §2510 of the Education Law when it permitted seniority in different tenure areas to be combined for the purposes of determining seniority for the purposes of layoff.

³² §3013 deals with layoff upon the abolishment of a position by a school district or a BOCES and provides, in pertinent part, for the reinstatement of a person who has been laid off to "an office or position similar to the one which such person filled without reduction in salary or increment...."

The same is true with respect to Taylor Law contract provisions that adversely impact upon layoff rights vested in employees in the classified service by §§80 or 80-a of the Civil Service Law [see *Plattsburgh v Local 788*, 108 AD2d 1045].

The Appellate Division, citing a number of cases including *Matter of Board of Educ. of Barker Cent. School District*, 209 AD2d 945, concluded that Marino "had every right to seek redress for the alleged violation of his statutory rights" by bringing a timely Article 78 action, "even after having begun a grievance procedure which related exclusively to an alleged violation of his contract [emphasis supplied]."

Why? Because, the court explained, "the issues presented and the remedies sought in each forum were separate and distinct," citing *England v Commissioner of Education*, 169 AD2d 868, among other cases, in support of its ruling.

The text of the decision is set out below:

MATTER OF MARINO v BOARD OF EDUCATION OF THE HAUPPAUGE UNION FREE SCHOOL DISTRICT

SONDRA MILLER, J.P., DAVID S. RITTER, WILLIAM C. THOMPSON,
MYRIAM J. ALTMAN, JJ.

In the Matter of Frank Marino, appellant, v Board of Education of the Hauppauge Union Free School District, respondent.

In a hybrid proceeding pursuant to CPLR article 78 to review a determination by the respondent which, in effect, decreased the petitioner's salary by \$4,148 per year, and for a judgment, inter alia, declaring that the respondent violated the petitioner's rights under Education Law § 3013, the petitioner appeals from an order and judgment (one paper) of the Supreme Court, Suffolk County (Underwood, J.), entered July 1, 1998, which granted the respondent's motion to dismiss and dismissed the proceeding/action.

ORDERED that the order and judgment is reversed, on the law, with costs, the motion is denied, the proceeding/action is reinstated, and the respondent is directed to answer the petition/complaint within 20 days after service upon it of a copy of this decision and order with notice of entry.

The parties' collective bargaining agreement provides a grievance procedure to resolve "any dispute between the parties concerning the interpretation of the terms and conditions of [the] agreement". There is no issue relating to the terms and conditions of

the agreement. Instead, this proceeding represents an attempt by the petitioner to vindicate rights conferred upon him by Education Law §3013(1).

The courts have repeatedly held that the statutory rights of tenured teachers whose positions are abolished, as established by the terms of Education Law § 3013, or by the parallel provisions of Education Law § 2510, may not be contravened in a collective bargaining agreement (see, Matter of Board of Educ. of Barker Cent. School Dist. [Barker Teachers Union], 209 AD2d 945; Board of Educ. v Depew Teachers Org. [Appeal No. 3], 167 AD2d 907; Matter of Szumigala v Hicksville Union Free School Dist. Bd. of Educ., 148 AD2d 621; see also, Matter of Smith v Board of Educ. of East Ramapo Cent. School Dist., 97 AD2d 795).

The petitioner had every right to seek redress for the alleged violation of his statutory rights in this proceeding, even after having begun a grievance procedure which related exclusively to an alleged violation of his contract. "The issues presented and the remedies sought in each forum were separate and distinct" (Matter of England v Commissioner of Educ. of State of N.Y., 169 AD2d 868, 870; see also, Matter of Board of Coop. Educ. Servs. of Nassau County v Nassau BOCES Cent. Council of Teachers, 103 AD2d 804, affd 64 NY2d 632; Matter of Smith v Board of Educ. Of East Ramapo Cent. School Dist., supra).

The respondent's alternative arguments for affirmance are without merit.

Entitlement to appointment from a preferred list

Maxine Davis v Westport CSD, Comm. of Ed. Decision 14,236

In order to establish entitlement to appointment to a new position under §§2510 and 3013, the individual must first establish that the two positions are in the same tenure area (Kelley v. Ambach, 83 AD2d 733). In addition, the old and new positions must require the same certification. Certification has been held to be a significant factor in determining the similarity of two positions (Brown v. Bd. of Educ., Morrisville-Eaton CSD, 211 AD2d 887

<http://www.counsel.nysed.gov/Decisions/volume39/d14236.htm>

Excessed individual claims not to be the least senior individual under the terms of a "memo of understanding"

Appeal of Sarah T. A. McCart, Decisions of the Commissioner of Education, Decision No. 16,010

The Hoosick Falls Central School District laid off Sarah T. A. McCart from her position as a teaching assistant. McCart appealed, contending that she should not have been excess as she had greater seniority than other teaching assistants that had been retained by the District.

McCart was initially employed by Hoosick Falls as a teacher's aide. In January 20, 2004, the board approved the appointment of the district's teachers' aides, including McCart, as teaching assistants subject to a three-year probationary period. McCart was granted tenure in the tenure area of teaching assistant effective June 5, 2008.

In February 2009, Hoosick Falls and the collective bargaining representative for the support staff agreed to a "memorandum of understanding" that "amended the order of appointment of teaching assistants" to reflect the actual length of service in the district based upon the teaching assistant's original date of hire.³³

When advised that "her position within the district was abolished," McCart filed a grievance alleging that she was improperly terminated from the district because she was not the least senior within the tenure area of teaching assistant based on length of service in the district.

Essentially McCart argued that the seniority list used to determine the order of layoffs at the March 17, 2009 board meeting did not list teaching assistants by their actual length of service within the district, as required by the Memorandum of Agreement. Instead, said McCart, the seniority list used their date of appointment as a teaching assistant.

In response to McCart's appeal to the Commissioner, Hoosick Falls argued that McCart failed to state a cause of action because (1) she was the least senior individual in the teaching assistant tenure area; (2) McCart's appeal was untimely filed; and that (3) McCart failed to join necessary parties in her appeal.

The Commissioner never addressed the merits of McCart's appeal, ruling that McCart's appeal was untimely. Such an appeal "must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is

³³ This appears to be an attempt to track the "seniority" provision set out in Civil Service Law §80 which provides, in pertinent part, that in the event an individual is to be suspended or demoted as a result of the abolition or reduction of positions, such suspension or demotion "shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs"

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