

# 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*

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### [Fifty percent test](#)

Karen Allen v Middle Country CSD, Comm. of Ed. Decision 13,730

The test of whether the duties of the two positions are, in fact, similar is whether more than 50% of the functions to be performed by the incumbent of the new position are those that were performed by individual in his or her old position.

<http://www.counsel.nysed.gov/Decisions/volume36/d13730.htm>

### [Guidelines – adopted by an appointing authority](#)

*CSEA Local 1000 v NYS Office of Mental Health*, 196 A.D.2d 276

§§80 and 80-a of the Civil Service Law sets out the procedures to be followed in the event permanent employees in the competitive and noncompetitive class are laid off. Essentially, those having the least seniority are to be laid off first.

The Civil Service Law is silent with respect to the procedures to be followed with respect to the layoff of temporary and provisional employees except that temporary and provisional employees must be laid off before permanent employees holding the same title are laid off.

Mental Hygiene adopted "guidelines" to be used by the department to layoff of staff regardless of their tenure status. The guideline was to be applied, as necessary, to layoff permanent, temporary and provisional workers.

The guideline stated that "there are legitimate alternatives to the use of initial state employment date."

Among the alternatives listed were job performance, program needs, affirmative action considerations and minimizing disruptions in service. Each facility director was to determine how displacements on temporary and provisional staff members would be handled in the unit.

CSEA complained that the guideline provided that these factors were to be used to "break ties" in the event two or more employees holding permanent status had the same seniority date. The department conceded that its guideline was to be applied to cases involving the layoff of tenured workers.

Finally the guideline provided that if two or more employees holding permanent status remained "tied" after applying these factors, the third letter of the employee's last name would be used to break the tie.

CSEA sued, contending that the guideline violated §§80 and 80-a of the Civil Service Law and constituted an abuse of discretion by considering factors unrelated to seniority, merit or fitness in violation of "equal protection" by creating an "improper affirmative action program."

A Supreme Court justice declared that the guideline had the same effect as a rule or regulation and was "out of harmony with the Civil Service Law."

Specifically, the court ruled that "some or all of the criteria in the policy and guideline are not objective, related to seniority or rationally related to the ability of the jobholder and ... therefore violative of Civil Service Law §§80 and 80-a."

The Appellate Division affirmed the lower court's decision. It rejected the department's argument in support of the guideline that essentially contended that "when there is a tie in seniority, the use of additional criteria in formulating a reduction in the work force is not prohibited.

The Appellate Division said that it could agree with this position had the department used objective, nondiscriminatory efforts based on merit and fitness to break ties.

Here, however, the court said that the guideline "specifically permits consideration of subjective and arbitrary factors unrelated to merit and fitness to break seniority ties."

The Appellate Division decided that under the circumstances, the department's policy violated "the constitutional and statutory scheme of merit and fitness in public service" and its use should be prohibited.

### [Granting seniority to transferred employee](#)

*Bushaw v County of St. Lawrence*, \_\_\_ AD2d \_\_\_ (1984)

Bushaw, an employee in the St. Lawrence County Clerk's office was laid off and appointed to a lower grade position. Her co-worker, Fox, was retained in the higher-level position. Bushaw said that the County Personnel Officer's ruling that Fox had more seniority was wrong and sued for reinstatement to the higher-level position.

Bushaw had worked for the County on a permanent basis longer than had Fox. Fox, however, had transferred to St. Lawrence from a similar position with another county and her permanent service in the other jurisdiction combined with her permanent employment with St. Lawrence County resulted in her having more “seniority” than did Bushaw.

The crediting of Fox’s seniority for service with the other county was held proper by the Personnel Officer for the purposes of §80 of the Civil Service Law (layoff). The court agreed.

§80.1 of the Civil Service Law provides that for layoff purposes seniority runs from the date of original appointment on a permanent basis in the service of the governmental jurisdiction in which the layoff occurs. There is an exception to this general provision in the case of a “transfer of function” between governmental jurisdictions.

If there is a transfer of function, the employees so transferred receive seniority credit under §80 for their service with their former employer. Presumably there was such a transfer of function in this case although the decision is silent on the point.

### [Internal Revenue Service Ruling 92-69](#)

"Outplacement assistance," a fringe benefit provided by employers to persons laid-off or expected to be laid-off, may be subject to personal income tax. Although such aid is usually viewed as an exempt fringe benefit, IRS says that "outplacement assistance" becomes "taxable income" if it is offered in place of higher cash severance pay.

If it is "taxable" because it is offered in lieu of severance pay, the laid-off employee may include it as a deduction under "miscellaneous items." However it is deductible only to the extent that the individual has "miscellaneous items" that exceed 2% of adjusted gross income.

### [Lay off - bad faith issues](#)

*Rosenthal v Gilroy*, 208 AD2d 748

There are a number of basic rules observed by the courts in situations involving a layoff. Some of these were considered and commented upon by the Appellate Division in the Rosenthal case.

The first basic rule is that a public employer may abolish a position in the civil service for any one of a number of legitimate reasons including budget considerations, the consolidation or abolition of services, or efficiency of operations.

The second basic rule is that a public employer may not abolish a civil service position as a subterfuge to avoid the statutory protection afforded public employees.

In the event an individual contends that his or her layoff resulted from a bad faith abolishment of a position, the courts have placed the burden of establishing such bad faith on the employee. Further, a "full hearing" must be conducted by the courts when such allegations are made.

When Rosenthal's position was abolished, she sued, claiming that her employer, the Nassau County Vocational Education and Extension Board [VEEB], acted in bad faith. Although Supreme Court concluded that Rosenthal presented no proof of bad faith, the Appellate Division disagreed. According to the ruling, Rosenthal presented sufficient evidence of the alleged bad faith on the part of VEEB that a full hearing was required.

Among the allegations made by Rosenthal in support of her claims were that:

1. After VEEB abolished her position it appointed another individual to "a newly titled position" involving substantially the same duties she had performed.
2. There did not appear any critical need to "automate" her former position, one of the reasons offered by VEEB in support of its action.
3. She had been terminated just prior to her vesting in the New York State Employees' Retirement System.

The Appellate Division held that such allegations, especially Rosenthal's representation that VEEB created a "newly titled position" to perform substantially the same duties as previously performed by Rosenthal, constituted "evidence of bad faith" sufficient to warrant a full evidentiary hearing.

## Lay off and bumping rights

*Freeman v Hempstead UFSD*, 205 A.D.2d 38

Freeman, a school nurse-teacher, was excessed when her position was abolished and her name was placed on a preferred list. The District simultaneously appointed her to the position of Registered Nurse.

As she was also tenured in the health area, Freeman contended that she was entitled to reassignment as a health teacher and thus had the right to "bump" a less senior health teacher. The District refused to reassign her to a health teacher position.

Had the District honored Freeman's request, it probably would have resulted in the layoff of another health teacher.

Freeman sued and persuaded a Supreme Court justice to order the District to reinstate her as a tenured health teacher with back pay. The Appellate Division reversed the lower court's ruling.

The Appellate Division pointed out that Freeman did not complain that she had been improperly laid off. Accordingly, the Court held that her claims to employment as a health teacher were subject to §2510.3 of the Education Law which deals with the certification of the preferred list or, possibly, to the provision of 8 NYCRR 30.13.

Considering the issue of reemployment from a preferred list, the Court said that in such cases three conditions had to be met:

1. The position sought must be the same or similar to the individual's former position.
2. The individual must be qualified for appointment to the vacancy.
3. The individual must be the most senior person on the preferred list willing to accept the appointment.

Preferred lists, however, are certified to fill vacancies; i.e., a position in which there is no permanent or tenured incumbent. Preferred list status itself does not provide an individual any "bumping" or "retreat" rights.

The Appellate Division ruled that as there was no vacancy in the health area at the time of her lay off, Freeman "failed to state a claim under §2510.3, except to the extent that

she may be eligible for placement on the preferred eligible list from which she could be rehired in the event that a vacancy does occur in the future."

Case law indicates that an individual who has been laid off does not have any right to compel an appointing authority to fill an existing or subsequent vacancy. The only limitation on the discretion of an appointing authority to fill or not fill an existing vacancy is that such a decision be made in good faith.

Discussing the impact of 8 NYCRR 30.13 in the event of a layoff, the Court said that under this rule a teacher who is excessed from his or her position but who has tenure [or holds probationary status] in another tenure area is to be "transferred to such other tenure area in which he [or she] has the greatest seniority and shall be retained in such area if there is a professional educator having less seniority than he [or she] in such other tenure area."

Simply stated, 8 NYCRR 30.13 allows a more senior individual to "bump" a less senior individual following his or her transfer to position in another tenure area in the course of a layoff situation.

Here, however, the Appellate Division indicated that although there are no cases interpreting 8 NYCRR 30.13 holding that a teacher "doing the bumping [to] be certified in the area in which she will bump another less senior teacher, this requirement would appear to be appropriate based on both common sense and 8 NYCRR 30.11...." 8 NYCRR 30.11 provides that Nothing herein shall be construed to authorize [the placement or retention of] an individual in a position for which such individual does not possess appropriate certification."

The Appellate Division remanded the case to the trial court to resolve a number of factual issues dealing with (1) the availability of vacancies to be filled by certification of the preferred list and (2) Freeman's claims regarding her qualifications for the purposes of "bumping" another health teacher under 8 NYCRR 30.13.

#### [Layoff - determination of seniority](#)

*Kransdorf v Northport-East Northport UFSD*, 181 A.D.2d 771, aff'd, 81 N.Y.2d 871, 597

This case concerns the rights of a tenured teacher in the event of a layoff. The Court of Appeals affirmed a ruling by the Appellate Division holding that three years of full-time substitute service should have been credited in determining Kransdorf's seniority

and tenure. Presumably Kransdorf is entitled to back salary and benefits for the period during which she was incorrectly excessed from her position.

Kransdorf was a regular substitute mathematics teacher for the school years 1984-1985, 1985-1986 and 1986-1987. In July 1987, the district appointed her as a part-time (80%) mathematics teacher for the 1987-88 school year, which began on September 9, 1987. On October 5, 1987, however, the board appointed Kransdorf as a full-time probationary position and made her appointment retroactive to September 14, 1987. As a result, Kransdorf was considered part-time (80%) for a period of four working days -- from September 9-14, 1987. She served as a full-time probationary math teacher for the 1987-1988 and 1988-1989 school years.

In June 1989, Kransdorf was told that her position would be "excessed" and that in accordance with §2510 of the Education Law she would be terminated because of her "relative seniority." The district had calculated her seniority from September 14, 1987, when she was retroactively appointed as a full-time probationary mathematics teacher, giving her no seniority credit for the prior three years as a full-time substitute teacher.

Another teacher began working as a full-time substitute in 1986-1987 and, by the end of the 1988-1989 school year, had four years of seniority. If, however, Kransdorf's three years of prior regular substitute service had been added to her two years as a full-time probationary teacher, she would have had a total of five years experience -- more seniority than the other teacher.

The only issue in this appeal concerns Kransdorf's seniority -- whether in computing her seniority she should be credited with the 3 years of full-time substitute teaching even though those years did not immediately precede her appointment to the probationary position. §2510 of the Education provides that "[w]henver a board of education abolishes a position under this chapter the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued."

The court of appeals rejected the method followed by the district in determining Kransdorf's seniority. It said that there was nothing to support its claim that full-time substitute work must come immediately before the full-time probationary appointment in order to be credited for §2510 seniority purposes.

In contrast, the court said that the Carey decision by the commissioner of education [*Matter of Carey*, 31 Ed Dept Rep 394] as well as 8 NYCRR 30.1(f) plainly state that

seniority credit for full-time substitute teaching under Education Law §2510(2) need not immediately precede full-time probationary experience.

Prior to Carey, the court of appeals had held that §2510 "is to provide a mandatory preference in rehiring for those unfortunate school employees who lose their positions through the practice of 'excessing'" (see *Brewer v Brd of Ed. of Plainview-Old Bethpage CSD*, 51 NY2d 855).

In Carey, the Commissioner, interpreting 2510, said, in effect, that "the section's salutary purpose is furthered by allowing seniority credit for full-time substitute teaching even though interrupted." Accordingly, for the purposes of §2510, teachers lose their seniority rights when they sever service with the school district while, in contrast, a teacher whose full-time service is merely interrupted by part-time service in the same district does not lose the right to claim any prior full-time service for purposes of §2510 seniority.

The court said that additional support for this view may be found in 8 NYCRR 30.(f) which, in pertinent part, states that length of service in a designated tenure area, rather than length of service in the district; such service need not have been consecutive but shall during each term for which seniority is sought, have constituted a substantial portion of the time of the professional educator.

The court said that as §2510 of the Education Law, on its face, requires interpretation and the Commissioner's interpretation is neither irrational nor unreasonable, it should be accepted.

#### [Layoff provisions given literally interpretation](#)

*Jester v Chenango Forks Central School District*, 109 AD2d 1004

The decision of the Appellate Division, 3rd Department, in *Jester v Chenango Forks Central School District* will be of concern to both administrators and teachers faced with layoff and reinstatement from a preferred list in §2510 situations.

Jester was first an elementary school teacher with the District. He later transferred to a District secondary school teacher position and thereafter transferred to the position of guidance counselor. As the least senior guidance counselor, he was excessed when the District abolished one of its counselor positions.

Jester was then appointed as a temporary sixth grade teacher. When he was refused a permanent appointment to the position he sued. He then started a second lawsuit when the District refused to appoint him on a permanent basis to either a vacant kindergarten teacher position or to a vacant social worker position. Both cases were eventually consolidated for appeal purposes when the trial court rejected Jester's claims that, by virtue of his prior service, he should be preferentially eligible for appointment to any of these three tenure areas (elementary teaching, secondary teaching or administrative) in which he had previously served with the District.

Literally interpreting §2510(3) of the Education Law, the Court decided that the statute was directed solely to the vacancy that had occurred in an office or position that was abolished. Hence, it said, the word "similar" used in §2510 referred only to positions similar to the office or position actually abolished and not to any office or position formerly held by the excessed employee. As Jester did not leave his earlier positions because they had been abolished, the Court ruled that §2510 (3) was not applicable in his case.

Noting that the Commission of Education had expressed a different view (see 8 Ed Dept Rpts 205), the Appellate Division said that "his views are counter to the clear wording of the statute and should not be accorded any weight." It then concluded that "if the statute is prone to produce unjust results, it should be corrected by the Legislature."

As a school district would have to reinstate any teacher or administrator it improperly excessed or improperly denied reinstatement, together with back salary and other benefits, experts are predicting that layoff and reinstatement decisions will be of significant concern to those districts faced with retrenchment situations as well as the personnel being excessed.

#### [Layoff - reinstatement to similar positions](#)

*McDermott v NYS Office of Mental Health*, 195 A.D.2d 932; Motion for leave to appeal denied, 82 N.Y.2d 660

§§80 and 80-a of the Civil Service Law provide that layoff of employees "holding the same or similar positions" are to be made in the inverse order of their seniority.

The State Department of Civil Service had traditionally interpreted this phrase to mean "posts with the same title."

The NYS Office of Mental Health [OMH] and the State Office of Mental Retardation and Developmental Disabilities [OMRDD] laid off a number of mental hygiene therapy aides pursuant to §80.1 of the Civil Service Law. For the purposes of the layoff, the "layoff unit" included both OMH and OMRDD employees.

The therapy aides claimed that their positions were comparable to those held by less senior employees serving as community residence aides and residential program aides employed at community-based facilities within OMH and OMRDD. They sued, asking that the court declare that therapy aide positions be deemed "equivalent" for the purposes of layoff and reinstatement within the meaning of the Civil Service Law and that they be reinstated with back salary and benefits.

The Appellate Division ruled that the courts were "obliged to honor" the civil service department's long-standing interpretation of the phrase "same or similar."

The court also noted that "in situations which involve the certification of a preferred list for filling vacancies in positions with titles different from an abolished position [§81, Civil Service Law] differ from cases under Civil Service Law §80."

### Layoff - similar positions

*Bartholomew v Columbia County*, 191 A.D.2d 881

§§80 and 80-a of the Civil Service Law<sup>26</sup> provide that incumbents holding the same or similar positions are to be laid off in the inverse order of their original appointment on a permanent basis in the classified service of the jurisdiction. §81 provides for the reinstatement of individuals on preferred lists to "the same or similar" positions. §81 also authorizes the certification of preferred lists to fill "positions in a lower grade in the line of promotion" and to any "comparable position." §86 of the Civil Service Law [formerly §22 - Civil Service Law of 1909] provides that in the event of a layoff, honorably discharged veterans and exempt volunteer firefighters "shall not be discharged ... but shall be transferred to a similar position wherein a vacancy exists." The Bartholomew case considers the issue of the meaning of "similar positions" in such situations.

Two honorably discharged veterans were laid off from their positions of senior motor equipment operators. When their requests for transfer to the position of laborer, lower

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<sup>26</sup> §80 of the Civil Service Law covers permanent employees of the State and the political subdivisions of the State in the competitive class; §80-a covers permanent employees of the State in the noncompetitive class. §86 does not apply to persons covered by §80-a of the Civil Service Law.

grade position, were denied, they sued, claiming that their rights under §86 of the Civil Service Law had been violated because they had been denied transfers to "similar positions."

The Appellate Division agreed with a lower court's ruling that the two positions in question were not similar and dismissed the appeal. The court found that there were "substantial differences" between the entrance level position of laborer and higher level, skilled position of equipment operator.

The court rejected Bartholomew's argument that former §22 of the Civil Service Law [1909], which provided for the transfer of a veteran who has been laid off to "such position as he may be fitted to fill" applied here, noting that the 1958 amendment changing the statutory language to "similar position" indicates a clear legislative intent to restrict the scope of the "available position to one which is truly similar to the vacated position and not one which the transferee is merely qualified to fill."

The decision also notes that in cases such as these, it is the individual seeking transfer to a position who bears the burden of proving that positions in question are similar.

### Layoff and age discrimination

*Kron v Moravia CSD*, 2001 WL 246072

The Moravia Central School District, anticipating a "budget shortfall," eliminated a guidance counselor position. James H. Kron, apparently the least senior guidance counselor, was excessed.

Alleging that the district's action violated the Age Discrimination in Employment Act, 55-year old Kron sued. Among his claims: the district subsequently decided to fill guidance counselor positions and he "would have been entitled to [reinstatement] if he had chosen to remain on the school's recall list" instead of retiring.<sup>27</sup>

The Circuit Court of Appeals characterized Kron's evidence as circumstantial. His evidence: within eighteen months of his being excessed "Moravia replaced two guidance counselors aged 55 with younger guidance counselors aged 28 and 45," and

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<sup>27</sup> Apparently Kron elected to apply for retirement benefits and upon his retirement his name was removed from the preferred list for guidance counselor.

Laws and rules applicable in laying off NYS public employees .

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