

The Discipline Book is a handbook for administrators, union officials and attorneys involved in disciplinary actions taken against public officers and employees employed by New York State and its political subdivisions under the State's Civil Service Law, the Education Law and disciplinary grievance procedures negotiated pursuant to the Taylor Law.

The Discipline Book is also a valuable resource for those involved in disciplinary actions taken against public officers and employees serving in other States.

The Discipline Book:

**Essentials of Discipline Involving Officers and Employees in the Public Service
2018 edition**

by Harvey Randall and Eric D. Randall

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THE DISCIPLINE BOOK

ESSENTIALS OF DISCIPLINE
Involving
Officers and Employees in the Public Service

NEW YORK STATE EDITION

Revised July, 2018

**Harvey Randall and
Eric D. Randall**

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USING THIS DATABASE

This is a "searchable" database and users may search for material contained in this database by using a key word, phrase, citation or other "identifiers" to locate relevant data included in this database, e.g.:

Dickinson

Moriah Central School District

82 AD2d 960

qualified immunity

Footnotes are identified in the text by with a red "super-script" numeral. For example, xxx¹²⁶.

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SECTION 2 - DUE PROCESS RIGHTS OF EMPLOYEES

When courts review the lawfulness of disciplinary actions taken against public employees, a single question is the most fundamental: Did the employee involved receive all the administrative due process to which he or she was entitled in the course of the disciplinary process?

Courts view the failure to satisfy any one of the elements required for administrative due process as a complete failure of the process and this will result in the complete frustration of the appointing authority's effort to discipline an officer or an employee.

The vesting of the responsibilities of being an appointing authority is derived from local or state legislation, or the charter of a locality. For example, the appointing authority for a Sheriff's Department is typically the sheriff. In political subdivisions of the State the appointing authority may be the school board, the governing body of a public authority, a town board, the town supervisor or the mayor. With respect to the State as an employer, the appointing authority is usually the agency or department head. In this database, the terms "appointing authority" and "employer" will be used interchangeably.

When courts uncover an error in due process that it does not view as "harmless error," they will void disciplinary penalties and either dismiss the case or remand (return) the case to the employer for reconsideration. Ignoring due process is costly -- and unfair.

Due process is short for "due process of law." This is an old concept with roots in English common law traditions. Under the common law individuals could not be deprived of their liberty without due process of law - - notice of the charges and a full and fair hearing before any action could be taken. Freedom from arbitrary action was deemed a form of liberty that must be protected. Over time the concept of liberty was extended to cover property rights. Clearly, a farmer evicted from his property without just cause was denied liberty. In the 16th century, the common law recognized that one's job is a form of property and that keeping one's job is a form of liberty. Under the common law, any person "put from his livelihood" had been denied liberty. Hence, no man could be denied his employment or trade without due process of law.

In modern disciplinary actions, it is essential that employees' due process rights be respected. Employees who are entitled to due process (typically, "permanent" and "tenured" employees) cannot be removed or subjected to any disciplinary penalty unless their incompetence or misconduct has been proved by substantial evidence presented in an administrative hearing.

Like the criminal justice system, administrative disciplinary procedures incorporate fundamental due process concepts such as the presumption of innocence of the accused and the placing of the burden of proof on the charging party.

§75 of New York's Civil Service Law, for example, requires notice and hearing, the right to representation, the right to confront and present witnesses, and the right of review or appeal.

This right to cross-examine witnesses was demonstrated in *Barber v New York State Off. of Victim Services*, 103 AD3d 931, wherein the court ruled that providing an opportunity to cross-examination witnesses is a critical element to due process in quasi-judicial administrative proceedings.

Barber had installed certain security and surveillance devices after being subjected to alleged stalking and harassment she claimed that she had experienced. She then filed a request for reimbursement for the cost of such devices with the State's Office of Victim Services, which application was rejected on the ground that she failed to prove that a crime had been committed.

Barber appealed and a hearing was conducted by a three-member panel of the Office of Victim Services. The panel affirmed the disallowance of Barber's claim.

In response to Barber's challenging the panel's determination, the Appellate Division said that notwithstanding the substantial evidence in the record to support Victim Service's denial of Barber's claim, reversal of the administrative determination was required because Barber had not provided with an opportunity to cross-examine witnesses providing testimony at the hearing.

According to the decision, although the panel was advised that Barber was waiting in the lobby for the hearing to begin, the panel members conducting the hearing and made the affirmative decision to take the testimony from one of the witnesses without her being present. Further, Barber was only invited to attend the hearing following the conclusion of that witness's testimony and then was asked to leave the hearing after testifying. Then, said the court, testimony was taken from a second witness without Barber being present.

The Appellate Division ruled that as Barber had been denied the right to cross-examine witnesses, the panel's determination must be annulled and the matter remitted to Victim Services for a new hearing.

The court explained that "Regardless of the merits in a particular case, a party whose rights are being determined at a quasi-judicial administrative hearing must be given the opportunity to cross-examine witnesses," citing *Matter of Seeger v Moduform, Inc.*, 146 AD2d at 923.

What if the witness is a child? This question was addressed by the Appellate Division in *Stergiou v New York City Dept. of Educ.*, 106 AD3d 511.

Here a teacher appealed the Supreme Court's denial of her petition to vacate the adverse disciplinary arbitrator's award and its granting the employer's motion to confirm the award. The critical issue before the Appellate Division: was the teacher denied administrative due process when she was not permitted to be present during the testimony of the "complaining witness," a student?

The Appellate Division unanimously reversed the Supreme Court's ruling "on the law" and remanded the matter to the hearing officer with instruction that the hearing officer take testimony from the child complaining witness in the presence of the teacher.

The Appellate Division, citing *Matter of Daniel Aaron D.*, 49 NY2d 788, explained that the teacher's exclusion from the administrative hearing "during the testimony of the only eyewitness to her alleged hitting of a student — the student himself — violated her constitutional right to confront the witnesses against her."

The court said that nothing in the record indicated that there was a "compelling competing interest" that warranted the teacher being excluded from that portion of the hearing and the record was silent as to the basis for the teacher's exclusion.

Further, the Appellate Division noted that there was no finding that teacher's presence would cause trauma to the student or substantially interfere with his ability to testify.

With respect to another argument advanced by the teacher -- in addition to her constitutional right she had an absolute right to confront witnesses under Education Law §3020-a – the Appellate Division ruled that “she waived that argument by failing to object on the record to her exclusion from the hearing, but had she so objected the argument would have been rejected” as the Appellate Division observed that “In any event, there is no such absolute right under §3020-a.”

Similar due process requirements are essential in alternative dispute resolution procedures negotiated through collective bargaining in accordance with the New York State Taylor Law.

Contract disciplinary procedures typically cover only those employees who have rights under statutes such as §75 of the Civil Service Law or §3020-a of the Education Law. However, some collective bargaining agreements grant due process rights to certain groups of employees, such as provisional employees, who are not provided with such rights by statute.

Due process rights depend on appointment status and jurisdictional classification

The right to due process is not universal. For example, a substitute teacher employed for a two-week stint does not have the same right to due process as a tenured teacher. Likewise, a provisional civilian police dispatcher does not have the same right to due process as a detective holding a permanent appointment. It should be clear from these examples that the due process rights of an individual employee flow from that individual's appointment status and jurisdictional classification.

Appointment status, also known as employment status, refers to whether one holds permanent, contingent permanent, temporary, or provisional appointment. The appointment status of employees in the public service is considered in “The Concept of Tenure” [See below].

The term jurisdictional classification refers to whether a position is (a) in the classified service, and therefore subject to the jurisdiction of a Civil Service Commission or (b) in the unclassified service [§35, Civil Service Law], and therefore not subject to the jurisdiction of a Civil Service Commission. The term jurisdictional classification is sometimes confused with “position classification.” Position classification deals with the duties and responsibilities of a position and, for State positions, its allocation to a salary grade. See below, “Budgetary classification is irrelevant to due process rights of employees.”

“Jurisdictional classification” also refers to whether a given position in the classified service is assigned to the competitive, non-competitive, exempt or labor class [§2.10 of the Civil Service Law]. Unless placed in a different jurisdictional class by action of a civil service commission or by statute, all classified service positions are in the competitive class.³

³ The term "jurisdictional classification" means the assignment of positions in the classified service to the competitive, non-competitive, exempt or labor classes. In contrast, the term "position classification" means a grouping together, under common and descriptive titles, of positions that are substantially similar in the essential character and scope of their duties and responsibilities and in the qualification requirements therefor.

Issues of appointment status and jurisdictional classification are at the heart of a high percentage of lawsuits involving disciplinary cases. Anyone involved in the disciplinary process should look at these issues first, as an employee's due process rights depend on his or her actual, i.e., statutory appointment status and the actual jurisdictional classification of the position to which he or she has been appointed.

We use the word "actual" because the failure of an employer to properly identify an employee's statutory appointment status or the statutory jurisdictional classification of the individual's position does not expand or diminish the employee's legal rights.

Probationers terminated during the probationary period often claim they were denied due process and constitute another significant body of individuals filing lawsuits against public employers in New York State.

For probationers, one other factor influences the right to due process beyond those listed above: how long the probationer has served in his or her position. Employees in competitive class or the non-competitive class who are serving probationary periods have due process rights only if they (a) not yet completed the minimum period of probation, (b) have become "tenured" by successfully completing their probationary period, or (c) have become tenured by serving the maximum period of probation and continuing to work in the position without having been removed by the appointing authority. Being continued in service beyond the maximum period of service without the appointing authority having taken formal action to confirm or deny tenure in the position is referred to as attaining "tenure by estoppel" or sometimes as attaining "tenure by acquiescence". In fact, §65.4 of the Civil Service Law actually provides for an appointee attaining tenure by estoppel under certain circumstances.

In contrast, probationers may be dismissed without due process, i.e., notice and hearing, for any lawful reason or for no reason, if they have completed their minimum period of probation but have not yet completed their maximum period of probation. See below, "The concept of tenure," and the successive sections.

In any event, neither a department policy nor a term in a collective bargaining agreement may trump the probationary period established by law or a rule or regulations having the force and effect of law as the decision in *Yan Ping Xu v New York City Dept. of Health & Mental Hygiene*, 121 AD3d 559, demonstrates. See, for example, *City of Plattsburgh v Local 788*, 108 AD2d 1045. Case law indicates that seniority for the purposes of layoff can neither be diminished nor impaired by the terms of collective bargaining agreements, i.e. layoffs within the title can only be made in inverse order of civil service seniority consistent with the mandates of Civil Service Law §80(1) and not by any other method.

Here the court found Yan Ping Xu was subject to a probationary term of six months notwithstanding any alleged "department policy" or provision in a collective bargaining agreement to the contrary and upon the expiration of that six-month period she became a "tenured employee" and could only be terminated after notice and hearing and remanded the matter to the New York City Dept. of Health & Mental Hygiene "for further consideration of [Yan Ping Xu's] claim of unlawful termination."

In its decision the court said that Yan Ping Xu became a "permanent" employee. However, an employee serving a probationary period is a permanent employee and attains tenure in the title upon his or her successful completion of the probationary period. Civil Service Law §63.1, in pertinent part, provides that a "... municipal civil service commissions may provide, by rule, for probationary service ... upon appointment to positions in

the exempt, non-competitive or labor classes....” and “shall, subject to the provisions of this section, provide by rule for the conditions and extent of probationary service” [see Civil Service Law §63.2].

The categories of jurisdictional classification in the classified service are the competitive class, non-competitive class, exempt class and labor class. One might wonder why these different classes exist.

The answer lies in Article V, §6 of the New York State Constitution, which requires that, wherever practicable, appointments and promotions in the civil service be made according to merit and fitness. Competitive examinations are used to establish eligibility for such employment. Because competitive examinations are not practicable in every instance, the State Legislature provides guidelines for creating positions outside the competitive class. These positions may be placed in one of three categories: the exempt class, the non-competitive class or the labor class.

“Jurisdictional classification” refers to the decision-making process concerning whether a position belongs in the competitive class or one of the other classes listed above.

In February 1998 the Civil Service Commission proposed a rule to clarify the categories outside the competitive class by establishing these definitions:

Exempt class: “The exempt class is to include those positions specifically placed there by the Legislature, together with all subordinate positions for which there is no requirement that the person appointed pass a civil service examination. Instead, appointments rest in the discretion of the person who, by law, has determined the position’s qualifications and whether the persons to be appointed possess those qualifications.”

Non-competitive class: “The non-competitive class is to be comprised of those positions which are not in the exempt or labor classes and for which the Civil Service Commission has found it impracticable to determine an applicant’s merit and fitness through a competitive examination. The qualifications of those candidates selected are to be determined by an examination which is sufficient to insure (sic) selection of proper and competent employees.”

However, as the Appellate Division indicated in *Bruen v Lhota*, 114 AD3d 676, employees in a non-competitive position designated as confidential or policy-influencing are not within the ambit of Civil Service Law §75.

A former employee [Petitioner] of the New York City Transit Authority [NYCTA] filed an Article 78 action challenging [1] NYCTA terminating him without a formal hearing pursuant to Civil Service Law §75 and [2] rejecting of his request for a lump sum payment for unused leave “based on his election to retire in response to an investigation into certain timekeeping violations which he subsequently was found to have committed.”

Supreme Court, Kings County dismissed the Article 78 proceeding and the Appellate Division affirmed the lower court’s ruling.

Addressing Petitioner’s claim that he was denied due process as a result of NYCTA’s failing to provide him with a pre-termination disciplinary hearing, the Appellate Division explained that NYCTA had demonstrated that Petitioner was an employee to whom the provisions of Civil Service Law §75 did not apply as he was employed in a non-competitive class position that had been designated as confidential or policy-influencing.

§75 applies to certain persons holding permanent appointment in the Classified Service and, in pertinent part, provides that a person holding a position by permanent appointment in the non-competitive class of the classified civil service in “other than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy...” (See §75.1[c]).

Turning to Petitioner’s claim that NYSTA could not deny his request for a lump sum payment without first affording him a formal disciplinary hearing pursuant to Civil Service Law §75, the Appellate Division ruled that the Authority’s action “was not improper.” See 4 NYCRR 23.1, which applies to employees of the State as the employer and provides for payment of leave accruals upon separation. 4 NYCRR 23.1, in pertinent part, provides that “No employee who is removed from State service as a result of disciplinary action or who resigns after charges of incompetency or misconduct have been served upon him shall be entitled to compensation for vacation credits under the provisions of this Part.” Many local civil service commissions have adopted a similar rule.

Citing *Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, the Appellate Division dismissed this branch of Petitioner’s appeal noting that NYCTA’s determination denying Petitioner’s request for a lump sum payment for his unused vacation credits was in accordance with its established policy and was neither arbitrary and capricious nor so disproportionate to the offense as to be shocking to one’s sense of fairness.

The labor class: “The labor class is to be made up of unskilled laborers in the service of the State and its civil divisions, except those which can be examined for competitively.” [NYS Register, Feb. 4, 1998, p.6]

Entitlement to due process

Broadly, the employees entitled to due process are those employees who are specifically granted due process rights under a state statute such as §75 of the Civil Service Law or §3020-a of the Education Law or a contract negotiated in accordance with the Taylor Law.

Most Taylor Law agreements closely track, or incorporate by reference, either §75 or §3020-a regarding categories of employees entitled to due process.

Those employees who enjoy a statutory right to due process under §75 or §3020-a are:

1. Tenured teachers in the public schools and BOCES [§3020-a of the Education Law]; see “Due process rights under §3020-a,” below.
2. Tenured administrators in the public schools and BOCES [§3020-a of the Education Law]; see “Due process rights under §3020-a,” below.
3. Employees with permanent and “contingent permanent” appointments to positions in the competitive class of the classified service, provided they have either (a) not yet completed the minimum period of probation, (b) become tenured by successfully completing their probationary period, or (c) become tenured by serving the maximum period of probation and continuing to work in the position without having been removed by the appointing authority (“tenure by estoppel”) [§75.1(a) of the Civil Service Law].

A so-called §64.4 or “contingent permanent” employee serves in a position that has been “left temporarily vacant by the leave of absence of the permanent incumbent thereof,” and who has been permanently appointed or reinstated to the position in accordance with §64.4 of the Civil Service Law. For an example of how these appointments are made at the state level, see §4.11 of the Rules of the NYS Civil Service Commission.

4. Non-competitive class employees who have served for at least five years and who are not considered policy-makers or “confidential” under the rules of the state or a local civil service commission. However, employees designated “confidential” within the meaning of the Taylor Law [Civil Service Law Article 14] by PERB constitute a different class of employees and such a designation does not affect their due process rights under §75, §3020-a and other statutes.

If a probationary period is provided by the civil service commission having jurisdiction, non-competitive class employees have due process rights only if they have either (a) not yet served the minimum period of probation, (b) successfully completed their probationary period, or (c) served the maximum period of probation and are still working in the position without being removed by the appointing authority (“tenure by estoppel”) [§75.1(c)].

5. Exempt class employees who are honorably discharged veterans who have served in time of war (WWI, WWII), or in a “police action”: Korea, Vietnam, Lebanon, Grenada, Panama or the Persian Gulf; [see §85] or are exempt volunteer firefighters as defined in the New York General Municipal Law §200 [§75.1(b) of the Civil Service Law].

However, being a veteran or firefighter will not entitle an exempt class employee to due process if he or she is designated a private secretary, cashier or deputy of any official or department [§75.1(b)].

Further, the presence (or absence) of the word “deputy” in an employee’s job title, such as deputy sheriff or deputy commissioner, is not predictive of whether or not the person is a deputy under §75. The meaning of the term “deputy” for the purposes of §75.1(b) refers to the possession of sufficient administrative power, by statute or other authority, to perform duties vested in a principal officer [See *Sullivan v Superintendent of Insurance of New York State* (64 NY2d 1074)].

To further complicate matters, courts have frequently relied on the duties set out in job descriptions rather than duties actually performed to determine whether individuals are have “deputy” status.

6. Labor class employees who are honorably discharged war veterans or exempt volunteer firefighters [§75.1(b)].

7. Employees in New York City who have served for at least three years as Homemakers or Home Aides in the non-competitive class [§75.1(d)].

8. Police officers who have served as detectives for three continuous years, unless they are reduced in rank for solely economic reasons, or consolidation or abolishment of police functions [§75.1(e)]’

Employees lacking due process rights.

Entitlement to due process depends on whether statute or terms set out in a collective bargaining agreement control.

§75 does not grant due process rights to employees in the classified service who are:

Temporary employees.

Provisional employees.

Non-competitive class employees who are policy-makers and are designated “confidential” in the rules of the responsible civil service commission.

Exempt class employees other than exempt volunteer firefighters and certain veterans.

Labor class employees other than exempt volunteer firefighters and certain veterans.

Such employees may be entitled to due process rights under collective bargaining agreements negotiated in accordance with the Taylor Law, however and under certain circumstances, other provisions of law.

A volunteer organization, however, may not be a “state actor” for the purposes of the Fourteenth Amendment.

In *Grogan v. Blooming Grove Volunteer Ambulance Corps*, USCA, 2nd Circuit, 13-656-cv, the Blooming Grove Volunteer Ambulance Corps [BGVAC], a private volunteer ambulance organization, submitted a motion in federal district court seeking summary judgment dismissing claims brought against it pursuant to 42 U.S.C. §1983 based on allegations that BGVAC had dismissed Lenore Grogan, one of its members, without a hearing.

In her appeal to the Second Circuit Grogan contended that BGVAC was a “state actor” for the purposes of the Fourteenth Amendment as it had contracts with a municipality to provide emergency medical services and thus had violated her rights when it issued disciplinary charges against her and then suspended her from the organization without a proper hearing. Grogan claimed that BGVAC’s conduct amounts to state action because: (1) the services BGVAC provides — emergency medical care and general ambulance services — are “traditionally exclusive public functions” that the State has delegated to BGVAC; and (2) the extensive State regulation and oversight under which BGVAC operates, coupled with BGVAC’s performance of a “municipally assumed” statutory function, so “entwines” BGVAC with the State that its actions are fairly attributable to the State.

The Circuit Court disagreed, sustaining the District Court’s determination that BGVAC’s conduct did not constitute state action.

The court explained that “Because the United States Constitution regulates only the Government, not private parties,” Grogan, who alleges that her “constitutional rights have been violated must first establish that the challenged conduct constitutes ‘state action.’” To demonstrate state action, said the court, a plaintiff must establish both that the alleged constitutional deprivation was caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is

responsible, and that the party charged with the deprivation is a person who may fairly be said to be a state actor.””

In this instance, said the court, there are two elements to consider:

1. Has the plaintiff satisfied the “public function” test – i.e., is there a “close nexus” between the challenged action and the State where the private entity has exercised powers that are traditionally the exclusive prerogative of the State; and
2. Is the private entity so entwined with governmental policies, or is government entwined in management or control of the private entity.

The court explained that the statute authorizing the municipality to contract with BGVAC, New York Town Law §198(10-f), imposes no duty, obligation, or responsibility on New York towns to provide emergency medical services. Instead, the statute is entirely permissive, declaring that “the town board may . . . provide an emergency medical service, a general ambulance service, or a combination of such services . . . and to that end may . . . [c]ontract with one or more . . . organizations” to provide such services.”

Because the New York statutory scheme does not place an affirmative responsibility on towns or municipalities to provide ambulance services, those services cannot be considered “public functions.” The Circuit Court further explained that “even if we were to assume that the provision of emergency medical care and ambulance services constitutes state action under the public function theory (which we do not), that conclusion would be of no assistance to Grogan because the gravamen of her claims deals not with the performance of those ambulance services but instead with BGVAC’s employment decision to charge and suspend her.”

Concluding that Grogan” failed to demonstrate a sufficiently close nexus between the State or Town governmental entities and the disciplinary actions taken against her,” BGVAC’s actions cannot be fairly attributed to the State or the Town and, as a result, BGVAC cannot be held liable under §1983,” the judgment of the District Court was affirmed.

§75 also applies to “exempt volunteer firefighters” as defined in the General Municipal Law employed in positions in the exempt, non-competitive or labor class. Such firefighters are entitled to the same removal and other disciplinary proceedings as apply to permanent employees in the competitive class.

Still, a veteran is not entitled to special due process in the form of a notice and hearing if he or she is removed from his or her position as a probationary employee as the Court of Appeals ruled in *Vaillancourt v NYS Liquor Authority*, 153 AD2d 531, motion to appeal granted 74 NY2d 616, affirmed 75 NY2d 889.

In *Vaillancourt*, the Court of Appeals said that §75.1(b)’s granting of due process rights to certain veterans did not “abrogate the provisions of Civil Service Law §63 requiring completion of a probationary term nor well-established judicial authority denying the right to a pre-termination hearing to a veteran on probation.”

Similarly, in 1990 the Appellate Division, Third Department, concluded that the right of a veteran to a §75 hearing did not apply if the employee-veteran was terminated during his probationary period.⁴

⁴ See *Waters v NYS Department of Correctional Services*, 160 AD2d 1112.

Of course, a collective bargaining agreement negotiated pursuant to the Taylor Law may provide due process rights in connection with discipline and dismissal actions to employees in the classified service not covered by §75.

In *Richards v Board of Fire Commr. of Brentwood Fire Dist.*, 117 AD3d 836, the court considered the due process rights of members of a volunteer fire department.

The Board of Fire Commissioners expelled a member of the Fire Department. The member sued and Supreme Court annulled the Board's determination and remitting the matter for a hearing and a new determination thereafter, and the petitioner cross-appeals from so much of the order as failed to grant the petition in its entirety. On a procedural note, in this instance, "on the Court's own motion," the notice of appeal and the notice of cross appeal from the [Supreme Court's] order was deemed to be applications for leave to appeal, and cross-appeal, respectively, and leave to appeal and cross-appeal is granted

The Appellate Division affirmed the lower court's ruling, explaining that as the member was entitled to a hearing "upon due notice and upon stated charge" under General Municipal Law §209-1 but was not afforded one, "the Supreme Court properly annulled the determination and remitted the matter for a hearing and a new determination thereafter."

GML §209-1 addresses the removal of volunteer officers and volunteer members of fire departments and, in pertinent part, provides:

1. The authorities having control of fire departments of cities, towns, villages and fire districts may make regulations governing the removal of volunteer officers and volunteer members of such departments and the companies thereof.
2. Such officers and members of such departments and companies shall not be removed from office, or membership, as the case may be, by such authorities or by any other officer or body, except for incompetence or misconduct. However, it should be noted that §209-1, further provides that "The provisions of this section shall not affect the right of members of any fire company to remove a volunteer officer or voluntary member of such company for failure to comply with the constitution and by-laws of such company."
3. Removals on the ground of incompetence or misconduct, except for absenteeism at fires or meetings, shall be made only after a hearing upon due notice and upon stated charges and with the right to such officer or member to a review pursuant to article seventy-eight of the civil practice law and rules. Such charges shall be in writing and may be made by any such authority. The burden of proving incompetency or misconduct shall be upon the person alleging the same.

Due process rights pursuant to §3020-a of the Education Law

§3020-a, most recently amended by the Legislature effective July 1, 2015, is the equivalent of §75 in primary and secondary public education. It provides that tenured teachers and administrators can be disciplined only for just cause and in accordance with the due process procedures set out in §3020-a or as provided in alternative disciplinary procedures negotiated under the Taylor Law and set out in a collective bargaining agreement.

Different sections of the New York State Education law grant due process rights as described in §3020-a to specific categories of tenured educational personnel.

These categories of educators are: generally teachers and supervisory staff of a vocational education and extension board (Education Law §1102.3); generally assistant and other superintendents and teachers and other employees of a city school system in cities having less than 125,000 inhabitants (§2509); generally assistant and other superintendents and teachers and other employees assistant and other superintendents and teachers and other employees of cities of New York, Buffalo, Rochester, Syracuse and Yonkers (§2573); specifically assistant and other superintendents and teachers and other employees of the City of New York, (§2590-j); generally assistant and other superintendents and teachers and other employees of school districts employing fewer than 8 teachers, other than a city school district (§3012); and specifically assistant and other superintendents and teachers and other employees of board of cooperative education services [BOCES] (§3014).

With respect to processing disciplinary actions pursuant to an alternative disciplinary procedure set out in a collective bargaining agreement, in *Kilduff v Rochester City Sch. Dist.*, 24 NY3d 505, the Court of Appeals held that providing an alternative disciplinary procedure in a collective bargaining agreement cannot diminish or impair a tenured teacher's and school administrator's right to elect the Education Law §3020-a disciplinary procedure in lieu of a contract disciplinary procedure.

The Rochester City School District notified Roseann Kilduff, a tenured school social worker, that she was to be suspended for 30 days without pay for certain alleged misconduct.

In response to Kilduff's written request for a hearing pursuant to Education Law §3020-a., Rochester advised her that she was not entitled to the process prescribed in that statute but could challenge the District's disciplinary determination by means of the procedures set out in the collective bargaining agreement (CBA) between the School District and the Rochester Teachers Association.

The CBA provided, in relevant part that "Except as provided elsewhere in this Section, any disciplinary action imposed upon any eligible teacher may be processed as a grievance and arbitration procedure." The Court of Appeals noted that a subsequent subsections of the CBA it is provided that "no eligible teacher may be discharged without the process prescribed in Education Law §§3020 and 3020-a."

The Court of Appeals, affirming a ruling by the Appellate Division, said that §3020-a of the Education Law, as amended, requires that all CBAs becoming effective on or after September 1, 1994, permit eligible employees facing discipline the right to elect the disciplinary review process provided by Education Law §3020-a notwithstanding a provision in the CBA to the contrary.

The court explained that inasmuch as the governing CBA took effect in 2006, Kilduff, "in the court's view," had the right pursuant to Education Law §3020(1) to choose the §3020-a disciplinary procedure in lieu any alternative grievance procedure contained in the CBA.

Accordingly, said the court, Rochester's failure to honor Kilduff's request that it was required by law to respect mandated the annulment of the disciplinary action it taken against her, explaining that the portion of Education Law §3020(1) relevant to the issues raised in this action states: "No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article or in accordance with alternate

disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment that was effective on or before September first, nineteen hundred ninety-four and has been unaltered by renegotiation, or in accordance with alternative disciplinary procedures contained in a collective bargaining agreement covering his or her terms and conditions of employment that becomes effective on or after September first, nineteen hundred ninety-four; provided, however, that any such alternate disciplinary procedures contained in a collective bargaining agreement that becomes effective on or after September first, nineteen hundred ninety-four, must provide for the written election by the employee of either the procedures specified in such section three thousand twenty-a or the alternative disciplinary procedures contained in the collective bargaining agreement."

In the words of the court, "the statute unambiguously provides that when a CBA is altered by renegotiation or takes effect on or after September 1, 1994, it must permit tenured employees to elect §3020-a's discipline review procedures, notwithstanding the availability of alternative, CBA-prescribed procedures."

The Court of Appeals said that while the statute would trump a CBA provision effective on or after September 1, 1994 that relegated a tenured employee exclusively to a non-statutory discipline procedure, "we perceive no reason to conclude that the present CBA in fact does that. It provides merely that a disciplinary action 'may,' not that it 'must,' be processed in accordance with the agreement's grievance and arbitration provisions which were retained unaltered in the parties' subsequent CBAs."

Further, in a footnote the majority observed that while the CBA required the §3020-a process where the discharge of a tenured employee was sought, this does not mean, as the School District contended, that it precludes a tenured employee from electing such process where less serious discipline was at issue, in this instance a 30-day suspension without pay.

Accordingly, the court, in this 4 to 3 ruling, Judge Smith dissenting in an opinion in which Judges Read and Pigott concur, held that the order of the Appellate Division should be affirmed, with costs.

It should be noted that with respect to eligible employees in the classified service, §76.4 of the Civil Service Law, in pertinent part, provides that §§75 and 76 of the Civil Service Law "... may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. Where such sections are so supplemented, modified or replaced, any employee against whom charges have been preferred prior to the effective date of such supplementation, modification or replacement shall continue to be subject to the provisions of such sections as in effect on the date such charges were preferred."

Unclassified service employees of the City and State University systems including community colleges are not covered by §3020-a; they are covered by the "trustee's policies" of these institutions or by procedures negotiated in accordance with the Taylor Law.

The concept of tenure

Although "tenure" is associated most closely with educational settings, the legal concept of tenure is not limited to educators. The status flowing from the vesting of due process rights and other rights in a probationer who has completed the maximum period of probation is often referred to as tenure. Attaining tenure simply means that

an employee has successfully completed a probationary period or, under certain circumstances, has not been dismissed prior to end of his or her maximum period of probation.

The concept of tenure originated in a time when a person's political or religious views could result in a termination if they were not consistent with the "politically correct" views of the period. The concept of tenure has endured under a public policy that a civil service meritocracy administered with integrity is preferable to appointment of public employees by reason of his or her association with a political machine.

In New York State, only incompetence or misconduct with respect to job performance or off-duty misconduct adversely reflecting on the public employer may serve as a legal basis for disciplinary action by a public employer. However, an OATH Administrative Law Judge recommended termination of an employee found guilty of misconduct unrelated to the performance of the individual's official duties [NYC Department of Sanitation v Ragone, OATH Index #1970/11].

The keys to attaining tenure in the public service are (1) permanent appointment, directly or by operation of law, and (2) successful completion of any probationary period required by law, rule or regulation.

Tenure can arise through inaction as well as through action. Should the appointing authority neglect to timely notify a probationer that he or she is to be terminated for failure to satisfactorily complete the probationary period on or before the end of the individual's probationary period, the employee is deemed to have obtained tenure by operation of law, also known as tenure by estoppel or tenure by acquiescence.

Tenure is not always permanent. For instance, an individual holding "tenure" in his or her position accused of wrongdoing may agree to be put on disciplinary probation to settle the matter. Violating the terms of the disciplinary probation can lead to dismissal without notice and hearing notwithstanding the employee's prior tenure status. For instance, state corrections officer Tina Ramos agreed to pay a \$1,000 fine and be placed on disciplinary probation for one year to settle a disciplinary case involving improper behavior when escorting a prisoner.

After Ramos was observed carrying her weapon in a hospital examination room in violation of departmental rules, she was terminated without a hearing for violating the terms of her disciplinary probation [Ramos v Coombe, 237 AD2d 713, leave to appeal dismissed 89 NY2d 981].

Permanent appointments, probation and tenure in the competitive class

§63.1 of the Civil Service Law provides that "every original appointment to a position in the competitive class is subject to a probationary period." This means that the effective date of an individual's permanent appointment to a position in the competitive class occurs on the same day that his or her probationary period begins.

In other words, becoming permanent and becoming tenured are two distinct events. An employee attains tenure upon completing a probationary period. If the employee is in the competitive class, he or she holds a permanent appointment from the first day of his or her probationary period and matures into tenured status upon satisfactory completion of the probationary period.

It follows that even probationers hold permanent appointments. This concept is put into practice when layoffs occur; the employer must measure the seniority of employees from the day they began as probationers, not the day they completed their probationary period.

To illustrate this concept, consider this question: The Civil Service Law states that for the purposes of layoff, a person's seniority is measured from his or her "original date of permanent appointment" to a position in the classified service.

When is that? The answer is not the date the employee's probationary term (if any) ended. Rather, it is the day he or she was initially permanently appointed to the classified service position as a probationer.

Permanent vs. probationer vs. provisional appointments

If a person is going to err thinking about the due process rights of an employee, it is likely to involve confusion of three "P" words: permanent, probationer and provisional. Even supposed experts in the civil service law are prone to errors in mixing up these terms. One of the authors was dismayed when he discovered that an editor substituted the word "provisional" for "probationary" in a Section he wrote for the New York Bar Association's book, *Public Sector Labor and Employment*. Here is a review of the definitions:

"Permanent" refers to the nature of an appointment of a person, not the status of the position itself. The term is also used to refer to the nature of appointments of employees in the classified service.

However, a special "appointment status" results when an individual is appointed to a position encumbered by an officer or employee absent for ordered military service. In such situations the position held by a public employee absent on military duty typically is filled by appointing a "substitute employee" to the vacancy.

The substitute employee is appointed "for a period not exceeding the leave of absence of the former incumbent and ... shall acquire no right to permanent appointment or tenure by virtue of" such service. For additional information concerning "substitute appointments [See §§242 and 243 of New York State's Military Law].

In addition, a special sub-class of "permanent" has been authorized by §64.4 of the Civil Service Law and is generally referred to as a "contingent permanent appointment." A contingent permanent employee serves in a position that has been "left temporarily vacant by the leave of absence of the permanent incumbent thereof" and has been permanently appointed or reinstated to the position in accordance with §64.4 of the Civil Service Law. Such individuals enjoy all of the rights of a permanent appointee except the right to continue in the position upon the return of the individual on leave from the position.

In the competitive class, a "permanent" appointment is typically an appointment made from a list of eligible candidates. These lists include "preferred lists" and other types of lists and "rosters" created as a result of a lay-off of employees and "eligible lists" rankings of people who have taken a civil service examination ("open competitive" or promotion lists). Most appointments in the New York State civil service are permanent appointments in the competitive class because (1) all positions in the classified service are automatically in the competitive class unless placed in another jurisdictional classification by the State Civil Service Commission or by statute and (2) the state constitution mandates that Civil Service positions be filled by competitive examination wherever practical.

In rare instances a permanent employee in the competitive class may be nominated for a noncompetitive promotion examination to a competitive class position. This is permitted when there are three or fewer candidates eligible for the promotion examination.

The term “permanent” for the purposes of the Civil Service Law does not have the common-use meaning of established or long-lasting. Rather, it denotes entitlement -- that the individual is entitled to certain benefits and protections not available to temporary or provisional employees.

In the non-competitive class, employers make “permanent” appointments where the only requirement is that the individual pass a non-competitive exam and satisfactorily complete the probationary period. All appointments in the non-competitive class are permanent unless the appointments were made to encumbered positions. An encumbered position is a position authorized to be established by the appropriate civil service commission and included in the budget whose permanent incumbent is absent, typically because of an authorized leave without pay.

Exempt and labor class employees also are recipient of permanent appointments as long as the appointments were not made to encumbered positions.

As described in the previous section, all employees that receive a permanent appointment must serve a probationary period before achieving tenure. But a probationary employee does not “become” permanent when he or she successfully completes the probationary term; as explained earlier, the appointment status of the individual is “permanent” from day one of his or her effective date of appointment.

“Provisional” appointments are made to wholly vacant positions in the competitive class. Technically, provisional appointments may not last more than nine months and are made when there is no appropriate eligible list available to fill the vacancy. Further, except as otherwise mandated by §65.4 of the Civil Service Law, such an appointment does not mature in to “de facto” tenure in the position notwithstanding the continuation of the provisional employee beyond the statutory limit [*Russell v Hodge*, USCA, Second Circuit, 470 F2d 212].

What is an “appropriate” eligible list? A list determined and certified by the responsible civil service commission or central personnel agency (state or local) containing the names of individuals qualified and eligible for appointment the position. The most common type of eligible list contains the names of individuals who have taken and passed an open-competitive or promotion civil service examination.

However where there are “preferred lists” or “special military lists” in being, such lists must be exhausted before list resulting from an open-competitive or promotion examination may be certified to the appointing authority.

To make appointments, employers must follow either the “Rule of One” (selecting the top person or the only person on a preferred list or special military list) or the “Rule of Three” (selecting from among three candidates receiving the highest scores). Which Rule the employer follows depends on the type of list certified or, in some cases, the provisions of a collective bargaining agreement.

Where there are at least two more people on the list than the number of positions to be filled by a competitive or promotion examination, this is referred to as a “mandatory” list and the appointing authority must make appointments in accordance with the Rule of Three.

Thus, if there are at least three people on an eligible list for a single position, the position is to be filled using the Rule of Three. If there is no mandatory list, the vacancy may be filled on a provisional basis in accordance with §65 of the Civil Service Law. More rarely, a vacancy may be filled on a “temporary” basis in accordance with §64 of the Civil Service Law [see 1.09, “Temporary and Provisional Appointments”].

“Provisional” refers to the nature of the appointment of a person, not the position in which the person serves or the employee as an individual. One is a “provisional” employee only in the respect that one has a provisional appointment to a position. There is no such thing as a “provisional position” -- rather there is a permanent or temporary position that is wholly vacant, and which may be filled by “provisionally appointing” an individual to the vacancy. Provisional appointments are described in §65 of the Civil Service Law.

To illustrate the difference between the personnel concept of “permanent status” and the budgetary concept of “permanent position,” it is possible to make a permanent appointment to a “temporary position.” Indeed, under certain circumstances it is possible to make a permanent appointment to a position that does not exist. In other words, the permanent or temporary status of a position deals with its funding and does not address the personnel status of the incumbent [See 1.11, “Budgetary classification irrelevant to due process rights of employees”].

In contrast, appointment to an encumbered position, permanent or temporary, is a “temporary” appointment or a contingent permanent appointment, depending of the action taken by the appointing authority and the eligibility of the individual for a contingent permanent appointment.

“Probationary” can refer to either a person or an appointment, but not to a position. You can call someone new to a job a probationary employee or say he or she has a probationary appointment until a certain date of maximum probation. But the position in which he or she serves is not probationary.

A probationers’ due process rights

It is not uncommon for there to be confusion or misunderstanding regarding the due process rights of probationary employees in the classified service. The rules of the state civil service commission and many local civil service commissions usually specify both a minimum period of probation (typically eight weeks) and a maximum period of probation (as short as 12 weeks or as long as three years, depending on the position and the jurisdiction).

Permanent appointees who have served as probationers can be divided into three categories, each with unique due process rights:

1. Employees who have not yet completed their minimum period of probation. These probationers have full due process rights under §75. Courts have voiced the view that it is unfair to dismiss someone except for cause until they have been given a minimal chance to prove themselves. For an employer to dismiss a probationary employee before he or she has completed his or her minimum period of probation, the employee must be brought up on charges of either incompetence or misconduct and found guilty.

2. Probationers who have completed the minimum period of probation, but not yet completed the maximum period of probation. These employees have virtually no due process rights under state law. Employers may summarily dismiss -- without notice and without hearing -- such probationers as long as the action is not being taken for a discriminatory, arbitrary or otherwise unlawful reason. See, for example, *Garrison v Koehler*, 161 AD2d 322, in which a female probationer persuaded the Appellate Division, First Department, that the “insubordination” that led to her dismissal from the New York City Dept. of Corrections was really her refusal to submit to sexual harassment.

Probationary terminations are often challenged by the disappointed employee. In its decision in *In re Nilda Munoz*, a case involving the interplay between the authority to terminate a probationer and the procedures requiring the evaluation of a probationer’s performance, decided March 18, 2003, the Appellate Division, First Department rejected a claim that §2573.1(b) of the Education Law provided that a New York City probationary school principal’s employment could be terminated only by majority vote of their respective community school boards. Munoz had argued that it was unlawful for a New York City community superintendent to terminate her services as a probationary principal.

The Appellate Division pointed out that §2573.1(b), which applies to the New York, Buffalo, Rochester, Syracuse and Yonkers city school districts, does not require a majority vote of the community school board but a majority vote of the board of education. Further, noted the court, the Education Law was subsequently amended by Education Law §2590-f.1(c), a provision applicable only to the New York City school district, that specifically grants community superintendents authority to appoint and discharge all employees.

The court said that to the extent the two provisions are inconsistent, the earlier enacted must be deemed superseded by the later enacted provision, citing *Garzilli v Mills*, 250 AD2d 131.

The court also rejected Munoz’s claim that her termination was unlawful because the steps set out in the “Principal Performance Review” procedure (PPR) had not been satisfied. Munoz contended that she was not evaluated at least annually and that she was not given notice of her deficiencies. Accordingly, she argued, the superintendent had not complied with certain procedural requirements incorporated in the multi-step evaluation and reporting process and thus her termination should be overturned by the court.

The court declined to do so, explaining that the PPR is not a rule implementing any law binding on the superintendent but merely constituted “a compilation of explanatory forms and instructions that have no legal effect” [See, also, *Munoz v Vega*, 2001 WL 1491330 and *Matter of Munoz v Vega*, 303 A.D.2d 253].

It should be mentioned, however, that local civil service commissions may have rules that restrict the circumstances under which a probationary employee may be dismissed, and employer must honor those restrictions. See the Court of Appeals ruling in *Scherbyn v Wayne-Finger Lakes BOCES*, 77 NY2d 753.

Likewise, some collective bargaining agreements specifically provide due process rights to probationary employees and other employees not having tenure rights.

3. Employees who have completed their maximum period of probation. These employees are no longer probationers but are “tenured” employees. They have full due process rights under §75. They cannot be dismissed except for cause, i.e.: being found guilty of charges of incompetence or misconduct.

A case in which the Court of Appeals clearly addressed these basic rules on dismissal of probationary employees is *York v McGuire*, 63 NY2d 760.

Notably, the maximum period of probation can be extended. Employers are empowered under the rules of state civil service commission and many local civil service commissions to extend periods of probation as a matter of discretion rather than terminate the employee. This must be done before the employee's maximum period of probation has expired, however.

Generally if a probationary employee is absent, for any reason, with or without pay, his or her probationary period is automatically extended by the number of days he or she is absent [See, for example, 4 NYCRR 4.5(f)]. There are some exceptions, however. If the absence is short -- 10 days (or 20 days if the probationary term or maximum term exceeds 26 weeks) -- Civil Service "Rules" may allow the appointing authority to consider the days absent as "time served." [See, for example, 4 NYCRR 4.5(f). This applies to both authorized and unauthorized absences.

If a probationer is absent due to "ordered military service," his or her military service is to be credited "as satisfactory service" for the purpose of completing his or her probationary period if he or she is honorably discharged or released from active duty [See §§242, 243 of the Military Law]. This means that an individual may satisfy his or her probationary period requirements while on military duty. If the individual is appointed or promoted to a position while on military duty, his or her military service is also to be counted as "satisfactory service" for the purposes of probation.

The above applies to all probationary employees in the classified service, those in the non-competitive class, the exempt class, the labor class and the competitive class. In the competitive class, probationary employees include permanent employees who are serving a probationary period upon an initial appointment, or upon promotion, as well as contingent permanent employees.

Sometimes a state law or the civil service commission having jurisdiction over a certain position has set the minimum period of probation and the maximum period of probation to be the exact same amount of time. In such cases, the employee has due process rights under §75 at all times or, as some may observe: instant tenure!

A danger in understanding the rights of probationers is to get caught up in nomenclature and assume that because someone is "probationary," he or she does not have due process rights. Often the exact opposite is true. Both employers and employee representatives should be vigilant on this issue.

Temporary and provisional appointments

Temporary appointments in the competitive class are appointments made to an encumbered position. It may be made without competitive examinations for short periods -- usually three or six months -- in accordance with §64 of the Civil Service Law. However §64 also provides for temporary appointment under other circumstances and may even require such appointments to be made from an eligible list.

Provisional appointments are appointments made by a civil service commission to fill positions that are wholly vacant when there is no appropriate eligible list. Forms of eligible lists include lists of the names of individuals who have taken a civil service exam, preferred lists of laid-off employees and special military lists.

Even if an employee has served years or decades as temporary or provisional, his or her status never “ripens” into a permanent appointment with tenure rights to due process. Temporary and provisional appointments are “merely stop-gap” measures with no possibility of ripening into permanent appointments [Fink v Kern, 176 Misc 114, aff’d., 262 AD 829].

There are exceptions to the above, however. Provisional employees can become permanent employees with tenure rights to due process under certain special conditions set out in §65.4 of the Civil Service Law. §65.4 provides that a provisional employee is automatically “afforded permanent appointment” in the position in the event either of two specific circumstances is satisfied:

1. The provisional employee (a) takes and passes an examination for the position and (b) the resulting list is not a “mandatory list” and (c) he or she is continued in the position for a period greater than the required probationary period for the position; or
2. An individual is (a) on a nonmandatory eligible list for the position and is (b) provisionally appointed to the position and (c) is continued in the position beyond the maximum probationary period for the position.

If a provisional employee attains permanent appointment by “operation of law,” he or she will have all the rights of a tenured employee, including the right to notice and hearing for the purpose of disciplinary action. See *Roulett v Town of Hempstead Civil Service Commission*, 1971, 71 Misc.2d 477, affirmed 40 AD 611].

Is there any exception to a temporary employee being ineligible for due process protections? Only if “temporary” does not truly describe the status of the employee, despite the label. See *Spindel v New York City Housing Authority*, 1964, 41 Misc.2d 363.

Of course, temporary or provisional employees might have special due process rights under a Taylor Law agreement. Also, any individual dismissed or penalized for a discriminatory reason or some other unlawful reason may be entitled to redress under the state Human Rights Law or federal laws such as Title VII, Civil Rights Law of 1964.

Furthermore, it should be remembered that individuals holding a temporary or provisional appointment who are terminated (as well as permanent employees who are dismissed before completing their probationary period) might be entitled to a “name-clearing hearing.”

The following summarizes the basic concepts underlying temporary and provisional appointments in the public service.

Typically a temporary appointment is made to a position temporarily vacant or to a position that is not expected to be continued for any extended period of time as generally set out in §64 of the Civil Service Law.

A long list of decisions support the holding that an individual “temporarily appointed” to a position pursuant to subdivisions 1, 2 and 3 of §64 of the Civil Service Law cannot and does not attain permanent status by operation of law regardless of the duration of such status and regardless of the fact that under certain circumstances the temporary appointment has been made from an appropriate eligible list. Indeed, such an appointment from the eligible list may lawfully have been made without regard to rank on the eligible list, thus avoiding the provisions of Civil Service Law §61, which sets out the so-called “rule of three.”

Accordingly, it seems clear that except as provided by §64.4, a temporary appointment cannot mature into permanent status.

An appointment pursuant to the exception set out in Civil Service Law §64.4 is typically referred to as a “contingent permanent appointment.” This may be viewed as a “special form of temporary appointment” -- one that provides many of the benefits incumbent upon permanent appointment to the individual appointed to an encumbered position in the competitive class of the classified service but (1) requires that the appointing authority affirmative act to provide for such a “contingent permanent” appointment and (2) requires that the appointee otherwise satisfies the mandates of §61.

As the Court of Appeals indicated in *Snyder v Civil Service Commission*, 72 NY2d 981, a temporary appointee, even if otherwise eligible for such appointment pursuant to §64.4, must be appointed specifically as a contingent permanent employee by the appointing authority, which status is granted solely at the discretion of the appointing authority.

In contrast, a provisional appointment authorized by Civil Service Law §65, [a provisional appointment may be made only to a position that is wholly vacant], may, under certain conditions, mature into a permanent appointment by operation of law. §65.4 sets out the terms and conditions pursuant to which a provisional appointment matures into a permanent appointment. The various terms, conditions and circumstances under which such permanent status obtains are explained in such decisions as *Matter of Roulette*, 40 AD2d 611, *Haynes v Chautauqua County*, 55 NY2d 814, *Becker v New York State Civil Service Commission*, 61 NY2d 252 and *La Sota v Green*, 53 NY2d 491.

Jurisdictional misclassification⁵

Many discipline cases involve employees who claim their positions belong in a jurisdictional classification that carries due process rights. In *Ficken v VEEB*, 90 NY2d 809, Ficken was terminated from her position of “secretary” with the Suffolk County Vocational Education and Extension Board [VEEB] for alleged misconduct. She persuaded the Appellate Division that her dismissal was without notice and hearing in violation of §75 of the Civil Service Law.

Although VEEB claimed that the Suffolk Civil Service Commission had designated Ficken’s position as unclassified pursuant to §35, the Appellate Division affirmed a lower court ruling that “there is no enumerated category under §35 within which [Ficken] falls.” The court said that “as all positions not defined as unclassified must be classified, [Ficken’s] position must be a classified service position” in the competitive class. Hence, Ficken was entitled to due process.

This ruling may be viewed as “overreaching,” however, because there was nothing in the record to suggest that the secretary was permanently appointed to her position from an eligible list. Serving in a competitive class position does not bestow due process rights upon the incumbent unless he or she holds a permanent or contingent permanent appointment. In other words, the court did not address the possibility that Ficken held a

⁵ The term "jurisdictional classification" means the assignment of positions in the classified service to the competitive, non-competitive, exempt or labor classes. In contrast, the term "position classification" means a grouping together, under common and descriptive titles, of positions that are substantially similar in the essential character and scope of their duties and responsibilities and in the qualification requirements for appointment to such title.

temporary or provisional appointment in the competitive class, as opposed to a permanent appointment or a contingent permanent appointment in the competitive class.

If a local civil service commission or the State civil service commission has jurisdiction, then the commission or its designee has control over all issues of appointment, retention and dismissal concerning the application of the Civil Service Law in a particular situation.

For instance, a civil service commission must certify payrolls at least once a year to ensure that each person paid has been lawfully appointed in accordance with the Civil Service Law. The certification attests that the individuals on the payroll were lawfully appointed in accordance with the Civil Service Law. It is a misdemeanor to pay an individual on a civil service payroll if that individual has not been lawfully appointed and so certified by the responsible civil service commission.

If a civil service commission has jurisdiction over a position, the Civil Service Law dictates the due process rights to which the individual is entitled. Which specific due process rights the individual is entitled to under the Civil Service Law depends on the individuals' employment status (permanent, temporary, provisional, et cetera) as well as the jurisdictional classification of the position and, possibly, the terms of a collective agreement.

Budgetary classification irrelevant to due process rights of employees

Managers sometimes think that designating a position as "permanent" or "temporary" for budgetary purposes can be meaningful in determining an individual's rights under the Civil Service Law or a Taylor Law Agreement. This is not the case.

The budget status of the position is irrelevant to the status held by the incumbent of the position for the purposes of determining an individual's rights and benefits, including the individual's right to due process. Indeed, for budgetary purposes, all "permanent" positions could be viewed as temporary, as there is no assurance that the funds necessary to pay the incumbent of a particular position will be appropriated for, or authorized for disbursement in, a given fiscal year. Indeed, the §§80 and 80-a of the Civil Service Law provides for the discontinuation of the services of permanent and contingent permanent employees upon the abolishment of a position.

In fact, a person may be appointed to a budget-maker's "temporary position" on a permanent basis or to a "permanent position" on a temporary basis. The only possible relevance to the budget status of a position is that the abolishment of a position encumbered by a permanent appointee may ultimately result in a layoff and the establishment of a preferred list.

However, the fact that the position has been abolished does not necessarily mean that disciplinary issues may be ignored. As the Appellate Division's decision in *Rubtchinsky v Moriah Central School District*, 82 AD2d 960, suggests, disciplinary action against an individual should not be discontinued simply because he or she has been laid off as a result of the abolishment of a position.

Rubtchinsky, a teacher, was suspended with pay pending the outcome of a disciplinary hearing on charges of incompetence and misconduct. He was then advised that a position in his department was to be abolished and as the teacher with the least seniority, his services would be discontinued. A §3020-a disciplinary hearing was

never held. The Appellate Division held that Rubtchinsky could get back salary upon reinstatement to his former position if he demonstrated that he was improperly excessed -- i.e., he was not the least senior individual for the purposed of being excessed. Significantly, the court commented that it knew of no reason to abort a disciplinary hearing simply because the individual was laid off from his or her position.

If, on the other hand, the disciplinary action against the employee is prosecuted and the penalty imposed is dismissal, he or she may be declared ineligible for reinstatement from a preferred list. For example, §80.7 of the Civil Service Law, in pertinent part, provides that “Notwithstanding any other provisions of this chapter, the civil service department or appropriate municipal commission may disqualify for reinstatement and remove from a preferred list the name of any eligible who ... has been guilty of such misconduct as would warrant his dismissal from the public service....”

Should the civil service agency elect to remove an individual from a preferred list under such circumstances, the law further provides that “No person shall be disqualified pursuant to this subdivision unless he is first given a written statement of the reasons therefore and an opportunity for a hearing at which such reasons shall be established by appropriate evidence, and at which such person may be represented by counsel and present evidence.”

As both the Civil Service Law and the Education Law vest an employee who has been laid off with the right to reinstatement from a preferred list, it seems clear that the employer must go forward with the discipline action notwithstanding the layoff of the accused employee or risk his or her potential reinstatement from the preferred list.

Again, it is important to understand that an individual’s appointment (permanent, contingent permanent, et cetera) defines the individual’s employment status, not the fiscal status of the position he or she is filling.

In fact, a person may even receive a permanent appointment to a position that does not exist and be vested with the rights that ordinarily flow from “permanent appointment” [See the Appellate Division, Fourth Dept.’s decision in *Shields v City of Buffalo*, 206 AD2d 921, Motion for leave to appeal denied, 84 NY2d 813].

Why would such an appointment to a nonexistent position be made in the first place? As the Buffalo decision explains: To provide for the appointment as a permanent of an individual in anticipation of a vacancy, which may not become available until after an eligible list expires. In this case, the appointing authority made an appointment to a non-existent position and placed the individual thus appointed on a leave of absence without pay from the non-existent position. When the incumbent retired some weeks later, which was after the eligible list had expired, the individual was reinstated from leave to the newly vacated position.

Another situation in which an appointment to a non-existent position might be approved is when there is a “promotion vacancy” but there is no vacancy in a lower grade position in the line of promotion. In such a situation an individual could be permanently appointed from an eligible list to a lower grade title in the promotion line, or reinstated to a title in the promotion line that he or she formerly held, and simultaneously appointed to the higher title as a provisional employee.

The reason for this is that if the individual were not permanently appointed to an eligible lower grade title, he or she would not be able to compete in the promotion examination for the title he or she held provisionally but, at best, could only compete in an open-competitive examination for the title, if one were held.

Here the significance lies in the fact that a promotion list must be exhausted before an open competitive list may be certified for appointment.

Rights of employees of quasi-government entities

If all this were not complicated enough, the line between public employment and “private employment” may be blurred in quasi-governmental entities. The general rule is that the officers and employees of a public benefit corporation are employed in the “private sector” and are not subject to the provisions of the State Constitution’s mandate concerning selection for employment in the public service on the basis of merit and fitness or the provisions of the Civil Service Law.

Accordingly, employees of a quasi-governmental entity such as a public benefit corporation are in the private sector and may not claim rights set out in the Civil Service Law unless the State Legislature has specifically granted civil service rights to the officers and employees of such a quasi-governmental entity. As an example, the officers and employees of the New York City Off-track Betting Corporation have been declared covered by the civil service system by statute.

The important thing for the reader to remember is that it is the individual’s employment status and jurisdictional classification which controls with respect to any rights or benefits he or she may enjoy or demand. Other considerations, such as an individual’s or an individual’s spouse’s status as a veteran may also have an impact on an employee’s rights to administrative due process.

It bears repeating that in order to determine the rights of a particular individual, whether by statute or by contract, it is essential to first determine that individual’s status in the personnel system of the State or a political subdivision of the State. The failure to make a correct determination with respect to an individual’s status could result in a court determination that the employee was unlawfully removed from the position and the appointing authority directed to reinstate the individual with back salary and benefits.

A veteran's due process rights

Veterans have unique due process rights under New York State law. §75 of the Civil Service Law specifically covers veterans who have served in the armed forces of the United States in time of war and who have been “honorably discharged” or released under honorable conditions. §85 of the Civil Service Law sets out the definition of a veteran for the purposes of §75.

However, a veteran who served in time of war employed and characterized as an “independent officer” was held not within the ambit of §75 of the Civil Service Law [DiBattista v McDonough, 80 AD3d 936].

This is a significant benefit if the veteran is in the exempt class or the labor class as such employees typically serve at the pleasure of the appointing authority and are not entitled to notice and hearing in connection with disciplinary actions. A veteran in an exempt class position [other than one serving as a private secretary, cashier or as the deputy of an official or department] or in a labor class position has been given the same rights with respect to removal and discipline as permanent employees in the competitive class.

Another benefit of veteran's status: If the employee is serving in a non-competitive class position but has not yet served for a sufficient period to qualify for §75 rights in such status, he or she may assert their veteran's status to qualify for §75 rights. Similar rights are available to employees who are "exempt volunteer firefighters." §75.1.e provides an example of such a benefit that is created by law.

Impartial tribunals

One of the most common due process claims challenging disciplinary determinations is that the tribunal that heard the charges was not impartial. Indeed, it is a common practice in New York State for governmental officials to render judgments in cases in which they are personally involved! Typically the appointing authority files charges against a subordinate pursuant to §75 alleging misconduct is the same authority issuing the final determination after a disciplinary hearing is held and the hearing officer issues his or her findings of fact and a recommendation as to the penalty to be imposed.

The appointing authority is simply the person or body that has the legal authority to hire and fire. Unless there is provision for some independent agent such as an arbitrator to make the final determination, the appointing authority, be it an elected body such as a school board or a town board, a department head or a public administrator such as a superintendent, police chief or town manager will make the final disciplinary decision concerning guilt and penalty to be imposed. This situation was the genesis of negotiating alternatives to the statutory disciplinary procedures, usually referred to as "contract disciplinary grievance procedures," through collective bargaining under the Taylor Law.⁶

Every so often an employee brought up on disciplinary charges challenges the impartiality of the person making the decision as to guilt and the penalty to be imposed. Less frequent is an employee's challenge to the qualifications of the person designated to review the disciplinary action. The impartiality of the disciplinary tribunal was an issue in *Edgar v Dowling*, 96 AD2d 510, and the decision addresses both such types of challenges involving persons serving in such a capacity.

Edgar was found guilty of misconduct and insubordination and he was dismissed from his position with the Town Highway Department. He was able to get the determination and penalty annulled by the court because the person who had investigated and filed the charges against him, Dowling, had also testified against Edgar at the hearing. Dowling then "reviewed the record of the hearing" and found Edgar guilty dismissing him. The court said that Dowling should have disqualified himself as the decision maker under the circumstances.

The court then directed that a "duly qualified individual, not heretofore involved in these proceedings", review the disciplinary record and recommendation. This was done and again Edgar was found guilty and again he was dismissed from the position.

Edgar appealed a second time, claiming that the individual chosen to redetermine the charges against him had not been "duly qualified" because he had not been formally appointed a deputy town superintendent of highways (See §32(2) of the Highway Law.) The court rejected the argument, finding no merit in the claim that the reviewer was not "duly qualified." It held that the determination of the reviewer was supported by

⁶ §3020.1, in pertinent part, provides that any such "alternate disciplinary procedures contained in a collective bargaining agreement that becomes effective on or after September 1, 1994, must provide for the written election by the employee of either the procedures specified in such §3020-a or the alternative disciplinary procedures contained in the collective bargaining agreement...."

substantial evidence. The court then said that while the penalty of dismissal was harsh, it was not so disproportionate to the offense as to shock one's sense of fairness, citing *Pell v Board of Education*, 34 NY2d 222.

In contrast, the lack of substantial evidence to support findings of guilt of certain disciplinary charges resulted in a remand to the appointing authority for new findings and reconsideration of the penalty to be imposed as was noted in *Matter of Licciardi v City of Rochester*, 87 AD3d 1381.

Such practices can suggest at least the appearance of a conflict of interest. Courts have judged such situations on a case-by-case basis and have found denial of due process in some cases but not others. The key issue is whether or not the person or body rendering the final determination was sufficiently impartial to be fair.

For example, the Appellate Division, Third Department, found the sheriff of Ulster County acted improperly when he demoted a corporal who was found guilty of sleeping on the job on two occasions.⁷ Even though an independent hearing officer heard the charges, the court said the demotion was excessive because the sheriff both initiated disciplinary charges against Stapleton and made the final determination as to the penalty to be imposed. Notably, the sheriff imposed a harsher penalty than one recommended by the hearing officer. The court ordered Stapleton's reinstatement to his former position with back salary and benefits until a new penalty determination by a designee of the sheriff without any personal involvement in the charges was made.

Similarly, the Appellate Division annulled the dismissal of Saratoga County's director of data processing, who had been found guilty of sexual harassment and incompetence.⁸ The court said the chairman of the county Board of Supervisors denied Ernst a fair and impartial tribunal because the chairman (a) met with the county's attorneys "to discuss the pending investigation," (b) met with the employees involved to, as he phrased it, "relieve their fears;" (c) signed the notice of the charges against Ernst, (d) voted to bring charges against Ernst, (e) served as a witness at the disciplinary hearing and (f) voted to accept a hearing officer's findings of guilt and impose the recommended penalty.

Another example: in *Botsford v Bertoni*, 101 AD3d 1245, the Appellate Division noted that if a disinterested party could conclude the appointing authority had adjudged the matter in advance of hearing it, remanding the matter to a qualified and impartial individual is required.

Brian Botsford, a fire inspector by the Village of Endicott, was the president of its firefighters union. Botsford was served with disciplinary charges and specifications Civil Service Law §75 alleging misconduct. The charges alleged that Botsford had engaged in an oral altercation with the Fire Chief concerning a directive issued by the Chief, during which he made two statements that resulted in disciplinary charges being filed.

Botsford filed an improper practice charge with the Public Employment Relations Board (PERB) shortly after being served with the disciplinary charges alleging that the Village's decision to discipline him amounted to anti-union animus.

At the hearing on the disciplinary charges Botsford acknowledged that he had made the one statement but denied making the second statement alleged in the charges filed against him. Crediting the testimony of

⁷ See *Stapleton v LaPaglia*, 207 AD2d 945.

⁸ See *Ernst v Saratoga County*, 234 AD2d 764.

witnesses to the encounter to the effect that Botsford had, in fact, made the second statement, the Hearing Officer found Botsford guilty of the charges and recommended a period of unpaid suspension. The Village's Mayor, John Bertoni, sustained the findings of guilt but modified the penalty of the unpaid suspension to be imposed on Botsford recommended by the hearing officer.

During the PERB hearing, held shortly after Bertoni had sustained the findings in the disciplinary hearing, Botsford again testified that he did not make the second statement. This resulted in Botsford being served with new disciplinary charges alleging misconduct amounting to perjury and making a false official statement, as well as incompetence for failure to be truthful based on his testimony at the PERB hearing and his testimony at the disciplinary hearing.

This second §75 disciplinary hearing resulted in Botsford being found guilty of the charges and the Hearing Officer recommending that his employment be terminated. Bertoni adopted the findings and penalty of the Hearing Officer, whereupon Botsford filed an Article 78 petition seeking an order vacating Bertoni's action. Supreme Court dismissed the petition and Botsford appealed.

The Appellate Division first noted that "Where a witness testifies falsely under oath, he or she may properly be subject to additional proceedings and sanctions, noting that the United States Supreme Court has held "...under circumstances indistinguishable from those present here ... that 'a [g]overnment agency may take adverse action against an employee because the employee made false statements in response to an underlying charge of misconduct'," citing *Lachance v Erickson*, 522 US 262 while in *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. at 542 the U.S. Supreme Court commented that "The core of due process is the right to notice and a meaningful opportunity to be heard." However, the court rejected on the basis of both precedent and principle, the argument that a "meaningful opportunity to be heard includes a right to make false statements with respect to the charged conduct." Further, in *Phelps-Clifton Springs CSD v Nicot*, Supreme Court, Ontario County, Index #103465, Justice Frederick G. Reed, February 8, 2010, the court held that perjury while testifying during a §3020-a disciplinary hearing results in court vacating the underlying arbitration award.

Notwithstanding this, the Appellate Division said that "Reversal is required," explaining that Bertoni should have been disqualified from reviewing the Hearing Officer's recommendations. Although an administrative decision maker is not deemed biased or disqualified merely on the basis that he or she reviewed a previous administrative determination and ruled against the same employee, or presided over a prior proceeding involving a similar defense or similar charges, in this instance the Appellate Division found that there was evidence indicating that the administrative decision maker may have prejudged the matter at issue. Thus, the court concluded, "disqualification is required."

The Appellate Division noted that in his decision in the first disciplinary proceeding, Bertoni not only agreed with the Hearing Officer's report, but also stated his own opinion that "I do not believe [Botsford's] account of what was said."

Further, said the court, his affidavit submitted in Botsford's CPLR article 78 proceeding challenging the first disciplinary determination, "Bertoni went one step further." In explaining the portion of his decision addressing Botsford's version of the second statement, Bertoni averred that he found that version "incredible."

Although the falsity of Botsford's account of the second statement was not at issue in the second disciplinary proceeding, as that issue was conclusively determined in the first proceeding, the central issue in the second

disciplinary proceeding was whether Botsford's false testimony was given knowingly and willingly. Thus, after concluding that he did not believe Botsford's account of what was said and that Botsford's version was "incredible," Bertoni put himself in the position of determining whether the statement that Botsford did in fact make was made knowingly and willfully.

The problem, said the court, was that these questions were inextricably intertwined, and Bertoni's statements regarding Botsford's testimony in the first proceeding were such that "a disinterested observer may conclude that [Bertoni] ha[d] in some measure adjudged the facts" surrounding the knowing and willful question "in advance of hearing it." Accordingly, the Appellate Division ruled that Bertoni should have recused himself and because he did not, his determination was affected by an error of law.

The proper remedy, said the court, Judge Egan dissenting in part, was to remit the matter for a de novo review of the present record and the Hearing Officer's recommendations by a qualified and impartial individual.

Nevertheless, in some cases courts have been more tolerant of employers being involved in some aspect of the disciplinary process.

In *Stanton v Board of Trustees*, 157 AD2d 712, the court ruled that an employee was not deprived of administrative due process even though members of the Board who voted to terminate Stanton also participated in the underlying investigation that led to charges of misconduct being brought against her. "(A)lthough a 'fair trial in a fair tribunal is a basic requirement of due process'," the court said, "... it has also been recognized that 'mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decision-maker.'"

In Stanton's situation the Appellate Division noted that although the Board was authorized by §75.2 of the Civil Service Law to conduct a disciplinary hearing concerning the charges it had filed against her, it elected to have an independent hearing officer preside at the hearing instead. The court viewed this as evidence of the board's desire to minimize the possibility of bias that might result from the overlapping investigator and adjudicative functions of the board.

In addition, the decision notes that members of the board who had testified against Stanton at the hearing did not vote on the question of whether to terminate her employment.

In cases in which a board is the appointing authority and is voting to accept a hearing officer's finding of fact, each member of the board must make an independent review of the record. This means a copy of the transcript must be made available to each member of the board who votes.

The appointing authority, however, is not required to read every page of the transcript taken at a disciplinary hearing. In *McKinney v Bennett*, 31 AD3d 860, the Appellate Division held that the appointing authority was not required to read all 1,228 pages of the hearing transcript and each document submitted, citing *Matter of Taub v Pirnie*, 3 NY2d 188, 195 [1957]. In this instance, the court commented, the individual failed to demonstrate that the appointing authority "made no independent appraisal and reached no independent conclusion", quoting *Matter of Kilgus v Board of Estimate of City of N.Y.*, 308 NY 620, 628 [1955].

Appointing authorities, whether they are individuals or boards, should use common sense in handling disciplinary cases to minimize even the appearance of an impropriety. Besides the risk of litigation, there can be

costs in terms of morale and public perception. One need not be an attorney to see that problems could arise with an administrator or a board member serving multiple roles such as accuser, investigator, witness, judge, jury and executioner.

The *Ernst v Saratoga County*, 234 AD2d 764, illustrates another principle. In *Ernst* the court was persuaded that board members failed in its obligation of “independent appraisal” because “the only complete copy of the hearing transcript was made available to the Board members at the county personnel office.”

In a case involving “an incomplete transcript” of a disciplinary hearing, is *Farrell v New York State Off. of the Attorney Gen.*, 108 AD3d 801.

In *Farrell* the Appellate Division reviewed a determination of Commissioner of Corrections and Community Supervision which found a prisoner guilty of violating a prison disciplinary rule. The Appellate Division ruled that the lack of a full transcript of a disciplinary hearing for review by the court required the annulment of the Commissioner’s finding the prisoner guilty of the charges filed against him.

The prisoner contended that, among other things, a meaningful review of the Commissioner’s decision by the court was precluded because a significant portion of the hearing was not transcribed. The Appellate Division agreed, explaining that it appeared that only the first side of the audiotape made during the hearing was transcribed by the stenographer. The stenographer had noted that “[s]econd side of tape not audible - runs on fast speed only,” and then “abruptly ended the transcript.” The court said that it could not ascertain what was on the second side of the tape or if it would have been beneficial to the prisoner's defense. Accordingly, it ruled that the Commissioner’s determination must be annulled and remanded the matter for a new hearing.

Specificity of charges

Disciplinary charges and specifications must be sufficient to permit the accused employee to understand the nature of the charges and specifications and prepare his or her defense.

The importance of being precise in drafting disciplinary charges is illustrated by the decision of the Appellate Division in the *Fella* case [*Fella v County of Rockland*, 297 AD2d 813]. According to the decision, even in situations where discipline may be warranted, the failure to properly word the charges and specifications may be fatal to the employer’s attempt to discipline an employee.

Peter Fella, Rockland County’s Commissioner of Hospitals, was suspended for 30 days without pay for allegedly violating the County’s Equal Employment Opportunity Policy [EEOP]. According to the court’s decision, following an investigation, the Rockland County Director of Employee Rights and Equity Compliance [Director] concluded that Fella had created a hostile work environment by promoting a person with whom he was then having a romantic relationship to a vacant assistant director of nursing position.

The Director held that the Commissioner’s action violated the County’s EEOP based on a finding that some employees said that they felt uncomfortable at work because Fella had this “romantic relationship” with a co-employee. This, according to the Director, created a hostile work environment and, as such, violated the EEOP.

The County Executive adopted the Director's findings and suspended Fella for having created a hostile work environment in violation of the EEOP.

In its decision the Appellate Division noted that the County's EEOP defined sexual harassment as "unwelcome sexual advances, requests for sexual favors, sexual demands or conduct of a sexual nature which had the purpose or effect [sic] of unreasonably interfering with an [affected] person's work performance or creating an intimidating, hostile or offensive work environment." Citing *DeCinto v Westchester County Medical Center*, 807 F2d 304, the court explained that there is no sexual discrimination or harassment involved "where the conduct complained of by the employee involves an isolated act of preferential treatment of another employee due to a romantic, consensual relationship."

The Supreme Court judge commented that while Fella's decision to promote an individual with whom he was having a romantic relationship may constitute poor judgment, it did not constitute a violation of the County's EEOP - the alleged basis for bringing the disciplinary action. As the County failed to establish any violation of its EEOP, the Supreme Court annulled the determination of the Rockland County Executive. The Appellate Division affirmed the ruling.

Of particular interest is the Supreme Court's noting that Fella's actions may have served as a basis for discipline, albeit based on other theories of alleged misconduct. While the Court concluded there was no violation of the EEOP and thus the County could not sustain the charges it filed against Fella, the decision suggests that Fella's behavior might constitute a legitimate basis for subjecting him to disciplinary action based on other specifications.

In other words, it is possible that had the County charged Fella with misconduct based on specifications other than violating the EEOP, the court might have allowed its disciplinary action against Fella to survive.

What lesson can be learned from Fella? While the charges and specifications filed against an employee should clearly apprise the individual of the alleged "misconduct or incompetence" giving rise to the charge, the specifications should constitute acts or omissions that, if proven to have occurred, would support a finding that the employee was guilty of misconduct or incompetence. In any event, the employer should be reasonably certain that it would be able to prove the allegations, whatever they may be, before initiating disciplinary action against an individual.

Under Education Law §3020-a as amended, hearing officers are empowered at prehearing conferences to hear requests from employees for a "bill of particulars" including witness statements, notes, district records, student records, exculpatory evidence and other material. [§3020-a.3(C)(III)(C)] Normally it is sufficient for the employer to provide enough information to allow the employee to make an informed response.

Sometimes an individual will demand "a bill of particulars" requiring the appointing authority to set out the charges and specifications filed against the individual in greater detail. Although Education Law §3020-a.3c(iii)(C) provides an administrator or teacher with the right to demand a "bill of particulars" concerning the charges and specifications filed against him or her, no similar provision is included in §75 of the Civil Service Law. In some instances the disciplinary grievance procedure set out in a collective bargaining agreement allows the employee to demand a "bill of particulars."

For instance, if an employee were accused of stealing, it would be appropriate to state what was allegedly stolen and when it turned up missing. In an 1899 case, state courts ruled that dismissal for alleged misconduct will not be sustained if the employer failed to state with any certainty the time and place that the alleged misconduct took place [*People v Elmendorf*, 42 App. Div. 306].

The Civil Service Law states that accused employees must be furnished with a copy of the charges and be given at least eight days to respond [§75.2, Civil Service Law].

The key issue is whether the employee has been given enough information to defend himself or herself from the charges. In *Martinez v Franco*, 222 AD2d 335, a New York City Housing Authority police officer claimed that the Authority prejudiced his right to be informed of the charges against him when it failed to introduce its Patrol Guide Manual into evidence at his disciplinary hearing.

The Appellate Division disagreed, finding that Martinez “showed an understanding of the charges when he consented to the introduction of the [Authority’s] letter setting them forth and waived a formal reading thereof.”

Another case dealing with the specificity of charges and specifications is *Ritz v Board of Fire Commissioners, Selkirk Fire District*, 622 NYS2d 830, 212 AD2d 949 (1995). In *Ritz*, disciplinary charges against a chief and assistant chief of volunteer firefighters alleged they had improperly conducted a “live” burn training exercise but did not specify any rule, regulation, by-law or policy that allegedly had been breached. Accordingly, the Appellate Division found this violated due process. It held that an individual charged with misconduct must be provided with sufficient information to develop a defense, and that there must be effective communication of any unwritten policy if that policy is to be the basis of disciplinary charges.

There are additional aspects of evidence that should be considered such as the method of gathering or obtaining evidence. Unlike the situation in matters to be determined by a court of law, “discovery” is not generally available in administrative proceedings. However, this may be changing. The recently amended Education Law §3020-a, which controls in the discipline of educators, however, provides for “discovery.”

In general, however, all that the employer usually is required to provide the employee charged with misconduct or incompetence is a statement of the charges and specifications in sufficient detail as to reasonably permit the individual to prepare a defense to such charges and specifications.

Although a subpoena may be issued to compel the production of documents at the hearing or require an individual to appear as a witness, neither the “examination before trial” (EBT) nor discovery are required to be provided in connection with administrative proceedings such as disciplinary actions pursuant to §75.

Rispoli v Waterfront Commission of New York Harbor, 104 AD3d 461, is a case that addressed an individual’s inability to cross-examine an individual who made statements implicating him or her because the individual ignored a subpoena issued by the Administrative Law Judge.

Unlike the situation in matters to be determined by a court of law, “discovery” is not generally available in administrative disciplinary proceedings. However, this may be changing. The recently amended Education Law §3020-a, which controls in the discipline of educators, however, specifically provides for “discovery” [§3020-a.3 c.(iii)(C)].

Addressing a related matter, in *Bd. of Educ. v Hankins*, 294 AD2d 360, [see also 5 AD3d 771], the Appellate Division affirmed the Supreme Court's decision quashing Hankins' subpoena duces tecum on the grounds that Hankin attempted to use the subpoena duces tecum improperly. Such a subpoena, said the court, "may not be used for purposes of discovery or to ascertain the existence of evidence." Insofar as the State is concerned, if the department or agency does not respond to a request for its documents, the party seeking the documents must obtain a judicial subpoena in order to obtain such records.

In this instance, said the court, Hankins wanted the subpoena in order "to discover the names, addresses, and telephone numbers of the students in the class on the day or days when his misconduct allegedly occurred." Accordingly, concluded the court, the subpoena was properly quashed by Supreme Court. Of course, to obtain state documents a judicial subpoena duces tecum -- i.e., a subpoena issued by a court having jurisdiction -- is required if the State entity holding the documents sought by the employee declines to provide them when requested to do so.

The rules differ with respect to arbitration. *Goldsborough v NYS Correctional Service*, 217 AD2d 546, appeal dismissed, 86 NY2d 834, illustrates the principal that if a party in an arbitration fails to exercise his or her rights to demand discovery or particularization in connection with a disciplinary action, he or she has lost them.

However, it seems that unless the collective bargaining agreement provides for discovery, or grants the arbitrator the right to order disclosure, the only avenue available to a party is to seek a court order compelling disclosure pursuant to 3102(c) of the Civil Practice Law and Rules.

The general rule in §75 disciplinary actions is that the employee must have notice of the offenses with which he or she is charged in sufficient detail as to be able to prepare his or her defense. In *Collins v Parishville-Hopkinton CSD*, 256 AD2d 700, the court addressed the resolution of a situation in which the hearing officer found Collins guilty of offenses with which she had not been charged.

As to the use of an "examination before trial" [EBT] or demands for discovery in connection with arbitration, such procedures are available only to the extent that the contract disciplinary procedure may provide for them.

In any event, there is another aspect to consider -- posting information on a social network such as Facebook may prove to be an example of the Doctrine of Unintended Consequences should such postings be targeted for the purposes of discipline in the course of litigation or arbitration.

In re Tenure Hearing of Jennifer O'Brien, No. A-2452-11T4 (N.J. Super. Ct., App. Div. Jan. 11, 2013), the Appellate Division, New Jersey Superior Court, sustained a decision by an administrative law judge, affirmed by New Jersey's Commissioner of Education, upholding the school district's termination of an elementary school teacher for posting derogatory remarks about her students on Facebook. The court decided that the teacher's remarks were not protected by the First Amendment of the U.S. Constitution as the remarks were not made on a matter of public concern.

Another decision involving a "Facebook" posting that resulted in disciplinary action is *Palleschi v Cassano*, 102 AD3d 603.

The Appellate Division affirmed the dismissal of an Emergency Medical Services Supervisor by the Commissioner of the New York City Fire Department for misconduct, ruling that the Commissioner's

determination that the Supervisor was guilty of violating departmental regulations was supported by substantial evidence.

The Supervisor had admitted photographing a computer terminal's screen containing confidential and privileged information concerning a 911 call concerning a medical emergency, as well as the 911 caller's name, address and telephone number and then uploading the image to his Facebook account, with the caption "[c]an't make this up." The decision states that approximately 460 of the Supervisor's Facebook "friends" had access to the posting.

Further, said the Appellate Division, at the time of the posting, the Supervisor understood that divulging such patient information was in violation of departmental rules, as well as a serious breach of trust.

Considering the "serious nature" of the Supervisor's misconduct, the court said that the penalty imposed, dismissal, did not shock its sense of fairness, citing *Kelly v Safir*, 96 NY2d 32 and *Berenhaus v Ward*, 70 NY2d 436.

Other cases involving postings on Internet social networks that triggered disciplinary action being initiated against public employees include *Rubino v City of New York*, 34 Misc 3d 1220(A), 106 AD3d 439, and *Fire Department v Palleschi*, OATH Index #551/11.

Christine Rubino was terminated following a disciplinary hearing in which she was found guilty of posting certain comments on an Internet social media website.

Supreme Court granted Rubino's petition to set aside the hearing officer's decision that resulted in the termination of her employment with the New York City Department of Education following a disciplinary hearing "to the extent of remanding the matter for the imposition of a lesser penalty." The Appellate Division affirmed the lower court's ruling.

According to the decision, Rubino had posted comments on a social media website alluding to a tragedy involving an unknown student at a different school. Although the court said that the comments "were clearly inappropriate," it explained that Rubino's purpose was to "vent her frustration only to her online friends after a difficult day with her own students."

Initially Rubino denied the incident but she subsequently admitted to making the comments at the disciplinary hearing, acknowledging that they were inappropriate and offensive and repeatedly expressed remorse.

The Hearing Officer found that Rubino had engaged in a plan with her friend to mislead investigators right after the allegations surfaced. However, the Appellate Division said that Supreme Court "reasonably concluded that Rubino's actions were taken out of fear of losing her livelihood, rather than as part of a premeditated plan." Under the circumstances, and in consideration of Rubino's not having ever before been the subject of a disciplinary action during her 15-year career and her avowing that she would never engage in a similar act again, the Appellate Division agreed with the Supreme Court's finding that the penalty of termination was "shocking to one's sense of fairness."

The use of such "social network" postings in administrative hearings, litigation and arbitration is a legal issue that courts being asked to address with increasing frequency.

In *Patterson v Turner*, 88 AD3d 617, a Supreme Court judge ruled that material on Facebook, if relevant, was subject to discovery while in *Abrams v. Pecile*, 83 AD3d 527, the Appellate Division declined to permit discovery of material posted on social network sites when the party seeking such access was unable to demonstrate that the material being targeted for discovery would be relevant in the lawsuit.

Immunity from discipline

An administrator is sometimes confronted by a situation in which an attempt to discipline an employee seems impossible because the employee claims that he or she has been granted immunity in connection with a criminal proceeding.

According to the Appellate Division, disciplinary action may proceed in spite of the claimed immunity (*Greco v Board of Nursing Home Examiners*, 91 AD2d 1108). The Special Prosecutor granted Greco “transactional immunity from prosecution” in connection with a criminal matter in exchange for his cooperation.

The board later revoked his nursing home administrator’s license. The Appellate Division, in a split decision, rejected Greco’s argument that his immunity barred revocation of his license. The court said “a prosecutor cannot divest an independent body of its lawful discretion by promising broad immunity.”

This is consistent with the view that an administrative disciplinary action based on the same events that may have resulted in a criminal prosecution is not “double jeopardy.” Had the board been a party to the granting of immunity, however, it would have been bound by the agreement.

Likewise, statements made by an employee to the police during their investigation of criminal charges filed against the employee constitutes “competent evidence” and may be admitted into evidence during the disciplinary hearing (*Dacey v County of Dutchess*, 121 AD2d 536).

The reverse situation occurs when a disciplinary action precedes criminal action. If an employer threatens to fire or take other adverse action against an employee if he or she does not answer questions, the employee’s answers to those questions are typically automatically shielded from use in a subsequent criminal prosecution under a concept called “transactional immunity” or “use immunity.”

Right to predetermination hearing

Sometimes it is difficult to determine whether an order given to an employee constitutes discipline and whether the employee is entitled to due process before the order goes into effect. When asked to evaluate such cases, the courts examine whether administrative decision constituted involved a deprivation of a “property interest” or a “liberty interest,” or whether the decision was arbitrary and capricious.

For example, in the Appellate Division’s decision in *Taylor v NYS Dept. of Correctional Services*, 248 AD2d 799, the court ruled that barring a corrections officer from carrying a weapon while off duty was not a disciplinary penalty that required a pre-determination hearing.

A psychologist advised a correctional facility's superintendent that State Corrections Officer Mark Taylor "was dangerous and may lose impulse control at any time." Taylor reportedly "became belligerent and abusive" when the psychologist refused to give him a copy of a report that he had prepared for Family Court. Taylor refused repeated requests to leave the psychologist's office and ultimately police officers were called and escorted him from the office.

The superintendent prohibited Taylor from carrying a concealed weapon while off-duty.

Although §265.20 of the State Penal Law gives State correction officers a statutory exemption from prosecution for criminal possession of a weapon, the rules of the state Correctional Services Department allow it to prohibit an employee from carrying a weapon while off duty if it determines "the employee's mental or emotional condition is such that his or her possession of a weapon represents a threat to the safety of the employee, the facility or the community."

Ambiguity of language in Taylor Law agreements

Sometimes the wording of a collective bargaining agreement is ambiguous as to whether a certain category of employees is entitled to due process rights. It is a basic tenet of contract law that in cases of ambiguity in contract language, the ambiguity should be resolved against the drafter of the language. So, if the employer wrote language in a collective bargaining agreement that is ambiguous, the dispute would be resolved in favor of the union. If the union drafted the language, the dispute would be resolved in favor of the employer.

In *Leon v Lukash*, 121 AD2d 693, 178 AD2d 583, a noncompetitive class employee of Nassau County in a position designated "confidential" by the Nassau County Civil Service Commission sought due process rights and cited an ambiguous provision in a collective bargaining agreement between the County and CSEA.

The Appellate Division found that the parties did not intend to grant confidential employees such as Leon pre-termination hearing rights. The court said that to the extent that there was any ambiguity in the language of the agreement, any such ambiguity "should be resolved against the drafter ... CSEA." The court concluded that Leon was not improperly discharged from his position insofar as the disciplinary provisions of the controlling Taylor Law agreement were concerned.

Other cases dealing with ambiguity of contract provisions and due process rights are *Taylor v NYS Dept. of Correctional Services* [arbitrator should decide whether BOCES teachers serving in its "alternative high school" were teachers covered by the agreement] and *Willis v NYC Police Department*, 214 AD2d 428 [Construing the language of an agreement to extend an employee's probationary period to a specific date against the drafter -- the employer -- Willis was granted an extension of her probationary period to cover 40 days of sick leave that Willis took during her original probationary period].

Right of appeal and timeliness

Part of due process is the right to appeal. But this right is a short-lived one for actions challenging an administrative action are brought pursuant to Article 78 of the Civil Practice Law and Rules [CPLR and Article 78 has but a four-month statute of limitations.

Some appeal rights have an even shorter life. For instance, appeals under §76 to the civil service commission having jurisdiction must be filed within 30 days, while appeals from Education Law §3020-a pursuant to Article 75 of the CPLR must be filed within 10 days [§3020-a.5].

If an employee wishes to challenge a disciplinary decision, it is critical that the action be commenced before the expiration of the controlling Statute of Limitations.

The general rule is that the statute of limitations begins to run beginning when a final administrative determination has been received by the individual or by his or her attorney.

However, the filing an appeal from an administrative decision in accordance with a grievance procedure does not toll the running of the statute of limitations for bringing an Article 78 action [Matter of Matter of Hazeltine v City of New York, 89 AD3d 613].

There are exceptions, however. For instance, if the employer agrees to grant a rehearing of a case, that can change the deadline for filing an Article 78 petition.

In *DelBello v NYC Transit Authority*, 542 NYS2d 271, DelBello did not attend a disciplinary hearing that resulted in his termination in 1985 because the notice of the hearing had been sent to an outdated address. (See “Absence from hearings” below.)

The Authority then agreed to give DelBello a new, second hearing but did not reinstate him to his position pending its issuing a determination following the completion of this second hearing and in 1986 sustained its earlier ruling terminating DelBello. When DelBello sued under Article 78, which has a four-month statute of limitations, the Authority argued that he was untimely as he had not brought the action within four months of his termination in 1985.

The Appellate Division, Second Department, ruled that DelBello’s Article 78 action was timely. If a governmental agency agrees to hold a new hearing at which new testimony is taken, new evidence offered and new matters are considered, an individual may challenge the new determination pursuant to Article 78. In such a situation, the time period allowed to file such a challenge begins to run from the date the new determination is received by the individual.

If the Authority had simply denied DelBello’s request to reconsider its decision, he would have been untimely as he had not sued within four months of his receiving the July 1985 determination. By agreeing to hold a new hearing, the Authority exposed itself to an Article 78 challenging its “new determination” in 1986 even though it affirmed its 1985 ruling.

There is a significant difference between granting an individual a new hearing and agreeing to reconsider a prior determination as the decision in *Pinto v Town of Greenburgh*, 170 AD2d 685 demonstrates.

Pinto, after being guilty of misconduct and dismissed from his position, asked the Town to reinstate him to his former position. When his request was denied, *Pinto* sued seeking reinstatement. The court dismissed his petition, holding that his 1988 request for reinstatement was nothing more than an application for reconsideration of the Town's determination dismissing him from his position.

Affirming the lower court's ruling, the Appellate Division said that Pinto's action was "time-barred," having been brought more than four months after the completion of the disciplinary action in 1986. The general rule: a request for "reconsideration" of a disciplinary determination does not stop the statute of limitations from running for the purpose of filing a timely appeal from the underlying decision [Cappellino v Town of Somers, 83 AD3d 934, request for reconsideration of a final administrative decision does not toll the running of the relevant statute of limitations].

Another exception involves suing school districts and BOCES. Typically the aggrieved party filing a "notice of claim" pursuant to §3813 of the Education Law must precede such actions. §3813 bars the initiation of any action for 30 days following the filing of the notice of claim. Accordingly, this extends the last day on which one can file an Article 78 action.

In *Cordani v Board of Education*, 66 AD2d 780, the Appellate Division decided that the four-month Statute of Limitations set out in §217 of the Civil Practice Law and Rules "was enlarged by 30 days in light of the fact that, pursuant to Education Law §3813, 30 days must pass after service of the notice of claim before an action may be commenced."

However, there is some disagreement concerning the application of the notice requirements of §3813 with respect to initiating judicial action against a school district or a BOCES when a challenge to a disciplinary action is involved.

§76 of the Civil Service Law gives a person found guilty of charges brought pursuant to §75 a statutory right to appeal the penalty imposed to the responsible civil service commission or, in the alternative, to the courts pursuant to §78 of the CPLR.

Notwithstanding this, the Appellate Division's ruled that an employee of a school district or a BOCES in the classified service, as a condition precedent to his or her filing an Article 78 appeal challenging the §75, Civil Service Law disciplinary action, must have filed a timely notice of claim with the district or BOCES [*Stevens v McGraw CSD*, 261 AD2d 698, motion for leave to appeal denied, 93 NY2d 816].

In contrast, in *Sephton v Board of Education of the City of New York*, 99 AD2d 509, the Appellate Division ruled that "the 'tenure rights' of teachers are ... considered a matter in the public interest and therefore §3813 is not applicable to cases seeking to enforce such rights."

New York courts have distinguished between proceedings "which on the one hand seek only enforcement of private rights and duties and those on the other in which it is sought to vindicate a public interest; the provisions of subdivision 1 of §3813 are applicable as to the former but not as to the latter" (*Union Free School Dist. No. 6 of Towns of Islip & Smithtown v New York State Div. of Human Rights Appeal Bd.*, 35 NY2d 371, 380, motion to reargue denied 36 NY2d 807).

Does challenging an adverse disciplinary determination involve efforts to vindicate a private right or a public interest? It would seem that the fact that the Civil Service Law provides an aggrieved employee with a statutory right to appeal an adverse disciplinary action to a civil service commission or to the courts, he or she should have the same standing with respect to his or her "tenure rights" as are enjoyed by educators under §3020-a, or vice versa.

It should be noted that in *CSEA v Lakeland Central School District*, the Appellate Division rejected the School District's theory that CSEA's action for damages "for breach of a collective bargaining agreement" should be dismissed because CSEA had not complied with the "notice of claim" requirements set out in §3813 of the Education Law. The Court said that "the collective bargaining agreement entered into by the parties contained detailed grievance procedures and this constituted a waiving compliance with that requirement" by the School District.

Another argument to consider: Typically an aggrieved party has a statutory or Taylor Law contractual right to appeal an adverse determination of the appointing authority or an arbitrator or arbitration panel as provided by §76 of the Civil Service Law and §3202-a.5 of the Education Law. Appeals under §76 may be appealed to the responsible civil service commission [within 30-days of the decision] or as provided by Article 78 of the CPLR while §3202-a.5 appeals are to be filed pursuant to Article 75 of the CPLR but must be filed within 10 days of the determination of the arbitrator or the arbitration panel.

A temporary or provisional employee, or probationary employee who has completed his or her minimum period of probation, does not have a statutory right to appeal his or her termination except where he or she alleges the dismissal was in violation of his or her constitutional rights or was unlawfully discriminatory. However, in some instances a probationary employee may have a contractual right to challenge his or her termination as set out in a Taylor Law agreement.

Absence from hearings

Due process is essentially the right to a hearing. What if an individual who has been served with disciplinary charges fails or refuses to attend the disciplinary hearing that has been scheduled? Has the employee been denied due process?

Not necessarily. "[D]ue process does not require that a petitioner be present at an administrative hearing, but rather requires notice of the charges and an opportunity to be heard," the Appellate Division, Third Department ruled in *Mujtaba v NYS Dept. of Education*, 148 AD2d 819; 107 AD3d 1066. The case involved a pharmacist who claimed, unsuccessfully, that she had been denied due process because, despite the fact that she knew a hearing was scheduled, she elected to go on a religious pilgrimage.

Sometimes an employee served with a notice of disciplinary action refuses to participate in the proceeding or does not appear at the hearing. Courts have held that the employer may proceed with the disciplinary action even though the employee is not present. The hearing may proceed and the employee tried in absentia provided the appointing authority made a diligent effort to contact the employee to inform him or her that the disciplinary hearing had been scheduled and would take place even if he or she did not participate.

Indeed, there is even case law stating that an arbitrator may proceed with a disciplinary arbitration hearing in the absence of the appointing authority and make a final, binding determination. In *Hall v Environmental Conservation*, 235 AD2d 757, the employer boycotted the arbitration because it believed that Hall was not entitled to the arbitration. The court upheld the arbitrator's award in favor of the employee.

In its appeal *Environmental Conservation [DEC]* claimed that its termination of Hall was not subject to being challenged pursuant to the "contract disciplinary procedure" because the State Department of Civil Service had

disqualified Hall for employment. Thus, claimed the DEC, Hall's appointment was void and therefore he could not claim any rights under §75 of the Civil Service Law or the collective bargaining agreement. A Supreme Court judge granted the union's motion to confirm that portion of the award providing for back pay, holding that the disciplinary proceeding was not rendered moot by the Civil Service Department's action but declined to confirm that part of the award that directed DEC reinstate Hall to his former position. The Appellate Division affirmed the lower court's ruling.

The Mari decision [Mari v Safir, 291 AD2d 298] sets out the general standards applied by the courts in resolving litigation resulting from conducting a disciplinary hearing in absentia.

The decision demonstrates that an individual against whom disciplinary charges have been filed cannot avoid the consequences of disciplinary action being taken against him or her by refusing to appear at the disciplinary hearing. The decision also provides an opportunity to explore a number of factors that should be kept in mind when involved in a disciplinary or other administrative action held "in absentia."

New York City police officer Robert A. Mari was served with disciplinary charges alleging that he (1) engaged in unauthorized off-duty employment; (2) knowingly associated with a person believed to be engaged in, likely to engage in, or to have engaged in criminal activities; (3) intentionally disclosed an informant's identity to a target of police activity; and (4) harassed "a former paramour."

When Mari failed to appear at his disciplinary hearing, he was "tried in absentia" and was found guilty of the several disciplinary charges filed against him. The penalty imposed: termination. Mari appealed, contending that he should be given a "new hearing" because he was not actually present during the disciplinary proceeding.

The Appellate Division, First Department, dismissed Mari's appeal. Conceding that Mari not present at the disciplinary hearing, the court said "a new hearing is not warranted since [Mari] avoided service of the notice of the revised hearing date, and thereafter intentionally absented himself from the hearing."

Another example of the appointing authority proceeding with a disciplinary hearing in absentia is Miles v NYC Office of Administrative Trials and Hearings, OATH Index No. 911/13. Further, in Miles the hearing was held after employee's attorney's motion to withdraw from the matter was granted by the administrative law judge.

The New York City Administration for Children's Services had filed eight disciplinary charges, alleging, among other acts of misconduct, that a Juvenile Counselor employed by Children's Services failed to immediately investigate, report, and document a reported incident of alleged child abuse at a juvenile detention center and then later failed to cooperate fully in an investigation of the matter.

The employee failed to appear at the hearing as scheduled. His attorney, however, did appear at the hearing and stated that she had made numerous attempts to contact the employee by Federal Express, by mail, and by telephone, but was unsuccessful. The attorney provided OATH Administrative Law Judge Ingrid M. Addison with proof that she had notified the employee of the hearing date and had notified the employee that she might withdraw representation if she did not hear from him. The employee's attorney, based on the employee's failure to communicate with her, asked to be relieved as counsel pursuant to §1-12(a) of OATH's Rules of Practice.

§1-12(a), Chapter 1, Subchapter B, of OATH's Rules of Practice provides as follows: An attorney who has filed a notice of appearance shall not withdraw from representation without the permission of the administrative law

judge, on application. Withdrawals shall not be granted unless upon consent of the client or when other cause exists as delineated in the applicable provisions of the Code of Professional Responsibility.

Judge Addison granted the attorney's motion because the employee's failure to communicate with her rendered her representation of the individual unreasonably difficult and because the ALJ could foresee no "material adverse effect on the interest of [the employee]."

The ALJ then proceeded to hold the disciplinary hearing in absentia and the matter proceeded as an inquest after the Children's Services presented its proof of service of the notice of the hearing by certified and regular mail addressed to the employee's address on file with Children's Services. The certified mailing to the employee was returned by the United States Postal Service marked "unclaimed."

The Administrative Law Judge found that:

- [1] Children's Services had proven seven of its eight allegations;
- [2] That there was undisputed evidence of the employee's misconduct; and
- [3] That there was no mitigating circumstance for the employee's failure to perform his duty.

Children's Services had requested a 45-day suspension without pay. Judge Addison agreed that this was an appropriate penalty under the circumstances and recommended that the employee be suspended without pay for forty-five days.

The general rule in such situations is that if the employee fails to appear at the disciplinary hearing, the charging party may elect to proceed but must actually hold a "hearing in absentia" and prove its allegations rather than merely impose a penalty on the individual on the theory that the employee's failure to appear at the hearing as scheduled is, in effect, a concession of guilt.

In such case, however, the appointing authority is required to make a reasonable effort to contact the employee before proceeding to hold a disciplinary hearing in absentia. It may be that the employee has a valid excuse for his or her nonappearance such as a family emergency or personal illness that would justify the hearing officer granting an adjournment.

The following are factors that should be kept in mind in connection with holding a disciplinary hearing in absentia:

1. Was the employee properly served with the disciplinary charges and advised of the date, time and place of the hearing?
2. If the individual fails to appear at the hearing as scheduled, a diligent effort must be made to contact the individual to determine if he or she has a reasonable explanation for his or her absence before the hearing officer proceeds with holding the hearing in the absence of the accused employee.
3. A formal hearing must be conducted and the employer is required to introduce evidence proving its charges to the hearing officer.

4. A formal record of the hearing must be made and a transcript provided to the appointing authority and, if requested, to the employee.
5. The employee must be advised of the appointing authority's determination and his or her right of appeal if he or she has been found guilty of one or more of the charges.

However, on occasion the employee's failure to appear at the disciplinary hearing may be excused as was a case involving disciplinary charges based on employee's failure to appear at the disciplinary hearing.

In this instance an employee was charged with being absent without leave and insubordinate when she mistakenly appeared for an OATH hearing at 10:00 a.m. instead of 2:00 p.m. OATH Administrative Law Judge Kevin F. Casey recommended dismissal of the charges because the proof did not show that the employee was given a clear directive to report to her work site in the morning and for trial in the afternoon [See OATH Index No. 1633/14]. Judge Casey found there was some miscommunication and the employee had made "an honest mistake" that did not constitute misconduct.

On the other hand, participating in an arbitration proceeding when one need not do so may have consequences equally serious to those flowing from the failure to appear and participate in the arbitration proceeding. In *Suffolk County v SCCC Faculty Association*, 247 A.D.2d 472, the Appellate Division pointed out that if a party participates in arbitration when "it did not have to," it couldn't later seek to vacate the arbitration award "because it was not required to submit to the arbitration of the issue."

On another point, assume that an individual served with disciplinary charges pursuant to §75 of the Civil Service does not file an answer to the charges and specifications. May the appointing authority impose the proposed penalty without holding a disciplinary hearing? Probably not.

Although §75 requires the appointing officer to allow the accused employee at least eight days to file his or her answer to disciplinary charges in writing, this simply gives, but does not mandate, the employee at least eight days in which to prepare and submit an answer to the charges.

As §75 is silent as to when the accused individual must file an answer, this suggests that the individual may remain mute -- i.e., decline to file an answer to the charges -- without jeopardizing any of his or her §75 rights to administrative due process.

In other words, the failure of an employee to file an answer to the disciplinary charges, appear at the disciplinary hearing or his or her even refusing to defend himself or herself against the charges at the hearing does not excuse the employer of its duty to prove the employee's incompetence or misconduct before making a determination as the employee's guilt with respect to the charges and specifications filed against him or her following a hearing duly held and then imposing an appropriate disciplinary sanction.

As noted above, §75.2 provides that the appointing officer must allow the accused employee at least eight days to file his or her answer to disciplinary charges in writing. §75.2, in pertinent part, provides: "A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing."

A close reading of §75 suggests that an employer's deeming an employee's failure to file an answer to §75 disciplinary charges an admission of the employee's guilt would not survive judicial review as §75 does not require that the employee submit an answer to disciplinary charges in contrast to its mandate that the appointing authority allow the individual at least eight days to file an answer to the disciplinary charges.

Accordingly, it appears that the accused individual may remain silent and appear at the hearing without having submitted any answer to the charges without jeopardizing his or her right to administrative due process. Furthermore, §75.2, in pertinent part, places "the burden of proving incompetency, and, or misconduct shall be upon the person alleging the same." In other words, the failure of an employee to offer an explanation or a defense does not absolve the employer of its obligation to prove the charges of incompetency, and, or misconduct served on an employee in an administrative hearing before imposing disciplinary sanctions.

It is well-settled that in the event the employee fails to appear at the disciplinary hearing, the charging party must proceed and actually hold a hearing in absentia rather than to merely proceed to impose a penalty on the individual simply because of his or her failure to appear at the hearing as scheduled [see *Mari v. Safir*, 291 AD2d 298, leave to appeal denied, 98 NY2d 613]. Further, the charging party must prove its case by presenting substantial evidence of the employee's guilt in the course of the hearing. Lack of substantial evidence to support findings of guilt of certain disciplinary charges results in remanding the matter to the appointing authority for new findings and reconsideration of the penalty to be imposed, [*Licciardi v City of Rochester*, 87 AD3d 1381].

Given the fact that the courts require employers to conduct a hearing if an employee fails to appear at the disciplinary hearing, it seems unlikely that the courts would approve imposing a penalty on an individual without holding a hearing simply because he or she failed to "answer" the charges.

Moreover, §75 does not require an employee to ask for a hearing -- it is to be provided as a right. §75 also requires that a transcript of the hearing be provided to the employee free of charge.

In contrast, §3020-a(2) of the Education Law, the statutory equivalent of §75 for teachers and school administrators, requires the individual request a hearing within 10 days after being served disciplinary charges [see Education Law §3020-a(2), subdivisions (c) and (d)].

The individual's unexcused failure to request such a hearing permits the appointing authority to impose the proposed penalty without holding a disciplinary hearing.

Most alternative disciplinary procedures negotiated pursuant to the Taylor Law follow the §3020-a model. Typically, if the employee fails to file a timely "disciplinary grievance," the collective bargaining agreement usually authorizes the appointing authority to impose the penalty proposed in the "notice of discipline" served on the individual without further action on its part and without referring the matter to arbitration.

Turning to the merits of the disciplinary determination in *Mari's* case, *supra*, the court said that "that there was substantial evidence ... to support the hearing officer's findings." As to the penalty imposed, the Appellate Division found that it was not so disproportionate to the offenses of which *Mari* was found guilty "as to shock this Court's sense of fairness," citing *Kelly v Safir*, 96 NY2d 32.

Mari also alleged that the department acted in "bad faith" when it accelerated the date of his disciplinary hearing. He contended that the hearing date was improperly accelerated and as a result his pension was forfeited

since his termination took place before the effective date of his retirement.⁹ The Appellate Division dismissed this branch of Mari's appeal. According to the ruling, that Mari "was found guilty of conduct that took place, and the resulting disciplinary charges were filed, long before [he filed his] application for retirement."

Notice of hearings

The employer is required to make a reasonable effort to notify the employee of the charges and of the date and place of the disciplinary hearing. In the DelBello case, mentioned earlier, [DelBello v NYC Transit Authority, 542 NYS2d 271] DelBello had moved from the address listed in the Transit Authority's records and did not receive notice of his disciplinary hearing. The Transit Authority was aware of this fact as its notice was returned to it unopened and marked by the U. S. Postal Service as "Moved, left no address." The Authority did not undertake any further attempts to inform him of the pending disciplinary action.

The Appellate Division, citing *Mullane v Central Hanover Bank and Trust Co.*, 339 U.S. 306, said that "mailing the notice to [DelBello's] last known address was not notice reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the [disciplinary proceeding] and afford [him] an opportunity to present [his] objections." The court concluded that the Authority acted in an arbitrary and capricious manner when it treated DelBello's failure to receive the notice of the charges and the hearing as "his problem."

Before conducting a hearing in absentia, the employer is required to make a reasonable effort to locate the employee and serve the charges. It is also advisable for the employer to document the efforts it undertakes in its efforts to notify the employee in such a situation.

Name-clearing hearings

Name-clearing hearings are ordinarily provided to probationary employees and others who lack the statutory due process protections of tenured employees and serves only one purpose - to provide the individual with an opportunity to clear his or her "good name and reputation" in situations where he or she alleges that information of a stigmatizing nature has been made public by the employer. Prevailing at a name-clearing hearing does not entitle the individual to reinstatement or to reemployment in his or her former position. This means that being provided with a name-clearing hearing and having thereafter cleared his or her name is, at best, all the relief an individual can expect.

If adverse information concerning an employee's termination has been publicized by the employer and could be construed as injurious to the reputation of the former employee, the former employee may demand a name-clearing hearing. This applies when no other due process is available. Such cases typically involve non-tenured employees.

A name-clearing hearing is not the equivalent of a disciplinary hearing. It is merely the opportunity to clear one's name. No further action is required of the employer should the name-clearing hearing result in the employee's vindication. Although an employer may choose to reinstate the employee after a name-clearing hearing, there is no legal obligation to do.

⁹ §13-173.1 of the Administrative Code of the City of New York requires an employee to "be in service" on the effective date of his or her retirement or vesting of retirement benefits. If the employee is not "in service" on that date, he or she forfeits his or her retirement benefits.

Much less is at stake in a name-clearing hearing than in a disciplinary hearing. If an employee prevails in a disciplinary hearing, he or she will win something tangible -- typically reinstatement and back pay. If an employee prevails in a name-clearing, the employer is compelled to do exactly nothing. Even if the appointing authority or its designee declares at a name-clearing hearing that the employer was completely mistaken and acted despicably, this statement may be the employee's only reward.

Name-clearing hearings are required in only certain circumstances. First, the employer must have publicized the reason that the employee was dismissed or disciplined. Perhaps a statement was made to a newspaper reporter, or a statement was made at a public meeting. In contrast, such statements made to another administrator who has an interest or responsibility involved does not constitute "publication" so as to justify a name-clearing hearing. Second, the reason given for the disciplinary action must reflect negatively on the employee such that it might hold the individual up to ridicule or impugn his or her reputation or good name and conceivably limit his or her opportunity for future employment.

As the Appellate Division held in *Lally v Johnson City Cent. Sch. Dist.*, 105 AD3d 1129, filing disciplinary charges and holding a disciplinary hearing obviates the individuals right to a name-clearing hearing

Among the issues considered by the Appellate Division was Thomas Lally's claim that he was denied a name-clearing hearing when he was terminated from his position. Supreme Court denied the School District's motion to dismiss the causes of action demanding a name-clearing. The Appellate Division disagreed with the Supreme Court's conclusion in this regard. The court said that Lally's seeking a court order directing the School District to provide such a hearing alleged due process violations based upon School District's failure to file disciplinary charges or otherwise provide him with an opportunity to challenge the claims against him.

However, said the court, disciplinary charges were subsequently filed against Lally pursuant to Education Law §3012(2)(a), "triggering the statutory procedures that afford him the opportunity to confront his accusers and entitle him to a hearing upon request." Thus, said the Appellate Division, Lally has received the relief to which he claimed to be entitled and his demand for a name-clearing hearing is moot.

Due process and optional hearings

Sometimes a public employer files charges and specifications against an employee and holds an administrative disciplinary hearing even if it is not required to provide the employee with such "notice and hearing" by law or a Taylor Law contract provision. The Appellate Division, Third Department, decided a case in which the due process implications of a non-mandatory disciplinary hearing were considered [*Christopher v Phillips*, 160 AD2d 1165].

The State Commission on Correction, following its investigation of a disturbance at the Orange County Jail, concluded that Christopher, a deputy sheriff-captain with the Orange County Sheriff's Department, "utilized poor judgment and did not respond properly in the incident." The Commission recommended that disciplinary charges be filed against Christopher and the Undersheriff.

Christopher was terminated. He was then offered an opportunity to challenge the charges filed against him. The hearing officer found Christopher guilty of six of the eight specifications filed against him but made no

recommendation as to any penalty. When the sheriff concurred in the hearing officer's determination, Christopher appealed.

The Appellate Division indicated that in its opinion "the protections of Civil Service Law §75" did not apply to Christopher and "in the absence of any other proof establishing [Christopher's] right to protection under ... §75" concluded that he could not claim that the hearing provided to him was mandated by that provision. Also noted was the fact that Christopher was not "a member of any civil service bargaining unit" and therefore presumably not protected by any contract disciplinary procedure negotiated pursuant to the Taylor Law [see §76.4, Civil Service Law]. The Appellate Division also stated that the termination notice "did not specify that any action was being taken pursuant to the Civil Service Law."

According to the opinion "if a hearing is not required by law, the substantial evidence standard of review does not apply...." Instead, said the Appellate Division, the appropriate standard for the purpose of judicial review [in such a situation] is whether the determination is arbitrary or capricious. The fact that a hearing was held even when not required by law does not alter the applicability of this standard. The Appellate Division decided that the sheriff's determination, including the sanction applied, termination, was rational and thus neither arbitrary nor capricious.

The lesson here is that if an appointing authority elects to provide an employee with "notice and hearing" in the nature of a disciplinary proceeding despite the fact that it is not otherwise required to do so, any determination made as a result of such an action is (1) subject to judicial review and (2) must be found to comply with the "arbitrary and capricious" standard if challenged in order to survive.

In contrast, in *Bocek v Lauro*, 104 AD3d 940, the Appellate Division sustained the appointing authority's decision to terminate an employee based on the findings and recommendations of a hearing officer after a §75 disciplinary hearing, explaining that "The standard of review of an administrative determination 'made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law' is whether the determination is supported by substantial evidence."

Finding that substantial evidence in the record supports the determination that the individual was guilty of the disciplinary charges, the court said that in this instance the penalty imposed, termination, was not so disproportionate to the offense as to be shocking to one's sense of fairness.

Similarly, in *Sica v Walker*, 115 AD3d 869, the Appellate Division noted that the scope of a judicial review of an administrative determination made after a hearing is limited.

An employee was found guilty of two disciplinary charges after a hearing conducted pursuant to Civil Service Law §75. The penalty imposed by the appointing authority: termination from employment. In an Article 78 proceeding seeking judicial review of the administrative determination the Appellate Division explained that such a review after a hearing required by law at which evidence is taken is limited to consideration of whether that determination is supported by substantial evidence.

Commenting that substantial evidence has been defined as "such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact," the Appellate Division in a judicial review of such an administrative determination, "[t]he court may not substitute its judgment for that of the [appointing authority]" as the determination under review was supported by substantial evidence.

Additionally, said the court, the imposed penalty of dismissal was not so disproportionate to the offense committed as to be shocking to the court's sense of fairness, citing *Pell v Board of Education*, 34 NY2d 222.

Removal by operation of law

In some cases, administrative due process hearings may be preempted by statute. A public officer may be subject to removal by operation of law, without regard to administrative due process.

Typically, the office is deemed vacant upon the occurrence of a specific event, usually a criminal conviction or his or her failure to maintain a legally mandated residence or the timely file his or her oath of office.

As an example of “removal by operation of law,” there presently exist statutes such as §30 of the Public Officers Law that mandates removal from public office as the automatic penalty in the event a public officer is found guilty of a felony or the violation of his or her oath of office. (A police officer is a “public officer” for the purposes of §30 [*Sullivan v Whitney*, 25 NYS2d 762; *Winkler v Sheriff*, 256 AD 770]. It should be understood that while all public officers are public employees, not all public employees are public officers.)

Statutes such as §30 contrast significantly with the concepts underlying progressive discipline. The removal provisions of these statutes can be said to constitute a punishment flowing from criminal conduct, wrongdoing or a violation of one’s oath of office. These transgressions are sometimes referred to in somewhat archaic legal terms: misfeasance, malfeasance or nonfeasance in office.

Loosely defined, these terms are used to describe, respectively, acting unlawfully; doing something badly; and not doing anything when something should be done.

Decisions addressing the issue of the automatic termination of an individual from his or her public office include: *Bowman v Kerik*, 271 AD2d 225, [§30.1(e) is a self-executing statute and no pretermination hearing was required]; *Schirmer v Town of Harrison*, USDC, SDNY, 1999 WL 61843, 1999 US Dist LEXIS 1292 [police officer had moved his domicile to Connecticut and therefore was no longer eligible for employment]; *Foley v Bratton* (decided with *Griffin v Bratton*), 92 NY2d 781, [to the extent that the automatic removal provision of Public Officers Law are inconsistent with pre-termination administrative hearing procedure, the Legislature’s determination that a felony or “oath of office” conviction is serious enough, without more, to justify automatic removal” is controlling].

Other decisions in which “termination by operation of law” was a factor include *Greene v McGuire*, 683 F2d 32 involving §30 of the Public Officers Law which provides for the automatic removal of an individual from his or her public office under certain conditions.

A federal district court held that a police officer who was removed from his position following his being convicted of a felony in accordance with Public Officer Law §30.1(e) was entitled to an administrative hearing on the question of reinstatement following the reversal of the conviction.

The 2nd Circuit Court of Appeals reversed, indicating that as the state law automatically results in dismissal upon conviction, refusal to provide an administrative hearing following the reversal of the former police

officer's conviction did not deprive the former employee of a property right or liberty interest protected by the 14th Amendment.

However, it should be noted that §30.1(e) currently provides in the event a public officer is convicted of a "felony, or a crime involving a violation of his [or her] oath of office . . . a non-elected official may apply for reinstatement to the appointing authority upon reversal or the vacating of such conviction where the conviction is the sole basis for the vacancy." A police officer is a public officer. Although not all public employees are public officers, all public officers are public employees.

The statute further provides that "After receipt of such application, the appointing authority shall afford such applicant a hearing to determine whether reinstatement is warranted. In the words of §30.1(e):

"The record of the hearing shall include the final judgment of the court which reversed or vacated such conviction and may also include the entire employment history of the applicant and any other submissions which may form the basis of the grant or denial of reinstatement notwithstanding the reversal or vacating of such conviction.

"Notwithstanding any law to the contrary, after review of such record, the appointing authority may, in its discretion, reappoint such non-elected official to his former office, or a similar office if his former office is no longer available. In the event of such reinstatement, the appointing authority may, in its discretion, award salary or compensation in full or in part for the period from the date such office became vacant to the date of reinstatement or any part thereof;"

Another scenario with respect removal from office is illustrated in *Auffredou v Board of Trustees of Vil. of Cornwall-on-Hudson*, 123 AD3d 922, which addressed the status of a public officer upon the expiration of his or her term of office.

Auffredou alleged that he was improperly removed from the office of Village Treasurer of the Village of Cornwall-On-Hudson prior to the expiration of his statutory two-year term in violation of Public Officers Law §36, Stephen Auffredou filed a petition pursuant to Article 78 of the CPLR challenging the determination of Village of Cornwall-on-Hudson Mayor Brendan Coyne's approving the appointment of Jeanne Mahoney to the office of Village Treasurer. The Appellate Division held that Auffredou had not been removed from office prior to the expiration of his term but rather Mayor Coyne decided not to reappoint him after his term of office had expired and appointed Jeanne Mahoney to the position instead.

This action was consistent with §5 of the Public Officers Law which addresses holding over after expiration of term and which, in pertinent part, provides that "Every officer except a judicial officer, a notary public, a commissioner of deeds and an officer whose term is fixed by the constitution, having duly entered on the duties of his office, shall, unless the office shall terminate or be abolished, hold over and continue to discharge the duties of his office, after the expiration of the term for which he shall have been chosen, until his successor shall be chosen and qualified; but after the expiration of such term, the office shall be deemed vacant for the purpose of choosing his successor."

The court noted that Jennifer Brow had been appointed to the office of Village Treasurer in July 2009 to serve the remainder of a two-year term of office, which had commenced on April 6, 2009. Brown, however, resigned from her position prior to the expiration of her two-year term of office and on April 5, 2010, Auffredou was

appointed to the vacancy. As Brown's term had not expired, Auffredou's appointment was limited to the balance of Brown's unexpired term pursuant to Public Officers Law §38. This term expired prior to the challenged determination made on April 18, 2011.

Accordingly, the Appellate Division affirmed the Supreme Court's dismissal of Auffredou's petition, ruling that the challenged determination had a rational basis, and was not arbitrary, capricious, or contrary to law. The court explained that the Mayor's administrative determination was not made after a quasi-judicial evidentiary hearing and thus the standard to be applied was whether the determination was made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, or an abuse of discretion

Suspension without pay

Due process may not be required in certain situations regardless of the status of the employee. An individual may be suspended without pay if he or she becomes unable to lawfully perform the duties of the position because of a lack of, or the loss of, a required license or similar permit.

If an individual has lost the required license or permit, the courts have upheld the right of the employer to summarily place the employee on leave without pay without limitation. "Summarily" in this context means without preferring (issuing) formal charges and providing a due process hearing. Frequently, however, the employee is also charged with incompetence or misconduct, and disciplinary sanctions imposed.

Courts have viewed employees who lack licenses as being "unqualified," in contrast to being "incompetent," to perform the duties of the position. Indeed, it could be argued that the employer has no alternative but to suspend the individual as it could be considered unlawful to permit an unlicensed individual to perform the duties of the position for which a license or permit is required.

Common examples include the revocation of a truck driver's permit to operate a motor vehicle on public roads, loss of an attorney's license to practice law and the expiration of a temporary permit to teach.

All that appears to be necessary in such cases is for the appointing authority to make some reasonable inquiry to determine if the employee may lawfully perform the duties of the position. See, for example: *Fowler v City of Saratoga Springs*, 215 AD2d 819 (City Engineer lawfully dismissed for failure to obtain Professional Engineer's license by a specified date); *Meliti v Nyquist*, 385 NYS2d 407, 53 AD2d 951, affirmed 41 NY2d 183 (immediate suspension of teachers was lawful because their teaching licenses had expired); *O'Keefe v Niagara Mohawk Power Corp*, 714 FSupp 622, (traveling company demonstrator was not discriminated against when a private employer terminated him after his driver's license was suspended).

The appointing authority also has the option of reassigning the individual to a different position provided the individual is otherwise qualified and for which the triggering license or permit is not required.

Whether the individual is suspended or reassigned, care should be taken that the license is, in fact, essential to the duties of the position. See *Matter of Jerry*, 35 NY2d 534 [tenured employee may not be suspended without explicit statutory (or Taylor Law contract) authority] and *Matter of Martin ex rel Lekkas*, 86 AD2d 712 [if the license is not essential to the duties of the position, failure to have a valid license is not fatal to the employee's continuation in service].

Authority to discipline

From time to time, the key issue in a discipline case is whether a given administrator has the authority to impose discipline. In *Rine v City of Sherrill*, 152 Misc.2d 19, it was claimed that only the City Commission, consisting of five elected officials and the city manager, had the authority to remove an employee and authorize disciplinary actions.

Rine had been suspended and served with §75 disciplinary charges alleging certain off-duty misconduct. The city manager designated a hearing officer to conduct the required disciplinary hearing. Rine objected, claiming that the city manager is not empowered to initiate “removal proceedings.”

The city, on the other hand, contended that the Manager had the sole removal authority” and therefore had the power to initiate the hearing. The court agreed with the city. It concluded that although the Charter could have expressly provided that the commission had the exclusive power to remove police officers, it was silent as to such removal authority.

As viewed by the court, the city manager was the city’s chief administrative officer and thus has the power to exercise control over all departments of the city’s government. Accordingly, the Manager’s power of removal was consistent with the controlling provisions of City Charter.

Pending criminal matters

Sometimes an employer wishes to proceed with a disciplinary action at the same time as criminal charges are pending. Does this constitute “double jeopardy”?

Courts have ruled this is not double jeopardy. For example, in *Matter of the Haverstraw-Stony Point CSD*, 24 Ed. Dept. Rep. 466; the Commissioner of Education ruled that a §3020-a hearing panel is not required to adjourn an administrative disciplinary hearing when parallel criminal proceedings are underway.

Chaplin v NYC Department of Education, 48 AD3d 226, is another example. Here the Appellate Division said that an employee was not entitled to a stay of the disciplinary case as a criminal defendant does not have a right to stay a related disciplinary proceeding pending the outcome of trial, citing *Watson v City of Jamestown*, 27 AD3d 1183. Denial of such a stay does not adversely affect the employee’s constitutional rights.

The appointing authority has no obligation to postpone disciplinary action even if the county District Attorney requests administrative action be postponed. This was the point made by the court in *Levine v New York City Transit Authority*, 70 AD2d 900 (2nd Dept 1979), affirmed 49 NY2d 747 (1980)].

A similar conclusion was reached in OATH Index No. 503/14, a case that considered an application to stay or adjourn a disciplinary hearing.

A New York City firefighter’s application to stay or adjourn disciplinary hearing pending the outcome of a state court proceeding was denied by a New York City Office of Administrative Trials and Hearings [OATH]. Administrative Law Judge Faye Lewis explained that the existence of a pending civil action does not generally

provide a basis for a stay of an administrative disciplinary proceeding and the issues raised in the disciplinary proceeding were not preclusive of the issues raised in the Notice of Claim filed by respondent in state court.

In addition, the ALJ commented that the firefighter's application demanding that the employer produce witnesses and document was denied in large part because it was based upon the firefighter's defense of selective enforcement, which is not a proper defense in an administrative proceeding but can be asserted only upon judicial review of an adverse decision.

ALJ Lewis also denied the firefighter's motion to suppress statements made at investigatory interview on the ground that the questioning went beyond the scope of the interview notice. Judge Lewis noted that the firefighter was represented by counsel at the interview and it does not appear that his statements were made involuntarily. Further, noted the ALJ, "if the questioning violated [firefighter's] contract, the remedy would be to file a grievance, not suppression.

However, it is sometimes advantageous for the appointing authority to wait until the criminal matter has been adjudicated, because a criminal conviction compels an automatic finding of guilt in a disciplinary hearing involving the same offense. If an employee is found guilty in a court of law of a crime such as stealing, and disciplinary charges are filed related to that same incident of theft, there is no lawful way for a disciplinary hearing officer to find the employee not guilty of stealing.

Probably the leading case illustrating this point is *Kelly v. Levin*, 81 AD2d 1005. In *Kelly* the court ruled that is a reversible error for an administrative disciplinary body to acquit an employee if the individual has been found guilty of a criminal act involving the same allegations.

The reason this is true is that the standard of proof required in a criminal proceeding is greater than that in a disciplinary proceeding. In a criminal case, the standard is proof beyond a reasonable doubt; in an administrative disciplinary action the standard is merely "substantial evidence." See Section 3, Evidence, especially "Affect of criminal conviction or dismissal on disciplinary outcome."

If the appointing authority elects to pursue a disciplinary hearing at the same time criminal charges are pending, the employee's rights under the Fifth Amendment rights may be a concern.

The employee may not wish to testify in his own defense in the disciplinary hearing, fearing his statement could be used against him in the criminal proceeding. In *Forte v NYC Transit Authority*, 2 AD3d 489, a New York State Supreme Court Justice ruled it was improper for a hearing officer to find an employee of the Manhattan and Bronx Surface Transportation Authority guilty and recommend dismissal under such circumstances.

It is worth noting that employees who have not been charged with any disciplinary offenses may be compelled to answer investigatory questions or face discipline, regardless of any claims to Fifth Amendment rights, provided that he or she is granted immunity from use of his answer in a subsequent criminal proceeding or is not required to waive such immunity [See "Refusal to answer questions," 2.06].

Forte had been arrested for allegedly stealing four payroll checks and refused to present a defense in the disciplinary hearing on the advice of his lawyer, citing the Fifth Amendment.

The court was sympathetic to Forte. It said “a central guiding principle since our Nation’s birth is that the ultimate injustice to be ever guarded against is governmental injustice. Since the prosecuting agency and the hearing authority are one and the same, there is an obligation incumbent upon the court to insure that the governmental authority has not abused its power and stripped petitioner of the civil remedy to which he was entitled.”

Manhattan & Bronx Surface Transportation Authority was ordered to conduct a two-part hearing and determine, as a threshold matter, whether Forte would have had to rely on his own testimony to refute the charges. If it was determined that Forte’s testimony was necessary, then by invoking his Fifth Amendment privilege, Forte did not receive the hearing to which he was entitled and MaBSTOA would have to conduct a new hearing.

According to the ruling, employees of MaBSTOA do not have civil service status. The court found that Forte enjoyed the rights and benefits incorporated in the provisions of MaBSTOA’s Managerial Disciplinary Policy and Procedure.

This “Policy and Procedure” provide, in pertinent part, that “prior to discharge an employee will receive written notice of charges, reason for discharge, and a statement that the employee may respond in writing or in person within two weeks, requesting an informal hearing with his/her immediate superior. When any aspect of the authority’s operation is jeopardized by the continued presence of a pre-discharged employee, that person may be immediately suspended without pay pending final determination. After having an informal hearing, the charged employee will receive written notification of the hearing disposition.”

Double jeopardy

If an employee is acquitted in a criminal case, that does not prevent the employer from proceeding with a disciplinary action because the standard of proof is different. (See Evidence). The very same facts and witnesses might prompt a verdict of not guilty from a reasonable jury yet bring a determination of guilty by a hearing officer.

A case that illustrated this was Police Comm., City of New York, [Not selected for publication in the Official Reports]. A police officer [DB] was indicted for perjury in connection with her testimony before a grand jury.

A few days after this indictment was returned by a grand jury, DB was served with disciplinary charges that alleged that she committed perjury during the same grand jury hearing in violation of police rules and procedures. Although DB was acquitted of the criminal action, the department proceeded with the administrative disciplinary action.

In considering the department’s proceeding with the disciplinary action, the court said, “It is true that DB was acquitted after trial on the criminal charge of perjury in the first degree.

Of course, she is entitled to the benefits of this adjudication. However, termination of a criminal case in a manner favorable to a defendant presents no bar to the continuation of a collateral civil service disciplinary proceeding.”

The court said that its view was based on the fact that “the standard of proof [substantial evidence] that must be met to sustain a charge at a disciplinary hearing, where the ultimate penalty could be the loss of employment, is not as rigorous as the standard of proof applicable to the trial of a criminal case [beyond a reasonable doubt], where the ultimate penalty could be the loss of liberty.”

Civil rights

Public employers in New York State should be vigilant that they do not violate employees’ civil rights while pursuing disciplinary action. Civil rights issues are not uncommon in discipline cases.

In one sheriff’s department, the employees’ manual contained a rule prohibiting employees from engaging in a “relationship with any inmate, former inmate, [or] parolee ... in any manner or form that is not necessary or proper for the discharge of the employee’s duties.” Any such conduct was to be reported to the department.

Vega, a corrections officer, was brought up on disciplinary charges alleging that she had engaged in “covert and unauthorized conduct in developing and maintaining an apparent close relationship with an inmate and parolee.” The charges noted that Vega was married to the parolee.

Found guilty of the charges, Vega was dismissed from her position. She sued the department contending that her dismissal was arbitrary and capricious and in violation of Executive Law §§291 and 296 which prohibits discrimination against an employee because of marital status.

The Appellate Division affirmed a lower court’s ruling dismissing the case. It said that although the marriage between Vega and the parolee was noted in the disciplinary charges, the basis for her termination was her violation of the rule prohibiting department employees from fraternizing with inmates, former inmates or parolees. Accordingly, Vega’s discipline and ultimate termination was not based on her marriage itself [Vega v Dept. of Correctional Services, 186 A.D.2d 340].

Other “fraternization” related decisions include *Hastings v City of Sherrill*, 90 AD3d 1586, [Police chief was found guilty of associating with a person suspected of “illegal activities” – his 29-year-old son]; *Brinson v Safir*, 255 AD2d 247, leave to appeal denied 93 NY2d 805, in which the Appellate Division sustained the termination of a New York City police officer found guilty of “knowingly and wrongfully associat[ing] with persons know to be engaged in criminal activity” and *Richardson v Safir*, 258 AD2d 328, in which the Appellate Division upheld the dismissal of a New York City police officer based on a determination that Richardson “knowingly associated with a person he reasonably believed was engaged in criminal activity.”

First Amendment rights

A number of public employers have policies in place that require an employee to use an internal grievance procedure before the employee can bring a matter to the attention of the public or other, non-department, public officials. Does such a policy violate the employee’s First Amendment rights?

In *Sanchez v Santa Ana*, 915 F2d 424, a U.S. Circuit Court of Appeals decided that such a procedure did not violate an individual’s right to free speech “given the employer’s interest in protecting itself from false and

unfavorable publicity.” Sanchez was a police officer; the agency involved was the Santa Ana Police Department.

In contrast, *Santer v Board of Educ. of E. Meadow Union Free Sch. Dist.*, 101 AD3d 1026, Appellate Division, Second Department, the court ruled that the employer must show that employee's legal speech threatened the effective operation of the employer to prevail in a disciplinary action taken against the employee.

The genesis of the disciplinary action taken against a union official was a series concerted actions by teachers during collective bargaining negotiations that included weekly picketing in front of a school when students were being dropped off. On a day when it was raining, some of the teachers parked their cars along nearby street and display their signs in their car windows. The street was one of several locations where parents would drop off their children.

The charges filed against the union president included the allegation that his activities “resulted in children being dropped off in the middle of the street which resulted in an otherwise avoidable and unnecessary health and safety hazard.” According to the school principal, the parking activity caused traffic to become extremely congested, and some children were dropped off in the street and had to cross traffic lanes to reach the sidewalk. However, no school official asked the teachers to move their cars during the protest, and no child was injured.

In the course of the disciplinary arbitration hearing, the union president contended that he had a constitutionally protected right to peacefully picket in a public area before the beginning of the school day. The arbitrator rejected this argument, found the president guilty of the charge of creating a health and safety hazard and directed that he pay a \$500 fine.

The Appellate Division, noting that an arbitration award must be rational and not arbitrary and capricious, said that the evidence that children were dropped off in the middle of the street due to the arrangement of the cars provided a rational basis for the arbitrator's determination that the president contributed to the creation of a health and safety hazard, and the award was not arbitrary and capricious.

However, the Appellate Division also considered the president's claim that that the disciplinary proceeding commenced against him, and the discipline ultimately imposed, violated his right to free speech under the First Amendment to the United States Constitution, explaining that courts “must balance free-speech principles against the threat to effective government operation presented by that speech.” Further, said the court, the government employer bears the burden of showing that the disciplinary action taken against the employee was justified.

The union president's "speech" regarding collective bargaining issues indisputably addressed matters of public concern and “despite the evidence establishing that the manner in which the protest was carried out interfered with the safe and effective drop-off of students,” the Appellate Division found that the School District failed to meet its burden of demonstrating that the union president's exercise of his First Amendment rights so threatened the school's effective operation as to justify the imposition of discipline.

The president, said the court, “fully complied with the applicable parking regulation” and were the municipality of the view that it was unsafe for cars to park along the street in question during the time when parents dropped off their children at the school, “it could have prohibited parking during the relevant time periods, but it did not

do so." Further, said the Appellate Division, "no school official asked the teachers to move their cars during the protest, and no student was injured as a result of the protest."

As the record established that the danger presented by the legally parking teachers could not have been substantial, the Appellate Division concluded that under these circumstances the District failed to demonstrate that union president's legal speech so threatened the effective operation of the school that discipline of him was justified.

Freedom of information

Another issue is freedom of information in disciplinary actions. The release of information related to a disciplinary proceeding is a concern to both employers and employees.

While an employee who has been served with disciplinary charges may decide to make such action public, the employer is generally reluctant to disclose the fact that it has served disciplinary charges against an employee and to provide the public or the press with the reasons for its undertaking such action.

When a newspaper learned that a city firefighter had been suspended, it asked the city for information concerning any disciplinary action being taken against the individual. The city refused to provide any information concerning any pending disciplinary action and, in addition, it refused to give the newspaper access to any city records concerning the matter. The city told the newspaper that the records it wished to obtain "constitute personnel records used to evaluate performance" and cited §50-a of the Civil Rights Law and §87(2-a) of the Public Officer Law as authority for rejecting the newspaper's request.

The newspaper sued the city claiming it had violated the freedom of information Law [Rome Sentinel Company v City of Rome, 145 Misc.2d 183]. The city resisted, arguing (1) the Sentinel was not entitled to documents concerning the suspension of a municipal employee; (2) the employee had a right to privacy that the city had an obligation to protect; and (3) the Sentinel failed to show that the records it sought "are clearly of significant interest to the general public."

The court held that the Freedom of Information Law establishes "specific, narrowly construed instances where disclosure will not be ordered." For example, an agency may deny access to records which are inter-agency or intra-agency materials and which are not final agency determinations. The court said that "under this exemption, the Sentinel would not be entitled to accusations or complaints of misconduct against the fireman; however it would be entitled to the final agency determination concerning his suspension, unless that determination is further protected by §50-a of the Civil Rights Law as a fireman's personnel records which are used to evaluate his performance."

The court also said that in balancing the privacy rights of the employee against the public's right to know and considering the decisions in *Capital Newspapers v Burns*, 67 NY2d 562 and *Gannett Co., Inc. v James*, 86 AD2d 567, it found that the newspaper was "entitled to disclosure of the final determination in this fireman's suspension hearing, without disclosing all the supporting allegations, complaints or witness names."

The confidentiality of disciplinary records was one of the issues in the Sangirardi case [Sangirardi v Nassau County, NYS Sup. Ct., Justice Alpert, 7/1/02, Not selected for publication in the Official Reports]. In deciding

the Sangirardi case, Supreme Court, Nassau County, considered the right of a student complainant to see the “Final Results” of a college disciplinary hearing held following her filing her complaint.

A Nassau County Community College women’s basketball team member alleged that she had been sexually assaulted by members of the college’s men’s basketball team. She asked for audiotapes, videotapes and transcripts of the disciplinary proceeding conducted by the college. The college declined to provide her with these materials, claiming that the federal Family Educational Rights and Privacy Act, 20 USC 1232g, frequently referred to as the Buckley Amendment, although allowing students and parents access to “education records,” prohibits their dissemination to the public.

Justice Alpert agreed in part, ruling that the student complainant was entitled to a copy of the “final results” of the disciplinary proceedings. Justice Alpert noted that the Buckley Amendment authorizes the disclosure of disciplinary records to teachers and school officials and of the “final results” of any disciplinary proceeding to an alleged victim.

Suppose a disciplinary action is “settled” and the parties agree to keep the terms of a disciplinary settlement confidential. Is such an agreement a defense to a demand to disclose the terms of the disciplinary settlement?

Reading the Sangirardi decision together with the ruling in *LaRocca v Jericho UFSD*, 220 AD2d 424, it appears that there is neither a federal nor a state shield to honoring such a confidentiality agreement.

In *LaRocca*, the School District had filed disciplinary charges against the principal of one of its schools. Subsequently the Jericho School Board authorized its superintendent to negotiate a settlement that would dispose of the matter. A settlement was reached and the Board adopted a motion withdrawing its charges against the principal without prejudice.

Anthony LaRocca, vice-president of the Jericho Teachers Association, asked for a copy of the settlement agreement on behalf of the teachers supervised by the principal. LaRocca’s request was denied on the grounds that (a) providing the teachers with a copy “would constitute an unwarranted invasion of personal privacy” and (b) the document relates to “intra-agency or inter-agency materials which the School District is not required to disclose.”

LaRocca then sued under the Freedom of Information Law [FOIL] (Article 6, Public Officers Law), contending that all records of a public agency are “presumptively accessible” and the settlement agreement did not fall within any of the recognized exceptions set out in FOIL.

Although a Supreme Court justice dismissed LaRocca’s petition [*LaRocca v Jericho UFSD*, 159 Misc.2d 90], the Appellate Division reversed, ruling that the settlement agreement did not constitute an “employment history” as defined by FOIL and therefore is presumptively available for public inspection.

Significantly, the Appellate Division said that “as a matter of public policy, the Board of Education cannot bargain away the public’s right to access to public records.” The court ruled that the settlement agreement or any part of it providing for confidentiality or purporting to deny the public access to the document “is unenforceable as against the public interest.” However, where a settlement agreement provided that the parties would keep its terms “confidential,” its subsequent disclosure pursuant to FOIL does not excuse a party

breaching other terms and conditions unrelated to such disclosure set out in the agreement [Gosden v Elmira City School District, 90 AD3d 1202].

Moreover, the decision indicates that a public employer may not, by private agreement, limit the public's right to access to records which are otherwise subject to disclosure under FOIL, citing *Anonymous v Board of Education of the Mexico Central School District*, 62 Misc 2d 300. In Mexico the court said that an agreement to keep secret that to which public has a right of access under FOIL unenforceable as against public policy.

There may be some aspect of a disciplinary settlement confidentiality agreement that is enforceable, however. In *LaRocca*, the settlement agreement contained references to charges that the principal denied or were not admitted, together with the names of certain teachers. The Appellate Division ruled that disclosure of such parts of the settlement agreement would constitute an unwarranted invasion of privacy within the meaning of FOIL. The Court said that the settlement agreement must be redacted [censored] to eliminate such references -- i.e., the disputed charges and the names of the teachers -- prior to its release to *LaRocca*.

However one member of the Appellate Division panel reviewing the appeal rejected the concept of providing for confidentiality in such cases. Judge O'Brien said that in his view, "Although disclosure of the charges might cause some embarrassment, that is an insufficient basis under FOIL to deny disclosure."

With respect to the availability of public documents pursuant to FOIL, it is well settled that FOIL imposes a broad duty of disclosure on government agencies as noted by the Court of Appeals in *Fink v Lefkowitz*, 47 NY2d 567.

The general rule: All agency records are presumptively available for public inspection and copying, unless they fall within 1 or more of 10 categories of exemptions, which, as a matter of the exercise of discretion, permit agencies to withhold certain records.

In other words, the fact that certain records may properly be viewed as falling into an "exemption" category does not mean that the record may not be disclosed pursuant to a FOIL inquiry. The statute merely permits the agency to elect to withhold disclosing an "exempt" document or record.

The Court of Appeals has repeatedly stated that FOIL is to be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.

Expressly exempted from mandatory disclosure are records that "if disclosed would constitute an unwarranted invasion of ... privacy" (Public Officers Law §87[2][b]), including but not limited to "disclosure of employment, medical or credit histories or personal references of applicants for employment." Although it is clear that a record is not considered an "employment history" merely because it records facts concerning employment, the term "employment history" for purposes of FOIL exemptions is not defined in the statute, nor well interpreted by case law.

However, as the court said in *Hanig v State of New York Dept. of Motor Vehicles*, 168 AD2d 884, aff'd 79 NY2d 106, its companion term "medical history" has been defined as "information that one would reasonably expect to be included as a relevant and material part of a proper medical history." By this the court presumably meant that term "employment history" means that "information" that one would reasonably expect to be included as a relevant and material part of a proper personnel record system.

Another element to consider: the courts had held that a payment made to an individual as part of a disciplinary settlement is not to be viewed as the payment of “annual salary.”

In *Horowitz v NYS Teachers’ Retirement System*, 293 AD2d 861, the issue concerned the impact of making a lump-sum payment to an employee as an inducement to his or her submitting a resignation in lieu of being served with disciplinary charges in determining his or her final average salary for retirement purposes.

In July 1988, the Jericho Union Free School District offered Marc W. Horowitz the opportunity to resign from his administrative position in lieu of his being served with disciplinary charges. As part of the settlement negotiations related to Horowitz’s separation, Horowitz was to receive a lump-sum payment of \$123,789 consistent with a benefit set out in a then expired agreement between the District and the Jericho Administrators Association entitled the “Resignation-Retirement Incentive Benefit Program.”

The Teachers’ Retirement System [TRS] refused to include the \$123,789 lump-sum payment to Horowitz as part of his “final average salary” [FAS] for the purpose of determining his retirement allowance. TRS viewed the payment “as an inducement for [Horowitz’s] immediate resignation” rather than “compensation for accumulated sick time” as claimed by Horowitz.

Horowitz sued, but the Appellate Division, Third Department, sustained the Supreme Court dismissal of Horowitz’s petition. Citing §501.11(a) of the Education Law, the Appellate Division said an individual’s FAS is defined as “the average annual compensation earnable as a teacher during any five consecutive years of state service.”

Noting the lesson in *Moraghan v New York State Teachers’ Retirement System*, 237 AD2d 703, the court said that the purpose of the statute is to prevent artificial inflation of an individual’s final average salary by payments made in anticipation of a member’s resignation.

Accordingly, the Appellate Division held that “a lump-sum payment may be excluded from the calculation of a teacher’s five-year final average salary where the circumstances support the conclusion that the payment was made in exchange for resignation rather than in satisfaction of accumulated sick leave”, citing *Hall v New York State Teachers’ Retirement System*, 266 AD2d 638, [leave to appeal denied, 94 NY2d 759].

Although §5003.2 of the Rules of the Commissioner, [21 NYCRR 5003.2 (b)], provide that “termination pay” is includable computation if it constitutes compensation earned as a teacher,” the Appellate Division ruled that 21 NYCRR 5003.2 did not apply in Horowitz’s case.

Why not? Because, said the court, the timing of Horowitz’s resignation rendered him ineligible for the lump-sum payment provided by the then expired collective bargaining agreement between the District and the Association. This apparently resulted in the District and the Association entering “into a separate agreement designed to facilitate [Horowitz’s] resignation.”

According to the decision, the so-called “Horowitz Incentive Agreement” provided Horowitz with the same financial benefit that the expired collective bargaining agreement provided to eligible retirees for accumulated sick leave. However, the Horowitz Incentive Agreement described its benefit as “a pay differential equal to one year’s salary” rather than the payment of accumulated sick leave credit and Horowitz’s resignation was specifically conditioned on the receipt of this payment.

Other distinctive elements noted by the Appellate Division: The Horowitz Incentive Agreement was executed on the same day as the stipulation, provided a benefit for which Horowitz was the only recipient and required Horowitz to act within two business days in order to obtain its benefit.

The Appellate Division ruled that the language and circumstances of the agreements involved here rationally support TRS' findings that the Horowitz Incentive Agreement was tailored to Horowitz's particular situation and was created "solely to induce his resignation." Under these circumstances, said the Appellate Division, Supreme Court did not err in upholding TRS' determination and dismissing Horowitz's petition.

However, the fact that the amount paid to the employee in connection with a disciplinary settlement was not deemed wages for the purposes of calculating the employee's FAS for retirement should not be viewed as suggesting that such the payment is not subject to withholdings for income tax and other purposes.

Public hearings

May the public be barred from an administrative disciplinary proceeding? The access of the public to a professional disciplinary proceedings held pursuant to the Education Law was considered in *Johnson Newspaper Corporation v Melino*, 151 A.D.2d 214. While the *Johnson Newspaper* case concerned disciplinary proceedings involving a dentist held pursuant to §6510(3) of the Education Law, the decision is instructive with respect to the access of the public to disciplinary proceedings.

The *Johnson Newspaper* case arose as the result of the State Education Department's Office of Professional Discipline's [OPD] refusal to allow a newspaper reporter to attend the disciplinary hearing. OPD advised the newspaper that such hearings were closed to the public. It indicated that it was the Regent's policy to close all such disciplinary hearings to the public unless "all present agree to public access ... which protects the public good and reduces the potential for irreparable harm to a professional reputation by unfounded accusations."

The *Johnson Newspaper* decision considered the applicability of "the State's strong public policy of public access to judicial and administrative proceedings" to a disciplinary proceeding under §6510(3) of the Education Law. The Appellate Division concluded that there exists "a countervailing presumption of confidentiality with respect to disciplinary proceedings" and "the closure of professional disciplinary proceedings does not violate [Johnson Newspaper's] First Amendment access to government."

This ruling provides some authority to support a decision to deny the public access to a disciplinary proceeding when both parties agree to do so. However, this does not imply that the public is to be denied access to disciplinary proceedings automatically. The opinion also notes that in *Matter of Capoccia*, 59 NY2d 549, a case involving disciplinary action taken against a lawyer, "the confidentiality of lawyer disciplinary proceedings might be waived." The court had concluded that the *Capoccia* ruling "inferentially accepts the confidentiality of professional disciplinary proceedings as to attorneys notwithstanding a similar lack of specific reference to closed hearings in ... [§90(10) of the Judiciary Law]."

However, this does not appear to be the case when the employer wishes to have the disciplinary proceedings closed to the public while the accused employee favors an open hearing.

For example, in *Randall v Toll*, 74 Misc.2d 315, the court held that a disciplinary action taken against an employee pursuant to §75 of the Civil Service Law could not be closed to the public unless the accused employee agrees or requests that the proceedings be held privately.

Here the employer had decided to close the disciplinary proceedings to the public over Randall's objections. The employer attempted to justify its action by claiming that it was trying to protect Randall's privacy. As noted in the *Capoccia* decision, any such right to "privacy" may be waived by the accused.

The hearing officer ultimately acquitted Randall of all charges and specifications.

In contrast, if the employer wants to have the disciplinary hearing opened to the public and the employee objects, insisting that the hearings be conducted in private, it probably would be best for the employer to agree to close the hearing for the reasons given to support the Regent's policy concerning public access to professional disciplinary hearings.

Where, however, the public's access to a disciplinary proceeding has been limited, or provided for, by an agreement negotiated under the Taylor Law, any deviation from the requirements of the contract should be agreed to by the employer and the union.

Rules promulgated by the Commissioner of Education implementing the recently amended disciplinary procedures for educators [See §3020-a, Education Law], provide that disciplinary hearings are closed to the public unless the accused employee elects an open hearing. However, there appears to be no authority in §3020-a justifying the "automatic closure" of a disciplinary hearing.

Disciplinary action based on pre-employment misconduct

In deciding *Umlauf v Safir*, 286 AD2d 267, the Appellate Division considered a rather unique question: what action, if any, may the appointing officer take in consideration of an employee's "pre-employment" misconduct.

Clearly an employee may be subjected to disciplinary action for his or her off-duty misconduct that adversely affects his or her employer.

If the employee is found guilty, any one of a number of penalties, including termination, may be imposed. May "pre-employment misconduct" serve as the basis for bringing disciplinary action against an employee?

Arthur K. Umlauf sued the City of New York following the Police Commissioner's dismissing him from his position without a hearing. Although Umlauf's petition seeking to annul the Commissioner's action was dismissed by State Supreme Court Justice William Davis, the Appellate Division reversed Justice Davis' decision "on the law."

The Appellate Division ordered Commissioner Safir to reinstate Umlauf to his former position. If the Commissioner wished have Umlauf terminated, said the court, Safir would have to submit a request for such action in accordance with the provisions of Civil Service Law §50.4.

§50.4 provides for the disqualification of applicants or eligibles by the state civil department or responsible municipal civil service commission for a variety of reasons. The court's decision indicates that the relevant provision in this case is §50.4(d). Paragraph (d) authorizes the disqualification of an individual who has been guilty of a crime.

§50.4 further provides that "[n]o person shall be disqualified pursuant to this subdivision unless he [or she] has been given a written statement of the reasons therefore and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification."

The court found that Safir had terminated Umlauf because of Umlauf's pre-employment conduct. This, said the Appellate Division, was improper -- an appointing authority does not have the authority to take such unilateral action. The court pointed out that in this instance §50.4 of the Civil Service Law vests the authority to disqualify or remove the individual in the head of New York City's Department of Citywide Administrative Services, not the head of a City department or agency.

Further, the individual may neither be disqualified nor terminated, as the case may be, unless he or she is provided with a written explanation of the reasons for the proposed action and given an opportunity to submit an explanation and facts opposing such action prior to his or her disqualification for, or termination of, employment.

Another element in Umlauf, Umlauf had also claimed that he was entitled to a name-clearing hearing. The Appellate Division, citing *Swinton v Safir*, 93 NY2d 758, agreed.

The court said that Umlauf "has sufficiently raised the issues of the partial falsity and overall characterization of information included in his personnel file, the dissemination of such information, both past and future, as well as the presence of 'stigma plus' -- in this case governmental defamatory action in conjunction with loss of employment."

Where the appointing authority seeks to have an individual disqualified or employee terminated for one or more reasons set out in §50.4, it should so advise the State Department of Civil Service or the responsible municipal civil service commission, as the case may be, setting out its reasons for seeking the disqualification or termination of the individual.

Is the individual who is to be disqualified or terminated pursuant to §50.4 entitled to a hearing before the department or municipal commission?

In *Mingo v Pirnie*, 55 NY2d 1019, the Court of Appeals ruled that no "§50.4 hearing" is required where the individual is advised of the reasons for the proposed action and given an opportunity to submit a written explanation and exhibits contesting his or her disqualification or termination. Citing *Mingo*, in *Attard v Kampe*, 95 AD3d 1005, the Appellate Division ruled that "Contrary to the petitioner's contention, her status as a permanent appointee in the competitive class of the classified civil service did not entitle her to a mandatory pretermination hearing under Civil Service Law §75(1)(a), where the Nassau County Civil Service Commission relied upon Civil Service Law §50(4) in revoking her payroll certification and directing the termination of her employment."

In Mingo a county civil service commission disqualified an employee following his permanent appointment and removed him from his position with the village pursuant to §50.4 of the Civil Service Law. The Commission had determined that the individual had “intentionally made false statements of material facts in his application or (had) attempted to practice (a) deception or fraud in his application”.

The employee sued, contending that the commission could not disqualify him for employment in the position without first providing him with a pre-termination hearing.

The Court of Appeals rejected this argument, stating that §50.4 “requires no more than that the person be given a written statement of the reasons [for his or her disqualification for employment] and afforded an opportunity to make explanation and to submit facts in opposition to such disqualification. No hearing is required.”

The Commission had found that the employee had falsified his application with respect to his experience and had concealed relevant facts related to his separation from previous employment.

Retirement to avoid disciplinary action

A Los Angeles Unified School District teacher arrested and accused of sexually abusing students retired from his position before administrative disciplinary action had been initiated by the school district. School District Superintendent John Deasy when asked what action the school district planned to take responded “Can you go back and fire someone who’s already retired?”

An appointing authority of a New York State or political subdivision of the State is able to do just that insofar as certain employees are concerned.

For example, 4 NYCRR 5.3(b), which applies to employees of the State as the employer, in pertinent part, provides that, Resignation, provides: that “... when charges of incompetency or misconduct have been or are about to be filed against an employee, the appointing authority may elect to disregard a resignation filed by such employee and to prosecute such charges and, in the event that such employee is found guilty of such charges and dismissed from the service, his termination shall be recorded as a dismissal rather than as a resignation.” Many local civil service commissions and personnel officers have promulgated rules similar to 4 NYCRR 5.3(b).

Further, State Education Law §1133.1 provides that “[a] school administrator or superintendent shall not make any agreement to withhold from law enforcement authorities, the superintendent or the commissioner, where appropriate, the fact that an allegation of child abuse in an educational setting on the part of any employee or volunteer as required by [Article 23-B of the Education Law] in return for the resignation or voluntary suspension from his or her position of such person, against whom the allegation is made.

Presumably the appointing authority could elect to disregard a “retirement” under similar circumstances [See *Mari v Safir*, 291 AD2d 298, leave to appeal denied, 98 NY2d 61].

In the case of an individual serving in a position in the classified service not otherwise entitled to a pre-termination disciplinary hearing pursuant to law or a collective bargaining agreement, the appointing authority presumably could elect to disregard the resignation, schedule a disciplinary hearing in the exercise of its

discretion and in the event the individual is found guilty of the charge[s], record the separation as a “termination for cause” rather than as a resignation.

Undertaking such a disciplinary action could be significant with respect to employment in the public service in the future as application forms for employment or examination with the State or a political subdivision of the State typically include the following questions.

1. Were you ever discharged from any employment except for lack of work for funds, disability or medical condition? [] yes [] no

2. Did you ever resign from any employment rather than face discharge? [] yes [] no

Failing to answer these questions correctly could result in the applicant being disqualified for such employment pursuant to §50.4(e), and, or (f) and, or (g) of the Civil Service Law by the responsible Civil Service Commission or Personnel Officer.

In a similar vein, may the appointing authority delay the processing of an employee’s application for retirement and deny the individual “retiree benefits” because of the employee’s alleged misconduct This was an issue in *Union Endicott Cent. Sch. Dist. v Endicott Teachers' Assn.*, 39 Misc.3d 1231(A) [Not selected for publication in the Official Reports.]

State Supreme Court Judge Ferris D. Lebous’ decision in this action considered issues raised by the union on behalf of a retired teacher concerning the school district’s delay in processing her application for retirement benefits and her eligibility for retiree health insurance under a Collective Bargaining Agreement. The events leading to this proceeding were summarized by the court as follows:

A teacher for the Union-Endicott Central School District became “a person of interest” in an investigation involving stolen school property. The teacher, however, submitted her resignation before the investigation was completed. Although the resignation indicated that the teacher intended to resign and retire at the end of the academic year, the Board of Education decided to delay the processing of the teacher’s application for retirement pending determinations on certain criminal charges and disciplinary charges.

The Association filed grievances challenging the Board of Education's decision to delay the processing of the teacher’s retirement application ("Grievance No.1") and its denial of the teacher’s retiree health insurance benefits ("Grievance No.2"). Judge Lebous stayed the arbitration of Grievance #1 as “not arbitrable,” but ordered the arbitration of Grievance #2, (*Union Endicott Cent. School Dist. v Endicott Teachers' Assn.*, 25 Misc 3d 1210 [A]).

The Appellate Division affirmed the court's ruling that arbitration could not be compelled with respect to Grievance # 1 but that Grievance #2, the grievance challenging the denial of the teacher’s health insurance benefits upon retirement, was arbitrable.

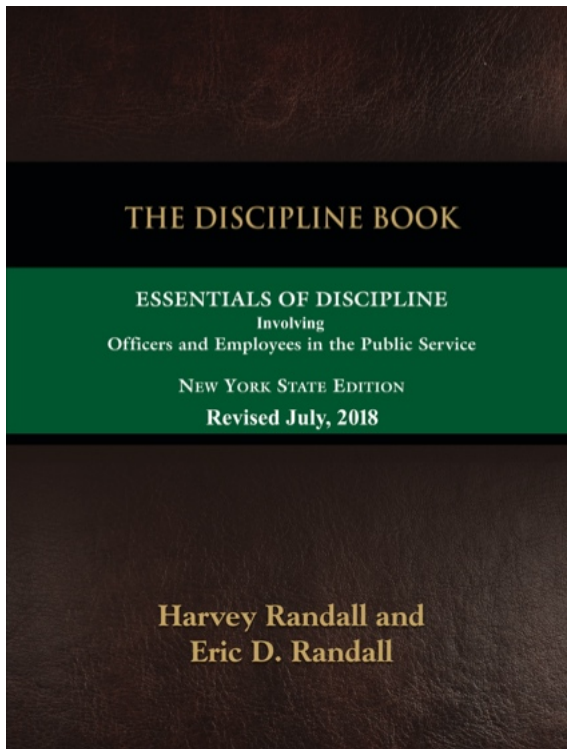
Ultimately, the arbitration hearings on the issue of the teacher’s eligibility for health insurance benefits upon retirement were conducted and arbitrator Louis Patack issued an Opinion and Award in favor of the teacher. The school district then filed a petition pursuant to CPLR Article 75 seeking a court order vacating the arbitrator’s award.

As described by the court, “The School District's primary argument in support of its petition is that the arbitrator failed to consider the issue of [the teacher’s] misconduct” in terms of “the faithless servant doctrine,” contending that the Appellate Division had “instructed” the consideration of that issue. The School District claimed that this failure on the part of the arbitrator constituted “misconduct in rendering his award and constitutes a ground for vacating the same under CPLR §7511 (b) (1) (i) and (iii).”

Noting that the Appellate Division “... did not mandate that the arbitrator apply the doctrine but merely stated that ‘[t]he issue of the effect, if any, of [the teacher’s] alleged misconduct on her entitlement to benefits goes to the merits of her grievance, not to its arbitrability,’” Further, Judge Lebus rejected the School District's representation that the arbitrator failed to consider or address the faithless servant doctrine. Rather, said the court, the record “clearly reflects that the arbitrator did consider whether the doctrine applied under the CBA and held that it did not.”

In addition the court commented that “as outlined by the Association,” the parties had entered into a stipulation at the arbitration hearing that the School District would offer evidence of [the teacher’s] alleged misconduct only if the arbitrator determined that the doctrine applied and because he did not so rule no such evidence was accepted.

Accordingly, the court denied the school district’s petition to vacate or modify the arbitration award and, in addition, denied its application for a stay of enforcement and implementation of the arbitration award.



The Discipline Book is a handbook for administrators, union officials and attorneys involved in disciplinary actions taken against public officers and employees employed by New York State and its political subdivisions under the State's Civil Service Law, the Education Law and disciplinary grievance procedures negotiated pursuant to the Taylor Law.

The Discipline Book is also a valuable resource for those involved in disciplinary actions taken against public officers and employees serving in other States.

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