Layoff, Preferred Lists and Reinstatement

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

by

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Revised Edition - 2014

This 2014 edition of Layoff, Preferred Lists and Reinstatement provides a concise guide to the laws, rules and regulations, and selected court and administrative decisions, applicable to New York State as an employer and its political subdivisions, municipalities and school districts.

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Table of Contents

....iv

Topical Index..iv

Introduction..1

Additional Relevant Decisions..322

Decisions of the Commissioner of Education 333

[Selected Decisions posted on the Department of Education Web Site]..333
Concerning Education Law §2510..333
Decision No. 15,007..440
Decision No. 15,007..492
Concerning Education Law §2585..499
James R. Sandner, Esq., attorney for petitioner, Mitchell H. Rubenstein, Esq., of counsel............510

Respondent Sherman has been served with all pleadings, affidavits and briefs in this proceeding. However, she has not filed an answer or otherwise appeared. I also note that, pursuant to §276.5 of the Commissioner's regulations, I have accepted and considered all of the additional pleadings, affidavits and exhibits submitted by the parties..512
Concerning Education Law §3013..517
James R. Sandner, Esq., attorney for petitioner, Mitchell H. Rubenstein, Esq., of counsel............568

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Decision No. 15,007..606

Appendix

A Summary of the Relevant Statutes and Rules and

Regulations Concerning

Layoffs and Preferred Lists
For the Classified Service....613
Summary of Layoff Provisions....613
Civil Service Law....618
....649
....650
Education Law....650
Military Law....660
Retirement and Social Security Law....679
Selected Rules and Regulations....684

General Index....703

Table of Decisions....708

Topical Index

Abolishing departments and agencies
Abolishment of positions
Adjusting teaching schedules
Accruing seniority rights in an administrative and teacher tenure area simultaneously
Administrative policy
Affirmative action in layoff, employment distinguished
Affirmative action yields to seniority
Age discrimination and layoff
All layoff rights in BOCES takeover situation
Annual appointments
Appointing authority -- individual's name on the preferred list
Appointment from preferred lists
Arbitrator -- layoff seniority determination
Asserting rights not covered by contract
Board's decision to abolish teaching position
BOCES layoff policy
Breaking seniority ties
Certification of preferred list for appointment to similar positions
Challenging the abolishment of positions

Challenging the reorganization of an organization
Change from full-time to part-time employment
Collective bargaining agreement - provisional employees
Competing union interests
Computation of seniority
Consolidations of the duties of position
Contracting out for services
Correcting an error in a preferred list
Counting substitute service for purposes of seniority
County legislature -- action required before layoffs
Court rules - BOCES staff layoff rights
Crediting prior service for seniority
Defining seniority
Demotion as a disciplinary penalty and preferred list
Deputy sheriffs – layoff rights
Determination of layoff units
Determining of seniority
Different titles - for purposes of layoff
Disability related tardiness
Disciplinary action and layoff
Disciplinary probation
Discipline to proceed regardless of layoff
Discriminatory effect of seniority system
Dismissal of a provisional
Disparate impact
Displacement and layoff
Duty of fair representation
Early retirement incentives
Eligibility - preferred list for appointment to new position
Employees' rights upon the take-over of a BOCES program
Employment of retirees
Enforcing statutory rights
Entitlement to appointment from a preferred list
Extending the probationary period
Family and Medical Leave Act
Fifty percent test
Granting seniority to transferred employee
Guidelines – adopted by an appointing authority
Internal Revenue Service Ruling 92-69
Lay off - bad faith issues
Lay off - bumping rights
Layoff - determination of seniority
Layoff - reinstatement to similar positions
Layoff and age discrimination
Layoff and displacement
Layoff and reinstatement

Layoff and reinstatement of individuals holding "parenthetic titles"
Layoff and tenure area
Layoff and the Taylor Law
Layoff extends probationary period
Layoff guides may be changing
Layoff procedure to meet affirmative action
Layoff provisions given literal interpretation
Layoff provisions of the civil service law override contract
Layoff rights
Layoff rights of a teacher granted tenure in an unauthorized tenure area
Layoff rights upon displacement - retirement
Layoff rules, seniority claims and reemployment roster
Layoff, based on seniority
Layoff, displacement and retreat
Layoffs and preferred lists
Legislative equivalency
Line of promotion
Liquidation of vacation pay upon separation
Litigating the impact of a layoff
Meetings open to the public
Military service - qualifying veteran status
Necessary parties to an appeal must be named and served
Non-resident veterans to get layoff preference benefits
Notice of a layoff
Ordering a hiring freeze
Part-time employment
Part-time service and seniority
Payment for unused leave credits
Placement of an educator on a preferred list requires "faithful, competent service" in the position
Placement on, and appointment from, a preferred list
Positions to be abolished determined by the employer
Power to freeze appoints to vacant positions
Preferred list determination
Preferred list rights
Preferred list - used for appointment to similar positions
Preliminary injunction barring layoff
Probationary employee to be placed on preferred list
Probationer - §3019-a and §3031 notice in layoff situations
Probationer retains bumping rights
Procedures for breaking tenure ties
Public employers may abolish positions for sound economic reasons
Reassignment of teachers in layoff situations
Redeployment Lists
Regular substitute - "seniority credit" for service
Reinstatement of teachers from a preferred list
Reinstatement - similar positions

Reinstatement - Taylor Law rights
Reinstatement following layoff - tenure rights
Reinstatement from preferred list
Release - pre-layoff sex bias claim barred
Removing a teacher from a preferred list
Resignation - seniority claim lost
Resolving inconsistencies between the Civil Service Law and a Taylor Law agreement
Retirement incentives
Retroactive seniority as redress
Reverse discrimination
Rules on seniority for layoff
Same layoff grievance complaint, different results
School board action to abolish a position
School district - providing legal counsel in layoff litigation
Seniority - for layoff purposes
Seniority and age discrimination
Seniority by lottery
Seniority credit for substitute service,
Seniority date - layoff
Seniority determinations
Seniority for layoff purposes
Seniority for part-time service
Seniority in a civil division
Seniority in layoffs determinations
Seniority ties
Seniority, layoffs and Title VII
Special layoff units - not authorized
Takeover of BOCES programs
Temporary appointment
Tenure and layoff
Tenure area - precedent over assignment
Tenure areas
Tenure by acquiescence
Tenure issues
Termination benefits
Titles and layoff
Transfer lists - §78, Civil Service Law
Transfer of a program to BOCES
Transfer of benefits
Transfer of employees
Transfer of position from one employer to another employer
Union's standing to sue
Using the preferred list
WARN Statute [NY]
Wrongful discharge

Introduction

Many municipalities and school districts and their employees and the employee organizations representing such employees are concerned that the financial difficulties faced by the responsible appointing authority will result in the abolishment of positions and the layoff of employees.

Both the Civil Service Law and the Education Law, and rules and regulations promulgated pursuant to such laws, set out guidelines and procedures addressing the layoff of public employees of the State as an employer and political subdivisions of the State including school districts and BOCES. Many court and administrative rulings have been handed down interpreting the application and administration of these statutes, rules, regulations and administrative determinations with respect to layoff of officers and employees in the public service.

Essentially, such officers and employees are to be laid off based on their relative seniority in the inverse order of their permanent appointment. Errors in making determinations concerning “seniority” for the purposes of layoff are costly as the redress in such cases is the payment of back salary and benefits to the individual unlawfully laid off from his or her position.[1]

§§80 and 80-a of the Civil Service Law and various provisions of the Education Law set out the procedures to be followed in executing a layoff of employees in the classified service and the unclassified service respectively.[2] These provisions, and similar statutes, have become required reading for many and are setout in the Appendix.

As to employees in the classified service, the date of the individual’s “original appointment” to a position on a permanent basis controls, regardless of the fact that the

[1] Employee improperly laid off due to error in determining her seniority entitled to back pay without any deduction for amounts she might have earned prior to being reinstated to her position. *Civil Service Employees Ass'n, Inc., Local 1000, AFSCME, AFL-CIO v. Brookhaven-Comsewogue Union Free School Dist*., 87 N.Y.2d 868.

[2] With respect to those situations where there are no statutory or contractual requirements concerning layoff applicable to incumbents of positions to be abolished, the appointing authority should consider adopting guidelines that will survive a challenge that the designation of the individual or individuals to be laid off was arbitrary or capricious.

individual was originally appointed a different the position from which he or she is laid off is in the competitive class [see CSL §80] or the noncompetitive class [see CSL §80-a].

In contrast, the Education Law provides that in the event a board of education abolishes a position the services of the tenured teacher having the least seniority in the school district or BOCES "within the tenure area of the position abolished shall be discontinued."

Similarly, seniority for the purposes of layoff of an employee by the Unified Court System is determined solely on the basis of his or her permanent service with the System as indicated by the court in Parenti v Pfau**,** 110 AD3d 650.[3]

Richard Parentim a Senior Law Librarian employed by the Unified Court System [UCS], was laid off as part of a workforce reduction by the System after USC had determined that Senior Law Librarians did not qualify for the "legal and secretarial employees providing services directly to judges" exception to the reduction.

In response to Parentim's petition challenging USC's determination, the Appellate Division ruled that USC's decision was based its interpretation of its own guidelines and "was not arbitrary and capricious, or irrational." The court explained that Parentim's title, Senior Law Librarian, did not place him in the category of personnel directly assigned to, and serving at, the pleasure of, the judges.

USC had determined Parentim's seniority "based solely upon his years of service for the UCS" in accordance with rules promulgated by the Chief Judge and set out in 22 NYCRR 25.30[a].

22 NYCRR 25.30[a] provides that personnel are to be laid off "in inverse order of original appointment on a permanent basis in the classified service of the [UCS]." The decision notes that the Judiciary Law §211(1)(d)'s directive that the administrative standards imposed by the Chief Judge "be consistent with the civil service law," requires only that they be guided, not governed, by it."

The Appellate Division concluded that 22 NYCRR 25.30's provision that personnel be reduced "in inverse order of original appointment on a permanent basis in the classified service of the [UCS]," is consistent with Civil Service Law §80(1)'s requirement that employees be given a preference based upon the length of their service and that its

[3] The decision is posted on the Internet at http://www.nycourts.gov/reporter/3dseries/2013/2013_07135.htm

enactment was within the judiciary's authority of self-governance in administrative matters.[4]

This element – seniority – however, cannot be diminished or impaired by the terms of collective bargaining agreement as demonstrated by *City of Plattsburgh v Local 788*, 108 AD2d 1045.

In Plattsburgh the issue concerned the application of a Taylor Law contract provision dealing with seniority in a layoff situation.

The collective bargaining agreement between Plattsburgh and the Union provided if there were to be demotions in connection with a layoff, the "date of hire" was to be used to determine an employee's seniority. However, the "date of hire" might not necessarily be the same date used to determine an individual's service for seniority purposes for layoff under State law, i.e., the individual's date of initial permanent appointment in public service.

For example, assume Employee A was provisionally appointed on January 1, and Employee B was appointed February 1, of the same year. Employee B, however, was permanently appointed on March 1 of the same year, while Employee A was permanently appointed a month later, on April 1.

Under the terms of the Local 788 collective bargaining agreement A would have greater seniority for layoff purposes than B. But §§80 and 80-a of the Civil Service Law provides that the date of an individual's most recent, uninterrupted "permanent appointment" determines his or her seniority for the purposes of layoff and so, under the law, B would have greater seniority than A.

This was the problem in the Plattsburgh case. The City laid off Mousseau rather than another worker, Racine. While Mousseau, had been employed by the City for a longer

[4] Civil Service Law §80.1 provide, in pertinent part, that "Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that the date of original appointment of any such incumbent who was transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made."

period than Racine, Racine had received his permanent appointment before Mousseau was permanently appointed.

The Union grieved, contending that under the seniority provision in the collective bargaining agreement, Racine should have been laid off. The City, on the other hand, argued that Civil Service Law §80 controlled and thus Mousseau, rather than Racine, had to be laid off first. Plattsburgh won an order prohibiting arbitration. The Court said that §80 of the Civil Service Law "reflects a legislative imperative" that the City was powerless to bargain away.

As the Court of Appeals said in *County of Chautauqua v. Civil Service Employees Ass'n*, 8 N.Y.3d 513, "Once such an informed decision as to which positions are to be [abolished] is made, §80(1) obligates the employer to respect the seniority rights of its employees."

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

However, in Gee v Board of Educ. of Rochester City Sch. Dist., 99 AD3d 1260, the Appellate Division, 4th Department, conclude that "by accepting employment as a school instructor and entering into a collective bargaining agreement as a result of his membership in the union representing him, the individual waived any right to be credited for seniority in the tenure area of teacher."

The court cited *Dietz v Board of Educ. of Rochester City School Dist.*, 98 AD3d 1251 in which it was held "… the collective bargaining agreement (CBA) between the District and the union representing petitioner provided that layoffs of 'school instructors' would be affected within the four separate categories of school instructors identified in the CBA rather than within tenure areas; that separate seniority lists for purposes of layoffs are maintained for school instructors; and that, '[i]n the event that positions are abolished, school instructors shall not have rights to displace teachers in regular school programs having less seniority, nor shall teachers have rights to displace school instructors having less seniority.'"

Another element to consider is "continuous service." §§80.2 and 80-A.2 of the Civil Service Law set out the effect, or lack thereof, of "interruptions in service" in the event

of resignation followed by a reinstatement; appointment to a position in the unclassified service and other types of absences or leaves.

Abolishment of positions: As to mechanics, the Attorney General has concluded that there must be an actual and lawful abolishment of a position in order to lawfully remove an employee from his or her position pursuant to §§80 and 80-a (1976 Opinions of the Attorney General 7; see, also, *O'Reilly v Nedelka*, 212 A.D.2d 714).

Typically the appointing authority determines which position or positions are to be abolished. In some cases, however, the Doctrine of Legislative Equivalency may be a consideration.

The Doctrine of Legislative Equivalency states that only the entity that created the position may abolish it [i.e., a position created by a legislative act can only be abolished by a correlative legislative act" (*Matter of Torre v. County of Nassau*, 86 NY2d 42)].

The Doctrine was cited in Civil Serv. Empls. Assn., Inc. v County of Orange, 107 AD3d 983, Appellate Division, Second Department,[5] a decision that demonstrates that the Doctrine of Legislative Equivalency controls when abolishing position in a layoff situation.

In this action a number of employees challenged their termination from their respective positions with the County of Orange.

The Appellate Division, reversed a Supreme Court ruling dismissing the Article 78 petition filed by these individuals "on the law" and the County's decision to terminate the employees was remitted to the Supreme Court, Orange County, for a determination of all the benefits those individuals "would have been entitled to had they remained employed for the period from October 29, 2010, to December 31, 2010, and for a calculation of the principal sum of back pay to be awarded to those [these individuals] in accordance herewith and thereafter for the entry of an appropriate amended judgment."
The genesis of this case was a direction of the County Executive of Orange County to send letters "to 39 civil service employees notifying them that they were being laid off effective October 29, 2010, for economic reasons" and, indeed, on December 2, 2010,

[5] The decision is posted on the Internet at: http://www.nycourts.gov/reporter/3dseries/2013/2013_04798.htm

the Orange County Legislature passed a budget for the 2011 fiscal year[6] that did not provide funding for the positions held by these 39 “laid off” employees.

The employees were advised that their names would be placed on a preferred eligible list pursuant to a provision in their collective bargaining agreement, which pertained to "abolished" positions. Subsequently the employees were advised that their names had been placed on the preferred eligible list "[i]n accordance with §81 of Civil Service Law."

Citing *Torre v County of Nassau,* 86 NY2d 421, the Appellate Division explained that the doctrine of "[l]egislative equivalency requires that a position created by a legislative act can only be abolished by correlative legislative act."[7]

The court explained, the Orange County Charter and Orange County Administrative Code vests in the Orange County Legislature sole authority to "establish or abolish positions of employment and titles thereof." However, the County Legislature had not taken any action to abolish the relevant positions at the time the County Executive terminated the subject employees' employment.

Although the Orange County Charter and Orange County Administrative Code give the County Executive the authority to "supervise, direct and control and administer all departments," they do not give the County Executive the authority to terminate the employment of civil service employees without a proper abolition of the positions by the County Legislature in accordance with the doctrine of legislative equivalency. Further, said the court, the County Charter does not authorize the County Executive to undertake any "remedial action" constituting unilateral modification to the budget and, or, abolition of legislatively created positions.

The bottom line: The County Executive did not have the authority to terminate the subject employees' employment for economic reasons, effective October 29, 2010. Thus, the court concluded, those individuals that were “laid off” effective October 29, 2010, are entitled to back pay, and presumably benefits, to which they would have been entitled had they remained County employees for the period from October 29, 2010, to December 31, 2010.

[6] Presumably the budget was to take effect January 1, 2011 and by not providing for the funding of the relevant positions, the Legislature was deemed to have “abolished them.”

[7] The Attorney General has opined that there must be an actual and lawful abolishment of a position in order to lawfully remove an employee from his or her position pursuant to §§80 and 80-a (1976 Opinions of the Attorney General 7; see, also, *O'Reilly v Nedelka*, 212 A.D.2d 714).

This Doctrine, and a number of other significant public personnel law issues including the establishment of positions in the Classified Service by a political subdivision of the State, jurisdictional classification of positions in the Classified Service and the impact of a Taylor Law agreement in the event there is layoff of employees in the Labor Class, were considered by the Appellate Division in Chandler v Village of Spring Valley, 104 AD3d 847.[8]

According to the decision, the Village of Spring Valley appointed three individuals [petitioners] to classified service positions of "Laborer" in the Labor Class in its Department of Public Works[9] and that these three individuals had "completed their probationary periods" prior to August 10, 2010. On August 10, 2010, however, the County of Rockland Department of Personnel, the municipal civil service commission [Commission] having jurisdiction over the Village, advised Spring Valley that it had "no record of employment" for the three petitioners, citing Civil Service Law §22 [Certification for positions] and §97 [Reports of appointing officers; official rosters].

The Commission's reference to Civil Service Law §22, Certification for positions, suggests that these were new position or existing positions in a jurisdictional class other than the Labor Class in that Section 22 provides that: "Before any new position in the service of a civil division shall be created or any existing position in such service shall be reclassified, the proposal therefor, including a statement of the duties of the position, shall be referred to the municipal commission having jurisdiction and such commission shall furnish a certificate stating the appropriate civil service title for the proposed position or the position to be reclassified. Any such new position shall be created or any such existing position reclassified only with the title approved and certified by the commission.

Significantly, Civil Service Law §44 provides that all positions in the Classified Service are in the competitive class unless placed in a different jurisdictional classification. The Appellate Division's decision, however, makes no reference to these three laborer positions having been placed in the Labor Class by amendment of the Commission's Rules, which rules are subject to the approval of the State Civil Service Commission in accordance with the provisions of Civil Service Law §20.

Accordingly, appears that the three petitioners at the time of their respective "appointment" were provisionally appointed to three "new positions in the competitive

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[8] The Chandler decision is posted on the Internet at:
http://www.nycourts.gov/reporter/3dseries/2013/2013_01826.htm

[9] The Classified Service consists of four jurisdictional classes: the Competitive Class, the Non-competitive Class; the Exempt Class and the Labor Class.

class," and that these appointments should have been so reported to the Commission with Village's request that the Commission amend its rules to "jurisdictional classify the three positions in the Labor Class." The Commission's August 10, 2010 notification also advised the Village that the "[petitioners] without approval from this office to work must be terminated immediately unless there is a resolution to the situation."

That same day, the Village Board adopted Resolution No. 519 of 2010, unanimously resolving that the individual petitioners "shall be immediately removed" from the Village payroll and informed that they are not employees of the Village.The three individuals then filed a petition pursuant to CPLR Article 78 seeking to annul the Village's resolution removing them from the Village payroll, to compel the Village to comply with its ministerial duty under the Civil Service Law by submitting the required paperwork to the Commission, and to reinstate them with back pay.

The petitioners also submitted evidence that another employee in the labor class with less seniority had been retained by the Village after their removal from the payroll, an action they alleged violated their "seniority rights under the governing collective bargaining agreement."[10]

In response, the Village contended that in the months preceding its adoption of the resolution terminating the three petitioners it had conducted a comprehensive review of its operations and determined that the Department of Public Works "would operate more economically and efficiently by creating three new positions with the title of assistant maintenance mechanic and eliminating all positions in the labor class by attrition and/or layoffs."

In rebuttal, the petitioners submitted evidence that the new title "Assistant Maintenance Mechanic" was proposed on July 27, 2010 and notice of three vacancies in the new class was posted on that date. Accordingly the petitioners contended that the Village had not properly abolished the individual petitioner's positions on August 10, 2010, but had terminated their employment "in violation of the collective bargaining agreement and the Civil Service Law."

The Supreme Court denied the petition and dismissed the proceeding, holding that the Village had properly abolished the individual petitioners' positions for the purpose of

[10] **N.B.** Employees in the Labor Class are not within the ambit of either §80 or §80-a of the Civil Service Law [which sections of law provide certain rights to employees in the competitive and non-competitive classes in the event of a layoff] but employees in the Labor Class may be accorded layoff rights based on "seniority" pursuant to a Taylor Law agreement provided that any such contract right does not adversely affect the statutory layoff rights of other employees [see City of Plattsburgh v Local 788, 108 AD2d 1045].

economy or efficiency and that the petitioners had failed to allege or establish that the Village had acted in bad faith in abolishing their positions.

The Appellate Division reversed the lower court's ruling, explaining that the Doctrine of "Legislative equivalency requires that a position created by a legislative act can only be abolished by a correlative legislative act," citing Torre v County of Nassau*,* 86 NY2d 42.

Here, said the court, it is undisputed that each of the individual petitioners' positions was created by resolution of the Village Board, and thus, another resolution of the Village Board was required to abolish each of those positions. Contrary to the Village's contention, the Appellate Division ruled that three positions in question were not abolished by the Village's Resolution No. 519 of 2010.

The Appellate Division explained that "The misconception of the Village Board that the positions did not exist was premised upon the Village's own failure to comply with the filing requirements of the Civil Service Law pursuant to the notification by the municipal civil service commission." The Village Board had "unanimously resolved to 'immediately remove[ ]' the individual petitioners from the Village payroll and to inform them that they 'are not employees of the Village,' rather than to remedy their filing and certification violations under the Civil Service Law." Further, said the court, the plain language of the subject resolution "refutes the [Village's] contention that the Village Board was abolishing positions then in existence."

Moreover, said the Appellate Division, the record supports the petitioners' contention that although the resolution "immediately removed the individual petitioners from the payroll," the Village continued to employ another laborer with less seniority. The Appellate Division held that the petitioners established that the positions of the individual petitioners were not abolished and they were laid off in violation of the seniority provisions of the collective bargaining agreement. The court explained that the Village's action in removing the individual petitioners from the payroll was not justified by its proper creation of a new class of employees, with the intention of eliminating the labor class by attrition or layoff.

Clearly "A public employer may abolish civil service positions for the purpose of economy or efficiency, as long as the position is not abolished as a subterfuge to avoid statutory protection afforded civil servants before they are discharged." Here, however, the Appellate Division ruled that "although the evidence supported the Village's contention that it *intended* to abolish the laborer positions after it had created the new class of assistant maintenance mechanic," the evidence does not support its contention

that the Village actually abolished the individual petitioners' positions in the resolution dated August 10, 2010 [emphasis in the decision].

In any event, said the court, even if the August 10 resolution could be construed to abolish the individual petitioners' positions effective August 10, 2010, the immediate termination of their employment pursuant to that resolution violated a provision in the collective bargaining agreement requiring two weeks notice prior to terminating an employee whose position has been abolished, and thus constituted improper abolishment of a civil service position "to avoid the statutory [in this instance better read “a contractual”] protection afforded civil servants before they are discharged."

The Appellate Division reversed the Supreme Court’s decision, annulled the Village’s August 10 resolution and remitted the case to the Supreme Court, Rockland County for further proceedings “including a calculation of the individual petitioners' pay retroactive to August 10, 2010.”

Once it is decided which competitive class positions [and with respect to the State as an employer, positions in the noncompetitive class] in a layoff unit are to be abolished, two factors control for the purposes determining the individual or individuals to be laid off: the employee's tenure status [i.e., the permanent, contingent permanent, temporary, or provisional status of the worker] and his or her seniority.

Layoff units must be considered as well. Among the elements that complicate the determination of the specific individual or individuals to be suspended or displaced as a result of a layoff are (1) the identification of the specific layoff unit(s) for layoff purposes and (2) the employee's decision with respect to exercising any "displacement," bumping" or "retreat" rights within that layoff unit that he or she may have. With respect to the State as an employer, layoff units are set out in the Rules of the State Civil Service Commission [see 4 NYCRR 72 below].

It could be costly to the appointing authority if it fails to make correct determinations concerning an employee's tenure status and seniority for the purposes of layoff. If a person ultimately found to have superior rights to retention was laid off and another individual having lesser rights to retention was continued in service instead, courts will usually award the individual who was laid off in error back salary and other benefits and the appointing authority would be directed to reinstate the individual retroactively to his or her former position as well.

Layoffs from positions in the unclassified service:

Layoffs of individuals employed in positions in the unclassified service are also governed by statute. For example, §§2510, 2588 and 3013 of the Education Law, among other sections, control with respect to the layoff of tenured teachers and administrators employed by a school district or a BOCES.

In addition, Rules of the Board of Regents must be considered. For example, 8 NYCRR 30-1.13 [Rights incident to abolition of positions] allows a more senior individual to "bump" a less senior individual following his or her transfer to position in another tenure area in the course of a layoff situation.

Tenure:

Insofar as tenure is concerned, those lacking permanent status in the title [i.e., temporary employees and provisional appointees] are to be terminated before permanent employees are laid off.

Permanent employees serving their probationary period are to be laid off before permanent employees in the title who have completed their probationary period. For the most part, so-called "contingent permanent employees" enjoy the same tenure rights as permanent employees when it comes to layoff.[11]

Seniority:

As to seniority, the basic principle in a layoff situation is "LIFO" - Last In; First Out. For the purposes of §§80 and 80-a, seniority is determined on the basis of the date of the individual's initial permanent appointment followed by continuous permanent status in the classified service up to the date of his or her layoff.

Note that it is the initial date of permanent appointment rather than the date on which the employee attained tenure upon satisfactory completion of his or her probationary period that controls.

[11] In some instances an individual may be employed pursuant to a “contract of employment” having a fixed duration or his or her continuation in employment may be subject to the appointing authority receiving “grant” or similar funding from an outside source. Such employees typically to not enjoy tenure in such a position but may be on leave from a position in which they hold “tenure.” Such tenure status in a position from which the officer or employee is on leave is another element that must be considered by the appointing authority in layoff situations.

Such “seniority" is not always the same as the employee's "seniority in the title" or "seniority" under a Taylor Law agreement.

Taylor Law contract provisions, however, may not adversely affect the layoff rights vested in employees by laws such as §§80 or 80-a of the Civil Service Law. [see *Plattsburgh v Local 788*, 108 AD2d 1045].

Some collective bargaining agreements may set out a different basis for determining seniority or grant “super-seniority” to certain individuals. In a layoff situation, the statutory provisions regarding determining seniority trump those set out in a collective bargaining agreement.

The fact that at sometime during his or her career the employee may have been provisionally promoted or been placed on leave from his or her "permanent position" or employed in a position in a different jurisdictional class will not necessarily constitute a break in the employee's "continuous permanent status" for the purposes of §§80 and 80-a. In some cases the employee's date of seniority may include service with another governmental jurisdiction.

Breaking ties in seniority:

Sometimes it may be necessary to break a “tie” in seniority, [for example, see *CSEA v OMH*, 196 A.D.2d 276; *Fiffe v City of Cohoes CSD*, 262 A.D.2d 762], especially in a layoff involving a school district where typically a number of educators are appointed simultaneously effective at the beginning of an academic year [see, for example, Decisions of the Commissioner of Education 12933].

Essentially any rational method of ranking to break ties in seniority may be used as long as it is consistently applied to those subject to the layoff.

Leaves and resignations:

Separation from employment after a leave of absence without pay from a position in the classified service in excess of one year would, in most cases, constitute an interruption of continuous service.

Service is deemed interrupted if an individual resigns from his or her position and is not reinstated or reappointed within one year of the effective date of the resignation.[12]

Layoff units:

Among the elements that complicate the determination of the specific individual or individuals to be suspended or displaced as a result of a layoff are:

(1) the identification of the specific layoff unit(s) for layoff purposes and

(2) the employee's decision with respect to exercising any "displacement," "bumping" or "retreat" rights within that layoff unit that he or she may have [see, for example, Rules of the State Civil Service Commission, 4 NYCRR 5.5 et. seq.

Layoff units are set out in the President's Regulations [see 4 NYCRR 72].

If only a few positions are involved in a layoff, it is somewhat easier to determine the specific individual or individuals to be laid off.

Where large numbers of positions are abolished, especially where the layoff unit is geographically spread out, the task of determining the rights of employees based on their relative seniority is made significantly more complex.

Military service:

Military service[13] may be a factor in determining seniority as well.

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[12] In some instances a civil service commission may approve the reinstatement of an individual who was not reinstated or reappointed within one year of the effective date of his or her resignation.

[13] §242.4 of the State's Military Law provides certain rights that could be relevant in a layoff situation. Time during which a public officer or employee is absent for military duty pursuant to §242, subdivisions two, three and three-a of the State's Military Law is not an interruption of continuous employment and, " notwithstanding the provisions of any general, special or local law or the provisions of any city charter, no such officer or employee shall be subjected, directly or indirectly, to any loss or diminution of time service, increment, vacation or holiday privileges, or any other right or privilege, by reason of such absence, or be prejudiced, by reason of such absence, with reference to continuance in office or employment, reappointment to office, re-employment, reinstatement, transfer or promotion."

A veteran who served in time of war may be entitled to have his or her "seniority date" adjusted for the purposes of layoff [§85, Civil Service Law]. Five years of service are credited to an eligible disabled veteran's original date of permanent appointment; 2 years of service credit is added in the case of non-disabled veterans. Also, the spouse of a 100% disabled veteran may be eligible for five years of "additional" service credit in layoff situations if he or she meets the requirements set out in §85.7 of the Civil Service Law.

Civil Service Law §85.7(1) provides that a blind employee is entitled to absolute preference in retention in cases of layoff.

Also, §86 of the Civil Service Law provides for the transfer of veterans and exempt volunteer firemen employed by political subdivisions of the State in positions in the non-competitive class or in the labor class employed by a political subdivision of the State upon abolition of positions in such classes [see, for example, *Bartholomew v Columbia County*, 191 A.D.2d 88].

Takeovers:

Another element that may be a factor in some layoff situations involves determining §§80 or 80-a seniority for individuals who attained permanent status with a public employer as a result of a "takeover" of a private institution or enterprise by a governmental employer pursuant to §45 of the Civil Service Law or a similar law. Such employees will typically have two seniority dates to consider and it may be necessary to consider both when determining their retention rights in a layoff situation.

One is their date of seniority with respect to other public employees in the layoff unit generally, usually determined on the basis of the effective date of the takeover. The second is the date of their seniority with respect to their coworkers at the private enterprise continued in public service pursuant to §45 upon the takeover.

Collective bargaining agreements:

As noted earlier, another difficulty may arise as a result of an employer's efforts to comply with "layoff provisions" contained in a Taylor Law agreement.

As the Plattsburgh decision indicates, [*Plattsburgh v Local 788*, 108 AD2d 1045], statutory seniority rights for the purposes of layoff may neither be impaired nor limited

by Taylor Law agreements.

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

Affirmative Action:

Layoff may also adversely impact affirmative action plans, interests and goals. Employees appointed pursuant to Affirmative Action programs may be among those having the least seniority and thus having the greatest potential of being laid off in the event of a "reduction in force [RIF].

Further, reinstatement following layoff is also based on seniority and here the so-called "rule of one" controls. The person having the greatest seniority willing to accept the position must be appointed to the item from the preferred list or the position must be kept vacant.

One Federal appeals court has concluded that unless there is some evidence that layoff procedures based on seniority were adopted or applied with an intent to discriminate against protected classes, layoffs based on seniority neither violate Title VII nor the post-Civil War Civil Rights statutes [42 USC 1981, 42 USC 1983] (see *NAACP v Detroit Police Officers Association*, 52 FEP 1001).

As minorities and women currently tend to cluster in the "lowest in seniority" group, layoffs based on traditional seniority provisions will most likely result in adverse impact. One of the factors to be considered is the influence of public employee unions that have generally favored "seniority" in contract provisions where possible. A number of attempts to negotiate minimizing the effect of layoff through work sharing or reduced workweek scheduling have been attempted with little success. However, it has been suggested that affirmative action considerations in connection with work force reductions may result in procedures could permit a public employer to retain all employees through mandated part-time work schedules, involuntary furlough in lieu of layoff or other methods to avoid the erosion of past equal employment gains.

Swiftly following its decision in the American Tobacco case, the United States Supreme Court issued its opinion in *Pullman-Standard v Swint*, 456 U.S. 273. The

decision holds that it is not unlawful discrimination under Title VII to operate a seniority system that has some discriminatory consequences unless it is shown that the system was purposefully discriminatory. Disparate impact alone was viewed as insufficient to invalidate the seniority system even though it may perpetuate pre-Title VII discrimination. This decision is viewed as illustrative of a trend in court decisions to place greater burdens on plaintiffs to show a violation of Title VII in cases where "length of service" is the criteria for selection, promotion or layoff.

The U. S. Supreme Court in *Guardians v Civil Service Commission of the City of New York* (51 LW 5105) holds that while proof of intentional discrimination is not required to establish a *prima facie* case of unlawful discrimination for the purposes of Title VII, intentional discrimination must be shown in order to be given compensatory relief under Title VI. In this case the compensatory relief sought was "constructive seniority" and "administration of a promotion test to minorities". If intentional discrimination is not shown in Title VI cases, only "limited injunctive relief" will probably be granted by federal Courts.

While the disparate impact standard may be sufficient to establish a "*prima facie*" case of discrimination in seniority cases, plaintiffs apparently now will have to show some intentional discriminatory purpose before the burden of going forward is shifted to the defendant.

Some believe that this will make it almost impossible to win Title VII claims alleging unlawful discrimination where contracts or law control advancement or layoff on the basis of seniority. As earlier noted, this decision may affect the results achieved through affirmative action efforts in layoff situations should public employers continue to reduce their work forces.

Retirement:

In an effort to reduce the total number of persons to be laid off, legislation may be enacted that provides certain employees with a "retirement incentive."

Many individuals faced with layoff who are eligible to retire will undoubtedly consider this option, especially where an "early retirement option" has been made available to officers and employees. A provision that may be of interest to persons who are not eligible for "superannuation retirement" and who are to be laid off is §73 of the Retirement and Social Security Law.[14]

[14] Spano v Kings Park Cent. School Dist., __ AD3d __, decided on April 7, 2009, is a case demonstrating some "unintended consequences" of electing to take a retirement incentive.
[see http://www.courts.state.ny.us/reporter/3dseries/2009/2009_02771.htm]

§73 grants eligibility for certain benefits to members of the Employees' Retirement System who have been discontinued from service after 20 years. A person who is laid off from service while a member "through no fault or delinquency on his part, may elect to receive his accumulated contributions or a retirement allowance...." §73.a deals with persons who last became members of the System before April 8, 1943; §73.b provides for those who last became members on or after that date. The section sets out the formula to be used in determining the member's retirement allowance in the event he or she elects to receive a retirement allowance under those circumstances. However, typically the retirement allowances available under §73 are significantly less than those that would be payable upon retirement for "superannuation."

Preferred Lists:

The "fall-out" of a layoff is the preferred list. Errors in the creation and use of preferred lists could be as expensive to the employer as errors in determinations concerning the individuals laid off following the abolishment of positions.

This is further complicated by the fact that a preferred list is a "moving target." If, for example, an individual is first on a preferred list, he or she may later be displaced as "number 1" by an individual in the layoff unit having greater seniority but subsequently laid off. Further, an individual is entitled to remain on a preferred list for the statutory period authorized by law, measured from the date on which he or she was laid off and placed on the preferred list.

Some key points concerning the use of preferred lists:

1. Typically the most senior individual on the list may be "passed over" or, under certain circumstances, have his or her name removed from the list, only if he or she actually declines the offer of an appointment.

2. The name of an individual may not be removed from a preferred list if he or she merely declines appointment to a different position for which certification of the preferred list was not mandated or deemed appropriate or accepts an appointment to a lower grade position.

With respect to accepting an appointment to a lower grade position, if an individual is laid off from Position A and subsequently accepts a position "to a lower rank position" for which the preferred list was certified his or her name remains on the preferred list.

If the employer subsequently reestablishes Position A and that the individual is eligible for certification from the preferred list and t he or she is the most senior person on the list, he or she must be appointed to the newly created position or the position must remain vacant.

3. The individual is not required to seek information concerning the existence of any vacancy for which he or she could be certified.

4. While an appointing authority is not required to fill a vacant position, if it elects to do so, it must use the appropriate preferred list if one exists.[15]

5. If an individual accepts other employment, his or her name is to remain on the preferred list until it may otherwise be lawfully removed. For example:

Another element that must be considered is the possible existence of a special eligible list or a "military reemployment list" authorized by the State's Military Law as it is possible that some State and municipal employees who have been ordered to military duty may be laid off as a result of the abolishment of positions. In such cases the provisions of §243.11 of the State's Military Law may be applicable.[16]
§243.11 provides that if a position occupied by a public employee is abolished prior to the termination of his or her military service, the name of that individual is to be placed on a preferred list. Persons in the competitive class are to have their names placed on preferred lists pursuant to §81 of the Civil Service Law; other individuals may be entitled to preferred list rights under other provisions set out in the Civil Service Law or the Education Law.

Persons not covered by the provisions of §243.11 may be entitled to have their names placed on a "military reemployment list" pursuant to §243.12 of the Military Law.

In addition to these benefits, a person ordered to military duty whose name is on an eligible list retains his or her rights and status on such list. If the name of such a person becomes reachable for certification while on military duty, he or she may request that their name be placed on a "special eligible list." This request must be made following the termination of military service and during the period of the employee's eligibility on such list. Names are kept on the "special list" for two years following the individual's termination of military duty [see §243.7, Military Law].

[15] (Under certain circumstances, a public employer may be required to use other types of "preferred lists" such as a "special military list" before the "regular" preferred list.)
[16] Public employees who volunteered for such military service are deemed to have been "ordered to military duty" for the purposes of §243 of the Military Law.

§243 provides other special benefits to those called to military duty such as crediting such service for the purposes of probation [see §243.9 and §243.9-a], special consideration in cases of disability and age [see §243.10 and §243.10-a] and appointment to a vacancy while on the individual is on active military duty [see §243.6]. Still other rights available to employees returning to work following military duty are listed in §§243.5 and 243.8.

Summaries of Selected Cases

Abolishing departments and agencies

Leman v Quinn, 170 A.D.2d 452

The abolishment of a department or agency necessarily implies the abolishment of positions. The result is that employees of such departments and agencies will be laid off and their rights, if any, to continued public employment will be governed by the various layoff provisions contained in the Civil Service Law.

Abolishment of entire departments and agencies may become more common as the impact of the State's budget problems becomes felt by pubic employers. In Leman the Court was asked to consider the actions by a Village's Mayor and Trustees following the abolishment of the Village's Police Department and its Assessor's Office.

Leman asked the Court to remove the Mayor and the Trustees pursuant to §§3 and 36 of the Public Officers Law because of their alleged violation of Municipal Home Rule Law in passing Local Laws abolishing the two agencies. The Court rejected Leman's contentions.

After noting that Leman petitioners lacked standing to bring the action because they were not residents of the Village, the Appellate Division ruled that the Village's officials "were clearly authorized by Village Law §8-800 to abolish the Police Department and properly followed the provisions of Village Law §§9-900 and 9-902 with respect to holding a referendum.

The Court also said that as a village is not required to have an assessor, a Local Law abolishing such an office was also proper.

Abolishing positions

James v Broadnax, 153 AD2d 627

As more public employers attempt to balance budget shortfalls by abolishing positions, the courts are being asked to consider the merits of the abolishment of particular

positions. The James ruling points out that the courts will limit the scope of judicial review in such instances.

James tried to have the decision of the New York State Department of Civil Service abolishing his position - Director of Public Employee Training (director of training) declared null and void.

He claimed that the abolishment of his position was a "sham" and that the decision to do so was made in bad faith. James also alleged that abolishing his competitive class position with the intention of replacing it with noncompetitive class "project director" positions violated Article V §6 of the State Constitution. Finally, James contended that by not using the preferred list or reemployment roster for director of training to fill "project director" positions violated his Civil Service Law §81 rights.

To rebut these contentions the department submitted affidavits from several department staff members explaining the reasons underlying the abolishment of James' position and why it considered it inappropriate to certify the preferred list or use the reemployment roster for the director of training position to fill "project director" vacancies. Among the statements contained in these affidavits was one by James' superior indicating that "he had determined that the training function being carried out by the Organization and Employee Development Services unit (OED) was not effective and that based on his recommendation OED was dissolved and all positions related to internal training, including [James'] were abolished."

The Supreme Court dismissed James' petition, indicating that he had failed to offer the required proof of bad faith. It was also noted that the Department of Civil Service had established that it had abolished James' position "to meet financial and staffing exigencies arising from the State's budgetary crisis."

In addition, the court decided that the duties of the two positions in question were different and that there was only a small overlap of the duties of the former director of training position and those of "project director."

Finally, the court ruled that the determination that the project director position "was not appropriate for inclusion in the preferred list or reemployment roster for the director of training position was rational because the positions differed significantly."

The Appellate Division affirmed the lower court's ruling. It said that James' argument that his position was improperly abolished because another person was appointed to perform the duties of his former position was without merit.

In addition, the Appellate Division held that James had failed to:

1. meet his burden of presenting creditable evidence showing that his position was abolished "in a bad faith effort to circumvent the Civil Service Law;" and

2. present proof sufficient to demonstrate that the position of project director was the same or similar to the position of director of training.

The Appellate Division's decision also indicates that:

1. Where there is a rational basis in the record for the determination of the Civil Service Department "not to include" a position for the purposes of certification of a preferred list or the use of a reemployment roster, "there is no need to hold a factual hearing pursuant to CPLR 7804" (an Article 78 proceeding); and

2. Where an agency's interpretation of a statutory provision "is within the special expertise and control of the agency and it is rational, it must be sustained."

Here the Appellate Division viewed the State Department of Civil Service as having such an expertise with respect to the layoff and reinstatement provisions of the Civil Service Law (see §§80, 80-a and 81, Civil Service Law).

Abolishing positions

DC-37 v NYC Department of Parks, CA2, 96-7050

Sometimes employees who have been laid off in connection with a reduction in employer's the work force will claim that their layoff constituted unlawful discrimination. Such a claim was made after the New York City Parks Department "eliminated the title of Laborer" as a result of budget cuts. Park Department laborers over the age of 40 brought a class action claiming the Department violated the Age Discrimination in Employment Act.

Although the employee claimed the layoff had a "disparate impact" on those age 40 and over, a statistical analysis of the ages of those laborers laid off demonstrated that those age 40 or older were actually underrepresented in the pool of employees laid off. In effect, the "bottom line" was no discrimination with respect to laborers age 40 or older. A jury decided that the Department had not discriminated against the members of the class and the Court of Appeals for the Second Circuit affirmed the lower court's dismissal of their action.

Although the jury had not been instructed that a "non-discriminatory bottom line" was not a defense to a disparate impact claim, the Court said this omission was not fatal because once the jury was told the elements of a disparate impact claim, it did not have to be told "which issues were not defenses.

The decision is posted on the Internet at:
http://www.hr-software.net/EmploymentStatistics/96-7050.htm

Abolishment of positions

Ensley v Dinkins, [not officially reported]

The Ensley case considers what constitutes standing to bring a lawsuit contesting the abolishment of positions in the public service. The case arose when the City of New York decided to terminate a significant number of employees in its Human Resources and Health departments in the interests of economy.

Local 371, AFSCME and a number of union members sued. The basic theory underlying their lawsuit was that in abolishing these positions and terminating staff members, the city violated the State Constitution and its Social Service and Health Laws by denying certain services to those citizens who were entitled to them.

The court dismissed the action on the grounds that the petitioners here lacked "standing" to bring such an action.

Essentially the union and its members argued that if the city was allowed to cut staffing it would be unable to comply with all of the obligations placed on it by law.

The decision indicates that here there was a critical element missing. The petitioners did not assert any contractual or other right concerning the "employment status" of the displaced workers. Rather, the petitioners were attempting to protect "persons in need of required services."

Their failure to claim some violation with respect to an employment right proved fatal in the eyes of the court.

The court said that its decision was based on the narrow ground that the union and the employees lacked standing "to represent the legal interests of the recipients of some forms of social services to have certain levels of employee staffing maintained."

In contrast, it was noted that the union and its members could challenge the city's action their own employment rights.
However, they would not be allowed to attempt to vindicate the rights of the public or the individuals entitled to the social services that they argued would be reduced were the layoffs permitted.

Abolishment of positions

Hartman v Erie BOCES #1, 204 A.D.2d 1037

In cases of the abolishment of a position, the general rule is that the decision is to be made in good faith and for budgetary reasons or because there is no longer a need for such a position due to the abolishment or curtailment of functions.

Hartman, Manager of Information Processing, a classified service position, was laid-off when his position was abolished. He sued, contending that (1) his position had not been abolished in good faith and (2) he should have been appointed to a "similar" Data Center Manager vacancy.[17]

Considering the issue of bad faith, the Appellate Division said that a position may not be abolished as a subterfuge to avoid the statutory protections afforded by the Civil Service Law.

It ruled that Hartman presented evidence that his former duties were being performed by a person who had not been appointed in accordance with the Civil Service Law, raising a triable issue of fact as to whether his position had been abolished in good faith.

The Appellate Division remanded the matter to Supreme Court for a hearing.

As to Hartman's claim that he had a right to be appointed Data Center Manager, the Court said this position was not the "same or similar" to his former position.[18]
In a similar case, Christian v Casey, 76 AD 835, the court considered the “good faith test” in resolving a challenge to the abolishment of certain positions.

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[17] Civil Service Law §80.1 provides that such layoffs are to be made in the inverse order of permanent appointment from "among incumbents holding the same or similar positions" in the layoff unit.

[18] See, also, Matter of Arnold, http://www.courts.state.ny.us/ad4/court/Decisions/2009/02-06-09/PDF/1640.pdf

Former employees of the City of Yonkers lost their jobs when the City planned to close it jail under its fiscal program.
The jail was never actually closed, however. It continued in operation with a reduced staff, with police officers performing some of the duties of the former employees, who had held the titles of jailer or matron. When the employees sued, the Court held that municipal corporation may in good faith abolish civil service positions for reasons of economy.

The assignment of police officers to the jail was held to be a good faith effort to consolidate the arrest procedures and not an attempt to replace the former employees with newly hired personnel.

The fact that some of the duties of the former employees were being performed by police officers serving in the jail was not viewed as bad faith by the Court as “the utilization of existing personnel to carry out those duties which remained after the abolishment of the positions in the wake of a financial emergency cannot amount to a lack of good faith.”

Abolishment of positions
Torre v Nassau County, 208 A.D.2d 850

Typically layoff decisions are the result of management determinations concerning the elimination or consolidation of services provided by a department or agency.

The Torre case explores the authority of a legislative body to reduce an agency's or department's funds for personnel services without specifying the positions or services to be eliminated. In other words, may the legislative body provide a "fiscal target" for the administrator to meet and allow "executive discretion" in determining which positions are to be eliminated in meeting those goals?

The Nassau County Board of Supervisors adopted a budget that cut the personnel services allocation for the County's Probation Department by more than one million dollars. The budget, however, did not specify the particular positions that were to be eliminated as a result in the reduction of the Probation Department's payroll funds.

As a result of this cut in its appropriation for personnel services, the Probation Department advised Torre, an attorney with the Probation Department, that his employment was to be terminated "due to budgetary cuts."

Torre sued, contending that the Nassau County Board of Supervisors, the legislative body that created his position, was required to abolish it prior to his termination and that its failure to do so "precluded his discharge." He obtained a court order declaring his termination null and void and directing Nassau County to reinstate him to his former position with back salary and benefits.

Nassau appealed, arguing that the Board of Supervisors was not required to specify the particular positions that were to be eliminated as a result of a budget cut.

The Appellate Division agreed. The Court ruled that by legislatively mandating budget reductions, the Board of Supervisors provided for the abolition of Torre's position.

The Appellate Divisions viewed the Board of Supervisors' action as, in effect, authorizing the elimination of Torre's position by directing the department head to reduce the budget and by investing the department head with the authority to effectuate layoffs to reduce the department's staffing by a designated amount.

Accordingly, said the Court, "it was thus unnecessary for the Board of Supervisors to engage in managerial decisions to identify the specific jobs that were to be included in the layoff."

Abolishment of positions
Herbert-Glover v Wantagh UFSD, 213 A.D.2d 404

The Wantagh Union Free School District appointed and ultimately granted Herbert-Glover a tenured appointment "as a teacher for the hearing impaired." However, "hearing impaired" is not a tenure area under the Rules of the Regents.

The District later abolished its Handicapped/Deaf and Hearing Impaired position. Herbert-Glover was laid-off as a result. In deciding Herbert-Glover's claim that she was improperly excessed, the Appellate Division considered the elements that determine a teacher's tenure area.

The Appellate Division concluded that it is "the intent and policy of the school district" that controls in such cases.

The Court found that it was Wantagh's intent to place Herbert-Glover in the special subject tenure area of "education of deaf children" (8 NYCRR 30.8[a][5]) rather than the tenure area of "education of speech and hearing handicapped children" (8 NYCRR

30.8[a][6]). Her duties reflected this, as they more closely corresponded to those of a teacher of the deaf rather than a speech teacher.
The Court said that although Herbert-Glover's original provisional and permanent certification was in "Speech and Hearing Handicapped," this was incorrect and thus could not be considered controlling.

The Court said that it is the actual duties of the abolished position that should be considered, citing *Bales v North Rose-Wolcott*, 32 Ed Dept Rep 559.

Finding that Wantagh did not act improperly when it abolished its full-time position in the "deaf tenure area," the Appellate Division ruled that Herbert-Glover had been properly terminated.

On a related issue, the Court said that Herbert-Glover "had been consistently placed on a seniority list separate from that of the speech teachers."

In addition, the Court ruled that there was no indication that the School Board had done anything to affect Herbert-Glover's seniority for the purposes of layoff.

Abolishment of positions

O'Reilly v Nedelka, 212 A.D.2d 714

Employee organizations are concerned with layoffs, or the possibility of layoffs, because of the economic difficulties faced by State and municipal agencies.

The basic rule in any layoff situation is that the position triggering the implementation of §80 [competitive class positions] or §80-a [non competitive class positions] of the Civil Service Law must be physically abolished and removed from the agency's table of organization.

This requirement was a key factor in the resolution of O'Reilly lawsuit challenging his "layoff" from his position as a Security Officer by the Town of North Hempstead.

Although it is clear that a public employer may abolish a civil service position for the purposes of economy or efficiency, in the O'Reilly case the Appellate Division decided that a position in the classified service was not abolished within the meaning of §80.

The Appellate Division said that under the facts of this case, O'Reilly could not be removed from his position without being given a hearing in accordance with the

provisions of §75 of the Civil Service Law. While the position may not have been "funded," the Court ruled that this was not the same as abolishing the position.

It seems that the only reason for O'Reilly's termination his employment was the Town did not receiving County funding for the position. This, said the Court, did not necessarily mean that O'Reilly's position was abolished within the meaning of §§80 or 80-a.

The Court implied that in order to be deemed abolished, the position has to be physically removed from an agencies' table of organization rather than merely left "unfilled" or vacated by the incumbent. The Town was directed to reinstate O'Reilly with back pay.

Abolishment of positions

Local 1170, CWA and Town of Greece, 27 PERB 3009

Under §§80 and 80-a of the Civil Service Law, the abolishment of a position results in the layoff of the incumbent.

In this case PERB was asked to consider whether an abolished position could be included in a negotiation unit.

PERB ruled that when a position is abolished (in contrast to being simply vacant) it should not be included in a negotiating unit.

Adjusting teaching schedules

Soukey v Cohoes City School Dist., Comm. Ed. Decision 14,106

Faced with a reduced work schedule or a perhaps layoff, a teacher may ask the school board to adjust the schedules of other teachers in order to retain him or her in a full-time position. Is the school board obligated to honor such a request?

This was one of the elements in Donna Soukey's appeal to the Commissioner of Education. Soukey, tenured as a health teacher, was employed in a 6/10's health teacher position following the abolishment of a full-time health teacher position by the district. Soukey was the least senior tenured health teacher at the time.

Soukey argued that the district "could have adjusted the schedules of other teachers ... to facilitate her assignment to classes within her various certification areas in order to retain her in full-time service." She provided the Commissioner with examples of how the district could have accomplished this.

The Commissioner pointed out that a school board is "not required to shuffle the schedules of teachers in tenure areas other than health merely because [she] happens to hold certification in those areas."

Noting that Soukey was the least senior teacher in the health tenure area, the Commissioner said that her services as a full time teacher were properly reduced. Commissioner Mills concluded that Cohoes was not required to make scheduling adjustments that would affect teachers' services in any other tenure area in an effort to retain Soukey as a full-time employee.

The major element in Soukey's appeal was her claim that she was not the least senior teacher in the health tenure area. The Commissioner ruled that there was nothing in the record to support overturning the district's seniority determinations with respect to the several teachers in the health tenure area involved in this appeal.

Another aspect of the appeal concerned Soukey request for "reimbursement for the costs of bringing this appeal" as part of the relief she sought. The Commissioner responded by pointing out that he "lacks authority to award such costs and attorney's fees in an appeal under Education Law §310" and dismissed this branch of Soukey's appeal as well.

The decision is posted on the Internet at:
http://www.counsel.nysed.gov/Decisions/volume38/d14106.htm

Administrative policy must list its exceptions

Gordon v Burstein, 116 AD2d 85, Leave to appeal denied, 68 NY2d 603

According to a Civil Service Department policy, reassignments and transfers to a different geographic area are not permitted in the face of a preferred list. The only exception listed in the policy provided that such a reassignment or transfer would be allowed in the face of a preferred list only if the failure to do so would result in the person to be transferred or reassigned being placed on a preferred list.

Gordon was first on a preferred list for a vacancy in Suffolk County. The appointing officer submitted a request to the Civil Service Department asking for approval to reassign an employee in its Westchester County office, Putzer, to Suffolk rather than use the preferred list. When this request was approved, Gordon sued, claiming she should have been appointed to the position.

May an employee be reassigned or transferred in the face of a preferred list? The Court in Gordon indicated that this type of change was not prohibited by law and, therefore, could be made. But after reviewing the Department of Civil Service's policy concerning such transfers and reassignments, he concluded that the reassignment of Putzer was not proper in this case.

Here the Department approved the reassignment as an "exception" to its policy because of Putzer's "personal circumstances." When the Court reviewed the situation it determined that although there was a specific exception mentioned in the policy (transfer or reassignment to avoid the layoff of another employee), it did not apply in this case as Putzer was not in danger of being laid off. Therefore there was no basis to grant an "exception" to permit Putzer's reassignment.

According to the decision, a policy must have "articulated objective standards" with respect to permitted exceptions. As the basis for the exception granted Putzer was not one of those listed in the Department's policy, Gordon was held entitled to the Suffolk County position and ordered to be reinstated with back salary.

The Court of Appeals declined to review the Appellate Division's determination. As a result, the Gordon decision confirms the narrowing of an administrator's opportunity to exercise discretion as the Appellate Division indicated that such discretion may only be used in determining whether or not to invoke the specified standard or grant exemption(s) and only where "specific standards are articulated." In other words, if the exceptions which may be made to a policy are not listed in the policy itself, administrative actions based on other than the listed exceptions will be struck down if challenged in a lawsuit.

Affirmative action in layoff, employment distinguished

Wygant v Jackson Board of Education, 476 U.S. 267

In a 5 to 4 ruling, involving 5 separate opinions, the U.S. Supreme Court held that a negotiated agreement which provided that less senior minority teachers would be retained in layoff situations in order to maintain a specific ratio of minority pupils to

minority teachers constituted unlawful discrimination. The use of affirmative action in recruitment, i.e., hiring goals, appear permissible, however. In contrast, the Court said that such goals in layoffs placed the entire burden of achieving racial equality on particular individuals and violated equal protection in the absence of proof of past unlawful discrimination.

The U.S. Supreme Court's determination struck down a labor contract provision that favored minority employees in a layoff situation but indicated that affirmative action in employment is not, per se, unconstitutional.

The question before the court was whether a public employer, here a school board, could give preferential protection against layoffs to some of its employees because of their race or national origin. While these opinions undoubtedly will be explored and evaluated by public employers, unions, affirmative action advocates and lower courts repeatedly in future months, the following appear to be among the key elements of this 5 to 4 ruling:

1. Racial classification by a public employer is permitted if such a classification can be justified by a compelling governmental interest;

2. Voluntary affirmative actions programs by a public employer do not require that the employer first be found to have unlawfully discriminated against protected class members by a court;

3. A public employer may attempt to correct apparent prior discrimination by affirmative action to avoid potential litigation;

4. Societal discrimination, alone, is not sufficient to justify a racial classification by a public employer; and

5. The employment or retention of minority employees to serve as "role models" is not a satisfactory justification for engaging in discriminatory employment or layoff practices.

The majority indicated that in cases involving valid hiring goals, affirmative action is constitutional even though the burden of implementing such a plan may be borne by innocent individuals. In such cases the effect of the plan is diffused to a considerable extent among society generally and, therefore, is not "intrusive."

In contrast, such racial classifications in layoffs impose the entire burden of achieving racial equality on particular individuals, a burden "too intrusive" in the opinion of the majority. The Court said that as a means of accomplishing an otherwise legitimate purpose, the Board's layoff plan was not sufficiently narrowly tailored and thus could not satisfy the demands of the Equal Protection Clause.

The majority specifically noted that "less intrusive means of accomplishing similar purposes -- such as the adoption of hiring goals -- are available." This, in the mind of many, is viewed as an indication of the Court's willingness to approve governmental affirmative action programs in employment under certain conditions.

Wygant and a number of other white teachers sued claiming that their constitutional rights had been violated when they were terminated pursuant to a collective bargaining agreement which provided that less senior minority teachers were to be retained in layoff situations in order to maintain a certain ratio of minority teachers to minority pupils in the Jackson schools.

The decision is posted on the Internet at:
http://www.law.cornell.edu/supct/html/historics/USSC_CR_0476_0267_ZS.html

Affirmative action yields to seniority
Memphis Fire Department v Stotts, 467 U.S. 561

The decision in Vulcan Pioneers may have been rendered irrelevant as a result of the U.S. Supreme Court's decision in *Memphis Fire Department v Stotts*.

While Pioneer held that employees laid off to preserve minority gains attained under a consent decree without regard to their seniority lost a property right for which they had to be compensated (in this case by the Federal government), the Stotts decision indicates that race conscious considerations in layoffs were unlawful.

This would be true even if it would result in the erosion of the benefits achieved by minorities as a result of "affirmative action."

There should be no race conscience preferences in retention in the face of a layoff if the layoffs are made in accordance with a bona fide seniority system according to the Stotts opinion.

In Stotts, the Memphis Fire Department was ordered not to apply its seniority rules insofar as it would decrease the percentage of black firefighters employed. The Supreme Court indicated that instead of using this approach, if individual black employees show that they have been the actual victims of unlawful discrimination, “compensatory seniority” may be awarded and such persons “given their rightful place in the seniority roster.”

Some advocates of affirmative action have expressed concern that this reasoning might be applied to the selection process as well. This would result in limiting any preference in selection for employment or promotion provided by a “settlement” of a Title VII complaint to persons able to demonstrate (or the employer concedes) that they were the actual victims of unlawful discrimination on the part of the employer.

A cause for this concern was probably the statement (described by Justice Stevens as “advisory”) in the Stotts opinion that “a court is not authorized to give preferential treatment to non-victims (of discrimination),” and the reference to §706(g) of Title VII. §766(g) provides that “No court can require hiring, reinstatement, ... or payment of back pay for anyone who was not discriminated against in violation of (Title VII).”

Age discrimination

Oberg v Allied Van Lines, 63 FEP 470, Cert. denied, 511 U.S. 1108
Wamsley v Champlin Refining, 11 F. 3d 534, Cert. denied, 115 S. Ct. 1403

The layoff of workers in the course of a retrenchment may result in the filing of charges of age discrimination under the Age Discrimination in Employment Act [ADEA].

To avoid such an action, employers often require employees to sign a "release" waiving their rights under ADEA as a condition of receiving severance benefits. Is such a waiver valid in view of the provisions of the Older Workers Benefit Protection Act [OWBPA] barring employees from waiving their possible ADEA claims unless their waiver is made knowingly and voluntarily?

There is a difference of opinion between the U.S. Circuit Courts of Appeal on this question.

In Oberg, the Seventh Circuit held that OWBPA flatly prohibited such a waiver and that employees did not have to return any benefits as a prerequisite to suing an employer for alleged age discrimination.

In the Wamsley case the Fifth Circuit decided that such a waiver was effective notwithstanding the fact that the employees had retained the severance benefits they received from their employer, Champlin.

OWBPA provides for a 45-day period during which employees can decide whether or not they wanted to accept the company's offer. Wamsley contended that Champlin's workers were not allowed 45 days to consider the company's offer. He argued that the release he signed was not voluntary as it "was obtained under duress," and thus in violation of OWBPA.

Although it noted the views of the Seventh Circuit in the Oberg case, the Fifth Circuit decided that the waiver was valid because Wamsley had kept the severance benefits paid by Champlin as "consideration" for the waiver.
Essentially the Wamsley court ruled that such a waiver is "voidable" rather than "void," and because the workers kept the benefits provided by the company they, by such conduct, agreed not to sue Champlin for alleged violations of ADEA.

Age discrimination
Kolbow v. Honeywell, 122 F.3d 1127

Donald Kolbow worked as an engineering aide for Honeywell for 38 years. He received excellent performance evaluations during much of his time at Honeywell and is credited as an inventor on seven patents procured for Honeywell between 1972 and 1993.

The company decided to lay him off along with 46 others in 1993. The layoffs stemmed from an vice president's desire to upgrade the technological skill base of engineering employees, which was to be done by "changing the skill mix of employees toward more degreed engineers and engineers with advanced degrees, and through training of retained employees."

Honeywell stated that Kolbow was laid off pursuant to its plan both because Kolbow did not have an engineering degree and because of his lack of training and experience with computer technology. Kolbow asserts that the real reason for his discharge was that his supervisors thought he was too old and that Honeywell's explanations were pretextual.

The Court of Appeals confirmed a District Court's ruling to dismiss Kolbow's complaint. He did not present enough information to warrant a trial on age

discrimination because he did not have any evidence that Honeywell's reasons were made in bad faith.

A similar case is *Marks v. Loral Corp*., 57 Cal.App.4th 30, in which a California appeals court in August 1997 that replacing older workers with younger ones is not discriminatory if the motivation is mainly economic. "We are not unmindful of the image of some newly minted whippersnapper MBA who tried to increase corporate profits -- and his or her own compensation -- by across the board layoffs," the court said. But age discrimination laws are not meant to inhibit "the very process by which a free market economy ... is conducted and by which, ultimately, real jobs and wealth are created."

Age discrimination and budget problems

Finnegan v TWC, CA7, 91-2150

The 7th Circuit Court of Appeals ruled that cuts in wages and fringe benefits to resolve fiscal problems did not violate the Age Discrimination in Employment Act despite the fact that most of the workers affected were 40 or more years of age. The court ruled that to allow such a lawsuit would require the employer to "balance its books on the backs of younger workers." This decision may prove important in cases involving layoff or early retirement incentives where unlawful discrimination on the basis of age is alleged.

Age discrimination and layoff

Graham v NYS Division of Human Rights, 197 A.D.2d 516

Graham filed a discrimination complaint with the Division of Human Rights contending that he had been terminated from his position because of age and following his reemployment was terminated in retaliation for his filing a complaint with the division.

He appealed the division's determination that his initial discharge was unrelated to age and his subsequent termination was not made in retaliation for his filing a discrimination claim but was based on inadequate work performance.

The Appellate Division said that the division's determination was based on substantial evidence in the record. The division had determined that Graham had been laid-off as part of a reorganization and retrenchment involving some 400 positions.

Subsequently reemployed following his filing a complaint with the division, he negotiated and was given a series of work objectives that he was to attain. He failed to attain the first set of objectives and, later, two other sets of objectives. He was then dismissed.

The decision indicates that Graham's "initial discharge was a business decision ... which was unrelated to his age and his subsequent discharge was not retaliatory, but based upon his inadequate performance." The Appellate Division then affirmed the division's determination dismissing Graham's complaints.

An educator may accrue tenure and seniority rights in both an administrative and teacher tenure area simultaneously under certain circumstances

Nancy Pearse v Board of Education of the Burnt Hills-Ballston Lake Central School District, Decisions of the Commissioner of Education, Decision #16,159

The Commissioner of Education sustained, in part, an appeal filed by Nancy Pearse challenging the determination of the Board of Education of the Burnt Hills-Ballston Lake Central School District and its Superintendent, James Schultz, to excess her as a foreign language teacher.

Pearse served in a position where she was assigned to spend 60% of her time as Dean of Students and 40% of her time as a foreign language teacher and on January 22, 2008, the board granted Pearse tenure in the administrative tenure area of dean of students, effective March 19, 2008.

In June 2008 the district abolished Pearse’s .4 teaching assignment as a foreign language teacher and she was laid off as a result.

Pearse appealed to the Commissioner contending that the board had violated her tenure and seniority rights as a foreign language teacher. She argued that she had received tenure by estoppel[19] in the foreign language tenure area and that she was not the least senior foreign language teacher in the district at the time it abolished her postion.

As redress, Pearse asked the Commissioner to direct the district to reinstate her to her foreign language teaching position, with back pay and benefits.

[19] Tenure by estoppel "results when a school board fails to take the action required by law to grant or deny tenure and, with full knowledge and consent, permits a teacher to continue to teach beyond the expiration of the probationary term" (see Lindsey v Board of Education of Mt. Morris Central School District, 72 AD2d 185, 186].

The district, on the other hand, argued that as Pearse's teaching position was part-time, she was not eligible to receive tenure in the foreign language tenure area. In addition, the district contended that the decision to layoff Pearse's was lawful because she was not entitled to accrue tenure and seniority rights in both an administrative and teaching tenure area simultaneously and, therefore, that she never accrued tenure or seniority rights as a foreign language teacher in the district.

The Commissioner said that Pearse's appeal "presents a novel issue -- whether an educator may accrue tenure and seniority rights in both an administrative and teacher tenure area simultaneously.

The test of whether an employee should be deemed to serve in an administrative tenure area is whether an employee spends over 50% of his or her time on administrative duties. The test with respect to teachers attaining "tenure" is that the educator spend at least 40% of his or her duties in the relvent teacher tenure area.[20]

The Commissioner rejected the school district's theory that Pearse could not have accrued tenure and seniority rights in a teacher tenure area because she is not a professional educator as defined in Part 30 of the Commissioner's regulations, noting that §30-1.1(e) of the Commissioner's regulations defines professional educator as follows:

Professional educator means an individual appointed or to be appointed to a full-time position on the professional staff of a school district or board of cooperative educational services, which position has been certified as educational in nature by the Commissioner to the State Civil Service Commission pursuant to the provisions of section 35-g of the Civil Service Law and in which position tenure may be acquired in accordance with the provisions of the Education Law.

Although, said the Commissioner, "§30-1.1(e) requires that the educator be appointed to a full-time position on the professional staff of the district, [it] does not require an individual to be employed solely in a full-time teaching position."

The Commissioner also rejected the district's claim that "an educator cannot accrue tenure and seniority rights in both an administrative and teacher tenure area

[20] Part 30 of the Commissioner's regulations [8 NYCRR 30] provide that teachers are deemed to serve in any tenure area in which they spend at least 40% of their time. Further, the test of whether an employee should be deemed to serve in an administrative tenure area is whether an employee spends over 50% of his or her time on administrative duties.

simultaneously," noting that Part 30 of the Commissioner's regulations clearly permits a professional educator to simultaneously hold tenure and earn seniority in more than one teacher tenure area, citing 8 NYCRR §30-1.9[d].

Accordingly, the Commissioner ruled that an educator "should be able to serve in both an administrative and teacher tenure area at the same time and receive seniority credit and tenure in both tenure areas provided that the individual performs more than 50% of his or her duties in the administrative tenure area and at least 40% of his or her duties in a teacher tenure area."

Also, noted the Commissioner "Public policy favors the protection of the tenure rights of both teachers and administrators."

However, the Commissioner said that it was "unclear from the record" if Pearse was the most senior teacher in the foreign language tenure area on the date on she was excessed. He deemed it appropriate "to remand this matter" to school district for it to calculate Pearse's seniority rights in the foreign language teacher tenure area and make a new determination as to whether she is entitled to be restored to a tenured position as a teacher of foreign language effective June 23, 2009, with back pay and retroactive benefits.

The Commissioner's decision is posted on the Internet at:
http://www.counsel.nysed.gov/Decisions/volume50/d16159.htm

An educator must serve at least 40% of his or her workday in the tenure area in which he or she claims greater seniority than others in that tenure area for the purposed of layoff

Appeal of Gary Cieslia from action of the Highland Falls-Fort Montgomery Central School District, Decisions or the Commissioner of Education, Decision 16,480

The school board granted Gary Cieslia tenure in the special education tenure area, About two years later the school board adopted a resolution abolishing two special education positions in the special education tenure area and notified Cieslia that, as he was one of the least senior persons in the special education tenure area, his services were being discontinued at the end of the school year and that he would be placed on a "preferred eligibility list."

Cieslia, claiming that he was improperly terminated in violation of Education Law §§2510 and 3013 and that he was more senior than five other teachers in the special

education tenure area, filed an appeal with the Commissioner seeking an annulment of the district's determination terminating his services and reinstatement as a full-time teacher of special education, with back pay and benefits.

The school district argued that Cieslia [1] failed to meet his burden of demonstrating that he was not one of the least senior teachers in the special education tenure area and [2] that he is not entitled to seniority in the special education tenure area because he did not spend at least 40% of his workday teaching in the special education tenure area.

The Commissioner said that Education Law §3013(2) provides that when a board of education abolishes a position, "the services of the teacher having the least seniority in the system within the tenure [area] of the position abolished shall be discontinued." Further, 8 NYCRR 30-1.1(f) [Rules of the Board of Regents] defines seniority as follows: "Seniority means length of service in a designated tenure area ...."

The significant issue in Cieslia's appeal was whether Cieslia was one of the two least senior teachers in the special education tenure area. Noting that "In general, seniority may be accrued in a given tenure area only if the service of the educator in such area constitutes 40% or more of the total time spent in the performance of instructional duties (8 NYCRR §30-1.1 [f] and [g])" the Commissioner ruled that Cieslia "has not established that the work he performed was in the tenure area of special education."

Although Cieslia did hold permanent certification in special education and was granted tenure in the special education tenure area, the record showed that Cieslia never devoted at least 40% of his work time to instruction in special education. Rather, said the Commissioner, the record showed that Cieslia's assignment comprised one special education resource room class and alternative education classes in English, mathematics, social studies and global history.

In an appeal to the Commissioner, the petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which he or she seeks relief. As Cieslia failed to submit any lesson plans or any other evidence to demonstrate that he spent more than 40% of his time in the special education tenure area during any of relevant school years, the Commissioner found that Cieslia "never served in the special education tenure area."

Nor, said the Commissioner, does the prohibition contained in 8 NYCRR §30-1.9 against assigning a professional educator to devote a substantial portion of his or her time in a tenure area other than that in which he or she has acquired tenure without his or her consent apply to these facts as from the "inception of his employment by the

Board Cieslia never devoted a substantial portion of his time within the special education tenure area and therefore was not a professional educator entitled to the protection of 8 NYCRR §30-1.9."

The Commissioner said that he was "constrained to dismiss this appeal," and noted that when Cieslia commenced his employment with the district the board lacked the authority to offer him a tenured position as a special education teacher. He then took this opportunity to "remind [the] board of the need to follow all pertinent provisions of the Civil Service Law, Education Law §3014 and Part 30 of Rules of the Board of Regents.

The decision is posted on the Internet at:
http://www.counsel.nysed.gov/Decisions/volume52/documents/d16480.pdf

Age discrimination charged in layoff

Roundtree v Niagara Falls CSD, 294 A.D.2d 876

Ernest A. Roundtree had about 40 years of service. He was demoted to a lower grade position after he said he would not retire from his position of maintenance foreman with the Niagara Falls City School District. Then 65 years old, Roundtree sued, claiming unlawful discrimination because of age. Supreme Court rejected the School District's motion to summarily dismiss Roundtree's complaint.

The district conceded that it told Roundtree that his position was to be abolished and urged him to retire in view of the fact that he was "almost 65 years old and had over 40 years in the retirement system." Roundtree, however, declined to retire and when his position was abolished he was "bumped" back to a position that he previously held, with a pay decrease of $17,000 per year. Four additional maintenance foreman positions were abolished at the same time. Two incumbents retired; the other two, in their forties, were reassigned to lower-level positions.

The School District's defense to the age discrimination charge: facing a $5,000,000 budget deficit, it abolished Roundtree's position, among others, in the course of a district-wide reduction in workforce.

The Fourth Department said that while Roundtree "establish a *prima facie* case of age discrimination under the Human Rights Law (Executive Law §296), the District rebutted Roundtree's allegations by showing it had a lawful reason for its decision and that its reason was not a pretext for unlawful age discrimination."

Holding that "[e]ven in the context of a legitimate workforce reduction, an employer may not discharge an employee because of his or her age," the Appellate Division ruled that the District:

1. met its burden in its motion to dismiss with proof that Roundtree's position was eliminated "based on nondiscriminatory reasons" by demonstrating that its financial problems required a workforce reduction, which included abolishing maintenance positions as well as teaching positions;

2. demonstrated that the reduction was accomplished in an unbiased manner in that it affected both older and younger employees in Roundtree's job title;
3. the foremen were not replaced after the elimination of the job title and their maintenance foremen duties were reassigned to other employees; and

4. Roundtree was given another position, although at a reduced salary.

Pointing out that Roundtree did not raise any issue of fact challenging the District's explanation for its eliminating his job title by alleging the reasons given by the District was pretextual and that age discrimination "was more likely the real reason," the Appellate Division ruled that Supreme Court was incorrect when it rejected the District's motion for summary judgment.

As to the "urging of retirement" issue, the Appellate Division said that "[c]ontrary to [Roundtree's] contention, [the School District] had a legitimate reason to inquire whether [Roundtree] was considering retirement in light of the magnitude of the workforce reductions."

All teachers have layoff rights in BOCES takeover situation
Buenzow v Lewiston-Porter Central School District , 101 AD2d 30, *Affd.,* 64 NY2d 676

In the Acinapuro Case (89 AD2d 329), the Court said that when a school district takes over a BOCES program within the meaning of §3014-b of the Education Law, BOCES teachers in the tenure area must be considered by the district first when filling any new positions involved. The teachers to be given such consideration included teachers who were not actually serving in the abolished BOCES positions. (In Acinapuro, the teachers involved were employed in different BOCES programs.)

When Lewiston-Porter Central School District, together with four other districts, took over a BOCES Orleans-Niagara Counties "learning achievement program," it said it would only consider applications for employment from excessed BOCES teachers. The BOCES had advised all of its employees that they might be eligible for a position with a district and if they were interested in a position with the district, to apply directly.

Two teachers not to be excessed declared that they wished to be considered employees of Lewiston-Porter as permitted by §3014-b(4) of the Education Law and claimed seniority/layoff rights for appointment to the positions that Lewiston-Porter had created as a result of the takeover. The District responded that only those teachers laid off by BOCES had a right to be considered and hired as special education teachers and a lawsuit followed.

The Court said Acinapuro applied and that BOCES was to certify an eligible list of candidates for appointment to the position(s) created by Lewiston-Porter as a result of the takeover. The Lewiston-Porter position(s) were to be filled by the most senior teachers on the list who "assert their rights to such position(s)."

As a result of these determinations, it appears that all BOCES teachers, not just those actually to be excessed, may claim layoff rights in such cases. This is undoubtedly of great importance to the teachers in situations where a more senior BOCES staff member believes that it is but a matter of time when he or she "will be the next to go," and a less senior teacher is being appointed to what may prove to be a more secure position with a district.

Annual appointments
Mohr v Salamanca City School District, 267 A.D.2d 983

Seniority is one of the critical elements in determining the retention of an employee in layoff situations. Such seniority, however, is a function of having tenure with the individual's employer, as the Mohr case demonstrates. Essentially, tenure is attained as a result of being continued in service after completing a probationary period and not simply completing a series of annual appointments.

Brian Mohr was appointed as a teacher's aide in Salamanca's Bilingual Education Program in 1978. He was reappointed annually to that position until 1982 when he was appointed as a Title VII funded Bilingual Resource Teacher [BFT] for one year. Mohr was reappointed as a BFT annually until he left the district's employ in 1985. In 1997

Salamanca appointed Mohr for a one-year term appointment as a "Title IV-A Program Director/Iroquois Culture Teacher, Administrator of SYC and SYD" [ICT].

Mohr was reappointed annually to the ICT position until 1993, when he was appointed as a "Permanent Substitute in the Elementary tenure area." This appointment was subject to a three-year probationary period.

About a year later the position of "permanent substitute" was abolished. Mohr, the least senior teacher, was terminated. He sued, contending that because of his earlier service with the district, he was not the least senior teacher in his tenure area.

Mohr argued that he had acquired tenure by estoppel as a teacher as a result of his service with the district from 1987 through 1993. He claimed that this entitled him to "bump" a teacher in the Seneca Language/Iroquois Culture tenure area with less seniority or, alternatively, to be placed on the preferred list for employment in "similar positions".

The Appellate Division said "Supreme Court properly rejected those contentions." According to the decision, although an individual who completes his or her probationary period may attain tenure by estoppel, Mohr had not been appointed to a "tenure track" position until 1993. Each of Mohr's pre-1993 employments by the district was dependent on the district's receiving grant funds. As Mohr had been employed under a series of one-year contracts rather than for a "probationary term," the court said that he could not, and did not, attain tenure by estoppel. This meant that Mohr could not "bump" a teacher with less service with the district.[21]

Mohr was no more successful with his claim that he should be placed on a preferred list. The Appellate Division said that "it is well settled that a teacher is entitled to be placed on a preferred eligible list if he or she is certified in the same or a similar tenure area."

Pointing out that Mohr was not certified to teach in the Elementary Education or a similar tenure area, the court said that while he held a permit that was the equivalent of certification to teach Seneca Language/Iroquois Culture, "the closest tenure area to Seneca Language/Iroquois Culture is the foreign languages tenure area, which, said the court, applies to seventh grade and above, not to the elementary grades." Accordingly,

[21] In *Yastion v Mills*, 229 A.D.2d 775, the Appellate Division held that a teacher may work on a year-to-year contractual basis and never acquire tenure even after three years of service. Orange-Ulster BOCES had appointed Yastion to a federally funded position and his annual employment contracts specifically indicated that "tenure does not apply to this position."

the Appellate Division dismissed this branch of his appeal as well, holding that Mohr was not "entitled to placement on a preferred eligibility list."

Applying the Doctrine of Primary Jurisdiction

Marsico v Armstrong, 111 AD3d 736[22]

Education Law §2510(2) provides that "Whenever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system *within the tenure of the position abolished* shall be discontinued [emphasis supplied].[23]

The Board of Education abolished Business Education teacher positions in accordance with Education Law §2510(2) and then established a preferred eligible list pursuant to Education Law §2510(3) for use in the event a vacancy became available and the Board elected to fill the position.

Donna Marsico was granted tenure as a Business Education teacher by the Board effective September 1, 1994. Upon the abolishment of her positions, the Board placed Marsico's name on the appropriate preferred list as "the most senior teacher for rehiring purposes." The Board, however, later concluded that Marsico's service with the school district as an Adult Education teacher from 1993 to 2007 should not have been considered in determining her seniority for placement on the preferred list.

The Board then adopted a resolution establishing a new preferred eligible list listing the names of two other teachers as having greater seniority in the tenure area than Marsico. One of those teachers was later appointed from the preferred list.

Marsico filed a petition pursuant to CPLR Article 78

[1] seeking a review of the resolution establishing the new preferred eligible list,

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[22] The Appellate Division's decision is posted on the Internet at: http://www.nycourts.gov/reporter/3dseries/2013/2013_07487.htm

[23] In contrast, in the event positions in the competitive class are abolished [educators are in the unclassified service], §80.1 of the Civil Service Law provides that the incumbents of such positions shall be laid off "in the *inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction* in which such abolition positions occurs [emphasis supplied]. §80-a(1) of the Civil Service Law so provides for employees in the noncompetitive class employed *by the State as the employer* [emphasis supplied].

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