Addressing Employee Behavior: Counseling through Discipline

Civil Service Law §75/Arbitration and Education Law §3020-a

WNY Education Conference

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Types of Employees

- **Instructional (Certified)**
  - Probationary
  - Tenured

- **Non-Instructional (Classified)**
  - Provisional
  - Probationary (different lengths)
  - Permanent

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TRUE OR FALSE

A provisional employee can only be appointed if s/he is one of the top 3 reachable on the list.

TRUE OR FALSE

A union member must be afforded union representation when you speak with him/her about a matter s/he witnessed?

TRUE OR FALSE

A Part 83 proceeding by the Commissioner of Education and Education Law 3020-a proceeding can proceed at the same time.

TRUE OR FALSE

If criminal charges are pending against an employee, the District should wait to investigate and/or take action.

TRUE OR FALSE

A District must have an employee agree to attend a training to address his/her improper conduct, which is held during the school day.

Proceedings against Employees

- Keep in mind that discipline is not the only proceeding to which employees in public schools may be subjected.
- Allegations concerning the moral character of New York State teaching certificate holders = Part 83.
- Criminal proceedings can be initiated by a local law enforcement agency.
- Could all be pending at the same time depending on the various alleged conduct of the tenured teacher.

Part 83 vs. 3020-a/Section 75 vs. Criminal (cont'd)

These proceedings can be pending at the same time:

Part 83

- Education Department
- Certification Proceeding
- Preponderance of the evidence
- Hearing Officer (with panel upon request)
- No statute of limitations
- Revocation of certificate or denial of application

3020-a, §75, Arbitration

- School District
- Employment Proceeding
- Preponderance of the evidence, Just cause
- Arbitrator – Mutual Selection
- Hearing Officer appointed by the Board
- 3-year limitation, except for criminal conduct (18 months for §75)
- Up to Termination

Criminal

- Local Prosecutor
- Criminal Proceeding
- Beyond a reasonable doubt
- Judge (with jury upon request)
- Generally, 5 years for felonies and 3 years for misdemeanors
- Loss of liberty (prison/jail)

Report of Potential Misconduct/Investigation

- Assess the Allegations/Act Promptly
- Interim Action? e.g. Administrative Leave
- Create Investigatory Plan
  - Who to Interview – complainant first, then witnesses
    - last is accused (union rep offered whenever employee is may be the subject of discipline – document offer or presence)
  - How to Investigate – gather evidence (documents, videos)
  - Timing
  - Location
- Evaluate the Evidence
- Review policies, procedures, rules, etc.
- Conclusion of the Investigation (final report)
- Now what? Corrective Action? Reporting requirements?

Spectrum of Responses to Employee Misconduct

- Ignore
- Critical Conversation = HR Support Indirectly Involved
- Verbal counseling
- Email/written warning (Check CBA)
- Counseling memorandum (and where incompetency is the underlying issue, may be accompanied by performance improvement plan - typically not “adverse”)
- ------
- Discipline = Just Cause HR Directly Involved
- Letter of reprimand
- Fine/Paid/Unpaid suspension
- Last Chance/Settlement Agreement
- Termination

Having Critical Conversations

- This includes in Employee Evaluations!
- Notice of Right to Union Representation
- Election for Union Representation
- Opportunity for employee to respond to concern
- Opportunity for you to learn mitigating or aggravating facts
- Opportunity for you to assess whether employee is remorseful and willing to make improvements

Documenting Critical Conversations

- Employer should not wait until initiating disciplinary process against employee to begin documenting.
- Creating a record of concerns as early as possible makes it harder for employee to claim he/she was not aware of an issue or claim later discipline is discriminatory or retaliatory.
- Annual performance appraisals/evaluations are very important!!
- Appeal of Rickson, Decision No. 18,147 (July 7, 2022)
  - Teacher who requests statement of reasons for termination, District must provide specific, detailed reasons. Providing less will not be legal compliant.

Documenting Critical Conversations (cont'd.)

- Detailed and proper documentation can help an employer defend against employment claims
- Lack of documentation can lead to legal liability
- Documentation is critical at every step of the process, whether discipline is imposed, restricted to a verbal warning, or not imposed at all
- Format: Email vs. Memo vs. Counseling Memo

Documenting Critical Conversations (cont'd.)

Basic documents any employer should maintain:

- Documents showing that each employee has adequate notice of conduct and expectations ("notice" documents, e.g. policies, code of conduct, handbook, etc.);
- Records of incompetency/misconduct and conferences/counseling;
- Written performance appraisals (with employee acknowledgement receipt);
- Records of progressive discipline policy/actions;
- Disciplinary investigation documents.

Counseling Memoranda

Purpose of a Counseling Memorandum

- A counseling memorandum is not discipline.
- A district may place a counseling letter critical of a tenured teacher's performance in the teacher's personnel file at any time.
  - Holt v. Board of Education, 52 N.Y.2d (1981)
- Supervisory personnel of a school district have right and duty to make such evaluations as an adjunct to their responsibility to supervise the faculty of the schools. *Appeal of M.D*, Decision No. 15623 (2007).
- The Commissioner and Appellate Court have ruled that a district can pursue 3020-a charges against a teacher who has been issued counseling letters previously for the same underlying misconduct, provided that charges are filed within the time limit (3 years). *Bd. of Educ. of the Dundee CSD v. Coleman*, 96 A.D.3d 1536 (4th Dep't 2012)

Purpose of a Counseling Memorandum

- Civil Service Law §75 does not insulate classified school district personnel from written critical comments from their supervisors.
  - Documents such as critical administrative evaluations or admonitions that are intended to warn or instruct a given employee may be placed in an employees file without resort to a formal hearing. Tomaka v. Evans-Brant CSD, 107 A.D.2d 1078 (4th Dept 1985),affd 65 N.Y.2d 1048 (1985)

Counseling Memorandum

- Counseling memos are useful “to warn and hopefully to instruct – not to punish.”
- They are “a useful tool to help the administrator correct minor problems before they grow into major ones.”
- These can be issued at any time
- You do not need an employee’s or union’s permission BUT representation required (and recall: union rep whenever employee may be the subject of discipline)
- Counseling memo can be issued for any misconduct allegations

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Who Issues a Counseling Memo?

- Direct Supervisor
- **NOT** Director of Human Resources or Assistant Superintendent or Superintendent unless s/he addressed situation when it happened or involved that individual
- Letter from the Assistant Commissioner of the Fire to firefighter that he violated the Department's Code of Conduct and EEO Policy may not be made part of petitioner's permanent EEO file without an opportunity for a hearing. *D'Angelo v. Scoppetta*, 19 N.Y.3d 663 (2012)

Counseling Memoranda: When They Cross the Line

- A harshly critical public rebuke issued by a Superintendent is considered a reprimand within meaning of 3020-a. *Appeal of Richardson*, 24 Ed Dept Rep 104 (1984) (ordering the reprimand to be removed from the teacher's personnel file)
- A harshly critical evaluation issued by the Board of Education also likely constitutes a reprimand. *Appeal of Fusco*, 39 Ed Dept Rep 836 (2000)
- Memo deemed to be critical of job performance amounts to an administrative evaluation. *Appeal of Leake*, Decision No. 17,236 (2017)
- Counseling Letter found to be disciplinary in nature ordered removed from teacher's record. *Appeal of Rogers*, 63 Ed. Dept. Rep. Decision 18,364 (December 18, 2023)

NOW….Two Primary Factors

Considerations in determining whether criticism constitutes an impermissible reprimand:

(1) Whether the Letter is Directed Towards Improvement in Performance or a Reprimand for Prior Misconduct; and

(2) The Severity of the Misconduct and the Admonition/Reprimand

What is the Process to Issue a Counseling Memo?

- Complete review of matter
- Directive to attend meeting – How?
- What Happened and Why
- Review Policies/Concerns
- Set Out Expectations and Requirements
- Explain Next Steps
- Prepare Counseling Memo, Sign Off and Personnel File
  - Notice and Opportunity to be heard

Reasons Why Some Do Not Issue A Counseling Memo

- They are a good employee. It was just a mistake.
- It doesn't rise to that level.
- The District does not plan on disciplining the individual.
- I can't prove they did it.
- I don't have time.

- **WHY** are these a problem?

Progressive Disciplinary Policy

A progressive disciplinary policy is useful because it:

- Gives the employee notice of when his or her performance violated applicable standards, with coinciding lowest level of consequences;
- Addresses (and provides record of) repeated employee problems early on (prevents last minute overcompensation by employer); and
- Builds link between employee performance and discipline to undermine idea that discipline is connected to some “other” event.

Progressive Disciplinary Policy (cont'd.)

Progressive disciplinary policies typically proceed in ascending order of severity:

- Verbal counseling (typically not considered "adverse");
- Written counseling memoranda (and where incompetency is the underlying issue, may be accompanied by PIP;
- Reprimand
- Suspension (with or without pay);
- Settlement (with last-chance provision?) agreement; and
- Termination

Classified Staff Discipline
CSL §75 or Arbitration

Discipline and Civil Service Employees

- Disciplinary proceedings involving public employees are governed by the New York Civil Service Law § 75 and/or negotiated agreements (Arbitration).
- Only employees with a property interest in their public employment position, are entitled to due process prior to being terminated or disciplined.
- All other employees may be disciplined or discharged without a hearing for any legal, non-discriminatory reason, not made in bad faith. *Tyson v. Hess*, 109 AD2d 1068 (4th Dept. 1985)
- "At will" employees are non-instructional employees who do not have job protection either under Section 75 or under a collective bargaining agreement and can be discharged without cause and without a hearing.

CSL §75 or Arbitration

- **CSL §75** is the default statutory protection for classified employees who are permanent competitive class, or labor or noncompetitive class with 5 years of continuous service who are not managerial or confidential, honorably (or other than dishonorable) discharged veterans, or exempt volunteer firefighters.
  - Why is it important to know status or classification of your employees?

- **Arbitration** full replacement for CSL §75 negotiated into a CBA. Generally, expands coverage to more employees than CSL §75.

CSL §75

- Incompetence or Misconduct
- District appoints Hearing Officer
- Stenographer
- Maximum 30-day suspension pending hearing.
- HO makes recommendation. Board (Appointing Authority) can accept, reject, or modify

Arbitration

- Just Cause
- Mutually selected Arbitrator
- Arbitrator notes official record unless stenographer
- Discipline imposed prior to arbitration
- Arbitrator's decision is final and binding.

Nuts and Bolts of CSL §75

- Section 75 provides certain basic rights to employees against whom disciplinary action is proposed, which include:
  - Right to written notice of charges and reasons for them;
  - A copy of the charges; and
  - A minimum of 8 days within which to file a written response.

Nuts and Bolts of CSL §75 (cont'd.)

- Charges must apprise employee of the specific offenses of which he/she is accused and that which the employer intends to prove at disciplinary hearing.
- No particular form, but each act or omission constituting the charges must be sufficiently identified and particularized with reasonable specificity.
- Maximum 30-day Unpaid Suspension pending hearing.
- Charges must be brought no more than 18 months after occurrence of alleged (1) incompetency or (2) misconduct complained of unless charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

Nuts and Bolts of CSL §75

What is involved in a Section 75 Hearing?

- "Formal" Hearing – like a "mini" trial.
- At the District (or another agreed-upon location)
- Impartial Hearing Officer (appointed by the District)
- Stenographer
- Typically, attorneys on both sides
- Burden of Proof - substantial and competent evidence
- Opening Statements
- Witness Testimony
- Exhibits
- Closing Statements/Briefs

Nuts and Bolts of CSL §75: Designation of Hearing Officer

- The employee is entitled to a hearing conducted by the body or officer having the power to remove the employee (Board of Education), or by a designee of that officer or body.
- If the Board of Education is not going to conduct the hearing, a hearing officer must be officially designated, **in writing**, to perform that function.
- The hearing officer must be unbiased and not be someone who has acquired knowledge of the facts relating to the charge prior to the hearing.

Nuts and Bolts of CSL §75 : The Determination

- The final determination must be made by the Board of Education.
  - The determination must be an “informed decision” based on an “independent appraisal” of the case.
  - There may be a finding of guilt with respect to a charge only if there is “substantial evidence” in the record to support such a finding.
- If acquitted, the employee must be restored to his or her position, with full back pay for period of suspension (if applicable), less unemployment benefits received.

Nuts and Bolts of CSL §75 : Penalties

- Upon a finding of guilt on one or more specifications, the penalty/punishment may consist of the following:
  - A reprimand;
  - A maximum fine of $100 to be deducted from employee's wages;
  - Suspension without pay for 2 month maximum;
  - Demotion; or
  - Dismissal.
- Any time during which the employee was suspended may be considered as part of the penalty.
- Right to Appeal – "shocking to one's sense of fairness."

Arbitration – What is Just Cause?

- **Notice** – Did the employee know beforehand that the conduct at issue had disciplinary consequences?
- **Reasonable Rule** – Did the employee violate a rule or order which was reasonably related to the orderly, efficient, and safe operation of the School District's business?
- **Investigation** – Did the School District conduct an investigation prior to starting the disciplinary action?
- **Fair Investigation** – Was the School District's investigation fair and objective?
- **Proof** – Did the School District's investigation demonstrate proof that the employee violated a rule or order?
- **Equal Treatment** – Has the School District enforced the rule, order and/or policy involved in the charge even-handedly and without discrimination?
- **Penalty** – Is the penalty sought reasonably related to the seriousness of the offense and the employee's record of service with the School District?

Nuts and Bolts of Arbitration

- Formal Hearing
- At the District or another agreed-upon location
- Arbitrator – mutually appointed
- Generally, no stenographer
- Typically, attorneys on both sides
- Burden of Proof – just cause and preponderance of the evidence
- Opening Statements
- Witness Testimony
- Exhibits
- Closing Statements/Briefs

The Administrator's Role in a Disciplinary Hearing

- Critical Conversations/Building the File (unless egregious conduct)
- Investigation of Facts and/or Witness During the Investigation
- Assist with the Collection of Evidence
- Assist with Preparation/Review of Charges
- Testify during the Hearing

Discipline Pursuant to Section 3020-a of New York State Education Law

Nuts and Bolts of 3020-a

- Tenured pedagogical employees in NY's public schools may not be disciplined or discharged without notice and an opportunity to be heard (i.e., a hearing) pursuant to §3020-a of the Education Law.
- Tenured staff have right to retain positions as long as they exhibit good behavior and competent and efficient service…AND do not exhibit:

a. Insubordination, immoral character or conduct unbecoming a teacher;
b. Inefficiency, incompetency, physical or mental disability or neglect of duty; and/or
c. Failure to maintain certification.

- Education Law 3012

Nuts and Bolts of 3020-a (cont'd.)

- Who's Covered?: Tenured administrators, teachers and teaching assistants.
- Standard: No person enjoying the benefits of tenure shall be disciplined or removed except for "just cause":

1. The employee knew of the District's policy.
2. The District's policy was reasonable.
3. The District investigated to determine that the employee violated the policy.
4. The investigation was fair and objective.
5. Substantial evidence existed of the employee's violation of the policy.
6. The District's policy was consistently applied.
7. The discipline was reasonable and proportional (punishment fits the crime)

Nuts and Bolts of 3020-a (cont'd.)

- **What is involved in a 3020-a Hearing?**
  - "Formal" Hearing – like a "mini" trial
  - At the District (or another agreed-upon location)
  - Impartial Hearing Officer (AAA list)
  - Stenographer (contract with NYSED)
  - Attorneys on Both Sides (typically)
  - Burden of Proof
  - Opening Statements
  - Witness Testimony
  - Exhibits
  - Closing Statements/Briefs

Nuts and Bolts of 3020-a (cont'd.)

- **Trigger**: Every type of action that is deemed disciplinary in nature triggers a tenured teacher's right to formal due process under 3020-a.
- **Penalties** include
  - Written reprimand;
  - Fine;
  - Suspension without pay for specified period; or
  - Dismissal

Nuts and Bolts of 3020-a: Considerations

- Costs (financial and time/energy/resources)
- Uncertain outcomes – no matter how strong the counsel and how clear cut the case seems
  - Impartial Hearing Officers
  - Select from AAA list through SED
  - Binding decision
- Possible costs of paid suspension (if warranted) or substitute costs for period of hearings
- Potential political costs (or benefits?)

Nuts and Bolts of 3020-a: When a 3020-a Needs to Occur

- Egregious conduct
- Employee not remorseful when confronted with concern(s)
- Attempts to counsel were ineffective
- Insubordination on prior counseling memos or directives
- Refusal to agree on terms of a settlement/separation

Nuts and Bolts of 3020-a: When a 3020-a Needs to Occur (cont'd.)

- Investigation/Preparation of "Confrontation Conference"
- Development of 3020-a Charges
- Notification of the Board
  - Executive Session – only time BOE votes in Exec. Session
  - Board acts as the "grand jury" and votes on on probable cause
- Note on involvement of attorneys

Nuts and Bolts of 3020-a: The Administrator's Role in a Section 3020-a Hearing

- Critical Conversations/Building the File (unless egregious conduct)
- Investigation of Facts and/or Witness During the Investigation
- Assist with the Collection of Evidence
- Assist with Preparation/Review of Charges
- Testify in the Hearing

Nuts and Bolts of 3020-a: Timeframes

- Charges must be brought within three (3) years from the date of the alleged misconduct, unless the conduct constituted a crime when committed
- Charges to be brought "between actual opening and closing of the school year for which the employee is normally required to serve."
  - Be particularly mindful of potential 3020-a situations for teachers or 10-month employees toward the end of the school year
- Effective April 1, 2013, all 3020-a proceedings are required to be filed and processed through the TEACH database.

Nuts and Bolts of 3020-a: Timeframes (cont'd.)

- Post April 1, 2012 – 125-Day Rule
  - 125 days from filing of charges to submit all evidence
  - 60 days from prehearing conference to final hearing.
  - 30 days from last day of hearing for decision.
- Expedited Hearings
  - Revocation of License or Certificate – One-day hearing within 7 days of the pre-hearing conference. 10 days for decision.
  - Pattern of ineffective teaching or performance (Ed. Law §3012-c) –Hearing within 7 days of the pre-hearing conference, to be completed within 60 days, 10 days for decision.
- Consider time frames when bringing charges

Changes to 3020-a Effective July 1, 2015

- Suspension Without Pay (Education Law Section 3020-a(2)(c))
  - Charges involving physical or sexual abuse of a student to be suspended without pay, but…A separate, preliminary probable cause hearing must be held regarding the unpaid suspension
- Expedited Proceedings (3020-a(3)(c)(i)(D)(i-a)(A))
  - Expedited hearing for charges of physical or sexual abuse of a student

Changes to 3020-a Effective July 1, 2015 (cont'd.)

- Reciprocal Discovery (3020-a(3)(c)(I)(c))
- Single Hearing Officer (3020-a(2)(c)(ii))
- Child Witnesses (3020-a(3)(c)(I)(c)
- Consideration of Penalty Recommendations (3020-a(4)(a))

Data on 3020-a Proceedings

Time To Process

- 2005 – 2008: 502 days
- 2014 – 2016: 175 days
- 2018: 125 days (95.5 days prehearing conference to final hearing date)

Date of Charges to Date HO Agrees

- 2008: 117 days
- 2014: 42 days
- 2018: 26 days

Data on 3020-a Proceedings

Salary Paid to Employee Charged

- 2008: $112,644
- 2018: $71,129

Fringe Benefits Paid to Employee

- 2008: $27,037
- 2018: $18,607

Consider additional costs (substitute teacher pay and benefits, administrative time and legal fees)

In a Nutshell

- The rules have changed for 3020-a hearings
- In the right circumstances, the process can be used as a cost-effective means of dealing with misconduct/issues
- Your District may no longer want to shy away from or avoid the 3020-a process
- Use 3020-a as a progressive discipline tool as well as for termination cases

Recommendations and Strategies

Know When to Hold 'em, Know When to Fold 'em

- Are you up against a SOL with respect to any of the chargeable conduct?
- Is the conduct something that is unusual/concerning and likely due to medical?
  - Examination Pursuant to Section 913 of Education Law
- Choose your investigator and gather and preserve evidence wisely.
- Will your policies help your case? (Awareness)
- Training? (Documentation of Attendance)

Assess the Ultimate Outcome

- Approach navigating the potential disciplinary matter with the ultimate goal in mind.
- Is this a case for termination or something short of termination?
- What is the likelihood of amicably reaching a settlement?
- Be confident that you have substantial, competent and credible evidence.
- Must be almost prepared to try case before bringing the charges (for 3020-a: to the board).

Questions?

Thank you!

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Thank You

The information in this presentation is intended as general background information.
It is not to be considered as legal advice.
Laws can change often, and information may become outdated.

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