LEGAL DEPARTMENT

LEGAL ASSISTANCE PROGRAM

Manual

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Produced by:
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Introduction

This manual has been prepared to assist the Labor Relations Staff in assessing situations for possible Legal Assistance. We have taken the areas covered by the Legal Assistance Program for which we receive the most applications, and provided you with separate discussions of each substantive area and a listing of information necessary to support completed Legal Assistance applications in each area.

Our goal is to make the job of evaluating whether to apply for Legal Assistance easier and to make applying for Legal Assistance and processing the Legal Assistance applications more efficient and expeditious.

A lot of work went into this manual and we hope that it will be helpful to you. Of course, we remain available to assist you in any way we can.

CSEA LEGAL DEPARTMENT
Daren J. Rylewicz, General Counsel

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ARTICLE 78 of the CPLR

I. Civil Practice Law and Rules (CPLR)

CPLR refers to the collection of Rules and Sections in law which governs the "practice" of law in the New York State Courts. The CPLR governs the procedure in civil judicial proceedings in all courts in the State and before all judges. It does not govern proceedings before administrative agencies such as the Public Employment Relations Board ("PERB") or contract grievance matters before arbitrators.

II. Article 78

Article 78 is the vehicle by which the following is challenged:

1. The actions of a body or officer which are in excess of lawful jurisdiction.

2. The failure of a body or officer to take an action or perform a duty required by law.

3. A determination of a body or officer which is arguably unlawful, arbitrary, capricious, or an abuse of discretion.

4. A determination made after a hearing which, arguably is NOT supported by substantial evidence in the hearing record when taken as whole.

An Article 78 proceeding must be commenced within four (4) months of the action/inaction complained of.*

The definition of **"arbitrary and capricious"** that will be most helpful is: An arbitrary action is one which is taken without sound basis in reason and without regard to the facts.

The Court's inquiry is limited to the question of whether the decision had ANY rational basis. If the Court finds that a rational basis for the decision existed, the Court will not substitute its judgment for that of the decision-maker and will not interfere (even where the Court may disagree with the outcome). In this inquiry, agencies charged by legislation with certain responsibilities (i.e., PERB/Taylor Law) will be given great deference by the Court in interpreting and applying the law the agency has been "placed in charge of" by the Legislature.

The definition of "substantial evidence" that is most helpful is: A decision is based on substantial evidence when the record of the hearing demonstrates that there is a rational justification for the factual conclusions reached.

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* Where used to review a PERB decision, the Article 78 proceeding must be commenced within 30 days of the decision complained of.

The Court's inquiry is again limited to the question of whether there is substantial evidence to support the result. If the Court finds that there is, the Court will not substitute its judgment for that of the decision-maker, even if the Court would have reached a different conclusion had it been the trier of the facts.

The basic difference between a "substantial evidence" question and an "arbitrary and capricious" question is in the decision sought to be reviewed. If there was a hearing, the question is one of substantial evidence; if there was no hearing, the question is one of arbitrary and capricious conduct or an abuse of discretion. The standard of review by the Court however, remains the same in that the Court is not hearing the matter anew (de novo); it is reviewing the action of another body and looking solely for a rational basis to support the action taken.

ARTICLE 78
(Petition to Challenge Administrative Actions)

Necessary documents and information to support Legal Assistance Applications:

- The complete personnel file of the individual.
- Copy of resolution or any other formal action taken by employer or governing body.
- The change in employment status form prepared for Civil Service.
- Copies of any and all memoranda and other documents the employee received during his/her employment relevant to the issue.
- Employee's civil service status (i.e., provisional, temporary, probationary, non-competitive class, labor class, etc.).
- All information which would suggest that the actions taken by the employer were due to discriminatory or unlawful motive(s): statements, disparate treatment, memos, etc.
- Names and addresses of any witnesses who heard the comments or observed the conduct which formed the basis for a discrimination/unlawful complaint.
- Information regarding the employee's rehabilitation, if applicable.
- Civil Service job description which sets forth the job responsibilities.
- Applicable local Civil Service rules.
- Applicable collective bargaining agreement.
- List of any other litigation or proceeding in which employee is currently involved.

BAD FAITH JOB ABOLITION

Civil Service Law Sections 80 and 81 provide that for reasons of economy, consolidation or abolition of functions, or curtailment of activities, Civil Service positions in the competitive and non-competitive classes may be abolished. A public employer can abolish Civil Service positions only for "economy or efficiency." Analogous provisions exist under the Education Law; a school board cannot rid itself of unwanted tenured positions when in fact no economy or increased efficiency is realized.

The burden is on the Employer to establish that the abolitions were legislatively authorized, resulted from legislatively approved changes due to a lack of funding, and are born of economic necessity.

The abolition of Civil Service positions is subject to challenge through an Article 78 proceeding where the purposes for the abolition were not allowable and therefore the abolition is said to be done in bad faith.

The Court of Appeals has held that a position is not effectively abolished where a person not appointed in accordance with the Civil Service system is employed to perform the duties formerly performed by the holder of the position.

BAD FAITH JOB ABOLITION*

Necessary documents and information to support Legal Assistance Applications:

- List of position(s) abolished or targeted for abolition.
- Name and address of appointing authority (employer).
- Detailed statement explaining why the abolition is in bad faith.
- Any documents from the employer regarding the reason why the position(s) were abolished.
- Any documents showing the manner in which position(s) was abolished (i.e., budget documents, legislative proposals/resolutions, local laws, rules, regulations, County Charter, etc.).
- Detailed statement explaining whether the functions and duties of at-issue position(s) have been abolished or transferred (and to which titles the duties transferred).
- Copies of any correspondence between the union and the employer regarding the abolition.
- List of any other litigation or proceeding in which employee is currently involved.

*Cross-check with Discrimination checklist

BREACH OF CONTRACT

The obligation to perform is based upon the existence of a binding contract. The court will not impose a contractual obligation under circumstances where the parties did not intend to include a binding agreement.

Where a binding contract exists, performance in the true spirit and meaning of the agreement is expected in the law. A party is bound by what he/she agrees to do, whether or not he/she intends to do what is agreed. Implicit in the performance of all contracts is an implied covenant and obligation of fair dealing and good faith.

In order to sue for breach of contract, a party must show that he/she has performed all the concurrent and dependent promises which were consideration for the contract, or that their performance has been offered, excused, or waived. Where a contract requires contemporaneous performance, neither party can sue until he/she has, by performance or offer of performance, put the other in default. Thus, generally, a party cannot sue for breach of contract without proof of performance, or at least willingness to perform, or waiver of a default.

BREACH OF CONTRACT

Necessary documents and information to support Legal Assistance Applications:

- Copy of contract, settlement, etc., or if contract was an oral agreement, narrative of contractual terms.

- Nature of breach (i.e., what employer did or failed to do).

- Date of breach – Is breach continuing or did it occur once or several times.

- Extent to which the parties have performed their obligation under the contract.

- Names of parties who entered into a contract and names of person(s) who negotiated contract, if different.

- Copies of any documents relative to the contract.
- Copies of any grievance, IPs, etc., and decisions with regard to proceedings prior to entering into the contract, if any.

- Statement why issue not grievable.

- Copy of any communications between the parties about the issue of compliance, including requests or demands for compliance.

RETIREE HEALTH INSURANCE: THE LEGAL FRAMEWORK

I. Retirees

1. Retirees who have the vested right to maintain the health benefits that were in place on the date of the retirees' retirement cannot have their benefits changed by subsequent collective bargaining negotiations between a union and employer. "Vested" rights are those retiree entitlements arising from the contract that are locked in place at the time of retirement.

2. A union is ***not*** the exclusive representative of individuals who already retired.

3. CSEA ***will*** review retirees' rights to maintain their health insurance under an existing collective bargaining agreement. If there is merit to retirees' claims to health insurance in retirement under a CSEA contract, CSEA will consider providing legal representation to enforce their rights to health insurance.

4. In some bargaining units, as a matter of history, employers have changed retirees' health insurance coverage when CSEA negotiated changes to the health insurance coverage for active employees without being challenged by CSEA. For example, CSEA may have negotiated contractual increases in co-pays or premium contributions for active employees, and then the employer, on its own, applied these increases to retirees. In this circumstance, we can no longer assert that retirees have a vested right to the same coverage the retirees had when they retired, because those benefits have already changed over the years without any challenge. Where retiree health coverage has consistently followed the coverage for active employees, and the employer attempts to diminish retiree health benefits even below the active employees' benefits, CSEA representatives need to determine if there has been a consistent, longstanding practice that retirees' benefits have always been the same as active employees' benefits in the past (at least over a significant number of years and several successive contracts). If the practice has been longstanding and consistent, we can claim that the retirees have contractual right to the same level of benefits as active employees, and attempt to enforce this as a consistent "past practice."

II. Enforcement of the right to retiree health insurance

1. Court action vs. grievance

    - When enforcing the right to retiree health insurance, a decision must be made about whether to enforce the retirees' right in court or by filing a grievance. This decision depends on the language in the contractual grievance procedure.

    - If the language is broad enough to allow a retiree to file a grievance, then a grievance must be filed for the retirees. If the grievance procedure permits only ***employees*** to file a grievance, then retirees ***must go to court*** to enforce their contractual rights to health insurance.

    - Example of contractual grievance definition allowing retirees to file a grievance:

        > *A grievance shall mean: any dispute that may arise regarding the application or interpretation of this Agreement.*

    - Contractual grievance definition permitting only employees to file a grievance:

        > *A grievance shall mean: any dispute between an employee and the employer regarding the application or interpretation of this Agreement.*

2. Contract is *silent* on retiree health insurance

If there is no language in the collective bargaining agreement covering retiree health insurance, then retirees have ***NO RIGHTS*** to maintain their health insurance in retirement.

The only *possible* exception to this rule is if the contract has an enforceable past practice clause ***AND*** the grievance procedure is broad enough to allow retirees to file a grievance ***AND*** there is a consistent past practice of providing retirees unchanged health insurance benefits by the employer over many years.

III. School District retirees' rights to health insurance

The State Legislature has passed legislation called the "Moratorium Statute" which prohibits school districts from diminishing health insurance benefits or contributions for retirees without a "corresponding diminution" in health insurance benefits or contributions for active employees. This statutory protection applies to school districts. Most active school district employees do have health insurance provisions in their collective bargaining agreements. Therefore, the Moratorium Statute guarantees that retirees' benefits in these districts will not be diminished *unless* benefits are also diminished for active employees, through contract negotiations.

The courts have enforced this moratorium to prohibit a school district from increasing co-payments only for retirees (i.e. without making the same increase in co-payments for active employees). Similarly, the courts have prohibited school districts from increasing the premium costs for retirees unless the same increase in premium costs is imposed for active employees.

By protecting the health insurance benefits of active employees, the union is automatically protecting health insurance benefits, if any, of retirees, *even if there is no contract language* in the collective bargaining agreement covering retirees.

RETIREE HEALTH INSURANCE: THE LEGAL FRAMEWORK

Necessary documents and information to support Legal Assistance Applications:

- All full contracts going back as far as possible because there might be language somewhere else in the contract that is relevant.

- Names and contact information for retirees who are affected.

- Names and contact information for individual retirees who are willing to be lead plaintiffs or lead grievants, who are also members of the applicable retiree local.

- A copy of letters sent to the retirees (if any) announcing the change in retiree health insurance.

- A copy of any legislation that may have been passed (if any) implementing the change in retiree health insurance (many times these changes are implemented through legislation and it is useful to see the language of the legislation).

- Copies of the description of the benefits in the old plan and the new plan.

- If there is a different plan for retirees on Medicare, submit a copy of the plan benefits for the Medicare-supplement or Medicare-Advantage plan.

- If there are different contribution levels for retirees on Medicare, submit that information.

- If the employer reimburses retirees for the cost of Medicare Part B, submit that information.

- If it is a claim under the school district statute, we need to have a comparison of the benefits and contribution levels for active employees as compared to the benefits and contribution levels for retirees. Submit copies of the plan booklets for each.

- It is very important to know whether there is a past practice that the retirees have always kept the same plan, same benefits, and same contribution levels that they had when they retired, prior to the changes which we are now challenging. If the plan/benefits/contributions have changed for retirees once or more since they retired, it can undermine any contractual claim to a vested right.

CIVIL SERVICE LAW SECTION 61 (OUT-OF-TITLE)

I. Selection of Eligibles for Appointment

1. The New York State Constitution and Civil Service Law mandate that appointments and promotions in the public service shall be made according to merit and fitness on the basis of tested qualifications. The statutory provisions regulating appointments under Civil Service Law are mandatory and must be complied with strictly. They may not be waived by contract.

2. Appointments and promotions in the competitive class of the Civil Service must be made from eligible lists. Appointments or promotions from an eligible list shall be made by the selection of one of the three persons certified by the appropriate Civil Service Commission as standing highest on such eligible lists who are willing to accept such appointment or promotion.

3. Appointments and promotions shall be made from the eligible list most nearly appropriate for the position to be filled. In other words, where duties of two different titles are essentially the same position, one title may be filled from an eligible list of the other title.

4. There is no vested right to an appointment from the eligible list, as the appointing authority may select any one of the top three available candidates on the list.

II. Out-of-Title Work

1. No person is to be appointed, promoted, or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person is to be assigned to perform the duties of any position unless he/she has been duly appointed, promoted, transferred, or reinstated to such position in accordance with the Civil Service Law.

    - Temporary out-of-title assignments are not necessarily violative of the CSL Section 61. It is continued and persistent assignment of out-of-title work that constitutes a violation.
    - The performance of out-of-title work cannot be used for experience credit toward promotion.
    - Out-of-title work which is invalidly imposed upon incumbents may not be validated by reclassification based upon the duties being performed.

CIVIL SERVICE LAW SECTION 61 (OUT-OF-TITLE)

Necessary documents and information to support Legal Assistance Applications:

- Applicable contract provisions, if any.

- Job descriptions of both the position held and the position alleged to be actually worked.

- List of employee's current tasks and duties.

- Statement as to whether the employee is still performing out-of-title work or whether the out-of-title work has ceased. If ceased, what date?

- List of duties claimed to be out-of-title, together with dates and amount of time spent performing such tasks.

- Summary of all decisions held with management regarding the out-of-title claim.

- Any prior awards/decisions regarding similar out-of-title claims.

- Salary level of assigned position and of the position which contains the duties the employee is performing on the out-of-title basis.

- Copy of local civil service rules.

CIVIL SERVICE LAW SECTIONS 71, 72 AND 73

Civil Service Law Section 71 concerns **reinstatement** of permanent public employees who have been separated from service by physical or mental disability after an **occupational** injury or disease.

Section 72 is applicable to removal of permanent employees for physical or mental disability after a **non-occupational** injury or disease. Section 73 is applicable to separation and reinstatement of such employees.

Civil Service employees who have been injured are entitled to at least one year of absence under Sections 71 (occupational) and 73 (non-occupational).

Both sections 71 and 73 also provide limited rights of reinstatement to employees who are terminated for disability, but who later recover.

The procedures set forth in these sections must conform with due process standards. **Section 71** provides that an employee shall be entitled to a leave of absence of at least one year, unless a disability is of such nature as to be permanently incapacitating. The employer is free to permit a longer leave. Further, it provides that the employee may, within one year after termination of the disability, apply to the Civil Service Department for a medical examination which is conducted by a medical officer selected for that purpose by the Department. If, after the medical examination, the medical officer certifies that the person is physically and mentally fit to perform his/her duties, then the employee is to be reinstated to his/her former position, if it is still vacant.

Section 72 provides that where, in the judgment of the appointing authority, an employee is unable to perform his/her duties by reason of a disability other than the one resulting from occupational injury, the employer may require the employee to undergo a medical examination. This can include a mental examination. If the results of the medical examination indicate that the employee is unfit to perform his/her job duties, the employer may place the employee on a leave of absence up to one year. This section further provides that the employee may be terminated in accordance with the provisions of Section 73 upon the absence of a year or more. However, prior to placing an employee on a leave of absence, the employee is entitled to notice of the facts on which the employer's determinations are made and to a full adversarial hearing.

Notwithstanding the right to a hearing, Section 72(5) provides that if there is probable cause to believe that an employee is a danger to persons or property, or would severely interfere with operations, he/she may be suspended immediately and allowed to use any sick leave, vacation and overtime, and other allowances pending a hearing.

Section 73 governs leave rights, reinstatement and termination of employees who are disabled by a **non-occupational** disease or injury. It provides that where an employee has been continually absent and unable to perform the duties of his/her position for one year or more by reason of a **non-occupational** disability, his/her employment

may be terminated. An employee terminated under Section 73 may apply to the Civil Service Department for reinstatement within one year from the date of termination, if the disability ceases. The employee must then undergo a medical examination from a doctor from the Civil Service Department. If the doctor determines that the employee is fit, the employee will be reinstated to his/her former position, if vacant. Although Section 73 lacks explicit due process protections, the Court of Appeals has held that employees are entitled to a hearing when there is a dispute concerning the facts.

NOTE: Under Section 71 (occupational injury or disease) an employee is entitled to one (1) cumulative year's worth of absences for the same injury or disease. That is, an employee may be terminated if out of work for a cumulative total of 365 days for the same work-related injury or disease.

Under Section 73, and employee is entitled to one (1) continuous year's worth of absences for a non-work related injury or disease. That is, an employee may be terminated under Section 73 after being absent for one (1) continuous (i.e., 12 months) year for a non-work related injury or disease.

CIVIL SERVICE LAW SECTIONS 71, 72, 73

Necessary documents and information to support Legal Assistance Applications:

- Date of injury/illness/disability.

- Nature of injury/illness/disability.

- Whether injury/illness/disability is work related.

- Date employee placed on leave due to injury/illness/disability.

- Basis or evidence supporting probable cause to place employee on leave (CSL Section 72(5)).

- Copies of any and all documents regarding the leave or the injury/illness/ disability (i.e., correspondence between the employee and the employer, such as notices to report to EHS for an exam, letter of notification of Section 72 rights; termination letter; employee and employer doctor's evaluations; etc.).

- Whether there is a Worker's Compensation claim.

- Whether member was sent to EHS or equivalent employer-retained medical consultant.

- The member's status (provisional, temporary, probationer, non-competitive class, labor class, etc.), and copy of Civil Service Department employment history.

- Length of employee's leave (dates).

- Whether employee has any prior or subsequent leave due to injury. If so, length of leave (dates); nature of injury; whether injury was work related.

- Whether employee disputes the fact that his/her inability to perform the normal duties and responsibilities of his/her job. If so, provide employee's medical verification of his/her version of fitness, if any, and date able to return to work.

- If employee agrees that he/she was unable to perform job at some point, provide date employee asserts that inability to perform job ceased.

- If employee able to return to work, but in limited capacity, provide medical verification of limitations and duration thereof.

- Describe employee's normal job duties and responsibilities.

- Provide any applicable job description.

- Provide evidence of employer retaliation for employee's exercise of Worker's Compensation rights, if any (i.e., favorable performance evaluations prior to injury/leave and then termination for poor performance while on leave or shortly after returning from leave).

- If applicable, relevant collective bargaining agreement provisions relative to provisional, temporary, probationary, non-competitive, or labor class employees, if any.

- Whether the employee's injury is permanent.

- Whether the employee has sought a "reasonable accommodation" (in the event injury/illness might qualify under ADA).

- List of any other litigation or proceeding in which employee is currently involved.

DISCIPLINARIES

I. Introduction

Generally, CSEA members can be disciplined in one of three manners: Pursuant to Article 33 of the various state contracts; pursuant to Civil Service Law Section 75; or pursuant to some other procedure specifically contained in a collective bargaining agreement.

For Article 33 disciplinaries, please refer to the specific summary and checklist beginning on page 24.

For Civil Service Law Section 75 disciplinaries, please refer to specific summary and checklist beginning on page 20.

As to any other disciplinary not covered by Article 33 or Section 75, (generally arbitration), it is important that each step of the disciplinary and/or grievance procedure, as applicable, is strictly followed in order to insure that the merits of the matter will be heard by the trier of fact (i.e., arbitrator). For example, many contractual disciplinary procedures contain time requirements for filling objections to a notice of discipline or for appeals, etc.

II. Procedure

Once the matter gets to hearing, it is generally the employer's burden to prove that the employee is guilty of the action and/or inactions alleged.

At the hearing, the employee generally has the right to representation, the right to present witnesses and evidence, and the right to cross-examine the employer's witnesses. Generally, there is an opportunity to submit post-hearing statements and/or briefs.

III. Appeals

The available avenues of appeal from a decision would depend on the type of proceeding that takes place. Generally, an arbitration can be "appealed" through CPLR Article 75 (discussed below), but, as a matter of philosophy, vacatur of arbitration awards is not sanctioned.

GENERIC DISCIPLINARIES

Necessary documents and information to support Legal Assistance Applications:

- Copy of Charge(s) and specifications.

- Copy of disciplinary appeal filed by member.

- Copy of applicable disciplinary procedure (not necessary for CSL Section 75 or NYS Article 33 cases).

- Copies of any and all decisions rendered at all lower steps of the grievance or administrative procedure.

- Copies of interrogation transcripts or tapes, member's statements, witness statements, etc.

- Copies of all correspondence regarding the disciplinary matter.

- Copies of medical documentation, work rules, memoranda, witness statements, correspondence, etc., which may impact on the merit of the disciplinary matter.

- Copies of all prior disciplines, settlements, awards/decisions or information regarding prior discipline for the individual employee and a list of all bargaining unit prior Disciplinaries, if possible.

- Copy of member's personnel history folder (evaluations, counselings, etc.).

- Name(s), title(s), phone number(s) of witnesses.

- Copy of any written policies or procedures relevant to charge(s).

- List of any other litigation or proceeding in which employee is currently involved.

CIVIL SERVICE LAW SECTION 75
(Removal and other disciplinary action)

I. Persons Protected

1. A person holding a position by permanent appointment in the competitive class of the classified service.

2. A person holding a position by permanent appointment or employment in the classified service who is an honorably discharged or honorably released war veteran, or who is an exempt volunteer fireman, except when such person holds a position of private secretary, cashier, or deputy of any office or department.

3. An employee holding a position in a non-competitive class other than a position designated in the rules of civil service commission as confidential or requiring the performance of functions influencing policy, who has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy.

4. An employee in the service of the City of New York holding a position as homemaker or home aide in the non-competitive class, who has completed at least three years continuous service in such position in the non-competitive class.

5. An employee in the service of the police department within the state holding the position of detective for a period of three continuous years or more; provided, however, that a hearing shall not be required when reduction in rank from said position is based solely on reasons of the economy, consolidation or abolition of functions, curtailment of activities or otherwise.

6. Any employee granted the protections of Section 75 through a collective bargaining agreement.

II. Procedure

1. Employee, who at the time of questioning, appears to be a potential subject of disciplinary action, shall have a right of union representation during questioning. Employee has the right to advance written notice of right to representation, and shall be allowed a reasonable period of time to obtain representation.

2. Person against whom disciplinary action is proposed must have written notice thereof and of the reasons therefore, be furnished a copy of the

charges proffered against him/her, and be allowed at least 8 days for answering charges in writing.

3. Standard in determining whether charges are stated with sufficient specificity: whether they are detailed enough to allow the person charged to present a defense.

4. The hearing shall be held by the officer or body having the power to remove or discipline the person charged, or by a deputy or other person designated by the officer or body in writing for that purpose.

5. In case a deputy or other person is so designated, he is, for the purpose of such hearing, vested with a record of the hearing, which must, with his recommendations, be referred to such body or officer for review and decision.

6. Employee is entitled to representation by counsel or union representative and shall be permitted to call witnesses on his/her behalf.

7. The burden of proving incompetence or misconduct shall be on the person alleging same and compliance with technical rules of evidence shall not be required.

III. Suspension Pending Determination of Charges; Penalties

1. Employee charged may be suspended without pay for a period not to exceed 30 days, pending determination of charges against him/her.

2. If found guilty, penalty may consist of a reprimand, a fine not to exceed $100, suspension without pay not to exceed two months, demotion in grade and title, or dismissal from service. The time during which an employee is suspended without pay may be considered as part of the penalty.

3. If employee is acquitted, he/she shall be restored to his/her position with full back pay for the period of suspension less the amount of any unemployment insurance benefits received during such period (compensation earned in any other employment or occupation during the period of suspension is not to be deducted.)

4. If employee is found guilty, a copy of the charges, the written answer, a transcript of the hearing, and the determination shall be filed in the personnel office of the employee's department or agency and a copy thereof shall be filed with the Civil Service Commission having jurisdiction over the position. An employee is entitled to a copy of the transcript free of charge.

5. A § 75 proceeding must be commenced within 18 months of the occurrence of the alleged misconduct. However, such limitation shall not apply where the action complained of would constitute a crime.

IV. Appeals

A determination may be appealed to court via an Article 78 proceeding (see Article 78) or via an appeal to the Civil Service Commission having jurisdiction pursuant to Civil Service Law Section 76. Appeals to the Commission must be made in writing within 20 days after service of the written decision. The Commission's decision is final.

CIVIL SERVICE LAW SECTION 75

Necessary documents and information to support Legal Assistance Applications:

- Charge(s) and specification(s).

- Member's "answer"/request for a hearing.

- Applicable collective bargaining agreement.

- Employee handbook, if any.

- Employer work rules, regulations.

- Member's personnel file (or personal history file) (evaluations, prior charges, settlements, counselings, etc.).

- Any documents member signed or was given.

- Information regarding similar situations, if any.

- Date of hearing, if set.

- Hearing Officer, if known.

- Suspension status (dates).

- Interrogation transcript or notes, if any.

- List of any other litigation or proceeding in which employee is currently involved.

STATE CONTRACTS/ARTICLE 33

I. Employee Rights

1. Employee shall be entitled to representation by CSEA or by private counsel selected at his/her own expense.

2. CSEA representation may include both a grievance representative and the CSEA Local President (or designee), and a CSEA staff representative. However, the absence of two additional representatives shall not unreasonably delay the interrogation or other proceeding.

II. Interrogation (the questioning of an employee who at the time of such questioning, appears to be a likely or potential target or subject for disciplinary action)

1. If employee is improperly subjected to interrogation, an arbitrator shall have the authority to exclude information obtained thereby.

2. No employee shall be required to submit to an interrogation unless such employee is notified in advance of the interrogation of the right to have CSEA representation or representation by private counsel.

3. No recording devices or stenographic or other record shall be used during an interrogation unless the employee is advised in advance that a transcript is being made and is offered the right to have CSEA representation or representation by private counsel. Any record and/or tape recording shall be furnished to the employee.

4. No employee shall be requested to sign any statement regarding his/her incompetence or misconduct unless the employee is offered the right to have CSEA representation or representation by private counsel.

III. Procedure

1. The employee shall be served with a Notice of Discipline (NOD) detailing the specific acts alleged and the penalty sought.

2. An employee shall not be disciplined for acts which occurred more than one (1) year prior to the notice of discipline, except those which would constitute a crime.

3. Two copies of the NOD shall be served on the employee by personal service, if possible, or by registered or certified mail, return receipt requested.

4. The NOD shall state that the employee has 21 calendar days to object by filing a grievance; that the procedure provides for a hearing; and that the employee is entitled to representation.

5. Once a grievance is filed, penalty cannot be imposed until after the matter is settled or an arbitrator renders a decision.

6. A NOD must be served within 14 days following any suspension without pay or temporary reassignment.

7. Pending the outcome of the NOD, an employee may be suspended without pay or temporarily reassigned when the appointing authority determines that there is probable cause to believe that the employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations.

8. Upon being suspended, the employee may be allowed to draw from accrued annual or personal leave credits, holiday leave or compensatory leave.

A. Expedited Disciplinary Procedure

The following procedure was implemented effective with the 2016-2021 State Agreements.

1. After receipt of a Notice of Discipline, an employee has the right to object by filing a grievance within 21 calendar days. Appeals will be sent to the Panel Administrator. All appeals received from CSEA will be placed in the Expedited Resolution (ER) Process.

2. If an employee elects to have private counsel, the case will be heard pursuant to the Disciplinary Arbitration process set forth in Article 33.4. In addition, employees whose NOD proposes a penalty of termination, with or without a suspension or reassignment, shall have the option of electing to have an arbitration hearing in accordance with Article 33.4, if the matter does not settle during the ER meeting.

3. The ER process will replace both the Agency-Level Review Meeting outlined in Article 33.3(f) and the arbitration process contained in Article 33.4. ER meetings will occur at a location that is agreed upon by all the parties.

4. Upon service of the Notice of Discipline, a settlement may be negotiated at any time during the process.

5. A single neutral, who will be jointly selected by the parties, shall hear all disciplinary matters, except those that are exempted. All fees and expenses of the neutral will be divided equally between the parties.

6. During the ER process the disciplinary grievant shall be represented by CSEA, and management will be represented by the agency. Each party may have a maximum of two (2) representatives present (exclusive of the grievant).

7. The parties shall provide copies of all relevant documents to the opposing party at least two (2) weeks prior to the ER meeting. At the ER meeting, all efforts will be made to reach a resolution of the matter satisfactory to both parties. The neutral will serve as a mediator to facilitate discussion of the issue(s), pursuit of an acceptable resolution and, if necessary, hear actual testimony and review formal evidence.

8. The neutral shall have the right to decide, based on information presented, whether additional information/documentation/witnesses are necessary to facilitate discussion and/or settlement of the matter. Before the ER meeting is concluded, the parties will agree as to whether the matter will be scheduled for further settlement discussions.

9. If the matter is not settled and no additional information or witness testimony is necessary, the neutral shall issue a short written decision no later than seven (7) calendar days following the ER settlement meeting.

10. After the second ER meeting on a particular matter, if the matter still cannot be settled or decided by the neutral without either additional evidence or witness testimony, the neutral shall conduct an expedited hearing. The hearing shall take no more than one (1) day. Before the ER process is concluded, the parties and the neutral shall agree on the issue and the witnesses to be presented at the hearing date. At the conclusion of the expedited hearing, at which the neutral shall serve as arbitrator, the neutral shall issue a short written decision within fourteen (14) calendar days.

11. The neutral shall have the authority to remand any discipline that cannot be presented within one (1) day back to the regular Article 33.4 arbitration process.

12. There will be three (3) ER meeting days per month. Additional ER days may be scheduled as needed. A maximum of four (4) cases will be scheduled for each ER day. The Panel Administrator, after consultation with CSEA and the appropriate agency(ies), will select the cases to be scheduled on each day. The Panel Administrator will issue notification regarding the ER meetings, including the date, time and location.

IV. Traditional Procedures for employees who elect private counsel or for employees who "opt out."

Arbitration

1. An arbitrator shall be selected by the Panel Administrator from the permanent panel of arbitrators.

2. All fees and expenses of the arbitrator shall be borne equally by the parties. Employees that elect private counsel are responsible for all costs and fees of arbitration including the arbitrator's fees.

3. The arbitrator will hold a hearing at an appropriate location at the employee's facility.

4. The arbitrator shall render determinations of guilt to innocence and the appropriateness of proposed penalties and shall have the authority to resolve a claimed failure to follow the procedural provisions of the contract and to determine whether the appointing authority had probable cause to suspend, if applicable. The arbitrator shall not increase the penalty sought by the State.

5. The employee's entire record of employment may be considered with respect to the appropriateness of the penalty to be imposed, if any.

6. Where an employee is awarded back pay, the award shall be deemed to include any retroactive benefits and accruals and shall not be offset by any wages earned by the employee during the period of suspension.

ARTICLE 33 DISCIPLINARY

Necessary documents and information to support Legal Assistance Applications:

- NOD and amendments, if any.
- Appeal form.
- Interrogation transcript(s) or tape(s).
- Lower step documents, if any.
- Member's personnel file (or personal history file) (evaluations, prior NOD's, counselings, etc.).
- Applicable agency regulations, rules, etc.
- Any underlying criminal documents (complaint, criminal information, affidavits, disposition).
- Any documents member signed or received.
- Information regarding similar matters, if any.
- Selected arbitrator, if known.
- Date of hearing, if known.
- Suspension status.
- Information related to probable cause of suspension, if applicable.
- Name, title, address, telephone numbers of potential witnesses.
- List of any other litigation or proceeding in which employee is currently involved.

DISCRIMINATION AND SEXUAL HARASSMENT

Federal, state and certain local laws prohibit employers from discriminating against employees in the terms and conditions of their employment. These laws also prohibit labor unions from excluding or expelling members or otherwise discriminating against union members based on their membership in protected categories.

I. Federal Law

Under federal law, it is unlawful for an employer or a labor union to discriminate based on a member's race, color, religion, sex, age, or national origin, or to cause an employer to discriminate against an individual. Further, it is unlawful to retaliate against a union member for asserting his/her rights.

II. Americans with Disabilities Law (ADA)

In 1990, Congress enacted the Americans with Disabilities Act (ADA). The law prohibits discrimination against people with disabilities in employment, public services, transportation, public accommodations, and telecommunication services. The statute substantially increased the protections afforded by federal law for individuals with disabilities. It prohibits state and local governments and labor unions from discriminating based on disability. The statute prohibits discrimination against a "qualified individual with a disability," which means one who, with or without a reasonable accommodation, can perform the essential functions of a job.

The ADA requires an employer to "reasonably accommodate" disabled individuals. The term "reasonable accommodation" can include: making facilities readily accessible; job restructuring; modifying work schedules; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; providing readers or interpreters, or other similar accommodations.

The ADA defines "disability" in very broad terms. The ADA defines "disability" as:

(a) a physical or mental impairment that substantially limits one or more of the major life activities of an individual;

(b) a record of such impairment; or

(c) being regarded as having such an impairment.

An employer is not required to provide an accommodation that will impose an "undue hardship" on its operations. The ADA defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of [certain] factors ..." These factors include the nature and cost of the accommodation, the overall financial resources of the facility involved in the accommodation and, the overall financial

resources of the covered entity, including the composition, structure, and functions of the work force of such entity. If undue hardship would result, the individual requesting the accommodation must be given the opportunity of providing the accommodation or paying that portion of the cost of the accommodation which causes the undue hardship.

The ADA was amended effective January 1, 2009 allowing a broader interpretation of the definition of disabilities.

III. Political Activity, Free Speech and Association

Another form of discrimination in public employment protected by federal law is discrimination based on political activity.

The First Amendment of the United States Constitution has been interpreted to prohibit public employers from discriminating against public employees by disciplining them for exercising their rights to free speech on matters of public concern.

Adverse employment actions by a public employer which are based solely on the employer's political beliefs or associations may violate First Amendment rights, unless the employer can demonstrate that political affiliation is an appropriate requirement for the effective performance of the public office involved.

The United States Supreme Court has made it clear that in order for political patronage practices to pass constitutional muster, the employer must demonstrate an overriding interest of vital importance requiring such practices. Moreover, the practices must be narrowly tailored to furthering such vital government interests with the least possible restriction of freedom of belief and association, and the benefits gained must outweigh the loss of constitutionally protected rights.

The test is whether the position in question authorizes meaningful input into government decision-making where there is room for principled disagreement on goals or their implementation. The question becomes "who is policy-maker?" In general, if an employer's responsibilities are broad and undefined, he will more likely be deemed a policy-maker. Final decision-making authority however, is not necessarily dispositive of the issue. Where available, statutory job descriptions have been utilized.

The Second Circuit (the federal Appellate Court having jurisdiction in New York) examines various factors set forth below to determine whether political affiliation is appropriately relevant to job performance: (1) Technical expertise/competence; (2) Control over others; (3) Authorization to speak in the name of policy-makers; (4) Public perception of position as a policy-maker; (5) Position's influence upon government programs; (6) Position's contact with elected officials; (7) Position's responsiveness to partisan politics and political leaders; (8) Position's exempt civil service classification.

In 2006, the Supreme Court ruled that speech by a public employee regarding matters that are related to their job responsibilities is not protected as free speech. Public

employees are not speaking as citizens when they are speaking to fulfill a responsibility of their position, according to the Court.

IV. State Law

Under the New York State **Human Rights Law**, it is unlawful for an employer or a labor union to discriminate against an employee or a member based on race, sex, color, national origin, religion, disability, marital status, age, arrest record or prior criminal accusations. In some circumstances, an employer cannot refuse to hire someone solely because he/she was previously convicted of a crime. Under the **Taylor Law**, a public employer and/or labor union cannot discriminate against an individual for engaging in **protected union activity.**

Lawful Activities Law makes it illegal for an employer to refuse to hire or employ, or to discharge from employment an individual due to "political activities outside of working hours," or an "individual's legal use of consumable products prior to the beginning of or after the conclusion of the employee's work hours," or an individual's legal recreational activities outside work hours. However, these activities must be without the use of the employer's equipment or other property and done off the employer's premises.

Civil Service Law Section 107 makes it a criminal act for a public employer to "discharge or promote or reduce, or in any manner, change the official rate or compensation" of a civil servant because of political opinions or affiliations.

New York Labor Law Section 740 (Whistleblowing) prohibits a private employer from taking retaliatory action against an employee who discloses to a supervisor or appropriate authority that the employer is in violation of a "law, rule or regulation" that "presents a substantial and specific danger" to the public health or safety. The term "law, rule or regulation" has been interpreted to include civil statutes, administrative regulations as well as traditional criminal laws.

Employees seeking the protection of Section 740 must specify which statute, rule or regulation is being violated by their employer. An assumption or opinion by an employee that a violation has occurred, or the mere possibility that an employer's conduct has breached a law or regulation, is not a sufficient basis for invoking the statute's protection. The statute applies where:

> 1) the employee threatens to disclose or discloses to a supervisor or public body that an activity, policy or practice of the employer is in violation of a law, rule or regulation;

2) the employee provides information to or testifies before a public body investigating a violation of a law, rule or regulation by the employer; or

3) the employee objects to or refuses to participate in any activity, policy or practice in violation of a law, rule or regulation.

Labor Law Section 740 offers only a limited protection to private employees because of the difficult burden of establishing that the conduct or activity complained of is creating a danger to the public health or safety. Activity that only threatens an individual's health or safety will not provide the basis for bringing a cause of action under the section.

New York Labor Law Section 741 protects persons (private or public sector) who perform health care services and who disclose violations of improper quality of patient care from retaliatory discharge. "Improper quality of patient care" is "any practice, procedure, action or failure to act . . . which violates any law, rule, regulation" where such violation may present a substantial and specific danger to public health or safety, or unlike section 740, a significant threat to the health of a specific patient. Also, unlike Section 740, an employee may prevail on a Section 741 claim if the employee reasonably believes, in good faith, that the employer's action constitutes improper quality of patient care; this belief does not need to prove correct.

Section 741 affords protection to only those persons who actually supply health care services. It is meant to safeguard only those employees who are qualified by virtue of training and/or experience to make knowledgeable judgments as to the quality of patient care, and whose jobs require them to make these judgments. Persons who do not render medical treatment are not protected.

Civil Service Law Section 75-b prohibits a public employer from retaliating against a public employee because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule, or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action.

New York State Civil Service Law Section 75-b, which is entitled "Retaliatory Action by Public Employer" states that a public employer shall not dismiss or take other disciplinary or adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. The statute defines "improper governmental action" as meaning any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such

agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state, or local law, rule, or regulation.

This statute requires that prior to disclosing information in this regard to a governmental body the employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action. This statute further provides that an employee who does provide the appointing authority with such information shall be deemed to have satisfied the previously mentioned requirement of disclosing information to a governmental body. Indeed, the statutory definition of governmental body includes "an officer, employer, agency, department, division, bureau, board, commission, council, authority, or other body of a public employer."

The standard in a Section 75-b case is that the employer would not have taken the adverse employee action but for the employee's "whistleblowing" activity.

V. Sexual and Racial Harassment

Both federal and state law prohibit sexual harassment and racial harassment. "Sexual harassment" is defined, essentially, as unwelcome sexual advances, request for sexual favors, or other verbal or physical conduct which is either demanded in exchange for employment security or benefit, or which creates a "hostile work environment" such that the employee's work performance is adversely affected.

Racial harassment which usually involves a racially hostile environment caused by an employer or other employees based on verbal or physical conduct due to an employee's race, are prohibited as well.

VI. Union Contract

Although under CSEA State contracts a complaint of discrimination cannot be grieved, this does not mean that CSEA does not have a legal responsibility to assist its members regarding complaints of discrimination. In fact, if CSEA does not take appropriate action regarding a complaint of discrimination, CSEA can be sued for discrimination. Similarly, in the area of sexual and racial harassment, if CSEA is aware that its members are harassing other members, and CSEA does nothing to stop it, CSEA can be sued.

The courts have held that when a union fails to investigate a complaint of discrimination from a union member and/or refuses to take any action to prevent such discrimination, the union can be held liable for condoning the discrimination. Further, it has been held that when a union fails to investigate or file a meritorious grievance regarding discrimination, such conduct constitutes unlawful discrimination by the union. Finally, the union can be held liable when the union itself discriminates against a member due to his/her membership in a protected group.

Therefore, if a CSEA member advises you that he/she is being discriminated against by the employer, a union official, or other CSEA members, it is important to investigate the claim as you would normally investigate any grievance by a union member. You should obtain all of the relevant facts surrounding the charge of discrimination.

In investigating a claim of discrimination, it is important to recognize that discrimination is not usually conducted in an overt manner. Sometimes a member will not realize that he/she is being unlawfully discriminated against. Therefore, it is important to question the member carefully.

Proving Discrimination

Unlawful discrimination takes place when similarly-situated people are treated differently for an inappropriate or unlawful reason. The best way to establish discrimination is to see whether the CSEA member has been subjected to disparate (different) treatment. Thus, if a CSEA member has advised you that he/she was denied a term and condition of his/her employment which another union member was permitted to have, there may be a legitimate claim of discrimination. For example, if a supervisor refuses a request for a vacation day from a black CSEA member, but grants similar requests by other, white CSEA members, the "disparate treatment" regarding the black CSEA member may demonstrate discrimination, even if the supervisor did not make a derogatory racial statement.

VII. Disparate Treatment/Disparate Impact

Disparate treatment occurs when an employer treats some individuals less favorably than other similarly-situated individuals <u>because</u> of their race, color, religion, sex, national origin, age, or disability. (In New York State law, marital status is included as well.) To prove disparate treatment, it will have to be established that the employer's actions were based on a discriminatory motive. This does not mean, however, that we must establish that the employer deliberately or willfully discriminated by submitting proof of the employer's subjective state of mind. The courts and agencies have recognized that most times it is difficult and often impossible to obtain direct evidence of discriminatory motive. Discriminatory motive can be inferred from the fact of differences in treatment.

The basis of the disparate treatment theory is differences in treatment between similarly-situated individuals. A comparison between similarly-situated individuals is comparative evidence. In determining which individuals are similarly-situated, we must try to determine who would reasonably be expected to receive the same treatment in the context of a particular employment decision.

Statistical evidence may also be used to establish disparate impact. It is important to remember, however, that statistics alone will not prove an individual case of

discrimination. Statistics revealing the treatment afforded members of a particular class or category are important in an individual disparate impact case because they may evidence the presence of a discriminatory motive. Generally, statistics are used to show that a particular practice or procedure or policy or test has a disproportionate impact on members of a particular class than on others.

Statistics may establish that the employer regularly failed to hire Hispanics for professional positions, or that the employer regularly failed to promote blacks. Individual cases illustrating how the policy affected particular employees or applicants may be used to buttress a pattern and practice case of disparate treatment.

VIII. Promotion

If a CSEA member claims denial of a promotion due to discrimination, all qualified applicants for a particular job are similarly-situated to each other. All applicants who are not qualified are similarly-situated. If the challenge is focused on the promotion exam as "failing" more minorities than whites, this would be an example of a "disparate impact" case.

It is important to remember that the law prohibits unions from engaging in disparate treatment based on a member's race, color, national origin, sex, etc.

IX. Discharge

In a discharge case, similarly-situated individuals are usually those who have been charged with misconduct identical or similar in kind or magnitude to that which the member is accused of. In such instances, we must identify all those accused of theft of property, or poor attendance (depending on the allegations), or equally serious misconduct, and determine whether they were all discharged. If a CSEA member and other members in a particular group were discharged more often for misconduct than members in a different group who engaged in the same or similar misconduct, it is reasonable to infer that their status as a member of that "group" was a factor in the discharge.

Identity of similarly-situated individuals will vary in different employment situations as indicated above; individuals similarly-situated for one employment decision may not be similarly-situated for another. For example, if a CSEA member alleges racial harassment by his/her supervisor, all employees working under the supervisor would be similarly-situated with the member. On the other hand, if a charge alleges the discriminatory enforcement by management of an agency-wide rule, all employees known to have violated that rule would normally be similarly-situated, no matter which supervisory unit they belong to.

When comparing similarly-situated individuals, we must compare as many similarly-situated individuals as possible. A comparison between the member and one

other similarly-situated individual might indicate disparate treatment; however, a comparison with many other similarly-situated individuals might dispel this inference.

The term "similarly-situated" does not necessarily mean identically situated. In many instances there will not be any individual who is situated in the same position as the charging party. In those cases, we must look to the most similar situations or to the most similarly-situated individuals.

Sometimes a discharge may be the basis for a grievance and a discrimination complaint. Both procedures should be discussed with the CSEA member and reviewed with the Legal Department.

X. Statistical Evidence

Statistical evidence can be relevant in proving an individual case of disparate treatment because it is evidence of the presence of a discriminatory motive. For example, an allegation that a member was not hired for a secretarial position because of her race (black) is buttressed if there is no statistical evidence indicating that respondent employs no black secretaries, despite their availability in the area where respondent is located. The statistical data creates an inference that respondent refused to hire blacks as secretaries and that charging party's rejection was pursuant to this practice. It is evidence of a discriminatory motive. It is important to remember, however, that statistics alone will not normally prove an individual case of disparate treatment.

XI. Direct Evidence of Motive

As indicated above, proof of disparate treatment requires proof that actions were based on a discriminatory motive. Discriminatory motive can be inferred from the fact that similarly-situated individuals of a different group received different treatment in the context of the same or a similar employment situation. However, we must also look for direct evidence of motive. Direct evidence of motive is any statement (oral or written) by an official that indicates a bias against members of a particular group. In addition, direct evidence is presented by a showing that respondent failed to take appropriate corrective action in a situation in which it knew or reasonably should have known that practices and policies or the behavior of its employees were discriminatory. Direct evidence of motive can be in the form of a document. It may be a statement by an agency official in an interview with the LRS or the CSEA member.

Examples of direct evidence of discrimination include: (a) disparaging remarks regarding groups protected by anti-discrimination laws; and (b) stereotypical ideas such as "women cannot be supervisors."

What Should be Done?

After investigating the complaint of discrimination, it is important that the employee be directed to the proper forum. If after investigating a complaint you believe that Legal Assistance should be provided, an application for Legal Assistance should be prepared and submitted. It is important to remember that the same set of facts may be the basis for both a grievance and a discrimination complaint.

The employee should be advised of the right to file a complaint with the U.S. Equal Employment Opportunity Commission or the New York State Division of Human Rights. An attorney is not needed to file an administrative complaint. Both agencies have offices throughout New York state. In addition, a lawsuit directly in court and/or an improper practice charge should be commenced.

Evaluation of All Claims of Discrimination

(race, sex, color, national origin, religion, Equal Pay Act, disability, marital status, sexual orientation, union activity, political activity, other lawful activities)

Necessary documents and information to support Legal Assistance Applications:

- Work location of member.

- Name and address of the employer.

- Date of the specific discriminatory act or acts.

- Type of discrimination alleged, race or racial harassment, sex or sexual harassment, Equal Pay Act, color, national origin, religion, disability, marital status, age, sexual orientation, union activity, political activity, or other off-duty lawful activities.

- Has a discrimination complaint been filed with the Equal Employment Opportunity Commission, New York State Division of Human Rights, or any other administrative agency? If available, attach a copy of the complaint and documents related to the complaint.

- Are there any related grievances, lawsuits, improper practice charges pending, or decided regarding the member or the discrimination?

- Is the discrimination based on union activity?

- State whether the alleged discrimination has unit wide or statewide implications.

- Provide the job title and job description of the member.

- Attach a copy of the anti-discrimination provision of collective bargaining agreement, if any.

- Attach a copy of employer's discrimination policy and procedures, if any.

- State whether the member or CSEA has made any form of complaint to the employer regarding the discriminatory conduct; if so, provide copies of all documents regarding the discrimination and the dates of and a description of any oral discussions with the employer and who was involved in said discussions.

- Set forth a narrative of speech facts which form the basis for the claim of discrimination:

- How long has the discrimination lasted;
- What adverse action was taken against the member;
- Who ordered the adverse action;
- What direct or circumstantial evidence exists which indicates that the employer's action was motivated by unlawful discrimination, such as statements by the employer or the circumstances surrounding the adverse action;
- Have other members been treated differently than the member? If so, provide the name, address, phone number, and title of the other members;
- What reasons has the employer given to the member or CSEA for its adverse action;
- What evidence exists showing that the reasons the employer has given are not the real reason for the complained of action;
- Is there evidence that comparable individuals of the opposite race, sex have been treated more favorably.

- List any other litigation or proceeding in which the employee is currently involved.

ADA or State Law Disability Claims

Necessary documents and information to support Legal Assistance Applications:

- What is the member's physical or mental impairment?

- What is the history of the impairment? How does the member claim the disability impacts a major life function?

- Is the member perceived or regarded as being disabled by the employer? If so, explain.

- What are the essential functions of the member's job?

- Attach a copy of the applicable job description and state whether the job description accurately describes what the member does. If the employee performs additional duties, list them.

- Is the member able to perform the essential functions of the job with or without a reasonable accommodation? Please explain.

- What is the nature of the accommodation being sought?

- Has the member requested the employer provide a reasonable accommodation? If so, please provide all relevant information related to the request and the employer's response including any alternative accommodation offered.

- If granted, would the requested accommodation adversely impact a provision of the relevant collective bargaining agreement, i.e., seniority clauses? Please attach any relevant provisions which may be adversely affected if the accommodation was granted.

- If the request was refused, what reasons did the employer give for refusing to provide the reasonable accommodation(s)? Please provide all relevant documents and information setting forth the reason for the denial, including any claim by the employer that it would be an undue hardship and any evidence that an accommodation would create an undue hardship.

- Provide any relevant medical documentation.

- List any other litigation or proceeding in which the employee is currently involved.

FAIR LABOR STANDARDS ACT

Generally: The Fair Labor Standards Act ("FLSA") is a federal law that sets forth certain wage and hour standards. The FLSA only provides a floor; CSEA can and usually does negotiate wage and overtime provisions that are more generous than those provided by the FLSA.

Among other things, the FLSA requires the payment of minimum wages. Effective July 24, 2009, the federal minimum wage is $7.25 per hour for covered, non-exempt employees. (Note: the New York State minimum wage law does not apply to public employees.)

The FLSA also requires payment for non-overtime hours at the minimum wage. For overtime pay, the US DOL regulations specifically require payment for each overtime hour worked.

Exempt employees: Exempt employees need not be paid overtime under the FLSA. The primary exemptions are as follows:

1. **Executive:** Generally speaking, for an employee who makes less than $100,000 a year to qualify as an executive employee, an employee must meet the following: (1) primary duty that is management of the enterprise, department or subdivision thereof; (2) customarily and regularly direct the work of two or more other employees; (3) the authority to hire and fire, or to make suggestions in that regard must be given particular weight; and (4) paid more than $455 per week.

   Examples of positions that are covered by executive exemption: department head, superintendent of construction project.

   Examples of positions that are not covered by executive exemption: working foreman, supervising inspectors who spend most of their time doing office work.

2. **Administrative:** Generally speaking, for an employee who makes less than $100,000 a year to qualify as an administrative employee, an employee must meet the following: (1) primary duty includes the performance of office or non-manual work directly related to the management or general business operations of the employer or employer's customers; (2) primary duty includes the exercise of discretion/independent judgment with respect to matters of significance; and (3) paid more than $455 per week.

   Examples of positions that are covered by administrative exemption: insurance claims adjusters, team leaders, human resources managers, purchasing agents.

   Examples of positions that are not covered by administrative exemption: inspectors, investigators, examiners or graders, personnel clerks.

3. **Professional:** Generally speaking, for an employee who makes less than $100,000 a year to qualify as a professional employee, an employee must meet the following: (1) primary duty is the performance of work requiring knowledge of an advanced type, including the consistent exercise of discretion and judgment in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instructions; and (2) paid more than $455 per week.

   Examples of positions that are usually covered by professional exemption: physicians, physician assistants, registered nurses, certain registered or certified technologists, lawyers, accountants, engineers, scientists, pharmacists, architects, teachers.

   Examples of positions that are usually not covered by professional exemption: licensed practical nurses (LPNs), x-ray technicians, EMTs, paramedics, bookkeepers, paralegals.

4. **"Highly Compensated" Employees:** Where an employee makes more than $100,000 a year, the requirements for the above white collar exemptions are relaxed. Those employees will qualify for exemption if they customarily and regularly perform any one or more (rather than all) of the exempt duties of an executive, administrative or professional employee.

5. **Computer Employees:** Employees in computer-related occupations can be exempt from overtime compensation based on general rules applicable to the three white collar exemptions. In addition, there are specific rules applicable to computer employees who are paid on a salary basis or earn at least $27.63 per hour.

6. **Seasonal-Recreational Employees:** Any employee who is employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center may be exempt if: (a) it does not operate for more than seven months per calendar year; or (b) during the preceding calendar year its average receipts for any six months of such year were not more than 33% of its average receipts for the other six months of the year.

"Volunteers": The term "employee" does not include any individual who volunteers to perform services for a public agency which is a state, political subdivision of a state, or an interstate governmental agency if: (1) The individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and (2) such services are not the same type of services which the individual is employed to perform for such public agency.

An individual may not then be a volunteer for a public agency when the volunteer hours involve the same type of service which the individual is employed to perform for

the same agency. For example, a corrections officer could not be a volunteer to be a deputy sheriff.

Hours of work: There have been a considerable amount of questions over what constitutes "work time" that must be compensated under FLSA.

Examples of Compensable Hours:

- Traveling between work locations;
- Traveling out of town during working hours;
- Coffee breaks/rest periods from 5-20 minutes or less;
- Meal periods where the employee is not free to leave the work station;
- Medical attention during working hours that is ordered by the employer;
- Fire drills during or after the regular working hours;
- Changing clothes, if required, and customarily paid in the past;
- Charitable work, if requested by employer;
- Cleaning, oiling, or greasing machinery;
- On-call time if freedom restricted;
- Cleaning, storing, or repairing tools (tools must be part of the principal activity);
- Stand-by time;
- Washing up or showering;
- Waiting for work after normal start time;
- Training programs, if required by employer;
- Training in normal/regular duties for the purpose of increased efficiency;
- Labor/management committee meetings which discuss daily operations or contract interpretations (check your individual contract).

Examples of Non-Compensable Working Time:

- Absences/leaves (bereavement leave/funerals, holidays, personal leave, vacations, annual leave, sick leave and weather-related absences);
- Jury duty;
- Civic or charitable work if time spent is voluntary;
- Employee organization leave for internal union business;
- Meal periods of 30 minutes or longer where no duties performed;
- Medical attention not ordered by the employer;
- On-call time spent at home or where the employee need only leave a telephone number and is not restricted;
- Pre-employment tests or examinations;
- Home to work travel (Portal-to-Portal Act). This includes commuting time between your residence and work and vice versa;
- Voluntary training programs (program not related to regular duties);
- Residence on employer's premises if employee is free to leave premises;
- Sleeping time of up to eight (8) hours (by contract) if the tour of duty is 24 hours or longer.

Overtime: Overtime pay must be paid at the rate of at least one and one-half times the normal rate of pay of the non-exempted (covered) employee, for each hour worked in a workweek in excess of the maximum hours applicable to the type of employment in which the employee is engaged. Normally, the basic workweek is limited to 40 hours before overtime pay applies. The workweek need not coincide with the calendar week.

Public safety employees: Police protection personnel, including deputy sheriffs and correctional officers (but <u>not</u> dispatchers), and fire protection personnel, are allowed to work periods ranging from 7-28 days consecutively. Such employees cannot have a work period longer than 28 days. The employer is responsible for the setting of the work period.

Hospital, nursing home and mental hospital employees: Employees who are primarily engaged in the care of the sick, the aged, or mentally ill residing on the premises are allowed, by agreement, to have the overtime calculated on a 14-day period (instead of the normal 7-day period), as long as those employees are paid overtime for hours worked in excess of 8 hours per day and in excess of 80 hours per 14-day period.

The 14-day period generally would be available to municipal hospitals, state, and local nursing homes or mental institutions, and halfway houses providing residential care for the mentally ill, alcoholics, or drug abusers. Non-residential facilities and/or clinics are not eligible and must use the standard 7 day/40 hour week system.

Bus drivers: Even though bus drivers are entitled to overtime compensation, the "charter activities" exemption may apply to some of their hours of work. That exemption applies to special activities that are not part of such employees' regular employment. The hours for those special activities need not be paid at the time and one-half rate.

Compensatory time: Compensatory time ("comp" time) is defined as future time off in lieu of present cash payment for overtime worked. Compensatory time for public employees is allowed as long as it is provided for by a collective bargaining agreement or employment agreement or understanding. Compensatory time must be earned at the same rate of cash compensation (time and one-half).

The compensatory time earned (at time and one-half) for hours worked more than 40 per week may be saved by the employee and carried by such employee until either used or liquidated at time of separation. However, the employer can require employees to use their compensatory time. The maximum amount of compensatory time that can be earned is 240 hours for regular covered employees, or 480 hours for public safety, emergency response employees. After these maximums have been reached, the employee must be paid at the rate of time and one-half the regular rate in cash.

An employee who has accrued compensatory time must be permitted to use the time off within a "reasonable period" after making the request if it does not "unduly disrupt" the operations of the employer. It is not particularly clear what "unduly disrupt" means; it probably means undue disruption of operations and most certainly does not mean mere inconvenience of the employer. The employer can compel an employee to use accrued "comp" time.

Upon termination of employment, an employee must be paid for unused compensatory time computed at time and one-half multiplied by: (1) the average regular rate received by such employee during the last three years of employment; or (2) the final regular rate received by such employee, whichever is higher.

Deduction from wages: The State Finance Law prohibits the State from attempting to recover overpayments, by salary offset or otherwise, to a state employee that occurred as a result of administrator error, with certain exceptions.

Case law in New York provides that public employers may deduct overpayments from employee salaries provided that the employer advises the employee of the basis for its action and gives the employee an opportunity to be heard prior to making the deductions.

The New York State Labor Law prohibits private sector employers from making deductions to employee pay unless the deduction is made in accordance with the law, rule, or regulation, or the deduction is expressly authorized in writing by an employee, and made for the benefit of the employee.

Complaint process: An administrative complaint with the United States Department of Labor can be filed about alleged FLSA violations. Alternatively, legal action can be brought. Employees can proceed on their own, or CSEA will assist employees with either procedure, depending on the circumstances.

The statute of limitations for FLSA violations against most employers is two years (three years for willful violations), but state employees have only six months to file a claim. This period runs from the date of each paycheck where an underpayment is made.

If FLSA compliance cannot be resolved satisfactorily and promptly with an employer, the Labor Relations Specialist can, depending on the circumstances, file a formal administrative complaint with the US DOL, or, alternatively, depending on the seriousness of the FLSA violations, can seek CSEA legal assistance for legal or other action by the CSEA Legal Department or a CSEA Regional Attorney.

FAIR LABOR STANDARDS ACT

Necessary documents and information to support Legal Assistance Applications:

- Statement as to how, in general, underpayment accrued.
- Statement as to employer's reasons, if any, for underpayment.
- Estimated amount of underpayment and number of affected employees.
- Was DOL complaint filed? If so, attach copies.
- Dates of underpayments.
- Provide normal workweek for each position.
- Provide the employer designation for each position (i.e., exempt or non-exempt, and, if exempt, particular claimed exemption).
- Provide actual duties of each position.

FAMILY AND MEDICAL LEAVE ACT OF 1993

The Family and Medical Leave Act of 1993 (FMLA) is a federal law which establishes minimum standards for employment and leave entitlement for an eligible employee of a covered employer.

I. Covered Employer

1. Private employers employing 50 or more employees.
2. All public employers, regardless of the number of employees.

II. Eligible Employees

1. Work for a covered employer (Note: an employee may work for a covered employer but not be eligible to take FMLA leave).
2. Have worked for employer for at least 12 total months.
3. Have worked at least 1250 hours over previous 12 months.
4. Work at a location where at least 50 employees are employed by the employer within 75 road miles.

A. All criteria must be met unless otherwise waived by the employer

1. Hours Worked: To meet the 1250 hours worked criteria (a little less than 24.5 hours over 52 weeks), all time for which the employee was paid should be included. (Regular hours, overtime, hours spent on call if considered compensable by employer, etc.) However, paid vacation, personal, or sick time does not count, nor do paid holidays.

2. Length of Service: The 12 months of required service does not need to be consecutive, rather it needs to be cumulative. However, breaks in service are not considered in determining the 12 months.

3. Worksite: Must be at worksite with 50 or more employees within a 75 mile radius. Generally, an employee's worksite is where the employee reports to work each day. For employees who do not report to a single worksite, the worksite becomes the place from where the employee's work is assigned. Further, worksites may include multiple locations, such as all of the buildings on a campus.

B. Twelve-Month Period

Employees are entitled to 12 weeks of FMLA leave every 12 months. The employer may choose the 12-month period in which employees may take the leave. As such, an employer may choose:

1. calendar year;
2. a fixed year, such as
   - employer's fiscal year;
   - one year measured from the employee's anniversary date;

3. a rolling year, beginning with the date the employee first requests leave.

Whatever method chosen must be applied consistently to all employees. The employer may change the measure of the 12-month period on 60 days' notice to all employees.

C. Special Considerations

1. Eligibility for FMLA leave to care for a child after birth, adoption, or foster care placement expires after 12 months from the date of birth, adoption or placement.

2. Spouses who work for the same employer are only entitled to a combined total of 12 weeks during a 12-month period if the leave is for:

   (a) The birth of a child or to care for the child after birth;

   (b) For the placement of a child for adoption or foster care, or to care for the child after placement.

   (c) To care for a seriously ill parent.

   However, where each spouse takes 6 weeks for the care of a newborn, each spouse could take an additional 6 weeks if the additional leave is for their own serious illness or for a seriously ill child. The limitation does not apply if one spouse is not eligible to take FMLA leave.

3. There are some additional special rules that apply to employees employed in mainly instructional capacity. However, the law excludes teacher assistants, cafeteria workers, counselors, and other non-instructional personnel from the special rules. Further, the special rules do not generally apply to colleges, universities, trade schools, and preschools.

III. Reasons for Leave

1. Birth of child and care for such child after birth;

2. Placement of child for adoption or foster care:

3. Care of spouse, son, daughter, or parent of employee for their serious health condition. **(In-laws are excluded from definition of parent); Spouse means spouse under State Law – NYS only recognizes common law marriages that originate in a state that recognizes their legal status.)**

4. Employee's own serious health condition.

IV. Serious Health Condition

Illness, injury, impairment, or physical or mental condition that involves:

1. Inpatient care in a hospital, hospice, or residential medical care facility, including any period of incapacity (inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; **OR**

2. Continuing treatment by a health care provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:

(a) a period of incapacity of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(i) treatment two or more times by a health care provider,
OR
(ii) treatment by a health care provider on at least one occasion which results in a regiment of continuing treatment under the supervision of the health care provider.

(b) Any period of incapacity due to pregnancy or for prenatal care;

(c) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. Chronic Serious Health Condition:

-Periodic visits to health care provider;
-Continues over long extended period of time;
-Episodic incapacity (diabetes, asthma, epilepsy).

(d) A period of incapacity which is permanent or long-term due to ineffective treatment. The employee, child, spouse, or parent must be under the supervision of, but need not be receiving active treatment from, a health care provider (i.e., Alzheimer's, severe stroke, terminal stages of a disease);

(e) Any period of recovery therefrom, by a health care provider for a condition that would likely result in a period of incapacity for more than three consecutive calendar days in the absence of medical treatment (cancer, kidney disease, etc.).

V. Medical Certification

Employer can require medical certification from a health care provider about the family member's condition or the employee's condition. The employer is generally required to request initial certification in writing. Employer must allow the employee 15 days to provide the certification.

Content:
- Date condition started and estimate of duration;
- A statement or description of appropriate medical facts regarding the patient's health condition for which FMLA leave is requested;
- Description of treatment;
- Indication of whether inpatient hospitalization is needed.

When certification is required by the employer, the employer may send the employee for a second opinion at the employer's expense. Although the employer may choose the second health care provider, such person may not be regularly employed by the employer.

If the first and second opinions conflict, a third opinion shall be paid for by the employer and the health care provider shall be agreed upon by both the employer and the employee. This third opinion shall be binding.

FAILURE TO PROVIDE CERTIFICATION: If an employee requests FMLA leave for a foreseeable reason and fails to provide requested certification within the designated time frame, the leave may be denied until certification is provided. If emergency FMLA leave is required and the employee fails to provide certification within a reasonable time, the continuation of leave may be denied until certification is provided.

VI. Health Benefits During Leave

1. Employer is required to continue health benefits as if employee is continually employed during FMLA leave.

2. FMLA leave is primarily unpaid leave. As such, employees will need to make arrangements to continue to pay the employee's portion of the health insurance premiums. If paid leave is utilized while on FMLA leave (i.e., use of accruals, employee contributions may be deducted from such pay).
3. If an employee fails to continue to pay health insurance premiums, the employer is no longer required to maintain the employee's health insurance.
4. If an employee fails to return from leave, the employer may recover its share of the premiums for health insurance coverage paid while the employee was on FMLA leave. This would be the case where a mother decides to remain at home to care for a newborn.
5. The employer cannot recover such premiums if the failure to return is not the employee's fault, such as a reduction in force where the employee is laid-off, or the continuation of the serious health condition beyond the 12 weeks, or if the employee's spouse is relocated more than 75 miles from the employee's worksite.

No collection of premiums by employer is allowed if employee returns to work for 30 calendar days or more.

VII. Notification

Employee is expected to give employer at least 30 days' notice of need for FMLA leave when such leave is foreseeable. For unplanned leaves, the employee is expected to notify the employer as soon as practicable (i.e., verbal notification within 1 or 2 business days).

Employer is required to advise employees of their rights to FMLA leave in the same manner as they currently do as required by established handbooks or documents. If an employee tells the employee that she/he will need FMLA leave, the employer is required to give the employee details outlining the employee's responsibilities before, during, and after the leave.

Employers are required to post information about the FMLA in a conspicuous place on the employer's premise.

VIII. Returning from Leave

1. Reinstatement: To same or equivalent position. If equivalent position, must be same benefits, pay, and working conditions, as well as same or similar duties and responsibilities, same worksite or geographically similar; same shift, provided said shift has not been eliminated.
2. Medical Certification: Employer may require medical certification that employee is able to return to work.

3. Upon return, employees are entitled to increases in pay, as provided in contracts.
4. Key employees: Such employees are those whose earnings are among the highest 10% of those within a 75 mile radius of their worksite. Such employees may be denied restoration to their previous job. A key employee must be notified that they qualify for this status before they take leave. Failure on the employer's part to notify a key employee that he/she is not guaranteed restoration nullifies this type of exemption.

FMLA Leave for Military Reasons

"Service Member Family Leave" entitles the employee to 26 work weeks of leave, as opposed to 12 weeks of leave. An eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member shall be entitled to a total of 26 work weeks of leave during a 12 month period to care for a service member.

"Qualifying Exigency Leave" entitles an employee whose son, daughter, spouse, or parent is on active duty or is called to active duty status, to 12 weeks of leave to handle various non-medical exigencies. There are eight broad categories that would be considered a "qualifying exigency."

The eight categories are:

- Short Notice Deployment: Leave to address any issue that arises from an impending call or order to active duty in support of a contingency operation seven days or less prior to the date of deployment.
- Military Events and Related Activities: Leave to attend any military ceremony, program, or event related to the active duty or call to active duty status or to attend certain family support or assistance programs and informational briefings.
- Childcare and School Activities: Leave to arrange or provide for childcare or school-related activities.
- Financial and Legal Arrangements: Leave to make or update various financial or legal arrangements.
- Counseling: Leave to attend counseling (by someone other than a health care provider) when necessary as a result of the active duty or call to active duty status.
- Rest and Recuperation: Leave to spend time with a covered military member who is on short-term, temporary rest and recuperation leave during the period of deployment (up to five days).
- Post-Deployment Activities: Leave to attend arrival ceremonies (including funeral or memorial services), reintegration briefings and events, and any other official ceremony or program sponsored by the military for a period of 90 days following active duty status.
- Additional Activities: Leave to address other events arising from military duty agreed upon between employer and employee.

An employer may require a copy of the covered military member's active duty orders or other military documentation to support the qualifying exigency, but only once. The employer may also require the employee to complete an appropriate certification form setting forth various details of such leave.

FAMILY AND MEDICAL LEAVE ACT

Necessary documents and information to support Legal Assistance Applications:

- Statement of reason for employee's leave (any and all medical documentation); copy of medical certification of need for leave, if any.
- Dates of leave.
- Name and address of employer.
- Evidence as to how many hours employee worked during the 12 months prior to leave.
- Copy of employee's request(s) for FMLA leave, if any.
- Copies of any and all employer responses.
- Copy of any employer policy regarding leaves of absence and/or CBA provisions regarding leave.
- Information about whether employee has taken any previous leave.
- Information regarding any adverse action taken by employer.
- Copies of notices posted regarding FMLA by the employer at the work place, if any.
- List of any other litigation or proceeding in which the employee is currently involved.

FREEDOM OF INFORMATION
(Public Officers Law Article 6)

I. What's FOIL & What's Accessible (State Law)

The Freedom of Information Law (FOIL) provides right of access to "records" of "agencies" reflective of governmental decisions and policies. The law defines "agency" to include all units of state and local government, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state.

The law defines "record" as any information kept, held, filed, produced, or reproduced by, with, or for an agency in any physical form whatsoever. Thus, it is clear that items such as tape recordings, microfilm, and computer discs fall within the definition of "record."

All records are accessible, except records or portions of records that fall within one of nine categories of deniable records. Deniable records include records or portions thereof that:

1. Are specifically exempted from disclosure by state or federal statute;

2. Would, if disclosed, result in an unwarranted invasion of personal privacy (Note: Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when, upon presenting reasonable proof of identity, a person seeks access to records pertaining to him or herself);

3. Would, if disclosed, impair present or imminent contract awards or collective bargaining negotiations;

4. Are trade secrets, or would cause substantial injury to the competitive position of an enterprise;

5. Are compiled for law enforcement purposes and which, if disclosed, would: (i) interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relative to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures;

6. Would, if disclosed, endanger the life or safety of any person;

7. Are inter-agency or intra-agency communications, except to the extent that such materials consist of: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations; or (iv) external audits, including but not limited to audits performed by the comptroller and the federal government;

8. Are examination questions or answers that are requested prior to the final administration of such questions; or

9. Are computer access codes.

II. How to Obtain Records

1. Each agency must maintain a subject matter list. The list is not a compilation of every record an agency has, but rather it is a list of the subjects or file categories under which records are kept.

2. Each agency must adopt standards based upon general regulations issued by the Committee on Open Government.

3. A records access officer must be appointed to coordinate an agency's response to public requests for records.

4. An agency may require that a FOIL request be in writing. The law merely requires that a request "reasonably describe" the record in which the requestor is interested. The responsibility for identifying and locating the record rests upon the agency. However, if possible, the request should supply dates, titles, file designations, or any other identifying information.

5. Within five (5) business days of the receipt of a written request, the agency must make the record available, deny access in writing giving reasons for denial, or furnish a written acknowledgement of receipt of the request and statement of the approximate date when the request will be granted or denied.

6. An agency may charge 25 cents per photocopy, unless a different fee is prescribed by statute.

III. Denial of Access

A denial of access must be in writing, stating the reason for the denial and advising the requester of the right to appeal to the head of the governing agency or the designee of the agency. An appeal must be filed within 30 days of the denial. Upon receipt of an appeal, the agency has 10 business days to fully explain in writing the reasons for further denial or provide access to the records.

Judicial review of a final agency denial may be sought under Article 78 of the CPLR. When the denial is based upon one of the nine exceptions, the burden is on the agency to prove that the record sought falls within one or more of the exceptions.

Courts are permitted to award reasonable attorney's fees when a person challenging a denial substantially prevails.

NOTE: FOIA is the federal equivalent of the state's FOIL. It is comparable but not necessarily identical and should be reviewed before demanding federal documents.

FREEDOM OF INFORMATION

Necessary documents and information to support Legal Assistance Applications:

- Copy of initial written FOIL request.
- Copy of initial denial from agency.
- Copy of public body acknowledging receipt of request.
- Copy of administrative FOIL appeal.
- Copy of agency FOIL appeal denial.
- Copy of written Taylor Law request for information, if any.

General Municipal Law Section 207-C

I. Who's Covered

Any sheriff, undersheriff, deputy sheriff or corrections officer of the Sheriff's Department of any county; any member of a police force of any county, city of less than one million population, town, or village, or of any district, agency, board, body or commission thereof, or a detective-investigator who is a police officer pursuant to the provisions of the criminal procedure law employed in the office of a District Attorney of any county or any corrections officer of the county of Erie Department of Corrections; an advanced ambulance medical technician employed by the County of Nassau; any supervising fire inspector, fire inspector, fire marshal or assistant fire marshal employed full-time in the County of Nassau Fire Marshal's office, or at the option of the County of Nassau; any probation officer of the County of Nassau. This definition is not exhaustive. Therefore, the Legal Department should be consulted if a question arises.

II. What's Provided

Any of the above persons who are injured in the performance of their duties, or who take sick as a result of the performance of their duties so as to necessitate medical or lawful remedial treatment shall be paid, by the municipality by which they are employed, the full amount of their regular salary or wages until their disability arising therefrom has ceased. In addition, such municipality shall be liable for all medical treatment and hospital care necessitated by reason of such injury or illness.

III. Medical Exams

After an employee begins to receive GML 207-c benefits, his/her employer may require him/her to be examined by a physician of the employer from time to time to determine whether the employee has recovered from such injury or sickness. Any employee refusing such medical exams will be deemed to have waived his/her rights under GML 207-c. If the physician certified that the employee has recovered, the employee is no longer entitled to benefits under GML 207-c.

IV. Due Process

Employees claiming benefits under GML 207-c are entitled to a hearing upon the initial denial of benefits. Where the employee receives benefits but subsequently is denied the continuation of such benefits, or is required to return to duty or "light duty," the employee can provide medical evidence that he/she is not medically fit to return to such duty.

GENERAL MUNICIPAL LAW SECTION 207-C HEARINGS

Necessary documents and information to support Legal Assistance Applications:

- What is the specific GML 207-c violation alleged?
- If there was a denial of a 207-c claim, what is the reason for the denial?
- Was the employee afforded a right to a hearing on the denial and did she/he exercise that right?
- Is there a GML 207-c policy in place? If so, provide a copy.
- If so, was it negotiated with the union?
- If so, when was it negotiated?
- If no policy is in effect, is there a practice in existence with regard to any disputed procedural aspect of the at-issue GML 207-c claim.
- Provide all correspondence and related documents regarding disputed claim.
- Provide all relevant facts, e.g. name and address of claimant, employer, job title, date and place of injury, circumstances surrounding injury, witnesses to injury with telephone numbers and addresses, if possible.
- List of any other litigation or proceeding in which employee is currently involved.

INJUNCTIONS/TEMPORARY RESTRAINING ORDERS

Injunctions/Temporary Restraining Orders (TRO) are drastic measures under the law. Typically, they are tough to obtain and will only be issued in extreme cases. Injunctions/TROs will only be issued where the act or action contemplated will cause an injury that cannot be remedied by any other ordinary remedies under the law (i.e., money damages).

CPLR Section 6301 sets forth the standards for the granting of a preliminary injunction. A preliminary injunction will be granted "where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual...".

It is well settled that in order to obtain a preliminary injunction, the moving party must show a likelihood of success on the merits, irreparable injury, and a balance of equities in their favor.

Generally, courts will issue injunctions where there is a clear constitutional violation or there is a direct and chilling effect on certain rights.

"Irreparable injury" means an injury that cannot be made whole by money damages. The classic example is enjoining a neighbor from chopping down a tree when the ownership of the tree is in dispute.

A TRO is an order enjoining or restraining action pending the opportunity for the court to hear the parties on the application for a preliminary injunction. A preliminary injunction will be granted, where the criteria are met, to enjoin an action until the underling dispute is resolved, i.e., who owns the tree.

INJUNCTIONS/TEMPORARY RESTRAINING ORDERS

Necessary documents and information to support Legal Assistance Applications:

- Detailed statement regarding what non-economic damage will be done that cannot be remedied by another/different action, or by the ultimate judgment at the end of the case (i.e., constitutional violation; direct and clear chilling effect on rights; etc.).

- Detailed statement as to what employer is about to do or is doing and how such action affects our member(s).

- Names of members/witnesses who are adversely impacted and will provide affidavits.

- Copies of any notices from employer regarding the action complained about.

- Copy of any applicable local laws, rules, regulations (including charters, resolutions, etc.).

- Copies of all correspondence between members/union and employer regarding at-issue action(s).

- When did CSEA/member(s) first learn of the action sought to be prevented by injunction/TRO?

- If the expected action is subject to negotiations with CSEA, have negotiations occurred or has a demand to negotiate been made? If negotiations occurred, give detailed account of the negotiations.

NEW YORK STATE JUSTICE CENTER
for PROTECTION of PEOPLE with SPECIAL NEEDS

The Justice Center was created by Executive Law, Article 20, and Social Services Law, Article 11. Its purpose is to strengthen and standardize the safety net for people who, due to physical or cognitive disabilities, or the need for services or placement, are receiving services from a facility or provider agency (referred to as "vulnerable persons"). This includes common definitions of abuse and neglect to be used for the reporting of incidents for investigation by the Justice Center, or by those to whom the Justice Center delegates responsibility for investigations. These standards apply to programs in the 6 agencies subject to the Justice Center's jurisdiction:

- Office for People with Developmental Disabilities (OPWDD)
- Office for Mental Health (OMH)
- Office of Alcoholism and Substance Abuse Services (OASAS)
- Department of Health (DOH)
- Office of Children and Family Services (OCFS)
- State Education Department

This includes all facilities, private or public, operated, licensed or certified by these agencies.

The Justice Center's investigative responsibilities include:

- Receiving reports of allegations of reportable incidents through a 24/7 hotline.
- Investigate reportable incidents.

After accepting reports of allegations of abuse or neglect, the Justice Center either investigates the case itself, or delegates the investigative responsibilities to the applicable State Oversight Agency. The Justice Center employs investigators with law enforcement experience to investigate the most egregious cases. The Justice Center also works with local law enforcement to coordinate investigation of potential criminal cases.

After the investigation, the Justice Center will review investigative findings to determine whether allegations of abuse or neglect have been substantiated or unsubstantiated. Senior investigators at the Justice Center review the adequacy of ALL investigations of reported abuse or neglect. Then attorneys at the Justice Center review ALL findings of substantiated or unsubstantiated allegations of abuse or neglect.

<u>Types of Justice Center Cases</u>

1. Administrative – Substantiated reports of abuse or neglect
2. Criminal – For criminal cases, the member must seek a criminal attorney as CSEA does not provide such representation

3. Disciplinary – The Justice Center may be involved in certain discipline cases. However, those cases are processed as disciplines. *See*, Disciplinaries at page 18 or State Contracts/Article 33 at page 20 in this manual.

Categories of Findings in Substantiated Reports of Abuse or Neglect

- Category 1 is serious physical abuse, sexual abuse, or other severe conduct by a custodian. A Category 1 substantiation places the custodian on the Staff Exclusion List. It also includes a second instance of Category 2 conduct that occurs within three years of a prior Category 2 finding.

- Category 2 is when a custodian significantly endangers the health, safety or welfare of a service recipient by committing an act of abuse or neglect. A report of Category 2 conduct that is not elevated to a Category 1 finding will be sealed after five years.

- Category 3 is for less serious incidents of abuse or neglect. Reports are sealed after five years.

- Category 4 covers systemic, provider-based incidents including instances when abuse or neglect has been substantiated but staff conduct is mitigated by systemic conditions. It also includes substantiated abuse or neglect against a service recipient in which a perpetrator cannot be identified.

Right to Appeal

A subject of a substantiated report of abuse or neglect, has the right to challenge the findings within 40 days. Any substantiated report may be challenged, regardless of the category determination.

Step 1: Administrative Review

The first step is to submit a written request for an amendment of the substantiated report. This request and any included statement will become evidence at any subsequent hearing. If the report of abuse or neglect is substantiated, a subject has the right to a hearing before an Administrative Law Judge (see Step 2). If the report of abuse or neglect is unsubstantiated, the report will be sealed.

Step 2: Administrative Hearing

After the Administrative Appeals Unit's review, if the report remains substantiated, the subject has the right to a hearing before an Administrative Law Judge. Prior to the hearing, a subject will receive a notice of conference, usually held by

telephone. At the conference, any disclosure of evidence will be discussed and a hearing date will be set. If there is a novel issue of law or a party wishes to make a motion, the time frame will be set by the Administrative Law Judge.

NYS JUSTICE CENTER

Necessary documents and information to support Legal Assistance Applications

- Report of Substantiated Findings

- Written request for Amendment of the Report

- Employee's explanation of the events/actions refuting the allegations in the Report of Substantiated Findings

- Administrative Appeals Unit Notice of Administrative Review Determination

- Notice of Pre-Hearing Conference

  If the member has already had the pre-hearing conference:

  1) the notice of hearing

  2) the Qualified Protective and Confidentiality Order

  3) any additional information/documentation the member has already received from the Justice Center

- Copy of the related Notice of Discipline or a notation that an NOD was never issued

- The status of the NOD (ex. not scheduled for Triage yet, going to 1 day hearing) and if already resolved, a copy of the outcome (ex. decision, settlement agreement) or, at a minimum, what the outcome was. If future dates scheduled for the NOD appeal, include those dates.

PATIENT ABUSE

(Governed by Public Health Law, Article 28, Section 2803-d)

I. Who is required to report patient abuse?

1. Any operator or employee of a residential health care facility;
2. Any person under contract to such facility;
3. Any nursing home administrator;
4. Any physician, medical examiner, coroner, physician's associate, registered nurse, practical nurse, dentist, or anyone else in the health field, including social worker;
5. Any other person having reasonable cause to believe that a person receiving care has been physically abused, mistreated, or neglected in the facility.

II. When must such abuse be reported?

Within 48 hours by telephone and in writing to the department affected.

III. What if a health care employee fails to report such abuse?

He/she shall be guilty of unprofessional conduct in the practice of his/her profession and could be subject to further hearings and penalties.

IV. After abuse is reported to the health care facility, what procedures are to be followed?

1. A report of the incident is given to the Commissioner of the New York State Department of Health, who must cause an investigation of the allegations. Every reasonable effort must be made to notify, personally or by certified mail, any person under investigation for having committed an act of physical abuse, mistreatment, or neglect. A written determination is then made and the accused person is sent a copy of the determination, together with a notice of the right to a hearing.

2. If there is no substance to the report, all information is expunged after 120 days following the notification of the determination to the person who made the report, unless an Article 78 proceeding is pending. The process then takes longer.

V. What are the rights of the accused in a patient abuse incident?

At any time within 30 days of the receipt of a preliminary determination, such person may make a written request that the Commissioner expunge or amend the report. If the Commissioner fails to comply within 30 days of the request, such person shall have the right to a fair hearing. The burden of proof is on the department making the charge.

VI. May such reports be disclosed to the public?

No, such information shall be confidential and is exempt from disclosure under Article 6 of the Public Officer's Law, commonly referred to as the Freedom of Information Law. Exceptions are:

1. If a person exonerated so authorizes disclosure;
2. As may be required by penal or criminal procedure law;
3. When requested by the accused, information relating to the charge may be disclosed, except that the identity of the person making the original report shall not be disclosed unless such person authorizes such disclosure.

VII. What is a fair hearing?

Hearing rights are governed by 10 NYCRR Section 51. These regulations require that a notice be given to the accused with a statement indicating the legal authority and jurisdiction under which the proceeding is to be held, reference to the statutes and regulations violated and a short, plain statement of the charges. The notice shall also specify the time, place, and date for the hearing. Notice is to be served at least 15 days prior to the date of the hearing by certified or registered mail.

VIII. May a party rebut the accusation before a hearing is held?

Yes, by serving an answer upon the Department no later than 3 days before the hearing date. The answer may be signed by the party or by the party's attorney.

IX. Who is the hearing officer?

No hearing officer shall preside who has any bias with respect to the matter in the proceeding. A person may file a request for removal if such hearing officer is biased or for other good cause. However, the State Administrative Procedure Act, Section 303 vests in an agency complete authority to select its own presiding officers and requires such officers to be members of the agency's staff.

X. May the accused have an attorney present at the hearing?

Yes, the accused may appear in person or by attorney.

XI. What procedures are followed regarding the hearing?

The rules of evidence are not observed, but each party has the right to present evidence and to cross-examine witnesses. Within the 60 days of receipt of the transcript of the hearing, the hearing officer must submit a report to the Commissioner, to any appropriate board or council, and to all parties. After receipt of the report, the Commissioner then makes a final determination and serves it upon all parties.

XII. What is the appropriate role of the State Commission on Quality of Care for the Mentally Disabled in a patient abuse incident?

1. Under Mental Hygiene Law Article 45, the Commission, among other functions, establishes procedures to assure effective investigation of complaints of patients, residents, and employees of mental hygiene facilities, including allegations of patient abuse and mistreatment. Such procedures shall include, but not be limited to, receipt of written complaints, interviews of persons, patients, residents and employees, and extensive review of such abuse. The Commission has nearly unlimited access to the facility, books, records, and officers or employees. It may require disclosure of any information necessary for carrying out its functions, powers, and duties, even confidential information as provided by law. However, it is required to keep such information obtained as confidential. It may also issue and enforce subpoenas, conduct hearings, and examine witnesses. The Commission is also empowered to investigate complaints of abuse or maltreatment of children in residential care. It must determine within 90 days whether a complaint is "indicated" or "unfounded."

2. After the determination has been made, where appropriate, the Commissioner shall report instances of physical abuse, mistreatment or neglect, or the failure to report, as required, to the appropriate committee on professional conduct for the professions outlined above. The Commissioner shall report instances of physical abuse, mistreatment, neglect, or misappropriation of resident property by a nurse aide or other unlicensed individual, along with any brief statement by the nurse aide or other unlicensed individual disputing the finding to the nursing home, and nurse aide registry.

XIII. How long are patient abuse reports on record?

There is no indication in the law of any time limitation requiring that reports be expunged from the record.

CHILD ABUSE

(Governed by Social Services Law, Article 6 Section 411 *et. seq.*)

I. Who is required to report child abuse?

1. Any physician, surgeon, medical examiner, coroner, dentist, osteopath, optometrist, chiropractor, podiatrist, resident intern, psychologist, registered nurse, hospital personnel engaged in the admission, examination, care or treatment of persons, a Christian Science practitioner, school official, social services worker, day care center workers, provider of family or group, day care employee or volunteer in a residential care facility or any other child care or foster care worker, mental health professional, peace officer, police officer, district attorney or assistant district attorney, investigator employed in the office of a district attorney, or other law enforcement official.

2. Any institution, school, facility, agency, organization, partnership, or corporation which employs persons mandated to report suspected incidents of child abuse or maltreatment shall provide all of its current and new employees with written information explaining the reporting requirement.

II. When must such abuse be reported?

Immediately by telephone or telephone facsimile and in writing (on a written form supplied by the Commissioner) within 48 hours after such oral report. Oral reports must be made to the Statewide Central register of Child Abuse and Maltreatment, unless the appropriate local plan for the provision of child protective services provides otherwise. Color photographs of trauma, x-rays, and radiological examinations are always required.

III. What if the professional fails to report such abuse?

He/she is guilty of a Class A misdemeanor and in addition, is liable for civil action damages proximately caused by any failure to report the abuse.

IV. After abuse is reported to the Statewide Central Register of Child Abuse and Maltreatment, what procedures are then followed?

An investigation is conducted by the Commissioner of Social Services, Child Protective Services Unit, and a report must be forwarded to the Statewide Central Register of Child Abuse and Maltreatment within 7 days of the report. A determination must be made within 90 days as to whether the report is “indicated” or “unfounded.”

V. What are the rights of the accused in a child abuse incident?

An accused person may request the Commissioner and the Statewide Central Register of Child Abuse and Maltreatment to amend, seal or expunge the record of the report at any time subsequent to the completion of the investigation, but in no event later than 90 days after receipt of the report. If the Commissioner refuses or does not act within 30 days after the request, the accused has the right to a fair hearing. The burden of proof is on the Department of Social Services. A determination must be made within 30 days of the hearing.

VI. May the final determination be disclosed to the public?

Yes, an authorized agency and the Division for Youth must inquire of the Department of Social Services as to whether any person who is actively being considered for employment with child-caring responsibilities, has been or currently is the subject of an indicated child abuse and maltreatment report on file with the Statewide Central Register. If the potential employee wishes to dispute the determination that such report is on file, another fair hearing must be granted. The sole question before the Department in this hearing is whether the applicant has shown that he/she did or did not commit the acts, and if so, whether he/she has been rehabilitated so that the safety and welfare of the child will not be endangered.

In such a hearing, the burden of proof as to whether an act was committed shall be on the Department, and the burden of proof on the issue of rehabilitation shall be on the applicant.

VII. What is involved in a fair hearing when child abuse incidents have occurred?

Hearings are governed by Social Services Law, Article 2, Section 22 and by 18 NYCRR Section 358 *et. seq.* These regulations require that the hearing officer be a member of the Social Services staff. A copy of all pleadings is given to the applicant along with a notice of the date and place of the hearing. The notice must be given to the accused within 6 days of the date of the hearing.

VIII. May the accused have an attorney present at the hearing?

Yes, an attorney or other representative may be present.

IX. What is the conduct of the hearing?

1. Technical rules of evidence shall not apply, but evidence must be relevant and material.

2. A verbatim record of the hearing shall be made.

3. A decision shall be issued within 90 days of the request for a hearing and shall be sent to all parties. Judicial review is then available.

X. Do reports of child abuse in public institutions go to the Commission on Quality of Care for the Mentally Disabled?

1. Yes, such reports are mandated by law to be forwarded to the Commission at which time another hearing may be held under the Commission's aegis pursuant to the Mental Hygiene Law.

2. With respect to reports of abuse or maltreatment in residential facilities or programs, in addition to complying with other requirements established by the Social Services Law, the Commissioner must, upon receipt of such report, commence an investigation within 24 hours, and must forthwith notify the subject of the report and other persons named in the report, in writing, of the existence of the report and their respective rights under the Social Services Law with regard to amendment or expungement of records, and notify the facility, the Office of Children and Family Services, Department of Education, local Social Services Commissioner, or school district placing the child of the existence of the report, including the name of the child alleged to be abused, the name of the subject of the report of child abuse, and any other information which may be necessary to insure the health and safety of the children at the residential facility.

XI. How long are such reports kept on record?

The record of such incidence is sealed no later than 10 years after the child's 18th birthday.

PATIENT AND CHILD ABUSE MATTERS

Necessary documents and information to support Legal Assistance Applications:

- Copy of "indicated" report file maintained by State Central Register, if applicable (employee must request).

- Copy of determination by Office of Children and Family Services (OCFS) or Department of Health regarding patient abuse investigation.

- Copy of notice letter to employee stating that a report of abuse was made and an investigation is being conducted.

- Copy of notice letter that report has been "indicated."

- Copy of employee letter requesting a hearing.

- Copies of any applicable policies of the employer.

- Copies of any preliminary determinations.

- Copy of written request that OCFS or the Commissioner of Health expunge or amend report, if applicable.

- Copies of all available material relating to underlying matter.

- Copy and disposition of any related discipline by employer.

- List of any other litigation or proceeding in which employee is currently involved.

PATIENT RECORDS (Subpoena Duces Tecum)

Necessary documents and information to support Legal Assistance Applications:

- Detailed statement explaining why records will be relevant to the disciplinary proceeding.

- Patient's name.

- Facility where patient resides.

PROBATIONER'S RIGHTS

I. General Rule

1. Probationers can be terminated without notice of charges or hearing, for any reason or no reason at all, as long as it is not for a prohibited reason (See II below).
2. Temporary and provisional employees have same lack of protection.

II. Exceptions

1. Reasons in violation of Constitution or statute (examples: discrimination, jury duty, retaliation for exercising Workers' Compensation rights).
2. Arbitrary, capricious, or in bad faith.
3. Procedural rights – 4 NYCRR Section 4.5
   (a) one week's notice of termination;
   (b) periodic notice of stats and progress;
   (c) cannot be terminated before expiration of minimum period of probation.

III. Remedies

Unless bad faith is proven, remedy is generally to reinstate employee to probationary status, for length of time commensurate with the violation; i.e., if less than one week's notice of termination, reinstated for one week; if terminated five weeks before end of maximum probationary period, without notice of status and progress, employee may be reinstated for time period adequate for employer to give meaningful notice of status and progress.

Caveat: Remedy for improper termination of probationer is never tenure; that can happen only where employee was actually retained beyond end of maximum probationary term without any prior notice of termination.

Caveat: New York Court of Appeals has reversed prior ruling that commencement of probation for former provisional or temporary employee is at earlier point than date of permanent appointment.

New York Court of Appeals has also held that honorably discharged veterans are not entitled to notice of charges or hearing when terminated during probation.

IV. Legal Assistance Applications (Standards adopted by Board)

To be considered for Legal Assistance, the facts must clearly demonstrate that the termination was based upon one or more of the following criteria:

1. Clear procedural violation of applicable state or local law or regulation.

2. Clear evidence of improper grounds for termination, including at least one of the following:
   (a) Violation of Taylor Law (Union Animus);
   (b) Violation of Workers' Compensation Law Section 120 (Retaliation);
   (c) Violation of Civil Service Law Section 75.b (Whistleblower);
   (d) Violation of Labor Law Section 201.d (Legal Activities);
   (e) Violation of Federal or State Constitution (First Amendment);
   (f) Violation of Human Rights Law, Title VII, or other, specific state or federal Civil Rights Law;
   (g) Violation of ADA;
   (h) Violations of FMLA;
   (i) Other applicable statutory violations.

3. Clear violation of provisions of penalty probation agreements.

NOTE: All applications must include specific statutory reference(s) and be accompanied by a detailed explanation of the underlying events signed by the employee seeking Legal Assistance.

PROBATIONARY TERMINATIONS*

Necessary documents and information to support Legal Assistance Applications:

- Copy of termination notification.
- Copy of probationary evaluations.
- Copy of letter requesting exit interview, if applicable.
- Copy of local civil service rules, if applicable.
- Copy of applicable collective bargaining agreement.
- Specific statutory references demonstrating illegality of termination (i.e., violation of Taylor Law, Workers' Comp. Section 120, Civil Service Law Section 75.b, Labor Law Section 201-d, Federal or State Constitution, Human Rights Law, Title VII, ADA, FMLA, etc.).
- Detailed narrative explaining underlying events signed by the employee which supports a claim that the termination was based on unlawful motivation.
- List any other litigation or proceeding in which employee is currently involved.

* **Cross-check with Discrimination checklist.**

RULES FOR INTERPRETING CONTRACT LANGUAGE

I. Introduction

The purpose of a collective bargaining agreement, like any other contract, is to establish a written agreement that expresses the mutual intent of the employer and the union with reference to the relationship between the parties, as well as declaration of the rights of the bargaining unit employees regarding wages, hours, and other terms and conditions of employment. It is rare that a collective bargaining agreement will be so clear and precise that there will never be any dispute as to its meaning or application to a particular set of facts or situation.

II. For Arbitrator's Consideration

There is no need for interpretation of a collective bargaining agreement unless it is ambiguous and, therefore, requires interpretation. In such instances, arbitrators will contemplate the following questions:

1. What is the plain and clear meaning of the words without any other guide than the ordinary meaning of the words themselves and the collective bargaining agreement itself?

2. Is the provision, on its face, susceptible to more than one reasonable or plausible interpretation? Is there an obvious ambiguity?

3. Is there a reasonable dispute on how clear and unambiguous language should be applied in a particular situation, so that effect can be given to the words? Is there a hidden ambiguity?

III. Interpretation and Construction

Once it is determined that the contract is ambiguous, either in whole or part, certain universal standards of interpretation and construction will be employed by the arbitrator to determine and carry out the mutual intent of the parties. An arbitrator may employ one or more rules of interpretation to give effect to the contract. Normally, it is not the role of the arbitrator to engage in "contract-making" for the parties, unless given specific authority to do so. In other words, if the parties have not spoken specifically to a situation in their contract, the arbitrator must determine whether the general framework of the agreement, or clearly established past practice, reveals the intent of the parties and thus, a resolution of the dispute. If not, the arbitrator may declare that there has been no meeting of the minds on the subject and find further negotiations are required.

IV. The Rules

1. The intent of the parties rule

The collective bargaining agreement should be construed, not technically, but broadly and so as to accomplish its evident aims.

2. Agreement to be construed as a whole

(a) If language can be interpreted in one of two ways, one which will be consistent with the rest of the agreement and the other which will be inconsistent, it shall be interpreted to be consistent with the rest of the contract because it is presumed that the parties intended the document to be consistent throughout.

(b) Sections of a contract cannot be isolated from the rest of the agreement and given construction independently of the parties' agreement, as evidenced by the entire agreement. The meaning of each paragraph and each sentence must be determined in relation to the contract as a whole.

(c) An interpretation which tends to nullify or render meaningless any part of the contract will be avoided.

(d) Ordinarily, all words used in an agreement will be given ordinary effect, unless from the context of the entire agreement, it is evident that the words are superfluous and irrelevant. Words may be implied into an agreement if such inclusion by implication is called for by consideration of the agreement as a whole.

3. Normal v. technical usage of words

(a) Words will be given their ordinary and popularly accepted meaning in the absence of anything indicating that the parties intended some special or technical meaning to be given to them. For example, the word "shall" has been given its ordinary meaning: "mandatory" in the absence of strong evidence that a permissive meaning was intended.

(b) Trade or technical terms will be interpreted in a trade or technical sense unless clearly used otherwise. A standard dictionary or a labor relations dictionary may be used for the purpose of defining terms if not otherwise defined in the agreement.

4. Interpretation in the light of the law

(a) Contracts will be interpreted to make the agreement valid and lawful as opposed to unlawful because the parties are presumed to have intended a valid contract.

(b) Where the parties rely on language from a statute or a legal rule and that language has been interpreted by the courts, the meaning given by the court will be utilized in interpreting the language. Clearly, this is relevant in the Civil Service Law context where there are a number of court decisions interpreting Civil Service Law and Rules.

5. Specific v. general language

Specific language will govern over general language when there is conflict between the two.

6. To express one thing is to exclude another

Where an agreement expressly deals with one or more items of a specific class in a provision, it is implied that all other items not mentioned in that class are excluded. For example, where a contract expressly states certain exceptions to a particular rule, it is concluded that all other possibilities that are not stated as exceptions are excluded, unless the language indicates that the matters enumerated are "by way of illustration" or are enumerated "without limitation."

7. Avoidance of harsh, absurd, or nonsensical results

Where one interpretation of an ambiguous provision would lead to harsh, absurd, or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be implied.

8. *Ejusdem generis* (general nature)

When general terms follow in enumeration of specific items, the general terms are interpreted to refer only to things of the same general nature as the specific items. For example, a clause providing that seniority shall govern in all cases of layoff, transfer, "or other adjustment of personnel," the latter phrase cannot be interpreted to mean that seniority would govern the allocation of overtime because overtime would not be of the same general nature as lay off and transfer; however, promotion or recall would be of the same general nature.

9. Avoidance of forfeiture

If there are alternative constructions, one which will lead to a forfeiture or a penalty and the other which will not, arbitrators will generally use the one which does not result in a forfeiture or a penalty. A contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation is reasonably possible.

10. Contract negotiations

(a) When a term in an agreement is unclear, if there is no evidence to the contrary it is assumed the parties intended that the term have the same meaning that it had during the negotiations leading to the agreement.

(b) An unsuccessful attempt by one of the parties to include a specific provision in an agreement has been interpreted to mean that the opposite of the statement prevails. But a different situation exists when there is a qualified withdrawal of a proposal by a party with a reservation of existing rights, or it is stated that the proposal was made for the purpose of clarifying the contract. The arbitrator may not use that fact against the party.

(c) If an agreement is not ambiguous, it is improper to modify its meaning by invoking the record of prior negotiations, if the prior negotiations differ from what is expressly stated in the contract.

(d) Minutes of the negotiating sessions, if in existence, may provide very important evidence, as does the recollection of the negotiators.

11. Custom and past practice

(a) The way in which the parties have dealt with a situation in the past will often be used as a guide in interpreting ambiguous language.

(b) The elements of past practice.

(i) The practice must be parties' understood and accepted way of doing things over an extended period of time.

(ii) It must be understood by the parties that there is an obligation to continue doing things this way in the future.

(c) Custom and past practice can rarely be used to give meaning to a provision which is clear and unambiguous. Some arbitrators allow past practice to amend unambiguous provisions where the party's behavior evidences a positive acceptance of the practice so as to amend the contract. Similarly, the same

standard is used in efforts to use custom and practice to fill in "gaps" in the contract.

(d) A party's failure to object to a practice may indicate its acquiescence, but it must be shown that the party knew or should have known that the practice was taking place.

(e) The past practice need not be absolutely uniform, but may permit scattered exceptions where they relate to a "predominate pattern of practice."

12. Miscellaneous Rules

(a) An arbitrator may interpret ambiguous language in light of the training and experience of the negotiators, tending to apply a strict interpretation of ambiguous language when experienced negotiators were involved, on the assumption that they chose the words with care.

(b) Ambiguous language will generally be construed against the drafter of the language under the rationale that the drafter has the burden either to use clear language or to explain what he or she means.

(c) Arbitrators may look to the practice of the parties' industry or occupation for guidance in the interpretation of ambiguous provisions.

(d) The arbitrator may look to the practice of one of the parties in other collective bargaining relationships with other unions or employers in order to clarify ambiguous language.

(e) Many times prior settlements will be used to give meaning to ambiguous provisions.

(f) Offers to settle a grievance prior to arbitration are not considered relevant because they typically are not negotiated with the union.

(g) Handbooks or manuals are not generally relied upon by an arbitrator because they typically are not negotiated with the union.

(h) Arbitrators attempt to give ambiguous language a construction which is reasonable and equitable to both parties, rather than one which will give one party an unfair and unreasonable advantage.

GENERIC CONTRACT GRIEVANCES

Necessary documents and information to support the Legal Assistance Application:

- Copy of grievance; copies of all grievance appeal forms.
- Copy of grievance procedure (not necessary for NYS Article 34 grievances).
- Copy of contract or contract articles alleged to have been violated or related to the issue (not necessary for State grievances).
- Copies of decisions rendered at all lower steps.
- Copies of all medical documentation; work rules; memoranda; witness statements; correspondence; etc. which may impact on the merit of the grievance.
- Information regarding past practice and/or bargaining history, where applicable and names of witnesses who can testify to such facts.
- Information relevant to any procedural defenses raised (i.e., timeliness, waiver, etc.).
- Name of LRS/CAS who negotiated agreement.
- Any prior decision interpreting at-issue provision.
- List of any other litigation or proceeding in which employee is currently involved.

CPLR ARTICLE 75

(To Compel or Stay Arbitration)*

Article 75 governs written agreements to submit controversy (existing or arising thereafter) to arbitration. It sets forth the grounds for compelling a party to honor the agreement to arbitrate, the grounds to modify an arbitration award, and the grounds to vacate an award.

1. In order to have the most effective weapon against an employer who refuses to honor the agreement to arbitrate, you MUST have in your DEMAND FOR ARBITRATION or your Notice of Intention to Arbitrate, the following language: **Pursuant to the CPLR Section 7503, you have twenty (20) days from the date of service of this Demand to apply to stay the arbitration or be precluded thereafter from making such application.**

   The Demand/Notice/Request to Arbitrate must be served by registered or certified mail, return receipt requested.

2. An application to compel arbitration can be made (by the Legal Department) where the employer refuses to proceed to arbitration.

3. An employer can seek a stay of arbitration where there arguably is no agreement to arbitrate the controversy, the claim sought to be arbitrated is barred by the statute of limitations, or the agreement to arbitrate has not been complied with. Should a stay application be made by the employer, our response is to cross-move to compel arbitration.

4. With respect to the remainder of Article 75, the limited grounds to modify or vacate an award are set forth: generally, there is no basis to vacate an award, even if the arbitrator has made an error of law or fact, misread the agreement, or even disagreed with another award.

   Only where the party can demonstrate that there was corruption or fraud, or misconduct in the procurement of the award, or that the arbitrator was partial (as in biased, prejudiced, compromised by his relationship to one of the parties) will a court entertain the idea of vacating the award. Two other grounds: imperfect execution (referring to calculations or money or the like), and that the arbitrator exceeded his authority.

   With respect to exceeding his authority, an arbitrator gets his/her jurisdiction from the Agreement's language on arbitration and from the wording of the issue presented. The only external control on an arbitrator's authority otherwise is express public policy, as stated in case law, constitutions, or legislation.

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* **See Article 78 for meaning of CPLR.**

As to modification, the grounds are: (1) there is a miscalculation of figures or mistakes in the description of a person or thing or property referred to in the award; (2) the award was made on a matter not submitted to the arbitrator; or (3) the award is imperfect in a matter of form NOT affecting the merits of the controversy and that the award may be corrected without affecting the issues submitted to the arbitrator.

5. Where an employer refuses to abide by an award, Article 75 allows for a procedure by which the award may be made a judgment of the court, which can be sued upon to obtain compliance (confirmation).

6. There are short time limitations for all these procedures so any inquiry as to their availability to a particular award must be made within 5-10 days of receiving the award.

7. Vacatur of arbitration awards is not sanctioned by unions and, in CSEA, generally not done.

CPLR ARTICLE 75 TO COMPEL OR STAY ARBITRATION

Necessary documents and information to support Legal Assistance Applications:

- Copy of collective bargaining agreement setting forth:

  (a) copies of relevant contract provisions which are alleged to be violated, which would be necessary in order to determine whether a valid contract grievance exists.

  (b) a copy of the provision of the contract containing the grievance procedure.

- Copy of grievance; copies of all grievance appeal forms.

- Copies of decisions rendered at all lower steps.

- Demand for arbitration.

- Statement as to merit of underlying grievance sought to be arbitrated.

- Letter from employer to union stating that grievance is not arbitrable or that the employer refuses to arbitrate the grievance or statement explaining employer's rationale, if any.

- Any information relative to similar situations in the past.

- Any evidence that similar issues have gone to arbitration under this CBA to other evidence indicating that the parties have agreed to arbitrate the subject matter at issue.

SUBSTANTIAL EVIDENCE AND/OR PENALTY REVIEW

I. Substantial Evidence

A "substantial evidence review" by a court follows an administrative hearing/proceeding. Matters reviewed for substantial evidence are reviewed by the Appellate Division(s) of the New York State Courts. Typically, for CSEA, a substantial evidence review follows a Civil Service Law Section 75 proceeding where it is determined that the finding of guilt is not based upon evidence contained in the record.

Under Civil Service Law Section 75, the burden of proof rests upon the employer asserting misconduct or incompetence in determining if there is substantial evidence adduced at the hearing. Substantial evidence should not be based on a mere scintilla of evidence, but on relevant evidence a reasonable mind might accept as adequate to support the conclusion. Courts must consider the whole record and evidence introduced by both sides.

A court's fact finding powers are constrained:

> [w]here there is a conflict in the testimony produced where reasonable men might differ as to whether the testimony of one witness should not be accepted or the testimony of another rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists.
>
> Berenhaus v. Ward, et. al., 70 N.Y.2d, 436, 443-444, (1987)

However, a hearing officer's determinations of fact are assailable. If a hearing officer's determination clearly misinterprets the facts, the determination should be set aside.

II. Penalty Review

There does not seem to be any bright line rule or well defined test as to when a penalty is "shocking to one's sense of fairness," as expressed in Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 356 N.Y.S.2d 833 (1974). The court appears to have simply stated whether a penalty was shocking without going into their reason of why it is shocking. From the cases that have come since Pell, one can begin to form boundaries which, if crossed, will result in a modification of the penalty. These boundaries can be generalized into four categories: (1) public policy; (2) the employee's record; (3) illegality of the offense; and (4) other mitigating factors.

1. The public has an interest in seeing that people engaged in certain occupations maintain a higher degree of professionalism and proper conduct. We expect more from these people and mete out more severe punishments upon them when they cross these loftier lines. Included in this group are people employed in the medical field, public safety, and education. A physician's dismissal was upheld after he was found to have improperly administered medicine to a patient, as was the case when a doctor had been found guilty of professional misconduct, and a psychiatric aide was terminated for punching and kicking a patient.

   A firefighter who disobeyed a direct order during an emergency situation and who had in the past repeatedly refused to accept directives was properly discharged. An automatic termination seems to be appropriate anytime a police officer assaults a civilian or threatens them by drawing his weapon. Teachers are also held to a loftier standard of conduct, as became apparent when an appellate court upheld the suspension of a teacher engaged in conduct unbecoming a teacher, and insubordination.

   The courts may feel that public policy dictates that when an employee is nearing retirement, the penalty of dismissal would be disproportionate for less serious offenses because the employee would lose his pension, which he had worked long and hard for. This was the basis of reasoning for the court where a bus driver, who had served 20 years, would have lost his pension if fired for three counts of misconduct. Instead, the court gave the driver the most severe penalty below dismissal, a 12-month suspension. Similarly, the court reduced a penalty of termination to a lengthy suspension for a subway token vendor who had been caught stealing fares from the city because the employee had given 20 years of service.

2. The employee's record and past conduct seems to be heavily weighed by the court. An employee file filled with past warnings or penalties will make it easier for a court to uphold a dismissal; whereas, a clean record will help an employee in such a proceeding. For example, a third charge of misconduct by a state trooper was enough to warrant the trooper's dismissal.

   Other examples include the following: a 17th unexcused absence in a one year period resulted in an employee's discharge; a record of past reprimands was given great weight by a court in upholding a termination; and a new violation by an employee while serving a suspension for a prior offense told the court that the offender would not respond to such discipline and allowed the revocation of the defendant's liquor license.

   The court will look favorably upon an employee with a clean record or who had been employed for a long period of time. A school bus driver involved in an accident had his termination reversed, in part because he had a clean record prior to the incident. Another bus driver had his discharge reduced to a suspension

because his service record showed him to be an above average worker, even though he had assaulted a student.

3. A third factor, the degree of illegality of the offense, seems to be considered very seriously by the courts. A male employee found guilty of misconduct towards three female employees was properly discharged. A tenant who operated a crack house in a public housing project was evicted.

   Those examples all dealt with more serious illegal conduct. Where the offense was of a less serious nature, the courts seem to go lighter on the employee. For instance, a tenured principal who had been temporarily appointed to the position of assistant superintendent had been found guilty of misconduct because he did not notify the school board about a budget deficit in a timely manner, and he had issued himself a retroactive check for the temporary promotion before the issuance of the check had been approved. The court felt that these improper acts were not serious enough to terminate the employee and ordered that, instead, he be placed on six months suspension. The courts overturned a dismissal of a police officer whose only offense had been using his influence to gain entrance into a bar after hours to get a drink.

4. The final factor is just a generic catch-all of mitigating circumstances. For instance, a school bus driver was reinstated partly because he had never been trained to operate the type of bus that he had an accident in, and which his supervisor had ordered him to drive. Another bus driver, who had physically and verbally assaulted a student, was reinstated because the student was a major disciplinary problem in the school district. The suspension of a liquor license was overturned when it was shown that the permitee had no knowledge that his actions were illegal, and thus did not have intent to commit the violation. In sum, the courts have never clearly defined what would be deemed "shocking to one's sense of fairness." Rather, they have taken each incident on a case-by-case basis and have relied on equity more so than established law. In doing so, the courts have applied a balancing test weighing one factor against another.

SUBSTANTIAL EVIDENCE AND/OR PENALTY REVIEW

Necessary documents and information to support Legal Assistance Applications:

- Copy of the record, including hearing transcript and exhibits from the underlying proceeding.

- Copy of the decision from the underlying proceeding.

- Copies of all documents from the underlying proceeding.

- List of any other litigation or proceeding in which employee is currently involved.

WITHDRAWAL OF RESIGNATION OR REFUSAL TO RESCIND RESIGNATION

The following example is instructive on this topic:

The issues are: (1) whether petitioner knowingly and validly resigned from his position with the School District; (2) whether the School District arbitrarily and capriciously refused to allow rescission of the purported letter of resignation; and (3) whether the refusal to allow the withdrawal violated petitioner's due process rights.

What constitutes duress is a matter of law; whether duress exists in a particular transaction is usually a matter of fact. Duress is an amorphous concept, which in civil cases, has been defined in different terms over the course of history. Duress has been found to exist "whenever one, by the lawful act of another, is induced to make a contract or to perform some other act under circumstances which deprive him of the exercise of free will." (49 N.Y.Jur2d 62, Duress). Under all authorities, however, ancient or modern, the act or threat constituting duress must be wrongful.

There are cases which hold that merely the threat of lawful arrest or prosecution may constitute duress, and in New York, it is immaterial whether the threatened person was guilty or innocent of the crime, as duress would exist in either case. The threat of arrest is sufficient.

A finding that the resignation was not obtained through duress, however, does not by itself preclude a finding that the resignation was involuntary. A resignation can be found to be involuntary, depending on the manner and circumstances under which it was obtained. The employee's resignation, obtained after lengthy questioning, and curtailment of physical freedom, suggests circumstances which courts have described as "oppressive."

Example:

Petitioner who suffers from a diabetic condition had been without food from 9:00 a.m.; he had undergone a polygraph examination and questioning from 10:29 a.m. to 1:10 p.m.; he had been questioned by two other law enforcement officers from 1:10 p.m. to 2:40 p.m., at which time he gave a statement admitting certain facts; thereafter, he had been taken to the police department, photographed, fingerprinted, had his belongings removed, and was confined to a holding cell, where he remained alone until approximately 8:30 p.m.; he was then arraigned and eventually released at approximately 9:00 p.m. It was not until he was ready to depart the police station that he was again presented with the resignation letter, which he had earlier declined to sign. On cross-examination, petitioner testified that, at that point, he "just wanted to go home," and signed the letter.

Detective testified that this was the first time he had ever been involved in obtaining a resignation, and didn't recall that he had ever received any instruction from

the police department regarding the obtaining of resignations. Undoubtedly, Detective was proceeding in accordance with what he understood to be the School District's wishes, as conveyed to him at least on one, and possibly two, occasions.

The totality of the circumstances surrounding petitioner's execution of the resignation letter lead to the conclusion that his resignation was not voluntary. Earlier in the day petitioner had told Detective that he did not wish to resign without consulting with his family. After several hours of being in police custody, however, and not having had anything other than a glass of water for almost 12 hours, and after being subjected to arrest, imprisonment, and arraignment, petitioner's execution of the letter of resignation, whether he read it or not, was an expression of his free will, but resulted from a depleted physical condition and the strain engendered by the circumstances of the preceding 12 hours. Further supportive of petitioner's position is the rapidity with which petitioner moved to consult with his union representative. After consultation with her, and after obtaining a copy of the document he signed, notice was immediately given to the School Board that he wished to withdraw his resignation.

The obtaining of the resignation and its delivery to the School District by a member of the Police Department, and the prompt intervention of petitioner's union representative setting forth their position that the resignation was coerced and executed under duress, should, at a minimum, have elicited at least some inquiry by the School District into the circumstances surrounding the execution of the resignation letter.

WITHDRAWAL OF RESIGNATION OR REFUSAL TO RESCIND RESIGNATION

Necessary documents and information to support Legal Assistance Applications:

- Copy of original resignation, if in writing (date of resignation).

- Copy of withdrawal of, or request to withdraw resignation, if in writing (date of withdrawal).

- Copy of applicable collective bargaining agreement.

- Copy of local civil service rules, if applicable.

- Copy of any interrogation or notes.

- Did employee request union representation?

- Whether employee was represented by union at time of resignation. If so, name of representative.

- Who did employee tender resignation to; under what conditions (i.e., during interrogation, who present, length of interrogation and any physical curtailment or other oppressive conduct?).

- Was the employee threatened? By whom? How (what was the threat?).

- If employee requested to withdraw resignation, who refused to allow withdrawal of resignation.

- Was there an arrest? If so, what is the nature of the charge(s)? Any disposition of charge(s)? (Include name of criminal attorney representing employee).

- Any and all related correspondence between employee/union and employer.

- List of any other litigation or proceeding in which employee is currently involved.

LEGAL ASSISTANCE APPLICATIONS
(Standards adopted by Board)

Absent a showing of fraud, duress, coercion, or other affirmative conduct which renders the resignation of a public employee involuntary, a resignation cannot be withdrawn once it has been delivered to the employer (accepted by the employer in the case of a school district*). Local civil service rules should be consulted to confirm when a resignation becomes effective with regard to a local government employee.

To be considered for approval to challenge an employer's refusal to accept a withdrawal of resignation, the Legal Assistance application must clearly demonstrate the following criteria:

1. Resignation must have been made under circumstance which evidence duress, undue influence, or otherwise indicate an involuntary resignation. Factors to consider:

   (a) Length of time given to consider option;
   (b) Opportunity to consult with union or others;
   (c) Employee's general state of mind at time of making decision (e.g., was employee ill, intoxicated, etc.?);
   (d) Evidence of bad faith, i.e., did employer representatives try to trick, fool, or otherwise unfairly convince employee to resign;
   (e) Experience, knowledge, education of employee in such matters (and other subjective factors which may have contributed to the decision to resign).

2. Request for withdrawal of resignation must have been made very soon after resignation is tendered. It has been held that an employer was not arbitrary in refusing to accept a withdrawal of resignation where the withdrawal request was made four days after tender of resignation.

All applications for approval of Legal Assistance in withdrawal of resignation cases must be accompanied by a detailed explanation of the underlying events, signed by the employee seeking Legal Assistance.

* For school districts, before a resignation may be deemed accepted by the employer, the Board of Education must act formally by motion to "accept" the resignation. For non-school district employers, no such formal action is necessary.

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