CSEA LEGAL DEPARTMENT

Civil Service Law SECTION 75

A Basic Primer

Since 1910

CSEA

New York's LEADING Union

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TABLE OF CONTENTS

INTRODUCTION

You are the unit president or grievance representative of a local government bargaining unit and a member has come to you with a notice of discipline or charges that he/she has just been served with. You look to your collective bargaining agreement. In it you find that matters of employee discipline are subject to Civil Service Law Section 75. Or perhaps your contract is silent on matters of discipline, in which case employees are automatically covered under Civil Service Law Section 75 ... or are they?

What is Section 75? Who is protected under Section 75? What are employee rights under Section 75? The purpose of this CSEA publication is to analyze and interpret Section 75, and to provide plain and simple answers to these questions.

Generally speaking, in matters of removal or discipline, Section 75 provides basic disciplinary protections to certain classes of public employees where there is no contractual disciplinary provision. However, *where there is contractual language that covers removal or disciplinary matters, the collective bargaining agreement will prevail over Section 75.*

I. Who is covered by Section 75?

A brief review of how public employees are categorized is necessary to understand Section 75 coverage.

First, the civil service is divided into two broad groups: unclassified and classified. The **unclassified** service includes all elected officials, all employees of the State Legislature, all employees of local legislative bodies whose principal functions are related to legislative functions, the heads of departments, all officers and employees of boards of election, teachers, and certain other selected positions. Section 75 is not applicable to anyone within the unclassified service.

Within the **classified** service, there are four subgroups or classifications: *exempt, non-competitive, labor, and competitive.* The *exempt* class consists of policy making positions and some "confidential" positions. The *labor* class consists of unskilled laborers. The *non-competitive* class consists of positions which are not in the exempt or labor class and which the appropriate civil service agency determines that it is not practicable to fill by competitive examination. The *competitive* class consists of those positions not in any of the other classes and for which competitive exams are held, lists established, and appointments made from certifications of the lists.

With those categories in mind, Section 75 provides protection for the following types of classified service employees:

A. Competitive class employee:

Employees within the competitive class who have successfully passed a competitive civil service exam and hold a position by permanent appointment are covered.

B. Qualified veterans and exempt volunteer firemen:
Section 75 protects qualified veterans and qualified exempt volunteer firemen within the classified service.

C. Noncompetitive with five years of service:
Employees within the non-competitive class who are tenured with at least five years of continuous uninterrupted service, and who are not designated as management/confidential employees, are covered.

D. N.Y.C. homemaker or home aide with three years of service.

E. Police detectives with three years of service.

Probationary employees excluded: New employees who are serving a required probationary period have no protection under Section 75, and may be terminated without notice and/or hearing. Even new employees with veteran or exempt volunteer firefighter status must complete any required probationary period before any entitlement to Section 75 protection attaches. Management's only responsibility in terminating a probationary employee is that such termination must not be in bad faith, contrary to statute or violative of the employee's civil rights.

The only exception to the probationary period rule would apply to a permanent employee who has received a promotion and is serving a probationary period in the promoted position. In such cases, any Section 75 protection the employee was previously entitled to would continue.

Other exclusions: persons in the **exempt** and **labor classes** have no Section 75 protection, regardless of permanency of employment or tenure, except those designated as veterans or exempt firefighters pursuant to paragraph (b). Also excluded from the provisions of Section 75 are those persons designated as **provisional** or **temporary** employees.

***Note: The collective bargaining agreement should always be consulted; Section 75 coverage can be expanded by agreement.

II. What are the grounds for removal and other disciplinary action under Section 75?

Civil Service Law §75(1) provides that a covered person "shall not be removed or otherwise subjected to any disciplinary penalty ... except for incompetency or misconduct ..."

Although Section 75 does not specifically define the terms "incompetency" or "misconduct," arbitration decisions and case law have led to generally accepted definitions as follows:

Incompetence: The inability to perform resulting from a lack of aptitude, a deficiency in knowledge, or a disregard for direction, procedures or methods.

Misconduct: An act or omission of intentional wrongdoing, deliberate violation of law, rule or regulation, improper behavior, or refusal to obey or comply.

III. What procedures and employee rights are provided by Section 75?

A. Right to representation at a disciplinary interrogation:
An employee is entitled to union representation when such employee appears to be a *potential subject of disciplinary action* and is to be questioned regarding some aspect of that matter before charges are served.

Before the questioning of an employee, management *shall* notify such employee *in writing* of his/her right to representation. If the hearing officer finds that an employee was not afforded this right, any evidence obtained because of the violation must be excluded.

If representation is requested, the employee is then entitled to a reasonable period of time to obtain representation. If, however, the employee is unable to obtain representation within a reasonable period of time, the employer has the right to proceed with the questioning.

The question of what constitutes a "reasonable time" stands unanswered. What may seem reasonable to one person may not seem reasonable to another. Consequently, a dispute as to whether an employee was afforded a reasonable period of time is reviewable by the hearing officer who is empowered by the statutory language to make such a determination. If, in fact, the hearing officer finds that a reasonable period of time was not provided for the employee to obtain representation, any statements, oral or written, or any other evidence obtained as a result of such questioning is deemed inadmissible and cannot be used to support or prove the underlying allegations of incompetence or misconduct.

B. Right to notice of the charges and to respond:

Management must provide written notice of such intention. This is commonly known as a notice of discipline or charges. Further, the charges must contain the reason(s) why management proposes removal or discipline.

Upon receipt of the charges, the employee ..."[s]hall be allowed at least eight (8) days..." to answer the charges. Usually, the charges specify the time within which the employee's answer must be filed.

C. Right to a hearing:

The charged employee has the right to an evidentiary hearing on the allegations. A transcript of the hearing must be kept and a copy provided upon request to the charged employee.

The statute provides that the appointing authority or his/her designee is empowered to preside over such a hearing. The employer pays the full costs for the hearing officer.

If the appointing authority presides over the hearing, he/she will hear the testimony and evidence presented and will then make a decision as to the employee's guilt or innocence and what penalty shall be imposed. If, on the other hand, the hearing officer, as a designee of the appointing authority, presides over the hearing, he/she will submit a recommendation as to whether there is sufficient proof of guilt and a recommended penalty, if any. The appointing authority is not compelled to adhere to the recommendation of the hearing officer and is empowered by Section 75 to make the final determination and decision.

The charged employee has a right to representation by counsel or union representative at the hearing, and has the right to call witnesses on his/her own behalf. It should also be noted here that, although not explicitly stated in the statutory language, the charged employee is, by right of due process, entitled to cross examine witnesses presented against him/her.

The strict rules of evidence required by the courts are not required in a Section 75 disciplinary hearing.

D. Burden of proof:

The burden of proving an allegation of incompetency or misconduct is upon the employer.

However, to sustain a charge of incompetency or misconduct it is not necessary to establish "proof beyond a reasonable doubt," as required in the criminal justice system. Here, the standard of proof necessary to find an employee guilty only requires "proof by a preponderance of evidence." Much has been written about just what constitutes a "preponderance of evidence." While the term is not easily defined, it generally means an amount of evidence "tending to support the occurrence of the conduct charged, and which would lead a reasonable person to believe the person charged is guilty."

E. Whistleblower protection:

1. Scope of activities protected

Civil Service Law §75-b(2)(a) prohibits public employers from terminating or taking other disciplinary action or other adverse personnel action against a public employee because the

employee disclosed information to a governmental body regarding "a violation of a law, rule or regulation which creates and presents a substantial and specific danger to the public health or safety; or which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action." "Improper governmental action" includes any action "which is in violation of any federal, state or local law, rule or regulation.

The whistleblower statute prohibits public employers from taking an adverse personnel action against a public employee who engages in protected conduct under the statute. "Personnel action" is defined as "an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance."

2. Mandatory pre-disclosure notification

Prior to reporting the information to another governmental agency, the public employee must make a good faith effort to provide the public employer with the information to be disclosed, with a reasonable time for the employer to "take appropriate action," unless there is an imminent and serious danger to the public health and safety. The failure to report to the employer what the employee reasonably believed to be an improper governmental action before going to another governmental agency can be fatal to a whistleblower's claim challenging an employer's retaliatory action. Furthermore, reporting of the misconduct to the supervisor who allegedly engaged in the misconduct is insufficient to satisfy the pre-disclosure requirement.

3. Burden of proof in whistleblower claims

The burden of proof is on the employee to demonstrate that "but for" the protected activity, the adverse personnel action by the public employer would not have occurred. A whistleblower defense will not be sustained where the public employer demonstrates a separate and independent basis for the adverse personnel action.

4. Forums and procedures for whistleblower claims

When a public employee is being subjected to disciplinary action under the procedures of Civil Service Law §75, any other disciplinary procedure under state or local law, or pursuant to the disciplinary procedures of a collective bargaining agreement, the sole forum to raise the whistleblower defense under the statute is during the disciplinary administrative hearing or the disciplinary arbitration. Both disciplinary arbitrators and Civil Service Law §75 hearing officers are mandated to rule on the statutory defense in the arbitration award or hearing officer decision.

If a collective bargaining agreement contains a provision prohibiting the employer from taking adverse personnel actions and also a provision with final and binding arbitration, a public employee can challenge retaliatory personnel actions through the grievance arbitration mechanism. Arbitrators selected to determine a grievance asserting a whistleblower claim are mandated to rule on the merits of that claim.

In the disciplinary context, if the arbitrator or Civil Service Law §75 hearing officer determines that the disciplinary action or proposed disciplinary action was based solely on conduct

protected by Civil Service Law §75-b, the arbitrator or hearing officer is mandated to dismiss or recommend dismissal of the disciplinary process and, if appropriate, reinstate the employee with back wages. In addition, in the disciplinary arbitration context, the arbitrator is authorized to "take other appropriate action as is permitted in the collectively negotiated agreement." Similarly, when determining a non-disciplinary grievance asserting a violation of Civil Service Law §75-b, an arbitrator is granted the authority to "take such action to remedy the violation as is permitted by the collectively negotiated agreement."

IV. Statute of Limitations

Section 75 establishes a statute of limitations that prohibits commencement of an action to remove or discipline for acts of incompetency or misconduct more than *eighteen months* after the occurrence.

There is an exception to this eighteen-month statute of limitations. If the alleged act of incompetency or misconduct would constitute a crime if proven in a criminal forum, then the disciplinary action may be commenced more than eighteen months after the act. In this instance, the statute of limitations applicable to the criminal offense would prevail.

V. Suspensions

An employee against whom charges have been preferred may be suspended without pay for no more than *thirty days*. At the end of the thirty day period, absent any hearing determination and/or

imposition of penalty, the suspended employee must be placed back on the payroll.

If there is a delay in the proceeding because of the actions of the charged employee (for example, he needs an adjournment of the hearing), the employee can be kept off the payroll for the amount of the delay.

VI. Penalties

The penalties set out in the law are: (1) reprimand, (2) monetary fine not to exceed $100.00 which would be deducted from the employee's salary or wages, (3) suspension without pay not to exceed two months, (4) demotion in grade and title, or (5) dismissal from service. If the employee has been under suspension prior to the hearing and determination, that period of suspension may be considered as part of the penalty.

If the employee is found not guilty of the charges, he/she must be restored to his/her original position with full back pay and benefits for any period of suspension. Any unemployment benefits may be deducted from the back pay restitution, as would mandatory taxes.

VII. Appeals

There are two options for an employee to appeal the determination of a Section 75 disciplinary proceeding.

First, an employee can appeal to the appropriate civil service commission. Using this option, the appeal must be filed in

writing within twenty days after the employee has received written notice of the determination. An appeal to the commission is final and binding and prevents any further appeal through the courts.

The second and preferred option for appeal is through the courts. The employee must file a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules (CPLR) within four months after receiving the final determination following the conclusion of the hearing. Be mindful, however, that notice of claim provisions may apply to such court actions. For example, if the employer is a school district, a notice of claim must be filed within three months of final determination, prior to initiating an Article 78 proceeding.