Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.

School Law Matters

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New York's Highest Court Rules That Teaching Assistants Have Internal "Bumping" Rights

Section 3013(2) of the Education Law provides that, when a board of education abolishes a position, the "teacher" with the least seniority in the system within the tenure area of the position abolished is to be laid off. The New York State Court of Appeals recently held that teaching assistants are covered by this statute. *Madison-Oneida BOCES v. Mills*, __ N.Y.2d __, 2004 WL 2941306 (December 21, 2004).

Background

In this case, we represented a BOCES which abolished several teaching assistant ("TA") positions. BOCES laid off the least senior TAs who worked in the particular specialized areas in which positions were abolished. Some of them had more overall seniority at BOCES than some of the TAs who were retained. NYSUT brought an appeal on their behalf to the Commissioner of Education, who held that all of the TAs should have been placed in one broad BOCES-wide tenure area.

The Commissioner also determined that TAs are protected by Education Law §3013(2). Therefore, in his opinion, they could be laid off only in accordance with their overall seniority in a broad BOCES-wide tenure area, regardless of the specialized areas in which they worked. The Commissioner did not cite any statutes or cases in support of this conclusion. He simply stated: "If petitioners were not to receive the benefits of §3013(2), it is hard to imagine why a system of tenure was created for teaching assistants in the first place."

BOCES sought review of this part of the Commissioner's decision. Initially, N.Y. State Supreme Court, Albany County annulled the Commissioner's decision. However, the Appellate Division, Third Department reversed. The Court of Appeals, the state's highest court, agreed to hear the case because of its statewide importance.

Our Arguments in the Appeal

In the appeal, we argued that TAs are different from teachers. By law, they must work under the general supervision of a licensed or certified teacher. Further, the requirements to obtain a license or certificate as a TA are much lower than for teachers and other certificated employees. We cited prior cases and legislative history that narrowly construed the term "teacher". When the State Legislature has chosen to include TAs or other employees, it has used broader language. For example, the statutes regarding tenure appointments apply to "teachers and all other members of the teaching staff".

Tenured TAs are already protected from arbitrary discharge without just cause, since §§3020 and 3020-a of the Education Law apply to all "persons enjoying the benefits of tenure", not only to "teachers." We argued that it is possible for TAs to have tenure (which is primarily the right to a hearing prior to discharge or other discipline), but not be covered by §3013 in the event of a layoff.

We also argued that it would be bad public policy not to allow educational employers to make staffing decisions based on the training and experience of TAs in the specialized areas in which they have worked. The New York State School Boards Association filed an *amicus curiae* brief in support of BOCES, which contended that such a decision would adversely affect school districts and BOCES throughout the state.

The Court's Decision

Unfortunately, the Court of Appeals decided against BOCES. It affirmed the order of the Third Department, holding that TAs are covered by §3013 (2) of the Education Law.

In essence, the court based its decision on a desire to be fair to teaching assistants. The court read together different sections of the Education Law on certification, tenure, layoff and recall. Despite the difference in the language used in these various statutes, the court expressed the opinion that the Legislature intended to grant TAs all of these rights.

The court expressed the opinion that it was necessary to interpret the statutes governing appointments and those gov-

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Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. provides comprehensive legal representation to school districts/BOCES throughout Upstate New York in all aspects of education law, employment law and labor relations.

School Districts Must Have "Local Wellness Policy" Beginning with the 2006-07 School Year

The Child Nutrition and WIC Reauthorization Act of 2004 will require every school district to enact a "Local Wellness Policy", beginning with the 2006-2007 school year. Specifically, the law will require the Policy to include the following:

(1) district's goals for:

- nutrition education,
- physical activity, and
- other school-based activities that are designed to promote student wellness

(2) nutrition guidelines for all foods available on each school campus during the school day with the objective of promoting student health and reducing childhood obesity;

(3) assurance that guidelines for reimbursable school meals will not be less restrictive than regulations and guidance issued by the Secretary of Agriculture pursuant to the Child Nutrition Act and the Richard B. Russell National School Lunch Act, as those regulations and guidance apply to schools;

(4) plan for measuring implementation of the local wellness policy, including designation of one or more persons within the district or at each school, as appropriate, charged with operational responsibility for ensuring that the school meets the local wellness policy; and

(5) involves parents, students, representatives of the school food authority, the school board, school administrators, and the public in the development of the school wellness policy.

While the law sets forth these minimum requirements for the policy, it is likely that the U. S. Department of Education will provide further guidelines and/or regulations to give school districts further assistance in creating a compliant policy. We will keep you informed as that information becomes available.

School Employees May Have to be Compensated for "Volunteering"

If you have employees who are volunteering in your school district, there may be a legal obligation to compensate those employees for some of those "volunteer" activities.

In a highly controversial Opinion Letter released by the Department of Labor (DOL) earlier this year, the DOL provided some guidance under the Fair Labor Standards Act (FLSA) concerning the use of non-exempt school district staff to assist with coaching sports or other extra-curricular activities. According to the DOL Opinion, non-exempt employees cannot be treated as "volunteers" (i.e., not paid) **if** they perform essentially the same duties they perform while they are "working". For example, if a bus driver for a school district volunteered to drive the basketball team to away games, the driver would be performing the same service that he performs as the district's employee. Thus, the driver would not qualify as a "volunteer" under the FLSA and would have to be compensated for the time it took to drive the team to the away game.

In general, the FLSA states that individuals are volunteers, not employees of the district, when they meet the following criteria:

1. Perform hours of service for civic, charitable or humanitarian reasons without promise, expectation, or receipt of compensation for services rendered; and
2. Offer their services freely without coercion, direct or implied, from the employer; and
3. **Are not otherwise employed by the district to perform the same services as those for which they propose to volunteer**.

Without question, school employees can qualify as volunteers if they perform different services than they are employed to perform. For example, if a food service worker volunteered to be an assistant coach on the basketball team, he/she would qualify as a volunteer. However, even when it is absolutely clear that an employee is truly "volunteering", the DOL would find such activity suspect when it involves the employee's same duties. **The only time this activity would not be suspect is when the employee is volunteering for an activity involving his/her own children.** Using the example of the bus driver driving the basketball team to away games, the DOL stated that, "... when the parent volunteers in activities directly involving the child's education and participation... [the DOL will] not enforce the provisions of the FLSA for the time spent driving the basketball team by [the parent/employee]."

If you have any questions regarding such matters, please contact our office at 315-437-7600.

Board of Education Can Criticize But Not Censure Board Members

The Commissioner of Education has held that a board of education is authorized to criticize the actions of a board member for exhibiting poor judgment. However, he also held that a board is not authorized to officially censure or reprimand one of its members. A very recent Commissioner's decision provides an illustration of the Commissioner's view of the subtle difference between a board resolution critical of a board member's actions and one which would be considered a "reprimand" or "censure".

The Facts

In *Appeal of L.S.*, a board of education was upset by the actions of a particular board member and retained special counsel to investigate and advise the board of education whether the board member's conduct warranted his removal. Upon the recommendation of special counsel, the board adopted a resolution concluding that the board member had engaged in improper conduct, including:

- using profanity toward district employees;
- threatening legal action against employees;
- soliciting proposals for professional services on behalf of the board without board approval;
- participating in student locker searches at the high school without authorization;
- contacting staff members on matters unrelated to his own children without authorization;
- using hostile language in written correspondence to other board members.

The board resolution expressed the board's expectation that the board member would exhibit appropriate conduct in the future. The resolution also directed the board member to request a meeting with the school attorney whenever he had questions about what was expected of him. The resolution further stated that if the board member was unclear as to the circumstances under which he might have contact with district employees on matters that did not affect his own children, he must obtain clarification from the superintendent or board president.

The board member appealed to the Commissioner, arguing that the resolution amounted to an impermissible censure. The board argued that its resolution was merely a criticism of the board member's poor judgment.

Commissioner's Ruling

The Commissioner ruled that although the board's resolution "avoids the use of the word 'censure or reprimand,' the circumstances surrounding its adoption, as well as its tone, undercut [the board's] position." The Commissioner found the language used in the resolution akin to formal discipline charges "… [that] elevates the tone of the resolution to more than mere criticism." In addition, the Commissioner was clearly troubled that the series of incidents which were the subject of the resolution took place over a period of 17 months. In the Commissioner's view, the delay undercut the board's argument and made the resolution appear more like an official reprimand than an effort to simply instruct a member about his inappropriate behavior.

Our Advice

In light of this latest Commissioner's decision, boards should take care and consult with counsel, as necessary, before adopting any resolution dealing with allegedly inappropriate conduct by an individual board member. Any resolution should be adopted close to the time of the inappropriate conduct so that a board member may alter his or her future behavior accordingly. The resolution should avoid using language that is normally reserved for formal disciplinary charges, not just the words "reprimand" or "censure", but terms such as "misconduct" or "conduct unbecoming a board member." Finally, any portion of the resolution which requires corrective action should be very specific in nature and not simply state that a board member should consult with the superintendent, board president or school attorney. In the L.S. case, the Commissioner noted that no specific corrective action had been directed toward the individual board member with respect to the conduct that formed the basis of the resolution.

If you have further questions about the decision or about the subject generally, please contact us.

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New York's Highest Court Rules Teaching Assistants Have "Bumping" Rights (cont'd)

erning abolition of positions consistently. The court stated that the Legislature sought to protect all professional educators, not just teachers. TAs are "professional educators" for the purposes of the tenure system as described in Part 30 of the Rules of the Board of Regents. By extension, the Court of Appeals determined that, for purposes of abolishing positions, the term "teacher" includes TAs. The court concluded that because protection of TAs appears to have been contemplated in other relevant statutes, it is probable that the Legislature intended to include TAs in Education Law §3013(2) for purposes of layoffs. The court also referred to prior cases in which administrators and guidance counselors had been assumed to be "teachers". The court concluded that applying the term "teacher" to TAs would be a logical extension of the term.

Impact of the Decision

The decision of the Court of Appeals settles the question of whether TAs are covered by the layoff statutes. It is now clear that, when teaching assistant positions are abolished, school districts and BOCES must lay off the TAs with the least overall seniority first, without regard to the particular programs in which they work. This will have an adverse impact on those districts and BOCES which have a practice, for example, of assigning certain TAs to work in the area of special education. It may especially be a burden with respect to TAs who are employed to work in programs that are funded by Title I and/or special education. As a matter of federal law (the No Child Left Behind Act and the Individuals with Disabilities Education Act), TAs in these areas must be highly qualified. If it is necessary to lay off TAs in these areas because they have the least seniority, it may not be a simple matter to reassign other TAs to take their place. There will be a need to ensure that the TAs assigned to these programs have the necessary training.

The Court of Appeals observed that it did not think that its decision would interfere with the ability of boards of education to abolish positions in areas where TAs are no longer needed. However, the case that it cited simply allowed employers to consider whether employees have the proper certification for the position. Under the court's decision, as long as the more senior TAs are licensed or certified as teaching assistants, they will be deemed to be eligible to be retained.

One positive note may be that, since it is clear that there is one tenure area for TAs, school districts and BOCES may exercise the right to assign TAs to work anywhere within that tenure area. (This may be limited by collective bargaining agreement provisions on transfers.)

If you have any questions, please contact Hank Sobota or Craig Atlas.

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