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

School Law Matters

Latest legal developments and practical guidance for school officials & administrators July 2004

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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.

New York's Highest Court to Hear 'Seniority Rights for Teaching Assistants' Case

The New York Court of Appeals, our state's highest court, has agreed to decide whether teaching assistants have the same lay-off seniority protection afforded "teachers" under Education Law Section 3013. *Matter of Madison-Oneida BOCES v. Mills.* A decision in this case is expected sometime next fall.

In this case, five teaching assistants ("TA's") were laid off when their positions were eliminated for the 2001-02 school year. Education Law Section 3013 requires school districts and BOCES to first lay off the least senior **teacher** in the tenure area affected by a layoff (e.g., the least senior social studies teacher). The five TA's brought an appeal to the Commissioner of Education claiming that they were not the least senior TA's, and therefore were protected under Section 3013. The Commissioner agreed, ruling that TA's are "teachers" within the meaning of the statute and must be laid off based on seniority within the "teaching assistant" tenure area.

The **Ferrara, Fiorenza Law Firm**, representing the Madison-Oneida BOCES, successfully argued in an Article 78 proceeding that the seniority statute does not apply to TA's. The TA's, in turn, appealed that decision and won at the Appellate Division. The Court of Appeals' decision will finally resolve this split of authority.

A ruling in favor of the Madison-Oneida BOCES would be a big help to school districts and BOCES when structuring needed layoffs. Assuming such a ruling, school districts/ BOCES will have greater flexibility when facing unavoidable cutbacks. They will be able to factor in the actual training, assignments, experience and/or skills of its teaching assistants in making these difficult decisions. For example, if a BOCES was making cutbacks in its cosmetology program, it will no longer be required to lay off a teaching assistant in its welding program, if the latter was the least senior teaching assistant at the BOCES.

For more information about this matter, feel free to contact Hank Sobota or Craig Atlas of our office (at 315-437-7600), who are handling the case for the BOCES.

Reminder: Appointing Resolutions Must Contain Information Required by Regents' Rules

In times of budget cutbacks and declining enrollments, school districts are often forced to consider reductions in force. These decisions are made more complex when there are disputes regarding the seniority/layoff rights of potentially effected teachers. Additionally, districts are often faced with disputes regarding the appropriate length of a teacher's probationary period as well as claims of "tenure by estoppel." When seniority or tenure disputes occur, districts must rely on their appointing resolutions to establish when the teacher's service began in a particular tenure area or areas. If those resolutions do not comply with the Rules of the Board of Regents ("Part 30"), districts may be faced with legal challenges to their seniority/tenure decisions. To avoid these problems, boards of education/BOCES must include the following information in each resolution that appoints a probationary teacher or grants a teacher tenure:

- name of the appointee;
- tenure area(s) in which the teacher will devote a substantial portion of time;
- date of commencement of probationary or tenured service;

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Reminder: Appointing Resolutions Must Contain Information Required by Regents' Rules (continued)

- expiration date of the appointment, if made on a probationary basis; and
- certification status of the appointee in reference to the position to which the individual is appointed.

It should also be remembered that boards of education/BOCES are not free to establish their own tenure areas. They must make appointments to the areas set forth in Part 30 of the Rules.

If you have questions concerning the probationary or tenure status of individual teachers or how to properly construct an appointing resolution, please contact us at 315-437-7600.

BOCES May Be Liable for Worker's Injuries on Landlord's Construction Project, New York Appellate Court Rules

A New York appellate court recently held that a BOCES could be held liable for a worker's injuries which were sustained while working on a construction project for the BOCES' landlord (on property being leased by BOCES). *Riordan v. BOCES of Rochester,* 4 A.D.3d 869 (4th Dept., 2/11/04).

Charles Riordan sued the Monroe #1 BOCES ("BOCES") for injuries he sustained while working on a construction project at a school building leased by the BOCES from the East Rochester Union Free School District ("District"). The District undertook the project for the BOCES' benefit, but it was a District project.

Mr. Riordan claimed that the BOCES was at least partly responsible for his injuries under two theories. First, he claimed a violation of New York State Labor Law provisions imposing a general duty that construction sites be operated to provide reasonable and adequate protection to workers. Second, he claimed that the BOCES was negligent. Under the negligence theory, the BOCES could be held liable if it had actual or constructive notice of an allegedly dangerous condition that caused worker's injuries.

BOCES sought to have the case dismissed because it was not the owner of the property where the injury occurred and not in control of the worksite. While a trial-level court agreed with the BOCES, the New York State Appellate Division, Fourth Department, reversed that decision and held that the BOCES could potentially be held responsible for Riordan's injuries.

The Court noted that:

> Nothing in the lease agreement, architect's agreement or the other documentary evidence submitted by [the BOCES] conclusively establishes that [it] had neither the right nor the authority to control the work site; nor does that documentary evidence conclusively establish that [the BOCES] did not have actual or constructive notice of the alleged dangerous condition.

One of the lessons to be learned from this case is to make sure that your lease agreements and construction project contracts clearly spell out who is legally responsible for injuries to workers. If you have any questions about this or similar matters, please call us at 315-437-7600.

Experienced Teacher's Racist Classroom Remarks Not Considered Protected Free Speech, Missouri Court Says

In *Loeffelman v. Board of Education of the Crystal City School District,* a student asked her teacher her opinion on the propriety of interracial marriages, to which the teacher responded "Oh, that's an easy one. I'm totally against it." The teacher also told students that interracial couples should be "fixed" so that they cannot have children. The teacher was further heard saying that "mixed children" are "racially confused." The aforementioned statements were made in the presence of two bi-racial students.

The school district thereafter brought a hearing to terminate the teacher's employment based on these comments. The teacher asserted that her comments were protected by the First Amendment as speech that was a matter of public concern. The school district disagreed, and found the teacher's comments violated four board policies prohibiting the making of discriminatory race-based comments.

The Missouri Court of Appeals held that the teacher willfully violated the school board policies and concluded that the

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Experienced Teacher's Racist Classroom Remarks Not Considered Protected Free Speech, Missouri Court Says (continued)

school district was authorized to terminate her contract. In making this determination, the Court noted that she was "an experienced teacher" with almost 10 years of experience. She was aware of the policies, and signed a contract that specifically referred to the policies which she violated. The court rejected the teacher's assertion that her comments were a matter of public concern. ***The court stated that her comments, in fact, expressing a private opinion, occurred during class time when she was supposed to be teaching, and were not part of her lesson plans.***

Please note that this case is from another jurisdiction and may provide some guidance to other courts. However, courts in New York may not follow its holding. Thus, school districts should react cautiously when dealing with similar situations.

Please contact us at 315-437-7600 if you have any further questions about such cases.

Foster Child's Tuition Paid by Last District of "Permanent" Residence

The "foster tuition" statute (Education Law Section 3202(4)(a)), states that the cost of instruction for children placed in foster care by the Department of Social Services (DSS) or another State agency is borne by the school district in which a student resided at the time the DSS or State agency assumed responsibility for "the placement, maintenance or support" of the pupil. The Court of Appeals, our State's highest court, has now ruled that children who live in a homeless shelter are not "residents" for purposes of this law. *Longwood CSD v. Springs UFSD*, 1 N.Y.3d 385 (2/17/04). Consequently, the school district which is a child's last permanent residence is responsible for the student's instructional costs.

In this case, the Longwood Central School District successfully argued that to establish residency for purposes of this law, a person must not only be physically present in a school district but must also have an intent to remain permanently in the district. ***In other words, the children in this case could not be considered "residents" for purposes of the foster tuition statute, since families cannot be considered permanent residents of a temporary homeless shelter.*** The Court of Appeals agreed with this argument (thereby adopting the longstanding position of the Commissioner of Education in such cases) holding that residency includes more than just physical presence; it must also include an intent to remain in a particular place. The Court also noted that viewing residency in this manner would avoid penalizing communities that are addressing the homelessness problem by having such shelters.

Asbestos Reinspection Reminder

The Federal Asbestos Hazard Emergency Response Act (AHERA), 40 CFR 763.85(b), and the Environmental Protection Agency (EPA) require **all** public and nonpublic elementary and secondary schools to reinspect previously identified asbestos-containing building materials (ACBM) in all facilities every three years. This pertains to all buildings that are owned, leased, or otherwise used as a school building. The 2004 AHERA triennial reinspection process must be completed no later than July 9, 2004.

PLEASE NOTE: If a building has never been inspected for asbestos, a new AHERA inspection must be completed as soon as possible. Pursuant to AHERA Section 763.85(a), any building leased or acquired on or after October 12, 1988, that is to be used as a school building must be inspected for asbestos prior to use as a school building. In the event that emergency use of an uninspected building as a school building is necessary, such buildings must be inspected for asbestos within 30 days after the use begins.

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Asbestos Reinspection Reminder (continued)

The reinspection process may only be performed by an individual currently certified by the New York State Department of Labor as an asbestos inspector.

The reinspection does not necessitate a new AHERA management plan. However, it does require a new section in the school's existing management plan document that reflects the reinspection process, its results, and any recommendations. This new section must be developed by an individual currently certified by the State Department of Labor as an asbestos management planner.

The AHERA triennial reinspection process also provides an appropriate opportunity to review the school's overall asbestos management plan. This process is the ultimate responsibility of the school's asbestos designee.

In conjunction with the AHERA triennial reinspection cycle, New York State public schools must also submit an asbestos reporting form to the Commissioner of Education on a triennial basis (§3602-a of Chapter 53 of the Laws of 1990). The 2004 AHERA triennial reinspection reporting process will be done electronically. This process is currently being developed.

To assist you with the AHERA requirements, the EPA has posted information on asbestos in schools at the following web sites:

- http://www.epa.gov/asbestos/asbestos_in_schools.html
- http://www.epa.gov/asbestos/aherarequirements.pdf
- http://www.epa.gov/asbestos/abcsfinal.pdf

For additional assistance on AHERA and the triennial reinspection requirement, please contact your local BOCES Health and Safety Coordinator or Laura Sahr at lsahr@mail.nysed.gov or 518-474-3906.

Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C.
5010 Campuswood Drive
East Syracuse, New York 13057