Legal Issues in Tough Economic Times: A Refresher

The Council’s Midwinter Conference
January 11, 2008

Presented by:
Douglas Gerhardt, Esq.
Harris Beach PLLC
677 Broadway, Albany, NY 12207
DGerhardt@harrisbeach.com
A Refresher Course on Issues in Tough Economic Times

- Layoff
  - Certificated
  - BOCES Takeback
  - Civil Service

- Collective Bargaining Issues
Teachers and Other Tenure – Eligible Faculty Members

- Statutory Authority – Education Law
  - § 2510 (Small City)
  - § 2585 (Large City),
  - § 3013 (Union Free, Central, BOCES)

- “[w]henever a board of education abolishes a position ..., the services of the teacher having the least seniority within the tenure of the position abolished shall be discontinued.”
Teachers and Other Tenure – Eligible Faculty Members

- Bona Fide Reasons for Abolishing Position
  - Boards of Education have broad latitude to abolish positions for economic as well as other reasons, as long as they act in good faith and reasonable judgment
    - Declining student enrollment
    - Declining revenue
    - Student need in other subject areas
  - Abolishing a position cannot be used to firing unwanted professional educators in contravention of tenure rights.
Process

- Professional Educator Positions Created After August 1, 1975 (8 N.Y.C.R.R. § 30-1.13)
  - Identify tenure area of the position to be abolished
  - Identify person with the least seniority within the tenure area - use seniority list
  - Determine whether the individual has the right to “bump” a less senior teacher in another tenure area – seniority list
  - Formal board resolution
  - Notice
Step 1
Identify the tenure area of the position to be abolished
Part 30 Tenure Areas

- **Elementary Tenure Area** - (Pre-K through Sixth Grade)
- **Middle Grades Tenure Area** - (applies when the instruction of seventh and eighth grades is not departmentalized by academic area)
- **Academic Tenure Areas** - (teachers at or above the seventh grade level where instruction is departmentalized are placed into the academic tenure areas of English, social studies, mathematics, science, and languages)
Part 30 Tenure Areas

- Special Subject Tenure Areas - (there are 31 special subject areas which encompass 15 academic areas, 9 ancillary or supportive educational services, 6 vocational education subject areas, and the teaching assistant tenure area)
Step 2
Identify the person with the least seniority within the tenure area
Seniority Credit

- Seniority rights are those rights to job security and priority based upon appointment to a tenure area.
- Seniority credit is awarded based upon the actual paid service in a specific tenure area.
- Seniority rights apply to both tenured and probationary teachers while tenure rights apply only to tenured teachers.
Seniority Credit

- Seniority is the sole criterion to be used in determining the order in which teachers are dismissed in the event that teaching positions are abolished.
- Tenure status and/or performance may not be used as a factor in determining layoff order.
Seniority Credit

Time spent working outside of a professional educator’s tenure area cannot be counted towards seniority credit in the tenure area.
Seniority Credit

- Commissioner’s Regulation 30.1

Seniority “need not have been consecutive, but shall, during each term for which seniority credit is sought, have constituted a substantial portion of the time of the professional educator.”
Seniority Credit

- A teacher must be given seniority credit for regular substitute service rendered any time prior to a probationary appointment, even if the substitute service is:
  - longer than two years; or
  - less than the full semester required for Jarema credit
Seniority Credit - Ties

- Full-time service within a tenure area
- If equal, the teachers’ appointment dates are to be used for determining seniority
- If same appointment date, the one whose appointment occurred first is the most senior.
- If both were appointment in the same resolution, District may use any reasonable factors.
Seniority Credit
Implications of part-time service

- Generally, part time service does not qualify an individual for seniority rights.

- Exceptions:
  - PT kindergarten teachers
  - PT service rendered after a full time probationary appointment if the district requests the change to PT.
  - Split assignment to multiple tenure areas if at least 40% in the area

- Years of regular full time substitute service count towards seniority, even if interrupted by part-time substitute service
Seniority Credit – Split Assignment

Teacher has split probationary appointment for five years:

50% - Science
50% - Math

Teacher has assignment solely to Math for 2 years.

Seniority Credit:

Math – 7 years
Science – 2 years
Step 3
Determine if the person with the least seniority has seniority credit within another tenure area.
Bumping Rights

- Under Commissioner’s regulation 30.13, a teacher whose position is eliminated in one area and who accrued seniority based on prior service in a different tenure area can take the position of a teacher in the previous tenure area if she/he has more seniority than another teacher in the previous tenure area.
Bumping Rights

- A district may not place a teacher who is bumping back into a previous tenure area on probation if the teacher had already earned tenure in the previous tenure area.
Step 4

FORMAL BOARD RESOLUTION
Board resolution

- Identify tenure area(s) and FTE(s)

- Direct the Superintendent to implement the reduction in force consistent with applicable law and regulation
Step 5

NOTIFICATION TO AFFECTED INDIVIDUALS
Notification Letter

- Abolishment of position
- Effective date of abolishment of position
- Placement on PEL
Layoff Scenarios

Service in One Tenure Area

- Identify least senior teacher or teachers in tenure area of position(s) to be abolished
- If the least senior teacher has service in just that tenure area, the teacher has no bumping rights and will be laid off
- Teacher is placed on a PEL for up to a seven-year period for reinstatement to the same or similar position
Layoff Scenarios

- **Service in Multiple Tenure Areas**
  - Split assignment
  - If a teacher is assigned to more than one tenure area and serves at least 40% in the tenure area, the teacher is entitled to full seniority credit.
  - If teacher is least senior in tenure area of position to be abolished, teacher may retain a position in the second tenure area based on seniority.
Teachers On Special Assignment

- Seniority credit is frozen in the tenure area in which the teacher previously served.
- If the TOSA position is eliminated, the individual can “bump” back into a position in the prior tenure area provided he or she is not the least senior person on the seniority list.
- Special agreements to provide seniority credit to TOSAs in their tenure area during the special assignment are not permitted when the teacher did not perform at least 40% of his/her duties within the tenure area.
Appointment to Unrecognized Tenure Area

- *Appeal of Devente and Jesenof*, Decision No. 15,822 (August 14, 2008)
- Teachers were hired as “Professional Development Specialists” and placed for tenure purposes in the Elementary tenure area
- The Commissioner found that the teachers had no rights to positions in the Elementary tenure area when their Professional Development Specialist positions were eliminated
- The teachers were not “professional educators” as the term is defined in Part 30 of the Commissioner’s regulations
- Their positions as “Professional Development Specialists” are not positions certified by the Commissioner to the State Civil Service Commissioner as being educational and they never devoted at least 40% of their time to classroom instruction
Recall Rights

- Recall rights – 7 years from the date of abolition of the position
  - Large City School Districts – until name reached on seniority list
- Recall rights are based on total service within the district rather than service in a particular tenure area
- Teachers on PEL must be offered a regular substitute position (5 months or longer in duration). If a teacher declines the position, he/she maintains the PEL rights
Recall Rights

- Recall rights survive:
  - Acceptance of other employment
  - Acceptance of employment in another tenure area within the district
  - Rejection of an offer of employment

- Recall rights are extinguished when:
  - Recalled to similar position and accept
  - 7 year period lapses
  - Teacher retires (unless for a disability retirement)
Abolition Of Administrative Positions

- Identify tenure area of the position to be abolished
- Identify person with the least seniority within the tenure area - use seniority list
- Formal board resolution
- Notice
- Placement on PEL
Administrative Tenure Areas

- Part 30 is not applicable to administrative tenure areas
- A school district may establish a single district-wide “administrator” tenure area or establish more narrowly defined administrative tenure areas
Administrative Tenure Areas

Factors to determine placement of positions in tenure areas

- Notice to the individuals of their tenure status
- Duties of the various positions
- Adverse practical impact of non-recognition of a particular area
- Membership in collective bargaining units
Entitlement to newly created position

An administrator may be entitled to appointment to a newly created position when:

- The newly created position is in the same tenure area as the abolished position
- The positions are “similar”, i.e., positions have more than 50% of duties in common
  - Also must look at comparable skill, experience, training and certification required
Boces Takeback Process
- Education Law 3014-b

In any case in which a school district duly takes over the operation of a program formerly provided by a board of cooperative educational services, each teacher, teaching assistant and teacher aide employed in such a program by such board of cooperative educational services at the time of such takeover by the school district shall be considered an employee of such school district, with the same tenure or civil service status he maintained in such board of cooperative educational services.
3014-b Takeback

The application of the 3014-b statute is automatic and occurs where a component school district withdraws its students from a BOCES program and establishes an equivalent program of its own.
3014-b Takeback Process

- BOCES must identify the individuals with the least seniority within the tenure area of the positions to be abolished.
- The teachers who are excessed as a result of the takeback are considered employees of the school district.
- If the takeback district cannot employ all excessed individuals, those who cannot be employed must be placed a district PEL.
- It appears that the employees also have a right to placement BOCES PEL for a period of 7 years even if they have become employed by a takeback district.
3014-b Takeback Process

- If more than one district is taking back the program, each affected employee who is identified to be excessed selects the particular school district in which he/she shall be considered an employee.
- The right of selection is based upon the employee’s seniority in the BOCES.
Part II: REDUCTIONS IN FORCE - CIVIL SERVICE EMPLOYEES
Civil Service Employees

Authority to Abolish Positions

- Board of education has the authority to abolish noninstructional positions for reasons of: (1) economy, consolidation, abolition of functions, or curtailment of activities.
- Abolishment must be made in “good faith”
- To determine if the abolishment was in “good faith”, courts look at whether:
  - the decision to abolish a position was really an attempt to terminate without following the required Civil Service procedures;
  - the district actually saved money by abolishing the position; and
  - a newly hired employee performs substantially similar duties.
Civil Service Employees

Order of Layoff in Competitive Class

- Types of Employment
- Inverse Seniority based on Continuous Service
- Special Protections and Rules for Certain Employees

Non–Competitive Class

- Layoff and recall procedures are not governed by New York Civil Service Law.
- Procedures and rights may be subject to local civil service rules or collective bargaining agreements
Civil Service Employees

Bumping Rights and Retreat Rights

- Bumping rights – Laid off employee must be in a title that has a direct line of promotion
- Retreat rights – Available only when there is no lower occupied position in the direct line of promotion and is subject to sever conditions
Civil Service Employees

Preferred Lists

- Laid off individuals placed on a preferred list that is used to fill school district vacancies in:
  - Same or similar title
  - Position in line of promotion
  - Any comparable title
Civil Service Employees

Additional Issues

- Additional rights under collective bargaining agreements – an agreement can grant additional rights as long as they do not directly conflict with Civil Service Law.

- BOCES Takeover/District Takeback – Teachers Aides
Military Leave Law Implications

Federal Law - Uniformed Services Employment and Reemployment Act of 1994 (USERRA)

- Reemployment rights – returning service members guaranteed reemployment in the position that they would have held or attained if no military leave had been taken
- Impact on seniority – returning service members entitled to the same seniority held at the time leave commenced, plus any additional seniority they would have attained if they had not gone on military leave
Military Leave Law Implications

State Law – New York State Soldiers and Sailors Civil Relief Act (SSCRA)

- Returning public sector employees are entitled to reemployment as long as application is made to employer within 90 days of the end of military leave
- Public employees on short-term reserve duty are entitled to continuation of their salary for up to 30 calendar days
- Time spent on military duty cannot be considered an interruption in service
Military Leave Law Implications

How Military Leave Affects Layoffs

- Computation of seniority
- Employee returning whose position was abolished during military leave
- Placement on preferred/reemployment lists
Part III: COLLECTIVE BARGAINING ISSUES
Collective Bargaining Issues

Abolishment/Curtailment of Services

Subcontracting/Transfer of Bargaining Unit Work

- “The subcontracting of bargaining unit work, for economic or other reasons, constitutes a mandatory subject of bargaining under the Act.”
- Is the work being transferred exclusive bargaining unit work?
- Is the work to be performed outside the bargaining unit substantially similar?
- Non-unit employees and independent contractors
- BOCES
- Waiver of the right to negotiate by the union by contract or action
Collective Bargaining Issues

Impact Negotiations

- An employer is required to bargain over the effects inevitably or necessarily caused by the exercise of a managerial prerogative.
- Requirement to impact bargain is triggered by a demand from the union.
- Employer’s belief that there is no impact does not avoid the impact bargaining obligation.
- Taylor Law procedures/rules apply.
Collective Bargaining Issues

Regressive Wage/Benefit Offers

- Offering less generous terms than previously offered.
- Changed economic or legal circumstances that are material and unanticipated.
- Improper motivation in making the offer.
- Comprehensive package bargaining.
Collective Bargaining Issues

Ratification of the Tentative Agreement

- By statute the Board has the right to legislatively approve terms requiring additional funds.
- Board must reserve the right to ratify the entire tentative agreement.
- District negotiators must support ratification unless they reserve the right not to support the tentative agreement.
  - Consequence will be a direction to implement the tentative agreement.
  - Can also result in rescinding the right to legislatively approve the tentative agreement.
- Ratification must be done within a reasonable time frame.
- If a majority of the Board are on the negotiation team agree to a tentative agreement, the Board has ratified and approved the agreement.
Collective Bargaining Issues

- Retiree health benefits statute.
- Existing collective bargaining agreements.
Questions?

Contact:

Douglas Gerhardt, Esq.
Harris Beach PLLC
677 Broadway
Albany, NY 12207
(518) 701-2738
DGerhardt@harrisbeach.com