

Municipalities 2023 Webinar Series

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The In's and Out's: Civil Service Law Sections 71 and 73

Presenters



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Overview

- Introduction
- Civil Service Law Sections 71 & 73
- Employer & Employee Rights
- Current Case Law
- Strategies to Limit Litigation
- Q&A



Introduction

- Civil Service Law (“CSL”) Sections 71 and 73 provide methods to remove civil service employees who are absent from work due to:
 - an occupational injury or disease (§ 71) or
 - a non-occupational injury or disease (§ 73).
- Sections 71 and 73 include:
 - Minimum leave of absence periods for disabled employees;
 - Employer rights for terminating disabled employees; and
 - Reinstatement procedures.

Introduction

- CSL Sections 71 and 73 were established to provide public employers with non-stigmatizing ways to remove civil service employees with long-term injuries or illnesses so that permanent replacements can be hired to perform the work needed.
- The statutes serve as an alternative to disciplinary action pursuant to Section 75 based on charges of incompetence for inability to perform the functions of the position.

Introduction

City of Long Beach v. New York State Public Employment, 39 N.Y.3d 17 (2022) (citing *Matter of Allen v. Howe*, 84 N.Y.2d. 665, 672 (1994)):

The legislature enacted section 71 [and section 73] to address prolonged employee absences and "**strike a balance between the recognized substantial State interest in an efficient civil service and the interest of the civil servant in continued employment in the event of a disability**" . . . The statute does so by entitling public employees disabled by an occupational [or non-occupational] injury to a one-year leave of absence, while also providing them with a means for later reinstatement if they are terminated for being absent longer than a year.

Civil Service Law Section 71

Civil Service Law Section 71

- “Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease . . . he or she shall be entitled to a leave of absence for at least one year, unless his or her disability is of such a nature as to permanently incapacitate him or her . . .”
- Applies to civil service employees who suffer an *occupational* injury or disease.
 - “Occupational injury or disease” – illnesses or injuries which are incurred in the course of employment as defined by the workers compensation law.
- **Two Parts of Section 71:**
 - 1) Employee Leave of Absence
 - 2) Reinstatement Procedure for Terminated Employees

Civil Service Law Section 71

Employee Leave of Absence:

- Employees who suffer an occupational injury or disease are entitled to a leave of absence of **at least one cumulative year**, unless permanently disabled, before being terminated.
- If the occupational injury is the result of an “assault,” employee entitled to leave of absence of **at least two cumulative years**, unless permanently disabled.
 - Statute does not define “assault”; generally limited to physical “assaults” only.
- Calculating *cumulative* leave of absence:
 - Counted on a day-by-day basis;
 - Can also include non-workdays that fall between two workday absences (e.g., weekends, holidays, and days employee was not scheduled to work);
 - Can count all absences related to the same illness or injury.

Civil Service Law Section 71

Reinstatement Procedure for Terminated Employees:

- Employees terminated upon expiration of their leave of absence under CSL 71 may seek reinstatement.
- Such employee may apply to the applicable civil service department or municipal commission for a medical examination to determine fitness to return.
 - Employee must submit application within **one year of the termination of his or her disability**.
- If deemed physically and mentally fit, employer must reinstate employee to:
 - (i) former position, **if vacant**, or
 - (ii) to a vacancy in a similar position or a position in a lower grade in same occupational field, or
 - (iii) to a vacant position for which employee was eligible for transfer.
- If no applicable vacancy exists, employee is placed on preferred list for his or her former position or similar positions for a period of four years.

Civil Service Law Section 71: Case Law

- CSL § 71 & Family and Medical Leave Act (“FMLA”)
 - *Jacobsen v. State Dep’t of Labor*, 274 A.D.2d 809 (3d Dep’t 2000).
 - **Calculation of one year under CSL § 71 properly includes weekends, holidays and days employee was not scheduled to work.**
 - **BUT**, while calculating one-year leave of absence on a 365-day basis was proper, employee was nevertheless unlawfully terminated because she did not receive notification that her FMLA leave would run concurrently with her workers’ compensation leave
 - **Key Considerations:**
 - Watch out for FMLA interplay for “serious health condition”;
 - Be mindful of FMLA 12-month period – see FMLA policy

Civil Service Law

Section 73

Civil Service Law Section 73

- “When an employee has been continuously absent from and unable to perform duties of his position for one year or more by reason of a disability . . . his employment status may be terminated and his position may be filled by a permanent appointment.”
- Applies to civil service employee who suffers a ***non-occupational injury or disease***.
- Section 73 essentially mirrors the procedures set forth in Section 71.
- Key Differences From Section 71:
 - Employee who suffers a non-occupational injury or disease is entitled to leave of absence of at least **one continuous year** (as opposed to *cumulative* year) before being terminated;
 - No extended leave of absence for injury resulting from an assault.

Civil Service Law Section 73: Case Law

- Physical and Mental Fitness Evaluation
 - *Coleman v. State*, 38 A.D.3d 1044 (3d Dep't 2007).
 - Petitioner applied for reinstatement following a CSL § 73 termination but was denied based upon her failure of a psychological evaluation, even though her leave was based on a physical injury she sustained.
 - Petitioner challenged the reinstatement denial on the grounds that the psychological standards used from NYS Correction Law § 8 came into effect after she had begun her one-year leave of absence.
 - The Third Department disagreed with Petitioner.
 - **Key Consideration:**
 - Employers may deny reinstatement if medical examiner determines employee is physically or mentally unfit, regardless of grounds for leave prior to termination.

Civil Service Law Section 73: Case Law

- Physical Fitness & “Essential Functions”

- *In re Civ. Serv. Empls. Assoc., Inc. v. Hogan*, 2007 N.Y. Slip Op 34307(U) (Sup. Ct. Suffolk Co. 2007).

- Petitioner was an approximately 30-year employee (Mental Hygiene Therapy Aide) who, 11 months into his § 73 leave of absence, sought reinstatement to duty but with restrictions (could not work overtime).
- Employer refused reinstatement on the basis that employee was “unfit for duty” because overtime was an “essential function” of the position.
- Employee was subsequently terminated under § 73.
- Court found the termination proper since overtime was shown to be “essential function.”

- **Key Consideration:**

- Be consistent with “essential functions”

Section 71 vs. Section 73

Civil Service Law § 71	Civil Service Law § 73
<ul style="list-style-type: none">• Occupational injuries or diseases• Computation of one-year threshold based on cumulative (i.e., need not be consecutive) absences.• Provides for a two-year leave of absence in the case of an “assault.”• Procedure for termination virtually identical.• Procedure for reinstatement identical.	<ul style="list-style-type: none">• Non-occupational injuries or diseases• Computation of one-year threshold based on “continuous” (consecutive) absences.• Does not provide for a two-year leave of absence in the case of an “assault.”• Procedure for termination virtually identical.• Procedure for reinstatement identical.

Employer & Employee Rights

Employee Rights

- 1) Leave of Absence
- 2) Reinstatement
- 3) Due process



Employee Rights: Leave of Absence

- Employees who are absent from work due to an occupational or non-occupational injury or disease are entitled to the following leaves of absence before being terminated:

Type of Injury or Disease	Leave of Absence
Occupational	One cumulative year
Occupational result from an on-the-job assault	Two cumulative years
Non-occupational	One continuous year
Permanently disabled/incapacitated to perform duties of the position	None

Employee Rights: Reinstatement

- Under both CSL 71 & 73:

- 1) Right to apply for reinstatement to former or similar position.

- Employee must submit application to the relevant civil service department or municipal commission for medical examination **within one year of the termination of his or her disability**.

- 2) Right to reinstatement to former or similar position.

- If deemed physically and medically fit, Employer **must** reinstate Employee to:

- (i) former position, **if vacant**, or
- (ii) to vacancy in a similar position, or a position in a lower grade in same occupational field, or
- (iii) to a vacant position for which employee was eligible for transfer.

- 3) Right to be placed on preferred list.

- If no vacancy exists or if the workload does not warrant the filling of such vacancy, Employer **must** place Employee on preferred list for his or her former position for a period of four years.

Employee Rights: Due Process

- A CSL 71 or 73 discharge must be accompanied by pre-termination notice and a minimal opportunity to be heard.
 - *Prue v. Hunt*, 78 N.Y.2d 364 (1991).
 - “To meet the minimum demands of Federal due process Petitioner should at least have been given an explanation of the grounds for the discharge and an opportunity to respond prior to his discharge.”
- Procedural due process standards apply equally to both Section 71 and Section 73.
- Be aware of the State vs. Local jurisdiction differences, as New York State’s Civil Service Law Regulations (NYCRR, Title 4) place additional significant procedural burdens and obligations on the State as an employer regarding Section 71 terminations

Employee Rights: Due Process

- Adequate Pretermination Hearing:
 - *Hurwitz v. Perales*, 81 N.Y.2d 182 (1993)
 - Pretermination due process, in the context of CSL 71 and 73, “amounts to no more than an opportunity for the employee to present opposing views as to whether she had been absent for one year or more and whether she was able to return to her position.”
 - “In this case, Petitioner was given adequate opportunity to respond to the claimed basis of her discharge prior to her termination. Petitioner was notified that she would be terminated upon her continuous absence for one year ‘by reason of a disability’ and that she had the right to submit medical documentation demonstrating her ability to return to work in order to avoid discharge.”
- **Key Considerations:** The hearing need not be a full evidentiary hearing; however, the hearing should (i) provide a check against mistaken termination; (ii) provide notice of tentative decision to terminate; (iii) allow for explanation of employer’s evidence; and (iv) provide opportunity to be heard.

Employer Rights

Two Main Areas:

- 1) Termination
- 2) Reinstatement



Employer Rights: Termination

- **Under both CSL 71 & 73:**

- 1) Right to terminate disabled employee upon the expiration of the required leave of absence period.
 - See “Leave of Absence” table, slide 19.
- 2) Right to immediately terminate permanently disabled employee.

*However, the *procedures* for terminating an employee upon expiration of the leave of absence period are mandatory subjects of bargaining. See *City of Long Beach, slide 28*

Employer Rights: Reinstatement

- **Under both CSL 71 & 73:**
 - 1) Right to choose medical examiner
 - 2) No duty to create vacancy
 - 3) No duty to fill vacancy if workload does not warrant filling such vacancy

CSL 71 & 73: Employee vs. Employer Rights

Employee Rights	Employer Rights
<ol style="list-style-type: none">1) Right to leave of absence2) Right to Due Process3) Right to reinstatement, if:<ul style="list-style-type: none">• deemed physically and mentally fit by medical examiner; and• vacancy in former or similar position, or in a position in a lower grade in the same occupational field, or a position he or she was eligible for transfer.4) Right to be placed on preferred list	<ol style="list-style-type: none">1) Right to terminate disabled employees upon expiration of leave of absence.2) Right to immediately terminate permanently disabled employees.3) Rights under Reinstatement Procedure:<ul style="list-style-type: none">• Right to choose medical examiner• No duty to create vacancy• No duty to fill vacancy if workload does not warrant filling such vacancy

Current Case Law

City of Long Beach v. New York State PERB (2022)

- In 2022, the New York Court of Appeals held that **municipalities must collectively bargain over the procedures for terminating a municipal employee after they have been absent from work for more than one year due to an injury sustained in the line of duty** (i.e., terminated pursuant to CSL 71).
- Court held that CSL 71 exempts a municipality’s “right to terminate” but does not remove from mandatory bargaining the *procedures* for termination.
 - “Our review of section 71 reveals that ‘there is no “plain” and “clear” evidence that the Legislature intended’ to foreclose from mandatory bargaining the procedures for terminating employees covered by the statute. Both the language and legislative history of [section 71] are silent on the issue of collective bargaining . . . Nor is there a ‘specific statutory directive [that] leaves “no room for negotiation” of pretermination procedures.’”
- **Key Consideration:**
 - Municipalities have a right to terminate disabled employees; however, they must collectively bargain over the procedures for doing so (i.e., must negotiate notice requirements, hearing procedures, etc.).
 - Holding may similarly apply to termination procedures under CSL 73.

In re Police Benevolent Association of Wappinger Falls (2023)

- On March 6, 2023, the New York State PERB made the following findings in a dispute between PBA of Wappingers Falls and the Village of Wappinger Falls regarding their CBA negotiations:
 - 1) Denied PBA proposal Number 14(4) because it related to a non-mandatory subject of bargaining.
 - Proposal 14(4):
 - “Officers absent on leave under CSL §71 who are medically cleared to return to modified/light duty by their treating physician shall be permitted to return to duty in a modified/light duty position consistent with their injuries/illness, for periods not to exceed three months. No more than one officer shall be permitted to work in a modified/light duty status on each tour of duty, which shall include officers absent on GML § 207-c leave.”

Wappinger Falls cont'd

- 2) The second and third sentences in PBA proposal Number 14(6) were prohibited subjects of bargaining.
 - Proposal 14(6): (*in relevant part*)
 - “The Village in rendering its decision shall take into account such factors as the nature of the illness/injury, the expected length of incapacity of the officer, the officer's ability to return to light duty, the length of service of the officer and proximity of the officer's eligible date for a service retirement and/or pendency of a disability retirement application.
 - The notice shall also provide that if the officer provides a physician's note indicating that the officer is cleared to return to full duty within three months after the proposed effective date of the termination, that the termination will be held in abeyance pending the officer's return and the right after termination of employment to apply to the Civil Service Department within one year of the end of disability for reinstatement to the position if vacant, to a similar position, or to a preferred list, pursuant to Civil Service Law.”

Wappinger Falls cont'd

3) The second sentence of PBA proposal Number 14(8) was a prohibited subject of bargaining.

– Proposal 14(8): (*in relevant part*)

- “Pending a hearing, the Village shall take no action to terminate the employee.”

- **Current Status of Case:**

- On April 4, 2023, the PBA of Wappinger Falls filed an Article 78 petition to the Supreme Court of Albany County, arguing that the NYS PERB’s findings are affected by errors of law, arbitrary and capricious, and contrary to the Court of Appeals holding in *City of Long Beach*.

Limiting Litigation

Strategies to Limit Litigation



Questions?



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Thank You

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