

N.Y. High Court rules on disciplinary definitions for public employees

Although public employers may be aware of their obligation to provide certain types of employees with an opportunity for a hearing before imposing discipline (such as a written reprimand), the line between a nondisciplinary counseling memorandum and a disciplinary reprimand is not always clear.

The New York State Court of Appeals' recent decision in *Matter of Michael D'Angelo v. Nicholas Scoppetta* serves as an important reminder that the term "reprimand" may be interpreted more broadly than public employers anticipate.

Inflammatory words in FDNY

In the *D'Angelo* case, the Fire Department of New York City (FDNY) sent a letter informing a firefighter that he had violated the department's Code of Conduct and Equal Employment Opportunity Policy. The Court of Appeals held that the letter constituted a "reprimand" that could not be placed in his file unless he had the opportunity for a hearing and other due process rights.

The firefighter was accused of yelling a racial epithet at an emergency medical technician, also employed by the fire department, while responding to a motor vehicle accident. The EMT filed a police report, notified his supervisor of the incident and complained to the department's EEO office. After a two-year internal investigation, the department found that the firefighter had used the racial slur as alleged. It issued a final report summarizing the findings and recommendations resulting from the investigation, and the report was approved by the commissioner of the FDNY.

The department's assistant commissioner sent the firefighter a letter stating that he had "exercised unprofessional conduct and made an offensive racial statement." The letter instructed him to read and sign an attached Advisory Memorandum

and informed him he would receive additional EEO training in the future. The assistant commissioner characterized the letter as a "formal Notice of Disposition of the filed Complaint," which would be placed in the firefighter's permanent file.

Firefighter's objection

The firefighter objected to the placement of the letter in his file without an opportunity for a hearing. He commenced an Article 78 proceeding to challenge the FDNY's placement of the letter in his file.

A trial court annulled the determination and expunged the letter from the firefighter's file, holding that it was a disciplinary reprimand and, therefore, the firefighter was entitled to a formal hearing and other due-process safeguards. The decision was subsequently affirmed by both the Appellate Division and the Court of Appeals.

'Evaluation' or 'reprimand'?

In reaching its decision, the Court of Appeals focused on several key facts to distinguish the letter issued to the firefighter from counseling letters issued to teachers, which a 1981 Court of Appeals decision had found to be nondisciplinary "critical evaluations." Specifically, the Court noted that the letters to the teachers, although "sharply critical," were not intended to punish the teachers, but rather were meant to identify relatively minor breaches of school policy and encourage future compliance.

In contrast, the Court held that the determination that the firefighter had used a racial epithet could not be considered a "minor breach" of the EEO policy. In fact, the FDNY conceded during oral arguments that it was serious misconduct that could negatively affect the firefighter's eligibility for future promotion.

Furthermore, the requirement that the firefighter participate in additional EEO training was deter-

mined by the Court to be a form of discipline.

Additionally, the letters to the teachers in the 1981 case were sent by an individual school administrator, who was the teachers' direct supervisor. In contrast, the letter in the *D'Angelo* case was sent to the firefighter following a two-year formal investigation conducted by the FDNY's EEO office with approval from both the assistant commissioner and commissioner.

In light of these specific facts, the Court of Appeals concluded that the letter was a formal disciplinary reprimand, and that the firefighter was entitled to a hearing to protect his due-process rights before the letter could be placed in his permanent file.

The *D'Angelo* decision serves as a good reminder to public employers: They must consider the manner in which employee performance and conduct problems are addressed, and be prepared to follow applicable due-process requirements when appropriate.

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