THE ADVOCATE

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Providing comprehensive employment and personnel relations services to local school districts for over 40 years.

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Terminating Probationary Public Employees for Absenteeism Due to On-the-Job Injury: Be Very Careful

A local school district recently asked for advice regarding the potential termination of a probationary teacher aide. The aide was appointed at the beginning of the school year, but had been on Workers' Compensation leave for eight of his nine months of employment with the school district.

The district asked whether it could terminate this teacher aide and hire another aide who would be present to serve the needs of a special education student. The district had been using substitute teacher aides to fill in, but this situation was unsatisfactory to both the district and the student's parents. The district inquired, "can the teacher aide be terminated due solely to his absenteeism?"

At first glance, termination based on absenteeism would not appear to be illegal or discriminatory. After all, focusing on absences as opposed to a disability seems to be a neutral and non-discriminatory basis upon which to take action, as school districts simply want more permanent employees' help in meeting the needs of the students in their districts. Unfortunately, this analysis has a pitfall. As explained below, a decision to terminate a probationary employee for his or her absences is not proper or legal under New York law if those absences were caused by a work-related injury.

In the absence of a showing that the dismissal was for a constitutionally impermissible purpose (such as race or gender) or in violation of a statute or a case law, a probationary employee may generally be terminated or discharged without a hearing and without a statement of reasons. *Taylor v. SUNY*, 13 AD3d 1149, 787 NYS2d 753 (4th Dep't 2004). However, this general proposition does not apply to this scenario. If the reason for the employer's termination of the probationary employee is based solely on absenteeism due to a work-related injury, it could be a violation of the New York Workers' Compensation Law, Section 120. *Kaye v. Brewster CSD Board of Education*, 103 AD2d 870, 477 NYS2d 894 (3rd Dep't 1984). The school district's appeal in *Kaye* was dismissed by the Court of Appeals. *Kaye v. Brewster*, 64 NY2d 756 (NY 1984), affirmed 64 NY2d 1097 (NY 1984). The case was cited in the later cases of *O'Malley v. New York City Transit Authority*, 158 AD2d 822, 551 NYS2d 407 (3rd Dep't 1990) and in *Oglesby v. City of Newburgh*, 2013 AD2d 726, 610 NYS2d 380 (3rd Dep't 1994).

In *Kaye*, a probationary bus driver was terminated during her probationary period and while she was out on Workers' Compensation leave. That court upheld the termination because the record contained the testimony of the employee's supervisor, which showed dissatisfaction with the employee's work attitude and absenteeism prior to her on the job injury. However, the court stated that if the reason for the termination is absenteeism due to a work-related injury, a violation of New York Worker's Compensation Law may be found. Workers Compensation Law Section 120 is titled "Discrimination against employees who bring proceedings."

An employee who feels wronged may file a complaint with the Workers' Compensation Board within two (2) years of the alleged practice, claiming a discriminatory practice. If the Board finds a violation of Section 120, it shall restore the employee to employment as well as to

provide compensation from the employer for any loss of compensation arising out of the discrimination and fees. In addition, an employer in violation of Section 120 shall be fined up to $500.

Based on these cases, our advice to the inquiring school district was not to terminate the teacher aide for his absence due to the work-related injury at this time. However, there is a remedy for public employers. The district can use Civil Service Law Section 71 when this employee has been absent for a cumulative period of one (1) year. This is a permissible route for termination, even if an employee's absences are the result of the on the job injury.

It is best practice to write to employees who are absent due to work-related injuries shortly after those injuries occur, and inform the employees that they are on leave for a job-related injury. Following this article, we have reprinted "Workers Compensation and Civil Service Law Notification," along with a sample letter that you can use to send to employees in this type of situation.

School districts should also note that they may have the option to extend the probationary period based on the employee's absences. Whether the extension is mandatory or simply an option varies based on the local civil service rules. *See, e.g.* Wayne County Civil Service Rules (requiring an employer to extend the probationary period where there are more than ten absences during that period); Tompkins County Civil Service Rules (permitting an employee to extend the probationary period, but not requiring that it be extended).

For more guidance on this type of situation, please feel free to contact our office or read Volume 64, McKinney's Consolidated Laws of New York Annotated (2006), NY Workers' Compensation Law §120. Discrimination against employees who bring proceedings, Practice Commentary by Martin Minkowitz at pages 346-352.

Workers' Compensation and Civil Service Law Notifications

Civil Service Law §71 entitles permanent civil service employees to a minimum one-year leave of absence for a work-related illness or injury. An employer has the right to commence a proceeding to terminate an individual's employment after the employee has exhausted his/her cumulative leave total of one year. In order to effectuate this termination, an employee must be given notice of his/her rights under the law and afforded a hearing to contest their ability to return to work and/or the amount of leave previously taken.

An appellate decision appears to require public employers to notify employees, at the inception of a workers' compensation leave, that they can be terminated if they fail to return within one year. *LaJoie v. County of Niagara*, 239 A.D.2d 908, 659 N.Y.S.2d 622 (4th Dept. 1997).

In *LaJoie*, the employee was terminated in accordance with Civil Service Law §71. That is, the employee was provided with notice of the pre-termination hearing. The hearing was held, and it was determined that the employee had been absent in excess of one year due to a work related illness or injury, and that she was not physically able to return to work. The employee appealed Niagara County's decision to terminate her employment and argued that the County did not notify her at the commencement of her workers' compensation leave that she could be terminated if she did not return within one year.

The Appellate Division, Fourth Department, agreed with Ms. LaJoie and upheld a lower

court's order to reinstate her. The Court found that the Civil Service Rules and Regulations obligated the County of Niagara to notify Ms. LaJoie, at the inception of her workers' compensation leave, that she could be terminated from her position if she failed to return from her leave within one year. See 4 N.Y.C.R.R. §5.9(b). In particular, 4 N.Y.C.R.R. §5.9(b) specifically provides that not later than the 21st day of absence due to an occupational injury or disease, the appointing authority must notify the employee in writing of:

1. the effective date of that leave;
2. the right to leave of absence from the position during continued disability for one year unless extended;
3. the right to apply to the appointing authority to return to duty at any time during the leave;
4. the right to a hearing to contest a finding of unfitness for restoration to duty;
5. the termination of employment as a matter of law at the expiration of the workers' compensation leave; and
6. the right thereafter 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 section 71 of the Civil Service Law and subdivision (e) of this section.

The Court found that the County of Niagara failed to provide this written notification within the first twenty-one (21) days of Ms. LaJoie's workers' compensation leave and directed her reinstatement.

There are arguments that 4 N.Y.C.R.R. §5.9(b) is not applicable to school districts and other local municipalities since the regulation applies to the New York State Civil Service Department and school districts are, for the most part, governed by the county civil service rules. Nonetheless, school districts and other public employers should take heed from the LaJoie decision and issue the appropriate written notification within the twenty-one (21) days after an employee commences a workers' compensation leave. A sample letter is provided, and we strongly encourage every school district to forward this letter immediately to every employee who is on or goes on a workers' compensation leave. We also encourage each employer to check with its workers' compensation carrier to determine if the requisite notification is already being issued.

(Employer Letterhead)

Employee Name
Employee Address

Re: Civil Service Law Section 71

Dear _____:

It has come to my attention that you are on workers' compensation leave as a result of a work-related illness or injury. Your workers' compensation leave is effective _____. Pursuant to Civil Service Law §71, you have the right to a leave of absence from the position during continued disability for not more than one year, unless extended. You also have the right to apply to the board of education to return to duty at any time during your leave.

If you do not return from your leave within one year, you have the right to a hearing to contest a finding of unfitness for restoration to duty. If you are found unfit to return to duty, your employment may be terminated in accordance with Civil Service Law §71. If you are terminated, you have the right to apply to the County Civil Service Department within one year after the end of your disability for reinstatement

to your position if it is vacant, to a similar position, or to a preferred eligible list pursuant to Civil Service Law §71 and 4 N.Y.C.R.R. 5.9(e).

I encourage you to contact your local union representative for advice. However, if you should have any questions regarding this letter, please do not hesitate to contact me.

Very truly yours,

(Employer)

School District Boundary Issues

There are common misconceptions about which school district a student may attend when the boundaries from two districts intersect a property. Education Law Section 3203 allows some property owners and occupants an opportunity to designate the school district children will attend. The district chosen by the occupant or owner is entitled to property taxes collected by the other district. N.Y. Educ. Law §3203(2).

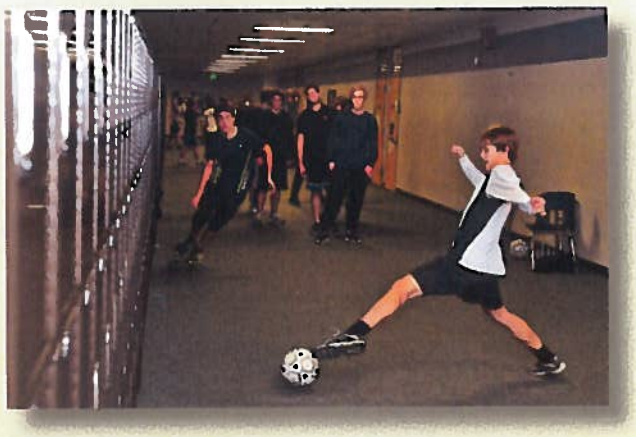
The requirement for a renter to be able to designate a school district is more stringent than for owner-occupied properties. For a renter to make use of Section 3203 and designate the district in which their children will attend, the districts' boundary lines must intersect the actual dwelling of the rented property. *See* N.Y. Educ. Law §3203(1). It is insufficient if the intersection occurs somewhere on the rented property or even through a building on the property. The boundary must intersect an integral part of the actual dwelling.

For owner-occupied single-family dwellings, it is sufficient for the boundary lines to merely intersect any part of the property. *See Id.* The size of the intersected portion of property is inconsequential, *see Crowe, et al. v. MacFarland, et al.*, 138 AD 2d 788 (3rd Dept. 1988).

The notice of designation must be made through a filing with the district clerk in each school district on or before August first in the year that the dwelling is built, and "thereafter." N.Y. Educ. Law §3203(1). For owner-occupied properties, the notice of designation must be made on or before August first of the year in which the dwelling is built or when the owner-occupant's first child begins attending school, and "whenever the ownership of such taxable property changes hands in an arms length transaction." *Id.*

It has been held that once residency is properly established through Section 3203, those students are entitled to all rights and privileges provided to any other resident student. It does not matter if the student later decides to attend a private school. See *Appeal of the Bd. Of Educ. of the Syosset Central School Dist.*, 14,144, 38 Educ. Dept. Rep. 791 (1999).

Once the designation has been set, it remains in place until there is a qualifying event that allows a new designation to take place. N.Y. Educ. Law §3203(3). Districts should be careful to scrutinize 3203 designations to see if they qualify under the law. If not, it could mean that the district is missing out on tuition from the attending students or incurring costs properly born by a neighboring district.



Hallway Soccer Practice Claim Survives District's Motion to Dismiss

A recent decision from the Appellate Division explains why a school district could be held liable when a student athlete sustains an injury during practice if the activity occurs in a location not normally associated with the sport in question.

In *Braile v. Patchogue Medford School District*, the girls' soccer coach decided to hold practice inside because of inclement weather. 123 A.D.3d 960 (2nd Dept. 2014). During the practice, the girls were instructed to pair up and run sprints against each other in the school hallway, which measured approximately one hundred and fifty feet in length. The coach told the girls that the finish line was just past a pair of open double doors. About ten feet beyond the double doors was a hard wall. The coach indicated that the loser of the sprint would have to run laps up and down the stairs.

The twelve-year old plaintiff in *Braile* was in the first pair to race the sprint. While racing her teammate, the plaintiff was not able to stop, put up her arms to brace herself, and her face crashed into the wall. The family commenced a lawsuit on behalf of the young plaintiff to recover for the injuries she sustained.

During the litigation, the school district argued that the plaintiff's claim should be dismissed based on the doctrine of primary assumption of risk. The court noted that under "doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." *Braile,* 123 A.D.3d at 962. The court went on to explain that the doctrine of primary assumption of risk was not applicable in this case, because the school district "did not establish that the commonly appreciated risks which are inherent in and arise out of the nature of soccer generally and flow from such participation on the soccer team included the risks of running into a wall while racing in the school hallway." *Id.* The court also noted that the coach may have "unreasonably increase[d] the inherent risks of the activity by, among other things, setting the finish line too close to the wall. *Id. at 963.*

School districts should take note of the potential for liability that arise in situations like these and make sure their coaches and other staff members understand the school district's policies and procedures to help ensure student safety during sports and other activities.

RECENT AREA TEACHER CONTRACT SETTLEMENTS (shaded areas = contract term)

DATA COLLECTED BY THE CAYUGA-ONONDAGA BOCES OFFICE OF PERSONNEL RELATIONS

CAYUGA-ONONDAGA BOCES

	Date Settled	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	AVG.
BOCES	**10-13**	4.50	4.50	1.50	1.75	2.25	2.25	2.25			2.71
Auburn	**6-12**	3.45	3.00	3.00	0.00	2.25	2.25				2.33
Cato-Meridian	**6-15**	3.80	3.80	3.80	2.00	2.00	2.00	2.70	2.60	2.50	2.80
Jordan-Elbridge	**12-14**	3.85	3.90	0.50	2.01	2.18	2.50	2.50	2.50		2.49
Moravia	**6-13**	4.00	4.00	2.00	2.00	0.00	2.50	2.50	2.50		2.44
Port Byron	**6-13**	4.25	3.70	2.00	2.00	2.00	2.00				2.66
Skaneateles	**5-14**	3.75	3.75	1.50	1.50	1.50	2.50	2.60	2.75		2.48
So. Cayuga	**4-13**	4.00	2.00	2.00	2.00	2.00	2.25	2.25			2.36
Union Springs	**6-14**	4.25	4.25	2.00	2.00	2.00	2.00				2.75
Weedsport	**7-13**	4.35	4.50	0.00	2.00	2.00	2.00				2.48
	AVG.	**4.02**	**3.74**	**1.83**	**1.73**	**1.82**	**2.23**	**2.47**	**2.59**	2.50	

BROOME-TIOGA BOCES

	Date Settled	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	AVG.
Chenango Vall.	**4-11**	4.10	2.50	2.75	2.75	2.75					2.97
Deposit	**9-13**	4.25	2.50	2.50	2.00	2.50	2.50				2.71
Maine-Endwell	**4-15**	4.50	4.50	4.50	4.50	2.60	2.80	2.95			3.76
Owego-Apal.	**1-13**	4.35	2.95	2.95	2.95	2.00	2.00				2.87
Union-Endicott	**11-10**	4.00	$2,253	2.70	2.70	2.70	2.70				2.96
Whitney Point	**6-13**	3.00	3.30	3.50	0.00	2.20	2.20				2.37
	AVG	**4.03**	**3.58**	**3.15**	**2.48**	**2.46**	**2.44**	2.95			

GENESEE VALLEY BOCES

	Date Settled	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	AVG.
Genesco	**1-15**	4.20	4.20	2.00	2.00	2.00	3.00	3.00	3.00		2.93

GREATER SO. TIER BOCES

	Date Settled	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	AVG.
Hornell	**7-13**	4.40	4.00	2.20	2.00	2.50	2.75				2.98

OSWEGO BOCES

	Date Settled	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	AVG.
Hannibal	**6-14**	3.50	3.50	0.00	1.75	1.75	2.20	2.20	2.20		2.14
Oswego	**12-14**	4.00	4.00	0.00	1.75	2.00	2.00	2.00			2.25
	AVG	**3.75**	**3.75**	**0.00**	**1.75**	**1.88**	**2.10**	**2.10**	**2.20**		

RECENT AREA TEACHER CONTRACT SETTLEMENTS (shaded areas = contract term)

TOMPKINS-SENECA-TIOGA BOCES

	Date Settled	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	AVG.
BOCES		4.00	4.00	4.00							4.00
Candor	**4-15**	3.00	3.00		2.00	2.00	1.5 + $1000	1.5 + $1000	2.0 + $500		2.15
Dryden	**6-14**	4.20	2.60	2.60	3.00	3.00	3.00	3.00	3.05		3.06
George Jr. Rep.	**9-08**	3.26									3.26
Groton	**3-13**	3.50	3.50	3.50	3.50	2.50	2.60	2.70	2.70		3.06
Ithaca	**6-11**	2.20	2.00	2.00	2.00	2.00	2.00				2.03
Lansing	**9-12**	3.40	3.50	3.50	2.70	2.70	3.00	3.00			3.11
Newfield	**5-14**	3.50	2.50	2.00	2.00	3.00	3.50	2.75	2.50		2.72
South Seneca	**7-13**	4.00	4.00	1.50	1.50	2.45	2.45				2.65
Trumansburg	**1-13**	4.00	4.20	2.70	2.70	3.00	3.00				3.27
	AVG	**3.51**	**3.26**	**2.73**	**2.43**	**2.58**	**2.79**	**2.86**	**2.75**		

WAYNE - FINGER LAKES BOCES

	Date Settled	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	AVG.
BOCES		3.00	2.50	1.90	1.90	2.50	2.45	2.45			2.39
Bloomfield		3.90	3.85	3.60	3.35	1.98	2.00	2.00			2.95
Canandaigua		4.20	4.10	3.85	2.00	2.69	2.65	2.57			3.15
Clyde-Savan.	**6-12**	5.00	5.00	5.00	2.25	2.25	2.25				3.63
Dundee	**1-14**	4.00	4.00	2.60	2.50	2.50	3.00	3.30	3.40		3.16
Gananda		4.00	2.75	2.75	2.60	2.60	2.75				2.91
Geneva	**6-12**	4.58	4.22	4.15	2.00	2.00					3.39
Gorham-M'sex	**6-14**	3.50	3.50	2.25	2.25	2.50	2.50	2.50			2.71
Honeoye	**2-12**	4.00	2.60	2.50	2.50						2.90
Lyons	**6-10**	4.25	4.66	3.37	3.88						4.04
Man-S'ville	**8-14**	4.00	4.00	1.80	2.00	2.00	2.00	2.50			2.61
Marion	**5-14**	4.50	3.50	2.80	2.00	2.00	2.40	2.25			2.78
Naples	**05-15**	4.00	4.00	2.25	2.25	2.25	2.25	2.50	2.50	2.60	2.73
Newark	**10-13**	4.00	2.50	2.50	1.25	2.50	2.50				2.54
N Rose-Wolcott	**6-13**	4.32	4.27	1.00	2.47	1.90	2.00	2.30			2.61
Pal-Mac	**4-15**	3.20	3.90	3.90	2.48	3.90	2.50	1.75 + $500	2.75	2.75	3.17
Penn Yan	**6-13**	4.00	4.00	2.29	2.29	1.90	2.00	2.00			2.64
Phelps-Cl Spr.		4.00	2.89	2.89	2.89	2.00	2.00	2.00			2.67
Red Creek		4.50	4.50	2.75	2.75	2.50	2.40	2.40			3.11
Romulus		3.33	3.33	3.50	3.50	1.50	1.50				2.78
Seneca Falls	**6-12**	3.67	3.91	3.50	3.45	2.00	2.00				3.09
Sodus		4.15	3.80	3.80	2.00	2.00	2.20	2.00			2.85
Victor		4.30	4.30	4.00	2.00	2.50	2.50				3.27
Waterloo	**5-13**	4.05	3.89	3.72	2.00	1.50	1.75	1.95			2.69
Wayne	**11-12**	4.25	4.00	3.00	2.00	3.00	2.00				3.04
Williamson		4.00	3.00	3.00	2.00	2.25	2.50				2.79
	AVG	**4.03**	**3.73**	**3.03**	**2.41**	**2.28**	**2.27**	**2.34**	**2.88**	**2.68**	