ESSAA Insights

Food for Thought from the ESSAA Legal Team

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The Probationary Period:
To "T" or not to "T", Exploring Answers to that Question

Paul A. Pagano, Esq.

An administrator or teacher who has their probationary period terminated is left angry, confused and in disbelief. In the public sector it is incorrectly presumed by many that once you have a job, you are entitled to that job for life. As we know, a tenured administrator cannot be terminated without the due process of a 3020-a hearing. By contrast, a board of education has very broad discretion in the dismissal of probationary employees for virtually any reason or no reason at all with very limited exceptions. Matter of Pinto v. Wynstra, 43 Misc. 2d 363, aff'd 22 AD 2d 914; Matter of Butler v. Allen, 29 AD2d 799; Matter of Tischler v. Bd. of Ed., 37 AD2d 261.

The three limited exceptions to the unfettered right to terminate a probationary period are (i) a constitutionally impermissible reason for termination, (ii) termination violated a NY State statute, or (iii) "bad faith." Most people are aware of what constitutes a "constitutionally impermissible reason" (i.e. violation of First Amendment rights) and many are aware of examples of statutorily prohibited reasons (i.e. race, gender, sexual orientation, etc); however, few people are aware of what actually constitutes "bad faith." While most, if not all, probationary employees who are terminated believe their termination was done in bad faith the finding of "bad faith" is extremely rare.

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The Commissioner had defined "bad faith" as "dishonesty of belief, purpose or motive." Appeal of Prisinzano, 62 Dep Rep Dec No. 18,195. A recent example of what might amount to "bad faith" arose in the Appeal of Adrianne Rickson from action of the Albany-Schoharie-Schenectady-Saratoga Board of Cooperative Educational Services regarding a personnel matter (Decision No. 18,211). There the Board terminated the teacher's probationary appointment based on three stated reasons which the Commissioner found "too vague to allow petitioner to ascertain whether any of the reasons were constitutionally or statutorily impermissible." After a remand, the Board, in effect, abandoned its prior justifications and provided the Commissioner with entirely new ones shifting from a termination based on the teacher's alleged dissemination of controversial materials and alleged promotion of misinformation (concerning vaccines) to content-neutral procedural grounds of failure to adhere to board policy and curricula. The Commissioner found that, among other things, the Board's drastic change in explanations for the termination of the teacher's probationary period indicated bad faith and the Commissioner reinstated the teacher to her position with an award of back pay and benefits.

While the decision doesn't explicitly say so, if the Board had provided the second set of reasons initially (instead of shifting from one set of reasons to another) the Commissioner would have likely let the termination stand, since, as discussed above, the case law is well established that boards have very broad discretion over terminating probationary employees. By reissuing an entirely new set of reasons the District itself provided and established "bad faith" behind the first set of reasons provided.

In most circumstances the issuance of reasons that are minor, unsupported by evaluations, etc., will be sufficient and upheld by the Commissioner. However, in instances where it can be shown that the reasons or rationale provided for the termination were fabricated or dishonest there is a chance (albeit small) that the Commissioner could find the termination was issued in "bad faith".

While an interesting and informative decision, the decision in Appeal of Adrianne Rickson is unlikely to significantly change the playing field for probationary employees. Probationary employees still need to be on their best behavior and work hard with the hope of obtaining tenure. In light of the decision, if you are given reasons for why you were denied tenure you should keep track of/memorialize same and note any changes in such reasons with the hope that the changes might be enough to demonstrate bad faith.

Paul Andrew Pagano brings to ESSAA over ten years of legal experience throughout New York State, primarily focused in labor law working closely with clients to ensure compliance with historical and emerging laws, acting as an advocate in alternative dispute resolution procedures i.e., mediation and arbitration, and litigating cases in State and Federal Courts. Before joining the ESSAA Legal Team, Paul was a litigation associate representing clients on labor and employment issues and handling a wide range of commercial litigation. Paul earned his Juris Doctor from St. John's University School of Law and his Bachelor of Arts from Cornell University, where he studied in the School of Industrial and Labor Relations. He is admitted to practice in the State of New York and the U.S. District Court, Southern and Eastern Districts of New York.