

New York City Mayor's Office of Labor Relations Bulletin



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Noteworthy Arbitration and Board Decisions

Termination Upheld Where Employee Made Threatening and Offensive Remarks to Colleagues and Neglected his Assigned Duties

The Grievant was a Community Coordinator employed by the Department of Consumer Affairs (“DCA”), where he was assigned to the Information Technology Department. He had been previously discharged for misconduct in 2006, which included making threatening remarks to co-workers by telling them that he would shoot them with an AK-47. Although at that time an Arbitrator found him guilty of the charged misconduct, he was returned to employment in 2009 based upon a lack of prior discipline. However, the Arbitrator warned in his decision that should the Grievant engage in any serious misconduct within three years of his reinstatement, he should reasonably expect to be terminated. Less than a year after his reinstatement, a co-worker reported that the Grievant threatened him by stating, “If anything happens to me, you’re next.” While investigating this complaint, the Agency learned that the Grievant had also made lewd and racially offensive comments to other employees. Additionally, upon his return to work, the Grievant was unproductive in his tasks, often neglecting his assignments, and was repeatedly counseled about attending to his work with no improvement.

The Arbitrator upheld the Grievant’s termination, finding that the employer established that the Grievant was a “disruptive and deliberately incompetent employee.” He also held that DCA appropriately terminated the Grievant based upon the fact that he engaged in “serious misconduct during the three years following his reinstatement.”

Arbitrator Sustains Termination of Favorably Evaluated Employee Due to His Failure to Report Pre-hire Criminal Misconduct

The Grievant was employed by a private check cashing company in 2006, cashed federal treasury checks fraudulently, kept the proceeds and then was fired because the company found out about his misconduct. Grievant applied and was then hired by the Human Resources Administration (“HRA”) in 2007. The HRA had no knowledge of the pre-hire malfeasance, and Grievant received outstanding performance evaluations. Subsequent to Grievant’s hire by and continued employment with a City agency, he was investigated by the federal government for the 2006 check cashing scheme, arrested, indicted and pleaded guilty. The HRA was informed of the federal criminal case and once Grievant was convicted, he was terminated from employment.

The Grievant contested his termination. The Union argued that the malfeasance was not the proper subject of discipline because it was not a crime of moral turpitude and it was unrelated to Grievant's work at the City Agency. The City argued that Grievant's crimes are obviously related to his work (he had access to clients' financial information) and indicate moral turpitude, and that there is no provision in the applicable Executive Order and Charter provisions that requires that the corruption/malfeasance for which the City may terminate an employee if it occurs post-hire. The arbitrator denied the grievance and upheld the termination.

This decision is notable, as it can be argued to stand for the proposition that the City may terminate an employee for pre-hire malfeasance that is either discovered post-hire or for which the employee is convicted of a crime post-hire provided the malfeasance indicates moral turpitude or there is a nexus between the malfeasance and the employee's current job/duties.

Representation Cases

Board of Certification Grants Local 621's Petition to Represent Directors of Motor Equipment Maintenance at DSNY - AC-1593-14

Local 621, Service Employees International Union, filed a petition seeking to add the title Director of Motor Equipment Maintenance (Sanitation) to its bargaining unit. Unlike the majority of petitions that come before the Board, this matter was unique in that the Board had already ruled regarding the eligibility of the Director title for collective bargaining; in 1992, the Board issued a decision determining that the title was, in fact, managerial (*Local 621, SEIU*, 50 OCB 7 (BOC 1992)). Therefore, in response to the Union's petition, the City and the Department of Sanitation ("DSNY") filed a Representation Petition arguing that the Board had previously deemed this title managerial and, as the duties and responsibilities of Directors had not changed, reconsideration of the 1992 determination was unwarranted. In a typical case where a Union seeks to represent a title that is managerial, the burden of proof rests with the City. However, because the Board had previously deemed this title managerial, the City/DSNY argued that in this matter, it was the Union's burden to prove changed circumstances. The City/DSNY further argued that the Union failed to sufficiently plead or to demonstrate through testimony and evidence, that a material change in circumstance existed that was substantial enough to warrant reconsideration of the 1992 determination.

The Board of Certification determined that there had been changes to the DSNY's Bureau of Motor Equipment Maintenance sufficient to warrant reconsideration of their prior determination, and ultimately concluded that the Director title is non-managerial and is eligible for collective bargaining. The Board did hold that it was the Union's burden to prove changed circumstances; they also held that the Union was successful in doing so. When evaluating the actual duties of the Directors, the Board found that the two Directors at issue, who report to a non-represented Deputy Commissioner, did not regularly participate in the essential process that results in policy formation, which is a critical element in finding that a title is exempt from collective bargaining. Although the Board did note that the Directors perform Citywide responsibilities, they held that Directors do not determine or have a significant role in setting priorities for DSNY, nor do they have a significant role in Agency labor relations. The Board contrasted this finding to the holding in its 1992 decision, where, at that time, Directors evaluated, advised, and recommended policies.

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Representation Filings

In our September 2015 Bulletin, we noted that Unions have increased their filing of petitions to represent current managerial and original jurisdiction (“OJ”) titles. In general, policy formulation, a major role in personnel administration, or direct assistance in the preparation for and conduct of collective negotiations and agency labor relations are the exceptions to a finding by the Board of Certification that a title is eligible for collective bargaining (i.e. can be represented by a union).

Below are the current managerial or OJ titles for which unions are seeking representation:

<u>TITLE SOUGHT</u>	<u>PETITIONING UNION</u>
ADMINISTRATIVE ACCOUNTANT	DC 37
ADMINISTRATIVE ASSESSOR	DC 37
ADMINISTRATIVE BUSINESS PROMOTION COORDINATOR	DC 37
ADMINISTRATIVE CLAIM EXAMINER	DC 37
ADMINISTRATIVE DIRECTOR OF SOCIAL SERVICES	DC 37
ADMINISTRATIVE GRAPHIC ARTIST	DC37/LOCAL 375
ADMINISTRATIVE INVESTIGATOR	DC 37
ADMINISTRATIVE JUVENILE COUNSELOR	DC 37
ADMINISTRATIVE MANAGER AUDITOR	DC 37
ADMINISTRATIVE PARK & RECREATION MANAGER	DC 37
ADMINISTRATIVE PUBLIC HEALTH NURSE	DC 37
ADMINISTRATIVE PUBLIC HEALTH SANITARIAN	DC 37
ADMINISTRATIVE REAL PROPERTY MANAGER	DC 37
ADMINISTRATIVE RETIREMENT BENEFITS SPECIALIST	DC 37
ADMINISTRATIVE SPACE ANALYST	DC 37/LOCAL 375
ADMINISTRATIVE TAX AUDITOR	DC 37
COMPUTER OPERATIONS MANAGER	DC 37
COMPUTER SYSTEM MANAGER	DC 37
CONFIDENTIAL STRATEGY PLANNER	OSA
HEALTH SERVICES MANAGER	OSA
MANAGER OF RADIO REPAIR OPERATIONS	DC 37
STRATEGIC INITIATIVE SPECIALIST	OSA
TELECOMMUNICATIONS MANAGER	DC37

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Labor Issues in Emergency Responses

The City participates in, and plans for a variety of emergency operations—including snowstorms, hurricanes, disease outbreaks and other calamities. Each type of situation can raise labor relations and personnel issues.

Overview: Legal Authority

As a general matter, the NYC Collective Bargaining Law provides the City with managerial authority to assign or reassign employees, determine what duties employees will perform during working hours, and allocate duties among its employees, unless the parties have limited that right by CBA. *See NYSNA v. City & NYPD*, 71 OCB 23 (BCB 2003). Importantly, the Law also grants the City the right to “take all necessary actions to carry out its mission in emergencies.” *See* NYC Admin. Code § 12-307(b).

However, that authority is not unfettered, as rulings by state courts and the NYC Board of Collective Bargaining (BCB) have illustrated. Section 12-307(a) of the NYC Admin. Code requires public employers to bargain in good faith over wages, hours and working conditions, as well as “any subject with a significant or material relationship to a condition of employment.” *DC 37*, 5 OCB2d 21, at 14 (BCB 2012). For its part, the BCB has indicated that it may conduct a balancing test that weighs the interests of the public employer and its employees when evaluating whether an issue is a mandatory subject of bargaining. *Id* at 14.

It should also be noted that Section 61 of the Civil Service Law prohibits out of title work, except upon assignment by proper authority during continuance of a temporary emergency situation. *See also* 55 RCNY 5.1.1.

Finally, Article V, Section 16 of the Citywide Agreement contains several relevant provisions. Article V, Section 16(a) states: “Every employee is obligated to report for work as scheduled.” Section 16(h) provides that every “Lateness caused by a verified major failure of public transportation, such as a widespread or total power failure of significant duration or other catastrophe of similar severity, shall be excused.” Finally, Section 16(i) requires each agency to “prepare contingency plans for operation during a major failure of public transportation which would cause disabled employees, as defined in the Americans with Disabilities Act, great difficulty in reaching their regular work location.”

Prior Guidance

Prior, event-specific memoranda—issued to City agencies after the emergency situation had occurred or in anticipation of the event—has generally included the following guidance.

- Employees must make every reasonable effort to overcome transportation difficulties caused by the snowstorm/hurricane/transit disruption, and report to work.
- Unscheduled absences must be charged against either annual leave or compensatory time balances. In cases where an employee has no applicable leave balances, annual leave will be advanced for this purpose.
- Lateness found by an Agency Head to have been caused by unforeseen transportation circumstances beyond the ability of the employee to control shall be excused with no charge to leave balances.

- Employees may be directed to report to an authorized alternative work site or to work staggered or flexible schedules, pursuant to agency Continuity of Operations Plans (COOP).
- If there's great difficulty for disabled employees to reach their regular work locations, agencies should apply contingency plans that should include, where practicable and productive, provisions for excusal of absences by the Agency Head on an individual basis.

Importantly, it should be noted that this prior guidance does not constitute statements of general applicability. Future guidance may vary from what is described above. When an emergency situation is near, agencies should review any guidance issued by DCAS, OLR or other oversight agencies.

Civil Service Probation

- ❑ What is Probation?
- ❑ Duration of Probationary Periods
- ❑ Leave of Absence During Probation
- ❑ Extension of Probationary Periods
- ❑ Sources
- ❑ Contact Information

What is probation?

- For employees appointed from civil service lists, the probationary period is the final phase of the selection process.
- The probationary period should be used to evaluate whether the probationer can and does perform the job satisfactorily.
- Completion of probation period gives Competitive class employees due process rights under New York Civil Service Law Section 75.
- Labor, Non-Competitive and Exempt class employees also serve probationary periods.

Duration of Probationary Periods

- Competitive and Labor Class appointments/promotions,
- Exempt and Non-Competitive appointments.
- The factors that influence duration:
 - Waivers (upon promotion)
 - Automatic (PRR 5.2.2) which means, the promotee shall not be required to serve a probationary period.
 - Discretionary (PRR 5.2.4) The agency may waive the requirement of satisfactory completion of the probationary period at any time during such period.
 - Provisional Service (PSB 200-11) Crediting time in provisional or temporary service to probation.
- Restoration after separation from service (PRR 5.2.6)
 - Same agency shall deduct time served from probation.
 - Other agency requires full probation unless agency agrees to credit
- Termination (requires DCAS approval if before minimum period) PRR 5.2.7
 - 2 months (Open Competitive list)
 - 4 months (Promotion list)

Leave of Absence During Probation

- During probationary period (PRR 5.2.5)
- Rights to former position (PSB 200-10)
- Status of former position upon promotion (PRR 5.2.3)
- Impact of Military Leave (PRR 5.2.2b and PRR 6.6.3)

Extension of Probationary Periods

Probations can be extended in certain cases, either where the employee has been absent during the probation or where the probationer consents to the extension.

- Performance – requires written consent and DCAS approval not exceeding six months. (PRR 5.2.8(a))
- Absence – extended by the number of days a probationer does not perform the duties of the position. (PRR 5.2.8(b)).
 - Does not require written consent of probationer.

Sources

NY Civil Service Law – Section 63

<http://public.leginfo.state.ny.us/lawssrch.cgi?NVLWO>

Personnel Rules and Regulations (PRR 5.2.1 – 5.2.11, 6.6.3)

www.nyc.gov/html/dcas/html/employees/personnelrules_regs.shtml

Personnel Services Bulletins (PSB 200-6R; 200-10; 200-11)

www.nyc.gov/html/dcas/html/employees/psbhome.shtml

Citywide Agreement

Contact Information

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New York City Deferred Compensation Plan/NYCE IRA

NYC DCP Financial Planning Center

In 2008, the New York City Deferred Compensation Plan/NYCE IRA founded its Financial Planning Center. The aim of this Center is to provide holistic financial planning and educational services to Plan participants.

The Deferred Compensation Plan is among the few defined contribution plans nationwide to provide its participants with an in-house Financial Planning Center. A team of salaried, non-commissioned CERTIFIED FINANCIAL PLANNER® professionals provide educational and planning services to Plan participants.

Financial Planning Seminars

The Financial Planning Center offers 13 seminars, presented monthly at its on-site locations at 22 Cortlandt Street and 40 Rector Street. They also coordinate seminars at various City agency work-site locations. The seminars address a variety of topics directly affecting City employees.

The array of 13 seminars are:

- ***I Recently Retired, What do I do now?*** – understanding how to identify and manage the various financial and personal issues retirees face.
- ***Basics of Diversified Investing*** - understanding the types of investments, the benefits of diversification and how to avoid common investing traps.
- ***Distribution Planning*** - understanding how to manage the risks retirees face and how to develop an action plan. The Plan's distribution options are highlighted.
- ***Eldercare*** - understanding the emotional and practical considerations essential for developing a care plan for oneself or an elderly relative.
- ***Estate Planning*** - understanding the different forms of property ownership, and how assets are transferred to ensure that they reach the intended beneficiaries.
- ***College Planning*** - understanding the various college savings vehicles: grants, scholarships, loans and the financial aid process.
- ***Insurance Planning*** - understanding how insurance can protect or reduce exposure to the various risks.
- ***Money & Credit*** - understanding how to make a budget and manage debt; understanding the credit report and credit score.
- ***Retirement Planning*** - understanding the importance of planning for a successful retirement, and how DCP can supplement other sources of retirement income.

- **Social Security and Medicare** - understanding the various Social Security programs, and the hierarchy of health insurance benefits for City employees.
- **NYCE IRA** - understanding the New York City Employee (NYCE) Individual Retirement Account. The NYCE IRA includes both a Traditional IRA and a Roth IRA for the exclusive benefit of current and former NYC employees and their spouses. Understand how the NYCE IRA can be used for consolidation, estate planning, rollovers, and conversions.
- **Tax Planning** - understand the tax benefits of DCP/NYCE IRA, Flexible Spending Programs which can reduce current and future income taxes; Tax planning and life events are highlighted.
- **NYC Health Benefits Program for Active Employees** – Understand the current health plan choices offered for active NYC employees as well as other tax favored benefits.

The seminars have been very successful. To date there have been more than 38,000 attendees. Participants have consistently expressed appreciation for the un-biased education.

Individual Consultations

The CFP® professionals also provide Individual Consultations to Deferred Compensation Plan/NYCE IRA participants.

An Individual Consultation allows a Deferred Compensation participant to receive a level of personal attention that isn't available in a seminar. An Individual Consultation includes:

- A 90 minute in-person meeting with the participant discussing their financial/retirement goals and a review of your current situation.
- An opportunity to address one or more of their financial questions such as college planning, estate planning or major purchase decision.
- A hard copy personal financial plan to take home.
- Impartial and unbiased education.

At the December 2015 Deferred Compensation Board meeting, in order to highlight this valuable service, the Board voted to reduce the cost of an Individual Consultation for the first 500 participants. During the 1st Quarter of 2016, the Plan will begin offering Individual Consultations at the reduced cost of \$25 (from the standard cost of \$179).

The Individual Consultation has been very successful since it's inception. Many participants have taken advantage of this service. Over 90% of participants that have completed an Individual Consultation have expressed a better understanding of their needs, goals and overall financial situation.

Now with the reduced cost of the Individual Consultation we hope many more will take advantage of this service. The Deferred Compensation Board's goal is to make the Individual Consultation accessible to individuals who may not feel they need a financial planner or have enough assets to work with one.

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Below are some sample pages from a personal Financial Plan:

Financial Needs Assessment for Sammy and Sally SAMPLE

Base Plan



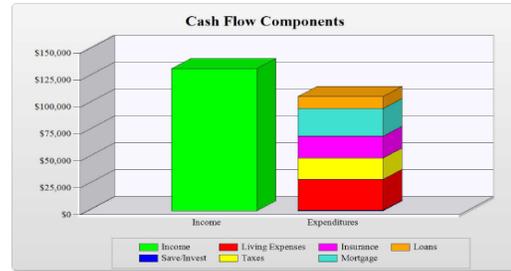
New York City Deferred Compensation Plan/Financial Planning
22 Cortlandt Street, 28th Floor
New York, NY 10007
212.306.5050

IMPORTANT: The illustrations or other information generated by this report regarding the likelihood of various investment outcomes are hypothetical in nature, do not reflect actual investment results and are not guarantees of future results.

2/13/2015

Cash Flow Base Plan

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The graph above shows the relationship of your expenditures to your available income. The expenditures group includes your personal expenses as well as taxes, insurance premiums, debt and mortgage payments, savings and investments deposits.

	Monthly	Annual
Income available	\$11,009	\$132,110
Less: Savings and Investments	(50)	(602)
Living Expenses	(2,390)	(28,680)
Taxes	(1,647)	(19,765)
Insurance	(1,686)	(20,230)
Mortgage	(2,146)	(25,752)
Loan payments	(930)	(11,160)
Total spending	(\$8,849)	(\$106,189)
Spendable income surplus	\$2,160	\$25,921

A15

The information you provided for this analysis indicates that your income is greater than your scheduled expenses.

You might consider using your surplus income for additional savings or investments.

You should regularly review your cash flow to determine if there are changes required in your spending habits.

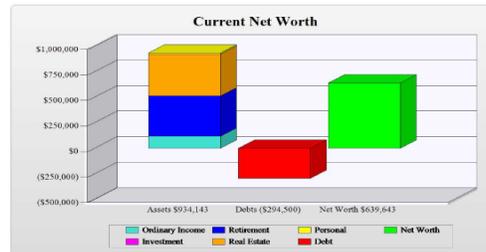
2/13/2015

This report, and its hypothetical illustrations, are intended to form a basis for further discussion with your legal, accounting, and financial advisors. Actual future investment returns, taxes and inflation are unknown. Do not rely upon this report to predict future investment performance.

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Net Worth Base Plan

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The Net Worth graph illustrates the amount of your assets, including savings, investments, retirement accounts, and personal assets, less liabilities such as mortgages, loans, credit card balances, etc.

Assets:		\$934,143
Ordinary income accounts	\$118,000	
Investment accounts	0	
Retirement accounts	394,142	
Real estate	410,001	
Personal assets	12,000	
Less Debts		(\$294,500)
Net Worth		\$639,643

A5

Your objective should be to measure your net worth on a regular schedule in order to assure that you are improving your financial strength.

2/13/2015

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