

DISCIPLINE OF TENURED EMPLOYEES IN  
NEW YORK STATE PURSUANT TO EDUCATION  
LAW §3020-a

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ABSTRACT

This article, in outline format, spells out the methods, grounds, and procedures for disciplining tenured educational employees in New York State. The information is based on the state's four-year experience with amendments to its education law, from 1994 to 1998. Also covered are prehearing, hearing, and posthearing procedures, disciplinary penalties, and the appeals process. The author cites examples of cases adjudicated under the revised provisions.

DISCIPLINE OF TENURED EMPLOYEES MUST  
BE CONDUCTED PURSUANT TO

- Education Law §3020-a; or
- Alternative disciplinary procedures(s) provided by a collective bargaining agreement:
  - 1) Effective before September 1, 1994, which has been unaltered by negotiations; or,
  - 2) Effective on or after September 1, 1994, which:
    - a) Provides for written election by the employee of the procedures under either §3020-a or the agreement; and
    - b) will result in a disposition of the charge within the time limitations of §3020-a.

## GROUNDS FOR DISCIPLINE

- **Just cause** is now the only ground for discipline, according to New York State Education Law §3020. The statute does not provide a definition. Formerly, the law specified such bases as conduct unbecoming a teacher, neglect of duty, insubordination, immoral conduct, incompetency, and inefficiency as grounds for discipline.
- Under the amended provisions, just cause will be determined by the arbitrator on a case-by-case basis. It may include all of the old categories. However, the triers of fact, who determine whether just cause exists, are virtually free to reject any and all definitions of misconduct that the New York State Commissioner of Education or the courts have handed down previously.

*CAVEAT: Arbitrators are not bound by precedent, the commissioner's or the courts'.*

- Arbitrators have utilized a seven-part test to determine whether an employer has met the burden of just cause.
- “In a 3020-a disciplinary case, a school board should carefully review each of the following criteria to ensure it meets the standards of just cause:
  - 1) Was the employee warned that his/her conduct could result in disciplinary action? Certain offenses, such as assaulting a student or coworker are so clearly inappropriate that a warning is not necessary.
  - 2) Does the board's rule or policy at issue reasonably relate to the orderly, efficient, and safe operation of the school district?
  - 3) Did the board investigate to determine whether a violation had occurred before taking disciplinary action?
  - 4) Was the board's investigation fairly and objectively conducted?
  - 5) Was the evidence obtained from the investigation showing the guilt of the employee substantial?
  - 6) Does the board apply its rules, orders, and penalties evenhandedly and without discrimination?
  - 7) Is the degree of discipline sought reasonably related to both the seriousness of the proven offense and the employee's service record?” [1].

*CAVEAT: To date no 3020-a arbitrator has specifically adopted this seven-part test, and no law requires an arbitrator to do so.*

- *Progressive Discipline*  
Progressive discipline is important to the just-cause analysis. Although it is not specified, the 1994 amendments to §3020-a appear to encourage school districts to use progressive discipline and to effectively utilize remediation prior to a teacher's dismissal.

*CAVEAT: Effective use of the new §3020-a, may warrant applying it in cases where a penalty of less than termination would be appropriate. A school district could accept a finding of guilt as a step in progressive discipline and may require a second set of charges before termination.*

### CHARGES

- Must be brought within three years of the occurrence, except when the charge is of misconduct constituting a crime when committed.

*Charges against teacher for having sexual relations with sixteen-year-old student twenty years earlier were sustained [2].*

- Must be in writing.
- Must be filed with the district clerk during the period between the actual opening and closing of school, during which the employee is normally required to work.

### PREHEARING PROCEDURES

- Within five days after the clerk receives the charges, the school board must meet in executive session to determine whether there is probable cause for each of the charges preferred.
- If the board finds probable cause, it must specify in writing the maximum penalty that will be:
  - 1) Imposed if the employee does not request a hearing, and
  - 2) Sought if the employee is found guilty after a hearing.

*CAVEAT: A statement that a lesser penalty must be imposed if a hearing is waived may, if a hearing is demanded, establish a predicate for the arbitrator to conclude that the board would accept that lesser penalty following a hearing.*

- The charges with the notice of intended penalty and a statement of the employee's rights must be forwarded to the employee immediately by certified or registered mail, return receipt requested, or by personal delivery.
- Suspension of the teacher pending hearing and determination is optional.
  - 1) Must be with pay, unless employee has entered a guilty plea or has been convicted of:
    - a) certain illegal drug-related activities or,
    - b) a felony crime involving physical or sexual abuse of a minor or student.

- 2) Statute does not authorize suspension without pay where lack of certification is the charge. However, pay may be unauthorized, pursuant to Education Law §§3009-3010.
  - 3) Collective bargaining agreements may alter the obligation to pay a teacher while on suspension.
  - 4) Teacher may be reassigned to nonteaching duties in lieu of suspension.
- Employee must notify clerk, in writing, within ten days of receipt of charges whether:
    - 1) s/he desires a hearing; and
    - 2) desires a single hearing officer or a three-member panel “when the charges concern **pedagogical incompetence** or issues involving **pedagogical judgment.**”
  - The employee’s unexcused failure to notify the clerk of his/her desire for a hearing within the time provided will be deemed a waiver of the right to a hearing. Where the employee fails or explicitly waives a hearing, the board of education is to determine the case and fix the penalty, which must be a penalty provided for in the statute.
  - Where the employee requests a hearing, the clerk must notify the commissioner of the need for one within three working days of the request for a hearing.

#### PEDAGOGICAL INCOMPETENCE

- Pedagogical incompetence and pedagogical judgment are not defined by the statute.
- CAVEAT: Charges formerly designated as incompetence or neglect of duty may arguably fall within these categories. The employee facing such charges has the right to elect a three-member panel to hear his/her case. The manner in which the specifications of just cause are drafted may unintentionally give the employee the option of choosing this hearing format. The employer has no option.*
- As stated above, when the charges involve pedagogical incompetence or issues involving pedagogical judgment, the employee may opt for a three-member panel. If the employee selects a three-person hearing panel, the employee appoints one member, the employer appoints one member, and the employer and employee select the panel chairperson as provided below.
  - Prior to the 1994 amendments, remediation was not required. However, Education Law §3020-a(4)(a) now provides that upon request of an employee, during the penalty phase, the hearing officer shall consider “the extent to which the employing board made efforts toward correcting the behavior of the employee which resulted in charges being brought under this section through means

including, but not limited to: remediation, peer intervention or an employee assistance plan.”

- §3020-a decision involving pedagogical incompetence:

Charges relating to incompetence included the following:

- Inadequate management of lesson.
- Ineffective teaching techniques—no student participation.
- Failure to pace the lesson; therefore unable to finish the lesson.
- Inadequate number of science experiments.
- Inadequate supervision over lab work.
- No visual aids.
- Failure to follow curriculum he had written.
- Failure to submit weekly lesson plans.
- Failure to control his class.
- Failure to give homework assignments [3].

*Remediation*—On numerous occasions, evaluations and memos documenting the above incompetence were written with regard to this teacher. In addition, the teacher was given counseling. The panel concluded the teacher knew what was expected of him [3].

*Standard for Incompetence*—Is the teacher able to provide a valuable educational experience? The panel concluded this teacher was unable to provide a valuable educational experience [3].

*Penalty*—Seven months suspension without pay [3].

### THE HEALING OFFICER

- The commissioner notifies the American Arbitration Association (AAA) of the need for a hearing and requests a list of labor arbitrators, selected by the AAA, together with biographical data. Upon receipt, the commissioner forwards this material to the board of education and the employee.

*CAVEAT: The Hearing Officers' qualifications are not determined by the commissioner. The only qualification specified by the legislature is that they be on the AAA's panel of labor arbitrators.*

- Except for cases involving pedagogical incompetence or pedagogical judgment, where the employee has chosen a three-member panel, all cases are to be heard by a single hearing officer (arbitrator), who will function as an arbitrator.
- The arbitrator is to be paid his customary AAA fees and expenses by the [NY] State Education Department (SED).

- The board and the employee are to mutually agree upon an arbitrator from the AAA list of fifteen names and notify the commissioner of their selection within ten days after receiving the list.
- If the board and the employee fail to agree, they must notify the commissioner, who then must request that AAA make a default selection.

*CAVEAT: The commissioner has no role in the selection process or in the process of qualifying potential hearing officers for inclusion.*

### THE PREHEARING CONFERENCE

- Within ten to fifteen days of agreeing to serve, the arbitrator is required to hold a prehearing conference in the district or the county seat.
- The conference is limited to one day, but there may be one additional day, if the arbitrator finds good cause.
- The arbitrator has the power to issue subpoenas.
- **Motions:** The arbitrator has the power to hear and decide all motions, including, but not limited to **motions to dismiss the charges**. The arbitrator is empowered to dismiss specifications **with prejudice**. A dismissal “with prejudice” means the charge can never be renewed. Prior to the statutory amendment, the chairperson of the panel could dismiss the charge only “without prejudice,” so as to allow its refile in the event it was not sufficiently specific.

*CAVEAT: No such limitation on the arbitrator’s authority appears in the amendment. Thus, it may very well be argued that a charge, which the arbitrator feels is not sufficiently specific, may be dismissed with prejudice. Therefore, while great attention should always be given to the drafting of charges, the amendment makes this even more imperative.*

- 1) Motions must be made not less than five days before the conference.
- 2) The arbitrator may waive this for good cause.

- **Discovery**
  - 1) Bill of particulars (means of curing lack of specificity).
  - 2) Requests for production of materials or information, including, but not limited to:
    - a) witness statements.
    - b) investigatory statements or notes.

*CAVEAT: Witness statements: Consider whether taking such statements is appropriate. Written witness statements may be useful to the extent that they may be produced at the hearing to refresh a witness’s memory. They are particularly valuable in preventing adverse witnesses from changing their testimony. They may also be useful when the witnesses are youngsters.*

*However, these statements are now subject to disclosure. Furthermore, written notes of witness interviews may also be discoverable—even if the notes were made by a lawyer. While a lawyer’s work product is not obtainable in discovery [4], if that work could have been done by someone other than a lawyer, it may be available.*

- c) exculpatory evidence.
- d) district records.
- e) student records.

*CAVEAT: Student and district records: In developing the strategy of the case, attention should be given to the fact that these records may involve statutory rights of confidentiality and may ultimately become part of a public record.*

- f) any other evidence relevant and material to the defense.

### 3) *Reciprocal Discovery*

In an attempt to expedite the hearing process §3020-a provides for full and fair disclosure of the nature of the district’s case to the employee. However, the statute is silent regarding the teacher’s responsibility to disclose evidence to the district regarding the employee’s defense(s). There has been an ongoing debate as to whether the duty to disclose is reciprocal.

- a) Several arbitrator decisions have required reciprocal disclosure:
  - i) Decisions by Arbitrators Arthur A. Riegel [5] and Howard Edelman [6] concluded that, although the statute requires a school district to disclose evidentiary information to the teacher, the law does not preclude the district from requesting and receiving information from the teacher. The emphasis in the law is expediting the proceeding, and these arbitrators concluded this goal would more readily be achieved by permitting the employer access to the teacher’s evidence.
  - ii) In [7], Arbitrator Weinstock ruled the new discovery requirements were reciprocal to the extent that the respondent was required to produce a statement regarding anticipated affirmative defenses. However, respondent would be allowed to supplement her statement after she “learns of the full breadth of the district’s case” [7].
- b) i) Other arbitrators have concluded that reciprocal discovery is not required. In [8] Arbitrator Lawson stated, “While the proceeding might progress with greater efficiency if both parties disclosed all of their evidence, including the identity of witnesses, from the outset, that strikes me as compromising respondent’s right to require the district to prove its charges before any defense is raised. Because of this burden, respondent shall not be obliged to divulge

his/her defense, including its evidence and witnesses, until such time as the district has rested” [8].

- ii) Arbitrator Bantle, in [9], also denied the board’s discovery application, stating:

[T]he Legislature did not provide for any right of discovery for school districts in the statute. The rights which are given in that subdivision are for documents and other evidence “relevant and material to the employee’s defense.” It seems obvious, if the legislature had wanted the school districts to have a similar right, it could easily have incorporated that into the statutory revisions [9].

- (iii) In [10] the arbitrator held that the teacher was not required to provide discovery or a list of witnesses. The arbitrator based this decision on the fact that it is the district that believes there is probable cause to bring charges against the teacher, and the teacher has no obligation to assist the district in meeting its burden of proof.

- (iv) The arbitrator in [11] also ruled that the board had no right to discovery in a §3020-a proceeding, stating:

It is clear that the discovery rights granted to the employee were designed to enhance the due process rights of the employee. Although the discovery rights that are provided to the employee may have the effect of reducing the amount of time it would otherwise take to hear and decide disciplinary charges, measures designed to ensure an efficient and cost-effective procedure are addressed by other provisions of the legislation. There is nothing in the language of the statute or in its history, to suggest that the legislature intended to confer upon the employing boards of education, the same rights of discovery it provided to employees [11].

• **Scheduling (Normal)**

- 1) The arbitrator shall
  - a) determine the reasonable amount of time needed to conduct the hearing; and
  - b) schedule the location, times, and dates.
  - c) schedule consecutive days if more than one day will be needed.<sup>1</sup>
  - d) not grant postponements unless the arbitrator finds good cause.
  - e) **complete the final hearing no later than sixty days after the prehearing conference** unless the arbitrator finds extraordinary circumstances warrant a “limited extension.”<sup>1</sup>

<sup>1</sup> It is submitted that these time constraints are impossible to honor in cases where the parties select established arbitrators with proven records, whose services are in high demand.

*CAVEAT: The actual effectiveness of the time constraints placed in the amended statute have only a slight impact when viewed in the light of the arbitrator's discretion to alter the time frames.*

- **Scheduling (Expedited)**

- 1) Where board presents evidence that the *employee's license has been revoked* and all means of appeal have been exhausted.
- 2) Hearing shall be not more than seven days after the conference.
- 3) Hearing shall be limited to one day.
- 4) No adjournments, except for good cause, determined by arbitrator.

*CAVEAT: There is no provision for an expedited hearing where the charges result from the teacher's never having had certification or where certification has lapsed.*

### THE HEARING

- The commissioner is empowered to establish rules and procedures for the conduct of hearings. (*Part 82 of the Commissioner's Regulations currently are consistent with the statute and do not make any substantial additions to the procedures established by the legislature.*)
- The hearing will be conducted by the arbitrator.
- There will be "full and fair disclosure of the nature of the case and evidence against the employee by the board."
- The hearing will be public or private at the employee's discretion.
- The employee will not be required to testify.
  - 1) On November 12, 1998, the Appellate Division, Third Department held that New York City rules requiring a teacher facing misconduct charges to cooperate with investigators are in **direct conflict** with §3020-a, which states that school employees cannot be required to testify at their own disciplinary hearings [12].<sup>2</sup>
- Right to counsel, cross-examination, subpoena witnesses, stenographic record.

### POSTHEARING

- Arbitrator shall render a written decision within thirty days of the last day of the hearing and forward a copy to the commissioner, who shall forward copies to

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This case appears to broaden the scope of §3020\\_a. In addition to denying an employer's right to compel an employee to testify at his/her hearing, this case stands for the proposition that an employee may not be questioned under the threat of insubordination for noncooperation as part of an investigation leading to disciplinary charges.

the parties. If it is an expedited hearing, the arbitrator has ten days within which to render a written decision.

- Decision must include:
  - 1) findings of fact on each charge.
  - 2) conclusions regarding each charge.
- Penalty, if any.
  - 1) At employee's request, arbitrator **shall consider** extent of the board's efforts to correct the employee's behavior through means, including, but not limited to:
    - a) remediation.
    - b) peer intervention.
    - c) employee assistance plan.
  - 2) Allowable penalties:
    - a) written reprimand.
    - b) fine.
    - c) suspension for fixed time without pay.
    - d) dismissal.
  - 3) Remedial action in addition to or in lieu of allowable penalties:
    - a) limited leaves of absence with or without pay.
    - b) continuing education and/or study.
    - c) counseling.
    - d) medical treatment.
    - e) other remedial or combination of remedial actions.
  - 4) Prior to the amendments, none of the parties—the hearing panels, the commissioner, and the courts—had been authorized to take any action upon a finding of guilt, other than to impose the prescribed penalties. Unfortunately, there were times when a recommended dismissal was the only alternative, simply because the employee could not be required to seek treatment. These “other actions” may be considered a positive change. However, this power might have been more appropriate if it had been given to the commissioner.
  - 5) Potential problem for districts: Teachers may claim that alcoholism, drug addiction, or psychological problems not previously known to the district had “caused” otherwise dischargeable misconduct. Under the amendments, treatment may be directed rather than termination.

*CAVEAT: “The legislature, in adding these remedial actions to section 3020-a, sought to encourage districts to use the 3020-a process to remediate the problem that caused the disciplinary charges to be filed, rather than using the statute solely as a punitive measure. The remedial actions provide greater flexibility in fashioning an appropriate remedy for tenured employees found guilty of one or more charges” [13].*

### SCHOOL BOARD ACTION

- Within fifteen days of receipt of the decision, the board shall implement it.
- If *acquittal*, restoration to position with full pay for any period of suspension without pay and charges expunged.

*CAVEAT: If the employee is not acquitted, the decision is a matter of public record and is subject to disclosure under the Freedom of Information law. If the employee is acquitted, it is not a public document.*

- If the charge was based on employee's conviction of a felony, for which suspension without pay was authorized, and conviction is reversed, employee shall have pay and benefits restored from date of suspension to date of decision.

*CAVEAT: In such cases, it may be prudent to base the charges, not on the conviction, but on the underlying acts. The employee may be guilty of just cause, even though his/her conduct does not rise to the level of a crime.*

### FRIVOLOUS CHARGES

- 1) The statute calls for the arbitrator to indicate in his/her decision whether any of the charges are frivolous. If the arbitrator determines the charges are frivolous, the district may face major financial repercussions.
- 2) If the arbitrator finds *all* of the charges were frivolous, s/he shall order the board to reimburse SED the costs incurred by it; and to reimburse the employee reasonable costs incurred in defending the charges, including counsel fees.
- 3) If the arbitrator finds that *some, but not all* of the charges were frivolous, s/he shall order the board to reimburse SED and the employee a portion, in his/her discretion, of the costs.
- 4) To support a finding of frivolousness the arbitrator must find the charges:
  - a) were commenced, used, or continued in bad faith.
  - b) were commenced solely to delay or prolong the resolution of the underlying matter.
  - c) were commenced to harass or maliciously injure another.
  - d) have no basis in law and fact [14].
- 5) It will be difficult to argue against reimbursement in the case of frivolous charges. There is a vast difference between an arbitrator directing it and a court doing so. In the case of a judge, the party can always appeal that the facts do not justify the judge's findings. In the case of an arbitrator, however, even if his/her findings are "unreasonable," a court cannot overturn them—unless, of course, they are "completely" irrational.

## APPEAL

- 1) Prior to the 1994 amendments to §3020-a, the employer or employee could appeal to the commissioner of education, or to the Supreme Court pursuant to Article 78 of the C.P.L.R. These two avenues of review are no longer available [15].

*CAVEAT: The absence of the right to seek review by the commissioner of the final decision removes an important part of the process for two reasons. First, it removes the state's highest education administrator from the discipline process. Second, it removes the specter of an appeal from an arbitrator or panel's consideration.*

- 2) Under the amended statute, C.P.L.R. Article 75 is the only avenue of appeal. However, it appears to be an ineffective means. In the four years since §3020-a has been amended, there have been no reported cases of successful appeals [16, 17].
- 3) Since the avenue for appeal has been limited, very little case law has been, or is likely to be, developed. Therefore, it makes interpreting the new statutory framework all the more difficult, because there is no cohesive body of case law on which school districts may rely.
- 4) There is no central repository for existing decisions and no way for a school district to ascertain whether there have been cases brought on similar charges or what other arbitrators have done with similar charges.
- 5) Not later than *ten days* from receipt of the decision, the employee or employer may apply to the Supreme Court [N.Y.S.] to vacate or modify the decision pursuant to the law for reviewing arbitration awards.
- 6) Grounds to vacate an arbitration award:
  - a) corruption, fraud, or misconduct in procuring the award.
  - b) partiality of the arbitrator.
  - c) arbitrator exceeded his/her power or so imperfectly executed it that a final and definite award on the subject matter was not made [18].
- 7) The courts have been loathe to reverse an arbitrator's award in disciplinary arbitrations in other industries.

*CAVEAT: Decision to reinstate pilot for drinking alcohol before flying was upheld. There was no law specifically excluding an arbitrator from doing so [19].*

*Reinstatement of flight attendant found to be under the influence of drugs while on a flight was upheld. There is no specific public policy excluding this from arbitration [20].*

*Arbitrator's reinstatement of truck driver discharged for drinking alcohol during a work break upheld as not violative of public policy [21].*

*Arbitrator's decision reinstating postal worker who had fired gunshots into supervisor's unoccupied car was within arbitrator's authority under bargaining agreement [22].*

- 8) Grounds to modify an arbitration award:
  - a) miscalculation of figures or a mistake in the description of any person, thing, or property referred to in the award.
  - b) arbitrator awarded upon a matter not submitted to him, and the award may be corrected without affecting the merits of the decision on the issue submitted.
  - c) award is imperfect in matter of form, not affecting the merits of the controversy [18].
- 9) The filing of the application to vacate or modify the decision shall not delay implementation of the decision.

#### 3020-a DECISIONS FOLLOWING THE 1994 AMENDMENTS

- 1) The panel authorized the district to terminate the teacher. The charges against the teacher included the following: a) excessive lateness; b) failure to submit lesson plans; and c) confusing her students. The district made numerous attempts to assist the teacher, including written directives. However, she rejected the district's offers of assistance. The teacher clearly knew what was expected of her, but failed to comply [23].
- 2) The arbitrator imposed a \$39,000 fine on a teacher found guilty of misconduct and insubordination regarding activities that took place while chaperoning an overseas trip. The arbitrator held it was a school-sponsored trip and that by allowing student consumption of alcohol she was violating the district's alcohol policies. The district requested termination of the teacher, claiming she was unfit to be in the classroom. The arbitrator noted the district should have removed the teacher from the classroom during the ensuing §3020-a proceedings, if it wanted to effectively prove its claim that she was unfit to be in the classroom [24].
- 3) The arbitrator fined the teacher \$30,000 after finding him guilty of various charges relating to his sexual contact with a female student and his attempts to cover up his conduct. He was allowed to continue teaching in the district, but he is not allowed to be alone with a female student while on school property [25].
- 4) The arbitrator found the teacher guilty of conduct unbecoming a teacher and insubordination. One of the charges involved the teacher grabbing a student by the back of the neck and squeezing it, thereby violating the district's corpo-

ral punishment policy. The arbitrator imposed a penalty of suspension without pay for one year [26].

- 5) The panel recommended the teacher in this case be dismissed, finding him guilty of insubordination, inefficiency, incompetency or neglect of duty, and conduct unbecoming a teacher or immoral conduct. The conduct leading up to the charges included ignoring directives by administrators, allowing students to make vulgar comments, lack of classroom control, inability to prepare final examinations, failure to submit lesson plans, and failure to attend curriculum meetings [27].
- 6) The arbitrator concluded the dismissal of the teacher was for just cause. The conduct leading up to the dismissal involved frequent sexual comments and inappropriate behavior toward students. The arbitrator stated that what “respondent did here was more than a mistake of judgment. He went beyond the bounds of the student/teacher relationship not once, but over a period of time” [28].
- 7) The arbitrator found the teacher guilty of corporal punishment, based on her use of unnecessary force on students. The penalty imposed was an eighteen-month suspension without pay. In addition, the district was given the right to have the teacher take a course in classroom management or control of students, as a condition of her return to service [29].
- 8) Decisions resulting in acquittal are not available for review.

#### NEW YORK STATE SCHOOL BOARDS ASSOCIATION SURVEY

In 1997 the association conducted a §3020-a survey, in which they analyzed information that was reported to them by school districts throughout New York state, including New York City, and BOCES superintendents. Pertinent survey findings were:

- a) The longest part in the §3020-a process was the time between the date the charges were filed and the first hearing was held (an average of 158 days).
- b) Although the new §3020-a states that hearings shall be held on consecutive dates, and should be completed within sixty days of the prehearing conference, the actual amount of time between the first and last hearing date was eighty-one days.
- c) The most common charges were conduct unbecoming a teacher, insubordination, incompetency, and neglect of duty.
- d) Most cases are heard by a single hearing officer.
- e) The most common penalty was suspension without pay [30].

THE TEN COMMANDMENTS OF SECTION 3020-A

- I. **Thou shalt not** take Section 3020-a lightly.
- II. **Thou shalt** investigate thoroughly all allegations.
- III. **Thou shalt, in general, obtain** written statements from eyewitnesses.<sup>3</sup>
- IV. **Thou shalt not** prefer frivolous charges.<sup>4</sup>
- V. **Thou shalt** prefer quality over quantity.
- VI. **Thou shalt not** prefer charges that lack specificity.<sup>5</sup>
- VII. **Thou shalt** not ignore the obvious.<sup>6</sup>
- VIII. **Thou shalt not** prefer charges in haste.<sup>7</sup>
- IX. **Thou shalt** attempt remediation before charges.
- X. **Thou shalt** confer with the school attorney.

\* \* \*

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REFERENCES

1. New York School Boards Association, 3020-a Update, Albany, NY, November 10, 1997, p. 22.
2. *Greenburgh C.S.D. v. DiMichele*, SED No. 2948 (Joel M. Douglas, 1997).

<sup>3</sup> Refer to Commandment X. Remember, you may have to produce those statements in discovery.

<sup>4</sup> Consider the expense of one of these proceedings, as well as what the arbitrator can do if he finds the charges frivolous.

<sup>5</sup> Lack of specificity is grounds for dismissal. Formerly, the hearing officer could dismiss on these grounds, without prejudice to renewal. Today, who knows what an arbitrator might do?

<sup>6</sup> E.g., an evaluation that is positive or neutral is **not** negative. It must be produced in discovery when the union requests exculpatory evidence.

<sup>7</sup> Particularly where the conduct alleged is criminal. If your charges are based solely on what is happening in the collateral criminal proceeding, the employee may be acquitted, get an A.C.O.D., or even a reversal on appeal. Proceed on the facts, don't trust your case to the district attorney, and don't accept a criminal burden of proof.

3. *Board of Education of the Lansing C.S.D. v. Weaver*, SED No. 3,029 (Eric W. Lawson, 1997).
4. C.P.L.R. 3101(c).
5. *Matter of the Board of Education of the City of New York v. Midy* (Arthur A. Riegel, 1996).
6. *Matter of the Board of Education, Abbott U.F.S.D. v. Walthall*, SED No. 3306 (Howard Edelman, 1997).
7. *Matter of Longwood C.S.D.* (Interim Opinion of Weinstock, 1995).
8. *Board of Education of the East Syracuse Minoa C.S.D.*, SED No. 3288 (Eric W. Lawson, 1997).
9. *Marcus Whitman C.S.D.*, SED No. 3210 (Douglas J. Bantle, 1996).
10. *Matter of Wisniewski* (1996).
11. *City School District of the City of Mechanicsville* (1997).
12. *Board of Education of the City School District of the City of New York v. Mills*, 1998 WL 792213 (3d. Dept., 1998).
13. New York School Boards Association, 3020-a panel adds remedial actions to penalty, Albany, NY, June 9, 1997.
14. C.P.L.R. §8303-a.
15. *Appeal of McCall*, 35 Ed. Dept. Rep. 38 (1995).
16. *Matter of West Babylon Teachers Association*, 237 A.D.2d 615 (2d Dept., 1997).
17. *Board of Education, Moriah C.S.D. v. Johnson*, No. 663-96 (Sup. Ct. Essex County, May 20, 1997).
18. C.P.L.R. §7511.
19. *Northwest Airlines, Inc. v. Air Line Pilots Association International*, 808 F.2d 76 (D.C. Cir., 1987), cert. denied, 486 U.S. 1014 (1988).
20. *Independent Federation of Flight Attendants v. T.W.A.*, No. 89-6065 CVSJ b, 1989 U.S. Dist. LEXIS 4894.
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