S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N A S S E M B L Y

May 15, 2009

Introduced by M. of A. MAGNARELLI, BENJAMIN, FIELDS -- Multi-Sponsored by -- M. of A. PEOPLES -- read once and referred to the Committee on Education

AN ACT to amend the education law, in relation to tenured teacher discipline

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraph (b) of subdivision 2 of section 3020-a of the education law, as separately amended by chapters 296 and 325 of the laws of 2008, is amended to read as follows:

(b) The employee may be suspended pending a hearing on the charges and the final determination thereof. The suspension shall be with pay FOR A PERIOD OF ONE HUNDRED TWENTY DAYS, except the employee may be suspended without pay IMMEDIATELY if the employee has entered a guilty plea to or has been convicted of a felony crime concerning the criminal sale or possession of a controlled substance, a precursor of a controlled substance, or drug paraphernalia as defined in article two hundred twenty or two hundred twenty-one of the penal law; or a felony crime involving the physical abuse of a minor or student. The employee shall be terminated without a hearing, as provided for in this section, upon conviction of a sex offense, as defined in subparagraph two of paragraph b of subdivision seven-a of section three hundred five of this chapter. To the extent this section applies to an employee acting as a school administrator or supervisor, as defined in subparagraph three of paragraph b of subdivision seven-b of section three hundred five of this chapter, such employee shall be terminated without a hearing, as provided for in this section, upon conviction of a felony offense defined in subparagraph two of paragraph b of subdivision seven-b of section three hundred five of this chapter.

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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S 2. Subdivisions 3, 4 and 5 of section 3020-a of the education law, as amended by chapter 691 of the laws of 1994, are amended to read as follows:

3. Hearings. a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner [of education] shall forthwith notify the American Arbitration Association (hereinafter "association") of the need for a hearing and shall request the association to provide to the commissioner forthwith a list of names of persons [chosen by the association] from the association's panel of labor arbitrators to potentially serve as hearing officers together with relevant biographical information on each arbitrator. Upon receipt of said list and biographical information, the commissioner [of education] shall [forthwith send a copy of both simultaneously] WITHIN TEN BUSINESS DAYS APPOINT A HEARING OFFICER FROM SAID LIST OF NAMES PROVIDED BY THE ASSOCIATION. UPON APPOINTMENT, THE COMMISSIONER SHALL IMMEDIATELY SEND NOTIFICATION OF THE HEARING OFFICER APPOINTED to the employing board and the employee.

b. APPOINTMENT. APPOINTMENT FROM SUCH LIST SHALL BE MADE ON A SEQUENTIAL BASIS BEGINNING WITH THE FIRST NAME APPEARING ON SUCH LIST. SHOULD THAT HEARING OFFICER DECLINE APPOINTMENT, OR IF, WITHIN FORTY-EIGHT HOURS, THE HEARING OFFICER FAILS TO RESPOND OR IS UNREACHABLE AFTER REASONABLE EFFORTS BY THE COMMISSIONER, EACH SUCCESSIVE HEARING OFFICER WHOSE NAME NEXT APPEARS ON THE LIST SHALL BE OFFERED AN APPOINTMENT, UNTIL SUCH APPOINTMENT IS ACCEPTED. ARBITRATORS MAY NOT ACCEPT AN APPOINTMENT UNLESS THEY ARE AVAILABLE TO COMMENCE AND COMPLETE THE HEARING WITHIN THE TIME FRAMES SPECIFIED IN THIS SECTION. AN ARBITRATOR'S UNEXCUSED FAILURE TO COMPLY WITH THE TIME FRAMES SPECIFIED IN THIS SECTION SHALL BE DEEMED GOOD AND SUFFICIENT GROUNDS FOR DISQUALIFYING HIM OR HER FROM CONSIDERATION FOR APPOINTMENT FROM SUCH LIST SPECIFIED IN PARAGRAPH A OF THIS SUBDIVISION. IF, AFTER COMMENCEMENT OF A HEARING AND BY MUTUAL AGREEMENT OF THE PARTIES, THE HEARING OFFICER IS DEEMED INCAPACITATED OR OTHERWISE UNAVAILABLE OR UNWILLING TO CONTINUE THE HEARING OR ISSUE THE DECISION, THE COMMISSIONER SHALL RESCIND THE APPOINTMENT OF THE HEARING OFFICER AND APPOINT A NEW HEARING OFFICER IN ACCORDANCE WITH THE PROCEDURES AS SET FORTH IN THIS SUBDIVISION, AND THE NEW HEARING OFFICER SHALL RESUME AND CONTINUE THE HEARING AT THE POINT AT WHICH IT WAS INTERRUPTED.

C. TRAINING PROGRAM. (I) THE COMMISSIONER SHALL ESTABLISH A TRAINING PROGRAM WHICH SHALL BE COMPLETED TO THE SATISFACTION OF THE COMMISSIONER AS A CONDITION FOR ELIGIBILITY FOR INCLUSION ON THE LIST OF NAMES OF PERSONS FROM THE ASSOCIATION'S PANEL OF LABOR ARBITRATORS TO POTENTIALLY SERVE AS HEARING OFFICERS UNDER THIS SECTION.

(II) EFFECTIVE SIX MONTHS FROM THE EFFECTIVE DATE OF THIS SUBPARAGRAPH, AS A CONDITION FOR ELIGIBILITY FOR INCLUSION ON THE LIST OF NAMES OF PERSONS CHOSEN BY THE ASSOCIATION FROM THE ASSOCIATION'S PANEL OF LABOR ARBITRATORS TO POTENTIALLY SERVE AS A HEARING OFFICER, AN ARBITRATOR SHALL:

(A) HAVE SUCCESSFULLY COMPLETED A TRAINING PROGRAM PURSUANT TO SUBPARAGRAPH (I) OF THIS PARAGRAPH;

(B) ATTEND SUCH PERIODIC UPDATE PROGRAMS AS MAY BE SCHEDULED BY THE COMMISSIONER;

(C) POSSESS KNOWLEDGE OF, AND THE ABILITY TO UNDERSTAND, THE PROVISIONS OF APPLICABLE LAW AND REGULATIONS PERTAINING TO THE DISCIPLINE OF TENURED EMPLOYEES UNDER THIS SECTION AND ADMINISTRATIVE AND JUDICIAL INTERPRETATIONS OF SUCH LAW AND REGULATIONS;

(D) POSSESS KNOWLEDGE OF THE PROCEDURES INVOLVED IN CONDUCTING A HEARING, AND IN REACHING AND WRITING A DECISION AND THE ABILITY TO CONDUCT HEARINGS IN ACCORDANCE WITH APPROPRIATE, STANDARD LEGAL PRACTICE; AND

(E) ANNUALLY SUBMIT, IN A FORMAT AND BY A DATE PRESCRIBED BY THE COMMISSIONER, A CERTIFICATION THAT THE HEARING OFFICER MEETS THE REQUIREMENTS OF THIS SUBDIVISION.

(III) THE COMMISSIONER SHALL ESTABLISH STANDARDS ALLOWING ARBITRATORS TO DOCUMENT THEIR QUALIFICATION TO BE IMMEDIATELY ELIGIBLE FOR APPOINTMENT FROM SUCH LIST SPECIFIED IN PARAGRAPH A OF THIS SUBDIVISION.

[(i)] D. Hearing officers. All hearings pursuant to this section shall be conducted before and by a single hearing officer selected as provided for in this section. A hearing officer shall not be eligible to serve as such if he or she is a resident of the school district, other than the city of New York, under the jurisdiction of the employing board, an employee, agent or representative of the employing board or of any labor organization representing employees of such employing board, has served as such agent or representative within two years of the date of the scheduled hearing, or if he or she is then serving as a mediator or fact finder in the same school district. Notwithstanding any other provision of law, the hearing officer shall be compensated by the department with the customary fee paid for service as an arbitrator under the auspices of the association for each day of actual service plus necessary travel and other reasonable expenses incurred in the performance of his or her duties. All other expenses of the disciplinary proceedings shall be paid in accordance with rules promulgated by the commissioner [of education].

[(ii) Not later than ten days after the date the commissioner mails to the employing board and the employee the list of potential hearing officers and biographies provided to the commissioner by the association, the employing board and the employee, individually or through their agents or representatives, shall by mutual agreement select a hearing officer from said list to conduct the hearing and shall notify the commissioner of their selection.

(iii) If the employing board and the employee fail to agree on an arbitrator to serve as a hearing officer from said list and so notify the commissioner within ten days after receiving the list from the commissioner, the commissioner shall request the association to appoint a hearing officer from said list.

(iv) In those cases in which the employee elects to have the charges heard by a hearing panel, the hearing panel shall consist of the hearing officer, selected in accordance with this subdivision, and two additional persons, one selected by the employee and one selected by the employing board, from a list maintained for such purpose by the commissioner of education. The list shall be composed of professional personnel with administrative or supervisory responsibility, professional personnel without administrative or supervisory responsibility, chief school administrators, members of employing boards and others selected from lists of nominees submitted to the commissioner by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members other than the hearing officer shall be compensated by the department of education at the rate of one hundred dollars for each day of actual service plus necessary travel and subsistence expenses. The hearing officer shall be compensated as set forth in this subdivision. The hearing officer shall be the chairman of the hearing panel.

c.] E. Hearing procedures. (i) The commissioner [of education] shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. Hearings shall be conducted by the hearing officer [selected] APPOINTED pursuant to [paragraph] PARAGRAPHS A AND b of this subdivision with full and fair disclosure of [the nature of the case and evidence against the employee] ALL MATERIAL RELEVANT TO THE PROSECUTION OR DEFENSE OF THIS ACTION by the [employing board] PARTIES TEN BUSINESS DAYS PRIOR TO THE FIRST HEARING DATE and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself or herself and an opportunity to testify in his or her own behalf. The employee shall not be required to testify, HOWEVER, THIS RIGHT SHALL NOT BE CONSTRUED TO MEAN THAT THE EMPLOYEE MAY REFUSE TO COOPERATE IN THE EMPLOYING SCHOOL DISTRICT'S INVESTIGATION OF ALLEGATIONS OF MISCONDUCT OR INCOMPETENCE RAISED AGAINST HIM OR HER. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer is hereby authorized to administer. A competent stenographer, designated by the commissioner [of education] and compensated by the [state education] department, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearings shall, upon request, be furnished without charge to the employee and the board of education involved.

(ii) The hearing officer [selected] APPOINTED to conduct a hearing under this section shall, within [ten to fifteen] THIRTY days of agreeing to serve as such, hold a pre-hearing conference which shall be held in the school district or county seat of the county, or any county, wherein the employing school board is located. The pre-hearing conference shall be limited in length to one day except that the hearing officer, in his or her discretion, may allow one additional day for good cause shown.

(iii) At the pre-hearing conference the hearing officer shall have the power to:

(A) issue subpoenas;

(B) hear and decide all motions, including but not limited to motions to dismiss the charges;

(C) hear and decide all applications for bills of particular or requests for production of materials or information, including, but not limited to, any witness statement (or statements), investigatory statement (or statements) or note (notes), exculpatory evidence or any other evidence, including district or student records, relevant and material to the employee's defense.

(iv) Any pre-hearing motion or application relative to the sufficiency of the charges, application or amendment thereof, or any preliminary matters shall be made upon written notice to the hearing officer and the adverse party no less than five days prior to the date of the pre-hearing conference. Any pre-hearing motions or applications not made as provided for herein shall be deemed waived except for good cause as determined by the hearing officer.

(v) [In the event that at the pre-hearing conference the employing board presents evidence that the professional license of the employee has been revoked and all judicial and administrative remedies have been exhausted or foreclosed, the hearing officer shall schedule the date, time and place for an expedited hearing, which hearing shall commence not more than seven days after the pre-hearing conference and which

shall be limited to one day. The expedited hearing shall be held in the local school district or county seat of the county or any county, wherein the said employing board is located. The expedited hearing shall not be postponed except upon the request of a party and then only for good cause as determined by the hearing officer. At such hearing, each party shall have equal time in which to present its case] ALL RULINGS ON SUBSTANTIVE MOTIONS SHALL BE PLACED ON THE RECORD WITH A FULL EXPLANATION OF THE HEARING OFFICER'S REASONING.

(vi) During the pre-hearing conference, the hearing officer shall determine the reasonable amount of time necessary for a final hearing on the charge or charges and shall schedule the location, time(s) and date(s) for the final hearing. The final hearing shall be held in the local school district or county seat of the county, or any county, wherein the said employing school board is located. In the event that the hearing officer determines that the nature of the case requires the final hearing to last more than one day, the days that are scheduled for the final hearing shall be consecutive. The day or days scheduled for the final hearing shall not be postponed except upon the request of a party and then only for good cause shown as determined by the hearing officer. In all cases, the final hearing shall be completed no later than [sixty] ONE HUNDRED TWENTY days after the pre-hearing conference unless the hearing officer determines that extraordinary circumstances warrant a limited extension.

4. Post hearing procedures. (a) The hearing officer shall render a written decision within thirty days of the last day of the final hearing, [or in the case of an expedited hearing within ten days of such expedited hearing,] and shall forthwith forward a copy thereof to the commissioner [of education] who shall immediately forward copies of the decision to the employee and to the clerk or secretary of the employing board. The written decision shall include the hearing officer's findings of fact on each charge, his or her conclusions with regard to each charge based on said findings and shall state what penalty or other action, if any, shall be taken by the employing board. At the request of the employee, in determining what, if any, penalty or other action shall be imposed, the hearing officer shall consider the extent to which the employing board made efforts towards 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. In those cases where a penalty is imposed, such penalty may be a written reprimand, a fine, suspension for a fixed time without pay, or dismissal. In addition to or in lieu of the aforementioned penalties, the hearing officer, where he or she deems appropriate, may impose upon the employee remedial action including but not limited to leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions.

(b) Within fifteen days of receipt of the hearing officer's decision the employing board shall implement the decision. If the employee is acquitted he or she shall be restored to his or her position with full pay for any period of suspension without pay and the charges expunged from the employment record. If an employee who was convicted of a felony crime specified in paragraph (b) of subdivision two of this section, has said conviction reversed, the employee, upon application, shall be entitled to have his OR HER pay and other emoluments restored, for the period from the date of his OR HER suspension to the date of the decision.

(c) The hearing officer shall indicate in the decision whether any of the charges brought by the employing board were frivolous as defined in section eight thousand three hundred three-a of the civil practice law and rules. If the hearing [officers] OFFICER finds that all of the charges brought against the employee were frivolous, the hearing officer shall order the employing board to reimburse the [state education] department the reasonable costs [said] THE department incurred as a result of the proceeding and to reimburse the employee the reasonable costs, including but not limited to reasonable attorneys' fees, the employee incurred in defending the charges. If the hearing officer finds that some but not all of the charges brought against the employee were frivolous, the hearing officer shall order the employing board to reimburse the [state education] department a portion, in the discretion of the hearing officer, of the reasonable costs said department incurred as a result of the proceeding and to reimburse the employee a portion, in the discretion of the hearing officer, of the reasonable costs, including but not limited to reasonable attorneys' fees, the employee incurred in defending the charges.

5. Appeal. (A) Not later than ten days after receipt of the hearing officer's decision, THE EMPLOYEE OR THE EMPLOYING BOARD MAY MAKE AN APPLICATION FOR REVIEW OF THE HEARING OFFICER'S DECISION TO THE STATE TENURED TEACHERS AND ADMINISTRATORS DISCIPLINARY REVIEW PANEL, (HEREAFTER REFERRED TO AS "THE REVIEW PANEL"), ESTABLISHED FOR THAT PURPOSE WITHIN THE DEPARTMENT IN ACCORDANCE WITH SUBDIVISION FORTY-TWO OF SECTION THREE HUNDRED FIVE OF THIS CHAPTER, AND THE RULES AND REGULATIONS PROMULGATED BY THE COMMISSIONER. THE REVIEW PANEL MAY MODIFY OR REVERSE THE DECISION OF A HEARING OFFICER AS APPROPRIATE TO PROPERLY EFFECTUATE THE PURPOSES OF THIS SECTION. THE DECISIONS OF THE REVIEW PANEL SHALL CONSTITUTE BINDING DECISIONAL LAW UNTIL MODIFIED OR REVERSED ON APPEAL BY EITHER PARTY BY A STATE SUPREME COURT OR BY AN APPELLATE COURT ON FURTHER APPEAL. REVIEW PANEL DECISIONS SHALL BE PUBLISHED PURSUANT TO RULES AND REGULATIONS PROMULGATED BY THE COMMISSIONER AND IN THE SAME MANNER AS ADMINISTRATIVE DECISIONS FROM OTHER STATE AGENCIES.

(B) NOT LATER THAN TEN DAYS AFTER RECEIPT OF THE DECISION OF THE REVIEW PANEL, the employee or the employing board may make an application to the New York state supreme court to vacate or modify the decision of the [hearing officer] REVIEW PANEL pursuant to section seven thousand five hundred eleven of the civil practice law and rules. [The court's review shall be limited to the grounds set forth in such section.] The [hearing] REVIEW panel's determination shall be deemed to be final for the purpose of such proceeding.

(C) In no case shall the filing or the pendency of an [appeal] APPLICATION FOR REVIEW BY THE STATE REVIEW PANEL OR AN APPEAL TO THE COURTS delay the implementation of the decision of the hearing officer.

S 3. Section 3020-a of the education law is amended by adding a new subdivision 6 to read as follows:

6. IMMEDIATE REMOVAL. (A) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, A PERSON ENJOYING THE BENEFITS OF TENURE AS PROVIDED IN SUBDIVISION THREE OF SECTION ELEVEN HUNDRED TWO, OR SECTION TWENTY-FIVE HUNDRED NINE, TWENTY-FIVE HUNDRED SEVENTY-THREE, TWENTY-FIVE HUNDRED NINETY-J, THREE THOUSAND TWELVE OR THREE THOUSAND FOURTEEN OF THIS CHAPTER SHALL LOSE SUCH BENEFITS AND SHALL BE IMMEDIATELY REMOVED FROM EMPLOYMENT BY THE EMPLOYING BOARD OF EDUCATION UPON CONVICTION OF ANY OFFENSE RELATED TO CHILD ABUSE; CHILD ABUSE IN AN EDUCATIONAL SETTING AS DEFINED IN SECTION ELEVEN HUNDRED TWENTY-FIVE OF THIS CHAPTER; OR ANY OTHER FELONY OFFENSE THAT AFFECTS THE OPERATION OF A SCHOOL DISTRICT; OR, UPON REVO-

CATION OF A PROFESSIONAL CERTIFICATE PURSUANT TO SUBDIVISION SEVEN OF SECTION THREE HUNDRED FIVE OF THIS CHAPTER.

(B) NOTWITHSTANDING ANY OTHER PROVISION OF LAW, NO PERSON ENJOYING THE BENEFITS OF TENURE AS PROVIDED IN SUBDIVISION THREE OF SECTION ELEVEN HUNDRED TWO, OR SECTION TWENTY-FIVE HUNDRED NINE, TWENTY-FIVE HUNDRED SEVENTY-THREE, TWENTY-FIVE HUNDRED NINETY-J, THREE THOUSAND TWELVE OR THREE THOUSAND FOURTEEN OF THIS CHAPTER WHO FAILS TO RECEIVE A PROFESSIONAL CERTIFICATE WITHIN THE STATUTORY TIMEFRAME AS REQUIRED BY SECTION THREE THOUSAND FOUR OF THIS ARTICLE SHALL RETAIN SUCH BENEFITS AND MAY BE IMMEDIATELY REMOVED FROM EMPLOYMENT BY A BOARD OF EDUCATION.

(C) ANY EMPLOYEE OF A SCHOOL DISTRICT SUBJECT TO IMMEDIATE TERMINATION UNDER THE PROVISIONS OF THIS SECTION SHALL HAVE FIVE BUSINESS DAYS FROM THE NOTICE OF TERMINATION IN WHICH TO PROVIDE DOCUMENTARY EVIDENCE ESTABLISHING TO THE SATISFACTION OF THE EMPLOYING BOARD THAT HE OR SHE IS NOT THE SAME INDIVIDUAL REFERENCED IN THE ACTION TRIGGERING HIS OR HER REMOVAL.

S 4. Section 305 of the education law is amended by adding a new subdivision 42 to read as follows:

42. (A) THE COMMISSIONER SHALL ESTABLISH THE STATE TENURED TEACHERS AND ADMINISTRATORS DISCIPLINARY REVIEW PANEL, (HEREAFTER REFERRED TO AS "THE REVIEW PANEL"). THE PANEL SHALL CONSIST OF NO LESS THAN THREE MEMBERS APPOINTED BY THE COMMISSIONER. PANEL MEMBERS SHALL BE EMPLOYED BY THE DEPARTMENT AND THEIR SALARY SHALL BE DETERMINED AND PAID BY THE DEPARTMENT.

(B) PANEL MEMBERS SHALL:

(I) SUCCESSFULLY COMPLETE A TRAINING PROGRAM ESTABLISHED BY THE COMMISSIONER AND ATTEND SUCH ADDITIONAL TRAINING PROGRAMS AS MAY BE REQUIRED BY THE COMMISSIONER;

(II) POSSESS KNOWLEDGE OF AND THE ABILITY TO UNDERSTAND THE PROVISIONS OF APPLICABLE LAW AND REGULATIONS PERTAINING TO THE DISCIPLINE OF TENURED EMPLOYEES UNDER THIS SECTION, AND ADMINISTRATIVE AND JUDICIAL INTERPRETATIONS OF SUCH LAWS AND REGULATIONS;

(III) POSSESS KNOWLEDGE OF THE PROCEDURES INVOLVED IN CONDUCTING A HEARING UNDER THIS SECTION; AND

(IV) POSSESS THE ABILITY TO RENDER AND WRITE DECISIONS IN ACCORDANCE WITH APPROPRIATE STANDARD LEGAL PRACTICE.

S 5. This act shall take effect immediately.