

## MANAGEMENT RIGHTS

A Labor Relations newsletter for clients of ROEMER WALLENS GOLD & MINEAUX LLP designed to provide relevant information to public sector managers on matters relating to the labor relations environment in government.

### *WINTER 2018*

#### **NYS CIVIL SERVICE LAW § 72: “HOW TO”**

NYS Civil Service Law § 72 (CSL § 72) is a bit complex. It is a statutory provision to be used when an employee has an incapacity (not work-related) which causes an inability to perform the job. These are the steps that must be followed to properly adhere to the strict statutory requirements.

1. The appointing authority must make an initial determination (a judgment call, actually) that the employee is unable to perform her duties due to a non-work related illness or injury (i.e., the illness or injury cannot be one subject to Workers’ Compensation).

2. Once this initial determination has been made, the employee may be required to submit to a medical examination by a doctor selected “by the local civil service department”. Note that prior to conducting the examination, the appointing authority must prepare a written statement (a letter) to the employee explaining the belief/judgment that the employee is unable to perform his/her job duties. This statement must be provided to both the employee and the local civil service department prior to the examination.

3. The medical examiner must determine and certify (in writing to the appointing authority) whether the employee is able (or not) to perform the job duties due to a physical or mental incapability. If the doctor certifies the employee as “unfit” then . . .

4. The appointing authority will notify the employee of this conclusion (in writing) and that he/she will be placed on an unpaid leave of absence (note that §72.5 allows for an emergency leave of absence if an employee is deemed, in the judgment of the appointing authority, to be a danger to himself/herself or others; see ¶13, below). However, a hearing must still be held, subsequently, to make this official.

In informing the employee of this medical determination, the appointing authority must, in writing,

- detail the reasons justifying the leave;
- propose a date for commencement of the leave;
- notify the employee that he/she has ten (10) working days from service of the notice to object to the imposed leave and request a hearing;
- such a request must be filed with the appointing authority in person or by first class mail, registered or certified, return receipt requested.

**This notice from the appointing authority will need to be personally served upon the employee or sent by first class registered or certified mail, return receipt requested.**

5. If an employee requests a hearing to review the determination as to fitness for duty, the employee (or authorized representative) must be provided with copies of all diagnosis, test results, etc. (if not already provided), which support the certification of inability to perform his/her job duties.

**6. Imposition of the leave of absence must be held off until following the due process hearing.**

7. **Hearing.** If one is requested, the hearing must take place within thirty (30) calendar days of the request; the Hearing Officer must be selected by mutual agreement of the parties. If the parties cannot agree, the Hearing Officer is then selected “by lot” from the list maintained by the New York State Civil Service Department. At the hearing it will be the municipality’s burden to prove unfitness for duty. The employee will have the right to

representation, to present witnesses and evidence, as well as the right to cross-examine those witnesses; the employee will be entitled to a copy of the transcript that will be made of the proceeding. The Hearing Officer will provide a Report and make a Recommendation to the appointing authority. (The Hearing Officer cannot be a local municipality employee.)

8. **Determination.** Within ten (10) working days of receipt of the Recommendation of the Hearing Officer, the appointing authority must render a final determination (**Note: no more than seventy-five (75) days may pass from the date of request for a hearing until the date of determination.**)

9. If placed on unpaid leave of absence (following the hearing or waiver of the right to a hearing), the employee is entitled to use all accumulated unused sick, vacation, overtime or other time accrued to his/her credit.

10. **Appeal.** In the Determination the employee must be informed of his/her right to appeal to the local civil service commission. The local civil service commission will establish the time and place for such an appeal.

11. **Application for Reinstatement.** Once on leave of absence pursuant to the process detailed above, an employee may make application to the local civil service commission for a medical examination. If found fit, the employee is to be reinstated.

12. **One Year Passes.** If the employee is not reinstated within one (1) year from date of commencement of the leave of absence, the employee's employment is subject to termination pursuant to NYS Civil Service Law § 73.

13. If the appointing authority determines that there is probable cause to believe that the continued presence of the employee on the job represents a potential danger to persons or property, or would severely interfere with operations, it may place such employee on involuntary leave of absence immediately, provided, however, that the employee shall be entitled to draw all accumulated unused sick leave, vacation, overtime and other time allowances standing to his/her credit. **NOTE: The employee must still be afforded all of the above detailed rights to a Hearing.** If such an employee is finally determined to be physically or mentally fit to perform the duties of his/her position, he/she shall be restored to his/her position and shall have any leave credits or salary that he/she may have lost because of such involuntary leave of absence restored to him/her, less any compensation he/she may have earned in other employment or occupation, and any unemployment benefits he/she may have received during such period.

14. Always recheck with counsel and review CSL § 72 for any statutory modification, and check the Collective Bargaining Agreement for any relevant provision.

The use of CSL § 72 is among the more complicated and detailed of all the Civil Service statutes permitting removal from service. This is an area where it would be imperative to work with counsel.

#### **EXPANDED CANCER SCREENING LEAVE BENEFITS**

A new NYS law was passed which grants public employees up to four (4) hours of excused leave per year to undergo screening for *any* type of cancer. Currently, this leave has been available to public employees only for breast or prostate cancer screening. N.Y. Civil Service Law § 159-c (prostate cancer) and § 159-b (breast cancer). This new law becomes effective **March 18, 2018.** The new law repeals § 159-c in its entirety, and makes § 159-b applicable to any cancer, not just breast cancer.

As with the current breast and prostate cancer screening leave, the employee cannot be required to charge other accrued leave (such as sick or personal time) during this period of absence. N.Y. Civil Service Law § 159-b. Although not expressly required by law, employers should adjust any affected policies accordingly, and ensure that employees are aware of this new leave entitlement in whatever manner notice of benefits is generally communicated to employees.

#### **NEW IRS MILEAGE FOR 2018**

Effective January 1, 2018, the new Internal Revenue Service mileage reimbursement rate is 54.5¢ per mile. For those municipalities who reimburse employees pursuant to the IRS rate, this increase is retroactive to January 1, 2018.

#### **2018 TRAINING INFORMATION**

To all of our Municipal and/or School District clients whose Retainer Agreements with RWGM offer training days, please watch your mail for the 2018 Training letter. Our attorneys are available to assist you in many areas. If you have not taken advantage of this opportunity in the last year or two, it may be time to have your employees and Supervisors/Department Heads refresh their understanding of current labor relations issues of the topics offered. At the same time, we will offer suggestions to update existing policies, if applicable. Please contact Elayne Gold or Karen Pelland with any questions, or to coordinate your training needs.