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NOTE: Blanks in the "PAGES" and "ISSUED" columns indicate that no "white pages" have been issued. These sections *may* contain Policy Bulletins or Advisory Memoranda.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #20-01

2200 Separations and Leaves **June 10, 2020**

To: Department and Agency Directors of Human Resources, Personnel and Affirmative Action Officers, Equal Opportunity Specialists, Diversity and Inclusion Specialists

From: Jessica Rowe, Director of Staffing Services

Subject: Terminations Under Civil Service Law §71 and §73 During the COVID-19 Public Health Emergency

The purpose of this memorandum is to provide guidance to agencies on the termination of employees placed on leave prior to the COVID-19 public health crisis.

Under Civil Service Law §71, an employee with a disability resulting from occupational injury or disease as defined in the Workers' Compensation Law is entitled to a leave of absence of at least one year, unless the employee's disability permanently incapacitates the employee and the employee cannot perform her or his duties. If the disability is caused by an assault in the course of employment, the employee is entitled to a leave of absence of at least two years, with the same condition for permanent incapacitation.

Under Civil Service Law §73, when an employee has been continuously absent from and unable to perform the duties of the employee's position for one year or more because of a disability not due to an occupational injury or disease, the employee may be terminated and the position may be filled by a permanent appointment.

While it is generally at the discretion of appointing agencies to terminate an employee once timeframes provided in Civil Service Law §71 and §73 have been met, due to the COVID-19 public health emergency, agencies should delay any such action until after July 31, 2020. Any questions should be directed to the Department of Civil Service.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #14-01

2200 Separations and Leaves **January 22, 2014**

T0: Department and Agency Personnel and Human Resources Directors

FROM: Mark F. Worden, Associate Attorney

SUBJECT: Return to Work Evaluations and Civil Service Law Section 72 Due Process Procedures

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On November 17, 2011, the New York State Court of Appeals decided two cases, *Sheeran v. New York State Department of Transportation*, and *Birnbaum v. New York State Department of Labor* (18 NY3d 61) which held that the procedural safeguards provided in Civil Service Law (CSL) section 72 apply when an employee who is voluntarily on leave due to personal illness is prevented from returning to work by the appointing authority. The Court held that a refusal to allow the employee to return to work converts a voluntary leave to an involuntary leave, which requires the appointing authority to follow the procedures under CSL section 72. Accordingly, all appointing authorities must review their return to work procedures to ensure that they are consistent with these Court of Appeals decisions and the following guidance.

Appointing authorities may continue to have any employee seeking to return to work from a voluntary leave due to personal illness evaluated by the Employees Health Service (EHS) to verify the employee's fitness for duty, consistent with section 21(e) of the Attendance Rules, the applicable collective bargaining agreements and the Family and Medical Leave Act (FMLA). (*An employee seeking to return to duty from an approved FMLA leave may be prevented from returning to work only in exceptional circumstances. Please refer to your FMLA guidance.)

If a return to work evaluation results in a recommendation from EHS that the employee is not fit to return to duty and the appointing authority determines that it will seek to place the employee on an involuntary leave, the appointing authority must send that employee written notice that the agency proposes to place him or her on involuntary leave under CSL section 72(1) and the employee must be allowed to return to work pending a hearing on the issue of fitness for duty. Unless there is probable cause to believe that returning the employee to duty would represent a potential danger to persons or property or would severely interfere with agency operations, consistent with section 72(5), the employee must be returned to duty.

It is essential that any employee denied a return to duty pending a hearing be provided with written notice that such action is being taken pursuant to CSL section 72(5) and notified of the reasons for such action.

The effect of these court decisions is to give an employee seeking to return from a voluntary leave for illness or injury the same due process rights as an employee who is at work and referred for a section 72 evaluation by the appointing authority.

Appointing authorities should follow the procedures, as outlined below:

A. Written notice to employee of agency intent to place employee on involuntary §72 leave based on the determination of EHS that the employee is unfit to perform the duties of his or her position. Notice should include the employee's right to return to work pending a hearing on the issue of unfitness for duty (or that the agency will keep the employee out of work pursuant to CSL §72(5) if there is probable cause to believe that a return to duty would pose a potential danger or disrupt agency operations); served in person or by first class, registered or certified mail, return receipt requested.	
B. Agency provides EHS with copy of any written objection or request for a hearing from the employee. EHS provides agency with all data supporting certification of unfitness (diagnoses, test results, observations, etc.) which must be transmitted to employee or representative.	
C. Due process hearing conducted by mutually agreed upon independent hearing officer. (If parties are unable to agree, the hearing officer must be selected by lot from a list established by the Department of Civil Service.) Employee has right to be represented by counsel or recognized employee organization and may present medical experts and other witnesses. Burden of proof is on person alleging unfitness. Technical rules of evidence shall not be followed. Record of hearing and recommendations to be provided to employee and to agency. Upon request, employee is to be given free copy of transcript.	Must be afforded within 30 calendar days of employee's receipt of notice.
D. Written notice to employee of agency's final decision with notice of right to appeal to Civil Service Commission.	Within 10 working days of receipt of hearing officer's report, * but no later than 75 calendar days from receipt of appeal.
E. Pursuant to CSL section 72(5), involuntary leave begins upon employee's receipt of notice if section 72(5) is invoked.	

The following is a Sample Notice for use in such situations. This may be modified to fit the particular circumstances applicable to any specific case:

Sample Notice of Conversion to Involuntary Leave for Ordinary Disability

Dear _____

You have requested to be restored to duty from a leave for personal illness or injury. Based upon medical evaluation(s), the Employee's Health Service (EHS) has advised that, in their opinion, you are not fit to perform the essential duties of your position. Accordingly, pursuant to section 72 of the Civil Service Law, this agency proposes to convert your present leave status to an involuntary leave based on the results of such medical evaluation(s). We propose to convert your leave to an involuntary leave effective on (date at least 10 working days from service of the Notice).

You have the right to object to this proposed involuntary leave and are entitled to request a hearing to contest this determination. If you object to the proposed leave, you also have the right to be immediately returned to duty pending the hearing and a final determination. You have the right to be represented at the hearing by an attorney or a representative of a recognized employee organization. To object, request a hearing and be immediately returned to duty, you must apply in writing to this office at (ADDRESS, PHONE#) within 10 working days of receiving this letter. A copy of the medical report on which this determination is based will be forwarded to you or your representative if you file a timely objection. (ANY OTHER RECORDS ON WHICH A REFUSAL TO RESTORE TO DUTY WAS BASED SHOULD ALSO BE INCLUDED).

As required by the Americans with Disabilities Act (ADA) and the New York State Human Rights Law (HRL), it is policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability as defined by the HRL, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office at the address noted above for an application for requesting such an accommodation or for further information concerning the ADA or the HRL.

A copy of Civil service Law section 72 is attached for your information. If you have any questions, please feel free to contact this office at - ADDRESS -, - PHONE.

(**Note:** If an appointing authority proposes to place the employee on an immediate involuntary leave pursuant to CSL section 72(5), the notice must be altered to comply with that provision).

In addition to this update to the SPMM, the Department will be modifying the Attendance and Leave Manual to reflect the changes resulting from these Court decisions. If you have any questions regarding the new procedures, please feel free to contact the Attendance and Leave Unit of the Department of Civil Service at (518) 457-2295.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum #09-04

2200 Separations and Leaves **December 2009**

THIS ADVISORY MEMORANDUM SUPPLEMENTS POLICY BULLETIN 93-02 IN SECTION 2200, SEPARATIONS AND LEAVES. PLEASE FILE THIS MEMORANDUM WITH POLICY BULLETIN 93-02. NOTE THAT THE "SAMPLE NOTICE OF PENDING TERMINATION" (PAGE 9) SHOULD BE AMENDED TO INCLUDE THE LANGUAGE BELOW. FOR REFERENCE, A NEW "SAMPLE NOTICE OF PENDING TERMINATION" APPEARS ON PAGE 2 OF THIS ADVISORY MEMORANDUM.

Section 5.9 of 4 NYCRR (Rules for the Classified Service) requires that appointing authorities provide 30 days notice of proposed termination to employees facing dismissal under §71 of the CSL.

An appointing authority recently asked this question: if an employee so notified of ensuing termination returned to work briefly, and then was absent *due to the same disabling condition*, would the appointing authority be required to provide another 30-days notice of termination? **The answer is "NO, not if the absence occurs within 30 days of the restoration to service."**

Section 5.9(c) requires that termination from service shall not be effective until 30 days from service upon the employee of a notice of impending termination containing a proposed effective date for termination. This section does not require a new notice after a short-lived return to work as long as the employee is initially notified how the effective termination date is determined if the employee is again absent and exhausts all leave within 30 days of restoration to service.

The initial letter of termination should notify employees that if a return to duty is short-lived and the employee again goes out on leave for the same occupational injury or disease, termination will ensue without any additional notice as soon as any remaining leave is exhausted. Employers should also notify any employee restored to service of the amount of remaining leave, if any, so the employee is aware in advance of the effective date for termination if absence recurs within 30 days of restoration. Counsel advises that this language should be used in the Notice of Pending Termination:

> If restored to duty, you will be informed of any remaining worker's compensation leave and if you return to workers' compensation leave for the same occupational injury or disease WITHIN 30 DAYS OF RESTORATION, you may be immediately terminated without further notice when your cumulative year of leave has been exhausted.

A complete "Sample Notice of Pending Termination" appears on the next page.

Sample Notice of Pending Termination

(to be sent at least 30 and no more than 60 days prior to the proposed termination date)

Dear_____:

Pursuant to §71 of the New York State Civil Service Law and §5.9 of the Rules for the Classified Service, your workers' compensation leave will end, and your employment will terminate on [DATE] due to ___[REASON: E.G. FINDING OF PERMANENT DISABILITY/COMPLETION OF ONE CUMULATIVE YEAR OF LEAVE/ETC.]___.

You have the right to apply to this office prior to that date for restoration to duty if you are medically fit to perform the duties of your position. If you apply, you may be required to submit to a medical examination to determine your fitness. If the examining physician finds that you are not fit, you will have the right to a hearing to contest that finding, pursuant to Subdivision (d) of §5.9 of the Rules for the Classified Service. If you are found fit for duty by this agency, your leave will be terminated and you will be scheduled to return to work. If restored to duty, you will be informed of any remaining worker's compensation leave and if you return to workers' compensation leave for the same occupational injury or disease WITHIN 30 DAYS OF RESTORATION, you may be immediately terminated without further notice when your cumulative year of leave has been exhausted.

After the termination of your employment, you have the right to apply to the Department of Civil Service within one year of the end of your disability for a medical examination to determine your fitness to return to work. If you are fit to return to work, we will consider you for reinstatement to your position, if vacant, or to a similar position. If you cannot be reinstated at that time, your name will be placed on a preferred list pursuant to §71 of the Civil Service Law and §5.9(e) of the Rules for the Classified Service.

As required by the Americans with Disabilities Act (ADA) and the New York State Human Rights Law (HRL) it is the policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee who has a disability. If you are an individual with a disability as defined by the ADA or HRL you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office for an application for requesting such an accommodation or for further information about the ADA or HRL.

You may wish to contact the Employees' Retirement System to determine your eligibility for various retirement benefits, including accidental disability retirement. You should do so as soon as possible in order to avoid possible ineligibility due to lateness. You may contact the Retirement System at 1-866-805-0990 or 518-474-7736 (in the Albany area), or by writing to: The New York State Employees' Retirement System, 110 State Street, Albany, NY 12236.

If you have questions regarding this letter, please contact this office at:

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #05-02

1400 Eligible Lists / 2200 Separations and Leaves
2800 Automated Position/Personnel System **April 28, 2005**

This memorandum supercedes and replaces Advisory Memorandum #96-01, "Transaction code for permanent employees who refuse a reassignment" in SPMM section 2800. Please remove that Advisory Memorandum from your manual.

TO: Department and Agency Personnel, Human Resource, and Affirmative Action Offices

FROM: Terry Jordan, Director of Staffing Services

SUBJECT: New NYSTEP Code for Permanent Employees Who Refuse Reassignment (**RFR**)

Permanent or contingent permanent (CP) employees who refuse reassignment to positions in counties other than current work locations are separated from employment. To date, the transactions separating those permanent or CP employees who refuse reassignment have been submitted to NYSTEP as resignations. Effective on May 12, 2005 (beginning of Institutional Payroll 4), these transactions are to be coded:

Action Code: SEP or TER

Transaction Group: OUT

Reason Code: RFR [refuse reassignment]

We shall continue to grant reemployment list rights to employees who refuse reassignment, provided the employees meet §§80/80-a CSL criteria.

You may address questions to Employment Records at (518) 457-3780.

Note: Please add a copy of this Advisory Memorandum to your copy of the *Guidelines for the Administration of Reductions in Force*, or annotate page 33 of your printed *Guidelines* with this new transaction code. Our online versions of the *Guidelines* have been updated. Also, please save a copy of this memo with your NYSTEP/PER User Manual.

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Advisory Memorandum #04-01

2200 Separations and Leaves **January 29, 2004**

TO: Department and Agency Personnel and Human Resources Directors

FROM: Patricia A. Hite, Director – Law Bureau

SUBJECT: Amendment to Civil Service Law Section 71, Reinstatement after Separation for Disability

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On September 22, 2003, Governor George E. Pataki signed Chapter 577 of the Laws of 2003, to amend section 71 of the Civil Service Law regarding leaves of absence for an occupational injury or disease resulting from an assault sustained in the course of or arising out of employment.

Chapter 577 amends section 71, effective September 22, 2003, to extend the leave of absence for an employee who has been separated from the service by reason of a disability resulting from an assault sustained in the course of his or her employment to at least two years, unless the disability permanently incapacitates the employee from the performance of the duties of his or her position. Employees separated from the service due to any other kind of occupational injury or disease will continue to be entitled to a leave of absence of at least one year. The leave of absence provided for in section 71 is a cumulative absence of one year or two years, as appropriate. Upon exhaustion of the applicable cumulative leave of absence, the employee may be terminated from the position if he or she is unfit to perform the duties of his or her former position.

This new provision is retroactive and applies to incidents occurring prior to the effective date of the law. Any employee not terminated prior to September 22, 2003 is potentially affected by this legislation.

Chapter 577 does not provide a definition of the term "assault." Therefore, the appointing authority must determine whether the injury is the result of an assault sustained in the course of employment based on the specific circumstances of each case. Where it is determined that the injury or disease is the result of an assault, the appointing authority is required to grant the two year minimum leave of absence to the affected employee.

The State Civil Service Commission will be issuing regulations to aid in the interpretation of the term "assault" as used in this statute. The Department of Civil Service, the Governor's Office of Employee Relations, various State agencies, as well

as the Personnel Council, will be consulted and have input on these proposed regulations before they are adopted.

Pending the adoption of regulations, we are defining the term "assault" to encompass only physical acts of violence and not verbal abuse or threats of physical injury without actual physical violence. If an appointing authority is unclear as to whether an assault is involved, guidance should be sought from Counsel's Office (518) 457-3177 at the Department of Civil Service.

It is essential that appointing authorities determine whether an injury or disease is the result of an assault and give notice to the employee of the determination regarding his or her entitlement to the one year or two year leave of absence as soon as possible so as to avoid potential problems when seeking to terminate an employee upon exhaustion of the leave of absence.

When there is further guidance in determining what constitutes an assault for purposes of section 71, we will provide that information to you.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

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Advisory Memorandum #02-03

2200 Separations and Leaves **August 30, 2002**

TO: Department and Agency Personnel, Human Resource and Affirmative Action Offices

FROM: William E. Doyle, Director of Staffing Services

SUBJECT: Leaves of Absence for Non-Competitive Class Employees

Policy Bulletin #98-02, issued December 29, 1998, entitled "Leaves Without Pay" in this section specifies those appointment types and employees which must be given a leave of absence under what limits pursuant to our rules and negotiated agreements.

One of the tables in this bulletin concerns **"Permanent Appointment to a Non-Competitive Class Position".** Two notes should be made on this table, and/or the table should be cross referenced to this memorandum.

1. "The above applies as well to non-competitive class employees appointed pursuant to §55-c, and to those who are currently serving in policy influencing / confidential (Φ) [phi] positions or who may be appointed to such positions."

Explanation: Neither our rules nor the articles of the contracts which concern leaves distinguish between the appointment methods for non-competitive class employees. Nor do they distinguish between positions which are designated as 'policy influencing / confidential' (Φ) and those that are not so designated. While some non-competitive class employees may be ineligible for tenure under §75, they must still be given a leave of absence if they meet all other criteria.

2. "Note however, that non-competitive class employees appointed pursuant to §55-b must be given a leave when appointed to ANY OTHER 55-b position. See Policy Bulletin #87-01 in 1805(B) Permanent/Non-Competitive, issued, February 5, 1987"

Explanation: This bulletin transmitted the guidelines and procedures for employment of persons with disabilities pursuant to §55-b of the Civil Service Law. Paragraph III. B. of that bulletin provides for this leave of absence.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #01-03

1225 Examination Announcements & 2200 Separations and Leaves

TO: Department and Agency Personnel, Human Resource and Affirmative Action Offices

FROM: William E. Doyle, Director of Staffing Services

SUBJECT: Promotion opportunities for employees on leave.

DATE: June 8, 2001

As you know, permanent competitive class employees (and permanent employees in the non-competitive and labor classes) who are on leave of absence, or who have been laid off and have had their names placed on reemployment lists, who are otherwise qualified, are eligible to apply for and compete in promotion examinations.

While it may be impractical for an agency to notify their employees who are on leave that promotion examinations have been scheduled, agencies should make reasonable efforts to apprise these employees of their right to compete in promotion exams. These efforts might include a statement to this effect provided to the employee which is included in the letter they are given upon granting leave of absence, or upon layoff.

This statement should include instructions for staying abreast of current examination announcements through the usual agency channels, or through the Department of Civil Service; our website can be found at: "http://www.cs.state.ny.us", and a reminder that it is the employee's responsibility to find out and apply for both open competitive and promotion examinations in which they may be interested. When indicated on the announcement employees may apply for promotion examinations over the telephone.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #01-02

2200 Leaves of Absence **April 13, 2001**

TO: Department and Agency Personnel, Human Resource and Affirmative Action Offices

FROM: Nicholas J. Vagianelis, Director of Civil Service Operations and Administration

SUBJECT: Request for Extension of Leave of Absence Pursuant to Attendance Rules of the Classified Service

This Memorandum Does Not Replace Advisory Memorandum #00-01 "Request For Extension of Leave of Absence Pursuant to Attendance Rules Of The Classified Service" Issued February 3, 2000 In This Section But Amends Form CSC-2.

We are reissuing Form CSC-2 (4/01L), [new copy enclosed only for Personnel and Human Resource Offices]. You will note that the boxes entitled "Date Original Leave Began" and the "Previous Extension Through" have been deleted. It is no longer necessary to provide this information. The wording "Previous Extension Through" has been changed to "Current Leave Ends". Instructions for preparation and submission are on the back of the CSC-2. You may photocopy the new form for your requests, or download it from the Department of Civil Service Website at: www.cs.state.ny.us. This form will be effective immediately. Please recycle Form CSC-2 (2/00L).

Please remember that, when you prepare the CSC-2 for submission, you must verify the information with NYSTEP. You must reconcile any discrepancies with your Staffing Services Representative before submitting the form to the Office of Commission Operations.

In all other respects, the processing of the leave extension request remains the same. Questions can be directed to Al Jordan of the Office of Commission Operations at 457-2575.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #00-01

2200 Leaves of Absence **January 27, 2000**

TO: Department and Agency Personnel, Human Resource and Affirmative Action Offices

FROM: Nicholas J. Vagianelis, Director of Commission Operations and James W. Sever, Director of Staffing Services

SUBJECT: Request for Extension of Leave of Absence Pursuant to Attendance Rules of the Classified Service

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The Department of Civil Service is streamlining the process for submitting requests for extension of leave of absence pursuant to the Attendance Rules of the Classified Service. Beginning with materials for consideration at the February 2000 Civil Service Commission meeting, you should send this type of request directly to the Director, Office of Civil Service Commission Operations. It is no longer necessary to send this type of request to your Staffing Services Representative.

Form S-47 has been used to request extension of leave of absence. We are issuing Form CSC-2 (12/99) to replace Form S-47. You will note that the position and spacing of some of the requested information has changed. Instructions for preparation and submission are on the back of the CSC-2.

Enclosed is a copy of the new Form CSC-2. You may photocopy the form or you can download it from the Department of Civil Service Website. Please recycle Form S-47.

When you prepare a form for submission, please verify the information on the CSC-2 with NYSTEP. This may include the need to verify the initial leave dates with APPS history, behind NYSTEP. Reconcile any discrepancies with your Staffing Services Representative **before** submitting the form to the Office of Commission Operations.

In all other respects, the processing of this request remains the same. Questions can be directed to Al Jordan of the Office of Commission Operations at (518) 457- 2575.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum 97-03

2200 Leaves of Absence

To: Department and Agency Personnel, Human Resource and Affirmative Action Offices
From: James W. Sever, Director of Staffing Services
Subject: Revised Processing of Form S-47, Request for Extension of Leave of Absence
Date: August 19, 1997

This Advisory Memorandum should be read in conjunction with Advisory Memorandum No. 96-03, issued March 15, 1996, on the same topic in this section. Form S-47 has been revised to conform with the requirement that requests for discretionary leave extensions be reviewed by State Operations on behalf of the Task Force on State Workforce Management and Employee Deployment. (See the March 22, 1996 Memorandum from James G. Natoli on *"Discretionary Leaves of Absence, Civil Service rule 5.2(b)"*)

Enclosed [for Personnel and Human Resource Offices only] are several copies of the revised form S-47 (8/97). The instructions now require that agencies provide appropriate documentation for review by State Operations before the S-47 is forwarded to the Department of Civil Service.

Use of the revised form and procedure begins with materials submitted for consideration at the October Civil Service Commission meeting.

Please recycle any earlier versions of form S-47. Additional copies are available through your Staffing Services Representative.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #96-03

2200 Separations and Leaves **March 15, 1996**

TO: Department and Agency Personnel, Human Resource and Affirmative Action Offices

FROM: James W. Sever, Director of Staffing Services

SUBJECT: Revised Processing of Form S-47, Request for Extension of Leave of Absence

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We are initiating several changes in the processing of Form S-47, Request for Extension of Leave of Absence, that will eliminate certain paperwork and ensure the timely updating and accuracy of the APP System with essential information.

You will still need to complete, sign and forward two copies of the form for each request to your Staffing Services Section. Once the Commission has acted favorably on your request, that information will be sent to the Employment Records Section for immediate entry in the APP System. **You will no longer have to prepare a PR-75 to update the employee's APPS records.**

You will receive notification in the form of a copy of the approved S-47 form and a transmittal memo rather than a letter from the Commission Operations staff on each request. This change should result in timelier notification from Commission Operations.

These changes will be implemented with the March 1996 Commission meeting. If you have any questions, contact your Staffing Services Representative.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Advisory Memorandum #94-11

1800 Appointments, 2200 Separations & Leaves **November 29, 1994**

TO: Department and Agency Affirmative Action and Personnel Officers

FROM: Commissioner, Virginia M. Apuzzo

SUBJECT: An Overview: Tenure, Leaves of Absence, and Reinstatements

The purpose of this memorandum is to provide information and advice on issues that are of concern to agencies and employees during this period of transition to a new administration. This memorandum is not intended to be the definitive document for the subjects discussed; it is an overview. As usual, specific questions should be directed to your Staffing Services Representative.

TENURE

Many employees are "tenured;" that is, they generally cannot be removed from their positions except for misconduct or incompetence, and they must be provided with the due processes guaranteed by law, rule or negotiated agreement. Employees who are without tenure in their positions do not have these rights.

Employees who are tenured:

- Competitive class employees who have been appointed on a permanent basis, including those appointed "contingent permanent" pursuant to Rule 4.11, and who have satisfactorily completed their probationary periods;
- Non-competitive class employees who have been appointed on a permanent basis, including those non-competitive employees appointed "contingent permanent" pursuant to Rule 4.12, who are not in positions designated by the Civil Service Commission "... as confidential or requiring the performance of functions influencing policy...", who have satisfactorily completed their probationary periods and who have the necessary continuous service to provide tenure protection pursuant to §75.1(c) and/or negotiated agreements; and
- Labor class employees who have been appointed on a permanent basis, who have satisfactorily completed their probationary periods and who have the necessary continuous service to provide tenure protection pursuant to negotiated agreements.

Employees who are without tenure:*

- Provisional and temporary employees;
- Probationers;
- Employees in exempt and unclassified service positions; and

- Non-competitive and labor class employees who do not have tenure protection pursuant to §75.1(c) of the Civil Service Law and/or negotiated agreements.

*NOTE, however, there are two important exceptions:

1. Some employees in reclassified positions may have tenure protection, which accrues to them as individuals, if they had such rights prior to their reclassification; and
2. Permanent employees in the classified service, regardless of jurisdictional class, who have completed probation and who meet the criteria of §75 (1) (b) (i.e., who are wartime veterans (see §85) or who are exempt volunteer firefighters (see the General Municipal Law)) have the tenure protection afforded by that section unless they hold the position of "private secretary, cashier or deputy of any official or department." Although relevant, the title assigned to a position is not controlling in determining whether a person is a "deputy" within the meaning of this section. Generally a person is a deputy if statute confers upon him or her authority to perform duties expressly vested in the principal officer, or if a statute authorizes the principal officer to delegate to him or her duties which are substantial and important, and not merely clerical or ministerial.

LEAVES OF ABSENCE

The duration of leaves of absence is governed primarily by Rule 5.2. Non-discretionary leaves, and their conditions, are covered by other rules and by negotiated agreements. In addition, many employees are granted discretionary leaves for a variety of reasons, including, for example, to serve in an exempt class position or to serve in a position in another agency after the probationary period. Generally, the terms of leaves can be modified only by mutual agreement, with four major exceptions:

1. Probationers who request restoration prior to the end of their leave must be restored (Rule 4.5);
2. Employees who have been temporarily or provisionally appointed to another position in their agency must be restored upon request (Rule 4.10);
3. Contingent permanent employees who are affected by return of an incumbent must be offered restoration (Rules 4.11 and 4.12); and
4. Employees on discretionary leave to serve in another position in the State service must be restored upon request.

Employees who have a right to be restored and employees who are requesting restoration must give the appropriate personnel office adequate notice (usually two weeks). Employees do not have rights to be restored **to a specific item**. Rather, they

have rights to their former title and appointment status. The appointing authority designates to which item the employee will return. Where the hold item has been moved to another geographic location (i.e., county) and the returning employee refuses to relocate, his or her name will be placed on a reemployment list provided they are otherwise eligible.

Extensions of leaves of absence may be granted by the Civil Service Commission for discretionary leaves beyond two years. Such extensions must be requested at the time of the expiration of the leave. Where a discretionary leave of absence has lapsed but the employee has continued in state service, "hold" rights may be re-established either by reinstating the employee and simultaneously granting a new leave to the position in which they have been serving, or, where the lapse is six months or less, by requesting approval for a retroactive extension of the original lapsed leave of absence.

CONTINGENT PERMANENT EMPLOYEES AFFECTED BY RETURN OF INCUMBENTS

Policy Bulletin #88-05, 1810 Contingent Permanent, issued Dec. 30, 1988, in this Manual contains detailed information on the procedures for effecting returns of incumbents.

Only one permanent incumbent may be appointed to a vacant position. All others who are appointed must be appointed "contingent" permanent pursuant to either Rule 4.11 or 4.12. The rule permits such "contingent" permanent employees themselves to be given a leave of absence. Whenever any such "contingent" permanent employee requests return to a hold item his or her seniority date must be compared with the seniority date of any other "contingent" permanent employee who also wishes to return at the same time, if any, and the seniority date of the current "contingent" permanent incumbent. Only the most senior employee can be restored, or retain his or her incumbency.

Seniority is determined pursuant to the process in §80 or §80-a. as appropriate, but because this is not a reduction in force, employees who are not able to be restored, or able to retain their incumbency have no rights to vertically "bump" or retreat. However their names will be placed on the appropriate reemployment lists.

REINSTATEMENTS

Generally, former competitive class employees may be reinstated to positions in titles they held permanently or were eligible to transfer to. Reinstatements must meet the basic criteria:

1. the reinstatement will benefit the agency;
2. the service in the former position was satisfactory; and

3. there is no reemployment list for the position.

Where a leave of absence has lapsed, but the employee has continued in state service, hold rights may be reestablished by reinstatement and/or by retroactive extension of the leave, depending on the circumstances (See *Leaves of Absence*, above).

The reinstatement rule does not guarantee placement; it only provides eligibility. Individuals may be reinstated without examination upon nomination by the agency. They are **required** to serve a probationary period.

People seeking reinstatement must contact agencies in those locations where they are willing to work to determine whether there are positions available and whether the agency is interested in reinstating them.

An information sheet on reinstatements and a list of addresses of agency personnel offices is also available by calling (518) 457-5596 or (518) 474- 8865 , or by visiting one of our Career Information Centers.

Section 1830 (A) in this Manual provides more detailed information on reinstatements pursuant to Rule 5.4.

REDUCTIONS IN FORCE

Terminations of employees who are not tenured, and contingent permanent employees being affected by return of incumbents are not *"layoffs."* or reductions in force. Positions must be abolished before §80 or §80-a become applicable.

If positions are to be abolished, the *"Guidelines for the Administration of Reductions in Force"* is your primary resource.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Advisory Memorandum #90-04

2200 Separations and Leaves January 17, 1990

Effective Date of Section 71 and Section 73 Terminations

Rule 5.3 prescribes, generally, that the effective date of resignation for an employee who resigns while on leave without pay shall be backdated to the date of leave commencement.

However, our Law Bureau has determined, and the Counsel at the Office of the State Comptroller has concurred, that the effective date of separation under a Section 71 or a Section 73 termination is the actual date of separation, not the earlier date of leave commencement. Therefore, terminations should not be backdated in these cases.

STATE OF NEW YORK
CIVIL SERVICE COMMISSION
THE STATE CAMPUS
ALBANY, N Y 12239

MEMORANDUM

TO: All Appointing Authorities

FROM: Karen S. Burstein, President

RE: Elimination of Mandatory Retirement by Article 14-a of the Retirement and Social Security Law (L. 1984, Chap. 296)

DATE: July 27, 1984

Much public attention has focused on the fact that, except where age is a bona fide occupational qualification, mandatory retirement will end for most public employees on January 1, 1985. Until then, however, Section 70(c) of the Retirement and Social Security Law continues to control.

This section allows government employees who must now retire at age 70 to be reemployed until age 78, subject to the approval of the State Civil Service Commission. We are providing the following guidelines to assist you in determining what action to take, vis-a-vis your over 70 work force, until Article 14-a takes effect next January 1.

(1) Any individual who reaches the age of 78 on or before December 31, 1984 will be mandatorily retired. Individuals attaining 78 on or after January 1, 1985 may continue to work.

(2) Individuals employed under Section 70(c) whose current approvals extend service beyond December 31, 1984 will require no additional approval from the State Civil Service Commission.

(3) You must request an extension in service from the State Civil Service Commission for individuals who attain current mandatory retirement age of 70 on or before December 31, 1984, or whose current approvals will expire on or before December 31, 1984 and who have not attained 78 years of age. Such approval will ensure the legal employment of affected individuals until the new legislation takes effect.

If you have any questions concerning this memorandum, please contact the Office of Civil Service Commission Operations at 457-2575.

President, Civil Service Commission

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE

STATE PERSONNEL MANAGEMENT MANUAL

Policy Bulletin #03-01

1400 Eligible Lists / 2200 Separations and Leaves **March 21, 2003**

TO: Department and Agency Personnel, Human Resource and Affirmative Action Offices

FROM: William E. Doyle, Director of Staffing Services

SUBJECT: Agency Reduction Transfer List and Reemployment Roster Appointments – Special Considerations

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This Policy Bulletin identifies two situations that appointing authorities may encounter in administering ARTL and Reemployment Rosters, and provides policy and procedures to use in those situations.

- Under certain circumstances, individuals on Agency Reduction Transfer Lists (ARTLs) or Reemployment Rosters (RRs) may not be fully qualified for appointment to specific titles which require "special qualifications". These include titles with physical and/or medical standards, required background checks, completion of specified course work, or possession of certifications or licensure in required areas. For such titles, the appointing agency is required to determine that individuals on ARTLs and RRs are fully qualified for appointment. Questions concerning specific situations should be addressed to the Career Mobility Office at (518) 485-6199.

- ARTL and Reemployment Roster appropriate-title determinations involving traineeship titles often specify appointment eligibility at a particular salary grade level. For example, a Senior Personnel Administrator vacancy may be filled at the Trainee 2 level by an ARTL or RR candidate whose eligibility derives from permanent service as a Senior Budgeting Analyst and subsequent layoff (or targeting). While the specified fill level for this type of appointment is Trainee 2, an agency has the option to fill at the Senior level if the ARTL/RR eligible meets the normal criteria for transfer (e.g. via §§52.6 or 70.1). Please note that such transactions should be submitted as ARTL/RR appointments, NOT as transfers.

Leaves of Absence Without Pay

THIS POLICY BULLETIN REPLACES POLICY BULLETIN #98-02, issued December 29, 1998.
PLEASE REMOVE POLICY BULLETIN #98-02 FROM YOUR SPMM AND DESTROY.

This policy bulletin is intended to be a guide to agencies on the topic of leaves of absence without pay.

Leaves of Absence Generally

The purpose of any leave of absence without pay is to provide employees with their appropriate tenure protection, promotion rights, and layoff rights based upon the employee's status in that position. Employees may not have multiple simultaneous leaves from the same item/position. However, to completely preserve their rights, employees may be on leave from different positions in the same title, in the same or different jurisdictional classes.

Some types of leaves are termed "mandatory." Other leaves are termed "discretionary."

- **Mandatory leaves** must be granted as required by Civil Service Law or rule or negotiated agreement, or Federal law, or State policy.
- **Discretionary leaves** may be granted in accordance with Classified Service Rule 5.2.

Usually a mandatory leave is granted when a permanent employee:

- is promoted or transferred to a position in which the employee must serve a probationary period.
- in the competitive class is appointed in contingent permanent, temporary or provisional status to a position in the employee's agency.
- in the non-competitive or labor class is appointed in contingent permanent status to a position in the employee's agency.
- is absent for a reason specified in the Family & Medical Leave Act.
- is absent for reasons specified in the Military Law.
- is unable to perform the duties of the employee's position due to disability.

When an employee must be granted a leave in a situation governed both by a Civil Service law, or rule *and* a negotiated agreement, and the identified limitations or length of leave required are different, the employee **must** be given the leave terms which provide the employee with the most protection.

Usually a discretionary leave is granted when a permanent employee who is not eligible for a mandatory leave:

- requests a leave because the employee accepted an appointment to a position in a different jurisdictional class.
- requests a leave because the employee accepted an appointment in another agency in temporary or provisional status.
- requests a leave for educational, parenting, or other personal reasons.

Basic Principles of Discretionary Leaves

1. A leave is discretionary if it is not mandatory.
2. Rule 5.2 permits an appointing authority to grant a discretionary leave for two years. At the end of this initial two years permission to extend such leave must be granted by the Civil Service Commission.
3. In some cases the courts have viewed a discretionary leave as being essentially a "contract" between an employee and his/her appointing authority. For the specified period the employee is entitled to be absent and, at the end of that period, to return. The terms of these contracts may only be changed by mutual consent, with the exception that employees on discretionary leave to serve in another position in the State service must be restored upon request.
4. A leave of absence does not prohibit the agency from dealing with the position in the normal course of business, e.g., filling the position, abolishing the position or assigning the position to a different location.
5. Employees may not be on mandatory leave and discretionary leave simultaneously from the same position.
6. Where an extension or further extension is not granted, the employee must return to the former position (i.e., title and status) and serve for six months before the agency may grant them a "new" discretionary leave, which does not require Commission approval.

Rights to Return to a Hold Item

Although for the sake of record-keeping a position (called a "hold item") is always identified, and usually the employee returns to it, management's right to assign and reassign staff among available positions overrides any right to a *specific* position, or even a location. The employee has the right to return to ***a*** position in their former title, jurisdictional class and appointment status.

When restoration to a hold occurs the agency designates the specific position. Agencies may change designated hold items and may reassign hold items to different locations at any time. However, some negotiated agreements may provide rights and limitations when employees return (for example see CSEA, I.S.U. Article 12). Further, agencies may not arbitrarily or capriciously reassign employees, nor do so punitively.

An employee who refuses to return to a hold item which was moved to a different geographic location (i.e., different county) is considered to have declined a reassignment, and is eligible for reemployment list status, but the employee is not eligible for bumping or retreat.

An employee granted a mandatory leave while serving probation may request restoration to a hold item prior to end of the leave, and the agency must restore the employee. This right to return is only provided under rule and contract to an employee granted mandatory leave while serving probation (Rule 4.5).

An employee who has been temporarily or provisionally appointed to another competitive class position, within the same agency, must be restored upon request (Rule 4.10).

A contingent permanent employee who is affected by the return of a prior permanent incumbent must be offered restoration with permanent status to the hold item required for this

purpose by Rules 4.11 and 4.12 provided the employee was originally appointed to the hold item in permanent status. If however, the employee was originally appointed to the hold item in **contingent permanent** status, and the agency made subsequent contingent permanent appointments to the same position, a comparison of the seniority dates (seniority dates are determined in accord with §80, or §80-a of the CSL) of **all** the contingent permanent appointees is required. Only if the returning former contingent permanent employee is the most senior may the employee return. If the one prior permanent incumbent has already returned, the contingent permanent employee may not return, regardless of seniority.

A contingent permanent employee who has completed probation may not voluntarily return to a hold item in the absence of a return of incumbent. Complete policy information regarding contingent permanent appointments and leaves can be found at SPMM 1810.

Non-competitive Class Appointments

A non-competitive phi designation on an employee's current position or the position to which the employee is appointed has no effect on the leave policies herein. See Advisory Memorandum #02-03 for more information.

Non-competitive class employees appointed pursuant to §55-b/c must be given a leave when appointed to ANY OTHER 55-b/c position. See Advisory Memorandum #02-03 and Policy Bulletin #11-01 for more information.

Exempt Class Appointments

Exempt class employees may be granted a discretionary leave of absence. However, the employee should be informed that the leave does not give the employee the right to return or to hold the position for any period of time. The exempt class employee continues to serve at will, albeit while on leave.

Pending Commission Review

Newly classified positions are competitive class positions until the Commission and Governor act to place them in another jurisdictional class (with the exception of titles the Commission has designated that "all" positions in the title are in a particular jurisdictional class, and, therefore a newly classified position is immediately placed in that jurisdictional class). After the Commission acts, the position is considered "pending non-competitive," "pending exempt," or "pending labor" as a shorthand way of keeping track of the status. But, in fact, the jurisdictional class does not change from competitive until the entire administrative process is complete and the resolution is filed with the Department of State. Therefore, a permanent competitive class employee appointed to such a pending position, or an incumbent whose position has been reclassified to a pending position, should be considered as having received an appointment to a competitive class position for the purposes of leave rights under the provisions of Rule 4.10.

When an exempt class position becomes vacant it is reviewed by the Commission. During the review period, only appointments in temporary status are permitted. A permanent competitive class or non-competitive class employee appointed on a temporary basis to such a position is not covered by Rule 4.10 or negotiated agreements and therefore any leave granted must be discretionary.

Summary of Mandatory Leaves of Absence by Type of Appointment

Depending upon the type of appointment that a permanent employee receives, various negotiated agreements and the Civil Service rules may require a leave of absence be provided from the current position. The following tables summarize this department's interpretations of the various rules, laws and negotiated agreements which mandate a leave of absence be provided when certain appointments occur. The compilation of the tables is intended to provide a complete catalog of the conditions under which mandatory leaves are provided. It is recognized that there is an overlap between the various authorities under which leaves are mandated. Where such overlaps occur, the leave which provides the greatest benefit to the employee, either in terms of duration or limitations, should be applied.

The rules refer to specific sections of the Classified Service rules. The negotiated agreements can be found on the GOER website at https://www.goer.ny.gov/Labor_Relations/Contracts/.

Promotion is defined as:

- The appointment of a permanent competitive, non-competitive or labor class employee to a competitive class position via appointment from a promotion or transition list; OR
- The appointment of a permanent non-competitive or labor class employee to a higher grade position in the same jurisdictional classification.

This department may update the tables on the online version of this Memorandum to reflect changes resulting from future negotiations or reinterpretation. When updated, the previous tables will be chronicled in the Staffing Division policy files.

Tables last updated: *August 7, 2018*

1.) Permanent Appointment from an Open-Competitive Eligible List

Legal/Contractual Basis	Employees Covered	Duration of Leave	Limitations
CSEA-ASU (02)	permanent* competitive, non-competitive	for the period of probation	none
CSEA-OSU (03)	permanent* competitive, non-competitive, labor	for the period of probation	none
CSEA-ISU (04)	permanent* competitive, non-competitive, labor	for the period of probation	none
PEF (05)	permanent* competitive & non-competitive	for the period of probation	none
Council 82-Security Supervisors (61/91)	permanent* competitive	for the period of probation	none
NYSCOPBA-Security Services (01/21)	permanent* competitive	for the period of probation	none
PBANYS-EnCon, Parks, SUNY Police (31)	permanent* competitive	for the period of probation	none
District Council 37-DHCR Rent Reg. Svcs. Unit (67)	permanent* competitive, non-competitive	for the period of probation	none
M/C employees (06)	permanent* competitive & non-competitive	for the period of probation	none
Rule 4.10 traineeship appointment	permanent competitive (including probationers)	for the period of probation	trainee appointment within the same appointing authority

***NOTE: "permanent" is defined as having successfully completed probation.**

2.) Permanent Appointment to a Non-Competitive Class Position (including phi-tag positions)

Legal/Contractual Basis	Employees Covered	Duration of Leave	Limitations
CSEA-ASU (02)	Permanent* competitive, non-competitive	for the period of probation or 52 weeks whichever is less	both positions within the same appointing authority
CSEA-OSU (03)	Permanent* competitive, non-competitive	for the period of probation	appointment must be to a higher SG position
CSEA-OSU (03)	Permanent* labor	for the period of probation	appointment must be to a higher SG position within the same appointing authority
CSEA-ISU (04)	Permanent* competitive, non-competitive, labor	for the period of probation	appointment must be to a higher SG position
PEF (05)	Permanent* competitive & non-competitive	for the period of probation	none
District Council 37 (67)	Permanent* competitive, non-competitive	for the period of probation or 52 weeks whichever is less	both positions within the same appointing authority
Rule 4.5(b)(2) & 4.5(e) [to be read together]	Permanent non-competitive (including probationers)	for the period of probation	appointment must be to a higher SG position

***NOTE: "permanent" is defined as having successfully completed probation for purposes of this coverage by the contracts.**

3.) Permanent Appointment to an Exempt Class Position

Legal/Contractual Basis	Employees Covered	Duration of Leave	Limitations
PEF (05)	permanent* competitive & non-competitive	for the period of probation	none

***NOTE: "permanent" is defined as having successfully completed probation for purposes of this coverage by the contract.**

4.) Permanent Promotion or Transfer to a Competitive Class Position

Legal/Contractual Basis	Employees Covered	Duration of Leave	Limitations
Rule 4.5(d) & (e) [to be read together]	permanent competitive & non-competitive* (including probationers)	for the period of probation	none

***NOTE: covers those non-competitive employees who are appointed from promotion lists when allowed to take promotion examinations pursuant to §52.11. Non-competitive class employees are not eligible for transfer.**

5.) Contingent Permanent Appointment to a Competitive or Non-Competitive Class Position

Legal/Contractual Basis	Employees Covered	Duration of Leave	Limitations
PEF (05)	permanent* competitive & non-competitive	for the period of probation	none
Rule 4.11(e)	permanent competitive & non-competitive (including probationers)	for the period of service in the contingent permanent position	both positions must be in the same appointing authority

***NOTE: "permanent" is defined as having successfully completed probation for purposes of this coverage by the contract.**

6.) Temporary or Provisional Appointment to a Competitive Class Position

Legal/Contractual Basis	Employees Covered	Duration of Leave	Limitations
Rule 4.10	permanent competitive (including probationers)	for the period of temporary or provisional service	both positions within the same appointing authority*

***NOTE: Although they have separate appointing authorities, OMH and OPWDD are each considered one agency for the purposes of applying Rule 4.10.**

Agency Reduction Transfer Lists

THIS SUPERCEDES POLICY BULLETIN #04-01
AND PROVIDES CLARIFICATION ON THE
AGENCY REDUCTION TRANSFER PROGRAM

Section 78 of the Civil Service Law permits the transfer of employees, without examination, from one department or agency to another department or agency of the State where necessitated by reasons of economy, efficiency, consolidation or abolition of functions, curtailment of activities or otherwise. (See copy of section 78 at the end of this policy). The Agency Reduction Transfer Program is a discretionary tool to be used to realign the workforce to meet programmatic and/or fiscal needs. Participation is voluntary on the part of eligible employees.

Who is eligible for the ARTL Program?

- Permanent and contingent permanent competitive class employees and eligible permanent non-competitive class and labor class employees whose positions may be impacted as a result of an action taken by reason of economy, efficiency, consolidation, or abolition of functions, curtailment of activities or otherwise. Agencies may, at their discretion, extend ARTL eligibility to other employees in the titles. Whatever method an agency chooses to determine eligibility must be objective and consistent across titles, and based upon operational needs. This Department may extend eligibility to permanent, non-tenured, non-competitive and labor class employees.
- Permanent and contingent permanent competitive class employees and eligible permanent non-competitive and labor class employees whose positions are relocated to a different county, and decline reassignment.

Who is not eligible for the ARTL Program?

- Exempt class employees
- Non-competitive class employees serving in policy-influencing or confidential positions
- Provisional employees

- Temporary employees
- Employees who decline reassignment within the same county
- Employees impacted by the return of incumbent in accordance with sections 4.11 and 4.12 of the Classified Service. (4 NYCRR section 4.11 and 4.12)

How is the ARTL Program Initiated?

The ARTL program may be initiated at any time prior to the target date for the intended action. Agencies should contact staff from the Career Mobility Office (CMO) prior to initiating this process and provide the CMO with a list of impacted titles and their locations, and an agency contact for the ARTL process. Staff from the CMO may be reached at:

Phone: (518) 485-6199 or (800) 553-1322

Fax: (518) 457-9430

E-Mail: cs.sm.careermobility@cs.ny.gov

The agency contact for the ARTL process should also serve as the agency's internal contact to answer employee questions about the ARTL program and their status. Staff from the CMO will provide the agency's Staffing Services Representative with this information.

After consulting with the CMO, agencies should notify eligible employees that they may volunteer for participation in the ARTL program. It is recommended that agency human resources representatives arrange with the CMO to meet with the eligible employees, explain the ARTL transfer process, and assist the employees in completing ARTL Form S-295.6 (commonly known as the "Blue Card"). Employees should also be provided with a copy of the Employee Guide for Agency Reduction Transfer List booklet published by the Department of Civil Service. This meeting is separate from and subsequent to the initial employee notification meeting hosted by the agency.

All information on ARTL Form S-295.6 must be verified by the agency before being submitted electronically to the Department of Civil Service using the Electronic Reemployment Card System (ERCS). Agencies should retain the paper forms for their records and employees should be encouraged to keep a photocopy of their completed forms as well. Please contact the CMO for assistance in using ERCS.

How Does the ARTL Program Work?

Eligible employees will have their names certified on transfer lists to fill vacant positions in their current titles, in lower-level direct-line titles, and to positions in titles declared comparable by this Department. Title comparability determinations are based on similarities in duties, minimum requirements, salary grades, and/or examination plans, and are generally the same as reemployment roster determinations. Existing title determinations may be found in the Title Transfer Reference System (TTRS), which is part of the Department of Civil Service Applications System.

How is the ARTL Certified?

An ARTL is one of a number of mechanisms used to transfer employees and is intended to provide continuity of employment. It is accessed through the Reemployment Lists Program, which is part of the Department of Civil Service Applications System. The order of certification follows:

1. Redeployment List – a list established pursuant to Section 79 of the Civil Service Law for permanent employees who are or will be suspended or demoted due to "contracting out."

2. Agency Reduction Transfer List (ARTL) – a list established prior to the date of the triggering action containing the names of employees who have been identified by their agency as being impacted by such action. Within an ARTL, the specific order of certification is:

    1. Title-for-title eligibles

2. Direct-line title eligibles
3. Comparable title eligibles

3. Preferred List – a mandatory list established pursuant to Civil Service Law section 81 as of the date of layoff containing the names of laid off employees ranked by layoff unit and seniority, for reinstatement to their layoff title and direct-line lower-level titles.

4. Reemployment Roster – a mandatory list established pursuant to Civil Service Law section 81-a as of the date of layoff containing the names of laid off employees for appointment to titles other than those for which they are eligible for reinstatement from a preferred list. These generally are titles in their former occupational field as determined to be appropriate by the Department of Civil Service. The names are certified without regard to seniority, probationary status, or layoff unit.

5. Placement Roster – a mandatory list established pursuant to Civil Service Law section 81-b prior to the date of layoff containing the names of employees who have been specifically identified for layoff who will have preferred and reemployment roster list rights as of the date of layoff as long as they are not reemployed from the placement roster at their same status and salary grade level. These eligibles are certified without regard to seniority, probationary status or layoff unit.

Eligible candidates in the title-for-title category and the direct-line category are ranked in seniority order within their respective titles. The eligibles in the comparable title category are not ranked and if there are no acceptors via title-for-title or direct-line, any comparable title eligible can be considered.

ARTL eligibles have preference over preferred list eligibles except in the following situation:

If there are title-for-title preferred list eligibles, seniority as determined in accordance with Civil Service Law, sections 80.3, 80-a.3 and 85.7, must be compared between the ARTL eligible and the highest ranked preferred list eligible. NOTE: When making this comparison, layoff unit designation and probationary status play no role for the ARTL eligible; seniority is the only relevant factor.

Only a title-for-title preferred list eligible with more seniority may block an ARTL appointment.

Preferred list eligibles who are in direct-line or appropriate-titles will not block an ARTL transfer, even if those preferred list eligibles have greater seniority.

How do ARTLs and Eligible Lists Work?

When filling a vacancy, agencies must use ARTLs before using eligible lists resulting from examinations. The one exception is newly established eligible lists. Upon the establishment of an eligible list resulting from a competitive examination for a title which there are ARTL eligibles, an appointing authority has 90 days from the date the eligible list is established to appoint a non-permanent employee in the title who is reachable for appointment. Thereafter, ARTLs shall take precedence over the eligible list.

How Does Accepting or Declining Job Offers Affect ARTL Eligibility?

Employees' responses to canvasses, interviews, and job offers will affect their continuing eligibility on ARTLs. Timeliness is crucial since one employee's decision may affect the eligibility of others. Replies to a canvass must be made within the same timeframes as replies to canvass from eligible lists. Responses to an invitation for interview and/or to a job offer must be made within a reasonable period of time (usually 48 hours unless there are mitigating circumstances, such as a geographic move). **In situations where an agency is unable to reach an employee using their regular canvass procedures to set up an interview after the employee has indicated an**

interest, the agency must send the employee a registered letter (return receipt requested) indicating the interview date, time and place.

Any of the following is considered to be a declination of a canvass:

- The employee fails to respond to a canvass letter within the period specified in the canvass letter.
- The employee fails to reply to a telephone canvass within two business days following actual contact. An agency representative must actually speak with the employee in order for the canvass to be valid.
- The employee returns a canvass letter indicating no interest in a position for any reason.
- The employee fails to appear for an interview or report to work.

Other policies applicable to canvass, interview and job offer responses are described below:

1. An employee is contacted regarding a permanent contingent or permanent appointment to a position at the **same** grade level, in the **same** county in which that employee currently works:
    - If the employee declines the canvass/interview/appointment, the employee is no longer eligible for the ARTL program. The employee's name will be removed from the ARTL for all titles and counties.
    - If the employee is appointed to this position, the employee's name will be removed from the ARTL program.
2. An employee is contacted regarding a permanent contingent or permanent appointment to a position at the **same grade level,** in a **different county** from which that employee currently works:

- If the employee declines the canvass/interview/appointment, the employee is no longer **eligible** for the ARTL program for that county only.

- If the employee is appointed to this position, the employee's name will be removed from the ARTL program.

3. An employee is contacted regarding a permanent contingent or permanent appointment to a **lower grade** position than which that employee currently works:

   - If the employee declines the canvass/interview/appointment, the employee is no longer **eligible** for the ARTL program for **all titles at that salary level and below for all counties.**

   - If the employee is appointed to this lower grade position in the county of the triggering action, the employee's name will remain active on ARTLs for appropriate higher level positions in all counties selected.

4. An employee is contacted regarding a permanent contingent or permanent appointment to a **lower grade** position in a **different county** from which that employee currently works:

   - If the employee declines the canvass/interview/appointment, the employee is no longer **eligible** for the ARTL program for all titles at that grade level and below in all counties within that area, **except** for the county in which the individual currently works. (See the "Employee Guide for Agency Reduction Transfer List" for the listing of "areas.")

   - If the employee is appointed to this lower-level position, the employee's name will remain active on ARTLs for appropriate higher level positions for all counties selected.

5. If an employee accepts or declines a temporary position that is three months or more in duration, the employee will be ineligible for future temporary positions, but **will remain eligible** for permanent positions. If an employee accepts or declines a temporary position that is less than three months duration, the employee will remain eligible for other temporary positions.

6. Employees, who decline jobs which require working a shift other than a normal day shift, **will** remain **eligible** for day-shift jobs.

7. If an employee declines an appointment to a traineeship position that leads to a journey-level title in the same or higher salary grade as their permanent title, they are considered to have declined a same-grade level position.

8. If an employee accepts or declines a part-time position, they will still be considered for full-time positions.

When do ARTL Appointments have to be made?

Appointment from ARTLs must be made on or before close of business on the date of the triggering action. As of close of business on the date of the triggering action, the names of all remaining ARTL eligibles are removed from the Reemployment List System.

Appointments resulting from managed placement referrals must be called in to the CMO by the appointing agency prior to the submission of the NYSTEP transaction, so that staff of the CMO staff can update the Reemployment System.

Where the Triggering Action will result from a Reduction in Force, the following will apply:

Leaves of Absence

Agencies must grant certain leaves of absence in other than probationary situations in order to protect the ARTL appointees' layoff and reemployment rights. While such

leaves are considered discretionary, agencies may not rescind the leaves until the employee's name is inactivated from the ARTL. Non-probationary appointees have no right to return.

Generally, the "losing agency" must grant a leave of absence to any employee who accepts an ARTL appointment to any position at a lower salary grade, until inactivated from the ARTL, regardless of the transferring employee's probationary status. Such leave of absence will ensure the employee's layoff and reemployment rights from the previous, higher-level title.

- Employees not currently on probation who transfer via an ARTL to positions in their current titles do not serve probationary periods and are not given leaves of absence from their former positions.
- Those who transfer via ARTL to positions in lower level direct-line titles do not serve probation but must be granted leaves of absence from their former positions until inactivated from the ARTL.
- Current probationers who transfer to positions in their current titles are required to complete the remainder of their probationary periods, and must be given leaves of absence for the duration.
- Employees transferring to "comparable titles" must serve full probationary periods, which may not be waived, and must be granted leaves of absence for the duration of the probationary period.
- Employees who complete probation in their new, **lower-graded** positions prior to the date of the triggering action must be continued on leave of absence until inactivated from the ARTL.

Ability to Return to a Hold Item

An ARTL transferee on probation, who decides to return to his/her hold item, or fails probation before the date of the triggering action must be allowed to return. If the employee is not the least senior in the original title and agency, the employee's return may impact the retention rights of other employees in the original title and agency. If the employee had the least retention rights in the original title and agency, the employee may be impacted by the triggered action.

An ARTL transferee on probation who decides to return to his**/**her hold item, or fails probation after the date of the triggering action, was not the least senior employee and would not have been impacted in his/her original appointment, must be allowed to return. Another employee with less retention status might be displaced to accommodate the return. If the probationer were the least senior, however, he/she could only return if a position exists to return to. Otherwise, the employee would be entitled to reemployment rights to the position from which he/she transferred.

This Department will review the circumstances of employees who fail probation or resign before completing probation on a case-by-case basis. These employees could be restricted from a reemployment list certification to certain agencies, titles, or locations, depending on the reasons for resignation or termination.

An ARTL transferee who received an appointment at the same level of his/her original position and is not on probation has no right to return. The original agency may choose to reinstate the employee but that action is entirely discretionary on the part of the agency and is subject to the normal reinstatement criteria.

If an ARTL transferee's hold item is not abolished, he/she has no further reemployment rights.

Note: If the action is triggered by anything other than a reduction in force, once the target date for the triggering action is reached, only those employees serving probation at that time will have a hold on their former position.

Special Considerations for ARTL Appointments

- Under certain circumstances, individuals on ARTLs may not be fully qualified for appointment to specific titles which require “special qualifications.” These include titles with physical and/or medical standards, required background checks, completion of specified course work, or possession of certifications or licensure in required areas. For such titles, the appointing agency is required to determine that individuals on ARTLs are fully qualified for appointment. Questions concerning specific situations should be addressed to the Career Mobility Office at (518) 485-6199.

- ARTL and reemployment roster appropriate-title determinations involving traineeship titles often specify appointment eligibility at a particular salary grade level. For example, a Senior Personnel Administrator vacancy may be filled at the Trainee 2 level by an ARTL candidate whose eligibility derives from permanent service as a Senior Budgeting Analyst. While the specified fill level for this type of appointment is Trainee 2, an agency has the option to fill at the Senior level if the ARTL eligible meets the normal criteria for transfer (e.g., via §52.6 or §70.1). Please note that such transactions should be submitted as ARTL appointments, NOT as transfers.

How Do ARTL Eligibles Become Inactive?

Agencies may inactivate titles as they meet their reduction goals. When that happens, the agency is required to notify the CMO and its affected employees in writing that the titles have been inactivated and are no longer ARTL eligible.

The names of ARTL eligibles are continually inactivated by the Department of Civil Service as appointments and declinations occur.

Employees may also inactivate themselves on ARTLs by contacting the CMO.

This Department will automatically inactivate the names of all of an agency's employees on the day of the triggering action, unless the date is extended and the agency requests to leave employees active.

While the ARTL program is voluntary, if a reduction in force occurs, it must be carried out in accordance with Civil Service Laws, Rules and Regulations to determine who will be impacted and who will have mandatory rights following separation. For those employees who have not been appointed from an ARTL and are to be laid off, agencies must submit a Preferred List Form 295.5 (formerly known as a "Green Card") to the CMO at least 20 calendar days in advance of the layoff target date. Laid off employees will be automatically transitioned from the ARTL to the Preferred List/Reemployment Roster system if a Preferred List Form 295.5 has not been received.

What are the NYSTEP Reason Codes for ARTL-Related Activities?

Appointments – the NYSTEP code **TRL** must be used by agencies to report an appointment from an ARTL.

Separations – The NYSTEP reason code **RSN** must be used for those employees who receive an ARTL appointment and do not have to serve a probationary period. **PBL** should be used for probationary employees who receive an ARTL appointment — until such time as the position is abolished or they are displaced from their hold item. At that time, one of the codes described below must be used:

LAF - Separation of the employee from his/her hold item pursuant to Section 80 or Section 80a.

LAD - Layoff of the employee from his/her hold item due to “bumping” by a higher-level employee in the direct promotion line.

LAR - Layoff of the employee from his/her hold item due to the retreat of a higher-level employee.

RFR – Termination of the employee who refuses reassignment across county lines.

Further questions about the ARTL process may be directed to the CMO at 1-800-553-1322 or (518) 485-6199.

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§78. Transfer of personnel upon the abolition of positions in state civil service.

1. Where necessitated by reasons of economy, efficiency, consolidation or abolition of functions, curtailment of activities or otherwise, employees may be transferred, without further examination, from one agency or department of the state, or from the Roswell Park Cancer Institute as defined in subparagraph (i) of paragraph d of section one of chapter forty-one of the laws of nineteen hundred ninety-seven, as amended, to positions in the same title or any comparable title, as determined by the department, in another department or agency of the state. Where more than one employee in the title and location from which transfer is to be made is eligible and willing to accept transfer, the department shall place the names of those employees upon a transfer list, and certify such list for filling vacancies, as hereinafter provided, first, in the same position; second, in any position in a lower grade in line of promotion; and third, in any comparable position. Such transfer list may be certified for filling a vacancy in any such position before certification is made from any other eligible list, placement roster, reemployment or preferred list, except as provided in subdivision four of this section.

2. Order of certification of names from transfer list. a. The names of persons on a transfer list established to fill vacancies in the same position or a position in a

lower grade in line of promotion shall be certified there from in the order of their original appointments, in accordance with the provisions of subdivision three of section eighty, subdivision three of section eighty-a and subdivision seven of section eighty-five of this chapter. b. The names of persons on a transfer list established to fill vacancies in a comparable position shall be certified there from with equal ranking for appointment.

3. Probation. a. Upon appointment to a position in the same title, a probationer shall be required to complete his or her probationary term. b. Completion of a probationary term, to the extent provided for in the rules promulgated by the commission pursuant to subdivision two of section sixty-three of this chapter, shall be required for all appointments to a position in a comparable title.

4. Relative seniority. Where a preferred list exists containing the names of persons who have been suspended or demoted from a position in the same title to which an appointment is to be made, the relative seniority, determined in accordance with the provisions of subdivision three of section eighty, subdivision three of section eighty-a and subdivision seven of section eighty-five of this chapter, of the person certified first on such preferred list willing to accept appointment and the person certified first on the transfer list willing to accept appointment shall be compared and the person with the greater seniority shall be certified first.

5. Termination of eligibility. Eligibility for appointment from a transfer list shall terminate on the date of the suspension, demotion or relocation. Notwithstanding any other provision of this chapter, any employee may voluntarily remove his or her name from a transfer list by application to the department.

6. Rulemaking authority. The president shall adopt rules for carrying into effect the provisions of this section, including rules for the relinquishment of eligibility.

7. The department shall continue to establish lists under the provisions of this section.

Agency Reduction Transfer Lists

THIS SUPERCEDES POLICY BULLETIN #03-02,
AMENDING POLICY STATED ON PAGE 8 OF THAT BULLETIN.

Section 78 of the New York State Civil Service Law offers state employees who might be affected by abolitions of positions the opportunity to transfer to other agencies prior to layoff. This program is commonly known as the Agency Reduction Transfer List (ARTL) program.

Who is Eligible for the ARTL Program?

- This is a voluntary program open primarily to permanent and contingent permanent competitive class employees serving in titles which may be affected by a reduction in force and who are serving in the location (county) where the reduction in force will occur. The program is intended for those employees who are most likely to be affected, but is open to all eligible employees in the affected titles in those locations.
- Permanent non-competitive and labor class employees serving in titles likely to be affected by a reduction in force may also be eligible for ARTL if these employees have completed at least one year of permanent continuous service.
- Exempt class employees are not eligible, nor are non-competitive class employees who are serving in policy-influencing or confidential positions.
- Provisional and temporary employees are not eligible for this program.
- The ARTL program is also available to employees whose positions are relocated to a different county, but who refuse reassignment. It is **not** available for employees who refuse reassignment within the same county.

- The ARTL program is **not** for employees who are affected by a return of incumbent § 4.11 and 4.12 (NYCRR). These employees have reemployment roster and Preferred List rights as described in the State Personnel Management Manual.

How are Eligible Employees Added to ARTLs For Agencies Reducing Positions?

In planning for a reduction, agencies will identify all titles for which an abolition of position(s) is anticipated.

The ARTL program may be initiated up to 6 months prior to the target date for the intended action. Agencies should consult with their Staffing Services Representative or the Civil Service Career Mobility Office (CMO) prior to initiating this process.

Each agency should designate a contact person to oversee the ARTL process. Agencies should also designate an internal contact person to answer questions from their employees about the ARTL program and their status in the system. Agencies should call the Civil Service CMO at (518) 485-6199 or 1-800-553-1322, with the name, telephone number and fax number of their contact person(s).

Agencies should then notify eligible employees in impacted titles and locations that they may volunteer for ARTL transfers. We recommend that agency human resources representatives meet with the eligible employees, explain the ARTL transfer process, and assist the employees in completing "blue cards" (Form S-295.6). Civil Service CMO and Staffing Services Representatives should attend this meeting. At this meeting, employees should be given a copy of the "Employee Guide for Agency Reduction Transfer List" booklet published by the Department of Civil Service.

Completed blue cards must be verified and signed by the agency's human resources designee before being submitted to the CMO staff at Civil Service. The agency should submit a cover letter with the ARTL cards, listing how many cards are included, explaining why the cards are being submitted, and stipulating the expected date of reductions or reassignments. Employees should be encouraged to keep a photocopy of their completed blue cards.

To better assist affected employees who serve in unique titles or who have minimal opportunities to be rehired, we recommend that agencies submit current resumes for these employees to the CMO along with the blue cards. We will use these resumes to identify other reemployment options for these employees.

How Does the ARTL Program Work?

Eligible employees will have their names certified on transfer lists to fill vacant positions in their current titles or in lower-level direct-line titles, and/or to positions in titles declared comparable by the Department of Civil Service. Title comparability decisions are generally based on similarities in duties, minimum requirements, salary grades, and examination plans. Comparable titles for ARTL and Reemployment Roster purposes are generally the same. To view the appropriate titles, check the reemployment determinations in the Title Transfer Reference System (TTRS), which is part of the DCS Applications System.

A second method of transfer is based on an individual's experience and education in relationship to the requirements of the position being filled. While this method is much less frequently used, it can be helpful for employees in unique titles. For consideration, an employee must:

- meet the minimum qualifications for the new position, and
- serve in a position allocated within two salary grade levels (or one M-grade) of the position being filled. (If the position being filled is at a lower grade, the span between grade levels is not restricted.)

Filling Vacancies

An ARTL list is one of a number of Reemployment Lists established to assist employees in maintaining or regaining employment as quickly as possible at their permanent salary grade levels if they are affected by the abolition of positions. These

lists are obtained through the Reemployment Lists Program found in the DCS Applications System.

Reemployment Lists are certified in the following order:

- **Redeployment List** – a mandatory list established pursuant to Section 79 of the Civil Service Law for permanent employees who will be or are suspended or demoted due to "contracting out."
- **Agency Reduction Transfer List (ARTL)** – a mandatory list established prior to the date of layoff containing the names of employees in affected titles at affected locations ranked by seniority who are eligible for transfer to positions in other agencies in their current titles, direct-line lower-level titles, and comparable titles.
- **Preferred List** - a mandatory list established as of the date of layoff containing the names of laid off employees ranked by layoff unit and seniority, for reinstatement to their layoff title and direct-line lower-level titles, and/or other appropriate titles.
- **Reemployment Roster** – a mandatory list established as of the date of layoff containing the names of laid off employees for appointment to titles other than those for which they are eligible for reinstatement from a preferred list. These generally are titles in their former occupational field as determined to be appropriate by the Department of Civil Service. The names are certified in random order without regard to seniority, probationary status, or layoff unit.

Within an ARTL, the specific order of certification will be:

1. title-for-title eligibles
2. direct-line title eligibles
3. comparable title eligibles

Eligible candidates in the title-for-title category and the direct-line category are ranked in seniority order within their respective titles. The eligibles in the comparable title category are not ranked and if there are no acceptors via title-for-title or direct-line, any comparable title eligible can be considered.

ARTL eligibles have preference over Preferred List eligibles except in the following situation: If there are title-for-title Preferred List eligibles, seniority (determined in accordance with §80.3, 80-a.3 and 85.7 CSL) must be compared between the ARTL eligible and the highest ranked Preferred List eligible. Please note that, when making this comparison, layoff unit designation and probationary status play no role for the ARTL eligible. Seniority is the only relevant factor. Also, Preferred List eligibles who are in direct-line or appropriate-titles will not block an ARTL transfer, even if those Preferred List eligibles have greater seniority. Only a title-for-title Preferred List eligible with more seniority may block an ARTL appointment.

If there are no ARTL eligibles, agencies are encouraged to contact the CMO to request candidates for managed placement referrals.

ARTLs and New Eligible Lists

When filling a vacancy, agencies must use the reemployment lists before using eligible lists resulting from examinations. The one exception, regarding newly established eligible lists, is as follows:

Upon the establishment of an eligible list resulting from a competitive examination for a title for which there are ARTL candidates, an appointing authority has 90 days in which to appoint a non-permanent employee in the title who is reachable for appointment from that newly established eligible list.

Thereafter, ARTLs shall take precedence over the eligible lists. Note that this policy applies in the case of newly established eligible lists only.

If newly established eligible lists are exhausted within 90 days, no new provisional appointments or reappointment of provisional employees will be allowed in the face of ARTLs.

How Will Accepting or Declining Job Offers Affect ARTL Eligibility?

Employees' responses to canvasses, interviews, and job offers will affect their continuing eligibility for ARTL transfer. Timeliness, for example, is crucial since the intent of the process is to provide expedient remedy, and what one employee decides may affect the eligibility of others. Replies to canvass must be made within the same timeframes as in the eligible list system. Responses to invitation for interview and/or to a job offer must be made within a reasonable period of time (usually 48 hours unless there are mitigating circumstances, such as a geographic move). **In situations where an agency has difficulty reaching an employee to set up an interview after he/she has indicated an interest, it is appropriate to send the employee a registered letter (return receipt requested) indicating the interview date, time and place.**

Other policies applicable to canvass, interview and job offer responses are described below:

1. An employee is contacted regarding a permanent contingent or permanent **same** grade level position in the **same** county in which that employee currently works.
   - If the canvass/interview/appointment is declined, the employee will be **ineligible** for ARTL transfer in all titles and counties and his/her name will be removed from the ARTL program. (*See note below.)
   - If appointed to this position, the employee's name will be removed from the ARTL program.
2. An employee is contacted regarding a permanent contingent or permanent **same grade level** position in a **different county** from which that employee currently works.
   - If the canvass/interview/appointment is declined, the employee will be **ineligible** for ARTL transfer in that county only. (*See note below.)

- If appointed to this position, the employee's name will be removed from the ARTL program for all counties, including his/her current one.

3. An employee is contacted regarding a permanent contingent or permanent **lower grade** position in the **same county** in which that employee currently works.
   - If the canvass/interview/appointment is declined, the employee will be **ineligible** for ARTL transfer to **all titles at that salary level and below** for **all counties**.
   - If this lower-level appointment in the county of layoff is accepted, the employee will remain active on ARTLs for appropriate higher level positions in all counties selected.
4. An employee is contacted regarding a permanent contingent or permanent **lower grade** position in a **different county** from which that employee currently works.
   - If the canvass/interview/appointment is declined, the employee will be **ineligible** for ARTL transfer for all titles at that grade level and below in all counties within that area, **except** for the county in which the individual currently works. (See the "Employee Guide for Agency Reduction Transfer List" for the listing of "areas.")
   - If this lower-level appointment is accepted, the employee will remain active on ARTLs for appropriate higher level positions for all counties selected.
5. If an employee accepts or declines a temporary position, that is three months or more in duration, that employee will be ineligible for future temporary positions, but **will remain eligible** for permanent positions. If an employee accepts or declines a temporary position that is less than three months duration, however, that employee will remain eligible for other temporary positions.

6. Employees who decline jobs which require working a shift other than a normal day shift, **will** remain **eligible** for day-shift jobs.

*Note: If employees decline ARTL transfer to a traineeship position that leads to a journey-level title with same or higher salary grade as their permanent title, they are considered to have declined a same-grade level position.

ARTL Appointments

The appointment date for ARTL appointments must be on or before the layoff date. As of close of business on the date of layoff, all remaining ARTL eligibles are removed from the ARTL portion of the Reemployment List system.

All appointments resulting from managed placement referrals must be called in to the CMO by the appointing agency prior to the submission of the NYSTEP transaction for the appointment, so the CMO staff can update the Reemployment System.

What about Probation and Leaves of Absence? (revised material in *italics*)

The Department of Civil Service has amended policy regarding leave of absence for transfers via Agency Reduction Transfer Lists. Agencies now must grant certain leaves of absence in other than probationary situations in order to protect the ARTL transferees' layoff and reemployment rights. While such leaves are considered discretionary, agencies may not rescind the leaves until the employees' inactivation from the ARTL. Non-probationary transferees have no rights to return.

Generally, the "losing agency" must grant a leave of absence to any employee who accepts an ARTL transfer to any position at a lower salary grade, until inactivated from the ARTL, regardless of the transferring employee's probationary status. Such leave of absence will ensure the employee's layoff and reemployment rights from the previous higher-level title.

- *Employees not currently on probation who transfer via ARTL to positions in their current titles do not serve probationary periods and are **not** given leaves of absence from their former positions.*
- *Those who transfer via ARTL to positions in lower level direct-line titles do not serve probation but must be granted leaves of absence from their former positions until inactivated from the ARTL.*
- *Current probationers who transfer to positions in their current titles are required to complete the remainder of their probationary periods, and must be given leaves of absence for the duration.*
- *Employees transferring to "comparable titles" must serve full probationary periods, which may not be waived, and must be granted leaves of absence.*
- *Employees who complete probation in their new, **lower-graded** positions prior to the date of layoff must be continued on leave of absence until inactivated from the ARTL.*

Frequent questions and answers about returning to original positions include the following:

Q. What happens if an ARTL transferee on probation decides to return to her hold item (or fails probation) before the date of layoff?

A. She must be allowed to return. If she is not the least senior in her original title, her return may affect the retention rights of other employees in her original title and agency. If she is the employee with the least retention rights in her original title and agency, she may return and be laid off.

Q. What happens if an ARTL transferee on probation decides to return to her hold item (or fails probation) after the date of layoff in her original agency?

A. Again, if she was not the least senior employee and would not have been laid off from her original position, she must be allowed to return to her hold item. Another employee with less retention status might be displaced to accommodate the return.

If the probationer were the least senior, she could only return if a position exists to which she could return. Otherwise, the employee would be entitled to Preferred List/Reemployment Roster rights for the position from which she transferred.

The Department of Civil Service will review the situations of employees who fail probation or resign before completing probation on a case-by-case basis. These employees could be restricted from a reemployment list certification to certain agencies, titles, or locations depending on the reasons for resignation or termination.

Q. What if an ARTL transferee not on probation wishes to return to his original position?

A. That employee has no right to return. The original agency may choose to reinstate the employee but that action is entirely discretionary on the part of the agency and is subject to the normal reinstatement criteria.

Special Considerations for ARTL Appointments

- Under certain circumstances, individuals on Agency Reduction Transfer Lists (ARTLs) may not be fully qualified for appointment to specific titles which require "special qualifications." These include titles with physical and/or medical standards, required background checks, completion of specified course work, or possession of certifications or licensure in required areas. For such titles, the appointing agency is required to determine that individuals on ARTLs are fully

qualified for appointment. Questions concerning specific situations should be addressed to the Career Mobility Office at (518) 485-6199.

- ARTL and Reemployment Roster appropriate-title determinations involving traineeship titles often specify appointment eligibility at a particular salary grade level. For example, a Senior Personnel Administrator vacancy may be filled at the Trainee 2 level by an ARTL candidate whose eligibility derives from permanent service as a Senior Budgeting Analyst and subsequent targeting. While the specified fill level for this type of appointment is Trainee 2, an agency has the option to fill at the Senior level if the ARTL eligible meets the normal criteria for transfer (e.g., via §52.6 or §70.1). Please note that such transactions should be submitted as ARTL appointments, NOT as transfers.

How Do ARTL Eligibles Become Inactive?

Agencies may inactivate titles (and locations) as they meet their reduction goals. When that happens, the agency is required to notify the CMO and its affected employees in writing that the titles have been inactivated and they are no longer ARTL eligible.

The names of ARTL eligibles are continually inactivated by Civil Service because of appointments and declinations.

Employees may also inactivate themselves on ARTLs by contacting the CMO.

The Civil Service Department will automatically inactivate the names of all of an agency's employees on the day of the projected work force reduction, unless the projected date is extended and the agency requests to leave employees active.

Employees whose names are active in the ARTL system are not automatically placed on Preferred Lists as of the date of a reduction in force. While the ARTL program is voluntary, any reduction in force must follow Civil Service laws, rules and regulations to determine who will be impacted and who will have mandatory rights following

separation. Agencies must submit "green cards" (Form 295.5) to the CMO at least 20 calendar days in advance of the layoff target date when employees who have not been transferred are to be laid off.

What are the NYSTEP Reason Codes For ARTL-Related Activities?

Appointments – the NYSTEP code **TRL** must be used by agencies to report an appointment from an ARTL.

Separations – The NYSTEP reason code **RSN** must be used for those employees who receive an ARTL appointment and do not have to serve a probationary period. **PBL** should be used for probationers until such time as the position is abolished or they are displaced from their hold item. At that time, one of the codes described below must be used:

LAF - Separation of the employee from his/her hold item pursuant to Section 80 or Section 80a.

LAD - Layoff of the employee from his/her hold item due to "bumping" by a higher-level employee in the direct promotion line.

LAR - Layoff of the employee from his/her hold item due to the retreat of a higher-level employee.

Further questions about the ARTL process may be directed to the CMO at 1-800-553-1322 or (518) 485-6199. Supplies of the "blue card," the ARTL program informational booklet, and the Reemployment System User's Manual are also available from the CMO.

S 78. Transfer of personnel upon the abolition of positions in state civil service.

1. Where necessitated by reasons of economy, efficiency, consolidation or abolition of functions, curtailment of activities or otherwise, employees may be transferred, without further examination, from one agency or department of the state, or from the Roswell Park Cancer Institute as defined in subparagraph (i) of paragraph d of section one of chapter forty-one of the laws of nineteen hundred ninety-seven, as amended, to positions in the same title or any comparable title, as determined by the department, in another department or agency of the state. Where more than one employee in the title and location from which transfer is to be made is eligible and willing to accept transfer, the department shall place the names of those employees upon a transfer list, and certify such list for filling vacancies, as hereinafter provided, first, in the same position; second, in any position in a lower grade in line of promotion; and third, in any comparable position. Such transfer list may be certified for filling a vacancy in any such position before certification is made from any other eligible list, placement roster, reemployment or preferred list, except as provided in subdivision four of this section.

2. Order of certification of names from transfer list. a. The names of persons on a transfer list established to fill vacancies in the same position or a position in a lower grade in line of promotion shall be certified therefrom in the order of their original appointments, in accordance with the provisions of subdivision three of section eighty, subdivision three of section eighty-a and subdivision seven of section eighty-five of this chapter. b. The names of persons on a transfer list established to fill vacancies in a comparable position shall be certified therefrom with equal ranking for appointment.

3. Probation. a. Upon appointment to a position in the same title, a probationer shall be required to complete his or her probationary term. b. Completion of a probationary term, to the extent provided for in the rules promulgated by the commission pursuant to subdivision two of section sixty-three of this chapter, shall be required for all appointments to a position in a comparable title.

4. Relative seniority. Where a preferred list exists containing the names of persons who have been suspended or demoted from a position in the same title to which an appointment is to be made, the relative seniority, determined in accordance with the provisions of subdivision three of section eighty, subdivision three of section eighty-a and subdivision seven of section eighty-five of this chapter, of the person certified first on such preferred list willing to accept appointment and the person certified first on the transfer list willing to accept appointment shall be compared and the person with the greater seniority shall be certified first.

5. Termination of eligibility. Eligibility for appointment from a transfer list shall terminate on the date of the suspension, demotion or relocation. Notwithstanding any other provision of this chapter, any employee may voluntarily remove his or her name from a transfer list by application to the department.

6. Rulemaking authority. The president shall adopt rules for carrying into effect the provisions of this section, including rules for the relinquishment of eligibility.

7. The department shall continue to establish lists under the provisions of this section.

More On Leaves of Absence Without Pay

Policy Bulletin #98-02 issued December 29, 1998 in this section on the topic *"Leaves of Absence Without Pay"* attempted for the first time to bring together all of the rules, regulations, and contractual language that provide for *mandatory* leaves of absence. It also attempted to provide for the first time some basic principles governing *discretionary* leaves of absence.

The following examples cover some common situations and address some of the questions received since issuing Policy Bulletin #98-02. They are intended to exemplify the basic principles and the application of the criteria in the tables under "*Summary of Mandatory Leaves of Absence by Type of Appointment*" contained in that Bulletin.

An important point about that material: if any situation is not covered by one of the types of appointments, or if the employee being appointed does not meet all the criteria under each column, any leave provided can only be discretionary.

The final section of this bulletin contains some notes and additional information not previously published elsewhere. These are also a result of questions and comments since the publication of #98-02.

Note also that the scope of these policy bulletins is intentionally limited. Only certain kinds of appointments are addressed, and we did not address leaves under the Attendance rules, or leaves required by federal legislation (i.e., FMLA).

This bulletin does not replace Policy Bulletin #98-02, nor does it modify that information. See also Policy Bulletin #94-04, *Leaves of Absence,* December 7, 1994, in this section, which was the first issuance of a discussion of discretionary vs. non-discretionary leaves. Please make a note on those two bulletins to also see this one.

These are examples and cannot be all inclusive. Discuss your specific situations with your Staffing Services Representative.

Situation A -- A permanent **competitive class management/confidential** employee is appointed to a **non-competitive** class position.

1. The employee is not covered by contractual provisions, nor is there any rule or law which requires she be given a leave of absence
2. If the agency does not offer her a discretionary leave of absence and she is terminated during her probationary period, she has no right to return to her former competitive class position.

Situation B — A permanent **competitive class** employee in agency X has been granted a discretionary leave. During this leave the employee **transfers** (his competitive class hold "transfers") **to a different agency, Y.**

1. The original discretionary leave is canceled.

2. The employee is on mandatory leave from his position in agency X as a result of the required probation (if not waived).
3. If agency Y wishes they may grant a new discretionary leave from the position to which the employee transferred.

Situation C — A permanent **competitive class** employee is given a discretionary leave from position C. During this leave the employee is **promoted or transferred** from C to position D, **within the agency**.

1. The promotion or transfer does **not** start a new discretionary leave.
2. The conditions of the original discretionary leave have been altered (with the consent of the employee in that she accepted the promotion or transfer) in that the employee is now on discretionary leave from position D for the time remaining in her original two years.
3. The employee is also on mandatory leave from position C for the probationary period required by the promotion or transfer.

SITUATION D -- A permanent **non-competitive** class employee is given a discretionary leave from position D. During this leave the employee is appointed to a **different non-competitive class position E, within the agency**.

1. The appointment does **not** start a new discretionary leave.
2. The conditions of the original discretionary leave have been altered (with the consent of the employee in that she accepted the appointment) in that the employee is now on discretionary leave from position E for the time remaining in her original two years.
3. Whether or not the employee is entitled to a mandatory leave from D while serving probation in E depends on whether she is a CSEA employee, on whether position E is at the same or a higher salary grade, and whether E is in the same agency. See the criteria under the table *"Permanent Appointment to a Non-Competitive Class Position"* in Policy Bulletin 98-02.

Situation E — A permanent **competitive** class employee has been granted a discretionary leave to serve in **exempt** class position E within his agency. During this leave he is appointed to **different exempt** class position, F, **within the agency**.

1. The appointment does **not** start a new discretionary leave.
2. The original conditions of the discretionary leave have not been changed.

Situation F -- A permanent **competitive** class employee has been granted a discretionary leave to serve in exempt class position F within her agency. During this leave she is appointed on a temporary basis (the only kind of appointment permitted) to a **different position**, G, which is **"temp pending Commission review"** for placement in the exempt class.

1. Because position G is pending Commission review it is competitive and since the employee is in the competitive class and the appointment is temporary and within her agency Rule 4.10 applies requiring a mandatory leave.
2. The mandatory leave interrupts the discretionary leave, but does not obviate it. Once the position is declared exempt the "clock re-starts" but the end date of the two years has to be altered to reflect the interruption. The employee does not get a new two years.

Situation G — A permanent competitive class employee in agency X has been granted a discretionary leave to serve in an exempt class position in agency Y. **During this leave he is terminated and requests to return to his position.** However, agency X says 'No' and tells the employee he may not return until the leave expires. On that date the employee returns to his competitive class position. The employee is immediately permanently appointed to non-competitive class position G.

1. The agency incorrectly told the employee he could not return. Although discretionary leaves are "contractual" in nature and their conditions may be changed only by mutual consent, since the employee was terminated he **must** be allowed to return before the date that was originally agreed upon.
2. In spite of the termination, the time spent out of pay status, and the appointment to G (a different position in a different jurisdictional class) this is **not** a new discretionary leave. If the agency wishes to continue him on leave at the end of two years they must request an extension from the Commission.

Situation H — A permanent **competitive** class employee in position H (represented by **CSEA**) has her position **reclassified to the non-competitive class**. The employee is appointed to the **"pending non-competitive"** (actually competitive) position temporarily (the only status permitted) until the Commission acts. There are no vacant positions in her former title.

1. Rule 4.10 requires she be given a leave for the duration of the temporary appointment.
2. Since there is no position available in her former title, the reclassified position is annotated as being her "hold item" for her former title, jurisdictional class and status. (See ***Notes & Additional Information*** below)
3. The employee has her name placed on the appropriate reemployment list(s) for her former title, but is restricted to her agency.

Subsequently, the position is approved as non-competitive. Since the employee was represented by CSEA in her former title she must be given a leave of absence for the duration of her probationary period that begins when she is permanently appointed. She completes this successfully and at that time is granted a discretionary leave. (Again this is an annotation made to document her former title, JC and status.) Prior to the end of her two years of discretionary leave her current position is once again reclassified, this

time to the exempt class. Again the employee is appointed **temporarily to the "pending"** position:

1. Rule 4.10 only requires a leave of absence when a **competitive** employee is appointed on a temporary basis to a **competitive** class position. Therefore this latest appointment does not provide her with any right to a mandatory leave. However, the agency must grant her a discretionary leave to document her former title, status and jurisdictional class. (See ***Notes & Additional Information*** below)
2. Again the employee's name is placed on the appropriate reemployment list(s). Note, however, that even if the non-competitive class position was policy influencing, she would be entitled to reemployment list status because of her former competitive class status.
3. When the position is placed in the exempt class and the employee is appointed permanently she has only whatever time is left of her original two years before the agency must request an extension from the CS Commission.

Notes and Additional Information

- **The meaning of "usually" in Policy Bulletin #98-02:** In the introduction to this complex topic we made some summary statements. Given that the topic of leaves of absence is addressed several places in the civil service law and rules, as well as in other related laws and the individually negotiated contracts (which are not consistent), and further, that the current language is not always as concise as it could be, words like "usually" and "generally" are necessary when setting out the basic concepts that cover the majority of situations.
- **Non-competitive positions:**
  - **55 b/c positions** - the contracts and rules do not distinguish among "regular" non-competitive and 55-b/c positions. Therefore, these latter are included where ever the non-competitive class is mentioned. Note however that it is the policy of the state, as enumerated in Policy Bulletin #87-01 in 1805 (B) in this manual, that where permanent 55-b/c appointees are given subsequent appointments to other 55-b/c positions, such employees must be given a leave of absence from their 55-b/c positions until they have satisfactorily completed probationary service.
  - **policy influencing positions** - Rule 4.5 does not distinguish between "policy influencing" and "non-policy influencing" positions so its provisions must be applied to both.
- **Appointments to positions pending Commission review:** When a position is classified it is in the competitive class until the Commission and Governor act to place it in another jurisdictional class. (However, in the non-competitive and labor classes, the Commission may designate that "all" positions in a title are in

the particular jurisdictional class, and, therefore when a new position is classified it is immediately in that jurisdictional class. For example, all positions of "Laborer" are in the labor class without additional action by the Commission and the Governor.) After the Commission acts the position is considered "pending non-competitive" or "pending exempt," etc. as a shorthand way of keeping track of the status. But, in fact, the jurisdictional class does not change from competitive until the entire administrative process is complete and the resolution is filed with the Department of State. Therefore, a permanent competitive class employee appointed to such a pending position, or an incumbent whose position has been reclassified, may, if the position is in the same department or agency, fall under the provisions of Rule 4.10 and be entitled to a leave of absence.

- **Review of Vacant Exempt Class Positions:** When an exempt class position becomes vacant it is reviewed by the Commission. A permanent competitive class or non-competitive class employee who may be appointed on a temporary basis to this position during this period is not covered by Rule 4.10 or negotiated agreements and therefore any leave granted from their position must be discretionary. When the Commission approves the continuation of the position in the exempt class, and the employee is appointed permanently and serving a probationary period, this is similarly not covered and the leave continues to be discretionary.
- **Leaves for Probationers:** There exists the myth that anytime a permanent employee must serve a probationary period that he must be given a leave of absence for the duration. In fact, whether the leave is mandatory or discretionary depends on the specifics of the employee's situation. Rule 4.5 (e) provides for leaves for the duration of the probationary period for employees who are **promoted** or **transferred**. This mandates leaves primarily for competitive class employees, but includes those non-competitive class employees who are defined as being **promoted** by section (a)(2) of the same rule. Other employees may or may not be covered by contractual provisions.
- **Appointments vs. Reclassifications:** Employees can accept or refuse appointments. One of the factors which may affect their decision is whether they are being given a leave. However, reclassifications are involuntary, and even though no rule or contract may require a leave, if the reclassification has impacted a permanent employee's tenure or promotion rights and no position is available from which to grant the employee a leave, the employee's reclassified position must be annotated to indicate former title, status and jurisdictional class for purposes identifying retention and promotion rights. In NYSTEP this requires an "E" encumbent transaction which must be entered by the Special Transactions Unit in Employment Records. Agencies must provide this information by either e-mail or FAX to Julie Dominion at Employment Records. The FAX number is 518-457-5497; e-mail is jcd@mail3.cs.state.ny.us.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Policy Bulletin #97-01
2200 Separations and Leaves June 20, 1997

Title Comparability Determinations for Reemployment Lists

The following is a new statement and explanation of policy on title comparability and certification for the purposes of reemployment.

THIS BULLETIN REPLACES POLICY BULLETINS 96-01, 96-02 WHICH SHOULD BE DISCARDED.

This policy unifies the standard for comparisons made to determine title comparability for primary redeployment lists, reemployment rosters, placement rosters and transfer lists. It also restates the policy on preferred list title comparability. This bulletin replaces all extant policy statements on comparability determinations established pursuant to Civil Service Law §§78, 79, 81, 81-a, and 81-b.

General Policy on Comparisons of Titles, Selection Plans, Qualifications, Duties and Responsibilities

In order to meet the requirements and intent of the Civil Service Law, Rule and Regulations, and to certify that individuals are eligible for appointments to positions in the classified service, the Department of Civil Service must make comparisons among titles and, for the competitive class, must also make comparisons among selection plans.

Factors Analyzed When Making ALL Comparability Decisions

Regardless of the type of list, the following factors are considered:

- the tasks and activities typically performed by incumbents in the target titles
- the essential knowledges, skills and abilities required for successful performance of the duties and responsibilities for the target titles
- the selection plans which have been or may be used to fill the target titles, including:
  - * minimum qualifications for admission to examinations
  - * types of tests, their contents and difficulty
  - * the on-the-job training, or orientation, or formal training required for completion of the probationary period
- titles found comparable for transfer pursuant to §70.1

Comparability Policy for Reemployment Lists

1. The standard for title comparability will be the same for reemployment roster (§81-a), ARTL transfer (§78), redeployment list (§79) and placement roster (§81-b) determinations except as noted below.
   Comparable titles shall be those in which the eligibles are likely to be able to successfully perform the required duties and responsibilities within a reasonable period of time after a standard period of orientation and training, as determined by analysis of the factors listed above. In order to mitigate the impact of position abolitions or movement, these determinations shall be as broad as possible. Moreover, since a

probationary period is required for almost all of these appointments, determinations should be made with a presumption in favor of inclusion when analysis discloses a similarity in the factors listed above. In this regard, similarity need not be found for every factor as long as the analysis suggests overall comparability exists. Competitive class titles may be certified to non-competitive and labor class titles, but not the reverse.

2. In determining comparable titles for preferred list certification, only those titles in the same jurisdictional class in which all employees in the layoff title are likely to be able to fully perform, with limited orientation, the essential duties and responsibilities of the positions in the titles being filled shall be declared comparable. The necessary degree of similarity in the factors for comparison for redeployment list, reemployment roster, placement roster and ARTL transfer list certification shall be less than the degree of similarity required for preferred list comparability.

General Description of the Titles Determined to be Comparable for the Various Types of Reemployment Lists

Preferred lists (§81) -- must include same title, and for the competitive class, direct line promotion titles (if any). Except in rare cases where there is a very high degree of similarity between two titles, the "other" titles mentioned in the law should be comparable on a reemployment roster basis.

Redeployment lists (§79) -- must include same title and comparable titles at the same or a similar level. Because of provisions for salary protection, the intent is to redeploy affected employees to positions in their title or to titles at similar grade levels. Thus, redeployment determinations will generally be made to titles within one organizational level (or within five salary grades, if one organizational level is less than five salary grades) below that of the impacted title. Where that would result in few or no redeployment opportunities, lower level titles will be considered.

Agency Reduction Transfer Lists (ARTLs) (§78) -- must be same title, direct line, and all comparable titles deemed comparable for reemployment roster certification.

Reemployment rosters (§81-a) -- may **not** be title to title or direct line lower level titles, but will include all other titles deemed comparable at all levels.

Placement rosters (§81-b) -- have been expanded to include the same titles as ARTLs and Reemployment rosters.

Certification

Employees may potentially be certified to all grade levels for which their comparable titles exist for preferred lists, ARTLs, reemployment rosters and placement rosters. Because individual employees may be unwilling to accept positions at lower levels, Civil Service will ask employees to designate the lowest grade level to which they would accept employment, and will certify based on their choices.

Other Considerations

- Specialists, including parenthetics, can be certified to generalist positions but generalists may not, in all cases, be appropriate to certify for specialist positions.
- Titles with language parenthetics should be comparable to fill the same titles as their non-language parenthetic counterparts.
- A managerial or supervisory layoff title may be comparable to fill another title at a similar level in a different agency or program when the occupation is found in both places, such as financial or information management, and does not require extensive knowledge of agency-specific programs or operations.
- A program management or higher-level professional title may be certified against other agencies' program titles at the journey level, but not to higher levels where these require extensive program expertise and knowledge of agency operations, and/or where incumbents must supervise and train subordinates in program operations, and/or where they must make substantial contributions to policy development.
- Managers and directors of multiple function program areas are generally presumed appointable to lower level positions in all those program areas.

REEMPLOYMENT ROSTER
APPROPRIATE TITLE DETERMINATIONS

The purpose of this bulletin is to describe the policies and procedures this Department uses to determine the titles for which employees will be eligible when their names are certified on a reemployment roster.

This bulletin is being issued at this time to provide a context for Policy Bulletin #95-03 and Policy Bulletin #96-01 in this section which contain information on the recent legislation and contractual language which implemented redeployment lists for those employees affected by the State's contracting out for services and the process for determining the titles appropriate for *Redeployment List* certification.

When agencies identify employees who may be affected by abolition of positions, or reductions pursuant to §80 or §80-a, they are required by §81-a to notify this Department of the names, titles, etc. of the employees at least 20 days prior to the date of layoff. At that time agencies should also provide any suggestions they may have relevant to the titles for which these employees may be eligible for reinstatement from a preferred list, or appointment from a reemployment roster.

Reemployment roster titles are intended to supplement the *Preferred List* determinations (i.e., title-for-title, direct line, and other closely related titles) for which laid off employees are eligible for reinstatement in seniority order without a probationary period.

Generally the titles considered appropriate for reemployment roster certification are those in the same occupational field in which:

1. eligibles perform similar tasks, and activities, and have similar critical duties and responsibilities, and
2. based upon a comparison of duties, tests and qualifications, eligibles can be expected to satisfactorily perform the required duties and responsibilities of the suggested title after a standard period of orientation and training.

Because there will likely be a range of employee performance in their new titles, seniority is not a relevant factor, and a standard period of probation for evaluation is provided.

REDEPLOYMENT LIST
APPROPRIATE TITLE DETERMINATIONS

Policy Bulletin #95-03 in this section contains information on the recent legislation and contractual language which implemented redeployment lists for those employees affected by the State's contracting out for services.

Policy Bulletin #96-02 in this section describes *"REEMPLOYMENT ROSTER APPROPRIATE TITLE DETERMINATIONS,"* and should be read as a contextual companion piece to this bulletin.

The purpose of this bulletin is to describe the policies and procedures this Department will use to determine the titles for which employees will be eligible when their names are certified on a redeployment list.

When agencies identify functions which may be contracted out, and the titles of employees potentially affected, they should contact their Staffing Services Representative to discuss and suggest titles which may be appropriate for preferred lists, reemployment rosters, and redeployment lists. The unions representing these employees should follow a similar procedure when suggesting possibly comparable titles.

The Department will then determine which titles will be considered appropriate for redeployment list certification. Generally, appropriate titles will be a "subset" of those titles which are determined to be appropriate for preferred list and reemployment roster certification, where:

1. the tests, qualifications or duties of the affected and suggested titles are substantially equivalent, and,
2. eligible's current title and the suggested title require a similar level of authority and responsibility.

Determinations will be as broad as possible within this context.

Where there have been layoffs previously in a title, the Department will simultaneously review preferred list and reemployment roster title decisions, and any new or additional titles identified as appropriate for redeployment list certification will be added.

A primary redeployment list eligible will not be certified to fill a title which is neither preferred list nor reemployment roster appropriate.

Secondary redeployment: -- In the event the Department determines there is little potential for the individual to be appointed from a primary redeployment list, the individual may be placed on special reemployment rosters for filling titles for which they are individually qualified.

REDEPLOYMENT LISTS

As a result of the recent agreements negotiated with CSEA, PEF, and DC 37 and implementing legislation, permanent State employees who will be or are suspended or demoted as a result of "contracting out" have a number of additional rights. These rights were also extended to management/confidential employees through legislation. Contractual Article 22 rights were also extended to non competitive and labor class employees who are permanent but have not met the one year length of service contract tenure requirement. Included among these rights are preference for reemployment in titles designated to be filled from **Redeployment Lists**, and salary protection for persons appointed from **Redeployment Lists**. These rights apply only to individuals with permanent status in the positions that are being abolished because of the contracting out.

Attached is a copy of the legislation which adds a new Section 79 to the Civil Service Law to provide for these lists. Also attached is a sample **Redeployment List Canvass Letter** (8/95) which agencies must reproduce and use.

TITLES FILLED BY REDEPLOYMENT LISTS

Redeployment lists will be used to fill positions in the same title or any comparable titles, as determined by the Department of Civil Service. Generally, the titles that will be appropriate will be some of the same titles for which eligibles will also be certified to fill from Preferred Lists and/or Reemployment Rosters. The contractual commitment is for the Department of Civil Service to be solely responsible for establishing the Redeployment List and making the appropriate title comparability determinations.

HOW AGENCIES ARE INFORMED THAT THERE ARE REDEPLOYMENT LIST ELIGIBLES

A new category has been added to the "CRIF" screen which agencies can access to find out if there are redeployment eligibles for a given title and location. The topmost category displayed is now "Redeployment List." It is at the top because Section 79 requires that Redeployment Lists take precedence over Preferred Lists and other reemployment lists. The new screen displays the number of Redeployment List eligibles for a title and location, if any. Redeployment list eligibles will be certified along with the Preferred List and other reemployment list eligibles as follows:

1. Redeployment List: Rule of One - the first listed acceptor must be appointed or the position left vacant;
2. Preferred List: Rule of One - the first listed acceptor must be appointed or position left vacant;
3. Reemployment Roster: Rule of the List - any acceptor may be appointed or the position left vacant [Note: Secondary redeployment eligibles will be interfiled on Reemployment Rosters, see below];
4. Placement Roster: Rule of the List - any acceptor may be appointed or the position left vacant.

The names of individuals on Redeployment Lists will be certified in the order of their original permanent appointment in the classified service adjusted for breaks of service of

more than one year, but not adjusted for veterans status. Unlike Preferred Lists, where variables such as layoff unit, probationary status, and direct-line title designation affect the order of certification, Redeployment Lists will be certified strictly by seniority as described above, with modifications only for bargaining unit preference. After the seniority order names of those from the bargaining unit, all other names follow in seniority order. For example, redeployment opportunities for positions designated as ASU, ISU or OSU will first be offered to affected employees represented by CSEA. Redeployment opportunities for PEF designated positions will be offered first to affected employees represented by PEF. Similar preference will be given to employees represented by DC 37, and to Management/Confidential employees in filling positions designated as management/confidential.

Agencies should request all reemployment lists, including Redeployment Lists, by calling our List Request Line at (518) 457-7683

PROBATIONARY REQUIREMENTS FOR APPOINTMENT FROM REDEPLOYMENT LISTS

For eligibles appointed from a Redeployment List to the title from which they were laid off, and who were not on probation at the time of layoff, there will be no probationary period. Appointees on probation when laid off must serve only the remainder of their probationary period.

Appointees to a title other than the title of layoff must serve the appropriate probationary period.

SALARY PROTECTION

Appointees from a Redeployment List will receive no less than their salary at the time of layoff.

EFFECT OF FULL TIME PERMANENT AND CONTINGENT PERMANENT APPOINTMENT OR DECLINATION FROM A REDEPLOYMENT LIST

APPOINTMENTS

Eligibles appointed from the Redeployment List will have their names inactivated on the Redeployment and Preferred Lists, and Reemployment Rosters for other titles at that salary grade and below. Their names will remain active on the Redeployment and Preferred Lists and Reemployment Roster for appropriate titles at higher salary grades. Eligibility for appointment from the Redeployment List ends six months after the eligible's separation from their title or when the eligible is appointed to a position at the same salary grade as the title from which he or she was laid off. Eligibility for appointment from the Preferred List and Reemployment Roster lasts up to four years but ends upon appointment to a position at the same salary grade as the title of layoff.

DECLINATIONS

Individuals appointed from a Redeployment List have salary protection. **Therefore, a declination of an offer of appointment at any salary grade will be treated as a**

declination of appointment to the same grade as the title of layoff. The individual's county of layoff and county of residence for the purpose of redeployment is determined at the time they are initially activated in the redeployment system and will not change.

If eligibles decline permanent or contingent permanent appointment from a Redeployment List in their county of layoff or county of residence, they lose all Contractual Article 22 protections and benefits, including salary protection, and are removed from the Redeployment List. Their names will also be inactivated on all other reemployment lists for any title at the same salary grade or lower than the title that they declined.

If eligibles decline a permanent or contingent permanent appointment from any Redeployment List for a county other than their county of layoff or county of residence, their names will not be certified for future Redeployment List appointments in that county. Their names will also be inactivated on all other reemployment lists for that county for any title at the same salary grade or lower than the title they declined.

DURATION OF REDEPLOYMENT LIST ELIGIBILITY

Affected employees will have their names added to the Redeployment List at least 90 days prior to suspension or demotion. Eligibility for Redeployment List appointment ends no later than 6 months following the date of separation resulting from contracting out. These employees will continue to have Preferred List and Reemployment Roster rights for up to 4 years from the date of suspension or demotion.

DoB REVIEW/APPROVAL TO FILL THE POSITION

Agencies filling positions with individuals appointed from a Redeployment List must receive prior approval from the Division of the Budget. Specifically, agencies must reach agreement with their budget examiners on the specific positions authorized to be filled via Redeployment Lists.

PROCESSING PAYROLL TRANSACTIONS

OSC has issued a payroll bulletin P-865 dated August 15, 1995, detailing the transaction code agencies are to use in appointing individuals to positions in which they will have salary protection due to appointment from a Redeployment List. The transaction code will be "REDEPLOY". Agencies must return the Redeployment List to Civil Service indicating the appointment prior to submitting a payroll form PR-75.

SECONDARY REDEPLOYMENT

Section 79 of the Civil Service Law also provides for secondary redeployment opportunities for affected employees, for filling positions where the employee meets the essential tests and qualifications. Individuals who qualify for a secondary redeployment opportunity will have their names interfiled on the **Reemployment Roster** for that title. Redeployment eligibles who are appointed from a Reemployment Roster **do not** have salary protection, and will be required to complete the normal probationary term.

QUESTIONS

If you have questions on this material, please write the Reemployment Services Section, New York State Department of Civil Service, Building 1, State Office Campus, Albany NY 12239, or call (518) 457-9392.

§79 . Establishment of redeployment lists in the state service; general provisions.

1. Primarily [sic, this should read "primary"] redeployment.

a. Where, and to the extent that, an agreement between the state and an employee organization entered into pursuant to article fourteen of this chapter so provides upon notification to the department that an employee in the state service is to be suspended or demoted in accordance with the provisions of section eighty or eighty-a of this article by reason of the state's exercise of its right to contract out for goods and services and receipt of the information required pursuant to section eighty-one-a of this article for purposes of establishing reemployment rosters at least ninety days prior to the suspension or demotion of an affected employee, the department shall place the name of the employee upon a redeployment list. Such redeployment list shall be certified for filling positions in the same title or in any comparable title, as determined by the department, before certification is made from any other eligible list, placement roster, reemployment roster or preferred list. The director of state operations is authorized to redeploy such employees to positions in appointing authorities of the executive branch. The department may extend the right to be placed on a redeployment list in accordance with the provisions of this section, to employees not subject to the provisions of such agreement.

b. Orders [sic] of certification of names from a redeployment list. The names of persons on a redeployment list shall be certified therefrom for appointment in the order of their original appointments, in accordance with the provisions of subdivision three of section eighty and subdivision three of section eighty-a of this article.

c. Salary upon redeployment. A person appointed from a redeployment list shall receive at least the same salary such person was receiving in the position from which he or she is to be or has been suspended or demoted.

d. Probationary term. Probationers who are appointed from a redeployment list to a position in the same title will be required to complete their probationary term. Employees who are appointed from a redeployment list to a position in a comparable title shall be required to complete a probationary term in accordance with the rules promulgated by the commission pursuant to subdivision two of section sixty-three of this chapter.

e. Termination of eligibility for appointment. Eligibility for appointment of an employee whose name appears on a redeployment list shall terminate at such time as the employee is redeployed pursuant to the provisions of this section to a position in the same salary grade as the position from which he or she has been suspended or demoted or has exercised his or her reemployment rights pursuant to the provisions of section eighty-one or eighty-one-a of this article, provided, however, that eligibility for appointment shall terminate no later than six months following the suspension or demotion of such employee in accordance with the provisions of section eighty or eighty-a of this article. Upon such employee's suspension or demotion, the department shall place the name of such employee upon a preferred list, and a reemployment roster, as appropriate, in accordance with the provisions of sections eighty-one and eight-one-a of this article.

f. Notwithstanding any other provision of this chapter, any employee may voluntarily remove his or her name from a redeployment list by application to the department.

2. Secondary redeployment. a. In the event the department determines, in accordance with the provisions of subdivision one of this section that there are no positions in the same title or any comparable title which an employee to be suspended or demoted by reason of the state's exercise of its right to contract out for goods and services can be redeployed, the department may place the name of such employee on a special reemployment roster, for filling positions in titles for which the employee meets the essential tests and qualifications. Such special reemployment roster may be certified immediately upon the employee's placement on the roster for filling a position before certification is made from any other eligible list, including a promotion eligible list, but not prior to a redeployment list or preferred list.

b. Termination of eligibility. Eligibility for appointment of an employee whose name appears on special reemployment roster shall not continue for a period longer than four years from the date of suspension or demotion provided, however, that eligibility for appointment of an employee whose name appears on any such special reemployment roster shall terminate at such time as the employee is redeployed pursuant to the provisions of this section and in no event, shall eligibility for appointment from a special reemployment roster continue once the employee is no longer eligible for reinstatement from a preferred list.

c. Employees placed on a special reemployment roster in accordance with the provisions of this section, shall have all the rights and privileges provided employees placed on reemployment rosters in accordance with section eighty-one-a of this article.

3. Rulemaking authority. The commission shall adopt rules for carrying into effect the provisions of this section, including rules providing for the relinquishment of eligibility for appointment upon appointment or upon failure or refusal to accept appointment from a redeployment list. Additionally, notwithstanding any inconsistent provision of law, rule, or regulation, an agreement between the state and an employee organization recognized or certified pursuant to article fourteen of this chapter can provide employment security rights and benefits where the state has exercised its right to contract out for goods and services. The commission upon receipt of a written request of the director of employee relations is authorized to implement provisions of such agreement consistent with the terms thereof and, to the extent necessary, may adopt rules and regulations providing for the benefits to be thereunder provided. The commission, with the approval of the director of the budget, may extend such benefits in whole or in part, to state employees excluded from collective negotiating units.

LEAVES OF ABSENCE

Non-discretionary, or required leaves, and their conditions, are covered by Rule 4.5, and 4.10 and by negotiated agreements. Generally the terms and conditions and duration of these leaves can only be modified as follows:

1. Probationers who request restoration prior to the end of their leave must be restored (Rule 4.5);
2. Employees who have been temporarily or provisionally appointed to another competitive class position in their agency must be restored upon request (Rule 4.10);
3. Contingent permanent employees who are affected by return of a prior permanent incumbent must be offered restoration with permanent status to their hold items, or to positions identified for this purpose (Rules 4.11 and 4.12).

It is important to note that the changes announced in Policy Bulletin #94-03 concerning the rights of "contingent" permanent employees apply to Rule 4.5, *Probation,* and Rule 4.10, *Temporary, provisional, or trainee appointment or promotion of permanent employee.* Employees appointed "contingent" permanent and given a mandatory leave pursuant to these rules do not have the same rights to return to a hold item as a **permanent** (i.e., not appointed under Rule 4.11 or 4.12) employee. As a result of these changes the "contingent" permanent employee's right to return depends on having **more seniority** than any "contingent" permanent incumbent who may be currently serving in a position in that title in the location.

SEE ALSO ADVISORY MEMORANDUM #94-11 IN 1800 AND 2200, AND POLICY BULLETIN #94-03 IN 1810 OF THIS MANUAL

Discretionary leaves and their duration are governed primarily by Rule 5.2. Employees may be granted discretionary leaves for a variety of reasons, including, for example, to serve in an exempt class position or to continue to serve in a position in another agency after a required probationary period. Generally, the terms of these leaves can be modified only by mutual agreement, with the exception that employees on discretionary leave to serve in another position in the State service must be restored upon request.

Employees who have a right to be restored and employees who are requesting restoration must give the appropriate personnel office adequate notice (usually two weeks). Employees do not have rights to be restored **to a specific item**. Rather, they have rights to their former title and appointment status. The appointing authority designates to which item the employee will return. Where the hold item has been moved to another geographic location (i.e., county) and the returning employee refuses to relocate, his or her name will be placed on a reemployment list provided they are otherwise eligible.

Extensions of leaves of absence may be granted by the Civil Service Commission for discretionary leaves beyond two years. Such extensions must be requested at the time of the expiration of the leave. Where a discretionary leave of absence has lapsed but the employee

has continued in state service, "hold" rights may be re-established either by reinstating the employee and simultaneously granting a new leave to the position in which they have been serving, or, where the lapse is six months or less, by requesting approval for a retroactive extension of the original lapsed leave of absence.

The six month cutoff is based on the assumption that either an administrative error has occurred or that, due to the scheduling of Commission meetings, the request was not made on a timely basis.

The intent of Rule 5.2 (c) is to prevent agencies from usurping the Commission's prerogative in granting extensions of leaves. We interpret Rule 5.2 (c) to have the following results:

1. If a discretionary leave is about to expire or has expired within the last 6 months, the agency may:
   (a) request an extension from the Civil Service Commission if the employee is to continue on discretionary leave, or
   (b) return the employee to a position in their former title for less than 6 months, then request an extension from the Civil Service Commission, or
   (c) return the employee to a position in their former title for 6 months or more and then grant the employee a new discretionary leave.

2. If a discretionary leave expired more than 6 months ago, the agency may reinstate the employee to a position in their former or an appropriate title and grant a new discretionary leave.

CHANGES IN HOLD ITEMS

The guiding principle to understanding the above is that leaves are **from** a title/status/agency [and not necessarily from a specific item in APPS] and not **to** a specific position, or necessarily to any position at all.

Employees may have their hold rights changed to a different position in the same title/agency, or via voluntary transfer or other permanent appointment, to a position in a different title/agency while they continue in their current positions. However such changes may affect their leave rights.

Changes in appointing authority cancel discretionary leaves granted by the former appointing authority. The new appointing authority may then grant a new discretionary leave. (Of course the employee may now also have a non-discretionary leave pursuant to Rule 4.5 or 4.10 or negotiated agreements from a hold item in the former appointing authority.)

Changes in title within an appointing authority do not interrupt a discretionary leave or change its end-date. (Of course the employee may now **also** have a non-discretionary leave pursuant to Rule 4.5 or 4.10 or negotiated agreements.)

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
Policy Bulletin #93-02
2200 Separations and Leaves May 12, 1993

This Policy Bulletin is a re-issuance of Policy Bulletin #90-02, issued July 5, 1990, which it replaces. A topic on the Americans with Disabilities Act has been added (see p. 6). The orginal sample notification letters have been revised to include reference to the ADA and a fourth letter, to be used upon denial of a request to be restored to duty, has been added. In other respects this bulletin remains unchanged.

SEPARATION FOR OCCUPATIONAL DISABILITY AND SUBSEQUENT REINSTATEMENT
Procedures for §71 — Rule 5.9

Background

The State Legislature granted security in employment to certain classes of State employees during good conduct and efficient service by enacting §75 of the Civil Service Law. Disciplinary proceedings under that section were the sole means of abrogating that right of tenure. The Legislature, over the years, enacted §§71, 72, and 73, to provide more humane procedures to abrogate that right of tenure in cases where a medical condition causes inability to perform the essential duties of the job.

The State Court of Appeals and the United States Supreme Court have held that a leave of absence, imposed by the employer, either without pay, or with pay dependent on the employee's expenditure of an accrued leave account balance, is a sufficient infringement of the property right in employment granted by Civil Service Law §75 as to trigger a right to due process in any proceeding to diminish that property right. Voluntary leave can become involuntary leave when one is prevented by the employer from returning to duty. The courts have also held that an employee cannot be held to the requirement to exhaust administrative procedures, unless the employee is first advised that they exist and provided notice of time limits and other technical requirements.

It must also be understood that §§71, 72, and 73 do not grant tenure to employees who do not have tenure under §75 or an applicable collective bargaining agreement.

It is in that framework that the new Rule 5.9 was drafted, not to establish new procedural requirements, but to inform State agencies of presumably acceptable minimum standards of procedure as those standards have evolved in the courts over the past decade.

Legal Basis

Section 71 provides that covered employees shall be entitled to a leave of absence for at least one cumulative year (unless found to be permanently disabled) when disabled due to an occupational injury or disease as defined in the Workers' Compensation Law. This section then goes on to authorize reinstatement procedures following recovery from the disability for a person whose public employment was terminated because that disability exceeded a cumulative year or for a person whose employment terminated because of a finding of permanent disability. It gives little procedural guidance. There has been no change in this section of law; rather, Rule 5.9 was adopted to provide procedural guidance in connection with the granting of leave, return to duty during the course of that leave, termination of employment, and reinstatement to employment pursuant to §71. Section 71 Civil Service Law and Rule 5.9 relate to workers' compensation disabilities only. Sections 72 and 73 of the Civil Service Law provide for leave, termination and associated standards of due process for proceedings in connection with ordinary disability. They are not interchangeable.

Applicability

Rule 5.9 applies to all employees subject to §71 of the Civil Service Law. This includes all State employees within the classified service, including probationers. The only limitation on that inclusion is that the rights and procedures of §71 do not serve to extend employment beyond the point at which it would otherwise lawfully end. For example, an unsatisfactory probationer could be terminated without resort to these procedures, if the required minimum eight weeks of active employment under Rule 4.5 of the Rules for the Classified Service had already expired. Similarly the employment of a temporary or provisional employee is not extended by §71 beyond the point it would otherwise lawfully end. The appointing authority should be mindful, however, of the prohibition in the Workers' Compensation Law against any form of retaliation against an individual for prosecuting a claim under that law.

Summary of Changes

The major changes effected by Rule 5.9 include:

- an initial notice requirement no later than the 21st day of absence from work (cumulative total of 21 workdays);
- notice of pending termination at least 30 days prior to the proposed effective date of termination;
- procedures for resolving disputes concerning fitness for duty in connection with alleged permanent disability, return from leave, or reinstatement following termination under §71.

Initial Notice Requirement

Rule 5.9(b) requires that no later than the 21st workday of the employee's absence, the appointing authority provide written notice of the terms and conditions of the leave to the employee who is granted leave due to an on-the-job injury or illness. Specifically, this notice must contain the following information:

- beginning date of the leave;
- entitlement to absence for at least one cumulative year during continuing disability unless sooner found to be permanently disabled, or terminated for some other lawful reason;
- entitlement to apply to the appointing authority for return to duty at any time during leave;
- entitlement to a hearing to contest a finding of unfitness for restoration to duty during leave pursuant to Rule 5.9(d);
- termination of employment at the end of the workers' compensation leave which is one cumulative year unless extended by the appointing authority or ended earlier due to a finding of permanent disability;
- entitlement to apply to the Department of Civil Service for reinstatement following termination but within one year of the end of the disability, including entitlement to a hearing to contest a finding of unfitness for reinstatement pursuant to §71 and Rule 5.9(e).

Notice of Pending Termination

Except where termination occurs as the result of a hearing, the appointing authority is required to provide an employee with at least 30 days' notice of the effective date of the proposed termination. The notice should not be served more than 60 days before the proposed termination date. Such notice may be served in person or by mail and must include the following information:

- the effective date of the proposed termination;
- the reason for the termination (e.g., a finding of permanent disability, completion of a cumulative year of absence, etc.);
- entitlement to apply before the proposed termination date for restoration to duty if found medically fit;
- obligation to submit to any required medical examinations;
- entitlement to a hearing to contest a finding of unfitness for restoration to duty pursuant to Rule 5.9(d);
- entitlement after termination to apply to the Department of Civil Service for reinstatement within one year of the end of disability, including entitlement to a hearing to contest a finding of unfitness for reinstatement pursuant to §71 and Rule 5.9(e).

While not required by the Civil Service Law, it would be good practice to include a suggestion in this notice, and in the final notice of termination, that the disabled employee contact the Employees' Retirement System promptly to determine whether an application for disability retirement is appropriate. There are short time limits for such applications that are rigidly applied.

Return from Leave

An employee may request to return from leave at any point during the leave, including during the 30-day period following notice of proposed termination. However, the appointing authority need not entertain such requests more frequently than once every six months except that one such application must be acted on in any event if submitted during the final 30 days of workers' compensation leave. The appointing authority may permit return to work based solely on its own internal criteria which may include medical documentation provided by the employee.

Alternatively, the appointing authority may require that the employee be examined by a physician designated by the appointing authority, such as the Employee Health Service, prior to allowing return to work. Where a medical examination is required, the appointing authority must provide both the examining physician and the employee with a statement of the employee's regularly assigned duties. An employee found fit to perform these duties by the examining physician shall be returned to duty. Where the designated physician finds an employee unfit for duty, the appointing authority, based upon consideration of all information available, may permit the employee to return to duty in accordance with his/her request or may deny the return to work.

An employee who has been denied return to work or found to be permanently disabled shall be provided written notice of that decision. This written notice must be delivered in person or by certified mail and must include the following information:

- the reason for the decision;
- entitlement to a hearing to appeal the decision;
- the procedures and time limits to apply for a hearing;
- a copy of the medical report and any other records on which the decision is based.

The employee has ten working days to appeal in writing. If the employee does not appeal, the workers' compensation leave continues until the expiration of such leave or until the employee makes another application to return to duty. Upon expiration of one year of leave, or upon an unappealed finding of permanent disability, the employee may be separated from service. (An employee can submit a written application to return to duty once every six months, or, in the discretion of the appointing authority, more frequently, and in any event during the final 30 days of the workers' compensation leave.)

If the employee appeals the denial of return to work or finding of permanent disability, a hearing officer appointed by the appointing authority will conduct a hearing. The

employee may be represented by an attorney or an authorized union representative. The hearing officer shall receive documents, testimony, written and oral argument on the issues of the medical condition of the employee, the duties of the position and the employee's ability to perform those duties. The hearing officer shall submit the record and recommendations to the appointing authority, who shall, based on the record assembled by the hearing officer, issue a written finding of facts and a determination regarding the employee's status. The employee may be returned to duty, continued on workers' compensation leave, or terminated upon a finding of permanent disability. Appointing authority determinations are final, subject only to judicial review under Article 78 of the Civil Practice Law and Rules.

In cases where the workers' compensation leave expires before the appointing authority has rendered a decision, and the delay was not occasioned by any action or inaction of the employee, the leave must be extended to include the date of the appointing authority's decision.

Notice of Termination

Upon termination, the employee must once again be notified of the right after termination to apply to the Department of Civil Service for reinstatement within one year of the end of disability, including entitlement to a hearing to contest a finding of unfitness for reinstatement. It also would be good practice to include a suggestion that the employee contact the Employees' Retirement System promptly to determine whether an application for disability retirement is appropriate. There are short time limits for such applications, which are rigidly applied.

Reinstatement Following Termination

Section 71 of the Civil Service Law provides that an employee terminated under that section who subsequently recovers at any time following termination has one year from the date the disability ceases to make application to the Department of Civil Service for reinstatement. Employees found medically fit to return to duty shall be reinstated or placed on a preferred list in accordance with that section.

Rule 5.9 establishes detailed procedures in connection with such reinstatement requests, which may not be made more than once every six months.

When the Department of Civil Service receives an application from a former employee for reinstatement, Civil Service will request from the former agency a statement of duties regularly required of employees in the title to which reinstatement is requested.

If receipt of that statement of duties would unduly delay the process, the Department of Civil Service will use the classification standard for the title. The Department of Civil Service will in turn provide to the former employee a copy of this statement of duties, along with notice of the date, time and place of the medical examination. Following the medical

examination, the Department of Civil Service will notify the former employee by certified mail of the findings of the examining physician.

A former employee who is found by the examining physician to be fit to return to duty will be reinstated or placed on a preferred list in accordance with §71.

A former employee who is found unfit to return to duty will be notified by the Department of Civil Service of the right to apply in writing to the President of the Civil Service Commission, within ten days of service of the notice of the results of the medical examination, for a hearing.

If the former employee applies for a hearing, a hearing officer appointed by the Department of Civil Service will conduct a hearing. The former employee may be represented by an attorney or an authorized union representative. The hearing officer shall receive documents, testimony, and written and oral arguments on the issues of the medical condition of the former employee, the duties of the position, and the former employee's ability to perform those duties. The hearing officer shall submit the record and recommendations to the President of the Civil Service Commission who shall issue, based on the record assembled by the hearing officer, a written finding of facts and a determination either directing or denying the reinstatement.

The former employee may accept the President's determination or may file a written request within 30 days of service of that determination for review by the Civil Service Commission. The Commission's review is limited to the issue of manifest error and is based solely on the written record. The Commission's decision is final, subject to judicial review under Article 78 of the Civil Practice Law and Rules.

Americans with Disabilities Act: Reasonable Accommodation

Title I of the Americans with Disabilities Act (ADA) requires employers to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability to enable such employee to perform the essential duties of their position. The obligation to provide reasonable accommodation applies to all aspects of employment, including separations and leaves, and is ongoing, arising any time an employee's disability changes.

While the Technical Assistance Manual on Title I of the ADA issued by the Equal Employment Opportunity Commission notes that, in general, it is the responsibility of the employee to request an accommodation, it also provides that employers are responsible for notifying employees of its obligation to provide reasonable accommodation. Therefore, the Sample Notification Letters provided in this policy bulletin have all been revised to reflect the language required by the ADA.

Sample Notification Letters

The following sample letters meet the informational requirements of Rule 5.9. You should personalize these letters as appropriate. For example, you may want to include expressions of concern about the injury and the employee's condition, information about impact on insurances and other benefits, information on agency procedures, including return to work procedures, etc. Alternatively, you should feel free to substitute your own letters provided they contain the same information included in the sample letters.

Sample Initial Notification

(to be sent before the expiration of 21 cumulative workdays of absence)

Dear :

You have been placed on workers' compensation leave effective ——(DATE)——.

You have a right to a leave of absence from your position during your disability for one cumulative year or until sooner found to be permanently disabled, or terminated for some other reason. For specific information regarding workers' compensation benefits, please refer to the employee contract for your bargaining unit, or consult with this office.

You also have the right to apply for return to duty at any time during this leave; but this agency does not have to process more than one application in any six month period. In the event that you are scheduled for a medical examination to verify your fitness to return to duty and it is determined that you are not fit to return to duty, you have the right to a hearing to contest that finding. If you are found fit for duty by this agency, your leave will be terminated, and you will be scheduled to return to work.

If you do not return to work prior to the expiration of your workers' compensation leave, your employment can be terminated as a matter of law. You have the right thereafter to apply to the Department of Civil Service within one year of the end of your disability for a medical examination to determine your fitness to return to work. If you are fit to return to work, we will consider you for reinstatement to your position, if vacant, or to a similar position. If you cannot be reinstated at that time, your name will be placed on a preferred list pursuant to §71 of the Civil Service Law and Rule 5.9 of the Rules for the Classified Service.

As required by the Americans with Disabilities Act (ADA), it is the policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability, as defined by the ADA, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office for an application for requesting such an accommodation or for further information concerning the ADA.

If you have any questions regarding the above, please contact this office by telephone at ——(PHONE)——.

REPLACED-SEE ADVISORY MEMO 09-04

Sample Notice of Pending Termination

(to be sent at least 30 and no more than 60 days prior to proposed termination date)

Dear :

Pursuant to §71 of the Civil Service Law and Rule 5.9 of the Rules for the Classified Service, your workers' compensation leave will end, and your employment will terminate on ——(DATE)——due to——(REASON,E.G.,FINDINGOFPERMANENTDISABILITY/COMPLETIONOF ONECUMULATIVEYEAR,ETC.)——.

You have the right to apply to this office prior to that date for restoration to duty if you are medically fit to perform the duties of your position. If you apply, you may be required to submit to a medical examination to determine your fitness. If the examining physician finds that you are not fit, you have the right to a hearing to contest that finding pursuant to Subdivision (d) of Rule 5.9 of the Rules for the Classified Service. If you are found fit for duty by this agency, your leave will be terminated, and you will be scheduled to return to work.

After the termination of your employment, you have the right to apply to the Department of Civil Service within one year of the end of your disability for a medical examination to determine your fitness to return to work. If you are fit to return to work, we will consider you for reinstatement to your position, if vacant, or to a similar position. If you cannot be reinstated at that time, your name will be placed on a preferred list pursuant to §71 of the Civil Service Law and Subdivision (e) of Rule 5.9 of the Rules for the Classified Service.

As required by the Americans with Disabilities Act (ADA), it is the policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability, as defined by the ADA, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office for an application for requesting such an accommodation or for further information concerning the ADA.

You may wish to contact the Employees' Retirement System by calling or writing the New York State Employees' Retirement System, The Alfred E. Smith State Office Building, Albany, New York 12244, phone (518) 474-7736, to determine your eligibility for various retirement benefits, including accidental disability retirement. You should do so as soon as possible in order to avoid possible ineligibility due to lateness.

If you have any questions regarding the above, please feel free to contact this office at ——(ADDRESS,PHONE)——.

Sample Notice of Refusal to Restore to Duty

(to be sent to an employee upon denial of a request to be restored to duty)

Dear :

Pursuant to §71 of the Civil Service Law and Rule 5.9(d) of the Rules for the Classified Service, your request for restoration to duty from your workers' compensation leave is being denied based on the results of the medical examination conducted by (EXAMINING PHYSICIAN) on (DATE), which found that you are (unfit to return to duty at this time) or (permanently incapacitated from performing the duties of your position).

You have the right to a hearing to contest this determination. You have the right to be represented at the hearing by an attorney or a representative of your labor organization. To request a hearing, you must apply in writing to this office at (ADDRESS,PHONE) within 10 working days of service of this letter. A copy of the medical report on which this determination is based is enclosed. (ANY OTHER RECORDS ON WHICH THE REFUSAL TO RESTORE TO DUTY WAS BASED SHOULD ALSO BE INCLUDED).

As required by the Americans with Disabilities Act (ADA), it is policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability, as defined by the ADA, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office at the address noted above for an application for requesting such an accommodation or for further information concerning the ADA.

If you have any questions, please feel free to contact this office at — ADDRESS —, — PHONE —.

Sample Notice of Termination

(to be sent following termination)

Dear :

Your workers' compensation leave ended and your employment with this agency ended effective close of business on ——(DATE)——due to ——(REASON)——.

If you recover from your disability in the future, you have the right under Section 71 of the Civil Service Law and Rule 5.9 of the Rules for the Classified Service, to apply to the New York State Department of Civil Service within one year of the end of your disability for a medical examination to determine your fitness to return to work. If you are fit to return to work, we will consider you for reinstatement to your position, if vacant, or to a similar position. If you cannot be reinstated at that time, your name will be placed on a preferred list.

Your application for medical examination may be addressed to the New York State Department of Civil Service, Employee Health Service, The W. Averell Harriman State Office Building Campus, Albany, New York 12239.

If you are not found medically fit for return to duty by the Department of Civil Service, you have the right to a hearing to contest that finding.

As required by the Americans with Disabilities Act (ADA), it is the policy of this agency to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified employee with a disability. If you are an individual with a disability, as defined by the ADA, you may be entitled to an accommodation to enable you to perform the essential duties of your position. If you believe you would be able to perform the duties of your position with a reasonable accommodation, please contact this office for an application for requesting such an accommodation or for further information concerning the ADA.

You should consider contacting the Employees' Retirement System by calling or writing the New York State Employees' Retirement System, The Alfred E. Smith State Office Building, Albany, New York 12244, phone (518) 474-7736, to determine your possible eligibility for various retirement benefits, including accidental disability retirement. If you intend to do so, you should act promptly.

If you have any questions, please feel free to contact this office at ——(ADDRESS, PHONE)——.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE
STATE PERSONNEL MANAGEMENT MANUAL
POLICY BULLETIN # 91 - 03
2200 Separations and Leaves May 30, 1991

LOSS OR SUSPENSION OF NECESSARY LICENSE OR CERTIFICATION

We have reviewed the procedures that we have recommended agencies follow when they discover that a tenured employee has lost the license or certification which is either required by law for a specific title, or required to lawfully perform a substantial and essential duty of the position.

Contrary to what we said in 1982, when an agency wants to remove an employee who has lost, or had suspended, any necessary license or certification, and who is entitled to tenure pursuant to Section 75 of the Civil Service Law (or an applicable collective bargaining agreement) the agency must prosecute the employee under §75 or the appropriate contractual article for incompetence.

To support discharge or suspension, the agency will be required to prove that:

1. there has been a loss or suspension of license or certification and,
2. the license or certification is required for the lawful or effective performance of an essential duty of the position.

An agency may, in its discretion, temporarily appoint such an employee to another title, or permit the employee to remain temporarily in the same title until the license or certification can be regained. **However, if an employee is reassigned to limited or special duties for any considerable period, it may be difficult to prove the essential nature of the license/certification in any subsequent proceedings under §75 or the appropriate collective bargaining agreement.**

Note further that:

- permanent competitive employees may be removed pursuant to §50 of the Civil Service Law if, at the time of hire, they lacked the necessary license/certification;
- employees who are **not** entitled to tenure as a matter of law or contract, who lose a required license/certification, may be removed in the same manner as would occur with any non-tenured employee,
- probationary employees who lose a required license/certification may be terminated without a hearing after the end of the eighth week of their probationary period.

As a matter of good practice, it is strongly advised that agencies tell **any** employee, even a non-tenured employee, that it is the agency's belief that a necessary license or certification has been lost; and that the employee be given a reasonable opportunity to demonstrate that the license or certification is still in effect, or assert any other relevant defense. Agency personnel offices should work closely with their labor relations representatives when these situations arise.

File this material in the section of the manual referenced above.

TO: All Personnel Officers

SUBJECT: Revision of Section 72 of the Civil Service Law

On July 20, 1983, Governor Cuomo signed Chapter 561 of the Laws of 1983. This chapter amends Section 72 of the Civil Service Law which governs involuntary leave for disability other than that resulting from occupational diseases or injuries.

Essentially, the amendment has two purposes. First, it extends the coverage of Section 72 to physical disability. Before it, disciplinary proceedings, under Section 75 or appropriate articles of the negotiated agreements, were the only avenues available to place an employee on involuntary leave for physical disability.

More important, this new Section 72 enjoins upon appointing authorities certain steps and timetables which courts have identified as fundamental due process requirements (see our March 18, 1980 memo to all agencies regarding **Laurido**). Failure to observe the rules set out in Section 72 has previously led to reversal of a number of agency suspension actions against workers, the payment of lost wages and restoration of benefits. We therefore suggest that agencies discuss all Section 72 cases with the Department of Civil Service's Counsel's Office before proceeding.

Due Process Procedures
Civil Service Law, Section 72.1*

Specifically, Section 72 provides:

1) Except as described in (2) below, before an agency an agency can place an allegedly mentally or physically unfit employee on leave of absence, the following procedures must be followed within the noted times:

Procedure	Timing
a) Written notice to employee and Civil Service Commission of appointing authority's judgment of inability to perform duties. This notice should set forth all the facts which form the basis for the agency's judgment that the employee is unable to perform his or her duties.	Begins process and must be given to employee prior to conduct of medical examination.

*In cases where no precise time limit is specified for completion of a procedure, due process nonetheless requires that it be handled expeditiously.

File this material in the section of the manual referenced above.

b)	Agency request to Employee Health Service to schedule medical examination (EHS should be notified that it is in connection with a §72 proceeding).	
c)	Medical determination as to fitness sent by Employee Health Service to employee and agency.	
d)	Written notice to employee of agency intent to place employee on leave (including statement of reason(s) for proposed leave, proposed effective date and employee's rights under this procedure; served in person or by first class, registered or certified mail, return receipt requested).	
e)	Employee appeal to agency (filed personally or by first class, certified or registered mail, return receipt requested). Leave suspended pending appeal.	Must be filed within 10 working days of service of notice of agency intent.
f)	Agency provides EHS with copy of appeal. provides agency with all data supporting certification of unfitness (diagnoses, test results, observations, etc.) which must be transmitted to employee or representative.	Upon receipt of request to appeal.
g)	Due process hearing conducted by mutually agreed upon independent hearing officer. (If parties are unable to agree, the hearing officer must be selected by lot from a list established by the Department of Civil Service.) Employee has right to be represented by counsel or recognized employee organization and may present medical experts and other witnesses. Burden of proof is on person alleging unfitness. Technical rules of evidence shall not be followed. Record of hearing and recommendations to be provided to employee and to agency. Upon request, employee is to be given free copy of transcript.	Must be afforded within 30 calendar days of recept of appeal.
h)	Written notice to employee of agency's final decision with notice of right to appeal to Civil Service Commission.	Within 10 working day of receipt of hearing officer's report, *but no later than 75 calendar days from receipt of appeal.

*See Chapter 547 of the Laws of 1984

File this material in the section of the manual referenced above.

1) Pursuant to Section 72.3, leave begins even if an appeal is taken.

2. Subdivision 5 permits the appointing authority to place an employee on immediate involuntary leave of absence where there is probable cause to believe that the employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with agency operations. Employees are entitled to all of the due process procedures described above, although they may be removed from the work-place before the process begins or at any time during the process. Notice to the employee of the facts providing the basis for the appointing authority's judgment of unfitness should be given, ideally, within 48 hours after placing the employee on immediate involuntary leave but in no event more than 10 calendar days following the effective date of such leave. (Although the appointing authority must be able to support its reasons for invoking subdivision 5, this need not be separately stated in the initial notice.) An employee placed on immediate involuntary leave is entitled to the restoration of any leave credits charged or salary lost because of such involuntary leave if the employee is ultimately found to be mentally and physically fit. The restoration of salary is subject to reduction by any compensation earned in other employment and by any unemployment benefits received.

3. An employee on leave of absence pursuant to Section 72 is entitled to be considered on such leave for not less than one year (during which time use of available leave credits is permitted). The employee may apply to the Civil Service Department for a medical examination and must be reinstated if the medical officer certifies that the employee is physically and mentally fit to perform the duties of his or her position. (Note that in the event action is taken pursuant to Section 72.4 by the appointing authority to terminate the employee as provided in Section 73, the reinstatement provisions of Section 73 apply.)

A copy of the legislation is attached for your information.

(NOT ATTACHED)

Karen S. Burstein
President, Civil Service Commission

Attachment

File this material in the section of the manual referenced above.

TO: All Personnel Officers

SUBJECT: Revision of Section 72 of the Civil Service Law

On July 20, 1983, Governor Cuomo signed Chapter 561 of the Laws of 1983. This chapter amends Section 72 of the Civil Service Law which governs involuntary leave for disability other than that resulting from occupational diseases or injuries.

Essentially, the amendment has two purposes. First, it extends the coverage of Section 72 to physical disability. Before it, disciplinary proceedings, under Section 75 or appropriate articles of the negotiated agreements, were the only avenues available to place an employee on involuntary leave for physical disability.

More important, this new Section 72 enjoins upon appointing authorities certain steps and timetables which courts have identified as fundamental due process requirements (see our March 18, 1980 memo to all agencies regarding Laurido). Failure to observe the rules set out in Section 72 has previously led to reversal of a number of agency suspension actions against workers, the payment of lost wages and restoration of benefits. We therefore suggest that agencies discuss all Section 72 cases with the Department of Civil Service's Counsel's Office before proceeding.

Due Process Procedures
Civil Service Law, Section 72.1*

Specifically, Section 72 provides:

1) Except as described in (2) below, before an agency can place an allegedly mentally or physically unfit employee on leave of absence, the following procedures must be followed within the noted times:

Procedure	Timing
a) Written notice to employee and Civil Service Commission of appointing authority's judgment of inability to perform duties. This notice should set forth all the facts which form the basis for the agency's judgment that the employee is unable to perform his or her duties.	Begins process and must be given to employee prior to conduct of medical examination.

* In cases where no precise time limit is specified for completion of a procedure, due process nonetheless requires that it be handled expeditiously.

File this material in the section of the manual referenced above.

b) Agency request to Employee Health Service to schedule medical examination (EHS should be notified that it is in connection with a §72 proceeding).	
c) Medical determination as to fitness sent by Employee Health Service to employee and agency.	
d) Written notice to employee of agency intent to place employee on leave (including statement of reason(s) for proposed leave, proposed effective date and employee's rights under this procedure; served in person or by first class, registered or certified mail, return receipt requested).	
e) Employee appeal to agency (filed personally or by first class, certified or registered mail, return receipt requested). Leave suspended pending appeal.	Must be filed within 10 working days of service of notice of agency intent.
f) Agency provides EHS with copy of appeal. EHS provides agency with all data supporting certification of unfitness (diagnoses, test results, observations, etc.) which must be transmitted to employee or representative.	Upon receipt of request to appeal.
g) Due process hearing conducted by mutually agreed upon independent hearing officer. (If parties are unable to agree, the hearing officer must be selected by lot from a list established by the Department of Civil Service.) Employee has right to be represented by counsel or recognized employee organization and may present medical experts and other witnesses. Burden of proof is on person alleging unfitness. Technical rules of evidence shall not be followed. Record of hearing and recommendations to be provided to employee and to agency. Upon request, employee is to be given free copy of transcript.	Must be afforded within 30 calendar days of receipt of appeal.
h) Written notice to employee of agency's final decision with notice of right to appeal to Civil Service Commission.	Within 10 working days of receipt of hearing officer's report,* but no later than 75 calendar days from receipt of appeal.

*See Chapter 547 of the Laws of 1984

File this material in the section of the manual referenced above.

i) Pursuant to Section 72.3, leave begins even if an appeal is taken.

2. Subdivision 5 permits the appointing authority to place an employee on immediate involuntary leave of absence where there is probable cause to believe that the employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with agency operations. Employees are entitled to all of the due process procedures described above, although they may be removed from the work-place before the process begins or at any time during the process. Notice to the employee of the facts providing the basis for the appointing authority's judgment of unfitness should be given, ideally, within 48 hours after placing the employee on immediate involuntary leave but in no event more than 10 calendar days following the effective date of such leave. (Although the appointing authority must be able to support its reasons for invoking subdivision 5, this need not be separately stated in the initial notice.) An employee placed on immediate involuntary leave is entitled to the restoration of any leave credits charged or salary lost because of such involuntary leave if the employee is ultimately found to be mentally and physically fit. The restoration of salary is subject to reduction by any compensation earned in other employment and by any unemployment benefits received.

3. An employee on leave of absence pursuant to Section 72 is entitled to be considered on such leave for not less than one year (during which time use of available leave credits is permitted). The employee may apply to the Civil Service Department for a medical examination and must be reinstated if the medical officer certifies that the employee is physically and mentally fit to perform the duties of his or her position. (Note that in the event action is taken pursuant to Section 72.4 by the appointing authority to terminate the employee as provided in Section 73, the reinstatement provisions of Section 73 apply.)

A copy of the legislation is attached for your information.

Karen S. Burstein
President, Civil Service Commission

:achment

New York State Department of Civil Service

THE STATE OFFICE BUILDING CAMPUS • ALBANY, NEW YORK 12239

M E M O R A N D U M

TO: All State Departments and Agencies

FROM: Office of Counsel
Department of Civil Service

SUBJECT: Leave for Disability--Section 72 Civil Service Law

DATE: March 18, 1980

Section 72 of the Civil Service Law authorizes an appointing authority to place an employee on leave of absence if, upon medical examination, a medical officer certifies that the employee is not mentally fit to perform the duties of his position. An employee on such leave is entitled to use all available leave credits in connection with such determination.

Federal courts have held that Section 72 of the Civil Service Law did not provide for "due process," which resulted in the courts viewing the placement of persons on such leave as unconstitutional.

In a recent decision, Judge Haight of the U. S. District Court, Southern District of New York, set forth certain procedures which, if followed, would overcome the criticism of the courts with respect to due process. The order of the court provided that the State is enjoined from placing employees on involuntary leave of absence based on a finding of mental unfitness to perform the duties of the position unless prior thereto the following procedures are accorded the employee:

1. Written notice of the facts relied upon by the appointing authority to suggest that the employee is not mentally fit to perform the duties of his or her position, in advance of the employee's examination by an Employee Health Services Unit physician.

2. Written notice of the Employee Health Services Unit physician's findings.

3. Written notice of the appointing authority's determination respecting involuntary leave, and the reasons and facts in support thereof.

4. Written notice of the employee's right to appeal the appointing authority's determination, and the procedures for perfecting such appeal.

5. Pre-hearing release to the employee or his or her authorized representative of the employee's medical records and related data, upon written request of the employee, or the employee's personal physician or attorney, where authorized.

6. Upon timely request, an adversarial-type hearing, before an impartial decision-maker, at which hearing the employee may be represented by counsel and may present evidence on his or her own behalf.

7. Written notice of the hearing decision, together with a statement of the reasons and facts relied upon in support thereof.

In addition, the court recognized that there might be compelling circumstances which would require the immediate suspension of an employee for the safety of the employee, the employee's co-workers, or the public, or for the proper conduct of business. The court indicated that under such circumstances, while an immediately pre-hearing leave of absence may be directed, the procedure described above must be provided within a reasonable time thereafter. The court also indicated that should the employee succeed in reversing the initial determination, reinstatement together with back pay and the restitution of leave credits would be required.

Although this may be further refined by the court, agencies are advised that they should provide for the notice and hearing described above in connection with a determination by an appointing authority to place an employee on leave pursuant to Section 72 of the Civil Service Law. We shall advise you if there are any substantive changes in this regard.

If you have any questions concerning the procedures to be followed in this regard, please contact the undersigned, 457-7659, for additional information.

Harvey Randall

STATE OF NEW YORK

5924

1983-1984 Regular Sessions

IN SENATE

April 26, 1983

Introduced by Sens. SCHERMERHORN, FLYNN -- (at request of the Department of Civil Service) -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the civil service law, in relation to determining whether an employee is unable to perform the duties of his or her position because of disability

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section seventy-two of the civil service law, as added by chapter two hundred twenty-five of the laws of nineteen hundred sixty-nine, is amended to read as follows:

§ 72. Leave for ordinary disability. 1. When in the judgment of an appointing authority an employee is unable to perform the duties of his or her position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the [workmen's] workers' compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. Written notice of the facts providing the basis for the judgment of the appointing authority that the employee is not fit to perform the duties of his or her position shall be provided to the employee and the civil service department or commission having jurisdiction prior to the conduct of the medical examination. If, upon such medical examination, such medical officer shall certify that such employee is not physically or mentally fit to perform the duties of his or her position, the appointing authority [may place] shall notify such employee that he or she may be placed on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor. Such notice shall contain the

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

LBD09644-03-3

reason for the proposed leave and the proposed date on which such leave is to commence, shall be made in writing and served in person or by first class, registered or certified mail, return receipt requested, upon the employee. Such notice shall also inform the employee of his or her rights under this procedure. An employee shall be allowed ten working days from service of the notice to object to the imposition of the proposed leave of absence and to request a hearing. The request for such hearing shall be filed by the employee personally or by first class, certified or registered mail, return receipt requested. Upon receipt of such request, the appointing authority shall supply to the employee, his or her personal physician or authorized representative, copies of all diagnoses, test results, observations and other data supporting the certification, and imposition of the proposed leave of absence shall be held in abeyance until a final determination is made by the appointing authority as provided in this section. The appointing authority will afford the employee a hearing within thirty days of the date of a request by the employee to be held by an independent hearing officer agreed to by the appointing authority and the employee except that where the employer is a city of over one million in population such hearing may be held by a hearing officer employed by the office of administrative trials and hearings. If the parties are unable to agree upon a hearing officer, he or she shall be selected by lot from a list of persons maintained by the state department of civil service. The hearing officer shall not be an employee of the same appointing authority as the employee alleged to be disabled. He or she shall be vested with all of the powers of the appointing authority, and shall make a record of the hearing which shall, with his or her recommendation, be referred to the appointing authority for review and decision and which shall be provided to the affected employee free of charge. A copy of the transcript of the hearing shall, upon request of the employee affected, be transmitted to him without charge. The employee may be represented at any hearing by counsel or a representative of a certified or recognized employee organization and may present medical experts and other witnesses or evidence. The employee shall be entitled to a reasonable period of time to obtain such representation. The burden of proving mental or physical unfitness shall be upon the person alleging it. Compliance with technical rules of evidence shall not be required. The appointing authority will render a final determination within ten working days of the date of the hearing. The appointing authority may either uphold the original proposed notice of leave of absence, withdraw such notice or modify the notice as appropriate. In any event, a final determination of an employee's contest of a notice of leave shall be rendered within seventy-five days of the receipt of the request for review. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his or her credit. The appointing authority in the final determination shall notify the employee of his or her right to appeal from such determination to the civil service commission having jurisdiction in accordance with subdivision three of this section.

2. An employee placed on leave pursuant to subdivision one of this section may, within one year after the date of commencement of such leave of absence, or thereafter at any time until his or her employment status is terminated, make application to the civil service department or municipal commission having jurisdiction over the position from which such employee is on leave, for a medical examination by a medical of-

ficer selected for that purpose by such department or commission. If, upon such medical examination, such medical officer shall certify that such employee is physically and mentally fit to perform the duties of his or her position, he or she shall be reinstated to his or her position.

3. An employee who is certified as not physically or mentally fit to perform the duties of his or her position and who is placed on leave of absence pursuant to subdivision one of this section, or who is denied reinstatement after examination pursuant to subdivision two of this section, may appeal from such determination to the state or municipal civil service commission having jurisdiction over his or her position. Such [commission may conduct such inquiry as it deems necessary or desirable, and shall provide for a medical examination of such employee, which shall be conducted by a medical officer designated by the commission who shall not be the same medical officer who examined the appellant under subdivision one or two in connection with the determination under appeal. - If the commission finds that the determination appealed from is arbitrary or unreasonable, it shall direct the reinstatement of such] employee and appointing officer or their representatives shall be afforded an opportunity to present facts and arguments in support of their positions including medical evidence at a time and place and in such manner as may be prescribed by the commission. Provided however, that in considering appeals pursuant to subdivision two of this section where a hearing has not been held within nine months from the date of notification pursuant to subdivision one of this section, the commisssion shall designate an independent hearing officer who shall hold a hearing and report thereon. The commission shall make its determination on the basis of the medical records and such facts and arguments as are presented to it. The final determination of the commission shall be binding on both the employee and the appointing authority; provided, however, that an employee or appointing authority may seek review of a final determination of a commission in accordance with the provisions of article seventy-eight of the civil practice law and rules.

4. If an employee placed on leave pursuant to this section is not reinstated within one year after the date of commencement of such leave, his or her employment status may be terminated in accordance with the provisions of section seventy-three of this article.

5. Notwithstanding any other provisions of this section, 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 or her credit. If such an employee is finally determined not to be physically or mentally unfit to perform the duties of his or her position, he or she shall be restored to his or her position and shall have any leave credits or salary that he or she may have lost because of such involuntary leave of absence restored to him or her less any compensation he or she may have earned in other employment or occupation and any unemployment benefits he or she may have received during such period.

§ 2. This act shall take effect immediately.

STATE OF NEW YORK

8613

IN SENATE

March 22, 1984

Introduced by Sen. SCHERMERHORN -- (at request of the Department of Civil Service) -- read twice and ordered printed, and when printed to be committed to the Committee on Civil Service and Pensions

AN ACT to amend the civil service law, in relation to the issuance of final determinations in employee disability cases

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision one of section seventy-two of the civil service law, as amended by chapter five hundred sixty-one of the laws of nineteen hundred eighty-three, is amended to read as follows:

1. When in the judgment of an appointing authority an employee is unable to perform the duties of his or her position by reason of a disability, other than a disability resulting from occupational injury or disease as defined in the workers' compensation law, the appointing authority may require such employee to undergo a medical examination to be conducted by a medical officer selected by the civil service department or municipal commission having jurisdiction. Written notice of the facts providing the basis for the judgment of the appointing authority that the employee is not fit to perform the duties of his or her position shall be provided to the employee and the civil service department or commission having jurisdiction prior to the conduct of the medical examination. If, upon such medical examination, such medical officer shall certify that such employee is not physically or mentally fit to perform the duties of his or her position, the appointing authority shall notify such employee that he or she may be placed on leave of absence. An employee placed on leave of absence pursuant to this section shall be given a written statement of the reasons therefor. Such notice shall contain the reason for the proposed leave and the proposed date on which such leave is to commence, shall be made in writing and served in person or by first class, registered or certified mail, return receipt requested, upon the employee. Such notice shall also inform the employee of his or her rights under this procedure. An employee shall be

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

LBD14779-01-4

allowed ten working days from service of the notice to object to the imposition of the proposed leave of absence and to request a hearing. The request for such hearing shall be filed by the employee personally or by first class, certified or registered mail, return receipt requested. Upon receipt of such request, the appointing authority shall supply to the employee, his or her personal physician or authorized representative, copies of all diagnoses, test results, observations and other data supporting the certification, and imposition of the proposed leave of absence shall be held in abeyance until a final determination is made by the appointing authority as provided in this section. The appointing authority will afford the employee a hearing within thirty days of the date of a request by the employee to be held by an independent hearing officer agreed to by the appointing authority and the employee except that where the employer is a city of over one million in population such hearing may be held by a hearing officer employed by the office of administrative trials and hearings. If the parties are unable to agree upon a hearing officer, he or she shall be selected by lot from a list of persons maintained by the state department of civil service. The hearing officer shall not be an employee of the same appointing authority as the employee alleged to be disabled. He or she shall be vested with all of the powers of the appointing authority, and shall make a record of the hearing which shall, with his or her recommendation, be referred to the appointing authority for review and decision and which shall be provided to the affected employee free of charge. A copy of the transcript of the hearing shall, upon request of the employee affected, be transmitted to him without charge. The employee may be represented at any hearing by counsel or a representative of a certified or recognized employee organization and may present medical experts and other witnesses or evidence. The employee shall be entitled to a reasonable period of time to obtain such representation. The burden of proving mental or physical unfitness shall be upon the person alleging it. Compliance with technical rules of evidence shall not be required. The appointing authority will render a final determination within ten working days of the date of <u>receipt of</u> the hearing <u>officer's report and recommendation</u>. The appointing authority may either uphold the original proposed notice of leave of absence, withdraw such notice or modify the notice as appropriate. In any event, a final determination of an employee's contest of a notice of leave shall be rendered within seventy-five days of the receipt of the request for review. An employee on such leave of absence shall be entitled to draw all accumulated, unused sick leave, vacation, overtime and other time allowances standing to his or her credit. The appointing authority in the final determination shall notify the employee of his or her right to appeal from such determination to the civil service commission having jurisdiction in accordance with subdivision three of this section.

§ 2. This act shall take effect immediately.

File this material in the section of the manual referenced above.

These procedures have been developed to assist agencies in attending to necessary details when a State employee dies.

Throughout, the term employee means only an active State employee; i.e., one who, at the time of death, was on the payroll in any pay or leave without pay status.

It is important that these matters be addressed promptly and with sensitivity in order to provide maximum assistance to the employee's survivors. To ensure uniformity and thoroughness, we recommend that agencies designate an appropriate individual to oversee these responsibilities and to serve as the primary contact with the family of the deceased. Agencies are, of course, free to adapt these procedures to suit their own unique circumstances.

These procedures are divided into two parts:

I. Procedures for all employee deaths;
II. Additional procedures for accidental job-realted deaths;

I. Procedures for All Employee Deaths

This Section identifies what information concerning the deceased must be collected, describes proper notification procedures for various benefit programs and describes procedures for contact with the family of the deceased. The data collection and notification steps (Parts A & B) should be completed as quickly as possible. Part C of this Section details additional activities agencies might need to consider and adopt when formulating their internal procedures to deal with employee deaths.

A. Data Collection

1. Ascertain the time and date of death and the county in which death occurred. (If this information is not provided at the time of notification of the employee's death or is not available from the deceased's supervisor, other sources include the funeral home, hospital, friends and relatives.)

2. Check the deceased's personal history folder for the name of a spouse or survivor. (While it may not be possible for the agency to idtneify a designated beneficiary, it is sufficient to communicate with a responsible party.)

3. Verify balances of unused leave accruals. Confirm that these balances reflect the final time sheet or time card.

4. Verify salary, negotiating unit, Social Security number, retirement registration number, insurance coverage and other payroll deductions.

File this material in the section of the manual referenced above.

B. **Notification procedures**

1. Process necessary payroll transaction to remove employee from payroll. Calculate lump sum payment for accrued and unused vacation and overtime compensatory time and ensure that payment is processed. (If an employee copy of any payroll transaction is generated, be sure it is filed and not sent to deceased's home.) Place hold on any salary checks due until they can be reissued to the appropriate survivor. (See item 8 below.)

2. Report employee's death to the appropriate retirement system. Prepare the Notification of Death Form (RS-6082) for members of New York State Employees' Retirement System or New York State Policemen's and Firemen's Retirement System or Form RET-61.1 for members of Teachers' Retirement System. The agency may attach a cover letter to the Director of Death Benefits at either retirement system as it deems necessary. For members of other retirement systems such as Teachers' Insurance and Annuity Association/College Retirement Equities Fund (TIAA/CREF), appropriate agency procedure should be followed.

3. Complete the Notification of Death Form (PS-150) for the Department of Civil Service Survivor's Benefit Program, specifically sections A and D. (Funding information may be obtained from the agency payroll unit or finance office.)

4. Complete Form (PS-404) Health Insurance Transaction Form, using the code for ordinary death, and send to Employee Insurance Section, New York State Department of Civil Service.

5. If employee was a union member, notify the appropriate local union chapter of the employee's death.

6. If the deceased was managerial/confidential and enrolled in the life insurance plan, notify the Department of Civil Service, Employee Insurance Section. Upon receiving notification, the Employee Insurance Section will send forms to the agency personnel office, which is responsible for completing a portion of them.

File this material in the section of the manual referenced above.

7. Send an official departmental letter of condolence to the survivor. Agencies should determine the appropriate person within the organization to issue such a letter which may vary in each case.

   In addition to condolences, this letter should include:

   - The name and phone number of the individual within the agency to contact in relation to employee benefit matters;
   - A copy of the brochure "Information for Survivors of New York State Employees."

8. In this or in subsequent correspondence, the survivor should be provided with two copies of Affidavit of Death Form (AC-934), which must be completed and returned in order to have salary checks reissued to the survivor. (Acceptable alternatives for Form AC-934 are Letters Testamentary or Letters of Administration.) When completed forms are received, checks are returned for reissuance in accordance with Office of the State Comptroller procedures.

C. **Other Agency Considerations**

1. Check with deceased's supervisor about any circumstances which may require special sensitivity in dealing with the survivor.

2. Secure the deceased's personal belongings, if any, for return to the survivor at an appropriate time. Determine if the deceased had any State property and make arrangements with the survivor for its return.

3. If there are no known close relatives or if one does not feel comfortable contacting the family, consider calling the funeral director to leave a desired message or to obtain necessary information. (Personal belongings and State property may also be returned through this channel.)

4. Circulate a memorandum through the agency or appropriate offices giving notice of the death and information such as date, time, and location of calling hours and funeral services, address to which condolences may be sent and wishes of the family regarding contributions.

5. Call at the funeral home, attend funeral and/or call on the family. This action sholld not be considered "**official representation of an agency**" unless specifically assigned by the agency appointing authority.

File this material in the section of the manual referenced above.

6. Send letter to the family offering the services of a staff member as liaison for State business. If the official departmental letter of condolence has already designated a person to contact, that person may wish to send his/her own letter offering assistance.

7. Notify departmental **"Good Will"** Committee, if appropriate.

8. Clip obituary from newspaper and place in personnel file of the deceased.

9. Determine if future payments, such as performance advancement awards, vacation exchange and workers' compensation, are due the deceased employee. If so, be sure these are addressed to the survivor and not the deceased employee.

*II. **Additional Procedures for Accidental Job-Related Deaths**

This Section identifies the extra steps to take when a death results from a job-related accident or incident. Of course, the general procedures outlined in Section I above are also applicable to such a case.

1. File Form C-2 (Employer's Report of Injury), submitting the original to the Workers' Compensation Board and two copies to the State Insurance Fund.

2. Complete Form PS-404, Health Insurance Transaction Form, using the code for accidental job-related death and send it to Employee Insurance Section, New York State Department of Civil Service.

3. Administer the Accidental Death Benefit Program for deceased employees as detailed in the Governor's Office of Employee Relations Bulletin OER-86-1, dated January 22, 1986. The procedure is as follows:

   a. Notify agency GOER liaison of the death of an employee that may be job-related.

   b. Advise survivor(s) of the existence of the Accidental Death Benefit and assist the survivor(s) to complete the Workers' Compensation Form C-62 (Claim for Compensation in Death Case).

   c. Telephone the Workers' Compensation Board and follow-up in writing with a request for an expedited hearing date.

   d. Upon receipt of the Workers' Compensation Board Form C-67 **(Notice of Decision in Death Case)** or Form C-68 or C-68A **(Notice of Award in Death Casses in Which There Are No Persons Entitled to Compensation)**, write to Director of Board Review Bureau, Workers' Compensation Board, 180 Livingston Street. Brooklyn, NY 11248, to request a written statement verifying

File this material in the Section of the manual referenced above.

that no appeal has been filed against the Board's decision.

e. Upon receipt of the letter from the Review Bureau stating that they have no appeals on file at the time, prepare and submit a special charge voucher for payment of the Accidental Death Benefit pursuant to Office of the State Comptroller Procurement and Disbursement Guidelines Bulletin G-45, dated January 14, 1986.

f. Notify the Governor's Office of Employee Relations, Program Planning and Employee Development Group, Tuition Processing Unit, by letter with a copy of Form C-67 **(Notice of Decision in Death Case)** of the existence of dependents who could become eligible for the tuition assistance program.

4. In the case of accidental job-related death, any Employees' Retirement System payment is supplemental to the Workers' Compensation Board award and the amount of such retirement payment is reduced by the amount of the Compensation award. In cases where it appears that the amount of any such retirement payment will be reduced pending a Workers' Compensation Board decision and the deceased employee was a member of the Employees' Retirement System, the survivor may submit an application to the Retirement System, pursuant to Section 61 of the Retirement and Social Security Law, for payment of benefits at a higher rate pending the final Workers' Compensation Board decision. The survivor must guarantee reimbursement of monies later considered duplicate payment. The Comptroller may authorize such payment pursuant to Section 64 of the Retirement and Social Security Law. thereby enabling the survivor to receive a greater fenefit at an earlier date. **(The agency cannot submit the application under Section 61 on behalf of the survivor.)**

5. The agency should provide every possible assistance to survivors in a timely manner and exercise special sensitivity in all contacts with them. For example, the agency head might want to send a personal letter of condolence to the family and to appoint an official delegation to attend funeral services.

Accidental Death Benefit

If the death was the result of a job-related accident, as determined by the NYS Workers' Compensation Board, you may be eligible for a survivor's $50,000 accidental death benefit. Details of this benefit are available from the deceased's personnel office.

In addition, dependent child(ren) of the deceased admitted to the State University of New York (SUNY) may be eligible for full tuition reimbursement. In case of State troopers, noncommissioned and commissioned officers and investigators in the Division of State Police and employees designated managerial or confidential, such child(ren) may be eligible for tuition reimbursement at the SUNY level while attending an accredited institution. For information on this Dependent Children Tuition Program, you should write directly to the

Tuition Processing Unit
Governor's Office of Employee Relations
Tower Building, 23rd Floor
Empire State Plaza
Albany, NY 12223
(518) 473-3939

Job-related accidental death

☐ yes WCB Case No. _____

☐ no

C-62 Filed

☐ yes Date Filed _____

☐ no

Children eligible for tuition assistance

☐ yes

☐ no