

**NEW YORK STATE DEPARTMENT OF CIVIL SERVICE**

**DIVISION OF STAFFING SERVICES**

**GENERAL INFORMATION BULLETIN No. 06-03**

TO: Department and Agency Human Resources and Personnel Officers;  
Department Counsels

FROM: Terry Jordan, Director of Staffing Services; Brian Reichenbach, Counsel

SUBJECT: Termination of Employees who Fail to Maintain Statutory Requirements  
for State Positions

DATE: March 31, 2006

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In Felix v. NYC Department of Citywide Administrative Services, 3 NY3d 498, the NYS Court of Appeals recently upheld New York City's right to terminate a tenured civil service employee without complying with the provisions of NY Civil Service Law §75 where the employee did not maintain one of the qualifications for his employment. This case has applicability to the State workforce.

The city employee, Mr. Felix, had signed a document upon hiring that warned him failure to maintain city residence would result in forfeiture of his employment. Mr. Felix did not maintain city residence and his employment was terminated. After such termination, the employee argued that the termination was ineffective because he had not been afforded the process due under §75 of the Civil Service Law.

The Court of Appeals decided the case on the basis of the answer to two questions: "whether Felix's nonresidency was a forfeiture of employment or misconduct for which he was entitled to a preremoval hearing and second, did the 'notice of and opportunity to contest the charge' procedure set forth under New York City Administrative Code [section] 12-120 satisfy due process."

As to the first question, the court noted that failing to maintain one's residence within the municipality is separate and distinct from an act of misconduct. The court distinguished between failure to maintain residence, which renders an employee ineligible for continued employment, and misconduct, which invokes §75 disciplinary procedures. In reaching its conclusion, the court cited Mandelkern v. City of Buffalo, 64 AD2d 279 [4th Dept. 1978], a case where lawyer plaintiffs had asserted their right to move out of the city of Buffalo and maintain their employment with the city despite a local law requiring continued residence. In Mandelkern, the Appellate Division, Fourth Department decided that a clear distinction should be drawn between qualifications for employment and misconduct. The Mandelkern court opined "The local legislation and the Civil Service Law have different purposes. The ordinance is designed with the legitimate purpose of encouraging city employees to maintain a commitment and involvement with the government which employs them by living within the city [citations omitted]. When so viewed, it is clear that residence is a consideration unrelated to job performance, misconduct, or competency. It is a qualification of employment, no less so than admission to the Bar may be in the case of these plaintiffs, and a qualification which the city may impose if it chooses to do so without running afoul of the Constitution or general laws of the State. The Civil Service Law, on the other hand, prescribes the

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procedures for removal of a protected employee charged with delinquencies in the performance of his job. It has nothing to do with eligibility for employment.", Mandelkern, at page 281.

The courts have thus established the principle that qualifications of employment, such as residence in an employing municipality, or a statutory license or certification to practice a profession or engage in regulated activity are to be distinguished from considerations related to job performance, misconduct, or competency. While the latter requires conformance with the procedures set forth in Civil Service Law §75 prior to any disciplinary or removal proceedings, the former require only notice to the employee and an opportunity for the employee to contest the charge.

The reasoning in Mandelkern and Felix can be applied to State employees who have failed to maintain a statutory qualification for employment in the following manner: if such an employee is required by a statute to maintain or possess a certificate or license to legally engage in an activity that is an essential part of his job, failure to maintain the certificate or license can be construed to be a disqualification of employment, unrelated to job performance, misconduct or competency. Such a failure is sufficient to terminate the employee without resorting to the requirements of §75 or the disciplinary articles of the applicable collective bargaining agreements. Examples of this would be employees who are required to drive as a part of their position, such as truck drivers or plow operators losing the type of driver's licenses that are required for those particular jobs, lawyers who are disbarred, or barbers who lose their licenses to practice barbering.

The employees in such a situations, however, are not without rights. As in Felix, these employees must be afforded notice and opportunity to contest the charges, i.e., to show that the alleged loss of certifications or licenses have not actually taken place or has been cured.

An example of an employment situation where the reasoning of these cases **should not be applied** is that of an employee assigned field duty, for whom business travel is a necessity, who loses a driver's license. The driver's license is not a statutory qualification for employment. Such employee may demonstrate the ability to perform the duties of the job even without a driver's license (for example, by securing rides with a member of the household, or by using public transportation).

We advise agencies to consult the Counsel's Office at the Governor's Office of Employee Relations before pursuing the dismissal of staff based on the Felix decision.