

**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

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.

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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.

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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.