

# School Law Matters

APRIL 2011



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

Route to: Board  Personnel  Instruction  PPS  Business  Other: \_\_\_\_\_

## Attorney Spotlight

### Ben Ferrara Receives Lifetime Achievement Award



We are extremely pleased and proud to report that Ben Ferrara has been named a recipient of the National School Boards Association (NSBA) Council of School Attorneys (COSA) **2011 Lifetime Achievement Award**. The Award recognizes Ben's exemplary leadership and distinguished service to the NSBA, and reflects Ben's dynamic and robust school law practice characterized by thoughtful counsel and vigorous representation of school districts across New York State.

This award has been bestowed only three times in the past and is considered the highest form of recognition by his colleagues who practice school law. Ben accepted the award on April 8, 2011 at COSA's annual conference in San Francisco.

As many of you will recall, Ben was elected chairman of COSA in 1996 and, as its chair, served that year on the Board of Directors of NSBA. He served on the COSA Board of Directors from 1986 - 2000. In 1998, Ben was also elected President of the New York State Association of School Attorneys and has been a member of its Board of Directors since 1988.

Ben's school law practice has always been — and will continue to be — focused on providing exemplary advice, counsel, representation and related services to school districts and BOCES throughout New York State. Ben also routinely serves as a legal consultant to many school board clients in connection with their selection and retention of educational leaders for their districts.

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## Firm Event

### Firm Attorneys to Present Briefings at Six Locations Statewide on Year-End Personnel Issues and Protecting Your District's Tax Base

You are invited to the latest of our law firm's ongoing series of "School Law Briefings." This one-and-one-half-hour briefing will cover a variety of topics of critical importance to Board Members, Superintendents, Personnel Directors and Business Officials. Specifically, firm attorneys Henry F. Sobota, Joseph, G. Shields and Eric Wilson will present on the following programs:

#### Legal Update on Year-End Personnel Issues

Participants will learn about:

- New developments in the Commissioner of Education's Annual Professional Performance Review ("APPR") regulations for instructional staff;
- New teacher and principal evaluation system created by Chapter 103 of Laws of 2010 and its interplay with APPR regulations; and
- Practical tips on evaluations.

As these issues are quickly developing in the State Legislature and the State Education Department, we will provide an update on pertinent legislation and regulations as of the date of the presentation.

#### Protecting Your District's Tax Base: Your Role in Tax Certiorari Cases

In hard financial times, school administrators need to pay special attention to protecting their district's tax base. One way to accomplish this is to take an active role in the legal challenges to real property tax assessments, known as tax certiorari proceedings. Avoid getting a court order in the mail advising you that your district suddenly owes a commercial taxpayer \$30,000-\$40,000 (or even greater) tax refund that you knew nothing about ...

and had not budgeted for in your current school year budget.

This portion of the program will focus on:

- Nuts and Bolts of Tax Certiorari Proceedings;
- Financial Incentives for School Districts to Actively Participate in Defense of Assessment;
- Cumulative Effect of Loss or Bad Settlement (Can Bind School District For Three Years);
- PILOT Agreements: What are They and What are Your Rights?;
- Defense Strategies; and
- Settlement Strategies.

The programs will be presented at six locations statewide, at the following dates, locations and times:

#### May 3, 2011

8:30AM - 10:00AM (ALBANY)

The Desmond Hotel  
660 Albany-Shaker Road, Albany, NY

1:30PM - 3:00PM (UTICA)

Hotel Utica  
102 Lafayette Street, Utica, NY

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- Teacher Layoffs -- Recent Rulings, "Last in, First Out" and Some Other Basic Points to Remember
- Upcoming Events

**Attorney Spotlight****Ben Ferrara Receives Lifetime Achievement Award (cont'd)**

In addition to his thriving practice, Ben writes and lectures extensively in the fields of education law and public employment law. He is a frequent speaker and participant at programs sponsored by the N.Y.S. School Boards Association, NSBA, COSA and other nationwide, statewide and local conferences dealing with education law, school board training, public sector employment and labor relations issues. As such, he has provided much insight on a variety of topics of interest to school boards and administrators. Ben is also listed in *The Best Lawyers in America* (1995-2010) which is based on an exhaustive peer review survey by top attorneys nationwide.

**Congratulations Ben!****Hot Topic****Teacher Layoffs -- Recent Rulings, "Last in, First Out" and Some Other Basic Points to Remember**

By Henry F. Sobota, Esq.

As school administrators prepare for the next round of teacher layoffs, it will be important to keep some basic points in mind.

Teacher layoffs are governed by state statutes -- principally Sections 2510, 3013 and 3014 of the Education Law -- and by Part 30 of the Commissioner's Regulations. Collective bargaining agreements generally do not apply, except in certain minor respects.

A school district is permitted by law to abolish any teaching position if it does so for reasons of economy or efficiency. It is up to a school board to decide which tenure area(s) will be impacted for reduction, and a reviewing court cannot substitute its judgment for such decisions.

**Last in, First Out.** Rule number one is that a school district must abolish the position of the least senior teacher in a tenure area to be impacted. This has been referred to in recent news stories as the "Last In, First Out" rule.

Do not confuse certification with tenure areas. Tenure areas are often broader

**Firm Event****Firm Attorneys to Present Briefings at Six Locations Statewide on Year-End Personnel Issues and Protecting Your District's Tax Base (cont'd)****May 10, 2011**

8:30AM - 10:00AM (SYRACUSE)

Hilton Garden Inn

6004 Fair Lakes Road, East Syracuse, NY

1:30PM-3:00PM (WATERTOWN)

Ramada Watertown

21000 NY State Route 3, Watertown, NY

**May 12, 2011**

8:30AM-10:00AM (BUFFALO)

Buffalo Niagara Marriott

1340 Millersport Highway, Amherst, NY

1:30PM - 3:00PM (ROCHESTER)

DoubleTree Hotel Rochester

1111 Jefferson Road, Rochester, NY

There is **NO REGISTRATION FEE** for any of the programs. However, space is limited and registration is necessary.

Please register at our website [www.ferrarafirm.com](http://www.ferrarafirm.com). Simply click on "School Law Briefing (Buffalo)" or "School Law Briefing (Albany)", for example, from the Events Calendar on the far right column of our Firm's home page, then click on "Register Now" and complete the online form. Click Submit and you're registered.

You may also register by telephone (at **315.437.7600 or 716.875.1406**) by providing your name, the name of your school district or organization and the names of all participants who will be attending.

than certification areas (e.g. a teacher in the science tenure area may be certified only in physics or biology, etc; a foreign language teacher may be certified only in Spanish or French).

**Calculation of Seniority.** A teacher's seniority is based upon total service within his/her tenure area without a break in service. Each year of service is counted, as long as the teacher has worked at least 40% of the work week in his/her designated tenure area. Check your records carefully when computing seniority -- the Commissioner has ruled that unpaid days of absence do not count in determining seniority.

Part-time service can be a tricky area. Generally, a part-time teacher will not accrue seniority unless he/she started out as a full-time teacher and was then reduced involuntarily or if seniority is required by the teacher contract or a Board policy. However, a part-time kindergarten teacher would earn seniority as if full-time.

**Bumping.** If a teacher is laid off, he/she may have the right to bump back into a

teaching position, in another tenure area, that he/she previously held. The Commissioner's Regulations state, "Should the individual so identified have tenure or be in probationary status in additional tenure areas created by this Part, he shall be transferred to such other tenure area in which he has greatest seniority and shall be retained in such area if there is a professional educator having less seniority than he in such other tenure area."

**Instructional Support Positions.** School districts cannot create their own teacher tenure areas, and are constrained to use the tenure areas set forth in Part 30 when appointing and granting tenure to teachers (e.g., Science, English, Math, Social Studies, Foreign Languages, Elementary Education and Special Education). Some districts erred in the past when they hired teachers for non-recognized job titles such as computer teachers or instructional support specialists. It is important to properly categorize such teachers before undertaking any layoffs.

**Hot Topic****Teacher Layoffs -- Recent Rulings, "Last in, First Out" and Some Other Basic Points to Remember (cont'd)**

The Commissioner of Education adopted amendments to his Regulations in 2009 so that a teacher who was initially hired into a proper tenure area, but then subsequently assigned to instructional support duties outside that tenure area for more than 60% of the time, without giving knowing consent, is deemed to have been serving in his/her former tenure area all along, and accrues seniority rights for the past service in that tenure area.

A teacher who was initially hired into an improper or non-existent tenure area to provide instructional support services prior to July 1, 2009, accrues seniority rights for his/her past and future service in a tenure area for which he/she holds proper certification.

A teacher first hired after July 1, 2009 in a recognized tenure area and later assigned to an instructional support position would continue to accrue credit toward tenure and/or accrue tenure and seniority rights in the recognized tenure area.

A teacher first hired after July 1, 2009 into an improper or non-existent tenure area to provide instructional support services receives no seniority credit for past service.

**Legislative Reform Proposal.** A few bills have been introduced in the 2011 State Legislature to end the "Last In, First Out" system. One such bill (S. 3501A), which applies only in the City of New York, was introduced by New York State Senate Education Committee Chairman John Flanagan, and would be known as the "Keep Effective and Excellent Professionals in the Classroom Act," is typical. It would allow the New York City School District to first lay off teachers and supervisors in the following order, without regard to seniority:

- any teacher or supervisor who received a rating of "unsatisfactory" or "ineffective" on his or her annual professional performance review;
- any teacher or supervisor who within the last 5 years has been fined or suspended without pay as a penalty imposed pursuant to section three thousand twenty-a of this chapter or as a result of a §3020-a proceeding or settlement;
- any teacher or supervisor not currently appointed to a regular position in a school for a period of 6 months or more as of the effective date of any citywide layoff pursuant to this section;
- any teacher or supervisor convicted of criminal charges within the past 5 years;
- any teacher or supervisor, if tenured, who within the last 5 years has been fined as a penalty imposed pursuant to charges related to chronic absenteeism, chronic lateness, or improper use or recording of leave time or as a result of settlement of 3020-a charges related to chronic absenteeism, chronic lateness or improper use or recording of leave time;
- any teacher or supervisor who within the last 5 years was the subject of an investigation where allegations of misconduct were substantiated by the city school district's special commissioner of investigation, the city school district's office of special investigations or the city school district's office of equal opportunity;
- any teacher or supervisor who has failed to fulfill all requirements for certification from the department as of August 31 of the year in which there is a citywide layoff;
- any teacher, for 2 years or more, ranked in the bottom 30% of all teachers in student test scores progress as measured by the city school district's value-added assessment except for teachers who work in licenses related to teaching children with disabilities or special needs; and
- teachers or supervisors who entered agreements to serve an additional year as a probationer pursuant to §2573 of the Education Law for the school year preceding a citywide lay-off.

If an alternative procedure is negotiated, it would supersede the foregoing procedure. Such procedures would be a mandatory subject for bargaining.

It seems unlikely that any such bill will make it out of the State Legislature this year.

**Recall Rights.** A laid-off teacher has the right to be placed on a preferred list for recall to his/her tenure area, and to stay on the list for seven (7) years. Lay-off rights are different than recall rights. Layoffs must be based upon service in a tenure area only. Recalls must be based upon district-wide service.

**School Administrators.** There are no Regents Rules for administrative tenure areas. These tenure areas are discerned based upon the language of appointment resolutions, appointment notices and individual school district personnel practices over the years. A careful check of personnel records may therefore be necessary. The provisions of Part 30, including its "bumping" rights, are not applicable to administrative positions.

**Denial of Tenure.** If an employee is

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**Commissioner's Decisions**

**Teacher Layoffs -- Recent Rulings, "Last in, First Out" and Some Other Basic Points to Remember (cont'd)**

due to receive a decision concerning eligibility to receive tenure at the same time as you are considering the abolition of his/her position, you should consider the two decisions separately. An employee who is not denied tenure and whose position is abolished will remain on the preferred eligibility list for seven years and will have rights to a subsequently created position which is similar to his/her former one.

**Restructuring of Positions.** The Commissioner and several federal courts have held that where a position has been abolished and simultaneously, an arguably similar position is created, the employee who has been laid off has a right to an informal hearing if the employee claims that the positions are so similar as to entitle the employee to the new position.

**Shifting Work between Bargaining Units; Subcontracting.** The Commissioner has ruled that schools lack the authority to subcontract teachers' work to private, independent contractors. (See, e.g., Appeal of Freedman, 19 Ed. Dept.

Rep. 522 [1980]; Appeal of Spataro, 25 Ed. Dept. Rep. 206 [1985]; and Appeal of Barker, 45 Ed. Dept. Rep. 430 [2006]).

However, a July 2, 2010 "Q & A" document from SED suggests that the Department may be softening its "no subcontracting" stance, usually for courses or programs for which no graduation credits are awarded. The document says that, under certain circumstances, school districts may contract with non-profit or other entities to provide distance or online learning opportunities for students; supplemental educational services; pre-K programs; certain special education services or programs, including related services; and advanced courses carrying both high school and college credit. See <http://www.emsc.nysed.gov/sss/lawsregs/ContractsForInstructionQandA.pdf>.

**Caution.** Regardless of SED's position regarding schools' authority to subcontract for such educational services, a school district may nevertheless have a

Taylor Law duty to negotiate with affected unions prior to contracting out for services (1) that had previously been done exclusively by bargaining unit employees, or (2) if the teachers contract contains a "no subcontracting" clause or similar language. Thus, in one case, the State's Public Employment Relations Board ("PERB") held that a school district violated its bargaining obligation by unilaterally abolishing the position of school nurse-teacher, which had been included in teachers' unit and establishing a substantially similar non-unit position of school nurse. PERB would take the same position regarding shifting or subcontracting bargaining unit work to a private, independent contractor.

**Upcoming Events**

Attorney(s)                      Date(s)                      Location/Event/Program

◇◇◇◇◇ SAVE THESE DATES ◇◇◇◇◇

**Firm School Law Briefing — Recent Developments in School Law and Protecting Your Tax Base**

Henry Sobota Joseph Shields Eric Wilson	}	5/3/11	Albany (8:30AM—10AM)
		5/3/11	Utica (1:30PM—3PM)
		5/10/11	Syracuse (8:30AM—10AM)
		5/10/11	Watertown (1:30PM—3PM)
		5/12/11	Buffalo (8:30AM—10AM)
		5/12/11	Rochester (1:30PM—3PM)

As discussed on the front page, this program will cover a variety of topics of critical importance to Board Members, Superintendents, Personnel Directors and Business Officials. Specifically, participants will learn the most recent developments associated with:

- New APPR legislation and regulations
- New York's Wage Theft Prevention Act and its implications for schools
- What school administrators need to know about protecting their District's tax base in tax certiorari cases