Division of Legal Services

YOUR RIGHTS AS A SCHOOL EMPLOYEE FACING SUSPENSION

Questions & Answers

What is a "suspension"?

A suspension is an adverse personnel action taken against an employee by the employer for disciplinary reasons. During the period of suspension, the employee does not provide any service to the employer and does not receive any compensation for that period. Sometimes an employer will place an individual on a "paid administrative leave" while it investigates allegations of wrongdoing. A paid administrative leave is not a suspension.

Which statute applies to suspensions of public school employees?

The statute that most commonly applies to the suspension of public school employees is Massachusetts General Laws Chapter 71, Section 42D. This statute sets forth specific requirements that a school district must follow when suspending employees. In addition, some education support professionals (ESPs) have rights under the Civil Service Law (M.G.L. c. 31, §§ 31 to 44), as described more fully in the last question and answer below. You may also have rights under state and federal laws that prohibit discrimination for union activity or on the basis of race, gender, sexual orientation, religion, national origin and age.

Which employees are covered by Section 42D suspension procedures?

The procedures and standards set forth in Section 42D of Chapter 71 apply to *all school district employees except the superintendent.* This includes administrators, support staff and teachers with or without Professional Teacher Status (PTS).

Who can suspend employees?

The superintendent can suspend any school employee. The principal can suspend any teacher or other employee assigned to his or her school. The principal need not obtain the approval of the superintendent to suspend. The school committee has no role in the initial decision to impose a suspension.

How long can a suspension last?

Suspensions cannot exceed "one month." An exception exists for suspensions imposed under a separate law while criminal charges are pending, as discussed below. Arbitrators have interpreted "one month" to mean 30 calendar days.

What procedural rights do I have before I'm suspended?

During the investigation: Your supervisor may not question you unless and until you are given notice that you are being investigated and that you have a right to representation during the investigation.

Before the suspension can be imposed: You are entitled to seven days' written notice of the employer's intent to suspend you. This notice must specify the grounds for the suspension. The notice must also offer you an opportunity to meet with the superintendent or principal to "review the decision." If you request a meeting, you are entitled to representation at this meeting.

Are there any circumstances under which I can be suspended immediately, without the preliminary procedures?

You can be suspended immediately – that is, without a presuspension meeting – only if the superintendent has "good cause." In that case, you are entitled to receive, at the time the suspension is imposed, written notice both of the grounds for the suspension and of the employer's basis for imposing it immediately.

What if the employer fails to follow these presuspension procedures?

In some circumstances you may be able to argue that any statements you make after you have been deprived of your right to notice or representation should not be used against you. If your suspension is arbitrated, you may be able to argue that the suspension should be overturned because of the procedural irregularity.

What if I am accused of criminal misconduct?

Under M.G.L. c. 268A, § 25, an employee who is indicted for misconduct on the job may be suspended without pay and without some benefits while criminal proceedings continue. That statute requires the employee to be reinstated with retroactive restoration of pay and benefits "if proceedings are terminated without a finding or verdict of guilty."

Do I have a right to contest my suspension?

Yes. You have a right to "statutory arbitration" and your association may also have a right to contest your suspension through "contractual arbitration."

What is "statutory arbitration?"

As a school district employee who has been suspended without pay, you have the legal right as an individual to arbitrate your suspension. This right to statutory arbitration is set forth in M.G.L. c. 71, §§ 42 and 42D. To assert this right, you or your representative *must file a written request for arbitration within 30 days after you have received notice of the suspension.* The request for arbitration must be filed with the Commissioner of Education at the Massachusetts Department of Elementary and Secondary Education.

When does the 30-day filing period begin?

The 30-day filing period for statutory arbitration begins on the date you receive final notice of your suspension.

What is "contractual arbitration?"

Your collective bargaining agreement may contain a provision that you will not be suspended or disciplined without "just cause." If so, the contractual grievance procedure may be available to challenge your suspension. If a grievance is filed but does not get resolved at one of the earlier steps in the procedure, the association may choose to arbitrate on your behalf. Arbitration is the final step in the contractual grievance procedure.

What is the filing requirement for a grievance or contractual arbitration?

Consult with your local leadership and the MTA field consultant. The contractual deadline for filing grievances and a demand for arbitration differ from one contract to another.

Can my suspension be arbitrated under the statute and under the collective bargaining agreement?

No. The law permits you to have only one arbitration proceeding on the merits of your suspension. Therefore, a decision must be made about which arbitration procedure to use. Often it is not possible to make this choice within the 30-day

filing period for statutory arbitration. For that reason, we may recommend that you file a petition at the Department of Elementary and Secondary Education (DESE) for statutory arbitration and request that DESE hold the petition in abeyance until the association makes its decision about filing for arbitration under the collective bargaining agreement. We will assist you in filing this petition with DESE.

Who decides which procedure to use?

Your local association, MTA consultant and assigned MTA attorney will work with you in deciding how to proceed. Individuals who act without union representation must use the statutory procedure. (Note that some collective bargaining agreements require employees to use statutory arbitration rather than contractual arbitration.)

Must I arbitrate my suspension through the association?

If you want to use *contractual arbitration*, then you must do so through, and with the approval of, the association. If you choose to proceed without the assistance of the association, you can and must use the statutory procedure.

In what ways are the two arbitration proceedings similar?

In *statutory arbitration*, the arbitrators are selected through the American Arbitration Association (the AAA). The AAA also supplies arbitrators under many *contractual arbitrations*. Either way, the AAA would send a list of possible arbitrators to both parties to the dispute and each party participates in choosing an arbitrator from the list. The list generally includes arbitrators who are established and experienced in handling labor relations cases. In either type of arbitration, the employer has the burden of proof to justify suspending you.

What are the differences between the two procedures?

- In a *statutory arbitration*, the AAA sends a list of only three arbitrators; regardless of the parties' wishes, it will appoint one of those three. In *contractual arbitration*, the AAA sends a lengthier list and the parties mutually eliminate arbitrators until they reach agreement.
- If there are contractual provisions (for example, on evaluation procedures or personnel files) that are useful to your case, there might be opposition from the school district to consideration of these contract claims in statutory arbitration. It may be easier to raise those issues in a contractual arbitration. Similarly, the suspension statute includes some procedural rights that your employer may have violated when suspending you; if so, it may be slightly easier to raise such statutory violations if you are challenging your suspension in the statutory forum.
- Statutory arbitration decisions are public records. Decisions are summarized on the DESE website and the full decisions are available to anyone who requests a copy of the decision from DESE. Hence, you may have more privacy in a contractual arbitration.
- Most arbitrators apply essentially the same "just cause" standards in both contractual and statutory arbitration. When you meet, your MTA attorney will explain the standards that arbitrators apply when evaluating a suspension case.

What if the association and I disagree about how to handle my arbitration and whether to settle it?

In a *statutory arbitration*, you as an individual are a party to the proceeding. In a *contractual arbitration*, it is the association that is the party to the proceeding. In either forum, if you request association representation and the association agrees, the association, in consultation with the assigned MTA attorney, will be responsible for deciding the best strategy for the case, including settlement strategies. In either forum, however, you will be continually consulted and actively involved in decisions affecting your case.

It is very unusual for irreconcilable conflicts to occur among the association, the assigned MTA attorney and the individual regarding suspension arbitration or settlement. If that should happen, however, and *if the arbitration is contractual*, the association's withdrawal will terminate the arbitration. *If the arbitration is statutory*, you will have the option of continuing on your own or retaining private counsel to represent you.

How much does arbitration cost and who pays?

The costs of a suspension case include the arbitrator's fees, attorney's fees, administrative costs and other expenses. Costs vary depending on the facts and issues involved and the number of witnesses. Arbitrator fees are shared by the parties, and the 50% share paid by the association (or by an individual proceeding to DESE on his own) would typically range from $2,000 to $4,000. If your association takes your case to arbitration, the MTA will provide an attorney to represent you at no cost to you and your association will pay the arbitrator's fees, in accordance with the MTA Legal Services Policy. If you choose to proceed under the statute without the assistance of the association, or if the association does not support your arbitration case, you would be outside the MTA Legal Services Policy and fully responsible for all costs, including arbitrator's fees, attorney's fees and other expenses.

Will it cost more to proceed in one forum than in the other?

There is no reason why costs and fees would be greater in one forum than in the other.

What additional rights do ESP personnel have under the Civil Service Law?

If you are a "permanent" Civil Service employee, you have an independent right under the Civil Service Law to prior notice and a hearing before your employer (the "appointing authority" – usually the superintendent of schools) suspends you for more than five days. For suspensions of less than five days, an employee has the right to request, within 48 hours of receipt of the notice of suspension, a hearing before the appointing authority or his or her designee. Suspensions of permanent Civil Service employees may be appealed to the Civil Service Commission. An appeal to the Civil Service Commission must be filed within 10 days of the earlier of: (i) receipt of notice that a suspension will be imposed or (ii) the actual suspension.

These rights under the Civil Service Law are *in addition* to your rights under M.G.L. c. 71, § 42D. A school district must comply with both the requirements of Section 42D and the Civil Service Law when suspending a permanent Civil Service employee.

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