School Administrators Association of SAANYS New York State

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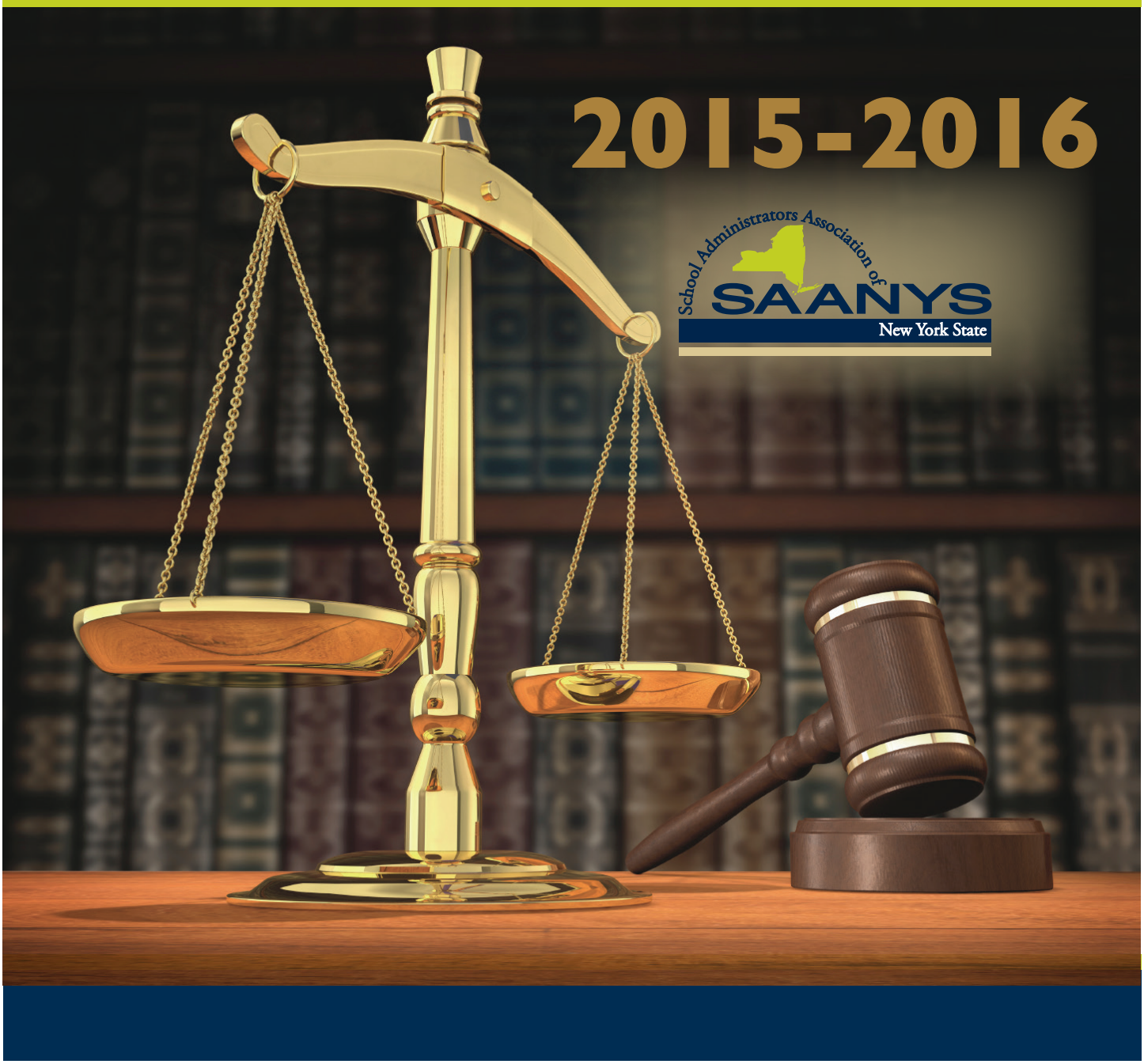

School Administrators Association *of* New York State

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School Email and Confidentiality September 2015

Email is a wonderful thing. We can quickly and inexpensively communicate with colleagues, friends, and loved ones. In real time as they say. A byproduct of this fast, efficient, and convenient method of communication is that it has made us, most of us I suppose, more productive. Are we less busy? No. History has shown us that a natural consequence of technological advancement is that more is expected of us. Regardless, today the ability to email is ubiquitous. We write email in the grip of quiet convenience, scribed often in the solitude of our offices, homes, cars, and pretty much anywhere with iPhones and smartphones providing email services. It may be easy in such circumstances to allow ourselves to lose sight of the fact that email is written correspondence to which we must be held accountable.

There are several legal cases that have arisen where the confidentiality of email correspondence between a person and their attorney has been waived because the individual used the email service provided by their employer. New York statutes are clear that communications between a client and an attorney do not lose their privileged character just because they are transmitted by electronic means. The purpose is to recognize the wide spread use of commercial email. The question becomes who owns the electronic means and what is its purpose.

For those readers who use school district email, it is critical that you read and understand your district's acceptable use policy. You are often required to sign one either annually or when you are first employed. Even if your acceptable use policy allows you to send personal emails using the district's address or on the district's server, or even if your district has no policy at all, I recommend you do not use school email to send sensitive personal material. Quite simply, you cannot expect to have confidential communications with your attorney using school email.

The courts have nonetheless set up a four-part test when considering whether attorney client privilege applied in a given dispute over use of employer email. The first was whether the employer maintained a policy banning personal use or other objectionable use. Second, whether the employer reserved the right to monitor computer or email use. Third whether the employees were notified of this right to monitor and finally whether a third party, such as your technical person, had the right to access your computer or email. It is conceivable then that in a dispute, someone asserting a privilege may convince a court that the employer failed to meet such a test.

But as I noted above, even if your employer does not have a policy or has failed to notify you of the policy and the procedures in it, out of an abundance of caution you should not expect to communicate confidentially with your attorney using school email. The reason is that the school district owns the email. The courts have recognized the school district's right to access your email. It is as if the district is looking over your shoulder as you write the email.

Everything noted above applies to private employers. Given that the school districts are public employers, public policy and transparency are added considerations for the courts in privilege disputes. This should inform users of school email that they should be doubly cautious. An employee should take every precaution to make sure their correspondence with their attorney remains privileged. It includes taking steps that evince the employee's intention that the communication was confidential such as password protecting documents, using one's own personal device and web-based email addresses. The courts consider attorney client privilege waived when one party's conduct is so careless that it suggests they are unconcerned with privilege or it otherwise increases the likelihood that their opponent will discover the material. The privacy notice at the end of an email is insufficient to protect your communication as privileged. So do not be surprised if your attorney asks you to correspond using web-based email in lieu of work email. ■

School Districts and Their Ability to Impose "Dress Codes" on Their Employees
October 2015

The issue of whether a district may impose a dress code on its employees has been a question that has been raised for several districts this past summer. It is important that you understand your rights and are aware of what a district can and cannot impose on you.

If you are in a bargaining unit, a dress code may not be unilaterally imposed on you by your school district. The requirement of a specific dress code for faculty is a mandatory subject of collective bargaining. However, there are some exceptions to this. According to PERB, a school district may require its staff to wear photo identification cards without first negotiating the issue with the union when the intent of such identification cards relate to the employer's mission to promote safety and accountability.

Another exception to dress code being a mandatory subject of bargaining – school boards may, "within reason…regulate the speech of teachers in the classroom for legitimate pedagogical reasons." In one case, the district banned wearing political campaign buttons and pins while on duty because they claimed its actions were triggered by concerns that "displays of political partisanship in the schools" were inconsistent with its educational mission. The district successfully argued that the ban was necessary to avoid improperly influencing students and impinging on their "rights…to learn in an environment free of partisan political influence." In order to limit political statements in a dress code, an employer must do so equally – a dress code cannot state that employees are not allowed to wear shirts supporting a specific candidate but then permit shirts supporting a different political candidate. However, there is a way around that insofar as an employer cannot prohibit employees from wearing union related paraphernalia.

If employees are not within a bargaining unit, according to New York State Department of Labor, an employer may pose a dress code that prohibits the wearing of certain items of clothing, visible tattoos, or piercings. However, it is illegal for an employer to set different dress codes based on gender. There are also exceptions for religious items of clothing. The rationale behind allowing the employer to set dress code restrictions is that employers have a right to set a certain professional tone through the appearance of its employees. For example, the U.S. Court of Appeals for the Second Circuit, which rules upon federal cases within New York State, has found that a dress code that requires a teacher to wear a neck tie is not only appropriate, but also does not infringe on first amendment rights to free expression or the right to privacy.

If your district is attempting to impose a dress code on your unit or you have any questions, please contact SAANYS and we would be happy to assist. ■

Protecting Your Terms and Conditions of Employment
November 2015

Oftentimes, SAANYS members call the legal department because they know that the terms and conditions of their employment are being impacted, if not outright violated, but they are not sure what to do to protect themselves. If you are ever in such a situation, the simple answer is to call the legal department, but the following is a brief guide to help you understand what actions may be needed.

The first step when you are concerned that your rights are being violated is to look at your Collective Bargaining Agreement (CBA) to see whether it is a topic that has been negotiated. If there is a provision in the contract that has been violated, then the remedy is to go through the negotiated grievance procedure. Oftentimes there is a very short period of time in which a grievance can be started, or else it is waived, so it is very important to look at the contract and the grievance procedure as soon as a violation is suspected. How grievances are processed vary from bargaining unit to bargaining unit, it is important not to assume

that because grievances are processed in a certain way for teachers that the process will be the same for the administrators in the same district.

If the perceived violation is not something that is covered within the CBA, then it must be determined whether the issue is something that could be brought for review before the Public Employees' Relations Board (PERB). The most typical types of cases that are brought before PERB are:

(1) Transfers of bargaining unit work: This typically occurs when a district either creates a new position or distributes the duties of an abolished position. In such events, it is important to look at the duties to see if they have been previously performed exclusively by the bargaining unit.

(2) Mandatory subjects of bargaining: These are topics that directly impact wages, hours, or working conditions. Any subject that impacts these three areas cannot be changed from the status quo without first being negotiated. An example that commonly arises is when a district unilaterally announces that employees may not take time off during certain days, particularly when students are not in session. (Often, the last two weeks of August.) Sometimes a mandatory subject of bargaining is also covered in the CBA. In such situations, SAANYS will file both a grievance and an Improper Practice Charge with PERB, which will typically wait to see how the grievance is resolved before taking action.

(3) Past practices: Past practices are often confusing to people because sometimes what is in the CBA is not adhered to by the unit and district for a number of years. If the subject matter of a past practice is covered by the contract, then either party has the right to revert back to the negotiated terms at any time. For example, if there is a clause in a CBA that administrators do not need to report to work on snow days, yet your unit members had done so in the past, the unit can put the district on notice at any time that its members will cease the past practice of reporting to work on snow days and there isn't anything the district can do about it as long as the CBA's language is clear.

In situations where the CBA is silent on a topic area, the past practice will control so long as it has been consistently applied for an extended period of time, measured in years. In such cases, the past practice cannot be changed without negotiations. If the past practice has been sporadically applied, then a past practice does not exist. Taking the example of snow days again, if the CBA is silent as to whether you need to report on such days and the consistent practice for a number of years is that administrators did not have to report and did not have to use leave accruals, then the district cannot require you to report without negotiating the change in the past practice with the bargaining unit. If sometimes administrators are required to report on snow days and sometimes are permitted to stay home without loss of leave accruals, then there is no past practice. (However, you may still have a work day/year violation as a mandatory subject of bargaining.)

For PERB actions, there is a 90 day window from when you discovered the violation in which to file a Notice of Claim with the school district. This puts the district on notice of the dispute and gives an opportunity for it to be remedied before a formal Improper Practice Charge is filed with PERB, which must be done within four months of discovering the alleged violation. Case law indicates that a Notice of Claim is not a prerequisite to commencing an action with PERB, but we often recommend doing so in order to foster settlement discussions with the district.

The third primary avenue for dealing with terms and conditions of employment comes when additional duties are added on to an administrator's already busy schedule. When this occurs, the remedy is for the bargaining unit to demand impact bargaining. (An individual may not engage in impact bargaining directly with the district.) The remedies in impact bargaining can be anything from further distribution of the additional duties, to more support services, or additional monetary compensation. There isn't a statute of limitations for demanding impacting bargaining. It is typically recommended that enough time passes so the impacted individual can gather data to quantify the number of hours the additional duties have added, but that impact bargaining is demanded within one year of the duties being added in order to avoid claims that the individual has lived with the duties without complaint.

These are the three primary ways your terms and conditions of employment can be safeguarded. As always, the SAANYS Legal Department is here to answer any questions, guide you in the right direction, and vigorously enforce your rights. Due to potentially tight statutes of limitations, it is always best to contact SAANYS if you suspect a violation so it can be addressed promptly. ■

SAANYS Legal Department Update on Important Litigation December 2015

There are currently several active lawsuits that may potentially impact SAANYS members. The SAANYS Legal Department is either actively involved in or monitoring these important legal matters. The following is a brief summary of several litigations that are of interest to SAANYS members.

NYSHIP Buyout

SAANYS has reported in the past about the Department of Civil Service's rule that employers who offer health insurance through the New York State Health Insurance Plan (NYSHIP) are no longer allowed to offer a financial incentive to employees in exchange for not taking employer offered health insurance if the alternate coverage also comes from a NYSHIP plan. Such a financial incentive is commonly referred to as a buyout and is a commonly negotiated benefit in collective bargaining agreements. Both SAANYS and NYSUT were involved in active litigation on the matter on behalf of bargaining units. The SAANYS case was dismissed on a procedural violation, namely the concept that the statute of limitations commences once the rule was issued and not when the employer admittedly first notified the administrators' association of the rule. SAANYS appealed this unfair determination that associations have constructive notice of changes to regulations without having actual knowledge of the changes. The Appellate Division, Third Department, disagreed with SAANYS' interpretation that the commencement of a statute of limitations should be when the association has actual knowledge of the change in regulation. SAANYS then attempted to bring the issue to the state's highest court, the Court of Appeals, which declined to hear the issue.

But hope is not lost on the buyout issue. NYSUT's cases were heard by a different judge, who ruled that the prohibition on the buyback was impermissible as a matter of law. The state appealed this decision and oral arguments were heard in October 2015. A decision is anticipated in the next few months and SAANYS will keep its members advised on this issue that impacts many members.

Anti-Tenure Litigation

As SAANYS has reported in the past, there is a group of parents from New York City, Albany, and Rochester who have brought a lawsuit on behalf of their children in Supreme Court, Richmond County, alleging that the statutes concerning tenure, layoff and recall rights, APPR, and 3020-a due process rights are denying their children to the constitutional right to a "sound basic education." The theory behind this lawsuit is that these challenged statutes are making it too easy for ineffective educators to receive tenure and making it too difficult for school districts to get rid of ineffective older educators, sometimes to the detriment of effective newer educators.

SAANYS, on behalf of two principals, was the only administrative group to intervene as a defendant in this litigation and become a party in order to protect the rights of administrators. Last January, oral arguments were heard on the defendants' motions to dismiss the case for failure to state a cause of action. In March 2015, the court determined that the plaintiffs sufficiently stated a cause of action and that the case should continue.

Subsequent to that decision, the laws were radically changed by the legislature, including issuing the new APPR system. In response, the defendants, including SAANYS, filed a new motion, seeking to have the case dismissed on the basis that the new versions of the challenged statutes made the case moot. The court recently issued a decision that the changes in the laws were minimal and the matter should proceed. It did recognize that the defendants are going to appeal both decisions in this case and have put a hold on the case until the Appellate Division issues a decision.

SAANYS and the other defendants are currently preparing their appeals for submission to the Appellate Division by the end of December. SAANYS will continue to keep members apprised of any developments in this important matter.

Educational Funding Litigation

SAANYS is also closely monitoring the pending case of *New Yorkers for Students' Educational Rights (NYSER) v. State of New York.* In that matter, NYSER, a group of parents from throughout New York State, are alleging that New York State has failed to implement the educational funding reforms it adopted in 2008. Plaintiffs in this case have filed a motion for summary judgment, seeking a judicial declaration that the state's continuing failure to apply its own funding reforms is denying the students of this state to their constitutionally guaranteed right to a sound basic education and that such non-compliance must be fully corrected by the 2016-2017 school year, either through implementation of the statutory funding formulas or through the development of a new educational finance system. Oral arguments on this motion took place on November 4, 2015. SAANYS is eagerly awaiting the decision on this matter and will inform everyone promptly of the developments.

If you have questions on these, or any other, cases, please contact the SAANYS legal department and we will be happy to discuss these matters. ■

What to Do When You're Under Investigation January 2016

As supervisors and leaders, SAANYS members are oftentimes forced to make hard decisions and/or call people to task for not doing their jobs. Acting in this responsible manner sometimes results in administrators being blindsided by false accusations that could lead to a school district investigation. Many find it understandably frustrating that districts investigate complaints that seemingly lack merit and/or come from people who are known to be chronic problems. It is important to understand that districts have an obligation to investigate complaints in order to prevent future liability should the person making the complaint decide to sue. If you find that you are the subject of an investigation, remember the best thing to do in these situations is to contact the SAANYS Legal Department at the earliest possible time. The following is a brief guide to help you understand what actions may be needed.

Initially, you need to be aware that if you are the target of an investigation, you are entitled to representation of your choosing. Districts often respect this fact, but occasionally we will hear of situations where members are told that they can only bring their unit president. This is simply not the case. If you are ever the subject of an investigation, you may bring someone from your local bargaining unit if you are comfortable, or SAANYS can arrange to send a labor relations specialist or attorney. If you receive pressure from the district to proceed with representation that is less than what you are comfortable with, contact the SAANYS Legal Department and we will intervene. Should you choose to go to an investigatory interview with just someone from your unit, you always have the right to stop the interview and request that it be resumed at a date and time when someone from SAANYS can accompany you.

The second part of being able to have the representation of your choosing is that the district must provide you with reasonable notice on any interview with you. All too often, SAANYS will receive panicked calls from members who are being directed to report to an interview in a very short period of time. If you would like someone from SAANYS present, we will make every effort to accommodate the requested time, however if we cannot get someone for the appointment, the district is under an obligation to reschedule the meeting for a mutually convenient date and time.

Once in the interview, it is important to know your rights. Members will often ask whether they are entitled to a copy of the allegations. The answer to that will depend on what your district's harassment policy states, but we always recommend that you press to at least hear the allegations before the interview in order to prepare any supporting documentation you may have. It is extremely important to note that tenured certificated administrators have the right not to answer any questions and the district may not use such refusal against the administrator. Probationary certificated administrators and Civil Service administrators do not enjoy this protection and may be found insubordinate if they refuse to answer questions. There is one extremely important exception to this fact, if the allegations could have criminal implications, you do not need to (and should not without the guidance of a criminal attorney) answer the questions.

Typically, you will know that you are the target of an investigation and the general subject matter (teacher complaint, specific incident with a parent, etc.) before the interview. When that occurs, the first thing to do is to take a deep breath and calm down, being frantic has never helped anyone. The next is to begin to collect documentation on the issue: emails, notes from meetings, and any other evidence are all helpful. Not only might this information help the district to exonerate you, but it may also assist you in writing a rebuttal should anything come of the investigation.

In the event that the person making the complaint decides to sue you and/or the district, you are entitled to a defense and indemnification. This means that the district must provide you with an attorney, who often is the same attorney who will represent the district, and pay any potential settlements or verdicts, with limited exceptions. If you ever are served papers in a lawsuit, you must specifically request a defense and indemnification. Call the SAANYS Legal Department and we will happily walk you through the process.

Being the subject of a complaint and investigation is a stressful thing. Always call the SAANYS Legal Department at the earliest possible point so we may ease some of the stress and provide you with specific advice and representation. ■

SAANYS Successfully Defends a Long Island Whistleblower February 2016

Recovers Back Pay and Benefits

Mike Tweed, a probationary Long Island administrator and SAANYS member, exposed a cheating scandal in his school district. Instead of being granted tenure based on his exemplary service, Tweed was retaliated against for reporting the criminal conduct by being denied tenure. During this time period, Tweed's administrative unit was not affiliated with SAANYS, however, Tweed fortunately was an individual member and sought out SAANYS General Counsel Art Scheuermann, a former Suffolk County prosecutor, to defend him against the illegal action taken.

In New York, it is extremely rare for probationary administrators to successfully challenge a denial of tenure. In the last known case, in 2003, SAANYS successfully tried such a case entitled, *Kunjbehari v. Wyandanch Union Free School District*, in Suffolk County Supreme Court, in which a building principal was wrongfully denied tenure after a fourth year of probation. It was proven at trial that the superintendent and board of education had discriminated against him because of his union activities. In that case, the principal received almost one half million dollars in back pay and benefits.

In the current case, several litigations were employed. First, SAANYS grieved the district's termination decision because the school district had failed to follow the collective bargaining agreement's (CBA) evaluation procedure. This litigation culminated in the recent arbitration award that is the basis of this article. And, second, SAANYS filed a federal constitutional lawsuit against the school district and individually sued the superintendent and every member of the board of education for their egregious conduct. The lawsuit is scheduled for trial in June of 2016.

Concerning the arbitration case, the administrators' CBA required the evaluation of non-principal administrators to follow the following procedures: (1) to jointly developed goals by October 15; (2) to provide continuous formative evaluation and feedback throughout the school year in the form of one-on-one evaluation meetings; (3) to document by written memo any serious performance issues that could result in a negative evaluation; and, (4) to issue a final annual evaluation. In conjunction with these specific contract provisions, Scheuermann also relied on past practice and relevant board policies to show that the school district treated Tweed like a pariah in following the established evaluation procedure for administrators.

For example, both the superintendent and Tweed's direct supervisor, an assistant superintendent, failed to meet and jointly agree on mutual goals by the contractual deadline, as had been done in Tweed's two prior probationary years of employment. From the start of his tenure-bearing year, Tweed noticed a difference in his evaluators and how the evaluation process was being largely ignored. Tweed's direct supervisor failed to schedule the goals-setting meetings over the summer as was done in his prior two years of employment.

Unlike prior years, Tweed's goals were not finalized by the end of the summer. Instead, Tweed's jointly developed goals were late by over two months and were only completed on December 20, 2014. The two month delay was a clear violation of the contract.

Due to the lateness of the goal setting, the evaluative period was abbreviated. However, neither the superintendent nor assistant superintendent ever held any evaluative meetings with Tweed. When confronted about this glaring violation of the CBA's evaluation procedure, both the superintendent and assistant superintendent claimed that they had evaluation meetings with Tweed, but they were in the form of group meetings, emails, and phone calls. The absence of any documented evaluative meetings constituted a second violation of the CBA.

The CBA also required that Tweed receive a written memo if a serious problem in performance should ever arise that could cause a negative final evaluation. In this case the superintendent and assistant superintendent never documented any issue with Tweed's performance. In fact, the assistant superintendent of human resources, who oversaw all aspects of personnel, testified that he was certain Tweed would be awarded tenure because of his outstanding work and the absence of any complaints or criticisms about his performance.

Despite the lack of documented performance issues, the superintendent denied tenure based on five trumped-up performance deficiencies. The arbitrator, Robert Simmelkjaer, saw through the baseless reasons for the denial of tenure and found that Tweed's supervisors' lack of calendar entries and documentation demonstrated different intentions. As the arbitrator wrote:

> [I am] . . . not persuaded the administer could have amassed five (5) performance issues ostensibly unrelated to his jointly developed goals that did not rise to the level that "could cause a negative final evaluation," yet collectively warranted a negative tenure recommendation. Inconceivably they failed to document anything.

Accordingly, Arbitrator Simmekjaer found the district failed to document Tweed's alleged performance concerns and found a third violation of the CBA's evaluation procedure. Given the clear and convincing evidence that Tweed's evaluators failed to comply with the CBA, past practice, and pertinent board policy, Arbitrator Simmelkjaer ordered Tweed be reinstated to a fourth year of probation, be awarded back pay and benefits, and directed to be made whole because of the school district's violations of the CBA.

Tweed's administrative bargaining unit, the Glen Cove Educational Administrators Association, has since joined SAANYS. ■

The Dangers of the Social Network
March 2016

Social networking is everywhere. It is common to find parents, children, coworkers, and even the elderly on the networks across the social media world, on sites such as Twitter, MySpace, Facebook, YouTube, and LinkedIn. With social networks, people across the world have access to tools and options that were previously non-existent. However, there are just as many new opportunities to get into potential danger as there are to connect.

Trouble from your use of social media comes in two forms: (1) usage and (2) content.

Usage related problems stem from an administrator's improper use of employer-owned equipment. If you are using a desktop, laptop, tablet, cellphone, email address, or other technology that is purchased and/or paid for by the district, then you have NO expectation of privacy. This means that your employer may go through its property to see your browsing history, etc. If your employer has an acceptable use policy that prohibits personal use of the technology or that you cannot use the technology for personal reasons during the workday, using social media on the equipment may result in discipline. It is important to check your district's acceptable use policy to see what you can and cannot do with district equipment and/or during the workday. Even if there is a very liberal policy in place, it may be wise to limit your social networking activities to personally owned pieces of equipment in order to best protect your personal privacy.

As for content related problems, one thing we often forget while having fun on social networks is that al-

most anybody can see what we are doing. While we are tagging photos of what we did on the weekends or using social networks on company time, it can be easy to forget that someone at work may see this and the result could cost you your job. Checking your privacy settings and acceptable contacts to make sure they are people you actually want to view the content you are posting on your personal social media accounts are good ways to limit potential damage.

It is also important to remember that there are some very good hackers out there. What student or angry parent would not love to get a photo of the school principal, or any other administrator, dancing on a table with a red solo cup in their hand? No one is saying that you cannot behave in that manner in private if you wish, however, being discreet and avoiding posting such activities on social media will prevent a whole host of problems down the line.

Another concern is the controversy with Facebook and their sharing your private information with third party companies. This is why you are shown a privacy statement when you install an application. The providers of these applications are third party companies and websites who could be able to access your private information such as your address or phone number. If they can get to it so can other individuals. Does this mean you should not have a Facebook or other social media account? Absolutely not, it means don't put anything on social media that you would not mind the general public having access to. There is no harm in declining to post your home address or placing a false address in your profile to throw people off.

While social media has good opportunities for networking, job-seekers should be careful about what they say or reveal on any social network. Many studies have shown that a significant percentage of employers use social media to conduct their own "background" checks. If a job-seeker applies for a serious job, certain information, conversations, or even flippant comments could compromise hiring status.

The *Washington Post* recently released an article about background checking services that now exclusively run social media background checks for corporations and companies around the country. Casual drug references, various photos, or jokes posted as a profiles status – could all be things that could and do prevent job-seekers from being hired.

There are documented cases that take this even beyond looking for a job, to being fired from a job for what is on a social media profile. A teacher in a Pennsylvania high school was fired for a photo she posted of herself dressed as a pirate, holding a plastic cup, and labeled "drunken pirate." She was fired for promoting underage drinking.

In New York, the state's highest court, the Court of Appeals, has held that the off-duty conduct of a tenured educator may be the basis of formal discipline if it (1) directly affects the performance of professional duties, or (2) without contribution by school officials, becomes the subject of such public notoriety that the educator cannot discharge his or her duties. If you are tenured, you have certain protections before you can be disciplined for your conduct on social media, but people in probationary capacities must be extra diligent or risk potentially being let go for being a poor role model.

Regardless of whether the charges were fair, the fact is, social media is public. It's something anyone can check, including employers who may have hired the unlucky, unsuspecting applicant who did not consider taking down a similar photo of herself out with friends. It may be a harmless, fun photo to the social media user, but to an employer it could be grounds for being scratched off the list of potential hires, or even grounds for discipline or even being fired. So, how do you get around this?

Be careful about what you do, how you behave, and what you say in a public, social forum – especially when job-hunting. Don't leave yourself open to professional scrutiny with possibly questionable photos, comments, or other content. Go the extra mile and create a dazzling social media presence. Ensure that you appear within a context of social media, the same way you would like to appear to an employer. Participate in industry groups. Post intelligent information, discussions, or recent goals that have been accomplished. Don't feel as though you need to isolate yourself, just protect yourself and your career at the same time. And, as always, if you ever encounter problems, contact the SAANYS Legal Department. ■

FMLA: When and How it Can be Used
April 2016

Taking an extended period of time off in order to deal with a health issue is often a scary and confusing time. To take some of the worry out of the process, employees are entitled to up to twelve weeks of unpaid leave per year pursuant to the Family Medical Leave Act (FMLA). While FMLA leave is unpaid, it does require that all group health insurance benefits be maintained during the leave. Unfortunately, the promise of job security can also result in additional stress for those who are not familiar with the process.

FMLA is for individuals who either directly suffer or must care for a family member suffering from a "serious health condition." This may either be something joyous, like the birth or adoption of a child, or an illness, injury, impairment, or physical or mental condition that involves inpatient care and subsequent treatment for the inpatient care or continuing treatment by a health care provider. If it is an injury or illness, there are legal requirements as to the frequency and nature of the continuing treatment in order for an illness or injury to qualify for FMLA. An employer has the right to request medical certification to prove that an employee qualifies for FMLA. Additionally, if FMLA is used for a personal illness or injury, the employer has a right to request a medical certification that the employee is fit to return to work.

FMLA leave may either be requested by an employee or designated by an employer for a long term absence. If the employer designates a leave to be under FMLA, the twelve weeks does not commence until the employee is put on notice of such designation. For example, if an employee is out using sick leave for three weeks with no return in sight when the employer designates the leave to be under FMLA, the twelve weeks would start on week four and not on the date of the first absence.

One of the biggest points of confusion with FMLA is the concept that it is unpaid. If an employee has accrued leave time or there is another provision within the applicable CBA providing for paid leave, an administrator may be paid through these methods while on FMLA leave at the designation of either the employer or the employee. This being said, the employer is the only party who may decide whether accrued time runs separately or concurrently with the unpaid FMLA leave. In other words, if an employee has eight weeks' worth of accrued time, he or she does not automatically have twenty weeks available to take off. Only the employer may decide whether there will be twenty weeks (eight paid and twelve unpaid) or only twelve weeks (eight paid and four unpaid).

FMLA frequently arises in situations of maternity/paternity leave. Both the birth parent and the spouse are eligible to take FMLA to care for a newborn. However, in situations where spouses are employed by the same employer, the amount of leave that may be taken due to the birth is limited to a combined total of twelve weeks. Further, in situations relating to childcare leave for the non-birth parent, whether an administrator may utilize sick leave will be limited to what has been negotiated within the applicable collective bargaining agreement (CBA). Some CBAs provide for unlimited use of sick leave in order to care for family members, while others limit the use to a certain number of days per year. Should you fall under the latter, then any additional paid time off will have to come through the use of accrued vacation or personal time.

Upon return from FMLA leave, an employee must be restored to his or her original job, or to an equivalent job with equivalent pay, benefits, and other terms and conditions of employment. An employee's use of FMLA leave cannot result in the loss of any employment benefit that the employee earned or was entitled to before using FMLA leave, nor be counted against the employee under an attendance policy.

There are many additional intricacies involved in FMLA leave, which the employer is obligated to notify the employee of at the time the leave is being applied for. The employer's human resources department is the best area to address any initial questions; however, SAANYS is happy to discuss any further questions that may arise. ■

Audio Recording in the School House May 2016

Many times while having a meeting in a classroom or during an investigation, you might feel the need to record someone or feel that you are being recorded by someone. In light of this, the SAANYS Legal Department would like to lay out a few of the basic rules regarding audio recording in New York State and the school setting. In case of any actual controversy regarding tape recording, please be sure to consult the SAANYS Legal Department as soon as possible.

Generally, recording a conversation in New York is permissible. New York is a one party consent state, meaning that only one participant in the conversation must consent to, or even know about, the audio recording, and that participant may be you. This can be a benefit or a hindrance to SAANYS members because while you may record a conversation that you are in without the other party's consent or knowledge; other school actors such as teachers, students, and community members may record a conversation that they are privy to without your knowledge. Moreover, when making a tape recording of a conversation on school property, be aware if the board in your educational institution has a blanket policy against audio recording on school premises.

In instances where you know you are being recorded, it is important to have a copy of the full recording in the event that a segment of the conversation is used against you out of context. It is recommended that, if you know that you are being recorded, you either ask for a copy of the full recording or make a recording simultaneously.

If you are not a participant in a conversation, you may not record it. This would be akin to wiretapping. However, a number of exceptions exist to this rule including: a) public meetings, such as school board meetings are recordable due to New York's open meetings law; b) recordings made by law enforcement personnel engaged in the conduct of their authorized duties; c) security system recordings where a written notice is posted on the premises stating that a video surveillance system has been installed for the purpose of security; and; d) video surveillance devices installed in such a manner that their presence is clearly and immediately obvious.

The rules regarding audio recordings further diverge in the collective bargaining and unit settings. In these areas, audio recording is generally not permissible during collective bargaining negotiations and when an employer is conducting an employee investigation.

During contract negotiations, if the parties do not mutually agree to an audio recorder being present, then the presence of one constitutes a failure to bargain in good faith. This is because contract negotiations by their very nature involve a tumultuous process with a continuous back and forth between the parties. In this type of setting, heated words may be exchanged and often times there are various tradeoffs.

In the context of an employer/employee investigation that could result in discipline, the terms and conditions of discipline are a mandatory subject of negotiation, meaning the association can always negotiate or demand to bargain regarding the parameters for discipline. This encompasses the issue of audio recording investigative meetings between employer/employee. More importantly, this means that the current investigation procedures are in place unless they are negotiated or mutually changed. In these cases members should look to the past practice of the employer or a negotiated policy regarding audio recording. If the past practice has never involved recording during employee investigations for the unit, it may not start unilaterally for an individual member. It is an employer violation of a past practice if an employer uses audio recording technology during an employee investigation, when never having done it previously.

As one can gather, the rules for audio recording in the school setting are complicated. Therefore, please be aware that when dealing with any audio recording issue it is advisable to consult a SAANYS attorney or labor relations representative before making any type of decision. ■