



TO: The Honorable the Members of the Board of Regents

FROM: Valerie Grey *Valerie Grey*

SUBJECT: Proposed Amendment to Subpart 82-1 Relating to Procedures for Hearings on Charges Against Tenured School Employees Pursuant to Section 3020-a of the Education Law

DATE: July 9, 2012

AUTHORIZATION(S): *Richard A. Trentaciani* *John B. J. J. J.*

SUMMARY

Issue for Decision (Consent Agenda)

Should the Board of Regents adopt the proposed amendments to Subpart 82-1, relating to procedures for hearings on charges against tenured school employees, in order to implement Education Law section 3020-a, as amended by Chapter 57 of the Laws of 2012?

Reason(s) for Consideration

State statute and Review of Policy.

Proposed Handling

The proposed amendment is submitted to the Full Board for adoption as an emergency measure and for confirmation as a permanent rule at its July 2012 meeting. A statement of the facts and circumstances which necessitate emergency action is attached.

Procedural History

On March 30, 2012, the Governor signed Chapter 57 of the Laws of 2012 (The Budget Bill). Part B of the Budget Bill amended section 3020-a of the Education Law relating to the appointment and selection of hearing officers and reimburseable hearing expenses. At its April 2012 meeting, the Board of Regents adopted the proposed amendment as an emergency rule, effective April 24, 2012. A Notice of Proposed and

Emergency Rule Making was published in the State Register on May 9, 2012. A copy of the proposed amendment is attached. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background

As part of its 2011 legislative agenda, the Board of Regents sought a number of modifications to the tenured teacher hearing process set forth in Education Law §3020-a to address spiraling costs and the extraordinary length of time arbitrators utilized to conduct hearings. This legislation was introduced in the Assembly and Senate. The Governor's proposed 2012-13 State Budget incorporated some of these reforms, and the State Budget as adopted by the Legislature incorporated a number of important programmatic and fiscal reforms.

The changes take place immediately, and apply to all charges against tenured educators filed with the clerk or secretary of the school district or employing board on or after April 1, 2012.

The enacted budget provides that any claims for cases in which charges were filed after April 1, 2012 be paid first out of the funds appropriated for the 2012-13 fiscal year pursuant to Education Law §3020-a(3)(b)(i)(A). Total spending for 2012-13 is limited to \$3.8 million. This is expected to allow the Department to make timely payments for services rendered for new cases under the new system in 2012-13. Thus arbitrators who accept cases under the new system with the recently enacted changes will be reimbursed for their services in a timely manner. Any funds remaining will be used to pay for claims on cases that had charges filed prior to April 1, 2012.

Below is a summary of the major Education Law §3020-a revisions and a description of where changes were made to existing regulations to conform to the new statutory requirements.

Prohibition on Introduction of Evidence After 125 days

A significant change is the prohibition on the introduction of evidence more than 125 days after the filing of charges unless there are extraordinary circumstances beyond the control of the parties. Proceedings under §3020-a have traditionally taken far too long to resolve and this provision is designed to ensure timely resolution by prohibiting the introduction of evidence beyond a certain point in the proceeding. This means that once the charges are filed, all parties should work expeditiously and cooperatively to complete the case in a timely manner. After 125 days, no additional evidence shall be accepted unless there are extraordinary circumstances beyond control of the parties. The "extraordinary circumstances" rule is meant to provide for that rare occasion when evidence truly can not be introduced within the prescribed time limit.

Department Selects Arbitrator When Parties Can Not Agree

The new amendments also modify the manner in which an arbitrator is selected if the parties fail to agree on an arbitrator selection within 15 days of receipt of the list.

Education Law §3020-a(3)(b)(iii) states that “[i]f the employing board and the employee fail to agree on an arbitrator to serve as a hearing officer from the list of potential hearing officers, or fail to notify the Commissioner of a selection within such fifteen day time period, the commissioner shall appoint a hearing officer from the list.” This provision authorizes the Commissioner to select the arbitrator if the parties fail to agree by the 15th day. It does not apply to NYC where there is an alternative procedure.

Department Can Establish Maximum Arbitrator Rates and Study Hours

An amendment to Education Law §3020-a(3)(b)(i)(B) requires the Commissioner to establish a schedule for “maximum rates of compensation of hearing officers based on *customary and reasonable* fees for service as an arbitrator and provide for limitations on the number of study hours that may be claimed” (emphasis added). The purpose of this amendment is to give the Commissioner the authority to control costs.

Department Can Exclude Arbitrators For Untimeliness

Pursuant to Education Law §3020-a(3)(c)(i)(B) the Department is authorized to monitor and investigate a hearing officer’s compliance with the timelines set forth in the statute. The Commissioner may exclude any hearing officer who has a record of continued failure to commence and conclude hearings within the timelines prescribed in the statute.

New Technology for Recording Hearings is Allowed

Education Law §3020-a(3)(c)(i)(D) continues the requirement that an accurate “*record*” of the proceedings be kept at the expense of the Department and furnished upon request to the employee and the board of education. The statutory changes, however, permit the Department to take advantage of any new technology to transcribe or record the hearings in an accurate, reliable, efficient and cost effective manner. The Department will explore other cost-effective alternatives to recording and producing transcripts for these proceedings, however, there will be no immediate change to the manner in which these hearings are recorded.

One-Year limitation on Claims

Education Law §3020-a(3)(d) imposes a one-year limitation, following the final disposition of the hearing, for the submission of claims for reimbursement for services rendered. The purpose of this amendment was to encourage timely submission of claims so that accurate budget assumptions can be made and claims can be paid for in a reasonable time.

Other Changes

A few other technical changes were made to clarify existing regulations, including, but not limited to, the following changes: (1) elimination of the requirement to include a copy of the vote of the board for each charge with the written statement of charges; (2) clarification that the notice of a need for hearing shall be sent to the Commissioner within three working days of the request for a hearing, with a copy to the

employee or the employee's attorney; and (3) a provision to authorize the Commissioner to select a replacement hearing officer if the parties fail to notify the Commissioner within two business days of their mutually-agreed-upon replacement. The amendment also provides the hearing officer with the power to regulate the course of the hearing, including scheduling the hearing dates and directing parties to appear, so that no party is unduly prejudiced by the prohibition on the submission of evidence after 125 days and clarifies that the Commissioner shall reimburse hearing officers and panel members for their necessary travel and other related reasonable expenses in accordance with the rules and limits on travel for State employees.

Following the 45-day public comment period, the Department received one comment on the proposed rule. The commenter requested that the Department limit the period of time that an employee who is charged under the provisions of 3020-a be compensated to 180 days. This change is not permitted under the statute. Attached is an assessment of public comment.

Recommendation

Staff recommends that the Board of Regents take the following action:

VOTED: That Subpart 82-1 of the Regulations of the Commissioner be amended, as submitted, effective July 22, 2012, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to ensure that the proposed amendment remains continuously in effect until it can be adopted as a permanent rule; and it is further

VOTED: That Subpart 82-1 of the Regulations of the Commissioner be amended, as submitted, effective August 1, 2012.

Timetable for Implementation

Part B of Chapter 57 of the Laws of 2012 became effective on April 1, 2012. At its April 2012 meeting, the proposed amendment was adopted as an emergency rule, effective April 24, 2012. A second emergency action is needed at the July Regents meeting to ensure that the rule remains continuously in effect until it can be adopted as a permanent rule. If adopted at the July Regents meeting, the proposed amendment will become effective as an emergency measure on July 22, 2012 and the regulation will be adopted as a permanent rule on August 1, 2012.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Proposed Rule Making in the State Register on May 9, 2012 the State Education Department received the following comment on the proposed amendments.

COMMENT: The proposed amendment to the regulation strives to shorten the length of time to conduct a 3020-a disciplinary process. We fully appreciate both that focus and the effort. However, a careful analysis by our Chief School Officers and consultation with our supporting labor relations attorneys leave us with the sense that the regulation is still full of exceptions to the time line that will not result in a shorter process. We strongly recommend that the amendment limit the period of time that an employee who is charged under the provisions of 3020-a be compensated. If the goal is to limit the process to 125 days from charge to resolution, then limit employee compensate to 180 days. This will be a motivator to significantly reduce use of the exceptions and both sides will demand quick resolution to the charge(s).

RESPONSE: The proposed amendment implements the provisions of Chapter 57 of the Laws of 2012. We would need a statutory amendment to further limit employee compensation to 180 days.

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The proposed rule is necessary to implement Education Law section 3020-a, as amended by Part B of Chapter 57 of the Laws of 2012, relating to hearings on charges against tenured school employees.

As part of its 2011 legislative agenda, the Board of Regents sought a number of modifications to the tenured teacher hearing process set forth in Education Law §3020-a to address spiraling costs and the extraordinary length of time arbitrators utilized to conduct hearings. This legislation was introduced in the Assembly and Senate. The Governor's proposed 2012-13 State Budget incorporated some of these reforms, and the State Budget as adopted by the Legislature incorporated a number of important programmatic and fiscal reforms.

The changes take place immediately, and apply to all charges against tenured educators filed with the clerk or secretary of the school district or employing board on or after April 1, 2012.

The new amendments modify the manner in which an arbitrator is selected if the parties fail to agree on an arbitrator selection within 15 days of receipt of the list. Education Law §3020-a(3)(b)(iii) states that “[i]f the employing board and the employee fail to agree on an arbitrator to serve as a hearing officer from the list of potential hearing officers, or fail to notify the commissioner of a selection within such fifteen day time period, the commissioner shall appoint a hearing officer from the list.” This provision authorizes the Commissioner to select the arbitrator if the parties fail to agree within 15 days of receipt of the list. It does not apply to NYC where there is an alternative procedure.

The proposed amendment requires the Commissioner to establish a schedule for “maximum rates of compensation of hearing officers based on *customary and reasonable* fees for service as an arbitrator and provide for limitations on the number of study hours that may be claimed” (emphasis added). The purpose of this amendment is to give the Commissioner the authority to control costs.

Pursuant to Education Law §3020-a(3)(c)(i)(B), the proposed amendment authorizes the Department to monitor and investigate a hearing officer’s compliance with the timelines set forth in the statute. The Commissioner may exclude any hearing officer who has a record of continued failure to commence and conclude hearings within the timelines prescribed in the statute.

The proposed amendment continues the requirement that an accurate “*record*” of the proceedings be kept at the expense of the Department and furnished upon request to the employee and the board of education. However, in accordance with the new law, the proposed amendment permits the Department to take advantage of any new technology to transcribe or record the hearings in an accurate, reliable, efficient and cost effective manner.

In conformity with the new law, the amendment also imposes a one year limitation for the submission of claims for reimbursement for services rendered. The purpose of this amendment is to encourage timely submission of claims so that accurate budget assumptions can be made and claims can be paid for in a reasonable time.

The rule is being adopted as an emergency measure upon a finding by the Board of Regents that such action is necessary for the preservation of the general welfare in order to immediately revise Subpart 82-1 of the Commissioner’s regulation to conform

to and implement the provisions of section 3020-a of the Education Law, as amended by Chapter 57 of the Laws of 2012.

Emergency action is also needed to ensure that the proposed amendment remains continuously in effect until it can be adopted as a permanent rule. The proposed amendment was adopted as an emergency measure at the April Regents meeting and became effective April 24, 2012. Pursuant to the State Administrative Procedure Act, the emergency rule is effective for 90 days and will expire on July 22, 2012. Therefore, emergency action is needed at the July Regents meeting to ensure that the emergency rule adopted at the April 2012 Regents meeting remains continuously in effect until it can be adopted as a permanent rule.

AMENDMENT TO REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to Education Law sections 207, 305, 3020-a and Part B of Chapter 57 of the Laws of 2012.

1. Subdivision (b) of section 82-1.3 of the Regulations of the Commissioner of Education is amended, effective July 22, 2012, to read as follows:

(b) A copy of a written statement specifying in detail each charge as to which the board finds probable cause exists[, and a copy of the vote of the board on each charge,] shall be immediately forwarded [at once] to the employee by certified or registered mail, return receipt requested, or by personal delivery to the employee and to the commissioner by first class mail. Such statement shall state the maximum penalty which will be imposed by the board if the employee does not request a hearing or that will be sought by the board if the employee is found guilty of the charge after a hearing and shall outline the employee's rights under section 3020-a, including the right to request a hearing and the right to choose either a single hearing officer or a three member panel when the charges involve pedagogical incompetence or issues involving pedagogical judgment.

2. Section 82-1.4 of the Regulations of the Commissioner of Education shall be amended, effective July 22, 2012, to read as follows:

Section 82-1.4. Request for a hearing

Where the employee desires a hearing, he or she may file a written request for a hearing with the clerk or secretary of the employing board within 10 days of receipt of the charges, and where the charges concern pedagogical incompetence or issues involving pedagogical judgment, the employee shall choose either a single hearing officer or a three member panel. In the request for a hearing, the employee may designate an attorney who will represent the employee at the hearing and who shall be

authorized to receive correspondence from the commissioner pertaining to the 3020-a proceeding on his or her behalf.

3. Section 82-1.5 of the Regulations of the Commissioner of Education is amended, effective July 22, 2012, as follows:

Section 82-1.5. Notice of need for hearing

(a) The notification [to the commissioner] of the need for a hearing shall be sent to the commissioner within three working days of the request for a hearing with a copy to the employee, or the employee's designated attorney, and shall contain the following information:

(1) an affidavit of service of the charges upon the employee;

(2) a copy of the employee's request for hearing;

(3) a place within the district or the county seat of a county in which the board is located which will be made available by the board at school district expense for the holding of the prehearing conference and hearing;

(4) the name and [address of] contact information for the attorney, if any, who will represent the board at the hearing;

(5) whether an expedited hearing is sought, and whether the employee is suspended either with, or without pay;

(6) an estimate of the number of days needed for the hearing;

(7) the name of the panel member selected by the board, if applicable; and

(8) where the board has received written notice that the employee will be represented by an attorney at the hearing, the name and [address of] contact information for such attorney.

(b) . . .

(c) [At the same time that the notification is sent to the commissioner, the board shall, by certified mail return receipt requested, send to the employee the information provided in paragraphs (a)(3), (4), (5), (6) and (7) of this section.

(d) Separate notification of the need for a hearing shall be given with respect to each employee against whom charges have been filed.

[(e)] (d) Whenever an employee shall be deemed to have waived his/her right to a hearing, the clerk or secretary of the board shall immediately file notice of such waiver with the commissioner.

(e) Where the matter is resolved prior to the decision of the hearing officer, the board shall notify the commissioner and send a copy of such resolution to the commissioner within ten days of the resolution.

4. Section 82-1.6 of the Regulations of the Commissioner of Education is amended, effective July 22, 2012, to read as follows:

Section 82-1.6. Appointment of hearing officer and notice of prehearing conference

(a) . . .

(b) [Not later than 10 days from the mailing of the list] Within 15 days after receiving the list of potential hearing officers, the parties or their agents or representatives shall by agreement select a hearing officer and each party shall notify the commissioner thereof.

(c) If the parties fail to notify the commissioner of [an agreed upon hearing officer within the time] a selection within the 15 day time period prescribed by subdivision (b) of this section, the commissioner shall [request the association to select a hearing officer from said list] appoint a hearing officer from the list. The provisions of this subdivision shall not apply in cities with a population of one million or more with alternative procedures specified in section 3020 of the Education Law.

(d) . . .

(e) . . .

5. Subdivisions (a) and (b) of section 80-2-1.7 of the Regulations of the Commissioner of Education shall be amended, effective July 22, 2012, to read as follows:

(a) The commissioner shall maintain a list of persons eligible to serve as panel members pursuant to Education Law, section 3020-a(3)(b)(iv), which list shall be updated [at least annually] as necessary.

(b) Copies of such list of panel members appointed by the commissioner [shall be filed in the office of the school district clerk or secretary of the board of each district and] shall be available for public inspection upon request to the commissioner.

6. Section 82-2.10 of the Regulations of the Commissioner of Education is amended, effective July 22, 2012, to read as follows:

Section 82-1.10. Conduct of hearings

(a) . . .

(b) . . .

(c) . . .

(d) If the hearing officer determines that the absence of a hearing panel member is likely to delay unduly the prosecution of the hearing, he or she shall order the replacement of such panel member. If the party who selected such panel member fails to select a replacement within two business days, the commissioner shall select such replacement. If the hearing officer needs to be replaced and [if the commissioner determines that] the parties [cannot agree on a replacement] fail to notify the commissioner of their mutually agreed upon replacement within two business days, the

commissioner shall [request the association to select a replacement from the list of hearing officers] select the replacement. In no event shall a panel hearing proceed except in the presence of two panel members and the hearing officer.

(e) . . .

(f) All evidence shall be submitted by all parties within one hundred twenty five days of the filing of charges and no additional evidence shall be accepted after such time, absent extraordinary circumstances beyond the control of the parties.

(g) The hearing officer shall have the power to regulate the course of the hearing, set the time and place for continued hearings, and direct the parties to appear, so that no party is unduly prejudiced by the prohibition on the submission of evidence after one hundred twenty five days.

(h) At the conclusion of the testimony, the hearing officer may adjourn the hearing to a specified date after conclusion of the testimony, to permit preparation of the [transcript] record, submission by the parties of memoranda of law, and deliberation; provided that such specified date may not be more than 60 days after the prehearing conference unless the hearing officer determines that extraordinary circumstances warrant a later date. [The] Upon request, the hearing officer shall arrange for the preparation and delivery of one copy of the [transcript] record of the hearing to each panel member, to the employee and the board.

[(g)] (i) The hearing officer or hearing panel shall render a written decision within 30 days of the last day of the final hearing, or within 10 days of the last day of an expedited hearing and shall forthwith forward a copy to the commissioner, in a manner prescribed by the commissioner, who shall send copies to [the employee and the clerk or secretary of the employing board] the parties and/or their designated attorneys. Such written decision shall include the hearing officer's findings of fact on each charge, his or

her conclusions with regard to each charge based on such findings and shall state the penalty or other action, if any, which shall be taken by the board, provided that such findings, conclusions and penalty determination shall be based solely upon the record in the proceedings before the hearing officer or panel, and shall set forth the reasons and the factual basis for the determination.

7. A new section 82-1.11 of the Regulations of the Commissioner of Education shall be added, effective July 22, 2012, to read as follows:

Section 82-1.11 Monitoring and Enforcement of Timelines

The Department will monitor and investigate a hearing officer's compliance with the timelines prescribed in Education Law section 3020-a. A record of continued failure to commence and complete hearings within the time periods prescribed in this section shall be considered grounds for the commissioner to exclude such individual from the list of potential hearing officers for these hearings.

8. The existing section 82-1.11 of the Regulations of the Commissioner of Education shall be renumbered as section 82-1.12 of the Regulations of the Commissioner of Education and is amended, effective July 22, 2012, to read as follows:
[Section 82-1.11] Section 82-1.12. Reimbursable hearing expenses

(a) [The] Except as otherwise provided in this section, the commissioner shall compensate the hearing officer with the customary fee paid for service as an arbitrator for each day of actual service rendered by the hearing officer. For [this purpose] hearings commenced by the filing of charges prior to April 1, 2012, a day of actual service shall be five hours. In the event a hearing officer renders more or less than five hours of service on a given calendar day, the per diem fee shall be prorated accordingly. For hearings commenced by the filing of charges on or after April 1, 2012,

a day of actual service shall be defined in guidelines prescribed by the commissioner.

Any late cancellation fee charged by the hearing officer shall be paid by the party or parties responsible for the cancellation.

(b) In addition to the statutory fees payable to the hearing officer and panel members for each day of actual service, the commissioner shall reimburse hearing officers and panel members for their necessary travel and other related reasonable expenses [incurred at rates not to exceed the rates] in accordance with the rules and limits on travel applicable to state employees.

(c) The commissioner shall arrange for the preparation of [a hearing transcript by a competent stenographer and shall compensate the stenographer for the cost of preparing the transcript and copies thereof for the hearing officer, each panel member, the department, the employee and the board] an accurate record of the proceedings. Upon request, a copy of the record shall be provided by the commissioner to the hearing officer, panel members and/or the parties at the department's expense. Upon request of one or more parties, the commissioner may arrange to have a daily copy of the [transcript] record prepared and distributed to each party making such request and to the hearing officer, in addition to [the] any final copies [to be] provided by the commissioner after conclusion of the hearing. Any incremental cost incurred for preparing a daily copy for a party and the hearing officer that is in addition to the base amount payable by the commissioner for preparation of the final [transcript] record shall be paid by the party requesting daily copy, or shall be shared equally by the parties where both parties request daily copy.

(d) . . .

(e) Limitations on fees for hearing officers. For hearings commenced by the filing of charges on or after April 1, 2012, a hearing officer shall be not be reimbursed beyond the maximum rates of compensation of hearings officers, as set forth in a schedule prescribed by the commissioner, based on customary and reasonable fees for service as an arbitrator and shall not reimbursed for more than a certain amount of study hours, as prescribed by the commissioner.

(f) Limitation on claims. No payments shall be made by the department on or after April 1, 2012 for the following if they are on a claim submitted later than one year after the final disposition of the hearing by any means, including settlement, or within 90 days after April 1, 2012 whichever is later; provided that no payment shall be barred or reduced where such payment is required as a result of a court order or judgment or a final audit:

(1) compensation of a hearing officer or hearing panel member;

(2) reimbursement of such hearing officers or panel members for necessary travel or other expenses incurred by them, or

(3) for other hearing expenses.