



Service Law § 71 – Information for PEF Members

Leave, Termination and Reinstatement Rights of Disabled Employees Under Civil Service Law § 71

Sections 71-73 of New York State Civil Service Law set forth the employment rights of occupationally and non-occupationally disabled employees. The main thing PEF leaders and stewards need to know is that no state or local-government employee can be placed on disability leave, refused reinstatement from such leave, or terminated from occupational or non-occupational leave without being given notice and an opportunity to contest the employer's decision.

CSL Section 71 – Disability leave

Civil Service Law § 71 deals with employees on occupational disability leave. It provides that an employee shall be allowed leave from his or her position due to an occupational injury or disease as defined in the Workers' Compensation Law. An occupationally disabled employee is entitled to a cumulative leave of absence of at least one-year. The appointing authority may terminate an employee after the employee has been absent on § 71 leave for a cumulative one-year period, or two years for assault cases.

If the employee is terminated, NYCRR § 5.9 outlines the specific type of written notice the employee must receive, as well as the time in which it must be given.

When the employee recovers sufficiently to return to work, the employee may be required to undergo a medical examination.

If the state disputes the employee's ability to return to work, the employee cannot be refused reinstatement, or fired, without notice and a hearing. These rights are spelled out in state Civil Service Department regulation § 5.9 that was adopted in the settlement of a federal civil-rights action brought by PEF.

ADA – Federal protections

Sections 71-73 must also be read in conjunction with the federal Americans with Disabilities Act (ADA) and New York State Human Rights Law (HRL). Under the ADA and HRL, an employer is prohibited from discriminating against qualified individuals with disabilities in hiring, promotions, compensation, termination, or other terms and conditions of employment. A qualified individual with a disability is anyone who has the skills, experience and education required for the job and can perform the job's essential functions, with or without a reasonable accommodation. Any decision about whether an employee can be placed on leave, refused reinstatement from leave, or terminated must be consistent with ADA and HRL standards.

When a member raises concerns about their rights under one of these sections of law, the matter should be brought promptly to the attention of the appropriate PEF field representative. If the field representative cannot provide the answers, the matter will be submitted to the PEF legal department for review. The legal department often provides advice and, in certain circumstances, representation in cases arising under Sections 71-73.

(Prepared by the PEF Office of General Counsel)

Employee Rights Under Civil Service Law § 71

Overview

Occupationally-injured employees have significant job protections under the *Civil Service Law*. CSL § 71 provides that an employee shall be allowed leave from his or her position due to an occupational injury or disease as defined in the *Workers' Compensation Law*. CSL § 71 further provides that an occupationally disabled employee is entitled to a *cumulative* leave of absence of at least one year (two years for assault cases). The employer may extend a Section 71 leave beyond that time, but is not required to do so.

Restoration From Section 71 Leave

At any time during the Section 71 leave, the employee may request restoration to duty. If the appointing authority agrees that the employee is fit, the employee will be returned to duty. The appointing authority has the right, however, to require the employee to undergo an examination by a physician designated by the appointing authority (either an Employee Health Services physician or a physician in the Medical Evaluation Network provided by Article 13 of the PEF/State contract). Prior to this examination, the appointing authority must provide the designated physician and the employee with a statement of the regularly assigned duties of the employee's position.¹ If the physician finds that the employee is medically fit, the appointing authority must restore the employee to duty.

Even if the examining physician finds that the employee is not medically fit, and recommends that the employee not be returned to duty, it is still within the appointing authority's discretion to restore the employee to duty. The appointing authority need not consider more than one application for restoration to duty from an employee during a single six-month period.

In the event that the appointing authority determines, based on the physician's recommendation, that the employee is not fit to return to duty, the employee is entitled to written notice of the decision. This notice must be delivered in person or by certified mail to the employee's home. **The employee has 10 working days to appeal the decision in writing.** An employee who appeals is entitled to a full due process hearing on the issue of his or her ability to return to work. At the hearing, the hearing officer will receive documents and testimony, as well as written and oral arguments, concerning the medical condition of the employee, the duties of the position, and the ability of the employee to perform those duties.

The hearing officer then submits the record of the proceeding and his or her recommendations to the appointing authority. The appointing authority issues written findings of fact and a determination, usually within 30 days, in which the appointing authority will either:

1. restore the employee to duty;
2. continue the employee on leave; or
3. terminate the employee upon a finding of permanent disability.

¹ The analysis of whether an employee is fit to return to duty must comply with the standards set forth in the *Americans with Disabilities Act* (ADA). The employer must determine, based on the medical report, if the employee is fit to perform the essential duties of the position with or without a reasonable accommodation.

PEF Field Representatives are available to represent bargaining unit employees in these hearings.

Termination of Section 71 Leave After One Year

The appointing authority may terminate an employee after the employee has been absent on section 71 leave **for a cumulative period of one year (2 years for assault cases)**. If the employee is terminated, **the employee must receive written notice of the termination, in person or by mail, at least 30 days prior to the effective date of the termination.**

The termination notice that the employee receives must include:

1. The proposed effective date of termination;
2. the right to apply to the appointing authority for reinstatement to duty if medically fit;
3. the obligation to submit to a medical examination to determine fitness to perform the duties of the position;
4. the right to a hearing to contest a finding of unfitness for restoration to duty; and
5. the right after termination of employment to apply to the Civil Service Department within one year of the end of the disability for reinstatement to the position, if vacant, to a similar position, or to a preferred list.

An employee who wishes **to contest termination under Section 71**, based on a claim that he or she has recovered sufficiently to perform the essential functions of the job with or without a reasonable accommodation, **may demand a hearing and is entitled to representation by PEF counsel at that hearing if he or she has medical documentation establishing he or she was medically able to perform the duties of the position, with or without a reasonable accommodation, at the time of the termination. The employee must also be able to produce a physician who is willing and able to testify at the hearing to that effect.**

Reinstatement After Termination

An employee who has been terminated pursuant to Section 71 may apply to the Civil Service Department for **reinstatement** if the disability ceases, but **must do so within one year from the end of the disability**. Upon application for reinstatement, a statement of the duties of the employee's former position must be served upon the former employee, together with notice of the date, time and place of the medical examination. After the examination, the former employee must be notified in writing of the findings of the physician by certified mail to his or her home. If the employee is found fit to return to perform the duties of his or her former position, the employee must be reinstated to his or her former position if vacant, or be placed on a preferred list.

If the former employee is found not fit to perform the duties of the position, he or she may apply to the President of the Civil Service Commission in writing for a hearing on the issue of fitness. The application for a hearing must be submitted within ten working days of service of the notice of an adverse medical finding or, to be on the safe side, ten days from the date of the letter itself. A hearing will be conducted during which the parties can present oral and written evidence. The hearing officer then

submits a recommendation to the President of the Civil Service Commission, who will then issue written findings of fact and a determination either directing or denying the reinstatement. An employee may appeal such a determination to the Civil Service Commission in writing within 30 days of the service of the determination denying reinstatement or, to be on the safe side, within 30 days of the date of the determination itself. The appeal, however, may only be made on the basis of manifest error and is limited to the written record. The decision of the Civil Service Commission is final and subject to judicial review via Article 78 of the *Civil Practice Law and Rules*.

Conclusion

Occupationally injured workers have significant legal protections under CSL § 71 and Section 5.9 of Civil Service regulations. No employee can be refused reinstatement from leave or terminated without notice and an opportunity to dispute the allegation that he or she is still unable to work. These rights are in large part the result of PEF's efforts, and PEF Field Representatives and attorneys are available to advise and represent members on all aspects of *Civil Service Law* § 71.

CSL § 71 and 4 N.Y.C.R.R. ¶ 5.9

Civil Service Law Questionnaire

1. Can the employer terminate an employee after the employee has been absent under *CSL § 71* for 9 months through a phone call to the employee's home?

2. Once an injured employee has been terminated under *CSL § 71*, is he or she permitted to seek reinstatement more than 1 year after the termination?

3. Can the employer send a notice under the *CSL § 71* for a termination that is effective as per the date of the letter as long as it states the reason for the termination?

4. Once an employee goes out on workers' compensation leave, at what time can he or she request a restoration to duty?

5. Can the employer require an employee who is seeking restoration to duty to undergo a medical exam?

If yes, a physician of the employer's own choosing, or the employee's own choosing?

6. Pursuant to *CSL § 71* can an examining physician find an employee who is seeking restoration to duty unfit to perform his duties if he reviews a duties description of the employee's job that the examining physician obtained on his own through the internet?

7. If the appointing authority, based on a physician's recommendation, determines that an employee is not fit to return to duty, can the agency issue its written notice to the employee via e-mail and regular mail?

8. After an employee receives such notice, does the employee have 10 calendar days to appeal, 10 working days to appeal, or 2 weeks to appeal?