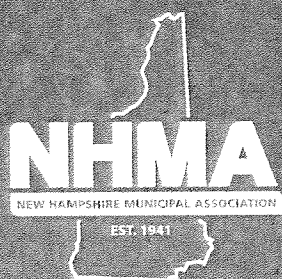


# NEW HAMPSHIRE Town and City

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## Cyberinfrastructure Projects in New Hampshire – Part 2



In This Issue:

Cyberinfrastructure Projects in New Hampshire – Part 2 .....	8
The National Flood Insurance Program and the Changes it Brings to New Hampshire.....	13
Planning for the “New Normal” .....	19
Filling a Vacancy in Local Government.....	21

## *Understanding and Applying Due Process in Disciplinary Decision Making*

By Mark Broth

Let us begin with a basic premise. Public sector employers owe a duty to the taxpayers to see that public employees are treated fairly. From a purely economic perspective, unfair treatment of employees results in a waste of public dollars. Recruitment and training of employees is expensive and time consuming. Those costs are only recovered in the community benefits from those up front costs over time. If an employee's period of service is unnecessarily shortened, those costs will never be recovered and additional monies will be expended on turnover costs. In addition, unfair treatment of employees is more likely to lead to grievances and the risk of legal liability. Not only does this cost money in legal fees, it costs the public employer the time of its officials and employees who are tied up in proceedings. Unfair treatment of one employee tends to demoralize his or her peers, resulting in inefficiency and lost productivity.

But it is more than about the money. Government is in the fairness business. Public officials are charged with the even-handed enforcement of laws, regulations, and policies. The public deserves fair treatment and will accept nothing less. Public employees do no less deserve fair treatment than the members of the public they serve.

It is also about individuals. There is a lot riding on discipline decisions. The financial stability of families can be significantly damaged when an employee is unfairly terminated. Loss of employment resulting from unfair treatment takes an emotional toll on the employee and his or her family. Employers who are cognizant of these realities often pay an emotional toll arising from uncertainty over whether they made a fair and correct decision.

A significant step towards providing employees with fair treatment is to assure that they receive *due process* prior to imposing discipline. Some, but not all, public employees are entitled to pre-termination due process as a matter of law. However, there is no harm and much benefit that derives from providing all employees with basic due process protec-

tion. Not only does it provide consistency, but due process is an added layer of protection to ensure both that the employee is treated fairly and that the employer is making a wise business decision.

What is due process? In the employment context, due process involves two basic principles: 1) that employees are entitled to know the nature of their alleged misconduct or performance deficiencies (i.e. the charges against them); and 2) that employees should be given a reasonable opportunity to respond to those allegations before any decisions are made regarding imposition of discipline.

How does it work? A decision maker (a person or entity with the authority to implement disciplinary action) gathers or causes to be gathered information regarding an employee's alleged misconduct or poor performance. An interview with the employee should be part of this information gathering process. The decision maker or person acting on his or her behalf then draws a tentative conclusion regarding the underlying facts. If that tentative conclusion is that the evidence does not support the allegations, then the disciplinary process is at an end. However, if the evidence appears to support the allegations of misconduct or poor performance, the subject employee, before any disciplinary decisions are made, should be given the opportunity to understand the nature of the evidence against him or her and an opportunity to give the decision maker their side of the story.

Let's use an example. A public works employee is alleged to have used a winch rated for 250 pounds to move a downed tree that was well over the weight limit. The winch cable snapped and the winch was damaged as a result. Luckily, the snapped cable did not hit the other employee who was standing nearby; if it had, serious injury or even death could have resulted. An investigation conducted by the Public Works Director confirms that the employee received winch safety training and had attended training on the removal of downed trees. The incident was witnessed by several people,

all of whom say the employee attach the winch cable to the downed tree and try to drag it with the truck. The witness also saw the snapped cable nearly strike another employee. The damage to the winch and the truck will cost hundreds of dollars to repair. Based on this information, the Director has recommended that the Town Manager terminate the employee.

Should the Town Manager accept the recommendation and terminate the employee? Would you be confident in the fairness of that decision? What if there are circumstances of which the Town Manager is unaware? While it is often tempting to make a judgment based on what appears to be a complete and compelling report, the Town Manager should pause before acting.

Fairness dictates that the Manager should first meet with the employee (and his or her Union representative, if in a unionized workplace). The employee should be told that the Town has evidence that he was driving the truck on the day in question, that he was observed connecting the winch cable to the downed tree, that he was observed backing the truck, that the cable parted nearly injuring a co-worker, that the winch and truck were damaged, that the employee had received winch and tree removal training, and that the Director was recommending termination. The Manager should then ask the employee why the Director's recommendation should not be accepted. The Manager should then listen to the employee's response. If information obtained from the employee suggests the need for further investigation, disciplinary decision making should be postponed until that further investigation has occurred.

Not only is this fair, but it is smart. From time to time, a story is not always as it seems – it is the decision maker's job to ensure that he has all the facts

before acting. Taking this extra step could save the Town Manager (and the Town) a lot of time and money.

Let's assume the Manager in our example does not take this step; he accepts and implements the Director's recommendation without first meeting with the employee. As one might expect, the employee files a grievance regarding his termination. In the grievance process, the employee finally gets the opportunity to tell his side of the story: that he was told by his supervisor to use the winch to move the tree; that he told the supervisor that this was unsafe; and that the supervisor told him that he would be demoted if he could not handle the heavier work. When this information comes out months after the employee's termination – the employee may be entitled to back wages as well as reinstatement. In addition, the employer looks silly.

In hindsight, wouldn't the Manager have been better off if he or she had this information before making the decision to fire the employee? You might ask why this information did not come out during the Director's investigation. The short answer is that investigations are imperfect tools and do not always develop all of the information necessary to reach a fair decision. Had the Manager provided a due process opportunity before firing the employee, he or she could have verified the information provided by the employee and incorporated that information into the decision making process. Essentially, the Town Manager would likely not have terminated the employee and would have saved time, money, and the detrimental by products of an unfair decision. Moreover, Manager would have the opportunity to address the conduct of the unsafe supervisor.

The additional time that may be required to provide an employee with

due process should always be outweighed by the desire to achieve a fair result. Sacrificing due process in the interest of expediency is impossible to justify and may well be short-sighted. Further, if the goal of due process is to achieve fair results, the failure to provide due process raises significant questions regarding the true motives of the decision maker. In short: due process is always a wise investment of time. Whether the decision maker is a board, council, commission or manager, providing due process can only strengthen your case, improve morale, and increase the chances of doing the right thing.

*Mark Broth is a member of the Drummond Woodsum's Labor and Employment Group and his practice focuses on the representation of private and public employers in all aspects of the employer-employee relationship. This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Drummond Woodsum & MacMahon, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that the reader should rely on it as such. "Copyright 2013 Drummond Woodsum. These materials may not be reproduced without prior written permission."*