Saying "Goodbye:" Nonrenewal, Reduction in Force, Dismissal and Evaluation Issues

March 7, 2012

Wadleigh, Starr & Peters, P.L.L.C.
Serving New Hampshire since 1899

By: Dean B. Eggert, Esquire
Alison M. Minutelli, Esquire
WADLEIGH, STARR & PETERS, P.L.L.C.
95 Market Street
Manchester, New Hampshire03101
Telephone: 603/669-4140
Facsimile: 603/669-6018
E-Mail: deggert@wadleighlaw.com
aminutelli@wadleighlaw.com
Website: www.wadleighlaw.com

About the Authors

Dean B. Eggert, Esquire (JD., UCLA; B.A., Wheaton College) is a partner in the firm of Wadleigh, Starr & Peters, P.L.L.C. Mr. Eggert is a jury trial attorney. Over the past 26 years he has had extensive experience representing school districts in special education matters at the administrative and appellate levels. He has spoken and lectured extensively on a wide range of legal issues in the field of education law.

Alison M. Minutelli, Esquire (JD., Franklin Pierce Law Center; B.A. Brandeis University) is an associate in the firm of Wadleigh, Starr & Peters, P.L.L.C. For the past 6 years, Ms. Minutelli has practiced in the field of school law, and has experience representing school districts in special education matters at the administrative and appellate levels. She has also written numerous articles on a wide range of legal issues in the field of education law.

A Word of Caution

No two cases are exactly alike. This material is designed to provide the administrator with a broad understanding of the law pertaining to the evaluation of school personnel. This material does not include every aspect of the law. You are strongly encouraged to seek an opinion from your legal counsel regarding any specific case.

I. Overview

The purpose of this material is to provide the administrator with a working knowledge of the law pertaining to evaluation of educators. More importantly, the goal of this material is to help the administrator understand the relationship between educator evaluation, professional development, non-renewal and dismissal. This material is not intended to cover all of the details of the law, but instead is designed to equip the administrator with a working knowledge of the general principles which apply to evaluating educators.

II. The Contractual Relationship

Since the time of the one room schoolhouse, educators have been employed on a contractual basis. Early teacher contracts included such suitable "perks" as room and board, firewood and a cow. Early contracts were subject to some rather unique and provincial terms. For example, in Coleman v. School District of Rochester, 87 NH 465 (1936), the New Hampshire Supreme Court upheld a regulation by a local school board which provided that a female teacher's marriage shall terminate her contract to teach.

The fact of the matter is that educators are not "at will" employees, but instead are protected by state law, individual contracts and collective bargaining agreements. State law provides in New Hampshire RSA 189:14 that a district "shall be liable in the action of assumpsit to any teacher dismissed in violation of the provisions of RSA 189:13 to the extent of the full salary for the period for which such teacher was engaged."[1] The Supreme Court has defined this statute as setting the "outside limit of recovery;" ruling that any earnings by the dismissed teacher after dismissal shall be deducted from her full salary for the contract period. See Spencer v. Laconia School District, 107 NH 125 (1966).

III. Defining the Contractual Relationship

The relationship between educators and their school district is defined by several aspects of the law. The purpose of this section is to identify and understand those areas of the law which impinge upon the relationship between a school district and its educators.

A. State Statutory Law

Part II, Article 83 of the state constitution establishes the fact that public education is a state function. As we understand from the case of Claremont School District v. Governor, 138 NH 183 (1993), a free public education is an important substantive right in New Hampshire. The state is the entity which protects this constitutional right. The state is also the body which has the right to

[1] "Assumpsit" is a Latin term for a contract claim.

define a constitutionally adequate education. Since education is a state constitutional obligation, state statutory law also generally defines how that constitutional duty is met. NH RSA 186:5 provides that:

> The [S]tate [B]oard [of Education] shall have the same powers of management, supervision and direction over all public schools in the state as the directors of a business corporation have over its business, except as otherwise limited by law. It may make all rules and regulations necessary for the management of its own business and for the conduct of its officer, employees, and agents, and to secure the efficient administration of the public schools.... It shall be the duty of school boards and employees of school districts to comply with the rules and regulations of the State Board.

Obviously, educators are the primary means whereby students receive a constitutionally adequate education.

B. State Regulation

The State Board of Education is given statutory authority to adopt rules and regulations relative to the following:

- Minimum curriculum and educational standards for all grades;
- Qualifications and duties for school superintendents, principals, school administrative unit professionals and other public school employees;
- Certification standards for education personnel;
- Requirements for teachers and teacher preparation programs;
- Certification standards for advanced teaching credentials; and,
- Appeals from a school board on the matter of nonrenewal of teacher contracts.

NH RSA 186:8.

C. Collective Bargaining Agreements

The relationship between educators and school districts is also defined through the context of a Collective Bargaining Agreement. Collective Bargaining Agreements may include terms which pertain to both educator's employment

status and their evaluations. The Collective Bargaining Agreement is best understood as the "master contract" between a teacher and their employer.

D. Contract

Most school districts enter into annual, partial year or "continuing contracts" with its teachers. An annual contract teacher is considered the equivalent of a non-tenured teacher whereas a continuing contract teacher is considered the equivalent of a tenured teacher.

E. Case Law

Our courts have also weighed in on the relationship between a school district and its educators. Courts have been called from time to time to define the ambiguous terms in a contractual relationship and thus further define the law pertaining to the relationship between an educator and their school district.

For example, in Gibson v. City of Cranston, the plaintiff, a former school superintendent, sued the District for breach of her employment contract. 37 F.3d 731 (1st Cir. 1994). Specifically, plaintiff alleged that the District "disregarded duties owed under the contract," including failure to provide her with an evaluation. The court found that the District had breached the agreement by failing to provide the required evaluation, but that the breach was not material (e.g. severe enough to warrant an award of damages to the plaintiff).

IV. The Law Pertaining to Non-Renewal

State law is the primary vehicle through which teacher non-renewal is regulated. NH RSA 189:14-a, entitled "Failure to be Renominated or Reelected," governs the process of teacher non-renewal. From an historic perspective, superintendents nominated teachers to the school board for "election," to another contract year. This historic process has come to be referred to as teacher renewal and connotes the idea that the school board has agreed to renew an educator's contract. This section is devoted to understanding that statute.

A. The Scope of the Non-Renewal Statute

The non-renewal statute applies to any teacher who has:

- A professional standard certificate from the State Board of Education; and
- Who has taught for one or more years in the same school district.

RSA 189:14-a.

The term “teacher” includes:

- Any professional employee of any school district whose position requires certification as a professional engaged in teaching, and also includes:
    - Principals;
    - Assistant Principals;
    - Librarians; and,
    - Guidance counselors.

2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a); see also Ferreira v. Bedford School District, 133 NH 785 (1990) (a school nurse was determined not to be a teacher under the non-renewal section).

B. The Notice Requirement

The teacher who qualifies under the above recited standards “shall be notified in writing:

- On or before April 15; or
- Within 15 days of the adoption of the district budget by the legislative body,

whichever is later, if that teacher is not to be re-nominated or re-elected, provided that no notification shall occur later than the Friday following the second Tuesday in May.” RSA 189:14-a, I.

C. The Tenured Teacher Right to Notification and Hearing

Any certified teacher:

- Who has taught for five consecutive years or more in the same school district; or

- Who has taught for three consecutive years or more in the teacher’s current school district before July 1, 2011,

who has been notified of a nonrenewal is entitled to:

- Request in writing within ten (10) days of receipt of a notice of non-renewal;

- A hearing before the school board; and

- Request a statement of reasons for their failure to be re-nominated or re-elected.

2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a).

The statute goes on to state that:

"Any teacher who has a professional standards certificate from the state board of education shall be entitled to all of the rights for notification and hearing if:

- The teacher has taught for 5 consecutive years or more in any school district in the state and has taught for 3 consecutive years or more in the teacher's current school district; or

- Before July 1, 2011, the teacher taught for 3 consecutive years or more in any school district in the state and taught for 2 consecutive years or more in the teacher's current school district."

2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a).

The reference to "years" in RSA 189:18-a means "calendar years" and not "contract years." See Nazzaro v. Merrimack Sch. Dist., 118 N.H. 287 (1978).

D. Notice of Rights

A notice of non-renewal must advise the educator of "all of the teacher's rights under [RSA 189:14-a,I,(c)]." The best way to do such is to provide the educator with a copy of RSA 189:14-a, as well as reciting the rights within the non-renewal notice letter.

E. School Board's Duty to Respond

The school board, upon receipt of a tenured educator's request for a hearing within ten (10) days of receipt of their notice of nonrenewal, shall provide for a hearing to be held within fifteen (15) days thereafter. The school board is required to issue its decision in writing within fifteen (15) days of the close of the hearing. RSA 189:14-a, I(c).

F. Leaves of Absence

The statute provides that a leave of absence shall not interrupt the consecutive nature of a teacher's service, but the leave shall not be included in the computation of whether or not the teacher has attained three years of service. RSA 189:14-a, I(c).

G. Burden of Proof for Non-Renewal

The burden of proof for non-renewal of a teacher "shall be on the superintendent of the local school district by a preponderance of the evidence." RSA 189:14-a, IV. The grounds for nonrenewal shall be determined at the sole discretion of the school board. Id.

The "preponderance of the evidence standard" is considered a civil standard of proof. The duty of the superintendent is not to demonstrate beyond a reasonable doubt that they had just cause for non-renewal, but instead that the weight of the evidence placed on the scales of justice tips in favor of the superintendent.

H. Non-Renewal Because of a Reduction in Force

The statute provides that in cases of non-renewal because of a reduction in force, the "reduction in force shall not be based solely on seniority." 2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a).

I. Due Process in Non-Renewal

ED 216.02 sets forth the due process standards whereby an educator receives their non-renewal hearing. These minimum due process standards include the following:

- The choice by the educator as to whether or not their non-renewal hearing shall be public or private;
- An obligation on the part of the board to record the hearing;
- An obligation on the part of the board to arrange for transcription upon request of either party;
- A duty on the part of the requesting party to pay for transcription;
- A right for either party to be represented by legal counsel;
- An obligation that all witnesses, except the party's principal to the action, be:
    - Sequestered from the hearings; and,
    - Allowed to enter the nonpublic session only for the purpose of testifying;

- Testimony shall be under oath or affirmation;

- The superintendent or their representative shall open the proceedings through the production of witnesses and documents;

- Party opponents are given the opportunity to cross-examine each witness, immediately following direct testimony;

- After each party opponent has had an opportunity to cross-examine a witness, the board may ask questions for purposes of clarification;

- Parties shall offer evidence as follows, but irrelevant, immaterial, or unduly repetitious evidence shall be excluded:

    - A party shall produce such additional evidence as the school board deems necessary to an understanding and determination of the issues;

    - All relevant and material evidence shall be admissible; and,

    - Hearings shall not be bound by the NH Rules of Evidence or the Federal Rules of Evidence;

- School board may receive and consider evidence of witnesses even though there has been objection to the admissibility of the evidence;

- Witnesses shall appear in person unless extenuating circumstances prevent appearance;

- By agreement, witnesses may occur through other means including telephone;

- Exhibits when offered by either party may be received into evidence by the School board;

- The educator has the opportunity to present their case and their witnesses after presentation by the superintendent;

- Rebuttal evidence may be presented, but is limited to rebutting evidence previously submitted by the other party;

- The educator provides their closing argument first;

- The superintendent provides their final closing argument;

- The superintendent has the burden of proof by a preponderance of the evidence;

- The school board deliberates in accord with the determination as to whether or not the hearing is public or non-public;

- The school board has an obligation to provide a written decision within fifteen (15) days of the close of the hearing;

- The decision must be in writing and set forth the facts and conclusions of law found by the school board;

- The school board must apprise the educator of their right to appeal the decision to the State Board; and

- The decision shall be mailed to the educator by certified mail.

J. A Limited Appeal Remedy

RSA 189:14-b provides that a teacher may petition the State Board of Education for review of the Board's decision, or "request arbitration under the terms of a collective bargaining agreement pursuant to RSA 273-A:4, if applicable, but may not do both." RSA 189:14-b, I; 2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a).

The statute goes on to state that "[a] petition for review under this section shall constitute the exclusive remedy available to a teacher on the issue of the nonrenewal of such teacher." 2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a and RSA 273-A:4).

RSA 273-A:4 has been amended to clarify that grievances resulting from a nonrenewal shall not be subject to arbitration or other binding resolution, unless:

- There is a provision in an existing collective bargaining agreement that provides for arbitration or other binding resolution, however, upon the expiration of the agreement, that provision shall be null and void; or

- The school district and the union enter into a subsequent collective bargaining agreement that provides for arbitration or other binding resolution for teacher nonrenewals, however, upon the expiration of such agreement, the provision shall be null and void.

2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a and RSA 273-A:4).

The petition must be in writing and filed with the State Board within ten days after the issuance of the Board's decision. Upon receipt of the request, the State Board has a duty to notify the School board of the request for review and "shall forthwith proceed to a consideration of the matter. Such consideration shall include a hearing if either party shall request it." RSA 189:14-b, I. The State Board shall issue its decision within 15 days after the request for review is filed and the decision of the State Board shall be final and binding upon both parties.

The standard of review clearly favors the local school board. Part II of the statute provides that "the State Board of Education shall uphold a decision of the local school board to non-renew a teacher's contract unless the local school board's decision is clearly erroneous." RSA 189:14-b, II.

The Supreme Court has interpreted the predecessor to RSA 189:14-b as limiting their judicial review to those circumstances where the board has exceeded its jurisdiction or authority, abuse its discretion or acted illegally, arbitrarily, unreasonably or capriciously. See Petition of Dunlap, 134 NH 533 (1991).

K. Teacher Performance Evaluation Policy

School boards are now required to adopt a "teacher performance evaluation policy." 2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a).

V. The Law Pertaining to Educator Dismissal

The dismissal of a teacher is governed by RSA 189:13 which sets forth a standard which is often referred to as a "for cause," or "just cause," standard for teacher dismissal. This section discusses the law pertaining to educator dismissal.

A. Who May Dismiss?

NH RSA 189:13 provides that the **school board** holds the dismissal authority. NH RSA 189:39 provides that the superintendent nominates and school boards elect teachers employed in the schools in their SAU. The Supreme Court has implied that a superintendent, by withholding nomination can effectively bring about a termination. This however, can only occur on a contract-to-contract basis. In short, only a school board has the authority to dismiss an educator.

B. Reasons for a Dismissal

A school board may dismiss any teacher found by them to be:

1. Immoral.

The trend in the law is that termination for immorality must be grounded in some form of immorality which directly affects the teacher's performance as a role model for the children. The morality must be of a nature which is clearly inconsistent with the character goals set by a school district. Classic examples of immorality include consistently lying to superiors, using vulgar language or engaging in actions which are contrary to the school district's code of conduct. Immorality should be defined by a local policy adopted by the school board.

2. Incompetent.

Incompetence is best defined through the negative that is by defining the competent educator. A termination for incompetence must, by definition, arise from a failure on the part of the educator to meet the district's definition of competence. A district which fails to define its expectations with regard to competency will have an extremely difficult time terminating for incompetence.

The school board should also adopt a policy that specifically defines incompetency. For example, one school district has adopted a policy that defines immorality, incompetency, and misconduct. The policy defines "incompetence" as: "Lack of requisite ability or sustained failure to perform the duties of one's employment." Id.

The policy contains the following examples of incompetence by teachers:

- Lack of knowledge of the subject area;
- Inability or failure to convey one's knowledge of the subject area;
- Inability or failure to effectively plan and present an organized lesson plan;
- Inability or failure to maintain a safe, organized, and orderly learning environment (including but not limited to blocking fire exit signs or doors, organizing the classroom

in a way that prevents a safe exist in an emergency, permitting the classroom or teacher's work area to become unacceptably cluttered or distracting, and neglecting to keep a clean, healthy, and hazard-free classroom);

- Inability or failure to properly store or secure potentially dangerous classroom materials or personal belongings (including but not limited to flammable materials, poisonous or toxic chemicals, implements or tools that could be used as weapons, and certain prescribed and over-the-counter medications).

- Inability or failure to maintain control in the classroom so as to permit learning to occur;

- Neglect of duties (including but not limited to: failure to follow a student's IEP or 504 Accommodations Plan, leaving students unsupervised, failure to discipline with consistency and/or failure to maintain proper building or classroom discipline, persistent and unexcused absence, and failure to prepare or follow lesson plans or course outlines).

- Misconduct.

The policy also contains the following examples of incompetence for other staff members:

- Lack of knowledge;

- Inability or failure to complete a job assignment;

- Inability or failure to follow instructions;

- Inability or failure to operate equipment;

- Inability or failure to perform job duties and responsibilities accurately;

- Neglect of duties;

- Misconduct.

In addition, an educator's teaching certificate or credential shall be suspended or revoked if the Bureau of Credentialing finds that the educator is incompetent. Ed 511.02 (a)(1).

3. In failure to conform to regulations prescribed.

This is an area where districts frequently fail to lay the requisite ground work. However, examples of termination for failure to follow prescribed regulations would include, but not be limited to, the following:

- Failure to conform with state regulations;
- Excessive unexcused absences; and
- Insubordination.

NH RSA 189:13.

C. Prior Notice and Hearing

A teacher under contract may not be dismissed until such time as they have been:

- Previously notified of the cause of such dismissal; and
- Have previously been granted a "full and fair hearing."

NH RSA 189:13.

The conventional wisdom is that a "full and fair hearing," will follow the state regulatory format for a non-renewal hearing. The term "full and fair," connotes due process and due process is best met through complying with the regulatory standard in ED 204.02. It is safe to assume that the superintendent bears the burden of proof in the dismissal.

D. Mandatory Dismissal

There are certain circumstances which require that a school district terminate an employee without a hearing. Employees of an SAU or school district who have been convicted of: homicide; child pornography; aggravated felonious sexual assault; felonious sexual assault; or kidnapping, in this state or under any statute prohibiting the same conduct in another state, territory, or possession of the United States, **shall have their employment terminated by the School Administrative Unit or school district after it receives notice of the conviction**. NH RSA 189:14-d. There is no "full and fair hearing requirement" for this form of termination.

In addition, a teacher certified in New Hampshire who has been convicted of any felony involving child pornography or of a felonious physical assault on a minor or of any sexual assault, shall have his/her teacher certification revoked by the New Hampshire State Board of Education. NH RSA 189:14-c.

E. Removal Authority

While a superintendent may not directly terminate an educator, "superintendents have a statutory duty through their principals to direct and supervise the work of teachers." A superintendent may "for cause" remove a teacher or other employee of the district from the classroom setting. The person so removed shall continue as an employee of the district unless discharged by the local school board, but may not return to the classroom or undertake to perform the duties of such person's position unless reinstated by the superintendent. NH RSA 189:31. This is the safety valve whereby a superintendent can remove an educator prior to a dismissal hearing.

Any person so removed (unless dismissed by the school board) has an appeal to the state board. This appeal is governed by NH RSA 189:32 which provides broad latitude to the State Board in "making such orders as justice requires." Conventional wisdom suggests that a classroom removal may give rise to a grievance under the grievance procedure of a Collective Bargaining Agreement.

Practice Pointer: RSA 189:31 would allow the superintendent to suspend an employee (with pay) during the pendency of an investigation. However, to assist in avoiding a claim that you have subjected an employee to two disciplinary sanctions for the same conduct, you should ensure that when an employee may be subjected to different levels of discipline for the same infraction, he or she is made aware that the first sanction is not final. See Zayas v. Bacardi Corp., 524 F.3d 65 (1st Cir. 2008) (When an employer suspends an employee for the purpose of probing the latter's conduct, neither the employer nor the employee reasonably can believe that the suspension is a final, complete, and conclusive punishment for the suspected infraction. Were the doctrine [of industrial double jeopardy] applied otherwise, an employer would be placed in an untenable position: either take precipitous action (by cashiering the employee without an investigation) or expose itself to further harm (by keeping the employee in place despite his suspected wrongdoing)).

VI. Board Member Impartiality

In the context of a non-renewal or dismissal hearing, the school board serves as the impartial trier of fact. When a board serves in this capacity, it is "presumed to be of conscience and capable of reaching a just and fair result." Appeal of Hopkinton Sch. Dist., 151 N.H. 478 (2004).

A board member who has actual bias or prejudice must recuse him or herself from the nonrenewal or dismissal hearing. Appeal of Hopkinton Sch. Dist., 151 N.H. 478 (2004) (holding that "a school board may conduct a non-renewal hearing, absent a showing of actual bias or prejudice. To hold otherwise would disregard the intent of the legislature in providing a statutory framework for non-renewal proceedings complete with hearings at [the local school board level]"); Farrelly v. Timberlane Reg'l Sch. Dist., 114 N.H. 560 (1974) ("[p]laintiffs assertion that they were denied due process because the school board's prior involvement in the case rendered it impossible for them to act as an impartial decision making body, is unsupported by any showing of actual bias or prejudice and it is well established that prior involvement in itself is not a sufficient ground to bar a statutory administrative body from acting as decision maker at an otherwise full and fair hearing").

While a showing of actual bias or prejudice requires "more than prior involvement" of a board member or the school board, board members should avoid the appearance of bias or actual bias by ensuring that they:

- Refrain from ex parte communication with the teacher or administration about the subject matter of the hearing;
- Refrain from obtaining information about the hearing, except through documents and evidence submitted as part of the hearing process;
- Refrain from communicating about the subject matter of the hearing, prior to the deliberations at the conclusion of the hearing; and,
- Ensure that they follow District policies pertaining to the processing of requests for hearings.

VII. The Relationship Between Educator Evaluation, Professional Development, and Its Impact on Renewal and Dismissal

A. The Duty to Evaluate

ED 302.02 states that a superintendent shall "(n) be responsible for the evaluation of personnel and programs in accordance with local school board policies." However, ED 304.01 requires that the school principal shall "assign, direct, and be responsible for the evaluation of all personnel employed in the school in accordance with local school board policy, administrative rules and as directed by the superintendent of schools." See ED 304.01(c).

B. Collective Bargaining Agreements and the Evaluation Procedure

Your district's Collective Bargaining Agreement may address the procedure for the evaluation of teachers. If so, it will be important to ensure that the agreed-upon evaluation process is followed. See Appeal of Pittsfield Sch. Dist., 144 N.H. 536 (1999) ("Once parties to a CBA have chosen to bargain over matters not otherwise prohibited from negotiation, the parties must abide by the agreement entered into during the term of the CBA." The CBA contained "ten procedures by which performance of teachers is to be evaluated," and as a result, the district could not unilaterally change those procedures while the CBA is in effect); see also Appeal of White Mountain Reg'l Sch. Dist., 154 N.H. 136 (2006) (reaching the same conclusion).

C. Minimum Evaluation Requirements

If your district's collective bargaining agreement does not set forth an evaluation procedure, then the following minimum professional development evaluation requirements should be part of the "Teacher performance evaluation policy" that all districts are required to adopt. 2011 N.H. Laws, Chapter 267 (eff. July 1, 2011) (making amendments to RSA 189:14-a).

- All teacher evaluations must be in writing;
- Unsatisfactory performance must be documented in writing and must be evident from the evaluation;
- If an evaluation is going to be used as a basis for non-renewing a teacher, its delivery should be accompanied by written notice that the evaluation result is unsatisfactory and may lead to a non-renewal recommendation;
- Teachers should be apprised in writing of the time period they have been given in which to correct their unsatisfactory performance.
- A second written evaluation must document the fact that the teacher failed to correct their unsatisfactory performance.

D. Case Studies

The following cases illustrate the importance of conducting timely and complete evaluations, and the impact of the evaluation on the dismissal process.

Weston v. Indep. Sch. Dist. No. 35 of Cherokee County, 170 P.3d 539 (Okla. 2007).

Facts: Weston obtained his teaching certificate in 1993. In 1995, he was selected as one of the top-five teachers in Oklahoma. In 2001 Weston began teaching fifth-grade math, science and social studies at an elementary school in another district. At that district, he received two evaluations per year; all but one of those evaluations indicated that he met "criteria/satisfactory." In October 2003, the principal met with the teacher; the principal indicated that the goal of the meeting was to make Weston a "better teacher." The principal told Weston that he had concerns about his prior test scores. Prior to that meeting, Weston had no indication that anything was amiss, and he had not received any complaints from parents or students.

The principal subsequently provided Weston with suggestions to improve his teaching and suggested that he use a specific methodology.

In November 2003, Weston received an evaluation that indicated that he had met "criteria/satisfactory." In February 2004, Weston was given a written improvement plan. The plan required that Weston take certain steps, such as observing other teachers and attending professional development. Weston took the required steps, however, the principal and vice principal continued to monitor him. At his second evaluation during the 2003-2004 school year, Weston also received a met "criteria/satisfactory" evaluation. Nevertheless, the principal recommended that Weston not be rehired.

The Superintendent recommended that Weston be dismissed. Weston was dismissed on the grounds of unsatisfactory performance and instructional ineffectiveness. Weston petitioned for a trial de novo before the district court, in accord with an Oklahoma State law. The law further provided that the burden of proof was on the district to prove that dismissal was warranted; the burden of proof was a preponderance of the evidence.

The district court found in favor of Weston and the district appealed. The appeals court reversed, finding that Weston failed to present sufficient evidence that he had complied with all of the requirements in the teacher evaluation plan. Weston appealed.

Issue: Whether the evidence established that the district failed to prove by a preponderance of the evidence that Weston should be fired for institutional ineffectiveness or unsatisfactory teaching.

Held: For Weston. The court noted that:

> Tenure status, which is statutorily conferred upon teachers who have been in employment of the school district the required number

> of years, demonstrates legislative intent to grant teachers substantive rights in their continued position, which are not possessed by those in a temporary or probationary status. Under this regime, teacher contracts are automatically renewed on a continuing basis unless a school board or a teacher acts to prevent the employment's renewal. Once attained, tenure status cannot be lost except on the grounds sanctioned by law.

The court went on to state that "[p]roving instructional ineffectiveness and unsatisfactory teaching performance by a preponderance of the evidence is the standard" under State law. The district failed to meet that burden. The testimony from the district that Weston had not utilized the methodology that the principal requested that he use did not establish that Weston was ineffective, particularly in light of the numerous positive evaluations that Weston had received.

Practice Pointer: Without more, the failure to utilize a specific methodology does not rise to the level of incompetence necessary for termination.

Marino v. Shoreham-Wading River Central Sch. Dist., 2008 U.S. Dist. LEXIS 95178 (E.D. N.Y. Nov. 20, 2008).

Facts: Plaintiff was a tenured teacher employed by the district to teach English to student in grades 7 through 12. In July 2007, plaintiff's immediate supervisor, the school principal, created a written "teacher improvement plan" that identified specific behaviors that the teacher was required to change, including: structuring her lessons in a manner that leads to high levels of learning for all; returning student work with appropriate feedback and grades in a timely manner; marking attendance appropriately and following up with the necessary procedures; supervising students at all times; supplying work for students on home instruction in a timely manner and responding promptly to parents and tutors; arriving on time for professional duties; following appropriate test administration procedures; and, improving her attendance.

The plan contained a timeline within which plaintiff was expected to accomplish the required changes and indicated that the plaintiff would be monitored regularly for compliance. It also identified multiple resources available to assist the plaintiff with compliance including: frequent unannounced observations by administration to make recommendations on plaintiff's teaching, periodic meetings with administration, authorization to attend conferences, and encouraging plaintiff to consult the employee assistance program.

After receiving the plan, plaintiff filed suit against the district pursuant to 42 U.S.C. §1983, alleging constitutional violations resulting from the imposition of the teacher improvement plan. In particular, the plaintiff alleged that the measures imposed upon her were "punitive and arbitrary and capricious," and that the plan was created as a result of the district's decision that she engaged in

misconduct and that the district failed to give plaintiff notice of the charge or the opportunity for a hearing. Plaintiff believed that the Board's actions violated the Fifth and Fourteenth Amendments to the United States Constitution. The district moved to dismiss the complaint in its entirety.

Held: For the district. The district argued that the plaintiff was not entitled to a hearing because the improvement plan was not a reprimand or suspension or dismissal. Instead, the plan was intended to improve plaintiff's performance. Plaintiff argued that the plan was the equivalent of an evaluation and that the procedures in the plan, along with the time period in which to complete the required elements of the plan constituted disciplinary measures.

The court noted that the plaintiff had a property right in her employment as a tenured teacher, but that she was not deprived of that right. The court cited a state law that provided that "no person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified" by law. Such procedures included notice and the opportunity for a hearing, prior to the imposition of said discipline or removal.

The court went on to note that the plaintiff did not claim that she was suspended without pay, fined, or dismissed. Thus, the issue was whether the improvement plan constituted a written reprimand sufficient to trigger the procedural safeguards set forth in the statute. If it did not, plaintiff could not establish a violation of her constitutional rights.

The court stated that the plan "infers that plaintiff's pedagogical competence and judgment were deficient in some areas and [was] critical of her performance, however, the purpose of the [plan] was to call plaintiff's attention to those areas of her performance which needed improvement and to encourage her compliance with the school policies and use of available resources in the future."

In addition, since the plan was drafted by the plaintiff's immediate supervisor, it was only one administrator's view of plaintiff's performance, and was not a formal finding of misconduct. Thus, the court found that the plan was a critical administrative evaluation, and not a disciplinary reprimand. As a result, plaintiff's complaint was dismissed.

Clarke v. Bd. of Educ. of the Vestal Central Sch. Dist., 105 A.D.2d 893 (N.Y. 1984).

Facts: Clarke, a tenured seventh grade teacher, was dismissed for incompetence. For the three years prior to his dismissal, his immediate supervisor and the school principal made at least seven separate and independent classroom observations of Clarke; based on the observations, both

individuals concurred in their identification of Clarke's teaching deficiencies. During that time period, Clarke received unsatisfactory evaluations, and was informed that his job was in jeopardy if his performance did not improve.

As a result of the evaluations, Clarke was directed to "prepare legible, satisfactory weekly lesson plans which identify appropriate behavioral objectives, which include specific and appropriate learning activities, techniques and procedures to accomplish these objectives." Legible copies of the plans were to be provided to his supervisor for review on a weekly basis. Clarke was also instructed to establish a folder for each student and to retain all of the student's written work.

When Clarke failed to improve, the district began removal proceedings on the basis of incompetency, insubordination, inefficiency, and conduct unbecoming a teacher. After 8 days of hearing, the board recommended dismissal; Clarke appealed.

Held: For the district. The court noted that "Incompetence is borne out by evidence that petitioner was a poor teacher who failed to demonstrate any improvement even though extensive aid was made available to him, and his constant unwillingness to accept the directives of his superiors clearly supports the finding of insubordination." The court found that there was evidence that Clarke repeatedly failed to submit lesson plans in a timely manner and, more often than not, those which were submitted were illegible, and that Clarke failed to maintain complete student folders. In addition, the work that was maintained in the folders was inadequately corrected and analyzed.

Bd. of Directors of the Sioux City Community Sch. Dist. v. Mroz, 295 N.W.2d 447 (Iowa Aug. 27, 1980).

Facts: Mroz taught junior high school science within the school district until the end of the 1977/78 school year. On March 4, 1978, the Superintendent informed Mroz that he was intending to recommend that the Board terminate his contract at the end of the school year on the basis of incompetence. The Superintendent provided Mroz with a written document that listed 14 reasons for the recommendation. The reasons fell into four broad areas: inadequate maintenance of discipline during class, excessive and ineffective use of films, ineffective classroom teaching, and failure to improve and cooperate with administrators who tried to assist in correcting the deficiencies. Upon receipt of the notice, Mroz requested a hearing before the School Board. The Board determined that just cause existed and voted to terminate the teaching contract. Mroz appealed.

On appeal, the Board was ordered to reinstate Mroz as a teacher. The Board appealed that decision with the District Court. The District Court affirmed, and the Board appealed again.

Held: For the District. The court noted that a teacher's contract may be terminated for "just cause," and that incompetence or faults attributable to the teacher can be just cause for termination. The court found that there was substantial evidence that supported the Superintendent's recommendation and the Board's decision to terminate the teacher. In particular, the evidence produced at the hearing established that the four areas that the Superintendent had included in the letter as the basis for termination were well established.

The court noted that the evidence established that "Mroz did not improve after administrators both informally and formally pointed out his deficiencies and made several offers to help him." The teacher also acknowledged that "he treated some recommendations for improvement 'a bit lightly.'" Thus, because the teacher had received both the formal and informal evaluations indicating that he needed to improve his performance, and he failed to do such, the Board was entitled to terminate him.

San Diego Unified Sch. Dist. v. Commission on Professional Competence, 194 Cal. App. 4th 1454 (Cal. App. 4th Dist. April 4, 2011).

Facts: A teacher posted an ad on Craigslist.com in which he solicited sex. The ad, which contained graphic images and obscene written text, was discovered by a parent and reported to the District. The district requested that the teacher remove the ad, and he did such. The teacher also took steps to ensure that there were no other links to the listing or information on the internet that would tie him to the listing.

Several months later, the teacher was placed on administrative leave and the District began proceedings to terminate the teacher on the basis that he was unfit for service, immoral, and refused to follow State Board of Education guidelines. The teacher requested a hearing to contest the charges.

During the hearing, the teacher testified that he created the ad at his home, after school hours, and did not use school time or equipment to create or access the listing. He did not believe that student's would view the posting, although he believed it was the responsibility of students and their parents not to access the listing.

The principal testified that based on the listing, she had lost confidence in the teacher and questioned his ability to serve as a role model for students.

The Board determined that cause for the dismissal did not exist, and ordered that the teacher be reinstated. The Board found that the listing was vulgar and inappropriate and demonstrated a serious lapse in good judgment, but that the district had "failed to prove any nexus whatsoever to [the teacher's]

employment with the district." The district appealed, and the trial court affirmed. The district appealed that decision to the court of appeals

Held: For the district. The evidence at the hearing established that the teacher was unfit to serve as a teacher and that he had engaged in immoral conduct, either of which were grounds for termination.

The court noted that the factors relevant to a determination of a teacher's unfitness to teach were:

1. The likelihood that the conduct may have adversely affected students or fellow teachers and the degree of such adversity anticipated;
2. The proximity or remoteness in time of the incident;
3. The type of teaching certificate held by the party involved;
4. The extenuating or aggravating circumstances, if any, surrounding the conduct;
5. The praiseworthiness or blameworthiness of the motives resulting in the conduct;
6. The likelihood of the recurrence of the questioned conduct; and
7. The extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers.

Id. (citing Morrison v. State Board of Education, 461 P.2d 375 (Cal. 1969)). There must also be a nexus between the individual's alleged misconduct and his/her employment.

The court noted that a parent and an educator saw the listing, and that there was testimony that the graphic, pornographic nature of the listing had impaired the teacher's relationship with the principal. In addition, the teacher's public listing was inconsistent with his credential, and the teacher had previously posted five or six similar ads. Although the teacher indicated that he would not post the same listing again, he indicated that he would continue to post advertisements to solicit sex. The court also found that the remainder of the factors indicated that the teacher was unfit, and supported the dismissal.

The court also noted that the public posting on the internet "of pornographic photos and obscene text constitute immoral conduct," sufficient to terminate the teacher.

TABLE OF CONTENTS