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THE LEGAL ASPECTS OF DISMISSAL OF NONCERTIFICATED PERSONNEL

The University of North Carolina at Greensboro

Ed.D. 1983

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THE LEGAL ASPECTS OF DISMISSAL OF
NONCERTIFICATED PERSONNEL


by

Lawrence C. Walker

A Dissertation Submitted to
the Faculty of the Graduate School at
The University of North Carolina at Greensboro
in Partial Fulfillment
of the Requirements for the Degree
Doctor of Education

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Approved by:


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Directed by: Joseph E. Bryson

The problem of dismissal of noncertificated staff for boards of education and school administrators is a relatively recent occurrence. Declining enrollments and determined, economy-minded voter-taxpayers are forcing educators to dismiss staff due to reductions in budgets. While teacher contracts and tenure laws prescribe dismissal procedures for professional staff, a void exists for procedures on dismissal of noncertificated staff. This study presents an historical perspective of the legal aspects of dismissal of noncertificated staff.

A legal background is presented for the analysis of court decisions concerning dismissal of noncertificated staff in six major areas: (1) reduction in force, (2) incompetency, (3) insubordination, (4) neglect of duty, (5) immorality, and (6) disability.

Chapter IV reviews significant decisions of the courts in the six major categories of dismissal. Chapter V reviews issues in which dismissal attempts may or may not be settled to the satisfaction of the individual, the school administrator, or the board of education. Prevailing social and political pressure groups, coupled with an increased awareness of the rights of individuals, have brought sensitivity and reaction to the issue of dismissal. Major educational and constitutional issues are reviewed. General conclusions are drawn

from analysis of court decisions concerning the legal aspects of dismissal of noncertificated staff. Such conclusions should be of assistance to school boards and school administrators in dealing with dismissal procedures.

A model school board policy is included with an administrator's worksheet and a recommended dismissal form.

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A special debt of gratitude goes to my family for instilling the value of education and the belief that education is a continuous process to be pursued throughout life. My wife, Mary, served as my critic and my greatest supporter for the many hours spent on this research project. A special appreciation to my secretary, Anne, for her assistance. To all of my colleagues and friends who provided encouragement and support, I am truly appreciative.

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CHAPTER I

INTRODUCTION

The legal aspects of dismissal of noncertificated staff are increasing in both momentum and time consumption for boards of education and school administrators. The numbers of noncertificated personnel have grown in recent years as new programs have been added to the curriculum. The noncertificated staff now perform many of the duties previously performed only by the certificated staff.

The dismissal of noncertificated staff has been brought to the forefront of the educational and legal communities by increased emphasis on the rights of individuals and the collective pressure of special interest groups. As dismissal of noncertificated staff is primarily a function of the local boards of education, debate continues, involving the courts at all levels of the judicial system.

This study reviews court cases dealing with six major areas of dismissal: (1) reduction in force, (2) incompetence, (3) insubordination, (4) neglect of duty, (5) immorality, and (6) disability. Specific litigated cases in each area of dismissal are reviewed in this study in order to interpret major judicial issues.

The overall purpose of this study is to provide appropriate information to aid school administrators and boards of education in

making decisions concerning the legal aspects of dismissal of noncertificated staff. Proper dismissal procedures should help prevent litigation and unpleasant public relations for school systems when dismissal becomes a major issue.

Statement of the Problem

The storm continues to rage over the dismissal of noncertificated staff. Administrators in public education are confused as they dismiss staff only to be challenged by quasi-judicial and judicial proceedings. As noncertificated staffs have grown in numbers to the extent that they now exceed the professional staffs in many school systems, so has grown the problem of dismissal of noncertificated staff.

Rights of individual and collective pressure groups have brought sensitivity and reaction to the issue of dismissal. Most states have statutes setting forth mandatory procedures for dismissing teachers. These procedures are found usually in the states' tenure acts. Some acts prescribe the procedural format in considerable detail, while others provide that the teacher be dismissed after notice and an opportunity for a hearing has been given. No state has been found to have a statute dealing with dismissal procedures for noncertificated staff. There may be several reasons for this void. For one, no general uniform licensing requirements are set by state law for noncertificated

staff. Because of nonuniform licensing standards, there is an absence of statutes for protection. Secondly, the source of employment of non-certificated staff is at the local school district level. Therefore, local school board policies and procedures are used as guides in determining employment standards and dismissal procedures.

Questions to be Answered

Listed below are pertinent questions which the writer will attempt to answer through this study:

1. What are the major legal aspects surrounding dismissal of noncertificated employees?
2. Of the major causes for dismissal of noncertificated employees, which ones are most likely to be litigated?
3. Are there major differences between the legal aspects of dismissal of professional employees and those of noncertificated employees?
4. Based on educational research, what criteria should be established for dismissal of noncertificated staff?

Scope of the Study

This study will entail an historical study of the legal aspects of dismissal of noncertificated staff in public schools in the United States. The study will describe the extent to which dismissal of

noncertificated personnel has been litigated, the causes for litigation, results of major court cases, and the possible effects on future decisions of school administrators.

The study discusses chronologically the history of judicial decisions and some quasi-judicial reviews of dismissal proceedings of boards of education.

The study will provide an analysis and a synthesis of all major court decisions and attempt to assess the present and future implications of dismissal of noncertificated employees for school administrators and boards of education.

Methods, Procedures, and Sources of Information

The basic technique of research for this study will be an historical approach that will examine, analyze, and synthesize the available resources relevant to the legal aspects of dismissal of noncertificated personnel.

In order to determine the relevance and need for such research, a search was made of the Dissertation Abstracts for related topics. Articles appearing in various journals were located through the use of the Education Index, Reader's Guide to Periodical Literature, and Index to Legal Periodicals.

Topics of related research summaries were located in various texts on school law, the many reports of personnel groups and

regulations coming from the federal and state levels, and a review of literature obtained through a computer search of the Education Resources Information Center (ERIC).

Federal and state court cases relative to dismissal of noncertificated personnel were isolated through the use of the Corpus Juris Secundum, American Jurisprudence, the National Reporter System, and the American Digest System. Other court cases were found by reviewing case summaries contained in various issues of NOLPE School Law Reporter. Cases were located, read, and analyzed, and then categorized into topics corresponding to the issues noted from the general literature review.

Definition of Terms

Terms that frequently occur in this study are selected for definition.

Noncertificated - A noncertificated employee is one whose position does not require teacher training, preparation, and licensing; examples include, but are not limited to janitors, cafeteria workers, secretaries, and aides.¹

¹"The Essentials of Employee Discharges," The Indiana School Board Journal, March-April, 1982, p. 29.

Procedural Due Process - Refers to the procedures and methods used to carry out regulations; an individual's right to notice and a hearing.²

Substantive Due Process - Refers to the fairness of the law or regulation; based largely on the due process clause of the Fourteenth Amendment to the U. S. Constitution and on comparable provisions in state constitutions.³

Courts - Refers almost exclusively to the state supreme courts and to the Supreme Court of the United States.⁴

Dismissal - Refers to either temporary deprivation or removal from a job⁵ or a permanent severance from service.⁶

Significance of the Study

One of the most difficult problems facing boards of education and school administrators today is the dismissal of staff. While

²Shirley B. Neill and Jerry Curtis, "Staff Dismissal: Problems and Solutions" (Sacramento, California: Education News Service Press, 1978), p. 33.

³Ibid.

⁴N. Bennett Boyles, "Legal Aspects of the Public School Academic Curriculum," Ed. D. dissertation, the University of North Carolina at Greensboro, 1981, p. 6.

⁵Nichols v. Suderland, 237 p. 2 d 614 (Ca. 1977).

⁶Downey v. School Committee of Lowell, 25 N. E. 2 d 738.

teacher contracts and tenure laws prescribe dismissal procedures for professional staff, a void exists for procedures on noncertificated staff. Declining enrollments and determined, economy-minded voter-taxpayers are forcing educators to do something totally foreign to their experience: dismiss staff. A generation of educators, who prided themselves on their ability to keep up with unprecedented growth, must now turn 180 degrees and cope with an entirely different situation.

During the periods of growth, it was much easier to dismiss staff or counsel them into moving on when things did not work out between employer and employee. Dismissals are now more difficult because of the effective resistance of unions, because fewer jobs are available, and because those dismissed are increasingly willing to go to court if necessary to retain their jobs.

There is no question that fewer pupils will mean fewer jobs and dismissal for some noncertificated staff. The total enrollment decline of 1.07 million students in grades K-12 between 1970 and 1975 looks small when compared to the 3.63 million student decline predicted for the period 1976 to 1985.⁷

⁷National Center for Education Statistics, *Projections of Education Statistics to 1985-1986* (Washington, D. C., 1980)

In a study conducted by the American Association of School Administrators, 42 percent of 1,728 responding school districts said staff dismissal had reached "serious proportions." More larger districts (up to and over 5,000 enrollment) found staff dismissal a "major" problem, with 53 percent calling it "serious" compared to 40 percent of smaller districts.⁸ One out of three districts was in the process of dismissing staff when the survey was conducted. Dismissals were occurring more frequently in the Northeast than in other sectors of the country.

The following reasons for dismissal by school administrators are often cited:

1. Incompetence
2. Declining Enrollment
3. Legislation
4. Tenure
5. Negotiations
6. Affirmative Action Policies
7. Budget Problems
8. Court-Ordered Unitary Systems

⁸Neill and Curtis, p. 5.

While many noncertificated employees are pressing for "seniority" and "job security", the general public is pressuring school districts more than ever to "do a better job" and to cut costs. The taxpayers want to slash taxes and "reduce wasteful government practices."⁹

Even before the taxpayers' revolt surfaced, school administrators had money and staff problems. They consistently ranked "adequate school financing," "cost reduction," and "dismissal of staff" as the top three administrative problems in polls conducted by the American Association of School Administrators.¹⁰

An item in the Wall Street Journal said:

Sentiment is suddenly crystalizing that taxes are too high and that the services government delivers are a poor bargain . . . Americans don't want to destroy government. They want it to serve them better. They want public employees to be paid at market rates, not above the market. They want featherbedding and waste eliminated.¹¹

Paul B. Salmon, American Association of School Administrators' Executive Director, said, "Dismissal of staff is more difficult today than it was ten years ago because of the dearth of jobs. Now . . .

⁹Ibid., p. 7.

¹⁰Neill and Curtis, p. 7.

¹¹Wall Street Journal, October 24, 1981, p. 12.

staff says, 'you have to fight me down to the wire because I can't get another job'. " ¹²

The public is looking closely at the intent and operations of the public schools. "The teaching profession is under more careful public scrutiny than other professions because it serves a large number of children and parents on a daily basis," indicated Salt Lake City Superintendent M. Donald Thomas. "Moreover," he continued, "salaries are paid from tax funds and therefore are subject to more intense public pressure." ¹³ Professor Theodore H. Lang of the City University of New York maintained that as we develop a more highly educated citizenry, the public is more interested in the process of education and insists on being involved in the process. ¹⁴

Design of the Study

The remainder of the study is divided into four parts. A review of the literature is covered in Chapter II dealing specifically with the legal aspects of dismissal of noncertificated personnel. This chapter also includes a review of research conducted in this area.

¹²Neill and Curtis, p. 6.

¹³Ibid., p. 7.

¹⁴Ibid.

Chapter III includes an historical narrative of dismissal procedures used with noncertificated staff, as well as a discussion of the legal aspects and the major educational issues surrounding this issue.

Chapter IV is a discussion and analysis of major litigated cases regarding dismissal of noncertificated staff. State and federal court cases have been reviewed with attention given to facts of the cases, decisions of the courts, and impacts of decisions on dismissal procedures.

The concluding chapter of the study contains a summary of the information obtained from a review of the literature. The questions asked in Chapter I are reviewed and answered. Recommendations for legally acceptable policies concerning dismissal of noncertificated staff are made.

CHAPTER II
REVIEW OF THE LITERATURE
Introduction

The problem of dismissal of noncertificated staff for boards of education and school administrators is a relatively recent occurrence. An historical perspective is presented to give the reader an overview of this challenging and often law-entangling subject. This background shows how noncertificated employees became a part of the school family and now almost exceed in numbers the certificated staff.

The positions of noncertificated employees were created from the earlier roles and duties of the certificated staff. The history of education in the United States is also the background for development of noncertificated personnel in the schools.

Employment of noncertificated personnel, and consequently their dismissal, must be set within the legal boundaries of the due process. The rights of employees to fair dismissal procedures are reviewed through court decisions; the implications of those decisions are also discussed.

Historical Perspectives

In the very early days of American development, as in any new

society, there were no public schools or teachers. Children learned from people within the family group. As population grew, and communities grew larger and more complex, schools were started to help teach the children. From the first, school staffs and schools were conceived as auxiliaries of the home and the community. The teachers took the place of parents for a time, and the school was a small community to prepare for the larger community.¹

It can hardly be said that the American people had developed an educational consciousness before about 1820, except in the northeastern states, and in some states it was not awakened until much later.²

There were many reasons in the national life for this lack of interest in education among the masses of people. The simple agricultural life of the time, the homogeneity of the people, the absence of cities, the isolation and independence of the villages, the lack of a good transportation system, the lack of full manhood suffrage in a number of states, and the want of any economic demands for education made the need for schools and learning seem relatively minor. The

¹Thomas Woofter, Teaching in Rural Schools, (New York: Houghton Mifflin Co., 1917), p. 3.

²Ellwood P. Cubberley, The History of Education, (New York: Houghton Mifflin Co., 1920), p. 655.

country was both very young and very poor.³ But, as a system of education developed, it assumed a major role in creating the American republic. It inevitably became involved in defining the American people.⁴

After the War of 1812 the nation built up a national consciousness and at last possessed the money and the resources to turn its energies toward the creation of a system of public schools.⁵

The colonial Latin grammar school, which was patterned after an English institution, never suited the American needs. As their democratic consciousness began to arise, the American people wanted a more practical institution less exclusive and less aristocratic in character. They wanted an education system that had instruction adapted to the needs of a frontier society. Some private institutions, essentially arising from the churches, were commonly supported by local subscription or endowment. It became customary for towns, counties, and states to assist in the maintenance of these schools, thus making them semi-public institutions.⁶

⁴Lawrence A. Cremin, American Education: The National Experience 1783-1876 (New York: Harper and Row Publishers, 1980), p. 7.

⁵Cubberley, The History of Education, p. 655.

⁶Ibid., p. 656.

Besides offering a fair type of higher training before the days of public high schools, academies became training schools for teachers. Girls were admitted rather freely to the academies. The grammar schools had been exclusively for boys.

The period from 1875 to 1900 was a period of discussion and criticism of education. Practical men took the public schools severely to task, pointing out their shortcomings. The schools were forced to become self-conscious and critical of their own aims and procedures.⁷ Formal discipline determined the curriculum and teaching procedures during the second half of the nineteenth century, just as culture had experienced a dormant role during the first half.⁸

Although some classes to train teachers had been developed by the end of the first decade of the nineteenth century, normal schools were not established until 1839. Most of the teachers whose education extended beyond elementary school, received their training in academies.⁹ New and higher requirements for those who were to teach were instituted. The new subject "pedagogy," expressive of the

⁷Ellwood P. Cubberley, Changing Conceptions of Education (New York: Houghton Mifflin Co., 1909), p. 42.

⁸Stuart G. Noble, A History of American Education (rev. ed. (New York: Rinehart & Co., 1954), p. 359.

⁹Newton Edwards and Herman Richey, The School in the American Social Order (Boston: Houghton Mifflin Co., 1963).

conception of public education at that time, now began to move into the universities.¹⁰

After 1890, there was an accelerated rate of expansion. Between 1890 and the beginnings of the 1930's, public school enrollment doubled, while the number of children between 5 and 17 years old increased only about 70 percent.¹¹ By 1900 the right of the state "to provide an efficient system of free public schools" for all the children of the state had been asserted and sustained by the courts. Education for all at public expense had come to be accepted as a settled conviction of the American people.¹² In the minds of many, education became subsidiary to citizenship and dependent upon it.¹³

Role of Noncertificated Personnel

Early teachers rendered many types of service. Often they were teacher, chorister, bell-ringer, sexton, janitor, and fire-builder. The following agreement, made in Lancaster, Pennsylvania in 1747 is illustrative:

I, the undersigned John Hoffman, parochial teacher of the church at Lancaster, have promised in the

¹⁰Cubberley, Changing Conceptions, p. 43.

¹¹Edwards and Richey, p. 497.

¹²Cubberley, Changing Conceptions, p. 44.

¹³Cremin, p. 7.

presence of the congregation, to serve as chorister, and as long as we have no pastor, to read sermons on Sunday. In summer I promise to hold catechetical instruction with the young, as becomes a faithful teacher, and also to lead them in singing, and to attend to the clock.¹⁴

Later the duties of the teacher increased and covered many areas in addition to teaching. Willard Ellsbee said,

The teacher is not a physician, a nurse, a soldier, a politician, a businessman, a farmer or an industrial worker. . . . The teachers' principal business is the training of minds and the dissemination of knowledge. If the primary function of the public schools is the training of minds and dissemination of knowledge that is useful to individuals and society, then the teacher can not be a fireman, policeman, soldier, and politician combined.¹⁵

Notwithstanding, in order to carry on the work of the schools, many people are needed in jobs that are not strictly educational. These people are engaged in support activities for the teacher-learning process. There is no pattern to their addition to the school family. They are added as need for their services occurs and funds become available. The following positions, typically held by noncertificated personnel, will be discussed:¹⁶

¹⁴ Ellwood Cubberley, Public Education in the United States (rev. ed. ; (New York: Houghton Mifflin Co. , 1934), p. 34.

¹⁵ Willard S. Ellsbee, The American Teacher (New York: American Book Co. , 1939), p. 258.

¹⁶ Chris De Young, An Introduction to American Education (3rd ed. ; New York: McGraw Hill Book Co. , 1955), p. 392.

1. Clerical and Aide Personnel

clerks, secretaries, stenographers, bookkeepers, teacher aides, library aides

2. Building Service Personnel

custodians, firemen, electricians, carpenters, plumbers, painters, truck drivers

3. School Transportation Personnel

mechanics, school bus drivers, stockroom clerks, monitors, radio operators, gas truck operators

4. Cafeteria and Lunchroom personnel

cooks, bakers, servers, cashiers, transporters, cafeteria managers.

Clerical and Aide Personnel

Many opportunities exist for clerical and office service in the field of educational work. Typists, secretaries, stenographers, and bookkeepers can and do perform many tasks in school settings, thus releasing administrators and teachers for purely professional duties. So important to the schools is the office personnel group that many an executive would rather accept the resignation of two teachers than that of one clerk or secretary.¹⁷ Clerical personnel should be provided for every administrator, especially the superintendent of a school

¹⁷Ibid.

system, in numbers sufficient to relieve him and his professional assistants from clerical duties. Many attendance clerks and computer clerks are needed now in public schools.

It is not to be inferred that clerical workers are inferior to teachers. In fact, some of the best clerical personnel are those who have an academic degree and who have had some teaching experience.¹⁸ In order to secure and maintain a stable, efficient, and loyal group of office workers, it is necessary to consider several factors. Careful selection and training of new clerical personnel, an adequate salary schedule, and justly planned provisions for tenure, working hours, leaves of absence, and retirement plans are important for productive workers.¹⁹

The newest group in this category of noncertificated personnel is teacher aides. This term refers to an individual who "should assist in implementing the prescription."²⁰ Most school systems do not have board policies for teacher aides as yet, possibly because the

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ "Teacher Aides... Study." New England Educational Assessment Project (Providence, Rhode Island, 1967), p. 10.

idea of aides is still in the developmental stage.²¹ Many aides appear to have an adequate general educational background for their tasks. Some require training in business education, preparation of educational materials, the operation of audio-visual equipment, an understanding of child growth and development, and a knowledge of the policies and regulations of the school. They require a good understanding of the duties that they are to perform.²²

In a New England study, the most common duties of aides in the classroom were found to be the following:

1. Providing clerical assistance including duplicating materials
2. Helping supervise the playground
3. Assisting with housekeeping chores and bulletin board arrangements
4. Helping with supervision of lunch period
5. Helping the individual child with his lesson
6. Filing and cataloging materials
7. Collecting money
8. Checking objective tests under the supervision of the teacher

²¹ Harry A. Becker, ed., "Working with Teacher Aides," (New York: Croft Educational Services, 1968).

²² "Teacher Aides in the Classroom," p. 12.

9. Correcting notebooks
10. Preparing visual materials for instruction as determined by the teacher²³

Teacher aides constitute a rapidly growing segment of the educational family as they bring valuable contributions to the classroom.

Building Service Personnel

In colonial days, most teachers performed the housekeeping duties in the school, a practice that still exists in many rural school systems. Today large and even medium-sized school systems employ numerous caretakers, who have specific titles and definite responsibilities such as engineer, fireman, cleaner, carpenter, mower, electrician, and grounds keeper.²⁴

In most systems, however, the duties devolve upon one person, who in the past has usually been called a janitor. The more acceptable nomenclature today is school custodian. Whatever the term, the modern larger and more sophisticated school plants and grounds require less manual labor, and greater knowledge and skill than were formerly required of their custodians.

²³Ibid., p. 4.

²⁴De Young, p. 393.

The building service personnel must be trained in the installation and care of delicately adjusted equipment and various machinery. Eventually preservice and in-service training will be required of all building service personnel. Some will be licensed to perform certain functions as plumbers, electricians, or heating/air conditioning specialists.

Some school systems have a civil-service examination for the purpose of selecting desirable building service personnel. Several factors hinder the improvement of school maintenance and operation, however, such as too frequent political intervention in the selection and appointment of personnel, insecurity or lack of tenure, no retirement allowances, low pay, and inadequate recognition.²⁵

School Transportation Personnel

Transportation has developed into a major educational enterprise. In states that have adopted large administrative units or consolidated small school systems in a larger unit, transportation requires a large staff. Several states are now paying part of the costs of conveying pupils to school, and many local school districts have added the school bus driver to the payroll. In some instances

²⁵Ibid., p. 394.

the school bus driver is accompanied by an assistant or a monitor who flags the bus over unprotected railroads and other hazards.²⁶

Larger school systems employ mechanics with various specialties in their garages and repair shops. Stockroom clerks, radio operators, and gas truck drivers are used in larger school systems. School transportation has developed and expanded in recent years to such significance that specific qualifications and training have been set for those engaged in this all-important work of bringing pupils in safety to the schools.²⁷

Cafeteria and Lunchroom Personnel

The school cafeteria and lunchroom are a large part of the school system today both in numbers of personnel and in percentage of the total school budget. The cafeterias are powerful factors in the educational process for the physical and social growth of children.

Cafeteria and lunchroom personnel have the following duties:

1. To provide daily attractive, well prepared, nourishing, and nutritionally adequate meals for all students at the most economical price possible.
2. To provide worthwhile learning experiences which contribute to the total development of the child.

²⁶Ibid., p. 395.

²⁷Ibid.

3. To help school provide for all students opportunities for learning good food and health habits, and for social training through S. F. S. program.²⁸

The larger school systems have a trained dietitian or home-economics-trained person as a member of the cafeteria staff. The closeness between the health program and the cafeteria program is closely monitored by school administrators. Too much care can not be exercised in the selection of a manager or other employee for the cafeteria.²⁹

Since cleanliness is essential to health, all the workers in a cafeteria should be immaculately clean. Periodic inspections are usually made by a health officer or a school nurse to assure that cafeteria personnel are performing under sanitary conditions.

The lunchroom and lunchroom personnel can be a real asset to the school program. They must emphasize the educational and nutritional aspects of their programs rather than the financial. The cafeteria personnel are an important part of the school family and should seek to train children in health habits, in food standards,

²⁸Elizabeth McPherson, ed., "Caswell County School Food Service Handbook," (Yanceyville, North Carolina: Caswell County Board of Education, 1975).

²⁹De Young, p. 292.

in business sense, in self-control, and in social niceties.³⁰

Legal Rights of Personnel

The successful dismissal of employees from their jobs by school boards and administrators is dependent upon a good understanding of the due process requirements. Generally, due process is satisfied when administrators and boards of education "invoke the principles of fair play and when they are reasonable, just and not arbitrary or capricious."³¹ Due process is not always required. In Roth v. Board of Regents³² the United States Supreme Court held that a public employer may choose not to give an employer a new contract--i. e. , dismiss an employee--for any reason that is not based on the employee's race, religion, sex, or national origin. Since the court did not find a constitutionally protected property right, the Fourteenth Amendment of the federal constitution does not apply. Therefore, no procedural due process is required. Due Process is required only when a question of violation arises

³⁰Ibid. , p. 293

³¹Shirley B. Neill and Jerry Curtis, "Staff Dismissal: Problems and Solutions" (Sacramento: Education News Service Press, 1978), p. 33.

³²Roth v. Board of Regents, 408 U. S. 564 (1972).

concerning the protection of a liberty interest being protected by the Fourteenth Amendment.³³

Determining the realm of due process appears to be easy, but the first problem encountered is determining what process is due. The courts have refused to formulate an absolute definition of due process. In Meyer v. Nebraska³⁴ the Supreme Court affirmed the Fourteenth Amendment rights of the individual. The Court stated:

The right of individuals to contract, to engage in any form of common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally engage those privileges long recognized as common law is essential to the pursuit of happiness by free men.

Due process is described as "developing by the gradual process of judicial inclusion."³⁵ In 1951, U. S. Supreme Court Justice Felix Frankfurter said, "Fairness of procedure is due process in the primary sense"³⁶ Frankfurter also said:

³³Robert E. Phay, Nonreappointment, Dismissal, and Reduction in Force of Teachers and Administrators (Chapel Hill: University of North Carolina, 1982), p. 15

³⁴Meyer V. Nebraska, 435, ct. 625 (1923).

³⁵Neill and Curtis, p. 33.

³⁶Liva Baker, Felix Frankfurter (New York: Coward-McCann, Inc., 1969), p. 173.

Due process is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment the precise nature of the interest that has been adversely affected, the manner in which this was done and the reasons for doing it, the available alternative, to the procedure implicit in the office of the functioning whose conduct is challenged, the balance of hurt complained of and good accomplished - these are some of the considerations that must enter into the judicial judgment.³⁷

In dismissal of noncertificated staff, school administrators must be concerned with both procedural due process and substantive due process. Procedural due process, refers to the procedures and methods used to carry out regulations.³⁸ This is generally thought of as an individual's rights to a notice and a hearing. Substantive due process refers to the fairness of the law or regulation.³⁹ The extent and definition of substantive due process are based largely on the due process of the Fourteenth Amendment to the U. S. Constitution and on comparable provisions in state constitutions.

Dismissal of employees is within the authority of boards of education so long as it is done within the requirements of due process. When an employee is dismissed, he or she may possess some rights

³⁷Ibid.

³⁸Neill and Curtis, p. 33.

³⁹Ibid.

to notice and a hearing before the action takes place. Even if there were no rights granted by local board of education policy or state laws or policies, dismissal might be questioned on the basis that it violated one or more of the individual's constitutional rights.

In The Legal Rights of Teachers,⁴⁰ Thomas Flygare noted several procedural rights that an individual has before or shortly after termination, as follows:

1. a contract
2. state law or regulations of the state board of education
3. local policies and practices of a local board of education
4. state court rulings
5. court rulings construing the U. S. Constitution.

Due process procedures must be consistently applied and administered. Accordingly, all procedures that might affect the rights of any individual considered for dismissal are reviewed below.

Commonly Recognized Aspects of Due Process

It is commonly accepted that due process requires a notice and a hearing.⁴¹ However, additional aspects of due process have

⁴⁰Thomas Flygare, "The Legal Rights of Teachers" (Bloomington, Indiana: Phi Delta Kappa, 1980)

⁴¹Neill and Curtis, p. 34.

been identified. Not all of them apply to every noncertificated employee who is dismissed. The status of the employee, local policies, and state requirements determine the amount of due process followed when an individual's livelihood is at issue.⁴² The following aspects of due process are commonly recognized:

1. Notice
2. Right to counsel
3. Judgment by an impartial tribunal
4. Right to avoid self-incrimination
5. Presentation of evidence
6. Right to cross-examination
7. Right to have witnesses
8. Proof of guilt
9. Record of hearing
10. Right of appeal.⁴³

All issues of dismissal must be "up-front." Supreme Court Justice Felix Frankfurter said that "the appearance of due process is

⁴²Ibid.

⁴³Ibid.

every bit as important as the due process itself."⁴⁴ Neill and Curtis (1978) have published a list for employers to follow "to give the appearance of due process."

Employers should

1. Publish and make available to every employee an up-to-date version of school rules and regulations
2. Display in a prominent place, preferably in a glass case under lock and key, the district's list of rules and regulations
3. Review annually with employees, individually if necessary, district rules and regulations. Some districts require principals to hold individual face-to-face conferences with employees to go over what is expected of them
4. Let an employee know about a problem in unequivocal terms as soon as it is discovered
5. Give all help possible to correct the unacceptable conduct
6. Allow a reasonable time for the correction to take place⁴⁵

Conclusions Of The Court

The Supreme Court held that the purpose of notice and hearing in an employee dismissal case is to provide the employee with an

⁴⁴Joseph P. Lash, From the Diaries of Felix Frankfurter (New York: Norton and Company, 1974), p. 161.

⁴⁵Neill and Curtis, p. 36.

opportunity to clear his name. The Court held that:

.... the hearing required where a nontenured employee has been stigmatized in the course of a decision to his employment is solely "to provide the person an opportunity to clear his name."⁴⁶

The Court noted that a board of education's power to dismiss and discipline is not personal or punitive. Its power is not intended to permit the exercise of personal moral judgments. The board of education's power rests in the state's interest in protecting a school community from harm.⁴⁷ Its exercise of dismissal authority can only be justified upon showing that harm has occurred or is likely to occur.⁴⁸

Decisions of local boards of education have been reviewed, rejected, and requested to be reviewed by the United States Supreme Court. In its opinion in Bishop, the United States Supreme Court discussed the role of the federal courts in reviewing decisions of governmental agencies including local boards of education. The Court said:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must

⁴⁶Codd v. Velger, 45 U. S. L. W. 4175, U. S. February 22, 1977.

⁴⁷Weisman v. Board of Education, 547 p. 2d 1967 (1976).

⁴⁸Ibid.

accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot be construed to require judicial review for every such error. In the absence of any claim that the public employer was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular, and if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.⁴⁹

Although school officials may be individually liable for the knowing or malicious denial of constitutional rights, a good faith immunity to this charge may be established. One of the crucial problems is how much school officials ought to be deemed to know about constitutional requirements. In a Nebraska case the district court ruled that school officials were immune and hence not liable for not informing an employee of a right to a hearing. The court reasoned that the board might not have known that the employee's lack of request for a hearing might not have relieved them of the duty of giving one.⁵⁰

Although the court let the board members off in this case, it noted that future boards would be charged with the knowledge of constitutional

⁴⁹Bishop v. Wood, 426 U.S. 341 (1976).

⁵⁰Brown v. Bathke, 416 F. Supp. 1194 (Neb 1976).

law, including this case. Thus, one board's immunity may be the next board's liability.

Summary

Education in the United States has been in a state of continual change. As the number of students attending public schools increased, as the curriculum changed, as new programs were added, more and more was added to the duties of teachers. With instructional duties of the teaching-learning process being the major concern of teachers, additional duties crowded the teacher's day of activities.

Additional personnel were added to the school family to perform some of the duties of the teachers that were not of an instructional nature and did not require professional judgment to accomplish. Rooted in the history of the earlier duties of teachers, many of the duties that are performed now by the noncertificated staff were previously performed by teachers.

Various groups of noncertificated employees have been added as needed for additional services when financial restraints allowed. Clerical and aide personnel were added to perform typing,

⁵¹The Yearbook of School Law 1977 (Topeka, Kansas: National Organization on Legal Problems of Education, 1977), p. 187.

bookkeeping, office work, and helping teachers in the classroom with students. As buildings became larger and more sophisticated in design and function, building service personnel were added. Carpenters, plumbers, painters, and engineers were needed to look after the buildings and grounds. As school districts grew larger and were consolidated, school transportation personnel were added to transport children to school. School bus drivers, mechanics, gas truck operators, and monitors were needed to support the transportation system. With an increasing interest in health and nutrition, cafeteria and lunchroom personnel were added to the school staff. Cooks, bakers, servers, cashiers, and cafeteria managers were needed to support the cafeteria program.

Noncertificated personnel do not need to be trained to make professional instructional decisions. Instead, their roles and duties complement those of the teacher by performing many of the duties previously performed by teachers.

CHAPTER III
THE LEGAL ASPECTS OF
NONCERTIFICATED PERSONNEL

Introduction

As increased number of noncertificated personnel have been added to the school staff, an increase has been noted in the number of disputes involving their dismissal. The potential for lawsuits increases for the administrator and school board who may be without a thorough knowledge of the legal dismissal procedures. It is important for the school board and administrators to review local procedures and policies and state laws and regulations in preparation for potential litigation. Many states have no laws directly governing dismissal of noncertificated personnel, as this is usually a local procedure. In the determination of procedure, reasons for dismissal may be grouped into six major categories: (1) reduction in force, (2) incompetency, (3) insubordination, (4) neglect of duty, (5) immorality, and (6) disability.

Historical Review

Until recently, school districts were required generally to defend lawsuits brought by one of its employees only when the school

board terminated the employee for cause.¹ Now, however, the potential for lawsuits brought by former employees has increased dramatically.

In education, there was a time when a college president, principal, superintendent, or board of trustees could fire an employee for a number of reasons. Sometimes, the termination of employment took place under so-called star-chamber proceedings where the employee's rights were ignored or circumvented. However, if summary dismissal was the rule for decades, the situation has reversed itself in recent years. Today, for example, the employee is protected by numerous laws, courts, and governmental agencies. In fact, the American pendulum of justice has swung to an extreme position, opposite to that of the star-chamber proceedings, and institutions now find themselves in the same position that employees did a few decades ago.²

Recent population shifts have forced many school districts to reduce the number of both teaching and nonteaching employees. For example, in the fall of 1978, there were 2,199,000 classroom teachers in the public schools,³ but by 1980, this number had fallen to

¹John F. Lewis, "How Not to Get Sued When You Fire Someone" (address delivered at NSPA Convention, Atlanta, Georgia, April 17-20, 1982).

²Joseph Mills, ed., "Job Termination and the Law," The School Law Newsletter, 6, No. 3, p. 246.

³National Center for Education Statistics, Digest of Education Statistics, 1980 (Washington, D. C.), 1980, Table 8.

2,160,000.⁴ Declining pupil enrollments and declining revenues were both contributors to this reduction of staff. But, whatever the reasons, the pool of former employers had now become potential plaintiffs.⁵

Before any type of evaluation or dismissal action is undertaken, laws and administrative regulations of the state must be reviewed and followed.⁶ As with the great majority of states, North Carolina has no statutory provision directly governing the duration or termination of employment of noncertificated school employees.⁷ By its terms the Tenure Act applies only to permanent full-time employees who hold at least a Class A certificate or a regular Vocational certificate, whose major responsibility is to teach or directly supervise teaching, and who are classified as or paid as a classroom teacher.⁸

However, as is true in most state school codes, statutory authority for employing noncertificated personnel does exist. In

⁴ NCES, Digest of Education Statistics, 1981, Table 8.

⁵ Lewis, p. 8.

⁶ David H. Larson, "Dismissing Incompetent Staff," The School Administrator, 40, No. 2 (February, 1983), 28.

⁷ Frederick G. Johnson, "Discharge of Nonprofessional Employees," School Law Bulletin 2, 10, No. 3 (July, 1979), p. 3.

⁸ North Carolina General Statutes 115c-325 (formerly G. S. 115-42).

North Carolina General Statutes 115c-315(a) authorizes city boards of education to appoint janitors and maids on recommendation of the superintendent. G. S. 115-58 gives the superintendent the duty to recommend and the board of education the duty to appoint "... all principals, and other school personnel in the county administrative unit." G. S. 115c-277 authorizes boards of education to employ clerical personnel to assist the superintendent. G. S. 115c-285 requires city and county boards to provide for the prompt payment of all salaries due "teachers and other school officials and employees." G. S. 115c-263 authorizes county and city boards of education to employ personnel as required to supervise school food services, including those persons directly involved in preparing and serving food. Also, G. S. 115c-35 gives boards of education "general control and supervision of all matters pertaining to the public schools in their respective administrative units." It is clear that the board of education of each administrative unit has the authority to employ nonprofessional personnel, on the superintendent's recommendation, and to prescribe reasonable rules and regulations related to their employment.⁹

As boards of education have the legal right to hire employees, they have the right to dismiss employees. In *Still v. Lance*

⁹Johnson, p. 3.

(1971),¹⁰ the North Carolina State Supreme Court reviewed the general nature of employment contracts. In North Carolina an employment contract that contains no provision concerning the duration of the employment or the means by which the employment may be terminated is terminable at the will of either party irrespective of the quality of performance by the other party.¹¹ An enforceable expectation of continued public employment can exist only if the employer, either by statutory or contractual provision, has granted some form of guarantee.¹²

Selected Court Cases

In Bishop v. Wood (1976)¹³ the United States Supreme Court upheld a ruling that under North Carolina law a city ordinance providing that permanent employees may be dismissed for failure to perform satisfactorily and prescribing certain procedures for dismissal did not give an employee an enforceable expectation of continued public employment. Rather, it granted only the procedural rights that were contained in the ordinance. In Bishop the plaintiff was employed by the City of Marion, North Carolina, as a

¹¹Id. at 259, 182 S. E. 2d 406 (1971).

¹²Bishop v. Wood, 426 U.S. 341 (1976).

¹³Ibid.

probationary policeman in 1969. By virtue of city regulations, he became a permanent employee six months later and subject to a city ordinance that required written notice of reasons for discharge from employment if requested. The plaintiff contended that the ordinance, coupled with his classification as a permanent employee, entitled him to a hearing before employment could be terminated. The court upheld the lower court's conclusion that the ordinance did not create a property interest in continued employment and a resulting right to a hearing before discharge.

In Nantz v. Employment Security Commission (1976)¹⁴ the Supreme Court of North Carolina considered a former Employment Security Commission employee's claim that she was entitled to a hearing before she was dismissed. The State Director of the Employment Security Commission had discharged her for conduct having a detrimental effect on the office in which she worked. Evidence indicated that she had written anonymous letters concerning the manager and the assistant manager of the office where she was employed. Re-emphasizing its previous decision in Still v. Lance,¹⁵ the court pointed out that no North Carolina statute gave state employees like the

¹⁴Nantz v. Employment Security Commission 290 N. C. 473, 226 S. E. 2d 340 (1976).

¹⁵Still v. Lance 279 N. C. 254, 182 S. E. 2d 403 (1971).

plaintiff

...tenure or right to judicial review of an administrative action terminating employment. Employment by the State of North Carolina, or by one of its political subdivisions, does not ipso facto confer tenure or a property right in the position. Mere longevity of employment, even though the employee's service be of excellent quality, does not confer upon the employee such property right.¹⁶

These court cases are an indication that in the absence of a statutory provision or a contractual provision the duration of employment may be terminated. Even though the job is referred to as regular or permanent, it is terminable at the will of either party.

Very few state courts have addressed the issue of dismissal of noncertificated staff. However, a few courts have dealt with the issue. The Illinois State Court of Appeals¹⁷ considered the case of a school custodian who alleged wrongful discharge from employment. He relied on a typed document regarding wages and related terms of employment that resulted from negotiations between the plaintiff's union and the school board. It was entitled "Working Agreement for Male Custodians." The plaintiff contended that he had a contract of employment for a one-year period and could not be discharged without

¹⁶Nantz v. Employment Security Commission, (1976).

¹⁷Kepper v. School Directors, 26 Ill. App. 3d 372, 325 N. E. 2d 91 (1975).

being given specific reasons. He sought damages of more than \$120,000. The school board contended that the plaintiff was an employee at will and his employment was terminable at any time by the board or by the plaintiff himself. In upholding the defendant's position, the court pointed out that the working agreement contained no provisions regarding the duration of employment or discharge.

The agreement in the cause before us merely specified certain terms and conditions relating to custodians applicable during the particular time indicated. It has no provision as to termination of employment or discharge. It does not establish the duration of plaintiff's employment in any manner. It is well settled that an employment contract which does not specify a definite duration is terminable at the will by either party.¹⁸

In an Oregon case the plaintiff was discharged from her position as a school secretary.¹⁹ At her request the school board affirmed its decision to dismiss her. The plaintiff then filed a Mandamus proceeding that contended that an Oregon statute, together with school board regulations and constitutional principles, entitled her to a predischarge hearing at which the school board must establish cause for her dismissal. In discussing the statute, the Oregon Court of Appeals concluded that although the legislature had enacted a

¹⁸Kepper v. School Directors, 325 E. 2d 93.

¹⁹Crampton v. Harmon, 533 P. 2d 364 (Ore. App., (1975).

statute that required a hearing for discharged school employees if requested within fifteen days of dismissal, the hearing is for "informational" purposes only. The court also discussed the different status accorded to teaching and nonteaching personnel by the Oregon legislature. The Court ruled it unlikely that nonteaching employees would have rights to a hearing superior to those of teaching employees.

An Ohio statute provides that nonprofessional school employees shall be given written notice of discharge by certified mail. Also, such employees may appeal a decision to discharge them to the Court of Common Pleas. In Appeal of Sergent,²⁰ a court of common pleas held that the term "appeal" implies a hearing from which an appeal may be taken. The court further held that the right to appeal presupposes proper notice of the subject matter, time, and place of the hearing and an opportunity to be heard. The importance of this case lies in its interpretation of the Ohio statute as applicable to the dismissal of noncertificated school employees and not in any general determination as to due process requirements for discharging noncertificated school employees.

A section of the Pennsylvania School Code²¹ requires a board

²⁰Appeal of Sergent, 49 Ohio Misc. 36 360 N. E. 2d 761 (1976).

²¹Pennsylvania General Statutes, 24 P. S. 5-514 (1962).

of education to give adequate notice and an opportunity for a hearing to any noncertificated employee before he or she is discharged for "incompetency, intemperance, neglect of duty, violation of school laws, or other improper conduct." The Pennsylvania Court of Appeals reviewed the school code.

In Sergi v. School District of Pittsburgh²² the court upheld that the provisions of the Pennsylvania School Code did not create a property interest under Roth. The court further held that an employee could be dismissed for a reason other than those specified without a cause.

Reasons for Dismissal

Many reasons and numerous legal cases are often cited as a basis for dismissal of an employee. In Roth v. Board of Regents²³ the United States Supreme Court made it clear that a public employer may choose not to give an employee a new contract or not to reappoint an employee to a new term. That is, it may be for any reason that is not based on the employee's exercise of constitutional rights or his race, religion, sex, or national origin. Since the Court did not find a constitutionally protected property right in reemployment, the Fourteenth

²²Sergi v. School District of Pittsburgh, 368 A. 2d 1359 (1977).

²³Roth v. Board of Regents, 408 U.S. 564 (1972).

Amendment of the federal Constitution does not apply, and thus no procedural due process. The board of education is not required to give a statement of reasons. Due process is required only when a liberty interest protected by the Fourteenth Amendment is violated. Due process is required when the employee is denied the right to free speech or is stigmatized.²⁴

Professor Floyd G. Delon in a study at the University of Missouri in 1976 identified the following twenty-three causes as specified by various state law for dismissal of personnel:²⁵

1. Incompetence (33 states)
2. Unfitness of service (4 states)
3. Neglect of duty and negligence (26 states)
4. Failure to provide designated service (13 states)
5. Failure to attend required institutions of meetings (1 state)
6. Inefficiency (16 states)
7. Incapacity (19 states)

²⁴Robert E. Phay, Nonreappointment, Dismissal, and Reduction in Force of Teachers and Administrators (Chapel Hill: University of North Carolina, 1982), p. 3.

²⁵Floyd G. Delon, "Reasonable Cause for Dismissal of Teachers" (paper presented to the Kansas School Attorneys Association/Kansas Association of School Boards School Law Seminar, Topeka, Kansas, June 3-4, 1977).

8. Insubordination (22 states)
9. Refusal to obey regulations
10. Noncompliance with school laws (23 states)
11. Disloyalty (5 states)
12. Contract violations
13. Conviction of specified crimes (12 states)
14. Immorality (33 states)
15. Untruthfulness, dishonesty, falsification
of records (4 states)
16. Drunkenness and intemperance (7 states)
17. Addiction to and selling drugs
18. Cruelty (5 states)
19. Conduct unbecoming an employee (10 states)
20. Unprofessional conduct
21. Violations of code of ethics
22. Revocation of teaching certificate
23. "Good," "just," or "sufficient" cause

Many other studies such as Neill and Curtis,²⁶ Lewis,²⁷

²⁶Shirley B. Neill and Jerry Curtis, *Staff Dismissal: Problems and Solutions* (Sacramento: Education News Service Press, 1978)

²⁷Lewis, p. 8.

and Larson²⁸ have listed reasons for dismissal. This author has synthesized the major reasons for dismissal and grouped them into six major categories, as follows:

1. Reduction in force
 - A. Enrollment decline
 - B. Supply and demand
 - C. Finances
2. Incompetence
3. Insubordination
4. Neglect of Duty
5. Immorality
6. Disability - physical or mental

Reduction in Force

Reductions in staff because of declining enrollments continue to be contested by those so dismissed, but with little success. In Gabriel²⁹ and Stets³⁰ the courts upheld rating systems as well as seniority as factors in determining which employees should be dismissed. The courts will not interfere with such dismissals and

²⁸Larson, p. 28.

²⁹Gabriel v. Trinity Area School District, 350 A. 2d 203, (Pa., 1976).

³⁰Stets v. McKeesport Area School District, 350 A. 2d 185, (Pa., 1975).

suspensions as long as they are made in good faith and supported by substantial evidence.³¹

The Pennsylvania courts considered cases in which dismissed employees charged that the school district claims of declining enrollment were not supported by substantial evidence. In one such case the court concluded that a drop of 476 students in five years and 661 in six years is "substantial" under the statute.³² The purpose of such hearings is to assume that the reasons for suspension or dismissal fall within statutory grounds and statutory procedures are followed. Another school district, also in Pennsylvania, was able to show that staff reductions were justified by a substantial decline in enrollment and that the procedures followed complies with statutory requirements.³³

Several reduction-in-force cases raise questions of tenure and relative seniority. Generally, in situations involving declining enrollment or financial exigencies, employees with tenure in a

³¹The Yearbook of School Law 1978, Topeka, Kansas: National Organization on Legal Problems of Education, 1978), p. 80.

³²Phillippi v. School District of Springfield Township, 367 A. 2d 1133 (1977).

³³Tressler v. Upper Dublin School District, 373 A. 2d 755 (1977).

particular area cannot be suspended or dismissed prior to nontenured employees. Some state statutes require release in reverse order according to the amount of seniority.³⁴ The statutes of some states require boards of education to give preferences, when vacancies occur, to former employees suspended or dismissed because of a reduction in force.³⁵

Where state statutes designate tenure and seniority as the primary criteria to be used in laying off employees, the success or failure of a released employee's challenge depends on the individual's status in this regard. The issues become rather complicated when the statutes require seniority to be considered in conjunction with other criteria or when seniority can be determined only after one of many legally recognized tenure areas is identified.³⁶

A number of suits of reduction in force in the New York courts have dealt with alleged failure of boards of education to give proper consideration to tenure and seniority rights in laying off people. The New York City Board of Education developed and implemented a plan designed to compensate for past discrimination. This was done by granting additional "constructive seniority credit" to

³⁴The Yearbook of School Law 1978, p. 83.

³⁵Ibid., p. 84.

³⁶The Yearbook of School Law 1979, p. 75.

blacks and those of Hispanic descent. As this plan was formulated in response to a federal court order, it was upheld in Landi.³⁷

In California employees who were suspended from their positions due to a reduction in force were unsuccessful in maintaining their jobs. The courts so ruled because they lacked tenure, and because no property right and therefore no constitutional right was interfered with.³⁸

In New Jersey the Commissioner of Education ruled that the board of education has the right to either abolish a position or reduce it to part-time employment. This decision, however, must be made within statutory limitations.³⁹

In North Carolina an employee of the Frank Porter Graham Child Development Center was dismissed for reasons of financial exigency and changing research positions. The Supreme Court held that there was no breach of contract as there was no money with which to pay her and research priorities were being channeled into another direction.⁴⁰

³⁷Landi v. Board of Education, 402 N. Y. S. 2d 118 (Sup. Ct. 1978).

³⁸Ventetuolo v. Burke, 470 F Supp. 887 (1978).

³⁹Brich v. Board of Education of Town of Montclair (1980).

⁴⁰McDonald v. University of North Carolina at Chapel Hill, (N. C. 1980).

Lastly, in West Virginia the court ruled boards of education must follow state statutes in dismissing staff or reducing hours worked where such statutes exist.⁴¹

Incompetency

Boards of education have generally experienced difficulty in removing employees they believe to be incompetent. Following the ground of immorality, incompetency is the second most frequently listed cause for dismissal. Charges of incompetency usually relate to the employee's on-the-job performance. Often a school board bases its decision to dismiss an employee on supervisor ratings.⁴² Such dismissals are often overturned by the courts due to the lack of defensible data based on evaluation of performance. Perhaps the situation is beginning to change. Boards of education are beginning to challenge incompetency dismissals, asserting insufficiency of evidence or due process violations.⁴³

Although strict adherence to the rules of evidence is not required in an administrative proceeding conducted by a board of

⁴¹Board of Education of Fayette City v. Hunley, 288 S. E. 2d 524 (W. Va., 1982)

⁴²McDonald v. University of North Carolina at Chapel Hill, (N. C., 1980).

⁴³The Yearbook of School Law 1980, p. 62.

education considering good cause for dismissal, basic fairness requires that evidence be carefully considered when an employee's property or liberty interest hangs in the balance. A finding of substantial evidence to justify termination is less likely to be sustained on appeal where the record illustrates that the adverse employment decision involved conflicting and contradictory evidence.⁴⁴

In Hollingsworth the court said:

Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.⁴⁵

In some instances, dismissals for "just cause" or "unsatisfactory performance" may represent dismissal for incompetency.⁴⁶ Employees may be charged with incompetency not only for poor performances, but also for behavior that deviates from the norm. Under a few states' statutes, a determination must first be made whether the deficiencies are remediable, and if they are, special procedures must be followed. In most cases, however, the former employee claims due process violations.⁴⁷

⁴⁴Ibid., p. 67.

⁴⁵Hollingsworth v. Board of Education, 303 N. W. 2d 506.

⁴⁶The Yearbook of School Law 1980, p. 63.

⁴⁷Ibid., p. 68.

Where the alleged incompetent performance is remediable within a reasonable time, the courts have prohibited dismissal without a showing that the employee was afforded an improvement period.⁴⁸

Insufficient evidence to justify termination for incompetence and insufficient time between notice of inefficiency and notice of intention to terminate often result in reinstatement. Some other adverse employment decisions, including failure to promote and suspension, have been justified on the basis of incompetency. A New York Court held that the board of education was justified in a non-promotion on the basis of incompetency. The evidence demonstrated the employee possessed the requisite technical skills but lacked the ability to cooperate and coordinate his activities with others. He was often abusive and insulting in relations with others and contributed to discord and dissidence among staff.⁴⁹

Where procedural flaws occur in terminations for incompetence, the courts generally do not permit a board's decision to stand.⁵⁰ In Kentucky an appellate court held that charges were not in sufficient

⁴⁸Mason City Board of Education v. State Superintendent of Schools, 274 S. E. 2d 435 (W. Va. 81).

⁴⁹McNamara v. Commissioner of Education, 436 N. Y. S. 2d 406 (N. Y. App. Div. 81).

⁵⁰The Yearbook of School Law 1979, p. 71.

detail to permit the employee to prepare an adequate defense.⁵¹ According to a New York appellate court ruling, fundamental fairness is required. In Romeo the court ruled that the hearing officer in a termination case must divulge any facts known to him that might create even the appearance of partiality or bias.⁵²

In North Carolina the court upheld dismissal for incompetency against a secretary. She had been habitually late, absent without authorized leave, and had falsified records. The court held that the University was justified in dismissing her.⁵³

In Louisiana a supervisor was terminated for incompetency after he permitted employees to leave their shift early to engage in gainful employment elsewhere. The court sustained the dismissal.⁵⁴

A New York board of education dismissed a bus driver for incompetency due to seven incidents of unsafe driving. Although no accidents or injuries occurred, the court did not consider that relevant. The court sustained the dismissal.⁵⁵

⁵²Romeo v. Union Free School District, 407 N. Y. S. 2d 518 (App. Div. 1978).

⁵³North Carolina A & T State University v. Kimber, 270 S. E. 2d 492 (N. C. App. 1980).

⁵⁴Dundy v. Louisiana State University, 394 So. 2d 650 (La. Ct. App. 1981).

⁵⁵Ronkese v. Board of Education of Highland Center School District, 442 N. Y. S. 2d 176 (App. Div. 1981).

The courts in both Massachusetts⁵⁶ and West Virginia⁵⁷ sustained decisions by boards of education to terminate custodians for incompetency. In the Massachusetts case of Duff, the court chided the superintendent because his letter was "lamentably bureaucratic in style."⁵⁸

Insubordination

Insubordination generally means a willful disregard of reasonable directions or a defiant attitude of noncompliance toward regulations.⁵⁹ As in a North Carolina Court of Appeals decision, charges of insubordination are usually confirmed by a series of acts that defy a subordinate's authority and responsibility.⁶⁰

The most frequently cited ground for disciplining school employees is insubordination. Such a charge usually stems from employee/supervisor conflicts or from employee infractions of administrative directives or school board rules.⁶¹

⁵⁶Duff v. School Committee of Milton, 431 N. E. 2d 960 (Mass. Apl. Ct., 1982).

⁵⁷Robertson v. Truby, 289 S. E. 2d 736 (W. Va. 1982).

⁵⁸Duff v. School Committee of Milton.

⁵⁹Gobla v. Board of School Directors of Crestwood School District, 414 A 2d 772 (1980).

⁶⁰Weber v. Buncombe County Board of Education, 266 S. E. 2d 42 (N. C. Ct. App. 1980).

⁶¹The Yearbook of School Law 1978, p. 66.

A noncertificated employee's conduct in destroying a copy of an evaluation of her work performance was not "gross insubordination" under Florida law. The incident occurred after school hours when the employee was presented with an overall unsatisfactory rating by her superior. The employee destroyed the evaluation copy, threw it at her supervisor and said, "This is what I think of this and you too."⁶² The court held that the incident was an isolated outburst. It could not be considered so "constant and continuing" as to be deemed gross insubordination. Especially was this true in view of the fact that the record did not establish that the employee refused to obey an order of the superior.⁶³

In Illinois a female coach was dismissed for insubordination. She refused to comply with her superior's request to have some students temporarily vacate lockers in the girls' locker room. She sought to establish a prima facie case of sex discrimination. She alleged that she was dismissed for insubordination while her male superior was not disciplined, that no investigation of her grievance over the incident had been undertaken by school authorities, and that the school district employed more male than female coaches. These

⁶²Smith v. School Board of Leon City, 405 So. 2d 183, (Fla. 1981).

⁶³Ibid.

allegations were not considered sufficient to raise an inference of discrimination in her dismissal.⁶⁴

In Massachusetts a noncertificated employee was dismissed for insubordination. He was not rehired at the expiration of his contract because he failed to enroll as a student and that condition was required for employment. It was held that the individual made himself ineligible for employment without good cause attributable to the employer.⁶⁵

The Supreme Court of Colorado upheld the termination of two food-service employees on grounds of insubordination when they refused to shave their beards in defiance of a state university rule that required them to do so while working with food. The court held that their dismissals did not violate their constitutional rights.⁶⁶

In Texas the dismissal of a teacher's aide was upheld by the court based on the charges of insubordination. The teacher's aide had publicly criticized her superiors at board meetings for their failure to raise her level of duties and pay. She wrongfully

⁶⁴Kneeland v. Bloom Township Highschool District, 518 F. Supp. 890 (Ill. 1981).

⁶⁵Harvard Student Agencies v. Director, 421 N. E. 2d 470 (Mass. App. Ct. 1981).

⁶⁶Chiappe v. State Personnel Board, 622 P. 2d 526 (Colo. 1981).

assumed that her remarks were protected by the freedom of speech guarantee of the first amendment. The court ruled that her remarks concerned terms and conditions of her employment. Those remarks were not of public concern, and, therefore, did not come under the protection of the constitutional guarantee.⁶⁷

In New Jersey a secretary was dismissed for insubordination for refusal to accept an assignment. The secretary had been granted a leave of absence by the board of education. Upon her return she refused to accept an assignment offered to her. She claimed reasons of health and declined the job. The board of education claimed she had abandoned the position and terminated her on grounds of insubordination. The court upheld the board of education's decision.⁶⁸

Insubordination may not be used to dismiss individuals whose political beliefs and activities may differ from the employer. The West Virginia court held that government employees who are satisfactorily performing their jobs when such jobs are of a non-

⁶⁷Barbre v. Garland Independent School District, 474 F. Supp 687 (Tex. 1979).

⁶⁸Tenure Hearing of Lucille Pedicine v. School District of Township of Millburn, Decision of N. J. Commissioner of Education, 1978.

policy-making and nonconfidential nature may not be dismissed even when political beliefs and activities differ from their employer's.⁶⁹

Neglect of Duty

Neglect of duty covers a broad category of reasons for dismissal by a board of education. Neglect is frequently charged in cases as simple as excessive absences, but more often it covers misconduct, excessive use of drugs and alcohol, and even multiple charges. The courts tend to examine the factual basis for neglect of duty rather closely.⁷⁰

Twenty-eight states have made statutory provisions authorizing dismissal of school personnel for "neglect of duty."⁷¹ A charge involving neglect of duty or persistent negligence cannot be sustained unless it can be established that a reasonably prudent person under similar circumstances would have recognized the duty and conformed to it.⁷²

Evidence that a particular duty was not completely performed on certain occasions, or evidence of an

⁶⁹Miller v. Board of Education of County of Lincoln. 450 F. Supp. 106 (W. Va. 1978).

⁷⁰The Yearbook of School Law 1980, p. 59.

⁷¹The Yearbook of School Law 1978, p. 69.

⁷²The Yearbook of School Law 1982, p. 67.

occasional neglect of duty of performance, in itself, does not establish incompetency or neglect of duty sufficient to constitute just cause for termination. Incompetency or neglect of duty are not measured in a vacuum nor against a standard of perfection, but, instead, must be measured against the standard required of others performing the same or similar duties.⁷³

An Indiana school board secretary resigned under pressure after being late for work thirty-five days during the school year. The school board denied eligibility for unemployment benefits. The employee appealed the board's decision to the Indiana Court of Appeals. The Court of Appeals held that the board acted properly in denying benefits.⁷⁴

In Delaware a fireman-custodian was able to get a demotion rather than a dismissal. His case is unique in that he was able to establish that the school district's policy to terminate his employment stated for "good cause." He proved that "good cause" created a property right. According to the district court he was entitled to a hearing based on his property right. After reviewing the evidence supporting charges of poor work and excessive absences, the court

⁷³Sanders v. Board of Education of South Sioux City
263 N. W. 2d 461 (1978).

⁷⁴Cornell v. Review Board of Indiana Employment
Securities Division, 383 N. E. 2d 1102 (1980).

decided that demotion rather than dismissal was warranted and awarded back pay accordingly.⁷⁵

In New York an employee was charged with neglect of duty because of unauthorized absences. The employee was dismissed, but carried the board of education to court. The court affirmed a finding of guilty and a dismissal of the employee.⁷⁶

In New Jersey a bus driver was charged with neglect of duty when he was found to have alcohol on his breath. This was discovered after he had transported pupils to a football game. The driver was dismissed from his job by the board of education. He appealed the dismissal decision to the Commissioner of Education. The Commissioner of Education ruled against the bus driver by upholding the dismissal decision of the board of education.⁷⁷

In Florida a board of education dismissed a systems analyst for willful neglect of duty and misconduct. The systems analyst was working for the board of education and himself at the same time.

⁷⁵Hawkins v. Board of Education, 468 F Supp. 201 (Del. 1979).

⁷⁶Paticoff v. Board of Education, 409 N. Y. S. 2d 528 (1978).

⁷⁷Marshall v. Board of Education of Washington Township, Decision of New Jersey Commissioner of Education, (1980).

He was operating a private business during regular working hours. He misrepresented his excessive absences from work by insisting that he was sick. The Florida District Court of Appeals sustained the school board had satisfied both constitutional and statutory requirements in the dismissal proceedings.⁷⁸

In California a media center employee was charged with neglect of duty and dismissed for taking home a television and recorder without completing a borrower's slip. The employee claimed that he should not have been dismissed as he worked in the media center and intended to return the equipment. The Court of Appeals sustained the dismissal.⁷⁹

In Pennsylvania a custodian was told at the time he was hired that he should "keep away from female students and not put his hands on them." When he did not follow the hiring instructions, he was dismissed for neglect of duty for harrassing students. He filed for unemployment compensation and it was denied on the basis that his conduct caused his dismissal. He appealed the decision.

⁷⁸ Reddick v. Leon City School Board, 405 So. 2d 757, (Fla. Ct. App., 1981).

⁷⁹ Washington v. California State Personnel Board, 179 California Reporter 637 (Calif. Ct. App. 1982).

The Pennsylvania unemployment board denied his benefits saying that his actions constituted willful misconduct.⁸⁰

In New York a school business manager was convicted of two counts of larceny of school property. He was dismissed for neglect of duty by the school board. He appealed the decision of the school board. The Court of Appeals ruled that the conviction of larceny was "conclusive proof of guilt." Therefore, the hearing panel could not find him not guilty of the school board's charges.⁸¹

Immorality

An allegation of immoral conduct related to the commission of, or conviction for, a crime constitutes the largest single number of cases involving good cause for dismissal of school employees. Typically, conviction of immorality is prima facie evidence of immoral conduct. It appears to be the same as an admission of guilt in a criminal prosecution.⁸²

The statutes of thirty-four states list immorality as a ground for dismissal.⁸³ Standards of moral behavior differ from

⁸⁰Bender v. Commonwealth Unemployment Compensation Board of Review, 427 A 2d 1964, (Pa. Com. Ct., 1981).

⁸¹Kelly v. Levin, 440 N. Y. S. 2d 424 (App. Div., 1981).

⁸²The Yearbook of School Law 1982, p. 67.

⁸³The Yearbook of School Law 1977, p. 71.

community to community and change from year to year. It is not surprising, then, that persons who lose their positions on the grounds of immorality urge the courts to declare it unconstitutionally vague. Sexual misconduct and criminal charges account for a major share of the disciplinary actions by board of education based on immorality.⁸⁴

However, dismissals for immorality are not limited to sex-related offenses. For example, a school employee in Pennsylvania was discharged for immorality after pleading nolo contendere (no contest) to a charge of running an illegal gambling operation. The employee argued that such a place could not be used as evidence to support his dismissal. In ruling for the board of education, the court found substance to the board's claim that the moral standards of the community had been offended.⁸⁵

The courts have had some variability in ruling on immorality cases. As values of communities vary from each other and change from time to time, the courts have been asked to determine what constitutes immorality. In making the determination of immorality the California Court of Appeals held that an employee is entitled to

⁸⁴ Ibid.

⁸⁵ Baker v. School District of Allentown, 371 A. 2d 1028 (1977).

a hearing in which not only his conduct, but other factors are to be considered and analyzed⁸⁶ such as the following:

1. likelihood of recurrence of the questioned conduct
2. extenuating or aggravating circumstances, if any
3. effect of notoriety and publicity
4. impairment of employees' and students' relationships
5. disruption of educational process
6. motive
7. proximity or remoteness in time and conduct

Disability

Disability constitutes the smallest number of dismissals by boards of education that are litigated, due, perhaps, to medical evidence that supports disability claims.

In California a school employee who worked half-time as a bus driver and half-time as a mechanic, lost his driver's license. His driver's license was not renewed because of his physical disabilities. He had vision problems, a heart condition, tuberculosis, and diabetes. For a short time after he lost his license the school board employed him as a full-time mechanic. However, since there was not enough work to justify this position, the board offered him the position of "adult school aide." He refused the assignment and the board of education dismissed him. The employee then applied for

⁸⁶Board of Education v. Commission on Professional Competence, 162 Cal. Reporter 590, (Cal. Ct. App. 1980).

sick leave, which the board of education denied. The employee contended that he was too sick to work. The board of education contended that he refused to work. The court sustained the action of the board of education on the grounds that he refused an available job.⁸⁷

Summary

Six categories of reasons for dismissal have been reviewed: (1) reduction in force, (2) incompetency, (3) insubordination, (4) neglect of duty, (5) immorality, and (6) disability. With sufficient reasons, evidence of one or more of these an employer may properly dismiss an employee. While reasons for dismissal may be stated to the employee, it is not legally required that they be stated. An employee may be terminated for a reason as long as it is not based on the employee's exercise of constitutional rights of race, religion, sex, or national origin. Where there is not a question of a protected property right, the Fourteenth Amendment does not apply, and hence, no procedural due process is applied.

⁸⁷Patton v. Governing Board of the San Jacinto Unified School District, 143 Cal. RPtr 593 (Cal. App. 78).

CHAPTER IV
REVIEW OF COURT DECISIONS

Introduction

This chapter presents a review of landmark decisions and other significant court decisions in the six major areas listed as reasons for dismissal of noncertificated personnel. An overview is presented for each major area and specific facts and judicial decisions are given. Discussion of each case is given as it pertains to the specific dismissal reason to which it is applied. Major reasons for dismissal and cases are listed below:

1. Reduction in Force

Board of Education v. Fayette City v. Hunley

Ventetuolo v. Burke

2. Incompetency

N. C. A & T University v. Kimber

Duff v. School Committee of Milton

3. Insubordination

Chiappe v. State Personnel Board

4. Neglect of Duty

Washington v. California State Personnel Board

Reddick v. Leon County School Board

5. Immorality

Baker v. School District of Allentown

Pettit v. State Board of Education

6. Disability

Patton v. Board of San Jacinto School District

Reduction in Force

Overview

Reductions in staff because of declining enrollments and re-allocation of fiscal resources continues to be contested by those dismissed. The courts will not interfere with dismissals as long as they are made in good faith and supported by substantial evidence. In Hunley the board of education acted in good faith, but did not follow the procedures of state law. In Burke the plaintiffs attempted to establish a property right to the job, even though the job site was moved to another site.

Board of Education of Fayette City v. Hunley

288 S. E. 2d 524 (W. Va. 1982)

Facts

The county school superintendent was urged not to rehire two of the three secretaries employed in the county Title I Health Center. Since each of the three secretaries had over ten years of service with the school system, he notified them by letter that they would be considered for transfer from their positions in the next school year because of the necessity of staff reduction. Unfortunately, the best he was able to offer to the secretaries was their choice of either continuing as secretaries on a half-time basis or of becoming full-time Title I aides. They chose the former option. The local board of education approved their retention on a half-time basis.

The three secretaries appealed the action of the county board of education to the state superintendent. He remanded the dispute to the local board of education for a hearing. The board of education refused to hold a hearing. The state superintendent published a decision on the matter, finding the action of the county board improper and directing reinstatement of the secretaries at full salary and workdays retroactive to the beginning of the school year. The local board of education then filed a petition of certiorari in Kanawha County Circuit Court. After considering the case, the Court reversed the decision of the state

superintendent. The state superintendent and the three secretaries appealed the decision to the Supreme Court of Appeals.

Decision

The judgment of the Circuit Court was reversed by the Supreme Court of Appeals. The decision of the state superintendent was reinstated. The three secretaries were reinstated as full-time secretaries at full salary and given retroactive pay.

Discussion

By virtue of their length of service, the three secretaries had attained continuing contract status under West Virginia statutes.¹ The local school board could not have modified their contracts without their consent. However, the local school board could have terminated the contract with "written notice, stating cause or causes, to the employee, by a majority vote of the full membership of the board before the first day of April of the current year."²

Despite the school board's characterization of its action as a transfer of the secretaries, what happened was different. The board of education, in an effort to reduce the force, terminated the

¹West Virginia Code, 18A-2-6 (1973).

²Ibid.

contracts with the secretaries and supplanted the old contracts with new half-time contracts. The local board of education should have followed the procedures of state law. The board of education had good intentions in trying to retain the secretaries in some capacity, but they, nonetheless, failed to follow the statutory procedure.

Ventetuolo v. Burke

470 F. Supp. 887 (1978)

Facts

Two former employees of a public agency, with some clerical responsibilities, brought action against the Commissioner of Education of the State of Rhode Island. They contended that their discharge deprived them of due process. The plaintiffs had been employed by the Rhode Island Department of Education in the Manpower Development Training Program. They left that job and joined NEAMIDS. After much controversy, the office was moved to Philadelphia. One plaintiff received a job, the other did not.

Decision

The Court ruled against the plaintiffs. The Court held that "to have a 'property' interest that is protected by due process, plaintiffs must have a "legitimate claim of entitlement" to continued employment arising out of state law.³ An expectation of continued

³Board of Regents v. Roth, 408 U.S. 593 (1972).

employment will not suffice as "there must exist rules or mutually explicit understandings that support the claim of entitlement." ⁴

Discussion

The charges brought in this case were multiple. It was necessary for the Court to address each one of them. For this writing, the major concern was related to the first charge when a reduction in force resulted in moving the location of the work site from Rhode Island to Pennsylvania. The Court cited both the "legitimate claim of entitlement" ⁵ and the "rules of mutually explicit understandings" ⁶ as a basis for denying a "property" interest.

Both plaintiffs admitted that they served as unclassified employees. At the time of discharge, neither plaintiff was employed pursuant to a written contract that specified a fixed time of employment.

Incompetency

Overview

Boards of education have generally experienced difficulty in removing employees they believe to be incompetent. Charges of

⁴Perry v. Sinderman, 408 U. W. 593 (1972).

⁵Board of Regents v. Roth.

⁶Perry v. Sinderman.

incompetency usually relate to the employee's on-the-job performance. Where the alleged incompetent performance is remediable within a reasonable time, the courts have prohibited dismissal without a showing that the employee was afforded an improvement period. Insufficient evidence to justify termination for incompetence and insufficient time between notice of inefficiency and notice of intention to terminate often results in reinstatement. In Kimber the issue was absence from work that involved being absent without approved leave and falsification of time records. In Duff the issue was both quantity and quality of work performed.

N. C. A. & T. University v. Kimber

270 S. E. 2d 493 (N. C. App. 1980)

Facts

Kimber worked for fifteen years at North Carolina A & T University in a clerical capacity. She became part of the newly established secretarial pool from 1976 until her employment was terminated on July 4, 1978. The letter of dismissal written by her supervisor informed her that she was dismissed for:

1. absence without approved leave;
2. habitual pattern of failure to report for duty
at the assigned time;

3. falsification of record.⁷

She was warned on at least five occasions, either in writing or orally, that absence without approval could lead to her dismissal. She failed to heed these warnings, and it was not until it became clear that she would not change her behavior that she was terminated. Also, she was specifically warned immediately prior to the falsification of her time record to record the time she was scheduled to come to work. The very next day she falsified her records. The time record indicated substantial tardiness on a daily basis.

Decision

The Court of Appeals held that there were sufficient grounds for dismissal, in that the employee (1) had been absent without approved leave, (2) had habitual pattern of failing to report for duty at assigned time, and (3) had falsified her time records in order to inaccurately reflect her arrival time. These facts constituted sufficient grounds for employee's dismissal.⁸

Discussion

The employee appealed her dismissal from employment at the university to the North Carolina Personnel Commission. The

⁷N. C. A. & T. University v. Kimber, p. 492.

⁸Ibid., p. 493.

Commission adjudged that the employees' actions warranted disciplinary action, but not dismissal. The Commission ordered the university to reinstate her at another location, plus one-half net pecuniary loss and her attorney's fees. Upon petition by the university, the Superior Court ordered the decision of the Commission reversed and the action of the university affirmed. The employee appealed the decision to the Court of Appeals which sustained the decision of the Superior Court. There is no regulation under which improper conduct by an employee can be excused.⁹

Duff v. School Committee of Milton

431 N. E. 2d 960 (Mass. App. Ct., 1982)

Facts

The plaintiffs were probationary custodians in the Milton Public Schools. Before the date on which he would have achieved tenure, each received a notice of discharge from the superintendent of schools. The notice read "on ground of insufficiencies in quality and quantity of work performance and attitudinal problems." The custodians appealed the school committee's decision to Superior Court.¹⁰ In Superior Court the judge entered judgments in favor of

⁹Reed v. Byrd, 255 S. E. 2d 606 (1979).

¹⁰Duff v. School Committee of Milton, p. 960.

the custodians. He directed reinstatement and back pay. The school committee appealed this decision.

Decision

The Court of Appeals reversed the decision of Superior Court and reinstated the school committee's decision. The Court of Appeals dismissed the action of the custodians against the school committee.

Discussion

The Court of Appeals said "although the language of the superintendent's notice is lamentably bureaucratic in style and suffers from consequent opaqueness, the only message is clear enough: the custodians didn't get as much done as they should have and what they did was not done well. Moreover, they were uncooperative." ¹¹ Relying on Costa ¹² the Court reiterated that . . . "it is not required of employers that they describe incidents or events of unsatisfactory performance." ¹³

¹¹Ibid., p. 961.

¹²Costa v. Selectmen of Billerica, 388 N. W. 2d 696 (1981).

¹³Ibid.

Insubordination

Overview

Insubordination generally means an intentional disregard of reasonable directions or a defiant attitude of not complying with rules, regulations, and directions. Often charges of insubordination stem from conflict situations between the employee and his or her immediate supervisor. Employers and employees may disagree and this disagreement may be a basis for dismissal due to insubordination. However, insubordination as a reason may not be used to dismiss individuals whose political beliefs differ from the employer. In Smith the board of education attempted to dismiss a transportation worker for her behavior related to her evaluation instrument. The board of Education dismissed her; the courts reinstated her. In Chiappe two food service workers refused to comply with established regulations of a "no beard" policy. As they worked where food was prepared and served, the Courts upheld their dismissal.

Smith v. School Board of Leon County

405 So. 2d 183 (Fla. 1981)

Facts

Smith, a noninstructional employee (clerical) in the transportation division of the Leon County Schools was suspended without pay for insubordination. The Director of Transportation, and Smith's

immediate supervisor, called Smith into his office and handed her a copy of an evaluation of her work performance. The evaluation indicated an overall unsatisfactory rating: six out of ten categories on the form were marked unsatisfactory. After Smith read the evaluation report, she became upset. She showed her displeasure by crumpling the form into a small ball and throwing it toward the supervisor's desk, stating at the same time, "this is what I think of this and you too."¹⁴

The superintendent brought formal charges against Smith alleging as grounds for dismissal misconduct in office, willful neglect of duty, gross insubordination, and incompetency. Some of the charges were based on the evaluation-form incident as well as several other work-related incidents. The school board considered the charges, and suspended Smith from employment without pay and referred the charges to the Division of Administrative Hearings.

The hearing officer rejected all charges, except those based on the evaluation-form incident, as baseless. The hearing officer found that Smith had been guilty of gross insubordination and misconduct in office. He recommended that her nine months' suspension without pay be considered sufficient punishment, that she be

¹⁴Smith v. School Board of Leon County, 405 So. 2d 183 (Fla., 1981), p. 184.

reinstated and transferred to another position, and that an official reprimand be placed in her file. The school board adopted the hearing officer's recommendation. Smith appealed the board of education's decision.¹⁵

Decision

The District Court of Appeals vacated the Board of Education's order sustaining Smith's suspension without pay. The order, in effect, made retroactive Smith's back pay during the suspension period.

Discussion

The Court did not agree that Smith's actions, forceful though they were, constituted "gross insubordination" or "misconduct in office," as those words are used in their normal meaning. The Court instructed the Board of Education "that if it wished to articulate policy which sets different standards of conduct for its administrative employees than for its instructional personnel, it is not precluded from doing so as long as there is a record foundation in support of that policy."¹⁶ The loss of back pay is a serious penalty and is

¹⁵Ibid., p. 185.

¹⁶Ibid.

instructive.¹⁷ In *Bowling* the Court stated:

When the standards of conduct to be enforced are not explicitly fixed by statute or by rule but depend on . . . debatable expressions . . . when the conduct to be assessed is past, beyond the actor's power to conform it to agency standards announced prospectively; and when the proceeding may result in the loss of a valuable business or professional license, the critical matters in issue must be shown by evidence which is indubitably as "substantial" as the consequences.¹⁸

In the North Carolina case of *Thompson*, the Court described insubordination as "imparts a willful disregard of express or implied directions of the employer and a refusal to obey reasonable order."¹⁹

Chiappe v. State Personnel Board

622 P. 2d 526 (Colo. 1981)

Facts

Salvador Chiappe and Michael Kaufman were hired as food service workers at the University of Colorado in 1974. At the time they were hired each had a beard, and no mention was made of a "no beard" policy as a condition of employment. They did not actually prepare or serve food, but worked as "busboys" in areas

¹⁷*Bowling v. Department of Insurance*, 394 So. 2d 165 (Fla., 1981).

¹⁸*Ibid.*, p. 172.

¹⁹*Thompson v. Board of Education*, 31 S. E. 2d 177 (1980).

where food was prepared and served, clearing and busing dirty dishes and cleaning tables. Their job description and classification entailed the possibility of being required to prepare food.

In May, 1976, a new manager was hired who decided to implement a hair restraint policy which included a no-beard policy. This policy had been in effect for several years, but it had not been enforced by past management.

Written and oral notice of the new policy was given to the food service workers by their supervisor. After they refused to shave their beards, they were suspended without pay for seven days and advised that they could return to work during this period if they should change their minds. They were notified that dismissal would follow a decision to retain their beards. Seven days later they returned to work with beards intact. They reiterated their resolve not to shave. Their employer then advised them orally and in writing that they were terminated from employment.

Chaippe and Kaufman appealed to the personnel board hearing officer who found that the no-beard policy was "directly concerned with promotion of clean and sanitary food service activities in the dining facilities . . . and as such is directly job related to the food service employees."²⁰ The hearing officer's decision, on appeal, was

²⁰Chiappe v. State Personnel Board, p. 530.

affirmed by the State Personnel Board. The appellants filed for judicial review.

Decision

In this case the appellants failed to show that the agency's policy was not rationally related to its objective of providing sanitary food to the public. For substantive due process purposes, the no-beard policy was rational. The employer did not act arbitrarily in enforcing such a policy and in making it a condition of continued employment. The penalty of discharge was job related and was not arbitrarily imposed.

Discussion

Chiappe and Kaufman contended that their liberty interests were irrationally restricted by the no-beard policy, even though they were food service employees. An individual's interest in personal appearance seems to come within the broad terms of the Fourteenth Amendment which declares that "no state shall . . . deprive any person of life, liberty or property, without due process of law."²¹ The liberty of the public employee, as distinguished from that of the ordinary citizen, may under some circumstances be subject to comprehensive and substantial governmental restrictions which impede

²¹U. S. Cons. Amend. XIV.

activities at the very core of specifically guaranteed constitutional rights.²²

In Taylor²³ the Courts emphasized that due process is a flexible concept. It requires the use of orderly procedures that are balanced in such a way as to protect constitutional interests, and, at the same time, further legitimate governmental ends.²⁴ The employee is entitled to a fair process for determining whether he or she violated the substantive conditions of their employment.²⁵

Neglect of Duty

Overview

Neglect of duty is a broad category of reasons for dismissal. Neglect is frequently charged in cases as simple as excessive absences, but more often it covers misconduct, excessive use of drugs and alcohol, and even multiple charges or offenses. A charge of neglect of duty usually can not be sustained unless it can be established that a reasonable, prudent person under similar circumstances would have recognized the duty in question and conformed to it. Evidence

²²Broadrick v. Oklahoma, 413 U. S. 601 (1973).

²³People v. Taylor, 618 P. 2d 1127 (Colo. 1980).

²⁴Chiappe v. State Personnel Board, p. 532.

²⁵Harrah Independent School District v. Martin, 440 U. S. 194 (1979).

that a particular duty or function was not performed on certain occasions does not constitute neglect. Even an occasional neglect of duty of performance, does not establish neglect of duty sufficient for dismissal. In Washington the major issue centered around an employee taking a TV set home without permission. In Reddick the neglect of duty was due to the employee's conducting his personal business during his customary hours of employment. Also, he used sick leave for nonsick leave reasons, namely, to work with his private clients.

Washington v. California State Personnel Board

179 Calif. Rept. 637 (1982)

Facts

Washington was employed as a media technician at California State University for approximately ten years, with the last seven years as an evening supervisor at the center that supervised the lending of the university's equipment. While he was working his 2 p. m. to 11 p. m. shift, he received a phone call from another employee asking him to check to see if a TV set had been left in an unlocked classroom. Doing so, he discovered a TV set and a recorder, worth a combined value of approximately \$2,000. He notified the campus police and locked the room. As he ended his shift, he again checked the room and found it

unsecured. He then allegedly decided to take the TV set with him and loan it to his cousin for two days so that she could watch an upcoming sporting event.

He stated that he had often taken equipment home in the past. He indicated that he intended to fill out the necessary forms the next day. As he was removing the set from the trunk of his car, he was stopped by two police officers. The police spotted a university emblem on the equipment and arrested him. Later, the charges were dismissed, but he was terminated from his employment.

Decision

The Court upheld the decision of the State Board of Appeals. "Dismissal is indisputably appropriate for the attempted theft of public property by a governmental employee." ²⁶

Discussion

Washington appealed the decision of the State Personnel Board on the grounds that (1) the Board based their decision on "unprofessional conduct," (2) he made inconsistent statements to the police, and (3) his conduct in removing the TV set was inconsistent with professional conduct. The Court did not need to determine whether the conduct was professional or unprofessional. The Board of Appeals had

²⁶ Washington v. State Personnel Board, p. 641.

found that Washington had acted in a dishonest manner. In verifying his statements to the police, the cousin informed the police that she had three operating television sets in her home and that there was no "special show she was planning to watch."²⁷

Neither an appellate court nor a trial court is free to substitute its discretion for that of an administrative agency concerning the degree of punishment imposed.²⁸

Reddick v. Leon County School Board

405 So. 2d 757 (Fla. Ct. App. 1981)

Facts

Reddick, a former systems analyst, was notified by the school superintendent of his suspension with pay until the next Board of Education meeting at which he was suspended without pay. He was charged with (a) being absent from work and thereby willfully neglecting his duties; (b) misconduct in office in that he represented to his supervisor that for medical reasons he was unable to return to work, when, in fact, he was operating a private business during regular hours; and, (c) that therefore he was guilty of neglect of duties.

²⁷Ibid., p. 642.

²⁸Barber v. State Personnel Board, 18 Cal. 3d 395 (1976).

Decision

The Board of Education dismissed the former systems analyst. Reddick appealed to a hearing officer who, after reviewing the evidence, reversed the decision of the Board of Education and recommended that charges be dropped and that Reddick be reinstated to his old job with back pay.

The Board of Education appealed the decision of the hearing officer. The District Court of Appeals held with the decision of the Board of Education finding that Reddick was guilty of willful neglect of duties and misconduct of office.

Discussion

In Reddick²⁹ the examples of neglect of duty are well founded in fact. His absences from work were documented by his sick-leave record. Also, his use of sick leave for nonsick-leave purposes to work in his own business was well documented. There was evidence from his telephone log, that even while he was supposedly working for the Board of Education, he was performing services for his private clients in his personal business.

²⁹Reddick v. Leon County School Board, p. 757.

Immorality

Overview

The term "immorality" as it is used in the statutes authorizing the dismissal of an employee refers to conduct which is not in conformity with the community. The accepted principles of right and wrong behavior must not be contrary to the moral code of the community.

Although sexual misconduct and criminal charges account for a major share of the discipline cases of immorality, dismissals for immorality are not limited to sex-related offenses. A crime of moral turpitude such as running an illegal gambling operation is usually considered to be immorality. A conviction of immorality is prima facie evidence of immoral conduct. It appears to be the same as an admission of guilt in a criminal prosecution.

Baker v. School District of Allentown

371 A. 2d 1028 (Pa. 1977)

Facts

The Board of Education dismissed the custodian on the grounds of immorality for operating an illegal gambling business. The alleged proof of his illegal business was when the employee entered a plea of nolo contendere to a federal charge of operating an illegal gambling business. The Board of Education contended that a plea of nolo

contendere was admissible as evidence of admission of guilt in dismissal proceedings. Such evidence supported findings that his actions were immoral and warranted dismissal. The decision of the Board of Education to dismiss the employee was appealed to the State Secretary of Education and to the Courts.

Decision

The Courts affirmed the decision of dismissal of the Secretary of Education.

Discussion

The school district employee was arrested on a federal offense of operating an illegal gambling business. The only evidence that the local district employee was engaged in illegal gambling was the nolo contendere plea. Upon appeal to the Secretary of Education the dismissal was affirmed solely on the grounds of immorality. A plea of nolo contendere was considered to be an equal admission of guilt. The Court affirmed the decision. The Court said:

We are not here dealing with a civil suit to enforce individual rights. Rather, we are dealing with an administrative agency of the sovereign which seeks to carry out its duty to protect the citizens of the Commonwealth. . . . It is the interests of many rather than the interests of few which impel the Board.³⁰

³⁰Baker v. School District of Allentown, p. 1029.

The custodian contended that the evidence did not support a finding that his actions offended the moral standards of the community. The testimony of the Superintendent of the Schools was considered to be substantial evidence of the offense. The evidence indicated that "a reasonable man acting reasonably could have reached the decision made by the school board."³¹

Not every immoral act must be defined in specific terms. It would be totally unrealistic to require each board of education to define every immoral act. The task would be impossible to fulfill since values differ both in time and geography.

Pettit v. State Board of Education

513 P. 2d 889 (1973)

Facts

An elementary teacher aide and her husband applied for membership in "The Swingers," a private club devoted primarily to promoting diverse sexual activities between members at club parties. An undercover officer investigated the club and was accepted for membership. He attended a party at a private residence in which he observed a man and a woman (not the plaintiff) engaging in sexual

³¹Landi v. West Chester Area School District, 353 A. 2d 895 (1976).

intercourse in an open bedroom. Throughout the evening he saw various other couples similarly engaged. He estimated that there were twenty persons at the party, some of whom were walking around the residence observing people engaged in sexual acts. In a one-hour period, he observed the plaintiff commit three separate acts of oral copulation with three different men. When these acts took place, the participants were undressed, and there were other persons looking on.

Later she was arrested and charged with violating a Penal Code, oral copulation. Through a plea bargain she pleaded guilty to a lesser charge, outraging public decency, a misdemeanor. She was fined and placed on probation.

Decision

The judgment of the Superintendent of Schools was affirmed by the court. The teacher aide was dismissed and her license to work with mentally retarded children was revoked.

Discussion

The court began with an analysis of Morrison v. State Board of Education,³² Morrison is the case that serves as a basis for most decisions involving moral turpitude. Although it involved the proof of Morrison's homosexual conduct as evidence of unfitness to teach,

³²Morrison v. State Board of Education, 461 P. 2d 375.

the conclusions of the court are used widely for both certificated and noncertificated staff. Morrison had engaged in a single incident of homosexual activity involving another teacher. The board of education considered this activity to constitute "immoral conduct."

At the hearing with the board of education, Pettit was found to have engaged in acts of sexual intercourse and oral copulation with men other than her husband. Also, she had appeared on television programs while facially disguised and discussed nonconventional sexual behavior, including wife swapping.

The court concluded that:

The intimate and delicate relationships between teachers and students require that teachers be held to standards of morality in their private lives that may not be required of others. Parents have the right to demand high standards of conduct in the personal lives of the teachers of their children, and should have the right to expect that the teachers' concepts of morals and sexual relationships not be at substantial variance with concepts that are generally accepted and approved in the community, and that they not engage in conduct which is proscribed by the criminal laws of this state. It should not be necessary for such unacceptable conduct to manifest itself in the classroom before the Board may, in the best interests of the educational system and of the students, revoke the teaching credentials of one who has evidenced such a disregard of the accepted standards of moral conduct and of the criminal statutes.³³

³³Pettit v. State Board of Education, p. 891.

Disability

Overview

Disability constitutes the smallest number of dismissals by boards of education that are litigated. Disability dismissals are usually well documented with evidence from medical opinions suggesting the status of the employee's mental or physical condition.

In Patton an employee applied for disability contingent upon his use of accumulated sick leave. Due to his physical condition, he was unable to be granted a bus operator's license. He was able to work, and was offered another job, which he refused.

Patton v. Board of San Jacinto School District

143 Cal. Rptr. 593 (Cal. App., 1978)

Facts

For many years prior to his retirement James Patton was employed as a bus driver-mechanic. He worked four hours each day as a bus driver and four hours as a mechanic. He was notified by the Department of Motor Vehicles that his bus driver's certificate would not be renewed because of his physical disability (heart condition, tuberculosis, diabetes, and vision problems).

The board of education, upon receipt of the notice of refusal by the Department of Motor Vehicles to renew James Patton's driving certificate, reassigned him to work full time as a mechanic on a temporary basis. Because the school district had a full complement of mechanics, Patton was offered the position of adult school aide for four hours a day in lieu of his former duties as a bus driver. This assignment together with his regular four-hour assignment as a mechanic would constitute a full eight-hour day. Patton refused the combined position of mechanic and adult school aide.

Patton was notified by the superintendent that the board of education would consider dismissing him since his loss of driving certificate would render him legally unable to perform his duties as a bus driver.

Patton applied for disability retirement. He received a letter from the Public Employees' Retirement System which said, . . . "the effective date of your retirement cannot be earlier than the day following the last day of sick leave with compensation. . ."³⁴ He advised the board of education of his intent to take sick leave. The board of education responded by requesting a medical statement verifying the nature and degree of illness and the reasons why he could no longer report for work. The medical report was submitted

³⁴Patton v. Board of San Jacinto School District, p. 595.

and reviewed by the board of education which terminated Patton without granting him the right to use accumulated sick leave.

Decision

The judgment of the Board of Education in denying sick leave benefits was affirmed by the court. The court held that Patton was not a fireman or law enforcement officer and therefore not within the scope of Labor Code, that he was not on leave of absence for an industrial injury, and that he was not too sick to work.³⁵ The court cited Marsille³⁶ as a basis for its findings.

Discussion

Patton contended that the board of education attempted to avoid its statutory obligation to pay him his accumulated sick leave by terminating him. The board of education responded that he was not fired because of his disability, but rather because he no longer had a certificate to drive a school bus. The board cited its own rules and regulations that establish the causes for disciplinary action including dismissal from service. One of the causes for dismissal is the unsatisfactory fulfillment of job responsibilities, including "loss or

³⁵ Ibid., p. 599.

³⁶ Marsille v. City of Santa Ana, 64 Cal. App. 3d 764 (1977).

nonrenewal of licenses, permits, or other documents required by the nature of the position." ³⁷

The court cited Phelps³⁸ in which rule-making authority was conferred on the governing boards of school districts by the legislature. However, the adoption of rules may not be in conflict with other statutory restrictions.

The terms "sickness" and "sick leave" were not defined in either the Government Code or the Education Code. Following the primary rule of construction the Court concluded that "sickness for the purpose of entitlement to sick leave is universally recognized as an illness or injury interfering with one's ability to perform one's usual work so that absence from work is warranted." ³⁹ Thus, sick leave is a factual issue and subject to the rules and regulations of a local school district.

³⁷ Patton v. Board of San Jacinto School District, p. 596.

³⁸ Phelps v. Prussia, 141 P. 2d 440 (1943), p. 142.

³⁹ Patton v. Board of San Jacinto School District, p. 598.

CHAPTER V

SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

The controversy over the dismissal of noncertificated staff continues and appears to be gaining momentum. School administrators and boards of education have a growing concern as they find their decisions on dismissal challenged by judicial proceedings.

Prevailing social and political pressure groups coupled with an increased awareness of the rights of individuals have made the issue of dismissal sensitive and reactive. Dismissal attempts may or may not be settled to the satisfaction of the individual, the administrator, or the board of education. After the appeal to the board of education has been exhausted, the solutions may require litigation.

Dismissal may involve major constitutional issues such as due process and freedom rights, and state statutes and authority of school administrators and school boards. Therefore, school officials should have access to appropriate and accurate information concerning the legal issues related to dismissal in order to make sound educational and legal decision. The condensation into major dismissal categories and identification of potentially litigious dismissal issues provided by this research may assist school administrators and boards of education in making sound decisions when dismissal is concerned.

Summary

The introductory material in Chapter I identified the difficult problems of dismissal of staff facing boards of education and administrators. While this problem is not ancient it is accelerating at an alarming rate. Public schools have been faced with more litigation problems concerning dismissal of staff in the past ten years than in the previous hundred years. The current economic, political, and social climate lends itself to increasing litigation. Declining enrollments and determined, economy-minded voter-taxpayers are forcing educators to do something foreign to their experiences: dismiss staff. The public is looking closely at the intent and operations of the public schools.

An attempt was made to include an exhaustive review of dismissal of employees from their jobs by school boards and school administrators. Also, an historical perspective was presented to give the reader of the subject background and an overview. In Chapter II, related literature was reviewed, and selected cases were presented in an effort to clarify the complexity of the basic judicial considerations contained in the court cases presented in Chapters III and IV. A discussion of due process rights of noncertificated staff was presented with selected litigated cases.

As a guide to the educational and legal research, several questions were formulated and listed in Chapter I of this study. While the review of the literature provided answers to some of these questions, most were contained in Chapters III and IV. The answers to these questions comprise the major portion of a legal guideline which school administrators and other educational decision makers can refer to when making decisions related to dismissal of noncertificated staff.

Question 1. What are the major legal aspects surrounding dismissal of noncertificated employees?

The individual's constitutional rights of due process and freedoms may become involved in the dismissal process. Legal recourse to claim or secure these rights may be found in the following sources of authority:

1. Contract between employee and employer
2. State law
3. Regulations of the state board of education
4. Local policies and practices of a local board
of education
5. State court rulings
6. Court ruling construing the United States
Constitution

Additionally, individuals who contest their dismissal are entitled to the following commonly recognized due process rights:

1. Notice
2. Right to counsel
3. Judgment by an impartial tribunal
4. Right to avoid self-incrimination
5. Presentation of evidence
6. Right to cross-examination
7. Right to have witnesses
8. Proof of guilt
9. Record of the hearing

Question 2. Of the major causes for dismissal of noncertificated employees, which ones are most likely to be litigated? The major reasons for dismissal have been synthesized and grouped into six categories, as follows:

1. Reduction in staff, due to (a) enrollment decline, (b) supply and demand, and (c) finances
2. Incompetence
3. Insubordination
4. Neglect of duty
5. Immorality
6. Disability

Question 3. Are there major differences between the legal aspects of dismissal of professional employees and those of noncertificated employees? The answer to this question is provided in an analysis of the literature and court decisions as found in Chapter III. Conditions of employment, and therefore dismissal, often distinguish between professional and noncertificated staff as to authority, terms, and credentials.

Question 4. What criteria should be established for dismissal of noncertificated staff? These criteria are set forth in the conclusions and recommendations of this study which follows:

Conclusions

Drawing specific conclusions from legal research is difficult and often without exactness. Even when legal issues appear to be the same as or similar to those in cases already decided by the courts, a slightly different set of circumstances can produce an entirely different decision.

1. Courts will intervene in the decision-making prerogatives of local school officials in dismissal of noncertificated staff only if an individual's constitutionally protected rights have allegedly been denied.

2. Determining what is encompassed in the concept of constitutionally protected rights will continue to be a growing legal issue for the courts to expand upon and to encapsulate in their decisions.
3. The jobs of employees in public education will continue to be examined closely under the watchful eye of an increasingly fiscally conservative public.
4. With the decline of numbers of school-age children, additional staff will be dismissed to compensate partially for declining enrollments.
5. The judicial trend has always been in favor of administrators and boards of education when sound policies have been formed and explicitly followed.
6. The actions of public school employees can not offend the moral standards of the community without serious legal implications.
7. Boards of education are conferred with policy-making authority to define dismissal procedures for noncertificated staff so long as those policies are not in conflict with other statutory provisions.

Recommendations

The stated purpose of this study was to provide school administrators and boards of education with appropriate information regarding the legal aspects of dismissal of noncertificated staff so that they might be able to make educationally and legally sound decisions concerning the issue.

The current trend seems to point toward a continual examination and criticism of practices of boards of education. Capable and skilled educators will be required to work closely with their staffs, communities, and boards as citizens exercise their constitutional right to express views concerning public education. Educators must develop strategies and tools which will keep the public informed about schools and win public support for their actions.

These same educators must continue to be informed and keep up to date on constitutional issues and legal developments affecting dismissal of staff. Lack of legal knowledge is not an acceptable excuse for arbitrary or capricious regulations. Special caution should be taken to prevent violation of constitutionally protected rights of employees. School board policies must be legally formulated, adopted, and implemented. A carefully designed plan for dismissal should be adopted and followed explicitly.

RECOMMENDED SCHOOL BOARD POLICY FOR
SUSPENSION AND DISMISSAL OF
NONCERTIFICATED STAFF MEMBERS

BOARD POLICY:

EMPLOYEES ARE SUBJECT TO SUSPENSION AND/OR
DISMISSAL WITH SUFFICIENT CAUSE.

Administrative Implemental Procedures:

1. An employee will be subject to immediate suspension and/or discharge if it is determined that a deliberate false statement has been made or included in the employment application.
2. Employees may be suspended temporarily with pay deduction for improper conduct or inferior job performance. The immediate supervisor of the employee will recommend the appropriateness of the length of the suspension. The time limit for any suspension shall not exceed five (5) working days.
3. Any action affecting an employee's position must be initiated by completing the appropriate form or forms.
4. Causes for suspension and/or dismissal shall include, but not be limited to the following:
 - a. Unexcused and/or extended absence
 - b. Failure to improve work performance after notification (Per form or letter from supervisor)
 - c. Frequent tardiness and/or absences without acceptable excuses
 - d. Supportive evidence and/or admission of dishonesty or improper conduct on the job

- e. Reporting and/or being on duty under the influence of liquor or other nonprescribed drugs
- f. Deliberate damage or destruction of Board of Education property.
- g. Continued carelessness or recklessness
- h. Disregard for the comfort and safety of a fellow worker
- i. Striking, fighting, or otherwise attempting to injure another employee
- j. Interfering with other employees in the discharge of their duties
- k. Insubordination
- l. Repeated failure to notify supervisor when unable to report to work.

RECOMMENDED ADMINISTRATOR'S WORKSHEET
ON DISMISSAL OF NONCERTIFICATED
STAFF MEMBERS

The following worksheet is intended to help administrators and board members outline the rules they must follow in making dismissals. The answers can be found in state law and in court decisions and administrative rulings interpreting state law. (State departments of education, state professional organizations, and school attorneys can help with the answers.)

A caution is in order: The worksheet, even with all of the answers filled in, is no substitute for good legal advice. But it can help administrators and board members get thoroughly acquainted with legal requirements, the first step toward making successful dismissals.

1. Included under the state employment/dismissal law are
 All certificated employees
 All noncertificated employees
 Superintendents
 Principals
2. Legally acceptable reasons for dismissal or nonrenewal are _____
3. The cause for dismissal or nonrenewal may be determined by:
 The school board
 The Superintendent
 Other
4. An employee must be provided with a written notice of dismissal.
 Yes No
5. The notice must contain a statement of cause.
 Yes No
6. The notice must include a statement that the employee may request a hearing.
 Yes No

7. The notice must include a time, date and place for consideration of the issue.
_____ Yes _____ No
8. The notice must be formally filed with the board.
_____ Yes _____ No
9. Failure of the employees to request a hearing means that the hearing notice will serve as a notice of termination.
_____ Yes _____ No
10. Failure of the employee to request a hearing means that the board's decision will be final.
_____ Yes _____ No
11. The employee's request for a hearing must be submitted in writing.
_____ Yes _____ No
12. When must the hearing be held?

13. Who is charged with conducting the hearing?

14. Must the hearing be conducted in public or in private?
_____ Public _____ Private
15. Counsel for the employee is specifically allowed at the hearing.
_____ Yes _____ No
16. An oath or affirmation of witness is required.
_____ Yes _____ No
17. The law says that evidence must be heard.
_____ Yes _____ No
18. Cross-examination of witnesses is allowed.
_____ Yes _____ No
19. Subpoenas may be used.
_____ Yes _____ No

20. The hearing must be confined to "cause."
 Yes No
21. A hearing transcript must be kept.
 Yes No
22. A copy of the transcript must be furnished to the employee free of charge.
 Yes No
23. The board's decision on dismissal requires a majority vote.
 Yes No
24. A decision by the hearing committee is final.
 Yes No
25. The decision must be put into written form.
 Yes No
26. The employee must be notified of the decision immediately.
 Yes No
27. Appeal of a decision may be made to:
 A hearing committee
 The board of education
 The courts
 Other
28. Appeal may be based on
 The decision
 New evidence
29. The decision may be appealed by
 The employee
 The board of education
30. Date when the appeal must be made

RECOMMENDED DISMISSAL FORM
FOR NONCERTIFICATED STAFF

EMPLOYEE _____ DATE _____

JOB _____ SALARY GRADE _____

The above referenced employee terminated his/her employment
for the following reasons:

WAGE INFO AND RELEASE

| | |
|--------------------------|----------|
| Wages Due | \$ _____ |
| Vacation Pay Due | \$ _____ |
| Other Pay Due | \$ _____ |
| Less Amount Due Employer | \$ _____ |
| Total | \$ _____ |

The total amount of \$ _____ is due and paid in final consideration
and does hereby release _____
School System forever of any claims made by the above against said
school system.

Employee's Signature

Date

School System

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