BOARD OF EDUCATION LAW - REPRESENTING COUNTY BOARD OF EDUCATION EMPLOYEES

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TABLE OF CONTENTS

Public school employees are most likely to engage counsel in three categories of matters: (1) employee grievances; (2) disciplinary proceedings; and (3) proceedings to adjust the work force. Following a discussion of certain concerns which are common to all three, each type of matter is separately addressed below.

I. COMMON CONCERNS

It is beyond the scope of this chapter to even summarize all the legal considerations pertaining to school personnel. Nevertheless, the practitioner may find the following observations to be useful in counseling the school employee.

The body of law affecting public school employees in West Virginia has undergone significant changes in the past two decades. Perennial "reform" legislation, a new generation of case law, and a proliferation of policies and administrative decisions have complicated the task of representing teachers and service personnel. No sooner are some principles or procedures established, it seems, than they are modified by another wave of change.

For that reason, counsel should approach critically the legal authorities which are most commonly consulted in this area: statutory law; reported cases; opinions of the Education and State Employees Grievance Board; state and county board of education regulations; opinions of the Attorney General; and school law interpretations of the State Superintendent of Schools. (Because there is no collective bargaining between school employees and the 55 county boards of education, there is no "labor agreement" to supply answers when questions arise.)

School personnel statutes, for example, regulate virtually every aspect of the employment relationship in West Virginia and will be consulted in most cases. Yet the statutes are so frequently amended that revisions often do not yet appear in the published Code. Always

be certain that you have located the applicable version of a school statute, especially on matters of procedure. If the Legislature has met since the publication of the most recent supplement to the Code, it is unwise to rely upon the Code or its supplements for a correct statement of current school law. (At this writing, school personnel statutes are now found primarily in Chapter 18A of the West Virginia Code).

Similarly, any opinion of the West Virginia Supreme Court of Appeals which seems applicable to a matter should be considered with great care. Many of the reported cases stand for propositions which have been nullified by the passage of time. In this area of the law, it is not unusual for subsequent legislation, new administrative policies, or constitutional developments to render relatively recent decisions obsolete.

On most school personnel questions it is also advisable to review pertinent written opinions of the West Virginia Education and State Employees Grievance Board. The decisions contain helpful analyses of specific factual situations. They also identify and discuss emerging issues in this changing area of law. Be aware, however, that Education and State Employees Grievance Board decisions are subject to judicial review and may have been reversed. (The Grievance Board often reports on its website the subsequent judicial history of its decision.) Like case law in this area, they may also be based upon outdated statutory or policy provisions.

Often overlooked in the treatment of school employee matters are the written regulations of the West Virginia Board of Education (Title 126 of the Code of State Rules) and the written policies of each county board of education. In appropriate cases, such regulations and policies may bind the respective boards of education and be enforced against them. See Trimboli v. Bd. of Educ. of the County of Wayne, 254 S.E.2d 561 (W. Va. 1979) (state

regulations); State ex rel. Hawkins v. Tyler County Bd. of Educ., 275 S.E.2d 908 (W. Va. 1980) (county policies). Thus, a regulation of the State Board of Education or a policy of an employer could conceivably influence or dispose of a school employee's case. State Board of Education Policy 5300, for example, has been cited in many of the reported cases and grievance decisions as the sole source of certain employee rights. County policies have likewise figured prominently into a number of Education and State Employees Grievance Board decisions.

Finally, parties to school employee proceedings sometimes rely upon formal opinions of the Attorney General of West Virginia or written interpretations of school law rendered under W. Va. Code § 18-3-6 by the State Superintendent. These authorities are not always accorded great weight in the courts and, like case law, may be rendered useless by the passage of time. Moreover, the interpretations of the State Superintendent of Schools frequently lack any helpful legal analysis, and they do not always describe in useful detail the facts upon which they are based.

An exhaustive review of these and other authorities will sometimes produce no definitive answer to a given school employee question. There are many school personnel issues which West Virginia law does not address or addresses ambiguously. An employee's situation may also differ factually from the reported cases in subtle but significant ways. Uncertainty as to the applicable rule of law or the ultimate result is standard fare in certain areas of school employee law and is to be expected. Together with budgetary pressures and heightened public concern over the condition of public education, this uncertainty has in recent years fostered an explosion in employee grievances, disciplinary cases, and proceedings to adjust the work force.

II. THE GRIEVANCE PROCEDURE

Although in some exceptional cases judicial relief may be immediately available to redress an employee's grievance by way of injunction or mandamus, see State ex rel. Bd. of Educ. v. Casey, 349 S.E.2d 436 (W. Va. 1986), in most instances one must first exhaust the administrative remedy provided by the Education Employees Grievance Act, W. Va. Code §§ 18-29-1, et seq.

The Act establishes what is intended to be a simple, expeditious and fair process to resolve employer-employee differences at the lowest possible administrative level. Except for matters relating to retirement systems, public employee insurance, and other issues in which authority to act is not vested with the employer, virtually any complaint by a public school employee may be prosecuted under the Act. Indeed, "grievance" is defined to mean:

> . . . any claim by one or more affected employees of the . . . county boards of education . . . alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees . . . .

The terms "discrimination," "harassment," and "favoritism" are separately defined in the statute. W. Va. Code §§ 18-29-2(a), (m), (n), (o).

Within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the date on which the event became known to the grievant, or within

15 days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee or his or her representative may invoke the grievance process by scheduling an informal conference to discuss the matter with the employee's immediate supervisor. Within ten days of the request, the conference must be held, at which time the grievant or representative is supposed to discuss with the immediate supervisor the nature of the complaint and the remedy sought. The informal conference is not open to the public.

Within ten days of the informal conference, the supervisor must respond orally or in writing to the employee's complaint. If the response is acceptable to the employee, the matter is at an end and there are no further proceedings.

A grievant who is dissatisfied with the immediate supervisor's response may, within ten days after receiving the response, file with the same immediate supervisor a written Level One grievance complaint. The form upon which a complaint is filed, like all other forms for filing and processing grievances, must be made available to the employee by the immediate supervisor. (A form for filing grievances is also available on the Grievance Board's website.) The immediate supervisor must respond to the written complaint within five days by delivering to the grievant a written Level One decision. The decision is supposed to set forth the supervisor's decision (to grant or deny the grievance) and the reasons for the decision. There is no requirement that the immediate supervisor conduct a hearing between the filing of the written complaint and issuances of the written Level One decision.

If the employee is satisfied with the written Level One response, the grievance ends at that level. However, if the immediate supervisor at Level One either fails to timely issue

a written decision or issues a decision with which the employee is dissatisfied, the employee may pursue the matter at Level Two by filing a written appeal within five days.

The Level Two appeal is filed with the county superintendent of schools upon a form to be made available by the employee's immediate supervisor. (A form for filing grievance appeals is available on the Grievance Board's website.) Within five days after the request is received by the superintendent, the superintendent or a person designated by the superintendent must conduct an impartial hearing upon the grievance. The superintendent and designee are forbidden by law to communicate about the merits of the grievance, ex parte, with the immediate supervisor who heard the grievance at Level One. The Level Two hearing is to be private unless the employee requests that it be public.

At the Level Two hearing, the grievant may be represented by anyone of his or her choice. The employer is often represented by an administrator, the immediate supervisor who made the Level One decision, or, in some cases, by counsel. At the hearing, witnesses testify under oath and both sides may present evidence, cross-examine witnesses, and rebut evidence. At the request of any party, subpoenas for witnesses and documents may be issued for Level Two hearings by the county superintendent of schools or by a Grievance Board administrative law judge in accordance with W. Va. Code § 29A-5-1. The formal rules of evidence are typically relaxed at the hearing. All testimony is recorded by mechanical means (usually a tape recorder) so that, if necessary, a written transcript of the hearing can later be made. The employee has the burden of proving his or her complaint by a preponderance of the evidence. Within five days after the Level Two hearing, the superintendent must issue a written decision which includes findings of fact and conclusions of law.

If the grievant is satisfied with the superintendent's decision, the grievance ends at Level Two. However, if a Level Two decision is not made within the prescribed time or if the employee is dissatisfied with the superintendent's decision, the employee may appeal within five days to the county board of education at Level Three or, alternatively, may elect to skip Level Three and proceed directly to Level Four.

The form for perfecting an appeal to Level Three may be obtained from the employee's immediate supervisor. (A form for filing appeals is also available on the Grievance Board's website.)

Within five days after the appeal is filed at Level Three, the board of education must exercise one of three options.

First, within five days of receiving the appeal, the full board of education may conduct an impartial hearing at which oaths are administered and at which both sides may present evidence, cross-examine witnesses, and rebut evidence. At the request of any party, subpoenas for witnesses and documents may be issued for Level Three hearings by the county superintendent of schools or by a Grievance Board administrative law judge in accordance with W. Va. Code § 29A-5-1. At a Level Three hearing, the parties are not limited to presenting only the evidence offered at Level Two but, instead, may present additional evidence relating to the grievance. The hearing is recorded so that, if necessary, a written transcript can later be made, and it is in private unless the grievant requests a public hearing. The employee has the burden of proving his or her grievance by a preponderance of the evidence. Within five days after a Level Three hearing, the county board must issue a written decision containing findings of fact and

conclusions of law. The board's decision must affirm, modify, or reverse the superintendent's Level Two decision.

Second, the county board may instead choose not to conduct a hearing but rather to decide the grievance on the basis of the record of the proceedings at Level Two. The written decision must contain findings of fact and conclusions of law and be issued within five days after the appeal was filed with the board.

Third, the board may choose to neither conduct a hearing nor review the record from Level Two. In this case the board must notify the employee in writing, within five days after the appeal is filed, that the board chooses to waive its right to be involved in the processing of the grievance.

Most often, county boards of education choose the third option and do so without first entertaining any presentation or argument by counsel. Regardless of which option the board chooses, the board of education is forbidden to confer with the superintendent or the employee's immediate supervisor regarding the merits of the grievance unless the grievant and any grievant's representative are present.

Once the board has exercised one of its options at Level Three, or if it has not done so within the prescribed time periods, a dissatisfied grievant who has appealed to Level Three may, in writing, request that the grievance be submitted at Level Four to a hearing examiner (referred to as an administrative law judge) employed on a full-time basis by the West Virginia Education and State Employees Grievance Board. This is done by filing the appropriate form not with the county board of education but, rather, in the Charleston office of the Grievance Board. (The Grievance Board's website offers a form for that purpose, together with contact

information for the Charleston office.) An administrative law judge will then be designated to conduct an impartial hearing which, under the statute, must be held within ten days following the request for a hearing, or within such time as is mutually agreed by the parties. Additionally, if the administrative law judge, in writing, gives cause for a reasonable delay, the hearing may be held as late as 30 days after the request is received.

A Level Four hearing resembles the hearings at Levels Two and Three. The administrative law judge may subpoena witnesses and documents in accordance with W. Va. Code § 29A-5-1, consolidate grievances, and exercise other powers to regulate the Level Four proceedings. Whether the hearing is public or private is within the discretion of the administrative law judge. The parties, who are usually represented at Level Four by counsel or (in the case of employees) by an employee association attorney or specialist, may present their evidence afresh and are not necessarily limited to presenting only the evidence which was offered at lower levels of the grievance procedure. Most often, however, the parties use a Level Four hearing only to supplement the record of the proceedings below, inasmuch as the record, by law, is submitted to the Grievance Board at Level Four. Where the lower level record is complete and a Level Four hearing will contribute nothing of significance to the body of evidence, the parties often agree to dispense with the Level Four hearing, submitting the matter for decision at Level Four on the basis of the record from the lower levels. In a Level Four appeal of the typical grievance, the employee has the burden of proving his or her grievance by a preponderance of the evidence.

The written decision of the administrative law judge at Level Four, including findings of fact and conclusions of law, must be rendered within 30 days following the hearing unless this deadline is extended by mutual consent of the parties. As a matter of practice, the

parties almost always agree to extend the decision deadline in order to have time to prepare and submit to the administrative law judge proposed findings of fact and conclusions of law. The Level Four decision is characterized by the statute as "final" and enforceable in circuit court.

All Level Four decisions are filed with the Secretary of State and, in recent years, posted on the Grievance Board's website. They are thus available for purposes of research. It is advisable to consult past decisions in preparing an appeal to Level Four, inasmuch as the Grievance Board's administrative law judges, in deciding questions of substance and procedure, rely heavily upon the body of prior Level Four decisions rendered in similar cases.

Within 30 days after the hearing examiner's decision is received, either party may appeal the hearing examiner's Level Four decision to the Circuit Court of Kanawha County or to the circuit court of the county in which the grievance originated.

The appellant initiates this process by filing a petition with the circuit court and serving a copy by mail upon the opposing counsel or, in the case of a pro se party, the party. As a matter of courtesy, a copy is usually also mailed to any lay representative who appeared on behalf of another party who had no attorney at Level Four. The petition should allege one or more of the permissible grounds for appeal: that the hearing examiner's decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the county board of education; (2) exceeded the hearing examiner's statutory authority; (3) was the result of fraud or deceit; (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or (5) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. In the Circuit Court of Kanawha County, which receives the most appeals, it is not necessary for parties other than the appellant to file answers. The circuit

court, in due course, enters an order by which the Education and State Employees Grievance Board is directed to transmit the entire administrative record to the clerk of the circuit court. Upon separate motion by a party, the court may also stay the Level Four decision.

The circuit court is not permitted by the statute to entertain new evidence but, rather, must review the matter upon the record made before the Level Four hearing examiner and with the benefit of oral argument and/or written briefs. (Typically, the briefs suffice and there is no oral argument. Typically, the court's order directing the Grievance Board to transmit the record also establishes a briefing schedule). The circuit court may reverse, vacate, or modify the Level Four decision of the hearing examiner or it may remand the matter to the county superintendent of schools for further proceedings.

The decision of the circuit court may be appealed to the Supreme Court of Appeals.

The foregoing description of the grievance procedure is based primarily upon the provisions of W. Va. Code §§ 18-29-3 through -11, which should be carefully studied before commencing or prosecuting a grievance. In advance of the informal conference and any proceedings at Levels One, Two or Three, counsel should also consult any formal policies of the county board of education relating to employee grievances at those levels. Before proceeding at Level Four, counsel should consult the procedural rules of the West Virginia Education and State Employees Grievance Board, 156 CSR 1, which are also posted on the Grievance Board's website. The Level Four rules cover such issues as preliminary conference procedure, rules for requesting subpoenas, motion practice, and discovery.

The following points are generally applicable to all four levels of the administrative procedure and should be kept in mind in developing a grievance strategy.

First, the word "days" as used in the Education Employees Grievance Act does not include Saturdays, Sundays, official holidays, or school closings occasioned by contagious disease, weather conditions, or any other calamitous cause over which the board of education has no control. All procedural time periods under the Act are subject to this definition. Legal holidays, especially, often have the effect of allowing more time for certain actions than might otherwise appear. Always consult the official school calendar, as most recently modified, to properly count "days." W. Va. Code § 18-29-2(b).

Second, the Act contains a "discovery rule exception" to the 15-day time limit for instituting a grievance. In Spahr v. Preston County Bd. of Educ., 391 S.E.2d 739 (W. Va. 1990), the court held that because the time in which to invoke the grievance procedure does not begin to run until the grievant knows of the facts giving rise to a complaint, a grievance can extend to prior years. The discovery rule exception, in effect, tolls the limitation as to those prior years. Because many grievances are denied at Level Four on the ground that they were not timely pursued by the employee, the discovery rule exception may in certain cases suggest a basis on which to avoid such a result.

Third, any of the specified time limits may be and often are extended by written agreement between the parties to the grievance. As a practical matter, many of the statutory time periods are simply too short to allow ample preparation or to accommodate the schedules of all involved. However, under the procedural rules of the Grievance Board, continuances at Level Four may be sought only by motion and are granted only for good cause shown. Note, too, that

the time limits at all levels of the grievance procedure must be extended whenever a grievant is not working due to circumstances that, under W. Va. Code § 18A-4-10, justify an employee's use of personal leave. W. Va. Code § 18-29-3(a).

Fourth, if the immediate supervisor at Level One, the county superintendent or designee at Level Two, or the county board of education at Level Three fails to make a required response within the statutory time limits (except as a result of sickness or illness that prevents compliance), the grievant may prevail by default. W. Va. Code § 18-29-3(a); 156 CSR 1-5.1. In order to so prevail, the grievant must promptly file with the employer (and may also file with the Grievance Board) a written claim seeking relief by default. This halts all proceedings at Levels One through Three. When such a claim is made, the Grievance Board conducts a hearing to decide whether, indeed, a default occurred, whether the employer has a statutory excuse for the delay, and whether the relief sought by way of default is contrary to law or clearly wrong.

Fifth, a grievance may be filed in the first instance at the level of the procedure vested with the authority to grant the requested relief, but only if the individual or board that would decide the grievance at that level agrees in writing. This acceleration of the grievance may be appropriate where the grievance complaint concerns a personnel action which the immediate supervisor has no power to rectify, but which can be rectified in an appropriate case by the county superintendent or designee at Level Two. W. Va. Code § 18-29-3(c).

Sixth, an employee may withdraw a grievance at any time. To do so, written notice must be given to the decision maker at the level where the grievance is pending. Once withdrawn, a grievance may not be reinstated without the consent of the decision maker who consented to the withdrawal. W. Va. Code § 18-29-3(d).

Seventh, a grievance may be filed by one or more employees on behalf of a class of similarly situated employees, but only with the written consent of each employee in the class. W. Va. Code § 18-29-2. Moreover, separate grievances may be consolidated at any level by agreement of all parties. W. Va. Code § 8-29-3(e). Class actions and consolidations can be effective ways to process, in one proceeding, the identical grievances of similarly situated employees.

Eighth, evidence which substantially alters the original grievance and renders it a different Eighth may be introduced only with the consent of the parties or, at Level Four, at the direction of the hearing examiner. Similarly, any change in the relief sought by the grievant must be consented to by all parties or may be allowed at Level Four by the hearing examiner. Accordingly, counsel is well advised to draft the Level One grievance complaint in a way that embraces all essential factual bases for the grievance and makes clear the full extent of the relief which will be requested. W. Va. Code §§ 18-29-3(j), (k).

Ninth, upon timely request, any employee must be allowed to intervene and become a party to a grievance if he or she claims that the disposition of the grievance may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties. W. Va. Code § 18-29-3(u). This occurs most frequently when a disappointed applicant for a job vacancy initiates a grievance claiming that he or she should have received the job and the successful applicant intervenes to protect his or her interest in remaining in the position.

III. DISCIPLINARY PROCEEDINGS

Under the school laws now in effect, suspensions, dismissals and the nonrenewal of probationary contracts are the kinds of employee discipline which the West Virginia practitioner is most likely to encounter. Frequently, the first two are combined so that a period of suspension precedes the eventual termination of employment.

At present, disciplinary suspensions are authorized and regulated by W. Va. Code §§ 18A-2-7 and 18A-2-8. Section 18A-2-7 empowers a county superintendent of schools to suspend school employees only temporarily, pending a hearing upon charges filed by the superintendent with the county board. The period of temporary suspension may not exceed 30 days unless extended by the board of education.

Additional suspension procedures, as well as the permissible grounds for disciplinary suspension, are set forth in section 18A-2-8. This section requires that written charges upon which a suspension is based must be served upon the employee within two days of the presentation of the charges to the board of education. Within five days of receiving the written charges, the employee may request, in writing, a hearing at Level Four of the grievance procedure described above. The West Virginia Education and State Employees Grievance Board gives such appeals to Level Four priority over other grievances pending at Level Four.

Under current law, disciplinary dismissals, too, are also regulated by W. Va. Code § 18A-2-8. As in the case of a suspension, a dismissal must be based upon one of the grounds enumerated in that statute. The employee must be served with written charges within two days of the presentation of the charges to the board of education and may, within five days of receiving the charges, request a Level Four hearing under the Education Employees Grievance

Act. The hearing is de novo unless the parties agree to submit the case for a decision based upon the record of a suspension or termination hearing conducted by the county board of education.

The employment of professional and service employees who hold probationary, rather than continuing, contracts of employment may arguably be ended, for cause, under an alternative procedure. Under W. Va. Code § 18A-2-8a, the employment contracts of probationary school employees (those employees who have not yet completed the three years of employment which entitle them to a continuing contract) are subject to nonrenewal once each year. Section 18A-2-8a requires the county superintendent of schools, on or before the first Monday in May of each year, to provide in writing to the county board of education a list of all probationary employees to be rehired for the following school year. Within ten days after the board accepts the list, the probationary employees whose names are not on the list must be notified in writing, by certified mail, that they have not been rehired for the next year.

Within ten days after receiving the notice, such probationary employees may request a statement of the reasons for not being rehired and may request and receive a hearing before the board of education. The statute requires that the county superintendent demonstrate at the hearing the reasons for the nonrehiring. A probationary employee whose contract has not been renewed and who requests and receives a board hearing may appeal any unsatisfactory outcome by initiating a grievance under the Education Employees Grievance Act within 15 "days" after the board hearing.

Counsel should be alert to the possibility that, in a given case, the employee against whom suspension or dismissal charges are brought, or whose contract has not been renewed, may be entitled to more due process than the cited statutes expressly require. For

example, as now written, W. Va. Code §§ 18A-2-7 and 18A-2-8 are silent as to the procedure to be followed by the superintendent of schools imposing a temporary suspension. Section 18A-2-8 also does not prescribe how a county board of education must act upon the recommendation for suspension or dismissal. Yet under the rules and reasoning of cases such as Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985), Bd. of Educ. of the County of Mercer v. Wirt, 192 W. Va. 568, 453 S.E.2d 402 (1994), and Waite v. Civil Service Commission of West Virginia, 161 W. Va. 154, 241 S.E.2d 164 (1978), an employee may be entitled to certain due process incident to a temporary suspension by the superintendent and to more than just after-the-fact notice of a suspension or dismissal imposed by the board of education. See Allen v. Monroe County Bd. of Educ., Education and State Employees Grievance Board Docket No. 90-31-021 (July 11, 1990). Moreover, an individual county board of education may have adopted local regulations which afford other procedural safeguards to a worker whose suspension or termination is sought.

Whatever the source, an entitlement to additional due process may prove quite valuable in a given case. If the additional procedure is actually made available to the employee, it may assist him or her in resisting the charges upon which suspension or dismissal is sought. If the additional procedure is denied, the resulting violation of due process may serve as a basis for a successful challenge to any actual suspension or dismissal.

Three other principles, now rooted in the law of public schools, should enter into the evaluation and defense of suspension, dismissal and nonrenewal cases.

One is that a suspension or termination for unsatisfactory performance may not be imposed unless the employee has first received an unsatisfactory performance evaluation, a

reasonable opportunity to improve, and yet another unsatisfactory evaluation. W. Va. Code § 18A-2-8. Nor may an employee be suspended or terminated for cause under other provisions of the statute if the reason has to do with misconduct or incompetency that has not been called to the employee's attention through evaluations and is correctable. Under West Virginia Board of Education Policy 5300, 126 CSR 141, an offense or conduct which affects professional competency is correctable if the conduct or offense does not directly and substantially affect the morals, safety, and health of the school system in a permanent, non-correctable manner. See Hosaflook v. Nestor, 346 S.E.2d 798 (W. Va. 1986), and Mason County Bd. of Educ. v. State Supt. of Schools, 165 W. Va. 732, 274 S.E.2d 435 (1980). It is, therefore, important in cases of suspension or termination for cause to consider not only whether the deficiency of which the employee is accused constitutes a ground for discipline under the applicable statute and actually occurred, but also whether it is correctable. If so, counsel should review the prior written evaluations or warnings given to the employee by school officials to ensure that the requisite prior notice was given. Even if it was, sufficient time must have passed between the evaluation and the disciplinary proceedings to allow the employee a reasonable opportunity to improve. The failure of a county board of education to fully observe these requirements may vitiate the disciplinary action.

A second principle which may afford some basis for relief is that a school employee may not be disciplined for off-the-job conduct unless the board of education can demonstrate a "rational nexus" between the conduct performed outside of the job and the duties the employee is to perform. Golden v. Bd. of Educ. of County of Harrison, 169 W. Va. 63, 285 S.E.2d 665 (1981). A rational nexus exists if the employee's off-duty conduct directly affects the duties the employee is to perform, or if, without contribution on the

part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the employee to discharge the duties of his or her job. Woo v. Bd. of Educ., 202 W. Va. 409, 504 S.E.2d 644 (1998); Rogliano v. Fayette County Bd. of Educ., 176 W. Va. 700, 347 S.E.2d 220 (1986). Where, for example, the dismissal of a guidance counselor was predicated upon her plea of nolo contendere to the misdemeanor charge of shoplifting, the court ordered reinstatement because the evidence did not show the requisite nexus. Id. Accordingly, unless common sense or prior decisions of the court indicate that a particular kind of off-the-job activity meets the rational nexus test, it may be productive to explore in some detail this aspect of an employer's case.

The third principle is that, in school disciplinary proceedings, "the punishment must fit the crime." Even if an employee is guilty of conduct constituting a valid basis for dismissal, a dismissal may be so harsh as to be unreasonable and arbitrary under the circumstances. Fox v. Bd. of Educ. of Doddridge County, 160 W. Va. 668, 236 S.E.2d 243 (1977). For example, a mere "error of judgment" on the part of an employee may justify a suspension, but in certain circumstances it is not punishable by dismissal.

Finally, the possibility of a negotiated resolution of a contested disciplinary matter should not be ignored. Sometimes alleged misconduct upon which a suspension or dismissal is sought is also the subject of a serious criminal investigation or prosecution. It may serve the interests of employer and employee in such a case to postpone school disciplinary proceedings and to agree to a leave of absence or similar arrangement pending a resolution of the criminal matter. Similarly, where it can be shown that the case against an employee is of dubious strength and the incompetency or misconduct is arguably correctable, the employer might be persuaded to forego action under W. Va. Code §§ 18A-2-8 or 18A-2-8a in return for the employee's promise

to pursue a definite plan of improvement or treatment. However, even where a negotiated resolution is achieved, the county superintendent may be under a legal obligation to report the employee's deficiency to the State Superintendent of Schools under W. Va. Code § 18A-3-6, at least where a teacher's conduct may warrant the revocation of his or her teaching certificate by the state.

IV. PROCEEDINGS TO ADJUST THE WORK FORCE

Falling into this category are employee dismissals and transfers which are not disciplinary in nature but, rather, are dictated by a need to adjust staffing patterns to reflect changing legal requirements, budget realities, changing student populations, and similar phenomena. These "administrative" transfers and dismissals are quite common and have been implemented primarily and under the reduction-in-force provisions of W. Va. Code §§ 18A-4-7a and 18A-4-8b.

Section 18A-4-7a provides that when a county board of education is required to reduce the number of professional personnel in its employment, the employee with the least amount of seniority shall be properly notified and released from employment under procedures set forth in W. Va. Code § 18A-2-2. However, before releasing a professional employee, the employee must be transferred to any other professional position for which the employee is certified and where he or she was previously employed, or to any lateral area for which he or she is certified, but only if the employee's seniority is greater than the seniority of any other employee in that area of certification. (Under § 18A-4-7a, all classroom teacher positions are deemed to be lateral to one another, but each county board of education must have its own policy specifying which professional positions shall be lateral.) The names of professional employees

whose seniority with the county board is insufficient to avoid dismissal must be placed upon a preferred recall list. Such ex-employees are to be recalled on the basis of seniority to any professional position opening within the area where they had previously been employed or within any lateral area for which they are certified, provided that no regular full-time professional employees, or professional employees returning from leaves of absence with greater seniority, are qualified, apply for and accept such positions.

West Virginia Code § 18A-4-8b provides that when a county board of education is required to reduce the number of service (rather than professional) employees within a particular job classification, the board must release the employee with the least amount of seniority within that classification or grades of classification, and transfer the employee to any vacant job in that classification or in any other job classification where the employee was previously employed. The names of least-senior employees who cannot be transferred to such a vacancy (because, typically, no such vacancy exists), and whose seniority with the board is insufficient to allow their retention during a reduction-in-force, must be placed upon a preferred recall list, from which they are to be recalled to work on the basis of seniority. A service employee on the preferred list may only exercise the right to preferred recall if there are no qualified regular employees who apply for and accept the vacancy in question.

If under the foregoing provisions of W. Va. Code §§ 18A-4-7a and 18A-4-8b it becomes necessary to release a least-seniored employee, the dismissal must proceed in accordance with W. Va. Code § 18A-2-2 for professional employees and W. Va. Code § 18A-2-6 for service personnel. See Farley v. Bd. of Educ. of Mingo County, 179 W. Va. 152, 365 S.E.2d 816 (W. Va. 1988). Under these statutes the affected professional employee is entitled, before the first Monday in April, to written notice of the superintendent's intention to

terminate the employee's contract at the end of the school year; the affected service employee is entitled to such notice before April 1. The notice must extend to the employee an opportunity to be heard at a meeting of the board prior to the board's action on the recommendation. Also before the first Monday in April, the county board of education must conduct a dismissal hearing for each professional employee who takes advantage of the opportunity to be heard; the hearing to each such service employee must be conducted before April 1. An employee's contract may then be terminated under this procedure only by a majority vote of the full membership of the board before the first Monday in April (professional employees) and April 1 (service employees) of the then-current year. Disgruntled employees who are terminated under this procedure may thereafter initiate a grievance under the Education Employees Grievance Act.

West Virginia Code § 18A-2-7 establishes the procedure to be followed when a transfer is necessitated by the reassignment of professional and service personnel as part of a reduction-in-force. On or before the first Monday in April prior to the school year when the transfer will take effect, the county superintendent of schools must provide written notice to professional and service employees who are being considered for transfer or are to be transferred. Any employee who desires to protest the proposed transfer may then request in writing a statement of the reasons for the proposed transfer, in which case the statement of reasons must be delivered to the employee within ten calendar days. The employee, within ten days of receipt of the statement of reasons, may make written demand upon the superintendent for a hearing before the board of education. The requested hearing must be held on or before the first Monday in May, and at the hearing the reasons for the proposed transfer must be shown.

Whether or not there is a hearing, the county superintendent, on or before the first Monday in May, must furnish to the board of education a written list of teachers and other

employees to be considered for transfer and subsequent assignment for the next ensuing school year. Under § 18A-2-7, all employees not so listed shall be considered as reassigned to the positions or jobs held at the time of this meeting. The list of those recommended for transfer must be included in the minute record of the meeting, and within ten days of the meeting each employee on the list must be given written notice by certified mail that he or she has been recommended for transfer and subsequent assignment and the reasons therefore. Only upon recommendation of the superintendent and by action of the board of education may an employee whose name is on the list of persons to be considered for transfer and subsequent assignment actually be transferred and assigned to a new position.

These statutory provisions for reductions-in-force and attendant dismissals and transfers are complex and frequently amended by the Legislature. While it is not possible here to even dent the surface of pertinent legal concerns, the following advice may be of help to the attorney who represents an employee subject to a reduction-in-force related dismissal or transfer.

First, be aware that various associations which represent school employees have developed considerable expertise in representing employees in reduction-in-force proceedings. If your client belongs to such an association, consider drawing upon this valuable resource.

Second, many county boards of education have adopted policies of their own to supplement the statutory provisions for personnel actions of these kinds. Review such policies in appropriate cases to ensure that the proposed transfer or dismissal has been processed in accordance with them.

Third, ensure that all calendar deadlines are met and that notices are given in the proper way and form. The Grievance Board's administrative law judges who ultimately hear these cases usually insist that all statutory deadlines and procedures be met.

Fourth, satisfy yourself that any hearing held at the employee's insistence meets applicable standards of due process such as those discussed above with respect to employee discipline. Of course, if the employee has received proper notice and not demanded a hearing, these due process concerns may be irrelevant.

Fifth, verify that seniority, certification or classification-based decisions to transfer or dismiss your client were based upon proper calculations and understandings of the employee's seniority, certification or classification. These are fertile areas for factual discrepancies and often necessitate a consideration of the seniority, certification and classification of other employees involved in the work force adjustment. Often overlooked resources are two lists which county boards are required to make available by electronic or other means to all employees: a list posted annually of all professional personnel showing their areas of certification and seniority, W. Va. Code §18A-4-7a, and a list posted twice each year of all service personnel in each classification category showing their seniority dates, W. Va. Code § 18A-4-8g. If additional information necessary to make the appropriate factual determinations is not voluntarily provided by the board of education, a request under the Freedom of Information Act, W. Va. Code §§ 29B-1-1, et seq., may be appropriate.

Sixth, barring any impropriety in the reduction-in-force dismissal procedure, ensure that the name of a dismissed employee is properly placed upon the list of employees to be recalled to work as vacancies develop. Be sure that the employee is aware of the full extent of

the recall rights which he or she enjoys. Here again, questions of seniority, certification and classification may be quite significant in determining which employees must be recalled to an open position.

Seventh, do not overlook the fact that employee transfers generally occur in two phases. Once an employee's name has been placed on a list of persons to be considered for subsequent transfer and reassignment in accordance with the procedure described above, there is usually a lapse in time before the board of education actually reassigns the employee to a different position. Although the initial process by which the employee's name was placed upon the list may have been regular and, therefore, unassailable, the ultimate placement of the individual should be scrutinized for possible violations of the statutes or any applicable local policy.

Eighth, realize that the interests of every employee involved in a reduction-related dismissal or transfer are not best served by invoking the hearing and other procedural rights referred to above. In many cases the facts and implications of an employee's seniority, certification or classification are not in issue, and it may serve no useful purpose to prolong the inevitable.

Finally, be aware of the possibility that an employee's reduction-in-force termination or transfer may be rescinded if, prior to August 1 after a reduction-in-force or transfer is approved, the reason for that action no longer exists. See W. Va. Code § 18A-4-7a (professional personnel), and W. Va. Code § 18A-4-8b (service personnel).

V. CONCLUSION

The effective representation of the school employee in grievances, disciplinary proceedings, or proceedings to adjust the work force necessitates a thorough understanding of the procedures to be followed, including time limits and hearing and notice requirements. Changes in pertinent statutes and policies are not uncommon and should be addressed before assuming that a procedure followed in the past or described in this article will necessarily apply to an action taken in the future.

The law governing the substance of an employee's claim, especially in grievances and disciplinary proceedings, is not as easily ascertained. In many (if not most) instances, the representation of a school employee will require that counsel become acquainted with not only the traditional tools of legal research, but also the pertinent written precedents of the West Virginia Education and State Employees Grievance Board.

Thorough preparation of the employee's case is essential in any personnel matter. Building an adequate administrative record is of particular importance, inasmuch as judicial review is usually confined to the record.