BOARD OF EDUCATION LAW - REPRESENTING COUNTY BOARD OF EDUCATION EMPLOYEES

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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. Each type of matter is separately addressed below following a discussion of certain concerns common to all three.

I. COMMON CONCERNS

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

The body of law affecting public school employees in West Virginia has undergone significant changes over the past three 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. It seems that no sooner are some principles or procedures established, they are modified by another wave of change.

For that reason, counsel should approach, critically, the legal authorities that are most commonly consulted in this area: statutory law; reported cases; opinions of the Public 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, must be consulted in most cases because they regulate virtually every aspect of the employment relationship in West Virginia public schools. 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 on the Code or its supplements for a correct statement of current school law. (At this writing, Chapter 18A of the West Virginia Code contains the school personnel statutes that most often apply to personnel matters.).

Similarly, consider with great care any opinion of the West Virginia Supreme Court of Appeals that seems applicable to a matter. Many of the reported cases stand for propositions nullified by the passage of time. In this area of the law, it is not unusual for legislation, new or amended administrative policies and constitutional developments to render decisions obsolete.

On most personnel questions, it is also advisable to review pertinent written opinions of the West Virginia Public Employees Grievance Board. Searchable from the Grievance Board's website, the decisions contain helpful analysis of specific factual situations. They also identify and discuss emerging issues in this changing area of law. Be aware, however, that 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 decisions.) Like case law in this area, they may also be based on 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. County school districts are required to follow State Board of Education regulations. A county board's own lawful policies bind the board and will be enforced against it. *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. For example, many reported cases and grievance decisions cite State Board of Education Policy 5300 as the sole source of certain employee rights. County policies have likewise figured prominently in a number of Grievance Board decisions.

Finally, parties to school employee proceedings sometimes rely on formal opinions of the Attorney General of West Virginia or written interpretations of school law rendered under West Virginia Code § 18-3-6 by the State Superintendent. The courts take these authorities into account but do not always accord them great weight. Like case law, they may be rendered useless by the passage of time. Moreover, by their nature, the interpretations of the State Superintendent of Schools frequently lack helpful legal analysis and do not always describe, in useful detail, the facts on 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 that 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 given rise to numerous employee grievances, disciplinary cases and proceedings to adjust the work force.

II. THE GRIEVANCE PROCEDURE

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*, 176 W. Va. 733, 349 S.E.2d 436 (1986). However, in most instances, an employee must first exhaust the administrative remedy provided by the Public Employees Grievance Act, West Virginia Code §§ 6C-2-1, *et seq*. Enacted in 2007, the Public Employees Grievance Act replaced a similar process called the Education Employees Grievance Procedure, which was established in 1985 in the since-repealed West Virginia Code § 18-29-1 *et seq*.

Regulations governing the grievance process are found in Title 156 of the Code of State Rules.

The Act establishes what it describes as a simple, expeditious and fair three-tiered process to resolve employer-employee differences at the lowest possible administrative level. Except for issues relating to public employees' insurance, retirement or any other matter 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, the statute defines "grievance" as:

> . . . a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including: (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer; (iii) Any specifically identified incident of harassment; (iv) Any specifically identified incident of favoritism; or (v) Any action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee or the health and safety of the employee.

The terms "discrimination," "harassment" and "favoritism" are separately defined in the statute. *See* W. Va. Code §§ 6C-2-3(d), (h), (l).

A school district employee may invoke Level One of the grievance process by filing a written grievance complaint with the county superintendent of schools and sending a copy to the West Virginia Public Employees Grievance Board. The complaint must be filed within 15 days following (a) the occurrence of the event on which the grievance is based, (b) the date on which the event became known to the grievant, or (c) the most recent occurrence of a continuing practice giving rise to a grievance. The Grievance Board has promulgated a form, available on its website, to be used for complaints. In addition to stating the nature of the grievance and the relief requested, the written complaint must request either a conference or a hearing at Level One of the grievance procedure.

A Level One conference must be held within ten days after the county superintendent receives the grievant's complaint. Advance written notice of the date, time and place of the conference must be sent to the parties and their representatives at least five days in advance. The Level One conference is a private, informal, off-the-record discussion in which the superintendent or designee, the grievant and any representative, and other persons who may be invited attempt to resolve the matter. After the conference, the superintendent or designee must issue a written Level One decision within 15 days.

If, instead, the grievant requests a Level One hearing, the hearing must be held within 15 days after the county superintendent receives the complaint. Written notice of the date, time and place of the hearing must be sent to the parties and their representatives at least five days in advance. Conducted in private by the superintendent of schools or designee and attended by

the grievant and any representative, the hearing is recorded. Both the grievant and the employer may present evidence, cross-examine witnesses and produce documents. The superintendent or designee regulates the number of witnesses, motions and other procedural matters. At the hearing, the parties are bound by the rules of privilege recognized by law, but the formal rules of evidence do not apply. After the hearing, the superintendent or designee must issue a written Level One decision within 15 days, sending copies to the parties, their representatives and the Public Employees Grievance Board.

Within ten days of receiving an adverse Level One decision, a dissatisfied grievant may request Level Two mediation, private mediation or arbitration. This is done by filing a written request with the Grievance Board. For this purpose, the grievant marks and signs the applicable portion of the same form on which the matter was filed at Level One. The second and third of the Level Two options—private mediation and arbitration—are explained in West Virginia Code § 6C-2-4, but almost never invoked.

Almost every Level Two appeal is processed under the first option—mediation. Once requested, a Level Two mediation must be scheduled by the Grievance Board within 20 days. A Grievance Board administrative law judge conducts the mediation in a private, confidential and off-the-record session, at no cost to the parties. Employing standard mediation procedure, the administrative law judge also follows the mediation provisions of the Grievance Board's regulations.

The grievant attends the mediation, as does the school district, typically by its superintendent of schools or another school administrator. Both sides are entitled to

representation, and each must bring a person having authority to resolve the dispute. The results of the mediation may not be released unless release is required by law.

Within 15 days after a Level Two mediation session, the administrative law judge must send a written report to the parties and their representatives. If the dispute is resolved in mediation, the parties are bound by a written agreement that sets forth the terms and is enforceable in mandamus. But, if mediation is unsuccessful, the administrative law judge's report takes the form of an "order of unsuccessful mediation" that includes an explanation of the grievant's right to appeal to Level Three. In the event of a Level Three appeal, the administrative law judge who conducted the mediation at Level Two will have no role in the Level Three proceedings, and none of the documents or records submitted by the parties during mediation will be retained.

A grievant may appeal to Level Three within ten days of receiving an order of unsuccessful mediation. The appeal is made by marking and signing the same form on which the grievance was initiated at Level One, and then filing it with the Grievance Board and the school district.

After receiving a Level Three appeal, the Grievance Board designates an administrative law judge to schedule the Level Three hearing and set deadlines in consultation with the parties. The administrative law judge is responsible for conducting all proceedings in an impartial manner, ensuring that all parties are accorded due process, administering oaths, ruling on motions, issuing subpoenas for witnesses, and otherwise presiding over the Level Three hearing as required by the Grievance Board's regulations. Ex parte communications with the administrative law judge about the merits or substance of a pending appeal is forbidden. The parties bear their own expense and costs at Level Three unless the administrative law judge decides

of bad faith. In extreme instances, a finding of bad faith may result in an allocation of the costs of the hearing to the party found to be acting in bad faith.

Under the grievance statute, the record of the Level One proceeding is made part of the record at Level Three. If a hearing was held at Level One and the parties agree that the record of that hearing is complete, they sometimes agree to dispense with a hearing at Level Three, in which case the appeal may be submitted for decision at Level Three on the basis of the Level One record and the parties' proposed findings of fact and conclusions of law. Even where the Level One hearing record does not contain all the evidence thought relevant, the parties often use the Level Three hearing only to supplement the record of the Level One hearing, without repeating all the evidence introduced below.

The administrative law judge must issue a written decision within 30 days following the Level Three hearing unless a party, within 20 days after the hearing, files proposed findings of fact and conclusions of law. In that instance, the administrative law judge's decision is due within 30 days after the ALJ receives the proposed findings and conclusions. A Level Three decision must contain findings of fact and conclusions of law on the issues submitted. It is final on the parties and enforceable in the Circuit Court of Kanawha County.

Level Three decisions are 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 Three. The Grievance Board's administrative law judges, in deciding questions of substance and procedure, rely heavily on the body of prior Grievance Board decisions rendered in similar cases, including decisions of the Public Employees Grievance Board's predecessor, the Education Employees Grievance Board.

Within 30 days after receiving the administrative law judge's decision, either party may appeal to the Circuit Court of Kanawha County, which has exclusive jurisdiction of such appeals. (This was not always the case. Until 2007, parties had the option of appealing to the Circuit Court of Kanawha County or the county in which the grievant's employer was located.)

A Circuit Court appeal is initiated by filing an Administrative Appeals Docketing Statement with the Circuit Court and serving a copy, by mail, on the Grievance Board and opposing counsel or, in the case of a pro se party, the party. The form of the docketing statement appears as Appendix A to the West Virginia Rules of Procedure for Administrative Appeals. 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 Three.

In the docketing statement or an attachment thereto, the appealing party should allege one or more of the grounds of error found in West Virginia Code § 6C-2-5: that the administrative law judge's Level Three decision (1) is contrary to law or lawfully adopted rule or written policy of the employer, (2) exceeds the administrative law judge's statutory authority; (3) is the result of fraud or deceit, (4) is clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

When a party appeals to Circuit Court, it is not necessary for the other party or parties to file answers. The Circuit Court, in due course, enters an order directing the Grievance Board to transmit the entire administrative record to the clerk. On separate motion by a party, the court may also stay the Level Three decision.

The Circuit Court is not permitted by the statute to entertain new evidence. Rather, it must review the matter on the entire record that was before the administrative law judge. The court requires the appealing party, and then the other party or parties, to file written briefs according to a briefing schedule established by the court. The court also has discretion to hear oral argument, but, typically, the briefs suffice, and there is no oral argument.

In reviewing Level Three decisions, the Circuit Court will not reverse evidentiary findings made by the administrative law judge unless clearly wrong. *Randolph Co. Bd. of Educ. v. Scalia*, 182 W. Va. 289, 387 S.E.2d 524 (1989). Conclusions of law, and the application of law to facts, are reviewed de novo. *Martin v. Randolph Co. Bd. of Educ*., 195 W. Va. 297, 465 S.E.2d 399 (1995); Syl. Pt. 2, *Maikotter v. University of West Virginia Bd. of Trustees*, 206 W. Va. 691, 527 S.E.2d 802 (1999). The Circuit Court may reverse, vacate or modify a Level Three decision, or it may remand the matter to the Grievance Board or the county superintendent of schools for further proceedings. If the grievant substantially prevails in Circuit Court, the court may allow the grievant to recover from the employer the grievant's court costs and reasonable attorney's fees.

A decision of the Circuit Court may be appealed to the Supreme Court of Appeals by filing and serving a notice of appeal under Rule 5(b) of the West Virginia Rules of Appellate Procedure within 30 days after entry of the Circuit Court judgment, and by filing and serving the petitioner's brief and the appendix record under Rule 5(g) within four months of the date of the judgment and in accordance with the Supreme Court's Scheduling Order.

The foregoing description of the grievance procedure is based primarily on the provisions of West Virginia Code §§ 6C-2-1 through -7, which should be carefully studied when commencing or prosecuting a grievance. Before proceeding at Level One, counsel is well advised

to consult any formal policies of the county board of education regulating employee grievances at that level. Before proceeding at Level Three, counsel should consult the procedural rules of the West Virginia Public Employees Grievance Board, which appear in Title 156 of the Code of State Rules and are also posted on the Grievance Board's website. The rules cover matters such as preliminary conference procedure, rules for requesting subpoenas, motion practice and discovery.

The following ten points are generally applicable to all levels of the Public Employees Grievance Procedure and should be kept in mind in developing a grievance strategy.

First, the word "days," as used in the Public Employees Grievance Act, does not include Saturdays, Sundays, official holidays and any day when the employee's workplace is legally closed by the school district due to weather or other cause provided by statute, rule, policy or practice. 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 § 6C-2-2(c).

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.,* 182 W. Va. 726, 391 S.E.2d 739 (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 Three 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 Grievance Board's procedural rules, continuances of Level Three hearings 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 because of accident, sickness, death in the immediate family or other causes for which the grievant has taken approved leave from employment. W. Va. Code § 6C-2-3(a)(2).

Fourth, if a required response is not made by the employer within the time limits established in the Act, the grievant may prevail by default unless the employer was prevented from making a timely response by injury, illness or a justified delay not caused by negligence or intent to delay the process. W. Va. Code § 6C-2-3(b). In order to assert a default, the grievant must file with the county superintendent of schools, within ten days of the default, a written notice of intent to proceed to the next level of the grievance process or, instead, to enforce the default. Filing of the notice automatically stays all proceedings. If the county superintendent objects to the default, the superintendent may, within five days of the grievant's filing, request a hearing before a Grievance Board administrative law judge for the purpose of showing that no default occurred, stating a defense to the default and/or showing that the remedy requested by the grievant is contrary to law or contrary to proper and available remedies. Upon finding that no default occurred, that the employer has a recognized defense to the default or that the remedy sought by the grievant is contrary to law or not proper or available at law, the administrative law judge may deny the default or modify the remedy to be granted to comply with the law or otherwise make the grievant whole.

Fifth, by agreement of the parties or when an employee has been discharged, suspended without pay or demoted or reclassified, resulting in a loss of compensation or benefits, the employee may bypass Levels One and Two of the procedure and proceed directly at Level Three. W. Va. Code § 6C-2-4(a)(4). However, once a grievance has been filed at Level One, it must be processed at Levels One and Two before it may be considered at Level Three.

Sixth, class action grievances are not permitted. However, one or more employees may file a grievance on behalf of a group of similarly situated employees if each similarly situated employee completes a grievance form stating the intent to join the group of similarly situated employees. Grievances may also be consolidated at any level by agreement of all parties or at the discretion of the county superintendent of schools or administrative law judge. W. Va. Code § 6C-2-3(e).

Seventh, on timely request, any employee may intervene and become a party to a grievance at any level by demonstrating that the disposition of the action may substantially and adversely affect the employee's rights or property, and that the employee's interest is not adequately represented by the existing parties. W. Va. Code § 6C-2-3(f). This occurs most frequently when a disappointed applicant for a job vacancy initiates a grievance claiming that the grievant should have received the job, and the successful applicant intervenes to protect the intervenor's interest in remaining in the position.

Eighth, in grievances where the relief properly sought by the school employee includes back pay—with one exception—back pay can only be granted for a maximum of one year prior to the filing of the grievance. The exception is that if the grievant proves that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, back pay may be

granted for a maximum of 18 months prior to the filing of the grievance. W. Va. Code § 6C-2-3(c)(2).

Ninth, if the school board contends that the filing of a grievance at Level One was untimely, it must raise that objection at or before Level Two. Otherwise, the objection is lost. W. Va. Code § 6C-2-3(c)(1).

Tenth, in all grievances, the grievant bears the burden of proving the grievant's case by a preponderance of the evidence, except in disciplinary matters. In disciplinary matters, the burden is on the employer to prove that the action taken was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence. 156 C.S.R. § 1-4.

III. DISCIPLINARY PROCEEDINGS

Under the school laws now in effect, the kinds of employee discipline that the West Virginia practitioner is most likely to encounter are contract suspensions, contract terminations and the nonrenewal of probationary contracts. 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 West Virginia Code §§ 18A-2-7 and 18A-2-8. Section 18A-2-7 empowers a county superintendent of schools to suspend school employees temporarily, pending a hearing on 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 only permissible grounds for disciplinary suspension, are set forth in West Virginia Code § 18A-2-8. The permissible grounds are (1) immorality, (2) incompetency, (3) cruelty, (4) insubordination, (5) intemperance, (6) willful neglect of duty, (7) unsatisfactory performance, (8) a finding of abuse by the Department of Health and Human Resources in accordance with West Virginia Code § 49-1-1 et seq., (9), the conviction of a misdemeanor or a guilty plea or a plea of nolo contendere to a misdemeanor charge that has a rational nexus between the conduct and performance of the employee's job, and (10) the conviction of a felony or a guilty plea or a plea of nolo contendere to a felony charge. A county board of education also may take necessary steps to suspend or dismiss any person in its employment at any time should the health, safety and welfare of students be jeopardized, or the learning environment of students be impacted.

Under the statute, an employee is entitled to a written statement of the charges on which a suspension is based. The statement must be served on the employee within two days of the presentation of the charges to the board of education. Within five days after receiving the written charges, the employee may request, in writing, a hearing at Level Three of the Public Employees Grievance procedure described above. A form to be used for such appeals is available at the Grievance Board's website. The Level Three hearing is de novo unless the parties agree to submit the case for a decision based on the record of the suspension hearing held by the county board of education.

Under current law, disciplinary dismissals, too, are regulated by West Virginia Code § 18A-2-8. As in the case of a suspension, a dismissal must be based on one of the foregoing grounds enumerated in that statute. Within two days of the presentation of the charges to the board of education, the employee must be served with written charges and may, within the next five days,

request a Level Three hearing under the Education Employees Grievance Act. As in the case of appeals of suspensions, the Level Three hearing is de novo unless the parties agree to submit the case for a decision based on 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 West Virginia Code § 18A-2-8a, the employment contracts of probationary school employees (those employees who have not yet completed the three years of acceptable employment that 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 May 1 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 ensuing year.

Within ten days after receiving that notice, a probationary employee 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 the county superintendent to demonstrate at the hearing the reasons for the non-rehiring. 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 Public 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, West Virginia Code §§ 18A-2-7 and 18A-2-8 are silent about the procedure to be followed by the county superintendent of schools imposing a temporary suspension. Section 18A-2-8 also does not prescribe how a county board of education must act on 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 due process incident to a temporary suspension by the superintendent and to more than merely an after-the-fact notice of a suspension or dismissal imposed by the board of education. *See Allen v. Monroe County Bd. of Educ.,* Grievance Board Docket No. 90-31-021 (July 11, 1990). Moreover, an individual county board of education may have adopted local regulations that 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 on which suspension or dismissal is sought. If the additional procedure is not followed, 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 and a reasonable opportunity to improve. W. Va. Code §§ 18A-2-8, 18A-2-12, 18A-2-12a. 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 that 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*, 176 W. Va. 648, 346 S.E.2d 798 (1986); *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 274 S.E.2d 435 (1980). Whether behavior is correctable in this sense of the word is not always easy to determine.

It is, therefore, important, in cases of disciplinary suspension or termination, 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 observe these requirements may vitiate the disciplinary action.

A second principle that 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 the employee's 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 on 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 may not be punishable by dismissal.

Finally, the possibility of a negotiated resolution of a contested disciplinary matter should not be ignored. Sometimes alleged misconduct on 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 West Virginia 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 and W. Va. Code § 18A-2-8, at least where a teacher's conduct may warrant the state's revocation of the teacher's teaching certificate.

IV. PROCEEDINGS TO ADJUST THE WORK FORCE

Falling in this category are employee discharges and transfers that 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 discharges are quite common and have been implemented primarily under the reduction-in-force provisions of West Virginia 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 for lack of need, the selection of the employee to be released from employment under the procedures of West Virginia Code § 18A-2-2 shall be based on seniority, certification, licensure and performance evaluations. However, before releasing a professional employee, the individual must be transferred to any other professional position for which the employee is certified and was previously employed, or to any lateral area for which the employee 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 other professional positions are considered lateral.) To avoid release, professional employees who lack enough seniority or the necessary certification to avoid dismissal under those provisions must be considered as automatic applicants for certain vacancies known on or before March 1 to exist for the ensuing school year. However, if the professional employee cannot be so placed, the school board must take action to end the person's employment as of the end of the school year and place the employee's name on a preferred recall list. Such ex-employees are to be recalled on the basis of qualifications 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 qualifications, 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 for lack of need, the board must release the service employee with the least amount of seniority holding a job within that classification or grades of classification and transfer the employee for the ensuing year to any vacancy in that classification or any other job classification where the employee was previously employed. When a least-senior employee cannot be so placed in a reduction-in-force (because, typically, no such vacancy exists), the board of education must take action to end the individual's employment as of the end of the school year and place the employee's name on a preferred recall list. Such employees are to be recalled to work, based on seniority. A service employee on the preferred list may only exercise the right to preferred recall according to priorities set forth in West Virginia Code § 18A-4-8b(b)(1)-(7).

If, under the foregoing provisions of West Virginia Code §§ 18A-4-7a and 18A-4-8b, it becomes necessary to release an employee, the dismissal must proceed in accordance with West Virginia § 18A-2-2 for professional employees and West Virginia 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 to advance written notice of the superintendent's recommendation to terminate the employee's contract at the end of the school year and the reasons for the recommendation. 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. The county board of education must then conduct a dismissal hearing for each employee who takes advantage of the opportunity to be heard. An employee's contract may then be terminated under this procedure only by a majority vote of the full membership of the board on or before May 1 of the then-current year. Disgruntled employees who are terminated under this procedure may thereafter initiate a grievance under the Public Employees Grievance Procedure. (Probationary employees who are released for lack of need may be processed under the contract non-renewal procedure discussed in Part III, above.)

West Virginia Code § 18A-2-7 establishes the procedure to be followed when a transfer is necessitated by the need to reassign professional and service personnel who will be retained for the ensuing year. On or before April 1 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 to the superintendent for a hearing before the board of education. The requested hearing must be held on or before May 1. At the hearing, the reasons for the proposed transfer must be shown.

Whether or not there is a hearing, the county superintendent, at a school board meeting on or before May 1, 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 for the coming school year 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. Within ten days of the meeting, each employee on the list must be given written notice, by certified mail, that the employee has been recommended for transfer and subsequent assignment and the reasons therefore. Only on 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 that represent school employees have developed considerable expertise in representing employees in reductions-in-force and transfer proceedings. If your client belongs to such an association, consider drawing on 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 any appeals 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-, qualifications-, evaluations- or classification-based decisions to transfer or dismiss your client were based on proper calculations and understandings of the employee's seniority, certification, qualifications, evaluations or classification. These are fertile areas for factual discrepancies and often necessitate a consideration of the seniority, certification, qualifications, evaluations and classification of other employees involved in the work force adjustment. In the case of service employees, often-overlooked resources are lists that county boards are required to post 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 school district, a request under the Freedom of Information Act, West Virginia Code §§ 29B-1-1, *et seq*., may be appropriate.

Sixth, barring any impropriety in the reduction-in-force release procedure, ensure that the name of a dismissed employee is properly placed on 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 employee's recall rights. Here, again, questions of seniority, certification, qualifications 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 on 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, qualifications, evaluations 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 and 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 or deadline 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 counsel to become acquainted with not only the traditional tools of legal research, but also the pertinent written precedents of the West Virginia Public 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.

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