

AN OVERVIEW OF TEACHER NONRENEWAL IN WISCONSIN

Presented by:

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Education

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I. 10 THINGS THAT DISTRICT ADMINISTRATORS SHOULD REMEMBER ABOUT TEACHER NONRENEWAL

Any discussion of teacher nonrenewal should start with the language of the applicable statute, s. 118.22, Stats. That provision states:

118.22. Renewal of teacher contracts

(1) In this section:

(a) "Board" means a school board, technical college district board, board of control of a cooperative educational service agency or county children with disabilities education board, but does not include any board of school directors in a city of the 1st class.

(b) "Teacher" means any person who holds a teacher's certificate or license issued by the state superintendent or a classification status under the technical college system board and whose legal employment requires such certificate, license or classification status, but does not include part-time teachers or teachers employed by any board of school directors in a city of the 1st class.

(2) On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employee at the direction of the board shall give the teacher written notice of renewal or refusal to renew the teacher's contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew the teacher's contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.

(3) At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to

being given written notice of refusal to renew the teacher's contract.

(4) A collective bargaining agreement may modify, waive or replace any of the provisions of this section as they apply to teachers in the collective bargaining unit, but neither the employer nor the bargaining agent for the employees is required to bargain such modification, waiver or replacement.

- A. Always check your collective bargaining agreement to determine whether it modifies or supplements your statutory obligations.
- B. Always check your board of education policies and individual teacher contracts to determine whether you have promised to follow certain procedures or afford additional rights as part of the nonrenewal process.
- C. The board of education should specifically approve the administration's recommendation to issue preliminary notice to consider nonrenewal.
- D. There is no specific date in the statute for preliminary notice to be given to a teacher. Instead, the board of education must give final, written notice of nonrenewal no later than March 15 and the board must inform the teacher that it is considering nonrenewal by preliminary notice "At least 15 days prior to giving written notice of refusal to renew...".
- E. The administrator should make certain that both the preliminary and final notices are actually received by the teacher by the statutory deadlines.
- F. The preliminary notice that the board will consider nonrenewal and the final notice of refusal to renew a teacher's contract must be in writing.
- G. If the parties wish to extend the statutory timelines for any reason, the school district, the teachers' union, and the individual employee all must agree to and sign the waiver of the statutory timelines. In addition, the best practice is to make clear that the waiver is a collective bargaining agreement between the parties under secs. 111.70 and 118.22(4), Stats.
- H. Nonrenewal of a teacher requires a majority vote of the full membership of the board of education.
- I. The nonrenewal statute generally must be followed in order to implement layoffs, unless the parties have negotiated a separate layoff clause that provides for different timelines as part of their collective bargaining agreement.
- J. The nonrenewal statute generally does not need to be followed to refuse to renew a teacher's co-curricular assignment, unless the parties' collective bargaining agreement, or board policy or individual contract language

provides otherwise, or creates additional procedural or substantive rights that must be afforded before such assignments can be terminated.

II. INDIVIDUAL STAFF ISSUES

A. Always Remember

1. Evaluation deadlines and criteria may appear in multiple sources. These may include:
 - a. Section 118.22, Stats. (Preliminary notice of consideration of nonrenewal must be provided no later than the final day of February).
 - b. Collective bargaining agreement
 - c. Board Policy
2. The right to attach a rebuttal statement to the evaluation is provided for by state law and is encouraged.
3. Conferencing on the evaluation may have separate requirements and is generally encouraged. There may also be policy requirements on the number of in-classroom visits that must be made, etc. These must be treated as mandates by the principal

B. Helpful Hints

1. For problem situations, always involve the union representative and local union officials. Include them in every meeting or other interaction where it is required or reasonable to do so. Why?
 - a. State statutes or the collective bargaining agreement may require their inclusion in certain kinds of meetings with the employee.
 - b. Seeing is believing. Legal disputes with employees are often tried not over what the employer did, but what it didn't do. Successful principals will want to include local representatives in every effort to remediate performance to establish the nature of the problem and to satisfy employee representatives of the exhaustive nature of their efforts.
 - c. Promote the principal's reputation for fairness with other staff members and build helpful alliances with association and remaining staff.

2. Rebuttal statements are always helpful to the principal, even if they put the principal in an unfavorable light. Why?
 - a. Valid points can be isolated and addressed. Principals should never approach the rebuttal statement with a closed mind as though it is not possible for an employee to make a valid suggestion about how their performance should be reviewed. These can then be focused on for further evaluation of performance.
 - b. A mutual perspective on the issues can be established. For every point that is disputed, there will be points that are not. The rebuttal statement is a place where issues are not only raised, but also conceded.
 - c. If an employee is truly incorrigible, his/her true colors will show. There is no better way for a principal to prove that an employee is recalcitrant than to have a rebuttal statement written by an employee remove all doubt. These exchanges often provide solid evidence that the principal is providing sober, thoughtful assessments, while the employee is vitriolic and counterproductive.

III. STATUTORY CONSIDERATIONS FOR TEACHER NONRENEWAL

A. Section 121.02(q), Stats. – Performance Evaluation of Certified Staff

1. Statutory Language

“Except as provided in s. 118.40(2r)(d), each school board shall:

Evaluate, in writing, the performance of all certified school personnel at the end of their first year and at least every 3rd year thereafter.”
2. Written evaluations
 - a. At the end of a teacher’s first year
 - b. At least every third year after the first year
3. Wisconsin Administrative Code – Sec. PI 8.01(2)(q)
 - a. Written position descriptions/board policy
 - b. Method of measuring teacher job performance

- c. Method of observing teacher job performance
- d. Trained evaluators

B. Section 115.31, Stats. – License Revocation and Reporting

1. Statutory Language

“Except as provided under sub. (2g), after written notice of the charges and of an opportunity for defense, any license granted by the state superintendent may be revoked by the state superintendent for incompetency or immoral conduct on the part of the licensee.

‘Immoral conduct’ means conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare, or education of any pupil.”

C. Section 118.21, Stats. – Teacher Contracts

1. Statutory Language

“The school board shall contract in writing with qualified teachers. The contract, with a copy of the teacher’s authority to teach attached, shall be filed with the school district clerk. Such contract, in addition to fixing the teacher’s wage, may provide for compensating the teacher for necessary travel expense. A teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void. All teaching contracts shall terminate if, and when, the authority to teach terminates.”

2. Collective Bargaining Agreement Requirements

D. Section 118.22, Stats. – Renewal of Teacher Contracts

1. Statutory Language

“Teacher”does not include part-time teachers...

On or before March 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employe at the direction of the board shall give the teacher **written notice of renewal or refusal to renew** the teacher’s contract for the ensuing school year. If no such notice is given on or before March 15, the contract then in force shall continue for the ensuing

school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew the teacher's contract for the ensuing school year on or before March 15, shall accept or reject in writing such contract not later than the following April 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.

At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by **preliminary notice in writing** that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefore with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew the teacher's contract."

2. Statutory Timeliness
 - a. At least 15 days prior to Notice of Nonrenewal – Preliminary written notice of nonrenewal
 - b. On or before March 15 – Written Notice of nonrenewal
 - c. Not later than April 15 – Teacher must accept or reject contract
 - d. Waiver – Section 118.22, Stats., may be waived, modified, or replaced through collective bargaining
3. Statutory Reasons
 - a. Probationary/non-tenured teachers – arbitrary and capricious standard
 - b. Non-probationary/tenured teachers – good cause standard
4. Provisions of the Collective Bargaining Agreement

E. Non-Discrimination Statutes

1. Section 111.32, Stats. – Fair Employment Act
2. Title VII, Civil Rights Act of 1964
3. Title IX, Educational Amendments
4. Rehabilitation Act of 1973 and the Americans with Disabilities Act – Discrimination on the basis of disability
5. Section 111.70, Stats. – Wisconsin Municipal Employment Relations Act (MERA)
6. Sections 118.195 and 118.20, Stats. – Teacher discrimination prohibited

F. Section 103.13, Stats. – Personnel Records Law

1. Statutory Language

“Every employer shall, upon the request of an employee, which the employer may require the employee to make in writing, permit the employee to inspect any personnel documents which are used or which have been used in determining that employee’s qualifications for employment, promotion, transfer, additional compensation, termination or other disciplinary action, and medical records, except as provided in subs. (5) and (6).”
2. Disclosure to Representative

G. Section 19.32, Stats. – Public Records Law

1. Personnel Record Requests
 - a. Evaluate if Disclosure Prohibited
 - b. Balancing Test
 - c. Notice to Employee
2. Act 47 Procedural Changes (Chart Attached)

H. Section 19.81, Stats. – Open Meetings Law

1. Board Meeting Requirements
 - a. Pre-Disciplinary Meeting

b. Disciplinary Hearing

I. COBRA & 632.897, Stats. – Health Insurance Continuation

IV. COLLECTIVE BARGAINING AGREEMENT CONSIDERATIONS FOR TEACHER NONRENEWAL

A. Objectives of Corrective Discipline

1. Improve the quality of the education provided to the students in the district.
2. Inform and enforce equally the responsibilities of the job and correct improper conduct.
3. Enforce established district rules and practices.
4. Help the teacher improve teaching abilities and job performance.
5. Protect the district's investment in training and replacement costs.
6. Deter improper conduct or violations of district policies.
7. In the case of discipline, warn other teachers that breaches of conduct or rules will subject them to punishment.

B. Supervision & Evaluation

1. Supervision and evaluation cannot be separated from the possibility of discipline, dismissal, or nonrenewal. Whenever discipline, dismissal, or nonrenewal is recommended, it should be based upon supervision and evaluation of the teacher's performance or a breach of district policies.

C. Pre-Disciplinary Procedures and Techniques

1. Provide evaluations on an ongoing basis.
 - a. Provide adequate notice of deficiencies.
 - b. Establish a timetable for correction of deficiencies.
 - c. Provide specific recommendations for improving performance which are reasonable and attainable.
2. Follow established procedures for all teachers.

3. Put everything in writing (informal and formal observations).
 - a. Be specific and record all facts.
 - b. Be consistent. Do not neglect to cite previous deficiencies if they continue to exist. (Single track v. multi-track discipline system).
 - c. Provide the teacher with copies of all evaluations and confirm in writing all conferences, together with a summary of the matters covered at the conference.
4. Personally observe the teacher for a length of time.
5. Observe the teacher on several occasions in different settings if possible.
6. Use other administrative personnel if possible or necessary. If used, other administrative personnel should be familiar and experienced with the teacher's responsibilities.
 - a. Minimize claims of personality conflicts.
 - b. Increase credibility if all evaluators reach the same conclusion.
 - c. Third parties requested to perform evaluations should be unbiased.
 - d. Be prepared to deal with claims that teacher is being singled out for treatment.
7. Utilize outside personnel.
 - a. Eliminates claims of bias, harassment or personality conflict.
 - b. Provides fresh, objective viewpoint.
 - c. Affirms local administrative conclusions.
 - d. Provides evaluative expertise in specialty areas (i.e., languages, science, etc.)

8. Detail the specific facts and observations upon which you base all your opinions.
 - a. Checklist or form evaluations – attach an explanation of each rating.
 - b. Narrative evaluations – do not generalize. Cite specific examples and facts upon which you base your ultimate conclusion or opinion.
9. Meet with the teacher and discuss all evaluations and administrative expectations.
10. Allow the teacher the opportunity to challenge and rebut any of your opinions or observations. Be prepared to deal with requests for either union representation or private attorney representation.

A teacher does not have the right to representation at meetings called for the purpose of reviewing job performance in the context of a formal evaluation procedure. *Waukesha County*, WERC Dec. No. 14, 662A, B (3/28/78).

NOTE: Must consider relevant provisions of the collective bargaining agreement.

11. Know your collective bargaining agreement.

D. Progressive Discipline Approach

1. Counseling.
2. Oral reprimand with verbal warning – A report on the date and nature of the verbal warning must be made by the administrator and be included in the teacher's personnel file.
3. Written reprimand with written warning – Supply teacher with initial formal reprimand notice.
 - a. Detail all previous discussion (formal and informal) and note deficiencies. State that failure to reach an acceptable level of performance may result in termination.
 - b. Put the teacher on notice of possible consequences for failure to meet required standards.

4. Suspension – A temporary removal, without pay, of a teacher from his/her designated job.
 - a. Length of time must correspond to the offense.
 - (1) Length of suspension should be dependent on the teacher's previous disciplinary record.
 - (2) Length of suspension should also be dependent on the seriousness of the misconduct.
 - b. Suspension normally follows oral and written warnings.
5. Withholding of increment or across the board adjustment – Failure to complete a satisfactory year of service. NOTE: Does the collective bargaining agreement permit such action?
6. Discharge or nonrenewal – Permanent severance of employment relationship.
7. Standards for discipline, discharge, or nonrenewal.
 - a. Procedural due process – statutory and contractual
 - b. Substantive Standards – contractual
 - (1) any reason
 - (2) arbitrary and capricious
 - (3) cause
 - (4) just cause, good cause, good reason(s)

E. The “Just Cause” Concept

In determining whether an employee has been disciplined for “just cause,” arbitrators have usually relied upon satisfactory proof by management relating to one or more of the following:

- 1, Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Did the employer, before administering discipline, make an effort to discover whether or not the employee had in fact violated or disobeyed a rule or order of management?

3. Was the employer's investigation conducted fairly and objectively?
4. Has the employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
5. Is the Rule Known?
 - a. Communication of Rules
 - (1) In writing
 - (a) Bulletin board postings
 - (b) Contract appendix
 - (c) Teacher handbook
 - (d) Board policy
 - (e) Contract
 - (2) Orally
 - (a) New teacher orientation
 - (b) Teacher inservices
6. Is the Rule Understood?
 - a. What standard applies?
 - (1) How many times tardy, absent, etc.?
 - (2) In what period of time?
 - b. What is the penalty?
 - (1) For the first offense?
 - (2) For the second and succeeding offenses?
 - (3) What, if any, period of time must elapse before previous infractions are removed from the teacher's record?

7. Is the Rule Reasonable?
 - a. Does it protect an interest which the district has a right or an obligation to protect?
 - (1) The district's physical property
 - (a) unauthorized smoking
 - (b) theft of property
 - (2) The district's financial assets
 - (a) embezzlement
 - (b) fraud
 - (c) falsification of records
 - (d) absenteeism
 - (3) The district as an organization
 - (a) insubordination
 - (b) image
 - (4) Society's interests
 - (a) use of drugs
 - (b) gambling
 - (c) assault
 - (d) theft of employee's property
 - (e) immorality
 - b. Would the enforcement of the rule place the teacher in a position of jeopardizing his health, safety or dignity? -- exception to "work now, grieve later" standard.
8. Are Established Facts Sufficient to Proceed?
 - a. Has the teacher been given an opportunity to defend himself/herself against the charge?

- b. Has an investigation been conducted?
 - (1) Did the investigation fail to produce additional evidence supporting the contemplated action?
 - (2) Did the investigation fail to produce evidence that makes the contemplated action improper?
 - c. Is the alleged violation of such an unusual nature that immediate removal of the offender from the workforce is in the best interest of the district or the employee?
 - d. Are mitigating, extenuating or unusual circumstances claimed by the employee and have they been given due consideration?
9. Has the Rule Been Applied Uniformly?
- a. Are all teachers subject to the rule (district wide) required to observe the rule?
10. Is the Rule Enforced?
- a. In the past, has it been enforced whenever conduct violating it was observed?
 - b. If the conduct was previously condoned, was the teacher informed that future similar behavior would be penalized?
11. Is the Penalty Appropriate?
- a. Is it too severe in view of the nature of the offense?
12. Does the Rule Provide for Progressively More Severe Penalties for Repeated Violation of the Rule?
- a. Is it the type of offense that warrants discharge for the first violation?
 - b. Is it the type of offense for which the district can and should undertake remedial, educational, or corrective actions with the offender, e.g., provide a “second chance”?
13. Is the Penalty Consistent with the District’s Penalty for the Rule?
- a. Have other offenders received a lesser penalty for the same offense, or a lesser penalty for an equal number of violations of the same rule?

- b. Is the contemplated disciplinary action more severe than the penalty stipulated in the policy applicable to the rule?
- 14. Was the Teacher Interviewed?
 - a. Did the teacher request representation?
 - b. If yes, was such representation provided?
- 15. Conclusion
 - a. If the district follows a consistent practice of progressive or constructive discipline before resorting to suspension, discharge, or nonrenewal, an arbitrator will tend to support the district's action.
 - b. Avoid arbitrary and unreasonable disciplinary procedures and establish a clear benchmark. This will minimize the number of grievances and provide a sound basis for arbitration if that becomes necessary.
- 16. Examples of Specific Grounds for Discharge (can be germane to nonrenewal in appropriate circumstances)
 - a. Contract violation
 - b. Violation of leave provisions
 - c. Intoxication
 - d. Dishonesty or theft
 - e. Violation of department rules
 - f. Unauthorized absence – to be determined based on the contract and district policy
 - g. Incompetence or failure to meet district standards of performance
 - h. Insubordination
 - i. Misconduct
 - j. Tardiness

V. CONSTITUTIONAL CONSIDERATIONS FOR TEACHER NONRENEWAL

A. 1st Amendment – Right of Free Speech, Religion, Association or Privacy

1. Protected 1st Amendment Right
 - a. Matter of public interest, not personal concern or dispute
2. Dismissal
 - a. Teacher may not be dismissed for exercise of 1st Amendment rights.

B. 4th Amendment – Unreasonable Search or Seizure

1. Key is reasonable expectation of privacy

C. 5th Amendment – Privilege Against Self-Incrimination

1. Key is whether nonrenewal is for invoking 5th Amendment privilege.

B. 14th Amendment – A School District May Not Deprive An Employee Of “Liberty Or Property Without Due Process Of The Law.”

1. Liberty & Property Interests
 - a. Liberty interests involve charges made against a teacher that would seriously damage the teacher’s standing in the community. This includes damage to teacher’s good name, reputation, honor or integrity.
 - b. Property interests involve reasonable expectations of continued employment. This includes teachers who have acquired tenure.
2. Substantive Due Process
 - a. The standard against which decisions are measured.
 - b. Protects employees from decisions based on unconstitutional reasons such as violations of the First Amendment.
 - c. Precludes arbitrary or capricious decisions and/or actions.

3. Procedural Due Process
 - a. Notice of hearing
 - b. Impartiality of decision maker
 - c. Right to representation
 - d. Formal hearing