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#### TEACHER DISMISSAL 2010-2011: EMERGING POLICY IMPLICATIONS

##### Overview

In this era of government accountability and managerial transparency the general public demands that public agencies demonstrate positive results for what has become and continues to be a heavy tax burden. In community after community, from large cities to rural towns and villages, public dissatisfaction with evidence of negative cost-effective results from federal, state, and local governmental agencies continues to escalate. The implications for local school board personnel policies are many.

*Public School Focus.* In 2010-2011, among the several governmental entities receiving a lion's share of public discontent are our nation's local public school systems. While school boards, superintendents, and principals are under fire, those receiving the most criticism are classroom teachers. Coupled with implementation of the "highly qualified teacher" mandate of the No Child Left Behind Act (2001), the Obama Administration's emphasis on placing quality teachers in public school classrooms, statewide student academic standardized testing programs, initiatives in several of the states to remove tenure status (characterized as an impediment to removing incompetent teachers), the closing of school buildings that are judged "under achieving," and efforts in communities to link student academic test score results to teacher performance evaluation, feelings of employment insecurity and job frustration are escalating among our nation's classroom teachers. A growing fear among today's public school teachers is best described by the following question: "Who next will fall victim to this feeding frenzy?"

##### Teacher Performance Evaluation and Job Security

Within reasonable limits the legal authority to select, contract with, assign, transfer, promote, non-renew, and dismiss public school personnel vests with local public school boards. (Vacca and Boshier, 2008) It must be emphasized, however, that in states where tenure exists the procedural mandates of tenure statutes must be honored. Also, in states where collective bargaining exists the provisions included in union negotiated employment contracts must be factored into employment decision-making. See, e.g., Schmitz v. Yukon-Koyukok School District (Alaska, 2006)

*Evaluation of Performance.* Over the next few years we likely will witness an increase in teacher grievance filings and in law suits as classroom teachers are non-renewed or dismissed from employment for what is alleged to be a lack of competence or professional fitness. If my prediction is accurate, school boards and administrative officers must be ready to defend, both substantively and procedurally, each decision—especially where the teacher involved has an expectation of continued employment. To bolster each decision sound performance evaluation policies and procedures must be in place and followed to the letter.

*Judicial Restraint.* In matters of school system personnel, court decisions consistently demonstrate that judges are reluctant to interfere with local school board decision-making where: (1) school officials do not abuse their legal authority, (2) documentation of inadequate work-place performance exists, and (3) the employee in question has been granted basic procedural due process. In case after case today’s judges consistently agree that “personnel behaviors, especially those involving classroom teachers, are best left to local school officials....” (Vacca, 2007).

*Uniform and Fair Teacher Evaluation Programs.* As Professor Martha McCarthy and her colleagues have summarized, “[s]everal principles emerge from the case law to guide educators in developing equitable systems: standards for assessing teaching adequacy must be defined and communicated to teachers; criteria must be applied uniformly and consistently; an opportunity and direction for improvement must be provided; and procedures specified in state laws and school board policies must be followed.” (McCarthy, et al., 1998)

More specifically, courts look to see if the teacher involved in the employment decision was given: (1) fair and timely notice of inadequate performance in the work setting (e.g., classroom, laboratory, gymnasium), (2) specific evidence of inadequate performance in the work setting, (3) an opportunity to present his/her side of the story, (4) assistance in remedying the inadequacies spotted, and (5) a chance to demonstrate adequate performance in the work setting. (Vacca and Bosher, 2008) As a general rule these five procedural steps are not required in situations where an employee does not have tenure or continuing contract status, or must be removed from the work setting for an egregious offense that requires immediate action.

## **Constitutional Overlay**

Beginning in the early 1970’s, the United States Supreme Court added an important aspect to employment decision-making and teacher job security. In addition to personnel decisions being evidence based (substantively documented) and procedurally sound, decisions must be free from *constitutional violations*. Board of Regents v. Roth (1972) and Perry v. Sindermann (1972)

In 1977, the Supreme Court established a standard to apply in cases where a public employee claimed he/she was dismissed for reasons in violation of the United States Constitution. When that charge is made, said the Court, the initial burden of proof is on the plaintiff teacher to show that: (1) the conduct exercised by him/her was constitutionally protected, and (2) his/her exercise of protected conduct, if assumed to be true, was the “motivating factor” in the decision to dismiss him/her from employment. If (1) and (2) are established, the burden shifts over to the employer to demonstrate that the adverse employment decision still would have been made absent (1) and (2). Mt. Healthy v. Doyle (1977)

Subsequent lower court decisions narrowed the inquiry to two basic questions in the search for possible constitutional violations—especially in cases where the immunity defense is asserted by public school officials. In such cases the court looks to see if (1) the complaining employee has clearly shown that a constitutional right was present in the decision-making situation, and (2) the employee’s right had been violated by school officials.

*Public Employee First Amendment Rights.* Of all the allegations and possible claims made in employment discrimination cases, employer restrictions on employee free speech dominate the recent legal landscape—especially where the employee claims that he/she was the victim of retaliation. Lifton v. Board of Education (7th Cir. 2005) While it is clear that public employees do not jettison their free speech rights when they pass through the workplace door, Tinker v. Des Moines (1969), their exercises of speech and expression are nonetheless limited both in content and scope by employer managerial prerogatives. (Vacca, 2006) Three leading decisions from the United States Supreme Court yield the legal standards to apply in establishing and maintaining a balance between employer prerogatives to protect and promote the efficiency of the public service performed and employee speech rights.

In 1968, the Supreme Court held that, absent recklessly made false statements, public employee workplace speech, on “matters of public importance,” is protected by the First Amendment where: (1) the employee’s speaking out does not negatively impact on the performance of his job, or (2) the employee’s actions do not have a detrimental effect on the operation of the school district. The Court also commented that public employees (in this case a public school teacher) should be able to speak out on matters of public concern “without fear of retaliation.” Pickering v. Board of Education (1968)

Fifteen years later, in a non-school case, the Supreme Court reiterated the critical distinction between public employees speaking in the workplace on “matters of public concern” (protected conduct) and situations in the work place where an employee is speaking on “personal matters.” (not protected conduct). Connick v. Meyers (1983) And, more recently, the Supreme Court added another element to the analysis—the First Amendment does not apply to public employees who make statements as a part of their “official job-related duties.” In such situations they are not speaking as “private citizens.” Carcetti v. Ceballos (2006)

### **Recent Case Law**

As the number of teachers dismissed from employment for lack of professional competence increases, the number of working conditions grievances likely will grow. To put it another way, individual teachers and teacher organizations, in anticipation of possible mass dismissals, might counter with the following preemptive question: “How do you expect classroom teachers in this school system to do an effective job with students when the conditions under which they labor are not conducive to effective teaching and learning?” There already have been situations where classroom teachers have gone into federal court alleging that publicly speaking out and openly expressing opinions about less than satisfactory conditions in their school have resulted in a retaliation- motivated dismissal from employment. See, e.g., Settlegood v Portland Public Schools (9th Cir. 2004)

*Adams, et al. v. New York State Education Department (S.D.N.Y. 2010).* Decided on April 6, 2010, the Adams case involved a group of public school teachers who filed suit in a federal district court. New York State and New York City education agencies and officials were named as defendants. In their pleadings plaintiffs alleged violations of free speech and due process, hostile work place employment discrimination (by confining them in Temporary Reassignment Centers (TRC’s), and breach of a collective bargaining agreement between the New York City Department of Education and the United Federation of Teachers (UFT).

*Facts:* Plaintiffs alleged that the named agencies and officials retaliated against them for speaking out against school system programs and policies designed to terminate teachers performing below an acceptable standard. They also alleged that the disciplinary hearings held were not fair and impartial in that the hearing officers who conducted the hearings were neither properly trained nor supervised. Defendant state agency and officials

moved for judgment on the pleadings and city agency and officials moved for dismissal of the action for failure to state a claim.

Initially the matter was handled by a United States Magistrate Judge (2010 WL 6240202) for supervision and pretrial proceedings. He issued a report and recommendations in which he recommended that defendant's motion to dismiss and judgment on the pleadings be granted. Plaintiffs filed timely objections to the report and the motions were granted. The matter then went into the United States District Court.

*Federal District Court Analysis and Rationale.* Focusing first on the magistrate's report, the court made it clear that a federal district court judge "may accept, set aside, or modify, in whole or in part, the findings of a magistrate judge." Recognizing the "extensive complexities and many pitfalls" inherent in drafting a complaint "where multiple constitutional and statutory claims under both federal and state law" are involved, the district court conducted a *de novo* review of the factual record. Having done so, the district court adopted, in part, the findings and recommendations of the magistrate judge. The district court also opined that while it is "obligated to read a pro se civil rights complaint leniently,.... it is not duty bound to rewrite deficient pleadings to fill in gaps that leave out what specific relief Plaintiffs seek against which specific Defendants."

Regarding the plaintiffs' First Amendment retaliation claims against New York City defendants, the court found them deficient. In each case the incidents upon which plaintiffs based their pleadings concerned "personal grievances expressed as employees generally relating to their official duties, work schedules, working conditions, or employer administrative policies and internal operations, rather than to any matters of public concern raised by Plaintiffs as private citizens." The court granted leave to plaintiffs to replead their complaint.

Plaintiffs' complaints alleging due process violations (*e.g.*, that there was not sufficient opportunity to be heard at the disciplinary hearings) also failed. Citing New York State statutory law the court said that the procedures set forth in New York State law "may be modified by collective bargaining agreement," as was the case in the contract between the New York City Department of Education and the union (UFT). Here the court granted plaintiffs repleading to elaborate on their due process allegations.

The hostile work environment claim against the New York City agencies and officials also failed because, except for one teacher, the actions were either time-barred or not reasonably related to the charges filed with EEOC or the New York State Division of Human Rights.

*Decision.* The United States Magistrate's Report was adopted in its entirety, with the exception that the Report's recommendation that the District Court not grant leave to file a third amended complaint and motions, and motions of defendants to dismiss the complaint, and for judgment on the pleadings be granted. It was further ordered that the Clerk of the Court is directed to dismiss plaintiffs' second amended complaint without prejudice; and that plaintiffs are granted leave to file a third amended complaint within thirty days of the date of the Court's order.

## **Policy Implications**

In today's austere economic environment public school systems across this nation, from large cities to small towns, are feeling community pressures to show positive gains in student academic achievement. To respond to community expectations and at the same time increase efficiency of operation local school boards are moving forward with personnel procedures designed to identify, retain, and reward competent and effective classroom teachers—while terminating the employment of those shown to be less than productive. At the same time, in an

effort to demonstrate a claim of basic unfairness in decision-making criteria and procedure, effected teachers likely will focus on, discuss, and sometimes publicly criticize school board funding, working conditions, administrative support, student motivation, and parental involvement as key factors impacting on classroom morale, teacher effectiveness, and student academic results.

To maintain a proper balance between school board prerogatives to protect and promote managerial efficiency of operation and teacher speech rights (both inside school and in the community), the implementation of an effective performance evaluation process is the key. If my prognostications are accurate the implications for local school boards are several and school system policies must make it clear that:

- The Board reaffirms its goal of striving to recruit, select, contract with, assign, and retain properly certified and endorsed classroom teachers.
- All teachers are subject to regular evaluations (both formative and summative) of classroom performance and effectiveness.
- Student academic progress and achievement are included among the criteria considered in determining teacher summative evaluation results.
- While the Board respects the First Amendment rights of all employees, statements made by an employee: (1) concerning work-related matters, or (2) in his /her official capacity, or (3) as a part of his/her employee duties and responsibilities are not considered private speech.
- Employees are encouraged to bring all work-related concerns and requests to the attention of their administrator.
- When speaking publicly as citizens about matters of public concern (including work-related matters) employees are encouraged to clearly identify that their remarks are those of a private citizen and not those of a school system employee.

One final statement is in order. It is difficult to predict the potential impact of public discussions of work-related matters by teachers and other employees via technology (e.g., Facebook). This vast network of communication will radically change the First Amendment debate and the future direction and content of school system employee speech policies.

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**Note:** The views expressed in this commentary are those of the author.