



THE COMMONWEALTH EDUCATIONAL POLICY INSTITUTE

CENTER FOR PUBLIC POLICY - L. DOUGLAS WILDER SCHOOL OF GOVERNMENT AND PUBLIC AFFAIRS

CEPI Education Law Newsletter

Dr. Richard S. Vacca, Editor; Senior Fellow, CEPI

JANUARY 2011 : Vol. 9-5

TEACHER DISMISSAL FOR UNPROFESSIONAL CONDUCT

Overview

The subject of classroom teacher competence has been and remains the focus of many essays and articles published in education law literature. While most of the pieces deal with instructional competencies (*i.e.*, academic/subject matter teaching capabilities and effectiveness), a growing number discuss teacher personal/social interactions and relationships with students—where legal and policy issues of sexual harassment and liability loom in the background. Suffice it to say, in our current era of instant electronic communication it is this latter area of education law that has motivated school (university, college, and school system) officials to enact strict policies prohibiting personal (outside the reasonable bounds of professional/teaching responsibilities and duties) contacts and relationships between staff (especially classroom teachers, internship supervisors, counselors, advisors, coaches and others having sustained and direct contact with students) and students. In my view we likely will see an increase in employment termination decisions where such policies (which sometimes bridge over into the outside school hours/private lives of staff members) become the subject of litigation.

Teacher Competence: What have the Courts Said? More than fifty years ago the United States Supreme Court opined that by engaging in teaching in a public school an individual does “not give up his right to freedom of belief, speech, or association.” However, the Court made it clear that an individual’s “fitness to serve as a public school teacher” is not solely judged by in-school performance. Beilan v. Board of Public Education (1958) Over the years, subsequent court decisions have demonstrated, that teacher *competence* is judged by a broad range of factors—including behaviors not taking place on school property during instructional time. (Vacca and Bosher, 2008) As one state court put it, “[a] teacher’s fitness may not be measured ‘solely by his ability to perform the teaching function and ignore the fact that the teacher’s presence in the classroom might, nevertheless, pose a danger of harm for a reason not related to academic proficiency.’” Gish v. Board of Education (N.J. 1976) See also, Melzer v. Board of Education (E.D.N.Y. 2002)

State Statutes and Cause for Termination. As a general rule, *cause* for termination is not required when dealing with probationary teachers. Board of Regents v. Roth (1972) See also, Lewis v. Board of Education (D.Md. 2003) However, in addition to granting the elements of basic *procedural due process*, *cause* is an essential

A Commonwealth Educational Policy Institute Publication - Copyright © CEPI 2011

CEPI grants permission to reproduce this paper for noncommercial purposes providing CEPI is credited.

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

ingredient in successfully terminating the employment of teachers who have achieved tenure or continuing contract status (*i.e.*, where a *property interest* in employment exists: (1) during the duration of an existing contract, or (2) stretching beyond the duration of the current contract). Cleveland Board of Education v. Loudermill (1985)

To determine specific *cause* one must look to state law where differences exist from state-to-state. A composite set of examples includes: incompetency, moral misconduct, noncompliance with school laws, persistent negligence, inefficiency, insubordination, failure to maintain classroom discipline, conduct unbecoming a teacher, unprofessional conduct, conviction of a felony, and other good and just cause. Suffice it to say each of these terms leaves open the possibility of broad interpretation and generalized application. Walthart v. Board (Iowa 2005) Thus, to survive the vagueness test school officials must be able to establish a decision-making foundation for each case (a) based on substantive, objective evidence, and (b) demonstrating (by the totality of the circumstance) a *rational nexus* between the teacher's behavior (in school and/or in his/her private life) and lack of competence to effectively carry out contractual responsibilities (including academic instruction and personal interactions with students).

Teacher and Student Personal Interactions. The decade of the 1990's produced a sudden outburst of publicly reported situations involving sexual relationships between students and school staff—including classroom teachers. It was during that decade that the United States Supreme Court handed down decisions involving Title IX of the Education Amendments of 1972 and issues of potential liability of public school boards for damages for acts of sexual harassment of students by a staff member. Franklin v. Gwinnett County (1992) While some questions were left unanswered, the high court did make it clear that damages may not be recovered in such circumstances unless “an official of the school district who at a minimum has the authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.” Gerbser v. Lago Vista I.S.D. (1998) In subsequent cases *deliberate indifference* became the seminal test for establishing potential liability. Shaul v. Cherry Valley-Springfield School District (2nd Cir. 2004) and Bostic v. Smyrna School District (3rd Cir. 2005)

Recent Case Law

Recently, I came across an interesting decision handed down by the Court of Appeals of Tennessee at Knoxville. Crosby v. Holt, et al. (Tenn. Ct. App. 2009) involved the dismissal of a male teacher based on state statutory grounds. Subsequently, the teacher received an evidentiary hearing before the school board—following which the school board voted unanimously to sustain the dismissal. The teacher was terminated. He next sought review of his termination in County Chancery Court where his termination was upheld. The teacher then appealed that decision.

Facts: On March 16, 2007, the Director of the Hamblen County Department of Education (hereafter referred to as “the Director”) recommended in a written memorandum to the school board (“the Board”) that Crosby (“the Teacher”) be immediately dismissed from his teaching position. The Director's recommendation was based on grounds of “unprofessional conduct and insubordination.” *Tenn. Code Ann.* 49-5-511(a) (1) and (2) (2009) The memorandum included factual background that related to the Teacher's alleged relationship with a minor female student, e-mails sent over the school's system to a married female teacher, and allegedly inaccurate and misleading information supplied to the Director during his investigation of the allegations. The investigation was triggered when the Teacher's son reported to the Director that his father was having an inappropriate relationship with one of his son's female classmates

Upon receiving the information regarding the alleged relationship, the Director contacted the female student's parents. The parents made a formal complaint against the Teacher based on the report plus a questionable history between the Teacher and their daughter which dated back to 2005. The Director then investigated the complaint (including holding three recorded and transcribed interviews with the Teacher). A brief summary of the Director's findings of fact follows.

The investigation found that the Teacher and student became acquainted in 2004, when she was enrolled in his geography class. In 2005, the Teacher also employed her in a business that he ran. Her parents forced her to quit her job when reports of a sexual relationship between their daughter and the Teacher were brought to their attention. However, because her father did not believe the reports he decided that his daughter could continue working for the Teacher.

When a second wave of allegations started the parents told their daughter that she could no longer work for the Teacher and that she was to have no further communication with him. Even though the Teacher knew this he later employed the student under the guise that she was going to do house work for his mother. During her work time he left his door unlocked (he lived in the backroom of the business) so that the student could come and go as she pleased. In addition to doing house work she ran errands for him.

Another area probed by the Director focused on the employer-employee relationship and the school's "job shadowing" program because in February 2005, the student participated in that program and listed the teacher as the employer that she was shadowing. While the Teacher denied participating in the program, personnel records showed that on the same day that the student had been out job shadowing the Teacher had taken leave from his regular classroom duties.

The findings of fact also included the report of another classmate that he saw the teacher and student hug and kiss. Four other classmates and a teacher testified that the student told them she was having sex with the Teacher. The Teacher denied that a sexual relationship existed.

The investigation also probed an allegation that the Teacher had used the school's computer network to send e-mails to a married female teacher. A school system policy reserved the right of school officials to monitor all activities on its network to determine what are or are not appropriate communications. Sexually oriented materials and messages were prohibited as were obscenity and vulgarity. The Director testified that in his view the e-mails sent by the Teacher were "offensive, defamatory, and suggestive." Subsequently, the Teacher admitted that he sent the e-mails but in his opinion they were not "offensive or sexually suggestive."

Based upon the trial court's factual findings it held that the board's dismissal decision was warranted on grounds of "unprofessional conduct and insubordination." The Teacher appealed that decision.

Court of Appeals of Tennessee Reasoning and Decision. The appellate court made it clear that under Tennessee law (*Tenn. Code Ann.* 49-5-513) a tenured teacher whose employment has been terminated by a school board has a right to chancery court review of the board's decision where the court: (1) conducts a *de novo* review, (2) does not attach correctness to the school board's findings of fact, and (3) is not confined to deciding whether the evidence preponderates in favor of the school board's determination. What is more, on appeal in a non-jury case the Court of Appeals conducts a *de novo* review with a presumption of correctness as to the trial court's determination of facts absent evidence that preponderates to the contrary. The court also made it clear that absent a flagrant and prejudicial violation it would not interfere with the actions of the school board.

Focusing first on the procedural issues, the Court looked at the Teacher's claim of three deficiencies in the notice requirement where he argued failure to: (1) identify the student with whom he is alleged to have had a sexual relationship, (2) identify the witnesses who had been told by the student that she was having a sexual relationship with him, and (3) to identify the allegedly "inaccurate and misleading information" furnished by him to the Director. The appellate court disagreed and said that the detailed memorandum, well in advance of the hearing, "adequately" informed him of the conduct at issue. He knew the substance, if not the source, of the testimony. In addition, said the Court, the notice of the charges as outlined in the Director's memorandum (as supplemented by the interviews with the teacher) were sufficient to allow him to prepare his defense.

Regarding the Teacher's challenge of the use of hearsay evidence of the alleged sexual relationship with the student, the Court stated that such evidence is admissible in an administrative (non-trial) hearing. In the Court's opinion, as a school board carries out its administrative responsibilities such information, used advisedly, "is a tool that can be utilized in an administrative search for the truth." In this case, said the Court, the board had not made up its mind before the formal hearing and the board fulfilled its duties—*i.e.*, evidence presented showed that the Teacher received a full, complete and impartial hearing.

Regarding the e-mails to another teacher the Court was convinced that they were "sexually charged and suggestive and that his denials were unbelievable." More importantly, said the Court, "...we think the Teacher's explanation of the meaning of the e-mails, and his denial of a recollection, added to the preponderance of evidence that he was being deliberately false, misleading and dishonest in complete disregard of the investigation. He appears to have decided that the whole investigation was trivial and that he did not need to tell the truth." The evidence presented and the trial court's finding that the Teacher was guilty of insubordination was upheld.

Finally, the Teacher's argument that the school board took into consideration his atheism in violation of his right to freedom of religion and that by firing him for refusing to discontinue what he said was his "non-sexual" association with the student, the school board violated his freedom to associate outside school hours was addressed. The Court rejected the notion that this was not proven to be a sexual relationship and that the relationship was not one based on a religious connection between the two. Moreover, the Teacher offered "no authority for the proposition that a school may not interfere with non-sexual association between a student and a teacher based on concerns of parents, even if the concerns are exaggerated." His rights of religion and association were not violated.

The judgment of the trial court was affirmed and the case was remanded for collection of costs.

Policy Implications

There is little doubt that in today's economic environment where reductions in staff are a reality, coupled with increased demands for student safety and academic progress, decision-making transparency, and direct accountability for results, job security is of great concern as local school boards are under pressure to hire and retain qualified and competent teachers and to immediately terminate the employment of staff who do not fit that profile. As the above discussion is intended to demonstrate, and the Crosby (2009) case illustrates, a determination of who is or is not *competent* to remain as a member of the teaching staff extends beyond the realm of academic/instructional ability and performance. While a proven record of competence in the classroom (including student academic progress) remains the primary reason for retaining tenured classroom teachers, *unprofessional conduct* between staff members and students (especially involving sexual misconduct) remains a viable and essential element in employment decision-making.

Crosby v. Holt, et al. (2009) is but one case in one jurisdiction and, in my opinion, the facts describe a rather bazaar set of circumstances. However, the facts of the case do offer an example of: (1) teacher conduct included in such general terms as “unprofessional conduct” and “insubordination,” and (2) a potential linkage between personal, non-academic/instructional conduct and teacher competence. As such, the Tennessee appellate court’s rationale yields information worth pondering as local school boards reexamine existing teacher/student non-fraternization policies and consider new ones.

Policies must make it clear that:

- Teachers are expected to provide a safe and disruption-free learning environment for students in their classes, laboratories, and in other instructional settings, and in extra-curricular activities.
- Teachers are expected to maintain professional relationships with students (*i.e.*, relationships that are directly related to professional, curricular, and extra-curricular activities and responsibilities), and to refrain from establishing and maintaining personal, non-professional, non-instruction related contacts and relationships with students.
- School employees and students are encouraged to report suspected inappropriate relationships between teachers and students to school officials.
- Reports of inappropriate conduct between teachers and students will be immediately investigated by administrative personnel.
- Parents of students involved in such reports will be immediately notified and involved in the investigation.
- Teachers named in such reports will be immediately notified of the report and the pending investigation.
- Where an investigation establishes the presence of an inappropriate, non-professional relationship between a teacher and student, the teacher shall be subject to dismissal from his/her employment in the school system and/or other action.
- School officials reserve the right to regularly monitor and review all activities on the school system’s communication network and to determine what are or are not appropriate communications initiated by employees.

Resources Cites

Beilan v. Board of Public Education, 357 U.S. 399 (1958)

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

Bostic v. Smyrna School District, 418 F.3d 355 (3rd Cir. 2005)

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)

Crosby v. Holt, 320 S.W.3d 805 (Tenn. Ct. App. 2009)

Franklin v. Gwinnett County, 503 U.S. 60 (1992)

Gerbser v. Lago Vista I.S.D., 524 U.S. 274 (1998)

Gish v. Board of Education, 366 A.2d 1337 (N.J. 1976)

Lewis v. Board of Education, 262 F.Supp.2d 608 (D.Md. 2003)

Melzer v. Board of Education, 196 F.Supp.2d 229 (E.D.N.Y. 2002)

Shaul v. Cherry Valley-Springfield School District, 363 F.3d 177 (2nd Cir. 2004)

Tenn. Code Ann., 49-5-511 (a) (1) and (2) (2009)

Tenn. Code Ann., 49-5-513 (2009)

Vacca, Richard S., and Bosher, William C., Jr., LAW AND EDUCATION: CONTEMPORARY ISSUES AND COURT DECISIONS, Seventh Edition (LexisNexis 2008)

Walthart v. Board, 694 N.W.2d 740 (Iowa 2005)

Richard S. Vacca
Senior Fellow CEPI

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