



## 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

DECEMBER 2009: Vol. 8-4

**PROCEDURAL FAIRNESS IN EMPLOYMENT DECISION-MAKING****Overview**

In 2009-2010, the long debated notion of teacher merit pay has once again surfaced amidst a renewed emphasis on linking individual teacher productivity to standardized student academic test score results. The federal government's *Rise to the Top* initiative stresses improving teacher and principal effectiveness based on performance. At the same time so too is there a renewed public demand to cull the ranks of administrators, classroom teachers, and support staff who are either ineligible for or in some way not competent to be working in our nation's public schools. Coupled with shrinking school system budgets and a need to cut costs by laying-off large numbers of school system personnel (including school administrators and classroom teachers working under some form of continuing contract), today's scene in public education is ripe for producing both legal and policy issues.

*The Important Balance.* It is an established tenet of public education law that local boards of education possess final authority to make all personnel decisions including but not limited to selecting, contracting with, assigning, transferring, non-renewing, and dismissing all employees. As a general rule courts have exercised judicial restraint and granted considerable discretion to local school boards to make all employment decisions necessary for the educational wellbeing of the school system. However, in 2009-2010, this broad base of authority is not without limitations and must be juxtaposed and balanced with employee rights and protections. Vacca and Boshier (2008)

*Equal Treatment and Fairness.* Over the past forty-plus years the passage of federal and state civil rights statutes, coupled with numerous decisions from the United States Supreme Court and the courts below it, have served to establish both substantive and procedural rights for all employees in public school systems—especially employees who can show (1) more than a unilateral expectation of continued employment, and/or (2) a violation of a basic constitutional and/or statutory guarantee. The primary effect of this era has been to insist that *basic fairness* and *equal treatment* under the law are the two primary ingredients of all contemporary employment policies and practices established and implemented by local school boards. Vacca and Boshier (2008) It therefore follows that *personnel evaluation* policies and procedures serve as key elements in building

and, if necessary, defending each decision made—especially where an employee is being terminated from his/her job.

*Property Interest in Employment.* Beginning in the early 1970's it became imperative that employees must demonstrate a legitimate expectation (i.e., a *property interest*) of continued employment as a precondition of receiving the full benefits of the constitutional requirement of *procedural due process*. As the United States Supreme Court established in Board of Regents v. Roth (1972), "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits....To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Roth (1972) and Perry v. Sindermann (1972)

As the United States Supreme Court clearly stated, in a post-Roth case involving at-will public employment, an individual must establish a property interest in his/her employment as a precondition to reaping the benefits of procedural due process. Bishop v. Wood (1976)

Subsequent court decisions consistently held that an employee's claim of property interest must rest on solid legal footing. For example, to accurately analyze the *legitimacy* of the employee's claim one must look to such sources as the: (1) status of the employee and whether or not he/she is tenured; and/or (2) specific provisions of his/her existing employment contract; and/or (3) specific provisions of a collective bargaining agreement (where collective bargaining exists); and/or (4) language included in employer policy statements. In other words the foundational base of an employee's property interest claim must be analyzed case-by-case.

*Procedural Due Process.* As legal experts consistently stress, "No concept of fundamental law is more basic to individual rights and freedoms than due process....The purpose of the due process is to extend justice and fairness to the individual in relationship to government. Due process provides a bulwark against the encroachment of the state on individual rights and interests, establishing a fundamental balance between the rights of individuals and the exercise of the police power of the state." Alexander and Alexander (2005) A flexible concept, procedural due process is best defined as *fundamental fairness* the basic elements of which are (1) reasonable and timely notice, and (2) a chance to be heard (tell his/her side of the story). Black's Law Dictionary (1999)

Recently I came across a decision from the United States Court of Appeals for the Third Circuit where several of the above key factors were the focus of the Court's issue analysis. In my view the Court's rationale contains important implications for local school system employment policies and procedures—especially as they relate to employee evaluation and documentation.

### **Biliski v. Red Clay Consolidated School District (3rd Cir. 2009)**

*Facts.* The Red Clay case involved a computer technician (Biliski) employed by a public school district (Red Clay) from March 2001, until his termination effective August 11, 2006. During the duration of his employment he also served briefly as a help desk coordinator. Biliski was under the impression that he could only be terminated from his job for "just cause." While he cited a specific Board policy wherein it stated that no employee could be dismissed "except for just cause," he admitted in testimony that his belief actually came from his coworkers and not from any formal school system documents.

Biliski's termination resulted from several performance-based problems that began in March 2006. Among the problems cited by school administrators were: his failure to meet an important deadline after being asked to do

so a number of times; his refusal to undertake another task when he was asked to do so—saying that it was someone else’s job; his showing a “lack of respect and attention” at a customer service training; his failure to meet other assigned deadlines; his refusal to sign a memorandum from his supervisor dealing with missed deadlines; his use of disparaging comments (he denied using profanity) when referring to a superior; and his unauthorized parking in a fire lane after receiving an e-mail directing employees not to do so.

Subsequently Biliski was issued five memoranda prior to his termination. Each memorandum outlined specific instances of poor performance and/or inappropriate behaviors. He was warned that failure to improve could result in disciplinary action being taken. Each memorandum was given to him at face-to-face meetings where the contents were orally explained. On advice of the Board President, Biliski was allowed to submit a rebuttal letter to the Board. In his fifteen-page rebuttal letter he told his side of the story and incorporated copies of four of the memoranda with a lengthy response to each of the charges listed.

The Board considered the letter both before and in a formal school board meeting (August 16, 2006) where his termination was approved. Biliski was sent a letter dated August 17, 2006, notifying him of his termination effective August 11, 2006. He later testified that he never received the letter and that the Board never responded to his rebuttal letter.

*District Court Action.* In December, 2006, Biliski filed a 42 U.S.C. Sec. 1983 action in federal district court. In his lawsuit he claimed that he had a “property interest in continued employment” and that his termination constituted a deprivation of his right to “procedural due process under the Fourteenth Amendment....” He argued that his “at-will” status had been altered by Board policy which provided that all employees, including classified employees, may be fired for “just and reasonable cause,” and after notifying the employee in writing of the charges and giving the employee an opportunity for a hearing.

As remedy he sought: (1) a declaratory judgment that the Board’s actions were unlawful and unconstitutional, (2) preliminary and permanent injunctions restoring him to his job and enjoining the Board from firing him again unless the procedures used comply with due process, (3) monetary damages, including but not limited to back pay, future earnings and fringe benefits, (4) compensation for all other injuries and losses proximately caused by the unlawful acts of the defendants.

*District Court Decision.* The district court granted summary judgment to school officials. In the Court’s opinion: (1) Biliski did not possess a property interest in his employment, (2) no statute existed limiting the Board’s ability to fire him, and (3) Delaware legal precedents established that unilateral expressions of company policies (e.g., employment handbooks) do not set out a definite term of employment and do not alter an employee’s “at-will” status. Biliski v. Red Clay (D.Del. 2007) Biliski appealed the decision.

### **The United States Court of Appeals for the Third Circuit.**

On appeal Biliski continued to focus on school board policy as his basis for claiming a property interest in employment. In his view, school board policy was “a legally sufficient expression of the Board’s intention to limit its discretion to fire district employees.” More specifically, the policy he cited said that no employee could be dismissed “except for just and reasonable cause.”

The Third Circuit Court relied on both Board of Regents v. Roth (1972) and Bishop v. Wood (1976) in the analysis of Biliski’s claim. In the Court’s view, an at-will employee “has ‘no property interest’ in his/her job sufficient to trigger due process concerns.” While the Court made it clear that it need not decide whether or not

the Board's policy conferred a property interest, it nonetheless offered the following observation: "even assuming *arguendo* that Biliski had such an interest, the process that Biliski received comported with due process." School officials had argued that even if the Court concluded that he had such an interest, the procedures that they provided met constitutional standards.

Turning directly to due process the Court articulated the controlling standard of analysis. To establish a due process claim plaintiff must show (1) he was deprived of an individual interest that is encompassed within the Fourteenth Amendment's protection of life, liberty, or property, and (2) the procedures available did not provide due process of law. The Court focused on both the *fairness* and *flexibility* of due process. Citing Matthews v. Eldridge (1976) and Cleveland Board of Education v. Loudermill (1985) the appellate court made it clear that (1) the process provided must lessen the risk of erroneous deprivation of an employee's private interest, and (2) a pre-termination hearing need not be elaborate and formal so long as the employee has a chance to present his/her side of the story. Quoting directly from Armstrong v. Mango (1965) the Third Circuit stressed that the fundamental requirement of due process is to provide an employee "with the opportunity to be heard 'at a meaningful time in a meaningful manner.'"

The Third Circuit Court insisted that the process provided must balance the interests of the employee with those of his employer. In this case a balance was struck between (1) Biliski's interest in retaining his job, (2) the "countervailing interest of school officials in the expeditious removal of unsatisfactory employees and avoidance of administrative burdens," and (3) risk of an erroneous termination. The Court specifically emphasized that employers must be free to remove employees who fail to satisfactorily perform—especially those who have been warned that continued work performance problems will lead to termination.

The memoranda (itemizing specific work performance problems) given to Biliski, the face-to-face meetings with supervisors (where Biliski's poor work performance problems were discussed), and the warnings included in the communications (that continued work performance problems would lead to termination from employment) were convincing. As such, the Court opined that administrators involved had met the requirements of due process. Emphasizing that the Board is the ultimate decision-maker the Court offered the following summary statement: "Because Biliski knew both the nature of the charges against him and that the Board, the relevant decision-maker, would be voting on his termination, he received enough notice so that he could, and did, prepare a detailed and lengthy written response to the charges against him in advance of the August 16, 2006, Board Meeting." Given the interests at stake in this case, the employee involved "received all the process due him." The District Court decision is affirmed.

### **Policy Implications**

At a time when cut-backs in school system personnel (including administrators and classroom teachers) are inevitable, it is of critical importance for local school officials to reexamine existing personnel policies and implementation procedures—especially as they relate to non-renewal and dismissal of staff. In my professional opinion the Red Clay case offers an excellent primer on the importance of basic *procedural due process* (fairness) and the essential ingredients of *personnel evaluation* and *documentation* in supporting every employment decision. Recognizing that the decision itself is not binding on States outside the Third Circuit, the facts of the case, the Court's analysis of the issues, and the Court's rationale are nonetheless instructive.

School system policies must make it clear that:

- The Board is the ultimate decision-maker in all personnel matters.

- The recommendations and supporting data provided by school administrators and/or other individuals functioning in a supervisory capacity shall serve as critical factors in the Board's deliberating and finalizing all decisions involving employees.
- The school system's personnel evaluation and work-related documentation system (as included and outlined in school system official materials) shall be: (1) made available and explained to all employees, (2) uniformly applied to all employees and (3) consistently implemented in accordance with Board policy.
- The work-related productivity and effectiveness of all employees shall be regularly and immediately communicated (including the sharing of work product samples) to each employee by the employee's direct supervisor in face-to-face meetings.
- Employees are strongly encouraged to regularly discuss their goals and to present samples of their work products in meetings with their direct supervisors.
- Employees shall be immediately notified, both orally and in writing: (1) when work performance and/or productivity problems are identified, and (2) of specific steps to remediate these problems. The resulting remediation plan shall be agreed to by the employee and his/her immediate supervisor.
- Where an employee fails, within a reasonable time frame, to remediate work-related problems he/she shall be officially notified, in writing, that continued failures to remedy work-related problems will result in termination from employment.

### **Postscript**

Three final thoughts are in order. First, the above suggestions for policy must be placed in a context of federal and state statutes appropriate to the specific circumstances of each employee's situation. Second, at a time when local public school systems are faced with severe budgetary issues, *exigent circumstances* may force school boards to take unanticipated, urgent, and immediate steps that deviate from past personnel policies, practices, and procedures. Finally, it is therefore wise to have all personnel policies, practices, procedures, and decisions reviewed by your school system's attorney prior to implementation.

### **Resources Cited**

Alexander, Kern, and Alexander, M. David, AMERICAN PUBLIC SCHOOL LAW, Seventh Edition (Thompson-West 2005)

Armstrong v. Mango, 380 U.S. 545 (1965)

Biliski v. Red Clay Consolidated School District, 2007 WL 4425851 (D. Del. 2007)

Biliski v. Red Clay Consolidated School District, 574 F.3d 214 (3rd Cir. 2009)

Bishop v. Wood, 426 U.S. 341 (1976)

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

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

Garner, Byran A., Editor in Chief, BLACK'S LAW DICTIONARY, Seventh Edition (West Group 1999)

Matthews v. Eldridge, 424 U.S. 319 (1976)

Perry v. Sindermann, 408 U.S. 593 (1972)

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

Richard S. Vacca  
Senior Fellow CEPI

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