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TEACHER EVALUATION AND THE COURTS**Overview**

Thirty years ago, United States District Court Judge Hoffman opined in a Virginia case “school board members are charged with the crucial task of providing the best quality education for all children and this duty may be discharged only if teachers are employed on ability alone and no other criteria.” (United States v Nansemond County, 1974) In Judge Hoffman’s view the equation is a simple one. Quality teachers deliver quality classroom instruction, and quality classroom instruction produces quality students.

It is imperative in 2004, that public school students be exposed to classroom teachers who are both highly qualified (academically prepared, fully certified by the state, and endorsed in their subject field) and competent (demonstrate a sustained professional record of effective classroom performance). It is important to note, however, that “highly qualified” and “competent” are two different concepts. While the qualifications of a teacher can be established simply by reviewing pieces of paper (e.g., official college academic transcripts, a teaching certificate, written recommendations of professors and former employers), establishing an individual teacher’s competence (effectiveness in teaching one’s subject and working with students and parents) is a more complicated and time consuming process within which instructional evaluation (performance assessment) is the *sine qua non*.

Teacher Competence: What Have the Courts Said? Ironically, one accurate and reliable way to construct a general definition of the term teacher competence is to seek out and examine teacher dismissal cases where teacher incompetence is the subject of the court’s analysis. Why? As Cambron-McCabe and her co-authors state, “Incompetency cases often involve issues relating to teaching methods, grading procedures, classroom management, and professional relationships.” (Cambron-McCabe, et al., 2004)

Based upon their review of the case law, Alexander and Alexander concluded that the notion of teacher incompetence contains a “broad range of factors” among which “lack of knowledge of subject matter” is but one. (Alexander and Alexander, 1998) Other experts in education law have added such specific factors as: inability or failure to impart the designated curriculum, failure to work effectively with colleagues, failure to maintain adequate classroom discipline, and failure to plan lessons (Imber and Van Geel, 2000). Still other experts have added excessive and improper use of corporal punishment, below average test scores earned by

students, persistent neglect of professional duties, and insubordination to the list of factors accepted by judges as convincing evidence of teacher incompetence. (Vacca and Boshier, 2003). Thus, because of the broad nature of the term, “the burden of proof... is on boards when officials claim that teachers have failed to meet their duties.” (Russo, 2004) To prevail the school board will need to convince the court with evidence (i.e., documentation) produced through the implementation of a fair and legally defensible instructional evaluation process.

Teacher Evaluation and Performance Assessment. While the basic intent and purpose of teacher evaluation (performance assessment) must be to improve classroom instruction for all students, the process also is used to establish the on-the-job competence of individual teachers. Thus, to accomplish both tasks the central activity of a typical instructional evaluation (performance assessment) process involves on-the-job evaluations conducted by trained evaluators who observe and (using job-related criteria) rate the work of individual teachers. (Vacca and Boshier, 2003) In Virginia, for example, the Code of Virginia (22.1-295) specifies, “School boards shall develop a procedure for use by superintendents and principals in evaluating instructional personnel that is appropriate to the tasks performed and address, among other things, student academic progress and the skills and knowledge of instructional personnel, including, but not limited to, instructional methodology, classroom management, and subject matter knowledge.” (Code of Virginia, 2003 Cum. Supp.)

Procedural Fairness. To make it fair, it is imperative that procedural safeguards be built into the instructional evaluation (performance assessment) process. The following basic elements are necessary to provide procedural due process and fair treatment. Each teacher must: (1) know ahead of time what minimal standards of performance are expected, (2) know ahead of time the criteria and procedures to be used in the evaluation process, (3) receive prior notice of the evaluation, including the name of the individual who will serve as the evaluator, (4) receive immediate feed-back of evaluation results, including an opportunity for employee comment and rebuttal, and (5) receive a clear explanation of areas where improvement is needed in job performance. It is wise, but not required, to offer help and sources of remediation, and to establish a suggested timeline for the removal of deficiencies and the improvement of performance. Finally, it is prudent to schedule a follow-up conference with the evaluatee within a reasonable timeframe. (Vacca and Boshier, 2003)

Emerging Issues

Employment issues (legal and constitutional) are, as a general rule, heard in courts located in the state where the employer school system operates. This includes both federal and state courts. Because employment decisions (especially those involving classroom teachers) are discretionary in nature, judges are reluctant to grant jurisdiction. (Vacca and Boshier, 2003) However, some employment matters do ripen into lawsuits. In the recent past, for example, court cases have developed from situations where teachers have complained that school officials:

- Either ignored, or violated, or abused their local school board policies and procedures.
- Failed to follow state law requirements regarding teacher evaluation.
- Failed to establish and communicate a clear standard upon which to measure “acceptable performance and productivity,” prior to the implementation of the evaluation process.
- Placed too much emphasis on using student standardized test scores to measure classroom effectiveness and productivity.
- Failed to establish and implement a program of professional staff development intended to improve and enhance professional growth and classroom performance.
- Failed to produce valid and reliable documentation to establish cause for the dismissal.

- Failed to establish and implement a program to remediate performance deficiencies.
- Failed to use trained evaluators to evaluate teachers.
- Used the evaluation process as a “retaliation weapon.”
- Used the evaluation process to create a hostile environment intended to force teachers to resign (i.e. constructive dismissal) from their positions.

Some examples of court decisions involving various aspects of teacher evaluation follow in the section below.

Case Law

Thirty years ago, the United States Court of Appeals for the Eighth Circuit upheld the dismissal of a public school teacher whose students failed to achieve acceptable scores on standardized achievement tests. In *Scheelhouse v Woodbury* (8th Cir. 1773), cert. denied (1974), the Court stated that the improvement of test scores was a primary objective of the school system and the teacher had failed to produce the results expected of her.

In *Mt. Healthy v Doyle* (1997), affirmed on remand (6th Cir. 1981), the United States Supreme Court emphasized the importance of teacher evaluation (especially the need to produce documentation to defend personnel decisions) when it created a three-pronged causation standard. The standard is especially helpful where the challenging party (in this case a teacher) is claiming that the school system’s stated reason(s) for taking an adverse employment action (non-renewal, dismissal, reduction in force, reassignment) is (are) merely a pretext to cover an unlawful or unconstitutional motive. The standard requires an answer to the following questions: (1) In this situation is there some element (race, religion, gender, disability, age) or exercise (speaking out in public, group affiliation) that is constitutionally or statutorily protected? (2) Did that element or exercise play a “substantial or motivating part” in the board’s decision? (3) Absent that element or exercise would the board have reached the same conclusion and taken the same action regarding this employee? In other words, can the school board overcome the employee’s discrimination allegation by producing substantive, job performance-based evidence?

A 1990 decision of the Court of Appeals of Texas involved a continuing contract teacher who was dismissed from employment for lack of competence in the performance of classroom duties. In *Roberts v Houston I.S.D.* (1990) the use of videotapes and written assessments of a teacher’s classroom performance by an evaluation team was the focal point of the teacher’s complaint. The fact was that she had been told of her teaching deficiencies, but she failed to correct the problems was significant in the high court’s rationale. Moreover, the appellate court held that due process had not been denied since she was represented by an attorney at the termination hearing, she had received adequate notice and had an opportunity to respond, and she was granted an opportunity to review the videotapes of her classroom performance prior to termination from her teaching position. Most important, the school board was able to show that it reached its decision to terminate, after carefully reviewing her teaching evaluations and the videotapes of classroom performance, and listening to the testimony of her instructional supervisors. In the Court’s view the school board neither acted arbitrarily nor deviated from accepted academic norms.

Shofield v Richland County School District (S.C. 1994), involved a probationary teacher who had been formally observed in her classroom on three different occasions. Her performance during each observation was rated as “adequate.” However, over the same year, and independent of the formal evaluations, supervisors developed concerns about her classroom discipline and control, her failure to provide planned and appropriate instruction, and her uncooperative behavior. Subsequently, and citing concerns with classroom management and

the lack of quality instruction in her classroom, it was recommended that her teaching contract not be renewed for the next year. She went to court claiming that she had been denied remedial help to correct the deficiencies prior to her non-renewal. The Supreme Court of South Carolina upheld the dismissal. In the Court's opinion, South Carolina statutory law does not require remedial help in all situations, especially where teacher deficiencies occurred outside the evaluation process. The deficiencies cited as reasons for her non-renewal did not occur during the three formal observations.

Baker v Board of Education (W. Va. 2000) is a decision of the Supreme Court of Appeals of West Virginia. The issue in this case is whether the statutes of West Virginia require that a probationary employee (here an assistant principal) be entitled to a formal written improvement plan and period within which to improve her performance prior to non-renewal of her contract. The Court's answer was no, where the employee had received informal notice of her deficiencies and it was suggested at the time that she seek some form of remediation.

In *Echtenkamp v Loudoun County* (E.D. Va. 2003) a school psychologist claimed, among other things, that school officials had used the evaluation process to retaliate against her for challenging some of the school system's special education policies. More specifically she alleged that she was placed on yearly evaluation cycles and that letters of reprimand, in which she was cited for failure to maintain a working rapport with students, were created. Also, she claimed that she was handed a resignation form and told that if she did not improve she would be terminated from employment. The Court denied the school board's motion to dismiss, stating that even though the employee had not been terminated the environment created by school officials, including the threat to terminate, violated the employee's First Amendment right to freely speak out on a matter of public concern.

This past year an Illinois appellate court made it clear that a local public school district was required to rate the performance of its teachers using the specific classifications enumerated in state law and no others. In *Buchna v Illinois State Board* (Ill. 2003), the Court held that local school officials must use the classifications "excellent," "satisfactory," and "unsatisfactory" as a part of their instructional evaluation process or lose their remedial authority over teachers.

Implications for Policy

The need to retain quality classroom teachers and to remove those who are not is of utmost importance in every public school system in this nation. To successfully meet this need local school systems must have in place and consistently implement a continuous process of teacher evaluation (performance assessment). As the professional literature and the case law on point demonstrate, however, the task is not an easy one, since the potential legal and policy issues associated with teacher evaluation are many.

If local school boards are to minimize the emergence of problems they must take a proactive approach. This effort must include a reexamination of existing teacher evaluation policies and procedures. What follow are some suggestions to consider as a part of the reexamination process. School board policies must make it clear that:

- The intent and purpose of the teacher evaluation (performance assessment) process is to improve instruction for all students and to stimulate and promote the professional growth and development of all teachers.
- The standard for satisfactory teacher performance and the criteria for measuring teacher effectiveness and productivity are clearly defined.

- Teacher effectiveness is linked to student academic progress and achievement.
- The school board through its administrative staff will, on a regularly scheduled basis, evaluate and assess the professional effectiveness and productivity of all classroom teachers.
- The school board will, to the extent practicable, use trained evaluators to conduct classroom observations.
- The teacher evaluation (performance assessment) process is both formative and summative in nature and includes both teacher-generated and employer-generated data.
- The teacher evaluation (performance assessment) process is both professional growth-oriented and accountability driven.
- All teachers will have opportunities to correct performance deficiencies.
- The teacher evaluation (professional assessment) process and the school system's professional development program are directly related.
- Teacher peers and mentor teachers play key roles in the evaluation (performance assessment) process and the professional development program.

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