

TIME OUT

WITH
WALSH ANDERSON

INSIDE: Contract Nonrenewal, Termination and Reductions in Force / Addition to the Educator Code of Ethics Targets Employee-Student Communications / From The Courts / Firm News

CONTRACT NONRENEWAL, TERMINATION AND REDUCTIONS IN FORCE

It's the time of year when school districts start considering the possibility of ending the employment relationship with some contract employees. Especially in this time of budgetary concerns and uncertainty, districts are well-advised to plan ahead and properly conduct end-of-the-year probationary contract terminations and term contract nonrenewals. It is also important to understand how any district wide reduction in force operates and how it can factor into the normal termination and nonrenewal processes.

WHEN MUST A SCHOOL DISTRICT ACT TO NONRENEW A CONTRACT? Under the state Education Code, a school district is required to deliver notice of its decision to terminate at the end of the contract a probationary contract or deliver the notice of intent to propose nonrenewal of a term contract no later than 45 days before the last instructional day. This notice is given after the Board takes action. Days are defined as calendar days, not school days. The failure to provide timely notice invalidates a nonrenewal decision and requires that the employee be given a new contract for employment in the subsequent school year. In most districts, nonrenewal of employment contracts is considered during March and early April.

WHAT TYPE OF PROCESS IS REQUIRED? The process is different for ending probationary and term contracts at the end of the school year.

PROBATIONARY CONTRACTS

For *probationary contracts* that expire at the end of the school year, what is often called "nonrenewal" is referred to as termination effective at the end of the contract or school year under state statute. This process is not the same as a midyear termination. With a probationary contract that expires at the end of the year, a board of trustees simply votes to terminate the contract where it is in the "best interests" of the school district. Once a board acts to terminate a probationary contract, notice of the termination decision must be delivered to the employee not later than the 45th day before the last day of instruction.

TIP: Although, there is no express requirement for documentation to terminate a probationary contract, a school district should have sufficient documentation to support its termination decision should the action be challenged and alleged to be unlawful, discriminatory or retaliatory. Challenges to a termination action may be brought as district grievances, complaints before the EEOC or its state component, or through civil litigation in state or federal court.

TERM CONTRACTS

In contrast to probationary contracts, state law requires much more due process for nonrenewal of a *term contract*. As a matter of law and policy, the board of trustees must first propose nonrenewal of a term contract. The

ALTHOUGH, THERE IS NO EXPRESS REQUIREMENT FOR DOCUMENTATION TO TERMINATE A PROBATIONARY CONTRACT, A SCHOOL DISTRICT SHOULD HAVE SUFFICIENT DOCUMENTATION TO SUPPORT ITS TERMINATION DECISION ...

WALSH, ANDERSON,
BROWN, GALLEGOS
and GREEN, P.C.

ATTORNEYS AT LAW

board's proposal will come after receiving a recommendation from the administration and after consideration of the teacher's most recent evaluation, if relevant to the nonrenewal recommendation. In its review, the board is to determine whether sufficient facts exist to likely establish conduct constituting grounds for nonrenewal as set forth in Policy DFBB (Local). At this point, the board does not engage in a rigorous review of the facts or hear from the employee. Rather, if convinced that sufficient facts exist to establish one or more of the policy reasons for nonrenewal, the board may vote to issue a notice of proposed nonrenewal to the employee, not later than 45 days before the last day of instruction.

After receiving the notice of proposed nonrenewal, the employee has fifteen days to request a hearing to challenge the proposed nonrenewal. Most policies state that the board will conduct the hearing, but some policies require that a hearing officer process be used, so it is important to check local policy to be sure. If a hearing is requested, the board must schedule it no later than 15 days after receipt of the request, unless otherwise agreed to by the parties. At the hearing, the administration bears the responsibility of showing, by a

preponderance of the evidence, that grounds for nonrenewal exist. Both the administration and the employee may be represented by legal counsel and have the right to present evidence and examine and cross-examine witnesses. At the conclusion of the hearing, the board must decide whether to renew or nonrenew the employee's contract and notify the employee in writing of the action not later than the 15 days after the hearing is held.

If the employee does not request a hearing within 15 days, the board then takes the second step and votes to nonrenew the employee.

WHAT IF THE EMPLOYEE RESIGNS? A term contract employee has the right to resign his or her position at any point before the penalty-free resignation date, which for most districts is around July 1. Thus, even on the eve of a nonrenewal hearing, the employee may resign his or her position and take away the right of a board to vote to nonrenew her contract.

HOW DOES A REDUCTION IN FORCE (RIF) FACTOR INTO NONRENEWAL SEASON? Typically, district Policy DFF (Local) describes the district's procedures required to declare a reduction in force (RIF) through either a program change or financial exigency. Should the board

determine that a RIF will require the nonrenewal of one or more employees, then the board identifies the program areas to be affected by the RIF.

The decision to end *probationary contracts* at the end of a school year does not trigger the RIF process. In contrast to term contracts, Boards simply take action and give probationary employees timely notice of a decision to terminate – 45 calendar days before the last day of instruction – in order to terminate the contract in the best interest of the school district.

While a RIF can be conducted during the school year in case of financial exigency, at nonrenewal time, the school district must use one of the listed policy bases for term contract nonrenewal, found at policy DFBB(Local). Typically, "reduction in force because of financial exigency or program change" is grounds for nonrenewal in policy. Once the Superintendent applies policy-based criteria to determine which employees within the affected employment area will be subject to RIF, the Superintendent prepares and makes a recommendation to the Board that one or more employees be proposed for nonrenewal. As with the usual nonrenewal, the employee can seek a hearing on the proposed nonrenewal before the Board makes the final nonrenewal decision.

Terminations, nonrenewals, or RIFs, ending a teacher's contract is one of the more significant personnel actions that a school board can take.

TERMINATIONS, NONRENEWALS, OR RIFs, ENDING A TEACHER'S CONTRACT IS ONE OF THE MORE SIGNIFICANT PERSONNEL ACTIONS THAT A SCHOOL BOARD CAN TAKE.

ADDITION TO THE EDUCATOR CODE OF ETHICS TARGETS EMPLOYEE-STUDENT COMMUNICATIONS

The increasing prevalence of technology in the hands of public schools, employees, and students, has added excitement, confusion, and uncertainty to the education community. The State Board of Educator Certification (SBEC) as well as the State Board of Education

(SBOE), have established rules and regulations specifically designed to address electronic communication between employees and students, in addition to the long standing rules generally intended to ensure appropriate relationships between employees and students.

Last year, SBEC proposed additions to the Code of Ethics and Standard Practices for Texas Educators (Code of Ethics), which were subsequently endorsed by the SBOE. Effective on November 19, 2010, Standard 3.9 was added to the Code of Ethics, addressing inappropriate

communications between employees and students with a specific focus towards electronic communications:

Standard 3.9. The educator shall refrain from inappropriate communication with a student or minor, including, but not limited to, electronic communication such as cell phone, text messaging, blogging, or other social network communication. Factors that may be considered in assessing whether the communication is inappropriate include, but are not limited to:

- (i) the nature, purpose, timing, and amount of the communication;
- (ii) the subject matter of the communication;
- (iii) whether the communication was made openly or the educator attempted to conceal the communication;

(iv) whether the communication could be reasonably interpreted as soliciting sexual contact or a romantic relationship;

(v) whether the communication was sexually explicit; and

(vi) whether the communication involved discussion(s) of the physical or sexual attractiveness or the sexual history, activities, preferences, or fantasies of either the educator or the student.

Most school districts have incorporated the Code of Ethics into the district's standards of conduct expected of all employees, not just certified educators, by adoption of the TASB model policies DH

(Local) and DH (Exhibit). As a result, the addition of Standard 3.9 may provide additional support for disciplinary actions taken against an employee by a school district based on inappropriate communication with a student.

It is important to note that the SBEC rule requires sound administrative judgments to be made in reviewing a particular situation involving an employee's use of technology with students. When assessing an employee's conduct involving electronic communications with a student, school districts should analyze the conduct under all applicable laws, policies and regulations, including DH (Local), DH (Exhibit), the Employee Handbook, and the Acceptable Use Policy.

MOST SCHOOL DISTRICTS HAVE INCORPORATED THE CODE OF ETHICS INTO THE DISTRICT'S STANDARDS OF CONDUCT EXPECTED OF ALL EMPLOYEES, NOT JUST CERTIFIED EDUCATORS, BY ADOPTION OF THE TASB MODEL POLICIES DH (LOCAL) AND DH (EXHIBIT).

FROM THE COURTS

U.S. SUPREME COURT EXPANDS WHO IS PROTECTED FROM RETALIATION. The U.S. Supreme Court recently ruled that the federal law barring retaliation against employees who complain about workplace discrimination also protects an employee's relative and non-relative loved ones from retaliatory action. Previously, most courts (including those in Texas) had ruled that the law protects only the employee who actually filed discrimination complaints.

In the recent case, an employee and her fiancé worked at the same company. The employee had filed a sex discrimination complaint with the EEOC and three weeks later, her fiancé, Eric Thompson was fired. He claimed he was fired in retaliation for her EEOC complaint and filed his own lawsuit. The lower courts had dismissed his claim stating that he had not engaged in "protected conduct" on behalf of his fiancé or on his own behalf. In other words, until he claimed

retaliation, he had never alleged that his employer had discriminated against him, nor had he assisted or supported his fiancé in her own complaint of discrimination.

In that case, the employer argued that extending anti-retaliatory protection to third-parties such as a fiancé would go down a slippery slope, making it difficult for employers to take any employment action if they had to first consider all possible connections or relationships to the employee that filed the EEOC complaint: boyfriends, close friends, etc. But the Supreme Court was not persuaded and said that because Title VII of the Civil Rights Act "prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a charge of

THE U.S. SUPREME COURT RECENTLY RULED THAT THE FEDERAL LAW BARRING RETALIATION AGAINST EMPLOYEES WHO COMPLAIN ABOUT WORKPLACE DISCRIMINATION ALSO PROTECTS AN EMPLOYEE'S RELATIVE AND NON-RELATIVE LOVED ONES FROM RETALIATORY ACTION.

discrimination,' [and because] a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired," then the employer had violated the law.

The Court added that "We expect that firing a close family member will almost always meet the [antiretaliation] standard, and inflicting a milder reprisal on a mere acquaintance will

almost never do so, but beyond that we are reluctant to generalize." For school districts, this case raises concerns because there are no clear rules regarding who can legitimately bring a claim of retaliation. In this case, as in a future one, the district may face two claims: one claim of discrimination by the original employee and a second claim of retaliation by another employee claiming to have a relationship with the first employee. That

second employee could be protected because of his or her familial or other type of relationship and employers must be prepared to establish that whatever adverse job action they took toward that person had nothing to do with that relationship or the fact that the family member or significant other previously had made a discrimination claim. *Thompson v. North American Stainless, LP*, No. 09-291 (2011).

Firm News

THE WALSH ANDERSON HOUSTON OFFICE is officially open! Our office is located at Millenium Tower, 10375 Richmond Avenue, Suite 750. Sandra Carpenter and Paula Maddox Roalson are moved in and ready for your calls! Stop by and visit if you are in the area!

WE ENJOYED SEEING YOU AT MID-WINTER! We appreciate you braving the elements and stopping by our Austin office for our annual reception. It was wonderful to have the chance to visit!

AND WE HOPE TO SEE YOU AT TASBO! We'll be at the annual TASBO Convention at the Austin Convention Center on March 2 – 3 and hope you can stop by our booth (#816) and say, "Hi." George Grimes, Ann Greenberg, Winnie Dominguez and Jim Walsh will be presenting on the following topics:

MARCH 2: ARCHITECTS: WHAT YOU DON'T KNOW ABOUT SELECTION, SCOPE AND CONTRACT NEGOTIATION WILL SHAKE YOU TO YOUR FAILED FOUNDATION by Ann E. Greenberg at the Austin Convention Center; 8:30 AM - 9:30 AM

MARCH 2: PROCUREMENT: GOOD SERVICES... AND EXACTLY WHAT CONSTITUTES A

PROFESSIONAL SERVICE by Ann E. Greenberg & Winifred H. Dominguez at the Austin Convention Center; 4:00 PM - 5:00 PM

MARCH 2: SOCIAL NETWORKING POLICIES FOR SCHOOL DISTRICTS by Jim Walsh at the Austin Convention Center; 4:00 PM - 5:00 PM

MARCH 3: THE DIRT ON BUYING, SELLING AND LEASING SCHOOL DISTRICT REAL PROPERTY by Winifred H. Dominguez at the Austin Convention Center; 10:30 AM - 11:30 AM

MARCH 3: THE DO'S & DON'TS & WISH-YOU-HADN'TS by George E. Grimes at the Austin Convention Center; 3:15 PM - 4:15 PM

WE WILL ALSO BE AT THE TASB WINTER GOVERNANCE CONFERENCE IN CORPUS CHRISTI FEBRUARY 24 – 26. Chris Elizalde will be moderating the student panel session on Friday, February 25 from 12:45 – 1:30 p.m.

AUDIO CONFERENCE / WEBINARS! We have eight audio conferences scheduled for February, March and April. Registration is available on line at our website or, if you have any questions about our audio conferences, please contact Tonya Estes at tonyae@wabsa.com or by phone at 512-454-6864.

FEBRUARY 8, 2011, Jim Walsh and Jenny Wells will present an audio conference

entitled "Independent Contractor or Employee? How the IRS Sees It."

FEBRUARY 10, 2011, Judy Brown and Christine Badillo will present "Preparing for Redistricting After the 2010 Census."

FEBRUARY 15, 2011, Chris Elizalde and Christine Badillo will present "How to Make Defensible Personnel Decisions in Tough Financial Times."

MARCH 3, 2011, Marquette Maresh and Robb Decker will present "Smooth Sailing in Student Discipline."

MARCH 8, 2011, Ann Greenberg and George Grimes will present "Bricks and Mortar: A Construction Primer for School Business Officials."

APRIL 5, 2011, Laura Rodriguez McLean and Sandi Tarski will present a Webinar "Making the Grade at Graduation."

APRIL 12, 2011, Ann Greenberg and Winifred Dominguez will present "Contract Conundrums: What to Look For."

APRIL 19, 2011, Elena Gallegos and Jan Watson will present a Webinar "Have Your Ducks in a Row: Preparing for, Conducting and Developing Legally Defensible ARDs and IEPs."

FOR MORE INFORMATION on retainer programs or the firm, please write to P.O. Box 2156, Austin, TX 78768, visit our website at www.WalshAnderson.com or call us at 512-454-6864.

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