



GARRETT HEMANN ROBERTSON PC

Back to Basics: Employee Discipline and Dismissal

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Kelly D. Noor ■ Paul A. Dakopolos

1011 Commercial St. NE • Salem, Oregon 97301-1049
(503) 581-1501 • 1-800-581-1501 • Fax (503) 581-5891 • www.ghrlawyers.com



I. INTRODUCTION

Private sector employees are generally "at-will;" school employees have myriad legal protections.

The Constitution, statutes, CBAs, and school policies all combine to limit an administrator's discretion in disciplining and dismissing employees.

School employees can be disciplined and dismissed.



II. U.S. CONSTITUTION

A. Due Process

1. Federal: 5th Amendment; State: 14th Amendment

2. Liberty and Property Interests

- *Board of Regents v. Roth*, 408 US 564 (1972)
- *Perry v. Sindermann*, 408 US 593 (1972)

a. Liberty Interest Cases:

- *Axelsen v. Hillsboro SD*, 898 FSupp 719 (D.Or. 1995)
- *Hayes v. Phoenix-Talent SD*, 893 F2d 235 (9th Cir. 1990)

b. Property Interest Case: *Seitz v. Clark*, 524 F2d 876 (9th Cir. 1975)



Due Process (cont'd)

B. Elements of Due Process

1. Notice
2. Hearing



Due Process (cont'd)

a. Hearing Rights

- Right to be heard
- Right to representation/counsel
- Right to present evidence/testimony
- Right to confront accuser
- Right to cross-examination
- Right to impartial or independent decision-maker
- Right to have decision based on reliable, relevant, probative, and material evidence
- Right to have statement of reasons/evidence relied upon for decision



Elements of Due Process / Hearing (cont'd)

- b. Procedural Protection (e.g., contract teacher v. probationary teacher)
- c. More than one hearing (pre-dismissal and post-dismissal) may be required. *Cleveland Bd. of Educ. v. Loudermill*, 470 US 532 (1985)
- d. Pre-dismissal hearing not like a court-style hearing. *Williams v. Cody*, 545 P2d 905 (Or. App. 1976)
- e. Pre-Dissmissal Due Process
 - Notice of Reason/Charges
 - Notice of Sanction Contemplated
 - Opportunity to meet informally with decision-maker or effective recommender before decision made



Elements of Due Process (cont'd)

C. Importance of Due Process

- 1. Provides fairness for employees
- 2. If procedures insufficient, courts will remedy
- 3. If in doubt, grant more due process

D. Other Constitutional Provisions

- 1. Freedom of Speech
- 2. Freedom of Religion



III: STATUTES

A. Classified Employees

- 1. ORS 332.544 – Procedure for demoting or dismissing
- 2. ORS 332.554 – Notice of reasonable assurance of continued employment
- 3. Refer to Collective Bargaining Agreement



Probationary Teacher

B. ORS 342.835

- 1. Dismissal “for any cause considered in good faith sufficient”
- 2. Written reasons for dismissal
- 3. Post-dismissal hearing before board
- 4. Non-renewal – same standards apply as dismissal
- 5. Appeals to circuit court – very limited review
- 6. Refer to Collective Bargaining Agreement



Contract Teacher

ORS 342.865 – Grounds for dismissal or contract non-extension

- a. No dismissal or non-extension except for:
 - Inefficiency
 - Immorality
 - Insubordination
 - Neglect of Duty
 - Physical or mental incapacity
 - Conviction of felony or crime
 - Inadequate performance
 - Failure to comply with reasonable requirements as Board may prescribe to show normal improvement and evidence of professional training and growth
 - Any cause constituting grounds for revocation of license



Contract Teacher (cont'd)

- b. Performance Evaluation (ORS 342.850) (ORS 342.856)
- c. Dismissal (conviction of ORS 342.143 crime)



Contract Teachers (cont'd)

- 2. ORS 342.875 - Immediate Suspension
 - a. Suspend without prior notice
 - b. Dismissal procedures commence or reinstatement
 - c. Paid administrative leave v. paid suspension (See ORS 339.388 for reference to paid administrative leave)
- 3. ORS 342.895 – Procedure
 - a. Dismissal or Non-Extension
 - b. 20-day Notice
 - c. Dismissal after school board action
 - d. Notice of board action via certified mail
 - e. Program of assistance
 - f. Teacher's salary placement cannot cause dismissal, non-extension or layoff



Contract Teachers (cont'd)

4. ORS 342.905 (FDAB Procedure)
 - a. Contract Teacher appeals decision
 - b. District provides written statement of reasons for non-extension
 - c. FDAB panel appointed
 - d. District and Teacher can agree to arbitrate
 - e. Appeal of FDAB decision is to Court of Appeals



Contract Teachers (cont'd)

Other Statutes Affecting Discipline and Dismissal

- ADA
- Family leave laws
- ORS 243.672 (protected union activity)
- Sexual harassment laws
- Civil rights laws
- Workers' compensation laws



IV: COLLECTIVE BARGAINING AGREEMENT

Who is covered? Employee has no protection under the collective bargaining agreement if not included in recognition article (e.g., licensed teacher)



CBA (cont'd)

Grievance Procedure

- Look at definition of "grievant," may limit coverage further
- Be aware of timelines
- How is dismissal handled? Grievance v. FDAB



CBA (cont'd)

Just Cause

- Did employer give employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
- Were employer's rules or managerial orders reasonably related to:
 - the orderly, efficient and safe operation of the employer's business; and
 - the performance that the employer might properly expect of the employee?
- Did employer, before administering discipline to an employee, make an effort to discover whether employee did, in fact, violate or disobey a rule or order of management?



CBA / Just Cause (cont'd)

- Was employer's investigation conducted fairly and objectively?
- At the investigation, did the "judge" obtain substantial evidence or proof that employee was guilty as charged?
- Has employer applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
- Was the degree of discipline administered by employer in a particular case reasonably related to:
 - the seriousness of employee's proven offense; and
 - the record of employee in service with the employer?



CBA / Just Cause (cont'd)



ERB's "reasonable employer" test

- Discipline in good faith and for good cause
- Sanctions proportionate to offense
- Consideration of employee's length of service, prior service records
- Warns employee re improper conduct
- Consistent disciplinary sanctions
- Discipline in a timely manner
- Notice of charges, sanctions, and opportunity to refute charges
- Allegations justify discipline
- Enforces reasonable regulations



CBA / Just Cause (cont'd)

Adaptation of Just Cause to Performance-Based Dismissal Cases

- Was there adequate notice of the standards of performance to which the teacher is held?
- Did the District implement sound educational practices and methodologies?
- Did the District reasonably observe performance deficiencies by identifying and explaining those to the employee?
- Did the District provide the employee with a reasonable timeline for improvement of those performance deficiencies, along with reasonable assistance by the District?



CBA / Just Cause (cont'd)

Adaptation of Just Cause (cont'd)

- Was there a fair and reasonable opportunity to improve once notice of performance deficiencies was given?
- Was there substantiated documentation of the continuing performance deficiencies and the continual warnings that these deficiencies must be improved?
- Were the performance standards for all professional educators equitably applied and employee performance judged in an evenhanded manner?
- Is the penalty of dismissal reasonably related to the seriousness of the performance deficiencies? (That penalty must be viewed in the context of the educational service that must be provided by the teacher: quality education to grade school boys and girls.)



CBA / Just Cause (cont'd)

FDAB Statute

The Fair Dismissal Appeals Board panel shall determine whether the facts relied upon to support the statutory grounds cited for dismissal or nonextension are true and substantiated. If the panel finds these facts true and substantiated, it shall then consider whether such facts, in light of all the circumstances and additional facts developed at the hearing that are relevant to the statutory standards in ORS 342.865 (1), are adequate to justify the statutory grounds cited.



CBA (cont'd)

Evaluation Articles

- Does the CBA contain an evaluation article? If so, it may affect dismissals, especially for probationary employees, independent of just cause provision.
- Evaluation articles may provide a backdoor opportunity for teacher to grieve non-renewal or dismissal by alleging a violation of the article, and not challenging the dismissal (even though reinstatement is the requested remedy). Can be used even if CBA limits dismissal challenges to FDAB procedure.
- Therefore, very important to follow evaluation article in CBA, or remove (not agree to) evaluation language in CBA.



CBA (cont'd)

Grievance Arbitration

- Procedure will be governed by CBA, or by the arbitrator
- Not necessarily faster or less costly than trial, but more unpredictable
- Hard to challenge arbitrator's decision



ORS 342.856

- Core teaching standards must:
 - Have multiple measures of teachers in areas
 - Take into consideration evidence of student academic growth and learning
- Core teaching standards must attempt to:
 - Strengthen classroom and administrative practices
 - Refine professional growth opportunities
 - Individualize classroom practices and learning objectives



ORS 342.856 cont'd

“A school district board must include the core teaching standards adopted under this section for all evaluations of teachers and administrators of the school district. The standards shall be customized based on the collaborative efforts of the teachers and administrators of the school district and the exclusive bargaining representative of the employees of the school district.”



ORS 342.850 Teacher evaluations

“The District shall develop an evaluation process in consultation with school administrators and with teachers. If the district’s teachers are represented by a local bargaining organization, the board shall consult with teachers belonging to and appointed by the local bargaining organization in the consultation required by this paragraph.”



V. DISTRICT POLICIES

- Policies and administrative rules provide notice to employees of expected performance/behavior.
- Violation of policies can be basis for discipline. Important for due process and just cause.
- Employer can unilaterally change policies and administrative rules, but must provide notice of the change to employees/unions.



VI. HINTS FOR SUCCESSFUL DISCIPLINE/DISMISSAL

- Knowledge of the Standards and Rules that apply is essential
- Document, Document, Document
 - Notice and discipline should be in writing, not verbal
 - Written documentation (reports, personal notes, conference notes, etc.)
 - Give clear directives
- When in Doubt, Give Extra Notice and Opportunity to be Heard
- Be Consistent



Contact Us

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