

Employee Discipline and Dismissal

Brian Hungerford

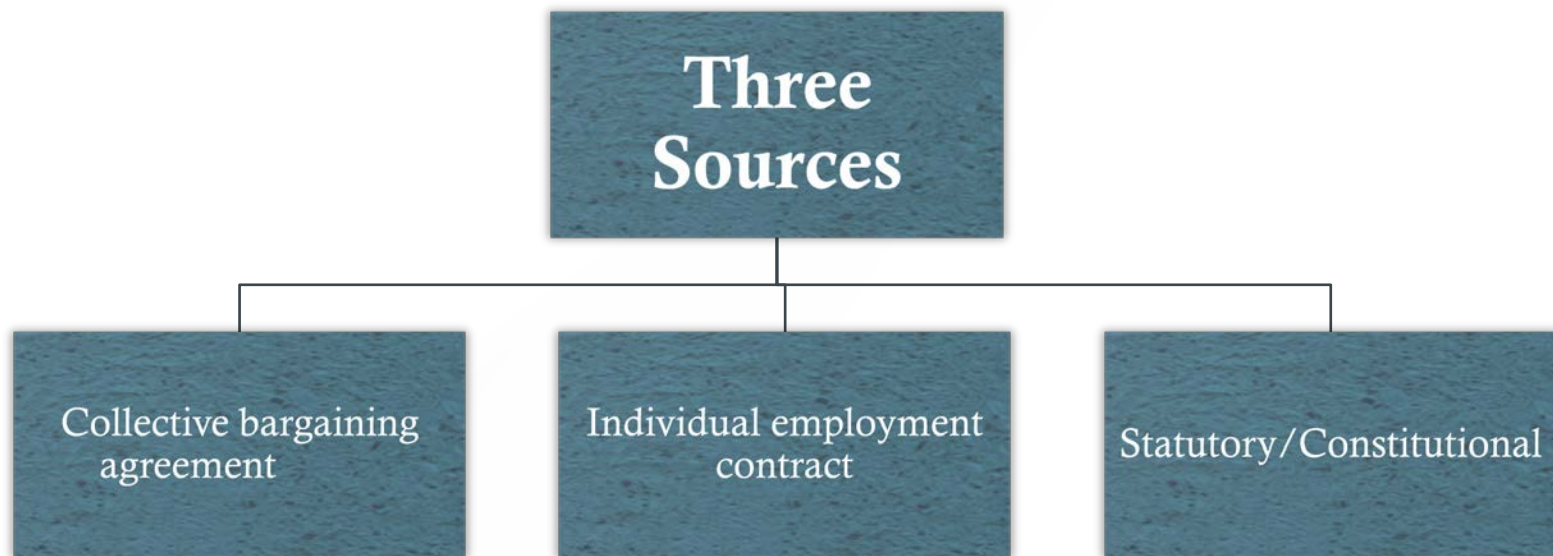
THE HUNGERFORD LAW FIRM

December 4, 2014

Session Goals

- Identify the sources of rules and regulations governing employee discipline and dismissal.
- Provide a detailed examination of the just cause standard and how to meet each test.
- Examine standards for the dismissal of teachers and administrators.
- Identify other collective bargaining provisions that may complicate a discipline or dismissal situation.
- Address non-contractual standards, such as Constitutional provisions, that apply to all school employees.

Sources of Rules Governing Employee Discipline/Dismissal



What is the standard?

Depending on the type of action and the type of employee, there will be a different standard that will be applied to that action.

- Classified vs. Licensed
- Contract/regular vs. Probationary
- Discipline vs. Dismissal
- Dismissal vs. Non-renewal/Non-extension
- Teacher vs. Administrator

Classified Employee Discipline

- No statutory standard; governed by contract
- Most often just cause or similar standard, but may not be
- Constitutional due process for disciplinary demotions

Classified Employee Dismissal

- No statutory standard; governed by collective bargaining agreement
- Most often just cause standard is used, but not always
- Constitutional Due Process applies
- Employee is entitled to a post-dismissal appeal to the school board as per ORS 332.544

Teacher Discipline

- No statutory standard; governed by collective bargaining agreement
- Most often is just cause
- Subject to review by an arbitrator through the grievance process
- Same standard typically applies to both probationary and contract

Probationary Teacher Dismissal or Non-renewal

- May be governed by collective bargaining agreement in unusual situations
- More often than not is governed by Oregon statute – ORS 342.835
- “Any cause deemed in good faith sufficient.”
- Typically not subject to grievance and never subject to Fair Dismissal appeal.

Contract Teacher Dismissal

- May be governed by collective bargaining agreement
 - Just cause provision
 - Choice of remedies
- Governed by statute if contract is silent or provides that dismissal is not covered by just cause provision
- Fair Dismissal statute applies
- Constitutional Due Process required

Contract teacher non-extension

- May be governed by collective bargaining agreement
 - Just cause provision
 - Choice of remedies
- Governed by statute if contract is silent or provides that dismissal is not covered by just cause provision
- Fair Dismissal statute applies
- Constitutional Due Process required
- Do teachers still have tenure?

Administrators

- No contractual or statutory standard for discipline
- Standard for probationary teachers same for administrator dismissal or non-extension/non-renewal
- Standard for dismissal same as for contract teachers
- Constitutional Due Process may apply
- Check administrator handbook or individual employment contracts

The Just Cause Standard

- Most prevalent standard in collective bargaining agreements.
- Sometimes referred to as simply “cause,” or “good cause”
- Regardless of how it is exactly stated, it will have the same definition.

Just Cause – What does it mean?

Just cause has no single established definition that is found in a statute or law. Instead, the exact meaning of that standard will be found in one of two places:

1. Collective bargaining agreement; or
2. Arbitrator

Just Cause as defined in the CBA

The parties to a contract may bargain their own local definition. For example, the San Francisco Unified teachers contract:

28.1.2 Teachers shall not be disciplined without just cause.

28.1.3 The following just cause guidelines shall be recognized:

28.1.3.1 The teacher shall be adequately informed of the consequences of his/her conduct.

28.1.3.2 The District's rules, regulations and policies shall be reasonable and related to the efficient operation of the District.

Contractual definition - continued

- 28.1.3.3 *A fair and objective investigation should reveal the necessity for disciplinary action.*
- 28.1.3.4 *Rules, orders and penalties should be applied fairly and equitably.*
- 28.1.3.5 *Disciplinary action should be appropriate and reasonably related to the nature of the offense.*

Contractual definition - continued

More often than not, the contract does not define the term “just cause.” The following provision from the Hillsboro School District classified contract is a familiar one:

No permanent employee shall be disciplined without just cause. Discipline shall be administered in private. For the purpose of this article, discipline shall include written warnings and reprimands placed in the employee's personnel file, suspension and discharge.

Traditional Just Cause Definition

The 7-Step Test

Where there is no contractual definition, arbitrators typically apply the following test:

1. Did the employee have adequate notice of the rule that he or she is accused of violating?
2. Did the employee have adequate notice of the possible consequences associated with violating that rule?
3. Was the rule reasonable?
4. Did the employer conduct a fair and thorough investigation before administering discipline?
5. Was there sufficient proof of the violation of the rule that the employee was charged with violating to warrant discipline?

The 7-Step Test - continued

6. Has the employer administered its rules, as well as the consequences for violating those rules, in a consistent and equal manner?
7. Is there a reasonable relationship between the severity of the penalty and the nature of the misconduct?

A NO ANSWER TO ANY OF THE ABOVE QUESTIONS WILL RESULT IN A FINDING THAT JUST CAUSE DID NOT EXIST.

1. Did the employee have adequate notice?

“It is well recognized that before an employee can be justifiably disciplined for a breach of an employer’s rules or regulations, he must have knowledge of the rule or regulation which he is charged with violating. In most cases, such employee knowledge is not to be inferred, but is required to be evident by the publication of such rules so that employees can be presumed to be aware of them.”

- Bay Area Rapid Transit Dist., 80-2 ARB 8612 (1980)

How can notice be given and demonstrated?

Job
description

Prior
discipline or
warnings

Employee
handbook

Board
policies

Written
memos

Is actual notice always required?

In some situations, the rule or expectation is so obvious that an employer need not prove actual notice on the part of the employee.

“Socially disapproved” and **“industrially disapproved”**

- Theft
- Physical violence
- Dishonesty/fraud
- Appearing at work under the influence

Common pitfalls with respect to notice

Relying on oral notice

“Negative notice”

Lack of specificity with regard to the rule or expectation

Failing to update employees on new rules or expectations

Assuming that notice has occurred without being able to demonstrate it.

2. Did the employee have notice of the possible consequences?

An employer must let employees know not only what kinds of conduct will lead to discipline, but what discipline is likely to result.

“An occasion for discipline is not necessarily an appropriate occasion for discharge. The employee should be aware of the significance which the company attaches to a prohibited act and, in a case of disobedience, that sanction will be immediate discharge.”

- Gray Drug Stores, Inc., 70-1 ARB 8115 (1969)

Issues with notice of consequences

- Especially important in cases involving dismissal.
- Inconsistent penalties interfere with notice of consequences.
- Use specific language where a specific penalty is likely to result.
- Need to be clear where dismissal may result for an accumulation of minor infractions.

Must notice of consequences always be given?

- Not typically necessary when the discipline in question is the lowest level of discipline, such as a written reprimand.
- Not necessary in situations involving the same sort of “socially disapproved” or industrially disapproved” conduct for which notice of the rules need not be expressly given.

3. Was the rule that was violated reasonable?

“It is a settled rule of arbitration that a company has the right unilaterally to issue and enforce rules that (1) do not conflict with any provisions of the parties’ agreement or of law and (2) are reasonably related to the safe, orderly, and efficient operation of the company’s business.”

- Industrial Finishing Co., 40 LA 670 (1963)

Reasonable rules

Rules are reasonable when they relate to:

- The employee's ability to perform his or her own job with reasonable efficiency and safety;
- The effective functioning of supervisory employees;
- The personal security of other employees;
- The security of the employer's product and other property.

What rules are unreasonable?

1. Rules that do not conform to the provisions of the collective bargaining agreement or applicable law.

Examples:

- Rules banning the wearing of union buttons.
- Rule requiring 48 hours notice of an absence when such notice was not required by the contract.
- Rule prohibiting employees from meeting with union representatives on break time.

What rules are unreasonable?

2. Rules that unnecessarily infringe upon an employee's personal freedoms in the work place.

Examples:

- Rule against facial hair, when no specific safety reason is present.
- Rules prohibiting any personal items in an employee's workspace unless specific reasons exist that make such a rule necessary.
- Rules requiring employees to participate in non-work activities during lunch or break periods (e.g., birthday celebrations for co-workers).

What rules are unreasonable?

3. Rules that affect the employee's off-duty life and conduct in a manner that is not necessary to protect a legitimate employer interest.

Examples:

- Rules against alcohol or tobacco use off-duty.
- Rules prohibiting "moonlighting."
- Rules against supporting certain causes or political agendas.
- Rules concerning where, or with whom, an employee may reside.

What rules are unreasonable?

4. Rules that are vague or ambiguous (similar to a lack of notice).

Examples:

- Rule that required employees' appearance to be "neat and professional."
- Rule requiring "timely notice" of an absence.
- Rule prohibiting "excessive" use of work computer for personal business.

Reasonable or unreasonable?



4. Did the employer conduct a fair and thorough investigation?

“ ‘Just cause’ is a multi-faceted consideration which has been applied by Arbitrators to fact portraits in various ways. A thread which runs through thee numerous decisions is the concept that the Company make a full, fair and objective investigation in order to be satisfied that the charged individual is in fact guilty of the offense or breach.”

- Dow Chem. Co., 60 LA 703 (1973)

Qualities of a Good Investigation

Prepare for the investigation

```
graph TD; A[Prepare for the investigation] --> B[Thorough collection of evidence and information]; B --> C[Proper documentation];
```

Thorough collection of evidence and information

Proper documentation

Pre-Investigation Considerations

1. **Is there a report that needs to be made?**
 - DHS
 - Law enforcement
2. **Is there a contractual complaint procedure that must be followed?**
 - Timelines
 - Identification of complainant
3. **Is this a situation in which law enforcement may be involved?**
 - Garrity considerations
 - Coordination/delay

Pre-Investigation - continued

4. **Should the employee be placed on administrative leave during the investigation?**
 - Check your contract
 - Complaint involves threat to safety or property
 - Employee may disrupt the investigation

5. **Review the complaint and develop a plan for your investigation.**
 - Who should do the investigation? Any conflicts? How serious is this?
 - Who are the key witnesses? Do parents need to be notified?
 - Where should the interviews take place?

Investigation Checklist

- Is the investigator impartial?
- Give the accused employee every opportunity to respond.
- Have witness interviews been sufficiently recorded or documented?
- Have employees been afforded their representation rights?
- Has physical and documentary evidence been gathered and preserved?
- Has the results of the investigation been adequately documented?

Top 5 Investigation Mistakes

1. Letting the representative control the investigatory meeting.
2. Promising confidentiality to witnesses or failing to honor it when required.
3. Not following the contractual complaint process.
4. Rushing to judgment.
5. Insufficient documentation.

5. Is there sufficient proof of the charged misconduct?

“To put it mildly, proof is indispensable. Whatever an arbitrator’s approach to just cause happens to be, proof that the employee really ‘did it’ is a rock-bottom requirement for discipline to pass arbitral review.”

- Just Cause: The Seven Tests, Koven & Smith (1998)

A discharge cannot be based upon conjecture, surmise, suspicion, or anything but hard, material, and known facts.

- Borden’s Farm Products, Inc, 3 LA 607 (1945)

How much proof is necessary?

Three standards of proof are typically available under the law:

1. **Preponderance of the evidence** = The greater weight of the evidence not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to include a fair and impartial mind to one side of the issue rather than the other. (*Black's Law Dictionary*)

How much proof is necessary?

Preponderance of the evidence = It is more likely than not that an event occurred.

How much proof is necessary?

2. **Clear and convincing evidence** = Evidence indicating that the thing to be proved is highly probable or reasonably certain. This is a greater burden than preponderance of the evidence but less than evidence beyond a reasonable doubt. (*Black's Law Dictionary*)

How much proof is necessary?

3. **Beyond a reasonable doubt** = Proof that precludes every reasonable hypothesis except that which it tends to support. Not even open to possible doubt, because every thing relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. (*Black's Law Dictionary*)

How much proof is necessary?

- Most arbitrators apply a preponderance of the evidence standard in ordinary discipline cases, and even in some discharge cases.
- Arbitrators frequently utilize the clear and convincing standard in dismissal cases, especially where the reasons for dismissal involve acts which allege moral turpitude (criminal behavior or socially stigmatizing behavior).
- Arbitrators almost never apply the beyond a reasonable doubt standard, even in dismissal cases.

What can be relied upon in establishing proof?

- Circumstantial evidence
- The “smoking gun” – video, computer, admission
- Credibility of witness statements
- Prior behavior

Answer = all of the above

6. Has the employer administered its rules and penalties in an equal manner?

Discipline may be held to be without just cause if it can be shown that the grievant has been treated unfairly as compared to other employees.

Two possible scenarios:

1. Disparate Treatment
2. Discrimination

Disparate Impact vs. Discrimination

Disparate impact = an individual receives less favorable treatment, not because he happens to be a member of a particular group, but because some rule or policy was applied differently or not applied at all to others.

Discrimination = unfavorable treatment of an individual because he or she happens to be a member of a particular group.

Disparate Treatment

- Other employees who engaged in similar conduct are currently being treated or in the past were treated in a more favorable manner; or
- What was previously acceptable conduct on the employee's part has somehow become unacceptable.
- In both cases, it is unnecessary for the employee to demonstrate any ill motive.

Discrimination

- The grievant is facing less favorable treatment because he or she is a member of a particular group.
- Unlike discrimination under the law, it is unnecessary to demonstrate that the discrimination is based on one of the traditional protected classifications, although it could be.
- Discrimination under just cause may also be based on other groupings, such as hourly versus salaried employees, supervisors versus subordinates, or one job classification versus another.

Causes of Unequal Treatment – Why does it occur?

- Personal prejudices and biases;
- Change in supervisors;
- Misconduct by multiple employees, some who have historically been “good” and some “bad;”
- Changes in societal opinions or sensitivities;
- Different degrees of external pressure.

7. Is there a reasonable relationship between the penalty and the misconduct?

“Indeed, it is an essential element of ‘just cause’ that the penalty in a discipline case be fair and reasonable and fitting to the circumstances of the case. For although an employee may deserve discipline, no obligation to justice compels imposition of the extreme penalty in every case or a penalty that is more severe than the nature of the offense requires.”

- Wolverine Shoe & Tanning Corp., 18 LA 809 (1952)

Reasonableness of penalty – What factors will an arbitrator look to?

- Impact, economic or otherwise, of the penalty on the employee.
- Impact on the employer of the misconduct engaged in by the employee.
- Whether other, non-disciplinary options for correcting behavior were available to the employer.
- The past record of the employee.
- Length of service with the organization.

Reasonableness of penalty – What factors will an arbitrator look to?

- Presence of any mitigating factors.
 - medical considerations
 - “unclean hands” on the part of the supervisor
 - legitimate excuse for engaging in misconduct
- Utilization of Progressive Discipline.

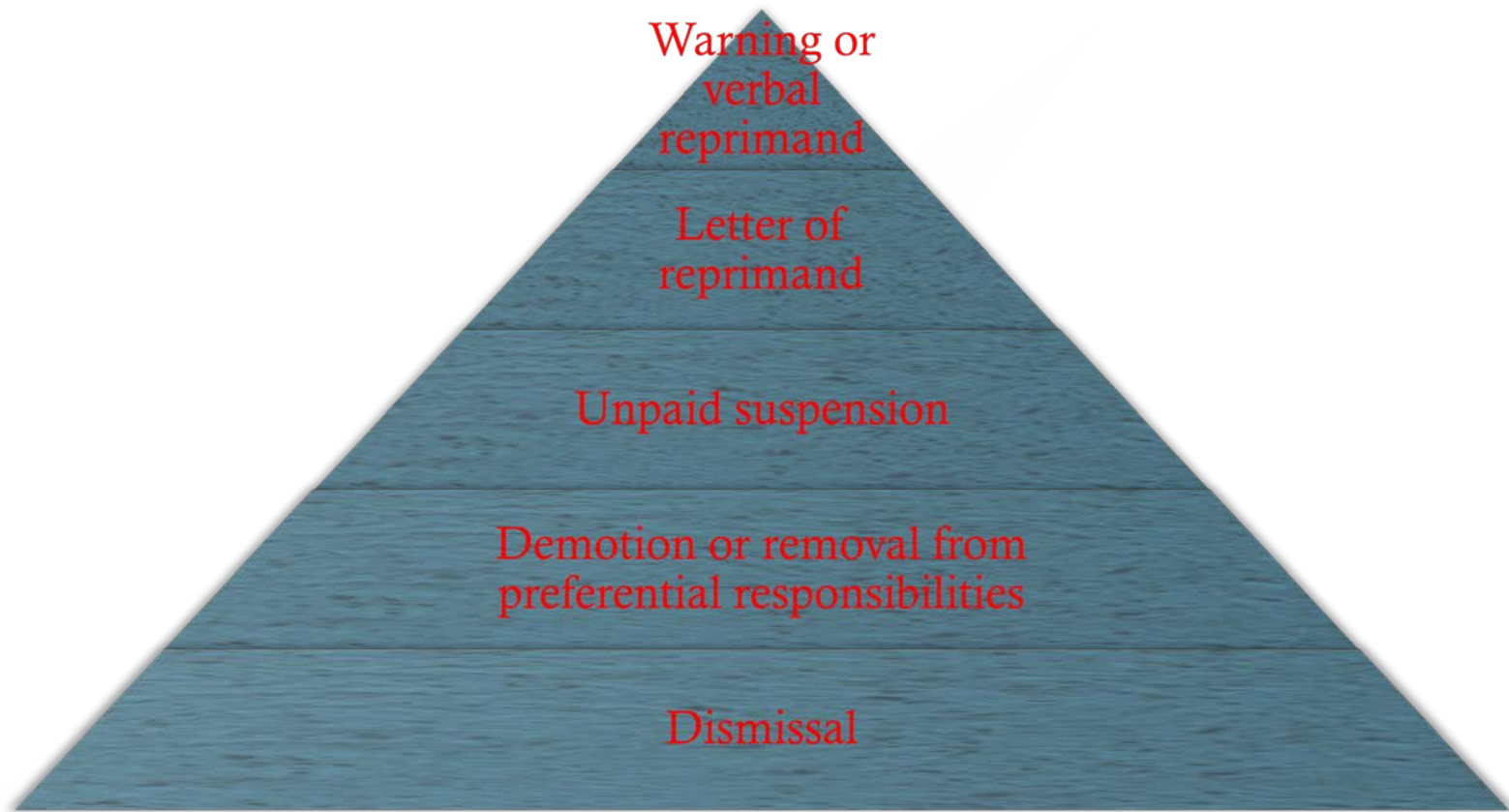
Progressive Discipline

Goal of discipline should be to correct behavior rather than to punish misconduct.

“Progressive discipline is not simply an escalator to crucify an employee. Through it an employer must demonstrate an honest and serious effort to salvage rather than savage an employee.”

- Victory Markets, Inc., 84 LA 354 (1985)

Progressive Discipline



Progressive Discipline

- Progressive discipline allows summary discharge for those class of offenses like theft, violence, and egregious dishonesty or insubordination.
- Not every step in the progressive discipline scheme must be implemented in every situation.
- In some instances, steps of the progressive discipline scheme may have to be utilized more than once before moving on to the next.

Applying just cause in situations involving off-duty misconduct

Arbitrators have historically allowed an employer to discipline for off-duty misconduct in the following situations:

1. The behavior harms the company's reputation or product.
2. The behavior renders the employee unable to perform his job or appear at work.
3. The behavior leads to refusal, reluctance or inability of other employees to work with him/her.
4. The behavior undermines the ability of the employer to direct the work force.

What does each of these look like in the school environment?

Applying just cause in situations involving off-duty misconduct

Just cause must still be met. The following steps of the just cause test are most implicated by off-duty misconduct:

1. Did the employee have notice of the rule or expectation?
2. Did the employee have notice of the consequences of violating the rule or expectation?
3. Was the rule or expectation reasonable?

Applying just cause in situations involving off-duty misconduct



Barriers to addressing off-duty misconduct

Contractual – *“The personal life of a member is not an appropriate concern of the District so long as it does not interfere with the member’s contractual work responsibilities.”*

- Could the conduct result in the loss of licensure necessary to hold the job?
- Does the conduct demonstrate a potential or actual danger to fellow staff, students, or district property?
- Is the conduct directly contrary to established curriculum the employee is responsible for delivering?
- Did the conduct cause actual physical loss to the district?

Barriers to addressing off-duty misconduct

Constitutional – First Amendment of the U.S.
Constitution; state constitutions

- Freedom of speech – *Is the speech concerning a matter of public concern? Does the interest in the efficient operation of the schools outweigh the employee's personal interests?*
- Freedom of religion – *Is the activity in question bona fide religious expression or observance?*

Off-duty criminal conduct

Special considerations where off-duty behavior is also criminal in nature:

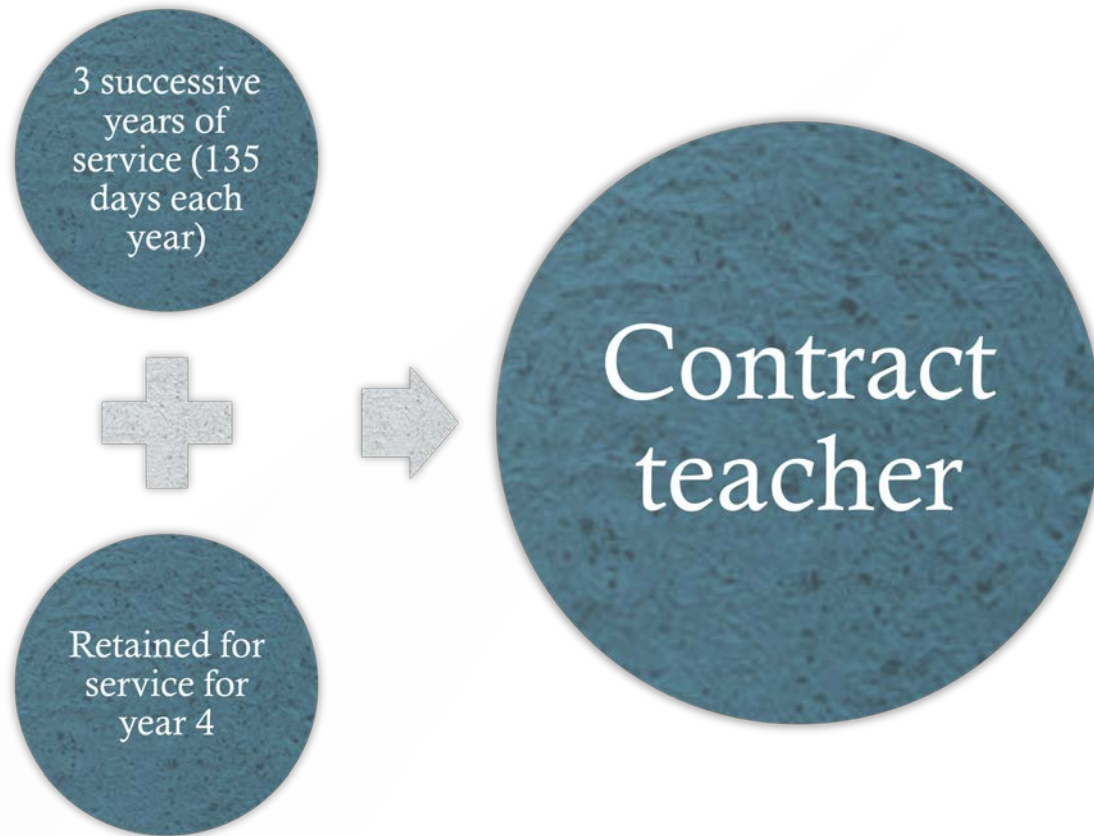
- Can a district proceed with discipline before an employee is actually charged with a crime? Before there is a conviction or guilty plea? If there is ultimately no criminal charge or conviction?
- What if the employee refuses to answer investigatory questions due to Fifth Amendment concerns?
- What if the employee is sentenced to jail for a period of time?
- What about the timelines in a complaint procedure?
- What if law enforcement directs you not to investigate?

Review your contract – It doesn't stop with just cause!

There are many other contractual pitfalls in a discipline or dismissal situation, such as:

- **Evaluation language** – failure to follow established process may cause the evaluations that support a dismissal to be invalid.
- **Personnel files** – contracts may place limits on what can go in a file and when, and how long material can stay in a file.
- **Paid suspensions** – Does your contract restrict the employer's ability to put someone on paid suspension during an investigation? Are there prerequisites?
- **Progressive discipline** – Does your contract mandate a sequence of disciplinary actions that must be followed? Does it restrict when you can move from one level of discipline to another?

Teacher Dismissal – Probationary Teachers



Teacher Dismissal – Probationary Teachers

Unless otherwise modified by CBA:

- May be dismissed at any time during probationary period.
- “For any cause deemed in good faith sufficient.”
- May only be formally dismissed by board action.
- Written reasons must be provided.
- Upon request, may have a hearing before the board.

Teacher Dismissal – Contract Teachers

- Unless alternate standard is provided for in CBA, governed by Fair Dismissal Law
- Appeal is heard by three-member panel made up of 1 teacher, 1 board member and 1 community member from like-size district (FDAB)
- FDAB decisions may be appealed to Oregon Court of Appeals and Oregon Supreme Court

Teacher Dismissal Process

Recommendation for dismissal from principal or HR to superintendent

Pre-termination hearing before superintendent

Superintendent recommendation to school board

Opportunity to be heard by board, followed by board action

Appeal to FDAB, and potentially Oregon Court of Appeals

Procedural Highlights – ORS 342.895

- Only the school board can dismiss a teacher.
- The school board can only dismiss a teacher upon the recommendation of the superintendent.
- A minimum of 20 days must elapse from the date of the superintendent's recommendation to the board taking action.
- The board is not required to conduct a “hearing” prior to taking action.

Grounds for Dismissal – ORS 342.865

A contract teacher may only be dismissed for one or more of the following reasons:

- Inefficiency
- Immorality
- Insubordination
- Neglect of duty
- Physical or mental incapacity
- Conviction of a felony or certain crimes
- Inadequate performance
- Failure to comply with reasonable requirements of the board for professional improvement
- Any cause that is grounds for revocation of license

Fair Dismissal Standard

1. Are the facts relied upon true and substantiated?
 - Facts must be proved by a preponderance of the evidence.
2. If yes, are the facts adequate to constitute one or more of the listed statutory grounds?
3. If yes to both, is the board's dismissal decision unreasonable, arbitrary or clearly an excessive remedy?

Off-duty conduct as grounds for dismissal

- Certain off-duty conduct may constitute neglect of duty or immorality sufficient to warrant dismissal.
- Must be a nexus between the conduct and the work/school environment.
- Many instances of criminal behavior that does is not a felony or on the list of crimes set forth in ORS 342.143 will not be sufficient grounds for dismissal.
- It is not enough that parents/students might find out about certain behavior and be shocked or upset.