



# Employee Issues:

The Board of Education's Role in Dealing with Employment  
Issues for Certificated Employees

Rex R. Schultze, Esq.

NASB/NCSA  
STATE EDUCATION  
CONFERENCE 2009  
November 29th  
4:30 to 5:30 p.m.  
November 19, 2009

I. Introduction: One of the most perplexing and misunderstood issues for board members is how school districts must deal with the evaluation of the performance of superintendents, administrators and teachers and the role of the board of education in that process.

II. The Board's Role – The Basics:

- Superintendent – The one employee over whom the Board has direct supervision.
  - Authority to hire – Neb. Rev. Stat. § 79-501, and Neb. Rev. Stat. § 79-594.
  - Term of contract is not to exceed three (3) years - Neb. Rev. Stat. § 79-594.
  - Always a probationary employee; review provisions of Neb. Rev. Stat. § 79-828 regarding employee status, evaluation and non-renewal of the contract of the Superintendent.
    - The contract of a probationary certificated employee shall be deemed renewed and remain in full force and effect unless amended or not renewed in accordance with sections 79-824 to 79-842.
    - If the probationary certificated employee is a superintendent, he or she shall be evaluated **twice during the first year of employment** and at least once annually thereafter.
    - If the school board determines that it is appropriate to consider whether the contract of the superintendent should be amended or not renewed for the next school year, such certificated employee shall be given written notice that the school board will consider the amendment or nonrenewal of such certificated employee's contract for the ensuing school year (statute requires notice by April 15, but usually Superintendent's contracts require notice by January).
    - The probationary employee shall be observed and evaluation shall be based upon actual classroom observations for an entire instructional period. If deficiencies are noted in the work performance of any probationary employee, the evaluator shall provide the teacher or administrator at the time of the observation with a list of deficiencies, a list of suggestions for improvement and assistance in overcoming the deficiencies, and follow-up evaluations and assistance when deficiencies remain.
    - Upon request of the Superintendent, notice shall be provided which shall contain the written reasons for such proposed amendment or nonrenewal and shall be sufficiently specific so as to provide such employee the opportunity to prepare a response and the reasons set forth in the notice shall be employment related.
    - The school board may elect to amend or not renew the contract of a Superintendent for any reason it deems sufficient if such nonrenewal is not

- for constitutionally impermissible reasons, and such nonrenewal shall be in accordance with sections 79-824 to 79-842.
- Prior to scheduling of action or a hearing on the matter, if requested, the notice of possible amendment or nonrenewal and the reasons supporting possible amendment or nonrenewal shall be considered a confidential employment matter as provided in sections 79-539, 79-8,109, and 84-1410 and shall not be released to the public or any news media.
  - At any time prior to the holding of a hearing or prior to final determination by the school board to amend or not renew the contract involved, the probationary certificated employee may submit a letter of resignation for the ensuing year, which resignation shall be accepted by the school board.
  - The probationary certificated employee shall be afforded a hearing which shall not be required to meet the requirements of a formal due process hearing as set forth in section 79-832 but shall be subject to section 79-834 (informal hearings at which the probationary certificated employee or superintendent, or his or her representative, shall be afforded the opportunity to discuss and explain his or her position with regard to continued employment, to present information, and to ask questions of those appearing on behalf of the school district).
- Contract - Superintendent's contract of employment and the terms and term thereof a critical document; should be prepared in consultation with legal counsel; the Board of Education and all members should know and understand the provisions of the Superintendent's contract. DO NOT USE A FORM PROVIDED BY A THIRD PARTY.
    - Term of contract – cancellation of employment during the term of the contract must be supported by “just cause.”
    - Neb. Rev. Stat. § 79-824 (4) – “Just cause means: (a) Incompetency, which includes, but is not limited to, demonstrated deficiencies or shortcomings in knowledge of subject matter or teaching or administrative skills; (b) neglect of duty; (c) unprofessional conduct; (d) insubordination; (e) immorality; (f) physical or mental incapacity; (g) failure to give evidence of professional growth as required in section 79-830; or (h) other conduct which interferes substantially with the continued performance of duties.”
    - Formal due process required – Neb. Rev. Stat. § 79-832.
  - Evaluation – Care should be taken to develop and adopt a process and procedure for the evaluation of the Superintendent and an evaluation instrument that measures objectively the Superintendent's performance adopted by the Board of Education.
    - Evaluation instrument form:
      - ❖ Annual goals and objectives (a more subjective form of evaluation).
      - ❖ Performance standards (a more objective form of evaluation).
      - ❖ Combination of annual goals and performance standards.
    - Evaluation process:
      - ❖ Should include:

- ✓ Annual review of evaluation instrument and process by all Board members (usually in January);
  - ✓ Review of Board goals with Superintendent - both short term and long term – establish expectations and objectives for Superintendent to assist the Board and lead the students, staff and community to meet the desired outcomes (usually in February).
  - ✓ Review by Board with Superintendent of performance standards for positions set forth in evaluation instrument (usually in August).
  - ✓ Evaluation of Superintendent (usually in October or November as pre-condition of renewal of contract by January as required by most contracts; also in March or April for a first year Superintendent).
    - ✚ Distribute evaluation instrument to all Board members;
    - ✚ Individual Board members conduct their evaluation;
    - ✚ Board President or other designated Board member compiles results and distributes to Board for review and preparation of cumulative Board evaluation;
    - ✚ Delivery of evaluation to Superintendent and review of evaluation with Superintendent; and,
    - ✚ Recommendation of renewal or non-renewal (usually in November or December).
- Principals – Under the direct supervision of the Superintendent. Subject to the Teacher Tenure Act, Neb. Rev. Stat. §§ 79-824 through 79-842.
    - Not subject to direct Board of Education supervision or evaluation.
    - Recommendation regarding employment made to the Board of Education by the Superintendent (e.g. evaluate the Superintendent on his/her performance in evaluation of principals and teachers).
    - Achieve permanent status after three (3) years of employment, just as teachers (note a tenured teacher hired as an administrator retains tenured status earned as a teacher when assigned to administrative position).
    - Board of Education has authority and should in conjunction with the Superintendent adopt evaluation instrument and procedure for principals and other administrators.
  - Teachers – Under the direct supervision of Principal and indirectly by the Superintendent (or possibly direct if Superintendent is also serving as principal).
    - Not subject to direct Board of Education supervision or evaluation.
    - Recommendation regarding employment made to the Board of Education by the Superintendent (e.g. evaluate the Superintendent on his/her performance in evaluation of principals and teachers).
    - Achieve permanent status after three (3) years of employment, just as teachers (note a tenured teacher hired as an administrator retains tenured status earned as a teacher when assigned to administrative position).

- Board of Education has authority and should in conjunction with the Superintendent adopt evaluation instrument and procedure for principals and other administrators.
  - Board of Education establishes the Standard of Performance expected of teacher through the adoption of evaluation instruments and processes.
    - ❖ Tool for Administrators to improve teaching.
    - ❖ Tool and guide for teachers to self evaluate and improve teaching.
    - ❖ Board should confirm evaluations are done, and support the administration when evidence is presented that the standards are not met by a Teacher.
  - Board members do not have authority to evaluate teachers.
    - ❖ NDE Rule 10, Section 007.06A1f requires the school district policy to describe the district plan of training administrators.
      - ✓ Additionally, Section 007.06B requires that all evaluators possess a valid Nebraska Administrative Certificate and be trained to use the evaluation system adopted by the district.
      - ✓ Trained in the "use" of the system means not only training in how to fill in the blanks, but training in the educational theory behind the criteria in the instrument, and the performance of a teacher that meets those criteria. This training should be both formal and informal, and be documented by the school district and the administrator on an annual basis.
      - ✓ Administrators must apply the models that incorporate the elements of good teaching in evaluation of staff.
      - ✓ Teachers, as professionals, must want to improve instruction and embrace a process to enhance student learning.
    - ❖ Access to teacher's personnel file – Neb. Rev. Stat. § 79-8,109 – “district and shall have the right to attach a written response to any item in such file. Such teacher, administrator, or employee may in writing authorize any other person to have access to such file, which authorization shall be honored by the district. Such access and right to attach a written response shall not be granted with respect to any letters of recommendation solicited by the employer which appear in the personnel file. No other person except school officials while engaged in their professional duties shall be granted access to such file, and the contents thereof shall not be divulged in any manner to any unauthorized person.
    - ❖ Content of teacher's files are not subject to Public Records Act – Neb. Rev. Stat. § 84-712.05 of the Public Records Act includes a specific provision allowing most personnel information to be withheld from the public: “The following records, unless publicly disclosed in an open court, open administrative proceeding, or open meeting or disclosed by a public entity pursuant to its duties, may be withheld from the public by the lawful custodian of the records: . . . (7) Personal information in records regarding

personnel of public bodies other than salaries and routine directory information.”

- ❖ Employment status and evaluations are confidential – Neb. Rev. Stat. § 79-828(6) possible amendment or nonrenewal shall be considered a confidential employment matter as provided in sections 79-539, 79-8,109, and 84-1410 and shall not be released to the public or any news media. See, also Neb. Rev. Stat. § 79-827(3) relating to confidentiality of tenured teachers’ employment status and evaluations.
- ❖ Board members’ response to patron concerns about a teacher's performance in the classroom.
  - ✓ Board members should defer and refer to the Administration.
- ❖ Board member access to teacher files: The question of whether an individual Board member has a right to review teacher evaluations was addressed in a recent case out of Pennsylvania, the court ruling that the Board member’s review of the teachers’ files was unlawful (*Bangor Area Education Association v. Angle*, 720 A.2d 198 (Pa.Cmwlth. 1998), aff’d, 750 A.2d 282 (Pa. 2000)).
  - ✓ The court granted the request, ruling that “a constitutional right to privacy protects public school teachers and their personnel files.”
  - ✓ The trial court had also reasoned that individual Board members should not review teacher evaluations because they might later serve an “adjudicatory” role in the event of a teacher termination hearing.
  - ✓ The appellate court held, “[T]he Board is occasionally required to sit as an adjudicatory body regarding issues involving personnel matters such as teacher contract termination, teacher tenure and labor disputes. In such cases, it is inconsistent for an individual Board member to obtain information outside of the hearing process that is protected by a privacy right relative to a teacher who may appear before the Board for dismissal proceedings. Such action would preclude the Board as a whole from properly performing its adjudicatory function because information obtained outside of the hearing process could be used inappropriately to formulate the Board's adjudication.”
- Action on a teacher's contract initiated by the Administration delivering a letter to the teacher notifying them of the recommendation of contract non-renewal, termination or cancellation.
  - Notice must be given by April 15, except in the case of a cancellation.
  - If a hearing is requested the process is essentially the same for probationary and permanent teachers.
    - The hearing must be held within 30 days of request for hearing; and not later than May 15 in RIF’s, non-renewals, and terminations.

- Time line for board final determination and for holding of hearing may be continued upon written agreement.
- Probationary Teachers — Neb. Rev. Stat. § 79-834 provides for an informal due process hearing; opportunity to be heard.
- Permanent Teachers — Neb. Rev. Stat. § 79-832 provides that at a formal due process hearing the “school board shall render the decision to amend, cancel, terminate, or not renew a certificated employee’s contract, BASED SOLELY ON THE EVIDENCE PRODUCED AT THE HEARING.”
- Assistance to the Board through the hearing process usually provided by an attorney from a different firm than the attorney representing the administration; advises the board prior to the hearing, assists in conducting the hearing, assists in preparing findings and determinations.
- Procedures to protect the district from lawsuits resulting from the employment action.
  - ❖ Protect the Record on Appeal — Retain a court reporter to transcribe the hearing.
  - ❖ Attorney for Administration.
  - ❖ Attorney to advise the Board of Education.
  - ❖ Preserve Board impartiality.
    - ✓ A "fair tribunal" free from bias is a basic tenet of due process.
    - ✓ Presumption that public officials carry out their duties with honesty and integrity and that a showing of bias must be supported by evidence of a personal or financial stake in the decision showing a conflict of interest. (See, Hortonville Dist. 1 v. Hortonville Ed. Assoc., 426 U.S. 482 (1976).
    - ✓ Courts have held that board members may be questioned (the legal process is called “voir dire”) to determine if they have previously formed an opinion with regard to the employee that would prevent the board member from being fair and impartial.
    - ✓ What can I tell Frank at the coffee shop about the hearing? “Frank, as Board member I have to act like a juror, so I can't talk to you about it. If you have information you think is pertinent to the matter or a concern, please contact the Superintendent.”
  - ❖ Protect against discrimination claims.