

Individual Contracts and the Non-renewal Process for Teachers



By: Robert Butler
WASB Associate Executive Director
Staff Counsel

bbutler@wasb.org
1-877-705-4422 (phone)
1-608-512-1703 (direct phone)
1-608-257-8386 (fax)

Topics Covered

- ▶ **Who is covered by employment contract requirements?**
 - ▶ **Contract requirements and term**
 - ▶ **Provisions to include and avoid**
 - ▶ **Non-renewal process for teachers**
 - ▶ **Due process and job security provisions**
-
- ▶ This presentation is a product of the Wisconsin Association of School Boards, Inc. This presentation is intended to provide authoritative general information, with commentary, as a service to WASB members. The materials and information provided in this presentation should not be relied upon as legal advice. If needed, legal advice regarding any topic, issue, situation, or incident should be obtained from the school district's legal counsel. © 2020

Basic Contract Requirements

- ▶ Common law requirements for an employment contract:
 - Competent parties
 - Legal subject matter
 - A meeting of the minds of both parties
 - Detailed provisions, including salary, duties, job security, and contract term
 - Valid consideration.
 - A court's role is to protect each party by ensuring that promises will be performed, but for a contract to be enforceable, its terms must be so definite that the promises and performances to be rendered by each party are reasonably certain.
- ▶ Teacher contracts must be in writing, approved by a majority vote of the full membership of the board, and filed with the school board clerk. [118.21\(1\)](#) and [118.22\(2\)](#).

Contracts – In General

► Contract Interpretation - Unambiguous Terms:

- It is well settled in Wisconsin case law that an unambiguous contract must be understood to mean what it clearly expresses.
- When a contract is not ambiguous it is clear that the court may not depart from the clear meaning of the contract.
Cernohorsky v. Northern Liquid Gas Co, 268 Wis. 586, 592-593 (1955).

Contracts – In General

► Contract Interpretation - Ambiguous Terms:

- Only when the contract is ambiguous, meaning it is susceptible to more than one reasonable interpretation, may the court look beyond the face of the contract and consider extrinsic evidence to resolve the parties' intent. Capital Investments v. Whitehall Packing Co., 91 Wis. 2d 178 (Wis. 1979).
- Wisconsin courts have held that contract language is ambiguous when it is reasonably and fairly susceptible to more than one construction. *James v. Jenkins, 88 Wis. 2d 712, 722m 277 N.W. 2d 815, 819 (1979).*

Administrators - Wis. Stats. 118.24

- ▶ **Covered in all instances:** § Wis. Stats. 118.24 (1)
 - District administrator
 - Business manager
 - School principals
 - Assistants to such persons
- ▶ **If they are employed to perform only administrative services, the following administrators are also covered: § 118.24 (8)**
 - Personnel administrators and supervisors
 - Curriculum administrators
 - Assistants to such persons

Bus Drivers - Wis. Stats. 121.52(2)

- ▶ (a) All drivers of motor vehicles owned by the school district and used for the transportation of pupils shall be under written contract with the school board of the district.
- ▶ (b) The owner or lessee of all privately owned motor vehicles transporting pupils for compensation shall be under written contract with the school board of the district for which such transportation is provided. The contract shall require the owner or lessee to perform any action necessary for the owner or lessee or the school board to fulfill any obligation specified in sub. (5) or s. 121.555.
- ▶ (c) The form of contract shall be prescribed by the department and shall provide that all parties to the contract are subject at all times to rules adopted by the secretary of transportation under s. 110.06 (2) and by the department.
- ▶ Wis. Stats. 121.52(2)

Teachers – Wisconsin Statute 118.21

- ▶ Wisconsin Statute 118.21(1) The school board shall contract in writing with qualified teachers.
- ▶ The contract, with a copy of the teacher's authority to teach attached, shall be filed with the school district clerk.
- ▶ Such contract, in addition to fixing the teacher's wage, may provide for compensating the teacher for necessary travel expense.
- ▶ A teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void.
- ▶ All teaching contracts shall terminate if, and when, the authority to teach terminates.

Teachers – Wisconsin Statute 118.21

- ▶ Wisconsin Statute 118.21(2) Any person who contracts to teach in any public school shall file in the office of the school district administrator, within 10 days after entering into such contract, a statement showing the date of expiration and the grade and character of certificate or license held.
- ▶ In any school district not having a school district administrator, the statement shall be filed with the school district clerk.
- ▶ No order or warrant may be issued by the school district clerk in payment of the salary of any teacher, unless the teacher has complied with this subsection.

Teachers – Wisconsin Statute 118.21

- ▶ Wisconsin Statute 118.21(3) School boards may provide in the contracts of teachers of agricultural and homemaking courses for payment out of school district funds for services performed outside the school district and connected with the performance of their regular teaching duties, and for travel expenses connected with such services.
- ▶ (4) School boards may give to any teacher, without deduction from the teacher's wages, the whole or part of any time spent by the teacher in attending a teachers' educational convention, upon the teacher's filing with the school district clerk a certificate of attendance at the convention, signed by the president or secretary of the association conducting the convention.

Teachers – Wis. Stats. 118.22

- ▶ Wis. Stats. 118.22(2) . . . No teacher may be employed or dismissed except by a majority vote of the full membership of the board.
- ▶ Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board.
- ▶ No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under contract of employment with another board.

Other Employees

- ▶ **Summer School Employee Contracts?**
 - Teachers teaching courses that receive state aid
 - Teachers teaching courses as “enrichment”, not part of pupil academic record
- ▶ **Extra-Curricular Contracts?**
- ▶ **Support Staff Personnel?**
- ▶ **Supervisory employees not explicitly covered by §118.24?**

Contract Term

- ▶ **The contract term varies depending upon position.**
- ▶ **Typical contract terms are as follows:**
 - **Administrator – 2 years contract term duration**
 - Designated number of days per contract year
 - How days are allocated if not a full 260 per year
 - **Teacher – 1 year contract term duration**
 - Designated number of days per contract year
 - How days are allocated if not a full-time teacher
 - **Bus Driver – school term or other term designated in the contract**

Teachers – Contract Term

Set forth in Wis. Stats. §118.22

- ▶ **One Year Contract Term Implied by the following statutory provisions:**
 - (2) *On or before May 15 of the **school year** during which a teacher holds a contract, the board by which the teacher is employed or an employee at the direction of the board shall give the teacher written notice of renewal or refusal to renew the teacher's contract for the **ensuing school year**. If no such notice is given on or before May 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew the teacher's contract for the ensuing school year on or before May 15, shall accept or reject in writing such contract not later than the following June 15...*

Teachers – Contract Term set forth in Wis. Stats. §118.22

- ▶ One Year Contract Term Implied by the following statutory provisions:
 - ***(3) At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year...***

What about issuing multiple 1-year contracts at the same time?
Although this case covered administrators, the court's logic and rationale may be transferrable to a teacher contract situation.

- *Klaus v. Eau Claire Area Sch. Dist.*, Case 3:09-cv-00479 (W.D. WI 2010)

Modification of Existing Teacher Contracts

- ▶ The timing of these modifications/negotiations will be dictated by the nonrenewal statute and timeline (discussed in more detail below):
 - [Wis. Stats. 118.22\(2\)](#): On or before May 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employee at the direction of the board shall give the teacher written notice of renewal or refusal to renew the teacher's contract for the ensuing school year.
 - If no such notice is given on or before May 15, the contract then in force shall continue for the ensuing school year.
 - A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew the teacher's contract for the ensuing school year on or before May 15 shall accept or reject in writing such contract not later than the following June 15.

Modification of Existing Teacher Contracts

- ▶ The timing of these modifications/negotiations will be dictated by the nonrenewal statute and timeline:
 - [Wis. Stats. 118.22\(3\)](#) ***At least 15 days prior to giving written notice of refusal to renew a teacher's contract*** for the ensuing school year, the employing board shall inform the teacher by **preliminary notice** in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a **private conference** with the board prior to being given written notice of refusal to renew the teacher's contract.
 - Note, however, that these timelines may be influenced by existing individual contracts, policies or handbook provisions.

Modification of Existing Teacher Contracts

- ▶ The timing of these modifications/negotiations will be dictated by the nonrenewal statute and timeline:
 - [Wis. Stats. 118.22\(2\)](#) (***continued***): . . . Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board.
 - Boards should begin planning prospectively to give adequate advanced notice to teachers and to allow time for subsequent negotiations and/or modifications.
 - Any changes will need to be agreed upon before the board needs to issue notice of nonrenewal or intent to renew.

Modification of Existing Contracts

- ▶ The timing of these modifications/negotiations will be dictated by the nonrenewal statute and timeline:
 - Boards must leave themselves time to determine whether they are willing to nonrenew teachers who are unwilling to accept proposed modifications to existing agreements.
 - Boards are not required to give just cause protection for the nonrenewal of a teacher's contract, and teachers have no property interests in the renewal of their contracts (unless the individual contract grants just cause or some other job security standard for nonrenewal).
 - See *Beischel v. Stone Bank School District*, 362 F.3d 430 (7th Cir. 2004)

Salary Provisions

- ▶ **Administrator:** Salary provisions set by individual contract
- ▶ **Teacher:** Salary provisions set by individual contract and possible collective bargaining agreement as it applies to total base wages
- ▶ **Bus Driver:** Wage provisions set by individual contract and possible collective bargaining agreement as it applies to total base wages

Teacher - Salary Provisions

- ▶ **Total Base Wage Limit:** 2011 Wisconsin Act 10 limits collective bargaining to increases to the total base wages only, and also caps the percentage increase to the total base wages to the average annual percentage increase to the CPI, unless a referendum is approved to exceed the cap. §§ [111.70 \(4\)\(mb\)](#) and [118.245](#).
- ▶ This cap applies only to employees who have recertified their collective bargaining units/representatives.
- ▶ The Wisconsin Employment Relations Commission was charged with certifying the CPI increase and creating the costing rules for calculating the “total base wages” subject to increase. This number is 1.81% for 2020-2021 teacher contracts.

Teacher Salary Provisions

- ▶ For renewed contracts, salary for this school year cannot be less than it was last year absent a voluntary agreement.
- ▶ Failure to pay may trigger policy or handbook issues.
- ▶ Provide step, lane, or other form of compensation movement based upon completion in accordance with individual contract, board policy, and employee handbook requirements.
- ▶ Any salary provision listed in an individual agreement must include a clause making it subject to any subsequent collective bargaining agreement reached over the base wage increase if a union still has bargaining rights over total base wages.



Salary Provisions

- ▶ **Individual bargaining demands in addition to traditional salary schedules:**
 - Signing/retention bonuses;
 - Pay based upon performance, certification, supply and demand;
 - Credit reimbursement, promissory notes to cover tuition expenses, etc.
 - This will place a premium on (a) performance evaluations and (b) record keeping. ***Why?***



Salary Provisions

- ▶ Districts have seen smaller groups of teachers join together to make group demands:
 - Prohibited “collective bargaining”?
 - Enforceable?
 - *Kabes v. Sch. Dist. of River Falls*, 2004 WI App 55
 - Such an “agreement,” which was entitled “Personnel Practices for Leadership Management Team” and that outlined administrators’ responsibilities, rights, and employment benefits as well as the District’s rights and responsibilities, was only enforceable upon the administrators who actually signed it.

Assignment & Responsibilities

- ▶ **Should the contract identify the administrator's or teacher's specific assignment?**
- ▶ Kabes v. School District of River Falls, 2004 WI App 55
 - Individual contracts specifically named Kabes as the high school principal and Buchholz as its high school assistant principal.
 - During the spring semester, the District reassigned Kabes to one of its elementary schools and Buchholz to one of its middle schools.
 - The District did not change their duties or compensation, but the administrators' filed suit and claimed that the district's reassignments breached their individual contracts.

Assignment & Responsibilities

- ▶ Kabes v. School District of River Falls, 2004 WI App 55
(continued)
 - The District argued that it retained its right to assign and transfer its administrators, but the court held that the district abdicated those rights when it specifically contracted with the administrators to perform their duties ***at the high school***.
 - Consequently, the court held that the district breached the contracts when it unilaterally transferred the administrators to different schools.

Assignment & Responsibilities

► Alternatives for Assignment - Teachers:

- Include a provision that the teacher's assignment is subject to change as educational needs dictate within the teacher's area of certification.
- Does this give the teacher an argument that he/she should be retained if a staff reduction is to occur and she/he is certified for the position?



Assignment & Responsibilities

► Administrator and Teacher responsibilities:

- The contract should also reference those duties and responsibilities specified in the job description, as well as any others contained in board policies or an employee handbook, but also note that the duties are subject to changes as educational needs dictate.
- Include a catch-all provision stating the district expects him or her to take part in/supervise extracurricular activities, group meetings, curriculum development, etc. and fulfill any other duties within the scope of his or her professional competence as assigned by the board.



Assignment & Responsibilities

- ▶ **Administrator and teacher responsibilities (continued):**
 - Districts must clearly specify administrator and teacher responsibilities because, even if the contract does not specifically require the board to show that it has cause to terminate the administrator/teacher, the administrator/teacher still has a property right in the salary specified in the agreement and that property right cannot be taken away without due process.
 - Therefore, if a district terminates an administrator/teacher, it still must be able to prove that it did so because the administrator/teacher failed to perform in accordance with duties and responsibilities contained in the individual contract.
 - Do economic reasons constitute cause to terminate a contract? See *Ploederer v. Osseo-Fairchild Sch. Dist.*, Case No. 3:09-cv-00479(Wis. Cir. Ct. 2008).

Certification

- ▶ Wis. Stats. 118.21(1) provides for the following (*emphasis added*):
 - *The school board shall contract in writing with qualified teachers. The contract, with a copy of the teacher's authority to teach attached, shall be filed with the school district clerk. Such contract, in addition to fixing the teacher's wage, may provide for compensating the teacher for necessary travel expense. A **teaching contract with any person not legally authorized to teach the named subject or at the named school shall be void. All teaching contracts shall terminate if, and when, the authority to teach terminates.***

Certification

- ▶ A teacher's lack of legal authority to teach assigned courses, although known to the school board at time of hiring and subsequent assignments, was sufficient ground for dismissal despite the fact that school superintendent repeatedly assured the teacher that the certification problem was an administrative omission that would be cured by the board. *Grams v. Melrose-Mindoro Jt. School Dist. No. 1*, 78 Wis. 2d 569, 254 N.W.2d 730 (1977).



Liquidated Damages

- ▶ Liquidated damages are not intended to be punitive, but rather to allow the district to recover the cost of finding a replacement administrator/teacher.
- ▶ Although a board may refuse to accept a resignation, a court would not likely order specific performance of the contract.
- ▶ Is the clause reasonable under the “totality of the circumstances”? *Jarosch v. American Family Mutual Insurance Company, 2011 WL 43563346 (ED Wi September 16, 2011)*



Liquidated Damages

- ▶ Factors to consider in determining if the clause is reasonable under the “totality of the circumstances”:
- ▶ Did the parties intend to provide for damages or a penalty?
- ▶ Is the injury caused by the breach difficult or incapable of accurate estimate at the time of the contract?
- ▶ Are the stipulated damages a reasonable forecast of the harm caused by the breach?

Jarosch v. American Family Mutual Insurance Company, 2011 WL 43563346 (ED Wi September 16, 2011)



Liquidated Damages

- ▶ 118.24 (6) . . . No such board may enter into a contract of employment with an administrator for any period of time as to which the administrator is then under a contract of employment with another board.
- ▶ Therefore, without a liquidated damages clause, a board would have to sue the administrator for breach of contract and/or the other district for tortious interference with a contract to recover any costs or damages.
- ▶ See e.g., WASB's [Legal Comment, Liquidated Damages in Teacher Contracts, \(8/09\). Legal Comment August 2009](#)



Other Provisions to Include

- ▶ **Invalid Provisions - Savings clause**
- ▶ **Jurisdiction:** Provision specifying that the contract is subject to the laws of the State of Wisconsin both in effect as of the date the contract is executed and enacted thereafter.
- ▶ **Non-renewal:** Provision specifying that renewal & nonrenewal are governed by the applicable statutes - §118.22 for teachers and §118.24 for administrators.



Other Provisions to Include

- ▶ **Complete Agreement**
- ▶ **Modification by Collective Bargaining Agreement (if applicable)**
- ▶ **Termination Standard** (more on this in subsequent slides)
- ▶ **Physical Examination**
- ▶ **Agreement to abide by board policies, procedures, etc. not in conflict with individual contract**



Other Provisions to Include

- ▶ **Draftsmanship of contract**
- ▶ **Captions/Headers**
- ▶ **Waiver**
- ▶ **Amendments:** How Amendments are made to the contract.
- ▶ **Date:** Board meeting at which contract was acted upon and executed.
- ▶ **Signatures & Date of Signatures**



Provisions to Avoid

- ▶ **Just cause** for nonrenewal of an administrator's or teacher's contract.
- ▶ **Waiver of statutory nonrenewal timelines & procedures**
 - *Faust v. Ladysmith-Hawkins Sch. Systems*, 88 Wis. 2d 525 (1979)



Provisions to Avoid

► Individual layoff provisions?

- *Faust v. Ladysmith-Hawkins Sch. Systems*, 88 Wis. 2d 525 (1979)
- “[E]ven had she known of her rights and had voluntarily acquiesced in her waiver, the waiver would be ineffective. Where a statutorily created private right serves a public policy purpose, the persons or entities protected by the statute cannot waive the right.” *Von Uhl v. Trempealeau County Mut. Ins. Co.*, 33 Wis.2d 32, 146 N.W.2d 516 (1966); *Jones v. Preferred Accident Ins. Co.*, 226 Wis. 423, 425, 275 N.W. 897 (1938).
- Brown County Circuit Court Judge in *Schneider* held that a teacher contract permitting layoffs during the term of the contract was permissible.
- See *Schneider v. Howard Suamico School District*, Case No. 2013-CV-397 (January 22, 2014).



Provisions to Avoid

- ▶ **Contracts that proclaim administrators or teachers are at-will employees.**
 - Brown County Circuit Court Judge in *Schneider* held that a teacher contract could be terminated during the contract term for non-arbitrary and non-capricious reasons.
 - See *Schneider v. Howard Suamico School District*, Case No. 2013-CV-397 (January 22, 2014).
- ▶ **Rolling or continuous two-year contracts for administrators, see *Klaus v. Eau Claire Area Sch. Dist.*, Case 3:09-cv-00479 (W.D. WI 2010).**

Standard for Discipline & Discharge

- ▶ **Just cause:** Most administrator's and teacher's individual contracts include provisions requiring that the employer have cause or just cause for termination of the contract during its term.
 - "Just cause" is a standard that focuses on the conduct, qualifications and performance of the employee. A school district does not have just cause to terminate an administrator when it has budgetary problems and terminates an administrator to reduce costs. *Ploederer v. Osseo-Fairchild School District*, Eau Claire County Cir. Ct., 2008.
- ▶ **Non-Arbitrary or Non-Capricious Reasons:** Brown County Circuit Court Judge in *Schneider* held that a teacher contract could be terminated during the contract term for non-arbitrary and non-capricious reasons.
 - See *Schneider v. Howard Suamico School District*, Case No. 2013-CV-397 (January 22, 2014).

Discipline And Discharge Standard - Teachers

Wisconsin Case Law:

- ▶ A school board has the authority to dismiss a teacher before the expiration of the teacher's contract for **good and sufficient cause**. See *Curkeet v. Joint School District* (1914), 159 Wis. 149, 152, 153, 149 N. W. 708. and *Millar v. Jt. School District No. 2*, 2 Wis. 2d 303 (1957).
- ▶ Any inexcusable substantial violation by an employee of instructions, or neglect of duty of a substantial character, or any misconduct inconsistent with the relations of master and servant and which might injuriously affect the former's business, regardless of any express agreement on the subject, constitutes good ground for discharging the employee."
· See *Millar v. Jt. School District No. 2*, 2 Wis. 2d 303, 313 (1957).



Other Considerations

► Administrator & Teacher Evaluation:

- Sec. 121.02(1)(q), Wis. Stats. - Each school board shall: Evaluate, in writing, the performance of all certified school personnel at the end of their first year and at least every 3rd year thereafter.
- Place evaluation procedures in individual contracts or in board policy?
- Use student examination scores?

Other Considerations

▶ Pay received over 9 or 12 months?

▶ Wis. Stats. §109.03 When wages payable; pay orders.

- (1) Required frequency of payments. Every employer shall as often as monthly pay to every employee engaged in the employer's business . . . All wages earned by the employee to a day not more than 31 days prior to the date of payment. . . The required frequency of wage payments provided in this subsection does not apply to any of the following:
 - (a) Employees covered under a valid collective bargaining agreement establishing a different frequency for wage payments, including deferred payments exercised at the option of employees.
 - (b) School district . . . employees who voluntarily request payment over a 12-month period for personal services performed during the school year, unless such employees are covered under a valid collective bargaining agreement which precludes this method of payment.

Other Considerations

▶ Public Employee Residency Requirements Prohibited

- [Wis. Stats. 66.0502](#). With certain exceptions that are generally not applicable to school districts, the law provides that no local governmental unit may require, as a condition of employment, that any employee or prospective employee reside within any jurisdictional limit.

Other Considerations

► Covenants Not to Compete

- Wis. Stats. §103.465 Restrictive covenants in employment contracts.
- A covenant by an assistant, servant or agent not to compete with his or her employer or principal during the term of the employment or agency, or after the termination of that employment or agency, within a specified territory and during a specified time **is lawful and enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer or principal.**
- Any covenant, described in this subsection, imposing an unreasonable restraint is illegal, void and unenforceable even as to any part of the covenant or performance that would be a reasonable restraint.

Other Considerations

► Covenants Not to Compete

- Restrictive covenants in Wisconsin are prima facie suspect as restraints of trade that are disfavored at law and must withstand close scrutiny as to their reasonableness. *Star Direct, Inc. v. Dal Pra*, 2009 WI 76, 767 N.W.2d 698 (2009).

Other Considerations

► Charges for Training

- Provision of collective bargaining agreement between city and firefighters, requiring any firefighter leaving city's employment within three years to reimburse city for cost of training did not violate Wisconsin Statute concerning Restrictive Covenants Provision was not linked to competition and it was unconditional whether firefighter went back to school; changed occupations or retired.
Heder v. City of Two Rivers, Wisconsin, 295 F. 3rd 777 (7th Cir. 2002).

► Promissory Notes and Re-Payment Schedules

Other Considerations

► Compensation for Early Return of Contracts

► Intellectual Property

- Ownership

- **Work Made for Hire:** A work made for hire is one that is either “prepared by an employee within the scope of his or her employment or a commissioned work in which the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.” *Recht v. Metro Goldwyn Mayer Studio, Inc.* 580 F.Supp 2d 775, 783 (W.D. Wis. 2008).

- Transfer of Ownership

- Use Agreements

Nonrenewal At A Glance

- ▶ **Part I: Preparing for “preliminary notice”**
- ▶ **Part II: “Preliminary notice”**
- ▶ **Part III: Period between “preliminary notice” and nonrenewal notice**
- ▶ **Part IV: Nonrenewal notice and beyond**

Before Preliminary Notice: Is the Statutory Process Required?

- ▶ § 118.22 Wis. Stat. specifies statutory procedures for the nonrenewal of **full-time** teacher contracts.
 - An employee handbook, individual teaching contract, and/or board policy may extend the § 118.22 procedures to part-time teachers.
- ▶ The elimination of a teacher's position, the reduction in time for a teacher, or the non-renewal of a teacher for performance, budgetary or programmatic reasons can be either done through a voluntary agreement with the teacher or by the School Board issuing a preliminary notice of nonrenewal.

Before Preliminary Notice: Is the Statutory Process Required?

- ▶ If the preliminary notice of nonrenewal route is taken, it should be done by a majority vote of the full membership of the board.
- ▶ 118.22 Wis. Stats only covers full-time teachers.
- ▶ 118.22 Wis. Stats. does not define what constitutes a full-time teacher, however the DPI recently promulgated licensure rules that define a full-time teacher.
- ▶ It is possible that a court may cite the DPI definition if asked to interpret 118.22 Wis. Stat, however in informal discussions DPI has stated that the definition applies to licensure.

Before Preliminary Notice: Prerequisites to Nonrenewal

► Handbook & Policy considerations and Items to Review:

- Job Security Standard - Just cause, Arbitrary & Capricious, etc.
- Evaluation procedures
- Professional assistance and allowing time for improvement
- Documented teacher performance and notice to teachers as required
- Statutory nonrenewal procedures should not apply to extracurricular assignments

Before Preliminary Notice: Evaluations

- ▶ Statutory Requirements:
 - [Sec. 121.02\(1\)\(q\), Wis. Stats](#) requires school boards to conduct written performance evaluations not later than the end of a teacher's first year and at least every third year thereafter.
 - A school board should also follow the statutory requirements under [§ 118.225](#) if the school board intends to use the value-added analyses of scores on examinations administered to pupils under [§ 118.30](#) and [20 U.S.C. § 6311\(b\)\(3\)](#) to evaluate teachers.

Before Preliminary Notice: Nondiscrimination

- ▶ Nonrenewal is unlawful if it is motivated, even in part, by the teacher's union activities or other protected, concerted activity.
- ▶ Nonrenewal may not be based on age (Wisconsin's Fair Employment Act prohibits mandatory teacher retirement), race, color, creed, religion, sex (including pregnancy and childbirth), sexual orientation, marital status, national origin, citizenship status, ancestry, disability, arrest record, conviction record, honesty testing, use or nonuse of lawful products outside the workplace during nonworking hours, military service, or declining to attend a meeting or to participate in any communication about religious matters or political matters.

Before Preliminary Notice: Nondiscrimination

- ▶ Teachers may not be non-renewed for:
 - Making reports required under the Child Abuse and Neglect Act;
 - For having filed an unemployment or worker compensation claim;
 - For having obtained a genetic or AIDS test;
 - For having exercised rights or opposed practices forbidden under the state or federal Family and Medical Leave or federal Fair Labor Standards Acts, among others;
 - For opposing unlawful employment practices or participating in actions to enforce rights under numerous statutes dealing with employee records, hazardous substances in the workplace, and various types of wage-and-hour claims.

Before Preliminary Notice: Nondiscrimination

- ▶ A nonrenewal may not be based on a teacher's disability:
 - The teacher must be able to perform the essential functions of the job.
 - The district may need to provide reasonable accommodations to teachers with a "disability" as the term is defined in the ADA or WFEA.
 - An accommodation is reasonable if it is effective and does not cause the employer undue hardship.
 - Accommodations may include changes in work schedules, part-time work, minor job restructuring, acquisition, modification, or permission to use specialized equipment, provision of interpreters, readers, or aides, leaves of absence, perhaps beyond the leaves provided under the terms of a board policy, employee handbook or the FMLA, and transfer to a vacant position where appropriate.

Before Preliminary Notice: Due Process

- ▶ The 14th Amendment to the U.S. Constitution prohibits the government (school boards included) from depriving any person of **liberty or property** without due process of law.
- ▶ Due process issues may arise when a board's decision to nonrenew or terminate an administrator's or teacher's contract raise property or liberty interests.



Before Preliminary Notice: Due Process

- ▶ Administrators and teachers have a property interest in completing the term of their contracts.
 - Termination of employment before the end of a contract raises a property interest.
 - Nonrenewal of a contract does not in itself raise a property interest, unless the contract requires just cause or some other level of job security for nonrenewal.
 - A suspension without pay probably raises a property interest, although “the Supreme Court has not had occasion to decide whether due process protections extend to discipline short of termination, Gilbert v. Homar, 520 U.S. 924, 929.” Klaus v. Eau Claire Area School District, Federal District Court, Western District of Wisconsin, 7/13/10.

Before Preliminary Notice: Due Process

- ▶ Administrators and teachers have a **liberty interest** in their good name and reputation. A liberty interest arises where an allegedly false charge is made against an administrator or teacher that:
 - Damages the administrator's or teacher's standing in the community (charges of dishonesty, treason or immorality); or
 - Limits the administrator's or teacher's freedom to take advantage of present or future employment opportunities.

Before Preliminary Notice: Due Process

- ▶ Due process requirements when property interests are involved:
 - Notice of charges
 - Hearing prior to termination or nonrenewal
 - An explanation of evidence used to support charges
 - The administrator or teacher must be given an opportunity to state his or her case.
 - The board's decision must not be arbitrary or capricious, biased, or discriminatory.
- ▶ If a liberty interest is at stake, due process requires that the administrator or teacher be given an opportunity prior to discharge or nonrenewal to clear his or her name.

Before Preliminary Notice: Due Process

- ▶ **Due process is a flexible concept** – the process that is due varies with the significances of the individual and governmental rights involved.
- ▶ **Impartial Decision Maker:** Due process requires that the decision maker be impartial.
- ▶ **Administrators, teachers, and school boards may contract for less than what due process may otherwise be required.**
 - In [Klaus v. Eau Claire Area School District](#), Federal District Court, Western District of Wisconsin, 7/13/10, the contract specified that, before being disciplined, the administrator would receive a meeting before the full Board on the merits of the proposed discipline and that the discipline would be neither arbitrary nor capricious.

Before Preliminary Notice: Open Meetings Law

► Notice, deliberation, and voting:

- In case of teacher without due process or job security rights, deliberation and voting may be done in closed session. [§ 19.85\(1\)\(c\) Wis. Stat.](#)
- If the teacher has due process or job security rights, the nonrenewal may be considered a “dismissal” such that [§ 19.85\(1\)\(b\) Wis. Stat.](#) more appropriately applies. Under [§ 19.85\(1\)\(b\)](#) the board must notify the teacher of any evidentiary hearing that may be held prior to the board taking final action and that the teacher has a right to demand that any such evidentiary hearing or meeting be held in open session. The board must also provide the teacher notice of any meeting in which final action may be taken.

Before Preliminary Notice: Other Constitutional Rights

► First Amendment:

- The first amendment protects personal privacy and freedom of speech, religion, and association in addition to the government's establishment of religion. Teachers may not be non-renewed for their exercise of those personal rights.
- A nonrenewal that impinges on such rights may nevertheless be lawful if the board reasonably believes the teacher's conduct would disrupt the school, undermine supervisory authority, or destroy close working relationships.
- If the nonrenewal is based on a teacher's statements about matters of personal (rather than public) concern or based on a teacher's statements made pursuant to his or her official duties, the First Amendment generally does not afford such speech any protection.

Before Preliminary Notice: Other Constitutional Rights

► First Amendment (continued):

- The First Amendment may not be violated if the board can demonstrate it would have non-renewed regardless of the teacher's constitutionally protected conduct.
- Be cautious in non-renewing because of a teacher's choice of teaching methodology, as the First Amendment also protects some measure of "academic freedom."

Before Preliminary Notice: Other Constitutional Rights

► Fourth Amendment:

- Protects against unreasonable searches and seizures.
- Searches and seizures of desks and files for non-investigatory, work-related reasons are reasonable, provided the teacher has no reasonable expectation of privacy.
- Searches and seizures of desks and files that are part of a district investigation of work-related misconduct are reasonable.
- Breathalyzers/blood and urine samples qualify as a search – must have reasonable suspicion.
- Mandatory random testing for drugs, alcohol, or diseases should be avoided as the constitutionality of such searches is questionable.

Before Preliminary Notice: Other Constitutional Rights

► Fifth Amendment:

- Protects against self-incrimination.
- If a nonrenewal is for conduct that might be the basis for criminal prosecution, a board may not non-renew a teacher for invoking the privilege against self-incrimination.
- However, a board may non-renew a teacher who refuses to respond to its questions after having been advised, prior to the board's initiating questioning, that the answers will not be used against him/her in a criminal proceeding (Garrity warning).

Before Preliminary Notice: Open Meetings Law

- ▶ Meetings at which the board will take action pursuant to the statutory nonrenewal timelines and procedures must comply with the Open Meetings Law:
 - Public notice.
 - Meetings must initially be open to public.
 - Closed sessions – board president's announcement must be made and an exemption must apply.

Preliminary Notice of Nonrenewal

- ▶ Give preliminary notice of refusal to renew a teacher's contract at least 15 days prior to giving formal written notice of refusal to renew.
- ▶ Give preliminary notice no later than last day in April.
 - Do not wait for last minute to allow cushion of time to deliver formal written notice.
- ▶ Note that board action is required.
 - Comply with the Open Meetings Law.

Preliminary Notice of Nonrenewal

► Content of notice:

- Under [§ 118.22](#), “preliminary notice” must state that if the teacher files a request with the school board within 5 days of receipt of the notice, he/she is entitled to a private conference with the school board prior to being given written notice of refusal to renew.
- The best practice is to hand deliver the “preliminary notice,” have the teacher sign and date a copy of the “preliminary notice,” and place the copy in the teacher’s file. The preliminary notice should be delivered in the form of a memorandum or letter from the school board.

Preliminary Notice of Nonrenewal

- ▶ If the teacher is entitled to constitutional due process, include in the “preliminary notice” an offer to provide the teacher with the reasons why nonrenewal is being contemplated and an opportunity to respond.
- ▶ Comply with any additional notice requirements that may be imposed by any applicable individual teaching contract, employee handbook, board policies or the Open Meetings Law.

Between Preliminary Notice and Final Notice of Nonrenewal

- ▶ If the teacher requests a private conference, the meeting should be scheduled as soon as possible:
 - The private conference is a meeting subject to the Open Meetings Law.
 - Purposes of the private conference:
 - The teacher may challenge the administration's recommendations and persuade the board to renew the contract;
 - The teacher may use the private conference as an opportunity to negotiate a resignation agreement with the board; or,
 - The teacher may use the private conference to simply resign.

Between Preliminary Notice and Final Notice of Nonrenewal

► Resignation:

- A resignation should be in writing, addressed to the school board or its clerk, dated, and signed by the teacher.
- The resignation should state the teacher is resigning voluntarily, unconditionally, and waives any right to further hearing by the board.
- If the teacher has placed conditions on the resignation, a formal separation agreement should be created.
- A resignation may be found to be a constructive discharge if the teacher can prove that school officials made working conditions so intolerable that the teacher was forced to quit.

Between Preliminary Notice and Final Notice of Nonrenewal

► Resignation Agreement Should Include (for example):

- A release and waiver by the teacher of all potential liability on the part of the district, board, individual board members, attorneys, agents, employees, and volunteers of the district for damages, costs, fees, and expenses arising out of specified circumstances or incidents.
- If the employee is 40 years of age or older, the release must comply with federal regulations to effectively release the district from liability under the Age Discrimination in Employment Act.
- A resolution of any pending grievances, administrative proceedings, or lawsuits.

Between Preliminary Notice and Final Notice of Nonrenewal

► Resignation Agreement Should Include:

- An indemnification by the teacher in the event the release and waiver provisions are violated or held unenforceable.
- A denial of any wrongdoing by the district, board, etc.
- A statement that the agreement is entered into by the teacher freely, knowingly, and voluntarily.
- Whether the separation is permanent - if not, the conditions under which the teacher will be considered for future employment.
- Return of District property.

Between Preliminary Notice and Final Notice of Nonrenewal

► Resignation Agreement Should Include:

- Whether the teacher will be granted any severance or termination pay or benefits, and if so, how such payment will be made and whether it will be subject to tax withholding.
- The date on which the resignation becomes effective.
- What arrangements will be made for salary, retirement, and insurance benefits, unused vacation, sick leave, or compensatory time.

Between Preliminary Notice and Final Notice of Nonrenewal

► Resignation Agreement Should Include:

- An agreement as to whether unemployment compensation will be paid or waived.
- Whether the board will provide a letter of reference and the terms of any such letter.
- The disposition of the teacher's personnel file.
- Whether the board will observe any restrictions in responding to job reference inquiries from other employers.

Between Preliminary Notice and Final Notice of Nonrenewal

► Resignation Agreement Should Include:

- A statement that the separation agreement is a complete resolution of the employment relationship and claims arising thereunder and that no other understandings or agreements for future benefits or claims exist.
- That the teacher is resigning voluntarily and waives any right to further hearing by the board.
- A savings clause.
- A statement that the agreement is subject to present and future law and regulations and if any part of the agreement is in conflict with the law or regulations, the law and regulations control.

Between Preliminary Notice and Final Notice of Nonrenewal

► Resignation and mandatory reporting to DPI:

- Under [Wis. Stats. § 115.31](#), a district administrator must report to DPI for investigation and possible license revocation any teacher who resigns if there is a reasonable suspicion that the teacher has resigned because of immoral conduct, which is defined as “conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil.”
- Immoral conduct includes the “intentional use of an educational agency’s equipment to download, view, solicit, seek, display, or distribute pornographic material.”

Between Preliminary Notice and Final Notice of Nonrenewal

- ▶ **Resignation and mandatory reporting to DPI:**
 - An administrator who requests a resignation and suspects the teacher engaged in immoral conduct must inform the teacher of the duty to report him/her to the state superintendent. Any report required under [§ 115.31](#) must be made within 15 days of the resignation.
 - A copy of the report must be sent to the teacher.
 - The report must also include a complete copy of the licensee's personnel file and all records related to any investigation.

Between Preliminary Notice and Final Notice of Nonrenewal

- ▶ If a teacher is entitled to due process, private conference should be structured so that it meets the constitutional requirements.
- ▶ **Procedural due process:**
 - **Liberty interest:** Teacher must be given an opportunity to clear name.
 - **Property interest:** Teacher must be offered a pre-nonrenewal hearing that includes oral or written notice of reasons for nonrenewal, explanation of the district's evidence and an opportunity for the teacher to present his/her side of the story.

Between Preliminary Notice and Final Notice of Nonrenewal

► Due process:

- Where property interest is involved, board decision to non-renew must not at a minimum be arbitrary nor capricious. Higher standards may apply based upon the individual contract, board policy, or employee handbook.
- Procedural due process is a flexible concept that will vary with circumstances of nonrenewal.

Between Preliminary Notice and Final Notice of Nonrenewal

- ▶ **Procedural due process requires:**
 - Advance notice of charges;
 - Teacher may be represented by advocate of teacher's choice;
 - Teacher has opportunity to call witnesses and present evidence;
 - Teacher has opportunity to cross-examine witnesses, and
 - The decision maker must be impartial.

Between Preliminary Notice and Final Notice of Nonrenewal

► School board as impartial decision maker.

- School boards are presumed to be impartial unless risk of bias is unusually high.
- Bias may exist where:
 - A board member has a financial interest in the outcome of the nonrenewal.
 - A board member has a personal conflict with the teacher.
 - A board member has a personal or family interest in the nonrenewal.
- If bias is a problem, the board member should recuse himself or herself.



Between Preliminary Notice and Final Notice of Nonrenewal

- ▶ The board should have an attorney at the due process hearing.
 - The attorney should not represent both the administration and board – if one attorney is used, that attorney should represent board.
 - The counsel who represents the administration in a nonrenewal should not participate in the board's deliberations.

Between Preliminary Notice and Final Notice of Nonrenewal

- ▶ **A pre-nonrenewal due process meeting is acceptable where a post-nonrenewal full evidentiary hearing is available.**
 - Grievance procedures under pre-Act 10 collective bargaining agreements usually met the due process requirement of a full evidentiary hearing.
 - Post-Act 10 collective bargaining agreements will not contain such grievance procedures, so if non-renewed teachers with a property interest at stake do not have access to the statutory grievance procedure, the private conference should be structured to provide an evidentiary hearing.

Between Preliminary Notice and Final Notice of Nonrenewal

- ▶ **Other private conference considerations:**
 - The school official who presented the reasons for giving preliminary notice of nonrenewal should attend the private conference.
 - Board members who vote on the nonrenewal must attend the entire private conference and/or evidentiary hearing.

Nonrenewal Notice & Beyond

- ▶ **Vote to Non-renew:** The decision to non-renew must be by a majority vote of the full membership of the board.
- ▶ **Meeting Minutes:** The name of the teacher non-renewed must be recorded in the meeting minutes as well as the motion and roll-call vote.

Nonrenewal Notice & Beyond

- ▶ **The nonrenewal notice must be delivered:**
 - No later than May 15, and
 - 15 or more days after the date of delivery of the preliminary notice of nonrenewal.
 - Do not wait until the last day of April to deliver the preliminary notice as this leaves you only one day (May 15) to deliver the nonrenewal notice.

Nonrenewal Notice & Beyond

- ▶ The best practice is to hand deliver the written notice of refusal to renew the teacher's contract, have the teacher sign and date a copy of the notice, and place the copy in the teacher's file.
- ▶ The notice should be delivered in the form of a memorandum or letter from the school board.

Nonrenewal Notice & Beyond

- ▶ If no notice of nonrenewal is given on or before May 15, the contract then in force shall continue for the ensuing year.
- ▶ The teacher must accept or reject the contract, in writing, no later than June 15, although if a teacher misses the deadline, the Wisconsin Court of Appeals has repeatedly held that this provision does not require automatic termination.
- ▶ If the teacher does not respond by June 15, however, the board may be free to hire a new teacher, if the board has explicitly notified the teacher of this potential consequence.

Nonrenewal Notice & Beyond: Grievance Procedure

- ▶ School districts are required by statute to have a written grievance procedure that covers, at a minimum, workplace safety issues, discipline, and termination.
- ▶ The grievance procedure must provide access to an impartial hearing officer and a final appeal to the board.

Nonrenewal Notice & Beyond: Grievance Procedure

- ▶ It's not clear whether a reviewing court would consider a "nonrenewal" to constitute "discipline" or "termination."
- ▶ Many grievance procedures explicitly define "termination" to exclude "non-renewals."
- ▶ However, if the teacher has a property or liberty interest at stake, and the teacher has not received a full pre-nonrenewal due process hearing, the board may have to allow access to the grievance procedure.

Nonrenewal Notice & Beyond

- ▶ Report to DPI under [§ 115.31](#) if nonrenewal is due to a reasonable suspicion that teacher engaged in immoral conduct.
 - See discussion of [§ 115.31](#) under resignation above.
- ▶ Determine if the teacher is entitled to continue group health insurance coverage under COBRA.
- ▶ Determine if the teacher is eligible for unemployment compensation.

Grievance Procedure

66.0509(1m) grievance process

- ▶ Although a district could argue that a nonrenewal is not a termination because the separation from employment is not immediate (i.e., the district is simply informing a teacher that it is going to let the existing contract expire at the end of its term), a recent Wisconsin Court of Appeals decision adopted the common dictionary meaning of “terminate,” which is to “[t]o discontinue the employment of; dismiss.” See, *Dodge County Professional Employees Local 1323-A v. Dodge County*, 2013AP535 (Wis. Ct. App. Dec. 5, 2013).
- ▶ Given the holding in this case, a court could hold that a nonrenewal constitutes a dismissal or termination subject to the statutory grievance procedure, especially if the nonrenewal is for performance reasons (as opposed to budgetary reasons) or the administrator has just cause protection for nonrenewal. *But see, Marks v. Wis. Rapids Pub. Sch., Case No 14CV205* (May, 3 2016).

Grievance Procedure

66.0509(1m) grievance process

- ▶ **Marks – Wood County Circuit Court:** The district could provide in the individual contract that all nonrenewals were not subject to the statutory grievance procedure.
- ▶ **Schneider – Brown County Circuit Court:** Relying upon rationale used by the Wisconsin Court of Appeals in deciding an earlier case involving the statutory grievance procedure, the judge looked at the dictionary definition of discipline that equated discipline to punishment. Some nonrenewals, such as those for poor performance, could constitute punishment. Therefore, the judge held that the district could not categorically exclude all nonrenewals from the grievance procedure. However, nonrenewals for non-disciplinary reasons, such as those for financial considerations or decreased enrollment, might still be excludable from the grievance procedure.

Court Cases

► Beischel v. Stone Bank School District, 7th Circuit U.S. Court of Appeals, 2004.

Beischel was nonrenewed and argued that the public hearing given to her was unfair based on the claim that board members were biased, in part because she had provoked them.

- The court rejected this claim.
- The U.S. Supreme Court ruled in Hortonville School District v. Hortonville Education Association, (1976) that school board members enjoyed a presumption of honesty and integrity when conducting a hearing regarding the continued employment of public employees (in that case teachers on strike).

Court Cases

- ▶ The **employee has the burden to prove a risk of actual bias** on the part of the school board or its members.
 - “. . . *actual bias might arise if an adjudicator has a pecuniary interest in the outcome or has been a target of personal abuse from the party before him.*”
- ▶ The court found that Beischel had not met that burden of proof and dismissed her claim.

Court Cases

► Ulichny v. Merton Community School District, 7th Circuit U.S. Court of Appeals, 2001.

A change in the administrator's job duties, with no change in job title, salary, and benefits did not violate Ulichny's contract, Wisconsin law, or federal due process requirements.

- The contract did not specify particular administrator job duties so the change in duties did not violate the contract.
- The change in job duties was not sufficient to support Ulichny's claim that she was constructively discharged.
- The court found that the Superintendent's expression of concerns regarding Ulichny's relationship with teachers and parents did not damage her reputation to the degree that would support a charge of deprivation of a liberty interest.

Court Cases

- ▶ Kabes v. River Falls School District, Wis. Ct. Appeals, 2004.
 - Kabes was the high school principal and Buchholz the assistant high school principal at River Falls. Each had a contract with the school board specifying their respective positions as being the high school principal and assistant principal. The school board reassigned Kabes to an elementary school principal position and Buchholz to a middle school assistant principal position in 2002. Both brought suit, claiming that the reassignment constituted a breach of their contracts. The circuit court agreed and the district appealed.
 - The Court of Appeals noted that both Kabes' and Buchholz's contracts specified their positions as being at the high school. It rejected the school board argument that section 118.24(3) Wis. Stat. supersedes the individual contract to allow a reassignment in conflict with that contract. It noted that the individual contracts did not include a provision allowing the board to reassign employees.

Court Cases

- ▶ Atterberry v. Sherman, et al. 7th Circuit U.S. Court of Appeals, 2006.
 - Atterberry was an administrator in the Illinois Department of Professional Regulation. In that position, he supervised 10 employees and had an office, car, and parking space. Following accusations of misconduct, he was reassigned to an investigator position. He had to share an office and lost his car and parking space. He retained his salary and job classification.
 - Atterberry brought suit in federal court claiming that he was demoted without due process. The court rejected that claim. The due process claim was dependent upon Atterberry showing that the change in his job duties and working conditions deprived him of a property interest. The property interest must be based upon either contract or state law. Atterberry had no right under contract or law to not be subjected to the change in job duties or working conditions.

Court Cases

- ▶ Batagiannis v. West Lafayette Community School Corporation, 7th Circuit U.S. Court of Appeals, 2006.
 - Batagiannis, the Superintendent of the West Lafayette School District, was suspended with pay and later terminated by the Board after losing confidence in her leadership.
 - The court determined that Batagiannis had no property interest in continuing to be Superintendent (as opposed to a property interest in the compensation):
 - *Every appellate decision that has addressed the subject accordingly has held that a contractual right to be a superintendent of schools creates a property interest in the salary of that office but not the ability to make decisions on behalf of the public. . . A superintendent of schools is in this respect like a football coach or a corporate CEO: the office may be withdrawn if the agreed upon compensation is paid.*

Presenter Bio

Bob Butler has been a WASB staff counsel since 1990. He is also, along with attorney Barry Forbes, the Association's co-associate executive director. Bob directly represents more than 40 school districts in Wisconsin on employment, human resources and school law matters. Bob also provides membership services, including general legal information, to all school districts that are members of WASB.

He graduated from the University of Wisconsin Law School and received his undergraduate degree in industrial and labor relations from Cornell University. Bob can be contacted at:

bbutler@wasb.org

1-877-705-4422 (phone)

1-608-512-1703 (direct phone)

1-608-257-8386 (fax)

