Discipline, Termination and Nonrenewal Under Districts' Grievance Policies

As a general proposition, employment in Wisconsin is at will. An employer may discipline or terminate an employee at any time, with or without notice, and for any reason so long as that reason is not illegal.[1] However, at-will employment can be modified by contract, statute or internal employer policy or handbook. For example, prior to 2011 Wisconsin Acts 10 and 32 (Act 10), most district employees were covered by collective bargaining agreements that required just cause for discipline and discharge and established a grievance arbitration procedure under which employees could challenge such actions. While Act 10 prohibits the negotiation of these provisions with a union representing employees, that legislation does not prevent boards from adopting these provisions unilaterally. Act 10 also requires that boards adopt a grievance process with respect to employee discipline, termination and workplace safety ("Act 10 grievance policy").[2] An Act 10 grievance policy must provide for a hearing before an impartial hearing officer and an appeal process in which the highest level of appeal is the school board. In addition to the process established by districts' Act 10 grievance policies, districts must follow the statutory procedural requirements for the nonrenewal of contracted full-time teachers and specified administrators.

Thus, even though Wisconsin is an at-will employment state, all districts seeking to discipline, terminate or nonrenew an employee have procedural obligations of which they need to be aware.[3] In addition, boards need to ensure that their Act 10 grievance policies, contracts and internal policies and handbooks are consistent with respect to the standard under which the district may terminate or nonrenew employees and the processes that must be followed in doing so.

This *Legal Comment* will review employee termination and nonrenewal in the context of a district's Act 10 grievance policy and how that policy should dovetail with other statutory, constitutional and internal procedural guidelines. Its emphasis is not a comprehensive discussion of employee termination or nonrenewal although either, as will be discussed, will trigger the Act 10 grievance policy.

Termination and Nonrenewal of Employees with a Contract

Districts must enter into written contracts with teachers, specified administrators and drivers of motor vehicles owned by the district.[4] Districts can also enter into individual contracts with other employees for a specific term or duration even though there is no statutory obligation to do so. Districts may include in their employment contracts the standards under which such contracts can be terminated during their term. Absent such provisions, districts may only terminate such contracts during their terms for "good and sufficient cause."[5] The standard by which an employee contract can be terminated during its term is important not only because it determines the circumstances under which such action can take place, but also because it dictates the process that a district must use to accomplish that action.

An employee who has an expectation of continued employment arising from a policy, statute, handbook, collective bargaining agreement or individual contract has a protected property interest in the employee's employment. Under the 14th Amendment to the United States Constitution, no one can be denied a protected property interest without due process of law. Such a property interest arises if, for example, an employee can only be terminated under a "just cause" or "cause" standard.[6] An employee who has a property interest in the employee's employment is almost always entitled to a pre-termination hearing prior to being terminated although individual circumstances will affect how elaborate such a hearing must be.[7] In some cases, the employee will also be entitled to a post-termination hearing that should be aligned with the district's Act 10 grievance policy. Regardless of the standard for termination adopted by the board, a terminated employee will have the right to file a grievance under the district's Act 10 grievance procedure.

Nonrenewal of full-time teachers' or administrators' contracts at the end of their terms is governed by Wis. Stat. ss. 118.22 and 118.24, respectively.[8] These statutes establish time parameters by which such teacher or administrator must be notified of potential nonrenewal and the right to a conference or hearing with the school board. These nonrenewal statutes do not establish a substantive standard that a district must meet in order to nonrenew a teacher's or administrator's contract. However, a district must meet any standard that it has adopted by board policy, employee handbook or individual contract in order to take such action. If a district has adopted a "cause" standard for nonrenewal, the district will have to ensure the nonrenewal process comports with due process. In this situation, districts should consult with legal counsel in order to properly coordinate any required statutory conferences or hearings with the

district's Act 10 grievance policy and the requirements of due process.

Termination of Employees Without Contracts

In the absence of any standard for termination or nonrenewal in any board policy or handbook, district employees without a contract are at-will employees with no expectation of continued employment. While these employees are not entitled to a pre-termination hearing, they may follow a district's Act 10 grievance policy to obtain a hearing before an impartial hearing officer after termination. In addition, some boards have adopted processes that must be followed as a condition precedent to any employee termination. For example, a board that adopts, by policy, handbook or individual contract, a mandatory progressive discipline scheme that must be followed before an employee can be terminated has likely eliminated employees' at-will status and could also have created an expectation of continued employment for its employees. In addition, a board can adopt a standard for termination higher than an at-will standard, but lower than a cause standard. For example, an "arbitrary or capricious" standard requires a rational basis for termination and likely does not create an expectation of continued employment.

Act 10 Grievance Policies and Due Process

One issue subject to judicial interpretation is whether an Act 10 grievance policy creates a property interest in employment, thus triggering the need for a pre-termination hearing before terminating an employee. In *Nesvold v. Roland*,[9] a county employee filed a federal lawsuit alleging that his separation from employment violated his due process rights. The county adopted an Act 10 grievance policy under which the impartial hearing officer could only overturn the separation upon a finding that such action was arbitrary or capricious. The court held that the adoption of an Act 10 grievance policy does not create a constitutional property right. Significantly, the court also concluded that the adoption of an arbitrary or capricious standard does not create a property right, holding that, while such a standard moves the employment out of at-will status, it does not establish a cause standard sufficient to create a property right in continued employment. The court further recognized that the Act 10 grievance policy in and of itself satisfies federal due process rights even if that process does not provide all the relief that an employee seeks, such as front pay or future loss of earnings. This case suggests that the adoption of an Act 10 grievance policy that includes a standard of review short of "cause" or "just cause" does not give rise to a property right that would impose due process obligations on a district.

Act 10 Grievance Policies and Nonrenewals

Act 10 provides little guidance as to what should be included in an Act 10 grievance policy and there is scant legislative history to aid in its interpretation. For example, the statute does not define "employee," "termination," "discipline" or "workplace safety." Given this lack of statutory clarity as to the scope of employment actions subject to Act 10's provisions, many districts have adopted Act 10 grievance policies that limit the application of the grievance process by excluding certain employment actions from the definition of "termination."

Many districts have chosen to exclude from their Act 10 grievance policies any employment action caused by economic factors such as layoffs, furloughs, reductions-in-force, or wage and benefit adjustments. Many districts also exclude non-disciplinary employment actions from their Act 10 grievance policies, such as resignations, retirements, voluntary quits and administrative leaves with pay. Some districts have also excluded nonrenewals from their Act 10 grievance policy.

The extent to which districts are able to narrow the scope of their Act 10 grievance policy by defining the terms "discipline" and "termination" has been the subject of some litigation. In *Marks v. Board of Education of the Wisconsin Rapids Public School*, the district's individual contracts and Act 10 grievance policy stated that nonrenewals would be governed by the process set forth in Wis. Stat. s. 118.22 and would not be subject to the district's Act 10 grievance policy.[10] The court concluded that no statute provided evidence that the legislature intended for nonrenewals to be subject to the Act 10 grievance policy, particularly when it had established a procedure for nonrenewal in Wis. Stat. s. 118.22. The court concluded that the nonrenewal statute and the Act 10 grievance policy address two separate and distinct aspects of the employment relationship between districts and teachers. Therefore, it held that the individual teacher contracts did not unlawfully exclude nonrenewals from the Act 10 grievance policy.

In *Schneider v. Howard Suamico School District*, the district adopted an Act 10 grievance procedure which excluded teacher nonrenewals under Wis. Stat. s. 118.22 from the definition of "termination" and "discipline."[11] A nonrenewed teacher argued that this exclusion violated Act 10. The court concluded that "discipline" is akin to "punishment" after interpreting the statute by referencing the dictionary definition of "discipline." The court concluded that because some nonrenewals may constitute "punishment," nonrenewals could not be categorically excluded from the grievance procedure. The court did not consider whether nonrenewals are also "terminations." This decision suggests that an Act 10 grievance policy may exclude from its scope the nonrenewal of teacher or administrator contracts for non-disciplinary reasons. The decision also suggests that other non-disciplinary actions might be properly excluded

from an Act 10 grievance policy.

However, *Dodge County Professional Employees Local 1323-A v. Dodge County*, a court of appeals case that did not involve a school district contract nonrenewal, suggests that perhaps boards do not have much latitude in excluding certain employment separations from the definition of "termination."[12] In this case, the county adopted an Act 10 grievance policy that excluded from its provisions "termination of employment due to … lack of qualification …" An employee was convicted of operating a motor vehicle while under the influence of alcohol. County policy required as a qualification for employment that employees not have any convictions for operating under the influence of alcohol. The county terminated the employee because of her conviction. The employee grieved the discharge under the county's Act 10 grievance policy. The county refused to process the grievance because the employee was terminated for lack of qualifications, which was excluded from the definition of "termination."

The employee filed a lawsuit alleging that the statute required that her discharge be considered a "termination" and, thus, subject to the county's Act 10 grievance policy. The court of appeals agreed, holding that the county's exclusion of her discharge from the grievance process violated Act 10. In interpreting Act 10, the court used the dictionary definition of "termination" and found it to mean "to terminate" or to "discontinue the employment of; dismiss." The court, however, noted that not all employment separations are "terminations" within the meaning of the statute and emphasized that its ruling was meant to convey only that the action taken against this specific employee was a termination within the plain meaning of the statute. While *Marks* suggests the nonrenewal of teacher or administrator contracts can be excluded from a district's Act 10 grievance policy, *Schneider* and *Dodge County* cloud the issue. Thus, whether a contract nonrenewal can be excluded from an Act 10 grievance policy is subject to debate. A district should consult with its legal counsel in deciding whether to include nonrenewal actions within the scope of its Act 10 grievance policy.

The Impartial Hearing Officer's Review Standard

Act 10 does not establish any standard of review to guide the impartial hearing officer. In *Marks*, the board established an arbitrary or capricious standard for termination in its teacher contracts. Notwithstanding this, the employee argued that the individual teacher contracts implicitly created a cause standard for termination. The court rejected this argument and concluded that the board could adopt an arbitrary or capricious standard for termination in its contracts. This decision confirms that a district has the discretion to establish whatever standard it wishes with respect to employee terminations (whether they are subject to employment contracts or not), including at-will, arbitrary or capricious, or cause.

Conclusion

The Wisconsin Legislature gave districts significant discretion in the drafting of Act 10 grievance policies. Boards should review their individual teacher, administrator and other employee contracts, district policies and handbooks, and their Act 10 grievance policies to determine if the termination and nonrenewal standards and processes stated in each are consistent. Failure to be consistent can cause difficulties when terminating or nonrenewing an employee who seeks to contest that action. Boards should also review their Act 10 grievance policies to determine whether to include nonrenewal of teacher and administrator contracts within the definition of "termination" in that policy. The law is not clear in this area and consultation with legal counsel on this issue is advised. Finally, if a district's contracts, policies or handbooks create a cause or similar standard for discipline or termination, the board should review its policies, including its Act 10 grievance policy, to determine whether the processes set forth in them provide for appropriate due process. ■

End Notes

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1. *Vorwald v. Sch. Dist. of River Falls,* 167 Wis. 2d 549, 482 N.W.2d 93 (1992).
2. Wis. Stat. s. 66.0509(1m).
3. The remainder of this *Legal Comment* will reference just termination and contract nonrenewal, although the standards for discipline are generally the same as termination.
4. Wis. Stats. ss. 118.21, 118.24, 121.52(2)(a).
5. *Curkeet v. Joint Sch. Dist. No. 2*, 159 Wis. 149, 149 N.W. 708 (1914); *Millar v. Joint Sch. Dist. No. 2*, 2 Wis. 2d 303, 86 N.W.2d 455 (Ct. App. 1957).
6. *Beischel v. Stone Bank Sch. Dist.*, 362 F.3d 430 (7th Cir. 2004).
7. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).
8. There are no statutory procedures applicable to the nonrenewal of contracts for drivers of motor vehicles owned by the district.
9. *Nesvold v. Roland,* 37 F. Supp. 3d 1022 (W.D. Wis. 2014).
10. *Marks v. Bd. of Educ. of the Wis. Rapids Pub. Sch.*, No. 14-CV-205 (Wis. Cir. Ct. Wood Cty. May 3, 2016).
11. *Schneider v. Howard Suamico Sch. Dist.*, No. 2013-CV-397 (Wis. Cir. Ct. Brown Cty. Jan. 23, 2014).
12. *Dodge Cty. Prof'l Emp. Local 1323-A v. Dodge County*, 2014 WI App 8, 352 Wis. 2d 400, 842 N.W.2d 400.