Untying the Gordian Knot: Policies, Handbooks, Contracts and the Grievance Process

Presented by:
Steve Zach, Boardman & Clark LLP
Mary S. Gerbig, Davis & Kuelthau, s.c.
The Gordian Knot

“Turn him to any cause of policy
The Gordian Knot of it he will unloose
Familiar as his garter.”

Shakespeare, *Henry V*, Act I, Scene 1, 45-47
The Strands Of The Knot

• Individual Contracts
  • Statutory Provisions
    • §118.21, Wis. Stats.
    • §118.22, Wis. Stats.
    • §118.24, Wis. Stats.
The Strands Of The Knot

• Individual Contracts
  • Statutory Process
    • Teachers
      • Preliminary Notice of Non-renewal.
      • Private Conference.
      • Final Notice of Non-renewal.
The Strands Of The Knot

• Individual Contracts
  • Administrators
    • Administrator contracts may contain extension clauses which must be affirmatively acted upon to preclude an automatic extension of the contract.
  • Preliminary Notice of Non-renewal.
  • Hearing.
  • Notice of Non-renewal.
The Strands Of The Knot

• Individual Contracts
  • Statutory Process
    • Substantive Standard for Separation
      • No statutory standard for non-renewal of the contract at end of contract.
      • Individual contracts may provide a standard for termination.
      • Good and sufficient cause permits a school board to terminate a teacher or administrator during the term of the contract.
The Strands Of The Knot

• Grievance Systems
  • Every school district must have a statutory grievance system pursuant to 2011 Wisconsin Act 10 and codified at §66.0509, Stats.
  • Statutory provisions
    • 66.0509(1m)(c)1. A grievance procedure that addresses employee terminations.
    • 66.0509(1m)(c)2. Employee discipline.
    • 66.0509(1m)(c)3. Workplace safety.
The Strands Of The Knot

- Grievance Systems
  - Statutory provisions
  - Grievance policy must contain:
    - 66.0509(1m)(d)1. A written document specifying the process that a grievant and an employer must follow.
    - 66.0509(1m)(d)2. A hearing before an impartial hearing officer.
    - 66.0509(1m)(d)3. An appeal process in which the highest level of appeal is the governing body of the local governmental unit.
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• Grievance Systems
  • There is no statutory guidance for defining:
    • Termination, discipline and workplace safety.
    • The standard governing the Impartial Hearing Officer (IHO) or school board review.
    • The process by which the IHO and school board hear a grievance.
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• Process
  • There must be a hearing before an IHO.
    • There is no requirement as to what the process must encompass.
    • There is no definition as to who an IHO should be.
    • There is guidance from various court decisions regarding “impartial” hearing officers.
The Strands Of The Knot

• Process
  • The school board must hear the appeal of an IHO decision.
    • There is no requirement as to what the process must encompass.
    • There is no guidance as to whether the school board decision is appealable to circuit court.
    • There are court decisions that may help to guide the process.
The Strands Of The Knot

• Standard of Review
  • There is no standard to govern either the IHO or the school board in determining whether to affirm the administrative decision.
  • Potential standards arising from the collective bargaining era include:
    • At-Will employment.
    • Just cause.
    • Good and sufficient reason.
    • Arbitrary and capricious.
The Strands Of The Knot

- Policies and Handbooks
  - Board handbook provisions and District policies may set forth requirements that must be fulfilled before an employee may be disciplined, non-renewed or terminated or impact such consideration.
    - Probationary clauses
    - Progressive discipline
    - Process requirements
    - Separation standards
  - Districts that do not fulfill the requirements contained in their handbook provisions risk having their decisions to discipline, non-renew or terminate an employee overturned.
The Strands Of The Knot

• Other handbook considerations:
  • When the handbook or board policies are updated, is the language reconciled?
  • Is there more than one complaint or grievance process within the handbook and board policies?
  • If so, how are they reconciled?
The Strands Of The Knot

• Constitutional Due Process
  • Public employees are not automatically granted a property right in their jobs.
  • Where property interests are concerned, an employee is almost always entitled to a pre-termination hearing, although individual circumstances will affect how elaborate such a hearing must be.
  • Though state statutes or school policies may establish pre-deprivation procedures, failure to comply with these procedures is not a violation of procedural due process if constitutional minimums have been met.
The Strands Of The Knot

• Collective Bargaining Agreements (CBA):
  • Not a factor?
  • The developing and on-going drama of Act 10.
The Knots

• Does the statutory grievance system create a property right giving rise to due process?
• Are your strands consistent?
• What are the potential ramifications for tying the terms of an individual contract to a District handbook or policy?
• If so, can the District unilaterally change the contract?
• Does it matter what standard for discipline, dismissal or non-renewal is established?
• Can layoff be subject to the grievance process?
The Knots

• Can an aggrieved party appeal a school board decision to circuit court under Chapter 227?
• Does it matter how termination is defined in a grievance policy?
• Can a school district exclude non-extension of an administrator contract from the grievance process?
• Can a grievance policy establish a standard for termination of an individual contract different than good and sufficient cause?
Clues from the Past

• There are a variety of court decisions that discuss elements of:
  • Characteristics of impartial decision makers.
  • Bias and pecuniary interests.
  • Common law concepts of due process.
  • Fundamental Fairness.