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What Does Due Process Mean for Employee Discipline?

The United States Supreme Court decision in *Cleveland Board of Education vs. Loudermill* 470 U.S. 532 (1985), was a significant development in the law of constitutional procedural due process regarding employment. The legal ruling arose from a decision by the Cleveland, Ohio school district to discharge two employees, Loudermill and Donnelly. Both of these individuals were civil service employees of the Cleveland school district who could be terminated only for "cause" under state law. The school district fired Loudermill and Donnelly when it discovered that Loudermill, a security guard, had a previous felony conviction (not permitted by the school district for a security guard) and Donnely, a bus mechanic who occasionally test-drove buses as part of his employment duties, failed an eye examination.

The Cleveland school district rules provided that both would be given an opportunity for a hearing on the grounds for their employment termination, but only *after* the termination was effected ("post-termination" hearings).

The Supreme Court had previously held in *Board of Regents v. Roth* that if a public-sector employee has a right to continuing employment in his job, recognized by state law (property interests in employment in Illinois include such things as tenure, collective bargaining agreement right to just discipline, among others) that right to continuing employment is a type of property, which the 14th Amendment of the Constitution protects. The 14th amendment states that no state can deprive a person of property without due process of law.

The *Loudermill* decision, discussed here, established that governmental entities owed employees who had rights to continuing employment the right to **notice** and **opportunity to respond**, *before* it terminated an employee, even if the governmental entity offered the employee opportunity to hearing on the grounds for the termination, after the discharge.

The Supreme Court held that the employee's pre-termination right was to "some kind of hearing" before being terminated. This "hearing" consisted of a right to oral or written notice of charges justifying the discipline, and an opportunity for the employee to present his side of the story before the employer determined to discharge the

employee. The Court explained that the pre-termination hearing serves as an initial check against mistaken decisions, but is not a full evidentiary hearing; and that the pre-termination hearing is essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. In pertinent part, the Court said,

> The Due Process Clause of the United States Constitution provides that certain substantive rights such as . . . property, cannot be deprived except pursuant to constitutionally adequate procedures. . . . The right to due process is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in public employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.

As a result of the Court's *Loudermill* decision, all public sector employers are required to provide their public sector employees with Loudermill proceedings *before* an employee is terminated an employee – but only those employees who have a right to continuing employment. If the employee is probationary, has no contractual, statutory, or employer-created right to continuing employment (such as granted by policy) the employee has no right to *Loudermill* proceedings prior to termination.[1]

Decisions of the 7th Circuit Court of Appeals (the federal Appellate court with jurisdiction over Illinois, Indiana and Wisconsin) and those of other federal appellate courts have clarified the limitations of employees' Loudermill rights, making it clear that the Loudermill hearing is merely a right to notice of charges and an opportunity to respond, not a trial before the trial. These decisions make clear that minimal proceedings will suffice.

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[1] The use of the word "termination" should be understood also to include suspension without pay, or other deprivations of earnings. Suspensions or other removals without pay are also a "taking" of a property right, because removal of pay deprive the person of money he otherwise would have earned through the employment. As one court put it, "Temporary suspensions without pay are not *di minimis*, and impinge on property interests. *Boarls v. Gran*, 775, f 2d 686 (6th cCir. 1985). *D'Acquisito v. Washington*, 640 F. Supp 594, (ND. Ill. 1986) (a suspension without pay for any appreciable lengthy of time deprived the employee of property).

In *Sonnleitner vs. York*, 304 F.3d 704 (7th Cir. 2002) the court ruled that Loudermill does not mandate any hard and fast rules of the specifics of the pre-termination due process and that that hearing need not be elaborate. In *Head v. Chicago School Reform Board of Trustees*, 225 F 3d 794, 7th Cir, 2000, the court held that the school board was not required to provide an elementary school principal with elaborate trial-type rights, such as the ability to cross-examine witnesses at the pre-termination hearing. In *Thomsen v. Romeis,* 198, F 3d 1022 (7th Cir. 2000) the Court held that written notice to the employee, followed by exchange of letters, which advised the terminated employee of the reason for his termination and invited his comments was a sufficient pre-termination measures under *Loudermill*.

To this point only *pre-termination* hearings have been discussed. It should be clear that a pre-termination hearing is not the only process due. The Supreme Court has held that an employee whose property interest is infringed because of an employer's action is entitled to have an impartial tribunal hear the evidence against him. *Withrow v.s Larkin* 421 US 35, 95 S.Ct. 1456, (1975). Accordingly, if an employee is suspended or terminated, after the fact, the employee is entitled to a full hearing before an impartial tribunal. This might be a hearing officer appointed by the board, or an arbitrator in a grievance proceeding.

Thoughts and Suggestions Regarding Employee Discipline:
Lessons Learned through Grievance Arbitration

In view of the recent labor arbitration decisions regarding the discipline of support staff employees, we can glean important practice points regarding employee discipline. Under many collective bargaining agreements, employees enjoy the right to be free from suspension or discharge without "just cause" – and it is this "just cause" provision which has been at the heart of these disputes and decisions.

In many of these cases, the arbitrator has found that the employee's conduct warranted discipline, but that the recommended disciplinary consequence of discharge was too severe, and therefore lacked "just cause". Even though the collective bargaining agreement (CBA) which governs these employees may contain a specific progressive discipline schedule, each arbitrator added his own layer of "proportionality" to the analysis in addition to the progressive discipline schedule. To put it simply, each arbitrator opined that if the next consequence on the progressive discipline schedule was too harsh (in the arbitrator's view), then the District was forbidden from using that next consequence. As it turned out, the arbitrator viewed discharge as too harsh, and ordered further suspension without pay instead.

First, the District's administrators and supervisors cannot be timid about using formal discipline when it is warranted. All too often, supervisory employees in school districts tend to shy away from using formal discipline when it is warranted. Experience leads to the conclusion that this reticence to disciplining employees who are engaging in poor performance or misconduct stems from a reluctance to "rock the boat". Instead of the situation improving when nothing "negative" occurs, the problem tends to snowball. Rather than hoping for improvement, setting high expectations and having clear consequences for failure to meet those expectations leads to a higher performing workplace, with greater pride and satisfaction in the work.

These consequences must be formal. Having informal conversations with employees about misconduct or poor performance are insufficient to set a workplace with clear standards, and are insufficient as evidence if there is a later challenge to the progressivity of discipline. Because of the important role verbal and written warnings play in documenting misconduct and the responses to misconduct, verbal and written

warnings should be used without hesitation when an employee is not meeting expectations. This way, there will exist appropriate documentation of each event, and will assist the District in building a later case for dismissal. This documentation is essential.

Second, when the District imposes disciplinary consequences on employees, it must remain progressive in the discipline, but quickly progress through the progressive schedule. As the discipline allowed by the arbitrators in the two cases makes clear, there may be times when additional suspensions without pay should be used prior to recommending discharge. The two key concepts attached to "just cause" discipline under the arbitration precedent (**progressivity** and **proportionality**) require us to move through the progressive discipline schedule, and to do so in a manner than is reasonably related to the misconduct. It can be appropriate for disciplinary history to lead to a more significant consequence for a lesser offense, however, the arbitrators still generally disfavor terminating an employee for a petty offense (akin to expelling a student for forgetting to bring a pencil to class).

Considering recent arbitration cases, I might suggest being eager about imposing a disciplinary consequence (i.e., avoiding being patient with non-compliant conduct), and then move steadily but incrementally toward increasing consequences. For example, jumping from verbal/written warnings to suspensions, and then instituting suspensions in quickly progressing increments (1 day, 3 days, 5 days, etc.).

Third, evaluations must be honest measures of an employee's performance. In each of the arbitration cases, the fact that the employee had received relatively positive performance evaluations played significantly into the arbitrators' decisions. One step that a District can take to improve in this area is to revise the evaluation instruments used for non-certified employees, along with clear expectations communicated via job descriptions. Poor evaluation instruments made effective and targeted evaluation of employee performance difficult, and frankly, it oftentimes is not a priority for the evaluators.

In the future, it is important the performance evaluations for all employees are used as a tool to accomplish three main goals: documenting employee strengths and weaknesses in specific and targeted ways; creating a plan for continuous improvement

for all employees; and informing employment decisions. If the evaluation is not honest and targeted, taking into account all issues that occur during an evaluation cycle, any employment decision is severely undermined for purposes of discipline and dismissal.

Fourth, the District must either tolerate misconduct, or not tolerate misconduct. There is not any middle ground here. If we tolerate misconduct for a period of time until we decide it's "too much", we have lost some of the validity of our actions if we decide later it is suddenly intolerable. If a particular action by an employee is not tolerable, then it should never be tolerated, and actions/consequences should accrue from the first instance – beginning with a documented verbal warning and moving progressively from there. Equally as important, all employees should be treated equally in this regard: if it is not tolerated for Employee A, then it should never be tolerated for Employee B.

Finally, the District must exercise discretion appropriately. Many arbitrators place importance on the administration's discretion regarding the sequence and necessity of the progressive discipline steps. Rather than apply a "one size fits all" consequence based on sequence, the arbitrators have suggested that we look at the context of the specific situation (aligned with the notions of progressivity and proportionality) prior to making a recommendation regarding discipline and discharge. While this seems slightly incongruous with the equal treatment of employees, the proper use of discretion is the final piece to the puzzle when determining appropriate consequences.

Implications of Performance Evaluations

With new rules regarding the implementation of the Illinois Performance Evaluation Reform Act (PERA) and the Education Reform Act (SB7), school districts are beginning to grapple with the implications of the new laws.

Evaluation plans may now be impacted by as many as four separate committees:

A) the district's pre-existing evaluation committee;
B) the PERA joint committee on evaluations;
C) the ERA joint committee on reductions in force; and
D) the bargaining committee.

While nothing in the law requires any of these committees to have differing membership, each committee has its own jurisdiction. As such, decisions made by the "wrong" committee could jeopardize the district's ability to enforce the rules the committee created.

Three components are therefore critical in decision-making for any district engaging in bargaining these issues: 1. What committee is meeting? 2. What authority does that committee have? 3. What will happen when the committee reaches agreement? All of these issues should be addressed at the very first meeting of each committee, and each meeting should identify *which* committee is meeting, who was present, what the committee discussed, and to what the committee agreed. For those going to the bargaining table this year, *now* is the perfect time to discuss the answers to many of these questions.

Education Reform Act/RIF Joint Committee

The SB7 or RIF Joint Committee establishes rules for how teachers' evaluations are categorized for purposes of reductions in forces. The law establishes specific topics for the RIF committee's discussions. The RIF committee's changes must be complete and agreed to by February 1 of any year in which a RIF is to be performed; otherwise the rules from the previous year (or the law if no prior agreement was reached) apply. The RIF committee is not required to meet annually unless otherwise required by agreement.

Each school district and special education joint agreement must use a joint committee composed of equal representation selected by the school board and its teachers or, if applicable, the exclusive bargaining representative of its teachers, to address the matters described in the law pertaining to honorable dismissals. The committee must have been formed and must have held its first meeting by December 1, 2011. Due to Public Act 98-513, districts must now have this meeting at least once annually before December 1.

Additionally, the school district is now required to provide a seniority list not later than February 1 of each year. The seniority list is <u>not</u> used for anything – but it is a condition predicate to conducting a Reduction in Force, and failing to produce the list in a timely fashion may jeopardize the RIF.

Unlike RIF groupings, the formation of the joint committee is not protected by grandfathering. The committee must reach agreement by majority vote by February 1 of any year for the changes to become effective for implementation during that year.

The joint committee must discuss the following topics:

> (1) The joint committee must consider and may agree to criteria for excluding from grouping 2 and placing into grouping 3 a teacher whose last 2 performance evaluations include a Needs Improvement and either a Proficient or Excellent.

(2) The joint committee must consider and may agree to an alternative definition for grouping 4, which definition must take into account prior performance evaluation ratings and may take into account other factors that relate to the school district's or program's educational objectives. An alternative definition for grouping 4 may not permit the inclusion of a teacher in the grouping with a Needs Improvement or Unsatisfactory performance evaluation rating on either of the teacher's last 2 performance evaluation ratings.

(3) The joint committee may agree to including within the definition of a performance evaluation rating a performance evaluation rating administered by a school district or joint agreement other than the school district or joint agreement determining the sequence of dismissal.

(4) For each school district or joint agreement that administers performance evaluation ratings that are inconsistent with either of the rating category systems… the school district or joint agreement must consult with the joint committee on the basis for assigning a rating that complies with [the four categories required by law] to each performance evaluation rating that will be used in a sequence of dismissal.

(5) Upon request by a joint committee member submitted to the employing board by no later than 10 days after the distribution of the sequence of honorable dismissal list, a representative of the employing board shall, within 5 days after the request, provide to members of the joint committee a list showing the most recent and prior performance evaluation ratings of each teacher identified only by length of continuing service in the district or joint agreement and not by name.

If, after review of this list, a member of the joint committee has a good faith belief that a disproportionate number of teachers with greater length of continuing service with the district or joint agreement have received a recent performance evaluation rating lower than the prior rating, the member may request that the joint committee review the list to assess whether such a trend may exist.

Following the joint committee's review, but by no later than the end of the applicable school term, the joint committee or any member or members of the joint committee may submit a report of the review to the employing board and exclusive bargaining representative, if any.

The formation of the committee is a pre-requisite to the implementation of RIF procedure which is compliant with the law. Notes should be taken at a meeting prior to the implementation of the new RIF procedure to document that the required topics were discussed.

Issues to watch during discussions: The law establishes what the committee may (and may not) agree to. Only the RIF committee can discuss how to move employees from Grouping 2 to Grouping 3 (but not Grouping 4), and only the RIF committee can discuss alternate definitions for Grouping 4. Further, only the RIF committee can discuss (and agree to) how to deal with non-compliant (that is, something other than Excellent, Proficient, Needs Improvement, and Unsatisfactory) evaluation summative ratings.

Schools should not agree to changes to the reductions in force procedure beyond those defined by law, and should not agree to pre-determine evaluation outcomes (everyone is an Excellent, for instance). Limiting discussions to those permitted by law is advisable.

PERA/Evaluation Joint Committee

The PERA or Evaluation Joint Committee establishes the rules for implementation of the student growth portion of the evaluation. The evaluation committee determines rules for the implementation of the student growth component and for the usage of assessments. If the evaluation committee does not come to agreement within 180 days, the student growth model of the state model plan is implemented. The evaluation committee may discuss other components of the plan, but is not required to.

There are three types of assessments:

> "**Type I assessment**" - assessment that measures a certain group or subset of students in the same manner with the same potential assessment items, is scored by a non-district entity, and is administered either statewide or beyond Illinois. Examples include SAT and ACT assessments.
> "**Type II assessment**" - assessment developed or adopted and approved for use by the school district and used on a districtwide basis by all teachers in a given grade or subject area. Examples include curriculum tests and assessments designed by textbook publishers.
> "**Type III assessment**" - assessment … aligned to course curriculum…. Examples include teacher-created assessments and assessments designed by textbook publishers, and assessments designed by staff who are subject or grade-level experts that are administered commonly across a given grade or subject.

23 Ill. Adm. Code 50.30. Each teacher evaluation plan must contain at least one Type I or II assessment and at least one Type III assessment. *Id*. at 50.110(b)(1). Each principal plan must contain a least two Type I or Type II assessments, or *may* use a Type III assessment.

The PERA joint committee's 180-day clock begins to run at the first meeting unless the committee agrees otherwise. 23 Ill. Adm. Code 50.200(b). Nothing prevents the joint committee from meeting early *provided* that there is formal agreement on what day the 180-day clock will begin to run. The best advice any committee may receive would be to discuss *process* first – when will the 180-day clock begin? What will happen when the 180-day clock runs?

The board of education is fully responsible for the implementation of an evaluation plan. 23 Ill. Adm. Code 50.120(a), but it is also the board's duty to work with the joint committee regarding certain components of the plan. In other words, the board determines what instruction is required, the joint committee develops rules by which the measurement of that instruction will be evaluated, and the board ultimately adopts or implements the evaluation framework. A school district *may* test a model prior to implementation.

How implementation of a plan (particularly in the event of a failure to reach agreement) occurs is still not completely clear. The evaluation plan must contain at least 25% student growth in the first two years after implementation, and 30% student growth thereafter. 23 Ill. Adm. Code 50.110(a). Administrators should be careful to discuss what that means with the joint committee, and determine to what extent the State Board Model will be implemented if its component is a larger percentage of the rating. Districts are well advised to work with the joint committee to determine how implementation will occur and who is responsible for each part of the evaluation tool before the tool itself is discussed. The parties should commit any and all agreements to writing *before* discussions on content take place, because once content is on the table, the rules will be dictated by how everyone gets what they want rather than what is best or fair.

According to the Code:

> In order to assess the quality of the teacher's professional practice, the evaluation plan shall include an instructional framework developed or adopted by the school district that is based upon research regarding effective instruction; addresses at least planning, instructional delivery, and classroom management; and aligns to the Illinois Professional Teaching Standards. The instructional framework shall align to the roles and responsibilities of each teacher who is being evaluated.

23 Ill. Adm. Code 50.120(a)(1) (internal citation omitted). The effect of this provision is to require that districts carefully address their evaluation plans so that the evaluation of each teacher reflects the instruction for which they are actually responsible (*e.g.*, so that a P.E. teacher is not evaluated based upon math performance and a math teacher is not evaluated based upon athleticism).

Be sure, when discussing the evaluation plan, to agree only to implementation of those components of the plan that administration is prepared to live with - according to the Code, the whole State Model plan need not be implemented, but that does not mean the union won't punish a board (read: litigation) for failing to agree on a model (particularly if your group likes the State Model better). This is the prime importance of determining *how implementation will occur* at the outset of meetings or during collective bargaining. Define when the 180-day clock will begin, and what exactly will happen when it runs.

TRAILER BILLS

Key Challenges and Changes Presented by the so-called "SB7 trailer bill," Public Act 98-513

- School districts must hold an annual meeting before December 1 to discuss reduction in force rules;
- Each year, each board shall also establish, in consultation with any exclusive employee representatives, a list showing the length of continuing service of each teacher who is qualified to hold any such positions, unless an alternative method of determining a sequence of dismissal is established as provided for in this Section, in which case a list must be made in accordance with the alternative method. Copies of the list must be distributed to the exclusive employee representative at least 75 days before the end of the school term.
- Teachers must now request, receive, and provide within 60 days of the start of service to a school district official copies of evaluations from prior employers in order to be eligible for accelerated tenure;
- A new definition applies to Grouping 1:
    - Grouping 1 must consist of each teacher who is not tenured and who (i) has not received a performance evaluation rating, (ii) is employed for one school term or less to replace a teacher on leave, or (iii) is employed on a part-time basis. "Part-time basis" for the purposes of this subsection (b) means a teacher who is employed to teach less than a full-day, teacher workload or less than 5 days of the normal student attendance week, unless otherwise provided for in a collective bargaining agreement between the district and the exclusive representative of the district's teachers. For the purposes of this Section, a teacher (A) who is employed as a full-time teacher but who actually teaches or is otherwise present and participating in the district's educational program for less than a school term or (B) who, in the immediately previous school term, was employed on a full-time basis and actually taught or was otherwise present and participated in the district's educational program for 120 days or more is not considered employed on a part-time basis.
- "Impasse" procedure has been modified to say "initiate public posting process." The concern about the filing of an unfair labor practice may remain, but the change removes improper declaration of impasse from the potential charges. The process is now clearly predicate to the declaration of a strike outside Chicago.

Public Act 098-0648 gives limited recall rights to honorably dismissed teachers placed in Grouping 2 who have one "needs improvement" rating.

Effective as of July 1, 2014 Public Act 098-0648 provides that if a board has any vacancies that become available from the beginning of the school year following a teacher's honorable dismissal through February 1 of that school year (unless a date later than February 1, but no later than 6 months from the beginning of the following school term, is established in a collective bargaining agreement), such positions must be made available to any teacher placed in Grouping 2 due to one "needs improvement" rating on either of the teacher's last two performance evaluation ratings who was honorably dismissed. In order to secure this new recall right, the teacher must be qualified to hold the position(s) and, if two ratings are available for the teacher, the teacher's other rating must be satisfactory, proficient, or excellent.

The amendment to the School Code also clarifies that only one performance evaluation per year may be used for determining the sequence of dismissal list. Except for performance evaluations conducted during or at the end of a remediation period, if multiple performance evaluations are conducted, only the rating from the last evaluation conducted prior to establishing the sequence of honorable dismissal list shall be the rating used for the purpose of creating the sequence of dismissal. Average ratings from multiple evaluations are not permitted (unless otherwise agreed to in a collective bargaining agreement).

ISBE recently released non-regulatory guidance addressing some of the questions raised by these amendments. In the guidance ISBE states that vacancies that become available any time after a teacher receives his or her notice of honorable dismissal through February 1 of the following school term must be offered to eligible teachers in Grouping 2, not just those vacancies that become available after the beginning of the school year following the teacher's honorable dismissal.

ISBE also assures that Public Act 098-0648 did not change the order of recall for eligible teachers, and thus the order of recall must still be in the inverse order of dismissal (unless an alternative order is established in a collective bargaining agreement). Thus, before any vacancies are offered to eligible teachers in Grouping 2, vacancies must first be offered to eligible teachers in Grouping 4 and Grouping 3, respectively.

PROFESIONNAL PRACTICE EVALUATION REQUIREMENTS

Changes by September 1, 2012 (pursuant to PERA)

1. Pre-qualification training for all evaluators
2. Evaluation frequency:
   a. Non-tenured = at least once every school year
   b. Tenured = at least once every 2 school years, UNLESS "Needs Improvement" or "Unsatisfactory"
   c. A principal shall not be prohibited from evaluating any teachers in his or her first year as principal of a school. (Beware bargaining implications).
3. Four categories for <u>all</u> teachers:
   "Excellent"–"Proficient"–"Needs Improvement"– "Unsatisfactory"
4. Professional development plan for any teacher with "Needs Improvement."
5. Changes to Principal AND Assistant Principal Evaluations
   a. Evaluated at least once every school year.
   b. Four categories (same as above)
   c. Must "provide for the use of data and indicators on student growth as a significant factor in rating performance."
   d. Must be evaluated annually (new for Assistant Principals)
   e.

Changes by PERA Implementation Date:

The PERA Implementation Date for most school districts will be September 1, 2016, except for the lowest performing 20% (September 1, 2015) or Chicago Public Schools (September 1, 2013). However, a school district and its teacher association can agree to expedite the PERA Implementation Date to as soon as September 1, 2013.

By the PERA Implementation Date, teacher evaluations must "incorporate the use of data and indicators on student growth as a significant factor in rating teacher performance." How this data will be incorporated must be determined by a joint committee composed of equal representation selected by the district and its teachers. If no agreement is reached within 180 days of the joint committee's first meeting, the district shall implement the ISBE model.

If a teacher successfully completes a remediation plan and then receives a second unsatisfactory rating in any evaluation during the 36-month period following the completion of the remediation plan, the school district may forego remediation and seek dismissal.

Do the regulations limit the number of visitations to a classroom or formal observations that may be performed?

No. 23 Ill. Admin. Code 50.320(c). The Code defines "formal observation" as "a specific window of time that is scheduled with the teacher, principal, or assistant principal for the qualified evaluator, at any point during that window of time, to directly observe professional practices in the classroom or in the school." 23 Ill. Adm. Code 50.30. The Code requires formal observation, but it does not limit that observation (beyond what is contractually obligated).

The Code *does* require both formal and informal observation. There must be at least two observations for a tenured teacher rated proficient or excellent in the last performance evaluation, at least one of which must be formal. There must be at least three observations for all other teachers at least two of which must be formal. Formal observations must meet one of the following criteria:

1. an observation of the teacher in his or her classroom for a minimum of 45 minutes at a time;
2. or an observation during a complete lesson;
3. or an observation during an entire class period, and allow the qualified evaluator to acquire evidence of the teacher's planning, instructional delivery, and classroom management skills. 23 Ill. Adm. Code 50.120(c). Formal evaluations must be preceded by a conference with the evaluator. *Id*. at (c)(4).

Must the internal rating scale match the summative rating scale?

No, but there must be 4 categories internally, and those categories must contain definition if they are different than the summative ratings. 23 Ill. Adm. Code 50.120(a)(3).

What type of notice is required for teacher evaluation?

A teacher must be notified at the beginning of the year (or no later than 30 days after contract execution if the teacher is hired after the beginning of the school year) if the teacher will be evaluated that year. The notice must include:

1) a copy of the rubric to be used to rate the teacher against identified standards and goals and other tools to be used to determine a performance evaluation rating;
2) a summary of the manner in which measures of student growth and professional practice to be used in the evaluation relate to the performance evaluation ratings of "excellent", "proficient", "needs improvement", and "unsatisfactory" as set forth in Sections 24A-5(e) and 34-85c of the School Code; and
3) a summary of the district's procedures related to the provision of professional development in the event a teacher receives a "needs improvement" or remediation in the event a teacher receives an "unsatisfactory" rating, to include evaluation tools to be used during the remediation period.

20 Ill. Adm. Code 50.100(c).

STUDENT GROWTH COMPONENT

What are the required components for the Student Growth component of evaluation?

There must be a Student Learning Objective Process, which is defined as a for organizing evidence of student growth over a defined period of time that addresses learning goals that are measurable and specific to the skills or content being taught and the grade level of the students being assessed, and are used to inform and differentiate instruction to ensure student success. The Student Learning Objective ("SLO") must contain:

1. Learning goal
2. Assessment
3. Procedures for measuring goal and growth expectation

23 Ill. Adm. Code 50.30.

The minimum required elements in a complaint SLO process are:

a) A list of the student population whose achievement will be measured for the purpose of determining student growth under the provisions of Section 50.210(b);
b) A description of the learning goal established pursuant to Section 50.210(b)(1)(A).
c) Standards associated with the learning goal.
d) A description of the assessments and scoring procedures established pursuant to Section 50.210(b)(1)(B) that measure students' understanding of the learning goal.
e) Identification of growth expectations established pursuant to Section 50.210(b)(1)(C) at the beginning of the SLO process.
f) Identification of adjustments made to the identified growth expectations at the midpoint of the SLO process, as applicable.
g) Documentation of the number or percentage of students who achieved the identified growth expectations.
h) An explanation of how the qualified evaluator translates the number or percentage of students who achieved the identified growth expectations into a final student growth rating; and
i) A final growth rating assigned at the conclusion of the SLO process.

23 Ill. Adm. Code 50.220

What is an "assessment"?

"Assessment" means any instrument that measures a student's acquisition of specific knowledge and skills. Assessments used in the evaluation of teachers, principals and assistant principals shall be aligned to one or more instructional areas articulated in the Illinois Learning Standards (see 23 Ill. Adm. Code 1.Appendix D) or Illinois Early Learning and Development Standards − Children Age 3 to Kindergarten Enrollment Age (see 23 Ill. Adm. Code 235.Appendix A), as applicable. 23 Ill. Adm. Code 50.30.

There are three types of assessments:

> "**Type I assessment**" means a reliable assessment that measures a certain group or subset of students in the same manner with the same potential assessment items, is scored by a non-district entity, and is administered either statewide or beyond Illinois. Examples include assessments available from the Northwest Evaluation Association (NWEA), Scantron Performance Series, Star Reading Enterprise, College Board's SAT, Advanced Placement or International Baccalaureate examinations, or ACT's EPAS® (i.e., Educational Planning and Assessment System).
> "**Type II assessment**" means any assessment developed or adopted and approved for use by the school district and used on a districtwide basis by all teachers in a given grade or subject area. Examples include collaboratively developed common assessments, curriculum tests and assessments designed by textbook publishers.
> "**Type III assessment**" means any assessment that is rigorous, that is aligned to the course's curriculum, and that the qualified evaluator and teacher determine measures student learning in that course. Examples include teacher-created assessments, assessments designed by textbook publishers, student work samples or portfolios, assessments of student performance, and assessments designed by staff who are subject or grade-level experts that are administered commonly across a given grade or subject. A Type I or Type II assessment may qualify as a Type III assessment if it aligns to the curriculum being taught and measures student learning in that subject area.

23 Ill. Adm. Code 50.30. Each plan must contain at least one Type I or II assessment and at least one Type III assessment. *Id*. at 50.110(b)(1).

What if a joint committee is unable to reach agreement on components of Student Growth?

A school district shall conform to the requirements of this Section for any portion of the performance evaluation plan outlined in Section 50.110 for which its joint committee could not reach agreement pursuant to Section 24A-4(b) of the School Code.

a) Any joint committee that cannot agree to the percentage of student growth that shall comprise the performance evaluation rating assigned shall adopt a performance evaluation plan in which student growth is 50 percent of the performance evaluation rating assigned. (See Section 50.110(a) of this Section and Section 24A-7 of the School Code.)

b) Any joint committee that cannot agree upon one or both of the assessments required under Section 50.110(b)(2) and (3) and/or the measurement models required under Section 50.110(b)(1) shall employ a student learning objective (SLO) process to identify how student growth will be measured for the applicable category of teacher (e.g., career

and technical education, grade 2) for which no agreement is reached. The SLO process shall include at least the information listed in Section 50.220.

1) Teachers in the category for which agreement was not reached, or their representatives, shall recommend no more than four SLOs in response to each assessment for which no agreement was reached. Using the SLO process, the teacher being evaluated and the qualified evaluator shall work collaboratively to identify the SLO, using the list of SLOs recommended. The learning goal, assessment and growth expectation that comprise the SLO shall conform to the provisions of this subsection (b)(1).

A) Each learning goal of the SLO shall be aligned to the needs of the teacher's students or the classroom and shall be based on: i) schoolwide or districtwide initiatives that address the content of the learning goal; and/or ii) the school improvement plan, as the plan may relate to the content of the learning goal.

B) The assessment of the SLO shall support and measure the applicable learning goal identified pursuant to subsection (b)(1)(A). An adaptive conditional measurement model shall be employed to determine student growth specific to the learning goal being measured.

i) Any assessment identified under this subsection (b)(1)(B) shall not be the same assessment upon which the joint committee could not reach agreement.

ii) If two assessments are to be identified under this subsection (b)(1)(B), then at least one shall be used by more than one teacher in the building or across the district, or by students in one grade level or course, if there is no more than one teacher in a particular category (e.g., career and technical education, grade 2).

iii) If only one assessment is to be identified under this subsection (b)(1)(B), then it shall not be of the same type for which agreement has already been reached.

C) The growth expectations for the applicable learning goal shall be evaluated at the midpoint of the evaluation cycle and modified as may be necessary.

2) Results from each assessment shall constitute 50 percent of the final student growth rating to be assigned.

3) The teacher and the qualified educator shall agree in writing to the determinations made pursuant to subsection (b)(1).

4) The provisions of this subsection (b)(4) apply only to those components listed in subsection (b)(1) to which the teacher and qualified evaluator are unable to jointly agree within 30 days after the start of the school year, as "school year" is defined under Section 50.100(e).

A) If agreement is not reached regarding both of the SLOs identified in response to Section 50.110(b)(1), the teacher being evaluated shall choose one SLO and the qualified evaluator shall choose the other SLO.

B) If agreement is not reached regarding only one SLO (or if only one SLO is to be identified and no agreement is reached), the qualified evaluator shall notify the district superintendent of this fact.

i) Within three school days after receiving notification, the district superintendent, or his or her designee, shall provide to the teacher being evaluated a list of qualified evaluators, who may be either teachers or administrators, employed by the district.

ii) Within five school days after receiving the roster, the teacher being evaluated and qualified evaluator shall jointly agree to a second qualified evaluator, who may be a teacher or an administrator. No later than five school days after the date on which the second qualified evaluator was appointed, the second qualified evaluator chosen shall make a final determination about the components of the SLO for which no agreement was reached.

iii) If the teacher and qualified evaluator are unable to jointly choose a second qualified evaluator from the roster within five school days after receiving the roster, or if the district superintendent is the only qualified evaluator on the roster, the district superintendent shall make the determination about those components of the SLO or SLOs for which no agreement was reached. A district superintendent may delegate the responsibility for making a final determination under this subsection (b)(4)(B) to an individual who has successfully completed the prequalification process required under Section 24A-3 of the School Code.

23 Ill. Adm. Code 50.210

What is a "qualified evaluator"?

"Qualified Evaluator" shall have the meaning set forth in… the School Code and shall be an individual who has completed the prequalification process required under Section 24A-3 of the School Code or Subpart E of the [administrative code], as applicable, and successfully passed the State-developed assessments specific to evaluation of teachers or principals and assistant principals.

No evaluator who has not completed the state-required training by September 1 may perform an evaluation. There shall be 4 categories (excellent, proficient, needs improvement, and unsatisfactory) of rating on all teacher evaluations. 105 ILCS 5/24A-5(d).

What is a "significant factor" for purposes of establishing a student growth component on an evaluation plan?

Student growth shall represent at least 25 percent of a teacher's performance evaluation rating in the first and second years of a school district's implementation of a performance evaluation system under Section 50.20 of this Part (for example, 2012-13 and 2013-14 school years for a school district with a 2012-13 implementation date). Thereafter, student growth shall represent at least 30 percent of the rating assigned. 23 Ill. Adm. Code 50.110(a).

How must the performance component apply to the evaluation?

The performance evaluation plan shall identify at least two types of assessments for evaluating each category of teacher (e.g., career and technical education, grade 2) and one or more measurement models to be used to determine student growth that are specific to each assessment chosen. The assessments and measurement models identified shall align to the school's and district's school improvement goals.

Each plan shall identify the uniform process (to occur at the midpoint of the evaluation cycle) by which the teacher will collect data specific to student learning. The data to be considered under this subsection (b)(5) shall not be the same data identified for use in the performance evaluation plan to rate the teacher's performance.

Who is responsible for creation of the instructional framework?

The board. 23 Ill. Adm. Code 50.120(a), See also, *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477 (7th Cir. 2007).

But it is also the board's duty to work with the joint committee regarding certain components of the plan. In other words, the board determines what instruction is required, the joint committee develops rules by which the measurement of that instruction will be evaluated, and the board ultimately adopts or implements the evaluation framework.

How that actually occurs is still not completely clear. The best advice is through bargaining and discussions with the joint committee to determine how implementation will occur and who is responsible for what and commit the agreement to writing *before* discussions on content take place.
According to the Code:

> In order to assess the quality of the teacher's professional practice, the evaluation plan shall include an instructional framework developed or adopted by the school district that is based upon research regarding effective instruction; addresses at least planning, instructional delivery, and classroom management; and aligns to the Illinois Professional Teaching Standards. The instructional framework shall align to the roles and responsibilities of each teacher who is being evaluated.

23 Ill. Adm. Code 50.120(a)(1) (internal citation omitted). The effect of this provision is to require that districts carefully address their evaluation plans so that the evaluation of each teacher reflects the instruction for which they are actually responsible (*e.g.*, so that a P.E. teacher is not evaluated based upon math performance and a math teacher is not evaluated based upon athleticism).

How does implementation of the performance plan occur?

A school district, in conjunction with the joint committee established under Section 24A-4(b) of the School Code, shall be required to adopt *those aspects of the State model contained in this Subpart C regarding data and indicators of student growth about which the joint committee is unable to agree* within 180 calendar days after the date on which the joint committee held its first meeting. 23 Ill. Adm. Code 50.200(a) (emphasis added).

According to the Code, the whole State Model plan need not be implemented, but that does not mean the union won't punish a board (read: litigation) for failing to agree on a model (particularly if the union likes the State Model better). This is the prime importance of determining *how implementation will occur* at the outset of meetings or during collective bargaining.

When does the 180-day clock begin to run?

When you decide (through the joint committee) that the 180-day clock may begin to run, not later than 180 days from implementation. 23 Ill. Adm. Code 50.200(b). Nothing prevents the joint committee from meeting early *provided* that there is formal agreement on what day the 180-day clock will begin to run.

Can a district "test" a model before the district "implements" the model?

Yes.

Appendix A
Obligations Checklist[1]

_____ Define the type of meeting
_____ Evaluation Joint Committee
OR
_____ RIF Joint Committee

_____ Define membership (must be equal representation Union and Board selected):

Union: _____ Board: _____
_____ _____
_____ _____
_____ _____

_____ When will 180-day clock for implementation of student growth component begin?
_____, and ending _____.

_____ What will occur when the 180-day clock concludes?
_____
_____
_____
_____.

_____ Will the state board model for student growth alone be implemented in accordance with 23 Ill. Adm. Code 50.200(a)?

OR

_____ Will something more be implemented?

If so, what? _____
_____
_____

_____ Any and all potential evaluators are listed on the plan with names and certificate identification
_____ Evaluators have all completed training modules before evaluation is conducted by such evaluator
_____ Evaluation notices have been sent to every employee to be evaluated by either the beginning of the year or within 30 days of employment contract execution. Notice contains:

_____ 1) a copy of the rubric to be used to rate the teacher against identified standards and goals and other tools to be used to determine a performance evaluation rating;

_____2) a summary of the manner in which measures of student growth and professional practice to be used in the evaluation relate to the performance evaluation ratings of "excellent", "proficient", "needs improvement", and "unsatisfactory" as set forth in Sections 24A-5(e) and 34-85c of the School Code; and

_____3) a summary of the district's procedures related to the provision of professional development in the event a teacher receives a "needs improvement" or remediation in the event a teacher receives an "unsatisfactory" rating, to include evaluation tools to be used during the remediation period.

_____ Implement a 4 category summative ratings on all evaluations (Excellent, Proficient, Needs Improvement, Unsatisfactory)
_____ Implemented a student performance based evaluation system for principals by or before September 1, 2012

[1] *This checklist is intended as a reference for commonly missed obligations, but is in no way comprehensive. For review of specific facts and circumstances, specific counsel should be sought.*

_____ The model accounts for at least 25% of the evaluation
_____ The model will account for at least 30% of the evaluation beginning in 2014-2015

_____ Implement an evaluation system with 4 categories of (well-defined) performance rating in each category – either in line with the summative ratings or otherwise appropriately defined.

_____ The plan has at least one Type I or Type II assessment and at least one Type III assessment

_____ Does your contract require any additional step or component?

_____
_____
_____
_____
_____

Has the contractual component been met or revised by agreement?

_____Yes _____Revised or removed (attach agreement) _____No

Signatures of all participants: Date_____

Union: _____ Board: _____
_____ _____
_____ _____
_____ _____