



MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.

EMPLOYMENT DO'S AND DON'TS

RIFs, PERA, AND EMERGING TOPICS IN SCHOOL LABOR & EMPLOYMENT

2014

Joint Annual Conference

Welcome

2014

Framing Today's Conversation

- I. Employment Overview
- II. Due Process in Employment Issues
- III. Just Cause in Employment Issues
- IV. How do we Document?
- V. Why do we Document?
- VI. PERA and Teacher Evaluations
- VII. Question & Answer

Employment Overview

2014

■ Types of Employment:

- “*At will*” employment
- Contractual employment
- Statutory employment
- Volunteer “employment”

■ Types of Employees:

- Professional Educator License (PEL)
- Educator License with Stipulations (ELS)
- Substitute Teaching License (STL)
- Non-License
- Volunteers

Employment Overview

2014

- **At will employment:**

- *At will – Subject to one’s discretion; as one wishes or chooses; esp. (of a legal relationship), able to be terminated or discharged by either party without cause.*

Black’s Law Dictionary

- A purely at will employee may be terminated at any time, for any non-discriminatory reason (or for no reason).
 - Does the employee have a “reasonable expectation of continued employment”?

Employment Overview

2014

- Contractual Employment:

- Collective Bargaining Agreements

- Individual Contracts:

- Superintendent Contracts: 105 ILCS 5/10-23.8

- Performance based, not to exceed 5 years

- Principal / Administrator Contracts: 105 ILCS 5/10-23.8a

- 1 year contracts (leading to “tenure”), or

- Performance based multi-year contracts not to exceed 5 years

- Statutory (Constructive) Employment:

- An administrator may be “constructively” employed after the expiration of their contract term if specific action is not taken pursuant to statute.

Due Process

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- **Due Process** – The conduct of legal proceedings according to established rules and principles for the protection and enforcement of private rights, including notice and the right to a fair hearing before a tribunal with the power to decide the case.
- **Procedural Due Process** – the minimal requirement of notice and a hearing guaranteed by the Due Process Clauses of the 5th and 14th Amendments, esp. if the deprivation of a significant life, liberty, or property interest may occur

Black's Law Dictionary

Due Process Basics for Employees

2014

- ***Board of Regents v. Roth***

- Right to continuing employment recognized by state law (in IL, tenure, CBA “just discipline”, among others) is type of property that the 14th Amendment of the Constitution protects.
- 14th Amendment: no state can deprive a person of property without due process of law.

- ***Cleveland Board of Education v. Loudermill***

- Governmental entities owed employees who had rights to continuing employment the right to:
 - Notice
 - Opportunity to Respond

Due Process Basics for Employees

2014

- ***Loudermill Rights – cont.***
 - “some kind of a hearing”
 - Right to oral or written notice of charges justifying the discipline, and an opportunity for the employee to present his side of the story.
 - Not a full, evidentiary hearing.
 - Essentially a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.
 - ONLY those employees who have a right to continuing employment.
 - NOT for probationary, no contract, statutory, or employer-created right to continuing employment (such as granted by policy).
 - NOTE “termination” should be understood to include suspension without pay or other deprivations of earnings.

Due Process Basics for Employees

2014

■ 7th Circuit Court of Appeals

- *Loudermill* hearing is merely a right to notice of charges and an opportunity to respond, not a trial.
- Minimal proceedings will suffice.
- *Sonnleitner vs. York* – *Loudermill* does not mandate any hard and fast rules of the specifics of the pre-termination due process and that the hearing need not be elaborate.
- *Head v. Chicago School Reform Board of Trustees* – school board 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.
- *Thomsen v. Romeis* – 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 sufficient pre-termination measures under *Loudermill*.

Due Process Basics for Employees

2014

■ Other Due Process Considerations:

- Right to union representation
- Additional due process rights imposed by the CBA
- Additional due process rights imposed by Board Policy
- Illinois Open Meetings Act
 - Hearing format
 - Closed session discussions
- Illinois School Student Records Act

Just Cause

2014

- Under many collective bargaining agreements, employees enjoy the right to be free from suspension or discharge without “just cause”.
- “Just cause” is the heart of many recent labor arbitration decisions regarding the discipline of employees.
- When an arbitrator views warranted discipline as too severe s/he, will decide that it lacked “just cause”.
- **How do we succeed under Just Cause standards?**
 - **Balance:**
 - **Progressivity with Proportionality**

Just Cause

2014

- Even though the collective bargaining agreement (CBA) governing employees warranting discipline may contain a specific progressive discipline schedule, each arbitrator added his own layer of “proportionality” to the analysis.
- **Simply Put: 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.**
- Discussion of Decisions

Just Cause & Related Concepts

2014

- Balancing Progressivity & Proportionality in an Effective Employment Environment
- First, District administrators and supervisors cannot be timid about using **formal** discipline when it is warranted.
 - Set high expectations.
 - Have clear consequences for failure to meet those high expectations.
- Second, when the District imposes disciplinary consequences on employees, it must remain progressive in the discipline, but quickly progress through the progressive schedule.
 - Move through the progressive discipline schedule in a manner that is reasonably related to the misconduct.
 - Avoid being patient with non-compliant conduct.

Just Cause & Related Concepts

2014

- Balancing Progressivity & Proportionality in an Effective Employment Environment
- Third, evaluations **must** be honest measures of an employee's performance.
 - “relatively good” evaluations lead to arbitration losses.
 - Think about evaluation instruments for non-certified employees.
 - Think about effective job descriptions.
- Fourth, tolerate misconduct, or don't tolerate misconduct.
 - No middle ground.
- Finally, exercise discretion appropriately.
 - Arbitrators weigh administration's discretion regarding the sequence and necessity of the progressive discipline steps heavily.
 - No “one size fits all” sequence of consequences.

How Do We Document That?

2014

- DON'T avoid the negative.
- Consequences MUST be FORMAL.
 - Information conversations with employees about misconduct or poor performance are insufficient to set a workplace with clear standards.
- Verbal and Written warnings play an extremely important role in documenting misconduct and the responses to misconduct.
 - Use without hesitation.
 - In this way, build the appropriate documentation of each event and built a later case for dismissal.

How Do We Document That?

2014

■ Write-Up Formula:

- 1. Here are our expectations.
- 2. Here is what you did (very specific, include dates).
- 3. Here is why that is bad (building case).
 - Potential liability, safety for kids, etc.
- 4. Here is what you are expected to do in the future.
 - Consequences
 - Further reminded to comply with administration and supervisors
 - Policies of District

■ Three Main Overall Goals:

- Document employee strengths and weaknesses in specific and targeted ways.
- Create a plan for continuous improvement for all employees.
- Inform employment decisions.

How Do We Document That?

2014

- AVOID “relatively good” evaluations.
 - Evaluations must be honest measures of an employee’s performance.
 - 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.
- Use the written portions of the evaluation tool:
 - Discuss:
 - Unsuccessful or inappropriate rapport with students, parents, or other employees.
 - Failure to timely and effectively report to parents.
 - Failure to cooperate with or work effectively with administration or other employees.
 - Failure to work effectively on committees or planning.
 - Failure to implement IEPs or make accommodations.
 - Failure to follow rules, procedures, or policies.
 - Failure to use prep time effectively for school-related work.
 - Failure to apply training to teaching or other duties.
 - Failure to perform duties that are not teaching curriculum.

Why Do We Document?

2014

- Employee relations are governed far beyond the contract or agreement, and robust documentation and a culture of strong record-keeping practices can protect against a myriad of potential State and Federal Claims.

Some Potential Illinois Claims:

IL Wage Payment & Collection Act

One Day Rest in Seven Act

Prevailing Wage Act

IL Educational Labor Relations Act

IL School Code

Human Rights Act

Equal Pay Act of 2003

Employee Classification Act

Minimum Wage Law

Eight Hour Work Day Act

Employee Medical Contribution

Employee Benefit Contribution

Personnel Record Review Act

Why Do We Document?

2014

Some Potential Federal Claims:

Americans with Disabilities Act (ADA)

Family and Medical Leave Act (FMLA)

Age Discrimination in Employment Act (ADEA)

Equal Employment Opportunity Commission (EEOC) / Title VII Claims

Uniformed Services Employment and Reemployment Rights Act (USERRA)

Employee “Cyber” Issues

- FIRST AMENDMENT RIGHTS: PERSONNEL
- First amendment rights as an educator are defined as:
- ...only when speaking as a private citizen and on a matter of public concern....

DOES A SCHOOL VIOLATE THE FIRST AMENDMENT IF IT DISCIPLINES A TEACHER FOR SPEECH THAT TOUCHES ON A MATTER OF PUBLIC CONCERN?

- It depends. It is important to remember that the test developed by the *Pickering-Connick* line of cases has two basic prongs.
 - First, the court must determine whether the speech in question touches on a matter of public concern. If it does not, the teacher *will not* receive any First Amendment protection.
 - If the speech *does* touch on a matter of public concern, the court proceeds to the balancing prong of the test. At that point, the court must balance the public school teacher's interest in commenting upon a matter of public concern against the school officials' interest in promoting an efficient workplace of public service.

SOME BALANCING FACTORS FOR A COURT TO CONSIDER INCLUDE:

- Whether the statement impairs discipline by superiors or harmony among coworkers.
- Whether the statement has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary.
- Whether the speech in question interferes with the normal operation of the employer's business.
- *Sometimes in considering these factors, the courts will side with school officials in a First Amendment lawsuit, even if the public school teachers' speech touches upon a matter of public concern.*

Employee “Cyber” Issues

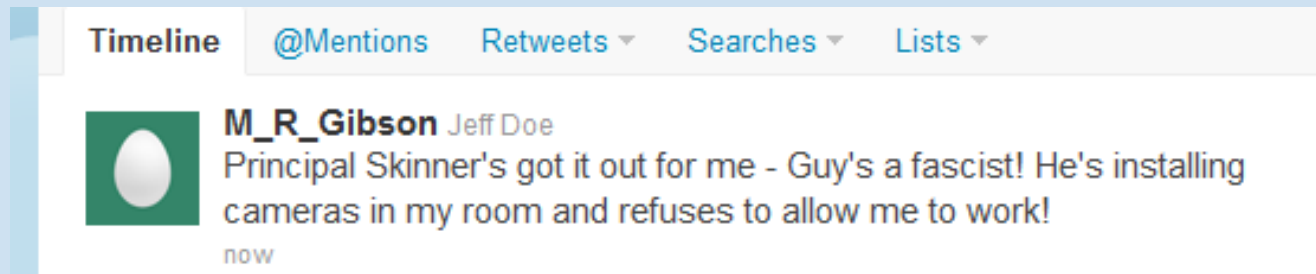
EMPLOYEE SPEECH: FIRST AMENDMENT

- *Snyder v. Millersville University* (E.D. Pa. 2008)
 - Court reviewed claim by a teacher that the university violated her First Amendment rights due to her person MySpace page and postings and activities thereon. Concluding that the teacher’s posting raised only personal matters, and did not touch on a matter of public concern, the MySpace posting in question was not protected by the First Amendment.

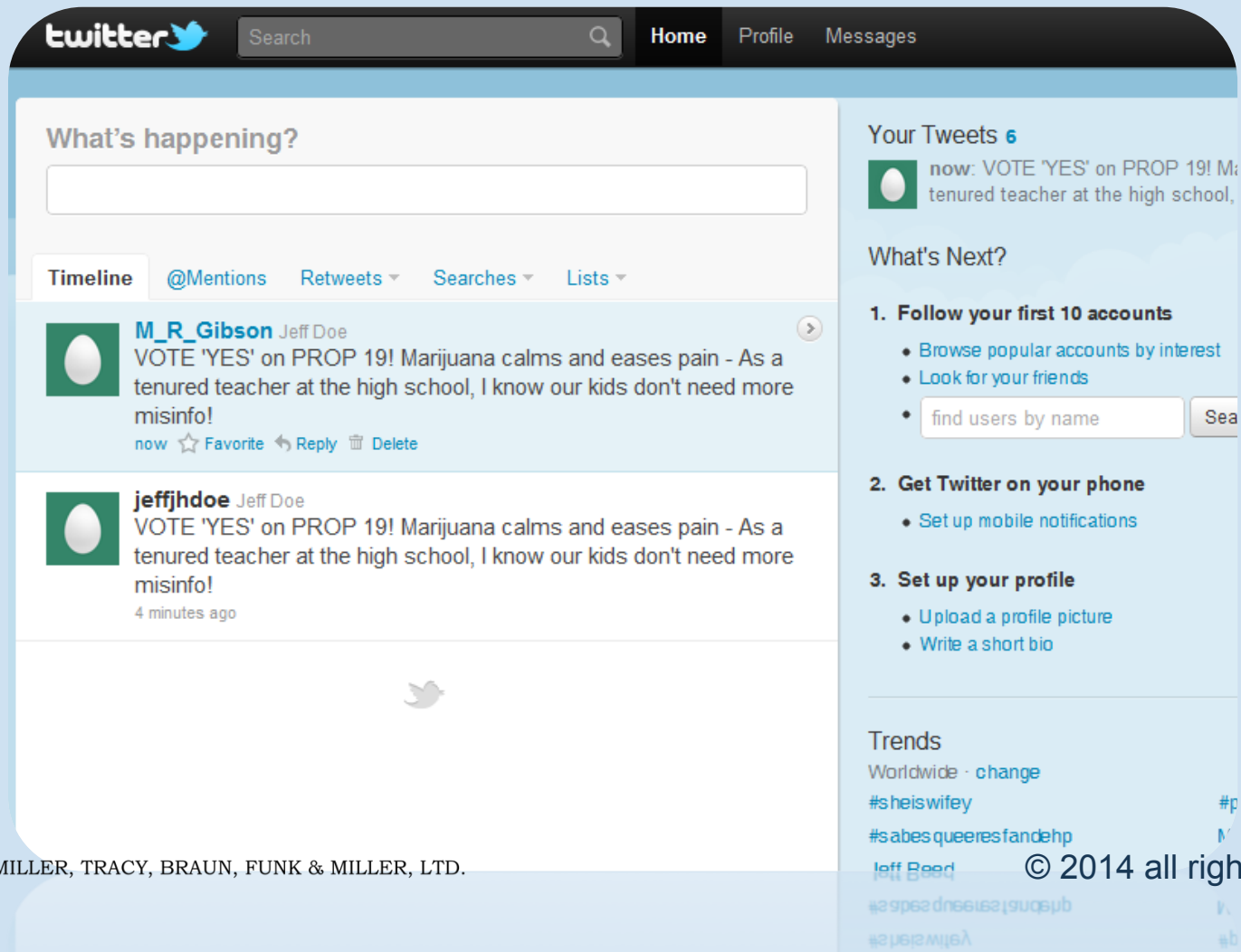
Employee “Cyber” Issues

EMPLOYEE SPEECH: FIRST AMENDMENT

- Your school has the following policy:
 - “No employee may use, operate, or post on a blog, Facebook, Twitter, or WordPress page in a manner which shall reflect poorly on his or her position, including, but not limited to, comments disparaging the school, the work environment, or administration. No posting regarding school shall be made without express written permission from the school.”



Employee “Cyber” Issues



Employee “Cyber” Issues

EMPLOYEE SPEECH: MATTERS OF PUBLIC CONCERN

- *Craig v. Rich Twp. High Sch. Dist.* 227, 736 F.3d 1110 (7th Cir. 2013)
- In December, the United States Court of Appeals for the Seventh Circuit issued a decision balancing the First Amendment rights of a school counselor against the public school district's interest in providing effective counseling services - deciding that the school's interest in providing effective counseling outweighed the First Amendment rights of the employee.

Why Do We Document?

2014

- **How Do We Prove. . . Whatever we need to prove!?**
- **Examples**
 - Look to entire history.
 - Well documented verbal and written warnings
 - Evaluations
 - Letters of discipline
 - Don't be afraid of honest, positive history.
 - Know how to prove that has changed:
 - “In the past, you were satisfactorily [performing, completing, etc.] ____, but currently that [performance] is not meeting District expectations.
 - This demonstrates: *our discipline and evaluations are meaningful, and we use them honestly for good and bad.*
 - Point to specific history.

Education Reform. . .

2014

Procedures
have
changed.

Hearings
have
changed.

**The
standards
have not
changed.**



FROM: TWITTER.COM

Outline

2014

- Evaluation
 - Structural requirements
 - Student Learning Objectives
 - Assessments
 - Advice for preserving options

Structural Requirements

2014

- Professional Practice
 - How does the employee perform as a professional?
 - Observations for Measurement
- Student Growth
 - How are the students performing, and are they getting better?
 - Student Learning Objectives
 - Learning Goal, Assessment, Measurement
- Summative Evaluation Ratings
 - Excellent
 - Proficient
 - Needs Improvement
 - Unsatisfactory

Structural Requirements: Required by Implementation Date

2014

- Notice at beginning of school or 30 days after employment of evaluation
 - A copy of rubric used for rating
 - A summary of manner in which measures of student growth and professional practice will relate to ratings
 - A summary of the district's procedures for professional development
- Assessment
- Professional Practice
- Observation
 - At least 2 observations
 - At least 1 of which is formal
 - Observation for a minimum of 45 minutes; OR
 - Observation of complete lesson
 - Observation of complete class period
- Summative Rating

What's an SLO?

2014

- Student Learning Objective
 - A process for organizing evidence of student growth
 - Learning Goal
 - Assessment
 - Procedures to measure the goal and growth expectations

SLO Requirements

2014

- Minimum Requirements (23 Ill. Adm. Code 50.220)
 - List of student population whose achievement will be measured;
 - Learning goal;
 - Standards associated with learning goal;
 - Identification of growth expectations;
 - Identifications of adjustments made to identified growth expectations at midpoint of SLO process'
 - Documentation of the number of students who achieved identified growth expectations;
 - Explanation of how qualified evaluator translates the number of students who achieved identified growth expectations into a final rating; and
 - A final growth rating.

SLO – whose choice?

2014

- The learning goal must be aligned to the needs of the teacher's classroom
- The teacher provides 4 objectives
- The evaluator chooses the one he or she wishes to evaluate upon

What's an Assessment?

2014

- Any instrument that measures a student's acquisition of specific knowledge and skills.
- There are 3 types of Assessments
 - Type I
 - Type II
 - Type III

What's an Assessment?

2014

"Type I assessment"

- 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 (think: ISAT, ACT).

"Type II assessment"

- means any assessment developed or adopted and approved for use by the school district and used on a district-wide basis by all teachers in a given grade or subject area (think: textbook tests).

"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 (think: textbook tests).

What's an Assessment?

2014

- You must include 2 different types of “assessments” in your evaluation by “implementation date”
 - At least one Type I or Type II
 - At least one Type III
- Best practice tip:
 - Begin learning about the assessment types and options now.
 - Don't be in a hurry to implement solutions, but don't be bashful about “trying” things in advance

What if we don't agree?

2014

- If you cannot agree to assessments, you'll use an SLO process
 - Teacher provides between 2 and 4 SLOs (goal and measurement) in response to each assessment
 - Evaluator chooses SLO from options presented

Evaluation Components

2014

- Every evaluation should have the following in every component:
 - **Facts** – What did you see?
 - **Rule** – What would a good teacher do?
 - **Directive** – What must the teacher do to succeed?
 - **How** – How does the teacher comply with your directive? In other words, how will you know whether or not the teacher complied?
- Evaluation rules which restrict administrator ability to create these parts should be avoided.

Evaluation Components

2014

- Use directive language
 - “You are *directed* to...”
 - “You *shall*...”
 - “You *must*...”
 - “I *expect* that you will....”
- Do not use suggestive language
 - “You might *consider*...”
 - “You *should*...”
 - “You *ought* to...”
 - “I might *suggest*...”
- *You are the boss – act like it!*

Best Practices

2014

- **Best practice tips:**

- Begin discussions regarding *process* which will be used before *substance* is discussed.
 - Procedure should drive substance
 - If you wait until substance is on the table, substance will drive procedure
- Begin preliminary discussions regarding changes *early*, do not be in a hurry to implement final drafts
 - Seek and be open to input from all stake-holders.
 - Don't be afraid to “try things out” before you commit to a final result.

Questions & Answers

2014

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