Employment Issues

Termination Procedures and Wrongful Discharge Claims

CONTENTS

General Information

As earlier discussed, Iowa and other states historically adhered to the employment-at-will doctrine, under which an employer was free to discharge an employee at any time and for any reason so long as such termination did not violate an employment contract (for example, a three-year agreement terminable only on mutual agreement) or statute (for example, forbidding discrimination because of race, gender or union membership). Under this doctrine, "just cause" was not required. The doctrine was often expressed as permitting a discharge for good cause, bad cause or no cause at all. As a corollary to the employer's right to freely discharge the employee, the employee was free to quit at any time, for any reason.

In recent years, the employment-at-will doctrine has been eroded by legislation and court decisions. For example, "whistle blower" statutes prohibit the dismissal of employees who institute or participate in proceedings under the Iowa Occupational Safety and Health Act (IOSHA) and the Public Employment Relations Act (PERA).[1] The Iowa Supreme Court has decided that employees fired for engaging in conduct protected by a clear policy of the state can sue their employer for damages.[2] Therefore, it is generally held that employees cannot be discharged for filing or threatening to file workers' compensation claims, serving as jurors, filing complaints against their employers with government agencies, refusing to perjure themselves to protect their employer or refusing to engage in other illegal behavior ordered by the employer. This common law cause of action is typically referred to as the "public policy" exception to the employment-at-will doctrine.[3] In addition to damages equal to the value of lost wages, successful plaintiffs in a civil suit for wrongful discharge may recover damages for emotional distress and, if malice is proven, punitive damages.[4]

The United States Supreme Court has held that teachers cannot be penalized for publicly criticizing a school board's policies or for otherwise commenting on matters of public concern because the comments are protected by the First Amendment to the U.S. Constitution.[5] It is, therefore, illegal to discharge a school employee for writing a letter to the local newspaper that criticizes the school board's position on a given matter or

otherwise expresses a viewpoint which is contrary to the school corporation's interests.[6]

As discussed earlier, the Iowa Supreme Court has recognized another exception to the employment-at-will doctrine. Employees terminated contrary to a policy or provision in the employer's work rules or personnel manual may bring a civil suit for breach of contract and recover actual (but not punitive) damages.[7] The policy or provision must be a specific limitation on the school corporation's right to discipline and discharge employees and not merely a general statement that all employees will be "treated fairly."[8] School corporations can, however, avoid lawsuits based on the theory of recovery by clearly stating that all classified employees are employed "at-will" and not for a specific duration.[9]

Staff Reduction

The Iowa Supreme Court has established that "just cause" for a teacher's year-end termination includes "legitimate reasons relating to the school corporation's personnel and budgetary requirements."[10] Examples of valid reasons for staff reductions include reduced state aid, declining enrollment either school-wide or in particular subject areas or classes, program deletions or realignment of staff.

Before a school corporation implements Chapter 279 procedures (discussed below) or lays off a classified employee, the school corporation must first comply with any provision in its collective bargaining agreement that controls the manner in which reductions in force are carried out. Most collective bargaining agreements contain some type of reduction in force article since "procedures for staff reduction" is a mandatory subject of bargaining.[11] Pertinent questions include:

1. Are there limitations on layoffs. For example, only after "a substantial enrollment decline."
2. Must employees subjected to layoffs or the employee's bargaining representative, be notified prior to April 30?
3. Must transfers or a realignment be attempted prior to layoffs?
4. Has the board determined the areas of the budget in which cuts will occur? (The board, to be impartial in a later termination case, can decide reductions and even select the specific areas of the budget to reduce. The board cannot, however, evaluate or decide which individuals will be laid off.)
5. If the contract bases layoffs on employees' relative qualifications, evaluations, ability or other non-seniority criteria, has the administration prepared a detailed analysis applying these criteria?
6. Do employees scheduled for reduction have the right to "bump" others and have they been given such an opportunity?

There are a number of practical steps for reducing the chances of a staff reduction grievance, a board hearing or other litigation. The immediate supervisor or other administrator can meet individually with employees slated to receive reduction-in-force notices and explain the reasons why reductions are necessary and, perhaps more importantly, why those employees were selected for layoff. This latter point is particularly critical if other less senior employees were not selected for reduction. The supervisor should also take this opportunity to discuss the employee's recall rights and the extended health insurance benefits that are available.

In cases where "qualifications" are the controlling factor, the superintendent or human resources director may meet with association officers or the UniServ director and candidly explain the reasons for the employees' rankings. The school corporation could provide out-placement assistance, prepare positive reference letters, offer re-training for other vacant positions or even severance pay. Making substantial severance payments can, however, lead to the argument that there was no financial reason to lay off employees. Experience has shown that these measures are worth considering, since many claims are provoked by misinformation or careless handling of staff reductions.

In staff reduction situations, unlike performance-based terminations, the teacher receiving a notice recommending termination, or the association, may claim the recommendation violates the reduction in force procedures of the collective bargaining agreement (asserting, for example, that other retained teachers were not as qualified as the contract required). In this case, the teacher or association can file a grievance and request a Chapter 279 hearing contesting the decision. The Iowa Supreme Court has ruled that school

corporations should "stay" or postpone the Chapter 279 proceedings until the grievance is resolved either through arbitration or agreement of the parties.[12] In most cases, the teacher will specifically request that the school corporation postpone the termination hearing as required by Iowa law. When agreeing to that request, school corporations should clarify that the parties are agreeing to waive the relevant timelines and assert the school corporation's right to proceed, if necessary, with the termination hearing after the grievance is resolved.

If the grievance is arbitrated, the arbitrator's decision will have a binding effect on any later board action. There may, however, be unresolved issues after the arbitrator's decision is issued that must be decided during a Chapter 279 hearing. An example is when a collective bargaining agreement requires a school corporation to reduce teachers based on reverse seniority, unless the qualifications of the teachers are not equal. A school corporation proceeds by selecting a more senior teacher for reduction because his or her qualifications are, in the school corporation's opinion, inferior to a less senior teacher. The teacher selected for layoff can file a grievance contesting the decision. If an arbitrator later rules in favor of the teacher, that decision is binding on the board of directors and the matter is closed. If, on the other hand, the school corporation prevails before the arbitrator and the selection of the teacher for layoff is upheld, then the school corporation must still conduct Chapter 279 proceedings (which have been held delayed due to the grievance) unless the teacher resigns. The school corporation must resume the Chapter 279 proceedings because it is only through those proceedings, and not arbitration, that a teacher's continuing contract can be terminated.

In many cases, the teacher will withdraw a request for a hearing before the board if the teacher loses the arbitration case, since the chance of overturning a superintendent's recommendation to reduce staff is very slim. If the teacher withdraws his or her request for a private hearing before the board, it is vital that the superintendent still submit his or her recommendation to terminate the teacher's contract and that the board formally act on the recommendation. Absent the board's acceptance of the superintendent's recommendation, the teacher cannot be terminated and the layoff is not completed.

The ultimate irony regarding proposed staff reduction is that much of the potential savings the school corporation hopes to achieve by reducing its staff can be consumed by the cost and expense of defending its position in arbitration and in a Chapter 279 proceeding. Superintendents and administrators must carefully analyze their chances of prevailing at arbitration, and before the board, before deciding whether to reduce staff. They must also consider the cost involved in proceeding in two forums and how likely it is that the teacher will vigorously contest the reduction.

Other Statutory Procedures in Termination Cases

Title VII of the Civil Rights Act of 1964 applies to employers with 15 or more employees. It prohibits an employer from taking any adverse employment action against an employee because of the employee's race, color, religion, gender or national origin.[12]

The Age Discrimination in Employment Act of 1967 (ADEA), in like manner, prohibits employers with 20 or more employees from discriminating against employees age 40 or older on account of the employee's age.[13] The ADEA, as amended, also forbids mandatory retirement at any age.[14]

The 1990 Americans with Disabilities Act (ADA), which applies to all school corporations, prohibits discrimination against qualified people with disabilities, people with perceived disabilities or people who associate with a disabled person.[15]

The Federal Rehabilitation Act of 1974 prohibits discrimination against people with disabilities in any program receiving federal assistance. [16] Most school corporations receive some form of federal funding and are covered by the Rehabilitation Act.

Title VII, ADEA or ADA cases begin with the filing of a written charge with the Equal Employment Opportunity Commission (EEOC) within 180 days of the alleged discriminatory act or within 300 days in a state with a "deferral agency." A deferral agency is a state or local fair employment practices agency which provides remedies for discrimination comparable to or greater than federal law. The Iowa Civil Rights Commission is, for example, a deferral agency

under EEOC regulations because IOWA CODE Chapter 216 prohibits employers from discriminating because of an individual's "age, race, creed, color, sex, national origin, religion or disability."[17] Consequently, if the employee has charged the employer with discrimination under the Iowa Civil Rights Act, the EEOC defers its investigation until the Iowa Civil Rights Commission has completed its investigation. The EEOC is not, however, bound to reach the same decision as the Iowa commission (or local human rights commission) and can file a lawsuit against the employer even if the Iowa Civil Rights Commission has decided there is no probable cause to believe discrimination occurred.

After investigating the case by securing evidence from the charging party and respondent-employer, the EEOC makes a written determination whether or not there is probable cause to believe the charge is true. The EEOC (unlike the Iowa Civil Rights Commission) is not a decision-making agency with remedial authority. Within 90 days of receiving a "probable" cause or "no probable" cause determination, the charging party must file a lawsuit against the employer in the appropriate federal district court.[18] Failure to comply with this time limit will bar a suit.[19]

The U.S. Civil Rights Act of 1991 grants plaintiffs a jury trial in all Title VII, ADEA and ADA cases. The act also increased the range of remedies available in Title VII and ADA cases to include reinstatement, back and front pay, compensatory damages (for emotional distress, for example), punitive damages, attorney fees, expert witness fees and court costs.

Courts and juries cannot, however, award punitive damages against a government subdivision such as a school corporation.[20] They can, however, award punitive damages against individual board members or administrators if the board member or administrator acted beyond the scope of his or her authority and the individual's conduct was willful or malicious in nature.

The U.S. Civil Rights Act of 1991 limits the combined compensatory and punitive damages (excluding back and front pay) a plaintiff may recover, based on the size of the employer. Those limits are:

15 to 100 employees	$50,000
101 to 199 employees	$100,000
201 to 499 employees	$200,000
501 or more employees	$300,000[21]

A successful plaintiff in an ADEA case is entitled to the same damages as a successful plaintiff in a Title VII or ADA case except that ADEA plaintiffs cannot recover compensatory or punitive damages.[22] ADEA plaintiffs are, however, entitled to liquidated damages equal to the amount of actual damages awarded if the plaintiff can establish the employer willfully violated the act.[23] A violation is considered willful if the employer knew, or showed reckless disregard for, whether its conduct was prohibited by the ADEA.[24]

Federal Civil Rights Act: Section 1981
The Civil Rights Act of 1866, 42 U.S.C. § 1981, provides in part that "all persons within the jurisdiction of the United States shall have the same rights… to make and enforced contracts … and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens…" the U.S. Supreme Court has ruled that §1981 prohibits governmental bodies, such as school corporations, from discriminating against individuals in the creation and enforcement of contracts because of their race. The Civil Rights Act of 1991 expanded the term "make and enforce contracts" to forbid discrimination in the administration of a contract. Thus, Section 1981 not only applies to hiring and termination decisions, but also to decisions made during the course of employment. Decisions to promote, demote or transfer a person to a parallel position are now covered by § 1981.

Section 1981 is limited to discrimination based on an individual's race. It does not apply to other protected classes such as sex, national origin, age, religion or disability. Section 1981, therefore, does not apply to a female administrator who alleges a school corporation refused to hire her as a high school principal because she is a woman. She could file a sex discrimination lawsuit pursuant to Title VII of the Civil Rights Act of 1964 or an equal protection claim pursuant to Section 1983.

Section 1981 does not contain a specific statute of limitations period. Courts, therefore, look to the most similar state law when determining whether a

§ 1981 claim is timely. The applicable Iowa statute of limitations for § 1981 claims is a 10-year statute for enforcement covering contracts if the plaintiff's claim is based on an alleged violation of a written contract of employment regardless of whether the employee was a classified or licensed employee. A five-year limitation applies if the contract is verbal rather than written. Filing a complaint with the EEOC prior to filing a §1981 suit is not required and the limitations on compensatory and punitive damages described above do not apply.

Federal Civil Rights Act § 1983

The Civil Rights Act of 1871, 42 U.S.C. Section 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress.

To make a claim under Section 1983, a party must allege that a person has deprived him or her of a federal right, privilege or immunity and that the person acted wrongfully under the guise of state law. A school corporation and its employees, agents and representatives can be "persons" for purposes of establishing liability under Section 1983.

The law regarding Section 1983 is complex and beyond the scope of this service. From a practical standpoint, current and former employees can use Section 1983 to claim the school corporation denied them a right guaranteed by federal law. Common allegations include that the school corporation denied an employee or former employee equal protection of the laws or failed to provide the employee with appropriate or adequate due process in violation of the 14th Amendment. Another common allegation is that employee or former employee was denied their First Amendment rights to free speech or free association. While not as common, Section 1983 can also be used to assert other federal law claims, such as a claim for sexual harassment, race or gender discrimination or unequal pay. Section 1983 is not typically used to assert these rights since the federal statutes creating the rights adequately protect the complaining party's interests.

Section 1983 does not pertain to every employment decision a school corporation makes. Section 1983 applies only to an "official policy, practice or custom" of the school corporation. Many employment decisions, particularly those based on specific facts and not on official policy, are not covered by Section 1983.

Section 1983, like section 1981, does not contain a specific statute of limitations. What state statute applies depends upon the nature of the claim. If, for example, the plaintiff alleges a school corporation denied him or her equal protection of the law, that claim is most like a tort claim and Iowa's two-year statute of limitations for tort actions applies.

There are a number of defenses a school corporation or its employees, agents and representatives can use in response to a Section 1983 action. First, the U.S. Supreme Court has ruled that individual school board members and school corporation employees enjoy a "qualified immunity" for all actions taken within the scope of their authority. They can be held personally liable for actions taken pursuant to such authority only if the plaintiff proves the school official knew or reasonably should have known his or her actions violated the plaintiff's constitutional right or if the official took the action "with malicious intention to cause a deprivation of constitutional rights or other injury." This qualified immunity applies to board members and school administrators. Also, if a school official or board member relies in good faith on the opinion of legal counsel that an action does not violate the Constitution or is otherwise consistent with federal law, it will frequently immunize the school official or board member from personal liability.

A jury trial is available under Section 1983. Reinstatement, back pay, front pay, compensatory and punitive damages and attorney's fees are available to prevailing plaintiffs.

Workforce Development Proceedings

A person discharged from employment, in addition to contesting his or her termination in one or more of the forums already mentioned, may seek unemployment benefits under the Iowa Employment Security Law.[25]

Generally, an individual is entitled to unemployment compensation benefits if he or she:

1. Has filed a claim for benefits.
2. Has earned a certain level of wages during his or her "base year."
3. Is "able to work, is available for work, and is earnestly and actively seeking work."[26]

Individuals who otherwise qualify for benefits can, however, be disqualified if they voluntarily quit their last job without good cause attributable to the employer or were discharged due to misconduct.[27] Individuals may also be disqualified for benefits if, without good cause, they fail to "either apply for available, suitable work when directed by the division or to accept suitable work when offered to that individual."[28]

Voluntary Quit

A person filing for unemployment is not entitled to benefits if the person voluntarily quit his or her job "without cause attributable to the employer."[29] In its rules, Workforce Development defines voluntary quit as "discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated" and lists over 30 reasons for quitting that are presumed to be without good cause attributable to the employer.[30] The common thread running through all 30 reasons listed is that the individual left his or her employment for personal reasons or for reasons that could not be directly attributed to the employer. The following reasons are particularly relevant to school corporations:

1. The individual's lack of transportation to the work site, unless the employer agreed to provide transportation.[31]
2. The individual moved to a different locality.[32]
3. The individual quit the job to pursue other employment, but did not secure that employment.[33]
4. The individual was absent from work for three days without giving notice to the school corporation in violation of a rule requiring the individual to provide notice of any absence.[34]
5. The individual left work due to his or her inability to work with other employees.[35]
6. The individual left work to get married or to accompany a spouse to a new location.[36]
7. The individual left work without notice after a mutually agreed-upon trial period of employment (i.e. a 60-day probationary period).[37]
8. The individual left work due to a lack of child care.[38]
9. The individual left work due to a personality conflict with the supervisor, because he or she disliked his or her assigned work shift, or because of other dissatisfaction with the work environment.[39]
10. The individual left work to take a vacation or attend school.[40]
11. The claimant left work after being reprimanded or left work rather than perform assigned work as instructed.[41]

The Workforce Development rules state an individual voluntarily quits their job, and is therefore not eligible for benefits, if the individual notifies the employer of his or her intent to resign and the employer accepts that resignation.[42] With

respect to school corporations, an employee is considered to have resigned his or her employment by declining or refusing to accept a new contract or a "reasonable assurance of work for a successive academic term or year," provided the offer for work is "within the purview of the individual's training or experience."[43] The Workforce Development rules that govern teacher's or administrator's eligibility for unemployment insurance benefits are not necessarily consistent with the automatic continuation or termination procedures under IOWA CODE Chapter 279.

Providing an employee with a reasonable assurance of employment for a successive academic year also prevents employees who are employed for less than a calendar year from recovering unemployment benefits for the months they are not under contract. As a result, a school bus driver whose employment contract only requires him to work when school is in session cannot receive unemployment benefits during summer vacation provided the school corporation has assured the bus driver that his or employment will resume when school commences the following fall. In like manner, a teacher cannot receive unemployment compensation benefits during summer vacation if the teacher has been offered a contract for the next school year within the time frames required by the IOWA CODE Section 279.13 but refuses to accept that contract and voluntarily resigns his or her employment.

Workforce Development's rules list a number of reasons for quitting employment that are presumed to be for good cause attributable to the employer, and permit the employee to receive benefits.[44] Of the reasons listed, the following could apply to school corporations:

1. The individual left work due to unsafe, unlawful working conditions or due to working conditions that were "intolerable or detrimental."[45]
2. The individual left work when he or she was given a choice of resigning or being discharged.[46]
3. The individual left work because the type of work was misrepresented when the individual accepted the work assignment.[47]
4. The individual left work in lieu of exercising the right to bump or oust a fellow employee with less seniority.[48]

Workforce Development regulations also list other causes attributable to the employer, such as an employer's willful breach of the individual's contract of hire or any changes in the employee's working conditions that jeopardize the individual's safety, health or morals.[49] The breach in the individual's contract of hire or change in working conditions must, however, be substantial to permit the employee to recover benefits. Workforce Development rules provide that the change must involve "a substantial alteration of the employee's working hours, shifts, remuneration, location of employment, or a drastic modification in the type of work."[50] Minor changes in the employee's contract of hire or initial working conditions are not, therefore, good cause attributable to the employer and will not result in unemployment benefits.

For example, a teacher hired for third grade who was involuntarily transferred to junior high math and then quit rather than perform that assignment, would not be entitled to unemployment benefits since the "change" in working conditions is not substantial. If, on the other hand, the school corporation transferred the teacher to a teaching associate position or to some other classified position and the teacher resigned, then Workforce Development would probably conclude the teacher left work due to a substantial change in the contract of hire and award the teacher benefits.

Misconduct

An employee discharged for misconduct is not eligible for unemployment benefits. Workforce Development regulations define "misconduct" as:

> A deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as that term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is

> found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand, mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.[51]

An employee discharged for misconduct as defined above is disqualified for benefits until he or she secures new employment and is "paid wages for insured work equal to 10 times the [employee's] weekly benefit amount, provided the [employee] is otherwise eligible."[52]

A more rigid penalty is imposed if the employee is discharged for "gross misconduct" which is defined as a written admission or conviction of "an act constituting an indictable offense in connection with the employee's employment."[53] The regulations define an indictable offense as "a common law or statutory offense presented on indictment or county attorney's information, and includes all felonies and all indictable misdemeanors punishable by a fine of more than one hundred dollars ($100) or by imprisonment in the county jail for more than (30) days"[54] An employee discharged for gross misconduct is not only disqualified from receiving benefits, but loses any wage credits earned, prior to the date of discharge, from all employers.[55]

The Iowa Supreme Court has on many occasions interpreted what actions constitute misconduct within the definition above. Employees who were terminated for partially exposing bare buttocks while at work, [56] failing to follow repeated instructions from a supervisor over an extended period,[57] failing to properly record an incident and then misrepresenting what occurred when questioned,[58] disclosing confidential medical records to a third party without authorization,[59] and making vulgar and threatening statements to a supervisor in front of a co-worker,[60] all engaged in misconduct and were not entitled to receive unemployment benefits, according to the court.

Workforce Development regulations further define misconduct to include "willfully and deliberately" making a false statement on a job application if it "does or could result in endangering the health, safety and morals of the applicant or others, or result in exposing the employer to legal liabilities or penalties, or result in placing the employer in jeopardy."[61] Workforce Development regulations also define misconduct as "excessive unexcused absenteeism." In determining whether absences are excessive and unexcused and therefore misconduct, the Iowa Supreme Court considers "past acts and warnings,"[62] and as a general manner, does not deny benefits for a single, isolated unexcused absence. Repeated and unexcused absence for compelling personal reasons or repeated acts of tardiness due to oversleeping, can, however, constitute misconduct pursuant to Workforce Development regulations.[63]

Misconduct requires a willful act by the employee that is deliberately against the employer's best interest. Generally, misconduct does not include acts of carelessness or negligence on the job, even if the acts occur after repeated instructions on how the employee should perform assigned duties.[64] Discharges due to "poor work performance" are not misconduct unless special facts demonstrate that the employee's actions were deliberately taken to harm the employer.[65] Conduct serious enough to warrant the discharge of an employee is not necessarily serious enough to disqualify an employee from unemployment benefits.[66]

Lastly, a discharge for misconduct must be based on a current act and cannot be based on a past act or acts.[67] This requirement does not, however, preclude Workforce Development from considering an employee's entire record, including prior acts of misconduct, when evaluating the magnitude of the current act.[68]

Substitute Teachers

Whether substitute teachers who do not receive assignments over an extended period are entitled to unemployment benefits is an issue many school corporations have faced or will face. Workforce Development takes a case-by-case approach regarding substitute teachers and has issued the following rule:

> The question of eligibility of substitute teachers is subjective in nature and must be determined on an individual case basis. The substitute teacher is considered an instructional employee and is subject to the same limitations as other instructional employees. As far as payment of benefits between contracts or terms and during customary and established periods of holiday recess is concerned, benefits are denied if the substitute teacher has a contract or reasonable assurance that the substitute teacher will perform services in the period immediately following vacation or holiday recess. An on-call worker (includes substitute teacher) is not disqualified if the individual is able and available for work each week, placing no restrictions on employment and is genuinely attached to the labor market.[69]

Applying the above rule, the Iowa Supreme Court has held that a teacher who was on the school corporation's list of available substitutes one school year and then informed that the school corporation would continue to include her on its substitute teacher list for the next year, was not entitled to unemployment benefits. The court concluded the teacher was given a reasonable assurance of future employment and was therefore still employed.[70]

If a school corporation refuses to give a substitute teacher assignments for any reason other than misconduct, the teacher may be eligible for benefits depending on the facts involved, including how often the substitute actually worked for the school corporation. Workforce Development rules treat substitute teachers as "on-call" workers, which means they are not eligible for benefits if the wage credits they have earned during their base "consist exclusively of wage credits by performing on-call work."[71] The rule also provides that an individual who is "willing to accept only on-call work is not considered to be available for work" and is not entitled to benefits.[72] These rules, when read together, mean that a teacher who works only as a substitute and has not attempted to secure full-time permanent work is not eligible for and cannot recover unemployment benefits even if the school corporation removes the teacher from its list of substitutes and refuses to give the teacher additional assignments.

Injured Employees

Workforce Development rules also address whether an individual who leaves work due to an injury, illness or pregnancy is entitled to benefits. The rules provide that with respect to illness and injury that is not due to employment, the individual is entitled to benefits if he or she left work on the advice of a "licensed or practicing physician," and upon recovery, returned to the workplace and offered to perform services for the employer but "suitable comparable work" was not available.[73] Employees who fail to meet each of those conditions (i.e. obtain the advice and certification of a licensed and practicing physician, fully recover, and return to work and offer services) are considered to have voluntarily quit their employment without good cause attributed to the employer and are not eligible to receive benefits.[74] An employee is considered to have fully recovered from a non-work related injury or illness if the employee is able to perform "all of the duties of the previous employment."[75] Employees who are receiving paid sick leave benefits are not eligible for unemployment benefits.

Different rules apply to situations involving separations from employment due to illness or injury due to employment. Workforce Development considers an individual as being eligible for benefits if he or she "was compelled to leave employment because of an illness, injury or allergy condition that was attributable to the employment and does not require the employee to fully recover from the injury or illness or even offer his or her services to the employer upon recovery." An individual is considered to have been compelled to leave his or her employment if "factors and circumstances directly connected with the employment caused or aggravated the illness, injury, allergy or disease to the employee which made it impossible for the employee to continue employment because of serious danger to the employee's health."[76]

While an employee who sustains a work-related illness or injury is eligible for benefits, if it is impossible to return to work, the employee can only receive unemployment benefits if he or she is available for and actively seeking other employment. An employee who sustains a totally disabling work-related illness or injury that removes him or her from the workforce is not entitled to unemployment benefits because he or she is not

"available for work." The employee is, however, probably eligible to receive Social Security disability payments or benefits under a disability insurance plan.

Prohibited Practices Proceedings

Section 10 of the Public Employment Relations Act (PERA) expressly prohibits public employers, employee organizations and employees from engaging in certain employment practices. The PERA also contains procedures public employers, employee organizations and employees must use to report and prosecute alleged prohibited practices and to otherwise enforce the rights and obligations and the PERA. The PERA also established the Public Employment Relations Board (PERB) and delegated to it the authority to hear and decide complaints alleging a prohibited practice or any other violation of the PERA. The procedures in the PERA are the exclusive means through which claims are litigated. Public employers, employee organizations and employees must, therefore, exhaust the extensive administrative remedies in the PERA before filing a lawsuit in state court.[77]

The administrative procedures in the PERA are initiated by filing a complaint with the PERB. Complaints alleging a public employer, employee organization or employee committed a prohibited practice must be filed within 90 days of the alleged violation.[78] The complaint must contain a "clear and concise statement of the facts constituting the alleged prohibited practice, including the names of the individuals involved in the alleged acts, the dates and places of the alleged occurrence, and the specific section(s) of the Act alleged to have been violated."[79] The party filing the complaint must have a copy of the complaint personally served on all listed respondents within a "reasonable time" after the complaint is filed with PERB. Service can also be accomplished by sending a copy of the complaint to the respondent by certified mail, return receipt requested.[80]

The responding parties have 10 days from the date they are served with a copy of the complaint to file an answer.[81] The answer the respondents file must specifically deny or admit the allegations in the complaint and list any new facts and arguments which may support their position. PERB can consider failure to answer the complaint within 10 days after service as an admission of the facts central to supporting the allegations in the complaint.[82] It is, therefore, important for respondents to file an answer within the allotted time or request an extension from PERB.

The PERA and PERB rules specify that the agency may conduct a preliminary investigation of any alleged prohibited practice.[83] In practice, the PERB schedules an evidentiary hearing before an administrative law judge (ALJ) and does not actually investigate the complaint. PERB's approach differs from that typically taken by the Iowa Civil Rights Commission and the EEOC. Those agencies investigate most discrimination complaints and do not schedule a hearing or make any decision until the investigation is over. The hearing before PERB's ALJ proceeds like any other contested case proceeding under the Iowa Administrative Procedures Act.

After the evidentiary hearing and submission of briefs, the ALJ issues a proposed decision that includes written findings of fact and conclusions from these findings through the application of law. The ALJ's proposed decision can be reviewed by PERB. PERB can accept, reject or modify the proposed decision. The proposed decision becomes, however, a final agency action unless PERB reverses, accepts or modifies the decision.[84] Either party can appeal an adverse PERB decision to Iowa district court and ultimately to the Iowa Supreme Court. An adverse decision must be appealed to the Iowa district court within 30 days of the final PERB action to preserve the party's appellate rights.[85]

As with any other appeal of a decision by an administrative agency, the district court must defer to the findings of fact made by the ALJ (provided the findings are not modified or rejected by PERB) and defer to PERB's presumed expertise on matters that pertain to the PERA.[86]. The district court's review is appellant in nature and it does not conduct a separate evidentiary hearing. The district court must sustain PERB's decision unless PERB acted in excess of its powers, its decision was procured by fraud or was contrary to law or the decision was not supported by a substantial evidence in the record when the record is considered as a whole.[87]

Terminating the Disabled Employee

In 1980, the Iowa Supreme Court stated that a licensed employee's physical or mental disability

could constitute "just cause" for termination.[88] The court listed the following factors as relevant:

1. The nature of the employee's duties;
2. The character and duration of the disability;
3. The needs of the school corporation;
4. Whether others could perform the employee's duties;
5. The amount of sick leave available;
6. Any pertinent provisions in the collective bargaining agreement;
7. Whether reasonable accommodations are possible;
8. Whether there is expert opinion that the disability causes the employee's incompetency.[89]

The court's decision, however, applied only to the just cause standard contained in IOWA CODE Section 279.15 and did not address the Americans With Disabilities Act of 1990 or the Iowa Civil Rights Act. Those statutes prohibit employers, including school corporations, from discriminating against any individual because of a potential disability.[90] Those statutes also require that employers reasonably accommodate the known disabilities of their employees.

The Iowa Supreme Court's decision and those statutes require school corporations to apply a two-pronged analysis when determining if they can legally terminate a teacher with disabilities. First, the school corporation must determine whether just cause exists under the standards articulated by the court. Second, the school corporation must analyze whether terminating the teacher constitutes disability discrimination under state or federal law. The school corporation need only use the second prong of the analysis when deciding whether to terminate a classified employee with disabilities.

Protected Disabilities and Job Description

Analyzing whether an employee discharge constitutes disability discrimination depends on whether the employee's claimed impairment is a protected disability under state or federal law. The ADA and Iowa's Civil Rights Act cover only physical or mental impairments that substantially impair a major life activity of a disabled individual. Not all impairments are protected disabilities. The school corporation cannot discharge an employee because of the physical or mental disability, provided the condition does not prevent the employee from performing the essential functions of his or her job with or without reasonable accommodation. The EEOC's regulations define the "essential functions" of a job as the "fundamental job duties" of the job and indicate that the term does not include "the marginal functions of the position."[91] The regulations further provide that the following factors constitute "evidence" on whether a particular function is essential or nonessential:

1. The employer's judgment as to which functions are essential;
2. Written job descriptions prepared before advertising or interviewing applicants for the job;
3. The amount of time spent on the job performing the functions;
4. The consequences of not requiring the incumbent to perform the functions;
5. The terms of a collective bargaining agreement;
6. The work experience of past incumbents in the job;
7. The current work experience of incumbents.[92]

Job descriptions are one piece of evidence regarding what job functions are essential. To be effective though, job descriptions must accurately reflect what the person actually does on a regular basis. In addition to listing the essential tasks or functions required to perform a certain job, an effective job description should also list any physical requirements required. For example, if a school custodian is required to lift 15 pounds or more on a regular basis and if the job requires continuous bending, stooping and standing, those physical requirements should be included in the job description. Any physical restrictions or limits in a job description must be accurate if the description is to be useful in determining what functions and qualifications for the job are "essential" under the ADA.

Many employers retain vocational rehabilitation counselors or persons with a vocational rehabilitation background to assist them when preparing job descriptions. Persons with expertise in this area can be very helpful when determining

the essential job functions and physical requirements for the job.

Reasonable Accommodation

The employer must determine whether the employee can perform the essential functions of the job with or without reasonable accommodation. If the employee cannot perform the essential functions of the job with or without reasonable accommodation, the employer can discharge the employee without incurring liability under the ADA or Iowa's Civil Rights Act. An employee who can perform the essential functions of the job with or without reasonable accommodation cannot be discharged because of his or her disability.

The apparent simplicity of this equation is somewhat misleading. Determining what constitutes a "reasonable accommodation" is one of the more complex issues an employer will face. The ADA provides that a method of accommodation is reasonable if it does not impose an "undue hardship" on the employer's business operations. The ADA defines an "undue hardship" as ,"an action requiring significant difficulty and expense" subject to the following considerations:

1. The nature and cost of the proposed accommodation.
2. The overall financial resources of the facility or facilities.
3. The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation.
4. The number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility.
5. The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity; the geographic separateness, administrative or fiscal relationship of the facility or facilities in question to the covered entity.[93]

Employers must use a two-pronged approach when determining whether an accommodation results in an undue hardship. First, the employer must analyze the effect the suggested accommodation will have on the "facility" where the disabled employee works. For school corporations, this will mean analyzing the effect at the building level. For example, will accommodating a custodian's lifting restrictions, cause an undue hardship because the custodian works alone at night and no one else is available to perform the job functions that require heavy lifting? Will accommodating a teacher who must rest periodically during the day result in an undue hardship because the building is short of staff and no other teacher or teacher associate is available who can substitute when the teacher needs to take a break? While these questions are difficult to answer in the abstract, a school corporation faced with those situations could potentially establish that the suggested accommodation would cause an undue hardship and is unreasonable when considered at the building level. The school corporation's analysis cannot end at the building level, though.

To comply with the ADA, a school corporation must also analyze the effect any suggested method will have on the entire school corporation. This means that while the school corporation may have difficulty accommodating disability at the building level, resources may be available elsewhere that could diminish or alleviate the overall burden. Using the custodian example, while the school corporation may not be able to accommodate the employee at the building level, it might have another employee available (perhaps at another nearby building) who could, at the end of his or her shift, complete the heavy lifting and thus allow the disabled employee to perform the essential functions of his or her job with accommodation. Under this scenario, the staff and resources available to the school corporation compensate for the limited staff and resources available at the building level.

The EEOC or a previewing court will, when determining whether a suggested method of accommodation constitutes an "undue hardship," evaluate the cost based on the general funds available to the school corporation, not on the budget for the building in which the employee works. Many aides and devices that help disabled employees perform their jobs cost less than $5,000. Most school corporations are financially able to absorb an expense of that magnitude.

Methods of Accommodating

Protected Disabilities

The potential methods available for accommodating an individual are numerous and varied, depending upon the nature of the disability and the work to be performed. The ADA does, however, list the following examples:

1. Job restructuring.
2. Part-time or modified work schedules.
3. Reassignment to a vacant position.
4. Acquiring or modifying of equipment or devices.
5. Appropriate adjustments or modifications or examinations, training materials or policies.
6. Providing qualified readers or interpreters.
7. Other similar accommodations.

The potential accommodations may seem daunting. Nothing in the ADA, however, prohibits employers from discussing potential accommodations with the disabled employee. To the contrary, EEOC's *Technical Assistance Manual* recommends it. The disabled employee is one of the employer's better resources concerning what the employer can and cannot do since the employee lives with disability daily. This does not mean, however, that the employer must accept and implement any method of accommodation the employee suggests. The EEOC only suggests the employer obtain input from the disabled employee. It does not require the employer to delegate its decision-making responsibility to the employee.

The ADA imposes heavier burdens on the employer to adjust its operations to accommodate the disabled employee than existed under prior Iowa law. Even so, the employer is not required to create permanent "light duty" jobs or to transfer the essential duty of a job to other employees, increasing their workloads.[94] In addition, the ADA does not require an employer to ignore or violate negotiated seniority clauses when reassigning a disabled employee.[95]

Terminations Due to School Reorganizations or Sharing Agreements

Employee associations have proposed collective bargaining agreement provisions guaranteeing continued employment of teachers after a reorganization. This may restrict the school corporation's right to reduce staff for legitimate reasons and should be reviewed carefully before it is adopted. Section 275.33 of the IOWA CODE states that the agreement of the largest school corporation in the reorganization is the "base agreement" for the first year and automatically applies to all teachers. If the base agreement is a multi-year contract, it remains in effect for its duration.

Employee associations have also proposed bargaining agreement provisions which dictate the contents of a Chapter 28E agreement on whole grade sharing. Some proposals require staff reductions to be made strictly according to seniority as provided in one school corporation's collective bargaining agreement or contract. The imposition of one school corporation's contract terms to teachers from another school corporation (who may not even be represented) is illegal. It is entirely appropriate, of course, to govern teachers' staff reductions by the terms of their collective bargaining agreement, if any. A proposal forbidding any reductions after a sharing agreement should be rejected.

Termination Involving Sexual or Physical Abuse of Children

The most difficult personnel situation a school administrator will ever encounter involves an allegation that an employee physically or sexually abused a student. The school administrator must know and follow the procedures contained in Chapter 102 of the Department of Education's regulations and provide the employee with sufficient due process before discipline. Licensed employees terminated or counseled out for sexual exploitation of a student must be reported to the Board of Educational Examiners. IOWA CODE 272.15.

Chapter 102 Procedures

Complaints regarding employee-student harassment are initially investigated through the procedure set forth in Chapter 102 of the Department of Education rules. However, for Chapter 102 to apply, the alleged harassment must have occurred on school grounds, on school time, at a school-sponsored activity or in a school-related context.[96] The allegations must also include an incident of

sexual or physical abuse. The regulations define those terms as follows:

- "Physical abuse" means non-accidental physical injury to the student as a result of the actions of the school employee. Injury occurs when evidence of it is still apparent at least 24 hours after the incident. Physical abuse may occur as the result of intentional infliction of injury or excessive, unnecessary, or unreasonable use of force.[97]
- "Sexual abuse" means any sexual offense as defined by IOWA CODE chapter 709 or IOWA CODE section 728.12 (1). The term also encompasses acts of the employee that encourage the student to engage in prostitution as defined by Iowa law, as well as inappropriate, intentional sexual behavior by the employee toward a student.[98]

The Chapter 102 procedures begin with a "report" being filed with the school corporation's designated investigator. "Any person who has knowledge of the incident of abuse" may file a report.[99]The report must provide certain background information including the name, address and phone number of the person filing the report and a "concise statement of the facts surrounding the incident, including the date, time and place of the occurrence, if known." Anonymous complaints may, however, be investigated.[100]

After receiving a report, the designated investigator, who is typically referred to as a "Level I" investigator, must thoroughly investigate the allegations. These Level I investigations typically involve a face-to-face interview with the alleged victim, the alleged perpetrator and any witnesses. If at any point in the process, the Level I investigator determines that it is likely an incident of "sexual abuse" or "sexual exploitation" as defined by Iowa law occurred, then he or she is required to contact appropriate law enforcement officials and not investigate the matter further.[101]

After the Level I investigator concludes the investigation, he or she must prepare a report of the findings. Copies of the report must be given to the student's parents or guardians, the employee and the employee's supervisors. In the report, the Level I investigator must determine, based upon a preponderance of the evidence, whether it is "likely that an incident took place between the student and the school employee."[102] A Level I investigator's determination is limited to that issue. He or she does not "determine the guilt or innocence of the school employee." If the Level I investigator finds it is not likely that an incident of sexual or physical abuse occurred, the matter is dropped. If the Level 1 investigator reaches the opposite conclusion (i.e. that it is likely that an incident of sexual or physical abuse occurred), the matter is referred to a Level II investigator.[103]

A Level II investigator is selected according to procedures adopted by the school corporation's board of directors. A Level II investigator can be a representative of law enforcement authorities, the county attorney's office, personnel or human services or private parties experienced and knowledgeable in the areas of abuse investigation.[104] The Level II investigator cannot, however, be a school employee,[105] meaning a person who works for wages or is a volunteer under the direction of the board of directors or any administrator of the public or nonpublic school, or the board of directors or administrator of an agency called upon by a school official to provide educational services to students, including area education agencies.

A Level II investigator is given relatively free rein to further investigate the alleged sexual or physical abuse. The Level II investigator is, however, required to review the initial report of abuse and the Level I investigator's report, and after further investigation is also required to prepare a separate report.[106] Unlike the Level I investigator, whose findings are limited to whether an incident of sexual or physical abuse likely took place, the Level II investigator must make a specific finding concerning whether the alleged sexual or physical abuse occurred.[107] With respect to physical abuse, the Level II investigator must also include whether the alleged physical contact with a student was justified under the circumstances.[108] The regulations permit a school corporation employee to use "reasonable and necessary force, not designed or intended to cause pain" for any of the following reasons:

1. To quell a disturbance or prevent contact that threatens physical harm to others;
2. To obtain possession of a weapon or other dangerous object within the pupil's control;

3. For purposes of self-defense or defense of others;
4. For protection of property;
5. To remove a disruptive pupil from class, or any area of school premises or from school-sponsored activity off school premises;
6. To prevent a student from the self-infliction of harm;
7. To protect the safety of others.[109]

In addition, the regulations also permit a licensed employee to use "incidental, minor, or reasonable physical contact to maintain order and control." When determining whether physical contact against the student is "reasonable," the Level II investigator must consider:

1. The nature of the misconduct of the student, if any, precipitating the physical contact by the licensed employee;
2. The size and physical condition of the student;
3. The instrumentality used in making physical contact;
4. The motivation of the school employee in initiating the physical contact;
5. The resulting extent of injury to the student.[110]

If the Level II investigator finds the school employee did not engage in sexual or physical abuse as defined under the regulations, the matter is dropped. If the Level II investigator concludes that sexual or physical abuse occurred, the school corporation is required to file a complaint with the Board of Educational Examiners and must also decide what discipline, if any, is required.[111]

The school's administration should not rely entirely upon the Level II investigator's report when disciplining the employee and should independently review the allegations. This is particularly the case if the allegations concern a licensed employee with continuing contract rights under IOWA CODE Chapter 279. An independent investigation is probably necessary to preserve the employee's due process rights. The administrator may and should take the Level II investigator's findings into account and should also review any witness statements or other documents the Level I or Level II investigator gathered. The superintendent or designee should not, however, rely entirely upon those materials and should also personally interview the licensed employee, the student and any witness. The superintendent should make an independent conclusion regarding whether the licensed employee actively violated district rules or policies.

Discipline will vary depending on the severity of the alleged abuse. Possible forms of discipline include written reprimand, unpaid suspension or discharge. For a licensed employee with Chapter 279 contract rights, the school corporation must follow set procedures to terminate the employee's contract. Most terminations for sexual or physical abuse will be immediate discharges pursuant to IOWA CODE Section 279.27. If the employee is not licensed, the school corporation should follow its standard personnel procedures which grant the employee appropriate due process protections.

Completing a Level I and II investigation takes time. A question that frequently arises when an employee is accused of physical or sexual abuse concerns what the school corporation should do with the employee while investigations are underway. Most school corporations place licensed employees on leave with pay pending resolution of the Level I and II investigations. The paid leave is typically referred to as an "investigative leave" to avoid the appearance of imposing discipline before the investigations are over. Placing the employee on leave removes the teacher from the scene to avoid the possibility of repeated misconduct. A paid leave also preserves the school corporation's ability to terminate the licensed employee's continuing contract if the Level II investigator, and then the administration, conclude the allegations are founded. Under Iowa law, a school corporation cannot suspend an employee without pay pending a termination hearing.[112]

Allegations of physical or sexual abuse against classified employees do not present the same problems since they can be placed on leave without pay during the investigation. Nonetheless, most school corporations place classified employees on paid leave unless the employee openly admits the allegations. Paid leave is provided since, in many cases, imposing unpaid leave would financially injure an employee who might later be cleared of all charges. It is also consistent with the presumption of innocence afforded under criminal law.

The School Board's Role in Teacher

Contract Terminations

In *Fairfield Community School District v. Justmann*, 476 N.W.2d 335 (Iowa 1991), the role of the school board in teacher contract termination hearings was addressed as well as the standard a court applies when reviewing a teacher contract termination case. The Fairfield School Board voted to terminate a teacher's contract based upon its findings that the teacher had solicited and engaged in sexual relations with one of his students. The adjudicator reversed the school board's decision. The district court reversed the adjudicator's decision and upheld the school board's decision. The Iowa Supreme Court affirmed the district court. The Supreme Court determined that the school board was in the best position to measure the credibility of the witnesses. The Supreme Court held that the determinations made by the school board were reasonable. In reaching this conclusion the Supreme Court stated:

> The testimony by those purporting to have first-hand knowledge of the events in question was limited to that given by Justmann, Huntzinger, and M. M. Considering the record as a whole, it is entirely reasonable to accept M. M.'s testimony as accurate and, consequently, to discredit the testimony given by Justmann and Huntzinger. Huntzinger's testimony suffered from bias and lack of clarity as to the details of the evening in question, and Justmann's testimony was sufficiently discredited by the birthday card and the hand-written map… Given that the board's findings of fact are reasonable inferences when considering the record as a whole, we are satisfied that the quantum of evidence required by subparagraph six of section 279.1 8 has been met. Id.,at 337.

In this case, the board's finding though spare, are sufficient to apprise the reviewing court of the material, factual underpinnings that support the board's conclusion that there was just cause for termination of Justmann's teaching contract. The findings clearly indicate that the board found that he did solicit and thereafter engage in sexual intercourse with M. M. in the spring of 1988. Id., at 340.

In order for the school board to offer the best education possible within the limitations of the school district, high quality staff must be maintained. Every school board may eventually face a decision of whether to retain or terminate a teacher's contract. School boards have strict guidelines to follow when terminating a teacher's contract.

The Teacher's Interest

The 14th Amendment to the U. S. Constitution states "nor shall any State deprive any person of life, liberty or property without due process of law…" Since the drafters of this amendment provided no clear indication of their intent, the courts have had to interpret the language. The courts have interpreted "state" to mean the state as well as political subdivisions, including school districts.

The interest an individual has in being deprived of life is pretty straightforward. Before an individual's life can be taken, the state must provide due process. An individual's interest in liberty and property is not so clear.

A property interest is one in which an individual has a legitimate claim of entitlement to the property as created by law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). A liberty interest includes an interest in an individual's good name, reputation, honor or integrity. *Roth*, at 573. A teacher facing contract termination possesses both interests. The teacher has a property interest because state law, IOWA CODE Chapter 279, states that after the probationary period, the teacher has an automatic continuing contract. Therefore, in order for a school board to terminate a teacher's contract the school board must comply with due process.

The teacher has a liberty interest because of the teacher's professional, and possibly, personal reputation at stake. Before the school board can injure a teacher's reputation, due process must be followed. In some teacher contract termination cases, only one interest will be at stake. In others, both of these interests will be at stake. It makes no difference which interest is at stake, the property or liberty interest require the same due process.

What is Due Process?

Due process is a requirement of the Fourteenth Amendment. Due process is required to ensure there is fundamental fairness in the procedures used to deny an interest. Due process is a flexible concept. It varies depending upon the individual's

interest at stake. *Matthews v. Eldridge*, 424 U.S. 319 (1976). The less serious the deprivation, the less due process required. The more serious the deprivation, the more formalized the due process must be. *(i.e. a teacher being reprimanded requires less due process than a teacher whose contract is being terminated.)* Due process at a minimum requires that the individual have a right to notice of the charges, an opportunity to be heard and a right to confront the charges. At the other extreme, due process requires that an individual have a right to a full-scale hearing by an impartial tribunal in addition to the minimum due process requirements.

Over the years, as the concept of due process has developed, courts have engaged in a balancing act. Three factors are weighed by the courts in determining the proper due process for the circumstances:

1. the individual's interest that will be affected by the official action;
2. the risk of an erroneous deprivation of the interest through the procedures used; and,
3. the financial and administrative interests of the governmental body. *Matthews*, at 334-335.

The *Matthews* test weighs the individual's infringed interest against the alternative procedures, keeping in mind the cost of the procedure. Although the cost cannot justify a total denial of an interest, the U. S. Supreme Court has upheld cost as a factor to be weighed because of the limited resources of governmental bodies. *Id*.

Before a determination is made as to which level of due process is necessary, the timing of the due process hearing must be addressed. Generally, the hearing must be held at a time before the interest is deprived. The reason for a hearing before the interest is deprived is to avoid the deprivation of an interest that may be irreversible or irreparable. The governmental body can only justify deprivation of an interest before a hearing is held if there is a valid governmental interest at stake that justifies a hearing after the interest has been denied. *Goss v. Lopez* 419 U.S. 565, 582-3.

Because of the importance of the teacher's interests in the contract termination process, Chapter 279 mandates a strict procedure for contract termination. It includes specific timelines and the option of a hearing by an impartial panel. *Larsen v. Oakland Community School District*, 416 N.W.2d 89 (Iowa App. 1987). To familiarize yourself with this process, refer to the *Licensed Employee Contract Procedures Manual* section of this service. Many samples of the required termination forms can be found at

http://www.ia-sb.org/WorkArea/showcontent.aspx?id=2488

Teacher Termination Due Process Steps

Fourteenth Amendment due process sets a minimum floor of procedures that may be necessary. The Fourteenth Amendment does not set a ceiling. Chapter 279 expands on the Fourteenth Amendment and sets out the procedures that must be followed in the termination of a teacher's contract.

Notice of the Charges - Iowa Code § 279.15

By April 30, the superintendent must notify the teacher that the superintendent is recommending to the school board, that the teacher's contract not be renewed. The notice must be in writing and delivered personally or by certified mail. The notice must contain a short and plain statement of the reasons why the superintendent is recommending termination of the teacher's contract. This notice must be complete and include all reasons for the recommendation. *Centerville Community School District v. Thom*, 90-1466, (Iowa App. 1991). If a reason is missing from this notice, it cannot be introduced at a later date.

A teacher's contract may be terminated for just cause. Just cause has been interpreted as faults attributable to a teacher as showing an adverse impact on school operations as well as faults not attributable to a teacher, i.e. the need to reduce or realign staff due to budgetary or other considerations. "Just cause" is determined on a case-by-case basis. The school district's master contract may list a number of factors constituting just cause in the area of staff reduction. If the master contract lists factors, it is not necessary that all of the factors be present to terminate a teacher's contract. If the master contract outlines specific procedures on staff reduction, they need to be followed. The notice need only address the factors relevant to the particular case.

In *Sac City Board of Education v. Schermerhom*, 340 N.W.2d 789 (Iowa App. 1983) the court stated

"*We recognize that the board may not be required in every instance to apply all the listed criteria to determine whose contract should be terminated since all the criteria may not necessarily be applicable in every case*." Id. at 791-2. A school board need only consider the relevant criteria determined by the facts of the case. Failure to consider all the relevant factors is grounds for reversal of the school board's decision.

The notice must also be specific enough to allow the teacher to prepare a defense. It need not include all the details because Chapter 279 allows the teacher to exercise discovery procedures to elicit information from the superintendent. *Wedergren v. Board of Director*, 307 N.W.2d 12, 17 (Iowa 1981)(Although Wedergren was an administrator, the same discovery rules apply). The test of whether the notice is adequate is fundamental fairness. The notice need not meet the technical rules of civil pleading. Id., at 16.

Opportunity to be Heard - Iowa Code § 279.1 5-. 16

A teacher has the right to request a private hearing before the school board and the opportunity to be represented by counsel. Within five days of receipt of the superintendent's notice, the teacher must notify the school board secretary in writing that the teacher requests a private hearing with the school board. The private hearing is exempt from the open meetings law, IOWA CODE Chapter 21. As a result, no public notice need be given for the private hearing, no public vote must be taken to enter the private hearing and the school board secretary is not required to tape the private hearing. However, the law does require that a certified shorthand reporter keep a record of the proceedings.

The private hearing must be held no less than ten days and no more than twenty days following the teacher's written request unless other arrangements are agreed to by the teacher and the school board. No later than five days following the private hearing, the school board must meet in closed session to discuss the evidence and make a recommendation. This session is subject to IOWA CODE Chapter 21 the open meetings law, to discuss the evidence and make a recommendation. After the school board has discussed the evidence, the school board must re-enter the open meeting. The vote to continue or terminate a teacher' s contract must be held in an open meeting.

Opportunity to Present Evidence - Iowa Code § 279.15-.16

The teacher has the right to present evidence on the teacher's behalf as well as confront evidence submitted by the superintendent including the right to cross-examine persons called on behalf of the superintendent. Five days before the private hearing the school board secretary must furnish the teacher any documentation the superintendent may present to the school board at the private hearing as well as a list of persons who may support the superintendent's recommendation at the private hearing. At least three days before the hearing, the teacher must provide, to the school board secretary, any documentation the teacher expects to present at the private hearing along with the names of the persons who may address the school board on behalf of the teacher.

Fair and Impartial Hearing

The school board is seated as the hearing panel. The school board will have an attorney present to assist the board president in conducting the hearing, ruling on motions during the hearing and in developing post-hearing findings. One of the most important aspects of due process is the right to be heard by a fair and impartial hearing panel or officer. This right is not addressed in Chapter 279 but is fundamental to the requirement of fairness in a due process hearing. The school board must enter the teacher's private hearing without preconceived notions of the outcome.

As the hearing panel in a teacher contract termination case, the school board acts as a quasi-judicial panel. The school board is the trier or determiner of the facts in question between the teacher and the superintendent. The school board, acting as a quasi-judicial body, possesses a presumption of honesty and integrity. A school board member may be disqualified from sitting on the panel when the school board member has a prejudicial interest in the case. The most obvious types of bias or loss of impartiality are those when a school board member has a financial interest in the outcome or where the school board member has been the target of abuse from the teacher. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). It is the responsibility of the teacher to prove the school board is actually biased and unable to remain impartial. *Id.*

Because of the school board's position and its role in school district operations, it would appear to be simple for a teacher to prove a school board was not impartial. But mere proof that the board exercises more than one role, administrative and judicial, does not result in automatic disqualification. There must be a showing that a decision maker is not capable of judging a particular controversy fairly on the basis of its own circumstances. *Hortonville Jt. School District No. 1 v. Hortonville Education Association*, 426 U.S. 482, 493 (1976).

Because due process prevents the school board from acting as prosecutor, judge and jury, school board members should not participate in the investigation or preparation of a teacher contract termination case against a teacher. While mere familiarity with the facts does not disqualify a decision-maker, a decision-maker could be disqualified if required to draw upon personal knowledge in reaching a decision. *Keith v. Community School District of Wilton*, 262 N.W.2d 249, 260 (Iowa 1978).

Under Chapter 279, the superintendent, not the school board, investigates the need for termination of the teacher's contract, states the factors for just cause termination of the teacher's contract, recommends termination of the teacher's contract and presents the evidence supporting termination of the teacher's contract. The school board is not involved until the private hearing. Generally, the school board remains impartial unless it is involved in the investigative stage or assists in prosecuting or proving the case or has some personal interest in the outcome of the matter.

The strong presumption that a school board member can remain impartial and make a decision based solely upon the evidence presented to the school board is not easily overcome. Even in a case where a school board member served on a committee to observe a teacher who eventually was terminated, the school board was found to be impartial. *Larson v. Oakland Community School District*, 416 N.W.2d 89, 95 (Iowa App. 1987). In *Olds v. Board of Education of Nashua Community School District*, 334 N.W.2d 765 (Iowa App. 1983), a teacher had contract termination hearings two years in a row. Three of the five school board members sat on both hearing panels. The court held that the fact that three of the school board members participated in both hearing panels was not a violation of due process and the teacher did have a hearing in front of an impartial hearing panel. The court found that the three school board members expressed their ability to remain impartial in the second hearing and the teacher had not met his burden to prove that the school board members were biased. *Id.*, at 769. See also *Hortonville*.

A teacher whose contract is terminated by the school board can appeal the school board's decision claiming the school board was biased and not impartial. In order for the school board's decision to be overturned on grounds of bias or lack of impartiality, the teacher must prove that a school board member made a decision based upon evidence other than that presented before the school board. *Larsen*, at 95.

The courts have not delineated a specific test as to what constitutes actual bias or lack of impartiality. They have addressed it case-by-case. In one case, a school board, which unsuccessfully negotiated contracts with striking teachers and then terminated the striking teacher's contract was found to be impartial. *Hortonville*, at 494. In *Hortonville*, the court found that the school board was merely carrying on its role as negotiator of the contracts. The courts have also found that bias or lack of impartiality does not exist when the school boards' legal counsel acts as prosecutor of the teacher as well as advisor to the school board. *Lamb v. Panhandle Community School District #2*, 826 F.2d 526 (7th Cir. 1987), quoted *Fairfield Community School District v. Justmann*, 476 N.W.2d 335 (Iowa 1991). In *Justmann*, the Iowa Supreme Court, quoting *Lamb*, stated that the combination of advisory and prosecutorial roles are not automatically objectionable and evidence of actual bias. In *Justmann*, the court held that even though a school board member, who did not sit on the hearing panel, was a witness for the superintendent, it was not sufficient to overcome the presumption of impartiality.

Right to an Appeal

Although due process does not guarantee a right to an appeal, Chapter 279 does. Under IOWA CODE § 279.17, the teacher has the right to appeal the school board's decision to an adjudicator. An adjudicator is an impartial 3rd party brought in to review the school board's decision. The teacher must notify the school board secretary in writing

within ten days of the school board decision that the teacher is appealing to the adjudicator.

After the teacher and the school board have agreed upon an adjudicator, the school board secretary forwards the record of the private hearing to the adjudicator. The cost of the record, in the form of a transcript, is paid for by the school district. The adjudicator hears the appeal based solely upon the record made in the private hearing. Additional evidence cannot be admitted into the record except in limited circumstances. If additional evidence was unavailable at the time of the private hearing and there were good reasons for failure to present the additional evidence at the private hearing or the additional evidence was not known to exist at the time of the private hearing, the adjudicator may allow the additional evidence to be heard. If the adjudicator allows the additional evidence to be heard, the school board hears the additional evidence and may modify its findings and decision.

The adjudicator must give weight to the findings of the school board, especially when it concerns the credibility of witnesses. However, the adjudicator is not bound by the school board's findings. The reasons for which an adjudicator can overturn the school board's decisions are limited. The adjudicator may only reverse or modify the school board action if substantial interests of the teacher have been prejudiced because the school board's action was:

1. in violation of a school board policy or contract;
2. unsupported by a preponderance of the competent evidence in the record made before the school board when the record is viewed as a whole; or,
3. unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. IOWA CODE §279.17.

Within fifteen days of the hearing, the adjudicator must make a decision. The decision is final and binding unless the teacher or the school board notifies the school board secretary within ten days of the adjudicator's decision that they intend to appeal to district court. The school board may reject the adjudicator's decision by roll call vote in an open meeting with the results of the vote recorded in the minutes. If the school board rejects the adjudicator's decision, it must immediately notify the teacher of the rejection by certified mail.

Both the school board and the teacher have the right to appeal the adjudicator's decision to district court. The appealing party becomes the petitioner and the non-appealing party becomes the respondent. Although district courts are generally trial courts, in this instance they sit as appellate courts. In these cases, the private hearing has taken the place of a trial. The adjudicator forwards a copy of the record to the district court. Since the district court is sitting as an appellate court, the record of the private hearing and the adjudicator's decision are the sole basis for review and the district court will hear no further evidence.

As with the adjudicator, the district court must give weight to the findings of the school board, especially when considering the credibility of the witnesses. However, the district court is not bound by the school board's findings. The district court must determine whether the school board's findings are supported by a preponderance of the evidence. In order words, is it more likely than not that the school board's factual findings are true. Even though a school board may not have been "completely assured of the truth of the matter. [the school board] did find that the greater weight of the evidence presented favored their ultimate decision on the matter." *Justmann* at 338.

Reviewing courts, like the district court in these cases, exercise judicial deference when reviewing school board's decisions. They defer to the school boards because of school boards' greater expertise in matters within its own jurisdiction. *Id*. In teacher contract termination hearings, "the board is uniquely situated to pass on the credibility of the various witnesses at the hearing." *Id.*

The district court's reasons for reversal or modification of an adjudicator's decision or school board's decision are limited. The district court can only grant the petitioner's requested relief if substantial interests of the petitioner have been prejudiced because the school board or adjudicator's decision is:

1. in violation of constitutional or statutory provisions;
2. in excess of the statutory authority of the school board or the adjudicator;

3. in violation of a school board rule or policy or contract;
4. made upon unlawful procedure;
5. affected by other error of law;
6. unsupported by a preponderance of the competent evidence in the record made before the school board and the adjudicator when that record is viewed as a whole; or,
7. unreasonable, arbitrary or capricious or characterized by an abuse of discretion or a clearly unwarranted exercise of discretion. IOWA CODE § 279.18.

The school board or teacher may appeal the district decision to the Iowa Supreme Court. The Iowa Supreme Court may refuse to hear the case, refer the case to the Iowa Court of Appeals or hear the case. If the Supreme Court refuses to hear the case, the decision of the district court is final and binding. If the Iowa Court of Appeals hears the case, there is still a right to an appeal to the Iowa Supreme Court where it will decide whether to hear the case or let the decision of the Court of Appeals stand as final and binding. If the Supreme Court hears the case, there is no other course for appeal and the decision of the Supreme Court is final and binding.

Endnotes

1. IOWA CODE § *88.9(3)* (probability of discrimination against an employee because the employee "has filed a complaint or instituted or caused to be instituted a proceeding under or related to the chapter or has testifed or is about to testify in any such proceeding" or because the employee exercises a right protected by the chapter); IOWA CODE §20.10(d) (makes it a "prohibited practice" for any employer to"[d]ischarge or discriminate against a public employee because the employee has filed an affidavit, petition or complaint or has given any information or testimony under this chapter ….").
2. *Springer v. Weeks & Leo Oil Co*., 429 N.W.2d 558, 560 (Iowa 1988); *Bennett v. City of Redfield*, 446 N.W.2d 467, 474-75 (Iowa App. 1989).
3. See *French v. Foods, Inc.*, 495 N.W.2d 268 (Iowa 1993); *Hunter v. Board of Trustees of Broadlawns Med. Center*, 481 N.W.2d 510 (Iowa1992); *Fogel v.Trustees of lowa College*, 446N.W.2d451(Iowa 1989).
4. *Smith v. Smithway Motor Express*, 464 N.W.2d 682, 686-688 (Iowa 1990).
5. *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983); *Perry v. Sindermann*, 408U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); *Keyishian v. Board of Regents*, 385 U.S. 589, 87 *S.Ct. 675, 17* L.Ed.2d *629 (1967).*
6. *Pinkering v. Board of Education*, 391 U.S.563,88 S.Ct. 1731, 20L.Ed.2d 811 (1967).
7. *French v. Foods, Inc*., 495 N.W.2d at 769-71; *Fogel v. Trustees of lowa College*, 446 N.W.2d at 455-57; *McBride v. City of Sioux City*, 444 N.W.2d 85, 90 (Iowa 1989); *Cannon v. National By-Products, 422 N.W.2d 638, 640* (Iowa *1988).*
8. Id.
9. *Palmer v. Women's Christian Ass'n of Council.Bluffs*, 485 N.W.2d 93 (Iowa App. 1992).
10. *Board of Education of Ft. Madison Comm. School Dist. v. Youel, 282 N.W.2d 677* (Iowa *1979); Olds Board of Educ. v. Nashua Comm. School Dist., 334 N.W.2d 765, 771* (Iowa App. *1983).*
11. IOWA CODE § *20.9.*
12. 42 U.S.C. § 2000e-2(a)(1).
13. 29 U.S.C. § 623(a)(1).
14. 29 U.S.C. § 631.
15. 42 U.S.C. § 12112(a). In its regulations, the EEOC defines "disablity" with respect to an individual as including an actual physical or mental impairment, a "record of such an impairment" or "being regarded as having such an impairment."29 C.F.R. §1630.2(g).
16. See generally 29 U.S.C. § 794(a).
17. IOWA CODE § 216.6(1)(a).
18. 29 U.S.C. § 626(e); 29 C.F.R. § 1601.19.
19. Id.; see *Shea v. City of St. Paul***,** 601 F.2d 345 (8th Cir. 1979).
20. IOWA CODE § 670.4(5).
21. 42 U.S.C. § 1981a(b)(3) (as added by the Civil Rights Act of 1990).
22. 29 U.S.C. § 626(b) and (c); *Fiedler v. Indian Head Truck Lines***,** 670 F.2d 806,809-10 (8th Cir. 1982).
23. 29 U.S.C. § 626(b).
24. *Transworld Airlines v. Thurston*, 469 U.S. 111, 105 S.Ct. 613, 83 LEd.2d 523 (1985);

see also *Hazen Paper Co. v. Biggins*,—U.S. —, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993) (applying Thurston standard to an age discrimination case based on a disparate treatment theory of recovery).

25. IOWA CODE Chapter 96.
26. IOWA CODE § 96.4.
27. IOWA CODE § 96.5(1) and (2).
28. IOWA CODE § 96.5(3).
29. IOWA CODE § 96.5(1).
30. 345 IOWA ADMIN. CODE § 4.25.
31. 345 IOWA ADMIN. CODE § 4.25(1).
32. 345 IOWA ADMIN. CODE § 4.25(2).
33. 345 IOWA ADMIN. CODE § 4.25(3).
34. 345 IOWA ADMIN. CODE § 4.25(4).
35. 345 IOWA ADMIN. CODE § 4.25(6).
36. 345 IOWA ADMIN. CODE § 4.25(10), (ll).
37. 345 IOWA ADMIN. CODE § 4.25(12).
38. 345 IOWA ADMIN. CODE § 4.25(17).
39. 345 IOWA ADMIN. CODE § 4.25(18), (21), (22).
40. 345 IOWA ADMIN. CODE § 4.25(25), (26).
41. 345 IOWA ADMIN. CODE § 4.25(27), (28).
42. 345 IOWA ADMIN. CODE § 4.25(37).
43. Id.
44. 345 IOWA ADMIN. CODE § 4.26(1)-(28).
45. 345 IOWA ADMIN. CODE § 4.26(2), (3), (4).
46. 345 IOWA ADMIN. CODE § 4.26(21).
47. 345 IOWA ADMIN. CODE § 4.26(23).
48. 345 IOWA ADMIN. CODE § 4.26(27).
49. 345 IOWA ADMIN. CODE § 4.26(1).
50. Id.
51. 345 IOWA ADMIN. CODE § 4.32(1)(a).
52. 345 IOWA ADMIN. CODE § 4.32(1)(b).
53. 345 IOWA ADMIN. CODE § 4.32(3).
54. 345 IOWA ADMIN. CODE § 4.32(3)(a).
55. IOWA CODE § 96.5(2)(b).
56. *Crane v. Iowa Dept. of Job Serv.*, 412 N.W.2d 194 (Iowa App. 1987).
57. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa App. 1990); *Meyer v. Iowa Dept. of Job Serv.*, 373 NW.2d 507 (Iowa App. 1985).
58. *White v. Employment Appeal Bd.,448 N.W.2d 691* (Iowa App. 1989).
59. *Hill v. lowa Dept. of Employment Serv.,442 NW.2d* 128 (Iowa 1989).
60. *Deever v. Hawkeye Window Cleaning Inc.*, 447 N.W.2d 418 (Iowa App. 1987).
61. 345 IOWA ADMIN. CODE § 4.32(5).
62. 345 IOWA ADMIN. CODE § 4.32(7); *Sallis v. Ernployment Appeal Bd.*, 437 N.W.2d 895 (Iowa 1989); *Higgens v. Iowa Dept. of Job Serv.*, 350 N.W.2d 187, 192 (Iowa 1984).
63. See e.g.*Ray v.lowa Dept.of Job Serv*.,398 N.W.2d 191 (Iowa APP. 1986) (denial of benefits where employee received 11 prior disciplinary notices for unexcused absenteeism and was placed on probation for one year). *Infante v. Iowa Dept. of Job Serv.*, 364 N.W.2d 262 (Iowa App. 1984) (same result regarding five unexcused absences and three incidences of tardiness); *Harlan v. Iowa Dept. of Job Serv.*, 350 N.W.2d 192 (Iowa 1984) (same result regarding repeated warnings and counseling concerning tardiness; court denies claimant's excuse of car problems noting that "[h]abitual tardiness or absenteeism arising from matters of purely personal responsibility such as transportation can constitute unexcusable misconduct.").
64. *Greene v. Employment Appeal Bd.*, 426 N.W.2d 659 (Iowa App. 1988).
65. *Richers v. Iowa Dept. of Job Serv*.,479 N.W.2d 308 (Iowa 1991).
66. *Nemnan v. Iowa Dept. of Job Serv*., 351 N.W.2d 806 (Iowa App. 1984).
67. 345 IOWA ADMIN. CODE § 4.32(8); *Meyers v. Iowa Dept. of Job Serv.*, 373 N.W.2d 507, 510 (Iowa App. 1985).
68. *Flesher v. Iowa Dept. of Job Serv*., 372 N.W.2d 230, 234 (Iowa 1985).
69. 345 IOWA ADMIN. CODE § 4.22(2)(i)(2).
70. *Des Moines Indepen. Comm. School Dist. v. Iowa Dept. of Job Serv.*, 376 N.W.2d 605 (Iowa 1985).
71. 345 IOWA ADMIN. CODE § 4.22(2)(i)(3).
72. Id.
73. 345 IOWA ADMIN. CODE § 4.26(6)(a).
74. 345 IOWA ADMIN. CODE § 4.25(35).
75. 345 IOWA ADMIN. CODE § 4.25(6)(a).
76. 345 IOWA ADMIN. CODE § 4.26(6)(b).
77. See *Brown v. PERB*, 345 N.W.2d 88,93-94 (Iowa 1984) (holding that the 90-day filing requirement contained in section 20.11(1) is mandatory and jurisdictional in nature).
78. IOWA CODE § 20.11(1).
79. 621 IOWA ADMIN. CODE § 3.2(3).
80. 621 IOWA ADMIN. CODE § 3.4.
81. 621 IOWA ADMIN. CODE § 3.5(1).
82. 621 IOWA ADMIN. CODE § 3.5(3), (4).
83. 621 IOWA ADMIN. CODE § 3.8.

84. IOWA CODE § 17A.15; 621 IOWA ADMIN. CODE § 9.1(1)-(2).
85. IOWA CODE § 17A.19(3).
86. *Dubuque Comm. School Dist. v. PERB*, 424 N.W.2d 427,431 (Iowa 1988); *Iowa Ass'n of School Boards v. PERB*, 400 N.W.2d 571, 575 (Iowa 1987).
87. IOWA CODE § 17A.19(8).
88. *Smith v. Board of Educ. of Ft. Madison Comm.School Dist.*, 293 N.W.2d 221 (Iowa 1980).
89. Id. at 224.
90. 42 U.S.C. § 12112 et. seq. (ADA); IOWA CODE § 216.6(1)(a) (Iowa's Civil Rights Act).
91. 29 C.F.R. § 163O.2(n)(1).
92. 29 C.F.R. § 1630.2(n)(3)(i)-(vii;).
93. 42 U.S.C. § 12112(b)(5)(A).
94. 42 U.S.C. § 12111(10)(B).
95. 42 U.S.C. § 12111(a).
96. 281 IOWA ADMIN. CODE § 102.3.
97. 281 IOWA ADMIN. CODE § 102.2(1).
98. 281 IOWA ADMIN. CODE § 102.2(2).
99. 281 IOWA ADMIN. CODE § 102.6(1).
100. 281 IOWA ADMIN. CODE § 102.6(3).
101. 281 IOWA ADMIN. CODE § 102.9(5).
102. 281 IOWA ADMIN. CODE § 102.9(4).
103. 281 IOWA ADMIN. CODE § 102.11.
104. 281 IOWA ADMIN. CODE § 102.5(2).
105. Id.
106. 281 IOWA ADMIN. CODE § 102.12.
107. Id.
108. 281 IOWA ADMIN. CODE § 102.12(2)
109. 281 IOWA ADMIN. CODE § 102.4(1).
110. 281 IOWA ADMIN. CODE § 102.4(2).
111. 281 IOWA ADMIN. CODE § 102.11(2).
112. *McFarland v. Board of Educ. of Norwalk Comm.School Dist.*, 277 N.W.2d 901 (Iowa 1979).