The Report Card Newsletter

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Senate Bill 7 Brings Major Changes to Teacher Dismissal Hearings

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The dismissal hearing process for both conduct- and performance-based dismissals changed under Senate Bill 7 (Public Act 097-0008) (Act). Moreover, when school districts implement the Performance Evaluation Review Act (PERA), there will be an additional option for dismissals based on teacher performance.

This issue of Hinshaw's *Report Card*—the fourth in a series covering the various changes to Illinois law brought about by the Act—addresses changes to the dismissal process; hearing officer selection; what steps school boards take after a hearing officer's decision is rendered; and changes to the appeal process. Not addressed here is the issue of dismissals of teachers not in contractual continued service under Section 24-11 of the Illinois School Code.

Streamlining the Hearing Process

One objective of the Act is to ensure that "the dismissal process proceeds in a fair and expeditious manner." 105 ILCS 5/24-12(d)(6). To that end, all hearing officers will participate in training provided or approved by the Illinois State Board of Education (ISBE) beginning September 1, 2012. ISBE is also directed to promulgate rules addressing procedure, including subjects such as: discovery (interrogatories, requests for production of documents); the conduct of the hearing; the use of subpoenas; the admission of evidence and examination of witnesses; and other post-hearing matters.

Among the new requirements will be a fairly thorough pre-hearing disclosure, to include the identification of prospective witnesses, a summary of the facts and expected testimony, and electronic discovery disclosures. The hearing officer will be allowed to bar witnesses and exhibits which are not disclosed before the hearing. These sorts of pre-trial disclosure expectations and possible sanctions have been in place for many years in federal and state trial procedure.

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Previously, the teacher-dismissal process generally, and the discovery phase in particular, have been more informal, moving at a pace and to an extent depending on the preferences of the attorneys involved. No formal rules have been in place. Hearing officers exercised their discretion, and had varying degrees of oversight and patience with the pace, scope and extent of discovery and pre-hearing disclosures. The changes brought about by the Act will therefore likely result in greater standardization in the hearing process and the decisions that follow.

Under the Act, the dismissal hearing must be commenced within 75 days, and completed within 120 days, of the hearing officer's selection. Thus, if one hearing day is allowed and the hearing is not completed, the parties must be prepared to reconvene in fairly short order. Unless extended by the hearing officer to present adequate evidence and testimony, each party will have no more than three days to present its case, with the exception being that the parties are allowed two days to present evidence and testimony under the PERA-based dismissal option.

This time allowance seems more than sufficient for presentation of each party's case; however, the timeline, when the more formal and thorough pre-hearing discovery rules are added, means that the management of dismissal cases will be fairly intense from the moment the board approves the dismissal until the post-hearing briefing is completed (post-hearing briefs are due within 21 days of receipt of transcript). No change was made to the statutory requirement that the hearing officer render a decision within 30 days from the conclusion of the hearing or closure of the record (whichever is later), unless good cause is shown for an extension of that deadline.

The Act also addresses the potential for laxity by hearing officers, whose workloads sometimes have impaired their ability to timely issue a decision. Under the Act, the parties are empowered to mutually agree to take the case before another hearing officer and either have a new hearing or submit the record for review and decision by a substitute hearing officer if a decision is not timely handed down. The failure of a hearing officer to timely issue a decision also will be a basis for removing him or her from the ISBE master list for up to two years and reducing or withholding his or her fee. Repetitive failures will be a basis for permanently removing the hearing officer from the ISBE master list.

Conduct-Based Dismissals

Section 10-22.4 of the School Code addresses dismissals of teachers for, among other things, cruelty, immorality, incompetence, negligence, or other sufficient cause. Senate Bill 7 modified it to delete the requirement for a one-year remediation when dismissing on the basis of performance in non-Article 24A situations. Regarding situations where the basis for the proposed dismissal of a tenured teacher is a remediable cause and no Article 24A remediation process is in place, the Act preserves a requirement that the teacher be given "reasonable warning" and an opportunity to remove the cause. Suspension of the teacher without pay is authorized pending the hearing if the board determines that the school's interests require such action.

Another revision concerns the bill of particulars. The board continues to be allowed five days to notify the teacher of the charges supporting the dismissal and a bill of particulars is to be provided with the notice. The Act adds a new requirement that the teacher answer and offer affirmative defenses to the bill of particulars and update that information after discovery. Also, the notice must be sent by regular mail *and* certified mail, return receipt requested, or by personal delivery. After July 1, 2012, the teacher also must be notified of his or her right to elect the manner in which a hearing officer is selected.

No hearing is required unless the teacher requests one within 17 days after receiving notice rather than 10 days as was previously provided. The hearing officer may be chosen from the ISBE master list provided. The Act eliminates the opportunity which previously existed of striking the entire list and causing ISBE to issue a second panel of five prospective hearing officers. Instead, if the entire list is stricken, ISBE will appoint a qualified hearing officer from its master list. This is yet another change that will tend to expedite hearing officer selection. Also, because striking the list will cede the opportunity to influence selection, the option will be less desirable. The ISBE-appointed hearing officer will serve unless the parties notify ISBE that they have mutually selected a hearing officer who is not on the ISBE master list (direct appointment or an arbitrator).

If the notice of dismissal is sent to the teacher before July 1, 2012, ISBE will pay the fees and costs of the hearing officer. In another cost-shifting move, the state will not pay the cost of hearing officers for dismissals noticed to teachers after June 30, 2012. This cost will be equally split between the school district and the teacher or the

legal representative of the teacher if the teacher selects a mutually agreed upon hearing officer. If the teacher prefers that the school board choose the hearing officer, the board pays the entire cost of the hearing officer.

The hearing officer in a conduct-based dismissal will make a recommendation for the school board as to whether the conduct is remediable and will also make findings of fact. The school board will make the ultimate decision on dismissal. The school board must use the findings of fact unless it decides that the findings are against the manifest weight of the evidence. In that event, the findings may be supplemented or modified. This constitutes a major shift in the process of teacher dismissals for cause. Prior to the enactment of the Act, a board had limited options when a hearing officer determined that a teacher must be retained, and had to seek administrative review of the hearing officer's decision through the courts. Under the new statute, the hearing officer's ruling is a recommendation, which the board can override. Should the board decide to retain the teacher, as recommended by the hearing officer, any dispute concerning back pay will be referred to the hearing officer for resolution. It is the board's decision, and not the hearing officer's recommendation, that is the basis for administrative review through the courts.

Article 24A Dismissals

The right to dismiss a teacher who fails to complete an applicable remediation plan with a rating better than "satisfactory" or "proficient" has not been altered. However, there are now two forms of hearing process available to review remediation-plan failures. The first is the new Section 24-12(d) procedures, which were addressed above and for which ISBE will be issuing new rules. The second method is described in Section 24-16.5, which is discussed below.

Optional Evaluative Dismissal Process for PERA Evaluations

The optional dismissal process for PERA evaluations applies to *all* school districts; however, its availability depends upon PERA implementation. The dates for PERA implementation vary by district. To be applicable, the board must have completed a training program on PERA evaluations as developed by ISBE. In addition, the performance evaluation under consideration must have occurred *after* the PERA implementation date and have otherwise been done on a form and through a process in compliance with ISBE rules for PERA implementation.

A district may dismiss a tenured teacher under this alternative process if:

- the teacher failed to complete a remediation plan with a rating equal to or better than "proficient";
- the "unsatisfactory" evaluation rating resulted from a PERA evaluation; and
- the district complies with the pre-remediation and remediation requirements of 105 ILCS 5/24-16.5(c).

The language of 105 ILCS 5/24-16.5(c) requires that in order to use the optional PERA process, the district must establish a list of "second evaluators" and allow teacher representatives an opportunity to submit names for this list. Selection from this list of evaluators must be based on a process established in good faith cooperation with teacher representatives. Teacher evaluators must meet certain standards, such as either having National Board of Professional Teaching Standards certification or "excellent" performance evaluation ratings in two out of three of his or her last three ratings. The second evaluator must either conduct the midpoint and final evaluation during remediation *or* conduct an independent assessment of whether the teacher completed the remediation plan with a rating equal to or better than "proficient." The second evaluator must not be the person whose evaluation caused the teacher to be placed on remediation, and, if the second evaluator is an administrator, he or she may not be a "direct report" to the individual whose evaluation placed the teacher on remediation.

The process for dismissal under this procedure begins with a notice from the board to the teacher, provided within 30 days of the final evaluation. Copies of the performance evaluations related to the hearing must be furnished. In addition to the hearing requirements previously discussed, the hearing officer must have completed a pre-qualification Section 24A-3-evaluation training program, unless ISBE waived that requirement.

The scope of the alternative hearing is limited. In a hearing dismissal based on PERA evaluations, the school district carries the burden of demonstrating:

- that the "unsatisfactory" performance evaluation rating that preceded remediation applied the teacher practice components and student growth components and determined an overall evaluation rating of "unsatisfactory" in accordance with the standards and requirements of the school district's evaluation plan;

- that the remediation plan complied with the requirements of Section 24A-5 of the School Code;
- that the teacher failed to complete the remediation plan with a performance evaluation rating equal to or better than a "proficient" rating, based upon a final remediation evaluation that meets the applicable standards and requirements of the school district's evaluation plan; and
- that if the second evaluator selected does not conduct the midpoint and final evaluation and makes an independent assessment that the teacher completed the remediation plan with a rating equal to or better than a "proficient" rating, the school district must demonstrate that the final remediation evaluation is a more valid appraisal of the teacher's performance than the independent assessment made by the second evaluator.

The alternative dismissal process will be a more limited dismissal proceeding than is currently available to teachers. In these hearings, the teacher may only challenge the substantive and procedural aspects of the "unsatisfactory" performance evaluation rating that led to the remediation, the remediation plan itself, and the final remediation evaluation. Any challenge based upon procedural aspects, such as a deviation from a collective bargaining agreement requirement, must demonstrate how the procedural defect "materially affected" the teacher's opportunity to successfully complete the remediation plan. Unless a material effect is shown, the procedural error will not impact the validity of the performance evaluation

Significantly, in this procedure, the hearing officer will only consider and give weight to the evaluations related to the remediation. This diverges from the Section 24-12 procedure, wherein all past evaluations may be considered.

Hearings under this optional procedure will be shorter. Moreover, hearing officers will not issue decisions; they are limited to issuing findings of fact and a recommendation to the board to either retain or dismiss the teacher. Thereafter, and within 45 days after receipt of the findings, the board will decide whether to dismiss or retain the teacher; only PERA-trained board members may participate in the vote. If the board dismisses the teacher despite a hearing officer's recommendation to retain him or her, it must give reasons and include them in a written order. The board's decision may be reversed only if it is found to be arbitrary, capricious, an abuse of discretion, or not in accordance with law.

For other articles addressing the Act, please see earlier editions of the *Report Card*, accessible at: **www.hinshawlaw.com**.

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