

Firing Underperforming Employees

**2010 Fund Members' Conference
April 25-27, 2010**

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School board members often ask, “Why can’t we just fire people who aren’t working out?” The simple answer is that, for better or worse, school employees are protected by a maze of legal rights that make it difficult to fire them. This outline addresses the legal and practical concepts involved in firing school employees.

This outline does not address at-will employment. Generally, at-will employees may be reassigned, demoted, suspended, or fired at any time, for any reason, other than an illegal reason. *Garcia v. Reeves County, Texas*, 32 F.3d 200 (5th Cir. 1994); *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984); *Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723 (Tex. 1990). Illegal reasons include discrimination (based on race, sex, age, disability, or another protected characteristic) and retaliation for engaging in protected conduct (such as reporting a violation of law or a work-related injury). Second, this outline does not address issues specific to superintendents. Superintendents are always employed under term contracts, but special rules apply to the nonrenewal of superintendent contracts. For further information on superintendent contracts, see TASB Legal Services’ *Guide to Superintendent Contracts*.

I. Don’t Over Commit

The biggest mistake school boards make in *firing* underperforming employees is actually made when *hiring* employees. School districts often make firing more difficult by giving new employees more rights by contract than they are entitled to by law. To preserve maximum flexibility, board members need to understand school employment contracts and the biggest contract mistakes.

A. School Employment Contracts: Chapter 21 of the Texas Education Code requires school districts to employ certain persons by written employment agreements. Tex. Educ. Code § 21.002. Colloquially, these agreements are called *Chapter 21 contracts* and the employees who receive them are *Chapter 21 employees*. Chapter 21 employees are those whose positions require certification, either because the State Board for Educator Certification (SBEC) requires persons in the position to be certified or because the district requires them to be certified. Chapter 21 employees include classroom teachers, school nurses, librarians, counselors, educational diagnosticians, principals, assistant principals, and superintendents. The following material is an overview of school employment contracts. For an in-depth discussion of educator contracts, see *TASB Legal Services Guide to Educator Contracts*.

The Texas Education Code recognizes three basic types of Chapter 21 contracts: *probationary*, *term*, or *continuing*. The type of Chapter 21 contract an educator receives depends on the employee's qualifications and experience:

- **Probationary contracts:** Probationary contracts are for educators who are either new to the profession or new to the district, or who have been away from the district for two or more years. Each probationary contract is for one school year. New educators may be employed under up to three probationary contracts, with an option for a fourth. Experienced educators who are new to the district may be employed under only one probationary contract. Probationary contracts automatically renew at the end of each year. A board can stop a probationary contract from renewing at the end of the school year by voting to terminate the contract "in the best interests of the district." Probationary contracts may be terminated during the contract term only for good cause. Tex. Educ. Code Chapter 21, subchapter C.
- **Term contracts:** Term contracts are for experienced educators who have served a probationary period in the district. The lengths of term contracts vary from one to five years. Like probationary contracts, term contracts automatically renew, regardless of whether the board votes to renew. The only way to stop a term contract from renewing is for the board to take affirmative action to nonrenew it, following specific, statutory procedures. Term contracts may be terminated during the contract only for good cause. Tex. Educ. Code Chapter 21, subchapter E.
- **Continuing contracts:** Comparable to tenure, continuing contracts are for educators who are neither new to the profession nor new to the district. These contracts are for an indefinite length of time. Nonrenewal is inapplicable to continuing contracts because they are for an indefinite term. Continuing contracts may be terminated only for good cause. Tex. Educ. Code Chapter 21, subchapter D.

Persons working in positions not requiring certification, such as transportation directors and business managers, are sometimes employed under a fourth type of agreement: a non-Chapter 21 contract. Also referred to as *noncertified contracts*, non-Chapter 21 contracts are written agreements for a specified period of time that do not incorporate the statutory rights of Chapter 21. Non-Chapter 21 contracts may be terminated during the contract term for cause, but the employee must be given reasonable notice of the reason for termination. *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970). Non-Chapter 21 contracts typically do not automatically renew, and no action is required to cancel the contract at the end of its term. *Perry v. Sindermann*, 408 U.S. 593 (1972); *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

School District Employment Contracts

Type of Contract	Eligible Employee	Length of Contract	Mid-Contract Termination	End of Contract Termination
Probationary	New educator or new district employee (with exceptions)	One year, renewable for up to three years (with exceptions)	Good cause	Best interests of the district
Term	Experienced educator	One to five years	Good cause	Nonrenewal reasons listed in local policy
Continuing	Experienced educator	Indefinite	Good cause	Not applicable
Non-Chapter 21 Contract	Persons designated by board policy	Specified by contract	Good cause	Not applicable

B. The Most Common Contract Mistakes: To preserve maximum flexibility to terminate underperforming employees, a board should limit contract rights to those required by law. Listed below are the most common ways in which boards give employees more rights than they are entitled to, with suggestions for how to avoid these mistakes in your district.

- **Contracts for noncertified employees:** Employees in noncertified positions are not entitled to Chapter 21 contracts; they can be hired and fired at-will. Underperforming at-will employees are the easiest to fire. Nonetheless, districts regularly give Chapter 21 contracts to noncertified employees, especially business managers, transportation directors, and food service supervisors.

Solution: Don't give contracts to employees in noncertified positions. If the board *must* give a contract to an employee in a noncertified position, consider giving a non-Chapter 21 contract. If employees in noncertified positions are currently employed under Chapter 21 contracts, switch them to non-Chapter 21 contracts at the end of the contract term.

In the past, there was some confusion as to the procedure for taking an employee off a Chapter 21 contract. Many believed that it was necessary to follow nonrenewal procedures. The commissioner of education recently clarified that an employee in a noncertified position who has been issued a Chapter 21 contract is entitled only to employment in the same professional capacity the following school year. *Harris v. Royse City Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 057-R1-0506 (Mar. 5, 2009). Thus, a district may issue a noncertified employee a non-Chapter 21 contract, or no contract at all, so long as the district keeps the person in the same employment position for another school year.

- **Long probationary periods:** Certified employees who are new to the profession can be required to serve under three probationary contracts, with an option to extend a fourth probationary contract, for a total of three to four years of probationary service. Of the three Chapter 21 contracts, probationary contracts are the easiest to cancel because the board merely has to vote to terminate the contract “in the best interests of the district” and provide the employee with timely notice. Nonetheless, in practice, districts often give employees term contracts after only one or two years of service under a probationary contract.

Solution: Require every employee to serve the longest probationary period allowed by law. If the employee is experienced, but new to the district, the employee can be required to serve only a one year probationary period. Tex. Educ. Code § 21.102(b). Inexperienced educators, however, can be required to serve three probationary years. If, after three years, the board is not convinced that an employee should receive a term contract, the board can vote to extend a fourth probationary contract.

- **Multiple-year contracts and contract extension:** Term contracts must be for a minimum of one year. Tex. Educ. Code § 21.401. A one-year term contract means the district has an annual opportunity to cancel the agreement. Nonetheless, districts routinely give two-, three-, four-, and even five-year term contracts, delaying their opt-out period by the same amount. These multiple-year term contracts are one-sided arrangements: they are binding on the district, but not the employee. Every Chapter 21 employee can resign at the end of the school year, so long as he or she provides notice before the penalty-free resignation date (45 days before the first day of instruction of the next school year). Tex. Educ. Code §§ 21.105(a), .160(a), .210(a).

A related concern is contract extension. *Extension* refers to the process of adding another year to a multiple-year contract, before the end of the contract term. If, for example, a principal has a three-year contract, the district may extend it by another year after the principal’s annual evaluation so that the principal always has between two and three years remaining on his contract. Board members often believe that contract extension is a statutory right. It is not. Contract extension is a creature of custom and practice. Similarly, board members confuse “nonextension” with nonrenewal and termination. Failure to extend a contract does not terminate the contract, nor does it prevent a term contract from automatically renewing.

Solution: Make multiple-year contracts the exception, not the rule. Contract extension should also be limited. There will always be employees who have enough bargaining power to insist on multiple-year contracts and contract extensions; and contracts of two- to three-years, or longer, as well as annual extensions, are standard for superintendents. Nevertheless, a board should not extend the contract of an employee whose performance is not 100% satisfactory.

Boards are frequently perplexed as to how to “nonextend” a contract. The answer is that no process is required. A board may vote “not to extend” a contract or may simply take no vote on the issue. In either case, the contract will not be extended and the employee will proceed into the next school year holding the same contract, one year closer to its end.

- **Dual-assignment contracts:** Board members often ask how they can fire an underperforming coach. In many cases, the district has made a contractual commitment to the coach, through a dual-assignment contract, and can only fire him or her by following the Chapter 21 procedures for termination or nonrenewal. A *dual-assignment contract* is a Chapter 21 agreement that includes both teaching duties and supplemental duties. Because both sets of duties are included in the contract, the district and the teacher are mutually committed to both. Neither party may terminate just part of the contract (i.e., just one of the assignments) without the other party’s agreement. Rather, the entire contract must be terminated.

The advantage of a dual-assignment arrangement is that the employee is bound to the supplemental duties to the same extent that he or she is bound to teaching duties. See *Skinner v. San Felipe Del Rio Consol. Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 036-R2-203 (Mar. 24, 2003) (upholding termination of coach who claimed disability prevented him from performing coaching duties). If the employee fails or refuses to perform the supplemental duties, the district may terminate the contract. See, e.g., *Salinas v. Roma Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 058-R3-1196 (Dec. 11, 1997).

The disadvantage of a dual-assignment arrangement is that the district is also committed to employing the educator for both teaching and the supplemental duty. The entire contract must be ended, using Chapter 21 procedures, to terminate either assignment. Once the contract is ended, both assignments are terminated. The district may be forced to terminate a teacher/coach’s contract—and lose a valuable teacher—simply to remove the teacher from coaching duties. The district can offer the employee a new contract only for teaching duties, but the employee is free to reject the offer.

Districts can preserve more flexibility by using single-assignment arrangements. A *single-assignment* arrangement is one in which the district and the employee enter into an at-will agreement for the supplemental duty that is separate from the employee’s teaching contract. See, e.g., *Carroll v. Wichita Falls Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 196-R10-899 (Apr. 26, 2000); *Robinson v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 143-R3-696 (Apr. 26, 2000). The advantage is that the district can terminate the employee’s supplemental duty, without having to also terminate the teaching

contract and without following Chapter 21 procedures. *See Skinner v. Weslaco Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 016-R2-996 (Dec. 11, 1997) (employee could be reassigned where agreement stated that he had no continuing rights to supplemental duties).

The disadvantage of a single-assignment arrangement is that the employee’s commitment is as limited as that of the district. The cheerleading sponsor can throw up her hands in the middle of the season and quit her sponsoring duties. The district has no recourse; it does not have grounds to terminate the teaching contract, and it cannot claim contract abandonment. Nevertheless, given the added flexibility of being able to terminate the coach without following any special procedures, many districts prefer the single-assignment approach.

Solution: Minimize the number of employees on dual-assignment contracts. Examine your district’s practices regarding supplemental duties, and weigh the risks and benefits of those arrangements. Remember, dual-assignment contracts tip the scales in the employee’s favor with limited return benefit to the district. If you must use dual-assignment contracts, use them in as few cases as possible.

- **Continuing contracts:** Districts that still give continuing contracts tie their hands by eliminating the possibility of nonrenewing underperforming employees. Before May 30, 1995, districts were required to elect one of two systems for employment of professional personnel: a term contract under former Texas Education Code chapter 21 or a continuing contract under former Texas Education Code chapter 13. In 1995, the 74th Texas Legislature adopted Senate Bill 1, the Term Contract Nonrenewal Act, which combined the contract provisions of former Chapters 13 and 21 into the current Chapter 21. Senate Bill 1 removed the requirement of a district-wide decision as to whether to issue term or continuing contracts. Districts may now use term contracts, continuing contracts, or both. A few districts in Texas, through local practice or policy, continue to extend continuing contracts to experienced professional employees. Even in term contract districts, individuals employed under continuing contracts before Senate Bill 1 can often be found.

Solution: Minimize the number of continuing contract employees in your district. If your district gives new continuing contracts, change local policy. If your district does not give new continuing contracts, but employees in your district hold continuing contracts from before Senate Bill 1, take advantage of opportunities to move these employees to term contracts. A district can negotiate with an employee to relinquish the continuing contract as a condition of, for example, promotion or a supplemental payment.

II. Consider the Alternatives

Given how difficult it can be to terminate or nonrenew a Chapter 21 contract, a district will want to consider alternatives, such as reassignment, demotion, return to probationary status, resignation, layoff, or suspension. In some cases, the district may be able to declare a contract void for lack of certification.

A. Reassignment: Chapter 21 employees are protected by their statutory rights, even in the area of reassignment. The TASB model employment contracts provide that the employee is subject to assignment and reassignment. However, the commissioner has read Chapter 21 to protect the employee's right to employment "in the same professional capacity," which is essentially the job title stated in the employee's contract. For example, an educator whose contract states that she is a "high school principal" may be assigned only to a principal position at a high school, not at a middle school.

To preserve flexibility, TASB Legal Services recommends that the professional capacities stated in Chapter 21 contracts be one of those identified in the Texas Education Code, such as *classroom teacher*, *certified administrator*, or *counselor*. An employee hired as a *certified administrator* can be reassigned to any certified, administrative position. See, e.g., *Sanchez v. Donna Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 075-R10-605 (Mar. 5, 2007) (upholding reassignment of *certified administrator* from principal to assistant principal); *Gonzalez v. Donna Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 074-R10-605 (Mar. 5, 2007) (upholding reassignment of *certified administrator* from central office administrator to assistant principal); *Pasqua v. Fort Stockton Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 011-R3-1102 (June 15, 2004) (upholding reassignment of *certified administrator* from high school principal to assistant middle school principal).

B. Demotion: Another alternative to reassignment is demotion. With the employee's agreement, the employee can be reassigned to any position, including a position at a lower grade than the employee's current position.

The district may demote an employee without his or her agreement if the district maintains the employee's compensation at the same level. The commissioner of education has jurisdiction over an alleged violation of a contract only if the violation results in monetary harm. Tex. Educ. Code § 7.057(a)(2)(B). For this reason, the commissioner routinely declines to consider demotion claims where the district did not reduce the employee's compensation. See, e.g., *Knoedl v. Austin Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 050-R10-405 (June 27, 2007); *Padilla v. McAllen Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 015-R10-1104 (Nov. 28, 2006); *Weldon v. Denton Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 046-R3-1203 (May 10, 2004). Remember, however, that the employee may be able to assert other claims, such as age or race discrimination, if facts exist to support such a claim. A district considering an involuntary demotion should work closely with legal counsel.

- C. Return to Probationary Status:** In lieu of terminating or nonrenewing a term contract, or terminating a continuing contract, a district and the employee may agree to return the employee to probationary contract status. The superintendent must provide the employee with written notice of intent to recommend discharge, termination, or nonrenewal. The notice must inform the employee of the district's offer to return the employee to probationary contract status, the period during which the employee may consider the offer, and the employee's right to seek counsel. The employee must be provided at least three business days to consider the offer. If the employee agrees to return to probationary status, the employee must serve a new probationary period as if employed by the district for the first time. Tex. Educ. Code § 21.106.
- D. Resignation:** Asking an employee to resign may be an alternative, if it is presented fairly as an option to the employee. Board members and administrators are frequently under the impression that it is illegal to ask an employee to resign. This is not correct; however, resignation may not be "coerced." Coercion in the context of contracts is a rather high standard: merely laying out options and honestly advising an employee as to the district's plans does not constitute unlawful coercion. See *Scarborough v. Harlandale Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 057-R3-505 (Aug. 10, 2007) (principal was not "forced" to sign a new contract merely because he was told he might be nonrenewed in the future); *Cabeen v. Spring Branch Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 060-R10-0304 (June 27, 2007) (severe criticism and threats of termination do not establish constructive discharge). A district that is seriously considering nonrenewal or termination should first consider giving the employee an opportunity to resign. A voluntary resignation saves time, money, and pride.
- E. Layoff:** Districts are often tempted to avoid the unpleasantness of firing an employee by characterizing the termination as a *layoff* or *reduction in force* (RIF). A layoff is a legitimate measure for addressing financial exigencies or program changes. However, an artificial RIF is a poor vehicle for terminating underperforming employees. A RIF is more complicated and more expensive than a routine nonrenewal or termination. A special process applies to RIFs of Chapter 21 employees and this process is a layered *on top of* the normal procedures for nonrenewing or terminating a Chapter 21 contract. In other words, RIFs are not a way to avoid terminating or nonrenewing a Chapter 21 contract. They are simply another ground for termination or nonrenewal.

The steps for a RIF are: (1) declare a financial exigency or program change; (2) identify the employment areas that will be affected by the RIF; (3) identify employees in the affected areas who will be terminated or nonrenewed; (4) consider the affected employees for available positions for which they are qualified; (5) determine the employees to be proposed for nonrenewal or termination; and (6) follow nonrenewal or termination procedures, as applicable. When the commissioner reverses a RIF case, it is

inevitably because the district failed to follow these procedures to the letter. *See, e.g., Bosworth v. East Central Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 090-R1-803 (Sept. 23, 2003) (reversing nonrenewal due to RIF where superintendent narrowed affected employment areas and failed to apply selection criteria in local policy).

- F. Suspension:** A district may want to suspend an employee, either as a form of discipline or pending termination. A frequent source of frustration for board members is the practice of putting underperforming employees on indefinite administrative leave, which is essentially a suspension with pay. As with many other practices relating to Chapter 21 employees, this practice is a result of statutory protections.

Suspension of a Chapter 21 employee *without pay* is complicated. Chapter 21 contains three slightly different provisions for suspension of employees employed under probationary, term, and continuing contracts:

- A district may suspend a *probationary* contract employee without pay for good cause “in lieu of discharge.” Tex. Educ. Code § 21.104(b).
- A district may suspend a *term* contract employee without pay for good cause “pending discharge” or “in lieu of termination.” If no discharge occurs after a suspension without pay, a term contract employee is entitled to back pay for the period of the suspension. Tex. Educ. Code § 21.211(b), (c).
- A district may suspend a *continuing* contract employee without pay for good cause “in lieu of discharge.” Tex. Educ. Code § 21.156.

Neither a probationary nor a term contract, nor a continuing contract employee may be suspended beyond the end of the school year. Tex. Educ. Code §§ 21.104(b), .211(c), .156(b).

Suspensions without pay are rare because the district must follow the same procedure as for contract termination: the board must vote to propose suspension and provide notice to the employee; the employee may request a hearing before a hearing examiner; and the board must then decide, based on the record, whether good cause exists to suspend the employee. Tex. Educ. Code § 21.251(a)(3); *Boyer v. Austin Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 062-R3-1296 (Jan. 22, 1997). Because of the cost and inconvenience involved, most districts will simply pursue contract termination.

Chapter 21 does not address suspension *with pay*. However, suspension with pay is unlikely to give rise to a legal claim because the commissioner does not have jurisdiction over a breach of contract claim unless the employee can show monetary harm. Tex. Educ. Code § 7.057(a)(2)(B). For this reason, suspension with pay is the preferred approach when it becomes necessary to remove an employee from his or her job duties until a decision can be made on contract termination or nonrenewal.

III. Get Out While You Can

If an employee is not performing up to standards, and the district has ruled out the alternatives, the next option is nonrenewal. Nonrenewal is easier than contract termination, but it is available only at the end of a term contract. Board members should understand when nonrenewal is available, reasons for nonrenewal, and nonrenewal procedures.

Nonrenewal should be distinguished from the other way to end a Chapter 21 contract involuntarily—termination. *Nonrenewal* occurs *at the end* of a term contract and is essentially a decision to cancel the contract. *Termination* occurs *during* a probationary, term, or continuing contract and refers to the discharge of an employee for good cause. Tex. Educ. Code §§ 21.104, .211, .156.

A. Renewal and Nonrenewal: Basically, term contracts are a form of evergreen contract. *Evergreen contracts* are agreements that automatically roll over at the end of each maturity period unless cancelled by one of the parties. Similarly, term contracts automatically renew unless the board takes action to cancel them. Tex. Educ. Code § 21.206(b). In other words, the length of a term contract does not determine when the contract ends; it determines when the district can exercise its option to cancel the contract.

Board action is not required to renew a term contract. *Renewal is automatic.* Many boards vote each spring to renew teacher contracts. These boards may believe that failing to vote to renew a contract is the same as cancelling the contract. It is not. The only way to cancel a term contract is through the statutory procedures. *Gallien v. Goose Creek Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 036-R1-0308 (May 2, 2008); *see also Lynch v. North Forest Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 058-R10-505 (Mar. 5, 2007) (teacher was employed under term contract for next school year, even though district failed to offer her a new contract, where board failed to propose nonrenewal); *Harrison v. Southside Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 063-R1-0606 (July 24, 2006) (failure of motion to renew is not the same as passage of motion to nonrenew).

B. Timing of Nonrenewal: Nonrenewal occurs at the end of the contract term. For a one-year contract, the end of the contract term will usually correspond to the end of the school year. For a multiple-year term contract, however, the end of the contract term is the end of the period stated in the contract. Thus, a three-year contract starting in 2009-2010 cannot be nonrenewed until the end of the 2011-12 school year. The only way for the district to end the contract before then is to pursue termination for good cause.

C. Reasons for Nonrenewal: A term contract may be cancelled *only* for the reasons set forth in local policy, typically at DFBB(LOCAL). Tex. Educ. Code § 21.203(b). In private business, most evergreen contracts are cancelled through timely, written notice and no reason for cancellation is required. With term contracts, however, the district must identify and prove that one or more of the reasons listed in local policy exists.

The standard for nonrenewal is lower than the standard for contract termination. A district need not show good cause. The only statutory requirement is that nonrenewal be based on pre-established reasons. If there is substantial evidence to support any of the reasons for proposed nonrenewal, the district's decision will be upheld. *Williams v. Galveston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 078-R1-504 (July 7, 2004).

Because the commissioner defers to districts' ability to specify reasons for nonrenewal in local policy, most nonrenewal cases are decided on procedural grounds. Occasionally, the commissioner will address whether a reason for nonrenewal asserted by a district was supported by substantial evidence. The following are decisions addressing some common grounds for nonrenewal:

- **Performance deficiencies:** The commissioner has upheld nonrenewal based upon deficiencies pointed out in observation reports, appraisals, or evaluations, where the administration provided the individual report, appraisal, or evaluation to the employee and the employee failed to remediate. *See, e.g., Flash v. La Marque Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 183-R1-799 (Aug. 19, 1999) (teacher received negative evaluations and failed to remediate or to complete her intervention plan).
- **Excessive absences:** The commissioner has upheld nonrenewal based on excessive absences and similar attendance issues. *See, e.g., Singleton v. Graford Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 049-R1-0508 (June 26, 2008) (employee ceased reporting to work in October because district began making deductions from his pay pursuant to federal tax levy); *Martin v. Dallas Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 059-R2-304 (Apr. 20, 2004) (librarian had thirty-two absences beyond available leave).
- **Failure to follow directives:** The commissioner has upheld nonrenewal based on failure to comply with an official directive. *See, e.g., Ballesteros v. Conroe Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 092-R1-500 (June 16, 2000) (teacher failed to follow official directive to attend an anger management class).
- **Failure to fulfill duties or responsibilities:** The commissioner has upheld nonrenewal based on failure to fulfill duties or responsibilities, such as campus procedures for reporting absences. *See, e.g., Jeffery v. Fort Bend Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 059-R1-0608 (July 31, 2008) (employee "flagrantly" defied directive to sign in when he reported to work); *Flores v. Pasadena Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 071-R1-601 (July 24, 2001) (teacher failed to follow campus procedures for reporting absences).

- **Failure to meet the district’s standards of professional conduct:** The commissioner has upheld nonrenewal where substantial evidence was presented to show that an employee violated the standards of professional conduct. *See, e.g., Fenter v. Quinlan Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 085-R1-502 (July 15, 2002) (substantial evidence existed that the librarian was harsh with students and discouraged use of the library).
- **Drugs and alcohol:** The commissioner has upheld nonrenewal for possession or use of alcohol, drugs, or narcotics. *See, e.g., Simpson v. Midland Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 076-R1-402 (June 17, 2002) (teacher purchased alcohol during school hours while driving a school vehicle).

D. Nonrenewal Procedures: A board must follow the applicable statutory procedures to prevent a term contract from automatically renewing for another school year. To nonrenew a term contract, the board must: (1) provide the employee with notice of *proposed* nonrenewal at least *45 calendar days* before the last day of instruction; (2) upon the employee’s request, provide a *formal hearing* on the proposed nonrenewal; (3) determine whether nonrenewal is appropriate under the board’s policies; *and* (4) timely notify the employee of its decision. Tex. Educ. Code §§ 21.206-.208. The employee may appeal the board’s decision to the commissioner.

A nonrenewal hearing is a formal hearing. *See* Tex. Educ. Code § 21.256 (specifying employee rights at hearing). Typically, both the district and the employee are represented by an attorney. The attorneys argue their cases, put on witnesses, and present evidence, just like in a trial. Because of conflict of interest rules, the attorney who represents the district at the nonrenewal hearing typically does not advise the board. The board may choose to have another attorney advise it. *See* Tex. Educ. Code § 21.258(c) (board may choose to obtain advice from an attorney who has not been involved in proceedings before a hearing examiner). Through local policy, the board may specify that nonrenewal hearings will be conducted before an independent hearing examiner, either every time or at the board’s option. Tex. Educ. Code § 21.251(b)(2). Very few districts use the hearing examiner process for nonrenewals.

- **A note about probationary contracts:** A different procedure applies to prevent probationary contracts from renewing. To cancel a probationary contract at the end of the contract term, the board must: (1) vote that termination will serve the “best interests” of the district; *and* (2) provide the employee with notice of the board’s decision at least *45 calendar days* before the last day of instruction. Tex. Educ. Code § 21.103(a). The board does not have to make any findings or provide any reasons for its decision. A probationary employee may not appeal the board’s decision to the commissioner. *Stansell v. Dallas Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 039-R2-1203 (Jan. 23, 2004).

IV. If All Else Fails, Terminate

Sometimes, the district will have no choice but to terminate the employee's contract. Even bad employees have rights. In other words, to fire even the worst employee, the district will have to commit to spending its resources and going through the process. This is truly an option of last resort because of the complex procedures, the involvement of a hearing examiner in every case, and the expense.

- A. Termination Procedures:** The procedures for termination of a Chapter 21 contract during the school year are the same for probationary, term, or continuing contracts. The board must: (1) provide the employee with notice of *proposed* termination; (2) upon the employee's request, provide a hearing before an independent hearing examiner; (3) determine whether good cause exists to terminate the contract; and (4) timely notify the employee of its decision. Tex. Educ. Code §§ 21.251, .253, .258.
- B. Independent Hearing Examiners:** Independent hearing examiners are required in every termination hearing. The benefit of using a hearing examiner is that it saves the board the time and inconvenience of conducting the hearing itself. Hearing examiners are licensed attorneys, familiar with the process. *See* Tex. Educ. Code § 21.252 (specifying qualifications for hearing examiners). Also, hearing examiners are from outside the district and are intended to bring an impartial perspective to the proceedings.

The hearing examiner process has its drawbacks. First, there is cost. The district must pay the hearing examiner's fees as well as the costs of a court reporter to transcribe the proceedings. Second, the board gives up some control when a hearing examiner is involved. The board does not select the hearing examiner—hearing examiners are appointed to cases by the Texas Education Agency (TEA). Tex. Educ. Code § 21.254. The hearing examiner is required to make findings of fact and conclusions of law, and may make a recommendation to the board regarding termination or nonrenewal. Tex. Educ. Code § 21.257. The board is not bound by the hearing examiner's recommendation. Tex. Educ. Code § 21.258. However, the board is bound by the hearing examiner's findings of fact, including determinations as to the credibility of witnesses. *See* Tex. Educ. Code § 21.259 (specifying requirements for rejecting hearing examiner's findings). A hearing examiner may make findings that contradict board members' own judgment. For example, if the board has worked with and knows a principal and believes the principal to be a reliable and honest person, the board must nonetheless reject the principal's testimony if the hearing examiner concludes that the principal was mistaken or untruthful.

A hearing examiner's recommendation is very likely to be upheld on appeal to the commissioner. The commissioner will almost always uphold a termination if the hearing examiner recommended the action. Conversely, if a hearing examiner recommends against termination, and the board terminates the employee anyway, the commissioner will almost always reverse the decision and reinstate the employee.

C. Good Cause and Its Limits: Although the board determines whether good cause exists, its determination is subject to review by the commissioner. In advising a board about whether good cause exists, a district's attorney will usually look to the commissioner decisions in good cause termination cases. Often there is no similar case, so it is necessary to make a best guess prediction as to how the commissioner might decide an appeal of the case.

As a very general rule, good cause is more likely to be found in cases of misconduct than in cases of poor performance. The following are some of the more common examples of conduct constituting good cause:

- **Sexual conduct involving students:** Sexual conduct involving a student will almost always constitute good cause. *See, e.g., Myers v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 067-R2-302 (May 15, 2002) (teacher told student he was frustrated by his attraction to her and let female students sit on his lap); *Adair v. Cumby Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 029-R2-1200 (Jan. 30, 2001) (teacher sent note of sexually-explicit nature, including drawing of a penis, to female student).

Proving that the conduct occurred can be problematic, however. Students are notoriously poor witnesses. *See, e.g., Gallegos v. Harlandale Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 077-R2-1296 (Apr. 30, 1997) (termination reversed where hearing examiner found student witnesses were not credible). Moreover, employees are most likely to fight this type of allegation because of the criminal-law implications. Even an employee who has been convicted of sexual misconduct is entitled to due process and an appeal to the commissioner. *See, e.g., Templeton v. East Central Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 462-R2-795 (Feb. 1, 2002) (termination of teacher seven years earlier was supported by his conviction for misdemeanor assault of student).

Also, the commissioner is wary of perceived overreactions to marginally sexual conduct. *See, e.g., Carvajal v. Santa Rosa Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 086-R2-1191 (Sept. 19, 1992) (two students complained that they saw coach's genitals, on one occasion, while he was sitting down, wearing loose shorts—alleged exposure was rejected as at most an accidental, one-time incident).

- **Criminal sexual conduct involving non-students:** Generally, an employee's personal sex life, no matter how offensive to the board, is not likely to constitute good cause unless the district can demonstrate that it interfered with the employee's ability to do his or her job. *See, e.g., Guzman v. Harlandale Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 485-R2-895 (Dec. 2, 1999) (married employee's romantic pursuit of colleagues was not good cause); *Avery v. Homewood City Bd. of Educ.*, 674 F.2d 337 (5th Cir. 1982) (blanket rule of terminating unwed mothers violated right to privacy).

Termination of a public employee based solely on sexual orientation or homosexual relationships would probably be considered a constitutional violation. However, good cause has been found where employees were convicted of sexual acts that would have been criminal even among consenting heterosexual adults. *See, e.g., Christian v. Dallas Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 192-R2-899 (Sept. 24, 1999) (employee was charged with lewd acts in public restroom).

- **Non-sexual criminal conduct:** Conviction of a serious criminal offense will probably constitute good cause, if the district is consistent about enforcement. If nothing else, good cause may exist if the employee failed to disclose the criminal charges to the district. *See, e.g., Morgan v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 160-R2-599 (June 25, 1999) (employee failed to disclose arrest and guilty plea relating to felony forgery and counterfeiting charges); *Heiligmann v. Northside Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 210-R2-797 (Sept. 15, 1997) (employee was convicted of two counts of felony theft, both related to a suspected auto theft ring).

Mere arrest is rarely sufficient for termination. *See, e.g., Duncan v. Pecos-Barstow-Toyah Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 351-R2-792 (Sept. 7, 1995) (reversing termination of guidance counselor who was arrested for shoplifting, but charges were later dropped). Also, the Equal Employment Opportunity Commission (EEOC) takes the position that relying solely on arrest records, without any corroborating investigation, has an illegal discriminatory effect on racial minorities because minorities are more likely to be falsely arrested. www.eeoc.gov/policy/docs/arrest_records.html.

- **Verbal abuse of students:** Disparagement of students will usually constitute good cause. *See, e.g., Hill v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 064-R2-503 (July 7, 2003) (teacher called students “stupid” and “idiots”); *Woolworth v. Eagle Pass Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 119-R2-1291 (Oct. 2, 1998) (teacher scratched and pushed students, threw erasers and pencils at them, “exposed herself” to them while sitting, told them she had a right to kill them, and called them demeaning names). Isolated incidents are not likely, however, to support termination. *See, e.g., Vestal v. Dallas Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 272-R2-495 (May 5, 1998) (reversing termination of twenty-three year teacher who lost her composure, screamed at a student, and put her hands on the student’s shoulders).
- **Use of physical force with students:** Use of physical force with a student, outside of corporal punishment, may constitute good cause *unless* the teacher was using force to maintain discipline or control of the student. *See, e.g., Jones v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 058-R2-304 (Apr. 13, 2004) (teacher grabbed student, pushed him into lockers, and punched him in the arm); *Adair v. Cumby Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No.

029-R2-1200 (Jan. 30, 2001) (teacher put student in headlock, injuring him); *Ruiz-Garcia v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 049-R2-1199 (Jan. 4, 2000) (teacher disciplined students by making them kneel with their hands above their heads); *Burnett v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 172-R2-898 (Oct. 9, 1998) (teacher dragged second-grade student approximately 60 feet down concrete walkway).

Compare Papa v. Presidio Indep. Sch. Dist., Tex. Comm'r of Educ. Decision No. 016-R2-0306 (May 3, 2006) (reversing termination where, to prevent student from defacing teacher's yearbook, teacher twisted student's arm behind his back, pushed student into wall, then pushed student out door into hallway); *Floyd v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 038-R2-203 (Mar. 28, 2003) (reversing termination where hearing examiner concluded male teacher's act of punching female student was reasonable, spontaneous response to physical attack by student).

- **Disregard for student welfare:** Acts that endanger students will usually constitute good cause. *See, e.g., Mullinax v. Texarkana Indep. Sch. Dist.*, No. 02-40220, 2002 WL 31115047 (5th Cir. Feb. 11, 2002) (teacher encouraged elementary students to eat weeds while on a nature hike and several students fell ill); *Hamilton v. Dallas Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 058-R2-401 (June 5, 2001) (teacher gave student prescription anti-anxiety medication, to which student had a bad reaction); *Adair v. Cumby Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 029-R2-1200 (Jan. 30, 2001) (teacher kept prescription painkillers in unlocked drawer); *Ruiz-Garcia v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 049-R2-1199 (Jan. 4, 2000) (teacher sent student back into school for her roll book during fire drill).
- **Cheating:** Material dishonesty or cheating on state assessments or extracurricular activities will usually constitute good cause. *See, e.g., Johnson v. Dallas Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 079-R2-605 (Aug. 15, 2005) (teacher developed answer key for state assessment and gave students answers or suggested they rework certain problems); *Askew v. DeSoto Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 014-R2-1202 (Jan. 14, 2003) (teacher falsified student grades); *Slover v. Comal Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 037-R2-1095 (Sept. 3, 1997) (FFA sponsor injected air under skin of calves to make them look bigger and gave calves injections to prevent eruption of permanent teeth).

- **Personal use of district resources:** Significant, personal use of district resources may constitute good cause. *See, e.g., Cooper v. Alief Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 059-R2-503 (July 2, 2003) (principal called mandatory meetings—during school hours—at which she and her relatives tried to sell pre-paid legal services to school employees); *Alejandro v. Robstown Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 053-R2-1199 (Sept. 5, 2000) (employee used district computer for personal business and to visit inappropriate internet sites).

Compare Peck v. Texas School for the Blind, Tex. Comm’r of Educ. Decision No. 069-R2-1287 (Dec. 17, 1990) (reversing termination based in part on teacher’s one-time personal use of school’s postage meter).

- **Purchasing violations:** Serious purchasing violations may constitute good cause. *See, e.g., Atkinson v. Mercedes Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 041-R2-0408 (May 29, 2008) (principal failed to follow financial procedures when he wrote checks to himself from campus accounts and signed the checks without supervisor approval); *Gonzalez v. Austin Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 011-R2-1005 (Nov. 28, 2005) (principal falsified invoice).

Compare Guerra v. Premont Indep. Sch. Dist., Tex. Comm’r of Educ. Decision No. 045-R2-303 (Apr. 30, 2003) (reversing termination of athletic director for ordering annual “certification” of helmets and shoulder pads, despite directive against additional purchases).

- **Attendance and leave issues:** Serious attendance and leave problems may be good cause. *See, e.g., Martin v. Dallas Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 059-R2-304 (Apr. 20, 2004) (librarian’s 32 days of absences, over and above her leave entitlement, were excessive); *Johnson v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 074-R2-402 (June 12, 2002) (teacher with history of attendance problems failed to report for first day of school); *Cox v. Andrews Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 092-R2-199 (Feb. 25, 1999) (teacher missed one day of school during first week, in violation of written directive not to go on cruise she had won); *Pfeuffer v. Dallas Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 163-R2-898 (Sept. 29, 1998) (teacher failed to return from temporary disability leave for a year after being released by her doctor); *Duncan v. Highland Park Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 085-R2-398 (May 12, 1998) (nurse failed to return five months after exhausting all available leave).

- **Reduced effectiveness:** Conduct that does not fall under any of the above categories, or any other fact situation previously addressed by the commissioner, may constitute good cause if the district can demonstrate that the conduct interfered with the employee's ability to do his or her job because of community reaction. *See, e.g., Massey v. Paris Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 137-R2-399 (May 18, 1999) (teacher's violation of probation for DWI resulted in adverse publicity); *Williamson v. Dallas Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 095-R2-498 (June 9, 1998) (teacher's comments to students about the Million Man March generated negative publicity); *McGilvray v. Boyd Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 185-R2-597 (July 7, 1997) (parents were outraged when they learned that teacher made list of "problem" students for juvenile probation officer); *Humphrey v. Westwood Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 476-R2-795 (Nov. 4, 1996) (teacher threatened wife with rifle in domestic violence incident, leading parents to threaten to withdraw their children from school).

D. Immunities: Some behavior that is objectionable from the district's point of view is nonetheless protected by law. These protections are often referred to as *immunities*. Protected behavior for school employees includes:

- Using physical force with students to maintain discipline. Tex. Educ. Code § 22.0512.
- Reporting a violation of law to an appropriate law enforcement authority (whistleblower). Tex. Gov't Code Chapter 554.
- Reporting a work-related injury. Tex. Lab. Code § 451.001.
- Reporting child abuse. Tex. Fam. Code § 261.110.
- Exercising free speech or taking positions on political issues as a private citizen (not as part of job duties). *Garcetti v. Ceballos*, 547 U.S. 410 (2006).
- For a nurse, refusing to engage in an act or omission that violates professional standards. Tex. Occ. Code § 301.352(a).

E. Perils of Pretext: Whatever the reason is for termination or nonrenewal, the district should be honest and consistent in its communications to the employee. Mischaracterizations, misrepresentations, "white lies," and just plain "fudging the truth" can lead to liability. If the employee sues the district for discrimination based on race, sex, religion, age, disability, or another protected characteristic or action, the jury may be allowed to infer from the fact that the district was inconsistent or untruthful that the real reason for the district's action was prohibited discrimination. *See, e.g., St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 523-24 (1993) (emphasizing the jury's factfinding role in determining whether an adverse employment action is a result of discrimination or a different reason proffered by the employer).

F. Voiding Contracts for Lack of Certification: A third method exists for cancelling a Chapter 21 contract, but it applies under limited circumstances. If an employee does not hold a certificate or permit issued by SBEC, or if the employee fails to fulfill the requirements for extending a temporary or emergency certificate or permit, the board may declare the contract void. The board may then terminate the employee, suspend the employee with or without pay, or retain the employee on an at-will basis. The employee may not appeal the board's decision to the commissioner. Tex. Educ. Code § 21.0031; *see also Roberts v. Marlin Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 021-R10-1204 (Aug. 14, 2007) (board, not superintendent, must exercise option to declare contract void for lack of certification).

V. Those Who Can't Teach

Surprisingly, one of the most difficult ways to successfully terminate a teacher is to prove good cause based on poor performance. The crux of the problem is that it is very hard to tie poor student performance to a teacher's performance. Moreover, the district may be required to offer the employee an opportunity to remediate. Finally, documentation, in the form of evaluations, is key to a nonrenewal or termination based on poor performance.

A. The Proof Problem: Most performance cases focus on non-instructional issues, such as failure to maintain discipline, poor classroom management, and failure to follow procedures. Usually, the problems must be pervasive to rise to the level of good cause, as the following examples demonstrate:

- *Goodfriend v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 079-R2-703 (Sept. 5, 2003): Teacher exhibited poor classroom management (students spoke out of turn, slept in class, and put their feet up on desks); poor discipline (teacher called campus police when student was being mildly disruptive and not physically threatening); poor rapport with students (teacher argued and was sarcastic); poor teaching techniques (objectives were not clearly stated and teacher did not follow lesson plan).
- *Chatman v. Houston Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 010-R2-901 (Nov. 13, 2001): Counselor failed to comply with directives regarding lesson plans, exhibited poor classroom performance, had excessive absences, and failed to comply with growth plans.
- *Edwards v. Dallas Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 052-R2-301 (May 2, 2001): Teacher exhibited "abysmal" classroom management and refused to comply with district's efforts to rehabilitate her shortcomings. Among other things: the teacher refused to break up a fight between two 6 year old boys because she was afraid they might hurt her; when two boys threw a girl's books in toilet, she put the wet books in the girl's backpack and took no action against the boys; when one boy cut another boy's shirt with scissors, she took no action to

discipline the child; she left children unattended on the playground; she locked her classroom during class; she cut herself out of class pictures purchased by parents (because she thought she looked like a “monster” in comparison to the children); she failed to follow lesson plans and submitted “forged” lesson plans; she told a parent one of her first-grade students was “probably gay”; and she failed to maintain her grade book.

Another frequent assertion is that a teacher neglected administrative matters, such as preparing and submitting lesson plans or maintaining a grade book. *See, e.g., Johnson v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 074-R2-402 (June 12, 2002) (teacher failed to maintain grade books, despite warnings); *Booker v. Houston Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 061-R2-1198 (Dec. 30, 1998) (teacher failed to maintain lesson plans or leave lesson plans for substitutes, failed to maintain grade and attendance books, and failed to complete end-of-year checkout sheet).

What about a teacher who complies with all of these requirements, but the students do not seem to be learning? Teaching ability is certainly an important factor in learning. But many other factors also contribute to student performance including economic status, parents’ level of education, limited-English proficiency, and nutrition. Even in cases involving abysmal student performance, the commissioner has held that a district must show that the teacher’s performance caused her students’ poor performance. *See Toussaint v. Dallas Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 071-R2-0708 (Sept. 9, 2008) (reversing termination of teacher from low-performing campus where hearing examiner concluded students’ poor performance was attributable to socioeconomic factors); *see also Howard v. Walnut Bend Indep. Sch. Dist.*, Tex. Comm’r of Educ. Decision No. 050-R1-0508 (July 7, 2008) (district must follow nonrenewal procedures even if teacher’s campus is rated academically unacceptable for two consecutive years).

For the reasons described above, districts rarely pursue mid-contract termination due to poor performance. Instead, poor performance is much more likely to be addressed through contract nonrenewal.

- B. Evaluations:** A board must consider an employee’s most recent evaluation before making a decision not to renew the employee’s contract if the evaluation is relevant to the reason for the board’s action. Tex. Educ. Code § 21.203(a).

Generally, all educators must be evaluated annually. Tex. Educ. Code § 21.203(a). Local policy may provide for evaluation of certain teachers on a less-than-annual basis. Tex. Educ. Code § 21.352(c). In districts that have such a policy, the most recent evaluations may be several years old. In such cases, nonrenewal based on performance deficiencies may be difficult unless sufficient other documentation is available.

If the employee's most recent evaluation is positive, administrators may still have sufficient documentation to support nonrenewal. A board may conclude that a teacher has a pattern of poor performance even if the teacher's most recent evaluation is positive. *Anderson v. Tyler Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 048-R1-0508 (June 24, 2008).

- C. Remediation:** Another important aspect of both termination and nonrenewal is remediation. Chapter 21 employees are entitled to an opportunity for improvement if the conduct or performance is remediable.

Remediation is typically associated with poor job performance, not misconduct. Conduct sufficient to warrant termination often is not remediable. *See, e.g., Reincke v. Richardson Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 063-R1-0607 (July 23, 2007) (no right to remediation where teacher used disparaging racial terms and other derogatory language); *Askew v. DeSoto Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 014-R2-1202 (Jan. 14, 2003) (no right to remediation where counselor falsified student grades).

Where remediation is available, it consists of notice and an opportunity for improvement. For teachers, remediation of poor performance often takes the form of a growth plan or intervention plan. A growth plan is a set of written directives about how to improve performance, with an expected time of completion for each directive. A growth plan is not a shield for the teacher, however. *See Dews v. Tyler Indep. Sch. Dist.*, Tex. Comm'r of Educ. Decision No. 053-R1-0508 (July 11, 2008) (upholding contract nonrenewal before the time specified in growth plan).

VI. Navigating the Road Less Travelled

In order to fire underperforming employees, the district must be able and willing to tackle the practical aspects of contract termination or nonrenewal. Practical considerations include evaluating evidence, understanding costs, managing risk, and working with legal counsel.

- A. Evidence:** A nonrenewal or termination case must be supported by evidence, which typically consists of documents and witness testimony. Good documentation must exist before a contract action is proposed. For good documentation to exist, administrators must be trained in and follow documentation practices. The documentation should be carefully vetted with a critical eye, preferably by legal counsel. It is easy to miss gaps and inconsistencies when you review documentation with a bias toward your case.

Similarly, the district will have to identify witnesses who will fill in the missing pieces and provide a human voice to the story. This can be difficult for a number of reasons. Non-employees may not be willing to testify. Although it may be possible to subpoena witnesses to testify against their will, they may not be ideal witnesses. Even those who testify willingly may not make good witnesses. They may be forgetful or too nervous to be credible.

- B. Costs:** The cost of ending a contract can be substantial. Economic costs are easiest to measure and include fees for a hearing examiner (if any), court reporter, expert witnesses, and attorneys for the district and board. Administrative costs are not as easy to quantify. Administrative costs include time spent compiling documents, meeting with legal counsel, preparing to testify, and actually testifying at the hearing. Also included in this equation is the stress and distraction of dealing with adversarial proceedings, which are unfamiliar to most administrators and educators.
- C. Risk:** The board should understand that risk is intrinsic to employment proceedings: there is always a chance the district will lose. Of course, there is also some risk in retaining an underperforming employee. One way to manage risk is to quantify the risk as much as possible. The board can ask its attorney to estimate the odds of losing before the hearing examiner or on appeal to the commissioner. The board can also ask for an estimate of the range of potential loss—what damages or relief might the employee be awarded if he or she prevails?

This last point is very important because the Texas Education Code provides for two specific remedies in a contract termination or nonrenewal case: backpay and reinstatement. Backpay is awarded from the date of termination until the date of reinstatement. Tex. Educ. Code § 21.304(e). As an alternative to reinstatement, the district may pay the teacher one year's salary from the date on which the teacher would have been reinstated. Tex. Educ. Code § 21.304(f). These statutes allow a district to quantify damages, both for risk management purposes and for purposes of negotiating any settlement. In some cases, a district may decide to capitulate on appeal and simply pay backpay, rather than incur legal fees and other costs by continuing to fight with an employee.

- D. Attorneys:** Other than backpay, legal fees represent the greatest expense in employment cases. Some attorney fees are unavoidable. The district's counsel will have to commit a certain amount of time to interviewing and preparing witnesses, reviewing documents, preparing and presenting the case, and communicating with opposing counsel and the hearing examiner (if any).

Some attorney fees are avoidable. For the most part, these are the fees associated with communicating with the client. To control the flow of information and the cost of legal services, most districts choose to limit who has access to the district's attorney. Both the district and the attorney need a clear understanding of who is authorized to call the attorney and under what conditions. The specifics generally should be spelled out in the written agreement between the attorney and the district, in local policy BDD or other written procedure, or both.

This document is provided for educational purposes only and contains information to facilitate a general understanding of the law. It is neither an exhaustive treatment of the law on this subject nor is it intended to substitute for the advice of an attorney. It is important for the recipient to consult with the district's own attorney in order to apply these legal principles to specific fact situations.

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Published April 2010