A Practical Guide to Providing Legally Compliant Employee and Student Hearings

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I. ARKANSAS TEACHER FAIR DISMISSAL ACT
A. Overview of the Law

Personnel matters concerning teachers are largely governed by the Arkansas Teacher Fair Dismissal Act (“ATFDA”). First enacted in 1983, the ATFDA was originally construed by Arkansas courts as requiring that the school district substantially comply with provisions of the law and its personnel policies. In 1989, the ATFDA was amended to require strict compliance with the law and the school district’s personnel policies. The law further permitted termination for any reason that was not arbitrary, capricious or discriminatory. In 2001, the ATFDA was again amended. The law now provides that non-renewal, termination or suspension of a teacher requires just and reasonable cause.
The Arkansas Supreme Court and Court of Appeals have so far not been presented with the task of defining just and reasonable cause. The plain meaning of those words are “just” means “fair,” and “reasonable” means that it makes sense. Just and reasonable cause can also mean the following:
B. Just and Reasonable Cause

• Was the employee adequately warned of the consequences of his conduct?
• Was the rule or order reasonably related to efficient and safe operations?
• Did the administration investigate before administering the discipline?
• Was the investigation fair and objective?
• Did the investigation produce substantial evidence or proof of guilt?
• Were the rules, orders and penalties applied even handedly and without discrimination?
• Was the penalty reasonably related to the seriousness of the offense and the past record?
• Rule #1: does the superintendent believe the board will uphold his recommendation?
C. Who Does the Law Cover?

ATFDA applies to all who hold a teaching license except for superintendents and assistant superintendents. Only the superintendent may recommend suspension, nonrenewal or termination. ATFDA applies to both probationary (teachers who have not completed three successive years of employment) and nonprobationary licensed staff. The only material difference in the law is that nonprobationary licensed personnel have a statutory right to appeal the board’s decision to circuit court within 75 days of the written notice of board action.
D. Standard for Compliance

The conduct or offense being used as the grounds of termination or non-renewal must occur in the current school year. Non-renewal or termination based exclusively on conduct occurring in prior years will be held arbitrary and capricious.
E. Board Hearings

A certified teacher is entitled to a hearing any time he receives the required notice that he is being recommended for termination or non-renewal. That notice must be in writing and include a detailed statement of the reasons for the recommendation, setting forth the reasons in separately numbered paragraphs so that a reasonable teacher can prepare a defense.

1. A teacher who receives the written notice of recommended termination or non-renewal may file a written request with the board of directors of the district for a hearing.

2. Said written request for a hearing shall be sent by certified or registered mail to the president, vice-president or secretary of the board, with a copy to the superintendent, or it may be delivered in person to one of them by the teacher, within thirty (30) calendar days after the written notice of proposed termination or non-renewal is received by the teacher.
3. Upon receipt of a request for a hearing, the board shall grant a hearing in accordance with the following provisions:

   a. The hearing shall take place at a time, agreed upon in writing by the parties, but if no time can be agreed upon, then the hearing shall be held not less than five calendar days nor more than twenty (20) calendar days;

   b. The hearing shall be private unless the teacher or the board shall request that the hearing be public;

   c. The teacher and the board may be represented by representatives of their choosing;

   d. The board shall elect to make and preserve a record of the hearing at its own expense, in which event a copy shall be furnished the teacher, upon request, without cost, to the teacher;
e. A written request is filed with the board by the teacher at least twenty-four (24) hours prior to the time set for the hearing, in which event the board shall make and preserve, at its own expense, a record of the hearing, and shall furnish a transcript to the teacher without cost; and

f. The board shall not consider at the hearing any new reasons which were not specified in the notice provided to the teacher.

4. Hearing Officer/Attorney for Administration

Arkansas courts will generally not substitute their judgment for that of school administration or the school board. Arkansas court decisions have accorded the school boards wide latitude and discretion in the operation of a school district.
F. Post Hearing Procedures

In addition to following the proper timing guidelines for the hearing, it is also imperative to follow the statute regarding board actions which occur subsequent to the hearing. Subsequent to the hearing, with regard to certified personnel, the board must make a decision regarding the superintendent’s recommendation within ten (10) days. And it is important to note that following any hearing granted by the ATFDA, the board shall by majority vote make specific written conclusions with regard to the truth of each reason given in support of the termination or non-renewal. Finally, a copy of the decision of the board must be subsequently furnished in writing to the teacher, either by personal delivery, registered or certified mail.
The board should be given specific written instructions regarding the process to be followed by the board after the evidence regarding the superintendent’s recommendation is presented. Key points are the use of executive session, wording of the board motions on the reasons for the recommendation and whether the board accepts, rejects or modifies the recommendation, or how the board should proceed if it elects to modify the recommendation.
G. Remedies and Damages

Failure to substantially comply with the ATFDA can result in the reinstatement of a non-desirable teacher as well as expense to the district in the form of back pay. Normally, the proper measure of damages in these cases where a teacher prevails is the salary which the teacher lost up to and including reinstatement, less mitigation for earnings realized through other employment.

Actions under the ATFDA are within the meaning of Arkansas attorney fees statutes. As such, attorney’s fees and costs may be awarded to the prevailing party in any action brought under the ATFDA. Damages and costs can be enormous and material to district operations (see Texarkana School District – $750,000 settlement in 2011).
H. Reassignment

Questions frequently arise under the Teacher Fair Dismissal Act in situations, often involving coaches or other supplemental contract positions, where a change in the teacher’s job responsibilities raises the question of whether the situation involves a reassignment of duties, which does not trigger the ATFDA, or if the change in duties was a non-renewal under the ATFDA. Where the teacher’s contract provided that he was subject to transfer or reassignment, his salary did not decrease and his duties were merely transferred to a different program and not otherwise materially changed, the ATFDA is not implicated. However, a school district’s action against a teacher is a non-renewal, rather than a reassignment of duties, where the teacher suffers a material reduction in salary and a material change in his duties. Under Arkansas law, a superintendent may transfer or reassign a teacher from one position to another without the need for a hearing.
I. Suspensions

The ATFDA does not apply to any disciplinary suspensions that are not imposed in the context of a recommendation of termination or the non-renewal of the teacher’s contract. The ATFDA applies only to suspensions that are imposed in connection with a recommendation of termination or non-renewal.
Under the Arkansas Teacher Fair Dismissal Act, each teacher must be evaluated in writing annually. Whenever a superintendent or other supervisor of a teacher believes or has reason to believe that the teacher is having difficulties or problems meeting school district expectations, the supervisor shall bring the problems in writing to the attention of the teacher and work out a method in which to try to resolve the problems.

The efforts that have been undertaken to assist the teacher to correct whatever appears to be the cause for potential termination or non-renewal should be documented in order to memorialize the actions that would establish that the administration has attempted to remediate the deficiencies in the teacher’s performance (professional development, written materials, mentors, improvement plans, etc.).
Authentic performance evaluations can be an effective means of preventing wrongful discharge claims. They can keep employees regularly advised of how they actually stand with the employer and prevent surprises in the future. If the evaluations are properly documented, they can head off wrongful discharge or discrimination claims or provide a good defense to them. On the other hand, if the evaluation is merely perfunctory and does not inform the employee of how he or she is actually doing, then it can come back to haunt the employer when a wrongful discharge or discrimination claim is filed. Too often, administrators who evaluate teachers have received no instructions concerning how to evaluate them, and those who rate teachers check “satisfactory” or “good” without giving very much thought to whether these terms are correct or because they don’t want to hurt someone’s feelings. Raters also tend to use the same comments for virtually all employees. Such use of the performance review is relatively meaningless, unreliable, and ripe for a lawsuit.
Administrators who evaluate teachers should be given instructions which are clearly set forth in writing. These instructions should explain the system’s importance and purpose, as well as the need for honesty, accuracy, and fairness, and should include information which is helpful to the supervisor or manager in dealing with potential EEO or wrongful discharge problems. A directive to review the job description before evaluating current employees should also be included in the instructions. Job descriptions should be updated at least annually. A program for training administrators in the proper way to handle performance reviews should be implemented.
The review must be honest, candid and authentic. While it is possible for an administrator to be unduly harsh on teachers during an evaluation, excessive leniency is ordinarily the rule rather than the exception. Excessive leniency usually results in falsely increasing and then frustrating a teacher’s expectations and can make an otherwise routine termination hazardous. Be aware that if there is excessive leniency, it is unlikely that job performance will improve, since the teacher may not even be aware of deficiencies. In order for a review process to be really productive, it must be the one that alerts employees to what is expected of them, where they are deficient, and how they can improve. If an employee has a specific problem, this problem should be specifically identified. If an employee is not doing a good job, he or she should be specifically told just that. Remember that nothing can be more damaging to a school district’s position in a lawsuit than to have unduly favorable evaluation reports in a personnel file.
K. Recent Cases

Reduction in Force Upheld

District’s nonrenewal of teacher during reduction in force upheld because district policies required evaluation of needs and goals. Teacher was not needed to teach social studies due to decreases in enrollment and funding. Another teacher was less senior, but he was retained in a different licensure area (PE/Coach).

Termination Unlawful

Teacher employed pursuant to additional licensure plan, but teacher did not complete ALP. District recommended termination, but the employment contract was for a high school teacher, not a specific license area. Teacher was licensed to teach in high school, just not in the license area for the ALP. Court held that it could not look outside the contract to other evidence to show that completion of ALP was required by contract.
Termination Unlawful

District’s nonrenewal of counselor violated ATFDA because it was unreasonable to blame counselor for seniors not having enough credits to graduate since the student handbook, on which the counselor relied, incorrectly listed the number of credits required, and the counselor was never given a copy of the board policy book. No substantial compliance with ATFDA where the counselor was only evaluated once in 14 years with district, so there was no need to even determine if district attempted to help the counselor correct his performance deficiencies.
II. ARKANSAS PUBLIC SCHOOL EMPLOYEE FAIR HEARING ACT
A. § 6-17-1702. Definitions.

• Employee – a person who is not required to have a teaching license as a condition of employment.
• Full-time employee – at least twenty (20) hours per week.
• Probationary employee – has not completed one year of employment.

B. § 6-17-1703. Termination or Nonrenewal.

• Superintendent’s recommendation must be in writing.
• Recommendation must be made no later than thirty (30) calendar days prior to beginning of employee's next contract period.
• Employee is entitled to a hearing before the Board upon written request within twenty-five (25) days of notice.
C. § 6-17-1704. Immediate Suspension.

- Employee may be immediately suspended provided written notice of the action is sent within two (2) school days.
- Notice shall include a statement of reasons and advise of the right to hearing.

D. § 6-17-1705. Hearing.

- The hearing may be public or private at the request of the employee.
- Employee may be represented by a person of his/her choice.
- Board may terminate the employee or continue the suspension for a definite period of time.
III.

STUDENT DISCIPLINE
Suspension – Expulsion

(a) As used in this section:
   (1) “Course time” means the number of hours of instruction devoted to a single subject during the school week;

   (2) “Expulsion” means dismissal from school for a period of time that exceeds ten (10) days;

   (3) “Nontraditional scheduling” means block or other alternative scheduling as defined by the Department of Education; and

   (4) “Suspension” means dismissal from school for a period of time that does not exceed ten (10) days.

(b) The board of directors of a school district may suspend or expel any student from school for violation of the school district’s written discipline policies, except that a school district shall not use out-of-school suspension as a discipline measure for truancy.

(c)(1) The board of directors may authorize a teacher or an administrator to suspend any student for a maximum of ten (10) school days for violation of the school district’s written discipline policies, subject to appeal to the superintendent or his or her designee; however, schools that utilize nontraditional scheduling may not suspend students from more course time than would result from a ten-day suspension under the last traditional schedule used by the school district.

(c)(2) If the superintendent initiates the suspension process, the decision may be appealed to the board of directors.

(d)(1) A superintendent may recommend the expulsion of a student for more than ten (10) days for violation of the school district’s written discipline policies, subject to appeal to the board of directors and the requirements of the federal Individuals with Disabilities Education Act.

(d)(2)(A) After hearing all testimony and debate on a suspension, expulsion, or appeal, the board of directors may consider its decision in executive session without the presence of anyone other than the board members.

(d)(2)(B) At the conclusion of an executive session, the board of directors shall reconvene in public session to vote on the suspension, expulsion, or appeal.

(d)(3) A school district board of directors meeting entertaining an appeal shall be conducted in executive session if requested by the parent or guardian of the student provided that after hearing all testimony and debate, the board of directors shall conclude the executive session and reconvene in public session to vote on such appeal.
EXPULSIONS: an exclusion from school for any period longer than ten (10) school days for violation of the District’s written discipline policies

REASONS FOR EXPULSION:

• The student’s conduct so serious that suspension would not be a strong enough sanction
• The student’s continued attendance at school would disrupt the orderly learning environment
• The student’s continued attendance at school would pose an unreasonable danger to the welfare of other students or staff
NOTICE OF RECOMMENDED EXPULSION:

- Written notice mailed to parents or legal guardians
- Contains specific length of expulsion and specific reasons for expulsion
- Contains date, hour, and location where school board will consider the recommendation

Hearing must be held within ten (10) school days of the notice date, but parents may agree to a later date
EXPULSION HEARING:

- Both the student and the administration may be represented by legal counsel.
- Hearing is conducted in open session unless parents request hearing in executive session.
- Administration has burden of proving the reasons for the recommendation by the preponderance of the evidence.
- Both sides may present witnesses, evidence, and argument in support of their positions.
- Board deliberates in executive session.
- Board action on the recommendation by majority vote to accept, reject, or modify takes place in open session.
EXPULSION OF STUDENT POSSESSING FIREARM ON SCHOOL PROPERTY:

- Arkansas law requires the superintendent to recommend expulsion for not less than one (1) year
- However, superintendent has discretion to modify the recommendation on a case-by-case basis
- Law requires the expulsion process to be completed even if the student has withdrawn from school
IV.
PERSONNEL POLICIES
Grievance Procedure
§ 6-17-208. Grievance Procedure.

(a)(1) It is the public policy of the State of Arkansas that:

(a)(1)(A) Each school district shall have a written grievance procedure that provides for an orderly method of resolving concerns raised by an employee at the lowest possible administrative level and in a clear and timely manner for both parties; and

(a)(1)(B)(i) All school employees shall have the right to file grievances and have those grievances heard.

(a)(1)(B)(ii) A group of employees who have the same grievance may file a group grievance.
§ 6-17-208. Grievance Procedure.

(a)(2)(A) “Grievance” means any concern related to personnel policy, salary, federal or state laws and regulations, or terms or conditions of employment raised by an employee.

(a)(2)(B) “Employee” means a person employed by a school district under a written contract.
§ 6-17-208. Grievance Procedure.

(b)(1) The grievance policy shall include at least the following provisions:

(b)(1)(A) A procedure for resolving the matter informally with the employee’s immediate supervisor;

(b)(1)(B) A procedure to appeal in writing an unsatisfactorily resolved grievance from the immediate supervisor to the superintendent of schools or his or her designee;

(b)(1)(C)(i) A procedure to appeal in writing an unsatisfactorily resolved grievance from the superintendent or his or her designee to the school board of directors at the next regularly scheduled school board of directors meeting unless both parties have agreed to a different date.
§ 6-17-208. Grievance Procedure.

(b)(1)(C)(ii) The hearing shall be open or closed at the discretion of the employee.

(b)(1)(C)(iii) If the hearing is open, the parent or guardian of any student under the age of eighteen (18) who gives testimony may elect to have the student’s testimony given in a closed session; and

(b)(1)(D) The right of a party to be represented by a person or his or her own choosing, but not by a member of a party’s immediate family at any level of the procedure.
§ 6-17-208. Grievance Procedure.

(b)(2)(A) The determination by the principal, superintendent, or their designees that the concern expressed by the employee is not a grievance may be appealed to the school board of directors for a final decision.

(b)(2)(B) At the hearing:

(b)(2)(B)(i)(a) The employee shall have an adequate opportunity to present the grievance.

(b)(2)(B)(i)(b) The employee shall be provided no less than ninety (90) minutes to present the grievance, unless a shorter period is agreed to by the employee; and

(b)(2)(B)(ii) Both parties shall have the opportunity to present and question witnesses.