II. Sources of Educational Employee Rights

An educational employee has a number of different legal protections and rights from a variety of sources. To determine whether any rights have been violated, each of the following sources should be explored. The rights listed below are by no means exhaustive, but are meant to highlight some of the more important protections.

A. Constitutional Rights

The United States Constitution and the Constitution of the State of Illinois provide a number of protections to all citizens. Two of the more important protections for educational employees are the rights of free speech and due process. Other rights include freedom of religion, freedom from search and seizure, freedom from self-incrimination, and certain privacy rights.

1. Free Speech

A person does not give up his or her First Amendment right to free speech as a result of becoming a public employee. Free speech encompasses a number of different areas, each with its own specific rules. These include academic freedom, artistic expression, the rights of association (such as with a union), and political speech. Educational employees may not be dismissed, transferred, reprimanded, nor have their employment rights infringed in any way as a result of exercising constitutionally protected rights of free speech. This applies to probationary as well as non-probationary employees. In addition to constitutional protections, employees may also have just cause protections in their collective bargaining agreement. For those employees, the employer must prove it had just cause to discipline the employee for their speech.

Determining whether free speech rights have been violated requires a number of steps. Much will depend upon the situation's unique facts. However, it is important to remember that a person must prove with evidence that his or her rights have been violated. Mere "belief" is not sufficient.

The first step is to determine whether "protected speech" is involved. Speech is considered to be protected whether it is made publicly (by letters to the editor, speeches to the public, comments at school board meetings, internet postings) or privately, such as to an immediate supervisor. The inquiry is two-fold: First, did the employee speak as a private citizen or pursuant to his or her official duties. Public employers have broad discretion to manage their operations, including restricting its employees' speech when the restriction is necessary to operate efficiently and effectively. Therefore, public employees expressing views pursuant to their official duties are not protected by the First Amendment. If, however, the employee is speaking as a citizen, then the second inquiry is whether the subject of the speech is a matter of public concern because only matters of public concern rather than private concern are protected. If, for example an employee

airs personal grievances against a supervisor that pertain solely to his or her individual situation, these are not protected speech. Issues of public concern include educational policy, expenditures of public funds, and board positions on collective bargaining.

The next step in the analysis is whether the employee's interest in commenting on matters of public concern outweighs the employer's interest in promoting efficiency and integrity in discharging official duties. There are a number of factors which will be considered in weighing the respective rights. These include:

1. The need to maintain discipline or harmony among co-workers;
2. The need for confidentiality;
3. The need to curtail conduct which impedes the employee's proper and competent performance of his or her daily duties;
4. The need to encourage a close and personal relationship between the employee and superiors where that relationship calls for loyalty and confidence.

The more disruptive the speech, the less likely it is to be protected. Similarly, the closer the personal contact between the speaker and audience, such as between a principal and a superintendent or a secretary and his or her immediate supervisor, the less likely it is to be protected.

After overcoming the "protected speech" requirement, an employee must prove that the exercise of the protected speech was a substantial or motivating factor in the employer's decision to take some adverse employment action against him or her. This issue of fact must be supported by proof.

If the employee is successful in proving that his or her speech was constitutionally protected and that it was a substantial or motivating factor in the employer's action, the employer is then given the opportunity to prove that it would have reached the same employment decision even in the absence of protected conduct. The theory, as expressed by the courts, is that an employee should not be placed in a better position just because he or she exercised rights of free speech. Similarly, an employer would not be prohibited from disciplining an employee if it would have done so even if no free speech issue were involved. Furthermore, if an employer, after a good faith investigation, reasonably concludes that the employee's speech was not a matter of public concern and takes action against the employee because of it, the employer's conduct will not be improper even though it is later determined that the employee's speech was constitutionally protected. Once again, this will be an issue of fact.

If the employee is successful in meeting these burdens of proof, appropriate relief can include an injunction, reinstatement to a job or position, other damages, and attorney fees.

2. Due Process

Public employees, including educational employees, may not have their "property rights" or "liberty rights" taken without due process of law. Liberty rights include things such as a person's reputation (i.e., being accused of acts damaging to your reputation). Property rights may include the right to keep a job. To have a property right in a job, there must be a reasonable expectation of continued employment. This expectation of continued employment could be based upon state law (such as tenure statutes); an employment contract; a "just cause" provision in a collective bargaining agreement; or some school board policy guaranteeing continued employment. An employee's belief he or she will continue to be employed is not sufficient.

The amount of process which is due varies considerably from situation to situation. It does not necessarily require all the rights normally given in a court proceeding. The more serious the penalty (i.e., discharge), the more "process" is required. The minimum process is a notice of the charges, a discussion of the proof against the employee, and some opportunity to respond. More rights are often given by statute or contract, and these possibilities are discussed later.

B. State and Federal Statutes

A second source of educational employee rights is state and federal statutes. The most important include tenure acts; School Code; labor laws; unemployment and workers compensation; receiving, continuing and converting health insurance; and various anti-discrimination statutes.

1. Illinois Educational Labor Relations Act (IELRA)

Enacted in 1984, the IELRA establishes a comprehensive labor relations framework for educational employees and employers. This statute creates rights for all employees of public school districts, co-ops, community colleges, and universities, except for those individuals who are supervisors, managers, students, and temporary employees, as defined by the IELRA.

The Act allows covered employees to organize, form, join, and assist unions for purposes of bargaining and for employees' mutual aid and protection. Educational employees can petition the Illinois Educational Labor Relations Board (IELRB) for an election to determine the exclusive bargaining representative. The exclusive bargaining representative then has authority to collectively bargain with the employer on behalf of the members of its bargaining unit.

The educational employer and exclusive bargaining representative are required to bargain in good faith. The duty to bargain in good faith does not require the parties to make concessions or agree to proposals, but does require the parties to exchange proposals in an attempt to reach agreement, reduce any agreements to writing, and incorporate those agreements into a collective bargaining agreement. The employer is required to negotiate with respect to wages, hours, and other terms and conditions of employment. Mandatory subjects of bargaining include: hours

worked by employees; the decision to subcontract work formerly performed by bargaining unit members; the development and implementation of procedural aspects of evaluation plans; the decision and the impact of a decision to reduce the number of full-time faculty for economic reasons; and the decision and impact of a decision to significantly reorganize the number and length of teaching periods. All collective bargaining agreements must include a grievance procedure ending in binding arbitration and prohibit strikes during the duration of the agreement.

The Act prohibits educational employers from doing a number of things considered unfair labor practices (ULPs). Some of the more common ULPs are: interfering, restraining, or coercing employees from exercising their rights under the Act; discriminating against employees to discourage membership in an employee organization or participation in IELRB proceedings; refusing to bargain in good faith, including making unilateral changes without adequate prior notice and bargaining with the exclusive representative; and refusing to comply with a binding arbitration award. Charges are filed with the IELRB which investigates the charges and, where appropriate, issues complaints. Hearings may then be held and a decision issued by the hearing officer of the IELRB. The IELRB has the authority to issue appropriate orders to prohibit the ULP and order remedial relief where appropriate.

A five minute video by IEA Associate General Counsel Betsy Pawlicki for members only about the IELRA can be found at the IEA Learning Portal: IELRA Training Video.

2. National Labor Relations Act (NLRA)

Enacted in 1935, the NLRA is the foundational statute of U.S. labor law. It guarantees private sector employees the rights to organize unions, engage in collective bargaining, and take collective action. This Act governs IEA members employed by private colleges and institutions. Decisions interpreting this law often influence the IELRB in applying the IELRA.

Employees unrepresented by a union can petition the National Labor Relations Board (NLRB) for an election to determine the exclusive bargaining representative. The exclusive bargaining representative then has authority to collectively bargain with the employer on behalf of the members of its bargaining unit.

The employer and exclusive bargaining representative are required to bargain in good faith. The duty to bargain in good faith does not require the parties to make concessions or agree to proposals, but does require the parties to exchange proposals in an attempt to reach agreement, reduce any agreements to writing, and incorporate those agreements into a collective bargaining agreement. The employer is required to negotiate with respect to wages, hours, and other terms and conditions of employment. Mandatory subjects of bargaining include: hours worked by employees; the decision to subcontract work formerly performed by bargaining unit members; the development and implementation of procedural aspects of evaluation plans; the decision and

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3. Tenure Laws

The Teacher Tenure Act for teachers in school districts other than Chicago is found in Section 24-11, *et seq.* of the School Code. Those provisions provide a comprehensive procedure for becoming tenured and the protections once tenured. More details about dismissal are in Section III.A titled Evaluations, Reductions-in-Force, Dismissal and Nonrenewal.

The Tenure Act covers all school district employees regularly required to be certified under the provisions of the School Code (*i.e.*, teachers, administrators, counselors, etc.). The Act further provides that a "teacher" who is first employed full-time by a school district or special education cooperative prior to the district's applicable Performance Evaluation Reform Act of 2010 (PERA) implementation date, attains tenure by serving four consecutive years as a full-time teacher in that district. Temporary employment, whether full time or part time, will not qualify toward the completion of the probationary period. A teacher must work for 120 days in a school year to count toward tenure. Time off for personal or sick leave does not count toward tenure. If a teacher works fewer than 120 days in a year, that year is not counted for purposes of determining whether the teacher taught for four consecutive years, but the teacher does not lose "credit" for the prior years. However, if a district opts to impose Family and Medical Leave Act leave on a teacher at the end of a school year, those days will count towards the 120 days.

Some changes to acquiring tenure will take effect once a school district implements student growth as part of a teacher's evaluation under the Performance Evaluation Reform Act of 2010 (PERA). There is a rolling date for implementation but most districts will begin using student growth in evaluations in 2015-16 or 2016-17. Current probationary teachers are grandfathered under the existing law to achieve (or be denied) tenure. No teachers will have to restart their tenure track as long as they remain employed by their current district.

For teachers hired after a school district implements PERA, the teacher must receive two "proficient" or "excellent" evaluation ratings in two of the last three years with a "proficient" or "excellent" rating in the fourth year. If no evaluation was performed on schedule, the teacher will be considered to have received a "proficient" rating. If at the end of the four year probationary period, a teacher fails to receive the required performance ratings, the district is compelled to non-renew the teacher. PERA also provides that teachers receiving "excellent" ratings in their first three years of achieve tenure. Also, after PERA is implemented, if a tenured teacher received "proficient" or "excellent" ratings in his or her last two evaluations moves to a new district, the teacher will eligible to achieve tenure in the new district after two straight years of receiving "excellent" evaluations.

Community College Tenure is governed by Section 3B-2 of the Public Community College Act. It covers "faculty members" who are defined to include full-time employees of the community college who are engaged in teaching or academic support services. Supervisors, administrators, and clerical personnel are excluded. A faculty member becomes tenured after being employed at the community college for three consecutive school years. The board may extend the probation for an additional year by giving the faculty member notice at least 60 days before the end of the school term, including notice of the corrective actions that need to be taken. The probationary period may be shortened by local board rule or collective bargaining agreement.

4. Discrimination Statutes

Both federal and state laws prohibit an employer from making employment decisions based upon certain prohibited criteria. The employer may not discriminate against an employee based upon race, color, religion, sex, national origin, age, ancestry, marital status, pregnancy, sexual orientation, physical or mental disability, order of protection status, or unfavorable military discharge. The employer may not fail or refuse to hire individuals or otherwise discriminate against them in compensation, terms and conditions of employment, promotion, discharge, discipline, or tenure based upon any of these prohibited criteria. Claims of discrimination can be filed with the Equal Employment Opportunity Commission (EEOC) and the Illinois Department of Human Rights. Under certain circumstances, claims can then be filed in either federal or state court. The initial elements to prove a discrimination case will vary depending upon the type of discrimination involved (pay, promotion, hiring, etc.). For example, to assert a discrimination claim based on a failure to promote, the complainant must first establish that he or she is a member of the protected class (e.g., racial minority), that he or she is qualified for the position in question, and that they were denied the position. The employer then has the opportunity to present some evidence of a legitimate, non-discriminatory reason for its action. Finally, the complainant has the burden of proving that the reason given by the employer was mere pretext. As with any other case, the person who believes he or she has suffered illegal discrimination must prove the charges with evidence.

C. Collective Bargaining Agreements

Another source of employee rights is the collective bargaining agreement (CBA). Provisions in a CBA often go well beyond rights given by statute or the constitution. These documents are also very flexible since negotiations occur every few years, and provisions can meet changing needs.

If a provision of a collective bargaining agreement is violated, the employee or union may file a grievance. Failure to file within the contractually stated period may result in a loss of rights, so it is very important to meet all grievance deadlines. The final stage of the grievance procedure is binding arbitration. Failure by an employer to comply with an arbitration award can be an unfair labor practice which is filed with the IELRB. See Section III.B.1 for more information on the IELRB. A short video and handout by IEA Associate General Counsel Rob Lyons for members only about grievance processing can be found at the IEA Learning Portal: Grievance Processing course.

D. School Board Policies and Handbooks

Another source of employee rights comes from board policies. A board is bound by the official policies it adopts. Where a collective bargaining agreement exists, board policies may serve as a supplement to those rights.

An employee handbook may also be a source of rights. To create enforceable rights, the language of the handbook must contain a promise clear enough that an employee would reasonably believe that an offer had been made. Second, the statement must be disseminated so the employee is aware of its contents and believes it to be an offer. Finally, the employee must accept the offer by beginning or continuing to work after he or she becomes aware of the handbook provision. If these conditions are met, the handbook becomes a contract binding on the employer.