On Advice of Counsel

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HB 64 Evaluation Changes: An Executive Summary

Are you having as much trouble as I am following all the "adjustments" being made to teacher/principal evaluation procedures? Thought this overview might help:

TEACHER/PRINCIPAL EVALUATIONS

- **Alternative Framework** (R.C. 3319.114) (eff. Sept. 29, 2015)

  Modifies the alternative framework for teacher evaluations as follows:

  - The teacher performance measure must account for 50% of each rating (rather than 42.5% to 50%).
  - The student academic growth factor must account for 35% (rather than 42.5% to 50%).
  - The remainder can include one or any combination of alternative components (rather than being limited to one alternative component).
  - In addition to the current alternative components (student surveys, teacher self-evaluations, peer review evaluations, and student portfolios), "any other component determined appropriate by the district board or school governing authority" may be used.
  - The use of ODE-approved instruments for the alternative component is made optional.

- **Value-added safe harbor** (Section 263.650; Section 263.630) (effective immediately)

  Teacher and principal evaluations: For the student academic growth portion of teacher and principal evaluations, or when making decisions regarding the dismissal, retention, tenure, or compensation of teachers and principals:

  - Prohibits boards of education[*] from using the value-added progress dimension rating that is based on assessments (prescribed under R.C. 3301.0710 and 3301-0712) administered in the 2014-15 and 2015-16 school years.
  - Permits a school district to enter into an MOU collectively with its teachers or principals stipulating that the value-added progress dimension rating may be used to assess student academic growth for purposes of evaluation or decisions regarding dismissal, retention, etc.
  - For teachers of grade levels and subject areas for which the value-added progress dimension is applicable, if no other measure is available to determine student academic growth as required, teacher and principal evaluations shall be based solely on teacher or principal performance. (Section 263.650)

  NCLB waiver:

  - Requires ODE to apply for a waiver from provisions of NCLB to account for the prohibition on using the value-added progress dimension to calculate student academic growth for teacher and principal evaluations for the 2015-16 and 2016-17 schools years (that are based on assessments administered in the 2014-15 and 2015-16 school years). (Section 263.630)

[*] Section 263.650 also applies to community and STEM schools.

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SCHOOL COUNSELOR EVALUATIONS – R.C. 3319.113, 3319.61(A)(7)

- **Counselor evaluations** (R.C. 3319.113)
  - Requires State Board to develop standards-based state framework for the evaluation of school counselors that meets specified requirements.
  - Rating levels are accomplished, skilled, developing, and ineffective.
  - By September 30, 2016, boards of education must adopt a standards-based school counselor evaluation policy that conforms with the framework – the policy becomes operative at the expiration of any collective bargaining agreement covering counselors that is in effect on September 29, 2015 and must be included in any renewal or extension of such agreement.
  - The district's policy must include: (a) implementation of the framework beginning in the 2016-17 school year; and (b) procedures for using the evaluation results for decisions regarding retention, promotion, and removal beginning in the 2017-18 school year.
  - Districts must annually submit a report to ODE regarding implementation of the district's evaluation policy – the report cannot include the name or personally identifiable information of any school counselor.
  - These requirements prevail over any conflicting provision of a collective bargaining agreement entered into on or after September 29, 2015.

- **Counselor Standards** (R.C. 3319.61(A)(7))
  - The educator standards board must develop standards for school counselors that: reflect what school counselors are expected to know and be able to do at all stages of their careers; reflect knowledge of academic, personal, and social counseling for students and effective principles to implement a school counseling program; reflect Ohio-specific knowledge of career counseling and education options that provide flexibility for earning credit; and that align with the American school counselor association's professional standards and standards developed under R.C. 3301.07(D)(3).

OHIO TEACHER RESIDENCY PROGRAM – R.C. 3319.223

The teacher residency program must include:

- Mentoring: by any teacher (rather than by those who hold a lead professional educator license), for only the first two years of the program.
- Counseling – modifies counseling provision so that counseling is included "as determined necessary by the school district or school."
- Measures of appropriate progression through the program – specifies that such measures must include the performance-based assessment prescribed the state board of education for resident educators in the third year of the program.
- Career-technical teachers – an individual teaching career-technical courses under an alternative resident educator license is not required to complete conditions that a participant, as of the amendment's effective date (September 29, 2015), would have been required to complete during the first two years of teaching. Such an individual must complete all the conditions that, as of the amendment's effective date, were necessary for a participant in the third and fourth year of the program prior to applying for a professional educator license.

Special thanks to **Cassandra Casto** for her superb work in the preparation of this resource.

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August 26, 2014

The Looming Nonrenewal Nightmare

OK, I know that title is a bit melodramatic, but I am sticking with it because I really do think we are headed for a serious problem in nonrenewing teachers, and it is a problem that will be upon us this school year in earnest. Let's put it this way: if I told you that any time your board decided to nonrenew a teacher, a grievance or lawsuit would be practically automatic, each one would be a "test case" that they would carry all the way, and that, frankly, your odds of winning might not be so good— would you call that a "nightmare?"

Well, in public education management terms, I think it comes pretty close. What am I talking about? I think your board attorney knows.

Prior to 1988 (going back to the early 1940s), a teacher who had not attained continuing contract status could be nonrenewed through a simple notice procedure (formerly by April 30—the notice date is now June 1). In 1988, all this changed with the enactment of a so-called "fair dismissal" bill (HB 330, remember?) which required that all teachers be *evaluated* as a condition of their nonrenewal. Opponents called it the "instant tenure bill," which turned out to be a bit of an overstatement. The basic compromise incorporated in the bill was that teachers would have to be evaluated prior to any nonrenewal, but that a board of education need only comply with certain *procedural* requirements in order to nonrenew—there was no *substantive* "just cause" requirement. This is the nonrenewal system we have been living with now, basically unchanged, for the last 25 years (although heavily modified through collective bargaining).

Now, however, we have a whole new overlay on the "fair dismissal" process, and it is a massive one. We start with HB 153 in 2011, creating a state-designed "framework" that incorporates student growth measures in a complex set of requirements spanning several pages of law, and an entirely new statute (ORC 3319.112). The State Board of Education has been charged with designing a system to implement all this (OTES) which, when described on paper, occupies 170 or more pages and which, inevitably, most districts have ended up using. Since HB 153, the legislature has followed with SB 316, HB 555, HB 59, and HB 362—in some ways improving things, but not making them any simpler.

Therefore, what constitutes "compliance with evaluation procedures" is now exponentially more complex than it was before. Under the original "fair dismissal" scheme, if you were going to nonrenew a teacher, the "evaluation procedures" you had to comply with were fairly basic: essentially, two evaluations based on two observations of at least 30 minutes each, within certain time frames, and a nonrenewal notice by April 30. Now, the "evaluation procedures" you must comply with will (arguably) take in all of OTES and the statutory language it is founded on, which may include such matters as:

- whether the board's evaluation policy is "standards based"
- whether the board's evaluation policy "conforms with the framework" established by the state

- whether the proper data on growth measures was used, and in the right percentage
- whether the board properly analyzed and applied the data used
- whether the board properly incorporated value-added progress dimension data, from the right year(s), and in the right percentages
- whether the teacher's student academic growth measures were "average or higher" so as to permit a reduced number of evaluations
- whether the board's evaluation policy properly addresses how evaluation results will be used in making decisions as to the retention of teachers or the "removal of poorly performing teachers"
- etc., etc., etc. . .

This is what a board of education will now face when it nonrenews a teacher, and is called upon to show that "*evaluation procedures have been complied with* pursuant to section 3319.111 of the Revised Code . . ." (ORC 3319.11 [D]).

<u>The Fix</u>

To its credit, the General Assembly has been trying to respond to the concerns of educators as to the unwieldy nature of all these changes. Unfortunately, in focusing on making the system more workable, it has not been able to look down the road at what all this is doing to *nonrenewal*— presumably one of its primary objectives in promoting ways for "using the evaluation results for retention and promotion decisions and for removal of poorly performing teachers." (ORC 3319.111[F].)

Technically, the fix is fairly obvious. In ORC 3319.11, when referencing *which* evaluation procedures must be complied with *for nonrenewal purposes*, those procedures need to be limited to the very basics as they exist under current law— that is, so many evaluations, based on so many observations, of so many minutes, plus written notice by June 1. And this language needs to be protected from collective bargaining.

This kind of fix would still leave us with a very complex evaluation system to sort out. But it would not be an evaluation system that stands in the way of nonrenewing ineffective teachers, as long as the fundamental elements of a fair process have been provided.

<u>The Fine Print Disclaimer</u>

Please note that the foregoing comments must be taken simply as one lawyer's interpretation and do not represent the only conclusions which may be drawn by competent legal counsel. Readers are cautioned against applying such commentary and related materials in specific factual situations without seeking professional assistance.

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May 30, 2014

Bargaining Teacher Evaluation

I don't have to tell you—a lot has happened with teacher evaluation since the Ohio General Assembly, in 2011, created in essence a "unitary" state system of teacher evaluation (through House Bill 153). More precisely, the General Assembly created a *mandate* for a standardized, statewide *framework* for teacher evaluation—leaving the details to the Ohio Department of Education. The result is a highly sophisticated, complex (some say too complex), and ever-evolving set of processes that we have all come to know as OTES—the Ohio Teacher Evaluation System. While the new legislation does not require the adoption of OTES *per se,* OTES has, as a practical matter, become THE way that teacher evaluation is now being done in Ohio K-12 schools.

So be it—and perhaps it is for the better. But all the focus on OTES and its processes has distracted us, I think, from the larger historical picture as to what has happened with teacher evaluation in a "local control" versus "state control" sense. Teacher evaluation has been now been pulled out of the local domain and taken under state control, much as has happened with student assessment, graduation, and promotion requirements. In essence, teacher evaluation is now designed not by local educators but by a set of state-created processes and criteria that are, collectively, a *de facto* state minimum standard.

Whether this is a good thing or a bad thing I leave to you professional educators. But it does present a serious transitional problem when you drop this bomb into the middle of our collective bargaining-dominated K-12 work environment. Teachers are naturally apprehensive about anything that touches on evaluation to begin with, and the HB 153 mandate for the use of student growth factors, category rankings, et cetera has sent the unions into full battle mode. The result is pages and pages of detailed proposals at the bargaining table, trying to push back against this wave of change in every way possible—layering on new protections while they're at it.

Do you have to negotiate these issues? *Can* you negotiate them?

"You Don't Have to Agree *to Any of This Stuff"*

Well—of course you have to negotiate the subject of evaluation with your teachers. It is a subject already in your contract (no doubt), so you are bound to bargain it in good faith and will actually need to do so in light of the dramatic changes brought about by our legislature.

But what I find myself saying to superintendents a lot lately is, you don't actually have to *agree* to any of this stuff—and by that I mean the union-created baggage. In fact, I would submit that you *can't* agree with a lot of it. Why? Because the Ohio General Assembly wisely recognized, after the enactment of HB 153, that their effort to establish a true "state framework" for teacher evaluation would all come to naught if each of Ohio's 612 districts could just bargain it all away under union pressure. The result was Senate Bill 316, which added to the law these words:

> "*Notwithstanding any provision to the contrary in Chapter 4117 of the Revised Code, the requirements of this section prevail over any conflicting provisions of a collective bargaining agreement entered into on or after the effective date of this amendment.*"
>
> ORC 3319.111(H).

Which is, remember, placed on top of the existing wording of HB 153 (still in the law) which states:

> *Not later than July 1, 2013, the board of education of each school district, in* ***consultation*** *with teachers employed by the board, shall adopt a standards-based teacher evaluation* ***policy*** *that conforms with the framework for evaluation of teachers developed under section 3319.112 of the Revised Code.*
>
> ORC 3319.111(A)(emphasis added).

These are the parts of the new law that I would suggest you carry foremost in your mind as you enter into the negotiation of these issues.

A Clean Slate

What I think this presents for you is actually an opportunity—an opportunity to look at what is in your current agreement and say, *the law is different now, we can't do it this way any more. We have to start over. And in starting over, we are now much more limited in what we can do. This is now a state standards-based system, which has to be based on a* ***board policy****, not a negotiated agreement. We must* ***consult*** *with you on what is going into that policy, but the procedures and criteria themselves must be controlled by the* ***policy****, not our negotiated agreement. Maybe we can do some peripheral things in our agreement, but we are* ***prohibited*** *by law from bargaining anything that differs in any way from the state framework.*

Yes, we have a new "state framework" for teacher evaluation. But we also have a new collective bargaining/school governance framework on this particular subject which moves these very important, state minimum standard-like requirements out of the collective bargaining realm and into board policy, which policy must follow uniform, state-level requirements.

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Local bargaining circumstances may affect a district's options, and particular attention must be paid to the effective dates of recent legislation as applied to specific negotiated agreements.

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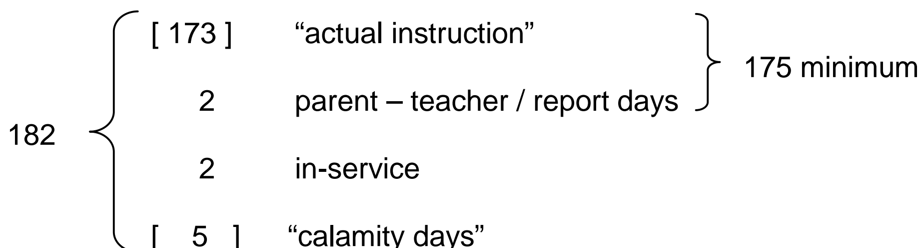
December 9, 2013

Where Did Our Calamity Days Go?
(. . *and how do we do this next year?)*

Now that we have had our first taste of Old Man Winter (who must be enjoying all the now-constant weather media hype), it is perhaps a good time to take a closer look at the new regime we have created for deciding just how many days we can call off when things get dicey out there. Yes, I am talking about "days to hours," which, as you must know by now, basically shapes up like this—instead of a minimum school year defined this way:



—we now have a minimum school year defined this way:

455 hours	=	1 "year"	(half-day kindergarten)
910 hours	=	1 "year"	(full-day K, 1-6)
1001 hours	=	1 "year"	(7-12)

Simple, right? Well, it *is* a simpler system, and it really *does* give you more flexibility in dealing with weather issues and other kinds of issues as well. One of the big problems with "calamity days" (a charming term—I hope we don't lose it) is that you had to meet the definition in the statute, which couldn't cover everything. For example, having a president come to your town wouldn't qualify as a "calamity." Last year, when lions and tigers (literally) were running loose in Muskingum County, it didn't qualify as a "calamity." So a definite improvement there.

What is still the same? You still get to "count" all of these things (in hours equivalents):

- Parent-teacher conferences/reporting periods — 2 days/yr.
- Teacher professional meetings — 2 days/yr.
- Recess periods (K-6) — 2 X 15 min. = .5 hrs./day
- HS seniors — 3 days/yr.
- Incoming kindergartners — 3 days/yr.

“Blizzard bags” may still be used to make up to 3 days/year (in hours equivalents). As the name suggests, this exception is still tied to “hazardous weather conditions” and the other situations described in the traditional “calamity days” definition. (See ORC 3313.482.)

What does this mean for your decision-making? Well, to start off, you are no longer tied to the concept of “minimum clock hours” for a “school day.” A “school day,” in hours, is whatever you want it to be. What about a 2-hour delay, or a 2-hour “early release?” Those exceptions are no longer in the law, but you can still do those things—in fact, you could have a 3-hour early release if you needed to. You just don’t get a “free pass” on those hours. That is, those 3 hours won’t count toward the minimum school year, so you will have to make them up if you are short.

But are you ever going to be “short?” I know most of you have done the math, and are seeing the obvious: When they went to define a new “minimum school year,” they based the required hours on the bare minimum “clock hours” of 5.0 hours (primary) and 5.50 hours (secondary). This makes sense, but it also shows the public what you have always known—that you regularly do more than the minimum required hours and have been doing that for a long time. What this means is that under the new law, most districts are going to have a substantial “cushion” to play with.

But isn’t there something in the new law which says you can’t reduce your schedule to be less than the previous year? Not really, because:

(1) The law doesn’t *prohibit* a reduction in hours, it only says that if you *do* make a reduction, it has to be done with a public board resolution; and

(2) You have to read the new law carefully. Here is what it says exactly:

> *“No school . . . shall reduce the number of hours in each school year that the school is* ***scheduled*** *to be open for instruction from the number of hours per year the school* ***was open*** *for instruction during the previous school year unless the reduction is approved by a resolution adopted by the district board of education.”* (ORC 3313.48[C].)

In other words, you only have to schedule the same or more hours than you were *actually open* the previous year—not the number of hours you were *scheduled* to be open.

All of this should make decisions about calling off school a lot easier, right? Yes, I think that by and large, most superintendents are going to find those calls less anxiety-producing due to the “cushion” effect described above.

However, the legislature has bundled up this new freedom with some new obligations, which I will summarize for you briefly as follows:

①

New “Transparency” Rules

A. At least 30 days prior to adopting a school calendar, the board of education must hold a public hearing on the calendar, “addressing topics that include but are not limited to the total number of hours in a school year, length of school day, and beginning and end dates of instruction.”

ORC 3313.48(B) (new)

B. No calendar may reduce the number of hours scheduled for the coming year below the number of hours school was open for instruction during the previous school year, unless the reduction is adopted in a formal board resolution.

ORC 3313.48(C) (new)

②

New “Calendar Cooperation” Rules

A. Career-tech schools (JVSDs) ORC 3313.48(D) (new)

No change may be made in scheduled hours or days unless first:

1. Must “consider compatibility” with JVS schedule
2. Must “consider impact” on JVS programs, opportunities, transportation, and graduation
3. Must provide advance notice of any change
4. Must enter into a written agreement specifying “reasonable accommodations” to JVS schedule

B. Community Schools (transported to) ORC 3313.48(E) (new)

No change may be made in scheduled hours or days unless first:

1. Must “consider compatibility” with CS schedule
2. Must “consider impact” on CS programs, opportunities, transportation, and graduation
3. Must provide advance notice of any change
4. Must enter into a written agreement specifying “reasonable accommodations” to CS schedule

C. Chartered Nonpublics (transported to) ORC 3313.48(F) (new)

No change may be made in scheduled hours or days unless first:

1. Must “consult” with nonpublic school
2. Must “consider the effect” on nonpublic school transportation
3. Nonpublic school must likewise “consult” with public school before it makes any changes in hours or days

③

Protection for Current Collective Bargaining Agreements

In an uncodified section of the recent budget bill, the legislature declared that the minimum school year and school calendar provisions we are talking about here “do not apply to any collective bargaining agreement executed prior to July 1, 2014.” (Section 803.50 of Am. Sub. HB 59.)

This is a rather strange provision. Did the legislature really mean to say that wording in a local union contract can prevent a district from joining the statewide days-to-hours conversion for up to three more years? It is not clear how many districts have contract language that would go so far, but this tail-wagging-the-dog provision will need to be closely watched as we go forward with full implementation next year.

I hope this gives you the basic framework as well as some food for thought.

In addition to the above, you will also want to check out the recently released guidance document from ODE on days-to-hours, which can be found at this link.

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February 15, 2013

Principal Evaluation/Nonrenewal Deadlines Pushed Back

Have you heard enough about principal evaluation yet? (OPES, etc.?)

Well, I have one more thing to tell you, which—believe it or not—is actually good news. It does not have anything to do with OPES, the “state framework,” or any of that. Rather, I am talking here about the deadline in state law for the **nonrenewal** of an administrator’s contract. One feature of Senate Bill 316 (eff. 9-24-12) which has been somewhat overlooked is that it pushed the nonrenewal deadline for all administrators (not just principals) back from March 31 to June 1. This in turn moves the *evaluation* deadlines back by an equal amount, because the evaluation deadlines have always been “sliding” deadlines measured back from the date of the actual board action.

What does this mean for you? Well, you and your board now have more time to complete the administrator evaluation process, IF your board is willing to delay the vote on administrator contracts until its April or May meeting. In the final year of an administrator’s contract, the deadline for the first evaluation is still 60 days prior to board action on the contract—which now pushes the date back to some time in mid-March (for action at May meeting). (The second evaluation is still due 5 days before board action.)

All in all, these are good developments. But you must continue to beware of the two big “gotchas” in administrator renewal/nonrenewal, namely: (1) the requirement for evaluations in **each prior year** of a multi-year contract; and (2) the requirement for offering an **executive session** with the board prior to board action. *See* ORC 3319.02 (C), (D).

Attached for your assistance is an updated version of our “checklist” for administrator evaluation and nonrenewal.

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CHECKLIST FOR ADMINISTRATOR EVALUATION / NONRENEWAL
(ORC 3319.02)

A. *First year or middle years of multi-year contract:*

Immediately	____1.	Confirm that board has adopted evaluation procedures for administrators.
	____2.	Confirm that current job description is attached to contract of administrator; if not, do so and give copy directly to administrator.
October - April (approx. time frame)	____3.	Superintendent or designee conducts observations and/or other evaluation activities in accordance with adopted policies.
By May 31 (or by end of administrator's contract year, if later)	____4.	Deliver final written evaluation document to administrator (personal delivery preferred method). Evaluation must "*measure administrator's effectiveness in performing duties included in the job description.*"
	_____5.	**For principals and assistant principals, e**valuation procedures "shall be based on principles comparable to the teacher evaluation policy adopted by the board under section 3319.111 of the Revised Code, but shall be tailored to the duties and responsibilities of principals and assistant principals." (*Such as*: OPES.)

B. *Final year of contract (or one-year contract):*

Immediately	____1.	Confirm that board has adopted evaluation procedures for administrators.
	____2.	Confirm that current job description is attached to contract of administrator; if not, do so and give copy directly to administrator.
October – February (approx. time frame)	____3.	Superintendent or designee conducts observations and/or other evaluation activities for ***preliminary evaluation.***

Timing	Item	Action
No later than mid-March ***(at least 60 days prior to meeting at which action to be taken)***[1]	____4.	Deliver written copy of preliminary evaluation to administrator (personal delivery preferred method). Evaluation must "*measure administrator's effectiveness in performing duties included in the job description.*"
February – April (approx. time frame)	____5.	Superintendent or designee conducts observations and/or other evaluation activities for ***final evaluation.***
No later than mid-May ***(at least 5 days prior to meeting at which action to be taken)***	____6.	Deliver written copy of final evaluation to administrator (personal delivery preferred method). Evaluation must "*measure administrator's effectiveness in performing duties included in the job description*" **AND must "*indicate the superintendent's intended recommendation to the board regarding a contract.*"**
Usually at same time final evaluation delivered, but in any event prior to date of board action	____7.	Deliver notice to administrator of right to appear in executive session of board to discuss reasons for considering renewal or nonrenewal of contract. Notice should indicate right of employee to be accompanied by representative of his/her choosing.
Prior to action on contract, usually at same meeting	____8.	All evaluations given during the term of the current employment contract provided to board members for their review and consideration.

[1]As the board must act on whether to renew or non-renew the administrator's contract no later than June 1 of the year in which the contract expires, the written preliminary evaluation should be provided to the administrator **before** the last day of March of the year in which the contract expires. Since 60 calendar days must pass before the board may act on the contract, it is suggested that the preliminary evaluation be provided to the administrator well before the end of March so that the board has sufficient time in which to pass a motion to nonrenew and have the notice of the board's action delivered on or before June 1.

On or before **June 1**[2]

____9. If requested by administrator board meets with administrator in executive session to discuss reasons for renewal or nonrenewal of contract. Board must discuss its reasons, and cannot remain silent.[3]

____10. Board (in open session) adopts resolution not to re-employ administrator and instructs Treasurer to issue written notice

____11. Treasurer delivers written notice of nonrenewal to administrator by personal delivery or certified mail, return receipt requested (personal delivery, with witness, is preferred method).

[2] **If at all possible,** the board meeting should be held well before June 1 in order to lessen the difficulty of serving the notice of the board's action upon the administrator by June1.

[3] The administrator can request to meet with the board any time after learning that he/she will be non-renewed. The administrator is not required to wait until after the final evaluation is conducted and the board provides notification that the administrator has the right to the hearing. If no executive session has been scheduled, it is, therefore, important to confirm prior to meeting that the executive session has in fact been declined by the administrator. *State ex rel. Carna v. Teays Valley Local School Dist. Bd. Educ.,* 2012 Ohio 1484 (2012).

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July 24, 2012

Recommending Family Members—
When It's Time to Get Yourself Off the Agenda

One of the great things about public education—and one of the most rewarding things—is the way it can become a shared family tradition. How many of you were inspired to enter education by a parent or other relative? How many of you have sons or daughters who became educators because of your example, or that of your spouse? How many of you share the life experience of being an educator with your spouse—perhaps in the same district? We all know that teaching "runs in families," and what could be more natural?

The difficulty that can come from all this for a superintendent, in legal terms, arises when members of your family are in fact working in "your" district. As you know better than anyone, the level of public scrutiny focused on public schools has increased exponentially in recent years, as has the general awareness of the legal rules and restrictions applicable to your conduct. One aspect of this greater public awareness is the increased familiarity of the public with the Ohio ethics laws. In particular, an Advisory Opinion issued by the Ohio Ethics Commission two years ago seems to have increased the awareness of the public about the specific restrictions applicable to school district superintendents. That is because the Opinion specifically discusses superintendents and their role in the employment of teachers:

> *"Whenever any statute, resolution, ordinance, rule, or policy requires that a particular public official participate in any part of the hiring process, the family members of that official cannot be hired by the public agency without a violation of R.C. 2921.42(A)(1).*
>
> *For example, R.C. 3319.07(A) states: 'In all school districts and in service centers no teacher shall be employed unless such person is nominated by the superintendent of such district or center.' There is a similar requirement for the nomination of administrative officials (including assistant superintendents, principals, assistant principals, and other administrators). R.C. 3319.02(B) and (C).* ***Because the law requires that a superintendent nominate the hire of all teachers and administrators, a superintendent's family member cannot be hired by the district or service center without a violation of R.C. 2921.42(A)(1)."***
>
> OEC Adv. Op. 2010-03 (emphasis added.)

Since the issuance of this Opinion, a flurry of complaints have been filed with the Ohio Ethics Commission relating to the employment of family members[1] of school district superintendents. In my capacity as legal counsel for BASA, I am personally aware of several of these, and have been advising BASA members in connection with the resulting investigations conducted by the Ohio Ethics Commission.

[1] "Family member" has been defined as including, but not limited to: grandparents; parents; spouse; children, whether dependent or not; grandchildren; brothers and sisters; or any person related by blood or marriage and residing in the same household. Opinion of Ohio Ethics Commn. No. 80-001.

So—what are the rules here?

The basic rule is simply this: that you, as a public official, cannot use your authority or influence to facilitate the employment of a family member, or provide any other direct benefit to a family member. (Legal citation: ORC 2921.42.[2]) This includes making a recommendation for employment in any form. In the eyes of the Ethics Commission, it does not matter that the action taken is on a "consent agenda" or that your family member is just one person on a long list of employees being recommended for employment or renewal. It will not matter that you have studiously avoided any comment or involvement in the action. It will not matter that your family member is highly valued and even "recruited" by board members or other administrators in the district. The Commission will view any recommendation as a violation.

Please note, however, that in saying that the above circumstances "will not matter," I am not suggesting that anyone is automatically going to jail when these things occur. Of course it will ultimately matter to the Commission whether your actions were intentional in nature, or more of a "technical" violation. I do not believe, as a general rule, that the Commission will refer a case for prosecution where they do not see any actual intent on the part of a superintendent to influence the employment of the family member. In such cases, I believe it is more likely that the Commission would recommend an alternative resolution, such as a formal warning or reprimand, rather than prosecution.

Having stated the problem, what are my suggestions?

- Be aware that anything you do in the way of recommending a family member for employment or re-employment is likely to be viewed as an ethics law violation, no matter how "routine" the process.
- Be aware that this issue arises not only when hiring or re-hiring family members, but also with more mundane matters such as approving sick leave, professional leave, or tuition reimbursement. You need to develop alternative procedures for those things.
- Be aware that this issue arises not only with *formal* actions or approvals, but also to any informal "lobbying" or other indirect actions you might take to get a job or a specific benefit for a family member. These must also be avoided.
- When family members are involved in board actions, watch out for the "automatic" recommendation language often used in preparing agendas. It is natural for the board to expect your recommendation on absolutely everything—but sometimes you need to assertively get yourself *off* the agenda.
- Recognize that the most difficult problem is posed by the *initial* employment of administrators and licensed professional staff. As noted above, because the superintendent's recommendation is a statutory requirement for employment in those situations, there is no easy "workaround." Legal counsel should be consulted well in advance if any such employment is being considered.
- Recognize that for most re-employment situations with administrators and licensed professional staff, it will be possible for the board to renew the family member without your recommendation, provided there is a three-fourths vote of the entire board—and, again, you do not have any other involvement. (See ORC 3319.02, 3319.07.)
- Recognize that for nonteaching, nonsupervisory positions, your recommendation is *not* required by statute, and can therefore be fairly easily avoided.

[2] Note that this is a criminal statute, punishable (at a maximum) as a fourth degree felony.

Question: Do these rules mean that it is a problem for a superintendent or administrator to be involved in collective bargaining or other decisions about employee benefits, when there is a family member in the bargaining unit?

Answer: Generally, no, it is not a problem as long as the superintendent or administrator is dealing with matters relating to all employees or to groups of employees, and not specific issues relating to the family member. It is a problem, however, if the family member is on the union's bargaining team, or functioning in some other kind of representative capacity that relates to job rights and benefits. (For a fuller discussion of this scenario, see Ohio Ethics Commission Advisory Opinion No. 1998-003.)

From here, I could go on at length with the suggestions and clarifications—there are so many variations and nuances to all of these questions. But by now, I'm sure you are getting "the point"—namely, that in today's environment, the fact that your intentions are innocent will not always be enough. You need to be aware of the public sensitivity to these issues and "forearmed" with the knowledge of the legal rules that govern your actions.

I hope that my comments above will help.

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July 17, 2012

OSU	1
ESPN	0

The Ohio Supreme Court's decision in *State ex rel. ESPN, Inc. v. Ohio State University*, (2012 Ohio 2690, June 19, 2012) has done more than settle a dispute between two of the biggest players in the American sports arena. It has also provided some clarity over the interaction between the Family Educational Rights and Privacy Act ("FERPA")—a federal law that protects the privacy of personally identifiable information contained in education records—and Ohio's Public Records Act (the "Ohio PRA").

As you probably know, this case is related to the actions that eventually led to Jim Tressel's resignation as OSU's football coach. At a press conference on March 8, 2011, Mr. Tressel disclosed that he had received e-mails in April 2010 notifying him that certain Buckeye football players had exchanged Ohio State memorabilia for tattoos. While Mr. Tressel did not share the e-mails with his superiors, he did forward them to an individual who was a personal mentor to Terrelle Pryor, OSU's starting quarterback.

Beginning in February of 2011, Ohio State had received more than 100 public records requests relating to the NCAA investigation of its football program. For its part, ESPN had at least seven different people make at least 21 public records requests to the University after Mr. Tressel's press conference. In response, Ohio State provided ESPN with over 700 pages of responsive documents, made more than 350 pages available on its web site, and provided ESPN with more than 4,200 pages of records requested by and made available to other members of the news media.

Despite this effort, ESPN sued the University because it was not satisfied with OSU's response to some of its requests. In its review of the case, the Ohio Supreme Court was largely unsympathetic to ESPN's claims. Of particular interest to educators, however, is the Court's treatment of ESPN's request for education records under FERPA. The Ohio PRA contains an exception for records the release of which is prohibited by state and federal law. (ORC 149.13[A][1][v].) ESPN argued that FERPA does not actually prohibit the release of the requested records, it simply penalizes educational institutions that have a policy or practice of violating FERPA. The Court rejected this argument and determined that when OSU accepted federal funds, it agreed to the conditions that come with those funds. OSU received about 23% of its operating revenues (over $919 million in 2010-2011) from federal funds. Having accepted those funds, OSU is prohibited by FERPA from systematically releasing education records without parental consent.

ESPN also argued that the documents were not "education records" pursuant to FERPA because they "do not directly involve Ohio State students or their academic performance, financial aid, or scholastic performance." In the past, several courts across the country have split over this very issue. Some courts have accepted arguments that FERPA is not meant to protect records that are non-academic in nature. Other courts, however, have read the definition of an "education record" in the Act and given the definition an expansive reading. The definition in the law provides:

> *For the purposes of this section, the term 'education records' means . . . those records, files, documents, and other materials which –*
> *(i) contain information directly related to a student; and*
> *(ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.*
>
> (20 U.S.C §1232g[a][4][A])

The Ohio Supreme Court had visited this issue once before in *State ex rel. Miami Student v. Miami Univ*. (79 Ohio St. 3d 168 [1997]). In that case, the Court had taken a more restrictive reading of the definition and had determined that certain student discipline records *should* be released after redaction because they were not academic in nature. Just a few years later, however, the United States Sixth Circuit Court of Appeals effectively negated this action—upholding an injunction that had been granted against Miami University to prevent further releases of student discipline records. In making its ruling, the Sixth Circuit held that "[u]nder a plain language interpretation of the FERPA, student disciplinary records are education records because they directly relate to a student and are kept by that student's university. Notably, Congress made no content-based judgments with regard to its 'education records' definition." (*United States v. Miami University*, 294 F.3d 797 at 812 [6th Cir. 2002].)

While most people have assumed that the standard enunciated by the Sixth Circuit holds sway in Ohio, the Supreme Court has never explicitly backed away from its prior ruling—not until ESPN made its argument against Ohio State. In reaching its decision in this case, the Court stated:

> *Upon consideration of our opinion in* Miami Student *and the Sixth Circuit Court of Appeals' opinion in* Miami Univ.*, <u>we agree with the Sixth Circuit and hold that the records here generally constitute "education records" subject to FERPA</u> because the plain language of the statute does not restrict the term "education records" to "academic performance, financial aid, or scholastic performance." Education records need only "contain information directly related to a student" and be "maintained by an educational agency or institution" or a person acting for the institution. 20 U.S.C. 1232g(a)(4)(A)(i) and (ii). <u>The records here—insofar as they contain information identifying student-athletes—are directly related to the students</u>.*
>
> (*ESPN* at ¶30; emphasis added.)

Finally, ESPN argued that FERPA is inapplicable to the withheld records because the records were not actually "maintained by an educational agency or institution or by a person acting for such agency or institution." This argument was based on language found in the United States Supreme Court's decision in *Owasso Independent School District. No. I-011 v. Falvo*, 534 U.S. 426 (2002), a case wherein the high court determined that there was no FERPA violation

when students graded each other's tests and then called out the scores so the teacher could record them in a grade book.

While not establishing any "bright line" test, the Ohio Supreme Court found that OSU "maintained" the records that ESPN sought:

> *Ohio State submitted sufficient evidence to establish that the responsive records are "maintained" for purposes of FERPA. Ohio State's Department of Athletics retains copies of all e-mails and attachments sent to or by any person in the department; the e-mails cannot be deleted. The department also retains copies of all documents scanned into electronic records, which are organized by student-athlete. Ohio State has additionally collected documents related to its investigation of student-athletes who exchanged memorabilia for tattoos and Tressel's failure to report that activity that were requested by the NCAA and has kept those documents in two secure electronic files. These records are not similar to the transient records involved in* Falvo.

(*ESPN* at ¶32 [citations omitted])

This does not mean (in baseball terms now) that the Buckeyes pitched a shutout. The Court, for instance, found that OSU violated the Ohio PRA when it rejected certain requests as "overly broad" but failed to provide ESPN with the opportunity to revise its request and inform ESPN how its records are maintained and accessed in the normal course of business. The Court also faulted OSU for telling ESPN that it would "not release anything on the pending investigation." *ESPN* ¶11. (The Court did not grant ESPN any relief for these violations, however, because ESPN did not actually request relief for them.) The Court also found that there were a small number of the withheld records that should be redacted and released. In the end, however, the Court rejected ESPN's request for attorney fees, "Because Ohio State complied with the vast majority of its obligations under R.C. 149.43 in responding to ESPN's records requests, and ESPN's claims are largely without merit." *ESPN* at ¶39.

In the end, the Buckeyes bested the World Wide Leader in Sports 7 votes to none—a victory that the NCAA cannot take away.

MANY THANKS to B&E's resident public records expert and sports analyst **Warren Grody** for "guest authoring" this article.

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March 29, 2012

A Breakthrough on "Uniform Plan"

A little over two years ago, I wrote in this space about the possibility of across-the-board salary reductions under the "uniform plan" concept embedded in Ohio's school employment laws. At that time, there was no judicial precedent to guide us on the big question: namely, whether a collective bargaining agreement—with its salary schedules—prevents the implementation of a "uniform plan" of salary reduction UNLESS the union agrees to go along. The answer I tentatively gave at that time was that, under existing SERB precedents, it appeared that a "uniform plan" reduction was indeed a possibility IF the district's financial condition met the requirement of "exigent circumstances," or was the result of a legislative mandate. And then only if you met a heavy burden of showing that you had bargained the issue to "ultimate impasse." (You can read that earlier article here if you like.)

We now have a court decision which can fairly be described as the first judicial ruling to directly address the question of "uniform plan" in the collective bargaining era. That in itself makes it a very significant ruling. But even more significant, I believe, is the conceptual basis for the ruling, which arguably removes the question of "uniform plan" from collective bargaining altogether.

THE CASE

The case in question arose in the Martins Ferry City School District of Belmont County. The Board of Education, faced with major funding setbacks, decided that the best option was to proceed with a 5% across-the-board salary reduction for all district employees (teaching, nonteaching, and administrative). Agreement was eventually reached with the teaching staff, but the classified employee union maintained its objection to the cuts. It filed a grievance, which went to arbitration. The arbitrator ruled in favor of the union (OAPSE), finding that the "uniform plan" violated the express terms of the negotiated agreement—specifically, the salary schedules. The Board was required to return bargaining unit members to prior pay levels and provide back pay.

The Board decided to challenge the arbitrator's decision in court—not always an easy proposition (they don't call it "binding arbitration" for nothing). Under the provisions of Chapter 2711 of the Ohio Revised Code, it filed in the Common Pleas Court of Belmont County for an order vacating the arbitration award on the grounds that the arbitrator had exceeded her authority and imposed terms not found within the negotiated agreement. Somewhat surprisingly, the Common Pleas Court ruled in favor of the Board of Education, vacating the arbitration award. (You can read the full opinion here.)

THE RATIONALE

The arbitrator in *Martins Ferry* accepted the union's argument that the uniform salary reductions implemented by the Board were in conflict with the contractually promised pay levels set forth in the negotiated agreement. Therefore, following the "contract over law" provision found in Ohio's Collective Bargaining Law (ORC 4117.10), she concluded that the negotiated

agreement (the salary schedules) *superseded* the "uniform plan" language in the statute governing nonteaching personnel.*

The Court found this to be erroneous. In the view of the Court, statutory rights cannot be superseded by a collective bargaining agreement unless that agreement is *very specific* in expressing the intention to override. In an ironic twist, the Court cited as support a 12-year-old ruling of the Ohio Supreme Court in OAPSE v. Batavia Local School District— a case in which OAPSE had itself made this same argument (successfully) from the employees' side.

THE IMPACT

What does all this have to do with collective bargaining?

The reasoning adopted by the Court in *Martins Ferry* is in essence this: the Ohio General Assembly has seen fit in various school employment statutes to provide an "escape valve" for times of economic crisis. This "escape valve" is the "uniform plan" concept. School employees may not have their salaries reduced in an arbitrary or haphazard fashion. But when economic circumstances dictate, public schools are given the authority to make such salary cuts— as long as they are made in a "uniform" fashion. This mechanism for making us live within our means is a matter of sound public policy, and should not be viewed as overridden by the mere existence of a negotiated salary schedule.

The significance of this reasoning is that it appears to remove collective bargaining from the equation. In the court's view, the salaries that are bargained are not absolute, *but are always subject to the condition of possible reduction under a "uniform plan."* Unless the parties have very expressly agreed otherwise, "uniform plan" is already a part of the employment relationship, and (presumably) does not require additional negotiation.

CAREFUL, EVERYONE

It must be borne in mind that the *Martins Ferry* ruling is at this point just one trial court's opinion, not binding outside Belmont County, and likely to be challenged aggressively on appeal. It is also a case which does not directly involve the duty to bargain as such—an issue on which SERB has created a vast body of rulings, and will undoubtedly want to weigh in.

That said, it does appear that the *Martin's Ferry* ruling has lent a certain measure of credibility to the "uniform plan" approach—an approach toward which the courts and the public may be favorably disposed in these trying economic times.

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*ORC 3319.081. Although Martins Ferry is a city school district, the Board and OAPSE had previously "bargained out" of civil service.

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January 12, 2012

RETIRE / REHIRE REFRESHER

In 2004, I wrote an article in this space called "Retire-Rehire Made Easy." That was kind of a joke, really—retire-rehire has never been easy from a public perception point of view (don't need to tell you that). And the procedures aren't really "easy" either—although I think my article has helped a bit on that end. At any rate, after 7+ years, it seemed like a good time to revisit this controversial and confusing process.

What is "retire-rehire?" In 2003, the Ohio General Assembly—not having the votes to ban the employment of public retirees altogether—decided that it would create a process to make it more difficult, or at least more "public." Laws were enacted for all three major retirement systems (STRS, SERS, PERS) requiring at least 60 days' prior notice to the public before re-employing a retiree in the "same position." In addition, a "public meeting" on the rehiring was required in a brief "window" period 15-30 days prior to the re-employment action. The result is an awkward three-step process that may not "sync up" with a board's typical meeting dates. It is also a process that creates a significant "lag time" between the decision to rehire and the actual board vote—which can cause problems if there has not been good advance planning.

Has "retire-rehire" changed since 2003? NO. The procedures for retire-rehire have not been modified in any way since 2003. Late in 2003, both STRS and SERS enacted rules which clarified that once you have gone through these "hoops" for a given employee, you are NOT required to repeat those steps again as long as that employee remains in the same position. And in 2009, STRS created a rule which generally excludes retire-rehirees from the STRS health insurance plan whenever the employer is providing health coverage for comparable employees. But none of these rules affected retire-rehire eligibility or procedures as such.

Is "retire-rehire" under legislative threat? Legislation to kill retire-rehire is always a possibility. However, given the great utility and popularity of retire-rehire among public employers and employees, the outright abolishment of the practice appears unlikely. Most legislative proposals have been directed at reducing the economic benefit to re-employed retirees. In 2007, for example, a bill was introduced that would have imposed a flat salary "cap" equal to 60% of the employee's final average salary. Other bills have proposed various approaches, including "tiered" salary limits and the forfeiture of retirement benefits during the re-employment period. The most recent offering from the legislature is a rather strange bill that puts a retired member's benefits in "escrow" during the period of re-employment. (See current House Bill Number 388.)

So HOW do you do "retire-rehire?" That is what I intend to show you! Please take a look at the following pages, which set out the procedures to be followed on a step-by-step basis, with sample language for your public notice, agenda, and "rehire" resolution.

Please note: The materials which follow do not attempt to address the question of what exactly is meant by the "same position" or other questions of interpretation. For those, you are advised to consult your legal counsel as the answer will depend on a very fact-specific analysis.

Good luck!

Step-by-Step Procedures to Implement "Retire-Rehire"

Step

❶ Identify Board meeting date for final Board vote to rehire. This date should be at least 70-90 days in the future in order to accommodate 60-day notice period (see # 5 below).

❷ Working backward from this date, find another Board meeting date which is 15-30 days *before* the rehire date. This will be the date of the "public meeting" on the rehire. If there is currently no Board meeting scheduled to occur within this 15-30 day "window," the Board will need to reschedule one of its regular meetings or add a special meeting.

❸ Board meets and votes to approve public notice and a date for public "input session." Board also acts (if necessary) to reschedule its next meeting or add a special meeting to get the "input session" within 15-30 day "window."

❹ Prepare a notice for placement in a newspaper of general circulation in the district. (The law does not actually specify the method of notification to the public, but this would probably be the "safest" method.)

SEE FOLLOWING PAGES FOR SAMPLE
NOTICE + BOARD MOTION

❺ Send notice to newspaper. Make sure it runs at least 60 days before date in #1.

❻ Prepare agenda item for "input session" on board meeting date set in #2 above.

SEE FOLLOWING PAGES FOR SAMPLE
AGENDA LANGUAGE

❼ Board meets and conducts "input session" on date selected under #2 above.

❽ At the meeting date originally selected in step #1 above, the board proceeds with a resolution to employ the individual in question. Use your "normal" employment resolution or motion. No need to specify or mention individual's retired status.

SEE FOLLOWING PAGES FOR SAMPLE
REEMPLOYMENT RESOLUTION

[The “retire-rehire” process normally requires THREE board meetings as follows:]

First Meeting (Step ❸ in process)
(Public Notice)

Meeting Date: __________, 20__ (60+ days prior to Third Meeting)

Motion by __________, seconded by __________ as follows:

To authorize and direct the Treasurer to place a notice in the ___________________ , no later than __________, 20__, which reads substantially as follows:

PUBLIC NOTICE

The _______________ School District Board of Education hereby gives public notice in accordance with Section 3307.353* of the Ohio Revised Code that _______________, who is currently employed by the Board of Education as ___________________, will be retired and seeking re-employment with the _______________ School District in the same position following [his][her] service retirement.

The Board of Education will hold a public meeting on the issue of re-employing the above-named person at a meeting to be held on __________, 20__ at ___ [a.m.] [p.m.] at the ___________________________________, located at ___________________________, Ohio.

(*3309.345 for classified employee)

Second Meeting (Step ❼ in process)
(Public Meeting)

Meeting Date: __________, 20__ (15-30 days prior to Third Meeting)

The "public meeting" should be placed on the agenda and treated as a "public participation" session on the single issue of the re-employment of the employee(s) in question. The matter could be reflected on the agenda as follows:

____. Public meeting on the issue of the re-employment of __________ during [his][her] [STRS][SERS] service retirement.

Members of the public are invited to provide input to the Board on the issue of re-employing _______________ during [his][her] service retirement. Speakers are limited to five (5) minutes each, and all public comment will be closed after thirty (30) minutes. A sign-up sheet will be used, if necessary, to determine the order in which persons will address the Board.

[*NOTE: No action to rehire should be taken at this meeting.*]

Third Meeting (Step ❽ in process)
(Vote to Accept Resignation and Re-employ)

Meeting Date: __________, 20__

Motion by __________, seconded by __________, as follows:

(1) To accept the resignation of _______________, submitted for purposes of initiating earned retirement benefits, effective as of the end of the work day on __________, 20__.

[Note: This resignation may have been submitted and accepted at some earlier date. If so, #1 above is not necessary.]

(2) To employ _______________ as _______________ beginning __________, 20__ and continuing through __________, 20___, such employment to be at the same salary set forth in [his][her] current [most recent] employment contract and subject to such other terms and conditions as are set forth in the written contract document presented to this Board.

FOR **GRAPHICAL REPRESENTATION** OF TYPICAL RETIRE-REHIRE SEQUENCE
SEE FOLLOWING PAGE ➔➔➔

FINE PRINT DISCLAIMER: All references to dates on these pages are based on the assumption that "reemployment" as referred to in the statute means the *date of the board's action to reemploy* (as opposed to the date the person actually reports for work). These procedures would be substantially different if STRS or SERS were at some time to adopt a different interpretation. To date, that has not occurred.

EXAMPLE: Typical Retire-Rehire Sequence

				1	2	3
4	5	6	7	8	9	10
11	12	13	14	15	16	17
18	19 Reg Mtg	20	21 NOTICE	22	23	24
25	26	27	28	29	30	31

❶ Board votes (a) to approve notice and "public meeting" and (b) to move next meeting back 1 week (to get within 15-30 day "window")

❷ NOTICE runs

1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23 Reg.Mtg (Moved)	24	25	26	27	28
29	30	31				

NOTICE RUNS
60+ DAYS BEFORE
HIRE DATE

③ "Public participation" session at meeting to discuss rehire

"PUBLIC MEETING"
28 DAYS BEFORE
HIRE DATE
(MUST BE 15-30)

			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20 Reg Mtg	21	22	23	24	25
26	27	28	29	30		

❹ Board votes to rehire

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