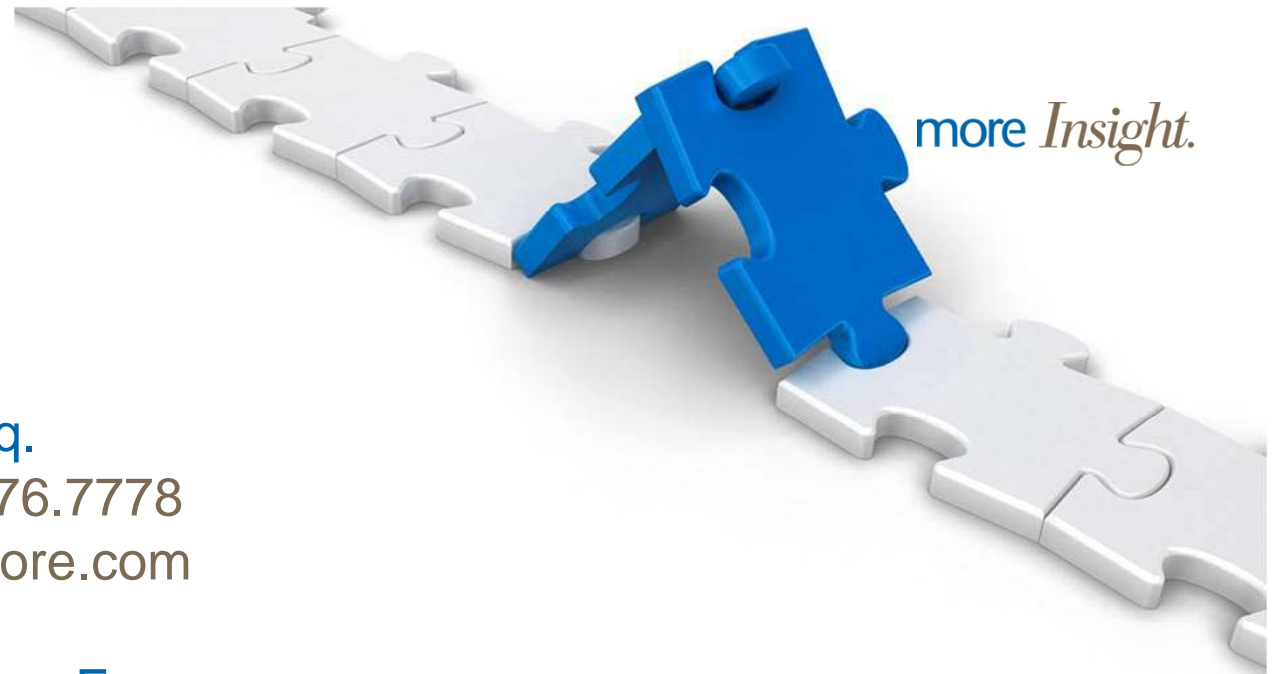




more *Insight.*

Employee Discipline: Step-by-Step for the Personnel Office

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Presenters

Jason S. Long, Esq.

Lewisburg ^ 304.276.7778
jason.long@dinsmore.com

Denise M. Spatafore, Esq.

Morgantown ^ 304.225.1445
denise.spatafore@dinsmore.com

Jason Long is a Partner in the firm's Lewisburg office and is the Chair of the West Virginia Education Law Practice Group. Jason's practice concentrates on education related issues and develops from his pre-lawyer days as an educator as well as growing up as the son of a county school superintendent. Jason focuses on representation of numerous county boards of education in the firm's Educational Law Practice Group, providing a wide range of services, including, but not limited to, guidance on personnel matters (both service and professional personnel), student and employee discipline matters, and due process hearings. He often provides in-service training to school personnel on issues such as student rights, student discipline, employee discipline, employee evaluations, and updates on the ever changing educational laws.

Jason.Long@dinsmore.com

304-276-7778

Denise Spatafore is a native of southern West Virginia, Denise is uniquely experienced in the education law area. For many years, she served as an administrative law judge for the Public Employees Grievance Board, authoring hundreds of administrative decisions that are still recognized precedent in the field of West Virginia school personnel law. Most recently before joining the firm, Denise was the personnel director for Harrison County Schools in Clarksburg, West Virginia, providing both legal services and human resources management for a large school system. Because of her background in the very specialized field of West Virginia school law and her experience as a central office administrator, Denise has a unique understanding of the issues facing our board of education clients. She is an of counsel member of the Labor and Employment Department, focusing on education law practice, located in the Morgantown office.

Denise.Spatafore@dinsmore.com

304- 225-1445



Education Law

Attorneys in Dinsmore & Shohl's Education Law Practice Group possess significant experience representing public and private school districts and professional associations throughout the region. Our law firm has the depth and resources you are looking for in addressing the ever growing complicated legal issues facing educational institutions. Our services are far reaching and unsurpassed and include personnel, ADA, FMLA, immigration, student rights, special education, Title VII, Title IX, HIPAA, bond finance, tax, litigation, real estate, environmental, media and public relations and the like. We offer proactive training and consultation to assist our clients in minimizing and avoiding expensive litigation to the fullest extent possible. Our Education Law Practice Group includes current Board members, who have a unique 1st hand insight into the issues, and practical solutions to the problems confronted by our education law clients. We treasure our clients and treat their matters personally.

Client Relationships

We highly value the relationships we have with our clients and work to instill in them a sense that they can depend on us for quality legal advice and representation with a results-oriented focus. The success of this relationship comes from teamwork and a risk management focus.

Education Law Issues

The firm advises and represents school districts concerning all matters impacting the educational law arena. We take great pride in our responsiveness and resourcefulness to address our clients' needs.

Training

The firm provides counseling and workshops for training in a wide range of topics. These workshops include administrative workshops, coaching workshops, teacher workshops, counseling workshops, special education workshops, on topics such as employee code of conduct, reporting suspected child abuse, ethical issues for counselors, overview of employee suspension, board-employee relations, drug-free workplace; anti-harassment, confidentiality of student information, student related policies, the evaluation process, avoiding liability in education issues, complying with the Americans With Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA) and handling EEO/sexual harassment issues. Our attorneys are frequent speakers on all aspects of Education Law and write numerous articles on practical education law tips for many news publications.

Suspension and Dismissal

W. Va. Code 18A-2-8 (Exhibit "A") provides that: A board may suspend or dismiss any person in its employment at any time for:

- ▶ Immorality;
- ▶ Incompetence;
- ▶ Cruelty;
- ▶ Insubordination;
- ▶ Intemperance
- ▶ Willful neglect of duty;
- ▶ Unsatisfactory performance; or
- ▶ Conviction of a felony or a guilty plea or plea of nolo contendere to a felony charge.



How Are These Terms Defined?

- ▶ Definitions (Exhibit “B”) of the terms found in W. Va. Code 18A-2-8



The Disciplinary Process

► Steps 1 – 8



Step-by-Step: STEP 1

- ▶ You have gathered sufficient evidence which indicates that discipline may be necessary.
- ▶ Provide the employee with notice that s/he is scheduled to meet with the Superintendent at a certain date/time/place, to discuss the allegations, **and that the employee has the right to have representation present, given that discipline may be discussed.**
- ▶ Example letter (Exhibit “C”)

Representation at the Meeting !! Why?

- ▶ W. Va. Code § 6C-2-3(g) (1) (Exhibit "D") which states: “(1) An employee may designate a representative who may be present at any step of the procedure as well as at **any meeting that is held with the employee for the purpose of discussing or considering** disciplinary action.” The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present if requested.



Do I Even Have to Provide a Meeting?

Must you? “NO.”

Should you? “YES!”



An initial meeting with the superintendent can lead to a quicker and less costly alternative to discipline, such as a resignation. It can also provide both sides an opportunity to achieve a better understanding and possibly avoid the imposition of any discipline.

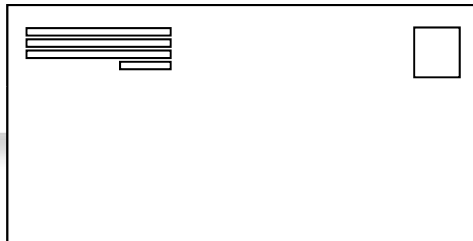
Step-by-Step: STEP 2

- ▶ The **MEETING**: Presentation of the charges to the employee, allow the employee to explain his/her behavior, and determine whether discipline is appropriate.
- ▶ Employee can have a representative present.
- ▶ Administration can have a representative (attorney) present.



Step-by-Step: STEP 3

- ▶ Following the **Meeting**, time for the Superintendent to determine the recommended **Discipline**.
- ▶ Typically we encourage the Superintendent to make a decision at that meeting, and provide the employee with his/her recommendation.
- ▶ Inform the employee of the recommended **Discipline *in writing***.
- ▶ Example letter (Exhibit “E”)



Step-by-Step: STEP 3 – Con't

- ▶ W. Va. Code 18A-2-7 (Exhibit “F”) provides that “The superintendent’s authority to suspend school personnel shall be temporary only pending a hearing upon charges filed by the superintendent with the board of education and such period of suspension shall not exceed thirty days unless extended by order of the board.”

What's Important About that Letter?

- ▶ W. Va. Code 18A-2-8 provides that, when a board of education is considering suspending or dismissing an employee, “[t]he charges shall be stated in writing served upon the employee within two days of presentation of the charges to the board.”
- ▶ Where an act of misconduct is asserted in a notice of dismissal, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity. **DON'T GET HUNG-UP ON TRYING TO FIND THE “BUZZWORD” OF 18A-2-8.**

“BUZZWORD”

- ▶ “It is not the label a county board of education attaches to the conduct of the employee . . . that is determinative. The critical inquiry is whether the board's evidence is sufficient to substantiate that the employee actually engaged in the conduct.” *Allen v. Monroe County Bd. of Educ.*, Docket No. 90-31-021 (July 11, 1990).

Step-by-Step: STEP 4

- ▶ Preparing for the Board of Education meeting, either regular or special.
- ▶ **THE AGENDA. List Employee's Name???**
- ▶ The meeting agenda provided the public may exclude the person's name ... unless the employee requests an open meeting.
- ▶ West Virginia Ethics Commission Opinion
(Exhibit "G")



Step-by-Step: STEP 5

BOARD MEETING & HEARING (IF REQUESTED)

- ▶ In the case of a disciplinary matter, such as dismissal or suspension for cause, discussion may take place in **executive session** as provided in W.Va. Code §6-9A-4(b).



Step-by-Step: STEP 5 – Con’t

- ▶ “There is no constitutional right to a hearing that is open to the public . . .”. *Romano v. Marion Cty BOE*, Docket No. 2008-1504-MrnED (Dec. 16, 2008). Concerns to be protected may include student confidentiality and other employee’s names or personal information.



Step 5 Cont'd: What is Due Process?

- ▶ The Due Process Clause of the 14th Amendment requires that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. The WV Supreme Court has held that public employees have such a “property interest” in continued, uninterrupted employment.
- ▶ Countless cases have held that the West Virginia Due Process Clause requires presentation of charges and some opportunity for the employee to respond to them before the imposition of discipline **which deprives the employee of wages or salary.**

What is Due Process - Cont'd

What does a board have to do to provide it?

- ▶ It is not necessary for a pre-disciplinary hearing to be a full adversarial evidentiary hearing; however, an employee is entitled to written notice of the charges, an explanation of the evidence, and an opportunity to respond prior to a board of education's decision to discipline the employee. *Board of Education v. Wirt*, 192 W. Va. 568, 453 S.E.2d 402 (1994).

Due Process: Why is it so important???

- ▶ After going through the difficult, time-consuming, and often expensive process of disciplining an employee, the board's decision could be reversed on a violation of due process finding.
- ▶ **Example:** Superintendent suspended the employee for one day without pay for failure to wear her bus operator's uniform, without informing her in advance that her suspension was proposed, without telling her in advance what the charges were, and without giving her a pre-suspension opportunity to respond to them. **The Superintendent's failure to afford her pre-suspension due process requires that her grievance be granted, without relying on the merits of the case.** *Hammer v. Greenbrier Cty BOE, Docket No. 2008-0302-GreED (May 21, 2008).*

The Importance of Due Process (cont'd)



As the Supreme Court observed in *Wirt*, “affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays.” In *Wines v. Jefferson County Board of Education* ([Exhibit J](#)), the Court awarded the employee both back pay (for the period between the termination vote and her actual hearing) and attorney’s fees. Although the charges were clear, the employee was well aware of her deficiencies, and she was notified of the date of the board meeting, her counsel’s request to reschedule should have been honored to allow her an opportunity to address the board, *prior* to their approval of her termination.

Step-by-Step: STEP 6

- ▶ Time for the **Board Members** to vote.
- ▶ The **Open Meetings Act** requires that, following any discussion in executive session, the name of the person being considered for discipline must be announced in open session **BEFORE** the board takes action to impose discipline.
- ▶ West Virginia Ethics Commission Opinion (Exhibit “G”)

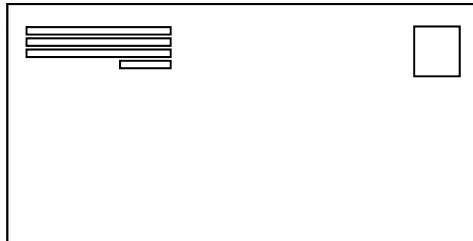


Step-by-Step: STEP 6 – Con't

- ▶ In school disciplinary matters, only the Board has the authority to make the final determination as to the suspension and its length, and it does so at a meeting.
- ▶ *Martin v. Pleasants Cty BOE*, Docket No. 2008-0197-PleED (Jan. 31, 2008). The School Board rejected the Superintendent's recommendation and unanimously approved a motion suspending Grievant for ten days. Grievant contends that his due process rights were violated.

Step-by-Step: STEP 7

- ▶ Follow up in writing to notify the employee of the Board of Education's vote.
- ▶ Example letter (Exhibit "H")



Step-by-Step: STEP 8

- ▶ As it relates to professional employees, W. Va. Code 18A-3-7 provides that “It shall be the duty of any county superintendent who knows of any acts on the part of any teacher for which a certificate may be revoked . . . to report the same, together with all the facts and evidence, to the state superintendent for such action as in the state superintendent’s judgment may be proper.”



Rational Nexus

- ▶ “In order to discipline a school employee for acts performed at a time and place separate from his employment, the board must demonstrate a “rational nexus” between the conduct performed outside the job and the duties the employee is to perform.” *Reed v. Summers County Bd. of Educ.*, Docket No. 06-45-002 (Jan. 26, 2006).
- ▶ In *Rogliano v. Fayette County Board of Education*, 176 W. Va. 700, 347 S.E.2d 220 (1986), the Supreme Court of Appeals of West Virginia stated that a “rational nexus” exists in at least two circumstances: (1) if the conduct directly affects the performance of the occupational responsibilities of the teacher; or (2) if, without contribution on the part of school officials, the conduct has become the subject of such notoriety as to significantly and reasonably impair the capability of the particular teacher to discharge the responsibilities of the teaching position.”

Rational Nexus Suspend Indefinitely?

- ▶ A board of education may conditionally suspend an employee based upon an criminal charges alone, provided there is a rational nexus between the charge and the employee's ability to perform his assigned duties. *Hicks v. Monongalia County Bd. of Educ.*, Docket No. 04-30-183 (Aug. 13, 2004) (misdemeanor battery).



Rational Nexus Examples

- ▶ BOE did not demonstrate a rational nexus between the discovery of 44 grams of marijuana at an employee's home, and employee's duties as a custodian, nor did the BOE demonstrate that employee's conduct had become the subject of any notoriety. *Conrad v. Grant Cty BOE*, Docket No. 2009-1458-GraED (Sept. 30, 2009).



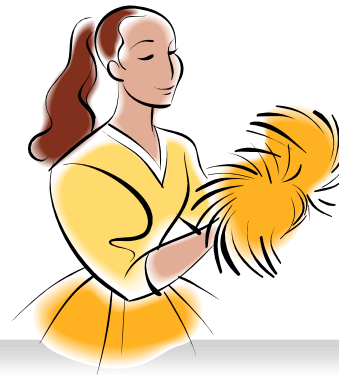
Rational Nexus Examples

- ▶ Employee argues that she should not be suspended for conduct that is alleged to have occurred away from work. Felony charge of operating, or attempting to operate, a clandestine drug laboratory She also notes that “indictment on felony charges” is not one of the reasons set out in W. Va. Code § 18A-2-8 for suspending or dismissing a school employee. In fact, the statute provides that an employee charged with a felony may be reassigned to duties where he/she has no contact with students.
- ▶ This notoriety was sufficient to reasonably impair employee’s capacity to perform her duties.
- ▶ Sufficient for Board to conditionally suspend her without pay pending the outcome of the felony charges. *Clark v. Kanawha Cty BOE*, Docket No. 2011-0987-KanED (Aug. 17, 2011).



Rational Nexus Examples

- ▶ Employee worked as head cook. She also held an extracurricular position as head cheerleading coach. BOE terminated employee from both of her positions . BOE asserted that the employee participated in an unauthorized overnight, out of county trip with the cheerleaders. While on this unauthorized trip, employee permitted the cheerleaders to behave in an inappropriate manner by allowing them to get into the hot tub topless. Employee posted on MySpace a photo of the cheerleaders, albeit fully clothed, but referring to them as “hoes.” BOE asserts that this behavior violated the sexual harassment policy. Employee argues the trip was not a school function, but instead, a Christmas party organized by a cheerleader mother.
- ▶ BOE failed to prove a rational nexus between Employee’s behavior as the cheerleading coach and her position as cook. *Kimble v. Kanawha Cty BOE*, Docket No. 2009-1640-KanED (Nov. 30, 2009).



Rational Nexus Examples

- ▶ Employee (custodian) was convicted of the misdemeanor crimes of passing bad checks and of impersonating a conservation officer. BOE terminated his employment as a probationary substitute custodian based on these convictions, on the basis that his criminal activity was immoral.
- ▶ BOE did establish a rational nexus between employee's off-duty misconduct and his job, as his duties placed him in a position of trust, and his crimes involved dishonesty. Employee's custodial position is one of trust, since while working he has keys to the entire building and works alone in the school unsupervised. *Reed v. Summers Cty BOE*, Docket No. 06-45-002 (Jan. 26, 2006).



Unsatisfactory Performance Charges (*Very tricky!*)

Remember, per W. Va. Code 18A-2-8, “A charge of unsatisfactory performance shall not be made except as the result of an employee performance evaluation.”

What does that mean? “[f]ailure by any board of education to follow the evaluation procedure in West Virginia Board of Education Policy 5310 . . . prohibits such board from discharging, demoting or transferring an employee for reasons having to do with prior misconduct or incompetency that has not been called to the attention of the employee through evaluation, and which is correctable.”

What is Correctable Conduct?

Correctable Conduct:

What is correctable conduct does not lend itself to an exact definition but must be understood to mean an offense or conduct which affects professional competency.



What is Correctable Conduct? – Con't

- ▶ If conduct is correctable, the county board must inform the employee of her deficiencies and afford her a reasonable period to improve. See, *Mason County Bd. of Educ. v. State Supt. of Schools*, 165 W. Va. 732, 274 S.E.2d 435 (1980). See also, *Maxey v. McDowell County Board of Education*, 575 S.E.2d 278, 2002 W. Va. LEXIS 226 (2002); *McMann v. Jefferson County Bd. of Educ.*, Docket No. 2009-1340-JefED (October 21, 2009). An offense or conduct which affects professional competency is correctable, if the conduct or offense does not “directly and substantially affect the morals, safety, and health of the system in a permanent, non-correctable manner.” *Mason County Bd. of Educ.*, 165 W. Va. 732, 739, 274 S.E.2d 435, 439 (1980).

McMann v. Jefferson Cty BOE

Docket No. 2009-1340-JEFED

- ▶ Grievant was terminated due to the result of a psychological evaluation, which concluded he was unfit for the classroom.
- ▶ Grievant had begun a “downward spiral” as a result of a personality conflict with his supervisor. Because “effective communication” is listed in Policy 5310 as an area of teacher responsibility, Grievant should have been given an improvement plan focusing on meaningful and constructive communication, along with counseling for impulse control and anger management.

Maxey v. McDowell Cty BOE

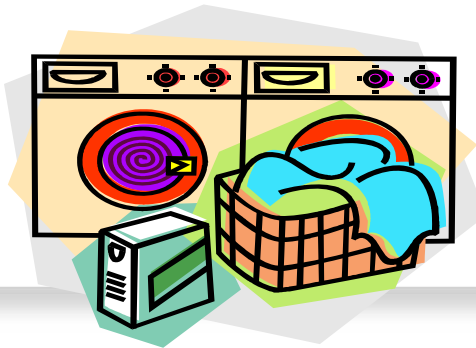
212 W. Va. 668, 575 S.E. 2d 278 (2002)

- ▶ Grievant was terminated for insubordination following a long personality struggle with her supervisor.
- ▶ The Court ruled: “[I]nitial confrontations between the Appellant [employee] and her supervisor were primarily performance related and reflected personality conflict and the absence of constructive communication. The insubordination claim was derivative of the original performance issue . . . the emergence from the performance issue of secondary acts, allegedly constituting insubordination, cannot be held to totally eclipse the underlying performance issues and cannot subvert the employee’s right to the protections of Policy 5310.”

Dalton v. Monongalia Cty BOE

Docket No. 2010-1607-MONED

- ▶ Grievant, a custodian, was terminated for willful neglect of duty following an unsatisfactory observation which noted deficiencies in his work, along with incidents of misconduct.
- ▶ Although Grievant had successfully completed an improvement plan the prior year, he contended he was entitled to another plan prior to termination.
- ▶ “To adopt Grievant’s reasoning in this case would result in an endless cycle of employee improvement, relapse into old work habits, and the need for additional evaluations and plans of improvement. Respondent [BOE] has done what was legally necessary . . . Grievant’s improvements in specific areas after completion of the improvement plan did not demonstrate a performance deficiency, but an intentional act on the part of the Grievant to neglect his duties.”



Alderman v. Pocahontas Cty BOE

675 S.E. 2d 907 (W. Va. 2009)

- ▶ Policy 5300 is inapplicable when the employee's conduct is willful, insubordinate and unapologetic.
- ▶ “It is not the label given to the conduct which determines whether 5300(6)(a) procedures must be followed but whether the conduct forming the basis of dismissal involves professional incompetency and whether it directly and substantially affects the system in a permanent, non-correctable manner.”



“Tricky Business” Example

- ▶ **Unsatisfactory Performance:** The BOE terminated employee employment when she was not able to successfully complete a Plan of Improvement. Employee did not receive a formal evaluation prior to the recommendation to terminate her employment. W. Va. Code § 18A-2-8 requires county board of education personnel to complete a formal evaluation of the employee’s performance prior to the recommendation to terminate her employment. Despite employee’s difficulties in learning her job responsibilities, The BOE simply did not do what the statute requires. *Romano v. Marion Cty BOE*, Docket No. 2008-1504-MrnED

Termination for Unsatisfactory Performance: Checklist for the Personnel Director

- ▶ Was the conduct correctable behavior?
- ▶ If so, was the employee given the appropriate number of observations and evaluations within proper timeframes?
- ▶ Was the employee given an opportunity to improve through a plan of appropriate length, with sufficient assistance, and a proper team?
- ▶ Can you articulate, and support through documentation, that the employee's performance has not improved and is worthy of termination?



Commons Issues to Consider with Discipline

Can a suspended employee bid on other positions?

- ▶ Employee was employed as a bus operator for the Wayne County Board of Education. While employed by BOE, Employee was arrested while off duty and charged with DUI. Employee was suspended from his employment by BOE without pay. While suspended, Employee applied for positions outside the classification of bus operator. BOE refused to consider him for any of the posted positions for which he applied. Employee ultimately pled no contest to the charge of driving under the influence, and BOE terminated Employee's employment on the ground of incompetency. Employee argued that if it had not been for his status of suspended without pay, he would have been the successful applicant for a number of the positions, conditioned upon passing the custodial competency test.
- ▶ "While suspended without pay, an employee does not continue to enjoy all of the benefits afforded an active employee." *Swimm v. Wayne Cty BOE*, Docket No. 2009-0836-WayED (Nov. 9, 2010).

Commons Issues to Consider – Con't

Bus operator's license is suspended because of health issues. Can I suspend, or required to provide alternative work?

- ▶ Lack of the prerequisite legal certification or licensure required to perform one's job duties may constitute incompetency within the meaning of W. Va. § 18A-2-8.
- ▶ **Not required to provide alternative work.** *Clark v. Wayne Cty BOE*, Docket No. 2009-1461-WayEd.

Commons Issues to Consider – Con't

Employee has been released from Workers' Compensation, but refuses to return.

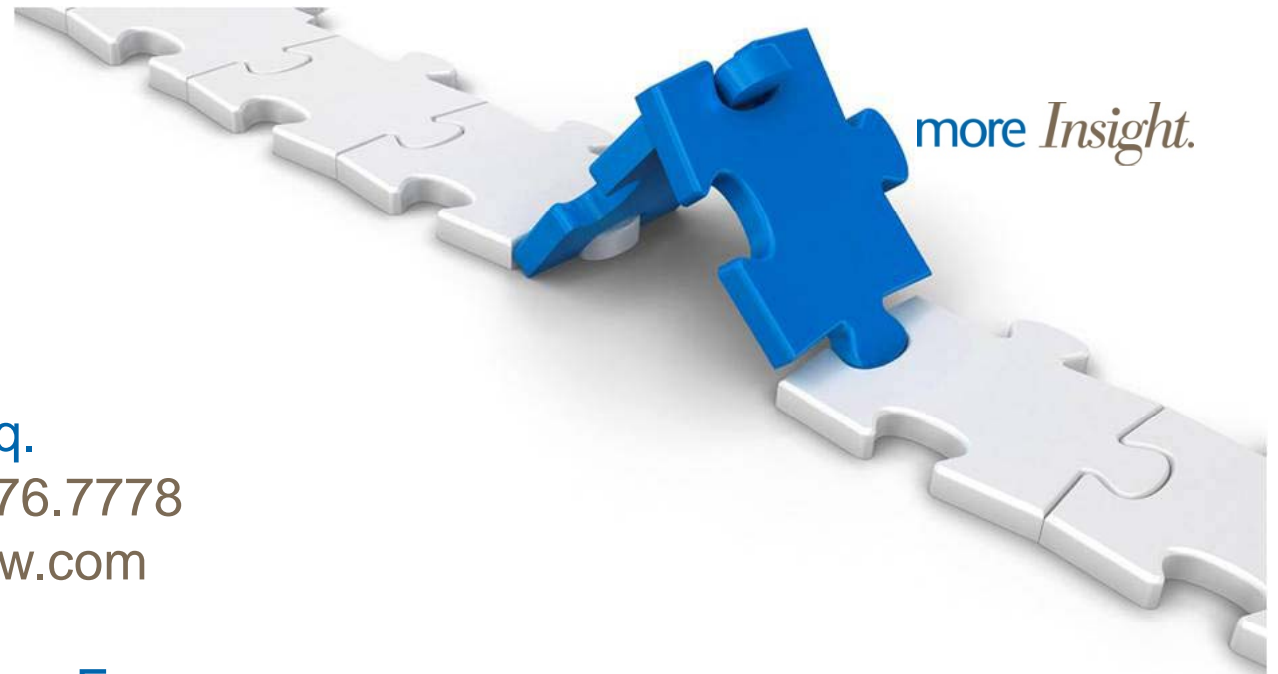
- ▶ Once an employee's Workers' Compensation claim has concluded, and the employee fails to return to work, s/he may be terminated.
- ▶ See example, *Plati v. Hampshire Cty BOE*, Docket No. 2010-0954-HamED (Sept. 21, 2011).
(Exhibit "I")

Commons Issues to Consider – Con't

Bus operator's license is suspended by the State Dep't. Can I terminate him?

- ▶ Employee was accused of inappropriate contact with a female student who rode his bus. After he was suspended by the BOE, the State Superintendent of Schools revoked his bus operator certification for the entire school year of 2006-2007, allowing him to reapply after that time and upon completion of sexual harassment training. Because he was not certified to drive a bus, the BOE terminated his employment. Employee argued that temporary incapacity to perform one's duties is not a legal justification for termination of a school employee.
- ▶ However, pursuant to W. Va. Code § 18A-2-8, employees may be terminated for incompetency, which includes the legal inability to perform one's job. Therefore, the termination was not arbitrary and capricious.





Questions?

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Lewisburg ^ 304.276.7778

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