

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill No: CS/HB 436a¹

49th Legislature, 1st Session, 2009

Short Title: School Employee Termination Process

Sponsor(s): Representative Keith J. Gardner and Others

Analyst: James Ball

Date: March 18, 2009

**HOUSE JUDICIARY COMMITTEE SUBSTITUTE FOR
HOUSE BILL 436**

AS AMENDED

The Senate Education Committee amendments:

- delete the right of appeal by school employees to the local school board of termination decisions made by the superintendent;
- provide that a school employee aggrieved by a termination decision by the superintendent may appeal the decision to an independent arbitrator;
- allow both the superintendent and school employees aggrieved by the superintendent's termination decision to be represented in a *de novo* hearing before an independent arbitrator by a person of the party's choosing;
- provide that the superintendent who is contemplating discharging a licensed school employee shall issue an "intent to recommend discharge" to the employee noting the causes of the recommendation;
- grant a licensed school employee recommended for discharge the right to a hearing before the superintendent regarding the superintendent's statement of intent to recommend discharge;
- grant the superintendent the authority to subpoena witnesses or records;
- allow both the superintendent and a licensed school employee aggrieved by the superintendent's intent to recommend discharge, after the discharge hearing, to be represented in a *de novo* hearing before the independent arbitrator by a person of the party's choosing; and
- provide that the independent arbitrator shall render a decision affirming or reversing the discharge action of the superintendent.

Original Bill Summary:

CS/HB 436 amends the *School Personnel Act* to require:

- employment contracts between school districts (rather than local school boards) and all licensed school employees (rather than licensed teachers);
- contracts to be approved by the Public Education Department (PED) (rather than the state board); and
- the superintendent (rather than the local school board) to:

¹ Version .177656.1

- issue notices of reemployment or termination for licensed school personnel;
- issue notices to unlicensed school employees who are terminated; and
- provide an informal hearing for a terminated employee.

For a termination hearing, the bill:

- allows the school employee to be accompanied by a person of the employee’s choice;
- requires the employee’s supervisor to present factual evidence that just cause exists for termination of the school employee;
- requires the school employee to present facts that support the contention that the termination decision was without just cause;
- allows rebuttal testimony deemed relevant by the superintendent;
- allows witnesses to be questioned by the school employee, the employee’s representative or supervisor, or the superintendent;
- allows the superintendent to consider only reliable evidence presented during the hearing;
- prohibits a record of the proceeding to be made;
- requires the superintendent to notify the school employee of a decision, in writing, within five working days from the conclusion of the hearing; and
- allows the school employee to appeal the final decision to the local school board.

For an appeal hearing to the local school board, CS/HB 436:

- requires the local school board to hold a hearing within 15 working days of receiving a notice of appeal from the employee;
- allows the superintendent and the school employee to be represented by counsel and to cross-examine witnesses;
- allows the school board to consider only reliable evidence presented during the hearing;
- prohibits a record of the proceeding to be kept; and
- requires the school board to notify the employee and the superintendent of a decision within five working days from the conclusion of the hearing.

In addition, the bill makes technical adjustments to the provision that an employee may appeal the local board’s decision to an independent arbitrator.

CS/HB 436 also requires compensation payments to discharged licensed school personnel to be terminated effective on the date that the superintendent notifies the employee of a discharge decision, provided that if the discharge is overturned on appeal, previously withheld compensation is reimbursed to the employee.

Finally, the bill replaces numerous instances of the “state board” with “department” and includes provisions for licensed school personnel employed by a state agency.

Fiscal Impact:

CS/HB 436 makes no appropriation.

Issues:

By giving to local school district superintendents the responsibility to hold initial hearings of licensed school employees who have been served notices of termination, CS/HB 436 adds a new

level of hearings to the existing termination process. With this additional hearing, an aggrieved licensed school employee who has been served notice of termination will be entitled to:

- an initial hearing before the local superintendent;
- an appeal hearing before the local school board;
- a *de novo* hearing before an independent arbitrator; and
- if the employee claims corruption, fraud, deception or collusion, an appeal in district court.

Non-licensed school employees who have been served a notice of termination also will be entitled to an additional hearing, including:

- an initial hearing before the local superintendent; and
- an appeal hearing before the local school board.

It might also be noted that the initial hearing before the superintendent in both cases requires the aggrieved employee to present his rebuttal to the same official who issued the notice of termination.

The PED analysis of CS/HB 436 notes that the bill reconciles the apparent inconsistencies between 22-5-14 NMSA 1978 (making all employee hiring, termination, and discharge decisions to be determined by the superintendent) and 22-10A-24 and 22-10A-27 NMSA 1978 (making all termination and discharge decisions to be determined by the local board). The bill, therefore, prevents a school district from discharging a non-licensed employee absent a showing of just cause, unless that employee is probationary.

The PED analysis also states that the requirement on page 10, lines 1 through 13 is too prescriptive in that it requires a principal or other person responsible for supervising a school employee at a termination hearing to present the factual basis for the action being taken. The person who presents the case should be up to the superintendent since these proceedings are quasi-judicial in nature and the superintendent may want this function carried out by an attorney. Moreover, the reasons may involve misconduct of which neither a principal nor other supervisory personnel may have direct knowledge. Additionally, the principal and/or the other supervisory person may need to be called as a witness if he or she does have personal knowledge.

Finally, PED notes that the appeal to the local board provided on page 10, lines 21 through 25 and on page 11, lines 1 through 9, does not indicate a standard for review. While the provisions discuss the nature of the evidence that can be presented, there is no standard for the local board to make its decision (e.g., arbitrary capricious; not supported by substantial evidence; was not in accordance with law).

Technical Issues:

The term “unlicensed” school employee should be changed to “non-licensed” school employee in order to clearly separate those employees whose work does not require licensure from those who might not currently hold the proper licensure for their assignment or potential assignment. The term is used on page 6, lines 21 and 23, and on page 17, line 3.

Background:

According to PED, in 2003 the *School Personnel Act* was amended to require the superintendent to make the hiring/firing decisions of all district employees, while the local school board has hiring/firing authority only over the superintendent. Prior to 2003, the local boards made all of the hiring/firing decisions, with the superintendent providing recommendations to the boards.

The PED analysis of the original HB 436 called attention to the 2001 New Mexico Supreme Court case of *Franco vs. Carlsbad Municipal Schools* to illustrate how school districts can get into trouble when non-licensed employees are given diminished procedures that effectively deprive them of due process. Although Mr. Franco was terminated (i.e., not rehired for appropriate reasons amounting to misconduct), the district did not provide him with all of the reasons in writing that they used against him, nor was he told that he could attend a board hearing and state his side of the story. He later was awarded \$50,000 in damages for wrongful termination. Mr. Franco was a five-year veteran custodian with the district at the time of his termination. CS/HB 436 does not address this issue since there is no specific requirement that the notice of termination to inform the non-licensed employee that he has the right to request the reasons for the termination and to have a hearing before the superintendent.

Related Bill:

HB 373a *School Board Approval of Personnel Decisions*