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OTES and the problem employee: The more things change, the more they (should) stay the same

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Unbelievably, Ohio's "new" Teacher Evaluation System (OTES) has already been in place for five years. When OTES was first unveiled, its provisions seemed simple enough—evaluate every regular employee every year who was employed under a teacher license and spent at least fifty percent of the time providing student instruction by conducting two 30-minute formal observations and classroom walkthroughs and, as a best practice, holding pre-and-post-conferences with the teacher.¹ Then the revisions began. Soon, boards of education could opt out of annually evaluating teachers who received accomplished or skilled ratings with average or higher student growth measures.² Then, a board could elect to skip the evaluation of a teacher who was on leave from the school district for fifty percent or more of the school year or who had submitted a notice of retirement accepted by the Board by December 1st.³ Beginning this year, a board may choose to not evaluate a teacher who participates in the teacher residency program in the year that teacher first takes at least half of the performance-based assessments prescribed for resident educators by the state board of education.⁴ These exceptions apply not only to teachers who have achieved continuing contract status but also to teachers who are on limited contracts, providing administrators a welcome respite from their

already hectic days. And that, surprisingly, is where the problem begins.

Few administrators relish dealing with a problem employee. When a teacher is known to have performance issues, an administrator crafts and implements a performance improvement plan for that teacher,

identifying areas for improvement and specifying required actions, available resources, and professional development necessary for improvement. The administrator gets to address all of the teacher's known deficiencies, from their inadequate lesson plans to their poor collaboration with colleagues. A teacher who fails to improve is then subject to removal—an action the law requires a board to consider in its policies.⁵

It is the unexpected performance issue that presents the true challenge, like a teacher's inappropriate comments to a student or a teacher's sudden refusal to perform an assigned duty. Teachers working under continuing contracts are exempt from nonrenewal and must be afforded the process provided by Ohio Revised Code Section 3319.16 before they may be terminated. Section 3319.16 allows a board of education to consider the termination of a continuing teaching contract after providing notice and a hearing—usually before a state-appointed referee—to the teacher. Even after undergoing these extensive measures, a board may only terminate the teacher's contract for good and just cause. Generally, OTES' procedures have little effect on the decision to terminate a continuing contract teacher when a problem suddenly arises.

Teachers having limited contracts, however, can be nonrenewed through the provision of written notice to them by June 1st of the district's intent not to reemploy them the following school year.⁶ Nonrenewed teachers may demand a list of the reasons underlying the board's decision to not reemploy them.⁷ They must also be accorded an opportunity to demand a hearing before a majority of the board's members to refute those reasons. However, it is the board—and not a referee—that determines whether the reasons for nonrenewal are sufficient. A board usually decides that its reasons for nonrenewing a teacher's contract are, in fact, sufficient. The nonrenewal process is generally considered to be quicker, easier, and, frankly, cheaper than the contract termination process. When an unexpected problem arises with a limited contract teacher, a district usually looks to simply nonrenew them.

Which brings us back to OTES. Despite the multiple exceptions to the evaluation requirement provided by Ohio's legislature, Revised Code Section 3319.111 still states that a board must require at least three formal observations of each limited contract teacher who is under consideration for nonrenewal.⁸ The nonrenewal provisions in Revised Code Section 3319.11 prohibit the nonrenewal of any limited contract teacher for whom evaluation procedures have not been complied with pursuant to Section 3319.111.⁹ The same is true for teachers who are on extended limited contracts. That appears to mean that a limited contract teacher must receive,

at a minimum, three formal observations each year to be nonrenewed, regardless of the reason.

To date, Ohio courts have consistently enforced the express requirements of Revised Section 3319.111. Ohio's Supreme Court has held that a board of education's decision to nonrenew is invalid if it has not properly evaluated the teacher in accordance with Section 3319.111.¹⁰ According to the Court, even a teacher's medical leave of absence will not excuse a school board from complying with Section 3319.111's requirements.¹¹ So much for that 50% leave exception...

Although these cases precede the implementation of the "new" OTEs system, they remain what lawyers refer to as "good law" and will continue to control the outcomes of evaluation issues until the law is revised (yet again), or the Court is convinced otherwise. The strength of the legislature's feelings about its changes to Ohio's teacher evaluation process is evident from the language it utilized in implementing them. Notably, the legislature sought to prevent any attempts to undermine its designated process by prohibiting workarounds that might be negotiated by a board and a union. It included the following language in Section 3319.111: "[T]he requirements of this section prevail over any conflicting provisions of a collective bargaining agreement entered into on or after September 24, 2012."¹²

This article was originally posted in the Ohio Association of Secondary School Administrators Update.

¹ O.R.C. 3319.111 and O.R.C. 3319.112.

² O.R.C. 3319.111(C) (2) (a) and (b). Boards that opt out of the teacher's formal evaluation process for this reason must still conduct at least one observation and hold one conference with the teacher each year. O.R.C. 3319.111 (C) (3).

³ O.R.C. 3319.111(C) (2) (d).

⁴ O.R.C. 3319.111(C) (2) (e).

⁵ O.R.C. 3319.111 (F).

⁶ O.R.C. 3319.11 (B) and (E).

⁷ O.R.C. 3319.11 (G).

⁸ O.R.C. 3319.111 (E) (1).

⁹ O.R.C. 3319.11(B), (D) and (E).

¹⁰ *Snyder v. Mendon-Union Local Sch. Dist. Bd. Of Educ.*, 1996-Ohio-138, 75 Ohio St.3d 69, 661 N.E.2d 717 (1996).

¹¹ *Skilton v. Perry Local Sch. Dist. Bd. Of Educ.*, 2004-Ohio-2239, 102 Ohio St. 3d 173,

807 N.E.2d 919 (2004).

¹²O.R.C. 3319.111 (H).