

# ELQ EDUCATION LAW QUARTERLY

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## WHAT'S NEW AT THE LAW FIRM

On January 1, 2009, The Cuddy Law Firm (Cuddy, Kennedy, Ives. Archuleta-Staehlin, Fairbanks & Vigil, LLP) merged with Santa Fe's White, Koch, Kelly & McCarthy to form Cuddy & McCarthy, LLP. The White Firm was founded in 1917 and, like the Cuddy Firm, is an AV-rated law firm, which is the highest rating given to law firms by judges and other members of the legal profession. The merger gives us a total of 18 lawyers, with offices in both Santa Fe and Albuquerque. The Santa Fe office remains at 1701 Old Pecos Trail, and our mailing addresses and phone numbers have not changed.

We invite you to take a look at the Firm's revised website, [www.cuddymccarthy.com](http://www.cuddymccarthy.com), which will be on line soon and which contains the resumes of all our attorneys. We will continue to publish the *ELQ* electronically on a quarterly basis, and the website will contain links to

current and past issues. By merging the firms, we are able to provide an even broader range of legal services to the education community in New Mexico. We will, of course, continue to focus considerable effort on preventive school law through programs such as the annual School Law Conference, presented in partnership with the NMSBA, as well as through workshops and other training programs we provide to individual school districts.

We look forward to having you meet all of the attorneys and staff at Cuddy & McCarthy and to continuing to serve your needs for many more years to come.

## **REDUCTION IN FORCE**

**By John F. Kennedy**

The current economic crisis and the fiscal problems facing New Mexico's state government could have dire consequences for school budgets, and school districts may be required to cut staff in order to live within their financial resources. Given this fiscal environment, we thought that the rules governing reductions in force (RIFs) should be revisited.

The "legal history" of school RIFs was explained in an *ELQ* article in April 2006 and will not be repeated here. Here is the essence of the law as it now stands:

In the seminal case of *Swisher v. Darden*, 59 N.M. 511, 287 P.2d 73 (1955) the New Mexico Supreme Court noted that "absent grounds personal to the teacher," the standard to be applied in a discharge resulting from a reduction in force requires that a school board "show affirmatively that there was no position available [that the teacher] was qualified to teach." *Id.* at 516. A later series of cases in the 1970's and 1980's reaffirmed the authority of local school boards to use reductions in force, and the overriding principal of *Swisher* remains in effect. Accordingly, the Supreme Court has held that "when a school board is forced to reduce its teaching staff by way of a RIF, it must satisfy the *Swisher* requirement and prove that there is no other position for which the teacher is *qualified* consistent with the academic necessities of the District." *Aguilera v. Hatch Valley Schools Board of Education*, 2006-NMSC-015, ¶25, 139 N.M. 330, 132 P.2d 587.

While the bottom line here is that reductions in force are authorized in New Mexico, in the *Aguilera* case, the New Mexico Supreme Court added a further restriction. The Court stated,

Unlike termination, which applies to the coming year, discharge results in a teacher losing her job in the middle of the school year, when there may be no opportunity to find other employment. Given the extreme hardship to the teacher, the justifications must be substantial to allow a school board to lay off qualified teachers in the middle of a school year pursuant to a RIF. The school board has to show not just projected financial burdens in the future, but that it cannot survive financially for the present year, which is already underway. To avoid such draconian consequences, the Legislature has authorized a school district to reserve up to 5 percent of its cash balance for an emergency fund to help get through the year when it experiences “unforeseen expenditures incurred after the annual budget was approved” NMSA 1978, §22-8-41(B)(2004).

*Id.*, ¶ 32. In other words, whenever a school district intends to initiate a discharge action (as opposed to a termination at the end of the school year) to RIF a certified employee, the school district must establish two elements: first, *dire financial circumstances* such that the district cannot survive financially for the remainder of the school year in the absence of a RIF (after exhausting available emergency funding); and second, that there is *no other position available for which the person* proposed for reduction in force *is qualified*.

In summary, it is our advice that if a RIF is likely to be necessary in your school district, and the RIF will affect tenured staff, it should be initiated through end-of-year non-renewals or terminations pursuant to your local RIF policy, if possible. If discharges are warranted, the *Aguilera* decision requires you to establish that your financial crisis is truly dire, and that not even your use of emergency funding will allow you to complete the current school year without deficit spending.

We have updated our model Reduction in Force Policy to address the requirements of the *Aguilera* decision and to address RIFs of both certified and noncertified staff who have acquired “just cause” termination rights. Should you wish to receive a copy of the updated version of this model policy, we will be happy to provide it to you.

## **WHEN DOES A TEACHER EARN TENURE?**

**By Evelyn A. Peyton**

Under the New Mexico School Personnel Act, a school district may terminate a teacher “with fewer than three years of consecutive service for any reason it deems sufficient,” provided that the reason is not discriminatory, retaliatory, or otherwise legally impermissible. Out of an abundance of caution, since the restoration of teacher tenure in 1991, we have advised our school clients that once a teacher and the school district have signed a third contract, the teacher effectively becomes “tenured.” This cautious approach eliminated the threat of litigation over whether a third-year teacher acquired tenure upon being reemployed under a third contract at the end of the second year of employment.

As long-time readers of the *Education Law Quarterly* may remember, the *ELQ* published an article in September 2004 addressing a decision by the United States District Court for the District of New Mexico in the case of *Martinez v. New Mexico Children, Youth & Families Dept., et al.*, No. CIV 03-0659 MCA/RLP (D.N.M. Jul. 30, 2004). In this decision, the court held that a third-year teacher who receives notice of termination before the end of the third year does not attain tenured status. A review of that case, and its status today, may be helpful to school districts wishing to take advantage of its more liberal reading of the tenure statute.

Jose Martinez was a teacher at the New Mexico Boys School in Springer. On May 9, 2001, during his third year of employment at the Boys School, he received notice that his contract would not be renewed. Although Mr. Martinez asked for, and received, written reasons for his termination, he was not satisfied, so he requested a hearing. His request for the hearing was denied, and he sued the school, claiming that he was entitled to a hearing and proof of just cause for his termination. The federal court was not persuaded.

In rejecting Mr. Martinez’s claim for breach of contract (based upon his claim that he was tenured), the court reasoned that the hearing/just-cause requirement applied only to “an employee who has been employed by a school district or state agency for three consecutive years.” *Id.*, *slip op.* at 16, citing N.M.Stat. Ann. 1978, § 22-10-14(C), (D). At the time Mr. Martinez received the termination notice, he had not completed three years of employment. *Id.* at 17. Mr. Martinez claimed that, because his termination was not effective until he had finished his third year of employment, he had become “tenured” prior to the termination. The court noted that the key question was “whether the . . . ‘three consecutive years’ . . . is to be measured from the date the employer . . . serves the employee with written notice of termination . . . or the date on which the employee completes his last day of work . . . [at] the end of the current school year.” *Id.*

The court rejected Mr. Martinez’s position on the basis of the shift in verb tense in Section 22-10-14(C), the termination statute in effect at the time Mr. Martinez received his notice: “An employee who *has been employed* by a school district or state agency for three consecutive years and who *receives* a notice of termination” is entitled to a hearing and proof of just cause. *Id.* at 18 (emphasis by the court). The court stated that the statute “does *not* guarantee an opportunity for a hearing to an employee who *will be employed* by a state agency [or a school district] for more than three years . . . . Rather, the employee in question must *have been employed* for three consecutive years at the time he or she *receives* the notice of termination . . . .” *Id.* at 19 (emphasis by the court). Because Mr. Martinez had not completed three years of employment at the time the notice of termination was issued, he was not entitled to a hearing or proof of just cause. *Id.* at 20.

As we noted in September 2004, it remained to be seen whether the *Martinez* rationale would be adopted by the state courts of New Mexico. Because *Martinez* is a federal court decision, it is not binding on the state courts, which would have the final word on this state-law issue. In general, the state courts of New Mexico tend to be more pro-employee than the federal courts. So far, however, no New Mexico state court decisions have addressed the question of whether a third-year teacher acquires tenure prior to the expiration of his or her third-year contract.

Because no New Mexico appellate court has considered the issue since *Martinez*, the question as to when a teacher attains tenure remains open. Although the *Martinez* decision is not binding on New Mexico's courts, it is the only legal precedent currently answering that question. Readers may wonder whether school districts should take the position that teachers who receive notice of termination before the end of their third full year of employment do not have tenure. The answer depends in part upon the school district's tolerance for risk.

Our long-term position and advice (that teachers effectively become tenured upon signing a third contract) has been the cautious approach, taken largely to keep our clients from incurring the cost and disruption of litigation. If a school district takes the aggressive position that tenure is not acquired until after the completion of the third contract, an affected teacher, or the teacher's attorney or union representatives, probably would challenge that position. Although the school district could avoid the resulting litigation by simply reversing its position, giving the teacher a hearing, and establishing good cause for the termination, the school district could decide that the matter was worth defending. The school district would then have the opportunity to seek a New Mexico state court's determination that the *Martinez* rule is consistent with the law in New Mexico. If the district did not prevail in the lawsuit, the adverse decision would establish definitively as New Mexico law what most districts have been doing all along. In certain circumstances, a district may want to take the *Martinez* position. However, your school district should not take such a position without first consulting with your legal counsel to assure that your documentation is sufficient to establish just cause and that you have a clear understanding of the risks and potential benefits of pushing this issue.

As always, the best course of action is to ensure that your school district's teacher supervision and evaluation procedures have been fairly and honestly followed, and that you can establish and justify a decision not to reemploy a teacher before the end of the second contract. Following this course of action protects your school district from having to make the *Martinez* argument and fulfills your obligation to keep only competent teachers.

**THE ATTORNEY-CLIENT PRIVILEGE FOR SCHOOL DISTRICT  
OFFICIALS**  
**By Ramon Vigil, Jr.**

Although many non-lawyers are vaguely aware of the attorney-client privilege, school board members and school administrators, as public officials who work frequently with legal counsel, can benefit from a more specific understanding.

The attorney-client privilege arose from society's recognition of the need for confidentiality of attorney-client communications so that there can be complete candor between a client and the client's lawyer, facilitating the best possible representation by the attorney. The attorney-client privilege protects from disclosure communication between (i) a client or the client's agent, and (ii) the client's lawyer or the lawyer's agent, (iii) relating to the lawyer's rendering of legal advice, (iv) made with the expectation of confidentiality, (v) that is not in furtherance of a future crime or tort.

The attorney-client privilege determines which statements made by the board of education, or by the school district's employee's agents, to the attorney can be kept confidential. Many non-lawyers believe that any statement made to an attorney by a school district employee is protected from disclosure. However the attorney-client privilege is limited as to the types of communications it covers, and as to the individuals involved in those communications.

Although most attorney communications with the client are protected, questions can arise as to who the client is. In the case of local school districts, the board of education is certainly the client, yet relatively few communications by board counsel are directly with the board. The attorney represents the school district as an entity by and through its board of education, and in some cases through its superintendent when decisions have been made regarding personnel. Communications with other agents of the board may also be protected, including those with the district's administrators, and even with non-managerial employees who may have specific information necessary to the lawyer's representation of the board.

Client identity is an important concept for school boards, superintendents, and other school district employees to understand. Frequently, the superintendent is the person who deals with the lawyer on a

regular basis. When the lawyer confers with the administrator, however, the administrator's, or other employee's, communications are being made on behalf of the board, and the attorney is providing legal advice to the school district as an entity, not to the administrator as an individual. As a result, potential conflicts of interest may arise. In most instances the school board and its administrators have the same interests, and the lawyer works closely with key staff, not with board members, to handle the day-to-day legal problems of the school district. There may be situations, however, in which the interests of the individual administrator(s) or board member, on one hand, and those of the board, on the other, are in conflict. In those instances, board members and administrators must understand clearly, at the outset of legal representation, that the lawyer works for the board as an entity, and usually not for any of its individual members (although the representation may be of the individual member if he or she is named in that capacity in litigation). Thus, the attorney-client privilege extends to board members and key staff who work as agents for the school board and whose interests are consistent with the interests of the school board.

The attorney-client privilege also protects legal advice and related communications from the attorney to the client. Business or policy advice is not privileged, however. For example, a letter discussing the legal implications of teaching creationism is privileged; the lawyer's non-legal opinion of the wisdom of such teaching is not.

The attorney-client privilege may be waived. The attorney-client privilege is "owned" by the client, and can be waived only by the client. When the client is an individual, the individual can decide when to waive the privilege. In the case of school districts, the school board, in its official capacity, "owns" the privilege, and only the board can decide to waive the privilege. Under some circumstances, however, the privilege can be waived unintentionally, by the client, its employee, or its attorney, if the privileged communication is disclosed to a third party – for example, by disclosing attorney-client privileged information to a third party in a casual conversation. Thus, a simple discussion of attorney-client privileged information by a board member and his or her spouse may be sufficient to waive the privilege. Similarly, placing written attorney-client privileged communications in a general file where they are accessed by employees outside the privilege could also waive the privilege. Accordingly, anyone with access to attorney-client communications must be instructed on the importance of keeping those communications confidential.

When the attorney-client privilege is waived or lost, the communication is no longer confidential. Thus, during an ongoing legal matter or lawsuit, the school board or its agents could be compelled by a court to reveal the confidential communications for which the privilege has been waived. Likewise, if the privilege is waived after the conclusion of a lawsuit, such information could be used by opposing parties in future litigation.

School board members and key staff who are entrusted with attorney-client communications must take care to keep those communications confidential. Individual board members and district employees should consult with counsel before sharing attorney-client privileged information with any third party.

The Education Law Quarterly provides general information of interest to our clients and should not be used or taken as legal advice for specific situations, which depend on evaluation of precise factual circumstances.