



Grievance Policy Found To Violate Act 10

Under 2011 Wisconsin Act 10, school districts were required to adopt by October 2011 a grievance policy that established a procedure for “terminations,” “discipline,” and “workplace safety.” Wis. Stat. § 66.0509. However, the statute did not define those terms, and school districts universally undertook to define them in their discretion. In doing so, most policies excluded certain employment actions from the grievance process. For example, “terminations” has been generally defined across the state to exclude situations, among others, in which an employee voluntarily quit, was laid off, and retired. Some school districts defined “discipline” to exclude verbal or written warnings.

With the passage of time since these policies were adopted, we are starting to see issues arise involving the application of the procedures to actual grievances, for example the use of the standard used by the Impartial Hearing Officer and governing body when judging the administrative action. In *Dodge County Professional Employees Local 1323-A, AFSCME, AFL-CIO and Heidi Burden v. Dodge County*, 2013AP535 (Ct. App. Dec. 5, 2013), the court of appeals addressed the ability of a municipal body to define what constitutes a “termination” as that term is used in Wis. Stat. § 66.0509. This FYI will briefly discuss this important development.

The issue arose with respect to Dodge County’s definition of “termination” that excluded from the grievance procedure a “termination of employment due to ...lack of qualification...” Burden’s job required that she not have been convicted of operating a motor vehicle while intoxicated within the past twelve months. When Burden was convicted of OWI, the County immediately dismissed her from employment. Burden sought to grieve her dismissal under the County’s grievance system, but was advised that her dismissal was not a termination under the policy so as to allow her to utilize it.

Burden filed a declaratory judgment action in circuit court contending that Dodge County’s grievance system violated Wis. Stat. § 66.0509 and asserting that her dismissal constituted a “termination” as used in the statute. The circuit court held that Dodge County had broad discretion to define “termination” under the statute and that by excluding dismissals for “lack of qualification,” Dodge County did not violate the statute. Burden appealed this decision, and the court of appeals ruled in her favor, reversing the circuit court decision.



In reaching its decision, the court of appeals was required to establish what the legislature meant by the word “termination.” In doing so, the court looked to the dictionary which defined a “termination” as the discontinuation of employment or dismissal. Dodge County contended that Wis. Stat. § 66.0509 authorized municipalities to exclude some forms of terminations from its coverage. The court of appeals agreed with the proposition that all forms of separation from employment are not “terminations,” for example, voluntary quits or retirement, and further acknowledged that “in all situations it will [not] be clear whether a ‘termination’ within the meaning of the statute has occurred.” Notwithstanding this, the court of appeals concluded that Burden’s dismissal was a “termination” within the plain meaning of the statute. The court of appeals found significant the fact that the Dodge County policy defined the employment action taken when an employee was found to “lack qualifications” for the position as a “termination.”

School districts were given a short window in which to adopt grievances systems in 2011 and not much guidance from the legislature as to the details of what they should and could address. This case, and the growing body of grievances under the systems, is starting to provide a sufficient background of information to assess policies adopted in 2011. We recommend that sometime in the near future, school districts review with legal counsel their Act 10 grievances policies.

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