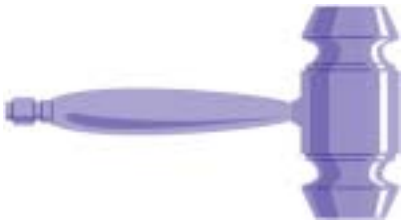
Legal Corner



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School Law Changes Affecting Principals

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I. Student Issues

A. Speech

1. Killion v. Franklin Regional School District, Civil Action No. 99-731 (Western District 2001), SLIE Vol. 38, No. 42 (2001).

Student compiled "Top Ten" list about the Athletic Director's appearance. The list was e-mailed to his friends but the list was not brought onto school property. Several weeks later the list was found in the teacher's lounge. Another student reformatted the original e-mail and brought it on to school grounds. The student was subsequently called to a meeting where he admitted to developing the list but denied bringing it onto school grounds. The student was subsequently issued a 10-day suspension for "verbal and/or written abuse of a staff member" and banned from extracurriculars during suspension.

The student subsequently brought action in Westmoreland County Court of Common Pleas seeking reinstatement. The student brought action claiming his First and Fourteenth Amendment Rights were violated. A consent decree was entered permitting student to return to school and both parties filed cross-motions for summary judgment.

After undertaking an exhaustive and detailed analysis of speech in the school setting, the Court granted the student's motion for summary judgment. The Court held that inasmuch as the speech occurred off school grounds, and since there was no "substantial disruption" as envisioned under Tinker, his First Amendment Rights, were violated. The Court commented although the speech was upsetting, it was not threatening.

2. Flaherty v. Keystone Oaks School District, 2003 WL 553545 (February 26, 2003), SLIE Vol. 40, No. 26 (2003).

The court struck down disciplinary policies in a high school handbook finding them unconstitutionally over broad and void for vagueness. The student posted disparaging comments on the Internet from home and school. The disciplinary code of conduct in the student handbook prohibited using speech or using the Internet in an abusive, offensive or harassing manner. The court held the underlying board policy did not render the handbook policies constitutional, because it was not incorporated into the handbook and also was not narrowly drawn to protect constitutional activity. Specifically, the court held the provisions relating to student expression did not require the school to assess whether the expression in question would be substantially disruptive to the school operations. The terms were not defined sufficiently to give a student fair notice of what is prohibited. There were insufficient limitations on the places and times a school district can discipline a student.

3. Sypniewski v. Warren Hills Regional Board of Educators, 307 F. 3d 243, SLIE Vol. 39, No. 83 (2002).

This is an injunction case, brought by a student who was suspended for wearing a Jeff Foxworthy tee shirt to school. He was suspended under the school's dress code and its racial harassment policy. The district court issued an injunction against enforcement of the dress code but upheld the school's racial harassment policy. The third circuit held that a school's racial harassment policy was constitutional except for the provision forbidding behavior likely to create "ill will." That section was considered vague and over broad and could not be enforced. Because the school had a history of racial tension, its racial harassment policy was drawn narrowly enough to address an issue necessary to avoid substantial disruption to the school and injury to other students. It also permitted the school district to inculcate values to maintain a democratic society. Although part of the policy was found to be vague, the third circuit held that school disciplinary rules need not be drawn as precisely as laws. This policy gave students fair notice of unacceptable behavior and gave school

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officials standards that they could enforce. Although the policy was upheld, its application to the Jeff Foxworthy t-shirt was not. The majority held that it did not fall within the racial harassment policy.

4. Walker-Serrano v. Leonard, 325 F. 3d 412 (SLIE Vol. 40, No. 37)

The Third Circuit Court of Appeals upheld summary judgment on behalf of the school district in this first amendment case. A third grade student argued that interference with her circulation of a petition protesting a field trip to the circus was a violation of her first amendment rights. The student had the petition on her desk and on the playground at times and in locations that were inappropriate. She spoke to the board of school directors about her position and she was permitted to pass out coloring books and stickers regarding her views. The majority reasoned that while elementary students' freedom of conscience is constitutionally protected, anything which interferes with the legitimate educational and disciplinary functions of elementary schools, could be regulated. The extent to which the school regulated the student's speech was acceptable and no First Amendment violation could be sustained. Two concurring opinions were filed.

B. Drugs and Alcohol

1. Giles v. Marple Newtown School District, 27 Pa.Cmwlth. 588, 367 A.2d 399 (1976).

Student smoking marijuana on school property permanently expelled. Lower court reversed the expulsion as too harsh a penalty, but Commonwealth Court reversed, noting the board's broad discretion in determining the appropriate penalty, and stated that the board obviously believed the student might become a conduit for drugs into the school, thereby creating a potential hazard to the student body at large.

2. T.S. v. Penn Manor School District, 798 A.2d 837 (Pa.Cmwlth. 2002), SLIE Vol. 39, No. 57 (2002).

The court affirmed a student's expulsion from school stemming from his purchase of a look-a-like drug while on school property. The court held the district was not required to produce confidential information about students who were subject to discipline sanctions. The court further found the student had reasonable notice of the district's policy prohibiting the possession of "drug look-a-likes" based on the student's admission he received the school handbook outlining the applicable policy.

3. Robinson v. Hampton Township School District, No. 1527 CD 2001 (September 12, 2002) SLIE Vol. 40, No. 10 (2003).

Commonwealth Court upheld a court of common pleas decision that overturned discipline of students who drank alcohol off school property. The students had alcohol on their breath during their participation in marching band. They admitted to consuming alcohol in a wooded area about one-half mile from the school grounds. The drug and alcohol policy prohibited students from possessing, using or being under the influence of alcohol while on or about school property. The policy did not define the term, "under the influence." The court held that mere consumption of alcohol cannot be equated to being under the influence. It further held there was no evidence that the students were under the influence. It found that the wooded area where the alcohol was consumed was not used by the school district and could not be defined as being "about" school property.

C. Other

1. Schmader v. Warren County School District, 808 A.2d 596, (Cmwlth.Ct. 2002).

Student sought review of school district's decision to discipline him for allegedly violating school district's disciplinary code. The provision of the school district's disciplinary code subjecting student to discipline for "inappropriate behavior, not otherwise specifically addressed in this Code," including "behavior that may be harmful to others," was not unconstitutionally vague as applied to eight-year-old student who was disciplined for failing to tell someone that his friend planned to throw a dart at another student. Student was old enough to know that knowledge of another child's intent to throw a dart at a third child was behavior that may be harmful to others and that could result in "trouble" at school. The Court of Common Please of Warren County Judge Millin rescinded the school's disciplinary action against the student. The school district appealed.

The Commonwealth Court held that: **(1)** disciplinary code section which student allegedly violated was not unconstitutionally vague as applied to the student; and **(2)** disciplinary action against student involved no constitutional deprivation of any type of property right requiring judicial redress. Disciplinary action taken against student, three days of 15-minute after school detention, did not rise to a constitutional deprivation of any type of property right requiring redress through the judicial system.

2. School Uniforms

An increasing number of school districts have opted to implement uniform policies in their schools. While this has been met with some outcry and opposition from anti-uniform advocates that say such policies infringe upon freedom of speech and expression, more courts are upholding such policies. However, uniform policies must be carefully drafted to ensure the rights and concerns of parents and students are addressed. One such example of a policy used at The Forney Independent School District in Texas that was upheld in the 5th Circuit included provisions such as:

- Opt-out options for students for religious or other valid reasons.
- Financial assistance for families unable to afford the uniforms.
- Exemptions for students to wear "the uniform of a nationally recognized\youth organization" (i.e. Boy or Girl Scouts) on regular meeting

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days provided such uniform complied with dress code standards like the 3" rule for the length of the uniform.

The Pennsylvania School Code contains a uniform provision at 24 P.S.\§13-1317.3 which states:

> *The board of directors in any school entity may impose limitations on dress and may require pupils to wear standard dress or uniforms. Dress policies may be applicable throughout the school entity or may be applicable to one or more school buildings within the school district.*

Notes of decision following this statue refer to only one case decided in August 2002. In Scicchitano v. Mt. Carmel Area School Board, the Third Circuit determined in an unreported opinion that children lacked standing to bring First Amendment and equal protection challenge to a provision of the school district's dress code that prevented them from wearing certain slogans on their clothing when they no longer attended school in the district, nor did students still attending school in the district have standing when they did not violate the rule and were not subject to discipline. The school district had imposed a dress code on grades K-6.

Scicchitano challenged the dress code by wearing a slogan "Followers wear uniforms, leaders don't." The school district found that slogan to be offensive and disruptive and banned it but allowed other slogans in protest of the policy. The court was never able to render a decision on this policy as by the time this case got to court the Scicchitano children were no longer in the Mt. Carmel School District and lacked standing. The one other child who challenged the policy could not provide evidence that she ever wore a slogan in protest of the policy and so she lacked the necessary standing as well.

3. The Pledge of Allegiance: "One Nation Under???"

On June 23, 2002 the 9th Circuit held in Newdow v. U.S. Congress that the words "under God" in the Pledge of Allegiance violated the Establishment Clause because uttering these words required students to swear allegiance to "monotheism" and Christianity. Despite urges by the Bush Administration to reconsider its decision, the 9th Circuit Court of Appeals declined to reconsider.

4. Rhames v. School District of Philadelphia 2002 WL 1740760 (SLIE Vol. 40, No. 7)

The U.S. District Court for the Eastern District of Pennsylvania granted a motion for summary judgment on a student's claims of false arrest, false imprisonment, unlawful detention, malicious prosecution and intentional infliction of emotional distress. The student (plaintiff) was walking to class when he met another student who raised his hand as if to hit plaintiff. Plaintiff struck the other student. That student's companion then hit plaintiff in the head with the butt of a gun. By the time security was called, the others had fled. Based on his own description of the incident, the plaintiff was arrested, charged with assault and removed from the school in the presence of other students and staff. The assault charge was dismissed in court.

In order to sustain his cause of action, the plaintiff would have to establish that there was no probable cause for his arrest. He failed to offer any evidence in response to defendants' motion to dismiss, and court submissions that asserted probable cause existed for his arrest. The court agreed there was probable cause for an arrest based on the record before it and mere allegations to the contrary were an insufficient response to the motion for summary judgment. Accordingly, the case was dismissed.

II. Recent Developments in the Employment Arena

A. Pressuring School District Employee to Retire is Not Constructive Discharge

When a superintendent pressured another administrator to retire and the administrator subsequently resigned, the federal court in Philadelphia has held that this conduct does not constitute a "constructive discharge." In this case, the superintendent gave many memoranda to the other administrator regarding deficiencies on the job, and ultimately recommended that the employee retire.

The federal court in denying the employee's claim against the school district, held that pressuring to retire is not akin to giving no choice to the employee. The Court still found that the resignation was a voluntary resignation and was not a violation of any constitutional rights.

Importantly, the Federal Court in this case of Speziale v. Bethlehem Area School District, decided June 2, 2003, (Eastern District of Pennsylvania), stated that "the rule of the federal court is not to ensure that employees are to be treated with civility, compassion or reason." The federal court upheld the fact that there must be a violation of federal constitutional right or statute in order to have the courts intervene.

Further, the court rejected a claim under the Family and Medical Leave Act in this case. The employee in this case made no claim for leave, despite the fact that the employee has missed a great amount of work at the school district. The federal court upheld the fact that an employee must give an employer knowledge that a Family and Medical Leave may be at issue before the school district must take action to determine whether a Family and Medical Leave Act claim exists.

B. Federal Courts Find Retaliation Claims Under ADA Do Not Need Disability To Exist

In the case of Shellenberger v. Summit Bancorp, the Third Circuit found that even though an employee who claimed a disability by way of sensitivity to fragrances did not establish a valid "disability" under the ADA, he could bring a claim for retaliation against his employer. The court held that an employee needs to only bring a good faith request for an accommodation under the ADA to be eligible to bring a "retaliation" claim. The court specifically found that the establishment of a disability is not a prerequisite to a retaliation claim, only that the employee intended to establish his rights under the Americans with Disabilities Act.

This decision only reinforces the fact that one of the easiest ways an employee can bring a lawsuit is by way of a "retaliation" claim. Management must be diligent to avoid any actions that could be linked to retaliating against

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an employee's claim under any Civil Rights statute, even though the claim might not be valid.

C. Employers Can Monitor "Instant Messaging" At Work

Several Court decisions have found that employers have the right to not only monitor e-mail communications of employees at work, but install software to monitor instant messaging. Courts have noted that employees are likely to be transmitting messages that may lead to litigation such as discrimination and harassment lawsuits, and the employers have a legitimate interest in protecting against such litigation with its employee communications.

However, because of the conversational nature of instant messaging, it can be perfect for plaintiff lawyers looking for evidence of a company's wrongdoings. Employees and employers need to be aware that instant messaging "creates a business record" and that the record constitutes "corporate DNA." If an employer gets sued, instant messaging can be used as evidence.

D. EEOC Has Proposed Regulations To Exempt Health Plans From Age Discrimination Claims

The EEOC has proposed a rule that would exempt from the Age Discrimination in Employment Act cases reduction in benefits or elimination of company-sponsored health coverage when retirees become eligible for Medicare or state-sponsored health plans. This notice has been placed in the Federal Register and the comment period is still taking place.

The EEOC has noted that the proposed exemption seeks to remove an incentive to reduce or eliminate pre-Medicare retiree health coverage. The change would make it clear that the ADEA permits employers to freely coordinate provisions of retiree health benefits with Medicare eligibility.

Under the prior Erie County case, employers cannot reduce health insurance benefits at Medicare age or risk an age discrimination lawsuit.

E. Sexual Stereotyping An Employee As Gay Does Not Result In Sexual Harassment Case

An employee who filed a sexual harassment claim that he was perceived, incorrectly, to be gay by co-workers was found to have no basis for a sexual harassment case in the recent Seventh Circuit decision in Hamm v. Weyauwega Milk Products, Inc. The court found that the harassment that the employee allegedly experienced could be linked to the perception that he was gay and that the co-workers' concern that he was not pulling his weight at work was the reason for some of the negative comments. The court also noted thinking someone is gay is not enough to prove the co-workers believed he did not fit the sexual stereotype of a man.

F. Federal Courts Continue To Invalidate Department Of Labor Regs On FMLA

Federal courts across the country have continued to rule various Department of Labor regulations on the FMLA invalid. After the Supreme Court decision in Ragsdale, which found that an employer could retroactively designate FMLA leave, the federal courts have proceeded to invalidate various other regulations. In particular, the regulation requiring a response to an FMLA request of two business days has been invalidated recently by a federal court.

We are currently involved in litigation against the Department of Labor over the ability of an employer to contact a physician after an initial certification for FMLA has been submitted. The Department of Labor takes the position that an employer may not contact a physician once FMLA leave has been approved. We have challenged the validity of such regulation, on the basis that this ruling of the Department of Labor permits an employee to leave work whenever they want to and merely claim FMLA. The Department of Labor has taken the position that the employer should deny the FMLA leave and ask for a second opinion initially rather than grant the FMLA. Thus, employers are safer to initially deny FMLA leave than to grant it and try to later ask for substantiation.

III. Employee Evaluations

A. Checklist

1. To dismiss a tenured professional employee on grounds of incompetency and/or unsatisfactory work performance requires two **consecutive** unsatisfactory ratings. However, it takes only one unsatisfactory rating to dismiss a temporary professional employee.

2. Anecdotal records are required by Regulation (22 Pa. Code 351.26(c)). Anecdotal records may be personal notes of the building principal, rating documents in the form of formal observations, admissions by the teachers, notes from students or parents, etc. The lack of such anecdotal records will render the unsatisfactory rating ineffective. Carmody v. Riverside School District, 453 A.2d 965 (1982).

3. Total numerical score for each category is clearly designated in the block at the bottom of each category column on the PDE-5501. Although such numerical scores should be set forth on the rating form (22 Pa. Code 351.22(e)), the absence of numerical scoring will not *per se* invalidate an unsatisfactory rating where they are otherwise accompanied by supporting anecdotal records. *See*, Phillis v. Mechanicsburg Area School District, 617 A.2d 830 (1992).

However, *see* Bonita Bassion v. Northeast Bradford School District, TTA 16-91, SLIE Vol. 31, No. 88 (1994), wherein the Secretary dismissed an incompetency charge against a professional employee because there were no numerical scores and the anecdotal record was not adequate.

4. The rater has clearly identified on the PDE-5501 the deficiency at issue by placing a check mark in the block provided at the top right corner of that particular category. (22 Pa. Code 351.22(d)). As a guide, the rater should also clearly identify on the face of the PDE-5501 by underlining, circling or noting the particular descriptor in each category that is of concern or in need of improvement.

5. Approval (signing) of unsatisfactory rating by superintendent. Although it goes without saying, the rater ensures that all appropriate items on the PDE-5501 are properly completed. For example:

- ✓ *Is the appropriate rating period filled in?*
- ✓ *Is the appropriate block checked, satisfactory versus unsatisfactory?*
- ✓ *Is it dated and signed?*

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✓ *Did the proper individual rate the employee?*

Reference Lower Merion School District and Lower Merion Education Association, PSA Vol. 19, No. 28 (1992), wherein Arbitrator held that district violated agreement when it used the observation of central office administrator in support of the observation of a principal. Contrary to the contract, the contract did not permit the use of the other person's observation. *See* Juniata-Mifflin Counties Area Vocational Technical School and Association of Mifflin County Educators, PSA Vol. 21, No. 7 (1994), wherein Arbitrator found that anecdotal records supporting the rating were incomplete because the chief school administrator's observation of grievant in a letter to the director were not part of the file. In Harmony Area School District and Harmony Area Education Association, Public Sector Arbitration Vol. 22, No. 35 (1995) the arbitrator held that employee's unsatisfactory rating should be changed to satisfactory because the contract language required evaluations to be based solely on a personal observation of the evaluator.

6. Employee shall be afforded the opportunity to sign his rating form. (22 Pa. Code 351.22(h)). If the employee refuses to sign the form, appropriate administrators shall record and date such refusal and the employee shall be notified in writing of this notation within 10 days. (22 Pa. Code 351.22(i)).

7. When dealing with temporary professional employees, proper care must be taken to comply with the mandates of PSC ' 1108. Among other things, PSC ' 1108 provides that no TPE shall be dismissed unless notification in writing of such unsatisfactory rating shall have been furnished to the employee "**within 10 days of the date following such rating.**" Said notice should reflect that the employee's contract is not being renewed. The employee is entitled to a written statement of charges signed by board president and secretary of board, **sent certified mail**, setting forth explicitly the reasons for such refusal to grant a contract affording him/her the opportunity for a school board hearing relative to same.

8. Depending on wording within the collective bargaining agreement, dismissal, issuance of rating and/or dismissal of employee, i.e. Nonrenewal of contract for TPEs may not be grievable. Keep in mind it is absolutely critical to raise substantive arbitrability as early on in the process but in no event later than submission to the Arbitrator. Relative to issue of arbitrability of TPE dismissal, *See* Juniata-Mifflin Counties Area Vocational Technical School v. Robert W. Corbin,* SLIE Vol. 34, No. 30 (1997)(-); Clearfield Area School District v. Clearfield Area Education Association and John Goss, SLIE Vol. 34, No. 3 (1997)(+).

> ***Commentary:*** *Association counsel often times incorrectly attempt to argue to arbitrators that the terms "dismissal" and "discipline" are synonymous. Citing Oxford Board of School Directors v. Commonwealth of Pa (PLRB), 376 A.2d 1012 (1977); see contrary Neshaminy Federation of Teachers v. Neshaminy School District, 462 A.2d 629 (1983).*

Reiterating that the "essence test" as the appropriate standard of review the Court stated that an arbitration award must be affirmed so long as it could in any rational way, be derived from the collective bargaining agreement "viewed in light of its language, its context, and any other indicia of the parties' intention."

Hanover School District v. Hanover Education Association, 2002 WL 31921217 (SLIE Vol. 40, No. 18) Commonwealth Court held that unless it is excluded by express language in a collective bargaining agreement, just cause is implied in every CBA. The case involved the disciplinary suspension of a professional employee. The school district argued that the matter was not arbitrable because the CBA did not include a just cause provision. The arbitrator determined it was arbitrable but decided in the school district's favor on the merits. On appeal, both the Court of Common Pleas and Commonwealth Court held just cause is implied in the CBA at issue since there was no language expressly excluding it.

9. When confronted with a violation of a policy, procedure or supervisory directive, deal with it at the time. Keep in mind arbitrators have a difficult time justifying two types of adverse personnel actions for the same incident. *See* Penn Argyl School District, PSA Vol. 23 No. 20 (1996) wherein Arbitrator upheld a ten (10) day suspension but ordered the District to revoke an unsatisfactory rating based on the same incident. *See also* Mountainview Education Association, PSA Vol. 24, No. 14 (1997) wherein the Arbitrator sustained a grievance finding that a disciplinary suspension cannot be used as the sole basis underlying an unsatisfactory rating.

10. Beware of "Due Process"

11. Unsatisfactory evaluations must conform to contractual language used in collective bargaining agreements if such language has been negotiated.

If the evaluation does not conform to an agreement's contractual language, arbitrator's may order the district to revoke an unsatisfactory evaluation. For example:

- A school district had to rescind an unsatisfactory evaluation because it was not issued according to the collective bargaining agreement's guidelines. Although the agreement required a written observation conference summary before a final evaluation was issued, the district did not hold one. Consequently, the district had to rescind the unsatisfactory evaluation. See Penn-Delco Sch. Dist. V. Penn-Delco Educ. Ass'n, at 14 (Skonier, Arb. 1995).

- A school district had to change an unsatisfactory evaluation to satisfactory because the rating was not based on the evaluator's personal observation, violating the agreement. See Harmony Area Sch. Dist. V. Harmony Area Educ. Ass'n, at 9 (Newman, Arb. 1995).

12. Rating teacher performance outside of the classroom

- Upon preparing teacher ratings, Lancaster School District was permitted to consider incidents occurring while a teacher acted in a co-curricular capacity, within the

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teacher's ratings. Consequently, a high school music teacher was given an unsatisfactory rating on a summative evaluation. This rating occurred because parents believed that the teacher, while acting as band director, failed to supervise students during a band outing. The unsatisfactory rating, therefore, was partly due to the teacher's actions while acting as band director. See Sch. Dist. Of Lancaster v. Lancaster Educ. Ass'n., at 2-3; 5 (Spilker, Arb. 1996).

13. Recent Cases Relating to Evaluation

- **Zugarek v. Southern Tioga School District, 214 F. Supp. 2d 468 (SLIE Vol. 40, No. 8)**

The U.S. District Court for the Middle District of Pennsylvania dismissed the amended complaint in this First Amendment and defamation suit. Zugarek, a teacher with the school district, alleged that after being fired and reinstated, the principal subjected her to a strict and continuous evaluation process. She asserted that this was retaliatory and violated her right to due process. The court held that rigorous evaluation does not rise to a level of adverse action sufficient to sustain a claim of retaliation. It further found that the speech in question was not one of public concern, and that plaintiff's due process rights were not denied. Pennsylvania common law extends absolute immunity for high public officials, including school board members and the district superintendent for conduct that is within the scope of their duties or authority. Because their conduct was within the scope of their duties or authority, the superintendent and the school board could not be held liable under the claims for defamation, intentional infliction of emotional distress and loss of consortium.

- **Chambersburg Education Association and Chambersburg Area School District (PSA Vol. 30, No. 4) James H. Jordan, Arbitrator**

1. Arbitrability, 2. Ratings

After attaining tenure status, this teacher received unsatisfactory performance ratings, which resulted in her being placed under intensive supervision. She grieved this, arguing that the district had to have just cause to place her on intensive supervision. The district asserted if it did not have this, then placing her on intensive supervision constituted discipline. The district challenged the timeliness of the grievance and its arbitrability. The arbitrator held that the intensive supervision program is not disciplinary and the matter is not arbitrable. The intensive supervision plan was meant to increase the teacher's effectiveness, not to punish or reprimand her.

- **Red Lion Area School District v. Red Lion Area Education Association, Nov. 27, 2001 (PSA Vol. 29, No. 8) Thomas G. McConnell Jr., Arbitrator**

1. Ratings (satisfactory), 2. Just cause: The arbitrator found the school district was justified in attaching a critical memo to a teacher's annual evaluation form, but should not have revised the evaluation for conduct occurring at an athletic event. The arbitrator held the district was justified in noting the teacher's refusal to sign her rating form, but could not draw any negative connotation from the refusal.

- **Methacton Education Association v. Methacton School District, (PSA Vol. 29, No. 25) Margaret R. Brogan, Esq., Arbitrator**

1. Salary, 2. Ratings (satisfactory), 3. Arbitrability: The arbitrator held that the school district justifiably withheld health from a physical education teacher, one-half of a scheduled pay increment based upon her receipt of a "Satisfactory with Needs" evaluations during the prior school year. The arbitrator found the rating was appropriate based upon an offensive comment the teacher made to students during a physical education class.

IV. Discipline

A. General Principles Governing Discipline

In both unionized and non-unionized workplaces, the disciplinary actions of supervisors and managers must be governed by three basic principles: *Just Cause, Due Process and Progressive Discipline.*

1. JUST CAUSE

In order for a supervisor's discipline to be upheld in an arbitration, just cause must exist for issuing the discipline. If the employee is a member of a protected class, the employee may file a complaint charging that the discipline was a form of discrimination. The employer must in effect show that just cause existed for the discipline in order to rebut a charge of discrimination.

Arbitrator Carroll R. Daugherty in Enterprise Wire Co., (46 LA 359 (1966)) formulated the following questions which can be used by both unionized and nonunionized employers to determine whether just cause exists:

a. Was the employee forewarned by the company of the possible disciplinary consequences of the employee's conduct? Can the company prove documentation that such notice was given?

b. Is the rule reasonably related to the operation of the company's business? Was application of the rule reasonable under the particular circumstances of the case?

c. Did the company make a reasonable effort to determine whether the employee did in fact violate the rule?

d. Was the investigation conducted fairly and objectively by the company?

e. Did the "judge" at the investigation obtain substantial evidence or proof that the employee was guilty as charged? Can the company produce adequate proof or evidence that the employee was guilty of violating the rule?

f. Has the company applied the rule and penalties consistently, evenhandedly, and without discrimination to all employees? The discipline a supervisor imposes, or does not impose, has an impact on the future ability of the company to administer discipline for the same offense.

g. Was the degree of discipline administered by the company consistent with the seriousness of the offense and the past record of the employee?