Employment Terminations: Tips for Getting it Right

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I. Introduction

A school district is considering the difficult decision of terminating an employee for a misconduct or performance issue. In every termination action, a district will consider whether termination is the best course of action and what will be the likelihood of a successful termination. This presentation is a “big picture” look at termination with a general overview of termination law, tips as to practical considerations, and a practice termination scenario.

Some basic questions that a school district will want to consider at the beginning of a proposed termination:

- What are the legal options for how to proceed with the particular termination action?
- What legal protections does the employee have as to the specific employment arrangement, either by law or contract?
- Has or will the district be able to timely and properly comply with the procedural requirements for the specific proposed termination?
- Is the documentation for the termination complete and convincing?
- Are there reliable, credible, and cooperative witnesses who will be available to support the termination?
- Does the employee have defenses that raise questions as to the legality or fairness of the termination?
- What is the recommendation/evaluation of administration and legal counsel as to the proposed termination?
- Is there a heightened media or public interest in the employment or termination of the employee?
- Is the employee represented by an experienced and strong attorney?
- Who may hear and review the termination, and will those authorities be likely to support the termination?

1 Termination is generally used throughout this paper to refer to the involuntary dismissal from employment of a school district employee related to performance or misconduct. In some instances, however, the separation from employment is not legally categorized as a termination, but instead is a nonrenewal of employment after the expiration of a contract term period. For at-will and probationary contract employees, the dismissal may be for additional reasons based on the needs or best interests of the district. The specific classification as a termination, nonrenewal, or other type of dismissal will be dependent on the particular circumstances of each situation.
• Who has the best “story” for or against termination, the district or the employee?

• After a thorough case evaluation, is termination still the best option or should the district reconsider other options such as reassignment or disciplinary action?

II. Overview of School District Employment and Termination Law

A. Termination Background

The law on employee termination includes notice and hearing requirements, standards as to reasons and burden of proof, and rights of appeal. The scope and degree of due process requirements and employee rights vary significantly depending on the employee’s job position and contract status. For those employees with a contract, there are also greater rights based upon a mid-contract versus an end of contract termination. The greater the employee’s rights and procedural protections, the more time consuming and expensive a termination action will be for the school district.

For example, a mid-contract termination of a Chapter 21 term contract teacher requires good cause and an independent hearing examiner proceeding. In contrast, there is generally no due process hearing for a non-contractual, at-will employee who may be discharged at any time for any reason that is not illegal. These differences must be factored into a case by case assessment of the costs of a particular termination action and the likelihood of success. At the earliest possible stage, a school district should consult with its local counsel as to the specific termination process, the evaluation of the strengths and weaknesses of a case, and a legal recommendation for achieving the district’s personnel objective of employment separation.

For additional information, the Appendix, an Employment Termination Chart, is a quick reference tool that outlines in general the similarities and differences for termination of employees who are at-will, non-Chapter 21 contracts, Chapter 21 probationary contracts, and Chapter 21 term contracts. In the TASB Policy Manual under Personnel, the “DC” series covers the law and local policy for each of the employment arrangements and the “DF” series addresses the different termination requirements.

This presentation does not address employee termination based upon financial exigency or reduction in force which require different processes and determinations as covered in TASB Policies DFF, DFFA, DFFB, and DFFC.

B. Employment Arrangements Impact Termination Process and Rights

School districts are governed by employment laws that are unique to public education. Unlike private employers, a main portion of a school district’s workforce, teachers as defined by Chapter 21 of the Texas Education Code, must be employed
by contract. These Chapter 21 contracts include heightened due process protections. Even school district employees without a contract have the constitutional right to have a grievance heard by the board of trustees. Tex. Const. art. I, § 27.

School district have the following employment arrangements:

- **At-Will**—no written agreement for an agreed period of time (no term contract)
- **Non-Chapter 21 Contract** for an agreed period of time (term contract)
- **Chapter 21 Probationary Contract**
- **Chapter 21 Term Contract**
- **Chapter 21 Continuing Contract** (by policy most school districts no longer offer)

### C. General Employment Arrangements: At-Will vs. Contract

School district employees are hired under two general employment arrangements: at-will and contract. Certain district employees are employed at the will of the school district, meaning they may quit or be terminated at any time.

In Texas school districts, however, most professional employees, including all full-time classroom teachers, are employed by written employment contracts as required by law. Contract employees are entitled to certain rights and due process protections that are not provided to at-will employees.

### D. Board v. Superintendent Hiring Authority

Unless delegated to the superintendent in local policy, the board has final authority for hiring decisions. The board may delegate final authority for selection of some or all personnel to the superintendent. The superintendent may make final hiring decisions only to the extent the board has delegated that authority. See TASB Policy DH(LOCAL). The superintendent has sole authority to make recommendations to the board regarding selection of personnel. Tex. Educ. Code § 11.1513.

### E. At-Will Employment

Districts employ most hourly, and some salaried, employees on an at-will basis. At-will employees are those who do not have written contracts or other agreements for employment for a set period of time. *Gonzalez v. Galveston Indep. Sch. Dist.*, 865 F. Supp. 1241 (S.D. Tex. 1994). Generally, an employment relationship triggers no due process requirement or right. *Mott v. Montgomery Cnty*, 882 S.W.2d 635 (Tex. App.—Beaumont 1994, writ denied). Either party may terminate an at-will employment relationship, for any reason or no reason, so long as it is not an illegal
reason, such as race, sex, or age discrimination. *Winters v. Houston Chronicle Publ’g Co.*, 795 S.W.2d 723 (Tex. 1990); *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984); *Garcia v. Reeves Cnty*, 32 F.3d 200 (5th Cir. 1994). Most districts hire the following employees on an at-will basis:

- part-time professionals;
- paraprofessionals; and
- auxiliary employees.

1. **Hiring**

Most school districts have delegated hiring authority to the superintendent for at-will positions. See TASB Policy DC(LOCAL).

2. **Termination**

By law, the superintendent initiates termination of all employees. Tex. Educ. Code § 11.201(d)(4). In most districts the board delegates to the superintendent the authority to terminate at-will employees in the district’s DC(LOCAL) policy. The superintendent should follow the process for termination of noncontract employees specified in policy. See TASB Policy DCD(LOCAL). Upon the request of the employee, the board shall provide a grievance hearing for a terminated at-will employee.

F. **Contractual Employment**

1. **Contracts in General**

School district employment contracts fall into two general categories: certified personnel contracts under Texas Education Code chapter 21 (Chapter 21 contracts) and general employment contracts. A contract is a written agreement between the district and an employee that establishes specific terms and conditions for the employment relationship. An employment contract, like any other contract, is a legally binding obligation that can be terminated only under certain conditions. The Texas Education Code requires that a district employ certified employees under Chapter 21 contracts.

The board may, but is not required to, adopt a policy that identifies other positions to be employed by a non-Chapter 21 contract. For example, some districts may enter into a term contract for a set period of time with a business manager, financial officer, or technology director. Non-Chapter 21 contracts should not incorporate the statutory requirements in Chapter 21 because that would result in additional legal burdens for the school district as to employment and termination. See TASB Policy DCE(LOCAL).
2. Chapter 21 Contract Entitlement

Employees who must be hired under Chapter 21 contracts include the following: superintendents, classroom teachers, principals, counselors, nurses, librarians, educational diagnosticians, and employees requiring certification under Subchapter B of Chapter 21 of the Texas Education Code or local policy. Tex. Educ. Code §§ 11.201(b), 21.002(a), .101, .151, .201(1). Once a contractual relationship is created under Chapter 21, the employee can be discharged during the contract only if the district follows the notice and hearing requirements set out in the Texas Education Code. See TASB Policies DFAA, DFBA, and DFCA.

Because Chapter 21 contracts incorporate statutory procedures that make termination of employment expensive and time-consuming, TASB Legal Services recommends that districts only provide Chapter 21 contracts to those employees entitled to them. Instead, a board by local policy may provide an alternative, non-Chapter 21 term contract for selected non-Chapter 21 positions that does not incorporate the additional employee rights in Chapter 21.

3. Types of Chapter 21 Contracts

The three basic types of Chapter 21 contracts are probationary, term, and continuing contracts. The three contracts differ primarily in who may receive the contract, the length of the contract, and how the contract may be terminated. A general overview is provided below.

**Probationary Contracts**

Employees new to the district are typically employed under probationary contracts. Tex. Educ. Code §§ 21.101-.103, .106, .202. See TASB Policy DCA(LEGAL). Probationary contracts have one-year terms, renewable for a total of three years. The probationary period may be extended a fourth year if the board deems it necessary. Educators hired with five years’ school experience in the previous eight years are limited to one year of probationary service with the district. A term or continuing contract employee who voluntarily accepts an assignment in a new professional capacity that requires a different class of certificate under Subchapter B of Chapter 21 than the one required by the educator’s previous professional capacity may be employed under a probationary contract. Tex. Educ. Code § 21.102. Teachers may be returned to a probationary contract in lieu of termination or nonrenueal if the district complies with procedures that inform the teacher of a proposed action to end employment and the teacher agrees to be returned to probationary status. Tex. Educ. Code § 21.106.
Probationary contracts may be terminated at the end of the contract term if the board determines termination is in “the best interests of the district.” The board must give notice of its decision to terminate not later than the 10th day before the last day of instruction required under the contract. Exhibit A of TASB Policy DFAB(EXHIBIT) provides a form for Notice of End-Of-Year Termination of Probationary Contract. Probationary contracts automatically renew at the end of the contract term absent board action. Tex. Educ. Code § 21.103.

**Term Contracts**


**Continuing Contracts**

Continuing contracts are issued to experienced educators who have served at least one probationary year. Similar to tenure status in higher education, continuing contract status is indefinite—the contract continues until it is terminated by the employee’s resignation or by the district for good cause. Tex. Educ. Code § 21.154. By policy most districts have elected to award term rather than continuing contracts. See TASB Policy DCB(LOCAL).

**G. Ending Contractual Employment**

1. **Nonrenewal v. “Good Cause” Contract Termination**

   Educators employed under term contracts leave districts involuntarily by one of two ways—nonrenewal or termination. It is important to understand the difference between nonrenewal, which occurs at the end of a contract, and termination, which occurs during the contract. A term contract automatically renews at the end of the contract term unless the district takes affirmative steps to prevent renewal. Therefore, nonrenewal is a decision not to rehire an employee at the end of his or her current contract. An employee may be nonrenewed only for reasons set forth in local policy.

   By contrast, termination occurs during the contract term and is essentially the same as discharge (i.e., being fired). A mid-contract termination of a term contract requires a showing of good cause based upon egregious misconduct, very poor performance, or other unusual circumstances.
2. Nonrenewal of Term Contracts

The board may nonrenew a term contract at the end of a school year for any one of the pre-established reasons set forth in local policy. See TASB Policy DFBB(LOCAL). The Texas Education Code gives boards discretion in adopting reasons for nonrenewal and requires only that the reasons not be arbitrary and capricious. Tex. Educ. Code § 21.209. The reasons listed in the local policy are the only grounds for nonrenewal—a district may not nonrenew a term contract for a reason not listed. Grounds v. Tolar Indep. Sch. Dist., 856 S.W.2d 417 (Tex. 1993). The pre-established reasons for nonrenewal in the district’s local nonrenewal policy are a lower standard than the “good cause” required for a mid-contract termination. Williams v. Galveston Indep. Sch. Dist., Tex. Comm’r of Educ. Decision No. 078-R1-504 (July 7, 2004).

Nonrenewal of a term contract requires two separate board actions: (1) proposed nonrenewal and (2) after completion of the nonrenewal hearing process, the board’s decision as to nonrenewal. The board must give notice of proposed nonrenewal not later than the 10th day before the last day of instruction in a school year. Tex. Educ. Code § 21.206(a). The board’s failure to timely provide this notice constitutes an election to employ the term contract employee in the same professional capacity for the following school year. Tex. Educ. Code § 21.206(b). Exhibit A of TASB Policy DFBB(EXHIBIT) provides a form for Notice of Proposed Contract Nonrenewal.

After compliance with Chapter 21 notice and hearing requirements, the board must give timely notice of its decision to renew or not renew the teacher’s contract. If the teacher does not request a hearing, the notice must be provided not later than the 30th day after the date the notice of proposed nonrenewal was sent to the teacher. Tex. Educ. Code § 21.208(a). If the teacher requests a hearing, notice must be provided not later than the 15th day after the date on which the hearing is concluded. Tex. Educ. Code § 21.208(b). Exhibit C of TASB Policy DFBB(EXHIBIT) provides a form for Notice of Term Contract Nonrenewal.
Nonrenewal Takeaways

- Contracts may be nonrenewed at the end of the contract term only for reasons listed in board policy. The district must follow strict statutory notice and hearing requirements to nonrenew a term contract. Tex. Educ. Code §§ 21.203, .206-.208.
- The superintendent provides for evaluation of all personnel and documentation to support recommendations. Tex. Educ. Code §§ 11.1513, .201(d)(2), (4).

3. Termination During Chapter 21 Contract Term

All three types of Chapter 21 contracts—probationary, term, and continuing—may be terminated during the contract term for good cause. Termination based upon good cause is a higher legal burden than that required for nonrenewal. The standard for what constitutes good cause differs slightly between probationary and continuing contracts, on the one hand, and term contracts, on the other.

For a probationary or continuing contract, good cause is the employee’s failure to meet the accepted standards of conduct for the profession as generally recognized and applied in similarly-situated Texas school districts. Tex. Educ. Code §§ 21.104(a), .156(a). The Texas Education Code does not provide a definition of good cause for purposes of term contract terminations. Instead, the statute refers to “good cause as determined by the board.” Tex. Educ. Code § 21.211(a). Texas courts have applied the following definition for good cause to terminate a term contract:

. . . the employee’s failure to perform the duties in the scope of employment that a person of ordinary prudence would have done under the same or similar circumstances. An employee’s act constitutes good cause for discharge if it is inconsistent with the continued existence of the employer-employee relationship.

4. Independent Hearing Examiner for Mid-Contract Termination

Chapter 21 employees have the right to a hearing before an independent hearing examiner prior to a mid-contract termination. Tex. Educ. Code §§ 21.251-.260. An employee has up to 15 days after receiving notice of the proposed termination to file a written request with the commissioner for appointment of a hearing examiner. Tex. Educ. Code § 21.253. Exhibits A and B of TASB Policy DF(EXHIBIT) provide forms for Notice of Proposed Termination based upon good cause for probationary, term, or continuing contracts.

If an employee does not timely notify the board or request a hearing, the board must still take final action to terminate the employee for good cause. Tex. Educ. Code § 21.211. Exhibit C of TASB Policy DF(EXHIBIT) provides a form for Notice of Contract Termination when no hearing occurs.

The hearing examiner must complete the hearing and make a written recommendation to the board no later than the 60th day after the date the commissioner receives a request for appointment of a hearing examiner. The recommendation must include findings of fact and conclusions of law. The recommendation may include a proposal for granting relief, including reinstatement, back pay, or employment benefits. Tex. Educ. Code § 21.257.

A determination by the hearing examiner regarding good cause for the termination of a probationary, continuing, or term contract is a conclusion of law and may be adopted, rejected, or changed by the board. Tex. Educ. Code §§ 21.257, .259.

5. Board’s Consideration and Decision on Hearing Examiner Recommendation

Following the issuance of the hearing examiner’s recommendation, the board of trustees or a subcommittee designated by the board must consider the recommendation and hearing record at the first board meeting for which notice can be posted in compliance with the Open Meetings Act. The meeting must be held not later than the 20th day after the date that the president of the board receives the recommendation and hearing record. The board or board subcommittee must allow each party to present an oral argument. Tex. Educ. Code § 21.258.

Not later than the 10th day after the date of the meeting, the board or board subcommittee must announce a decision that includes findings of fact and conclusions of law and may include a grant of relief. The board of trustees or board subcommittee must follow the specific statutory procedures in making the decision to adopt, reject, or change the hearing examiner’s findings of fact,
conclusions of law, and any proposal for granting relief. The board of trustees or board subcommittee must state in writing the reason and legal basis for a change or rejection made to the hearing examiner’s recommendation. Tex. Educ. Code § 21.259.

The school district must bear the cost of a certified shorthand reporter to record the oral argument and the announcement of the board’s decision. Tex. Educ. Code § 21.260.

### Termination Takeaways

- **A mid-contract termination must be for good cause.** Tex. Educ. Code §§ 21.104(a) (probationary contract), .156 (continuing contract), .211(a) (term contract).
- **The superintendent provides for evaluation of all personnel and documentation to support recommendations.** Tex. Educ. Code §§ 11.1513, .201(d)(2), (4).
- **The superintendent recommends termination of all employees to the board.** Tex. Educ. Code § 11.201(d)(4).
- **The board provides for appropriate hearings at the request of an employee, which may include any of the following:**
  - Grievance hearings for probationary employees terminated at the end of their contract period;
  - Due process hearings for mid-year termination of probationary or term contracts; or
- **Chapter 21 contract employees have the right to a hearing before an independent hearing examiner before mid-contract termination.** Tex. Educ. Code § 21.251.
- **The board adopts, rejects, or modifies the independent hearing examiner’s recommendations.** Tex. Educ. Code §§ 21.258-.259.

### III. Tips for Employment Termination

The following tips are general practical recommendations for planning, evaluating and taking actions as to a termination. Each termination, however, is subject to varying laws and processes that will need to be reviewed on a case by case basis. Termination is intended to mean the involuntary ending of school district employment by the district, including for term contract teachers the special process of nonrenewal.
A. Test the Termination Case Early With a Complete, Neutral Evaluation

A termination recommendation should be evaluated early with a complete and neutral assessment as to the specific facts and law of the case. Experienced administrators and legal counsel should be involved in a case review and the decision to proceed with the termination. Even when a termination recommendation is the right decision from a personnel perspective, it may be vulnerable to a legal challenge. If the termination is questionable as to a favorable outcome, it is much better to come to that conclusion before expending significant time and money in pursuing a termination rather than other options.

As part of the case evaluation, the termination recommendation should be put to the test from the point of view of the employee, evaluating what weaknesses may be used to challenge the termination action. Obviously, the district should evaluate whether the termination is persuasively supported by available witnesses, strong documentation, district policy, and the law. Often, however, the employee may have other strengths in challenging the termination that are not as readily evident on paper.

The district will want to consider all factors that may influence the outcome, including the following:

1. The employee has support from co-workers or the community.
2. The employee has the resources to proceed with an extended legal challenge.
3. The employee is highly motivated based on a perception of unjust treatment.
4. The lawyer representing the employee is a strong, well-prepared advocate, especially if the lawyer has a history of successful employee representation.
5. The employee or witnesses for the employee are likable, credible and persuasive.
6. The reason for the termination appears to meet the minimum legal standard, but there are issues that raise serious questions about the legality or fairness of the process or the appropriateness of termination.
7. There are no adult witnesses—reliance on student witnesses alone is risky due to age, communication ability, maturity and unpredictable availability.
8. The person(s) who may hear a challenge to the termination are inclined to support the employee or employees in general.

As a precautionary note for early planning, many school district’s decisions to terminate have often been reversed based on an inadvertent procedural error. Such errors can occur early in the termination process, only to be discovered and challenged later. When all procedural requirements are satisfied, it is less likely that a school district decision will be reversed based on the district’s decision on the merits. Consequently, it is very important that a school district consult with its attorney from the start of the termination process until its conclusion.
B. Consider all the Costs Before Making the Commitment to Proceed With Termination

There will be monetary and non-monetary costs for any termination that should be factored into the decision to proceed with a termination. If the termination is challenged, the costs will likely increase significantly.

In the initial case assessment, the district should estimate the fees that may be incurred for lawyers, hearing officer, investigator, and a court reporter, as well as other legal expenses such as the costs of responding to discovery and court fees. The school district bears the cost of the services of a Chapter 21 independent hearing examiner, including travel expenses. Tex. Educ. Code §21.255(e); 19 Tex. Admin. Code 157.1101. The district should evaluate its risk exposure to an adverse judgment including damages, injunctive relief and any other relief that may be granted by administrative or judicial order. In Chapter 21 cases, the relief may include reinstatement, back pay and employment benefits. Tex. Educ. Code §§21.257(b), .304(e). Finally, the district will want to assess the precedent for future cases that may result from the district’s decision to proceed.

The district should also factor into the assessment other non-legal costs: the loss of time for administrators, other employees, and students; the possibility of public conflict with damage to the district’s standing in the eyes of some in the community, and the overall emotional wear and tear resulting from legal conflict. While there may be an initial strong commitment and determination to stand firm with an employment termination, enthusiasm may wane as the costs and time spent increase, and the inevitable question arises as to whether the termination was really worth it.

C. Put the District in a Stronger Position by Limiting Termination Obligations to Those Required by Law

Employment contracts impose obligations and responsibilities on a school district, including additional employee rights and due process protections. For purposes of termination, a school district will be in a better position when it limits its personnel contracts, and the rights under those contracts, to the minimum required by law:

1. Provide Chapter 21 contracts to only those employees entitled to them under Chapter 21.
2. Employ persons not covered by Chapter 21 as at-will employees.
3. If a school district opts to provided personnel contracts for certain employees not covered under Chapter 21, do not incorporate and expressly disclaim Chapter 21 rights.
4. Utilize the maximum probationary periods and probationary contract options as provided by Chapter 21; for example, enter into one year probationary contracts for up to three years for employees new to the district, subject to the Chapter 21 exception for an experienced teacher.

5. Adopt and use Chapter 21 term contracts rather than continuing contracts.

6. Enter in one-year Chapter 21 term contracts rather than multi-year term contracts unless local circumstances or a particular position supports the decision to provide a longer term.

7. If a district opts to enter into a multi-year term contract, it is generally preferable to let the term expire before offering a new contract. When an employee is regularly provided a new multi-year term contract in the middle of existing multi-year term contract, the process effectively places the employee in the position of only being subject to termination for good cause. The district should evaluate and make a deliberate determination that local circumstances or a particular position support the decision to provide such a favorable contractual position to the employee.

D. Utilize Non-Termination Options for More Efficient Resolution and Weaker Cases

If the early termination assessment is not sufficiently encouraging as to a successful outcome, or anticipates a lengthy and costly process, the district has multiple other options to consider for addressing its concerns:

1. Reassignment to a new position, which must be within same professional capacity for Chapter 21 employees.

2. New contract for assignment to different professional capacity agreed to by the employee, which is required for Chapter 21 contract employees.

3. Return of a term or continuing contract teacher to probationary status in lieu of discharge, subject to the required notice process by board or superintendent and teacher agreement.

4. Employee voluntary submission of resignation.

5. Disciplinary action, e.g. written reprimand with directives for corrective actions and termination warning.

6. Postpone termination until a later time when the evidence better supports a termination action for the applicable legal standard.

Sometimes the initial assessment that a proposed termination is strong will change as a case develops. The star witness is no longer available or appears to be unlikely to do well under cross examination. Documentation has critical gaps or new documentation disclosed in discovery supports the employee’s case. Media coverage of the case
turns negative against the district, and public sentiment appears to be in favor of the employee. As the case progresses, the district will want to remain flexible and open to its non-termination options with ongoing and timely reevaluation of the case.

E. Plan the Timing of the Termination for Lesser Legal Burdens and a Stronger Case

1. **At-will:** At-will termination is broad and flexible based on the needs of the district. At-will termination may be at any time. At-will termination does not require notice as to reasons or a termination hearing. This lack of contract-based due process protections, however, may work to a school district’s detriment if it results in overconfidence and weak documentation.

   Termination of any school district employee, including an at-will employee, cannot be for an illegal reason. An at-will employee may seek relief by filing a grievance with the board of trustees or filing a lawsuit based on federal or state law claims. Therefore, an at-will employee should not be terminated until there is adequate, persuasive documentation that support the reason for termination. The documentation should be sufficient to refute an at-will employee’s claim as to an illegal reason for termination, including the following possibilities:

   a. Having a particular race, color, disability, religion, sex, national origin, or age
   b. Refusing to submit to sexual harassment
   c. Filing or cooperating in the investigation of an employment discrimination claim
   d. Participating in active duty in state and federal military forces or the reserves
   e. Refusing to perform an illegal act or inquiring about the legality of an act the employer has required
   f. Reporting a violation of law to an appropriate law enforcement authority (retaliation for blowing the whistle under the Texas Whistleblower Act)
   g. Exercising state or federal constitutional rights, such as the right to free speech
   h. Exercising rights to receive overtime or fair compensation under the Fair Labor Standards Act
   i. Seeking or taking leave under the Family and Medical Leave Act
   j. Organizing, joining, or supporting unions or other employee organizations
   k. Raising a complaint about or assisting in the investigation of a health or environmental law violation
   l. Asserting rights to express breast milk
   m. Any other rights protected by law from adverse employment action
2. **Non-Chapter 21 Contract:** The key termination timing consideration for a non-
Chapter 21 contract employee is whether to terminate during the contract or after
the end of the contract term.

A mid-contract termination of an employee with a term contract must be for good
cause. *Lee–Wright, Inc. v. Hall*, 840 S.W.2d 572, 578 (Tex. App.—Houston [1st
Dist.] 1992, no writ). In addition, constitutional minimum due process requires
oral or written notice of charges against the employee, explanation of the
employer’s evidence, fair opportunity for employee to present his or her side of
story, and a full evidentiary post-termination hearing conducted at meaningful
time. *Brandy v. City of Cedar Hill*, 884 S.W.2d 913 (Tex. App.—Texarkana 1994,
no writ). The employee also has the right to request for the board hearing on the
termination to be conducted in open session. Tex. Gov’t Code § 551.074.

Once a non-Chapter 21 term contract expires, and absent any agreement or district
policy otherwise, the employee is in the much weaker position of being in at-will
status without due process protections. Good cause or a particular cause for
termination is not required after the end of the contract. The district does not have
to provide notice as to the reason for termination or a termination hearing.
Consequently, non-Chapter 21 terminations should be timed to be effective after
the end of the contract term unless serious misconduct warrants an immediate
mid-contract termination.

3. **Chapter 21 Probationary Contract:** A substantial difference exists between the
legal requirements for the termination of a Chapter 21 probationary contract
employee during the contact term versus the end of the contract. For a mid-
contract termination, the district must comply with the notice and hearing
procedures under Chapter 21, including a full-evidentiary hearing before an
independent hearing examiner, the burden to prove good cause, and a board
decision as to the hearing examiner recommendation.

In contrast, a termination at the end of the probationary contract term merely
requires timely notice to the employee of the board’s decision to terminate in the
best interests of the district. The board does not conduct a termination hearing,
make findings, or document the reasons for its decision. Absent serious
misconduct, a school district will be better served by choosing to terminate
probationary contract employees only at the end of the contract term.

4. **Chapter 21 Term Contract:** In contrast to the other employment arrangements,
Chapter 21 term contract employees possess the special right to a nonrenewal
process at the end of the contract term. See II. F. and the Appendix. The
nonrenewal process makes it more difficult to terminate term contract
employment. In general, a mid-contract, good cause termination of a term contract
employee will be even more burdensome than nonrenewal. In some situations,
however, such as egregious misconduct, a serious performance issue, or a need
for more immediate action prior to the expiration of a longer contract period, a mid-contract termination might be evaluated as the better option than nonrenewal. Due to the greater complexity of ending the employment of a Chapter 21 term contract employee, a school district should consult with their local counsel early in the decision making process as to the pros and cons of nonrenewal versus good cause termination.

F. Have Well-Prepared Termination Documentation

Documentation should establish persuasive, legal reasons to support the termination and that a fair, consistent termination process was executed in accord with the law and district policy. Documentation will also be a primary source for determining who will be the likely witnesses and the credibility of their testimony. In a close case with competing stories from witnesses, documentation that aligns with a witnesses’ testimony and supports the district’s reason for termination will often be the tie-breaker in the district’s favor.

If the termination is based on misconduct, there should be documented investigation findings that weigh in favor of the conclusion of misconduct. Written statements by witnesses should be reviewed for consistency, gaps in information, and overall credibility in support of the termination reason.

If the termination is based on performance, it will be important to establish a fair, documented process prior to termination. In general, the performance documentation should make employees aware of performance problems, provide employees with written directives for improvement, assess periodically with feedback provided and opportunity for employee dialogue, notify employees of any rights under policy relative to adverse employment actions, and carefully follow district policies and practices. Documentation should be dated, prompt, specific and show that the employee was timely put on notice of the deficiencies. Performance documentation that is created or disclosed after the initiation of termination will be subject to serious challenge as to credibility.

A typical documentation process followed by supervisors of employees might include the following:

1. Contemporaneous notes on informal counseling and oral directives for correction.
2. Formal written memorandum(s) as to the job performance issue(s), including:
   a. the nature of the allegation and the process of the investigation,
   b. specific findings of fact and conclusions with a timeline of specific events and reference to corroborating documentation or witnesses,
   c. specific directives for future conduct and any remedial activities,
d. an opportunity to comment or respond within a time period, and
e. dated signatures of supervisor and employee.

3. Formal written documentation as to the employee’s failure to perform as counseled and directed, with specific references to policies or standards violated.

4. A termination recommendation with reasons supported by law or policy.

G. Document Specific Violations of Standard of Conduct or Performance Failures

If a decision to terminate an employee is challenged, it will be viewed more favorably when an employee is provided written notice as to standards of conduct or performance and then fails to comply. See TASB Policy DH(LOCAL), Employee Standards of Conduct.

In the process of a recommendation and then decision to terminate, the district should document notice of expected conduct and performance, and any specific standards that the employee has violated or failed to meet, including the following:

1. State and federal laws
2. Contract provisions
3. District policy
4. Ethical standards
5. Administrative regulations
6. Employee handbook/guidelines
7. Job duties
8. Performance requirements
9. Employer directives
10. Acceptable use agreement for technology

At the same time, the district should have documentation that confirms the district’s compliance with its policies, administrative procedures, and employee handbook as to the termination. Documentation that shows failures to comply with the law or policy on the part of the district will obviously hurt the district’s case.

H. Comply with the Law on Consideration of Relevant, Recent Appraisal Evaluations

Teacher evaluations must be considered in the process of nonrenewal and the employment decision of termination. Before making a decision not to renew a teacher’s contract, the board must consider the most recent evaluations if the
evaluations are relevant to the reason for the board’s action. Tex. Educ. Code § 21.203(a). In the case of a classroom teacher, a district shall use the teacher’s consecutive appraisals from more than one year, if available, in making employment decisions. Tex. Educ. Code § 21.352(e).

In a termination of any employee, at-will or contract, a school district should review and assess how recent, relevant employee evaluations may support or not support a termination decision. If the employee has good evaluations, and specifically proficient or higher marks in the areas that pertain to the termination reason(s), then clearly that documentation will weaken the district’s case.

I. Preserve, Collect, and Evaluate all the Termination-Related Documentation

A district typically makes a file that includes documents that are considered to be of prime importance to the termination. A case evaluation by the district and its attorney requires a more comprehensive look at additional or “missing” documentation that relates to a termination. E-mails must be searched. Additional documents that are referred to in the file documents or by witnesses must be located. A district does not want to be surprised by damaging information from its own documents that has come into possession of the employee but is not included in the termination file.

Even if the district does not intend to use the additional documentation in its case, the information may be required to be disclosed in response to a discovery or public information request by the employee. A district should preserve all such documentation and consult with its legal counsel as to the implementation of a litigation preservation hold.

J. Consider Whether the District has the Winning Story for the Difficult Terminations

Some termination cases are close calls with conflicting evidence and greater uncertainty as to the expected legal outcome. In difficult cases, the decision will often not be based on a clear legal answer, but rather the decision maker’s subjective judgment as to the right thing to do. Many different people may review the case, including hearing officers, board members, administrative law judges, federal agencies, the commissioner of education, and trial and appellate courts. Each may have very different beliefs and emotional reactions as to what is a fair process and just decision. If the case involves multiple levels of appeal, the termination decision may prevail at one level and then be subsequently reversed. For each step in the termination review process, a district should evaluate whether it has the story that will be more likely to sway all these potential decision makers in its favor.
A winning story goes further than simply proving the right to terminate. A winning story focuses on the reasons that make the termination the right thing to do. By the end of a presentation, the decision maker should be on your side, in agreement that if placed in the district’s shoes, the same termination decision would have been made. For example, an elderly bus driver may try to portray himself as an underdog working for children who has been wrongfully terminated based on his age. In response, the district will want to present an equally compelling story. If the bus driver is late in violation of his duties, the winning story is not just that the employee violated a rule. The district will want to be able to show a fair process and relatable reasons for reaching the point of termination. A winning story would show that the bus driver was provided multiple opportunities to correct his performance with clear and reasonable directives, but he was insubordinate and continued to be late thereby putting at risk the safety of the students on the bus route.

K. Diligently Comply with the Laws on Open Meetings, Hearing Processes and Records

Many terminations are reversed based on legal procedural issues. This is particularly common as to failure to comply with the Open Meetings Act, the hearing or grievance process applicable to a particular termination, and the making and preservation of a proper record. As the procedures, rights and evidentiary requirements vary for the different terminations, school districts should consult with their attorney as to compliance with the law as to each particular case, including the following as applicable:

1. Prehearing notices or correspondence to comply with district policy and law on due process or statutory requirements.
2. Proper posting for the board meeting as to the subject matter and any action to be taken.
3. Rules as to the conduct of the hearing or grievance. It is recommended that guidelines be provided to the presiding officer as to hearing procedures, open meetings act compliance and the general legal standards for the termination.
4. Recordkeeping of the hearing documentation and the hearing itself.
5. Rules related to hearing and deliberating in open or closed session.
6. Rules as to presentation of evidence, witnesses, representation, and argument.
7. The burden of proof or other legal standard for the board hearing/grievance.
8. Requirements, if any, as to findings of fact, conclusions of law, and decision.
9. Proper motion and vote as to the action taken by the board.
10. Proper notice of the board determination, action or decision.
L. Comply With the Law on SBEC Reporting and Notification of Reporting

When certain misconduct is related to an educator’s termination or resignation, the State Board for Educator Certification (“SBEC”) must be notified. See TASB Policy DHB(LEGAL).

The superintendent must notify SBEC in writing not later than the seventh day after the date the superintendent knew about an employee’s termination or resignation after an alleged incident of the following misconduct:

1. Sexually or physically abused or otherwise committed an unlawful act with a student or minor;
2. Was involved in a romantic relationship with or solicited or engaged in sexual contact with a student or minor;
3. Possessed, transferred, sold, or distributed a controlled substance, as defined by Health and Safety Code Chapter 481 or by 21 U.S.C. Section 801 et seq.;
4. Illegally transferred, appropriated, or expended funds or other property of the district;
5. Attempted by fraudulent or unauthorized means to obtain or alter a professional certificate or permit for the purpose of promotion or additional compensation; or
6. Committed a criminal offense or any part of a criminal offense on school property or at a school-sponsored event.


Before accepting an employee’s resignation that requires notice to SBEC, the employee shall be informed in writing that such a report will be filed and that sanctions against his or her certificate may result as a consequence. 19 Tex. Admin. Code § 249.14(d)(3)(A). A superintendent shall also notify the board and the educator of the filing of a written report with SBEC. Tex. Educ. Code § 21.006(d).