



STATE OF KANSAS

OFFICE OF THE ATTORNEY GENERAL

2ND FLOOR, KANSAS JUDICIAL CENTER, TOPEKA 66612-1597

ROBERT T. STEPHAN
ATTORNEY GENERAL

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MAIN PHONE: (913) 296-2215
CONSUMER PROTECTION: 296-3751
TELECOPIER: 296-6296

ATTORNEY GENERAL OPINION NO. 90- 133

Mr. William H. Dye
Counsel for Unified School District No. 259
700 Fourth Financial Center
Broadway at Douglas
Wichita, Kansas 67202

Re: Schools--Evaluation of Certificated Personnel--
Legislative Intent; Policy of Personnel Evaluation

Synopsis: Every board of education of a school district is required to adopt a written policy of personnel evaluation procedure. The purpose of the evaluation procedure is to provide for a systematic method for improvement of school personnel who remain in a school's employ and to improve the educational system of the state of Kansas. Any other use of the evaluations conducted pursuant to K.S.A. 72-9001 et seq. is not contemplated within the act. Therefore, the use of evaluations in determining the eligibility of a teacher for merit pay will be subject to the terms of the negotiated agreement reached by the school district and the teachers. Relevancy of the evaluations to the issues before an administrative body or court of law will determine whether the evaluations are admissible. Cited herein: K.S.A. 1989 Supp. 60-2101; 72-5413, as amended by L. 1990, ch. 255, § 1; K.S.A. 72-5436; K.S.A. 1989 Supp. 72-5438; K.S.A. 72-5442; 72-5443; 72-8205; 72-9001; 72-9002; 72-9003; 72-9005.

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Dear Mr. Dye:

As attorney for Unified School District No. 259, Sedgwick county, Kansas, you request our opinion regarding the use of evaluations of certificated personnel conducted pursuant to K.S.A. 72-9001 et seq. Specifically, you ask whether evaluations conducted pursuant to K.S.A. 72-9001 et seq. during the fifth or sixth year of employment may be used in determining the merit pay of a teacher. You also ask whether such evaluations are admissible in an administrative hearing or a court of law in a matter regarding a teacher's performance.

Under K.S.A. 72-9003, every board as defined in K.S.A. 72-9002 is required to adopt a written policy of personnel evaluation procedure. The purpose of the evaluation procedure is to provide for a systematic method for improvement of school personnel who remain in a school district's employ and to improve the educational system of the state of Kansas. See K.S.A. 72-9001; Burk v. Unified School District No. 329, Wabaunsee County, 646 F.Supp. 1557, 1563 (D.Kan. 1986). As a part of the procedure, the policy of a unified school district must:

"Provide that every employee in the first two consecutive school years of employment shall be evaluated at least one time per semester . . .; and that every employee during the third and fourth years of employment shall be evaluated at least one time each school year . . .; and that after the fourth year of employment every employee shall be evaluated at least once in every three years. . . ." K.S.A. 72-9003(d)(1). (Emphasis added.)

The statute establishes the minimal requirements that must be met by a unified school district in conducting evaluations of certificated personnel; a school district may conduct more frequent evaluations if it so desires. All evaluations conducted become a part of an employee's personnel file, see Unified School District No. 501 v. Secretary of Kansas Department of Human Resources, 235 Kan. 968, 973 (1984), and must be maintained for a period of not less than three years from the date each evaluation is made. K.S.A. 72-9003(c). Therefore, the personnel file of every

certificated employee of a unified school district will, at the end of each school year, contain at least one evaluation.

The general grant of statutory power to a board of education of a unified school district is set forth in K.S.A. 72-8205(c). NEA-Wichita v. U.S.D. No. 259, 234 Kan. 512, 517 (1983). The general authority is limited by K.S.A. 1989 Supp. 72-5413(1), as amended by L. 1990, ch. 255, §1, which sets forth the terms and conditions of professional service subject to mandatory negotiation. Id. at 518. Among the items listed in K.S.A. 1989 Supp. 72-5413(1) are "salaries and wages, including pay for duties under supplemental contracts." Because merit pay would appear to be included in salaries and wages, use of evaluations in determining eligibility for merit pay will be subject to the terms of the negotiated agreement reached by the school district and the teachers.

The procedure to be followed in termination of a teacher's contract is set forth in K.S.A. 72-5436 et seq. A teacher whose contract is to be nonrenewed must be afforded a hearing before a hearing committee as designated in K.S.A. 1989 Supp. 72-5438.

"Hearings hereunder shall not be bound by rules of evidence whether statutory, common law or adopted by the rules of court: Provided, however, That the burden of proof shall initially rest upon the board in all instances other than when the allegation is that the teacher's contract has been terminated or nonrenewed by reason of the teacher having exercised a constitutional right. All relevant evidence shall be admissible, except that the hearing committee may in its discretion exclude any evidence if it believes that its probative value is substantially outweighed by the fact that its admission will necessitate undue consumption of time." (Emphasis added.) K.S.A. 72-5442.

Depending on the circumstances of the hearing, relevant evidence to be considered by a hearing committee has been deemed to include the testimony of teacher's aides, parents, and students, Unruh v. U.S.D. No. 300, 245 Kan. 35, 36 (1989), testimony of the school principal, district

superintendent, building custodian, and fellow teachers in the district and documents consisting of evaluations, letters, and memoranda. Haddock v. U.S.D. No. 462, 233 Kan. 66, 70 (1983). Subject to the provisions of K.S.A. 72-9005, evaluations conducted pursuant to K.S.A. 72-9001 et seq. and maintained in the teacher's personnel file may be considered by a hearing committee in reaching its opinion regarding the nonrenewal or termination of a teacher's contract.

The school board may, based upon the opinion of the hearing committee, be required to reconsider its decision to terminate or nonrenew a teacher's contract. K.S.A. 72-5443. In light of the opinion of the hearing committee and oral arguments or written briefs presented by the teacher and a representative of the school board, the school board shall issue its final decision. Id. The final decision of the school board may be appealed to the district court as provided by K.S.A. 1989 Supp. 60-2101. Id.

"The scope of review by the district court of school board decisions in a nonrenewal case is fully covered by Brinson v. School District, 223 Kan. 465, Syl. ¶ 6, 576 P.2d 602 (1978). In Brinson this court held that, in reviewing a decision of an administrative agency under 60-2101, a district court may not substitute its judgment for that of the administrative agency or tribunal and may not examine the issues de novo; it is limited to deciding whether: (1) the agency or tribunal acted fraudulently, arbitrarily, or capriciously; (2) the administrative order is substantially supported by evidence; and (3) the tribunal's action was within the scope of its authority. In reviewing the judgment of the district court in an administrative appeal, this court is required to determine whether the district court properly limited its scope of review. (Citations omitted.)" Leaming v. U.S.D. No. 214, 242 Kan. 743, 749 (1988).

Therefore, as is the case regarding administrative hearings, if evaluations conducted pursuant to K.S.A. 72-9001 et seq. are relevant to a court's determination of whether a

school board has acted fraudulently, arbitrarily, or capriciously, or whether a school board's decision is substantially supported by evidence, the court may consider evaluations maintained in an employee's personnel file.

Very truly yours,



ROBERT T. STEPHAN
Attorney General of Kansas



Richard D. Smith
Assistant Attorney General

RTS:JLM:RDS:jm