

SCSBA

2018 School Law Conference

Human Resources for Board Members, with a Focus on
Employee Online Speech

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Contract Levels and Rights of Teachers

Induction Contract Teachers

- Minimal due process rights of a pre-termination hearing with notice of concerns, sharing of evidence regarding the concerns, and an opportunity to tell his/her side of the story.



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Contract Levels and Rights of Teachers

Annual Contract Teachers

□ **S.C. Code Ann. § 59-26-40**

...Teachers working under a one-year annual contract who are not recommended for reemployment at the end of the year, within fifteen days after receipt of notice of the recommendation, may request an informal hearing before the district superintendent ... At the hearing the evidence must be reviewed by the superintendent. The teacher may provide information, testimony, or witnesses that the teacher considers necessary ... The teacher may appeal the superintendent's decision to the school district board of trustees.

...The board of trustees shall review all the materials presented at the earlier hearing, and after examining these materials, the board may or may not grant the request for a board hearing of the matter.

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Contract Levels and Rights of Teachers

- Continuing Contract Teachers
 - South Carolina Employment and Dismissal Act provisions apply.
- Teacher Misconduct Issues
 - **S.C. Code Ann. § 59-25-430.** Dismissal of teachers; grounds; opportunity for hearing; suspension pending resolution of charges.

Any teacher may be dismissed at any time who shall fail, or who may be incompetent, to give instruction in accordance with the directions of the superintendent, or who shall otherwise manifest an evident unfitness for teaching; provided, however, that notice and an opportunity shall be afforded for a hearing prior to any dismissal. Evident unfitness for teaching is manifested by conduct such as, but not limited to, the following: persistent neglect of duty, willful violation of rules and regulations of district board of trustees, drunkenness, conviction of a violation of the law of this State or the United States, gross immorality, dishonesty, illegal use, sale or possession of drugs or narcotics....

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Contract Levels and Rights of Teachers

- Continuing Contract Teachers
- Teacher Arrests
 - **S.C. Code Ann. § 59-25-430.** Dismissal of teachers; grounds; opportunity for hearing; suspension pending resolution of charges. ... Notwithstanding the provisions of Section 59-25-450, when any teacher is charged with a violation of the law of this State or the United States which upon conviction may lead to, or be cited as a reason for, dismissal, such teacher may be suspended pending resolution of the charges and receive his usual compensation during the suspension period, such compensation not to exceed the term of his teaching contract. If the teacher is convicted, including pleading guilty or *nolo contendere* to the charges, he may then be subject to dismissal proceedings. If no conviction results, his suspension shall be terminated.



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Contract Levels and Rights of Teachers

- Continuing Contract Teachers
- Performance Concerns
 - **S.C. Code Ann. § 59-25-440.** Written notice to teacher of possible dismissal; school administrator required to make reasonable effort to assist teacher in corrective measures; reasonable time for improvement required.
Whenever a superior, principal, where applicable, or supervisor charged with the supervision of a teacher finds it necessary to admonish a teacher for a reason that he believes may lead to, or be cited as a reason for, dismissal or cause the teacher not to be reemployed he shall: (1) bring the matter in writing to the attention of the teacher involved and make a reasonable effort to assist the teacher to correct whatever appears to be the cause of potential dismissal or failure to be reemployed and, (2) except as provided in Section 59-25-450, allow reasonable time for improvement.

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Contract Levels and Rights of Teachers

- Continuing Contract Teachers
- Hearing Rights
 - **S.C. Code Ann. § 59-25-470.**
 - (A) Within fifteen days after receipt of notice of suspension or dismissal, a teacher may serve upon the chairman of the board or the superintendent a written request for a hearing before the board, or its designee.
 - (B) If the teacher fails to make such a request, or after a hearing as provided in this article, the board shall take action and shall enter an order as it considers lawful and appropriate.
 - (C) The hearing must be held by the board, or its designee, within forty-five days after the request is served. A notice of the time and place of the hearing must be given the teacher not less than five days before the date of the hearing.
 - (D) The teacher may be present with counsel at the hearing, and may cross-examine witnesses, may offer evidence and witnesses, and present defenses to the charges. The board, or its designee, shall order the appearance of any witness requested by the teacher, subject to the limitations of Section 59-25-460. The superintendent shall initiate the introduction of evidence in substantiation of the charges.

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Contract Levels and Rights of Teachers

- Continuing Contract Teachers
- Hearing Process
 - **S.C. Code Ann. § 59-25-460.**
 - (A) A teacher may not be dismissed unless written notice specifying the cause of dismissal first is given to the teacher by the superintendent and the teacher is given an opportunity for an evidentiary hearing. The superintendent or his designee may meet with the teacher before issuing a notice of dismissal to discuss alternative resolutions. The parties attending this meeting must have the option of having a representative present. This written notice must include the fact that a hearing before the board or its designee is available to the teacher upon request if the request is made in writing within fifteen days as provided in Section 59-25-470. Any such hearing must be public unless the teacher requests in writing that it be private. A board that chooses to delegate the evidentiary hearing to one or more designees, as provided in this section, shall indicate in board policy that it engages in this practice. The hearing process becomes effective when the board adopts the policy, and must be communicated to all affected employees within fifteen days. A subsequent change only may be made pursuant to the board policy revision process.

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Contract Levels and Rights of Teachers

- Continuing Contract Teachers
 - **S.C. Code Ann. § 59-25-460.**
 - (B)(1) If the board chooses to delegate the evidentiary hearing to a designee, the designee must be:
 - (a) an attorney licensed to practice law in this State;
 - (b) certified by the South Carolina Supreme Court as a mediator or arbitrator; and
 - (c) designated by the board to hear all evidentiary hearings in the district for the school year, except when:
 - (i) both parties consent to use an alternate hearing officer; or
 - (ii) the district uses more than one designee, in which case the parties may by mutual consent select one of these designees for their hearing or, if they fail to reach such an agreement, the board randomly shall select one of its designees for the hearing.

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Contract Levels and Rights of Teachers

- Continuing Contract Teachers
 - **S.C. Code Ann. § 59-25-460.**
 - ... (2) If the designee holds the evidentiary hearing, he shall issue a written report and recommendation containing findings of facts and conclusions of law to the board, superintendent, and teacher within fifteen days after the hearing concludes. The superintendent and the teacher may submit a written response to this report and recommendation to the board within ten days after the date on which the report and recommendation are issued, after which the board shall issue a decision affirming or withdrawing the notice of suspension or dismissal within thirty days. In the interim, the board may conduct a hearing on the order to consider any written responses from the superintendent and teacher, but this hearing may not operate to extend the thirty day limit in which the board shall issue its decision affirming or withdrawing the notice of suspension or dismissal. The board retains final decision making authority regarding the teacher dismissal or suspension recommendation based on its consideration of the record, the report and recommendation, and any written submission of the superintendent and teacher.

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Contract Levels and Rights of Teachers

- Continuing Contract Teachers
 - **S.C. Code Ann. § 59-25-460.**
 - ... (C) If the board holds the evidentiary hearing, the board shall issue its decision within the thirty days after the hearing. This decision must be in writing and must include findings of facts and conclusions of law.
 - (D) The board shall determine if the evidence shows good and just cause for the notice of suspension or dismissal, and accordingly shall render a decision to affirm or withdraw the notice of suspension or dismissal ...

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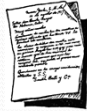
Teacher Evaluations

- State Board of Education Regulation 43-205.1
 - ...teachers who are being recommended for formal evaluation the following school year must be notified in writing on or before the date the school district issues the written offer of employment or reemployment. The written notification must include the reason(s) that a formal evaluation is recommended, as well as a description of the formal evaluation process.* Continuing contract teachers who are new to the district must be advised at the time of their hiring if they are to receive a formal evaluation.

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Teacher Misconduct Issues

- Administrative leave with pay (as appropriate)



- Report to law enforcement (as appropriate)



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Teacher Misconduct Issues

- Report to Department of Education (as appropriate)



- Conduct investigation of allegations (obtain written statements, as appropriate)



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Classified Employee Rights

- Follow Board Policy on Discipline, Suspension and Dismissal of Support Staff
- Support staff are generally considered “at-will” employees.
- Minimal due process rights of a pre-termination hearing with notice of concerns, sharing of evidence regarding the concerns, and an opportunity to tell his/her side of the story.
- Criminal charges
 - Generally, Board policies provide that the District may place on administrative leave, with or without pay, a support staff employee who has criminal charges filed against him/her. The District generally investigates the actions which led to the employee’s arrest and takes further disciplinary action against the employee, up to and including termination, regardless of the resolution of the criminal charges.

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Employees and Technology/Social Media

- Review Staff Conduct policies
- Staff Conduct policies typically provide, in part, as follows:

The personal life of an employee, including the employee's personal use of non-district issued electronic equipment outside of working hours (such as through social networking sites and personal portrayal on the Internet), will be the concern of and warrant the attention of the board if it impairs the employee's ability to effectively perform his/her job responsibilities or as it violates local, state or federal law or contractual agreements. Unprofessional conduct may subject the employee to disciplinary actions consistent with state law, federal law and/or board policy.

All employees will maintain a professional relationship with students at all times, both inside and outside of school. No employee may engage in inappropriate conduct of a sexual nature with a student at any time. This includes any action or conduct communicated or performed in person, in writing or electronically through such means as a telephone, cell phone, computer, personal data assistant or other telecommunication device and includes text messaging and social networking..

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Employees and Technology/Social Media

- If the administration learns of a concern with an employee's communication by way of such things as e-mail, text message, or any form of social media that may possibly impair the employee's ability to effectively perform his or her job responsibilities, the administration should conduct an appropriate investigation and immediately preserve any evidence regarding the employee's electronic communication at issue.



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Employees and Technology/Social Media

- Employees should not involve any District students in personal social networking activities or provide students with access to their social networking activities through the Internet.
- Employees should understand that all conduct, including conduct exhibited through the Internet and electronic communications such as social networking sites, can quickly become headline news.
- Employees should be cautious in their comments and use of photographs. Specifically, employees should avoid the use of, among other things, profanity, sexually inappropriate statements, derogatory comments about students, and/or inappropriate photographs of the employee.
- Employees should not share or post on the Internet or on personal social networking sites student information, including student photographs, student work, or student activities without the prior approval of the school administration and the student's parent. This prohibition does not apply to sharing student work or photographs through District approved means that are related to instruction.

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Employees and Technology/Social Media

Fourth Circuit Court of Appeals Decision

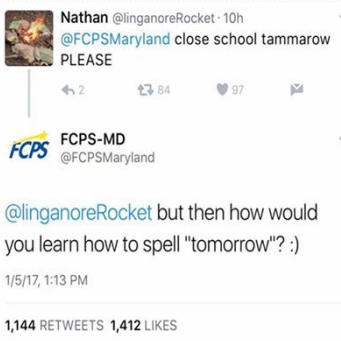
In *Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017) the Fourth Circuit Court of Appeals addressed the use of social media by employees of a fire department. In its decision, the Court noted in a footnote as follows:

We observe that the act of “liking” a Facebook post makes the post attributable to the “liker,” even if he or she did not author the original post. See *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), as amended (Sept. 23, 2013) (“[C]licking on the ‘like’ button literally causes to be published the statement that the User ‘likes’ something, which is itself a substantive statement. . . . That a user may use a single mouse click to produce that message . . . instead of typing the same message with several individual key strokes is of no constitutional significance.”).

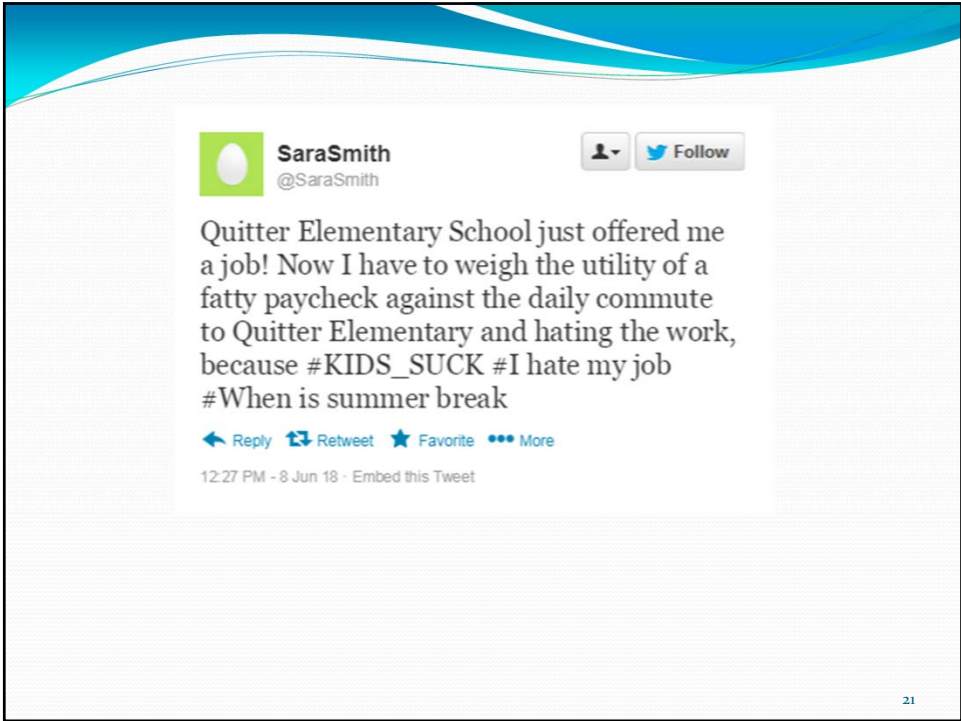
Accordingly, for ease of reference, we refer to Plaintiff’s various Facebook posts, comment replies, and “likes,” collectively, as Plaintiff’s “Facebook activity” or “speech.”

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Frederick County Public Schools terminated a web experience coordinator for sending the following tweet.



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A screenshot of a tweet from SaraSmith (@SaraSmith) posted on June 18, 2018, at 12:27 PM. The tweet text reads: "Quitter Elementary School just offered me a job! Now I have to weigh the utility of a fatty paycheck against the daily commute to Quitter Elementary and hating the work, because #KIDS_SUCK #I hate my job #When is summer break". The tweet includes interaction options: Reply, Retweet, Favorite, and More. A "Follow" button is also visible next to the user's name. The background of the tweet card is white with a light blue wave graphic at the top.