



# I can't talk about that ... employee

SCSBA SCHOOL LAW CONFERENCE  
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## School Board

- ❖ There are numerous employment matters that may come before the Board pursuant to Board policies, so Board members should preserve their impartiality on any such matters in the event they come before the Board.
- ❖ Examples of policies which might have employment matters come before the Board include:
  - Grievance policies
  - Certified employee non-renewals or terminations
  - Classified employee terminations



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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

### ❖ 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.* (emphasis added)

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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. ...
- C. The hearing must be held by the board, or its designee, within forty-five days after the request is served. ...
- 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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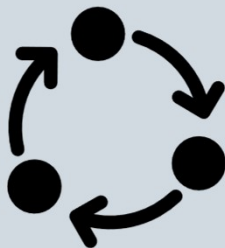
## Contract Levels and Rights of Teachers

### ❖ 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.... 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

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### ❖ Continuing Contract Teachers

### ❖ Hearing Process

#### ○ 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

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### ❖ Continuing Contract Teachers

### ❖ Hearing Process

#### ○ 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 Misconduct Issues

- ❖ Report to Department of Education (as appropriate) pursuant to State Board Regulation R. 43-58.1
  - A district superintendent, on behalf of the local board of education, shall report to the Chair of the State Board of Education and the State Superintendent of Education, the name and certificate number of any certified educator who is dismissed, resigns, or is otherwise separated from employment with that district based on allegations of misconduct... that is reasonably believed by the district superintendent to constitute grounds for revocation or suspension of the certificate issued to the educator by the State Board...



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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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# Employee Expression

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## Key U.S. Supreme Court Cases on Employee Expression

### ❖ *Pickering v. Board of Education / Connick v. Myers*

- The Connick-Pickering three-part test to determine whether a public employee has sustained a First Amendment challenge to an adverse employment action.
- First, determine whether the employee spoke as a citizen on a matter of public concern.
- Second, evaluate whether the employee's interest in First Amendment expression outweighs the employer's interest in the efficient operation of the workplace.
- Third, decide whether the protected speech was a substantial factor in the employer's decision to take adverse employment action.

14

14

## *Pickering v. Board of Education*, 391 U.S. 563 (1968) U.S. Supreme Court



- ❖ A teacher was terminated for sending a letter to a local newspaper in connection with a recently proposed tax increase criticizing the board's allocation of funds between educational and athletic programs. It was critical of the way in which the board and the district's superintendent had handled past proposals to raise new revenue for the schools.
- ❖ The U.S. Supreme Court held that in the case of *Pickering*, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."

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## *Pickering v. Board of Education*, 391 U.S. 563 (1968) U.S. Supreme Court

- ❖ The court stated "because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interest should run."
  - The court found the statements in Pickering's letter consisted essentially of criticism of the board's allocation of school funds between educational and athletic programs and were in no way directed towards any person with whom Pickering would normally be in contact in the course of his daily work as a teacher. Thus, no question of maintaining either discipline by immediate superiors or harmony among coworkers was presented.
  - The court concluded that the teacher's statements were critical of his ultimate employer, "but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."

16

16



## Fourth Circuit Cases on Employee Social Media Use

- ❖ *Liverman v. City of Petersburg*, 844 F.3d 400 (4<sup>th</sup> Cir. 2016)
- ❖ Officers, while off duty, posted remarks to a Facebook page discussing promotion policies referencing rookie cops becoming instructors and discussed concerns with elevating inexperienced police officers to supervisory roles.
- ❖ The City of Petersburg police department social networking policy had what was referred to as a “negative comments provision” which stated:
  - Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public’s perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law.
- ❖ The court held that the department’s social networking policy was unconstitutionally overbroad and that the disciplinary measures taken against the officers pursuant to the policy were likewise impermissible.
- ❖ In applying the Connick-Pickering three-part test, the Fourth Circuit held that the interaction between the two officers was a single expression of speech on a matter of “public concern.” The court further found the police department failed to establish a reasonable apprehension that the officers’ social media comments would meaningfully impair the efficiency of the workplace.



17

17

## Fourth Circuit Cases on Employee Social Media Use

- ❖ *Grutzmacher v. Howard County*, 851 F.3d 332 (4<sup>th</sup> Cir. 2017)
- ❖ The Fourth Circuit addressed the use of social media by employees of a fire department. In its decision, the Court noted in a footnote the following:
  - 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 (4<sup>th</sup> Cir. 2013), as amended (Sept. 23, 2013)(“Clicking 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 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.”

18

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## Fourth Circuit Cases on Employee Social Media Use

- ❖ The Plaintiff was a Battalion Chief with the Howard County Department of Fire and Rescue Services who posted comments that advocated violence to certain classes of people and “liked” comments that could be interpreted as supporting racism or bias.
- ❖ The court determined that some of Plaintiff’s Facebook activity implicated matters of public concern so it had to determine whether Plaintiff’s interests in speaking on a matter of public concern outweighed the department’s interest in providing effective and efficient services to the public.
- ❖ The court found the department’s interests in workplace efficiency and preventing disruption outweighed the commentary contained in Plaintiff’s Facebook activity, and noted:
  - Plaintiff’s Facebook activity interfered with and impaired department operations and discipline as well as working relationships within the department.
  - Plaintiff’s speech frustrated the department’s public safety mission and threatened “community trust” in the department, which is vitally important to its function.

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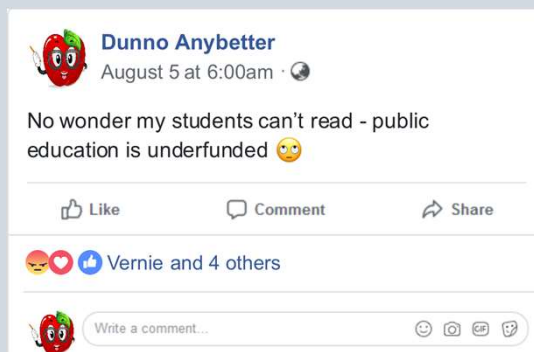
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## Staff Conduct Policy

- ❖ Review and update the Board’s Staff Conduct policy, as needed, to address social media issues.
- ❖ Avoid policy language that could be found to be unconstitutionally overbroad.
- ❖ Recommend including language such as:
  - Employee social media use has the potential to result in disruption of the school/work environment or impair the efficiency of the school/workplace. As such, the board expects employees to ensure all their conduct and communications, including those associated with their social media, do not disrupt the school/work environment, create a reasonable apprehension of disruption in the school/work environment, or impair the efficiency of the school/workplace. Employees will be held to the same professional standards in their use of social media as they are for any other conduct. If an employee has a question regarding the appropriate use of social media, he/she should consult his/her direct supervisor or building principal for guidance.

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## Scenario

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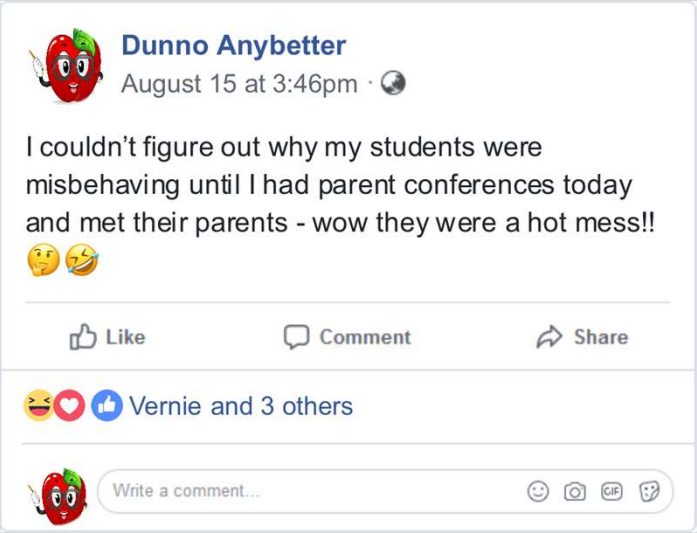
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## Scenario

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**Dunno Anybetter**  
August 15 at 3:46pm · 🌐

I couldn't figure out why my students were misbehaving until I had parent conferences today and met their parents - wow they were a hot mess!!  
🤔🤔

👍 Like    💬 Comment    ➦ Share

🤔❤️👍 Vernie and 3 others

 Write a comment...  
😊 📷 GIF 🤖

# Scenario

23