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RIGHTS WATCH

Students Grading Teachers

Can a competent, tenured teacher be fired solely on the basis of student evaluations? A famous Nebraska school thinks so, but a federal court says "no."

Immortalized in the 1938 Spencer Tracy movie *Boys Town*, Father Flanagan's Boys Home is well known for its unique mission to house and educate troubled youth.

But the nonprofit school's treatment of NEA member Michael Mullins was, well, somewhat less than charitable.

The school fired him in 1999—despite glowing administrator and peer evaluations of his job performance—solely because a handful of students gave him poor marks on an anonymous student survey.

Teachers at Boys Home are evaluated in eleven categories of job performance. Administrators and co-workers conduct the evaluation in ten of the areas. The 11th category, "Student Satisfaction," is the product of a student questionnaire. The teacher has to score at least a 6.0 on a 7-point scale in each of the 11 categories in order to "meet expectations" and be rehired.

Mullins had taught 11th grade English at the Omaha, Nebraska, school since 1984. And by all accounts, he was a stellar teacher.

On his 1998-99 evaluation, fellow teachers and his principal gave Mullins almost perfect ratings in the ten categories of job performance they assessed.

But the kids—for whatever reason—didn't see it that way. In two "Student Satisfaction" surveys during that year, Mullins fell a fraction short of the magic 6.0 figure, scoring 5.57 and 5.74.

While most of the students gave him superior marks, others flunked him, skewing the survey results.

Their complaints? "He gives us too much homework"; he's "too pleasant and positive"; he should show "more movies" in class; and "he talks funny and doesn't have no humor."

So the school board voted not to renew the contract of the 15-year veteran teacher. The only reason given was his failure to achieve the 6.0 score on the two student evaluations.

Upset but undaunted, Mullins turned to his union for help, and the Boys Town Education Association filed a grievance over the termination.

The school argued that under the collective bargaining agreement, it had the right to terminate a teacher after two unsatisfactory performance evaluations.

The union countered that the bargaining agreement also prohibited the school from dismissing employees for "arbitrary and capricious" reasons,

In an October 1999 decision, Arbitrator Michael Gordon sided with the union and ruled that the nonrenewal was "arbitrary and capricious" because it was based solely on student evaluations.

"The core defect," Gordon wrote, "is not the Home's professional judgment about [Mullins] but the fact it ceded that judgment exclusively to an anonymous, non-validated student questionnaire."

Gordon noted that many of the students "are emotionally troubled, educationally disadvantaged and inexperienced in responsible decision making." The arbitrator said it was "unreasonable" for the school to rely on "student surveys about 'satisfaction' levels" to justify firing Mullins, particularly where the school's own trained professionals gave him great marks.

The arbitrator ordered the school to reinstate Mullins with back pay and benefits.

The school then asked a federal judge to throw out the arbitrator's award. But U.S. District Court Judge Joseph Bataillon refused, declaring that the arbitrator acted well within his authority in ruling that Mullins' termination was arbitrary and capricious and violated the contract.

Father Flanagan's Boys Home then appealed the decision to the U.S. Court of Appeals for the Eighth Circuit, which upheld the arbitrator's ruling in Mullins's favor.

The Boys Home decision likely will have only limited precedential value because the court simply upheld an arbitrator's interpretation of a collective bargaining agreement.

Nevertheless, the case sends a clear message to school employers that they shouldn't base employment decisions solely on student evaluations. ✔

—Michael D. Simpson
NEA Office of General Counsel

"Viagra" ruling expands women's rights

In a decision with profound implications for the reproductive freedom rights of female workers nationwide, the Equal Employment Opportunity Commission (EEOC) ruled last December that an employer's health insurance plan must cover prescription contraceptives for women if the plan covers other prescription drugs such as Viagra.

The EEOC declared that the failure to provide such coverage is illegal under the federal Pregnancy Discrimination Act (PDA). The PDA applies to all school districts and colleges and universities.

NEA joined with a coalition of some 65 organizations represented by the National Women's Law Center in petitioning the EEOC for the ruling.

Citing the EEOC decision, a federal court in Seattle last June became the first in the nation to find an employer guilty of discrimination for failing to include prescription contraceptives in its health care plan.

Ruling in favor of Jennifer Erickson, a pharmacist at Bartell Drug Co., Judge Robert Lasnik said, "Although the plan covers almost all drugs and devices used by men, the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered."

The National Women's Law Center has prepared a brochure titled "Take Action" that provides employees with practical advice about how to obtain coverage for prescription contraceptives from their employers. It's posted at www.nwlc.org/pill4us/index.cfm.

The EEOC decision is posted at www.eeoc.gov/docs/decision-contraception.html.

M.D.S.

Supreme Court Goes to School

In a surprising move that may affect many teachers' classroom procedures, the U.S. Supreme Court has agreed to decide whether teachers can allow students to grade each other's tests.

As reported in the November 2000 *NEA Today*, the Tenth Circuit Court of Appeals last year ruled that the common practice of peer grading violates a federal privacy statute known as FERPA, the Family Educational Rights and Privacy Act. That's a 27-year-old law that prohibits schools from disclosing a student's "education records" without parental consent.

The appellate court said that students' test scores are education records and can't be disclosed to third parties—including other students.

Complaining that "our teachers are overworked and underpaid now," a dissenting judge warned, "What will happen to them when they can be sued by every irate parent or student claiming that someone saw a grade?"

The *Washington Post* applauded the Supreme Court's decision to enter the fray and urged the Justices to "correct this ridiculous holding." NEA will be filing an *amicus* brief urging reversal of the lower court decision.

The case, *Owasso* (Oklahoma) *Independent School District* v. *Falvo*, will be argued this fall, and a decision is expected sometime after the first of the year.

M.D.S.

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