



## INSTRUCTIONAL STAFF REDUCTION IN FORCE

A reduction in force involves the elimination of instructional staff as a result of board action taken in response to budget cuts, decreased enrollment or other reasons unrelated to employee performance or conduct. A reduction in force is appropriate any time the board's action results in a decrease in the number of teaching positions in the district.

This memorandum provides an overview of the requirements for an instructional staff reduction in force (RIF), and explains the changes in the RIF process as a result of the 2010 educator effectiveness bill, also referred to as Senate Bill 191 ("SB 191"). The information provided is not intended to serve as legal advice and districts are strongly encouraged to contact legal counsel prior to initiating a reduction in force.

### Overview of changes to the RIF statute

SB 191 amended the RIF provision of the Teacher Employment, Compensation and Dismissal Act (the "Act"). Under prior law, a school district had discretion whether to define the RIF process in a contract between the school board and teachers, in board policy, or not at all. The law now *requires* districts to include their RIF process in any contract between the board and employees (e.g. collective bargaining agreements) or in school board policy.

SB 191 removed the statutory default language that, in the absence of contrary contract provisions or board policy, required cancellation of teacher contracts essentially by seniority, beginning with first-year teachers. Instead, the Act now requires districts to "include the criteria described in section 22-9-106 as significant factors" in determining which contracts to cancel pursuant to a RIF. C.R.S. 22-63-202(3). However, C.R.S. 22-9-106, which defines the requirements for licensed personnel performance evaluation systems, does not include any clear criteria. In the absence of such criteria, CASB interprets the cross-reference to require superintendents and local boards to give significant consideration to teachers' performance or "merit," as reflected in their performance evaluations, when determining which contracts to cancel.

The Act also requires each district's contract or policy to include consideration of an employee's length of service in the district but *only after* the consideration of merit, and only if the decision is in the best interest of the students in the district. CASB has incorporated these changes into CASB sample policy **GCQA, Instructional Staff Reduction in Force**.

### Scope of RIF protections

An instructional staff member is entitled to the Act's RIF protections if the staff member falls within the definition of "teacher." Under the Act, a "teacher" includes "any person who holds a teacher's license issued pursuant to the provisions of Article 60.5 of this title and who is employed to instruct, direct, or supervise the instructional program." C.R.S. 22-63-103(11). "Teacher" does not include those persons holding letters of authorization or the superintendent. Id. Due to this broad definition, a school administrator such as a principal or assistant principal may be entitled to the Act's RIF protections if the administrator holds a current and valid Colorado teacher's license.

The Act defines "part-time teacher" as "a teacher who normally performs services as an employee of a school in an amount of time less than four hours during each regular school day." C.R.S. 22-63-103(6). Thus, a teacher who is employed on less than a full-time basis but works more than the Act's definition of "part-time" may also be entitled to the Act's RIF protections. In addition, reducing a teacher's employment from full-time to part-time may result in the "cancellation" of the teacher's full-time contract, which again requires the district to follow the Act's RIF protections prior to reducing the teacher's work schedule.

Finally, as amended by SB 191, the Act defines a "probationary teacher" as a teacher who has not completed three consecutive years of demonstrated effectiveness. If the board of education does not notify a third-year probationary teacher that he or she is nonrenewed on or before June 1, the teacher is deemed reemployed for a fourth year and considered nonprobationary. C.R.S. 22-63-203(3). Because probationary and nonprobationary teachers are treated differently under the Act for purposes of RIF, it is important to classify each teacher appropriately. Generally, it is easier and preferable to nonrenew a probationary teacher for *any lawful reason* (e.g. budgetary cuts) prior to June 1 than it is to RIF a probationary teacher.

### Due Process Requirements

Although the Act does not set forth any procedural requirements to follow in an instructional staff RIF, the Colorado Supreme Court has held that minimal procedural due process standards must be followed when a nonprobationary teacher is subject to a RIF. Howell v. Woodlin Sch. Dist. R-4, 595 P.2d 56 (Colo. 1979). The due process considerations for a RIF are less stringent than teacher dismissal due process requirements because in a RIF situation, no charges are alleged against the teacher.

The board's reduction in force policy and procedure should set forth the minimal due process standards in any RIF, which have been defined as:

1. Notice of the proposed action in sufficient detail and timely enough to enable the teacher to present evidence relating to it;
2. Notice of the reason and factual basis for the action;
3. An opportunity for the teacher to present testimony and evidence in his or her defense; and
4. A hearing before an impartial tribunal.

The minimum due process standards at a RIF hearing will be met if the hearing addresses the following issues:

1. Was there a rational basis to determine a reduction in force was necessary?
2. Was the employment cancellation procedure arbitrary or capricious?
3. Was the decision to cancel the teacher's employment arbitrary, capricious or pretextual?

### Avoiding Legal Challenges

The Act permits the cancellation of a teacher's contract when there is a "*justifiable* decrease in the number of teaching positions." C.R.S. 22-63-203(2) (emphasis added). The courts have recognized two general categories that might give rise to a "justifiable decrease" in the number of teaching positions: fiscal exigency and program change. A fiscal exigency may occur any time a school district is unable to maintain staffing at existing levels for financial reasons. This may be due to a decrease in student enrollment, increased costs, or budgetary cuts. A program change refers to any elimination, curtailment, or reorganization of curriculum, or a reorganization or consolidation of schools. A program change may or may not be related to a fiscal exigency. Declining student enrollment across the entire school district is not required to justify the cancellation of teachers' contracts. If enrollment in a particular program has declined, the board may justifiably eliminate teaching positions in that program.

The Act provides extensive due process rights to teachers who are recommended for termination for reasons related to performance or conduct. Boards must resist the temptation to use the RIF process as pretext to circumvent the dismissal procedures required by the Act.

It is the board's role to determine when a fiscal exigency or need for program change exists. When the board makes this determination, the board's decision is considered a legislative act. Ring v. Springfield Sch. Dist. RE-2, Case No. 90CV37 (Baca County Dist. Ct. 1992); Snyder v. City of Lakewood, 542 P.2d 371, 375-76 (discussing legislative v. judicial authority). Due to the constitutional separation of powers between the different branches of government, the board's legislative acts are subject to limited court review and may only be challenged on constitutional grounds for an arbitrary abuse of authority. Snyder, 542 P.2d at 375.

Accordingly, as long as there is a rational underlying basis for the board's determination that a fiscal exigency exists or program change is necessary, the board's determination will withstand a legal challenge that the determination was merely a pretext for the teacher's dismissal. As explained by a hearing officer in a decision upholding the board's cancellation of two teaching contracts:

In order to survive scrutiny, the fiscal exigency must simply have a rational basis supporting the determination that it was necessary or appropriate. This means that the decision to declare a fiscal exigency must be within the spectrum of reasonable decisions which were available to the Board. It need not be the best possible choice or the one which would have been selected by either the Teachers or [a] Hearing Officer.

Findings of Fact and Conclusions in the Matter of the Reduction of Staff D.B. and C.P. by Weld County School District No. 6 (Hearing Officer Nancy Connick, June 1993).

Once the board determines that the district's financial situation or program change makes an instructional staff RIF necessary, the board's RIF policy typically requires the superintendent or superintendent's designee to recommend those teachers whose contracts will be cancelled. *See*, CASB sample policy **GCQA**, subheading "Superintendent's Action." The superintendent's decision should be based on the factors set forth in board policy. To avoid claims of pretext, the superintendent should use a formal process, which may include a chart, form or matrix, to compare teacher performance and qualifications when developing recommendations.

#### "Bumping" Rights

One question that often arises is whether a nonprobationary teacher who is the subject of a RIF has the right to "bump" a less senior teacher. The answer to that question is unclear, especially in light of SB 191's removal of the statutory language requiring the contracts of first-year probationary teachers to be cancelled first. Of course, if the board's RIF policy or the district's collective bargaining agreement grants teachers "bumping" rights, such rights must be recognized when conducting any RIF.

Questions regarding whether a teacher has the right to bump *any* other teacher should be referred to the district's legal counsel.

#### Recommendations

CASB recommends that the board adopt a sound RIF policy and procedure that meets the Act's requirements as well as Howell's due process requirements, discussed above. The exception to this recommendation is when RIF and the RIF hearing process are already addressed in the district's collective bargaining agreement with its teachers.

Once the RIF policy and procedure are adopted by the board, CASB recommends the following steps when conducting an instructional staff reduction in force:

1. The board makes a legislative determination based on data and declares a fiscal exigency, program change, or both.
2. In accordance with the board's RIF policy, district administration develops or uses a chart, form or matrix to assess individual teacher qualifications and develop recommendations.
3. District administration makes specific contract recommendations to the board.
4. District administration provides written notice to affected teachers and informs them of their right to request a RIF hearing.
5. Board takes action to cancel teaching contract(s) consistent with the outcome of any requested RIF hearing as well as the board's RIF policy and procedure.

Finally, the board should be especially vigilant about complying with Colorado's Open Meetings Law (OML) when taking action to implement a RIF. See, e.g., Hanover Sch. Dist. v. Barbour, 171 P.2d 223 (Colo. 2007) (board's decision to nonrenew a probationary teacher was void because it violated the OML).

In conclusion, the board's decision to cancel a teacher's contract will withstand judicial scrutiny so long as the board's actions are not arbitrary or pretextual, afford minimal due process protections, and are conducted in compliance with the OML.

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