Employee Grievances and Appeals to the Local Board of Education

by Robert P. Joyce

BECAUSE OF TWO PROVISIONS in Chapter 115C of the North Carolina General Statutes (hereinafter G.S.), almost anyone affected by any school decision may appeal that decision directly to the local board of education. The individual bringing the appeal may be a student, a parent, a school employee of any status, full- or part-time, permanent or temporary, at-will or tenured. Local boards of education, in developing employee grievance policies, must structure those procedures with these provisions in mind. This article examines the scope of the two appeals statutes and the law regarding grievance procedures.

The Older Statute: G.S. 115C-45(c)

The first of these two sweeping appeals statutes traces its history to at least the statutory Revisal of 1905 and today is found in G.S. Chapter 115C at G.S. 115C-45(c) [sometimes to be referred to in short as 45(c)]. It provides the following:

> An appeal shall lie from the decision of all school personnel to the appropriate local board of education. In all such appeals it shall be the duty of the board of education to see that a proper notice is given to all parties concerned and that a record of the hearing is properly entered in the records of the board conducting the hearing.
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> The board of education may designate hearing panels composed of not less than two members of the board to hear and act upon such appeals in the name and on behalf of the board of education.
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> An appeal shall lie from the decision of a local board of education to the superior court of the State in any action of a local board of education affecting one's character or right to teach.

Four elements of 45(c) determine the nature of appeals that can be brought under it. First, the appeal must come from a "decision" by school personnel. Second, there must be a "hearing." Third, the hearing may be conducted by a panel of the board. And fourth, where the action of the local board affects "one's character or right to teach," there may be an appeal from the local board to the superior court. A discussion of each of these elements follows.

The Requirement of a Decision

For a matter to be appealable to the board of education under 45(c), it must constitute a decision by school personnel. In two cases employment actions have been held to constitute decisions: (1) action by a principal and a school committee (under an old statutory scheme) to dismiss a cafeteria worker[1] and (2) a principal's action in changing performance evaluation scores in a way that made a teacher's aide ineligible for renewal.[2] In two other cases, actions in school contexts other than employment also have been held to be appealable decisions: (1) determining whether a student

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1. Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).
2. Murphy v. McIntyre, 69 N.C. App. 323, 317 S.E.2d 397 (1984).

had a right to attend school in a particular system[3] and (2) student short-term suspensions.[4]

The decision not to renew the contract of a probationary teacher under the Teacher Tenure Act is not appealable to the board for a hearing under 45(c) because the decision is made by the board itself and not by "school personnel."[5]

The Requirement of a Hearing

G.S. 115C-45(c) requires a hearing and sets out two procedural requirements for all hearings under the statute. First, the board has the duty "to see that a proper notice is given to all parties concerned." There is no specification as to what constitutes "proper" notice, however, and there is no case law or regulatory guidance on this point. Second, the board has a duty to see that "a record of the hearing is properly entered in the records of the board." As to this requirement also, there is no specification as to what kind of record would suffice.

The North Carolina attorney general, in an opinion published in 1985, [6] has identified one other requirement that applies to all 45(c) hearings. Although 45(c) does not, the attorney general wrote, "expressly require that local board members act impartially in determining these appeals, we think that responsibility is an implied part of their duty."[7]

These three procedural requirements—notice, a record, and impartiality—constitute the bare minimum that must be met for a 45(c) hearing, but in certain circumstances, constitutional considerations of due process will impose additional procedural requirements. Such is the case when the issue on appeal involves a property interest. The property interest enjoyed by more school-related personnel than any other is the protection afforded to tenured teachers under the Teacher Tenure Act. Hearings held with respect to the dismissal or demotion of school employees who are protected by the Teacher Tenure Act are not 45(c) hearings, and most 45(c) hearings on employment matters do not involve property interests. A property interest might be involved in certain circumstances, however, such as the dismissal, in the middle of a contract term, of an employee who is employed under a written contract for a specified period of time but is not subject to the Teacher Tenure Act, the Administrator Term Contract Law, or statutes governing the employment of superintendents and associate and assistant superintendents. Without the contract, the employee would be an at-will employee; with the contract, the employee has a property interest during the contract term, and that interest must be protected by due process.

In the absence of a property interest, however, the heightened procedural requirements of due process do not apply.[8] So long as the board meets the minimum procedural requirements of adequate notice, making a record, and impartiality, it may structure the hearing in any way it deems appropriate. It may, for instance, set a time limit, allowing the appealing party, say, twenty-five minutes to present evidence and arguments.

But wait: a 1999 decision of the state court of appeals, deciding a case involving an at-will employee where clearly no property interest was involved, made this bald statement: "Although the school board may operate under a more relaxed standard than a court of law, all essential elements of due process must still be satisfied."[9] It is uncertain just what the court meant by this statement. The uncertainty stems from three elements of the case. First, the court did not identify the presence of any property interest to trigger the due process requirements. Second, as support for its statement, the court cited a 1993 court of appeals decision[10] that concerned the dismissal of a tenured teacher and thus *did* involve a property interest. And third, the court made no effort to identify what constituted the "essential elements of due process" to which it referred. This appears to be a careless statement by the court of appeals upon which future courts are unlikely to rely.

Hearing by a Panel

G.S. 115C-45(c) authorizes the board of education to designate hearing panels composed of at least two members of the board "to hear and act upon such appeals in the name and on behalf of the board of education." There is no case law or regulation that in any way delineates the authority of the board to conduct its hearings in this manner. The wording of the statute seems to

3. 55 N.C. Op. Att'y Gen. 61 (1985).

4. Attorney general opinion letter to Lester G. Carter (Mar. 30, 1984).

5. Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971), interpreting the statute as it was then codified at Chapter 115, Section 34, of the North Carolina General Statutes (hereinafter G.S.).

6. 54 N.C. Op. Att'y Gen. 86 (1985).

7. *Id*. at 88. The holding of the opinion is that boards of education have the authority to exclude from participation in a G.S. 115C-45(c) hearing a member of the board who is not impartial.

8. 54 N.C. Op. Att'y Gen. at 88.

9. Cooper v. Board of Educ. for Nash–Rocky Mount Schs., 135 N.C. App. 200, 204, 519 S.E.2d 536, 539–40 (1999).

10. Hope v. Charlotte-Mecklenburg Bd. of Educ., 110 N.C. App. 599, 430 S.E.2d 472 (1993).

make it clear that the board could rule that the decision of the panel is final and that it requires no further action by the full board. The statute does not specify whether the board could establish a procedure by which a panel would hear a matter and then make a recommendation that the entire board could accept or reject, but presumably the board could do so. That conclusion is consistent with the view expressed by the attorney general that the North Carolina General Assembly has granted great discretion to local boards in the establishment of panels.[11] In holding that the board could exclude a member whose impartiality is in doubt (as has been discussed), the attorney general noted the discretion a board has in establishing panels and said, "There is no statutory limitation on the exercise of this discretion and if a board determines that one member should not participate, whatever the reason, its action has been authorized by the General Assembly."[12]

Appeal to the Superior Court

The fourth element of 45(c) establishes the possibility of appeal from the board of education to the superior court. Under the statute, an appeal "shall lie from the decision of a local board of education to the superior court of the State in any action of a local board of education *affecting one's character or right to teach*."[13]

Matters that may be appealed. Unless the decision of the board of education affects one's character or right to teach, there is no appeal to the superior court under 45(c). (The situation may be quite different under the newer statute to be discussed later in this article.) The North Carolina Supreme Court considered this provision in a 1971 case in which a nontenured teacher sued the board of education over its decision not to renew her contract.[14] The court held that the teacher could not appeal to superior court because there was nothing about the board's decision that was damaging to the teacher's character or that worked to "deprive her of the right to teach *elsewhere*."[15] The same court reached a contrasting conclusion in a 1979 case in which a school cafeteria manager was dismissed by her superintendent after it was alleged that the manager had supplied liquor to painters working in the school cafeteria during the school day and that the superintendent had communicated to others the reasons for the dismissal.[16] In that case, the court held, the employee's "character" was affected.[17]

Appeal to the board must precede appeal to the court. The state supreme court has made it clear that an individual who wishes to pursue an appeal to the superior court in a matter that could be heard by the board of education under 45(c) must first attempt to have the matter heard by the board.[18] The individual cannot simply skip that step and go directly to court. The term employed is "exhaustion of administrative remedies."

Standard for review. The standard for the court to apply in an appeal under 45(c) is the "whole record test" developed under the Administrative Procedure Act (APA). The courts have long held the whole record test to be the standard for review in the superior court in a case under the Teacher Tenure Act,[19] even though the Teacher Tenure Act does not specify a standard for review and even though the APA explicitly states that it does not apply to local boards of education.[20] In a 1999 decision, the North Carolina Court of Appeals held that the whole record test applies to a review of a 45(c) decision of the board of education.[21] Under the whole record test, the job for the superior court judge is to determine whether, in view of the entire record, the decision of the school board is supported by substantial evidence.[22] If the answer is yes, the decision of the board stands.

11. 54 N.C. Op. Att'y Gen. at 89.
12. *Id.*
13. Emphasis added.
14. Still v. Lance, 279 N.C. 254, 182 S.E.2d 403 (1971).
15. *Id.* at 261, 182 S.E.2d at 408 (emphasis added).
16. Presnell v. Pell, 298 N.C. 715, 260 S.E.2d 611 (1979).
17. The question of whether a principal's resignation became effective when accepted by the superintendent or could be rescinded before it was accepted by the board of education was held not to affect character or the right to teach in *Warren v. Buncombe County Board of Education*, 80 N.C. App. 656, 343 S.E.2d 225 (1986). In 1996, the North Carolina Court of Appeals affirmed, in an unpublished memorandum opinion, the holding in a superior court case that an employee has a right to a G.S. 115C-45(c) hearing for a decision "affecting character" only when the employee's constitutional liberty interest in reputation is affected. Walker v. Durham Bd. of Educ., 123 N.C. App. 790, 476 S.E.2d 148 (1996).
18. *Presnell*, 298 N.C. at 722, 260 S.E.2d at 615 ("We read [the statute] to require that a party entitled to its provisions must first challenge action taken by school personnel by way of an appeal to the appropriate county or city board of education. After a decision by the board 'affecting one's character or right to teach,' a party may *then* invoke the appellate jurisdiction of the superior court.") (emphasis in original).
19. *See* Thompson v. Wake County Bd. of Educ., 292 N.C. 406, 233 S.E.2d 538 (1977); Overton v. Goldsboro Bd. of Educ., 304 N.C. 312, 283 S.E.2d 495 (1981); Evers v. Pender County Bd. of Educ., 104 N.C. App. 1, 407 S.E.2d 879 (1991), *aff'd*, 331 N.C. 380, 416 S.E.2d 3 (1992).
20. G.S. 150B-2(1a).
21. Cooper v. Board of Educ. for Nash–Rocky Mount Schs., 135 N.C. App. 200, 519 S.E.2d 536 (1999).
22. Whether the decision of the board is supported by substantial evidence is, in fact, the most common issue for the superior court under the whole record test. There are, however, five additional potential issues other than the "substantial evidence" issue: whether the action was in violation of constitutional provisions, was in excess of the statutory authority or jurisdiction of the board, was made upon unlawful procedure, was affected by other error of law, or was arbitrary or capricious. These are all questions

The Newer Statute: G.S. 115C-305

The second of the two sweeping appeals statutes is much newer than 45(c). Enacted in the 1981 recodification of G.S. Chapter 115C, it is found at G.S. 115C-305 (at times hereafter referred to in short as 305). It provides the following:

> Appeals to the local board of education or to the superior court shall lie from the decisions of all school personnel, including decisions affecting character or the right to teach, as provided in G.S. 115C-45(c).

Statute 305 obviously overlaps with 45(c) and is very similar to it, but there is one highly significant way in which they differ. The following sections discuss the similarities and differences between 45(c) and 305.

How 45(c) and 305 Are Alike

Three elements of the two statutes are clearly parallel. Another element of the two is apparently parallel. First, both 45(c) and 305 require a "decision" by school personnel. On this point, the cases that have been decided under 45(c), as previously described, apply with full force to 305. In addition, two cases have been decided on this point directly under 305.[23] The two cases, both from the New Hanover County schools, arose from very similar fact situations and concern the denial of a promotion to a teacher in a career ladder program (under an old statutory scheme). In each case the court of appeals held that that denial was a decision appealable under 305.

The second clear way that the statutes are alike is the exhaustion of administrative remedies requirement in each.[24] Before an appeal of a school decision may be taken to court under either statute, the adversely affected individual must first take the appeal to the board of education, unless, of course, the initial offending action was taken by the board of education itself.

The third similarity is that the same principles of the whole record test standard for review of appeals from the board to the superior court are applied under 305 as under 45(c) (discussed above).[25]

The fourth, probable, similarity is that the language of 305 appears to import the requirement of a hearing and the related elements of notice, record, and impartiality because, by its very terms, 305 authorizes appeals "as provided in G.S. 115C-45(c)." Presumably, then, a board of education that is processing a 305 appeal could establish a panel to hear the matter, as is authorized in 45(c).

A Fundamental Difference between 45(c) and 305

There is only one way in which 45(c) and 305 are fundamentally different, but this one difference opens the door to many more appeals of personnel decisions from the board of education to the superior court: Appeals can be taken under 305 even if the decision being challenged does not reflect negatively on one's character or affect the right to teach, a basic requirement for appeals to court under 45(c).

The North Carolina Court of Appeals identified this difference in a case involving the resignation of a public school principal in Buncombe County.[26] The principal submitted his letter of resignation to the superintendent; the superintendent accepted it. Before the board of education met to vote on accepting the resignation, the principal asked to rescind it. The superintendent refused, and the board then voted to accept the resignation. The principal asked for and received a hearing before the board, and then, after the board voted to uphold the action of the superintendent in accepting the resignation, the principal appealed to the courts. The court of appeals held that the principal probably did not have the right to appeal to superior court under 45(c) because the acceptance of the resignation did not affect the principal's character or right to teach. But, the court held, the appeal was proper under 305, which permits appeals of decisions *including decisions affecting character or the right to teach*. "The emphasized language," the court said, "indicates an intention to extend the right of appeal in public school personnel decisions far beyond the confines of the former law."[27]

To date, this case from Buncombe County and the two from New Hanover County are the only ones taking board of education personnel decisions to the superior court under 305, but the door is open for many more.

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under the whole record test derived from a provision of the Administrative Procedure Act, G.S. 150B-51(b) and made applicable to school board appeals by *Evers v. Pender County Board of Education*, 104 N.C. App. 1, 407 S.E.2d 879 (1991), *aff'd*, 331 N.C. 380, 416 S.E.2d 3 (1992).

23. Williams v. New Hanover County Bd. of Educ., 104 N.C. App. 425, 409 S.E.2d 753 (1991); Warren v. New Hanover County Bd. of Educ., 104 N.C. App. 522, 410 S.E.2d 232 (1991).

24. *Williams*, 104 N.C. App. 425, 409 S.E.2d 753.

25. Warren v. Buncombe County Bd. of Educ., 80 N.C. App. 656, 658, 343 S.E.2d 225, 226 (1986).

26. *Warren*, 80 N.C. App. 656, 343 S.E.2d 225.

27. *Id.* at 658, 343 S.E.2d at 226.

Another Possible Way in Which 45(c) and 305 Are Different

As we have seen, 305 permits appeals to superior court even in cases that do not involve character or the right to teach, and in that way 305 allows many more potential appeals than 45(c) does. On the other hand, it is possible that 305 is limited to appeals by teachers, whereas 45(c) is open to everyone. The court of appeals has explicitly held that 45(c) appeals to superior court are available to nonteachers (for instance, a teacher assistant and bus driver).[28]

So, may teachers only take appeals to superior court under 305? One reason to think that the answer is yes is that 305 is found in Article 20 of Chapter 115C of the General Statutes, and Article 20 is entitled "Teachers." Yet, in the Buncombe County case discussed above, the court applied 305 to the case of a principal. Principals are covered by Article 18 ("Principals and Supervisors"), not Article 20. So it is not clear from this reasoning whether or not 305 is limited to teachers. A second reason to think that 305 may be limited to teachers is a superior court decision explicitly holding so and a 1996 unpublished memorandum decision of the North Carolina Court of Appeals upholding that ruling.[29] Yet, a superior court decision and an unpublished memorandum appellate decision together are to be accorded very little weight.

Until the appellate courts speak more clearly, we simply do not know whether 305 applies to teachers only, or more broadly to school employees generally, as 45(c) does.

Implications for Local Board Policy

The very broad language of these two statutes means that just about any decision made by anyone employed in the schools that has an adverse effect on the employment status of someone else employed in the schools may be appealed to the board of education. So far that has included performance reviews, dismissals, and acceptances of resignations. Given the expanded interpretation of 305 as granting the right to appeal to the superior court to cases involving more than effects on character or the right to teach, it is likely that more cases involving matters arising within the realm of employment will end up in court. If, for example, 305 is not limited to teachers (see previous discussion), then even at-will employees may appeal dismissal decisions to superior court, whether or not the decision affects "character or the right to teach." This would constitute a major change in these employees' at-will status.

Regarding the standard for review to be used in appeals made to superior court, courts are to review the actions of the board of education under the "whole record" test, as the state appeals court made clear in the Buncombe County case.[30]

Boards need to be aware of their options in holding hearings under 45(c) and 305, the relatively relaxed procedural options that are available when no property interest is involved—and therefore no constitutional requirement of due process governs—and the more stringent procedural requirements mandated by the application of due process.

Because every personnel decision is potentially a matter of appeal to the board of education and, following that, to the courts, school systems are wise to develop grievance procedures designed to handle disputes over personnel decisions in a less confrontational, time-consuming, and expensive way. Developing workable grievance procedures is the subject of the remainder of this article.

Grievance Procedures

Boards of education are under no obligation to adopt a grievance procedure of any kind. No statute requires it, and the courts have held that no general public policy of the state requires units of local government to adopt such procedures.[31] The reasons for supporting grievance procedures are more practical than legal. Grievance procedures can weed out troublesome cases before they have the chance to mature into matters that occupy the time and energy of the board of education; they also can work out quick and convenient solutions to situations in which employees are being treated unfairly.

28. Cooper v. Board of Educ. for Nash–Rocky Mount Schs., 135 N.C. App. 200, 519 S.E.2d 536 (1999).

29. Walker v. Durham Bd. of Educ., 123 N.C. App. 790, 476 S.E.2d 148 (1996).

30. *Warren*, 80 N.C. App. at 658, 343 S.E.2d at 226.

31. Walter v. Vance County, 90 N.C. App. 636, 369 S.E.2d 631 (1988). According to a 1982 opinion of the state attorney general, local boards of education do not have the authority to adopt rules calling for binding arbitration of employee grievances by outside arbitrators. 52 N.C. Op. Att'y Gen. 46 (1982).

Elements of an Effective Policy

An effective grievance policy must include the following five elements: First, it must make clear what matters are properly the subject of a grievance. Second, it must clearly indicate how an employee wishing to pursue a grievance is to proceed. Third, it must impose on both the employee and the responding school officials reasonable and definite time limits within which to act. Fourth, it should include the opportunity for the superintendent to decide how the grievance should be resolved. And fifth, it must provide for an appeal to the board of education. This section discusses those elements.

What matters are to be covered. The policy should make it clear exactly what sorts of grievances are to be covered. The broader the coverage, the more likely it is that unfair and inequitable treatment of employees will be corrected but, also, that time and effort will be consumed on trivial matters. Thus judgment is needed in striking a balance. At one extreme, the policy might broadly define "grievance" to include any matter of concern or dissatisfaction arising from the working conditions of an employee and subject to the control of the board of education. At the other extreme, the policy might more narrowly define "grievance" to include violations, misinterpretations, or inequitable applications of adopted board policies. However the term is defined, the grievance policy should make it clear that it does not apply to appeals of suspensions, demotions, or dismissals of employees subject to the appeals processes set out in the Teacher Tenure Act.

Clear statement of the process. The policy must, in clear and direct terms, inform employees and administrators of their obligations in the grievance process. Employees must not be left to guess how to initiate a grievance and how to follow through an appeal. The first step in almost any grievance procedure calls for the aggrieved employee to take up the issue with his or her immediate supervisor. The policy should, however, include a provision that if the grievance involves an alleged claim of sexual harassment by the supervisor, then step one may be skipped. In step two, the appeal goes to someone with authority over the supervisor. This person might be a department head (such as the director of transportation or the director of food services), or it might be an assistant superintendent. The policy should make it clear whether the person to whom the appeal is made at this level depends on the position of the employee who initiated the grievance or whether all grievances go to the same person. The next step may call for the appeal to go directly to the superintendent or to a grievance committee established under the policy. If the appeal goes to a grievance committee, the policy should spell out how a hearing is to be held (stressing its informality) and should call for the committee to make a recommendation to the superintendent for resolving the grievance. If the appeal goes directly to the superintendent, the policy should spell out how the superintendent is to hear the matter. The last step should provide for an appeal of the superintendent's decision to the board, in compliance with both G.S. 115C-45(c) and G.S. 115C-305.

Time limits. An essential element of a workable grievance procedure is the inclusion of reasonable and definite time limits. Justice delayed is justice denied; a grievance simmering is a morale killer and a lawsuit incubator. The policy should encourage the employee to attempt to resolve the matter informally before initiating a formal grievance, but it should hold the employee to beginning the formal process within some set time frame—maybe five days, maybe thirty—after the offending incident occurs or after the employee becomes aware of the problem. At each stage, the employee must be held responsible for pursuing appeals within clearly set time limits; the policy should state that a consequence of such a failure is dismissal of the grievance. The policy must also hold the administration to action within set times. Administrators must have a clear understanding of their obligations, one of which is to make sure that employees know the time limits and the consequences of the failure to meet them.

Superintendent's action. An essential element of the grievance procedure is the opportunity for the superintendent—as the system's chief executive officer—to make a decision. The superintendent has the authority to enforce a decision and the status needed to lend legitimacy to the entire procedure. In addition, the procedure needs the certainty that a superintendent's decision can impose.

Appeal to the board. As the first sections of this article make clear, however the grievance procedure is structured, the final appeal must, because of the statutory provisions found at G.S. 115C-45(c) and G.S. 115C-305, be to the board.

Legal Implications

There are two legal implications that boards of education must consider in adopting and enforcing a grievance procedure. The first relates to the extent to which employees may be required to pursue the matter

through the grievance process before taking it to the board. The second involves a warning to boards to make sure that their school administrators follow the procedures adopted by the board.

Question of a prerequisite to an appeal to the board. G.S. 115C-45(c) and G.S. 115C-305 both permit employees to take appeals of school decisions to the board of education. If the board of education adopts a grievance procedure, may it require an employee to use the channels of the grievance procedure before taking the matter by appeal to the board? The question has never been addressed directly by the North Carolina appellate courts, but the courts have ruled that where the legislature has provided an effective administrative remedy by statute, that procedure must be followed before going to court.[32] In a case involving an at-will employee of The University of North Carolina, the state court of appeals held that the employee seeking court relief first had to go through the university's grievance procedure if that procedure was to be effective in granting the relief the employee sought.[33] Perhaps the same principle would apply to a grievance procedure adopted by a board of education. The law is not clear on this point.

Obligation to follow the procedure. Finally, boards must take care to ensure that their administrators follow the grievance procedures that have been established. In a case arising from a North Carolina municipality (not a school system) as an employer, a case in which the town had adopted a grievance procedure like the one described above, the state appeals court held as a denial of due process the firing of a police officer without granting the officer an opportunity to use the town's grievance procedure, even though the officer was an at-will employee and thus had no property interest in his job.[34] That case should serve as a warning to all public employers in the state. ■

32. Church v. Madison County Bd. of Educ., 31 N.C. App. 641, 645, 230 S.E.2d 769, 771 (1976), *disc. review denied*, 292 N.C. 264, 233 S.E.2d 391 (1977); Lloyd v. Babb, 296 N.C. 416, 427, 251 S.E.2d 843, 852 (1979).

33. Privette v. University of N.C., 96 N.C. App. 124, 138, 385 S.E.2d 185, 193 (1989).

34. Howell v. Carolina Beach, 106 N.C. App. 410, 417 S.E.2d 277 (1992). *See also* McLean v. Mecklenburg County, 116 N.C. App. 431, 448 S.E.2d 137 (1994).