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OHIO SCHOOL BOARDS ASSOCIATION 2013 CAPITAL CONFERENCE

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“Employee Discipline and Other Thorny Issues”

Presented by
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Moderated by
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I. Effective Investigation Procedures

A. Reasons for Investigation.

1. Uncover the truth about employee misconduct.
2. Protect other employees, students, and the public.
3. Avoid liability.
 - a. An effective investigation which documents an appropriate response can reduce or negate liability.
 - b. Documents the response to allegations of wrongdoing.
 - c. Identifies the source of the problem so that it does not get worse.

4. An effective investigation can deter future misconduct by employees by demonstrating that action will be taken against misconduct.

B. Considerations before Beginning Investigation.

1. Determine who will conduct the investigation.
 - a. The Administrator as “investigator” – assess limitations and strengths.
 - (1) Who has experience, expertise, or time?
 - (2) Who is unbiased/neutral?
 - b. Responding to misconduct in a charged environment.
 - c. Role of outside counsel.
 - (1) Preparation for hearing.
 - (a) Document review.
 - (b) Interviewing witnesses.
 - (2) Assessing witnesses/victims’ strengths and weaknesses including credibility.
 - (3) Investigation experience/questioning of witnesses.
 - (4) If a hearing occurs, first step is to begin the working relationship with witness.
 - (5) Advantages of attorney-client privilege and attorney work product.
2. Check Negotiated Agreement and Board policies for any requirements.
 - a. Procedural requirements and Title IX investigations.
 - b. Notice to employee of investigation.
 - c. Language with rigid “complaint” procedures.

- d. Language with progressive discipline requirements that do not permit administrator discretion.
 - e. Language with personnel file language including requirements that every document in a personnel file be initialed by employee.
 - f. Language with sunset provisions on prior discipline coupled with progressive discipline language.
 - g. Status of employee during investigation or if Board initiates termination proceedings.
3. Coordination of investigation with law enforcement if necessary.
- a. Should law enforcement be notified.
 - b. Is it possible for both investigations to occur together?
 - (1) Depends on the jurisdiction.
 - (2) Limits the number of times a victim/witness has to be interviewed.
 - c. If criminal investigation results in no criminal charges, an employee discipline/termination matter may still need to be addressed.
4. Possible coordination with Office of Professional Conduct, Ohio Department of Education.
- C. Suggested Process for Investigation.
- 1. Begin investigation with interview and statement of victim or complainant.
 - a. Get the details – who, what, where, when, and how.
 - (1) Obtain a chronological account of events.

- (2) Obtain the name of every person the witness knows or believes may have information and/or persons with whom the witness has spoken regarding the matter.
- (3) Also gather phone numbers and addresses.
- b. Considerations when dealing with children as witnesses.
 - (1) Check Board policy on questioning students.
 - (2) Parent consent and involvement.
 - (a) Plan to meet with parents to discuss student witness involvement in the ongoing proceedings.
 - (b) Be prepared for all range of parent responses.
 - i. "He/She would have told me."
 - ii. Protective.
 - iii. Cooperative.
- c. Believability of allegations – could this have happened?

This is a different question than whether there is sufficient evidence to prove the incident.
- d. Credibility as a witness.

"Witness credibility is a subjective, amorphous quality, often defined as much by the preconceptions of the persons who perceive the witness as by the witness's personal characteristics."
81 Am. Jur. 2d Witnesses §993.
- e. The data suggests that "false allegations constitute only a small percentage of all allegations." Phi Delta Kappan, "Sexual Abuse of Students by School Personnel," March, 1995, at p. 514.
- f. Common characteristics of student victims.
- g. Expect questions about process for:
 - (1) Employee termination case;

- (2) Revocation of certificate case; and
 - (3) Possible criminal case.
 - h. Expect concerns about keeping identity confidential.
 - i. Establish that victim and/or all witnesses are willing to testify.
2. Removal of employee from assigned duties.
- a. Upon receipt of complaint, employee may be removed from assigned duties by Superintendent.
 - (1) Letter from Superintendent to employee relieving employee of duties will suffice.
 - (2) Still entitled to receive pay and benefits.
 - (3) Do not assign to their home
 - b. Timing of removal – removal may occur after thorough interview of victim(s) and/or witnesses.
 - c. Depends on the nature of the allegations.

If there are credible allegations of misconduct, remove immediately.
 - d. What is the effect of the employee's presence on the ability to investigate fully and fairly?
3. Corroboration.
- a. Makes case more than victim's word against the accused's word.
 - b. Types of possible corroboration:
 - (1) Witnesses.
 - (a) Friends.
 - (b) Parents.
 - (c) Private Counselors.

- (2) Documents.
 - (a) Notes.
 - (b) Letters.
 - (3) Check computer and e-mails.
 - (4) Text messages.
 - (5) Social media.
4. Other victims/other acts which are basis for discipline/termination.
 5. Interview the alleged wrongdoer.
 - a. Schedule after all other witnesses have been interviewed.
 - (1) Allow employee the opportunity to fully respond. Document all responses to the allegations.
 - (2) May be new allegations after interview.
 - b. Review personnel file and any prior investigations or side files.
 - c. Insubordination if refuse to answer questions.
 - (1) Exception: Fifth Amendment privilege against self-incrimination. ReGault 387 US 1, 18 LEd 527, 87 S. Ct. 1428, 40 Ohio Ops. 2d 378 (1967).
 - (2) Garrity warning.
 - d. Often the teachers who sexually abuse their students are judged to be among the best teachers in a district and are very popular with students and parents . . . the allegations of abuse were most likely to be made against staff members who worked with students in extracurricular activities or who had frequent one-to-one contact with students. Phi Delta Kappan, "Sexual Abuse of Students by School Personnel," March, 1995, at p. 515.

6. Polygraph examination.
7. Commons missteps and errors.

Problems of investigations as reported by Phi Delta Kappan, "Sexual Abuse of Students by School Personnel," March, 1995, at pp. 516 and 517.

- a. Investigations tended to be poorly carried out.
- b. The allegations were not reported to child abuse authorities.
- c. Most investigations were kept in-house, and superintendents rarely sought confirming testimony or evidence.
- d. Often a teacher's claim that the allegations were untrue or that the behavior had been misunderstood ended the investigation.
- e. "Superintendents also reported that they found themselves unable to believe the charges when they were first presented, because the accused was often an outstanding teacher or administrator, and the target was often a marginal or troublesome student."
- f. "In many cases, the superintendents were friends of the alleged abusers, and they felt torn by the requirement that they investigate their friends."
- g. Staff members' responses:
 - (1) "Superintendents reported that other teachers rallied to the defense of the accused teacher, often in ways that the superintendents felt jeopardized the investigation and intimidated the students."
 - (2) "Teachers often believed that the allegations were lies or that the administration was 'going after' a good teacher."

D. Superintendent's Observations.

II. Disciplining Employees

A. Teacher Termination/Discipline.

1. Statutory grounds under O.R.C. §3319.16.
 - a. “The contract of any teacher *** may not be terminated except for *** good and just cause ***. The Board may suspend a teacher pending final action to terminate his contract if, in its judgment, the character of the charges warrants such action ***.”
 - b. “Notwithstanding any provision to the contrary in O.R.C. Chapter 4117, the provisions of this section relating to the grounds for termination of the contract of a teacher prevail over any conflicting provisions of a collective bargaining agreement entered into after the effective date of this amendment.”
 - c. The Ohio Revised Code is silent as to other forms of discipline, such as written reprimands and suspension without termination of an employment contract.
2. Negotiated Agreement.
 - a. Disciplinary and termination procedures.
 - b. Conflicts between Ohio law and collective bargaining agreements regarding standards or procedures.
3. Generally accepted seven tests to satisfy just cause standard.
 - a. Arbitrator standards (“Daugherty Test”).
 - (1) Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
 - (2) Was the employer’s rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company’s business, and (b) the performance that the employer might properly expect of the employee?
 - (3) Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed the rule or order of management?

- (4) Was the employer's investigation conducted fairly and objectively?
 - (5) At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
 - (6) Has the employer applied rules, orders, and penalties evenhandedly and without discrimination to all employees?
 - (7) Was the degree of discipline administered reasonably related to (a) the seriousness of the employee's offense, and (b) the record of the employee's service with the employer?
- b. A negative answer to any of the inquiries within the test signifies that good or just cause is not present.
- c. Summit Cty. Children Servs. Bd. v. Communication Workers of Am. Local 4546, 113 Ohio St. 3d 291 (2007).

Arbitrator considering union grievance over county's discharge of employee could use Daugherty test, including determination of whether degree of discipline imposed was reasonably related to the seriousness of the offense and the employee's record, to determine whether dismissal was for "just cause," where collective bargaining agreement did not define "just cause," and agreement did not specifically prohibit arbitrator from using the test or forbid consideration of mitigating factors.

- d. Newbury Educ. Assn. and Newbury Local School Dist., AAA Case No. 53 390 00262 09 (Nov. 24, 2009).

"Just cause generally requires persuasive proof that the rules or policies cited for the discipline were violated and that, under the totality of the circumstances, the discipline is proportionate to the offense, i.e., within the zone of reasonableness. Usually, the just cause standard favors progressive discipline, which gives an employee an opportunity to correct behavior and provides notice that failure to do so will lead to more severe discipline. However, progressive discipline need not always follow an oral warning, written warning, suspension, and discharge sequence in lock step order. The facts and circumstances of each particular case dictate the appropriate disciplinary level. Progressive discipline concepts,

however, do not apply in the face of gross misconduct, such as dishonesty, that warrants summary discharge in the first instance. Finally, no citation is needed for the principle that employees have the initial discretion to impose discipline for proven misconduct. Generally, arbitrators will not second guess management so long as the penalty imposed is within the zone of reasonableness under the totality of the facts and circumstances.” ***

B. Nonteaching Employee Termination/Discipline (Non-Civil Service District).

1. Grounds under O.R.C. §3319.081

- a. “The contracts as provided in this section may be terminated only for violation of written rules and regulations as set forth by the board of education or for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or any other acts of misfeasance, malfeasance, or nonfeasance.”
- b. Instead of termination, board may, alternatively, “suspend an employee for a definite period of time or demote the employee ***” on same grounds.

2. No specific reference to just cause in statute.

C. Termination/Discipline of Civil Service Employees in City School District.

1. Grounds under O.R.C. §124.34.

- a. “No employee shall be reduced in pay or position, fined, suspended, or removed, or have the *** employee’s longevity reduced or eliminated, except *** for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty *** or any other failure of good behavior or any other acts of misfeasance, malfeasance or nonfeasance in office, or conviction of a felony.”
- b. Check local Civil Service Commission regulations.

2. No specific reference to just cause in statute.

- D. Questions Every Board of Education and Administrator Should Ask Before Undertaking Termination or Disciplining of an Employee for Cause.
1. Would the average reasonable and impartial person, being aware of all of the relevant facts, conclude that termination was justified and fair?
 2. What are the facts and circumstances of the misconduct?
 3. Are the facts and circumstances undisputed or admitted?
 4. Does the misconduct concern one or two focused incidents, or a larger pattern of performance issues?
 5. Can the facts and circumstances be presented in a legal proceeding, through witnesses, documents or other means?
 6. Are the facts and circumstances determined from first hand verifiable information, or from rumor, innuendo or hearsay?
 7. If the facts and circumstances are unclear or incomplete, how will they be investigated and by whom?
 8. Is there a role for experts in investigation, handwriting or other disciplines?
 9. Do allegations of misconduct depend on the believability of child witnesses?
 10. How should information from children be obtained and recorded?
 11. Is the information fresh or stale, or does this even matter?
 12. Are there issues of witness cooperation, such as teacher vs. teacher?
 13. Is the teacher popular with students, parents, the board?
 14. Is there a duty to report child abuse under the circumstances?
 15. Is there a question of police involvement and cooperation?

16. Is the written record adequate and complete, or can it be improved?
17. Is the personnel file complete and up to date?
18. Has any negotiated complaint procedure been followed?
19. Does the collective bargaining agreement limit the termination option?
20. Has the same situation been handled differently before with other employees?
21. Did the misconduct occur off the job?
22. Will the employee resign?
23. Are there other alternatives to termination?
24. Does the potential cost of a termination affect the decision to proceed?
25. Should the employee be immediately removed from the classroom or school?
26. Is there a firm, high-level commitment from the board and administration to take on the employee?

E. Superintendent's Observations.

III. Last Chance Agreements and Resignations

A. Last Chance Agreements.

1. When to raise the idea of a Last Chance Agreement.
2. Language to include in a Last Chance Agreement.
3. Why and when a Last Chance Agreement makes sense – pros and cons.
4. Duration of Last Chance Agreements.

B. Employee Resignations.

1. No form required by law.
2. Can be withdrawn until accepted by Board.
3. Can a Board refuse a resignation?
4. Negotiated Resignation Agreements.

C. Superintendent's Observations.

IV. Conclusion and Board Member's Observations

