

Off-duty behavior: When can districts discipline?

Van D. Keating, senior staff attorney

A North Carolina teacher made headlines when she was suspended after a video surfaced of her working part time as a pole dance instructor. While the teacher had posted the video only on her private Facebook page, it was leaked to her school district, which promptly suspended her with pay, pending an investigation.

The district has a policy in which employees are to act as role models and “are responsible for their public conduct ... even when they are not performing their job duties as employees of the school system.” Ultimately, her fate as a teacher in the district will be determined by its board of education.

Situations such as this are not unique to North Carolina. In every instance, the question quickly becomes, what can the district legally do about an employee’s off-duty behavior? Can an employee be disciplined, or does the district have to just look the other way?

The legal answer is, as in many situations, it depends. It depends on the actual nature of the conduct, and it depends on whether laws, policies, regulations or rules were actually broken. Remember that various Ohio statutes call for the revocation or suspension of an educator’s license for certain misconduct.

Most of these provisions are found in Ohio Revised Code 3319.31 and 3319.311. Discipline under these statutes does not depend on whether the bad conduct occurred before, during or after working hours and, instead, focuses on whether the conduct occurred at all. Additionally, the State Board of

Education may independently act to revoke or suspend an educator’s license for conduct that may or may not be criminal but is incompatible with the teaching profession. More specifically, the State Board will review whether the employee engaged in an immoral act, incompetence, negligence or “conduct unbecoming to the profession.”

The phrase “conduct unbecoming” has become the focus for a variety of behaviors that can result in license revocation by the state. The Office of Educator Licensure has developed the Code of Professional Conduct for Ohio Educators in Ohio Administrative Code 3301-73-21(B), which contains descriptions and examples of inappropriate conduct for educators in this state.

The eight areas of conduct addressed are:

- professional behavior;
- professional relationship with students;
- accurate reporting;
- criminal acts;
- confidentiality;
- use, possession or unlawful distribution of alcohol, drugs and tobacco;
- accepting compensation for self-promotion or personal gain;
- commitment to contract.

Again, note that none of the addressed conduct is restricted only to on-duty hours.

Clearly, if the employee’s off-duty behavior is “bad” enough, he or she can lose his or her license and, ultimately, his or her job. But what if the conduct does not quite rise to that level? What

if the employee’s actions were simply embarrassing to themselves and the district? Potential discipline for that type of misconduct typically rests with local school district policies, which can vary considerably among districts in Ohio.

Many Ohio schools share the same philosophy — if not the identical language — of their North Carolina counterpart: Our employees are role models for the school community and are expected to act as such at all times and places. Often, in an effort to further emphasize this point, that phraseology will even appear in an employee’s job description. Districts with an employee union also may have language in their collective bargaining agreement that protects many aspects of employee behavior and limits potential discipline.

For unionized districts, any type of discipline will be subject to the negotiated agreement’s grievance procedure. Often, that language will include the phrase “just cause,” which can add steps and requirements to the discipline process.

The very nature of discipline under union contracts can be complex and daunting. Employee discipline frequently results in time-consuming and costly arbitration hearings, after which the board’s discipline could be reduced or even overturned. However, the potential frustrations of complying with a district’s discipline procedure should not deter a district from disciplining an employee for misconduct.

In many arbitrations involving

disciplining employees for off-duty conduct, the key issues focus on the reasonableness of the contract provision or policy violated and whether the employee had advance knowledge or notice that the off-duty conduct was prohibited. Remember that the arbitrator is a neutral third party whose interpretation of what is a reasonable rule may be entirely different from the board that created the rule. The board may need to explain how the employee's off-duty conduct adversely affected the employer to establish the reasonableness of its policy.

Another employer obligation is to show exactly how and when this policy was communicated to district employees. Boards that presume their employees automatically read every district rule and policy just because it is posted online may have a difficult time at the hearing. Arbitrators look for proof that policies have been distributed and actually read by employees before they

can be enforced. In short, it is difficult to successfully discipline employees for improper conduct based on rules or policies that were not effectively communicated to all district employees.

In every instance, the question quickly becomes, what can the district legally do about the employee's off-duty behavior?

So, if the pole dancing teacher was in Ohio, could a district have disciplined her? Maybe. A court or arbitrator would likely weigh the district's arguments that pole dancing is unprofessional, but not necessarily immoral, behavior for an Ohio teacher against the teacher's

arguments that pole dancing is fast becoming an accepted form of exercise and has no detrimental relationship to the teaching profession.


What may decide this case could be the difference between a pole dance performer and a pole dance instructor and whether that distinction makes any difference in light of the board's policy. OSBA's Division of Legal Services will continue to monitor the case and provide information on this topic to school districts. In the meantime, districts that are faced with specific questions of whether it is appropriate to discipline an employee for off-duty conduct are encouraged to contact their district counsel. ■

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