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Effective Approaches to Employee Discipline and Investigations

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Anna B. Cole 8/30/2018 10:00 AM

Comment [1]: update

Effective Approaches to Employee Discipline and Investigations

I. Employee Discipline

A. Introduction

From a legal standpoint, whether a school district has sufficient evidence to sustain the discipline/termination will depend on the relevant standard applied by either the court or administrative body, which often depends on particular contract language or the application of a particular statute to the employee. However, regardless of the standard that will ultimately be applied to review the action, all employers should apply certain fundamentals when determining whether discipline or termination of any employee is appropriate in a particular case.

B. Disciplinary Documentation

Documentation is the key to surviving any review (by an arbitrator, agency, or court) of a decision to discipline or discharge an employee. Therefore, it is extremely important to document all disciplinary actions and maintain them in the employee's personnel file. It is equally important to draft such documents with care, as they could be (and will be) used in as exhibits.

When drafting documents, consider the following points:

1. Review any applicable policies and collective bargaining agreements. Be on the lookout for provisions requiring that the school district provide the employee with particular notice before certain meetings, governing how complaints will be processed, or limiting what documentation can be included in an employee's personnel file. These requirements should be referenced in your documentation to show that you satisfied them. Additionally, if you are stating that an employee violated a particular workplace rule, it is helpful to state the particular rule in the documentation.
2. Review the employee's personnel file so that your documentation can reference prior discipline/evaluations where appropriate and place particular conduct into context.
3. Consider the ultimate reader. Disciplinary documentation must clearly communicate with the particular employee, future supervisors, and, potentially, an arbitrator or reviewing court or agency.
4. Document all conversations with the employee regarding any performance or conduct concerns, provide the employee with copies, and require that the employee sign the documentation to acknowledge that he or she has read the document.

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5. Complaints by co-employees, students, parents, or members of the public regarding an employee should be documented either by the complainant or the supervisor in writing. Details concerning who made the complaint, when and where it was received, and the substance of the complaint should also be in writing. Thereafter, the supervisor or individual tasked with determining whether a complaint is founded should document what fact finding was performed (i.e., what documentation was reviewed, who was spoken to, accused employee's response to the allegation, etc.) and ultimately whether they determined that the complained-of conduct occurred. Before finalizing the documentation, get a second opinion on the results of an investigation to ensure that it is reasonable, fair, and complete.

C. Seven Steps for Determining Whether Just Cause Exists for Discipline

When determining whether there is sufficient cause to impose discipline, consider the following seven steps, which are based on the labor law concept of "just cause." Although "just cause" is not required by all collective bargaining agreements or by statute for at-will employees, it is helpful to consider these steps in all cases to ensure that the disciplinary action is "fair" to the employee.

1. Did the employee have **prior notice** that his or her conduct would be subject to discipline, including possible dismissal?

Consider:

- a) Did the employee have prior notice of the rule, policy, or performance expectation alleged to have been violated
- b) Did the employee have prior notice of the consequences of violating the rule, policy, or performance expectation?
- c) Was the rule, policy, or performance expectation consistently enforced?

2. Was the rule, policy, or performance expectation allegedly violated **reasonable**?

Consider:

- a) Would an objective person view the rule, policy, or performance expectation of the school district reasonable?
- b) Is the rule, policy, or performance expectation reasonably related to the proper operation of the school?

3. Did the school make a reasonable effort, before taking action, to discover whether the employee **did in fact violate** the rule, policy, or performance expectation?

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- a) Did the employer conduct an investigation into the infraction?
 - b) Before making a decision regarding what took place, did the employer give the employee a meaningful opportunity to respond to the alleged infraction before making a decision?
 - c) Did the employer use strong investigative techniques?
 - d) Was the investigator trained in doing investigations?
4. Was the investigation **fair and objective**?
- a) Was the investigator biased?
 - b) Did the investigator keep an open mind during the investigation?
 - c) Did the investigator consider and evaluate all relevant facts?
 - d) Did the investigator follow up on the witnesses and/or documentation provided by accused employee and/or other witnesses?
5. Is there **adequate proof** that the employee did in fact violate the rule, policy, or performance expectation?
- a) Does the employer have a good faith, reasonable basis for believing that the employee violated the rule, policy, or performance expectation?
 - b) Does a preponderance of the evidence support that belief?
6. Was the decision to discipline **nondiscriminatory**, i.e., was the employee treated differently than similarly-situated employees?
- a) Has the rule, policy, or performance expectation been enforced against other employees?
 - b) If so, is the discipline being imposed similar or consistent with the consequence imposed on other employees who violated the rule, policy, or performance expectation? If not, is there a relevant distinction between the employees that explains the difference in treatment?
 - c) Is the employee being singled out because the employee is a member of a union, recently made a complaint/participated in an investigation, or otherwise a member of a class protected by state or federal law?
7. Was the degree of **discipline reasonably related to the seriousness of the violation**?
- a) Would an objective individual agree that the punishment fits the infraction?
 - b) Have other employees been disciplined in the same manner

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for the same or similar offense?

- c) Has the employee previously been disciplined for a violation of this, or a related, rule, policy, or performance expectation?

II. Effective Investigations

A. Introduction

One of the most important things that must be done before imposing discipline is to determine what happened. Performing a proper investigation is essential to discover the truth, make informed disciplinary decisions, protect the rights of both complainant and the accused, and help reduce the risk of a lawsuit or dispute over a disciplinary decision (or help the employer succeed in such a dispute, if one does arise). Consequently, it is critical that school personnel charged with investigating employee misconduct understand some of the key elements of the investigation process.

B. Background & Preparation

To be effective, investigations must be well-planned and performed with deliberation. Begin by ensuring the safety of individuals and property. As soon as that is accomplished, assess the scope of the investigation, and address who will investigate.

1. Receipt of the Complaint

As soon as a complaint is received, the employer must make an initial assessment of the seriousness of the complaint. Although virtually every complaint is entitled to some level of investigation, complaints that may have an impact on the safety of visitors, parents, students, and/or other employees, as well as complaints indicating discrimination issues and complaints of potential criminal conduct, require a greater level of scrutiny than those relating to minor workplace or school annoyances.

2. Use Common Sense: Protect People and Property First

If a complaint relates to the safety of visitors, parents, students, other employees, or property, it must be treated as a matter of highest priority and immediate action should be taken to stop the dangerous or destructive behavior.

1. Stop the dangerous behavior.
2. Consider notification of:
 - a. Law enforcement
 - b. Legal counsel
3. Consider removal of the accused
4. Protect the evidence at the scene (including computers)

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3. Planning the Investigation

Prior to beginning an investigation, a plan as to how that investigation will proceed should be developed. This plan should include identifying who will be performing the investigation, listing who will be interviewed and how contact should be made, outlining what questions potential witnesses will be asked, and identifying relevant documents that must be compiled. The plan should also involve identifying how the investigation will be concluded (i.e. ask yourself what question you have to answer and what information you need to reach a conclusion) and who will be responsible for deciding what action should be taken. Determining a schedule for the investigation is also helpful to ensure that it will be concluded in a timely fashion. When determining a schedule, be careful to consult your district's policies and procedures to make sure that your timelines at every step of the investigation comply with state and federal law.

4. Choosing an Investigator

One of the more important decisions an employer has to make when investigating an allegation of misconduct is to determine who should conduct the investigation. Whoever is chosen should have a general knowledge of the laws applicable to the allegation and of school rules, policies, and practices. In some instances, this will be a building principal or assistant principal, central office administrator, or the superintendent. In other cases, it will be more appropriate to bring in an outside investigator, such as the district's legal counsel or a non-affiliated investigator.

In every case, the individual chosen as the investigator should be objective, impartial, and credible, and have the skills to develop a rapport with the people being interviewed.

5. Know the Rules and Standards

In order to perform an effective investigation, the investigator needs to know not just the facts, but the relevant legal standards and rules. At a minimum, the investigator should review the following before beginning an investigation:

1. Relevant legal standards
2. Applicable student and/or employee handbooks
3. District rules, policies, and practices
4. All the materials/documents available at the outset.

C. Conducting the Investigation

1. Review Documents

Most investigations begin with a review of any available documentation relevant to the complaint, such as email correspondence, personnel file documentation, etc. During the course of the investigation, the investigator may become aware of additional documents that may assist the investigator in drawing a conclusion. For example, there may be text messages, Facebook or other social media posts, further email correspondence, etc. relevant to the investigation. While interviewing witnesses, investigators should ask them if they can think of any information that may be helpful to the investigation. If a witness informs you of documentation that you had not previously reviewed, ask them to provide you with a copy of the documentation. Review all documents thoroughly and determine which documents, if any, you will use as evidence in your investigation report.

2. Witness Interviews

a) Sequence of Interviews

While no one method will work in every case, it is generally best to interview the complainant first, the person under investigation last, and all other fact witnesses in between.

b) Location of Interviews

Always hold interviews in as private a place as possible, and try to select a location in which the interviewee will feel comfortable. Interviews in locations where other employees are aware that the interview is ongoing can prove problematic.

c) Recording the Interview

Always make a contemporaneous written record of the interview. However, it is not necessary for the notes of the interview to be a transcript of everything said. At a minimum, the interview notes should be dated and reflect who participated in the interview. If more than one person is present during the interview, make sure that only one set of notes is kept.

Remember, this is a record of the interview, not a summary of the investigator's conclusions. Therefore, the investigator should not include his or her own impressions of the interviewee or the investigation in general in the interview notes. Those types of comments should be recorded on a separate document.

d) Commencing the Interview

No one system of starting an interview will fit every situation. An

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investigator must adopt techniques that fit each circumstance. As a general rule, inform the person you are interviewing what his/her role is in the investigation, underscore the need for confidentiality, and explain how the information given to you by that person may be used. An investigator should not promise someone that whatever the witness says will be kept confidential or that their identity will be kept confidential, unless the investigator knows he or she can keep that promise.

e) Questioning

In general, investigators should ask open-ended questions first, and then narrow down to specific questions about the alleged incident. It is important for an investigator to make sure throughout the interview that he or she is understanding what the witness is saying. Ask the witness about details, who else was present, and who can corroborate his/her testimony.

Some witnesses are not forthcoming, and others are openly hostile. It is often helpful to start by asking questions that are easy for the interviewee to answer before getting to the more difficult/controversial questions. If a witness is being uncooperative, it often makes sense to explain, or re-explain, why the investigation is taking place and what the employer is trying to accomplish. Additionally, it can help to reiterate that the interview is the individual's opportunity to share their side of the story and that, if they choose not to participate, the investigator will nonetheless be making a decision regarding what happened based on the information available.

f) Ending the Interview

If possible, at the end of each interview, ask the witness if there is anything else of importance that the witness would like the investigator to know and if there is anyone else the witness believes the investigator should speak to. At the conclusion of the interview, underscore once again the need to maintain confidentiality. Further, remind the witness that he/she is entitled not to be retaliated against as a result of his or her participation in the investigation and, furthermore, that he or she is also prohibited from retaliating against any individual as a result of the investigation.

D. Concluding the Investigation

Once all the documents have been reviewed and witnesses have been interviewed, the investigator should go back over the notes taken during the investigation to find out where there are inconsistencies, whether there are additional people who should be interviewed, and whether it is necessary to speak again with someone who has already been interviewed. Remember, it is alright to go back for more information if it may help clarify something.

Deciding when the investigation is over is often the hardest part of the investigation. Even the most seasoned investigator often has difficulty determining when it is time to stop investigating and make a final decision.

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Making that final decision is often difficult as well, particularly if there are contradictions in what people have said and the investigator is forced to decide who to believe and who not to believe. However, remember that it is the investigator's absolute obligation to reach a conclusion before the investigation is closed. The investigator can assess the credibility of witnesses and whether their stories make sense, analyze their motives, and even rely on hearsay to make a conclusion.

While it is not always necessary to write a formal investigation report, if a decision has been made that a report should be generated, the content of the report will depend on the scope and purpose of the investigation. Most reports will include:

1. A statement of the substance of the complaint
2. A list of what documents were reviewed, including school policies/codes of conduct
3. A list of witnesses who were interviewed.
4. A summary of the accused person's response to the allegations
5. A statement of the investigator's findings of fact and conclusion regarding whether or not the complaint is founded or unfounded.

In most cases, a written report should not include recommendations as to what, if any, remedial action should be taken. A written report should also never include information that is extraneous to the incident being investigated. For example, if the investigation revealed the existence of concerns in the school beyond just those between the complainant and the accused, that is an issue that must be addressed in the proper forum and should not be included in a report of the investigation of at hand. Similarly, if during the investigation, the investigator develops opinions as to what staff should or should not have done to avoid the incident, those opinions should be raised outside of the context of the investigation and not be included in the report.

III. Pre-Dismissal Review

Before making the final decision to discharge an employee, employers should review the facts and circumstances surrounding the decision with a disinterested party, such as another member of the administration, a member of the SAU, or legal counsel. You should consider the following issues in conjunction with the seven steps outlined above, before recommending dismissal:

1. Whether the school district's policies and procedures have been followed.
2. Whether or not an individual employment contract or applicable collective bargaining agreement exists. If a contract does exist,

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review the contract to determine whether and under what circumstances termination is appropriate under the contract.

3. Whether the employee is covered by a statute that provides for certain due process protection prior to dismissal, such as continuing-contract teachers.
4. Whether the employee's personnel file and other documentation supports the termination decision.
5. Whether the employee is in a protected class under federal or state law.
6. Whether the employee has been involved in whistleblower or union activities.
7. Whether the employee has recently filed for workers' compensation benefits, requested leave under the Family and Medical Leave Act, or sought accommodations under the Americans with Disabilities Act.
8. Whether the employee has been informed that his or her performances has been inadequate or that he or she violated school district rules or policies.
9. Whether the employee has been given an opportunity to respond or explain any allegations of misconduct or poor performance.
10. Whether the employee was given sufficient opportunity to improve or correct any performance problems.
11. Whether discharge is consistent with the way other, similarly-situated employees have been treated.
12. Whether the employee has been promised that he or she would not be terminated without "just cause" or only for certain reasons.
13. Has the decision-maker sought the supervisor's input and had the decision independently reviewed by at least one other person.

IV. Special Issues: Teacher Nonrenewal, Discharge, and Removal

Apart from applicable collective bargaining agreement language or provisions of an individual employment contract, the New Hampshire legislature has enacted specific statutes governing the nonrenewal of a teacher's employment contract, teacher dismissal, and teacher removal from the classroom. Accordingly, the applicable statutory framework must be considered before discipline or termination of a teacher is finalized.

A. RSA 189:14-a – Nonrenewals

RSA 189:14-a governs the process of nonrenewal for certified teaching staff, as well as principals, assistant principals, librarians, and guidance counselors (hereinafter “teachers”). The statute requires that all teachers be provided with notice of the school district’s intent to reemploy the teacher for the following school year on or before April 15th, or within 15 days of the adoption of the school district’s budget by the legislative body, whichever is later. However, in no event can the notification occur later than the second Tuesday in May.

When looking at nonrenewal, school officials first must differentiate between “continuing contract” and “non-continuing contract” teaching staff. The statute defines a “continuing contract” teacher as:

- Any teacher who has taught for five (5) or more consecutive years¹ in their current school district; or,
- Any teacher who taught for five (5) consecutive or more years in another district and has completed three (3) consecutive years in the current school district.

1. Nonrenewal of Continuing Contract Teachers

Pursuant to RSA 189:14-a, continuing contract teachers who are not being renewed are entitled to: (a) written notice of the reasons for the nonrenewal; (b) a hearing before the local School Board within 15 days of request and a written decision of the school board within 15 days of the hearing; and (c) an appeal to the New Hampshire State Board of Education or arbitration of the disputed nonrenewal if allowed by a Collective Bargaining Agreement (but not both).

2. Nonrenewal of Non-Continuing Contract Teachers

RSA 189:14-a does not require school districts to provide non-continuing contract teachers with written reasons for the nonrenewal or a hearing before the school board. Nonetheless, while RSA 189:14-a does not require school district’s to *give* such teachers reasons for his or her nonrenewal, as explained above, school district’s should nonetheless *have* reasons for such nonrenewals. Although non-continuing contract teachers cannot seek redress for the nonrenewal under RSA 189:14-a, they could, for example, assert a claim against the school district alleging that the nonrenewal was the result of protected activity or a protected classification in violation of state or federal law and seek review of the nonrenewal by a court or agency. Thus, in brief, there is a difference between having reasons and giving reasons – always have reasons.

¹For the purpose of RSA 189:14-a, “years” are not school years, but are calculated as running 365 days from the date of hire. *Nazzaro v. Merrimack School District*, 118 N.H. 287 (1978).

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B. RSA 189:13 – Discharge

Pursuant to RSA 189:13, only a school board can dismiss a teacher during the school year, except in very specific circumstances where a teacher commits a serious crime, and then only after the school board holds a dismissal hearing. In order to comply with the statute, teachers can only be dismissed for: (1) immorality, (2) failure to maintain the competency standards “established by the school district;” and (3) failure to conform to the regulations prescribed. Prior to dismissal, teachers are entitled to: (1) notice (usually written) of the cause if the dismissal occurs mid-contract/mid-year; and (2) a full and fair hearing before the local board. Pursuant to RSA 189:14, a teacher dismissed by the local school board in violation of RSA 189:13 may file a breach of contract claim in state court to recover wages lost during the remainder of her contract period.

Teacher dismissals also may be challenged under the grievance and arbitration procedure of an applicable CBA. Thus far, attempts to exclude teacher dismissals from arbitration, absent clear language, have been unsuccessful.

C. RSA 189:31 – Removal

Pursuant to RSA 189:31, a superintendent has the authority to remove a teacher from the district “for cause.” While RSA 189:31 does not define “cause,” the State of New Hampshire Board of Education has held that allegations of wrongdoing are adequate cause to remove a teacher from the classroom pending an investigation. An employee suspended in accordance with RSA 189:31, but not dismissed by the school board, may appeal the suspension to the State Board of Education under RSA 189:32. The basis for such appeal would likely be whether the Superintendent had adequate “cause” to remove the employee from her duties. Thus, it is important for school districts to explain the reason(s) for the suspension, e.g., allegations of misconduct, parent complaint, etc., in sufficient detail and the steps being taken to investigate the matter at the time the employee is removed from their duties.