

INVESTIGATIONS AND DOCUMENTATION OF EMPLOYEE OR STUDENT MISCONDUCT

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Investigation Focus

- ▶ Who?
- ▶ What?
- ▶ Where?
- ▶ When?
- ▶ How?

What Should be Investigated?

- ▶ Alleged criminal violations (may be parallel law enforcement investigation)
- ▶ Alleged violations of Board policy, discipline codes, personnel and student conduct regulations
- ▶ Sexual harassment (Title IX has its own specific investigation requirements)
- ▶ Alleged discrimination
- ▶ Alleged retaliation
- ▶ Alleged bullying
- ▶ Alleged fraudulent conduct
- ▶ Other offenses that may result in termination/discharge of employees or suspension or expulsion of students
- ▶ Unsatisfactory work performance

Why are effective employee investigations needed?

- ▶ Improvement/Correction
- ▶ Due Process If There Will Be Job Action:
 - ▶ Basic Fairness and Integrity of Fact Finding
 - ▶ Notice of Charges
 - ▶ Explanation of Evidence
 - ▶ Opportunity to Respond
- ▶ Deliberate Indifference
 - ▶ Avoiding Future Liability
- ▶ State Statutes and Regulations
- ▶ Protecting the District from Employee Claims/Defenses

The Initial Complaint

- ▶ Anonymous Tips
- ▶ Verbal Complaint
- ▶ Written Complaint

Initial Reporting to outside entities?

- ▶ Report crimes to law enforcement
- ▶ Report allegations of sexual assault or sexual abuse involving any school district personnel, school employee, school volunteer, contractor or a contractor's employee to the appropriate law enforcement agency. NMSA§ 22-10A-5
- ▶ Report reasonable suspicion of unethical misconduct to Superintendent/PED. NMSA§ 22-10A-5.1
- ▶ Suspected Child Abuse or Neglect to CYFD or law enforcement. NMSA§ 32A-4-3.

Possible Conflicts of Interest with Law Enforcement

- ▶ Different timelines
- ▶ Different standards of proof
- ▶ Self-Incrimination
- ▶ Reluctance by police to share evidence

Factors to Consider in Planning Your Investigation

- ▶ Nature and seriousness of allegations
- ▶ Whether allegations have been admitted
- ▶ Whether the allegation can be established by the complainant alone
- ▶ Corroboration/Witnesses
- ▶ Impact on the workplace or school environment, and possibility of additional damage
- ▶ Administrative paid leave/ Temporary suspension of students
- ▶ Notice to public/parents and how much, how little

Who Investigates?

- ▶ Immediate Supervisor
 - ▶ For certified staff performance problems, supervisors should be used since they know the professional standards
- ▶ Personnel Administrator
- ▶ Superintendent (rarely)
- ▶ Outside Investigator
- ▶ Site-level administrator
- ▶ Law Enforcement (Is there a reporting obligation? Violation of the law?)

Make Decision Regarding Danger or Potential Harm to Students/Staff

- ▶ Immediate Removal From School Setting
- ▶ Employee: Suspension with Pay (administrative leave)
 - ▶ What do you have to tell them?

Quiz Question:

The Anonymous Complaint

You receive an anonymous complaint that a staff member has a romantic relationship with a student.

- What do you do with something like this?
- What are your concerns?
- Are there reporting obligations that you may have here?

Admissions

- ▶ Oral/Written
 - ▶ Get it in writing if you can;
 - ▶ Have witnesses present;
 - ▶ Make sure you have complied with union requirements

Information Gathering

- ▶ Interview the Complaining Party
 - ▶ Written statement; exact nature, description, dates, witnesses.
- ▶ Interview Witnesses: written statements
- ▶ Interview Hostile/Accused Last
 - ▶ Union? Role in the meeting? Outside of the meeting?
 - ▶ Do you need a Garrity warning?
 - ▶ Broad questions, moving to narrow.
 - ▶ Remind witnesses of confidentiality/retaliation issues
- ▶ Start with Open-ended questions and then narrow; Have scripted questions or an outline but don't be afraid to deviate from it. Listen closely and ask follow up questions.
- ▶ Take Good Notes; have a witness.
- ▶ Get Written Statements
- ▶ Seize physical evidence
- ▶ Consider law enforcement report
- ▶ May need to involve parents of accused student and other parents.

Analyze Your Evidence:

- ▶ How will it be characterized by opposing attorney?
- ▶ View Evidence from Independent Observer's Perspective
 - ▶ How will an arbitrator, judge, or jury view it?
 - ▶ Use the “reasonable person” standard
 - ▶ Remember that if there is a hearing, the Employee will have an opportunity to present evidence to refute charges, present witnesses, cross-examine witnesses, and review all evidence against him/her.
 - ▶ Is it Just Cause?

**REVIEW YOUR
EVIDENCE WITH AN
ATTORNEY**

Analyze Facts and Make a Decision

- ▶ Based on a Preponderance of the Evidence
- ▶ Employee:
Termination/Discharge/Suspension/other discipline
- ▶ Licensure reports
- ▶ Mandatory Reports
 - ▶ Child abuse/neglect
 - ▶ HB 128: Licensure reports
 - ▶ Ethical misconduct: discrimination
 - ▶ Sexual Misconduct: allegations of

Investigation Report

- ▶ The investigator's job is to establish findings of fact; the credibility of the complainant, accused and witnesses; identify violations of law and policy; and perhaps provide recommendations.

What do you do if the complaint is not corroborated?

- ▶ Do nothing?
- ▶ How do you finish?

Documentation Formats

- ▶ Misconduct: Verbal; Letters of Warning or Reprimand
 - ▶ Format:
 - ▶ Statement of observed conduct;
 - ▶ statement of rule, standard or directive;
 - ▶ statement that the matter has been reviewed;
 - ▶ conclusion that the rule/standard/directive was violated (and is disruptive, inappropriate or otherwise causing problems);
 - ▶ Warning or consequence
- ▶ Performance: Verbal; Letters of Coaching; PGPs, and Evaluations
 - ▶ Format (for letter):
 - ▶ Statement of Observed Deficiency
 - ▶ Statement of expected standard (using standard);
 - ▶ Conclusion that the performance is unsatisfactory
 - ▶ Statement of supports, expectations, timelines.

Pitfalls in Documentation

- Failing to document and failing to call the action “misconduct” or “performance” in your letters;
- Failure to reference policy, directive, or performance issues;
- Failure to warn of additional disciplinary consequences (misconduct) or of further performance oversight (performance);
- Treating an employee’s misconduct like unsatisfactory work performance or vice versa

Student conduct and discipline policies

- ▶ Student on student misconduct may merit investigation, and should be governed by the school district's student code of conduct and associated discipline matrix (Unless Title IX Sexual Harassment). Expectations regarding student conduct must be clearly communicated to students and parents, and the last thing you want to happen is to have inconsistency as to how these expectation are applied in the district.
- ▶ • Make certain that the matrix is current, published and consistent with Board policies.
- ▶ • Make certain that your district's policies are consistent with State and Federal laws and regulations.
- ▶ • Make certain that your site supervisors are applying the code of conduct and resulting discipline at all school sites with no favoritism or straying from the matrix.

Misconduct Issues: Off Campus Misconduct

- ▶ Staff can be disciplined/fired for what they do on their own time but “it depends”
- ▶ What is the tie/nexus to the school?
- ▶ Any conduct that bears on your fitness to teach
 - ▶ DWI? Theft? In jail?

Quiz Question

- ▶ You smell marijuana on an employee. When confronted, he shows you his medical marijuana card and says, “I only smoke at night for my arthritis pain.”
 - ▶ Is this necessarily a problem?
 - ▶ What are your courses of action?
 - ▶ What documentation do you need?
 - ▶ Extra credit: what is the biggest concern here?

Discharge or Termination?

- ▶ 22-10A-27 (discharge): only for licensed staff, middle of the contract.
- ▶ 22-10A-24 (termination): this is for nonrenewal of any staff member at the END of the contract; also for terminating non-certified staff, middle of the contract.
- ▶ Third option:
 - ▶ negotiating buyouts, in exchange for waivers
 - ▶ Suspension in lieu of discharge.

Documenting Misconduct and Poor Performance of Staff

- ▶ Timelines for renewal
- ▶ Know the difference between misconduct and performance
 - ▶ Misconduct: Can you point to a rule, standard of conduct or lawful directive that has been violated?
 - ▶ Performance: Is the problem a failure to meet expected performance criteria in carrying out duties?
- ▶ Confusing the two may make it difficult to take corrective or disciplinary action
- ▶ Failing to document will tie your hands

Misconduct or Unsatisfactory Performance

- ▶ Misconduct: what are your tools?
 - ▶ Verbal warnings; letters of concern; reprimands; suspension; termination/discharge.
- ▶ Unsatisfactory Performance: what are your tools?
 - ▶ Verbal warnings; letters of coaching; PGPs; possible termination/discharge.

You need to know where you are going before you start!

Who should sign it?

Role of Progressive Discipline?

Documenting Performance

- ▶ "Unsatisfactory work performance" means the failure by licensed school personnel to satisfactorily perform those tasks which are evaluated by the employee's supervisors, pursuant to the school district's approved plans for evaluation and supervision of its licensed employees. Furthermore, for the purpose of this regulation unsatisfactory work performance does not include insubordination or conduct deemed to be outside the normal scope of duties of licensed school personnel. NMAC 6.69.2.7

Being Specific About Performance Correction and Supports

- ▶ In either a Letter of Coaching or PGP, the administrator needs to communicate the concern and expectation.
 - ▶ Exactly what tasks need to be done or stopped?
 - ▶ Example: Mr. X will not raise his voice at students. Mr. X will submit a classroom management plan, outline for students and post his behavior expectations. Mr. X will work with a peer assistant on classroom management.
 - ▶ How does each task need to be done (written reports, oral reports, etc.)?
 - ▶ Example: Mr. X will meet with administrator and peer assistant to review progress. Will provide progress reports.
 - ▶ When does each task need to be done?
 - ▶ Management plan and posted expectations and statement to class will be in place by (date). Meetings with peer intervenor once per week and with administrator every two weeks.
 - ▶ For whom does each task need to be done?
 - ▶ List responsible parties for initiating and making up meetings. Any supports?
 - ▶ Comments on these tasks.
 - ▶ A Letter of Coaching or PGP can and should say that performance in these competencies is unsatisfactory.
 - ▶ A PGP may say that “failure to meet the requirements of the PGP may lead to a conclusion that this is uncorrected unsatisfactory work performance.”
 - ▶ Sign an acknowledgment

Quiz Question: Personnel

- ▶ A teacher was seen sleeping at his desk. What do you do?
- ▶ What concerns should you have?
 - ▶ Is this misconduct or poor performance?
 - ▶ Extra Credit: What other concerns might you have?
 - ▶ What tools do you decide to use?

Spotting and Preparing for EEOC Claims

- ▶ Allegations of discrimination on the basis of race, national origin, religion, gender, sexual orientation, age, disability.
- ▶ Whistleblower claims: responding promptly to and reviewing claims by employees of waste, fraud, abuse
- ▶ Your best protection is documentation of misconduct and poor performance **AS THEY OCCUR**
 - ▶ Example: Timing of complaint
 - ▶ New or non tenured employees.
 - ▶ Investigation of complaints and referring the employee to the complaint process.

Questions??

THANK YOU!!

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