

Maintaining Personnel and Payroll Records Tips and Guidelines

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The Law

- Most businesses maintain personnel files, even though they don't have to
- In Alabama, there is a law requiring personnel files for employees of boards of education
- Alabama Code §16-22-14 (1975)

Personnel Records

- Business Records
- Maintain information on employees that helps accomplish business purposes
- Place where put required information

Establishment of File

“Each board shall establish and maintain a personnel file on each employee.”

Alabama Code §16-22-14(b)(1975)

Maintenance of File

- Executive officer is responsible for supervising maintenance of file and for maintaining “updated, complete and accurate records.”
- Clear those tasks may be delegated, but ultimate responsibility is Superintendent’s

Work Performance Records

- Statements, reports and comments
 - Work performance
 - Discipline
 - Suspension
 - Dismissal
- Have to be written and signed as to accuracy
- Information attached to the work performance materials

What Goes in the File?

- Immigration materials
- Tax information
- Name/address
- Work performance materials may be placed in file

Work Performance Records

- Materials pertaining to work performance provided to employee
- Also have to provide all materials that:
 - Tend to diminish employee’s professional or work status
 - Reflect adversely on employee’s record of performance or character

Anonymous Materials

- Anonymous materials can go in the file under prescribed conditions:
 1. Must be transmitted to Superintendent
 2. Superintendent decides if investigation is needed
 3. Investigation
 4. Results reduced to writing
 - Signed by Superintendent or other responsible official
 - Dated
 - Attached to anonymous complaint
 5. Place results in file
- If no investigation within thirty days, complaint has to be destroyed

Use of Personnel Files

- Personnel files should not be a dumping ground for everything related to an employee
- Everything in them should have a business related use
- Used to store information that is needed or will be used for board's purposes
- Ask the question – what do we really need?

Typical Contents of Personnel Files (This is NOT in the Code)

- | | |
|--------------------------------------|---|
| ▪ Application | ▪ Evaluations |
| ▪ Insurance information | ▪ Accolades |
| ▪ Retirement and benefit information | ▪ Disciplinary matters |
| ▪ Transcripts | ▪ Reprimands |
| ▪ Certificate information | ▪ Responses to reprimands |
| ▪ Leave requests | ▪ Personnel actions |
| ▪ Health information | ▪ Photographs |
| ▪ Pay information | ▪ Memoranda/
Reminders/
Acknowledgments |

Employee Access to Records

- Employees have access
- Employee representatives have access
- Access to the whole file (“No document shall be withheld”)
- Can get copies of all documents in file
- Can “answer or object” in writing to material and the “answer or objection” will go in file

Public Access to Files Confidential or Not?

“Public access to school personnel files is affirmed subject to the privacy rights rulings of the various federal and state courts.”

ALA. CODE §16-22-14 (1975)

Public Writing

- Not defined in the Open Records Act
- Judicially defined in Stone v. Consolidated Publishing Co.

Open Records Act Ala. Code §36-12-40

“Every citizen has a right to inspect and take a copy of any public writing of this state, except as otherwise provided by statute.”

Public Writing

A record as is reasonably necessary to record the business and activities required to be done or carried on by a public officer so that the status and condition of such business and activities can be known by our citizens.

Stone v. Consolidated Publishing Co.

Public Record

Ala. Code §41-13-1

- Written, typed or printed books, papers, letters, documents and maps
- Made or received in pursuance of law by public officers
- In transaction of public business

Balance

Interest of citizens in knowing what public officials are doing

vs.

Interest of general public in having government run efficiently and without undue influence

Exceptions

- Recorded information received by a public officer in confidence
- Sensitive personnel records
- Pending criminal investigations
- Records the disclosure of which would be detrimental to the best interests of the public.

Citizen's Burden

- Responsibility of citizen to identify the documents needed under reasonable safeguards established by the board
- Also, it is the citizen's burden and expense to copy the writings and delivery

But, remember . . .

- Open Records Act is construed broadly and in favor of disclosure
- It is the board's burden to show why disclosure is not required

Personnel Records & Confidentiality Teachers

Attorney General Opinion No. 96-00003

Must disclose

- a. Salary expenditure account information
- b. Race and gender
- c. Current assignment
- d. Rank and type of certificate
- e. Employment experience
- f. Salary
- g. Hire and tenure date
- h. Applications and disciplinary action
- i. Superintendent's recommendation for transfer or discipline after board action

Exceptions

- Statutory (State and Federal)
 - Banking Records
 - Juvenile court records
 - Hospital records
 - Certain medical records
 - Records subject to privilege
 - Probation reports
 - Identity of Medicaid recipients
 - Records under FERPA
 - Records under HIPAA
 - Confidential information under federal grants
- Other
 - Personnel Records

Emerging Issues

- Personnel files in the electronic age
 - Electronic mail
 - Computer records
- FERPA
- HIPAA

Legal Complications

- Americans with Disabilities Act
- Fair Labor Standards Act
- Family and Medical leave Act
- Title VII
- 42 USC 1983 (Constitutional Violations)
- Age Discrimination in Employment Act
- State Common Law

Title VII of the Civil Rights Act of 1964

- Title VII makes it illegal to discriminate in any aspect of employment, including:
 - Hiring and firing;
 - Compensation; assignment or classification/segregation or employees;
 - Transfer, promotion, layoff or recall;
 - Job advertisements;
 - Recruitment;
 - Testing;
 - Use of company facilities;
 - Training and apprenticeship programs;
 - Fringe benefits;
 - Pay, retirement plans and disability leave; or
 - Other terms and conditions of employment.

Title VII Discrimination

- Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating in employment on the basis of:
 - Race
 - Color
 - Religion
 - Sex
 - National origin

Title VII of the Civil Rights Act of 1964

- Discriminatory practices under Title VII also include:
 - Harassment on the basis of race, color religion, sex or national origin;
 - Retaliation against an individual for filing a charge or discrimination, participating in an investigation or opposing discriminatory practices;
 - Employment decisions based on stereotypes or assumptions about the abilities, traits or performances of individuals of a certain sex, race, age, religion or ethnic group and;
 - Denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race or national origin.

Title VII of the Civil Rights Act of 1964

- EEOC Statistics
 - For the fiscal year of 2011, the EEOC received almost 100,000 individual charges of discrimination:
 - Over 35% of the charges alleged race discrimination;
 - Nearly 29% of the charges alleged sex discrimination;
 - Nearly 24% of the charges alleged age discrimination;
 - The remainder of the charges were made up of national origin, religion, disability and equal pay discrimination.
 - Retaliation charges were alleged over 37% of the time – fastest growing category

Frequently, the charges allege more than one type of discrimination.

Title VII Discrimination

- Most cases are “circumstantial” cases, which means that based on all the facts, it would seem that discrimination was the reason for an employment decision. In these cases, to establish a prima facie case under Title VII, the Plaintiff must prove the following:
 - belong to a protected class
 - was qualified for the position they applied or held
 - they were subjected to an adverse job action
 - they were replaced by someone outside the protected group

Title VII Discrimination

- A plaintiff/complainant must file a charge of discrimination with the EEOC within 180 days of the alleged discriminatory act.
- The EEOC issues a Right to Sue letter. Title VII requires that the plaintiff file a civil action within 90 days after receipt of the EEOC Right to Sue letter.
- “Direct evidence” of discrimination (*i.e.*, you can have the promotion because I do not like working with women).

Title VII Discrimination

- The burden shifts to the defendant to articulate some legitimate non-discriminatory reason for the employment decision. If a legitimate, non-discriminatory reason is established by the employer, the burden shifts back to the employee to prove that the alleged legitimate reason is a front or pretext to hide discrimination.
- Referred to as the McDonnell-Douglas burden shifting analysis

Equal Pay Act

- No employer shall discriminate between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex, for equal work on jobs which require equal skill, effort, and responsibility, and which are performed under similar working conditions.

Equal Pay Act

- A plaintiff must show equal works on jobs requiring:
 - Equal skill
 - Effort
 - Responsibility
 - Performed under similar work conditions
 - Jobs must be substantially equal, not identical
 - Actual job requirements are determinative, not job titles or classifications
 - Overall job forms basis of comparison, not individual segments
 - Requirements of equal skill, effort, and responsibility cannot be aggregated to establish equal work

Equal Pay Act

- The EPA permits difference in wages when such difference is based upon
 - seniority system
 - merit system
 - a system which measures earnings by quantity or quality of production
 - differential based on any other factor other than sex

Age Discrimination

- The Age Discrimination in Employment Act ("ADEA") was enacted by Congress with the express intent to prohibit arbitrary discrimination in employment and to promote employment of America's older population based on ability rather than age.

Age Discrimination

- The current law protects all employees over the age of 40 who are employed by an employer subject to the ADEA. The law generally prohibits an employer from compelling an employee to retire due to age subject to a very narrow exception.

Americans With Disabilities Act

- The ADA protects employees and prospective employees with disability from discrimination by employers based on their disabilities. All boards of education in Alabama are subject to the ADA since all boards have more than fifteen employees.
- The ADA prohibits employers from engaging in discriminatory and other unlawful practices in the hiring, managing and termination process of disabled individuals and imposes an affirmative obligation on employers, in some instances, to reasonably accommodate disabled applicants and employees.
- Employee must request the accommodation.
- To fall within the scope of the ADA, a person must have a disability and be a qualified employee or applicant.

Age Discrimination

- To establish a claim under the ADEA, a plaintiff must prove the following:
 - membership in the protected class (*i.e.*, over the age of 40);
 - the employee was qualified or performing up to the employer's expectations, but nevertheless was either not hired or was subjected to an adverse personnel action;
 - job was given to a younger employee or a younger employee was treated more favorably; and
 - the plaintiff had the same qualifications as the younger employee.

Americans With Disabilities Act

- "Disability" is defined as follows:
 - a physical or mental impairment that substantially limits one or more major life activities;
 - a record of such impairment; or
 - being regarded as having an impairment.

In addition, the employee or applicant must be capable of performing the essential job functions with reasonable accommodations if necessary.

Americans With Disabilities Act

- In pre-employment inquiries, the employer is
 - prohibited from asking questions concerning an individual's disability or questions likely to illicit information about an individual's disability.
 - The employer is permitted to determine whether the employee can perform the functions of the job. Focus should be on the specific job related functions when interviewing applicants.
 - The ADA permits an employer to establish job related qualifications standards, but those standards must not screen out or tend to screen out individuals on the basis of a disability unless they are job related and consistent with business necessity.

Americans With Disabilities Act

- The employer has a duty to reasonably accommodate an employee.
- The duty to accommodate is subject to exceptions and is excused when it imposes an "undue hardship on the employer."

Americans With Disabilities Act

- What are Major Life Activities?
 - Major life activities are those basic activities that the average person in the general population can perform with little or no difficulty. These include caring for one's self, performing manual tasks, walking, sitting, standing, lifting, reaching, seeing, hearing, speaking, breathing, learning, working, thinking, concentrating and interacting with other people. More recently, the Supreme Court has determined that the "ability to procreate" is a major life activity.

Americans With Disabilities Act

- Reasonable accommodation does not include
 - hiring additional employees;
 - creating a new job;
 - reallocating the "essential functions" of the job;
 - reallocating duties to other employees so they must work harder or longer than the impaired employee;
 - allowing indefinite light duty; and
 - allowing an indefinite leave of absence.

Americans With Disabilities Act

- What constitutes Undue Hardship?
 - Undue hardship is a defense generally defined as "requiring significant difficulty or expense." The criteria for establishing this defense include the:
 - Size of the company;
 - Size of the company's budget;
 - Nature of the company's operation;
 - Number of employees;
 - Composition and structure of the workforce; and
 - Nature and cost of the accommodation.

A Word About the FLSA Recordkeeping Requirements

- The FLSA requires that certain records be kept
 - Not required to go in personnel file necessarily, but make sure you have all of these kept somewhere
1. Name & Social Security Number
 2. Address and Zip Code
 3. Birth date
 4. Gender and job title
 5. Time and day when work week begins
 6. Hours worked each day
 7. Hours worked each week
 8. Basis for wage payment
 9. Regular hourly pay
 10. Total earnings – straight time for day or week
 11. Total overtime – week
 12. Additions/ Deductions from wages
 13. All wages in pay period
 14. Date of wage payments

Americans With Disabilities Act

- What constitutes "Undue Hardship"?
 - Undue hardship refers not only to financial difficulty, but to accommodations that are unduly extensive or disruptive, or to those that would fundamentally alter the nature or operation of the business.

FMLA – What does it do?

In a nutshell :

- Guarantees 12 weeks of unpaid leave in situations described in Act for eligible employees
- Guarantees 12 weeks of unpaid leave for "any qualifying exigency" for families of National Guard and Reserves
- Guarantees 26 work weeks of unpaid leave to care for service members with illness or injury incurred in line of active duty

The Basics FMLA – Eligible Employees

- Must work for covered employer (school boards are covered)
- Must have worked for Board at least 12 months
- Must have worked 1,250 hours during the 12 months prior to the start of the FMLA leave

The Basics – Leave

- Employee may take 12 work weeks in a 12 month period
- Spouses employed by same employer may be limited to combined total of 12 work weeks of family leave for:
 - birth and care of child
 - placement and care of adopted child or child in foster care
 - care for employee's parent with serious health condition
- In case of military caregiver leave, can take up to 26 weeks – spouses are limited to 26 weeks combined

The Basics Reasons for Leave

- Birth and care of newborn child
- Placement and care of a newly adopted or placed child (includes foster care)
- Serious health condition of the employee
- Serious health condition of immediate family member
- Military caregiver leave
- Qualifying exigency leave (military)

The Basics – Pay Status

- FMLA leave is unpaid leave
BUT
- Must continue to provide benefits, such as group health insurance coverage (PEEHIP)
- Must be on same terms as before employee went on leave – employee must still pay his or her share (if applicable)

FORMS

- Department of Labor General Notice "Poster" (Pub. 1420)
- Notice of Eligibility & Rights & Responsibilities (WH-381)
- Designation Notice (WH-382)
- Certification forms
 - Employee's Serious Health Condition (WH-380-E)
 - Family Member's Serious Health Condition (WH-380-F)
 - Serious Injury or Illness of Covered Service Member (WH-385)
 - Qualifying Exigency for Military Family Leave (WH-384)
- Frequently Asked Questions about Revisions from DOL
 - FMLA
 - Military Family Leave

Do's

- Get a plan – what should go in files
- Organize by subject matter or date
- Standardize – size and materials
- Make sure Superintendent knows what is in files
- Scan in files/digitize and secure
- Develop an access policy/guidelines
- Make a backup

Don'ts

- Just throw everything in
- Assume everything is confidential
- Commingle private and public material
- Delegate and fail to supervise
- Keep a "super secret" file or "personal" personnel file
- Deny access to employees or the public (but can establish reasonable restrictions and guidelines)

Technology Basics

General Recommendations – Policies

- Draft an acceptable use policy that specifies that privacy is not guaranteed, that information on a Board computer is not private, that the content of Board provided e-mail is subject to review, and that the Board reserves the right to log computer activity.
- Secure and maintain employees' and students' written acknowledgment of review and understanding of policies, prohibitions, etc. Most systems choose to have all users of Board-owned technology sign an acceptable use agreement.

The Family Educational Rights and Privacy Act ("FERPA")

FERPA is a federal law that protects the privacy of student educational records

The Family Educational Rights and Privacy Act

- FERPA defines an “educational record” as one directly related to a student and maintained by an educational agency or institution or person acting for such an agency or institution.
- The term “educational record” does not include a record that is kept in the sole possession of the person who made it, is not accessible or revealed to anyone except a temporary substitute for the record’s maker.
- Educational records include records, files, documents and other materials that contain personally identifiable information concerning the student.

The Family Educational Rights and Privacy Act

- FERPA allows parents to inspect and review a student’s educational records upon written request.
- The parent is not entitled to access to records of other children, even if the information regarding other children is part of a document containing information concerning their own child.
- A non-custodial parent would have the same right of access as the custodial parent.
- A school system must allow the parents an opportunity to inspect their children’s records within 45 days after the school receives the request.

The Family Educational Rights and Privacy Act

- Examples of Educational Records:
 - Date and place of birth
 - Parent(s) and/or guardian addresses
 - Where parents can be contacted in emergencies
 - Grades, test scores, courses taken
 - Academic specialization and activities
 - Special education records
 - Disciplinary records
 - Medical and health records
 - Documentation of attendance, schools attended, courses taken, awards conferred and degrees earned
 - Personally identifiable information- information that would make it easy to identify or locate a student such as
 - Student ID numbers/codes
 - SSN
 - Picture

The Family Educational Rights and Privacy Act

- In the event a parent believes with the contents of a student’s educational records are inaccurate or misleading, the parent can request that the records be amended.
- If the school does not amend the records, the parent can request a hearing to challenge the content of the educational records.

The Family Educational Rights and Privacy Act

- Generally schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records **WITHOUT CONSENT**, to the following parties or under the following conditions:
 - School Officials with legitimate educational interest;
 - A legitimate educational interest = a need to review the record in order to fulfill his or her professional responsibility.
 - Other schools to which a student is transferring;
 - Specified officials for audit or evaluation purposes;
 - Appropriate parties in connection with financial aid to a student;

The Family Educational Rights and Privacy Act

- What is "Directory Information"?
Directory information may include the following:
 - Student's name
 - Address
 - Telephone number
 - Email address
 - Date and place of birth
 - Information typically found in school yearbooks or athletic programs (i.e., names, pictures of participants in various extra curricular activities, receipts of awards, grade level, pictures of students, height and weight of athletes)
- Annually, school must notify parents of types of personally identifiable student information the district has designated to be directory information, and provide an opportunity for parent to opt-out of disclosure of some or all of their child's directory information

The Family Educational Rights and Privacy Act

- Organizations conducting certain studies for or on behalf of the school;
- Accrediting organizations;
- To comply with a judicial order or lawfully issued subpoena;
 - Must provide parents with notice of subpoena before responding to subpoena.
- Appropriate officials in cases of health and safety emergencies;
- State and local authorities, within a juvenile justice system, pursuant to a specific State law; and
- Pursuant to No Child Left Behind Act of 2001 and the National Defense Authorization Act for Fiscal Year 2002 Student's name, addresses, and telephone numbers to military recruiters, when requested – unless parent "opts out" "directory" information.
- Directory information.

The Family Educational Rights and Privacy Act

- The regulations for FERPA require the school district to make annual notification to parents and students over the age of eighteen concerning their rights with regard to the student's educational records. The notice must include information regarding the following:
 - The right to inspect and review a student's records within forty-five days of the date the request for the review is received.
 - The right to request the amendment of a student's educational records that the parent or eligible student believes are inaccurate or misleading.

The Family Educational Rights and Privacy Act

- The right to consent to disclosure of personally identifiable information contained in the student's educational records, except to the extent that FERPA authorizes disclosure without consent.
- The right to file a complaint with the U.S. Department of Education concerning alleged failures by the school district to comply with the regulations under FERPA.
- Including the FERPA notice in the Code of Student Conduct or student handbook is recommended.

The Family Educational Rights and Privacy Act

- There is no private right of action for a violation of FERPA
- The Family Policy Compliance Office receives and investigates complaints regarding violations of FERPA

The Family Educational Rights and Privacy Act

- Model notices written by U.S. Department of Education can be found here:
<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/lea-officials.html>
<http://www2.ed.gov/policy/gen/guid/fpco/ferpa/mndirectoryinfo.html>

HIPAA

- Health Insurance Portability & Accountability Act
 - Provides protection for personal health information held by covered entities
 - Ordinarily, school district not considered a "covered entity" as not a healthcare provider
- BUT
- If district employs nurses, doctors, psychologists, or other healthcare providers and bills for services (Medicaid reimbursement), then can be

HIPAA

- Health records maintained as part of education records are considered education records covered by FERPA, not HIPAA
- Still have to be careful whenever disclosure of medical records involved, prudent to review guidelines

What Goes in the Files About Developing Content

Investigation
Documentation
Letters and Emails
Electronic Communications

HIPAA

- Employment records are not covered by HIPAA
- Medical information included in employment records is not covered

Investigation

Designed to get answers and provide foundation for decisions

- Not just "gathering facts"
- Formal and informal
 1. How to proceed depends on judgment and application of policy and procedure
 2. May start as one and lead to another
- There is a tendency to over or under investigate
- Can lead to problems
- Just about all problems require a further look (this is a type of investigation)
- All starts with a "Complaint" or Other Initiating Event

Investigation and Reporting Practical Tips

Step One : The Complaint

- If a complaint and if possible, have complainant reduce complaint to writing and then signed
- Should be as detailed as possible
- Does two things
 1. Establishes and locks in the "story" early
 2. Identifies the areas needing investigation
- Don't draw a line in the sand on the "in writing" requirement
- Can reduce it to writing for them (not preferable though)
- The objective is to get the story and frame the issue
- Use judgment here-every minor complaint does not have to be made in writing and made formal – don't make a "mountain out of a mole-hill"

Investigation and Reporting Practical Tips

Step Two: "Secure" the Scene

- Take every measure to ensure that no further incident or interference can occur while investigating
 - Reassignment or removal from environment
 - Transfer
 - Administrative Leave/Suspension
 - Increased Supervision
- Maintain confidentiality
- Also reduces ability to "corrupt" evidence or for influencing witnesses

Investigation and Reporting Practical Tips

Step One : Where There is No "Complainant"

- Have the reporting party or person who observed describe the incident in writing and then sign
- Should be as detailed as possible
- Does two things
 1. Establishes the "story" early
 2. Identifies the areas needing investigation
- Sometimes the Principal or Administrator may be the "reporting party"
- The objective is to get the story and frame the issue

Investigation and Reporting Practical Tips

Step Three: Assign an Investigator

- Needs to be someone trained and experienced in the law, board's policies and procedures, and investigation
- Must have the time to investigate thoroughly
- Must not have an interest in the outcome
- For specialized investigations may need special administrators - Title IX Coordinator / Personnel Director/Financial professionals (Auditor)
- Can be Board attorney as well
- Think about the gender of complainant / accused and relationships of the parties (i.e. potential for case under Students First, Expulsion Hearing, Due Process rights)

Attorney as Investigator

Pros

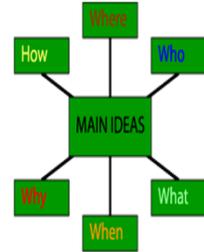
- Familiar with the law
- Trained to investigate
- If action is to be taken, will learn facts while investigating (“kill two birds with one stone”)
- Can take advantage of attorney-client privilege

Cons

- Cost
- Lack of time
- Disruption of having attorney in schools
- Intimidating
- Accused more likely to “lawyer up”

What information to obtain

- Review Board policy governing the alleged event
- Make use of the 5 W's (then add HOW)
- Look out for follow-up questions
- Seek to elicit specific facts rather than generalizations or characterizations
- Ask about other potential witnesses



Investigative Structure and Strategy

Step Four: Formulate the Investigation Plan:

- What information to obtain
- From whom to obtain the information
- When to obtain the information
- How to obtain the information



From whom to obtain the information

- The person reporting the misconduct (Note: If at all possible, get this statement in writing. This both establishes the complainant's "story" early and lets you know exactly what to investigate.)
- The person alleged to have committed the misconduct
- Anyone who may have witnessed the misconduct
- Anyone who may have second-hand knowledge of the misconduct

Note: Keep in mind the relationship of the witness to the event and to other witnesses when determining credibility.

When to obtain the information

- Generally, begin sooner rather than later
 - Prevent loss of relevant information through fading memories, unavailability of witnesses, etc.
 - If possible, speak to witnesses before they speak to each other
- Try to schedule witness interviews at a time and place when the witness is likely to be cooperative

How to obtain the information

Signed Statements

Pros

- Nails down the victim's allegation
- Gives written basis for going forward with investigation
- If victim later recants, gives basis for your actions
- May be provided to certain other parties

Cons

- Opposing counsel may cross-examine and impeach the witness
- Criminal prosecutor may object because of impeachment, and also demand the presence of a professional
- Statements may be ambiguous, or may be written so as to show bias or leave out important information



Avoid giving witnesses more information than necessary

- Don't feed them the answers you wish to receive
- Don't give them sensitive information that can be repeated to outside parties

Investigation and Reporting Practical Tips

Step Six: Focus on Technology

- Almost all "situations" these days involve a computer, cell phone, text messages, e-mail, Facebook, and the like
- Pull computers of those involved (if within jurisdiction) or have inspected after hours
- Pull e-mail archives, Internet history, etc.
- Chance are there will be something there
- Ask victim for phone records, if phones involved

Investigation

Step Five: Interview complainant

- Ask open ended questions first
- Allow complainant to tell story
- Listen for consistency
- Follow up with questions
- Review employee's background
- Details, details, details . . .

Investigation and Reporting Practical Tips

Step Seven: Interview the Accused

- Numerous approaches to this
- I like the straightforward approach
- Explain the allegations and then ask to respond
- Let him/her tell their side of the story
- Depending on the nature of charges, may not lead with that, but ease into details
- Ask for potential witnesses
- Instruct NOT to retaliate against accuser
- Emphasize how serious it is

Investigation and Reporting Practical Tips

Step Eight: Interview Others

- Can swap with Step 7
- Get details and ask broad questions too, especially if a hostile or unfriendly environment is invoked
- Don't give "confidential" information unless you have to, as discretion is important
- Reinforce the Board's commitment to the principle implicated whether it be safety, security, work environment, stand against harassment, etc.

Investigation and Reporting Practical Tips

Step Nine: Communicating Results

This step must be undertaken with delicacy – if investigation ends up in litigation or an administrative hearing, your report will likely be Exhibit 1

- Sift through the relevant evidence
- Include the facts and what conclusions you feel reasonably able to draw from them, but do not point fingers
- Back up your credibility determinations
- Use clear and concise language
- Proofread. Then proofread again
- It is advisable to call your school board attorney at this stage for help in crafting your report

Special considerations

Interviewing minors

- If an outside party (a Central Office administrator or an attorney) is involved in the investigation, ask the parents of the minor student if they wish to be present for the interview
- Do NOT discipline a student if you think a report is false. Only consider disciplining a student for a false report if the student ADMITS he/she made a false accusation
- If a student victim has not reported alleged misconduct previously, either get the report in writing or make note of one or two reliable witnesses to confirm that no prior report had been made

Interviewing potential criminal defendants

- Generally, speaking, an employee or a student represented by an attorney in a criminal case stemming from the same allegations giving rise to your investigation will refuse to give any statement. You may not compel that individual to speak with you
- On the other hand, if a student or employee wishes to give you a statement, you may accept it, and you need not warn the individual giving the statement of any right against self-incrimination or right to counsel

Some Practical Tips "Documentation"

- Probably an overused term.
- Usually refers to official record of events or a situation.
- We tend to think of it in deliberate, purposed context – "Keeping a File."
- Broaden the scope – documentation should be thought of in much broader terms.

Documentation Forms

- Writings.
- Photos, sketches, multi-media.
- Electronic notes, data.
- Any means of memorializing or creating a record.

To Document or not to Document . . . That is the Question.

- Know why you are documenting.
- “Documenting for the sake of documentation” is a mistake.
- The “why” will often lead you to the “how” and “how much.”

Documentation Purposes

- Creates a record of event or communication.
- Establishes or affirms an understanding or conclusion.
- Enhances the credibility and validity of decisionmaker’s position.

Principles of Effective Documentation

- Pointless “papering the file” is usually more harmful than helpful.
- Understand the liability implication of documentation, recognizing that every writing or record has potential liability implications.
- These principles sometimes work together.
- Examples:
 - Frustrated teacher “documents” that student can’t be managed.
 - Administrator “documents” that dangerous situation was brought to maintenance department’s attention.

Principles of Effective Documentation

- Know when documentation is needed and when it is not. Example:
 - Formal evaluation of performance should be documented, BUT not precondition to termination of employee who committed major offense.
- Be consistent both as to whether you document and how much (guards against perception of bias).
- Should not be used as a disciplinary weapon or the act of documenting as a means of punishing or threatening the employee or student (i.e., "This is going in your file!").

Principles of Effective Documentation

- Be positive and consistent in tone whenever possible.
- Be precise and concrete in terminology.
- Avoid emotionally charged statements, bias, unprofessionalism.
 - Suggests irrationality, lack of composure, bias, unprofessionalism.
 - The "24-hour rule" – don't document in anger or frustration.
- Avoid ultimatums, threats, lectures, adversarial tenor, verbal "finger wagging."
- Write clearly and comprehensively – pay attention to style, spelling, grammar and punctuation.

Principles of Effective Documentation

- Be honest and fair in approach – note both positives and negatives.
- Don't use as way to "avoid conflict" or confrontation.
- Don't "hide" behind a memo or letter when a verbal discussion is called for – often a discussion followed by confirmatory note is appropriate.
- Similarly, don't fail to document, "fudge," or retract unfavorable documentation because you feel bad, to avoid conflict, or to win favor of a parent or colleague – don't "negotiate" an evaluation.

Principles of Effective Documentation

- Avoid references to your authority or position ("As your assistant principal, it is my prerogative . . .").
- Don't "document" to blame someone else for a problem.
- Document success stories as well as setbacks.

EXAMPLES

A Better Way

INTERNAL MEMORANDUM

RE : JOHN DOE

DATE : January 23, 2013

I spoke today with Debbie Doe, John Doe's mother, about John's absence from school for the past two weeks. (Previous attempts to reach her had been unsuccessful, as her phone had apparently been disconnected.) I identified myself and explained the purpose of my call. Ms. Doe initially seemed wary and defensive; she offered the comment that "if people don't give me some space, I may need to get a lawyer on 'them.'" I explained that I was not attempting to get her into trouble but that I did have a professional and legal obligation to inquire into John's absence from school. She stated that she had been sick, that her husband had recently left her without a nickel, that her car did not work, and that she didn't have the money to fix it.

I expressed sympathy and suggested several avenues for Ms. Doe to explore, including possible school bus service and neighborhood riding groups, and offered to assist by contacting the Transportation Department on her behalf. Ms. Doe indicated that she might have a neighbor that could lend her a car or give John a ride to school. She asked for the transportation department's telephone number and stated that she would speak directly to the Director if she could not arrange for John to get a ride to and from school.

We discussed the probability that John would be required to do makeup work in his academic classes. I agreed to remain available to discuss or deal with any problems that might arise on John's return to school. I also suggested that a meeting between Ms. Doe and John's teachers might be helpful to John in making a smooth transition back to school and in enhancing the teachers' understanding of John's circumstances. I agreed to participate in such a meeting.

I closed the conversation by securing a commitment from Ms. Doe to have John at school tomorrow or to contact me promptly if she was unable to make arrangements for his transportation to and from school.

Following the telephone call with Ms. Doe, I called Student Services to apprise them of the situation, to seek additional guidance, and to confirm that the Does, in fact, reside within the school district and this attendance zone. The telephone number that I was given to understand was the Doe's new number is from a different county.

Can you find the problem areas?

INTERNAL MEMORANDUM

RE : JOHN DOE

DATE : January 23, 2013

I finally reached John Doe's mother to discuss his truancy and what she was going to do about it. She was most belligerent and threatened to sue me and the Board for harassment. I informed her that I had a personal lawyer and that the Board had its own lawyers, that lawyers weren't going to help her son get an education, but that I would with her cooperation. She stated that she had been "sick" (she is reported to have a drinking problem) and that her husband had left her "without a nickel." I told her that I was sorry but that other people with similar problems had found a way to get their kids to school. She asked about bus service. I gave her the Transportation Director's number but did not promise her bus service because I wasn't sure exactly where she lived. I told her that I expected to see John in school tomorrow, and that John will be withdrawn if he is not. After talking to her, I called AEA to make sure I was covered against any frivolous suit that might be filed. I also called student services to see if this parent actually lives in the school district.

See any issues with this?

January 23, 2013

Mr. John Jones
ABC Business
Birmingham, Alabama

Dear Mr. Jones:

In regard to your complaint about students using your business as a parking lot, I regret that I have little or no control over the situation. We will continue to monitor the problem and do what we can, but our hands are tied to students' off-campus activities. We hope to construct a new parking lot at some point, but funding is uncertain. Any pressure you can apply on the board would be appreciated.

Sincerely,

Arnold Weatherbee

A Better Way

Mr. John Jones
ABC Company
Birmingham, Alabama

Dear Mr. Jones:

This will formally acknowledge your complaint regarding students using your business premises to park their cars during the school day. I appreciate the opportunity to address your concerns.

You may be pleased to learn that construction on an overflow parking lot has been approved by the Board. It is not clear precisely when ground will be broken for the new lot, as the contract is contingent on the availability of funds which may not be in place for some time.

In the meantime, the school will undertake the following initiatives in response to the problem:

- a. Assistant Principal Ann Smith will monitor the problem on an ongoing basis and will serve as a liaison between you and the school on all concerns and decisions pertaining to this matter.
- b. Students will be reminded by periodic general announcements that they are not to park on your property, except for bona fide business purposes.
- c. Individual offenders will be sanctioned within the limits of our authority to do so and their parents will be notified of future infractions.
- d. We will request appropriate assistance from law enforcement agencies if and as necessary to respond to future violations.
- e. Your letter will be forwarded to Board Superintendent Bruce Wright for his review and possible additional response.
- f. I will remain open to any suggestion you may wish to make in order to properly respond to further problems, if any.

As you might expect, our options are not unlimited, and we cannot guarantee that the problem which prompted your complaint will not recur. At the same time, the school is committed to being a good neighbor to you and all surrounding property owners. I very much appreciate your patience in allowing us to meet that goal.

Sincerely,

Ima Goodhart, Principal

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Exercises in Documenting

Is this better?

Several students (identities currently unknown) were overheard by the school secretary to say that John Rambo slipped on ice as he was arriving at school this morning. I have been unable to obtain the name of any witnesses or persons making any statement about the incident. John was not at school today. I have been unable to reach anyone at John's home or parents' offices. As new information becomes available, it will be forwarded for review and appropriate action.

 BishopColvin
BISHOP COLVIN, JENNINGS & KIRBY, LLC

Exercises in Documenting

How is this one?

Several students told the school secretary that John Rambo slipped on a patch of ice on the sidewalk as he was arriving at school, and that he was taken to the emergency room by his mother, who was dropping him off at school at the time. I suspect that the ice was caused by the leaking faucet near the entrance to the building. I have repeatedly called the problem to the attention of the maintenance department to no avail. This is at least the second time something like this has happened.

 BishopColvin
BISHOP COLVIN, JENNINGS & KIRBY, LLC

Exercises in Documenting

Behavior Evaluation/Misconduct

You were late for the third time this semester, despite several warnings. I should not have to tell a teacher to be on time to work! This will not be tolerated. Any more tardies will result in a recommendation from me as your supervisor for your termination.

 BishopColvin
BISHOP COLVIN, JENNINGS & KIRBY, LLC

Exercises in Documenting

Behavior Evaluation/Misconduct

According to school sign-in records, you have been late to school at least three times this month. On 3/11/99, you signed in at 8:15 a.m.; on 3/17/99, you signed in at 8:45 a.m.; and today (3/24/99), you signed in at 9:05 a.m. Your employment record with the Board reveals no history of chronic tardiness or absenteeism, and I would hope that this month's experience is an aberration. Please let me know if these tardies are caused by any problem for which the school or school system can provide assistance.

Exercises in Documenting

Behavior Evaluation - Employee

Employee has:

- a. Failed to attend mandatory staff meetings, after written notice;
- b. Failed to explain or account for his absences from the meetings, following written requests for explanation(s);
- c. Abandoned his work station twice this month, without notice or explanation;
- d. Precipitated two complaints of rudeness this month (one from a repairman seeking directions to the office and one from a parent who was seeking entry into the building to pick up the child's homework assignments) (see more detailed memos in file).

Exercises in Documenting

Behavior Evaluation Employee

Employee is uncooperative and has a poor attitude.

Some Practical Tips (Things I have learned along the way)

- In communications, open with positive statements or sentiment (even if gratuitous).
- Set the stage – recite the reason for the communication.
- Lay out the facts that matter.
- Make the point (the conclusion the facts have lead you to and what your action is).
- Draw the reader in – express a common goal or ground (“I want the best for John, as I know you do”), or ask for feedback.
- Close with a positive statement

A Word About Electronic “Documentation”

- You can assume that you are not the only one “documenting.”
- Electronic communications are not private, they are stored (presumably) forever, and are subject to manipulation.
- Deleting e-mails, texts, etc. does not eliminate them.
- You should assume that whatever you send out is permanent and public.

Conclusion

- Management of investigations and documentation is not difficult but it does require patience, judgment and a deliberate approach – all of which can be hard in today’s fast paced world. To aid in the process:
 - Slow down and don’t jump in just because. Once you figure out what is involved, get a plan and follow it.
 - Be sensitive, thoughtful, and even handed in your approach
 - Be willing to draft, revise, and review all documents you generate
 - Think of every note, letter, evaluation, or writings as “Exhibit A” in a court proceeding, and use commensurate care and thoughtfulness in preparing it.
- Remember - Your approach to the investigation says as much about you as it does the subject

Practical Tips

- Treat e-mail just like a written letter – if you would not write it, don’t type it.
- Take your time and take a deep breath – we tend to be very conversational in e-mails. That is fine, just “think twice, type once.”
- Use your draft folder and revise e-mails like you would a letter.
- Keep a file like you would paper (not just the inbox).

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QUESTIONS... ?

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