

Investigating Improper Relationships and Other Employee Misconduct

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Agenda

- o Why do we investigate?
- o What should be investigated?
- o What is an improper relationship?
- o What is misconduct?
- o Who should conduct an investigation?
- o Investigation stages?
- o What are the rights of an accused employee?
- o How do you analyze the evidence?
- o Creating a report?
- o Working with law enforcement/tribal entities?

Why are effective misconduct investigations needed?

- o Due process
 - o Basic fairness and integrity of fact-finding
 - o Notice of charges
 - o Explanation of evidence
 - o Opportunity to respond
- o Deliberate indifference
 - o Avoiding future liability
- o State statutes and regulations

Investigation and Reporting Requirements pursuant to NMSA

22-10A-5

- o Superintendent must investigate all allegations of ethical misconduct about any licensed school employee who resigns, is being discharged or terminated, or otherwise leaves employment after an allegation is made
- o If investigation results in finding of potential wrongdoing, superintendent must report employee's identity and circumstances of the misconduct to PED within 30 days following separation from employment



What Should Be Investigated?

- o Alleged criminal violations
- o Alleged violations of Board policy, discipline codes, personnel and student conduct regulations
- o Sexual harassment reports
- o Alleged discrimination
- o Miscellaneous (alleged offenses that may result in termination/discharge of employees or suspension or expulsion of students)
- o Rumors? Sometimes.

Allegations of Misconduct

- o Could be oral or written
- o Could come from student, employee, parent, community member, the press, the police, or anonymously
- o GIVE A COMPLAINT OR ALLEGATION IMMEDIATE ATTENTION
- o A rumor may be sufficient reason to investigate depending on the nature and seriousness of the offenses rumored

What should an Investigation Accomplish?

- o Determine whether an improper relationship exists or if misconduct took place
- o Determine what occurred, and how
- o Identify the person(s) responsible for the undesirable conduct
- o Change that conduct
- o Support the imposition of consequences (discipline), when appropriate, for undesirable conduct
- o Solve this problem before being run over by the next problem

What is an Improper Relationship?

- o 1. Favoritism
- o 2. Contact outside of school and/or social media
- o 3. Gossip or truth about other school employees or students
- o 4. Sexting
- o 5. Physical contact
- o 6. When your radar goes up – follow up.

What is Misconduct?

- **6.60.9.7 DEFINITIONS:** “Ethical misconduct” means behavior or conduct engaged in by a licensed or certified school employee that violates the minimal standards of accepted ethical behavior and professional conduct listed in the standards of professional conduct section of this rule, or that constitutes the grounds for revoking licensure listed in 6.63.8 NMAC except for failure to meet level 3-A competencies.

N.M. Admin. Code 6.60.9

Misconduct cont.

- o **B. “Insubordination”** means actual or implied willful refusal to follow written policies, regulations, rules, or procedures established by the department, the local school board, or administrative authorities; or the lawful written or oral orders, requests, or instructions of administrative authorities.

N.M. Admin. Code 6.69.2

Who Should Conduct an Investigation?

- o Immediate supervisor
- o Personnel administrator
- o Superintendent
- o Board member (never!)
- o Outside investigator (?)

Who Should Conduct an Investigation?

Factors to Consider

- o What do your policies say?
- o Is there a conflict of interest?
- o Can the investigator:
 - o Keep accurate records?
 - o Conduct a thorough witness interview?
 - o Maintain confidentiality?
 - o Complete and accurate and thorough report?

Early Investigation Stages

- o Open a file for the investigation and maintain file at one location under lock and key.
- o Consider whether early indications give rise to reasonable suspicion that a crime has occurred, or child abuse or neglect, that warrant report to police or CYFD– may need to revisit this later.
- o Remember--Legal obligation to maintain evidence– whether good or bad– when litigation may reasonably result.

Early Investigation Stages

- o Review your applicable policies related to investigations.
- o May be specific investigatory steps in certain cases, i.e., bullying or harassment complaints.
- o Do you have a collective bargaining agreement with specific investigation requirements?
- o If likely to result in claim against the District or employees, notify insurance carrier

Considerations for the Investigator

- o Adopt a calm, impartial, fair, and deliberate mindset; do not prejudge;
- o Be the calm in the storm; no witch-hunts allowed;
- o Exercise common sense and good judgment;
- o Remember that your actions will be reviewed, and challenged; the materials you develop and your communications may be subject to later disclosure

Make Decisions Regarding Danger or Potential Harm to Students/Staff

- o Separate alleged victim from alleged violator?
- o Immediate removal from school setting?
- o Employee: Suspension with pay (administrative leave)
- o Contact law enforcement when necessary or danger imminent.

Handling Witness Interviews

- o Interview the complaining party first if possible
- o Interview witnesses (separately, please)
- o Create a set of questions that everyone is asked and ask everyone
- o Interview the accused party last

Handling Witness Interviews

- o Interview promptly while events still fresh
- o Be discrete about where and how interviews will be conducted to avoid rumors, speculation, embarrassment
- o Interview with two individuals present if possible. One to take notes and one to conduct the interview.
- o Interview witnesses separately if possible (or with union rep. if applicable)
- o Keep interviews confidential and remind witness to do the same

Handling Witness Interviews

- o Explain to the witness that you are conducting an investigation and that you will be taking notes.
- o Ask open-ended questions first, then narrower follow up questions.
- o Date and time of incident, location, who present, detailed description, reaction to incident, who else has witness spoken to or other potential witnesses.
- o Take good notes (include date and time of interview)
- o Take your time. Be thorough.

Handling Witness Interviews

- o Get written statements when possible.
- o Take good quality color photos where appropriate (e.g., bruises)
- o Record the interview, if necessary or helpful.
- o Keep a timeline of events that took place before, during, and after incident(s) in question.

Special Considerations for the Accused Employee

- o Request for union representation
- o Request for legal representation– no right to have a lawyer present during interview
- o Garrity Warning– accused has a right not to incriminate him/herself that applies in criminal setting. No such right in employment setting. Accused may be discipline/fired for not answering employer's questions

Sample Garrity Warning

As a condition of your employment, you are being ordered to answer our questions as part of an official investigation. The questions will be specifically directed and narrowly related to the performance of your official duties.

The information or evidence you provide cannot be used against you in any criminal proceeding. However, your statement may be used against you if a subsequent administrative action is commenced.

If you refuse to answer our questions, you will be subject to disciplinary action, which could include job termination. Do you understand?

Other Steps

- o Seize physical evidence
 - o Fourth Amendment issues (right to be free from unreasonable searches and seizures)
 - o Search is legally permissible when:
 - o 1) justified at its inception
 - o Individualized Reasonable Suspicion that a school rule or law has been violated and that search will produce evidence
 - o 2) reasonable in scope.
 - o Search tailored to find evidence of wrongdoing.

Do not allow the employee to have an opportunity to destroy evidence. Cut them off of email, computers, the property in advance of notifying them of the investigation, if necessary.

Create a Report

- o Description of allegations.
- o Response of accused.
- o Names of witnesses, facts found, summary of witness statements.
- o Investigator's findings and conclusions.
- o Recommendations for this action and possible policy/procedural changes.
- o Confidentiality Concerns:
 - o *Do not disclose investigation report to Board as they may need to sit in a future discharge or termination hearing.*

Confidentiality Concerns

- o Do not disclose investigation report to Board as they may need to sit in a future discharge, termination or student discipline hearing.
 - o They must remain a neutral and objective party.
- o Do not disclose information FERPA protected information.
- o Exercise caution in small communities – it is too easy to figure out who was accused.

Do Not Forget...

- o Report alleged crimes to law enforcement
- o Report alleged abuse or neglect to CYFD
- o Report ethical violations to PED

Analyze Your Evidence:

- o View evidence from independent observer's perspective
 - o How will the Board or an arbitrator, judge, or jury view it?
 - o Use the "reasonable person" standard
 - o Use direct evidence v. "hearsay" evidence
 - o Do you have enough evidence (documents and witnesses to testify) to prove a case where you bear the burden of proof.
 - o Are there holes in the evidence? Do you have more investigating to do?
 - o Remember that employee will have an opportunity to present evidence to refute charges, present witnesses, cross-examine witnesses, and review all evidence against him/her.

Analyze Facts and Make a Decision

- o Standard is preponderance of the evidence
- o Evaluate the credibility of your witnesses
- o Employee discipline options

Investigation and Reporting Requirements in NMSA 22-10A-5

- o District cannot enter into any agreement with employee that interferes with this duty to investigate and report
 - o Beware of Union requesting this type of provision in a settlement
- o PED may suspend, revoke, or refuse to renew license of superintendent who fails to make report as required

Reporting Requirements under NMAC 6.68.3(C)

(1) Every local school superintendent or the person designated by the governing authorities of state agencies, private schools or charter schools shall provide written notification to the director of the ethics bureau upon acquiring knowledge of purported facts reasonably believed by such notifying person to constitute grounds for suspension, revocation or other disciplinary action against an educator or administrator license. At a minimum, the written notification shall include the name and address of the licensed individual, the personnel action taken by a school district, if any, and a statement of reason for the action. The following are not justifications for failing to report this information to the director: whether or not the personnel action is final; whether or not the personnel action was taken by a different school district; whether or not the licensed person resigned from a different school district pending investigation for misconduct; whether or not a person has been licensed for three or more years; whether or not any adverse personnel action is/was reversed. Written notification shall be made to the director within 30 calendar days of the sooner of any adverse personnel action or discovering purported facts reasonably believed to constitute grounds for licensure revocation, suspension or other disciplinary action. Failure of a superintendent to provide such written notification under this subsection or Paragraph (2) of Subsection C of 6.68.3.8 NMAC below shall not bar the department from serving notice on a licensee, or revoking, suspending or taking other disciplinary action against his or her license.

(2) A school district superintendent or the person designated by the governing authorities of state agencies, private schools or charter schools shall report to the department any conviction of any felony or a misdemeanor involving moral turpitude of a licensed school employee that results in any type of action against the school employee in accordance with Section 22-10A-5D, NMSA 1978.

Possible Conflicts of Interest With Police Investigations

- o Different timelines– Don't hold off on employee or student discipline until police investigation complete; may exceed time limits for hearings
- o Police and Schools have different standards of proof
- o Police and Schools have different goals for investigating
- o Self-incrimination/double jeopardy
- o Police and/or school evidence may be different



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