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Tips for Managing Employee Misconduct

October 2014

Preliminary Considerations

- ✓ When an allegation of employee misconduct is made, Board Policies and Procedures should be reviewed and HR consulted.
- ✓ Thereafter, preliminary inquiries should be undertaken to determine whether to pursue a full investigation. If the allegations are unfounded, a full investigation will not be required.
- ✓ Evaluate whether the allegations necessitate statutory reporting to the police or local Children's Aid Society ("CAS"). If in doubt, make a "no-names" basis call to inquire as to whether it is appropriate to report in the particular situation (if this is possible in your jurisdiction).
- ✓ If a report is made and the third party investigates the situation, the Board must still conduct its own investigation, but may be required to wait for the third-party investigation to be completed and for confirmation from the third party that the Board can proceed. Consult with the third party to avoid impeding their investigation and with legal counsel if there are complex issues or if delays ensue.
- ✓ If a police investigation leads to criminal charges, monitor the proceedings to have a record of the evidence and outcome (also order transcripts). This information can be considered in your proceedings. You can take a similar approach with College of Teachers' proceedings; however, these matters rarely conclude before the Board process is completed, including any grievance. CAS investigations are generally kept confidential; however a brief letter summarizing the conclusion of the investigation may be provided to the Board. This letter

may only indicate that the complaint was verified or not verified without any substantive summary. This may also vary from CAS to CAS.

- ✓ Determine what kind of action is necessary for the Board's investigation: internal or external investigation? If an internal investigation is decided upon, is it pursuant to a particular Board policy (e.g.: workplace harassment or human rights policy)?
- ✓ Determine the status of the employee facing allegations during the investigation: eg., remain in role; assign to a different role; assign to home with pay; suspend without pay? (Check with legal counsel first!) The appropriate action will depend on the nature of the allegation and the role of the employee.
- ✓ If the complainant is an employee, consider possible steps to separate the complainant from the employee facing allegations during the investigation, as well as supports that the Board may provide to both the complainant and the employee facing allegations throughout the process (i.e. Employee Assistance Programs (EAPs), efforts to protect their privacy, etc.).

Communication Issues

- ✓ Often, issues of employee misconduct include issues of community and media relations. Consideration should be given to appropriate communication once the misconduct comes to the attention of the School / Board. The communication must be co-ordinated through the designated Board representative(s).
- ✓ Communication will vary and must respect the requirements of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). However, consideration should be given to communication to staff within the School, parents of students in the School, the School Community, as well as appropriate responses to the media. Any such communications must be coordinated through the appropriate Board contacts and representatives.
- ✓ When and if appropriate, a meeting can be held with staff, and certain information can be conveyed to staff as an exception to MFIPPA on a need-to-know basis.
- ✓ In some circumstances, it may be necessary to arrange a meeting with the School Community. These meetings are difficult, and the communications are restricted by MFIPPA. However, there are appropriate communication strategies which can be implemented and conveyed to the School Community.
- ✓ Further communication may also be necessary during stages of a misconduct matter or if there are "rumours" circulating in the School or community. For example, if charges are laid and the matter proceeds to a preliminary hearing or trial, there may be contact by the media

or the community and, in any event, consideration should be given to a further communication strategy.

Considerations During the Investigation

Internal Investigation

- ✓ In the course of an internal investigation, conduct interviews of the complainant, the employee facing allegations, and any witnesses who may have relevant information (including witnesses suggested by the parties).
 - Determine the location of the interviews, who should conduct the interviews (eg., the principal, human resources?), who should be present during the interviews, and the points to be covered during questioning.
 - Questions should be open-ended and not leading. (The 5 Ws: who, what, why, when, where).
 - Consider having two Board representatives present: one to conduct the interview and one to take notes (confirm the reason for two before/or when interview commences).
 - Provide interviewees with the opportunity to consult with and be accompanied by their union or association representative, where applicable.
 - Strongly recommend that the employee facing allegations has union or association representation. If the employee facing allegations refuses, have him/her sign off on having voluntarily refused the right to representation.
 - If there is no union or association, consider whether to advise the employee facing allegations to consider counsel.
 - Do follow up interviews where necessary to ensure all relevant information is obtained.
 - Take steps to preserve confidentiality to the greatest extent possible. Only disclose limited information as necessary for the furtherance of the investigation. Advise witnesses of the confidential nature of the situation and request that they not discuss the situation with others, including other witnesses.
 - Always interview witnesses individually.

- The employee facing allegations is typically the last witness to be interviewed. A summary of key allegations should be presented to the employee facing allegations in order that he or she may provide his or her version of the events.
- Consider meeting with the employee facing allegations to provide disclosure first, and then adjourn and reschedule (to permit time for the employee facing allegations to consider the allegation before providing a response).
- Notes should be detailed and factual, without the judgment or opinion of the questioner.

External Investigation

- ✓ In a contentious, politically sensitive or complicated situation, it may be preferable to hire an external investigator (e.g. harassment complaints).
- ✓ If an external investigation is decided upon, select a qualified and appropriate investigator.
 - Set the parameters of the investigation and facilitate the investigation.
 - Remember that all communications with an investigator may be disclosed should the matter proceed to arbitration. (Consider having legal counsel retain the investigator to establish some privilege).

Duties of Procedural Fairness and Natural Justice

- ✓ Remember that in an internal or external investigation you have responsibilities to the employee facing allegations with respect to procedural fairness and natural justice:
 - The employee is entitled to know the nature of the allegations.
 - The employee is entitled to have the opportunity to respond to the allegations. If there are parallel criminal proceedings, the employee may refuse to respond to any allegations, or be interviewed at all (if you are able to conduct an investigation).
 - The employee must be presumed to be innocent and all employees should be treated equitably, fairly, and without preferential treatment.
 - The decision regarding the employee's conduct must be made by an impartial decision maker who acts objectively and without bias throughout the entire process.
 - As best as possible, confidentiality with respect to the employee facing allegations is to be maintained.

Determining the Appropriate Action

- ✓ At the conclusion of the investigation, carefully evaluate the findings to determine the appropriate action.
- ✓ Determine whether discipline is appropriate, and, if so, the appropriate degree of discipline.
- ✓ In contentious, politically sensitive, or complicated cases, including situations which may lead to a recommendation for termination, consider seeking a legal opinion with respect to the imposition of discipline.
- ✓ If the employee facing allegations has a disability, including mental health concerns, that could possibly be related to the conduct, consult the Human Rights representatives in your Board and/or legal counsel prior to commencing the discipline process to determine how to navigate this complex area, including ensuring compliance with the Ontario *Human Rights Code* and positioning the Board against a potential future Human Rights Application.

General Tips

- ✓ Investigations must be timely – memories fade and misconduct should be dealt with ASAP.
- ✓ Investigations should always be conducted as confidentially as possible.
- ✓ Appropriate notes should be kept (factual and not evaluative).
- ✓ Board policies and procedures should be general to allow flexibility to tailor investigations to each particular situation. (Consider a clause that allows for development of process in circumstances not covered by the procedures; e.g., multiple complaints of harassment).
- ✓ Be mindful of the implications of all Board policies/ procedures / guidelines etc. regarding investigations and discipline, any applicable collective agreements, the *Education Act*, the *Human Rights Code*, the *Occupational Health and Safety Act*, the *Employment Standards Act*, the *Municipal Freedom of Information and Protection of Privacy Act*, and the *Labour Relations Act*.
- ✓ Make sure that employees are aware of and kept up to date with respect to Board policies regarding expected conduct and repercussions for misconduct.
- ✓ Ensure that all misconduct is addressed at the school and Board level as appropriate. Permitting misconduct to continue may: (1) result in no basis for future discipline; and (2), be considered condonation of the misconduct, creating a legal obstacle to discipline.

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October 2014