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Spring Cleaning: Effectively Responding to Allegations Against Special Education Employees

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I. BEFORE THE INVESTIGATION

A. **Document the Discovery.** Whoever discovers the alleged misconduct should create a written statement that describes everything the person knows about that conduct, including the names of potential witnesses, the identity of the alleged wrongdoer (if known), the date that the misconduct occurred or was discovered, and any other potentially relevant information.

B. **Report Maltreatment.** Minnesota law requires professionals who work in education to report suspected maltreatment of minors. Minn. Stat. § 626.556, subd. 3(a)(1). The duty to report is triggered whenever a mandated reporter

"knows or has reason to believe a child is being neglected or physically or sexually abused or has been neglected or physically or sexually abused within the preceding three years." Minn. Stat. § 626.556, subd. 3(a). When a mandated reporter has reason to believe that maltreatment occurred in a school facility, a report must be made to a local welfare agency, law enforcement and/or the Commissioner of Education. An oral report must be made within 24 hours, followed by a written report within 72 hours. In addition, as soon as practicable after a school receives information regarding an incident that may constitute maltreatment of a child in a school facility, the school shall inform the child's parent, legal guardian, or custodian that an incident has occurred that may constitute maltreatment, when the incident occurred, and the nature of the conduct. Minn. Stat. § 626.557, subd. 7(h).

C. **Determine Whether an Investigation is Necessary.** To determine whether an investigation is necessary, school officials should consider the following:

1. Does the behavior complained of violate the law or the employer's policies?

2. Is an investigation required by policy?

3. Does the conduct in question involve a pattern of prohibited behavior?

4. Could the conduct result in liability to the employee or employer?

5. Did the alleged wrongdoer admit to the conduct?

6. Even if a complainant or subject is no longer an employee, the employer may have an obligation to investigate. Such an investigation could pose a logistical problem because employers cannot compel non-employees to participate in investigations. Any refusal to participate should be documented.

D. **Determine Whether the Alleged Wrongdoer Should be Placed on Administrative/Investigatory Leave Pending the Outcome of the Investigation.** Depending on the nature of the alleged misconduct, the employee's duties, and the duration of the planned investigation, it may be appropriate or necessary to immediately place the alleged wrongdoer on administrative leave pending the outcome of the investigation. When making such a decision, employers should consider the following factors:

1. Whether the employee has the ability to destroy relevant information;

2. Whether a secret investigation may adduce more relevant evidence;

3. Whether placing the employee on administrative leave is necessary to protect the safety of students and staff; and

4. Whether placing the employee on administrative leave is necessary to limit the employer's potential exposure to losses and/or negative publicity.

5. Depending on the specific situation, employers may wish to issue specific directives to employees placed on paid leave. Such directives typically include: (1) prohibiting the employee from doing any work for the employer; (2) requiring the employee to turn in all employer property, including electronic files; (3) directing the employee to appear for an interview; and (4) ordering the employee to not access any of the employer's electronic resources during the investigation.

E. **Act Promptly.** If an employer decides to conduct an investigation, even minimal delays may result in lost evidence or provide the alleged wrongdoer with an opportunity to conceal the truth or come up with a "story."

F. **Choosing an Investigator.** The employer should decide whether it will investigate alleged misconduct internally or whether it will hire a third party investigator. In making this determination, employers should consider the following:

1. The potential ramifications of the problem, both practical and legal;

2. Whether an internal investigator will be viewed as biased because of his/her position with the employer;

3. The long-term impact of using an internal investigator, including the future work relationship, if any, between the investigator and the subject of the investigation;

4. The ability of an internal investigator to efficiently conduct the investigation in a thorough, objective, and timely manner; and

5. The likelihood of the investigator having to testify at a grievance arbitration, litigation, or other matter related to the investigation and subsequent discipline.

II. DATA PRACTICES CONSIDERATIONS IN INVESTIGATIONS

A. **Tennessen Warnings.**

1. **Legal Requirements.** The Minnesota Government Data Practices Act ("MGDPA") states that an individual who is asked to provide any private or confidential data concerning the individual shall be informed of the following:

   a. The purpose and intended use of the requested data;

   b. Whether the individual may refuse or is legally required to supply the requested data;

   c. Any known consequences arising out of supplying or refusing to provide the private or confidential data; and

   d. The identity of other persons or entities authorized by state or federal law to receive the data. Minn. Stat. § 13.04, subd. 2.

2. **Best Practices.**

   a. **Give Tennessen Warnings at the Start of all Investigation Interviews.** Although several decisions from the Minnesota Court of Appeals suggest that public employers do not need to give a Tennessen Warning when seeking information arising out of an employee's employment for use in the employment context, the best practice is to administer a Tennessen Warning at the start of all investigation interviews, especially when interviewing the subject of the investigation. The failure to administer a Tennessen Warning may result in the employer's inability to use, store, or disseminate the collected data.

   b. **Tennessen Warnings should be in Writing.** The MGDPA does not require written Tennessen Warnings. However, in order to avoid issues of proof, the best practice is to give written Tennessen Warnings, signed by the employee. Above the space for the employee's signature, the warning should contain language to the following effect: "By signing below you acknowledge that you have read this notice prior to being interviewed. A copy will be provided to you upon request."

   c. **Broadly Drafted.** The Tennessen Warning should broadly address the legal components discussed above. Employers should not limit

themselves to overly specific uses of the data or omit any person or entity that may have a right to access the collected data.

B. **Garrity Warnings.**

1. **When Administered.** Public employers must administer a Garrity Warning when requiring employees to provide information as a condition of maintaining employment. *Garrity v. New Jersey*, 385 U.S. 493 (1967).

2. **Consequences of Garrity Warning.** If a public employer directs an employee to answer interview questions upon penalty of discipline, the information obtained by that employer and any subsequent information obtained as a result of the compelled statement cannot be used in subsequent criminal proceedings against the employee.

3. **Language.** Like a Tennessen Warning, a Garrity Warning should explain the interview subject's rights under the MGDPA. Unlike a Tennessen, however, the Garrity Warning should: (1) direct the subject to answer the interviewer's questions accurately and truthfully under penalty of discipline for insubordination; and (2) inform the interview subject that the information he/she provides and any information resulting from the interview may not be used against them in criminal proceedings. The Garrity Warning should also stress that any information obtained independently by law enforcement or prosecuting authorities may be used in any criminal proceeding.

4. **Coordination with Law Enforcement.** If law enforcement officials are also investigating the conduct in question, it may be a good idea to contact the investigating officer before administering a Garrity Warning.

III. DETERMINE THE SCOPE AND STRATEGY OF THE INVESTIGATION

A. Most investigations follow the same pattern: (1) receive complaint and/or interview complainant; (2) interview fact witnesses; and (3) interview alleged wrongdoer. At each stage of this process, school districts should reevaluate whether additional investigation is warranted or needed and who should be interviewed next.

B. It is beneficial to review any applicable school district policies prior to conducting the investigation.

C. **Identify Fact Witnesses.**

1. Consider who will have knowledge regarding the allegations made in the complaint.

2. Witnesses who observed the conduct in real time or received contemporaneous information about the conduct are important fact witnesses in an investigation.

3. There is no minimum or maximum number of fact witnesses, but rather, the number of witnesses is dependent on the allegations made in the complaint.

D. **Determine Who Will be Present at Each Interview.**

1. Depending on the circumstances, it may be beneficial to have more than one employer representative present.

2. Upon request, an employee who is in a union has a right to have a union representative present if it appears that the interview may result in discipline. Some union contracts provide this right even if there is not a request by the employee.

3. If the investigation involves minor students, the investigator (or the district) should determine in advance whether parents will be permitted or invited to attend the interview. Factors such as the age of the student and the subject matter of the investigation should be considered. Unless the district has adopted policy to the contrary, school officials are not required to permit parents to attend the interview.

E. **Prepare a Response to Common Distractions.** Before conducting any interview, the investigator should decide how he/she will respond to the following types of complications:

1. The interview subject demands that the interview be taped;

2. The interview subject requests that a parent, friend, co-worker, or attorney be present during the interview;

3. The union representative repeatedly interjects or tries to help the interview subject frame his or her answers;

4. The interview subject refuses to answer questions;

5. The interview subject asks who you have interviewed or plan to interview;

6. The alleged wrongdoer asks whether the employer is going to discipline him or her; and

7. The alleged wrongdoer or his/her union representative asks for a written list of questions or asks to be allowed to submit written answers to questions in lieu of a face-to-face interview.

IV. INTERVIEW BASICS – ALL INTERVIEWS

A. **Explain the Purpose of the Interview.** Do not make any comments that could be perceived as minimizing the complaint.

B. **Define your Role in the Investigation.** Regardless of your other roles, make it clear that you are there as an impartial investigator. Do not take sides.

C. **Explain the Investigation Process.** Explain that the employer will follow up on information it receives. Ask the interviewee to report any contact from the alleged wrongdoer or any retaliation (from whatever source) immediately.

D. **Do *Not* Promise Confidentiality if Applicable Law Might Require Disclosure.** Information received during the scope of an investigation is subject to the MGDPA and must be released in accordance with its provisions.

E. **Ask Specific Questions.** Who, what, when, where, why, how? Get as detailed of information as possible. Do not allow an interview subject to make generalizations or to offer conclusions as opposed to facts. Follow each line of questioning to its logical conclusion based on the witness's *personal knowledge*, as opposed to what he or she has heard from others.

F. **Ask the Tough Questions.** Even if the subject matter is uncomfortable.

G. **Ask for Documents.** Ask each interviewee if he/she has any tangible evidence that corroborates his/her recollection of events. Documents such as e-mail correspondences, notes, diary entries, time sheets, or calendars, might all contain relevant and valuable information. Recordings of voice mail messages might also contain helpful information.

H. **Ask Each Interview Subject to Identify Other Witnesses to the Misconduct.**

I. **Do *Not* Guarantee Results.** Investigators should not expressly or implicitly guarantee any particular outcome of the investigation. Nor should they suggest or imply that disciplinary action will be taken against the alleged wrongdoer.

J. **Ask Short, Open-Ended Questions.** The goal is to have the witness talk more than the investigator. Investigators should avoid "leading" questions. This is not a time for cross examination.

K. **Assume that the Investigator will be Required to Defend the Interview Questions in Court.** Be impartial and thorough. Keep in mind that the investigator's notes *may* become discoverable evidence at some point.

L. **Observe Witness Demeanor.** Document those observations in the investigation notes.

M. **Follow Up.** If a witness answers "I don't know" or "I can't recall," break the question down and/or rephrase it to determine whether the witness does not have the information or is being evasive. If you believe the witness is being evasive, circle around and come back to the question at other points in the interview. If you have an objective reason to believe that the witness would know or remember particular information, do not hesitate to express surprise when the witness answers "I don't know" or "I don't remember."

N. **Visual Representations.** If you believe it would be helpful, have the witness draw a picture of the alleged misconduct or the location at which it occurred. It may also be helpful to have the witness take you to the site of the alleged misconduct for a personal inspection.

O. **Disclose as Little as Possible.** Use your judgment as to how much to tell the witness about the complaint.

P. **Tell the Witness not to Discuss the Process with Anyone Else.** Witnesses should not talk about the allegations, the content of their individual interviews, or the fact that there is an investigation being conducted.

1. CAUTION: Under PELRA, public employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Minn. Stat. § 179A.06, subd. 7. A request or direction to an employee not to discuss the investigation could be construed as a limitation on the employee's ability to engage in concerted activity for mutual aid and protection. Employers should choose their words very carefully when directing employees not to discuss confidential information.

Q. **Do not limit yourself to witnesses suggested by the complainant and alleged actor.**

R. **Note any indication of bias on the part of the interviewee.**

S. **Appear at ease, matter-of-fact and neutral.**

T. **Label impressions about what you were told as your own.**

U. **Assure witnesses that they, too, will be protected against reprisal.**

V. **Thank the interviewee for his/her time and for participating in the important process of gathering information about what may or may not have occurred.**

V. INTERVIEWING THE ALLEGED WRONGDOER

A. **Union Representation.** If applicable, the investigator should determine whether a union representative will be available for the interview in the event that the subject requests such representation at the start of, or during, the interview itself. The U.S. Supreme Court has held that individual employees have a right to refuse to participate in an investigation without union representation if they reasonably believe that discipline may result from the investigation. *N.L.R.B. v. Weingarten*, 95 S.Ct. 959 (1975). Consequently, if the alleged wrongdoer requests union representation, the employer might have to reschedule the investigation until such time as representation is available.

B. **Opening Remarks.** Prior to asking any questions, the investigator should explain the following to the alleged wrongdoer and his/her union representative:

1. The role of the investigator as a neutral fact finder;

2. The Tennessen warning, which the employee should be asked to sign prior to asking any questions;

3. Ground rules for the interview, such as not interrupting each other and professional conduct; and

4. The alleged wrongdoer should be expressly informed that this interview may be his/her only opportunity to tell his/her side of the story before a decision is reached.

C. **Refusals to Answer.** The investigator should decide in advance how to respond to the alleged wrongdoer's refusal to voluntarily answer questions. Typically, an employee will voluntarily cooperate if he/she knows that the interview may be his/her only chance to tell his/her side of the story. A typical Tennessen warning contains language to that effect. If the employee decides not to answer anyway, the investigator should consider whether he/she is willing or able to issue a Garrity warning to compel answers.

D. **Follow-up Questions.** Be prepared to ask appropriate follow-up questions in order to obtain the full response to each allegation. In addition to the general considerations discussed above, the following tips may help an investigator get the full response from an alleged wrongdoer:

1. **Be Blunt.** Do not dance around delicate topics. Ask the question directly.

2. **Ask Why.** If the alleged wrongdoer admits to any particular action, ask what his/her intent was.

3. **Check Credibility.** If the alleged wrongdoer denies the allegations, ask whether he/she believes anyone would have a reason to fabricate the allegations.

E. **Closing Remarks.** Before ending the interview, the investigator should:

1. Ask for any other information that may be helpful, or other information that the alleged wrongdoer would like to provide;

2. Explain that retaliation will not be tolerated. Direct the alleged wrongdoer not to take any action that could reasonably be perceived as an attempt to retaliate against any person who may have participated in the investigation. Stress that the term "retaliation" will be considered as broadly as possible;

3. Direct the alleged wrongdoer not to take any action that could give the appearance of attempting to influence the testimony of other witnesses; and

4. Direct the alleged wrongdoer not to discuss the investigation or the allegations with anyone other than his/her union representative and attorney.

VI. FINDINGS & CONCLUSIONS

A. Was the allegation substantiated or unsubstantiated?

B. If substantiated, did the conduct violate law or the District's policies?

VII. EMPLOYEE DISCIPLINE

A. Typical Reasons for Discipline

1. **Absenteeism.** Attendance is generally considered to be an essential function of a job. In Minnesota, excessive absenteeism was found to be a legitimate and nondiscriminatory reason for discharging a disabled (arthritic) employee from her position, and therefore her claim under the Minnesota Human Rights Act was dismissed. *See Lindgren v. Harmon Glass*, 489 N.W.2d 804 (Minn. App. 1992).

2. **Performance problems related to alcohol and drugs**

3. **Failure to perform duties assigned to an employee**

4. **Sexual Harassment or Violence**

5. **Negative communication with fellow employees and supervisors**

6. **Disruption of the workplace**

7. **Failure to follow the employer's rules and procedures**

B. Determining Appropriate Discipline

1. **Collective Bargaining Agreements and Past Practice: All Employees.** Collective bargaining agreements typically provide that employees shall not be disciplined or discharged except for "just cause." Most personnel rules also apply a just cause or similar standard for discipline to be imposed.

2. **At-Will Employees.** Some employees may be "at-will" without any expectation as to continued employment and therefore may be disciplined or discharged without establishing any particular standard of cause or cause at all. However, to protect against discrimination charges, employers should be cautious about imposing unfair discipline against an employee just because s/he is not protected by a union contract or other policies.

3. **Definition of just cause.**

a. Legal definition: "Cause," or "sufficient cause," means "legal cause," and not just any cause the employer may think sufficient. The cause must be one that specifically relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause must be one touching the qualifications of the person or his or her performance of his or her duties, showing that s/he is not a fit or proper person to hold the office.

Under this definition it appears that the cause or reason for dismissal must relate to the manner in which the employee performs his or her duties, and the evidence showing the existence of reasons for dismissal must be substantial.

b. Arbitrators apply a "just cause" standard to nearly all forms of discipline imposed on an employee who is in a union. Different arbitrators define just cause differently. However, the basic components of just cause are fair and equal treatment and punishment that fits the offense.

i. **Arbitrator Gallagher's Test:** "An employer has just cause to discharge an employee whose conduct has a significant adverse effect upon the enterprise of the employer, if the employer cannot change the conduct complained of by a reasonable effort to train or correct with lesser discipline."

ii. **Arbitrator Flagler's Test.** This arbitrator applies a multi-part test:

a) Is the rule under which the grievant was discharged reasonably related to the safe and efficient conduct of the business?

b) Was the rule clearly expressed and effectively promulgated?

c) Did the employer conduct a *fair* investigation into the facts?

d) Do the facts establish the guilt of the grievant?

e) Does the penalty of discharge fit the proven offenses?

f) Has the grievant been afforded even-handed disciplinary treatment?

g) Has the employer either condoned such behavior in the past or otherwise entrapped the grievant into believing that such conduct was acceptable?

c. The nature of the discipline must be appropriate for the infraction.

d. Discharge is reserved for the most serious and egregious infractions or for "the last straw" violation.

e. The concept of progressive discipline is borne out of this requirement.

f. The burden of proof is on the employer.

C. Progressive Discipline

1. Written warning
2. Letters of reprimand
3. Withholding salary increments
4. Suspension without pay
5. Demotion
6. Discharge

D. Six Part Test of Substantive and Procedural Due Process. If misconduct is determined to have occurred, it is important to impose discipline commensurate with the nature of the offense as well as the employee's prior discipline history. Progressive discipline is generally, but not always, appropriate. For example, an employee having a sexual relationship with a minor client would invariably result in discharge proceedings, even if the employee had a spotless record.

1. Was the employee warned about the possible consequences of his conduct?

2. Was the rule reasonably related to the orderly and safe operation of the department?

3. Did the employer investigate before administering discipline?

4. Was the investigation fair and objective?

5. Did the investigation produce substantial evidence of misconduct?

6. Has the employer applied its rules evenhandedly and without discrimination?

E. **Implementing Effective Discipline**

1. **Promulgate clear rules and policies.** An employer's failure to clearly express its expectations may give rise to an appearance of unfairness if an employee is disciplined for violating a rule or policy.

2. **Consistently and fairly enforce all rules and policies.**

3. **Conduct a reasonable inquiry and investigation prior to determining discipline, except in the most obvious and heinous situations.**

4. **Provide a notice of charges in sufficient detail so that the employee can understand them.**

5. **Give the employee an opportunity to be heard prior to making a final decision regarding discipline or termination.**

6. **Follow appropriate progressive discipline except in cases of serious misconduct.** Look at an employee's entire record before determining the appropriate disciplinary action. Determine what discipline is fair under the circumstances, appropriate to the magnitude of the offense in light of the employee's prior discipline and designed to deter the employee from engaging in the same or similar conduct in the future.

7. **Treat similarly situated employees equally.** "Similarly situated" does not mean that each employee who engages in the same misconduct must be treated in exactly the same way.

EXAMPLE: Employee A has a long history of disciplinary actions, including tardiness, insubordination, and abuse of sick leave. The employee has been issued reprimands and has been suspended. Employee B has no prior disciplinary actions. Employees A and B engage in a heated argument in the high school hallway in front of community members who are there on business.

The District is not prohibited from imposing a more severe sanction on Employee A, in light of that employee's discipline history. In fact, it might be counterproductive to treat the two employees the same. The District should, however, have a clear, documented basis for treating them differently in the event of a challenge.

8. **Document misconduct and performance deficiencies.** Inaccurate or incomplete performance evaluations will be used by the employee to establish that no real problem could have existed since you failed to note it. Do not be nice. Be truthful and complete. Failure to have documented prior warnings or discipline will be used by the employee to establish that the problem did not exist prior to the current incident giving rise to discipline. The employee will argue (and the arbitrator will probably agree) that if s/he had been given a warning, s/he would have corrected the problem or more clearly understood the seriousness of the matter.

9. **DON'T:** School districts are discouraged from entering into agreements whereby discipline is removed from the file after a period of time.

F. **Imposing Discipline**

1. **Who Imposes Discipline:** The immediate supervisor should generally be the person to actually impose the discipline, unless the immediate supervisor is alleged to have engaged in inappropriate conduct related to the employee in the past or related to the incident giving rise to the disciplinary action.

2 **All disciplinary actions should be imposed in a planned, calm, and respectful manner and not in the heat of the moment.**

3. **In nearly all cases, the supervisor should consult with the department head and personnel department prior to imposing discipline to ensure that all parties agree on the appropriate action and that it is consistent with overall employer policy and practice.**

4. **Impose Discipline Privately.** Discipline should be imposed in a private location where the parties cannot be seen or overheard by co-workers, members of the public or others. Only supervisory employees and the employee's union representative, if any, should be present when the discipline is imposed.

   a. Due to data practices implications as well as potential defamation actions, only supervisors should be involved in disciplinary action.

Supervisors must take steps to ensure that no co-workers or other nonsupervisory individuals are informed of the disciplinary action by the employer (the employee is free to tell them if s/he wishes). This includes taking care to have disciplinary letters typed only by confidential secretaries, refraining from discussing the discipline with the employee or supervisors where they might be overheard.

b. There may be occasions when an employee needs to be immediately corrected by his/her supervisor. Even under these circumstances, however, the supervisor must take care to take the employee aside, out of the hearing of others, before discussing the conduct.

5. **Document all disciplinary action.** This includes oral reprimands, where a memorandum verifying that it has occurred should be retained, either in the personnel file or a separate file. In the event that the District is sued in the future on the grounds that it negligently retained an employee, documentation of all prior discipline imposed on the employee may save the employer from liability.

EXAMPLE: Employee A tells an inappropriate joke of a sexual nature to Employee B. Supervisor gives employee an oral reprimand but does not document that she has done so. Employee A continues to tell inappropriate jokes, and ultimately, the School District is sued by Employee B. The School District is unable to establish that any action was taken against Employee A.

G. Discharge of Employees

1. Special Issues Relating to Non-Licensed Employees.

a. **Veterans.** Veterans may only be terminated for cause for misconduct or incompetence. Minn. Stat. § 197.46. Veterans, like teachers, are entitled to a pre-termination hearing and must remain on paid status until the hearing is concluded. The Veterans Preference Act contains notice and procedural requirements that must be followed. Veterans must be given written notice of the right to a hearing before a neutral panel before being discharged. Failure to give a veteran notice of the right to a hearing before removal tolls the sixty-day period for requesting a hearing. The veteran may assert the right to a hearing at a later date, and substantial liability for back pay may result.

b. **At-Will Employees.** At-will employees are not entitled to any due process upon termination of their employment. *Phillips v. State*, 725 N.W.2d 778 (Minn. App. 2007, *pet. for rev. denied* (Mar. 28, 2007). (The court held that an instructor at a community college had no entitlement to due process upon termination of his fixed term contract.)

2. **Procedural due process required.**

a. Notice of expectations and work rules.

b. Notice of performance deficiencies.

c. Notice of charges for egregious conduct justifying termination.

3. **Conduct a "*Loudermill* Hearing" Before Deciding to Discharge.**

4. **Post-termination hearing rights.**

a. Arbitration proceedings pursuant to a collective bargaining agreement.

b. Hearing pursuant to a personnel policy.

H. **The Basic Process For Disciplining a Teacher**

1. **Clearly Identify the Teacher's Deficiencies or Misconduct.** To the extent possible, objective criteria should be used to identify deficiencies and objective facts should be used to describe misconduct. Before identifying a teacher's deficiencies, the district must be able to identify the expected level of performance and the basis for that expectation. Performance expectations can be guided by job descriptions, collective bargaining agreements, and statutes and regulations defining the responsibilities and minimum qualifications for a teacher in a particular field.

2. **Determine Whether the Teacher is Probationary and, if so, Whether the Deficiencies Warrant Non-renewal.** Depending on the nature and extent of a probationary teacher's performance deficiencies, a school district may best serve its interests by non-renewing the teacher rather than utilizing district resources to try to train or rehabilitate the teacher. If a teacher performs poorly during his or her probationary period, it is

unlikely that the teacher's performance will improve once he or she has the statutory protections of a continuing contract or tenure.

3. **Determine Whether the Teacher's Deficiency or Misconduct Meets One or More of the Statutory Grounds for Termination or Discharge.**

   a. **Statutory grounds for termination of a continuing contract, effective at the end of the school year.** After being given written notice of the specific items of complaint and a reasonable time within which to remedy them, a continuing contract may be terminated, effective at the end of the school year, based on any of the following grounds (Minn. Stat. § 122A.40, subd. 9):

      i. inefficiency;

      ii. neglect of duty, or persistent violation of school laws, rules, regulations, or directives;

      iii. conduct unbecoming a teacher which materially impairs the teacher's educational effectiveness;

      iv. other good and sufficient grounds rendering the teacher unfit to perform the teacher's duties.

   b. If the board orders termination of a continuing contract or discharge of a teacher, its decision must include findings of fact based upon competent evidence in the record and must be served on the teacher, accompanied by an order of termination or discharge, prior to April 1.

4. **Statutory grounds for <u>immediate</u> discharge of a teacher with a continuing contract.** A board may discharge a continuing contract teacher, effective immediately, based on any of the following grounds (Minn. Stat. § 122A.40, subd. 13):

   a. immoral conduct, insubordination, or conviction of a felony;

   b. conduct unbecoming a teacher which requires the immediate removal of the teacher from classroom or other duties;

   c. failure without justifiable cause to teach without first securing the written release of the school board;

d. gross inefficiency which the teacher has failed to correct after reasonable written notice;

e. willful neglect of duty; or

f. continuing physical or mental disability subsequent to a 12 months leave of absence and inability to qualify for reinstatement in accordance with subdivision 12.

A board must discharge a continuing contract teacher, effective immediately, upon receipt of notice that the teacher's license has been revoked due to a conviction for child abuse or sexual abuse.

5. **Determine Whether Further Investigation is Warranted.** In determining whether an employee engaged in misconduct, an investigation is often necessary and/or advisable. If an investigation is conducted, it must be done in a fair and objective manner. Otherwise, an arbitrator may refuse to terminate the subject of the investigation on the ground that he or she was treated unequally or unfairly.

6. **Determine Whether the District has a Mandatory Obligation to Report the Teacher to the State Licensing Board.** Under Minnesota Statutes Section 122A.20, a school district must report to the appropriate state licensing board (i.e. Board of Teaching or Board of Administrators) within ten days after the event has occurred:

   a. When any of its teachers or administrators are suspended or resign while an investigation is pending under any of the grounds for discharge in Minn. Stat. § 122A.40, subd. 13(a), clauses (1) through (5); or Minn. Stat. § 626.556 (reporting maltreatment of minors).

   b. When any of its teachers or administrators are discharged or resign after a charge is filed under either Minn. Stat. § 122A.40, subd. 13(a), clauses (1) through (5); or Minn. Stat. § 626.556 (reporting maltreatment of minors).

   c. Individuals who make reports to the licensing boards in good faith and with due care are immune from civil or criminal liability. Minn. Stat. § 122A.20, subd. 3.

7. **Determine Whether the Teacher's Deficiencies Are Remediable.** If a continuing contract or tenured teacher's conduct or poor job performance

is "remediable," before seeking to discharge the teacher the school district must give the teacher written notice of the specific performance deficiencies and a reasonable period of time to remedy them. Minn. Stat. § 122A.40, subd. 9. If the teacher's conduct is not remediable, the school district should propose the teacher for immediate discharge.

a. **Relevant Factors.** In determining whether conduct is remediable (and thus whether immediate discharge is appropriate), courts and arbitrators consider the following factors:

   i. the teacher's prior record;

   ii. the severity of the conduct in light of the teacher's record;

   iii. the impact of the conduct upon the teacher's students including whether the teacher's conduct presented any actual or threatened harm. *Downie v. Indep. Sch. Dist. No. 141,* 367 N.W.2d 913, 917 (Minn. Ct. App. 1985); and

   iv. whether the conduct could have been corrected had the teacher been warned by superiors. *Kroll v. Independent Sch. Dist. No. 593*, 304 N.W.2d 338, 345-46 (Minn. 1981).

At least one arbitrator also considers whether the conduct can be corrected by any method other than discharge. *In the Matter of Rank v. Independent Sch. Dist. No. 21, Audobon*, BMS Case No. 92-TD-12, 16 (Gallagher, Arb. Nov. 29, 1992).

b. **Are All <u>Performance</u> Deficiencies Remediable?** An arbitrator is likely to conclude that virtually all performance issues (as opposed to bad conduct) are remediable in nature unless:

   i. the teacher has been given written notice of the performance deficiency and has failed to cure the deficiency within a reasonable amount of time;

   ii. the teacher has been directed to perform in a certain manner but has repeatedly failed to do so; or

   iii. the deficiencies are so pervasive and fundamental that they amount to willful neglect of duty or failure to teach.

8. **Consider the "Just Cause" Standard Applied by Arbitrators.** In addition to the statutory grounds set forth above, arbitrators apply a "just cause" standard to nearly all forms of discipline imposed on a teacher. Different arbitrators define "just cause" differently. "When applying it to specific cases, arbitrators tend to define just cause in nebulous terms or to make conclusory statements. . . . In fact, one arbitrator characterized the term 'just cause' as 'purposefully ambiguous.'" Roger I. Abrams and Dennis R. Nolan, 594 Duke Law Journal (1985). However, the basic components of just cause are notice, fair and equal treatment, and punishment that fits the offense.

9. **If the Performance or Conduct is Remediable, Draft a Written Notice of Deficiency.** Before moving to discharge, a school district must give a teacher written notice of his or her specific performance deficiencies and a reasonable time within which to remedy them, unless a teacher has received prior written notice of his or her deficiencies or has engaged in irremediable conduct.

    a. **The Desired Outcome of a Notice/Letter of Deficiency.** As a result of a well written letter of deficiency for performance issues, the district should be able to show that one of the following is true: (1) the teacher has complied with the directives and thereby corrected her deficiencies; (2) the teacher has intentionally and persistently failed to comply with the reasonable directives in the letter of deficiency and, therefore, is guilty of insubordination; or (3) the teacher did not comply with reasonable directives because she is unable to do so and, therefore, is grossly inefficient and incapable of performing the essential functions of his or her job—in other words, the employee is incompetent.

    b. **Recommended Components of a Letter of Deficiency ("LOD").** The LOD should contain at least the following:

        i. **Statement of the Purpose of the Letter.** The LOD should state that it is a formal notice of deficiency issued pursuant to Minnesota Statutes Section 122A.40, subd. 9.

        ii. **Statement of Statutory Grounds for Termination.** The LOD should state that the teacher has demonstrated deficiencies in his or her job performance which, unless corrected within a reasonable time, meet the following statutory grounds for termination of employment (list all that could possible apply): inefficiency; neglect of duty;

persistent violation of school laws, rules, or directives; conduct unbecoming a teacher which materially impairs the teacher's educational effectiveness; and other good and sufficient grounds rendering the teacher unfit to perform his or her duties as a teacher.

iii. **Statement of Deficiencies.** The LOD should clearly state the manner in which the employee's job performance has been deficient. Use specific facts (who, what, when, where, and how) rather than conclusions. If the effect of the deficiency is not obvious, briefly explain the potential harm. The LOD must be based on the teacher's current deficiencies, but should refer to prior deficiencies that are related to the current deficiencies, especially if the teacher was previously notified of those deficiencies.

(1)**Example:** "You are the IEP manager for 14 students. On April 1, 2016, Ms. X, the Supervisor of Student Services, reviewed your files and found that the IEPs for 11 of your 14 students have exceeded 12 calendar months in duration. The law states that the duration of an IEP may not exceed 12 calendar months. You have failed to comply with that requirement. Ms. X was unable to review the remaining three files because they were not in the locked file drawer. School district policy requires that all special education records be kept in the secure location designated for each building. You have also failed to comply with that requirement. Your actions have jeopardized student and parent rights and have placed the District at financial risk for a due process hearing and the recapture of state funds. In March 2015, Ms. X orally warned about you failure to adhere to special education requirements."

(2) **No student names.** Be mindful of data privacy issues and avoid using student names when disciplining teachers.

iv. **Directives.** The LOD should contain a clear, objective, and reasonable directive for each area of deficiency. Directives should not be punitive in nature. Rather, they should be designed to help the teacher cure his or her deficiencies.

(1) **Mandatory Nature.** Directives must truly be directive in nature. If you tell a teacher, "I would like you to do X," an arbitrator is likely to consider this a request rather than a directive. Therefore, use phrases such as "You are hereby directed to do X by May 13, 2016" or "You must do X by May 13, 2016."

(2) **Example:** "You are hereby directed to schedule IEP meetings and take the necessary steps to have new IEPs in place for the 12 students on your caseload who have IEPs that have been in duration for more than 12 calendar months. You must have new IEPs in place for all twelve students by May 5, 2016."

(3) **Date Certain.** Most well crafted directives for performance deficiencies will have a date by which the teacher must comply. Unless a deadline is provided, the teacher will argue that he or she is still working on the directive and, therefore, cannot be punished for not complying with it.

v. **Consequences of Failure.** The letter should contain a statement explaining the consequences of failure. For example: "If you fail to correct your deficiencies or to follow any of the directives contained in this letter, the School District may take disciplinary action against you, including immediate discharge or termination of your employment effective at the end of the school year."

vi. **Burden of Seeking Clarification.** The letter should contain a statement that places the burden of seeking clarification on the teacher. For example: "If you have any questions about the information or directives contained in this letter, you must immediately contact me. If you do not contact me, you will be deemed to fully understand the information and directives contained in this letter."

c. **Meet with the Teacher to Present the Notice of Deficiency.** It is advisable to meet with the teacher, review the letter of deficiency, and ask the teacher whether he or she has any questions. Such a meeting will help

defeat any claim that the teacher did not understand the information in the letter.

1. **Tennessen Warning.** Begin by explaining the purpose of the meeting, and then give the teacher an appropriate Tennessen warning before asking any questions. See Section I, C above for a review of the elements of a Tennessen warning.

2. **Opportunity to Respond.** After reviewing the letter, give the teacher an opportunity to respond and ask questions. Confirm with the teacher that he or she understands the information set forth in the letter of deficiency.

10. **Closely Track the Teacher's Performance After Receipt of the Letter of Deficiency, and Notify the Teacher of Insubordination.** The district must closely monitor a teacher's job performance once a letter of deficiency has been given. The district should assess any changes in the teacher's performance and whether the teacher is complying with the directives in the letter of deficiency.

    a. **Tracking Performance.** Directives to correct poor performance should be written in a manner that allows the district to later identify the teacher's level of performance when the letter of deficiency was issued, and compare it to the teacher's level of performance a reasonable amount of time after he or she receives the letter of deficiency.

    b. **Notice of Insubordination.** As soon as the district discovers that a teacher is not complying with a directive in a letter of deficiency, the district should notify the teacher in writing that she has not complied with the directive. The teacher should also be notified that failure to comply with the directive constitutes insubordination, which is a ground for immediate discharge. In addition, the letter should notify the teacher that all prior directives remain in effect, and that if he or she fails to follow any directives in the future, the school district may take disciplinary action up to and including immediate discharge or termination of employment effective at the end of the school year

11. **Respond to the Teacher's Statements About the Letter of Deficiency.** Teachers respond to letters of deficiency in a variety of ways. Some teachers ask a few clarifying questions and then begin working diligently to correct their deficiencies. Unfortunately, others will spend much of their time writing extensive letters arguing about their job performance and alleging that the district has treated them unfairly. The school district's response to such post-LOD communications from the teacher can be critical.

a. **No Response.** If the teacher does not make any response to the letter of deficiency, the district should presume that the teacher understands the information in the letter and is competent to comply with the directives in the letter.

b. **I Need an Extension.** Most well crafted directives will have a date by which the teacher must comply. Absent unusual circumstances, such as a death in the teacher's family, extensions should be granted sparingly. The date specified in a directive should be carefully considered before the directive is issued. The date should represent a reasonable period of time for the teacher to complete the work necessary to cure the deficiency. Granting an extension without a solid rationale could suggest to an arbitrator that the original directive was not reasonable.

c. **I Need Help.** A school district should carefully consider any request for *specific* assistance. Because an arbitrator may be reviewing the matter at some point in the future, the district must act in a manner that is fair and reasonable under the circumstances. However, by virtue of being licensed, teachers are presumed to be competent to do their job. School districts are not required to essentially assign another person to do a special education teacher's job for him or her. If a teacher responds to a letter of deficiency by simply saying, "I need help," the district should instruct the teacher to specify the help she needs. For example: "If you believe you need additional training to correct your deficiencies, you are directed to develop a plan outlining the training you need and to submit the plan to me within two weeks from the date of this letter."

d. **I Do Not Understand the Directives.** Always attempt to clarify any provision that a teacher finds unclear, but in doing so be careful not to modify or back down from the directives in the letter of deficiency.

e. **Other Teachers Are Not Required to Do This.** Teachers who receive directives often respond by claiming that the directives add more work to their day, and that they are being treated unfairly because other teachers do not have similar directives to follow. One way to respond to such a claim is as follows: "The directives you received are not designed to increase your workload. Rather, they were carefully designed to help you cure your continuing deficiencies. You have been given these directives because you have demonstrated that you are unable to meet the requirements of your job without such directives."

12. **Avoid Common Mistakes.** Below are examples of the most common mistakes committed by administrators when building a case for disciplining a teacher.

a. **Inadvertently Modifying a Directive.** Although this can happen many ways, the following is one of the more common scenarios: (a) Teacher receives a letter of deficiency ("LOD") with clear directives. (b) Teacher later meets with Building Principal, and Teacher suggests additional ways of correcting the deficiencies. (c) Building Principal expresses that she is pleased to see Teacher taking initiative to improve. (d) Teacher fails to comply with the directives in LOD. (e) Teacher and Union later claim that Principal agreed to the teacher's suggestions *in lieu of* the earlier directives in the LOD. Even if the teacher does not plan this outcome when he meets with the principal, it can still be an effective after-the-fact argument if the teacher does not comply with the directives and the matter proceeds to a hearing. To prevent this strategy from working, at the conclusion of any such meeting, and in any correspondence regarding the teacher's job performance, the principal should *reiterate that all prior directives remain in effect*.

b. **Inadvertently Withdrawing a Directive or Extending a Deadline.** When a teacher fails to comply with a directive by the specified date, administrators sometimes make the mistake of inadvertently extending the deadline. For example, suppose that on September 5, 2023, Principal directs Special Education Teacher to provide a copy of her daily schedule, including the times when she will be providing direct service to students so Principal can determine whether the amount of service specified in the IEPs is being provided. Teacher is directed to comply by October 6, 2023.

i. **Inadvertent Modification.** On the morning of October 6, 2023, Principal sends a follow-up letter which says, "You have not yet given me a copy of your schedule. You must do so by October 20, 2023." Teacher will persuasively argue that Principal extended the deadline.

ii. **Inadvertent Withdrawal.** On October 9, 2023, Principal writes Teacher a letter stating: "We discussed your schedule today. You have a rough draft prepared. I asked that your prepared schedule be submitted to me no later than October 13, 2023." Teacher will persuasively argue that Principal withdrew the prior directive or extended the deadline.

iii. **Recommended Action.** Principal should *allow the deadline to pass and then write a letter* to Teacher. An example of an

appropriate written response is as follows: "You have failed to comply with my directive to submit a copy of your daily schedule by October 6, 2023. Your failure to comply with my directive constitutes insubordination, which is a ground for immediate discharge. You are hereby directed to explain, in writing, why you have failed to comply with my directive. You are further directed to give me a copy of your schedule by the end of the school day tomorrow. I am not granting you an extension of the deadline in my prior directive; rather, I am giving you a new directive in recognition of the fact that you have failed to comply with my prior directive. All prior directives remain in effect."

13. **Conduct a "*Loudermill* Hearing" Before Deciding to Terminate.**

14. **Identify the Appropriate Level of Discipline.** Whether the district will suspend a teacher without pay for a few days or propose a teacher for immediate discharge depends on the gravity of the teacher's deficiencies or misconduct. However, if a lesser form of discipline, such as suspension without pay, is not identified in the collective bargaining agreement, the union may argue that the district does not have the right to impose such discipline. The district also needs to be aware that it may not discipline a teacher twice for the same bad performance or the same incident of misconduct. Once a teacher is disciplined, any future discipline must be based on performance deficiencies occurring after the prior discipline or on a different incident of misconduct.

15. **Terminating a Non-Probationary Continuing Contract Teacher.**

    a. **Consult with legal counsel.** If a district decides to pursue termination, it must follow all statutory procedures for termination. There are several statutory provisions that apply to the termination of a continuing contract teacher. Therefore, upon making the decision to pursue termination, it is advisable for school districts to contact legal counsel to discuss the particular facts and statutory provisions that are applicable to the case.

    b. **Notice of Proposed Termination.** Before a teacher's contract is terminated by the school board, the board must notify the teacher in writing and state its ground for the proposed termination in reasonable detail together with a statement that the teacher may make a written request for a hearing before the board within 14 days after receipt of such notification. The notice must also inform the teacher that he or she may request arbitration within 14 days after receipt of the notification if the termination is to be effective at the end of the school year, or within 10

days after receipt of the notification if the district is proposing an immediate discharge. Minn. Stat. § 122A.40, subd. 15(a).

c. **Failure to request an arbitration hearing.** If a teacher requests a hearing, but does not expressly request arbitration, the request is considered to be a request for a hearing before the school board, in which case an independent hearing examiner will generally hear the case. The independent hearing examiner is hired by the school district and makes a recommendation to the school board. The school board can accept or reject the recommendation. The school board's decision is subject to review by Minnesota's appellate courts. An arbitrator's decision, on the other hand, is subject to very limited judicial review. See Minn. Stat. § 572.08 et seq.

d. **Failure to request a hearing.** If a teacher fails to request a hearing within the required timeframe, the teacher will be deemed to have acquiesced to the school board's proposed action.

e. **Teacher may be suspended with pay.** In some cases, a school district needs to immediately remove a teacher from the school. This is generally the case when an immediate discharge is proposed. The school board may suspend a continuing contract teacher with pay pending the conclusion of the hearing. Minn. Stat. § 122A.40, subd. 13.

VIII. QUESTIONS

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