

Coaching, Counseling and Disciplining Charter School Employees

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What type of employer are you?

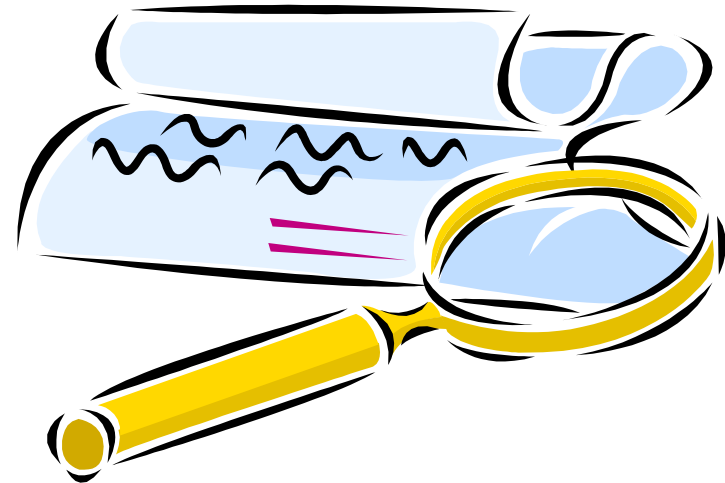
- ▶ Public Employer v. Private Employer: Why does it matter?
 - Procedural Due Process
 - Appropriate discipline procedures
 - Employee appeal rights
 - Employer defenses at litigation
 - Compliance with state and federal laws
 - Wage and Hour
 - Governmental Claims Act
 - Making educated decisions about risks associated with particular employment decisions

How do I figure out what type of employer my school is?

- ▶ Cal. Ed. Code § 47610: A charter school shall comply with:
 - “this part” and
 - “all of the provisions set forth in its charter,”
 - But is otherwise exempt from laws governing school districts, except:
 - Participation in State Teachers’ Retirement Plan (Cal. Ed. Code §47611.)
 - Liability for repayment of loan to charter school (Cal. Ed. Code §41365.)
 - All laws establishing minimum age for public school attendance
 - California Building Standards Code

Where do I look first?

- ▶ The charter establishing a charter school is a contract detailing the school's governance structure. (Cal. Ed. Code §47605(b)(5).)
 - Violating the charter can lead to the charter being revoked.

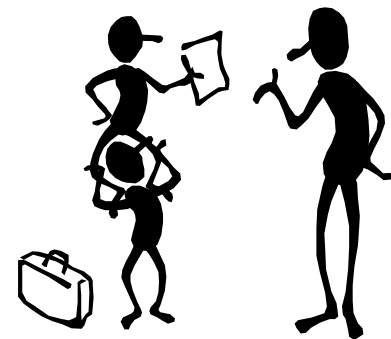


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What does my charter say?

- ▶ Operate as or be operated by a nonprofit public benefit corporation?
 - By-laws may contain any provision, not in conflict with law or the articles, for the management of the activities and for the conduct of the affairs of the corporation. (Corp. Code §5151 (a), (c).)
 - Typically limited to information such as the number of directors, etc.
- ▶ Under the umbrella of the chartering authority?



Is it in my charter?

Charter must contain a declaration regarding whether or not the charter school shall be deemed the exclusive public employer of the employees for purposes of employee organizing...

If charter does not specify that it will comply with those statutes and regulations governing public school employers that establish and regulate tenure or a merit or civil service system, the scope of the representation than the charter school shall also include discipline and dismissal of charter school employees

By March 31, 2000 all existing charter schools must declare whether or not they shall be deemed a public school employer and such declaration shall not be materially inconsistent with the charter.

• See Cal. Ed. Code §47611.

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Educate Supervisors about the terms of the Charter

- ▶ Violation of the charter can lead to revocation of the charter or non-renewal.
- ▶ If employee rights are established in the charter, it may be treated as a “contract” and be deemed to establish employee rights regarding discipline, including termination and appeal of disciplinary actions.

Is it in the Employee Handbook?

- ▶ Do we have a handbook?
- ▶ What's in it?
 - Many California courts have found that policies set forth in employee handbooks can create contractual obligations.
 - *E. g., Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 681, held that an employer's written "Termination Guidelines" that set forth grounds for discharge and mandatory seven-step termination procedure created an implied contract with respect to termination.
 - Without a handbook.....



What's in our handbook?

- ▶ In California, employment is presumed “at-will.” (Labor Code §2922.)
- ▶ However, an employee handbook may create an agreement that termination will only be for “good cause.”
- ▶ Introductory periods can also create implied contractual rights to employment on successful completion of a probationary period.
 - Employer cannot argue that the employee’s performance was unsatisfactory if s/he completed the probationary period. (*See Walker v. Northern San Diego County Hospital Dist.* (1982) 135 Cal.App.3d 896.)

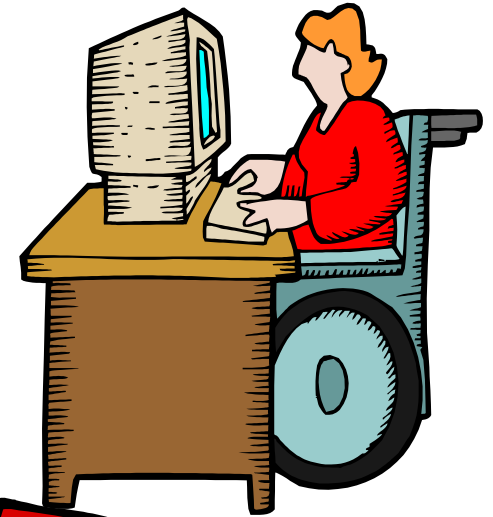
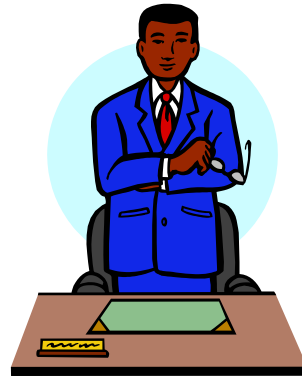
Is there a Collective Bargaining Agreement?

- ▶ What's in it?
- ▶ Who does the agreement affect?
 - Notice of Disciplinary Action
 - *Skelly* / Due Process issues
 - Appeal of Disciplinary Action

Training Administration and Managers/Supervisors:

- ▶ Administrators and Supervisors must be educated on:
 - How the school defines itself as an employer
 - Familiar with all sources of employee rights, duties and obligations
 - Familiar with employee classification

What type of employee am I dealing with?



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Specific types of Employees

- ▶ **Certificated Teachers**
 - Mandatory reporting guidelines
 - Affect credentialing?
- ▶ **Non-Certificated Staff**
 - Board member?
 - Contract employee?
 - Hourly? Salaried?
- ▶ **Charter School Officials**

Documenting Positive Performance

- ▶ Are you creating any implied rights?
- ▶ Consistent application of employee review process should be sufficient.
 - Uniform application across employee classification groups.
- ▶ How will this document look down the road?

Employee Performance Issues

- ▶ Are there written guidelines regarding performance for the employees?
 - Does the employee know of them?
 - Have expectations been communicated to the employee?
 - What can be done on an informal basis? Is that documented?
- ▶ Has the employee been evaluated?
 - Consistent criteria
 - Consistent application
 - Self-evaluations
- ▶ How problematic is the performance?
 - Progressive system
 - Employee awareness of the system?

Documenting Employee Performance Issues

- Conduct egregious enough for immediate termination? Suspension? Investigation?
- Investigation required under the law, e.g. FEHA?

Documenting Disciplinary measures

- ▶ Fair and reasonable

Informal Conversations

- ▶ Document performance / conduct conversations on the day that they happen;
 - Date, time, author, employee's name and title
 - Never include confidential information (i.e. medical)
 - Manager v. Personnel File
 - Must be consistent. Suggestion: use a log for each employee.

Informal Conversations, con't

▶ Include:

- Deadlines / assignments not met
- Tardiness / unexcused absences
- Disciplinary acts
- Employee responses to questions
- Positive contributions
- Details of significant personal interaction with employees

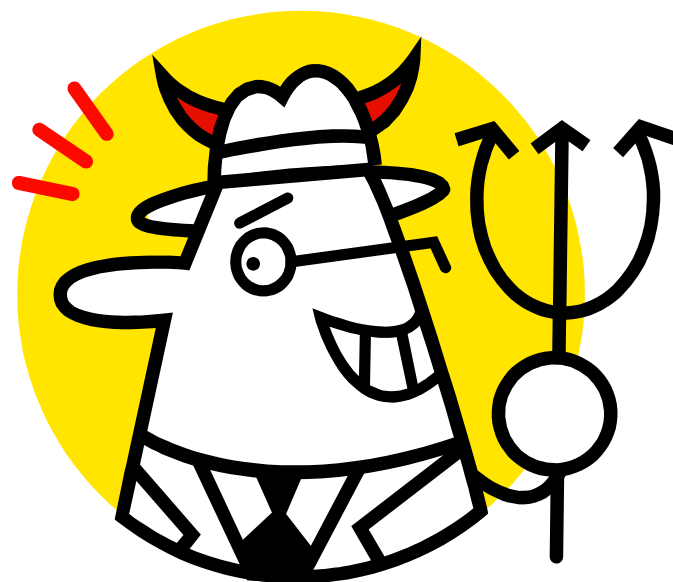
▶ Do NOT Include:

- Rumors / details about personal life
- Theories regarding employee behavior
- Personal information
- Opinions re: career prospects
- Unsubstantiated complaints

Formal Conversations

- ▶ Document at time
- ▶ Have employee sign that they have received / acknowledge
- ▶ Level of discipline and reason for discipline
 - Date of violation
 - Date of discipline
 - Date of notice of discipline
 - Last date of performance problem or misconduct
 - Last date for improvement / necessary changes
 - Time line for corrective action
 - What happens if there is no improvement
 - Subject to further discipline
 - Supervisor signature
 - Space for employee comments.

Investigations / Responding to Misconduct

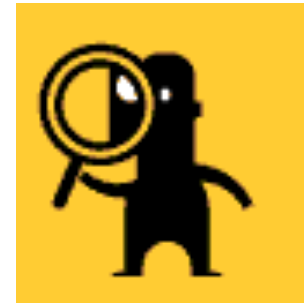


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Employee Misconduct

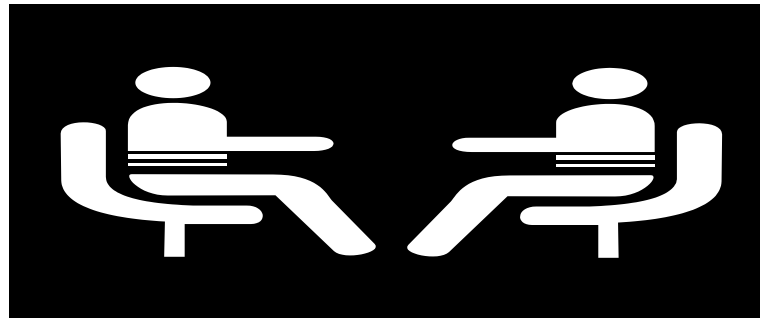
- ▶ An employer, whether public or private, has a duty to investigate claims of harassment
 - Swift
 - Neutral
 - Reasonable
 - Even if it appears to be false, it must be investigated.
 - Not required to be in writing (even if handbook says so).
 - Even if no complaint, if employer sees conduct, it should be investigated.
 - If complainant asks for no investigation, it still must be investigated.



Before Starting the Investigation

- ▶ Determine what the allegations are and if possible, have them verified by the complainant.
 - Review policies and determine which ones are applicable.
 - Obtain documents that will assist in the investigation.
 - Create list of initial witnesses to interview.
 - Prepare / outline questions you will ask the witnesses.
 - Generally the same, regardless of the witness.
 - Use policies and allegations as guidelines.
- ▶ Consider whether the accused should be removed from the workplace during the investigation.
 - Do not suspend!
 - Place accused on paid leave pending the outcome of the investigation.

Interview the Complainant



If possible,
start with the
complainant

Explain the process
and procedure that
will be used to
assess the complaint
(s)

Unbiased
investigation

Identify issues and
facts to be
investigated

Interview the Complainant

Start with
open-
ended
questions.

- Who, what, where, when, why and how.
- Examine any potential motivations to embellish or fabricate.
- Ask who the complainant believes you should speak with the corroborate their allegations
- Document!
- Confidentiality and its limits.
 - Accused has right to know the allegations
 - Other witness interviews.
- Retaliation will not be tolerated.

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Interview the Accused

Ask the accused why s/he thinks the two of you are meeting.

- If no response, chronologically go through the allegations and allow the accused to respond to each allegation.
- Ask if there are any witnesses to corroborate his/her version of events.
- Examine motives, bias, credibility and opportunity.
- Document!
- No retaliation will be tolerated and s/he should not interfere with the investigation.

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Interview Witnesses

- ▶ No retaliation
- ▶ Confidentiality
- ▶ Limited to the allegations
- ▶ Document!



Compile your Information

- ▶ Review documents and any other physical evidence
- ▶ Review witness information
- ▶ Fill in gaps with follow-up as needed
- ▶ Review allegations
- ▶ Review policies
- ▶ Assess credibility
- ▶ Reach a conclusion



Reaching a conclusion

- ▶ Did the alleged incident occur?
- ▶ Was company policy violated?
- ▶ Do not:
 - State the law has been violated.
 - Conclusion is used to advise the employer and allow it to make further decisions/corrective action.



Reporting the Results of an Investigation

- ▶ Statement of the allegations / description of the conduct
- ▶ Description of the investigative process
- ▶ List of witnesses interviewed
- ▶ List of documents reviewed and any other evidence relied upon
- ▶ Summary of objective factual findings
- ▶ Conclusions
- ▶ Record that the employer's policy regarding harassment and no retaliation was given/discussed with complainant, accused and witnesses

Contents of the Report

- ▶ Your name and how you became the investigator
- ▶ Qualifications to conduct an unbiased investigation
- ▶ Description of the complaint(s) investigated
- ▶ Description of method used to collect evidence, including sequence and process
- ▶ Names of witnesses, dates interviewed, location of interview
- ▶ Summary of each witness interview
- ▶ Summary of conclusions
- ▶ Steps taken to protect the sanctity of the investigation
- ▶ How and why you reached credibility assessments

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Report the results

- ▶ Complainant
- ▶ Accused
- ▶ Decision maker(s)



Take Corrective Action

- ▶ It should not be the investigator who makes decisions or informs any party of the corrective action.



YOU
ARE
FIRED

Terminating Employees

- ▶ What type of employee is being terminated?
 - Procedural guidelines based on their employee classification?
 - Is it a potentially high risk termination?
 - Length of service
 - Membership in a protected group
 - Employee's recent evaluations
 - Recent pay increases
 - Commendations from supervisors, parents, students
 - On a leave of absence
 - Filed a workers' compensation claim
 - Complained about workplace conduct? Harassment? Discrimination? You?

Follow a Process

- ▶ Why is the employee being terminated?
 - Can it be articulated?
 - Would progressive discipline be more appropriate?
 - Can you “prove” your “case?”
 - Checked against policies
 - Is it the result of documented and investigated misconduct?
 - Has the employee been given an opportunity to correct or provide his/her version of events?
 - Prior warnings? Documented prior counseling?
 - What disciplinary action has been taken against other employees for the same type of conduct



Is the timing bad?

- ▶ If timing is bad, can you show that the reason for the termination was not based on the “bad” timing issue?



Have alternative actions been considered?

- ▶ Leave of absence?
- ▶ Progressive discipline?
- ▶ Demotion?
- ▶ Corrective action plan?



Can you justify why the alternatives are not possible?

Informing an employee they have been terminated

- ▶ Who is delivering the message?
 - Immediate Supervisor
 - Should witness be present?
 - Is security a concern?
 - Provide a truthful reason, but don't engage in a discussion. Be direct and to the point.
 - Do not procrastinate.

Immediate payment of all wages and benefits due

- ▶ Due at the time of termination, unless employee avoids receiving payment purposefully.
- ▶ Collection of personal belongings.



Questions?



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