

IF YOU DIDN'T WRITE IT DOWN, IT DIDN'T HAPPEN

Publication
Jul 1, 2014

As education and employment lawyers, we experience schools' collective challenges at a far greater rate than any individual institution. This year, the issue that schools have struggled with most is the failure to document employee-performance challenges, leading to a higher risk in making nonrenewal or separation decisions for employees with substandard performance or poor behavior. This article outlines the concerns and steps schools should take in preparation for the next school year.

Problems With Lack Of Documentation

By far the biggest challenge of most educational institutions is the failure to document performance and behavior of its employees. This seemingly mundane, unimportant process often results in schools paying substantial amounts to former employees for claims that the school is left largely unable to defend, at least without expending substantial amounts in fees.

The irony is that schools do such a great job testing, documenting, evaluating, and communicating clearly about student progress and disciplinary issues. Schools have clear policies regarding the requirement that teachers communicate with parents about concerns. They have suggested language to use in progress reports and report cards so teachers don't have to recreate the wheel in documenting good, questionable, and poor performance. And, they have regular, mandated timeframes for ensuring that the process is complete.

Yet, most schools do not take nearly the same amount of

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care in addressing employee performance, often leading to retention of substandard teachers (and other employees) years longer than they should, and increasing the risk for claims when the school finally lets the individual go.

In the last few months alone (nonrenewal and rehire season), we have had a large number of schools either have to reconsider nonrenewals, pay more in severance, or receive claims for age discrimination due to the employee's surprise when told of the school's decision not to renew. The usual retort from the administrator who made the decision is that the individuals clearly knew that their performance was not meeting standards. And when we explore further, we learn that there were numerous verbal conversations and are told that there is "lots of documentation" of this substandard performance or poor behavior.

Unfortunately, the documentation that we receive in support of this position is usually in the nature of cryptic emails, scribbled notes of passing meetings, summaries of general faculty meetings in which aspirations were discussed, etc., but nothing that one can point to that clearly outlines the concerns with the particular employee or substantiates a reason to separate a long term, 50- or 60-year old employee.

One of the things we have learned over time is that if you have not taken the time to write the criticism down, the employee will not "hear" you. Many administrators have likely experienced the situation in which they have repeatedly verbally counseled an employee about an issue (without success). When they finally write it down, the employee is shocked and surprised that there were any concerns.

Recommended Training

To take better control of the process and to give employees the chance to improve their performance (or to understand that they are not meeting expectations), schools should set aside some time in the August planning week to train department heads, supervisors, and administrators on the importance of appropriate documentation. It's not enough to simply talk about it. You need to conduct a workshop in which you delve into the details of what appropriate documentation really means.

You want each person who has the authority to bind the school through actions or *inactions* to understand fully what their responsibilities are regarding documentation and to be able to model the type of documentation that is necessary and appropriate for each type of situation. Give them forms. Give them examples. Work through scenarios. And, most importantly, make the requirement of appropriate documentation a part of the administrator's job description and include an assessment of it in the administrator's annual evaluation.

Appropriate Evaluations

The concept of annual evaluations is another common problem with schools. Again, although schools constantly evaluate students, many do not have a structure for evaluating teachers and administrators. If they do have a structure, the school often has not trained administrators on how to complete the evaluation.

Most schools only use the classroom observation process, which, from a legal standpoint, is nearly useless. This is because the classroom observation is a snapshot of one 50-minute lesson one or two times per year. Teachers are told ahead of time that they will be observed on that particular day. Not surprisingly, most of these observations are overwhelmingly positive because teachers were on their best behavior and presented the most engaging lesson ever. Often, it turns out that this is the same teacher that the school wants to nonrenew a few months later because the teacher is ineffective, not a team player, is frequently absent, and has numerous student complaints. Yet, the only documentation in the teacher's file is the observation form.

At the very least, schools should perform an honest evaluation of *all* employees at least once per year. Employees actually like to be evaluated because it gives them critical feedback, an opportunity to discuss goals, and to understand clearly the school's expectations. It is important that the evaluation reflects a snapshot of the entire year. If the employee had challenges at the beginning of the year, those challenges should be noted, along with any improvement shown. Likewise, the evaluation should not be overly weighted by something wonderful the person did at the end of the school year, while having challenges throughout the year.

The evaluation form itself should avoid ratings that are from 1 to 5 (poor to excellent) because most managers will end up circling "3," as meets standards. The form should also require explanatory comments for any areas of lower ratings so the employee understands the concerns and reasons for the rating.

You should also evaluate on more than simply the employee's "job duties" which may be classroom teaching or facilities maintenance. All employees also have obligations to be good citizens of the school. Thus, the evaluation should include things like attendance, team work, interaction with others, willingly offering to volunteer for various activities, and other aspects that are important to your school.

Critical Elements For Documentation

Finally, regardless of the type of documentation being used, all performance documents should include certain elements. The document should:

- be written with a positive tone – try to find something that you can say that is positive about the employee's performance, recent improvement, etc.;
- should clearly outline (in factual statements with examples) the challenges in the employee's behavior or performance;
- contain no statements that could be viewed as discriminatory or retaliatory (i.e., ageist comments, such as "you should retire soon" or "you have had too much time off to care for your husband, hampering your ability to perform");
- clearly state the school's expectations;
- make clear *when* the noted changes are expected and outline the consequences for failure (for example, "unless we see immediate and sustained improvement, you will be subject to additional disciplinary action, termination, or non-renewal");
- be presented to the individual and signed by him or her (if you are faced with a refusal, have a witness sign the document evidencing that you gave it to the person, and

tell the employee that the acknowledgment is simply to show receipt of the document, not agreement); and

- provide a space for the employee to write comments.

After the evaluation, read the comments to ensure there is nothing you need to follow up on, and put the document in the employee's personnel file.

Conclusion

These guidelines may seem overly simplistic, but if every administrator or manager takes the time to address employee performance as the issues occur and then conducts a comprehensive year-long evaluation at the end of the school year, the school will have several positive rewards.

First, employees who are not meeting expectations will understand clearly where their challenges are. They may rise to meet the challenge or may understand that they need to begin looking for another school. Second, the document will provide support for a possible non-renewal decision if the employee does not meet the challenges outlined. Third, the employee should not be surprised at the nonrenewal decision, which will likely lead to fewer threatened or actual claims.

For more information on good documentation principles and forms to use to accomplish this purpose, contact the author at SBogdan@fisherphillips.com or 954.525.4800.