EVALUATION, INVESTIGATION, TERMINATION AND THE COMMON DENOMINATOR = DOCUMENTATION: COMMON OBSTACLES IN EMPLOYEE TERMINATION

Session 6A

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Good performance should be a good thing, right? Sometimes, however, employees with positive performance evaluations need to be terminated. And, sometimes, a history of “positive performance” evaluations does not necessarily mean that an employee actually has a history of good performance.

When the need or desire to dismiss an employee arises, it often becomes apparent how those positive performance evaluations can complicate the termination process. For instance, an employee with a history of positive evaluations may feel as though a termination action is based on a discriminatory motive and, as a result, might file a charge with the EEOC or sue the school district for a constitutional or other violation.

When a school district is looking to terminate an employee, positive performance evaluations may cause some hurdles in three typical scenarios:

1. Consistently “good” evaluations that were never warranted in the first place, or the employee’s performance has subsequently declined;
2. Employees who may be great teachers in the classroom but who are poor employees otherwise; and
3. The occurrence of an incident that is serious enough to justify termination, despite positive performance evaluations by otherwise good employees.¹

¹ Throughout this paper, reference is made generally and interchangeably to “teachers” and “employees.” Certain information, however, may be applicable to teachers only despite use of the term “employee.”
With good observation, evaluation, and documentation practices in place, a school district can navigate these scenarios better. Without them, on the other hand, a school district might find itself, at least until a later date, unable to justify a proposed termination of an employee.

I. EVALUATION SCENARIOS

A. Poor performance with a history of positive performance evaluations

This scenario can occur in several ways and typically becomes an issue when a long-time employee is assigned to a new supervisor. This category addresses situations in which the teacher at issue is not currently a good teacher but has a history of positive classroom performance evaluations.

Maybe a teacher did, at one time, have good classroom skills but his/her performance has declined over time, or the teacher has not, cannot, or will not adapt to new methodologies, technologies, and/or and teaching techniques expected by administration. For any number of reasons, this teacher may continue to get positive performance evaluations that do not accurately reflect his/her true classroom performance.

What we tend to see more often, however, is the situation of a long-time employee whose principal or supervisor has been negligent in his/her duties to responsibly and effectively evaluate the employee under his/her supervision over the years such that the employee’s positive evaluations have never been warranted. Similarly, this scenario may also result from principals and supervisors simply copying prior years’ evaluations, basing their evaluations on personal relationships, or not being properly trained in conducting employee evaluations.

An effort to terminate an employee under this scenario will be problematic because the employee may believe that there is some ulterior discriminatory motive for termination. As far as he/she is

\[ See \ App\end{A}:\ Tips\ for\ Preparing\ Teacher\ Observations/Evaluations.\]

\[ In\ this\ case,\ a\ school\ district\ may\ need\ to\ address\ such\ issues\ at\ a\ higher\ level.\ If\ the\ district’s\ supervisors/administrators\ are\ not\ adequately\ performing\ important\ duties\ of\ their\ positions\ in\ conducting\ these\ evaluations,\ then\ it\ might\ not\ be\ very\ difficult\ to\ discern\ how/why\ lower\ level\ employees\ may\ not\ be\ performing\ up\ to\ par.\]
concerned, the district has always viewed him/her as a good employee and he/she has nothing but positive evaluations to “prove” it. Further documentation will have to be developed in order to demonstrate the employee’s poor performance. Teachers with a history of positive evaluations will likely need to be placed on assistance or performance improvement plans and provided an opportunity to resolve the newly identified problem area. Then, they will need new evaluations that reflect their true performance.

If/when a school district finds itself in this situation/scenario, it may take a year or more before it is able to terminate such teachers on this basis alone due primarily to a history of inaccurate performance evaluations. In such case, proper documentation will be critical to showing these teachers’ poor performance and overcoming a history of documented positive performance. On the other hand, a school district that emphasizes upon its administrative staff the importance of regular, responsible, and accurate observation, evaluation, and documentation will be in a much better position to avoid this scenario altogether.

B. Good classroom teachers may not necessarily be good employees

Consider the teacher who has high-performing students but is generally a problem employee otherwise because he/she repeatedly misses deadlines, leaves campus without permission, or causes dissention among school faculty and staff. Or imagine a teacher who refuses to participate in faculty meetings, professional development activities, and other directed events. Positive performance evaluations in these scenarios provide an incomplete and inaccurate representation of the employee’s true performance and can also create challenges when it comes to termination.

Like the scenario above, termination in these situations generally is not appropriate until the employee receives notice of the problems and is afforded a reasonable opportunity to improve. Then, if the employee fails to improve, the notice, opportunity to improve, and failure to do so will be documented and termination will be better supported. Unless the principal has documented the deficiencies, addressed them with the teacher, the teacher has failed to improve, and such failure has
been documented, all that the teacher’s record will otherwise reflect is a history of positive performance evaluations. As with the inaccurate evaluations described above, documentation of employee issues is key to putting “incomplete picture” evaluations in proper context.

C. Terminable incidents and offenses

Oftentimes, a substantial issue arises such that an employee must be terminated regardless of a history of positive performance in and out of the classroom. Some examples of these scenarios include:

- Theft or other illegal or unauthorized taking of funds or other property of the school district
- Falsification of job application, student scores, and/or other documents
- Attempting by fraudulent or unauthorized means to obtain or alter a professional certificate or permit for the purpose of promotion or additional compensation
- “Immorality” as used in Louisiana Teacher Tenure Law
  
  “Immorality” is defined to mean “any conviction of a felony offense affecting the public morals enumerated in Part V of Chapter 1 of Title 14 of the Louisiana Revised Statutes.” Some examples of immoral offenses include carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile, prostitution, abortion, crime against nature, gambling, and cruelty to the infirm.

- Committing a criminal offense on school property or at a school-sponsored event

These often complicated scenarios first require proper investigation to determine if the allegations are true, and, like the other evaluation scenarios above, careful documentation is necessary for the district to defend against challenges to the termination decision. Careful documentation of the investigation itself is also critical to demonstrating the veracity of such investigation.

II. INVESTIGATIONS

Administrators are obligated to investigate anytime they have reason to believe that improper conduct is occurring or has occurred, even if a formal complaint has not been made. Particularly because the public, parents, and the media expect school districts and their employees to have high standards and because the types of employee misconduct in schools can often be sensationalized, administrators should always err on the side of conducting and documenting a complete investigation. If the district has
policies and/or procedures for referring certain types of complaints to a specific individual or department, then those procedures should be followed.

A. Receipt of a complaint

Reports or complaints may be made or received in various ways. Below are some of the most common examples:

- A school administrator may personally observe wrongdoing in his/her day-to-day activities, observations, or other performance of supervisory duties. These observations by trained administrators may be the most reliable indication of wrong-doing and should be appropriately investigated and documented.\(^5\)

- Receipt of a verbal complaint. These should be reduced to writing, ideally in the complainant’s own handwriting and signed and dated by the complainant.

- Receipt of a written complaint. Try to make sure that these are as complete as possible and include all pertinent facts like names, dates, times, locations, etc. All written complaints should be signed and dated by the complainant.

B. Determine whether an investigation is warranted, conduct the investigation, and make a determination

After a complaint is received, administrators/school districts should consider, among other things, the nature and seriousness of the allegations, the evidence presented, and whether the allegations have been admitted by the accused, and then determine whether to investigate. However, as explained above, they should almost always err on the side of conducting and documenting a complete investigation in light of the high standards and expectations placed on school districts and school employees.

See Appendix B: Tips for Conducting Investigations.

\(^5\) While maybe not necessarily thought of as a “complaint” or part of an “investigation,” this is often where school administrators drop the ball and miss repeated opportunities to document and address inappropriate or unacceptable conduct that they personally observe on a regular basis.
Once the investigation has been completed and a course of action has been determined, a final meeting should be held with the accused employee which is followed by a post-meeting letter. The purpose of the meeting is to assure that the employee understands the results of the investigation, the nature of the evidence gathered, the employment decision reached and reasons therefor, and any other instructions or pertinent information.

III. TERMINATION AND RESIGNATION

As demonstrated throughout this paper, a history of positive performance reviews can present a challenge to school districts when a teacher offers his/her positive written reviews in support of a discrimination or retaliation claim. Despite a school district’s best efforts to comply with state statutes governing dismissal of teachers and other school employees, employees who feel that they were treated unfairly may accuse the school system of terminating them for some discriminatory or retaliatory purpose. Although courts have recognized that positive performance evaluations, standing alone, do not establish whether an employee has met his/her employer’s performance expectations, positive written reviews, particularly a long history of them, can be intriguing evidence used by former employees to show that the school district’s stated explanation for the termination is not the real reason for the termination but rather is a pretext for a discriminatory or retaliatory reason. Again, what will best defend a school district against such accusations are well-documented, legitimate, non-discriminatory reason(s) for the employee’s termination.

A. Type of employee and basis for dismissal

In making a determination regarding the appropriate disciplinary or employment action, the school district must first consider the type or class of employee.

i. Contract employees

School employees hired or promoted to certified positions above a classroom teacher do not acquire tenure in such positions. Rather, employment in these positions is a matter of contract, and written performance objectives are to be included within the contract. As provided in LSA-R.S. 17:444,
during the term of the contract, such employees are to be retained unless found incompetent or inefficient or are found to have failed to fulfill the terms or performance objectives of their contracts. At the expiration of each existing contract, the board shall negotiate and offer a new contract to such contract employees unless the superintendent recommends against the new contract based on an evaluation of the contract employee or unless failure to offer a new contract is based on cause sufficient to support a mid-contract termination or unless the position has been discontinued or eliminated as a result of a district reorganization.

ii. Tenured teachers

Pursuant to LSA-R.S. 17:443(B)(1), tenured teachers may be disciplined or dismissed upon charges of “poor performance, willful neglect of duty, incompetency, dishonesty, immorality, or of being a member of or contributing to any group, organization, movement, or corporation that is by law or injunction prohibited from operating in the state of Louisiana …” Incompetency includes academic or professional shortcomings and requires remediation. Dishonesty would include things like theft and falsification of documents/job application. Some examples of immoral offenses include carnal knowledge of a juvenile, indecent behavior with juveniles, pornography involving juveniles, molestation of a juvenile, prostitution, abortion, crime against nature, gambling, and cruelty to the infirm. “Poor performance” was added as an additional ground for removal by Act 1. The most common basis for dismissal, willful neglect of duty, can include any intentional disobedience of a superior’s order or directive, leaving students unattended, and inappropriate conduct or language in classroom.

iii. Nontenured teachers

LSA-R.S. 17:443(A) provides that the “superintendent may take disciplinary action against any nontenured teacher after providing such teacher with the written reasons therefor and providing the

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6 Immorality is defined to mean “any conviction of a felony offense affecting the public morals enumerated in Part V of Chapter 1 of Title 14 of the Louisiana Revised Statutes.”
teacher the opportunity to respond.” As with tenured teachers, if incompetency is used as the basis for termination, then remediation will still be required before termination can take place.

iv. Employees not capable of acquiring tenure

This group or class of employees includes all non-certificated employees, like secretaries, custodial staff, janitorial staff, paraprofessionals, maintenance employees and any other employee whose position does not require one to hold a teaching certificate issued by LDOE, including non-certificated administrators. Pursuant to LSA-R.S. 17:81.5, dismissal of this class of employees is governed by board policy. In most school districts, this is found in policy file: GBN. The only requirement for dismissal of an employee from this class is that the Board follow its own policy.

B. Resignations and settlements

Having a well-documented case for termination may also, or instead, lead to the resignation of the problematic employee, which is almost always preferable to a termination procedure. From the school district’s perspective, resignation is typically the quickest and most efficient way to separate employment as it avoids the need of having to wait for any delay periods or go through any termination or nonrenewal proceedings. Generally speaking, resignation permits the employee and the school district to part ways cordially, and leaving on cordial terms may prevent later litigation.

If the school district is involved in pending litigation or other legal proceedings (EEOC complaints, etc.) with a current employee, board counsel should always be contacted prior to taking any action involving that employee. First, any investigation, discipline, or other employment action taken with respect to the employee can seriously affect the pending legal proceedings. Also, in negotiating a

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7 LSA-R.S. 17:81.5 provides that each “parish school board shall develop and adopt rules and policies which it shall use in dismissing school employees who have not attained tenure in accordance with applicable provisions of law and whose dismissal is not a result of a reduction in force, as provided for in R.S. 17:81.4.”

8 In most districts, policy GBN provides that these types of employees “shall be subject to dismissal upon the written recommendation by the Superintendent to the School Board.”
resignation, for example, a school district should consider whether to get a release of claims or enter into a formal settlement agreement. When leaving their employment with the school district, employees might be more inclined to dismiss pending claims in exchange for such concessions.\(^9\)

**IV. DOCUMENTATION**

As explained, documentation is critical in all of the circumstances described above, and documentation serves numerous purposes. Documentation serves the goal of improving employee performance and, if performance does not improve, forming the basis for removal of a poor performing or otherwise problematic employee. Documentation also serves as a means to set really good employees apart from others.\(^10\)

Also, while verbal directives, guidance, or reminders about conduct or performance may be easy and even effective in the moment, they may not be remembered and generally will not be very useful in the future. Anytime the school system, administrator, or other supervisor wants to communicate clearly and unambiguously with an employee, written documentation should be prepared. Documentation improves understanding in the moment and confirms what occurred in the past, providing clarity for those involved and also for third parties if such becomes necessary.\(^11\)

For purposes of employee terminations, termination hearings, and defending termination decisions in lawsuits alleging ulterior discriminatory or retaliatory motives, consistent, well-kept documentation can be critical to demonstrating a pattern of poor performance and/or conduct by the employee.

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\(^9\) Settlement negotiations might include issues such as whether to change an evaluation rating, if possible, whether to agree to provide a reference, and what the effective date of resignation will be.

\(^10\) Consider a scenario in which every employee in a certain class or category has the exact same evaluation rating and nothing distinguishes one employee from the next. If you pull the personnel files of those employees and one among them has ten pieces of positive documentation in his/her file more than any other employee in that certain class or category, the odds are in that employee’s favor when it comes to category-wide decisions, which might include transfers, promotions, and/or dismissals.

\(^11\) For example, in the long term, consistent documentation can assist a supervisor’s successor by providing a record of what occurred before a new supervisor became responsible for a problem employee.
employee, demonstrating that problems were communicated to the employee and the employee was treated fairly, and demonstrating that requisite policies and procedures were followed in connection with termination of the employee. Failure to document can weaken, or even completely defeat, a school district’s defense if a disgruntled former employee disputes the basis for his/her termination.\footnote{Consider the case where a school district contends that it terminated an employee because he failed to perform. In response, the employee argues that these reasons are pretextual because of his positive performance evaluations, the school district’s failure to document his claimed performance problems, and the suspect timing of his termination following his recent absence due to personal illness. In support, the former employee presents e-mails from his supervisor reflecting his good job performance. The lack of documentation of the reasons offered by the school district for the termination will make them practically implausible.}

\textit{See Appendix C: Tips for Documentation.}

V. CONCLUSION

In sum, good performance is a good thing – when it really is good performance and not simply the result of inept, overwhelmed, or disorganized evaluators, or otherwise only a partial or inaccurate representation of an employee’s performance as a whole. Although written performance evaluations can be seen as powerful evidence, with implementation of the practices and tips presented today in the areas of observations, evaluations, investigations, terminations, and documentation, school districts should be able to overcome challenges posed by positive performance evaluations and present evidence necessary to support, defend, and uphold decisions to terminate employees in any given scenario.
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APPENDIX A: PREPARING TEACHER OBSERVATIONS/ EVALUATIONS

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TIPS FOR PREPARING TEACHER OBSERVATIONS/EVALUATIONS

1. Prepare all documents as if you are going to court. You rarely know at the time that such documents are prepared whether they will ultimately reviewed by a judge.

2. Be certain to follow your personnel evaluation plan carefully. More teacher terminations are reversed on procedural grounds than on substantive grounds.

3. Do not forget that the number of observations required in your personnel evaluation plan is a minimum. If possible, observe a teacher more than the minimum number of times particularly if the teacher is having difficulties. It is easier to substantiate problems in the classroom if you can testify that you observed the teacher six times rather than three times.

4. Do not wait until the end of the year to evaluate a teacher if he/she is having difficulty in the classroom. The requisite number of observations and the evaluation of a teacher can take place at anytime during the school year. If remediation will be necessary, you want to do that evaluation as early as possible. If you feel that a teacher is not performing in a competent fashion, then you must attempt to remediate the teacher’s performance through the personnel evaluation plan before you can recommend the teacher’s termination. This is another reason why you should not wait to conduct observations/evaluations of weak teachers.

5. If a teacher is placed into a plan of remediation, make sure that the goals established in that plan and the time period for completing those goals are reasonable. For example, it is unreasonable to require that a teacher learn and implement a new discipline system or instructional methodology in one week. On the other hand, it is reasonable to include in a remediation plan that a teacher appear to work on time and that this occur immediately.

6. Be careful and specific with the preparation of remediation plans. For example, do not tell a teacher to “observe another teacher” because she may do so and not change anything in her own classroom. Rather, the remediation plan should require that she “observe the discipline system utilized by another teacher and implement that system in her class”.

7. Do not “brown nose” observations; say what you mean and mean what you say. You may be cross-examined under oath about the contents of those observations/evaluations, and you need to be in a position to testify truthfully about what you observed. Someone is going to look foolish if one principal gives a teacher all satisfactory ratings and the next gives the same teacher unsatisfactory ratings.

8. Do not minimize the deficiencies of a teacher in his/her observations/evaluations so you can have her transferred at the end of the year; “what goes around comes around”.

9. The Louisiana School Employees Personnel Files Act requires all documents relative to the performance of an employee to be placed in his/her personnel file and for the employee to have been provided a copy of the same. If documents have not been shared with the teacher, then they cannot be used against the teacher in a termination proceeding.

Appendix A

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10. Prepare observation reports contemporaneously with classroom observations; i.e., do not write an observation in April based on what you observed in the classroom in January.

11. Record facts, not conclusions, in teacher observations/evaluations. For example, do not record that a teacher came to school drunk. Instead, record that you observed the teacher to have bloodshot eyes, slurred speech, shakiness on his/her feet, etc.

12. Never prepare an observation or evaluation when you are angry or personally involved. Wait a day or so or call in a third party to review it before it is sent out to the employee. The best observations/evaluations are those which are very precise, objective, and professional.

13. Provide complete information to the teacher. There should be no surprises to the teacher if he/she receives an unsatisfactory evaluation or a recommendation for termination.

**Principals, supervisors, and other administrators should not ask the Superintendent for assistance with an employee unless he/she has already:

1. notified the employee of the problem,
2. given the employee an opportunity to address the problem, and
3. documented the problem, the assistance offered to the employee in order to address the problem, and the employee’s failure to adequately address the problem.

The principal’s, supervisor’s, or other administrator’s failure to do so may be grounds for disciplinary action against him/her.