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SHIPMAN

EMPLOYEE DISCIPLINE 101: AN INTRODUCTION TO BEST PRACTICES

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Supervision and evaluation of employees is a core responsibility of school administrators, and on occasion supervision includes imposing discipline on employees. It is no fun to hold employees accountable for their misconduct or incompetence, but it is necessary. In the following, we will pose questions and provide answers as to legal requirements and best practices for imposing employee discipline in the school setting.

QUESTION ONE:

> I keep personal notes in my right-hand desk drawer to document my concerns with teachers and other employees. One of the teachers in my school has asked for a copy of her "personnel file." Do I have to share my secret notes with her?

ANSWER TO QUESTION ONE:

As with so many other legal issues, it depends. However, if you have kept those notes truly personal and have not shared those note with others, you do not have to share them, as discussed below.

First, it is important to recognize that the personnel file is not a geographic location, but rather a category of information. *Loris v. Board of Education, Norwalk Public Schools*, Docket # FIC 2005-296 (May 10, 2006). In that case, a teacher successfully claimed that the school district violated the FOIA when it responded to her request for her "personnel file" by simply providing the records that were in the file in the personnel office.

The state law on personnel files does not apply to public agencies, presumably because its provisions for disclosure were unnecessary for public agencies, given access rights previously set forth in the FOIA. This statute, however, provides helpful guidance in defining the records that should be considered "the personnel file." Conn. Gen. Stat. § 31-128a defines the "personnel file" as "papers, documents and reports, *including electronic mail and facsimiles*, pertaining to a particular employee that are used or have been used by an employer to determine such employee's eligibility for employment, promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action including employee

evaluations or reports relating to such employee's character, credit and work habits." (Emphasis added). Significantly, this definition relates to categories of documents, not to a physical location.

Under the Freedom of Information Act, "preliminary drafts or notes" are exempt from disclosure, provided the public agency has determined that the public interest in withholding such documents clearly outweighs the public interest in disclosure. Conn. Gen. Stat. § 1-210(b)(1). When a school administrator takes personal notes to do his or her job, these notes may be maintained as confidential under this provision. *Lewin v. Freedom of Information Commission*, 91 Conn. App. 521 (2005); *Bates v. Director, Personnel Department, City of Bristol*, Docket #FIC 2015-855 (November 16, 2016). However, as is discussed under Question Two below, keeping such notes confidential does not aid at all in appropriate supervision.

QUESTION TWO:

A paraeducator has arrived late to work seven times, and her repeated tardiness has imposed hardship on the classroom teacher. Can I suspend the paraprofessional?

ANSWER TO QUESTION TWO:

Again, it depends. If we receive a call about a situation like this, our first question is always: "What is the employee's disciplinary history?" The appropriate disciplinary response will depend on the principle of "progressive discipline." That principle requires in most cases that disciplinary action follow a progression of intensity that is intended to correct the employee, if possible, and ultimately to permit termination if the employee persists in the misconduct or poor performance.

The first step in progressive discipline is notice – has the employer made expectations clear to the employee? Of course, some expectations are implicit and need not be stated, such as the prohibition against stealing or assaulting colleagues. However, in many cases notice (or warning) is required before an employee may be held accountable through discipline.

Here, we would ask whether the employee has been told that her tardiness to work is unacceptable, and until that happens (whether the employee has been late once or twenty times), discipline will likely not be sustained.

The first level of discipline is an oral warning. As to oral warnings, there is a question of documentation. Often, the oral warning is simply remembered, and it is only cited if the poor performance or misconduct continues. However, in some formal disciplinary systems, employers document oral warnings as such. In any event, it is the lowest level of discipline.

The next level of discipline in traditional progressive discipline is a written warning. Such discipline involves reducing the employer's concern to writing and giving that written warning to the employee. Sometimes, written warnings are subject to collective bargaining provisions, such as requirements that employees sign off to acknowledge receipt or a provision that written warnings are removed from the personnel file after some period of time, say two years, unless there is a recurrence of the misconduct or poor performance during that period.

If an employee fails to correct his/her actions, another written warning may be appropriate. However, it is sometimes necessary to escalate to the penultimate disciplinary action – suspension. Any suspension should be accompanied by a written explanation of the reason for the suspension, and any such writing should certainly state that any recurrence of the problem will result in further serious disciplinary action, up to and including termination of employment.

The final stage of progressive discipline is, of course, termination of employment, which is a last resort.

Though progressive discipline envisions a progression through the steps, the employer must consider that seriousness of the offense, and it is often appropriate to initiate disciplinary action at a later stage in the progress, depending on the seriousness of the misconduct. For example, even without prior discipline, an employee who threatens another employee in anger may appropriately be given a written warning, be suspended or even be terminated, depending on the specific facts. In short, we ask whether the punishment fits the crime.

Finally, most collective bargaining agreements provide that disciplinary action may be taken only for "just cause." We see these elements of progressive discipline in the principle of "just cause," as reflected in the traditional seven step test for "just cause," as first articulated by Arbitrator Carroll Daugherty in *In re Enterprise Wire Co. and Enterprise Independent Union*, 46 LA 359 (March 28, 1966):

- Was the employee forewarned of the consequences of his or her actions?
- Are the employer's rules reasonably related to business efficiency and performance the employer might reasonably expect from the employee?
- Was an effort made before discipline or discharge to determine whether the employee was guilty as charged?
- Was the investigation conducted fairly and objectively?
- Did the employer obtain substantial evidence of the employee's guilt?
- Were the rules applied fairly and without discrimination?
- Was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?

When an employer can show compliance with these expectations, thereby establishing that there was just cause for the action, discipline should be sustained if challenged through a grievance procedure.

QUESTION THREE:

> I put one of the teachers I supervise on a performance improvement plan, but when we meet to review his progress, the union representative keeps interrupting and answering for him. Can she do that?

ANSWER TO QUESTION THREE:

In a word, no. The role of the union representative is limited to clarifying questions and meeting privately with the employee being questioned, even during the meeting. But, before get to what union representatives can and cannot do, we will review the rules regarding union representation more generally.

The rights of unionized teachers and non-certified employees working for school districts are provided by the Teacher Negotiation Act and the Municipal Employees Relations Act respectively. Both laws are modeled on the National Labor Relations Act, and our Connecticut State Board of Labor Relations often adopts rulings of the National Labor Relations Board (NLRB) in interpreting employee rights under the TNA and MERA.

The NLRB describes the basis for the right of union representation as follows:

> Section 7 of the National Labor Relations Act (the Act) guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."
>
> Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7" of the Act.

Based upon these provisions, in *J. Weingarten, Inc. and Retail Clerks Union, Local Union No. 455, Retail Clerks International Association, AFL-CIO*, 202 N.L.R.B. 446 (N.L.R.B 1973), the NLRB decided that it is an unfair labor practice for an employer to refuse to permit an employee to have union representation during an investigatory interview at which the employee reasonably fears for his or her job security. In 1975, the United States Supreme Court ruled in favor of the NLRB in this case, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), and the now well-known *Weingarten* right to union representation was born.

The Connecticut State Board of Labor Relations has adopted the *Weingarten* rule, ruling in 1983 that teachers have a right of union representation at meetings to review performance when the teacher reasonably has concern for job security. *East Hartford Board of*

Education, Dec. No. 2256 (St. Bd. Lab. Rel. 1983). This rule clearly applies in your case because you have placed the teacher on a plan based on performance concerns that could result in a recommendation that the teacher's contract be terminated. Accordingly, you must permit the teacher to have union representation at your meetings to review his progress.

More generally, *Weingarten* rights arise only when an employee asks for union representation, and employers do not have an affirmative duty to notify employees of their right to union representation in a pre-disciplinary meeting. However, as a courtesy school officials often remind employees of their right to union representation, which serves to underscore that job security is indeed at issue. Moreover, employees can assert their *Weingarten* rights at any time, and when an employee asks for union representation in the middle of a meeting, the employer must stop the questioning until the employee has representation. Employers must be careful in such situations not to ask the employee to just finish the meeting. If there is any question whether a meeting could result in discipline, union representation must be allowed. If an employer violates employee *Weingarten* rights by denying union representation, the employer is not permitted to use information gathered at the meeting, and the employer may be held accountable for committing an unfair labor practice.

That said, there are significant limits on the role of the union representative at an investigatory interview (which, per the *East Hartford Board of Education* case, includes review of performance under a plan). First, the interaction must be investigatory, *i.e.*, you must be asking for information from the employee. *Weingarten* rights are not triggered when an employer communicates with an employee in the normal course. Therefore, the teacher's statement that he will not speak with you without a union representative is overly broad, and you do not have to permit union representation every time you want to tell this teacher something.

Second, the role of the union representative at such a meeting is to clarify questions (so that the employee does not answer based on a misunderstanding of the question) and to caucus with the employee at any time during the meeting. Here, you are asking questions of the teacher, not the union representative, and answers to your questions may involve his professional judgment. Therefore, you can (and should) insist that the teacher answer your questions. If the union representative starts to respond when you ask the teacher questions, you have every right to stop the union representative, confirm that the question is clear, and insist that the teacher answer your questions.

QUESTION FOUR:

> A teacher filed a sexual harassment complaint, alleging that a colleague has been "checking her out." I interviewed the complainant, but when I scheduled an investigatory meeting with the alleged perpetrator, his union representative told me that I had already violated his rights under Title IX. Really?

ANSWER TO QUESTION FOUR:

The honest answer is "it depends." But before we get to the answer, let's briefly review the new Title IX landscape and the related obligations it imposes on school districts.

As you may remember, on May 6th, of 2020, the U.S. Department of Education ("DOE") published its final regulations regarding sexual harassment under Title IX of the Education Amendments of 1972. Until then, there had been no binding federal regulations related to sexual harassment under Title IX, only administrative guidance issued by the DOE's Office for Civil Rights. The final regulations took effect on August 14, 2020 and, as expected, they have had a significant impact on the manner in which educational institutions investigate and address claims of sex discrimination and harassment.

First, we note that the final regulations considerably expanded the requirements for Title IX grievance procedures. Upon receiving actual knowledge of sexual harassment, the school district must engage in the following steps:

1) Explain to the complainant the process for filing a formal complaint.
2) Offer supportive measures.
3) Consider if administrative leave of an employee respondent is appropriate.
4) If a formal complaint is filed, determine if there is Title IX jurisdiction.
5) Send the written notice of allegations and inform the respondent of the grievance process.
6) Consider the informal resolution process.
7) Conduct the investigation.
8) Provide the parties with the opportunity to review the evidence.
9) Draft the investigative report.
10) Provide the parties with the opportunity to submit written questions.
11) Draft the responsibility determination.
12) Any party has the right to appeal the responsibility determination or the dismissal of a formal complaint.
13) Ensure implementation of the responsibility determination or informal resolution agreement, including remedies designed to restore access to the educational environment for the complainant.

In analyzing this question, we would first ask the school district whether the teacher filed a Title IX formal complaint. If the employee has not filed a formal complaint, a Title IX coordinator may wish to file their own complaint (depending on the severity of the allegations). The facts of each case are significant and some allegations may not rise to the new standard of "severe, pervasive, and objectively offensive" required for Title IX harassment.

If the employee has filed a formal complaint, then the district will most likely commence a Title IX investigation and thus must give the respondent all the due process rights

to which he is entitled under Title IX. One of the first requirements is that the district, within ten (10) school days of receiving a formal complaint, must provide the known parties with written notice of the allegations potentially constituting sexual harassment under Title IX and a copy of the grievance process. The written notice must also include the following:

i. The identities of the parties involved in the incident, if known;
ii. The conduct allegedly constituting sexual harassment as defined above;
iii. The date and the location of the alleged incident, if known;
iv. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
v. A statement that the parties may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence; and
vi. A statement of any provision in a district's policies that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Another tenet of due process, also codified in the new Title IX regulations, is that the parties must be given an equal opportunity to discuss the allegations under investigation with the investigator(s) and be permitted to gather and present relevant evidence. As such, the district is further required to provide written notice of the date, time, location, participants, and purpose of all hearings (if applicable), investigative interviews, or other meetings, with sufficient time for any party (including the respondent) to prepare to participate.

Here, we must ask whether the district provided written notice of the allegations against the employee and whether it also provided written notice of the date, time, location, participants and purpose of the meeting with sufficient time to prepare. If they failed to do so, the district may have, in fact, violated the employee's rights under the new Title IX regulations.

The new Title IX regulations are complicated and specific. As such, we recommend that you work closely with your legal counsel to determine the appropriate steps in each instance.

QUESTION FIVE:

I hate writing employees up. What can I do to make it easier for me to follow up with employees who need straightening out?

ANSWER TO QUESTION FIVE:

First, as a threshold matter, it is important to frame the issue appropriately. Writing an employee up is actually a help to the employee. When verbal warnings do not result in correcting employee behavior, the employee may benefit from a written warning because the escalation puts the employee on notice that the concern is serious and must be addressed.

Second, in writing disciplinary letters, supervisors should use language that is clear and direct. Often, in a misguided effort to be kind, supervisors use "polite" phraseology such as "it was noted that the purpose of the lesson was not clear." Such use of the passive voice undercuts the communicative purpose of the write-up, and direct language (here – "you failed to make the purpose of the lesson clear") is much more effective.

Third, an explanation of how such letters should be structured may be helpful. In the following, we will show the progression from documentation to a written warning to a suspension, and we will highlight the essential elements of such letters.

1. Letter to Follow up on Conference:

TO: Tom Teacher
FROM: Ms. Principal
RE: Meeting on January 23, 2022
DATE: January 24, 2022

To follow up on our conference on January 23, I wish to summarize our discussion and my understanding of future steps. At our meeting, we discussed my concern that [describe concern]. You [agreed/disagreed – describe teacher's position]. We agreed that you would [describe commitment by teacher/ directive by supervisor]. Please report back to me by [date] on your efforts. We will meet again to review this matter on [date].

cc: Personnel File

NOTE: Written follow-up on a disciplinary concern is important, and use of such a template makes it easier to follow up promptly. Also, note the following:

- The supervisor expressly describes the concern.
- The supervisor documents the employee's position, which is helpful either way.
- The supervisor describes expectations for the employee to take action, not for the supervisor to take action.
- Reference to the Personnel File reminds the employee that this follow-up memorandum is part of the employee's personnel history.

NOTE: The following elements should be included in any discipline letter, and the two letters that follow show the escalation that should occur when problems continue:

- The supervisor should state the concern.
- The supervisor should describe findings, including the employee's response during any investigation. Supervisors should never write a disciplinary letter

without meeting with the employee first to give the employee a chance to respond.

- The supervisor should describe conclusions as to what the employee did wrong.
- The supervisor should explain expectations and what the employee should have done.
- The supervisor should clearly state the results of the investigation, including the specific discipline being imposed. If further problems could result in termination, the letter should say so.
- Who writes the letter is part of the escalation. Note that the principal can write a letter of reprimand, but the superintendent should write any suspension letter.

2. Letter of Reprimand:

TO: Tom Teacher
FROM: Ms. Principal
RE: Class Supervision
DATE: January 24, 2022

On January 10, 2022, we discussed a report by a paraprofessional that you had left your seventh period class unattended on January 6 for an extended period of time. You stated that you had asked Ms. Smith in the next classroom to keep an eye on your class, and you claimed that you had simply run to the cafeteria for a doughnut.

After reviewing this situation, I find that your conduct on January 6, 2022 was unacceptable. You are responsible for the proper supervision of your class at all times. Your trip to the cafeteria was unnecessary and put the students in your class at risk. Moreover, if there were a problem with the proper supervision of your class, you must address that problem with a responsible administrator, rather than asking a fellow teacher to cover.

This letter will be placed in your personnel file. Any future failure to meet your professional responsibilities will result in further disciplinary action. I hope and trust that any such future action will not be necessary.

cc: Personnel File
Superintendent

3. Suspension Letter:

TO: Tom Teacher
FROM: Mr. Superintendent
RE: Class Supervision
DATE: May 4, 2022

On April 30, 2022, your principal walked by your classroom and saw that two students were involved in an altercation in your third period class and you were nowhere to be found. Given the serious concern over your failure to provide proper supervision to students, your principal has referred this matter to me for review and action.

As we discussed at our meeting on May 1, 2022, you explained that you left your classroom unattended to get supplies out of the trunk of your car. You admitted, however, that you did not inform the administration of the need to go to your car and/or to provide supervision for the students in your class.

Failure to provide proper supervision to the students entrusted to your care is a violation of your professional responsibilities and will not be tolerated. Your misconduct is especially serious in light of the recent warning you received concerning the need to supervise the students in your classes. You are hereby suspended for one day for this serious misconduct, and this letter of reprimand will be included in your personnel file. Any such misconduct in the future will lead to further, serious disciplinary action, up to and including a recommendation to the Board of Education that your contract of employment be terminated.

Sincerely,
Superintendent

cc: Ms. Principal
Personnel File

QUESTION SIX:

One of our coaches swore at student athletes, and we gave him a written warning. Now, a local reporter has asked for the discipline letter and our "interview notes." Can we deny the request on the basis that it is a confidential personnel matter?

ANSWER TO QUESTION SIX;

You will not be able to keep the letter you wrote to the coach confidential, because disciplinary letters concerning public employees are subject to public disclosure.

To be sure, "records of teacher performance and evaluation" are not considered public records, and records of teacher evaluation may not be disclosed without the permission of the

affected teacher. Conn. Gen. Stat. § 10-151c. However, in 2002, that statute was amended, and it now further provides that "records of the personal misconduct of a teacher shall be deemed to be public records and shall be subject to disclosure pursuant to the [FOIA]. Disclosure of such records of a teacher's personal misconduct shall not require the consent of the teacher." Disciplinary letters of other public employees have always been subject to public disclosure, and this coach may or may not also be a teacher. However, given this statutory provision, such letters concerning teachers are also subject to public disclosure when requested under the FOIA.

As to the investigation notes, whether the public has access depends on additional facts. Were those notes maintained confidentially as personal memory notes? Have they been shared with others? As discussed above, under Conn. Gen. Stat. § 1-210(b)(1), personal memory notes can be considered to be "preliminary drafts or notes," which may be maintained as confidential and not subject to public disclosure. However, notes that are shared with others are no longer "preliminary," and they will be subject to public disclosure.

Finally, a report summarizing the findings of the investigation will be subject to public disclosure. Under the *Perkins* test announced by the Connecticut Supreme Court in 1993, records related to personnel are subject to public disclosure unless (1) there is no public interest in the information, and (2) release of the information would be highly offensive to a reasonable person. *Perkins v. Freedom of Information Commission*, 228 Conn. 158 (1993). Given that there would certainly be public interest in the outcome of an investigation of public employees, such reports will be subject to public disclosure. That said, when legal counsel for the school district investigates a situation, writes a report, and offers related legal advice, that report will be an attorney-client communication, which may kept confidential.

QUESTION SEVEN:

> My secretary keeps making mistakes, but when I sat her down to tell her that she better improve or else, she grew indignant, telling me, "Well, you know that I have diabetes, don't you?" Confused, I ended the meeting. What should I have done?

ANSWER TO QUESTION SEVEN:

Under the ADA, an employee should be considered to have a disability when:

- the employee has an impairment that substantially limits one or more major life activities,
- the employee has a record of such an impairment, or
- the employee is regarded as having such an impairment.

Moreover, under the ADA Amendments Act of 2008, these terms must be read expansively, and, for example, diabetes is considered a disability. However, for the disability to trigger

ADA protections in the workplace, the employee must show how it limits a major life activity related to work.

As a threshold matter, the employer must determine whether the employee is claiming that the disability affects the employee's ability to perform job duties. The employer should have no interest in an employee's disability that does not affect job performance. Accordingly, in response to the secretary's statement here, the employer should ask whether the secretary is claiming that the disability affects her ability to do her job and if so how.

When the employee claims to have a disability that affects job performance, the employer may verify (or dispute) the employee's claim to have a disability. In such cases, the employer has the right to require that the employee submit to an independent medical examination (IME) to determine whether the employee should be considered to have a disability under the ADA. In this scenario, there would be no need for an IME because the secretary would be able easily to provide a doctor's note to establish that she is diabetic.

When an employee's disability affects job performance, the ADA requires that the employer engage in an interactive dialog to determine (1) how the disability affects the employee's ability to perform job responsibilities, and (2) whether and how the employer can make reasonable accommodations so that the employee can perform the essential job duties.

Through that interactive process, the employer must determine whether and how the employee's disability can be accommodated. Such accommodations may include relieving the employee of peripheral job functions, modifying work schedules, and otherwise providing reasonable supports. However, in making such accommodations, the employer may require that the employee perform the essential job functions.

QUESTION EIGHT:

> A custodian continues to cause trouble, even after a suspension and two written warnings. I am ready to recommend that he be fired, but the union representative is asking me to consider a last chance agreement. What is that, and are such agreements advisable?

ANSWER TO QUESTION EIGHT:

Last chance agreements can be an appropriate way by which employers can give a problematic employee a final opportunity to perform successfully. The essence of such agreements is that the employee waives the right to challenge a termination decision if the employee again engages in the described prohibited behavior. It may be helpful to review the elements and the mechanics of such agreements. However, such agreements are used only for unionized employees who may challenge termination of employment through the grievance procedure. Final warnings are also appropriate for non-union employees, but the formality of

a last chance agreement, with time limitations and procedures for challenge, is not necessary for non-union employees.

First, it is important to be specific as to the misconduct that, if it recurs, will trigger termination of employment in accordance with the last chance agreement. For example, if the reason for the last chance agreement is habitual tardiness, that should be stated, and if the employee commits a different offense, that would be separate and would not trigger termination under the last chance agreement. Precision (to the extent possible) as to the triggering conduct is important.

Second, to be enforceable, the last chance agreement should be time-limited. As a matter of public policy, an arbitrator or a judge could well rule that a last chance agreement of indefinite duration is not enforceable. Therefore, it important to determine a reasonable period of time when termination under the last chance agreement can be triggered, typically two or three years. However, it is important to include in the last chance agreement that, once the effective period has expired, the last chance agreement (and the related conduct) remains part of the employee's disciplinary history.

Third, the last chance agreement will provide that the employee's employment will terminate if the employee engages again in the prohibited conduct, *e.g.*, tardiness, inaccurate time-recording, antagonism toward co-workers or supervisors. However, the last chance agreement typically does not leave solely to the employer the determination that such conduct recurred. Rather, the last chance agreement will typically provide that the employee may challenge that determination through the grievance procedure, with the understanding that termination will follow if the conduct is confirmed through grievance review. If and while the employee challenges the employee's factual claim that the prohibited behavior has recurred, last chance agreements also typically provide that the employee will be on an unpaid leave. However, if the employer's claim that misconduct has recurred is not confirmed, typically the employee will be restored to employment with full back pay.

If the employer, employee and union can agree on such terms, last chance agreements can be helpful. If the employee is unable to refrain from the prohibited conduct, termination follows without the burden of a grievance arbitration hearing. By contrast, if the employee is able to meet the requirements of the last chance agreement, such agreements provide an opportunity for rehabilitation and continued employment.

QUESTION NINE:

> A school secretary has complained that she has been paid at the wrong rate ever since she was hired three years ago. She is correct, and she is demanding a pay adjustment for the whole time. Should we give it to her?

ANSWER TO QUESTION NINE:

The answer to this question depends on the grievance procedure of the applicable collective bargaining agreement. We must start there.

We start with consideration of the grievance definition. In responding to grievances, it is important in the first instance to determine whether the complaint falls within the definition of "grievance" as set forth in the collective bargaining agreement. Typically (but not always) the grievance procedure defines a "grievance" as an alleged violation, misinterpretation or misapplication of the terms of the collective bargaining agreement. If the grievance definition does not include the complaint being made, all responses through the grievance procedure should so state.

Here, the secretary's complaint will fall within the definition of "grievance" because the failure to pay the rate prescribed in the contract is certainly a violation. However, the next question is whether the grievance is timely. Here, the secretary is asking that the district correct her pay retroactively for some three years. However, grievance procedures are intended to resolve disputes promptly, and all grievance procedures include a time period within which a grievance must be filed, with a provision such as "Any grievance not filed within ten school days of the time the grievant knew or reasonably should have known of the event or condition giving rise to the grievance shall be waived." If the complaint here were a singular event, this grievance would be untimely.

This particular complaint is not untimely per se because it is a "continuing grievance," *i.e.*, each time the employee was paid at the wrong rate would be a separate contract violation. However, that does not mean that the school district should grant the secretary's request to be paid retroactively at the correct rate for the last three years. Each pay check put the secretary on notice that she was being paid at the wrong rate, and under the provision quoted above, the secretary has a valid claim for any pay check issued during the grievance time period (here, by way of example, ten school days). Situations in which employees are paid at the wrong rate are not uncommon, and sometimes employers go back to the beginning of the then-current contract year to make an adjustment. However, a remedy that extends further than the grievance timeline would otherwise allow is a courtesy, and school officials should extend such a courtesy only with the written agreement of the union that such remedy does not set a precedent for future cases.

Finally, all school administrators should have a working knowledge of the grievance procedure. However, administrators should coordinate responses to grievances with the Central Office and HR Departments. A grievance response is binding on the school district, even at the lowest level of the grievance procedure, and it can set a precedent for future claims. Therefore, it is important to assure that management at all levels is in agreement on the appropriate response to a grievance.

QUESTION TEN:

> A student claimed that a teacher pushed him into the wall. We filed a report with DCF and put the teacher on leave. DCF took the case, but it is taking forever to complete the investigation. Can we go ahead and do our own investigation?

ANSWER TO QUESTION TEN:

Eventually, the school district will be able to do its own investigation. Indeed, the school district is required to conduct its own investigation, as discussed below. However, before undertaking any such investigation, school officials must coordinate with the Department of Children and Families (DCF) and get permission to proceed with its own investigation.

These obligations are set forth in Conn. Gen. Stat. § 10-221s(b), which provides

> (b) A local or regional board of education shall permit and give priority to any investigation conducted by the Commissioner of Children and Families or the appropriate local law enforcement agency that a child has been abused or neglected pursuant to sections 17a-101a to 17a-101d, inclusive, and section 17a-103. Such board of education shall conduct its own investigation and take any disciplinary action, in accordance with the provisions of section 17a-101i, upon notice from the commissioner or the appropriate local law enforcement agency that such board's investigation will not interfere with the investigation of the commissioner or such local law enforcement agency.

We see the following in this statute:

- School districts must give priority to any investigation of abuse or neglect by DCF or a law enforcement agency.
- School districts must conduct their own investigation, but only after receiving notification from DCF or the appropriate law enforcement agency conducting such investigation will not interfere with the DCF or law enforcement investigation.
- Following investigation, the school district must take disciplinary action in accordance with the provisions of Conn. Gen. Stat. § 17a-101i.

In reviewing Section 171-101i, we note the following:

- If DCF substantiates abuse or neglect ***and*** the DCF Commissioner recommends that the school employee be placed on the registry (or if DCF determines that a school employee has victimized a student (as defined by the statute), the school district must suspend the school employee.

- Any such suspension must be with pay and without prejudice until action is taken on the employee's employment, whether termination is by the superintendent of a non-certified employee or by the board of education in the case of a certified employee.
- When a certified employee is suspended pursuant to Conn. Gen. Stat. § 17a-101i, the superintendent must notify the board of education and the Commissioner of Education within seventy-two hours of the suspension and the reasons for the suspension.
- The statute contemplates that any such certified employee will be terminated in accordance with the Teacher Tenure Act (providing that "the suspension of a school employee employed in a position requiring a certificate shall remain in effect until the board of education acts pursuant to the provisions of section 10-151").
- The superintendent must disclose records of the investigation of a certified employee to the Commissioner of Education and to the board of education or its attorney for purposes of reviewing the certified employee's employment and whether the employee's certification should be revoked.
- If the contract of employment of such certified school employee is terminated, or such certified school employee resigns such employment, the superintendent must notify the Commissioner of Education or representative, within seventy-two hours after the employee is terminated or has resigned.
- When the Commissioner of Education receives such notification, the Commissioner may commence certification revocation proceedings, with the understanding that information received by the Commissioner of Education or representative pursuant to this statutory process is confidential notwithstanding the provisions of the FOIA.
- Finally, this statute prohibits boards of education from employing a person whose employment contract is terminated or who resigned from employment following a suspension pursuant this statute if such person is convicted of one or more of crimes involving an act of child abuse or neglect as enumerated in the statute.

CONCLUSION:

Investigating employee misconduct and imposing appropriate discipline is certainly a challenge. However, we hope that these questions and answers and related discussion will help administrators fulfill this important responsibility.