

NEW HAMPSHIRE SCHOOL BOARDS ASSOCIATION

Theodore E. Comstock, Executive Director

Barrett M. Christina, Staff Attorney

603-228-2061

www.nhsba.org



Investigating Allegations of Employee Misconduct

October 2007

The following information is intended as instructional and reference material only. It should not be construed as specific legal advice. You are encouraged to seek the advice of your own attorney regarding specific questions you may have about the following material.

Investigating Allegations of Employee Misconduct

School officials are often called on to investigate allegations of employee misconduct. Officials receive complaints of misconduct from numerous sources – coworkers, students, and members of the public. Investigating these complaints can create complex situations. The purpose of this publication is to identify problem areas and to assist school administrators and school boards when conducting investigations of employee misconduct.

Identifying the Nature of the Complaint

The first step is to determine whether the alleged misconduct is school-related. Even if the misconduct is serious, it may be an entirely private matter (e.g., extra-marital affair). If the alleged misconduct does not affect or significantly relate to the school, the best practice is not to investigate the matter.

Next, the alleged “victim” should be identified. If the alleged victim is a student, that student’s parents/guardian should be notified immediately about the allegations. Conversely, there may not be a victim, but rather an allegation that the employee violated a school policy.

It should then be determined if the allegation relates to past conduct or more present conduct, and if there is risk that the alleged misconduct might be repeated. If there is a significant threat that the alleged conduct could or will be repeated, the administration may need to take affirmative action to protect others before an investigation can be resolved, such as a temporary suspension with pay or a reassignment. It is recommended you consult your collective bargaining agreement prior to taking any of these steps.

Last, a determination should be made whether illegal or criminal wrongdoing has been alleged. If so, the school district may be required to notify local law enforcement officials or state agencies. These requirements are discussed below.

Is an Investigation Warranted?

After these initial determinations are made, school officials need to decide if a full investigation is necessary. As stated above, if the allegation relates to a school matter or has the possibility of affecting school functions, an investigation should be undertaken. If the administration is unsure or hesitant, it is recommended that an investigation be conducted. School districts may face liability for their failure to properly investigate and rectify allegations of misconduct. As such, it is best to err on the side of caution and conduct an investigation.

If a student is involved, either as a victim or potential witness, the parents/guardian should also be notified of the allegations, of the ongoing investigation, and that the student may need to give an official written or oral statement.

The complainant should put his/her allegations in writing. This will provide the investigator a framework from which s/he can conduct the investigation. It will allow the accused to fully and adequately know what the actual allegations are. It also ensures that the allegations are coming directly from the accuser, and have not been “filtered” by anyone else.

If the accuser is a young student and is not capable of drafting a complete and coherent written statement, an oral interview may be justified. If this is necessary, it is recommended that the student’s parent/guardian be present during the interview. Whoever conducts the interview should transcribe a written account of the interview as soon as the interview ends.

Who Should Investigate?

If school officials decide to conduct a formal investigation, an investigator needs to be chosen. Consult your current school board policies to ascertain if a policy already addresses this issue. Normally, investigatory duties and responsibilities lie with the superintendent. New Hampshire RSA 193-C:4 and Department of Education Rule 302.02 both state superintendents are charged with overseeing and supervising staff.

However, depending on the nature of the allegations, you may want to hire an independent third person such as a private investigator or outside attorney. The school board should make this decision. Hiring an independent third party ensures that the investigation is conducted fairly and objectively. Also, these persons may be more experienced in conducting similar investigations, especially if the allegations relate to serious wrongdoing such as sexual abuse or other gross misconduct.

For numerous reasons, the New Hampshire School Boards Association strongly recommends that the school board or individual school board members do not conduct the investigation. School board members should leave the investigatory process to individuals who have experience conducting prior investigations. Furthermore, because the school board may eventually sit as “judge and jury” during a dismissal hearing or non-renewal hearing, the potential for bias or due process violations is significant if board members conducted the investigation.

The Investigation Process

The accuser should be interviewed first. Then, all witnesses should be interviewed and encouraged to provide written statements. The accused employee should be interviewed last. This way, his/her statements can be compared to information already gathered from the investigation.

If the employee is a union member, request that the employee's union representative be present for the interview, even if the employee declines union representation. The investigator should request that the accused provide a written statement of his/her version of events or defense. The investigator should also draft a written memorandum of the interview as soon as the interview concludes. Under no circumstances should the investigator discuss the accusations or investigation with the accused "off the record."

An "investigation file" should be opened and maintained in a safe, confidential place. The investigation file should not be part of the employee's personnel file until any disciplinary action is taken against the employee.

A strict chain of custody for all physical evidence should be established. As few people as possible should have access to physical evidence. Evidence should be stored in a secure, discreet location. Evidence that is illegal to possess, such as narcotics or firearms, should be immediately turned over to local law enforcement authorities. If this is necessary, the investigator should request a written verification from law enforcement stating they took the evidence.

After the Investigation is Complete

The investigator must make a written report of his/her findings. If the allegations prove false, the written report should state as such. If the investigator is someone other than the school superintendent, the superintendent should receive the written report as soon as possible.

Factors the investigator needs to consider before making a final determination include the credibility and objectivity of the accuser and witnesses, the consistency of testimony, and whether there is enough proof to substantiate the allegations of wrongdoing.

If the investigation yields sufficient evidence of wrongdoing, the superintendent may take appropriate disciplinary action against the employee. Prior to taking disciplinary action, superintendents should consult their applicable collective bargaining agreement/master agreement to review discipline procedures and requirements. Generally, the superintendent has the authority to impose discipline anything short of dismissal.

If the investigator or superintendent believes dismissal is appropriate, the school board should be notified immediately. The requirements of RSA 189:13 must be followed if the employee is a teacher. If the misconduct occurred at the hands of a non-certified employee, the school board should refer to the collective bargaining agreement for disciplinary provisions, if

applicable. In the absence of a collective bargaining agreement, school boards should refer to board policies regarding termination or dismissal.

If the investigation bears evidence of wrongdoing, certain reporting requirements may be triggered. First, law enforcement authorities should be notified if allegations of illegal conduct seem legitimate. Second, Department of Education Rule 510.01 requires superintendents and other educators report to the Department all charges of misconduct against a teacher who holds state credentials. This rule also mandates that teachers who suspect another teacher has abused or neglected a student report their suspicions to the Department of Education as well as to the Department of Health and Human Services.

Also, RSA 189:14-d mandates the immediate dismissal of school district employees who have been convicted in court of homicide, child pornography, aggravated felonious sexual assault, felonious sexual assault or kidnapping. This may be relative if the school district did not conduct an investigation of its own, but rather waited for the criminal justice process to run its course.

Additionally, your school district's liability insurance carrier should be notified immediately if an investigation yields evidence of physical harm, property damage, discrimination, harassment, or any other similar misconduct perpetrated by an employee.

Checklist: Investigating Allegations of Employee Misconduct

1. Identifying the Nature of the Complaint

- School-related matter or private matter?
- Does the matter stand to affect the school?
- Past conduct or present conduct?
- Threat to safety and welfare of students or staff?
- Possibility the conduct will be repeated?
- Temporary suspension or reassignment necessary?
- Has illegal or criminal conduct been alleged?

2. Is an Investigation Warranted?

- Conduct an investigation if the matter affects school function.
- If unsure – conduct the investigation.
- Is a student a victim or witness? If so, have the parents/guardian been notified?
- Have accuser provide the complaint in writing.

3. Who Should Conduct the Investigation?

- Consult current school board policy stating who investigates.
- Does an independent third party need to be hired?
- Has a school official ever investigated a similar matter?
- Does the chosen investigator have experience investigating these or similar matters?

4. The Investigation Process

- Interview accuser first. Get written statement.
- Interview witnesses accordingly. Get written statements.
- Interview the accused employee last. Get written statement or written defense.
- If accused is a union member, request union representative be present at all interviews with the accused (even if accused declines union representation).
- Investigator should draft written memo of interview with the accused employee.
- Never discuss the investigation with the accused employee “off the record.”

5. The Investigation File

- Maintain in safe, secure, confidential place.
- Do not place investigation file in accused employee’s personnel file.

- Develop chain of custody for all physical evidence.
- If physical evidence is illegal contraband, contact law enforcement to procure it.
- Get documentation from law enforcement stating they have received the evidence.

6. After the Investigation is Complete

- Provide written, final report to superintendent.
- Report must include a statement of findings.
- Is there sufficient proof and evidence to justify discipline?
- If so, and the accused is a teacher, review collective bargaining agreement.
- If the accused is not a teacher, consult board policies regarding discipline.
- Is dismissal appropriate? If so, the school board must be contacted.
- If dismissal of teacher is recommended, follow requirements in RSA 189:13.
- Does the Department of Education or Department of Health & Human Services need to be contacted?
- Does law enforcement need to be contacted?
- Has the employee been convicted of a crime described in RSA 189:14-d? If so, the employee must be dismissed.
- Contact the school district's liability insurer.