



Admin 101: Nuts and Bolts of Human Resources in Community Colleges

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Today's Agenda

- Performance Evaluations
- Privacy Rights & Personnel Records
- Discipline
- Past Practice: Collective Bargaining Agreements & Grievance Procedures
- Discrimination
- Disability Issues

An Overarching Theme

The focus of Human Resources is conflict management.

How do *you* manage conflict?

Effective Ways to Manage Conflict

- Set expectations early on
- Be consistent in your message, values, and treatment of employees
- Don't avoid uncomfortable conversations
- Be clear, direct, and specific in communicating the issue(s) and expectation(s)
- Be calm, professional, and respectful
- Know the contract (CBA) and be able to reference it
- Be able to explain the operational impacts of the concern or conduct to the department
- Allow the employee to maintain a sense of dignity in all circumstances

Evaluations

Employee Evaluations

Two Primary Purposes:

1. Communicating to employee how he/she is doing
2. Documenting performance for the time period since the last review

ACCURACY

Employee Evaluations

A Few Key Points:

- Ongoing review
- Avoid surprises
- Document, concurrently
- Communicate
 - The good, bad, and needs improvement
- Apply proper criteria, consistently
- Use specifics
- Cover the appropriate time frame
- Follow up

Evaluation of Community College Employees – Classified Employees

- Requirements for classified employee evaluations are usually contained in:
 - Collective bargaining agreement (CBA)
 - District policies/procedures

Evaluation Rules of the Road...

- Be honest
- Be specific - provide actual examples
- Provide constructive feedback
- Be factual with evidence to support your claims
- Do not place anything in a performance evaluation unless you can provide evidence that you have met with the employee, discussed the matter, and discussed performance expectations with the employee previously

Evaluation of Community College Academic Employees

- Frequency (Education Code § 87663)
- Academic employees
 - Probationary (contract)
 - At least once in each academic year
 - Permanent (regular)
 - At least once in three academic years
 - Temporary
 - Within first year of employment
 - Thereafter, at least once every six regular semesters or once every nine regular quarters

Privacy Rights & Personnel Records

Emails and Text Messages

- Very few documents and/or electronic communications are privileged
- What you write can be discoverable under subpoena or Public Records Act requests (even in personnel matters)
- If you have a sensitive matter to discuss with HR or another manager, do it in person
- Be mindful of using names in documents shared via email
- Less is always better
- When you forward a document you lose control of it
- Imagine your words on a 10-foot screen in court
- **Respond, don't react**

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Searches and Surveillance

- Constitutional right of privacy
- Protected:
 - Employee's person, personal property, and personal work areas and activities in which there is a *reasonable expectation of privacy*
 - Employer's search of employee's text messages on City-issued device was reasonable. [*City of Ontario, Cal. V. Quon* (2010) 560 U.S. 746.]
- Balancing test: reasonable expectation of privacy vs. legitimate interest in maintaining safe and efficient workplace
- Adopt written policies that set expectations

Senate Bill (SB) 178

- California Electronic Communications Privacy Act, Penal Code § 1546, *et. seq.*
- Limits a government agency's ability to search or access information on an electronic device or network without a search warrant or court order
- District-owned and personal devices distinguished

Electronic Devices and the Public Records Act

- *City of San Jose v. Superior Court* (2017) 2 Cal.5th 608.
 - When a public employee uses a personal account to communicate about the conduct of public business, the writings may be subject to disclosure under the CPRA.
 - This applies to emails and text messages.
- Brown Act requirements still apply.
- Compare: accessing district accounts on personal devices.

Personnel Records

- A district cannot rely on derogatory material in reaching any decision affecting the employee's employment status unless the district has timely provided the employee with notice and opportunity to review and comment. [*Miller v. Chico Unified School District* (1979) 24 Cal.3d 703.]
- Codified in Education Code § 87031
- Employee not entitled to review ratings, records, or reports:
 - Obtained before employment;
 - Prepared by examination committees; or,
 - Obtained in connection to promotional examinations

Inspection

- No right to inspect during working hours
- If the employee to send representative for inspection, written authorization required
- Inspection may be monitored
- Copies of documents in the file can be obtained at a reasonable copying expense

Medical Information

Medical information must be maintained in a separate confidential file

Discipline of Employees

Classified Employees Non-Merit System Disciplinary Procedure

- Governing board prescribes grounds and written rules and regulations

Education Code § 88013, subdivision (c)

Weingarten Notice

In 1975 the United States Supreme Court, in the case of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), upheld a National Labor Relations Board (NLRB) decision that employees have a right to union representation at investigatory interviews. These rights have become known as the **Weingarten Rights**.

Reasonable Belief of Discipline?

- In addition to the investigatory component, the employee must have a reasonable belief that discipline will result in connection with the meeting.
- PERB has held that “the reasonableness of an employee’s belief that discipline might ensue... will turn on the totality of the circumstances present at the time, which may include the employee’s history and previous communications with management on matters related to the subject of the interview.”
 - (Capistrano Unified School District (2017) PERB Decision No. 2532-C.)

Weingarten Notice

During an investigatory interview, the Supreme Court ruled that the following rules apply:

Rule 1: The employee must make a clear request for union representation before or during the interview. The employee cannot be punished for making this request.

Rule 2: After the employee makes the request, the employer must grant the request and delay questioning until the union representative arrives or can be present.

Rule 3: If the employer denies the request for union representation, and continues to ask questions, it commits an [unfair labor practice](#) and the employee has a right to refuse to answer. The employer may not discipline the employee for such a refusal.

Classified Employees Non-Merit System Disciplinary Procedure

- No disciplinary action for:
 - Cause occurring before employee becoming permanent
 - Cause arising more than two years preceding date of filing notice of cause
 - Exception: If cause concealed or not disclosed by employee

Education Code § 88013, subdivision (d)

Classified Employees Merit System Disciplinary Procedure

- Personnel Commission
 - Sets rules and causes for dismissal
 - Caution: Bargaining unit members will be in negotiated agreement
 - Causes for suspension or dismissal in addition to Personnel Commission rules

Academic Employees Disciplinary Procedures

- Probationary (Contract) Academic Employees
- Permanent (Regular) Academic Employees
- Education Code § 87732 establishes the causes – not negotiated
 - Immoral or unprofessional conduct
 - Dishonesty
 - Unsatisfactory performance
 - Evident unfitness
 - Physical or mental condition → unfitness to instruction/associate with students
 - Persistent violation state law and state or district regulations
 - Conviction of felony involving “moral turpitude”

Academic Employees Disciplinary Procedure

- Probationary faculty: Understand the distinction between non-renewal of contract v. discipline
- If discipline, must use same procedure as for tenured faculty members

Academic Employees

- Contract Employee Release
 - First Contract (Education Code § 87608)
 - Second Contract (Education Code § 87608.5)
 - Third Contract (Education Code § 87609)
 - Note, the third contract is for a term of two academic years
- Challenges to decision to release are processed as a grievance
 - Basis for grievance depends on whether the employee was a first/second year or a third/fourth year probationary employee

Academic Employees Disciplinary Procedure

- Procedures are also set out in Education Code
- 90-day notice (Education Code § 87734)
 - Unsatisfactory performance
 - Unprofessional conduct
- Statement of charges served on employee
 - 4 year jurisdictional bar
- 30 days to request hearing
- If hearing requested, arbitrator selected or OAH assigns ALJ

Academic Employees

- Employment of educational administrators
 - By appointment or contract of up to 4 years (Education Code § 72411)
 - Absence of express appointment or contract (Education Code § 72411.5)
 - Tenured
 - Non-tenured

Skelly Procedures

- Protect the due process rights of employees being disciplined
- Elements:
 - Written Notice
 - “Skelly” Meeting
 - Imposition of Discipline
 - Right to Appeal to Neutral Party

What Discipline is Appropriate?

- Work with HR!
- Considerations:
 - Offense
 - Longevity
 - Prior discipline
 - Performance record
 - How others treated for same or similar offense
 - Evidence
 - CBAs

Past Practice: CBAs & Grievance Procedures

Past Practice

- May I take a particular action?
- Is there a written document permitting or prohibiting me from taking a particular action?
- What if there is no written guidance?

Past Practice - Definition

An ongoing reaction to recurring types of situations having mutual acceptance by both labor and management.

Past Practice – Elements

1. Consistency
(recurring)
2. Longevity
(occurring over period of time)
3. Mutuality
(acceptance)

Past Practice – CBAs & Written Policies

- Does the collective bargaining agreement address the issue?
- Is the collective bargaining agreement clear and unambiguous or silent?
- Do other district written policies address the issue? Are they clear and unambiguous or silent?

Past Practice – Reversing

- Consult with management
- Publicize intent
- Allow time interval
- Set and implement a deadline

Past Practice – Questions

- Am I consistently implementing and enforcing rules and policies?
- Is there any laxity or disparity in the application of practices?
- Are there practices I need to eliminate before they become binding?

Discrimination and Harassment

Federal & State Law Prohibit Discrimination Based on:

- Race
- National Origin
- Disability/Medical Condition
- Sex (Includes Pregnancy)
- GINA
- Religious Creed
- Marital Status
- Age (40 & Above)
- Sexual Orientation
- Gender Identity/Expression
- Military or Veteran Status

Forms of Discrimination

- Disparate treatment
 - Intentional
 - Harassment
 - Retaliation
- Disparate impact

Forms of Harassment

- Quid pro quo (sexual harassment)
- Hostile work environment
- Retaliation

Quid Pro Quo Sexual Harassment

Job benefits promised in exchange for sexual favors or denied if sexual favors are not given.

“Hostile Work Environment” Harassment

- Protected status
- Physical, verbal or visual behavior
- Objectively *and* subjectively offensive
- Effective January 2019, “severe and/or pervasive” is no longer the threshold—a single incident of harassing conduct is now sufficient to create a triable issue of fact regarding the existence of a hostile work environment
- Effective January 2019, an individual no longer needs to prove his or her “tangible productivity” declined as a result of harassment in a workplace harassment suit, and may instead show a “reasonable person” subject to the alleged discriminatory conduct would find the harassment altered working conditions so as to make it more difficult to work

Retaliation

- Protected activity
- Adverse employment action
- Causal link

Accommodations for Religious Beliefs

- Employers may not retaliate or discriminate against a person for requesting an accommodation for his or her disability or religious belief, regardless of whether the accommodation was granted.
 - Amends Gov. Code, § 12940.

Disability Issues

Two Issues

- Does the individual have a disability?
- If so, have you met your reasonable accommodation obligations?

Physical Impairment

- Individual with a physiological disorder, condition, etc. affecting one or more bodily systems
- Individual regarded as having such a disability
- Individual with a record of such disability
- Additionally, under FEHA:
 - Impairment requiring statutorily provided special education or related services
 - Condition posing future impairment

Mental Impairment

Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities

Major Life Activity

- Caring for one's self
- Performing manual tasks
- Bodily functions
 - Breathing, seeing, hearing, speaking
- Learning and concentrating
- Walking, sitting, standing, lifting, reaching and sleeping
- Participating in community services
- Working

Interactive Process

- Interactive process is communication held in good faith between employer and employee to identify and implement a reasonable accommodation
 - In the 9th Circuit, Interactive Process mandatory under the ADA
 - Interactive Process also mandatory under FEHA
 - PERB held that the right to union representation extends to interactive process meetings. (*Sonoma County Superior Court* (2015) PERB Decision No. 2409-C.)

What Triggers Interactive Process

- Notice to employer by employee of desire for accommodation
- Employer's actual or constructive knowledge of employee's impairment

Castro-Ramirez v. Dependable Highway Express

Employer may be required to accommodate an employee who has to care for a disabled family member.

- *Castro-Ramirez v. Dependable Highway Express* (2016) 2 Cal.App.5th 1028.

Examples of Employee Requested Reasonable Accommodation include:

- Modify work schedules
- Changes to workplace or acquisition of equipment & devices
- Modifying a current position (but not essential duties)
- Transfer to vacant position (equal or lower level)
- Paid or unpaid leaves of absence
- Personal assistants
- Employee uses his/her own equipment or services
- NOT reasonable: Removing essential function of position
[*Nealy v. City of Santa Monica* (2015) 184 Cal.Rptr.3d 9.]

Reasonable Accommodation and Discipline

- No duty to waive discipline even if disability is the source of misconduct
- Must accommodate disability to allow employee to participate in grievance or discipline process

Final Thoughts from Human Resources

Effective Managers...

- Use influence rather than power when addressing concerns
- Listen to understand
- Address issues early, often, and communicate directly
- Insist on a culture of professionalism and respect within their department
- Model good behavior
- When in doubt...call HR!

Thank you!

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