

HANDLING EMPLOYEES' PENDING CRIMINAL ACTIONS

Presented by Alexander L. Ewing &
Thomas B. Allen

Frost Brown Todd LLC

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STATUTORY REVIEW

I. Suspension following Certain Criminal Arrests

a. R.C. 3319.40(B):

If a person who is employed by a school district [...] is **arrested, summoned, or indicted** for an alleged violation of an offense listed in division (C) of section 3319.31 of the Revised Code, if the person holds a license, or an offense listed in division (B)(1) of section 3319.39 of the Revised Code, if the person does not hold a license, the superintendent of the district or the chief administrative officer of the chartered nonpublic school **shall suspend** that person from all duties that require the **care, custody, or control of a child** during the pendency of the criminal action against the person.

[Similar language for employees whose duties are assigned by the school treasurer, and for the superintendent and treasurer themselves.]

b. R.C. 3319.40's Unanswered Questions

i. What does "suspend" mean?

1. The statute is silent.
2. No case law / Ohio Attorney General opinion on point.

ii. Is the suspension paid or unpaid?

iii. Suspension from duties "that require the care, custody, or control of a child."

1. Do we need to reassign a teacher or employee to other duties?
2. What if employee has no duties "that require the care, custody, or control of a child."

II. Review of Statutory Authority to Suspend Employees

a. Administrators & Teaching Employees (R.C. 3319.02 & 3319.16)

- i. R.C. 3319.16 does not specifically mention suspension as a form of disciplinary action.
 - 1. Statute expressly permits suspension pending final action to terminate a teacher's contract.
 - a. Implication from statute is that suspension pending termination may be unpaid.
 - 2. What about other type of suspension?
 - a. Arguably, statute is silent, therefore school district does not have authority to implement suspension.
 - b. Courts have suggested that there is an implied right to suspend teachers.
 - i. *Rowland v. Madriver Local School Dist.* (June 25, 1978, U.S. District Court, Southern District of Ohio No. C-3-75-4), unreported.
 - ii. *Deal v. Vandalia-Butler City Schools*, 1991 WL 116644 (2d Dist.).
 - iii. R.C. 3319.01: Superintendent authority to "direct and assign" teachers.
- b. Civil Service Non-Teaching Employees (R.C. 124.34)
 - i. Employee may be suspended for "incompetency, inefficiency, unsatisfactory performance, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of any policy or work rule of the officer's or employee's appointing authority, violation of this chapter or the rules of the director of administrative services or the commission, any other failure of good behavior, any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony while employed in the civil service."
- c. Non-Civil Service Non-Teaching Employees (R.C. 3319.081)

- i. Employee may be suspended for “incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, or any other acts of misfeasance, malfeasance, or nonfeasance.”
 - ii. The action of the board of education suspending the employee shall be served upon the employee by certified mail.
- d. NOTE: Review the terms of collective bargaining agreement. Most CBAs include suspension as a form of discipline. (R.C. 4117.10(A) allows CBAs to supersede most state laws.)

WAYS TO ADDRESS CRIMINAL ARREST (PENDING CONVICTION)

I. Paid Administrative Leave

a. What Is It?

- i. An individual is removed from their position with the school for an indefinite period of time, and maintains pay during this time.
- ii. Not intended to be disciplinary, but a removal from duties pending the outcome of an investigation.

b. Due Process Required?

- i. Review of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), deprivations of property interest require notice and an opportunity to be heard.
- ii. However, paid administrative leave is not disciplinary and does not result in an adverse employment action. Therefore, there is no denial of due process when implementing paid administrative leave. See *Eggers v. Moore*, 257 Fed. Appx. 993 (6th Cir. 2007).

c. Pros and Cons

- i. Pros: Easy to implement; removes employee from duties quickly.
- ii. Cons: Costly; unpopular with the community (“paid vacation”).

II. Unpaid Administrative Leave / Suspension without Pay

- a. What Is it?
 - i. An individual is removed from their position with the school for an indefinite period of time without pay.
 - ii. Is it disciplinary? Is it pending termination?
- b. Due Process Required?
 - i. *Loudermill* hearing is likely required.
 - ii. Indictment: Felony indictment provides adequate assurance that a suspension is not unjustified. See *Gilbert v. Homar*, 520 U.S. 924, 934 (1997).
- c. Is it permitted?
 - i. Ohio Supreme Court on civil service employees (R.C. 124.34): Citing to Ohio Adm. Code 124-9-08(D), stated that “indictment for a criminal offense does not establish a statutory basis for discipline under [R.C. 124.34].” *State ex rel. Baran v. Fuerst*, 65 Ohio St.3d 413 (1992).
 - ii. Teachers (R.C. 3319.16): Suspension without pay pending termination is permitted without the formal requirements of a termination. *Weinstein v. Canton City School Dist.*, 1983 WL 7382 (5th Dist.).

III. Termination

- a. Do we have to wait until a conviction before terminating? No.
- b. What about alternatives to conviction (plea bargain or diversion program)?
 - i. There is no requirement for a conviction if the conduct otherwise warrants discipline.
 - 1. Obviously, a conviction helps.
 - 2. But examine independently: is there sufficient cause for discipline without a conviction?

ii. Key Points:

1. A non-conviction, plea bargain, or diversion program does not mean that the employee did not engage in the alleged conduct.
2. We are not required to prove misconduct “beyond a reasonable doubt.”
3. We are not bound by rules of evidence (hearsay, etc.).

iii. Pitfalls: Criminal conduct often occurs off duty.

1. What is warranted for discipline?
2. How do we prove it?
3. Can we uphold the discipline at appeal?

c. Off-Duty Misconduct

- i. Generally, employees cannot be disciplined for off-duty misconduct.
- ii. Must be a sufficient “nexus” between off-duty misconduct and workplace.

iii. Statutes

1. R.C. 3319.16: “Good and just cause”.
 - a. “Good and just cause” must be a “fairly serious matter.”
Hale v. Lancaster Bd. of Educ., 13 Ohio St.2d 92 (1968).
2. R.C. 3319.081/R.C. 124.34: See above.

iv. Collective Bargaining Agreements: The Seven Factors for Just Cause - *Enterprise Wire*, 46 L.A. 359 (Daugherty, 1966). These factors are succinctly stated as follows:

1. NOTICE: Employee knew or should have known that conduct would subject him to discipline.

2. REASONABLENESS OF RULE: Rule violated is reasonably related to the safe, efficient, and orderly operation of the enterprise.
3. INVESTIGATION: Employer made a reasonable effort to discover and determine if the employee violated the rule.
4. FAIR/OBJECTIVE INVESTIGATION: The employer made a fair and objective investigation.
5. PROOF: Burden of proof on the issue of guilt has been met.
6. NON-DISCRIMINATORY: Employer's action was non-discriminatory.
7. PUNISHMENT FITS THE CRIME: Penalty is reasonably related to the seriousness of the offense and/or the employee's record with the employer.

v. Review policies.

vi. Licensure Code of Professional Conduct

1. "Conduct unbecoming" (Ohio Adm. Code 3301-73-21) includes "other crimes or misconduct that negatively reflect upon the teaching profession[.]"

d. Burden of Proof

- i. Administrative Appeal (R.C. 2506.04): "unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence."
- ii. Arbitrators: Most apply "preponderance of the evidence"; some apply "clear and convincing" standard.

e. Investigation

- i. Conducting an independent investigation is critical.
- ii. Questioning an employee.
 1. *Garrity* rights against self-incrimination.

- a. Employee still has an obligation to answer questions truthfully.
 - b. Dishonesty can be grounds for discipline.
 2. The employee may make admissions/statements against interest.
 3. Be sure to get the employee's full story and lock him into it before taking action.
 4. Preserve evidence and document investigation.
- iii. What facts are undisputed?
1. Contact the police investigating the matter.
 2. Review documents created by the police.
 3. Interview investigators.

REPORTING EDUCATOR MISCONDUCT

I. Requirements

- a. R.C. 3319.313: The superintendent must report to the State Board of Education in the following circumstances:
 - i. The superintendent [...] knows that the employee has pleaded guilty to, has been **found guilty by a jury or court** of, has been **convicted** of, has been found to be **eligible for intervention in lieu of conviction** for, or has agreed to participate in a **pre-trial diversion program** for an offense described in division (B)(2) or (C) of section 3319.31 or division (B)(1) of section 3319.39 of the Revised Code.
 - ii. The district board of education [...] has initiated termination or nonrenewal proceedings against, has terminated, or has not renewed the contract of the employee because the board of education [...] has **reasonably determined** that the employee has committed an act that is **unbecoming to the teaching profession or an offense** described in division (B)(2) or (C) of section 3319.31 or division (B)(1) of section 3319.39 of the Revised Code.

- iii. The employee has resigned under threat of termination or nonrenewal [per (ii) above].
- iv. The employee has resigned because of or in the course of an investigation by the board of education [...] regarding whether the employee has committed an act that is unbecoming to the teaching profession or an offense described in division (B)(2) or (C) of section 3319.31 or division (B)(1) of section 3319.39 of the Revised Code.

b. Licensure Code of Professional Conduct

- i. Provides guidance on conduct unbecoming.
- ii. Includes criminal conduct. (See above.)
- iii. “An educator serves as a positive role model to both students and adults and is responsible for preserving the dignity and integrity of the teaching profession and for practicing the profession according to the highest ethical standards.”
 - 1. “Committing any violation of state or federal laws, statutes, or rules, **although the conduct may not have resulted in a criminal charge, indictment, prosecution, or conviction.**”

Alexander L. Ewing & Thomas B. Allen

Frost Brown Todd LLC

513-870-8200

aewing@fbtlaw.com & tallen@fbtlaw.com