

## Educational Support Personnel

### Employment Termination and Suspensions 1

#### Resignation and Retirement

An employee is requested to provide ~~2~~two weeks' notice of a resignation.<sup>2</sup> A resignation notice cannot be revoked once given. An employee planning to retire should notify his or her supervisor at least ~~2~~two months before the retirement date.

#### Non-RIF Dismissal 3

The District may terminate an at-will employee at any time for any or no reason, but not for a reason prohibited by State or federal law.

Employees who are employed annually or have a contract, or who otherwise have a legitimate expectation of continued employment, may be dismissed: (1) at the end of the school year or at the

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<sup>1</sup> State or federal law controls this policy's content. This policy contains an item on which collective bargaining may be required. Any policy that impacts upon wages, hours, and terms and conditions of employment, is subject to collective bargaining upon request by the employee representative, even if the policy involves an inherent managerial right. School officials should consult with their attorneys before adopting this policy or taking any action under it.

If a local collective bargaining agreement contains provisions that exceed these requirements, it will supersede this policy for those covered employees. In such cases, the board policy should be amended to state, "Please refer to the applicable collective bargaining agreement." For employees not covered, the policy should reflect the board's current practice. The local collective bargaining agreement may contain provisions that exceed these requirements. When a policy's subject matter is superseded by a bargaining agreement, the board policy may state, "Please refer to the current [insert name of educational support CBA]."

Administrative procedures implementing this policy should include guidelines for exit interviews. These guidelines should include a list of items to discuss with the employee, e.g., the reasons for the termination; how the district could improve its policies, procedures, and working conditions; how to reduce employee turnover; and information about the employee's benefits, including continued health insurance coverage.

#### <sup>2</sup> Optional provision:

In most cases, resigning employees are permitted to work until their effective resignation date.

<sup>3</sup> If employed at-will, the employee may be dismissed at any time for a non-discriminatory reason unless the dismissal is for a reduction in force. See ~~policy-5:270, Employment At-Will, Compensation, and Assignment~~. **Important:** whether a specific employee is actually employed at-will depends on the specific facts. Griggsville-Perry Community Unit Sch. ~~ool~~ Dist. v. Ill. Educ. Labor Relations Bd., 368 Ill. Dec. 494984 N.E.2d 440 (Ill. 2013) (upheld an arbitrator's finding that the requirement to provide a pre-discharge written notice was drawn from the essence of the agreement); Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532405 S.Ct. 1487 (1985). See also Baird v. Warren Comm. Unit Sch. ~~ool~~ Dist., 389 F.3d 685 (7th Cir., 2004)(because board members denied a dismissed superintendent procedural due process rights, they were denied qualified immunity).

It is safest to presume that all non-licensed employees are employed for the school year because districts routinely assure next-year employment so that the employee will not qualify for summer unemployment. In addition, annual employment may be created through a collective bargaining agreement, past practice, an employees' handbook, personnel policy manual, an oral promise, or any type of specific annual allocation per year, e.g., vacation or sick day allotments. Thus, the sample policy addresses those employees "with an annual or longer contract or who otherwise have a legitimate expectation of continued employment." A dismissal at the end of the school year or end of a contract generally requires only minimal due process. A mid-year or mid-contract dismissal will require significantly greater due process.

Even if an employee is at-will, a district should consider giving a dismissal reason. The failure to give a reason may provoke an employee into challenging the dismissal, e.g., by alleging illegal discrimination or retaliation for exercising a protected right or whistleblowing.

Consult the board attorney to determine: (1) which employees are at-will, have annual employment, or have a different expectation for their length of employment, and (2) the level of due process to provide specific employees in the event of a dismissal.

end of their respective contract after being provided appropriate notice and after compliance with any applicable contractual provisions, or (2) mid-year or mid-contract provided appropriate due process procedures are provided.

The Superintendent is responsible for making dismissal recommendations to the School Board consistent with the Board's goal of having a highly qualified, high performing staff.

#### Reduction in Force and Recall 4

The Board may, as necessary or prudent, decide to decrease the number of educational support personnel or to discontinue some particular type of educational support service and, as a result of that action, dismiss or reduce the hours of one or more educational support employees. When making decisions concerning reduction in force and recall, the Board will follow Sections 10-22.34c (outsourcing non-instructional services) and 10-23.5 (procedures) of the School Code, to the extent they are applicable and not superseded by legislation or an applicable collective bargaining agreement.

#### Final Paycheck

A terminating employee's final paycheck will be adjusted for any unused, earned vacation credit.<sup>5</sup> Employees are paid for all earned vacation. Terminating employees will receive their final pay on the next regular payday following the date of termination, except that an employee dismissed due to a reduction in force shall receive his or her final paycheck on or before the next regular pay date following the last day of employment. <sup>6</sup>

#### Suspension

Except as provided below, the Superintendent is authorized to suspend an employee without pay as a disciplinary measure, during an investigation into allegations of misconduct or pending a dismissal hearing whenever, in the Superintendent's judgment, the employee's presence is detrimental to the District. A disciplinary suspension shall be with pay: (1) when the employee is exempt from the overtime provisions,<sup>7</sup> or (2) until an employee with an employment contract for a definite term is provided a notice and hearing according to the suspension policy for professional employees.<sup>8</sup> Upon

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<sup>4</sup> 105 ILCS 5/10-23.5 grants educational support personnel significant protection during a RIF. Unless otherwise defined by a collective bargaining agreement, the board can define the position categories for a seniority list. Cook v. Eldorado Community Unit School-Sch. District, 354 Ill.App. 3d 256820 N.E.2d 484 (5th Dist.Ill.App.5, 2004). While the statute gives boards the discretion to define *categories of positions*, boards may not define *categories* differently for lay-off/recall purposes than for other purposes.

105 ILCS 5/10-22.34c governs layoffs as a result of a third party non-instructional services contract. See Community Unit School-Sch. Dist. No. 5 v. Ill. Educational-Educ. Labor Relations Board, 382 Ill.Dec. 12042 N.E.3d 120 (4th Dist. Ill.App.4,2014)(no unfair labor practice occurred when a school employer outsourced its transportation services and dismissed bus drivers as a result of bona fide and legitimate reasons, not anti-union animus, and the district had bargained in good faith with the union.

<sup>5</sup> A district may also adjust an employee's final paycheck for advanced vacation leave, *provided* that the employee agreed to deduct a specified amount of pay equaling the advanced vacation. (56 Ill.Admin.Code §300.760). If employees are required to execute such an agreement before taking unearned vacation leave, add the following phrase to this sentence: "or, if the employee agreed in writing, vacation time taken that was not earned."

<sup>6</sup> These final paycheck requirements are in 105 ILCS 5/10-23.5.

<sup>7</sup> Employees who are exempt from overtime requirements become eligible for overtime if they are subject to disciplinary suspensions without pay. Auer v. Robbins, 519 U.S. 452417 S.Ct. 905 (1997). Although the U.S. Dept. of Labor modified this rule in 2004, the Illinois legislature rejected these rule changes. (820 ILCS 105/4a). Illinois employers must use the federal rules as they existed on March 30, 2003.

<sup>8</sup> A suspension of an employee having a protected property right in continued employment requires a notice and hearing. See f/n 3 for additional discussion.

receipt of a recommendation from the Ill. Dept. Children and Family Services (DCFS) that the District remove an employee from his or her position when he or she is the subject of a pending DCFS investigation that relates to his or her employment with the District, the Board or Superintendent or designee, in consultation with the Board Attorney, will determine whether to: <sup>9</sup>

1. Let the employee remain in his or her position pending the outcome of the investigation; or
2. Remove the employee as recommended, proceeding with:
  - a. A suspension with pay; or
  - b. A suspension without pay.

Any criminal conviction resulting from the investigation or allegations shall require the employee to repay to the District all compensation and the value of all benefits received by the employee during the suspension. The Superintendent will notify the employee of this requirement when the employee is suspended. <sup>10</sup>

LEGAL REF.: 5 ILCS 430 et seq.  
105 ILCS 5/10-22.34c and 5/10-23.5.  
325 ILCS 5/7.4(c-10).  
820 ILCS 105/4a.

CROSS REF.: 5:240 (Professional Personnel - Suspension), 5:270 (Educational Support Personnel - Employment At-Will, Compensation, and Assignment)

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<sup>9</sup> This sentence is optional. 325 ILCS 5/7.4(c-5), amended by P.A. 100-176, eff. 1-1-18. Consult the board attorney about suspending an employee without pay pursuant to a DCFS 325 ILCS 5/7.4(c-5)-recommendation. This sample language balances the interests of student safety and employee due process when the district receives a recommendation to remove an employee who is the subject of a DCFS investigation from employment.

**Note:** Liability may exist when a district receives a 325 ILCS 5/7.4(c-5)-recommendation and does not remove the employee as a result. Consider In re Estate of Stewart v. Oswego Comm. Unit. Sch. Dist. No. 308, 406 Ill.Dec. 345 (2nd Dist. 2016)(finding district's response to a student health emergency was willful and wanton as it had prior information regarding appropriate response protocols and denying tort immunity to district); In re Estate of Stewart, 412 Ill.Dec. 914 (Ill. 2017) (school district's appeal denied).

<sup>10</sup> The repayment requirements in the first sentence of this paragraph are in 5 ILCS 430/5-60(b). The second sentence is optional.