



BOARD HIRING, FIRING AND OTHER LEGAL CHALLENGES

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Issues to be Covered

- Statutes establishing authority for employment decisions
 - Legal exposures in hiring process employees
 - How to hire while preserving flexibility
 - The quasi judicial process for hiring matters
 - Legal exposure in termination proceedings
 - The limits to free speech and the liabilities for going beyond those limits
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Board Roles in Hiring and Firing

Statute describing Board authority is silent on hiring and termination power---speaks to policy governance, budget issues etc...

There are specific statutes that establish a Board role in hiring

There are specific statutes that establish a Board role in terminations/nonrenewals

There are collective bargaining agreements with unions that establish a role for the Board in reviewing discipline, including termination/nonrenewal

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How about the Superintendent's role in employment matters?

Authority of the Superintendent (section 242):

Chief executive officer for the SU and the districts

Carry out policies adopted by the Board

Nominate a candidate for employment if it is a licensed employee---if Board declines, nominate a new person

Hire unlicensed employees

Fire licensed and unlicensed employees except if CBA or statute say otherwise

Hiring (and firing) the Superintendent

- Advice of the Secretary is required
- Employed with a written contract for a term not to exceed five years nor less than one year.
- May be dismissed for cause or as specified in the contract of employment
- Notice of nonrenewal by May 15 of year that contract expires
- If SU/District does not hire a Superintendent, the duties can be assigned to a school principal or "other qualified persons."



Hiring (and firing) the Principal



After recommendation by the Superintendent

May serve in more than one school

Contract for a term of not less than one year, but not more than three years

If more than two years in the same position, renewal rights if not notified by February 1 of nonrenewal.

Entitled to an executive session hearing if terminated

VSBA Model Policy


1. The appointment of licensed employees will be made by the board subject to the nomination of candidates by the superintendent of schools.
2. Subject to any pre-employment screening processes approved by the board, the superintendent shall appoint all non-licensed employees to be employed by the school district or supervisory union.
3. Contracts of employment or other notification of employment will be conditional pending receipt of criminal records check information and evaluation of that information.
4. Upon completion of a criminal records check, the superintendent shall:
 - a. notify the person subject to the check about the district's protocol for maintenance of criminal history files, and
 - b. ask the person subject to the check to indicate if his or her record should be maintained or destroyed after the retention period specified in the District's user agreement with VCIC.
5. Employees who have been employed for fewer than two years in Vermont public schools are considered probationary teachers and may be **offered a probationary contract**



General Hiring Issues

- Boards hire Principals, Superintendents, Teachers and other licensed personnel


Boards must be mindful of:

- Discrimination
 - ADA requirements
 - Affirmative Action
 - Contract terms
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Hiring and firing issues

The Board has traditionally hired everyone in the District and they like it that way. Is that against the law? Can it continue?





Discrimination in Hiring

- Cannot make any decision based in part on protected characteristics.
- Race, religion, ethnicity, age, veteran status, sexual orientation, gender identity, marital status, crime victim status, place of birth, disability and color
- Disability is defined under ADA to include impairment, regarded as impaired, regarded as disabled or disabled
- Disability: a condition that substantially limits a major life activity
- Impairment: some condition that does not rise to the level of disability
- Regarded as impaired is someone about whom we believe there is an impairment when there is not.

Disabilities
are Defined
Broadly
under the
ADA (not
disabilities)

Transvestitism

homosexuality

pedophilia

exhibitionism

Compulsive
gambling

Personality
traits and
judgment

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Impairments are Defined Broadly under the ADA

Left handedness

Predisposition to illness or disease not caused by an immune disorder

Common personality traits like poor judgment or quick temper which are not part of a mental health condition

Poverty, prison record, lack of education

ADA Accommodation in Hiring

Employer may tell applicants what the hiring process involves, but may not ask if he or she needs accommodation. For example, “there will be an interview and timed typing test or job demonstration.”

The application and interview process requires reasonable accommodation.

May not ask during interview process if the applicant needs accommodation to do the job unless the disability is obvious



Social Media and Hiring

An employer shall not require, request, or coerce an employee or applicant to do any of the following:

- (1) **disclose a username, password,** or other means of authentication, or turn over an unlocked personal electronic device for the purpose of accessing the employee's or applicant's social media account;
 - (2) access a social media account in the presence of the employer;
 - (3) divulge or present any content from the employee's or applicant's social media account; or
 - (4) change the account or privacy settings of the employee's or applicant's social media account to increase third-party access to its contents.
- (c) An employer shall not require or coerce an employee or applicant to add anyone, including the employer, to his or her list of contacts associated with a social media account.
- (d) No agreement by an employee to waive his or her rights under this section shall be valid.

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Hiring in the age of Google

- Betty Boardchair decides to check up on the applicant for principal. She Googles her and finds out that she sued her last employer. She also sees lots of social media posts where the applicant expresses that she supports blue lives matter, not black lives matter.
- Are we now in trouble if we do not hire the applicant?

The Social Media/Internet Problem

The Problem with Social Media and Hiring Practices

It can be tempting for an employer to peruse a social media site or even do research on a potential candidate to find out more about their personal and professional background to see if they will fit in with a company's culture. However, researching candidates on the Internet and through social media during the hiring process may reveal individual characteristics that would otherwise remain private until the actual interview, such as gender, race and age. This information, along with information about sexual orientation, religion or disabilities, is considered "protected" under state and federal law.

There is also the concern that the information may not be accurate, creating both a legal exposure and a moral dimension.



Ban the Box law

Legislature was convinced that it is harder for ex-cons to get a job if they must disclose criminal convictions before they are interviewed. It gets in the way of rehabilitation. Passed a law that would defer the information.

The employer may not request a criminal history on an initial application

“Criminal History” is a broad concept, including police contacts, charges and convictions (covers arrests with no conviction)

The employer may inquire after an initial determination that the employee is “otherwise qualified”

The employer may inquire during a job interview

But, if you do obtain information, you must give the employee an opportunity to explain

VSBA Model Policy Language/Process

5. **After the initial written or electronic application process is complete,** applicants selected for an interview will be required to provide a statement identifying any criminal charges brought against the applicant, including the date of each charge, the court where the charge was filed and the disposition of the charge. The statement shall also include a warning to the applicant in bold print that falsification of information or the omission of information on the statement may constitute grounds for dismissal if the applicant is hired. **Any job offer shall be made contingent on the candidate successfully completing the school district's background check process**

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Affirmative Action in Hiring (as distinct from recruitment)

May only base hiring decisions on race or other protected characteristics if there is a plan adopted by the District


The plan must identify past underrepresentation of the protected characteristic in the position for which the employer wishes to use affirmative action

The protected characteristic may only be a “plus factor” in hiring decisions



VSBA Model Policy Language:

It is the policy of the board to select employees solely on the basis of character, professional qualifications, and critical job requirements. Employees will be selected in a manner that does not unlawfully discriminate.





Interviewing Done Right, Right?

During the interview for a new teacher, one of the board members tells the applicant that this is a great community to live in. Housing is cheap. People are nice. The community supports the school. The member asks if the applicant has children. The applicant says she does and that she and her partner are looking for a place like this. Their children have disabilities and need a place that will provide for their intensive needs.

What do we do?



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The Interview Script

- Explain the ground rules before you start the interview
- Have it in writing for the file
- Script the questions in advance and divide them up
- Limit follow up questions to credentials, qualifications and job-related issues
- Do not use the interview as a get to know you session
- Create a metric for evaluating applicants
- Follow your pre-planned process for narrowing the field based on resume and then interview
- Never explain why you chose not to hire without careful thought
- Never make promises or guarantees

Suggested Checklist



Describe the format of the interview to the candidate.

Ask open-ended informational, situational, and behavioral questions that are exclusively job related.

Let the applicant do most of the talking.

Keep the interview on track. No drift/no personal “bonding”

Observe nonverbal behavior.

Take notes.

Leave time for the candidate to ask questions.

Ask if you can check references and pursue references not listed on the resume. Raise release if needed.

Describe the remainder of the search process and the time it will take.

Thank candidate for his or her time.

After the Interview:

Give the final candidates a brief overview or written synopsis of benefits.

Answer any questions related to salary.

Evaluate the candidate with the committee.

Document the interview with prepared forms and/or notes

Send a letter communicating the decision.

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Contract issues in hiring

For cause employment creates “Loudermill” rights

Loudermill gives employees a right to a pre-termination meeting and post-termination hearing

There are no Loudermill rights if the employee is at-will

There are no Loudermill rights if the employee has a provision in the contract that allows for termination without cause

To be or not to be “for cause?”

Teachers, principals and Superintendents are statutory employees and have rights established by statute

All other employees may be at-will, if not union

May have a hiring letter that maintains at-will status

May have a contract that limits district exposures: **Employer may terminate this Agreement with 60 days’ written notice. Employee shall not report to work during the notice period.**

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Termination/non-renewal of Employees

- The Board must terminate teachers, principals and Superintendents
- Those employees will likely be entitled to a hearing that looks like Loudermill
- 1752: Superintendent suspends with pay, employee may request an “appeal” within 7 days and the board hears the appeal and decides if just cause exists. If no appeal, the Board terminates after consideration of evidence in executive session with Superintendent. Board hears grievance later.
- 243: Board dismisses and has a hearing or has a hearing and dismisses

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What is just cause to support termination?

Just cause is based on concepts of proportionality and progressive discipline: Punishment must fit the crime and should be based on the idea that it is to improve performance, except some misconduct is so bad that it requires immediate termination.

Misconduct/Negligent performance: Misconduct leads to immediate discipline and negligent performance elicits a plan for improvement.

Duties for Negligent Misconduct Improvement plans: 1. identify performance deficiencies; 2. Identify what good performance looks like; 3. Give a reasonable time to improve; 4. Provide supports; 5. Notice to the employee of consequences; and 6. Have a fair evaluator.

Most important factors to consider in connection with Misconduct discipline: 1. Severity of the performance issues; 2. Seniority; 3. Consistency with prior discipline with the employee or other employees; 4. Notice to the employee of consequences

Due Process and Board Hearings

How far can a Board go before it can no longer hear a termination/non-renewal case?

1. **Loudermill:** The employee is entitled to a “fair” hearing
2. The employee is entitled to an “impartial” decision maker
3. Board members may know some things about the matter without sacrificing their ability to be impartial

Vt. S.C.: Bias may be actual bias or the probability of actual bias. If that exists, the Board member may not decide the issue

What is bias for a Board member?



From VSBA policy: Conflict of interest (bias) means a situation when a board member's private interests, as distinguished from their interest as a member of the public, would benefit from or be harmed by their actions as a board member.

Vt. S.Ct.: Bias will exist only in the most extreme of situations. There is a "presumption of honesty and integrity."

Familiarity with the facts gained through the Board member's statutory role is not grounds for recusal

But what about a Board member who engages in a personal investigation?

So, is there bias such that the decision will be tainted?

Brenda Boardchair will preside over a teacher termination hearing. The employee, Tony Teacher, is her cousin's husband. Brenda was never particularly close with her cousin. So, she decides that she will not recuse herself. The other Board members are not so sure.

How should Brenda handle the issue?

What is the process for handling the dispute between Board members?



Is There a Conflict of Interest?

Brenda Boardmember has a long and unhappy history with Peter Principal. The Board takes up whether to offer him a new contract. Another member says that Brenda should not be involved because of a conflict. Is there a conflict of interest?

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This is
clever,
but is it
legal?

The District wants to avoid a long, expensive hearing. It decides to place the Principal on paid leave until the end of the year, when her contract expires. She has been non-renewed. It is only five months, but that is better than a hearing.

Are we okay?

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Your Right to Free Speech v. Defamation

Defamation:

1. Statement published to others
2. Untrue statement
3. Negligence of greater fault
4. Special damages

We need to be careful about what we say about employees or the public to avoid potential claims

Tips to avoid claims: Appoint one member to be spokesperson, avoid statements about specific employees, and respond with generalities.

Do not grant interviews. Issue a statement in writing.

Statement of the Board

Facts: An employee has been accused of sexual misconduct with a student. The Board does not yet know if it is true.

Statement: The Board demands the highest levels of professionalism from its licensed employees. If there is an allegation of misconduct, particularly sexual misconduct, the Administration immediately commences an investigation. During the course of the investigation, the employee will not be permitted to have contact with students or staff. The District will also provide support to any victims.

If there is a finding that the allegations are substantiated, the employee will be terminated. We cannot discuss the specifics of any employee because those matters are confidential. We are committed to a safe learning environment for our students.

Employee Free Speech Rights

- The right attaches to discussion of **matters of public concern**
- It does not attach to speech in **furtherance of job duties**
- The right does not extend to matters or types of speech that significantly adversely impact the employer's ability to maintain an efficient workplace
- **Balancing test** between the two to determine the extent of the right

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Can we discipline employees for speech?

Tony Teacher recently read Mein Kampf. He posts pictures of Hitler and sends messages that “other than genocide and eugenics, he had some good ideas.” Tony is careful not to discuss his views at school. Is this protected free speech? Can we discipline him for it?

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Final thoughts

- Employment issues are the most significant source of claims against Districts and Boards
- It is important to be circumspect
- It is important to preserve your ability to serve your role in hiring and firing
- It is important to professionalize the processes for hiring and firing