A GUIDE TO THE

PRINCIPLES OF PROGRESSIVE DISCIPLINE

2010
This guide was originally created in 2004 by a committee of management and union representatives from all 7 represented employee groups of the Simcoe County District School Board.

Since then the Guide has been revised in 2008, 2009 and again in 2010. The September 2010 revision to this Guide returns to the 2004 mandate in which verbal reminders were not official discipline and therefore not copied to the personnel file.

These revisions have been approved by the Administrative Council of the Simcoe Country District School Board and our unions have been consulted through the Director’s Advisory Council as well as Working Conditions meetings.

We are pleased to present this version of the Guide which aligns with our philosophy of corrective action and our collective agreement obligations.
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INTRODUCTION

This document was developed to provide a consistent approach to address employee misconduct. It is very important to review this document with a clear understanding of the difference between behaviour and performance. This addresses situations related to behaviour only.

The Board believes that its employees are responsible and trustworthy and are capable of making decisions appropriate to their sphere of responsibility when given the necessary information, training and experience. Respect and trust in an education working environment are achieved by communicating reasonable expectations of acceptable conduct to employees, and by fair, objective and consistently enforced disciplinary procedures, including fair investigatory techniques, when those expectations are not met for reasons within the employee’s control.

This guide is for the use of Simcoe County District School Board administration including principals/vice-principals and all managers/supervisors who may at some time be required to handle a matter of employee misconduct requiring disciplinary measures. Since employee misconduct, or culpable behaviour, is not a common occurrence for most employees, a resource tool is necessary to provide guidance to system leaders who may have little or no experience with this complex issue.

It is the general approach of the Board to correct behaviour, not punish it. The emphasis of the principal/vice-principal or manager/supervisor should be identification and isolation of problem situations in a supportive and non-intrusive manner before formal corrective action should be undertaken. However, discipline may be imposed without prior corrective action where the behaviour is serious, recurrent, or results in harm of any sort to another individual or risk to the Board's operations or reputation within the community.

Employees must be aware of the expectations of their employer, the reasons for the corrective action, and possible future consequences of any repetition of the behaviour. Every effort should be made to ensure that the employee understands that discipline is the result of his/her own actions and not from any personal animosity on the part of the principal/vice-principal or manager/supervisor.

Every incident of employee misconduct is unique, just as every individual is different; therefore, administrative responses to such behaviour must be considered in light of all the circumstances. The approach and response should be consistent, and must not reflect the application of rigid rules or arbitrary responses.
SECTION ONE: DEALING WITH EMPLOYEE MISCONDUCT

1. Misconduct Distinguished From Substandard Performance

A school principal/vice-principal or manager/supervisor is expected to intervene when an employee's performance is not up to minimum standards or when the behaviour of an employee is not appropriate. The reason for this is that where substandard performance or behaviour continues over time and the employer, through its management representatives, can be shown to have knowledge of the employee's activities, arbitrators have ruled that such performance or behaviour was "condoned" by the employer.

Where performance standards are not being met, the school principal/vice-principal or manager/supervisor must appraise the performance, clarify or set standards, inform the employee and provide resources to assist the employee. In addition the employee must be given time to improve. A performance appraisal review is not considered discipline, although a failure to improve performance may result in a negative sanction for the employee. That sanction may appear to be disciplinary in that it is intended to address ongoing issues, and may include demotion, discharge, suspension, warning or other action to reflect the seriousness of the performance concern and the necessity for improvement to maintain ongoing employment. However, the penalty may be overturned by an adjudicator, and the sanction rescinded, where the employer has failed to address the ongoing issue(s) (i.e. has "condoned" the conduct or poor performance), or has acted in an unfair or arbitrary manner in imposing the sanction. This sends a bad message to other employees, and may serve to excuse another employee who acts in a similar fashion.

Where behaviour does not conform to expectations, the school principal/vice-principal or manager/supervisor must advise the employee that the conduct is "culpable" or unacceptable, and that repetition of the misconduct will have consequences for the employee. Imposing consequences for employee misconduct is discipline. It is expected that once an employee is put on notice, there will be an immediate correction of the behaviour and that no time for improvement will be given. In fact, a good way to distinguish between performance and behaviour issues is to determine whether the employee can meet expectations immediately (culpable behaviour) or whether there is a learning curve (substandard performance).

2. Examples Of Unacceptable Behaviour

2.1 In The Workplace

2.1.1 Examples of unacceptable behaviour are listed below:

   2.1.1.1 lateness;
   2.1.1.2 absenteeism (without pre-authorization, valid excuse and/or failure to notify through SCARRI);
2.1.1.3 abuse of sick leave;
2.1.1.4 inappropriate use of Board or school property (including computer/internet use, vehicles, student materials);
2.1.1.5 breach of confidentiality of student or other personal information (including confidential school or Board documents or information);
2.1.1.6 theft of Board property (including theft of communications such as making long distance personal phone calls);
2.1.1.7 threats/assaults;
2.1.1.8 missing assigned supervision;
2.1.1.9 disclosure of confidential information;
2.1.1.10 physical, verbal or mental abuse of a student or another individual in the workplace (includes harassment);
2.1.1.11 insubordination (includes rudeness or disrespect)
2.1.1.12 breach of Board Policy or Procedure
   a) A7630 - Code of Conduct Section 2.3,
   b) A7640 - Harassment - Student,
   c) Board Policy 3031 - Workplace Harassment,
   d) A7620 - Children in Need of Protection - Child Abuse and Neglect Reporting Procedures,
   e) Board Policy 3125 - Anti Racism and Ethnocultural Equality;
      (e.g. Racial or Ethnocultural Mistreatment, Sexual Harassment, Inappropriate treatment of students, Inappropriate relationships with students - O.C.T. Advisory)

NOTE: This list includes examples of unacceptable employee misconduct, but it is not exhaustive. Any conduct that is unprofessional or inappropriate in the workplace setting may be subject to disciplinary measures, the scope of which may be increased or decreased depending on the presence or absence of mitigating factors.

Mitigating factors take into account the context of the situation. A school principal/vice-principal or manager/supervisor must consider what circumstances faced the employee when the misconduct occurred, and must consider any extenuating reasons that motivated the employee to the misconduct or poor performance, or that may have played a role in the seriousness of the misconduct. Mitigating factors do not necessarily excuse the conduct or determine that no discipline will be imposed. Rather, they may be considered in determining the extent or scope of the discipline, and whether an alternative response (such as remediation or support) may be in order in place of, or in addition to, the disciplinary sanction.

2.1.2 Mitigating factors may include:

2.1.2.1 the employee's prior disciplinary (or non-disciplinary) history;
2.1.2.2 the nature of the work at issue, vis-à-vis the employee's personal/professional profile (includes the training, experience and background of the employee to address the assignment, and the need for or extent/availability of supports in the event of a particularly difficult assignment);
2.1.2.3 the interference or assistance (including involvement) of other persons and the nature of any relationship(s) between/amongst them;
2.1.2.4 the length of employment with the employer (a long term employee may be given the benefit of the longer tenure, unless the length of employment actually contributed to the seriousness of the behaviour);

2.1.2.5 the employee’s health (physical, mental or emotional) or the presence/absence of an addiction or disability that may have contributed to the behaviour.

Mitigating factors must always be weighed against the risk of condoning employee misconduct/culpable behaviour.

It is advisable to carefully consider each situation that arises in light of the distinction between substandard performance and culpable behaviour drawn above. Imposing sanctions for performance matters without first trying to address the underlying issues through assistance and support may result in grievances. So too, treating culpable behaviour as a matter requiring lengthy remediation may be interpreted by an arbitrator as condonation of the behaviour.

2.2 Out Of The Workplace

Employees of public institutions must be careful that, by their actions, they do not bring the reputation of the institution into disrepute or compromise the employee’s ability to perform the work of the institution. Discipline of professional employees for misconduct outside the workplace has been supported by arbitrators. In a school board in particular, a teacher’s behaviour may be seen to provide a bad example for students or to create an apprehension of risk to students. At the extreme, criminal behaviour such as drug trafficking, sexual assault or child abuse are examples of such misconduct, even where students of the Board are not directly involved.

Teachers, in particular, have a general duty under the Education Act, Section 264, to:

"inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues."

Teachers and other professional employees with professional qualifications such as nurses, accountants, engineers, psychologists and social workers, are also subject to professional standards of practice and ethical guidelines. A breach of the professional expectations and standards may result in discipline for just cause both by an employer and by the respective governing professional body.

3. Did The Employee Breach The Rule Or Commit The Offence?

Once a school principal/vice-principal or manager/supervisor concludes that an employee did commit the offence or engage in the conduct at issue, he or she must decide the seriousness of the misbehaviour. That may determine the scope of the discipline, including whether it should attract formal discipline or an informal warning. Once that determination is made, the appropriate degree of discipline can be imposed, having regard to the presence or absence of mitigating factors.
If an employee disputes the discipline by grievance and the grievance is taken to arbitration, the onus, or burden of proof, is on the employer to establish, by way of verbal testimony and acceptable documentary evidence, that the employee was disciplined for just and proper cause. If the employer succeeds, then the onus shifts to the grievor to establish that there are other considerations which may bear upon the issue.

Unlike a criminal trial where the test is "proof beyond a reasonable doubt", at arbitration, an employer must satisfy the lesser standard of proof, "on a balance of probabilities". This means it is likelier than not that the conduct took place. However, the more serious the allegation, the more convincing the principal/vice-principal or manager/supervisor must be in establishing reliable clear and cogent evidence of the behaviour at issue.

4. **Investigation Of Complaints Or Allegations Against An Employee**

Criminal matters must be reported to the police and, if the employee is a teaching professional, to the Ontario College of Teachers. Criminal convictions and determinations of child sexual, physical or emotional abuse must be reported to the Children’s Aid Society, and to the Ontario College of Teachers, or other governing professional body, if applicable.

Board policies may specify standard procedures for investigations. For instance, the Board policy on harassment is supported by APM A4070, which sets out the procedure for the investigation of a complaint of harassment or discrimination under the Ontario Human Rights Code.

Reporting a complaint about the behaviour of an employee is a very serious matter and with the right to complain comes the duty to act responsibly.

Many employees are concerned that they may be the victim of false or malicious allegations. Therefore, it is essential that they have confidence in the investigatory procedures. Complaints and allegations should be investigated promptly, professionally and without bias. Attached as APPENDIX A is A Guide to the Investigation Stage, which provides for due process as required in a full investigation.

5. **Did The Culpable Behaviour (Misconduct) Warrant Discipline?**

Five questions should be addressed when considering discipline, as follows:

5.1 **Did the employee have knowledge of the rule or practice breached?**

It should not be assumed that employees know the rules. The employer is under an onus to demonstrate that an employee knew or ought to have known a rule. An inadvertent or naïve violation is more suitably corrected by counselling or advice. This constitutes notice in the event the behaviour reoccurs. In progressive discipline, putting an employee on notice is called a "warning".
A school principal/vice-principal or manager/supervisor should be aware of the Board's past practices since an employee may come to rely on these, rather than written rules, which may be contradictory. An employee may in some instances justifiably defend his or her actions through a claim of surprise or "detrimental reliance" on the past practice, although these claims will rarely succeed in the face of serious breaches of professional standards or ethics, or where clear harm results to an individual.

5.2 Considering all the circumstances, did the employee neglect his/her duties or responsibilities?

Deliberate or negligent behaviour justifies some discipline if knowledge of the rules can be demonstrated or if the employee has been warned, or if the knowledge is properly known to be a professional expectation.

5.3 Did the employee violate any rules or practices and were there harmful or potentially harmful consequences for the Board, its employees and/or its students?

When there are serious consequences to the employer, it becomes imperative to intervene formally with an employee. Discipline should be seriously considered even when no knowledge of the rules can be imputed to an employee in the following situations:

5.3.1. anyone has been physically or emotionally harmed;
5.3.2. anyone has been put at risk of physical harm;
5.3.3. the employee engaged in theft;
5.3.4. the reputation of the Board has been jeopardized.

5.4 Are there any mitigating circumstances?

Every situation must be viewed in context. A school principal/vice-principal or manager/supervisor should consider what circumstances faced the employee when the misconduct occurred. They should examine any extenuating reasons that motivated the employee to act. In particular, it should be determined whether the employee was well (physically, mentally or emotionally) or was reasonably settled in a new assignment. These circumstances and other mitigating factors must always be weighed against the risk of condoning culpable conduct.

5.5 Has the employee been permitted to explain or deny the conduct?

The failure of a principal/vice-principal or manager/supervisor to follow the rules of due process can often result in the overturning of discipline for even serious culpable behaviour. A principal/vice-principal or manager/supervisor must observe the rules of union representation in the collective agreement, and cannot impose any discipline until the employee has been given an opportunity to respond to the allegations and provide a defense, and to have union representation at the meeting in which the discipline is discussed or imposed.
Where an employee refuses to meet with the principal/vice-principal or manager/supervisor, a negative inference can be taken and discipline may be imposed. Where an employee denies an allegation, especially when there is only one witness or complainant, it is up to the principal/vice-principal or manager/supervisor to judge the credibility of the complainant and that of the employee and to make an appropriate determination as to culpability. In addition, where there are incriminating circumstances, such as possession of stolen property, an obligation to explain arises if the employee wishes to avoid discipline.

6. Is The Penalty Appropriate?

The employer may be found by an arbitrator to have just cause to impose discipline, but the level of discipline may be found to be excessive or inappropriate. In such cases, the arbitrator has the authority to substitute a lesser penalty. Therefore, principals/vice-principals and managers/supervisors should always consider whether the penalty to be imposed is fair to the individual in the circumstances. It is this requirement which makes it impossible to determine a schedule of pre-set penalties for various types of culpable behaviour.

Some of the major factors to consider are listed below.

6.1 How serious were the consequences?

What is the range of the effect of the behaviour on others or on the Board?

6.2 What were the circumstances under which the misconduct occurred?

Was the behaviour observed by others and were there mitigating circumstances?

6.3 Is this a long service employee?

The longer the service of the employee, the greater the effort required to educate the employee or to correct the behaviour. It may be relevant whether an employee is probationary or has achieved permanent status, since there is typically a lesser standard of tolerance applicable to misconduct on the part of a probationary employee. Similarly, an employer generally has a lesser responsibility to casual or temporary employees, although overall tenure with the employer continues to remain a consideration.

6.4 Is there a past disciplinary record?

If there is no record of previous misconduct, the emphasis should be on educating or correcting an employee’s behaviour. Conversely, a lengthy record, particularly of conduct similar to the incident in question, will call for more serious discipline, up to and including termination. If there has been a long intervening period of good behaviour, this should be considered a mitigating factor.
6.5 **Is there evidence of rehabilitation?**

Discipline is not punishment, but a way of correcting and documenting behaviour. Therefore, the potential of an employee to rehabilitate or evidence of past successful remediation should weigh in favour of the employee. One possible indicator is whether the employee admitted to the conduct and whether contrition was demonstrated.

6.6 **Was the conduct provoked?**

Discipline can be mitigated by proof that the conduct was provoked.

6.7 **What was the employee’s state of mind?**

If the conduct was planned or premeditated, then it should attract harsher discipline than spontaneous behaviour. It will also be important to know whether substance abuse was involved in order to fashion the appropriate disciplinary response. With alcoholism or illness, arbitrators will inquire as to whether the employee is fit to work or is likely to recover when considering the appropriateness of the penalty.

6.8 **Is the response consistent with Board responses to other similar situations?**

Although each fact situation will be unique, the pattern of disciplinary responses must be seen to be consistent. The employer is not entitled to discriminate by disciplining some employees and not others or by imposing different degrees of punishment for similar conduct. In addition, the principal/vice-principal or manager/supervisor should ensure that the behaviour in question has not been condoned by them or others in the past.
SECTION TWO: PROGRESSIVE DISCIPLINE

There is only one method of correcting employee behaviour that is recognized by labour arbitrators - progressive discipline. In the Simcoe County District School Board, this is a five step process, except in the case of very serious misconduct which may justify omitting one or more steps. Alternatively, steps may be repeated as required by the circumstances.

STEP 1. VERBAL REMINDER

STEP 2. WARNING/LETTER OF EXPECTATION

STEP 3. WRITTEN REPRIMAND

STEP 4. SUSPENSION WITHOUT PAY

STEP 5. RECOMMENDATION FOR DISMISSAL FROM EMPLOYMENT.

1. **Timelines**

   All discipline should be imposed as soon as possible after the misconduct so that there is a clear connection between the employee's conduct and the consequences.

2. **Due Process**

   No discipline can be imposed before a meeting is held with an employee, and the union/federation, where applicable. This allows the employee to respond to the allegations and permits an examination of any mitigating factors. However, if the allegations are sufficiently serious that, if proven, they suggest the employee is a danger or risk to others in the workplace, the employee must be re-assigned to an alternative worksite without the same risk factors, or assigned to home until the investigation can be completed and a decision made as to culpability. This meets the expectations for due process, but should be implemented only as necessary in the Board’s interest.

   Re-assignment or assignment to home are non-disciplinary actions intended to give the employer the opportunity to conduct a fair investigation and determination of the matter. It also gives the employee the opportunity to prepare his/her response, without being subject to differential treatment at his/her usual work location. The employee must be given assurance the action is non-disciplinary and will not form part of his/her employment record, must be told the basis for the action, and should be given a reasonable anticipated date to conclude the investigation and be given the results. This should be put in writing. If the employee is subsequently exonerated, that too should be put in writing, but not placed in the employment file.
3. **Double Jeopardy**

Once an employee has been warned, reprimanded or suspended, there can be no further disciplinary action taken for the same occurrence, although the discipline imposed can be relied upon in establishing a pattern of misconduct that justifies advancement to the next stage or stages of progressive discipline.

4. **Five-Step Process**

4.1 **STEP 1 – VERBAL REMINDER**

A verbal reminder is usually the precursor to the imposition of formal written discipline which becomes a matter of record in the employee’s personnel file. On a first instance of culpable behaviour, an employee should be put on notice of the principal/vice-principal's or manager/supervisor's expectations, and the consequences of repetition of such conduct. This is a verbal reminder. Once a verbal reminder has been given, the incident is closed. An employee cannot receive another type of formal discipline for the same incident. A verbal reminder is more informal than written discipline contained which is contained within an employee’s personnel file. While union representation is not required when issuing a verbal reminder, such representation is acknowledged if the employee requests it.

Employees generally respond favourably to professional or other advice from a principal/vice-principal or manager/supervisor, particularly when the conversation is held soon after the event, in private. The principal/vice-principal or manager/supervisor should take a positive approach with the goal of having the employee correct his/her own behaviour without resentment or embarrassment. It is important that the employee be told that it is a verbal reminder and the first step in the process.

The intent of a verbal reminder is to correct, not punish. The principal/vice-principal or manager/supervisor should note the time and date of the event in her/his journal in the event that, at some future date, the conduct recurs and formal discipline is contemplated.

4.2 **STEP 2 – WARNING / LETTER OF EXPECTATION**

A Letter of Expectation is considered the second step of discipline. On a second instance of culpable behaviour, an employee should be put on notice of the principal/vice-principal's or manager/supervisor's expectations, and the consequences of repetition of such conduct. This is formal written discipline which is filed in the employee’s personnel file. Union representation is required for both the investigative meeting and the discipline meeting. The level of union representation required is defined by the terms of the applicable collective agreement.

In order to properly discipline an employee, a formal investigation meeting must be convened. If the employee is represented by a union or federation, the principal/vice-principal or manager/supervisor shall arrange for union representation by meeting the requirements of the collective agreement applicable to the employee. An employee must be advised of her/his right to union/federation representation.
The principal/vice-principal or manager/supervisor shall confirm the warning in a Letter of Expectation which sets out the expectations for the future. (A sample letter may be found in APPENDIX B)

NOTE: There may be occasions when the culpable behaviour is so serious that formal discipline can reasonably be imposed without prior notice or a verbal warning having been given.

4.3 STEP 3 – WRITTEN REPRIMAND

If there is repetition of conduct for which an employee has been warned or the circumstances of an incident of culpable behaviour call for a more formal response, the employee in question should be reprimanded.

In order to properly reprimand an employee, a formal investigation meeting must be convened. If the employee is represented by a union or federation, the principal/vice-principal or manager/supervisor shall arrange for union representation by meeting the requirements of the collective agreement applicable to the employee. An employee who is not unionized has no right to representation, but will be accorded the courtesy of accompaniment by a person of the employee’s choice. The employee must be told you will be reviewing the information gathered during the investigation and will be deciding on next steps.

If it is determined that discipline is warranted, a Written Reprimand must be presented to the employee at a disciplinary meeting scheduled with the employee and union / federation representative. The letter must be addressed to the employee and should be signed by the immediate supervisor. The letter must contain the following:

4.3.1 a confirmation of the attendees at the meeting;
4.3.2 a confirmation of the disciplinary meeting;
4.3.3 a description of the wrongdoing;
4.3.4 reference to previous verbal/written warnings, if applicable;
4.3.5 a clear and concise statement of expectations;
4.3.6 a notice that this letter constitutes formal disciplinary action;
4.3.7 a notice that repetition of the behaviour will result in further disciplinary action;
4.3.8 a copy sent to the Board personnel file;
4.3.9 a copy sent to the applicable union/federation.

4.4 STEP 4 – SUSPENSION WITHOUT PAY

A suspension without pay is a temporary denial of employment by the employer, imposed as a disciplinary penalty. While future scheduled work can be affected, it is not possible to withhold pay for work already performed, or to decrease a vacation or other entitlement.

4.4.1 Investigating Before Imposing Discipline

There will be situations where the continued presence of the employee may be detrimental to the interests of the Board or compromise the safety and wellbeing of other employees and/or students. The alleged offender should be sent home with pay for the remainder of the work day with the requirement that the employee report for an interview as soon as possible to determine
whether the employee can return to work. Any continuation of an assignment
to home should be characterized as part of the investigation and be
supported by a superintendent. If security is a concern and an employee has
keys or other Board equipment in his or her possession, these should be
turned in. No warnings or discipline should be imposed at this time. Once
the investigation is complete, a disciplinary meeting may be scheduled.

4.4.2. Allegations of Criminal Activities

In the case of an investigation into allegations of serious criminal activities for
which the employee could be dismissed if convicted, an employee shall be
reassigned to home immediately, with pay, pending a determination by the
police that charges will or will not be laid.

If the allegations involve sexual abuse of a student by a teacher, consult
Professional Advisory – O.C.T., Sept. 27, 2002 (attached as APPENDIX C)
for the correct procedures.

If charges are laid, the suspension may be continued, with pay, pending a
court disposition or conclusion of a school board, principal/vice-principal or
management independent investigation into the allegations. If school board
senior administration have clear and cogent evidence of serious misconduct,
independent of the police investigation, a suspension may be without pay, as
discipline, or pending termination of the employee’s employment if there is
just cause and supporting evidence. The investigation, decisions and follow-
up should be done only with the knowledge of and at the direction of the
appropriate superintendent, in consultation with the Superintendent of Human
Resource Services and Organizational Development.

NOTE: A criminal charge without an independent investigation and clear and
cogent evidence of wrongdoing will not support discipline or
termination. However, if a police investigation results in no charges
being laid, or the charges are subsequently dropped or the employee
is found not guilty, there may still be an internal investigation which
will require a continuation of the suspension until a disciplinary
meeting or a termination proceeding is held.

4.5 STEP 5 – TERMINATION OF EMPLOYMENT

Termination of a permanent employee for cause must be approved by the Board
upon the recommendation of a superintendent.

It is prudent to assume that all terminations will be litigated. The arbitration and court
jurisprudence support the principle that terminations should only occur when
corrective measures have failed, are inapplicable or there is no reasonable
alternative. This standard usually requires a substantial accumulation of
documentation and proof by the employer that the principles of progressive discipline
have been followed.

A single act of misconduct will not normally be grounds for termination unless it is
extremely serious in nature. Examples of acts that have been considered serious
enough include significant theft, a serious case of dishonesty, willful and deliberate
disobedience, aggravated assault, abuse of management, sexual harassment and criminal acts of violence and sexuality.

Once a school principal/vice-principal or manager/supervisor determines that the conduct at issue is sufficiently serious to support possible termination of employment, he/she must report to the appropriate superintendent for direction and assistance. The superintendent will consult with the Human Resource Services and Organizational Development Department and the Director of Education.
A GUIDE TO THE INVESTIGATION STAGE

1. **DUTY OF FAIRNESS**

   While investigations of alleged wrongdoing by employees are not limited by the restrictions of criminal law, such investigations must be conducted in a manner that allows any wrong to be detected, but protects the interests of the accused.

   It should be kept in mind that interviews of complainants, witnesses and the accused employee are part of an investigative procedure which must be complete before any conclusions are drawn.

   The accused employee must be presumed innocent until facts demonstrate the misconduct. There is a tendency by investigators to try to gather information to prove what they have already determined or suspect to be true, rather than what actually happened.

   Focus on the facts and avoid making conclusions at this stage. Get the "who", "what", "where", "how" and if relevant, "why".

2. **RECEIVING A COMPLAINT/ALLEGATION**

   The starting point of any investigation is usually the receipt of a complaint. The complaint can be written or verbal, but to be credible the identity of the complainant must be known, except in unusual circumstances where there is independent support for the credibility of the complaint. Basing an investigation on an anonymous tip without other corroborating facts or evidence may undermine later findings and conclusions, and may result in the discipline being overturned at arbitration.

   Once a credible complaint is received, the matter to be investigated must be defined, the likely sources of relevant information must be identified, and the investigation must be initiated and continued through to disposition.

   Complainants or witnesses are sometimes concerned about possible personal ramifications. The person receiving the complaint should advise a complainant or witness about some of the following issues and should seek immediate assistance from the Human Resource Services Department.

   2.1 **REPRISAL**

       A complainant or witness should be counselled that an accused employee will be advised that, regardless of the truth of an allegation, any act of reprisal will result in disciplinary action.

   2.2 **PRIVACY**

       It is not possible to guarantee anonymity or complete confidentiality to any complainant or witness, but every effort will be made to protect the privacy of individuals. Depending on the seriousness of the matter, other senior management may have to be informed of the allegation. If the conduct requires the Board or an individual to report the employee to the employee's
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professional governing body, the police or the Children’s Aid Society, the name and contact information of the complainant(s) will have to be disclosed to the agency. If the investigation results in disciplinary action toward the employee, or the employee is in any way aggrieved about the circumstances, the employee’s union has the legal right to file a grievance. The matter can then be advanced to arbitration for a decision on the merits of the complaint or with respect to the manner in which the investigation or complaint were handled. In any litigation, including arbitration, the law requires full disclosure of the material facts on which the employer is relying, including the names of complainants or possible witnesses to the conduct at issue. The complainant(s) or witness(es) must be advised that he/she/they may be required to give evidence under oath at the subsequent hearing, if any.

2.3 ADVERSE REPORTS BY TEACHERS ABOUT TEACHERS

Section 18(1)(b) of the Regulation under the Teaching Profession Act requires any member of the Ontario Teachers’ Federation, on making an adverse report on another member, to furnish that member with a written statement of the report at the earliest possible time and not later than three days after making the report. There is an exception to this, for example when reporting sexual abuse of a student, the reporting member does not need to provide him/her with a copy of the report. There are no similar legal requirements for other employees.

3. WHO INVESTIGATES THE COMPLAINT/ALLEGATION?

Investigations involving Children in Need of Protection follow A7620.

In the case of relatively minor allegations, the immediate supervisor of the accused employee should ordinarily be responsible for the investigation. In a school, the principal would undertake the investigation of an employee the principal supervises. In other cases, the employee’s manager/supervisor is responsible. In all cases the appropriate supervisory officer should also be informed of the allegation(s) and the ongoing status of the investigation.

Exceptions to the general rule include circumstances where the school principal/vice-principal or manager/supervisor is involved in filing the complaint, or is the subject of the investigation, or where his or her involvement would “taint” the decision (e.g. where he or she has a personal relationship with a complainant or accused employee) or where on reasonable grounds, the complainant or witness(es) is not comfortable or cannot be candid in the investigative interviews.

In cases of serious misconduct, the investigation may be undertaken by the Human Resource Services Department, the responsible supervisory officer or, in rare cases, at the direction of the Director of Education, by an external professional investigator.

4. ACCURATE RECORDS OF COMPLAINTS / INTERVIEWS

When a school principal/vice-principal or manager/supervisor receives a verbal complaint about an employee, it is essential that the complainant(s) be told that in order for the employer to act, there must be a documented record. If possible, the
investigating principal/vice-principal or manager/supervisor should also get written and signed statements from all persons interviewed as possible witnesses. Witnesses should be told that, if the investigation results in disciplinary action, they may be required to give their evidence under oath at any subsequent legal hearing. The witness must be offered the opportunity to read any statement he or she is being asked to sign, and must be given a copy, if requested.

Complainants and witnesses must also be informed that placing the word "confidential" on a document does not guarantee it will not be disclosed. When preparing a document to support a disciplinary investigation, assume it will be disclosed to the person who is the subject of the investigation. At arbitration, for example, a grievor has the right to full disclosure of the Board's case. Statutory protection, but not anonymity, is granted to witnesses to prevent retaliation or harassment, but anonymous complaints cannot be the basis for discipline. As well, in many circumstances, the Municipal Freedom of Information and Protection of Privacy Act entitles an employee to disclosure of personal information on file with the Board.

Human Resource Services will work with the principal/vice-principal or manager/supervisor and the superintendent to ensure that files are set up and maintained as appropriate, but also to ensure that necessary documentation/information is placed into a complaint file to support any subsequent legal proceeding (e.g. labour arbitration, professional college, human rights, civil action). Human Resource Services will also assist in determining the documentation to be placed in the employee’s personnel file.

5. IMMEDIATE ACTION

After the complaint is received and an investigation appears warranted, it is important to act promptly. With the passage of time, facts become stale and memories fade.

6. INTERVIEWING THE EMPLOYEE

The principal/vice-principal or manager/supervisor conducting the interview shall ensure he or she has a second manager/supervisor or principal/vice-principal in the room to observe and take notes, and who can attest to the conduct of the interview.

Unionized employees are entitled to union representation in investigation interviews for disciplinary matters. While non-unionized employees have no corresponding right, it is advisable to allow him or her to be accompanied by an individual of his or her choice as an observer.

Generally it is advisable to interview the employee last, when most information has been collected and the direction of the investigation is clear. In some instances, further investigation may result from the employee interview, and a second meeting may be required.
If the principal/vice-principal or manager/supervisor expects the interview to result in discipline, or if the nature of the complaint is extremely serious, it is required that the interview take place in the presence of a union representative. When this occurs, the employee should be notified in advance that she/he is being interviewed in order to investigate a possible incident of culpable behaviour. If no representative is present, the meeting should be adjourned immediately, to give the employee the opportunity to obtain union advice and assistance. Do not continue an investigatory interview past the point of knowing discipline will result, unless the union is present.

The manager/supervisor or principal/vice-principal should invite the union or federation to attend the investigation meeting. Representatives at an investigation are present to support the employee, but should not be permitted to argue, cross-examine the investigator, confront, interfere or respond for the accused.

It is essential that such meetings be clearly investigative and not inquisitory. No conclusions should be drawn nor criticisms made which would turn the meeting into a disciplinary meeting.

An employee who is the subject of an investigation does not have the same right to remain silent as a criminal accused. The employer has the right to a full accounting by an employee of conduct while at work. The employer has the right to make negative presumptions when an employee refuses to answer questions or to provide information, even where the same conduct may be a matter for criminal investigation, or subject to possible or actual criminal charges.

7. ADMISSIBLE EVIDENCE

Circumstantial evidence can be used to prove “just cause” for discipline if it points to the employee in question and excludes any other person. In labour arbitration, unlike a criminal or court proceeding, hearsay evidence can be used, but cannot form the complete basis for disciplinary response. Hearsay evidence requires some other corroborating evidence. The amount or degree of corroboration depends to some extent on the seriousness of the allegations and the possible scope of the discipline being contemplated. The accepted standard for professional misconduct is ‘clear and cogent evidence’ of the misconduct at issue, although progressive discipline principles can support employee discharge on a lesser standard if the behaviour is ongoing and evidences a pattern of misconduct or failure to address the issue(s) of concern.

Direct evidence or evidence corroborating hearsay must be first hand and provable by sensory facts. As a witness at arbitration, a supervisor will be asked what he/she personally saw, heard, tasted or smelled. Only witnesses qualified as experts can testify as to their opinion. As an example, an individual witness can say that he or she smelled alcohol on an employee’s breath, and can describe the persons’ gait, speech pattern or other evidence of possible intoxication, but cannot conclude that the employee was drunk. An expert can introduce and interpret medical, scientific or other evidence to give an opinion that the individual was or was not likely drunk.
Hearsay evidence is second-hand evidence of an individual who did not directly hear or see the conduct at issue, but who may have obtained information or overheard statements from another individual. Although hearsay evidence may be permitted in a labour arbitration hearing or before a tribunal, only direct evidence is generally admissible in a court proceeding. However, hearsay evidence may be permitted in certain circumstances, including if it is part of a routine report made in the course of business or is an admission against interest by the disciplined employee.

8. CONCLUDING THE INVESTIGATION

At the conclusion of the investigation, it must be determined whether culpable behaviour or employee misconduct occurred. In the event that there is insufficient evidence of wrongdoing or it is determined that no discipline is warranted, the documentary record of the investigation must be destroyed.

All parties to the investigation should be apprised of the fact that the investigation is closed.

A complainant is entitled to know whether the complaint was substantiated. If the employee has physically mistreated a child, the parent is also entitled to know whether discipline was imposed, but not necessarily the nature or extent of the discipline. The parent should be made aware that employment sanctions are personal information of the employee and not for public information.

In the event that culpability has been demonstrated, the employee will be informed of the results of the investigation as part of the disciplinary meeting. The employee is also entitled to know if the complaint is not substantiated.

Neither the complainant nor the employee is entitled to the notes or documentation of the investigation. Those notes often contain personal information of third parties or other information not required to be disclosed.

Witnesses will not generally be privy to personal information about the accused or the complainant. However, should the discipline be grieved, they are entitled to be fully informed as to their role in any subsequent proceedings.
[Date]

[Name of Employee]
[Home Address]
[City, Prov]
[Postal Code]

Dear [Name of Employee]:

Re: [Level of Discipline]

This letter confirms a disciplinary meeting held with you in my office, on [date]. In attendance were [list name and title of all people in attendance].

The disciplinary meeting was a follow-up to the investigation meeting held with you in my office, on [date]. In attendance were [list name and title of all people in attendance]. At the meeting, we discussed [state general issue being investigated].

On [date], it was reported that you [cite culpable behaviour].

You stated at the meeting that [cite employee's explanation].

On [date], you were given a verbal reminder regarding [cite culpable behaviour] as Step one of the progressive discipline process. On [date], you were given a Letter of Expectation as Step two of the progressive discipline process. Despite these prior warnings, you have continued to [cite culpable behaviour].

I am concerned that you continue to [cite culpable behaviour]. In the future, it is expected that [cite expectations].

As a result of your conduct, I am issuing this [level of discipline] as Step [cite level of discipline] of the progressive discipline process. Any further incidents of [cite culpable behaviour] may result in further discipline, up to and including termination.

Yours truly,

[Principal/Vice-Principal or Supervisor/Manager]
[School / Department]

c Superintendent
Union Representative
Personnel File

I acknowledge that I have received a copy of this letter of discipline.

[Employee's Name] [Date]
Ontario College of Teachers

PROFESSIONAL ADVISORY

Professional Misconduct Related to Sexual Abuse and Sexual Misconduct

Approved by Council September 27, 2002

The Council of the Ontario College of Teachers has approved this Professional Advisory. The intent of this advisory is to help members of the College identify the legal, ethical and professional parameters that govern their behaviour and to prevent sexual abuse of students and sexual misconduct. This advisory is not to be construed as providing an exhaustive list of unacceptable behaviours, but rather is intended to provide examples and guidance.

The authority of the College to investigate complaints against members of the College and to deal with issues of professional misconduct is stated in the Ontario College of Teachers Act. The Investigation Committee and the Discipline Committee of the College may consider this advisory when reviewing allegations of professional misconduct. The Discipline Committee will determine, in each case, whether particular behaviour amounts to professional misconduct.

The term “sexual abuse” is defined by the Student Protection Act. That definition is set out below. The term “sexual misconduct” is used in this advisory to refer to any behaviour of a sexual nature which may constitute professional misconduct.

Members of the College should consult their employer’s policies to ensure that they are familiar with all expectations and obligations that may exist in their particular workplaces and communities related to the contents of this professional advisory.

This advisory applies to all members of the Ontario College of Teachers, including but not limited to teachers, consultants, vice-principals, principals, supervisory officers, directors of education and those working in non-school board positions.
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Why an advisory on professional misconduct of a sexual nature?
Public and professional sensitivity to and awareness of sexual abuse and sexual misconduct has increased in recent years, not only in teaching but also in other professions, particularly where people are in positions of trust and moral authority. In April 2000, the provincial government released the report of former Justice Sydney L. Robins Protecting Our Students: A review to identify and prevent sexual misconduct in Ontario schools. This report made numerous recommendations for the teaching profession, including a recommendation for the College to clarify and elaborate on members' obligations and professional duties.

Student Protection Act
In June 2002, the Ontario legislature passed Bill 101, the Student Protection Act. This Act modified existing legislation and placed new obligations on members of the profession. The College has undertaken to issue this professional advisory as the Student Protection Act comes into force.

Building on the standards of practice and the ethical standards
Members of the College demonstrate care for and commitment to students that require them to act in students' best interests and report suspicious behaviour or allegations of professional misconduct of a sexual nature to appropriate authorities. Members must take a student's disclosure of abuse or exploitation seriously, even if some allegations prove to be unfounded. Dealing with victim disclosure requires professional judgment. This advisory provides some criteria to assist members in using their judgment.

Members maintain professional relationships with students and recognize the trust that the public places in them. They are aware of the negative impact of boundary violations on students. They respond professionally to victims' allegations by collaborating with other professionals such as police, child and family services, and College investigators.

This advisory helps clarify members' responsibilities to the profession — to govern their own conduct and to understand clearly what conduct by other members does not conform to professional standards, provincial law and the Criminal Code.

Understanding the legal, ethical and professional parameters of behaviour is central to a member's successful career. This advisory helps members recognize when they are at risk of breaching those parameters.

Even though many of the behaviours described here may be unthinkable to most members, the College has the obligation to identify them so that the parameters of professional behaviour are clear.

Ignorance of the law or College regulations is not an acceptable excuse. Engaging in sexual abuse of students or sexual misconduct is a form of professional misconduct and will result in an investigation and disciplinary action by the College. Consequences may include the suspension or revocation of a member's certificate of qualification and membership in the teaching profession.

Sexual abuse
Sexual abuse is a form of professional misconduct. The Student Protection Act defines sexual abuse of a student and amends the Ontario College of Teachers Act to include this definition:

(i) sexual intercourse or other forms of physical sexual relations between the member and a student,
(ii) touching, of a sexual nature, of the student by the member, or
(iii) behaviour or remarks of a sexual nature by the member towards the student.

Accordingly, members should avoid:
- sexual relations or sexual intercourse with a student
- any form of sexual touching of a student
- any sexual contact including behaviour or remarks of a sexual nature, regardless of the age of the student or any apparent consent by the student.

Professional misconduct
Professional misconduct includes, but is not limited to, sexual abuse of a student by a member. Professional misconduct of a sexual nature could involve a member's own students, other students or children, or even adults, if the Discipline Committee of the College determines that the behaviour amounts to an act defined as professional misconduct.

There may be forms of professional misconduct that do not fall within the definition of sexual abuse but which may be considered sexual misconduct. These behaviours could nonetheless fall within the definition of sexual misconduct and constitute professional misconduct. These behaviours may include sexual harassment and sexual relationships with students or any conduct which may lead to an unprofessional and inappropriate relationship with a student. The latter is often called grooming behaviour.

The College deals with complaints made by members, employers and the public. Written complaints of alleged sexual abuse of a student or sexual misconduct have to be investigated by the College if they fall within the definition of professional misconduct.

Ultimately, the determination of whether particular behaviour constitutes professional misconduct will be made by the Discipline Committee based on the definition of sexual abuse, as well as the other definitions of
professional misconduct contained in Regulation 437/97 -
The Professional Misconduct Regulation — including:
1(5) failing to maintain the standards of the profession
1(7) abusing a student physically, sexually, verbally, psychologically, or emotionally
1(14) failing to comply with the [Ontario College of Teachers] Act, the regulations or the bylaws
1(15) failing to comply with the Education Act or the regulations made under that Act, if the member is
subject to that Act
1(16) contravening a law if the contravention is relevant
to the member's suitability to hold a certificate of qualification and registration
1(17) contravening a law if the contravention has
carried on may cause a student who is under the
member's professional supervision to be put at or
to remain at risk
1(18) an act or omission that, having regard to all the
circumstances, would reasonably be regarded by
members as disgraceful, dishonourable, or unprofessional
1(19) conduct unbecoming a member.

Sexual harassment
Inappropriate behaviour or remarks of a sexual nature which
may constitute professional misconduct include, but are not
limited to, conduct that would amount to sexual harassment
or discrimination under the Ontario Human Rights
Code. These need not be overtly sexual but may nonetheless
demean or cause personal embarrassment to a student,
based upon a student's gender, race or sexual orientation.

Members should avoid even a single event that may
constitute sexual harassment, including but not limited to:
• objectionable conduct or comments incompatible
with the role of a member, regardless of whether the
affected student appears to be offended by the
conduct or comments
• sexual harassment of non-students or of co-workers
• reprisals or threatened reprisals for rejecting sexual
advances.

Sexual relationships
Regardless of the age of a student and whether there are
any criminal law considerations, a member engaging in or
attempting to establish a sexual relationship with a student
is unacceptable.

Professional misconduct includes but is not limited to any
sexual relationship with
(i) a student, regardless of the student's age
(ii) a former student under the age of 18
(iii) a former student who suffers from a disability
affecting his or her ability to consent to a relationship.

Responsibility for ensuring that a member-student
relationship is professional and appropriate rests with the
member and not with the student. This remains the case
even when it is the student who attempts to initiate an
inappropriate relationship. Any conduct directed to
establishing such a relationship may constitute

It is not necessary that the student be in the member's own
class. A student may be a student who is in the school or
school system where the member is employed, or in relation
to whom a member is otherwise considered to hold a position of
trust and responsibility.

Members should not engage in activity directed to
establishing a sexual relationship. This includes, but is
not limited to:
• sending intimate letters to students
• making telephone calls of a personal nature to students
• engaging in sexualized dialogue through the Internet
with students
• making suggestive comments to students
• dating students.

Such conduct is inappropriate even if the conduct does not
result in the establishment of a relationship.

Engaging in a sexual relationship with a person who is under
the age of 18, or in relation to whom the member holds a
position of trust or authority, may also constitute
professional misconduct, regardless of whether the person is
a student or former student.

Knowing the limits - the responsibility of each member
There are situations, activities and actions where members
should be cautious. Even though an action or event may
seem to be in a student's best interest, members need to
consider thoroughly the implications and appearance of the
action or event beforehand.

Members have an additional responsibility to avoid
activities that may reasonably raise concerns as to their
propriety. Keeping this in mind can help members avoid
complaints to either their employer or to the College, and
can help protect students by detecting and preventing
sexual abuse or sexual misconduct by others.

Using good judgement
Members understand that students depend on teachers
to interpret what is right and wrong. This judgement
can be difficult when certain acts seem innocent, but
may be considered later as a prelude to sexual abuse or
sexual misconduct.

In the interests of student safety, when members use
their professional judgement about their own or
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others’ activities they should be mindful of these and other considerations:

- whether the activities are known to, or approved by, supervisors and/or parents or legal guardians
- whether the student is physically isolated from other observers, for example, behind closed doors
- whether the circumstances are urgent or an emergency (providing transportation in a blizzard, for example)
- whether the educational environment might be detrimentally affected by the activities
- whether the activity would reasonably be regarded as conduct intended to promote or facilitate an inappropriate personal relationship with a student
- the extent to which the activities might reasonably be regarded as posing a risk to the personal integrity or security of a student, or as contributing to any student’s level of discomfort
- whether the conduct would reasonably be regarded as being in the best interests of the student.

Members should avoid:

- inviting individual students to their homes
- seeing students in private and isolated situations
- exchanging personal notes, comments or e-mails
- becoming personally involved in students’ affairs
- giving personal gifts to students
- sharing personal information about themselves
- making physical contact of a sexual nature.

When meeting with students, members should, whenever possible, ensure that:

- classroom and office doors are left open
- a third party is present or aware of the meeting
- the student is not physically isolated from other observers, for example, behind closed doors
- they are not alone with an individual student except in urgent or emergency circumstances.

Reporting suspected or alleged inappropriate sexual behaviour

If a member of the College has reasonable grounds to suspect sexual abuse of students or sexual misconduct, a member has a responsibility to report suspected or alleged cases to appropriate authorities. This includes one or more, or all of the following: child and family services, police, the employer and the Ontario College of Teachers.

Adverse report and anti-reprisal provisions

The Student Protection Act also amended the Teaching Profession Act. A member who makes an adverse report about another member respecting suspected sexual abuse of a student by that other member need not provide him or her with a copy of the report or with any information about the report.

Members of the College may not engage in, or threaten to engage in, reprisals against anyone who discloses, reports or otherwise provides information with respect to alleged or suspected professional misconduct of a sexual nature.

Employer responsibilities

Similarly, employers were previously required to report to the College members who had been convicted of an offence under the Criminal Code involving sexual conduct and minors. The Student Protection Act stipulates that employers must now report to the College at the time a member is charged with a sexual offence.

Responsibility of the Ontario College of Teachers

The Investigation Committee of the College is responsible for investigating complaints relating to a member’s alleged professional misconduct, incompetence or incapacity. Allegations of misconduct may result in charges under Regulation 437/97 made under the Ontario College of Teachers Act. If the Investigation Committee refers a case to the Discipline Committee, a panel of the Discipline Committee will conduct a hearing to determine whether the alleged conduct constitutes professional misconduct.

If members of the College or the public have questions about the content of this advisory, please contact the College at 416-961-8800 or toll free in Ontario at 1-888-534-2222, or e-mail info@oct.on.ca.

Legislative references

Ontario College of Teachers Act
Education Act
Regulation 437/97, Professional Misconduct made under
the Ontario College of Teachers Act
Teaching Profession Act
Child and Family Services Act
Ontario Human Rights Code

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SIMCOE COUNTY DISTRICT SCHOOL BOARD
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