

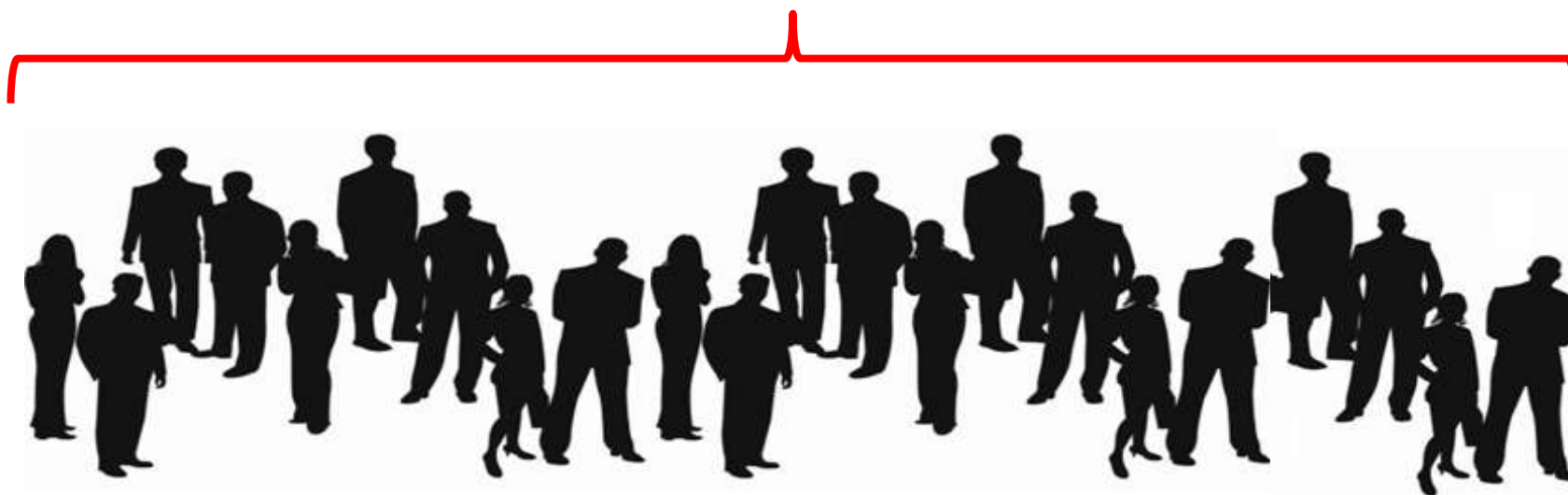



PANC 2017 FALL CONFERENCE

Tuesday, October 3, 2017

Human Resources and Board of Education Interaction

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- N.C.G.S. 115C-40 provides that a local board is a “corporate body.” As a corporate body, the Board had no legal existence apart from its members or committees.
 - Further, the Board has no authority to act outside of a regular meetings and members have no authority to act on behalf of the Board unless first authorized to do so. (Some duties cannot be delegated.)

Duty to Act Only as a Corporate Body, Not Individually

- Because of its corporate nature, a county board of education can exercise its powers only in a regular or special meeting attended by a quorum of its members, and cannot perform its functions through its members acting individually, informally, and separately.

Iredell County Board of Education v. Dickson, 235 N.C. 359 (1952).

Duty to Act Only as a Corporate Body, Not Individually

- Unless authority is delegated, board members have no independent authority to act alone. Some duties of the board cannot be delegated at all.

Bowles v. Fayetteville Graded Schools,
211 N.C. 36 (1936).

Duty to Make Hiring and Firing Decisions

- Local boards of education are authorized to make hiring (and firing) decisions upon the recommendation of the superintendent only.

See e.g., N.C. Gen. Stat. § 115C- 315(b).

- Failure to make decisions according to the appropriate procedure and for the appropriate reasons can result in personal liability for board members.

See Chadwell v. Lee County School Board, 535 F.Supp. 2d 586 (W.D.Va. 2008).

Duty to Maintain Impartiality in the Exercise of Judicial Functions

- The board has a duty to maintain impartiality as a part of its judicial function.
 - The Fourteenth Amendment to the U.S. Constitution guarantees the right to "due process" before a liberty or property interest can be taken away. The right to due process includes the right to a fair hearing before an impartial decision-maker.



Duty to Maintain Impartiality in the Exercise of Judicial Functions

- When performing their judicial function during a board hearing and resulting deliberations, board members must act impartially and in a fair manner.

Crump v. Board of Education, 93 N.C. App. 168, aff'd, 326 N.C. 603 (1990).

Duty to Maintain Impartiality in the Exercise of Judicial Functions

- Members must be able to set aside their prior knowledge and preconceptions concerning the matter at issue and base their considerations solely upon the evidence presented at the hearing.

Crump v. Board of Education, 93 N.C. App. 168, aff'd, 326 N.C. 603 (1990).

Duty to Maintain Impartiality in the Exercise of Judicial Functions

- Mere familiarity with facts concerning a charge against a person or prior involvement in the case does not automatically indicate bias, but a fixed decision, made prior to the hearing, to vote in a particular way is impermissible bias.

Crump v. Board of Education, 93 N.C. App. 168, aff'd, 326 N.C. 603 (1990).

Duty to Maintain Impartiality in the Exercise of Judicial Functions

- The bias of a single board member is sufficient to taint the hearing process and deprive an individual of due process. This is true regardless of the impact, if any, of that bias on the board's final decision.

Crump v. Board of Education, 93 N.C. App. 168, aff'd, 326 N.C. 603 (1990).

Duty to Maintain Impartiality in the Exercise of Judicial Functions

- If a board determines that a member is not impartial on a matter that is before the board for hearing, the board may disqualify the member from the hearing.

54 Op. N.C. Att'y. Gen. 86 (1985).

Public Records: Assume everything that "relates" in any way to the school district IS a public record. (e.g. notes, voicemails, letters, e-mails etc.)

The most common exceptions are:

Purely Personal Records

- Personal records, including e-mail, that do not have anything to do with the school district or its business are not a public record (i.e. an e-mail to Mom saying Happy Birthday).

Student Records

- Education records of a student or prospective student and personally identifiable information under FERPA are not considered public records.

Attorney-Client Communication

- ONLY CERTAIN COMMUNICATIONS FROM THE ATTORNEY ARE EXCLUDED, NOT EMAILS FROM YOU! Legal questions, or requests for legal advice are public records (unless about personnel or another exceptions).

Personnel Records

- Most information on an employee or applicant, gathered by the employer, regarding the employee's performance, evaluation and/or disciplinary action is likely to be a personnel record. This can include records outside of the central office personnel file.

Trial Preparation Materials

- In order to be excluded, trial prep material must be prepared in anticipation of legal proceedings and include mental impressions and opinions of the author.

Public Security Plans

- After 9/11, the General Assembly excluded information about government buildings and their security, including school emergency plans.

Volunteer File

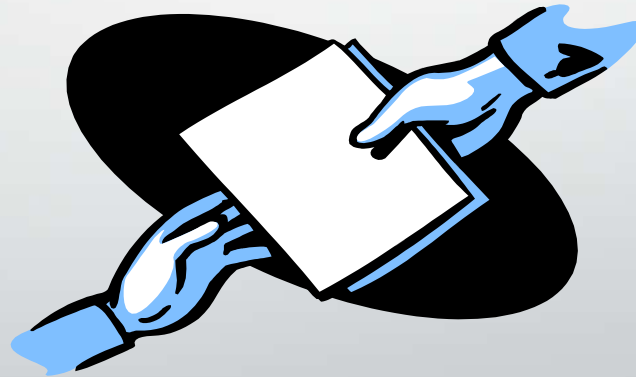
- Any information that relates to the volunteer's performance, selection, non-selection, disciplinary action, or termination.

Other Exceptions:

- Address Confidentiality Program Information
- Medical Records
- Criminal Investigations
- Trade Secrets of Bidders/Vendors/ Contractors

Best Practice: If the record does not clearly fall within any of the above exceptions, assume that it will be made available to the public and media upon request. If that makes you nervous,

DON'T PUT IT IN WRITING!



CLOSED SESSION MOTION

(most frequently used subsections)

- Chairman: I will entertain a motion for the Board of Education to go into closed session pursuant to G.S. § 143-318.11 for the following purposes:

(Announce ALL that Apply)

CLOSED SESSION MOTION

(most frequently used subsections)

1. Under subsection (a)(1) to prevent the disclosure of privileged or confidential student information pursuant to 20 U.S.C. 1232g (FERPA) and G.S. § 115C-402(e); [includes student discipline and student transfers/releases]
2. Under subsection (a)(1) to prevent the disclosure of privileged or confidential personnel information pursuant to G.S. § 115C-319-321; [includes employee matters]
3. Under subsection (a)(3) to discuss matters protected by the attorney-client privilege; [includes attorney update]

CLOSED SESSION MOTION

(most frequently used subsections)

4. Under subsection (a)(3) to receive advice from the school Board Attorney regarding the following lawsuit(s): [list all lawsuits to be discussed];
5. Under subsection (a)(5) to discuss the acquisition of real property;
6. Under subsection (a)(5) to discuss the terms of a contract for employment; [includes discussing contract terms for new employees]
7. Under subsection (a)(6) to hear a complaint or grievance, by or against an employee.

CLOSED SESSION MOTION

(most frequently used subsections)

Sample motion when closed session involves student issues, personnel issues, and attorney updates:

I move that the Board of Education go into closed session pursuant to G.S. § 143.318.11 for the following purposes: under subsection (a)(1) to prevent the disclosure of privileged or confidential student information pursuant to 20 U.S.C. 1232g (FERPA) and G.S. § 115C-402(e); under subsection (a)(1) to prevent the disclosure of privileged or confidential personnel information pursuant to G.S. § 115C-319-321; and under subsection (a)(3) to discuss matters protected by the attorney-client privilege.

TOP TEN THINGS EVERY GOOD BOARD CHAIR KNOWS

10. The Chairman makes sure that decisions are made by the Board at official Board meetings.
9. On any item requiring immediate action at a meeting, a motion and second should be received before discussion.
8. The Chairman welcomes folks for public comment and reminds them to be respectful.
7. The Chairman reminds speakers before public comments begins that complaints about individual employees need to be directed to the school administration before the Board will consider accepting public comment on the issue because we have a process to follow.

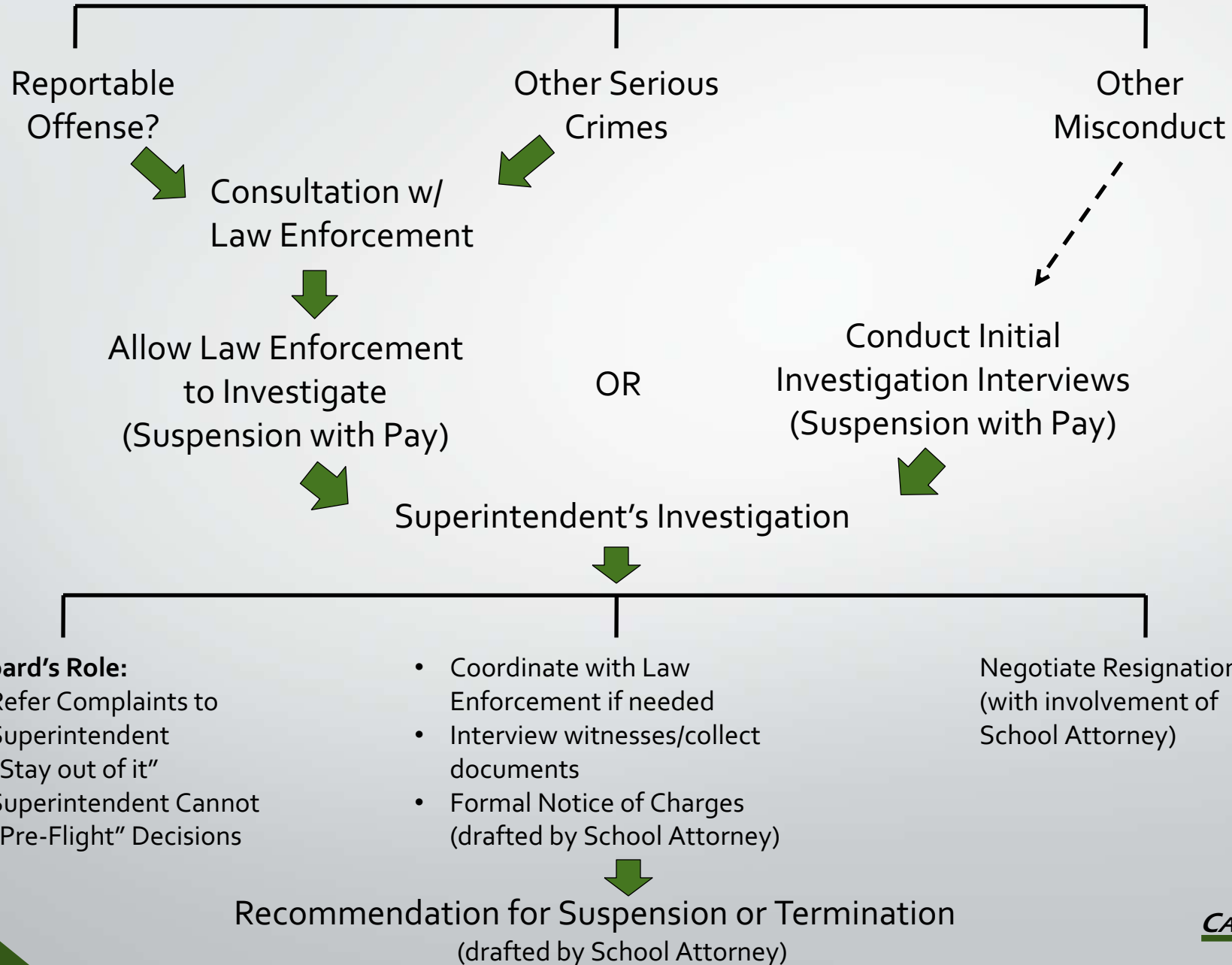
TOP TEN THINGS EVERY GOOD BOARD CHAIR KNOWS

6. The Chairman makes sure all other members have spoken before he weighs-in.
5. The Chairman knows what can and cannot be discussed in closed session.
4. When the Chairman speaks to County Commissioners, the media, and others he speaks for the Board and should be clear if his personal views differ from the majority.
3. The Board acts as a group not as individuals.

TOP TEN THINGS EVERY GOOD BOARD CHAIR KNOWS

2. The Chairman ensures that all personnel matters are referred to the Superintendent for investigation, recommendation or action.
1. The Chairman immediately notifies the Superintendent of any concerns that Board members have to prevent small problems from becoming bigger problems.

ALLEGATION





Avoiding Flashpoints

**Tips for Superintendents and H.R. Professionals
on Working with the Board of Education**

FLASHPOINTS FOR BOARD MEMBERS


1. Feel they are “the last to know” about a serious personnel matter.
2. They were not consulted in advance regarding major employee decisions (i.e. Principal transfers and assignments).
3. One or more members are getting involved in personnel actions and want to see the personnel file of a single employee.
4. One or more members do not feel they have enough information to vote on personnel in general or for a specific employee.
5. The Board does not know the salary of various central office employees and/or does not know a central office employee received a discretionary pay increase.



Tips on Working with the Board of Education

#1 Be Upfront regarding major personnel actions.

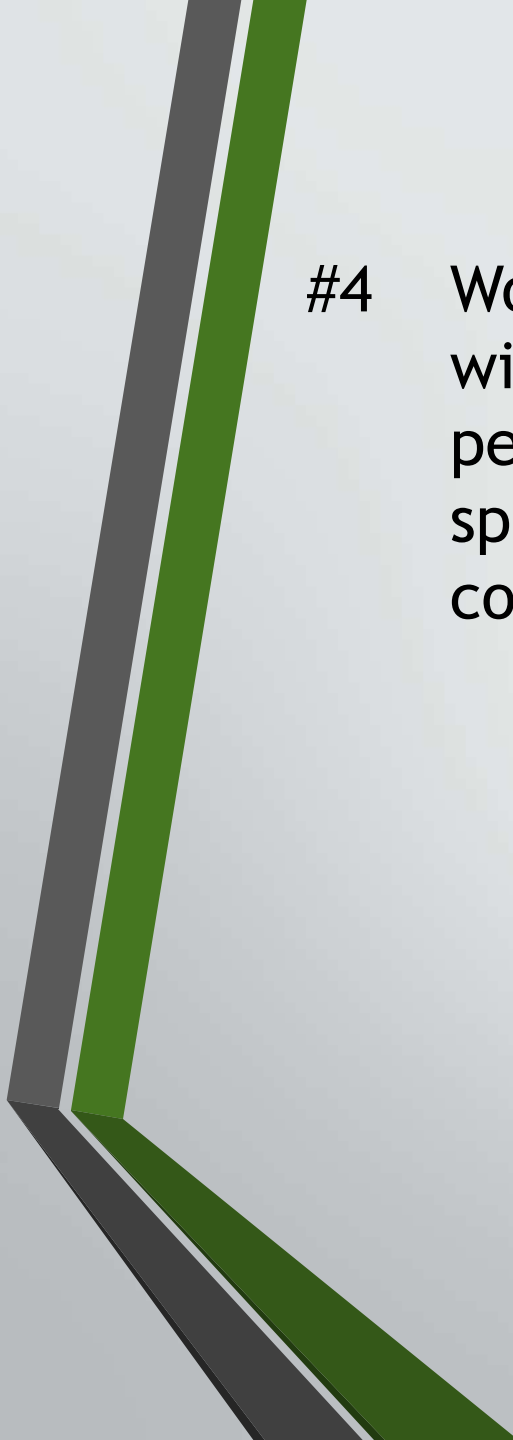
- If the new hire or promotion is not paid strictly from a state salary schedule, inform Board members what the salary will be and the source of funds.
- Do not delay in disclosing potential personnel problems to the Board via telephone and/or during closed session, including
 - Allegations of Employee Misconduct and/or discipline matters (see #3 below); and
 - Budget constraints and reduction in force issues.
- Once a personnel action is concluded and/or if the employee does not appeal or resigns the Board can be given full information. Especially important if Board members want to know the outcome.

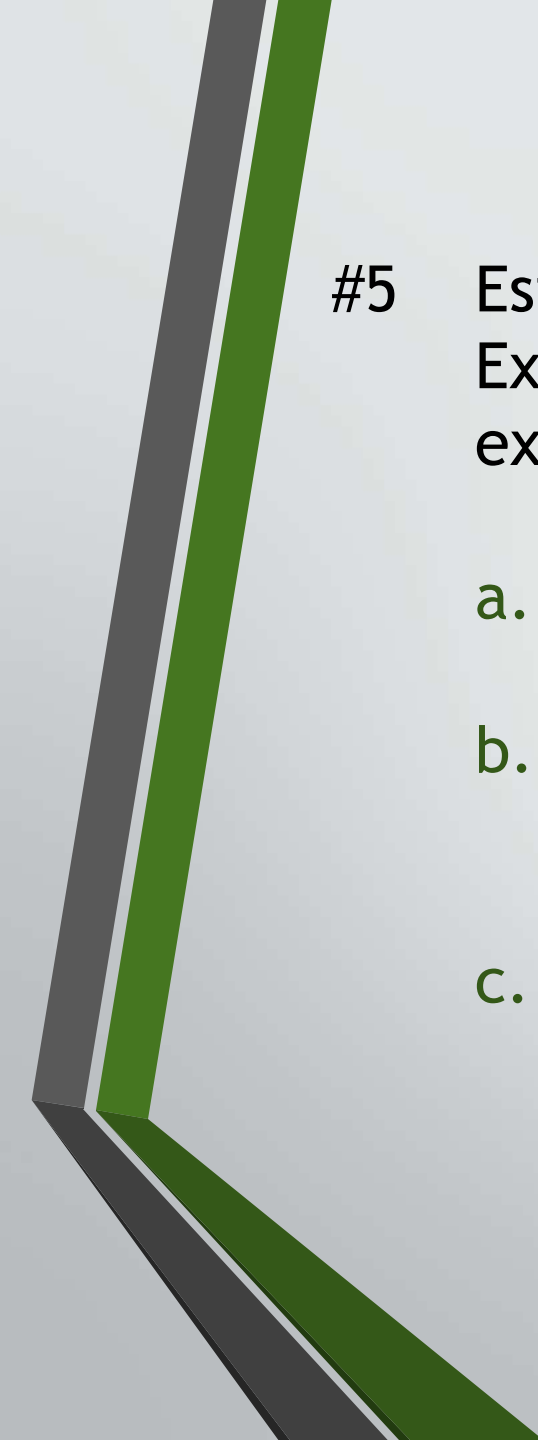
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- #2 Be open to providing the type of information that a majority of the Board members want on the recommended personnel list and disclose family relationships with other employees and Board members to ensure compliance with nepotism policies.



#3 Be honest in making any recommendation.

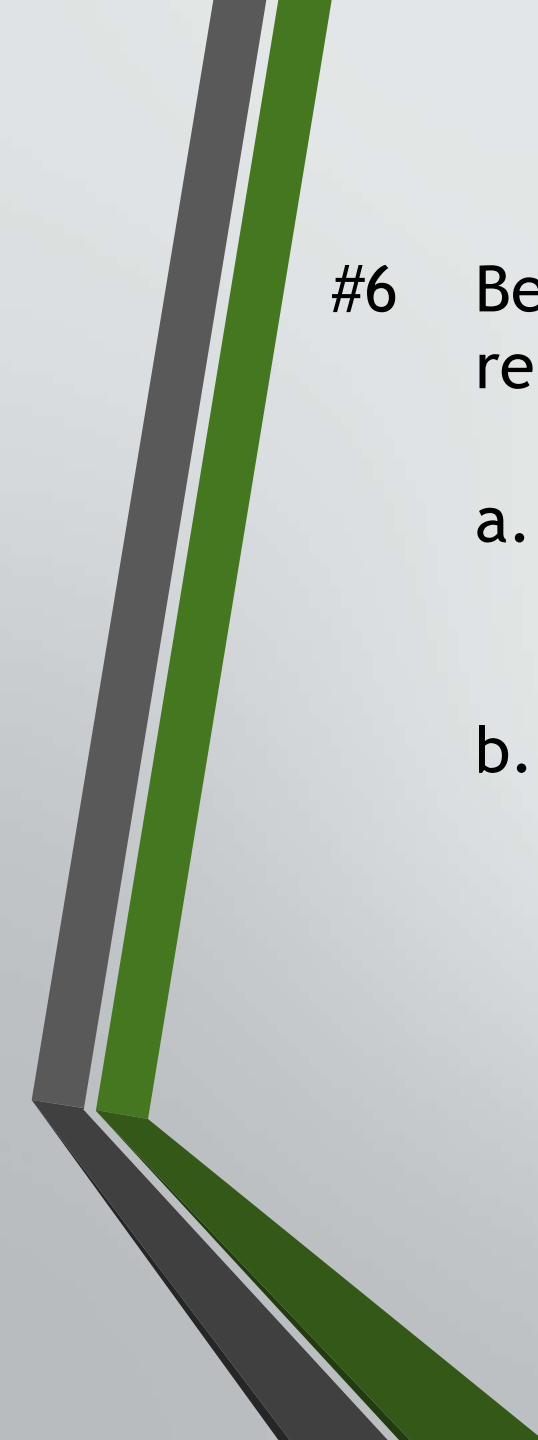
- Provide full and accurate information to the Board regarding pros and significant cons.
- Do not leave out important information about an employee, unless it involves a due process issue (see #4).

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- #4 Work with your attorney and superintendent to determine what will and WILL NOT be shared with the Board in an on-going personnel matter. Remind Board members that they cannot have specific details regarding an employee investigation since they could be asked to hear an appeal or make a final decision.



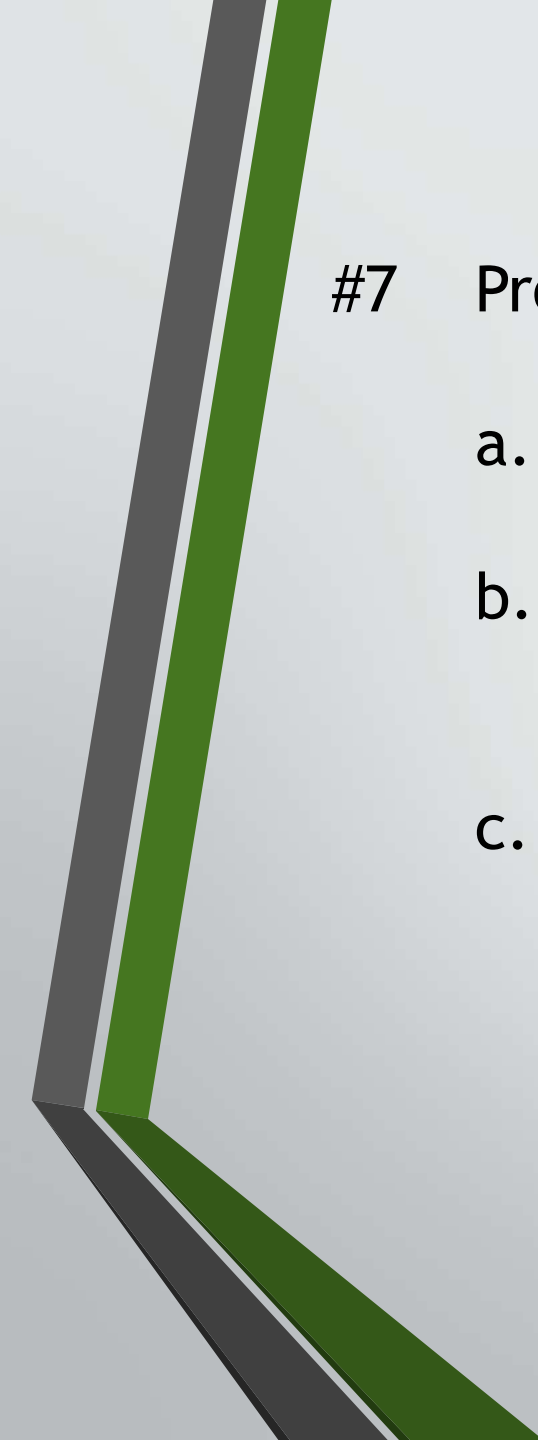
#5 Establish a culture that the hiring process is open and fair. Explain the hiring process to new Board members so they can explain it to others in the community:

- a. Vacancies are posted;
- b. Candidates to be interviewed are selected by the administration; and
- c. Superintendent makes a recommendation to the Board.




#6 Be open about the process of employee improvement and non-renewal or termination.

- a. What are the policies, procedures and practices of the district in assisting employees with performance issues?
- b. What are the types of documentation necessary for dismissal or non-renewal of an employee?


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- #7 Provide all board members with the same information.
- a. Especially with large requests of information.
 - b. Ensure that a majority of the Board wants to spend time on large information requests.
 - c. If a Board member wants to see a personnel file, we recommend that the Chair and Board Attorney be notified for further discussions.




#8 Let the Superintendent or Chair take the lead in addressing conflicts with Board members.



#9 Read your policies before making final administrative decisions and recommendations.



#10 Ensure principals and other supervisors understand the Board's expectations in how we handle personnel issues (i.e. read your policies and win the head / win the heart).



Employee Due Process Rights and Involuntary Resignations:

Section 1983

- Procedural Due Process Claim
- Constitutionally protected “liberty” or “property” interest
- Deprived through State Action

Section 1983

- Property interest = contract of employment with termination “for cause” (Leardini)
- Liberty interest = reputation in profession (See *Ridpath v. Bd. of Governors*, 447 F.3d 292 (4th Cir. 2006))
- Resignations must be “voluntary”
- If “voluntary”, no deprivation. (See *Stone v. Univ. of Maryland Med. Sys.*, 855 F.2d 167, 173 (4th Cir. 1988).

“Involuntary Resignations” Can Be Proven Using Two Theories.

- First = obtained by employer’s material misrepresentation or deception, or
- Second = forced by employer’s duress or coercion

“Material Misrepresentation” Means that a False Statement Concerns Either

- 1) the consequences of the resignation
 - E.g. “You will lose your retirement if fired” (See *Brookshire v. Buncombe County*, 2012 WL 136899 (WDNC))
- 2) the alternative to the resignation
 - E.g. “Quit or be fired.” (*But see Wolford v. Angelone*, 38 F.Supp.2d 452 (W.D. Va., 1999) (holding that an incomplete statement on discharge did not amount to a material misrepresentation))

NOTE: Reliance must be reasonable under the circumstances

DURESS OR COERCION

“Duress” means that the totality of the circumstances demonstrate that the employer’s conduct took away the employee’s free choice to resign.

Factors to Consider in Analyzing Possible Duress:

- “(1) whether the employee was given some alternative to resignation;
- (2) whether the employee understood the nature of the choice he was given;
- (3) whether the employee was given a reasonable time in which to choose; and
- (4) whether he was permitted to select the effective date of resignation .”

Stone at 174.

What about COMMON SENSE?

The mere “unpleasant choice” of “resign or face legal or disciplinary action”, does not establish a due process violation.

Stone at 174.

INVESTIGATION BEST PRACTICES

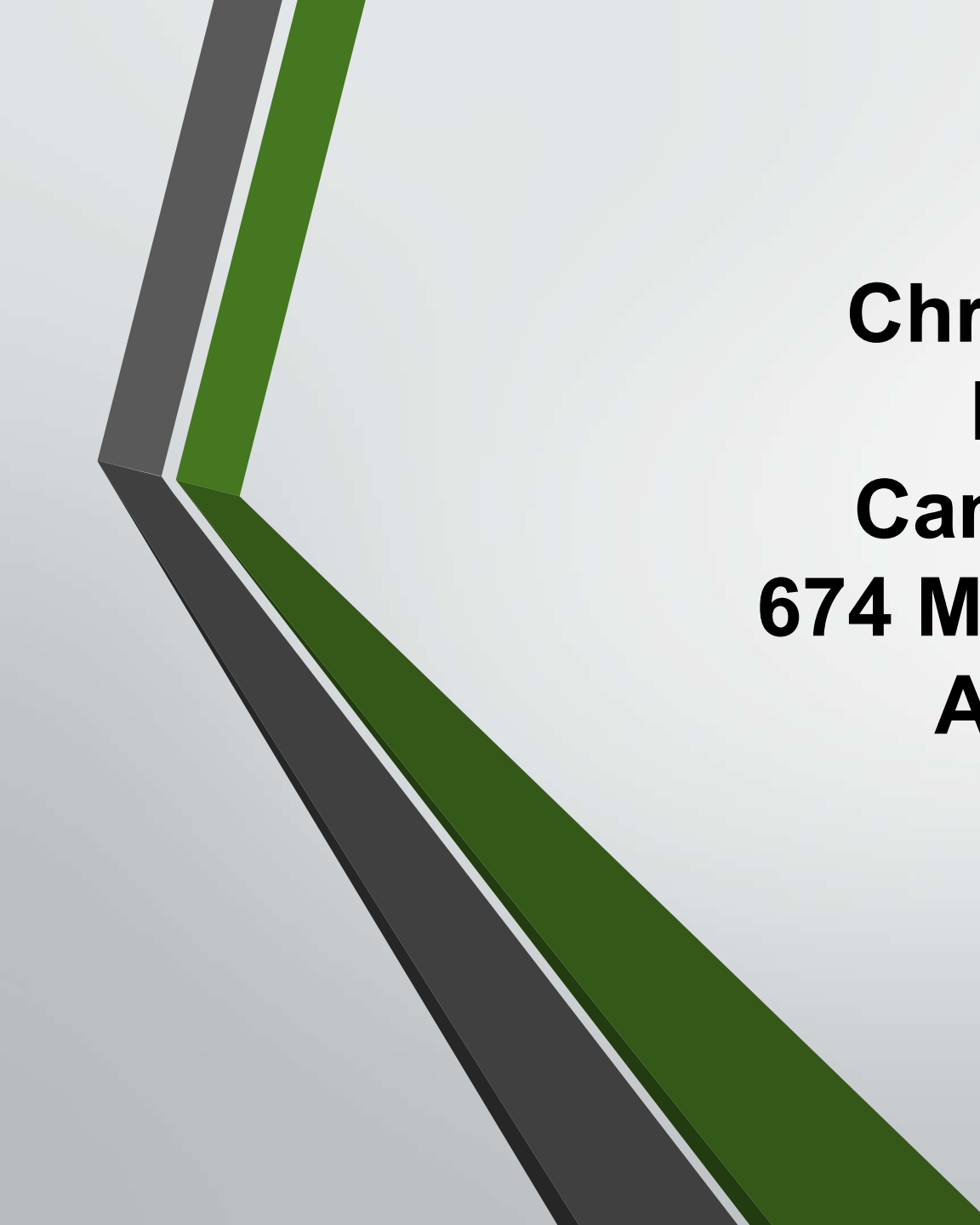
10. If serious allegations are made against an employee use suspension with pay to allow time to investigate.
9. Meet with the employee as soon as you know the facts to get their side of the story. Sometimes this requires multiple meetings with the employee.
8. Do not bring up resignation at the initial meeting or during fact-finding meetings with the employee. Let the employee ask about resignation.
7. Do not offer opinions regarding the outcome of the investigation.

INVESTIGATION BEST PRACTICES

6. Do not make promises or offers to entice an employee to resign unless it is part of a written resignation agreement (see #3 below).
5. If the employee insists on resigning, do NOT offer favorable terms such as positive reference, removal of documents from the personnel file, no further action, etc. In other words, allow the employee to resign without making any promises.
4. Encourage the employee who wants to resign immediately to take time to consider their decision and to contact an attorney. If they decline, put that fact in writing for their signature and make no other promises or deals!

INVESTIGATION BEST PRACTICES

3. If the employee wants to negotiate their resignation, involve your school board attorney to get the terms of the resignation or employment separation in writing.
2. Always involve a witness who can support what happened in the meeting and write-up your meeting notes immediately after the meeting.
1. Don't be in a hurry to get a resignation! If there is good reason for them to resign. . . they will.



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