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School Employees Charged with Crimes

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It’s July. You see on the morning news that one of your school division’s teachers has been arrested, charged with several crimes related to inappropriate conduct with a minor. As soon as you get to the office you talk to the Director of Human Resources to see what she knows about it. “Nothing,” she says. “We have never investigated a complaint against this teacher and do not even know who the alleged victim might be. But we can fire her, right?” You sigh.

An employee criminally charged for school-related conduct, about which the school division has little or no information, presents a quandary for school administrators. How do you discipline or dismiss an employee with a liberty interest in her employment absent any evidence that she has violated school board policies? While you almost certainly can place the teacher on administrative leave pending the outcome of the charges, you may be required by state law or a collective bargaining agreement to pay her pending the outcome. Given the months (or longer) it could take to resolve the charges, the prospect of retaining a teacher charged with a criminal offense will be distasteful to many. It may also hinder the school division’s ability to hire a suitable replacement. But what to do?

Consider Applicable State Laws, Labor Agreements, and Grievance Procedures

The starting point should be, of course, any legally required processes or limitations imposed by state law or labor agreements. For example, Virginia statutes and regulations establish the procedures that must be followed for public school employee grievances, including timelines for the employee to appeal, a hearing before a hearing officer, and action by the school board.1 Particularly relevant to the hypothetical situation set forth above, Virginia law allows school divisions to suspend an employee charged with a felony or certain enumerated misdemeanors, including “the physical or sexual abuse or neglect of a child,” with or without pay. If the suspension is without pay, however, the salary must be escrowed, with interest, until the employee is found guilty or the charges are dismissed.2 The Virginia statute at least accomplishes the objective of removing a teacher charged with a serious crime from the classroom without pay.

Because the Virginia statute permitting suspension without pay only applies once the teacher is charged, the more difficult issues arise when a teacher is suspected of a crime but authorities are still investigating. For example, if a student goes to a school counselor and asserts that either she or another student has had inappropriate contact with a teacher, most state laws require a timely report to child protective services (CPS) or its equivalent agency. At that point, the investigation may largely be out of the school division’s hands, particularly if the bulk of the evidence, such as text messages or other evidence obtained by warrant, is in the custody and control of the police. The teacher will most likely be placed on administrative leave, pending the outcome of the CPS / police investigation.

But what if the investigation drags on, all while the teacher sits at home being paid?

Build Relationships

A few years ago, there were several incidents in our school division that caused the police and CPS to become frustrated with what they perceived as school administrators’ mishandling of allegations that school employees had inappropriate contact with a student. These included not only allegations of intimate contact, but also physical abuse. School leaders, on the other hand, were equally irritated that those agencies were taking months to investigate incidents reported by school administrators, all while the employee sits at home. To address these issues, executive-level administrators from the school division met with their counterparts in the police department and CPS. A representative from the local prosecutor’s office responsible for prosecuting crimes against children also attended. Each agency had a chance to express its concerns and everyone learned some valuable lessons.
The police, CPS, and the prosecutor did not understand that absent charges or substantive information about the employee's conduct on which to base disciplinary proceedings, the school division was required to pay employees during the investigation even though they were not working. They agreed, of course, that employees facing such allegations should not be at school, but they had not considered that the pace of their investigations (and the schools' lack of information) greatly impacted the school division's ability to act.

At the same time, school division leaders learned how their investigation of physical or sexual abuse by an employee could jeopardize the investigation and, ultimately, the prosecution of the offender. The law enforcement agencies explained that when school administrators interview a student victim and/or require the student to provide written statements before the police or CPS get involved, any inconsistency between those statements and the ones taken by law enforcement may impact the prosecution of any subsequent criminal case against the employee. As the police and CPS noted, they have officers specifically trained to interview minors about sensitive issues and, in the case of police, the ability to obtain electronic evidence inaccessible to school divisions. As a result of these ongoing discussions, the agencies put in place a cooperative framework for handling such issues going forward.

Because an allegation of physical or sexual abuse involving a school employee might be made first to either agency — the school division, the police, or CPS — the parties outlined procedures for the initial handling of the complaint, cross-reporting to the other agencies, and coordinating a response. Each agency designated a point of contact and agreed that, when possible, school administrators would be allowed to sit in on interviews and receive other information.

CPS agreed to expedite the handling of mandatory reports by the school division with an aspirational goal of notifying the school within hours whether it was “screening out” the complaint or would be opening an investigating. If it was screened out, the school was free to proceed with its own investigation. If CPS intended to investigate, school administrators would not investigate further and would assist in arranging witness interviews with CPS or police personnel and securing evidence such as security footage.

Once the school division, CPS, and the police agreed upon a protocol, they also agreed to train their respective staffs on implementation. The school division trained school administrators and counselors. The agencies held joint trainings for school resource officers and principals. Significant efforts were made to implement the parties' agreement with fidelity.

The agencies also agreed to meet every two years to review the protocols and determine whether changes might be necessary. Implementation of the parties' agreement resulted in improved reporting by the school division, faster handling by CPS and law enforcement, and better working relationships between the agencies involved. Mistakes still occur, but when they do, those involved know who to call for corrective or remedial action.

Other Considerations
Suppose, for example, a student reports to the school counselor that a teacher struck him in the hallway when he refused to return to class. Child protective services was notified and declined to pursue, leaving the school division to investigate. Aside from the student's allegation, there are no other known witnesses. When the employee comes in to answer questions about what happened, he refuses to respond other than a general denial that he did anything wrong. In such circumstances Garrity v. New Jersey, 385 U.S. 493 (1967) may be implicated.

Although a comprehensive review of Garrity is beyond the scope of this article, it nonetheless warrants a brief discussion. In Garrity the Supreme Court confronted the question of whether governmental employers can “use the threat of discharge to secure incriminatory evidence against an employee.” Specifically, Garrity involved "police officers under investigation who were informed they could claim their privilege against self-incrimination but that refusal to answer a question would subject them to termination." Under threat of discharge, the officers answered the questions and were subsequently convicted of crimes based on their answers.
In deciding Garrity the Court cited its previous holding “in Slochower v. Board of Education that a public school teacher could not be discharged merely because he had invoked the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee.” The Garrity Court then held that “the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.” As the Court explained:

The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or remain silent. That practice … is likely to exert such pressure on an individual as to disable him from making a free and rational choice. We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.

Continuing with the example above, the teacher accused of hitting the student is faced with the prospect of either refusing to answer (and being dismissed for failing to cooperate with an investigation) or admitting conduct that might result in criminal charges – the precise coercion that concerned the Garrity Court. If the school division notifies the teacher that his failure to answer the questions fully and truthfully could result in termination, he must answer questions that are specifically, directly, and narrowly related to the performance of his official duties or fitness for employment. So long as he does so, he is essentially afforded “use” immunity and his admissions may not be used as a basis for any criminal prosecution. Of course, any admission that he struck the student subjects him to discipline or dismissal. As a practical matter, the school division would be wise to have the teacher sign a document informing him of his “Garrity rights” before requiring him to answer.

What if the teacher, having signed the Garrity form, denies being in the hallway with the other student at the time of the alleged incident? A few days later a previously unknown student witness comes to the principal and shows her cell phone video of the teacher striking the student victim. When other evidence demonstrates the employee has lied, the school division may take disciplinary action, subject to whatever grievance procedures may be required. Indeed, the Fifth Amendment would not shield the teacher from prosecution for perjury, false statements, or obstruction of justice should state law permit such a prosecution.

**Conclusion**

Public school employees suspected of or charged with crimes present particularly challenging issues when school divisions have little or no information about the conduct involved. Evidence of misconduct is increasingly located on personal cell phones or social media accounts beyond the reach of school administrators but often accessible to law enforcement. In advance of such situations, school divisions should assess their areas of concern in light of applicable state laws, labor agreements or grievance procedures. Division leaders should also partner with their local law enforcement and child protective service agencies to develop protocols for reporting incidents and sharing information when possible.

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2 Va. Code § 22.1-315(B) provides:
   Any school employee suspended because of being charged by summons, warrant, information or indictment with one of the offenses listed in subsection A may be suspended with or without pay. In the event any school employee is suspended without pay, an amount equal to his or her salary while on suspended status shall be placed in an interest-bearing demand escrow account. Upon being found not guilty of one of the offenses listed in subsection A or upon the dismissal or nolle prosequi of the charge, such school employee shall be reinstated with all unpaid salary and accrued interest from the escrow account, less any earnings received by the school employee during the period of suspension, but in no event shall such payment exceed one year's salary.
3 The agencies also agreed to similar procedures in response to allegations of student-on-student sexual abuse. It should also be noted that Va. Code § 22.1-279.3:1 requires the school division and the police to report certain offenses committed by students to the other agency.

Clemente v. Vaslo, 679 F.3d 482, 491 (6th Cir. 2012).

Garrity, 385 U.S. at 499 (internal citations omitted).

Id. at 500.

Garrity, 385 U.S. at 497–98 (citation and internal quotation marks omitted).

United States v. Veal, 153 F.3d 1233, 1240–41 (11th Cir. 1998), rev’d on other grounds by Fowler v. United States, 563 U.S. 668 (2011); See, e.g., United States ex rel. Annunziato v. Deegan, 440 F.2d 304, 306 (2d Cir.1971) (“[A]ppellant was not prosecuted for past criminal activity based on what he was forced to reveal about himself; he was prosecuted for the commission of a crime while testifying, i.e. perjury. In short, while a public employee may not be put to the Hobson’s Choice of self-incrimination or unemployment, he is not privileged to resort to the third alternative, i.e., lying.”); Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 859 F.2d 276, 281 (3d Cir.1988); United States v. Devitt, 499 F.2d 135 (7th Cir.1974).