

LEGAL WATCH

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September 1997

Official Personnel Records, Notice and Access

An area that is a potential trap for higher education administrators is the improper handling of official personnel records. Specifically, supervisors need to understand the requirements of NDCC sec. 54-06-21 covering public employee personnel records, filing of documents in those records, and access. In particular, in the past, records relating to faculty have tended to be much more diverse and spread out than records relating to classified employees and this has caused some problems.

Overview

Section 54-06-21 was enacted in 1991 and amended in 1995. It places certain obligations on state universities and gives certain rights to university employees regarding the "official" personnel file.

A document that relates to an employee's "character or performance" cannot be placed in the official personnel file unless the employee has had the opportunity to read the material. Thus, even though there is access to the file, and thus, always an opportunity to read the material, notice and acknowledgment does not need to be made for everything in the file, but only those matters that relate to "character or performance". Obvious examples would be an evaluation, a written sanction or a recommendation for promotion. If there is doubt whether an item relates to "character or performance", assume it does.

The employee must be allowed to read the matter and sign the item to be filed or the signature can be attached to the item. For various reasons, it may be better to have the signature attached rather than on the item itself (for example, an award). This is discretionary with the administrator but the employee's preference, if any, should be taken into account.

In those situations when an employee is shown the copy to be filed and refuses to sign, then the law has a specific requirement that the administrator must indicate "on the copy" that the employee was shown the material and was requested to sign but refused. It probably does not make much sense that signatures can be attached to the copy when the employee does sign and must be on the copy when they don't, but that is the current status of the law. A possible reason for this distinction might be that it might make it more difficult to falsify proof that the item was shown to the employee when the signatures are required to be on the item. In addition, the law requires that the administrator "in the presence of the employee and a witness" sign and date a statement verifying that the employee refused to sign the copy.

Below are the statements we use at NDSU which cover the requirements previously mentioned in NDCC Sec. 54-06-21(1).

A copy of this item will be placed in your personnel file. You have the right to file a written response. Please sign and date at the designated place below indicating that you have read this item. Signing does not mean that you agree with its contents.

Employee Date: _____

Employee was shown this item and refused to sign after being requested to do so.

Supervisor Date: _____

Witness Date: _____

The employee has the right to respond to any material filed and the response must be attached to the file copy. Interestingly, this provision does not necessarily apply just to matters that address an employee's character or performance, but is a right to respond to any material filed. As a practical matter, most employees are only interested in responding to a matter which would relate to their character or performance.

An employee can grieve matters and items that are placed in his/her files. NDCC sec. 54-06-21(6) limits the grievance to "nonevaluation" material, however. The response right is presumably the employee's remedy in this situation.

The employee must be allowed to examine his/her file and to have copies at the employee's expense. Typically, we don't charge the employee for copies of materials in their own file. Since North Dakota is an open records state, files are open not only to the employee, but, with some exceptions (for example, medical, employee assistance matters, and specified personal information such as a social security number), to any citizen requesting to look at the file. Furthermore, in North Dakota persons other than the employee can even have copies of the open records items in the file. The open records law does not just allow access by the public, but the public has a right to have a copy but can be charged a reasonable expense for the copy.

Working Files

Supervisors can maintain notes or records on performance separate from the file for evaluation purposes or possible disciplinary action. One caveat to be careful about is that those notes are open records under the broad interpretation of the open records law by the North Dakota Supreme Court even though they can be maintained separately by the supervisor. This can cause some complications when an employee asks to see those items. The university administrator needs to be aware of this potential. In many cases, employees are demanding any e-mail the supervisor has relating to them.

Also, even though an administrator can have this "working file information," at some point the

supervisor would need to decide whether this matter was going to be used in the future and whether these items, or a summary, would need to go into the official file. For example, would the notes be summarized in an evaluation or end up forming the basis for some type of sanction, like a written reprimand or warning? The notes could be summarized and the summary placed in the file, but supervisors need to be aware that they may be asked for and may become important in any subsequent appeals or litigation.

"Official File"

NDCC Sec. 54-06-21 states that the "official" personnel file is "the file maintained under the supervision of the agency head or the agency head's designated representative." In the past, what is "official" has been somewhat problematic, particularly for faculty files. For example, files were in the department, in the dean's office, with the vice president and president, in human resources/payroll. With classified employees this has generally not been as much of a problem because human resources normally kept the official file.

At NDSU the "official file" for faculty is kept in the dean's office. The department may have a working file, for example, but items that would go in the official file would then be transferred to the dean's office. A better practice, in my opinion, is to file items which are going to be kept with the official file so that the employee clearly gets notice, rather than to place them in the department file. There is less risk that the notice provisions of NDCC Sec. 54-06-21 might be overlooked. Copies of those matters filed in the official file can be kept in the department. At NDSU, the official file for other employees (non-faculty) is kept in the Human Resources Office, except Extension and Agricultural Experiment Station non-classified files which are kept in the Office of the Vice President for Agriculture.

Anonymous Material

The law also restricts placing any anonymous letters or materials in the employee's file. Sometimes administrators will get anonymous material and then the question becomes what to do with it? Is it shown to the employee or tossed out? The circumstances will direct the appropriate response, and there is not

necessarily an absolute right or wrong answer in this touchy area. As a general rule, absent some significant health or safety issue or an allegation of criminal wrongdoing, supervisors should toss anonymous material out.

However, there may be circumstances where the supervisor feels that he/she needs to talk to the employee and show them the item to get their response or to warn them. The supervisor could then inform the employee that the item will be tossed or kept in the supervisor's working file. (For example, the supervisor might not want to toss a document which might have been a threat to an employee as it could be evidence in the future). Keeping it, however, without informing the employee of it has the potential for the most problems. Thus, it is probably better to either toss it or to inform the employee about it, depending on the seriousness and the nature of the situation.

Student Complaints

Another problematic area is student complaints about a faculty member. Administrators will sometimes promise students confidentiality. This is a dangerous thing to do if the complaint is put in writing, as it is a promise that cannot always be kept. For due process reasons, if there was some sanction or evaluation based on these complaints, the employee would be able to see a copy. The Federal Family Educational Rights and Privacy Act would not preclude access to a complaint lodged against an employee, at least as to the employee, on the grounds that it is an educational record and, therefore, confidential. This argument could be used with regards to someone other than the employee, such as a citizen or the press, but because of the due process arguments the employee is going to be able to see this complaint and, therefore, a supervisor can't promise total confidentiality. The employee can be discouraged from looking at

these written complaints if the supervisor is not intending to do anything about them, but if they become a factor in any evaluation, then the employee would have a right to see them and to respond to them.

Access Record

There must be an access record for the file. This record should be kept with the file and provide for the date and name of the person viewing the file. There is an exception to this requirement when certain benefit and tax information is put in the file. Since the access record is only required on the "official" file, this is another good reason to designate the "official" file. Supervisors should also index the file. Otherwise something might be taken from the file, or even added, without the university's knowledge even if the file is kept under observation.

Sometimes, files may need to be "cleaned up" and the university may want to delete matters from files. Other than noting access, the law doesn't mandate employee notice or signatures in this situation, but the best practice is to inform employees about what is being removed and what is being done to the items, e.g., destroyed or transferred, and whether the employee would want copies. The employee could grieve a removal, but the final decision is the university's.

Conclusion

In conclusion, administrators should review the specific requirements in NDCC sec. 54-06-21 and work with human resource and legal counsel to make sure those requirements are being met. What the employer wants to avoid is to have some problem with not meeting the law's requirements interfere with a subsequent personnel action.