



## **STUDENT SAFETY INITIATIVE UPDATE REGISTERED EDUCATIONAL PERSONNEL CONVICTION LIST**

By: Brad Banasik, Legal Counsel, Michigan Association of School Boards

Many school districts will soon receive the “new” conviction list from the Michigan Department of Education. This list identifies current school district employees and their criminal convictions. The following information provides guidance to school officials on various legal issues that school districts are likely to encounter upon receiving the list.

### ***FREEDOM OF INFORMATION ACT (FOIA) ISSUES***

School districts that receive a conviction list are likely to receive a FOIA request from local newspapers shortly after receiving it from the Department of Education. The following information provides guidance in responding to possible FOIA requests.

#### **How much time does a school district have to respond to the requests?**

A school district must respond to a FOIA request for a public record within five business days after the district “receives” the request. When computing the five business day period for responding, a request made by e-mail is not officially “received” until one business day after the electronic transmission was made. (MCL 15.235). For example, a request that is transmitted on Friday, May 19 will not be “received” until Monday, May 22.

#### **Are the conviction lists exempt from disclosure?**

When the first lists were published in January, the question of whether they could be disclosed to the media or general public was unsettled. Since then, Public Act 84 of 2006 has provided the following parameters relating to the disclosure of conviction lists under the FOIA:

- The lists will be exempt from disclosure for 15 business days after the date a list is received by a school district.
- After the expiration of the 15 business day period, a school must disclose accurate information from the list on individual(s) who have misdemeanor convictions involving sexual or physical abuse or **any** felony convictions.
- Information from the lists relating to misdemeanor convictions that do not involve sexual or physical abuse is exempt from disclosure by a school district. However, this information must be disclosed by the Department of Education upon request, but the disclosure must not include any personal identifying information.

- Information from the lists that is determined to be inaccurate will remain exempt even after the expiration of the 15 business day period.

### **How should a school district respond to requests?**

The law requires a response with a letter that does one of the following: (a) grants the request; (b) issues a written notice denying the request (stating the specific reason(s)); (c) grants the request in part and issues a written notice denying the request in part; or (d) issues notice of a ten-day extension to respond to the request by stating the reason(s) for the extension and the date by which the district will respond.

Because the conviction lists are exempt from disclosure for 15 business days after the date the list is received, all requests for the lists during this time should be denied. Although, while the lists are exempt from disclosure during the 15 business day period, it is important that school districts still respond to all requests for the lists during this period.

The following is an example of a denial letter that may be used to respond to requests for a conviction list during the 15 business day exempt period:

*Dear Mr./Ms. Requester:*

*I am writing in response to your May \_\_\_\_ request for records under the Freedom of Information Act, which was received May \_\_\_\_\_. You requested a copy of a record that the district received from the Department of Education that identifies school district employees and their criminal convictions. This record is commonly referred to as the Registered Educational Personnel (REP) Conviction List.*

*Section 1230h of the Revised School Code (MCL 380.1230h) provides that the REP Conviction List is exempt from disclosure under the Freedom of Information Act for 15 business days after the date the list is received by a school district. Because we received the list on May \_\_\_\_\_, the 15 business day exempt period has yet to expire. Your request therefore is denied.*

*The Freedom of Information Act provides you the right to appeal my decision. You may make an appeal in writing to the \_\_\_\_\_ Board of Education, [Address]. The term "FOIA APPEAL" should be placed in capital letters on the front of the envelope and the written appeal should identify the reason(s) for reversal of the disclosure denial. You may also seek judicial review of my decision by commencing an action in circuit court within 180 days from the date of this letter. If, after judicial review, a circuit court determines that the school district has not complied with the Freedom of Information Act and orders disclosure of the requested records, you will be rewarded reasonable attorneys fees and actual or compensatory damages.*

*If you have any additional questions, please contact \_\_\_\_\_ [district's FOIA Coordinator] at \_\_\_\_\_.*

*Sincerely,*

*[School District]  
FOIA Coordinator*

If a district receives a request for the conviction list after the 15 business day period, the request could still be denied if the list is limited to misdemeanor convictions that do not involve sexual

or physical abuse. The following language may be used in the above denial letter to specifically respond to and deny a request under such circumstances:

*(insert as second paragraph)*

*Section 1230h of the Revised School Code (MCL 380.1230h) provides that if the REP Conviction List includes misdemeanor convictions that do not involve sexual or physical abuse, the information relating to such convictions is exempt under the Freedom of Information Act. The REP Conviction List we received only includes misdemeanor convictions that do not involve sexual or physical abuse. Your request therefore is denied.*

A request may also be denied if the conviction list is determined to be inaccurate. The following language may be used to specifically respond to and deny a request under such circumstances:

*(insert as second paragraph)*

*Section 1230h of the Revised School Code (MCL 380.1230h) provides that if the REP Conviction List includes inaccurate information, such information is exempt under the Freedom of Information Act. Accordingly, we have determined that the REP Conviction List we received includes inaccurate information. Your request therefore is denied.*

However, the whole list will not be exempt if the list is only partially inaccurate. If a district receives a conviction list that includes three employees who have been convicted of felonies, but one listing is determined to be inaccurate, the two accurate listings would still have to be disclosed upon request (See option “(c)” listed above – “grant the request in part and issue a written notice denying the request in part”).

## **ISSUES RELATING TO EMPLOYMENT DECISIONS**

If the conviction list includes an employee who has been convicted of an offense that requires registration as a sex offender (“**listed offense**”), the employee must be terminated.

A district may employ an individual who has been convicted of a **non-listed offense** felony only if the superintendent **and** board of education each specifically approve the employment or work assignment in writing.

The following information provides general guidance on steps and issues to consider if you have an employee who appears on a conviction list for a listed offense or any other non-listed felony. Because the information cannot account for specific factual situations or other matters that may be dictated by a local collective bargaining agreement or contract, school boards and administrators should consult with their retained legal counsel before making any decisions regarding the employment status of a current employee.

### **A named tenured teacher has been convicted of a listed offense**

- Notify the named teacher and his/her supervising principal. [**Note-** Personally notifying the teacher would not likely amount to an “investigatory interview” which would require the presence of a union representative under the *Weingarten* Doctrine.]
- Determine if the listing is accurate. This may include verifying the listing using the department of state police’s internet criminal history access tool (ICHAT) or providing

the teacher with the opportunity to submit fingerprints to the state police to verify the conviction.

- If the listing is determined to be accurate, provide a *Loudermill* due process hearing: (1) oral or written notice of the charges; (2) explanation of the evidence relating to the charges; and (3) opportunity for the teacher to present his/her side of the story before discipline is imposed.
- Place the teacher on immediate leave [**Note** - If a teacher is convicted of a felony that is a “listed offense,” a district **shall** discontinue the teacher’s salary effective on the date of conviction. If convicted of a misdemeanor that is a listed offense, a board **may** discontinue the teacher’s salary upon the date of conviction. MCL 38.103(2)].
- The superintendent files and signs written tenure charges with the board specifying discharge as the proposed outcome. A copy of the charges must also be sent to the teacher.
- Within ten days of the filing, the board reviews the charges brought by the superintendent and makes its decision to proceed on the charges as stated.
- After the decision to proceed with the charges is made by the board at an open meeting, it has five days to provide the teacher with the written decision, a written statement of the charges, and a statement of the teacher’s right to appeal the decision to the Tenure Commission.

[**Note**- The teacher’s collective bargaining agreement may require additional termination procedures.]

#### **A named employee has been convicted of a listed offense**

- Notify the named employee and his/her immediate supervisor. [See Note above on *Weingarten* Doctrine].
- Determine if the listing is accurate. This may include verifying the listing using ICHAT or providing the employee with the opportunity to submit fingerprints to the state police to verify the conviction.
- If the listing is determined to be accurate, the employee may have a right to a *Loudermill* due process hearing: (1) oral or written notice of the charges; (2) explanation of the evidence relating to the charges; and (3) opportunity for the employee to present his/her side of the story before discipline is imposed.
- Place the employee on immediate leave under the terms of the employee’s collective bargaining agreement or contract.
- Follow the termination procedures under the employee’s contract or collective bargaining agreement and board of education policy.

#### **A named teacher/employee has been convicted of a non-listed offense felony**

- Notify the named teacher/employee. [**Note**- Under the *Weingarten* Doctrine, the teacher/employee has a right to insist on the presence of a union representative in an investigatory interview that the teacher/employee reasonably believes might result in discipline.]

- Determine if the listing is accurate. This may include verifying the listing using ICHAT or providing the teacher/employee with the opportunity to submit fingerprints to the state police to verify the conviction.
- Consider placing the teacher/employee on immediate leave depending upon the crime/circumstances.
- Review the teacher/employee's employment application to determine if the crime had been disclosed.
- The superintendent and the board of education must then determine if the teacher/employee will be retained. As noted above, a school district may continue to employ an individual who has been convicted of a non-listed offense felony only if the superintendent **and** board of education each specifically approve the employment or work assignment in writing.
- If the employee is a tenured teacher, the superintendent and board of education should consider the Tenure Commission's conclusion that conviction of crime raises a nexus between teachers' conduct outside of school and their fitness to teach, particularly in cases involving fraud, deceit or dishonesty on a particular person, or illegal activity for one's personal gain. Further, the "just cause" standards of *Szopo v Richmond Community Schools* (TTC 93-60) should also be considered:
  - ✓ Was the behavior planned or deliberate?
  - ✓ Did it constitute a crime? [Yes]
  - ✓ Did it involve fraud, deceit, sexual misconduct, drugs or a weapon?
  - ✓ What was the teacher's motive or purpose?
  - ✓ Did the conduct result in harm to a specific victim, and if so, what was the gravity of the harm?
  - ✓ How much did the conduct deviate from the norms of appropriate conduct for members of society and teaching?
  - ✓ Was there any prior discipline, especially for the same conduct?
  - ✓ What effect did any previous discipline have on the teacher's record?
  - ✓ What is the teacher's attitude – accepts responsibility and exhibits a willingness to change?
  - ✓ What is the likelihood the behavior will reoccur?
- For non-teaching employees, the standard for termination under a collective bargaining agreement is typically "just cause," which has been defined under the following standards:
  - ✓ Did the employer give forewarning of consequences of the employee's conduct?
  - ✓ Was the rule reasonably related to the operation of the employer's business?
  - ✓ Did the employer make an effort to discover the employee violated the rule prior to disciplining?
  - ✓ Was the employer's investigation conducted fairly and objectively?
  - ✓ Did the employer obtain substantial evidence of the employee's guilt?
  - ✓ Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

- ✓ Was the degree of discipline administered by the employer reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his/her service with the employer?
- Further, the following set of principles have been established by arbitrators to determine if “off-duty misconduct” amounts to “just cause”:
  - ✓ Did the conduct damage the employer’s business or reputation?
  - ✓ Did the conduct result in the refusal of other employees to work with the employee in question?
  - ✓ Did the conduct prevent the employee from reporting to work due to incarceration?
  - ✓ Is the employee unsuitable for work due to the specific nature of the misconduct?

If the employer can prove that one of these effects occurred to a significant extent, an arbitrator will likely uphold the employer’s discipline. If not, an arbitrator will rule that the employer’s discipline was overly intrusive into the employee’s privacy, and will sustain a grievance.

- The above standards are also similar to the standards set by the EEOC that prevent an employer from basing an employment decision on a criminal conviction unless the employer demonstrates a “business necessity,” which takes into account (1) the nature and gravity of the crime; (2) the elapsed time since the conviction; and (3) the nature of the job held.
- The Open Meetings Act permits closed sessions to discuss the dismissal or disciplining of an employee if a closed meeting is requested by the employee.
- If the board of education and/or superintendent determine that discipline or termination is necessary based upon the conviction, the appropriate tenure and collective bargaining procedures and board of education policies must be followed as stated above. This may include a right to a *Loudermill* due process hearing: (1) oral or written notice of the charges; (2) explanation of the evidence relating to the charges; and (3) opportunity for the employee to present his/her side of the story before discipline is imposed.
- If the board of education **and** the superintendent decide to retain the teacher/employee, the decision must be made by the board at an open meeting and memorialized in writing, signed by the board (or a representative) and the superintendent.

As indicated by the foregoing information, many factors must be considered when terminating a professional or non-professional employee based upon a criminal conviction. Therefore, a “zero tolerance” approach is not recommended when considering discipline for an employee who has been convicted of a non-listed offense felony or misdemeanor. We urge you to contact retained legal counsel prior to making any decisions regarding the employment status of the affected employee.

***If you have any questions about the above information, please contact Brad Banasik at (517) 327-5900, ext. 232 or bbanasik@masb.org.***