

Benefits of a Good Workplace Environment/Risks of a Bad One

By
Eric V. Hall

February 25, 2016

I. SCOPE OF THIS PRESENTATION

A. Ingredients of a Good Workplace

1. Legal
2. Non-Legal

B. Symptoms of a Bad Workplace

1. How to Recognize Erosion
2. Legal Issues and How to Address Them

II. INGREDIENTS OF A GOOD WORKPLACE

A. Legal Components – Necessary But Not Sufficient

1. Charter school must be a Colorado nonprofit corporation, C.R.S. 22-30.5-104(4)(a)
 - a. The corporation should not have “members” as defined by the Colorado Nonprofit Corporation Act, C.R.S. 7-121-101 *et seq.*
2. Articles and Bylaws
 - a. Governing board
 - (i) Who is on it?

- (1) Mix of backgrounds and abilities
- (2) Parents?
- (3) Non-parents?
- (4) Board members should not have a conflict of interests
- (5) Do board members have time to serve?
- (ii) Term limits?
- (iii) How are board members chosen?
 - (1) Self-perpetuating
 - (2) Elected by parents
 - (3) Mix of both
 - (4) Not picked by your management company
- (iv) Removal procedure
- b. Protect Your Board
 - (i) Directors & Officers Insurance
 - (ii) Indemnification provisions
 - (iii) Volunteer Service Act, C.R.S. 13-21-115.5
- c. Board Committees
 - (i) Executive Committee
 - (ii) Finance Committee
- d. Board Meetings
 - (i) Who can call them?
 - (ii) Notice
 - (iii) Quorum

- (iv) Voting on resolutions
 - (1) Regular items – majority
 - (2) Special items – usually super-majority (2/3)
 - a. Amend articles and bylaws
 - b. Remove board members
 - c. Buy or sell real estate
 - d. Transactions above a certain amount
 - e. Amend charter/mission
 - f. Enter executive session, C.R.S. 24-6-402(4)
- (v) Public comment
- (vi) Executive Session, C.R.S. 24-6-402(4) (a)-(h)
- e. School Leader
 - (i) Role
 - (ii) Relationship between school leader and board
 - (iii) Hiring and firing authority
 - (iv) Removing the school leader
 - (1) Specific process for removing?
 - (2) Protected by an employment contract?
- 3. Board Policies
 - a. Conflict of Interests
 - b. Financial Controls
 - c. Grievance
 - d. Sexual Harassment

4. Employment Essentials

- a. Employment agreements
 - (i) At-will employment
- b. Employee handbook
 - (i) Guidance, not binding promises
 - (ii) Only policies you need
 - (iii) Update annually
 - (iv) Sexual harassment
 - (v) Grievance
 - (vi) Right to search the school's electronic devices
 - (vii) Child abuse reporting

5. Enrollment Policy

- a. Enrollment must be open to any child, C.R.S. 22-30.5-104(3)
 - (i) Except need not alter structure of facility
 - (ii) Except need not alter arrangement of rooms
 - Unless required by state or federal law
- b. Enrollment decisions shall be made in a nondiscriminatory manner, C.R.S. 22-30.5-104(3)
 - (i) Lottery
 - (ii) First-come, first-served (aka waiting list)
- c. Preferences
 - (i) Founders
 - (ii) Board members
 - (iii) Faculty/Staff

- (iv) In-district
- (v) Free/Reduced Lunch

6. Statutes

- a. Charter Schools Act, C.R.S. 22-30.5-101
- b. Open Meetings Law, C.R.S. 24-6-401
 - (i) Public notice of meetings 24 hours in advance
 - (ii) No “meetings” by email
 - (iii) Procedures for executive session, C.R.S. 24-6-402(4)
 - (iv) Selecting a new school leader, C.R.S. 24-6-402(3.5)
- c. Colorado Open Records Act, C.R.S. 24-72-200.1
 - (i) All records are public, unless they are not
- d. Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. 1232g
 - (i) Educational records may only be shared with parents
- e. Non-discrimination – students and staff
 - (i) Charter Schools Act, C.R.S. 22-30.5-104(3)
 - (ii) Colorado Anti-Discrimination Act (CADA), C.R.S. 24-34-401
 - (iii) Title VII, 42 U.S.C. 2000e
 - (iv) Title IX, 20 U.S.C. 1681

B. Non-Legal Components – They Make All the Difference

- 1. Know Thyself and Be Thyself – Stay focused on *your* mission
 - a. Curriculum-driven or Demographic-driven?
- 2. Use Good Common Sense – Education is a human endeavor
- 3. People feel safe

- a. Physically, emotionally, and intellectually
- b. Employees, students, families

4. Quality employees are the key

III. SYMPTOMS OF A BAD WORKPLACE

A. How to Recognize Erosion in the Workplace

1. Factions

- a. Pro-principal v. Anti-principal
- b. Board v. Staff
- c. Conservatives v. Liberals

2. Adults spend most of their time talking about other adults

3. CORA requests

- a. By employees
- b. By families
- c. By media
- d. By authorizer

4. Board spends a lot of time in executive session

5. Marathon board meetings

B. Legal Issues and How to Address Them

1. Can charter school employees unionize?

- a. Historical context
 - (i) Long before charter schools existed, the rule used to be that school districts could forbid teachers from belonging to labor unions

Seattle High Sch. Chapter No. 200 v. Sharples, 293 P. 994 (Wash. 1930)

People ex rel. Fursman v. City of Chicago, 116 NE 158 (Ill. 1917)

- (ii) That old rule was held to be a violation of the First Amendment right to freedom of association

Am. Fed'n of State, County, and Municipal Employees v. Woodward, 406 F.2d 137, 139 (8th Cir. 1969)

McLaughlin v. Tilendis, 398 F.2d 287, 288 (7th Cir. 1968)

- b. National Labor Relations Act of 1935, 29 U.S.C. §§ 151-169
 - (i) Right of employees to organize and bargain collectively, 29 U.S.C. 151
 - (ii) Inequality between employees and employers, 29 U.S.C. 151
- c. Is a charter school a “political subdivision” of the state?
 - (i) Political subdivisions are not covered by the NLRA
 - (ii) Private employers are covered, 29 U.S.C. 152(2)
- d. *NLRB v. Natural Gas Utility District of Hawkins County*, 402 U.S. 600 (1971) (“*Hawkins County*”) -- An entity is a “political subdivision” if it is either:
 - (i) Created directly by the state so as to constitute a department or administrative arm of the government, or
 - (ii) Administered by individuals who are responsible to public officials or to the general electorate. *Id.* at 604-05
- e. If charter schools are political subdivisions (and not private employers), Colorado case law holds that, while public sector employers *may* collectively bargain with unions, they are not required to.
 - (i) *Littleton Education Assoc. v. Arapahoe County*, 553 P.2d 793 (Colo. 1976)

- (ii) *City and County of Denver v. Denver Firefighters Local No. 858, AFL-CIO*, 663 P.2d 1032 (Colo. 1983)
- f. The NLRB in Chicago recently issued two decisions finding that charter schools were “private employers” and thus the Board had jurisdiction over two Chicago charter schools under the NLRA
- (i) *Chicago Mathematics & Science Academy Charter School*, 359 N.L.R.B. No. 41 (Dec. 14, 2012).
 - (ii) *Pilsen Wellness Center*, 359 N.L.R.B. No. 72 (Mar. 8, 2013).
- g. If charter schools are private employers, then the NLRA applies.
- (i) Rights of employees under the NLRA, 29 U.S.C. 157
 - (1) to self-organization
 - (2) to form, join, or assist labor organizations
 - (3) to bargain collectively through representatives of their own choosing
 - (4) to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection
 - (5) to refrain from any or all of such activities
 - (ii) Unfair labor practice by employers, 29 U.S.C. 158(a)
 - (1) interfere with Section 7 (§ 157) rights
 - (2) interfere with formation of labor organization
 - (3) discriminate in employment to encourage or discourage membership in a labor organization
 - (4) retaliate against an employee for participating in an NLRA claim or investigation
 - (5) refuse to collectively bargain with the representatives of its employees

- h. Good Law Review Articles on this Topic
 - (i) Martin Malin & Charles Taylor Kerchner, *Charter Schools and Collective Bargaining: Compatible Marriage or Illegitimate Partnership?*, 30 HARVARD J. LAW & PUB. POLICY 885 (2007) – See especially Parts IV & V
 - (ii) Preston Green, Bruce Baker & Joseph Oluwole, *Having It Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and the Autonomy of Private Schools*, 63 EMORY L. J. 303 (2013) -- See especially Part II

2. Discrimination

- a. Adverse employment action must have been “because of” protected class or conduct
- b. Protected classes, C.R.S. 24-34-402
 - (i) Disability
 - (ii) Race
 - (iii) Creed
 - (iv) Color
 - (v) Sex
 - (vi) Sexual orientation
 - (vii) Religion
 - (viii) Age (over 40)
 - (ix) National origin
 - (x) Ancestry
- c. Must first file with EEOC or CCRD

3. Harassment

- a. Subset of discrimination – Harassed “because of” protected classification

b. Must have and follow a harassment policy

c. Types of harassment

(i) Supervisor/subordinate

(ii) Adult/adult

(iii) Adult/student

(iv) Student/student

4. Termination of Employment

a. Progressive discipline has come first

(i) Documented

(ii) Employee should not be surprised

b. Dignity and privacy

(i) Non-renew v. termination

(ii) Graceful exit

(iii) Share information only on a need-to-know basis

c. Specific reasons for termination

(i) At-will = any reason or no reason

(ii) Not an illegal reason

d. Termination meeting itself

(i) Scripted

(ii) Direct supervisor and one other person

(iii) Final paycheck ready, C.R.S. 8-4-109(1)(a)

e. Separation Agreement

(i) Employee releases legal claims against school

(ii) School gives employee separation pay

-- Money beyond final paycheck

(iii) Reachable under CORA, C.R.S. 24-72-204(3)(a)(II)(B)

f. Post-Separation

(i) Enter onto school property?

(ii) Speak with school employees?

(iii) Come to school events?

(iv) Keep children enrolled in the school?

(v) Refer friends to the school?

g. Legal Issues Post-Separation

(i) Unemployment Compensation

(1) Qualifying or Disqualifying reason, C.R.S. 8-73-108

(2) Employers can no longer "not dispute" or "not file",
C.R.S. 8-79-104(1)

(ii) Claims of discrimination (see above)

SAMPLE POLICIES

Harassment

The goal of the school is to provide a workplace free from tensions involving matters that do not relate to the education of our students. In particular, an atmosphere of tension created by non-work-related conduct, including ethnic, racial, sexual or gender-related remarks, animosity, or unwelcome sexual advances or other such conduct does not belong in the workplace. As such, the school will not tolerate any form of harassment related to any protected class. It will not tolerate retaliation for refusing unwelcome, harassing overtures, for reporting instances of harassment, or for providing statements or evidence related to alleged harassment.

Types of Harassment

Harassment may be verbal (epithets, derogatory statements, slurs, innuendo), physical (unwelcome touching, assault, gestures, physical interference with one's work), or visual (posters, drawings, faxes, e-mail). It may involve, but is not limited to, unwelcome sexual advances or unwelcome invitations to participate in offensive conduct. Harassment may originate from employees, supervisors, students, parents, or others visiting the school. In whatever form and from whatever source, it is forbidden.

Retaliation Prohibited

No supervisor shall have the authority to retaliate against a victim, reporter, or witness of harassment because of his or her report. Any such retaliation is subject to prompt reversal upon completion of any related investigation.

Reporting Harassment

In some situations, a person may not realize that his or her behavior is inappropriate or unwelcome. Employees who consider any person's behavior to be inconsistent with these guidelines are encouraged (but not required) to tell that person that his or her behavior is considered inappropriate and request that the conduct stop. Persons so told should comply immediately and graciously with such requests or seek direction from their supervisor.

The school must be informed of harassment before the school can stop it. Thus, every employee who reasonably suspects that harassment has occurred, including everyone who believes that he or she is a victim of harassment, must immediately report the circumstances to their immediate supervisor or to the Head of School. Allegations involving the Head of School may also be reported to the Chair of the Board of Directors.

Employees should not assume that management is already aware of the situation. They should not assume that it is someone else's duty to report.

Conflict of Interests

The school expects all faculty and staff to scrupulously avoid conflicts between the interests of the school and their own personal, professional, and business interests. This includes avoiding potential and actual conflicts of interest, as well as perceptions of conflicts of interest.

In order to protect the integrity of the school's decision-making process, to enable our constituencies to have confidence in our integrity, and to protect the integrity and reputations of our employees, the school requires that all staff disclose in writing to the Head of School any interests, relationships, and holdings that could potentially result in a conflict of interest or the appearance of a conflict of interest.

All employees are responsible for ensuring that they do not place themselves in any position that will conflict with their responsibilities to the school. No employee shall serve on a governing board or committee of any agency contracting with, making grants to, or receiving grants from the school, except under special circumstances and with the express approval of the Board of Directors. In no such case shall an employee vote or take an active part in discussion of a grant or contract between the school and an organization of which he or she is a member or in which he or she has an interest.

No employee at the school may tutor or give lessons to any student for pay without first seeking the permission of the Head of School. If there is a conflict or perceived conflict of interest, the request will be denied. As needed, the complete policy on this subject may be consulted.

Grievance Policy and Procedures

The school values open and proactive communication among and between the members of the school community, including parents, students, faculty, staff, administration, and the Board. Issues that are not dealt with directly can become destructive to the school community and, therefore, detrimental to the learning process of our students. As adults we must model for our students a willingness to address conflict directly. As such, the school's procedures (outlined below) for settling differences are designed to support prompt and equitable resolution of disagreements at the lowest possible faculty or administrative level.

These procedures guide how faculty and staff are expected to express grievances about other members of the professional community, including peers, supervisors, or the administration. They are similar to the procedures that parents and students are expected to express grievances about faculty, staff, or administrators.

The administration and Board both expect that conflict will be addressed and proactively dealt with following the fewest steps of the procedures below. However, if the conflict is not resolved at the lowest faculty or administrative level, the guidelines below provide a process for resolving the conflict.

Grievance Procedures

The school is committed to ensuring that the following procedures are followed:

1. Address Issue With Those Directly Involved

The grievant brings the situation or concern to the attention of those directly involved. Should a faculty member fail to begin the process at the lowest possible level, and instead go directly to a Board member with a concern about a Head of School (for example), the Board member will re-direct the grievant to the Head of School.

2. Address Issue With Appropriate Supervising School Director

If satisfactory resolution is not realized after a direct conversation between the conflicted parties, the situation must be brought to the attention of the Head of School within ten days of the above meeting. The Head of School and the conflicted parties will address the situation, facilitate communication, and develop goals for conflict resolution. The Head of School will monitor this process until resolution is realized or until an impasse is reached.

If the concern is regarding the Head of School, the Chair of the Board will facilitate the complaint at this level.

3. Prepare a Written Grievance for the Board of Directors

If the grievant is not satisfied with the response received via steps one and two, the grievant shall prepare a formal written grievance with the assistance of the facilitator in Step 2. This written grievance should:

- 1) describe the incident, decision or practice that gave rise to the complaint;
 - 2) cite the contract, policy, or procedure that has been violated and/or rationale for concern;
 - 3) describe what conflict resolution strategies were attempted via steps 1 and 2;
- and
- 4) explain what corrective action is being requested.

If the concern is regarding the Head of School, the Chair of the Board will oversee this process.

It is the Head of School's responsibility to manage the ultimate resolution of conflicts among parents, students, faculty, and staff, excepting those that pertain to the Head of School him/herself or to a Head of School's execution of a school-wide policy or procedure.

4. Provide Written Grievance to the Board

The grievant may request that the matter be brought to the attention of the Board only if the matter has not been satisfactorily resolved. Upon request by the grievant, the Head of School will forward the written grievance to the Chair of the Board at least one week prior to the next scheduled Board meeting. The Chair, or designee, will review the above process with the grievant and ensure that the proper steps were taken before adding the issue to a meeting agenda. Grievances shall not be brought to the Board as a matter of Public Comment as this does not give the Board sufficient time to consider the issue(s) and address them through this grievance process. The Board will not hear matters that do not follow this grievance process.

The final forum for conflict resolution, after a grievant has followed the steps outlined above, will be at the level of the Board of Directors.