

ANATOMY OF A DISCHARGE FOR CAUSE PROCEEDING

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1. **STEP 1. MAKING THE DETERMINATION TO PROCEED.**

a. Question of the day: Are there grounds to proceed with a discharge for cause? This determination is initially made by the superintendent with guidance of the School Board's attorney.

b. The standard:

NDCC § 15.1-15-07. Discharge for Cause – Grounds. The board of a school district may dismiss an individual employed as a teacher, a principal, or as an assistant or associate superintendent prior to the expiration of the individual's contract for any of the following causes:

1. *Immoral conduct.*

2. *Insubordination.*

3. *Conviction of a felony.*

4. *Conduct unbecoming the position held by the individual.*

5. *Failure to perform contracted duties without justification.*

6. *Gross inefficiency that the individual has failed to correct after written notice.*

7. *Continuing physical or mental disability that renders the individual unfit or unable to perform the individual's duties.*

c. Things to consider:

i. In addition to the statute, has the School Board established any policies that apply? If so, you must follow them to provide procedural due process. If you fail to follow those policies, it can be grounds for an appeal.

ii. If performance is an issue, check the individual's contract to determine whether any violations have occurred.

iii. If physical or mental disabilities are at issue, consider whether FMLA or ADA may be applicable.

2. **STEP 2. GETTING ON THE AGENDA.**

a. Once the Superintendent makes the decision to recommend to the School Board to pursue discharge for cause proceedings, the Superintendent needs to schedule and properly notice a School Board meeting for two agenda items: (a) pursuing a discharge for cause proceeding, and (b) contemplating whether the individual should be suspended while discharge for cause proceedings are pending.

- b. Practice Tip. At the school board meeting, the existence of a discharge for cause proceeding becomes public. For this reason, it's an opportune time to try to negotiate prior to the school board meeting.
- c. Practice Tip. Notify the individual that the School Board will contemplate proceeding with a discharge for cause at the scheduled School Board meeting. Inform the individual that, should the individual wish to resign, the School Board will consider acceptance of resignation in lieu of a discharge for cause. Present this not as a threat, but as an option. If resignation occurs before notice of the School Board meeting's agenda items are published, neither the School Board nor the public will have knowledge that a discharge for cause was ever considered.
- d. Practice Tip. If the individual chooses not to resign, the Superintendent can ask the School Board to suspend the individual without pay pending the final discharge for cause hearing.
- e. Practice Tip. The Superintendent has discretion to place an individual on administrative leave with pay pending the School Board meeting. In the event student health or safety is at issue, this should absolutely be done.

3. STEP 3. THE INITIAL SCHOOL BOARD MEETING.

- a. The School Board should do the following:
 - i. Vote on whether to pursue a discharge for cause proceeding (NDCC § 15.1-15-08).
 - (1) In making the recommendation to pursue discharge, the superintendent should only provide generic reasons supporting the recommendation (the details regarding the underlying conduct supporting the recommendation must be saved for the final hearing, as the School Board is supposed to remain unbiased). For example, the Superintendent could indicate that he/she is recommending the School Board to pursue discharge for cause because, following an investigation, he/she has determined the teacher engaged in an inappropriate relationship with a student.
 - (2) Discussions about whether and any vote to pursue discharge for cause must be held in open session. This decision is made by majority vote.
 - ii. If the vote to pursue discharge is affirmative, the School Board should authorize the Superintendent to file a petition with the Office of Administrative Hearings for the purpose of appointing an ALJ (NDCC § 15.1-15-08).
 - iii. If the vote is affirmative, the School Board should also consider (a) whether the individual should be suspended while the discharge for cause

proceeding is pending, and (b) whether the suspension should be with or without pay (NDCC § 15.1-15-10).

- (1) Discussions about suspension must be made in executive session, but the vote is open to the public. This vote must be unanimous.
- (2) Practice Tip: If the School Board suspends pay but ultimately does not discharge the individual, the School Board can and must award back pay. If the School Board pays the individual and ultimately discharges the individual, the School Board doesn't get the money back. For these reasons, it's most common for School Boards to suspend without pay.

4. **STEP 4. APPLY FOR AN ALJ; COMMENCE THE PROCEEDING.** (These steps will be largely handled by the School Board's legal counsel with input from the Superintendent.)

- a. The initial steps of the proceeding include applying for an ALJ, drafting a complaint, preparing a list of charges to be provided to the individual, and providing the individual with notice. As part of the proceeding, discovery is allowed, and scheduling conferences and pretrial hearings may be conducted.
- b. The procedural rules for the discharge for cause proceeding are found in NDCC §§ 15.1-15-08 and 28-32-21 – 62. In addition to these statutes, keep in mind that the usual notice requirements for School Board meetings continue to apply.
- c. The ALJ is to serve as a procedural administrative law judge only, without making a recommended decision. This means that the ALJ will preside over and conduct the hearing, but the ultimate decision on discharge will be up to the School Board. (NDCC § 15.1-15-08(6)).
- d. The superintendent and School Board counsel should consult NDCC § 28-32-37 in the event communications are necessary with the School Board during this process. Ex parte communications are generally prohibited with the School Board, but there are broad exceptions.
- e. See NDCC §§ 15.1-15-08(1) and 28-32-21 for timing and notice requirements. NDCC § 15.1-15-08(1) requires a list of charges to be given by the School Board to the individual at least 5 days before the hearing. NDCC § 28-32-21(b) requires a complaint to be served at least 45 days before the final hearing, along with notice of the time and place of the hearing to be given at least 20 days before the hearing.
 - i. Practice Tip: NDCC § 15.1-15-08(2) provides that the hearing must be conducted in accordance with Chapter 28-32 except as otherwise provided in NDCC 15.1-15-08. This creates the procedural question of whether the list of charges required by NDCC § 15.1-15-08(1) takes the place of, or is in addition to, the NDCC § 28-32-21(b) complaint and notice of hearing requirements. We chose to take the conservative position by providing the

list of charges, the complaint, and notice of hearing to ensure no procedural deficiencies, but this arguably was not necessary.

- f. Practice Tip: To petition for the appointment of an ALJ, complete and submit a “Request For Administrative Law Judgment – Complaint”. This form is available on the ND Office of Administrative Hearings website: www.nd.gov/oah/
 - g. Practice Tip: If you ever have procedural questions, don’t hesitate to call the Office of Administrative Hearings (“OAH”) directly. Its staff is very knowledgeable, and they are happy to help.
5. **STEP 5. INFORMAL DISPOSITION.** Due to the consequences associated with a discharge for cause on an individual’s record, most cases are resolved short of the final hearing by informal disposition. Informal disposition may include a stipulation, settlement, waiver of hearing, consent order, default, alternative dispute resolution, or other informal disposition subject to agency approval. (NDCC § 28-32-22). Expect negotiations to be ongoing throughout the entire process.
- a. Practice Tip: While ex parte communications are generally prohibited, the School Board’s attorney may keep the School Board apprised of settlement efforts throughout the process. (NDCC § 28-32-37)
6. **STEP 6. HOLD THE DISCHARGE FOR CAUSE HEARING.**
- a. The Superintendent will need to handle some logistics in advance – where the proceeding will be held, how a recording will be made, and public notice requirements for the hearing (this is a meeting of the School Board, so the usual notice requirements apply).
 - b. The hearing starts in an open meeting of the School Board. The meeting should transition to executive session to conduct the hearing. (NDCC 15.1-15-08(3)). Each side may have three invitees at the hearing. (NDCC 15.1-15-08(3)).
 - c. The hearing proceeds much like a court trial. There will be opening statements, testimony from witnesses and cross examination, and closing arguments. The ALJ will conduct the entire process, and the School Board largely observes much like a jury (I say “largely”, because the School Board members may ask questions to the witnesses, should they wish).
 - d. Following closing arguments, the School Board members will deliberate. This is done in the presence of the ALJ and all parties. Once the School Board members are done deliberating, a vote should be made to go back into open session.
 - e. In open session, the School Board members vote on whether to discharge the individual for cause. This is decided by majority vote.

7. **STEP 7. WRITTEN ORDER.**

- a. A written order is required in which findings of fact, conclusions of law, and the order for discharge is made. (NDCC § 28-32-39). This can be drafted by the School Board's counsel after the discharge for cause hearing occurs. It must be drafted and served on all parties within 30 days after the hearing, so plan to approve a draft at the next School Board meeting (or at a special meeting if necessary).

8. **STEP 8. APPEAL (IF ANY).**

- a. The decision may be appealed within 30 days after the Order is served on all parties. Appeal may be made to the District Court, followed by an appeal to the ND Supreme Court. (NDCC §§ 28-32-42 – 49).

9. **STEP 9. REPORT TO THE EDUCATION STANDARDS AND PRACTICES BOARD.**

- a. If the individual is discharged for cause, the School Board must report the discharge to the education standards and practices board. (NDCC § 15.1-15-11).
- b. This reporting requirement is very serious, and it is often described as the death to a teacher's career. For this reason, persons subject to these proceedings are usually motivated to settle, and settlement usually occurs prior to the final discharge for cause hearing. This is why discharge for cause hearings are so rare.