A Complaint has been appealed for a Board Hearing: Now What Do We Do?

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Annual Convention 2015
“A Complaint Has Been Appealed for a Board Hearing: Now What?”

1. How did we get here?

Most policies on complaint procedures will provide for “written appeal to the Board.” (see GBN/JBA – AR and GBNA – AR (Hazing procedures) as examples.

Already had process below:

Investigation, written appeal and now this one.

Read/Review your policy. Policies provide timelines for appeal and for the hearing and for the Board to provide a written decision to complainant.

2. The appeal has been submitted – now what?

Set the ground rules – time/date/place; behavior expectations; timing on testimony; who will be allowed to testify; limited to issues in controversy.

Communicate those rules to the complainant – see letter exhibit. Communication should outline:

Time/date/place of hearing; recite what happened below; does complainant/employee want public or executive session (if applicable); outline hearing procedure (what will happen); how long they can talk; can they submit written materials (if so, by when and to who); any witnesses allowed?; deliberations will be in executive session and then a public vote.

3. Hearing itself.

All Board members should have all relevant materials (copy of complaint, decision below, CBA if needed, any contracts, any statutes etc.)

Gather and provide to all Board members.

If public controversy is anticipated, may want security at the meeting.

Will you need a time-keeper? Board chair can do.

4. Hearing – Prior to beginning, go through procedures orally. One party presents, other party presents. Short rebuttal for each. Questions by Board members (limited to the issues in controversy). Conclude the hearing.


Discuss/debate. Not a chance for independent fact-finding by the Board; agree/disagree with decision below (was it within policy etc.)
6. Public session for vote –

"I move that the Board adopt the superintendent’s findings and conclusions.” Don’t have to explain reasons for decision.

7. Communicate decision to complainant (again, review Policy for what is required).

8. Lawyers – optional. If District/Board thinks issue will end in a lawsuit, have the District lawyer present.

We recommend allowing the complainant to have one present if they wish/person not allowed to speak. Same with union rep.

10.) Goal – everybody walks away feeling that the procedures and the process itself was fair. They may disagree with the decision, but felt heard and that they had their day in court (so to speak). KEY is to communicate and to plan ahead.
Hand Delivered

RE: ____________ Complaint Appeal

Dear ____________:

I am sending you this letter in preparation for the ____________ School Board hearing that will take place on ____________ commencing at 5:30 p.m. at the ____________.

I represent the ____________ School Board and will be present to assist them during this board hearing.

As you know, ____________ presented a written complaint to the Board Chair on _____________. This complaint was investigated, and Board ____________ determined that while the majority of facts surrounding the complaint were substantiated, they did not give rise to a policy violation under Board policy _____________.

In a timely manner, they timely appealed these findings and recommendations to the full Board, and has requested a hearing for this appeal.

Pursuant to your request, the hearing will be conducted in executive session pursuant to ORS 192.660(2)(b).

The hearing will begin with Board Chair ____________ presenting the history of the complaint, including ____________ findings and recommendations.

It will then be given 10 minutes to present ____________ appeal. You will then be given 10 minutes to present any testimony you would like to present to the board. Both parties will be given 5 minutes to offer rebuttal testimony. If you choose to waive your opportunity for rebuttal and present a full 15 minutes of testimony if you would prefer. Under Policy ____________, this appeal is related the findings and recommendations stemming from ____________ written complaint, so both parties should take care to limit your presentation to the facts surrounding that complaint.

You may also submit a written statement or any witness statements in support of your appeal. If you plan to submit any written materials, please provide those materials to ____________ by 3 pm.

Oral witness testimony other than from yourself and ____________ will not be permitted. You will be permitted to have a representative present for observation at the hearing, but this representative cannot speak on your behalf. ____________ will similarly be allowed to have a union representative present, but this representative will not be allowed to speak on your behalf.

After the board has heard testimony from yourself and ____________, you both will be excluded so the board can deliberate privately. If the board is able to render a decision, it
will return to open session to take a vote. It is possible that the board will not be able to render a decision on your appeal on the night of the hearing.

Please let me know if you have any questions or concerns about the procedure for the hearing. Thank you.

Sincerely

Oregon School Boards Association

cc:
My name is ________________, I am an attorney for the Oregon School Boards Association and provide legal counsel to the _______ School District. I am advising the District regarding ________ appeal to the _______ School Board. I understand ________ is appealing School Board Chair ________ conclusion regarding your ________ complaint related to ________ . I will serve as facilitator at this hearing.

Scope:
The scope of this hearing is limited to your appeal of the Board Chair’s conclusions drawn from the investigation of your ________ complaint that you had been harassed by ________ and that ________ conduct had created a _________. The question before the Board and the testimony presented will be limited to whether the Board Chair erred in conclusion that ________ conduct toward did not violate District policy against _________. The board will only hear evidence and testimony addressing that question. No other complaints will be heard at this time. Please plan your presentation accordingly.

Process:
The process will be governed by the District’s __________________ Complaint policy and rules. Chair ________ has convened the Board in executive session. Both parties may have a representative present. Under Oregon public meeting laws, media representatives are permitted to attend executive sessions, but cannot report on the content of the meeting.

Under the District’s complaint policy, the burden of proof is on ________ as the appealing party to show cause why the Board Chair’s decision should not be upheld. ________ will be given 20 minutes to present ________ arguments on the question. ________ will then be allowed to present. Each party will also receive a rebuttal (10 Minutes). A rebuttal is a response to a preceding argument that is intended to refute it. Neither party may not introduce new arguments or complaints in this period.

Ground Rules:
In order to ensure fairness and that the board is able to hear relevant evidence, I have set some ground rules for the hearing:

1. Participants must address their presentation to the question currently before the board. New complaints regarding events that occurred after the conclusion of the investigation of the ________ complaint, are outside the scope of this hearing.

2. Participants will address the board as a whole; they may not direct questions to board members.

3. There will also be no cross-examination.

4. Participants will observe the time limits and respect the timekeeper’s notice that time has concluded. I will serve as timekeeper.

5. All participants will speak in respectful tone and volume.

6. No personal attacks will not be allowed.

7. Board members are asked to save their questions for the presenters for the Q/A period.
I will now state the question before the Board that they are tasked with considering at this meeting: **Did the Board Chair err in _____ conclusion that ________ conduct toward ________ did not violate the District’s ________ policies?**

Presentations will be as follows:

- ________ (5 minutes)
- ________ (20 minutes)
- ________ (20 minutes)
- ________ rebuttal if requested (10 minutes)
- ________ rebuttal if requested (10 minutes)
- Questions from the Board.

There are two possible outcomes of this appeal:

**Possible Outcomes:**

**A-** The Board finds the investigation was INSUFFICIENT and directs the board chair to reopen the investigation to address the following question(s) that remains unanswered.

**B-** The Board finds the investigation was SUFFICIENT.

The parties will then be dismissed and the Board will deliberate in private. The Board may move into public session and vote on a motion put forward by a Board Member.
Overall process and rules look something like this:

- **Rules** (READ these out loud to everyone…and provide in writing):
  - No negative comments are allowed about any staff, students or other people other than the one being complained about. All others retain their right to a confidential process.
  - We will remove anyone who uses foul language, complains about other people or speaks out of turn.
  - All speakers must wait to be recognized before speaking and must address their comments to the chair.
  - Under no circumstances will the two parties (complainant and alleged perpetrator) be allowed to question or address each other.
  - There will be no public input. The only speakers permitted will be the board, complainant, alleged perpetrator and the superintendent. (You could allow one or more additional person to speak for each side and the superintendent, or whatever you/the board want. Could be trouble, you be the judge!)

- Superintendent presents his facts. Should be brief, he gets a second shot for his recommendation after the others have spoken.
- Complainant is allowed to present their side (give a long limit, like up to 10 minutes; you want them to not have to rush but you don’t want them to be able to filibuster) and have a timer present. Give time signals (Use a yellow card with 2 minutes on it and a red card with 1 minute on it. Bang your gavel lightly at zero +30 seconds).
- Board may ask questions of the complainant (although in public, limit to questions relevant to the facts of the complaint or clarifying questions).
- Alleged perpetrator presents their side (allow them to speak for up to 10 minutes).
- Board may ask questions of the alleged perpetrator.
- Superintendent presents his/her recommendation to the board.
- Board may ask questions of the superintendent.
- If the board has additional questions of the complainant or alleged perpetrator, they may also ask those after they finish with the superintendent. If they do, the superintendent should be allowed to respond to the board and make any final closing statement/recommendation to the board. ALWAYS MAKE SURE YOU LET THE SUPERINTENDENT SPEAK LAST. His/her closing statement should be his/her recommended board action, including the wording for a motion if your board needs that kind of clarity.

Then the board deliberates. The board is deciding whether or not to accept the recommendation of the superintendent based on whether or not the superintendent acted within his/her authority and followed policy. The board is NOT substituting their own judgment for that of the superintendent. You may disagree with the superintendent’s decision but if s/he acted within policy and his/her authority then the board should defer to his/her judgment, and go change the policy later. If this is in public, say as little as possible. It is okay to move right to a vote, but I recommend at least having each board member make a simple ‘I support the superintendent’s recommendation’ or something similar.
If you think the situation at the heart of the complaint could end up in a lawsuit, the Board should have its lawyer present. The biggest danger is not knowing and understanding the legal requirements and making statements and decisions not consistent with the legal requirements in the particular situation.

A final bit of advice: Board member body language goes a long way towards heating this up or cooling it down. As chair, you are most important. Lean forward and look the speakers in the eye, keep your arms open, smile and nod occasionally. Go out of your way to be warm, welcoming and not appear dismissive or arrogant, even if you are thinking very different thoughts in your head. Your objective is to get through this without creating any more conflict than there already is. It’s a movie.

For more information on this question, Ask Betsy’s Team.
Resources

Which aspects of employee discipline should be handled in executive session vs public session?

July 13, 2012

In executive session, your board will discuss the disciplinary issue (or complaint or other personnel issue) and arrive at a consensus about the action you will take (a letter for the employee's file or other disciplinary action). This executive session should be posted under ORS 192.660(2)(b). Then the board will return to public session, make a motion, get a second, and vote. The motion should be something like, "I move the board take the disciplinary action discussed in executive session." Nothing more is said in public. In other words, the final action is taken in public session, without revealing any confidential information. If the board's consensus is to take no action, then the board does not have to make any public statement. However, it is usually a good practice to come out into public session and state that the board is taking no action on the executive-session topic the board has just met about.

For more information on this question, Ask Betsy's Team.

Resources

A complaint has been filed against a staff member which has progressed through the complaint procedure and has been appealed to the school board. The staff member who the complaint is against has requested the complaint be heard by the Board in public session. We anticipate both sides of the issue may have supporters in attendance. After the board reviews the complaint and the superintendent's response, may we go into executive session to deliberate or do we have to do all of that in public session as well?

September 27, 2013

If staff member who is the subject of the complaint has requested the meeting be held in a public session, then the entire meeting is conducted in public session, including the board deliberations. If the Board's attorney is in attendance, the Board would be allowed to meet with the attorney in executive session to discuss the attorney's advice to the board on how to proceed with the complaint. You may want to consider having an attorney present anyway if you think the meeting could get difficult. We have also recommended in some cases to request police presence if there are concerns attendees may become disruptive. You be the judge of how difficult you think it could be. An officer in uniform goes a long way to cool things down. In any case, discussion of the merits of the complaint will still need to be handled in an open session.

We strongly suggest that you read aloud to all in attendance meeting rules which clearly explain that there is no public input or comment at this hearing. Make sure your entire board is in agreement with this. You do not want one of the board members asking for audience response. Also, make sure your board knows they must be EXTREMELY careful with what they say during the public portion. The best advice is for the board members to limit discussion to clarifying questions. Any discussion which takes place in a public session is documented and can ultimately be used at a later date to assist in establishing violations of state and federal law, district policy or provisions of a collective bargaining agreement. You should indicate who speaks, in what order and how much time they have.