

Legally Speaking

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SCHOOLS**

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Public Records

Part II—Is e-mail a public record?

By Tom Wittmer, Assistant School Board Attorney

*I*n October 2000, a reporter from the *St. Petersburg Times* made a public records request for the City of Clearwater to produce all e-mails sent or received in the past year on two employees' computers. In response, the city provided the business e-mails from the computers but withheld the employees' personal e-mails. The *Times* sued the city, alleging that all e-mails on a government-owned computer were public records.

The trial court ruled that the public records law does not apply to personal correspondence unrelated to work stored on a government computer. The Second District Court of Appeal affirmed the trial court and referred the matter to the Supreme Court as an issue of great public importance. On Sept. 11, 2003, the Florida Supreme Court held that employees' "private" or "personal" e-mails do not fall within the definition of public records. See insert below.

Many employees occasionally send or receive personal e-mail messages while at work. Such incidental use is permissible, and the e-mails have nothing to do with the school board's official business. The Supreme Court's ruling means that under the law, a member of the public may not view personal e-mails just by making a public records request.

That does not mean personal e-mail and documents on your district-owned computer never can be viewed by others. Employees should be aware that under **School Board Policy 7.33, Use of Electronic Resources**, the school district has the right to monitor the use of electronic resources, and that "employees do not have an expectation of privacy in their use of electronic resources." The policy does allow for the



Mission Statement

The mission of the School Board Attorney's Office is to provide the highest quality legal services to the Pinellas County School Board and district by ensuring timely and accurate legal advice and effective representation on all legal matters.

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Did you know?

"Public records" is defined in section 119.011 (1) Florida Statutes (2002) as "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, *made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.*"

How Are Policies Adopted?

By Allen Mortimer, Ph.D., Director of Planning and Policy

One of the primary responsibilities of the School Board is to adopt rules for the operation of the school district. These rules are what we refer to as policies and are found in "The Policy Manual of the School Board of Pinellas County, Florida." The **Policy Manual** can be found on the Pinellas County Schools' website in the dropdown menu under "School Board."

The adoption of policy occurs at a public hearing during a School Board meeting and follows statutory requirements for rule development under Florida's Administrative Procedure Act. The policy adoption process may be initiated by the School Board, the Superintendent, or any interested person in or out of the district. Ultimately, a proposed policy is presented to the Board through an agenda item for their approval.

Generally, there are many steps that occur before the School Board votes on final adoption. Most policy amendments presented by the Superintendent are developed by the Superintendent's staff consulting with the School Board Attorney. Some involve a broad range of people and may take months to insure that all views are represented. For example, revisions to the "Code of Student Conduct" start in December in order to get final approval from the School Board in May. Input for the Code is received from principals, teachers, parents and of course, students.

One of the first steps in the development process is to submit a policy amendment request to the Director of Planning and Policy. Depending on the subject, the proposed amendment may be discussed by the School Board at one or more workshops at various points during the process.

The amendment will be put into the

policy amendment format showing ~~words struck through~~ as deletions and words underlined as additions.

The Director of Planning and Policy will send a copy of the proposed amendment to the originator for review and request the division head's approval. The Director of Planning and Policy also will request input from various stakeholder groups (i.e. principals, SACs, PTAs or other divisions or departments such as Management Information Systems). The originator and the Director of Planning and Policy will be listed as contact people to receive input. Based on input received, revisions may be made to the amendment. At some point, the proposed development of the policy (rule) is required by the Administrative Procedure Act to be advertised prior to being submitted to the Board for the first reading.

Next, the Director of Planning and Policy will send the policy amendment to the Board Attorney and Deputy Superintendent for review and then submit the amendment to the next scheduled meeting of the Superintendent's Cabinet. Based on the Attorney's and Cabinet's input, the Superintendent will submit an agenda item regarding the policy amendment to the next School Board meeting for what has come to be known as the "first reading." The Board is requested at the first reading to set a public hearing and authorize the advertisement of that public hearing to consider the amendment to policy.

Based on Board approval, the public hearing (which has come to be known as the "second reading") will be advertised. The proposed amend-



ment is submitted by the Superintendent for final adoption at the public hearing. Because of the requirements of the Administrative Procedure Act, the public hearing normally occurs at the second Board meeting after the first reading.

Anyone interested in the proposed policy can address the Board at the first reading and the public hearing. It is not unusual for the Board to make changes in the proposed policy at both meetings in response to what it hears. After Board adoption, the Director of Planning and Policy will prepare a supplement to the Policy Manual and distribute it to all holders of Policy Manuals. It will also be available on PLACES and the Internet.

The process for the adoption or amendment of School Board policies is one that assures careful consideration of the impact of the policy, adequate notice to the public and all affected parties with multiple opportunities for input from all interested parties before final Board adoption. ■



New Whistle-Blower Policy

By Tom Wittmer, Assistant School Board Attorney

A "whistle-blower" is a person who reveals wrongdoing within an organization to the public or to those in positions of authority. On Aug. 19, 2003, the School Board approved new **Policy 7.35, Whistle-Blower**. The policy is modeled after Florida Statutes and is intended to protect employees of the Board and employees of contractors with the Board from retaliation when they

report certain kinds of information about wrongdoing. "Retaliation" in this policy means an adverse employment action, such as dismissal, discipline or other action that "affects the rights or interests of" the reporting employee.

An employee is protected under this policy if he or she:

- discloses information about wrongdoing in a
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Progressive Discipline

By Jim Barker, Administrator, Office of Professional Standards

P inellas County **School Board Policy 8.25 (1)** states:

"The school district generally follows a system of progressive discipline in dealing with deficiencies in employee work performance or conduct. Progressive discipline may include, but is not limited to, verbal or written counseling or caution, written reprimand, suspension without pay and dismissal. The severity of the problem or employee conduct will determine whether all steps will be followed or a recommendation will

be made for suspension without pay or dismissal."

A good example of progressive discipline is an employee with tardiness problems. If an employee starts coming to work late, the supervisor will meet with the employee to discuss the problem. The employee will explain the reasons for being late. The supervisor will direct the employee to correct the problem. That could be considered a verbal warning. If the employee continues to be late, there will be another meeting. Following that meeting the supervisor could write

the employee a conference summary, letter of caution or directive memo regarding the continued tardiness.

If the employee continues to have tardiness problems, the supervisor will meet and possibly write a letter of reprimand to the employee for tardiness and insubordination for failing to follow a directive to report to work on time. If the problem continues, the employee could face suspension without pay and ultimately dismissal.

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Dear John ...



Q. A student wants to receive credit for community service work toward his Florida Academic Scholars award by working on a Habitat for Humanity project sponsored by his church's youth group. Is this permissible or is it government-sponsored religious activity?

A. To be eligible for a Florida Academic Scholars award, "a student must complete a program of community service work, as approved by the district school board ... which shall include a minimum of 75 hours of service work." The

student is to "identify a social problem that interests him or her" and develop a plan to address the problem.

Working on a Habitat for Humanity project is not a religious activity just because it is sponsored through a church. Building a home for a needy family clearly falls within the statutory requirement of completing a program of "community service work." The School Board will not run afoul of the Establishment Clause of the First Amendment by approving

such community service work even when it is done through a church youth group.

The answer would be different if the request were to receive credit for service to the church by engaging in activities designed to convert others to that particular religion. Evangelical activities may be church service, but it is not considered a "program of community service work" required by the statute for the Florida Academic Scholars award. Approving such church service as satisfying the community service work requirement would be an excessive entanglement by the School Board in religion thus violating the First Amendment Establishment Clause. ■

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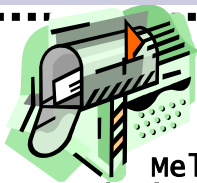
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Public Records

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incidental personal use of computers as long as such use does not interfere with the employee's job duties and performance or with system operations or other system users.

Even though personal e-mail is not a public record just because it is on a government-owned computer, it can become a public record. For example, if an employee is investigated for a violation of the *Use of Electronic Resources policy*, everything on the employee's computer (including personal e-mail and correspondence) becomes a part of the investigation file and becomes a public record when the investigation is concluded. That has been extremely embarrassing for employees who misuse their computers when their intimate correspondence or tax returns maintained on their district computer become public records. ■

Whistle-Blower ...

(Continued from page 3)

- written and signed complaint;
- is requested to participate in an investigation, hearing or other inquiry by a local, state or federal agency;
- refuses to participate in a retaliatory action prohibited by the policy; or
- makes a complaint through the state whistle-blower hotline.

The policy is meant to protect employees who report instances of serious wrongdoing. To be protected, an employee must disclose

- a violation of law, policy, rule or regulation committed by an employee or agent of the Board or independent contractor which violation creates and presents a substantial and specific danger to the public's health, safety or welfare; or
- an act or suspected act of gross mismanagement, malfeasance, misfeasance, gross waste of public funds, suspected or actual Medicaid fraud or abuse, or gross neglect of duty committed by an employee or agent of the Board or independent contractor.

If an employee wishes to report this kind of act or violation, he or she should contact the Board's Office of Professional Standards (OPS). The policy protects and keeps confidential the name and identity of any person who reports wrongdoing to OPS under the policy. However, any employee who discloses information known by the employee to be false, or who reports an act or violation that she or he committed, is not protected.

After making a protected report, if an employee believes that he or she has been retaliated against in a way that is prohibited by the policy, then she or he may file a complaint with OPS. That office will investigate the complaint and make a decision as to whether the employee was subjected to a retaliatory action. After a decision by OPS, if the employee is not satisfied with the result, he or she may bring a civil action in court. ■

Progressive Discipline

(Continued from page 3)

The employee will be afforded appropriate due process during each of the disciplinary steps and is entitled to representation.

With some offenses all of the progressive discipline steps may not be followed. For example, if an employee was found to have had a sexual relationship with a student, the resulting discipline will be dismissal without the other progressive steps being taken.

Progressive discipline is designed to change an employee's behavior so that the employee can continue as a productive employee of the district. It is in the best interest of the district and the employee to allow an opportunity for the employee to correct problem behavior unless, of course, the problem behavior is so severe that it warrants immediate termination. ■