

Resignations and Terminations: What's a County Board to do?

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Resignations

- ◆ A resignation is "a '[f]ormal renouncement or relinquishment' of office made with the intention of relinquishing the office and accompanied by 'an act of relinquishment.'
- ◆ A resignation requires both an intent to resign and an affirmative act of relinquishment.

Resignations

◆ Standard for withdrawal and acceptance of resignation:

- Davis v. Marion County Engineer (1991), 60 Ohio St.3d 53
 - ◆ A public employee may rescind or withdraw a tender of resignation at any time prior to its effective date, so long as the public employer has not formally accepted such tender of resignation
 - ◆ Acceptance of a tender of resignation from public employment occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, that clearly indicates to the employee that the tender of resignation is accepted by the employer

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Resignations

◆ Davis:

- Crucial factor is manner of acceptance
- Acceptance of a tender of resignation: more than simply the receipt of the letter of resignation
- Acceptance should be in writing, and should encompass some type of affirmative act that clearly indicates that the tender of resignation is accepted by someone empowered by the public employer to do so
- Absent acceptance in this manner, the public employee should be free to withdraw his or her tender of resignation prior to its purported effective date

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Resignations

◆ Davis:

- Acceptance does not have to be in writing, but, if not, face a high burden of proof
- Clear and convincing evidence

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Resignations

◆ Acceptance of resignation:

- Does it have to be communicated to employee?
 - ◆ No
 - ◆ Law only requires affirmative action to be taken to accept
 - Triplett v. ODRC (10th Dist. 1999), 1999 Ohio App. LEXIS 5526; Davidson v. Hanging Rock (4th Dist. 1994), 97 Ohio App.3d 723

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Resignations

◆ Communication to employee:

- *Davis* requires nothing more than “some type of affirmative action, preferably in writing, that clearly indicates to the employee” that the resignation has been accepted
 - ◆ Davidson
- Cases seem to revolve more around receipt by than communication to the employee
 - ◆ Neither required

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Resignations

◆ Refusal to accept withdrawal:

- What happens if an employee seeks to withdraw his/her resignation before its effective date?
 - ◆ Assuming already accepted and appointing authority does not accept resignation, resignation has the effect of a discharge and employee can appeal to SPBR
 - Davis; Triplett

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Resignations

◆ Recommendations

- Upon the tender of any resignation, for any reason, the Superintendent, or his/her designee, should immediately issue a letter to the employee accepting the resignation
- The acceptance letter should be delivered to the employee immediately, with acknowledgement of receipt, either by certified mail, return receipt requested, electronic mail, hand delivery, or all of the above

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Resignations

◆ Recommendations

- The county board's Human Resources Director, or equivalent, should issue a letter to the employee, explaining the exit procedure and benefits to be paid out to the employee, upon the effective date of the resignation
- If the employee seeks to rescind the resignation, the Superintendent, his/her designee, or the Human Resources Director, or equivalent, should reject, in writing, the rescission and refer to the previous letter of acceptance

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Terminations

- ◆ Not discussing disciplinary procedure governed by Ohio law or collective bargaining agreement
- ◆ Rather, discussing certain actions that, as an employer, should take when considering termination of an employee
 - Applicable to all employees
 - Designed to bolster defense in appeal or wrongful termination lawsuit

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Terminations

- ◆ Documentation
- ◆ Deliberation
- ◆ Decisive action
- ◆ Consideration

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Terminations

◆ Documentation:

- Includes a number of things
- Evidence of notice to employee of what is prohibited
 - ◆ Handbook
 - ◆ Policies
 - Received and reviewed by employee

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Terminations

◆ Documentation:

- Evidence of performance issues
 - ◆ Evaluations
 - ◆ Discipline
 - ◆ Plans of correction and follow-up
 - ◆ Performance issues even where discipline not imposed

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Terminations

◆ Documentation:

- Should be timely and accurate
- May be difficult to provide an honest appraisal of an employee but necessary to justify termination or non-renewal later
 - ◆ Don't need a reason for non-renewal but what if employee files a charge with OCRC/EEOC
 - ◆ By doing honest evaluation and documenting performance issues as they arise helps out the case
 - Same for probationary employees

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Terminations

◆ Deliberation:

- Ensure that termination is the proper mode of discipline.
- What happened and whose at fault?
- Was there a misunderstanding?
- Is there anything else at play?
 - ◆ Sexual harassment, personality conflict

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Terminations

◆ Deliberation:

- Has the employee been disciplined before?
- Are there any mitigating factors?
- How strong is the evidence and witnesses?

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Terminations

◆ Deliberation:

- Termination for performance:
 - ◆ Before you pull the trigger, look at the performance evaluations of the supervisors:
 - What do they say? Do they support termination for performance issues?
 - Anything else in the file? Again, documenting performance issues can only support basis for termination

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Terminations

◆ Deliberation:

- Termination for misconduct:
 - ◆ Was employee aware that behavior was prohibited by policy?
 - ◆ Previous record of discipline for same offense?
 - ◆ Other discipline?
 - ◆ Audience that will review:
 - Arbitrator, SPBR or Board, or public

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Terminations

◆ Decisive Action:

- Take action as soon as possible (immediately is best), especially if employee is on paid admin leave
- Don't let the employee hang around (until resign or retire)
 - ◆ Too problematic
 - ◆ Undermines position on termination

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Terminations

◆ Decisive Action:

- Protect the Board, its employees, and clients
 - ◆ Limit employee's access to files, computers, and facilities
 - Change passwords and locks (if necessary)
 - ◆ Advise third parties of employee's termination, if necessary, to avoid confusion
 - Be truthful and limit to necessary information

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Terminations

◆ Decisive Action:

- Privately, notify the employee of his/her termination, ask him/her to gather his/her personal effects, return any county board property, and leave the premises
 - ◆ Always have one or two staff present
 - ◆ Get passwords and equipment (cell phone/laptop) if applicable
- Sometimes, this is simply not practicable

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Terminations

◆ Consideration:

- Only applies if willing to allow employee to resign
- Getting the employee to resign instead of being fired alleviates many problems, most of which involve having to deal with appeal or lawsuit

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Terminations

◆ Consideration:

- Depending upon the circumstances, may be willing to pay severance as part of resignation
- Do so only with execution of release for the Board and its members and employees
- Resolves employment completely and important when dealing with a problem employee

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Terminations

◆ Consideration:

- Would not advocate offer of resignation, release, and severance in every instance
- Resignation gets rid of an employee without right to appeal to SPBR, but employee could still file lawsuit, claiming he was forced to resign
 - ◆ Unlikely under the worst circumstances for the employee
 - ◆ Employee would rather quit than be discharged

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Terminations

◆ Consideration:

- Payment of severance in connection with a release, however, ensures some finality for the Board
 - ◆ Employee cannot be forced to waive right to payment of minimum wage or overtime pay, receipt of unemployment compensation, or file a charge of discrimination with OCRC or EEOC

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Questions ???

Thanks for attending!

**OHIO ASSOCIATION OF COUNTY BOARDS
OF MENTAL RETARDATION
AND DEVELOPMENTAL DISABILITIES**

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**Resignations and Terminations:
What's a County Board to do?**

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ISSUES

How should a county board of MR/DD handle a resignation of an employee to ensure that the resignation is effective? Apart from procedures required by Ohio law, contract, or a collective bargaining agreement, what practical steps should a county board of MR/DD take when terminating an employee? This memorandum will tackle these questions from a legal standpoint and provide some helpful tips.

DISCUSSION

A. Resignations

1. Manner and method of tender and acceptance

An employee comes to you one day and says he/she has to resign for personal reasons. You ask whether the employee has thought through the consequences and to reconsider; the employee remains steadfast on resigning. The employee submits a letter of resignation. You ask for, and the employee offers three (3) possible replacements for his/her position. You interview these three individuals plus six others. The employee subsequently seeks to withdraw his/her resignation verbally but you refuse to allow the employee to do so. The employee then submits a letter, withdrawing his/her resignation and you refuse to allow such withdrawal. Is the employee's resignation effective or has it been properly rescinded? The answer will surprise you.

A resignation is "a '[f]ormal renouncement or relinquishment' of office made with the intention of relinquishing the office and accompanied by 'an act of relinquishment.'" State ex rel. Dwyer v. Middletown (1988), 52 Ohio App.3d 87, 92, quoting Black's Law Dictionary (5th Ed.1979) 1177. Thus, a resignation requires both an intent to resign and an affirmative act of relinquishment. Id.

The Supreme Court of Ohio has set forth the following standard regarding acceptance of resignations:

A public employee may rescind or withdraw a tender of resignation at any time prior to its effective date, so long as the public employer has not formally accepted such tender of resignation.

Acceptance of a tender of resignation from public employment occurs where the public employer or its designated agent initiates some type of affirmative action, preferably in writing, that clearly indicates to the employee that the tender of resignation is accepted by the employer. Davis v. Marion County Engineer (1991), 60 Ohio St.3d 53, syllabus ¶¶1 and 2.

Surprisingly, on the facts set forth above, the Supreme Court, in Davis, reversed the judgment of the court of common pleas and court of appeals and upheld the decision of the State Personnel Board of Review that the employee had made a timely resignation. This was a case of first impression for the Court, and despite announcing what appeared to be a clear statement of the law, the Court seemed to not apply that clear statement of law to the facts at hand. The Court stated:

In our view, the crucial factor in determining the legal effectiveness of a withdrawal of resignation from public employment prior to its effective date is the manner of acceptance conveyed by the employer to the employee. In this vein, we are of the opinion that acceptance of a tender of resignation from public employment should be more than simply the receipt of the letter of resignation. Acceptance of a resignation should be in writing, and should encompass some type of affirmative act that clearly indicates that the tender of resignation is accepted by someone empowered by the public employer to do so. Absent acceptance in this manner, the public employee should be free to withdraw his or her tender of resignation prior to its purported effective date. (Citations omitted).

While the Court stated a preference for the tender of a resignation, acceptance of a resignation, or withdrawal of a resignation prior to acceptance to be set forth in writing, it stated that such actions could be accomplished orally. It nevertheless placed a high burden on cases involving an oral tender, acceptance or withdrawal of resignation: clear and convincing evidence would be necessary to support the validity of any of the foregoing actions if performed orally.

Yet, despite the affirmative actions of the employer in Davis, which clearly indicated an acceptance of the employee's resignation, the Supreme Court, without any explanation or analysis, found that the employee had timely rescinded his resignation.

2. Communication of acceptance

Does acceptance require communication to the employee? According to two courts of appeal, the answer is no. See Triplett v. ODRC (10th Dist. 1999), 1999 Ohio App. LEXIS 5526; Davidson v. Hanging Rock (4th Dist. 1994), 97 Ohio App.3d 723. In each case, the court rejected the employee's argument that the acceptance of the resignation by the appointing authority was not effective because it was not personally communicated to the employee.

In Triplett, the employee was a captain at the Allen Correctional Institution. After submitting a written resignation on October 3, 1996, the employee sought to withdraw his resignation on October 11, 1996 when he met with the warden. Prior to the meeting with the warden, the following occurred:

- (1) At approximately 8:00 a.m., October 11, 1996, the warden dictated and signed a letter accepting the employee's resignation;

(2) A copy of the letter was delivered to the employee's residence at approximately 10:30 or 11:00 a.m.;

(3) An attempt to personally deliver the letter to the employee at the residence failed but the letter was affixed to the side door of the residence, adjacent to the driveway;

(4) A copy of the letter was mailed by regular U.S. mail to the employee's residence;

(5) The employee and the warden had no contact from the time the employee submitted his letter of resignation until approximately 4:30 p.m. on October 11, 1996; and

(6) At their meeting in the afternoon of October 11, 1996, the warden provided the employee a copy of the acceptance letter prior to the employee informing the warden that the employee wanted to revoke his resignation and prior to the employee providing the warden with a letter revoking his resignation.

In Davidson, the employee submitted a written letter on March 27, 1990, indicating he was making an application for retirement. The village council and village mayor construed this as a letter of resignation, and accepted the resignation at an April 2, 1990 council meeting. On April 12, 1990, the employee delivered a letter to the village clerk, withdrawing his application for retirement.

In Davidson, the 4th District Court of Appeals found that the Supreme Court did not require the acceptance be communicated to the employee. Rather, under Davis, the appointing authority is only required to take affirmative action to accept the resignation. The court further focused on the circumstances at hand to indicate that the acceptance was sufficient to prevent the withdrawal of the resignation:

We find that when the village council voted to accept appellant's resignation, the village council acted affirmatively to accept the resignation. *Davis* requires nothing more than "some type of affirmative action, preferably in writing, that clearly indicates to the employee" that the resignation has been accepted. The village council's vote, duly taken in a public meeting, satisfies the *Davis* requirement. We question whether the village council could have "acted affirmatively" without voting on the matter.

Appellant argues that because the *Davis* opinion uses the word "conveyed" in the phrase "the manner of acceptance conveyed by the employer to the employee," the village had a duty to communicate its acceptance of the resignation directly to appellant. We find no merit to

appellant's argument for two reasons. First, we note the *Davis* syllabus does not require acceptance of a resignation to be conveyed or communicated directly to the employee. Second, we note a major distinction between *Davis* and the case *sub judice*. In *Davis*, the public employee worked for the county engineer. County engineers do not generally conduct business in meetings open to the public. In the case *sub judice*, however, appellant worked directly for the village. Villages and other political subdivisions conduct their business in public and record their actions in records open to the public. See, e.g., R.C. 731.17. When the village met and voted to accept appellant's resignation, the village conveyed its acceptance of appellant's resignation not only to appellant, but to the public as a whole. We find that *Davis* requires nothing more.

Citing both Davis and Davidson, the 10th District Court of Appeals in Triplett found that the actions by the warden was sufficient affirmative action to constitute acceptance under Davis:

While merely the drafting of the letter alone may not constitute an acceptance under *Davis*, there was reliable, probative, and substantial evidence adduced at the hearing to support the ALJ's findings that Warden Leonard initiated some type of affirmative action indicating to appellant that his resignation had been accepted. In particular, there was considerable evidence that there was an attempt to deliver the letter to appellant personally at his residence in the morning of October 11, 1996, and that, when this attempt failed, the letter was affixed to his door.

In Triplett and Davidson, the appointing authorities were successful in accepting the resignations. While the moral of the story might be that communication to the employee of the acceptance of the resignation is not necessary, we recommend that the acceptance be conveyed to the employee at some point. The warden in Triplett did communicate the acceptance to the employee; it simply was not received. In Davidson, the public act of voting to accept the resignation was not only an affirmative action to accept the resignation, but public notice of such acceptance. Notwithstanding these decisions, once accepted, you should communicate the acceptance to the employee.

3. Consequence of refusal to rescind resignation

What happens if you refuse to allow an employee to withdraw his/her resignation? According to at least one court, the employee has the right to appeal to the State Personnel Board of Review. See Davis, *supra*; Triplett, *supra*, ("Consequently, appellee's refusal to recognize appellant's alleged timely rescission is the equivalent of a discharge, a matter clearly within the jurisdiction of SPBR under R.C. 124.03(A). Thus, SPBR was authorized to hear appellant's appeal"). Thus, if you refuse to allow an employee to rescind his/her resignation, he/she arguably has a right to appeal to SPBR. As in Davis and Triplett, SPBR will be the first place to defend the decision to not accept the employee's rescission of his/her resignation.

4. Recommendations

The facts and circumstances are going to control whether an appointing authority has properly accepted a proffered resignation, such that the employee cannot rescind his/her resignation. Given the Supreme Court's holding in Davis, we suggest the following:

- Upon the tender of any resignation, for any reason, the Superintendent, or his/her designee, should immediately issue a letter to the employee accepting the resignation.
- The acceptance letter should be delivered to the employee immediately, with acknowledgement of receipt, either by certified mail, return receipt requested, electronic mail, hand delivery, or all of the above.
- The county board's Human Resources Director, or equivalent, should issue a letter to the employee, explaining the exit procedure and benefits to be paid out to the employee, upon the effective date of the resignation.
- If the employee seeks to rescind the resignation, the Superintendent, his/her designee, or the Human Resources Director, or equivalent, should reject, in writing, the rescission and refer to the previous letter of acceptance.

B. Terminations

Despite the excitement and hope that occurs when an employer hires a new employee, not every employment relationship works out. What do you do when things turn sour, and you have to make the unfortunate decision to terminate a relationship with an employee? We will examine some practical actions to take in this memorandum. **This memorandum will not address the procedural steps required by Ohio law for a county board of MR/DD to terminate a classified civil servant or a management employee, which are governed by either Ohio law or a collective bargaining agreement. Rather, it will examine the actions the employer should take leading up to termination of an employee.**

Regardless of whether the employee is a classified civil servant or a management employee, a county board should take certain steps when making the decision to terminate an employee. While the appointing authority's heart may be pure, without a solid documented procedure, his/her motives are subject to attack. Thus, a county board should take into account the following when terminating an employee:

(1) Documentation;

(2) Deliberation;

(3) Decisive action; and

(4) Consideration.

1. Documentation.

Documentation should start well in advance of the termination stage. In fact, it should start at the hire stage. Depending on the size and number of employees, a county board should have, at least, a rudimentary employee handbook, providing notice to employees of the county board's policies and expectations. Employees should be given a copy of the handbook and required to sign for receipt of the handbook. During the course of employment, the county board should have a meaningful evaluation system, at least annually, if not more frequently. Even for management employees subject to non-renewal, these documentary aspects are the first line of defense and protection to the county board in the termination setting.

Of course, when the county board disciplines an employee, documentation of such discipline, plans of correction, and follow-up on those plans should be placed in the employee's personnel file. Even when an employee is not disciplined, performance issues should be addressed in writing (before, during, and after the evaluation process). Although progressive discipline is preferred, but not necessarily required, not every infraction will be viewed as a terminable offense by a jury, arbitrator, or administrative hearing officer, should one get the chance to opine on the matter. Documentation of any discipline provided, including the violations of county board policy that result in termination, will help the county board defend against any challenge by the employee to his/her termination, even if that amounts only to a claim for unemployment benefits.

2. Deliberation.

Before terminating an employee, a county board should ensure that termination is the proper mode of discipline. Disagreements with supervisors may occur often, tempers may run hot, and, at first glance, the employee's behavior may look egregious. But is it? Who was at fault? Was there a misunderstanding? Has the employee been disciplined before? Are there any mitigating factors? What other facts are at play? These questions are crucial because while, in most circumstances, the county board will incur no liability for terminating an employee, there are odd situations where an employee's actions are caused by other factors of which the county board either is unaware (sexual harassment from a supervisor or co-worker) or has chosen to ignore (disability).

When an employee is being fired for performance reasons, the county board should review the employee's personnel file. Check the evaluations and supervisor comments. Does the employee's performance evaluations or other documentation support or discredit the basis for termination? Even if the latter, a few good evaluations, especially after the passage of time, do not preclude termination of an employee whose

performance has diminished. Documentation of performance problems while they occur can help to defeat any claim that the basis for termination is pretext for some other, unlawful motive. When termination is based upon employee misconduct, the employer's decision-making process is more focused on whether the employee was aware that his/her actions violated the county board's policies, if applicable, or the mores of a reasonable person.

3. Decisive Action.

What this means is that once the county board has determined that an employee should be terminated, it should occur as soon as possible, if not immediately. While it might be practicable for a county board to terminate an employee but retain them for a couple of weeks to finish up a project, the damage that a disgruntled employee can cause often outweighs the benefit of retaining the employee for this short period of time. It also undermines the county board's argument that the employee was so incompetent, dishonest, or harmful to its operations that termination was appropriate. This is not the case where the employee gives notice that he/she is moving because his/her spouse got transferred to another state. An employee that has been terminated may have an axe to grind, and, depending upon the specific situation, a county board puts its employees, its clients, and itself at risk by allowing the employee to continue working beyond the termination notice.

Once a county board has made the decision to terminate an employee, it should take preventive steps to protect itself even before notifying the employee. For example, the employee's access to equipment, supplies and records should be restricted as soon as possible after the termination, if not before. Locks should be changed, if necessary, and key personnel should be informed.

After taking these initial steps of prevention, the county board should then, courteously and in a manner designed to protect the employee from embarrassment, notify the employee of his/her termination, ask him/her to gather his/her personal effects, return any county board property, and leave the premises. Generally, arrangements can be made for an employee to clean out his/her personal space and leave when other co-workers are not present. Sometimes, this is simply not practicable. In any event, a county board representative should be present to avoid any disruptions in the workplace or to the county board's operations. The county board should obtain all county board property at that time, or arrange for its return. Any passwords that the employee has with respect to electronic equipment should be provided to the county board and changed immediately. Depending upon the employee's position, employees, clients, providers, and vendors should be notified of the employee's separation from the county board and that the employee no longer has authority to speak for or bind the county board in any manner. Such communications should be truthful and limited to the information necessary.

4. Consideration.

A contractual term, consideration is something that is done or promised in return for a contractual promise. In the context of termination, it means this: if a county board pays severance compensation to an employee, who has agreed to resign rather than be terminated, it should receive some consideration in return. For the county board, this consideration constitutes a valid release by the employee of any legal claims he/she may have against the county board. While an employee cannot agree to waive his/her right to payment of minimum wage or overtime pay, receipt of unemployment compensation, or file a charge of discrimination, he/she can waive a plethora of rights under federal, state, and local law. Such a release can offer incredible value to a county board that is facing a troublesome employee who will dispute the termination. By paying severance to an employee without such a release, the county board may simply be funding the employee's wrongful termination lawsuit.

Termination of an employee is not something a county board wants to face, but it is often necessary. Preparing for a termination ahead of time puts the county board in a better strategic position once it pulls the trigger on an employee. In fact, with appropriate documentation, counseling, and discipline during the course of an employee's employment, a termination may never occur.