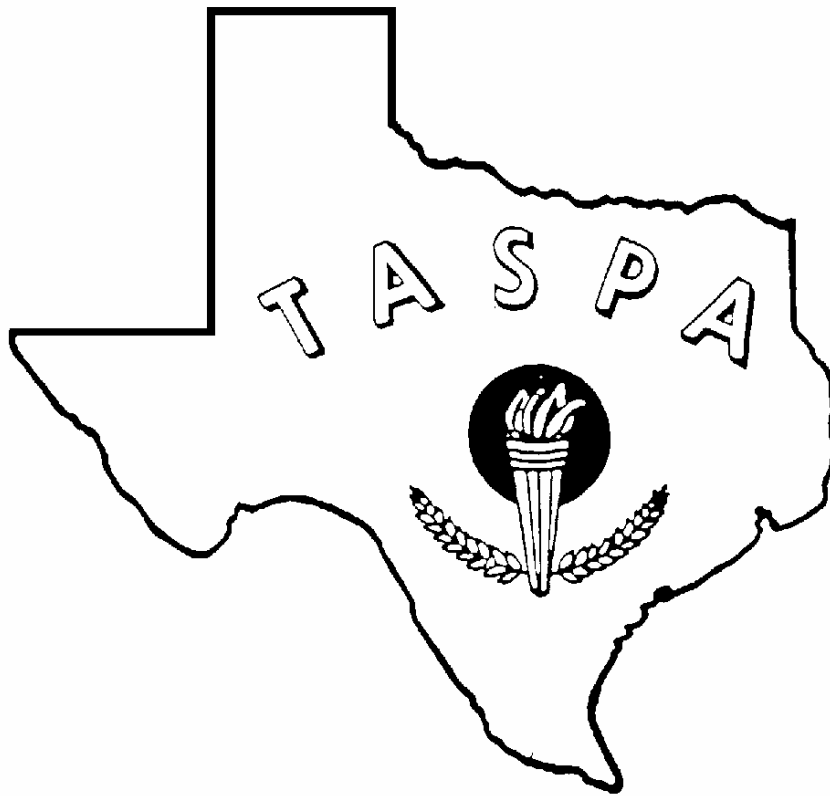


Your October 2002

TASPA

SPECIAL REPORT # 32

is inside...



Your letter from the Director and information on upcoming events are printed on the inside front and back of this cover sheet.



Texas Association of School Personnel Administrators

Dr. Alejandra (Alex) Martin, Executive Director

406 East 11th Street Austin, TX 78701

Phone (512) 494-9353 Fax (512) 494-9354

TASPA@austin.rr.com TASPA Website: www.taspa.org

Officers

President

Gilbert Vasquez
Director for Elementary Education
Ector County ISD
P.O. Box 3912
Odessa, TX 79760-3912
(915) 334-7154; Fax (915) 332-0468

President Elect

Carrie Durley
Exec. Dir. of Human Resources
Aldine ISD
14910 Aldine Westfield Road
Houston, TX 77032-3099
(281) 985-6310; Fax (281) 985-6474

First Vice President

Bob Presley
Asst. Supt. HR/Admin.
Hays Consolidated ISD
21003 IH 35
Kyle, TX 78640-4745
(512) 268-2141; Fax (512) 268-2147

Second Vice President

Sue Sansom
Assoc. Supt. for Personnel Services
Judson ISD
8012 Shin Oak Drive
San Antonio, TX 78233-2413
(210) 659-9608; Fax (210) 659-9734

Secretary

Jed N. Reed
Assistant Director of Personnel
Lewisville ISD
P.O. Box 217
Lewisville, TX 75067-0217
(972) 539-1551; Fax (972) 539-0239

Immediate Past President

Dr. Mary Hopkins
Executive Director of Personnel
Carrollton-Farmers Branch ISD
1445 N. Perry
Carrollton, TX 75006-6134
(972) 466-6158; Fax (972) 323-5765

District Representatives

District I

Michael Briones
Director for Secondary Personnel
Corpus Christi ISD
P.O. Drawer 110
Corpus Christi, TX 78403-0110
(361) 844-0247; Fax (361) 886-9057

District II

Richard Lane
Asst. Supt. for Human Resources
Clear Creek ISD
P.O. Box 799
League City, TX 77574-0799
(281) 338-5888; Fax (281) 338-5931

District III

Dr. David O'Neill
Asst. Supt. for Human Resources
Georgetown ISD
603 Lakeway Drive
Georgetown, TX 78628-2843
(512) 943-5000; Fax (512) 943-5002

District IV

Richard L. Valenta
Director of Personnel Services
Birdville ISD
6125 E. Belknap
Haltom City, TX 76117-4296
(817) 547-5751; Fax (817) 831-5721

District V

Edgar A. Dillard
Director of Human Resources
Wichita Falls ISD
1104 Broad Street
Wichita Falls, TX 76307-7533
(940) 720-3281; Fax (940) 720-3220

District VI

Marcia Brown
Director of Personnel
El Paso ISD
6531 Boeing Drive
El Paso, TX 79925-1008
(915) 779-4120; Fax (915) 779-4280

October 14, 2002

Dear TASPA Member:

Enclosed is your October Special Report, "Giving and Obtaining Employee References", which was presented by Richard A. Morris at the TASPA Summer Conference July 18, 2002. Since the presentation was so well received, we felt other members who could not attend the session would value having the written document.

Please let us know if there are other topics or past conference sessions you would like to see in a special report. Also, if you would like to submit or write a document on a topic which you feel would be a valuable resource to other TASPA members, please email a copy of the text to TASPA@austin.rr.com for consideration.

The TASPA office has new contact information: Phone (512) 494-9353, Fax (512) 494-9354, and email at TASPA@austin.rr.com. The physical and mailing address remain the same, at 406 East 11th Street, Austin, TX 78701. Pictures of the recently furnished TASPA Resource Room will be included in the November Update.

Best,

Dr. Alejandra (Alex) Martin
Executive Director



UPDATE

Texas Association of School Personnel Administrators

Special Report No. 32

October

2002

GIVING AND OBTAINING EMPLOYEE REFERENCES

By Richard A. Morris, Feldman & Rogers, L.L.P.
5718 Westheimer, Suite 1200, Houston, Texas 77057
Telephone: (713) 960-6000, Facsimile: (713) 960-6025

I. OBTAINING REFERENCES AND CONDUCTING BACKGROUND CHECKS

Obtaining complete and accurate information about prospective employees is essential in the hiring process. Without a thorough employment history, school administrators cannot make sound hiring decisions.

A. Applications, Service Records, and Transcripts

All applications for employment should require information about the prospective employee's history and references for each employer listed. Language should also be included in the applications providing that the prospective employee grant permission for a school official to contact former employers and references as well as language releasing the District from any liability.

In addition to the application for employment, as it relates to teachers or administrators, school districts typically require a copy of the teacher's or administrator's service record and college transcripts. Pay attention to dates of employment. Teachers and administrators who leave in the middle of the school year may require additional scrutiny.

B. Criminal History Records Checks

1. Optional, when hiring many employees
 - a. A school district may obtain criminal history record information from any law enforcement or criminal justice agency about a *prospective* employee or volunteer.

- b. A district may also obtain criminal history record information that relates to a current volunteer or employee of the district or an employee of a person with whom the district contracts, if the employee has or will have continuing duties related to the contracted services, and the duties will be performed on school property or an another location where students are regularly present.

TEX. EDUC.CODE § 22.083.

- c. Applications for employment should contain specific questions regarding applicants' criminal histories. For example, the prospective employee should be asked: "Have you ever pled guilty or *nolo contendere* (no contest) to, or been convicted of a felony or a misdemeanor involving moral turpitude, regardless of the disposition?"

Offenses involving "moral turpitude" are those with elements of dishonesty, fraud, deceit, misrepresentation, deliberate violence, or are contrary to good morals.

2. Mandatory, when hiring bus drivers

A school district that contracts for transportation services must obtain from any law enforcement or criminal justice agency all criminal history record information that relates to:

- a. a person employed as a bus driver by the contracting entity; or,
- b. a person the contracting entity intends to employ as a bus driver.

If the district obtains information that a person who works for, or has applied for employment with, the contracting entity has been convicted of a felony or a misdemeanor involving moral turpitude, the district shall inform the chief personnel officer of the contracting entity that that person may not drive a bus on which students are transported.

TEX. EDUC. CODE § 22.084.

3. Current employees

- a. A school district is entitled to obtain from the Department of Public Safety, no more than twice each year, criminal history record information that it is required or authorized to obtain.
-

- i. “Criminal history record information” means information collected about a person by a criminal justice agency that consists of identifiable description and notations of arrests, detentions, indictments, information, and other formal criminal charges and their dispositions. The term does not include identification information, including fingerprints, or driving records.
- ii. Such information may not be disclosed to anyone other than the person who is the subject of the information, the Texas Education Agency, the State Board for Educator Certification, or the chief personnel office of the transportation company, if the information is obtained in relation to the school district’s contract for transportation services.

TEX. GOV’T. CODE § 411.097

Note: Given the restrictions on disclosure, school officials in possession of criminal history record information that is obtained for the “district” should reveal this information to other officials within the district only on a need-to-know basis.

- b. A school district may discharge an employee if the district obtains information that the employee has been convicted of a felony or of a misdemeanor involving moral turpitude that the employee did not disclose to the State Board for Educator Certification (SBEC).

TEX. EDUC. CODE § 22.085.

- i. SBEC defines a “reported criminal history” as “information about an arrest, indictment, prosecution, conviction, or other disposition by the criminal justice system”. Probation and deferred adjudication, SBEC notes, are party of an individual’s reported criminal history. See SBEC’s website for more information (www.sbec.state.tx.us).

- ii. In addition to what appears on the reported criminal history, SBEC should be notified when certain misconduct results in an employee's termination or resignation. (See D.3)

 - c. Contracts often contain language such as:

“False statements, misrepresentations, omissions of requested information, or fraud by Employee in or concerning any required records or in the employment application may be grounds for discharge. Employee hereby represents that he/she has made written disclosure to the District of all instances in which he/she has pled guilty or *nolo contendere* (no contest) or been convicted of a felony or a misdemeanor involving moral turpitude, regardless of the disposition (i.e., an actual sentence, a suspended sentence, deferred adjudication, probation, etc.)”

An employee who has falsified the employment action may, pursuant to such language, be terminated.

 - d. Employees (at-will or contractual) may be subject to disciplinary action, up to and including dismissal, for similar misrepresentation. Adverse employment decisions may also be based on criminal history information in the absence of any misrepresentation.
 - i. A district terminated a teacher when it learned of his act of domestic violence (striking his wife with a rubber hose). The commissioner upheld the termination, noting that the teacher's act involved moral turpitude, caused him to lose moral authority, and was directly related to the profession of teaching. Moreover, the employee did not inform the district of his criminal conduct as required by local policy. *Moten v. Dallas Indep. Sch. Dist.*, Dkt No. 131-R2 399 (Comm'r Educ. 1999).

 - ii. On his application, an employee revealed that he had a felony conviction for driving while intoxicated (DWI). The principal did not review the application, however, and hired the man. Although the district ran background checks on all applicants, the DWI did not show up on the check run in 1992. In 1994, the employee was arrested for another DWI violation and placed on probation and spent nine days in jail.
-

His contracts required that he report felony convictions or offenses involving moral turpitude, but he did not. The district terminated the employee, and the commissioner agreed that the past felony conviction and recent arrest for violating a term of his probation constituted good cause for termination.

Masey v. Paris Indep. Sch. Dist., Dkt No. 137-R2-399 (Comm'r Educ. 1999).

4. Restrictions on use
 - a. Criminal history record information is for the exclusive use of the authorized recipient of the information and may be disclosed only if, and only to the extent authorized or directed by the Texas government code or other law or order of a court.
TEX. GOV'T. CODE § 411.084.
 - b. A person commits an offence if the person knowingly or intentionally obtains criminal history record information in an unauthorized manner, uses the information for an unauthorized purpose, or discloses the information to a person who is not entitled to the information.
TEX. GOV'T. CODE § 411.085.
 - c. A superintendent is required to promptly notify the State Board for Educator Certification (SBEC) in writing if the superintendent obtains information or has knowledge of information showing that an applicant for or holder of a teaching certificate has a reported criminal record. TEX. EDUC. CODE § 22.083. A school district or a school district employee is not liable for making such a report. TEX. EDUC. CODE § 22.086.

C. Background checks are advisable.

1. A girl was raped by a school custodian after school, and her parents sued the school district. Among their claims was one alleging a failure to conduct an adequate check of employees' criminal histories. The Fifth Circuit Court of Appeals declined to hold the district liable for not conducting background checks but did point out that the U.S. Supreme Court has held that failure to adequately scrutinize an applicant's background could, in some circumstances, form the basis for liability. *Doe v. Hillsboro Ind. Sch. Dist.*, 113 F.rd. 1412 (5th Cir. 1997).

2. A sheriff hired a deputy without adequately reviewing the deputy's background (he had pleaded guilty to various driving infractions and misdemeanor assault and battery). A woman sued the county, alleging that the county should be liable for the injuries she incurred when the deputy arrested her, because the sheriff had not adequately reviewed the deputy's background. The U. S. Supreme Court did not hold the county liable but left the possibility open: If evidence were presented that adequate scrutiny of the deputy's history would have led a reasonable policymaker to conclude that the plainly obvious consequence of the hiring decision would deprive another of his or her federally protected rights, the county could be held liable. *Board of County Commr's of Bryan County v. Brown*, 117 S.Ct. 1382 (1997).

D. Practical pointers for conducting reference and background checks

- Review the employee's service record.
- Contact at least the three most recent employers listed on the application.
- Record notes of telephone references.
- Request the applicant provide evaluations or request consent to obtain them.
- Conduct background checks or seek additional information when information on applications or from other sources is inconsistent.
- Prepare a list of standard questions to ask references. One of these should include whether the reference would rehire the person.
- Although workers' compensation records may be obtained after an offer of employment has been made, an applicant's worker's compensation history should not be considered when making a hiring decision.

II. PROVIDING REFERENCES AND OTHER ACTIONS ONCE THE EMPLOYMENT RELATIONSHIP ENDS

Giving and receiving references is an important aspect of employing personnel. Providing a reference that gives the type of information you would like to receive is legally and ethically sound. However, administrators must also be mindful of potential areas of liability.

A. The Law

1. Defamation Claims

Defamation claims are the most common claims asserted by an employee challenging a negative reference. To establish a claim for defamation, a plaintiff must show:

- a. The statement was published, meaning that it was communicated orally, in writing, or in print to a third party capable of understanding the statement and that that third party did understand the statement;
- b. The statement caused injury to the person's reputation; and
- c. The statement was made with malice, meaning the person made the statement with knowledge that it was false or with reckless disregard as to its truth. Truth, therefore, is a complete defense to defamation.
TEX. CIV. PRAC. & REM. CODE § 73.005.

Defamation claims are unlikely to succeed if references contain objective statements that are made in good faith.

2. Immunity Specific to References

Since 1999, Texas law has provided reassurance to employers.

- a. Upon request, an employer may disclose information about a current or former employee's job performance to a prospective employer of the current or former employee.
- b. An employer who discloses information about a current or former employee is immune from civil liability for that disclosure or any damages proximately caused by that disclosure unless it is proven by clear and convincing evidence that the information disclosed was known by that employer to be false at the time the disclosure was made or in reckless disregard for the truth or falsity of the information disclosed.
- c. For the purposes of this law, "known" means actual knowledge based on information relating to the employee, including any information maintained in a file by the employer on that employee. The law extends to a managerial employee or other representative of the employer who is authorized to provide and who provides information on behalf of the employer.
TEX. LABOR CODE § 103.005.

3. General Professional Immunity

The Education Code also provides immunity from liability for professional employees.

Section 22.051 of the Texas Education Code provides that a professional employee of a school district is not personally liable for any act that is:

- a. incident to or within the scope of the duties of the employee's position of employment; and
- b. involves the exercise of judgment or discretion on the part of the employee.

Immunity is not available:

- a. in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students; or,
- b. when the operation, use, or maintenance of any motor vehicle is involved.
TEX. EDUC. CODE § 22.051.

B. Provide neutral, objective, and accurate references.

1. Don't "Hide the Ball". Although no law requires employers to give references, once the responsibility is accepted, it must be carried out with reasonable care. While educators have professional immunity, and school districts are protected by the Tort Claims Act, giving accurate references is a good rule to follow in public schools. As revealed by the following cases, failure to reveal an employee's misconduct may come back to haunt you.

Example No. 1: Gregory DiFonzo was a music teacher at Methacton School District from 1970 to 1979. For three of those years, he engaged in a sexual relationship with a female student, who was 12 years old when the relationship began. When school officials finally confronted DiFonzo, he admitted to the relationship. They gave him a prepared resignation letter indicating he was resigning for "personal reasons". Three weeks later, DiFonzo applied for a position in the Philadelphia School District. The Philadelphia School District requested a recommendation, and Methacton responded that DiFonzo's service had been "satisfactory". Philadelphia hired DiFonzo, and 14

years later, he sexually abused a nine-year-old girl. The girl's parents sued both districts. A federal court found that Methacton's "cover-up" of DiFonzo's misconduct permitted DiFonzo to be hired by the Philadelphia School District. Methacton could, therefore, be subject to liability for the plaintiff's injury. In addition, the individual defendants were not entitled to immunity, and therefore, could be held personally liable. *Doe v. Methacton Sch. Dist.*, 880 F.Supp. 380 (E.D. Pa. 1995), *aff'd*, 124 F.3d 185 (3rd Cir. 1997).

Example No. 2: Melvin Estes molested a boy who joined Estes' scouting troop. The boy told his peers about the molestation, and one of the fathers told the head scoutmaster. The Boy Scouts did not report this information to law enforcement and took no further action. Shortly thereafter, Estes was chosen to be scoutmaster of another troop, started by a church. The scoutmaster of Estes' prior troop did not inform the church of what he had heard about Estes. Estes resumed his abusive activities until he was arrested and sentenced to 20 years in prison. The Texas Supreme Court held that the Scouts did not have a duty to screen adult volunteers or investigate the rumors about Estes. But it did owe a duty to the church: it was obligated to use reasonable care in light of the information it had received. If the scout troop knew or should have known that Estes was likely to molest boys, it had a duty not to recommend him as scoutmaster. Once the duty to recommend is accepted, therefore, the recommendation must be made with reasonable care. *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287 (Tex. 1996).

2. Act in "good faith". A statement about an employee's performance that is made in good faith will be privileged.

Example: Polly Hammond worked for Katy ISD as a special education teacher. Following disagreements with her supervisors concerning discipline of a disruptive student, Hammond resigned. She then sued and claimed that one supervisor had sent a reference to Alief ISD that Hammond was "insubordinate and unprofessional". She claimed that this statement was false and denied her ability to work as a teacher. Rejecting this claim, the court of appeals held that "a letter of reference written by a professional supervisor of a public school merely expressing his professional opinion on an employee's work performance under his supervision is an act within the scope of the employee's duties with the school district and is, consequently, not subject to libel action....". Moreover, the court noted, Hammond had found employment in another school district. *Hammond v. Katy Ind.Sch. Dist.*, 821 S.W.2d 174 (Tex. App. – Houston [14th Dist.] 1991).

C. Less is not always more when it comes to providing references.

In many situations, an employee will attempt to negotiate a neutral reference as a condition of his or her resignation. Several cases have been brought against school districts that allegedly failed to disclose information about a former employee's prior misconduct in response to an inquiry from a prospective employer.

Example No. 1: In *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582 (Cal. 1997), the court held that liability could be imposed on a school district and its administrators for negligent misrepresentation. The administrators wrote glowing references about a former employee and failed to mention that the employee was forced to resign under pressure as a result of sexual harassment allegations.

Example No. 2: In *Methacton*, the school district gave an employee who had admitted to a sexual relationship with a student a prepared resignation letter indicating that he was resigning for "personal reasons". A federal court found that Methacton's "cover-up" of the employee's misconduct permitted the employee to be hired by the Philadelphia School District, and Methacton could, therefore, be subject to liability for the plaintiff's injury. In addition, the individual defendants were not entitled to immunity and could, therefore, be held personally liable. *Doe v. Methacton Sch. Dist.*, 880 F. Supp. 380 (E.D. Pa. 1995), *aff'd*, 124 F3d 185 (3rd Cir. 1997).

D. Code of Ethics complaints

State board for Educator Certification rules require superintendents to notify the Executive Director of the State Board for Educator Certification in writing within seven days of obtaining information that:

1. an applicant for or holder of a certificate has a reported criminal history;
 2. that a certificate holder was terminated from employment based on a determination that he or she:
 - a. sexually or physically abused a minor or engaged in any other illegal conduct with a minor;
 - b. possessed, transferred, sold, or distributed a controlled substance;
 - c. illegally transferred, appropriated, or expended school property or funds;
-

- d. attempted by fraudulent or unauthorized means to obtain or alter any certificate or permit that would entitle the individual to be employed in a position requiring such certificate or permit or to receive additional compensation associated with a position; or
 - e. committed a crime, any part of such crime having occurred on school property or at a school-sponsored event; or,
3. that a certificate holder resigned and reasonable evidence supported a recommendation for termination based upon one of the five aforementioned acts. Before accepting the certificate holder's resignation, the superintendent must inform the employee in writing that a report to SBEC is required to be filed and that such a report may result in sanctions against the employee's certificate. The superintendent must also notify the school board before filing the report with SBEC. 19 TEX. ADMIN. CODE § 249.14.

E. Talking to the Media

Menard ISD recommended a teacher for termination based on allegations that she made a racially derogatory comment about a student. An independent hearing examiner found that the proposed termination was arbitrary, capricious, and not supported by the evidence. The parties then entered into a settlement agreement providing that the superintendent would only disclose the teacher's dates of employment, the capacity in which she served, the fact that she resigned, and a copy of an agreed-upon reference letter.

The day after the settlement agreement was signed, the superintendent had a telephone conversation with a newspaper reporter. The newspaper ran an article indicating that the teacher had resigned amid findings that she had used a racial epithet against a student. The former teacher sued the district and the superintendent.

The superintendent claimed immunity under Section 22.051 of the Education Code. The teacher argued that making false, defamatory statements to the media was not part of the regular duties of a superintendent and could not, therefore, be interpreted as advancing the legitimate function of superintendents or their districts. She further claimed that the settlement agreement clearly delineated the superintendent's duties, and therefore, his speaking to the media could not have been a discretionary action that would allow for immunity. The superintendent responded that he understood the settlement agreement to restrict the information he could provide in response to a prospective employment inquiry – not to other inquiries. Because he was not provided with any guidance on how to interpret the agreement, and he did

not have any prepared statement to use at media interviews, the superintendent argued that he used his discretion and judgment in formulating his responses to the reporter's question.

The court of appeals determined that it was not the individual response to the media or the interpretation of the agreement that should determine whether the superintendent was exercising a discretionary or ministerial function. Instead, it reviewed the overall responsibilities of a superintendent to determine whether personal deliberation and judgment are exercised. Like maintaining discipline, interpreting contracts or communicating with the media, the court held, require the exercise of judgment and personal deliberation. Consequently, it granted the superintendent immunity from the teacher's defamation claim.

Deaver v. Bridges, 47 S.W.2d 549 (Tex. App. –San Antonio 2000)

F. References are confidential...

Education Code section 21.355 provides that evaluations of a teacher or administrator are confidential. Because references evaluate a teacher's performance, the attorney general has concluded that they are not required to be disclosed. Tex. Att'y Gen. OR2000-2543.

G. ...but settlement agreements are not.

Employment relationships are often severed as the result of a settlement agreement. The terms of a settlement agreement reached through alternative dispute resolution are not confidential. Tex. Att'y Gen ORD No. 658 (1998). Similarly, resignation agreements will generally not be confidential.

H. Practical pointers for giving references

- An employer is not required to speak, but once it does, it should speak truthfully.
- Statement should be made in good faith. Statements made in good faith are protected by a qualified privilege and will not form the basis for liability.
- Providing a positive reference for an employee you know has had misconduct problems is an invitation for liability.
- Stick to the facts. Although professional opinions concerning performance are appropriate, keep personal feelings and emotions to yourself.
- If necessary to refresh your memory of specific incidents, refer to the employee's file. Accuracy is the key.



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406 East 11th Street
Austin, TX 78701

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