

# 29th Annual Law Conference for Community Colleges



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# Understanding Community College Employment Law

By: Bob Joyce  
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**ipse dixit**

nunc pro tunc

# property

# at-will employment

any reason  
no reason  
a poor reason  
with notice  
without notice

# your brother-in-law



# educational institutions a major exception

tenure

no no no no no no no no

# State Personnel Act

no no no no no no no no

contracts

yes yes yes yes yes yes

# “legitimate claim of entitlement”

legitimate claim of entitlement  
equals  
property

# deprivation

# XIV



government may not  
deprive any individual of  
property without due  
process of law

# dismissal

# pre-termination conference

notice  
statement of reasons  
opportunity to respond

# post-termination hearing

present evidence and witnesses  
confront evidence and witnesses  
attorney  
impartial decision maker

# non-renewal

employment under this  
contract does not imply the  
right to any future  
employment



# who is the employer?

# GS 115D-20(1) and (2)

# board of trustees power

“To elect a president”

“To elect or employ all other personnel of the institution upon nomination of the president”

“Trustees may delegate the authority of employing such other personnel to its president”

10

workers' comp

unemployment comp

jury duty

safety complaints

9

# protections for military service



8

# protection from unreasonable searches

7

collective bargaining

no no no no no no no no

6

# personnel records privacy

5

whistleblower protection

GS 126-5(c5)

4

# free speech protection

3

guaranteed leave for health  
conditions

FMLA

2

overtime compensation

FLSA

1

freedom from unlawful  
discrimination

Title VII

ADEA

ADA



# Legal Principles for Effective Management

Consistency, Preparedness,  
Forthrightness,  
Commitment to Integrity

By: Q. Shanté Martin, *General Counsel*  
North Carolina Community College System



## Local College Personnel Policies - 23 N.C.A.C. 2C.0210(a)

Each community college is responsible for adopting and implementing personnel policies that address the following:

- (1) Adverse weather;
- (2) **Annual leave (vacation);**
- (3) Drug and alcohol use;
- (4) Civil leave;
- (5) Communicable disease;
- (6) **Compensatory leave;**
- (7) Definitions of the employment categories and benefits for each:
  - (A) Full-time permanent,
  - (B) Part-time permanent,
  - (C) Full-time temporary, and
  - (D) Part-time temporary;
- (8) **Disciplinary action addressing suspension and dismissal;**
- (9) Educational leave (reference 23 NCAC 2D .0103);
- (10) **Employee evaluation process;**
- (11) Employee grievance procedures;
- (12) **Employee personnel file;**
- (13) Hiring procedures (describing procedures used for employment of both full-and part-time employees);
- (14) Leave transfer;
- (15) Leave without pay;
- (16) Longevity pay plan (reference 23 NCAC 2D .0109);

## Local College Personnel Policies - 23 N.C.A.C. 2C.0210(a) cont'd

- ▶ (17) Military leave (reference 23 NCAC 2D .0104);
- ▶ (18) Nepotism (reference 23 NCAC 2C .0204);
- ▶ (19) Non-reappointment;
- ▶ (20) Other employee benefits;
- ▶ (21) Political activities of employees (reference 23 NCAC 2C .0208);
- ▶ (22) Professional development;
- ▶ (23) **Reduction in force;**
- ▶ (24) Salary determination methods for full-and part-time employees that address at least the following:
  - (A) Provisions and criteria for salary determination,
  - (B) Requirements for annual salary review, and
  - (C) Establishment of salary formulas, ranges, or schedules;
- ▶ (25) **Sexual harassment;**
- ▶ (26) Tuition exemption (reference 23 NCAC 2D .0202);
- ▶ (27) Sick leave consistent with provisions of the State Retirement system;
- ▶ (28) Secondary Employment that addresses conflict with the employee's primary job responsibilities and institutional resources;
- ▶ (29) Shared leave consistent with provisions of the Office of State Personnel (reference 25 NCAC 1E .1301 through 25 NCAC 1E .1307).; and
- ▶ (30) Providing a preference for veterans, as defined in G.S. 128-15, in hiring decisions.

# Selected Personnel Policies Related to Management

- ▶ Although managers should be familiar with all of the college's personnel policies, there are several policies of which managers should be particularly cognizant:

<b>Annual leave</b>	<b>Personnel file issues</b>
<b>Compensatory leave</b>	<b>Reduction in force</b>
<b>Disciplinary issues</b>	<b>Sexual harassment</b>
<b>Employee evaluation and grievance</b>	

# Annual/Vacation Leave

- ▶ Supervisors must be consistent in their application of the leave policy. Don't make exceptions for certain employees. Treat all employees the same regarding the application of policies.
- ▶ Although leave is automatically earned, employees may not take leave without supervisor approval.
- ▶ Evaluate the needs of your department before approving leave. If you will not be able to fulfill the needs of the department without that person's presence during the requested leave, then have the forthrightness to deny the leave and suggest an alternate time period.
- ▶ It is a good idea to explain why leave is being denied.
- ▶ Encourage employees to request leave well in advance to attempt to minimize the difficulty presented when a leave request is denied.
- ▶ Emphasize the importance of requesting leave BEFORE it is taken.

# Compensatory Leave

- ▶ Employees should be prohibited from working overtime without the supervisor's *prior* approval.
- ▶ Managers should carefully monitor compensatory leave.
- ▶ Managers should keep meticulous notes regarding compensatory leave.
- ▶ Managers should monitor any “official” or “unofficial” time sheets that record compensatory leave to ensure that it is not being accumulated.

# Disciplinary issues

- ▶ Supervisors must embody consistency, forthrightness, superb documentation, and a commitment to integrity regarding disciplinary issues.
- ▶ Supervisors must have the forthrightness to address disciplinary issues head on. Ignoring disciplinary problems don't make them go away; it only causes the problem to fester.
- ▶ Any time there is a problem or a failure to meet work expectations, supervisors should address it every time and document it every time.
- ▶ Documentation of problems on evaluations should not be a surprise to employees.
- ▶ While college employees do not enjoy protections of the State Personnel Act, employers should still adhere to the principles of coaching and discussion of problems with employees to maximize the effectiveness of the work environment.
- ▶ Supervisors should treat similar issues the same no matter who the employee is. This will aid in preventing discrimination issues.

# Employee evaluation

- ▶ Do not be afraid to write your true thoughts on evaluation forms.
- ▶ Be prepared to support every statement you make on the evaluation. It is a good idea to keep a running record of accomplishments and areas of concern. If you have a running record, it is much easier to support your evaluation.
- ▶ Don't let any comments on the evaluation be a surprise to the employee.



# Employee grievance process

- ▶ When supervisors are faced with a grievance, having been consistent, keeping good documentation, being prepared, being committed to integrity, and being forthright puts the supervisor in a good position to defend any decisions or actions he or she has made.

# Employee personnel file

- ▶ N.C.G.S. § 115D-27 states that “a personnel file consists of any information gathered by the board of trustees which employs an individual, previously employed an individual, or considered an individual’s application for employment, and which information relates to the individual’s application, selection or nonselection, promotion, demotion, transfer, leave, salary, suspension, performance evaluation, disciplinary action, or termination of employment **wherever located or in whatever form.**”

# Employee personnel file cont'd

- ▶ Several community college policies provide that the personnel files for employees are maintained in the Personnel Office.
- ▶ Although policies provide that the personnel records are maintained in the Personnel Office, they are really maintained all over campus in various formats. The notes you keep on employees on your computer or in your desk that are never turned in to Human Resources constitute part of that employees' personnel file if it fits one of the delineated categories in N.C.G.S. § 115D-27. The drafts of evaluations constitutes that employees' personnel file.
- ▶ Be aware that the personnel file is located anywhere in whatever form.

# Sexual Harassment

- ▶ Avoid questionable comments.
- ▶ Avoid affectionate touching.
- ▶ Eliminate discussions about your personal sex life or anyone else's.
- ▶ Do not make any comments or jokes you would not feel comfortable making from a witness stand.
- ▶ Do not send questionable pictures.
- ▶ When in doubt, do not say it.
- ▶ Make sure employees don't engage in inappropriate behavior with each other. Use disciplinary process if necessary.

# Reduction-in-Force

- ▶ When evaluating the need to implement a reduction-in-force, community colleges should have a systematic way of determining who will be reduced-in-force.
- ▶ Community colleges should not use a reduction-in-force as a mechanism to get rid of non-performing employees.

# Due Process and Student Dismissal

By: Bob Joyce  
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# property

“legitimate claim to  
entitlement”



legitimate claim to  
entitlement  
equals  
property

# deprivation

# due process

contract employees  
vs.  
at-will employees

# students

# property?

you're a lawyer  
just tell me the answer

I don't know



# the assumption approach

“We assume for purposes of this appeal that Butler has a property interest in continued enrollment that is protected by the Due Process Clause.”

# the yes-property approach

- ▶ “In this Circuit, we have held that the Due Process Clause is implicated by higher education disciplinary decisions.”

# the no-property approach

“Without this underlying state created property interest,  
Plaintiff does not state a claim for violations of due  
process.”

# the down-home approach

“rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.”



# academic failure

fully-informed student  
“careful and deliberate  
decision”

# misconduct

notice  
statement of specific charges and grounds  
informal hearing  
“all necessary protective measures”

- ▶ written statement of evidence?
- ▶ right to an attorney?
- ▶ right to cross-examine?
- ▶ written statement of findings?
- ▶ right to appeal?

# Frequently Asked Legal Questions

By: Q. Shanté Martin, *General Counsel*  
*North Carolina Community College System*

# Frequently Asked Questions

- ▶ **FAQ #1: Are employees whose contracts are non-renewed because of budgetary constraints entitled to reduction-in-force benefits?**
  - **QSM Response to FAQ #1:** No. An employee whose contract has not been renewed at the end of that employee's contract has not been reduced-in-force regardless of the basis for the nonrenewal.
    - Reduction-in-force entails the premature ending of an employee's property right in his or her employment for budget purposes.
    - An employee whose contract has ended no longer has a property interest in his or her employment, and therefore, has not suffered a premature ending to their property right.

## Frequently Asked Questions cont'd

### **FAQ #2 - When employees are reduced-in-force, are community colleges permitted to pay severance pay past the end of that employee's contract?**

**QSM Response to FAQ #2:** No. The maximum amount colleges are permitted to pay for severance is the amount of money owed through the end of the contract. Again, an employee whose contract has ended has no expectation of employment past the end of the contract term. Thus, the employee cannot be entitled to any money past the date of the end of the contract.



## Frequently Asked Questions cont'd

**FAQ #3: A random member of the public comes into the Personnel Office and asks the HR Director to provide the salaries of every single person in the Personnel Office at the college.**

**a. Is that person required to make his or her request in writing?**

**QSM Response to FAQ #3a:** Probably not. With the exception of requests for copies of computer databases (N.C.G.S. § 132-6.2(c)), nothing in the Public Records Act requires that requests for public information be made in writing. See N.C.G.S. § 132. "Persons requesting copies of computer databases may be required to make or submit such requests in writing." N.C.G.S. § 132-6.2(c).

**b. Can the HR Director require that member of the public to state the reason he/she is requesting the salaries of all the personnel in the Personnel Office?**

**QSM Response to FAQ #3b:** No. The Public Records Act provides that persons requesting public records shall not "be required to disclose the purpose or motive for the request." N.C.G.S. § 132-6(b).

## Frequently Asked Questions cont'd

- c. A member of the public wants to review all of the salaries at 6:30 p.m. to give her time to get off of work and get to the college. Does the college have to comply with her request to meet after the normal business hours?**

**QSM Response to FAQ #3c:** No. The Public Records Act specifically provides that the Act does not “require a public agency to respond to requests for copies of public records outside of its usual business hours. See N.C.G.S. § 132-6.2(d).

- d. A person requests that the college provides a document containing a listing of the age of all personnel staff whose original date Of employment took place prior to 1999. Is the college required to provide that document?**

**QSM Response to FAQ #3d:** Unless the college has such a document, the college will not be required to create a record that does not exist. While the college would have to give the requester access to the information requested, the college does not have to create the listing requested.

## Frequently Asked Questions cont'd

- e. **The person asks for a salary history of all the employees in the Personnel Office. Is the college required to provide that information?**

**QSM Response to FAQ #3e:** No. N.C.G.S. § 115D-28 provides that an employee's current salary is subject to public inspection, not their salary history.

## Frequently Asked Questions cont'd

- ▶ **FAQ #4: ABC Community College suspended Jimmy Jones from the college for violating their disciplinary policy by smoking marijuana on campus. During the term of Mr. Jones' suspension, he has applied for admission to DEF Community College in the neighboring county. Is DEF obligated to admit Jimmy Jones under the open-door admission policy?**

**QSM Response to FAQ #4:** Maybe not. 23 N.C.A.C. 2C.0301(c) provides that local boards of trustees “may adopt policies refusing admission to any applicant during any period of time that the student is suspended or expelled from any other educational entity. Absent a policy addressing the issue, colleges may not have the authority under the open-door policy to deny admission to Jimmy Jones, even though he’s been suspended for disciplinary reasons. **I recommend that all colleges adopt a policy that would allow the college the discretion to deny admission to applicants when they’re suspended or expelled from other educational entities.**

## Frequently Asked Questions cont'd

- ▶ **FAQ #5: Are illegal immigrants going to be permitted to attend community colleges? If so, when will the policy be effective and what are the parameters of the policy?**
  - **QSM Response to FAQ #5:** We do not know at this time whether illegal immigrants will be permitted to attend community colleges. The Policy Committee of the State Board of Community Colleges has proposed a policy for the full State Board's consideration in September 2009.

## Frequently Asked Questions cont'd

- ▶ **QSM Response to FAQ #5 cont'd:** The **proposed** policy would allow illegal immigrants to obtain admission to community colleges if:
  - 1) The illegal immigrant graduated from a United States public school, private school, or home school that operates in compliance with State or local law;
  - 2) Colleges use federal immigration classifications to determining who is an undocumented immigrant;
  - 3) Illegal immigrants do not receive state or federal financial aid in the form of a grant or loan;
  - 4) Illegal immigrants pay out-of-state tuition;
  - 5) Students lawfully present in the United States have priority over any undocumented immigrant in any class or program of study when capacity limitations exist; and
  - 6) Colleges should take into account that federal law prohibits states from granting professional licenses to undocumented immigrants when considering admission into a specific program of study.

## Frequently Asked Questions cont'd

- ▶ **QSM Response to FAQ #5 cont'd:** If nothing out of the ordinary happens, the policy on undocumented immigrants should be effective by the Fall 2010 semester.