

**Handbook for North Dakota
Public Library Board Members**

Volume III - The Library as an Employer



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Volume III - The Library as an Employer



DISCLAIMER

The primary purpose of this publication is to provide information. The following pages of suggestions are offered as guidelines and should not be regarded as legal advice. They are intended to alert public libraries to some of the many issues that exist within the public employment sector. Nothing contained herein should be interpreted as replacement for competent legal and other such consultation.

HANDBOOK AVAILABLE

This handbook is on the North Dakota State Library Website at www.library.nd.gov and can be printed or changed to meet the needs of your library and library board members.

TABLE OF CONTENTS

FOREWORD	iv
SECTION I	
THE HIRING PROCESS	1
A. Job descriptions	
B. Application Forms	
C. Screening Applicants	
D. Interview Questions	
E. Job References	
F. Child Labor Considerations	
G. Equal Employment Opportunity	
H. Veterans' Preference	
I. New Hire Reports	
J. Attachments	
SECTION II	
SALARY AND BENEFITS	8
A. Salary and Wages	
B. Overtime	
C. Unemployment Compensation	
D. Workers' Compensation	
E. Insurance Benefits	
F. Leaves	
G. Early Retirement Programs	
H. Summary of Posting Requirements	
I. Attachments	
SECTION III	
DOCUMENTING PERFORMANCE	18
A. Best Employer Defense	
B. Establish a System of Evaluation	
C. One Solution	
D. Attachments	

SECTION IV	
SEXUAL HARRASSMENT	25
A. Definition	
B. Sexual Harassment Checklist	
C. Last Word	
D. Attachments	
SECTION V	
OPEN RECORDS/OPEN MEETINGS	34
A. Reference To Other Information Sources	
SECTION VI	
TERMINATION OF EMPLOYMENT	36
A. “At-Will” Employment – In Theory	
B. Exceptions to the “At-Will” Rule	
C. Options For Terminating Employment	
D. The “Fairness” Defense	
E. Exit Interviews	

FOREWORD

North Dakota appeared to be almost immune from the fastest growing classification of lawsuits occurring in the last decade of the 20th Century. During the first years of the 21st Century, however, that immunity is no longer so apparent. A 1.2 million dollar settlement of a sexual harassment/gender discrimination suit has served as a wake-up call for all public employers in North Dakota.

Since the prevention of lawsuits is both more effective and less traumatic than a jury trial, the purpose of this *Public Libraries as Employers Handbook* is to provide red flags and checklists for public libraries throughout the employment process. Six major areas of concern, from hiring to terminating employees, have been identified for review and special attention as public libraries assess their vulnerability to possible litigation.

In addition to checklists provided for each of these six identified areas of concern, gratitude goes out to the North Dakota Department of Labor, the U.S. Department of Labor, and the EEOC for numerous informative pamphlets, posters, and checklists which are included as attachments to the text.

It has been said that “Any fool can learn from his own mistakes, but the wise man learns from the mistakes of others.” It is hoped that this handbook will promote good employment practices by those wise persons who manage the human resources of our public libraries. This handbook is not intended to replace your local legal counsel, but rather to help you recognize those situations when you should seek legal advice and assistance.

Doris Ott
State Librarian

SECTION I

The Hiring Process

Some people maintain that “when you hire, you fire.” One of the applicants gets a job – all the others do not. The inherent problem is that the rejected applicants may accuse you of discriminatory hiring practices.

It may sound flippant, but the best defense against any discrimination action is simply not to discriminate. If a library has a written hiring policy based upon the law as cited below, understands this policy, and follows it to the letter, a quantum step toward prevention and protection will have been taken. Please bear in mind that there is no absolute guarantee that litigation will not happen, but the more precautions that are taken, the better the chances that things will go without a hitch.

The North Dakota Human Rights Act prohibits a broad range of discriminatory practices, as shown in 14-02.4-03 of the North Dakota Century Code (NDCC).

14-02.4-03. **Employer’s discriminatory practices.** It is a discriminatory practice for an employer to fail or refuse to hire a person; to discharge an employee; or to accord adverse or unequal treatment to a person or employee with respect to application, hiring, training, apprenticeship, tenure, promotion, upgrading, compensation, layoff, or a term, privilege, or condition of employment, because of race, color, religion, sex, national origin, age, physical or mental handicap, status with respect to marriage or public assistance, or participation in lawful activity off the employer’s premises during nonworking hours which is not in direct conflict with the essential business-related interests of the employer. It is a discriminatory practice for an employer to fail or refuse to make reasonable accommodations for an otherwise qualified person with a physical or mental handicap or because of that person’s religion. This chapter does not prohibit compulsory retirement of an employee who has attained sixty-five years of age, but not seventy years of age, and who, for the two-year period immediately before retirement, is employed in a bona fide executive or high policymaking position, if the employee is entitled to an immediate nonforfeiture annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of those plans, of the employer, of the employee, which equal, in aggregate, at least forty-four thousand dollars.

A good place to start the hiring process is to carefully review, discuss, and come to an understanding of NDCC 14-02.4-03. Then, apply it to what you plan to do.

It is essential that public library boards in their roles as employers, carefully review all aspects of their hiring processes to identify potentially discriminatory hiring practices. A checklist is provided on the following page to assist in that chronological review.

Public Libraries "Hiring Checklist"

A. JOB DESCRIPTIONS

The employer should carefully identify “**essential job functions.**” Unless the employer has specifically stated what is reasonably expected, an applicant could get the job under the provisions of the North Dakota Human Rights Act or the Americans with Disabilities Act, and yet, not be able to perform some of the duties that weren’t specified within the job description that accompanied the vacancy notice. Are lifting, reaching, standing, etc., actually a part of the job? If so, then be certain to **specify qualifications required.** As a basis for future evaluation of job performance, **list job expectations.**

At this point in the hiring process, you are in a position to create a picture of the ideal candidate. If everything went perfectly, what qualities would the person hired bring to the job? You may not get everything on your wish list, but unless you know specifically what you are seeking, you certainly won’t find that perfect match. You don’t go hunting for a rabbit unless you know what a rabbit looks like.

When you have created a job description for the ideal **candidate**, you have in effect, developed a **MODEL.** This model will be used to guide you through certain processes that follow.

**See <http://www.nd.gov/labor/publications/docs/brochures/002.pdf> for additional information.

APPLICATION FORMS

Eliminate all “unwanted” information from your forms. (See <http://www.nd.gov/labor/publications/docs/brochures/005.pdf>) You are permitted to ask for certain information and other information is “off limits.” Review carefully what you can and what you can’t ask. Revise all your application materials so that they conform with the standards specified.

You want to seek valid eligibility criteria throughout the application, screening, interview, and selection processes. If an applicant volunteers information such as age, religion, marital status, etc., cross it out and note that “This is information **not** sought as part of this application.” You do not want access to this kind of information!

Go back to your model as described above. The application forms should be designed to surface the qualities being sought as described for your ideal candidate (model). The entire application process is aimed at finding the person who most nearly meets the standards and qualifications you have set.

C. SCREENING APPLICANTS

If you receive a large number of applications, it may be impractical to interview them all. How many should be interviewed? Don't be trapped by a specified number. Schedule interviews with all candidates who, based upon the submitted applications, appear to be qualified for the job being filled. This may be two or it may be a dozen. Who seems to meet the requirements as set forth in your written materials?

D. INTERVIEW QUESTIONS

Go back once more to the model. All questions at the interview should be crafted to identify how closely the candidate comes to your model. The same principles as presented for applications are valid here. Review <http://www.nd.gov/labor/publications/docs/brochures/005.pdf> to determine what questions will be asked at the interview (and which ones won't be asked).

If there are multiple interviewers, the spokesperson needs to be alert and if someone asks a forbidden question, the point needs to be made immediately that the item is improper and the candidate should not respond.

Do not make any promises at the interview.

Document the interview. Such documentation has numerous values, not the least of which is a record to combat charges of discriminatory hiring. Retain these records for at least two years.

E. JOB REFERENCES

References should have been a part of the original application requirements. Confirm that the applicant has complied. Have a plan to check these references. Your plan could include a visit(s) to the previous work site. Be careful with this visitation process. If the candidate is successful, fine, but you can also cause unsuccessful candidates considerable grief by stirring things up in their communities. As part of the application materials, the following authorization should be included and specified as a required item:

AUTHORIZATION FOR RELEASE OF PERSONAL DATA

I, THE UNDERSIGNED, HEREBY AUTHORIZE AND REQUEST ANY PRESENT OR FORMER EMPLOYER, EDUCATIONAL INSTITUTION, LAW ENFORCEMENT AGENCY, FINANCIAL INSTITUTION, OR OTHER PERSONS HAVING PERSONAL KNOWLEDGE ABOUT ME TO FURNISH _____ AND ITS AGENTS WITH ANY AND ALL INFORMATION IN THEIR POSSESSION REGARDING ME, IN CONNECTION WITH AN APPLICATION FOR OR RETENTION OF EMPLOYMENT. FURTHER, I HEREBY RELEASE FROM LIABILITY AND HOLD HARMLESS ALL PERSONS AND CORPORATIONS SUPPLYING THIS INFORMATION TO _____ AND ITS AGENTS. A PHOTOCOPY OR TELEPHONE FACSIMILE (FAX) OF THIS AUTHORIZATION IS AS EFFECTIVE AS THE ORIGINAL.

SIGNED: _____

DATE: _____

SOCIAL SECURITY OR DRIVER'S LICENSE NUMBER: _____

F. CHILD LABOR CONSIDERATIONS

An employee must be at least 16 years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the United States Secretary of Labor. Fourteen and fifteen-year-olds may work outside school hours in various non-manufacturing, non-mining, nonhazardous jobs under certain specified conditions. These include no more than three hours on a school day or eighteen hours in a school week and no more than eight hours on a non-school day or forty hours in a non-school week. A certificate is required from the North Dakota Department of Labor (See <http://www.nd.gov/eforms/Doc/sfn04598.pdf>)

Work may not begin before 7:00 a.m. or end after 7:00 p.m., except from June 1 through Labor Day, when evening hours are extended to 9:00 p.m.

Generally, the child labor laws for North Dakota are contained in NDCC Chapter 34-07 and NDAC Title 46. Federal laws related to child labor are found in the Fair Labor Standards Act (Child Labor Bulletin No. 101).

(Also see <http://www.nd.gov/labor/publications/docs/brochures/001.pdf>) which includes the following statement:

"THE NORTH DAKOTA DEPARTMENT OF LABOR IS RESPONSIBLE TO PROTECT THE SAFETY AND WELFARE OF NORTH DAKOTA'S TEEN WORKERS THROUGH ENFORCEMENT OF YOUTH EMPLOYMENT LAWS. TOGETHER WITH THE U.S. DEPARTMENT OF LABOR, IT IS OUR AIM TO PROVIDE SAFE, QUALITY EMPLOYMENT FOR OUR YOUTH – THE KEY TO OUR FUTURE."

G. EQUAL EMPLOYMENT OPPORTUNITY

(See <http://www.dol.gov/esa/ofccp/regs/compliance/posters/pdf/eeopost.pdf>) which gives an overview of the provisions of numerous portions of laws and regulations that apply to equal employment opportunity. Libraries as employers should become familiar with these provisions.

H. VETERANS' PREFERENCE

(See the United States Department of Labor information on the Uniformed Services Employment and Reemployment Rights Act—USERRA at <http://www.dol.gov/vets/programs/userra/main.htm>) which gives pertinent information regarding veteran's preference. This is another area with which many employers are unfamiliar. It is covered in law and therefore becomes a consideration when libraries are hiring for any position. This is yet another law that must be reviewed, understood, and followed to the letter in the hiring process.



I. NEW HIRE REPORTS

Many employers are not aware that upon hiring a new person, certain reports must be filed. Effective October 1, 1997, certain information must be submitted to the Department of Human Services. The purpose of this action is to improve child support collection procedures. These reports are due 20 days following employment and failure to comply can result in civil penalties: \$20 to \$250. (See <http://www.nd.gov/dhs/services/childsupport/docs/new-hire-reporting.pdf>)

REMEMBER: It is much easier to not hire an undesirable applicant than to terminate a bad hire. Also, negligent hiring could result in employer liability for wrongful (even intentional) acts of an employee.



SECTION II

Salary and Benefits

IMPORTANT NOTE: The North Dakota Department of Labor lists posters that all employers must have displayed in an area readily available to all employees. The list is available at <http://www.nd.gov/labor/publications/posters.html>

A. SALARY AND WAGES

Both the federal government and the State of North Dakota establish minimum wages and require the posting of those wages in the workplace. The current federal figures are available at <http://www.dol.gov/esa/whd/regs/compliance/posters/minwagebwp.pdf> to this section and the state requirements are available at <http://www.nd.gov/labor/publications/docs/posters/min-wage-072008.pdf> These figures are subject to change from time to time, and it is the responsibility of the employer to keep current on the minimums.

B. OVERTIME

Employees who work more than 40 hours in any one, seven-day period (workweek) are to receive 1-1/2 times the employee's regular hourly rate. There are some employees who are exempt from this 1-1/2 rule. These are classified as administrative, professional, or executive. There is considerable additional information about these exemptions in **Attachment II-A** at the end of this section.

The employer has the burden of proof when establishing that a valid exemption exists. Amount or manner of payment (hourly or salary) is not sufficient proof.

When calculating overtime, use the formulas available for hourly and monthly salaries shown in **Attachment II-B** at the end of this section. Employees who are paid principally from commission and those performing two jobs for the same employer are covered in **Attachment II-C** at the end of this section.

C. UNEMPLOYMENT COMPENSATION

It should be remembered that unemployment compensation is intended to compensate the unemployed. For that reason, the burden is once again upon the employer to prove disqualifying circumstances.

The two most common grounds for disqualification from unemployment compensation payments are:

VOLUNTARY QUILTS: Resignation coupled with a waiver of hearing rights, including anticipated discharge, is the most successful employer defense.





DISCHARGE FOR MISCONDUCT: Where the grounds for discharge are substantially more than simple unsatisfactory performance. Misconduct may be a defense if it is remarkably or extraordinarily flagrant. More information is given in the poster included at <http://www.state.nd.us/jsnd/docs/ji/UIForms/uiposter.pdf>.

REMEMBER: The burden is upon the employer to establish that a disqualification exists.

D. WORKERS' COMPENSATION

Workers who are injured or become unable to work as a result of work-related activity may be entitled to six types of benefits.

1. Necessary and reasonable care.
2. Wage loss, if unable to work for five days or more on doctor's order.
3. Wage loss due to loss of 16% or more of whole body.
4. Vocational rehabilitation.
5. Death benefits to surviving spouse and dependents.
6. Liaison services of the Office of Independent Review.

The poster at <http://www.workforcesafety.com/library/documents/posters/ImportantNoticetoWorkersPoster.pdf> indicates the posting that is required regarding Workers' Compensation.

There is the North Dakota Fraud and Safety Hotline available for reporting fraud and unsafe work conditions. Calls are confidential. The number is 1-800-243-3331. <http://www.workforcesafety.com/library/Documents/newsletters/EmployerFraudPreventionTips.pdf>

E. INSURANCE BENEFITS

Although not required by law, several types of insurance benefits have become common across the state. These include:

1. Health insurance (partial or full premiums with deductibles and co-pay).
 - a. Life insurance.
 - b. Disability coverage.
 - c. Cafeteria plans, including dental, vision, and other coverage.
 - d. Liability protection.



F. LEAVES

National Guard leave and jury duty are statutorily required. The Family and Medical Leave Act (FMLA) is prescribed in federal law and provides for 12 weeks of unpaid leave each year.

1. **ELIGIBILITY:** FMLA requirements apply only to public employers with more than 50 employees located within a radius of 50 miles. It is likely that this requirement will not apply to many (if any) public libraries in North Dakota.
2. **NOTICE REQUIRED:** Employers must provide **written** notice to the employee applying for FMLA leave. This is particularly important if employers intend to count paid sick leave as also being part of the 12-week FMLA leave. The “penalty” for failure to provide notice is that the 12 weeks remain “unused” until proper notice triggers the reduction in that number of allotted days.
3. **HEALTH INSURANCE CONTINUES:** While FMLA leave is without pay, any employer-provided health insurance must be continued. The employer has the right to recover the amounts paid for health insurance if the employee does not return to work at the conclusion of the FMLA leave. See <http://www.dol.gov/esa/whd/fmla/finalrule/FMLAPoster.pdf> for more information.

When voluntary leave is offered, it should specifically address the issues included in the CHECKLIST FOR DRAFTING LEAVES included as **Attachment II-D** at the end of this section.

G. EARLY RETIREMENT PROGRAMS

Many public employers have created what are perceived to be mutually beneficial early retirement programs. Unfortunately, many of these incentive programs are age discriminatory and therefore violate the federal Older Workers Benefit Protection Act (OWBPA). Violations include:

1. **Age-Based Eligibility:** Programs in which eligibility commences at a specified age and terminates at a specified later age (e.g., eligible from age 55 to age 65).
2. **Age-Based Reduction in Payment:** For example, at age 55 employee receives 100% of annual salary, which is reduced by 10% each year the employee does not exercise this voluntary option, until it reaches 0% at age 65.
3. **Age-Based Health Insurance Coverage:** Employees who retire early are provided “free” health insurance until age 65 or until they are eligible for Medicare (which is deemed to be age-based).

These age-based early retirement programs are currently the subject of litigation and EEOC audits, with expensive damage awards being imposed on well-intentioned public employers. Absent new legislation providing more definite guidance, public libraries should either eliminate these programs or tie them to years of service – **NOT AGE!**

H. SUMMARY OF POSTING REQUIREMENTS

The North Dakota Department of Labor lists all the required postings at <http://www.nd.gov/labor/publications/posters.html>



ATTACHMENT II-A

OVERTIME GUIDELINES

Administrative exemption: the following criteria are used to determine if employees are exempt. Exempt employees under this provision must be paid on a salary basis. Not every criteria must be met but these are factors in making the determination:

- a) The performance of office or non-manual work directly related to management policies or general business operations of the employer or the employer's customer, (as opposed to work that is routine, manual, clerical, or process oriented;
- b) Who customarily and regularly exercises discretion and independent judgment; and
- c) Regularly directs the work of the other employees, the department, or subdivision thereof.
- d) Employee devotes more than 50% of his/her work time to activities which are directly related to the performance of the work described in a - c above.

Professional exemption: the following criteria are used to determine if employees are exempt. Exempt employees under this provision must be paid on a salary basis. Not every criteria must be met but these are factors in making the determination.

- a) Work requiring a knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual, or physical processes;
- b) Work requiring the consistent exercise of discretion and judgment in its performance; and
- c) Work that is predominately intellectual and varied in character (as opposed to routine mental, manual, mechanical, or physical work) and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.
- d) Employee devotes more than 50% of his/her work time to activities which are directly related to the performance of the work described in a - c above.

ATTACHMENT II-A

Executive exemption: the following criteria are used to determine if employees are exempt. Exempt employees under this provision must be paid on a salary basis. Not every criteria must be met but these are factors in making the determination.

- a) The management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof;
- b) Directing the work of two or more other employees therein;
- c) The authority to hire or fire other employees, or whose suggestions as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees, will be given particular weight; and
- d) Must customarily and regularly exercise discretionary powers.
- e) Employee devotes more than 50% of his/her work time to activities which are directly related to the performance of the work described in a - d above.

Overtime Regulations

- Just because an employee is salaried does not mean that they do not have to be paid overtime.
- Overtime is based only on hours worked. Paid holidays, paid time off, or sick leave are not counted in computing overtime hours.
- Compensatory time (carrying hours from one week to the next) is illegal for non-exempt employees in private employment.
- Providing time-off to employees in the same week as the extra hours are worked is an effective tool to avoid paying overtime.
- Employees working more than one job under the control of the same employer must have all hours worked counted toward overtime.

For answers to specific questions on overtime, contact the Department of Labor at (701) 328-2660 or toll free at 1-800-582-8032 or by e-mail: labor@pioneer.state.nd.us or on the World Wide Web at WWW.tradecorridor.com/ndlabor.

ATTACHMENT II-B

*Compliments of the
North Dakota
Department of Labor*

DETERMINING OVERTIME FROM AN HOURLY RATE:

HOURLY RATE X 1.5 = OVERTIME HOURLY RATE OF PAY

OVERTIME HOURLY RATE OF PAY X NUMBER OF HOURS WORKED IN EXCESS OF 40 = AMOUNT OF OVERTIME DUE

DETERMINING HOURLY RATE AND OVERTIME FROM MONTHLY SALARY

$\frac{\text{MONTHLY SALARY} \times 12}{52} = \text{WEEKLY SALARY}$

$\frac{\text{WEEKLY SALARY}}{\text{TOTAL HOURS WORKED DURING THAT WEEK}} = \text{RATE PER HOUR}$

TO CALCULATE OVERTIME FROM THIS

RATE PER HOUR X $\frac{1}{2}$ X NUMBER OF HOURS WORKED IN EXCESS OF 40 = AMOUNT OF OVERTIME DUE

ATTACHMENT II-C

**DETERMINING OVERTIME FOR EMPLOYEES PAID
PRINCIPALLY FROM COMMISSION**

*Compliments of the
North Dakota
Department of Labor*

Total compensation for one week = Regular rate of pay
Total hours worked for that week

Week #1
 $\frac{\$350.00}{45} = \7.77 per hour
 No overtime required

Week #2
 $\frac{\$250.00}{45} = \5.56 per hour
 $\$5.56 \times .5 = \2.78
 $\$2.78 \times 5 = \13.90 overtime
 $\$250.00$
 $\underline{13.90}$
 $\$263.90$

Each work-week stands alone and overtime must be calculated as such. In the above example in week 1 the employee was above \$7.73/hr (\$7.73 per hour is the Minimum Wage current \$5.15 X 1.5 = \$7.73 per hours worked) and exempt from overtime. In week 2 he/she was not and therefore entitled to overtime.

WEIGHTED AVERAGE METHOD OF OVERTIME

When an employee performs two jobs for the same employer; with each job having a different rate of pay, the method of computing overtime is as follows:

<u>Rate of Pay</u>		<u>Number of Hours</u>		
JOB 1: \$6.00		25	=	\$150.00
JOB 2: \$5.25		20	=	<u>105.00</u>
		45		\$255.00
<u>\$255.00</u>				
45 hours	=			\$5.66 Average Per Hour
<u>\$5.66</u>				
2	=			\$2.83 Rate Of Overtime
\$2.83	Overtime Rate			
X 5	Number Of Overtime Hours			
\$14.15	Total Overtime Due			

Total Gross Pay Should Be \$269.15

ATTACHMENT II-D

CHECKLIST FOR DRAFTING LEAVES

*Compliments of the
North Dakota
Department of Labor*

1. COMPENSATION: Full pay, set-off, or no pay?
2. BENEFITS: Full, reduced, or none?
3. CREDIT FOR EXPERIENCE (seniority): While on leave, does seniority accrue?
4. THRESHOLD FOR ELIGIBILITY
5. MAXIMUM NUMBER ON LEAVE SIMULTANEOUSLY
6. LENGTH OF LEAVE: Minimum/Maximum?
7. RIGHT TO RETURN BEFORE END OF LEAVE?
8. RIGHT TO RETURN TO JOB: Identical position or comparable position? (same schedule, same assignment, same building?)
9. EFFECT OF FAILURE TO PROVIDE TIMELY NOTICE OF INTENT TO RETURN: Resignation?
10. GRANT OR DENIAL OF LEAVE: At sole discretion of the employer?
11. TERMS: Clearly defined? (What is an "emergency"? "immediate family"?)
12. EMPLOYER'S RIGHT TO REQUEST FITNESS TO RETURN: Medical certification after illness, etc.

NOTE: This checklist is not intended or represented to be exhaustive. Each leave policy should be scrutinized for ambiguities.



SECTION III

Documenting Performance

A. BEST EMPLOYER DEFENSE

In an area of ever-increasing litigation, the Number One defense to claims of unlawful employment discrimination is **DOCUMENTATION OF POOR PERFORMANCE!!** It doesn't need to be sophisticated or exhaustive. It simply needs to be in **WRITING** reviewed with and signed by the employee and placed in the employee's personnel file. Signature of employee indicates awareness but not necessarily approval of context. The employee may attach rebuttals. Unfortunately, the two most common characteristics of most employees' files are:

1. Raises – annual salary increases.
2. Praises – because it is much more pleasant to praise an employee than to document dissatisfaction in writing.

When employees sue for wrongful termination, the courts look for “fairness” which is commonly defined as:

1. NOTICE of deficiencies, in writing.
2. OPPORTUNITY TO IMPROVE.

If a judge or jury believes that an employee received notice of dissatisfaction with job performance AND a reasonable opportunity to improve, then the appearance of fairness will often overcome employee claims of prohibited discrimination or retaliation by the employer. The notice and opportunity to improve must be in writing, or it becomes a “he said/she said” proof problem.

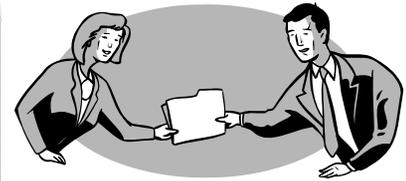
B. ESTABLISH A SYSTEM OF EVALUATION

1. Objectives.
 - a. Identify performance problems.
 - b. Record improvement (praise is OK).
 - c. Create a paper trail.

2. Time Line: “Just do it!” At least annually.
3. Documentation system.
 - a. Daily memo to file – **See Attachment III-A.**
 - b. Specific incident memo – **See Attachment III-B.**
 - c. Summary memo – (general) – **See Attachment III-C.**
 - d. Summary memo with specific directives and consequences – **See Attachment III-D.**
4. Evaluations (at least annually).
 - a. Tied directly to job description (see Section I).
 - b. Include overall assessment.
 - c. Improvement plan – if appropriate.
 - d. Comply with statutory mandates (if any).

C. ONE SOLUTION

As noted in the *Introductory Remarks* at the very beginning of this handbook, employment law is the fastest growing source of lawsuits in the United States. The one **SOLUTION** which will reduce the likelihood of being sued and increase the chances of winning if sued, is **DOCUMENTATION**. The first thing a plaintiff’s lawyer wants to review is the employee’s personnel file. If it is full of “raises and praises,” rather than “notice and need to improve,” the probability of a lawsuit goes up markedly. Documentation of unsatisfactory job performance does not need to be perfect; it just needs to be!



ATTACHMENT III-A
DAILY MEMO TO FILE

Staff member: Brenda Bookshelf, Reference Librarian

9/09/05 - Late to work – arrived 8:50 a.m. – failed to sign in.

9/23/05 - Did not sign in.

10/07/05 - Late to work – arrived at 8:25.

10/25/05 - Did not sign in.

11/11/05 - Did not sign out.

11/29/95 - Did not sign out.

04/08/06 - Arrived late at 8:45 a.m. – did not sign out.

05/06/06 - Did not sign out.

NOTE: This memo is based upon the assumption that the library which employs Ms. Bookshelf has a clear, written policy that states the starting time and requires employees to sign in and out.

SUGGESTION: This could be a one-page document placed on the inside cover of the employee's personnel file for daily notes, both good and not-so-good.

ATTACHMENT III-B
SAMPLE SPECIFIC INCIDENT MEMORANDUM

DATE: October 7, 2008

TO: Brenda Bookshelf, Reference Librarian

FROM: Dewey D. Cistum, Library Director

SUBJECT: PROCEDURE FOR DEALING WITH PUBLIC AT REFERENCE DESK

On October 4, 2008, you and I had a conference to discuss the way in which you treat patrons when they approach you at the reference desk. I expressed my concern that you do not comply with basic principles of courtesy nor do you appear to be concerned with helping people find information. You act as if normal patron requests are an imposition upon your time.

Upon your arrival here at the library, I personally gave you a copy of our staff handbook which, among other things, contained your job description. That description specifically states that the reference desk librarian must at all times remember that the patrons are the reason that the library exists, and one of our primary responsibilities is to provide them with what they need.

I have had three complaints from patrons during the past month. Because of these complaints, I have made it a point to personally observe you in your job, and I must agree that the complaints have merit.

On one occasion, I overheard you tell a patron the books are filed and stored in a very scientific manner and that she is responsible to know this system if she intends to use the library. Three days later, you obviously ignored a young man who was trying to find information about the North Dakota Century Code.

Please understand that I expect you to immediately correct this disregard for our patrons and take on an air more consistent with the specifications in your job description. Please review your employee handbook carefully and make sure you understand the requirements contained therein. If there are any items you don't understand, I will be happy to discuss them with you.

If you disagree with the facts, conclusions, or directives in this memorandum, please advise me in writing no later than (specify a date) so we can meet and work out any differences.

Dewey D. Cistum, Library Director

Date

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents and that I have an opportunity to respond if I disagree.

Brenda Bookshelf, Reference Librarian

Date

ATTACHMENT III-C
SAMPLE SUMMARY MEMORANDUM
(General)

DATE: October 8, 2008

TO: Brenda Bookshelf, Reference Librarian

FROM: Dewey D. Cistum, Library Director

SUBJECT: CONFERENCE ON OCTOBER 7, 2008

On October 7, 2008, you and I had a conference and talked about some of my concerns regarding your job performance. I told you I was concerned because you have arrived to work late three times during the month of September. These late arrivals occurred on September 2, September 12, and September 26. Each day, you arrived more than fifteen minutes after the library opened. Since you operate the reference desk, your presence is mandatory for smooth and effective library functioning.

You also failed to sign in on the days you were tardy.

In the future, I expect you to be on time, no later than 8:00 a.m., and to sign in as per the instructions in our handbook. I will be monitoring you to determine your compliance with my directives. If you disagree with the facts, conclusions, or directives in this memorandum, please advise me in writing no later than (specific date) so we can work out any differences.

Dewey D. Cistum, Library Director

Date

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents, and that I have an opportunity to respond if I disagree.

Brenda Bookshelf, Reference Librarian

Date



ATTACHMENT III-D
SAMPLE SUMMARY MEMORANDUM
(Specific Directives and Consequences)

DATE: January 10, 2009

TO: Brenda Bookshelf, Reference Librarian

FROM: Dewey D. Cistum, Library Director

SUBJECT: PERFORMANCE DURING 2008 AND EXPECTATIONS FOR 2009

On December 16, 2008, you and I talked about your performance during 2008. Throughout the year, we have discussed several aspects of your performance that have been a concern for me. We discussed those same areas again yesterday. Specifically, we discussed the following:

1. Compliance with the staff manual. At the close of last year, I found you had not complied with some of the fundamental provisions of the staff manual. Most obvious was your failure to treat patrons with the respect due them. I personally observed this behavior, documented it, and spoke with you about it.
2. Arriving LATE. On three occasions last fall, you reported for work after the library had opened for business. Then, twice more during December, you came in late.
3. Failure to sign in and out. This is another area we discussed. It is imperative that we know who is present and ready for duty, and who has left the building. This is a written requirement that has a basis in need, and you have violated it with a cavalier dismissal.

For the coming calendar year, I expect you to do the following things:

1. Follow exactly all requirements in the staff manual regarding service to patrons.
2. Sign in at the prescribed point each morning and be at your desk, ready to begin work no later than 8:00 a.m. each day.
3. Sign out each afternoon when staff normally leaves the building no earlier than 5:00 p.m.
4. Follow all other requirements specified in the staff manual.

I appreciate your willingness to work toward total correction of all these matters. I look forward to a good, productive year in (enter future year). If you disagree with the facts, conclusions or directives in this memorandum, please advise me in writing no later than (specific date) so we can meet and work out any differences.

Dewey D. Cistum, Library Director

Date

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents and that I have an opportunity to respond if I disagree.

SECTION IV

Sexual Harassment

Sexual harassment charges are the fastest growing segment of employment law. From 1991 to 1997, sexual harassment charges filed with EEOC more than doubled (from 8,000 to 16,000 per year). See <http://www.nd.gov/labor/publications/docs/brochures/003.pdf> for more information about sexual harassment in the workplace. A public library has the option to hire an outside agency to conduct a sexual harassment investigation rather than having the library director or the library board conduct the investigation.

A. DEFINITION: Sexual harassment is a form of sexual discrimination that violates Title VII of the Civil Rights Act of 1964.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances including, but not limited to the following:

1. The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
2. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
3. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
4. Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
5. The harasser's conduct must be unwelcome.

B. SEXUAL HARASSMENT CHECKLIST

1. Adopt a policy which:
 - a. Defines sexual harassment using examples.
 - b. Prohibits sexual harassment.
 - c. Contains a reporting procedure **with several reporting options**.
 - d. Identifies possible consequences.
 - e. Prohibits retaliation.



2. Post the policy in a conspicuous place.
3. Provide in-service training for all employees and supervisors at least every two years.
4. Develop a complaint form (see **Attachment IV-A**).
5. Establish an investigation procedure.

Avoid the “knee-jerk” reaction of going directly to the accused and saying, “You didn’t do it, did you?”

Rather, establish a sequence of interviews.

- a. Complainant first.
 - b. Eyewitnesses or others identified by the complainant.
 - c. Others who may have been in the area and have some information.
 - d. The accused (near the end of the investigation).
 - e. Witnesses and others identified by the accused.
6. Do not make any assumptions before the investigation.
 7. Document all interviews.

After the interviews are completed:

- a. Prepare statements, after the interview, for the signatures of the witnesses. Offer to make changes if necessary. If the witness refuses to sign, note this on the statement.
 - b. It is advisable to have someone witness the signing of the statement(s).
8. Same-sex interviewers are recommended to conduct sexual harassment interviews.

9. Confronting the accused.

- a. Interview the accused last.
- b. Plan the interview, using a checklist of questions based on the investigation thus far.
- c. Notify accused of meeting.
- d. Permit a “representative” to be present if termination could result.
- e. Make no decision of guilt during the interview unless an admission is made by the employee being interviewed.
- f. Ensure responses are voluntary; do not physically prevent the accused from leaving the interview.
- g. Consider whether administrative leave (or suspension) is necessary during the completion of the investigation.
See Attachment IV-B for sample letter of suspension. Administrative leave is voluntary and is usually with pay.



10. Making a decision.

- a. A Preliminary Decision should be made once the investigation is completed.
- b. A Meeting with the Accused should be held to discuss the results, including the penalty(s) under consideration, if any. The employer should present the preliminary report and allow the accused to respond.
- c. A Written Memorandum (see **Attachment IV-C**) should be prepared after the meeting, containing the following:
 - (1) Nature of the charges and the evidence supporting the charges.
 - (2) The accused’s response to the charges.
 - (3) The conclusions reached. If the evidence is inconclusive, then directives and the right to reopen should be identified. If no wrongdoing is found, that should also be documented. **See Attachment IV-D** for a sample letter.
 - (4) Discipline to be imposed or recommended (e.g., termination) and a clear statement prohibiting any retaliation.
 - (5) A request for written questions, if the accused has any, to be submitted within a specified period of time.

It should be noted that the test for sufficiency of the disciplinary measures taken is whether the complained-about behavior STOPS. If it does not, then the action taken (viewed from the lofty perspective of hindsight) was NOT SUFFICIENT.

11. Preventing retaliation.

Two steps are essential if public employers are to avoid liability for a separate cause of action for retaliation, even where a sexual harassment complaint is unfounded.

- a. Emphasize retaliation will NOT be tolerated.
- b. Follow up to determine if retaliation is occurring after the complaint has been received and investigated.

C. LAST WORD

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. In-service programs for all employees are required. They should clearly communicate to employees that sexual harassment will not be tolerated. Employers can do so by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains. The “ostrich” approach to this workplace problem is a very costly, ill-advised option for public libraries.



ATTACHMENT IV-A

COMPLAINT FORM

Person filing this complaint: _____

Position/ employer: _____

Telephone: _____

Statement involves complaint against: _____

Please describe in detail the events surrounding the complaint against the above-named person. Please include dates, time, locations, persons present, substance of statements, and conversations, etc. Please be as factual as possible. If you must express an opinion, please make it clear that you are doing so:

(multiple pages if necessary)

Note: When you are finished, please re-read your statement in its entirety. Make any necessary changes and initial those changes. Then initial each sheet in the top lefthand corner. Sign and date below.

I affirm that the above statement is the truth to the best of my knowledge.

Signature Date
Person making statement

Signature Date
Person receiving statement

ATTACHMENT IV-B
SAMPLE LETTER OF SUSPENSION
(*Administrative Leave*)

Date

HAND DELIVERY

Mr. Dusty Stacks
2035 Ashby Road
One Rope, ND 59234

Dear Dusty:

This letter is provided as a follow-up to our conference earlier today and will confirm various things we discussed at that time. The purpose of our meeting was to review preliminarily the facts and nature of allegations which have been made concerning alleged improper sexual conduct by you with various staff members. We reviewed with you the information we currently have and provided you with an opportunity to respond to the allegations.

Based upon the nature of the charges, we believe it to be in your best interest and that of the library that you be temporarily relieved of your duties until a thorough investigation can be completed and a decision reached as to how the matter will be resolved. Therefore, this will confirm that you will be on administrative leave with full pay and benefits as of today, until further notice. Placing you on administrative leave is not any determination of guilt or wrongdoing.

During the period of administrative leave, you will not be able to participate in any library activities, and you are not to return to the library, whether during working hours or after, unless prior arrangements have been made with your immediate supervisor, Ms. Baker. Your contacts during this period should be with or through Ms. Baker. If you have any questions, please call her. She may require that you check with her periodically by telephone. If you have not already done so, you should arrange with her to obtain your personal belongings and turn over library property currently in your possession by DATE SPECIFIC. This will be scheduled after library hours.

Unless you receive notice from Ms. Baker to the contrary, we have scheduled a meeting with you to be held DATE AND TIME SPECIFIC in my office to review the status of the investigation and to advise you of any recommendations or decisions made. You may have a representative present with you at that time. Should there be any questions by others of you regarding this matter or the investigation, you may refer them to me, the library's attorney, or to your own personal representative.

If you have any questions concerning your status, your responsibilities, or the library's expectations during this period, contact me or Ms. Baker by DATE SPECIFIC.

Sincerely,

Library Director

Dusty Stacks
cc: Personnel File

Date

ATTACHMENT IV-D
SAMPLE MEMORANDUM
(No Wrongdoing Found)

DATE:

TO: Dusty Stacks

FROM: Cookie Baker, Reference Supervisor

SUBJECT: ALLEGATION OF WRONGDOING MADE BY LENA GINSTER

This memorandum addresses the allegations of wrongdoing asserted against you by Ms. Lena Ginster. Specifically, Ms. Ginster alleges that she has been the subject of harassment and intimidation by you at the library during recent weeks. This harassment and intimidation, according to Ms. Ginster, arose from her rejection of alleged sexual advances made toward her by you. I have conducted an investigation of those allegations, and have found no witnesses to corroborate Ms. Ginster's story. Since I do not know which one of you to believe, I am closing the matter for lack of evidence.

Although I have found that you did not engage in the wrongdoing as alleged by Ms. Ginster, I have a suggestion for your future dealings with Ms. Ginster. I feel that to the extent possible, you should avoid contact with Ms. Ginster while at the library in order to diminish the chances of such allegations arising again in the near future.

If you have any questions concerning my findings or these directives, or if you disagree with the facts or conclusions stated in this memorandum, please advise me in writing no later than (DATE CERTAIN), so we can meet and work out any remaining differences.

Cookie Baker, Reference Supervisor

Date

I have received a copy of this memorandum. I understand that my signature does not necessarily constitute agreement with its contents, and that I have the opportunity to respond if I am in disagreement.

Dusty Stacks

Date

SECTION V

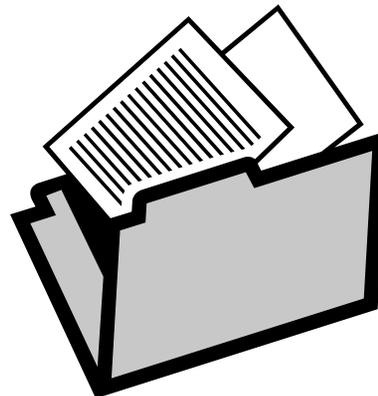
Open Records/Open Meetings

NOTE: A thorough presentation on the subject of open records/open meetings is presented in Section VII of *Volume II* of this trilogy, which is another publication of the State Library. Several points will be repeated here for the purpose of emphasis.

A. REFERENCE TO OTHER INFORMATION SOURCES

1. Perhaps the best approach to take is that all library board meetings are open to the public and all records of the governing board of the public library are public domain.
2. The exceptions are so infrequent and rarely come up in the normal activities of a library board. The exceptions will be discussed in the following text. Even when a board is relatively certain they may meet in executive session, it is recommended that they obtain competent legal advice to be sure they are acting properly.
3. When dealing with personnel matters, from hiring to firing, public bodies often attempt to “protect” individuals from publicity. Whether it is the identity of the applicants, the selection of the best applicant, or the taking of disciplinary action, North Dakota’s broadly defined “sunshine” laws governing public records and public meetings **MUST** be followed. Failure to do so often generates much greater public exposure than does compliance with North Dakota’s laws on these subjects. Charges of “secret” records or “secret” meetings, defending civil lawsuits, and facing possible criminal charges, are all good reasons to comply with these statutes.
4. **UNDER NO CIRCUMSTANCES SHOULD A LIBRARY BOARD TRY TO “GET AROUND” THE LAW. FOLLOW THE PROCEDURES TO THE LETTER – DON’T LOOK FOR LOOP HOLES. YOU’RE INVITING DISASTER IF YOU ATTEMPT TO PLAY GAMES WITH THE LEGALLY ESTABLISHED PROCESS. GET HELP IF THERE IS ANY PART OF THE REQUIREMENTS THAT YOU DON’T UNDERSTAND.**

Remember, there is more detailed information in *Volume II: Conduct of the Board Meeting*.



SECTION VI

Termination Of Employment

In North Dakota, there are numerous ways in which employment is terminated in the public sector. Some have legal ramifications. This section is presented to point out some of the perils that employers encounter in the process of ending the employment of a worker.

A. “AT-WILL” EMPLOYMENT — IN THEORY

In Theory. The simple rule of “at-will” employment is that the employee may leave employment at any time and likewise, the employer may terminate that employment at any time without cause. However, it is the exceptions to “the rule” that create the problems for public employers.

B. EXCEPTIONS TO THE “AT-WILL” RULE

1. Contracts. Written and Verbal – When an employer and employee enter into a contract (written or verbal) which specifies a duration of employment, the employer’s right to terminate the contract for any reason or no reason at all, is extinguished. Absent good cause, the employer may be liable for breach of contract damages for not honoring the full term of the contract.
2. Employee Handbook promises. Expressed or implied promises contained in employee handbooks or manuals may create a duration of employment that replaces the employment “at-will” status. For that reason, a disclaimer should be prominently displayed in all employee handbooks and manuals, such as:



DISCLAIMER: This employee handbook has been drafted as a guideline for our employees. It shall not be construed to form a contract of employment between the public entity and its employee. Rather, it describes the public entity’s general philosophy concerning policies and procedures.

3. Other Verbal Promises. A supervisor’s promise of continued employment, if proven to have been made and relied upon by the employee, may create an exception to the “at-will” doctrine. Promises made during the interview may have the same effect.

C. OPTIONS FOR TERMINATING EMPLOYMENT

Termination of employment does not have to mean an employee was discharged (fired). Other options are worth exploring.

1. Resignation. An employment relationship may be ended by mutual agreement through the use of a resignation. This option may enhance the employee's "reemployability" by providing a viable explanation for leaving prior employment ("I resigned" is preferable to "I was fired"). If it is truly a VOLUNTARY resignation, then the likelihood of a lawsuit is also substantially reduced if two prerequisites are met.
 - a. A written resignation is obtained.
 - b. A waiver of all hearing rights is helpful in defending against unemployment compensation claims. (See Section II—Subsection C.)
2. Early Retirement Plans. Early retirement is a form of "resignation with pay" which can be an effective means of ending employment on a friendly, mutually advantageous basis. The money paid out is often recouped over a short period of time by employing a less-experienced replacement at a lower salary. However, the problem of age discriminatory plans that violate the federal Older Workers Benefit Protection Act must be addressed.
3. Severance Pay/Buyouts. A third mutually agreed upon option is a "buyout" option. Similar to early retirement in some respects, this option should definitely include the use of a Separation Agreement. That agreement should include:
 - a. A payment provision.
 - b. Withholding of income taxes (state and federal).
 - c. Withholding of FICA.
 - d. A voluntary resignation.
 - e. A statement that the employee is not eligible and will not apply for unemployment with the employer in the future.
4. Nonrenewals. This process is unique to public schools and will not be covered here.
5. Termination for cause. This option, commonly referred to as "firing," is the one most likely to result in litigation because it is most likely to result in the employee being less employable. If the termination procedure involves the discharge of a public employee during the term of the employment arrangement, the key to winning a wrongful termination lawsuit is DOCUMENTING THE PERFORMANCE that is unacceptable. Refer back to Section III of this handbook for additional information. Written documentation of poor performance is the best defense available to the wide range of charges of discrimination prohibited by the North Dakota's Human Rights Act and numerous federal laws.



6. Due Process Requirements. The termination of a public employee for cause may include a need to provide some level of due process.

a. Pretermination Hearings for non-certified (classified) employees.

In a United States Supreme Court case, it was determined that an employee had safeguards that had to be met prior to termination.

(1) Notice of the charges against the employee.

(2) An explanation of the employer's evidence.

(3) An opportunity for the employee to present his or her side of the story.

(4) A similar procedure should be provided prior to terminating a classified public employee, as a matter of fairness.

b. Statutory Due Process hearing. This must be granted where required by statute. All procedural hearing requirements (e.g., due process statutory requirements for certain city appointed officials, library staff, etc.) must be met if the termination decision is likely to be overturned by the courts. The mandatory procedural requirements are critical and merit giving serious consideration to retaining legal counsel, especially when discharge during the term of a contract is involved.

c. Policy Due Process Provisions. A procedural hearing requirement contained in a public entity's policies must also be provided.

7. Elected vs. Appointed Officials: While it is clear that appointed public officials are subject to supervision by their appointing authorities, the termination of elected officials is more complex. It appears that elected officials are subject to either recall or removal procedures in North Dakota. It is equally clear that both appointed and elected officials are included within the prohibitions against discriminatory practices (including sexual harassment) as defined by state and federal law. Written documentation of job performance of appointed officials should be implemented.

D. THE "FAIRNESS" DEFENSE

When faced with an employment discrimination lawsuit, it is critical that the public employer consider the makeup of the jury that will decide the facts at issue. Jurors are likely to be older, rather than younger; female as well as male; and **MOST SIGNIFICANTLY**, former or current employees, **NOT EMPLOYERS**. Simply stated, juries are not likely to be sympathetic to management. Therefore, it is critical that employers can pass the "FAIRNESS TEST." It consists of the following two elements:

1. **NOTICE AND AN OPPORTUNITY TO IMPROVE:** Did the employer provide notice of dissatisfaction and an opportunity to improve job performance to the employee?
2. **DOCUMENTATION OF THE FAILURE TO IMPROVE:** It is essential that the employer's notice of dissatisfaction is followed up with written documentation of the improvement, or the failure to improve, that results from that notice. This documentation need not show 100% failure to improve. Rather, it should show both the improvement (if any) and the failure to improve.
3. If these two elements of "fairness" are established by the employer, then both judges and juries are much more likely to support termination decisions in the public workplace. Also plaintiff's counsel who review employees' personnel files are less likely to commence a lawsuit if that file contains documents which support the termination decision.

E. EXIT INTERVIEWS

It is recommended that an exit interview be conducted and documented whenever an employee terminates employment. Documenting that exit interview is particularly helpful when subsequent charges of constructive discharge are raised on grounds such as sexual harassment where no prior complaints were made or voiced during the exit interview. A standardized form should be developed to determine why the employee is leaving, as well as any dissatisfaction with the workplace and working conditions.





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Doris Ott
State Librarian

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Dr. Wayne G. Sanstead, State Superintendent

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