

PROVISION OF REFERENCES TO OTHER EMPLOYERS AND SCHOOLS – GUIDANCE FOR HEADTEACHERS

1. INTRODUCTION

- 1.1 Headteachers and other senior staff in schools are frequently approached to supply references to outside employers and to fellow Headteachers in other Norfolk schools for former or current employees. Whilst there is no obligation in law to provide a reference, it is clearly in our interests to do so because of the reciprocity in giving and receiving references. Most prospective employers like to confirm their impression of a candidate by checking out facts and opinions with someone who knows him/her well. Since there is an interest in receiving references, it is in the interests of all parties to provide them so long as they add value to the recruitment and selection processes.
- 1.2 The purpose of this document is to provide information on the legal issues arising from providing references, to set out the LEA's guidance for schools. A model policy for adoption by Governing Bodies is featured in the attached Appendix and this guidance should be read in conjunction with that model.

2. LEGAL IMPLICATIONS

Obligation to give an honest reference

- 2.1 While there is no legal obligation to provide a reference, if a reference is given, the law expects it to be an honest one. Therefore, care needs to be exercised, both in justice to the employee and the prospective employer, and to protect the school and the County Council against liability for mis-statements. If a reference is provided which is false in a material particular, the giver of the reference, the school or the County Council may be liable for an action for:
 - (a) Defamation – if a false statement is made and it damages the reputation of the subject of the reference; or
 - (b) Malicious falsehood – if a statement is made knowingly with the intention that the person receiving the reference will act on it; or
 - (c) Negligent Mis-statement – if the person giving the reference has failed to exercise reasonable care not to injure the subject of the reference.

Additionally, failure to give a reference that is reasonable and fair (even if it is strictly accurate) may breach the implied term of trust and respect, and could lead to a claim for constructive dismissal.

Rehabilitation of offenders

- 2.2 Where a reference specifically seeks information concerning a person's previous convictions, the Rehabilitation of Offenders Act 1974 imposes an obligation on the giver of the reference not to disclose a spent conviction. Therefore if it is known that an employee or ex-employee has a conviction recorded against him/her, the giver of the reference must satisfy him/herself

as to whether the conviction is spent or otherwise. There are exceptions to these rules in certain cases and if in doubt, legal advice should be sought. In practice, however, because schools have access to police records in respect of prospective employees, questions regarding convictions are rarely asked in reference requests.

Data Protection Act 1998

- 2.3 Although employers are not obliged to disclose references they have given, they may have to disclose references they have received from others, under the Data Protection Act 1998. Essentially, elements of the Act which came into force on 24th October, 2001, allow employees access to references (under most circumstances) through the receiving organisation and the entitlement applies equally to successful and unsuccessful candidates. When writing references, Headteachers should assume that the subject could well see the reference at a later date. With this in mind, the LEA's guidance and model policy adopt an open approach to the provision of references.

Human Rights Act 1998

- 2.4 The Human Rights Act 1998 incorporates the European Convention of Human Rights into English law and enables victims to pursue remedies for breach of their rights in the English Courts. By following the guidance given in this document, Headteachers should ensure that the rights of employees who are the subject of references are not normally infringed. The relevant rights are:-

- Respect for private and family life;
- Freedom of thought, conscience and religion; and
- Prohibition of discrimination in enjoyment of these rights.

3. RESPONDING TO A REQUEST FOR A REFERENCE

Who should references be written for?

- 3.1 A reference can be provided for any individual who is sufficiently known to the referee although in some cases there may be a limit on the amount of information available due to lack of knowledge in particular areas. These guidance notes and the model policy at the Appendix cover only employees and ex-employees of schools. They are not written to cover other individuals such as teaching students, volunteers or pupils. Having said this, the same basic principles apply in all cases. The 'open reference' approach, however, is intended for use as part of the employer/employee relationship only. Additionally, where ex-employees are the subject of a reference, the extent to which the open reference approach can practically be operated may vary from case to case.
- 3.2 It is not good practice to provide references or supplementary information verbally. It is advisable to ensure that all requests for information and responses are made in writing (using e-mail or fax if time is limited). This better strengthens the author's position if s/he is challenged at a later date.

Who should respond?

- 3.3 An individual who receives a request for a reference for an employee or ex-employee addressed to him/her at school and who responds to that request on school stationery is acting as an agent of the school and the County Council providing an official **employer reference**. As a general rule, such references should always go out in the name of the Headteacher or his/her approved representative. Comments and recommendations from the subject's head of department or a deputy Headteacher should be sought (if appropriate).
- 3.4 It should be made clear at the school which members of staff have the authority to provide an employer reference. It is recommended that the Headteacher at least requires sight of references which are provided by other senior members of staff, before they are posted, if the Headteacher is not the sole reference provider. The Headteacher has the right to withhold a reference if s/he believes that the information provided is inaccurate on certain details, incomplete, or fails to portray an accurate overview of the subject.
- 3.5 Where a reference is requested which is not connected with an individual's employment at the school, this should be regarded as a **personal reference** and school stationery must not be used.

Content

- 3.6 The subject of the reference should be informed, by the provider, that a request for a reference has been received and, in accordance with the model policy, provided with a copy of the draft reply. References should not contain anything which would come as a surprise to the candidate and which the Headteacher or other appropriate person has not sought to discuss with him/her. Furthermore, it is vital that the giver of the reference is able to justify everything he/she says about the subject of the reference and demonstrate that the opinions expressed in the reference are based on actual facts. In short, reference givers should:
- (a) stick to the facts;
 - (b) tell the truth;
 - (c) exercise caution in making predictions about how well the subject will do; it is better to just describe how well the subject has done in your own experience; and
 - (d) limit statements to those which are appropriate to the post and which are not unfairly or unlawfully discriminatory. EXCLUDE comments relating to:
 - marital status
 - sexual orientation
 - gender
 - gender reassignment
 - pregnancy

- disability – even if comments are positive, don't put them in the context of disability but comment only on performance in the job
- ethnicity
- religion and religious beliefs (except where appropriate, for example in cases such as recruitment/promotion to Headteacher and other posts in voluntary aided schools where preference may be given in selection to candidates with particular religious opinions and/or beliefs as permitted under the School Standards and Framework Act 1998)
- trade union membership
- age
- carer's/dependant's responsibilities
- any other personal circumstances

this list is not exhaustive but it does outline the most significant areas.

- (e) even if direct questions are asked that relate to these areas, do not respond. Comment only on the subject's performance in the job.
- (f) be willing to provide details of the number of days sick leave taken but DO NOT give information regarding the reasons for such absence, i.e. do not state the illness or medical condition, even if it has been written on medical certificates. If time-keeping is a concern there may be personal reasons for it, and attempts at offering explanations should not be made by the provider of the reference.

References for unsatisfactory employees

3.7 Responding to a request for a reference for an unsatisfactory employee or ex-employee is a delicate matter. Good references should not be provided for unsatisfactory employees in order to encourage prospective employers/fellow Headteachers to appoint them. Such arrangements can backfire in two directions:

- (a) If the employee does not find another job and formal action under the capability procedure was invoked, it will be difficult to establish that there are justifiable concerns over the employee's capability when he/she can produce a good reference as evidence.
- (b) Should the nature of his/her unsatisfactory work performance be relevant to the kind of work or the circumstances in which he/she works with the new employer, and it emerges after an unsatisfactory period of employment with the new school or establishment that the previous employer experienced similar problems but had not disclosed them despite being asked for a reference, then the school or County Council could be liable for any losses incurred by the new employer (see 2.1 above).
- (c) Therefore, where there are serious problems with an employee (i.e. where those problems are being addressed at the formal stage of the appropriate procedure), the written reference should say so. It is not acceptable for Headteachers or other appropriate persons to provide a neutral written reference and invite the prospective employer to follow

it up by telephone. No information should be provided by telephone. If additional information is required, and if insufficient time is available for a normal written request and response, the request and response should be made using fax or e-mail. Copies of fax or e-mail responses should also be provided to the subject of the reference under the model policy.

- 3.8 Following a Court of Appeal decision (re: Sun Alliance case), Lord Justice Mummery gave the view that employers should confine unfavourable statements about an employee in references to those matters into which “they had made reasonable investigation and had reasonable grounds for believing to be true”. He went on to say that where an agreed termination takes place in such circumstances (and the case in question involved an act of dishonesty amounting to corruption – potentially gross misconduct – but the employee resigned before the disciplinary hearing took place), the parties should try to agree the wording of a reference. It is hoped that in Norfolk schools, the appropriate Personnel Consultant and trade union representative would, in any case, be aware of the situation and involved in issues such as ‘agreed’ references. The problem in such cases, however, is that the employee’s demands can be quite unreasonable. Even if an employee had done a good job previously, it would not be open to the employer to simply refer to that previous good performance without also making a reference to the potentially bad performance that [could have] resulted in dismissal.

Disclaimer clauses

- 3.9 Some organisations include a paragraph disclaiming responsibility for the references they provide in order to try to obviate the possibility of legal action. However, a ‘disclaimer’ on references has no proven value. Under the Unfair Contract Terms Act 1977, the disclaimer will only be valid in so far as it is deemed fair and reasonable and it would not cover a situation where the contents of the reference were made maliciously or otherwise given in bad faith. In any case, disclaimers will be unnecessary if reference givers follow the advice set out in this document. Therefore, disclaimers should not be included on official employer references.

4. OPENNESS AND CONFIDENTIALITY

- 4.1 When providing a reference it is advisable to bear in mind that although a reference may be given in confidence, the employee may have access to that reference in the following circumstances:
- (a) Where the receiver of a reference places the reference onto a personnel file, from 24th October, 2001, employees will (under most circumstances) have access to the information under the Data Protection Act 1998.
 - (b) Where the subject of the reference asks an Employment Tribunal for an order for ‘discovery’ of it to support an allegation of unlawful discrimination on the grounds of sex, marital status, race or disability and the Tribunal makes such an order (which it will normally do).

- 4.2 Bearing this in mind, the LEA's model policy requires that Headteachers adopt an 'open reference' approach. This involves *consultation* with the subject of the reference to the extent that s/he has sight of the reference before it is issued and is able to comment on the accuracy and fairness of the reference. If concerns exist about an employee's competence, particularly, it would be beneficial to take time to talk through the reference with the subject. It is important that Headteachers should not *negotiate* a reference with the subject with this type of approach although the benefit of obtaining the subject's view of the content of the reference could be valuable in ensuring accuracy and mutual agreement. Openness in the provision of references can be beneficial to staff relations, as it ensures transparency and can prevent difficult situations arising at a later date.
- 4.3 It is advised that when providing a reference under this policy, the provider includes within the reference text a statement to the effect that "This reference is not confidential and if you wish you may discuss it with the applicant. It will form part of the applicant's records and the applicant may see a copy".

5. **OPENNESS AND CONFIDENTIALITY**

- 5.1 Queries about providing references should be raised with the School's Personnel Consultant in Education Personnel Services.