

DISCIPLINE OF EMPLOYEES

Ann R. Goering
arg@ratwiklaw.com

May 2, 2019

HOW TO LOSE A DISCIPLINE CASE

INCOMPETENCE

No performance evaluations

Bad performance evaluations

Lack of documentation

Little or no opportunity to improve

Disparate treatment

Misconduct

Lack of Investigation

Lack of Due Process

Disparate Treatment

Failure to Make the Punishment fit the Offense

PREPARE FOR EVALUATIONS THROUGHOUT THE YEAR

- Document performance in various categories throughout the year
- Keep examples of work, both those that could be improved upon or examples of excellence, as may be appropriate

PREPARE FOR EVALUATIONS THROUGHOUT THE YEAR

- Timely share everything with employee
 - The most anxiety producing and complained about part of evaluations are “surprise” criticisms.
 - Employees should be getting feedback from supervisors throughout the year.
- Few “Desk Drawer” Exceptions

FUNDAMENTALS OF EVALUATIONS

- Evaluations should be conducted fairly, consistently and objectively to protect your employees and the County.
 - Supervisors should be able to articulate basis for ratings
 - Objective reasoning rather than subjective feelings to avoid discrimination claims
 - Facts, not conclusions

FUNDAMENTALS OF EVALUATIONS

- Conduct regularly
 - The performance of employees may change over time.
 - Legal issues related to accommodations, discipline, etc.
- Document performance in preparation for formal evaluation.
- Share completed performance evaluation with employee.

THE JOB DESCRIPTION MATTERS

- Review the job description
- Consider the essential functions of the job when completing the evaluation
- Tailor comments to specific position



CRITERIA FOR EVALUATION: IF NUMERICAL IS USED

- 1-5 Scale: If your evaluation tool uses a scale –
Be Honest and give a 1 when warranted
- Each rating within scale defined
Review how it is defined and apply it
- Allows for comparison between employees
- Important for Supervisors to apply scale consistently

EVALUATION OF A DIFFICULT EMPLOYEE

- Actually address the problems in the evaluation
- **Do not** only give feedback in areas where the employee is having success as a means of encouragement.
- Employees need to be told when they are wrong or how they need to improve.
- Include comments on how the employee needs to improve. **Do not** couch the comments amidst positive comments to “take the sting out.”

HOW TO DEAL WITH A DIFFICULT EMPLOYEE? ACTUALLY DEAL WITH THE DIFFICULTY

- Talk about the problems as they arise. Do not ignore the problem.
- Be careful not to attribute behavior or problems to disabilities.
- If an employee is rude, meet with the employee and deal with the rudeness.
- Passive-aggressive behavior
- Do not be afraid to address it even if the employee denies it.

DRAFTING AN EFFECTIVE PERFORMANCE IMPROVEMENT PLAN

COMMON PROBLEMS

- Poor performing employees who do just enough to skate by.
- Historically great employees who start performing badly.
- Employees with drug or alcohol problems that do not seek help.
- The impact frequently absent employees have on their co-workers.
- The lack of collegiality that can make the work environment negative.

BASIC RULES IN DOCUMENTING PERFORMANCE PROBLEMS

- Document Everything
- Conduct Numerous Observations and Evaluations
- Address Previous Problems and Deficiencies
- Be Careful about Making Positive Comments
- There are No “Desk Drawer” Exceptions
- Timely Share Everything with Employee

WHEN TO ISSUE A PERFORMANCE IMPROVEMENT PLAN

- If performance evaluation notations have been unsuccessful.
- If the problem is of a nature that it cannot be addressed properly in a performance evaluation.
- If the problem is serious and needs immediate attention.
- If the problem is longstanding.

GUIDELINES FOR DRAFTING PIP

- Decide how to classify response: discipline or performance improvement
- Be extremely honest
- Give specific examples of problem behavior and why it is unacceptable
- Offer alternative behaviors
- Give clear directives.
- Do not use qualifiers... “usually”
- Do not use other employees’ names
- Warn the employee of the consequences, up to termination, for failing to comply with directives and improve performance
- Obtain employee’s signature

EXAMPLE OF IDENTIFICATION OF BEHAVIOR TO BE CORRECTED:

In a random sampling of your cases showed the following significant errors since your performance evaluation was conducted a month ago, at which time you were advised that you needed to make significant improvement:

1. In Case 1234569, you failed to accurately record the client's actual gross income amounts in MAXIS. While you claimed to have verified the amount based upon the paystubs, the amounts in the system and the amounts on the paystub did not match.

IDENTIFICATION OF BEHAVIOR

The County has received complaints that you fail to return messages in a timely manner and that you do not adequately answer questions or explain your responses. Clients have complained that instead of helping them through the process, you seem adversarial, and it seems as though you are trying to hinder the process. Clients have also stated that you have treated them poorly, and as though they were beggars. Recent complaints have also alleged that you have disregarded your job duties and have avoided helping clients.

WHEN APPROPRIATE EXPLAIN CONSEQUENCE OF BEHAVIOR

An example of your inability to adequately communicate with clients is a complaint that was received where a client believed that she had money on her EBT card based on your conversation, and did not find out that she had no money on the card until she was checking out at the supermarket. She stated that she was humiliated and had to put back all of the groceries. The client complained that your advice had been unclear, and led to confusion.

DIRECTION TO CORRECT

- You must treat every client, co-worker, and member of the public with respect and courtesy.
- You must not “talk down” to clients, and you must remain patient and take the time to fully explain your advice and answer questions. Be as clear as possible and find a way to adequately communicate with clients. Take affirmative steps to ensure that the client understands you.
- You must remain helpful with clients, including listening to their needs and suggesting programs that are available and would meet their needs.
- You must promptly respond to questions and concerns of clients in a helpful manner.

INCLUDE AT THE END OF EVERY PIP: CONSEQUENCES

Failure to improve your performance and comply with these directives contained in this Performance Improvement Plan may result in disciplinary action, including possible termination of your employment.

WHAT'S NEXT?

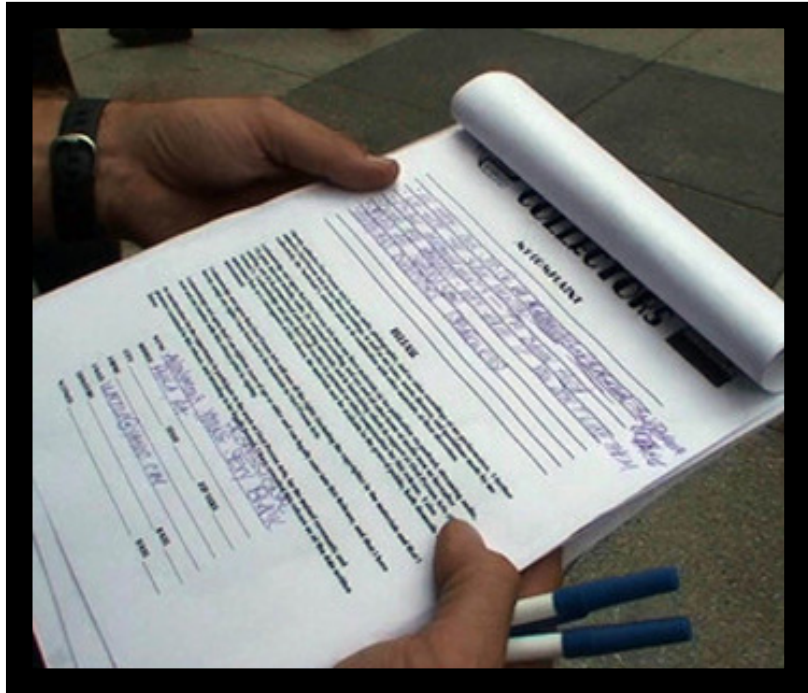
- Observations and Evaluations
- Determining if deficiencies have been corrected
 - PIP may contain ongoing benchmarks of meeting with supervisor every 2 weeks/30 days to evaluate progress.
 - Employees generally will show an improvement immediately following a PIP, but may revert to old behaviors after a few months.
 - Documentation that the problem has been corrected will result in having to start from scratch with a new PIP so be careful about retracting or stating it has been completed.
- Additional action if improvement does not occur

EXAMPLE OF STATEMENT UPON PIP COMPLETION

You must continue to follow the directives contained in the PIP issued to you on [Date] other than [specific deadlines] and maintain the performance improvement that you have shown since the issuance of the PIP. The County will discontinue the [weekly/bi-weekly/monthly] meetings with your supervisor at this time.

LIFE IN 3D: DUE PROCESS, DISCIPLINE AND DISCHARGE

COMPLAINTS



- Investigate promptly
- Get employee's response
- Take appropriate action promptly
- Do not wait until evaluations to take action

Due Process in Employee Conduct Issues

- Notice of Rules, Policies & Expectations
 - Do employees know what can get them in trouble?
- Investigation
 - Investigate before taking action.
- Tennessen Warning
- Garrity Warning (only sometimes – check with attorney)
- Representation
- Substantive and Procedural Due Process
 - Fairness

NOTICE

Document notice to employees regarding expectations and specific areas of misconduct which could lead to discipline, including:

- Sexual Harassment
- Misuse of the Internet or E-mail
- Drug or Alcohol Use
- Theft
- Threats
- Insubordination

NOTICE

Generally for Incompetence, you will need documentation of performance evaluations and PIPs unless the conduct adversely impacts the rights of others, or violates clearly established laws, rules, policies or clear directives.

INVESTIGATION

- Meet with employee and give opportunity to respond before to the complaint or concerns.
- Interview other witnesses as appropriate.
- Review appropriate documentation.
- Review materials provided by employee.
- Employers should choose their words very carefully when directing employees not to discuss confidential information.
 - PELRA

DATA PRACTICES CONSIDERATIONS IN INVESTIGATIONS



DETERMINE THE SCOPE AND STRATEGY OF THE INVESTIGATION

- Review Documents
- Interviews
 - Typically interview subject last, but may need to conduct follow-up interviews
- Investigation Reports



TIPS FOR INTERVIEWING COMPLAINANTS AND FACT WITNESSES

- Look at the Big Picture
- Preparation
- Follow-Ups
- Assessing credibility
- Interviews are your chance to get the information you need



TENNESSEN WARNING

- **Kobluk v. University of Minnesota**, 613 N.W.2d 425 (Minn. Ct. App. 2000): Employers are not required to give Tennesse warnings to employees when questioning them in the course and scope of the employees' duties in the workplace.
- Best practices:
 - Include a Tennesse warning in personnel policies.
 - Provide a Tennesse when questioning employees about their own misconduct or requesting other private data about the employee.

GARRITY WARNING

Three components:

- 1) Direct/order employee to answer questions.
- 2) Inform employee that failure to answer will result in discipline.
- 3) Inform employee that the employee's statements are subject to immunity. Neither the statements nor the fruits of the statements may be used against the employee in any criminal proceeding.

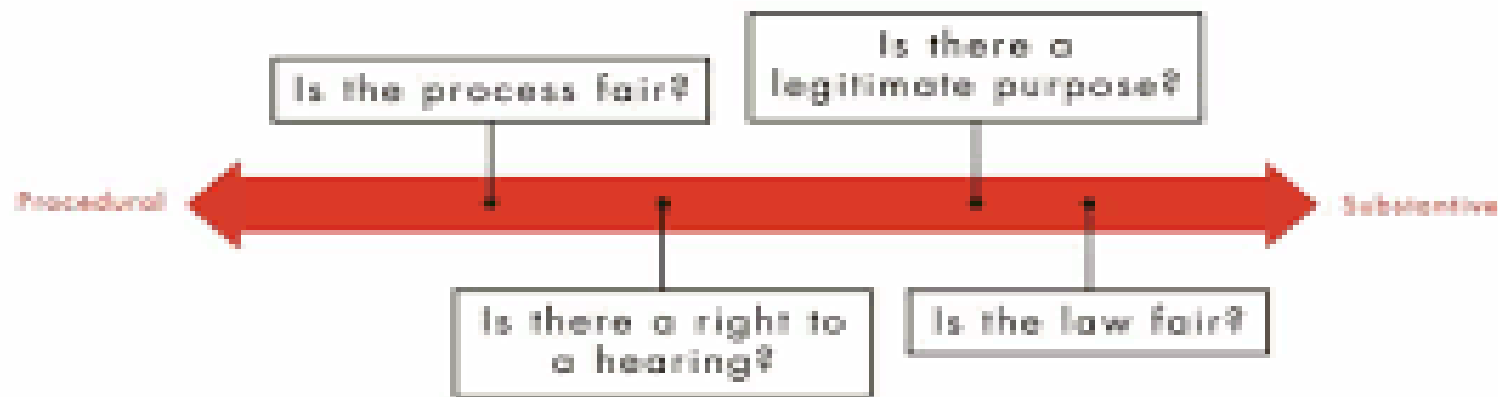
CONSULT WITH THE COUNTY ATTORNEY OR SHERIFF BEFORE ISSUING THIS

REPRESENTATION

- The Union does not have any right to take an active role in the investigatory interview. The union representative may, however, attempt to clarify facts.
- Employees represented by labor unions
- Not the obligation of the employer to contact the Union. Employee may request the union if she is the subject and may reasonably delay the interview.

PROCEDURAL AND SUBSTANTIVE DUE PROCESS

PROCEDURAL VS. SUBSTANTIVE



REASONS FOR DISCIPLINE

Misconduct

- Can discipline immediately
- Some misconduct can result in immediate discharge
- Harassment, discrimination or safety-sensitive issues must be documented

Incompetence

- Generally start with performance evaluation
- Give warnings before discipline
- Make clear the standards expected
- Give directives to improve

PROCEDURAL AND SUBSTANTIVE DUE PROCESS

- Was the rule or work order reasonably related to the orderly and safe operation of the department?
- Was the employee aware of the rule or work order and the possible consequences of failing to comply?
- Did the employer investigate before administering discipline?
- Was the investigation fair and objective?
- Did the investigation produce substantial evidence of misconduct?
- Has the employer applied its rules evenhandedly and without discrimination?
- Appropriate discipline based upon totality of the circumstances

DISCIPLINE OF EMPLOYEES

- When do you discipline an employee and how severe should the discipline be?
- “Just cause”
- Employment “at-will”
- Progressive discipline
- Consider employee’s prior disciplinary history
- Don’t lock yourself into policies requiring lock-step discipline
- Treat similarly situated employees equally.
- “Similarly situated” does not mean that each employee who engages in the same misconduct must be treated in exactly the same way.
- Let the punishment fit the crime

WHAT TO DO ABOUT THE LACK OF COLLEGIALLY?

- Rudeness.
- Disrespect.
- Passive-Aggressive Conduct.
 - Difficult to prove
 - Employee denies it
- Do not ignore it.
- Address it directly, both with colleagues and subordinates.
- Set expectations.



EXAMPLE: LACK OF COLLEGIALITY

- You raised your voice when speaking to your co-worker and refused to offer assistance when it was requested. When I spoke to you about this you were hostile and disrespectful to me, stating that it was not your responsibility to help your co-worker do her job.
- On at least five occasions over the last six months you have attended staff meetings where you have failed to participate in any meaningful way, have spent your time sending or receiving messages on your cell phone in an obvious and obtrusive manner, and have made rude snickering sounds, rolled your eyes or made other sounds or gestures of disapproval when people were speaking.

ADMONITION

Your conduct is unacceptable. You must conduct yourself in a professional and respectful manner at all times.

DIRECTIVES

- You are directed to refrain from raising your voice to any County employee or other individual you encounter in the course and scope of your employment, unless it is necessary such as in the case of an emergency.
- You are directed to promptly and politely respond to questions posed to you by co-workers if you are able to do so. Under no circumstances are you to be impolite or sarcastic to anyone asking for your help or communicating with you at school.

DIRECTIVES

- You must attend and participate in meetings in a professional manner. You shall not make sarcastic remarks, sounds or gestures. You are not to bring your cell phone into any meeting unless specifically authorized by me and if so, you may only use it to schedule other appointments.

CONSEQUENCES

Failure to comply with these directives may result in disciplinary action, including possible termination of your employment.

TERMINATION

Anoka County and LELS

Deputy Terminated Following Gross Misdemeanor Stalking of Female Deputy

- Not a Felony which would have resulted in loss of license
- Discharge Upheld

TERMINATION REDUCED TO SUSPENSION

State of Minnesota and MAPE

Sexual harassment. Showed sexually explicit picture to female co-worker. Continued asking her to lunch after she said no.

Award: Reduced Termination to 1 week suspension. Unwelcome actions did not amount to sexual harassment. Failed to consider good work record. Inappropriate use of computer and showing photo warranted suspension.

TERMINATION REDUCED TO SUSPENSION

Ramsey County and LELS

K9 Officer got drunk and beat his dog. Plead guilty to animal cruelty misdemeanor.

Award: Reduced Termination to 7 month suspension without pay (reinstated w/o back pay) Officer attended rehabilitation program. County had allowed him to remain on the job for 4 ½ months after the incident before terminating him, showing he was not a threat. 20 year employee.

TERMINATION REDUCED TO SUSPENSION

Minnesota Employment and Economic Development and MAPE

Job Counselor translated Spanish to English for private company while at work.

Award: Reduced Termination to 10 day suspension. Supervisor had okayed the practice, employee had not been paid for it and was 16 year veteran with no discipline history. 23 emails of translation activity over 2 years.

TERMINATION UPHELD

Mower County and LELS

- Jailer terminated to removing private inmate data, including medical data, as well as security policies and other documents from the jail.
- Female jailer suspended 10 days and LCA for related offenses, but she did not remove private inmate data.
- Discharge Upheld.

TERMINATION REDUCED

Douglas County and Teamsters Local 320

- License Center Employee looked up man who she read in the news had been missing. She claims she was being a good Samaritan, but she did not report her suspicion that she recognized him or thought he had been in the License Center to a supervisor or law enforcement.
- Her conduct violated the Drivers Privacy and Protection Act and she was suspended for using the system for 30 days, with a warning that anyone abusing the system after 8/1/2018 would be permanently banned.
- County moved to terminate on the grounds that she violated the law, placed County at risk of legal liability, signed agreement every day to comply with the rules when she logged in and that she missed the state permanent prohibition by less than 90 days.
- Termination reduced to 7 month suspension without pay.

LAST STRAW TERMINATION - UPHELD

Pennington County and IUOE-49

- “Last Straw” discharge - 11 priors. Misconduct that alone is not cause for discharge is sufficient based on number of chances given in progressive discipline.
- EE drove a seriously overloaded trailer and sarcastically asked supervisor, "is that enough dirt for you?"
- Discharge Upheld.

Imposing Discipline

- Typically immediate supervisor.
- Supervisor should consult with the personnel department prior to imposing discipline.
- Document all disciplinary action.
- Don't discipline when you are angry.
- Impose discipline privately.
- Consider having a supervisory witness present.



Discharge of Employees

- Pre-Termination Hearing Rights
- Post-Termination Hearing Rights
- Keep Trying
- Unemployment



Loudermill

- Conduct after investigation but before imposing termination or suspension.
 - May provide basic written listing of grounds prior to meeting.
- While courts have held that investigation/Loudermill can be the same if there is a hearing process later, arbitrators expect separate meetings.
- Do not have the termination letter present in the room when you conduct the Loudermill!
- Do not give the employee the termination letter if the employee is being given time to consider resignation.
- Make sure that a decision is not made simultaneously with the Loudermill. Take a break and talk through what the person said.

TERMINATING EMPLOYEES



Consider preserving electronic records when an employee resigns or is terminated under circumstances which may later result in litigation.

PEACE OFFICER DISCIPLINE PROCEDURES ACT



- Before taking statement, a written complaint must be on file.
- Officer must be given written notice of charges before interview.
- Officer must be given a *Garrity* warning.
- Officer has the right to representation.
- Interview must be recorded.

VETERANS' PREFERENCE ACT

- Provides certain protections and benefits to military veterans.
- After the expiration of a probationary period, veterans can only be removed from public employment for incompetency or misconduct.
- Must be given a written notice of the right to a hearing prior to discharge.

IS THE EMPLOYEE A VETERAN?

- Employer may request copy of DD 214.
- Employer should consider referencing this requirement on job application.



VETERANS' PREFERENCE



Excluded positions:

- Department head
- Chief deputy
- Confidential employees

NOTICE OF INTENDED TERMINATION

- Written charges.
- Within 30 days of notice.
- Right to appeal to arbitrator or civil service panel
Failure to request a hearing within 30 days constitutes a waiver of right to hearing and other legal remedies for reinstatement.
- Probationary period consistent with Union Contract or other employees.

NOTICE OF INTENDED TERMINATION

- Notice should also be provided when a veteran elects to resign.
- Failure to give notice keeps 30-day clock running. If the right to hearing is asserted at a later date, liability for back pay could result.

DISCHARGE STANDARDS

- Employer has burden of proving “incompetence or misconduct” sufficient to justify termination.
- Charges must be in writing.
- “Just cause” standard.

MEDICAL INCOMPETENCY

- Hearing notice and standards apply to a person who is medically incapable of performing his/her public employment.
- Standard: whether employer acted reasonably in determining that employee lacks capacity to perform job based on authoritative medical restrictions.

LAYOFF

- Courts have allowed a public employer to layoff a veteran where he is the least senior employee and the position is abolished.
- Employer cannot abolish position and assign duties to other less senior positions as subterfuge to avoid veteran's right to a hearing.

HEARING COSTS

- Recent changes in the Veterans Preference Act make the employer responsible for the veteran's **attorneys fees** if the veteran prevails in a termination or it is reduced.
- Veterans is paid until termination is final (if able to work).
- Employer pays all hearing costs.
- If the employer fails to give notice and a hearing the employee can get reinstated with back pay and a hearing can be ordered.

THANK YOU FOR ATTENDING!