



OACBMRDD

Executive Development Program

PROGRESSIVE DISCIPLINE AND JUST CAUSE

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Progressive Discipline - Requirements

- ✦ Correction not punishment
- ✦ Clear policy
- ✦ Escalating discipline for successive infractions
- ✦ Commensurate with offense(s)
- ✦ Communicating with employee

Sample Progressive Discipline

- ✦ Verbal Warning or Counseling
- ✦ Written Warning
- ✦ Short Suspension (less than 32 hours)
- ✦ Long Suspension (or reduction in pay)
- ✦ Last Chance Agreement (Possible)
- ✦ Termination

Is Discipline Necessary?

- ✦ Is conduct related to job duties?
- ✦ Is conduct known publicly or by employees?
- ✦ Does it affect agency's ability to perform mission?
- ✦ Is it an embarrassment for the agency?

Just Cause - Definition

- ✦ The standard to determine whether management acted fairly in enforcing the agency's work rules
- ✦ The “how and why” of management in imposing employee discipline

7 tests of Just Cause
Enterprise Wire Co.
46 LA 359 (1966)

Arbitrator Daugherty

Just Cause – Test I

✦ Did the agency give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Just Cause – Test 2

✦ Was the rule or order reasonably related to:

- ◆ The orderly, efficient, and safe operation of the agency's business; and
- ◆ The performance that the agency might properly expect of the employee?

Just Cause – Test 3

- ✦ Did the agency, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Just Cause – Test 4

✦ Was the agency's investigation conducted fairly and objectively?

Just Cause – Test 5

✦ At the investigation, did the agency “judge” obtain substantial and compelling evidence or proof that the employee was guilty as charged?

Just Cause – Test 6

- ✦ Has the agency applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

Just Cause – Test 7

✦ Was the degree of discipline reasonably related to:

- ◆ The seriousness of the employee's proven offense, and
- ◆ The record of the employee in his/her service with the agency?

Just Cause – Summary of Tests

- ✦ Forewarning or notice
- ✦ Reasonable rule
- ✦ Confirmation – did it happen?
- ✦ Objective investigation
- ✦ Substantial proof
- ✦ Evenhanded enforcement
- ✦ Appropriate degree of discipline

Planning the Investigation

- ✦ Identify the action and issues to be investigated
- ✦ Which rules or laws have been broken?

Planning, cont.

✦ Assess the nature of the infraction

- ◆ Administrative
- ◆ Criminal
- ◆ Confidential

Planning, cont.

✧ Who should conduct the investigation?

✧ When should the investigation begin?

Who should be interviewed?

- ✧ Witnesses to all events
- ✧ Authors of relevant documents
- ✧ People suggested to you:
 - ◆ By the interviewee
 - ◆ By the suspected employee
- ✧ Anyone with relevant information

Weingarten Rights

NLRB v. Weingarten, 420 U.S. 251
(1975)

✦ An employee is entitled to a third party representative during the investigatory interview if the employee reasonably suspects the investigation or questioning could result in discipline of the employee. [Clinton v Bush v NLRB]

Basics of Interviews

- ✦ What happened? Where, When, Who, How?
- ✦ Are there any other witnesses?
- ✦ Is there any written evidence?
- ✦ Did any employee keep a record?
- ✦ Has the employee talked to anyone else?

Tips on Questions

- ✦ Sketch out questions in advance
- ✦ Start broad then focus
- ✦ Don't put words in the interviewee's mouth
- ✦ Use answers to your planned questions to form additional questions

Tips on Questions, cont.

✦ Don't lead the interviewee

◆ "Isn't it true that...?"

✦ Avoid compound questions

◆ "Did you see John first thing or later in the day?"

Tips on Questions, cont.

✦ Don't form conclusions during the interview

◆ “So, it appears that Bob believed that no one would be around. Don't you think so?”

✦ Review your understanding of the event (s) with the interviewee

Tips on Questions, cont.

- ✦ If the subject denies responsibility, ask him/her to comment on the evidence:
 - ◆ “Do you know any reason why Jan would have said that about...?”
- ✦ Ask if the person has any additional relevant information
 - ◆ “What else do you think I need to know?”

Pre-disciplinary Conference

- ✦ Established by Ohio Supreme Court
- ✦ Conference only necessary if there is a chance that the EE will be suspended, reduced in pay or position, or terminated.
- ✦ Conference administrator does not have to “neutral”
- ✦ If it is a management employee, we suggest going outside the ER for an administrator.

Notice of Pre-disciplinary Conference

✦ Witnesses:

- ◆ Notice is not necessary
- ◆ Witness does not need representation (assuming the witness is not subject to discipline)

Notice of Pre-disciplinary Conference, cont.

✦ Subject: preference for 3 days written notice so employee can secure a representative

- ◆ Include subject of the investigation, time, date, location, and right to union representation (attorney?)

Rules regarding Representation

- ✦ Any available steward, other employee, or union representative.
- ✦ If the employee declines representation, have the employee sign a waiver.
- ✦ The employee must answer the questions; however, the representative may assist with clarification.

Rules regarding representation, cont.

- ✦ The employer retains the right to compel the employee to answer. The union rep cannot counsel the employee not to respond.
- ✦ The union rep has no right to challenge or question the interviewer.

“Garrity Right”

✦ Individual's right not to answer questions that will incriminate him/her

Pre-disciplinary Procedure

- ✦ Explain what is being investigated
- ✦ Indicate role that interviewee has
 - witness, subject of investigation

Pre-disciplinary Procedure, cont.

- ✧ Clarify whether information will be kept confidential
- ✧ Indicate what charges are contemplated

Pre-disciplinary Procedure, cont.

✦ Ask your questions

✦ Keep accurate written notes of questions & answers

✦ Allow the interviewee time to answer

Pre-disciplinary Procedure, cont.

- ✦ Stay in control of meeting

- ✦ Halt the meeting if you become aware of criminal activity, or new or more serious offenses

Pre-disciplinary Procedure, cont.

- ✦ Ask if there is anything the interviewee would like to add
- ✦ Close the meeting and inform the interviewee regarding notification, if any, of the outcome

Sample Checklist for Witnesses

- ✦ Witness Name
- ✦ Witness Info
- ✦ Facts to which Witness will Testify
- ✦ Documents Submitted BY witness
- ✦ Documents Submitted THROUGH witness

Sample Checklist for Exhibits

- ✦ Exhibit Number
- ✦ Description of Exhibit
- ✦ Exhibit from/through which Witness(es)
- ✦ Submitted for Identification? _____
- ✦ Accepted as Evidence? _____

Pre-disciplinary Report

✧ Report of the Incident:

- ◆factual overview
- ◆what happened
- ◆who was present

Pre-disciplinary Report, cont.

✦ Report of the Investigation:

- ◆ state the charges against the employee
- ◆ document process of investigation, interviews, evidence
- ◆ demonstrate how charges are supported (or not) by the evidence

Pre-disciplinary Report, cont.

- ✧ Recommended action: Conference administrator does not recommend discipline. Charges are either based in fact or not
- ✧ Attach all interview notes, witness statements, and documentation of evidence

**The Red Queen wouldn't
make it as a public manager....**





**BEFORE ISSUING OR
NOT ISSUING
DISCIPLINE,**

**THE
SUPERINTENDENT
MUST...**

Analyze the Evidence

✦ Review the 7 tests of just cause

✦ Be able to justify discipline

✦ Account for any extenuating circumstances

Analyze the Evidence, cont.

- ✦ Review disciplinary grid (if you have one)
- ✦ Reach a conclusion
- ✦ Discuss conclusion with your Labor Relations contact

CASE STUDIES

- ✦ These are actual DD cases that we have handled.
- ✦ Each table will review the case, answer the questions and state what they believe were the strengths and weaknesses of the case and what the outcome should have been.