



# **OACBMRDD**

## **Executive Development Program**

---

### **PROGRESSIVE DISCIPLINE AND JUST CAUSE**

February 6, 2012

Dublin Management Group, Ltd

Dave Kessler / Rich Bourgault

# 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.