



**EMPLOYEE DISCIPLINE
AND
INVESTIGATIONS**

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Presented By

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These materials are designed to accompany a presentation and are not intended to be legal advice.

CHECKLIST FOR EMPLOYEE DISCIPLINE AND DISCHARGE

1. Are there contractual requirements and/or standards that apply?

- Collective bargaining agreements
- Individual employment contracts
- School district policies
- Employee manuals/handbooks
- Oral contracts
- Past practice

2. Are there statutory requirements or restrictions that apply?

- Continuing Contract Law (Tenure) (Minn. Stat. § 122A.40)
- Public Employees Labor Relations Act ("PELRA") (Minn. Stat. Ch. 179A)
- Veterans' preference laws
- Open Meeting Law
- Data Practices Act

3. Who should be involved in the decision-making regarding?

- Investigation
- Evaluation, monitoring and supervision
- Discipline/discharge planning and decision-making

4. Do I have reporting obligations?

- Maltreatment of Minors Act (reporting allowed to law enforcement, social services, or the Department of Education)
- Board of Teaching
- State Auditor
- Law Enforcement

5. Do we need to investigate?

- Who should conduct the investigation?
- Are there immediate steps I need to implement to protect safety or insure a proper investigation?
- What standards will apply?
- Who will be present during interviews?
- Where should the interviews take place?
- *Tennesen* notices given to persons who are requested to provide private data
- Proper documentation of investigation and conclusions

- *Loudermill* principles

6. What is the deficiency?

- Poor performance
- Attendance
- Competency
- Acts of misconduct

7. What is the evidence that supports these deficiencies?

- Performance evaluations
- Investigation documentation
- Documentation of previous discipline
- Witness and/or documentary evidence

8. What form of discipline is appropriate and sustainable?

- Immediate discharge for egregious misconduct
 - Continuing contract law for teachers provides specific types of conduct that may warrant immediate termination without progressive discipline
 - Just-cause standard
 - "At will" employees
- Progressive discipline:
 - Oral warning or directive
 - Written warning or directive
 - Letter of deficiency
 - Remediation principle
 - Suspension without pay
 - Discharge
- Is the employee subject to tenure (continuing contract) laws? If so:
 - Is the conduct remediable?
 - Has the employee been given notice and an opportunity to remedy?
 - Has the opportunity and progress (or lack thereof) to remedy deficiencies been appropriately documented?

9. What should happen at the disciplinary meeting?

- Who should be there?
 - School district personnel
 - School district legal counsel

- Union representation (*Weingarten* rights)
- What should employee be given at the meeting?
 - Disciplinary documents
 - "No retaliation" warning
 - The disciplinary meeting is not a hearing

10. Formal Disciplinary Action/Recommendation

- Is school board action required for the disciplinary action or discharge?
- Comply with open meeting law and notice requirements
- Provide employee with notice of school board action
- Tenured teachers or veterans may be entitled to be paid pending completion of hearing proceedings

11. Post-Discipline Issues

- Grievance rights
- Statutory right to a hearing
- Employee requests for reason for his/her discharge or non-renewal
- Data Practices Act requests
- Access to personnel file

12. What other laws may apply?

- Americans With Disabilities Act
- State and federal anti-discrimination statutes
- Family Medical Leave Act
- Constitutional due process rights
- Free speech rights
- Other constitutional rights
- Defamation
- Invasion of privacy

SEVEN TESTS OF JUST CAUSE

1. DID THE EMPLOYER GIVE TO THE EMPLOYEE FOREWARNING OR FOREKNOWLEDGE OF THE POSSIBLE OR PROBABLE DISCIPLINARY CONSEQUENCES OF THE EMPLOYEE'S CONDUCT?

This part of the test basically involves the communication of rules which must be communicated to the employee either verbally or in writing, along with penalties for violation.

However, there are exceptions. Some offenses are so serious that they do not require notice--everyone knows or should know that they are wrong. Examples of these offenses are:

- Gross insubordination, (clear refusal to obey a direct order);
- Alcohol, drug consumption and/or being under the influence on the job;
- Fraud or theft from employer or co-worker, (includes fraudulent time reporting, fraudulent use of sick leave or other leave);
- Sexual and physical abuse;
- Some forms of sexual harassment; and
- Assault.

Also, it is well established that employers may prohibit:

- Offensive behavior (such as threatening, verbal or physical conduct toward a supervisor or co-workers);
- Profanity and/or verbal arguing;
- Less than gross insubordination (this deals with the passive-aggressive employee who doesn't directly refuse to comply with a directive, he/she just doesn't do it);
- Disloyal conduct (for example, maintaining confidential information or bad mouthing the School District or its employees. CAVEAT: Be careful that employees are prohibited only from making false accusations and that they are not prohibited from speech regarding matters of "public concern." Otherwise, the constitutional right to free speech may be violated.
- Attendance problems, including: Excessive absences for any reason, No shows.

2. **WAS THE EMPLOYER'S RULE OR MANAGERIAL ORDER REASONABLY RELATED TO (A) THE ORDERLY, EFFICIENT, AND SAFE OPERATION OF THE EMPLOYER'S BUSINESS AND (B) THE PERFORMANCE THAT THE EMPLOYER MIGHT PROPERLY EXPECT OF THE EMPLOYEE?**

If the employee thinks a rule is "unreasonable", he or she must, nonetheless, comply unless it would immediately jeopardize his or her personal safety or integrity. He or she may then challenge the rule through the grievance procedure or agencies later. This is referred to as the "*Obey now, grieve later rule.*"

3. **DID THE EMPLOYER, 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?**

Generally, investigations should be conducted before the disciplinary action.

An employee may be suspended pending investigation. For teachers, such a suspension must be with pay. For non-licensed employees, the collective bargaining agreement governs. If there is no provision requiring pay, the employee may be suspended without pay, unless he or she is a veteran. The School District will be liable for lost pay if the misconduct is unsubstantiated or the discipline is not sustained. Veterans have statutory rights to continue pay pending final disposition of a discharge.

4. **WAS THE EMPLOYER'S INVESTIGATION CONDUCTED FAIRLY AND OBJECTIVELY?**

It is essential that the investigator be detached from the situation and that the investigation is thorough.

5. **AT THE INVESTIGATION DID THE EMPLOYER OBTAIN SUBSTANTIAL AND COMPELLING EVIDENCE OR PROOF THAT THE EMPLOYEE WAS GUILTY AS CHARGED?**

6. **HAS THE EMPLOYER APPLIED ITS RULES, ORDERS, AND PENALTIES EVENHANDEDLY AND WITHOUT DISCRIMINATION TO ALL EMPLOYEES?**

What has been the employer's "past practice"? However, it should be noted that if the School District has been lax in enforcing its rules, they are not precluded forever from enforcing them. This situation may be rectified by notifying employees of the School District's intent to enforce all rules as written.

Furthermore, employers are not required to treat all employees the same for the same offense. In fact, arbitrators will look at what is fair and equitable considering the seriousness of the offense and mitigating circumstances, even if an employer has not.

A significant mitigating circumstance in an arbitrators view seems to be the employee's work record. A good work record may call for a less harsh penalty.

7. WAS THE DEGREE OF DISCIPLINE ADMINISTERED BY THE EMPLOYER IN A PARTICULAR CASE REASONABLY RELATED TO (A) THE SERIOUSNESS OF THE EMPLOYEE'S PROVEN OFFENSE, AND (B) THE RECORD OF THE EMPLOYEE?

A trivial offense will not merit harsh discipline unless the employee has been guilty of other offenses or the same offense a number of times in the past.

TEN RULES OF THUMB FOR EMPLOYEE DISCIPLINE

- 1. The personnel file should tell the story.**
- 2. Document, document, document**
- 3. It won't get better on its own. Don't delay. Being "nice" doesn't do the trick.**
- 4. Transfers don't work.**
- 5. Be candid. Say what you mean (in layperson language) in written and/or verbal discipline.**
- 6. Be consistent and fair.**
- 7. Everyone does not have to be treated the same.**
- 8. Utilize progressive discipline, but remember that a lockstep approach is not required, especially in cases of serious misconduct.**
- 9. Post-discipline follow-through and monitoring is important.**
- 10. Don't do it alone.**

COMMON PITFALLS FOR SUPERVISORS

BY Timothy R. Palmatier

PITFALL #1

“Performance from Mars, Evaluations from Venus”

Problem: Formal evaluations often provide the first and best opportunity for a written indication of a performance problem. Too often, however, supervisors allege “ongoing” performance problems at the time discipline is being implemented, but such performance problems were not presented very clearly as part of the employee’s past performance evaluations. Inconsistencies between the evaluation and the supervisor’s subsequent oral account will decrease the likelihood of the disciplinary action being upheld.

Suggestion: It is important that performance deficiencies or other concerns be noted in evaluations, if such concerns or deficiencies will be relied upon later to support discipline or terminations.

PITFALL #2

“Oh, What I Wouldn’t Give for a Good Document Right Now” or “Paper Trails Are Happy Trails”

Problem: Similar to the concerns noted in Pitfall #1 with respect to performance evaluations, supervisors often present anecdotes regarding an employee’s past performance problems or will recall concerns expressed by others in an effort to justify discipline. However, a review of the personnel records reveals no documentation of the previous problems now being recalled. School Districts are often required to demonstrate “progressive discipline” or a pattern of increasing discipline before more severe forms of discipline are upheld. A written history of prior warnings and actions can be critical to the School District’s efforts in that regard.

Suggestion:

1. Supervisors should be trained regarding the importance of progressive discipline and the need to record discipline.
2. A procedure for issuing warnings should be established. Ideally, the employer will develop forms or models which may be used by supervisors to record discipline.
3. Written discipline should include a summary of the nature of the deficiency, the corrective action required, and a warning that a recurrence of the problem may result in additional discipline, up to and including termination.
4. Written discipline should be dated and signed by the supervisor issuing the warning.
5. The employee should be given the opportunity to acknowledge, in writing, the issuance of the warning (some collective bargaining agreements require it).
6. A copy of the disciplinary letter should be placed in the employee’s file.
7. The discipline should be issued at approximately the same time the problem arose rather than created after the fact in an effort to “paper the file.”

Pitfall No. 3
“Policies Schmolicies”

Problem: Many School Districts have a wide variety of policies governing employee rights and behaviors. Given the press of other business, such policies may not regularly be updated to insure they comply with applicable law or changes in the School District’s actual practices. Also, policies are often not appropriately disseminated, which will be used against the School District in a grievance or discharge hearing.

Suggestion: The School District should make sure policies are properly drafted and updated. Supervisors need to be aware of the existence of policies and following them. Failure to do so jeopardizes an employer’s ability to successfully implement discipline.

Pitfall No. 4

“Don’t Worry, That’s Just the Way the Guys on the Loading Dock Talk” – Failure to Take Complaints Seriously and Respond Appropriately

Problem: When the conduct of an employer or supervisor is being reviewed for purposes of determining liability in cases involving claims such as discrimination or sexual harassment, the legal inquiry often boils down to the question: “What did the employer know, when did it know it, and what did it do about it? If the problem behavior or concern was brought to a supervisor’s attention and no meaningful action or response was taken, the School District’s defense is jeopardized.

Suggestion: School Districts should adopt clear policies relating to employee complaints, harassment, and discrimination (someone required by law). Supervisory staff should be trained to properly handle employee complaints and to take complaints seriously. Supervisors should receive information regarding which types of complaints require formal action. An internal procedure for processing employee complaints should also be made available to supervisors and an appropriate person should be selected to conduct an investigation, if warranted, after a complaint is received. At a minimum, supervisors should be instructed to contact the human resources department if they have any doubts about how to properly address a complaint or concern.

Pitfall No. 5

“She’s Probationary – She Doesn’t Have Any Rights”

Problem: Supervisors often incorrectly assume that because an employee is “probationary,” the employee has no legal rights and may be summarily disciplined or terminated. While it is true that probationary employees have greatly reduced protections and rights compared to other employees, various laws or rules may apply which require a School District to observe certain procedural or substantive requirements before disciplining or terminating even probationary employees.

For example, probationary employees may be entitled to at least minimal due process protections under both the state and federal constitutions before they are discharged. Also, various other laws or authorities, including veteran’s preference laws and collective bargaining agreements, may give probationary employees at least some procedural or substantive rights which must be observed before discipline or termination is implemented.

Suggestion: School Districts should not assume an employee has no rights just because an employee is probationary.

Pitfall No. 6

“Files, Files Everywhere!”

Problem: It is common for a School District to maintain a centralized system which contains personnel records of employees. Employees often believe the file maintained in the central system is their “personnel file.” However, it is also common for supervisors to maintain a filing system at their work locations which the supervisor considers to be a “desk file” or a “personal file.” Often, materials in such files do not end up in the employee’s formal “personnel file” centrally maintained by the public employer – even though the files contain information which may be helpful in considering discipline. In addition, applicable laws regarding maintaining or releasing data regarding public employees require the School District to be responsible for all data maintained regarding an employee, regardless of the location of the documents within the School District’s system. If the individuals responsible for maintaining the central files are not aware of other files, it is difficult for employers to comprehensively respond to requests for data and creates potential data practices violations.

Suggestion: School Districts should insist that supervisors forward relevant performance, disciplinary and other information to a centralized location, or should at least have the ability to identify and locate the contents of all relevant file materials if needed. Also, supervisors should not give employees the impression that any “files” maintained by the supervisor will not be disclosed to anyone else.

Pitfall No. 7

“Next Year, It Will Be Someone Else’s Problem” or “Let’s Rearrange the Deck Chairs on the Titanic”

Problem: Supervisors sometimes avoid making difficult disciplinary decisions if they realize a problematic employee will not be assigned to the supervisor much longer. Supervisors may also attempt to “transfer” a problem employee somewhere else rather than deal with the employee. While those strategies may relieve near-term headaches for the individual supervisor, they can prolong the problem for the School District. Typically, the employee’s deficiencies resurface at the new location and the new supervisor is left trying to explain why his or her opinion that the employee is deficient is not consistent with the evaluations of prior supervisors.

Suggestion: Supervisors should address problems as they arise. Try to avoid an attitude that the disciplinary process is “more trouble than it’s worth.”

Case Study #1

You have been the Special Education Director at Anywhere School District for two years. Your responsibilities include supervising staff in regard to compliance with special education statutes and regulations. Mr. Teacher is a special education teacher (LD) and case manager at the high school. He has taught in the School District for five years.

Shortly after you were employed by the School District, several high school staff told you “confidentially” that Mr. Teacher was “not doing his job.” Also, during your first year, a parent told you that Mr. Teacher was not responding to her repeated requests for a copy of her daughter’s IEP. You asked Mr. Teacher why he had not responded to the parent and he told you he had the IEP somewhere and he would get it to her as soon as possible. He did finally send the parent a copy of the IEP.

The students love Mr. Teacher. He is very cool. They especially love his math project that is a mock horse race game where students can bet on the horses. You are somewhat concerned about the game and the overall noise level in Mr. Teacher’s classroom, but everything seemed under control during the two announced observations you have done. Mr. Teacher did make a couple of sarcastic remarks to students during one of your observations, but the content of his instruction and overall organization seemed good, so you did not mention the verbal conduct in his written evaluation. You did tell him that he “should be careful about sarcasm.”

While the students love Mr. Teacher, most of the staff do not. He refuses to participate in planning meetings and rarely shows up for special education staff meetings. When he does, he frequently rolls his eyes and argues small points. Once or twice, he looked as if he was sleeping. Team meetings are tense when Mr. Teacher is involved in them.

Last week, Mr. Teacher told you that he has a “personality conflict” with a paraprofessional assigned to his classroom. He has demanded that she be transferred. The paraprofessional told you that Mr. Teacher is retaliating against her because she complained to him when he left her alone with the students to take a “mental health break.” She said she thinks Mr. Teacher went outside to smoke.

Two days ago, a parent called you to report that her son’s reassessment is long overdue and his case manager, Mr. Teacher, won’t return her phone calls. She is very concerned about her son’s lack of progress.

You went to Mr. Teacher’s classroom and asked to see him in the hallway. You asked him to bring the student’s file and meet with you at the end of the school day. He said the student’s file is at home and he will bring it tomorrow (Tuesday). On Tuesday, Mr. Teacher calls in sick. On Wednesday, you receive a letter from Mr. Teacher’s physician indicating that he is suffering from depression induced by your harassment. Among other things, the physician recommends that someone else supervise Mr. Teacher

and that he paraprofessional be transferred from his classroom, so as to reduce Mr. Teacher's stress.

What do you do?

Case Study #2

Carl Custodian has worked for the School District for five years. He has worked in various school buildings. He is currently assigned to the Elementary building. Carl's work performance has been average or below average. He has been given many verbal directives and three letters from his supervisors regarding improving his performance. Carl has responded to the directives by completing the tasks he was specifically directed to complete, but not doing other tasks. For example, in the last letter to Carl, he was told to empty all the wastebaskets in every classroom. Carl emptied the wastebaskets, but did not vacuum the classrooms. When his supervisor asked him about the vacuuming, Carl said, "I keep telling you people, I don't have time to do it all. Anyway, they were clean when I left."

During the last three months, the building principal has been unable to find Carl in the building during the first one-half our to hour of Carl's duty time. When the principal finally finds Carl, he says things like, "I was around, you just didn't look hard enough."

Carl does not get along with his co-workers. Several times, Carl has been seen shouting and arguing with co-workers in various parts of the building. Last week, a co-worker told Carl that a teacher needed something mopped up in her classroom and Carl threw the mop in the co-worker's direction and said, "Do it yourself, if you're so worried about it."

Two days ago, a parent complained to the principal that she asked Carl to open the auditorium for an after-school boy scout meeting and Carl seemed very irritated. She said that Carl told her, "How am I supposed to get my work done if I'm running around opening doors?" The principal confronted Carl with the parent's complaint and Carl said the parent was lying. He also said, "You can't keep anybody happy around here."

Carl has made and/or threatened to make complaints to several agencies (i.e., OSHA, Wage and Hour, and Department of Human Rights). Carl has complained to his supervisor that the chemicals the School District requires him to use are "dangerous chemicals," that he must be given more breaks, and that he is being discriminated against because he is older than the other custodians.

Rather than hassle with Carl, Carl's supervisor often does Carl's work and ignores Carl's abusive remarks.

Co-workers have reported to Carl's supervisor that they think Carl's breath sometimes smells like alcohol; however, they have not observed any other signs of alcohol consumption or intoxication.

Carl is a veteran of the Vietnam War.

What should the School District do about Carl?

Case Study No. 3

Ms. Teacher has been a junior high social studies teacher for 20 years. She was never an outstanding teacher; her principals evaluated her as “average.” Ms. Teacher never engaged in any acts of misconduct and was friendly, cooperative, and respectful to her peers and the administration.

Ms. Teacher’s classroom control has been deteriorating over the last couple years. There is excessive noise coming from her classroom, a large number of student referrals to the office, and several minor repairs in the classroom by the custodians.

Some parents have complained about Ms. Teacher’s classroom control. Other parents have complained that the course work is too easy and that the students are not learning anything.

Principal Peterson does classroom observations during which the students behave. Ms. Teacher attends a seminar on student discipline and her classroom control improves for a time, then deteriorates again. During subsequent observations by Principal Peterson, the students behave, but Principal Peterson becomes more concerned about the quality of the instruction.

Ms. Teacher attends a seminar on the elements of instruction. Principal Peterson works with Ms. Teacher extensively, and Ms. Teacher gets to the point where she can design an effective lesson plan. Principal Peterson observed Ms. Teacher delivering those lesson plans. Ms. Teacher’s instruction is so unenthusiastic and monotone that Principal Peterson almost fell asleep during the class. A couple of students actually dozed off for a few minutes.

Ms. Teacher is extremely cooperative. She responds positively to every suggestion given by Principal Peterson. After one year of working with Principal Peterson, Ms. Teacher’s discipline and instruction improves only slightly.

What should Principal Peterson do?