

Discipline & Documentation

December 13, 2022

Subjects to cover:

- Just cause standard
- Investigation of misconduct/discipline matters
- Documentation of misconduct/disciplinary issues
- Loudermill hearings
- Discharge proceedings

The problem:

Client: We need to fire X. He's a lousy employee and he's not going to get any better.

Lawyer: No problem. What are we firing him for?

Client: He's not doing his job.

Lawyer: OK. What do we have by way of documentation or past discipline?

[uncomfortable silence]

Everybody agrees that X is a bad employee and has violated minor work rules, but there are no prior warnings, reprimands, disciplinary suspensions or other actions taken in his file. Worse, all of his annual reviews are average or above-average.

What are your chances of success at grievance arbitration?

- Can't prove that X was warned about past bad performance.
- Can't demonstrate that progressive discipline was applied.
- May not be able to prove that X had notice of the rule he allegedly violated.

At the arbitration hearing a year later...

“The District never told me was doing anything wrong. They were lying in wait.”

“Other people are doing much worse things, so they’re out to get me for some other reason.”

“If the District thought I was doing my job badly, shouldn’t I have been given a chance to fix it? I’m a long-term employee.”

JUST CAUSE

District must have “just cause” for imposing discipline. There is no accepted definition of “just cause”. Arbitrators use the seven tests for determining whether the District had just cause for disciplining an employee.

Just Cause Test

1. Was employee adequately warned of consequences of their conduct? (May have been given orally or written)
2. Was District rule or directive reasonably related to efficient and safe operations?
3. Did Principal / Supervisor investigate before administering the discipline?
4. Was investigation fair and objective?
5. Did the investigation produce substantial evidence or proof of guilt?
6. Were the rules, orders and penalties applied consistently and without discrimination?
7. Was the discipline reasonably related to the seriousness of the offense and the past record?

Typically, Progressive Discipline Has Four Steps

1. Verbal warning (or reprimand)
2. Written reprimand and warning
3. Suspension without pay (or with pay during the investigation)
4. Final warning and discharge

Documentation vs. Disciplinary Investigation

Documentation can address incidents that, standing alone, don't warrant imposition of discipline, but which may lead to discipline if repeated or a negative evaluation at year-end.

Documentation

Use documentation to create a record of present-tense observations and communications.

In short, documentation should:

- (1) tell an employee what occurred that did not meet expectations,
- (2) describe the expectation, if it isn't obvious, and
- (3) record the employee's response, if any, to being confronted about the conduct.

Email makes documentation easier than ever, but anything that's serious deserves a letter.

Components of good documentation:

1. Summarize the facts (“This morning I observed you...”)
2. Review the investigative procedure used (“I spoke to you and to...”)
3. Review the rules/policies/expectations (“The expectation is that...”)
4. Reference past incidents, if any (“This is the second time I have addressed this...”)

Keys to Effective Documentation

- **Be timely.**
- Write documentation as soon as you're able to do so, when your memory of an event and pertinent facts will be clear and in order to minimize claims of delay or bad memory.
- If circumstances prevent you from being timely, explain the delay in your documentation to show why the delay occurred (if possible) and to insulate yourself from criticism about untimeliness.

All documentation, from addressing informal matters to documenting terminable conduct, is built on these components.

Types of documentation:

- Informal / email documentation
- Formal documentation
- Summary of Loudermill hearing
- Disciplinary reprimand

- **Know what is worth documenting.**
- It is possible to over-document.
- For example, should you send an email if an employee is late for the first time by less than five minutes? Probably not, unless that lateness led to something significant. Better to wait until there are several minor incidents to document at once
- Sure, the Union will sometimes claim that any documentation is irrelevant and motivated by bad actions, but it's important that you not appear ticky-tacky.

Follow the CBA

- What does the relevant CBA say about any documentation and disciplinary procedures?
- Are you required to give advance notice of any meetings?
- Are you required to turn over your collected statements or notes?
- Generally, documentation that does not impose formal discipline is not grievable.
- Is documentation required to be removed from a person's personnel file upon their request?

What not to do when documenting.

- Don't write documentation when you're angry. Or, at least, don't send it.
- Don't let your personal feelings toward a person (either positive or negative) cloud your judgment or intrude into your documentation.
- Consider having another managerial-level person read more significant documentation before you send it to check for clarity and to be sure you are coming across professionally.
- Don't refer to an employee's medical matters unless recording what the employee brought up.

What if the misconduct warrants imposition of discipline?

All of the above, plus investigation and due process

- Talk to all available witnesses. Don't leave yourself open to the criticism that you failed to talk to a relevant person.
- Obtain written statements from the employee and all witnesses, and document your efforts if people refuse.
- In your documentation, refer to all necessary facts, statements made and witnesses present at an event.
- Include all grounds for potential discipline. If you leave potential misconduct out of the disciplinary documentation, you will not be able to rely on it later.

Hypothetical one:

- Instructional aide is late for work three times in one week.
- Administrator meets with aide, reiterates expectation and sends documentation which summarizes the events and states that discipline may be imposed if the conduct occurs again.

Hypothetical two:

- Instructional aide is alleged to have inappropriate contact with student.
- Administrator (1) conducts investigation, by interviewing all possible witnesses and obtaining written statements; then
 - (2) conducts Loudermill conference to give employee required due process; then
 - (3) imposes discipline

Investigative meetings vs. Loudermill hearing/conference

Similarities:

- Same people may attend—District administrator or supervisor, employee, Union representative
- Offers employee a chance to tell his or her side of the story

Differences:

- Finding out what happened vs. letting the employee tell you why what you think happened didn't
- Must have prior notice, and it should be written and specify the reasons for the conference
- Does your CBA require prior notice (written?) for either?

LOUDERMILL PROCEDURES

- Cleveland Board Of Education v. Loudermill, 470 U.S. 532 (1985)
- “An essential principle of due process is that a deprivation of life, liberty, or property “be preceded by notice and opportunity for hearing appropriate to the nature of the case.” ...We have described “the root requirement” of the Due Process Clause as being “that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.”...This principle requires “some kind of a hearing” prior to the discharge of an employee who has a constitutionally protected property interest in his employment.”

In brief, Loudermill requires that before you deprive a public employee of any pay, benefit or other pecuniary advantage, you must give them some limited due process in the form of a conference where they:

- Have some notice of the allegations against them
- Have the opportunity to be accompanied by a Union representative
- Have the ability to respond to those allegations prior to discipline being imposed

- Employees are able to waive Loudermill hearings, but they are useful for employers to gather additional information.
- A Loudermill hearing (or Loudermill conference) is the last step to occur before imposing discipline, and you should be sure to maintain that you have not made your mind up about imposing discipline until the Loudermill is held.
- If you investigate certain allegations, then hold a Loudermill for those allegations, then learn of new things—even at the Loudermill—you should hold a second Loudermill.

Loudermill notice:

Dear employee,

I am directing you to appear at a Loudermill conference to be held in my office at the High School at 3:00 pm on June 21. The reason for the conference is to permit you to respond to the following allegations:

You are permitted to be accompanied by a Union representative, but it is your responsibility to secure his or her attendance.

After the conference is held, it may be necessary to impose discipline, so your responses to the allegations will be of significant importance.

- Loudermill notice must put the employee on notice of what it is that he or she is expected to address, and what he or she would eventually receive discipline for. To that end, while written notice is not strictly required—an impromptu conference was held to satisfy the requirement--you should always put together a formal letter to avoid any dispute over what the employee believed he or she was required to address.
- The failure to hold a Loudermill conference is grounds for reversal of discipline on due process grounds.
- For serious allegations, you can suspend with pay during an investigation, pre-Loudermill, but a suspension without pay can only occur post-Loudermill.

Holding a Loudermill

- Have two District employees attend so that you have two note-takers and two witnesses to what you may hear.
- At the outset, identify the summoning letter, confirm they received it and that they understand why the conference is being held. Did the letter put them on notice?
- After a brief explanation of the allegations, turn it over to the employee
- Allow the employee to talk for as long as they like. “Is there anything else you’d like to say?”

Post-Loudermill:

- Take detailed notes at the Loudermill. Don't be afraid to leave things hanging so you can get your notes taken. Get direct quotes where possible.
- Have both District witnesses convert their notes into a readable document.
- Realize that employees will sometimes admit things at a Loudermill that they later disavow, so don't assume people will stick to the same story later.

Post-Loudermill letter:

- After the Loudermill is held, send a letter summarizing the following:
- Who attended the Loudermill
- What the employee said in response to the allegations, particularly anything that (1) supports the allegations, (2) shows remorse or (3) offers any explanation.
- Evaluates credibility and concludes whether misconduct occurred.
- You may impose discipline in this letter, if discipline is warranted.
- Having a record of what the Administration heard at the Loudermill and based its action on is critical.

DISMISSAL PROCESS

DISMISSAL PROCEDURES

Due Process Rights and Procedures Depends on the Classification of the Employee

- Temporary Professional Employees (TPE's)
- Professional Employees
- Support Staff
- Administrators

TYPICAL TERMINATION DUE PROCESS INCLUDES:

- Complete Investigation
- Loudermill Hearing
- Statement of Charges
- Board Hearing **OR** Arbitration

ALWAYS INVOLVE YOUR SOLICITOR IN THESE MATTERS!

Types of Employees

- Certificated – Employee that holds a certificate from PDE
- Non-Certificated – Employee that does not hold a certificate from PDE
- Professional – Employee that holds an active certificate from PDE and is tenured and works in a permanent position
- Temporary – Employee that is non tenured (1-3 years experience) and holds active certification and works within certification are
- Permanent – Employee who hold a permanent “board approved” position

Termination of Temporary Professional Employees

- Process is less onerous than for Tenured Employees
- Employees may be dismissed based on a single unsatisfactory rating
- Employee's rights under Section 514 (and Collective Bargaining Agreement)
 - Causes: incompetency, intemperance, neglect of duty, improper conduct and violation of any school laws
- Appeal to the Courts NOT to the Secretary of Education
- Board action requires only a majority vote and NOT 2/3

Termination of Temporary Professional Employees

Under Section 514 – steps in dismissal process:

1. Complete investigation
2. Due Notice – Loudermill Hearing
3. Statement of Charges issued (Jones Case)
4. Board action, after Board hearing, if demanded

Remember: Union employees (Teachers) usually have a choice of either a hearing before the Board of School Directors or through the grievance procedures (arbitration).... NOT BOTH

Termination of Tenured Professional Employees

Rights of Tenured Professional Employees are granted under Section 1127, 1130 and 1132

Section 1127:

- Complete investigation
- Due Process Rights – Loudermill Hearing
- Written Statement of Charges, signed by Board President and attested by Secretary, sent registered mail setting forth time and place, when and where employee will be heard in person or by counsel, or both, before the Board and setting detailed Statement of Charges (Jones Case)
- Hearing date is NO sooner than 10 days and no later than 15 days from date of notice
- Employee has right to representation and right to question all witnesses

Remember: Union employees (Teachers) usually have a choice of either a hearing before the Board of School Directors or through the grievance procedures (arbitration).... NOT BOTH

Termination of Support Staff

- Status as non-professionals
- Causations under School Code Section 514
- No Due Process rights under School Code
- Due Process rights are under local contract and/or Board policy

Remember: Support staff Union employees usually have a choice of either a hearing before the Board of School Directors or through the grievance procedures (arbitration)
..... NOT BOTH

Causes for Termination – Immorality

22 Pa. Code § 237.3 defines immorality as: “Immorality is conduct which offends the morals of a community and is a bad example to the youth whose ideals a professional educator has a duty to foster and elevate.”

Examples of Immorality

- Any form of criminal conduct
- Restraint, terroristic threats and criminal assault
- Shoplifting
- Corrupting minors
- Criminal harassment
- Illegal gambling
- Selling counterfeit watches and other related federal offenses
- Stealing food from an employee dining room
- Driving under the influence of alcohol

Examples of Immorality

- Any form of sexual or amorous conduct toward students
- Proposed spanking of female students
- Any physical contact of a sexual nature
- Male teacher concealing himself in a girls' locker room
- Amorous relationship, with or without a sexual relationship
- Any form or use of vulgar and profane language or displaying nudity in class.

Examples of Immorality

- Showing of a sexually explicit film
- Use of profane language in class
- Misappropriation of school administered funds and utilization of school district resources for personal gain without any accounting
- Misrepresenting the use of sick days
- Lying to the Superintendent regarding an employee's status
- Lying while applying for employment
- Possession of illegal drugs
- Distributing racial hate jokes in school

Causes for Termination – Persistent Negligence

22 Pa. Code defines incompetency as: “A continuing or persistent mental or intellectual inability or incapacity to perform the services expected of a professional educator.”

Examples of Incompetency

- Carelessness with confidential student records
- Failure to maintain proper teaching space
- Excessive, unexplained absenteeism
- Inability to respond appropriately to situations
- Use of poor English
- Failure to follow directives
- Failure to maintain proper relationships with students
- Lack of classroom control
- Deficient content and quality of required reports
- Failure to give sufficient or proper tests
- Deficient lesson plans
- Deficient student records
- Inability to motivate students
- Failure to maintain good working relationships with clerical and teaching staffs

Causes for Termination – Negligence

According to 22 Pa. Code § 237.8 “Negligence is continuing or persistent actions or omissions in violation of a duty.”

Persistent Negligence in the Performance of Duties

A duty may be established by law, school rules or procedures, by express direction from superiors or by duties of professional responsibility, including duties prescribed by the Code of Professional Practice and Conduct for Educators

Examples of Persistent Negligence

- Disregard of pupil disciplinary policy
- Failure to attend meetings
- Failure to comply with student testing and record keeping requirement
- Repeated lateness
- Improper release of students from class
- Failure to prepare or file lesson plans
- Failure to provide sickness or disability certificate as authorized by Section 1154 of the School Code
- Repeated carelessness
- Inconsistent and ineffective discipline of students
- Lack of ability to communicate effectively
- Poor judgment
- Failure to turn in year-end grades, roll books and student papers
- Manipulation of students
- Failure to create a healthy and positive learning environment

Examples of Persistent Negligence

- Disregarding school district policy in classroom temperature settings
- Refusal to comply with superiors' directives
- Failure to submit reports
- Refusal to answer supervisors' questions
- Refusal to accept assignment
- Failure to control class
- Unprofessional behavior
- Excessive absenteeism
- Sleeping in class

QUESTIONS

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