

BEST PRACTICES FOR MANAGING POOR PERFORMERS

**LEARNING FROM WHY!
CABE/CAPSS CONVENTION
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Daniel P. Murphy, Esq.

Kainen, Escalera and McHale, P.C.

Be The Buffalo!!!

The Colorado landscape is known for huge mountains jutting out of the plains. It's also known for buffalo and cattle living in close proximity to one another in the plains.

As storms build in the Rockies and move toward the Eastern Plains, we are given astonishingly different examples of how to handle diversity.

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- Cattle have a natural, but foolish, response to an approaching storm. When cattle see a storm, they turn away from the storm and attempt to outrun it – which they cannot do.
- The result? Cattle dramatically increase their pain and suffering by trying to outrun the storm.

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- Buffalo, in contrast, respond to storms not by running away, but by running directly into the storm.
- Just like the cattle, the buffalo are initially battered by the storm. Just like the cattle, the buffalo are wet and tired.
- But, **UNLIKE THE CATTLE**, the buffalo decreases the amount of pain and suffering by moving through, instead of moving with, the storm.

Classification of the Employment Relationship

“At-will” employment

1. Effect on discipline/discharge
2. Limitations
 - a. Wrongful discharge for violation of public policy
 - b. Statutory provisions (e.g., Title VII, ADA, Connecticut Fair Employment Practices Act, anti-retaliation provisions of Workers' Compensation Act, Unemployment Compensation Act, Municipal Employees Relations Act)

Classification of the Employment Relationship

Contractual rights to continued employment

1. Sources of contractual rights
 - a. Collective bargaining agreement providing just cause discipline/discharge
 - b. Individual employment contract
 - c. Employee handbook or policies which restrict right to discipline/discharge
 - d. Established practices, procedures or oral assurances creating implied promises

Classification of the Employment Relationship

2. Effect on discipline/discharge
3. Standards
 - a. In accordance with collective bargaining agreement, individual contract, handbook or other promises
 - b. “Just cause” – arbitrators have formulated four broad principles in analyzing whether “just cause” exists for any discipline:

Classification of the Employment Relationship

- i) Notice and Knowledge
- ii) Equal and Non-discriminatory Treatment
- iii) Appropriate Discipline
- iv) Progressive Discipline

Classification of the Employment Relationship

Progressive discipline

- a. Just cause requires progressive discipline in appropriate cases, including:
 - i) warnings (verbal warnings, written warnings and reprimands)
 - ii) suspensions, including notice of dismissal for next offense
 - iii) dismissal
- b. Progressive discipline need not be followed in every case (i.e., cases of very serious misconduct which may warrant suspension or discharge for even the first offense)

EMPLOYEE HANDBOOK AS A TOOL FOR DISCIPLINE/DISCHARGE

A. Eliminate uncertainty by specifying the purpose of discipline, the conditions under which it may be imposed, the range of penalties and any right of appeal.

1. Power to impose discipline: Who has the authority to issue warnings, to suspend and to discharge?
2. Review process: Does the employee have a right to appeal to higher authority inside or outside the organization?
3. Applicable standard: Has the employer made an express or implied promise that discipline will be imposed only for cause, or for specified reasons, or that progressive discipline will be followed?

EMPLOYEE HANDBOOK AS A TOOL FOR DISCIPLINE/DISCHARGE

B. Termination policies and review procedures

1. Substantive provisions

- a. Employment at-will
- b. Expansive list of grounds for discipline/discharge
- c. Work rules
- d. “Just cause” and similar standards
- e. Use of illustrative, but not exhaustive, examples
- f. Case by case determination
- g. Disclaimer - specific denial of contract rights

EMPLOYEE HANDBOOK AS A TOOL FOR DISCIPLINE/DISCHARGE

2. Procedural provisions
 - a. Progressive discipline/fair notice
 - b. Statement of reasons and supporting evidence
 - c. Opportunity for defense and rebuttal
 - d. Second opinion or independent review

3. Application of related policies
 - a. Introductory period
 - b. Evaluation procedure

INVESTIGATING ALLEGATIONS OF MISCONDUCT

Incident occurs or report is made

Sources of complaints or reports:

- Coworkers;
- Students;
- Members of the public;
- Complaints received from outside agencies (CHRO; OCR; FOIA; CSDE; etc.)

PRE-INVESTIGATION

- Clock starts running – disciplinary action should be prompt
- Assess the incident – Preliminary assessment
 - Is this “school-related”?
 - Is there a nexus to the school and/or district?
- Identify potential victim(s)
- Interim steps? Administrative leave – paid/unpaid?

PRE-INVESTIGATION

- Do the allegations involve potential criminal activity?
- Do the allegations require mandated reporting?
- Review applicable Board policies:
 - Sexual harassment
 - Bullying
 - Etc.

PRE-INVESTIGATION

- Contact Insurer(s)
- Contact Legal Counsel
- Review applicable collective bargaining agreements
- Timely investigation and action is important:
 - 1) Witness memory
 - 2) Intervening events can lead to retaliation claims

PRE-INVESTIGATION

- Potential liability for failure to investigate and/or take appropriate remedial action
- Attempt to secure a written complaint
- Anonymous complaints?
- Err on side of caution
 - If unsure whether or not to investigate,
INVESTIGATE

WHO SHOULD INVESTIGATE?

- Independent third party:
 - Private Investigator?
 - Attorney
 - Acting as legal counsel or as an investigator?
 - District's regular counsel or different attorney?
- District personnel:
 - Administrator?
 - Human Resources?

WHO SHOULD NOT INVESTIGATE?

- Anyone with a direct/indirect interest in the outcome of the investigation
- Anyone with a conflict of interest
- Board members (including “independent” investigations)
- Persons without investigative experience in the area of concern

CONDUCTING AN INVESTIGATION

- Well documented
- Prompt & thorough
- Maintain appropriate confidentiality
- Leads to effective action
- Reasonable conclusions drawn

CONDUCTING AN INVESTIGATION

Planning an effective investigation

- Be familiar with the issue(s) to be investigated;
- Identify relevant documents;
- Identify potential witnesses and order of interviews;
- Prepare a checklist – Review and revise as necessary

CONDUCTING AN INVESTIGATION

Conducting the Investigation

- Interview complainant (if any)
- Interview alleged wrong-doer
- Interview witnesses (if any)
- Document, Document, Document!!!
- Reach conclusions and prepare report
- Take appropriate corrective action
- Communicate results to wrong-doer, human resources (and complainant?)
- Check CBAs for documenting obligations
- Follow up as necessary

CONDUCTING AN INVESTIGATION

Communicating to Interviewees

- Nature of interview
- Confidentiality – Remember DO NOT PROMISE
- Retaliation is prohibited
- Seek facts, not opinions

CONDUCTING AN INVESTIGATION

Interviewing Guidelines

- Prepare an OUTLINE of questions
- Ask open-ended questions
- Maintain appropriate tone
- Remain open-minded
- Ask for supporting evidence
- Think and follow up

CONDUCTING AN INVESTIGATION

The Fairness Component

- Did you try to get all sides?
- Did you check relevant documentation for corroboration?
- Were all relevant witnesses interviewed?

CONDUCTING AN INVESTIGATION

Common Mistakes

- Taking sides
- Promising complete confidentiality
- Failing to properly document
- Failing to document contemporaneously
- The “Lazy Investigator” – don’t just ask for a written statement. Be interactive.
- Failing to reach conclusions

DOCUMENTING DISCIPLINE

Common Problems

1. Being too nice
2. Retaining drafts and not finalizing and sending
3. Casual dialogue
4. Attempting to offer explanations for the employee's conduct
5. A bomb waiting to explode: Informality, joking, sarcasm, "no one is ever going to see this"

DOCUMENTING DISCIPLINE

Do NOT include:

1. Personal opinions
2. Legal conclusions
3. Hearsay, gossip, rumors
4. Information about a medical condition
UNLESS NECESSARY
5. EEO status (protected classes)
6. Be careful of retaliation claims

HOT TOPICS

Immediately deal with -

1. Criminal Conduct
2. Child Abuse or Neglect
3. Bullying / Harassment / Title IX
4. Erratic Behavior
5. Chronic abuse of policies and procedures / Fraud
6. When in doubt, call DCF and/or Police

SUMMARY OF ADVICE REGARDING DISCIPLINE/DISCHARGE

- A. Establish policies outlining reasons and procedure for discipline.
- B. Thoroughly investigate all allegations of misconduct.
- C. Follow disciplinary procedures consistently for all employees.
- D. Administer progressive discipline when appropriate.
- E. Accurately document all instances of employee misconduct and performance deficiencies.
- F. Prepare honest, accurate performance evaluations.
- G. Whenever possible, include final warning notice in discipline immediately preceding termination decision.

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