

REHABILITATION FOR WISCONSIN

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**CHANGING EMPLOYEE BEHAVIOR THROUGH EFFECTIVE
COUNSELING AND DISCIPLINE—
A LEGAL AND PRACTICAL GUIDE**

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THE DISCIPLINARY PROCESS

I. Introduction

The primary role of discipline is not to punish employees, but rather to correct that aspect of the employee's performance which is unsatisfactory and, therefore, detrimental to the company's operations.

II. The foundation of any system of industrial discipline are the company's work rules.

A. Draft appropriate work rules.

1. Work rules are a written guide of conduct for employees and putting them in writing helps assure that employees know and understand the standards of behavior and performance that are expected.
2. Rules must be related to the orderly, efficient and safe operation of the plant or they may be deemed to be unreasonable and, accordingly, unenforceable.
3. Rules should at least generally state the penalty and match the gravity of the penalty to the seriousness of the violation.
 - a. Rules are usually broken out into major and minor violations.
 - b. For major violations, suspension or termination is the appropriate penalty for a first offense.
 - c. Minor violations require the application of a progressive form of discipline.
 - d. Rules should be reduced to writing and properly communicated to both new and existing employees.
 - e. Rules must be implemented and enforced uniformly across all departments of the plant.

B. Progressive Discipline

1. The purpose of progressive discipline is to change an employee's performance in a certain aspect of his work. It is not to punish. A progressive discipline system allows employers to detect violations of company rules and enables employers to deal with problem employees before the behavior gets out of hand and the employee is rendered unemployable. Progressive discipline is a system of steps taken in response to unacceptable employee conduct. The steps taken to remedy the conduct become increasingly harsh as more violations of company rules are committed.

2. A Five (5) Step Progressive Process
 - a. Teaching – Employees should know the company’s expectations through appropriate training, instruction and orders provided by frontline supervision.
 - b. Oral or Verbal Warning (first formal step of discipline) – The warning should identify the problem behavior, identify the rule or policy which was violated, let the employee know what is expected of him or her, explain what will happen if the employee does not improve and/or change behavior, provide the employee a chance to respond and afford the employee a chance to improve (should be placed in personnel file).
 - c. Written Warning – The written warning should be delivered in a face-to-face meeting and be placed in the employee’s personnel file and should include:
 - i. Specific details regarding what the employee did wrong (or did not do, as the case may be).
 - ii. Refer to earlier written warning(s) where appropriate.
 - iii. Specify what action must be taken, or not taken as the case may be, to improve the employee’s behavior.
 - iv. Explain the consequences of the employee’s failure to improve.
 - v. Set a deadline for improvement or a review of interim behavior.
 - vi. Reiterate that if the employee does not improve that the employee is subjecting himself/herself to more serious discipline.
 - d. Suspension
 - i. When moving into more severe forms of discipline, it is a good idea to review the employee’s personnel file for signs of behavior which determine whether the employee has the attitude to improve.
 - ii. Make sure that an investigation has been properly undertaken and that the results have been recorded. It is possible that this employee is headed for a

termination and, as such, documentation of all performance defects is important.

- iii. Determine whether the prior written warning specified that suspension would be a consequence of a failure to improve.
- iv. The reasons for the suspension, as well as the dates on which the suspension are to occur should be documented.

e. Termination

- i. As with any discipline, consistency is the key. It should be determined that termination is the appropriate penalty for the employee's failure to improve over the course of the disciplinary progression.
- ii. An investigation should be conducted and documented so that it can be established that the employee did, in fact, not undertake the appropriate norm of behavior.
- iii. The company should always have a witness at the termination meeting and document what is said by all parties.

3. A Flexible System of Discipline

The progressive discipline system should not control the employer. The employer should be in control of the system. Consistency is a mainstay of a successful disciplinary system, however, built into the system should be a significant degree of flexibility so that the discipline for any particular violation can be related to the seriousness of the infraction. For example, state that a violation of company policy could result in discipline up to and including termination or that the discipline administered will turn on the seriousness of the offense and the employee's prior work record.

4. Why Practice a System of Progressive Discipline?

- a. Improve Performance - Employees receive fair warning that they have violated company policy and that they need to shape up or eventually they will be shipped out.
- b. Fairness to Employees – The punishment fits the crime. Just as repeat criminal offenders are subject to harsher penalties,

so are repeat offenders who have violated a company rule on more than one (1) occasion.

- c. Employee Security – Employees are educated on the company rules and are given a chance to improve.
- d. The consistent application of progressive discipline is an effective tool for establishing that the treatment of a particular employee was not discriminatory, but rather was in line with the treatment of all other employees when engaged in similar conduct.
- e. An employee who progresses through the steps without improving, in essence discharges himself.

C. The Factors to Remember For Effective Employee Discipline

- 1. Be sure of your facts.
- 2. Be sure of the company policy or practice.
- 3. Before deciding what to do, consider:
 - a. The employee's underlying problems, if any;
 - b. Job responsibilities;
 - c. Length of service; and
 - d. Overall work record.
 - e. Do the factors support a finding of wrongdoing?
- 4. From the company's standpoint, were we fair in how we handled the situation?
- 5. How have we treated others in the same situation?
- 6. What message does this discipline send to other employees?
- 7. Do we know everything we should know before we made our decision?

D. Understanding "Just Cause" for Discipline

- 1. The employee has been advised of the problem and the need to take corrective action (counseling);

2. The employee knows how to do the job (training);
3. Nothing prevents the employee from doing the job properly (obstacles);
4. It makes a difference whether the job is done right, done wrong, or done at all (consequences);
5. The employee knows exactly how well he or she is doing (feedback).
6. Ask yourself the following questions:
 - a. Was the employee forewarned of the possible consequences of the conduct? This can be oral or written. Some conduct is so serious an employee is assumed to know that the conduct is offensive and heavily punishable. Such conduct includes theft, insubordination and drinking on the job.
 - b. Was the rule or order reasonably related to the orderly, efficient and safe operation of the business and the performance of a nature of the company might properly expect of the employee? Obey now, grieve later is a commonly applied concept in industrial relations - unless obeying the rule (or order) would seriously and immediately jeopardize the employee's personal safety or integrity.
 - c. Prior to administering the discipline, did the company make an effort to discover whether the employee did violate or disobey the rule or order? Suspensions pending investigation are very common practices.
 - d. Was the investigation conducted fairly and objectively?
 - e. Is there substantial evidence that the employee engaged in the prohibited conduct?
 - f. Has the rule, order and penalties been evenhandedly applied to all employees? A "no" answer to this question is fatal, unless the company had notified the employees beforehand of its intention to enforce the rules as written in the future.
 - g. Was the degree of discipline reasonably related to the seriousness of the offense and the employee's record? With some offenses the employee's record may have little or no importance.

E. Counseling and Discipline

1. One of the most difficult responsibilities of the supervisor is the application of discipline. Discipline must be firm, fair and consistent. It must be documented and in accordance with company policy to withstand the test of grievance and arbitration.
2. Most incidents should be handled with progressive discipline. The normal procedure for handling discipline situations is first an oral warning, then a written warning, then a step or two of suspension and finally termination. This approach assumes employees will be motivated to better their behavior and gives them the opportunity to do so. Coaching and support for improvement should be emphasized rather than the punishment. At the same time, by progressively more severe treatment, it discourages repeated offenses and protects the right of the company to sever completely the relationship if the employee proves to be irresponsible.
3. Do not condone violations of the rules. Some discipline should be imposed in each case even if not the full penalty. If the company been lax in enforcing a rule, the rule should be eliminated or changed rather than ignored. If enforcement has been lax and the company seeks to tighten up enforcement, employees should be given full advance notice of the company's intent in this regard.
4. Avoid arbitrary or hasty action when confronted with a discipline situation. If you need time to investigate and fully review, especially a discharge situation, suspend the employee pending the investigation. The degree of discipline should be consistent with the stated penalties for the violation, and should match the severity of the offense or record in the case of progressive discipline.
5. Do not be discriminatory in applying the severity of discipline.
6. Confront an employee immediately upon uncovering a rules violation. This is true whether or not your are the employee's immediate supervisor. You can always bring the employee's supervisor into the discussion.
7. Effective counseling is a crucial aspect of discipline. Some guidelines to remember include:
 - a. Describe in detail the work habit that concerns you.
 - b. Indicate why it concerns you. Remain factual and state the problem specifically in terms of actual performance and desired performance.
 - c. Ask the employee for reasons, comments and reactions and listen to the explanations.

- d. Explain the full rationale for the policy or rule that was violated.
- e. Tell the employee the changes that need to be made and the time frame for making them, as well as the specific action you will take if the changes are not made and the conduct not corrected. Offer any suggestions you may have for correcting the conduct – i.e., observed improper methods, offer training or advice on the proper method.
- f. Ask the employee for input. Does the employee know how he or she can make the necessary changes to correct the conduct? Ask if the employee needs assistance and what that assistance may be. Perhaps additional training is necessary.
- g. Avoid personal attacks and emotional outbursts. Emotional behavior and personal attacks prevents the discussion from being productive and diverts attention from the real problem. Do not let your emotions or emotional behavior of the employee interfere with your management performance.

SUPERVISOR'S INVESTIGATION GUIDE

Proving your case to the factfinder requires developing and presenting your theory of the case and the facts that support your argument. Ask the following questions and use the answer to complete the Grievance Prep Sheet:

1. What happened?
2. Who was involved?
3. When and where did the event occur?
1. Who witnessed the event?
2. How is the event covered under the work rules or employment contract if applicable?
3. How does the issue relate to general standards in the practice of labor/management relations?

Your investigation prior to discipline should include the following. You will use the information you gather and record in the Grievance Prep Sheet.

1. Find out if there are any eyewitnesses.
2. Talk to all witnesses and take notes of your questions and their responses as well as any additional comments they make.
3. Analyze the strength of circumstantial evidence corroborating the allegation of misconduct and justifying the disciplinary action.
4. Review the Company rules for any relevant, or arguably relevant, rules or provisions.
5. Talk with the employee. Take the employee's statement and the statement of any witnesses the employee claims or infers may corroborate his or her position.
6. Be as specific as possible in your questioning and investigation. Ask for dates, times, locations, who else was present, what specifically was said and/or done, who said or did it. Remember the basic questions begin with "Who, What, When, Where, Why and How?"
7. Follow all leads and review any documents available.

CHECKLIST FOR DISCIPLINE
(review before taking action)

1. What conduct are you considering discipline for?
2. What work rule or rules or contract provisions were violated?
3. Was the rule posted or otherwise published and communicated to the employees?
4. Was the conduct so blatant that, even though there is no specific work rule, the employee could not help but know that the conduct violated reasonable standards of conduct which the employer expects of its employees?
5. Is the rule reasonably related to the orderly and efficient operation of the business or otherwise a rule governing conduct which the employer has a right to expect?
6. Is the rule clear and understandable?
7. Are the consequences spelled out clearly?
8. Who was involved?
9. Where there any witnesses? Who?
10. What are the facts and circumstances?
11. How or from whom did you gather your information?
12. Is the information accurate and reliable?
13. Have you talked with the employee?
14. What did the employee say?
15. Was the employee:
 - a. Aware of the rule?
 - b. Aware of the consequences of violating the rule?
 - c. Confronted with any obstacles outside his/her control which prevented the employee from complying with the rule?
 - d. Previously warned?
16. Has the rule been consistently enforced?
17. If exceptions have been made, do they fit the circumstances of this occurrence?

18. Any evidence of this conduct being overlooked previously which would indicate this employee is being singled out? If the conduct has been overlooked in the past, has the Company since that time publicized its intent to strictly enforce the rule in the future?
19. What other corrective action has been taken with this employee?
20. Check all previous discipline under the progression?
21. Have the progression steps been properly followed?
22. At what step of the progression is the employee?
23. Were any steps expunged?
24. Has a fair and objective investigation been conducted?
25. Is there substantial evidence that the employee violated the rule?
26. Is the discipline appropriate for the offense? You may need to take into consideration the progressive discipline steps and the employee's prior work record.
27. Recordkeeping is an important aspect of discipline. Record everything related to employee problems, discipline, and the employee's comments. Be as specific and as factual as possible. Do not be vindictive, discriminatory, defamatory or offensive.

CASE STUDIES

Number 1

Pete Postal, who had been a great employee for a number of years, began to display a significant drop in productivity. His supervisor counseled him several times in an informal manner. In the second session Pete asked, “look, can I tell you something in confidence?” The supervisor replied, “Sure.” Pete then said, “I have been going through some tough times. My 18-year-old son is involved in drugs and dealing with that has put a strain on my marriage. I get so frustrated and mad and have the strangest dreams like going into a store or coming to work with a gun and just start shooting. It scared me. So I got some help. I’m on an anti-depressant and in therapy. It seems to be getting better. I know I have not been getting the job done, but I am only asking for you to hang in there with me for a while longer. Can you cut me some slack?” How should the supervisor and the company respond?

Number 2

Bob Goodworker has been an excellent employee for a number of years. He has a great attitude, is cooperative and is well liked by his peers. He also smokes. The company has implemented a “smoke free campus” policy. On clear days, Bob walks to the sidewalk and has a cigarette. On rainy days and in severely cold weather he will go to his car and smoke which, because the vehicle is parked on company property, is a violation of the work rule. He does this on breaks and during lunch and is always at his work station in a timely fashion.

When his supervisor talked to him about a recent violation, Bob apologizes and stated, “I am really embarrassed. I hate my habit but cannot seem to quit. I was feeling under the weather. I needed a cigarette but could not stand the thought of standing in the rain even with an umbrella. I’m sorry and I will not let it happen again.”

Three weeks later, on a bitterly cold, blustery day, Bob’s supervisor observes Bob sitting in his car during a break. The supervisor suspects that Bob is smoking but is tempted to ignore the situation. How should she respond?

Number 3

Maria is capable of good work and she interacts well with the agency's clients. The problem is that she has no "people skills" when it comes to working with peers. She is negative and has never met a new policy, practice or procedure that she thought was an improvement. Co-workers avoid Maria because of her negativity except for two or three malcontents who, collectively, seem to drag down agency morale. Maria does not do well when criticized. She will become sullen and upset but, to her credit, does not let this attitude affect her work with clients. The supervisor has become reluctant to confront Maria concerning her negativity. In his judgment, Maria is getting the job done and any attempt to correct or adjust her behavior will fail. In his mind, any corrective discipline would punish him, not Maria, because he will pay the price in having to manage an even more difficult employee. His comment to the agency director is, "You are not going to change her. She is hard to deal with but she gets the job done."

How do you deal with a problem like Maria?