

EMPLOYEE RELATIONS

Notes

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Misconduct, Part Two

You may first realize you have a problem employee when you start to notice a pattern of misconduct. You may observe an employee not following the rules of the organization or failing to follow your instructions. Maybe it is a tardiness or leave problem. Perhaps it is more obvious, such as abusive language or rudeness with customers or coworkers. Sometimes it is more serious, such as fighting or destroying Government property. Conduct problems range from the minor infraction to the outrageous one.

The decision to take disciplinary action should be a reasoned one. This issue of ER Notes will familiarize you with the different types of disciplinary actions you can take, and will explain the required documentation for these actions. As always, the Employee Relations Branch wants to assist you in handling these types of problems. This newsletter is intended as a guide, but we encourage you to call us at any time with questions.

Types of disciplinary actions

The fundamental principle in the use of discipline is to correct unacceptable behavior, not to punish the employee. Supervisors should follow the practice of progressive discipline; that is, using the minimum action possible to correct the problem, and implementing more severe levels of discipline if the behavior is not corrected. Sometimes the minimum corrective action necessary is a reprimand; sometimes there is no effective penalty short of termination. It all depends on a variety of factors that makes each case unique. For a first offense, a mild caution might be effective. If the behavior is repeated, it is reasonable to direct employee improvement through taking more serious disciplinary actions. Why go through all this work? For two reasons. First, employees can and do file grievances and appeals, and use of progressive discipline is reviewed by third parties. Second, it's sound management. If something does not work, you

have another opportunity to choose a more severe corrective action.

Choosing an appropriate penalty can be a difficult decision because you must weigh many factors, such as an employee's past work record and type of job, as well as the seriousness and frequency of the misconduct. There are, in fact, twelve "Douglas Factors" that the Merit Systems Protection Board has set forth as important consideration for supervisors. We will discuss these different factors in the next issue. These are the types of disciplinary actions available to supervisors:

Oral Counseling: The first and most important step is supervisory counseling. Oral counseling is a non-written correction by a supervisor of an employee's improper conduct. It cannot be grieved nor appealed. As the first step, its purpose is to correct behavior. Counsel in a timely manner. Correctly identify the problem and state it at the outset. Have the facts ready. Make your expectations clear, and make the consequences clear. An employee should know what the supervisor plans as the next step. Be specific. Use clear language. Document all observations and counseling sessions.

Letters of Warning/Caution: Most often, this letter is issued by a supervisor to an employee based on an observed pattern of unacceptable behavior or performance. It should state the problem observed, and note the supervisor's expectations on how to correct the problem. It should state that further instances of misconduct may result in disciplinary action unless a change in behavior or performance is seen.

Official Letters of Reprimand: This is a formal action and the Letter of Reprimand remains in the Official Personnel Folder (OPF) for up to 2 years. An employee may file a grievance on the letter. This letter is similar to the letter of warning except that it reprimands the employee about a specific act of misconduct, and is considered a more serious disciplinary action.

Suspensions from Duty and Pay: These may be short suspensions of a few days or long ones, up to a few months. They require advance written notice which specifically states the reasons for the suspension, and gives the employee a chance to review the material relied on and to reply to the charges. The employee receives a written decision before the effective date of the suspension, and is given the rights to either file a grievance (short suspensions) or file an appeal to the Merit Systems Protection Board (long suspensions over 14 days). This action is permanently recorded in the OPF.

Removal from Position and Federal service: This action is taken as warranted by law, or for specific serious instances of misconduct. The procedures are similar to the long suspension action above. Often, an employee has received other less serious disciplinary actions before receiving a removal notice. But, in a serious case, one instance of misconduct can result in removal from Federal service.

Alternative Discipline Agreement: This can be offered in lieu of a disciplinary action, and for less serious offenses. The employee offers to remedy the misconduct through compensatory service, volunteer service, or other remedies agreeable to all parties. It is still considered disciplinary in nature, and can be used to show progressive discipline.

Building Your Case

If you have a documented history of employee misconduct coupled with a record of your previous, unsuccessful, attempts to correct the behavior, the ultimate penalty will almost certainly be upheld by a third party. The key term, however, is “documented history.”

Third parties can overturn your action if not properly documented. The agency will need to prove: 1) Do the facts establish that the employee did or failed to do the things claimed? 2) Did the employee violate an established rule regulation or standard of conduct? 3) Did the employee know or should have known of the rule or regulation, or standard of conduct?

It will be up to you, as supervisor, to support the case with evidence—memos, documents, witness statements, regulations, email. The documentation will help you make an informed decision on whether or not to take an action, and help you decide on the type of penalty. Be aware that you will need to do some investigation and that this can take some time. Don't just rely on what you saw. What did others see or hear? What did the employee have to say for him/herself? Next, pull together any email messages or other documents that show or support wrongdoing. The investigation is the first step and you will need to do it before initiating disciplinary action.

A few cautions: Don't forget that bargaining unit members have the right to a union representative when being questioned (called “Weingarten rights”). Don't prematurely announce your disciplinary intentions before fact finding is completed. Work closely with your employee relations specialist to make sure you are following procedural requirements.

This may seem like a lot of hard work, but that's no reason to look the other way. Misconduct must be addressed early and effectively. If it isn't, it will encourage repeated misbehavior and the situation can easily spin out of control. You're going to have to deal with it—it's a fact of life for a manager. But you have us to help. Please call for guidance and assistance.