

HOT TOPICS FOR PUBLIC SECTOR EMPLOYERS

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Rule #1

**No Good Deed
Goes
Unpunished!!!**

Rule #2

**If It Wasn't Written
Down,
It Didn't Happen!**

At-Will Employees?

- 75% of jurors feel employers must:
 - ▣ Give the employee fair warning prior to termination; and
 - ▣ Work with the employee to correct the problem.
- 60% believe the best evidence of work performance is the employee's performance evaluation.
- 60% believe companies need to be "sent a message."
- 90% believe that a company is negligent if it does not properly document performance problems.

Why Supervisors Fail to Document

- ❑ I don't have time.
- ❑ Employees know if they are doing a good job.
- ❑ I don't like criticizing people I have to work with.
- ❑ I have a good relationship with my employees, they wouldn't sue *me*.

Benefits of Documentation

- Informs the employee;
- Sets expectations; and
- Decreases the likelihood of successful litigation.
 - ▣ Juries draw negative inferences from the absence of documents.
 - ▣ Written records refresh/replace memories.
 - ▣ Establishes that similarly-situated employees treated same.
 - ▣ Courts give greater weight to documents than to memories.

Essential Documentation

- Records of verbal/written warnings.
- Attendance/Timekeeping records.
- Notes from disciplinary meetings.
- Performance evaluations.
- Notes from termination meetings.

Suggestions for Documentation

- Prepare as soon as possible.
- Expect everything to be an exhibit.
- Give an actual opportunity to improve.
- Avoid Jargon.
- Tell a story.

Documentation Should Include

- Who, What, Where, When & Why;
 - ▣ Be truthful, self-serving and persuasive.
 - ▣ Identify both good and bad facts.
 - ▣ Focus on behavior not assumptions.
 - ▣ Summarize witness testimony.
 - ▣ Reference past discipline.
- Impact on the company and other employees;
- What should have happened;
- Consequences of future occurrences; and
- The Employee's response—if any.

PERFORMANCE REVIEWS



Good Performance Evaluations

- Recognize achievements and areas for improvement.
 - ▣ Set expectations/consequences.
 - ▣ Address any discipline during the year.
 - ▣ Are more than “checking a box.”
- Coordinate employee’s goals with Employer’s goals.
- Serve as a guide for raises.
- Are based on notes kept during the year.
- Are honest.
- **Are not all above average!!!**

Good Performance Evaluations

- Schedule a follow up meeting after a below average review to evaluate improvement rather than waiting until next year.
- Employers must also evaluate each supervisor's evaluation skills.
 - ▣ Evaluations need to be consistent across each employee and each supervisor/department.

Performance Evaluations

- When suspending or terminating for job performance, performance issues must be documented.
- It is better to have no evaluations than to have poor evaluations.
- ***The first place courts/juries look is an employee's past performance evaluations.***

DISCIPLINARY MEETINGS



Guidelines for a Discipline Decision

- Was the employee given prior warning of the consequences of his or her conduct?
- Was the company's rule "reasonably related" to the efficient and safe operations of the company?
- Are you confident that the employee engaged in the misconduct and/or violated the rule resulting in termination?

Guidelines for a Discipline Decision

- Are you confident in the results of the company's investigation?
- Was the investigation objection (*i.e.*, was a third party used)?
- Is this decision consistent with past actions under similar circumstances?
- Was the discipline reasonably related to the seriousness of the offense and the employee's past work record?

The Disciplinary/Termination Meeting

- WHO ATTENDS?
 - A. Union Representative
 - B. Co-employee
 - C. Attorney
 - D. Advocate
 - E. Management Witness
 - F. Note Taker

Conducting A Disciplinary Meeting

- Show that Employer is responding quickly;
- Describe the problem;
- Explain the type of discipline;
- Agree on ways to improve; and
 - Have the employee summarize: discussion; and
 - State confidence in employee's ability to improve.
- Set a follow-up date.

Weingarten

- In Weingarten, the USSC upheld the NLRB's rule that an employee covered by a union has the right to have a representative present during an investigatory interview that the employee reasonably believes may result in discipline.
 - ▣ The employee must request representation. The employer has no obligation to advise the employee of this right.
 - ▣ An employee does not have a right to the presence of a lawyer or family member.

Veterans Preference

- ❑ No veteran shall be removed from employment except for ***incompetence or misconduct*** shown after a hearing, upon due notice of stated charges.
- ❑ The burden of is on the public employer.
- ❑ Potential Damages - double wages and attorney's fees.

Loudermill

- Under Loudermill, to take away a “property right” of employee:
 - Give a pre-disciplinary or pre-termination hearing;
 - Identify specific charge(s).
 - Allow employee to respond prior to discipline or termination.
 - May prohibit witnesses, but employee can indicate what witnesses would say.
 - Must give enough information about investigation and findings to allow employee to respond.

Public Safety Bill of Rights

- An interview must be at a facility of the investigating agency.
- An officer shall have the right to pursue civil remedies against a citizen for a false complaint made against the officer.
- An officer shall not be discharged, disciplined, or threatened with discharge or discipline in retaliation for exercising the rights in this section.
- The rights enumerated in this section are in addition to any other rights granted pursuant to a CBA or other applicable law.

TERMINATION MEETINGS



Guidelines for a Termination Decision

- Was the employee given prior warning of the consequences of his or her conduct?
- Was the company's rule "reasonably related" to the efficient and safe operations of the company?
- Are you confident that the employee engaged in the misconduct and/or violated the rule resulting in termination?

Guidelines for a Termination Decision

- Are you confident in the results of the company's investigation?
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Before the Termination Meeting

- Is the meeting scheduled? to minimize employee's personal contact with other employees?
- Have arrangements been made to notify the employee in private?
- Will the employee be given the reasons for his/her termination in writing?
- Will the employee be given an opportunity to resign in lieu of termination?

Before the Termination Meeting

- Does the Handbook have relevant procedures for termination, discipline, severance, at will employment?
- Is there an employment contract?
- Has employee filed workmen's compensation claim?
- Has employee recently taken leave?
- Does the employee have a physical condition?
- Does the employee have a drug problem?

During the Meeting

- Give the employee:
 - ▣ Brief explanation of the basis for termination.
 - ▣ Brief opportunity for response.
 - ▣ Procedures for departure.
 - ▣ The final paycheck, COBRA and benefits information.
 - ▣ Brief explanation of severance agreement (if offered).
 - ▣ Property – theirs and yours.
- Have more than one person representing the employer in the room.

Common Termination Issues

- ❑ Retaliation
- ❑ Selective application of criteria
- ❑ Performance appraisal unrelated to job performance
- ❑ Defamation
- ❑ Failure to follow policy
- ❑ Failure to allow for improvement
- ❑ Breach of Contract

DOCUMENTATION PITFALLS





Pitfall 1: Failure to Document




Pitfall 2: Failure to Train



Pitfall 3:

Lack of Good Evidence



Pitfall 4:
“Grade” Inflation



Pitfall 5:

Failure to Consult HR



Pitfall 6:
Inappropriate E-mail



Pitfall 7: Inconsistent Treatment



Pitfall 8:
Discrimination Claims

Protected Classes

- Age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion and/or disability.
- Gender identity is “gender-related identity of a person.”
- Sexual orientation means ***actual or perceived*** heterosexuality, homosexuality, or bisexuality.
- The ADA has been amended (*i.e.*, the ADAAA).

Questions?