

Number 8.0 - DISCIPLINARY ACTION AND CORRECTIVE ACTION

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Subject: Disciplinary Action and Corrective Action

Applicable To: All classified employees within the Executive Branch of the State of Vermont.

Issued By: Department of Human Resources

Approved By: Susanne R. Young, Secretary of Administration

PURPOSE AND POLICY STATEMENT

It shall be the policy of the State of Vermont to administer discipline fairly, reasonably, and impartially. Employees and the State are best served when discipline is administered to correct actions rather than to punish. Disciplinary action is intended to maintain the efficiency and integrity of State service. Progressive disciplinary actions will generally be used after considering the nature and severity of the offense.

It is the responsibility of each supervisor, human resources professional, and appointing authority to evaluate the circumstances and facts as objectively as possible and then apply the most suitable form of discipline. The current collective bargaining agreements (“contract”) between the State of Vermont and its union(s) provide that no member of a bargaining unit will be disciplined except for just cause, and they also contain various procedural requirements applicable to the imposition of discipline.

With respect to employees who are not eligible to join bargaining units (employees designated as managerial or confidential) the Personnel Rules and Regulations provide that such employees may not be disciplined except for cause, but the contract provisions regarding discipline do not apply to them. The following discussion of specific contract requirements, therefore, does not necessarily apply to employees who are not members of a bargaining unit. The Department of Human Resources Legal and Labor Relations Divisions should be consulted when discipline for non-bargaining unit employees is under consideration.

DEFINITIONS

“Progressive Corrective Action” means a systematic method intended to train or correct an employee whose performance is deficient.

“Progressive Discipline” means a systematic method intended to correct employee conduct.

GENERAL PROCEDURES

Many problems can be avoided by keeping communication open between the supervisor and the

employee. It is important for supervisors to ensure that employees understand what is expected of them in the performance of their duties. The supervisor should meet with each employee and together develop goals and objectives for the employee's specific job. The Performance Evaluation Report (AA-PER-6C) contains a summary page to describe the major job duties and performance expectations. This summary can be a starting point for outlining the performance expectations for the coming year.

Situations may arise where performance issues are not resolved and/or misconduct occurs warranting disciplinary action or progressive corrective action. The disciplinary action article of the current contract must be followed when imposing discipline. Supervisors should further consult the Department of Human Resources Guide to the State Performance Management System.

IMPORTANT CONSIDERATIONS

The contract outlines two procedures when addressing employee conduct—one for employee misconduct and one for performance deficiencies. Therefore, the first step is to determine whether the circumstance involves employee misconduct or performance deficiency. While the contract does not define such terms, the following principles and guidelines must be considered:

A. Employee Misconduct

An employee commits misconduct when the employee has failed to comply with the rules of the workplace. An employee's actions need not have been an intentional violation of a rule to be misconduct—negligence in the workplace may be sufficient. For instance, if an employee fails to act as a reasonably prudent person would to carry out the job mission, or is indifferent in carrying out job duties, such actions are misconduct. Thus, if an employee is indifferent to and does not satisfy an important work deadline, this is misconduct. Even in the absence of a deadline, an employee commits misconduct if important interests reasonably calling for prompt action are ignored. Finally, while they may also impact on performance, absenteeism and tardiness are considered to be misconduct.

If the employee has committed misconduct, the contract provisions for imposing "progressive discipline" will apply. However, there may be instances in which it is appropriate to bypass progressive discipline. If, on the other hand, the employee has a performance problem, the section regarding "progressive corrective action" applies. This distinction is extremely important because using the incorrect contractual approach may render the action taken to be legally invalid.

Managers and supervisors **must** consult with the Department of Human Resources when contemplating the imposition of discipline. Technical details such as notice and the wording of disciplinary letters should be reviewed by the Department of Human Resources. All such letters must be reviewed by the Department of Human Resources **prior to issuance**. This is important because great emphasis has been placed on the wording of disciplinary letters in grievance proceedings.

B. Performance Deficiencies

An employee is considered to be deficient in their job performance when the employee has failed, because of a lack of ability or a shortcoming of judgment, to perform the job to the satisfaction of the employer. If the State has not, through training or rulemaking, made its expectations for employee job performance precisely clear, it is generally a performance problem when the employee falls short of expectations. In some positions, many day-to-day decisions are left to the judgment and discretion of the employee, or assignment of priorities may be left to the employee. Where the employer is not satisfied with the employee's use of judgment or discretion, or assignment of priorities, such a problem is usually appropriately addressed with progressive corrective action. Thus, as an example, in a case where the State left it to the employee's judgment to determine an appropriate course of action, but was dissatisfied with the employee's decision-making, it was found that a written reprimand (which is used to address a misconduct problem) was an inappropriate and invalid response by the employer under the contract.

"JUST CAUSE" DEFINED

"Just cause" is the primary standard against which all discipline will be judged. It contains two distinct elements:

1. **Notice**: The "just cause" standard provides that employees may not be disciplined unless they had notice that their conduct was prohibited by the employer. Notice may be express or implied. Notice is express when the employer has prohibited conduct by rule, by training, or by some other form of directive to employees. Notice is implied when, even in the absence of the foregoing, reasonable employees would understand such conduct to be prohibited. For example, reasonable employees know, without being told, that criminal violations in the workplace can lead to discipline. Similarly, reasonable employees know that acts of dishonesty or violence in the workplace are not permitted. Implicit notice exists in such circumstances because, using an objective standard, employees, using common sense, know or should know such behavior to be prohibited in the workplace.
2. **Reasonableness**: The second and ultimate question regarding "just cause" is whether the employer acted reasonably in the administration of discipline or corrective action. The standard is an objective one. Thus, in order for there to be "just cause," the employee must have demonstrated a substantial shortcoming detrimental to the employer's interests which the law and sound public opinion recognize as good cause for the action taken by the employer. In other words, there will not be "just cause" for discipline where the employee's actions were both insignificant and unrelated to any interest of the State. Minor incidents, however, may accumulate so as to provide "just cause" for serious discipline.

OTHER IMPORTANT CONTRACT PRINCIPLES

The following standards and principles should be followed when applying disciplinary or correction action:

1. **Uniformity and Consistency of Discipline**: The contract provides that the State will "apply discipline or corrective action with a view toward uniformity and consistency." Appointing authorities should take into consideration, when deciding on an appropriate action, what action was taken against other employees in similar circumstances. However, the contract should not be taken to mandate rigid standards of uniformity.
2. **Timeliness of Discipline**: The contract also provides that the State will "act promptly to impose discipline or corrective action within a reasonable time of the offense." Again, the standard is an objective one, which will take into account individual circumstances of a case. State policies regarding particular subjects should be reviewed to ascertain whether the State has provided a specific time frame for taking certain actions. Such a commitment will be taken into consideration when the promptness of discipline is reviewed. Thus, appointing authorities must be reasonably diligent in conducting investigations and taking disciplinary actions. This is not only the contractual mandate but also good labor relations policy.
3. **Progressive Discipline**: Discipline is imposed in progressively more severe sanctions to alert the employee to the seriousness of misconduct and to deter continued inappropriate actions, except in those cases where the employee's actions justify bypassing one or more steps of progressive discipline or corrective action. Bypassing progressive discipline may be warranted, for example, when the nature of the offense was such that the employee's credibility on the job was irretrievably damaged. It may also be warranted when the employee's actions destroyed the confidence of supervisors or management in the employee's ability to continue effectively in the position. Progressive discipline or corrective action may also be bypassed simply on the basis that the seriousness of the offense alone warrants a severe penalty. It is only very infrequently, however, that performance problems warrant bypassing the contractual steps for progressive corrective action.
4. **Notice of Right of Representation**: The contract requires the employer to inform bargaining unit employees of their right to request the presence of a VSEA representative for certain proceedings. This is the case when: (1) the employee is required by a supervisor or management to give oral or written statements on an issue involving the employee, which may lead to discipline against the employee; and (2) whenever an employee is called to a meeting with management where discipline is to be imposed on the employee.

While this requirement is broad, it does have some exceptions. First, the notification requirement does not apply to the informal initial inquiry of the employee by his or her supervisor or management without knowledge or reason to believe that discipline of the employee was a likely possibility. Thus, if the employee is only a witness to alleged

wrongdoing by another employee, and is not suspected of any misbehavior, no notice is required. Should the possibility of discipline against such an employee arise in the course of a meeting, it should be interrupted for purposes of giving the notice. Secondly, such a notice is not required when the meeting is called to provide the employee with oral or written notice of performance deficiencies. (See Contract, Article 12, Section 1).

5. **Pre-Disciplinary (Loudermill) Meeting**: Constitutional due process, under the *Loudermill* decision, State Policy 8.1, and the contract (See Article 14, Section 4), require a specific procedure to be followed whenever a disciplinary suspension of any length or dismissal of a classified State employee. The key components of this process are to provide notice of charges of misconduct in support of the contemplated discipline and the opportunity for the employee to respond to the charges before discipline may be imposed. The contract provides that, "whenever an appointing authority contemplates suspending or dismissing an employee, the employee will be notified in writing of the reason(s) for such action and will be given an opportunity to respond either orally or in writing." Such a "Loudermill" letter should not be issued without review by the Department of Human Resources, because the contents of the letter may receive strict scrutiny in any subsequent litigation. Employers must comply with the "Loudermill" process prior to dismissal of an employee for unsatisfactory performance.

THE TWELVE FACTORS

Each disciplinary action is considered in the context of twelve factors which are typically relevant to evaluating the appropriateness of a penalty. Since such factors will be used to evaluate the propriety of an action which is the subject of a grievance, appointing authorities must consider them when determining whether, and to what extent, disciplinary action is imposed. The twelve factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.
2. The employee's job level and type of employment including supervisory or fiduciary role, contacts with the public and prominence of the position.
3. The employee's past disciplinary record.
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability.
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties.
6. Consistency of the penalty with those imposed upon other employees for the same or similar

offenses.

7. Consistency of the penalty with any applicable agency table of penalties.
8. The notoriety of the offense or its impact upon the reputation of the agency.
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense or had been warned about the conduct in question.
10. Potential for the employee's rehabilitation.
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter.
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

CORRECTIVE ACTION IN PERFORMANCE CASES

A. Order of Progressive Corrective Action:

Appointing authorities should follow the following procedure when assessing corrective action for performance deficiencies:

1. Oral or written notice of performance deficiency;
2. Written performance evaluation, special or annual, that specifies a prescriptive period for remediation, normally three (3) to six (6) months;
3. Warning period of thirty (30) days to three (3) months that can be extended for a period of up to six (6) months;
4. Dismissal.

B. Procedure for Implementing Corrective Action:

The following steps should be implemented when administering corrective action:

1. The supervisor should give employees performance standards and expectations and a fair opportunity to improve sub-standard performance.
2. Periodic discussions should be held to review the employee's performance progress.

3. Performance evaluations, notices of performance deficiencies, performance standards, and performance review notes should be discussed with the employee. Such discussions should make it clear when performance is considered to be unsatisfactory.
4. Employees should know before being placed into a prescriptive period for remediation or warning period that there are performance problems, and specifically what they are.
5. Performance expectations or standards should be reasonable, unambiguous, job-related, and, to the extent possible, objectively verifiable.
6. Employers should have clearly established systems for reviewing corrective action to ensure it is administered only with the knowledge and support of senior management and the personnel officer.

DISCIPLINARY ACTION IN MISCONDUCT CASES

A. Order of Progressive Discipline for Misconduct Cases

Appointing authorities should follow the following procedure when assessing disciplinary action for employee misconduct:

1. Oral reprimand;
2. Written reprimand;
3. Suspension without pay;
4. Demotion (optional in the State's discretion);
6. Dismissal.

Employers must comply with the pre-disciplinary process outlined in the Policies, including Policy 8.1, and the contract prior to imposing discipline for misconduct and/or dismissing an employee for unsatisfactory performance.

Approved:

Susanne R. Young
Secretary of Administration

Date