### Number 8.0 - DISCIPLINARY ACTION AND CORRECTIVE ACTION

Effective Date: March 1, 1996

**Applicable To:** All classified employees with the Executive Branch of the State of

Vermont.

**Issued By:** Department of Personnel

**Approved By:** William H. Sorrell, 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, personnel officer and appointing authority to evaluate the circumstances and facts as objectively as possible and then apply the most suitable form of discipline. The current Agreements between the State of Vermont and the Vermont State Employees' Association, Inc. (VSEA) provide that no bargaining unit employee 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, such as 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 non-bargaining unit employees. Personnel officers or Employee Relations staff should be consulted when discipline for non-bargaining unit employees is under consideration.

## **DEFINITIONS**

DISCIPLINE IN EMPLOYMENT - a systematic method intended to train or correct an employee whose performance or behavior is deficient.

PRESCRIPTIVE PERIOD FOR REMEDIATION - a period of time, normally from three (3) to six (6) months, for employees to improve their performance.

## **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, and can be a starting point for outlining the performance expectations for the coming year.

Situations may arise where performance issues are not resolved and disciplinary action or progressive corrective action may become warranted. The disciplinary action article of the current contract must be followed when imposing discipline. The Performance Management Appendix to this policy manual (see Appendix C) should also be consulted.

## **IMPORTANT CONSIDERATIONS**

#### **Performance Cases vs. Misconduct Cases:**

The contract provides for different procedures to be followed when addressing employee behavior, depending on whether the employee has committed misconduct or has a problem of job performance. If the employee has committed misconduct, the contract provisions for imposing "progressive discipline" will apply. 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.

Therefore, when determining what action to take, one of the first determinations to make, in consultation with the personnel officer, is whether the circumstance involves one of misconduct or a job performance problem. While the contract does not define such terms, some general principles have developed in litigation over this issue. They are as follows:

Misconduct: is committed when an employee has not complied with the rules of the work place. An employee's actions need not have been an intentional violation of a rule to be misconduct - negligence in the work place may be sufficient. 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 generally considered to be misconduct offenses.

<u>Performance Problems</u>: are generally considered to be those instances where an 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 rule-making, 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 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.

Managers and supervisors <u>must</u> work with their agency/department personnel officer when contemplating the imposition of discipline. Technical details such as notice and the wording of disciplinary letters should be cleared through the personnel officer. The Employee Relations Division of the Department of Personnel should do a final review of letters <u>prior to issuance</u>. This is extremely important because great emphasis has been placed on the wording of disciplinary letters in grievance proceedings.

## "JUST CAUSE" DEFINED

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

- 1. <u>Notice</u>: 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 work place can lead to discipline. Similarly, reasonable employees know that acts of dishonesty or violence in the work place 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 work place.
- 2. <u>Reasonableness</u>: 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. 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

- 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. <u>Timeliness of Discipline</u>: 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. For example, the State's policy on sexual harassment provides that investigations will generally be completed within thirty (30) days. Such a commitment will be taken into consideration when the promptness of discipline is reviewed. While there have been few cases which have interpreted this requirement, it was decided in one case that a seven month delay between an offense and a disciplinary action violated the contract. 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 fairly broad, it does have some exceptions. First, if the supervisor or management does not believe the circumstances may lead to discipline against the employee, no warning is required. Thus, if the employee is only a witness to alleged wrongdoing by another employee, and is not suspected of any misbehavior, no warning 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 warning. Secondly, such a warning 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-Termination (Loudermill) Meeting:** Constitutional due process, under the Loudermill decision, and the contract (See Article 14, Section 4), require a specific procedure to occur prior to the dismissal of a classified State employee. The key components of this process are to provide notice of charges of misconduct in support of a contemplated dismissal and the opportunity for the employee to respond to them before dismissal is imposed. The contract provided that, "whenever an appointing authority contemplates 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 personnel officer and the Employee Relations Division, because the wording used therein has received extremely strict scrutiny in litigation. For example, a State employee was recently reinstated, despite having committed serious misconduct, because she was informed in the "Loudermill" letter that the State was contemplating "disciplinary action under Article 14", rather than "dismissal", as the above contract language was interpreted to implicitly require.

### THE TWELVE FACTORS

Under the case law, 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, it is helpful for the employer to take them into consideration before a disciplinary action is imposed. Such factors duplicate some issues already discussed, but can serve as a reminder of matters which should be considered.

- 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. (The State does not currently use any form of 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.

### ORDER OF PROGRESSIVE CORRECTIVE ACTION

13. Oral or written notice of performance deficiency;

- 14. Written performance evaluation, special or annual that specifies a prescriptive period for remediation from three (3) to six (6) months;
- 15. Warning period of thirty (30) days to six (6) months that can be extended for a period of up to six (6) months;
- 16. Dismissal.

The following should steps should be implemented when administering corrective action:

- 17. The supervisor should give employees performance standards and expectations and a fair opportunity to improve sub-standard performance.
- 18. Periodic discussions should be held to review the employee's performance progress.
- 19. 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.
- 20. 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.
- 21. Performance expectations or standards should be reasonable, unambiguous, job-related, and, to the extent possible, objectively verifiable.
- 22. 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.
- 23. Employers must comply with the pre-termination process outlined in the Disciplinary Action Article of the contract prior to dismissal of an employee for misconduct or performance problems.

### ORDER OF PROGRESSIVE DISCIPLINE FOR MISCONDUCT CASES

- 1. Oral reprimand;
- 2. Written reprimand;

- 3. Suspension without pay;
- 4. Demotion (optional in the State's discretion);
- 5. Dismissal.