Introduction to Employee Discipline:
Avoiding Common Pitfalls in the Process of Taking Corrective Action

The Road to Discipline

- Performance evaluations
- Documenting performance problems
- Updated and effective policies
- Investigations

Disciplinary Process

- Determining appropriate level of discipline
- Progressive discipline
- Notice of Intent
- Skelly meeting
At-Will Versus For Cause

- Do not need good cause to discipline or terminate at-will employees
- Employment status generally defined by statute
- Should still have a business reason for making employment decisions with respect to at-will employees
- For cause rights trigger due process

Updated Policies

- Necessary for effective discipline
  - Progressive discipline
  - Standards of conduct
  - Harassment and discrimination
  - Evaluation process
  - Job descriptions
  - MDUs
  Need to warn employees of possible consequences for misconduct. Out of date policies can negatively impact your ability to discipline!

Documenting Performance Problems

- One of the biggest impediments to discipline is failure to address earlier concerns
- Document any interaction with employees regarding performance
- Effective documentation
  - Date, time, location
  - Detailed description of events
  - Name of observer and any other witnesses
  - Detailed description of supervisor’s interaction with employee
  - Reference to relevant documents/policies
Supervisor’s Notes (with Caveats)

- Maintain for all employees
  - Especially with performance issues
- Include facts and observation
  - General impressions are likely not helpful
- Need not share with employee for non-public safety
  - But should communicate with employee about the incident
- Incorporate into formal evaluation
- Need not keep in personnel file
  - Note: cannot be relied on for discipline, but should refresh supervisor’s recollection
- Discard after use
  - Incorporated into evaluation

Performance Evaluations

- Dealing with employee input
- Importance of evaluations to the organization
- Importance to disciplinary proceedings
- The worst thing we can hear when handling an appeal for an employee disciplined for performance issues...

Common Pitfalls With Evaluations

- Not doing them on time or at all
- The Halo effect – Everyone gets an A
- Viewing meeting expectations as a negative score
- Rating an employee as meeting expectations when they do not, then transferring them versus dealing with the problems
- Not setting expectations or formulating new expectations
- Not setting an action plan to improve performance
- Only addressing performance once per year at evaluation
Performance Evaluations, cont’d.

- To maximize effectiveness, evaluations should:
  - Be timely, accurate, and fair
  - Be consistent throughout organization
  - Include feedback from all relevant persons, including the employee
  - Document other communications regarding employee’s performance throughout the review period
  - Give concrete examples
  - Set goals and objectives (especially for correcting performance issues), and document successes or failures in meeting the previous goals and objectives

Investigations

- When are they required?
  - FEHA issue
    - “Immediate and appropriate corrective action”
  - Discrepancies in accounts of misconduct/ performance
  - Not all misconduct
    - But must have good documentation of basis for discipline

Conducting an Investigation

- Who will investigate?
- Set an internal timetable
- Stay organized
- Investigation notices
- Representation issues
- Results of the investigation
Investigations – Preliminary Considerations

• Internal vs. external investigator?
  – Not a percipient witness
  – Factual conclusions vs. determinations of policy violations

• Any immediate action necessary?
  – Administrative leave
  – Stopping continued misconduct/ harassment
  – Address criminal conduct

Notice to Employees

• Not required until employee will be questioned (even for subject)*

• Notice should include:
  – Right to representation if a subject
  – The “nature of the investigation”
  – The time and date of interview or indication that someone will contact to schedule

*Not check rules!

Investigations – Interviews

• Weingarten allows an employee subject to an investigative interview that could reasonably lead to discipline to have a union representative present during the interview.

• Record all interviews

• Credibility of witnesses

• Scheduling the interview
  – Right to representation vs. perennially unavailable counsel
Results of the Investigation

- Who draws conclusions of policy violations or makes recommendations about discipline?
- Communicate to subject if charges were unfounded or not sustained
- Proceed with discipline if appropriate
- Need verifiable facts to have discipline upheld

Common Pitfalls Investigations

- Delays that lead to a lack of timeliness
- Conclusions not supported by evidence
- Relying on evidence from one source without considering alternatives
- Failing to be mindful of conflicts of interest and/or bias (applies to investigators and witness statements)
- Reciting statements versus performing critical analysis (like considering credibility, motive etc.)
- Failing to consider exonerating evidence
- Failing to listen to recordings/review transcripts in reaching conclusions

Disciplinary Process
Determining the Penalty

- Seriousness of the proven offense
- Employee’s prior employment record
- Employee’s prior discipline for similar infractions
- Employer’s responsibility to avoid arbitrary or discriminatory discipline
- Likelihood of a corrective or constructive effect on the employee
- Likelihood of a corrective or constructive effect on the workplace and other employees
- Possibility of appeal of the imposed discipline
- History of discipline for similar infractions at the agency

Progressive Discipline

- Incrementally higher levels of discipline
- Intended to curb misconduct or performance issues before implementing more severe forms of discipline
- Not legally required, but often considered by hearing officers
- Be aware of intersection of personnel rules and MOU
- But severe misconduct calls for equally severe discipline

Available Penalties

- Reprimand
- Suspension
- Demotion
- Reduction in pay
- Termination
Notice of Intended Disciplinary Action

- Required by due process for all “for cause” employees
- Should include
  - Basis for proposed discipline
  - Date and description of alleged misconduct, rule(s) violated
  - Proposed discipline, including effective date
  - Consideration of prior discipline
  - Copies of all documentation on which conclusion was based
  - Notice of right to respond, verbally, in writing, or both, including timeframe

Common Pitfalls Level of Discipline

- Using the discipline “penalty” to make up for the employer’s failure to address past performance problems
- Unequal treatment of similar situations
- Having a decision-maker that does not understand what is required to later prove the misconduct in a hearing
- Being too rigid about the penalty (Don’t forget about the ability to settle later on in the process)
- Being too punitive and not thinking about progressive discipline and actions to put an employee on notice of the need to improve
- Relying on conclusions not supported by the evidence

Overview of Discipline Process

- Skelly meeting
- Appeal rights and responsibilities
- Strategic and other considerations
Skelly Meeting

• What is it?
• Why do we have it?
• Who is entitled to a Skelly meeting?

The What, When and Where of Skelly

• What it is:
  – Due process right to pre-termination meeting
  – Employee’s opportunity to respond to the proposed discipline
  – Gut-check

The What, When and Where of Skelly, cont’d.

• When:
  – After the notice, but before the discipline is imposed
  – Look to Rules and MOU for timing provisions
  – Can change to a convenient time for the parties
• Where: Agency chooses location
Who is Entitled to a *Skelly* Meeting?

- For cause employees subject to “serious discipline”
- What kind of discipline is “serious”?
  - Discharges
  - Suspensions
  - Demotions
  - Pay reductions
- Vs. “not serious discipline”
  - Verbal reprimand
  - Written reprimand
  - PIP
  - Poor evaluation

Who Should Conduct the *Skelly* Meeting?

- Reasonably impartial uninvolved reviewer
- Officer must be senior enough to influence final decision maker
- Consider:
  - Past practice
  - Officer’s level of involvement in investigation or proposed discipline
  - Political concerns
  - Suitability for making difficult disciplinary decisions

Frequently Asked Questions

- What if the employee’s representative is not available?
- Is the *Skelly* an evidentiary hearing?
- What if the employee wants to call witnesses?
- What if the employee doesn’t like the *Skelly* officer or requests a different one?
- Is the employee/representative allowed to ask the *Skelly* officer questions?
- Can the Skelly officer ask questions of the employee (even if the union rep is doing all the talking)?
Frequently Asked Questions, cont’d.

• If the employee is on leave, do we have to delay the Skelly?
• What if additional misconduct comes to light in the Skelly?
• Who should be there?
• What if the decision maker disagrees with the Skelly officer?
• When should the attorney be involved?
• Can the employee have both an attorney and a union representative?
• Can the Skelly officer tape the meeting? Can the employee?

What If New Material is Revealed?

• Skelly officer cannot recommend a higher level of discipline than that which was already proposed
• Remedy is a new Notice of Intent incorporating the new charges and a new Skelly hearing

Skelly Officer’s Role

• Skelly officer should ask follow up questions to make sure they understand employee’s position
• Should be well-versed in background facts
• View this as an important gut check and really consider what is being raised
Recommendations Following the Hearing

• Further investigation may be warranted if new allegations or information was raised in the hearing
• Final decision maker is not required to follow Skelly officer’s recommendation
• Communicate reduction in charges

*Practice Pointer: Think about settling the discipline during the Skelly process*

Final Notice of Discipline

• Issued after consideration of employee’s presentation at Skelly hearing
• Include:
  – Charges or allegations
  – Facts relied upon
  – Reasons for decision
  – Acknowledge and, if appropriate, rebut employee’s response
  – Actual discipline imposed
  – Applicable details (dates, duration, new assignment, etc.)
  – Appeal procedure
  – Attach all relevant documents (or reference NOID)

Appeal of Discipline
The Nuts and Bolts

- Due process requires a full evidentiary hearing
- Employer has the burden of proof
- Logistics vary by employer
- Binding vs. advisory

Burden of Proof

Burden is to prove just cause. Seven steps of just cause often applied by arbitrators:
1. Notice
2. Reasonable Rules & Orders
3. Sufficient Investigation
4. Fair Investigation
5. Proof
6. Equal Treatment
7. Penalty

Appeal of Discipline
Hearing officer

- Must be neutral party
- Employer may not unilaterally select and pay for an officer who will be paid again by the employer
- Often, employer must pay for hearing
- Consider issues of attorneys from the same firm advising the decision maker
Appeal of the Appeal

- Many disciplinary decisions are appealable by writ (C.C.P. s 1094.5)
- If binding arbitration not much ability to appeal
- May be brought by employer or employee
- Generally, chance of success is low
- Standard: whether ruling was based on “substantial evidence,” or whether ruling was arbitrary and capricious

Regarding At-Will Employees

- Not entitled to Skelly or Administrative Appeal
- May be entitled to Lubey hearing if employees is charged with misconduct that could stigmatize
- “Name clearing” hearing

Strategic and Other Considerations
Settlement Issues

- Many disciplinary matters settle short of appeal hearing
- Union Rep can often be your ally
- “Confidential” settlement discussions may take place at any time, but strategic times exist for having such discussions
- Last Chance Agreements may be a good resolution for certain serious discipline cases

Any Questions?

Thank you!

Jesse Lad
Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607
(510) 808-2000
jlad@meyersnave.com

Joseph Lopez
Deputy City Manager
City of Modesto
1010 10th Street
Modesto, CA 95353
(209) 577-5402
hr@modestogov.com