

FUNDAMENTALS OF EMPLOYEE DISCIPLINE

Southwestern Michigan Business Officials

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Topics on the Agenda

- What Is Discipline?
- Purposes of Discipline
- Legal Restrictions On Employer's Disciplinary Decisions
 - Constitutional, Statutory & Contractual
- Investigation Best Practices
- Misconduct vs. Performance



Disciplinary Actions

- The public employer always bears the burden of proving its disciplinary action was appropriate.
- In addition, because the public school employer is responsible to comply with both the state and federal constitutions, most public school employees are entitled to a level of “due process.”



How Can I Sue Thee? Let Me Count the Ways

- Tenured Teachers may appeal tenure charges
- Non-teachers may pursue grievance arbitration
- Employees may go to state or federal court or an agency
 - EEO; MDCR; OCR
- Due process claims may be filed by any public employee who has a “property right”; typically, those with a just cause standard for disciplinary decisions, or those with a contract for a set period of time that does not contain a lesser standard (i.e., “at will”)



When Is Due Process Required?

At Will

- No due process rights (caveat)
- Non-union – no contract or policies



Contracts

- Individual
- Collective Bargaining Agreements
 - Typically, just cause
 - Teachers, “not arbitrary or capricious”



“Due Process”

- What constitutes “due process”?
 - Varies with circumstances, including severity of contemplated discipline
 - At a minimum, employee must have opportunity to tell side of story before decision made
 - LISTEN
 - INVESTIGATE IF NEEDED
 - Modify Decision if appropriate and reasonable



Right to “Hearing”

- If deprivation substantial, must have post-decision opportunity for some sort of “hearing”
 - Superintendent or other Administrator
 - BOE
 - Arbitrator, if a collective bargaining agreement is in place, excluding teacher due to PERA 15(3)(m)
- If have post-termination “hearing,” like arbitration, pre-termination opportunity can be moderate
- Where no post-termination “hearing,” the obligation to be careful before the decision is made, is heightened

Standards for Discipline

- Two standards (i.e., burdens of proof): one for teachers and one for other unionized employees.
- The standard applicable to teachers is required by law (PERA and the Tenure Act) to be the “not arbitrary or capricious” standard.
- The standard for teacher discipline is a “prohibited subject.”
- All other union employees are subject to disciplinary protection under a “just cause” standard.
- Non-union/non-contract employees = “at-will”
 - Some level of “due process” should be afforded to defend any outside complaint

“Not Arbitrary or Capricious”

- “Arbitrary” means fixed or arrived at through an exercise of will or by caprice, without consideration or adjustment with reference to principles, circumstances or significance.
- “Capricious” means apt to change suddenly, freakish or whimsical.
- A reason is arbitrary and capricious if it is based on prejudice, animus, or improper motives.

Cona v. Avondale Sch. Dist., 303 Mich. App. 123 (2013)

How Is This Standard Enforced?

- By the Tenure Commission if and only if the discipline issued exceeds 14 unpaid days for a single incident or 30 unpaid days in a full school year.
- Otherwise, *perhaps* by a court or EEO agency.
- Since July 2011, arbitrators no longer have jurisdiction to decide whether the discipline of teachers satisfies the applicable standard, because the discipline of teachers is now a “prohibited subject” under PERA, section 15(3)(m).
- Probationary teachers since 2011 may be dismissed for any reason at any time (excluding evaluative reasons).

Prohibited Subjects

- Apply only to teachers.
- Identified only by PERA.
- With respect to any “prohibited subject,” the public school employer has sole authority to act. MCL 423.215(4).
- As a matter of good labor relations, this does not mean the public school employer should be arbitrary or unfair.
- If there is a dispute about whether something is a prohibited subject or not, the MERC will decide.

Just Cause – 7 Part Test

- NOTICE OF EXPECTATIONS
- Did employer give employee fair warning of likely disciplinary consequences of employee's conduct?
 - Work rules
 - Expectations
 - Board policies
 - Staff meetings
 - Training
 - Memos
- Sometimes, notice is implied!



Reasonable Rule

- Was rule reasonably related to employer's business needs and the performance the employer might reasonably expect?
- If no rule, is it the kind of conduct for which no rule is needed?



Employer Fairness

- Before discipline administered, did employer make an effort to discover whether employee did in fact violate the rule?
 - Basic Due Process
 - Notice of charges
 - Explanation of evidence
 - Opportunity to respond



Investigation

- Was employer's preliminary investigation – before discipline administered – conducted fairly and objectively?
 - Who conducted it?
 - Was it reasonably thorough and fair to employee?
 - Did employer keep open mind?



Two Factors Important to Success:

1. INVESTIGATION

- Factually accurate
- Legally correct

2. DOCUMENTING INVESTIGATION

- Complying with contract
- Proving case



Burden of Proof

- Employer bears burden of proving just cause by a preponderance of evidence or clear and convincing evidence, in some cases.
- Is there enough evidence to meet one of those standards that employee did what is charged?
- In teacher tenure case, District bears burden of proving there are “not arbitrary or capricious” reasons for employer’s discipline.

Uniform and Consistent

- Has the employer applied its rules, orders, and penalties evenhandedly without discrimination, to all employees?
- If not, does employer have a satisfactory explanation to justify the differences in treatment?
- If employees are not “similarly situated,” discipline may be different!

Proportional Discipline

- Did degree of final discipline reasonably relate to (a) seriousness of offense and (b) the employee's work record with the employer?
 - Past offenses should be relevant in nature or proximate in time.



Not Carved in Stone

- Some modifications of 7 part test, but should have good explanation for why depart from one of 7 standards



Progressive Discipline



- Except for serious offenses, most arbitrators expect a progression of discipline.
- Typically, verbal, written, suspension, dismissal, or some variation.
- What does the CBA language say?

Tenured Teachers

- Up to 14-day suspension without pay per incident and up to 30 days each school year
- *Szopo v. Richmond Comm Schools*, 10 part test



Also, Szopo Factors Apply to Tenured Teachers

1. Was the behavior planned or deliberate?
2. Did it constitute a crime?
3. Did it involve fraud, deceit, sexual misconduct, drugs, or a weapon?
4. What was the teacher's motive or purpose?
5. Did the conduct result in harm to a specific victim, and if so, what is the gravity of the harm?
6. How much did the teacher's conduct deviate from the norms of appropriate conduct for members of society and teaching professionals?
7. Was there any previous disciplinary record, especially for the same type of conduct?
8. What effect did any previous punishments or interventions have on the teacher's behavior?
9. What is the teacher's attitude, including whether the teacher accepts responsibility and exhibits a willingness to change?
10. What is the likelihood the behavior will recur?

How Do Employees & Their Unions Challenge Discipline?

On the Merits



Procedural Flaws



Procedural Flaws

- May lead arbitrator, court or agency to modify or set aside discipline
- Importance of knowing and following procedures in contract and Board policies
- Contact Central Office
 - Double jeopardy
 - Uniformity and consistency
 - Knowledge of similar incidents
 - Assistance in drafting final documents



Anticipate Defenses

- I did not do it
- I did not know it was wrong
- The discipline is too harsh
- You did not follow contract procedures
- You did not give me due process
- No union rep
- You treated me differently than others
- You led me to believe it was okay
- Discrimination!
- You just don't like me!
- Rule unreasonable/no right to adopt rule

Using the Grievance Procedure



- Use the Grievance Procedure – do not “skip” steps
- Review facts & investigation
- Elicit defenses
- Evaluate defenses
- Explore specifics of disparate treatment claims and other defenses
- Fix if wrong decision made, or if new facts brought forward during grievance process that warrant a change in position

Investigation Best Practices



Understanding the Purpose of an Investigation

- Why have policies and procedures? Some policies REQUIRE an investigation
- It's the right thing to do – an employee's job is on the line
- Obtain information that may assist the District in defending against future claims
- Act of investigating may assist the District in avoiding liability!!
 - One of the few situations under the law in which actions taken by the school after alleged misconduct has occurred may absolve the school of, or limit, its liability –
VERY IMPORTANT

Best Investigator?



- Internal or External Investigator
- Skill-Set to Conduct the Investigation
 - Ability to judge credibility / Viewed as credible / Common sense
 - Effective interviewing skills / Ability to think on their feet and ask follow-up questions
 - Ability to be impartial, objective, non-judgmental, and understanding
 - Ability to determine the scope of the investigation / decipher what's relevant
 - Knowledge of school policies / employment or other issues
 - Time to conduct a prompt and thorough investigation
 - Ability to make a decision - Have to be tough, but fair

How to Investigate

- Learn of Allegation
- Review applicable rules, policies, etc.
- Review contract & Board policies
- Consider whether to place employee on leave pending investigation? If so, paid or unpaid?
- Conduct investigation & think about how to document the facts on which you rely
- Determine Discipline to be issued
- Document discipline to employee



Contract Provisions to Review

- Definition of probationary employee
- Definitions of discipline
- Progressive discipline language
- What documents go in employee files & when
- Language expunging disciplinary reports
- Restrictions concerning complaint handling and investigations
- Grievance/arbitration process & powers



Investigatory Interview

- This is a meeting to investigate allegations that could lead to discipline up to and including termination. (You may request the presence of Association representative.)
- You are expected to fully cooperate, and to answer all questions truthfully and completely.
- DO YOU UNDERSTAND?



Union Representation – Weingarten Rights

- Upon employee request
- When employee reasonably believes s/he is participating in an investigatory interview that could lead to that employee's discipline
- But, look at your collective bargaining agreement – does it provide greater rights?
- NO union representation for evaluative meetings or other performance meetings, unless you are likely to discipline employee after meeting



Role of Union Representative

- No authority to direct employee not to answer, in violation of supervisor's order
- Should not be allowed to answer questions for employee
- May caucus (note when and for how long)
- May ask clarifying questions or object to questions
- May emphasize points on employee's behalf
- May be zealous/enthusiastic in defense of employee
- No authority to "pick and choose" what union rep they want.
 - Caveat: severity of the allegations



Who, What, When, Where, Why?

- Identify who has “firsthand” knowledge
- Keep asking until you find the person with “firsthand” knowledge
- Get relevant documents & think about IT and video evidence
- Statements in writing that you write or they write and approve (sign or initial)
- Ask employee under investigation who else you should interview



Confidentiality?

- What do you do about a staff member who comes forward with a complaint against another staff member, but wants to remain “confidential”?



Confidentiality?

- Due Process
- “Need to Know”
- Impacts ability to discipline employee
- Impacts ability to effectively investigate
- Retaliation Protections

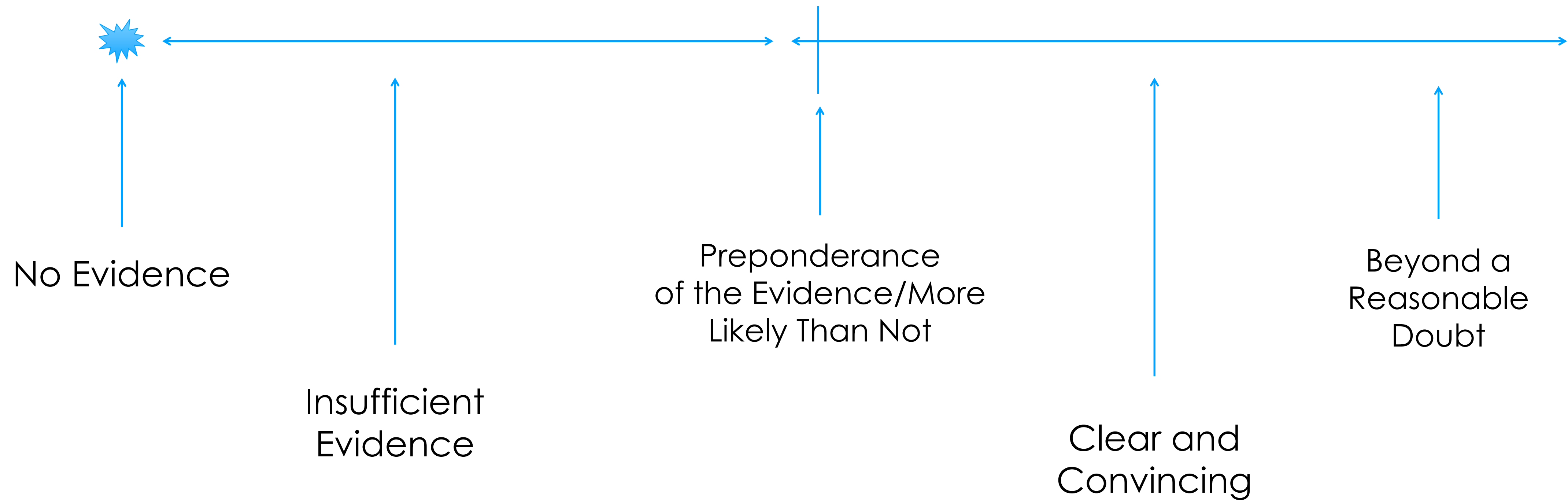


Documentation of Relevant Incidents

- Who, what, when, where
- State observed facts and events
- Minimize/avoid characterizations, conclusions when describing events

Evidence Thresholds

Evidentiary Standards



Forms of Documentation

- Memo to file
- Memo to employee
- Formal documentation
- Informal documentation



Common Problems

- Delay in investigation
 - stale memories & negative inferences of import
- Double jeopardy
- Employee refusal to answer questions
- Union rep interference
- FERPA considerations
- Reluctant witnesses
- Employee refusal to sign final document



Special Disciplinary Problems

- Off Duty Misconduct – Nexus Requirement
- Impaired Employee
- Insubordination
- Impact of ADA disability
- What Can You Consider in terms of prior discipline?
- Attendance Issues



Attendance – Performance vs. Misconduct?

- Essential function of any job
- Contract provisions that tolerate or permit absences
- Some arbitrators require proof of just cause
- Some arbitrators permit discipline where attendance excessive, albeit there is good cause for each absence
- Importance of progressive discipline & documentation



Evaluation (Performance) vs. Misconduct?

- Not mutually exclusive
- Somewhat of a judgment call
- Job performance versus conduct
- Misconduct should/may be noted in evaluation
- Evaluation not discipline, even an unsatisfactory evaluation



Evaluation/Job Performance

- Failure to appropriately document (IEPs, service logs, incident reports, etc.)
- Failure to timely document
- Communication issues (w/ other staff, parents, Administration)
- Knowledge of processes/procedures
- Lack of follow up with parents/Administration
- MODEL behavior and expectations through IDP/PIP – provide resources to improve. Things that can be worked on with additional assistance/coaching
 - (1-3 year teacher vs. 20 year teacher)

IDP/Plan of Assistance/Improvement

- Specific areas of improvement related to job performance and recommendations to improve
- Timeline appropriate to implement recommendations
- List of supports and resources
 - Mentor/Mentee
 - Training/PD
 - Model behavior/shadowing
 - “Template” forms
 - Additional meetings with supervisor to “check-in”
- How and when will you measure progress? Can progress be easily measured?
 - Frequency/Duration/Feedback
- Statement that objective improvement must be maintained timely and continuously or else employee is subject to discipline, up to and including termination



Be Honest



- State conclusions honestly on forms
- Is mediocre or marginal “satisfactory?”
- If “unsatisfactory,” how long is appropriate for remediation?
- Remember your role in creating district history and precedent

Misconduct/Discipline

- Professionalism
 - Absenteeism
 - Tardiness
 - Obscene/foul language
 - Lying
 - Insubordination
 - Non-compliance with BOE Policies
-
- Things you don't need training or resources to improve
 - "You should know better"
 - Should note and consider discipline in overall evaluation
 - DO **NOT** GIVE IDP for misconduct issues!!



"I don't know which is harder-- getting Smythe started in the morning, or his computer."

Questions/Scenarios of Your Own?



Thank You



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Legal Disclaimer

This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.