

THE ARCHDIOCESE OF SAINT PAUL AND MINNEAPOLIS

SCHOOL LAW DAY

Friday, October 28, 2011

**PROGRESSIVE DISCIPLINE
PROCEDURES UNDER JUSTICE IN
EMPLOYMENT**

PRESENTED BY:

THOMAS B. WIESER

MEIER, KENNEDY & QUINN

CHARTERED
ATTORNEYS AT LAW

**SUITE 2200, BREMER TOWER
445 MINNESOTA STREET
SAINT PAUL, MINNESOTA 55101-2137**

**TELEPHONE (651) 228-1911
FACSIMILE (651) 223-5483
E-MAIL: TWieser@mkqlaw.com**

NOTE: The information set forth in these materials is intended to provide an outline of the law existing as of the presentation date. It is not intended as, nor should it be considered, "legal advice." If you are presented with a specific issue, you should consult with legal counsel.

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. SEVEN ELEMENTS OF EFFECTIVE PROGRESSIVE DISCIPLINE	
A. Adequate Warning	1
B. Reasonable Rules	2
C. Rule or Standard of Conduct Violated	2
D. Fair and Adequate Investigation	2
E. Proof of Wrongdoing	3
F. Fair and Equal Treatment	4
G. Appropriate Discipline	4
III. PROGRESSIVE DISCIPLINE STEPS	
A. STEP ONE - Oral Warning	5
B. STEP TWO - Written Warning	5
C. STEP THREE - Final Written Warning or Suspension	6
D. STEP FOUR - Dismissal	6
E. STEP FIVE - Resolution of Work Related Issues	7
IV. DISCIPLINARY DOCUMENTATION	
A. Notice of Initiating Progressive Discipline	7
B. Nature of Present Problems	8
C. Background - Past History	8
D. Required Corrective Action	8
E. Consequences	8
 SAMPLE PROGRESSIVE DISCIPLINE FORM	

PROGRESSIVE DISCIPLINE PROCEDURES UNDER JUSTICE IN EMPLOYMENT

I. INTRODUCTION

As a general rule, an employee's employment status is "at will." That means that the employee and employer can end the employment relationship at any time, without cause and without notice. Employees of The Archdiocese of Saint Paul and Minneapolis and parishes and schools within The Archdiocese, however, may only be terminated for "just cause," after completion of the probationary period. This applies to situations where the employee is terminated for poor employee performance or improper conduct. It also applies to employment terminations relating to a reduction in staff or layoff. The following discussion will focus on progressive discipline under Justice In Employment that can lead to Just Cause termination or be considered when making a staff reduction or layoff decision. Disciplinary action that fails to follow the progressive discipline procedures can undermine the legitimacy of that disciplinary action and, in some instances, compel reversal of disciplinary decisions.

II. SEVEN ELEMENTS OF EFFECTIVE PROGRESSIVE DISCIPLINE

- 1) Adequate Warning
- 2) Reasonable Rules
- 3) Rule or Policy Violation
- 4) Fair Investigation
- 5) Proof of Wrongdoing
- 6) Fair and Equal Treatment
- 7) Appropriate Discipline

A. Adequate Warning

The following is a checklist of questions the administrator or supervisor should review before taking disciplinary action.

Question No. 1: Did the employee know or have reason to know that his or her conduct could result in disciplinary action?

What policy, standard of conduct, or rule applies to the situation?
Examples include:

1. Employee Handbook policy
2. Justice In Employment standard of conduct
3. Job Description
4. Code of Conduct

The absence of a specific policy does not automatically limit the employer's right to take disciplinary action. Fighting, being intoxicated at work, theft, and repeated absenteeism can warrant disciplinary action, even absent a specific policy.

B. Reasonable Rules

Question No. 2: Is the rule one of general application that is designed to create a safe and desirable workplace environment?

Any policy or procedure that appears to “pick on” one employee or set up an employee to fail may be challenged.

C. Rule or Standard of Conduct Violated

Question No. 3: Have you (administrator or supervisor) identified the specific policy, rule, or standard of conduct you claim was violated by the employee?

Using vague terms to describe an employee's alleged wrongful conduct (employee was “mean” to co-workers or failed to “cooperate” with supervisor) may be difficult to enforce.

D. Fair and Adequate Investigation

Question No. 4: Have you asked the employee to explain his or her conduct?

There can be, and often are, two sides to a story. Taking disciplinary action based on a co-worker's or supervisor's report of misconduct without asking for the employee's explanation can result in inappropriate disciplinary action. This can easily happen in situations where rule violation appears to be so clear (employee left work early without notifying supervisor), and asking the employee to explain (health emergency with family member) would eliminate the need to revoke a hasty disciplinary action.

Careful planning of an investigatory meeting is critical to assessing whether disciplinary action is justified.

Issues to consider:

1. When and where should the investigatory meeting be conducted?
2. Should you have a witness present?
3. What is your response if the employee wants to have a friend, co-worker, family member, or attorney present for the meeting?
4. Should the meeting be recorded?
5. How will the questioning be conducted?
 - a) Direct (“Why did you leave work early yesterday?”)
 - b) Indirect (“Do you know why I have asked to meet with you?”)
6. Have all witnesses been questioned?

Note: While it can be appropriate to inform employee that allegations are serious and could have impact on employee’s job status, it is most often best choice to avoid informing employee of the results of the investigation and the disciplinary decision at investigatory meeting.

E. Proof of Wrongdoing

Question No. 5: Has the allegation of wrongdoing been substantiated?

The requisite level of proof for disciplinary action can often relate to the level of disciplinary action under consideration. Something less than substantial proof would be acceptable for a verbal warning. The level of proof necessary to support a decision to terminate employment does not need to be “proof beyond a reasonable doubt,” but should be tangible, verified, and able to withstand careful scrutiny. An employee’s admission of wrongdoing should always be documented.

F. Fair and Equal Treatment

Question No. 6: How have other employees been disciplined under similar circumstances?

When deciding on the type of discipline to be imposed, it is important to consider how/what disciplinary action has been taken against other employees for the same or similar infraction.

Have other employees been allowed to arrive at work late without consequences? Is a male employee known to be cohabitating when you are considering whether to take disciplinary action against an unmarried, pregnant, female employee?

At the same time, “fair” treatment does not mean that the disciplinary action must be identical. Factors that can support different levels of discipline include:

1. prior disciplinary history;
2. length of employment; and
3. type of position.

G. Appropriate Discipline

Question No. 7: Does the level of punishment fit the offense?

First-time offenders and less serious issues generally warrant a lesser level of discipline. Major offenses and repeated violations will generally support more serious disciplinary action, including termination of employment.

III. PROGRESSIVE DISCIPLINE STEPS

The Progressive Discipline policy in Justice In Employment states that when performance deficiencies are observed, the supervisor is to “first offer suggestions, criticism or comments to the employee to correct those deficiencies or workplace behavior issues.” If that fails to resolve the problems, or if the severity of the circumstances warrant it, the supervisor is to follow a series of corrective steps.

That process begins with the supervisor informing the employee that the supervisor “is initiating progressive discipline under JIE.”

Note: As part of the process of implementing the progressive discipline procedures, Justice In Employment provides that “the employer is encouraged, but not required, to seek the advice and counsel of a human resources professional qualified in employment related matters and knowledgeable about these policies.”

A. STEP ONE - Oral Warning

JIE Procedure - Step I

The immediate supervisor will give the employee an oral warning that may include a time frame for correction of the issue. The immediate supervisor will document the date, time and subject matter of the oral warning.

Comment:

An oral warning is generally used when a problem persists after the supervisor has brought it to the employee’s attention through counseling. The goal is to bring the problem to the attention of the employee before it becomes more serious and to provide direction to the employee so he or she can correct the problem.

B. STEP TWO - Written Warning

JIE Procedure - Step II

If the oral warning is not effective in producing the desired results within the specified time frame, the supervisor then will give the employee a written warning at the next review meeting. All written disciplinary statements will include specific information as to the improvement needed and corrective measures required. The supervisor will give a copy of the written warning to the employee and place a copy in the employee’s personnel file.

Comment:

If the employee has not satisfactorily corrected the problem outlined in the oral warning, the supervisor can proceed to the next step: the written warning.

In some instances and where the severity of the circumstances warrant, it can be appropriate to begin the disciplinary process with a written warning.

The written warning should:

1. provide an explanation of the circumstances underlying the written warning;
2. specify the corrective steps the employee must take to improve his or her performance;
3. if appropriate, provide a timetable for demonstrating improvement; and
4. clearly define the consequences for failure to show adequate improvement.

C. STEP THREE - Final Written Warning or Suspension

JIE Procedure - Step III

If sufficient improvement does not occur within the noted time frame or if serious work performance or behavior issues warrant immediate attention, disciplinary action in the form of a final written warning and/or a suspension without pay may be taken by the supervisor.

Comment:

The last corrective step in the progressive discipline process is a final written warning “and/or” suspension. The purpose is to convey the message in the strongest possible terms that the problem is extremely serious, and it is the employee’s last chance to correct the problem or be terminated.

In the case of the suspension, it is usually not paid; and vacations, sick leave, PTO, or other leave benefits do not accrue.

D. STEP FOUR - Dismissal

JIE Procedure - Step IV

If lack of sufficient improvement continues or if serious issues warrant immediate action, the supervisor may recommend and then implement dismissal. Prior to dismissal, consultation must take place as required in the section of these policies on Discharge for Just Cause.

Note: The Discharge: Just Cause policy states: “Prior to discharging any employee for cause, the employer or his or her designate *shall* seek and follow the advice of an attorney qualified in employment law and familiar with these policies, to ensure that these policies are followed.”

Comment:

If the progressive disciplinary steps are not successful, the employee may be dismissed. Dismissal is the final step in the progressive discipline process. It is not corrective. Before implementing the dismissal, it is usually appropriate to meet with the employee, notify the employee that dismissal is under review, and give the employee an opportunity to explain the conduct that resulted in the dismissal recommendation and further explain why dismissal is not warranted.

E. STEP FIVE - Resolution of Work Related Issues

JIE Procedure - Step V

Employees who believe that they have been disciplined unfairly may resort to the Policy on Resolution of Work Related Issues.

IV. DISCIPLINARY DOCUMENTATION

The Justice In Employment policies specify that certain information will be included on the disciplinary memorandum. The following section will discuss the elements of an effective warning memorandum.

A. Notice of Initiating Progressive Discipline

Justice In Employment states that if the supervisor’s suggestions, criticism, and comments do not correct the performance deficiencies,

“. . . the supervisor will inform the employee that the supervisor is initiating progressive discipline under JIE.”

Failure to note that the supervisor is “initiating progressive discipline under JIE,” specifically on the initial warning memo, whether that is an oral warning, written warning, or final written warning memo, could invalidate the warning notice.

B. Nature of Present Problems

This section of the warning memo identifies the specific incident or the nature of the current issue. It is helpful in this section to cite to the specific rule, policy, or standard in the employee's job description that was violated and is the basis for the disciplinary action. Summary information about the results of the employer's investigation, including the employee's response to the allegation, especially any employee admissions, should be included.

C. Background - Past History

This section reviews the employee's history of related offenses and prior disciplinary actions. This section can provide an explanation of how the problematic conduct has affected the workplace and co-workers and show why disciplinary action was taken.

D. Required Corrective Action

In this section, the employee is informed about the improvement needed and corrective measures required. A time frame for demonstrating the required improvement is normally included. It is recommended that the corrective measures be described in terms of what the employee must "do," rather than "don't." ("Arrive at work on time" vs. "Don't be late.") Be specific.

E. Consequences

The warning memo should end with a clear statement of the consequences for failure to demonstrate improved performance. "Failure to be on time for work will result in further discipline, up to and including immediate termination from your job."

SAMPLE PROGRESSIVE DISCIPLINE FORM

[Employee Name]
[Oral] [Written] [Final] Warning

From: [Supervisor Name]
Date: October 28, 2011
Time: 2:00 p.m.
Present: [Employee]
 [Supervisor]
 [Parish Administrator]
 [Pastor]

NATURE OF PRESENT CONCERN

This is to notify you that we are [initiating] [continuing] progressive discipline under Justice In Employment.

[Refer to specific policy employee has violated.]

Background

[Describe prior disciplinary instances.]

Improvement Required

[Describe specific corrective action and a timetable, if appropriate.]

Consequences

“Any further violations of this policy or any other performance deficiencies will result in discipline, up to and including immediate termination.”