

# Progressive Discipline

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# Agenda

- Good Management Practices
- Section 75 of the Civil Service Law
- Section 71, 72 & 73 of the Civil Service Law
- ADA & FMLA
- General Rules for Effective Disciplinary Policy
- Procedures Before Disciplinary Action is Taken
- Reasonable Suspicion Policy & Procedures

# Good Management Practices

- General Policies for the workplace should be outlined in a department policy and procedure manual or written memoranda as well in the County Employee Handbook
- Meetings and training will articulate work rules and expectations
- Record kept indicating employee received training and a copy of Employee Handbook and department manual

# Progressive Discipline Overview



# Supervisor's Role

- Coach
- To advise, guide, teach, oversee
- To recommend what should be done
- To direct
- To communicate duties & responsibilities
- To praise, encourage
- To express disapproval & explain how to improve performance or correct behavior
- Want respect? Give respect.

# General Rules for Effective Supervision

- Application of policies and penalties must be **consistent**
- Rules, conduct and performance standards should be **clearly communicated** and understood
- Employees must consistently be held **accountable** for a rule violation or for failing to meet performance standards
- **Investigate** a matter fully before taking any action (Do not make decisions in the heat of the moment)
- Inappropriate or unacceptable behavior should be **addressed** as soon as possible
- All action taken should be fully **documented**

# Neogov

## Performance Evaluation & Talent Management Tool

- Web based tool to assist in effective communication of expectations
- Sets forth performance standards
- Provides additional means for documentation
- Allows for sharing of information among supervisors
- Training available



# Neogov -- Notes




































Convenient place to document:


- Conversations with an employee
- Praise from you or others
- Performance problems, such as lateness or attendance issues
- Critical incidents
- Coaching sessions



# Neogov Notes (Cont'd)

Notes & Attachments				New
Created By	Note	Created On	Actions	
 Yvonne Rodriguez	Social Worker Position Description	04/18/2013		

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# Notes List

**John Doe**

<u>Date</u>	<u>Owner (You)</u>	<u>Title (Issue)</u>
6/10/10	Bill Smith	Damaged tools
7/14/10	Bill Smith	Late 40 min. no call
8/16/10	Bill Smith	Customer complaint
8/26/10	Bill Smith	Late 53 min. no call
9/3/10	Bill Smith	Customer complaint
9/6/10	Bill Smith	Damaged property

# Using Coaching Ideas in Notes

- Coaching means approaching performance issues from a problem solving rather than a disciplinary perspective
- As a coach, your role is to provide your employees with direction, support & feedback
- To help employees correct performance deficiencies, develop existing and new skills

# Counseling – What it is – and is Not

- Counseling is a means to correct unacceptable behavior and/or improve performance
- Counseling is a necessary component of good supervision
- Counseling is NOT discipline
- Your early intervention can prevent a behavior pattern from becoming a disciplinary matter
- Employee should be given opportunity to correct behavior with your guidance & counseling

# Counseling

- Counseling session not required by law
- Serves as a means of communication with employee
- Counseling sessions should be positive, constructive, and informative; not punitive
- No right to union representation during counseling
- Do not need to call it a “counseling”, merely a meeting between supervisor and employee

# Counseling

- Never schedule a counseling session when you are rushed. It leaves an impression you do not care
- Conduct counseling sessions in private
- Be direct - do not beat around the bush
- Explain the exact nature of your concerns
- Be a good listener - give the employee an opportunity to explain
- Keep an open mind – if, after the discussion you believe the concern was unfounded, say so

# Counseling

- Discuss ways an employee can overcome a performance shortcoming
- If employee is cooperative, your job is to make sure the unacceptable behavior does not continue
- Employee may need additional training, reassignment, closer instruction, etc.
- If appropriate, tell employee about available assistance, such as Employee Assistance Program
- If employee becomes hostile, remain calm, speak in a measured voice. If employee remains hostile, consider having another supervisor present.

# Counseling

- Focus on behavior or performance issues, not the person(ality)
- At conclusion, repeat agreed objectives and corrective actions, and any follow-up dates
- Follow up is crucial to correcting problems and also to providing basis to move to more formal action if necessary



# Follow-up Memos

- When are they appropriate?
- Follow-up memos to a Counseling session are not appropriate in every instance or situation (e.g., first time minor offense)
- These memos can be very helpful to clarify misunderstandings or misperceptions and ultimately very helpful if formal discipline necessary.

# Guidelines for Effective Memos

- Write for the reader
- Be factual and accurate (memos can be subject of contract grievance)
- Be reasonable – think about how you would want to be spoken to or dealt with
- A Follow-up memo is NOT a reprimand
- A Follow-up memo is notice, instruction, and documentation

# Guidelines for Effective Memos

- Don't write them in advance of a conversation or as a substitute for a discussion with the employee
- Take time to think about the facts and the employee's response, including an agreement (or instruction) and timetable for corrective measures
- Indicate in the memo that it is a follow-up to the conversation on a specific date regarding a specific topic. Indicate the results of the meeting and the course of action settled upon.

# Guidelines for Effective Memos (Cont'd)

- Always cc personnel file with Follow-Up Memos
- If previous written memos and instructions were not placed in personnel file, reference in Follow-up memo and attach them
- If previous conversations occurred that were not documented, reference them in the Follow-Up memo (e.g. – if you have previously discussed this topic with employee on more than one occasion, say so)

# Sample Follow-Up Memo

To:

From:

Subject:

Date:

- On (date) we met to discuss your performance, specifically.....
- I stated that....& you replied that.....
- I then explained that....
- In response, you said...
- We then agreed the following would take place.....
- We also agreed to meet as a follow up to review your progress on (date)

# Probationary Period

## Westchester County Civil Service Rules

- The Civil Service Rules provide for the start date and length of probationary periods (12 wk min)
- Become familiar with the duration of the probationary period and your responsibilities under the rules
- Honestly evaluate all new and recently promoted employees through performance reviews
- Communicate expectations and progress with those whom you supervise
- Report to your supervisor frequently with respect to progress of those who are on probation under your supervision well in advance of end of probation

# Increments

## Are they Automatic???

- Increments are earned
- Authority to deny increment is with Commissioner/Department Head
- Consistency is important – if an individual has performance issues and has been counseled and/or disciplined, question whether increment should be granted
- Denial of increment requires 30 days notice

# Section 75 Overview

- Disciplinary action for incompetency or misconduct
- Procedures for removal and other disciplinary proceedings
- Only Commissioner has authority to impose discipline
- Who is covered by Section 75
- 18 Months is operative time frame
- Hearing on stated charges



# Who is Covered

- Permanent competitive class employees
- Non-Competitive Class employees with 5 years of continuous service in a position not designated as policy influencing/confidential; however, a bargaining agreement could make Section 75 available in less than 5 years service (ex., CSEA agreement provides tenure after 1 year)
- Safest to assume that the employees that you supervise are entitled to Section 75 protection and proceed accordingly

# Disciplinary Procedures: Section 75, Contract, or Both?

- Section 75 may be supplemented, modified or replaced by contract disciplinary procedures
- For example, the Police Officer and Correction Officer Contracts provide for separate disciplinary procedures.

# Section 75 Civil Service Law

- A public employee covered by this section can only be removed or otherwise subjected to a disciplinary penalty after a hearing upon stated charges pursuant to this section.
- The only grounds available are incompetency or misconduct.
- Usually no great shock to employee (at least, it shouldn't be!)

# Section 75 Procedures

- Two levels of Discipline –
  - Notice of Questioning
  - Formal Charges
- Before you question an employee, must decide whether that employee is a potential subject of disciplinary charges
- If so, the employee is entitled to be advised in writing and have a union rep present

# Section 75 Procedures

- You do not have authority to conduct a Notice of Questioning under Section 75 -- Must go through your Commissioner's Office
- If representation is requested, a reasonable period of time shall be afforded to obtain representation

# Section 75 Procedures

- If you believe that a Notice of Questioning would be appropriate, you should first contact Law Department.
- If representation is requested, a reasonable period of time shall be afforded to obtain representation

# Section 75 Procedures

- Information gained without representation may not be used in the hearing
- Why do a questioning?
  - Information gathering – defenses?
  - Send a message
  - Notice
  - Assists with Progressive Discipline, and may be enough to scare an employee straight

# Section 75 Procedures

A person against whom removal or other disciplinary action is proposed shall:

- Be notified of charges in writing
- Have charges detailing specific offenses and including dates when offenses occurred
- Be furnished a copy of the charges
- Be allowed 8 days to answer the charges in writing
- Have charges brought within 18 months unless charges are a crime – keep in mind that charges will be lost if not brought within 18 months



# Section 75 Procedures

- The burden of proving incompetency or misconduct is upon the Commissioner alleging the charges
- Once Commissioner has referred the matter to the Law Department, the attorney assigned will work with the Department to draft charges

# Section 75 Procedures

- It is imperative that the Department provide all relevant information to the attorney assigned - especially if there are other employees with similar issues or if FMLA involved
- Supervisor usually main witness – knows dates, times, specifics
- Supervisor must participate in collection of evidence and/or documentation  
(document, document, document!!!)

# Penalties that may be Imposed

- Reprimand
- Fine not to exceed \$100
- Suspension without pay up to 2 months
- Demotion in grade and title
- Dismissal from service
- Time while suspended without pay pending determination may be considered as part of the penalty

# Alternatives to Proceeding to a Hearing

The Commissioner and the employee may enter a stipulated agreement

- Employee agrees to plead guilty to one or more charges for defined penalty
- Benefit for Department - Penalty is not limited to those contained in Section 75, but may be tailored to particular facts and conduct
  - EAP referral
  - Last Chance Agreements

# Sections 71 – 72 – 73

## Civil Service Law

- Sections 71, 72 and 73 were enacted to provide an alternative to the imposition of traditional disciplinary action, when a medical condition causes the employee's inability to perform the essential functions of his or her position.

## Section 71

- Applies to all employees in the classified service, including probationary employees, who sustained a job injury, resulting in an inability to work
- Excludes County police & correction officers by collective bargaining agreement

## Section 71

- Right to a leave of absence for one year, unless found to be permanently disabled or terminated for other reason
- Right to apply for restoration to duty at any time during leave
- Right to be reinstated within one year after termination of their disability

## Section 72

- Involuntary leave of absence
- Allows employer to put an employee, who is unable to perform the essential duties of the job, due to a non-occupational injury or disease, on leave of absence



## Section 72

- Medical exam and determination of fitness required before imposing leave
- Employee may contest medical findings and demand hearing before a neutral hearing officer
- Employee may be represented by counsel/union

## Section 72

- Employee may apply to return within one year, subject to the findings of a new medical exam
- Medical determination may be challenged by employee at a new hearing before a neutral hearing officer
- After one year of continuous absence, employee may be terminated pursuant to Section 73

## Section 73

- Termination of employee, who was continuously absent & unable to perform job duties, for 1 year or more due to a non-occupational injury or disease
- Employee may apply, within one year of termination of disability, to the Commissioner of Human Resources, for a medical exam to determine fitness for duty
- If found medically fit to perform job duties, employee must be reinstated to former job or similar, if vacant (Preferred list if not)

## Sections 75, 71, 72 & 73

Must be consistent with requirements of

- Americans with Disabilities Act (ADA)
- and
- Family Medical Leave Act (FMLA)

# Americans with Disabilities Act (ADA)

- Unlawful to discriminate against a qualified individual with a disability
- Employers must provide reasonable accommodations
- If individual cannot perform the essential functions of the job, not ADA covered; can be disciplined, placed on applicable leave or terminated as appropriate

# Family Medical Leave Act (FMLA)

- Allows for cumulative absences up to 12 weeks in any calendar year for qualifying individuals, who have a serious health condition or have a family member with a serious health condition
- Employers prohibited from penalizing or otherwise discriminating against employee because of the leave
- Does not protect employee who is incompetent or engages in misconduct, including excessive non-FMLA absenteeism.

# General Rules for Effective Progressive Discipline

- Successive acts of misconduct should result in progressively more significant response
  - i.e., informal discussions, e-mail reminders, Counseling session, Follow-up memo to Counseling, Notice of Questioning, Formal Discipline
- Remain objective: personal prejudice has no place in an effective disciplinary program

# Progressive Discipline Checklist

- Where do you look for guidance on disciplinary protections and/or procedures?  
For example - Union Contract?
- What kind of behavior is actionable?
- Did the act constitute misconduct or incompetence?
- What was the nature of the act?  
(insubordination, theft, tardiness, etc)
- Major or minor incident?



# Progressive Discipline Checklist

- If a violation of the rule, was the employee advised of the rule?
- Was an investigation conducted?
- Who spoke to the employee?
- Was it on or off duty misconduct?
- Are there extenuating circumstances?
- Should action be taken?

## Points to Remember

- Timeliness of the disciplinary proceeding: no proceeding shall be commenced more than 18 months from occurrence unless it is a crime
- Involving the County Attorney's Office early in the process will help to keep the charges timely
- Your time investment in good supervisory practices may prevent the need to discipline.

# Points to Remember (cont'd)

Good supervision can

- increase productivity
- save you time
- reduce your stress
- reduce the need for disciplinary action

# Reasonable Suspicion Policy and Procedures

# Quick Quiz

- ☐ What's the difference between Counseling and Coaching?
- ☐ Is Counseling discipline?
- ☐ What's the difference between Section 72 and 75?
- ☐ What's the first thing you do if you suspect your employee is under the influence of substances?

# Questions?

