

Section E

Progressive Discipline

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Progressive Discipline Defined

Discipline is designed to put employees on notice that they must correct their behavior or face increasingly severe forms of discipline, and ultimately, dismissal. Progressive discipline means imposing increasingly severe sanctions for repeated infractions. It must be administered with genuine interest in helping the employee correct performance or behavior problem(s).

Except where dismissal is justified by very serious misconduct (for example: falsification of official documents, theft, physical abuse of coworkers, overt harassment or substantial misuse of the employees official position), progressive discipline should be used.

Depending on the circumstances, formal discipline may be a written reprimand or an economic sanction such as a temporary salary reduction. Repetition of the misconduct should result in a more severe economic sanction, which may be followed by demotion or dismissal if the conduct is repeated.

If the problem is skill or knowledge-based (for example, entering a set number of documents in a certain timeframe, taking a certain number of claims each day) the employee should be given reasonable opportunity at each step of the process to correct the deficiency.

If the problem is behavioral (for example, consistent tardiness, harassment, rude treatment of the public, etc.), there is no need to give the employee time to improve. You may require the employee to **immediately** cease and desist from engaging in the behavior. If the behavior is repeated, impose a more severe sanction.

Progressive Discipline Steps

Progressive Discipline Steps for Represented Employees	
1: Letter of Reprimand	
2: Economic Sanction:	<ul style="list-style-type: none">a. Pay Reductionb. Suspension Without Payc. Involuntary Demotion
3: Pre-dismissal:	<ul style="list-style-type: none">a. Written Noticeb. Meeting
4: Pre-dismissal Outcome:	<ul style="list-style-type: none">a. Discipline Other Than Dismissalb. No Actionc. Last Chance Agreementd. Dismissal

Notes: _____

Weingarten

Weingarten Rights allow an employee to have union representation at an investigatory meeting, which the employee reasonably believes may result in discipline.

The union representative may inquire, *at the onset of the interview*, regarding the purpose, including inquiring about the general subject matter of the questioning to follow.

During the investigatory meeting, the union representative may ask clarifying questions *but may not counsel* an employee on how or whether to answer the employer's questions.

After the employer has completed asking questions of the employee, the union representative may ask the employee questions designed to clarify previous answers or to elicit further relevant information.

Before the end of the meeting, the representative may suggest to the employer other witnesses to interview and may describe relevant practices, prior situations or mitigating factors that could have some bearing on the employer's deliberations concerning discipline.

The Special Status of Union Stewards

Under labor law, stewards and union officers have a protected legal status. When engaged in representational activities, stewards and union officers are considered to be equals with management. Three rules apply to stewards and union officers in recognition of their need to vigorously advocate when representing an employee:

The Equality Rule:

Allows a steward to raise a voice, gesture, challenge management's claim of truthfulness, threaten legal action or raise the possibility of group protests. The employer cannot label this behavior as insubordinate and impose discipline. This rule applies only when a steward acts in his/her representational capacity.

The No-reprisal Rule:

A steward cannot be punished or threatened with punishment because management considers his/her grievance to be overly frequent, petty or offensively written. Reprisals against stewards are unfair labor practices. An employer violates the no-reprisal rule if it segregates a steward from other workers; deprives a steward of overtime or other benefits; transfers a steward to a different job or shift, etc.

The Same Standards Rule:

Employers must apply the same standards to stewards as they do to other employees. Employers cannot say, "Of all people, you're supposed to know the rules," then impose discipline for failure to meet a higher standard. The only circumstance in which a steward may be held to a higher standard than a rank-and-file worker occurs when a no-strike clause imposes duties on union officials.

Investigatory Meeting Roles

If discipline is being contemplated you **must** conduct an investigatory meeting with the employee. Failure to do so may delay and/or prevent you from taking disciplinary action that is warranted. Each party plays an important role in the investigatory meeting.

HR's Role:

It is imperative the manager consult with Human Resources early in the process when an issue has developed requiring an investigatory meeting that could lead to a disciplinary action. In preparing for and conducting all such investigatory meetings, HR provides support and assistance to the manager collaboratively defining the problem/issue, identifying/gathering relevant facts, the needed resolution, and what level of disciplinary action is being considered. This consultative and collaborative approach will allow HR to provide maximum assistance in the resolution of the issue, and assure that if discipline is required, that all the requirements of due process and the current Union Contract are followed.

Manager's Role:

This is your meeting as a manager. You called it. The purpose of the meeting is to investigate an issue, to get the employee's version and ask clarifying questions. You are there to seek information. You need to maintain control of the meeting. Keep the meeting low key and model respectful behavior. If a second manager or Human Resources Analyst is attending the meeting, agree on who will lead the meeting, ask questions, take notes, etc. prior to the start of the meeting. Either participant can ask the employee to repeat and/or clarify an answer.

Employee's Role:

The employee is there to listen to and understand the area(s) of concern and respond to the specific facts (as you know them). This allows the employee to present his/her side; explaining circumstances and presenting mitigating facts.

Steward's Role:

The union steward is there to support and represent the employee. A Steward can only ask clarifying questions. They may not advise the employee how to answer or to not answer questions. They may not leave the room to have a “caucus” or speak in private. The representative may suggest to the employer other witnesses to interview and may describe relevant practices, prior situations or mitigating factors that could have some bearing on the employer’s deliberations concerning discipline.

Investigatory Meeting Best Practices

- **Contact Human Resource.**
- **Schedule the meeting in advance.**

In a private setting, let the employee know the purpose of the meeting and that it is investigatory.
- **Offer union representation.**

The employee has a right to have representation. You need to allow enough time prior to the meeting for the employee to obtain union representation. If an employee declines representation get the decline in writing (e-mail OK). If an employee wants representation they need to use the nearest steward and make the arrangements. A union steward may represent an employee telephonically. We do not delay meetings so that an employee can use a specific steward nor do we pay steward's travel expenses. The steward must arrange with their supervisor to take time away from their job to represent the employee.
- **Prepare for your investigatory meeting in advance.**

Conduct preliminary interviews with witnesses, technical experts, etc. to gather pertinent facts. Get specifics; what happened, when, where, who witnessed, and any supporting documentation.
- **Identify the time period(s) under investigation.**

Understand the time frame you are covering when investigating an issue or concern. When investigating a specific incident identify the date of the incident. If prior corrective steps were taken (i.e. written or verbal coaching, LOE, written warning or formal discipline) and were unsuccessful – cover from the date the employee knew or should have known that improvement was needed to the date of the investigative (fact-finding) meeting. That is the only time that can be covered in supporting facts if formal discipline is being used.
- **Have some pre-made questions.**

Identify the specific topics/incidents you want to address with enough information available to allow the employee to accurately respond. Your HR person is there to help you if you need assistance.

Conducting the Meeting

Conduct the meeting by...

- Setting simple ground rules at the start of the meeting such as *confidentiality*, the steward's role, the employee must answer the questions, no leaving the meeting to consult, etc.
- Disclosing enough specific information for the employee to be able to respond. This can include covering a brief history of actions previously taken to help the employee correct an issue and/or to confirm what the employee knew or should have known.
- Keep an open mind. The intent of the meeting is to provide an opportunity for an employee to present his/her side of the story before deciding whether or not to take disciplinary action so that you can objectively evaluate the circumstances and determine whether disciplinary action is warranted.
- Asking open ended (big picture) questions. Examples:
 - ⇒ Was there something that prevented you from/caused you to ??
 - ⇒ Is there anything that is going to get in your way of being able to accomplish??
- Ask follow-up clarifying questions.
- Take notes. Have a second manager (or HRA) in the room to take notes. You do not have to give the employee or the representative a copy of your notes. They have the same opportunity you do to take notes for themselves.

Notes: _____

Close the meeting by...

- State that you will take all of the information provided under consideration.
- If applicable, commit to any follow-up investigation steps identified as needed in the meeting.
- Identify an approximate time that the employee will hear back from you (set depending on what follow-up is needed, extent of actions being considered, etc.).
- And finally, remind all parties of the importance of confidentiality.

After the meeting, meet with HR Analyst

Considerations on how to proceed may involve review of past feedback and coaching, actions, progressive discipline, etc. that have taken place with the employee on related issues; how like concerns have been addressed, contract language and past practices.

Your HR Analyst can help you with all of these considerations and recommend the best course of action for the circumstances being addressed.

Notes: _____

Avoid These Actions in an Investigatory Meeting

Do not let the employee engage you in a preliminary discussion.

When scheduling a meeting stick to the topics you plan to cover and if there is a potential for formal discipline as a result of the meeting.

Do not make your decision to discipline before the meeting.

Remember you are gathering information to determine if you need to proceed and how to do so. With this mindset you will be better able to listen to what the employee is telling you.

Do not ask closed questions.

If closed questions (those that can be answered by a yes or no) cannot be avoided follow them up with a “why” question or ask them to please explain their response.

Do not allow recording.

You have no control where that recording will end up. If on a limited basis recording the meeting is being considered, consult with HR. Also, all parties must agree to be recorded in person; however, it is permissible to record a phone conversation if only one party agrees.

Do not close the meeting by committing to a specific level of discipline.

Don't tell the employee what you have decided in the meeting. Take the information and go over it with HR and your supervisor. Take facts and mitigating circumstances into consideration before making your decision to discipline and at what level.

Do not keep the employee in limbo.

Make sure you get back to the employee either by meeting with them to present a disciplinary document or to tell them that there will be no discipline.

The Seven Elements of Just Cause

1. *Did employer forewarn employee of possible consequences of conduct?*

Are there rules about the type of conduct at issue? Are they oral or written? If oral, how would employee hear about them? If written, has employee been given access? Did employee say she/he knew about the rule? How would employee know about the rule? If there is no formal or informal rule, is the conduct the type that employees could still be expected to know was not permitted?

2. *Was rule or directive reasonably related to orderly, efficient, and safe operation of business?*

Why was the rule put in place? Does the rule protect others? Does the rule fairly give guidance to employee about how to act? Without the rule would employee be uncertain what to do?

3. *Before administering discipline did employer make effort to discover whether employee did, in fact, violate or disobey rule or directive?*

Did anyone find out what happened? Who was the person? Is there a report? If no report, is there a reason that one was not drafted? Are their notes showing an investigation?

4. *Was employer's investigation conducted fairly and objectively?*

Are there any prior problems between investigator and employee that could be raised to question objectivity of investigator? Can any claim of bias be made based on the wording in the investigation report? Did investigator evidence anger or frustration during interview that could be raised to claim bias? Does the report cover the facts, both harmful and helpful, to the employee? Were all logical sources that could provide information covered or does report leave questions in the mind of the reader about why other sources were not contacted?

5. *In investigation, did employer obtain sufficient evidence or proof that employee was guilty as charged?*

What did employee do? Any physical evidence to show what happened? Are there any witnesses that observed the conduct? Are the conclusions about what happened logical in light of the existing evidence? Is there “speculation: to fill in gaps in the evidence? Do the conclusions take into account all the evidence, even if some evidence is contrary to other evidence?

6. *Has employer applied its rules, directives, and penalties evenhandedly and without discrimination?*

Has this conduct, or similar conduct, happened before in this workplace? Was discipline imposed? At what level? Did the prior disciplines contain any explanation to support why they were given? If this is the first time this type of conduct has occurred, what factors make you want to impose discipline? Examples: (a) employee needs to understand not to do it again; (b) other employees would do the same if this employee is allowed to; (c) past actions of employee show she/he needs to be put on notice; (d) the conduct has the potential to create great risk for the employer.

7. *Was degree of discipline reasonably related to seriousness of offense and employee’s record?*

On a continuum, is it intrinsically unethical behavior on one extreme or a lapse in judgment on the other extreme? Has there been adverse publicity about the conduct? Would publicity about the conduct be detrimental to the public’s view of the employer? Should employee have known better? Was conduct intentionally done or the result of poor judgment?

Types of Discipline

What Are They? Who Issues Them? When Should They Be Used?

Five types of progressive discipline are:

- Written reprimand;
- Temporary salary reduction;
- Suspension without pay;
- Demotion; and
- Dismissal.

The following pages contain descriptions of each type of discipline and a *general* overview of when it can be effectively used. *Remember* that every case will have different circumstances and administrative authorities are not required to use the types of discipline in any specific order. For example, a demotion is optional, not a required step, and could be used earlier in the process if it were the best option for the situation.

Remember that you must consult with Human Resources PRIOR to administering any discipline.

As a reminder...

Before any discipline is administered managers and supervisors must objectively evaluate the circumstances and determine whether disciplinary action is warranted. This means always gathering the facts and providing an opportunity for an employee to present his/her side of the story before deciding whether or not to take disciplinary action. Failure to do so may delay or prevent you from taking disciplinary action that is warranted. *Employees who are represented must be given the right to union representation in the investigatory meeting when a disciplinary action is being considered.*

Written Reprimand

What is a Written Reprimand?

A written reprimand is a written communication to the employee describing what the employee did that was wrong, why it was wrong, what management's specific expectations are regarding the employee's future performance, and the consequences of not meeting those expectations. A written reprimand is the only disciplinary action that does not result in a loss of pay.

Who Issues a Written Reprimand?

A written reprimand is generally written by the employee's immediate supervisor in close consultation with HR. It should be written in first person (from the supervisor to the employee) and does not require the signature of the appointing authority. When the reprimand is signed by the supervisor, the following should be given a copy and be listed as a "cc" on the reprimand itself:

- The supervisor's supervisor
- Union
- Personnel file

The reprimand must have the employee's signature and date, and include the following statement: Employee's signature confirms that the supervisor has discussed and given a copy of the material to the employee and that a copy will be placed in the employee's official personnel record. The signature does not indicate agreement or disagreement.

How is a Written Reprimand Communicated to the Employee?

The written notice is given to the employee **personally** by supervisor or manager. The union steward does not have the right to be present.

When Should a Written Reprimand Be Given?

In general, a written reprimand is appropriate when the employee has failed to heed a previous expectation and/or verbal or written warnings and the employee's conduct or action is not serious enough to warrant an economic sanction. A reprimand should **not** be given for repetition of conduct for which an employee has previously received a formal disciplinary action (i.e. an earlier formal written reprimand, temporary salary reduction or demotion).

Temporary Salary Reduction

What is a Temporary Salary Reduction?

A temporary salary reduction is a decrease in pay for a specified period of time. As a matter of practice, temporary salary reductions are imposed in full-step increments for one or more months (for example, a one-step, one-month reduction; a two-step, one-month reduction; a two-step, two-month reduction).

Who Issues a Temporary Salary Reduction?

A temporary salary reduction must be written and issued by the appointing authority.

How is a Salary Reduction Communicated to the Employee?

The written notice is given to the employee ***personally*** by supervisor or manager. The union steward does not have the right to be present.

When Should a Temporary Salary Reduction Be Used?

A temporary salary reduction is an appropriate step to take after an employee has failed to heed a written reprimand. They are particularly appropriate for performance-related deficiencies in which you are attempting to improve the quality and/or quantity of work the employee performs. There are limited occasions when an employee's behavior is so egregious that a salary reduction is warranted in lieu of a written reprimand and a dismissal action is determined to be severe for the situation.

Suspension

What is a Suspension?

A suspension is a cease of work mandated for a specified period of time on a without pay basis.

Who Issues a Suspension?

A suspension must be written and issued by the appointing authority.

How is a Suspension Communicated to the Employee?

The written notice is given to the employee ***personally*** by supervisor or manager OR mailed to the employee via certified mail. The union steward does not have the right to be present.

When Should a Suspension Be Used?

A suspension is an appropriate step to take after an employee has failed to heed a lesser disciplinary action or the employee's behavior is so egregious that a lesser action is not appropriate. They are particularly appropriate for addressing behavioral and/or judgment deficiencies and/or when an economic sanction is warranted, but not possible due to the employee's current salary level. Generally suspensions are not considered for performance-related deficiencies in which you are attempting to improve the quality and/or quantity of work the employee performs.

Involuntary Demotion

What Is an Involuntary Demotion?

A demotion is the movement of an employee for disciplinary reasons from a position in one class to a position in another class having a lower salary range. When a represented employee is demoted, the salary will be determined based upon the applicable union contract. The employee's salary eligibility date is not affected.

Who Issues an Involuntary Demotion?

A demotion must be issued by the appointing authority.

How is the Notice of Involuntary Demotion Communicated to the Employee?

The written notice is given to the employee **personally** by supervisor or manager. The union steward does not have the right to be present.

When Should a Involuntary Demotion Be Used?

As a general rule, demotion is best used in situations where an employee's performance in the employee's present class of work is unsatisfactory and management has reason to believe the employee could function successfully in a lower class. A demotion would never be considered when performance concerns are behavioral in nature. Also, a demotion is never an appropriate sanction for an employee on initial trial service; nor is a demotion an appropriate sanction for an employee on a promotional trial service, because the employee can be returned to the class of work he/she held immediately before promotion, without resorting to the disciplinary process.

One important factor to consider in deciding whether to impose a demotion is how a lower-level position will be obtained for the employee. If there is a current vacancy in the lower-level class, the demoted employee may be assigned to the vacant position before it is posted.

In most cases, demotion should be used only after lesser disciplinary actions have failed with an employee who has a long service history with the Department, including service in the class (or class with equivalent salary range) to which the employee will be demoted.

Pre-Dismissal Meeting

When Should a Pre-Dismissal Meeting Take Place?

When dismissal is being considered, a pre-dismissal meeting must be scheduled. This process requires specific notices be sent/given to the employee and they are reviewed by DAS Labor Relations and DOJ prior to being issued. When circumstances warrant it, an employee may be placed on paid administrative leave (duty stationed at home) during the course of an investigation where dismissal is being considered. Should this occur a written notice is required and must be signed by OMD's appointing authority.

Who Issues a Pre-dismissal Meeting notice?

The appointing authority issues the pre-dismissal meeting notice.

How is the Pre-dismissal Meeting Communicated to the Employee?

The scheduling of the pre-dismissal meeting is communicated in *writing* to the employee and is sent to the employee via certified mail.

The notice advises the employee that the appointing authority is **considering** dismissing the employee and states the reason(s) why. The notice identifies the supporting facts and advises the employee of the right to meet with Human Resources and/or to prepare a written statement to refute the reason(s) for potential dismissal. The notice also advises the employee of their right to union representation at the pre-dismissal meeting. The notice includes a scheduled time and date for the meeting with Human Resources. The pre-dismissal notice does not include a summary statement or conclusion paragraph as the final information (mitigating circumstances) is not available until the conclusion of the pre-dismissal meeting.

Who Attends a Pre-Dismissal Meeting?

The employee, union representation, employee's supervisor and Human Resources. With very limited exceptions, attorneys are not allowed to attend pre-dismissal meetings.

What Happens after the Pre-Dismissal Meeting?

After meeting with the employee, Human Resources reviews all the information available and decides (in consultation with the supervisor or manager of the employee) whether to proceed with the dismissal.

If Human Resource decides to proceed, he/she writes the employee a notice of dismissal. The notice is signed by the appointing authority.

Dismissal Process

When Should Dismissal Take Place?

Dismissal takes place when all efforts to correct an employee's conduct or performance through progressive discipline have failed.

—OR—

When the employee engages in an act or acts of misconduct that are so egregious that the employee's continued presence in the workforce would constitute an intolerable liability (for example, theft of department monies or property, overt harassment, falsification of documents, etc).

Who Issues a Dismissal notice?

The appointing authority issues the dismissal notice.

How is the Dismissal notice Communicated to the Employee?

The written notice is sent by the Human Resources Office via certified mail. The notice includes essentially the same information that was in the pre-dismissal notice with the addition of a summary and/or conclusion paragraph.

What if the Decision is Made Not to Dismiss?

The Human Resource Director in consultation with the employee's supervisor and manager may issue a last chance agreement, a lesser form of discipline or a written notice that no disciplinary action will be taken.

This notification will be given to the employee personally.

Tips To Remember

- **Consult with Human Resources.**
- Keep molehills from becoming mountains. Address misconduct or deficiencies when first noted.
- Be fair.
- Get the facts. (Don't jump to conclusions as they might be wrong!)
- **DOCUMENT, DOCUMENT, DOCUMENT.**
- Be consistent.
- Know your timeframes. (How far do you look back and what history should be considered?)
- **NEVER** discuss disciplinary information with anyone other than the affected employee, Human Resource staff, DOJ legal counsel, and other management staff in the employee's chain of command.
- **NEVER** issue written statements regarding the action taken and why it was taken.