Effective Management through Progressive Discipline

NEW JERSEY IS AN AT WILL EMPLOYMENT STATE

- EMPLOYEES CAN BE DISCIPLINED/TERMINATED FOR ANY REASON OR NO REASON UNLESS THE REASON IS DISCRIMINATORY OR RETALIATORY OR

- THE EMPLOYEE IS PROTECTED BY:
  - COLLECTIVE BARGAINING AGREEMENT
  - CIVIL SERVICE RULES AND REGS OR
  - CONTRACT OTHER THAN CBA
HOW MANY?

- PEOPLE HERE TODAY ARE MANAGERS?
- PART OF A COLLECTIVE BARGAINING UNIT?
- IN A CIVIL SERVICE JURISDICTION?
- DO NOT HAVE COLLECTIVE BARGAINING AGREEMENTS GOVERNING RELATIONSHIP BETWEEN EMPLOYER AND EMPLOYEE?
- HAVE “CBA” REQUIRING PROGRESSIVE DISCIPLINE?

PROGRESSIVE DISCIPLINE

- Progressive discipline is a disciplinary model in which the severity of the discipline increases each time an employee commits an infraction. Generally, the progressive discipline scale starts with an oral reprimand, followed by a written warning, suspension, and, finally, termination. Progressive discipline procedures are most often found in collective bargaining agreements and in the public employment arena, but they are becoming increasingly common in the private sector.

- There are two major issues with having a progressive discipline procedure in an at-will relationship. First, it can be time-consuming to administer the steps and generate the supporting paperwork.
PROGRESSIVE DISCIPLINE FRAMEWORK

- CIVIL SERVICE NJAC
- 4A:2-2.1 Employees covered
- (a) This subchapter applies only to permanent employees in the career service or a person serving a working test period.

CIVIL SERVICE DISCIPLINE

- 4A:2-2.2 Types of discipline
- (a) Major discipline shall include:
  1. Removal;
  2. Disciplinary demotion;
  3. Suspension or fine for more than five working days at any one time;
- (b) See N.J.A.C. 4A:2-2.9 for minor disciplinary matters that are subject to a hearing, and N.J.A.C. 4A:2-3 for all other minor disciplinary matters.
- (c) The length of a suspension in a Final Notice of Disciplinary Action, a Board decision or a settlement, when expressed in "days," shall mean working days, unless otherwise stated.
CIVIL SERVICE DISCIPLINE

• 4A:2-2.3 General causes
  • (a) An employee may be subject to discipline for:
  • 1. Incompetency, inefficiency or failure to perform duties;
  • 2. Insubordination;
  • 3. Inability to perform duties;
  • 4. Chronic or excessive absenteeism or lateness;
  • 5. Conviction of a crime;
  • 6. Conduct unbecoming a public employee;
  • 7. Neglect of duty;
  • 8. Misuse of public property, including motor vehicles;
  • 9. Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment;
  • 10. Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder;
  • 11. Violation of New Jersey residency requirements as set forth in P.L. 2011, c. 70; and
  • 12. Other sufficient cause.

CONTRACTUAL DISCIPLINE

• TYPICAL LANGUAGE FROM CBA
  • An employee may be dismissed, suspended or demoted from service of the Township for just cause by the Township Administrator. The Township agrees to recognize

  and follow the concept of progressive discipline, where appropriate.
EMPLOYEE REMEDIES

• CIVIL SERVICE

• 4A:2-2.5 Opportunity for hearing before the appointing authority

• (a) An employee must be served with a Preliminary Notice of Disciplinary Action setting forth the charges and statement of facts supporting the charges (specifications), and afforded the opportunity for a hearing prior to imposition of major discipline, except:

• 1. An employee may be suspended immediately and prior to a hearing where it is determined that the employee is unfit for duty or is a hazard to any person if permitted to remain on the job, or that an immediate suspension is necessary to maintain safety, health, order or effective direction of public services.

• An employee may be suspended immediately when the employee is formally charged with a crime of the first, second or third degree, or a crime of the fourth degree on the job or directly related to the job. See N.J.A.C. 4A:2-2.7

CIVIL SERVICE REMEDIES CONT’D

• 4A:2-2.8 Appeals to Civil Service Commission

• (a) An appeal from a Final Notice of Disciplinary Action must be filed within 20 days of receipt of the Notice by the employee. Receipt of the Notice on a different date by the employee’s attorney or union representative shall not affect this appeal period.

• (b) If the appointing authority fails to provide the employee with a Final Notice of Disciplinary Action, an appeal may be made directly to the Commission within a reasonable time.
CIVIL SERVICE REMEDIES CONT’D

• Major discipline hearings will be heard by the Commission or referred to the Office of Administrative Law for hearing before an administrative law judge, except that an appeal by certain law enforcement officers or firefighters of a removal shall be heard as provided in N.J.A.C. 4A:2-2.13. Minor discipline matters will be heard by the Commission or referred to the Office of Administrative Law for a hearing.

CONTRACTUAL REMEDIES

• The purpose of this procedure is to secure an equitable solution to the problems which may arise affecting the terms and conditions of employment under this Agreement.
• Nothing herein shall be construed as limiting the right of any employee having a grievance to discuss the matter informally with any appropriate member of their Department. Nothing stated in the informal discussions shall be referred to during the formal institution of the grievance procedure.
• In the presentation of a grievance, the grievant shall have the right to present his/her own appeal or to designate an Association representative to appear with him/her. There shall be no loss of pay for the time spent presenting the grievance by the grievant or his/her representative through the grievance procedure.
CONTRACTUAL REMEDIES CONT’D

• The term "grievance" as used herein means an appeal by an employee or the Association on behalf of an individual employee or group of employees, from the interpretation, application or violation of policies, agreements, and administrative decisions affecting them. Discipline, including dismissal, suspension or demotion, shall be deemed grievable.

CONTRACTUAL REMEDIES CONT’D

• A grievance concerning discipline shall be initiated at the grievance step involving the management representative taking the initial disciplinary action.
CONTRACTUAL REMEDIES CONT’D

• **Step One:** The employee or the Association shall institute action under the provisions hereof within ten (10) working days after the event giving rise to the grievance has occurred, and an earnest effort shall be made to settle the differences between the aggrieved employee and the immediate supervisor for the purpose of resolving the matter informally. Failure to act within said ten (10) working days shall be deemed to constitute an abandonment of the grievance.

• **Step Two:** If no agreement can be reached orally within five (5) working days of the initial discussion with the immediate supervisor, the aggrieved or the Association may present the grievance in writing within ten (10) working days after expiration of the five (5) working days to the Department Head. The written grievance at this Step shall contain the relevant facts, the applicable section of the Agreement allegedly violated, and the remedy requested by the grievant. The Department Head will answer the grievance in writing within ten (10) working days of receipt of the written grievance.

• **Step Three:** If the Association wishes to appeal the decision of the Department Head, such appeal shall be presented in writing to the Township Administrator within fifteen (15) working days thereafter. This presentation shall attempt to include copies of all previous correspondence relating to the matter in dispute. The Township Administrator shall respond, in writing, to the grievance within fifteen (15) working days of the submission.

• **Step Four:** If the grievance is not settled through Steps One, Two and Three, either party shall have the right to submit the dispute to arbitration pursuant to the rules and regulations of the Public Employment Relations Commission within thirty (30) working days after receipt of the Township Administrator’s response. The costs for the services of the arbitrator shall be borne equally by the Township and the Association. Any other expenses, including, but not limited to, the presentation of witnesses, shall be paid by the parties incurring same.
CONTRACTUAL REMEDIES CONT’D

- The arbitrator shall not have the authority to add to, modify, detract from or alter in any way the provisions of this Agreement or any amendment or supplement thereto. The decision of the arbitrator shall be final and binding. Unless mutually agreed to by the Township and the Association, the arbitrator does not have the right to resolve any obligation involving a violation of law.

ARBITRATION

- LIKE A TRIAL
- PRESENT WITNESSES AND EVIDENCE
- “LAWYERS INVOLVED”
- LOSS OF TIME
- LOSS OF PRODUCTIVITY
- ANIMOSITY
- WINNER AND LOSER
**ARBITRATOR DECISION**

- CAN BE BINDING AND NOT APPEALABLE
- CAN BE APPEALED (DEPENDS ON CONTRACT/CIVIL SERVICE)
- Where a collective bargaining agreement does not define “just cause” for discipline, an arbitrator has broad authority to reject an employer’s sanction of discharge and impose a lesser penalty once such cause is determined, New Jersey’s high court has ruled. *Linden Board of Education v. Linden Education Association*, No. A-17 (June 8, 2010). Thus, endorsing a view long held by arbitrators, and even parties to their proceedings, the Court rejected an intermediate court’s decision that once just cause is found, the arbitrator must accept the employer’s resulting discipline.

**LINDEN BOARD OF ED CASE**

- FACTS: EMPLOYEE TERMINATED
- On May 5, 2005, John Mizichko, a custodian for the Linden Board of Education, was working the night shift at Linden High School during a dance recital. The students were required to change outfits in several classrooms. Mizichko was informed that certain classrooms would be used as changing rooms and was instructed to knock loudly and announce who he was before entering.
- Without knocking, Mizichko entered a room where female students were changing. He proceeded to clean the glass panes on the door, despite the students’ pleas for him to leave. A teacher informed Mizichko that his presence in the classroom was improper and instructed him to leave. He eventually left the room.
CONTRACT DID NOT DEFINE JUST CAUSE

• The issue before the arbitrator was: “Did the Board of Education have just cause to terminate the employment of John Mizichko? And, if not, what shall be the remedy?”
• In his award, the arbitrator determined that, despite finding that Mizichko was motivated by a desire to do his job, he knew about the rule against entering the classroom and the possible consequences of its violation. Thus, there was just cause to impose discipline, the arbitrator determined.
• The arbitrator, however, noted that the incident was Mizichko’s first offense and posited that under the circumstances termination would be disproportionate to the gravity of the conduct. In analyzing the issue of just cause, the arbitrator concluded that progressive and corrective discipline is an integral part of the just cause concept and here a 10-day unpaid suspension as opposed to termination was required.

NEW JERSEY SUPREME COURT

• AGREED WITH ARBITRATOR BECAUSE THERE WAS NO DEFINITION OF JUST CAUSE IN THE CONTRACT
• DECISION 5 YEARS LATER
• EMPLOYEE WOULD BE REINSTATED WITH BACK PAY
• WHY END UP THERE?
SPECIFIC ISSUES

• TARDINESS
• ACTUAL EXCUSES PROVIDED BY EMPLOYEES FOR BEING LATE
• These were among the more-unusual excuses people have given for being late to work, according to a CareerBuilder survey released Jan. 28. The excuses, collected from Nov. 4-Dec.1, 2015, are from 2,595 hiring and HR managers and 3,252 full-time workers in the U.S.
• Traffic, oversleping, bad weather, lack of sleep, and getting children to day care or school were the typical reasons given for late arrivals, but others were more creative:

SPECIFIC ISSUES CONT’D

• TARDINESS
• My hair caught on fire from my blow-dryer.
• All of my clothes were stolen.
• There was a store grand opening and I wanted to get the opening-day sales.
• A Vaselinetruck overturned on the highway and cars were slipping left and right.
• I thought of quitting today but decided not to, so I came in late.
• I was confused by the time change and unsure if it was “spring forward” or “fall back.”
• A black bear entered my carport and decided to take a nap on the hood of my car.
• I had to chase my cows back into the field.
• I was detained by Homeland Security.
• I had to finish watching “My Name Is Earl.”
• There was fresh powder on the hill. I had to go skiing.
• My lizard had to have emergency surgery and died during surgery. I had to mourn while deciding whether to bring the lizard corpse to work or have the vet dispose of the lizard.
ANGER

• Anger
 Sometimes an employee may become angry when confronted with counseling on performance deficiencies. Your reaction can help de-escalate that emotion. Don’t get drawn into the moment; watch the pace, pitch, and volume of your own voice (PPV). The PPV of an angry person’s voice usually increases; they speak faster, at a higher pitch, and louder. Sometimes it can help to de-escalate this emotional reaction by doing just the opposite. Reduce the PPV of your own voice. Respond in a slow, low, and quiet tone of voice, such that the person may have to actually pause in his own frenetic pace of speech to listen to you. In that moment, you may recapture the person’s attention and invite the person to take a break from the conversation and begin again in a few minutes or perhaps even in a few hours or the next day. At this point, the emotion may override any productivity that could be derived from the meeting. How effective can you be when the person is focused on his own anger? Give the person time to return to a calm state before reengaging him in the conversation. On another note, keep yourself safe.

Passive-Aggressive

• This pattern of behavior may be less gently referred to as being two-faced. This behavior is demonstrated by the employee who is very reticent, polite, and apologetic in your presence, indicating he is sorry and will do better moving forward. After the employee leaves your office, however, you begin to hear from coworkers that he is complaining about you and the company, unfair treatment, and generally bad-mouthing the organization.
THE TOXIC WORKER

• HOW DO YOU RESPOND?
• Set the company standard early, and in writing, about what constitutes unacceptable behavior. Management MUST identify toxic behavior clearly.
• Have a manager or HR representative meet personally with the employee to describe the bad behavior, with specific examples, and to explain how it’s affecting fellow workers

THE TOXIC WORKER

• Set up a specific plan for changing the offending employee’s behavior, spelling out disciplinary action if the behavior doesn’t improve.
• Be aware of the possibility of any personal crises in the employee’s life. A divorce, death or seriously ill child could turn a usually collaborative worker into a temporarily toxic one.
THE TOXIC WORKER

- Document problematic behavior that you believe is “toxic.” Should you fire a toxic employee and he or she sues, such documentation is likely to help the MUNICIPALITY defend itself.

ACCOMMODATIONS

- EMPLOYEES WITH DISABILITIES ARE ENTITLED TO REASONABLE ACCOMMODATIONS IN ORDER TO PERMIT THEM TO PERFORM THEIR ESSENTIAL JOB FUNCTIONS
- WORKERS COMP ISSUES
- FMLA ISSUES
- INABILITY TO PERFORM ESSENTIAL FUNCTIONS
PRACTICAL CONSIDERATIONS

• DISCIPLINE FITTING THE OFFENSE
• CONSISTENCY
• AVOID PAST PRACTICE ARGUMENTS
• DOCUMENTATION IS IMPORTANT
• CREATE LEVERAGE
• WORK WITH THE ADMINISTRATOR
• FIND OUT WHY

GRIEVANCE/ARBITRATION QUESTIONS

• Did the employer give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?
• Did the employer’s rule or order reasonably relate to the orderly, efficient, and safe operation of the business?
• Did the employer, before administering discipline to an employee, try to discover whether the employee did in fact violate or disobey a rule or order of management?
GRIEVANCE/ARBITRATION QUESTIONS

• Was the employer’s investigation conducted fairly and objectively? Note: During the investigation, the management official may be both “prosecutor” and “judge” but he/she may not also be a witness against the employee.
• During the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?

GRIEVANCE/ARBITRATION QUESTIONS

• Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
• Was the degree of discipline administered by the employer in a particular case reasonably related to a) the seriousness of the employee’s proven offense and b) the record of the employee in his service with the employer?
FINAL NOTES

• Progressive discipline is critical in any discussion of just cause. In brief, discipline should be appropriate to the offense and the offender. For minor offenses, discipline should be applied progressively from the minimum of oral warnings through the entire continuum of disciplinary measures, until the maximum penalty of discharge is imposed. More serious disciplinary offenses might warrant a response farther along on the continuum, and some may be so egregious as to warrant an immediate imposition of the maximum penalty. Each case must be judged on its own merits and must consider the employee’s record.

QUESTIONS?