



# Today's Agenda

- Why discipline is different in the public sector
- Strategies to address poor performance and/or misconduct and when to initiate the disciplinary process
- How to implement the disciplinary process in the public sector
- Practical and legal issues to consider when implementing discipline

# 14th Amendment to the United States Constitution

“No state...shall...deprive any person of life, liberty, or property, without due process of law.”



# What Is Due Process?

- Notice
- Opportunity to Be Heard
- Fair Process



# Question:

When does a public employee acquire a “property interest” in his/her employment?



# Performance Management and Discipline: An Overview

- Performance Evaluation
  - Manager/supervisor interaction
    - Should be constant and honest – don't sugarcoat
  - Annual performance appraisal
    - Conduct annual performance evaluations for all employees
- Discipline (Two Broad Categories)
  - Misconduct
  - Performance Based (e.g., pattern of continued performance problems)

# Performance Management and Discipline: An Overview

- Discipline Process
  - Investigation
    - Can be formal or informal (depends on circumstances)
    - Needed to establish “just” or “good” cause
- Significant vs. Low Level Discipline
  - Low level discipline usually means:
    - Written Reprimand
    - Suspensions of 5 days or less

# Performance Management and Discipline: An Overview

- Discipline Process
  - Significant Discipline
    - Notice of Intent to Discipline
    - Pre-Discipline (*Skelly*) meeting
    - Final Notice of Discipline
    - Post-Discipline Evidentiary Hearing
    - Judicial Review of Administrative Decision



# Two Types of Discipline

- Performance-based discipline
- Misconduct-based discipline

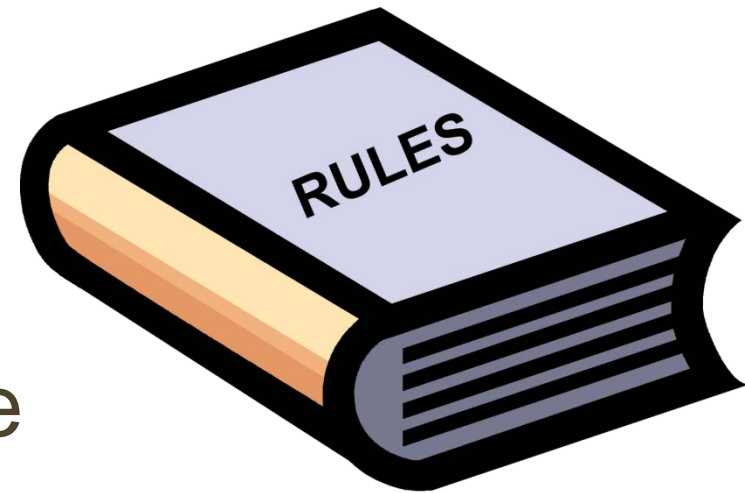
# Assessing Performance-Based Discipline

- A last resort
- Start by managing performance through evaluation or performance improvement plan.
- When performance cannot be corrected or improved, discipline may be appropriate.
- Performance deficiencies and corrective measures (i.e., help offered) must be documented.

# Before Taking Disciplinary Action . . .

# Sources of Disciplinary Grounds

- Agency Codes (e.g., Municipal or County Code)
- Personnel rules/policies
- Department policies/procedures
- MOUs
- Written orders/directives
- Job descriptions
- Evaluations/Prior discipline



# More Sources of Disciplinary Grounds

- Harassment/discrimination policy
- Workplace violence policy
- Drug and alcohol policy
- Email/Computer/Internet/Cell phone usage policies

# Issues to Consider Before Initiating Disciplinary Action

- Is there authority (e.g., a rule) that supports the imposition of discipline?
- Was the relevant workplace rule clear?
- Is there a preponderance of evidence to establish the employee's conduct violated the rule(s)?

# Issues to Consider Before Disciplining Employees

- Does the workplace rule comply with the law, other rules, or a MOU?
- Were employees put on notice of the rule or any change in its enforcement?

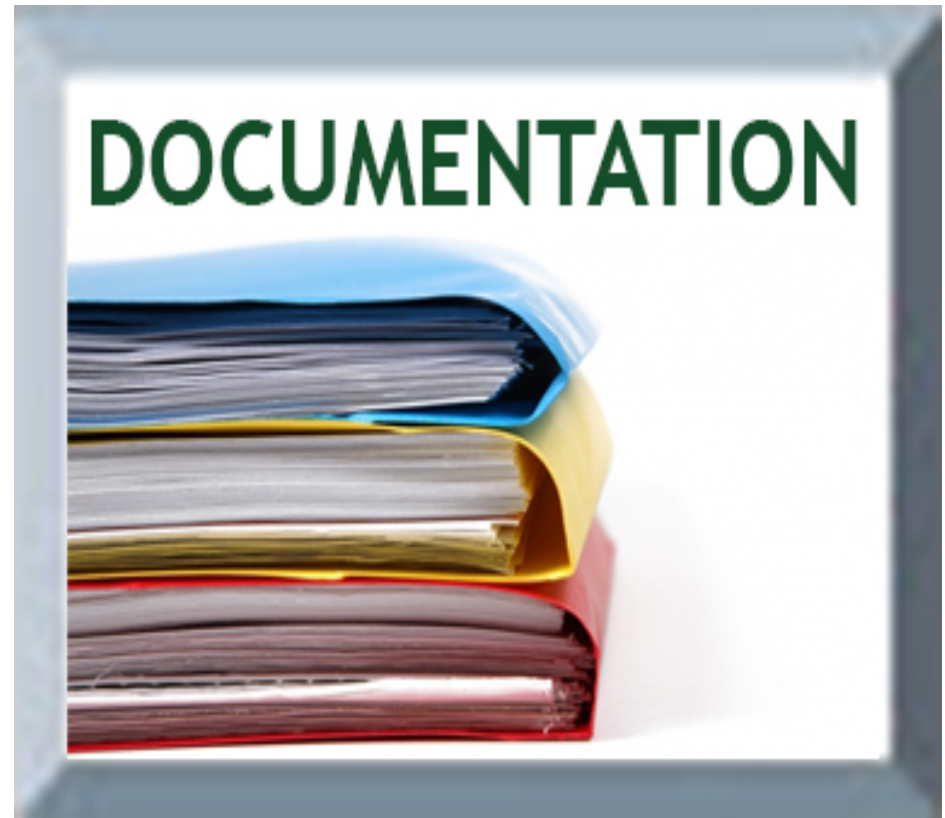
# Issues to Consider Before Disciplining Employees

- Was the workplace rule applied uniformly to all employees, i.e., can the employee argue disparate treatment?
- Should extenuating circumstances be considered or disregarded?
- Was the penalty too harsh under the circumstances?



# Why Is Documentation Key?

Because a public employer has the burden of proof at a discipline appeal hearing, and evidence is needed to meet that burden



# Documentation to Support Discipline

- Performance evaluations
- Prior disciplinary notices
- Directives
- Memoranda
- Emails



# Legal Considerations

- First Amendment Rights
- Whistleblower Rights
- Union Rights
- Discrimination/Harassment Laws

# The *Skelly* Process

# True, False or Maybe?

Employees with “property rights” are entitled to present evidence and cross examine witnesses before imposition of discipline.

# Pre-Disciplinary “*Skelly*” Rights

- Applies only to “significant” punitive action.
- Purpose of pre-discipline “due process” is to provide a “pause” before discipline is implemented.

# Pre-Disciplinary “Skelly” Rights

- Minimum “due process” protections are:
  - Notice of the proposed disciplinary action;
  - Statement of reasons for proposed disciplinary action;
  - Charges and materials on which the proposed discipline is based; and
  - Right to respond orally or in writing.

# The Notice of Intent



# Drafting the Notice of Intent

- What should be included in the NOI?
  - Description of purpose of NOI
  - Citation to Rules
  - Factual Bases for Recommendation
    - Use details and specifics!
  - Caveat language
    - “the violation of any one of the rules, regulations, or policies, or commission of any act or omission described herein, would in and of itself support the imposition of the proposed discipline”

# Drafting the Notice of Intent

- What should be included in the NOI (Con't)?
  - Explanation of level of discipline
  - Warning re future conduct
  - Warning re no retaliation
  - Materials relied upon
  - Details re next step, i.e., Skelly Meeting
  - Right to representative

# The *Skelly* Conference

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- Employee tells his/her side of the story
- *Skelly* Officer listens and considers aggravating or mitigating factors
- *Skelly* Officer should get clarification regarding any confusing statements
- Do not permit interrogation of the *Skelly* Officer

# The Final Notice of Discipline

# Final Notice of Discipline

- Should look similar to NOI
- Summarize the *Skelly* conference and explain analysis, e.g., explain why mitigating factors swayed the final decision or not
- Once again, specify what penalty is being imposed and state effective date of imposition

# Final Notice of Discipline

- Once again, identify all rules violated and facts upon which the discipline is based
- Provide all documents relied upon (unless already provided with NOI)

# Alternatives to Discipline

- Settlement Agreement (sometimes called “Last Chance Agreement” where termination was the proposed discipline)
- Resignation in lieu of discipline



# The Post-Discipline Evidentiary Hearing

# Hearing Process

- Opening statements
- Presentation of Evidence by Agency (Direct, Cross, Redirect Examinations)
- Presentation of Evidence by Employee (Direct, Cross, Redirect Examinations)
- Rebuttal by Agency (if appropriate)
- Closing arguments

**APPEAL**

# Any Questions?