



Employee Relations, Classification & Compensation
Office of Human Resources
Oregon State University

Employee and Labor Relations



November 2009

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EMPLOYEE AND LABOR RELATIONS

Labor Relations – An Overview

At the heart of labor relations is the desire of both management and labor to create an efficient and effective organization. When this happens, management is planning, organizing and directing work such that employees understand their roles and responsibilities in a way that they can produce the desired outcomes. There is a healthy work environment and strong working relationships amongst everyone. The employees have an opportunity to contribute and each feels valued as part of the collective effort of the unit. A mutual respect exists between management and employees. Life is good and everyone is happy.

Achieving and sustaining this ideal state does not always occur; and some might argue, never fully happens. Employees do not always meet expectations, conflict and other factors challenge group dynamics, laws and other compliance issues exist, and sometimes managers and supervisors do not lead or address a given situation well. The domain of labor relations exists in a dynamic environment.

While the preference of managers and supervisors is to lead emphasizing the upside, they also need to understand their responsibilities and be able to address the downside. The module on labor relations will focus on what managers and supervisors need to know and do, particularly when there are performance issues.

The Role of the Supervisor

Understanding labor relations begins with being able to answer the following question: What is your role as a supervisor in a union environment?

Learning Objectives

- To understand the role of a supervisor in a union environment.
- To write and maintain proper documentation of employee performance.
- To write appropriate counseling memos and letters of reprimand.
- To understand progressive discipline and properly apply laws and bargaining agreements.
- To access the employee and labor relations resources of OSU.

The supervisor has multiple responsibilities. The role of the supervisor includes the following:

- Administer and effectively apply the Collective Bargaining Agreement.
- Know the rights provided for management.
- Consistently enforce standards of behavior.
- Know and follow the standards of “just cause.”
- Communicate objectively.
- Role model desirable behavior.
- Know and adhere to the legal rights of employees; e.g. EEO, ADA, OFLA/FMLA, Unlawful Harassment, *Weingarten* Rights.

What is a Collective Bargaining Agreement (CBA)?

A collective bargaining agreement represents the terms and conditions of employment for those employees represented by the bargaining unit. It defines both the rights of management and those of the represented employees.

There are currently two unions representing employees on campus. The *Service Employees International Union (SEIU)* represents employees at all seven public universities. The second union is the *OSU Coalition of Graduate Employees (CGE)*. The CGE bargaining unit includes all graduate students with Graduate Teaching Assistant (GTA) or Graduate Research Assistant (GRA) appointments employed by Oregon State University in a given academic term with a minimum 0.15 FTE appointment, provided that at least 0.10 FTE is devoted to service to OSU as an employee.

The *Employment Relations Board (ERB)* is the governing body that determines what constitutes an appropriate employee unit for union representation, and whether a position qualifies for exclusion from a bargaining unit. In determining which employees and positions should belong to a single bargaining unit, ERB considers “such factors as community of interests, wages, hours, and other working conditions of the employees involved, the history of collective bargaining, and the desires of employees.” Community of interest includes: job classifications and functions, work location, supervisory structure, and interchange of employees, i.e., transferability among classifications.

There are three types of employee exclusions to any bargaining unit: confidential, supervisory, and managerial. An unclassified position in the Oregon University System (OUS) would not be appropriately placed in a bargaining unit if (1) it was confidential, supervisory, or managerial; or (2) it did not share a community of interest with the bargaining unit.

The OUS is responsible for bargaining with the SEIU in conjunction with management representatives at each of the seven institutions. Within the Office of Human Resources (OHR) is the Employee Relations, Classification & Compensation (ERCC) unit. The ERCC unit is responsible for negotiating the contracts, providing contract interpretation, and assisting with the application of the CBAs.

To effectively administer the CBA, it is incumbent upon management to read and know what is in the agreement. The OUS website: <http://www.ous.edu/dept/finadmin/labor.php> posts current contracts. If you supervise employees in either of the two unions, it is necessary to familiarize yourself with the respective contract. Please contact the ERCC if you have questions about contract application or interpretation.

Management Rights

The rights reserved for management are often short, concise and yet very powerful. They give management the authority to conduct business and direct the actions of the employees to accomplish the business objectives.

To illustrate, SEIU contract Article 9 reads as follows:

“Except as may be specifically modified by a specific term of this Agreement, the Employer shall retain all rights related to management in the direction of its operations, resources, facilities and services including the direction of the work force. Rights of the Employer shall include, but not be limited to, the right to:

- a) Manage and direct employees;
- b) Hire, promote, transfer, assign and retain employees;
- c) Suspend, discharge or take other proper disciplinary action against employees;
- d) Reassign employees;
- e) Relieve employees from duty because of lack of work or other reasons;
- f) Schedule work;
- g) Determine methods, means and personnel by which operations are to be conducted, and
- h) Determine the need for a reduction or increase in the workforce.”

When issues arise in the workplace or between a supervisor and employee, a typical statement or argument that is regularly heard is, “Show me in the contract where you (management) have the right to do ‘X’.” However, a more appropriate question is, “Where in the contract does it state that ‘management’ cannot do ‘X’?”

To effectively manage, a supervisor not only needs to understand the rights reserved for management, but also needs to understand employee rights. Reading and familiarizing yourself with the contract(s) is the starting point.



Enforce Standards, Laws, and Model Behavior

While management retains the authority to direct work, it also carries significant responsibility to know the rights of employees and to create an environment in which the unit can be successful. One aspect of this is to establish expectations and standards that will enable each employee individually, and the unit collectively, to accomplish its business needs. A separate module is devoted to expectations and standards. It is the responsibility of management to establish and ensure these standards are met. Secondly, management has a responsibility to understand applicable federal and state laws. Thirdly, management must understand the organization's policies and procedures.

Doing so, requires an objectivity and modeling of behavior that the manager wants exemplified in the workplace. Managers should take care to conduct themselves at or above the standard to which they expect employees to perform. Failure to do so will harm their integrity and call their credibility in to question.

Documentation

Occasionally, an employee's inappropriate conduct or unsatisfactory performance will require the manager to address these issues in an objective manner. In some instances, an employee is unable or unwilling to correct his/her behavior or performance. In these instances formal disciplinary action may be necessary. If we are going to impose discipline, it is critical that we have documentation to substantiate that an employee was advised that her/his behavior or performance is not acceptable and what improvement is needed.

The following questions will clearly be answered by good documentation:

- What are the performance or behavioral expectations of the position?
- What and when policies, procedures, or guidelines have been communicated?
- How are expectations, procedures, etc. being met or falling short?
- When were successes/complaints shared and how were expectations communicated?
- What is/was the impact on the work/employee/work unit?
- How did you address the situation?
- What are your follow-up observations?
- Are the notes I'm keeping objective and factual or based on my opinion?

Documentation can take many forms, such as:

- Provide examples of the employee's performance (e.g., accomplishments, letter with many typos, an inflammatory e-mail, or a piece of damaged equipment);
- A letter from a customer;
- Written statements from witnesses;
- Anecdotal notes of your observations, conversations with co-workers and customers, or interaction with the employee;
- Notes representing the employee's perspective;
- Summary notes of meetings with the employee.

NOTE: If it is important to have the conversation, it is equally important to document the conversation.

Your documentation must indicate a conversation with the employee outlining your expectations.

Supervisory Files

Article 16, Section 2 of the SEIU contract between OUS and the SEIU provides:

- (a) Supervisors may keep records and/or anecdotal notes on subordinate employees. Employees will be notified if a supervisory file is being kept. Supervisory files will be maintained under conditions that ensure the integrity and safe keeping of the files.
- (b) The employee may inspect the supervisory file upon reasonable notice to the supervisor. Upon employee request, a copy of the records and anecdotal notes within the file will be provided.
- (c) At the employee's request, rebuttal documents will be placed in the supervisory file.
- (d) If the employee severs his/her employment with the university, the supervisory file will be expunged. If the employee promotes, transfers or demotes within the university, the supervisory file will be retained in the former department for a period of up to one (1) year from the effective date of such action, at which time the file will be expunged.

Documentation in the supervisor's file needs to be shared with the employee on a regular basis. It is incumbent upon the supervisor to address issues in a timely manner. Employees cannot be expected to improve performance if they have not been put on notice that their performance is not meeting expectations. Employees will interpret management's absence of response to their conduct and unsatisfactory performance as accepting the conduct as permissible and performance as satisfactory.

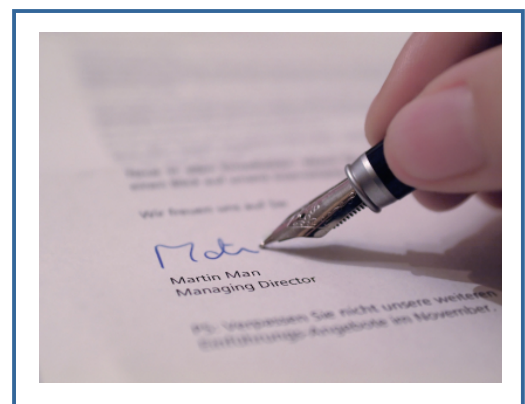
Standards are what you allow. If you are giving employees permission to not follow rules or perform to standard by not calling attention to conduct or performance that does not meet your expectations, the employees will believe that they are meeting your standards. The behavior or substandard performance will continue.

Material in the supervisory file will indicate that you have addressed performance and conduct issues with the employee. For instance, you may have received an e-mail from a customer which states that the employee did not provide appropriate service. As documentation of addressing the issue, you would note your conversation with the employee regarding this situation and what needs to be done differently in the future.

Formal Letters of Deficiency

At some point, an employee's performance or behavior may warrant a formal letter to address deficiencies. This could be a letter of counsel which puts the employee on notice that his/her performance or behavior is unacceptable or a letter of reprimand which is the first step in the formal discipline process.

Although the letter of reprimand is considered the stronger response, both types of letters have common elements.



The Audience

Pause and answer the following question: When you write a notice of deficiency, who are the various audiences to whom you are writing?

Notices of deficiency are written to communicate to a variety of audiences. These include:

- The employee. You will want to document that the employee has been clearly advised that his/her performance is not acceptable and what your expectations for successful performance entails.
- The employee's representative union. We want to ensure that the union understands management's perspective on the situation.
- Other levels of management or a future supervisor who may review the material.
- Third party reviewers such as an arbitrator. Arbitrators will not know the facts or the context on which to judge them other than what is communicated in the documentation being reviewed.

NOTE: Always talk to the employee prior to issuing a letter of caution or written reprimand. Talking to them helps put the letter in context.

The Contents of the Letter

Background:

This section contains information that puts the facts into context and sets the stage to help the reader understand how the employee knew or should have known the rule or standard that was not adhered to. This section might include: information regarding the employee's duties; length of service; prior training; licenses or certifications; relevant policies, procedures or guidelines; prior instances of the same or similar conduct; prior warnings or disciplinary action; and other descriptive information which helps the reader understand the context of the situation.

The background also brings forward those necessary elements required to demonstrate "just cause."

The background section usually will be the first paragraph of a letter, but may follow the supporting facts section.

Examples of paragraphs in the background section include:

1. You have been employed (*length of service currently in the position*) as a (*position or title*) since (*date*). As a (*position or title*) your duties include: (*duties relevant to the facts for which the employee is being counseled or disciplined.*)

[Inclusion of this provides information about the employee's property rights.]

2. On (*date*), you received a copy of the relevant department policy (*attach copies vs. quoting in text*). Relevant unwritten policies of conduct were reviewed (*date*).

[This establishes "just cause" standards.]

3. On or about (date) you were advised by your supervisor to (or not to) do (*whatever*).

[This reviews previous expectations.]

4. As a licensed (*occupation*) you are aware of the standards for conducting (*whatever*).

[Provide the Information which would have reasonably advised the employee of the conduct to be expected.]

5. In a counseling memo issued (*date*) you were advised that it is inappropriate to (or not to) do (*whatever*).

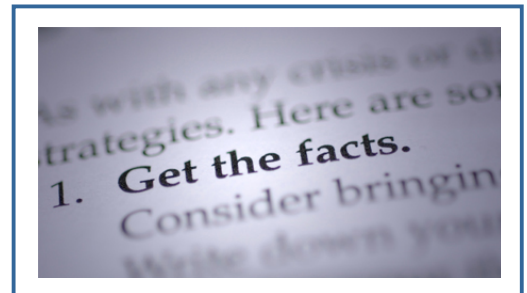
[Identify any previous verbal or written notification.]

Supporting Facts:

This section states the reasons for which the employee is being counseled or disciplined. The facts should be stated clearly and succinctly. This section might include: date, time and location of incident or omission; exactly what the employee did or did not do to warrant discipline; how you became aware of these facts; and the impact of the employee's action or omission.

Examples of paragraphs in the supporting facts section include:

1. At (*time*) on (*date*) I observed you (*doing whatever*).
2. On (*date*) you failed to complete (*specific assignment*) as instructed. Give specifics so employee can identify exactly what occurred (*name of customer/said*).
3. In a telephone conversation, you called her a (*specific language used*). When I talked with you about your conversation, you agreed you lost your temper and said (*specific language*).
4. On (*date*) at approximately (*time*), a (*name of equipment*) was taken from the shop. (*Name of witness*) states that she observed you loading the (*equipment*) in your car.



Summary or Conclusion:

This section pulls together the background and supporting facts, in addition to other information such as mitigating circumstances or the employee's rebuttal of the facts, to articulate why the employee was fault worthy and counseling or discipline is appropriate. This section might include: Information obtained from collateral sources; a brief response to the employee's rebuttal; reasoning as to why you conclude the employee is fault worthy; and mitigating or aggravating circumstances.

NOTE: When responding to an employee's rebuttal of the facts, you do not need to go through a point-by-point explanation. It may be sufficient to just state that you do not find the employee's statement to be mitigating or you find a witness to be credible. You do not need to "argue" the validity of the facts.

Examples of paragraphs in the Summary/Conclusion section are:

1. After considering all information presented, I find that you did (*whatever*) in violation of department policy.
2. I find the statements of (*witnesses*) credible and conclude that you knew doing (*whatever*) was inappropriate.
3. I have considered your statement that (*whatever*), but do not find these facts to mitigate the inappropriateness of your actions.

Action Taken:

This section describes why the conduct warrants discipline and informs the employee that you are imposing discipline or issuing a warning. It will also include the consequences of continued unsatisfactory performance or conduct. This section is sometimes combined with the "Conclusion" section.

We usually use boilerplate language in this section:

"Your (*inappropriate conduct or performance*) is unacceptable and will not be tolerated. I am issuing this letter of reprimand to impress upon you the seriousness of your conduct/performance. Failure to exhibit immediate, significant and sustained improvement may result in discipline up to and including dismissal."

Employee's Signature:

This section confirms that the issues have been discussed with the employee and he/she has received a copy of the notice.

Boilerplate language is also used in this section:

Employee's signature *confirms only* that the supervisor has discussed and given a copy of the material to the employee. His/her signature does not indicate agreement or disagreement with its content.

- Letters of counseling should also be copied (cc'd) to "supervisory file."
- Letters of reprimand should be copied to the employee's official "personnel file" maintained in the Office of Human Resources.

Exercise: Notes from a Supervisor's File

Instructions

The following represent 24 different notes from a supervisor's file regarding an employee by the name of Tom over a 4 ½ month period. The majority of these notes are not written well. First, scan all of the notes to get a picture of the performance issues.

Secondly, recognize that a supervisor's role includes well documented notes in the event of poor performance to build a strong case for appropriate disciplinary action. Poorly written or incomplete notes may readily slow the progressive discipline process because you'll be asked to take the steps you missed or did poorly. In this first exercise, determine which notes are written well or poorly. For those you determine to be poorly written, how would you write them differently? It may be useful to scan all of the notes to get a picture of the performance issues.

Thirdly, if you had to rewrite these notes, what would you do differently? Comments about the first 10 notes are highlighted. A good set of notes will cover the factual information and include:

- The date of the note,
- What happened,
- Who was involved,
- When did the incident occur,
- What transpired in the meeting discussing the incident, and
- What should happen going forward.

Exercise

1. Counseled Tom extensively on 1/15/2009 concerning his attendance and rude behavior. Provided my expectations of attendance and my expectation that Tom be respectful, positive and encouraging to others in the workplace.

Gave Tom a list of his leave usage and reminded him that any sick leave without pay would be unauthorized subject to discussion.

2. 2/5/2009 - Prof. Smith complained about Tom's poor attitude.
3. 2/17/2009 - Prof. Jones told me that Tom was rude to him.



1. Improve memo by documenting:

- The time frame and type of attendance issues.
- What constitutes "rude" behavior, to whom and when have these incidents occurred?
- The specific expectations of attendance and behavior should be included. If these are on another handout, a reference of this handout should be noted.



2 & 3. Improve memo by documenting:

- Who Prof. Smith and Prof. Jones are relative to Tom and his work.
- What lists of behaviors constitutes "poor" attitude and rudeness?
- Whether or not the supervisor addressed these complaints with Tom and how.

2/19/2009 - Prof. Jones said that he gave Tom a project about two weeks ago and Tom has not even started it.

5. 2/28/2009 - Dolly in Payroll called to say that Tom was rude to her.

6. 3/2/2009 - Tom called in sick (headache)

3/3/2009 - Tom still out sick ("just not feeling well")

I reminded Tom he could not use vacation, comp time or any other form of leave to cover his sick leave and that he was dangerously close to depleting his sick leave balance. I asked Tom to review the use of sick leave expectation he was given on 1/15/2009.

7. 3/9/2009 - Complimented Tom on the good work he did on the equipment inventory. Also told Tom to try and work on Prof. Jones' project.

8. 3/11/2009 - Tom took truck into town to purchase widget. Was gone 3 hours. Plenty of widgets in supply cabinet.



4. Improve memo by documenting:

- In what context can Prof. Jones request work of Tom without going through you as the supervisor.
- The actual request and deadlines.
- How this issue was addressed with Tom.



5. Improve memo by documenting:

- Who Dolly is relative to Tom and his work.
- What behaviors constitute rudeness.
- Whether this particular issue was addressed with Tom and how.
- Notations about Tom's pattern of behavior.



6. Improve memo by documenting:

Whether or not the procedure for calling in sick was followed per the 1/15/09 counseling session would be helpful here.



6. Improve memo by documenting:

Did this reminder occur on 3/3/09 as this was a day that Tom was out sick? If so, noting this would be appropriate. Example: "I spoke with Tom when he called in sick. I reminded Tom..." Since Tom was out ill, referencing how this communication took place would be helpful.



7. Improve memo by documenting:

- Acknowledging and noting good work is important. It provides a balance and indicates areas of the job where Tom is doing well. However,
- What does "try" mean? Taking time to review Prof. Jones' project and the specific tasks and deadlines to meet is needed here.
 - As the supervisor, this was brought to your attention by Prof. Jones on 2/19. Addressing this with Tom on 3/9 is not timely.



8. Improve memo by documenting:

- What policy or procedure is in question here.
- Whether this is an issue about taking the truck, use of time, or something else.

9. 3/14/2009 - Counseled Tom to check supply cabinet before going in to town to purchase supplies. Also counseled him on poor attitude.



9. Improve memo by documenting:

- The applicable policy or procedure should be referenced.
- Specific information about what behaviors constitute the “poor attitude.” When did the poor attitude occur? Referencing that this is a continuing issue would be helpful.

10. 3/14/2009 - Came back from meeting with the Dean and couldn’t find Tom. Other workers said he went home sick at 10:00 am.



10. This entry is okay.

11-24 are for you to review and rewrite into an acceptable note.

11. 3/15/2009 - Talked with Tom about failing to follow attendance standards, i.e, requirement to inform me or Sally if need to leave work sick. Will issue a letter of caution.

11.

12. 3/19/2009 - Asked Tom how he was coming with Prof. Jones’s project. Said he should be able to start it next week.

12.

13. 3/21/2009 - Prof. Smith said went into shop to seek help and Tom was playing games on the computer. Tom seemed irritated that Prof. Smith was interrupting him.

13.

14. 3/25/2009 - Found message on my voice mail from Tom that he would not be in.

14.

15. 3/26/2009 - Tom did not report for work, no call.

15.

- | | |
|---|-----|
| 16. 3/28/2009 - Followed up with Tom with Letter of Reprimand for not following the attendance standard and inappropriate behavior directed at another employee. | 16. |
| 17. 4/5/2009 - Tom called in sick (headache). | 17. |
| 18. 4/10/2009 - Received voice mail from Tom that he is sick. | 18. |
| 19. 4/11/2009 - Tried to meet with Tom to give him performance evaluation; says he's too busy. | 19. |
| 20. 4/19/2009 - Tom still refusing to meet with me for performance evaluation. | 20. |
| 21. 4/23/2009 - Ran into Prof. Jones in hallway. He said he had vendor in town complete project for him. Said he almost lost a \$100,000 grant because of Tom. Said he reported it to the Dean. | 21. |
| 22. 4/24/2009 - The Dean told me to write up Tom for not working on Prof. Jones's project. | 22. |
| 23. 4/29/2009 - Gave Tom letter of reprimand. He said this made him sick so he went home. | 23. |
| 24. 5/3/2009 - Tom showed up in my office at 9:00 am with Union rep. They handed me a grievance. Called HR. | 24. |

Good documentation takes time, but will ultimately save time if progressive discipline advances, particularly in establishing a case for termination. The documentation demonstrates the steps the supervisor has taken to help the employee correct behavior and improve performance. While most employees will respond, a few will result in termination.



Exercise: Writing a Letter of Reprimand

Because of Tom's lack of improvement, a letter of reprimand is written to be given and discussed with him. In reviewing the draft letter below you realize it is written poorly and needs to be redone. Based upon what you've learned in this section, what changes would you make and how would you rewrite this letter?

Letter #1: Poorly Written

April 29, 2009

TO: Tom Jones

FROM: Jack Supervisor

- (1) During the past several months I have spoken to you many times about your attitude. It is bad. I have asked you to improve your attitude, but you haven't done so. Evidence of your bad attitude is complaints from Professors Smith and Jones, and Dolly in Payroll. Sam in Purchasing also has a problem with you.
- (2) Your attendance also stinks. You use too much sick leave and don't always call in. Please try to be here more often.
- (3) I also counseled you about playing computer games and using a University car to run errands. Also, you did not complete Prof. Jones' project which could have made him lose a grant. I am also aware that you have taken some tools from the shop to use at home. You also make too many mistakes on purchase orders and invoices. On one purchase order the total should have been \$80.56, but you wrote \$308.56. From now on I don't want to see mistakes that are more than 5% above what total should be.
- (4) I have also been told that you spend too much time making personal phone calls during work hours. You also talk in a very loud voice that disturbs your co-workers. In the future, please limit your personal phone calls to no more than four each day (two in the morning and two in the afternoon) and keep each call to less than 15 minutes. Also when engaged in personal phone calls, please talk in a low voice. I expect to hear less complaints about you in the future.
- (5) PS - I still need to meet with you to discuss your performance evaluation.

Letter #2: Better Written Letter of Reprimand

April 29, 2009

TO: Tom Jones

FROM: Jack Supervisor

SUBJECT: Letter of Reprimand

On or about February 5, 2009, Professor Jones asked you to design and build a refrigerated box he needed for an experiment. On February 19, Prof. Jones asked for a progress report on this project. You indicated that you had not yet begun. Prof. Jones advised you that he needed the project completed by March 15, 2009.

On March 9, I directed you to work on Prof. Jones' project immediately. By March 19, you still had not begun this project. At no time did you alert me that Prof. Jones needed the project completed by March 15. Had I been informed, I would have assigned the project to another technician. Prof. Jones eventually had to contract with a private vendor at increased costs to have his project completed.

On April 25, 2009, I met with you to afford you an opportunity to explain why you did not work on the project. Your only response was that you were too busy with other projects. However, a review of your work assignments does not indicate that you were assigned any other major projects during this time.

I am issuing this letter of reprimand to impress upon you the seriousness of your conduct. Failure to work on projects when assigned and to keep your supervisor informed of deadlines and progress is unacceptable and will not be tolerated.

Future instances of the same or similar conduct may result in discipline up to and including dismissal.

Employee's signature confirms only that I have discussed and given a copy of the material to the employee. His signature does not indicate agreement or disagreement with its contents.

Employee's Signature/ Date

The Purpose of Discipline

Disciplinary action is intended to be corrective intervention. It is the opportunity for a manager to provide clear notice to an employee about areas of performance that need to be corrected. It also clearly communicates the consequences of failing to make correction. Additionally, the documents that are produced through disciplinary action create a record of reference for the manager and others and provide a basis of defense if future actions are challenged.

Grounds for Discipline and Definitions

The cause for discipline may be a single flagrant act or a series of lesser offenses constituting one or more of the following grounds:

Misconduct:	Conduct an employee knows, or should know, is not proper behavior, such as violation of rules, policies or procedures, or violation of general standards of reasonable conduct.
Inefficiency:	Failure to produce required results even though the employee is competent to do so, such as failure to meet minimum efficiency standards in the performance of duties.
Incompetence:	Absence of ability or qualifications to perform required tasks.
Insubordination:	Refusal to obey a lawful order or directive, such as willful or repeated violations of a rule, policy or procedure, the refusal to perform work assigned or the refusal to comply with written or oral supervisory instructions, and the employee knows the consequences for the failure to comply.
Indolence:	Behavior indicating unwillingness to work, such as laziness.
Malfeasance:	Conduct showing moral turpitude, such as the commission of an act which is morally wrong and unlawful.
Other Unfitness to Render Effective Service:	Any other employee conduct, quality or condition which tends to obstruct an agency in fulfillment of its mission or that justifies the agency in questioning whether it should continue to employ the employee, such as state of health, personality traits, personal habits or behavior, which adversely affect work performance.

Progressive Discipline

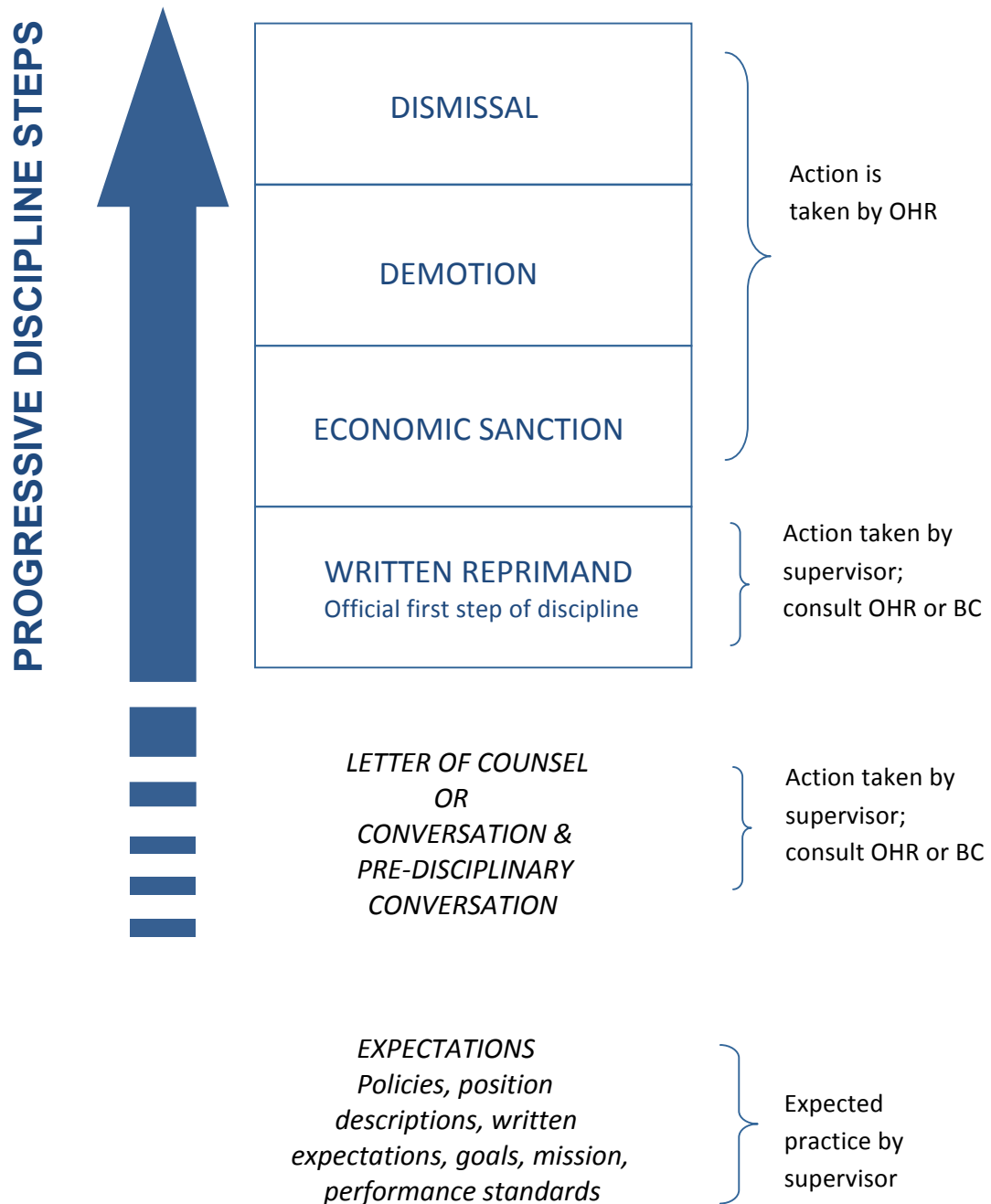
The University utilizes a system of progressive discipline which is a series of increasingly stringent disciplinary actions. This process is designed to provide a consistent manner for a supervisor to address unsatisfactory performance or inappropriate conduct. The established steps in a progressive disciplinary process are not always rigidly followed. The circumstances of a particular situation may outweigh the normal progression. For example, a manager would not issue a letter of counsel for theft or workplace violence. Please consult with ERCC to determine the appropriate level of disciplinary action.

Just Cause

Setting the Stage for Progressive Discipline

- Communication is the Key - Set Expectations
- Know Agency Culture re: Discipline
- Be Consistent

NOTE: An employee can only be disciplined for “*just and proper cause*” or “*just cause.*”



Due Process

Oregon State University is a public employer and must provide due process to employees. Following the principles outlined in progressive discipline is a significant component of due process. This section will illustrate the rights of representation and standard of proof.

Union Representation and Weingarten Rights

<i>Rights . . .</i>	LABOR	CRIMINAL
<i>Representation. . .</i>	WEINGARTEN	MIRANDA
<i>Standard of Proof . . .</i>	PREPONDERANCE (51%) CLEAR & CONVINCING (70-80%)	BEYOND REASONABLE DOUBT (99.9%)

When a represented employee is being investigated and the investigation may lead to discipline, the employee is entitled to representation by a union representative. This is referred to as *Weingarten Rights*. The employer needs to put the employee on notice that the meeting may be disciplinary and they have the option to have a union representative present. The employee needs to affirmatively request their rights. The representation applies only to the employee being investigated. Therefore, if you are interviewing other parties about a particular situation, but they are not the subject of the investigation, then they are not entitled to representation. However, if in questioning an employee not currently under investigation the employee says something that leads you to believe that the employee may be involved, then you are required to stop the meeting, inform the employee of the right to be represented and schedule a new time to investigate the employee's potential involvement.

Weingarten rights only apply to situations that may lead to potential discipline. A supervisor's role of directing, assigning, giving feedback, counseling, or conducting performance reviews, as examples, are not disciplinary actions. However, there is nothing wrong if a supervisor errors on allowing unnecessary representation to an employee.

The role of the union representative is not to answer the questions you have of the employee. They may help clarify the process, suggest certain questions be asked, suggest questions be asked to clarify previous answers, suggest specific witnesses be interviewed or other resources be considered. The role of the union representative is further defined on Page 21, entitled "Management Insight."



Standard of Proof

The standard of proof required in order to take disciplinary action is a “preponderance of evidence” or 51%. Recognize that 51% is not a very strong case. A much stronger case is one in which there is “clear and convincing” evidence or 70-80% evidence that the employee’s actions were wrong.

In some situations, there may be evidence of criminal behavior, i.e. theft. In such a case, the investigation conducted by the police is done separately from an internal investigation. The rights and standard for evidence in a criminal matter is different from a labor issue. Immediately contact an OHR employee relations representative to assist you if such a situation arises.

Just and Proper Cause for Disciplining an Employee *The Seven Tests*

Few, if any, union-management agreements contain a definition of “just cause.” Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have established a commonly held definition. This definition consists of a set of criteria that are to be applied to the facts of any specific case. These criteria are set forth below in the form of questions.

The employer’s action must be able to pass all seven tests. If the discipline fails to pass any one of the tests, the discipline will usually be vacated or amended.

The Questions

1. ***Did the agency give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?***

Note A: Forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and penalties for violation thereof.

Note B: There must have been actual oral or written communication of the rules and penalties to the employee.

Note C: A finding of lack of such communication does not in all cases require a “no” answer to question number one. Certain offenses, such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the company or of fellow employees, are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

Note D: Absent any contractual prohibition or restriction, the agency has the right unilaterally to promulgate reasonable rules and issue reasonable orders, and same need not have been negotiated with the union.

2. Was the agency's rule or managerial order reasonably related to the orderly, efficient, or safe operation of the business?

Note: If an employee believes that the rule or order is unreasonable, s/he must nevertheless obey it (in which case s/he may file a grievance thereover) unless s/he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his or her personal safety. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his or her disobedience.

3. Did the agency, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Note A: The agency's investigation must normally be made before its disciplinary decision. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his or her day in court through the grievance procedure about the exaction of discipline. By that time, it is generally conceded that there has been too much hardening of positions.

Note B: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, s/he will be restored to his or her job with full pay for time lost.

4. Was the agency's investigation conducted fairly and objectively?

Note: At said investigation, the management official may be both "prosecutor" and "judge" but s/he may not also be a witness against the employee.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note: It is not required that the evidence be conclusive, or "beyond reasonable doubt." But the evidence must be truly substantial and not flimsy or slight.

6. Has the agency applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

Note A: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note B: If the agency has been lax in enforcing its rules and disorders and decides henceforth to apply them rigorously, the agency may avoid a finding of discrimination by telling all employees in advance of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the agency 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 or her service with the agency?

Note A: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good," a "fair," or a "bad" record. Reasonable judgment thereon must be used.)

Note B: An employee's record of previous offenses may never be used to discover whether s/he was guilty of the immediate or most recent offense. The only proper use of his or her record is to help determine the severity of discipline once s/he has properly been found guilty of the immediate offense.

Note C: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the agency may properly give a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.



MANAGEMENT INSIGHT ON CONTRACT ARBITRATION

September 12, 1991

PERSONNEL & LABOR RELATIONS DIVISION - RCP SECTION

FURTHER EXPLANATION OF WEINGARTEN ROLE OF THE UNION REPRESENTATIVE DEFINED

The Washington County Police Officers Association charged that Washington County's Procedures Manual violated ORS 243.672(1) (a). These charges stemmed from the Sheriff's Department instructions that a union representative could not actively participate in the interview of an employee. In this case, the Department representative instructed the employee's union representative to remain silent and threatened to eject him from the interview if he did not comply.

The Employment Relations Board ruled that union reps may ask clarifying questions, but may not counsel employees on how or whether to answer the employer's questions. The Board defined the representative's role as follows:

1. The representative may inquire, at the outset of the interview, regarding its purpose, including inquiring about the general subject matter of the questioning to follow.
2. During the questioning of the employee by the employer, the representative may participate only to the extent of seeking clarification of questions.
3. After the employer has completed the questioning of the employee, the representative may ask the employee questions designed to clarify previous answers or to elicit further relevant information.
4. 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.

In applying these guidelines, the Board found that the County had violated ORS 243.672(1) (a) in that its Procedures and instructions placed the union representative in a role of "silent observer in investigatory interviews."

The Board ordered the County to cease and desist from instructing the union representatives to be silent during investigatory interviews. However, ERB refused to assess a civil penalty. The Board noted that the County had attempted to comply with Weingarten and since this was the first case in which the Board defined the role of the union representative, it should not be the basis for civil penalty.

On reconsideration, the Board rejected the Association's contention that a representative had a right to counsel the employee during an interview. The Board stated that if counseling means consulting with an employee on how or whether to answer questions, the Board was concerned that normal employee interviews would be changed into adversarial proceedings.

ERB noted that representation rights in a pre-grievance situation is permissible under ORS 243.662, but is not required. In this case, ERB could not be guided by Weingarten since it came after the establishment of ORS 243 (PECBA) in 1973. The Board felt that a greater or lesser role for union representatives in investigatory interviews, beyond this opinion, were better left to collective bargaining. However, the Board left the door open for it to establish other rules to protect employee representation rights should there be a major change in general employer practices. *Washington County Police Officers Association v Washington County* (UP-15-90) (Jan. 17, 1991) reconsidered (Jan. 31, 1991).

If you have any questions concerning the application of this Board ruling to your agency, please contact your assigned Labor Relations Manager (378-3141).

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Imposing Discipline

1. *Be Impersonal*

- Focus on actions, not person.

2. *Act Immediately*

- If no response from supervisor, employee assumes everything must be OK.
- Standards are what you tolerate.
- If not addressed, little things build and become bigger issues when finally addressed.
- If it is a broad-based issue when finally addressed, then address as such. Do not discipline first employee to violate unannounced new standard.

3. *Be Consistent*

- Do not give mixed signals. Make sure the employee understands what has happened.
- Level of reaction may be different due to mitigation.
 - Document mitigation to protect ability to take future action.

4. *Be Positive*

- All speech should be positive and aimed at correcting behavior.
- Articulate standard and reasons for it.
- What needs to be changed?
- Get employee agreement.
- Express confidence in employee's ability to meet standard.
- Concentrate on future; past cannot be changed.

5. *Respect the Dignity of the Employee*

- No need to demean.
- Common courtesy is the rule.

6. *Respect the Confidentiality of the Matter*

- Never discipline in front of others.
- Never discuss with other employees.

Case Studies to Explore

Instructions

Please read each case study and assume that you're the supervisor. Then,

- 1) What action would you take to address the behavior or performance issue(s)?
- 2) If you would discipline, what are the grounds for this course of action?
- 3) What mitigating circumstances might exist?
- 4) What level of discipline would you seek or impose?
- 5) Is there anything in the case study that might raise concerns about the seven tests for "just cause" being met? If so, what?

Case #1

A correctional officer has been discovered sleeping on his post. He was so sound asleep that a manager was able to unhook the officer's keys from a loop on his belt. A photograph was taken of the employee sleeping with his feet up on his desk, his head back with eyes closed, and the manager standing over him holding the keys.

The employee has been with the agency for 4 years. Although he has always received satisfactory performance appraisals, management considers him a "goof off." Six months ago, he was issued a Letter of Reprimand for engaging in horseplay with another employee. He is currently on a work plan for absences and lateness.

Discussion notes:

Case #2

Susie has worked for you for 3 years. She is very pleasant and well liked by co-workers. Her duties include taking telephone messages and typing correspondence for the signature of the department head, vice provost, and occasionally the president.

She does not report telephone messages accurately. She transposes digits in telephone numbers or forgets to get the caller's number, she forgets to write the time of the call, and occasionally forgets to get the caller's name. Although this has been a recurring problem, the frequency of her mistakes has increased during the past year.

She is a fast typist, but makes mistakes in grammar, spelling, punctuation and sentence structure. Occasionally she leaves out sentences when transcribing documents. Recently she omitted an entire paragraph in a letter being written for the president's signature. She has been advised

numerous times to include the president's middle initial when she types his name. She forgets to do this about half the time.

Most of these problems have existed since she was hired. You felt, however, that with time she would improve. You have always noted these problems on her performance evaluation, but have given her satisfactory ratings. You feel that giving her satisfactory ratings is a way to encourage her. Your belief is that giving unsatisfactory ratings de-motivates employees.

Discussion notes:

Case #3

This employee has been on the job for 4 months and is on trial service. Previously he was a supervisor for 12 years in private industry. His position was eliminated due to a plant closing.

He is resistive to taking direction and often tells you how he believes things should be done. He has become argumentative on several occasions. You have previously counseled him about his behavior.

You have just given him instructions on the proper procedure to follow in completion of an assignment. He responds by telling you that you are a poor supervisor and continues to do the task as he wishes in violation of your instruction.

Discussion notes:

Case #4

This employee has worked in your unit for 15 years. Although "No Smoking" signs are posted throughout the building, he has been observed smoking in the building on numerous occasions. During the past 6 months, you have warned him on 6 or 7 occasions. Three weeks ago, you observed him smoking and issued a Letter of Reprimand. Two other employees have just advised you that they saw the employee smoking in the building earlier today.

Discussion notes:

Case #5

Carol, an Office Specialist 1, has complained to you several times about being overworked. You have now asked her to stop what she is doing and to type a document that the department head needs immediately. Carol refuses to do it. She states that is not her job and the department head can “shove it.”

Discussion notes:

Case #6

This employee used the name, birth date, and social security number of a student employee whom she supervises to apply for a line of credit. She has attempted to purchase \$700 worth of jewelry with the line of credit.

Discussion notes:

Case #7

You receive a telephone call from Transportation Services informing you that a citizen complained that a university vehicle was exceeding the speed limit on I-5 in Washington State. The complaint also alleged that there were small children in the vehicle. The vehicle was checked out to an employee in your department.

The employee in question was on vacation at the time, so you ask Transportation Services to double-check their records. Transportation Services sends you a copy of paperwork which shows the employee’s signature. Additionally, you find that your signature, authorizing use of the vehicle, has been forged.

Discussion notes:

Case #8

You have been in your current supervisory position for about 6 months. Diane and Jill are two employees in your department who do not get along. Diane has worked for the department for 6 years. Jill has worked in the office for about 2 years. Each believes the other is incompetent. They have heated arguments on occasion.

You are aware that animosity between the two has existed since Jill began working for the department. The previous supervisor attempted to resolve the issues by bringing in third parties to facilitate resolution between the two employees. This was not successful.

Jill has now reported to you that Diane has pushed her. You have asked each to provide a written statement of the incident.

Jill's version: They came from opposite directions around a blind corner and stopped within a foot of each other. Each had time to move to the side. However, before Jill could move out of the way, Diane crossed her arms in front of her and pushed Jill. Jill had to catch herself on the cubicle wall to avoid falling. Diane then said, "You stopped right in front of me."

Diane's version: They came from opposite directions around a blind corner. Realizing there was no time to stop, Diane attempted to maneuver to the side, but bumped shoulders with Jill. Jill immediately said "You pushed me." Diane said "You stopped in front of me."

You interview other workers in the office, but no one witnessed this incident. However, one employee tells you that Diane has previously made demeaning remarks about Jill including calling Jill "old and stupid." Another employee tells you that Diane has stated that "she doesn't need to change her ways to accommodate Jill." None of the other employees seem to be taking sides. They all wish both Diane and Jill would start behaving appropriately.

Discussion notes:

Purposes of an Effective Grievance Procedure

There will be times in which a represented employee feels that a supervisor erroneously did or did not do something that disadvantages the employee. An employee needs to be able to raise the issue with a goal of getting resolution. A formal, written grievance procedure exists for this purpose. In the SEIU contract, this is covered in Article 18. The purposes of a grievance procedure include the following:

1. To assure employees a way in which they can get their complaints considered rapidly, fairly, and without reprisal.
2. To encourage the employees to express how the conditions of work affect them as employees.
3. To get better understanding of policies, practices, and procedures which affect employees.
4. To instill a measure of confidence in employees that actions are taken in accord with policies.
5. To provide a check on how policies are carried out by management.
6. To give supervisors a greater sense of responsibility in their dealings with employees.

Most grievance procedures follow specific deadlines to help ensure that grievances are timely and relevant. As an unresolved grievance moves up the process, some are taken to arbitration to get resolved.

As a supervisor, if an employee whom you supervise files a grievance against you, you have the responsibility to:

1. Continue to work with that employee in a fair and objective manner to move work forward.
2. Not retaliate or act in a biased manner towards that employee.
3. Work with your manager and the Employee Relations group in OHR to provide the information so a timely response can be made to the grievance.
4. Recognize that the employee is simply exercising their right. The end result will be resolution and clarification of the issue.