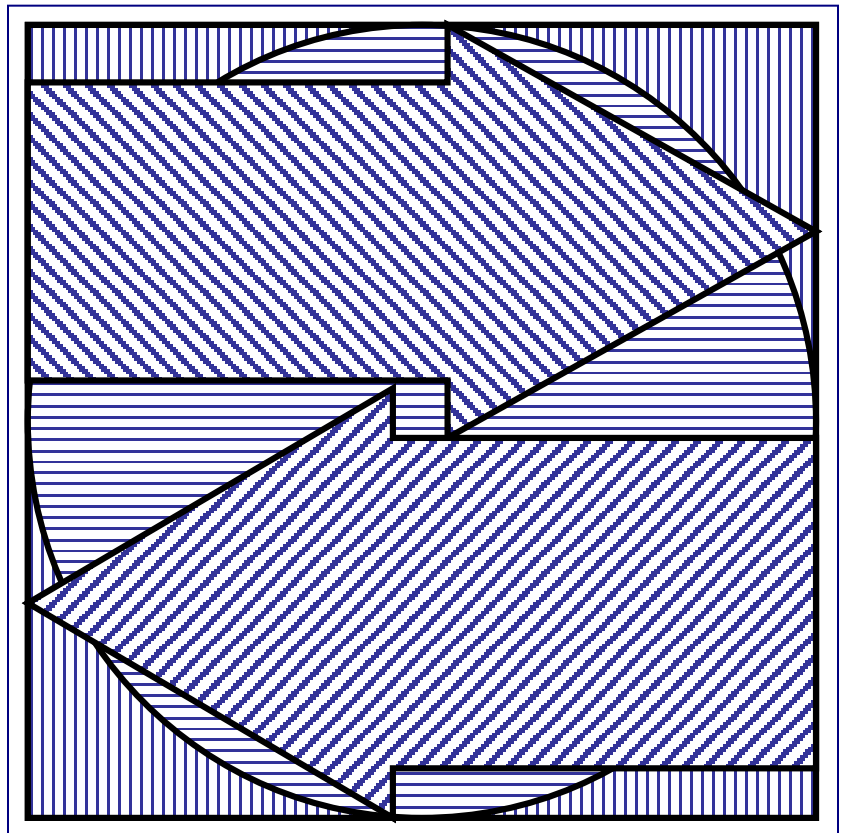


state of montana

**discipline
handling
guide**



**state human resources division
department of administration**

june 10, 2013

STATE OF MONTANA

Discipline Handling Guide

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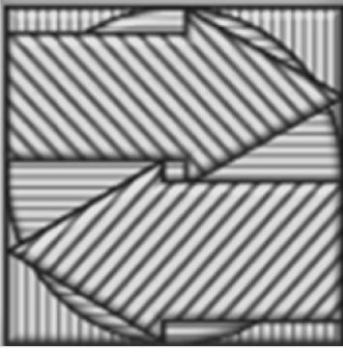
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This guide provides assistance to state supervisors and managers in administering disciplinary action. This guide is not state policy or administrative rule. It is not binding on any agency; it does not establish practice or set precedent.



what is discipline?

Discipline is a system of communication – about expectations and, when necessary, about expected changes in behavior

discipline and effective supervision

“Discipline” represents perhaps the most difficult area of supervision. In part, this difficulty stems from the many meanings people place on the word itself ...

dis•ci•pline *n.* [ME. < OFr. *descepline* < L. *disciplina* < *discipulus*: see DISCIPLE] 1. a branch of knowledge or learning 2. a) training that develops self-control, character, or orderliness and efficiency b) strict control to enforce obedience 3. the result of such training or control; specif., a) self-control or orderly conduct b) acceptance of or submission to authority and control 4. a system of rules, as for the conduct of members of a monastic order 5. treatment that corrects or punishes (*Webster's New World Dictionary*)

In our approach to discipline, we will emphasize its definition as training that develops self-

control, orderliness, and efficiency. When necessary, it includes supervisory actions that correct employee behavior. Although a supervisor may sometimes need to penalize employee behavior, that aspect of discipline must be secondary; it should be used only when necessary.

This guide will help you in your job as a supervisor in a state agency. As you read this guide, keep in mind that preventive action — establishing and maintaining good “discipline” in your unit — is preferable to taking disciplinary action.

Remember, effective discipline is more *prevention* than *intervention*.

what are my supervisory responsibilities?

As a supervisor, you are responsible for developing and maintaining a high level of performance in your work unit. You are also responsible for developing and maintaining appropriate conduct and good working relationships in your unit.

In your responsibilities as a supervisor, you need to be aware of things employees must know to perform their jobs efficiently.

These include . . .

- the agency's policies, rules, and regulations governing the employees' work,
- the proper kind of behavior expected of employees to establish and maintain good working relationships,
- the objectives, duties, and tasks each employee is expected to perform.

what are my supervisory responsibilities? (continued)

- what you, as the supervisor, consider the standards of performance for the job,
- knowing the scope of your authority to impose or recommend disciplinary action,
- how well each employee is meeting those expected standards of performance,
- how the employees can improve their performance and working capabilities.

how do these relate to supervisory practices?

It is essential that, with your help, employees learn and practice constructive behavior patterns in their work. Good working habits will have a “ripple effect,” influencing the behavior of every employee in the unit.

Good supervisory practice requires that you keep maintain documentation on performance and conduct. This enables you to justify decisions you make concerning performance appraisal and disciplinary action.

Set reasonable work objectives for your employees. A key point is to set objectives that are reasonable both to you and your employees. Employee participation in setting objectives can result in realistic goals that employees are committed to achieving.

Good supervisory practice requires that you be willing to make such decisions promptly, impartially, and with justification. If an employee exhibits unacceptable conduct or performance, intervene as soon as practical.

how should I deal with problems?

No matter how good a supervisor you are, problems will occasionally arise in your work group. The occurrence of a problem does not reflect on your ability as a supervisor; how you handle it does.

thority, make sure you refer it to the proper person, such as your supervisor or the human resources officer. Make sure the employee knows the outcome of your discussion with the other person.

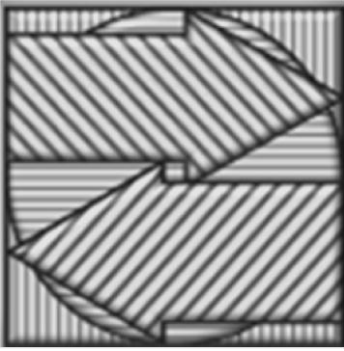
The occurrence of a problem does not reflect on your ability as a supervisor; how you handle it does

You should encourage and help the employee to solve the problem. Many situations that have the potential to develop into chronic problems can be resolved by the supervisor properly communicating with the employee.

If you supervise members of a bargaining unit, be sure you are familiar with the terms of the union contract before acting or recommending any action.

If the solution to the problem with the employee is within the scope of your responsibility, examine the situation and try to correct the problem. If the problem is above or beyond your au-

Often, simple courtesy, straightforward discussion, and “clearing the air” can prevent minor problems from growing into grievance actions. A later section of this guide provides tips on conducting meetings with employees.



what is progressive discipline?

progressive discipline

Progressive discipline is a process of applying disciplinary actions, moving from less serious to more serious actions based on the initial severity or on repetition of the problem behavior.

For most conduct problems, discipline begins at the first of these actions. Any later occurrences of the same problem by the same employee require more serious disciplinary action.

Some infractions — such as theft, assault, or falsifying records —

are very serious. These problems merit disciplinary action that begins at a higher level than step one. To determine which action to take, you must consider . . .

- past treatment of similar problems
- the proper kind of behavior expected of employees to establish and maintain good working relationships,
- the offense and its effects
- the relevant policy
- the circumstances
- the employee

what are the progressive discipline steps?

The State's discipline-handling policy lists these actions:

Informal disciplinary actions

1. coaching
2. oral warning

Formal disciplinary actions

3. written warning
4. suspension without pay
5. disciplinary demotion
6. discharge

The policy also allows that other

disciplinary interventions may be possible.

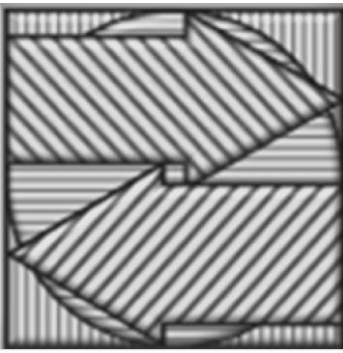
Management must decide which step of the progressive discipline process is best in a given situation. You also must determine the specific actions to take and the order of these actions.

Failing to follow your agency's policies on progressive discipline may expose the State and the agency to legal liability.

what about employee assistance?

Employee assistance can be helpful at any stage of progressive discipline— for both employee and supervisor. You can find more information about employee assis-

tance later in this guide. In addition, information on employee assistance is available from the Health Care and Benefits Division, Department of Administration.



how has the employment environment changed?

critical concepts of discipline

Time was, not so long ago, employers enjoyed nearly unlimited power to discipline and discharge employees. Over the last several years, however, this arbitrary power has been limited by statutes and court decisions.

Some important cases have dealt with specific issues, such as discrimination and workers' compensation. More importantly, a growing number of court decisions have outlined the employer's responsibility to show *just cause* for severe disciplinary ac-

tions, such as discharge. And most public employers, such as the state, must afford *due process* to the affected employee.

The next couple of sections explain what these concepts mean for state supervisors.

Montana's Wrongful Discharge from Employment Act sets out certain rights and remedies with respect to wrongful discharge. You can read a description of this law later in this guide and its full text in the appendix.

what is just cause?

“Just cause” means reasonable, job-related grounds for taking disciplinary action

The term “just cause” — also called “good cause” or simply “cause” — eludes precise definition. Courts and arbitrators have wrestled with the term, trying to pin a workable meaning on it.

In 1987, the Montana Legislature passed the Wrongful Discharge from Employment Act. For the purposes of the law, it defines “good cause”:

... reasonable job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

For our purposes, the state's discipline-handling rules define “just cause”:

... reasonable, job-related grounds for taking a disciplinary action based on failure to satisfactorily perform job duties, or disruption of agency operations.

the definition continues ...

Just cause may include, but is not limited to: an actual violation of an established agency standard, procedure, legitimate order, policy, or labor agreement; failure to meet applicable professional standards; criminal misconduct; wrongful discrimination; deliberate misconduct; negligence; deliberately providing false information on an employment application; willful damage to public or private property; workplace violence or intimidation; harassment; unprofessional or inappropriate behavior; or a series of lesser violations.

what is just cause? (continued)

Essentially, to show just cause, management must

1) show that the employee violated a specific policy, rule, performance requirement, or standard of employment

and

2) show that the employee knew about the policy, rule, performance requirement, or standard of employment

The key words in this definition are **reasonable** and **job-related**. As you consider whether to take disciplinary action, you need to consider a number of factors to determine if just cause is present. The following seven questions can help you determine whether you've established just cause.

1. Did the employee's alleged behavior violate a specific work rule, policy, or managerial order?
 - written policies
 - orientation and training
 - verbal and written warnings
 2. Did the employer give the employee forewarning of the possible or probable consequences of the employee's conduct?
 - written policies
 - orientation and training
 - verbal and written warnings
 3. Was the rule or managerial order that the employee violated reasonably related to the orderly, safe, and efficient operation of the agency?
 4. Did management, before administering discipline to an employee, make an effort to discover whether the employee did, in fact, violate a rule or order?
 - The investigation should normally occur prior to any disciplinary decision.
 5. Was the investigation conducted fairly and objectively?
 - The employer must make a reasonable, "good faith" effort to discover all the facts about a given case.
6. Has the employer applied its rules, orders, and penalties even-handedly and without discrimination among all employees?
 - You're not required to provide evidence that is "beyond a reasonable doubt," but it must be reasonable and clear.
 - If not, the apparent or real discrimination may result in the overturning or modification of a disciplinary action.
 - If the employer has been lax in enforcing rules and policies and decides to "get tough," it should notify employees beforehand of its intent to enforce all rules and policies as written.
 7. Was the degree of discipline administered in a particular case reasonably related to a) the seriousness of the employee's offense, and b) the employee's record of service?
 - A trivial offense does not merit harsh discipline unless the employee has committed the same offense a number of times in the past.
 - Management should refer to the employee's "record of service" only to determine the severity of discipline.
 - If two or more employees commit the same offense, their respective records provide the only proper basis for "discriminating" between them in administering discipline.

Keep in mind that the state's discipline-handling rules require management to have just cause for taking any formal disciplinary action.

what is due process?

The state's grievance procedure – properly followed – satisfies the due process requirement, except in cases where due process is necessary before disciplinary decisions

The opportunity to grieve a formal disciplinary action does not apply when the action is a written warning

Be aware of any grievance procedure that's included in an applicable collective bargaining agreement

The U.S. Constitution (Fourteenth Amendment) and the Montana Constitution (Article II, Section 17) state that the government shall not deprive a person of property or liberty without due process of law. Statutes or administrative rules may give public employees a "property interest" in continuing their employment with an agency.

If a public employee has a "property interest" in his or her position, the agency may not deprive the employee of that interest (that is, impose an economic detriment) without "due process of law." The governmental agency must determine what process is "due" in a given case.

In general, due process requires that the employee receive **notice** of and an **opportunity to respond** to formal disciplinary action. Under the state's discipline-handling rules (ARM 2.21.6507), this requirement means ...

... an employee:

1. is informed of the action being taken and the reason for the action; and
2. has the opportunity to respond.

To ensure that due process is provided, the state's rules require that formal disciplinary action include written notification to the employee.

The state's discipline-handling policy requires that an employee facing formal disciplinary action receive written notice and an opportunity to respond. The state's grievance policy also provides the opportunity for a hearing *after* discharge.

Court cases have affected due process rights for permanent state employees facing discharge.

Critical elements of this notice include:

1. the just cause (reasons) for the disciplinary action,
2. a description of the disciplinary action, including dates and duration, if applicable,
3. the improvements or corrections expected of the employee, if applicable,
4. consequences (further discipline) if the employee fails to improve or correct behavior, if applicable, and
5. the employee's right to respond, either orally or in writing.

Management must present the written notice to the employee for his or her review. If the employee chooses not to sign the notice, you may note that fact on the notice. You might have a witness to the refusal sign the notice in the presence of you and the employee. Preferably, the witness will be an agency human resources officer or your boss.

Any written response by the employee must be attached to the notice and included in the employee's personnel file. The employee may also grieve certain formal disciplinary actions.

what about due process rights before discipline?

In particular, the U.S. Supreme Court decided *Loudermill v. Cleveland Board of Education* in March 1985. This case yielded guidelines for a hearing *before* a possible discharge.

In October 1994, the Montana Supreme Court decided *Boreen v. Christensen*. The Court held that the state's discipline policy creates a property interest for per-

what about due process rights before discipline?

(continued)

A neutral third party may hear the employee's side of the story and investigate the situation before the decision is made whether to suspend, demote, or discharge the employee

A due process meeting prior to discipline is informal – there is no requirement to introduce evidence or to examine witnesses

manent state employees. This property interest gives rise to the right of due process before deciding on discipline that could have an economic impact on the employee (such as demotion, suspension without pay, or discharge).

Under the impact of these cases, you should consider the following suggestions that would satisfy the need for a “due-process meeting” or “Loudermill hearing.”

- Never fire an employee “on-the-spot.” Allow a “cooling-off” period before making a decision on discharge. If it is vital to remove the employee from the work situation, place the employee on administrative leave, pending the outcome.
- A due-process review may take place to determine if there are reasonable grounds to believe the allegations against the employee are true and that the evidence supports the disciplinary decision.
- The person conducting the review should be someone who has not been involved in recommending the employee's discharge. Preferably, the person would not be within the line of supervision above the employee.
- The review should contain the following steps:
 - a. Notice to the employee of the allegations supporting the recommended discharge action;
 - b. Notice to the employee of the substance of relevant evidence supporting the allegations;
 - c. A meeting between the employee and the reviewer. The reviewer presents the information to the employee and hears the employee's response. The meeting is usually **not** a full evidentiary hear-

ing; an informal process works. As an alternative, the employee may submit a written response to the information.

- To be effective, the person conducting the review should be well versed in the legal principles governing employee discipline, as well as the state's human resource policies and practices.
- The due-process review or hearing need not resolve definitely the issue of discipline; the review is an initial check against mistaken decisions. Its purpose is to determine if there are reasonable grounds to believe that the charges against the employee are true and support the proposed discipline.
- Remember that “Weingarten rights” apply for union employees. See the section starting on page 26.
- Thorough due process requires good documentation:
 - a. Date and time of the meeting, names of those attending;
 - b. List of the allegations about the employee's conduct or performance;
 - c. The employee's response, along with any other discussion;
 - d. Any evidence presented by the employee in the meeting;
 - e. Review of relevant policies;
 - f. Information, if available, on how the agency has addressed similar issues in the past;
 - g. A review of the employee's history, if not already in the investigation report.
- Finally, a due-process review does not replace the opportunity for a full hearing after discipline, as provided by the state grievance policy or by collective bargaining agreement.

what does an investigation involve?

A fair and balanced disciplinary process requires thorough information – developed through fair and balanced investigation

Serious allegations about an employee's conduct or performance require serious consideration. As a supervisor, you may be part of investigating the allegations.

Management decides case-by-case on the appropriate level and extent of an investigation. It can range from the supervisor asking the employee a few questions to bringing in an outside investigator to review documents and conduct interviews.

Whatever the level, investigation requires a careful balance of gathering information and preserving confidentiality.

Because of the sensitive nature of an investigation, you should always consult with your Human Resources office before trying to gather any information. This will help to safeguard employees' rights related to

- union representation (Weingarten rights)
- self-incrimination, when the employee's conduct in-

volves possible criminal activity (Garrity rights)

- privacy and freedom from unreasonable searches
- free speech and association
- due process.

For example, if the employee's conduct involves possible criminal activity, Human Resources will know how and when to get law enforcement involved. It's also important to consult HR if an employee is arrested off-the-job on charges unrelated to work.

The State's rules on Employee Records Management (ARM 2.21.6612) exclude investigation reports. These are separate from individual personnel files and may, in some cases, be subject to public release. As a result, all documents related to an investigation need careful management.

In short, the sensitive nature of investigations and related documents require each supervisor to proceed carefully and in close cooperation with Human Resources.

what about documentation?

We have said that the effectiveness of discipline hinges on the quality of the supervisor's interactions with an employee. Of equal importance is the supervisor's attention to documenting the facts related to performance, conduct, and communication about these areas.

Keep in mind the often-quoted saying: **If it isn't written down, it didn't happen.** Without adequate documentation, management is virtually powerless to resolve a long-term disciplinary problem.

what are informal documents?

Like disciplinary actions, documentation falls into two categories: informal and formal. Informal documents are those kept by the supervisor prior to any written disciplinary notice to the

employee. The most common — and most important — among informal documents are the supervisor's notes. These notes may take the form of a journal, log, or calendar.

A good supervisor makes notes at the time a problem occurs — sort of a running account of an employee's conduct and what the supervisor had done about it. Of equal importance with recording the notes is making sure that you discuss the issues with the employee. **You should not document anything that you have not discussed or will not discuss with the employee.**

When recording information in your journal or log, restrict your entries to important facts about the discipline problem. These should include . . .

- dates, times, and places of the events or incidents in question.
- names of other persons involved in the incident, either as witnesses or participants.
- a specific, objective description of the employee's behavior — state facts, not conclusions or conjecture.
- a summary of your discussions with the employee, including what the employee said in defense of his or her behavior.

Other informal documents include any materials that provide evidence of the problem behavior. Some examples are ...

- complaints from other units, agencies, or members of the public — e-mail, letters, memos.
- written and signed statements from witnesses to the employee's conduct.
- examples of the employee's work, if related to the behavior in question.
- business records, such as time records, travel vouchers, work logs, equipment releases, and so on, if they are related to the behavior in question.
- copies of memos or e-mail from supervisor to the employee that outline the results of informal disciplinary action.

Be aware that even informal documentation may become evidence in a hearing. Always stick to the facts and avoid subjective accounts.

what are formal documents?

If it isn't written down, it didn't happen

Formal documents are those with the employee's signature on them. Many formal documents are entered into the employee's personnel file, with the original given to the employee. Often, formal documents represent notification of formal disciplinary action.

Other formal documents might include ...

- forms that show the employee has been informed of pertinent rules and policies,

- completed performance appraisals, if poor performance is the reason for disciplinary action.

Formal disciplinary documentation carries some requirements ...

- the employee must review the document and receive a copy,
- the employee may sign the document (or the supervisor notes if the employee declines to) before the document is placed in the employee's personnel file,

what are formal documents?
(continued)

Discipline is only as good as the informal documentation that supports it

- the employee has the right to respond to the document, either verbally, in writing, or both. Any written response must go in the personnel file with the document.

Before presenting a formal document to the employee, the supervisor must make sure the document contains absolutely no errors. Typos, misspellings, grammatical errors, and transposed numbers may seem minor, but

they can erode your credibility and provide the basis for an employee to challenge a disciplinary action.

It is also a good idea to present the document for review by your supervisor or your human resources officer, or both. They can double-check to see that the notice meets agency requirements. They can also provide additional proof-reading to prevent the types of errors mentioned.

how do informal documents relate to formal documents?

Formal documentation becomes management's record of disciplinary action. If an employee challenges a disciplinary action, this record provides the main element of management's defense — in a grievance, arbitration hearing, or lawsuit.

Informal documentation lays the foundation for formal documentation. In writing a formal document, the supervisor refers to the informal documentation for the necessary information. The information the supervisor has gathered thus becomes a part of the record.

example of supervisory journal entries ...

- 6/6/13 telephone usage Discussed with Josh Benue at 11:30 a.m. today the issue of telephone usage. At issue were long-distance calls on his phone printout that appeared personal. He admitted they had been personal calls. I explained the policy on phone usage – it prohibits personal, long-distance calls on the state billing system. He said he understood. I told him the discussion today was an oral warning.*
- 7/7/13 absence without notice Josh Benue was absent from work yesterday, 7/6, without prior approval. I received no notification at all yesterday. This morning when he came in, Josh explained that he had stayed home ill. I reminded him of the requirements for leave: he must call me if he is taking leave without prior approval. I provided coaching on the issue.*
- 8/14/13 clothing Josh Benue arrived at work this morning wearing a yellow tank-top shirt, denim knee-length shorts, and sandals. I directed him to go home and change into clothing that complies with the expectations on record: polo or sports shirt with sleeves, full-length pants, and closed-toed shoes, including socks. He returned at 9:40, wearing tan khakis, a blue polo shirt, and sneakers with socks.*

a note about confidentiality

Disciplinary action involves the employee's right of privacy

Montana's constitution and key statutes guarantee public access to government records and meetings. However, the constitution limits the "right to know" when "the demands of individual privacy clearly exceed the merits of public disclosure" (Article II, Section 9). **Disciplinary action is an area of individual privacy.**

Because disciplinary action is a matter of the affected employee's individual privacy, the state has an obligation to protect that privacy. As a supervisor, you are responsible for upholding that obligation. This obligation extends to disciplinary records, disciplinary conferences with the employee, and oral information about the situation.

You have an important role in protecting employees' privacy. Make sure that all disciplinary documentation remains confidential. This includes your supervisory notes, investigation reports, and disciplinary letters to the employee.

Hold all disciplinary conferences in private; the only people present should be you, the employee, and other people who have a need or right to know of the situation. Such people might be a union representative, your boss or other manager in the chain of command, and possibly a human resources officer or specialist in your agency.

The same goes for discussing disciplinary action. You should discuss the matter only with those

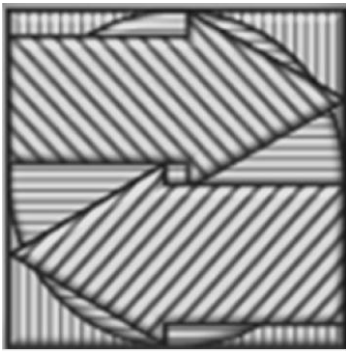
who have a need or right to know. Once again, that group might include the union representative, your boss or other manager in the chain of command, and the human resources officer or specialist in your agency.

Beyond that, keep quiet. You shouldn't discuss the disciplinary action in connection with employee's name with anyone, whether inside or outside your agency. You may mention the fact that a disciplinary action has taken place, but that's all.

The need for confidentiality applies to peers, friends, and relatives. In dealing with the sometimes frustrating aspects of discipline, you may be tempted to "vent" with someone you trust. However, unless that person has the need or right to know, your venting could be a serious breach of confidentiality.

Finally, in some situations, the merits of public disclosure may exceed the demands of individual privacy. Under such circumstances, your agency may have to release the name of an employee and the disciplinary action that took place.

The decision to do so properly belongs to the director or other executive manager, after getting advice from the human resources officer and an attorney. You might be asked to provide information that will help make the decision, but you shouldn't decide on your own to release such sensitive information.



informal disciplinary actions

why use informal disciplinary actions?

These sections contain examples of infractions that may merit informal disciplinary action. The action you decide to take will depend on the circumstances of each situation

Most conduct or performance problems are minor in degree. This doesn't mean that they are unimportant, but that they do not initially merit formal disciplinary action. They are, in fact, important to you, and the sooner you deal with them appropriately, the less likelihood they will develop into major problems.

By dealing with minor problems informally, you help to maintain a good working relationship with the employee. You can prevent the employee's resentment or anger that might accompany "harsh" actions that don't fit a minor problem.

Whether you consider a problem

"minor" will depend on at least three considerations: the infraction by the employee, its effect on the unit's operations, and past practice in dealing with similar infractions. Minor infractions may include ...

- a routine performance error
- tardiness
- leaving the workplace without permission
- inappropriate use of work time
- rudeness to the public or to coworkers
- inappropriate use of state equipment
- smoking in an unauthorized area
- . . . and so on

coaching

Coaching is a constructive, informal step taken to improve unsatisfactory employee behavior. The key part of the process is usually a meeting in which the supervisor and employee agree on the nature of the problem and the necessary steps to correct it.

The success of coaching hinges on two factors: 1) conducting it in a positive, non-threatening manner, and 2) obtaining the employee's agreement that a problem exists and that he or she is responsible for his or her behavior.

The following Seven-Step Coaching Model provides a helpful guide for informally counseling an employee on a conduct or performance problem.

1. State your purpose — get to the point.
2. Describe the problem in specific, behavioral terms.
3. Listen! Invite the employee's self-evaluation and try to understand.

Get the employee's agreement that a problem exists

coaching (continued)

4. Agree on the cause or causes of the problem.
5. Ask for suggestions from the employee. Mutually develop a plan to correct the problem.
6. Have the employee sum up the discussion and the solution.
7. Set a follow-up meeting, if appropriate, to review progress and change in the employee's behavior.

At the completion of such an interview, document it in your notes. Record the employee's name, date and time of the interview, the problem, and the agreed solution. Also note the date and time of any planned follow-up.

You can use the coaching form (see appendix) to document this action. If you use it, the employee **must** receive a copy of the plan.

oral warning

If coaching fails to produce needed improvement, or if the infraction warrants starting progressive discipline at a more serious step, consider giving an oral warning. Another way of describing this step is “first reminder.”

Within progressive discipline, an oral warning should take place immediately if a problem recurs — that is, a problem you've already addressed in coaching.

If you are considering issuing an oral warning as the first action you take, consider these factors: the infraction by the employee, its impact on the unit's operations, and past practice in dealing with similar problems.

Some problems that may warrant an oral warning as a first step include . . .

- minor safety violations
- first misuse of sick leave
- absence without notification
- receiving a traffic citation while using a state vehicle
- inappropriate use of the state's e-mail system

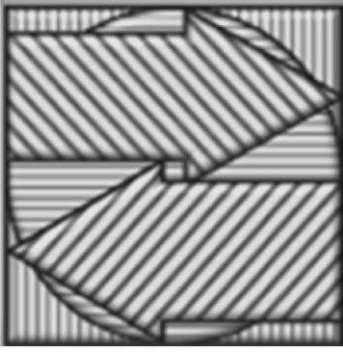
- ... and so on.

When issuing an oral warning, you should make it clear to the employee that it is a disciplinary action. For example, you might say, “This is an oral warning. It is a step in the progressive discipline process.” Such a statement reduces the opportunity for an employee to protest a subsequent, more severe disciplinary action by claiming that there were no previous warnings.

It is important for you to maintain informal documentation of an oral warning, including the employee's name, the date and time, and the infraction. An appropriate place for this documentation is in your supervisory journal or log.

You can also summarize the action in a memo to the employee. Put the memo on paper, not in e-mail. It reinforces the importance of correcting the problem and provides additional documentation. This documentation remains informal.

Even with an informal disciplinary action, make it clear to the employee that it is a step in the disciplinary process



what are formal disciplinary actions?

These sections contain examples of infractions that may merit formal disciplinary action. The action you take will depend on the circumstances of each situation

formal disciplinary actions

Formal disciplinary actions are management procedures designed to correct employee conduct. In general, you use them when informal measures have failed to produce the desired change in behavior. However, some serious infractions may warrant formal discipline on the first occurrence.

In order of severity, formal disciplinary actions include ...

- written warning
- suspension without pay
- disciplinary demotion
- discharge

Any formal disciplinary action requires **written notice** to the employee. The section on due

process in this guide describes in detail what the notice must contain. Each of the sections that follow includes one or more examples of written notice.

Whenever possible, a meeting between the supervisor and the employee should be part of any disciplinary action. Such a meeting has two purposes: 1) it communicates to the employee how serious the situation is, and 2) it provides an opportunity to answer any questions the employee may have.

A later section in this guide contains some pointers for conducting effective meetings with employees.

written warning

A written warning is a step in progressive discipline and the first among formal disciplinary actions. It notifies an employee of unsatisfactory performance or conduct. It also communicates improvement you expect from the employee. Another way of describing this step is “formal reminder.”

As the name implies, a written warning informs the employee of the consequences, should he or she fail to improve or correct the behavior in question.

When an oral warning fails to produce the desired changes in employee behavior, the supervisor should issue a written warning. However, some infractions may warrant a written warning on the first occurrence. Examples of such infractions may include ...

- safety violations that pose an imminent threat of injury
- inappropriate use of internet
- assault (no physical contact or weapon) on a co-worker

continued on page 16



example of a written warning

Subject: Warning for Absence Without Approved Leave

Date: May 20, 2013

Dear Mr. Doe:

On May 18, 2013, in my office, I discussed with you an unauthorized three-day absence. You were absent on May 11, 12, and 13, 2013, without permission or adequate justification. You have been informed that if you are ill, or if an emergency prevents you from reporting to work, you must call me before 8:30 a.m. on the day of your absence. With this occurrence, you did not call me until 10:15 a.m. on Friday, May 14.

You received an oral warning on March 5, 2013, about taking time off without my approval in advance. At that time, I told you that you must have approval three days in advance of the absence, except in situations of illness or emergency described above.

I am hereby formally warning you that future unauthorized absence may result in additional disciplinary action, up to and possibly including discharge. A copy of this letter will be placed in your personnel file.

You will correct this problem by following the procedures stated in paragraphs 1 and 2 of this letter.

You may provide a written response to this warning. *[If the employee is in a collective bargaining unit, explain whether the action is grievable under the union contract.]*

The Employee Assistance Program, offered by, is available to you. If you wish to use the service for any reason, contact the Health Care and Benefits Division.

Sincerely,

Gene Jackson, Bureau Chief

(Your signature acknowledges that you have had the chance to review and comment on this notice – not that you necessarily agree with it.)

the just cause

***documentation
(exact dates, times,
previous discipline,
etc.)***

***statement of
discipline***

how to correct

notice of rights

***employee assistance
reminder***

employee may sign

Employee's signature

date

written warning
(continued)

- insubordination
- ... and so on

A written warning must include the same elements as all other written disciplinary notices:

1. the just cause,
2. the disciplinary action,
3. the consequences of failure to improve or correct behavior,
4. notice of right to respond, and
5. space for the employee's signature

The example on the previous page shows the written warning

as a letter to the employee. You may also use the Written Warning form (see appendix). If you complete that form accurately, you fulfill all the necessary requirements for a written warning. You can get the form from your human resources officer.

In the example here – and all the other examples of formal disciplinary notices in this section – the far left column provides labels for the elements of the notice. These labels help explain the document; they wouldn't be part of an actual notice to the employee.

suspension without pay

A suspension without pay is an unpaid leave of absence ordered by management. It requires the employee to remain off the job for a specified period of time.

Imposing a suspension without pay represents a formal action taken against the employee's behavior. Because the action is formal, the supervisor must show just cause, due process, and adequate documentation.

Suspension without pay is a serious step in progressive discipline. If a written warning fails to produce the desired change in behavior, the agency may impose a suspension.

However, some infractions may warrant a suspension on the first occurrence. Examples of infractions may include ...

- false or defamatory public statements about an employee or the agency

- divulging confidential agency information
- sexual harassment
- physical fighting on the job
- gross insubordination
- ... and so on.

Imposing a suspension may take one of two forms:

1. a written suspension issued to the employee in a disciplinary meeting, or
2. a verbal suspension issued to the employee at the time of the infraction (followed by written notice).

You should verbally suspend an employee only when the situation demands it — that is, when you think it is necessary to remove the employee immediately from the work environment. Such necessity may arise from a fight, gross insubordination, or some other situation where a “cooling off” period is desirable.

You should verbally suspend an employee only when you think it is necessary to remove the employee from the work setting

continued on page 18

exempt employees and suspension without pay

Changes in federal regulations allow suspending an exempt employee for less than one week.

The State has amended its policy to be in line with federal regulations

Over the last few years, the rules have changed on suspending employees who are exempt under the Fair Labor Standards Act.

You may suspend an “exempt employee” for less than a full work-week. That means the suspension could run for one to four days without imperiling the employee’s exempt status.

An exempt employee is a “salaried employee” who earns hour-for-hour compensatory time for extra time worked. A nonexempt employee is an “hourly employee” who earns time-and-a-half overtime pay or compensatory time.

Changes in the rules benefit managers when deciding on an appropriate disciplinary measure. A five-day suspension without pay may be too harsh. A two-day suspension may be an appropriate consequence. Managers now have the freedom to decide on length of suspension without fearing loss of exempt status for the employee.

**administrative leave
(sometimes called suspension with pay)**

Administrative leave is **not** a disciplinary action. It's a tool that allows managers to conduct a thorough and orderly investigation. The investigation may result in a disciplinary action, but that action is separate from the administrative leave. A term people sometimes use for this process is “suspension with pay.”

By giving the employee normal pay and benefits, management prevents undue harm to the employee. It's a small price to pay to ensure a fair and orderly process.

Administrative leave can serve any of several purposes:

- preserving evidence
- interviewing others without interference or intimidation
- a “cooling off” period when the conduct has been threatening or disruptive
- protecting clients or other employees from harm

During an administrative leave, the employee is still “on duty” during his or her regular shift. The employee needs to be available to the agency, mostly for interviews and other activities associated with the investigation.

Work closely with management and the Human Resources Office to use administrative leave. This includes providing proper notice in writing to the employee about the nature and reason for the leave.

suspension without pay (continued)

When verbally suspending an employee, make the action clear: “You are suspended without pay and are to leave work immediately.” A **written notice** of suspension must follow as soon as possible.

Your investigation after a verbal suspension may reveal facts that exonerate the employee or mitigate the discipline. In such a case, the suspension ends, and the employee receives pay and benefits for the time away from the job.

Another possibility is to suspend the employee *with* pay, pending investigation. See the section on administrative leave, page 17.

In all cases of suspension without pay, the written notice must include the same elements as all other written disciplinary notices:

1. the just cause,
2. the disciplinary action,
3. the consequences of failure,
4. notice of grievance rights, and

5. space for the employee's signature.

An employee who is suspended without pay may not use any accrued leave or compensatory time during the suspension. Holiday pay takes place in accordance with the rule on holidays.

The duration of the suspension might interrupt the state's share of benefit contributions for the employee. Consult with your human resources officer about the effect on benefits before drafting the suspension notice.

Employees exempt under fair labor standards are also subject to suspension without pay. See the section on this topic on page 17.

The following page illustrates the written notification of suspension without pay. The far left column provides labels for the elements of the notice. These labels help explain the document; they wouldn't be part of an actual notice to the employee.

disciplinary demotion

A disciplinary demotion is a formal action involving reassignment of an employee. The employee is removed from his or her current position and put in a position with reduced responsibilities. A demotion may result in reduced pay.

Disciplinary demotion is most commonly used as a way of resolving a chronic performance problem. It is seldom applied to a conduct problem.

As with other formal disciplinary actions, imposing a demotion requires **written notice** to the employee, containing all the elements previously discussed. You

must work closely with your agency human resources officer to accomplish a disciplinary demotion. Because the action also may affect the employee's salary, it must be administered carefully. Your human resources officer can discuss the process with you.

Page 20 shows the written notification of disciplinary demotion. The far left column provides labels for the elements of the notice. These labels help explain the document; they wouldn't be part of an actual notice to the employee.



example of a suspension without pay notice

Subject: Suspension Without Pay

Date: March 19, 2013

Dear Mr. Wilson:

statement of discipline

This letter is to inform you that you are suspended without pay for the dates March 22 and March 23, 2013. Your suspension begins at 8 a.m., March 22, and ends at 5 p.m., March 23. You will report back to work at 8 a.m. on Wednesday, March 24, 2013.

the just cause and documentation (exact date, time, description of behavior)

This disciplinary action is based on an incident on March 18, 2013, at 3:20 p.m., in which three witnesses saw you involved in an argument with Dave Sloan. During the incident, you used profane and abusive language toward Sloan and shoved Sloan. Verbal and physical assault of this nature is totally unacceptable in the work place.

how to correct

If, in the future, you have problems or disagreements with your fellow employees at work, you will bring the problem directly to me to resolve. You are prohibited from any use of abusive or profane language and from any physical abuse of coworkers. Any further incident of this nature may result in discharge from this agency.

consequence of failure to correct

notice of rights

You may provide a written response to this notice. You may also file a grievance in accordance with ARM 2.21.8010 et seq. *[The rules apply to non-union employees. If the employee is in a collective bargaining unit, cite the grievance section in the union contract.]*

employee assistance reminder

The Employee Assistance Program, offered by, is available to you. If you wish to use the service for any reason, contact the Health Care and Benefits Division.

Sincerely,

Fred Smith
Division Administrator

(Your signature acknowledges that you have had the chance to review and comment on this notice – not that you necessarily agree with it.)

employee may sign

Employee's signature

date



example of a disciplinary demotion notice

Subject: Disciplinary Demotion

Date: July 22, 2013

Dear Ms. Jacobson:

the just cause and documentation (exact date, time, description of behavior)

On July 17, 2013, four of your co-workers and your supervisor witnessed you yelling at a client and threatening to “take him out in the parking lot and kick his ass.” This is a serious breach of the agency’s policy against violence in the workplace. The policy prohibits using abusive or physically threatening language with our clients or your co-workers.

You have previously been warned about this type of behavior. On July 15, 2013, three co-workers reported hearing you “yell” profane language at a client at the customer service counter. At that time, I gave you a written warning that the agency would not tolerate additional occurrences of verbally abusing or threatening clients or co-workers. The written warning also advised you any additional behavior of this nature could result in disciplinary action up to and including discharge.

consequence of failure to correct

Any future violation of this policy may result in your discharge. However, we realize you are a long-term agency employee. At this time, have decided to take a less severe disciplinary action than discharge.

statement of discipline

Effective July 23, 2013, you are demoted to Clerk (position no. 111222), pay band 3, in this division. As provided in Pay Plan Rules, your compensation will be adjusted to reflect the market ratio at the lower band. Your hours of work will be 8:00 a.m. to 5:00 p.m., Monday through Friday. Your immediate supervisor will be Susan Jrsuski, the clerical unit supervisor.

notice of rights

You may provide a written response to this disciplinary demotion. You may also file a grievance in accordance with ARM 2.21.8010. *[These rules apply to non-union employees. If the employee is in a collective bargaining unit, cite the grievance section in the union contract.]*

employee assistance reminder

The Employee Assistance Program, offered by, is available to you. If you wish to use the service for any reason, contact the Health Care and Benefits Division.

Sincerely,

Fred Smith
Division Administrator

(Your signature acknowledges that you have had the chance to review and comment on this notice — not that you necessarily agree with it.)

employee may sign

Employee's signature

date

discharge

You should obtain unified agency approval before deciding to discharge an employee

Discharge means an employee is fired for just cause. Because it is the ultimate discipline, you must give thorough consideration to all aspects of a case before recommending discharge. When discharge is necessary, you should consult with your supervisors, human resources officer, agency legal staff, and other appropriate people to obtain a unified approval for the action.

Within the progressive disciplinary process, discharge is, of course, the final step. It is appropriate when other disciplinary actions have failed to resolve a conduct or performance problem that directly affects the unit operations.

In addition, some infractions are so serious that they warrant discharge on the first occurrence, pending your investigation. Examples of such infractions may include ...

- theft of state or employee property,
- unauthorized possession of firearms on the job,
- assault with a dangerous weapon against another employee,
- vandalism of state property,
- deliberate sabotage or falsification of records,
- ... and so on.

In establishing just cause, you must conduct a thorough investigation into the case. The evidence should leave no doubt about 1) the employee's responsibility for the offense, and 2) the employee's prior knowledge of the rules or policies prohibiting the offense.

When the decision to discharge has been made, you and other agency managers will draft a letter of discharge, containing these elements:

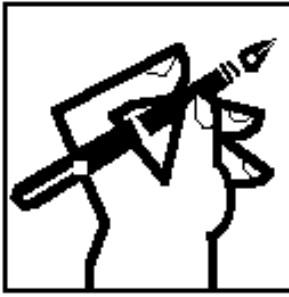
1. the statement of discharge,
2. the just cause for the action,
3. documentation of just cause,
4. notice of due process rights,
5. an attached copy of the state grievance policy

As a part of the discharge process, you should meet with the employee, if at all possible. The meeting serves two purposes: 1) it clearly communicates the fact of the discharge to the employee, and 2) it provides an opportunity to inform the employee of his or her due process rights and to answer questions about them.

A good practice is to have another authority present, such as your supervisor or human resources officer. This person will be able to provide additional information in any proceeding arising from a challenge to the discharge.

In this situation, an employee may become upset. Don't allow his or her emotions to dominate or control the meeting. You must maintain your focus on the fact of the discharge, the reasons for it (as stated in the letter), and due process rights. Any other statements are inappropriate, and they may be used against you in a challenge proceeding.

The next page gives an example of a discharge letter. The far left column provides labels for the elements of the notice. These labels help explain the document; they wouldn't be part of an actual notice to the employee.



example of a discharge letter

Date: December 10, 2013

Dear Mr. Doe:

This letter is to inform you that you are discharged from your position as Accountant III with this agency as of 5 p.m. today, December 10, 2013. This action is based on your failure to follow the rules and procedures regarding leave of absence. Your disregard for the rules has been evident continually during your employment, specifically as follows:

1. In your first year of employment, you received two coaching sessions and an oral warning about your failure to request leave in advance and your failure to contact your supervisor directly when you unexpectedly took a leave of absence. You were instructed during each of these sessions to request all annual leave at least three days in advance and to personally contact your bureau chief, Gene Jackson, when you took an unanticipated sick leave day.
2. Mr. Jackson met with you on May 18, 2013, to discuss a three-day unapproved absence. You received a written warning as a result of this meeting.
3. On September 8 and 9, 2013, you again failed to appear for work and did not contact Mr. Jackson. You were suspended without pay for the two days you did not appear and for two additional days.
4. On December 2 and 3, 2013, you again failed to appear for work and did not contact Mr. Jackson.
5. On December 6, 2013, you met with Human Resources Officer Gene Blond from 3 p.m. to 3:46 p.m. Mr. Blond presented these facts to you and offered you the opportunity to respond. Your response gave us no new information that would indicate against discharge.

You have received extensive notice of this problem and what you were expected to do to correct the problem. You have repeatedly failed to comply with the directions of your supervisor regarding use of leave, and your absences have disrupted the operations of your bureau. For these reasons, we are discharging you.

You may provide a written response to this letter. You may also file a grievance in accordance with ARM 2.21.8010 et seq. A copy of these rules is attached, in compliance with 39-2-911, MCA. *[The policy applies only to non-union employees. If the employee is in a collective bargaining unit, cite the grievance section in the union contract.]*

We will mail your final paycheck to you.

Sincerely,

Fred Smith, Division Administrator

**statement of
discharge**

**documentation
(exact dates, times,
previous discipline,
etc)**

**“Loudermill” due
process meeting**

the just cause

notice of rights

the wrongful discharge from employment act

The 1987 Legislature enacted the Wrongful Discharge from Employment Act to set forth specific rights and remedies with regard to wrongful discharge. The Act took effect July 1, 1987.

In passing the law, the legislature preempted common law actions that had previously been available to discharged employees. Such tort claims had included the torts of wrongful discharge, breach of the covenant of good faith and fair dealing, and negligence.

In place of these varied and often confusing causes of action, the legislature carved out three situations in which a discharge is wrongful:

1. as a retaliation against the employee for refusing to violate public policy or for reporting a violation of public policy,
2. when the discharge was not for good cause, provided the employee had completed the employer's probationary period,
3. when the employer violated the express provisions of its own written personnel policy.

The law also changed the statute of limitations — the period of time a claim must be filed — to one year from the date of discharge. Previously, tort claims could be filed within a three-year period.

The statute of limitations places other, specific obligations on the employer and employee. If the employer has a written grievance policy, as the state does, the employee must first exhaust the grievance process before filing a

wrongful discharge lawsuit. (“Exhaust” means going through the process to its final stage.)

However, the employee must exhaust the process **only** if the employer informs the employee that the grievance procedure is available. This must take place within seven days of the date of discharge, and the employee must receive a copy of the procedure.

Finally, if the employee files a grievance, the employer must ensure that the process is completed within 90 days. After that period, the law deems the grievance exhausted, and the employee may go to court.

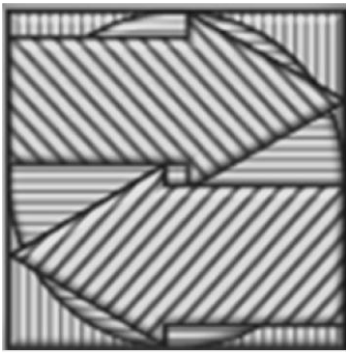
It is important for employers to follow this procedure precisely. Be sure to discuss it thoroughly with your human resources officer and legal staff before taking any action to discharge an employee.

The Act also provides two major **exemptions** — situations not covered under the Act:

1. a discharge that has any other remedy available under state or federal law. (For example, a discrimination claim is covered under the Montana Human Rights Act or Title VII of the federal Civil Rights Act.)
2. a discharge of an employee covered by a collective bargaining act. (Under most circumstances, union employees may not file claims under this Act.)

A summary of Montana Supreme Court cases dealing with wrongful discharge is available from the State Human Resources Division. Several decisions have interpreted provisions of the Act.

The legislature carved out three situations in which a discharge is wrongful



what is the purpose of a disciplinary meeting?

conducting disciplinary meetings

It makes little sense to conduct a disciplinary meeting merely for the sake of a meeting. The meeting should have a purpose.

One important reason for meeting with the employee concerns your role as a supervisor. A well conducted meeting communicates to the employee that you take the problem seriously and want to deal with it head-on. Dealing with a disciplinary problem merely through memos or formal notices can reduce your personal effectiveness as a supervisor. It may give the impression that you are “hiding behind paper.”

In conducting a meeting, you should strive to achieve four major objectives:

1. to ensure the employee understands the rule or policy that he or she has violated,
2. to get agreement on the existence of the problem and the need to correct it,
3. to work with the employee in developing a plan for improving his or her behavior,
4. to establish a schedule for reviewing the employee's progress in correcting the problem.

Also keep in mind two important goals: you want to **resolve the problem** and **preserved the relationship**. Maintaining the balance means treating the employee with respect.

how do I prepare for a meeting?

If you are badly prepared for a disciplinary meeting, it may have little effect on the employee's behavior. In fact, it can backfire on you, resulting in a more serious problem than before.

First, make sure your emotions are not governing your actions. An employee's conduct might make you angry. Whenever possible, let your anger subside so that you can deal with the problem calmly and objectively. If this means putting off the meeting until the next day, so be it —

provided the problem behavior doesn't present a threatening or unsafe condition.

Second, give some thought to the timing of the meeting. Often, a natural impulse is to hold a meeting at the end of the day. This increases the probability that the employee will “take the problem home” and stew or fret about it. If you hold the meeting near the beginning of the work day, you and the employee can focus on solving the problem and then return to normal work activities.

Make sure your emotions are not governing your actions

how do I prepare for a meeting? (continued)

Base your preparation on what you know, avoiding assumptions or jumping to conclusions

Third, think about how you will present the problem to the employee. You should be ready to do the following things:

1. clearly describe the **problem** in terms of the employee's behavior.
2. pinpoint the **information** that shows the employee's responsibility for the problem.
3. cite the **rule, policy, or standard** that prohibits the behavior, as well as the **reasons** behind the rule or policy.
4. define the **results** you expect from the meeting — what

changes you expect from the employee to correct or improve the behavior and what the appropriate behavior is.

Fourth, be prepared to listen. Decide what you will say based on what you *know for sure* about the situation. Avoid assuming or jumping to conclusions — the meeting offers the opportunity for the employee to “fill in” any missing information.

Fifth, be prepared to advise the employee about the Employee Assistance Program. It's a good idea to give this information in *every* disciplinary meeting. For more on employee assistance, see the later section on this topic.

any additional preparation pointers?

Always plan to conduct a disciplinary meeting in private

Arrange for the meeting to be conducted in a **private place**. You don't want the employee to feel that he or she is being disciplined in front of his or her co-workers.

Your office may seem a convenient place to hold the meeting, but it has its drawbacks. First, it may be hard to prevent interruptions there. Second, you may find it difficult to end the meeting on your own terms — when the time comes, do you kick the employee out of your office?

You should meet with the employee in his or her office, if privacy can be assured, or in a neutral, private place, such as an available conference room. There will be fewer things to distract you from the purpose of the meeting. And you will be able to end the meeting without embarrassment or discomfort to the employee.

It's also important to schedule **ample time** for the meeting. Under the pressure of limited time, you are **unlikely** to achieve the best solution or agreement.

If you are taking formal disciplinary action against the employee, you may want to have the **written notification** ready before the meeting. Or you may want to prepare the notice afterward, based on the results of the meeting. In the latter case, **Weingarten rights** would apply for union employees (see next page).

Lastly, advise your own **supervisor** of the need for the meeting. You might also get feedback and suggestions from your human resources officer. Explain the details of the situation and your intended course of action. You should inform your boss at each step of the disciplinary process.

what about the meeting itself?

A primary objective of the meeting is to get the employee to accept responsibility for his or her behavior and for the change that must occur

If you complete all the steps listed above, you should be well prepared to conduct the disciplinary meeting. That doesn't guarantee that it will be easy, though — few disciplinary situations are. The following tips will help you get results from the meeting.

1. Get right to the point. Explain the purpose of the meeting and present your viewpoint of the problem. Give the reasons why the employee must correct the problem.
 2. Allow the employee to present his or her response. You can keep control of the interview by asking open-ended questions (requiring more than a “yes” or “no” answer), repeating key points the employee makes, and maintaining focus on the problem.
 3. Keep in mind that a primary objective of the meeting is to get the employee to accept re-
4. Keep the interview on a professional level. The focus must remain on job-related behaviors and not aspects of personality, attitude, or personal issues. It is important that you stay calm and objective, even if the employee does not.
 5. Steer the meeting toward the results you expect. The meeting should end with a clear understanding of the required change in the employee's behavior, an agreed deadline for improvement, and, if appropriate, a written plan of action.
 6. If you give the employee a written notice of formal disciplinary action during the meeting, request his or her signature, showing that the employee has received and reviewed the notice.

what does “Weingarten” mean?

In June 2004, the National Labor Relations Board restricted these rights to union employees

“Weingarten” refers to a U.S. Supreme Court decision in 1975, *National Labor Relations Board v. J. Weingarten, Inc.* In that decision, the court ruled that a union member has the right to request having a union representative present in an investigatory interview when the employee reasonably believes that disciplinary action could result.

In June 2004, the National Labor Relations Board restricted these rights to union employees. The case was *IBM Corporation*. The NLRB had ruled in 2000 (*Epilepsy Foundation of Northeast Ohio*) that a nonunion employee had

responsibility for his or her behavior — and for the necessary change.

4. Keep the interview on a professional level. The focus must remain on job-related behaviors and not aspects of personality, attitude, or personal issues. It is important that you stay calm and objective, even if the employee does not.
5. Steer the meeting toward the results you expect. The meeting should end with a clear understanding of the required change in the employee's behavior, an agreed deadline for improvement, and, if appropriate, a written plan of action.
6. If you give the employee a written notice of formal disciplinary action during the meeting, request his or her signature, showing that the employee has received and reviewed the notice.

the right to request having a co-worker present during an investigatory interview if the employee reasonably believed that disciplinary action could result.

The *IBM* decision overturned the right for nonunion employees. Anyone supervising employees in a collective bargaining unit should be aware of the rights and requirements imposed by *Weingarten*.

A number of NLRB and court decisions have defined employees' rights, and they come down to this:

**what does
“Weingarten”
mean?**
(continued)

**More information on
Weingarten rights is
available from the
State Office of Labor
Relations;
call 444-3885**

1. the employee may have a union representative present at an interview that the employee reasonably believes may result in disciplinary action for him or her.
 - If the employer has already decided on disciplinary action, and the interview is only to inform the employee of the action, the right does not apply;
 - If the employer is gathering information with no intention of disciplining the particular employee, the right does not apply;
 - The important factor is how the employee perceives the meeting.
 - The employee's request doesn't need to be very specific. Listen for any indication that the employee would like to have a union representative at the meeting.
2. the employee may consult with the representative before the meeting.
 - This also means the employee must be told what you're investigating. Let him or her know.
 - You don't have to postpone the interview to let the employee consult with a private attorney.
3. the employee may request an alternative representative if the first choice is unavailable.
 - Management need not postpone the interview if management is not responsible for the first choice being unavailable.
 - Management is not obliged to suggest or obtain an alternate representative.

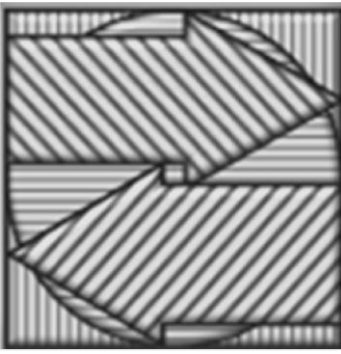
You should consider the following limitations and guidelines before holding an investigatory meeting.

- *Weingarten* applies only when the purpose of the interview is **investigatory**, that is, to gather information that may result in

discipline (but the burden of proof is on management to show that *Weingarten* doesn't apply).

- *Weingarten* applies only when **formal disciplinary action** is probable.
- the **employee must request** representation; management is not obliged to inform the employee of that right.
- management has **no obligation to negotiate** with the union representative during the interview. The representative may take part in the interview, but may not disrupt it.
- management must grant an employee's request for **time to consult** with the representative prior to the interview.
- violation of the employee's right to representation may **invalidate** any disciplinary action or result in an **unfair labor practice** charge.
- management is **not required to conduct** any interview with the employee's representative or co-worker present.
 - management may decide to discontinue or not hold the interview at all.
 - management may give the employee the choice of having the interview without a representative or not having an interview at all.

The *IBM* case represents a third reversal by the NLRB. If you have any doubts about an investigatory meeting, **check with your human resources office.**



employee assistance

what is employee assistance?

The state's health insurance usually pays more for treatment if the employee first goes through the employee assistance program

“Employee assistance” means an effort by management to guide an employee toward help for a personal problem. The expected benefit of employee assistance is that the employee's conduct or performance will return to an acceptable level.

The state provides employee assistance through the Health Care and Benefits Division, Department of Administration. The program covers several services. Call the division or go to benefits.mt.gov.

Employee assistance is a tool you and the employee can use in conjunction with discipline or other

corrective actions. You may suggest employee assistance at any stage of the disciplinary process. Participation in employee assistance is generally not mandatory, but it can help an employee resolve a problem at work or home. At the same time, it's not a substitute for improvement.

Even if you aren't aware of a personal problem affecting the employee's behavior, you may want to routinely suggest employee assistance during a disciplinary meeting as a possible source of help. For an example, see the last paragraphs of the documents on pages 15, 19, and 20.

what do you mean by “personal problems”?

Don't try to diagnose personal problems – it's not in your job description

The line that separates our personal and professional “lives” is a convenient illusion. In reality, home and work are deeply intertwined in everyone's life. A problem at work can greatly affect one's home life, and vice versa.

It is beyond the supervisor's scope of authority to act as a psychologist, marriage counselor, physician, or social worker. As a supervisor, you must be concerned with the work. You should never try to diagnose a medical or personal problem. You must focus only on the employee's performance or conduct at work.

A supervisor who is effective at disciplinary counseling works

with the employee to analyze the causes of a conduct or performance problem. Sometimes, the problem at work stems from a problem in the employee's personal life or health. “Personal problems” may include any of the following areas:

- alcohol or drug dependency
- marital estrangement, separation, or divorce
- financial hardship
- stress and anxiety
- illness or death of a relative
- other health concerns

You might learn that the employee's problems stem from a physical or mental disability that affects his or her ability to do the

**what do you mean
by “personal
problems”?**
(continued)

job. You must then work with the employee to determine whether a reasonable accommodation will allow the employee to perform the essential functions of the job. The employee doesn't have to ask for an accommodation if you have enough information to tell that the employee is a qualified individual with a disability.

A reasonable accommodation is any modification in the job or work environment that allows the employee to perform the essential job duties. A reasonable accommodation fact sheet is available from the State Human Resources Division. The guide provides resources on reasonable accommodation.

**how do I
approach
employee
assistance?**

Under most circumstances, you can't order an employee to seek employee assistance as a condition of employment. Employees may voluntarily seek assistance, but their involvement in counseling or another program does not excuse substandard conduct or performance.

It's not your role to diagnose a personal problem, however strong your suspicions may be. Avoid statements like, “You have a drinking problem, and it's interfering with your work.” On one hand, you may be wrong. On the other hand, even if you're right, the employee will likely become defensive and deny there's a problem.

***It's up to the
employee to
acknowledge that a
personal problem
exists***

You may find it difficult to even mention the possibility that a personal problem is affecting the employee's work behavior. Disclosing a medical condition may also be difficult for many employees.

In discussing a performance or conduct problem, you may say, “If you feel you have a personal problem that contributes to your problems at work, we suggest you contact the employee assistance program.” It's the employee's choice to say if such a problem exists.

It's best if the employee brings up the subject, but people are often reluctant to discuss or acknowledge their personal problems. Some employees may choose to contact the employee assistance program without telling their boss.

The state's employee assistance program provides the gateway to helpful resources. The employee can get crisis counseling and free services from in-network providers.

If the employee lets you know a personal problem underlies the work problem, you can mention employee assistance as an option. If the employee volunteers that a disability underlies the work problem, you must work with the employee to determine whether the agency can provide a reasonable accommodation. However, if you suspect the employee has a personal or medical problem, yet the employee says nothing about it, your role is limited.

You are also welcome to contact the employee assistance program for counseling resources that can help you supervise more effectively.

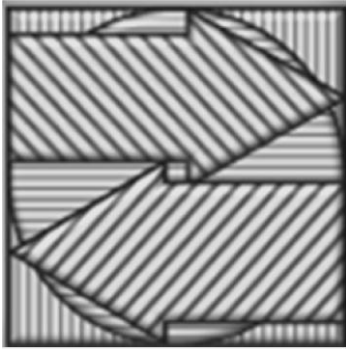
If you refer an employee to the state's program, document the referral during each stage of the disciplinary process.

what should I do?

- Make sure all employees are informed about and understand what is expected with regard to performance and conduct.
- Be alert, through continual observation, to any changes in work or behavior patterns of your employees.
- Document all unacceptable behavior, attendance, or performance that falls below established standards.
- Consult with your human resources officer to get help in determining a course of action.
- Discuss deteriorating work performance or conduct with the employee. Express your concern. Stress that the employee's job could be in jeopardy unless behavior improves.
- Monitor the employee's performance and conduct. If the deterioration continues, refer the employee to assistance, if appropriate. Explain that the employee is responsible for seeking assistance.
- Be aware that an employee with a chemical dependency, emotional problem, or medical problem will often deny there is a problem that he or she can't handle alone. This requires that you keep your focus on the necessary work improvement, rather than battling a problem you can't solve.
- Keep an eye on performance and conduct. Promptly deal with any further problems. Referral to assistance does not excuse poor performance or inappropriate conduct.

what should I avoid?

- Don't try to diagnose the problem. Stick to job performance and conduct. Don't moralize.
- Avoid debating with an employee about the existence of a personal problem.
- Don't try to help an employee to solve a personal problem. It's not your business.
- Don't avoid openly communicating with the employee about the problem. Avoiding dealing with a problem is not a solution.
- Avoid discharging a previously satisfactory employee without first considering employee assistance.
- Don't try to protect an employee or cover for his or her problem.
- Don't allow the employee to play on your sympathy. This is frequently a tactic to avoid facing a problem and the need to correct it.



what are my resources?

We don't expect this brief guide to answer every question you might have about discipline. Nor will it help you deal with every situation that arises. As a supervisor, you should know about and make use of the various resources available to you.

The best source of information on disciplinary rules and procedures is your agency **human resources officer**. He or she is there to consult with you and provide technical assistance. If you have any questions about what to do, talk with the human resources officer before taking action.

what training and other resources are available?

The **Professional Development Center (PDC)** offers several management training courses. Many of them relate directly or indirectly to discipline.

The PDC regularly offers these topics:

- disciplinary procedure
- documenting discipline
- performance management
- supervising performance improvement
- wrongful discharge
- managing conflict

You can obtain information on these courses through your human resources officer or by contacting the PDC (444-3871). Also

watch for regular course announcements by poster and e-mail.

In addition, the PDC can arrange to conduct the training specifically for your agency, or it can design a course to cover a given topic for your agency's supervisors. Contact the PDC Director (444-2607) for more information about these services.

You should also refer to state policies on discipline and related areas. The following rules and policies may be pertinent:

- discipline (ARM 2.21.6501 et seq)
- employee records management (ARM 2.21.6601 et seq)

Call the Professional Development Center at 444-3871

Guides are available; call 444-3871 or go to the State Human Resources web site: <http://hr.mt.gov>

- grievances (ARM 2.21.8010 et seq)
- probation requirements
- performance management

All policies and rules are available at mom.mt.gov. Under “categories,” click on “Human Resources / Employee benefits.”

Your department may have adopted its own policies covering these areas. MOM policies and ARM rules set minimum standards, and each department has the option of adopting separate policies, as long as they meet the standards set in MOM or ARM. Check to see if your department has its own policies. If so, read them thoroughly.

The State Human Resources Division provides guides on sick leave, reasonable accommodation, employee assistance, and performance appraisal. You can get any of these guides by calling 444-3871 or visit <http://hr.mt.gov>.

If you supervise members of a bargaining unit, be sure you are

familiar with the terms of the union contract. Many contracts contain provisions regarding discipline and related matters. Contract provisions take precedence over MOM or departmental policy.

The state's employee assistance runs through the Health Care and Benefits Division. You can get information by contacting the division. You can get access to a lot of health information and other resources at HCBBD’s web site. (See address in left column.)

Employees should be aware that the State's health insurance provides some coverage for counseling and treatment of most personal problems. The coverage is greater when the treatment is obtained through the Employee Assistance Program.

Finally, a summary of Montana Supreme Court cases dealing with wrongful and unlawful discharge is available. Contact the PDC (444-3871) to get more information.

Direct questions about employee assistance to the Health Care and Benefits Division ...

benefits.mt.gov

Click on the appropriate link to get EAP information.

MOM policies and ARM rules are available at <http://mom.mt.gov>. Guides and other resources are available at the State Human Resources Division web site: <http://hr.mt.gov>

The PDC website is <http://pdc.mt.gov>



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the wrongful discharge from employment act

39-2-901. Short title. This part may be cited as the "Wrongful Discharge from Employment Act."

39-2-902. Purpose. This part sets forth certain rights and remedies with respect to wrongful discharge. Except as provided in 39-2-912, this part provides the exclusive remedy for a wrongful discharge from employment.

39-2-903. Definitions. In this part, the following definitions apply:

(1) "Constructive discharge" means the voluntary termination of employment by an employee because of a situation created by an act or omission of the employer which an objective, reasonable person would find so intolerable that voluntary termination is the only reasonable alternative. Constructive discharge does not mean voluntary termination because of an employer's refusal to promote the employee or improve wages, responsibilities, or other terms and conditions of employment.

(2) "Discharge" includes a constructive discharge as defined in subsection (1) and any other termination of employment, including resignation, elimination of the job, layoff for lack of work, failure to recall or rehire, and any other cutback in the number of employees for a legitimate business reason.

(3) "Employee" means a person who works for another for hire. The term does not include a person who is an independent contractor.

(4) "Fringe benefits" means the value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination.

(5) "Good cause" means reasonable, job-related grounds for dismissal based on a failure to satisfactorily perform job duties, disruption of the employer's operation, or other legitimate business reason. The legal use of a lawful product by an individual off the employer's premises during nonworking hours is not a legitimate business reason, unless the employer acts within the provisions of 39-2-313(3) or (4).

(6) "Lost wages" means the gross amount of wages that would have been reported to the internal revenue service as gross income on Form W-2 and in-

cludes additional compensation deferred at the option of the employee.

(7) "Public policy" means a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by constitutional provision, statute, or administrative rule.

39-2-904. Elements of wrongful discharge -- presumptive probationary period. (1) A discharge is wrongful only if:

(a) it was in retaliation for the employee's refusal to violate public policy or for reporting a violation of public policy;

(b) the discharge was not for good cause and the employee had completed the employer's probationary period of employment; or

(c) the employer violated the express provisions of its own written personnel policy.

(2) (a) During a probationary period of employment, the employment may be terminated at the will of either the employer or the employee on notice to the other for any reason or for no reason.

(b) If an employer does not establish a specific probationary period or provide that there is no probationary period prior to or at the time of hire, there is a probationary period of 6 months from the date of hire.

39-2-905. Remedies. (1) If an employer has committed a wrongful discharge, the employee may be awarded lost wages and fringe benefits for a period not to exceed 4 years from the date of discharge, together with interest thereon. Interim earnings, including amounts the employee could have earned with reasonable diligence, must be deducted from the amount awarded for lost wages. Before interim earnings are deducted from lost wages, there must be deducted from the interim earnings any reasonable amounts expended by the employee in searching for, obtaining, or relocating to new employment.

(2) The employee may recover punitive damages otherwise allowed by law if it is established by clear and convincing evidence that the employer engaged in actual fraud or actual malice in the discharge of the employee in violation of 39-9-904(1)(a).

(3) There is no right under any legal theory to damages for wrongful discharge

under this part for pain and suffering, emotional distress, compensatory damages, punitive damages, or any other form of damages except as provided for in subsections (1) and (2). [see 27-1-221, MCA, regarding “actual fraud” and “actual malice.”]

39-2-906 through 39-2-910 reserved.

39-2-911. Limitation of actions. An action under this part must be filed within 1 year after the date of discharge.

(2) If an employer maintains written internal procedures, other than those specified in 39-2-912, under which an employee may appeal a discharge within the organizational structure of the employer, the employee shall first exhaust those procedures prior to filing an action under this part. The employee’s failure to initiate or exhaust available internal procedures is a defense to an action brought under this part. If the employer’s internal procedures are not completed within 90 days from the date the employee initiates the internal procedures, the employee may file an action under this part and for purposes of this subsection the employer’s internal procedures are considered exhausted. The limitation period in subsection (1) is tolled until the procedures are exhausted. In no case may the provisions of the employer’s internal procedures extend the limitation period in subsection (1) more than 120 days.

(3) If the employer maintains written internal procedures under which an employee may appeal a discharge within the organizational structure of the employer, the employer shall within 7 days of the date of the discharge notify the discharged employee of the existence of such procedures and shall supply the discharge employee with a copy of them. If the employer fails to comply with this subsection, the discharged employee need not comply with subsection (2).

39-2-912. Exemptions. This part does not apply to a discharge:

(1) that is subject to any other state or federal statute that provides a procedure or remedy for contesting the dispute. The statutes include those that prohibit discharge for filing complaints, charges, or claims with administrative bodies or that prohibit unlawful discrimination based on race, national origin, sex, age, disability, creed, religion, politi-

cal belief, color, marital status, and other similar grounds.

(2) of any employee covered by a written collective bargaining agreement or a written contract of employment for a specific term.

39-2-913. Preemption of common-law remedies. Except as provided in this part, no claim for discharge may arise from tort or express or implied contract.

39-2-914. Arbitration. (1) A party may make a written offer to arbitrate a dispute that otherwise could be adjudicated under this part.

(2) An offer to arbitrate must be in writing and contain the following provisions:

(a) a neutral arbitrator must be selected by mutual agreement or, in the absence of agreement, as provided in 27-5-211.

(b) The arbitration must be governed by the Uniform Arbitration Act, Title 37, chapter 5. If there is a conflict between the Uniform Arbitration Act and this part, this part shall apply.

(c) The arbitrator is bound by this part.

(3) If a complaint is filed under this part, the offer to arbitrate must be made within 60 days after service of the complaint and must be accepted in writing within 30 days after the date the offer is made.

(4) A discharged employee who makes a valid offer to arbitrate that is accepted by the employer and who prevails in such arbitration is entitled to have the arbitrator’s fee and all costs of arbitration paid by the employer.

(5) If a valid offer to arbitrate is made and accepted, arbitration is the exclusive remedy for the wrongful discharge dispute and there is no right to bring or continue a lawsuit under [sections 1 through 8]. The arbitrator’s award is final and binding, subject to review of the arbitrator’s decision under the provisions of the Uniform Arbitration Act.

39-2-915. Effect of Rejection of Offer to Arbitrate. A party who makes a valid offer to arbitrate that is not accepted by the other party and who prevails in an action under this part is entitled as an element of costs to reasonable attorney fees incurred subsequent to the date of the offer.

Coaching

State of Montana

name

title

department

division

bureau

Your performance or conduct needs improvement in the following areas:

(Supervisor – complete before interview; specify exact behavior, plus policies or procedures violated)

You will take the following actions to correct the problem

(Supervisor – complete during the interview)

Time frame for improvement:

We will provide the following assistance to help you accomplish the desired solution (if necessary).

Employee

This form will not be placed in your personnel file. You will receive a copy of this form. If you do not improve or correct the problem as described, further disciplinary action may result.

We will meet to review accomplishments under this plan on _____

Signature of Supervisor

Date

Signature of Employee

Date

Conclusions of review:

additional pages ___ yes ___ no

Written Warning Notice

State of Montana

name

title

department

division

bureau

Just Cause (Supervisor – specify exact times, places, dates, rules violated, previous disciplinary action, etc.)

This written warning is issued for the following reasons:

Correction

To improve or correct this problem, you must:

Time frame for improvement:

Consequences of Failure

If you do not improve or correct the problem as outlined in this notice, further disciplinary action may result, up to and including discharge.

Signature of Management

Date

Notice of Rights

This form will be placed in your personnel file. You will receive a copy of this form. You have the right to respond orally, in writing, or both to this notice. Your response, if written, will be included in your personnel file. Your signature indicates you have received this notice – not necessarily that you agree with its content.

Signature of Employee

Date

complete only if the employee refuses to sign this notice

_____ has received a copy of this written warning notice
employee's name

signature of supervisor _____ date _____

additional pages ___ yes ___ no

Suspension Notice

State of Montana

name

title

department

division

bureau

Notice of Disciplinary Suspension

Your suspension begins on _____ and ends _____. You are expected to return to work on _____

Just Cause (Supervisor – specify exact times, places, dates, rules violated, previous disciplinary action, etc.)
This suspension is issued for the following reasons:

Correction

To improve or correct this problem, you must:

Time frame for improvement:

Consequences of Failure

If you do not improve or correct the problem as outlined in this notice, further disciplinary action may result, up to and including discharge.

Signature of Management

Date

Notice of Rights

This form will be placed in your personnel file. You will receive a copy of this form. You have the right to respond orally, in writing, or both to this interview. Your response, if written, will be included in your personnel file. You may file a grievance based on this disciplinary action. Your signature indicates you have received this notice – not necessarily that you agree with its content.

Signature of Employee

Date

complete only if the employee refuses to sign this notice

_____ has received a copy of this suspension notice

employee's name

signature of supervisor _____ date _____

additional pages ___ yes ___ no