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EMPLOYEE PERFORMANCE MANAGEMENT: EMPLOYEE DISCIPLINE AND PERFORMANCE IMPROVEMENT PLANS

MINNESOTA COUNTIES INTERGOVERNMENTAL TRUST

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SECTION I
DRAFTING A PERFORMANCE IMPROVEMENT PLAN

I. Performance Improvement Plan

A. When to Issue a Performance Improvement Plan

1. If performance evaluation notations have been unsuccessful;

2. If the problem is of a nature that it cannot be addressed properly in a performance evaluation;

3. If the problem is serious and needs immediate attention; or

4. If the problem is longstanding.

B. What a Performance Improvement Plan Should Contain

1. **Specific problems and examples**

   a. Describe what the employee does wrong. Do not, however, list other individuals' names.

   b. Explain why the employee's conduct is not acceptable. Be careful to make sure you are not holding this employee to a different standard than other employees, unless there is a clear reason why (i.e. 10 years of experience versus a probationary employee).

2. **Specific Areas of Improvement**

   Describe each area in which improvement must be made. Whenever possible, explain what the employee should do differently.

3. **Directives**

a. Be very clear in the directives you give. You want to be able to state, if possible, that the employee is insubordinate if he or she fails to comply.

b. Be fair and reasonable in the directives you give. You do not, however, have to limit directives to those you require of other employees if you can establish a good reason for a different requirement.

4. **Offer of Assistance**

5. **Steps to Follow**

a. Documentation

b. Meeting with the employee

c. Signature of the employee

C. **After a Performance Improvement Plan has Been Issued**

1. **Observations and Evaluations**

2. **Determining if Deficiencies have been Corrected**

Be careful not to issue letters or evaluations which state or document that the deficiency has been corrected until a reasonable amount of time has passed. Employees generally will show an improvement immediately following a notice of deficiency, but may revert to old behaviors after a few months. Documentation that the problem has been corrected will result in having to start from scratch with a new notice of deficiency.

3. **Additional Action if Improvement does not Occur**

II. Guidelines for Drafting Directives:

Decide how you want to classify the County's response to an incident of misconduct or incompetence. If you want the response to constitute "discipline," clearly state that to be the case: "You are hereby disciplined for doing/failing to

'A'." You may, however, issue directives to improve performance without characterizing it as discipline.

A. **Be brutally honest.** If something is important enough to warrant a written directive, arbitrators and the courts expect the employer to tell the employee exactly what he or she is or is not to do. This is the best defense against any later lawsuit by the employee.

B. Offer alternative behaviors or the proper way to do something.

C. **If the directive is simply to stop doing something, say so:** "You are directed to immediately stop X"

D. Do not use qualifiers, such as "normally," "generally," etc. Instead, use the following format: "You shall not do 'C' in the future. The only exceptions to this directive are 'D' and 'E'."

E. If you use words such as "necessary" or "inappropriate," assume that an outsider will interpret them from the employee's perspective.

F. State in the written document that you will assume the employee understands the directives unless he or she seeks clarification from you.

G. Warn the employee that he or she will be subject to discipline, up to and including discharge, if the directives are not followed.

H. Respond meaningfully every time the employee seeks clarification.

I. Make sure that all clarifications do not contradict the written directives.

J. Send a follow-up memo to the employee memorializing any verbal clarifications.

SECTION II:
DUE PROCESS IN
EMPLOYEE CONDUCT ISSUES

I. Due Process in the Disciplinary Process

A. Notice of Rules, Policies and Expectations

Document notice to employees regarding expectations and specific areas of misconduct which could lead to discipline, such as sexual harassment, misuse of the internet or e-mail, drug or alcohol use or possession of property, threats, insubordination, theft, etc.

B. Investigation

When you become aware of possible misconduct by an employee, an investigation should be conducted into the circumstances surrounding the allegations, including possible interview of witnesses. The employee accused of the misconduct should also be met with and given an opportunity to respond. Do not reach a conclusion or impose discipline prior to getting the employee's side of the story, unless the employee chooses not to respond.

In general, when conducting a workplace investigation, employers do not want witnesses or subjects of the investigation discussing the investigation or its underlying facts. Such discussion tends to taint the evidence gathered during the investigation. However, under PELRA, public employees have the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Minn. Stat. § 179A.06, subd. 7. This could be construed as a prohibition on an employer directing employees not to discuss the investigation, which would limit the employees ability to engage in concerted activity for mutual aid and protection. Employers should choose their words very carefully when directing employees not to discuss confidential information.

C. Garrity Warning:

If you are interviewing an employee concerning a disciplinary matter that could involve criminal charges and you intend to require the employee to answer all of your questions on pain of an insubordination charge, a Garrity Warning must be given.

1. In *Garrity v. State of New Jersey*, 385 U.S. 493 (1967), the U.S. Supreme Court ruled public employees cannot be forced to choose between admitting to criminal activity and forfeiting their jobs.

2. If the employee admits to the commission of a crime, the admission cannot be used as evidence against the employee in criminal proceedings, but it can be used in employment disciplinary proceedings.

3. **Three Elements of a Garrity Warning**

   a. Direct/order employee to answer questions.

   b. Inform employee that failure to answer will result in discipline.

   c. Inform employee that the employee's statements are subject to immunity. Neither the statements nor the fruits of the statements may be used against the employee in any criminal proceeding.

D. **Representation Issues**

Employees represented by labor unions have the right to have a representative present at all meetings which could lead to disciplinary action. The union does not have any right to take an active role in the investigatory interview. The union representative may, however, attempt to clarify facts.

E. **Six Part Test of Substantive and Procedural Due Process**

If misconduct is determined to have occurred, it is important to impose discipline which is commensurate with the nature of the offense, as well as the employee's prior discipline history. Progressive discipline is generally, but not always, appropriate. For example, an employee having a sexual relationship with a minor client would invariably result in discharge proceedings, even if the employee had an otherwise spotless record.

1. Was the employee warned about the possible consequences of his conduct?

2. Was the rule reasonably related to the orderly and safe operation of the department?

3. Did the employer investigate before administering discipline?

4. Was the investigation fair and objective?

5. Did the investigation produce substantial evidence of misconduct?

6. Has the employer applied its rules evenhandedly and without discrimination?

F. **Loudermill Hearing**

As discussed in Section IV below, before suspending or discharging an employee, the employee must be given an opportunity to respond to the allegations and understand that he/she could be subject to suspension/termination.

SECTION III:
WHEN AND HOW TO
DISCIPLINE EMPLOYEES

I. Determining Appropriate Discipline

A. Collective Bargaining Agreements and Past Practice: All Employees

1. Collective bargaining agreements typically provide that employees shall not be disciplined or discharged except for "just cause."

2. Some personnel rules also apply a just cause or similar standard for discipline to be imposed.

3. Some employees may be "at-will" without any expectation as to continued employment and therefore may be disciplined or discharged without establishing any particular standard of cause or cause at all. However, to protect against discrimination charges, employers should be cautious about imposing unfair discipline against an employee simply because he or she is not protected by a union contract or other policies. Employers will still need to justify the decision to the EEOC or courts in the event of a discrimination charge or other legal challenge.

B. Appropriate Level of Discipline

The discipline must be appropriate for the infraction.

1. Discharge is reserved for the most serious and egregious infractions or for "the last straw" violation.

2. The concept of progressive discipline is borne out of this requirement.

a. Avoid contract language or policies that mandate progressive discipline or lists discipline in numeric order without the clear caveat that the employer may select the appropriate discipline based upon the offense;

b. Preserve the option to discharge for serious conduct that occurs for the first time.

3. Discharging a long-time employee with an otherwise spotless record is difficult even if the misconduct is serious though not egregious.

C. The Burden of Proof is on the Employer

D. Progressive Discipline

1. Verbal Reprimand

2. Written Reprimand

3. Withholding salary increments (if permitted)

4. Suspension

5. Demotion (if appropriate)

6. Discharge

E. **"**Daugherty Factors" for Just Cause

Some arbitrators still use what is referred to as the "Daugherty Factors" for just cause, although these factors have fallen out of favor over the years. Nevertheless they are still worth considering during the process of investigating and imposing discipline.

The seven factors were established in *Grief Brothers Cooperage*, 42 LA 555, 558 in 1964 by Arbitrator Carroll R. Daugherty, namely:

1. Notice. Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?

   An employer's failure to clearly express its expectations may give rise to an appearance of unfairness if an employee is disciplined for violating a rule or policy.

2. Reasonable rule or order. Were the employer's rules reasonably related to (a) the orderly efficient and safe operation of the employer's business; and, (b) the performance that the employer might properly expect of the employee?

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

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

5. Proof of the investigation to the decision maker. Did the person making the determination have substantial evidence or proof that the employee was guilty as charged?

6. Equal treatment. Has the employer applied its rules, orders and penalties even handedly and without discrimination to all employees?

7. Penalty. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense; and, (b) the record of the employee in his/her service with the employer?

II. Implementing Effective Discipline

A. **Promulgate Clear Rules and Policies.** An employer's failure to clearly express its expectations may give rise to an appearance of unfairness if an employee is disciplined for violating a rule or policy.

B. **Consistently and Fairly Enforce All Rules and Policies.**

C. **Conduct a Reasonable Inquiry and Investigation prior to Determining Discipline, Except in the Most Obvious and Heinous Situations.**

D. **Provide a Notice of Charges in Sufficient Detail so that the Employee can Understand Them.**

E. **Give the Employee an Opportunity to be Heard Prior to Making a Final Decision Regarding Discipline or Termination.**

F. **Follow Appropriate Progressive Discipline Except in Cases of Serious Misconduct**. Look at an employee's entire record before determining the appropriate disciplinary action. Determine what discipline is fair under the circumstances, appropriate to the magnitude of the offense in light of the

employee's prior discipline and designed to deter the employee from engaging in the same or similar conduct in the future.

G. **Treat Similarly Situated Employees Equally.** "Similarly situated" does not mean that each employee who engages in the same misconduct must be treated in exactly the same way.

EXAMPLE: Employee A has a long history of disciplinary actions, including tardiness, insubordination and abuse of sick leave. The employee has been issued reprimands and has been suspended. Employee B has no prior disciplinary actions. Employees A and B engage in a heated argument in in front of members of the public.

The Employer is not prohibited from imposing a more severe sanction on Employee A, in light of that employee's discipline history. In fact, it might be counterproductive to treat the two employees the same. The employer should, however, have a clear, documented basis for treating them differently in the event of a challenge.

H. **Document Misconduct and Performance Deficiencies.**

1. Inaccurate or incomplete performance evaluations will be used by the employee to establish that no real problem could have existed since you failed to note it. Do not be nice. Be truthful and complete.

2. Failure to have documented prior warnings or discipline will be used by the employee to establish that the problem did not exist prior to the current incident giving rise to discipline. The employee will argue (and the arbitrator will probably agree) that if s/he had been given a warning, s/he would have corrected the problem or more clearly understood the seriousness of the matter.

I. Employers are discouraged from entering into agreements whereby discipline is removed from the file after a period of time.

III. Imposing Discipline: Once the Discipline has Been Decided, How Should it be Imposed?

A**. Who Imposes Discipline:** The immediate supervisor should generally be the person to actually impose the discipline, unless the immediate supervisor is alleged to have engaged in inappropriate conduct related to the

employee in the past or related to the incident giving rise to the disciplinary action.

B All disciplinary actions should be imposed in a planned, calm and respectful manner and not in the heat of the moment.

C. In nearly all cases, the supervisor should consult with the department head and personnel department prior to imposing discipline to ensure that all parties agree on the appropriate action and that it is consistent with overall employer policy and practice.

D. **Impose Discipline Privately:** Discipline should be imposed in a private location where the parties cannot be seen or overheard by co-workers, members of the public or others. Only supervisory employees and the employee's union representative, if any, should be present when the discipline is imposed.

1. Due to data practices implications as well as potential defamation actions, only supervisors should be involved in disciplinary action. Supervisors must take steps to ensure that no co-workers or other nonsupervisory individuals are informed of the disciplinary action by the employer (the employee is free to tell them if he or she wishes). This includes taking care to have disciplinary letters typed only by confidential secretaries, refraining from discussing the discipline with the employee or supervisors where they might be overheard.

2. There may be occasions when an employee needs to be immediately corrected by his/her supervisor. Even under these circumstances, however, the supervisor must take care to take the employee aside, out of the hearing of others, before discussing the conduct.

E. **Document all Disciplinary Action.** This includes oral reprimands, where a memorandum verifying that it has occurred should be retained, either in the personnel file or a separate file.

In the event that the employer is sued in the future on the grounds that it negligently retained an employee, documentation of all prior discipline imposed on the employee may save the employer from liability.

EXAMPLE: Employee A tells an inappropriate joke of a sexual nature to Employee B. Supervisor gives employee an oral reprimand, but does not document that she has done so. Employee A

continues to tell inappropriate jokes and ultimately the Employer is sued by Employee B. The Employer may be unable to establish that any action was taken against Employee A.

SECTION IV:
DISCHARGE OF EMPLOYEES

I. All of the rules and considerations of general applicability to discipline cases, discussed above, also apply in discharge cases.

II. Discharging veterans involves different considerations and a different proceeding than non-veteran cases. To be safe, include a veteran's preference notice within all discharge, layoff or demotion notices, regardless of whether or not you believe the person is a veteran.

III. Public employees under a collective bargaining agreement or other policy or contract establishing a standard (such as just cause) for termination have an expectation of continued employment and a property interest triggering the due process clause of the U.S. Constitution**.**

A. Procedural Due Process Required

1. Notice of expectations and work rules.

2. Notice of performance deficiencies.

3. Notice of charges for egregious conduct justifying termination.

B. <u>Loudermill</u> Pre-Termination Hearing

Prior to being discharged and deprived of their property interest in their job, including a suspension, public employees have the right to an informal pre-termination meeting to respond to the allegations against them prior to a decision being made. The <u>Loudermill</u> hearing is informal.

C. Post-Termination Hearing Rights.

1. Arbitration proceedings pursuant to a collective bargaining agreement, including proceedings under Minn. Stat. § 626.892.

2. Hearing pursuant to a personnel policy.

3. Merit System Appeal

D. "If at first you don't succeed, try, try again."

Employers who have tried to terminate an employee and who, through arbitration or other process is reinstated, sometimes become discouraged and give up. Losing a discharge case, however, does not mean that you are permanently left with a problem employee. To eventually succeed, however, supervisors must continue to document performance problems and continue to discipline the employee. Ultimately, the employee will either improve, resign or be fired.

E. Unemployment Compensation

1. Employees who voluntarily resign generally are disqualified from receiving unemployment compensation for a period of time.

2. Employees who are laid off or fired for incompetence are entitled to unemployment compensation.

3. Employees discharged for misconduct may be disqualified.

TENNESSEN NOTICE AND GARRITY WARNING TO EMPLOYEE

Name of Employee: _____

1. You are being interviewed by _____, an administrator of _____.

2. The purpose of this interview is to collect information regarding [***specify purpose]*** [example: "allegations of misconduct raised against an employee of the police department, including possible misuse of equipment, misuse of sick leave, poor community relations and insubordination.]

3. The information collected may be used by the County in administrative proceedings such as grievance procedures, termination, suspensions or other disciplinary proceedings, as well as employee evaluations and job assignments***.[specify any other uses]*** The information may also be used in civil litigation.

4. You are directed by ***[Specify Department Head or other Official]*** to truthfully and completely answer all questions posed to you during the course of this interview. Providing false or misleading information during this interview will be considered insubordination and may result in disciplinary action against you, including possible termination of your employment. You **are** legally required to provide the information requested.

5. Information provided during the course of this interview and the fruits of such information will not be used against you in any criminal proceedings.

6. Failure or refusal to fully and truthfully provide answers to all questions posed will result in disciplinary action against you. Similarly, disciplinary action may be imposed against you based upon the information you provide. With respect to information not specifically requested, be advised that this interview may be the only opportunity you will have to present information to the County prior to a conclusion/decision being reached regarding discipline or other action in this matter. Failure or refusal to provide all relevant information may result in the County's decision(s) being based on incomplete information.

7. Any type of retaliation or reprisals by you or at your direction or suggestion against other employees or witnesses participating in the investigation into allegations against you, including any form of harassment, intimidation or coercion, shall be considered misconduct and insubordination.

8. The information which you provide during this interview may be released to the Board, Administration, agents of the employer, ***[the Minnesota Department of Human Rights, the Equal Employment Opportunity Commission if harassment/discrimination allegations are raised]*** the unemployment compensation authorities***, [Specify any other involves entities]*** other individuals or entities directly or indirectly involved in the matter(s) discussed, including complainants and witnesses, other employees of the County, and the representatives of such individuals. This information may also become public and may be released to other individuals and entities authorized by law to receive it or as ordered by a court of law. This information may also be used in civil litigation.

9. Nothing in this Notice shall be construed as waiving any work-product privileges or other privileges that may apply to this investigation.

10. [As the subject of this investigation, you may have a union representative, if any, present during this interview.]

By signing below you acknowledge that you have been given an opportunity to read this Notice prior to being interviewed. A copy will be provided to you upon request.

Dated:_____ _____

Signature of Employee

TENNESSEN NOTICE

Name of Employee: _____

1. You are being interviewed by _____, an administrator of _____.

2. The purpose of this interview is to collect information regarding [**specify purpose]**

3. The information collected may be used by County in administrative proceedings such as grievance procedures, termination, suspensions or other disciplinary proceedings, as well as employee evaluations and job assignments**.[specify any other uses]** The information may also be used in civil litigation .

4. You are not legally required to provide private or confidential information regarding yourself during this interview. However, failure or refusal to provide all relevant information, whether or not specifically requested, may result in decisions being made based on incomplete information.**[If person is employee, add: "If you choose to provide information, that information must be true and not misleading. Providing false or misleading information will be considered misconduct.]**

5. The information which you provide during this interview may be released to the Board, Administration, agents of the County**, [the Minnesota Department of Human Rights, the Equal Employment Opportunity Commission if harassment/discrimination allegations are raised]** the unemployment compensation authorities**, [Specify any other involves entities]** other individuals or entities directly or indirectly involved in the matter(s) discussed, including complainants and witnesses, other employees of the County and the representatives of such individuals. This information may also become public and may be released to other individuals and entities authorized by law to receive it or as ordered by a court of law. This information may also be used in civil litigation.

6. Nothing in this Notice shall be construed as waiving any work-product privileges or other privileges which may apply to this investigation.

By signing below you acknowledge that you have been given an opportunity to read this Notice prior to being interviewed. A copy will be provided to you upon request.

Dated:_____ _____

Signature

Employee Name: _____ Date: _____

Job Title: _____ Last Day of Employment _____

EMPLOYEE SEPARATION CHECKLIST

Written Notice of Resignation/Termination/Retirement (circle one) _____

Return of Keys, Equipment, Misc. Items to Employer _____

Retrieval of Personal Property from Workplace _____

Voice Mail Password (if applicable) _____

COBRA Notification/State Continuance Coverage _____

Exit Interview _____

Separation Information (Vac. Leave/Sick Leave/Overtime . . .) _____

Return of All Government Data in the Employee's Possession _____

Other _____

_____ _____

Signature of Employee Signature of Individual Conducting

cc: Personnel File

enc.