

COHL, STOKER & TOSKEY, P.C.  
ATTORNEYS AND COUNSELORS  
601 NORTH CAPITOL  
LANSING, MICHIGAN 48933

PETER A. COHL  
DAVID G. STOKER  
ROBERT D. TOWNSEND  
BONNIE G. TOSKEY  
RICHARD D. McNULTY  
TIMOTHY M. PERRONE  
MATTIS D. NORDFJORD  
GORDON J. LOVE

(517) 372-9000  
FAX (517) 372-1026

TO: Michigan Association of Counties

FROM: Peter A. Cohl

DATE: September 21, 2015

RE: **HOW TO PROPERLY DISCIPLINE EMPLOYEES IN ORDER TO  
AVOID LITIGATION: CASES AND STATUTORY  
REQUIREMENTS**

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**Proper Disciplinary Procedures Requiring "Just Cause"**

1. "Just Cause:" Reasonableness of the disciplinary penalty imposed in light of the nature, character and gravity of the misconduct, offense or dereliction of duty.
2. Review any applicable contract terms and/or personnel manual.
  - (a) Procedures
  - (b) Notice requirements, et cetera.
3. Progressive Discipline - is part of "just cause."  
  
Verbal Warning  
Written Reprimand  
Suspension  
Discharge  
  
(Severity of discipline will depend upon the offense committed)  
(Refer to prior infractions whether related or not)  
(FLSA disciplinary time off for exempt employees)
4. Equal Treatment For All Employees: Do not select some for discipline and not others who commit same infraction -- be consistent.

5. Procedural Due Process - Follow Procedure in Contract; Personnel Manual

a. Notice of charges

Public employees are entitled to a “hearing” prior to being terminated if they are “just cause” employees because they have a “property right.” *Cleveland Board of Education v Loudermill*, 470 US 532 (1985). This is known as a pre-termination or *Loudermill* hearing. It requires that the just cause employee be given notice of the charges against him/her and an opportunity to respond before adverse employment action is taken. This right does not attach to employees who do not have a property interest in public employment such as at-will or probationary employees. *Chilingrian v Boris*, 882 F2d 200 (6<sup>th</sup> Cir, 1989).

b. Opportunity to defend

(Employees cannot refuse to answer legitimate questions).

c. Union Steward present

Beginning with the employer’s investigation of possible employee misconduct, certain due process rights must be provided. An employee who is a member of a collective bargaining unit has a right to have a union representative present during an interview by the employer where the interview can lead to discipline. This is known as a “*Weingarten* right.” It is recommended to have two Employer representatives present.

d. *Garrity* Warning

In *Garrity v New Jersey*, 385 US 493 (1967), the U.S. Supreme Court ruled that an employee cannot refuse to answer questions about employment activities based on the Fifth Amendment protection against self-incrimination if he or she is given a “*Garrity* warning.” A *Garrity* warning means that any employee statements will not be used in a criminal proceeding. To avoid conflicts, it is best to consult with the prosecutor before issuing a *Garrity* warning.

6. Employee Evaluations

- a. It is essential to have honest and thorough employee evaluations. Improper employee evaluations may result in appropriate discipline being disregarded by an arbitrator.

- b. Supervisors performing employee evaluations should not discuss the protected statutory classifications, such as race, color, religion, national origin, age, sex, disability that is unrelated to the individual's ability to perform the duties of a particular job or position, height, weight, marital status, or political affiliation. The evaluation should be related to work performance only.
  - c. Failure to properly conduct employee evaluations could result in disciplinary action against a supervisor.
7. Burden of Proof is on the Employer in disciplinary cases -- need facts to prove your case.
8. Documentation!
9. Checklist When Disciplining an Employee.
- a. Review applicable labor contract and/or handbook for compliance with all procedures.
  - b. Review the complete personnel file of the involved employee. Check for documentation and other infractions.
  - c. Investigate properly to make sure you have accurate facts.
  - d. Investigate to determine possible allegations of discrimination or wrongful discharge.

Some of the issues to review are:

- (1) Age of employee.
  - (2) Did employee have a disability protected by the Americans With Disabilities Act?
  - (3) Is the employee pregnant?
  - (4) If the employee is a minority, how many minority employees remain after discharge?
  - (5) Has the employee complained recently about issues such as sexual harassment or unlawful conduct in the work place?
10. Employee Right to Know Act. MCL 423.501, *et seq.* - personnel records and their release is partially governed by this statute.

## **WHAT WOULD YOU RECOMMEND?**

The Union president works in the Parks Department. Under the collective bargaining agreement, employees are allowed to have two 15-minute breaks during the course of the work day. The union president has historically abused this by taking longer breaks by 5-10 minutes. None of her co-workers abuse break time. One day she doubles her 15 minutes break time to a half hour. The supervisor finally gets fed up and calls her into her office. The supervisor asks why she took such a long break. The employee answers that she was sick in the bathroom during that time. Later, one of her co-workers tells the supervisor that she was not sick. The building where the employee works has outside security cameras. After checking the security cameras, the supervisor discovered the employee was only in the bathroom for about 5 minutes and the rest of time was spent outside smoking and walking around the building.

**As a supervisor, what would you do?**