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HOW TO REMOVE A BAD APPLE FROM YOUR ORGANIZATION AND OTHER WAYS TO AVOID LITIGATION[1]

WILFORD H. STONE, BRETT S. NITZSCHKE
HOLLY A. CORKERY, and PATRICK J. O'CONNELL
LYNCH DALLAS, P.C.
526 SECOND AVENUE S.E.
P.O. BOX 2457
CEDAR RAPIDS, IOWA 52406-2457
TELEPHONE: (319) 365-9101
FAX: (319) 365-9512
E-MAIL: wstone@lynchdallas.com, brett@lynchdallas.com,
hcorkery@lynchdallas.com, poconnell@lynchdallas.com

I. Who, Me? What Happens when a City Administrator or City Employee is Personally Sued for Harassment, Retaliation, and Termination of Employment – Defenses and Strategies (Wilford H. Stone)

A. INDIVIDUAL LIABILITY AND EMPLOYMENT LAWS
B. IOWA CODE 670.8 (2015) – FOR TORT CLAIMS ONLY
C. BEST PRACTICES

II. Open Meetings/Open Records Considerations When Disciplining or Terminating an Employee (Brett S. Nitzschke)

A. OPEN MEETINGS – IOWA CODE CHAPTER 21
1. Common Questions:
a. What is considered a meeting?
i. A meeting is a gathering in person or by electronic means, formal or informal, of a majority of the members of a governmental body where there is deliberation or action upon any matter within the scope of the governmental body's policy-making duties. Iowa Code section 21.2(2).
ii. It is well-established that a meeting of the majority of members is necessary for a meeting to occur. Wedergren v. Board of Directors, 307 N.W.2d 12, 18

[1] This information is provided as a general outline to recent developments in state and federal municipal law. It is not intended to be an exhaustive outline of all topics that a City Manager/Administrator should be aware of nor is it intended to provide legal advice in lieu of advice provided by a licensed attorney. Those reading this document are encouraged to contact an attorney before acting on any of the information provided herein.

(Iowa 1981) (finding that any gathering, therefore, of two members of the five-member school board would not ordinarily be a meeting under chapter 21).

iii. Activities of a board's individual members to secure information to be reported and acted upon at an open meeting ordinarily do not violate the statute. Gavin v. City of Cascade, 500 N.W.2d 729, 732 (Iowa Ct. App. 1993).

iv. Additionally, in determining whether a meeting has occurred, the courts will consider the individual's intent in holding the gathering and/or avoiding the purpose of Chapter 21. Gavin v. City of Cascade, 500 N.W.2d 729, 732 (Iowa Ct. App. 1993).

v. A meeting does not include a gathering of members of a governmental body for purely ministerial or social purposes when there is no discussion of policy or no intent to avoid the purposes of this chapter. Iowa Code section 21.2(2).

b. When are closed sessions permitted?

i. Closed sessions are permitted for any of the following commonly used reasons:

i. To review or discuss records which are required or authorized by state or federal law to be kept confidential. Iowa Code section 21.5(1)(a).

ii. To discuss strategy with counsel in matters that are presently in litigation or where litigation is imminent where its disclosure would be likely to prejudice or disadvantage the position of the governmental body in that litigation. Iowa Code section 21.5(1)(c). Counsel needs to be present either in person or by electronic means. IPIB Advisory Opinion 2015-10, present means either in person or by electronic means. For purposes of going into closed session under Iowa Code section 21.5(1)(c), there needs to exist a prior public statement of the attorney-client relationship between the governmental body and the individual who is going to be its legal counsel. This statement can be an existing engagement letter, contract, resolution or a designation made in the minutes of a prior meeting. If there has been no prior public statement, then the

governmental body should announce before going into closed session that it is going to utilize the individual as its legal counsel on the issue that is going to be discussed in closed session. If the governmental body is going to utilize an individual as its attorney and the name of that individual has already been publicly stated, then no additional announcement or designation is required.

iii. To evaluate the professional competency of an individual whose appointment, hiring, performance, or discharge is being considered when necessary to prevent needless and irreparable injury to that individual's reputation and that individual requests a closed session. Iowa Code section 21.5(1)(i). For a closed session to occur all of the following must occur: (1) the discussion must involve an evaluation of the professional competency of an individual; (2) the discussion must involve consideration of the appointment, hiring, performance or discharge of the individual; (3) the discussion must be such that if conducted during an open meeting it would cause needless and irreparable injury to that person's reputation; and (4) the individual must request the closed session.

iv. IPIB Advisory Opinion 14FO:0002 – Iowa Code section 21.5(1)(i) provides the exclusive process for the evaluation of the professional competency of an individual whose appointment, hiring, performance or discharge is being considered. The application of section 21.5(1)(i) cannot be avoided under the guise of a confidential record review or discussion during a closed session conducted pursuant to section 21.5(1)(a).

c. Requirements of entering a closed session:
   i. The reason for entering the closed session must be stated publically and recorded in the minutes.
   ii. There must be a public roll call vote whether to enter a closed session.
   iii. The vote must be of 2/3 of the members of the board or all of the members present at the meeting.

iv. The vote must be required in the minutes.
v. Detailed minutes need to be taken that record what occurred in closed session.
vi. Only the topic for which a closed session is entered into can be discussed.
vii. No final action can be taken during a closed session.

d. Who may attend a closed session?
i. IPIB Advisory Opinion 2015-03 – Iowa Code section 21.5 is silent as to who may be invited to attend a closed session. It is at the discretion of the governing body as to who it may invite to attend.

B. <u>OPEN RECORDS – IOWA CODE CHAPTER 22</u>

1. Common Questions:

a. What are considered public records?
i. Public records are all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to any city. Iowa Code section 22.1(3)(a).
ii. IPIB Advisory Opinion 2015-08 - A document that is discussed and made viewable to the public at a public meeting makes the document a public record that shall not be treated as confidential under Iowa Code section 22.7. This does not apply if a confidential record is only discussed or referenced at a public meeting.

b. Who is the custodian of a public record?
i. Iowa Code section 22.1(2) defines the term lawful custodian as: the government body currently in physical possession of the public record. The custodian of a public record in the physical possession of persons outside a government body is the government body owning that record. The records relating to the investment of public funds are the property of the public body responsible for the public funds. Each government body shall delegate to particular officials or employees of that government body the responsibility for implementing the requirements of this chapter and shall publicly announce the particular officials or employees to whom responsibility for implementing the requirements of this chapter has been delegated.

c. What type of access needs to be provided?

i. A city has to provide an individual the ability to examine the information without charge. Iowa Code section 22.2.
ii. A city has to allow the individual to make copies of the information or to pay for the public entity to copy the information. Iowa Code section 22.2.
iii. A city may charge the individual for all expenses of the examination and copying. The amount charged can include the following:
iv. The reasonable fee for the services of the lawful custodian or the custodian's authorized designee in supervising the examination and copying of the records. Iowa Code section 22.3(2).
v. The reasonable fee shall not exceed the actual cost of providing the service. Actual costs shall include only those expenses directly attributable to supervising the examination of and making and providing copies of public records. Actual costs shall not include charges for ordinary expenses or costs such as employment benefits, depreciation, maintenance, electricity, or insurance associated with the administration of the office of the lawful custodian. Iowa Code section 22.3(2).
vi. A city can put into place policies and procedures regarding the request for review and/or copying of public records.

d. Is any information exempt from disclosure?
    i. Iowa Code Section 22.7 sets out a list of over sixty types of records that shall be kept confidential, unless otherwise ordered by a court, by the lawful custodian of the records, or by another person duly authorized to release such information. The following are some of the most applicable public records that are considered confidential and are not to be released:
        i. Records which represent and constitute the work product of an attorney, which are related to litigation or claim made by or against a public body. Iowa Code section 22.7(4).
        ii. Personal information in confidential personnel records of government bodies relating to identified or identifiable individuals who are officials, officers, or employees of the government bodies. Iowa Code section 22.7(11).

1. Except that the following information contained in personnel records are public records that can be released:
    1) The name and compensation of the individual including any written agreement establishing compensation or any other terms of employment excluding any information otherwise excludable from public information pursuant to this section or any other applicable provision of law.
    2) The dates the individual was employed by the government body.
    3) The positions the individual holds or has held with the government body.
    4) The educational institutions attended by the individual, including any diplomas and degrees earned, and the names of the individual's previous employers, positions previously held, and dates of previous employment.
    5) The fact that the individual was discharged as the result of a final disciplinary action upon the exhaustion of all applicable contractual, legal, and statutory remedies. Iowa Code section 22.7(11)(a).

iii. Additionally, settlement agreements and summaries of written settlement agreements are public records, provided the settlement is final, binding and written and resolves a legal dispute claiming monetary damages, equitable relief, or a violation of a rule or statute. Iowa Code section 22.13.

e. Does it matter where the record is stored?
    i. IPIB case, <u>In Re the Matter of Analisa Pearson, and concerning Des Moines Public Schools</u>, Ms. Pearson alleged that a school employee's private cell phone

was used to conduct school business. IPIB ultimately decided, in its Probable Cause Report, that any information on the private cell phone that contains information relating to public duties of an official or employee or the government body served is a public record. To permit a government body to avoid public records disclosure by simply allowing, or even requiring, that officers or employees use their privately owned electronic devices would completely thwart the transparency goals of Chapter 22. A policy of a government body that allows its officers and employees to use personal electronic devices for the conduct of public business assumes the risk that extra expense may have to be incurred to process and separate public business from private business on those devices. That additional cost should not be borne by citizens exercising their rights under Chapter 22.

C. IOWA PUBLIC INFORMATION BOARD

1. The Iowa Public Information Board (IPIB) was created in 2012 to provide an alternative means by which to secure compliance with and enforcement of the requirements of the Iowa open meetings and public records law to all interested parties.
2. How does IPIB fit into the scheme of open meetings/public records violations?
    a. An individual or entity can seek enforcement of Iowa's open meetings and public records law by doing one of the following:
    b. Filing a request for judicial review (under Iowa Code section 17A.19).
    c. Filing suit for judicial enforcement of Iowa's open meetings law (under Iowa Code section 21.6)
    d. Filing suit for judicial enforcement of Iowa's public records law (under Iowa Code section 22.10); or
    e. Filing a complaint with the Iowa Public Information Board.
3. Procedure for a complaint filed with IPIB:
    a. An individual/entity must file a complaint within sixty (60) days from the time the alleged violation occurred or the complainant could have become aware of the violation with reasonable diligence. The complaint is a public record.
    b. An individual/entity must follow IPIB's rules and regulations regarding the filing of complaints.
    c. IPIB determines whether the complaint is within its jurisdiction, is legally sufficient and could have merit.

d. IPIB works with the parties to reach an informal, expeditious resolution of the complaint or, if this does not work, offer the parties mediation.
e. If the parties do not reach an agreement, IPIB shall initiate a formal investigation concerning the facts and circumstances set forth in the complaint.
f. If IPIB finds there is probable cause to believe there has been a violation of Iowa's public meetings and open records law, it issues a written order and begins a contested case proceeding. At the end of the contested case proceeding, IPIB shall vote regarding whether a violation has occurred.
g. A city may defend against a proceeding on the ground that, if the violation occurred, it was only harmless error or that clear and convincing evidence demonstrated that grounds existed to justify an injunction against disclosure.
h. If a violation has occurred, IPIB issues an order requiring or prohibiting action and providing a remedy, if necessary.

4. What powers does IPIB have?
   a. Can adopt rules regarding Iowa's open meeting and public records law.
   b. Can issue declaratory orders with the force of law and provide informal advice regarding Iowa's open meeting and public records law.
   c. Can examine a record that is the subject of a complaint, even if that record is considered to be confidential.
   d. Can, after appropriate board proceedings, issue orders with the force of law regarding a record that is the subject of a complaint.
   e. Can offer training and disseminate information regarding open meetings and public records.

III. Performance Evaluations: Do Them Right, or Not at All, and How They Can Make or Break your Defense to a Termination Claim (Holly A. Corkery)

A. WHAT IS A JOB DESCRIPTION?

1. Job descriptions are, unsurprisingly, exactly what they sound like.
2. They are written understandings and explanations of what a specific employment position's requirements, responsibilities, duties, and functions are, when those items are to take place, and how they are to take place. They should contain:
    a. Title
    b. Department and Supervisors
    c. Employment Status
    d. Qualifications/Requirements
    e. Summary of Position
    f. Typical Duties
    g. Essential Job Functions
        i. So what functions are essential? Ask yourself, what does this position exist to do?
            i. Firefighter:
                1. fighting fires (and those functions that go along with fighting fires.)
                2. Real estate record clerk: accurately record real estate records (and those functions that go along with recording real estate records.)
            ii. Ask yourself, if I remove the function, is the position fundamentally changed?
            iii. Also, ask the employee what do you do in day or a week? Use the employee's input in creating the job description/essential job functions.
            iv. Ask yourself, what does it take to perform the job functions? Is there special expertise? Education? Physical skill?
3. For example, a complete job description for a firefighter might contain the following:
    a. Title: Firefighter
    b. Department: Health and Safety
    c. Reports to: Fire Chief
    d. Employment Status: Full Time, Non-Exempt
    e. Qualifications: EMT certifications, graduate of a Fire Technology College Level Program

f. Summary: Works to protect the health and safety of Gotham City residents by performing inspections, putting out fires, responding to medical and community emergencies, providing training and outreach services to the community, and other such activities.
g. Typical Duties:
    i. Inspects buildings and properties for compliance with fire regulations.
    ii. Develops and attends multiple training programs for the community to prevent fires or safely respond to fires.
    iii. Minimizes fire damage by responding to fire alarms.
    iv. Safely drives and operates department vehicles and machinery to fulfill these duties.
    v. Maintains department property, vehicles, and machinery to keep them in good condition and good working order.
    vi. Completes necessary reports to provide information.
    vii. Works well with other firefighters and supervisors to accomplish duties.
    viii. Attends educational workshops and uses other methods to maintain and gain technical knowledge of fighting fires.
    ix. Performs other, related activities upon necessity.
    x. Accurately reports time worked to supervisors on a daily basis.
h. Essential Job Functions
    i. Must be able to wear protective clothing weighing up to fifty pounds and maintain mobility.
    ii. Must be able to manually operate firefighting equipment.
    iii. Must be able to maintain a state of high cardiovascular exertion for extended periods of time, up to several hours.
    iv. Must be able to carry an adult human person up or down stairs while wearing protective clothing weighing up to fifty pounds.
    v. Must be able to withstand extreme working conditions, including extreme heat, dense smoke, and extreme physical exertion for extended periods of time.
    vi. Must be able to withstand intense psychological pressures on a regular basis.

vii. Must be able to respond to alarms at any and all times of the day.

B. WHY ARE JOB DESCRIPTIONS SO IMPORTANT?

1. Why take the time to draft a document that tells you what you and your employee already know?
2. There are two overarching reasons why employers must take proper care in reviewing, crafting, and implementing job descriptions.
    a. First, quality job descriptions are good for business, good for employees, and good for management.
    b. Second, well-crafted job descriptions are good for compliance with the laws of Iowa and the United States.

C. PERFORMANCE EVALUATIONS

1. Performance evaluations often contain the "smoking gun" to prove an employee's case in the performance evaluations. For example, maybe an employee recently terminated for performance only has glowing performance evaluations in his personnel file. Another example would be a comment that could be inferred as discriminatory in an employee's performance evaluations.
2. Few managers or employees like performance evaluations, and fewer think about them outside of the one day a year in which they might occur. However, when done correctly, performance evaluations can be a boon to employers and employees both. There are numerous advantages in instituting regular employee performance evaluations:
    a. Quality of Performance- first and foremost, it allows the employer an opportunity to review and determine at what level the employee has been performing his or her job. The employer can then determine if positive praise or awards are appropriate, such as raises or promotions, if training or improvement plans need to occur, or whether the performance is at such a level that termination may be appropriate.
    b. Self-Reflection- evaluations give employees the opportunity to reflect on their own work, and get a third party perspective on where they need to improve. Many employers use a self-evaluation process in addition to supervisory evaluation, which, when combined, can give a thorough look into an employee's job performance and satisfaction.
    c. Guide and Create Training Schedules- evaluations give the employer an opportunity to see where the employees are at in terms of their performance and understanding of the work. This allows the employer to recognize when training programs might be necessary, and how soon they should be

put into place. For example- if a new billing program has been provided to employees, and upon review an employee's work is being negatively impacted by an inability to work the program, the employer can identify that training is needed and work to get that implemented.

d. Goal Identification and Satisfaction- evaluations allow employers and employees to work together to identify what appropriate goals might be for the upcoming period before the next evaluation. The evaluations also provide an opportunity to determine if the goals have been met, and why or why not.
e. Job Description Updates- evaluations allow employers and employees to discuss what the employee's true job duties and essential job functions are. This then allows employers to update the job descriptions if necessary, to ensure accuracy for all of the reasons listed above. For example, if the employee with the new billing program mentioned before no longer has to compile daily paper billing reports and enter them into the computer, but instead now reviews billing reports directly through the software, her job description should be updated accordingly. Her duties have shifted from data entry to data review.
f. Creates Evidence- performing evaluations, so long as they are documented properly, provide the employer with evidence of the employee's performance and other potential issues that can be used in later potential litigation or investigations. Solid documented proof is much more valuable than an employer's words at a later date.
g. Prevents Avoidance- evaluations require the employer to actually inquire into each individual employee, their performance, and any issues that have presented themselves during the evaluation period. This prevents employers and employees from ignoring issues or letting them go untouched for extended periods of time. It also promotes discussion between employees and employers that may not occur on a regular basis.

3. Evaluations have a great number of benefits for employer and employees alike. To have successful evaluations the following is suggested:
    a. Document Everything- It may seem like a lot of work, but documenting the entire process can be incredibly important in the future. Your evaluation summary and notes could prove to be valuable evidence in future litigation, and they will help you determine if the employee has performed to

your expectations and discussions since your last evaluation.

b. Be Prepared- Take the time to review your past evaluations, to review the employee's file, disciplinary notes/warnings, awards/commendations, performance numbers, and any other relevant information before your evaluations. As with many things, you get out what you put in. Preparation will help you identify the important issues, allows you to be specific, and shows the employees that you are taking them seriously.
c. Be Specific- During your review, the evaluation itself, and in your notes, be specific. Generalizations will not be as helpful to your employees in attempting to improve, nor will they be helpful to you or a court in trying to read your notes and summaries later. Use specific events and goals in your evaluations.
d. Set Goals- Employees will perform better if they can understand what is being asked of them. Set clear goals, both broad and specific, and communicate them clearly with the employee. These goals will help them, but also help the employer ascertain the employee's level of performance during the next evaluation period. Use SMART goals- specific, measurable, achievable, results oriented, and time bound.
e. Follow Up- If you set goals and never check in on their progress, the goals lose their meaning and purpose. If your evaluation period isn't for another year, be sure to set a day far in advance of that to check in with the employee on their progress and production.
f. Use Self-Reviews- employees will typically be tougher on themselves than their supervisors or coworkers upon review. This also requires the employee to engage in introspection, and to come into the evaluation with the employer having actually thought about their work over the evaluation period.
g. Be Honest but not Confrontational- employees appreciate directness and honesty. Most want to know what they have done well and what could be done better. However, be wary of being confrontational, or making it seem like you have caught them in the act as the employee will close himself off and stop taking in your comments.
h. Make it a Conversation- while you should have plenty to say, be sure to seek input from the employee. After all, it is their job and performance that is the focus of the evaluation. Get

their opinion on their work, what could be better, and what has gone well for them. Be a good listener.

i. Be Transparent- Have clear, job based criteria, make it obvious what those criteria are to the employee, and be consistent in your application of the same.

j. Follow the Rules- At all times, the employer must be sure to follow the requirements of their employee handbook and any collective bargaining agreement that is in place. Failure to follow these guidelines can lead to liability, litigation, and may cause actions taken by the employer to be invalidated entirely.

k. Know Weingarten- if there is any possibility of an employee being disciplined during an evaluation, or if the employer is attempting to investigate an incident or actions that may lead to discipline, union employees must be offered the opportunity to contact a union representative to be present during the meeting. This is required by the US Supreme Court.

l. Don't retaliate. If an employee has recently complained about harassment, discrimination, FMLA, FLSA or some other employer violation of the law, be especially careful. Do not use the employee's performance evaluation to "punish" the employee for her complaint. If the employee perceives that you are using the performance evaluation to retaliate against her complaints, you could also find yourself in a retaliation lawsuit.

4. If these tips are followed, the employer and employee can experience the benefits of quality employee performance evaluations. This allows all parties, and the organization, to improve the quality of work, and the experience in the workplace.

IV. Firing a Public Employee: Due Process Issues and Unique Iowa Laws that Apply (Patrick J. O'Connell)

A. PROTECTED CLASSES

1. Who is the employee?
2. Analyze any adverse employment action in light of how it will be perceived by the Federal EEOC and the Iowa Civil Rights Commission in terms of the "***age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability of such applicant or employee.***" *See,* Title VII of the Civil Rights Act of 1964; Chapter 216, Iowa Code.
3. Assume the employee has an attorney who will analyze your action in light of all of these protected classifications.

4. Make sure the termination of employment is "job related" or related to business or economic necessity and NOT because of some protected characteristic

B. AVOIDING CLAIMS OF RETALIATION

1. Avoid the appearance of **retaliation** when considering disciplinary action.
    a. Federal and state laws prohibit an employer from retaliating against employees who make "good faith" complaints to the employer or to an administrative agency or employees who participate in the employer or agency's investigation into another employee's complaints.
    b. Employers may not terminate an employee for the exercise of a statutory right or threat to exercise a statutory right.
        i. Examples Include employees:
            i. Applying or threatening to apply for workers' comp. Frazier v. IBP, 200 F.3d 1190 (8th Cir. 2000);
            ii. Making a demand for wages due and owing (Tullis v. Merrill, 584 N.W.2d 236, 239 (Iowa 1998));
            iii. Seeking partial unemployment compensation benefits (Lara v. Thomas, 512 N.W.2d 777, 782 (Iowa 1994)); or
            iv. Threatening to obtain a lawyer in a wage dispute (Thompto v. Coburn's Inc., 871 F.Supp. 1097, 1115-1116 (N.D. Iowa 1994)).
    c. The essential elements of a retaliation case are: employee engaged in a protected activity, the employer took adverse employment action against the employee and a causal connection between the first two elements. Cherry v. Menard, Inc., 101 F.Supp.2d 1160, 1184 (N.D. Iowa 2000); Cossette v. Minnesota Power & Light, 188 F3.d 964, 972 (8th Cir. 1999).
    d. This does not mean you cannot discipline problem employees, but ensure you are doing it for the right reason and that it is well documented, to avoid retaliation claims, or at least create a solid defense to such a claim.

C. DOCUMENT, DOCUMENT, DOCUMENT

1. You must be prepared to distinguish your perfectly legal actions from discriminatory or retaliatory actions.
2. Create a paper trail. For example, if your policies call for an oral warning at first, document the oral warning in writing and place it in the personnel file.
3. If there is an investigation prior to disciplining or terminating an employee, carefully document all steps of the investigation.
4. Document all reprimands.
5. Maintain all performance reviews.
    a. Do them right or not at all. Do not give everyone an "acceptable" or "average" rating. Do not write random thoughts. If the comment does not have a purpose, remove it.
    b. Juries will not buy the notion that you did not really "mean" the employee was "acceptable" or "average" when you rated them as such, particularly if you gave the employee a raise every year before you terminated them.
6. Document any performance Improvement Plans (PIPS)
7. Iowa courts have held that adherence to written disciplinary policies and careful documentation of disciplinary action rebuts wrongful discharge claims because these steps provide a legitimate, business reason for termination of employment. Thompson v. Eaton, 2004U.S. Dist. LEXIS 4207 (S.D. Iowa 2004) (*citing* Yockey v. State, 540 N.W.2d 418, 411 (Iowa 1995)).

D. UPDATE YOUR EMPLOYMENT POLICIES AND PRACTICES

1. Employment applications, handbooks, and other written documents;
2. Include a prominent "at-will" disclaimer in your handbook, and require "at-will" employees to acknowledge status ***in writing*****;**
3. Ensure discipline and firing policies reflect issues raised by modern technology, such as abuse of the company's Internet, e-mail, computer, and telephone systems;
4. Make sure job descriptions are current and share them with employees; have employees sign and acknowledge them;
5. Have current anti-discrimination/harassment policies which include mechanisms for complaints, investigation of complaints, and remedies for all protected classes, including anti-retaliation provisions.

6. Train employees on any new policies, and obtain signed acknowledgments confirming employees have received and read them.

E. ENSURE GOOD MANAGEMENT PRACTICES

1. BE CONSISTENT in applying the policies and procedures. A lack of consistency in application of policies and procedures is the most likely way an employer will find themselves in litigation.
2. Follow up. If action is required by the policy, such as a review in three months, DO IT.
3. Do NOT use email or other written correspondence to discuss disciplinary or performance issues, except as absolutely necessary.
4. When you have reached the stage in the disciplinary policy which calls for termination, DO IT. If the employee is a problem now and you do not terminate, the employee will become a bigger problem later.
    a. Problem employees often know when they are at the end of the rope and file frivolous discrimination, harassment or work comp claims. Then the termination process becomes significantly more challenging and you have been set up for a retaliation claim.
5. Always have a witness present during a termination.
    a. The witness should draft a short memo for the personnel file regarding the termination. If you do not do it now, you may not remember it two years later.
6. The termination notice should be direct and concise. Do not argue or debate. Do not issue overly sympathetic statements or apologies.
7. Collect city property such as cell phones, pagers, keys, identification badges, etc.
8. If the person has access to the city computer network, access passwords should be changed during the meeting or before, if possible. Do not wait until afterwards as damage may be done quickly from home or a remote site.
9. Where applicable, provide (in writing) the employee with a notification regarding benefit continuation rights. COBRA provides that the employer must provide notice to the health plan and the employee within thirty days of a qualifying event, such as termination. COBRA applies to employers with twenty or more employees in the previous year. COBRA continuation rights extend

for eighteen months after termination. The qualifying employee has sixty days to elect for continuation.

10. ALWAYS perform termination somewhere private. The meeting should not be conducted in work areas or places that are within earshot of other employees.
11. Where you have an employee who is at a high litigation risk, talk with your attorney about offering a chance to resign as opposed to terminating employment.
    a. Do this only if:
        i. your disciplinary policy permits the discretion to do so AND
        ii. you apply the policy consistently to employees in similar circumstances.
    b. Use this tactic when you want to obtain a signed release of all claims (i.e. where you think there may be a potential for the employee to file a harassment or discrimination claim.)
    c. Offer the employee the opportunity to keep their employment record clean, allow them to apply for unemployment benefits in exchange (or as consideration for) the release.
    d. The positive reason for allowing resignation is obtaining a release and (hopefully) avoiding litigation. The downside of allowing a resignation in exchange for a release is that you telegraph the notion they may have a claim that needs to be released.

F. <u>CONSIDER SUSPENSION</u>

1. Suspension is the most severe form of discipline, short of termination.
2. Should be reserved for serious infractions only and only after thorough investigation and evaluation.
3. Usually by the time suspension is on the table the employee has already received a written warning and made little or no effort to correct the performance or behavior.
4. If you suspend first, before terminating, you can establish you did everything that you could to avoid termination, and your actions, as an employer, leave little doubt you terminated the employee's employment based upon his or her failure to correct the stated behavior or performance issues.

5. A well-considered suspension may also help in an unemployment benefits hearing (which requires that the employee "willfully" commit misconduct, as evidenced by the employer warning/suspending for the conduct and the employee continuing the conduct after the warning/suspension.)
6. Paid suspensions are usually an attractive option during investigations because they do not strip the employee of any property interest, which is a critical consideration, given the special due process rights afforded most public employees.

G. INTERVIEWING EMPLOYEES AND WITNESSES

1. There are different schools of thought regarding who to interview first, but starting with the complaining party is always best, especially if the complaining employee *could* have a claim for harassment. This way, you can establish from the outset that you took the complaint seriously.
2. Confidentiality is key! Warn everyone involved to maintain the confidentiality of the investigation, or face discipline themselves. Remind them that if it were an investigation about *them*, they would want their confidentiality respected.
3. Be clear about what you are investigating. A rules violation? A practice or procedure violation?
4. Be thorough, but not overly invasive. Avoid following irrelevant or tangential issues.
5. Obtain a chronology of events and a list of players and key witnesses.
6. Follow up with all key witnesses.
7. Keep notes and create a report, but with the expectation it could be used as evidence in future litigation:
    a. summarize the complaint;
    b. summarize the witness statements;
    c. summarize your credibility assessments (Bias? Memory? Perception? Consistency in sequence and content? Corroboration or lack thereof? Veracity? Plausibility? Body language/demeanor? Prior misconduct?)
    d. Make findings of fact based on the credibility assessments.
    e. Make conclusions which are fair, reasonable and supported by the evidence.

f. Identify any unresolved issues.
g. Make recommendations based on employer policies and which are consistent with past practices.

8. Follow up with the employee and any complainant - take the remedial/disciplinary measures consistent with the report.

H. Due Process

1. Step 1: Investigate the misconduct:
   a. Interview persons with knowledge;
   b. Gather documentary proof; and
   c. Investigate the department policies and procedures and note which sections the employee violated
2. Step 2: Is The Loss of a Property Right a Possibility?
   a. Suspension without pay?
   b. Termination?
   c. It is advisable to consult the City Attorney at this stage to discuss strategy. Civil Service hearings require preparation, and the key preparation starts at this stage. Also, if termination is an option, it is sometimes best to seek a severance agreement, rather than an outright termination. Every case is different.
   d. If ***no***, proceed to Issue written reprimand to the employee and place the reprimand in the employee's file.
   e. If ***yes***, proceed to Step 3.
3. Step 3: Ask yourself the following questions:
   a. What documentation exists to justify the loss of a property right?
   b. Are there sufficiently similar prior reprimands to justify punishment beyond a reprimand? Or is the misconduct, standing by itself, severe enough to justify the loss of a property right? (If in doubt, ask: What was done under similar circumstances in the past within the department and statewide? Call your attorney if you are not sure.)
   c. If ***no***, consider going back to Step 1 and issue a written reprimand only.
   d. If ***yes***, or ***possibly yes***, proceed to step 4.
4. Step 4: Conduct Administrative Interview[2]
   a. Determine date for interview;
   b. Ensure recording equipment available;
   c. Select a witness to be present at interview;

[2] Always conduct this interview after you have obtained all possible proof from other sources. The employee in question should always be the last step in the investigation.

d. Provide notice required pursuant to Weingarten and Laudermill
    i. Provide **Notice of Administrative Interview** to the employee, and be sure to carefully list all the charges found in Step 1. Remember, the employee cannot be stripped of a property right without notice of the charges.
    ii. Provide **Notice of Right to Representation** to the employee.
e. Prepare questions for interview (If in doubt, call the City Attorney for assistance).[3]
f. Conduct the recorded interview, being sure to get the employee on the record consenting to the interview and acknowledging that it is recorded.
    i. Ask thorough questions, prepared in advance;
    ii. Explore all issues;
    iii. If the employee brings an attorney in lieu of or in addition to union representation, ask the City Attorney to attend on behalf of the City.

5. Step 5: Deliberate on the evidence and determine if there is support for the loss of the property right.
    a. Consider carefully the employee's answers to the questions posed;
    b. Consider the supporting evidence;
    c. Determine whether or not the preponderance of the evidence supports the conclusion the employee committed the misconduct;
    d. Consider any mitigating circumstances;
    e. Consider whether the evidence shows a severe enough infraction to support the loss of a property right (e.g. suspension without pay and/or termination). If a suspension without pay is considered, compare previous suspensions for substantially similar conduct when determining the appropriate length of time for the suspension. Consult the City Attorney if you are unsure).
    f. If the answer, based on a through e above, is ***no***, report to the employee that either: 1) the matter has been investigated and closed; OR 2) issue a written reprimand in lieu of the loss of a property right (see Step 2).

[3] If the basis for the misconduct is criminal activity, always contact the County Attorney before proceeding. Due to Garrity v. New Jersey, 385 U.S. 483 (1967), the County Attorney may recommend certain advisements and disclaimers be made at this stage. The City Attorney can provide a Garrity rights advisement form in these cases.

g. If the answer, based on a through e above, is ***yes***, proceed to Step 6.

6. Step 6: Conduct Due Process Hearing and, following the hearing, determine whether the appropriate sanction is the loss of a property right.
    a. Determined date for hearing, leaving at least twenty-four (24) hours' notice after time the **Notice of Due Process Hearing** and **Notice of Right to Representation** is provided;
    b. Ensure recording equipment is available;
    c. Select a witness to be present at hearing;
    d. Provide notices required pursuant to *Weingarten* and *Laudermill;*
        i. Provide **Notice of Due Process Hearing to** the employee, and be sure to carefully list all the charges found in Step 1. Remember, the employee cannot be stripped of a property right without notice of the charges. If the employee was not asked about the charges at the interview stage, the employee should not be disciplined on the basis of that charge.
        ii. Provide **Notice of Right to Representation** to the employee.
    e. Conduct the Hearing:
        i. Ask the employee and/or the representative to state anything the employee wishes regarding the charges, either in defense or mitigation (it is not necessary to ask questions, although that is a good idea if the employee states anything unclear, or if the employee raises new facts which need to be investigated);
        ii. If the employee brings an attorney, ask the City Attorney to attend on behalf of the Department.
        iii. Provide **Notice to Interviewee at Time of Due Process Hearing**.
    f. If the answer, based on a through e above, is ***no***, report to the employee that either: 1) the matter has been investigated and closed; OR 2) issue a written reprimand in lieu of the loss of a property right (see Step 2).
    g. If the answer, based on a through e above, is ***yes***, proceed to Step 7.
7. Step 7: Deliberate on the contemplated discipline.
    a. It is advisable to consult the City Attorney at all stages, but especially this one. It is sometimes advisable to seek a severance agreement and a release, in lieu of an outright termination.
8. Step 8: Issue the Discipline

a. Schedule meeting with employee;
b. Provide **Notice of Decision Following Due Process Hearing**.
    i. Did the discipline result in a termination?
    ii. If the answer is ***no***, inform the employee of the dates of suspension and alert the payroll department to the loss of pay. Especially in the case of police and firefighters, post the suspension internally as an example to others.
    iii. If the answer is ***yes***, go to Step 9.

9. Step 9: Discharge the Employee
    a. Take possession of all issued equipment;
    b. Remove any keys to cars or City property;
    c. Change computer passwords;
    d. Alert Department to dismissal;
    e. Ensure HR is informed to issue COBRA notices, accrued vacation, pay due and owing, etc.

10. Step 10: Discuss with City Attorney the possibility of a civil service appeal and / or grievance, and preparatory steps.