Understanding the Employee Disciplinary Process
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Preliminary Analysis

Performance Issues v. Discipline Issues

- Are the employee's actions due to incompetence?
- Inability to do the job?
- Lack of understanding of the tasks or requirements of the job?

- Are the employee’s actions deliberate acts?
  - Negligence is a deliberate act.
  - Failure to exercise good judgment is a deliberate act.

 Excellency Levels:
- Excellent
- Good
- Average
- Poor
Why is Understanding the Disciplinary Process Important?

- Our employees have a right to due process. Due Process is an employee’s right to fair procedure.

- The government cannot take a property interest (e.g., a public sector job) away from an individual without a fair procedure/process.

- A property interest in a job can be conferred by statute or regulation, contract, or even by past practice.

Due Process Rights

For UWM employees, due process rights are built into:

- Wisconsin Statutes
- Wisconsin Administrative Code
- UW System Policies & Procedures
- UWM Policies & Procedures

- Statutes and Administrative Code provide the minimum procedural requirements.

- UWM provides additional process through its own policies and procedures.
Due Process Rights

- Rights and procedures differ among UWM’s different employee classifications.
- Today’s focus is on Faculty, Academic Staff and University Staff.
- The Policies and Procedures are different for each classification, but are built around similar principles.

Available Disciplinary Actions

- Informal Counseling
- Oral Reprimand (not recommended)
- Written Reprimand
- Suspension(s) - a specific period of days off payroll
- Dismissal - the last resort when all other methods to salvage the employee’s behavior have failed or the employee has committed a major rule violation

Steps can be skipped or repeated as needed, but should be consistent.
Overview of Laws and Policies Governing Discipline and Dismissal at UWM

Faculty Discipline

- Wisconsin Administrative Code UWS Chapter 6 – Complaints and Grievances
- UWM Faculty Policies and Procedures Chapter 5 (Faculty Personnel) - relevant faculty disciplinary procedures begin at §5.42.

If you are considering faculty discipline or dismissal you should be sure to work with your Dean’s Office, in consultation with the Provost’s Office and Legal Affairs.
Faculty Discipline

- All faculty discipline must go to the Faculty Rights & Responsibility Committee (FRRC); faculty have the right to request a hearing.

- FRRC makes findings and recommendations to the Chancellor.

- BOR, at its option, may grant a review on the record.

- Finding of misconduct to be based on a “clear preponderance of the evidence.” [more probably true than not]

- Counseling and/or other rehabilitative intervention may be considered as an alternative or supplement to discipline.

Faculty Dismissal

- Wisconsin Administrative Code Chapter UWS 4 – Procedures for Dismissal

- Wisconsin Administrative Code Chapter UWS 7 – Dismissal of Faculty in Special Cases - expedited process for “serious criminal misconduct.”

- UWM Faculty Policies and Procedures Chapter 5 (Faculty Personnel) - Relevant faculty dismissal procedures can be found at §§5.21 through 5.28
Faculty Dismissal

➢ Tenured faculty member may be dismissed only by the BOR and only for *just cause* after due notice and hearing.

➢ Dismissal complaints go to the Chancellor for investigation.

➢ If Chancellor ultimately determines dismissal is warranted, recommendation goes to the BOR.

Academic Staff Discipline

Disciplinary process itself not detailed – the process for grieving any discipline is.

• Wisconsin Administrative Code UWS Chapter 13 – Grievances

• Academic Staff Policies & Procedures Chapter 112 - Grievance Process

 ➢ Grievance is a claim of unfair employment-related treatment.

 ➢ Employee can grievance discipline through a four (really five) step process (immediate supervisor, next appropriate administrative level, appropriate Dean or Division Head, Hearing Appeals Committee, Chancellor).

 ➢ Excludes non-renewal, dismissal, or layoff.
**Academic Staff Dismissal**

- Wisconsin Administrative Code UWS Chapter 11 - Dismissal of Academic Member for Cause
- Academic Staff Policies & Procedures Chapter 109 - Dismissal for Cause
  
  > Academic Staff holding an indefinite appointment may only be dismissed for just cause. Academic Staff with a probationary or fixed term appointment may only be dismissed prior to the end of their contract term for just cause.

  > Process differs for indefinite vs. probationary/fixed-term.

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**Academic Staff Dismissal**

- Indefinite: dismissal complaints investigated at Chancellor's request by dean/division head; charges prepared.

- Probationary/Fixed-Term: provided written notification of charges; opportunity to be heard by dean/director.

- Academic Staff Member can request a hearing – ASHAC.

- ASHAC makes a recommendation to the Chancellor.

- Chancellor makes final determination; BOR may grant review.
University Staff

UPS Operational Policy GEN 14: Grievance Procedures, accords employees just cause protections. It provides:

- "Discipline and dismissal of a university staff member with an expectation of continued employment may be imposed only for just cause."

University Staff

- UWM University Staff Grievance Policy and Procedures
  - Defines Just Cause
    - The only place in the policies where just cause is explicitly defined
  - Details three-step grievance process
Just Cause = Due Process

*Just Cause* refers to standards to be met in order to impose a discipline or dismissal that meets Due Process.

- Explicit standard for University Staff discipline and dismissal.
- Explicit standard for Faculty and Academic Staff dismissal, but we follow it for discipline as a matter of practice.
- Just cause has several, usually 7, basic elements.

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Elements of Just Cause

1. **Notice.** Did the employee have notice of workplace expectations and the potential consequences if those expectations were not met?
2. **Reasonableness.** Were those expectations reasonable?
Elements of Just Cause

3. Investigation. Before administering the discipline, did the employer conduct an investigation that was full and complete?

4. Fair and Objective. Was the investigation fair and objective?

5. Proof. At the investigation stage, did the employer obtain substantial evidence that the employee in fact committed the offense?

Elements of Just Cause

6. Equal Treatment. Were the rules, orders, and penalties applied evenhandedly and without discrimination to all employees?

- If you perceive differences in the treatment of possibly similar circumstances, can you articulate the reasons for the differences?
Elements of Just Cause

7. **Penalty.** Was the degree of discipline administered in this particular case reasonably related to
   - the seriousness of the offense, and
   - the past record of the employee in service to the employer?

The Employer's Investigation

The employer should discover:
- What happened?
- When?
- Where?
- How?
- Who was involved? Who saw something?
- Why?

The employer should remain impartial until all the evidence has been gathered.
The Employer's Investigation

The employer investigates by:
- Gathering physical and documentary evidence
- Considering circumstantial evidence
- Considering witness statements
- Interviewing the involved employee(s)

The Investigatory Meeting

- Even if not required, it's often a good idea to talk to the employee to get the employee's side of the story.
- For Faculty/Academic Staff, this may provide employee with an opportunity be heard.
- For University Staff, the investigatory interview is part of the employer's investigation. You may or may not be required to hold an investigatory interview before imposing discipline.
The Employer's Investigation
The Bottom Line

- Disciplinary action requires proof!
- The standard by which you determine if the facts warrant discipline is: Is it more likely than not that events happened (>50% likelihood) as reported?
- The supervisor/investigator is entitled to make a determination as to whom is the more credible.

 Discipline Principles

Two Key Principles:

- **Corrective**: The goal of discipline is to correct undesirable conduct. Discipline is intended to be corrective, not punitive.
- **Progressive**: Discipline is applied in a series of levels that increase in severity when undesirable behavior is repeated.
Purpose of Progressive Discipline

- Change unacceptable job behavior to an acceptable level.
- Establish a good faith effort by the supervisor to correct unacceptable behavior.
- Provide an opportunity for an employee to demonstrate ability to change.
  ➢ Often employees indicate that had they known what was expected, they would have changed.

Summary Discharge

The exception to the Corrective and Progressive principles.

- Action taken regardless of prior disciplinary record.
- Used for misconduct that:
  ➢ Destroys trust – employee’s integrity or credibility, or
  ➢ Destroys ability – employee cannot do his/her work with others
  ➢ Generally for violence, theft, or weapons
Mitigating Circumstances or Defenses

- Factors considered in determining whether the severity of a penalty should be reduced.
- Mitigating circumstances do not alter the decision whether to discipline, but they may be considered in determining the severity of the discipline.
- Example: provocation, self-defense, extraordinary stress, or an employee's years of service and good job performance.

There may also be exacerbating factors, that allow for a more serious penalty.

Removal from the Workplace with Pay

- During the course of an investigation if there is a potential for danger or damage.
- Last resort – only when employee’s continued presence on campus poses a threat.
  - As stewards of public funds, we shouldn’t use taxpayer funds to pay an employee to sit at home.
- Consider temporarily reassigned job duties and/or worksite pending outcome of the investigation process.
Predisctinary Meeting for University Staff

- If the investigation indicates that discipline is warranted, the employer must conduct a predisctinary meeting.
- This is not an adversarial proceeding. The employee does not have the right to cross-examine witnesses.
- The employer should follow up on any new facts presented.
- Not strictly required for Faculty/Academic Staff.

Difference between Investigatory Meeting and Predisctinary Meeting

- Investigatory meetings are preliminary fact-finding taking place before any conclusions of responsibility or discipline are considered.
- Predisctinary meetings are wrap-ups to completed investigations, and are a final check on possible errors in the investigation or mitigating circumstances for the employee to present prior to establishing discipline.
University Staff
Role of the Representative

When a University Staff employee reasonably believes a meeting will result in disciplinary action, the employee may choose to have a representative in attendance.

- Investigatory meeting or predisciplinary meeting
- Ask the employee to designate in advance.

- Role is as an observer and advisor. The representative may not answer for the employee.
- During the meeting, the representative is considered an equal. Should the representative become disruptive, the meeting should be ended.

Faculty/Academic Staff
Role of the Support Person

There is no requirement to permit a Faculty or Academic Staff member to bring someone along to a discipline-related meeting.

- We do not generally allow attorneys to participate in discipline-related meetings.

- As a matter of practice, upon request, Faculty and Academic Staff members are typically allowed to be accompanied by a support person to advise them.

- Not permitted to actively participate in the meeting or speak for the employee.
Take Aways

Process matters!

- Read the relevant policies and procedures before you discipline or terminate.
- Failure to follow policy and procedure could violate an employee’s right to due process and lead to the decision being overturned.
- When in doubt, err on the side of providing additional process.

Take Aways

Meet the just cause standard:

- Was there notice of expectations?
- Were the expectations reasonable?
- Was your investigation full, fair and complete under the circumstances?
- Was there proof of wrongdoing?
- Was the discipline imposed fair, relative to others?
- Was the discipline reasonably related to the employee’s past record?
Take Aways

Don’t be afraid to ask for help!

- Department of Human Resources
- Office of Legal Affairs
- Personnel Representatives
- Dean’s Office
- Provost’s Office