

# Progressive Corrective Action



west virginia  
DIVISION OF PERSONNEL

## §23-5A-3. Termination of Injured Employees Prohibited

In part: It shall be a discriminatory practice to terminate an injured employee while the injured employee is off work due to a compensable injury and is receiving or is eligible to receive temporary total disability benefits unless the injured employee has committed a separate dischargeable offense.

A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury... or aggregation of absence due to the injury with any other absence from work.

# Separate Offense - Warranting Employer Action

- Corrective action in process prior to the accident/injury.
- Policy violations, misconduct, or unacceptable performance
  - Occur prior to the accident/injury
  - Occur at the time of the incident, including violations that contributed to the accident/injury
  - Occur following the incident.

The cause for corrective action is the performance or violation, not the result of an employee filing a claim or reporting a safety hazard.

# Determining Appropriate Action

- The specific circumstances, including any mitigating or aggravating factors
- Nature of the incident - alleged violation or misconduct
- Past practices and consistency
- Timeliness of the corrective action
- Is the level of corrective or disciplinary action appropriate for the seriousness of the infraction?

# Grievant V. Higher Education Policy Commission [i]

2/01 Verbally counseled for excessive absenteeism

4/2/02 Written warning for excessive absenteeism

4/1/02 - 5/10/02 Absent 7 times 4.5 unexcused

5/21/02 Sustained workplace injury and was off until 6/4/02

6/5/02 Grievant returned and was issued a written warning

6/5/02 Grievant filed WC and was off through 7/1/02

7/15/02 Grievant filed a grievance

## Grievant V. Higher Education Cont.

Grievant alleges harassment and retaliation for filing the 2002 workers' compensation claim, and discipline was improper and excessive because her history of absenteeism was the result of back problems sustained in the 1997 and 2000 on-the-job injuries. (Both requiring  $\leq 3$  days absence)

“Absences due to compensable injury may not be considered in the determination of leave misuse or excessive absenteeism.”

## Grievant V. WV Division of Corrections [ii]

Grievant was dismissed shortly after returning from Temporary Total Disability (TTD). Grievant claimed that his dismissal was retaliation for filing a workers' compensation claim.

The grievant cited the Respondent's delay (6 mo.) in charging him for the three violations that resulted in his dismissal as an example of retaliation.

# Progressive Corrective and Disciplinary Action

- Establishes knowledge of the policy, procedure
- Management intervention
- Re-education following a violation or incident
- Coaching/counseling
- Verbal warning
- Performance Improvement Plan (PIP)
- Written warning
- Suspension (3, 5, 10-day)
- Demotion or dismissal



## Like Penalty for Like Offenses

Discipline may be determined to be excessive when it “is so clearly disproportionate to the employee’s offense, displaying an abuse of discretion.”

“Considerable deference is afforded [in] the employer’s assessment of the seriousness of the employee’s conduct and the prospects for rehabilitation.”

-Overbee v. W. Va. DHHR [iv]



“What gives you the idea we’re on a sinking ship?”

# Liberty and Property Interest Rights

The Due Process Clause of the WV Constitution requires procedural safeguards against State action which affects a liberty or property interest of State classified employees.

*“[t]he constitutional guarantee of procedural due process requires  
“some kind of hearing” - WV Supreme Court of Appeals*

Classified employees are entitled to a due process hearing (predetermination conference) prior to initiating any disciplinary involving suspension, demotion, or dismissal.

# Due Process Requirements

## Predetermination Conference

- Meet in person, virtually, or telephonically.
- Advise the employee of the charges, including specific details, for which discipline is being considered.
- Provide the employee the opportunity to respond to why discipline should not be imposed.
- Employee has the right to a representative of their choice.

# Due Process Requirements Cont.

Following the pre-determination conference

- Determine if corrective or disciplinary action is appropriate
- If disciplinary action is issued, notify the employee in writing:
  - 3 working days prior to the effective date of a suspension
  - 15 days prior to the effective date of a demotion or dismissal
- Provide notice of the opportunity to respond prior to the effective date and appeal rights.

# DOP Resources

## Employee Relations Guides and Job Aids

- Progressive Corrective and Disciplinary Action
- Attendance Management
- Functional Capacity Evaluation
- Returning to Work After Illness or Injury

## OHRD Training

- Beginners Guide to Due Process
- Managing and the Law
- Workplace Safety, Your Responsibility
- Discipline and Documentation



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