

FOR YOUR INFORMATION

News for School Clients

**WHEN DOES DOCUMENTATION
BECOME DISCIPLINE?**

October 2003



740 Regent Street
P.O. Box 1507
Madison, Wisconsin
(608) 257-7766

Joanne H. Curry care of info@lathropclark.com

October 2003
News For Clients

When Does Documentation Become Discipline?

Documentation is an important aspect of the effective management of district employees. Indeed, effective management requires memorializing conversations, notifying employees of unacceptable behavior, and identifying areas of improvement for employees. While it is not necessary to include all documentation in personnel files, it is often a good practice to do so. However, when it is included, a question that often arises is whether the documentation constitutes discipline, which typically must be supported by “cause.”

To be discipline, documentation must include a threat of adverse consequences or advise on a penalty for future violations of work rules. If the documentation is a memorialization or simple corrective measure that has no threat to the employee’s prospect for continued employment, it is not discipline. Disciplinary documentation must serve to damage the employee’s current standing as an employee.

The question of whether documentation is discipline often arises after an employer responds to a complaint over an employee’s job performance. In this context, an employer can respond to a complaint and issue a directive telling the employee to adequately perform his or her normal and customary duties without it constituting discipline. A case in point is *Washburn School District*, Case 52, No. 61258 (Emery,

4/17/03). In that case, a parent complained about the teacher’s untimely evaluation of student work, her failure to review exams with the students, and her lack of objectivity in evaluating student work. The principal met with the teacher and prepared a memo discussing the issues, the teacher’s response, and the principal’s expectations for corrective behavior. The principal placed a copy of the memo in the teacher’s personnel file. The Union filed a grievance, asking to have the document removed. The arbitrator concluded, however, that the memo was not discipline, stating:

The memo summarizes a conference between the Principal and the Grievant regarding certain of her evaluation practices. The Principal notes that some of the Grievant’s methods do not meet the standards he expects from his faculty and he proceeds to enunciate those standards with the expectation that in the future the Grievant will improve in those areas. The fact that [the Principal’s] comments are evaluative, and even perhaps critical, in nature, however, does not make the memo disciplinary.

Thus, a pre-disciplinary process often includes making sure the employee knows

what conduct is expected, advising the employee that the present performance does not meet expectations, and developing a plan with the employee to conform with acceptable standards. If this informal process is unsuccessful, management may take formal corrective and disciplinary action, such as letters of reprimand, warning, suspension and termination.

The question of whether documentation is discipline also often arises in cases dealing with employee misconduct, particularly in cases where notice is given for unacceptable comments made by an employee. Such notice has been regarded as not discipline. In one case, it was held that an employer was entitled to place the employee on notice that it viewed such conduct as unacceptable. In another case, an arbitrator determined that the notice was not discipline because the employer indicated on the document that it was not a reprimand. Based on this statement, the arbitrator held that the employer waived its right to use the notice to support any further disciplinary action.

Administrators, however, must be careful. Arbitrators may conclude that a document is discipline even though it does not have magic words designating it as such. In one case, an arbitrator had little difficulty concluding that a letter, not identified as discipline, which criticized an employee's poor performance, constituted discipline. *City of Mauston*, Case 21, No. 46904 (Mawhinney, 8/5/93). The arbitrator based her decision on the fact that the letter was delivered outside the normal evaluation process and on the belief that it laid the ground work for more severe action.

Regardless, administrators must continue to keep documentation as part of good management. Failure to document employee matters may jeopardize an employer's ability to support subsequent disciplinary action. Part of this process includes reviewing documents that are included in personnel files. The above discussion is intended to aid this review. If a document is not intended to be discipline, an employer may also consider writing on the document that it is not discipline.

This FYI was authored by Richard F. Verstegen, an experienced attorney who recently joined the Lathrop & Clark, School, Municipal, Labor and Employment Team. If you have any questions regarding this topic, please call any of the following members of the Team.

Michael J. Julka (608) 286-7238

David E. Rohrer (608) 286-7249

Frank C. Sutherland (608) 286-7243

Shana R. Lewis (608) 286-7202

Mark Herman (608) 286-7157

Joanne Harmon Curry (608) 286-7248

Richard Verstegen (608) 286-7233

Disclaimer: Lathrop & Clark LLP provides this material for information about legal issues and not to give legal advice. However, material may quickly become outdated. Anyone referencing this material must update the information presented to ensure accuracy. The use of the materials does not establish an attorney-client relationship, and Lathrop & Clark LLP recommends the use of legal counsel on specific matters.