

FOR YOUR INFORMATION

News for School Clients

**SMOKING POLICY VIOLATIONS
LEAD TO SUSPENSION UNDER
PROGRESSIVE DISCIPLINE**

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Smoking Policy Violations Lead To Suspension Under Progressive Discipline

Employee discipline generally has two goals: (1) to help the employee improve poor work performance or to notify them of any inappropriate on-the-job behavior; and (2) to provide the employer an opportunity to document poor performance or bad behavior should further discipline or discharge become warranted in the future.

To this end, employers typically administer a progressive discipline process, in which the employer imposes increasingly severe discipline against the employee for incidences involving poor performance or inappropriate behavior. The common steps of a progressive discipline system include: (1) verbal warning; (2) written warning; (3) suspension; and (4) discharge or termination. Utilization of such a process can ensure that each discipline decision with regard to a particular employee is supported by just cause.

A progressive discipline procedure may be specifically set forth in a collective bargaining agreement. If so, arbitrators expect the employer to utilize that procedure. When such procedures are followed, the employer's action is generally upheld. When such procedures are not followed, arbitrators tend to modify

any discipline that is issued, unless the misconduct is extreme, such as stealing or other violations of law. Notice and the opportunity to improve are important aspects of progressive discipline.

A recent arbitration case, *Plymouth School District*, Case 60, No. 61571, MA-11988 (Burns, 11/18/03), provides a good example of a decision where an arbitrator upheld the employer's proper use of progressive discipline. An employee for the district was found smoking on district property in violation of district policy and state law. Prior to this incident, the employee had received one verbal warning and two written warnings, all for smoking in violation of state law and district policy. Based on the employee's prior violations and the district's use of lesser forms of discipline that had no effect on the employee's misconduct, the district imposed a one-day suspension without pay against the employee.

The union objected to the district's action. It argued, in part, that the district acted improperly when it considered the prior verbal and written warnings because there was no just cause provision in the collective bargaining agreement at that time and the agreement, on its face, did not

allow grievances to be filed on disciplinary matters. Therefore, the union argued that the employee could not contest the accusations giving rise to the disciplinary actions.

The arbitrator rejected the union's argument. After a detailed examination of each prior warning, the arbitrator found the union's argument was contradicted by testimony indicating that meetings were held with the employee concerning the prior written warnings, that the employee had an opportunity to rebut the basis for the disciplinary actions at the meetings, and that the employee grieved at least one of these disciplinary actions. The employee, the arbitrator noted, had also received prior notice that smoking on school property was prohibited by state law and district policy.

The arbitrator concluded that, even though the prior disciplinary actions were issued against the employee before the collective

bargaining agreement contained a just cause provision, the district could consider the disciplinary actions and issue a one-day suspension against the employee. Indeed, this case shows that an arbitrator will uphold more severe disciplinary actions against an employee when the employer properly follows a progressive discipline procedure.

To ensure that the goals of such a system are met, it is important that supervisors and managers correctly and consistently apply such procedures and that they are provided proper training in this respect. To this end, the school district should make sure that any forms or reports that the district desires to be utilized by supervisors and managers for this process are widely disseminated to them. Absent such forms and reports, the school district should provide detailed instructions on how to properly document each step of the disciplinary process.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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