

# **PERFORMANCE MANAGEMENT AND DOCUMENTATION**

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- I. Performance Management
  - A. The Legal Perspective
    - 1. An example
  - B. The Practical Perspective
    - 1. Improve productivity because performance problems rarely go away on their own.
    - 2. Improve morale and keep the best employees.
    - 3. Make the supervisor's life easier.
  - C. A Good Performance Management System (Including Documentation) Presents a Mirror of Employee Performance.
  - D. Common Problems When the Mirror Does Not Work Properly
    - 1. Late/after-the-fact feedback
    - 2. Unclear/vague language
    - 3. Incorrect information provided to Employee
    - 4. Conflicts with information from
      - a. Different Supervisors
      - b. The Same Supervisor
  - E. Poor Performance Management Can Lead to Exposure to Legal Claims
    - 1. Discrimination/Harassment
    - 2. Breach of Contract
    - 3. Whistleblower
    - 4. Retaliation
    - 5. Invasion of Privacy

## II. Evidence to Support Discipline

### A. Just Cause Discipline

1. Notice: Did the Employer give to the employee fore-warning or fore-knowledge of the possible or probable consequences of the employees conduct?
2. Reasonable Rules and Orders: Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?
3. Investigation: Did the Employer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Fair Investigation: Was the Employer's investigation conducted fairly and objectively?
5. Proof: At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Equal Treatment: Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?
7. Penalty: Was the degree of discipline administered by the Employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?

## III. Assess the Solutions and Tools of Performance Management

### A. Common tools include:

1. Training
2. Coaching
3. Corrective action
4. Verbal warnings
5. Written warnings
6. Final warning
7. Last chance agreement or suspensions
8. Termination

#### IV. Create an Action Plan

- A. Upon deciding the appropriate tools to manage the situation, the manager next needs to create a plan describing how the employee will improve performance. A good action plan is:

1. Task oriented
2. Specific
3. Offers the appropriate training/help
4. Sets goals
5. Sets timetable for effecting change
6. Explains the consequences of continued poor performance
7. Removes obstacles to performance
8. Considers appropriateness of professional resources

#### V. Document the Problem

- A. The Importance of Documentation

1. Documenting performance problems has many advantages, including:
  - a. Establishes a record of employment actions take and the reasons for the actions.
  - b. Allows managers to organize thoughts
  - c. Provides a “script” for the performance counseling meeting
  - d. Serves as a written record to helps the employee know what to do
  - e. Lessens confusion later
  - f. Serves as evidence of employer's business reasons for actions taken.
2. Serves to assist the employer's business reasons to stand up in court
  - a. Written records overcome fallible human memory
  - b. Written record given greater weight than individual recollection
  - c. Documentation can help demonstrate consistent treatment amongst employees.
  - d. Documentation demonstrates the line of thought leading to an employment decision
  - e. Documentation provides discipline to the decision making process.
3. When Documentation Should Occur?
  - a. Memorialization of Specific Instances of Job Misconduct
  - b. Memorialization of Poor Performance

- c. Evaluation of Performance
- d. Records Regarding Absenteeism and Tardiness
- e. Record of Directive(s)
- f. Record of Disciplinary Meeting

#### B. Implications of NOT Documenting

- 1. Performance or conduct does not improve and there are negative aspects to the employer's business.
- 2. Increased frustration by supervisor and co-workers
- 3. Misunderstanding in interpretation of supervisor/employee discussions
- 4. Leads to perceptions of or actual unfairness
- 5. Results in lack of evidence to support employment actions.

#### C. Use Evidence of the Performance

- 1. Evidence of the performance problem is a powerful way to let employees know exactly what they are doing right or wrong. Evidence can include:
  - a. Written correspondence such as reports, memos, notes and letters.
  - b. Meeting agendas
  - c. E-mail and voicemail
  - d. Photos and videos
  - e. Calendars

### VI. Make Sure the Documentation is Complete.

#### A. When documenting misconduct, each document describing employee performance deficiencies should contain most, if not all, of the elements identified below:

- 1. The date the document was prepared. The document should be prepared **at** or **shortly after** the incident.
- 2. Whether or not the documentation is being characterized as discipline. (Note: this is important for purposes of disclosure as allowed by the Minnesota Government Data Practices Act and/or whether the matter is subject to the grievance procedure pursuant to a collective bargaining agreement).
- 3. The signature of the person preparing the document.
- 4. The printed name of the person preparing the document.

5. A description of the location, date and exact time of the event(s).
6. An identification of all witnesses to the event.
7. A description of what occurred: an objective recording of sensory observations, not subjective conclusions or value judgements.
8. An identification of the rule, policy or contract provision that has been violated or which is being abused or threatened. Be specific and spell out the entire rule.
9. A description of the severity of the act.
10. A description of the effect of the act on others and the organization.
11. A description of the steps employee is directed to take to correct the situation.
12. An offer of management/supervisor help.
13. A suggestion of employer resources that might help.
14. A suggestion of outside resources that might help.
15. A statement that the document will be placed in the employee's personnel file.
16. An indication that other relevant documents, photographs, etc. are attached. The documents should then actually be attached.
17. A description of past conduct by the employee which is similar to the current conduct and which therefore sheds light on the need for the immediate documentation.
18. A discussion of any employee explanations received, indicating the employee has received, read and understands the document.
19. A space for employee's signature, indicating the employee has received, read and understands the document.

## B. Questions to Ask Yourself

1. Before completing the documentation, take a step back and look at it as if you were an outsider. At some point, others will likely need to obtain information about the employee from the documentation. This could include a new manager that has to deal with the employee or a jury trying to decide whether the organization's business reasons for its decisions were justified. Ask yourself the following questions:
  - a. Is the document understandable to a stranger to the business?
  - b. Does the document make it clear why a problem is serious?
  - c. Is the criticism obvious?
  - d. If you received the document, would you be able to create an action plan from it?

## VII. Samples