


1-1-1985

Discipline And Due Process In The Workplace

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Recommended Citation

Dean, Edwin B. (1985) "Discipline And Due Process In The Workplace," *Hospitality Review*: Vol. 3 : Iss. 2 , Article 9.
Available at: <https://digitalcommons.fiu.edu/hospitalityreview/vol3/iss2/9>

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Discipline And Due Process In The Workplace

Abstract

In the article - Discipline and Due Process in the Workplace – by Edwin B. Dean, Assistant Professor, the School of Hospitality Management at Florida International University, Assistant Professor Dean prefaces his article with the statement: “Disciplining employees is often necessary for the maintenance of an effective operation. The author discusses situations which require discipline and methods of handling employees, including the need for rules and due process.”

In defining what constitutes appropriate discipline and what doesn't, Dean says, “Fair play is the keystone to discipline in the workplace. Discrimination, caprice, favoritism, and erratic and inconsistent discipline can be costly and harmful to employee relations, and often are a violation of law.” Violation of law is a key phrase in this statement.

The author offers a short primer on tact in regard to disciplining an employee.

“Discipline must be tailored to the individual,” Dean offers a pearl of wisdom. “A frown for one can cause a tearful outbreak; another employee may need the proverbial two-by-four in order to get his attention.” This is a perceptive comment, indeed, and one in which most would concede but not all would follow.

Dean presents a simple outline for steps in the disciplinary process by submitting this suggestion for your approval: “The steps in the disciplinary process begin perhaps with a friendly

warning or word of advice. The key here is friendly,” Dean declares. “It could progress to an oral or written reprimand, followed by a disciplinary layoff, terminating in that equivalent of capital punishment, discharge.”

Ouch [!]; in order from lenient to strident. Dean suggests these steps are necessary in order to maintain decorum in the workplace.

Assistant Professor Dean references the Weingarter Rule. It is a rule that although significant, most employees, at least non-union employees, don't know is in their quiver.

“If an interview is likely to result in discipline, the employee is entitled to have a representative present, whether a union is involved or not,” the rule states. “The employer is not obligated to inform the employee of the rule, but he is obligated to honor the employee's request, if made,” Dean explains.

Dean makes an interesting point by revealing that a termination often reflects as much on the institution as it does the employee suffering the termination.

The author goes on to list several infractions that could warrant an employee disciplinary action, with possible approaches toward each. Dean also cautions against capricious disciplinary action; if not handled properly a discipline could and can result in a lawsuit against the institution itself.

Keywords

Edwin B. Dean, Discipline and Due Process in the Workplace, Arbitration, Termination/Dismissal, Weingarter Rule, FIU

Discipline and Due Process in The Workplace

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Disciplining employees is often necessary for the maintenance of an effective operation. The author discusses situations which require discipline and due methods of handling employees, including the need for rules and due process.

In the course of managing an enterprise, it is sometimes necessary to discipline employees for actions which range from a violation of rules or procedures to activities which would merit termination of employment or, sometimes, legal action or prosecution. Wrongfully applied, discipline can subject the enterprise to poor morale, union difficulties, a lawsuit, or government intervention by a variety of agencies.

Fair play is the keystone to discipline in the workplace. Discrimination, caprice, favoritism, and erratic and inconsistent discipline can be costly and harmful to employee relations, and often are a violation of law. Employees are very aware of what is taking place, and even if they are not directly involved, the "there but for the Grace of God" syndrome will tend to identify them with the disciplined employee. The steps in the disciplinary process begin perhaps with a friendly warning or word of advice. The key here is friendliness. It could progress to an oral or written reprimand, followed by a disciplinary layoff, termination in that equivalent of capital punishment, discharge.

Discipline must be tailored to the individual. A frown for one can cause a tearful outbreak; another employee may need the proverbial two-by-four in order to get his attention. Discipline must take place privately, almost never in the presence of others, as it is important to preserve the employee's dignity and sense of worth. It should be administered as closely as possible to the time the infraction occurs, and never in anger, if possible, and never near quitting time. Even worse, saying, "I want to see you in the morning," lets the employee stew overnight, involving and perhaps upsetting the family.

If an interview is likely to result in discipline, the employee is entitled to have a representative present, whether a union is involved or not. The name of that lawful rule is *Wemgartner*. The employer is not obligated to inform the employee of the rule, but he is obligated to honor the employee's request, if made.

Most Discipline Is For House Rules

Infractions of house rules are the most frequent causes of employee discipline. Those rules should be, insofar as possible, in writing, and must be known to the employee. General rules apply to all employees, but departmental rules are specific to departments. For example, rules pertaining to maids removing articles left in hotel rooms would not be applicable to waiters and waitresses.

One problem with rules is that sometimes they are unevenly enforced. Management may enforce them, seemingly, by whim, then "lower the boom" after a number of unpunished infractions. If this is the case, it would be necessary to make sure that employees are warned in advance that management is planning to enforce rules which heretofore had had lax or sporadic enforcement. If rules are in writing, employers can require employees to sign an acknowledgment of receiving the rules, together with a statement that they have been read and are understood. Management should also carefully check employee handbooks to make sure there are no conflicting statements in them. The number of employers who have instituted a sequential series of warnings, such as three over a period of time before a discharge, is growing. On its face, this seems fair enough, but there are shortcomings because there is a presupposition that all such reprimands carry the same weight. It is better to treat each case on its own merits. There is no question that offenses such as drinking, fighting, or theft should not be tolerated or condoned under the progressive discipline policy. Such fairness is the *sine qua non* of employee discipline; good personnel administration would make the three-step system unnecessary, and sometimes unwise.

In a sense, discharge can be an indictment of management for previous failure to invoke lesser disciplinary measures, thus making a discharge mandatory. Discharges are costly, for they require hiring and training employees who may be no better, and sometimes worse, than those discharged.

Virtually every labor contract has a provision requiring just cause for a discharge. Such contracts also have a provision for arbitration if the union does not agree that a discharge is for just cause. An arbitrator looks at the employee's work history and previous disciplinary steps, if any, and the burden of proof is on management in such cases. Testimony is taken under oath, and the question of guilt or innocence may hinge on whether management violated its own personnel rules in invoking the discharge. Often top management relies on statements by department heads, which under the weight of testimony may be contradicted by witnesses who are manifestly telling the truth. Specific examples of just cause follow, with comments that have been tested in arbitration proceedings:

- **Drinking or being under the influence of alcohol.** Don't depend on another rank and file employee to testify on your behalf. At best, he will be most reluctant; at worst, his union or peers will put pressure on him not to testify against a fellow employee. It is advisable to have another supervisor confirm your judgment by observing

the behavior and conduct at close range, i.e., alcoholic breath, slurred speech, etc. Make the accusation at the time and record the response. This may forestall an attempt later to blame medication for the infraction.

• **Insubordination.** Is the order clear? Is it related to the employee's normal duties? For example, a waitress's refusal to go upstairs to make beds would surely be upheld. The best procedure is to repeat the order in the presence of a witness and to tell the employee that refusal would result in his or her being sent home and subject to discharge.

• **Stealing.** This charge is very difficult and dangerous for the employer. Unless the culprit is caught red-handed in the presence of witnesses, it is better to discipline for a violation of rules and procedures. Relying on an arrest followed by prosecution is risky and may backfire. The higher court standard of guilty beyond a reasonable doubt may result in a failure to convict, and you may be left with a lawsuit for false arrest.

• **Inefficiency.** This may be a tough one to sustain. You will have to have answers for (a) How long employed? (b) When did this become apparent? (c) What steps have you taken to cure it? (d) Is there another job this employee can handle? There is normal disbelief if an employee with medium seniority is terminated. Why didn't you act sooner?

• **Fighting on the premises.** It is good practice to discharge both participants. Later investigation may result in the reinstatement of the non-aggressor. Here, as in all disciplinary cases, it is most important to hear the employee out.

• **Absenteeism.** This can take many forms. In addition to those you can readily identify, there was a case where regular dinner waiters were on the banquet rolls of a large hotel. When a particularly lucrative banquet came along, they would call in sick on their regular jobs. Careful records of absenteeism must be kept, and, after repeated warnings, it might be necessary to tell an employee that his or her job seems to be harmful, and you don't want to be a party to the destruction of his or her health by continuing to have him or her on your payroll.

• **Violation of any house rule or regulation.** The problem here is uneven enforcement. Obviously, the rule should be known and understood by the employee. It should not be honored in the breach, then suddenly enforced, for example, bartenders operating with an open cash drawer, or failing to deposit guest checks into a locked box. In one case, a bartender was fired for reusing guest checks which were arrayed on the bar next to the register in plain view. It took an investigative shopper to call this to management's attention, for it had been going on for some time. The defense was that the house auditor was hell on wheels about voided items on checks, so when a mis-ringing

occurred, the bartender put the check aside until he could serve a matching item. He thus violated a rule, but escaped the wrath of the auditor.

• **Insolence or lack of courtesy.** Courtesy cannot be put on every morning like a clean shirt. It should be a full-time reflection of top management's attitude, and enforced between employees, supervisors, and, of course, guests. Where a guest is concerned, hear the employee out. Some guests are lightning rods for discourtesy in their treatment of employees and, in these cases, a stern reprimand or a "turn the other cheek" lecture may be sufficient.

• **Failure to perform required services.** There is a time element here. During the first six months you should have no trouble. It is only when long-time employees are involved that a question arises. An aging employee may sometimes be carried by fellow employees out of friend-ship, but there comes a time when they have had enough, and then management has to make a decision. Here your heartstrings may make a decision tough. Do your homework first; determine what resources are available to that employee and conduct the interview with com-passion and understanding. No business can afford to carry deadwood, not only for business reasons, but because of its effect on the other employees.

• **Poor personal appearance, sanitation, and cleanliness.** This is self-explanatory, in most cases. However, it could cover excessive use of perfumes, jewelry, or inappropriate clothing.

• **Physical condition which endangers the employee or others.** Be alert for unusual physical changes. One case involved a front bar-tender with facial skin cancer and one band-aid, then more. The union successfully fought the discharge through two arbitrations. It took an order from the county health officer to effect a discharge.

• **Possession and/or use of a controlled substance.** The alarm-ing rise in the use of drugs requires management to be especially alert to erratic or unusual behavior. The employee grapevine may provide clues, and action must be taken before drug use affects performance of other employees. There is a growing trend to outside counseling and clinics, not only involving drugs, but alcohol as well. Employers opting to become involved must monitor the results and possible back-sliding.

This list is not all inclusive, and an employee may be subject to discharge for conduct which is detrimental to the welfare and busi-ness interests of the employer. This usually refers to activities away from the job, and employees may fight discipline on the grounds that it is none of the employer's business. However, if it is morally reprehensible, it may involve the employer. One case involved a waitress who was arrested for shoplifting in a department store. The newspaper article clearly identified her as an

employee of a named hotel, and management discharged her. The union objected, and it was agreed to let the law take its course. The day of the trial the store detective did not show up and the case was dismissed for lack of prosecution. What happened? The trial date had been changed; the department store did not follow through with its paperwork, and there went the case. The hotel settled for the waitress's back pay. So much for having your decision depend on the workings of the law.

Employment at will and its corollary, discharge at will, is an idea which is losing ground. Obviously, a union contract defeats it, but there are an increasing number of court cases where no union is involved, yet a court finds that a discharge was not for just cause, or contrary to an employee handbook, or against public policy. This can open a Pandora's box of legal problems. It is increasingly good personnel policy to act as if a union and/or the government is looking over your shoulder. In truth, they may be.