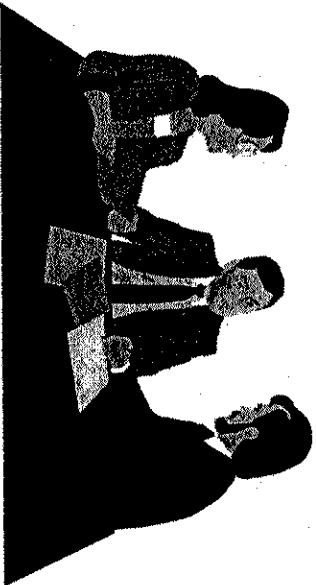


MANAGEMENT
GUIDELINES
FOR ADMINISTERING
CORRECTIVE DISCIPLINE



STATE OF WISCONSIN
DEPARTMENT OF EMPLOYMENT RELATIONS
BUREAU OF COLLECTIVE BARGAINING

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INTRODUCTION

This handbook is designed to assist personnel and human resource managers in situations where it becomes necessary to administer corrective discipline. Sections 1 through 9 focus on the disciplinary principles and procedures commonly applicable to matters of employee misconduct in the nature of specific work rule violations. Section 10 focuses on deficient job performance and generally outlines an alternative disciplinary approach with that type of problem.

This handbook is designed as a quick reference for the personnel manager. By necessity, it only highlights concepts and key procedures. The personnel manager must *still always consult the particular collective bargaining agreement for specific requirements.*

The Department of Employment Relations' Bureau of Collective Bargaining also provides regular, intensive training on labor relations matters, including detailed training in the area of employment discipline.

SECTION 1: PRINCIPLES OF DISCIPLINE

Just Cause

While statute and the contract permit you to impose discipline, such authority cannot be indiscriminately exercised. *Just cause is an essential protection accorded employees by statute and by the contract.* It is reinforced by an employee's access to the grievance/arbitration process, through which improperly imposed discipline can be overturned. Therefore, your key to successful discipline is to assure that *first*, the facts warrant discipline and then, *second*, that all due process requirements are respected.

Just cause incorporates three basic concepts. The discipline must be:

- timely
- corrective
- progressive

Timely Discipline

Timely discipline means that the disciplinary decision is made within a reasonably prompt period of time from when you learned of the possible misconduct, through the investigation, to the point of the disciplinary action itself. A disciplinary investigation must be commenced *promptly*. The reasonableness of the length of time for the investigation itself is measured against the complexity of the case and any special circumstances.

Corrective Discipline

As a general rule, discipline is not for punishment, but rather to motivate improvement. *Corrective* discipline means that the

discipline must be for the purpose of getting the employee's attention in order to *motivate* the employee to improve his/her conduct or performance.

Progressive Discipline

Progressive discipline means that the disciplinary action:

- must be the *minimum level*, and amount, of discipline necessary to get the attention of the employee;
- must be *proportionate* to the seriousness of the offense; and
- takes into account relevant, *previous* disciplinary actions applied to the employee.

SECTION 2: DUE PROCESS IN THE APPLICATION OF DISCIPLINE BY FOLLOWING THE 7 TESTS OF JUST CAUSE

When applying discipline, certain tests generally must be met. These tests constitute the *due process* of just cause. *All seven of the tests must be met* by the Employer for there to be just cause for the disciplinary decision. These seven tests are:

1. Notice
2. Reasonable Rule or Order
3. Thorough Investigation
4. Fair Investigation
5. Proof
6. Equal Treatment
7. Appropriate Penalty

Failure to follow all of the steps can result in a disciplinary decision being modified or overturned by an arbitrator.

These seven tests are detailed on the following pages.

Test 1: Notice

Discipline based upon just cause presupposes that the employee is *sufficiently aware* of the Employer's expectations of conduct and performance.

In order to establish this awareness, you need clear evidence that the Employer's expectations were *communicated* to the employee in some form.

In addition to formal, written work rules, expectations of conduct and performance may also be communicated to employees by other means. These other means include position descriptions and performance standards. They may also include office memoranda and written policies and procedures. In some instances, expectations of conduct may also be established by office practice.

Warnings and counseling regarding specific problem areas with a particular employee can also be forms of notice.

Test 2: Reasonable Rule or Order

The substance of any work rule or order must be *reasonable*. A reasonable rule or order meets three criteria:

- The rule or order applies to an *operational interest* or *requirement* of the employee's office, i.e., it is work-related;
- Compliance with the rule is *attainable*, and
- The rule is *not arbitrary, capricious or in bad faith*, i.e. it is not issued or applied on a whim, nor is it a pretext (a cover) for illegal action.

So long as it can be demonstrated that a rule or order has been issued or applied based upon rational reflection, it generally will not be considered arbitrary, capricious or in bad faith.

Test 3: Thorough Investigation

Investigation determines the facts. What happened? What are the facts? Who, what, when, where, why and how? Do not discipline an employee without a thorough investigation. You must understand and be able to explain what happened.

Test 4: Fair Investigation

Conducting a fair investigation means an *objective* examination, seeking out all evidence of guilt or innocence, and of any mitigating circumstances. It also means respecting the due process rights of the employee, which include notice of the essential charges of misconduct, union representation, and an opportunity to respond to the charges.

Test 5: Proof

Facts must support any disciplinary action. Base the discipline upon *solid evidence* of what happened.

Test 6: Equal Treatment

Follow the "S" principle: *similar, similar, similar*. Similar disciplinary penalties must be imposed among employees for violations of similar rules under similar circumstances. Where management can articulate different relevant circumstances (i.e., dissimilar circumstances) surrounding the current occurrence of misconduct from previous occurrences (i.e., differences in the prior disciplinary record of the employees; lying to cover up; more serious impact upon the operation of the office, etc.), a different level of discipline may be justified.

Test 7: Appropriate Penalty

Determining an appropriate penalty blends two concepts:

- The disciplinary action must be *proportionate* to the seriousness of the offense, and
- The disciplinary action must be *corrective* and, generally, should be a *progressive* step over any earlier discipline of the employee.

Nevertheless, an offense may be so serious in its adverse impact upon the operations of the work unit that a lengthy suspension, or even a discharge, may be the only action sufficient to safeguard operational interests. A discharge for such serious offenses, even where the employee's work record is clean, is referred to as "summary discharge". It is utilized only in the most serious of cases.

SECTION 3:
KEY DISCIPLINARY PROCEDURES

The major benchmarks in the disciplinary process are:

- an *investigation of all the facts*, which usually includes questioning all witnesses, and an *investigatory interview* with the employee.
- a *pre-disciplinary (Loudernill) meeting* with the employee prior to a final decision to impose discipline, *if it appears likely that there will be discipline that will result in the loss of wages.*
- *communicating* to the employee the essential findings of the investigation, the discipline being imposed (if any), and the reasons for that discipline.

The importance of the investigation cannot be stressed enough. For the most part, an arbitrator reviewing the just cause for a disciplinary decision will consider only the facts known to the manager *at the time* the manager made the disciplinary decision. With a few exceptions, evidence discovered after the decision is made will *not* be considered by an arbitrator. Consequently, the investigation should be exhaustive and a manager should be thoroughly familiar with all the facts supporting his or her decisions to discipline an employee.

SECTION 4: "SUSPENSIONS" PENDING INVESTIGATION

Suspensions with pay pending investigation. Generally, a public employee cannot be suspended *without pay* until a determination has been made *after* an investigation and pre-disciplinary procedures that he or she committed a work rule violation. It may be necessary, however, to remove an employee from the work site during an investigation, *but do it without interrupting pay*, if important *security interests* are involved. This action is often referred in common terms as a "suspension with pay pending investigation." The security interests usually involve preventing the destruction of potential evidence, protecting witnesses from intimidation, or protecting residents or co-employees from further harm. Under the right circumstances, the suspension with pay can also include the protection of program interests against the erosion of public confidence. Allegations of theft and violence commonly involve these interests.

Balancing of interests. Suspension with pay under such circumstances respects both the Agency's and the employee's interests. The Agency's legitimate concern for safety and security is protected by removing the employee from the work site when there is preliminary evidence of serious misconduct justifying a fuller investigation. At the same time, the employee's economic interest is protected by not stopping pay before he or she has been given the due process of a full investigation and a pre-disciplinary right to respond to the accusations. A suspension with pay pending investigation should not be grievable since the employee's pay continues and no disciplinary decision has yet been made.

Be able to explain the circumstances requiring a suspension with pay. Even though a suspension with pay pending investigation is not grievable, it should be used only where there is a real, demonstrable concern that can be expressed for the security of people, documents, other items of value, or program

integrity. Some preliminary evidence pointing to a reasonable suspicion of misconduct by the particular employee must exist. The supervisor or manager must also be able to detail the circumstances that create a reasonable concern for security if the employee suspected of the misconduct continued to work at the worksite. Some acts of misconduct, such as patient abuse or theft, involve obvious security concerns. Other acts standing alone may not be so obvious, without additional circumstances. For example, a charge of verbal sexual harassment may not be sufficient justify a suspension with pay pending investigation, but reports by the target of the harassment that the employee has now threatened her if she continues to complain could be justification.

Act promptly. Once the manager or supervisor is aware of the circumstances requiring a suspension with pay pending investigation, the action should be carried out promptly. Delay only undermines the position that the suspension pending investigation was necessary to protect important interests. Normally, the necessity for the action should be apparent at the time that there is preliminary evidence of the employee's misconduct (e.g., theft), however, for some offenses there may not be a concern unless there is later evidence of threats or intimidation against witnesses.

Notice. Inform the employee in writing that he or she is being suspended with pay pending investigation of the specific alleged offenses. Beyond identifying in this notice the offenses that will be investigated, at this time do not detail the circumstances that require the suspension with pay. Include directions that the employee is to remain available for investigatory meetings during normal working hours, and that he or she should notify a designated person with the Agency regarding any forwarding numbers at which he or she can be reached.

A timely investigation is still required. A suspension with pay pending investigation necessarily implies that an investigation will be conducted. As a matter of due process, the employee is still entitled to a *timely investigation*, fairly conducted, and completed in a manner that he can respond to the accusations before any

disciplinary decision is finalized. The investigation should commence immediately. A suspension with pay should not result in the investigation being delayed or dragged out.

SECTION 5: INVESTIGATORY INTERVIEW

An important part of a disciplinary investigation is the investigatory interview with the employee who is the subject of the investigation. Your investigatory interview with the employee may start the investigation or it may come later in the process, after talking to other witnesses. It may be necessary to have more than one investigatory interview with the employee.

Notice of Investigatory Interview

First give notice. If at all possible, the notice should be in writing; however, if there is an immediate need, it may be verbal. In either case, notice should include communication of the following points to the employee:

- the purpose of the interview,
- the suspected offense(s),
- the work rule(s), procedure(s), standing or specific order(s), or other requirement(s) that may be involved,
- the time of the meeting,
- the place of the meeting,
- the individual conducting the meeting,
- the duty to cooperate with the investigation, including answering questions and the consequences of failure to answer questions (however, see Section 6, "Conducting the Investigatory Interview," if possible criminal charges are involved),

The notice should also include the following two additional points, if it has been the agency's practice in the past to notify employees of:

- the right to union representation, and
- the right to a brief period of time prior to the interview to consult with the union representative.

Delivery of the Notice

Delivery of a written notice should be followed by a memo to the file or an affidavit noting the manner, time and place of the delivery.

If you give verbal notice, document the way you did it by writing a memo to file; if possible, give the verbal notice in the presence of a management witness, who can also initial the memo to file.

SECTION 6: CONDUCTING AN INVESTIGATORY INTERVIEW

The investigatory interview is conducted for the purpose of gathering information to determine if there was misconduct warranting discipline and, if so, at what level of discipline.

General

Have a management witness present, not to ask questions, but to take notes and listen carefully.

Tell the employee that (1) you consider this a very serious meeting; (2) you are listening very carefully to his/her answers and statements; and (3) you have not reached any decision on misconduct or discipline and a decision will not be made at this meeting.

Conduct the meeting in a room that ensures privacy and provides adequate space for the participants. Make arrangements to avoid any interruptions.

Listen very carefully to the information offered by the employee. Ask questions that seek information about the events. Questions should be probing, not judgmental. Ask clarifying questions. Do not make opinion comments to the employee at this meeting about his/her answers, about others who may be involved, or about potential discipline.

Take extensive notes.

Allow time (at least a day, and more if necessary) to (1) consider the information provided by the employee; (2) investigate any claims or leads provided by the employee; and (3) consult with your personnel/employment relations office and upper management on further steps.

Use the time productively for these purposes to ensure the continued timeliness of the investigatory process.

An Employee's Duty to Answer Questions

An employee has an unqualified "duty to cooperate" in an internal investigation into work-related matters where there is no possibility of criminal charges being brought against him/her. In this situation, an employee can be directed to answer all questions. An employee who then refuses to answer questions in such a situation can be disciplined (including discharged) for insubordination.

If there is a possibility of criminal charges against the employee, he/she can refuse to answer your work-related investigative questions unless certain specific statements are made to the employee. In such a situation, the supervisor should contact the agency's Personnel/Employment Relations office and/or General Counsel to discuss the advisability of requiring the employee to answer questions under the terms of *Odden v. Board of Police and Fire Commissioners*, 108 Wis. 2d 143 (1982) at pp. 159, 161-162, and 164-165.

SECTION 7: UNION REPRESENTATION AT THE INVESTIGATORY INTERVIEW

By law, an employee has an absolute right. Upon request, to have union representation at a meeting where the employee will be questioned about a matter that the employee reasonably believes could result in discipline of him/her. You are not required by law or contract to notify the employee of his/her right to such representation. However, it is strongly recommended that you inform the employee about this right to union representation in your letter ordering attendance at the meeting.

If you have a past practice of automatically informing employees of their right to have union representation at investigatory interviews, or if you automatically notify the union representative of such meetings, then you must continue to do so.

If you assure the employee that the meeting will not result in any discipline, that assurance means that he/she cannot have a reasonable belief that the meeting is an investigatory interview and therefore you can, if you wish, reject any request for union representation. Understand, however, that an arbitrator or other adjudicator will likely hold you to this assurance even if the meeting results in information implicating the employee in misconduct.

Treat as a formal request any expression of interest by the employee in having union representation. A request for union representation at an investigatory meeting automatically applies to all such future meetings on this matter. Arrange for the representation as soon as the request is made. Thus, if at any time during an investigatory interview, the employee makes a request for union representation, you must immediately adjourn the meeting and either reschedule it when a union representative can attend or cancel the meeting.

An investigatory interview should be canceled only if (1) the union representative's actual conduct before or at the investigatory interview is very disruptive, or (2) repeated, unreasonable delays requested by the union representative make holding the meeting essentially impossible in a timely fashion. In either event, both the employee and the union representative should be informed as to why the investigatory interview is being canceled and the consequences of such cancellation resulting from their conduct, i.e. that factual findings will be made without benefit of hearing from the employee.

Role of the Union Representative at the Investigatory Interview

What a Union Representative May Do

Before the meeting, the union representative and the employee must be allowed a brief time to confer with each other.

At the meeting, the union representative has the right to observe and take notes.

Further, he/she also has a limited right to speak during the meeting, including to:

- repeat to you points the employee has already made;
- explain to you the significance of points made by the employee; and
- speak to you about practices at the work site;
- occasionally confer with the employee in a confidential manner.

What a Union Representative May Not Do

The union representative has no right to bargain about anything at an investigatory interview. The union representative may not make the employee's willingness to answer contingent on a guarantee of leniency.

The union representative has no right to speak for the employee in response to questions. If there is no possibility of criminal charges, the employee has an obligation to answer questions at this meeting. If the union representative continues to try to answer for the employee or instructs the employee not to respond, take the following steps:

- Inform the union representative one last time: (1) of the limits of his/her function at an investigatory interview; (2) that you have the prerogative to question your employees about work related matters; (3) that you have the right to expect the employee to answer your questions; and (4) that the union representative has no right to interfere with this process.
- Inform the employee: (1) of his/her duty to cooperate and answer your questions; (2) that the employee is responsible for his/her own choice of cooperating or not; (3) that under appropriate circumstances, the employee can be disciplined for failure to cooperate*; and (4) that if the employee continues to refuse to answer your questions, you will make a disciplinary decision based upon existing facts and sources of information.
- If possible criminal charges are involved, see Section 6, "Conducting the Investigatory Interview."

SECTION 8:

PREDISCIPLINARY (LOUDERMILL) MEETING

If, after completing the investigation, you tentatively conclude discipline is appropriate and that the level of discipline should likely involve loss of pay (i.e., suspension without pay, a reduction in base pay or dismissal) you must provide the employee with an opportunity for a predisciplinary meeting. This meeting is often referred to as a *Loudermill* meeting after the Supreme Court case *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 1 ER 424 (1985), and is a constitutional requirement based upon the 14th Amendment to the U.S. Constitution.

Objectives of the Predisciplinary (*Loudermill*) Meeting

The objective of this meeting is to assure that the employee has a full and fair opportunity to respond to all the essential facts and/or to offer mitigating circumstances for your consideration prior to you finalizing your discipline decision. This is the opportunity for the employee to "tell his/her side of the story." This meeting also provides management with the opportunity to "check" that it has reasonably considered and evaluated all available, relevant facts. To accomplish these ends, the employee must be made *fully aware of your view of all the essential facts upon which you will be basing a disciplinary decision.*

Difference between Predisciplinary Meeting and Investigatory Interview

The investigatory interview and predisciplinary meeting occur at separate times and serve different legal purposes. *You should avoid combining these meetings.*

The investigatory interview is part of your initial fact gathering and is done before reaching a conclusion.

The predisciplinary meeting occurs *after* the completion of the investigation. You are now informing the employee regarding your findings about what happened and giving the employee an opportunity to respond.

* The predisciplinary meeting can be done in writing in unusual circumstances, such as when an employee is in jail.

Providing Notice of the Predisciplinary Meeting to the Employee

The notice should specify the date, time and place of the meeting, the subject matter of the meeting, and identify the management official who will be conducting the meeting.

The subject matter of the predisciplinary notice should include a summary of the essential facts upon which discipline will be based. Key documents may also be attached. The objective is to adequately inform the employee of the charges and the facts supporting the charges so the employee can respond.

Scheduling the Predisciplinary Meeting

The Employer is only required to provide the employee with the opportunity for a predisciplinary meeting. If the employee refuses to attend, or unduly delays the meeting, the employee can be considered to have waived the right to the meeting. However, scheduling should reasonably accommodate the employee and the union representative, without lengthy delay.

Conducting the Predisciplinary Meeting

The predisciplinary meeting is *not* a formal contested hearing. Witnesses are not called. There is no right to question or cross examine you or any persons who provided you with information. *You need only identify the essential facts upon which you will be basing your disciplinary decision.*

You may present your findings of essential facts verbally, but it is recommended that you organize them in writing to assist the employee in efficiently responding to the findings. Ideally, you should provide these written findings to the employee a reasonable period of time before the meeting. Although you are not required to produce underlying documents at this meeting, providing them at this time is recommended, absent bona fide security concerns.

Role of the Union Representative in the Predisciplinary Meeting

Since the predisciplinary meeting is still essentially investigatory in nature, the employee has a right to a union representative if the employee requests one.

If a union representative is present at the meeting, the same rights and restrictions on the representative's participation noted in the "investigatory interview" section of this booklet continue to apply.

Follow-Up to the Predisciplinary Meeting

If any new information is provided by the employee, investigate its validity and relevancy. Do not pass judgment or make any commitment on them at the meeting. It may be necessary to hold a final follow-up meeting with the employee after you have reviewed the new information.

Timing the Disciplinary Decision

At the meeting, the employee or union representative may ask you (1) for your response to the employee's arguments, (2) for your decision on misconduct, and/or (3) for your decision on discipline. Just say that you will be considering what you have heard at the meeting and will notify the employee and union representative when you make a decision.

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SECTION 9: DETERMINING THE APPROPRIATE LEVEL OF DISCIPLINE

Factors in Determining the Appropriate Level of Discipline

Determining the appropriate level of discipline depends upon consideration of the following factors:

- severity of the current misconduct (including impact on operations);
- previous discipline;
- similarity between the current misconduct and any previous discipline (is there a "theme?");
- length of time since previous disciplines;
- contract limitations on the use of previous discipline (usually time limits);
- mitigating circumstances regarding the current misconduct;
- length of service of employee and his/her performance record (sometimes considered a "mitigating circumstance").

Mitigating Circumstances

Mitigating circumstances are factors considered in determining whether discipline for an act or acts of misconduct should be lessened, or even excused. Generally, mitigating circumstances include such considerations as provocation, self-defense or extraordinary stresses. An employee's seniority and the quality of his/her work performance (usually good work performance) are also often considered to be mitigating circumstances.

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A mitigating circumstance may or may not be acceptable, depending on the seriousness of the misconduct and its impact on operations. It is important that management be able to explain why mitigating circumstances were or were not applied.

If you apply a mitigating circumstance to a particular disciplinary situation, it is advisable to state that point in the letter of discipline and to explain your reasons. This provides some historical record to distinguish that particular situation from equal treatment claims that may be raised in other, subsequent disciplinary matters involving other employees.

An employee's involvement in an Employee Assistance Program is not in itself a mitigating circumstance, although the underlying problem of the employee may or may not be a mitigating circumstance. An employee cannot and should not be disciplined for utilizing EAP, *however*, neither should discipline be waived or held in abeyance as an "incentive" for an employee to participate in EAP. EAPs and discipline exist on entirely different tracks. If a level of discipline is appropriate for the misconduct, an employee should be held accountable for his/ her actions.

Levels of Discipline

Discipline means imposing one of seven possible actions:

- verbal reprimand,
- written reprimand,
- suspension without pay,
- demotion,
- termination,
- reduction in base pay, or
- "other appropriate disciplinary action."

Verbal Reprimand:

A verbal reprimand is an oral statement made by you to your employee; it is not put into writing. The *fact* that a verbal reprimand was given to the employee, however, should be informally recorded, allowing you to recall it if later progressive discipline is necessary. Recording it by simple calendar notation is recommended. Neither its fact nor substance is entered into the employee's official personnel record.

Give the verbal reprimand in private. It is not a public humiliation.

Written Reprimand:

A written reprimand is formally documented in writing to the employee and placed in the employee's personnel file.

Suspension Without Pay:

If a more severe discipline than a written reprimand is warranted, it will normally be a one-day suspension without pay for FLSA non-exempt employees* (See following note re: FLSA exempt employees). The progressivity of the discipline is important. A prototypical progression of suspensions is 1-3 workdays*, 5 workdays, 10-15 workdays*, followed by termination. The maximum suspension without pay should be no more than 30 workdays. A suspension is documented with a letter of discipline to the employee and is placed in his/her personnel file.

***Important Note regarding FLSA (Fair Labor Standards Act) Exempt Employees:** Employees designated "FLSA exempt" (many professional employees, as well as most managers and supervisors) generally can only be suspended without pay for periods of a full workweek, which in the case of full-time employees is usually a five-day, forty-hour week. Consequently, "progressive discipline" of FLSA exempt employees for most misconduct will have to take the form of a series of increasingly severe letters of reprimand ("progressive written reprimands") before proceeding to a full workweek suspension and/or discharge, unless the misconduct is so serious as to warrant proceeding immediately to a full workweek suspension.

In other words, progressive written reprimands will have to take the place of shorter-term suspensions for FLSA-exempt employees. "Progressive written reprimands" should specify any previous reprimands for related misconduct and the time period over which the employee has received them. The letter could specify that the employee "should consider this disciplinary action as equivalent to" a one-, two-, or three-day

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suspension without pay "if such action could have been applied under federal wage and hour law for professional employees". If the employee's misconduct continues through the series of reprimands, the Employer can then progress from the series of reprimands to a full workweek suspension or to discharge, depending upon the nature of the misconduct and the impact of that continuing misconduct on operations.

The FLSA implies that *in the very limited circumstances involving the violation of a "major safety regulation,"* exempt employees could be suspended without pay for less than a workweek. To avoid confusion, however, management is advised to follow either the progressive written reprimand process already described, or to proceed directly to a full workweek suspension if the violation of the major safety regulation has a serious enough impact on operations.

The use of progressive written reprimands for FLSA-exempt employees is extremely important, and should not be ignored. They are an essential component of employment relations. Since shorter period suspensions will not be an option for correcting the misconduct of FLSA-exempt employees, the progressive written reprimands will be a necessary substitute. If misconduct is ignored simply because it would "only warrant a letter" and not a suspension, then full week suspensions and discharges for later continued misconduct could be jeopardized in arbitration as a result of an absence of previous progressive discipline.

Agency payroll offices can inform you about the FLSA designation of a particular employee. Bulletins from the Department of Employment Relations should be consulted for more detail on the issue of suspension without pay for exempt employees.

Demotion:

Demotion is the movement of the employee into a lower level classification that generally involves a corresponding reduction in pay. Demotion as a disciplinary action should only be considered

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