



**TUSTIN**  
17862 East Seventeenth Street  
Suite 204 • East Building  
Tustin, CA 92780-2164

(714) 573-0900 Tel  
(714) 573-0998 Fax

**SACRAMENTO**  
2520 Venture Oaks Way  
Suite 190  
Sacramento, CA 95833-4228

(916) 245-8677 Tel  
(916) 333-1115 Fax

[www.parkercovert.com](http://www.parkercovert.com)

\* A Professional Corporation

# **2023 SCHOOL TRANSPORTATION BUSINESS MANAGEMENT FORUM**

## **“MANAGING CLASSIFIED EMPLOYEES AND EMPLOYEE PERFORMANCE EVALUATIONS”**

**October 12, 2023**

**Presented by:  
Steven Montanez, Esq.**

**© 2023 By Parker & Covert LLP  
All Rights Reserved**

# MANAGING CLASSIFIED EMPLOYEES AND PERFORMANCE EVALUATIONS

## TABLE OF CONTENTS

<b>I.</b>	<b>DISCIPLINE</b> .....	1
A.	INTENT OF DISCIPLINE.....	1
B.	PROGRESSIVE DISCIPLINE .....	1
1.	The Spectrum of Progressive Discipline.....	1
2.	Stages of Documentation .....	2
C.	DOCUMENTATION OF PROGRESSIVE DISCIPLINE .....	4
1.	Characteristics of Disciplinary Documents.....	4
2.	How to Effectively Communicate in a Disciplinary Document .....	4
3.	Analysis of Shortcomings .....	5
D.	GOALS OF DOCUMENTATION .....	5
E.	DISCIPLINARY CHECKLIST .....	5
F.	“JUST CAUSE” .....	10
G.	ARBITRATOR’S ANALYSIS .....	11
H.	“JUST CAUSE” ANALYSIS .....	12
<b>II.</b>	<b>EVALUATIONS OF CLASSIFIED EMPLOYEES</b> .....	13
A.	COMMUNICATION OF JOB PERFORMANCE EXPECTATIONS .....	13
B.	DOCUMENTATION OF OBSERVED JOB PERFORMANCE .....	14
C.	CONSIDERATION OF DISCIPLINE.....	14
D.	EVALUATING PROBATIONARY CLASSIFIED EMPLOYEES .....	15
1.	Potential.....	15
2.	Technical Competence and Interpersonal Skills .....	15
3.	Common Sense.....	15
E.	HOW DO YOU RECOGNIZE THE GOOD CLASSIFIED EMPLOYEE? .....	15
F.	HOW DO YOU MANAGE THE MARGINAL EMPLOYEE? .....	16

# **I. DISCIPLINE**

## **A. INTENT OF DISCIPLINE**

1. Discipline should be considered as a means to solicit improved performance via communication and counseling in response to substandard employee performance or inappropriate employee conduct. It is also a means to establish a foundation for disciplinary action.
  - a. For the employee, corrective discipline, through escalated penalties, opens the door to rehabilitation and the opportunity to restore his/her District standing and continued employment.
  - b. For the District employer, pursuit of discipline is a management responsibility that provides an opportunity for the employee to benefit from discipline by improving his/her job performance or reforming inappropriate behavior.
    - (1) The District is able to benefit from the cost invested in the employee training and skill development, as well as reap cost savings by avoiding the expense of hiring and training new replacement personnel.
  - c. The principle of progressive discipline requires that the degree of discipline should fit the seriousness of the misconduct. In other words, the discipline consequences, “should fit the crime.”

## **B. PROGRESSIVE DISCIPLINE**

1. **The spectrum of progressive discipline.**
  - a. Verbal Counseling
  - b. Informal Conference - Documented
  - c. Formal Conference - Letter of Reprimand
  - d. Statement of Charges - Suspension
  - e. Statement of Charges - Termination

- f. Progressive Discipline Exceptions - Egregious Conduct (i.e., violence, assault, drug sale, theft etc.)

## 2. **Stages of Documentation.**

Documentation in progressive discipline requires successive stages of consequences in response to more serious disciplinary actions.

### a. Informal Conferences

- i. Verbal reprimand to put the employee on notice that performance is unsatisfactory.
- ii. Advise employee of expectations.

### b. Written Reprimand

- i. Used when employee continues to break rules, fails to perform tasks, or falls short of expectations.
- ii. Administrator/supervisor should formally document problem by written reprimand.
- iii. Provide notice to employee that reprimand will be placed in personnel file and inform employee of right to comment and have comments attached. (Education Code § 44031.)

### c. Written Summaries

- i. Used after one or a series of written reprimands.
- ii. Administrator discusses the employee's specific shortcomings.
- iii. Administrator gives direction for improvement.
- iv. Employee warned of future disciplinary action if conduct continues.
- v. Employee signs document.
- vi. Given opportunity to respond.

- vii. Place in personnel file.
- d. Unsatisfactory Written Evaluation
- i. Used after written reprimands, conference summaries, etc.
  - ii. Used when employee has already been put on notice and given direction to improve on many occasions.
  - iii. Evaluation may recommend discipline or that the employee be given more time to improve.
  - iv. Given opportunity to respond.
  - v. Place in personnel file.
- e. Dismissal Proceeding
- i. Used when concerning formal discharge proceedings.
  - ii. Employee may request (and get) hearing.
  - iii. Burden of proving charges falls on District.
  - iv. Personnel file is used in hearing.
- f. Important considerations for all types of documentation and evaluation
- i. Reference authority such as Education codes, Board Policies, Administrative Regulations, and District or Departmental Rules that are violated.
  - iii. Connection (“nexus”) to job performance.
    - (a) Statement of Impact of Conduct: on students, other faculty, staff, administration, community.
    - (b) Notoriety of Conduct: compliments or complaints from students, faculty, community members.

- (c) Proximity or Remoteness in Time: timeliness of supervisor's communication/intervention.
- (d) Extenuating, Aggravating or Enhancing Circumstances: surrounding conduct.
- (e) Prior Help Given: as well as employee's efforts to correct.
- (d) Likelihood of Recurrence: continued pattern of conduct.

## **C. DOCUMENTATION OF PROGRESSIVE DISCIPLINE**

### **1. Characteristics of Disciplinary Documents.**

There is no perfect disciplinary document for all circumstances, but good disciplinary documents share certain characteristics:

- a. Clear, direct, relevant communication from the supervisor to the subordinate;
- b. Reliance on specific factual detail rather than on general statements; and
- c. Conclusions based on a factual foundation rather than conclusory statements.

### **2. How to Effectively Communicate in a Disciplinary Document.**

- a. Open and frank communication of information regarding performance/conduct concerns and deficiencies;
- b. Employee must know specifically what is wrong with performance;
- c. Employee must know what to do about it to correct it; and
- d. Employee must know what will happen if he/she fails to follow the supervisor's direction.
- e. There can be no room for employee to apply his/her own interpretation.

- f. Be tactful without engaging in a personal attack on employee.
- g. Focus on specific areas of dissatisfaction with the employee's work performance, and **not** on employee as a person.

**3. Analysis of Shortcomings.**

Thoroughly analyze shortcomings in employee's job performance, **not** employee's personal shortcomings.

- a. Follow up with a sincere offer to help employee improve his/her job conduct or skills.
- b. Investigate the facts. When a complaint or incident report is received, thoroughly question the person making the report, as well as witnesses.

**D. GOALS OF DOCUMENTATION**

- 1. Improving performance.
- 2. Developing a record for a dismissal case.
  - a. Not necessary for discipline due to single, isolated incident (e.g., egregious violations, felonies).
- 3. Information comes from personnel file.
- 4. Used to support discipline based on acts of a continuing nature, such as:
  - a. incompetence;
  - b. unprofessional conduct;
  - c. persistent tardiness/absences; and/or
  - d. insubordination.

**E. DISCIPLINARY CHECKLIST**

A disciplinary memorandum, such as a directive to cease and desist an action or a letter of reprimand, should contain all the significant elements surrounding an exceptional incident of employee misconduct. When preparing the memorandum, it is

helpful for the writer to first review the following checklist to ensure that his memorandum will be complete and accurate.

1. The memorandum must be prepared soon after the event which is being described while the writer's memorandum of the incident is still fresh.
2. The memorandum should be addressed to the employee and indicate its subject; e.g., Statement of Concern, Letter of Reprimand, Notice of Unprofessional Conduct, Summary Discipline.
3. The memorandum must be neatly written or typed.
4. The memorandum must indicate the date, time and location of the incident(s) being described.
5. The memorandum must be given to the employee soon after the incident which is the subject of the memorandum.
6. If at all possible, have the employee sign and date when he/she received the memorandum.
7. The memorandum must describe the facts of the incident, in objective terms, evidencing employee misconduct. A memorandum that is neutral or ambiguous in its effect upon the employee's job performance is worthless for disciplinary purposes.
8. The memorandum must show that the employee has performed poorly on a matter of importance or significance. A memorandum that is nit-picking or concerns only the periphery of the employee's performance places the memorandum writer in a poorer light than the employee.
9. The memorandum must indicate any rule, regulation, board policy, or provision in the Collective Bargaining Agreement that the employee has violated.
10. The memorandum must contain definite suggestions on how the employee is to improve.
11. Use "interoffice memorandum" format.



- a. Show who the memorandum is directed to.
- b. Show who prepared it.
- c. Show the date it was prepared, including the year.
- d. Show the subject matter.

12. The body of the memorandum should include such specifics as:

- a. **When** did it happen?
  - i. Exact time or date. (e.g., was person sleeping on the job or while on break?)
- b. **Where** did the incident occur? (e.g., at employee's work station or in car or in the parking lot?)
- c. **What** happened?
  - i. Set out in narrative form in detail.
  - ii. If possible, state the distance the observer was from the act/omission/conduct observed.
  - iii. Also state the length of time observation took place.
  - iv. **What** is wrong with the conduct?

13. A disciplinary memorandum must give the employee **notice** of his/her deficiencies.

- a. Refer to the rule, policy or contract provision violated.
- b. Attach the rule, etc., whenever possible.
  - i. Attaching the rule precludes the defense that the employee lacked fair notice.

14. What must be done to **correct** the behavior?

- a. Employers must give direction as to proper conduct or level of performance required in the future.

- b. Use **clear directives** that leave no room for interpretation.
  - i. Do not use terms like “hope,” “ask,” “request,” etc.

**15.** What are the **consequences** of further conduct?

- a. The disciplinary memorandum must put the employee on notice that further disciplinary steps will be taken if he/she **fails to improve** his/her conduct or performance.
- b. Use phrases like: “Failure to follow this directive will result in more serious disciplinary action, up to and including dismissal.”
- c. Prior to placing memorandums in the personnel file, the employee must be given notice and an opportunity to review and comment upon the document. The employee shall have the right to enter, and have attached to any derogatory statement, his or her own comments. (Education Code § 44031.)

**16.** Memorandum is then placed in personnel file.

- a. Have employee sign that he/she has read and understands the memo (not a legal requirement - if employee refuses to sign, supervisor should write “employee refused to sign” and date and initial the document).

**17.** Identify to the employee the conduct that is unacceptable.

**18.** Be objective and specific rather than subjective and conclusory.

- a. This objective approach has the advantage for the administrator who is often the primary witness in a disciplinary hearing against the employee.
- b. Be direct.
  - i. When an employee is directed to improve his/her performance, there should be no room for doubt in the employee’s mind that if he/she does not do expressly what has been directed, consequences will result.

**19. Conference summaries.**

- a. To the extent permitted by the contract, utilize written conference summaries of meetings held with employees.
- b. The conference summary should state who was present, the date on which the conference was held, the reason the conference was held, what expectations and directives were communicated to the employee at the meeting, and the evaluator's response, where appropriate, to comments, admissions, or excuses offered by the employee at the conference.

**20. Place documents in the personnel file.**

- a. When a conference summary, reprimand, or other documents have been given to the employee, the behavior or performance described therein should be stated clearly and documented. Employee is given the opportunity to respond and have his or her response attached to the document. The document is then placed in the personnel file.
- b. Be sure to consult the appropriate Collective Bargaining Agreement to follow the process for placing documents in personnel files.

**21. Protected areas.**

- a. In the documentation and evaluation process, criticism on the basis of a protected characteristic or class should be cautiously avoided except in limited instances where such criticism is protected by law.
- b. Discrimination on the basis of race, age, sex, religion, marital status, pregnancy, or disability is prohibited.
- c. Evaluations and employment decisions and benefits may not be based on these factors except in certain very limited instances where the trait or status is a bona fide occupational qualification (e.g., female attendant for girls' locker room).

- d. Physical Disability. Where work performance is unsatisfactory and the rationale offered by the employee is that of physical limitation or handicap, careful attention should be given to future evaluations of such an employee.
- e. First Amendment rights. Other areas in which an evaluator should exercise caution before disciplining or reprimanding an employee include potential First Amendment or free speech considerations.
- f. Employee organizations. Be aware of rights under the EERA (Educational Employment Relations Act). In evaluating, observing, and working with employees, the evaluator should be thoroughly familiar with the Collective Bargaining Agreement as well as with the Board policies. The site administrator's failure to observe their requirements may result in invalidation of the evaluation.

#### **F. "JUST CAUSE"**

Inherent in the concept of "just cause" is the principle that the disciplinary penalty should be consistent with the seriousness of the employee's proven misconduct and that it should be the minimum necessary to correct such behavior.

"[O]nce the misconduct has been proved, the penalty imposed must be fairly warranted and reasonably calculated to eliminate or correct the offensive conduct."

It has been emphasized that punishment should be based on the employee's actions, not on the consequences of those actions. But where rehabilitation fails, discharge can then follow. The purpose of progressive discipline is not only the rehabilitation of the employee and the prevention of continued misconduct, but also:

". . . the protection of the right of the Company to sever completely its relationship with any employee who by his total behavior shows himself to be irresponsible." (Adolph M. Koven and Susan L. Smith, Just Cause: The Seven Tests, Second Edition, revised by Donald F. Farwell (Washington, D.C.: BNA Books, 1992.)

One of the most commonly recognized principles in the arbitration of discipline and dismissal cases is that there must be reasonable rules or standards consistently applied, enforced and widely disseminated. Concerning notice of rules, one arbitrator stated:

“‘Just cause’ requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless the conduct is so clearly wrong that specific reference is not necessary.”

In regard to warnings, evidence as to whether warnings of unsatisfactory conduct were given prior to discharge or discipline generally is relevant in determining whether the penalty is justified.

Where an employee continues prohibited conduct after having been warned, the fact that he/she was warned stands against him/her. On the other hand, failure to give prior warnings may be one of the reasons for the refusal by an arbitrator to sustain disciplinary action (particularly discharge).

### **G. ARBITRATOR’S ANALYSIS**

An arbitrator may reduce discipline to a lesser form if progressive discipline has not been applied or if the discipline is deemed excessive. Arbitrators have developed a definition of “just cause” which has been applied to educational employment cases:

1. Did the District give the employee forewarning or foreknowledge of the possible disciplinary consequences of the employee’s conduct?
2. Is the policy or rule that was violated within the appropriate policy-making authority of the board or administration; i.e., does it reasonably relate to: (1) the orderly, efficient and safe operation of the District; and (2) the performance that the District may properly expect of the employee?
3. An exception is allowed where compliance with a policy or rule would jeopardize the employee’s health, safety or integrity.
4. Did the District, before administering discipline to an employee, try to discover whether the employee had, in fact, violated a policy or rule?
5. Was the District’s investigation conducted fairly and objectively?
6. At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
7. Has the District applied its rules, orders and penalties to all employees evenhandedly and without discrimination?

8. Was the degree of discipline administered by the District 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?

A "No" answer to one or more of the above questions generally means that "just cause" does not exist.

#### **H. "JUST CAUSE" ANALYSIS**

For the employer to show "just cause," the following questions should be answered in the affirmative:

1. Was the conduct known to the employee?
2. Did the expected conduct relate to efficient and orderly operation of the school or educational program?
3. Was the employee informed of the expected conduct, as well as unacceptable behavior?
4. Was the employee informed that non-compliance with statutes, rules, orders, policies, or regulations could result in disciplinary action?
5. Was the employee allowed to be heard and explain his/her actions prior to any disciplinary action?
6. Was there, in fact, a clear violation, disobedient act, or disregard of common judgment?
7. Was there specific data, documentation, and other information to substantiate and verify the employee's failure in meeting expected behavior?
8. Was the disciplinary action taken consistent with the seriousness and nature of the offense?
9. Was the disciplinary action taken consistent with the treatment of others in a similar situation, including the employee's previous record?

10. Was available assistance provided to help the employee succeed or correct unacceptable behavior?
11. Did an attitude of “help and assist” rather than a “vendetta to get rid of” prevail?
12. Were all proper and timely procedures followed?

## II. EVALUATIONS OF CLASSIFIED EMPLOYEES

### A. COMMUNICATION OF JOB PERFORMANCE EXPECTATIONS

1. The key to successful employee job performance is communication job performance expectations.
2. There must be a clear understanding of job expectations by the classified employee before the end of classified employee’s probationary period.
3. Document Expectations – Upon hire, management should give the classified employee a detailed description as to what you will be evaluating to determine if the employee’s job performance is satisfactory.
4. The evaluator shall indicate the criteria for evaluation upon hire. These criteria may include the following:
  - i. Defining what constitutes appropriate conduct, behavior, competency, efficiency or other standards for good performance.
  - ii. Identify the criteria the evaluator will be using to determine if job performance meets District standards.
  - iii. Expectations for physical appearance.
  - iv. Is there a special “look for” item that you want to emphasize in management observations such as safety protocols.
  - v. Expectations for maintaining student safety and respect for parents.

## **B. DOCUMENTATION OF OBSERVED JOB PERFORMANCE**

1. Evaluations are useless if they are not an honest assessment of the employee's job performance.
2. Evaluations are capable of illustrating the deterioration, over time, of an employee's performance or of improvement over time.
3. The evaluation should also note the employee's willingness to improve, as may be evidenced by an employee receiving a poor comment in a particular area during an interim evaluation, and the improvement, or lack thereof, in the final probationary performance evaluation.
4. Since all evaluations become a part of the employee's personnel file, the classified employee must be provided with the opportunity to respond to the derogatory performance evaluation.

## **C. CONSIDERATION OF DISCIPLINE**

1. When a teacher demonstrates an inability or unwillingness to correct his/her deficiencies, discipline may be appropriate.
2. A discipline case is only as strong as the documentation evidencing not only the deficiencies, but the employee's understanding of the deficiencies, and the means for correcting them.
3. Regular communication must be made to the classified employee, wherever possible.
4. Documentation should include expectation lists prepared by you at the beginning of the school year, observations, summaries, improvement plans, evaluations, or any document that demonstrates that you communicated specific expectations to the classified employee.
5. Also included should be teacher responses to unsatisfactory performance documents or notes from you, including what you discussed with the teacher, how much time was spent explaining the corrective actions needed, and what specific directives were given to the classified employee.



## **D. EVALUATING PROBATIONARY CLASSIFIED EMPLOYEES**

1. Potential. When evaluating a probationary classified employee, you need to consider whether or not the probationary employee has the potential to develop into an employee that can make a significant contribution to the mission of the Department.
2. Technical Competence and Interpersonal Skills. The two areas that, in general, are the most important, is the ability of the employee to be successful.
  - a. Technical Competence. Based upon experience and observations, it should be apparent that the probationary classified employee has the ability, based upon their experience and skills, to satisfactorily perform the essential functions of the position.
  - b. Interpersonal Skills. Ability to effectively communicate with co-workers and other educational stakeholders, including parents, students, and members of the community at large. Good natured, dedicated, professional and understanding when difficulties and problems arise.
3. Common Sense. A common sense understanding of the District's mission. The educational delivery system is made up of individuals who must work together as a team. Some individuals can excel independently, but they also need to be mindful of the District's mission in their individual delivery of instruction.

## **E. HOW DO YOU RECOGNIZE THE GOOD CLASSIFIED EMPLOYEE?**

1. Recognition must be achieved by providing compliments and accolades when warranted. In order to be effective, the site administrator must follow a three-step process:
  - a. Specifically articulate the compliment. State with particularity how and why the employee's performance was noteworthy.
  - b. Explain the benefit to the School or District as a result of the employee's good work.

- c. Express your personal feelings about how the employee's excellent job effort made you feel as the supervisor. The utilization of these three components will recognize the employee in a positive manner.

## **F. HOW DO YOU MANAGE THE MARGINAL EMPLOYEE?**

The marginal employee has developed, as a survival skill, the ability to perform their job only at the level of adequacy to avoid negative disciplinary consequences.

1. The process of managing the marginal employee is very similar to delivering positive recognition to a good employee. Marginal employees value anonymity to avoid work criticisms. To manage the marginal employee, the supervisor must identify missed opportunities to make a difference in their job performance. The steps to manage the marginal employee are as follows:
  - a. Express with particularity how the marginal employee missed an opportunity to provide substantial benefit in their work by failing to exert extra effort in their job.
  - b. Explain how the District was denied the benefit of the opportunity or express the benefit the Department may have received had the employee taken advantage of the opportunity to excel.
  - c. Express your personal feelings of disappointment regarding the loss of that opportunity.





**TUSTIN**  
17862 East Seventeenth Street  
Suite 204 • East Building  
Tustin, CA 92780-2164

(714) 573-0900 Tel  
(714) 573-0998 Fax

**SACRAMENTO**  
2520 Venture Oaks Way  
Suite 190  
Sacramento, CA 95833-4228

(916) 245-8677 Tel  
(916) 333-1115 Fax

[www.parkercovert.com](http://www.parkercovert.com)

\* A Professional Corporation

## **Steven Montanez, Attorney at Law**

### **Legal Experience**

Mr. Montanez has been with the law firm of Parker & Covert LLP since 1997. In this position, he has provided guidance and counsel in the areas of discipline for both certificated and classified employees, labor relations, employment, negotiations, and grievance handling. He is now semi-retired and is Of-Counsel for Parker & Covert LLP.

He is a graduate of Southwestern University School of Law, and received his Juris Doctorate degree in 1993. His undergraduate degree is from Occidental College in Los Angeles where he received his Bachelor of Arts degree, and was a Ford Foundation Scholarship Recipient.

During his career, he has provided counsel to clients regarding interpretation of bargaining agreements for both classified and certificated employees, advice regarding interest-based bargaining, and conflict resolution. Mr. Montanez has extensive experience working with school districts that have a Personnel Commission for both community college districts and K-12 school districts. Mr. Montanez has appeared before the Public Employment Relations Board (PERB) in defending school districts from allegations of an unfair labor practice.

Mr. Montanez is considered an expert in student matters, including issues of discipline, residency, compulsory school attendance, grade change, and challenges to pupil records. He also helps school districts with processing of complaints filed under the Uniform Complaint Procedure.

Mr. Montanez has provided in-service presentations and training to school district clients. Training topics have included, the Brown Act, sexual harassment prevention, employee evaluations, employee discipline management, subpoena processing, and requests for public records made under the California Public Records Act.

### **Work Experience**

Mr. Montanez had a career in human resources for 15 years prior to graduation from law school. He worked in human resources in the private sector, including Human Resources Director for Charter Oak Hospital; Personnel Supervisor for Santa Barbara Cottage Hospital; Employee Relations Manager for CIGNA; and Personnel Relations Manager for Security Pacific Bank.