



## **PROCEDURE**

**Section: Human Resources**

**Subject: Disciplinary Action Guidelines**

**Approved By: DENR Secretary and State Personnel Commission**

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**Procedures, and Policy, have been retained in original format for consistency in training employees, and administering the legal aspects of this policy under the Administrative Procedures Act.**

**SEE ALSO:**

**Disciplinary Action, Suspension and Dismissal in Section 9 of the State Personnel Manual.**

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# Purposes of Disciplinary Action

The purposes of disciplinary action are to correct performance problems that employees have the capacity and ability to correct and to eliminate unacceptable employee conduct.

Many situations can be rectified through coaching and counseling without disciplinary measures. When disciplinary action is necessary, the supervisor should approach the employee as an adult and emphasize the employee's responsibility in resolving the problem. Disciplinary action should never be a surprise to the recipient.

Before taking disciplinary action the supervisor should always do the following:

Gather the relevant facts

Get the employee's "side of the story"

Consider any mitigating factors

Determine the applicable policy, seeking technical advice if necessary

Document the matter

## Sources of Material

The proper administration of the State disciplinary policy requires knowledge of this policy.

Official North Carolina State Personnel Commission policy on disciplinary action suspension and dismissal, and employee appeals and grievances is contained in Volume 25 of the North Carolina Administrative Code, Subchapter 1J, Section .0600, etc. The policy is also contained in the State Personnel Manual, Section Number 9.

In addition the Office of State Personnel guidelines on using the disciplinary policy are presented in the State Personnel Manual, as "procedures," separate from "policy."

The Department of Environment and Natural Resources has also adopted supplemental disciplinary and grievance policies, procedures and guidelines which are summarized herein.

## Where You Can Get Help

The Department aims to present its policies and procedures in clear, easily understood terms. However, questions may arise as to meaning, intent and application. Questions should first be directed to your division personnel representative. Division personnel staff may contact the Department Employee Relations Section (919-715-4502) for further technical advice and assistance. When necessary, the Employee Relations Section will secure legal advice and counsel services from the Office of the Attorney General.

# Who Is Covered By These Policies

These policies and procedures apply to Department employees who are subject to the State Personnel Act, NCGS Chapter 126.

In administering the policy for employees subject to the State Personnel Act, it is important to understand that the Act exempts certain categories of employees from either specific provisions of the Act and/or from various policies, rules and plans established by the State Personnel Commission pursuant to the Act. The following categories are presented to aid your understanding and application of the disciplinary and grievance policies and procedures:

1. Employees with Probationary Appointments - New employees must serve a probationary period. The length of the probationary period shall be not less than three nor more than nine months. During the probationary period, the supervisor is responsible for working with the employee in coaching and assisting him/her to achieve a satisfactory performance level. Progress should be reviewed periodically. If it is determined that the employee's performance or conduct indicates that he/she is not suited for the job and cannot be expected to meet acceptable standards, the employee should be separated before the end of the probationary period. If the employee is not separated before the end of nine (9) months of employment (to the day), he/she automatically receives a permanent appointment and may not be separated without just cause and Department grievance rights.

Supervisors should follow as many of the disciplinary steps as time allows. However, a probationary employee may be dismissed without prior discipline for either job performance or conduct reasons.

An employee with a probationary appointment has no grievance or appeal rights under DENR or Office of State Personnel policy, except for appeals alleging employment discrimination (under NCGS 126-16 and 36) or concerning alleged inaccurate or misleading information in a personnel file (NCGS 126-25).

The status of an employee with a trainee appointment is similar to an employee with a probationary appointment for the duration of the trainee appointment. The duration of a trainee appointment is outlined in the class specification for the regular classification.

An employee may be dismissed during the trainee period for causes related to job performance or personal conduct. A dismissed trainee employee with a trainee appointment has no appeal rights except for allegations of employment discrimination or inaccurate or misleading information in his/her personnel file or unless he/she has reached career status.

2. Employees with Permanent Appointments - An employee who satisfactorily completes a probationary period of three to nine months is granted a permanent appointment. By DENR policy, such an employee is deemed to be subject to State Personnel Commission disciplinary policies and procedures, but such employees do not have a general right of appeal to the State Personnel Commission. A right of appeal to the State Personnel Commission does, however, exist when the appeal is filed pursuant to NCGS 126-7.1, 126-16, 126-25, 126-36 or 126-36.2. Copies of these statutes are appended.

An employee who has completed the probationary period has all appeal rights as specified in the DENR employee grievance policy.

3. Career Employees - A career employee is subject to all State Personnel Commission disciplinary and grievance policies and procedures and enjoys all appeal rights under State law and policy and DENR policy, including appeal (although not necessarily direct appeal) to the State Personnel Commission.

## **A career State employees will be defined as:**

1. Employee is in a permanent position appointment;
2. Employee has been continuously employed, by the State of NC in a position subject to the State Personnel Act for the immediate 24 preceding months.

4. Exempt Employees - DENR and State Personnel Commission disciplinary and grievance policies and procedures do not apply to employees in positions that are exempt from the State Personnel Act by specified provisions of NCGS 126-5, except as provided under NCGS 126-5 (c).

## **Just Cause**

Any employee, regardless of occupation, position or profession, may be warned, demoted, suspended or dismissed by the appointing authority. Such actions may be taken against career employees and employees with a permanent appointment only for just cause. The degree and type of action taken shall be based upon the sound and considered judgment of the appointing authority in accordance with the provisions of State personnel policy.

## **Bases for Discipline**

There are two bases for the discipline and/or dismissal of employees under the statutory standard of "just cause" as set out in G.S. 126-35. These two bases are:

- (1) Discipline or dismissal imposed on the basis of unsatisfactory job performance, including grossly inefficient job performance;
- (2) Discipline or dismissal imposed on the basis of unacceptable personal conduct.

Either unsatisfactory job performance or unacceptable personal conduct constitutes just cause for discipline or dismissal. The categories are not mutually exclusive, as certain actions by employees may fall into both categories, depending upon the facts of each case.

## **Performance**

The term "unsatisfactory job performance" means work-related performance that fails to satisfactorily meet job requirements as specified in the job description, work plan, or as directed by management of the work unit or division/institution.

The term "grossly inefficient job performance" means a type of unsatisfactory job performance that results in:

- (1) the creation of the potential for death or serious bodily injury to one or more employees or to members of the public or to one or more persons over whom the offending employee has responsibility; or
- (2) the loss of or damage to state property or funds that seriously impact the State and/or work unit.

## **Examples of Unacceptable Job Performance**

- (1) Inability to maintain a filing system after having been instructed in its operation.
- (2) Inability to prepare written reports free of factual errors and grammatical mistakes.
- (3) Inability to complete work in a timely manner.
- (4) Inability to perform assigned task in a satisfactory manner.
- (5) Failure to maintain harmonious working relationship with co-workers.

- (6) Poor work quality.
- (7) Accounting errors that result in substantial loss of state funds (grossly inefficient job performance).

## **Conduct**

The term "unacceptable personal conduct" is defined as:

- (1) conduct for which no reasonable person should expect to receive prior warnings;
- (2) job-related conduct which constitutes a violation of state or federal law;
- (3) conviction of a felony or an offense involving moral turpitude that is detrimental to or impacts the employee's service to the state;
- (4) the willful violation of known or written work rules;
- (5) conduct unbecoming a state employee that is detrimental to state service.
- (6) Unauthorized absence from work after all authorized leave credits and benefits have been exhausted; or
- (7) falsification of a state application or other employment documentation.

## **Examples of Unacceptable Personal Conduct**

- (1) Insubordination (defined as willful failure or refusal to carry out a reasonable order from an authorized supervisor.)
- (2) Violation of criminal statute on premises or in conjunction with work which adversely affects the employee's ability to perform his or her duties (using or selling illegal drugs at the work site).
- (3) Misuse of state property (use of state equipment for a non-state purpose) and willful or reckless abuse of state equipment, state vehicles or state monies (illegal use of telephone, unauthorized use of credit card, reckless driving in a state vehicle).
- (4) Violation of criminal statute not on premises but where conduct adversely impacts ability to do work (conviction of a social worker for child abuse; conviction of a courier driver for DWI).
- (5) Patient, client, resident and student abuse as defined by agency policy.
- (6) Sexual harassment as defined by State and Department policy.
- (7) Unauthorized practice of professional services.
- (8) Intoxication or drug impairment while at work.
- (9) Willful disclosure of confidential information.
- (10) Fighting or instigating a fight in the workplace.
- (11) Excessive use of abusive language in the workplace.
- (12) Conflict of interest or self-dealing.
- (13) Failure to follow call-in policy or to report for work as scheduled.

- 14) Willful failure to obtain approval before engaging in secondary employment.
- (15) Failure to report abuse or neglect.
- (16) Willful or habitual violation of safety, health or security rules or regulations.
- (17) Failure to follow procedure for signing out equipment.
- (18) Sleeping on the job.

## **False and Misleading Information**

NCGS 126-30 provides, in part, that "any employee who knowingly and willfully discloses false or misleading information, or conceals dishonorable military service, or conceals prior employment history or other requested information, either of which are significantly related to job responsibilities on an application for State employment may be subjected to disciplinary action up to and including immediate dismissal from employment." Such actions are considered personal conduct violations under State disciplinary policy.

## **Falsification of Employment Application**

When credential or work history falsification is discovered after employment by the State, disciplinary action shall be administered as follows:

- (a) If an employee was determined to be qualified and was selected for a position based upon falsified work experience, education, registration, licensure or certification information that was a requirement for the position, the employee must be dismissed.
- (b) In all other cases of post-hiring discovery of false or misleading information, disciplinary action will be taken, but the severity of the disciplinary action shall be at the discretion of the Division Director.

The Division Director's decision, while discretionary, should consider: sensitivity of the division's mission; sensitivity of the employee's position; effect of the false information on the hiring decision; advantage gained by the employee over other applicants; effect of the false information on the starting salary; and the advantage gained by the employee in subsequent promotion and salary increases. Job performance shall not be considered in such cases, nor can decisions be made on the basis of race, creed, color, religion, national origin, sex, age, handicapping condition or political affiliations.

Providing false information on an employment application or concealing information shall be considered unacceptable personal conduct.

## **Failure to Maintain Required Credentials**

By statute, regulation and/or administrative rule, some duties assigned to positions in the State service may be performed only by persons who are duly licensed, registered or certified as required by the relevant law, rule or provision. All such requirements and restrictions should be specified in the statement of essential qualifications or recruitment standards for classifications established by the State Personnel Commission.

Employees in such classifications are responsible for obtaining and maintaining current, valid credentials as required by law, rule or regulation. Failure to obtain or maintain the legally required credentials constitutes a basis for immediate dismissal without prior warning consistent with dismissal for unacceptable personal conduct or grossly inefficient job performance.

When an employee in such a position is no longer licensed, etc., management has one of two options; the employee may be retained, but in a position which does not require licensure, etc. or, management may terminate the employee.

## **Performance or Conduct**

There are some actions or behaviors which fall into a "gray area" between job performance and personal conduct and could easily be considered in either category. The division personnel office can be of assistance in identifying an action/behavior as job performance or personal conduct. The division personnel office may choose to seek assistance from the Department's Employee Relations Section. Regardless of how the determination is made, identification of a behavior as either job performance or personal conduct is basic to applying corrective disciplinary procedure.

## **Performance Dismissals**

In order to be dismissed for a current incident of unsatisfactory job performance an employee must have received at least two active disciplinary actions; first, one or more written warnings followed by another written warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal. Dismissal of an employee for job performance without the two required actions may result in the employee's reinstatement, as well as awards of back pay and attorney's fees.

Successive disciplinary actions need not all concern the same type of unsatisfactory performance. Actions related to personal conduct may be included in the successive system for performance related dismissals, provided that the employee has received at least two active actions prior to dismissal. Warnings are intended to bring about a permanent improvement in job performance; should the required improvement later deteriorate, or other inadequacies occur, and there are one or more active warnings in the employee's personnel file, then further disciplinary action may be considered.

## **Written Warnings**

The following shall be the procedure for issuing written warnings to Department employees:

- (1) Tell the employee that he/she is being issued a written warning and not a nondisciplinary action such as counseling.
- (2) Tell the employee the specific issues that are the basis for the warning.
- (3) Tell the employee what specific improvements or corrections must be made to address the issues.
- (4) Tell the employee the time frame for making the required improvements or corrections.
- (5) Tell the employee the consequences for failing to make the required improvements or corrections.
- (6) All of the above information shall be included in the warning itself along with the employee's appeal rights. A DENR Disciplinary Action routing form must be completed and approved in accordance with the instructions outlined on the form.
- (7) A copy of the warning shall be provided to the employee in such form as to provide certification of the date it is received by the employee.

Reference may be made in this warning to earlier active warnings.

A written warning is not grievable under the DENR Grievance Procedure. However, an employee may place a letter of rebuttal in their personnel file within 15 calendar days of receipt of the written warning.

Have the employee acknowledge receipt of the warning in writing by signing the disciplinary action routing form. If the employee refuses, call in another supervisor to witness in writing that the warning was issued. The supervisor should note on the file copy of the warning that the employee refused to acknowledge receipt.

## **Timing**

How much time should be allowed for an employee to demonstrate improved performance will vary from employee to employee. Absent a specified time frame 60 days is the time frame allowed for unsatisfactory job performance and immediate correction is required for grossly inefficient job performance or unacceptable personal conduct.

Any disciplinary action (other than dismissal) issued to an employee will remain "active" until:

- (1) the employee's supervisor or manager notes in the employee's personnel file that the reason for the action has been resolved or corrected, or
- (2) the purpose of a performance based action has been achieved as evidenced in the employee's latest overall performance summary following the action by a summary performance rating of "Good" or better in the area of performance cited in the action; or
- (3) 18 months have passed since the action, the employee does not have another active warning or other disciplinary action which occurred during the 18 months and the employee's supervisor or manager has not issued to the employee notice of extension of the action prior to the expiration of the 18 months.

## **Mailing**

Occasionally, it may be necessary to mail a warning (or suspension, demotion or dismissal) letter to an employee. Management's responsibility is only to make a reasonable effort to inform the employee. Such letters should be mailed certified (return receipt requested) to the last known address of the employee.

## **Consistency**

In the disciplinary process the similarity of treatment of persons in similar situations should be an important consideration. Inconsistent use of discipline in similar situations may lead to poor morale, grievances or lawsuits.

## **Removal of Warnings**

Warnings may be removed at any time by supervisors or higher levels of management. Warnings placed in a personnel file by a previous supervisor may be removed by the current supervisor. A written request to remove a warning should be directed to the department Personnel Director.

## Conduct Discipline

Employees may be dismissed, demoted, placed on disciplinary suspension without pay or warned on the basis of unacceptable personal conduct. Discipline may be imposed, as a result of unacceptable conduct, up to and including dismissal without any prior disciplinary action against the employee. Written warnings given for unacceptable personal conduct may not be used to shorten the successive disciplinary action process required to dismiss an employee on the basis of unsatisfactory job performance (two (2) prior active actions are still required).

Generally, the form of discipline most often used in the personal conduct process is dismissal. This is because personal conduct discipline, unlike job performance discipline, is not successive.

## Placement on Investigation

Investigation status is used to temporarily remove an employee from work status. Placement on investigation shall be with pay and does not constitute a disciplinary action. Management must notify an employee in writing of the reasons for investigatory placement not later than the second scheduled work day after the beginning of the placement. An investigatory placement with pay may last no longer than 30 calendar days without written approval of extension by the division or institution director and the State Personnel Director. When an extension beyond the 30-day period is required, the employee must be notified in writing of the extension, the length of the extension and the specific reasons for the extension. If no action has been taken by the end of the 30-day period and no further extension has been granted, Management must either take appropriate disciplinary action on the basis of the findings upon investigation or return the employee to active work status.

Under no circumstances is it permissible to use placement on investigation status for the purpose of delaying an administrative decision on an employee's work status pending the resolution of a civil or criminal court matter involving the employee. It is permissible to place an employee in investigative status with pay only under the following circumstances:

- (1) To investigate allegations of performance or conduct deficiencies that would constitute just cause for disciplinary action;
- (2) To provide time within which to schedule and conduct a pre-disciplinary conference, or
- (3) To avoid disruption of the work place and/or to protect the safety of persons or property.

## Disciplinary Suspension

An employee may be suspended without pay for unsatisfactory job performance after the receipt of at least one prior disciplinary action or for causes relating to any form of unacceptable personal conduct or grossly inefficient job performance.

Prior to placing an employee on disciplinary suspension without pay, a management representative shall conduct a pre-suspension conference with the employee. This conference shall be carried out in the same fashion as a pre-dismissal conference (See "Pre-Dismissal Conference" hereinafter).

An employee who is being placed on disciplinary suspension without pay must be furnished a written notice setting forth the specific reasons for the suspension and the employee's appeal rights (that the employee has 15 calendar days from the date of receipt of the notice to file a written appeal with his/her

immediate supervisor). The notice shall be issued in a fashion that provides a record of the date it is received by the employee.

A disciplinary suspension without pay for an employee who is subject to the overtime compensation provisions of the Fair Labor Standards Act (FLSA) must be for at least one full work day, but not more than two work weeks. The length of a disciplinary suspension without pay for an employee who is exempt from the overtime compensation provisions of the FLSA must be for at least one full work week, but not more than two full work weeks.

## **Demotion**

Any employee may be demoted as a disciplinary measure. Demotion may be based on either unsatisfactory or grossly inefficient job performance or unacceptable personal conduct

- (1) Job Performance - An employee may be demoted for unsatisfactory performance after the employee has received at least one prior disciplinary action. An employee may be demoted for grossly inefficient job performance without any prior action.
- (2) Personal Conduct - An employee may be demoted for unacceptable conduct without any prior action.
- (3) An employee who is demoted must receive written notice of the specific reasons for the demotion, as well as notice of his/her appeal rights (that the employee has 15 calendar days from the date of receipt of the written notice to file a written appeal with his/her immediate supervisor). The notice shall be issued in a fashion that provides a record of the date it is received by the employee.

Disciplinary demotions may be accomplished in several ways. The employee may be demoted to a lower pay grade with or without a loss in pay, except that no salary may exceed the maximum rate of the range, or, the employee's salary may be reduced within the same pay grade. In no event shall an employee's salary rate be reduced to less than the minimum rate or the special entry rate for the applicable pay grade. Prior to the decision to demote an employee for disciplinary reasons, a management representative must conduct a pre-disciplinary conference with the employee.

## **Dismissal**

Before an employee with a permanent appointment may be dismissed, the employee shall be afforded a pre-disciplinary conference and furnished a dismissal letter as provided below.

## **Pre-Disciplinary Conference**

The supervisor recommending dismissal shall discuss the recommendation with appropriate division management and receive management's and Department Personnel authorization to hold a pre-disciplinary conference with the employee. The person conducting the pre-disciplinary conference must have the authority to recommend or to decide what, if any, disciplinary action shall be imposed on the employee. The purpose of the pre-disciplinary conference is to review the recommendation with the affected employee, and to listen to and consider information put forth by the employee in order to insure that the decision is not based on misinformation or mistake.

The supervisor or designated management representative shall schedule and conduct a pre-disciplinary conference with the employee. Advance written notice of the pre-disciplinary conference must be given to the employee including the time, locations and the type of disciplinary action being considered including the facts which led to this recommendation. The amount of advance notice shall be as much as is practical under the circumstances. A second management representative or security personnel may be present at management's discretion. No attorneys representing either side may attend the conference. In the conference the supervisor shall give the employee oral or written notice of the recommendation for dismissal, including specific reasons for the proposed dismissal and a summary of the information supporting the recommendation. The employee shall have an opportunity to respond to the proposed dismissal, to refute information supporting the recommended dismissal action and to offer information or arguments in support of the employee's position. Every effort shall be made by the supervisor or the designated management representative to assure that the employee has had a full opportunity to set forth any information in opposition to his/her dismissal prior to the end of the conference. This opportunity does not include the right to present witnesses.

The occurrence of a pre-disciplinary conference shall be documented, showing the date of the conference and the names of the participants. This can be in the form of a note or memorandum to the employee's personnel file and/or a reference in the letter of dismissal.

In the unusual case in which the employee is unavailable for a pre-disciplinary conference, the purposes of the conference can be satisfied by telephone or through written correspondence. Confer with your division personnel representative for assistance in this regard.

## **Dismissal Letter**

Following the conference, management shall review and consider the response of the employee and reach a decision on the proposed recommendation. If management's decision is to dismiss the employee, a written letter of dismissal containing the specific reasons for dismissal, the effective date of the dismissal and the employee's appeal rights shall be issued to the employee in person or by certified mail, return receipt requested, to the last known address of the employee. The letter of dismissal should not be prepared prior to the pre-dismissal conference. To minimize the risk of dismissal upon erroneous information, and to allow time following the conference for management to review all necessary information, the decision to dismiss shall not be communicated to the employee prior to the beginning of the next business day following the conclusion of the predisciplinary conference or after the end of the second business day following the completion of the conference.

There may be legal consequences in failing to apply these procedures. Specifically, a dismissal letter without specific reasons for the dismissal is ineffective. Further, failure to provide the appeal rights in a letter of dismissal will extend the time the employee has to appeal. The DENR Disciplinary Action Routing form satisfies the requirements of the dismissal letter.

## **Effective Date**

The effective date of a dismissal for unsatisfactory job performance shall be determined by management. Such dismissals are usually effective immediately upon notice to the employee. A career employee who is to be dismissed for unsatisfactory job performance may at management's discretion be given up to two weeks' working notice of dismissal. Instead of providing up to two weeks' working notice and at the discretion of management, a career employee may be given up to two weeks' pay in lieu of the working notice. Such working notice or pay in lieu of notice is applicable only to dismissals for unsatisfactory job

performance. The effective date of the dismissal shall not be earlier than the letter of dismissal nor more than 14 calendar days after the notice of dismissal.

## **Approval**

The Department requires that all disciplinary actions be approved in advance by the Employee Relations Section in the DENR Division of Human Resources.

## **Disciplinary Actions and Performance Management System**

State Personnel and Department policy provide that a disciplinary action issued during an employee's Performance Management System work cycle shall be considered in rating the employee's overall work performance during the cycle. An employee's disciplinary record and overall performance rating during a particular cycle should be consistent. Any disciplinary action taken for a performance deficiency shall be documented as a special review to incorporate into the Performance Management System rating process.

## **Right to Appeal**

An employee with a permanent appointment who has received a disciplinary action, other than a written warning, shall have 15 calendar days from the date of his/her receipt of written notice of such action to file an appeal under the Department grievance procedure. Grievances which do not allege unlawful discrimination or denial of promotion in violation of GS 126-7.1 must follow the Department grievance procedure. An appeal of a final Department decision regarding a suspension, demotion or dismissal must be filed with the Office of Administrative Hearings (P. O. Drawer 27447, Raleigh, North Carolina 27611-7447) within 30 calendar days of receipt of the final Department decision. Grievances of disciplinary actions which allege unlawful discrimination may, at the election of the employee, proceed through the Department procedure or proceed directly to the State Personnel Commission for a hearing by the Office of Administrative Hearings and a decision by the Commission. A direct appeal to the State Personnel Commission (such appeal involving a contested case hearing by the OAH and a recommended decision by that agency to the Commission) must be filed in the Office of Administrative Hearings within 30 calendar days of receipt of notice of the act complained of. Grievances and appeals filed on an untimely basis must be dismissed.

## **Employee Grievance Policy**

The Department of Environment and Natural Resources employee grievance policy has been approved by the State Personnel Commission and is located on the Division of Human Resources web site under Policy and Procedures. Printed copies are available by contacting the program division human resources manager.

# The Employee Assistance Program

The Employee Assistance Program (EAP) provides the supervisor and the employee an additional tool to use in addressing and correcting performance inadequacies and conduct problems. The Employee Assistance Program is neither an alternative to nor a substitute for the corrective disciplinary process, rather, it is an additional route which may be used.

At some point in the disciplinary process, the supervisor can inform the employee of the EAP and the possibility that use of this program may help the employee in making the necessary performance or conduct improvements. Both the supervisor and the employee should be aware of the following concerning the Employee Assistance Program:

1. The EAP is confidential.
2. The EAP, and the employee's use of it, is independent of the disciplinary procedure. Use of the EAP does not stop the progress of the disciplinary and dismissal procedure.
3. The EAP is designed to address personal problems which may be causing performance or conduct problems at work. The EAP cannot address lack of competence or ability.

For more information on the EAP contact your division personnel office.