

# **Investigation Guidelines**

## **Causes for Disciplinary Action and Associated Foundational Issues**

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The purpose for this document is to list and define the twenty-five causes for disciplinary action included in Administrative Procedure IV-1 (Disciplinary Action), and to establish the foundational issues that must be addressed in an investigation to determine whether that particular cause of action is applicable.

### **1. Unauthorized possession or use of District property or another employee's property.**

You'll note that this cause of action falls short of actually having to prove theft; the focus here is on the possession of property (either the District's or another employee's) when the individual was not entitled to possess that property.

#### Foundational issues:

- Determining that the subject employee was actually in "possession" of property that was not theirs
- Was there any communication with the employee by others regarding the property? For example, is this a situation involving a "misunderstanding" of verbal permission being given?
- Is there a history of "borrowing" property between the subject employees, which could have led to the employee "assuming" that they could temporarily take the property in question?
- Where and how was the property being kept by the subject employee, and what inference can a reasonable person draw from that? For example, was District property being kept at the employee's home, or in a workplace location where others could view and use the property?
- What was the employee's stated purpose for possessing the property?

### **2. Willful abuse, damage, or defacing of District property**

#### Foundational issues:

- The property in question belongs to the District
- The extent to which it is clear that the subject employee was the one who engaged in abusing, damaging, or defacing the property
- Determining "willfulness" requires delving into the intent of the employee – the reason they took that action, and also whether a reasonable person would understand that such action constitutes abuse, damage, or defacing of property. For example, an employee who chooses to add a sticker to a District-issued hard hat may not have recognized that this is considered defacing property.

### **3. Misuse or personal use of District materials, equipment, or property**

This disciplinary cause of action differs from that above, in that you do not need to prove willfulness, and “misuse” is easier to prove than “abuse” of equipment. The focus here is on not following instructions for use, or using District equipment for reasons other than legitimate business purposes.

#### Foundational issues:

- The materials, equipment or property clearly belongs to the District
- The extent to which it is clear that the subject employee was misusing the equipment, or using it for personal purposes
- The extent of the use, and whether it involved taking the property from District premises
- The extent to which you can prove that the employee was aware of the proper use of the equipment, but misused it.

### **4. Neglect of duty**

This cause of action is often used in conjunction with, or in exchange with, “Failure to Perform Work As Assigned”. The focus here requires a finding that the individual had a duty to perform a specific task, and that they did not do so, and that this constitutes a neglect of that duty. There does not have to be a finding of “intent” or “willfulness” – rather, the very fact that the employee was supposed to perform a duty, but failed to do so, constitutes neglect of that duty. The action does not have to be directly tied to a specific job or task – for example, someone could have neglected their duty to use the appropriate level of care or oversight in performing their work or in making a decision.

#### Foundational Issues:

- Establish whether or not the duty that should have been performed falls within the employee’s scope of responsibility (job spec).
- Establish the extent to which the employee was aware of the need to perform that duty, their familiarity with the duty, and whether they had performed it before.
- What evidence exists with regards to the specific communication given to the employee that they were to perform the work within a specified time frame, and how was its priority communicated to the employee?
- Evidence supporting that the employee failed to perform that duty, and any extenuating or mitigating circumstances that may have been involved.

## 5. Insubordination

To sustain a finding of insubordination, the investigation must be able to sustain a finding that:

- There was a lawful, business-related order or instruction given by a supervisor
- The employee was aware of this order or instruction, and capable of performing (in other words, were trained, or knowledgeable enough about the process to be able to successfully carry through the instruction or order
- The employee was made aware that failure to follow the instruction or order could lead to disciplinary action. Did the supervisor place the employee on notice? If not, is the direction or order so clearly obvious that failing to perform would lead a reasonable person to understand that this could subject them to discipline?
- In spite of all this, the employee either refused or failed to follow through.
- Are there any mitigating circumstances that could be relevant as to why the employee did not follow through? For example, did a legitimate safety concern exist?

## 6. Violation or disregard of published safety rules or common safety practices

Often, such a cause of action is the result of an accident investigation, or the finding of a qualified individual (such as the Safety Officer) that an unsafe act has occurred.

### Foundational issues:

- Review appropriate safety rules (Cal-OSHA, CCWD regulations, Safety Manual, Safe Practices Handbook, etc.) to determine the appropriate way for performing the task or issue in question.
- Extent to which it is clear that the employee either deviated or disregarded those regulations.
- Level of training and familiarity with the safety task
- Level of understanding and familiarity with the correct way to perform the work, or understanding and familiarity with the regulation.
- Had the employee performed this same task safety before?
- Do the facts support that this was a willful disregard of safety rules, versus a lack of training or understanding about the safety requirements?
- Was appropriate safety equipment available for the employee's use, such as personal protection equipment?
- Are there any extenuating circumstances, such as unsafe or unusual conditions or hazards that had not been identified which may have played a role?

## 7. **Sleeping on the job**

Short of video or photographic evidence, or very clear and credible witness statements, this is a difficult element to prove. For example, employees may argue that they were merely resting, not asleep, or simply closed their eyes for a moment, etc.

### Foundational issues:

- What evidence exists that the employee was truly asleep?
- Confirm that the incident occurred during active work hours, versus within the time period for a break or lunch period.
- What was the employee supposed to be doing during this time? What activities were they to be performing?
- Did eye-witnesses observe the employee appearing to be asleep for a period of time, or just a moment or two? (Observing someone for five minutes versus a few seconds makes a difference).

## 8. **Refusal or failure to perform work as assigned**

This cause of action is frequently used with, or exchanged with “Neglect of Duty”. The primary distinction between the two is that if there is an actual refusal to perform a legitimate work task/assignment within the employee’s scope of responsibility (job spec), then this cause of action should be used.

### Foundational issues:

- Focus on evidence that proves/disproves whether the employee refused to perform work, or failed to perform assigned work.
- What evidence exists regarding a clear understanding that the employee understood that they had been assigned the task? Had the employee performed the work before? How “basic” was the task – in other words, was the assignment a normal task, frequently performed by the employee, clearly understood to be their responsibility, or was this an unusual or rarely performed task? How clearly articulated were the instructions for performing the task, and how was the expectation that the employee would perform the work conveyed? The investigation needs to articulate whether this was a fundamental part of the employee’s job, or something outside the norm (was it was legitimately the responsibility of the employee?)
- Confirm that the work that was to be performed falls within the scope of the employee’s job spec
- Are there any mitigating circumstances? For example, did the employee legitimately believe that what they were being asked to perform created a safety risk? What evidence exists in support of that?
- What was the seriousness of the impact to the District that the employee either refused or failed to perform work as assigned?

## 9. **Loitering or willfully wasting time during working hours**

This cause of action can arise from a wide spectrum of issues, such as inappropriate and excessive internet and e-mail use, failing to perform work and instead engaging in conduct that represents wasting of time.

### Foundational issues:

- What was the employee supposed to be doing during the period in question?
- How clear was it (or should it have been) to the employee that they were supposed to be engaged in that activity during that period?
- What evidence exists regarding what they were doing instead, and to what extent would a reasonable person consider that to be wasting time during paid work hours?
- What evidence exists as to the “willfulness” of their actions? Was this “wasting of time” more inadvertent, such as not performing a task as efficiently as it could have been, or where they engaging in conduct or activities that clearly weren’t work related, such as using the internet for personal purposes, or making long personal phone calls on their cell phone when they were supposed to be working and not on break?
- Focus on evidence that helps to differentiate the *intent* to waste time – the level of discipline will likely depend on what they were doing instead of the work they were supposed to be performing, and on what their intent was – how obvious it was to any reasonable person (and by inference, the employee) that what they were doing was not appropriate and constituted wasting time during work hours.

## 10. **Gross negligence that negatively affects the quality of service or finished product**

This cause of action requires that the employee’s misconduct directly impact service delivery or an actual product of the District. “Product” and “quality of service” can involve many things, such as any deliverable item belonging to the District – including a report, a response to a customer problem, or a physical item. You have to prove that as a result of the employee’s direct conduct/decisions/actions, service or products were negatively impacted. There must be a direct cause and effect between what the employee did, and the end result.

### Foundational issues:

- Gross negligence must be found. What evidence exists to identify that the action (or failure to act) by the employee was of such a nature as to be obvious to any reasonable person that they failed to act with the care necessary to perform the work (service) or produce the product (product) appropriately?

- To what extent did the employee know/understand expectations for the service delivery or product? What training or experience had they had before regarding this same service or product?
- What evidence exists as to what actually occurred? Where was the failure, and how did that impact the quality of service or finished product?
- What evidence exists that it was this particular employee's actions or decisions that lead to quality of service or finished product being negatively affected?
- What reasons or explanations are available as to why the employee did what they did? What was their intent, and what evidence can you find in support of that, to help clarify what the intent was? For example, was this a mistake due to poor training, or was this a deliberate act to sabotage the District and damage its reputation? The ultimate level of discipline will be determined based on this important finding.

## **11. Fighting on District premises**

An investigation into allegations of finding will have to focus on the intent of the parties – what led up to the incident, what occurred in the aftermath? Eye-witness testimony will be key.

### Foundational issues:

- An altercation involving one or more employees took place during work hours.
- What evidence exists that establishes what led up to the incident? Were angry words exchanged, threats of physical violence made, or did some sort of grudge or ill-will exist between the individuals involved?
- Investigation interviews with the participants need to really drill down on the cause – what sparked the incident? How did the person feel during this period (was there actual anger or cause to fear for their physical well-being)? Employees may try to pass off an actual fight as “horseplay”. As the investigator, you need to establish the context for the altercation.
- Witnesses likewise must be carefully questioned as to what they saw and heard. Don't just focus on what was said, or what was done – but on HOW it was said, what actions did they see. Ask witnesses what they heard leading up to, during, and after the incident, including tone used. What appeared to be happening from their perspective?
- To what extent was anyone injured or property damaged? Did the incident take place in front of customers or the public? Be sure to obtain names and follow up with those individuals as well – seek out their perspective – what appeared to be happening from their viewpoint.

## **12. Gambling on District premises**

### Foundational Issues:

- Gambling involves an exchange of money; what evidence is there that money was exchanged?
- Need to identify what type of gambling was taking place, and ensure the investigation identifies all parties who were involved.
- Need to determine exact location of gambling activity – confirm it was on District premises.
- If this was “organized”, determine who were the organizers, who were participants, etc. Level of discipline may be impacted by the extent to which there was involvement.
- Was this activity taking place during work hours as well? If so, may need to include other causes of action.

## **13. Smoking in smoke-free District premises**

### Foundational Issues:

- Evidence/confirmation that a specific individual was smoking in a smoke-free District area.
- Awareness – was the individual aware they were violating the law or District policy by smoking in that area?
- Was the individual approached, and asked to stop smoking? What was their response? The investigation needs to determine the extent to which the individual knew they were violating policy, and the “willfulness” of that act.

## **14. Possession of alcoholic beverages, illegal/unauthorized drugs, or being under the influence of intoxicating beverages/drugs on District property**

This cause of action could involve the DOT policy as well.

### Foundational issues:

- First, determine that the incident or possession took place while on District property. Was it also during work hours? If so, additional causes of action may apply.
- Evidence supporting the individual was in possession of alcoholic beverages, illegal drugs, or under the influence.
- Was the employee asked to voluntarily submit to a random drug or alcohol test? If so, what was their response?
- Actual lab test results – confirm under the influence?
- If not a DOT random test, on what basis was the allegation made of being in possession of or under the influence of alcohol and/or drugs? (Two

supervisors are required to visually observe, contact HR/Risk as practical for guidance).

- Are there any potential mitigating circumstances (such as, are these prescribed drugs, did the employee make the District aware previously of their need to take these medications, is there a doctor's note, etc.?)

#### **15. Conviction of illegal conduct**

Note – this is for conviction of illegal conduct – not the fact that they may have been arrested or are facing charges.

##### Foundational issues:

- Proof that the individual was actually convicted of illegal conduct
- Nature of that conduct
- Given the nature of the conviction, extent to which there is a nexus to the work being performed by the individual
- What impact would there be or what level of risk would result from keeping the individual on as an employee

#### **16. Unauthorized selling of merchandise on District premises or during working hours**

##### Foundational Issues:

- Confirm location of activity involved District premises
- Confirm that the action took place during working hours, if not on District premises. How much time was spent by the subject employee, and others, in this effort when they should have been working. This may result in an additional cause of action: willful wasting of time.
- Nature of the merchandise that was being sold
- Extent to which the activity also impacted operations (disrupted work day)

#### **17. Unauthorized possession of weapons**

##### Foundational issues:

- Evidence that the employee was in possession of weapons, and if so, what type
- Evidence that the possession was while on District premises and/or while on District work time
- Purpose for possessing the weapons – this could lead to additional causes of action, such as violence in the workplace/threat
- Level of awareness that the employee had brought weapons into the workplace; for example, does this involve a weapon that was used for hunting/camping, that the employee “forgot” was in their personal vehicle,

etc. What you're looking for is the awareness and intent for willfully violating this policy. That's not to say it is "okay" to "accidentally" forget and bring a weapon into the workplace, but it's less egregious than bringing a weapon with the intent to do harm!

## **18. Falsifying pay records or production records**

This cause of action involves official documentation, reports, and timesheets. The investigation needs to fully articulate the scope of what occurred, and the impact to the District. Apply the "reasonable person" rule. How likely is it that what occurred was simply an unintentional mistake, without intent and forethought, versus a deliberate effort involving specific action on the individual's part to falsify a record.

### Foundational issues:

- What evidence exists that there was an actual falsification of record? Were changes made to an existing record, or did this involve the creation of a new record or report?
- Determine who had access or generated the falsified report, and ensure that there were no others that may have been involved, knowledgeable of the action, or responsible for the falsification other than the person the investigation is focusing on.
- Ask questions and seek evidence that gets to the heart of what the employee's intent may have been – was this a deliberate falsification of record, or a mistake due to extenuating circumstances?
- What level of effort was required for the falsification? Did it require a planned, deliberate process, or was it an oversight, such as reversing figures or placing data in the wrong column? The investigation needs to fully articulate the scope of what occurred.
- What was the impact of the falsification for the District? Could/would the District's reputation be damaged, or would/could the District be exposed or the public placed at risk?
- Seek answers that identify why someone would want to falsify a record – what was the context in which they were operating? For example, was the individual facing disciplinary action or counseling for poor performance? What would be the motivation for falsifying a record? This area of investigation delves into the WHY, and helps to determine the deliberateness of the action. This could have an impact as to the level of discipline that would be warranted.

## **19. Excessive absenteeism/tardiness**

Refer to the District's Administrative Policy for Sick Leave Monitoring for guidance, as well as the workshop materials developed by HR that can be found online. The AP clearly defines sick leave usage expectations and establishes thresholds of 48+ and 64+ hours. Disciplinary action may be taken, if warranted,

after 64+ hours of sick leave usage in a rolling 12-month period if there are no mitigating circumstances.

Foundational issues:

- Review attendance records and confirm the employee has exceeded the thresholds established via District policy.
- Determine whether any mitigating circumstances exist, such as a serious injury or illness. Was the employee ever offered FMLA paperwork? If not, is it appropriate to do so now, and if the employee fails to provide the required FMLA certification, then follow up?
- Is there a pattern to the leave usage that would indicate the possibility of misuse? For example, always out ill on a Friday or Monday, or the day before/after a holiday?
- Was the employee counseled regarding their absenteeism or tardiness? If so, what supervisory records exist confirming that the employee was on notice regarding their conduct?
- Ensure that attendance/tardiness issues have been dealt with consistently for the work unit. Have all employees with equal absenteeism or tardiness been treated similarly? If not, why not?
- Determine the impact to operations that is created by the excessive absenteeism or tardiness. Articulate in the investigation how this conduct has affected operations or productivity.
- Review gate logs and entry logs to confirm extent of tardiness. Do any mitigating circumstances exist that need to be considered?

## **20. AWOL – Absence without approved leave**

This cause of action often arises when an employee has been denied vacation leave, yet is absent on the days originally requested for vacation. This can also occur when an employee fails to properly notify the District of their absence due to illness, or when the employee extends a vacation without seeking prior authorization from their supervisor.

Foundational issues:

- Confirm that the absence is not a result of a “miscommunication” between the employee and their supervisor.
- What evidence exists that this was a deliberate absence without prior authorization or notification? For example, did the employee call in stating that they needed an extra day of vacation, were denied, then called in sick or stated in the same phone call that they were actually too ill to come in to work?
- Determine the extent of the absence and the circumstances surrounding that absence. For example, did the employee leave work early without authorization? Was the employee on an authorized vacation but due to circumstances beyond their control, were unable to return to work on the appointed date? For example, were airports closed due to bad weather,

was there a documented vehicle accident or ill health that unexpectedly occurred and would have reasonably created an unanticipated delay in return for the employee?

- Is there any evidence that the employee was attempting to deceive the supervisor as to the nature of their absence or reason for it? What was their motivation?

## **21. Offensive Treatment of the public or other employees, threatening others, engaging in threatening behavior, or committing a violent act in the workplace**

The District takes a very strong stand against offensive and threatening behavior in the workplace. An investigation with this cause of action for discipline needs to apply the “reasonable person” standard. Would a reasonable person have felt threatened or offended?

- Determine the specifics regarding the incident. What was said, what was done. What tone of voice was used? What was the posture and body language? Was there actual physical contact?
- Where there other witnesses to the incident? Ask those witnesses similar questions to determine the nature of what occurred. Make a point of asking the witness whether they felt there was a credible threat of violence, or whether they were afraid. If dealing with offensive treatment allegations, ask the witnesses what their reaction was to hearing or seeing what occurred. (Did they find that offensive or threatening?)
- As an investigator, you will need to make the call whether there was a credible threat, or whether what occurred was offensive. Apply the “reasonable person” standard. For example, an individual may have felt threatened, and that carries a lot of weight, but you need to look at whether what was reported to have occurred, and confirmed if possible by eye witnesses, truly constituted a threatening or offensive situation.
- Ask questions and seek evidence that helps put the incident into context. What lead up to the incident? Is there a history of incompatibility or hostility between the individuals involved? Was there a prior verbal incident before this latest incident that led to the investigation?

## **22. Fraud in securing employment**

All candidates seeking employment with the District are required to provide truthful answers and actually sign an affidavit that what they are submitting is true and correct. This cause of action usually arises when the employer subsequently determines that an employee falsely stated that they earned a degree or certificate when in fact they never did so.

### Foundational issues

- What evidence exists that there was falsification or an attempt to deceive with regards to securing employment?

- Follow up on any specific issue in question – such as a college degree or certification. Ensure that this is not a matter of miscommunication or delay in processing paperwork. Did the individual attend the course or not? What hard evidence exists?
- Determine whether this is the result of a simple misunderstanding or mistake, versus a deliberate attempt to deceive. For example, did the individual reflect the wrong dates of previous employment, or is there no history whatsoever that the individual worked at the employer they listed on their application? The investigation needs to delve into intent and scope of what occurred.
- Has the employee been given an opportunity to rectify the problem (such as furnish proof of prior employment or certification) and has failed to do so?

### 23. Dishonesty

This is a difficult cause of action to prove, as the crux of this cause of action involves intent and willfulness. Significant and credible evidence must exist in order for an investigation to conclude that someone engaged in dishonest conduct.

#### Foundational issues:

- Ensure the investigation clearly defines and articulates what occurred, and how this constitutes dishonest behavior.
- Determine what corroborating evidence, if any, exists that the individual willfully engaged in an effort to deceive. This is a critical element for this cause of action.
- Ask pointed questions during the interview process. Often, the subject of the investigation will state that they made a simple mistake; that they did not intend to be dishonest. An investigator will need to make a call regarding the individual's credibility. Apply the "reasonable person" standard. How plausible is their explanation?
- Are there witnesses to what was said/done? How credible are they?

### 24. Incompetence. **As used herein, the term "incompetence" shall mean that the employee lacks adequate ability, knowledge or fitness to perform the duties which are within the scope of the employee's employment.**

This cause of action is to be applied in cases where there was gross incompetence – a clear inability to perform the work that is within the employee's job description. The focus here needs to be on defining what the employee failed to do, or did incorrectly, how "basic" that task is with regards to their classification, and what level of training and availability of appropriate resources and tools were provided that should have made it possible for the employee to perform at a satisfactory level. Special emphasis is required in reviewing

performance history; A finding of incompetence usually results in termination or demotion as the appropriate action.

Foundational Issues:

- Review the job spec for the classification, and the employee's job history and prior evaluations.
- What level of support has the employee received to enable them to perform their job adequately? Training, feedback, coaching, counseling, tools, etc. need to be identified.
- Determine what has actually occurred. Ensure that the duties in question fall within the employee's job spec. A finding of incompetence focuses on the issue that the employee should have been able to perform the duties, but despite adequate training and availability of resources/tools, lacks the ability to do so.
- Would additional training or resources enable the employee to perform adequately? If not, the incident and record needs to reflect that there is no hope for improvement, and the employee is deemed incompetent.
- Is this level of inability to perform a sudden onset, or is there documentation that performance has been inadequate for a while? If sudden onset, are there any mitigating circumstances that may be involved? For example, is there a serious medical condition, have the tools the employee normally used to perform their job suddenly changed radically (such as the need to use computers for the first time, etc.)?