west virginia
DIVISION OF PERSONNEL

SUPERVISOR'S GUIDE TO PROGRESSIVE CORRECTIVE AND DISCIPLINARY ACTION IN THE CLASSIFIED SERVICE

DISCLAIMER

This Supervisor's Guide to Progressive Corrective and Disciplinary Action is intended to be used as a reference and procedural guide to the corrective/disciplinary action of classified employees. The general information contained should not be construed to supersede any law, rule, or policy. If any inconsistencies exist, statutory and regulatory provisions prevail. This guide is written with the understanding that the West Virginia Division of Personnel (DOP) is not engaged in rendering legal services. If legal advice or assistance is required, seek the services of legal counsel. Supervisors should also refer to policies, rules, and regulations and consult their agency's human resources office. For technical assistance concerning specific situations, employees and employers may contact the DOP Employee Relations Section at (304) 414-1853.

I. INTRODUCTION

To maintain an efficient and effective work environment, employers must often address inappropriate employee conduct and/or performance through corrective and/or disciplinary action. In this context, corrective action includes coaching, verbal warnings, and written warnings (reprimands). Disciplinary action is defined as disciplinary suspension, demotion, and dismissal. We distinguish corrective and disciplinary action: corrective action consists of employer interventions on the lower end of the continuum. Disciplinary action, by contrast, consists of employer interventions at the upper end of the continuum that negatively affect an employee's property interest in an uninterrupted salary, whether through an unpaid disciplinary suspension, a demotion for cause resulting in a reduction in pay, or dismissal. The West Virginia Public Employees Grievance Board has considered verbal and written warning disciplinary action when assigning the burden of evidence in a grievance proceeding.

The West Virginia Supreme Court of Appeals has determined that our State civil service statute (§29-6-1 *et seq*.) requires disciplinary actions to be for cause and that the employee be provided due process.

West Virginia Code §29-6-10(12) provides, in pertinent part,

> "[f]or discharge or reduction in rank or grade only for cause of employees in the classified service. Discharge or reduction of these employees shall take place only after the person to be discharged or reduced has been presented with the reasons for such discharge or reduction stated in writing, and has been allowed a reasonable time to reply thereto in writing, or upon request to appear personally and reply to the appointing authority or his or her deputy."

The Court has established that "[t]he basic purpose of the civil service law is to afford to covered employees security of tenure." *Mackin v. Civil Serv. Comm'n*, 155 W.Va. 139, 181 S.E.2d 684, 1971 W.Va. LEXIS 183 (1971). More specifically, the Court has held that "[g]ood cause must exist for the dismissal of an employee in the classified service. Not only shall good cause be alleged in the dismissal of such

employee but it must be proved in the event of an appeal from the dismissal." *Yates v. Civil Serv. Comm'n*, 154 W.Va. 696, 178 S.E.2d 798, 1971 W.Va. LEXIS 230 (1971). Additionally, "…[A]ll the process that is due is provided by a predetermination opportunity to respond, coupled with post-termination administrative procedures." *Swiger v. Civil Serv. Comm'r,* 179 W.Va. 133, 365 S.E.2d 797, 1987 W.Va. LEXIS 695 (1987).

Consequently, administrators of disciplinary action in the classified service (civil service) must understand the concepts of property interest, good cause, and due process. Employer violations of employee liberty and/or property interests may expose the employer to significant civil liability.

II. LIBERTY AND PROPERTY INTERESTS

The Due Process Clause, Article III, Section 10 of the West Virginia Constitution, requires procedural safeguards against State action which affects a liberty or property interest. The liberty interest includes an individual's right to freely move about, live and work at his chosen vocation, without the burden of an unjustified label of infamy. A liberty interest is implicated when the State makes a charge against an individual that might seriously damage his standing and associations in his community or places a stigma or other disability on him that forecloses future employment opportunities.

A property interest includes not only the traditional notions of real and personal property, but also benefits to which an individual may have a legitimate claim of entitlement under existing rules or understandings. A State civil service classified employee has a property interest arising out of the statutory entitlement to continued uninterrupted employment. The extent of due process protection afforded to a property interest requires consideration of three distinct factors: first, the private interests that will be affected by the official action; second, the risk of an erroneous deprivation of a property interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

III. GOOD CAUSE

The basic principle underlying disciplinary procedures is that management must have good cause to impose discipline. The definition of good cause may vary from situation to situation. To determine whether good cause is present, the following general principles should be considered:

- Were expectations identified and communicated to employees? (What was to be done, how it was to be done, and when it was to be done.) Performance expectations should be supported by a current employee performance appraisal and evaluation (EPA-1 and EPA-3).
- Are the agency's work rules and policies written, and have they been effectively communicated to employees? (Except where conduct is self-evident.)
- Were the work rules in effect and uniformly enforced at the time of an alleged violation?
- Do the agency's work rules and expectations bear a rational relationship to the job and organizational needs?

- Were employees adequately warned of the consequences of violation of rules or failure to meet expectations?
- Did management investigate the alleged violation before issuing discipline?
- Was the investigation fair and objective, and was the employee given an opportunity to respond to the charges during a predetermination conference?
- Did the investigation produce substantial evidence or proof of guilt?
- Was the employee's response during the predetermination conference given consideration before making a decision if disciplinary action is appropriate?
- Was discipline imposed uniformly without favoritism or discrimination?
- Was the discipline reasonably related to the seriousness of the offense, and did the employer consider the employee's past disciplinary history, performance record, and perhaps length of service with the agency?
- Was the discipline consistent with the past practices of the agency, that is, like penalties for like offenses?

IV. DUE PROCESS

Due process is the substantive and procedural safeguard to a person's liberty and property interests provided by the U.S. and West Virginia Constitutions. Since continued, uninterrupted employment is a property interest for a classified (civil service) State employee, any employee who is suspended, demoted, or dismissed is entitled to substantive and procedural due process, which envisions the following essential components:

1. Notice- Notice of contemplated disciplinary action, including specific charges and dates (specific or approximate). In limited circumstances, when there is a continuing danger to persons or property or to the orderly conduct of affairs of the agency, an employee may be immediately removed from the workplace without notice of a predetermination conference. The employer may take this action through a non-disciplinary suspension pending investigation. If an employee is immediately removed from the workplace through a verbal suspension, the employer must provide written confirmation of the disciplinary action within three (3) working days.

2. Predetermination Conference- The predetermination conference should be an initial check of whether there are reasonable grounds to believe that the allegations against the employee are accurate and support the proposed action. Before issuing a disciplinary suspension, demotion with prejudice, or dismissal, the supervisor or manager should meet in person, virtually, or telephonically with the employee to advise him or her of the contemplated disciplinary action. During the predetermination conference, the employee should be provided the specific charges with facts (who, what, when, where, and how) to support assertions and dates (specific or approximate). The predetermination conference provides the employee the opportunity to offer any reason(s) why he or she believes the contemplated discipline is not appropriate. In some

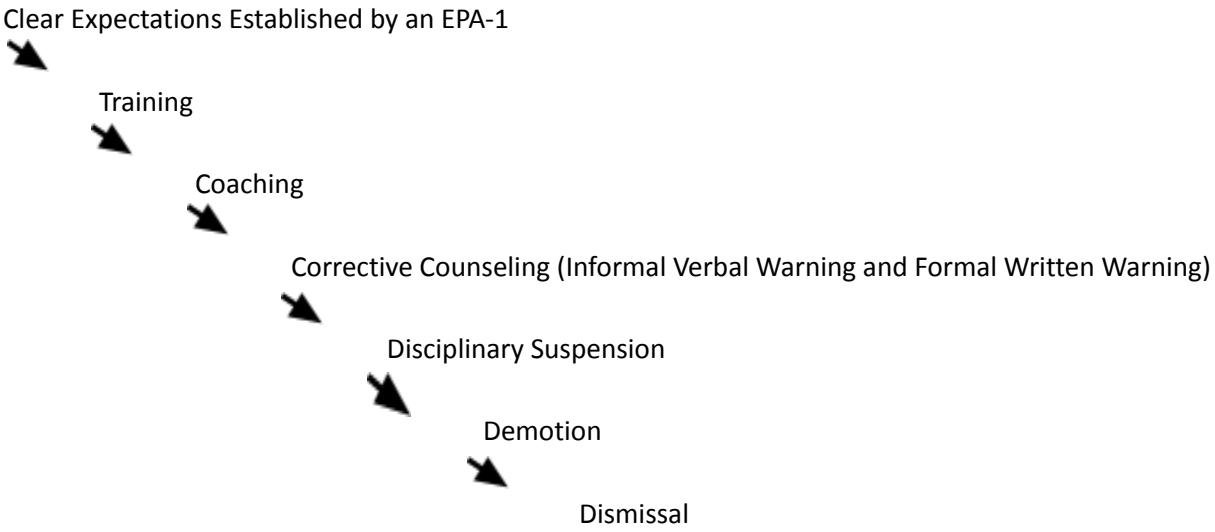
instances, the employee may provide facts not previously known or considered by the supervisor, or evidence of mitigating circumstances that, when discovered, cause the supervisor to change his or her mind about the appropriate level of discipline or the number of days of disciplinary suspension. As provided in the West Virginia Public Employees Grievance Board statute, West Virginia Code §6C-2-1 *et seq*., an employee is permitted to have a representative at a predetermination conference meeting, provided it may not be the employee's immediate supervisor. A reasonable time should be given to the employee to obtain the representative of their choice.

3. Opportunity to respond- If disciplinary action is issued, the employee must be given the opportunity to respond to the charges. Notice of the opportunity to respond must be included in the written notice to the employee of disciplinary action. This is the final opportunity for the employee to tell their side of the story or offer any mitigating information before the effective date of the disciplinary suspension, demotion, or dismissal. If an employee is verbally suspended or dismissed, the employer must still provide written confirmation of the disciplinary action within three (3) working days and allow the employee to respond to the charges in writing or in person.

4. Appeal Rights- An employee who is suspended, demoted, or dismissed has the right to "face his accuser" and to appeal the final action through the *Grievance Procedure for State Employees*, which is codified as West Virginia Code §6C-2-1 *et seq*. The West Virginia Public Employees Grievance Board has determined that the notice advising the employee of the right to request a hearing must include instructions on where to file the request and the time limits to appeal the action. The Grievance Procedure has three (3) procedural levels, and the procedural level at which a grievance may be filed depends on the nature of the discipline.

V. PROGRESSIVE CORRECTIVE AND DISCIPLINARY ACTION

Progressive corrective and disciplinary action is the concept of increasingly more severe actions taken by supervisors and managers to correct or prevent an employee's unacceptable conduct or performance. The level of discipline is dictated by the relative severity of the infraction. Employees should be made aware of expectations both verbally and in writing. Employee performance appraisals and evaluations are integral components of an ongoing process of performance planning, management, and improvement. Address deficiencies, performance issues, and/or conduct through ongoing dialogue between the employee and supervisor. Document and retain performance management efforts. Documentation should be specific and avoid conclusions unless supported by facts. When it becomes necessary for a supervisor or manager to take corrective action, the action may be precipitated by a wide variety of situations, each with a unique combination of circumstances. Consequently, disciplinary guidelines should be specific enough to ensure technically correct action yet flexible enough to permit the supervisor or manager reasonable latitude to consider mitigating and/or aggravating circumstances when issuing constructive and progressive corrective and disciplinary action. Progressive and constructive corrective and disciplinary action will proceed, if appropriate and required, along a continuum from corrective counseling to dismissal, with incremental steps between, as shown below:



The point on the continuum at which the agency initiates corrective or disciplinary action should be determined by the concept of like penalties for like offenses and the relationship of the penalty to the conduct/violation. Subsection 12.5 of the West Virginia Division of Personnel *Administrative Rule*, West Virginia Code R. §143-1-1 *et seq*., provides that, "... [i]n dismissals for cause and other disciplinary actions, appointing authorities shall impose like penalties for like offenses." Although the stages of discipline can vary depending on the nature and seriousness of the infraction, progressive discipline typically involves some combination of the following stages:

Corrective Counseling

Corrective counseling should be done as soon as the supervisor or manager becomes aware of an employee's work performance or conduct problems. While it may be natural to want to allow an employee the opportunity to correct deficiencies without supervisor intervention, problems left to self-correct rarely do. Corrective counseling should be informal, with the supervisor/manager meeting with the employee to ensure the employee understands that their work performance or conduct is unsatisfactory and what improvement is required. A written improvement plan, with specific expectations and time frames for accomplishing them, may be implemented simultaneously as part of the corrective counseling session. Corrective counseling can also be provided more formally by a section or department head. It may be especially appropriate when alcohol, drugs, or personal problems are the source of an employee's work-related deficiencies. Ideally, corrective counseling is conducted before the misconduct or work performance deficiency reaches a serious level.

Verbal Reprimand / Warning

Depending on the seriousness of the infraction, if corrective counseling on at least one or two occasions fails to bring about the desired change in the employee's conduct or performance, a supervisor or manager may proceed to a verbal warning/reprimand. In a corrective counseling session, the supervisor, manager, or other appropriate agency official meets with the employee to discuss the employee's failure to meet required standards of work. A verbal warning should clearly explain what is expected of the

employee and the consequences of continued failure to correct deficiencies. A written improvement plan containing specific expectations and time frames for accomplishing them may be implemented simultaneously with the verbal warning as a component of the verbal warning.

Document the verbal warning with a brief written summary kept in the supervisor's/manager's administrative file; however, do NOT provide the summary to the employee, place it in the employee's official agency personnel file, or send it to the DOP. If deficiencies persist, the verbal warning may serve as the basis for subsequent corrective action measures.

Remember that a verbal reprimand's value as a foundation for further discipline, absent any additional infractions, significantly diminishes after one (1) year.

Written Reprimand / Warning

Generally, if there is insufficient or no improvement in the employee's work performance/conduct within one to two months, or if new or more serious problems surface, a written reprimand/warning may be the appropriate next step. A brief history of the corrective counseling sessions and verbal warning(s) should be included in the written warning/reprimand document to the employee, which may be in memorandum or letter form. As with corrective counseling and verbal warnings, advise the employee of their failure to meet the required standards of work, and provide specific examples of deficiencies. Outline specific expectations and required time frames, and clearly state the consequences of continued failure to meet the required standards of work. The employee should also be given an opportunity to respond in person or in writing to the written reprimand/warning. A written improvement plan containing specific expectations and time frames for accomplishing them may be included as part of the written reprimand. Place a copy of the reprimand/warning in the employee's official agency personnel file.

Disciplinary Suspension / Non-disciplinary Suspension

Disciplinary Suspension

If an employee fails to correct deficiencies in work performance or conduct behavior after appropriate corrective counseling, verbal warning(s), and written warning, or if a more serious singular incident occurs, a disciplinary suspension of three (3) days to thirty (30) days (depending on the seriousness of the infraction and prior disciplinary action) would be the next appropriate step. The suspension letter should outline specific expectations and required time frames and clearly explain the consequences of the employee's failure to correct deficiencies. Neither annual leave nor compensatory time may be used to substitute for a disciplinary suspension. A written improvement plan containing specific expectations and time frames for accomplishing them may be implemented at the same time as the suspension.

Disciplinary suspension is a suspension without pay and is administered in accordance with subsection 12.3. of the *Administrative Rule*, which states:

> 12.3.a. Disciplinary Suspension. -- An appointing authority may suspend any employee without pay for a specific period of time for cause. Accrued leave shall not be paid to

employees during the period of suspension. Further, an employee who works additional hours during the same workweek or work period as the suspension will still have tenure reduced for the length of the suspension. The appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director. Before the effective date of the suspension, the appointing authority or his or her designee shall:

12.3. a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated suspension.

12.3.a.2. give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension; and

12.3.a.3. give the employee a minimum of three (3) working days' advance notice of the suspension to allow the employee being suspended a reasonable time to reply in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. Provided, however, that three (3) working days' advance notice is not required in certain cases when the public interest is best served by withholding notice.

Due Process Requirements of a Disciplinary Suspension Include:

1. A minimum of three (3) working days' written notice prior to the effective date of the disciplinary suspension - If the supervisor or manager believes a disciplinary suspension is appropriate, a suspension letter is prepared and presented or mailed to the employee; however, the disciplinary suspension may not begin until at least three (3) working days after the date of the suspension letter.

2. Specific written reason(s) for the suspension - The suspension letter should cite the appropriate section of the *Administrative Rule* establishing authority to suspend and must contain the specific reasons for the suspension along with dates and examples of the employee's performance and/or conduct deficiencies. Additionally, a brief history of the corrective counseling sessions, verbal warning(s), and written reprimand/warning should be included to demonstrate past and continuing inability or unwillingness to meet expectations. Also clearly state the consequences of the employee's failure to correct the deficiencies.

3. Specific period of time for the suspension (except where the employee is the subject of an investigation, criminal proceeding, or indictment) - Depending on the severity of the infraction and prior disciplinary action, a disciplinary suspension should generally be no less than three (3) days and no more than thirty (30) days. A disciplinary suspension of less than three (3) days would probably not be an adequate deterrent and is administratively costly, and a disciplinary suspension of more than thirty (30) days is excessive (if the infraction is so egregious as to cause an agency to contemplate more than a 30-day disciplinary suspension, a demotion or dismissal may be the more appropriate action).

Non-Disciplinary Suspension

An employee may be suspended without pay, or may choose to use accrued annual leave during the non-disciplinary suspension period while the agency conducts an investigation or while the employee is the subject of an indictment or other criminal proceeding. Unlike disciplinary suspension, three (3) working days' notice is not required for employees in circumstances where the public interest is best served by withholding notice. Impose such suspensions only in limited circumstances and only when the agency reasonably believes the employee's presence presents a threat of continuing danger to persons or property, or may compromise the integrity of evidence. Important Note: A non-disciplinary suspension is a suspension that is not disciplinary in nature and is administered in accordance with subsection 12.3.b. of the *Administrative Rule*, which states:

> 12.3.b. Non-disciplinary Suspension. -- An appointing authority may suspend an employee without pay indefinitely to perform an investigation regarding an employee's conduct which has a reasonable connection to the employee's performance of his or her job or when the employee is the subject of an indictment or other criminal proceeding. Such suspensions are not considered disciplinary in nature, and an employee may choose to use accrued annual leave during the period of non-disciplinary suspension but is not eligible for any other leave afforded in this rule. The appointing authority shall give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the suspension. A predetermination conference and three (3) working days' advance notice are not required; however, the appointing authority shall file the statement of reasons for the suspension and the reply, if any, with the Director.

Upon completion of the investigation or criminal proceeding, the appointing authority shall:

> 12.3.b.1. initiate appropriate disciplinary action as provided in this rule; and
>
> 12.3.b.2. unless the employee is dismissed or otherwise separates from employment prior to completion of the investigation or criminal proceeding, provide retroactive wages or restore annual leave for the period of suspension; provided, that such retroactive wages may be mitigated by other earnings received during the period of suspension. Further, the appointing authority and employee may agree to consider all or part of the period of unpaid suspension pending investigation or criminal indictment or proceeding as fulfilling the period of any disciplinary suspension without pay.

Due Process Requirements of a Non-disciplinary suspension are:

1. Written notice of opportunity to respond, either in person or in writing - If an employee is suspended verbally, without prior written notice, the employer must still provide written confirmation of the suspension within three (3) working days. In cases of non-disciplinary suspensions pending investigation, criminal proceeding, or indictment, it is recommended that the initial suspension be for a specific period with notice to the employee that the period of non-disciplinary suspension may be shortened or extended, as necessary.

2. Notice of appeal rights - The suspension letter must contain specific information notifying the employee of the person(s) to whom any appeal should be directed and the time limits to appeal the suspension.

3. Statement of the continuance of insurance coverage and/or COBRA rights.

Upon completion of the investigation:

1. If disciplinary action is being considered, the appointing authority must provide the employee with an opportunity to respond to the charges in a predetermination conference held virtually, telephonically, or in person.

2. If the investigation determines the allegations are unsubstantiated, the employee will return to work and be compensated for the period of suspension.

3. If the allegations are substantiated, in whole or in part, appropriate disciplinary action, up to and including dismissal, should be implemented. If it is determined that disciplinary suspension without pay will be imposed, the appointing authority and employee may agree that all or part of the period of unpaid non-disciplinary suspension may be considered as fulfilling all or part of the imposed disciplinary suspension without pay.

Demotion

If an employee fails to correct deficiencies in work performance or conduct after appropriate corrective counseling, warning(s), and suspension, or a more serious singular incident occurs (depending on the seriousness of the infraction and prior disciplinary action), demotion may be the final attempt at corrective action prior to dismissal. Demotions are administered in accordance with Section 11.4. of the *Administrative Rule*, which states:

> 11.4. Demotions. - An appointing authority may demote an employee with or without prejudice and may demote a probationary employee as provided for in subsection 10.3 of this rule. The appointing authority shall file the reasons for the demotion and the reply, if any, with the Director. Prior to the effective date of the demotion, the appointing authority or his or her designee shall:
>
> 11.4.a. meet with the employee in a predetermination conference and advise the employee of the contemplated demotion, provided that the conference is not required when the demotion is requested by the employee, voluntarily and without duress, such as to accept a posted position for which the employee has applied;
>
> 11.4.b. give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the demotion; and
>
> 11.4.c. give the employee a minimum of fifteen (15) days' advance notice of the demotion to allow the employee a reasonable time to reply to the demotion in writing, or upon

request to appear personally and reply to the appointing authority or his or her designee. Provided, that fifteen (15) days' notice is not required when the demotion is requested by the employee, voluntarily and without duress, such as to accept a posted position for which the employee has applied.

Due Process Requirements of a Demotion Include:

1. Fifteen (15) calendar days' written notice to the employee prior to the effective date of the action and which includes the citation of the appropriate section of the *Administrative Rule* establishing authority to demote;

2. Specific written reason(s) for demotion along with dates and examples of the employee's performance and/or conduct deficiencies. Additionally, a brief history of the corrective counseling sessions, verbal warning(s), and written reprimand/warning should be included to demonstrate past and continuing inability or unwillingness to meet expectations.

3. Opportunity for the employee to respond either in person or in writing prior to the effective date; and

4. Written notice of appeal rights specifying to whom the appeal should be directed and the time limits to appeal the demotion.

5. Within thirty (30) days of demotion, the supervisor, manager, or appropriate agency representative should meet with the employee to establish expectations for the new position and ensure that the employee understands and is committed to the established performance expectations of the position along with the consequences of failure to meet the required standards of work. The DOP evaluation Employee Performance Appraisal 1 (EPA-1) shall be used for the Initial Planning Session.

Dismissal

In most cases, dismissal is imposed only when other attempts to correct the problem and less severe forms of discipline have failed. However, dismissals may be issued when (1) infractions/deficiencies in performance and/or conduct continue after the employee has had adequate opportunity for correction, or (2) the employee commits a singular offense of such severity (such as assault of a supervisor or co-worker, bringing a weapon to the workplace, patient abuse, inmate abuse, etc.) that dismissal is warranted.

Uniformed Services Employment and Reemployment Rights Act (USERRA) Protection

Under USERRA, veterans' employment and reemployment rights include protection from discrimination, retaliation, and dismissal. These protections apply when actions are taken against an individual because of membership in the uniformed services, an application for membership, performance of service, an application for service, or service-related obligations.

During the protected period, a returning service member may not be discharged, except for cause and, depending on the circumstances, only after receiving advance notice, express or reasonably implied, that the conduct or continued poor performance could result in dismissal. The length of this protection period depends on the duration of the individual's most recent period of military service. In this context, "for cause" protection from dismissal extends to classified, classified-exempt/at-will, and exempt employees. Visit the U.S. Department of Labor's Guide to the Uniformed Services Employment and Reemployment Rights Act for more information.

When it is determined that dismissal from employment is appropriate, such action must be administered in accordance with subsection 12.2. of the *Administrative Rule*, which states:

> 12.2. Dismissal.
>
> 12.2.a. An appointing authority may dismiss any employee for cause. The appointing authority shall file the reasons for dismissal and the reply, if any, with the Director. Prior to the effective date of the dismissal, the appointing authority or his or her designee shall:
>
> 12.2.a.1. meet with the employee in a predetermination conference and advise the employee of the contemplated dismissal.
>
> 12.2.a.2. give the employee oral notice confirmed in writing within three (3) working days, or written notice of the specific reason or reasons for the dismissal; and
>
> 12.2.a.3. give the employee a minimum of fifteen (15) calendar days' advance notice of the dismissal to allow the employee a reasonable time to reply to the dismissal in writing, or upon request to appear personally and reply to the appointing authority or his or her designee. Provided, however, that fifteen (15) days' advance notice is not required when the public interest is best served by withholding notice or when the cause of dismissal is gross misconduct.
>
> 12.2.b. An appointing authority may require that a classified employee dismissed for cause immediately vacate the workplace, or a classified employee dismissed for cause may elect to do so. If the appointing authority requires a dismissed employee to immediately vacate the workplace in lieu of working during the notice period, or if an employee who receives notice of dismissal elects to immediately vacate the workplace, the employee is entitled to receive severance pay attributable to the time he or she otherwise would have worked, up to a maximum of fifteen (15) calendar days after vacating the workplace. An appointing authority shall not provide severance pay when notice is withheld as provided in subdivision 12.2.a of this rule. Receipt of severance pay does not affect any other right to which the employee is entitled with respect to the dismissal.
>
> 12.2.c. An appointing authority may dismiss an employee for job abandonment who is absent from work for more than three (3) consecutive workdays or scheduled shifts

without notice to the appointing authority of the reason for the absence as required by established agency policy. Consecutive scheduled workdays or scheduled shifts are determined without regard to scheduled days off that occur during the period of absence without notice. Thus, annual leave, holidays, modified holiday observance, compensatory time, regularly scheduled days off, or any other time for which the employee was not scheduled to work during the period of absence shall not constitute a break when determining the three (3) consecutive scheduled work days. The dismissal is effective fifteen (15) calendar days after the appointing authority notifies the employee of the dismissal. Whereas job abandonment is synonymous with resignation, a predetermination conference is not required, and an employee dismissed for job abandonment is not eligible for severance pay.

In addition to subsection 12.2, dismissal of probationary employees is administered in accordance with subsections 10.1. and 10.5. of the *Administrative Rule*, which states:

§143-1-10. Probationary Period.

10.1. Nature, Purpose, and Duration.

10.1.a. The probationary period is a trial work period designed to allow the appointing authority an opportunity to evaluate the ability of the employee to effectively perform the work of his or her position and to adjust himself or herself to the organization and program of the agency. It is an integral part of the examination process, and the appointing authority shall use the probationary period for the most effective adjustment of a new employee and the elimination of those employees who do not meet the required standards of work.

10.5. Dismissal during Probation.

10.5.a. If at any time during the probationary period, the appointing authority determines that the services of the employee are unsatisfactory, the appointing authority may dismiss the employee in accordance with subsection 12.2. of this rule. If the appointing authority gives the fifteen (15) calendar days' notice on or before the last day of the probationary period, but less than fifteen (15) calendar days in advance of that date, the probationary period shall be extended fifteen (15) days from the date of the notice and the employee shall not attain permanent status. This extension shall not apply to employees serving a twelve-month probationary period.

NOTE: A probationary employee is not entitled to the usual protections enjoyed by a permanent State employee, as the probationary period is used by the employer to ensure that the employee will provide satisfactory services. Therefore, the burden of evidence in a grievance proceeding is upon the employee if the dismissal is for unacceptable performance, as such dismissals are not considered disciplinary in nature but the burden of evidence rests with the employer if the cause for dismissal is misconduct.

12.2.d. In providing any employment verification or reference to another appointing authority for a dismissed employee, or an employee who resigns in lieu of dismissal, the appointing authority shall disclose that the separation was due to dismissal, or resignation in lieu of dismissal, and that the employee did not leave employment in good standing, and shall comply with the disclosure requirements of W. Va. Code §55-7-18a.

Generally, elements of a dismissal are:

1. Fifteen (15) calendar day written notice to the employee prior to the effective date of the action which includes the citation of the appropriate section of the *Administrative Rule* establishing authority to dismiss;

2. Specific, written reason(s) for dismissal;

3. Option of working out the notice period or receiving severance pay up to a maximum of fifteen (15) calendar days after vacating the workplace or the requirement of immediate separation and severance pay, except in dismissal for job abandonment;

4. Opportunity for the employee to respond either in person or in writing prior to the effective date of the dismissal;

5. Written notice of appeal rights specifying to whom appeal should be directed and time limits to appeal the dismissal; and

6. Statement of the continuance of insurance coverage and/or COBRA rights.

NOTE: An employee who has been absent for more than three (3) consecutive work days or scheduled shifts without notice of the reason to the employer (according to agency policy)may be dismissed for job abandonment. However, to provide the employee the opportunity to respond either in person or in writing prior to the effective date of the dismissal, the fifteen (15) calendar days' written notice is still required. A predetermination conference and the option to work out the notice period or elect severance pay do not apply to a dismissal for job abandonment. Employees dismissed for job abandonment are not eligible for severance pay.

Immediate Separation (Dismissal) and Severance Pay

The opportunity to work out the notice period is not required when either:

1. The employer requires immediate separation from the workplace, or

2. The employee elects immediate separation following written or verbal notice of dismissal for cause.

Nevertheless, the employer is still obligated to provide the employee with a predetermination conference and written notice of dismissal as described above.

If the employer requires or the employee elects immediate separation, the employee is entitled to receive severance pay for the work days that he or she would have been scheduled to work during the fifteen (15) calendar day notice period, up to a maximum of fifteen (15) calendar days. During the time for which severance is received, the employee shall not be paid for holidays and shall not accrue annual leave, sick leave, tenure, and increment pay. The fifteen (15) calendar day notice and severance pay are not required when the public interest is best served by withholding the notice or when the cause of dismissal is gross misconduct. Severance pay is also not required when an employee is dismissed for failure to return from a leave of absence as provided in subparagraph 14.8.d.3. of the *Administrative Rule*.

Whenever possible, the employer should meet with the employee and hand-deliver a disciplinary letter. The employer may request that the employee verify receipt of the letter. The following acknowledgment may be typed at the bottom of the letter:

> I have received a copy and am aware of the contents of the foregoing letter
>
> _____ _____
> Employee Signature Date

If the employer mails the dismissal letter/notification, it should be sent by first-class, regular U.S. Postal Service delivery and by certified mail, return receipt requested. If an employer wishes to certify that the letter was mailed, they may consider typing the following certification of service at the bottom of the letter:

> The undersigned certifies that the above letter/notification was mailed to **[name]** by first-class and certified mail, return receipt requested, on the _____day of _____, 20_____.
>
> _____[Signature]_____
> **[typed name and title]**