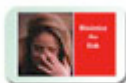




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# When It's Time to Dismiss an Incompetent Employee

*Organizational Leaders Need a Legally Sound Process for Supervision, Documentation and Termination*

**By Mary Jo McGrath, Attorney at Law  
President/Founder, McGrath Systems, Inc.**

Excellence and accountability in public service -- this is the clarion call across the nation, driving reform and innovative approaches in public policy and public agency management at the federal, state and local levels. Yet nothing can render the phrase more hollow than the ongoing tolerance of incompetent employees.

The cost of employee incompetence and poor performance is staggering. Failure by organizational leaders to take action results in ineffective programs and services, low employee morale, diminished public confidence, employer liability, and increased litigation.

If you think this is an exaggeration, take schools as a primary example. Just ask school board members what people talk about when they encounter them in the grocery store or at a social event. It is the poor-performing teacher who gets all the community's attention, rather than the vast majority of dedicated professionals who nurture and educate our students.

Incompetent teachers comprise approximately 10 percent of the teacher workforce. This 10 percent tends to have the same effect as the proverbial "one bad apple." This phenomenon is even more pronounced when parents who had that same teacher when they were in school start angling to make sure their child won't get stuck with him, they assume that the teacher was horrible then, and must still be horrible.

## Dismissal Grounds

Grounds and procedures for dismissing employees who are tenured, civil servants or otherwise protected by strong bargaining units are set forth in state statutes and bargaining agreements. The most common reasons for dismissal are:

- immoral conduct,
- dishonesty,
- unprofessional conduct,
- incompetence,
- violation of administrative policies or procedures or refusal to follow them,
- conviction of a felony, and

alcoholism or drug abuse.

Incompetence must be proven by a pattern of conduct rather than one single instance of behavior. The charge of incompetence can be proven using observations prepared by evaluators over the period of time in question, as well as through summary evaluations.

Other types of evidence that can be submitted in a termination proceeding are reports, charts, and other documentary information related to the job. In teacher dismissal cases, such documentation may include lesson plans, tests and quizzes taken by students, homework assignments, and classroom assignments.

Evidence and testimony of clients, parents or coworkers can also be important. It is essential, if client or community complaints are going to be relied upon, that the employee was made aware of the complaint when it was received by the administration and was given an opportunity to respond to it at that time.

"Hidden" complaints that are lumped together and then dumped on the employee are often excluded by hearing officers on the basis that the employee did not know of the information and did not have an opportunity to respond to it at the time it was received by the administration. This failure to notify an employee of a complaint and to provide the supporting information results in a disadvantage to the employee who must attempt to explain his or her behavior after the fact. Many jurisdictions routinely exclude any such evidence, whether it be a parent complaint, a memorandum prepared by administration or any other item disclosed in an untimely manner.

The most important factor in proving incompetency is to show that the individual was specifically notified of the deficient areas, provided a remediation plan by his or her supervisor, and given the assistance and time needed to correct these inadequacies in job performance.

More than in any other case, when a termination is based on incompetency, the supervisor's effectiveness and credibility are at issue. Ongoing documentation of the supervision and evaluation provided by the supervisor should not only reflect a thorough, systematic process, but also compassion and helpfulness in the attempts that were made to improve the employee's performance.

## **Vital Evaluation**

Too often when an employee is performing poorly, action is not initiated until the community gets up in arms and starts besieging the agency administration or governing board. At that point, everybody scrambles. The community will not be appeased by half measures, and yet the dismissal an employee who is protected by virtue of a union contract, civil service regulations and/or tenure is not accomplished overnight.

When the "incompetency" issue comes to light, past evaluations of that employee will be reviewed. It usually surprises no one that those evaluations may indicate satisfactory performance. However, those satisfactory ratings do not reflect the reality of the employee's performance. Rather, they reflect the atmosphere of expediency that makes it preferable to mark an employee "satisfactory" and avoid dealing with the union and the employee about an unsatisfactory evaluation. The satisfactory rating also could signify a lack of training and/or competence on the part of the supervisor.

This lack of competence is due in large measure to a failure by public agencies to make the task of employee evaluation a priority. Organizational leaders need to ensure money and resources for staff development on evaluation skills and to allocate time to the site administrator or manager to perform the function properly.

If done haphazardly, employee termination can turn into a nasty, bloody affair in which everybody loses. Other employees will close ranks around a colleague whom they feel is being unfairly treated, even though they may recognize that person is not doing well in the job. This creates tremendous conflicts for the professional who is committed to providing excellent public service but is unwilling to have the rights of employees shortchanged.

This unnecessary conflict can be avoided when documentation and evaluation are done thoroughly and fairly. Colleagues won't have to choose sides, and frequently the struggling employee will be counseled by his or her association to "move on."

## Why Document?

Dismissal of public employees often requires a full evidentiary hearing, sometimes before the fact and sometimes after. The evidence presented must accurately substantiate an employer's decision to proceed to dismissal. Weak, inaccurate, careless, nonexistent, or procedurally improper evaluations and documents can weaken significantly the strength of the agency's case.

When problems come screaming to the attention of the administration or governing board, inevitably someone will say to the site supervisor, "You need to document and you need to evaluate." Being a trooper, the site supervisor will say, "Oh yes, of course," and yet have no real idea of how to perform those functions well.

If you ask a group of supervisors whether they have ever heard the terms "due process" and "just cause," all hands will go up acknowledging they have. If you then ask what those terms mean on a practical, day-to-day basis, your percentage drops from 100 percent to somewhere near zero. This lack of understanding of the minimum legal requirements has led to a paralysis of action in this area. Training is essential if we are to free people up so they can document accurately and fairly.

## Fuzzy Evaluations

Often, when faced with necessary evaluation and documentation, a supervisor is overcome by a condition that I call "*inarticulitis*." This common malady is characterized by a paralysis of the portion of the psyche that governs honest, straightforward, and clear communication. Its usual cause is fear of the reactions of others.

Why don't managers and supervisors "tell it like it is?" Very simply, they don't feel safe! Everyone experiences *inarticulitis* at some point. It is supported by honest motives such as not wanting to upset people or rock the boat.

Many supervisors fear that clear, direct communication about ineffective performance will destroy their relationship with employees. They are particularly fearful when the communication is in written form. The commonly held belief is that writing is a sign of trouble. The result is a lack of contemporaneous accountability records to support summary evaluations.

Evaluations and performance documentation often are riddled with warm, fuzzy phrases and diluted assessments of substandard performance. Even when remedial steps are provided, they are sandwiched between vague or pleasant platitudes. The supervisor looks arbitrary and unfair, and the employee feels attacked. The end result is usually that a grievance is brought and a request made to withdraw the evaluation because of unsubstantiated data.

In the end, the supervisor reverts to writing neutral evaluations with phrases taken straight from management handbooks to avoid potential conflicts with the employee. *Inarticulitis* sets in for good.

## Finding a Cure

To break the cycle of "*inarticulitis*," a new paradigm for supervision, documentation, and evaluation needs to be used. The paradigm starts with taking a stand that effective communication builds working relationships, it does not destroy them. It has a powerful impact on employee performance and satisfaction.

In this paradigm, a systematic process of converting traditionally oral communication into clear, direct, and specific written form is the cornerstone of documenting for success. Employees are being provided honest, factual feedback from which they can effect change. The result is open communication that provides the basis for developing a shared vision and common understanding of expectations for employee competency and performance.

Supervisors must be trained in written communication skills that facilitate trust and respect between themselves and their employees. This trust and respect will be based on the confidence and commitment demonstrated by the supervisor and the quality of his or her supervision documents and evaluations.

In a program I call the *McGrath SUCCEED with Supervision, Evaluation and Leadership*, organizational leaders discover how the supervision process can become a partnership.

Carole Lee, PhD, Director of Assessment and Evaluation for Fontana Unified School District in Fontana, CA states:

“The most significant result of the McGrath SUCCEED System is a focus on optimizing the potential of the people we already have. I believe that most administrators now have the idea they are working to create productive relationships with those they supervise in order to effect change. It is fairly challenging to communicate in ways that foster growth among ourselves and others. I believe that SUCCEED provides the principles and tools that make it much more possible.”

A major component of the SUCCEED curriculum is the McGrath Template - a simple yet highly specialized tool for educators that provides order and form to the necessary components of a termination matter. The template has four major parts: *Facts, Impact, Context, and Action*. Each part is critical to the whole and creates the substance for developing legally fit and educationally sound communication.

As an administrator progresses through each part and responds to the intermediary steps, a comprehensive and complete communication evolves. The program considers such issues as performance standards, efforts for correction, and specific actions for remediation. It also addresses the due process and just cause standards found in most states, American Arbitration Association case law, and collective bargaining agreements.

## Achieving Victory

People often say that incompetency cases are the hardest to win since the issue of competency seems to be so subjective. When a paradigm for effective communication is in place, competency cases are not the most difficult to win. Rather, litigation rarely takes place as the administration and union representatives join together to counsel the individual into another profession.

Occasionally, an individual is unable to see, despite the volumes of evidence, that he or she is performing incompetently. No amount of reasoning will deter the individual from "having her day in court." In those instances, the agency needs to be prepared to present its case conscientiously and thoroughly.

Unless high priority is given to employee evaluation, the myth that it is impossible to fire protected or tenured employees will continue for the simple reason that the agency will be unprepared to litigate the dismissal when necessary. When supervisors document for success in a continuous fashion, however, they become empowered to impact employee performance.

As organizational leaders seek to effect change and eradicate incompetence, they must stand on the solid foundation of a shift in paradigm. That shift must reflect that telling the truth to people about their performance does not harm them but instead sets them free.

Editors' note: “This article is general in nature and is not intended to replace professional, legal advice.”