

# SMITH ANDERSON

## **Developing Defensible Performance Plans: A Checklist**

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## Developing Defensible Performance Plans: A Checklist

### I. Identify (and collect evidence establishing) the circumstances that led to management identifying the employee as a performance problem.

#### A. Is management raising the bar?

Develop evidence as to how the bar was raised for all coworkers and how either their response differed from the employee's or they too were placed on a performance plan.

Rule out or remedy any disparate treatment.

#### B. Has the employee's performance deteriorated?

Develop evidence of the deterioration by contrasting evidence of past performance with current performance.

#### C. Is the work group downsizing or reorganizing?

Develop evidence:

- (i) illustrating the work group pre- and post-reorganization;
- (ii) contrasting employee's pre- and post- reorganization duties; and
- (iii) comparing relative skills, abilities, performance, etc. of work group.

#### D. Other cause?

Determine what it is and tailor an appropriate strategy.

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## II. Identify (and collect evidence of) the performance problem.

A. Do specific examples of the problem exist? Identify and document them as follows:

- (i) who witnessed, who else was involved, who discovered the problem, who was informed of the problem and who took responsive action;
- (ii) what happened, when and where;
- (iii) what consequences resulted from the problem;
- (iv) was the employee notified of the problem--if so, what explanation was offered-if not, why not;
- (v) what responsive action was taken, when and where--if no responsive action was taken, why not;
- (vi) was evidence of the problem and its consequences preserved or other contemporaneous documentation prepared?

Obtain copies.

B. Is management's understanding of the performance problem based on hearsay accounts or conclusions rather than their own personal knowledge and observation?

If so, pursue, determine and document the first-hand account.

C. If management cannot articulate specific examples, why not?

D. How long has the problem existed? What is the basis for this belief?

E. Who identified the problem?

How long has the person who identified the problem served in his present capacity?

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Basis for his belief that a problem exists?

How much opportunity has he had to form his opinion?

F. Would others have had an equal or better opportunity?

If so, determine who they are and get their input.

### **III. Identify and evaluate the corroborating documentation.**

A. Review all past performance appraisals, salary adjustments or other performance-related documents/evidence. Do they support or undermine that the problem exists? If the latter, how is the apparent discrepancy explained? Document the explanation.

Obtain copies.

B. Is the most recent performance appraisal positive overall or does it omit mention of the performance issues now being addressed? If so, is there a logical, reasonable explanation for the seeming discrepancy? Document the explanation.

Obtain a copy.

C. When did the last appraisal take place? Who undertook it? Was it presented to the employee? What transpired?

Obtain a copy.

D. Has the employee been evaluated on a regular basis throughout his employment? If not, why not? Document the explanation. What about coworkers?

E. Have all remedial efforts been documented? If not, why not? Document the explanation.

F. Do performance appraisals, accountabilities, expectations and the job description support that employee should be performing as the

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supervisor now desires? If not, ensure that either they or the supervisor's expectations are adjusted?

Obtain copies.

- G. Review and retain the corporate personnel file.
- H. Does a department or supervisor file exist? If so, review and retain a copy.
- I. Assess all documentation using the evaluation criteria set forth in XIV. Evaluating Documentation.

## **IV. Identify and evaluate management's response to comparable situations.**

- A. Do others under the same supervision or in the same job classification or elsewhere in the company have similar problems?

Was the management response taken with other employees less? More? The same? If there were differences, what extenuating circumstances justified the differences in treatment?

- B. Do others in the work group have more serious problems? Remedy them now.
- C. How do the performance appraisals, personnel files and other pertinent documents of others in the work group compare?

## **V. Collect pertinent historical background data.**

- A. How long has the employee been in this position? With the company?
- B. Has he been exhibiting the same behavior but nevertheless promoted or given salary increases?
- C. Does the employee have a history of succeeding when his job changes?

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- D. Has the employee received the appropriate training for the job? If not, this deficiency should be addressed.
- E. Has the employee received the same training and development opportunities of others in the work group? If not, is it pertinent to his current performance problems? Document the resolution of this issue.

## **VI. Collect evidence verifying the existence of legitimate business expectations.**

- A. Have the performance expectations been explained to the employee? If so, what evidence do we have of this? Did the employee receive a copy of them?

Obtain a copy of them.

Did the supervisor develop expectations in accordance with EPM?

- B. Does a work plan exist? Has the employee seen it?

Obtain a copy.

- C. Does a job description exist? Is it accurate? Has the employee seen it?

Obtain a copy.

## **VII. Document whether (and collect evidence establishing that) the employee has been given notice of the problem and an appropriate opportunity to correct it.**

- A. Has the employee previously been notified of the problem? If not, why not? If so:

- (i) how was the employee notified;

- (ii) who notified him, when and where;

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- (iii) what was he told and what was his response; and
- (iv) does any documentation exist?

Obtain it.

B. Has the problem been addressed to date? If not, why not? If it has been addressed:

- (i) who addressed it, when and where;
- (ii) how has it been addressed; and
- (iii) does any documentation exist?

Obtain it.

C. Has the employee been given an opportunity to correct the current performance deficiencies or change his behavior?

If so, how much of an opportunity did he have? Was it adequate, fair and comparable to what other similarly situated employees have received?

What other things could have been undertaken? Why were they not undertaken?

D. Was the employee given regular feedback in follow-up sessions? If so:

- (i) who gave the feedback, when and where;
- (ii) what feedback was given;
- (iii) what was the employee's response; and
- (iv) does any documentation exist?

Obtain it.

## **VIII. Anticipate the employee's reaction to the performance plan.**

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- A. What does management believe the employee's reaction to notice of the alleged performance problem will be?
- B. Have any previous counter-allegations from the employee (g. q. race/sex/age discrimination, etc.) been investigated and addressed?

**IX. Review management's proposed performance plan or, if appropriate, develop and prepare it in consultation with management.**

- A. Determine exactly what management wants the employee to be doing and how it wants him to be doing it.

If necessary, revise job descriptions, accountabilities, expectations and work plans.

- B. Determine exactly what the employee needs to do to correct the problem.

Determine how much time can and should be given to the employee to improve.

Determine what assistance can be given to the employee to allow him to succeed.

Confirm that the employee is being treated comparably to others similarly situated and, if not, document the reasons why.

- C. Is the employee better suited for another position? Transfer? Demotion? Time to locate?

- D. Prepare a progress monitoring and feedback plan that will allow management to establish that everything possible was done to assist the employee and document the employee's efforts (or lack thereof) to remedy the problems.

**X. Communicate the performance plan to the employee.**

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- A. Supervision (and HR or another management representative) should meet with the employee.
- B. Management should review with the employee the performance problem and give specific examples.

Ensure that all information shared with the employee is consistent with the reasons identified in section 1.

- C. The employee should be given the opportunity to respond to the problems and the specific examples. The goal is to get the employee to acknowledge that the problem occurred, even if he does not agree with management's reaction to it.

If the employee contests the existence of the problem, then additional investigation should be undertaken.

Document this exchange carefully and completely.

- D. Management should solicit from the employee his explanation as to what led to his problems.

Document this exchange carefully.

- E. Management should set forth the expectations (along with any revised accountabilities, expectations, etc.), what the employee should be doing that he is not doing and how he should be doing it. Management should set forth the time period in which the employee will be given to improve and the consequences for his failure to do so.

Document this exchange carefully.

- F. Management should ask the employee what assistance can be given to allow him to overcome his problems and succeed with the improvement.

Document this exchange very carefully.

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- G. Management should get the employee's commitment that he understands what is expected of him, that he is capable of overcoming and willing to overcome the problems, and that he will promptly request assistance from management as needed to succeed.

Document this exchange very carefully.

- H. Revise the performance plan, as appropriate, to reflect any additional issues raised during the meeting.
- I. Follow the progress monitoring and feedback plan and document all efforts undertaken to assist the employee and document his efforts (or lack thereof) to comply.

## **XI. Miscellaneous**

- A. What is the makeup (race, sex, age, etc.) of the work group? Does this information impact the decisions/actions?
- B. How will other employees react to management's treatment of the employee? Are they potential witnesses to any of the employee's performance problems? If so, what is their likely version of the facts?
- C. Has employee exercised any legal rights, such as filing worker's compensation or employee benefits' claim, OSHA complaint, Title VII charge, Department of Labor charge, etc.?
- D. Is the employee close to vesting?
- E. Is it clear that the employee's performance problems/behaviors are not being contributed to or caused by lack of or poor supervision, lack of training that the Company/supervisor would be expected to provide or inadequate resources beyond the employee's control?
- F. Have any EEO-related claims been asserted in the department by others?

## **XII. Evaluating Documentation.**

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- A. Are all performance appraisals and other documentation signed and dated by management and the employee? If not, why not? What is the applicable policy or practice?
- B. Does documentation occur close to the events/behaviors being described? If not, how is the delay explained?
- C. Is all the documentation accurate, complete and consistent with all other documentation?
- D. Does any of the documentation reflect resentment, anger, hostility, lack of concern, coldness, uncaring or perfunctory analysis, bias or prejudice?
- E. Do the tone and words of all documentation convey reasonableness, thoughtfulness, and legitimate business considerations?
- F. Does all of the documentation use nouns and verbs used rather than adjectives and adverbs?
- G. Has any of the documentation been altered? If so: who altered it, when and why?