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ASSOCIATION OF COLLEGE HUMAN RESOURCE OFFICERS (ACHRO) 2018 FALL INSTITUTE

How to Write it Right: An Advanced Course on Discipline and Performance Documentation

10/10/2018

PRESENTED BY:

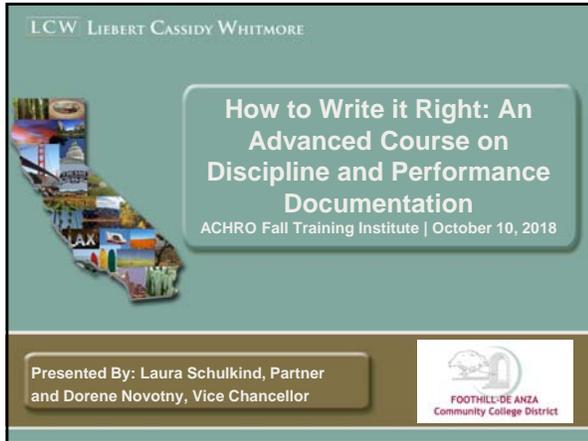
Laura Schulkind & Dorene Novotny

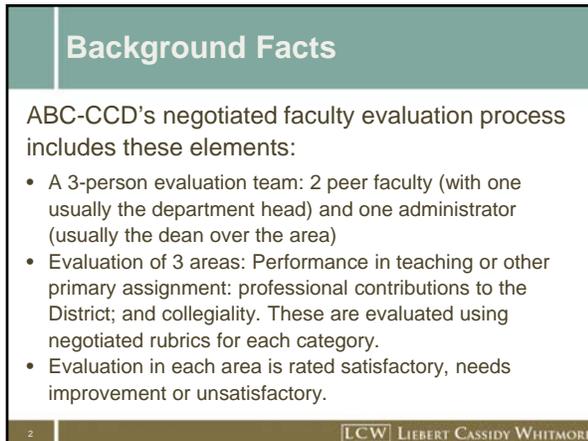
How to Write it Right: An Advanced Course on Discipline and Performance Evaluation

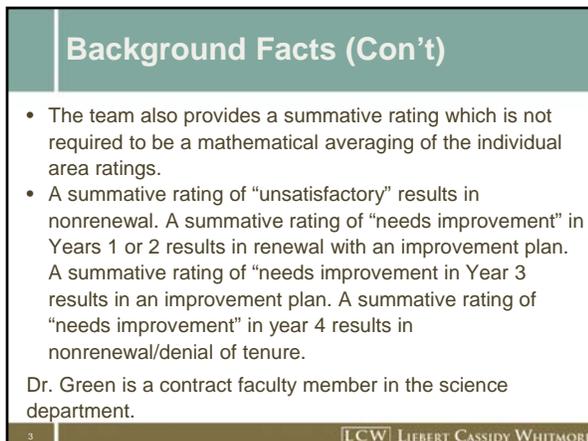
ACHRO Fall Training Institute | October 10, 2018

Presented by: *Laura Schulkind - Partner, Liebert Cassidy Whitmore*

Dorene Novotny – Vice Chancellor, HR & EO, Foothill-De Anza Community College District







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Writing it Right...and What Went Wrong?

Scenario Part 1: Improving the Evaluation

The Evaluation (Year 1): How to Make it Better?

While we are giving Dr. Green satisfactory ratings in all areas, and a summative rating of satisfactory, we must note that Dr. Green was habitually late returning work to students, resulting in several complaints. We know Dr. Green has been addressing some challenging personal issues this semester, and we appreciate that she has clearly made more of an effort to get work back to students in a timely fashion since this issue was brought to her attention. However, she also got her grades in late in the Fall, and got them in just under the wire in the Spring. This was very frustrating for the Department Chair and Dr. Green needs to be less cavalier about her paperwork. She needs to be aware of the impact on the chair and be a better "team player" in the Department. Goals for next year should include improving in these areas.

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The Evaluation: How to Make it Better?

Discussion:

1. What is wrong with this evaluation segment and how could it be made better?
2. HR becomes aware of this situation. What would you advise the Dean and Department Chair about what else should have occurred during the year regarding this issue?

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The Evaluation: Practice Tips

Language should be:

- ✓ Objective
- ✓ Descriptive & Specific
- ✓ Focused on Behavior & Actions

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The Evaluation: Practice Tips

Example regarding objective language

Subjective:
Dr. Green needs to be less cavalier about her paperwork.

Objective:
Dr. Green submitted Fall grades 2 weeks after the deadline, despite at least three reminders she received regarding the deadline from Chair Lee.

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The Evaluation: Practice Tips

Example regarding descriptive/specific language:

Vague:
Dr. Green was habitually late returning work to students, resulting in several complaints.

Specific:
Dr. Green did not return the anatomy research papers to her anatomy class until 4 weeks after they were submitted, which was also only one week before the final exam.

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The Evaluation: Practice Tips

Example regarding action-based language:

Judgmental:
Dr. Green needs to be less cavalier about her paperwork

Factual:
Dr. Green's responsibilities include the timely submission of grades. However, she submitted Fall grades 2 weeks late, and Spring grades were submitted at midnight of the due date, and only after Chair Lee sent at least three email reminders.

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The Evaluation: Practice Tips

What *not* to include:

Information not relevant to performance
➤ *We know Dr. Green has been addressing some challenging personal issues this semester*

Personal feelings or opinions:
➤ *This was very frustrating for the Department Chair*

Conclusion statements:
➤ *She needs to be aware of the impact on the chair and be a better "team player" in the Department.*

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The Evaluation: Practice Tips

- In sum:
 - Describe positives, opportunities to improve and means to improve
 - Be specific
 - Deliver evaluations timely
 - Adhere to negotiated subject matter
 - Be honest and don't sugarcoat!

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Scenario Part 2: Improving the Discipline Notice

The Reprimand: How to Make it Better?

Dear Karen,

Regretfully, I must inform you that your conduct the other day made Mr. Lee feel very uncomfortable and embarrassed. You have many fine attributes as a science instructor, which we all (including Mr. Lee) truly appreciate. However, you really can't just barge into people's offices. It isn't professional. If you have concerns regarding Mr. Lee, please make arrangements to meet with him and when you do meet with him, present your concerns in a calm and clear fashion.

I also must note my concern that your classroom observations, thus far, are not showing the sort of growth in teaching methods that we would expect during your second year.

This is a written reprimand. It will be placed in your personnel file. Consistent with your CBA, you have 10 days to submit a response, which will be attached to the reprimand.

Sincerely, Bob.

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The Reprimand: How to Make it Better?

- Dean Marks has asked H.R. to review his draft reprimand and make suggestions.

What do you advise?

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**The Reprimand:
Discipline Practice Tips**

- Be concrete
- Focus on the conduct, not the person
- Link the conduct to its negative impacts
- Focus on what you know, not how you know it
- Be accurate—don't exaggerate
- Describe what is expected
- *Always* end with an action/accountability plan

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**Scenario Part 3:
Crafting Performance Goals**

Crafting Performance Goals

The evaluation team is preparing Dr. Green's year-2 evaluation. They have decided to rate Dr. Green as "needs improvement" in the areas of teaching, but satisfactory in the areas of Professional Contributions and Collegiality—while noting as a "collegiality concern" that Dr. Green is "too emotive" in her communications. They thus give her a summative rating of satisfactory, and Dr. Green receives her third contract (a 2-year contract.)

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Crafting Performance Goals

Write 5 performance goals to be included in Dr. Green’s improvement plan, to address the performance and collegiality concerns. (Use evaluation practice tips.)

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**Scenario Part 4:
Preparing a NUC/NUP**

**Preparing the NUC/NUP:
Practice Tips**

- Discussion & Review
(Turn to template NUC/NUP in the handout)

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**Preparing the NUC/NUP:
Practice Tips**

- The purpose of the 90-day notice is to afford the employee an opportunity to correct his or her faults and to overcome the grounds for the charge.
- Groundwork for intended disciplinary action
- Statement of Charges cannot add new facts regarding unprofessional conduct or unsatisfactory performance not included in the 90-day notice

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**Preparing the NUC/NUP:
Practice Tips**

- Be comprehensive: include everything within jurisdictional reach (4 years)
- Document all prior discipline, feedback, opportunities to improve
- Link conduct to
 - Statutory causes
 - Morrison factors
 - Negative impacts

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**Preparing the NUC/NUP:
Practice Tips**

- Be factual and detailed
- State expectations
- Provide notice of placement in personnel file
- Attach documentary evidence relied upon in the Notice
- Attach most recent evaluation
 - **Fatally defective if evaluation not attached!**

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**Preparing the NUC/NUP:
Practice Tips**

**Cause for Discipline under Education
Code § 87732**

- Immoral or unprofessional conduct
- Dishonesty
- Unsatisfactory performance
- Evident unfitness for service
- Persistent violation of rules
- Crime of moral turpitude

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**Preparing the NUC/NUP:
Practice Tips**

**Cause for Discipline under Education
Code § 87732**

- Unprofessional conduct and unsatisfactory performance require a 90-day notice

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**Preparing the NUC/NUP:
Practice Tips**

The Morrison Factors:

- Likelihood of adverse effect on students
- Degree of adversity anticipated
- Proximity in time
- Extenuating or aggravating circumstances
- Motives resulting in the conduct
- Likelihood of recurrence
- Chilling effect of discipline

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**Preparing the NUC/NUP:
Practice Tips**

Unsatisfactory Performance

Assess by reference to objective evaluation criteria such as:

- Lack of knowledge of the subject matter;
- Inability to teach the subject in a clear and precise manner;
- Inability to maintain a classroom conducive to learning; and
- Inability to work harmoniously with fellow colleagues.

Education Code section 87732(c)

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**Preparing the NUC/NUP:
Practice Tips**

Dishonesty

- Subject to analysis under the Morrison factors.
- The Morrison Court noted that there are many different levels of dishonesty from the “smallest fib” to a “flagrant lie.”
- Theft in connection with work responsibilities is a form of dishonesty.

Education Code section 87732(b)

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**Preparing the NUC/NUP:
Practice Tips**

Evident Unfitness for Service

- Morrison factors apply

“Unfitness for service” is based on a fixed character trait or defect in temperament (cannot be remedied) as opposed to unprofessional conduct which is not a fixed trait (and can be remedied).

Education Code section 87732(d)

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Scenario Part 5: Preparing the NOI

Preparing the Notice of Intent

- Include President's recommendation to terminate. (Education Code Section 87671(c)).
- Include all relevant evaluations. (Education Code Section 87671(b)).
- Attach all documents relied upon to assert the charges.
- Do not include charges of unprofessional conduct/unsatisfactory performance not covered in a prior 90 day notice within same academic year.

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Thank You!

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Write it Right...and What Went Wrong?
Evaluation and Discipline of Dr. Green

BACKGROUND FACTS

ABC-CCD's negotiated faculty evaluation process includes these elements:

- A 3-person evaluation team: 2 peer faculty (with one usually the department head) and one administrator (usually the dean over the area)
- Evaluation of 3 areas: Performance in teaching or other primary assignment; professional contributions to the District; and collegiality. These are evaluated using negotiated rubrics for each category.
- Evaluation in each area is rated satisfactory, needs improvement or unsatisfactory.
- The team also provides a summative rating which is not required to be a mathematical averaging of the individual area ratings.
- A summative rating of "unsatisfactory" results in nonrenewal. A summative rating of "needs improvement" in Years 1 or 2 results in renewal with an improvement plan. A summative rating of "needs improvement" in Year 3 results in an improvement plan. A summative rating of "needs improvement" in year 4 results in nonrenewal/denial of tenure.

Dr. Green is a contract faculty member in the science department.

SCENARIO PART-1

Facts:

- At the end of year-1 (2016-17) Dr. Green received generally positive student surveys and peer classroom observations, and satisfactory ratings in all areas. However, in the narrative portion of the evaluation the team wrote:

While we are giving Dr. Green satisfactory ratings in all areas, and a summative rating of satisfactory, we must note that Dr. Green was habitually late returning work to students, resulting in several complaints. We know Dr. Green has been addressing some challenging personal issues this semester, and we appreciate that she has clearly made more of an effort to get work back to students in a timely fashion since this issue was brought to her attention. However, she also got her grades in late in the Fall, and got them in just under the wire in the Spring. This was very frustrating for the Department Chair and Dr. Green needs to be less cavalier about her paperwork. She needs to be aware of the impact on the chair and be a better “team player” in the Department. Goals for next year should include improving in these areas.

- Prior to receiving this feedback, Dr. Green received several “reminder” emails from her Department Chair. She got no other feedback regarding this issue.

Discussion:

1. **What is wrong with this evaluation segment and how could it be made better?**
2. **HR becomes aware of this situation. What would you advise the Dean and Department Chair about what else should have occurred during the year regarding this issue?**

SCENARIO PART-2

Facts: During Dr. Green's 2nd year (2017-18) she continues to get generally positive student surveys, as she is a dynamic teacher. However, her peer classroom observations note several areas of concern:

- She does not regularly check for understanding
- She focuses on the same few students who are highly engaged, while several students were “checked out” on their iPhones in the back of the room
- She uses lots of personal stories that weren't always “on point”.

Dr. Green also has not improved her timeliness in handing back student work. Her department chair, Mr. Lee, has continued to remind her of her responsibilities in emails such as:

Karen, you are not meeting your performance goals. I would hate to see you go from “satisfactory” to “needs improvement” in your evaluation.

Dr. Green starts to express that Mr. Lee is picking on her and holding her to a higher standard than male faculty. On one occasion, Dr. Green became very upset and stormed into Mr. Lee's office while he was meeting with a student and threw a stack of papers on his desk, shouting “here are Fall grades ON TIME.”

Dean Marks issues a written reprimand for the outburst incident.

Dear Karen,

Regretfully, I must inform you that your conduct the other day made Mr. Lee feel very uncomfortable and embarrassed. You have many fine attributes as a science instructor, which we all (including Mr. Lee) truly appreciate. However, you really can't just barge into people's offices. It isn't professional. If you have concerns regarding Mr. Lee, please make arrangements to meet with him and when you do meet with him, present your concerns in a calm and clear fashion.

I also must note my concern that your classroom observations, thus far, are not showing the sort of growth in teaching methods that we would expect during your second year.

This is a written reprimand. It will be placed in your personnel file. Consistent with your CBA, you have 10 days to submit a response, which will be attached to the reprimand.

Sincerely, Bob.

Discussion: Dean Marks has asked H.R. to review his draft reprimand and make suggestions. What do you advise?

SCENARIO PART-3

Facts: The evaluation team is preparing Dr. Green’s year-2 evaluation. They have decided to rate Dr. Green as “needs improvement” in the areas of teaching, but satisfactory in the areas of institutional contributions and collegiality—while noting as a “collegiality concern” that Dr. Green is “too emotive” in her communications. They thus give her a summative rating of satisfactory, and Dr. Green receives her third contract (a 2-year contract.)

Exercise: Write 5 performance goals to be included in Dr. Green’s improvement plan, to address the performance and collegiality concerns.

SCENARIO PART-4

Facts: During the Fall of Dr. Green's third year, the following occur:

- She fails to hand in Fall grades on time. Dean Marks issues a 2nd reprimand and directs her to immediately turn in grades. She hands them in the next day--awarding everyone As.
- She fails to improve in the teaching performance areas noted in her evaluation.
- She refuses to meet with Lee and insists that he only communicate with her in writing.

Discussion: **The District decides to issue a Notice of Unprofessional Conduct/Notice of Unsatisfactory Performance. Review and discuss "model" NUC/NUP.**

NOTICE OF UNPROFESSIONAL CONDUCT/UNSATISFACTORY PERFORMANCE

January 15, 2019

Personal service or other method
establishing clear date of receipt>

VIA PERSONAL DELIVERY

Dr. Karen Green
Address
City State Zip

Re: *Notice of Unprofessional Conduct and Unsatisfactory
Performance - Notice to Correct Deficiencies*

Make sure to frame as a "notice to correct"
and not just a notice of UP/UC.

Dear Dr. Green:

Introduction: Key points: 1) Nature of 90-day
notice. This is not a disciplinary notice. It is a
right to notice and opportunity to correct. 2)
Reserve right to initiate discipline for causes
other than UP/UC. 3) Reserves right to
discipline the conduct alleged in the notice
on grounds other than UP/UC.

Pursuant to Education Code section 87734, this letter constitutes notice to correct your unprofessional conduct, unsatisfactory performance, or both, in your performance as an ABC-CCD ("District") academic employee. Section 87734 requires the District to provide an academic employee with such notice, and opportunity to improve, at least ninety (90) days prior to initiating formal disciplinary proceedings for dismissal on the grounds of unprofessional conduct or unsatisfactory performance. However, please be advised that section 87734 does not preclude the initiation of such formal disciplinary proceedings for causes other than unprofessional conduct and unsatisfactory performance.

This formal notice provides you with sufficient information to understand the nature of your unprofessional conduct and unsatisfactory performance and to describe specific instances of your behavior with such particularity as to provide you with an opportunity to correct these faults and overcome the grounds for charges based on unprofessional conduct or unsatisfactory performance. Please be advised that the ninety-day remedial period specified by Education Code section 87734 shall begin on the date this notice is served upon you.

Please be further advised that, while I am issuing this notice pursuant to Education Code section 87734, your conduct may also support allegations of other violations of Education Code section 87732.

Your unprofessional conduct or unsatisfactory performance is based more specifically upon the enumerated deficiencies set forth below.

Use headers to clearly organize the key components: facts supporting the notice; linking conduct to negative impacts; expectations going forward.

Within fact section: move chronologically. Use Headers to help organize facts and state the issues.

Describe conduct in detail. Include dates. Attach exhibits.

State what occurred, not state of mind. "You failed to...." Not "You were unwilling to" or "You were unable to".

Document feedback –whether by evaluation, counseling, reprimands or other method—as it occurs in the chronology. This helps to show factually the failure to improve.

I. FACTS SUPPORTING THIS 90-DAY NOTICE OF UNPROFESSIONAL CONDUCT/UNSATISFACTORY PERFORMANCE

A. 2016-2017 Academic Year: Failure to Carry Out Key Responsibilities in a Timely Fashion

1. During the 2016-17 academic year—your first year as a contract faculty member—you failed to return student work in a timely fashion on a repeated basis. Further, you continued to return work late despite reminders provided to you by your Department Chair, Mr. Lee, that it is important to return work in a timely way. Specifically, on at least two occasions, Mr. Lee reminded you that students rely on the feedback instructors provide to study and identify areas where they need to focus. (See emails of November 15, 2017 and May 3, 2018 attached as Exhibit A.)
2. Also during the 2016-17 year, you failed to turn in semester grades by the clearly-stated deadline. This is one of the core responsibilities of all faculty—one which you were repeatedly reminded of both through general announcements by your Chair, and emails sent to you personally, as Mr. Lee became concerned that you were going to be late. (See emails of December 1, 3 and 12, 2017 attached as Exhibit B.)
3. As a result of your lack of timeliness, your evaluation team noted in your annual evaluation that you were “habitually late returning work to students, resulting in several complaints.” Your evaluation team further noted that you also got your grades in late in the Fall, and got them in just under the wire in the Spring. As a result, your goals for 2017-18 specifically included that you improve your timeliness in handing back student work, and handing in grades.

B. 2017-2018 Academic Year: Failure to Improve Timeliness and Lack of Collegiality

4. Despite your express goals for the 2017-18 academic year, students continued to complain that they were not getting their work returned. As a result, Mr. Lee emailed you to inform you that you were not meeting your goals, and alerting you that this could result in negative ratings in your next evaluation.
5. Further, you not only failed to improve, but also failed to accept

responsibility for your deficiencies. Instead, you became verbally abusive and threatening toward Mr. Lee when he appropriately reminded you of your responsibilities. Specifically, given your past pattern of poor time management, Mr. Lee appropriately reminded you several times of the deadline for submitting final grades, as the deadline approached. Rather than accept this appropriate guidance, on December 15, 2017, you burst into Mr. Lee’s office and threw the grades on his desk, shouting something to the effect of “here are fall grades on time!” Mr. Lee was with a student at the time.

6. As a result of this outburst, Dean Marks issued you a letter of reprimand. Among other things, the letter directed that you address any concerns you may have with Mr. Lee in a professional and collegial manner. (See Letter of Reprimand dated January 20, 2017, attached as Exhibit C.)

7. Also during the 2017-18 academic year, your peer review team noted that you were less effective in your teaching. Specifically they noted :

- She does not regularly check for understanding
- She focuses on the same few students who are highly engaged, while several students were “checked out” on their iPhones in the back of the room
- She uses lots of personal stories that weren’t always “on point”.

These deficiencies, combined with your continued failure to hand back student work in a timely fashion (to the detriment of your students) resulted in a “needs improvement” rating. The team also identified as a concern, and area for improvement, your lack of collegiality in your interactions with your department chair, Mr. Lee. (See 2017-18 classroom observations and final evaluation, attached as Exhibit D.)

C. Fall 2018—Failure to Improve in Timeliness, Teaching and Collegiality and Gross Unprofessional Conduct in Administering Grades

8. Despite the guidance and expectations provided to you by your evaluation team and Dean marks regarding collegiality, you have continued to engage with your department chair in an unprofessional and uncollegial manner. Specifically, you have taken the position that you refuse to meet with him and demand that he communicate with you only through email. The ability to communicate with your colleagues, and accept constructive

guidance from your department chair are essential components of collegial conduct.

9. Further, your teaching performance this Fall showed no improvement in the areas noted in your 2017-18 evaluation. Specifically, the classroom observations performed during the fall semester consistently noted that you digressed into personnel stories unrelated to the curriculum and failed to engage the whole class. (See Fall 2018 classroom observations attached as Exhibit E.)
10. Finally, and most alarming, despite the repeated guidance and reminders provided to you, and, summarized above, you again failed to submit Fall grades on time. Dean Marks issued you a reprimand and directed you to immediately submit your final grades. (See Reprimand dated December 15, 2018, Attached as Exhibit F.)
11. In response, you submitted grades the next day—awarding all students As. This action was tantamount to not handing in grades at all—as they clearly did not reflect an honest, accurate and individualized assessment of each student’s performance. As you are already aware, this has resulted in the District asserting its authority to reject the grades and is having to burden other faculty with reviewing and grading your students’ work.

II. CONDUCT CONSTITUTING UNSATISFACTORY PERFORMANCE AND UNPROFESSIONAL CONDUCT

The above-described performance deficiencies constitute unprofessional conduct and unsatisfactory performance on your part as an academic employee of the District. You have also violated the following rules and standards:

- Faculty Contract Article 10: Job Description
- District Board Policy XX: Faculty Obligations to Students (Title 5 sec. 55002)
- District Board Policy XXX: Academic Integrity

Despite the reasonable and appropriate guidance of your dean, department chair and evaluation team, you have continued to fail in your duties to the detriment of your students. Further, in response to this guidance rather than improve, you have blamed others, refused to take responsibility and allowed your performance to decline further.

Link conduct to its negative impacts on the education/work environment. Identify any policies, contractual provisions violated.

Providing students with regular feedback on their work is an essential component of effective teaching. When you take weeks to return quizzes and papers, students are unable to assess their strengths and weaknesses and study appropriately.

Similarly, turning in final grades on time is necessary to effectively serving our students and smoothly running a department. Your repeated failure to adhere to this clear expectation burdened your colleagues and inconvenienced your students.

Most concerning, however, you have responded to attempts to correct your poor performance with escalating hostility. Not only has this created tension and discord among your colleagues, you have lost your temper in front of students—causing them to question the value of study in this department.

Finally, you reacted to Dean Marks directive to turn in grades by turning in a false set of grades. This patently dishonest behavior constitutes grossly unprofessional conduct—and as noted above possible grounds for immediate discipline.

Include directive to correct conduct/performance and expectations/remediation plan

III. DIRECTIVE TO CORRECT

Within the next ninety (90) days, you are directed to eliminate the unprofessional conduct and unsatisfactory performance. In order to overcome these deficiencies, you must comply with the following directives and timeline for improvement:

Return all student work, accurately graded, within one week of the work being submitted.

Submit all final grades one week prior to the calendar deadline.

The District's administration is willing to assist you in overcoming these deficiencies. However, please be advised that your failure to immediately correct these deficiencies, and improve your conduct and performance may result in your dismissal or other disciplinary action in accordance with the provisions of the Education Code.

Reserve right to discipline for causes other than unprofessional conduct/unsatisfactory performance within the 90 days.

Finally, please note that the District reserves the right to proceed with dismissal prior to the expiration of the 90-day period described in Education Code section 87734 in connection with any incidents of misconduct which may be considered other than unprofessional conduct or unsatisfactory performance.

Always attach, and note attachment of, most recent evaluation. Notice is fatally defective if not included.

Include list of all attachments.

Include notice of placement in personnel file.

Include acknowledgement of receipt

As noted above, your last Performance Evaluation, dated April 25, 2017, is attached to this Notice as Exhibit G. Please immediately contact me should you have any questions regarding this notice, its content, or any of its directives.

Very truly yours,

Etc.

LIST EXHIBITS

cc: Personnel File

A COPY OF THIS NOTICE OF UNPROFESSIONAL CONDUCT AND UNSATISFACTORY PERFORMANCE WILL BE PLACED IN YOUR PERSONNEL FILE. YOU HAVE THE RIGHT TO MAKE A WRITTEN RESPONSE. ANY WRITTEN RESPONSE YOU MAKE WILL BE ATTACHED TO THIS DOCUMENT AND ALSO PLACED IN YOUR PERSONNEL FILE.

ACKNOWLEDGMENT OF RECEIPT

I understand the information contained in this correspondence and I acknowledge receipt of this document. My signature does not mean that I agree with the statements made in this correspondence, but merely signifies that I have received, read, and understand the contents of this correspondence.

Dated: September __, 2018

Karen Green

SCENARIO PART-5

Facts: During the Fall of her 3rd year, (Fall, 2018) Dr. Green's classroom performance continues to decline. The District also receives 3 student complaints that Dr. Green has created a hostile environment by repeatedly using personal stories about her husband's recovery from sex addiction; that marriage is between one man and one woman; and homosexuality is a curable disease. The complaints were investigated and Dr. Green admitted to the statements--asserting academic freedom. Chair Lee has now also threatened to file a complaint because he is being "bullied" by Dr. Green.

The District concludes Dr. Green is doing harm to the students, who are not developing the necessary skills to advance. The District is also concerned that if it does not address the student complaints or Lee's frustration, these issues will escalate. The District feels it cannot keep her in the classroom for the next 1.5 years. Thus, they decide to prepare a Notice of Intent to Terminate, and hope that this can be utilized to "encourage" Green to resign with a settlement agreement.

Exercise: **Discussion: General structure of an NOI.**