

Documenting Discipline and Performance Issues



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for

**Georgia Community Action Association
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Program Agenda

- **Why Managers Hate to Document?**
- **Did You Know?**
- **Documenting Employees' Performance**
- **Documentation**
- **Examples of Documentation**
- **Analyzing Discipline Problems**
- **Performance Appraisal Program**
- **Assessing an Employee's Performance**
- **Checklist of Factors that Distort Performance Appraisals**
- **Coaching/Counseling Employees**
- **Preparation from an Employee's Perspective**

"The first responsibility of a leader is to define reality. The last is to say thank you. In between, the leader is a servant."

– Max De Pree Leadership Is An Art

Description of Workshop

This course is designed to assist front line supervisors in conducting employee performance appraisals and documenting discipline.

Goals

What Do I Want You to Achieve From This Seminar?

Upon completion of this course of instruction, the supervisors should be able to:

- Document the performance plan
- Coach, counsel, and provide feedback to employees
- Document an appraisal
- Communicate effectively to employees about performance problems and performance improvements

Knowing how to do a job is the accomplishment of labor.

Showing others is the accomplishment of a teacher.

Making sure the work is done by others is the accomplishment of a manager.

Inspiring others to do better work is the accomplishment of a leader.

- John Maxwell

Andrea's MOTTO...



**Remember it tomorrow
by
writing it down
today!**

Unwanted List!



(WHY DO MANAGERS HATE TO DOCUMENT?)

1. _____
2. _____
3. _____
4. _____
5. _____

DID YOU KNOW??

You NEVER WIN an employee lawsuit.



Even if the judgment is in your favor, the legal costs are very expensive.

Other costs include emotional drain, employee turnover and lower morale.



10 WAYS TO AVOID LIABILITY

document

document

document

Document

Document

Document

Document

Document

Document

DOCUMENT

SEVEN REASONS FOR DOCUMENTING EMPLOYEES' PERFORMANCE

1. Prevents later denial
2. Aids your memory
3. Minimizes misunderstandings
4. Stimulates thoughtfulness
5. Reveals patterns
6. Covers your absence
7. Supports future evaluators

HOW JURORS VIEW THE EMPLOYER'S DOCUMENTATION OF DISCIPLINE

To fully understand how jurors view the documents of any disciplinary action, put yourself in the shoes of a juror hearing an employment matter filed in a current or former employee. The juror knows that by the time the witness takes the witness stand, he/she has met with the attorney to rehearse the testimony. That explains why what is said "after the fact" is a poor substitute for a document that expresses the thought processes and conclusions, the discussions with the employee, and what was agreed to and acknowledged at the time you were dealing with the problem. While the jury will have no written record of your testimony, that document prepared at the time of the incident could well become an exhibit at trial - one that will go into the jury room for examination by the jurors during their deliberations.

How do you want that document to read? Will it reflect that you have given the employee due process? That you took the time to explain how you were arriving at a "fair" decision? That you took the time to explain the business purpose behind your action?

Do it now! Do it when your motives are not suspect. Allow the juror to "walk in your shoes" and to see things from your point of view.

If you can do this, the juror will be less likely to second guess your decision. More important, if the document is truly jury-friendly, the employee will be less likely to take such a case to an attorney and litigation will be avoided.

The moral is: What you do and say today must be done with a view toward what you would say if ever called to testify before a jury.

Allan L. Rolnick

HOW EMPLOYERS CAN UNDERSTAND AND RESPOND TO THE NEW LITIGATION PARADIGM

Why does the litigation of employment cases differ from commercial lawsuits or other types of business-related litigation? Why will the numbers of employment lawsuits increase next year and what can be done to protect against the cost of such litigation?

The answer to both questions comes from understanding the new paradigm and changing the approach to employee discharge and discipline so that documents are drafted according to a fair and deliberate process designed for jury comprehension.

Changing employment laws and related government enforcement efforts, as well as corporate attention to the “new efficiencies” brought about by global competition, have constructed this new paradigm. The changes in the workplace have led to employee insecurity. Even within employment settings which have not actually experienced a reorganization, employee loyalty has been influenced by reductions in force affecting other family members, acquaintances or friends. The previous “social compact” whereby the employee was guaranteed a job as long as he performed up to standard has been cast aside. Many employees now feel that management’s verbal commitments to employees as “the Company’s most valuable resource” are consistent with its actions. The result is more job insecurity, less loyalty to the employer, and a greater propensity of employees at all levels to consider the filing of discrimination charges and lawsuits.

When employee insecurities from a changing work environment are coupled with the advent of jury trials of employment cases, we have yet another new paradigm. Attorneys that represent plaintiffs in employment cases are becoming more selective in the cases they handle. These lawyers are aggressive and understand the dynamics of juror reaction to employment cases. Since current remedies are capped, settlements are encouraged because both the plaintiff and the attorney know that the federal law prevents a “big” payday. Thus, almost every federal complaint contains state tort claims as well. Many employers currently buy their way out of potential lawsuits with severance packages in exchange for executed releases of liability. However, employer generosity seems to reduce with each downsizing and the lack of transition assistance further exacerbates the loyalty crises. We can anticipate an effort to persuade Congress to remove the “caps” on punitive damages for discrimination matters. If successful, employees will be less inclined to accept reduced packages and plaintiffs’ attorneys will have a disincentive to “settle” employment matters an incentive to take their chances with a jury. We can anticipate an increase in cases brought by employees affected by management’s continued downsizing and an increase in jury trials as plaintiff’s attorneys pursue the “pot of gold” made available by punitivedamage

opportunities either created by new legislation or arising from state tort claims appended to federal claims.

Jurors tend to give the benefit of the doubt to the employee and regard the employer's "deep pocket" as a source to rectify perceived injustices. This new dynamic makes it imperative that management revise its disciplinary policies and procedures so that the methods used (i.e., the "bedside manner" of the officials who communicate employment decisions) and the disciplinary documentation clearly convey the business reasons behind decisions to terminate the employment relationship or to promote, or demote, or reassign job duties. Juries concern themselves with fairness. Therefore, management's methodology becomes a critical "walk in the shoes" of the decision maker, juries will tend to side with the employee and punishing employers with punitive damage verdicts. Jurors are more likely to read documents and less likely to credit management's verbal testimony at trial. Jurors rarely resolve credibility conflicts in favor of employers. Therefore, proper documentation and a fair and deliberate procedure become the best defense against adverse jury verdicts.

Employers must recognize why settlements will be fewer, why more cases will be litigated before juries, and why state punitive damages claims will result in increasing jury verdicts. Employers must re-write documentation requirements and procedures to insure the appearance of fairness or they will find themselves unprepared to respond to these shifting paradigms.

Allan L. Rolnick

DOCUMENTATION

Effective Documentation: A Key to Winning Lawsuits

Employment Records Closely Scrutinized

Recent court decisions and jury surveys indicate that judges and juries look closely at employment records before making a decision. If facts are in dispute, great weight is often given to written documentation in resolving the dispute. Employers who have established a format for written documentation also realize a consistent and high-quality written product helps focus management's response to given circumstances (rather than having each supervisor determine the appropriateness of the action) and increases the likelihood of making consistent and defensible employment decisions.

Factors to Ensure Proper Documentation

The following factors should be considered by employers when advising or training supervisors on proper documentation:

- Documentation should be generally addressed to the employee rather than addressed "to file" Employees should also receive a copy of such documentation.
- Be sure to remind supervisors that written documentation will likely be reviewed by administrative and judicial decision-makers if the case becomes contentious. Accordingly, care should be taken that the writing is done in a professional manner. This includes, at a minimum, proper punctuation, spelling and format. A poorly written document will reflect negatively on both the company and the supervisor.
- The document itself should have a statement about its purpose. For example, if the employee has consistently failed to meet company production standards, that should be explained in the documentation.
- The documentation should have a statement of the problem or violation. This includes the classic who, where, what, how, why and when. Due process, a concept most Americans accept, would require that this information be given to an employee.
- The documentation should also have a statement regarding any employment rule, policy or practice regarding the situation. Citing the rule tells the decision-maker that the employer has a clearly articulated position and that the employee is on notice that he or she is not satisfying requirements.
- An important item often overlooked by employers is a statement telling the employee how his or her action had a negative impact on business operations. This statement has been cited by decision-makers as the key to effective documentation. If the employee's actions had no adverse impact, employers should question the need for the warning.
- It is also helpful to refer to any previous warnings about other performance problems. Some employers limit this to the same or related type problems. However, in cases where an employee is nearing termination, employers should list all previous employment-related problems. This summarizes the progressive nature of the problems and that the employer has been fair in dealing with the employee.
- Employers should also set forth the corrective action to be taken by the employee to remedy the deficient performance and note the employee's response to the corrective action. For example, note if the employee agrees to improve his or her performance up to company standards or if the employee indicates that he or she will do nothing.
- Finally, the documentation should have a warning of the consequences of failure to improve. This should be stated in clear and concise language. This again tells the decision-maker that the employee was on notice of the consequences of the problems.

BAD EXAMPLE OF DOCUMENTATION

To: Ima Latesky

From: Eva Evilene

Date: February 5, 2011

You have been in my department now for more than five years. I did not want you in the first place because I heard from Bonita Hampton and the other supervisors that you were not a reliable employee; however, you were assigned here over my objection.

I promised myself that since you spend so much time complaining that you are discriminated against because you are old, the first time you stepped out of line I was going to let you have it. This morning you did. Ha! Ha! I caught you coming into the building ten minutes late----crutches are no excuse!

I simply will not tolerate such disregard for my authority. Therefore, you are to gather your personal items immediately and leave this building by noon today. You are then to report to Lorraine Daniels. Maybe she will know what to do with you and your kind.

Thanks for making my day!

GOOD EXAMPLE OF DOCUMENTATION

To: Ima Latesky

From: Eva Evilene

Date: February 5, 2011

Re: Habitual Tardiness and Absenteeism

Georgia Community Action Agency's Rules of Conduct state that habitual tardiness or absenteeism will be subject to discipline.

Ima, I talked to you on December 1, 2010, January 2, 2011 and on January 13, 2011 about your tardiness. On January 24, 2011 you were late again and I discussed with you the importance of coming to work on time because lateness interferes with the schedule of work and it places an unfair burden on your fellow employees. I told you that unless you reported to work on time you would be subject to further disciplinary action. Today, you were late again. Please consider this a written warning. Unexcused absences, tardiness, or failure to follow department procedures for reporting to work will result in further discipline up to and including termination of employment.

Ima, I expect you to immediately resolve your tardiness and attendance problems and become the dependable receptionist I know you have the capability to be.

The undersigned employee hereby verifies that she has been given the opportunity to read and discuss the contents of this memo and to respond to it in writing below or on the reverse side.

_____ (Date) _____ (Employee)

_____ (Date) _____ (Supervisor)

_____ (Date) _____ (Witness)

Documentation Exercise

1. “You have good communication skills.”

Answer: _____

2. “Has poor attendance record.”

Answer: _____

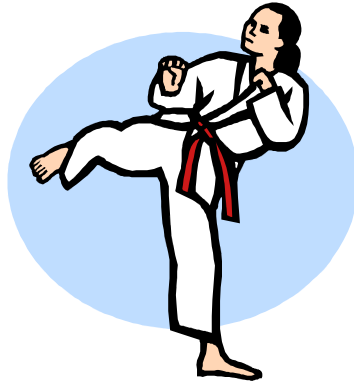
3. “Arrives late for meetings at least 10 minutes every time.”

Answer: _____

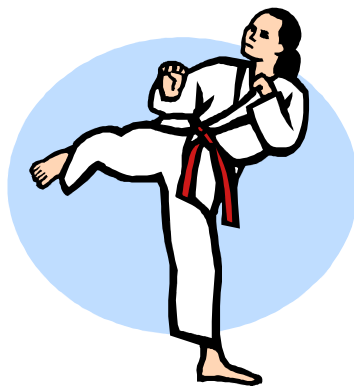
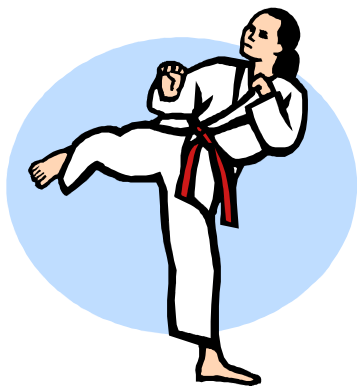
If It Isn't Documented, It Didn't Happen!



**Documentation
is the**



**foundation for your
defense
in any major event!**

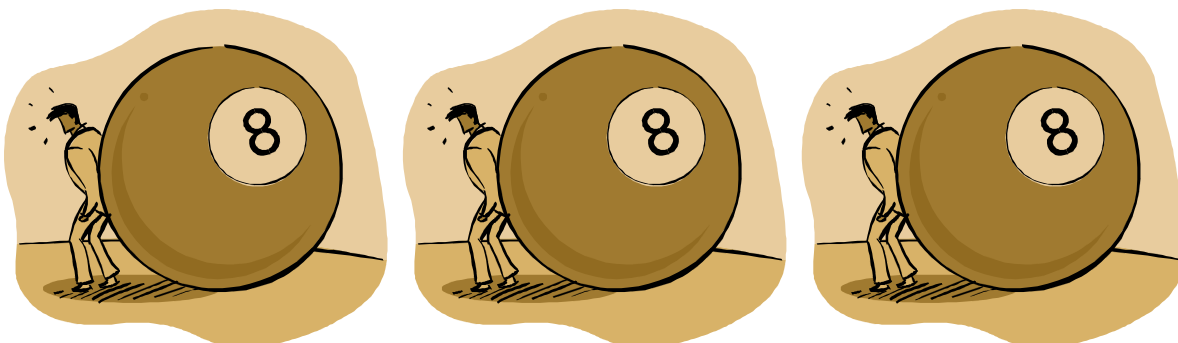
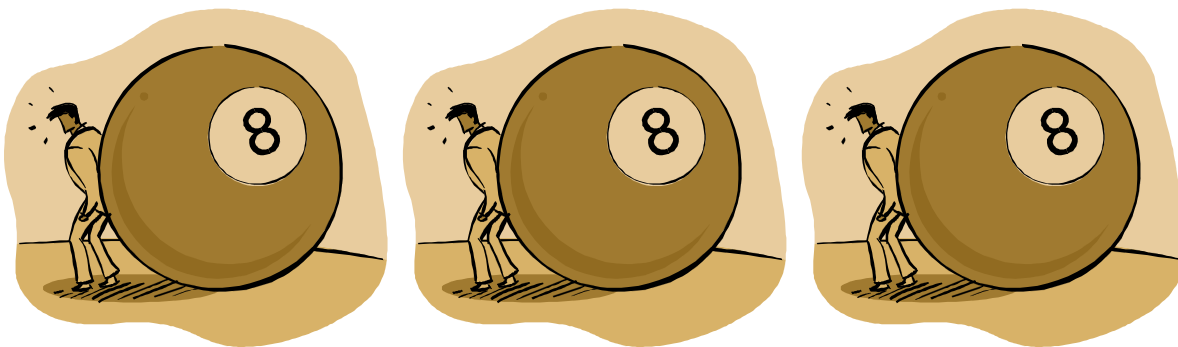




CHECKLIST: ANALYZING DISCIPLINE PROBLEMS

- Seriousness of the Problem:** How severe is the issue or infraction?
- Time Span:** Have there been other, similar, discipline problems in the past by this employee and, if so, over how long of a time span?
- Frequency and Nature of Problems:** Is the current problem part of an emerging or continuing pattern of problematic behavior or disciplinary infractions?
- Policy/Rule Violated:** If a policy or rule was violated, was the rule (or supervisor's order) reasonably related to the employee's job and performance? Was every effort made to ensure that the employee did, in fact, violate the rule or management order?
- Employee's Work History:** How long has the employee worked for the organization without problems, and what has been the overall quality of job performance?
- Malice/Intent:** Did the employee commit the offense spontaneously as a matter of strong personal impulses, or is there evidence of premeditation?
- Extenuating Factors/Provocation:** Are there reasonable extenuating circumstances related to the problem such as provocation by another person?
- Degree of Orientation:** To what extent has management made an earlier effort to educate the problem employee about existing discipline rules or performance expectations, and the consequences for violations?
- Investigation:** Was the employer's investigation conducted fairly and objectively? Was the investigation completed fully before disciplinary action was taken and was there substantial evidence or proof of the employee's guilt?
- History of Organization's Discipline Practices:** How have similar infractions been dealt with in the past? Has there been consistency in the application of discipline procedures or are there unique conditions that would set this particular situation apart from others?

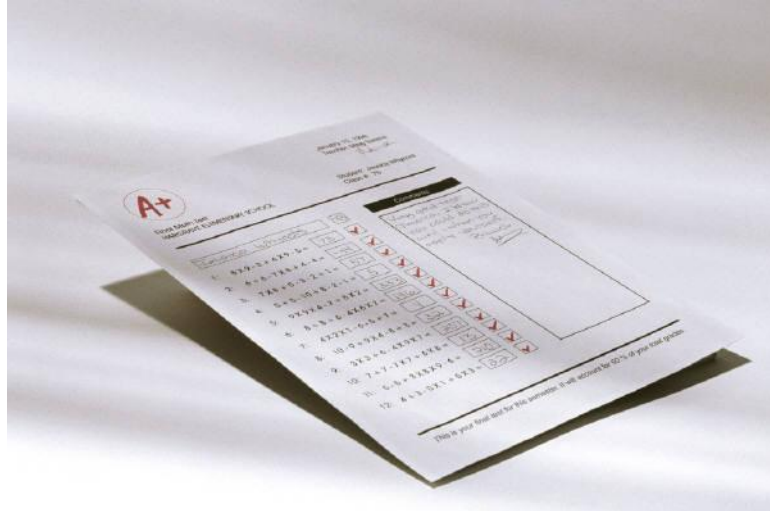
- ❑ **Implications on Other Employees:** What impact will this decision have on other employees in the work unit and/or organization - will it be seen as fair, reasonable, and just or discriminatory treatment?
- ❑ **Progressive Discipline:** Is the nature and severity of the problem appropriate to use progressive disciplinary measures as a means of trying to correct the problem? Do personnel policies require progressive discipline on all infractions.
- ❑ **Justification:** If the employee decides to take his or her case to higher management (or the courts), is there reasonable evidence (documentation) to justify the disciplinary/termination decision?





Caution: Problem Areas

- 1. Personal Opinions and Biases**
- 2. Poor Choice of Words**
- 3. Omissions**
- 4. Illegibility**
- 5. “Attitudes”**
- 6. Unbalanced, slanted, or inaccurate information**



Why Have A Performance Appraisal Program?

There are many other valid reasons to conduct employee performance appraisals and many potential uses for the information generated. Decisions related to promotability, advancement, selection for training, salary administration, discipline and even potential termination may flow from the results of an objective performance appraisal process.

The performance appraisal is one of the most powerful motivational tools available to a leader. It has three main objectives:

1. To **objectively** measure performance against job requirements this allows effective workers to be rewarded for their efforts and ineffective workers a target for performance improvement.
2. To **increase performance** by identifying specific development goals
"If you don't know where you are going, any road will take you there," Lewis Carroll in Alice's Adventure in Wonderland (1865). The appraisal allows the worker to target specific areas for job growth...it should be a time to plan for better performance on the job
3. To **develop career goals** so that the worker may keep pace with the requirements of a fast paced organization. More and more, every job in an organization becomes more demanding with new requirements. Just because a worker is performing effectively in her job now, does not mean she will be able to perform effectively in the future. She must be allowed to grow with the job and the organization.

A worker should not walk blindly into a performance appraisal. Past counseling sessions, feedback, and one-on-ones should give her a pretty clear understanding of what to expect from the appraisal. If you blind-side her, you have not done your job as a leader. Helping your people to grow is not a once or twice yearly duty, but a daily duty.

The appraisal should be a joint effort. No one knows the job better than the person performing it. By turning the appraisal into a real discussion, the leader could learn some insightful information, which could help boost performance in the future. Before the meeting, have the worker complete her own self-appraisal. Although you might think they will take advantage of this by giving themselves unearned high marks, studies have shown that most workers are harder on themselves than the leader would have been.

Yearly performance reviews are critical. Organizations are hard pressed to find good reasons why they can't dedicate an hour-long meeting once a year to ensure the mutual needs of the employee and organization are being met. Performance reviews help supervisors feel more honest in their relationships with their subordinates and feel better about themselves in their supervisor roles. Subordinates are assured clear understanding of what's expected from them, their own personal strengths and areas for development and a solid sense of their relationship with their supervisor. Avoiding performance issues ultimately decreases morale, decreases credibility of management, decreases the organization's overall effectiveness, and wastes more of management's time to do what isn't being done properly.





PITFALLS TO AVOID WHEN ASSESSING AN EMPLOYEE'S PERFORMANCE

- Don't focus on one specific incident - review the entire period which the appraisal covers.
- Don't go solely by memory - base the review on accurate and factual data.
- Avoid the "halo" and "horns" effects. Just because the employee performs badly in one area does not make his overall performance bad. The same goes for good performance.
- Length of service or job grade does not necessarily mean better performance. Look carefully at the individual's performance within that job.
- Avoid bias about an employee based on your personal feelings for that individual.
- Don't base current performance on past performance. Look at the current period being reviewed.
- Don't overrate a poor performer as a motivational tool.
- Not all individuals are the same. Analyze each employee carefully; establish performance ranking.
- Don't rush through the appraisal. Take time to record accurate information which truly reflects the individual's performance.
- Don't be afraid to provide truthful information.

Word of CAUTION!

- Be meticulous when filling out performance evaluations as their contents may one day be used in court as justification for discipline, discharge, or other adverse employment action against the employee. Fill out the evaluation forms **carefully** since they may one day be read back to you on the witness stand or during a deposition.

CHECKLIST OF FACTORS THAT DISTORT PERFORMANCE APPRAISAL

The checklist below can be used to help supervisors avoid the most common sources of rating errors in the appraisal process:

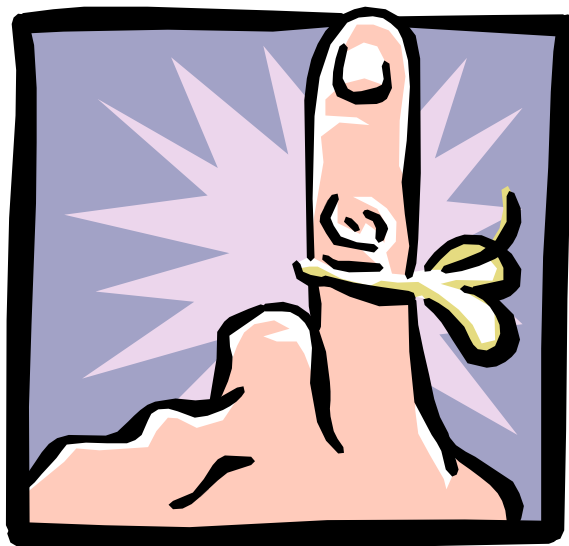
- **Bias:** There is an “unconscious bias” or natural tendency for supervisors to give favorable ratings to someone like themselves.
- **Rating “attitude” and “personality” rather than performance:** Supervisors may respond quickly and strongly to personality traits such as charm or aggressiveness which may bias them when it comes time to assess accomplishments. The appraisal should focus on actions, behavior, and accomplishments.
- **“Halo” effect:** A halo effect occurs when a supervisor gives an excellent employee top ratings in all areas or gives an unsatisfactory employee low ratings in all areas. The halo effect results when supervisors let one strong value judgment in one area color their judgment of other behaviors and traits. Regardless, employees who “need improvement” usually have some strengths and “high achievers” may have some areas in need of improvement.
- **Leniency:** Supervisors may be afraid to hurt employees’ feelings or to hurt employees financially. Sometimes a supervisor may be unwilling to give a low rating to an employee who is likely to bring a grievance or lawsuit even when the employee’s performance is hurting co-workers’ morale.
- **Severity:** Some supervisors have unrealistic expectations about employee performance. Others are simply reluctant to offer praise.
- **Inadequate observation:** Supervisors who are not familiar with all aspects of an employee’s performance, supervisors who do not work closely with subordinates, or supervisors may become set in their opinions and disregard observed behavior that differs from their conclusions.

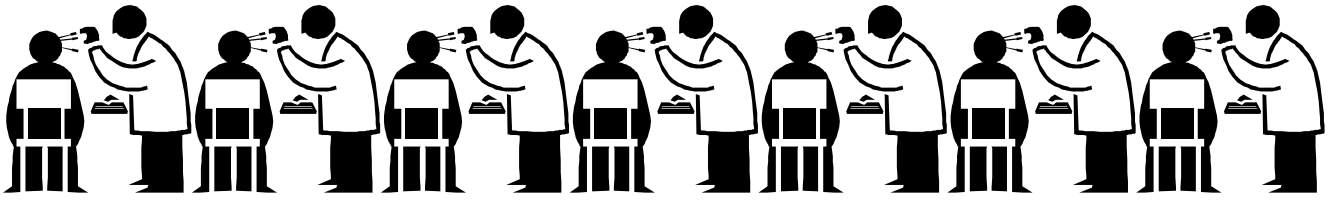
- **Inappropriate time span:** Supervisors who look back to incidents that occurred before the last appraisal are being unfair to employees. Performance appraisals should cover the whole of an employee's progress during the time period from one appraisal date to the next.
- **“Contrast” effect:** The exceptionally good or bad performance of one or two employees may greatly distort the ratings that the others receive. This is especially relevant when a fixed amount of rewards must be distributed within a group morale may fall if the rating of one employee shifts the rating for the others.
- **Overemphasis on uncharacteristic performance:** Unusual behavior is more memorable.



DON'T FORGET TO

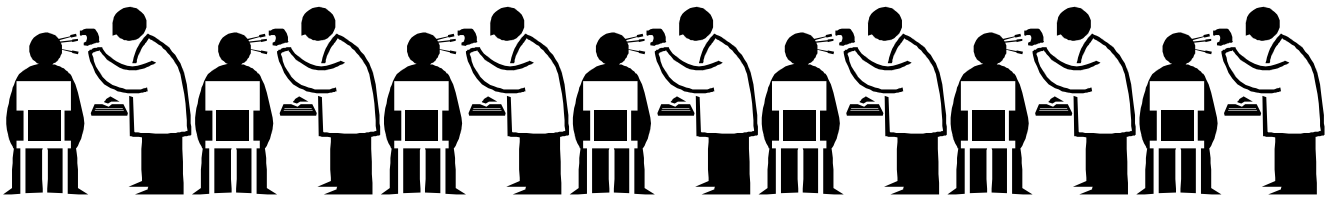
Express confidence in the employees' ability to succeed. When you show confidence in a person, you can be sure that the individual will try to justify it. They will leave with a positive impression on the discussion and you would have boosted their self-esteem.





CAREER COACHING/COUNSELING CHECK-UP

1. How many new things did you learn last year? How will this help you this year?
2. How did you add value to the organization? Team? Department? Community?
3. In what areas do you feel that you need added support, structure and direction?
4. What can I, as your supervisor and the company, do to ensure that you are fulfilling your career development goals by building a solid portfolio of skills?
5. What have you done to:
 - improve yourself?
 - improve your position?
 - increase efficiency (save time)?
 - improved the company/organization?



Preparation from an Employee's Perspective!



What:

When:

Where:

How:

Why:

As a result of this presentation, I am going to:

1. _____

2. _____

3. _____

4. _____

5. _____

6. _____

7. _____

8. _____

9. _____