The Lost Art of Communication

By Wayne Evans, FSA General Counsel

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Recent articles for this column have focused on specific areas of the law, such as public records, the Bill of Rights, and the Family and Medical Leave Act. In this article I will address a more abstract subject – personal communication with the employee, both verbal and written.

The subject may seem to be better suited for a different type of periodical, such as a human resources journal, or better yet, by an author other than an attorney such as myself. However, in the 20 years that I have been advising Sheriffs' Offices on personnel issues and defending a variety of discrimination and retaliation claims, I have come to appreciate the benefit of direct communication with the employee and have seen the problems created when such communication is missing.

Litigation is often driven by perceptions and hard feelings between the employee and the administration. Some lawsuits will be filed regardless of any approach taken with the employee and, in these cases, nothing said or written may prevent it. But in other cases, a personal touch with the employee may be the deciding factor in whether the employee decides to retain counsel and sue the agency.

An example relates to fitness for duty. I am often asked to assist in cases involving extended medical leave that implicates the Family and Medical Leave Act and the Americans with Disabilities Act. Occasionally, and unfortunately for the employee, the result at the end of the extended medical leave is a medical determination that the employee is incapable of performing the essential functions of his or her position.

For a sworn or civilian employee who has invested a career at the agency, such a change in status is very difficult to accept. If the first official notice of separation of employment is a letter in the mail, the employee is likely to be surprised, hurt, and bitter about the change in circumstances.

Rather than first providing the notice of separation through written correspondence, whenever possible a face-to-face, personal meeting between the employee and staff should be scheduled to explain the background and circumstances that led to the decision to remove the employee from his or her current position. This meeting is also an opportune time to emphasize the employee's value to the agency and, if other positions are available for which the employee may be qualified, to encourage the employee to apply for another position. In short, this personal touch is a beneficial means of communicating this life-changing event to the employee, and, consequently, may avoid an adversarial position between the employee and the agency in the future.

Personal meetings are equally important in addressing performance issues. Sometimes, when an employee's performance is deteriorating, a "fork in the road" message from a supervisor may clearly put an employee on notice of the consequences of continued substandard performance and the possibility of discipline up to and including termination.

There is no substitute, however, for documentation. Whether it is a counseling session to correct behavior or something more significant, such as the fitness for duty meeting discussed above, written confirmation of the interaction with the employee is critical.

Too often, there is a failure to document. Sometimes, supervisors have the mistaken belief that they are doing the employee a favor if there is no written documentation because a memorandum critical of performance or otherwise documenting misconduct may be stigmatizing. Some employees are difficult and confrontational, which may be a reason supervisors avoid documenting their concerns. In other cases, supervisors assume that formal documentation is simply unnecessary because they believe that they can otherwise get an employee's attention.

Certainly, there is a time and place for verbal correction without documentation. Minor problems that are not repeated, such as tardiness, may be an example. However, when a supervisor takes an employee aside to address repeated problems or more serious concerns such as substandard quality of work, the absence of documentation in these cases is problematic for everyone.

An employee is not well served in these cases when formal notice is lacking. A memorandum confirming the meeting and issues covered underscores the seriousness of the issue. It also gives the employee a plan for improving the performance by identifying the problem, what needs to be done to remedy the deficiency and who can assist in this regard. It also can address the consequences of failing to correct the behavior.

I am not suggesting that discipline is mandatory for every issue. A counseling memorandum can be perfectly adequate to instruct and correct. Similarly, following a meeting with the employee, entering notes into the personnel management plan for future reference for the evaluation is beneficial to create a record of an issue that was significant enough to warrant a meeting between the supervisor and employee.

However, without documentation, it is very difficult to defend litigation arising from adverse employment action challenged by the employee, such as a substandard evaluation, the failure to be promoted or disciplinary action including termination of employment. Both verbal and written communication are absolutely critical to establish nondiscriminatory reasons for the employment action in question. When this documentation is lacking, or worse, misleading, the employment decisions appear subjective and can be more easily challenged as arbitrary.

In employment cases, surprise is not beneficial to the employee or the employer. Written notice of performance issues or misconduct, which has been provided to the employee, eliminates surprise. Whether the employee agrees with it or not, a counseling memorandum or other documentation provided to the employee provides a clear statement of the employer's concerns with the employee's actions and a record of these concerns.

In conclusion, personal and direct communication with an employee is absolutely essential, not only to defend lawsuits, but also to bring out the best in an employee's performance. Hopefully, this message is reinforced at all levels of supervision in each agency.

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Col. Joseph Bradshaw Receives Florida Bar Claude Pepper Award

Col. Joseph Bradshaw

The Florida Sheriffs Association congratulates Colonel Joseph Bradshaw of the Palm Beach County Sheriff's Office (PBSO) for receiving the 2013 Florida Bar Claude Pepper Outstanding Government Lawyer Award. The award, named after the Honorable Claude Pepper, – a Florida attorney, United States Senator, and United States Congressman – recognizes an outstanding lawyer who has made an extraordinary contribution as a practicing government lawyer. Col. Bradshaw received the award from Florida Bar President Gwynne Young at their Annual Convention.

"Law enforcement plays a crucial and powerful role in society and Colonel Bradshaw's advice has been invaluable in helping to guide PBSO toward the right course of action and ensure the protection of our citizens' constitutional rights," said Palm Beach County Sheriff Ric Bradshaw.

Col. Bradshaw started his law career as an Assistant District Attorney in Brooklyn, New York, where he spent the majority of his time prosecuting child abuse cases. Col. Bradshaw has spent the past 27 years at PBSO rising through the ranks of road patrol deputy, investigator and public information officer. In 1990, he became the first full-time in-house legal advisor for PBSO, appointed by then-Sheriff Richard Wille. Today, Col. Bradshaw and his department provide legal advice to the Sheriff and the Sheriff's Office, an organization with more than 4,000 employees.

"The Florida Sheriffs Association congratulates Colonel Bradshaw for this prestigious honor," said FSA Executive Director Steve Casey. "Sheriff Bradshaw and his team are fortunate to have someone with the knowledge and expertise that Col. Bradshaw brings to their office every day."

Col. Bradshaw has been a member of the Florida Association of Police Attorneys for more than 20 years and served as its president for an unprecedented three terms, from 1994 to 1997. He is a member of the National Sheriff's Association (NSA) and was appointed by NSA President, Sheriff B.J. Roberts, as a member of the Legal Affairs Committee for the 2010-2011 term.