




**THREE
DANGER ZONES
EVERY MUNICIPAL
ATTORNEY SHOULD
RECOGNIZE**



DANGER ZONE 1

Due Process:

*Recognizing the Perils and Pitfalls
Arising from Due Process
Obligations*



14th Amend., U.S. Constitution
Procedural & Substantive Due Process

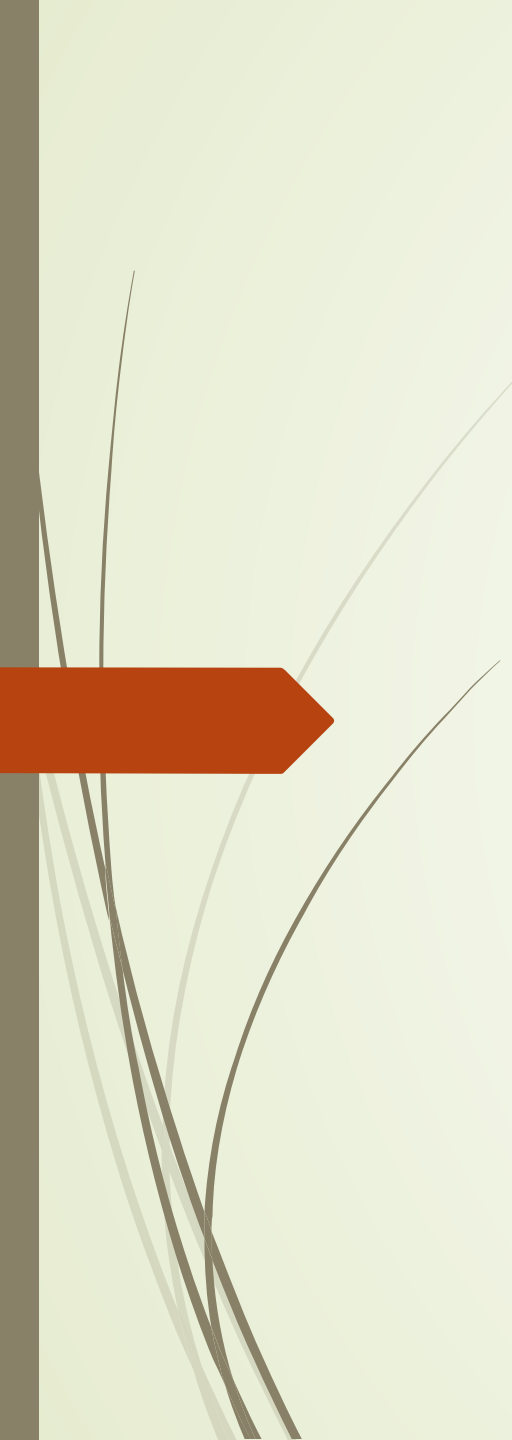
Procedural - public employees (EE) **property interest in their employment, meaningful opportunity to be heard prior to termination.**



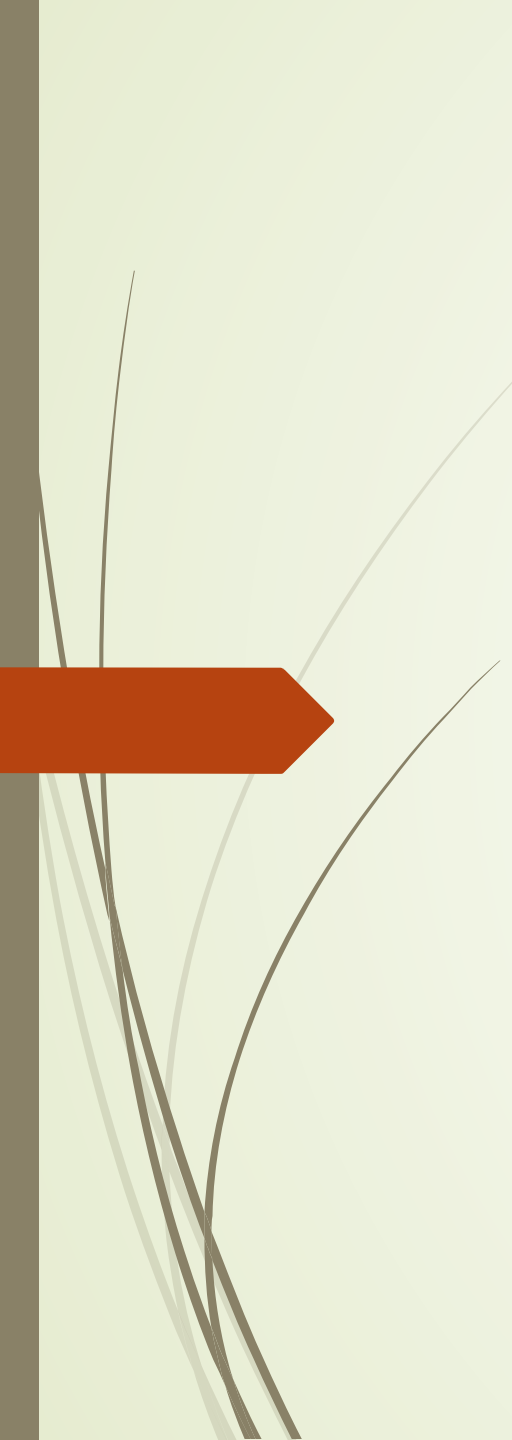
*Cleveland Brd of Educ. v.
Loudermill, 470 U.S. 531 (1985)*

EE deprived of due process by government employer (ER) in termination of employment may be entitled to relief under § 1983 if have property interest in their employment.

Hunter v. Great Falls, 2002 MT 331



Property interest = Demotion,
suspension, termination, or other financial
deprivation



Probationary employees do not have a right to *Loudermill* meeting, unless policy manual broadens that right
Hunter, supra, ¶¶ 23-24.



Essential *Loudermill due process elements*:

- * **Notification;**
- * **Opportunity to respond**

Purpose: allow EE present side of story & mitigating/unknown circumstances prior to imposing proposed discipline



REMEMBER:

Must be held before the EE deprived of property interest & decision must not have already been made



NOTIFICATION:


1. Preferably in writing;
2. Advising of proposed discipline;
3. Summary explanation of evidence; and
4. Notification EE's opportunity to be heard



OPPORTUNITY TO RESPOND:

1. To proposed action & factual basis;
2. Period between notice & meeting of sufficient duration to enable EE reasonable time to prepare;
3. EE not required to attend/respond; and
4. EE must be given opportunity and notified failure to attend/respond, decision made and imposed based on info. know.

Meeting is **NOT** full evidentiary hearing



Purpose of review is to determine **if** reasonable grounds to believe charges against EE are true and support proposed discipline.



Loudermill does **NOT** require:


1. Disclosure of **ALL** evidence gathered to date;
2. Production of witness statements



Good documentation (*Danger Zone 2*) is a MUST for thorough due process

- Date & time of meeting, identify those attending;
- List of allegations about the EE's conduct or performance;
- EE's response, along with any other discussion;
- Any evidence presented by the EE in the meeting;
- Review of the relevant policies;
- Information, if available, on how the department has addressed similar issues in the past;
- Review of the EE's history, if not already in the investigation report.

Disciplinary document – should reference “*Loudermill*” meeting



Example: “*On September 27, 2017, you met with Jane Doe from 8:00 a.m. to 9:00 a.m. At this meeting you were presented the above facts and you were offered the opportunity to respond. Your response provided no new information that would indicate against discharge.*”



What does your employee manual say? (*Danger Zone 3*)

- * Did you follow?
- * Does it comply with the law?
- * Is it ambiguous?
- * Does it need to be rewritten?

Example:

*“Employees have the right to receive **adequate notice** of pending termination and have the opportunity for a **hearing** in which employee may **present evidence** on his/her behalf before final decision. The **hearing** will be before the department head and a board appointed by the Mayor.” (emphasis added)*



Boreen v. Christensen,

267 Mont. 405, 884 P.2d 761 (1994)

Holding: when government ER has by admin. regs limited its ability to terminate an EE without just cause, EE subject to that scheme has property interest in their continued employment, protected by due process

i.e., property interest not created by the Constitution, but exists in employment only if “some written contract, state law, or regulation ... states or otherwise provides a specified term of employment.”



Boreen cont'd....

Due process requires:

“Oral or written notice to the [EE] with an explanation of the [ER’s] evidence and the opportunity for the [EE] to respond in ‘something less’ than a full evidentiary hearing before termination coupled with a full post-termination hearing at a meaningful time.” (emphasis added)



Boreen cont'd....

“[T]he pre-termination hearing **need not definitively resolve the propriety of the discharge.** It should be an **initial check against mistaken decisions** – essentially, a **determination** of whether there are **reasonable grounds to believe that charges** against the [EE] are **true and support** the proposed action.” (emphasis added)



See also Moe v. Butte-Silver Bow Co.,
2016 MT 103

Holding: EE pursuant to Co. Charter protected property interest

Opportunities afforded to participate in pre-termination process;

EE received copy of indep. investigator's report, responded to report, and EE/attorney met with Co. Chief Executive to present arguments as to charges

EE received "oral and written notice with an explanation of the [ER's] evidence and had the opportunity to respond in 'something less' than a full evidentiary hearing before" EE's termination.



Mysse v. Martens,
279 Mont 253, 926 P.2d 765 (1996)

Holding: EE afforded written notice of impending discharge and a pre-termination hearing. Meeting with Co. Commissioners, informed of required job duties & told potential discipline if failed to fulfill. Meeting “clearly meets the *Loudermill* requirements of avoiding ‘mistaken decisions’ and ascertaining whether the complaints against the [EE] are true.”

Wolny v. City of Bozeman,
2001 MT 166

Holding: ER’s letters and attached documents gave EE notice of the charges made against him – notice was adequate

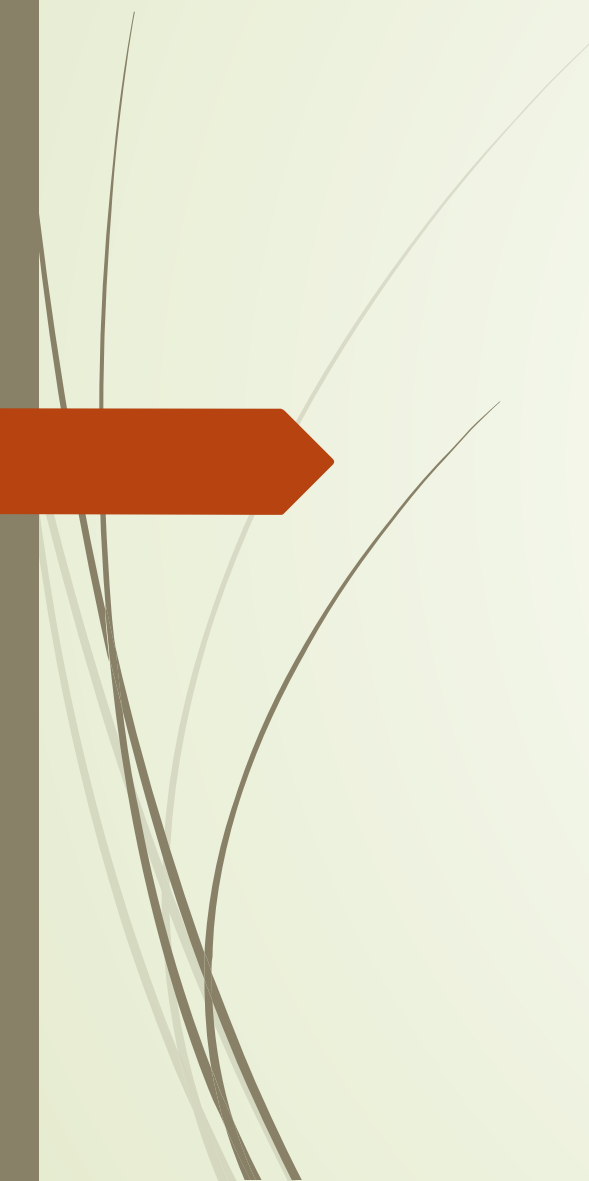


Don't forget *Weingarten* and
Garrity....



Weingarten rights for Union employees

NLRB v. J. Weingarten, Inc., 420 U.S. 251 (1975) -
Union member has right to request union rep
present in investigatory interview when EE
reasonably believes disciplinary action could result.



NOT applicable to nonunion employees
IBM Corp., 341 NLRB No. 148
(06/09/2004)



Garrity Rights – 5th Amend.

Garrity v. New Jersey, 385 U.S. 493 (1967) –
EE may be disciplined (including termination) for insubordination for failure to answer ??s concerning criminal activity during admin interrogation, but only where:

- * EE has been ordered to answer ?? & compelled by threat of discipline to respond; and
- * ??s asked are specifically, direct & narrowly related to EE's duties or fitness for duty



Applies to:

All EE's in public sector who are compelled to make statement under threat of possible loss of job.

Uses:

EE's statement cannot be used later against EE in a criminal prosecution. But, may be used against another EE/ individual and may be used in a civil suit.



Truthfulness Required:

If EE voluntarily answers investigatory questions, or does so under compulsion of *Garrity*, answers must be truthful or EE may be subject to discipline, including termination, for dishonesty.



Admonishment:

Where criminal activity is the workplace conduct being investigated, should discuss whether necessary for *Garrity* admonishment to be read to EE under investigation.



DAMAGES:

Failure to provide procedural due process = separate injury & compensable by NOMINAL damages when termination would have been occurred even if correct procedures followed

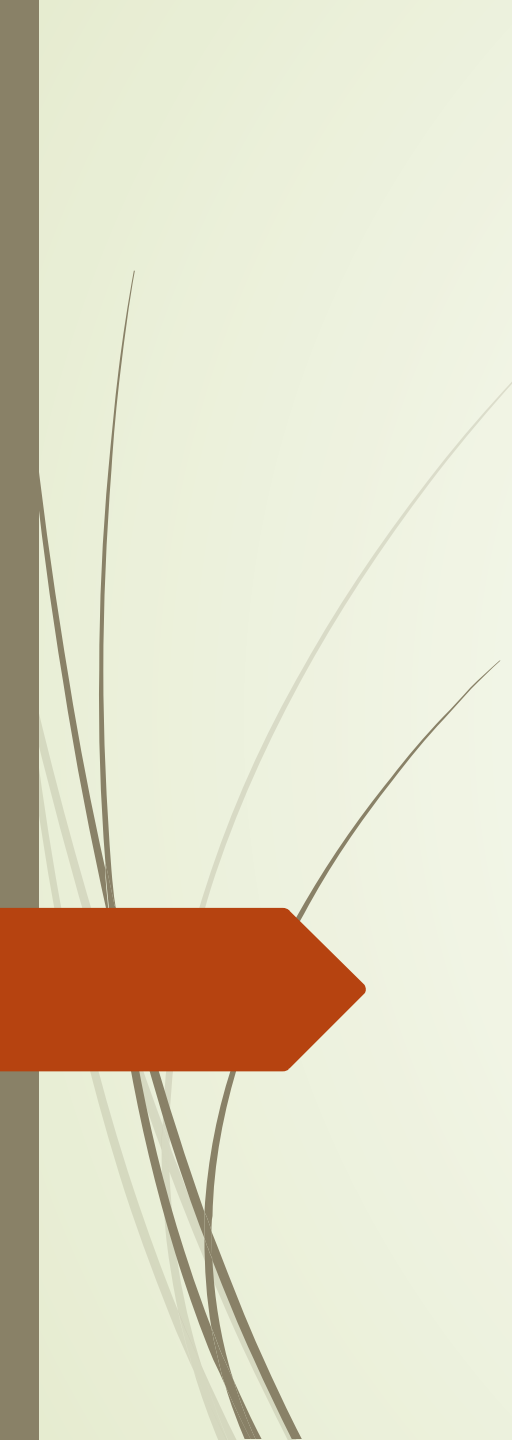
Carey v. Piphus,
435 U.S. 247 (1978)

- * No windfall
- * Don't presume mental/emotional distress because where deprivation justified but procedures deficient, whatever distress EE feels may be attributable to the justified deprivation rather than to deficiencies in procedure
- * Must produce evidence mental/emotional distress actually caused by denial of procedural due process itself
- * If cannot prove actual injury because of violation or procedural due process = nominal damages not to exceed \$1

Cases cited by *Carey* - may be proper to compensate for time between termination and proper *Loudermill* meeting

i.e., substantive damages awarded for due process violation when there is cause, for the time between termination and subsequent, sufficient hearing.

See e.g., Horton v. Orange Cty. Bd. of Ed., 464 F.2d 536 (4th Cir. 1972) (ordering damages totaling actual wage loss due to premature termination from date of actual termination until date district court decision); *Thomas v. Ward*, 529 F.2d 916 (4th Cir. 1975) (ordering award of back pay from date of termination to time of second proper full hearing before school board)



Subsequent *Carey* decisions = procedural due process violations will not be compensable if ER demonstrates discharge for cause & if the EE can't show actual injury due to mental/emotional distress (*i.e.*, caused by the lack of process given, not from the disciplinary action itself)

See e.g., Barachkov v. Lucido, 151 F.Supp. 3d 745 (E.D. Mich. 2015); *Montgomery v. City of Admore*, 365 F.3d 926 (10th Cir. 2004)



Danger Zone 2 –

Documentation:

*How to Erase Your Risk with Proper
Documentation*



**IF IT ISN'T WRITTEN DOWN
IT DIDN'T HAPPEN.**

Without adequate documentation, powerless
to resolve a long-term disciplinary problem



2 TYPES OF DOCUMENTS:

Equally important

1. Informal

2. Formal



Informal documentation?



Kept by the supervisor prior to written disciplinary notice to the EE



Examples:

Supervisor's notes (logs, journal entries, calendar notes)

Complaints re: EE from other depts., EEs, public (e-mails, letters, memos)

Written/signed statements from witnesses


Examples of employee's work (if job performance or related to behavior in question)

Business records – time sheets, travel vouchers, work logs, emails, swipe card records, reimbursement requests

Memos/e-mails from supervisor to EE outlining results of informal discipline (e.g., summarizing oral discipline)



Remember:

- * **Lays the foundation for formal documentation**
 - * **Can become evidence**
 - * **Always stick to the facts and avoid subjective accounts**
 - * **Should be written contemporaneous to the problem**
 - * **Nothing documented unless discussed with EE**
- 



What to include ...

- * **Dates, times, places of the events/incidents in question**
- * **Names of other persons involved (witnesses/participants)**
- * **Specific, objective description of EE's behavior – facts, not conclusions or conjecture**
- * **Summary of discussions with EE including what EE said in defense of behavior**



Formal documentation?

Your record of disciplinary action.



Examples:

Notice of admin leave

Due process letters

Formal disciplinary action

Written warnings

Written suspensions (verbal, followed by written notice)

Demotions

Discharge

Forms showing EE informed of pertinent rules & policies

Completed performance appraisals



Remember:

- * **Refer to informal docs for necessary/supporting info**
- * **Formal docs form the basis of defense at grievance hearings, arbitrations, lawsuit**
- * **EE must review document and receive copy**
- * **EE may sign (or supervisor notes EE declines)**
- * **EE's right to respond – verbally and/or writing (*Danger Zone 1*)**




What to include ...

- * **Explanation of cause for discipline**
- * **Documentation (exact dates, times, previous discipline)**
- * **How to correct**
- * **Inform of the consequences – what happens if they fail to improve or correct behavior at issue**
- * **Notice of rights (attach copy of grievance policy)**
- * **EE signature**



Do Use:

- Date (including year)
- Specific facts
- Accurate & honest statements
- Explanations re: documents purpose
- Direct quote
- Meeting attendees (names/titles)
- Reference to rules, policies, procedures for support
- Confirm EE's access to policies & procedures
- Drafter's printed name, signature & title
- Be Direct
- Include next step




Don't Use:

- Editorial comments/personal opinions
- Unsupported conclusions/accusations
- Derogatory comments
- Generalities and/or absolutes
- Legal terms/labels
- Hedge language
- Abbreviations
- Sarcasm
- Speculation
- Excuses for EE
- Inaccurate statements (even if trying to be “nice”)
- Confusing language



Personnel Files:

- * Essential proper records management
 - * Important documenting employment status, performance, discipline and other aspects
 - * Important follow best practices to maintain
 - * Investigation docs should be kept separate – only results of investigations, if form discipline, in file
- 

Main Personnel File (all employees)	Payroll File (all employees) <small>(can be section of main personnel file)</small>	Training files	Medical/ADA files (if applicable)
Employment App/ Resume/ Cover letter	Time sheets	Training and Development summaries / certificates	Medical/Dr. Notes
Acknowledgment forms	Attendance records	Training attendance / sign-in sheets	Work Comp Information
Performance Evals.	Direct Deposit Information	Testing results	ADA information
PIPs	Garnishment Information	Specific information re safety meetings	Drug Testing Information
Disciplinary Documents	Tax Records		
Promotion letters	Pay Increase Information		
Grievances			



Danger Zone 3 –

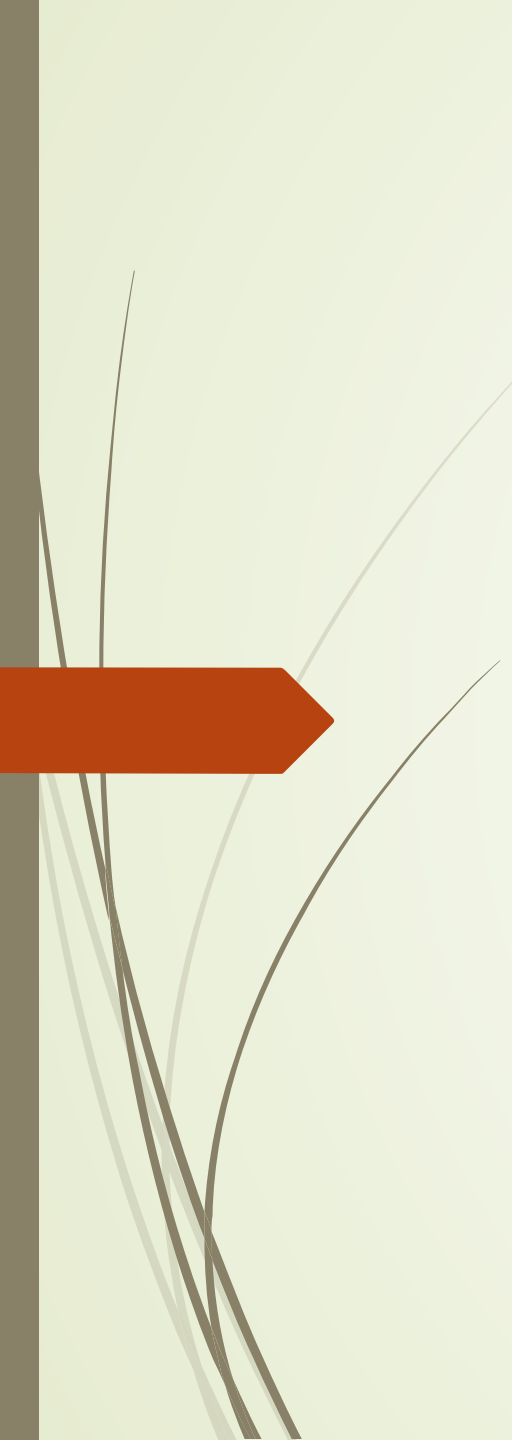
LAWS AND POLICIES:

*Risks When You Are Not Educated as
to Federal/ State Employment Laws
and City/ Town Policies*



Must be familiar with Federal and
State employment laws


*Montana DOL, Employment Laws, [http://
dli.mt.gov/resources/laws](http://dli.mt.gov/resources/laws)*



Must know and understand City's policies and procedures:

Progressive discipline – are you following?

Failure to follow written personnel policies –
WDEA violation?



Johnson v. Costco,

2007 MT 43

ER's must apply policies equally; not
“arbitrarily or capriciously”



CONCLUDING OBSERVATIONS & TAKE AWAYS.....



Take Aways:


1. COMMUNICATION IS KEY





“The single biggest problem in communication is the illusion that it has taken place.”

~ George Bernard Shaw



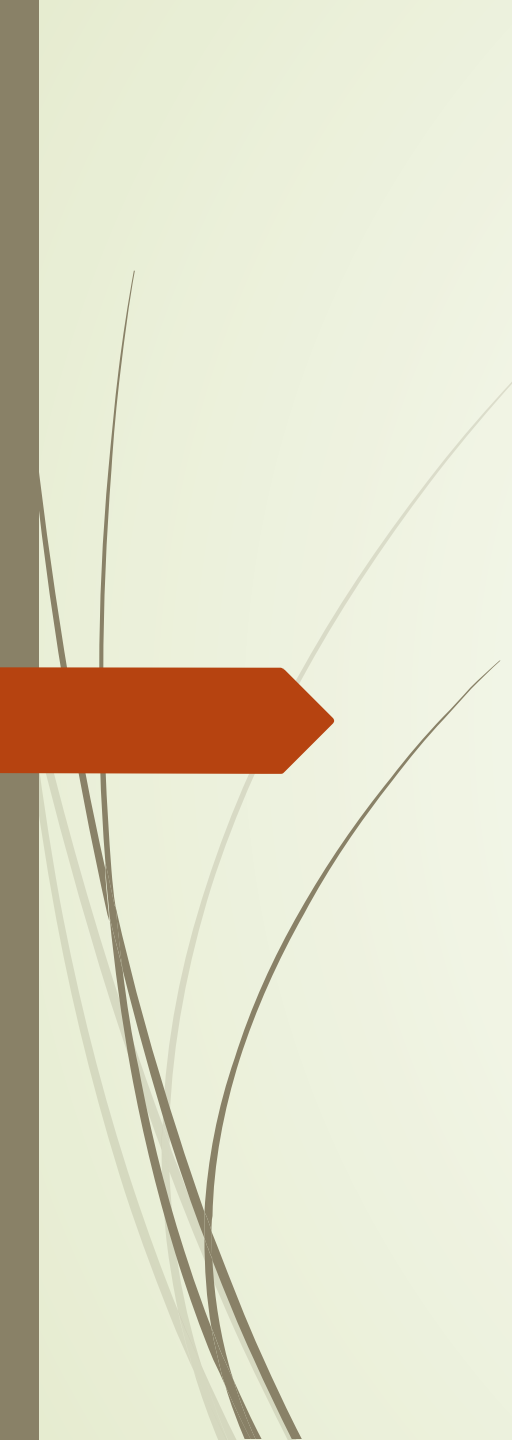
Consistent communication and/or interactions between City Attorney, City Manager/Mayor, HR, and Department Supervisors will prevent your Town or City from falling into these “danger zones”.



Take Aways:

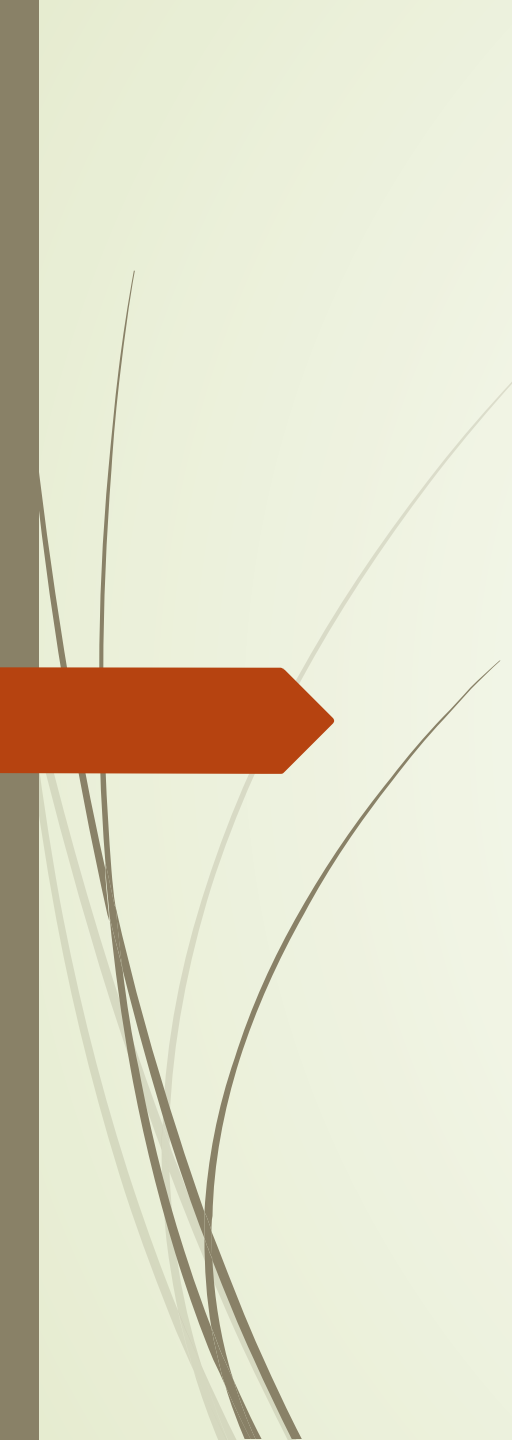
1. Communication is key

2. TRAINING IS TANTAMOUNT



“Excellence is an art won by training and habituation. We do not act rightly because we have virtue or excellence, but we rather have those because we have acted rightly. We are what we repeatedly do. Excellence, then, is not an act but a habit.”

~ Aristotle



Everyone is going to be successful if they are:

(a) properly trained to know their role;

(b) educated in the rules & policies that apply;

(c) understand what is expected of them;

(d) know how they should proceed.



Take Aways:

1. Communication is key

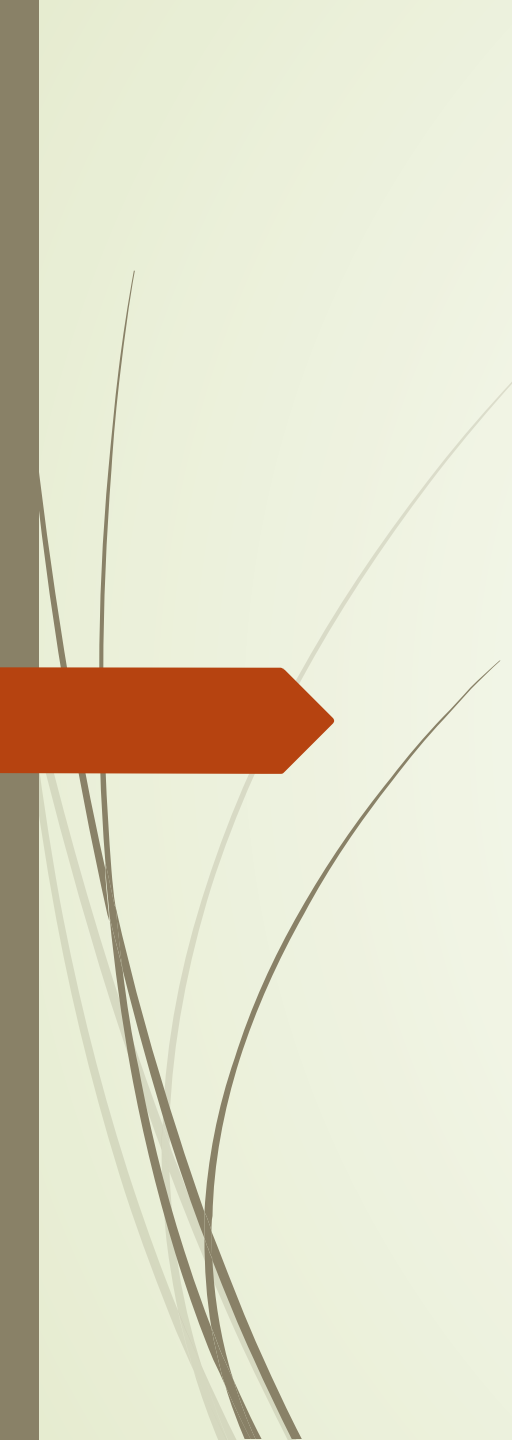
2. Training is tantamount

3. BE ON THE OFFENSIVE



“Think ahead. Don’t let day-to-day operations drive out planning.”

~ Donald Rumsfeld



The old adage, “the best defense is a good offense”, rings true.

Thoughtful and supported action, not knee-jerk reaction, will lead to a strategic advantage.



You've got the evidence, work backwards.

How will it be attacked?

Bias – supervisor out to get me

Mistake


Prejudice

Me-too-ism – Another person did the same thing and was not punished



CONCLUDING OBSERVATIONS

- 1. Communication is key**
 - 2. Training is tantamount**
 - 3. Be on the offensive**
- 



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Disclaimer

This presentation is not legal advice. It is intended to provide a general and limited overview of employment issues, with discussion of some, but not all, applicable statutes and case law.