



THE WETHERINGTON FACTORS

DETERMINING EMPLOYEE DISCIPLINE FOR PERSONAL CONDUCT

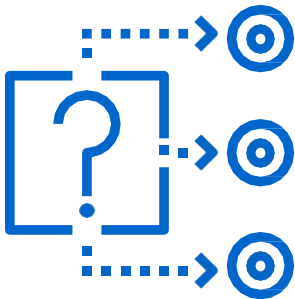
Before disciplining an employee with career status for just cause based on unacceptable personal conduct, an agency **MUST** consider all five factors required by the North Carolina Supreme Court in the 2015 case *Wetherington v. DPS*. A county must examine the facts and circumstances of each individual case. **The county should discuss how the Wetherington Factors were considered in the Pre-Disciplinary Notice and the Notice of Discipline letter.**

THE FIVE WETHERINGTON FACTORS:

1. SUBJECT MATTER

Describe the subject matter of the unacceptable personal conduct. Was it about something important? Was it job-related?

- If the action was outside of work, the conduct must have a rational nexus (a causal link) to the employee’s future ability to perform for the agency.



2. RESULTING HARM

- Explain how the conduct caused actual or potential harm. Potential harm is less persuasive than actual harm and needs to be supported with specific facts.
 - According to the courts, “minimal degree of potential risk of harm” will not be persuasive.

Caution: The court is skeptical about whether there is harm under *Wetherington* if an employee error results in failure to prosecute or bring criminal charges.

3. SEVERITY OF THE VIOLATION

When considering severity, consider the level or degree of the action, error, or policy violation. Was it a minor or major violation?

- This overlaps with the other factors — the severity of the violation can be higher or lower due to the subject matter or the resulting harm.

Caution: The more time between the unacceptable conduct and when discipline begins, the more the courts may question the conduct’s level of severity.

4. EMPLOYEE’S WORK HISTORY

The courts require that the employer must review the employee’s full history, including all past performance evaluations. Considering only the last three years is insufficient. This can include previous active and inactive disciplinary actions.

5.



DISCIPLINE IN SIMILAR CASES

The agency should have specific cases that show the agency is being consistent. General assertions aren’t good enough.

- If the discipline was different for other employees, explain why, using the *Wetherington* Factors to show how this case is different.
- If, after a thorough search, there are no similar cases for comparison, say that.

Caution: Remember the confidentiality of personnel file information. Do not use other employees’ names.

CONSIDER ALL FIVE FACTORS

Most judges require the consideration of all five *Wetherington* Factors. Failing to show how even one of the factors was considered will result in the action being remanded or a decision that the county did not have just cause for the disciplinary action.

Weigh the facts for each *Wetherington* Factor and weigh the factors against each other. Analysis of the factors must include any mitigating or exacerbating circumstances relevant to each factor. Particular factors can outweigh others, and discipline can move forward even if one factor (like work history) is positive.



Questions? Give OSHR Local Government staff a call at (984) 236-0874.

