





National Academies of Emergency Dispatch

Performance Evaluations:

**Best Practices –
Reduced Liability**

Jim Kuthy, Ph.D.
Criticall Pre-Employment Testing Software

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Contact Information

Jim Kuthy, Ph.D.
jkuthy@biddle.com
Biddle Consulting Group, Inc.
193 Blue Ravine, Ste. 270
Folsom, CA 95630
800-999-0438

Criticall
Dispatcher/Calltaker Pre-Employment Testing Software

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A little about Jim Kuthy...

- Masters and Doctorate Degrees in Industrial & Organizational Psychology
- Eighteen years of experience in the employment selection field
- Served in public safety in California & Nevada
- Designed/Validated selection and promotion systems for dozens of employers, including those that have been successfully defended in court or passed review by federal agencies
 - Author of Biddle Consulting Group's Criticall® Pre-Employment Testing Software

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  Small Print

The opinions expressed during this presentation are my own, and do not necessarily reflect those of Biddle Consulting Group, Inc. or CritiCall Pre-Employment Testing Software

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  **Presentation Outline**

- **What are Performance Evaluations**
- **Why do them?**
- **What to measure and how**
- **Minimizing potential liability**
- **Hints for a successful and defensible process**
- **Selected references**



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  **Wikipedia**

- **A performance appraisal, employee appraisal, performance review, or (career) development discussion** is a method by which the job performance of an employee is evaluated (generally in terms of quality, quantity, cost, and time) typically by the corresponding manager or supervisor.
 - http://en.wikipedia.org/wiki/Performance_appraisal

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 **Is this really an issue?**

- Survey of 195 CEOs of small businesses
 - Almost half had been sued by an employee
 - About one third of those suits were related to wrongful discharge
 - *TEC and Inc. Magazine survey, 1995*
<http://www.inc.com/magazine/19960401/1632.html>
- The median jury award for wrongful terminations in 1996 was about \$206k
 - *Goldberg, 1997*

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 **However, Please Keep in Mind**

- Many wrongful termination claims we see in the headlines are often just **claims!**
- Employers **have** the right to terminate employees based on an appraisal of employees' poor performance
- According to the Fifth U.S. Circuit Court of Appeals
 - **"In order to properly manage its business, an employer must be able to supervise, review, criticize, demote, transfer and discipline employees. Not all of these processes are pleasant for the employee. Neither is termination."** The court went on to say, **"An employer will not be held liable for exercising its legal right to terminate an employee, 'even though he is well aware that such [action] is certain to cause emotional distress.'**"

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 **Claims of Wrongful Termination**

- Until recently, performance evaluations have not been the basis of litigation unless there was also a Civil Rights claim
- More recently, however, there has been a rise in wrongful termination lawsuits due to an erosion of the "employment-at-will" doctrine in many jurisdictions
- Many of the more recent wrongful termination suits rely on contract theory or violation of "public policy"
 - Violation of public policy means "terminations are unlawful if they are not consistent with the will of the people"
 - *Tomlinson & Bockanic, 2009*
- Standards for "at will" employment and public policy differ substantially between states
 - *Check with your legal counsel for details in your jurisdiction*

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911   **No Surprises** 

- Feedback and/or guidance should be provided to employees on a regular basis
 - *Feedback is much more effective when given closely to the event being evaluated*
 - *Make certain your feedback is in line with the standards set by the organization*
- Formal performance evaluations should be a summary of the performance feedback management has been providing to the employees over time
 - *The results of a performance evaluation should not come as a surprise to an employee*

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911   **Define the Purpose**

- A good prerequisite to designing an appropriate and effective evaluation system is to decide what is to be measured and how that information is to be used
 - *(1) Statement of purpose; (2) types of activities to be measured; and (3) a draft of the analysis plan*
- Evaluations used for multiple purposes (e.g., pay, retention, development) are often less informative/effective than those with specific purpose
 - *It is better to have different evaluations for different purposes, than it is to have one evaluation for more than one purpose*

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911   **Defensible Practices**
Barrett & Kernan, 1987

1. Conduct a job analysis to identify characteristics for successful job performance.
2. Incorporate those characteristics into the rating instrument.
3. Train supervisors to use the rating instrument properly.
4. Have formal appeal mechanisms available, as well as a review of review of ratings by upper-level personnel.
5. Carefully document the evaluations and reasons for any termination decisions.
6. Provide performance counseling or corrective guidance to assist poor performers.

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Job Analysis

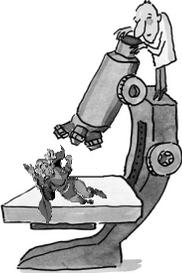
- Base your performance appraisal process on an analysis of the job
 - Objective of a job analysis is to define a job "in terms of the behaviors necessary to perform it" (Casio, 2005)
- Most defensible performance appraisals are based on a content-related approach, which emphasize focusing on observable aspects of work performance

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What to Measure

- Evaluate employees' performance of work-related tasks
 - Focus on more than just calltaking
- Define the task performance in terms of observable behaviors or observable outcomes
 - Measurement of non-observable characteristics, such as attitude, is very difficult to defend unless defined in terms of observable behavior



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Observable Job Performance Behavior Examples

- **Public Safety Dispatcher/Calltaker**
 - **Behavior:** "Answer and/or initiate phone calls, radio transmissions, and/or other communications in a timely fashion."

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Observable Job Performance Behavior/Outcome Examples

- **Public Safety Dispatcher/Calltaker**
 - **Behavior:** “Analyze and determine appropriate response based on information presented (such as which unit/agency to dispatch and/or what resources are needed).”
 - **Observable Outcome:** “Appropriate units are dispatched.”

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Rating Scales

- Create one or more set of rating-scale metrics to be used across performance dimensions, when appropriate
 - *E.g., Unacceptable, Somewhat Unacceptable, Acceptable, Highly Acceptable, Outstanding*
 - *Define each level so that all raters are using the same “frame of reference”*
 - *Of course, some behaviors are simply “acceptable” or “unacceptable”*
 - *Offer those choices only when appropriate*
- We suggest not using rating scales that refer to “average performance” or “meets expectation,” since there are difficult to define or codify

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Example of Acceptable or Unacceptable Performance

- **Public Safety Dispatcher**
 - “Change/adjust voice-recording back-up tapes and/or memory devices”

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 **Define Each Point on the Rating Scale (Example)**

- Unacceptable:** Employee fails to meet the stated performance criteria.
- Somewhat Unacceptable:** Employee usually meets the stated performance criteria, but occasionally fails to do so.
- Acceptable:** Employee consistently meets the stated performance criteria.
- Highly Acceptable:** Employee consistently and clearly exceeds the stated performance criteria.
- Outstanding:** Employee consistently far exceeds the stated performance criteria.

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 **Anchored Rating Scales**

- **Anchors** are examples of effective and ineffective behaviors at various performance levels that assist raters with their ratings
- A job analysis can be used as the basis for creating “anchored rating scales” to be used when evaluating employees
- To develop examples of effective and ineffective behaviors, have job experts identify **critical incidents** where performance on important tasks makes a difference
 - Then use behaviors related to those incidents to develop “anchors” for various points on your rating scale

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 **Rating Scales**
Example

- Unacceptable**
Anchors: Example(s) of “Unacceptable” behaviors
- Somewhat Unacceptable**
- Acceptable**
Anchors: Example(s) of “Acceptable” behaviors
- Highly Acceptable**
- Outstanding**
Anchors: Example(s) of “Outstanding” behaviors


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911   **Rating Scales**

- Raters should be required to provide an explanation about observable behaviors to justify the ratings they give for above or below “acceptable” levels
 - Just checking boxes is less defensible
 - Providing an explanation helps the reader to understand why the rating is justified
 - *It also provides feedback to the employee*
 - Forces the rater to focus on observable behaviors
 - Litigation frequently takes years to wind through the courts... memories fade with time

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911   **Train Your Raters**

- **Note: Only those who have had an opportunity to observe the employee should be allowed to rate that employee**
- Agreement among multiple raters has been a critical component for success in court
 - *Werner & Bolino, 1997*
- **Frame-of-Reference** training can help insure consistency
 - Train a common set of standards against which employees are evaluated, based on the job analysis
 - Emphasize the multidimensionality of work performance
 - Provide evidence that the training was effective
 - Periodically reinforce training

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911   **Leniency Rater Error**

- **Leniency** means rating an employee more favorably than his/her performance warrants
- Leniency in performance appraisal ratings is generally **not** a good idea
- For a variety of reasons, supervisors are frequently **overly lenient** in their ratings
 - Hold raters accountable for their ratings
 - Require documentation, including examples
 - Train raters to keep a record of worker behaviors
 - Conduct role-playing exercises
- Key to successful training is not to train supervisors to be less lenient; it is to train them to become **more accurate**

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  **Appeals**

- Courts look favorably when employers offer an appeals process to those who received poor performance evaluations
 - Express this process to the employees
 - *Both in advance and at time of evaluation*
 - Document employees' acknowledgement of the appeals process
 - *Both in advance and at time of evaluation*
 - Make certain appeals process works as "advertised"
 - Document the process and the outcome

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  **Management Review**

- Some courts appear to be more likely to rule in employer's favor when performance evaluations are reviewed by management to prevent bias by an individual supervisor
- Thoroughness of the review can be demonstrated by having upper management make notes or otherwise indicate they have read and agree with the contents
 - *More than just a signature, please!*
- Be sure to review carefully... employers can be found liable when employees are terminated based on the personal bias of a supervisor

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  **Documentation**

- Careful documentation is important for evaluations of both poor and successful employees
 - *Make clear and unambiguous documentation*
 - *Inform employee of that information*
 - *Obtain documentation of receipt of that information*
 - *Rater and Ratee should sign evaluation*
- Timeliness can also be important
 - *Some courts have suggested that explanations of events made long after the event has taken place are given less weight than those written contemporaneously*


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Provide Counseling/Guidance

- Courts appreciate when counseling and/or guidance is offered to employees to address performance deficiencies
- Offer training or counseling as soon as possible once a problem becomes noted – *be consistent*
- Corrective counseling that is ignored by a problem employee or which does not result improvement provides some evidence the employee is not qualified to hold the job
- Allow sufficient time for improvement, if appropriate
 - *Balance the need for terminating an employee quickly with the sense of fairness in allowing an employee to improve*
- However, know when to say “enough is enough”

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Set Up to Fail?

Manzoni, 2002; Manzoni & Barsoux 1998

- The act of labeling someone as a poor performer can sometimes lead to even worse performance
 - According to these authors, a downward spiral is frequently triggered by a manager’s perception of an employee’s attitude rather than the employee’s actual performance
 - ***Focus on performance; not attitude!***
 - Framing training or counseling as an “opportunity” can sometimes minimize this from occurring

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Fundamental Attribution Error

Manzoni (2002), page 118

- Most people unconsciously tend to overestimate the effect of a person’s stable characteristics – the individual’s disposition and capabilities – and underestimate the impact of the specific conditions under which a person is operating
- People are more prone to committing the fundamental attribution error when they operate under demanding conditions
 - *People can better distinguish the impact of situational forces when we have time and energy to spare than when there are multiple demands on our attention*

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Consistency

- Consistent enforcement of policies, both written and unwritten, is extremely important for success in court
 - *Glynn & Marshall (2005)*
- Consistent ratings across raters and those being rated is important
 - *Hold all employees in the same position to the same performance standards*

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Consistency



All employees performing the same job should be compared against the same standard in the same way

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Consistency

- Standards should be changed when justified
- Changes in standards should be documented
- If standards are changed, changes should be clearly communicated to all employees
 - *It would be helpful (i.e., more defensible) to obtain acknowledgement of the notification of the change*

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Court Case in Point

- **Santo v. Luzerne County Community College (2008)**
 - A severe reduction in the employee's performance appraisal after she complained of discrimination was used as evidence to support her claim that employer's proffered reason for terminating her was not credible, even though she was fired seven months after her discrimination claim was made
 - Courts have sometimes found sudden downward trends in appraisal ratings very suspect, unless employer can provide solid evidence of a non-discriminatory explanation of downward trend and there is no other evidence of discrimination
 - Be extremely careful when evaluating employees who have taken an affirmative action against your organization (such as filing a claim of discrimination, harassment, or otherwise). Be consistent across employees
 - *We no NOT mean for you to overly lenient when rating these employees. Instead, provide sufficient documentation to show that your use of your rating criteria has not changed, but the **employee's performance did change***

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What About Self Appraisals?

- Some organizations have employees generate appraisals of their own performance
- However, employees' opinions may be different than management's, so discrepancies should be addressed
 - *Failing to address discrepancies can lead to a false sense of adequacy on the employee*
 - *It may also add to confusion if challenged in court*
- Courts have generally ruled that self-appraisals on their own, especially if not endorsed by management, carry little weight
- However, as indicated previously, employees should be allowed to provide feedback and/or to be able to appeal appraisals management makes

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Knock Outs or Compensatory?

- Sometimes employees claim success in one area of performance should be allowed to compensate for failure in another area
- However, some jobs require employees perform competently in more than one area
 - *See... that's why we do a job analysis!*
- If supported by the job analysis, it may be appropriate to terminate an employee who is performing poorly in one or more critical work areas, even if they are performing well in other areas
- *Note: If Job Analysis indicates that below acceptable performance in a particular area cannot be compensated by performance in other areas, be extremely careful when computing "overall" job performance ratings*
 - *In other words, averaging performance ratings may falsely give the impression of acceptable overall performance*

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Due Process

- Employees and managers report greater satisfaction with appraisal systems that takes due process into account
 - *Taylor, Tracy, Renard, Harrison, & Carroll (1995)*
- Three characteristics of due process
 - **Adequate notice** about the appraisal system
 - There should be a **fair hearing** about the appraisal
 - Judgments about appraisals should be based on evidence about standards that is **applied consistently** across employees
 - *Folger, Konovsky, & Cropanzano (1992)*

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Interactional Justice

- When people are treated with interpersonal sensitivity, it indicates to those people that their dignity and intrinsic worth have been honored
- Treat employees, including those with performance issues or who are departing, with dignity and respect
 - Do not use pejorative labels such as “slow” or “deficient”
 - Such labeling can inadvertently send a message to other employees about how they organization expects those under scrutiny to be treated and evaluated
 - Rudeness can undermine claims of impartiality by the employer

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Communicate Carefully

- Periodically communicate your organization's “at will” employment process, if appropriate
- Check handbooks and offer letters carefully
- Communicate disciplinary policies effectively **and follow them**
- Be extremely careful when communicating with others, including other employees, about why someone is leaving your organization
 - The courts have been skeptical when departing employees are used as examples to others
 - *Noonan v. Staples, Inc.*, U.S. 1st Circ., No. 80-2159, 2009

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Hints

- Have a formal disciplinary policy
- Train supervisors on the policy
- Educate employees about the policy
- Enforce the policy consistency across all employees
- Document any steps taken to enforce the policy
 - Maintain a “paper trail”



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Peer Review &/or 360-Degree Feedback

- Obtaining appraisal information from multiple sources, such as supervisors, other employees, and even other stakeholders, may be useful for some purposes
- Make certain all raters have an opportunity to view the employee's behavior
 - Raters should be not allowed to rate behaviors they have not witnessed
 - The Raters should be informed of the purpose of the appraisal
- Train all raters on the process, including the rating dimensions and rating scales
- Some researchers suggest if a 360-degree feedback system is used, that a more traditional “top-down” appraisal also be conducted

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Peer Review &/or 360-Degree Feedback

- Peer reviews and 360-degree feedback may work better for performance or employee-development purposes than for pay issues
- It might be helpful to conduct analysis of the raters' level of agreement
 - If there are discrepancies between ratings by various performance appraisal raters, examine those discrepancies to determine whether the issue is performance or personality related
 - Re-train or eliminate discrepant raters



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Hints



- Begin to institute your behavior-based performance appraisal system **now!**
 - *Systems that are put into place to address a specific problem with a specific employee have been challenged in some instances*
- Create and/or customize performance appraisals to address the job as it is performed at your organization
- Pilot test your evaluation process before expanding to entire workforce
- Conduct evaluations on a regular basis
- Eliminate any offensive language in materials you provide

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Hints Regarding Termination

- Watch what you say, even in jest
- Obtain written waiver from departing employees, if possible
- Be efficient
 - *Judges and juries may wonder by a 'problem' employee was retained for so long*
- Have all documentation in place before terminating an employee (if possible)
 - *Tomlinson & Bockanic, 2009*

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Summary Points

- You do not need to continue to employ those who cannot perform the job
- You should use an evaluation process based on a job analysis
- Your evaluation standards should be job related, fair, and consistently enforced
- Treating employees with dignity and respect has many benefits and virtually no "down side"

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911  I hope you found this presentation helpful...



Thank You

Should you have any questions please email me at jkuthy@biddle.com or call me at 800-999-0438

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911  **Selected References**
Check with your College or University Library

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