

# Disciplinary Matters:

## A SURVEY

- *Common Types of Disciplinary Charges*
- *Grounds for Employer Disciplinary Action*
- *Types of Arbitrator Penalties and Factors Influencing Penalties*



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## **INTRODUCTION**

The provision of legal representation to CSEA members in disciplinary cases is a major component of the CSEA Legal Assistance Program. Throughout time we have gathered much information on disciplinary penalties and now offer this information to CSEA activists as a useful tool in representing our members involved in disciplinary actions.

This manual has been created to provide information regarding some common categories and grounds for discipline in the CSEA-represented workplace. It sets forth the types of penalties issued by arbitrators when guilt is found, and the factors that influence the type of penalty in specific cases. This is not meant to be an exhaustive treatment of the topic, but rather to serve as a survey of the types of cases that regularly arise, with an attempt to emphasize factors that may lead arbitrators to assess penalties less severe than what is usual for the type of conduct at issue. However, arbitrators can, and often do, issue more severe penalties, and each case must be thoroughly investigated and handled on its own merits. A more in-depth treatment of disciplinary actions in general can be found in the CSEA Legal Department publication, *Disciplinary Manual-Public & Private Sector*.

## **GROUNDS FOR DISCIPLINE**

There are two general categories of discipline: incompetence and misconduct. Incompetence is generally defined as the inability or failure to perform the job, resulting from a lack of ability or aptitude, a deficiency in knowledge, or disregard for procedures or methods. There are many factors to be considered when investigating a disciplinary case based on incompetence. There may be mitigating or extenuating circumstances responsible for the employee's performance which is alleged to be incompetence. Some of these mitigating factors include personal problems, work-related problems, health problems, failure of the employer to follow its own policies, and improper training.

Misconduct is generally defined as willful conduct which, by its very nature, is inappropriate, prohibited, illegal, or otherwise violates acceptable workplace behavior, employer rules, regulations, policies or legal statute. Mitigating factors affecting penalties may include length of service, good evaluations and work history, type of position, personal issues, unequal treatment, progressive discipline, due process violations, or management error or fault.

## **INCOMPETENCE CASES**

### **Employer's failure to follow its own policy results in dismissal of charge:**

Employee cashier was charged with several cashiering errors, both overages and shortages. The employer's written policy required the cashiers to be present when their receipts were reconciled, but the practice at this work location was that the cashiers were not present. The arbitrator found that the disparity between the employer's "policy" and its actual "practice" violated basic due process, and he dismissed the Notice of Discipline.

### **Long tenure and good work record result in lesser penalty:**

While employee sewer plant laborer was on duty, 2.8 million gallons of sewage was discharged over a two-day period into the Hudson River. He was charged with incompetence. In carefully reviewing the evidence, the Civil Service Law Section 75 hearing officer found the employee innocent of most of the charges, but did find he had made certain mistakes. Given the employee's long tenure and disciplinary-free record, a 30-day suspension without pay was recommended, instead of the employer's proposed penalty of termination.

### **Employer's own systems failures result in lesser penalty:**

The employer sought to terminate a short-term, part-time Nurse's Aide who, among other things, used an anal thermometer on two occasions to take the oral temperature of a patient. This mistake occurred, the arbitrator decided, partly because of employer system failures. The employer failed to have a system in place to clearly indicate that the thermometer was a rectal thermometer. Thus, the mistake made was not entirely the employee's fault. Because the employer and employee shared fault here, a four-week suspension, rather than the employer's proposed penalty of termination, was imposed by the arbitrator. Had the thermometer been clearly marked as an anal thermometer, this employee action would have constituted serious misconduct and warranted a greater penalty.

### **Termination not sustained where others similarly situated were not disciplined:**

Employee nursing service training coordinator was found guilty of multiple acts of sloppy record keeping. Other managers, however, were similarly deficient but not disciplined. The employee had received two prior oral counselings but no discipline. The arbitrator determined that in light of this disparate treatment, a demotion and 60-day suspension without pay, rather than termination, was the appropriate penalty.

## **MISCONDUCT CASES**

*I. **Insubordination*** – Insubordination includes the refusal to obey management's directives (either verbal or written), as well as abusive behavior toward management. Termination often is the penalty imposed for disregarding an employer's directives or otherwise challenging the employer's authority.

### **Employee receives only nine-month suspension for disobeying directives regarding child under his supervision because employer failed to enforce directives:**

Employee 20-year senior caseworker had a youth, who had previously been placed in detention by the court, move in with him, violating specific employer directives against this type of conduct. The arbitrator found that the employee was wrong in violating the orders, but also that the employer had sent mixed signals to the employee by failing to enforce the directives until much time had passed. Instead of sustaining the penalty of termination sought by the employer, the arbitrator returned the employee to work without back pay, in effect imposing a nine-month suspension without pay.

**Employer's failure to impose progressive discipline leads to reduced penalty:**

In this Civil Service Law Section 75 proceeding, the hearing officer found that the employee building inspector acted inappropriately and was insubordinate on several occasions. However, the employer had failed to deal with these incidents for a significant lapse in time when it should have proceeded with counselings or disciplines. Instead, the employer allowed these matters to pile up and then attempted to obtain termination. The actions taken by the employer, the hearing officer held, did not constitute progressive discipline. A one-week suspension without pay was imposed.

**Poor prior work record leads to long suspension for leaving work early without permission:**

After a night of snowplowing, employee went home without permission, claiming he thought the work was done. At the hearing, the employee acknowledged that the workplace practice had been for the supervisor to announce to everyone when the shift was over. The employee was therefore found guilty of misconduct. Given his five prior disciplinary convictions and extensive counselings, a 50-work day suspension without pay was found by the arbitrator to be the appropriate penalty.

**Long-term good work record results in reprimand for insubordination:**

Employee was directed to provide a witness statement regarding an incident, but he did not do so. His defense was that the employer never gave him a specific deadline. The arbitrator found him guilty of misconduct. The fact that the employer had not given a specific deadline was not a convincing reason for failing to obey the directive. However, because of the employee's long discipline-free work record, the arbitrator issued only a letter of reprimand as a penalty.

**Feigned illness to avoid overtime results in suspension:**

Employee had indicated an unwillingness to work on a certain weekend. When ordered to work overtime that weekend, he called in sick but failed to produce medical documentation as requested by the employer. The arbitrator found that the employee's claim of a sudden illness was not credible. A letter of reprimand and one week suspension was deemed by the arbitrator to be an appropriate penalty.

**Employee terminated for repeated unauthorized access to Tax Department computer records:**

The employer had specific policies regarding restricted access to computerized taxpayer records. The employee knew of these policies and previously had been cautioned to follow them. Employee continued to access the files of delinquent taxpayers, which were not among his assigned cases, because he believed that the employer was not sufficiently pursuing collection of their balances. The arbitrator held that because of the employee's repeated acts of insubordination in violating the employer's policies that were designed to assure privacy and security of public records, termination was an appropriate penalty.

### **Short-term employee terminated for insubordination:**

Employee had been employed for only about one year. Although he had been previously counseled, grievant left the work site without supervisory authorization. Termination was directed by the arbitrator.

*II. Dishonesty* – Dishonesty may entail lying, theft of property, or the falsification of records, including an employment application, business records, time and attendance records, expense accounts, and so forth. Termination is the usual penalty for these types of offenses, although mitigating factors can influence the result here as well.

### **Theft results in less than termination where items stolen were scrap:**

Employee was a long-term employee with a satisfactory record. He had material removed from a work site and brought to his home. The arbitrator found that the employee thought the material was scrap and determined that employee was not then guilty of theft. The employee should have, however, obtained supervisory approval. Rather than termination, a twelve-week suspension without pay was directed as a penalty.

### **Long tenure results in reprimand:**

Employee was found guilty of being on an unauthorized break, lying, and ridiculing his boss. Because he was a long-term employee with a good record, this being his first disciplinary infraction, only a reprimand was directed as penalty.

### **Short tenure results in termination:**

Employee investigator was found guilty of having used his official position to create opportunities to meet a female employee of a business he regulated and then falsifying his timecard. Because he was a short-term (3 years) employee and had been warned previously about such behavior, the arbitrator sustained the termination.

### **Unauthorized visits to pornographic websites results in reduced penalty because of mitigating factors:**

Employee, while at his workplace, visited pornographic websites and printed thousands of images. The material involved graphic sexual assaults and bestiality. Employee's conduct took place while he was off duty and he did not transmit the material to others. In the past, the employer seldom sought termination for this type of misconduct. Employee admitted his misconduct and accepted responsibility for it. He was a long-term employee with a good record. Under all the circumstances, the arbitrator found termination to be inappropriate; a four-month suspension without pay was directed, along with a one-year probation period, and an immediate referral to EAP for counseling.

**Unauthorized visits to pornographic websites results in reduced penalty because of remorse:**

Employee was charged with viewing rape-related and violent pornographic websites at work and printing out documents from these sites. The employer sought termination. The employee admitted guilt and showed much remorse at the hearing. Because of the admission of guilt and remorse shown by the employee, the arbitrator found the proposed penalty of termination inappropriate and, instead, imposed a four-month suspension.

**Long unblemished work record does not convince arbitrator to reduce termination penalty for forgery:**

Employee worked in an office that was responsible for the security of highly sensitive financial information. While at work, employee altered some of her own official personal documents for an illegal purpose. She subsequently pled guilty to a felony charge of forgery. The employee had serious personal problems at the time and a good and long record with this employer. Despite her good work record and personal problems at the time of this misconduct, the offense was considered so serious by the arbitrator that she decided that termination was an appropriate penalty.

**Arbitrator issues five-month suspension for filing false residency certificate:**

Employee issued a residence certificate to her son, which indicated he had resided in the county for the prior year. The son had, however, lived elsewhere at various places over the year but had claimed he intended his residence was at his parents' home. The arbitrator held that the issuance of the residence certificate was improper. The arbitrator was convinced by the County's proof that the son did not meet the residency requirement, and that the employee knew it. The arbitrator did not sustain the employer's proposed penalty of termination because the employee had a satisfactory long-term employment record and had acted improperly only this one time. The arbitrator ruled that a five-month suspension without pay was the appropriate penalty.

**Grievant terminated for stealing topsoil:**

Employee was accused of using the employer's vehicle to take topsoil from the worksite to his home. Upon the advice of his criminal attorney, the employee refused to respond to questions at his interrogation. The arbitrator, stating that he did not rely on the employer's assertion that the employee's refusal to respond to interrogation questions created a presumption of guilt, found the employee guilty on the evidence presented against him at the hearing and directed termination.

**Punching another's timecard results in five-day suspension:**

Employee was accused of having another employee punch his time card. The "accuser" of the employee and the employee had a history of ill feelings toward each other, and this was used as a defense against the charges. Even though the arbitrator believed that there was a history of bad relations between the two employees, the employee was found guilty based on the evidence, and the arbitrator imposed the employer's proposed penalty of a five-day suspension without pay. This case is an example of the fact that even where the accuser acts in bad faith, if guilt is proven, the charges will be sustained and a penalty will be imposed.

**III. Discourtesy** – Employees involved in serving the public are expected to be courteous and solicitous toward others and may be disciplined where they are guilty of abuse toward co-workers or members of the public. Penalties in these cases tend to be heavy due to the conduct being at odds with the employer's mission of serving the public well.

**Profane language leads to termination:**

Employee had been a state employee for approximately nine years. He had been the subject of repeated counselings and a disciplinary proceeding. He was charged with and found guilty by the arbitrator of using vulgar, profane and abusive language towards co-workers. Termination was found appropriate.

**Intimidating behavior results in penalty of one-year suspension:**

Employee was charged with ten counts of threats, profanity, intimidating behavior, and insubordination stemming from two incidents. The employee blamed his actions on his being treated unfairly by his supervisor and others in the workplace. The arbitrator found employee guilty of seven of the charges, stating that the employee engaged in "angry outbursts," acted like a "sulking child," and that his behavior was "outrageous and contrary to the smooth functioning of the workplace." If an employee has a complaint, he must utilize the grievance process and not react by lashing out in anger at others. At the time of the decision, the employee had been suspended without pay for almost one-year, pending a determination on the charges. Rather than termination, the arbitrator directed that the employee be reinstated without back pay. The employee's work record had only been fair, and the arbitrator felt that this penalty (almost a year-long suspension) was deservedly severe.

**Profanity in presence of a minor results in 60-day suspension:**

Employee was charged with making "dirty" remarks to a co-worker in the presence of a minor and also saying such things to the minor alone. She was found guilty of the first offense, but not guilty of the second, as there was no other evidence to support the latter. Given the seriousness of the offense, the arbitrator directed a 60-day suspension without pay.

**Rude conduct results in suspension and "forced" remedial education:**

The employer sought a four-week suspension without pay because of the employee's alleged rude and inappropriate conduct with taxpayers and supervisors. The employee was found guilty of the conduct. In a very unusual award, the arbitrator issued a stern warning to the employee and directed a four-week suspension without pay unless the employee read books involving customer service, dealing with frustration in the work place, and improving inter-personal relationships. The books were to be selected by the employer and, once read by employee, the suspension was to be lifted.

### **Threats of violence warrant termination:**

The employer brought charges against the employee for, among other things, making comments about “offing” other employees and doing “something like Columbine.” The arbitrator rejected the arguments made on behalf of the employee that the employee was not serious about the statements and was incapable of carrying out the threats. The arbitrator held that simply making the threat was sufficient for the most severe discipline. An employer has an obligation to protect its employees, and should not have to wait to see which threats, if any, are carried through. Based on the type of threats made, the arbitrator ruled that termination was warranted.

### **Similar conduct, same result:**

In a credibility determination in this Civil Service Law Section 75 proceeding, the employee bus driver was found guilty of telling another employee that she was going to have a “hit man” get a third employee. Although the bus driver was a 13-year employee with no prior disciplines, the Hearing Officer recommended termination.

### **Long tenure results in reduced penalty for threatening behavior:**

At a meeting to discuss her evaluation, employee became very agitated and started yelling, waving her arms, and moving towards her supervisor. The supervisor became frightened and called security to take the employee off the premises. The employee was found guilty of threatening her supervisor. Because the employee had a ten-year record with no prior disciplinaries, the arbitrator held that the employer’s proposed penalty of termination was not appropriate and, instead, directed a 30-day suspension without pay.

### **Employer’s inappropriate investigation results in reduced penalty:**

Employee was found guilty of making several racially inappropriate remarks, but none of the remarks were made in anger or directed at other employees. Furthermore, the remarks were isolated and were made over a long period of time. The arbitrator found that the employer performed an inappropriate investigation by having all the employees discuss the allegations at length in a meeting. Under all of these circumstances, the arbitrator rejected the employer’s proposed penalty of termination and instituted a six-week suspension without pay.

### **Employer overreacted to employee’s remarks:**

Employer sought termination of employee who allegedly threatened to blow up the building where she worked. The evidence at the hearing revealed that the employee was on the phone talking to her union representative, and stated that she was going to “blow this place apart” with regard to her pending grievance. The employee was overheard. The employer had the employee escorted from the building by security. The employee credibly testified that she did not mean she would blow up the building, only that her grievance would “blow this place apart.” The arbitrator found the employee not guilty of the charges.

**Penalty reduced because supervisor provoked the behavior that led to disciplinary action:**

Employee cursed at his boss. At the hearing, the union proved that the boss had provoked the employee and that the boss's conduct is what caused the inappropriate behavior. The arbitrator still found the employee guilty, but under the circumstances found that a lenient penalty of a three-day suspension without pay was warranted.

*IV. Patient Abuse/Neglect* - If charges of intentional patient abuse are proven, the penalty is almost always termination. There are incidents, however, where abuse is unintentional, or where there are other mitigating circumstances resulting in a less severe penalty.

**Reduced penalty for kicking patient where proof showed, among other things, that other employee received similar penalties for related conduct:**

On videotape, an employee was seen kicking a consumer while on an outing. The employee and his supervisor were present on the videotape, and the supervisor did not report the incident. The employer sought termination. Considering the employee's long good record, the fact that the employer had given penalties less than termination to other employees in cases of alleged physical abuse, and that there was no injury to the consumer, the arbitrator penalized the employee with only a six-month suspension without pay.

**Reduced penalty due to reporting irregularities and improper investigation:**

A long-term employee was served with a variety of abuse charges. The two main witnesses waited months before reporting anything, with the primary witness having done so only after the employee complained about him. Further, the employer's investigation was held to be improper by the arbitrator who stated that "it must also be noted that a basic standard of sound investigative practice, namely that a supervisor should not routinely be given responsibility to investigate his/her own subordinate, was neglected." The employee was found guilty of certain verbal abuse and of violating the employer's directive not to talk to other employees about the investigation. An eight-week suspension, rather than termination, was directed due to the employee's long positive work record and employer's poor investigative practices.

**Termination was directed where employee had poor prior work record:**

Employee was found guilty of failing to provide proper assistance to a profoundly disabled patient and acting in a rude and abrupt manner in providing the limited assistance that was provided. The employee had been counseled previously for similar behavior, had received unsatisfactory performance evaluations, and had been disciplined twice. Under the circumstances, termination was directed.

**Termination directed where employee was not credible:**

A co-worker testified that the charged employee had left a consumer naked, soiled, and in a bed without bedding. The charged employee testified to several versions of the event. The employee was found guilty and termination directed.

### **Termination penalty reduced because of good work record:**

Employee with an 18-year satisfactory record led a consumer naked from a bathroom to the consumer's bedroom. The employee contended that he had to do this so that the consumer did not throw a temper tantrum and hurt himself. The employer sought termination. The arbitrator held that the employee should have sought assistance instead of escorting the consumer naked, and thereby violating the employer's policies. Because of the employee's satisfactory long-term work record, a suspension to date instead of termination was deemed the appropriate penalty.

### **Circumstances justified employee's "dragging" of a youth:**

Employee youth detention aide dragged a detention facility female youth across the ground and into the unit's mudroom. The evidence showed that the female youth had refused directives from the employee, and had sat down on the ground while walking between classes. The incident occurred during the winter, and it was cold and icy. The defense demonstrated that there was a concern, given temperature outside, that the youth could get hypothermia. (She was in her school uniform which consists of a skirt with bare legs.) Trying to lift the youth and perform a proper escort was impossible due to the ice on the ground, so the employee dragged the youth across the ice and into the unit for her warmth and safety. The arbitrator accepted the defense and found that even though an unapproved escort technique was utilized, under the circumstances the employee was not guilty. No penalty was assessed.

### **Employee terminated for striking patient:**

Employee developmental aide was accused of slapping a consumer in his care while in the hospital. The employee denied the allegation, but two independent witnesses, both hospital nurses, testified against the employee. The arbitrator upheld the employer's proposed penalty of termination.

### **Employee found guilty, but arbitrator orders her to remain in employment until 20<sup>th</sup> anniversary date of employment:**

A 19-year employee was charged with: (1) swearing in front of a consumer; (2) failing to take a consumer out with a walking harness; and (3) failing to immediately notify his supervisor of the consumer's resulting disappearance. The employer sought termination. The arbitrator found the grievant guilty of all charges, but because of the employee's previous length of satisfactory service, the arbitrator ruled that the employee should remain on leave without pay until such time as she obtained 20 years seniority. At that point, the employee would retire. He further ruled that if the employee must be on active status at the time of retirement she would be returned to such status for the minimal period of time required to satisfy the pre-conditions for retirement. Clarifying, the arbitrator stated that the return status must not be in a position supervising consumers.

### **Mitigating factors result in lesser penalty for patient neglect:**

An employee involved in client care was accused of leaving a consumer locked in a car while another consumer and he spent time in a mall. The employer suspended employee and sought dismissal. The consumer was found in the vehicle by the Chair of the facility's Citizen Advisory

Committee. The employee's defense was that he was taking the two consumers to the mall for an outing but the consumer had refused to leave the vehicle. The other consumer asserted that he had to use the bathroom immediately, which was the reason for the employee's conduct. The arbitrator found that the employer failed to prove that the employee went into the mall for personal reasons, and that his asserted reason, the other consumer's need to use a bathroom, was a mitigating circumstance for violating the employer's rules. The arbitrator nonetheless found the employee guilty. Because of the mitigating circumstance, the arbitrator rejected the employer's proposal of termination and suspended employee without pay for six months.

**V. Drug/Alcohol Use** – A common ground for discipline is drug and alcohol use. Repeated violations eventually end in termination. However, it is not unusual for an arbitrator to give the offender a second chance. Many factors come into play in these types of cases, including drug/alcohol policies, specific job duties involved, whether the charged employee has sought help to resolve substance abuse issues, and the testing process used by the employer.

**Termination based on employee's testimony at a prior arbitration not proper:**

In an earlier arbitration, it was held that the employer had subjected employee to a drug test without reasonable cause. During that arbitration, however, the employee admitted that he had recently once used marijuana. Based on that testimony, the employer now tried to fire the employee. The arbitrator held that it was improper to terminate the employee based solely on his own testimony in a previous hearing because employee was compelled to testify in that hearing in order to save his job. In effect, the arbitrator found that employer's position violated the basic concept of fairness. The arbitrator dismissed the charge and ordered reinstatement with full back pay.

**Employee's refusal to take drug test results in ten-day suspension:**

Employee laborer refused to take a random drug test. It was argued on the employee's behalf that laborers do not hold "safety sensitive" positions, and should therefore not be required to be drug tested. Unfortunately, the drug policy, by its terms, included laborers. Employee was found guilty and a ten-day suspension without pay directed as penalty.

**Failure to advise employees of new drug policy results in reduced penalty:**

Employee DPW equipment operator had a prior DWI and a prior positive drug test. In this case he was charged with yet another positive drug test, and now the employer insisted on termination. The employer had a new commissioner, and the employer argued that it had adopted a new "get tough" policy on drug use. The defense was able to show that the employer had never notified the employees of the new "get tough" policy. Under these circumstances (lack of adequate notice of the new policy), the arbitrator held that there was no just cause to terminate the employee. However the arbitrator still found the employee guilty because he surely must have known that marijuana use is illegal and that, even if used in off hours, marijuana might have deleterious effects on work performance. Accordingly, the arbitrator found the employee guilty of using an illegal substance, and issued a ten-month suspension without pay as penalty.

### **Charges dismissed because of improper alcohol testing procedures:**

Employee had prior alcohol-related problems and, on the day at issue, employee appeared sleepy, his speech was loud, and his behavior erratic. He then “failed” two breathalyzer tests. The arbitrator, however, dismissed the disciplinary charges. The “reasonable suspicion” used to justify the tests was weak, as it was based on the observations of an untrained supervisor. The arbitrator also found the breathalyzer tests to be “so riddled with errors as to be unreliable.” Among other things, the tester did not show that he had cleared the testing device before administering the tests, failed to advise the employee that he should not belch because it may bring up alcohol in his mouth, which could affect the test results, failed to check employee’s mouth at anytime, and never ran the breathalyzer in a confirmation mode. Additionally, the test forms were not properly checked and filled out and the subject tests results were so high as to appear unreliable.

### **Girlfriend’s possession of marijuana not considered reasonable suspicion for testing employee:**

Employee and his ex-girlfriend had an argument and the police were called. The employee told the police that the ex-girlfriend had marijuana, which they found, and she was arrested. A few days later, the employer tested the employee for drugs because his ex-girlfriend had been arrested for possession. The employer claimed that it tested the employee based on its policy that allowed for “reasonable suspicion” drug testing. The employee tested positive. The arbitrator held that the fact that the employee’s ex-girlfriend possessed marijuana did not constitute reasonable suspicion sufficient for drug testing the employee. The charges were therefore dismissed.

### **Three positive drug tests lead to termination:**

In less than three months, employee highway maintenance worker failed three drug tests for cocaine. The hearing officer ruled that the employee must assume the consequences of his serious misconduct. The hearing officer also noted that the employee’s subsequent rehabilitative efforts had been somewhat lax. Under the circumstances, termination was recommended.

### **Tug captain terminated after losing his license due to a positive drug test:**

Because of a positive drug test, employee tug captain lost his Coast Guard license. The employee had a good work record and was extremely remorseful about the situation. His license was suspended, however, for at least one year. The employer’s drug testing policy specifically provided that the employer “will seek” the dismissal of any employee who has a positive drug test and who has his license suspended by the Coast Guard. The defense argued that this language did not require the arbitrator to uphold the penalty of termination sought by the employer. The arbitrator ruled that the employer was not acting in an arbitrary, capricious, or discriminatory manner in bringing the charges and seeking termination. Since the employee could not perform his duties for a one year period, and in the absence of any evidence that this employee was being treated differently than others, it was reasonable for the employer to have its proposed penalty of termination upheld.

**Disciplinary charges for DWI dismissed because employer knew of the violation and waited too long to take action:**

During the prior year, employee heavy equipment operator had a DWI. After the re-election of the commissioner, the commissioner brought disciplinary charges against employee for the DWI, a prior DWI, and for allegedly driving without a proper license. The employee had worked on the election campaign of the commissioner's opponent. The arbitrator dismissed the charges, holding that the employer had known about the two DWI convictions, had taken no action prior to the election, and that documentary evidence clearly showed employee had a conditional license during the time he was alleged to have driven with an improper license.

***VI. Off-Duty Misconduct*** – An employer may be able to discipline an employee for off-duty misconduct where there is a direct or demonstrable relationship between the off-duty conduct and the performance of the employee's job. An employee may be held to a higher standard depending on the position/title held.

**County Social Services employee found not guilty of misconduct:**

County Social Services employee posted a "rant" on Facebook, identifying himself as an employee of Social Services, and clearly referred to individuals who were clients of Social Services. Nevertheless, the arbitrator found that the employer failed to prove misconduct. The County had not adopted any social media policy, and no proof that the County suffered harm as a result of the posting. Furthermore, there was no evidence that the employee's continued ability to do his job had been compromised.

**Long-term employee with good record gets reduced penalty:**

In front of his office building, employee, who was engaged in a cell phone conversation, was stopped in such a way that his vehicle was blocking a bus. The employee refused to move despite two requests of him to do so and a disturbance resulted. The arbitrator found the employee guilty of misconduct. Because of the employee's 22-year disciplinary-free record, only a two-day suspension without pay was imposed as the penalty.

**State Police employee receives eight-month suspension instead of termination for leaving the scene of an accident:**

While on probation, the employee clerk was involved in leaving the scene of an accident and removing evidence from the scene. The employer, Division of State Police, was immediately informed but did nothing. When the employee was arrested on felony charges some five months later after the employee had passed his probation, the employer sought termination. The criminal charges were thereafter dismissed. The arbitrator found that although the clerk was under severe emotional distress at the time of the incident, she was still guilty of misconduct in leaving the scene of an accident and reviewing evidence. The employer's reason for disciplining her, however, was the criminal charges. Because those charges were dismissed, termination was not warranted. Instead, an eight-month suspension without pay was directed as a penalty.

**Arbitrator reduces penalty of termination for lost license, and gives employee one year to have license restored:**

Employee general mechanic lost his driver's license because of a DWI. A license was required for his position. The arbitrator held that the employee's immediate termination by the employer was inappropriate. Rather, the arbitrator directed that until the employee could restore his license, a suspension without pay for a period of up to one year was the proper penalty. The arbitrator further ruled that the employee could be terminated after one year, if his license has not been restored.

**Psychiatrist testimony convinces arbitrator that employee lacked the necessary intent to violate Tax Department rules when he failed to file his own tax returns:**

Employee tax compliance agent was charged with failing to file federal and state tax returns for three years. The employer sought termination. The employee's psychiatrist testified on his behalf and stated that the employee had suffered with depression over an extended period of time and was receiving treatment. The arbitrator held that the psychiatrist's testimony proved that the employee did not have the necessary "intent" to engage in misconduct as alleged by the employer. The disciplinary charges against the employee were therefore dismissed.

**Heroin possession was not related to employee's job as a cleaner:**

Employee cleaner pled guilty in federal court to heroin possession. The employer never suspended him and did not show, at the arbitration, that the conviction for this off-duty misconduct had any effect on employee's job. Based on these factors, the charges were dismissed by the arbitrator.

*VII. Fighting on the Job* – An employee can be disciplined and possibly discharged for fighting on the job, particularly where the employee is the aggressor, uses a weapon, or has a history of similar conduct.

**Termination ruled appropriate for striking a fellow employee on the head:**

Employee was accused of hitting, in anger, another employee on the back of the head. There were no witnesses. In a credibility determination, but also in particular consideration of the bruise on the back of the injured employee's head, the arbitrator found the employee guilty. Given the nature of the conduct, termination was found to be appropriate.

**Inadequacies in employer's investigation impact on how disciplinary charges are assessed:**

Employee certified nursing assistant was alleged to have, among other things, thrown urine at another worker while in an argument with that worker. The employer never interrogated the employee or interviewed important potential witnesses. While these procedural deficiencies did not support the dismissal of the charges, the arbitrator held that the inadequacies of the employer's investigation impacted on how the charge of misconduct should be assessed. The urine-throwing incident could not be properly evaluated because of the employer's inadequate investigation. Nonetheless, employee was found to have acted in a threatening manner. A one-month suspension

without pay, rather than termination, was found to be the appropriate penalty, along with one-year probation.

**VIII. *Sleeping and/or Unalert on the Job*** – Discharge for sleeping on the job is sometimes deemed an appropriate penalty, especially where there is a work rule or established practice supporting such a penalty. Sleeping is considered particularly critical where it may cause potential danger to the safety of employees, the public or property, or when the behavior may result in the harm or escape of incompetent wards or inmates.

**No remorse or mitigating factors results in termination:**

Employee developmental aide was found guilty of sleeping and neglecting duties on one particular night. The arbitrator imposed the employer’s proposed penalty of a two-week suspension without pay where there was neither remorse by the employee nor mitigating factors to explain the conduct.

**Sleeping, when coupled with neglect, results in termination:**

In a credibility determination, employee developmental aide was found guilty of sleeping several times on the job and requiring a consumer to stand in front of a toilet, sometimes for very lengthy periods, until he urinated before consumer could go to bed. The arbitrator found that these acts of neglect and abuse warranted the penalty of termination.

**Mitigating factors persuades arbitrator to overturn termination of sleeping bus monitor:**

Employee bus monitor had ten years of service and a poor record, mostly for time and attendance and “no call no shows.” She was charged with sleeping on duty, including numerous occasions in the District automobile that was used to transport one special education student. The District sought termination. Even though the employee was found guilty, the arbitrator rejected the District’s proposal of termination, and ordered employee reinstated without back pay (five months). While acknowledging the seriousness of the offense, the arbitrator stated that there were mitigating factors, including the fact that while the bus monitor slept, the bus driver was awake and alert and therefore could watch for any problems with the student and there were no instances where the employee failed to assist the child when needed. The employee was reinstated without back pay, having served a five-month suspension.

**Termination upheld for employee who violated the cell phone use policy in light of history of prior counselings and discipline:**

County employee used his cell phone in violation of the County’s cell phone policy while operating a fork lift. The employee was aware of the policy through prior counselings, discipline, as well as the dissemination of the written policy itself. Employee was also a problematic employee in terms of his general behavior.

**IX. *Time & Attendance*** – Whether discipline will be upheld for attendance problems depends on the specific facts of each case. Important factors include whether there is a reasonable attendance policy, whether it is followed consistently, the employee’s work record in general, and

other mitigating factors such as illness, family problems, incarceration, employer notification, and so forth.

**Termination upheld for excessive absences even though for legitimate purposes:**

During an 18-month period, employee was absent 214.5 out of 360 workdays. Approximately 60% of the absences were for legitimate and documented medical reasons. Nonetheless, the Section 75 hearing officer found such a high absentee rate reflected misconduct and incompetence and, therefore, he recommended termination. The Hearing Officer commented that the employee's excessive absences placed a significant burden upon the employer's budget and its other employees, and that it was impossible for the employer to hire a permanent replacement for the employee while he remained on the payroll.

**Long-term employee terminated after long history of attendance problems:**

Although employee was a long-term employee, she had several prior counselings and disciplinary actions. Her last discipline had a "last chance" warning. Throughout her tenure, employee had serious attendance problems. This discipline involved further attendance issues. Given the circumstances, termination was directed.

**Termination appropriate for repeated failure to "call in:"**

Despite prior counselings and discipline, employee continued to periodically be absent from work and failed to call in, pursuant to an agreed-upon call-in procedure. Under the circumstances, termination was found appropriate.

**Long positive record gets grievant reinstated after being absent for four month jail term:**

While employee was in jail for four months, he was terminated. He had worked for the employer for 14 years with only minor problems. The arbitrator directed that the employee be offered restoration to his most recent job on a two-year probationary basis. It is important to note that arbitrators have differing views of incarceration as an excuse for being absent from work. Factors considered include the length of incarceration, the nature of the act resulting in confinement, the impact of the absence on the employer's operations, and the employee's work record.

**Disciplinary charges dismissed where no adverse impact on operations was shown:**

The employer sought to discipline employee for excessive (albeit authorized and legitimate) use of sick days. The arbitrator held that to prevail in such circumstances the employer had to establish that the employee's legitimate absences, due to doctor's appointments, surgery and illness, had a negative impact on the employer's operations or resulted in harm to the employer's budget as a result of overtime payments to other unit employees. Not having proven that the legitimate sick time resulted in a negative impact on the employer's operations, the disciplinary charges were dismissed.



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