



DISCIPLINARY MANUAL

Public & Private Sector

Mary E. Sullivan, President
CSEA Legal Department
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CHAPTER ONE
STATE CONTRACTS/ARTICLE 33 DISCIPLINARIES

I. Employees Covered

All persons covered by Civil Service Law §75, and permanent non-competitive and labor class employees after a year.

II. Employee Rights

1. The employee shall be entitled, if a member of CSEA, to representation by CSEA, or, if a non-CSEA member, or if the employee waives CSEA representation, by private counsel selected at his or her own expense.

2. CSEA representation may include both a grievance representative and the CSEA Local President (or designee) and a CSEA staff representative. However, the absence of two additional representatives shall not unreasonably delay the interrogation or other proceeding.

3. In 2018 the Taylor Law was amended such that it is no longer a violation of CSEA's duty of fair representation for CSEA to refuse to provide representation to public sector non-CSEA members during (1) interrogation; (2) statutory/administrative proceedings; and (3) disciplinary arbitrations.

III. Interrogation (Definition: The questioning of an employee who, at the time of such questioning, appears to be a likely or potential target or subject for disciplinary action.)

1. If an employee was improperly subjected to interrogation, an arbitrator shall have the authority to exclude information obtained thereby.

2. No employee shall be required to submit to an interrogation unless such employee is notified, in advance of the interrogation, of the right to have CSEA representation or representation by private counsel.

3. No recording devices or stenographic or other record shall be used during an interrogation unless the employee is advised in advance that a transcript is being made and is offered the right to have CSEA representation or representation by private counsel. Any record and/or tape recording shall be furnished to the employee.

4. No employee shall be requested to sign any statement regarding his or her incompetence or misconduct unless the employee is offered the right to have CSEA representation or representation by private counsel.

IV. Procedure: Service and Content of the Notice of Discipline

1. The employee shall be served with a Notice of Discipline (NOD) detailing the specific acts alleged and the penalty sought.

2. An employee shall not be disciplined for acts that occurred more than one year prior to the notice of discipline, except those that would constitute a crime.

3. Two copies of the NOD shall be served on the employee by personal service, if possible, or by registered or certified mail, return receipt requested, and concurrent first class mailing

4. The NOD shall be accompanied by a written statement that the employee has 21 days to object by filing a grievance; that the procedure provides for a hearing; and that the employee is entitled to representation.

5. Once a grievance is filed, penalty cannot be imposed until after the matter is settled or an arbitrator renders a decision.

6. A NOD must be served within fourteen days following any suspension without pay or temporary reassignment.

7. A Notice of Discipline (NOD) must be appealed by filing a grievance within 21 calendar days of service of the NOD to the department or agency head. The grievance is to be filed either in person or by e-mail where available or by first-class mail, by the employee or CSEA.

8. Pending the outcome of the NOD, an employee may be suspended without pay or temporarily reassigned when the appointing authority determines that there is probable cause to believe that the employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations.

9. Upon being suspended, the employee may be allowed to draw from accrued annual or personal leave credits, holiday leave or compensatory leave.

V. Responding to the Notice of Discipline

The first and foremost responsibility of the representative in an Article 33 disciplinary case is to make sure that the charge is grieved in a timely and proper manner. A failure to do so may negate any further effort to provide effective representation and could result in an employee suffering the imposed penalty of a fine, suspension or even termination. Untimely filing of a disciplinary grievance, or filing it in the wrong manner, may also expose the union to a charge that it has breached the Duty of Fair Representation.

It is therefore **imperative** that the representative be familiar with **CRITICAL TIME LIMITS**, and with the appropriate form and procedures for filing the appeal (grievance). [The required form that must be used for Article 33's is the DISCIPLINARY GRIEVANCE FORM.]

There may be situations in which a CSEA member elects to waive union representation and either "go it on his/her own," or obtain private counsel. This is certainly within the employee's rights. However, from the union's perspective, in these situations a waiver should be obtained releasing the union of its obligations under the Duty of Fair Representation.

If for any reason the CSEA member refuses to sign the waiver, the union representative should nonetheless complete the waiver and sign it as a witness and note that the employee refused to sign. In such cases, it would be advisable to have a third party verify the refusal and sign the waiver.

Again, as stated in Section II (3), above, in cases involving employee discipline, the Duty of Fair Representation extends only to CSEA members.

VI. Expedited Resolution Process

Unresolved workplace disciplinary disputes can have a demoralizing impact on the workforce. If a disciplinary dispute cannot be resolved in a timely fashion it can lead to counter-productive attitudes and behaviors on the job. It is with this in mind that both labor and management have agreed to explore other meaningful alternatives for resolving disputes in a timely manner.

The GOAL of the Expedited Resolution Process is to provide a successful alternative dispute resolution mechanism for resolving disciplinary matters without the need to resort to the more formal, time consuming, and costly Article 33 arbitration process.

1. Initially, the Expedited Resolution Process must be utilized unless the employee elects to use private counsel, in which case a waiver form must be signed, or in the case of employees who are not members of CSEA. The case will then be heard in the traditional Article 33 manner and the employee is responsible for all associated costs.

2. Unless the employee has elected private counsel and a waiver has been signed, or, if the employee is NOT a member of CSEA, each employee will have one (1) initial Expedited Resolution (“ER”) meeting.

3. If the matter does not settle during the initial ER meeting, an employee whose NOD proposes a penalty of termination with or without a suspension or reassignment, shall have the option of electing to have a one (1) day expedited arbitration to be held before the same arbitrator or, in the alternative, an arbitration hearing in accordance with Article 33.4. If an employee elects Article 33 Arbitration, management is responsible for contacting the Panel Administrator.

4. A single neutral, who was selected by both CSEA and NYS, shall hear all disciplinary matters except those cases where the employee is not a member of CSEA, or has elected either private counsel (see No. 1) or those who elect out after the ER meeting (see No. 3).

5. During the ER process, the grievant shall be represented by CSEA and management will be represented by the Agency. Each party may have up to two (2) representatives present (exclusive of the grievant).

6. Copies of all relevant documents will be shared by the parties at least two weeks prior to the first ER meeting. GOER encourages agencies to share this information more than two weeks in advance, if possible.

7. At the first ER meeting, the neutral will act as a mediator to facilitate discussion on the issue(s). The neutral may also assist the parties so that an acceptable resolution can be reached that is satisfactory to both parties. *If necessary, the neutral may choose to hear testimony and review formal evidence.

8. If the matter cannot be settled and no additional information or testimony is needed, the neutral will issue a written decision within seven (7) calendar days following the ER meeting. In some instances, the neutral may need to conduct an expedited hearing.

9. An expedited hearing should not take longer than one (1) day. At the conclusion of the hearing, the neutral will issue a written decision within 14 calendar days.

10. If an unsettled discipline cannot be heard in one (1) expedited hearing day, the neutral can remand it back to the regular Article 33.4 process.

VII. Arbitration

1. An arbitrator shall be selected by the Panel Administrator from the permanent panel of arbitrators.

2. All fees and expenses of the arbitrator shall be borne equally by the parties. Where a grievant has elected private counsel, or if a grievant is a non-CSEA member, the grievant is responsible for his/her half of the arbitration fees and expenses as well as their attorneys' fees.

3. The arbitrator will hold a hearing at an appropriate location at the employee's facility.

4. The arbitrator shall render determinations of guilt or innocence and the appropriateness of proposed penalties and shall have the authority to resolve a claimed failure to follow the procedural provisions of the contract and to determine whether the appointing authority had probable cause to suspend, if applicable. The arbitrator shall not increase the penalty sought by the State.

5. The employee's entire record of employment may be considered with respect to the appropriateness of the penalty to be imposed, if any.

6. Where an employee is awarded back pay, the award shall be deemed to include any retroactive benefits and accruals and shall not be offset by any wages earned by the employee during the period of suspension.

CHAPTER TWO **CONTRACT DISCIPLINARIES**

Employee discipline in all other contracts is governed by the specific terms of the applicable contract, or, in the absence of specific disciplinary provisions, any applicable statutory protections (i.e., Civil Service Law §75).

I. Employees Covered

The employees covered by a contract disciplinary clause are as defined by that clause.

II. Employee Rights

The employee shall be entitled, if a CSEA member, to representation by CSEA, or, if a public sector non-CSEA member, or if the employee waives CSEA representation, by private counsel selected at his or her own expense.

III. Interrogation (Definition: The questioning of an employee who, at the time of such questioning, appears to be a likely or potential target or subject for disciplinary action.)

The collective bargaining agreement may contain specific provisions about union representation during an interrogation. The agreement should also be consulted first.

Absent such contractual provisions, the U.S. Supreme Court's *Weingarten* decision gives **private sector** unionized employees an absolute right to representation during an interrogation in which the employee may face possible disciplinary action.

However, it is paramount to note that under the *Weingarten* decision the employer is under no obligation to advise the employee of his/her right to representation. The burden of responsibility is placed on **the employee who must assert the right** to have their union representative present during an interrogation. Once representation is requested, the employer is not required to interrogate the employee.

For **public sector** employees who are not covered by Civil Service Law §75, New York's Taylor Law provides that public employees are entitled to the same rights as private sector employees under *Weingarten* during an interrogation. See, Chapter Three for public employees covered by Civil Service Law §75. See, Chapter Five for additional information about interrogation rights.

IV. Procedure

1. Typically the employee is served with some type of Notice of Charges detailing the specific acts alleged.

2. The contract may provide for a specific time limit during which charges may be preferred against the employee (i.e., one year, 18 months, etc.).

3. Depending on the contract, the employee, once served with charges, is typically required to file an answer or grievance disputing the charges. Some contracts allow the employer to implement the penalty pending the outcome of a hearing or arbitration, while other contracts provide that the penalty will be held in abeyance pending the outcome of a hearing or arbitration.

V. Responding to the Notice of Discipline

The first and foremost responsibility of the representative in a contract disciplinary case is to make sure that the charges are answered in a timely and proper manner. A failure to do so may negate any further effort to provide effective representation and could result in an employee suffering the imposed penalty of a fine, suspension or even termination. Untimely filing of an answer may also expose the union to a charge that it has breached the Duty of Fair Representation.

However, in 2018 the Taylor Law was amended such that it is no longer a violation of CSEA's duty of fair representation for CSEA to refuse to provide representation to public sector non-CSEA members during (1) interrogation; (2) statutory/administrative proceedings; and (3) disciplinary arbitrations.

It is therefore **imperative** that the representative be familiar with **CRITICAL TIME LIMITS** for filing an answer.

There may be situations in which a CSEA member elects to waive union representation and either "go it on his/her own," or obtain private counsel. This is certainly within the CSEA member's rights. However, from the union's perspective, in these situations a waiver should be obtained releasing the union of its obligation under the Duty of Fair Representation.

If for any reason the CSEA member refuses to sign the waiver, the union representative should nonetheless complete the waiver and sign it as a witness and note that the employee refused to sign. In such cases, it would be advisable to have a third party verify the refusal and sign the waiver.

VI. Hearing/Arbitration

1. Depending on the contract, an employer may appoint a hearing officer, or an arbitrator may be selected by the parties. Where an arbitrator is selected, the contract typically provides that the parties select an arbitrator from a list provided by the American Arbitration Association (AAA) or the Public Employment Relations Board (PERB). Some contracts establish a permanent arbitrator panel where arbitrators are appointed from the list on a rotating basis.

2. Typically, in all arbitration cases, all fees and expenses of the arbitration are borne equally by the parties. Where an employer is entitled to appoint a hearing officer, all fees and expenses of the arbitration are typically borne by the employer.

3. The hearing/arbitration is generally held at an appropriate location at the employee's facility.

4. When an arbitrator is utilized, the decision of the arbitrator is typically final and binding on all parties.

CHAPTER THREE

CIVIL SERVICE LAW §75 DISCIPLINARIES

I. Employees Covered

Unless expanded by the collective bargaining agreement, Civil Service Law §75 covers permanent competitive employees; permanent employees in the classified services who were honorably discharged and served in time of war or are exempt volunteer firefighters; non-competitive employees after five years of competitive service; as well as laborers after five years of continuous service.

II. Employee Rights

The employee shall be entitled to representation by CSEA, if a CSEA member, or by private counsel selected at his or her own expense.

Note: Civil Service Law §75 provides for representation only by a union at an interrogation. An employee may be represented by a union, if a union member, or private counsel at the hearing.

III. Interrogation (Definition: The questioning of an employee who, at the time of such questioning, appears to be a likely or potential target or subject for disciplinary action).

1. An employee is entitled to be notified in advance, in writing, of the right to have CSEA representation at the interrogation. Such right, of course, is dependent upon actual CSEA membership.
2. An employee shall be afforded a reasonable period of time to obtain representation. If an employee is unable to obtain representation within a reasonable period of time, the employer has the right to question the employee.
3. The hearing officer shall determine whether a reasonable period of time was afforded to the employee to obtain representation prior to an interrogation.
4. If the employee was improperly subjected to interrogation, a hearing officer shall have the authority to exclude information obtained thereby.

IV. Procedure

1. The employee shall be served with a Notice of Charges detailing the specific acts alleged.
2. An employee shall not be disciplined for acts that occurred more than 18 months prior to the Notice of Charges, except those that would constitute a crime.
3. The employee has at least eight days to file an answer and request a hearing.

4. Pending the outcome of the disciplinary charges, an employee may be suspended without pay for a period not exceeding thirty days.

V. Responding to the Notice of Charges

Pursuant to Civil Service Law §75, an employee must be afforded at least eight days to file an answer.

There may be situations in which a CSEA member elects to waive union representation and either "go it on his/her own," or obtain private counsel. This is certainly within the CSEA member's rights. However, from the union's perspective, in these situations a waiver should be obtained releasing the union of its obligations under the Duty of Fair Representation.

If for any reason the employee refuses to sign the waiver, the union representative should nonetheless complete the waiver and sign it as a witness and note that the employee refused to sign. In such cases, it would be advisable to have a third party verify the refusal and sign the waiver.

VI. Hearing

1. The employer generally appoints a hearing officer.
2. All fees and expenses of the hearing officer are borne by the employer.
3. The hearing is generally held at an appropriate location at the employer's facility.
4. The hearing officer shall make a record of the hearing. A copy of the hearing shall, upon request of the employee, be furnished free of charge.
5. The hearing officer shall make a report and recommendations to the appointing authority. (Note: the "appointing authority" is the officer or entity that has the power to hire, as defined by statute or local charger. For some examples, for a county, it is usually a department head; for a school district, it is the school board; for a city or village, it is usually the mayor).
6. The appointing authority shall review the record of the hearing along with the hearing officer's report and recommendations and issue a decision.
7. Where an employee is acquitted of all charges, he shall be restored to his position with full pay less any unemployment insurance benefits he may have received during a period of suspension.

CHAPTER FOUR **PRE-HEARING SUSPENSION**

I. Article 33 (State Contracts)

Under the State contracts, an employee can be suspended without pay if the appointing authority determines there is probable cause to believe the employee's continued presence on the job represents a potential danger to persons or property or would severely interfere with operations. This determination is reviewable by the arbitrator.

An employee can also be suspended without pay if he or she has been charged with the commission of a crime. If, during the pendency of such suspension based solely on the employee being charged with a crime, and the employee's charges are dropped or otherwise resolved, either CSEA or the employee should demand that the employee be put back on the State payroll.

The pre-hearing suspension time limit under the State contracts is indeterminate. However, State employees may use personal, vacation, and compensatory leave accruals to offset non-paid suspension time. And, in some situations, employees may be offered a temporary transfer or reassignment; they cannot then use their leave accruals.

II. Other Contracts

Pre-hearing suspensions are governed by the terms of the contract. Some contracts provide specified criteria for suspensions, others do not. Some contracts provide for suspensions of only up to thirty days, others do not explicitly refer to suspensions, and others allow the employer to implement the sought-after penalty prior to a hearing. For example, if the employer seeks termination and the contract allows for implementation prior to a hearing or arbitration, the employee may be terminated and then subsequently restored by an arbitrator or hearing officer.

III. Civil Service Law §75

There are no specified grounds or criteria for imposing a suspension without pay under Civil Service Law §75.

The pre-hearing suspension time limit is thirty days. Thus, if an employee is suspended prior to a hearing, the employee must be returned to the payroll on the (thirty-first) 31st day. This does not mean the employee returns to work. The employer may require the employee to remain "on leave" with pay. **Note:** If there is a delay in the hearing because of the employee (e.g., request for adjournment), the thirty day time limit may be extended by the employer for the period of the delay.

CHAPTER FIVE EMPLOYEE INTERROGATION RIGHTS

I. Interrogation Representation

All CSEA State contracts provide covered employees with the right to union representation, or representation by private counsel, at a disciplinary interrogation. However, CSEA is under no obligation to represent public sector non-CSEA members at a disciplinary interrogation.

Pursuant to Civil Service Law §75, an employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his/her certified or recognized employee organization. However, CSEA is under no obligation to represent any public sector employee who is not also a CSEA member. Under Civil Service Law §75, a public employer must give written notice to the employee of his/her right to representation.

Other contracts (local government and private sector) may provide for union representation during an interrogation. CSEA is under no obligation to represent any public sector employee who is not also a CSEA member at an interrogation, or any other stage of a disciplinary process.

Absent such contractual provisions, the U.S. Supreme Court's *Weingarten* decision gives private sector unionized employees an absolute right to representation during an interrogation in which the employee may face possible disciplinary action. Under the Taylor Law, it is an improper practice for a public employer to refuse to afford a public employee the right, upon demand, to a union representative when at the time of questioning it reasonably appears that the employee is a potential target of disciplinary action.

However, it is paramount to note that under both the *Weingarten* decision and the Taylor Law, the employer is under no obligation to advise the employee of his/her right to representation. The burden of responsibility is placed on **the employee who must assert the right** to have their union representative present during an interrogation.

II. Limits

Situations in which an employee may not be entitled to representation and/or where representation limits exist include (but may not be limited to):

- ❑ Investigations by government agencies for reasons other than employee discipline, such as revocation of a license;
- ❑ Investigations by employers when the employee is NOT the target of action;
- ❑ Employment-related criminal investigations being conducted by law enforcement authorities.

The employer has no obligation to bargain with the union (representative) during an investigation. The union representative cannot interfere with, disrupt, or otherwise undermine

management's right to investigate and/or conduct an interrogation. The employer cannot, however, insist that the union representative be quiet; the representative has a right to represent the employee in a meaningful way.

****NOTE:** Even though an employee may be entitled to interrogation representation, he/she has the obligation to respond to and answer the employer's questions at an interrogation. There is **no Constitutional Fifth Amendment** right against self-incrimination at an employee interrogation that is being conducted solely by the employer/management. Any refusal to answer questions can (and no doubt will) result in an additional charge of insubordination.

III. Use Immunity

An important aspect of employee rights with regard to incriminating statements is the employee's right to "Use Immunity."

"Use Immunity" is a court driven doctrine that protects an employee's Fifth Amendment right against self-incrimination in disciplinary interrogations where an employee has been compelled to answer management's questions under the threat of insubordination. Under the precept of "Use Immunity," any statements made under the threat of insubordination cannot be used against the employee in a criminal prosecution.

Additional points to remember are:

- Although the courts have held that "Use Immunity" attaches as a matter of law and without declaration by the employee, the employee (or the union representative) should assert the right for the record. *Matt v. Larocca*, 71 N.Y.2d 154 (1987).
- The employee/representative should know or ask who is conducting the questioning.
- The employee/representative should ask if he/she is compelled to answer questions or face insubordination. If the employer says YES, the employee/representative should recite the "Use Immunity" right.
- In situations where an employee knows, suspects or has been informed that his/her answers could lead to a subsequent criminal investigation, the employee has certain decision options: (a) request time to secure legal representation, and (b) decide between accepting a charge of insubordination or risking an investigation which may lead to an arrest.
- Remember, although police cannot use statements made by an employee under the doctrine of "Use Immunity," they can conduct an independent investigation on their own or at the request of the employer.
- Where the police are present during questioning or are conducting the questioning, the employee's Fifth Amendment right against self-incrimination attaches. In such cases, the police will/should have advised the employee of the right to remain silent, right to

counsel and so forth [*Miranda* warnings], and any statements illegally obtained would be suppressed.

- If management is sitting in on an interrogation being conducted by a law enforcement agency and the employee has been properly advised of his/her *Miranda* right to remain silent, the employee can refuse to answer questions that might be self-incriminating. However, if the employee waives his/her *Miranda* rights and answers the questions presented in a law enforcement setting, (whether management is present or not), any statements made can be used by the employer in its disciplinary case against the employee.

In situations where the employer is law enforcement or quasi-law enforcement agency such as a police department or department of corrections, the question arises, "When being questioned as part of a disciplinary interrogation, is the employee protected by Use Immunity?" Although there is no direct case to cite, the logical answer would appear to be "Yes." Here it would appear that the employer may act as "employer" to compel the employee to answer under threat of insubordination, in which case "Use Immunity" attaches; or the employer acts in its capacity as a law enforcement agency with the power to prosecute and must therefore grant the employee Fifth Amendment right to remain silent against self-incrimination. However, employees who are employed by such agencies should be cognizant of any pre-employment waivers they may have been required to sign as a condition of employment.

What has been discussed above applies to interrogations which are conducted as part of management's investigation and which have taken place prior to the issuing of a Notice of Discipline. If, on the other hand, management has served the suspect employee with a Notice of Discipline, the rules change. That is, once an employee has been served with a Notice of Discipline, there should be no further questioning of the employee regarding that matter. If management does conduct such an interrogation following service of an NOD, the employee can refuse to answer questions that would be self-incriminating per Article 33.

IV. Interview versus Interrogation

Whether the right to representation is statutory or contractual, the determining factor for representation hinges on whether the questioning is an interview or an interrogation.

The term interview as it relates to the investigative process could certainly be defined in many ways. Three commonly accepted definitions are:

- ▶ An investigation to learn facts surrounding an incident;
- ▶ The gathering of information by systematic questioning of a person or persons who may have relevant information relating to an incident;
- ▶ A conversation between parties whereby the interviewer seeks information from a person or persons about an incident.

In contrast to the interview, an interrogation occurs when a person being questioned is suspected of wrongdoing. As taken from the State contract(s), the commonly accepted definition of an interrogation is:

- ▶ The questioning of an employee who, at the time of such questioning, appears to be a likely or potential target or subject for disciplinary action.

V. Union Representation – Rights and Limits

The union representative should be assertive when representing an employee at an interrogation, and should request the right:

- Prior to the commencement of the interrogation, to be informed of the subject matter of the interrogation, including the nature of the charges and allegations;
- To confer with the employee prior to the commencement of the interrogation;
- To speak during the interrogation, and to request clarification of question(s) if the employee does not understand the question(s);
- To advise the employee as to the manner of how he/she should answer;
- To offer further information following the interrogation.

If management refuses to permit employee representation at an interrogation, or denies the employee/representative any of the rights provided under a contract, the union representative should advise management that the union will be filing a grievance pursuant to the contract or an improper practice charge. This alone may prompt management to comply properly. However, if management continues to refuse representation rights, the Labor Relations Specialist should be consulted about the filing of a grievance or improper practice charge.

Also, pursuant to State contract language and Civil Service Law §75, statements obtained from an employee in violation of representation rights are generally inadmissible as evidence against the employee at a hearing and/or arbitration. Issues of admissibility are part of the hearing process and are decided by the arbitrator or hearing officer.

VI. Effective Representation

As a representative it is important for you to:

- ⇒ Educate employees within the bargaining unit to assert/request representation rights;
- ⇒ Know the applicable contract language;
- ⇒ Seek clarification of the employee's obligation to answer under "Use Immunity";

- ⇒ Know the consequences of violations by management;
- ⇒ Consult with Legal Department and/or Regional Attorneys.

Your specific role at the interrogation serves several important purposes, including:

- To advise the employee properly so as to avoid a charge of insubordination for refusing to answer questions;
- To assist a frightened or inarticulate employee in explaining his/her conduct;
- To caution against wholesale denials which might create the appearance of dishonesty or cause unnecessary contradictions;
- To prevent unwarranted fatal admissions, [The key here being, don't volunteer unsolicited information!];
- To point out mitigating and/or extenuating matters which may have influenced the employee's conduct;
- To serve as a witness against future false accounts by management relating to answers/statements made during the interrogation.

THE INTERROGATION (REPRESENTATION) CHECKLIST

Although some of the following information may seem redundant, it warrants reiteration, and provides a handy checklist any representative can follow:

- ___ 1. If Personnel, Human Resources or Labor Relations have requested your presence at the interrogation, insist on being told the general subject of the interrogation.
- ___ 2. If management fails to comply, advise them you will be filing a grievance if applicable or an improper practice charge.
- ___ 3. Advise the employee of his/her right to a private attorney at his/her own expense, if criminal charges are likely to be filed. It should be highly recommended to the employee that he/she obtain private counsel in such instances. [CSEA's Legal Assistance Program does not provide for legal representation in criminal matters.]
- ___ 4. When the employee contacts you before management, discuss the matter with the employee, and then confirm the subject matter with management.
- ___ 5. If the employee decides to obtain private counsel, advise management and request a "reasonable" time be granted to obtain counsel.
- ___ 6. In speaking to the employee prior to the interrogation, find out the names of anyone he/she believes may be a potential witness (either for or against).
- ___ 7. Advise the employee that he/she will be charged with insubordination for failing or refusing to answer questions relating to the employment matter being investigated.
- ___ 8. Advise the employee that if, during the interrogation, he/she wants to confer with you, he/she must make the request because you may not be allowed to disrupt or interrupt the interrogation proceedings.
- ___ 9. If criminal charges are likely to result from the alleged incident, advise the employee about the concept of "Use Immunity."
- ___ 10. If, at the interrogation, management does not advise the employee of his/her right to "Use Immunity," make the following statement for the record:

I believe you will be questioning this employee concerning a matter that is or may be criminal in nature. The employee's right to protect himself/herself against self-incrimination is protected by the United States Constitution. Therefore, will the employee be disciplined for insubordination if the employee exercises his/her constitutional right and refuses to answer questions?

As previously discussed, management will no doubt say “Yes” at which time you should state: “Then will you confirm that you are providing the employee with 'Use Immunity'?” (Remember, even though management may refuse to state “Use Immunity” for the record, the right attaches as a matter of law and cannot be denied.)

If management does say that the employee is **not** being compelled to answer the questions, advise the employee that he or she need not answer the questions.

- ___ 11. Ensure only one question at a time is asked of the employee. Object to repetitious questions. Object to confusing or unclear questions.
- ___ 12. If management refuses to allow the employee the right to confer with you during the interrogation, request that such denial be noted on the record, including the time, name and job title of the management representative making the denial decision.
- ___ 13. Take notes during the interrogation of the questions asked and answers given.
- ___ 14. Should management attempt to badger the employee, note on the record that a grievance and/or improper practice charge may be filed concerning the interrogation.
- ___ 15. Note how the minutes of the interrogation are being taken, i.e. shorthand, tape recorder, stenographer.
- ___ 16. Advise the employee following the interrogation not to discuss the case with his/her coworkers. Explain that those other employees may later be compelled to answer questions or testify concerning such conversations.

CHAPTER SIX

GROUNDS FOR DISCIPLINE

I. Incompetence

Incompetence is 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 that need to be considered when investigating an incompetence disciplinary case. There may be mitigating or extenuating circumstances responsible for the employee's alleged incompetence:

- ▶ Personal problems
- ▶ Work-related problems
- ▶ Health problems

In addition, when investigating an incompetence disciplinary proceeding, it is important to establish that management has met its responsibility and obligation:

- a) Are there established standards of performance?
- b) Has the employer communicated the performance standard to the employee prior to the date of discipline? {NOTE: It must be shown that the employee failed to meet the employer's standard of performance.}
- c) Has the employee been properly trained to perform the job or task?
- d) Have the employee's past performance evaluations been indicative of a problem?
- e) How does the employee's performance compare with the employer's standard of performance?
- f) Was the employee accorded progressive discipline?

When reviewing cases alleging incompetence:

- a) Arbitrators generally recognize that employers have a right to set reasonable performance standards in the absence of language in the collective bargaining agreement to the contrary.
- b) Arbitrators prefer objective and measurable criteria as standards, but subjective standards may be used. Once subjective standards are used, arbitrators will look at how similarly situated employees have been evaluated and treated.
- c) Performance standards may be written or oral.

d) There is no set rule as to how many warnings are required prior to the issuance of disciplinary charges. The sufficiency of the warnings would depend on how clearly they were communicated to the employee and whether the employee was given a fair and reasonable opportunity to correct his/her behavior.

e) Generally, a supervisor's testimony alone as to insufficient quality or quantity of work is sufficient. In other words, the employer need not corroborate the testimony of the supervisor with other independent evidence or testimony.

** NOTE: These are general considerations that must be taken into account when evaluating cases involving incompetence; they are by no means hard and fast rules nor the only considerations.

II. Misconduct

Misconduct is generally defined as willful conduct that, by its very nature, is wrong, inappropriate, prohibited or illegal, and violates acceptable behavior, employee rules, regulations, policies, or legal statute.

Since misconduct can take on many forms, we have compiled a list of the most common actions or omissions that might lead to employee discipline. Following each heading is a list of relevant points relating to the behavior that can be used as an investigative tool. The points may also provide insight into why the employee behaved in a particular manner and may provide affirmative defenses based on mitigating or extenuating circumstances.

In each case the seven tests of "just cause" are applicable (see Burden of Proof chapter) as an investigative guide, keeping in mind that all seven of the tests of just cause may not always be applicable.

1. Fighting on the Job

An employee can be disciplined and possibly discharged for fighting on the job, particularly where the employee was the initial aggressor, used a weapon or has a history of similar conduct. In investigating cases involving fighting on the job, questions that need to be answered are:

- a) Was the employee the initial aggressor or was he/she defending himself/herself?
- b) Was the employee provoked into the fight?
- c) Was a weapon involved? Did the employee use a weapon and was there intent to cause bodily injury?
- d) Does the employee's work history indicate the potential for similar future behavior?

2. Horseplay

An employee can be disciplined but probably won't be discharged for horseplay unless there is a history of progressive discipline.

Questions to answer:

- a) Was this a childish act that unintentionally caused injury or embarrassment to a fellow employee or caused property damage?
- b) Has there been an atmosphere in the workplace that condoned, or even promoted such behavior?
- c) Is the employee clearly remorseful indicating such conduct will not reoccur?
- d) Can it be determined that the conduct was intentional and deliberate, as opposed to merely mischievous?

3. Sleeping and Loafing

Discharge for sleeping on the job is sometimes deemed to be an appropriate penalty, especially where there is a work rule or established practice supporting such a penalty. Sleeping is particularly critical where it may involve danger to the safety of employees or the public or property, or where the behavior may result in escape of incompetent wards or inmates. Situations that, although not justifying sleeping, may provide some mitigating circumstances for the behavior are:

- a) There is a rational explanation for the employee's actions, such as: the employee was on medication; the employee has been working excessive hours (overtime); there is a problem at home which has been preventing the employee from receiving adequate sleep or rest.
- b) Has the employer been consistent in dealing with this type of conduct in the past?
- c) Was there direct evidence that the employee was sleeping, or was the evidence based on hearsay?

4. Dishonesty

Dishonesty may entail either direct theft of property or the falsification of records including false job applications, false work records, time and attendance records, expense accounts, etc. Intentional theft of property is a dischargeable offense; therefore, the question becomes whether it can be proven that the employee committed the act. Factors to be considered and investigated with regard to less clear issues of theft are:

- a) Did this employee have access and/or opportunity to steal, and was he/she the only person who had such access and/or opportunity?
- b) Did the employee have reason to believe that the employer discarded the item taken? And, does the employer have a clear policy prohibiting the taking of discarded items from the premises?
- c) What is the value of the stolen property?
- d) Is the employee being forthright that he/she has taken the property or was he/she evasive and dishonest once confronted with unquestionable evidence of his/her actions (the theft)?
- e) Are co-workers/fellow employees concerned about the security of their personal property?

With regard to falsification of records, the following factors must be considered:

- a) Was this a deliberate act of falsification, or was it an honest mistake/error?
- b) What was the nature of the falsification? What effect or impact does the falsification have on the employer's mission?
- c) Is this the first such incident involving the employee?

5. **Insubordination**

Insubordination includes both the refusal to obey management's directives as well as abusive behavior toward management. The best "rule of thumb" is that an employee should comply with management's directive first, even if he/she disagrees with the directive, and file a grievance afterward. The only exception to this is where compliance with the directive would be a direct violation of law or where the directive would pose a danger to employee health or safety.

With regard to a **refusal to obey a directive**, the following factors must be considered:

- a) What is the magnitude of the offense, and has the employee engaged in similar behavior in the past?
- b) Was the order or directive clearly expressed by management (or management's official)?
- c) Was the employee made aware that his/her refusal to comply with the directive would result in disciplinary action?
- d) Was it self-evident that the employee's refusal to carry out the directive constituted insubordination, and therefore, no warning was necessary?

- e) Has discipline been applied in a non-discriminatory and progressive manner?

When investigating cases involving **abusive behavior** toward management, we should consider and determine the following:

- a) What is the extent of the abusive behavior? Was it merely a disrespectful attitude or did the behavior involve abusive language, threats, or physical assault?
- b) If the conduct involved threats, abusive behavior, or physical violence it should be kept in mind that arbitrators rarely tolerate such behavior.
- c) Were there any mitigating circumstances such as supervisory provocation, extreme stress on the employee such as fatigue from overwork, personal problems, illness, etc.?
- d) Is abusive (obscene, rough) language part of the normal "shop talk" in the particular workplace?
- e) Was the directive work-related or was the employee being directed to do something personal for the supervisor? Was there any possibility of sexual harassment?

6. Discourtesy

Employees involved in serving the public are expected to be courteous and solicitous toward the public and may be disciplined where they are guilty of abuse toward coworkers or members of the public. In investigating such cases, factors to consider are:

- a) What is the degree of the inappropriateness of the behavior of the employee?
- b) Was the employee being rude or merely unthinking in his/her behavior?
- c) What is the impact or consequence to the employer as a result of the employee's behavior?
- d) Has the employee been properly trained or advised as to the standards of proper conduct?
- e) Were there mitigating circumstances? Was the employee the object of abuse by a member of the public?
- f) Has progressive discipline been applied?

7. Off-Duty Misconduct

In some instances, management may be able to discipline an employee for off-duty misconduct, where "there is a direct or demonstrable relationship" or "nexus" between the off-duty conduct and the performance of the employee's job. Employees in certain positions are held to a higher standard than employees in other positions.

Factors that are relevant in determining off-duty misconduct are:

- a) Did the misconduct render the employee unable to perform his/her job satisfactorily and/or did it lead other employees to refuse to work with the employee?
- b) Did the misconduct injure the employer by creating publicity that damaged the employer's public image?
- c) Can a relationship between the employee's conduct and the employer's mission be shown? Here the employer must show that there is a direct relationship between the misconduct and the employee's ability to perform the job, or that the employer will be harmed by retaining the employee.
- d) Was the employee convicted of an offense or was he/she acquitted? Where an employee is convicted of a crime that otherwise may result in discipline, a court reduction of penalty will become a mitigating factor to consider, just as an acquittal will be a defense.

It would be difficult for an employer to discipline and/or discharge an employee simply because the employer dislikes or disapproves of the employee's social behavior unless the employer can establish a nexus or clear relationship between the off-duty conduct and the employer's mission or public image. For example, it would be inappropriate for an employer to discharge a female employee because of an out-of-wedlock pregnancy where no rational relationship exists between her job performance and her personal life.

8. Sexual Harassment

Employees are subject to discipline for harassing coworkers or clients. Such actions would include sexual harassment, sexual threats, insults, innuendo, inappropriate comments, sexual gestures or unwelcome physical contact/touching. Based on employer policy, statute and case law, it is well-established that sexual harassment interferes with job performance and creates an offensive or hostile work environment.

At best, in investigating such a case, the union representative should be looking for false allegations on the part of the "victim" of the harassment, or evidence that the employee was not given notice that such actions were offensive to the victim (unless, of course, the behavior was so blatantly or obviously offensive that there should have been no doubt that the behavior was clearly sexual harassment).

9. Poor Attitude or Disloyalty

An employee may be disciplined or even discharged for poor attitude or disloyalty where it can be shown there is a continuing course of conduct which adversely impacts on workplace morale or efficiency and creates so serious a breach between the employer and the employee that a continued relationship is impossible. Relevant facts to be considered in investigating such disciplinary action against an employee are:

- a) Did/does the employee's attitude cause or combine with other unacceptable behavior or conduct?
- b) Did/does the employee's attitude negatively affect the morale or performance of coworkers?
- c) Has the employee exhibited an unwillingness or inability to change his/her attitude?

Attitude problems must be very extreme before they will suffice to support severe disciplinary actions. The employee would have to be considered and shown to be incorrigible.

CHAPTER SEVEN **BURDEN OF PROOF**

In contrast to contract grievances where the union has the burden of proof, in disciplinary cases management must sustain the burden of proof alleging employee misconduct or incompetence. However, unlike the criminal justice system, the degree of proof required is not "proof beyond a reasonable doubt." In disciplinary cases brought before an arbitrator, the degree of proof necessary to establish guilt is typically "proof by a preponderance of the evidence." In hearings pursuant to Civil Service Law §75, unless modified by the collective bargaining agreement, the degree of proof necessary to establish guilt is one of "substantial evidence", which is a lesser standard.

In many cases part of management's burden of proof includes establishing that there was "**just cause**" for disciplining the employee. "**Just cause**" means that an employee cannot be subjected to discipline arbitrarily and without good and proper reason. There are seven tests of just cause. Arbitrators apply the following seven tests in evaluating just cause:

1. Was the employee forewarned of conduct that might reasonably lead to or result in discipline?
2. Were rules reasonably related to the operation of the employer's business and performance expectations?
3. Was an effort made by the employer to determine if, in fact, the employee violated the employer's rule, regulation or standard of expected behavior?
4. Did the employer conduct a fair and objective investigation?
5. Did the employer meet its burden of proof by obtaining substantial and compelling evidence that the employee was guilty?
6. Has the employer applied its rules, regulations and penalties evenhandedly and without discrimination?
7. Was the proposed discipline reasonably related to (a) the seriousness of the offense, and (b) the record of the employee's service with the employer?

CHAPTER EIGHT

OBTAINING INFORMATION/EVIDENCE

As the employee's representative you will have a need to request information from the employer to investigate whether the grievance has merit, prepare for a step meeting/hearing, and/or to monitor compliance with the contract.

I. Taylor Law

One of the most useful tools provided by the Taylor Law is the union's right to obtain information from employers. PERB has held that either party in a negotiating relationship is entitled to demand and receive from the other information that is reasonably necessary to that party's preparation for collective bargaining or for the administration of the contract (i.e. administering grievances).

A. What You Can Request

The employer's obligation to provide grievance information is extremely broad, and includes the disclosure of documents, factual information and data. Management must provide requested materials that could be useful to the union or could lead to the identification of useful material.

If the employer does not have the information in its possession, it must make a diligent effort to obtain it. The employer cannot insist that the union request this information through the Freedom of Information Law (FOIL). However, you may utilize FOIL to obtain information. **See, II. Freedom of Information Law, *infra*.**

Your requests for information must be made in good faith. In order for the request to be deemed reasonable, the information or documents requested should not be readily available through other means. The right to use FOIL, however, does not render a Taylor Law request unreasonable. The response to the request can be in a form other than demanded, if it satisfies the requesting party's needs.

B. Documents

Here are some examples of the records you can request:

- Accident/Incident Reports
- Disciplinary records
- E-mails
- Employer manuals and guidelines
- Management memos
- Personnel files
- Photographs
- Reports and studies
- EEOC reports
- Security guard records

- Security reports
- Seniority lists
- Equipment specifications
- Evaluations
- Inspection records
- Insurance policies
- Interview notes
- Investigative reports
- Job assignment records
- Job descriptions
- Safety data
- Payroll records
- Supervisors' notes
- Time study records
- Training manuals
- Videotapes
- Wage and salary records
- Witness statements
- Work rules

C. Confidentiality

An employer can sometimes successfully resist a Taylor Law request by asserting confidentiality. This defense can only be used to protect information or records that are particularly sensitive.

Employee medical records, psychological data and aptitude test scores are usually considered confidential. Employer records disclosing trade secrets or containing sensitive research data have also been deemed confidential.

To invoke the confidentiality defense, an employer must have an established policy barring disclosure and must have consistently adhered to that policy. An employer who asserts confidentiality must be willing to negotiate with the union to attempt to accommodate the union's needs.

If medical confidentiality is asserted, for example, the union might agree to allow the employer to delete medical references from personnel files or to delete workers' names. The union might also agree to request that the employee sign a HIPAA authorization, thus agreeing to the release of what otherwise might be confidential medical information.

D. Taylor Law Request Form Letter (sample)

The following is a form that should be utilized to request information under the Taylor Law:

_____, 20__

John Doe, Employer Representative
EMPLOYER NAME
Anywhere, New York 12345-1234

RE: Disciplinary Proceeding -- (Joe Smith)

Dear Mr. Doe:

Pursuant to the Taylor Law, as interpreted in a long line of decisions by the New York State Public Employment Relations Board, demand is hereby made that you provide copies of the following so that we may properly be able to analyze and evaluate this case, and properly defend grievant in this disciplinary arbitration:

1. Statements of witnesses to the allegations set forth in the notice of discipline.
2. Copies of all accident or incident reports regarding the allegations set forth in the notice of discipline.
- 3.
- 4.
- 5.

Please provide the above on or before _____, 20__. If convenient, please call my office when the documents are ready and we can pick them up. Please note that if this Taylor Law demand for information is not honored, we will be filing an improper practice charge with the New York State Public Employment Relations Board.

Very truly yours,

Labor Relations Specialist

****NOTE:** Keep in mind that some documents, such as patient records in a patient abuse case, must be subpoenaed. The Legal Department should be contacted as soon as possible in order to facilitate the obtaining of a subpoena as needed.

II. Freedom of Information Law

A. What's FOIL & What's Accessible

The Freedom of Information Law (FOIL) provides a right of access to "records" of "agencies." The law defines "agency" to include all units of state and local government, including state agencies, public corporations and authorities, as well as any other governmental entities performing a governmental function for the state or for one or more units of local government in the state.

The law defines "record" as any information kept, held, filed, produced, or reproduced by, with or for an agency in any physical form whatsoever. Thus, it is clear that items such as tape recordings, microfilm and computer discs fall within the definition of "record."

All records are accessible, except records or portions of records that fall within one of nine categories of deniable records. Deniable records include records or portions thereof that:

1. Are specifically exempted from disclosure by state or federal statute;
2. Would, if disclosed, result in an unwarranted invasion of personal privacy (***NOTE:** Unless otherwise deniable, disclosure shall not be construed to constitute an unwarranted invasion of personal privacy when identifying details are deleted, when the person to whom a record pertains consents in writing to disclosure, or when, upon presenting reasonable proof of identity, a person seeks access to records pertaining to himself or herself);
3. Would, if disclosed, impair present or imminent contract awards or collective bargaining negotiations;
4. Are trade secrets, or would cause substantial injury to the competitive position of an enterprise;
5. Are compiled for law enforcement purposes and which if disclosed would: (i) interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relative to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures;
6. Would, if disclosed, endanger the life or safety of any person;
7. Are inter-agency or intra-agency communications except to the extent that such materials consist of: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect

the public; (iii) final agency policy or determinations; (iv) external audits, including but not limited to audits performed by the comptroller and the federal government;

8. Are examination questions or answers that are requested prior to the final administration of such questions; or

9. Are computer access codes.

B. How to Obtain Records

1. Each agency must maintain a subject matter list. The list is not a compilation of every record an agency has, but rather it is a list of the subjects or file categories under which records are kept.

2. Each agency must adopt standards based upon general regulations issued by the Committee on Open Government.

3. A records access officer must be appointed to coordinate an agency's response to public requests for records.

4. An agency may require that a FOIL request be in writing. The law merely requires that a request "reasonably describe" the record in which the requester is interested. The responsibility for identifying and locating the record rests upon the agency. However, if possible, the request should supply dates, titles, file designations, or any other identifying information. This request may be done through actual letter (see "D" below), or sometimes, through the "Open FOIL NY" website that is a centralized location to file a FOIL request to more than 50 New York State executive agencies and authorities. The web address is: <https://www.ny.gov/programs/open-foil-ny>

5. Within five business days of the receipt of a written request, the agency must make the record available, deny access in writing giving the reasons for denial, or furnish a written acknowledgment of receipt of the request and statement of the approximate date when the request will be granted or denied.

6. An agency may charge 25 cents per photocopy, unless a different fee is prescribed by statute.

C. Denial of Access

A denial of access must be in writing, stating the reason for the denial and advising the requester of the right to appeal to the head of the governing agency or the designee of the agency. An appeal must be filed within thirty days of the denial. Upon receipt of an appeal, the agency has ten business days to either fully explain in writing the reasons for denial, or to provide access to the records.

Judicial review of a final agency denial may be sought under Article 78 of the CPLR. When the denial is based upon one of the nine exceptions, the burden is on the agency to prove that the record sought falls within one or more of the exceptions.

Courts are permitted to award reasonable attorneys' fees when a person challenging a denial substantially prevails.

****NOTE:** FOIA is the federal equivalent of the State's FOIL. It is comparable but not necessarily identical and should be reviewed before demanding federal documents.

D. FOIL Request Form Letter (sample)

_____, 20__

Records Access Officer
Employer Name
Employer Address
Anywhere, New York 12345-1234

RE: Freedom of Information Law Request

Dear Records Access Officer:

Under the provisions of the New York Freedom of Information Law, Article 6 of the Public Officers Law, I hereby request records or portions thereof pertaining to _____.

If there are any fees for copying the records requested, please inform me before filling the request (or...please supply the records without informing me if the fees are not in excess of \$_____).

As you know, the Freedom of Information Law requires that an agency respond to a request within five business days of receipt of a request. Therefore, I would appreciate a response as soon as possible and look forward to hearing from you shortly.

If for any reason any portion of my request is denied, please inform me of the reasons for the denial in writing and provide the name of the person or body to whom an appeal should be directed.

Very truly yours,

Labor Relations Specialist

III. NATIONAL LABOR RELATIONS ACT (NLRA)

One of the most useful tools provided by the NLRA is the union's right to obtain information from employers. The National Labor Relations Board (NLRB) has held that either party in a negotiating relationship is entitled to demand and receive from the other information which is reasonably necessary to that party's preparation for collective bargaining or for the administration of the contract (i.e. administering grievances).

A. What You Can Request

The employer's obligation to provide grievance information is extremely broad, and includes the disclosure of documents, factual information and data. Management must provide requested materials that could be useful to the union or could lead to the identification of useful material.

If the employer does not have the information in its possession, it must make a diligent effort to obtain it.

Your requests for information must be made in good faith. The response to the request can be in a form other than demanded, if it satisfies the requesting party's needs.

B. Documents

Here are some examples of the records you can request:

- Disciplinary records
- Employer manuals and guidelines
- Management memos
- Personnel files
- Photographs
- Reports and studies
- Security guard records
- Security reports
- Seniority lists
- Equipment specifications
- Evaluations
- Inspection records
- Insurance policies
- Interview notes
- Investigative reports
- Job assignment records
- Job descriptions
- Safety data
- Payroll records
- Supervisors' notes

- Time study records
- Training manuals
- Videotapes
- Wage and salary records
- Work rules

C. **Confidentiality**

An employer can sometimes successfully resist an information request under the NLRA by asserting confidentiality. This defense can only be used to protect information or records that are particularly sensitive.

Employee medical records, psychological data and aptitude test scores are usually considered confidential. Employer records disclosing trade secrets or containing sensitive research data have also been deemed confidential.

To invoke the confidentiality defense, an employer must have an established policy barring disclosure and must have consistently adhered to that policy. An employer who asserts confidentiality must be willing to negotiate with the union to attempt to accommodate the union's needs.

If medical confidentiality is asserted, for example, the union might agree to allow the employer to delete medical references from personnel files or to delete workers' names.

D. NLRA Request Form Letter (sample)

_____, 20__

John Doe, Employer Representative
EMPLOYER NAME
Anywhere, New York 12345-1234

RE: Disciplinary Proceeding (Joe Smith)

Dear Mr. Doe:

Pursuant to the National Labor Relations Act, as interpreted by the National Labor Relations Board, I am requesting you to provide various documentation relating to the above referenced matter. Specifically, I am requesting the following documents:

- 1.
- 2.
- 3.

Please be advised that if your agency is unwilling to comply with its obligation to disclose these documents, CSEA is prepared to take appropriate legal action to compel such release.

As time is of the essence, please provide the above requested materials by no later than _____, 20__. Please feel free to contact my office if you have any questions with respect to this letter.

Very truly yours,

Labor Relations Specialist

CHAPTER NINE **SETTLEMENTS**

I. Wording Disciplinary Settlements

When drafting a settlement, make sure that any and all specific items agreed to by the parties are clearly stated. Keep sentences as short, simple and straightforward as possible (**CLEAR, CONCISE, CORRECT**). Compound sentences and lengthy narrative paragraphs lend themselves to ambiguity.

Make sure that the settlement clearly identifies the charge that it addresses by date of the NOD, case number, or recitation of the charge.

II. Back Wages

Carefully consider the following items, which may impact on the represented employee and his/her benefits:

- Offset for taxes: Monetary awards for "back pay" are subject to both federal and state withholding tax
- Payment or restoration of lost accruals
- Seniority (restored, modified, etc.)
- Offset for unemployment insurance, public assistance
- Payment for items as a result of being off payroll, e.g. education tuition, medical expenses, pension contributions, etc.
- Avoidance of offset for money earned in other employment (Article 33.4[h] prohibits this under State contracts.)

III. Probation

Whenever possible, agreements that place an employee on probation as part of the settlement in a disciplinary action should be avoided. However, if unavoidable, the probation should never be general, only "conduct specific." In other words, the probation and potential for discharge without the right to a hearing should only be allowed if the employee commits the same (or nearly identical) offense during the probationary period.

Questions to ask:

1. Do the specific terms of the settlement make it clear that the probationary status is "conduct specific" and does not apply to other circumstances, such as reduction in work force or layoffs, bidding, promotions, etc.?

2. Is the length of the probation specific and clearly stated?

IV. Letter of Reprimand, Fine, Demotion, etc.

Evaluate the following items involving these forms of penalty:

- Letter of reprimand should be incident specific.
- Whether letter of reprimand is to be eventually sealed or removed from file.
- Letter should be used only for purpose of progressive discipline.
- The consequences of the violation or conditions (if any) of the letter of reprimand.
- Withdrawal of NOD in exchange for letter in file.
- Whether the terms of the payment of any fine are clearly spelled out, i.e. all at once or over a period of time.
- Identification of the position to which the employee is demoted.
- Penalty should not adversely affect future promotion, transfer, bidding rights.
- Penalty should not adversely affect future rights.

V. Resignation

Evaluate the following items in cases involving resignation:

- ▶ Settlement is not an admission of wrongdoing/guilt.
- ▶ Settlement is not a precedent for matters involving other employees.
- ▶ Whether settlement provides for positive or neutral recommendations.
- ▶ Whether settlement provides for removing or modifying adverse personnel file materials.

VI. Alcohol and Drug Situations

1. Agreements related to alcohol and/or drug rehabilitation must spell out the employee's obligation to attend rehab, AA or any other program decided upon.

2. Set forth a clear indication of the consequences of failing to adhere to the rehabilitation.
3. Set forth when the employee will be relieved of rehabilitation reporting requirements.
4. Does the agreement call for drug testing? This should be avoided, or at least minimized.
5. The circumstances for testing must be clearly spelled out. Is it to be done regularly, randomly or only on reasonable suspicion? Who pays for the testing? Will it be conducted on employer time?

****NOTE:** In cases involving disciplinary action for violation of the federal Omnibus Employee Testing Act, random follow-up testing is mandated and cannot be negotiated. However, in view of the statutory mandate there should be no additional testing requirements.

VII. Member's Acknowledgment of Representation

One of the most important sections of a settlement is the member's acknowledgment that his/her rights have been explained, indicating that he/she has been represented by CSEA and that there has been no duress or other undue influence in entering into the stipulation of settlement. It is imperative that language similar to the example set forth below be included in every settlement that [we] enter into on behalf of a member. **Members** must always sign the Disciplinary Settlement.

Example:

"The parties have reached the following terms of settlement which by virtue of their execution of this instrument, acknowledge their understanding and acceptance thereof. The Employee further acknowledges that he/she has been advised of his/her rights, pursuant to the (collective bargaining agreement or statute) , has been fairly represented by CSEA, and that he/she has entered into the settlement of his/her own free will."

NOTES



Local 1000 AFSCME, AFL-CIO

143 Washington Ave., Albany, NY 12210

cseany.org

