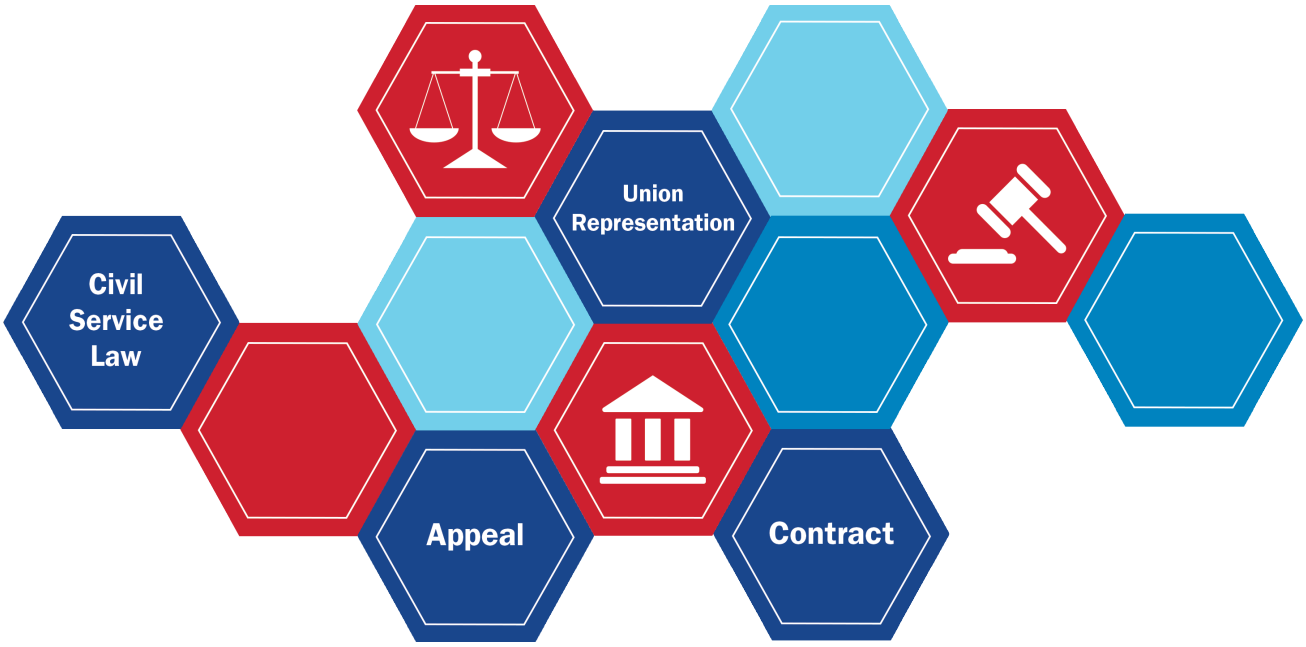
LEGAL ACTIVISTS' MANUAL



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I. LEGAL ASSISTANCE PROGRAM OVERVIEW

GUIDELINES FOR EFFECTIVE REPRESENTATION OF BARGAINING UNIT MEMBERS

- **Know grievance procedure or other available procedures to remedy bargaining unit members' problems.**

  It is essential that all local/unit representatives handling grievances and member problems strictly follow steps of procedures and observe all time limits. Any agreement to alter, extend, or otherwise change a procedure should be written.

- **Conduct a good faith, reasonable investigation of every member's grievance/ problem.**

  It is essential that issues of fact are investigated before a determination is made to reject the member's grievance/ problem as lacking in merit. Allow members the opportunity to submit additional evidence or further arguments in support of the grievance at various stages. Keep records/minutes of telephone calls, meetings and discussions.

- **Deliberate on determinations on the basis of the merits of the case.**

  A decision must be made as to whether to pursue the member's grievance/problem and whether to advance it through the various steps of a procedure. Decision must be made on merits of case. All members of the bargaining unit must be treated equally. Do not use different standards or allow a determination to be influenced by such considerations as whether the individual is a CSEA member or not, who he/she supports in Union elections, etc. Minutes/notes should be kept to demonstrate that decision was made after due deliberation of the merits of the case.

- **Represent the member in good faith, and keep the member informed of the status of his/her grievance/problem or determinations made.**

  The member should be advised early as to any decisions made as to whether or not his/her grievance/problem will be pursued. In the case of a rejection, he/she should be advised as to any rights he/she may have to pursue the case on his/her own. Whenever possible, notice should be in writing. Keep a written record of the grievance/problem, and note dates, contacts, decisions made regarding the grievance/problem; and the reasons therefor. Always represent the member's interest in good faith.

SOME GENERAL GUIDANCE POINTS

- **Know the contract and the laws affecting employees.**

- **Understand the Union representative's responsibility under the duty of fair representation and act accordingly.**

- **Be realistic in assessing the merit of a case.**

  The best representation is given to an employee when you know the strengths and weaknesses of both your case and the employer's. If your evidence is lacking, look for ways to break down the employer's case. Do not become so personally involved with a case, or become intent on "showing up" management, that you lose sight of your responsibility to represent the member(s)' interest. They are entitled to know of any risks involved.

- **Consider the impact of the contract and other CSEA members when investigating employee complaints.**

  Unless there is a very clear violation of law or contract which affects only the employee, you must consider the likely result of formally pursuing a case which may have some negative impact on the contract or on other CSEA members.

- **Do not overlook procedural violations or timeliness issues.**

  Even the most meritorious cases can be lost if they are determined to be flawed because of procedural errors. Also, be mindful of procedural or timeliness errors on the employer's part. Many arbitrators exclude evidence secured in an improper interrogation; dismiss charges based upon the same incident for which an employee has already been counseled; or dismiss charges and/or specifications which precede a certain time period (usually specified in the contract).

- **Give serious consideration to settlement of a case and/or alternative methods of resolution.**

  Most cases are not sure winners or losers, and often times, there are other means to resolving an issue aside from formal action in a grievance or a lawsuit; e.g., appealing to or inquiring of the Civil Service Commission, calling for a job audit in an out-of-title matter, or filing a complaint with EEOC or Human Rights. Settlement is often the best option for all – all parties generally win something, rather than risking getting nothing from an arbitrator, hearing officer, or judge.

- **Understand the burden of proof in a case.**

  There are differences in standards of proof required in a "just cause" case, a "preponderance of evidence" case, or a "beyond a reasonable doubt" case.

- **Always consider the various laws and proceedings which might address issues in a case.**

  Very often an issue may violate the contract and the law, and consideration must be given to different types of filings; e.g., an issue might require the filing of an IP and a contract grievance; a lawsuit and an EEOC or Human Rights Complaint.

- **Be accurate and clear in describing the issues and available proof in a case.**

  In a contract grievance, it is extremely important to cite any and all contract articles alleged to have been violated, as well as the remedy sought. It is equally important to describe how the contract was violated. The same principle

holds in any type case – if a lawsuit, describe the law that was violated, the remedy sought, and how the law was violated.

Describe your proof and the relevance to the issue. It is not enough to simply state, for example, that there is a strong past practice to support the claim. You must describe the past practice and the proof to support your claim.

- **Consult with your regional attorney or the "attorney of the day" in CSEA's Legal Department as necessary.**

  The Legal Department and the Regional Attorneys are there to assist you whenever you have questions related to employee issues and the means to address their problems.

- **Client contact policy.**

  CSEA Regional Attorneys should not have attorney/client contact with bargaining units member/grievants before legal assistance is approved by CSEA Headquarters. To do so otherwise exposes CSEA to liability and is confusing to the unit member, should CSEA disapprove legal assistance.

- **Private attorney representation.**

  CSEA's Board of Directors has mandated that all matters approved for legal assistance under CSEA's Legal Assistance program shall be handled by CSEA attorneys, except in those cases in which there is a legally compelling reason, such as a conflict of interest which would require referral of the case to another attorney. Under these circumstances, however, the matter usually will be referred to a nearby Regional Attorney or CSEA's own Legal Department.

- **Consult with the Legal Assistance Program Administrator's office whenever you have questions regarding program policy, administrative procedures, or problems dealing with difficult members.**

- **Document, Document, Document.**

  There is no better way to get a satisfactory result in a formal proceeding or to get quick action on a request for legal assistance than with fully supported and documented proof of the claims and theories in a case.

LEGAL ASSISTANCE FIELD REPORT CHECKLISTS
(All Reports are filed by Labor Relations Staff and need the following backup and attachments.)

Disciplines

1. A clear, concise, description of the circumstances leading to the discipline; include the grievant's version of events and management's version of events.

2. Supporting Documents:

   — Appeal Form/Grievance
   — Copy of Charges
   — Management's Written or Oral Responses at various steps in Discipline Procedure
   — Copy of Grievance Procedure for Discipline (not necessary for Civil Service Law Section 75 or NYS Article 33 Cases)
   — Copies of medical documentation, work rules, memoranda, time records, etc. which may impact the merit of the grievance.

Grievances

1. A clear, concise description of the contract violation(s); include the Union's arguments to support its claim of a violation, and management's arguments to support its claim that no violation has occurred.

2. Supporting Documents:

   — Appeal form/grievance
   — Copy of grievance procedure (not necessary for NYS Article 34)
   — Copy of contract articles alleged to have been violated
   — Copy of any other related contract articles to the issue
   — Copies of management's decision responses at each step of the grievance procedure or information regarding oral responses
   — Copies of medical documentation, work rules, memoranda, etc. which may impact the merit of the grievance
   — Provide information/documentation regarding past practice, negotiating history, etc., if relevant.

Lawsuits

1. A clear, concise description of the violation(s); include the Union's arguments to support its claim of a violation, and management's arguments to support its claim that no violation has occurred.

2. Copies of related documentation to the issue should be attached, e.g. letter of termination, probationary evaluations, work rules, etc.

IN ALL LEGAL ASSISTANCE MATTERS, ANY TIMELINESS OR PROCEDURAL PROBLEMS SHOULD BE BROUGHT TO THE ATTENTION OF THE STAFF PERSON PROCESSING THE MATTER. IN ADDITION, ANY DEADLINES, SUCH AS THE EXPIRATION OF A STATUTE OR A SCHEDULED HEARING SHOULD BE CLEARLY HIGHLIGHTED.

II. DISCIPLINARY MATTERS

FACTORS CONSIDERED IN THE EVALUATION OF MERIT IN A DISCIPLINE CASE

Background Information

1. Circumstances surrounding the issuance of charges upon the grievant.

2. Grievant's version of facts and circumstances; his/her defense.

3. Management's version of facts and circumstances; their case against grievant.

4. Expected witnesses for both management and the grievant. How many, their titles, and relationship with grievant. Substances of each witness' testimony and an assessment of the credibility of each witness.

5. Work history/length of employment. Provide information on the prior discipline/ counseling record of grievant with particular emphasis on similar misconduct. Years of service.

6. Settlement discussions. Provide list of offers by management and Union. Explain why settlement was not possible.

7. Other relevant facts might include:

   — Information regarding any procedural or other legal technicalities;
   — Medical documentation, time records, etc.
   — Information on grievant's participation in programs, special training, etc.
   — Copies of any applicable laws, rules, regulations, policies, etc. which bear on the case issue.
   — Documentation or other information which might have a bearing on the merit of the case.

Evaluation Process

Information provided above is weighed against other factors, such as:

1. Degree of culpability of the grievant.

2. Impact of work history, e.g., poor record vs. commendable record; long-timer vs. short-timer, etc.

3. Reasonableness of penalty or settlement offer if a measure of guilt is determined to exist on the part of the grievant.

4. Labor arbitration principles, such as, progressive discipline, "work now, grieve later," etc.

DISCIPLINE – INSUBORDINATION

Arbitrators have consistently held that when there is an established grievance procedure, an employee must "work first, grieve later." An employee may not resort to self-help or refuse a direct order even though it might be shown the order was clearly improper.

In refusing an order, it is clear an employee will be found guilty of insubordination unless he or she can prove:

- an order was not clearly given;
- following the order created a risk to health or safety; or was illegal and could subject the employee to criminal charges; and
- the employee acted in a responsible manner, as would any prudent person, and there were no other options available to remedy the problem.

Evidence/documentation to support the defenses could include:

- credible witnesses to testify that a direct order was not clearly given, but rather, "asked";
- proof of a risk to health and/or safety which was clearly communicated to the supervisor prior to, or at the time the order was given. This could include:

    - medical documentation;
    - witnesses to testify to the danger of a particular job task or faulty equipment;
    - records of mechanical problems with equipment necessary to follow the order, etc.;
    - a description of how the order clearly violated law and subjected the employee to criminal charges;

- the burden is on the employee to prove that he or she acted responsibly and had no other alternatives but to refuse the order. This could include:

    - testimony or documentation that the employee clearly communicated the risks or concerns to the manager prior to, or at the time the order was given; and
    - an analysis of all possible alternatives with a rational explanation why they were not workable.

Most cases of insubordination are difficult to win even when it is a case of an employee's word against a supervisor's word. Most often, arbitrators will determine what is an appropriate penalty for the misconduct. In reaching a decision, they consider the following:

— the nature of the act of insubordination; its consequences – gross and willful insubordination will warrant a severe penalty;

— the employee's work history: length of employment, performance evaluations, disciplinary and/or counseling record, commendations, etc.;

— credibility of the testimony of the witnesses;

— the employee's demeanor – whether he or she was willing to acknowledge the problem and correct it; or self-righteous and unwilling to accept responsibility for his or her own actions.

SETTLEMENT LANGUAGE

In many instances Union leadership will have the opportunity to settle disciplinary charges at an early stage of the process. There are many reasons why this may happen. Among them, a member may desire a speedy resolution. Alternatively, a particular matter or penalty may not have sufficient value to the member to pursue to hearing. The following is designed to help formulate and draft settlement agreements.

After investigation and negotiation, and settlement terms are agreed upon, the terms of agreement must be put into a written Stipulation of Settlement or simply a Settlement. It is imperative that this document is carefully drafted as it will govern the relationship of the parties from that day forward. Each party must fully understand what the terms of the agreement mean, what each party is agreeing to and what is expected of them in the future. Future expectations are particularly important in specific probation or general probation. The use of clear and concise language in the Stipulation of Settlement will avoid conflicting interpretations by the parties, thus avoiding litigation later on.

Before any settlement agreement can be recommended to a member, let alone executed, the staff member or local official must fully investigate the facts relating to the incident. (It is important to note that a failure to adequately investigate may subject CSEA to a claim for breach of duty of fair representation). The impact of any proposed settlement upon the effected member must also be evaluated prior to offering a particular proposal as a settlement on behalf of the member. The same is true when recommending an offer of settlement to a member made by management. Note, however, that all offers made by management must be conveyed to the member.

Generally, there are five parts to every settlement. These parts are the:

1. Introduction;
2. Facts;
3. Disposition;
4. Member Rights; and
5. Signature Blocks.

1. Introduction

The introductory paragraphs should fully identify the parties and should state the parties are desirous of settling the matter.

> Example: WHEREAS, as Notice of Discipline was served on Mr. X by the Town of Nowhereville, and
>
> WHEREAS, the parties are desirous of resolving all issues pertaining to said Notice of Discipline . . .

2. Facts

Identify the specific incident involved either by reference to the Notice of Discipline, the charge and specification in a CSL Section 75 action, and/or any other writings that are used in some of the local government contracts. If there is no writing available, give a detailed but clear and concise written narrative of the specific incident involved.

3. Disposition

Here the specific items agreed to by the parties should be detailed in short, simple and straightforward language. Compound sentences and lengthy narrative paragraphs lend themselves to ambiguity. Ambiguity inevitably results in litigation.

If the settlement involves:

a) Back Wages – the following items should be addressed with the help of assigned staff:

— offset for taxes – monetary awards for "back pay" are subject to federal and state withholding

— payment or restoration of accruals

— seniority

— offset for unemployment insurance, public assistance

— payment for items as a result of being off payroll; i.e., tuition, medical expenses, etc.

Avoid offset for money earned in other employment (State Contracts prohibit this in an Award. See Art. 33.4 (h)).

b) Promotion, Letter of Reprimand, Fine, Demotion, etc. – the following items should be addressed with the help of assigned staff:

— length of probation

— **making the probation, letter of reprimand, etc. incident specific**

— even while on incident specific probation, employee should be entitled to a hearing on issue of guilt or innocence if accused of similar act while on probation

— having letter of reprimand sealed or eventually removed from file

— not adversely affect promotion, transfer, bidding rights

— letter only used for purposes of progressive discipline

— the results of violation of conditions of the letter of reprimand, etc.

— withdrawal of NOD in exchange for letter in file

c) Resignation – the following items should be addressed with the help of assigned staff:

— settlement is not an admission of wrong-doing/guilt

— settlement not precedent for any matter not involving the employee

— positive or neutral recommendation

— favorable or neutral performance evaluation

— see back wages, 3(a) above

This is only a partial list of possible items.

4. Member Rights

This section is as important as the dispositional section for it is here that the member will acknowledge his/her rights, that he/she has read and understood the Stipulation of Settlement, 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 language set forth below be included in every settlement which we enter into on behalf of a member. This will protect CSEA in the event a member, for whatever reason, "Monday Morning Quarterback's" the settlement agreement. (See state Contracts Art. 33.4(f)). Further, members must always sign settlements of disciplinary charges.

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

5. Signature Blocks

Identify the individuals signing the agreement and the capacity in which they are signing. The employee who is the subject of the discipline **must** sign the settlement agreement. Neither a Local/Unit official nor a staff person should sign a settlement that does not have the member's signature.

Example: _____
Jane Doe, Grievant/Employee

_____
Pete Jones, CSEA
Labor Relations Specialist

_____
Betty Smith, CSEA
Unit President

In many instances the Union will not be drafting the Stipulation of Settlement. The task will be undertaken by management. This does not preclude the Union from editing or suggesting certain changes to the language of the Stipulation to insure it reflects the intent of the parties and to insure its clarity.

As a final note, an original signed settlement should be kept in the Union files and a copy or a second original should be provided to the member.

III. ARTICLE 78 PROCEEDINGS

GENERALLY

This section of the handbook relates to court actions brought against state agencies, towns, cities, etc. under Article 78 of the Civil Practice Law and Rules (CPLR). In some situations, in order to challenge an employment decision by a public employer, CSEA will have to commence an Article 78 proceeding in New York State Supreme Court.

Essentially, a proceeding under CPLR Article 78 is a lawsuit to overturn an action by the State or by a local government entity. The government action which gives rise to an Article 78 petition is a violation of law by a government official, or a violation of a regulation. The action can also be based on a failure to perform a duty required by law. The party bringing the Article 78 petition has the burden of proving the government action was arbitrary and capricious or was taken in bad faith or in violation of law. If a hearing was held before an administrative agency, we must prove that the decision based on the hearing was not supported by substantial evidence.

Statute of Limitations

Due to the fact that an Article 78 proceeding must be commenced within four months, it is important that CSEA make a determination within that time period of whether an Article 78 proceeding is the appropriate procedure to be utilized in challenging a determination.

It often requires a complicated legal analysis to determine when the four months begins to run. Therefore it is critical that the Labor Relations Specialists submit a Legal Assistance Field Report requesting an Article 78 proceeding immediately upon discovery of facts which may give rise to an Article 78 proceeding. The Field Report has to be reviewed by the Legal Committee and if it is approved, it is assigned to an attorney. The attorney needs a matter of weeks to draft the papers to submit to court. Therefore, the four-month time limit is not as long as it seems, and the Field Report should be submitted as soon as we become aware of facts which give rise to such a proceeding.

ARTICLE 78
PROBATIONARY TERMINATIONS

The courts have consistently held that a probationer may be terminated for any reason, without notice of charges or a hearing. Procedural violations, such as an improper, untimely notice of a termination, most often will result in the court dismissing the action on the basis that there was "substantial compliance" with the statute or a decision to extend the probation by some days to allow the employer to provide the appropriate notice time to the employee.

Despite the difficulties in overcoming the very high standards courts apply and the heavy burden of proof required for success in this type of case, certain circumstances will warrant a closer look by a court. These include:

— Proof that a termination was arbitrary and capricious, or in bad faith, i.e., for reasons totally unrelated to job performance;

— Proof that the termination was constitutionally impermissible[1]; i.e., on the basis of race, sex, age, religion, etc.;

— Proof of retaliation for exercising workers' compensation rights[2], or for absences related to jury duty, or "whistle blowing" Section 75b;

— Proof of violation of procedural rights (4 NYCRR Section 4.5); e.g.,

- one week's notice of termination was not provided;
- periodic notice of status and progress was not provided;
- minimum period of probation was not completed;
- probationary period was improperly extended.

Unless bad faith is proven, the remedy is reinstatement to probationary status to correct the violation. Occasionally an employee who is retained beyond the end of the maximum probationary term without any prior notice of termination may be granted permanent appointment.

Gathering proof of arbitrary and capricious actions or bad faith is often tricky since the employer is not required to provide a reason for the termination. Therefore, your proof must be independently gathered and so glaringly obvious that no other interpretation or conclusion is possible. Also, there can be no other factors present in the case which would in and of itself justify the termination. For example, it would be difficult to prove the termination of a probationer was retaliatory for the filing of a workers' compensation claim if the employee's record was replete with "unsatisfactory" or "needs improvement" evaluations, counselings, etc., which pre-dated the workers' compensation issue.

The information/documentation needed to support this type of suit would include the following:

— a copy of the termination letter; or date of notice of the termination, if orally given;

— a copy of the appointment letter specifying dates of the probationary period, minimum and maximum terms;

— copies of performance evaluations; or any other documentation, written or oral, regarding the job performance;

— copies of any documentation or proof of oral statements as to the reason for the termination, e.g., credible witnesses;

[1] Also consider filing Equal Employment Opportunity Commission or Human Rights Complaints.
[2] Also consider a Section 120 Workers' Compensation Complaint.

— copies of attendance records if there is a claim that the employee's probationary period was improperly extended due to authorized absences;

— copies of any documentation or witness statements to support any claims of bad faith, discrimination or retaliation, with a thorough explanation of how the proof will support the claim.

PROBATIONERS' RIGHTS

1. General Rule

a) They can be terminated without notice of charges or hearing, for any reason or no reason at all.

b) Temporary and provisional employees have same lack of protection.

2. Exceptions

a) reasons in violation of Constitution or statute.

(1) Examples: discrimination;
jury duty;
retaliation for exercising Workers' Compensation rights

b) arbitrary, capricious, or in bad faith
– where totally unrelated to job performance

c) procedural rights – 4 NYCRR § 4.5

(1) one week's notice of termination
(2) periodic notice of status and progress
(3) cannot be terminated before expiration of minimum period of probation

3. Remedies

Unless bad faith is proven, remedy is generally to reinstate the employee to probationary status, for a length of time commensurate with the violation; i.e., if less than one week's notice of termination, reinstated for one week; if terminated five weeks before the end of maximum probationary period, without notice of status and progress, the employee may be reinstated for a time period adequate for employer to give meaningful notice of status and progress.

CAVEAT: Remedy for improper termination of probationer is never tenure; that can happen only where employee was actually retained beyond the end of maximum probationary term without any prior notice of termination.

CAVEAT: New York Court of Appeals has reversed a prior ruling that the commencement of probation for former provisional or temporary employees is at an earlier point than the date of permanent appointment.

New York Court of Appeals has also recently held that honorably discharged veterans are not entitled to notice of charges or hearing when terminated during probation.

4. CSEA Board of Directors Standards for Consideration of Probationary Termination Cases

Legal Assistance applications for review of probationary terminations will be entertained in limited circumstances. To be considered for approval, the application must clearly demonstrate that the termination was based upon one or more of the following criteria:

1. Clear procedural violation of applicable state or local law or regulation.
2. Clear evidence of improper grounds for termination, including at least one of the following:

    a. Violation of Taylor Law (Union Animus)
    b. Violation of Workers' Compensation Law § 120 (Retaliation)
    c. Violation of Civil Service Law § 75-b (Whistleblower)
    d. Violation of Labor Law § 201-d (Legal Activities)
    e. Violation of Federal or State Constitution (First Amendment)
    f. Violation of Human Rights Law, Title VII, or other specific State or Federal Civil Rights Law
    g. Violation of ADA
    h. Violation of FMLA
    i. Other applicable statutory violation

3. Clear violation of provisions of penalty probation agreements.

All applications for approval of Legal Assistance for probationary termination cases must include specific statutory references and must be accompanied by a detailed explanation of the underlying events signed by the employee seeking Legal Assistance.

ARTICLE 78 / GRIEVANCE ARBITRATION
OUT-OF-TITLE WORK

An out-of-title issue is fact-specific, and the outcome is very much dependent upon the remedy sought and the quality of the proof. The remedy sought (out-of-title pay, an upgrading or reclassification, or a cease-and-desist order) and whether out-of-title work or reclassification are covered by the contract will generally determine the best forum to resolve the issue.

Depending upon the remedy sought, a contract grievance may not be the appropriate (or the only) vehicle for resolving out-of-title claims. Some contracts contain no out-of-title clause, and thus, no provision for resolving out-of-title issues. (A cease-and-desist is sometimes available in the absence of specific contract language, depending upon the broadness of the definition of "grievance" therein.) Section 61(2) of the Civil Service Law prohibits out-of-title work "except upon assignment by proper authority during the continuance of a temporary emergency situation." See Part IV, B herein. Thus, a cease-and-desist order may be obtained through an Article 78 proceeding in some instances where it would not be available through the grievance procedure.

Often what an employee really wants, however, is an upgrading or reclassification of his/her present position, and this is not usually available under law or the contract. A request for a job audit may be in order in such instances.

It is surprising how often an employee works out-of-title without extra compensation, and literally years go by before a complaint is made to the Union. Many times, the situation is ongoing, so a grievance or lawsuit is not likely to be deemed untimely, but an award for out-of-title pay may be limited and may not reach back to more than a particular time frame usually specified in the contract before the grievance was filed. Other situations involve sporadic assignments of out-of-title work, and the general rules requiring adherence to contractual or statutory time limitations to bring an action may apply.

Evidence or documentation to support a claim of out-of-title work should include:

— a comparison of job descriptions or specifications for related titles, i.e., the employee's usual title and the higher-level title or titles he or she claims to be working in;

— a log of the specific dates the employee worked out-of-title, the specific duties he or she performed, and the portion of the workday he or she worked out-of-title;

— if a grievance is filed, contract articles related to out-of-title work must be evaluated to determine the limitations of the remedy;

— examine the circumstances under which the work was performed; e.g., was the grievant directed by the employer to take over the higher-titled job; did he or she simply fall into the habit of doing the work of a higher-titled employee who was often absent; is there any written documentation concerning these events;

— has a request for a job audit or a reclassification/reallocation been processed.

Generally, a claim of out-of-title work requires us to establish that the employee performed all or substantially all of the duties of the higher title in question at least 51% of the time. Isolated incidents of out-of-title work or taking over one or two minor duties while the boss is on vacation, for example, usually will not establish a claim of out-of-title work. Calling for a job audit or utilizing a reclassification/reallocation procedure is another way to address out-of-title issues. The employee must be cautioned, however, that a reclassification of a position can result in the employee's removal from the job in some competitive class titles.

CSEA Board of Directors Standards for Consideration of Out-of-Title Work Cases

To be considered for approval, the Legal Assistance application must clearly demonstrate the following criteria:

1. Duties being performed are those of a higher title and are not duties of an applicant's title, i.e. there should be more than mere overlap.

2. The out-of-title duties must be performed on a regular basis for a substantial part of the employee's workday.

3. There is no temporary emergency necessitating the performance of the subject duties.

    a. "Temporary" for the purpose of the term "temporary emergency" has been defined by one court to be as long as 60 days. See, Wojtylak v. GOER, 558 N.Y.S.2d 210 (3rd Dept. 1990).

    b. An emergency is something that cannot be planned, i.e. an unexpected illness, as opposed to elective surgery which can be planned long before leave is taken.

4. If not performed for successive periods over time, then the out-of-title work must be performed by the employee on a non-emergency basis consistently and regularly over time; for example, every time the supervisor is absent, the employee is required to act as substitute and perform the supervisor's duties.

All applications for approval of Legal Assistance in out-of-title work cases must be accompanied by a detailed explanation of the underlying events signed by the employee seeking Legal Assistance.

IV. CIVIL SERVICE LAW

CIVIL SERVICE LAW § 61

A. Selection of Eligibles for Appointment

1. The New York State Constitution and Civil Service Law mandate that appointments and promotion in the public service shall be made according to merit and fitness on the basis of tested qualifications. The statutory provisions regulating appointments under Civil Service are mandatory and must be complied with strictly, and they may not be waived by contract.

2. Appointments and promotions in the competitive class of the Civil Service must be made from eligible lists. Appointments or promotion from an eligible list shall be made by the selection of one of the three persons certified by the appropriate Civil Service Commission as standing highest on such eligible lists who are willing to accept such appointment or promotion.

3. Appointments shall be made from the eligible list most nearly appropriate for the position to be filled. In other words where the duties of two different titles are essentially the same, the position in one title may be filled from an eligible list of the other title.

4. There is no vested right to an appointment from an eligibility list, as the appointing authority may select any one of three on the list.

B. Out-of-Title Work

1. No person is to be appointed, promoted or employed under any title not appropriate to the duties to be performed and, except upon assignment by proper authority during the continuance of a temporary emergency situation, no person is to be assigned to perform the duties of any position unless he/she has been duly appointed, promoted, transferred or reinstated to such position in accordance with the Civil Service Law.

a) Temporary out-of-title assignments are not necessarily violative of CSL § 61. It is the continued and persistent assignment out-of-title that constitutes a violation.

b) The performance of work out-of-title cannot be used for experience credit toward promotion.

c) Out-of-title work which is invalidated by reclassification based upon the duties being performed.

COMPARISON OF CIVIL SERVICE LAW SECTIONS 71, 72 AND 73

Civil Service Law Section 71 concerns removal of permanent public employees for physical or mental disability after an occupational injury or disease.

Section 72 is applicable to involuntary removal of permanent employees for physical or mental disability after a non-occupational injury or disease.

Generally, civil service employees who have been injured are entitled at least one year leave of absence under Sections 71 (occupational) and 73 (non-occupational).

Section 72 provides the process for involuntarily placing employees who have been disabled due to a non-occupational injury on leave of absence.

Both Sections 71 and 73 also provide limited rights of reinstatement to employees who are terminated for disability but who later recover.

The procedures set forth in these sections must conform with due process standards. Section 71 provides that an employee shall be entitled to a leave of absence of at least one year (two years if assaulted in the course of employment) unless a disability is of such a nature as to be permanently incapacitating. The one or two year period can be comprised of separate leaves of absence, related to the same injury added together. The employer is free to permit a longer leave. Further, it provides that the employee may, within one year after the termination of the disability, apply to the Civil Service Department for a medical examination which is conducted by a medical officer selected for that purpose by the Department. If, after the medical examination, the medical officer certifies that the person is physically and mentally fit to perform his/her duty, then the employee is to be reinstated to his/her former position if it is still vacant.

Section 72 provides where, in the judgment of the appointing authority, an employee is unable to perform his/her duties by reason of a disability other than one resulting from occupational injury, the employer may require the employee to undergo a medical examination. This can include a mental examination. If the results of the medical examination indicate that the employee is unfit to perform his/her job duties, the employer may place the employee on a leave of absence up to one year. This section further provides that the employee may be terminated in accordance with the provisions of Section 73 upon the absence of a consecutive year or more.

Courts have held that placing a permanent civil service employee on involuntary leave where the disability is disputed, implicates a property interest and that the employee is entitled to notice of the facts on which the employer's determinations were made and to a full adversarial hearing. Without these due process protections, involuntary leave where the disability is disputed has been held to be unconstitutional. (Section 72 has been recently amended to contain the due process procedures).

Section 73 governs leave rights, reinstatement and termination of employees who are disabled by other than an occupational disease or injury. It provides that where an employee has

been continually absent and unable to perform the duty of his/her position for one year or more by reason of a non-occupational disability, his/her employment may be terminated. An employee terminated under Section 73 may apply to the Civil Service Department for reinstatement within one year from the date of termination if the disability ceases. The employee must then undergo a medical examination from a doctor from the Civil Service Department. If the doctor determines that the employee is fit, the employee will be reinstated to his/her former position, if vacant. Although Section 73 lacks explicit due process protections, the Court of Appeals has held that employees are entitled to a hearing when there is a dispute concerning the facts.

Section 72(5) provides that if there is probable cause to believe that an employee is a danger to persons or property, he/she may be suspended immediately and allowed to use any sick leave pending a hearing. The courts have held that prior to removing a tenured employee, the employee is entitled to notice and an opportunity to be heard or to suspension with pay where predetermination is impracticable.

Although Section 71 does not contain any specific due process procedures, the rules and regulations now specifically provide for such protections.

SECTION 72 HEARING

Pursuant to Section 72 Civil Service Law, a permanent employee can be put on an involuntary leave of absence for a physical or mental disability resulting from a non-occupational injury or disease. Where, in the judgment of the appointing authority, an employee is unable to perform his/her duties by reason of a disability, physical or mental, the employer may require the employee to undergo a medical examination. If this results in a finding that the employee is unfit to perform his/her job duties, the employer may place the employee on a leave of absence up to one year. Courts have held that placing a permanent civil service employee on involuntary leave where the disability is disputed entitles the employee to a hearing. Section 72 has been amended to contain the due process procedures.

Section 72(5) provides that an employee may be suspended immediately and allowed to use any sick leave or other accruals pending a hearing if there is probable cause to believe that the employee is a danger to himself or herself, others, or operations.

These cases are most often won or lost on the basis of the quality of the employee's own doctor(s)' assessment and testimony of the employee's ability to perform the essential functions of the job with or without reasonable accommodation. Section 72 hearing officers may not be fully empowered to decide upon any procedural violations of the statute and its due process provisions. Therefore, it is imperative that if there are procedural issues, immediate consideration also be given to institution of an Article 78 lawsuit to avoid any statute problems (an Article 78 proceeding must be instituted within four months of the violation).

When investigating a case of a Section 72 involuntary leave, consider and/or provide documentation as follows:

— copy of letter(s) and other correspondence leading to and placing the employee on involuntary leave;

— copies of employer doctor's diagnoses, test results, observations, and other data supporting the employer's determination to place the member on involuntary leave. (The employee is entitled to these documents upon request to the employer);

— the employee's personal physician(s) medical statement(s) attesting to the employee's fitness to perform all duties or the essential duties of his/her job. The employee's doctor(s)' statement(s) should address the medical condition upon which the employer relied in placing the member on involuntary leave, and should also evaluate the member's ability to perform his/her job as it is described in the classification standards for the job title;

— the employee's work history as it relates to the medical condition;

— classification standard for the job title; and/or a description of the employee's job duties and how disability affects performance;

— requests to the employer for reasonable accommodation, if warranted;

— whether procedural violations warrant consideration of a lawsuit;

  — was the employee provided with requested documents (medical evaluations, etc.) upon which the employer relied to place the employee on involuntary leave;

  — was employee properly notified of the leave and properly afforded a right to a hearing;

  — are there any disabilities which might be covered under the Americans with Disabilities Act;

  — was the employee removed from the payroll prior to a determination that Section 72.5 applied.

V. DISCRIMINATION AND SEXUAL HARASSMENT

Federal, state and certain local laws prohibit employers from discriminating against employees in the terms and conditions of their employment. These laws also prohibit labor Unions from excluding or expelling members or otherwise discriminating against Union members based on their membership in protected categories.

RESPONDING TO SEXUAL HARASSMENT

As a Union activist, you may encounter sexual harassment in at least three different ways:

1. You observe sexual harassment occurring yet no one has complained to you about it;

2. A member advises that he/she has been subjected to sexual harassment by his/her supervisor and/or co-employee; or

3. A member seeks Union representation in a disciplinary case in which he/she is charged with sexual harassment.

When Sexual Harassment Is Occurring But No One Complains

The mere fact that a specific member has not complained to you about sexual harassment does not mean that you should not intervene if you observe conduct which you believe constitutes sexual harassment. In other words, the Union representative cannot "look the other way" in the face of objective evidence of sexual harassment. It is important that an activist contact his/her assigned Labor Relations Specialist (staff) for assistance and guidance in investigating and properly referring all complaints of sexual harassment.

EXAMPLES OF SEXUAL HARASSMENT INCLUDE:

Unwelcome sexual advances
Suggestive or lewd remarks
Unwanted hugs, touches, kisses
Requests for sexual favors
Retaliation for complaining about sexual harassment
Derogatory or pornographic posters, cartoons or drawings

POSSIBLE STEPS TO TAKE:

Contact your Union representative
File a complaint with the employer
Call the NYS Division of Human Rights or the U.S. EEOC
Document what occurred

Sexual Harassment By A Supervisor

It is important to recognize the extreme emotional pain that can be caused by sexual harassment. Therefore, if you are contacted by a member who has been subjected to sexual harassment, it is important that you demonstrate both sensitivity and discretion.

If the member has been victimized by his or her supervisor, the member should be advised of the employer's sexual harassment policy and the procedures to be followed under the employer's policy. If no policy exists, you should encourage the member to notify the personnel office, either through the Union or individually. You should encourage the member to start preparing a diary or log of any future acts of sexual harassment. Due to your role, you may also want to keep your own records because you may be called as a witness on behalf of the member.

Absent a "tangible employment action," e.g., discharge, demotion, etc., an employer cannot be held liable for sexual harassment by one of its supervisors unless it knew or should have known that sexual harassment was occurring and failed to take prompt remedial action. By following the procedures in the sexual harassment policy, you can insure that the employer is on notice that sexual harassment has occurred or is occurring and that you are seeking an end to the harassing behavior.

An employer's duty upon learning of sexual harassment is to take "prompt remedial action." This means that the employer must consider the facts and determine the appropriate response. For example, the employer may decide to take disciplinary action against the supervisor. Sexual harassment has been found to be a legitimate basis for discipline. However, due to the status of the supervisor in the hierarchy, the employer may attempt an alternative to discipline: transfer the supervisor or the victim. Many times the employer's response, short of discipline, will be unsatisfactory to the victim. If so, the victim can take legal action against the employer.

Under federal law, a victim of sexual harassment can file a complaint against the employer with the EEOC. A complaint must be filed with the EEOC within 300 days of the discriminatory action.

After the EEOC investigates, a victim of discrimination can sue in federal court against the employer.

In addition, under New York State law a victim of sexual harassment can file a complaint against the employee with the New York State Division of Human Rights ("NYS DHR") or file an action in state court. A complaint must be filed with the NYS DHR within one year. A lawsuit must be filed within three years. However, if a complaint is filed with the NYS DHR, a lawsuit cannot be pursued simultaneously and vice versa. Some municipalities in the State of New York have human rights agencies as well.

As noted, it is unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex, or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

Sexual Harassment by Co-Employees and <u>The Issue of Discipline</u>

Like other forms of misconduct, a charge of sexual harassment can pit one Union member against another member. Sexual harassment complaints will frequently result in disciplinary charges. It is firmly established that if an employee is found to have sexually harassed a co-employee, the employee will be disciplined. Both the courts and arbitrators have ruled that termination may be an appropriate penalty for sexual harassment. In fact, some courts have ruled that <u>termination</u> is the only appropriate penalty, but again, an examination of the "totality of circumstances" will determine what type of penalty is appropriate.

UNION REPRESENTATIVE'S ROLE

Union representatives – officers and stewards – are the first people with whom an employee may speak about their experiences with a harasser. This is because the activist is seen as the official representative of the employees and someone who will take the speaker seriously and try to help. **<u>NOTE</u>:** the same Union representative <u>should never try to represent both the accuser and the accused.</u> Separate representatives should be obtained for one or the other employee.

Under the law, the Union MUST INVESTIGATE a sexual harassment complaint and, where appropriate, advise the employer of the fact of a complaint. Failure to do so may leave the Union itself open for a charge of abetting sexual harassment.

Good listening skills are helpful when someone is telling you about their experiences. When the subject of the conversation is sexual harassment, people need to feel relaxed, while at the same time staying focused on the facts of what happened.

Good listening requires the listener to:

1. Understand that the experience of being harassed can be very upsetting and, in some instances, traumatic.

2. Be attentive to what the employee is telling you. You should not belittle what he/she is saying or feeling.

3. Encourage the speaker to give as much background and specifics as he/she can. Ask clarifying questions or questions seeking more specifics, where appropriate.

4. Understand what the speaker wants in order to remedy the problem and also what he/she wants from the Union. Be clear with the speaker that it may be necessary for the employee to tell the harasser that the employee wants the conduct to stop. This can be difficult when the offending person is in a superior work position or a position of authority.

5. Do not "cross examine" the employee. In other words, do not challenge the employee's account of what occurred by suggesting he/she is not being truthful or is misperceiving what occurred. However, once a more complete investigation is done, it may be necessary to go back to the employee and ask him/her to explain the contradictory information you have learned.

6. Do not ask "leading questions" where you put information into the question and seek only a "yes" or "no" response. An example of a leading question is: "Did he say he wanted to have sex with you?" When you ask leading questions you are not obtaining information from the employee because you are loading up the question with information that you are supplying. Ask simple, open-ended questions, like "what did he say?"; "what did she do?" or "what happened then?" The standard "who, what, where and when" questions are a good place to start.

7. Explain that sexual harassment sometimes is a "power play" and an attempt to dominate another person; it generally has nothing to do with sex or attraction.

8. Be mindful of different cultural values. Race, nationality or ethnic background may inform how either the employee or the offending person views the events. Understanding this possibility is imperative to assessing the situation and determining the Union's position with respect to conflicting requests for representation if the matter is "litigated" in any disciplinary or other employer procedure.

9. If the speaker is unsure of whether to file a complaint, encourage him/her to at least, (1) say "NO" to the offending party, either verbally or in writing, with a notation of the time, place and date; (2) encourage the speaker to talk with co-workers; perhaps others have had a similar experience and there can be support and comfort in not going the complaint route alone; and (3) encourage the speaker to keep a written record of all interactions with the offending party. This way, should the speaker decide later to file a formal complaint, you have insured that he/she is in the best posture to have the complaint taken seriously.

POSSIBILITIES FOR INFORMAL RESOLUTION

The Union may be able to head off problems by conducting some informal programs aimed at educating and sensitizing members to the issues surrounding sexual harassment. Some examples include:

1. Advising employees that tolerating or engaging in sexual harassment is not a Union value and undermines what we are about.

2. Encouraging employees to communicate with the Union and to not solely rely on management.

3. Providing a "support group" opportunity for members to come together to discuss their experiences and even develop an action plan, if the problem turns out to be a particular supervisor or co-worker.

4. Providing training for particular activists to handle sexual harassment problems among bargaining unit members. Some should be trained to work with the complaining party and others should be trained to work with the harasser, particularly when disciplinary action is imminent. Where both the complainant and the alleged harasser are in the unit, the Union must assign different representatives to each member.

5. Considering establishing an informal dispute resolution mechanism whereby the complainant and the alleged harasser can meet with a neutral third party who is trained in bringing people together to work out their differences and develop an ability to work together in a respectful manner.

SOMETIMES THE UNION MUST TAKE A STAND

Unions are best equipped to fight sexual harassment in the work place when they have a comprehensive program in place.

Such a program should include the following:

1. An anti-sexual harassment policy.

2. An education program delivered regularly to all members explaining that allowing any form of discrimination, including sexual harassment, to exist in the work place subverts Union solidarity.

3. A periodic membership survey assessing the extent of members' experiences involving sexually harassing conduct.

4. Negotiated anti-sexual harassment policy in collective bargaining agreement, including procedures for handling any complaints and schedule of discipline for offenders.

5. Holding employer accountable to have its anti-sexual harassment policy in place and regularly published to all employees, regardless of position or location.

6. A Union handbook setting forth the laws and procedures for filing formal complaints with outside agencies.

SAMPLE
SEXUAL HARASSMENT SURVEY
LOCALS AND UNITS CAN USE TO GAGE WHETHER THEY HAVE A PROBLEM

1. I am a ____ Woman
   ____ Man

2. Do you believe you have ever been the victim of sexual harassment?
   ____ Yes
   ____ No

   If No, PLEASE GO TO QUESTION 12.

3. If Yes, did the sexual harassment occur
   ____ on your present job
   ____ on a previous job with the state (city, county)
   ____ on a previous job with a different employer

4. When did it occur?
   ____ I am currently experiencing a sexual harassment problem
   ____ less than 2 years ago
   ____ more than 2 years ago

5. Who was (were) the harasser(s)?
   ____ my immediate supervisor
   ____ higher management official(s)
   ____ Union official
   ____ my co-workers
   ____ clients, vendors or other non-employees

6. What was the nature of the harassment?
   (Check all that apply)
   ____ unwelcome sexual relations
   ____ unwelcome physical contact (e.g. touching, pinching)
   ____ graphic commentary on your body
   ____ harassing phone calls
   ____ propositions of a sexual nature
   ____ sexually suggestive objects displayed in the work place
   ____ other: _____
   _____
   _____

7. Were any threats or insinuations made that your failure to submit to the harassment would adversely affect your employment?

____ Yes
____ No

8. Did you have adverse action taken against you because you refused to submit to the harassment?

If yes – check all that apply

____ denied promotion
____ denied salary adjustment
____ reprimand
____ poor performance evaluation
____ involuntary transfer
____ discharge
____ other
____ No

9. What did you do about the harassment?

____ nothing
____ informally resolved the problem by talking to the harasser
____ complained to management
____ filed a grievance through the Union
____ filed discrimination charges with the Federal Equal Employment Opportunity Commission or State Division of Human Rights
____ consulted an attorney and filed a lawsuit

10. If you approached the Union for assistance, did you find the Union helpful?

____ Yes
____ No

11. What was the outcome of your effort to stop the harassment?

_____
_____
_____
_____

12. Do you have any opinions to share about how the Union can more effectively respond to problems of sexual harassment?

_____
_____
_____
_____

VI. ANTI-UNION ANIMUS

STATUTORY PROVISIONS

Under New York law, there are two statutes which prohibit a public employer from discriminating against Union activists or employees engaging in protected activity: the Taylor Law and the Lawful Activities Law.

1. The Taylor Law

A. Generally

Pursuant to the Taylor Law (Civil Service Law 209-a(1)), it is an improper practice for a public employer to deliberately:

a) interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights;

b) to discriminate against any employee for the purpose of encouraging or discouraging membership in, or participation in the activities of, any employee organization;

B. Per Se Violations

There are some actions by public employers against Unions which are so bad they constitute per se violations of the Taylor Law. Some employer conduct is per se anti-union activity and the Union does not have to show that the employer was motivated by anti-union animus. Some of these per se violations include: (1) granting a bargaining unit member benefits greater than that provided under the collective bargaining agreement; (2) refusing to deduct and forward Union dues under Civil Service Law 208. However, most cases do not involve per se types of cases and do involve showing that the employer's actions were motivated by anti-union animus.

C. PERB Procedures

When an employee has been the victim of anti-union discrimination under the Taylor Law, either CSEA or the individual can file an improper practice charge with the New York State Public Employment Relations Board (PERB). The improper practice charge must be filed with PERB within four months of the action(s) which is being challenged by the improper practice charge. Therefore, it is critically important to contact your Labor Relations Specialist immediately if you suspect anti-union discrimination so that a timely improper practice charge can be filed. After the charge has been filed, PERB will hold a prehearing conference which is aimed at sorting out the relevant issues and determine whether the case can be settled. At the hearing, CSEA will be obligated to present evidence demonstrating that anti-union actions have taken place.

a. Injunctions

In order to obtain an injunction, CSEA has to present evidence, such as affidavits and documents, to PERB upon the filing of an improper practice charge, showing that CSEA has a likelihood of success and that CSEA and its members will be irreparably harmed unless the employer's conduct is enjoined. PERB will then petition the court for an injunction against the employer or permit the Union to petition the court.

It is important to understand that **injunctions** under the law **are difficult to get**. However, the first injunction obtained under the law was obtained by CSEA against the City of Troy's city manager who stopped membership dues and agency shop fees deductions. CSEA was able to obtain the injunction through a coordinated effort between the unit members, the field staff and the CSEA Legal Department.

2. The Lawful Activities Law

A. Labor Law 201-d(2)(d) states that it is unlawful for an employer to discriminate based on:

> an individual's membership in a Union or any exercise or rights granted under Title 29, USCA, Chapter 7 or under article fourteen of the civil service law

In addition, unlike the Taylor Law, the Lawful Activities Law protects a variety of other activities including political and recreational activities outside of working hours.

B. Under the Lawful Activities Law, a person can commence a lawsuit in New York State Supreme Court for damages and injunctive relief. The statute of limitations is three years. Before CSEA can commence an action under the Lawful Activities Law, a request for legal assistance must be filed by the Labor Relations Specialist and be approved by the CSEA Standing Legal Committee.

3. Private Sector Employees

For CSEA members who work for private sector employers, the National Labor Relations Act (NLRA) is the law which protects employees against anti-union animus. Section 8 of the NLRA prohibits employers from interfering, restraining or coercing employees with respect to their right to engage in Union related activity or discriminating against employees for engaging in such activity.

A. NLRB Procedures

The procedure under the NLRA for challenging anti-union activity is very different from the public sector. Under the NLRA, an unfair labor practice charge must be filed with the National Labor Relations Board (NLRB). The charge must be filed within six months of the alleged conduct. After the charge is filed, the NLRB's regional office will conduct an investigation. After an investigation, the NLRB will either find that the charge has merit or does not have merit. If the NLRB finds merit to the charge after conducting its own investigation, it will issue a complaint. The complaint is heard by an administrative law judge and an NLRB attorney will present the case against the employer. An administrative law judge decision is appealable to the full NLRB Board.

THE STANDARDS OF PROOF

In order to win a case of anti-union discrimination we must present probative evidence satisfying the burden of proof. There are three essential elements necessary to prove a case of discrimination based on Union activity:

1. **THE EMPLOYEE OR EMPLOYEES HAVE ENGAGED IN ACTIVITY WHICH IS PROTECTED UNDER THE TAYLOR LAW OR THE NLRA;**

2. **THE PROTECTED ACTIVITY WAS KNOWN TO THE PERSON(S) MAKING THE ADVERSE EMPLOYMENT DECISION;**

3. **THE ADVERSE EMPLOYMENT DECISION WOULD NOT HAVE BEEN MADE BUT FOR THE PROTECTED ACTIVITY.**

CSEA **must** present evidence which demonstrates all three elements.

1. What is Protected Activity

A. In order for conduct to be considered protected Union activity it must be done in the context of some organizational connection to the Union. The mere fact that an employee has complained to his or her supervisor about working conditions may not be sufficient to show protected activity, unless the employee was acting on behalf of the Union or other Union members or there are other facts which demonstrate that the activity is protected activity.

B. The activity must in some way relate to the terms and conditions of employment. The following are examples of activity which has been recognized to be protected activity:

1. filing a grievance or an improper practice charge

2. unit officer filing a health and safety complaint with the New York State Department of Labor

3. announcing an intention to run for Union office

4. unit officer's vocal opposition to an employer's staffing decision

5. written communication to the unit membership regarding terms and conditions of employment

C. PERB has ruled that political activity by Union officials, acting within the political department or processes of the Union, is unprotected under the Taylor Law. For example, the distribution of a letter from a CSEA unit president to the unit membership giving them an update about negotiations and stating he planned to vote for a particular candidate in the upcoming elections was found not to be protected activity under the Taylor Law. Therefore, a Union official retaliated against for his or political activities on behalf of the Union cannot successfully challenge such retaliation at PERB.[3] PERB has also ruled that retaliation against a unit member for filing a claim of sex or race discrimination does not constitute protected activity under the Taylor Law.[4]

2. Showing That Management Knew of the Protected Activity

In most cases, it is not difficult to demonstrate that the person who made the retaliatory decision was aware of the protected activity. Frequently, the protected activity is done in front of management, or management does not dispute that it was aware of the protected activity. When an employment decision, such as termination, is tainted by an improperly motivated recommendation, the employment decision may be found to constitute a violation of the Taylor Law. For example, in a case involving a Long Island school district, CSEA established that a Union activist was terminated for his Union activity by showing that his supervisor was motivated by animus when he recommended that the activist's job be abolished. It did not matter that the school administrator, who made the ultimate decision to abolish the position, was unaware of the activist's Union activity.

3. "But For" the Protected Activity

Generally, this is the most difficult aspect of any anti-union case: demonstrating that the employer retaliated only because of the protected Union activity. Nevertheless, there are a number of ways to prove this element of a case.

A. Direct Evidence: Statements by Management Representatives

In many successful cases, we have been able to prove anti-union animus based on "in your face" type statements. Angry comments critical of the individual's Union activity is the

[3] However, retaliation for political activity can be challenged in a lawsuit under the Lawful Activities Law and the First Amendment to the United States Constitution.

[4] However, where an employer retaliates against an individual for filing a claim or assists in the filing of a claim of discrimination prohibited by Title VII of the 1964 Civil Rights Act and New York's Human Rights Law, the individual can challenge the retaliatory action in federal or state court.

best evidence of anti-union motivation. Therefore, it is critically important to keep records regarding such statements especially when they involved a direct threat. In one case, CSEA won based on a six-month old threat to fire an employee if he got involved in the Union and the employer terminated the employee after he announced his intention to run for Union office.

B. Circumstantial Evidence

1. The timing and content of the employer's reaction can be used to prove animus. For example, an employer resurrecting disciplinary charges which had been previously settled was found by PERB as demonstrating animus.

2. "Disparate Treatment": animus can also be shown through differences in treatment by the employer toward another similarly situated employee. For example, PERB found anti-union animus in a case where one of three members charged with stealing was terminated after he filed a grievance challenging a suspension. The other two employees who were suspended were not terminated.

3. PERB has recognized that an employer's misleading explanations for their action against an individual is relevant to the question of whether the employer acted based on anti-union animus.

DEVELOPING PROOF FOR A DISCRIMINATION CASE

The ground work for proving a case of anti-union animus must begin as soon as the employer has taken the adverse action and it is suspected that it was done to retaliate for Union activity. An interview of the employee and any witnesses should begin immediately. Any and all relevant documents should be gathered. In addition, you should contact your Labor Relations Specialist who can aid in insuring that all evidentiary bases are covered.

In building a case, it is beneficial for someone from CSEA to contact management immediately to learn what justification, if any, management offers for their action. Obviously, if management admits that the adverse action was taken against the employee for engaging in Union activity it is important to keep a record of the conversation.

Some members believe that they can protect themselves by secretly tape-recording conversations. In fact, in one case, CSEA proved a case of anti-union animus based on the fact that the supervisor had tape recorded a conversation with the member who was fired. Although it is permissible in New York for one party to secretly record a conversation they are having with another party, engaging in such tape-recording **is not appropriate**. Secretly recording conversations can harm the case more than help. Also, the admissibility of such tape recordings is not guaranteed.

CSEA has successfully litigated cases where employees were fired for Union activity, and after successful Union challenges, the employees were ordered reinstated. The evidence presented usually includes both direct and circumstantial evidence of discrimination.

In one case an employee was threatened with termination if he challenged his discipline. The threat was made in front of a unit vice president. Subsequently, the employee filed a grievance challenging the discipline. Three days later he was terminated. In this case, the unit leadership obtained written statements from all relevant witnesses. In addition, management was challenged to explain the reasons for the termination but management refused. The proof demonstrating discrimination was based primarily upon evidence gathered by the unit leadership within days of the threat and subsequent termination.

In another case, it was shown that the terminated employee's supervisor sought the termination because the employee was a "shit-stirrer." The Union presented evidence demonstrating that the supervisor utilized this term to describe the employee's Union activity. Although the school district was found to be ignorant of the supervisor's anti-union motivation, the employee was ordered reinstated because it found that the supervisor would not have sought the termination if the employee had not filed a grievance and had been active in other protected activity.

CONCLUSION

Working together, we can stop discrimination against CSEA-represented employees based on protected Union activity. Cases of anti-union discrimination can be proven with the assistance of your Labor Relations Specialist and through a prompt and detailed investigation of the facts. Your role in gathering and analyzing the background and specifics of each situation for your Labor Relations Specialist is key to the development of a timely and successful case.

VII. AMERICANS WITH DISABILITIES ACT

As a membership organization, CSEA has a responsibility for Americans with Disabilities Act (ADA) compliance at a multitude of levels including unit, local, region and statewide. The many facilities and events to which we attract members as well as the Union's printed materials must be accessible under the Act.

ADA REQUIREMENTS

1. That CSEA, through policy and action, affirm its commitment to accessibility to its members and to its Region, Local and Unit entities.

2. That CSEA maintain confidentiality of those requesting reasonable accommodation to our physical plant, to events or to materials of the Union and strongly urge its subdivisions to do so as well.

3. That CSEA establish a standard operating procedure through which a member can request a reasonable accommodation.

4. That CSEA establish an internal process through which a complaint alleging failure to accommodate can be pursued.

5. That CSEA undertake to make its physical plant as accessible as possible.

6. That CSEA urge its Units and Locals to do likewise by providing them with a checklist for accessibility to subdivision events and the encouragement of the organization to comply.

7. That CSEA make all of its events accessible by booking only at facilities which can meet our ADA compliance requests. (Adopted by Board of Directors April 22, 1994).

8. That CSEA urge its Regions, Locals and Units to book events only at facilities which can meet ADA compliance requests. (Adopted by Board of Directors April 22, 1994).

9. That CSEA, for the purposes of finding accessible facilities, prepare a standard survey form and checklist to be used to ascertain member need and facility accessibility in order to comply with the Act.

10. That CSEA be prepared to accommodate its sight and/or hearing impaired brothers and sisters, upon request, with its organization materials such as:

    a) The Constitutions (Statewide, Region, Local, Unit)
    b) The Financial Standards Code
    c) Internal union-related election materials

d) Major CSEA Training Materials
e) A CSEA Member Benefits Manual

11. That CSEA be prepared to accommodate its sight and/or hearing impaired brothers and sisters, upon request, at its proceedings.

VIII. LIABILITY FOR OFFICERS' ACTIONS

CSEA is going to be liable for your actions as an officer if your actions are consistent with the authority given to you by the Union. Where your actions are not within your authority, the Union may not be liable. This is because of certain legal concepts explained below.

A "principal" is liable for the actions of its "agents" while such agents are in the performance of their duties and acting "within the scope of their authority." If an agent has acted outside the scope of his or her authority CSEA may not be bound by those acts.

CSEA acts through many "agents." Its agents include its elected officials and its staff. It also includes those elected or appointed to positions at the Region, Local, Unit, Section, and Voice Local 100A Chapter levels, and all statewide committees.

EXPRESS AUTHORITY

Authority is conferred on agents in several ways. Express authority (also known as "direct" authority) is granted by a principal through formal writings and official actions. CSEA "confers" authority through the use of Delegate and Board resolutions, the CSEA Constitution and By-Laws, the Region Constitution, the Local Constitutions, the Unit Constitution, the Financial Standards Code, and other applicable rules and guidelines.

By expressly specifying the authority conferred upon or withheld from its agents, CSEA insulates itself from financial responsibility for actions taken by its agents beyond the scope of their authority.

Most formal constitutions and/or by-laws, as is the case with CSEA, list the officers' positions and provide a general description of the power of each officer. Specification of the duties of Local and Unit officers and VOICE Local 100A Chapter Reps. in the Local/Unit Constitutions constitutes your express authority.

IMPLIED AUTHORITY

"Implied authority" is authority which is inherent in the office or position that an individual holds. The concept of "implied authority" is based on what is "customary" or in the regular practice of a specific position. Such practices must be known to the principal and not objected to. So, any actions that have generally been undertaken by Local or Unit officers (or Local or Unit employees, where applicable) where such actions are known by the Association and not objected to by the appropriate body may be considered "implied authority" by an outsider.

Critical to understanding implied authority is the difference between ordinary acts and extraordinary acts. Ordinary acts are those acts which arise out of the position of the agent and are acts for which an outside third party can reasonably assume the agent has authority. An example of an ordinary act would be a Unit President or Local President filing or settling a

grievance. Ordinary acts are presumed to be within the realm of an agent's authority, even though not specifically provided for in writing.

Extraordinary acts are those acts which are outside the scope and realm of authority of an agent. As such, an agent cannot bind a principal to an agreement with a third party that involves an extraordinary act. An example of an extraordinary act would be a president of a Local or Unit entering into a contract (other than a collective bargaining agreement) to buy a building, without prior approval from the Board.

If you are not sure of your authority as an officer in a particular matter, be sure to check with your Local or Region President, as appropriate, or with the Executive Offices in Albany. If you act "outside the scope of your authority," you may find yourself faced with personal liability for the consequences of those actions.

The best protection for CSEA and for you as an officer is for you to be sure of the authority you have with respect to the actions you plan to undertake. Any questions you have with respect to your authority in this regard should be discussed with the appropriate person and, if in doubt, with your Region President before you act.

SPEAKING RESPONSIBLY AS A UNION OFFICER

Many times an officer is asked to comment on behalf of the Union; other times events unfold that you, as an officer, will be asked to comment on or may feel compelled to comment on.

You may be presenting your comments in person orally or you may be commenting in writing. In either case, you need to have a basic understanding of just what constitutes defamation in order to comment responsibly, without incurring organizational or personal risks unnecessarily or unknowingly.

Defamation is an attack on a person's good name, character or reputation. There are two types of defamation. **Slander** is an oral statement which says something false and/or unfavorable about an identifiable person and which is "published" to a third party. **Libel** is a written statement which says something false and/or unfavorable about an identifiable person, which is "published" to a third party. Libel can include a pictorial statement, such as a cartoon. **"Published"** in this context means that the remarks were said in front of, or to someone other than the person about whom you have made a comment. It also means that your written comments were distributed, left around, circulated or otherwise made available to someone other than the person about whom the comment is made.

Defamation by an elected official may have legal and monetary consequences for CSEA. It may also result in individual liability. To guard against such possibilities, the following are some basic questions you should ask yourself before you make any speeches, write any letters, or otherwise make oral or written commentary:

1. Is the statement I am about to make false? Is it fact or opinion? Can I verify what I think is a fact by something other than a newspaper story? What is my opinion based on?

2. Is the statement I am about to make unfavorable? Does it have a stigmatizing effect on the reputation of the person defamed? Does it subject the individual to public ridicule or derision? Is it unflattering in some manner? Would I be upset if it were said about me?

3. Does the statement identify the person? By name? By description? By peculiar characteristics? By position? By circumstances? Will people know about whom I am speaking/writing simply by what I say?

4. Has the statement been published? Has the verbal or written utterance been distributed? Spoken? Is it generally "out there" for public consumption?

5. Is the person I am speaking about or writing about a "public figure?" If so, am I knowingly or purposely mistaking or misconstruing what I know to be the facts?

While often we need to be fiery in our speaking and writing, we can do so with great effect and little likelihood of a problem afterwards if we are careful with what we say about specific people. If you have any concerns, talk with your Communications Associate at your Region Office. And, if all else fails, if in doubt, leave it out!

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