

Just Cause Discipline

Progressive Discipline, the Supervisors Role

The concept of just cause or progressive discipline grows out of the idea that an employee should be given a warning when they behave improperly or perform below expected norms. Also these ideas include the approach that employees should be given a chance to correct their behavior or improve their performance before they are fired. Overtime these basic ideas have been filled out until we have the progressive discipline approach which characterizes unionized workplaces. Supervisors who want discipline to be effective and to be upheld can be implementing progressive discipline avoid having an arbitrator later overturn their actions. This handout and training is designed to give supervisors some tools to achieve this end.

On the Amherst Campus unions represent almost all University staff. This means that employees being disciplined are covered by a “just cause” clause in the union contract. From the managers point of view this means if the Union files a grievance saying an employee was not disciplined for just cause, at some point a labor arbitrator will hold a hearing to decide on that question. It does not mean that you cannot discipline a unionized public employee. If you apply a few common sense approaches and procedures you will find you are normally upheld when you issue discipline. In fact, an employer who does not enforce the rules it has in place can have more problems then one that does.

BASIC APPROACHES

- ❑ **Discipline is prompt** - Don't sit on the problem. Look into as quickly as fairness allows makes your decision and let the employee know. Some arbitrators will void late discipline.
- ❑ **Discipline is proportionate**- Proportionality comes into the picture in two ways. First, discipline should be progressive unless the occurrence giving rise to the discipline is serious enough to warrant stronger action right away. The Stages of progressive discipline are Oral Warning, Written Warning, Suspension, and Termination. A second question of proportionality is the question of the seriousness of the incident and the seriousness of the punishment.
- ❑ **Discipline is consistent**- This means a similarly situated employee in terms of work record and length of service will get a similar punishment for a similar cause. Consistency does not mean you must always give the same punishment for tardiness. The more consistent we are over time the more likely we are to be successful in disciplining employees.

BASIC PROCEDURES

- The Supervisor looks into the facts before disciplining. Including if suspension or discharge is possible a meeting with the employee proceed by oral or written notice. At this meeting the employee tells his/her side of the story. If the employee facing discipline has completed their probationary period and the supervisor believes that the likely disciplinary action they will take is suspension or termination the must offer the employee an informal pretermination hearing.¹
- The Supervisor allows the employee if they ask to have a union representative present if they are going to talk to them about something that is likely to lead to discipline.²
- The Supervisor sends a copy of any disciplinary letters to the Whitmore Permanent Personnel File.

BACKGROUND

DICTIONARY DEFINITION

To subject to discipline, in earlier use, to instruct, to educate, train; in later use more especially to train to habits of order and subordination, to bring under control.

HISTORY

When Unions first organized in mines, plants, shipyards and other businesses, strikes were sometimes called when a worker was fired- this shut the business down so that the owner lost money and such strikes also caused workers to loose pay. Companies wanted the Union not to strike and Unions wanted away to make sure Companies followed the Contract if they could not strike. Slowly, the practice of trading a no strike clause for an arbitration clause grew. During World War II, the government banned strikes and sent trained industrial experts out to hear discipline cases. The practice of arbitration of discipline grew in this way. This concept is so common today that Arbitrators have been known to imply a no strike agreement from the existence of a grievance procedure.

Unions bargained for, and in most (but not all) cases, included in contracts language that said the employer could not discharge or discipline employees without just cause. The "Just Cause Clause" is the key element in distinguishing unionized workplaces from nonunion. In a non-union work place an employee can be fired at the will of the employer, provided that firing does not violate a law such as the anti-discrimination laws. For many

¹ See Special topics a on page 14 for more details about this hearing. Normally these hearings will be done by a Department Head or their Assistant Manager.

² See Special Topics on page 23 for more detailed information on when a Union representative must be permitted to join the employee if requested.

years "at will" employees had little chance to sue their non-union employer successfully. Today that is changing; employment litigation against non-union employers is the fastest growing type of lawsuit in many states.

OVERVIEW OF DISCIPLINE

Unlike matters such as vacation, the labor agreements tend to say very little about discipline. Contracts may just say no employee will be discharged or disciplined without just cause. However, Arbitrators have built up a number of concepts that are advisable to apply, as most discharges will end up in arbitration. These concepts include making the employer prove its case first. The idea that discharge (sometimes called industrial capital punishment) should not be imposed for minor infractions. The principal that discipline should be progressive, that is start with warnings and then build through suspensions to discharge. Arbitrators and the National Labor Relations Board have created the obligation of the employer to offer an employee about to be subjected to possible discipline should be afforded a chance to seek Union representation. Arbitrators apply these ideas even when the contract is silent. To maintain an effective discipline process the University must also follow these ideas.

The University of Massachusetts is a very unionized work place. Only a relatively small number of Employees are exempt as confidential and managerial from membership in a bargaining unit. For this reason, almost all employees for whom discipline is appropriate are covered by a just cause provision.

I do not believe it is appropriate to compare the discipline system used to maintain order and efficiency in a work place to the system of laws used to maintain order in society. The Supreme Court has determined that a public employee does not have a free speech right to criticize their employer and may be fired for such criticism. The case in which this was decided involved the District Attorney of New Orleans and a lawyer in his office who became unhappy with the way the office was run and criticized the DAs budget. The Supreme Court upheld that lawyer's discharge because the speech was not protected by free speech. Only when the criticism moves beyond the operation in which they work do free speech protections apply. Rather, the employee discipline system is meant to give an employee a chance to conform their behavior to the work places needs before they are fired.

The State of Massachusetts in the early 1970s and late 1960s extended to public employees (including state employees) the right to join unions and bargain over the terms and conditions under which they are employed. Only the right to strike is denied to Massachusetts Public Employees. The Massachusetts Courts, in a series of cases, upheld and supported arbitration of discipline cases. For these reason supervisors, managers and university employees all must deal

with the need to see a discipline process that is subject to review by a labor arbitrator.

SUPPLEMENTAL MATERIAL, VIEWPOINTS ON JUST CAUSE AND SUBJECTS FOR DISCIPLINE

Seven Tests for Just Cause

1. Was the employee adequately warned of the consequences of his conduct? The warning may be given orally or in printed form. An exception may be made for certain conduct such as insubordination, drinking on the job or coming to work drunk or on drugs.
2. Was the employer's rule reasonably related to efficient and safe operations?
3. Did management investigate before administering discipline? Investigation should be made before administering discipline. When immediate action is necessary, the best course is to suspend the employee pending the investigation.
4. Was the investigation fair and objective?
5. Did the investigation produce substantial evidence of guilt?
6. Were the rules orders and penalties applied evenhandedly?
7. Was the penalty reasonably related to the seriousness of the offense and the employee's past record?

Types of Discipline

Verbal Warning

(Verbal Warning with Notation to the File)

Written Warning

Demotion

Transfer

Suspension

Termination

COMMENT ON JUST CAUSE

A half-century of reported cases in labor arbitration in which one can establish what constitutes the standard of just cause. I suggest that there are three (3) parts that make up the standard of just cause.

- A. Did the employee breach the rule or commit the offense as charged?
- B. Are there mitigating circumstances that would render improper the discipline or the degree of discipline imposed? Length of service, prior 'clean' record or prior "poor" record, the facts and circumstances that was present in the particular case. Was a proper investigation conducted prior to imposing discipline?
- C. Does the discipline imposed fit the improper conduct? (Does the penalty fit the crime?)

Culpable or Non-Culpable

The next question is whether the action or inaction of the employee is something that lends itself to disciplinary action as opposed to strictly corrective but non-disciplinary action.

This area needs to be discussed, I believe, to properly put to rest the argument that substance abuse is an illness and

GUIDING PRINCIPLES FOR IMPOSING DISCIPLINE IN DIVERSE SITUATIONS

- A. Due process
- B. Progressive or corrective discipline

Due Process Termination

- A. Knowledge of, and/or published, rules
- B. Adequate warning
- C. Opportunity to be heard

- D. Notice of that opportunity
- E. Notice and opportunity generally prior to discipline
- F. No pre-judgment
- G. Decision communicated to employee in timely fashion and generally in writing

Introduction

- A. What is its purpose?

To discourage employees from engaging in offensive conduct.

- B. How does it work?

Progressively more severe penalties may be imposed on an employee each time any given offense is repeated.

IV. Elements of Progressive Discipline

- A. Generally, does the 'punishment fit the crime"?

- (1) Oral warning/reprimand
- (2) Written warning/reprimand
- (3) Suspension
- (4) Discharge

- B. Considerations to be made in each Discipline Situation

- (1) Nature of offense
- (2) Past record
- (3) Length of service
- (4) Allegations of bias
- (5) Knowledge of rules; Warnings
- (6) Lax enforcement of rules

(7) Contract Interpretation

(8) Disparate Treatment

C. When is progressive discipline necessary?

(1) Generally there are two categories of offenses

a. Extremely Serious

b. Less Serious

(2) Extremely Serious Offenses (i.e., stealing, drug use on the property)

- Usually justify summary discharge without any attempt at corrective or progressive discipline.
- arbitrators are more willing to recognize the need for enforcing penalties that meet the seriousness of the offense.'

(3). Less Serious Offenses (i.e., tardiness, absence without permission)

- Usually not punishable by discharge but call for some penalty.
- Arbitrators continue to apply progressive discipline, exercise leniency, and modify disciplinary penalties imposed by management when there are mitigating circumstances that lead the arbitrator to conclude that the penalty is too severe. 2

D. Types of questions asked when assessing whether particular disciplinary measures. Were justified:

(1) Was the employee adequately warned of the consequences of his/her conduct before disciplinary action was taken?

(2) Did the employer make earlier efforts to educate/rehabilitate the person causing the problem?

(3) Was the specific discipline based on the progressive discipline approach?

(4) Was the rule or order reasonably related to the efficient and safe operation of the work area?

(5) Did management investigate before administering the discipline?

- (6) Was the employer's investigation conducted fairly and objectively and was it fully completed before disciplinary action was taken?
- (7) Was the employee given an opportunity to give his or her side of the case?
- (8) Did the investigation produce substantial evidence or proof that the employee had committed the offense?
- (9) Had the employer applied its rules, orders, and penalties without discrimination (i.e. consistently throughout the organization)?
- (10) How severe is the problem or infraction?
- (I 1) Have there been other discipline problems in the past, and over how long a time span?
- (12) Is the current problem part of an emerging or continuing pattern of discipline infractions?
- (13) How long has the employee worked for the organization, and what was the quality of performance?
- (14) Was the employee provoked in whole or in part to commit the misbehavior?
- (15) Are there extenuating circumstances relating to the problem?
- (16) Did the employee commit the offense on the spur of the moment as a result of a momentary aberration due to strong personal impulses or was the offense premeditated?
- (17) Was the degree of discipline administered in the particular case reasonably related to:
 - a. The seriousness of the employee's proven offense, and
 - b. The employee's work record?
- E. General Guidelines for establishing a program of progressive discipline.
 - (1) The employer must prescribe rules of conduct which a-re reasonably comprehensible by all employees, enforceable, related to the department's function, applicable to all employees and which do not unduly infringe upon an employee's private life.

- (2) All persons in supervisory positions and particularly first-line supervisors should know the rules of conduct and be required to carefully observe them.
- (3) The rules of conduct should be carefully explained to all employees.
- (4) A regular warning procedure for infractions of rules should be worked out and applied.
- (5) When appropriate, discipline short of discharge should be used.
- (6) Avoid arbitrary or hasty action when confronted with a situation requiring discipline.
- (7) Progressive discipline does not mean that each disciplinary action that is taken must necessarily be more severe than the preceding one, regardless of the offense involved.

F. Common Questions Concerning Progressive Discipline

- (1) Is progressive discipline necessary? 1(
- (2). Does the length of employment play a role in progressive discipline?
- (3) Do financial pressures play a role?
- (4) Do industry pressures play a role?

CATAGORIES OF DISCIPLINE

Absenteeism

Insubordination

- Refusal to Obey a Direct Order
- Abusive Behavior
- Unprotected Union Activity

Misconduct

- Damaging Company Property
- Dishonesty
- Dress and Grooming
- Fights and Altercations
- Gambling
- Discourtesy
- Garnishment

Horseplay
Off-Duty Misconduct
Moonlighting
Sleeping and Loafing
Strike-Related Activity
Sexual Harassment

Substance Abuse
Intoxication and Alcoholism
Drug Abuse

Unsatisfactory Performance
Incompetence
Negligence
Disability

SAMPLE LETTERS³

Oral Warning- Noted in file

Oral warning given to _____ on _____ for failure to _____. Told employee of proper course of action in the future.

Written Warning

This is a formal written warning. A copy of this letter will be placed in your permanent personnel file. On _____ you were _____. This is a violation of the standard of performance/behavior/productivity/attendance, which you must adhere to in this work location. . Your adherence to proper standards of conduct must improve. If your adherence does not improve you will be subject to further disciplinary action up to and including discharge.
Sincerely

Cc: Personnel File
Labor Relations
Department
Union

SUSPENSION

This letter suspends you from work for __ days from start of work on ____ to start of work on _____. I met with you on _____ day(s). And asked you to provide me the reason your conduct. I have concluded you engaged in the following conduct:

After considering your response my investigation and the misconduct, I have concluded you engaged in I determine a suspension is warranted. This suspension letter will become a part of your permanent personnel file. Further incidents of this sort may result in further suspensions or discharge.

Sincerely

Cc: Personnel File
Labor Relations
Department

³ These letters are drafted to address attendance problems due to substance abuse or other similar issues which prevent an employee from coming to work. Please note that letters addressing productivity or behavior in the workplace should appropriately modified.

Union

TERMINATION

This letter is to inform you that you are terminated from the service of the University Effective _____. The reason for your termination is _____. You should report to Human Resources prior to leaving the University grounds for an exit interview. Attached, please find a handout informing you of your right to unemployment compensation under certain circumstances. I regret your University service has come to an end in this way.
Sincerely,

Cc: Personnel File
Labor Relations
Department
Union

NOTICE OF DISCIPLINARY HEARING

This is a formal notice that I am directing you to appear at an investigatory hearing that I will conduct to determine if the possible instances of employee misconduct that I briefly summarize in this memo may warrant disciplinary action including suspension or termination from employment at the University or other disciplinary action. This investigatory meeting will take place on _____, 2002 at _____M in _____ Building. You may bring a union representative. At that time you will have an opportunity to answer the allegations that I am raising in this letter as well as to present any information about the incidents at issue.

I am holding this hearing for various reasons, including:

- 1) On September 2002 you (give a brief description of each incident)

At the conclusion of the meeting I will assess all relevant and appropriate information and make a determination as to what action, if any, should be taken.

Cc: Personnel File
Labor Relations
Department
Union

Special Topics

a) Pretermination hearing for non-probationary public employees

LOUDERMILL RIGHTS

Where the Constitution Meets Public Employee Discipline

Loudermill rights are due process rights afforded a tenured public employee facing discharge or suspension. Because these rights fit neatly into the standards of review often applied by labor arbitrators, following Loudermill procedures is likely to help us in shaping a procedurally sound case before an arbitrator. I would note that, unlike Just Cause which is a standard of review created by the Labor Agreement, Loudermill Rights are afforded public employees because of the Fifth Amendment to the Constitution of the United States and similar provisions in state constitutions. The Fifth Amendment says:

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In a decision announcing a Constitutional right for public employees not possessed by private employees, the Supreme Court in *Cleveland Board of Education v. Loudermill* held that most public employees are entitled to a hearing before they are discharged. However, the “hearing” is not a full evidentiary hearing and need not include the opportunity to cross-examine your accusers. All that is required is:

1. Oral or written notice of the charges and time for hearing⁴
2. An explanation of the employee’s evidence: and
3. An opportunity to present “his side of the story.”

⁴ See attached template for written notice

Further, since the issuance of the *Loudermill* decision, the lower courts have strictly limited the remedy for *Loudermill* violations. Specifically, an employee deprived of his *Loudermill* rights is not entitled to reinstatement if the employer can prove that there was just cause for the discharge in any case.

Just as Public Employees have a right to a *Loudermill* hearing before termination or suspension they are not free to fail to follow the orders of a supervisor to answer questions about a matter under investigation. The rules governing such investigations are known as *Garrity Rule*. According to the *Garrity Rule*, before a public employer can discipline the employee for refusing to answer questions, the agency must:

- order the employee to answer the questions
- ask questions which are specifically, directly, and narrowly related to employee's duties or the employee's fitness for duty, and
- advise the employee that the answers to the questions will not be used against the employee in criminal proceedings.

If the employee then refuses to answer appropriate questions, the employee may be disciplined for insubordination.

Characteristics of *Loudermill* Process

The due process rights in *Loudermill* included:

Notice of charges. Nearly all departmental discipline systems provide such notice.

A statement of the grounds for the charges and the supporting evidence. Some systems provide a description of the grounds, but many do not give the charged employee access to the supporting evidence. Few give the employee access to the evidence prior to demanding that the employee give evidence. In most cases of serious discipline, the evidence on which charges are sustained is based on the employees own statements given prior to that employee's access to the evidence.

Right to respond. This right is usually given, but as mentioned, the response is required prior to gaining access to evidence of the charges and then often becomes the central basis of the evidence against the employee.

The right to call witnesses. This right is usually allowed at least in part in the post-hearing stage. Typically, however, the employee's right to call witnesses - and finance or compel their testimony - is more limited than that of the department.

Right to Counsel. Representation by counsel is usually, but not always, allowed.⁵

⁵ Counsel for the employee may be denied the right to participate but cannot be barred

Unbiased trier of fact. This is often given in states with collective bargaining but denied elsewhere. In too many departments, the same person who must initially approve the decision is also the authority of final review.⁶

Record. A record is not always made of such proceedings.

Judicial review. This is not always available. In many jurisdictions, the law is unclear on this point. The implications of this review are important. When full due process is not available in the post-discipline stage, the Supreme Court's decision in *Loudermill* would indicate that more than a notice, a right to review the evidence, and a right to respond is due in the pre-discipline stage. A serious *Loudermill* issue arises when one or more elements of full due process are denied at both stages of the discipline review.

Background and Issues of Current Validity

A public employer determines that an employee should be suspended or terminated for misconduct. Permitting the employee to continue on the job would create a potential threat either to the public or the workplace. The employee whether he/she has tenure⁷, an employment contract or is covered by a union contract which permits discharge only for "just cause." Most public employers would clearly recognize their *Loudermill* obligations in this situation. However, a 1997 Supreme Court case and the lower court cases following it indicate to some public sector attorneys that the law may be changing and that tenured public employees may not be entitled to pre-deprivation hearings. We urge caution in jumping to such a conclusion.

Background - *Cleveland Board of Education v. Loudermill*

As most public employers know, in 1985 the United States Supreme Court held that a public employee dismissible only for cause was entitled to a hearing prior to termination, and also a post-termination hearing. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The Court in *Loudermill* held that if a public employee has a property interest in his or her position, the employee is entitled to a pre-termination hearing to satisfy the basic requirements of the Due Process Clause. While such a pre-termination hearing does not necessarily have to be formal or elaborate, the hearing does need to provide the employee with: (1) proper notice of the charges; and (2) an opportunity to respond. The pre-termination hearing is designed as an initial check against mistaken decisions and a method to determine whether there are reasonable grounds to support the employer's action. The Court looked to the requisite post-termination hearing to more fully provide the employee an opportunity to be heard, to be represented by counsel, to examine and cross-examine witnesses, and so forth.

⁶ In our case the arbitrator empowered by our collective bargaining provisions is the ultimate unbiased trier of fact.

⁷ Has completed the probationary period in our situation

What Process is Due

The Court in *Loudermill* recognized that procedural due process is a flexible concept, and that there is no one set of rules governing the substance of a pre-termination hearing. So long as the employer gives the employee some type of information about what the charges against them are, and a hearing is held giving the employee an opportunity to respond to the charges where there is a dispute, courts find in most instances that due process is met. The following cases are illustrations:

DeMarco v. Cuyahoga County Department of Human Services, 12 F.Supp.2d 715 (N.D. Ohio 1998) (holding that employee had no right to knowledge of specific grounds on which adverse action was taken and general notice of pre-discipline hearing was enough to satisfy *Loudermill*);

Moore v. the Board of Education, 134 F.3d 781 (6th Cir. 1997) (finding pre-termination hearing that the teacher received in connection with defendant's decision to not renew teacher's contract satisfied due process because teacher was given notice and opportunity to be heard even though superintendent had dual role as both investigator and presiding employee at the hearing);

Murphy v. Baltimore County, 701 A.2d 1208 (Md. Ct. Spec. App. 1997) (holding due process met when employee given written notice of her imminent termination and told she could take medical leave for one year even though not given chance to explain her side because no factual dispute as to grounds for employer's action).

However, courts have also held that contemporaneous notice during a pre-termination procedure is not adequate to satisfy procedural due process. See, e.g., *Staples v. City of Milwaukee*, 142 F.3d 383 (7th Cir. 1998); *Morton v. Beyer*, 822 F.2d 364 (3d Cir. 1987). A case reaching the contrary result is *Coleman v. Reed*, 147 F.3d 751 (8th Cir. 1998) (finding due process was met when employee, who was accompanied by an attorney, received contemporaneous notice of the charges against her at the initial pre-termination hearing and was given an opportunity to respond and was given a second opportunity to respond prior to termination at a school board meeting that evening). The courts' general disapproval of contemporaneous notice made the 1997 *Gilbert v. Homar* decision, discussed below, even more surprising.

The Supreme Court's 1997 Decision in *Gilbert v. Homar*

Courts since *Loudermill* have confronted the issue of what type of hearing is necessary when the employee is not terminated, but is suspended with or without pay. The majority of courts have found that no constitutionally protected property interest is implicated if a public employee continues to receive full pay and benefits during the time of his or her suspension. *Harris v. Board of Education*, 105 F.3d 591, 596 (11th Cir. 1997) ("[A] public official has a constitutionally protected property interest only in the economic benefits of his position. . . ."); *Royster v. Board of Trustees*, 774 F.2d 618 (4th Cir. 1985) (holding that no deprivation of property interest occurs so long as the employee receives

payment of full compensation); *City of Annapolis v. Rowe*, 717 A.2d 976 (Md. Ct. Spec. App. 1998); but see *Tweedall v. Fritz*, 987 F.Supp. 1126 (S.D. Ind. 1997) (finding teacher had property interest even though suspended with pay and full benefits).

However, there is clearly a deprivation of property interest when a public employee is suspended without pay. The question is what type of due process is required when the discipline is short of termination.

The Supreme Court addressed this issue in 1997 in *Gilbert v. Homar*, 117 S.Ct. 1807 (1997), holding that a Pennsylvania state institution did not violate the Constitutional due process rights of a University police officer when it immediately suspended him without pay upon learning he had been charged with a drug felony. *Homar* was arrested by the state police in a drug raid while off duty. That same day, the police filed a criminal complaint against him, charging him with felonious activities. The police also notified a university representative, who immediately suspended *Homar* without pay "effective immediately" pending an investigation into the criminal charges filed against him.

The criminal charges against *Homar* were dropped within a week of the incident. Seventeen days later, the University met with *Homar* to give him an opportunity to relay his side of the story. After the hearing, the University demoted *Homar* to the position of grounds keeper, effective the next day.

The Court stressed that due process is flexible and "calls for such procedural protections as the particular situation demands." Citing its previous decision in *Mathews v. Eldridge*, 424 U.S. 319 (1976), the Court stated that to determine what process is due a public employee before adverse action is taken, three factors are balanced: (1) the private interests of the employee affected by the official action; (2) the risk of an erroneous deprivation of the employee's interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguard; and (3) the government's interests.

Looking at the first factor, the Court opined that while the loss of a regular paycheck is a significant interest of the employee, here it was moderated by the brief length of loss and the lack of finality of the deprivation. Regarding the second factor, the Court stated that the risk of an erroneous decision is minimized where, as in the instant matter, a responsible third-party has made the decision to arrest the employee and file formal criminal charges against him. The Court emphasized that the purpose of a *Loudermill* hearing is to ensure reasonable grounds to support the employer's action, and that the unbiased actions of an independent third party to arrest and charge the employee at issue assures such reason.

Addressing the third factor, the Court found that the state has a significant interest in immediately suspending employees who "occupy positions of great public trust and high public visibility, such as police employees, when felony charges are filed against them." The Court did remand the case to determine whether *Homar's* due process rights were violated by his not receiving a prompt hearing once the charges were dropped.

Post-Gilbert Cases

Many commentators, including this source, believed that *Gilbert* was just an anomaly in the long line of *Loudermill* decisions. To our surprise, courts following the *Gilbert* decision have used the *Matthews* factors discussed in *Gilbert* to justify suspensions and even terminations without full pre-deprivation hearings. In *Mustafa v. Clark County School District*, 157 F.3d 1169 (9th Cir. 1998), the court held that a teacher did not have a due process right to a pre-deprivation hearing even though there was no independent investigation by a third party to substantiate the charges against the teacher. Mustafa was a teacher against whom a former student filed a police report claiming "open and gross lewdness." The student reported this charge to the school administration, which then met with the teacher and presented him with a "Notice of Intended Disciplinary Action: Immediate Suspension and Dismissal." The Notice set forth the allegations of sexual misconduct, stated that Mustafa was suspended without pay effective immediately, and stated that termination of Mustafa would be recommended. The Notice also informed Mustafa that a hearing would be held and that he had a right to binding arbitration following the hearing.

Mustafa filed suit claiming, among other allegations, that the school district deprived him of his procedural due process by suspending him without pay prior to a hearing and basing its decision on the Notice, which had been signed prior to his meeting with the administration, indicating the decision was predetermined. The court disagreed, citing *Gilbert* and holding that *Loudermill* did not require a pre-deprivation hearing in this situation. Without specifically addressing the *Matthews* factors, the court opined that as a public school teacher Mustafa occupied "a position of great public trust and high public visibility." Also, the court noted that Mustafa was given a hearing just five days following the suspension. The court stated that even though the facts differed from *Gilbert* in that Mustafa's suspension was not based on an independent determination of probable cause that a serious crime had occurred, the student's police report and later discussion with school district official about her charges "reasonably supported the suspension." *Mustafa* at 1177. Because Mustafa was afforded an adequate post-deprivation hearing, and because the facts justified it, the court held that no pre-determination hearing was necessary to satisfy procedural due process. cf *Tweedall v. Fritz*, 987 F.Supp. 1126 (S.D. Ind. 1997) (Citing *Gilbert* and finding that pre-deprivation hearing not necessary because teacher was in position of trust, there were numerous student accusations against the teacher regarding sexual misconduct, the school had a great interest in protecting the students, and the teacher was afforded adequate post-suspension remedies).

Similarly, in *Macklin v. Huffman*, 976 F.Supp. 1090 (W.D. Mich. 1997), the court held that a state prison guard was not entitled to a hearing prior to being suspended based on the ruling in *Gilbert*. In *Macklin*, a state prison employee was accused by a prisoner of sexual relations with another prisoner. The employee's supervisor advised the employee of the allegations against him. The employee thereafter was asked to answer a series of written questions, which he did.

Because of the proximity of the employee with his accuser, as well as other prisoners, the supervisor recommended suspension of the employee until completion of the investigation in order to ensure the integrity of the investigation as well as the safety of the employee and his accuser. The employee was then suspended without pay for 15 days. Because the prison's investigation failed to substantiate the accusations against the employee, he was ultimately reinstated with full back pay.

The employee brought suit against the department of corrections and his supervisor, alleging that his procedural due process rights were violated when he was suspended without pay prior to any pre-deprivation hearing. The court disagreed, analogizing the case to *Gilbert*.

Analyzing the three factors cited in *Gilbert*, the court opined that in regard to the first factor the employee's loss of pay here was only temporary and his lost income was relatively insubstantial. Looking at the second factor, the court found that the allegations against the employee came from an "independent source" and therefore insured that the decision to suspend the employee was reasonable. Finally, the third factor was satisfied because the court found that the department of correction's interest in preserving the integrity of its investigation as well as the safety of the employee, his accuser and others, warranted immediate suspension.

The court held that the employee's procedural due process rights were not violated even in the absence of a pre-deprivation hearing. See also *Ibarra v. Martin*, 143 F.3d 286 (7th Cir. 1998) (comparing case to *Gilbert* and finding due process was satisfied by procedures followed prior to probation employee's suspension on sexual misconduct charges because supervisor told employee of charges and asked for employee's side of the story, the charges provided assurance that suspension was justified, and the State has significant interest in the integrity of probation employees, even though supervisor did not go into detail about the charges and did not specifically state the disciplinary consequences of allegations); *Hummel v. McCotter*, No. 2:94 CV 702 K, 1998 WL 838695 (D. Utah Dec. 2, 1998) (citing *Gilbert* without discussing the *Matthews* factors and holding that employee of state department of corrections who was suspended without pay following his arrest for criminal child abuse was afforded adequate procedural due process even without a pre-deprivation hearing where employee received a hearing six months following his suspension).

Though the cases favorably citing *Gilbert* appear to minimize the importance of a pre-deprivation hearing, public employers should be certain that the three factors cited in *Gilbert* are met before even considering suspending or firing an employee without such a hearing. Otherwise, your jurisdiction may face the same legal facts as Los Angeles' school district.

In *Bostean v. Los Angeles Unified School District*, 63 Cal.App.4th 95 (Cal. Ct. App. 1998), the court found that these factors were not met and that the employee's procedural due process rights were violated when the employer placed the employee in indefinite involuntary sickness leave without pay without a pre-deprivation notice and hearing. The

employee in *Bostean* suffered from diabetes and epilepsy. Following an inquiry by the District to his doctor about the employee's limitations, and the doctor's response that the employee could perform all of his duties with some limitations, the District placed the employee on involuntary illness leave without pay.

The *Bostean* court stated that there was no explanation in the record as to why the District placed the employee on sick leave, that there was no evidence that there was any threat to the employee's or others health or safety were he to remain on the job, and that there was no showing of any change in the employee's condition warranting prompt action and justifying postponement of an opportunity to be heard until after he was placed on leave. Therefore, the court found that there was no justifiable state interest, which would support the District's action without a pre-deprivation hearing.

A Note of Caution

Granting a pre-discipline hearing is generally a simple matter. Therefore, employers should recognize that suspending a "tenured" employee without pay prior to a *Loudermill* hearing has inherent risks, and an employer should rely on *Gilbert* to justify taking action without a pre-discipline hearing only in the most extreme circumstances. Even then, a short hearing should be held as soon as possible with the "accused", followed by a more comprehensive due process hearing later on. It should also be noted that the Massachusetts Constitution and Massachusetts Civil Rights Act could form independent underpinnings for a state right similar to the *Loudermill* Right. For this reason *Loudermill* hearings prior to suspension and discharge remain the appropriate course for Massachusetts Public Employers.

NOTICE OF LOUDERMILL HEARING TEMPLATE

To:

From:

Date:

Subject: *Notification of Investigatory/Disciplinary Hearing;*

CC:

_This is a formal notice that I am directing you to appear at an investigatory hearing that I will conduct to determine if the possible instances of employee misconduct that I briefly

summarize in this memo may warrant disciplinary action including suspension or termination from employment at the University or other disciplinary action. This investigatory meeting will take place on [*Month Day, Year*] at [*Time AM/PM*] in [*Room number*] Whitmore Administration Building. You may bring a union representative. At that time you will have an opportunity to answer the allegations that I am raising in this letter as well as to present any information about the incidents at issue.

I am holding this hearing for various reasons, including:

- 1) On [*Date of incident*] you(give a brief description of each incident)

At the conclusion of the meeting, I will assess all relevant and appropriate information and make a determination as to what action, if any, should be taken.

b) Right to union representation

WEINGARTEN RIGHTS

Intro: In 1975, in [NLRB v. J. WEINGARTEN, INC., 420 U.S. 251 \(1975\)](#), the U.S. Supreme Court announced the rights of employees in the presence of union representatives during investigatory interviews. Since that case involved a clerk being investigated by the Weingarten Company, these rights have become known as Weingarten rights.

Summary: When management begins to ask you questions that could lead to your being disciplined, you don't have to face it alone. If you have a reasonable belief that answers you give could be used by the supervisor to discipline you, the U.S. Supreme Court says you can refuse to answer any questions until the union steward is on the scene and has had a chance to talk things over with you first. It's your right to have the steward present during the questioning to advise you, ask supervisors for clarifications, and provide additional information at the end of the session. The employee subject to the interview must reasonably believe that the investigatory interview will result in disciplinary action. A meeting called by the employer for the purpose of informing the employee of the imposition of discipline already decided, is not an interview subject to Weingarten rights. Management is not required to inform the employee of his/her Weingarten rights; though at the University our advice is if a manager thinks discipline is likely in a given situation an offer of Union Representation should be made to the employee even if not required.

THERE ARE LIMITS TO WEINGARTEN RIGHTS

Just as it's important to know what your employee's Weingarten rights are, it's also important to know the limits.

You are not entitled to have a steward present every time a supervisor wants to talk to you. But if the discussion begins to change into questioning that could lead to discipline, you have the right to ask for your steward before the conversation goes any further. The

Massachusetts Labor Relations Commission in fact has ruled it is an unfair labor practice for an employee to repeatedly ask for a Union Steward when she was being asked to come to a meeting about her performance review.

If you're called in to the supervisor's office for an investigation, you can't refuse to go without your steward. All you can do is to refuse to answer questions until the steward gets there and you've had a chance to talk things over. If you are called at home and asked the same kind of questions, you have a right to insist on waiting to answer them in the presence of a steward.

Remember an investigatory interview is not a "True Confessions" meeting or some infomercial psychic doling out to advice to an employee--it is a meeting which could possibly lead to disciplinary action including removal from the University.

The Role of a Union Representative

The role of a union representative in an investigatory interview is to observe the discussion and to assist and counsel workers during the interview. There is no right to silence similar to the fifth amendment in a criminal case an employee must answer questions put to them and the steward cannot tell them to refuse to answer or answer for them. Employees Declining to answer questions are subject to discipline.

The Supreme Court has also ruled that during an investigatory interview management must inform the union representative of the subject of the interrogation. The representative must also be allowed to speak privately with the employee before the interview. During the questioning, the representative can interrupt to clarify a question or to object to confusing or intimidating tactics.

While the interview is in progress the representative can not tell the employee what to say but he may advise them on how to answer a question.

The Rules at a Glance

Under the Supreme Court's Weingarten decision, when an investigatory interview occurs, the following rules apply:

RULE 1:

The employee must make a clear request for union representation before or during the interview. The employee cannot be punished for making this request.

RULE 2:

After the employee makes the request, the employer must choose from among three options. The Employer must either:

- Grant the request and delay questioning until the union representative arrives and has a chance to consult privately with the employee; or
- Deny the request and end the interview immediately; or
- Give the employee a choice of (1) having the interview without representation or (2) ending the interview.

RULE 3:

If the employer denies the request for union representation, and continues to ask questions, it commits an unfair labor practice and the employee has a right to refuse to answer. The employer may not discipline the employee for such a refusal

ADDENDUM

Advice Memorandum from NLRB: Does an employee have the right to select a particular Union steward as his representative at a Weingarten interview. NLRB's advice to Local USPS and NALC. (note: this memorandum is for informational purposes)

National Labor Relations Board

OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: March 13, 2003

TO: Ronald K. Hooks, Regional Director; Ruth Small, Regional Attorney; Thomas H. Smith, Jr., Assistant to Regional Director, Region 26

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: United States Postal Service and NALC Local 27, Cases 26-CA-20975 and 26-CB-4252

506-4033-3000, 536-2581-0100, 536-2581-3388

These cases were submitted for advice on whether the Union and Employer, in applying certain contractual provisions, lawfully denied an employee his right to select a particular Union steward as his representative at a Weingarten interview.[1] We conclude that a contractual analysis does not apply here because the employee did not have the unfettered right to select a particular Weingarten representative present at the facility, and that the Union did not breach its duty of fair representation in denying the employee his choice in the circumstances of this case.

FACTS

The Union represents employees at the Employer's Crosstown Station where employees service two postal zones, 38104 and 38105. Each of these carrier zones constitutes a separate work group and each has a separate elected steward. Pertinent provisions of the collective-bargaining agreement provide:

Stewards may be designated for the purpose of investigating, presenting, and adjusting grievances....

The selection of and appointment of stewards is the sole and exclusive function of the Union.... Stewards will be certified to represent employees in specific work location(s) on their tour...

If an employee requests a steward or Union representative to be present during an interrogation by the Inspection Service, such request will be granted.

Charging Party Employee Bullock works in carrier zone 38105 where the elected steward was on long term sick leave, and the Union had designated no assistant steward. Instead, Union president Jackson appointed Fisher, the steward in carrier zone 38104, also to be the acting steward in zone 38105. The Union informed the Employer and the unit employees of Fisher's appointment. The Union had appointed employee Latting as the assistant steward in carrier zone 38104. Latting had no steward authority in zone 38105. On October 31, 2002, a supervisor summoned employee Bullock to an investigatory interview. When Bullock arrived at the meeting, acting steward Fisher was already present. Bullock stated that he would prefer Latting to Fisher as his Weingarten representative. Latting was present at the facility at the time. The Employer delayed the interview and telephoned Union president Jackson. Jackson said that Bullock could be

represented by Fisher or himself, but not by Latting.[2] Bullock declined to have either represent him, and underwent the investigatory interview alone. Bullock alleges that the Union unlawfully refused to provide him with Latting as his choice of Weingarten representative.

ACTION

We conclude that the Region should dismiss these charges, absent withdrawal, because Board precedent in the other factual contexts indicates that a 9(a) representative, rather than the employee subjected to an investigatory interview, can designate that employee's specific Weingarten representative and the Employer must acquiesce in that designation or terminate the interview. Since the Union here did not breach its duty of fair representation by making its selection here, the denial of the Charging Party's request for a specific individual as his representative was not unlawful.

A Union clearly may waive the right of unit employees to Weingarten representation altogether.[3] Research disclosed no Board decisions addressing the respective rights of an employee and a union abiding by its duty of fair representation where the employee requests a particular union official as his or her Weingarten representative. However, Board decisions hold generally that, if the employee requests a Weingarten representative, the choice of the representative belongs to the union. An employer acts unlawfully if it conducts an investigatory meeting without the union-selected representative present.

In Illinois Bell Telephone Co.,[4] the union had told employee Hatfield not to go to an investigatory interview alone, and that she could bring any union member she chose. Hatfield therefore asked the employer to allow a particular employee (and former steward) represent her. The employer refused because that employee was not a steward. The ALJ found that the employer unlawfully denied Hatfield her choice of an employee as her Weingarten representative. The ALJ reasoned that, since an employee at an unrepresented plant could select any representative she wished, so too could an employee at a represented plant. 251 NLRB at 938.

The Board found a violation, but on a different basis than had the ALJ. The Board held that Hatfield had the right to select an employee as her Weingarten representative solely because the collective-bargaining agreement and the parties' oral understandings did not

require otherwise, and because there was no actual union representative present at the facility.[5] In disagreeing with the ALJ's rationale, 251 NLRB at 933, the Board stated: [T]here is a difference between the rights of represented and nonrepresented employees to interact with the employer as individuals. Certainly an employee cannot act in derogation of the union majority representative.

In contrast, in *Pacific Gas & Electric Company*, 253 NLRB 1143 (1981), the employer brought the union's on-site steward to a Weingarten interview involving employee Green. However, Green wanted another steward located at another site, 40 minutes away. The employer refused to delay its interview to bring over the other steward. The Board found no violation:

The Supreme Court in *Weingarten* neither stated nor suggested that an employee's interests can only be safeguarded by the presence of a specific representative sought by the employee. To the contrary, the focus of the decision is on the employee's right to the presence of a union representative designated by the union to represent all employees.[6] In view of the above decisions, finding limited employee *Weingarten* rights vis-a-vis the union, we conclude that the Union here, as the 9(a) representative, could not have unlawfully designated Fisher unless it breached its duty of fair representation in doing so. We further conclude that the Union did not breach its duty of fair representation by refusing to accede to Bullock's choice of Latting as his Union representative. A union breaches its duty of fair representation when its conduct toward an employee is arbitrary, discriminatory, or in bad faith. A union must be allowed a wide range of reasonableness in serving unit employees, and any subsequent examination of a union's performance must be "highly deferential." [7] Thus a union's conduct is arbitrary only if, in the light of the circumstances at the time of the union's actions, the union's behavior is so far outside a wide range of reasonableness as to be irrational.[8]

Here, there is no evidence that the Union's conduct was discriminatory, or in bad faith, and we find that the Union's conduct was not arbitrary. In requiring Bullock to use Fisher, the Union was only insisting upon the use of the steward it had appointed for that carrier zone. The Union denied Bullock the use of Latting because the Union had never given Latting, the alternate steward in zone 38014, authority to act in Bullock's zone. Since the

Union's conduct was in accord with its own steward appointment policy, we find that it was not arbitrary.[9]

Finally, we find it unnecessary to decide whether the parties' agreement waived Bullock's asserted right to select a particular Weingarten representative. Rather, we find that Bullock did not possess an unfettered right of selection and that the Union did not breach its duty of fair representation by refusing Bullock's particular selection in the circumstances of this case. Accordingly, the Region should dismiss the Section 8(b)(1)(A) and Section 8(a)(1) charges, absent withdrawal.