



Winning Discipline Grievances

TDU Contract Enforcement Series

Jason Ide, Teamsters Local 399

Goals of the Class

Learn How to Investigate a Discipline Case

- Put together a file for the business agent or arbitration advocate
- File an information request
- Draft a grievance

Learn How to Analyze a Discipline Case

- Identify key facts for the Union and Management
- Apply just cause to evaluate the strength of the case



Agenda

- ☐ Just Cause Discipline
- ☐ Drafting the Grievance
- ☐ Information Requests
- ☐ Investigating the Grievance
- ☐ TEST AT THE END



Intro poll

Have you ever represented a member in a disciplinary hearing before?



Poll #1

What is the most important tactic to winning discipline grievances?

- A. Doing a thorough investigation of the facts
- B. Researching past arbitration decisions
- C. Being tough with the boss at the hearing
- D. Arguing a clear point with management



Answer to Poll #1

What is the most important skill to winning discipline grievances?



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What is Just Cause Discipline?

- Union alternative to “at will” employment
- Interpreted by common understanding of arbitrators
 - Not spelled out in most CBA's
 - Not usually precedential
- Progressive and Corrective
- Burden of proof is with management
- Looser standard than “beyond a reasonable doubt”



The 7 Tests of Just Cause

ARE THEY EQUALLY IMPORTANT?



Just Cause

- (1) **Notice.** Did the employer give the employee advanced notice or warning of the possible disciplinary consequences of the employee's conduct?

An employer may not discipline an employee for violating a rule or standard whose nature and penalties have not been made known.

- (2) **Reasonable Rule or Order.** Was the employer's rule reasonably related to
- (a) the orderly, efficient and safe operation of the business, (an employer position)
 - (b) the performance that the employer might properly expect of the employee? (an employer position)
 - (c) Prior enforcement An employee may not be penalized for violating a rule or standard that the employer has failed to enforce for a prolonged period. (An important Union position)



- (3) **Prior investigation.** Did the employer, before administering the discipline make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- (4) **Fair investigation.** Was the employer's investigation conducted fairly and objectively?

An employer must conduct an interview or a hearing before issuing discipline, must take action promptly, and must list charges precisely. Once assessed, discipline may not be increased.

- (5) **Substantial Evidence.** At the investigations did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Charges must be proven by substantial and credible evidence.

- (6) **Equal Treatment.** Has the employer applied its rules, orders, and penal ties even handedly and without discrimination to all employees?

Equal treatment. Unless a valid distinction justifies a



higher penalty, an employer may not assess a considerably stronger punishment against one employee than it assessed against another known to have committed the same or a substantially similar offense.

- (7) **Penalty.** Was the degree of discipline administered by the employer reasonably related to
- (a) the seriousness of the employee's proven offense, and
 - (b) the record of the employee in his service to the employer?
 - (c) Mitigating and extenuating circumstances. Discipline must be proportional to the gravity of the offense, taking into account any mitigating, extenuating or aggravating Circumstances.
 - (d) Progressive discipline. When responding to misconduct that is short of egregious, an employer must issue at least one level of discipline that allows the employee an opportunity to improve.



The 3 Tests of Just Cause?



Joe Vitale's Rules of "Just Cause"

1) What is the employee's length of service?

- Does the employee have significant discipline in his/her file?
- “Longtime employees get one ‘Get Out of Jail Free’ card. That is unless what they did was so egregious that they cannot be returned to the workplace.” Arbitrator Shriftman

2) Did the employee do what management accused him or her of doing?

- If not, did they do a lesser version of what management accused him/her of doing?
- Is our version of events more/less credible than the Employer's version?

3) Is the punishment too severe?

- How has the Employer punished similar infractions in the past?
- If they have a zero tolerance rule, have they enforced it evenly?



Drafting the Grievance

A LESSON IN BEING LACONIC



Laconic

Definition: Concise to the point of seeming rude

Derived from the ancient Greek region of Laconia, whose capital was Sparta.

"The story goes that Philip II of Macedon once called on the Spartans to surrender, sending them the following message: "if I bring my army into your land, I will destroy your farms, slay your people, and raze your city". The Spartans, in typical *laconic* style, sent a reply containing just one word: **If**



Grievance

DATE:

<Date You Filed the Grievance>

Statement of Grievance:

?

Remedy Desired:

Make whole in every way including but not limited to rescinding the discipline.

Section of Contract Violated:

All relevant sections of the CBA, including but not limited to <Most Relevant Section>



Poll #2

Management gives Jason Ide a 3 day suspension on August 7th for showing up late to work for the fifth time. Many other employees have been late to work more than ten times and received no discipline at all.

Statement of Grievance

- A. On August 7th management violated the terms of the collective bargaining agreement by violating the 6th test of just cause and suspending Jason Ide while at the same time giving no punishment at all to other similarly situated employees.
- B. Management violated just cause again by suspending Jason Ide on August 7th as part of their continuing and ongoing campaign of harassment against union activists and stewards. This is unjust and illegal.
- C. On or about August 7th management disciplined Jason Ide without just cause.
- D. Stop the harassment.



Answer to Poll #2

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- C. On or about August 7th management disciplined Jason Ide without just cause.
- D. Stop the harassment.



Information Requests

MAKING MANAGEMENT MISERABLE SINCE 1935



Why File An Information Request?

- Actually get company files and records
- Make management work hard for a change
- Show management holes in their own case
- Build for a board charge or negative inference



Legal Basis of the Right to Information

1. The National Labor Relations Act

- a. The National Labor Relations Act (NLRA) generally requires employers to furnish to unions information relevant to the administration or negotiation of a collective bargaining agreement upon request.
- b. See *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979). Specifically, the Supreme Court provides that “[t]he duty to bargain collectively, imposed upon an employer by § 8(a)(5) of the National Labor Relations Act, includes a duty to provide relevant information needed by a labor union for the proper performance of its duties as the employees’ bargaining representative.”
- c. “Relevant and Necessary” legal standard
 - i. A “discovery type” standard
 - 1. The Employer must provide information if it is “...probably or potentially relevant...to the bargaining process, contract administration, or the evaluation and processing of grievances.” (Feldacker 2014)
 - 2. Does not depend on the merit of the grievance or bargaining proposal



Drafting An Information Request

1. Requests should be in writing and the delivery verified (email)
2. Date your request
3. Cite “relevant and necessary” standard
4. If not presumptively relevant, state a one sentence explanation of why you need the information (relevance and necessity)
5. Ask for documents that actually exist
6. Limit the time period of the request
7. Give a reasonable deadline (5 business days?)
 - a. Set a calendar alert for second request
 - b. Do a threatening second request
 - c. Charges on third request
8. State that you will accept the balance of the information if it is not all ready at once
9. State how you want to receive the information (electronically)



Employer Defenses

1. Legal Ping Pong at the Board
 - a. Ping Pong delays the process
 - b. Must keep the ball on their side of the net or board agent will not go to complaint
 - i. Respond quickly to defenses in writing and send to board agent
 - ii. Email trail is the substance of ULP
2. Anticipate them and draft around them
3. Burdensome
 - a. The Employer can avoid providing if overly burdensome
 - b. Union Responses
 - i. Narrow the request
 - ii. Offer to pay expenses or assist



Investigating the Grievance

AKA “JUST THE FACTS, MA’AM.”



OBTAINING THE FACTS

📎 1. LISTEN

- To learn, not to challenge
- Don't interrupt
- Evaluate while listening
- Draw no conclusions until after the facts are heard

📎 2. QUESTION

- Patiently ask for all the facts
- Ask questions to keep the speaker on the issue
- Don't forget to ask the grievant what remedy she/he wants.

📎 3. RECORD

- Keep notes on interviews

📎 4. MEASURE

- Put as many facts as possible in quantities that can be measured like years, dates, minutes.

📎 5. COLLECT

- All relevant documents
(time sheets, policies, previous warnings)
- Witnesses' testimonies

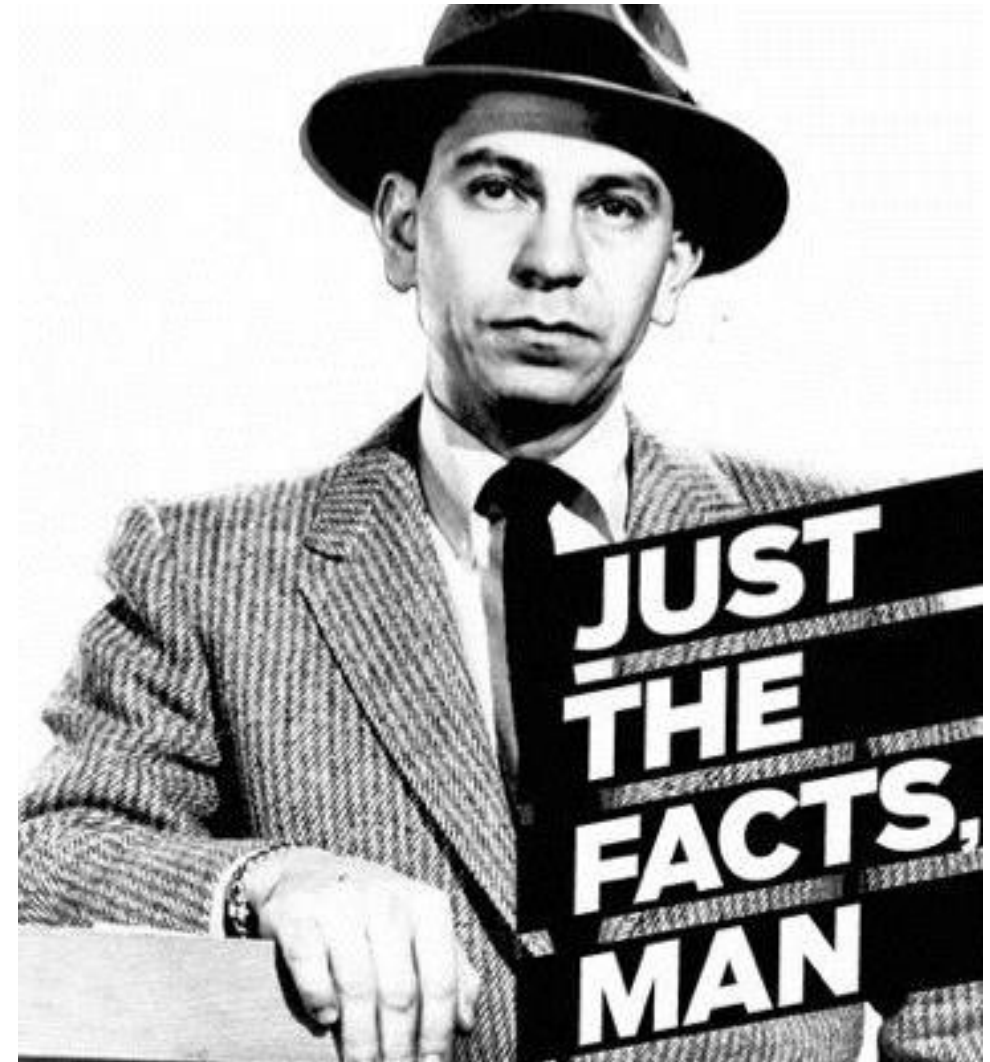


Roleplay



Materials

- ☐ Pen
- ☐ Paper
- ☐ Cell phone



Overview

Louisa T. calls you, the shop steward, on Monday, March 14th, saying that she has been suspended for ten days.

Louisa says that on Friday, March 11th she was loading a truck at the warehouse with lighting equipment. Rob Smith, a supervisor, got into her face and yelled at her. Louisa told him to leave her alone.

Louisa felt like just leaving, but she stayed and finished loading the truck and then worked until the end of her shift.

Louisa is very upset about the discipline and doesn't think she did anything wrong. She wants you to do something about it.



Draft a Grievance for Louisa

Date: March 22nd, 2022

Statement of Grievance: On or about March 21st, 2022, Louisa was disciplined without just cause.

Remedy Desired: Make whole in every way including but not limited to rescinding the discipline and payment of lost wages and benefits.



Poll #3: Best Fact for the Union

What is the most important fact for the Union in this case?

- A. Louisa is a hard worker. She did the work of multiple employees on the day in question.
- B. Rob has shown a pattern of harassing pro-Union workers.
- C. Junior's testimony that Louisa did nothing wrong.
- D. Louisa is a long-tenured employee with a pretty clean disciplinary history.



Answer to Poll #3

What is the most important fact for the Union in this case?

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- B. Rob has shown a pattern of harassing pro-Union workers.
- C. Junior's testimony that Louisa did nothing wrong.
- D. Louisa is a long-tenured employee with a pretty clean disciplinary history.



Poll #4

What is the most important fact for management in this case?

- A. Louisa has a previous write-up for similar misconduct.
- B. Junior is not a credible witness.
- C. Louisa did it. She yelled and probably cursed at Rob.
- D. Sandra from accounting overheard the incident and could testify to that.



Answer to Poll #4

What is the most important fact for management in this case?

- A. Louisa has a previous write-up for similar misconduct.
- B. Junior is not a credible witness.
- C. Louisa did it. She yelled and probably cursed at Rob.
- D. Sandra from accounting overheard the incident and could testify to that.



Case Analysis: Union and Management

Union

- Louisa is a long-time employee.
- 10 day suspension is very harsh for arguing with a supervisor.
- There are mitigating circumstances (Rob starting it, understaffing etc.).

Management

- Louisa did it. She was insubordinate.
- She has previous write-ups for similar infractions.



Questions?

