SPECIAL STATUS OF THE UNION REPRESENTATIVE

- Under the Taylor Law, when you are acting as a UR, you step out of the shoes of an employee and into the shoes of an exclusive bargaining representative. That means that the rules of conduct that normally apply to employees in their interactions with management do not apply to you.

- The rights and rules of conduct that apply to URs are based on the following:
  - Equality with the boss
  - No retaliation
  - Equal discipline standards

- When you are acting in your official union capacity, you are no longer in a subordinate role but become an equal with the supervisor. You can openly disagree or argue vigorously with the management during grievance meetings question management’s authority; demand certain actions, all without risking disciplinary action.

- The law recognizes that collective bargaining in general and the UR’s job in particular requires open, direct, candid communication between equals.

- However, the rules of common courtesy and mutual respect still apply!!!
On July 18, 2007, Gov. Spitzer signed a bill which restored “Weingarten Rights” for public employees in the state of NY. In a decision by the NYS Court of Appeals in February 2007, public employees lost the right to representation in interviews or investigations that could lead to discipline. The bill amends the Taylor Law by explicitly making it an improper practice (specifically, a 209-a-1-g charge) for a public employer to deny an employee’s demand for union representation when the employee is facing an interview by the employer that could reasonably lead to potential discipline. An Improper Practice charge (I.P.) is an alleged violation of the Taylor Law that is tried before an Administrative Law Judge (ALJ) at the Public Employment Relations Board (PERB).
**UNION REPRESENTATION AND WEINGARTEN RIGHTS**

The Union Representative should prepare the member for the interview by discussing the following points. The Union Representative and the member should develop specific tactics for use during the interview. It is helpful to rehearse before the interview.

- Get the story straight and stick to it. Tell the truth.
- Take your time...do not rush...take deep breaths
- Listen to the question and answer only the question that was asked... do not volunteer more information than asked for.
- Beware the interrogator’s pause...do not try to fill the silence by answering a question that was not asked.
- If a question is not clear...ask for clarification (reminder: the UR can also ask for clarification)
- If a premise to a question is incorrect...point that out to the supervisor
- Do not “think out loud” or speculate
- If you do not know or do not remember...say so
- If you are not sure...say so
- Do not express feelings or emotions unless they are yours
- Do not ascribe motive to behavior unless it is yours
- Do not implicate others negatively
- Talk about “behaviors" in simple terms...not emotional or value-laden
- Talk about what you saw or heard first-hand...no rumors or hearsay
- For tenured members, pursuant to “Cadet Rights”, you have the right not to answer (you have the right not to incriminate yourself)
• Union rep and member should work out a system for communicating caution during the interview (i.e. ask for caucus, kick under the table, interrupt, union rep asks for “clarification”)

• Watch your language in interrogations
  o We do not grab...we restrain
  o We do not push or pull...we help/assist
  o We do not yell...we speak in a strong, assertive voice

• If you used physical force, you did so to: (the legal reasons)
  o Protect a student from being injured by another or self
  o Protect oneself
  o Protect school district property
  o Remove unruly student from classroom

• Stand up for yourself in an assertive manner, but do not be argumentative

• Stay businesslike/professional in manner and tone

• Avoid inflammatory language or name-calling

• Take notes... both the Union Representative and the member

• Do not sign anything on the spot...ask for time to review and consult with union representation
MATTER OF CADET*
BOE NYC vs. Mills, Appellate Division, 3rd Dept.

Appellate Division affirms Supreme Court decision upholding the Commissioner’s ruling that (1) a teacher who refuses to answer questions in connection with a 3020-a proceeding is not guilty of insubordination; (2) that a penalty of 3 years suspension without pay is an appropriate penalty for having an inappropriate relationship with a student.

Court Decision

Cadet was brought up on two charges; first, that he was having a romantic relationship with a student and, second, that he refused to answer questions about his relationship at an interrogation by a special investigator from the Board of Education. The tenure panel found him guilty of misconduct for having the romantic relationship, but found him not guilty of insubordination in connection with the interrogation. The panel recommended a six month suspension.

On appeal, the Commissioner affirmed the panel’s finding of not guilty on the charge of insubordination declaring that Section 3020-a of Education Law permits a teacher to refrain from answering questions during an investigation leading up to the 3020-a hearing as well as at the 3020-a hearing itself.

On the misconduct finding, however, the Commissioner noted that the teacher’s romantic relationship with a student was inappropriate irrespective of the student’s age. Therefore, the Commissioner increased the penalty to a three year suspension, noting that he would have recommended discharge, except that Cadet had an,

“unblemished record of service before this incident, (as well as) evidence of considerable dedication to his students and (the) lack of any evidence indicating that respondent had a sexual relationship with the student”

Albany County Supreme Court affirmed the Commissioner’s decision and the Appellate Division affirmed suite. The Appellate Division observed that the NYC Board of Education regulation requiring a teacher to answer questions during a pre-hearing investigation was in conflict with Education Law 3020-a(3)(c)(1); and further,

“no local legislative body is empowered to enact laws or regulations which supersede State statutes, particularly with regard to the ‘maintenance, support or administration of the educational system’”.

The Court also affirmed the Commissioner’s action of increasing the penalty to a three year suspension without pay.

*pronounced Ka´Day
35 Ed. Dept Rep 418; Decision #13589
American Arbitration Association

HOW TO DETERMINE JUST CAUSE

Few union-management agreements contain a definition of “just cause”. Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have established a sort of “common law” definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case. These criteria are set forth below in the form of questions.

A “no” answer to one or more of the following questions normally signifies that just and proper cause did not exist. In other words, a “no” means that the employer’s disciplinary decisions contained one or more elements of arbitrary, capricious, unreasonable, and/or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his or her judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing. Frequently, however the facts are such that the guidelines cannot be applied with surgical precision.

THE QUESTIONS

1. Did management give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

Forewarning or foreknowledge may properly have been given orally or in writing through typed or printed sheets or books of shop rules and penalties for violations.

There must have been actual oral or written communication of the rules or penalties the employee.

A finding of a lack of communication does not require a “no” answer to Question Number One, in all cases. Certain offenses, such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of company or of fellow employees, are so serious that any employee in industrial society may properly be expected to know already that such conduct is offensive and heavy punishable.
Management has the right to unilaterally promulgate reasonable rules and issue reasonable orders, unless there are any contractual prohibitions or restrictions. This may not have been negotiated with the union.

2. **Was the rule or managerial order reasonably related to the orderly, efficient, and safe operation of the business?**

If an employee believes that the rule or order is unreasonable, she/he must, nevertheless, obey it unless he/she sincerely feels that to obey the rule or order would seriously and immediately jeopardize his or her personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his or her disobedience. The rule or order may then be grieved.

3. **Did management make an effort to discover whether the employee did in fact violate or disobey a rule or order of management before administering discipline?**

The investigation must normally be made before a disciplinary decision. If management fails to do so, its failure may not normally be excused on the ground that the employee will get his or her day in court through the grievance procedure after the administration of discipline. By that time, it is generally conceded that there has been too much hardening of positions.

There may of course be circumstances under which management must reach immediately to the employee’s behavior. In such cases, a proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, she/he will be restored to his or her job with full pay for time lost.

4. **Was the investigation conducted fairly and objectively?**

At the investigation, the management official may be both “prosecutor” and “judge”, but she/he may not also be a witness against the employee.

5. **At the investigation, did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?**

It is not required that the evidence be preponderant, conclusive, or “beyond reasonable doubt.” But the evidence must be truly substantial and convincing.
6. **Have the rules, orders, and penalties been applied evenhandedly and without discrimination to all employees?**

A “no” answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

If management has been lax in enforcing its rules or orders and decides henceforth to apply them rigorously, the agency may avoid a finding of discrimination by telling all employees in advance of its tenure to enforce hereafter all rules as written.

7. **Was the degree of discipline administered reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his or her service with the agency?**

A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same offenses a number of times in the past. There is no rule as to what number of previous offenses constitutes a “good,” a “fair,” or a “bad” record. Reasonable judgment must be used.

An employee’s record of previous offenses may never be used to discover whether she/he was guilty of the immediate or most recent offense. The only proper use of his or her record is to help determine the severity of discipline once she/he has properly been found guilty of the immediate offense.

Given the same proven offense of two or more employees, their respective records provide the only proper basis for “discriminating” among them in the administration of discipline for said offense. Thus, if employee A’s record is significantly better than those of employees B, C, and D, the agency may properly give a lighter punishment than it gives the others for the same offense. This does not constitute true discrimination.
“Just Cause” May Provide Your Day in Court

“No unit member will be disciplined, discriminated against, reprimanded, reduced in rank or privilege without just cause.” This is a typical “just cause” clause from an SRP contract in the Elmsford Region. If a member is disciplined, a just cause clause triggers a due process hearing before an arbitrator, pursuant to the grievance procedure in the contract; so if Superintendent Donald Trump says, “You’re fired!”, you can retort, “Not without just cause!”

Few contracts contain a definition of “just cause.” Nevertheless, over the years, the opinions of arbitrators in innumerable discipline cases have established a sort of “common law” definition of the term. This definition consists, in part, of a set of guidelines or criteria that are to be applied to the facts of any one case. One theory of just cause is known as, “The Seven Tests of Just Cause.” These “Seven Tests” are listed below in the form of questions.

A “no” answer to one or more of the following questions normally signifies that just and proper cause did not exist. In other words, a “no” means that the employer’s disciplinary decisions contained one or more elements of arbitrary, capricious, unreasonable, and/or discriminatory actions to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his or her judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing. Frequently, however, the facts are such that the guidelines cannot be applied with surgical precision.

The Seven Tests of Just Cause

1. Did management give the employee **forewarning** of the possible disciplinary consequences for the employee’s conduct?

2. Was the rule **reasonably** related to the orderly, efficient, and safe operation of the business?

3. Did management make an effort to **discover** whether the employee did, in fact, violate or disobey a rule before administering discipline?

4. Was the **investigation** conducted fairly and objectively?
5. At the investigation, did the administrator obtain **substantial evidence** that the employee was guilty as charged?
6. Have the rules, orders, and penalties been applied **without discrimination** to all employees?

7. Was the degree of discipline administered reasonably related to (a) the **seriousness** of the employee’s proven offense and (b) the **record of the employee** in his or her service with the employer?

Arbitrators in just cause hearings also look for the following elements to establish if the discipline was just and proper:

**Due Process**
Implies (1) timely disciplinary action by the employer; (2) a fair investigation; (3) a precise statement of the charges; (4) a chance for the employee to explain before imposition of discipline; and (5) no double jeopardy (cannot be punished twice for same infraction).

**Progressive Discipline**
Implies attempted rehabilitative actions by the employer to correct inappropriate behavior over time, including written and verbal warnings to the employee.

For SRPs covered by civil service law, a “just cause arbitration” may be applied in lieu of a Section 75 disciplinary hearing. For teachers and teaching assistants, a “just cause arbitration” may be applied in lieu of a Section 3020-a hearing or in matters not covered by 3020-a. In the just cause discipline or discharge hearing, the burden of proof is on the employer (i.e. the employee is innocent until proven guilty).

Check your contract to see if you have a just cause clause in the agreement. If so, apply it when appropriate. If not, it is a difficult item to achieve in contemporary collective negotiations, but it may be worth the effort. For more information contact your NYSUT LRS.