

IV: DISCIPLINE CASES

Discipline is a formal penalty imposed by management. It can include verbal counseling, written reprimands, suspensions without pay, demotions, forced transfers and, finally, termination (although some contracts don't permit some of these actions to be taken as discipline).

Management usually cites one of two reasons for taking disciplinary action: 1) it believes the employee is guilty of misconduct — that is, not following legitimate management orders, rules or policies; or 2) it believes the employee is failing to perform job functions to the standards of the workplace.

The general theory of discipline is that it should not be punitive in nature but rather corrective — that is, designed to correct behavior with the goal of encouraging an employee to carry out his/her assigned job duties.

First and foremost, stewards must know the procedure for appealing a discipline case. This is found **in the contract** (or work rules) and very often the process differs from that used for other grievances (e.g., there may be a pre-disciplinary hearing called for in the contract, or you may file discipline grievances not at step 1 but at a higher step).

Management has the burden of proof in discipline cases.

Just Cause

The basic underlying principle in discipline cases is that management must have “just cause” for imposing the disciplinary action. Many contracts state that discipline will only be given “for just cause.”

A common test for determining whether just cause existed was developed by arbitrator Carroll Daugherty in a 1966 case. This standard has come to be known as the “Seven Tests of Just Cause.” To meet the standard, management must be able to answer “yes” to the following seven questions.

1. Was the employee adequately warned of the probable consequences of his/her conduct?
2. Was the employer's rule or order reasonably related to the efficient and safe operation of the job function?
3. Did management investigate before administering the discipline?
4. Was management's investigation fair and objective?
5. Did the investigation produce substantial evidence or proof that the employee was guilty of the offense?

6. Has the employer applied its rules, orders and penalties evenly and without discrimination?
7. Was the amount of discipline reasonably related to the seriousness of the offense and the employee's past service and record? (Did the "punishment fit the crime"?)

A "no" answer to one or more of the questions indicates management's action was arbitrary, capricious and/or discriminatory in one or more respects. The union can argue that management did not have just cause to take the disciplinary action.

Progressive Discipline

Discipline is normally viewed as a progressive process, especially where the issue is failure to perform the assigned job. This means that for the first offense in a given subject (attendance, for example), the discipline will be mild (e.g., verbal counseling or a written reprimand); for subsequent offenses *on the same subject* the discipline will become progressively more severe (e.g., a short suspension, a longer suspension, termination). The intent of progressive discipline is to provide the employee the opportunity to improve performance or correct unacceptable behavior. If management does not follow progressive discipline, the union may make this failure part of its grievance case.

The major exceptions to the concept of progressive discipline are those instances where an employee's conduct is so severe or unacceptable that management feels justified in immediately terminating the employee (examples would be theft, drug or alcohol use on the job, or threatening or using physical violence).

Obey Now, Grieve Later

A general rule that arbitrators apply is that workers are expected to follow management's instructions and directives. If the worker believes the instruction to be unfair or a violation of the contract, he/she can file a grievance at a later time. Arbitrators have customarily held that failure to follow management directions can lead to the employee being charged with — and disciplined for — insubordination.

There are two recognized exceptions to the "obey now, grieve later" principle. Employees may refuse a supervisor's order when they believe that following the order would either 1) result in them doing something illegal; or 2) put them in "imminent danger" of their health and safety. Of course, if management takes disciplinary action after such a refusal, the employee must prove that his/her belief about the unsafe condition was justified.

Insubordination

Insubordination is refusing or failing to carry out a direct order. To claim that a worker was insubordinate, management must (1) issue a direct order, and (2) make the worker aware of the consequence of not following the order.

Weingarten Rights

In the 1975 case *NLRB v. J. Weingarten Inc.*, the U.S. Supreme Court declared that unionized employees have the right to have a steward present during a meeting with management when the employee believes the meeting might lead to disciplinary action being taken against him/her. This case applies to workers in the private sector. Most public employees have similar rights, but the rules vary from state to state, so check your state's labor laws.

Weingarten rights apply during investigatory interviews when a supervisor is questioning an employee to obtain information that could be used as grounds for discipline. When an employee believes such a meeting may lead to discipline, he/she has the right to request union representation. These basic Weingarten rights stem from the Supreme Court's decision:

1. The employee must request representation before or during the meeting.
2. After an employee makes the request, the supervisor has these choices:
 - a. grant the request and wait for the union representative's arrival;
 - b. deny the request and end the meeting immediately; or
 - c. give the employee the choice of either ending the meeting or continuing without representation.
3. If the supervisor denies the request and continues to ask questions, the employee has a right to refuse to answer. In addition, the supervisor is committing an unfair labor practice.



Bright Idea ***Employee Rights in "Weingarten" Meetings***

Beware that management is not obligated to inform employees of their Weingarten rights — employees must ask for them. Unlike Miranda rights — where police are required to tell a suspect of his/her right to an attorney, etc. — employees must ask for their Weingarten rights.

Some locals provide members with a wallet-sized card they can keep with them. If they find themselves in a meeting they believe may lead to discipline, they can read or hand the card to the supervisor.



Bright Ideas **Steward Rights in “Weingarten” Meetings**

- Ask to be informed of the purpose of the meeting.
- Meet with the employee before the supervisor begins questioning the employee.
- If necessary, request clarification of a question before the employee responds.
- Offer advice to the employee on how to answer a question.
- Provide additional information to the supervisor after the meeting is over.

If called in to a “Weingarten” meeting, you should also: 1) take detailed notes on the questions asked and the answers given during the meeting; and 2) help the employee remain calm during the meeting, and remind the employee to keep answers short and truthful and not volunteer additional information.

Sample Weingarten Card

“If the discussion in this meeting could in any way lead to my being disciplined or terminated, or impact on my personal working conditions, I request that my steward, local officer or union representative be present. Without union representation, I choose not to answer any further questions at this time.”

This is my right under a Supreme Court decision called Weingarten (or cite a state law).