DISCIPLINE FUNDAMENTALS

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A. Introduction

1) In your careers as Union Representatives, you will no doubt have the opportunity to see certain of your members disciplined for inappropriate actions. You will frequently be challenged by your grievor, and perhaps his/her colleagues as to whether the level of discipline was reasonable, or whether discipline was warranted at all. Our goal in preparing this presentation is to help you understand the factors that are taken into account by an Arbitrator in ruling on the reasonableness of discipline.

2) In this paper we will suggest ways that you, as a Union Representative, can play a role in having discipline overturned or lessening the severity of the penalty in certain situations.

3) The focus of this paper is on culpable conduct, which is discipline-worthy. It should be noted that an employer may, in some circumstances, dismiss an employee for non-culpable reasons such as inadequate performance or non-culpable absenteeism.

B. Grounds for Discipline

4) While it is impossible to exhaustively list grounds for discipline, discipline is commonly meted out for: tardiness and culpable absenteeism; violation of rules; theft; dishonesty; criminal and other deviant behaviour, insubordination, and even conduct that occurs outside of working hours such as inappropriate social media posts.

C. The Initial Stages of the Discipline Process

5) As earlier stated, a Union Representative can play a role in lessening the severity of discipline or having the dismissal overturned. This is because you may become involved at the earliest stages of the discipline process. There is no doubt that early intervention by a skilled representative is advantageous for a number of reasons, which we will discuss below.

C.1 Always be Ready for the Next Discipline Situation

6) While we talk about your early intervention, this part of the presentation deals with ensuring your readiness before you ever get notified of the next disciplinary incident.

7) We recommend the following to ensure that you are prepared to deal effectively with the next disciplinary incident:

i) Have easy access to your Collective Agreement and to policies, procedures, etc. Familiarize yourself with these documents.

ii) Keep a file on each of your members once a disciplinary process begins against them. This member file will allow you to quickly access the individual's past disciplinary record. It will also allow you to compare what the Employer claims is your member's past record with what you have on your file. It may be that the Employer has issued discipline in the past without copying the Union. This is often a violation, as many Collective Agreements contain a requirement that the Union receive a written copy of all discipline issued to its members. This oversight by the Employer may even allow you to challenge the validity of discipline if your Union has not been copied.

iii) You should, as part of your filing system, also keep a Master Discipline File in a safe and easily accessible place. Because some disciplinary notations are extremely vague, we recommend you attach a note to each disciplinary notation (do not write on the actual disciplinary notation) thereby allowing you to recall the exact reasons for the discipline. The ultimate importance of a Master Discipline File is to allow you to compare a current level of discipline with previous levels of discipline for similar offences, in order to determine whether your member is receiving discriminatory treatment.

C.2 The Investigative Phase

8) Hopefully, you will be notified of the fact that the Employer is conducting an investigation that may lead to discipline.

9) For the purposes of this part of the presentation, we will assume that you have been consulted and are now actually representing your member during the investigative phase. It is important to know firstly that because the investigation happens prior to the filing of the grievance, everything at this early stage is admissible as evidence in arbitration.

10) Because this part of the discipline process is admissible in evidence, you could be called as a witness. For that reason we recommend you take good notes.

11) We also recommend that you try to find out as much as you can from the Employer as to allegations, witnesses, documents, etc., that may incriminate your member, and that you do so prior to the commencement of any investigative meeting.

12) It is important to know that your member's actions during the investigation stage may impact on the level of discipline. The following factors may impact on the level of discipline:

i) Demeanour

ii) Truthfulness

iii) Apologies

iv) Failure to assist in the investigation

13) Certain actions during the investigative phase can impact the level of discipline. It is important to know that improper conduct on the part of the Employer can also convince an Arbitrator to lessen a penalty. We mention this because we have already encouraged you to take good notes. If the Employer is screaming or swearing at the employee, or otherwise behaving poorly, those instances should be well-documented in your notes in order to properly recall them later during the arbitration phase.

C.3 The Post-Investigative Phase

14) There is often a period of time after the investigation is completed and before a decision is made on discipline. During this stage, an Employer may consult with you. If they do so, firstly keep in mind that you are still in a pre-grievance phase and everything you say, and they say, is admissible later on at the arbitration phase.

15) At this early stage, we recommend that you consult your Master Discipline File to see if it contains examples of the same, or similar type of disciplinary offences in order to see what levels of discipline have been imposed in the past. You may succeed in convincing the Employer of a certain level of discipline on the basis that it is consistent with past examples of similar incidents.

16) Your individual file on the employee will reveal his/her past disciplinary record, and an absence of a record may convince an Employer at an early stage to lessen the penalty.

17) You may also be able to convince your member to accept a certain level of discipline by informing him/her of the fact that this level of discipline is consistent with past cases of a similar nature.

C.4 Disciplinary Meetings

18) It may often happen that an Employer will go directly to a disciplinary meeting after the investigative phase. Indeed, Employers often go directly to disciplinary meetings without any, or very little, investigation. In some instances, there is no disciplinary meeting at all.

19) At a disciplinary meeting, you can have an influence on the Employer's level of discipline in cases where they have not made a firm decision. We recommend you follow the same considerations we have set out earlier about the Investigative Phase i.e. demeanour, apology, etc.

20) Recall that this is still a pre-grievance phase, and as such, everything that is said, including the demeanour of participants, is admissible in evidence at arbitration. Once again, we strongly encourage good note-taking.

21) We recommend you come prepared to discuss past levels of discipline from your Master Discipline File, as well as the individual's past disciplinary record.

22) As with the Investigative Meetings, you should try to find out as much from the Employer in advance as you can, so you know what to anticipate. We also suggest you speak to your member about demeanour, etc. before going into the meeting.

23) In our experience, Employers have often made up their minds prior to convening a discipline meeting, but it never hurts to try and convince them to lessen the penalty.

24) If your member wishes to admit and apologize during the disciplinary meeting, then we recommend that you ensure he/she has the chance to do so. This may not change the Employer's mind on the level of penalty, but may have a positive impact later at arbitration. This will be discussed more fully in the next portion of this presentation.

D. The Grievance/Arbitration Phase

25) Prior to filing a grievance, you will discuss with your member whether the discipline will be grieved. This needs to occur in order to file a grievance within the timelines set out in the Collective Agreement.

Once the grievance is filed, all discussions that occur afterwards are inadmissible in evidence at an arbitration. As a result, during the steps of the grievance procedure, you can speak freely with the Employer and vice versa.

26) In anticipation of these meetings, you will no doubt have taken the time to prepare your presentation. Indeed, in many instances, this will be the first time you have the opportunity to meet with the grievor and his/her witnesses to fully explore the merits of the grievance. You should also attempt to discover as much as possible about the Employer's case (documents, notes, witnesses, video, etc.).

27) In the post grievance stage, because discussions are "off the record", both sides can discuss their case freely and even offer settlements without fear that this will become evidence at arbitration.

28) In most cases, the most effective tool is to be able to convince an Employer that besides the high costs of arbitration, they have a real risk of losing and having the penalty lessened or having the discipline overturned entirely. The best way to accomplish this is to understand the factors that influence an Arbitrator on penalty and to argue your position in a fashion similar to the arguments that would be made at arbitration.

29) At this stage, it is also very effective to have a solid understanding of past penalties for similar infractions, and as such, this would be a perfect time to refer to your Master Discipline File. The more you know about the examples of past discipline, the more persuasive you are likely to be in trying to convince the Employer to lessen the penalty if it exceeds the amount given in past cases.

30) As previously stated, an Employer may be influenced by a convincing argument about how an Arbitrator would rule on the penalty. This is therefore an appropriate time to set out the factors that influence an Arbitrator on penalty, though we suggest also highlighting these factors in earlier discussions with the employer on penalties. Those factors come from several leading cases:

i) The previous good record of the grievor

ii) The grievor's length of service

iii) Whether or not the offence was an isolated incident in the employment history of the grievor

iv) Provocation

v) Whether the offence was committed on the spur of the moment as a result of a momentary aberration, or due to strong emotional impulses, or whether the offence was premeditated

vi) Whether the penalty imposed has created a special economic hardship in light of the grievor's particular circumstances

vii) Unequal application of Company rules

viii) Circumstances negativing intent

xi) The seriousness of the offence

x) Any other circumstances such as admission and/or apology

31) The British Columbia Labour Relations Board set out another test for reviewing penalties which has also been frequently cited by Arbitrators:

i) How serious is the immediate offence of the employee which precipitated the discharge (for example, the contrast between theft and absenteeism)?

ii) Was the employee's conduct premeditated, or repetitive; or instead, was it a momentary and emotional aberration, perhaps provoked by someone else (for example, in a fight between two employees)?

iii) Does the employee have a record of long service with the Employer in which he proved an able worker and enjoyed a relatively free disciplinary history?

iv) Has the Employer attempted earlier and more moderate forms of corrective discipline of this employee which did not prove successful in solving the problem (for example, of persistent lateness or absenteeism)?

v) Is the discharge of this individual employee in accord with the consistent policies of the Employer, or does it appear to single out this person for arbitrary and harsh treatment (an issue which seems to arise particularly in cases of discipline for wildcat strikes)?

32) Most of the factors set out above are based on common sense. They are, however, critical to understanding what it takes to succeed in lessening the penalty for your grievor.

E. Miscellaneous issues

33) There are certain other issues that may affect level of penalty. We will discuss them below:

i) ***Progressive Discipline*** - Certain Employers have set out in their policies that they will follow the principle of progressive discipline. With very few exceptions, those Employers will always expressly reserve the right to resort to higher penalties, including termination, for serious offences. This of course is in keeping with the general way that Arbitrators view progressive discipline. In fact, regardless of whether an Employer agrees to follow the principle of progressive discipline, the Arbitrator will nevertheless apply that principle in determining whether to lessen the penalty or not. You should know that it matters not where your member is on the scale of progressive discipline if he/she commits a serious offence such as theft. As previously stated, a long term employee with no disciplinary record can be terminated for theft, and that termination will most often be upheld at arbitration.

Some Employers set out the nature of their progressive discipline in writing e.g. one day, three day, termination. It is important to know that unless the Union has agreed to this progression, the Arbitrator is not bound by it, and can lessen the penalty. In doing so, the Arbitrator will apply the principle of "proportionality", which in simple terms means "does the punishment fit the crime"?

ii) ***The Culminating Incident*** - An employee may have a horrendous disciplinary record with numerous suspensions and clear warnings that he/she will be terminated for the next infraction. In such circumstances, the next wrongdoing may be seen as the culminating incident and termination may be justified. It is important to understand that the culminating incident need not be all that serious. Indeed, the culminating incident is frequently a situation that, taken in isolation, would never justify termination. However, the Arbitrator will not view the culminating incident in isolation. Rather, it will be viewed in the context of the horrendous record and clear warnings.

iii) ***Warnings*** - It is always important, when reviewing your member's past record, to examine closely whether he/she received clear warnings that future incidents would result in discipline. As a general rule, the more clearly worded are the warnings, the less likely is the Arbitrator to lessen the penalty. This is especially so if the warning contains the level of penalty

that will follow for any subsequent infraction. Of course, the warning of future penalty must still be reasonable.

iv) ***The Hybrid Approach*** - This area of Labour Law is quite complex. It is not our intention to fully analyze the area of health issues and disabilities in this presentation. However, it is possible to lessen or even quash a penalty on the basis that the employee was affected by significant personal health issues such as addictions. As you may well know, many people are reluctant to divulge such personal matters to anyone, including Union Representatives and/or their Employers. If you suspect that there are underlying addiction issues that are linked to the disciplinary incident, we recommend telling the employee:

a) that you suspect that there may be underlying health/disability issues which may have affected their behaviour and contributed to the disciplinary incident; and

b) that an Employer and/or an Arbitrator may possibly lessen or eliminate the penalty if informed of those issues.

Of course you cannot force an employee to divulge such information to you, much less reveal it to the Employer. The safest route is to advise them that it is their choice, but that the information may, if revealed, alter the discipline in a positive way.

v) ***Rehabilitative Potential of the Employee*** - This is most often analyzed in the worst of situations, such as termination. Arbitrators have in the past accepted the principles of corrective discipline and rehabilitation. They will examine whether the employer-employee relationship can be restored. In doing so, they may take into account a wide variety of things, some more subtle than others. For that reason, the demeanour and attitude of your grievor are critical. As their Union Representative, you ought to discuss with them the importance of being polite and respectful throughout an entire hearing. It would be wise to let them know that they will be "under the microscope", and watched closely at all times while in the presence of the Arbitrator. If they can portray a positive image to the Arbitrator, and at the end of the day the Arbitrator has a good impression of them, it increases the chances that they will be seen as having rehabilitative potential.

F. Conclusion

39) There is no doubt that a well-informed and well-prepared Union Representative plays an important role in lessening the severity of penalty in discipline cases. We hope

that this presentation will help focus on the types of information and steps that must be taken to achieve the lowest penalty possible, and during the earliest steps possible of the discipline process.