You’ve Gotta Be Kidding Me … All of That???

Discipline and Discharge Procedures Under Civil Service Law Section 75

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What Is Civil Service Law § 75?

• Primary procedure for the discipline and discharge of public employees
  – covered employees may only be disciplined or discharged for “incompetency” or “misconduct,” and
  – have a right to a hearing when faced with discipline or discharge

Who Is Covered By § 75?

• Permanent competitive class employees
• Non-competitive class employees with 5 or more years of service
• Honorably discharged war veteran with permanent appointment in any classified service position
  – must have served during a “time of war”

Who Is Covered By § 75?

• Exempt volunteer firefighters with permanent appointments in any classified service position
• Police detectives having served for 3 consecutive years
• Homemaker or home aids working in New York City

Who Is Covered By § 75?

• Does not apply to temporary employees
• Does not distinguish between full-time and part-time so long as the appointment is permanent
• Probationary employees:
  – full § 75 rights before “minimum” probation time is served

How Does § 75 Work?

• Five Step Process:
  – Investigation
  – Prepare and Serve Charges
  – Hearing
  – Decision
  – Appeal
**Step 1 - Investigation: Employee Interview**

- Prepare a list of questions
- Decide who should conduct the interview
  - At least 2 managerial representatives
- Record the interview
  - Detailed notes
  - Audio recorder

**Step 1 - Investigation: Right to Representation**

- An employee has a right to union representation where he or she “appears to be potential subject of discipline action”
  - Not entitled to attorney representation
- **WARNING:**
  - Do not let union representative take over the interview!!

**Step 1 - Investigation: Right to Representation**

- Employer’s Obligations:
  - provide employee with advanced written notice of right to union representation
  - allow reasonable time for employee to make arrangements for representation
- If employee cannot get union representation, may go ahead with interview, **BUT**
  - If reasonable time was not given, hearing officer may exclude information from hearing

**Step 1 - Investigation**

Refusal to answer questions during the interview may be grounds for discipline!!!
Step 3 – Hearing

<table>
<thead>
<tr>
<th>13</th>
<th>Step 3 – Hearing</th>
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</thead>
<tbody>
<tr>
<td>Who hears the case?</td>
<td>Must be held before officer or body with the power to remove the employee</td>
</tr>
<tr>
<td>– Highway Superintendent vs. Village/Town/County</td>
<td>May designate a different hearing officer</td>
</tr>
<tr>
<td>– Employee must be notified in writing</td>
<td>May be included in charge</td>
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Step 3 – Hearing

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<th>14</th>
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<tbody>
<tr>
<td>What is the employee’s role during the hearing?</td>
<td>May have representation</td>
</tr>
<tr>
<td>– union representative or private attorney</td>
<td>NOT friends, relatives or co-workers</td>
</tr>
<tr>
<td>– May present evidence</td>
<td>Call witnesses</td>
</tr>
<tr>
<td>– Cross-examine employer witnesses</td>
<td>Introduce documents</td>
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Step 3 – Hearing

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<tbody>
<tr>
<td>What is the employer’s role during the hearing?</td>
<td>Has burden to prove incompetence or misconduct</td>
</tr>
<tr>
<td>– Attorney representation is strongly recommended</td>
<td>Determines overall legal strategy</td>
</tr>
<tr>
<td>– May need to issue subpoenas</td>
<td>Prepare witnesses</td>
</tr>
<tr>
<td>– Direct and cross-examination</td>
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Step 4 – The Decision

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<th>16</th>
<th>Step 3 – Hearing</th>
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<tbody>
<tr>
<td>What happens after the hearing?</td>
<td>Parties submit briefs</td>
</tr>
<tr>
<td>– Hearing officer’s report and recommendation (“R&amp;R”) based on evidence presented at the hearing and proposes a penalty</td>
<td>A copy of the R&amp;R, hearing transcript and exhibits, is provided to the final decision maker</td>
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<tr>
<td>– The R&amp;R is not final and binding</td>
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Step 3 – Hearing

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<tr>
<td>Appointing officer or body makes final decision</td>
<td>Superintendent, but may be Village/Town/County</td>
</tr>
<tr>
<td>– Not bound by hearing officer’s R&amp;R, BUT</td>
<td></td>
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<tr>
<td>– Decision must be based on evidence in record</td>
<td>May not rely on material outside of record</td>
</tr>
<tr>
<td>– Should explain rationale for different determination</td>
<td>Guilty determination must be supported by substantial evidence</td>
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<tr>
<td>– Not “proof beyond reasonable doubt”</td>
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Step 4 – The Decision: Not Guilty

- Reinstatement
- Back pay (less unemployment earnings)
  - Only entitled to back pay if found not guilty on all charges

Step 4 – The Decision: Guilty

- Possible Penalties
  - Demotion
  - Suspension without pay for up to 2 months
  - Fine of up to $100
  - Reprimand
  - Other discipline possible if arbitration process replaces § 75
- May consider mitigating circumstances
  - Disciplinary history
  - Length of service

Step 4 – The Decision: Guilty

- The following must be filed with the appropriate civil service commission and the employer:
  - copy of the charges
  - written answer
  - transcript of the hearing
  - determination
- The employee must be provided with a copy of the hearing transcript upon request

Step 5 - Appeals

- Civil Service Commission
  - filed in writing within 20 days of the determination
  - in its discretion, may affirm, reverse or modify penalty
  - Article 78 - review in State Court
    - must be filed within 4 months
    - “Substantial Evidence” standard
      - Is the penalty so disproportionate to the offense that it shocks one’s sense of fairness?

Case Study: Facts

- Village charges employee with 5 counts of misconduct
- The hearing officer finds him guilty of only 1 charge of insubordination
- The employee’s employment record was NOT part of the record, and 30-day suspension was recommended
- On its own, the Village reviews his employment record and finds prior discipline for insubordination
- The Village tells the employee it’s adopting the hearing officer’s findings of fact and, in light of his employment record, terminates him
- The employee appeals

Case Study: Discussion Questions

- Would the Village’s determination be reversed?
- What if the Village determined the employee was also guilty on a charge of theft, based on discussions a Board member had with the employee’s co-worker who said the employee admitted to the theft?
- What if the hearing officer failed to recommend any penalty in his report and recommendation?
Questions?

66th Annual School for Highway Superintendents

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