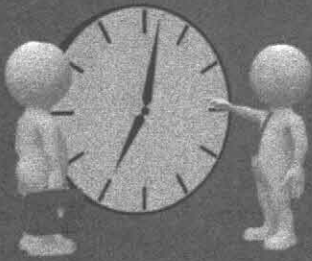


# DISCIPLINE

## WAPWU Fall Training October 28-30, 2022



# DISCIPLINE

- ▶ Article 16 gives Management the right to discipline employees for misconduct:
  - ▶ insubordination,
  - ▶ theft,
  - ▶ fighting,
  - ▶ intoxication (drugs or alcohol),
  - ▶ attendance,
  - ▶ incompetence,
  - ▶ failure to perform work as requested,
  - ▶ violation of the terms of this Agreement, or
  - ▶ safety violations
  - ▶ etc.

# Steward's Responsibility

- ▶ Representation – not, judgment
- ▶ Not necessarily your job to "get them off"
- ▶ Competent, thorough, and fair defense
- ▶ Objective: to resolve grievances at the lowest step

# Steward's Responsibility

- ▶ No substitute for HARD WORK
- ▶ Effective & Timely Investigation
- ▶ Complete & Thorough Documentation
- ▶ Detailed Analysis and Development of All Issues and Arguments

INVESTIGATION

DOC.

ANALYSIS

# Steward's Responsibility

- ▶ There is no substitute for a timely investigation and grievance
- ▶ Interview all witnesses
- ▶ Obtain Statements
- ▶ Collect Documents (RFI)



## Stewards' Checklist

- ✓ Conduct Interviews
- ✓ Collect Documents
- ✓ Take Notes

# Article 16, Section 1

## Section 1. Principles

In the administration of this Article, a basic principle shall be that *discipline should be corrective in nature, rather than punitive*. No employee may be disciplined or discharged *except for just cause* such as, but not limited to, insubordination, pilferage, intoxication (drugs or alcohol), incompetence, failure to perform work as requested, violation of the terms of this Agreement, or failure to observe safety rules and regulations. Any such discipline or discharge shall be subject the grievance-arbitration procedure provided for in this Agreement, which could result in reinstatement and restitution, including back pay.

# JUST CAUSE

- ▶ Is there a rule?
- ▶ Is the rule a reasonable rule?
- ▶ Is the rule consistently and equitably enforced?
- ▶ Was a thorough investigation completed?
- ▶ Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?
- ▶ Was the disciplinary action taken in a timely manner?

# Playing by the Rules

- ▶ Is there a rule?
- ▶ Is the rule a reasonable rule?
- ▶ Rule should be an element of the charge
- ▶ Was the employee made aware of the rule?

# Playing by the Rules

- ▶ **Some rules are understood by all**

You Can't Punch  
Your Supervisor



THEFT

INTOXICATION

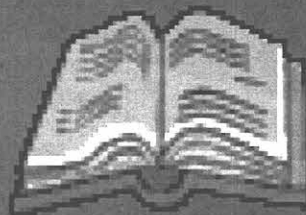
FIGHTING

ABUSE

INSUBORDINATION

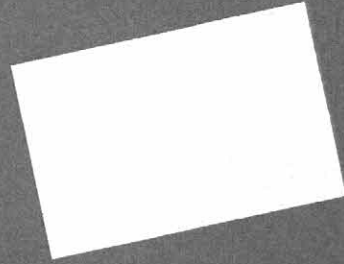
# Playing by the Rules

- ▶ **Was the employee made aware of the rule?**



# Playing by the Rules

▶ Is the rule understood?



# Disparity as a Defense

▶ Is the rule consistently and equitably enforced?

"DISCIPLINE...MUST BE APPLIED WITH A GENERAL SENSE OF EQUITY"

# Disparity as a Defense

- ▶ Comparison Employees
  - ▶ Other Bargaining Unit Employees
  - ▶ Supervisors

# Disparity as a Defense

- ▶ Where a Rule has not been enforced
- ▶ Cannot suddenly "make an example out of an employee" through enforcement without prior notice

*"Any employer has an obligation to inform employees clearly, without equivocation, and without the possibility of misunderstanding, when rules which have been ignored are to be enforced. . ."*

## PRE-DISCIPLINARY INTERVIEW AND INVESTIGATION

- ▶ Was a thorough investigation completed?
  1. Investigatory Interview
  2. Pre-Disciplinary Day in Court

## PRE-DISCIPLINARY INTERVIEW AND INVESTIGATION



"Perhaps if the Postal Service is unwilling to listen to the views of arbitrators, it should at least defer to that six-hundred-pound gorilla known as the Supreme Court of the United States."  
- Arbitrator Martatz

- ▶ Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985)

"The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity for him to present his side of the story."

## PRE-DISCIPLINARY INTERVIEW AND INVESTIGATION

- ▶ **Employer's Investigation**
- ▶ **Employee's Day in Court**
  - ▶ Employee should be given an opportunity to respond to the specific charges
- ▶ **Both Should Occur Before a Final Decision to Discipline is Made**

## PRE-DISCIPLINARY INTERVIEW AND INVESTIGATION

- ▶ **Supervisor MUST**
  - ▶ Conduct an independent investigation
  - ▶ Give employee "day-in-court"
- ▶ **Supervisor CANNOT**
  - ▶ Rely solely on PI's Investigative Memorandum



*Postal Inspectors'  
Investigative Memorandum*

# WEINGARTEN RIGHTS

- ▶ **Employee has a right to a steward when:**
  - ▶ Employee reasonably believes interview could lead to discipline, *and*
  - ▶ Employee requests a steward

*NLRB v. Weingarten, Inc.,  
420 U.S. 251,  
February 19, 1975*



# WEINGARTEN RIGHTS

- ▶ May consult privately with Steward BEFORE interview
- ▶ Employer not obligated to bargain with steward
- ▶ Steward may not obstruct the investigation
- ▶ Steward IS NOT required to remain silent during the interview

## PROGRESSIVE DISCIPLINE

- ▶ Was the severity of the discipline reasonably related to the infraction itself and in line with that usually administered, as well as to the seriousness of the employee's past record?

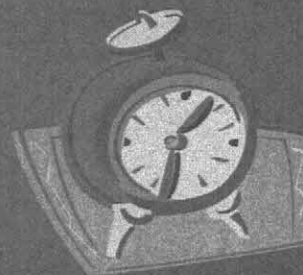
WARRANTY  
NOT PRINTED

ZERO TOLERANCE

## A MATTER OF TIME?

- ▶ Was the disciplinary action taken in a timely manner?

Discipline, to be effective, must be timely.



# JOB DISCUSSIONS

## Section 2. Discussion

For minor offenses by an employee, management has a responsibility to discuss such matters with the employee. Discussions of this type shall be held in private between the employee and the supervisor. Such discussions are not considered discipline and are not grievable...

# Discussions, not “talks”

## ELM 511.42 Management Responsibilities.

To control unscheduled absences, postal officials:

. . .

- b. Discuss attendance records with individual employees when warranted.

# REVIEW & CONCURRENCE

- ▶ Article 16.8
  - ▶ Review must occur before discipline is imposed.
  - ▶ Must be higher level review
  - ▶ Burden is on Employer to prove review occurred

# REVIEW & CONCURRENCE

Article 16.8:

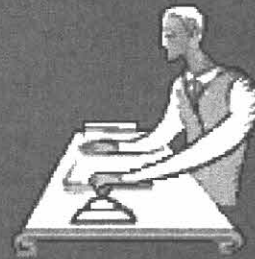
- a) Is not violated if the lower level supervisor consults, discusses, communicates with or jointly confers with the higher reviewing authority before deciding to propose discipline;
- b) Is violated if there is a 'command decision' from higher authority to impose a suspension or discharge;
- c) Is violated if there is a joint decision by the initiating and review officials to impose a suspension or discharge;
- d) Is not violated if the higher level authority does not conduct an independent investigation and relies upon the record submitted by the supervisor when reviewing and concurring with the proposed discipline;
- e) Is violated if there is a failure of either the initiating or reviewing official to make an independent substantive review of the evidence prior to the imposition of a suspension or discharge...

National Award, Arbitrator Eischen, Case No. E95R-4E-D 01027978,  
December 3, 2002

# REVIEW & CONCURRENCE

- ▶ Reviewing Authority
  - ▶ Need not conduct an independent investigation
  - ▶ Must make an independent substantive review of the file

*A Review. . .  
Not Just a "Rubber Stamp"*



# REVIEW & CONCURRENCE

- ▶ **Higher Level Review**
  - ▶ Decision may not be unduly influenced by higher level official
  - ▶ Decision may not be made by higher level official and "concurrent in" by supervisor
  - ▶ Delegation of authority for higher level review should be in writing

# The Notice Requirement

- ▶ **Suspension (14 days or less)**
  - ▶ Minimum 10 days notice (on the job or on the clock)
  - ▶ Effective date delayed until resolution of any grievance, if timely filed
- ▶ **Removal (or Suspension > 14 days)**
  - ▶ Minimum 30 days notice (on the job or on the clock)

# BURDEN OF PROOF

- ▶ **Management always has the burden of proof in a discipline case**
  - ▶ Real evidence
  - ▶ Not argument, supposition, or allegations
- ▶ **Does not excuse Union's obligation to produce exculpatory evidence**
- ▶ **Burden shifts to the Union for any affirmative defenses**

## MITIGATING FACTORS



- ▶ Provocation
- ▶ Length of service
- ▶ Lack of intent
- ▶ Repentance
- ▶ Alcoholism or chemical dependence (with treatment)
- ▶ State of mind

## MSPB RIGHTS

- ▶ Notice of Proposed Removal
- ▶ Opportunity to Meet with higher level deciding official
- ▶ Letter of Decision
- ▶ Appropriate Notice of MSPB Appeal Rights

# EMERGENCY PLACEMENT

- ▶ Article 16, Section 7
- ▶ Must be "immediate"
- ▶ Must be a "Notice"
  - ▶ Need not be "advance"
- ▶ Applies to "on-duty" misconduct
- ▶ For specific reasons listed in CBA

# EMERGENCY PLACEMENT

- ▶ Employee may be immediately placed in an off duty status
  - ▶ Allegation involving use of drugs or alcohol (intoxication)
  - ▶ Pilferage
  - ▶ Failure to observe safety rules
  - ▶ Where retaining employee on duty may result in
    - ▶ Damage to USPS property
    - ▶ Loss of mail or funds
    - ▶ Danger to self or others

# INDEFINITE SUSPENSION

- ▶ Article 16, Section 6
- ▶ Must be "reasonable cause to believe" employee is guilty of a crime for which a sentence of imprisonment could be imposed.
- ▶ Must still be just cause.



# INDEFINITE SUSPENSION

- ▶ "Reasonable Cause to Believe..."
  - ▶ Arrest generally insufficient
  - ▶ Indictment is usually enough
  - ▶ USPS must conduct independent investigation
- ▶ Just Cause - Nexus

# NEXUS: Off-Duty Misconduct

▶ **Just Cause and Nexus – Employer Must Show:**

1. That the alleged misconduct occurred
2. "Nexus" or relationship to employment
3. Evaluation of seriousness of charge and mitigation or extenuation

# STEWARD IMMUNITY



▶ Stewards are generally protected from discipline if they

- ▶ Raise their voice during meetings with management

## ATTENDANCE DISCIPLINE

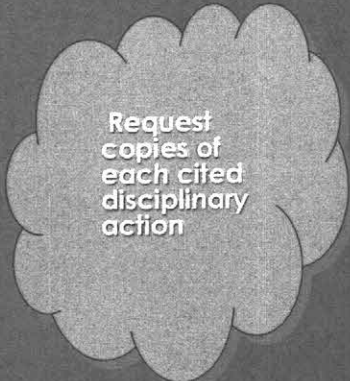
- ▶ Unscheduled leave (even if approved) can be subject of discipline.
- ▶ There is no numerical standard.
- ▶ Discussion required
- ▶ Management must consider all other factors (e.g., medical documentation, reasons, overall record, etc.)

## PROBATIONARY REMOVALS

- ▶ No access to grievance procedure to challenge a removal during probation
  - ▶ Regardless of reason
    - ▶ Legal ,or
    - ▶ Illegal
  - ▶ Regardless of any procedural issues
- ▶ However, if removal occurs after probation is completed full protection of "just cause" provision occurs

## DISCIPLINE TRACKING

- ▶ Life of each discipline is 2 years unless
  - ▶ Shortened by settlement
  - ▶ Extended by subsequent discipline
- ▶ Modified discipline must be
  - ▶ Reissued, or
  - ▶ Modified



Request  
copies of  
each cited  
disciplinary  
action

## DISCIPLINE TRACKING

- ▶ Only modified discipline (not original) may be cited
- ▶ Expunged discipline may not be cited
- ▶ Expunged discipline may not be relied upon during the grievance procedure
- ▶ Discipline which has not yet been adjudicated should not be relied upon
  - ▶ National Award, Arbitrator Fasser, Case No. MC-S-0874-D, June 18, 1977
  - ▶ USPS v. Gregory, 534 US 1 (2001)

# HEARSAY EVIDENCE

- ▶ Hearsay Evidence is admissible at arbitration
- ▶ Hearsay Evidence is "inherently suspect"



# EVIDENCE GATHERED AFTER THE FACT

*Request all information related upon at the time discipline was issued*

TO: \_\_\_\_\_ FROM: \_\_\_\_\_

**OBJECT: REQUEST FOR INFORMATION & DOCUMENTS RELATIVE TO PROCESSING & DUE DILIGENCE**

We request that the following information be furnished to the undersigned in a timely manner in order to facilitate the processing of the above-captioned matter in accordance with the provisions of the applicable contract provisions.

CCFO, Article 7, Section 1 requires the Employer to provide the member all documents that are relevant to the processing of the matter. The Employer is requested to provide the following information to the undersigned in a timely manner in order to facilitate the processing of the above-captioned matter: 1. A copy of the contract provisions that apply to the processing of the matter. 2. A copy of the contract provisions that apply to the processing of the matter. 3. A copy of the contract provisions that apply to the processing of the matter. 4. A copy of the contract provisions that apply to the processing of the matter. 5. A copy of the contract provisions that apply to the processing of the matter. 6. A copy of the contract provisions that apply to the processing of the matter. 7. A copy of the contract provisions that apply to the processing of the matter. 8. A copy of the contract provisions that apply to the processing of the matter. 9. A copy of the contract provisions that apply to the processing of the matter. 10. A copy of the contract provisions that apply to the processing of the matter.

REQUEST APPROVED     REQUEST DENIED (SEE REASON)

- ▶ Management may only rely on information available at the time discipline was issued
- ▶ Subsequently uncovered information should not be considered

# ENTRAPMENT

## ▶ Employee

- ▶ Must not have been predisposed to particular criminal activity, but
- ▶ Was induced or "entrapped" into such activity by agent of the employer



# DISCIPLINE REISSUED

- ▶ Employer may not reissue discipline after it has been resolved through the grievance/arbitration procedure
- ▶ Employer may correct procedural errors if it does so before grievance is filed
- ▶ Employer may not correct procedural errors raised during the grievance procedure

# DISCIPLINE REISSUED

## ▶ *DOUBLE JEOPARDY*

- ▶ Stems from criminal law
- ▶ Can't be punished twice for the same misconduct

## ▶ *RES JUDICATA*

- ▶ Legal principle
- ▶ Matter which has been resolved cannot be re-litigated

# LAST CHANCE AGREEMENTS

- ▶ Should only be used as a "last resort"
- ▶ "Just cause" is generally limited to determination whether the LCA was violated
- ▶ Still entitled to basic due process

# LAST CHANCE AGREEMENTS

- ▶ LCA cannot waive employee's rights under the National Agreement
  - ▶ Right to file grievance
  - ▶ Numerical attendance standards (should not agree to standards higher than normal)
- ▶ LCA cannot waive employee's rights under Federal Law
  - ▶ FMLA
  - ▶ MSPB

## STEP 1

- ▶ Immediate supervisor's admission that he "doesn't have the authority" to resolve a grievance at Step 1 can be fatal to discipline.



## **STEP 2**

### **PROCEDURAL ISSUES**

- ▶ Lack of authority to resolve grievance
  - ▶ Issuing supervisor
  - ▶ Reviewing or concurring official
- ▶ Failure to meet at Step 2
- ▶ Failure to provide all information relied upon
- ▶ Failure to provide a timely Step 2 decision

## **DENIED INFORMATION**

- ▶ Union is entitled to all information
  - ▶ Relied on by the Employer
  - ▶ Requested by the Union for purposes of any affirmative defenses
- ▶ Information must be provided in a timely manner

# DENIED INTERPRETER



- ▶ Deaf employees are entitled to reasonable accommodation
  - ▶ Certified
  - ▶ Other
- ▶ Use of interpreters is not limited to handicapped employees

# CONCLUSION

## REMEMBER:

- ▶ There is no substitute for a timely investigation and grievance
- ▶ Interview all witness
- ▶ Obtain Statements
- ▶ Collect Documents (RFI)



- Stewards' Checklist
- ✓ Conduct Interviews
  - ✓ Collect Documents
  - ✓ Take Notes

