

Tips for Successful Employee Discipline and Discharge

Just in case, the background investigation was not good enough!

By Gene King, MML LEAF Coordinator

The last issue of the LEAF Newsletter dealt with the importance of performing appropriate background investigations on new employees. This issue will discuss discipline and discharge issues and the processes departments should follow to have the best chance to be successful. It merits a complete book's worth of information to completely deal with the issue of proper discipline. Our goal is to provide information about those areas of the disciplinary process that often create trouble for employers.

The **Manual of Law Enforcement Risk Control** contains a variety of policies that guide officers in the performance of their duties. The *Manual* also contains Chapter 11, *Rules for Law Enforcement Operations*, the purpose of which is to regulate the behavior of officers when they perform their duties. Occasionally an employee does not conform to the department's standards and a discipline situation arises.

In the **Manual**, Chapter 12, *Citizen Complaint Process*, and Chapter 13, *Internal Investigations*, contain policies that outline how to handle complaints about an officer and how to investigate the allegations. Chapter 14, *Disciplinary Process*, provides general guidelines for disciplinary action if the investigation confirms that the officer has acted inappropriately. If the department's decision is to discipline, a Labor Agreement, Ordinance, or Act of Law may control the disciplinary process. In any situation, however, the following information applies when the employer must decide "the right thing to do."

THE DAUGHERTY TEST

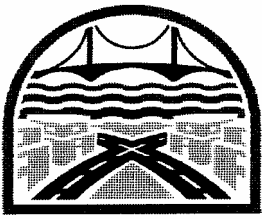
Discipline may range from counseling to dismissal for serious offenses or continued infractions. No matter what type of discipline the department applies, it should evaluate certain factors to ensure the discipline is fair and just. In *Enterprise Wire Company*, 46 LA 359 (Arbitrator: Daugherty, 1966), Arbitrator Carroll R. Daugherty used seven factors, which are now a basic part of arbitral common law called the Daugherty Test, to determine the fairness of a disciplinary action. The Seven Factors require that the correctness of discipline be determined in light of mitigating or extenuating circumstances, that is, judged against the seriousness of the infraction and the quality of the employee's employment history.

The Seven Factors of the Daugherty Test are:

1. The warning must be adequate.
2. The rule the employee broke must be reasonable.
3. The employer must investigate the alleged infraction.
4. The employer must conduct a thorough and unbiased investigation.
5. The evidence the investigator uncovers must be strong enough to justify discipline.
6. The employer must apply the rule evenly to all employees required to follow it.
7. The level of discipline should be appropriate to the infraction.

However, passing the Daugherty Test is not sufficient. To ensure a successful disciplinary action, employers should answer the following questions before administering discipline:

- Does the law prohibit the proposed discipline?
- Is the discipline consistent with public policy?
- Did the organization follow established rules and regulations?
- Did the organization follow its policies?
- Did the employer meet contractual obligations?
- Has the employer applied progressive discipline?
- Has the employer offered the employee a hearing?



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If the answer is "no" to any of these questions, then the employer should stop and review the process. The review should determine if the employer can continue or if it needs to correct the omission before proceeding so that a successful disciplinary process results. The policies provided in the **MANUAL OF LAW ENFORCEMENT RISK CONTROL** contain language that satisfies a number of these concerns.

LEGAL REQUIREMENTS

There are certain requirements that employers must satisfy during a disciplinary action. In all cases, they must ensure that managers and supervisors are following any existing Labor Agreement, Ordinance, or Act. If these exist, the department has specific hearing requirements within them. In addition to the requirements in these agreements, LEAF recommends that departments adopt Chapters 11, 12, 13 of the **MANUAL OF LAW ENFORCEMENT RISK CONTROL** as departmental practice. If an Agreement, Ordinance, or Act does not exist, then the department should adopt the policies and procedures found in Chapters 11, 12, 13, 14 and 15.

If the disciplinary action is serious in nature, managers should always contact the municipality's legal counsel for advice. Properly administering discipline and discharging an employee is difficult and strategic. It requires adherence to a specific and consistent process in order to survive if challenged.

Of particular importance to the disciplinary process are legal protections every employer must extend to the employee. The following provides a brief description of some of the areas that most commonly cause concern. Again, before beginning the disciplinary process, employers should consult with legal counsel to confirm they are acting appropriately.

GARRITY RIGHTS

In *Garrity v New Jersey* (385 U.S. 493; 87 S. CT. 616; 17 L.Ed. 2d 562 [1967]), the U.S. Supreme Court extended the Fifth Amendment protection against compulsory self-incrimination to police officers. The Court ruled that departments could not use statements or admissions taken in the coercive atmosphere of an internal investigation in a criminal proceeding against the officer. The Court ruled that before a law enforcement agency can discipline an officer for refusing to answer questions, the agency must:

- Order the officer to answer the questions.
- Ask only questions related to the officer's duties and fitness for duty.
- Advise the officer that the department will not use any information given in a criminal investigation.

Police Executives should consult the resource documents found in Chapter 13, *Internal Investigations*, for a full discussion of *Garrity*. A previous LEAF Newsletter is contained in the Chapter as well as a Review of the Law the outlines that law and its applicability. LEAF also recommends that Departments

use the notice forms included in the resource section of the chapter. Having complete information will minimize any confusion about the intent and requirements of the Garrity decision.

WEINGARTEN RIGHTS

Weingarten Rights, *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), provides for rules of representation in a disciplinary interview. To exercise these rights, the employee must believe that the interview will result in discipline and must ask for representation. Representation rights cannot interfere with the legitimate rights of the employer.

If the interview might lead to discipline, the department should advise the employee of the right to representation before the interview. The situation does not change with a representative present. The employee must answer questions if the department has followed the Garrity rules.

DUE PROCESS

If an investigation upholds the allegations of wrongdoing and disciplinary action might follow, the department should provide the employee with an administrative hearing to afford him or her due process. Before the hearing, the department should inform the employee of

- The Notice of Charges (What the employee did or failed to do).
- The particular rule(s) the employee allegedly violated.
- The possibility of disciplinary action if the department substantiates the allegations.
- The date, time, and place of the hearing during which a discussion of the allegations will take place. The department must allow a reasonable time.
- The employee's right to receive assistance from another person of his or her choosing.

(See Chapter 14, *Discipline Policy*, of the **MANUAL**.)

LOUDERMILL RIGHTS

An employer must provide employees who have a property interest in their jobs with a pre-termination hearing before employers can suspend or terminate them without pay. This hearing can be informal. The key to this hearing is the property interest in the job, meaning they are a just cause employee and have an expectation of continued employment. To establish management's record of accomplishment in protecting employees' rights, departments should arrange a Loudermill hearing for any serious disciplinary matter that might result in the loss of job rights or economic loss. Loudermill Rights entitle employees to:

- Have a person in authority conduct the hearing. A person in authority is an individual who can affect the employee's property interest;

- Receive a written or oral notice of charges;
- Receive an explanation of the evidence against them;
- Offer mitigating or extenuating evidence, or, at least, an opportunity to present their side of the story.

POST DISCIPLINE

Once disciplined, employees may have several areas of appeal. For example, a Labor Agreement, Ordinance, or Act of Law will generally outline an appeal process. If a Labor Agreement, Ordinance, or Act of Law does not govern a department's actions, it should develop a process that allows the employee to appeal to the next higher authority. Such a process provides continued due process and allows for a review of management's actions.

TERMINATION

If the decision is to terminate, employees may have the right to a post-termination hearing. The key to this right is the existence of a property interest in employment through a personnel handbook, ordinance or charter that requires "just cause" termination. To determine the need for a hearing, departments should consult their legal counsel.

Other Restrictions on Termination

Veteran's Preference Act, MCL 35.401 et seq. This act restricts the termination employees hired under the Veteran's Preference Act. The Act mandates that public sector employers can terminate a veteran only for specific offenses. The Act also has hearing requirements. If employees fall under the Act, the department should contact legal counsel before initiating termination proceedings.

MCL 35.61 defines a "Veteran" as a person who served in the active military forces, during a period of war or who received the armed forces expeditionary or other campaign service medal during an emergency condition and who was discharged or released there from under honorable conditions.

Under the Veterans' Preference Act

. . . no veteran or other soldier, sailor, marine, nurse or member of women's auxiliaries holding an office or employment in any public department or public works of the state or any county, city, township or village of the state; except heads of departments, members of commissions, and boards and heads of institutions appointed by the governor and officers appointed directly by the mayor of a city under the provisions of a charter, and first deputies of such heads of departments, heads of institutions and officers may be removed or suspended, or, without his consent, be transferred from such office or employment, only except for official misconduct, habitual, serious or willful neglect in the performance of duty, extortion, conviction of intoxication, conviction of felony, or incompetency;

and the veteran may not be removed, transferred or suspended for any of these reasons except after a full hearing

before the Governor, if a state employee, or before the prosecutor, if a county employee, or before the mayor of any city or the president of any village, or before the commissions of any city or village, if an employee of a city or village, or before the township board, if a township employee;

and, at the hearing, the veteran has the right to be present, to be represented by counsel, and to defend himself against the charges.

Further, the veteran is entitled to a notice in writing stating the cause for removal, transfer, or suspension at least 15 days before the hearing;

and any removal, suspension, or transfer may be imposed only upon written order of the Governor, prosecutor, mayor, commission, or township board, and the hearing must be held within 30 days of the filing of the notice.

We encourage employers to avoid violating the rights accorded to employees under the Veterans' Preference Act. However, if an employer removes a veteran from employment in violation of the act, the employee must file a written protest within thirty days or the law will deem him to have waived the benefits and privileges of the act. In *Grant v Meridian Twp*, 250 Mich App 13; 645 NW2d 79 (2002), the petitioner failed to protest timely the lack of a hearing before his discharge, and thus he waived any right to relief.

Name Clearing Hearing: The municipality must provide officers terminated for any act that stigmatizes them, such as theft, sexual harassment, or acts involving moral turpitude, with a post-termination name clearing hearing. The U.S. Supreme Court's decision in *Paul v. Davis*, 424 U.S. 693, 712, 96 S.Ct. 1155, 1165-66, 47 L.Ed.2d 405 (1976) established the requirement for the hearing. This rule, labeled the "stigma-plus" standard, requires a plaintiff to show that the government official's conduct deprived the plaintiff of a previously recognized property or liberty interest in addition to damaging the plaintiff's reputation. *Id.* at 712, 96 S.Ct. at 1165-66. Arbitration under labor agreements or Act 78 hearings will suffice. If a labor agreement or Act 78 does not cover officers, the municipality must advise officers of their right to a hearing. The department must arrange the hearing only if an employee formally requests it.

Even when employees have no property right to their job, in all cases involving termination on sensitive issues that may seriously damage employees' reputations, including the ability to obtain future employment, the employer should try to minimize the circulation of the information. Sometimes public distribution of the reasons for the discipline is unavoidable, so the employer may want to offer the employee an opportunity to have a hearing to clear his or her name.

Departments must remember that initiating discipline against an employee is extremely sensitive and imposes strict obligations on the employer. If the violation warrants discipline that involves a property right of an employee, the department should seek legal counsel before the disciplinary process. The time and expense will be worth the effort by protecting the rights of the employer and the employee.

Remember the Daugherty Tests. If your actions cannot pass the test then you should take a second look at the plan.

The LEAF Committee of the Michigan Municipal League Liability and Property Pool and Workers' Compensation Fund continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. You can find the **MANUAL OF LAW ENFORCEMENT RISK CONTROL** at www.mml.org, under the Insurance tab. Click on LEAF. Do not hesitate to contact the MML Loss Control Services at 800-482-2726, for more information on the Risk Management is Good Management program or any other risk reduction needs and suggestions.

While compliance with the loss prevention techniques suggested herein might reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our readers are encouraged to consult with their attorneys for specific legal advice.

LEAF MANUAL UPDATES

Check out the changes to the LEAF **MANUAL FOR LAW ENFORCEMENT RISK CONTROL**, including updates to over twelve chapters. Go to mml.org, click on the insurance tab, select LEAF and you will go directly to the manual. If you are a member of the pool or are a law enforcement executive who is a member of the fund, click on the member sign-in arrow at the bottom left of the page. If you are new to the site, contact Gene King (gking@meadowbrook.com) for assistance. Gene can also help you remember your password!

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