Regional Employees Association of Professionals February 2016 News

"Presenteeism:" The High Price We All Pay When You Must Come to Work Sick

The Occupational Safety & Health Administration has coined a new word: Presenteeism. This is the loss in productivity caused by employees who come to work when they are suffering from illness or injury. According to the Journal of Occupational Medicine, between 18% and 61% of the total cost of employee illness actually comes from illness at work. The maladies range from headaches, muscle pain, allergies and colds to the more serious problems of hypertension, arthritis, and cancer. Mental illnesses -- bipolar disorder, anxiety and serious depression -- also take a toll, as do work-related injuries affecting employees who continue to do their jobs while in pain.

Not only do sick and injured employees perform their jobs with difficulty, making limited contributions to the workplace, but also they may cause more serious problems. Obviously, many illnesses are contagious. Aside from the obvious discomfort, employees who come to work sick lower the productivity of *other* employees.

Also, people who do physical labor while recovering from an injury, have a much greater tendency to re-injure their self than in they had stayed off the job. This is the case even when employers provide for "light duty." (It is amazing how light duty can morph back into normal duty, when the work needs to be done…) The long-term cost of worker comp benefits and *permanent* productivity loss resulting from re-injury is almost impossible to estimate.

There are concrete actions employers may take to reduce the incidence of "Presenteeism." Many include topics that employees associations can also address at the bargaining table:

- Expanding the amount of sick leave available to employees (Did you know that 48% of the jobs in the U.S. provide NO sick leave at all?)
- Making sure supervisors are trained to recognize when employees are working in sick or injured circumstances and are notified about their right to leave the workplace.
- Making sure than employees are educated about their rights under the state and federal Medical Leave Acts.
- Do away with programs that penalize employees for the legitimate use of sick leave, and discontinue programs with tie pay adjustments to sick leave usage.

- Don't cause employees to work excessive hours or in understaffed conditions. Don't put employees in the dangerous circumstances of working alone when they should be working in pairs or crews.

- Make sure equipment is safe AND that it is ergonomically sound. Do not ignore employee complaints about discomfort due to workplace equipment problems.

- Instead of disciplining employees who are clearly experiencing performance problems, refer them for assistance and/or diagnosis to medical or mental heath practitioners. Make sure everyone knows about the availability of the Employee Assistance Program.

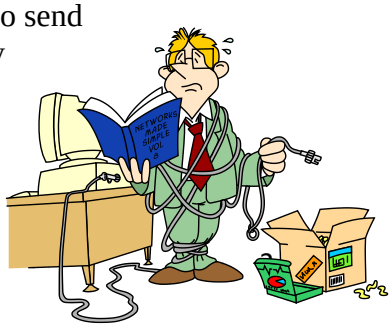
These last two points merit some discussion. With the advent of computers the incidence of chronic, serious hand and arm injuries has skyrocketed. In some kinds of work, such as 911 dispatchers who operate large, computerized "CAD" systems, arm and shoulder problems have almost come to be viewed as part of the job. Now that we've had nearly a generation of experience, the statistics are in: employers KNOW that they pay a high price for the repetitive trauma caused by ill-fitting work stations, but many still ignore employee complaints at the early stages. **An "ergonomic workplace" is one where the desk, chair and tools of the job are not uncomfortable to the person who works with them.** If you *are* uncomfortable and your employer ignores your request for improvement, this situation *is grievable.*

Finally, although it's not the City's responsibility to play doctor or therapist, some employers are much more progressive than others in managing an employee who is clearly in decline for reasons outside his control. Older employees may be wiser, but they are also "tireder" – especially if they have spent a lifetime at physical labor. A certain percentage of the population will always be ill, often with conditions that are not diagnosed yet. In fact, because we spend most of our waking hours at our jobs, it is likely that the job may be the first place that a physical or mental illness may manifest. People in the early stages of Alzheimer's will forget things. People developing Parkinson's will begin dropping things. Otherwise placid co-workers may become agitated and belligerent – only to be later diagnosed with manic depression. ***And all of these employees will become more sick, and worse at their jobs, when they are reprimanded for their shortcomings!***

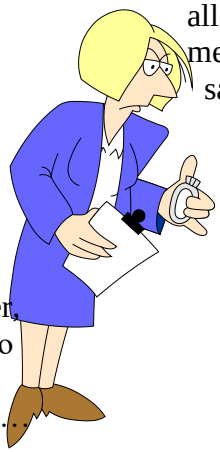
Some public employers do an excellent job at detecting problems and assisting employees with them (particularly when not everyone is *receptive* to this assistance…) But as many public workplaces have been more "corporate" and impersonal, as more and more jobs have become automated and/or subject to "speed-ups," and as top managers focus on productivity above all else, a failing employee may be viewed more as a defective machine than as a sadly-declining member of the team.

Despite the presence of numerous laws which allow people to leave the job for short or long periods to cope will illness, they are often treated with suspicion, warned about possible termination, threatened with discipline for work they can't keep up with, or penalized with denials of step raises or negative performance reviews. The fact is that a Customer Service Rep coming to work between chemotherapy treatments may be listless. A Maintenance Worker with arthritis can still rake leaves, but not nearly as many or as quickly.

Many people suffering from chronic conditions don't know what to do -- except to keep on trying to work. Rather than discipline such a person, it's incumbent on a good employer to try to take the lead for long-term resolution. Employers do have the right to send employees for fitness for duty exams. The employee may consider this harassing or cruel, but it is not as cruel as being disciplined for a



circumstance beyond one's control. A caring employer (or co-worker) can be the catalyst for someone's getting proper diagnosis or care.



Similarly, an employee who is not physically able to perform one job can often perform another. Legally, this is where the Americans With Disabilities Act comes in: an employee subject to termination for "incapacity to perform" must be provided accommodation options under the ADA. There is no reason, however, that an employee's problem must progress to termination before someone in City administration begins looking at his options…

Retirement or long-term disability leave should be included in the options. It is not age discrimination for employers to make sure their employees know how the retirement system works – including the Disability Retirement system. (Sometimes, for example, employees may retire, but still continue to work on a part-time basis, or in the private sector.)

Finally, people who are leaving their jobs for disability reasons need to know about their *medical* options. Almost all public employers allow (and are *required,* if they're in the PERS medical*)* retirees to use the medical plan at the same rate as the active members. If someone is not quite of retirement age, a termination agreement can make special arrangements for medical coverage. If the employee is disabled due to work injury, he/she should probably consult with a workers compensation attorney before severing the workplace entirely. There may be a question of lifetime benefits.

All of us become ill. All of us will decline. A significant proportion of us will still be working when these events occur.
"Presenteeism" is just the tip of the iceberg….

Overtime Alert!

County Can't Tell Employees "No Money is Available."

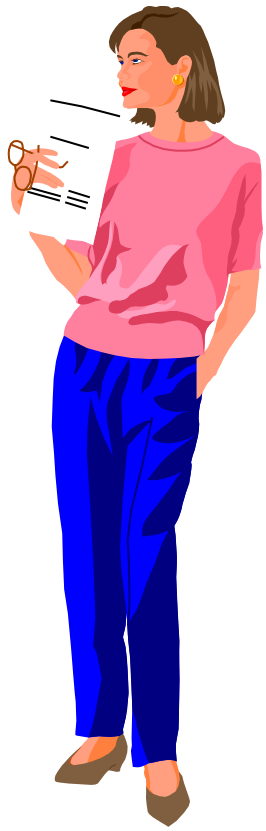
Overtime pay can be expensive: the Fair Labor Standards Act requires employers to pay time-and-a-half for overtime. Overtime in the public sector is triggered after 40 hours in a week.

The County does have the right to REQUIRE you to work overtime. If you are required to work overtime, It's not legal for your employer to "flex your schedule" to avoid payment. You have the right to the money. It's also NOT LEGAL for the employer to say "no money is available; only comp time."

It IS legal for your employer to ASK, *before the overtime is worked,* whether you are interested in working overtime, although only "comp time" or a flexed schedule is available. In this case, the overtime work must be voluntary; you must have the right to say "no, thank you." If you work overtime,

but the form of compensation is not discussed, nor have you been given any choice, you have the right to the money!

COURTS ESTABLISH "REASONABLE WOMAN" STANDARD FOR SEXUAL HARASSMENT



For over two decades now, the law has said that an employee who suffers sexual harassment has grounds for legal action against her employer. Employers are responsible for insuring that workers are not subjected to "hostile working environments: off-color remarks, inappropriate "attention" or physical contact, sexually suggestive pictures or graffiti, etc.

The DEFINITION of hostile environment, however, has been unclear. A woman might say that she found her boss' invitations, or her co-worker's bulletin board, offensive; but an individual judge could decide whether HE considered the material objectionable. Now, however, a "reasonable woman" standard has been established, and the impossible burden of proving harassment is becoming much lighter.

The new standard, established by the 9th Court of Appeals, states basically that harassment must be judged from the point of view of the victim -- not the judge. This "Reasonable Woman" standard says that women "share common concerns about the work environment which men do not necessarily share," and that "a hostile environment exists" if a reasonable woman would find the conditions "sufficiently severe or pervasive" to create an uncomfortable work setting.

One of the significant changes in employment law in the 1990's has been the "coming out of the closet" of sexual harassment, however many employees are still reluctant to complain about these problems until too late. This failure to report problem can be viewed in the same light as the failure to report an illness or injury: employees who are in pain or demoralized are unproductive and frequently avoid coming to work altogether. They tend to use up their sick leave and vacations, for no apparent reason, and come to be viewed as poor workers. If they don't report the original problem *until* after discipline has been imposed, the harassment will be viewed only as "an excuse" for poor performance.

In addition to the embarrassment and interpersonal difficulties caused by reporting harassment, women employees were fearful of retaliation because of the lack of confidentiality surrounding the filing of a formal complaint. All to often, in the past, Management's response was that no harassment existed until the grievant had "proven it." (Usually, of course, there are no witnesses...)

All of this has changed in the last five years, as women have won costly claims against employers who never took their informal complaints seriously. Now most public employers have implemented - and advertised - detailed harassment and discrimination policies. The "reasonable woman" standard has played a key role in allowing victims

to win their cases, thus cleaning up the work environment *before* legal action is required. As the Court of Appeals put it, the new standard is not intended to "lean in favor" of men or women, but to enable all employees to "participate on an equal footing" in non-abusive work places.

Changing Status of Marijuana Laws Doesn't Require California Employers to be "Compassionate"

Marijuana use is now permitted in 23 states and the District of Columbia. Four of these states (Alaska, Colorado, Oregon, and Washington) permit recreational use. The other 19 states have legalized marijuana use for medical purposes only. Voter opinion on the subject is changing rapidly. Support for legalization jumped 11 percentage points between 2010 and 2013. In a survey conducted by the Pew Institute in March 2015, 53% of Americans said marijuana should be legal; 44% opposed this.

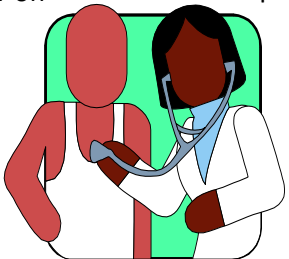
But, while the majority of Americans support the liberalization of marijuana laws, in most states, the majority of employment policies have not kept pace with this change. Connecticut, Illinois, Maine, and Rhode Island have passed laws protecting medical patients from discrimination in employment based on their marijuana use. Arizona and Delaware bar employers from discriminating against registered medical marijuana patients, *unless they use, possess, or are under the influence,* on the job. In all other states an employee may be terminated for marijuana use, even if the user holds a medical prescription. **This is because marijuana is still considered a Schedule I drug (equivalent to heroin or cocaine) by the federal government.** Although enforcement may be lax, and may vary widely from state to state, possession of marijuana *in any state* could lead to prosecution as a federal offense.

On the national scene, the most recent law about drugs in the workplace is 30 years old. In 1986, Ronald Reagan issued an executive order called the Federal Drug-Free Workplace Act which requires employers to maintain a "zero tolerance" environment if they are to receive ANY federal funding. This means that Federal employees, or employees in agencies that do any work on behalf of the federal government, must be swiftly banished if they use ANY illegal drug.

Thus, the majority of employers, still take the position that use or possession of marijuana is likely cause for termination. This is true even where marijuana is fully legal under state law. This principle was recently tested in a landmark case (*Coats v. Dish Network*) in Colorado. In "*Dish,"* the Court upheld the termination of a quadriplegic employee who was taking medically-administered marijuana for nerve pain. Mr. Coates, who had been disabled since the age of 16, was hired by the company in 2007 and was ranked among the top 5% of the company's customer service representatives. In 2010 a random drug test found that he had marijuana in his system. He held a medical marijuana license and the company agreed that he was *not* impaired at the workplace. Nonetheless, he was terminated for violating the "Drug Free Workplace Policy."

Coates sued for wrongful termination, citing Colorado's law protecting employees from termination for participating in lawful activities "off the clock" as his defense. (California has a similar law.) The company countered by insisting that neither the state's medical marijuana law nor the right to conduct lawful activity during non-work hours protected him against discipline for possession of a Schedule I drug under federal law. The trial court agreed with the company.

Coates appealed, pointing to his right to protection to use *legal* marijuana, under the Americans with Disabilities Act. But the ADA specifically bars coverage to "any employee who engages in the illegal use of drugs. " Ultimately, the Colorado Supreme Court upheld the company's position and this long term,



high performing *disabled* employee, who was using marijuana for *medical purposes,* in a state where marijuana is *completely legal,* was terminated, without any recourse.

California is NOT a "Compassionate" State

California has a "Compassionate Use Act" enabling citizens to use marijuana for medicinal purposes. But this protection does NOT extend to the workplace. **No law requires employers to accommodate possession, use, or influence of marijuana in the workplace.** The fact that increasing numbers of employees *believe* that they will be accommodated is an emerging problem for employers. All too often these are perfectly good employees performing their jobs perfectly well. Unless they are heavy vehicle drivers or hold safety-sensitive positions, they are not likely to be drug tested. However, if their drug use is "discovered" they may be subject to termination.

To some extent this situation is almost as problematic for employers as it is to marijuana users. Employers like to be consistent and "zero tolerance" policies mean that employers really should treat all drug users the same. All too often, however, a valuable, high performing employee becomes "snagged" in this system. This creates a dilemma for everyone, and has led to the widespread use of "Last Chance Agreements." In general, these Agreements (which are hammered out in the appeals process as an alternative to termination) require the employee to agree to cease the drug use, to attend a counseling program, be subjected to random drug testing and to understand that his job will be forfeited, without right of appeal, if the "problem" reoccurs.

Critics of this current system point out that there is nothing in the federal law that **requires** employers to punish marijuana users – *especially licensed medical users* – so severely. As one state legislator put it, "I'm not sure the federal law reaches as far as the state decisions which interpret this law. The Federal government is more focused on offenses involving possession than on someone who is simply under the influence at a given moment." For today however, the gap between liberal marijuana laws and "zero tolerance" employment policies can be the source of real confusion in the workplace. Employees should be aware of the fact that California is NOT a "compassionate state" when it comes to public employment.

Here's a Good Question…

Must I Disclose my Medical Diagnosis in a Request for Accommodation?

QUESTION: I am requesting that my desk be moved to a quiet space, outside of public view, due to a chronic medical condition. My doctor has sent a letter explaining this, but now my HR Department is asking to know what the exact condition is. Do I legally have to disclose this information?

ANSWER: Federal law (the American with Disabilities Act) requires that an employer "reasonably accommodate" a physical or mental disability. Not all chronic medical conditions rise to the level of disabilities, so the first issue that the employer would need to resolve is whether you are disabled. According to the EEOC, a person may be disabled if he/she has a condition that substantially limits a major life activity (such as walking, talking, seeing, hearing, or learning).

When an employee is requesting accommodation, but the disability is not obvious, the employer may ask for documentation, including information about and functional limitations that might interfere with the employees' job performance. The employer is entitled to know that the individual has a legitimate disability, but can only request information that is pertinent to the employee's job. For example, many people have dyslexia, which is a learning/reading impairment recognized under the ADA. It's legitimate for an employee with the condition to request accommodation, but it is also legitimate for the employer to gather enough information to know whether accommodation is justified and how it should be accomplished. So… it sounds as if you have a condition which is not obvious, and for which you're seeking accommodation under the ADA. Based on this information, it appears that your employer does have the right to request additional information.

Can the City Require You to Show Your Child's Birth Certificate? (Yes…)

Although it appears to be a violation of your privacy, you employer DOES have the right to request social security numbers and/or birth certificates for dependent children. The reason for this stems from regulations established by health care providers. The underlying reason is that health care companies do have the right to PROOF that they are insuring an employee's actual or adopted children, or children for whom they hold legal guardianship – and not a grandchild or other relative.

The requirement to provide this information is ONLY triggered by the employee's request for dependent child health coverage. So, if you feel strongly about maintaining the privacy of your child's social security number or birth information, you can avoid this intrusion by not applying for his/her insurance. Since many employers now charge employees for the full cost of dependent coverage, it might well "pay off" for you to buy your child a separate policy – or list him on your spouse's plan

Public Agencies Are Still Understaffed;

What Should YOU Do When You Can't Do It All…

Over the last eight years, almost all public agencies in California have "downsized." The Great Recession triggered this change, but the "Great Recovery" doesn't seem to have alleviated it. Some cities are still down to 60% of their pre-2008 workforce! In most cases, these agencies have not discontinued services; they have filled empty positions with part-time or contract labor or simply shuffled the duties around so fewer people are doing more and more work. *Both strategies may be violations of your rights.*

Almost everyone who held a job during the Recession understands the concept of "pitching in:" doing extra work, without extra pay (often while "on furlough," or often while picking up more and more of your own benefit costs). But now it's 2016, and the overwork/underpay situation may be getting really old! **You are paid to do 40 hours of work, not to squeeze 80 hours into 40…** And you are paid to do one job – NOT THREE!

So how should you respond if you are in a situation where you are expected to accomplish far more work than is reasonable (or even possible) in a normal work week? Here are some suggestions; please call your HELP representative if you would like professional help.

1. MAKE SURE YOUR MANAGEMENT KNOWS THAT YOU HAVE MORE WORK THAN YOU CAN ACCOMPLISH.

This means a good in-person discussion with your supervisor, where he/she expresses understanding that you probably cannot get all the tasks in your multiple jobs accomplished. Most people think that their supervisors know a lot more about their daily work than is actually the case. If you cannot accomplish a good understanding about a reasonable workload, pay close attention to numbers 2 and 3, below…

2. MAKE SURE THAT YOU AND YOUR SUPERVISORS AGREE ON YOUR PRIORITIES,

which includes agreement on which tasks may never get accomplished. This means a written agreement, or email exchange which lists your many duties and, literally, puts them in priority order. You should probably also talk about what happens if certain tasks aren't performed regularly. What are the consequences? Who will these consequences fall upon? Who CAN pick up the work?

3. CLARIFY THE STATUS OF OVERTIME.

Most employers don't want to pay for overtime. *This is their choice*, not yours (unless they give **you** the choice, which should be in writing.) You should NOT work overtime without appropriate pay or comp time. If you are told to work overtime to finish a task, but management doesn't want to pay you to do this, do the job ANYWAY, but write to your supervisor, explaining that you DO need to be paid. If this creates conflict, call your union rep for help.

If YOU think you need to work overtime to finish a task, but your management tells you not to, do what they say! You really shouldn't care any more about your job than your management does. Document (i.e. send your boss an email) listing the work that's left unfinished. If you're later bothered about this, call your union rep.

4. IF YOU'RE FLSA-EXEMPT (NOT ELIGIBLE FOR OVERTIME) YOU SHOULD STILL MAKE IT CLEAR THAT YOU CAN'T WORK BEYOND A REASONABLE WORK WEEK.

"Reasonable" is a pretty fuzzy term, and for exempt employees, overwork is widespread. This doesn't mean it's OK. Being a mid-manager or professional does not mean you are a slave. Abusive work conditions are grievable.

5. CLARIFY THE WORK DISTRIBUTION ISSUE.

When you are being asked to work "above and beyond" normal capacity, you're allowed to ask questions – or make suggestions -- that aren't normally part of your concern. This means that if one person in the office isn't taking on extra work, while others are straining under the weight, you *can* suggest that some of the work be redistributed. You can also suggest other ways that the work can be streamlined or reorganized. Sometimes supervisors just can see what you can see. Often they are too busy, themselves…

HOWEVER, if your managers are NOT receptive to your input, drop it! It's not your job and you don't want to be accused of insubordination. (Further, there may be salient information about the Department's operations that you don't know about.)

Your "Right to a Fair Hearing"

Most public employees know that they have "the right to a fair hearing" if they are threatened with major discipline. But what IS major discipline… and what IS a fair hearing? Who do these rights belong to? And what happens if you're deprived of them?

Stemming from a 1975 California Supreme Court case, the *"Skelly"* decision established your basic right to "due process" before your employer can terminate, demote or suspend you for more than 40 hours. Since then, dozens of other decisions have clarified this basic right, mostly to employees' advantage. The following is a sample only of the most significant rulings. If you have specific questions, please contact your HELP representative.

First of all, it would probably help to define "major discipline." Any kind of negative action that your employer takes against you can be considered discipline, but not all discipline may be appealed via the "*Skelly process."* For example, Letters of Reprimand and negative performance reviews are considered "minor discipline"; *the law doesn't establish any appeals rights for these.* The method for appealing these may not be spelled out by any law, either. But the procedure may be found in your MOU or Personnel Rules; or, in the absence of a written procedure, your association staff can probably access the grievance procedure, as your means of challenging unfair minor discipline.

For *major* discipline, however, state law applies. This means that if you are a permanent public employee,
you MUST be provided a hearing BEFORE the suspension, demotion or termination can be imposed. This *"Skelly"* hearing is named after Doctor Skelly, who was a state employee with repeated performance problems. When his department finally fired him, he argued (successfully) that his job -- his livelihood-- was a form of property, and that, based on the Constitution, the government could not "seize" this property without proving that he had done something bad enough to lose it. The result was the *Skelly* doctrine, which said that employees must receive these "pre-disciplinary safeguards:"

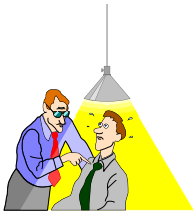
1) **Written notice of the charges against him and the proposed discipline;**
2) **The right to see all materials upon which the charges are based;**
3) **The right to respond, with at least five days' notice, either orally or in writing, to a hearing officer at the level of management with authority to modify the proposed discipline;**
4) **The right to be paid until the agency provides a written answer;**

The "*Skelly hearing"* is not a "full, evidentiary hearing." There is no right to bring evidence or witnesses, nor is the hearing officer required to be "impartial." In fact, the hearing officer is almost always a department head or manager who may have been involved in proposing the discipline. However, he or she must be in a position to genuinely consider the employee's explanation and to reverse or mitigate the discipline.

After the *Skelly* hearing, the City may impose the discipline**. HOWEVER, the employee still has another opportunity to appeal: this time in a much more formal and thorough hearing.** At this second step of the "*Skelly"* process, the accused employee does have the right to bring evidence and witnesses. This "post-disciplinary" hearing is very much like a court proceeding.

The hearing officer at this level must be "reasonably impartial." We say "reasonably" because the Courts have found that it's perfectly legal for the City Manager or District Director to be the hearing officer, as long as he or she has not been involved in the case at lower levels. The hearing body can also be a panel such as a Civil Service or Personnel Board, or even the whole City Council. As law in this arena has developed (which means as employees have sued over unfair procedures), more and more agencies are opting to use professional hearing officers or arbitrators. The subject is entirely negotiable. If your MOU doesn't provide for arbitration at the top step of the disciplinary appeals procedure, this is something to strive for.

So, What Does *Fair* Mean? Employee advocates argue, legitimately, that the initial Skelly hearing is a bit of a "kangaroo court." After all, the employee is appealing to the very people who have handed him the discipline. Sometimes, though, these meetings are truly productive and information is exchanged which changes Management's opinion. It's not unusual for the employer to modify the discipline after the *Skelly* hearing.



Further, if the accused employee doesn't believe his case was fully considered at the informal "*Skelly,"* s/he is much more likely to receive a full, fair hearing at the formal level of the process. Over the years, employees have gone to Court and won cases that established precedents in this arena. For example, it's no longer legal for the City's attorney to be the *advocate* for the employer in a discipline case, while also serving as the legal *advisor* to a hearing Board. If the Personnel Commission needs legal advice, it must retain its own legal counsel. The Courts have also found that it is a likely violation for the City to singlehandedly select – and pay – a professional hearing officer. (Hence, almost all arbitration proceedings require that the union and the

employer to split the cost.)

Speaking of the Union, you should know that an employee has the right to representation at all steps of the Skelly procedure. The rep can be provided by the union, but it can also be an outside attorney or "agent" of the employees' choice. Also, although your union should represent members at the first step of the process, **it's under no obligation to represent them in the full, evidentiary hearing if they believe that the case "lacks merit."**

WHAT IS "MERIT?" This question of "merit" is based on your legal staff's analysis of whether they can win the case: i.e., whether or not the employee is truly innocent of the charges, and/or whether the discipline is too extreme for the violation. Your union's attorney should provide a recommendation to your Association's Board about this and, if they do not believe the discipline can be modified, you don't have to proceed to the next step. (This can be important because arbitration can be expensive. Your Board should not be spending members' money on discipline cases it cannot win.)

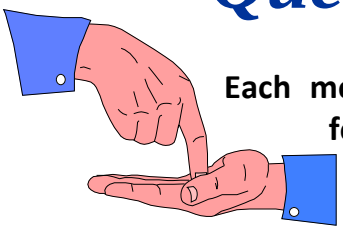
If the union decides that it cannot support a members' case through arbitration or a Board hearing, the employee still has the right to proceed alone or with his own rep. In fact, in 2006, the Court ruled that if arbitration is available as part of an employee's appeals procedure, but he or she is not represented by a union, the City must still provide the same

procedure *at no cost to the employee.*

Last but not least, what happens if the City fails to provide a "fair hearing" – or provides one that is flawed, so that it was *not fair?* Employees can – and do -- go to Court if they can show that their employer violated "*Skelly*" in hearing the appeal of their discipline. This is how the law has been improved. (However, public employees cannot "skip" the Skelly process and file for "wrongful termination" directly in Court, unless they can show that some *other* law has been violated, which caused the termination.

By the way, the consequence to the employer of failing to provide a fair hearing is severe: full back pay and reinstatement until a proper hearing has been held. So, employers rarely mishandle these proceedings nowadays…

Questions & Answers about Your Job



Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a work-related problem, contact Board Rep or Association Staff at (562) 433-6983 OR cea@cityemployees.net.

Question: Our MOU has a "cap" on vacation of 320 hours, but I have accrued more than 400 hours above the cap. Can you tell me whether the City can simply "wipe out" that time above the cap? If so, how much time do we have before it is "lost"?

Answer: Vacation time is considered a form of earned wages. This means that your employer cannot "wipe out" your accrued leave without either allowing you to use it or receive payment for it. So, no, the City cannot seize your accrued leave. (But they can notify you that you will not accrue any additional hours until you "spend" the leave down to the cap.)

Question: I have a co-worker who is a Planning Assistant II; however, with her accommodation for a chronic illness, she will only be doing the work of an Assistant I. I want to know if she can be demoted to the level of a I, or is the City required to continue paying her at the II Level?

Answer: Assuming that your co-worker has been assigned to these duties as the result of an "interactive meeting" under the Americans with Disability Act, there is probably a written agreement about her pay during this time period.

If there is no written agreement, she is probably being accommodated *informally,* in which case her pay should NOT be reduced. In order to actually demote her, the City would either need to 1) secure her agreement that she is accepting a lower-paid job for disability reasons OR 2) prove (via a hearing process) that she is incapable of performing normal duties of her Assistant II job.

Question: Our department head says there is no budget for overtime, but the nature of our work sometimes requires that we stay after 5 p.m. in order to finish a task. He says we can ask for comp time, but there "is no guarantee" and money is definitely not available. I want to know if this is legal.

Answer: If you're a non-exempt employee and you work over 40 hours in a week, the city must pay you overtime. You have the right to the MONEY *unless* your association has negotiated an agreement to accept comp time only. If there is no such agreement, you always have the right to money rather than time *unless the overtime work is voluntary.* If you are required to stay after 5 p.m. to complete a task, this isn't voluntary. But if you are opting to do this, comp time is legal. So,

even though you think you know the answer, it's always wise to make sure your management agrees that you need to work overtime when you do this. Under this circumstance, you must be PAID.

Question: Our Manager left the City three years ago. His position was never filled and I've been doing the job and receiving acting pay. But I have never been properly reclassified. It now looks as if the City is going to hire someone for this position -- and it won't be me! My previous job was filled by someone more than a year ago. I want to know 1) do I have any "right" to insist that I be given this job and 2) if not, could I possibly be terminated because my previous position is no longer available?

Answer: Have you made a request to be reclassified? If you had filed a grievance or at least put in a written request for reclassification, there is a line of argument which says that the job "belongs" to you – especially since you were receiving acting pay.

As for being terminated, the answer is no. You have the right to due process and cannot be fired unless the City either proves that you're unable to do your old job or it decides to eliminate the job entirely, and lay you off.

Question: I work in an office where there are multiple levels of supervision. I have a LEAD and a SUPERVISOR. I feel there is a tug of war between these individuals and I try to always follow the chain of command. So, if I get a directive from my LEAD that is contradicted by the SUPERVISOR, I understand that the SUPERVISOR holds the final word. But what should I do when I find myself in the middle of a power play.

Answer: Your assessment about the chain of command is spot on. When you find yourself in the middle of a "power play," you should document the contradictory directives. If your lead gives you a different order than you supervisor, you should get in the habit of confirming that with an email to *both* parties. Make sure they understand you are simply trying to follow directions and are seeking clarification. It's more work for you, but will protect you, down the road, from their conflict.

Question: I made a request to my manager to waive my half-hour meal break and combine my two fifteen minute paid breaks so I can end my shift at 4:00 p.m., instead of 4:30 p.m. She advised me I cannot legally do this. I want to know if this is true. Can the city require me to take my lunch and deny me the option of leaving early if I don't take it?

Answer: Unfortunately, yes. The California Labor Code says "an employer must provide an employee who works five or more hours with at least a 30-minute uninterrupted meal period." The meal period is supposed to be in "mid-day."

Strictly speaking, public employees are not covered by this section of the labor code, but almost all local rules include this same language. So, it is probably not feasible for the department to shorten your work day by allowing you to skip lunch. They have the right to insist that you take an unpaid lunch break.

Question: I'm the director of a child care center and have recently had to handle a complaint about an employee who slapped a child. I want to know whether I, personally, could be sued by an unhappy parent.

Answer: It's not unusual for an unhappy resident to threaten to sue a public employee (and occasionally, this really does happen). In this situation, the City is required to defend you, as long as the charge involves behavior committed during the "course and scope" of your employment. So, if you're sued for failing to stop a subordinate from slapping a child, the City would represent you. The matter involves your job duties. (On the other hand, if you were to kidnap a child, the City would have no obligation to defend you…)

Question: I was told I would need to work four hours past the end of my shift because one of my co-workers called in sick. I told my supervisor I was not able to stay

because I had an event to attend which I had already paid for. They asked me for proof that I had paid for the function, which I showed them, so they let me leave. I want to know whether it is legitimate for a supervisor to ask to see proof that you have paid for a function before they let you deny working an overtime shift.

Answer. It's even worse than you think: your employer can require you to work overtime *without regard to whether you have other plans.* If you refuse, you could be disciplined for insubordination. Luckily, most supervisors are reasonable and wouldn't want you to miss an event that was already paid for. So, in this situation, it looks as if a potential problem was averted. You didn't miss your event and your boss doesn't think you were being insubordinate. It sounds as if you work in a 24-hour facility, which requires constant staffing. In these kinds of workplaces, the need for mandatory overtime comes up often. Problems can be avoided if the City were to keep a list of staff available and interested in working overtime. If you need help negotiating this, call your representative.