Regional Employees Association Of Professionals September 2014 News

BUT I'M SICK!

YOU MEAN THEY CAN FIRE ME??

As too many employees have learned in recent years, the myth that "You Can't Fire a Public Employee" is false. There are three general reasons you can be unwillingly separated from your job: 1) disciplinary dismissal, 2) layoff, and 3**) termination due to absenteeism caused by illness or disability.**

The first two scenarios are fairly well understood. If you're fired for bad behavior, you have the right to a Skelly Hearing and a full, evidentiary hearing in front of an impartial third party. In this case, the burden is on the County to *prove* that you did something seriously wrong. If you are laid off because your position is eliminated, the County must negotiate over such "impacts" as your bumping rights and severance pay. Further, you can call for arbitration if you believe you were targeted for layoff.

But, if your employer attempts to terminate you due to long-term illness or injury, the rules affecting your rights are very confusing. What follows is our best attempt to clarify these rights.

PROTECTION DURING LONG-TERM ILLNESS

Many people operate under the false assumption that if they have a legitimate illness, they can't be fired. Frankly, this just isn't true. However, thanks to the state and federal Family Leave laws, your job is protected for at least 12 weeks in the case of an illness or injury which prevents you from coming to work.

The County does NOT have to pay you during Family Leave time, but you do have the right to use all accrued leave before going into unpaid status. When your accrued leave runs out, many agencies provide disability insurance, which can cover your loss of income for a period of time. Or, if your employer is a member, you may be able to draw from the State Disability Insurance Fund. You may also have a negotiation leave donation plan available.

But the fact that you are on disability is no guarantee that your job will be held for you indefinitely. If your disabling condition lasts long enough, or if you are really not able to perform your job after you return to work, you CAN be replaced by someone who IS able to do it.

IF YOUR CONDITION IS WORK-RELATED

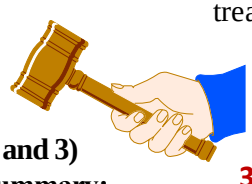
If your absence is caused by a work-related injury, the law requires that you be paid Temporary Disability pay, which is generally 66% of your regular income. Some employers provide *full pay* for injured workers for a period time; this is negotiable.

In terms of job security, an employee with a work-related injury is not really any more "protected" than someone with a non-work injury or illness – but many employers *believe* that they are. Therefore, people with work injuries are often kept on the books for long periods of time, even when it's likely that they will never be able to return to their regular jobs. In truth, the law makes it clear that employers may exercise their "business necessity" right to fill the absent employees' positions after a period of time.

What is this period of time? Unless you have negotiated better protections in your MOU, an employee who is off the job for medical reasons may be terminated after he has exhausted 12 weeks of FMLA leave – *once his employer has ALSO completed all the other steps involved in terminating a public employee in California*. Lucky for you, these steps can be numerous and complex.

DUE PROCESS

Public employers in California can't terminate an employee who is medically unable to work until they has exhausted his/her rights under 1) the Americans with Disabilities Act, 2) *Skelly* due process and 3) the his/her Retirement System. Here's a summary:



1) AMERICANS WITH DISABILITIES ACT…

After an employee has exhausted his FMLA period, *or a medical doctor has provided evidence that s/he will never be able to perform the core duties of the job,* the County must do an analysis to determine whether it can accommodate the medical condition. Generally "accommodation" means either modifying the workplace or offering the employee a job, which s/he's more capable of performing.

This analysis is an actual Interactive Meeting, usually conducted by a professional in this field who looks at your job description and your work limitations and asks a lot of detailed questions about your capabilities. **You should be represented by** your attorney or your union staff. This is NOT a meeting about your well-being; it's about your continued employment. The County **can** terminate you, even if you have a work injury, if they determine that it would cause unreasonable hardship or expense to accommodate you.

2) YOUR SKELLY RIGHTS

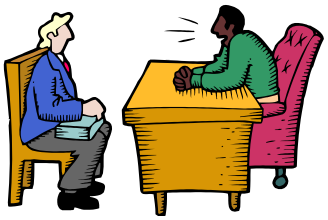
In the late '80s, the California Supreme Court decided injured and disabled workers have the same right to appeal their terminations from public agencies as employees who are terminated for disciplinary reasons. The original case arose in the City of Hawthorne, where Police Department management decided that its sole female police officer was mentally ill. They fired her for this "disability," without proving it – and without any right of appeal. Hence YOU now have the right of appeal.

So, if your employer attempts to terminate you because you are too sick or disabled to work, you do have the right to go through two levels of hearing, the second of which must be a "full evidentiary hearing before a reasonable impartial third party." At this hearing the burden lies with the County to prove that you are incapable of performing the core duties of the job.

Skelly hearings over these circumstances don't occur very often, because (as the ADA has become a stronger law) most facts about your medical condition and the demands of the job were probably hashed out in the Interactive Meeting. But, where the employer hasn't treated its ADA obligation seriously, or where an employee still believes that he IS still able to perform, an arbitrator or Civil Service Commission may make the final decision.

3) APPEALING INVOLUNTARY DISABILITY RETIREMENT AT CALPERS…

If your agency contracts with CalPERS, it cannot terminate you involuntarily for disability reasons until it has applied for *and secured* your PERS disability retirement. You do NOT need to agree to this; in fact, you can appeal it.



THE HUMAN FACTOR

The days when a public employee could consider himself hired for life are long gone. Nowadays, most public agencies employ Risk Managers who, literally, evaluate the risk of keeping a sick or injured employee in relation to his value to the organization. The pressure to remove an unproductive worker, especially one who might become a greater liability, is very real.

To what extent can you expect the County to truly accommodate your condition? There are definitely some laws on your side, and good union representation can help a lot. But, the law is also full of loopholes, and if you must actually go to Court, the cost can be high. **In truth, it's the human factor – the extent to which you are still helpful and productive in the workplace – that has the greatest influence over your ability to keep**

your job.

If your supervisor views you as a valuable, hard-working member of the team, he is FAR more likely to advocate that you be accommodated than if you are just an "OK" employee who seems to be absent a lot. A hard-working, well-liked employee who becomes ill engenders sympathy, and it's difficult to fire someone you like and feel sympathy for. This isn't law; it's psychology and reality. Even top managers are human beings. The role of their subjective opinions in making personnel decisions shouldn't be underestimated.

ILLNESS PUTS HUGE STRAIN ON THE EMPLOYMENT RELATIONSHIP

Even the best employee can be the source of irritation to management when he is not really able to do his job. This is one reason that it may be smarter to stay off the job entirely when you are sick or partially disabled, than to try to work intermittently or with limitations. It is often much smarter simply to stay out of view….

Similarly, someone suffering from illness or injury isn't always the most cheerful employee – especially if your workplace was *the cause* of your medical condition. People in this situation are often stunned by their employer's callousness: badgering them for information, criticizing their best efforts, making medical treatment difficult, even threatening termination. If you are having trouble maneuvering through the bureaucracy, or you believe that your rights are being violated, call your Association staff. The law is complicated; this is why you pay dues.

Please keep in mind, though, that the County does not have to employ you forever. It is wise to try to be as cooperative as possible, even when you're feeling your worst. Your union rep knows the local system, and can function as your liaison.

New EEOC Guidelines Emphasize Accommodation for Pregnant Workers

On July 14, 2014, the federal Equal Opportunity Employment Commission (EEOC) issued its enforcement rules for the first time in 30 years. The EEOC issues "guidance" about employee rights and employer responsibilities for most federal discrimination laws, including the Pregnancy Discrimination Act (PDA), the American with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA.)

Basically, the PDA says that an employer may not discriminate against or harass an employee based on past, current, or intended pregnancy, childbirth, or related medical conditions, including lactation. Women affected by these medical conditions must be treated the same as other employees in similar work situations. Under the new guidelines, the EEOC makes clear that "the PDA requires workplace adjustments for pregnant employees if those adjustments would be required for an employee with an ADA-covered disability."

In other words, even though the ADA says that a normal, healthy pregnancy is not a disability, the employer may still have to provide the same reasonable accommodations to a pregnant worker that it provides to a disabled worker. For example if an employee has a 20-pound lifting restriction because of a back injury, which lasts for several months, he is entitled to reasonable accommodation under the ADA. Therefore, a woman who has a similar lifting restriction due to pregnancy is also entitled to the same accommodation. Similarly, if employers provide "light duty" jobs for employees with on-the-job injuries, they must make those jobs available to pregnant workers as well.

Can They Just *CHANGE* That? What's negotiable? What's a "Management Right?"

In general, if you belong to a recognized employee organization – whether you call it a union or an employees association – your employer is required to bargain with the Association before it can make changes in "wages, hours, or conditions of employment." This rule (which is embodied in the state bargaining law, the Meyers-Milias-Brown Act) applies to big changes, such as your pay rate or medical plan or small changes such as the County's dress code or your job description.

We say "in general," because there are a few exceptions to this rule. For example, public employers have the right to lay employees off without bargaining.. This is considered, under the law, to be a "management right." Another exception might fall in the area of "operational decisions" necessary to carry out the business of the County. For example, the decisions to buy a new piece of equipment or design a new form would generally be considered "management rights." (Although if the forms are used for personnel reasons, such as a performance evaluation form or a grievance form, it **is** negotiable because the County can't change *personnel-related* rules without your union's agreement.)

So….How do we know which topics are within "management's right" to change and which are negotiable subjects? Well, over the 50-plus years tin which public employees have been bargaining in California, the Public Employment Relations Board has hammered out thousands of disputes on this subject, which are now considered precedents. These precedents tell the parties whether a matter is "within scope" (and therefore, negotiable) under the law, or is considered a "management right." (MOST subjects have been found negotiable, by the way…)

IF YOU HAVE A CONTRACT IN PLACE….

If your Association is in the middle of an MOU, it does not need to agree to negotiate changes in "wages, hours, or conditions of employment" at all. That's the purpose of a Contract: it protects the status quo. There are exceptions to this rule also, though, mostly involving changes that are compelled by external law. For example, if the State changes the licensing requirements for truck drivers, the County is required BOTH to negotiate with your union AND to comply with the law. The union may want some concessions in response to this change: training time or extra money for the impacted drivers. But if the parties don't come to agreement, the County has the right to impose the change, even if there is an in-force Contract.

Your staff at the CEA office receives calls from members every day asking "can they just *change* this about my job?" Here are some recent ones. If YOU have a specific question about what's negotiable, and what's not, feel free to call us: 562-433-6983 or cea@cityemployees.net.

Question: I'm a Code Enforcement Officer. The County wants us to get a Uniform Building Code certificate, but I'm retiring in a few years and don't want to bother with this. It's NOT required by state law and not in my job description. Can they force me to do this?

Answer: No. The County would have to negotiate with your Association to change the job description to make this certification a requirement. You probably want to let your leadership know *now* that such a proposal may be coming from the County, and that you're opposed to it. They DON'T have to agree to it.

But keep in mind that when your MOU expires, the County may well want to press for this change to the point of imposing it. If/when this occurs, it's always possible to negotiate exemptions from rules for certain circumstances. (Keep in mind, also, that some changes to job descriptions, such as training and certification, give your union the opportunity to negotiate extra pay…)

Question: Do changes in Standard Operating Procedures need to be adopted by Human Resources or the County Commission? I work in a department where our boss seems to be changing the SOP's every month. Shouldn't the employees have some voice in this?

Answer: If the operating procedures are truly ONLY operating procedures (i.e. how paperwork is handled or phones are answered) these changes would probably be considered a management prerogative. But, if they affect personnel matters, such as a shift bidding procedure, then they are negotiable. It's probably best to check with your legal staff before talking to management directly on this subject.

Question: Our Department Head put out a memo saying that we are no longer allowed to wear jeans. I've been wearing jeans every day for the entire 11 years that I've worked here. I looked at the County's dress code and it says that we are required to wear "professional attire." Does this mean that they can make this change?

Answer: Probably not. In the absence of a past practice (many years of jeans wearing) the question would be "can jeans be considered professional attire?" One judge might say yes; another might say no – it's ambiguous. *However, there IS a past practice,* so the County really should not be making this change without "extending the opportunity to meet and confer" to your union. The general rule here is that past practices have effect unless the language of the local rules is "clear and unambiguous." Yours is *not…*

Question: The County seems to be installing GPS's on all the Public Works Department vehicles. Can they just do this?

Answer: This is where we get into deeply into the subject of "management rights." It's a management right to install equipment, BUT if the equipment is used for personnel-related matters (such as discipline) the policy for the use of the equipment is fully negotiable. So, your union has the right to request to meet and confer over the *use* of the GPS's for potential discipline. (The same principle applies, by the way, to any equipment that can be used to monitor employee actions, such as hand-held computers and video cameras…)

Question: Our new supervisor is making a lot of changes in our daily practices: changing work hours, the lunch schedule, changing the way we answer the phone, making us cover the phones in other offices, making us take pictures for employee badges and wear shirts with County logos, etc. I want to know whether he's breaking any rules and whether we have the right to refuse to comply.

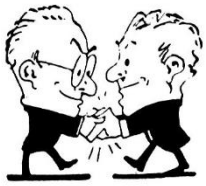
Answer: You don't have the right to "refuse to comply" with anything unless it endangers yourself or others! However, you *may* have the right to object (in the form of a grievance) if the supervisor is stepping into negotiable territory. The things that may be negotiable in the list you provided are work hours (maybe) and being required to wear County shirts (if you haven't in the past.) Putting your picture on a badge or a logo on a shirt or assigning you to work at a different desk would probably be considered operational decisions. However, this doesn't mean that your Association can't help you. With this much potential turmoil in your department, you may want to contact your union staff, who can facilitate a meeting with the new supervisor.

Question: I know that the County has the right to lay people off, but do they have the right to contract out a whole department?

Answer: The short answer is, **no,** they don't have the right to contract out unless this is clearly stated in your MOU or the County's rules. Further, even if this right IS established in the local rules they cannot contract out most public services unless they are contracting to another public county OR unless the agency is a charter city. (Many agencies operate as if

they do have the right to contract out, when they actually don't…)

Question: I'm on our Association Board and it seems to me that our County makes changes in our jobs all the time. For example, they just told us that we won't be able to use vacation time in one-day increments any longer. When I talked to HR about this they pointed me to the Management Rights section of the MOU which seems to give them the right to do whatever they want! Is there anything we can do about this?



Answer: Yes, call your professional staff. These "Management Rights" clauses are generic and are the same in almost every MOU. They give the employer overarching power to run the County: hiring and firing, organizing the work, buying equipment, etc. **However, all of these "rights" are mitigated by both the law (which requires them to meet and confer on matters within "scope" under the MMBA) and by any other local rules or MOU language OR by past practices.**

So, for example, if the MOU gives you a certain amount of vacation time, and doesn't discuss how it's scheduled, and you have always been able to use it in one-day increments, Management's withdrawal of this ability is a "unilateral change." They can't do this without bargaining.

Ignore the Management Rights clause! Call your union staff!

New Law Prohibits Public Agencies from Automatically Disqualifying Convicted Criminals for Job Applications

Assembly Bill 218 went into effect on July 1, 2014. The new law impacts the ability of people with felonies to apply for jobs at public agencies. Agencies can no longer automatically disqualify someone with a conviction as lacking the minimum qualifications for a position. It is now illegal for public agencies to ask questions about convictions on an initial job application.

Advocates of "ban the box" laws have been arguing for years that the automatic disqualification of felons from public service has a disparate impact on minorities. They have also argued that many qualified applicants are rejected from job opportunities simply because of old or minor infractions. In 1998, Hawaii became the first state in the U.S. to adopt a "ban the box" law. In California, nine cities and counties had already adopted similar laws.

Although the new law prohibits state or local agencies from asking job applicants to disclose criminal convictions on the initial applications, it doesn't prevent them from inquiring about these later in the hiring process. It just requires the county to refrain from doing so until it has determined that the applicant is qualified for the position. Questions about an employee's driving record and/or driver's license do not necessarily violate AB 218, however. Administrative determinations made by the DMV are not criminal convictions.

There are significant exemptions from the new law: job positions that are required by state law to include background checks (Police and Court Employees, Prosecuting Attorneys, Public Defenders, Child Care Providers, Playground and Recreation Center Employees who supervise minors.)

Here's a Good Question…

Question: Our manager is a real jerk. He constantly undermines our work, belittles people in public, screams (or threatens your job) if you disagree with him, asks inappropriate personal questions (especially to women), makes off-color jokes, and is basically a bully.

After years of this, all five of us filed a harassment complaint with Human Resources. Our union rep coordinated it, and each person provided a written statement. These were examples of sexual harassment because we were told that this would compel the County to have to conduct a formal investigation.

A formal investigation was conducted. We were all interviewed and tape recorded. But, since then, not a thing has happened. We expected that our manager would be disciplined, or at least moved to another division. But nothing has changed. It's all been swept under the rug. We have asked for a copy of the report and told that we cannot have it! What must we do next? Hire a private attorney?

Answer: What you do next depends on your goal. If the goal is to sue the County or sue the manager, then you will need to hire an attorney. However, there may not be anything to "win" in court. Unless someone has been forced out of his job or rendered seriously ill, you probably are not "owed" any compensation for tolerating bad management for years (and if someone *was* made sick – and this *does* happen – a workers compensation claim would be the next step.)

But if the goal of your harassment complaint was to cause the harassment to cease, you may have accomplished it. You should not assume that your manager wasn't disciplined. If your complaints were serious and real, he was probably questioned, *hard,* and told that his job is at risk if he doesn't change the behavior. He was probably also sent to a counseling program or supervisors training classes.

The County is not going to tell you any of this. They have no legal obligation to provide you with their report, and if they DID provide "findings," they would probably say that your complaints weren't verified. This is because, if the County did admit that you were mistreated, you could use this in a lawsuit.

However, the County does have the obligation to provide you with a safe, healthy workplace and it cannot avoid taking a formal complaint from five employees seriously, especially if it includes allegations of sexual harassment. So at this point you should be evaluating whether your manager's behavior has improved. He may never become a completely cheerful bunny, but the unnecessary criticism, belittling, screaming and sexual remarks should cease. The majority of people DO modify their behavior when they are told that their jobs are at stake. But some are compulsive and unable to change. You and your co-workers should feel free to keep notes about further difficulties. If the problems continue – or if you experience retaliation for filing the complaint – you should call your Association staff. You have every right to move your grievance to the next step of the procedure if you continue to be mistreated.

Workplace Bullying: What Can You Do? Robin Nahin, CEA Staff

It seems to me that harassment and bullying are on the rise in public workplaces. This isn't an easy problem to resolve, legally, so I decided to do some research on the subject… I discovered that there actually is an organization called the Workplace Bullying Institute (WBI) which assists people in understanding and dealing with this problem. They define bullying as "repeated mistreatment: verbal abuse, threatening conduct, intimidation, humiliation and/or sabotage by others that prevent work from getting done." Using this definition, we are told that 35% of employees experience bullying in the workplace and that 62% of the bullies are men. A separate Harris, poll conducted in 2011, found that 34% of women reported being bullied in the workplace.

We know that people who are the victims of bullying in the workplace can, literally, be made sick. Dr. Noreen Tehrani, who publishes articles on Post Traumatic Stress Syndrome has said that the symptoms of long-term bullying are not much different from those of soldiers returning from combat: nightmares, anxiety, inability to concentrate and a variety of very real physical illnesses. A study of 3,100 men over a 10-year period published in the **Journal of Occupational and Environmental Medicine** found that people who reported that their managers were incompetent, inconsiderate, secretive or uncommunicative were 60% more likely to suffer a heart attack than those with less troubling managers. On the flip side, a study of 6,000 British office workers over several years found that employees who consider their supervisors "fair and reasonable" had a 30% lower risk of heart disease.

So, bullying in the workplace is real, appears to be on the increase and can take a toll on its victims. Much of the literature in this field is intended for employers. Unchecked bullying also takes a toll on organizations: high absenteeism rates, staff turnover, low productivity, and low profit margins. One long-term study showed that employees stressed by bullying performed up to 50% worse than other employees on basic math and reading tests. Another showed that the financial costs of bullying on American industry could be as high as $200 billion per year. There are costs associated not only with counseling, appeasing, and consoling victims, but with transfers, department reorganizations and, of course, workers compensation claims and lawsuits.

Who Are these Bullies? Is the Problem Truly Getting Worse? There is a proven relationship between the kind of people who want to be managers and the kind who turn out to be bullies. They are both Type A personalities; they are competitive and often operate with a "sense of urgency." **But the difference between a <u>good</u> Type A manager and a bad one is how they behave under stressful circumstances** – when the work doesn't go according to plan. Bullies are those who thrown temper tantrums or search for other people to blame. Good managers have a degree of self-awareness, or at least self-control. Bullies tend to be egocentric while a good manager is able to look at situations from other peoples' points of view.

Researchers at both UC Berkeley and USC found that **managers who are in over their heads are more likely to bully their subordinates.** This is because feelings of inadequacy trigger them to lash out at others. Four separate studies, published in the journal <u>Psychological Science,</u> showed a direct link between self-perceived incompetence and aggression.

Impact of Financial Stress. There is general agreement that the Recession exacerbated stress in the workplace and therefore exacerbated bullying. People concerned with money problems and job security and

working in understaffed conditions, simply have more conflict on the job. One study conducted by Florida State University concluded in 2012 that "employer-employee relations are at one of the lowest points in history, with a significant decline in basic civility."

Does this mean that bullying is a reflection of a general decline in civil behavior? In poll after poll, Americans seem to be agreeing that their workplaces are less and less "civilized" and more and more a "negative experience," since the Great Recession. In fact, some people theorize that bullying is become more pervasive throughout society: in the schools, in neighborhoods, on the roads, in politics and in the media. Some people believe that our culture applauds "cutthroat behavior" in many settings.

So What Can Be Done about Workplace Bullying? This is where academic advice fails us. Most of the literature tells employees to take direct action: Speak up! Confront bullies! Report them! Refuse to accept their bad behavior. I suspect that most of these researchers never had to support a family or keep a job. In my opinion, confronting a bully is NOT a smart move, unless the situation is intolerable and you have no other options. Why? Because bullies retaliate! When they are in positions of authority, they can make your life miserable. So, in most cases, the smartest thing to do is to try AVOID bullies. Try to get along; try to "fly under their radar…"

What If the Situation IS Intolerable… If the situation IS intolerable, you absolutely do have the right to take action, usually in the form of a written complaint. Some agencies have an in-house procedure for harassment complaints, but most don't. If there is none, the grievance process works just fine. You should feel free to ask your legal staff to help with this.

The most important thing is that your complaint should be FORMAL, and, if possible, *done in conjunction with others who are experiencing the same problem.* Why? Two reasons. First, the obvious: there is safety in numbers. Retaliation is real. Second, it is much more difficult for your Human Resources Department to ignore a group complaint than a single person. They really would rather ignore these problems. They are not easy to solve and the old adage that "Management backs Management" is true. Employers often won't intervene in supervisor/subordinate relationship until you are nearly bleeding or under psychiatric care. They assume that managers are competent and well-intended and that a sole complainer is … well, a complainer.

A Group Grievance. So, multiple complaints about the same person shift the "burden of proof," in Management's eyes, from you to the bully. The first step is for each affected person to make a list of "incidents" including dates and witnesses, if possible. It should be a short "bullet list"; not long narratives. You can save the narratives as back up material, but the important thing is that the person receiving the materials should get a handful of easy-to-read lists of examples of the bully's very bad behavior: hollering, threatening, sabotaging work, belittling, throwing things, touching people, foul-language, unjustified criticism, whatever. If people are afraid to put their names on their lists, this is OK, but they should know that the next step will probably be a formal investigation, and they are likely will be interviewed.

Your union rep's job is to make sure that Human Resources pays attention to this complaint and follows through. If necessary, he or she can facilitate a group meeting with Management. It should be clear that your goal is for the bullying behavior to cease. You don't have the power to get your boss fired; but if your complaints are legitimate, he will probably be appropriately disciplined AND threatened. You will never know the outcome of

their interaction with *him.* (In fact, they will probably never admit that there was a problem**.) But the bullying should cease.** If it does not (and you should keep record of this) you can move forward with other action.

What "Other Action?" The courts do hear cases of workplace harassment. But an "award" from the court is granted when the plaintiff has had a loss that a lot of money is involved. This could happen, for example, when someone is so severely abused that he has to quit his job. One key element in such a case, though, is that the employee must prove that he brought the abuse to his employer's attention, but they did nothing to solve the problem. This happens, but not very often at public agencies in California.

More commonly, people develop psychological problems which can take the form of very real, disabling illnesses – and need to take time off the job. The legal "remedy" for this loss is a workers comp claim. To win a stress claim, you need to be under the care of psychologist or psychiatrist, who is able to verify that your illness is caused by the job. Again, you need to show that you asked management for help, but didn't receive it, and that the abusive treatment continued. Sometimes people subjected to these conditions are *never* able to return to work and their settlements can be high. **You can see how "bullying behavior" in the workplace can be very expensive to everyone.**

Major Legal Decision: Neutral Hearing Boards Can't Be Guided by Employer-side Attorneys

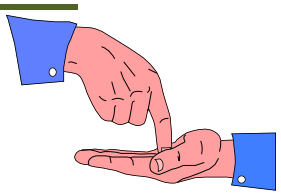
Employees threatened with major discipline have the absolute right to "Skelly Due Process." This is a two-part hearing process: first an informal meeting with Department Management to allow you to respond to the charges; and second, a "full evidentiary hearing before a reasonably impartial non-involved reviewer." In many public agencies, this "reviewer" is a Personnel Board or Civil Service Commission. On the surface, this is good. All too often in the past, however, this neutral hearing Board was advised, legally, by the same attorney who served as the advocate for the County. In other words, the "neutral" hearing board was receiving its advice about how to conduct the hearing by the same person who was assigned to WIN that hearing.

A few years ago the Fourth District Court of Appeals issued a ruling that rendered this obvious conflict of interest illegal. The case involved the termination of a non-sworn Police employee in the City of Santa Ana. The lawyer who advised the Personnel Board about its role, also served as the "prosecuting" attorney for the City. When the Personnel Board upheld the City's termination, the employee's Union sued. It argued that the "neutral" legal advisor to the Board could not possibly have been neutral.

The Court agreed, and ordered the employee to be provided a new hearing. The Court found that although the hearing might well have been fair and impartial, "the dual roles" played by the City's lawyer "lead to a clear appearance of bias on the administrative level." Even though the employee might have been guilty of a severe infraction, "this perception alone" was sufficient to overturn the termination….

This decision is significant, especially for small jurisdictions that rely on legal advice from a single City Attorney. It is NOT acceptable for the employer's advocate also to serve as its neutral "advisor."

Question and Answers: Your Rights on the Job



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

Question: One of our members has been assigned, temporarily, to work as a crew supervisor. Since the supervisors are in a different union, the county now says that he can no longer pay dues to our association. Is that true?

Answer: No, it's not true! Until/unless your member is permanently promoted, he is still part of your bargaining unit and thus your association. The County must continue to deduct dues from this member.

Question: I was on jury duty all of last week, but then was called in to work overtime on two evenings, for a total of seven hours. When I received my paycheck, it didn't include the overtime pay. Is this legal?

Answer: It depends on whether jury duty is counted as "time worked" for the calculation of overtime. If it is, and you "worked" 40 hours in your week of jury duty, then the extra seven hours should be paid at the overtime rate. Most contracts are silent on the subject of whether jury duty is considered "time worked" for overtime purposes, but they DO allow jury duty to substitute for work time for basic pay. Therefore, unless your contract specifically says that jury duty is NOT counted toward the calculation of overtime, or unless there's some established practice about this, it probably should be counted – and you are probably owed some pay.

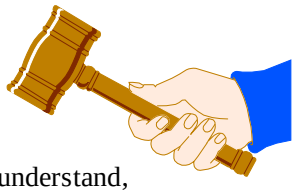
Question: I retired last year and just found out that I have hepatitis C. I believe that I contracted this at work. Can I file a workers comp claim after I retire?

Answer: Yes, you ALWAYS retain the right to file a workers comp claim. You are probably going to need an attorney, though. Depending on the kind of work you did, it may be difficult to prove that the illness arose from the workplace.

Question: I just came back from a two-week medical leave and have discovered that people have been looking at my computer and reading my email. There are exchanges with co-workers that I really didn't want other people to read. What, if anything, can I do about this?

Answer: Unfortunately, not much. The computer and your email are property of your employer and it is possible that your management had a legitimate business need to look at it. This is another reminder that you should try to use your email at work, for work ONLY. Even if you are not out on sick leave, your computer can always be monitored by management.

Question: My supervisor is in the same union as me. I want to know how my union will be able to help me if I have a grievance against my supervisor.



Answer: Great question. It's important to understand, first, that you cannot file a grievance against an individual. A grievance arises from a violation of your rights under the law or the local personnel rules or your MOU. So, if you are harassed by your supervisor, you would file a grievance with your employer for failing to protect you on the job. The purpose of the grievance is to compel your employer to take action to make the abuse cease, and your union rep would help you move your case along.

Your employer will most likely call in your supervisor to an investigative meeting, and if he's in the union, he may call for a representative to sit in with him. Similarly, if he is disciplined and decides to appeal, he may call for a representative but it would still be a different staff person than the staff person who has been representing you.

Your employer will ultimately decide if the harassment is occurring and how to stop it. In either case, he will be represented by a *different* union staff person from the one who represented you.

Question: I am an Associate Engineer. Although I sometimes assist other employees in lower job classes, I'm <u>not</u> a supervisor. My Manager has just asked me to attend an evaluation training class and to begin doing the performance evaluations for three other employees in the Department. I want to know can they <u>require</u> me to do this.

Answer: They can require you to do this even if you are not a supervisor. However, if the Department begins requiring you to perform these supervisory duties for a significant portion of your job, you should probably ask about "Acting" or "Out-of-Class" pay. If these become long-term or permanent assignments, you may want to request to be reclassified to a supervisor's position. If denied, you might consider filing a grievance. This will make the County have to decide whether it wants to pay you appropriately for the work you are doing or remove the supervisory duties.

Question: Can you tell me if the county has to provide health care insurance to my girlfriend if we file a domestic partnership with the state?

Answer: You are not going to like this answer, but domestic partnerships aren't recognized under most health care plans unless the parties are over 65 or of the same sex.

Question: My new Department Head sent out a memo asking all his subordinates for "any information you feel is important regarding your education, work background, outside interests or other items which may affect your working life." Can he do that?

Answer: He can ask, and you're free to respond, but you're under no compulsion to respond. Your personal life is not your supervisor's business unless it directly (and negatively) affects your work. However, if this is a new boss, he may simply be trying to get to know his employees; perhaps you should see this as an opportunity to show him the sides you *do* want to share.

Question: I work days and I am thinking about taking a second job working evenings and weekends. Can the County stop me from doing this?

Answer: The County has the right to know what other work you're doing to insure that there's no conflict of interest. They also want some assurance that they won't be made liable for an injury you may sustain in someone else's employ, so they will probably require you to sign a waiver. After that, you have the right to do what you want with your free time, with one possible exception: if you are on standby or pager as a condition of employment, you must be available to return to your County workplace when called.

Question: My supervisor called me into a meeting. I don't have any idea what the reason is. Do I have to go?

Answer: Yes, but if you believe that you may be disciplined *or questioned* with the possibility of later discipline, you have the right to a representative. You have every right to *ask* about the purpose of the meeting (or have your representative ask) prior to attending.

The Law Protects You Against Discipline For "Off Duty" Conduct

Several years ago, the Labor Code was amended to resolve one of the largest questions in California's labor relations: "what right does my Employer have to punish me for what I do in my personal life?" Although most Court decisions would tell you, that your employer has NO right to take disciplinary action against you for "off duty" behavior, a great many employers continued to believe that you could be held liable for "behavior unbecoming a representative of the County or "bringing discredit to the employer."

The new law, however, makes it clear that if you suffer "a loss of wages as the result of demotion, suspension or discharge for *lawful* conduct during non-working hours," you may file a claim with the California Labor Commissioner. The Labor Commissioner has "full remedial authority" over its cases. It may award not only back as well as reinstatement. The Commissioner is not bound by any local hearing process, even if it includes arbitration. What this means is that, even if you go through your County's grievance or discipline process, and lose, you may appeal violations of this law to the Labor Commission.

Labor Code Section 96(k) means that an employer cannot discipline any employee – including Police Officers -- for any off-duty lawful conduct, regardless of the effect it may have on the employer or on the employee. However, the employer is not prevented from taking disciplinary action if an employee is found guilty of *unlawful* conduct away from the job.