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Representative Information Bulletin

Discipline

There are two types of disciplinary action: minor and major

- **Minor:**
 - Formal written reprimand
 - Suspension/fine of 5 working days or less

- **Major:**
 - Removal
 - Disciplinary demotion
 - Suspension or fine of more than 5 working days
 - Suspension or fine of 5 working days or less where the aggregate number of days is 15 or more days in a calendar year
 - Suspension or fine where an employee receives more than 3 suspensions of 5 working days or less

General causes for discipline

- Incompetency, inefficiency or failure to perform duties
- Insubordination
- Inability to perform duties
- Chronic or excessive absenteeism or lateness
- Conviction of a crime
- Conduct unbecoming a public employee
- Neglect of duty
- Misuse of public property, including motor vehicles
- Discrimination that affects equal employment opportunity (as defined in N.J.A.C. 4A:7-1.1), including sexual harassment

- Violation of Federal regulations concerning drug and alcohol use by and testing of employees who perform functions related to the operation of commercial motor vehicles, and State and local policies issued thereunder
- Other sufficient cause

***It is important to remember that our contract is clear, and there is case law to support that disciplinary action may only be brought for “just cause”

Appeals

- Any disciplinary appeal must be filed within 15 calendar days of the notice of disciplinary action
- All discipline may be appealed through the Appointing Authority
- Major discipline
 - Major discipline can be appealed through the advisory disciplinary arbitration process
 - This process can only be requested through the President, within 20 days of the decision
 - Major discipline can be appealed to the Department of Personnel within 20 calendar days of receipt of the Final Notice of Disciplinary Action
 - If DOP procedure is chosen, it will be considered final and binding and an absolute waiver of going through the disciplinary arbitration process
- Major discipline appeals are referred to the Office of Administrative Law for a *de novo* hearing, which means “new hearing”
- Major discipline can also be appealed through an “Alternate Dispute Resolution” program
 - This must be agreed to by employee, union, and employer

Minor discipline

- Minor discipline appeals can be appealed to the Department of Personnel only if the appeal presents issues of general applicability in that it interprets law, rule, regulation, or policy. If this standard is met, the minor appeal is referred to the Office of Administrative Law for hearing.
 - If DOP procedure is chosen, it will be considered final and binding and an absolute waiver of going through the disciplinary arbitration process
- Minor discipline from suspensions of 1 to 5 days may be appealed to the Joint Association Management Panel

Steps before imposition of major discipline

- Employer must serve Preliminary Notice of Disciplinary Action, setting forth the charges
- Employee may appeal the charges within 15 days of service of the charges
- Employer must hold appeal hearing within 20 days of receipt of the appeal
- Hearing Officer must render a decision on the appeal, and Employer must serve Final Notice of Disciplinary Action within 20 days of hearing
- Sanction may be imposed after service of the Final Notice of Disciplinary Action

Automatic dismissal

- Disciplinary action must be brought within 45 days of the Appointing Authority becoming reasonably aware of the infraction, for all but EED violations
- EED disciplinary action must be brought within 60 days of the Appointing Authority becoming reasonably aware of the infraction
 - If the charges are not brought within these time frames, the charges shall be considered dismissed

Limitations on suspensions and fines

- No suspension or fine shall exceed six months except for suspensions pending criminal complaint or indictment
- In State service, suspensions shall be without pay unless directly authorized to be with pay by the department head. Where a fine of \$100.00 or more is to be imposed, the fine will be withheld pending the final disposition of the appeal, if so requested by the employee
- An appointing authority may impose a suspension on the record when the appointing authority and the employee, or, where the employee is covered by a collective negotiations agreement, the employee's majority representative, agree in writing that, for purposes of progressive discipline, the employee will receive a suspension on the record and that it will have the same force and effect for purposes of future disciplinary actions as a suspension actually served by the employee.

An appointing authority may only impose a fine as follows:

- As a form of restitution
- In lieu of a suspension, when the appointing authority establishes that a suspension of the employee would be detrimental to the public health, safety or welfare
- Where an employee has agreed to a fine as a disciplinary option
- An employee may pay a fine of more than five days salary in a lump sum or through installments. Unless otherwise agreed to by the employee, an installment may not be more than five percent of the gross salary per pay for a fine under \$500.00; 10 percent of gross salary per pay period for a fine between \$500.00 and \$1,000; or 15 percent of gross salary per pay period for a fine over \$1,000

Conditions for immediate suspension

- Employee is unfit for duty or a hazard to fellow employees or others
- It is necessary to maintain safety, health, order or effective direction of public services
- Employee is charged with a crime of the first, second, or third degree, or the fourth degree on the job or directly related to the job

Suspensions

- Contractually, suspensions cannot be implemented before 72 from the beginning of the work shift during which notice of the suspension was given, except in Loudermill situations

Procedures for immediate suspension without pay

- Loudermill hearing notice must be given to employee at least 24 hours before a hearing

- Loudermill hearing where the employee is advised of why the suspension is sought and the general charges and evidence. The employee is given the opportunity to review the charges and evidence and to respond before the Appointing Authority
- Employer must serve employee with Preliminary Notice of Disciplinary Action within 5 days of suspension
- Employer must hold disciplinary appeal hearing within 30 days of serving preliminary notice
- Hearing Officer's decision and final notice of disciplinary action served to employee within 20 days of the hearing

Actions involving criminal matters

- Employees suspended pending criminal complaint must be served with preliminary notice of disciplinary action stating that forfeiture of position may apply
- Departmental appeal hearing is limited to the issue of whether the public interest would be best served by suspending the employee with or without pay pending the disposition of the criminal charges
- The indefinite suspension may extend beyond 6 months but not beyond the disposition of the criminal charges

Progressive Discipline

- An employee's past record is not admissible to establish the charges upon which the discipline is based, but may be considered in determining the penalty to be imposed
- The past record which may be considered in determining the appropriate penalty includes performance evaluations, reasonably recent history of promotions, commendations, and formally and informally adjudicated disciplinary actions

Investigations of employees

- Generally, minor infractions should be investigated by the employee's supervisor, in his/her chain of command
- SID may investigate misconduct that may be criminal in nature, or involve inmates,
- SID may investigate serious administrative rule violations, especially involving safety and security
- EED shall investigate all matters associated with violations of any EED policies
- Don't forget
 - Loudermill Rights
 - Weingarten Rights
 - Garrity Rights
 - Miranda Rights

Burden of Proof

- Burden of proof is incumbent upon the Appointing Authority
- Guilt must be proven by a preponderance of credible evidence, which is greater than 50%

Appeal to the Merit System Board

- Appeal must be made within 20 days of the final notice of disciplinary action
- A request for interim relief can be made, but must show a clear likelihood of success on the merits, a danger of immediate or irreparable harm, and absence of substantial injury to other parties, and the public interest

- The Merit System Board prepares that appeal for review by the Office of Administrative Law
- Early settlement can be accomplished
- An Administrative Law Judge hears the case and makes a recommendation to the Merit System Board, for their approval
- All parties have 13 days to file exception to the ALJ's report
- The Merit System Board may accept, reject or modify the ALJ's recommendation

Back Pay, Benefits and Seniority

- Is awarded when disciplinary action is reversed
- May be awarded when disciplinary penalty is modified
- Is awarded following disposition of pending criminal charges, when there is a verdict of not guilty at trial, dismissal of the complaint or indictment, or termination of the prosecution
- Back pay includes any salary, regular wages, shift overlap, increments, and across-the-board increases
- Back pay does not include such items as overtime or holiday premium pay
- Benefits include vacation and sick leave credits and additional amounts expended by the employee to maintain health insurance coverage during the period of removal
- Back pay is reduced by the amount of taxes, social security payments, dues and pension payments, and other sums normally withheld
- Back pay is reduced by the amount of money which was actually earned or could have been earned during the separation. If the employee had previously held other employment, the earnings from this employment are not deducted from back pay unless the employee increased work hours with the other employer during the separation. The pay for the additional hours is subtracted from the back pay award
- Back pay is subject to reduction by any delay of the appeal proceedings caused on behalf of the employee
- Back pay is not awarded when the charge is disposed of through conditional discharge or pre-trial intervention

Counsel Fees

- The Merit System Board awards full or partial reasonable counsel fees where the employee has prevailed on all or substantially all of the issues
- The actual amount is to be settled by the parties whenever possible

The Executive Board is always available to assist with any disciplinary appeal issue that you may have. We can serve as observers to assist, or we can present and have you observe.

Also, as a representative, you may request recesses during any disciplinary appeal hearing. If things seem out of hand, or if you have a question, the Executive Board is only a phone call away.

Good luck,

Jeffrey Smith