Procedures followed in disciplining employees serving in the Civil Service.

The Discipline Book
by Harvey Randall and Eric D. Randall

The Discipline Book

A Concise Guide to Discipline

in the

New York State Public Service

by

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and

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CHAPTER 2

CONDUCTING AN INVESTIGATION

When allegations of misconduct arise, both the employer and the union representing the employee are obligated to investigate.

The employer has a responsibility as a steward of public trust to investigate any allegations of malfeasance (wrongdoing), misfeasance (performing a public duty, but in an improper manner) and nonfeasance (failing to perform one's duty).

The union has an obligation to investigate under its duty of fair representation. The union must ascertain facts in order to adequately represent the individual or make judgments of how to devote resources when multiple union members are involved or perhaps are accusing each other of improper conduct.

This chapter considers the procedures that should be followed in processing disciplinary actions. Specific requirements in individual cases may vary depending on the legal authority used -- Section 75 of the Civil Service Law, Section 3020-a of the Education Law, or an alternative disciplinary procedure negotiated under the Taylor Law [Article 14 of the Civil Service Law] and set out in a collective bargaining agreement.

When the appointing authority is a "body" such as a board or commission, it is not unusual for one or more members of the "body" to participate in an investigation of employee conduct that ultimately results in disciplinary charges being filed against the employee. Has the employee been denied due process if those members of the board or commission who conducted the investigation also participate in the post hearing determination as to the employee's guilt with respect to one or more of the charges and imposition of a discipline penalty?

This issues is explored in Stanton v Board of Trustees, 550 NYS2d 16

In Stanton the Appellate Division, Second Department ruled that an employee is not deprived of administrative due process because members of the Board who voted to terminate Stanton also participated in the underlying investigation that lead to charges of misconduct being brought against her.

The decision states that "although a fair trial in a fair tribunal is a basic requirement of due process ... it has also been recognized that mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not disqualify a decision-maker."

As to Stanton's other claims in support of her contention that she had been denied due process, the Appellate Division commented that although the Board was authorized by Section 75.2 of the Civil Service Law to conduct a disciplinary hearing concerning the charges it had filed against her, it elected to have an independent hearing officer preside at the hearing instead.

The Court viewed this as evidence of the Board's desire to minimize the possibility of bias that might result from the overlapping investigatory and adjudicative functions of the Board. In addition, it was noted that members of the Board who had testified against Stanton at the hearing did not vote on the question of whether to terminate her employment.

Regardless of whether the legal authority for pursuing a disciplinary action is Section 75, Section 3020-a or a collective bargaining agreement, certain elements are standard in any disciplinary process in New York State.

These elements are:

1. A suspicion of wrongdoing or the receipt of allegations of employee misconduct or incompetence.

2. An investigation and determination as to whether disciplinary action is warranted.

3. The filing of disciplinary charges, including the proposed penalty.

4. Holding the disciplinary hearing.

5. Findings of fact and a determination by a hearing officer or tribunal.

6. Appointing authority accepts, modifies or rejects hearing officer's finding[s] and/or recommendation[s].

7. Challenging the hearing determination through an appeal process.

The remainder of this chapter will describe proper procedures in perhaps the most sensitive part of a disciplinary proceeding: the investigation of allegations. Later chapters will concern other steps in the discipline process.

It is worth noting that collective bargaining agreements typically contain detailed guidelines on procedures to be followed in investigations. Employers sometimes choose to follow the steps in a collective bargaining agreement even for personnel who are not covered by the agreement. For instance, suppose an administrator is investigating an employee for possible misconduct. Although the employee is not covered under the employer's collective bargaining agreement, the administrator may choose to follow the same investigatory steps outlined in the collective bargaining agreement.

There are pros and cons to this approach. On the positive side, following the procedure conveys an intent to be fair and equitable. Also, those steps are well defined and familiar to the administrator. There is no risk of establishing a past practice within the meaning of the Taylor Law if the individual is outside the negotiating unit, because past practice only applies to parties to an agreement.

On the other hand, if the individual involved is a member of the negotiating unit but is not entitled to due process due to his or her employment status there is a strong possibility of establishing a "past practice" by providing due process to individuals in a negotiating unit not entitled to due process under a collective bargaining agreement or by statute.

With respect to those not in a negotiating unit, providing such a procedure to some, but not others, may result in claims of unlawful discrimination by those not accorded such a benefit. For instance, a black employee who is not entitled to due process may cite as evidence of discrimination the case of a white employee who was not entitled to due process yet was granted it anyway while he or she was not accorded similar treatment.

If charges are served on the employee as a result of the investigation, the authority for such action would be set out in a statute such as Section 75 of the Civil Service Law or Section 3020-a of the Education Law or the relevant clause in a collective bargaining agreement.

2.01 Overview: Disciplinary investigations

It is well established that an employer, acting through its supervisory staff, has an inherent power to investigate its employees when it has knowledge of, or a reasonable suspicion, of misconduct.

A disciplinary investigation has three basic purposes: (1) to ascertain whether claims of misconduct or incompetence have a firm basis in fact; (2) to exonerate the innocent and (3) to identify the persons or records that will be relied upon at any future disciplinary hearing.

Most collective bargaining agreements set out in some detail the procedures to be followed in connection with the investigation of a matter that may lead to disciplinary action. Such guidelines for investigations may prove helpful in other disciplinary situations as well.

Where there are no contract provisions concerning investigations, the employer usually relies on Section 61.f the Public Officers Law as authority for conducting the investigation.

2.02 Handling complaints

Employers sometimes receive complaints or allegations of misconduct about employees from members of the public or co-workers. Such complaints should be investigated.

If the appointing authority is satisfied that there is no merit to the allegation, there is no need to pursue discipline or alternative remedies. If the employer believes there is merit to the allegation, it has options besides proceeding with disciplinary charges.

These options include:

Assignment of a mentor

Clarifying duties and responsibilities

Closer supervision

Counseling

Retraining

Transfer or reassignment

2.03 Anonymous allegations

Sometimes an individual is the target of allegations that have been submitted anonymously. An anonymous allegation poses a serious problem for the administrator. The allegations may be false, made as a result of malice or may simply be a mistake on the part of the accuser. Nevertheless, it is necessary for the administrator to assume the charges are valid and undertake an investigation of the matter.

Such an investigation probably need not be as intensive as would be the case were the allegations made by a supervisor in the normal course of business or by a known party. However, the administrator should satisfy himself or herself that there is no substance to the allegation. If the investigation reveals that there is some substance to the allegations, and if true would constitute misconduct, further action should be taken by the administrator.

Anonymous communications that allege improper conduct by an employee place the appointing authority on the horns of a dilemma. If the employer ignores the communication, it may later develop that there was some substance to the allegation, and the employer will be exposed to criticism (or liability) for failing to act "on the information." On the other hand, if the appointing authority confronts the employee, relying solely on the information it received anonymously, it may be criticized for taking adverse action against the employee based on such information alone. Such was the situation that faced the appointing authority after it received an anonymous letter alleging that one it its firefighters, Scott Wilson was using illegal drugs.

Wilson v City of White Plains, 95 NY2d 783, sets out the standard applied by the Court of Appeals when it considered the actions taken by White Plains based on its receiving anonymous information alleging Wilson was using illegal drugs.

White Plains ordered Wison to submit to blood and urine. Ultimately disciplinary charges were filed against Wilson. A hearing officer found Wilson guilty of six charges of misconduct. The Commissioner of Public Safety adopted the findings and recommendations of the hearing officer and dismissed Wilson from his position. Wilson appealed his termination and persuaded the court that his removal was arbitrary.

Noting that "there was no objective evidence which would have suggested that the [Wilson] was abusing alcohol or drugs," the Appellate Division said that under these circumstances, ordering Wilson to undergo such testing "was arbitrary and without even a minimal basis of justification." Finding that Wilson's dismissal was improper under the circumstances, the court directed the department to reinstate him to his former position with back pay and benefits.

In annulling Wilson's dismissal the Appellate Division said that "in directing [Wilson] to submit to blood and urine tests, the fire department officials "relied upon an unsubstantiated and anonymous letter" and that there "was no objective evidence which would have suggested that the [firefighter] was abusing alcohol or drugs."

The Court of Appeals disagreed with the lower court's conclusion and reversed the Appellate Division's determination.

According to the high court, in addition to its receiving an "anonymous letter" concerning Wilson's alleged use of drugs, "the City presented evidence of Wilson's physical manifestations of substance abuse the day he was tested, long record of excessive absences, prior substance abuse problems, reputation for showing up at work under the influence, as well as his understanding that he could be tested if he showed any signs of recurring substance abuse."

2.04 Fairness in investigations

It should be remembered that in the investigatory stage of the disciplinary proceeding it is as important for the employer to attempt to clear the employee as to discover evidence of wrongdoing.

Investigation is essentially fact-finding. While the investigation may have been undertaken as a result of allegations of misconduct directed at a particular employee, it should also be used as a means of exoneration. Indeed, the investigation might uncover the fact that while there was wrongdoing, it was the act of another employee rather than the target of the original investigation.

Typically, the investigation should be conducted and completed before the decision to initiate discipline is made. In any event, discipline action shall be taken as a result of the analysis of the findings of the investigator, and not because of any prejudgment or "instinct" concerning the guilt of an individual on the part of the administrator.

There should be no preconceptions as to the guilt of the employee under investigation or any limit placed on the scope of the investigation with respect to merits of the charges being explored.

2.05 Interviewing employees

The co-workers of the employee as well as superiors, subordinates and others may be interviewed in the course of an investigation. Employees who are not suspected of wrongdoing can be required to provide and sign statements concerning the target of the investigation.

The employer usually cannot compel the cooperation of any non-employee witnesses, however.

2.06 Refusal to answer questions

Case law suggests that an employee may be disciplined for refusing to answer questions, provided that he or she is either granted immunity from use of his answer in a subsequent criminal prosecution or is not required to waive such immunity.

In January 1998 the U.S. Supreme Court ruled that federal government agencies may take silence into consideration and draw adverse inference in discipline cases.

In Lefkowitz v Turley, 414 US 70, the U.S. Supreme Court held that when a public employee is compelled to answer questions or face removal if he or she refuses to do so, the responses are cloaked with immunity automatically, and neither the compelled statements nor their fruits may be used against the employee in a subsequent criminal prosecution. Similarly, a New York Supreme Court justice ruled in Seabrook v Johnson, 173 Misc.2d 15, that it would "offend the guarantee against self-incrimination to require a public servant to answer questions, even relating to the performance of official duties, upon the threat of dismissal, and to make use of the incriminating statements in a subsequent criminal prosecution."

If a person believes information obtained under threat of disciplinary action is going to be used against him or her in a pending criminal proceeding, he or she may request a "Kastigar hearing" to determine whether the prosecution made any use of either a compelled, immunized statement or any evidence derived directly or indirectly from such a statement [Kastigar v United States, 406 U.S. 441.]

Another U.S. Supreme Court case frequently cited concerning this issue is Garner v Broderick, 392 U.S. 273. The High Court held that if an public officer or employee refuses to answer questions specifically, directly and narrowly related to the performance of his official duties and is not required to waive his or her immunity with respect to the use of such answers in a criminal prosecution, the constitutional privilege against self-incrimination would not bar termination for such refusal to answer.

New York's highest court, the court of Appeals, addressed the issue in People v Corrigan, 80 NY2d 326. The Court of Appeals said that under both state and federal law any statement made under the threat of dismissal is protected by the privilege against self-incrimination and is "automatically immunized from use in criminal proceedings." The court said that the immunity that attaches to any statement that a public worker gives under compulsion bars the use of the statement itself, as well as any evidence derived directly or indirectly from it, in any criminal prosecution. See 9.04, "Use of Disclosures in Criminal Trials."

The specifics of the Corrigan case may be instructive, because the court permitted incriminating statements to be used in criminal proceedings. The court reasoned that the incriminating statements were in the form of official reports -- Use of Force reports.

Five corrections officers were indicted in relation to use of force on prisoners. Each officer filed an affidavit asserting that he had been ordered by a superior officer, under threat of job forfeiture, to submit a written "Use of Force" reports about the underlying incidents. Each man claimed that at the time the report was submitted he believed that neither the statement nor any information or evidence derived therefrom could be used in a subsequent criminal investigation.

Not all affirmative duties to report violate the privilege against self-incrimination, the court said. As an example, it noted that "hit and run" statutes requiring a driver involved in an accident to stop at the scene and provide a name and address do not violate the constitutional right against self-incrimination.

The court noted that the rules and regulations of the employer required Use of Force reports to be completed by any officer involved either as a participant or a witness in a use of force incident against an inmate. The court said that the "Use of Force Reports" could be equated to incident reports. Officers involved in incidents were required to complete a written report concerning the event, but such filing did not serve, in and of itself, to make them targets of investigation.

The mere possibility of incrimination is insufficient to defeat the strong policies in favor of disclosure in instances where force is used. The court commented that the "Use of Force Report" is "clearly designed, at least in part, to protect the interests of the individual officer as well as the Department and includes space for the officer to list any claimed injuries." The court ruled that the Department's reporting regulation did not violate the officers' constitutional rights.

Other cases concerning an employee's duty to respond to a superior's questions are Albino v City Civil Service Commission, 565 NYS2d 520 [appointing authority does not abuse discretion by suspending an employee for 20 days without pay for refusing to answer as supervisor's questions]; Shales v Leach, 119 AD2d 299 [police officer accused of bribe can be disciplined for refusal to answer questions], and Altieri v Roberts, 92 AD2d 1028 [former county corrections officer is not entitled to unemployment insurance benefits after being fired for refusing to cooperate in a hearing concerning an alleged assault on an inmate].

2.07 Free speech

Sometimes an employee is disciplined for action that the employee claims was Constitutionally protected free speech. Orange County Deputy Sheriff Christopher Warren was suspended without pay for 30 days after the Department decided that he violated Sheriff Department rules by giving statements concerning the relocation of the County's jail to a newspaper reporter before he obtained his superior's authorization. The Appellate Division said Warren's speech was not protected because it involved his personal concerns with the relocation of the jail and not a matter of public concern.

Employers should be cautious about policies regarding media contacts. A federal district court judge ruled that a public employer violates the First Amendment rights of its employees by requiring "pre-clearance" of any communication with the news media. [Harman v City of New York, USDC SDNY 96Civ846, 1997]

Another freedom of speech case involved a corrections officer with Nazi sympathies. When New York State Corrections Commissioner learned that corrections officer Edward Kuhnel flew a Nazi flag at his home, he suspended him from his position. Two days later charges of misconduct were filed against Kuhnel, seeking his termination.

PERB Arbitrator Robert T. Simmelkjaer ruled that the department could not discipline an employee for his off-duty exercise of his or her rights to free speech without demonstrating that such conduct actually harmed the Department or impaired the individual's ability to perform his official duties.

In Fry v McCall, USDC SDNY, 6/99 [Judge Koeltl], a federal district court judge was asked to determine if a public official statements concerning matters alleged to be of "public concern" served as a shield against his or her removal from the position.

Patricia C. Fry sued State Comptroller Carl McCall alleging that she had been dismissed from her position as Director of the Bureau of Budget Analysis with the Office of the State Deputy Comptroller because she spoke out on a matter of public concern and that her discharge deprived her of her First Amendment right to free speech in violation of 42 U.S.C. Section 1983.

Fry alleged that she had been terminated because she had questioned reports concerning a New York City "budget crisis" in 1993 and 1994 and that the Comptroller discharged her because she expressed skepticism about the accuracy or integrity of those reports.

The Comptroller, on the other hand, contended that Fry "had become insubordinate to her supervisor, disruptive at staff meetings, unwilling to cooperate in the preparation of the OSDC reports, and abusive toward a colleague." In addition, the Comptroller argued that even if he had discharged Fry because of her statements, this "did not violate her First Amendment rights because the State's interest in the effective and efficient operations of the [agency] outweighed any free speech rights [Fry] may have had."

The court said that to win her Section 1983 claim for wrongful termination based on a First Amendment violation, Fry was required to prove by a preponderance of the evidence (a) that the speech at issue was constitutionally protected, and (b) that it was a "substantial" or "motivating" factor in the decision to terminate her employment. Judge Koeltl concluded that "Fry has failed to prove by a preponderance of the evidence that her expressions of concern [regarding the reports] were a 'substantial' or 'motivating' factor in the decision to dismiss her."

The decision notes that there are a number of relevant factors to be considered in such cases, including [a] the time, manner, and place of the speech; [b] the extent of the disruption caused by the employee's conduct; [c] the responsibilities of the employee and [d] whether the employee held a policymaking position...." Significantly, the court observed that "[a] high ranking policy-making employee does not have, and never has had, a First Amendment right to refuse [her] employer's directive to promote agency policy."

In Vezzetti v. Pellearini, 22 F.3d 483, 486 (2d Cir. 1994) the Second Circuit Court of Appeals, which has jurisdiction over New York State, set out a number of guidelines for determining "policymaker status." To resolve the issue, the courts should determine whether the individual:

(1) is exempt from civil service protection,

(2) has some technical competence or expertise,

(3) controls others,

(4) is authorized to speak in the name of the policymakers,

(5) is perceived as a policymaker by the public,

(6) influences government programs,

(7) has contact with elected officials, and

(8) is responsive to partisan politics and political leaders.

The court said that Fry satisfied all of these eight criteria with respect to the issue of her "policymaker" status. Under the Pickering balancing test, said the court, the Comptroller "justifiably terminated Ms. Fry, a policymaking employee whose behavior not only threatened to become disruptive, but had already become disruptive, in order to preserve the efficiency and effectiveness of the OSDC."

Having found that Fry "failed to demonstrate that Comptroller McCall, or indeed any state employee, acting under color of state law, deprived her of her right to free speech in violation of the First Amendment", the court dismissed her action on the merits.

2.08 Self-incrimination and immunity

Forcing an employee to answer questions generally precludes criminal prosecution based on those answers. Testimony obtained under threat of the loss of public employment provides the employee with limited immunity and such testimony may not be used as a basis for subsequent criminal prosecution [Lefkowitz v Turley, 414 US 70].

What about witnesses who may have participated in wrongdoing? Are they automatically granted limited immunity by virtue of their testimony in an administrative procedure? The answer is no. An administrative officer cannot bind the district attorney by a promise of immunity from criminal prosecution in exchange for his or her testimony as a witness at an administrative hearing.

By the same token, the district attorney cannot bind an administrative tribunal with respect to its exercising its lawful authority. If immunity is a consideration, the witness must be granted such immunity by the appropriate authority in order for it to be effective and binding.

The several decisions in Mountain v Schenectady focused on the relationships between a refusal to waive immunity from prosecution and the loss of public office. See 474 NYS2d 612; 453 NYS2d 93 and 428 NYS2d 772.

2.09 Lying by employees

Any cloak of immunity that might attach to an employee's statements dissolves if the employee is shown to have lied in his or her testimony. It is well-settled law that one who is granted immunity in return for his testimony receives no license to swear falsely with impunity under the protection of that immunity.

If the employee supplies information deemed to be cloaked with immunity because it had been compelled under threat of termination, "that immunity would dissolve in the face of false allegations being filed." [Seabrook v Johnson, 660 NYS2d 311.] See also United States v Apfelbaum, 445 U.S. 115.

In 1998 the U.S. Supreme Court ruled unanimously that federal government agencies could mete out harsher discipline to employees who lie while being investigated for job-related conduct. Although only federal employees were involved, the ruling is also expected to influence cases involving state and local employees. Chief Justice William H. Rehnquist wrote that if employees remain silent, citing the Fifth Amendment or some other reason, employers are free to take such silence into consideration and draw adverse inferences in discipline.

2.10 Statute of limitations on discipline

If an employer decides to postpone disciplinary action, the employer should be mindful of the running of the statute of limitations, which under Section 75 is 18 months (1 year for managerial and confidential state employees), except for acts or omissions that constitute a crime. [Section 75.4] Thus, if the employee's alleged misconduct would not constitute a crime under New York or federal law, the employer must file disciplinary charges within 18 months of the act of alleged misconduct or incompetence. After 18 months, the employer is barred from filing charges based on those acts or omissions.

2.11 Legal representation during investigations

Sometimes a person asks to have a union representative or an attorney present when being questioned at the investigatory stage of a potential disciplinary action. However, unless provided for under the terms of a collective bargaining agreement, generally the employee has no right to have an attorney present during an investigatory interview. The employer may allow an attorney to be present, but there is risk that this could be viewed as a past practice and become an obligation in future disciplinary cases.

In 1993 the state Legislature amended the Civil Service Law to address the right to representation. The law states employees subject to potential disciplinary action are entitled to union representation during the investigatory state, and to have representation by an attorney or a union representative in a disciplinary hearing. Section 75.2 provides that an employee "who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of

this chapter and shall be notified in advance, in writing, of such right.... If representation is requested a reasonable period of time shall be afforded to obtain such representation…. [At a disciplinary hearing] (t)he person or persons holding such hearing shall, upon request of the person against whom charges are preferred, permit him to be represented by counsel, or by a representative of a recognized or certified employee organization.…"

The law also provides that accused employees must be furnished with a list of charges and be given at least eight days to respond.

Although a given employee may have no statutory right to counsel in a given disciplinary investigation, Taylor Law contracts may provide that an employee may have attorney (or a union representative) present during a pre-disciplinary investigatory interview.

Generally, though, employees who refuse to answer questions unless legal counsel is present are subject to discipline for refusing to answer. Cases that illustrate that the employer has no obligation to allow the employee's attorney to be present during investigatory questioning are Sundram v Kirschbaum et al, and Sundram v Hallerman, _ AD2d _. In those cases the State Commission on Quality Care for the Mentally Disabled argued successfully that "the courts consistently have rejected the right to counsel before an investigatory administrative body."

The cases involved the death of a patient and the sexual abuse of another at Bellview Hospital Center. The Commission had a policy against allowing attorneys to be present during interviews of employees. The Appellate Division said this was a permissible policy because it viewed the Commission's authority as purely investigatory in nature "as it has no adjudicative functions, existing merely to gather facts, generate reports and make recommendations." The court said: "That disciplinary or criminal proceedings may result from the Commission's investigatory function is insufficient reason to impose a right to counsel."

Suppose an employee is threatened with disciplinary action if he or she does not immediately resign. Is the employee entitled to consult with a lawyer before making such a decision?

In Rychlick v Coughlin, 63 NY2d 643, a case involving a corrections officer, the Court of Appeals ruled that the answer is no. The court pointed out that threatening to do what the appointing authority had a right to do -- i.e., file disciplinary charges -- did not constitute coercion so as to make the resignation involuntary.

Even a contractual right to representative is not absolute, though, as the Appellate Division ruled in Reid v NYS Division of State Police. Reid appealed his dismissal, claiming that his due process rights under the Taylor Law agreement then in force had been violated because counsel did not represent him when he was interviewed by "Division investigators" prior to being served with disciplinary charges.

The Appellate Division said that the interview was an ordinary inquiry by a supervisor, however. The court ruled that an ordinary supervisory inquiry was not governed by the procedural requirements of the collective bargaining agreement.

2.12 Suspension with or without pay

One issue that arises early in disciplinary cases is whether the employer should immediately suspend the employee from his or her position pending the results of an investigation. This is a matter of discretion.

Section 75 provides that an individual can be suspended pending a hearing on the charges and the final determination. The suspension may be without pay for a maximum of 30 days. [Section 75.3] The legislature enacted this rule because of laxness on the part of supervisors in fixing hearing dates. To suspend an employee without pay and then fail to provide for a prompt hearing would place the employee under undue hardship [Morris v Reid, 1960, 210 NYS2d 868]

If the disciplinary proceeding or a settlement has not been completed within 30 days of the beginning of the period of suspension without pay, the individual must be restored to the payroll, even if he or she is not permitted to return to work. [Maurer v Cappelli (2 Dept. 1973) 42 AD2d 758, 346 NYS 2d 154] An exception provides for a pre-hearing period of suspension without pay longer than 30 days if the employee or his or her representative delay the hearing. See, for example, DeMarco v City of Albany (3 Dept. 1980) 75 AD2d 674, 426 NYS2d 860. For other exceptions due to collective bargaining agreements or other reasons, see Winkler v Kingston Housing Authority, NYS App. Div, April 10, 1997, Langhorne v Jackson, 614 NYS2d 627, and Robinson v New York City Transit Authority (2 Dept, 1996) 226 AD2d 467, 641 NYS2d 55.

If the employee is later acquitted, “he shall be restored to his position with full pay for the period of suspension less the amount of any unemployment insurance benefits he may have received during such period” [Section 75.3]. It should be noted, however, that although the civil service law as amended bars consideration of income earned by the employee in determining the individual’s back salary, sometimes the courts overlook this change in the law.

If the employee is found guilty, Section 75 lists among permissible penalties a suspension without pay not to exceed 60 days. If such a penalty is assigned, the pre-hearing suspension may be considered “time served” but there is no requirement for the employer to do so [Section 75.3]. An employee found guilty has no right to salary for the period of pre-hearing suspension [Paris v City of New York, 1947, 189 Misc. 445, 74 NYS2d 584].

Under Taylor Law agreements and Section 3020-a, penalties of suspension without pay longer periods that otherwise set out in statute are possible. In the case of a teacher found guilty of helping students cheat on a Regents exam, for instance, the Appellate Division ruled “a two-year suspension without pay was not so disproportionate to the offenses committed as to be shocking to one’s sense of fairness.” [Earles v Pine Bush CSD, 638 NYS2d 163]

The employer’s ability to suspend an employee may depend on the terms of a collective bargaining agreement rather than Section 75. But the existence of a “grievance procedure,” alone does not constitute a substitute for Section 75. [Mancuso v Crew, NYS Supreme Court, January 1998, not officially reported].

Section 75.3 provides that an employee may be suspended without pay only if "charges have been preferred." In other words, until a notice of disciplinary charges has been actually served on the employee, the individual must be retained on the payroll. Written charges may be served via a delivery service such as certified U.S. mail or by hand, in which case an affidavit by the deliverer would serve as proof of service of charges on the employee.

There are other alternatives for removing the employee from the workplace. The employer may suspend the employee with pay or reassign the individual to another position for which he or she is otherwise qualified. Either of these actions will usually withstand judicial scrutiny.

See also Chapter 8, Suspending Employees Pending a Hearing.

2.13 Affect of criminal actions on suspensions

Suppose that after disciplinary charges are served the individual is arrested and jailed based on the same acts or omissions. The individual's ability to build a defense would be compromised, and he or she might be unable to attend the scheduled disciplinary hearing.

Even if the individual is released on bail, it is likely that prosecutors would pressure the employer not to proceed for fear of compromising the criminal case. Is the employer forced by such circumstances to return the employee to the payroll after 30 days? The answer is: not necessarily. The employer has the option of withdrawing the charges pending resolution of the criminal case. This can also save the employer considerable effort in proving its case, because a guilty verdict in a criminal court automatically serves to establish guilt in a disciplinary forum. See "Impact of criminal action on disciplinary action, generally", below, and Chapter 3, Evidence.

If the disciplinary charges are withdrawn and the individual remains in jail and thus unable to report to work, the employer can require the employee to use up all his or her vacation, personal leave and other leave (other than sick leave, unless he or she is sick) while he or she is in jail if he or she wishes to remain on the payroll, then suspend the employee without pay because the employee is absent and has exhausted available leave credits.

2.14 Impact of criminal action on disciplinary action, generally

In some cases the incident for which the employee is to be disciplined may also constitute or be related to a crime and there may be a criminal proceeding pending or expected. It is common for prosecutors to ask employers to refrain from proceeding out of fear that the criminal case would be compromised.

There is no legal obligation on the part of the employer to honor such a request. Neither a district attorney nor the employee can require that the administrative action be postponed until the criminal action is completed.

However, if the decision is made to proceed before the criminal action is tried, the agency may find itself having to develop its own evidence. Often the district attorney will refuse to cooperate.

Postponing action can save the employer effort because the standard of proof is higher in the criminal forum, and a guilty verdict in a criminal court automatically serves to establish guilt in a disciplinary forum. [Kelly v Levin, 440 NYS2d 424]

By the same token, a "not guilty" verdict in a criminal proceeding does not prevent the individual from being found guilty in a disciplinary hearing, because the standard of proof differs. The criminal standard is proof of guilt beyond a reasonable doubt, while the standard for disciplinary proceedings is substantial evidence of guilt. [See Chapter 3, Evidence.]

Statements made by the employee to police during investigation of criminal charges filed against the employee constitutes "competent evidence" and may be admitted into evidence during the disciplinary hearing [Dacey v County of Dutchess, 121 AD2d 536].

See also Chapter 9, Pending Criminal Actions.

2.15 Voluntary resignations

A common reaction to the receipt of information that could result in disciplinary action being brought against an employee is for a supervisor to confront the employee and state that charges will be preferred (filed) unless the individual "volunteers" to immediately resign from the position.

An employee may claim that such a confrontation constitutes "duress or threat" that will negate the "voluntariness" of the resignation and make it meaningless. However, case law indicates that in the absence of extenuating circumstances such as excessively lengthy or intense questioning, it is difficult to argue successfully that one's resignation was obtained under duress. In a nutshell, the employer has a legal right -- perhaps even a duty -- to file disciplinary charges. It is not coercive to threaten to do what one has a legal right to do.

The Rychlick case illustrates the point [Rychlick v Coughlin, 63 NY2d 643]. Rychlick, a corrections officer, was alleged to have failed to come to the assistance of a fellow corrections officer during a fight between that officer and an inmate. In the presence of his union representative, he was offered the option of resigning or having formal disciplinary charges filed against him. He was permitted to confer with a union official but when he requested time to consult with an attorney, he was advised that unless he resigned at that moment in time, charges would be filed against him. He resigned.
Four days later Rychlick sought to withdraw the resignation, which he claimed had been "forced" from him. The request was denied and Rychlick sued to regain his job. Although a lower court had found "duress" and ordered Rychlick reinstated with back pay, the Court of Appeals held that the "threat to file formal charges ... does not constitute duress."

The decision noted that the appointing authority had the legal right, if not the duty, to press charges under the circumstances and it was not duress to threaten to do what one had the legal right to do.[17]

2.16 Issuing subpoenas, recording evidence

State officers are authorized under Section 61 of the Public Officers Law to make an "inquiry as to the official conduct of any subordinate officer or employee," also local laws may grant parallel powers to local government officials. In connection with such investigations, the officer has the power to issue subpoenas to require the attendance of witnesses and the production of books and papers relating to any matter under inquiry.

If a person refuses to honor a subpoena, it may be necessary to have a court issue the order. While the administrator or arbitrator issuing a subpoena rarely has the power to "enforce" compliance, a court may hold a person in contempt for such a failure to comply with its order. (Subpoena means "under penalty".) The court can place the offender in jail, fine him, or both for noncompliance with what has now become its order.

2.17 Informants

Sometimes disciplinary action results from information supplied by an informant. Does the accused have the right to know the identity of the informant?

Because "the hearings held in disciplinary proceedings are not governed by the rules obtaining [applying] at a criminal trial" the Appellate Division, First Department, has ruled the answer is no [Coleman v Kramer, 603 NYS2d 140, 198 AD2d 12, leave to appeal den 84 NY2d 801].

The case involved a New York City Transit Police officer who tested positive for cocaine in a test that was administered on the tip of an informant.

The opinion indicates that in the course of the hearing, the administrative law judge "diligently evaluated the reliability of the confidential informant, and the informant's fear for personal safety," in an "in camera" review. An in camera review is a private review (literally: "in one's heart").

2.18 Evidence

Unless there is substantial evidence to support the charges, the employee cannot be found guilty. Accordingly, any defects in the investigatory stages of the disciplinary action may have a significant adverse effect later in the proceeding.

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[17] The general rule with respect to an employee seeking to withdraw his or her resignation: Allowing the employee to withdraw a resignation that has be delivered to the appointing authority or its representative is at the sole discretion of the appointing authority. However, a resignation must be in writing in order to be effective; typically courts will refuse to recognize an oral resignation.

This is true from both the employer's and the employee's perspective.

Sometimes the employee fails to develop or preserve evidence that would tend to exonerate him or her. He or she then may be unable to rebut the evidence presented by the employer at the disciplinary hearing.

See Chapter 3 for more on evidence.

2.19 Recording investigation findings

It is important to maintain accurate records regarding persons interviewed, including dates and times of the interviews as well as the documents examined and the other physical evidence reviewed or observed. Where appropriate, photographs or videotape may be used to preserve evidence.

Having a written sworn statement is also important. If the person is unwilling to provide such a sworn statement (it is best to obtain the statement at the time of interview), it makes the information gathered suspect at best. At worst, if called as a witness, the person may deny having made such a statement or claim it was misunderstood.

While recorded evidence can strengthen a case, introducing written or taped testimony can be problematic if the witness does not appear, because the individual in essence is denied the right to cross-examine the witness. However, the employee must lodge any objections to taped testimony when it is introduced at the disciplinary hearing if he or she is to retain the right to challenge the findings of the hearing officer on this basis in court [Baker v NYC Transit Police Department, Appellate Division].

2.20 Record-keeping

After an investigation has been completed there are three major options available to the administrator:

1. Determine that disciplinary action is unwarranted.

2. Decide that there is insufficient evidence for filing charges but that some other action, such as "counseling the individual" is appropriate.

3. Recommend the filing of disciplinary charges against the individual.
Regardless of the decision or recommendation with respect to going forward with disciplinary action, a formal report of the findings and reasons for the recommendation should be prepared. It is important to do this for a number of reasons.

First, the reasons for undertaking the investigation in the first place might be attacked as an abuse of process, unlawful discrimination or on a number of other theories.

A contemporaneous report concerning the investigation undertaken and the findings may be critical to successfully defending the decision to investigate or to proceed, or not to go forward, with disciplinary action upon the completion of the investigation.

The next chapter will provide guidelines for presenting evidence at disciplinary hearings under Section 75 of the Civil Service Law, Section 3020-a of the Education Law and under collective bargaining agreements negotiated pursuant to the Taylor Law.

2.21 Defamation of employees

Even if the employee decides not to proceed with disciplinary action, an employee who has been the subject of an investigation may claim that he or she has been defamed in a libelous or slanderous manner. [If defamatory statements are written, it could constitute libel; if oral, slander.] The employee could accuse the employer or a co-worker of committing libel or slander.

To prove libel or slander, the individual generally must show that defamatory statements or writings were provided to a third party not otherwise entitled to receive such information. The Fedrizzi decision [Fedrizzi v Washingtonville CSD, 611 NYS2d 584, 204 AD2d 267] considers such a case and briefly summarizes the law with respect to libel or slander.

The Washingtonville Central School District fired Fedrizzi, a school bus driver, after a disciplinary proceeding. He sued, contending that the school district had libeled him. The Appellate Division, upholding a lower court's determination, ruled that "the publication of the offending statements to a third party" is a necessary element to proving libel or slander.

The court said that "words are published within the meaning of the law of libel when they are in writing and are read by someone other than the person libeled and the person making the charges."

As to the law of slander, the court said that "the slanderous words must have been spoken in the presence and hearing of some person other than the one slandered, who is not entitled to hear the defamatory matter."

In either situation, libel or slander, there is no damage within the meaning of the law unless there is some communication to a third party having no interest in the matter.

Among the most common situations are those involving the employee alleging that defamatory statements appeared in internal communications between administrators or between an employee and an administrator. In such cases defamatory written or oral communication between and among administrators and employees may be protected by what is called a "qualified privilege." To overcome a qualified privilege, malice must be shown. Murphy v Herfort, 428 NYS2d 117, is an example of litigation resulting from communications between administrators; Missek-Falkoff v Keller, 545 NYS2d 360, is an example of a case where one employee sued another because of the contents of a memorandum from the second employee to a superior concerning a "problem" with the co-worker.

Likewise, the issue of injury to one's reputation may arise in connection with an employee's former employer supplying information to a prospective employer of the individual in response to a request for "references" [see Buxton v Plant City, 57 LW 2649].

Cases alleging defamation may also involve consideration of whether a "public official" is able to recover damages because of allegedly libelous or slanderous statements.

Procedures followed in disciplining employees serving in the Civil Service.

The Discipline Book
by Harvey Randall and Eric D. Randall