

Posting To Be Removed From Bulletin Board by BCGEU Steward Only

DATE: November 3, 2008

TO: Local 605 Executive Members, Stewards and Mail Contacts

FROM: Fairleigh Murray, Staff Representative

RE: Letters of Expectation

The question of whether or not a document represents a reprimand or is legitimately a statement of expectations, has been the subject of a number of arbitration awards. Arbitrators have come up with a list of characteristics that help determine the true nature (and intent) of such documents. In an arbitration case between Alberta Hospital Edmonton (Provincial Mental Health Advisory Board) and Health Sciences Association of Alberta (Nash) 69 L.A.C. (4th) 289, the Arbitrator set out a list of considerations to be taken into account when we assess the true nature of such correspondence:

"In reviewing the contents of an employer's letter, an arbitration board must be aware of the differences between disciplinary letters ... (or performance expectations)... These differences are reviewed in ... a helpful article, cited by counsel for the Association, by Roger Gunn, entitled "What is Discipline? Do Performance Expectation Letters have a place outside the discipline process?" 1993, Calgary Labour Arbitration Conference. Without pretending to give an exhaustive listing of the differences, they include:

| Performance Expectations Letter | Disciplinary Letter |
|--|---|
| Purpose: to counsel and communicate, to identify or clarify expected behaviour in performance of job duties. | Purpose: to correct poor performance or undesirable behaviour -- assumes that discipline is needed to achieve correction. |
| Employer's intention: helpful, supportive. | Employer's intention: disciplinary. |
| Examples used only as a means to clarify inappropriate or acceptable behaviour. | Nature of the employee's conduct: culpable -- specific incidents of poor performance, or infraction of a rule, policy, or standard. |
| Support is offered by way of training and/or other resources. | Should be clearly stated to be disciplinary. |
| Develops, with employee's input, mutual goals to encourage employee's commitment to change. | Does the employee have to grieve the letter to be able to respond effectively to it? |
| Focus: assumes behaviour will change in future, when employee understands what is expected and is supported in effort to change. | Focus: expected behaviour is identified, but consequences are attached to present and any future failure to meet prescribed standard. |
| A review period is set to give feedback on progress of change. | May require compliance with provisions of the collective agreement, such as the presence of a union representative, when discipline is imposed. |
| A future disciplinable offence will be treated with no reference to this letter as a foundation for any progressive discipline. | Negative impact on employee's work record. Part of progressive discipline. |
| This letter may only be used to show that the employee was aware of the employer's requirements. | Further incidents of a similar nature may be followed by further, possibly increased, discipline. |

Article 10 of the 14th Master Agreement establishes our members' rights when faced with disciplinary action. In particular, Clause 10.5(a) sets out the types of written disciplinary action grievable by an employee. That list expressly includes:

- (1) written censures;
- (2) letters of reprimand
- (3) adverse reports; or
- (4) adverse employee appraisals.

It is our experience that some Employers have attempted to construct disciplinary correspondence but title the document as a "Letter of Expectation". The objective, of course, is to attempt to convince employees that the document is rather innocuous (though destined for their personnel file) and shielded from the grievance procedure because of the short list of types of documents contained in Clause 10.5(a) above. Sometimes these Employers have refused to accept grievances disputing these letters by asserting that they are non-disciplinary and part of the Employer's obligation to ensure employees know what is expected of them.

From the foregoing excerpts, it is clear that in each case where an employee is presented with a "Letter of Expectation", the employee should seek the counsel of their Steward to review the concepts set out in the arbitration award above. Where the content of the document better fits the description of a "disciplinary letter", a grievance should be filed under Clause 10.5. If the document was presented to the employee without a steward present, the grievance should also reference a violation of Clause 10.8.

As a general rule of thumb, whenever an employee has suspicions when called to a meeting and told it is for the purpose of receiving a "Letter of Expectation", the member is well advised to request the presence of a Shop Steward. Clause 10.8 entitles you to have a Steward present "at any discussion with supervisory personnel which the employee believes might be the basis of disciplinary action..." (our emphasis)

For further legal analysis on the topic of Letters of Expectation, please visit the BCGEU website and click on the "Steward" link that is just below the President's picture in the middle of the page. The website is www.bcgau.ca

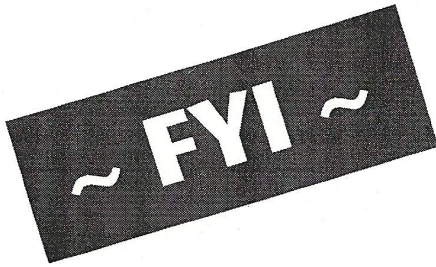
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Distribution: Doug Kinna, Component 6 Chairperson

Catherine Sullivan, Staff Administrative Representative for Component



To all BCGEU stewards and members
in Component 6
Please post and distribute
October 31, 2005

Update

Letters of expectation vs. Letters of discipline

Please note that a previous alert on *How to deal with "letters of expectation"* dated Oct. 26, 2005 was incorrect in stating that letters of expectation do not go in an employee's file.

For further clarification, please refer to the following *Steward* article by BCGEU staff representative Lisa Claxton.

While it is permissible for an employer to provide a general written statement of its expectations to an employee, an employer may not disguise discipline in the form of a letter of expectation.

The burden of proving a case that a document is disciplinary in nature falls to the union. Once such a *prima facie* case is made out, the burden then shifts to the employer to prove it has just cause to impose the discipline.

The arbitration decision in *Re Hilton Villa Care Centre and BCNU* (2003: 115 LAC (4th) 154) clarifies the sometimes blurry line between letters of expectation and disciplinary letters.

The facts of the case were that the employee had received a letter entitled "Re: Letter of Expectation" which began with the following sentence: "I am writing this non-disciplinary letter of expectation..." The letter documented an incident and the employer's "concerns" regarding the employee's conduct in handling the incident.

The employee grieved the letter on the basis that it was disciplinary on its face despite the employer's statement that it was not, and sought the removal of it from her personnel file. The employer contended that the letter was non-disciplinary, would not be used in future disciplinary proceedings, was not an "adverse report" as defined in the collective agreement and therefore, was not grievable.

The Arbitrator considered the analysis of the same issue in *Re Alberta Hospital Edmonton and HSAA* (1998: 69 LAC (4th) 289).

In order to determine the character of the letter in dispute, the Arbitrator adopted the same approach as that used in the *Re Alberta Hospital* case. She looked to the facts and the circumstances surrounding the disputed letter including the following:

- other relevant correspondence and surrounding circumstances, if it helps the arbitrator to interpret the letter;
- whether the letter is specifically directed at particular employees;
- whether the letter accuses the employees of misconduct of a culpable nature;
- whether the letter refers to possible disciplinary action if the conduct persists;
- whether the letter suggests that the employee's actions are ill-founded or improperly handled;
- whether the language used in the letter refers to communications of performance expectations

rather than the identification of concerns or unacceptable or insubordinate behaviour possibly warranting discipline in the future if it continues;

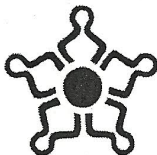
- whether the purpose of the letter appears to have been to correct undesirable behaviour by specific employees;
- whether the employer addresses its concerns in a supportive manner and whether any support is offered to improve or overcome the perceived problems; and
- whether the letter itself is in a disciplinary format.

With respect to the employer's statement that the letter was not disciplinary or would not be used in future disciplinary proceedings, the Arbitrator held that if a communication to an employee is disciplinary either by its intent or on its face, such a statement by the employer cannot alter its basic character.

In the end, the grievance was successful finding that the basic character of the "letter of expectation" was disciplinary.

Since there had been no further disciplinary action within the relevant period of time under the sunset clause of the collective agreement, the letter was removed from the employee's personnel file.

The issue about whether the letter was an "adverse report" as defined in the collective agreement was not determined since the letter was removed from the file and the matter concluded.



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