

Representing Members 1: Attending Disciplinary Meetings

Introduction

In addition to acting as a representative of the union in the workplace, Shop Stewards act as representatives of their fellow co-workers. You will do this for members attending disciplinary meetings and for members wishing to resolve issues with their working conditions. This section will focus on representing members at disciplinary meetings. Representing Members 2 will detail the processing of member complaints.

Understanding Progressive Discipline

Managers use a wide range of 'performance management tools' to ensure that employees are meeting expectations on the job. These include providing a clear statement of duties for each position, setting up personalized work plans with specific goals and areas for improvement, giving periodic informal feedback, and conducting annual performance reviews. When an employee is underperforming at some task, a manager may assign additional training, issue a 'letter of expectation'¹² indicating the specific standards that the employee is expected to meet, or withhold a performance increment to the employee's salary.¹³ Although you should be available to provide information and general support, a Shop Steward is not directly involved in any of these performance management activities. For example, a member concerned about an upcoming performance evaluation might talk to a Shop

¹² In some cases a document labeled a "letter of expectation" is in fact disciplinary in nature. The difference will be explained later in this section.

¹³ Under "Pay" or "Pay Administration", most collective agreements provide for written advance notice if an employer plans to withhold an annual performance increment, as well as details for reviewing the decision. If these provisions are not followed, the matter can be grieved. However, employees are not entitled to union representation at performance review meetings, even if an increment is withheld – this falls within Management Rights, and is not considered a disciplinary measure.

Steward to get more information about the normal process, but a Steward would not represent the member at such a meeting.

Employee discipline is separate from performance management. It is regulated in the Collective Agreement (CA), and includes the involvement of a union representative (usually a Shop Steward). Discipline is an action by the employer intended to correct or deter an infraction against one of the employer's rules, policies, or expectations (and not just to punish). Examples include a written warning added to the employee's personnel file after she used a Company vehicle for personal purposes, or dismissing an employee after a serious violation of a safety standard.

Discipline is almost always "progressive", meaning that penalties increase in severity for repeated offences, and are proportional to the seriousness of the offense. Some CAs make specific mention of the steps of discipline typically taken, while others leave it to the discretion of management. The following list is representative of the process, though the steps taken in your workplace might vary considerably from it:

- i. Verbal warning (including a note added to the employee's personnel file)
- ii. Written warning
- iii. Written reprimand
- iv. Suspension without pay
- v. Demotion
- vi. A "last chance agreement"
- vii. Dismissal

It is important to note that a record is kept of every stage of a formal discipline process. So, even though the first step might be a 'verbal warning' with nothing in writing given to the employee, a written record of the warning must be kept in the employee's file if it is to be used as a reason for more severe discipline in the future. It is also important to note that even if your employer does not have a policy on progressive discipline, arbitrators expect there to be a progression in employee discipline. A decision to dismiss an employee for showing up late could be overturned (and the employee reinstated with back pay) without evidence that other attempts to correct the behaviour were used first.

Attending Disciplinary Meetings

At every stage in the formal discipline process an employee has a right to union representation, ensuring that the process is kept transparent and fair. When called upon for this, a Steward is not expected to present a full defense of the member as a lawyer might at a criminal proceeding. However, the Steward is expected to protect the rights of the member and ensure that the process followed is fair. A Steward should:

- **Keep members informed of their right to representation.** Some CAs place a duty upon the employer to inform employees of their right to union representation before conducting a disciplinary hearing, but you shouldn't count on that. Spread the word, and ensure that your co-workers know they can call on you if the need arises.
- **Make contact with YEU Intake.** Every time you are asked by a member to attend a disciplinary meeting, contact Intake to open a file. YEU will keep record of the incident and ensure that you have all the support you need.
- **Meet privately with the member prior to the meeting.** The employee will likely be nervous and may be quite upset. Take this time to clarify some expectations, both about how the meeting is likely to go, and about what you can and cannot do to help. Tell the member that your role is to ensure the process is fair and in line with the CA, but do not make promises about reducing or eliminating discipline. Encourage the member to be calm and cooperative during the meeting; if procedure is broken or the contract violated by the disciplinary measures, it can be grieved later.
- **Represent the member's interest during the meeting.** At all times, remember that you are acting on the member's behalf, ensuring that s/he is treated fairly. Among other things, this means that you do not offer information to management that may become grounds for additional discipline. You do not 'take management's side' by overtly agreeing with them or by criticizing the employee. You do insist on proper procedure, for example by objecting if a manager's attitude becomes hostile. Your job is not to get a guilty co-worker off the hook, but to uphold a process that respects everyone's rights.

- **Know the discipline policy and the provisions in your CA.** If your employer has a written policy available, you should read and understand it. Keep a bookmark in the “Discipline” article of your CA so you can refresh the provisions in your mind before a discipline meeting.
- **Ensure that the provisions are followed.** Every CA has its own wording and may have a more or less detailed section on discipline. Some common themes are:

1. **Just cause** – Employers can take disciplinary action only for just cause, meaning that it cannot be arbitrary or unfair. A common resource for determining just cause is a set of questions used by Carroll Daugherty, an arbitrator in 1966:

- Was the employee forewarned of the consequences of his or her actions?
- Are the employer's rules reasonably related to business efficiency and performance the employer might reasonably expect from the employee?
- Was an effort made before discipline or discharge to determine whether the employee was guilty as charged?
- Was the investigation conducted fairly and objectively?
- Did the employer obtain substantial evidence of the employee's guilt?
- Were the rules applied fairly and without discrimination?
- Was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?

If the answer to any of these questions is “no”, then there may be grounds to object to the discipline.

2. **‘Sunset’ clause** – a ‘sunset’ clause gives an expiration date on disciplinary reports in an employee’s personnel file, provided that there is a clean record for a certain period of time. For example, it may state

that “Any notice of disciplinary action placed on the employee's file shall not be introduced by the employer as evidence after one (1) year has elapsed, provided that no further disciplinary action has been recorded during this period of time.” This means that after one year with a clean record, harsher discipline for an offense cannot be assigned on the basis of the past misconduct. When an Employer produces a document from the employee’s file related to past discipline, ensure that it is allowable under the sunset clause (if there is one in your CA).

3. **Employee’s access to personnel file** – Your contract may grant employees access to the contents of their own personnel file. It may also prohibit the use of documents the employee was not made aware of at the time of filing. If an employer produces a document reporting some past misconduct and uses it to impose harsher discipline, ensure that the document is something the employee knows about. If not, and if the use of such documents is ruled out in your Agreement, a Steward should object to its use in determining discipline.
 4. **Excessive discipline** – Your CA may make reference to a progression of disciplinary measures, or may state that “The Employer will use the least serious form of disciplinary action which will likely stop or deter further disciplinary infractions by the employee.” In any case, if the discipline imposed seems excessive to you or to the employee, ask your Union Advisor to investigate after the meeting.
- **Take notes.** Sometimes a Steward needs to intervene in a disciplinary meeting to ‘police’ the contract, in one of the ways mentioned above. More often, however, the Steward’s main role is to observe and take notes. Keep a record of who attends the meeting and keep notes on what is said. Request copies of any documents used. Submit your notes to your Union Advisor after the meeting for a second opinion of the proceedings and result. Your notes are important union documents and should not be copied or shared with anyone else, or stored in an unsecure location. Respect their confidentiality! Some tips on taking notes efficiently are including in the Additional Resources section of this Handbook.

- **Meet with the member privately after the meeting.** You should take a few minutes to clarify the results of the meeting with the member and to answer any questions they may have.
- **Follow-up with your Union Advisor.** Your meeting notes should be delivered to the Union Hall for filing. Discuss the meeting with your Advisor to get another perspective on the details and if needed, follow up again with the member.

Is it Discipline?

As stated above, disciplinary measures in a unionized workplace allow for union involvement, typically with a Shop Steward representing members at disciplinary hearings. One way an employer might try to avoid union involvement is by disguising discipline in something that looks more innocent, such as a “letter of expectation” or an investigative meeting.¹⁴

The intent behind a genuine letter of expectation (LOE) is to clarify the standards an employee is to meet and provide examples of unacceptable or inappropriate behaviour. It may identify specific areas in which the employee is expected to improve and may direct the employee to further training or mentorship resources, but its intent is informative rather than corrective. What it should not contain is language that can reasonably be interpreted as a formal warning, such as “if this behaviour continues, it may lead to further discipline.” An LOE will be kept in the employee’s personnel file and might be used at a later disciplinary meeting for the purpose of establishing that the employee was made aware of the expected standards (in order to establish “just cause” – see II.f.1 above). However, since it does *not* count as discipline itself, it cannot be used to show that some behaviour is a repeated offense meriting a harsher penalty. A well-written LOE will identify specific ways the employee can improve (for example by offering a particular training course) and include a time frame for expected improvement or follow-up.

¹⁴ This is not always an intentional attempt to sidestep the union; a well-meaning manager may just not be clear on what counts as discipline and what does not.

Two complications to be aware of: First, very often an LOE will explicitly state that it is “not disciplinary in nature”. If the tone, wording, and intent of the letter are disciplinary despite this claim, then it should be treated as a written warning or letter of reprimand (and should only be presented to an employee with union representation available). It can be grieved if it does not follow standard disciplinary procedures. Second, since they are not supposed to be disciplinary, LOE’s may not be subject to the sunset clause. This means that it could remain in an employee’s file indefinitely. This is one reason to encourage members to ask a union representative to look over any LOE.

A ‘fact-finding’ or ‘investigatory’ meeting is an investigation the employer conducts to determine whether there was any offense meriting discipline. An employee should never be disciplined without such an investigation, including the opportunity to explain oneself and respond to any charges. Sometimes a fact finding meeting is called because the employer is unclear about what exactly happened, and other times it is just to offer the employee an opportunity to share his/her own perspective. Sometimes one employee is asked to attend a meeting because the employer suspects that she witnessed events involving another employee under investigation. The investigation is not disciplinary itself, but it *is* the sort of meeting that could lead to discipline. This is often an employee’s only chance to give his own account of the events under investigation, and the way he responds to questions will immediately affect whether discipline is issued at a follow up meeting. Because of this, it is actually *more* important that the employee have union representation at a fact-finding meeting than at a follow up meeting where the employer’s decision to discipline is announced. In fact, when an employer refuses an employee their right to union representation when investigating circumstances leading to discipline, none of the information gained from that investigation can be used to impose discipline. A well informed member would request the presence of a Shop Steward before participating in any sort of investigation like this, and part of your job as a Steward is to ensure that the members you work with are well informed. A good practice is to encourage all members to ask management if the meeting could lead to discipline, and to request a Shop Steward if so.

If a manager refuses the request for a Shop Steward and conducts an investigation leading to discipline anyway, that action can be grieved. As with other issues, the rule is to ‘work now, grieve later’, meaning that an employee in that situation should

stay at the meeting and comply with the employer's directions, then seek to correct it afterwards.

Professional Conduct at Meetings

Disciplinary meetings can become very emotional and heated. A Steward should strive to remain calm and collected, and to encourage the same attitude from the member. Sometimes a meeting has been called because the employer already has compelling evidence of wrong-doing. In those cases the best response from the employee might be an admission, an apology, and a promise that it won't happen again. In other cases when the employee hasn't done anything wrong, you'll ensure that s/he gets a fair chance to explain the situation and answer the questions raised by management. Having done that, you will receive the manager's decision, and then grieve the disciplinary action after the meeting.

Remember that as the union's representative, you have a duty to give fair representation to every member of the bargaining unit. This means that you may be asked to represent an employee you have personal issues with, or one that you know has committed more or worse offenses than management is aware of, or even an anti-union member who always criticizes your union involvement. Remember that it is management's job to conduct a full investigation and not your job as the Steward to offer any information that could make things worse for the employee. You are there to protect the employee's right to fair treatment. When you feel that you are unable to represent a member fairly, ask another steward (or your Chief Shop Steward) to take the case.

Along with this, be careful not to interact with management representatives about the issue when the member is not present. While you should strive to maintain a good working relationship with the supervisors and managers you'll deal with, you do not want to be so friendly that you raise suspicions among your co-workers about whose side you are really on. Meet with the member before and after the meeting, but don't meet privately with management representatives.

Last Chance Agreements

A “Last Chance Agreement” is sometimes offered by an employer as a final alternative to dismissal, usually as part of the employer’s duty to accommodate a disability.¹ The agreement will specify that the employee can be immediately dismissed for a future offense, and limits the union’s ability to grieve this decision. For example, it might contain wording like this:

The parties agree that in the event of a breach of this agreement, an arbitrator's jurisdiction shall be limited only to making a finding of fact (a finding that something did or did not happen). Should a finding of fact be made, the arbitrator shall have no authority to modify or vary the discipline imposed by the employer.

This means that the union might try to establish that the offense did not take place (or that the employer has insufficient evidence of it), but cannot argue that dismissal is too strict a penalty.

A Last Chance Agreement is an important legal document (it is not simply a matter of a supervisor or manager verbally informing an employee that “this is your last chance.”), and it requires the consent of the union to be binding. In all cases, therefore, it should be forwarded to the Union Hall before being presented to a member. As a Steward you should never have to deal with this, but the important thing to keep in mind is that a Last Chance Agreement *should never be signed on the spot*. Ensure that the member discusses it with a Union Advisor first.

Discipline and the Duty to Accommodate

One important concern in some discipline cases is the possibility of a disability, an illness, or a change in personal situation (e.g. family status) contributing to the alleged misconduct. An employee with a strong work history who starts showing a pattern of lateness or absenteeism may be dealing with an issue the employer is

¹ Find more on the Duty to Accommodate on pg. 57, and in the resources listed on pg. 63. Importantly, a Last Chance Agreement cannot be used to circumvent the duty to accommodate. That is, even if everyone involved consents to the terms, the agreement may not be considered legally binding if it can be shown that the employer has not made sufficient efforts to accommodate the employee’s disability.

legally obligated to accommodate. A member may be reluctant to share this information with you or with the employer, but it is important that they understand their rights. More on the Duty to Accommodate is included in the section on processing complaints and grievances, and a link to even more information is included in Additional Resources.

Grieving Disciplinary Cases

When proper procedure is not followed, just cause is not established, disciplinary measures are not progressive, or a disability is a factor in the misconduct an employer's actions can be grieved. Grievances about the initial stages of progressive discipline, including written warnings and reprimands, are processed the same way as other individual grievances. The details on filing these will be covered in the section on processing complaints and grievances.

Disciplinary measures involving a suspension, a Last Chance Agreement, or a dismissal are significantly more serious and are not managed by a Shop Steward. Instead, when there is merit to object to a suspension or a dismissal a Union Advisor will process the complaint, usually accessing the final level of the grievance procedure immediately, or using a separate appeal process. If you attend a fact finding meeting or a follow up to such a meeting in which the member is given a letter of suspension or dismissal, direct the member to your union advisor for follow up and review.

Finally, keep two things in mind:

- The general rule to “work now, grieve later” applies to discipline cases. Reassure the employee prior to the meeting that the CA provides for a fair process, and that if that process is violated there are actions we can take to remedy it. A fact finding meeting should provide an opportunity for the member to offer and explain his/her own account of events, but it is not a good place to get into an argument if s/he does not agree with the employer's actions.

- The Union's only official record of what occurs during the meeting is in the notes that you take. It is vital that you record accurate information, and get copies of any documents produced to justify the employer's decision.

Conclusion

Representing a co-worker at a disciplinary meeting involves a lot of responsibility, but remember that the responsibility is shared by us all. A Shop Steward is one member of a team; as long as your notes record what was said and decided at the meeting, other members of your team are able to help you ensure that the process was fair.