

The 2008 Staff Development Training Institute:

STAFFING THE PUBLIC SERVICE AND PROGRESSIVE DISCIPLINE

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(Prepared for Instructional Purposes Only)

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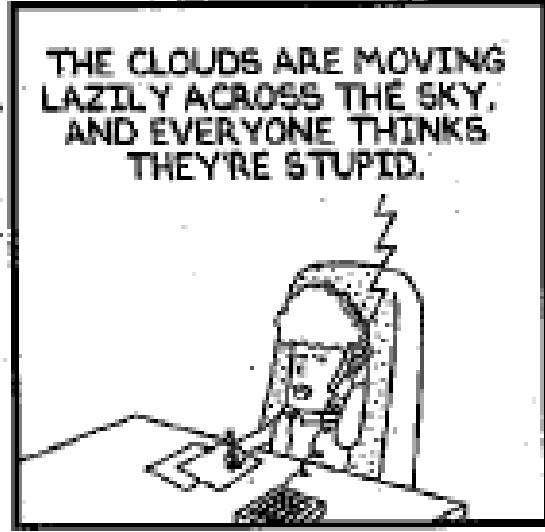
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“In my opinion, you will be very fortunate to get this person to work for you.”

“I most enthusiastically recommend this candidate with no qualifications whatsoever.”

“I can assure you that no person would be better for the job.”

“I would urge you to waste no time in making this candidate an offer of employment.”

Program Overview

- **Historical Perspective**
- **Position Classification**
- **Jurisdictional Classification**
- **Examinations and Appointments**
- **Counseling vs. Discipline**
- **Disciplinary Investigation**
- **Right to Union Representation**
- **Grounds for Disciplinary Action**
- **Smoking Gun Offenses**

Program Overview (cont.)

- **Employee Defenses to Job Performance Problems and Mitigating Factors**
- **Arbitration and Just Cause Standard**
- **New York State Civil Service Law Section 75**
- **Penalty Phase**

Emergence of the Merit System

On January 16, 1883 the Pendleton Civil Service Reform Act was passed in response to President Garfield's assassination by a disappointed office seeker.

Chapter 354 of Laws of 1883

An ACT to Regulate and Improve the Civil Service System of the State Of New York

“Its aim is to take the civil service out of the political arena...it is absolutely necessary that appointments should only be made after competitive examination”

-Theodore Roosevelt

Chair of the Assembly Cities Committee

**First State to Adopt a Merit System
Marked the End of the “Spoils System”**

CIVIL SERVICE EMPLOYEES

- All non-military jobs in government fall under the broad category of “civil” service.
- In 1894, NYS Constitution Article V, §6, was added to provide that “appointments and promotions in the civil service Shall be made according to merit and fitness to be ascertained by examination which, as far as practicable, shall be competitive”

Position Classification

DEFINITION

GROUPING TOGETHER, UNDER COMMON AND DESCRIPTIVE TITLES, POSITIONS THAT ARE SUFFICIENTLY SIMILAR IN ESSENTIAL CHARACTER AND SCOPE OF DUTIES AND RESPONSIBILITIES AND IN QUALIFICATION REQUIREMENTS

Legal Authority

CIVIL SERVICE LAW SECTION 22

“Before any new position in the service of a civil division shall be created or any existing position in such service shall be reclassified, the proposal therefor, including a statement of the duties of the position . . . any such position shall be created or any such existing position reclassified only with the title approved and certified by the commission.”

Jurisdictional Classification

Civil Service jobs fall into two major categories:

- **Unclassified Service**
- **Classified Service**

Jurisdictional Classification

DEFINITION

***ASSIGNING POSITIONS TO THE
UNCLASSIFIED SERVICE***

OR

***TO THE COMPETITIVE, NON-
COMPETITIVE, EXEMPT, OR LABOR
CLASS OF THE CLASSIFIED SERVICE;***

- The UNCLASSIFIED (§35) includes elected officials, members of boards or commissions, Board of Election employees, the head or heads of any department of the government who are vested with authority, direction and control over a department, and who have power and authority to appoint and remove employees and officers therein.

- Generally speaking, the CLASSIFIED Service (§40) includes all other employees.
- The Classified Service is divided into four subcategories:

- Competitive (§44) – Must meet minimum qualifications set by the local civil service and are subject to a competitive examination Unless designated by law or administrative action of the local civil service, the position falls in the competitive classification.
- Typically includes all positions in DSS except Commissioner of Social Services, possibly Deputy Commissioner and Community Services Aides.

- Noncompetitive (§42) – Qualifications can be objectively assessed, but no written or oral examination is given. Civil service sets minimum qualifications. In the Department of Social Services the Commissioner and Community Services Aides are Noncompetitive.

- Exempt (§41) – all positions for which a competitive or noncompetitive examination is not practicable. Often involves highly confidential duties.

- Labor (§43) – Unskilled positions, with no minimum qualifications.
- Typically includes such titles as laborers, cleaners and sanitation workers.

Competitive Class

Why Do We Test?

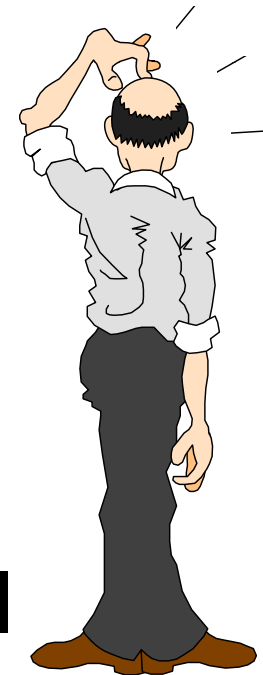
Article V, Section 6 of the State

Constitution provides that:

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable by examination which, as far as practicable, shall be competitive.

Who prepares these #0!* things?

- ◆ New York State Department of Civil Service for State positions.
- ◆ Civil Service Law, Section 17.4 -- Local Personnel Officer has the authority to conduct examinations and establish eligible lists.
- ◆ Civil Service Law, Section 23.2 - Requires NYS Department of Civil Service to render exam services to locals upon request.



Types of Examinations

- Written Test – typically multiple choice
- Ratings of Training and Experience (T & E's)
- Performance Tests
- Physical Agility Tests
- Oral Examinations

A particular examination may be a combination of some of the above types.

Eligible List Usage

Rule of Three

Appointments from an eligible list must be made from among one of the three persons standing highest on an eligible list.



Example

1.Lisa	100	reachable
2.Carol	95	reachable
3.Jim	90	reachable
4.Frank	90	reachable
5.Amy	90	reachable
6.Anne	90	reachable
7.Linda	90	reachable
8.Sandra	90	reachable
9.Joe	85	not reachable

Probationary Period

- All permanent employees must complete a probationary period.**
- Length may vary.**
- After completion of minimum period, but prior to completion of maximum period, employee may be fired for any reason (provided not discriminatory or illegal reason).**
- After the completion of the probationary period, the appointment becomes permanent in all respects**

- **Provisional Appointment**: An appointment made to a competitive classification when there is no eligible list available or the available list contains the names of less than 3 willing to accept (exam has not been given, list expired, or less than 3 eligible candidates). **Must meet minimum qualifications**. Position should only be for a 9 month period, but can be extended under extenuating circumstances. May be fired for any reason (provided not discriminatory or illegal) during provisional appointment.

Temporary Appointment

A short term appointment

- Up to 3 months – anyone qualified regardless of the existence of a list.**
- 3 up to 6 months – anyone on list, if list exists.**
- 6 months or greater – 1 of top 3 willing to accept such a position from list, if list exists.**
- 12 months if the position will not continue in existence beyond that period.**

Temporary Appointment (cont.)

- **18 months for special study or project that will not continue in existence beyond that period (but not only because the position may be grant funded)**

Counseling

vs.

Discipline

Counseling

- NOT DISCIPLINE
- NO RIGHT TO UNION REPRESENTATIVE

- Purpose of Counseling:
 - Counseling can be viewed as **COMMUNICATING** with an employee over whom you have supervisory authority about work standards, conduct and other concerns you and/or the employee may have related to employment.
 - place the employee on notice that the current conduct exhibited is unacceptable;
 - Let the employee know what goals he or she must meet.
 - Place the employee on written notice that should the unacceptable conduct continue, you will seek disciplinary action.

- Counseling sometimes relates to off-duty conduct, which has a nexus to employment.

Counseling and the documentation of conduct:

- Aid in employee training and remediation.
- Contribute to a fair system of discipline.
- Is an integral part of progressive discipline.
- Make it possible for the employer to obtain the discipline sought.
- Provide the employer with a basis for successfully defending itself in litigation.

Informal Counseling:

- Routinely give employees feedback in terms of your expectations, standards, and goals.
- Reinforce what constitutes acceptable behavior.
- Let the employee know when he/she has done something which is unacceptable.
- Keep a log of unacceptable behavior and list the date, time and place of each event in your own file.

- IF UNACCEPTABLE BEHAVIORS PERSIST, REVIEW THEM WITH THE EMPLOYEE IN A FORMAL COUNSELING SESSION AS PART OF THE EVALUATION PROCESS AND DOCUMENT THOSE BEHAVIORS.

The purpose of FORMAL COUNSELING as part of the disciplinary and evaluation process is:

- To place the employee on notice that the current conduct exhibited is unacceptable.
- To let the employee know what goals he or she must meet (i.e., create an improvement plan with targeted goals).
- To place the employee on written notice that should the unacceptable conduct continue, you will seek disciplinary action against him or her.

- **ALWAYS:**
 - Send a follow-up memorandum summarizing the counseling meeting.
 - Offer the employee an opportunity to respond, in writing, to the counseling memorandum.
 - Place the documentation of the counseling session in the employee's personnel file.
 - Continue to monitor the employee's conduct.

- For Union Employees Only:
 - Stop the counseling session and afford the employee union representation if during the counseling session the employee becomes the disciplinary target.

PRELIMINARY STEPS TO TAKING DISCIPLINE

- Review the collective bargaining agreement.
- Find Out:
 - Employee's job title and civil service classification
 - Employee's date of hire
 - Whether the employee is an exempt volunteer firefighter
 - Whether the employee was a veteran during time of war
 - Identity of the appointing authority

DISCIPLINE

- Where investigation needed, complete as much of the investigation as is reasonably possible before meeting with the employee whose conduct is in question.
- Have a witness for the employer available where appropriate. (Do not tape record investigation).
- Send employee who is target of disciplinary investigation written notice of meeting and advise him/her of his/her right to have a union representative present.

- Prepare outline in advance to use a guideline for the meeting, including the questions; who, what, where, when, witnesses, explanation, confrontations.
- Have appropriate documentation: i.e., attendance records, certifications of convictions, personnel file, prior evaluations, work checklists, and job descriptions.
- Meet with employee in a timely manner.

- Listen to employee's explanation/defenses, if any.
- Find out what rights employee has, if any, under CBA and Section 75.
- Determine whether immediate suspension would be appropriate and find out who has authority to suspend.

The Tests of Just Cause

- Notice
 - Was the employee adequately warned of the consequences of his/her conduct?
- Reasonable Rule or Order
 - Was the rule or order reasonably-related to efficient and safe operations?
- Investigation Before Action
 - Did the employer investigate before administering the discipline?

- Fair Investigation
 - Was the employer's investigation conducted fairly and impartially?
- Evidence of Guilt
 - Is there evidence the employee is guilty of the offense?
- Fair Treatment
 - Has the employer applied the rule even-handedly and without discrimination?
- Punishment
 - Is the disciplinary action reasonably related to the seriousness of the offense, the employee's record of service, and the general standards applied by the employer?

Smoking Gun Offenses

- Theft
- Assault
- No call/no show
- Falsification of records
- Possession, use or distribution of drugs
- Obscene or immoral conduct
- Sexual harassment

Other Grounds for Disciplinary Action

- Unsatisfactory job performance
- Attendance issues
- Misconduct
- Insubordination

Identifying Job Performance Problems

- Does the employer have objective defined standards of performance?
- Is an otherwise qualified employee refusing or failing to perform his/her duties or is the employee simply incapable of performing the job?
- Has the employee lost “qualifying status” to do his/her job?
- Has the employee committed a specific error, misdeed, or misjudgment?
- Has the employee engaged in a pattern of unacceptable activity or inactivity?
- Has the employee demonstrated a disregard for performance standards or what a reasonable person would do?

Employee Defenses to Job Performance Problems

- The employer's standards are unreasonable.
- The employer did not reasonably notify employees of the standards expected.
- The employer assigned an unreasonable amount of work.
- The assessment of the employee's performance is unfair or partial.
- The employer provided inadequate training or support.
- Acts of the supervisor or co-workers contributed to the performance issues.
- Defective equipment or processes contributed to the performance issues.
- The employer did not impose similar discipline when other employees had similar performance problems.

Identifying Attendance Problems

- The number of absences exceeds usage by similar employees.
- The employee has exceeded the allotment of time under the CBA.
- The employee fails to follow reasonable, required procedures in connection with absences.
- Use of sick leave is immediately before/after weekends or holidays or is otherwise suspicious.
- The employee is late.
- The employee leaves work early without authorization.
- The employee takes excessive time for lunch or breaks.

Mitigating Factors with Attendance Problems

- The employee's absences or failure to comply with procedures is due to circumstances beyond the employee's control.
- The employer applied standards and procedures inconsistently.
- The employer's instructions or requirements were ambiguous.
- The employee made good faith attempts to comply.
- The attendance problem may be excused as a reasonable accommodation under the Americans with Disabilities Act.
- The attendance problem is protected under the Family and Medical Leave Act.

Misconduct

Employee behaviors in this category include, but are not limited to:

- Unprofessional and/or inappropriate workplace behavior
- Threats to safety or property
- Criminal activities

Insubordination

“The intentional and willful refusal to accept the valid authority or directive of a supervisor.”

Absent a serious safety or health risk, as judged by a reasonable person, an employee's disagreement or objection does not excuse non-compliance. The employee must comply with the directive and then seek relief through the grievance procedures.

Effective Discipline “Best Practices”

- Notice
- Reasonable rule/order
- Investigatory due process
- Evidence
- Consistent management action
- Reasonable disciplinary action

Keys to Effective Discipline

- **Prompt**
Act as quickly as possible but don't "jump the gun."
- **Impartial & Consistent**
Don't play favorites
Discipline as an organization
- **Fair**
Impose discipline proportionate to the offense and the employee's service record.
- **Notice**
Clearly communicate expectations and changes to expectations.
- **Follow Through**
Persist, honor commitments, and don't make commitments you can't keep.

NYS CIVIL SERVICE LAW

Statute of Limitations:

- 18 Months.
- Time limitation not applicable if incompetency or misconduct alleged constitutes a crime.

CSL Section 75

Due Process Discipline

Employee is entitled to

- ➡ **A written notice of the charges**
- ➡ **Opportunity to answer charges**
- ➡ **A hearing by the officer having the power to remove or his/her designee**
- ➡ **Hearing is open to public unless employee requests otherwise**

What Penalties May be Imposed?

Penalties Authorized by Section 75

- ➡ **Fine not to exceed \$100**
- ➡ **Suspension not exceeding two months**
- ➡ **Demotion in grade and title**
- ➡ **Dismissal**
- ➡ **Reprimand**
- ➡ ***Multiple penalties are not authorized***

- Employees Covered

- Competitive (permanent appointment)
- Non-Competitive (continuous employment of 5 years or more unless designated by Civil Service as confidential or policy making)
- Veteran during time of war (honorably discharged as defined in CSL §85) after completion of probationary term.
- Volunteer Firefighters (as defined in GML §200) after completion of probationary term.
- Detective (3 continuous years; unless reduction in rank based solely on economic reasons, consolidation, or abolition or curtailment of functions)

- Some collective bargaining agreements expand the scope of covered employees (e.g., they may include employees of the labor or non-competitive classification with less than 5 years of service).

- Investigation

- Any employee who is the target of a disciplinary investigation has the right to Union representation during questioning. Must be notified in advance, in writing, of right to union representation.
- Possible Consequences of Not Complying: All statements obtained in questioning and information obtained as a result of questioning, will be excluded from hearing.

- Who brings Charges?
 - A representative of the Employer vested with the responsibility by the appointing authority. Not the appointing authority who, as final arbiter, must distance him/herself or itself from the investigation or subsequent preferring of the charges.

- Basis for Charge:
 - Misconduct or Incompetence.
- Charges:
 - Charges should specify penalty desired
- Delivery of Charges:
 - Law does not specify (Suggestion: Personal service if possible)

- Answer to Charges:
 - Employee must be given at least eight (8) calendar days to submit answer to charges
- Suspension Pending Determination of Charges:
 - Without pay or a period not exceeding 30 days if acquitted, restored to position with full back pay, less any unemployment).

- Who Serves as Hearing Officer:
 - Appointing Authority or Hearing Officer appointed by Appointing Authority. If a Hearing Officer is used, his/her findings and recommendations, along with stenographic record of the hearing, are given to the appointing authority for review and decision. The appointing authority can accept, modify or reject Hearing Officer's findings of fact and penalty recommendation.

- Hearing Officer Compensation:
 - Paid by Public Employer
- Burden of Proof:
 - Charging Party
- Representation of Employee:
 - Attorney or Union Rep. (Employee allowed to summon witnesses on his/her own behalf).

- Rules of Evidence
 - Not strictly followed
- Transcript:
 - Yes (paid for by Employer and provided without charge, upon request, to the employee).

- Penalties:

- Reprimand
- Fine (not to exceed \$100)
- Suspension without pay not exceeding 2 months (the suspension pending the hearing does not have to be considered as part of the penalty)
- Demotion in grade and title
- Dismissal

(Should consider employee's complete employment history)

- **Filing of Record**

- If employee found guilty, a copy of charges, answer, transcript and determination must be filed with the Public Employer, as well as the Civil Service Commission having jurisdiction over the position.

- Appeal

- As provided for in CSL §76, either court via Art. 78 proceeding (four month statute of limitations) or Civil Service Commission having jurisdiction over a district (20 days to appeal to Civil Service Commission having jurisdiction over the municipality)

PELL STANDARD

- Whether the punishment is “so disproportionate to the offense, in light of all circumstances, as to be shocking to one’s sense of fairness.”
 - Matter of Pell v. Board of Education, 34 NY2d 222 (1974)