Department of Civil Service

Manual of Procedure in Disciplinary Actions

Andrew M. Cuomo
Governor

Disclaimer

This manual is intended to be used as a practical and informative guide only and is not to be used as legal authority for any purpose. Specific legal authority comes exclusively from statute and case law and we reserve the right to revise, modify or alter the contents of this manual at any time.

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TABLE OF CONTENTS

	Section	Page
PREFACE	I	1
PURPOSE OF MANUAL	II	2
STATUTORY OVERVIEW	III	3
OFFICERS AND EMPLOYEES COVERED BY SECTION 75	IV	5
General		
Temporary, Provisional, Part-time or Per Diem Employees		
Probation		
Private Secretary, Cashier, Deputy		
Independent Officers		
Notice of Status as War Veteran or Exempt Volunteer Firefighter		
PROCEDURE BEFORE DISCIPLINARY ACTION IS TAKEN	V	11
Fair Play-Due Process		
General Policies		
Records Showing Incompetency or Misconduct		
E-Mail		
Conferences and Counseling		
Assignment to Other Locations/Duties		
Investigation		
Representation During Investigation		
Criminal Acts or Omissions		
Medical Examination		
OFFENSES SUBJECT TO DISCIPLINARY ACTION	VI	22
Time Limitations		
Offense Must Be Substantial		
Effect of Layoff		
“Outside” or “Off Duty” Offenses		
Indictment and Conviction on Criminal Charges		
Retaliatory Action		
PREPARATION OF CHARGES	VII	26
Form		
Charge		
Specifications		
Related Matters		
SUSPENSION	VIII	32

TRANSMITTAL OF NOTICE AND STATEMENT OF CHARGES IX 34

THE ANSWER X 36

EFFECT OF RESIGNATION XI 38

DESIGNATION OF HEARING OFFICER XII 39

SUBPOENAS XIII 41

General
Who May Issue Subpoenas
Obtaining a Subpoena
Service
Fees

COUNSEL AND REPRESENTATION XIV 44

HEARING XV 45

General
Open or Closed Hearing
Adjournments
Relationship Between Hearing Officer and Employee
Failure or Refusal to Appeal
Hearing Procedures/Evidence
Stenographic Record/Exhibits

SETTLEMENT XVI 50

THE DETERMINATION XVII 51

General
Evaluation of the Evidence
Reinstatement If Found Not Guilty
Penalties
Notice of Determination
Other Procedural Requirements
Effects of Penalties
Suspension or Fine of Overtime Ineligible Employees

APPEALS TO CIVIL SERVICE COMMISSION OR PERSONNEL OFFICER XVIII 59

Procedure on Appeal
Determination on Appeal

CONCLUSIONS XIX 63

APPENDIX

Section I

Preface

When public sector employees are incompetent at work or engage in misconduct relating to the performance of their duties, employers may seek to discipline those employees, either to correct their behavior or to remove them from the workforce. Employers, however, are bound by specific laws and court decisions that relate to the procedural and substantive requirements to effect discharge or other disciplinary penalties.

Although there is increased public and judicial scrutiny in this area, the notion that public employees may be disciplined or separated from public service only under the most extreme circumstances, and solely for the gravest offenses, is utterly untrue. The same reasons which are generally acceptable for disciplining employees in private industry may be the basis for discipline in the public service – although in public service specific due process procedures must be followed and the employer's actions are subject to broader review.

We have prepared this manual to aid administrative officials in becoming more familiar with the formalities required to meet current legislative and judicial standards. Since the last revision of this manual in 1987, there have been many changes and additions that are now reflected in this edition.

We have also included some recommendations relating to personnel practices that have a bearing on disciplinary procedures, and also some suggestions on how to make the disciplinary process more fair, efficient and manageable.

This 2003 revised edition of the Manual of Procedure in Disciplinary Actions pursuant to the Civil Service Law was prepared by the Law Bureau of the Department of Civil Service.

Section II

PURPOSE OF MANUAL

Generally, disciplinary proceedings involving civil service employees are governed by the provisions of sections 75, 75-b, 76 and 77 of the Civil Service Law and/or the negotiated agreements between the various bargaining units and each public employer.

Each statute and/or negotiated agreement provides for or relates to the procedures to be followed during the various stages of a disciplinary proceeding. Though variance from some of these procedures may have little practical effect on the proceeding or may be easily remedied, other failures to follow established procedures may profoundly affect the course and outcome of the action or may even be fatal to the charges at any stage of the proceeding, or upon appeal and review. The importance of following proper procedures, therefore, cannot be over emphasized.

This manual is designed primarily to serve as a guide to the procedures that should be followed in disciplinary actions and to illustrate such procedures by appropriate examples. While the focus of the manual is on those procedures set forth in the Civil Service Law, references will be made regarding the procedures applicable to arbitration proceedings under the terms of negotiated agreements. Inasmuch as disciplinary proceedings require the conduct of formal hearings and involve legal issues, the advice and guidance of appropriate government counsel may be necessary at any stage of the proceeding. This manual, which is intended to be a valuable resource, is not a substitute for sound legal advice from counsel.

Section III

STATUTORY OVERVIEW

Civil Service Law section 75 provides that a covered employee may not be removed or otherwise subjected to disciplinary penalty except for incompetency or misconduct shown after a hearing on stated charges. Such employee is entitled to representation and to summon witnesses to testify on her or his behalf at the hearing. Upon service of the charges, the appointing officer or authority may suspend the employee without pay for a period of up to thirty days pending the hearing and determination of the disciplinary charges. The burden of proving the facts upon which the charges are based and the appropriateness of the proposed penalty is on the employer.

If the employee is acquitted of the charges, she or he is restored any salary and benefits lost as a result of the employer bringing those charges. If the employee is found guilty of any charges, she or he may receive a penalty ranging from a formal letter of reprimand to a fine, a temporary suspension, demotion or dismissal from service.

Civil Service Law section 75-b, commonly known as the "whistleblower law," prohibits a public employer from taking disciplinary action against a public employee because that employee reveals information to a governmental body regarding a violation of a law, rule or regulation which presents a substantial and specific danger to public health and safety <u>or</u> reveals information which the employer reasonably believes is true and constitutes an improper governmental action.

When the employee reasonably believes that a disciplinary action would not have been taken but for the protected activity, section 75-b may be raised as a defense in that proceeding. Once raised, the defense must be considered and determined as part of the hearing officer's decision.

The burden of proving the disciplinary action was retaliatory pursuant to section 75-b is on the employee.

If the employer shows a valid and independent reason for bringing the disciplinary action, the defense will not succeed. If the defense is upheld, the hearing officer is required to dismiss or recommend dismissal of the proceeding.

Civil Service Law section 76 permits an employee who is aggrieved by a penalty of demotion, dismissal from the service, suspension without pay, a fine, or an official reprimand (if coupled with an unremitted suspension without pay), to appeal from such determination either to the civil service commission or personnel officer having jurisdiction, or to the court. An appeal to the commission or personnel officer must be filed within twenty days after the employee receives written notice of the determination. The commission is required to review the record of the disciplinary proceeding and the transcript of the hearing, and to determine the appeal on the basis of such record and transcript and such oral or written argument as it may deem appropriate. The determination appealed may be affirmed, reversed or modified. The commission may, in its discretion, direct the reinstatement of the appellant, permit transfer to another position or place her/his name on a preferred list.

(Sections 75, 75-b, 76 and 77 of the Civil Service Law are set forth in full in the Appendix of this manual.)

Section IV

OFFICERS AND EMPLOYEES COVERED BY SECTION 75

General

Essentially, the protections and procedures afforded by section 75 only apply to public employees who have a property interest (tenure) in connection with their public employment position.

Section 75 applies to:

(1) a person holding a position by permanent appointment in the competitive class;

(2) a person holding a position by permanent appointment in the exempt, non-competitive or labor class who is an honorably discharged war veteran (as defined in Civil Service Law section 85) or an exempt volunteer firefighter (as defined in the General Municipal Law), except where such person holds the position of private secretary, independent officer, cashier, or deputy of any official or department;

(3) a person holding a position by permanent appointment in the non-competitive class, except for positions designated as confidential or policy influencing, who since last entry into the service has completed at least five years of continuous service in that class. Time employed in a confidential or policy influencing position cannot count towards the required five-year period;

(4) persons holding certain Homemaker or Home Aide positions in New York City; and

(5) certain police detectives.

Temporary, Provisional, Part-time or Per Diem Employees

The protections afforded by section 75 apply only to persons who hold their position by permanent appointment. Consequently, the protections of the statute do not apply to temporary or provisional employees.

Section 75 makes no distinction, however, between full time employees and those who are part time or who are paid on an hourly or per diem basis. Since a property interest in a public position is unaffected by these factors, the applicability of section 75 procedural rights are also unaffected.

Probation

Probationers have only limited protection under section 75. A probationary term generally entails a fixed minimum and maximum period, as fixed by State or local rule, through which an employee must pass prior to attaining full tenure and property interest rights to the specific public position.

During the minimum period of probation, which is typically eight weeks, section 75 affords full procedural and due process protection. Any discipline or removal sought during this period must be on stated charges and after a full hearing as the probationer has a protected right to serve the minimum probationary period.

Once the minimum probationary period has passed, however, and before the maximum probationary period elapses, the incumbent holds a permanent appointment but may be discharged without written charges or a hearing. The employer must still follow the proper procedures relating to probationary evaluation, notification, and termination, but section 75 procedures do not apply. When the probation period has ended and the employee has gained a property right to the position, the employee also gains the full protection of the statute.

It should be noted that an employee who is laid off when a position is abolished or whose appointment is revoked by the civil service commission pursuant to Civil Service Law section 50(4), is not entitled to section 75 procedures. Neither instance involves misconduct or incompetence in public service leading to disciplinary action.

Private Secretary, Cashier, or Deputy

As noted earlier, section 75 explicitly provides that a person holding the position of private secretary, cashier or deputy of any official or department, who would otherwise be entitled to the protections of section 75 as a war veteran or exempt volunteer firefighter, may be discharged or disciplined without charges or a hearing. From a procedural standpoint, the crucial question is which employees fall into these categories. Though the position title may give some indication as to which, if any, category an individual might belong in, such title is in no way determinative. Each category of position must be considered individually based upon the duties of the specific position held.

The category which is most troublesome, and which has been the subject of the most litigation, is that of a "deputy of any official or department." Generally, the duties and responsibilities of the position determine whether it constitutes a "deputy" position, and the courts have focused on whether there exists statutory authority for the principal officer to delegate his or her duties or responsibilities to a deputy. In some instances, the statute may directly confer authority on the employee to perform duties vested in his or her principal officer. Since these questions are legal in nature, it is suggested that the advice of counsel be sought before any disciplinary measures are considered regarding an individual who might be considered such a "deputy."

An appointing officer may not make a "deputy" out of any subordinate he or she chooses; the general rule is that the deputization must be effected directly by a statute or pursuant to statutory provisions authorizing the delegation of powers and duties.

It is not necessary that the deputy be authorized to act generally for and in place of his or her principal, as is required for exempt classification under section 41 of the Civil Service Law. It is sufficient that he or she be authorized to exercise part of the powers and duties of the principal. However, the powers and duties of the principal conferred on the "deputy" must be substantial and important, not merely clerical or ministerial.

If a subordinate is one to whom the principal officer, pursuant to statutory authority, may delegate powers and duties so as to constitute him or her as a "deputy," there must actually be such a delegation to except the subordinate from the protections of section 75.

Some example positions where the courts have determined that the person is a "deputy" include an assistant corporation counsel, an executive director of a housing authority, a deputy county attorney, and an executive assistant for legislative affairs.

With respect to the position of "cashier," the title is deceptive and does not denote a public employee that works at a register or counter receiving money. The cases indicate that the statute was intended to exempt from section 75 protection high level financial officers or officials who are in charge of distributing and receiving money.

Independent Officers

In addition to the exceptions expressly stated in the statute, the courts have established a rule that the provisions of the Civil Service Law governing the dismissal of war veterans and exempt volunteer firefighters do no apply to "independent officers." An "independent officer" has been described by the courts as one "whose position is created and whose powers and duties are prescribed by statute and who exercises a high degree of initiative and independent judgment."

For example, a federal appeals court held that a City Engineer/Superintendent, whose position and duties were created by statute, and who exercised a high degree of initiative and independent judgment, was an Independent Officer, even though he received direction from the City Manager.

Most times, determining who is subject to the section 75 procedures will be straightforward, but care must be taken to assess each case on an individual basis.

Notice of Status as War Veteran or Exempt Volunteer Firefighter

Since any individual in the exempt, non-competitive or labor class, who otherwise would not be protected by section 75, automatically gains such protection if he or she is a war veteran or exempt volunteer firefighter, it is important to ascertain which employees fall into these categories. While ideally, this should be done at time of appointment, most employers do not routinely include questions relating to such issues in the appointment process.

At the very least, whenever disciplinary action is contemplated against any employee who does not appear to be subject to section 75 procedures, an inquiry should be made into possible "war veteran" or "exempt volunteer firefighter" status. Before any discipline is imposed, it is incumbent on the appointing authority to determine whether such status is applicable. Simply asking the individual may be sufficient to ensure fairness and accuracy.

An employee who is terminated without advance notice and who, within a reasonable time, demonstrates that he or she is a war veteran or exempt volunteer firefighter, is entitled to section 75 procedures and must be given a hearing. Failure to make inquiries into this issue exposes the employer to potential litigation and expense. It is a better practice to avoid unwelcome surprises.

It should also be noted that section 202-a of the General Municipal Law authorizes the recording of certificates of exempt volunteer firefighters in the

office of the county clerk. Similarly, section 250 of the Military Law authorizes the recording of a veteran's certification of honorable discharge. Each statute provides that such certificate "when so recorded shall constitute notice to all public officials of the facts set forth therein."

Special Circumstances

There are a few municipal employees, such as members of a town or village police department, who may be covered by section 75 and/or other disciplinary statutes such as Town Law section 155 or Village Law section 8-804. These statutes were already in existence at the time Civil Service Law sections 75 and 76 were enacted and are still applicable to such officers. Disciplinary actions against this class of employee will require advice from Counsel to determine the appropriate procedures to be followed in each case.

Section V

PROCEDURE BEFORE DISCIPLINARY ACTION IS TAKEN

Fair Play – Due Process

If all of the standards and requirements applied to disciplinary proceedings by the Legislature and the Judiciary could be described collectively in a single phrase, the most apt, undoubtedly, would be "due process." An appointing authority who substantively violates this requirement will probably suffer reversal on appeal. An even more serious consequence may be the damaging effect on the morale of the other employees of the agency.

The procedures followed and steps taken before charges are served lay the foundation for the formal disciplinary proceeding. It is important, therefore, that the same principles of due process which govern the formal proceeding be applied also in the preliminary stages, particularly in the conduct of investigations, in conferences with the employee and in preparing the case. An employer should avoid trying to mislead an employee or to place her or him at an unfair disadvantage. An employer should also guard against prejudices which might make it difficult or impossible to appraise the case objectively and realistically. The observance of these cautions can save an appointing officer a great deal of grief, embarrassment and expense.

General Policies

There are certain steps an employer can take long before any question of discipline arises, that can both reduce the chances of misconduct or incompetence, and can facilitate a successful resolution of such problems when they occur. Attention to sound personnel practices can prevent many problems associated with employee discipline.

A common element in all disciplinary matters involves the specific rules, standards, and duties which apply to each employee. An employer seeking to

discipline an employee must clearly show what rule was violated, what performance standard was not met, or what duty was breached and that the employee was aware of and understood the rule, standard and/or duty, in order to successfully establish incompetency or misconduct. Employee handbooks should clearly set forth the employer's rules, personnel directives and standards of conduct. The clearer the "rules" are, the easier it is for the employee to understand what is expected of him or her, and for the employer to discipline the employee if he or she violates those "rules." A thorough review and revision of all workplace policies should be considered, keeping these principles in mind.

It is also important for all employees to understand that a failure to abide by the "rules" or to meet minimum standards of competence may result in disciplinary action. An employer should not rely only on general statements that violations of the rules may lead to discipline, but should include possible penalties. For example, while it would be acceptable to state in an employee handbook that repeated unexcused absences or tardiness may result in discipline, rules regarding insubordination, theft of services or property, or use of alcohol or drugs in the workplace, should be accompanied by specific notices that violations of these rules will result in disciplinary action and may result in dismissal from the service.

Finally, a record should be kept to show that each employee has received a copy of the employee handbook or employer policies and that each employee was told of the responsibility to read, understand and abide by those policies. Such record could be as formal as a form signed by each employee upon appointment, or as informal as a checkmark on a personnel folder showing the documents were provided and the employee read and understood the documents. If a disciplinary matter ensues, an employer will be able to establish knowledge of the rules and of the consequences of violating those rules.

Records Showing Incompetency or Misconduct

The decision whether to institute a disciplinary proceeding and the result of that proceeding will most often depend entirely upon the evidence assembled

by the employer. Since charges of incompetency or misconduct must be proven at a hearing, it is important that records be kept of each incident in which the supervisor believes that the employee has shown incompetency or has been guilty of dereliction of duty or misconduct. It is important, therefore, to train and instruct supervisors to create the appropriate records and reports regarding any incident which might lead to discipline. Documentary evidence is not prone to the same distortions of time and memory that often undercut the testimony of witnesses. Any document created at or about the time the incident occurs carries great weight and is invaluable in preparing a witness for testimony. To paraphrase an old adage: The three most important ways to implement effective discipline are to document the facts, document the facts, and document the facts.

Of course, supervisors don't need to keep track of every trivial infraction or incident involving their subordinates, but it may be useful to keep a log so patterns of time and attendance misuse or other misconduct can be spotted early on. Early intervention can sometimes prevent a behavior pattern from becoming a disciplinary matter. Any serious incident, however, which has the potential to result in counseling or future discipline, must be fully documented in sufficient detail to preserve all the essential facts.

When a supervisor believes that an employee is guilty of serious incompetency or dereliction of duty or misconduct, the need for documentation increases proportionately. Physical evidence should be preserved wherever available. This might consist, for example, of letters, memoranda or reports prepared by the employee which reflect incompetency, or a record which may have been altered unlawfully, or perhaps something of value which he or she may have attempted to remove from the premises and appropriate for his or her own use. In addition, the supervisor should make a formal memorandum to record all the facts and circumstances surrounding each incident. If an incident might result in disciplinary charges, it may be advisable to request a memorandum from any other employee who witnessed it or was otherwise involved in the matter. Such memoranda may be used later in the event that it is necessary for such other employee(s) to testify at a hearing. The memoranda

and any physical evidence available will also facilitate the drafting of charges in the event that disciplinary action against the employee involved becomes necessary.

E-Mail

A note must be added regarding electronic mail (e-mail) and its usefulness in documenting employee misconduct. In many instances, supervisors will try to avoid personally confronting their subordinates with competency or misconduct issues. Such confrontations can be uncomfortable, time consuming and disruptive to the employer's operations. Similarly, employees can become emotional and flustered, responding inappropriately and the encounter can be extremely unpleasant. It is not surprising that many incidents or situations which could be addressed early on, are either ignored or tolerated until the situation becomes serious.

Electronic mail messages from a supervisor, however, have many advantages in certain situations, promoting effective employee discipline. E-mail can be a confidential way to address behavior so the employee is not embarrassed and co-employees are not privy to the supervisor's concerns. It is quick, efficient and it can create a permanent record. Supervisors may be more prone to address and document behavior that might ordinarily be disregarded. Most importantly, if the employee's behavior continues or rises to the level where counseling or discipline is considered, the e-mail messages can be easily reviewed and utilized to ensure that the facts are accurately assessed and, if necessary, proven. Supervisory training regarding the documentation of employee behavior is always a good idea.

Conferences and Counseling

Although not required by law, it is usually advisable for the supervisor to communicate with the employee and discuss each incident as it occurs so that the employee has an opportunity to explain her or his actions. This avoids misunderstandings, and provides some notice that the employee's performance

or conduct is not acceptable. If the explanation is considered unsatisfactory, the employee should be warned that disciplinary action may result unless the conduct at issue or the caliber of her or his work improves. Employee conferences are desirable not only from the standpoint of good personnel practice but also as a matter of fairness to the employee. An employee should be made aware of what is expected on the job and whether he or she is living up to those expectations. In some cases, a simple conference with the employee can lead to improved performance and conduct, thus avoiding the necessity for future disciplinary proceedings.

Any formal conference or counseling session is not itself a form of discipline and it should be conducted as a positive, informative and constructive exchange between supervisor and employee, not as a reprimand. A memorandum which documents what was covered in the conference should be prepared and filed in accordance with employer policies, and a copy should be delivered to the employee. Such memoranda prevent misunderstandings later on and can facilitate the drafting of charges if the conduct continues or worsens.

Assignment to Other Location/Duties

If an employee's misconduct or incompetency appears to stem solely from a personality clash between that individual and others, an alternative to discipline would be reassignment of the employee or another employee to some other office. Of course, an appropriate vacancy is not always readily available. The possibility of solving or avoiding a potential disciplinary problem by reassignment should not be overlooked, however, as the expense and effort of recruiting and training an employee are wasted when that individual is separated from service.

Ideally, any reassignment due to personality conflict should be agreed upon between the employer and employee. Unilateral action by the employer may be taken, but there have been instances where reassignments, reclassifications and transfers have been challenged as retaliatory and disciplinary in nature.

As a temporary expedient, appointing authorities sometimes make the mistake of relieving an incompetent employee of his or her regular duties, and assigning that individual less responsible or difficult functions. Later, when they attempt to remove or demote the employee through discipline, they are, as a consequence, unable to show, for the period of reassignment, that the employee was incompetent in performing the duties of the title. Such reassignments to less difficult work should be avoided if possible, or if such a change in function has already occurred, the employee should again be assigned to the regular work of his or her title and allowed ample opportunity to prove whether he or she can perform the full range of required duties. Disciplinary action may then be taken if the employee's service is not satisfactory.

In some instances of serious misconduct or incompetence, an employee may want to resign rather than face disciplinary charges. The appointing authority should consider exploring this possibility with the employee before bringing disciplinary charges, but there are certain pitfalls to be avoided. (See Section XI, Effect of Resignation.)

Investigation

In determining whether or what disciplinary action may be warranted in any instance, it is essential to first determine the facts. Any investigation should be as accurate and as comprehensive as the circumstances allow or require, and the employer should ensure that both the investigatory steps taken and the facts ascertained are properly recorded.

The investigation should only be conducted by individuals who can be fair, accurate and impartial. No individual who will ultimately decide whether the charges have been proven or whether a penalty is appropriate should be involved in the investigation. Depending on the circumstances, it may be advisable to bring in outside personnel to investigate serious matters.

It is a fundamental right of the appointing authority, either personally or through deputies, supervising staff or other subordinates, to question any employee concerning the performance or discharge of the employee's official duties and responsibilities. The employee is obligated to answer such inquiries and refusal to do so is, in itself, a form of insubordination, which can be the basis for disciplinary action. Moreover, the appointing officer may have the interrogation recorded and transcribed by a stenographer.

Warning: In any matter that may involve potential criminal charges, an employer's questioning may jeopardize the criminal investigation or prosecution. Please refer to the paragraphs relating to criminal acts of omission at the end of this subsection.

There is usually ample authority for an appointing officer to require that an employee be sworn and testify under oath concerning the performance of his or her duties. (County Law, §209; Local Charters and Laws).

Representation During Investigation

Although an employer has the right to question an employee about the discharge of his or her official function or duties, an employee may have a right to be represented during any such questioning, either by a lawyer or a representative of a union. A determination regarding whether the employee is entitled to representation must be made before any extensive interrogation is begun.

Generally speaking, the employer may question any employee regarding any situation that is job related, and an employee has no right to representation as long as there is no reason to think that the employee might be a potential subject of any disciplinary action. When the facts show that the employee to be questioned appears to be a potential subject for discipline, however, the right to representation may attach. Since the failure to follow procedures regarding

representation can have a profound affect on any disciplinary proceeding brought under section 75, the employer should proceed with caution whenever a hint of a serious disciplinary matter arises during any routine inquiry.

For example, a supervisor can ask any employee at work what he or she may be photocopying, or downloading or printing from a computer, and the employee must answer or explain the situation. If the inquiry brings out facts that show the employee has acted improperly, however, and maybe subject to discipline for his or her actions, the supervisor should consult with his or her employer to determine if the employee is entitled to representation before continuing with the questioning.

Specifically, unionized employees who appear to be potential subjects of discipline have a right to be represented by their certified or recognized employee organization under section 75. Similarly State management/confidential employees also have a right to be represented during such questioning (Civil Service Law, section 75(2)). Other public employees, however, are not covered by this provision and do not have the same right of representation during the investigatory stages.

In cases where an employee does have the right to representation during questioning, the employee must be given written notice of that right in advance of the questioning, and must be given a reasonable period of time in which to obtain representation if that employee wants to be represented. If the employee cannot get representation within that reasonable time period, or waives representation, then the employer may proceed with the questioning. All steps regarding representation and/or waiver must also be fully documented.

It should be noted that most (if not all) collective bargaining agreements have provisions relating to representation during questioning. An employer should always review the contractual provisions applicable to any represented employee.

Just because an employee is a potential subject for discipline and is entitled to representation, it does not mean that she or he should not be questioned as part of the investigation. In fact, it is almost always useful to question the potential subject as long as that questioning will not compromise any other aspect of the investigation. First, fundamental fairness dictates this approach to avoid simple misunderstandings and prevent unnecessary charges. Second, such questioning can firmly establish the subject's version of the facts and avoid the possibility of getting a different, and perhaps better thought out, story at the hearing. Finally, it is usually the subject who knows the most about the situation and information obtained during questioning can lead to other relevant evidence. In short, interrogation of the subject should always be considered.

It should also be remembered that the employee's representative is not there to impede or obstruct the investigation, and should not be allowed to do so. A refusal to answer can still be insubordination even if it is based on advice from counsel or a representative.

Under section 75 or the applicable collective bargaining agreement, a hearing officer or arbitrator will eventually determine issues, such as whether the questioned employee appeared to be a potential subject of discipline at the time of questioning and/or whether the employee was given a reasonable period of time to obtain representation. If the hearing officer finds that the proper procedures were not followed, or that the employee's rights were violated, any and all statements of the employee made during the questioning, and any evidence or information derived from that questioning, or as a result of that questioning, will be excluded from being considered as evidence in the hearing.

This retrospective approach means that the employer must be careful to preserve employee rights, establish internal procedures to promote proper questioning, and document the steps taken and information gained at every stage of the investigation. All supervisors should be instructed that as soon as

any employee appears to be a possible subject of discipline, further questioning should be conducted only after conferring with appropriate personnel familiar with disciplinary procedures.

Criminal Acts or Omissions

Any interrogation or questioning of an employee may reveal facts that indicate a criminal act may have occurred. Evidence of theft, assault or sexual abuse may be uncovered, or may be apparent from the outset. An employer must be extremely cautious wherever this type of situation arises and must consider contacting the proper law enforcement authorities immediately.

All employees have a constitutional right against self-incrimination and that right can be violated when an employee against whom potential criminal charges may be brought, is questioned by an employer. Though a public employer can compel an employee to answer questions or face disciplinary action, including dismissal, for failure to cooperate, this type of forced questioning will act to grant the employee a limited immunity and prevent the use of his or her testimony in a subsequent criminal action. Obviously, any situation involving potential criminal charges should be immediately brought to the attention of counsel and appropriate legal advice should be sought, if possible under the circumstances.

Medical Examination

Any investigation of a possible disciplinary matter can reveal facts which raise questions of a possible physical or mental disability. If there is a reasonable basis to believe that an employee may be unfit for duty due to physical or mental conditions, the appointing officer can require that employee to submit to a medical examination, at municipal government expense, by a doctor designated by the appointing officer. Such an examination can be required pursuant to section 72 of the Civil Service Law which provides that if the individual is found to have a mental or physical disability which prevents him or

her from performing the essential duties of the position with or without reasonable accommodation, the appointing authority may place the employee on an involuntary leave of absence.

The existence of such medical issues, however, does not mean that any disciplinary matter must be postponed or abandoned. Until the employee is evaluated, the employer has no real knowledge as to whether or to what degree the employee is responsible for his or her own actions. A section 75 disciplinary proceeding may be commenced pending a determination regarding disability. As long as the procedures outlined in both statutes are followed, it often makes sense to pursue both options simultaneously.

Section VI

OFFENSES SUBJECT TO DISCIPLINARY ACTION

The statute authorizes removal or other disciplinary penalties only for "incompetency or misconduct." There is no comprehensive list of acts and omissions which constitute "incompetency or misconduct." Rather, common sense and a review of the employer's rules and performance standards tell us, in most cases, whether an employee's performance or conduct provides a basis for disciplinary action. There are, nevertheless, a number of points which warrant specific mention in this manual.

Time Limitations

Section 75 expressly provides that a disciplinary proceeding may not be based on alleged incompetency or misconduct which occurred more than 18 months before the commencement of such proceeding, unless the incompetency or misconduct would, if proved in a court of appropriate jurisdiction, constitute a crime. Any acts which would constitute a crime may be the basis for disciplinary action without regard to time limitations. There is a one year limit in the case of a State employee designated management/confidential.

Offense Must Be Substantial

An offense or a series of like offenses must be substantial in order to support disciplinary action. In other words, a single trivial, non-substantial or technical offense is not enough to warrant disciplinary action. A pattern of such behavior, however, could suffice in this regard. It would be difficult, if not impossible, to formulate a standard or measure to determine the seriousness of any charge. Here again, what is sufficient to warrant disciplinary action is largely a matter of good judgment and common sense. Normally, the same reasons generally acknowledged as proper grounds for discipline in private employment would be applicable to discipline in the public service.

In one case involving the issue of substantiality of the offense charged, the Court annulled the removal of an employee charged with having been late for a total of about three hours over a three-month period; the Court regarded this offense as trivial, particularly when it was shown that, during that same period, the employee worked eleven hours overtime without any compensation. In another case, the Court reversed a determination dismissing a head dining room attendant who had been serving eight ounce portions of meat in violation of a rule limiting servings to four ounces each. It appeared that the meat was cut and delivered to the employee from the kitchen; that eight ounces was the customary portion; and that there was no malicious intent or gross neglect on the part of the employee.

In the same vein as trivial or technical offenses is an "error of judgment." An innocent error of judgment without bad faith or gross neglect is not sufficient to sustain a disciplinary action. A succession of such errors or a demonstrated proclivity to make errors in judgment may, of course, constitute incompetence which is a basis for disciplinary action.

Effect of Layoff

An employee who is laid off and then later reinstated from a preferred list may be subject to disciplinary action based on his or her conduct or performance on the job prior to the layoff. The fact that an employee's name is placed on a preferred list does not create a presumption of satisfactory prior service shielding it from review upon subsequent reinstatement. The time limitations set forth in section 75, however, would still apply. Also, a municipal civil service commission or personnel officer may disqualify for reinstatement and remove an eligible's name from a preferred list who has been guilty of such misconduct as would warrant dismissal from public service (Civil Service Law, section 81(7)).

"Outside" or "Off Duty" Offenses

An act committed off the premises and not connected in any way with the duties of the job may nevertheless be cause for disciplinary action if it reflects unfavorably upon the moral character or fitness of the employee, or if it brings discredit to the public service. There have been several cases on this point, most of which have involved police officers who, the courts have noted, must command the absolute confidence and respect of the public and, therefore, must be above reproach. Even though many other employees do not hold positions as demanding as police and law-enforcement officers from the standpoint of integrity and public confidence, some employees, because they do hold positions of public trust, may be removed in appropriate cases for "outside offenses" that reflect on their character and fitness for the public service or otherwise cast discredit on their departments or agencies. For example, the Court of Appeals upheld dismissal of a physician for indecent assault on a woman he was treating in private practice. Other "outside" offenses, however, that have no bearing on the employee's job duties or responsibilities, may not be a proper cause for discipline. Much will depend on the position involved, and the employer's need to maintain the integrity and trust of persons holding that position. That need may be set forth in a workplace rule that delineates what "outside" conduct is unacceptable and might result in disciplinary action.

Indictment and Conviction on Criminal Charges

If an employee is indicted on criminal charges but acquitted, the acquittal does not preclude disciplinary proceedings on charges which may include the very same offenses tried in the criminal court. In other words, it is possible for an employee to be found not guilty of an offense after trial on criminal charges, but guilty of the same offense when tried in a departmental disciplinary proceeding. The burden of proof and the rules of evidence are much more strict in a criminal proceeding, so evidence insufficient to convict at trial may well sustain disciplinary charges in an administrative proceeding under section 75.

On the other hand, if the employee is convicted of charges connected with his employment duties or position, that conviction may be used as evidence in a subsequent disciplinary proceeding and may, in fact, be dispositive of the issue of guilt.

Any "public officer" who is convicted of a felony or a crime involving a violation of her or his oath of office, automatically vacates his or her position without recourse to section 75 (Public Officers Law, section 30(1)).

Retaliatory Action

The appointing authority must not take "disciplinary or adverse personnel action" because an employee disclosed information regarding a violation of rule or law which creates or presents a danger to public health or safety. (See section 75-b, set forth in the Appendix.)

This does not mean, however, that an employee about to be charged with incompetence or misconduct can shield herself or himself from discipline by becoming a "whistleblower." This defense of retaliation only applies to discipline instituted solely as a result of their protected conduct and the employee must prove that the action instituted against him or her would not have happened but for the disclosure. Accordingly, the employer should have the offenses charged well documented so any allegations of retaliation will not adversely affect the outcome of those disciplinary actions. If raised, the "whistleblower" defense must be considered and determined by the hearing officer. If the employee sustains the burden of proof on this issue, the hearing officer must dismiss or recommend dismissal of the disciplinary proceeding, and can award reinstatement with back pay.

Section VII

PREPARATION OF CHARGES

Form

The principle purpose of the charges is to apprise the employee of the specific offense or offenses of which she or he is accused and that the department or agency intends to prove. It is essential, therefore, that each act or omission constituting the charge or charges be identified and particularized sufficiently so that the employee can know with reasonable specificity what the accusations are, and be able to answer each charge and prepare proper defenses to the charges.

The charges are not required to be in any particular form. Some agencies use a caption on the notice and on the statement of charges (as well as on the other papers in a disciplinary proceeding) in the manner customary on papers in legal proceedings; an example appears on the model subpoena set forth in the Appendix. Under the practice followed in most agencies, however, the notice and statement of charges are set forth in a letter from the appointing officer addressed to the employee. An example of such a letter is also found in the Appendix. In either instance, the document must include both charges and specifications.

Charge

A charge is a general accusation (e.g., misconduct evidenced by excessive tardiness, failure to exercise reasonable care in the use of motor equipment, striking a patient). It is stated in general terms only and, of itself, need not identify any particular act or omission.

Specifications

Each charge should be followed by one or more specifications. These are

statements setting forth in detail the specific acts or omissions of which the employee is accused. The specifications must identify the alleged acts or omissions with particularity, stating, so far as possible, dates, times, places, names of persons involved; listing pertinent memoranda, correspondence or other documents; identifying material or equipment which may be involved; and referring to any previous warnings given to the employee.

In drafting the specifications, one should take into account pertinent facts which reasonably can be expected to be proved at the hearing. In this regard, it may be helpful to consider which witness or document will prove each fact alleged. Allegations based solely on rumor, hearsay or "impressions" must be discarded. This process of boiling the circumstances down to the provable facts helps the officer making the charges to accurately appraise the "case." Occasionally, it may be discovered at this stage that the "case" is not sufficient to sustain a disciplinary action.

The specifications should be concise, but nevertheless should include all the facts pertinent to each incident. Insofar as practicable, each specification should relate only to a single incident. Well drawn specifications will greatly facilitate preparation for the presentation of witnesses and evidence at the hearing. Keep in mind that, in reaching a determination, the hearing officer must make findings of fact and her or his task will be easier if the facts are alleged clearly and concisely in separate specifications. Findings as to the allegations can then be stated by a mere "guilty" or "not guilty" for each specification.

Although care in the drafting of specifications is important, technical inaccuracies are not fatal so long as the employee is fairly apprised of the accusations made against her or him. However, if the specifications are vague or incomplete, the employee may ask for and should be given a bill of particulars. This might necessitate an extension of the time allowed for answering and an adjournment of the hearing. Such delay can be avoided by careful preparation of the specifications in the first instance.

An appeal to the courts or to the civil service commission or personnel officer having jurisdiction from a determination in a disciplinary proceeding brings up for review only those matters included in the charges and specifications. A determination on appeal will depend on the gravity of the stated charges and whether or not they have been proven at the hearing. Instances of incompetency or misconduct not covered in the charges, even if proven at the hearing, may not form the basis for a determination of guilt.

Related Matters

In addition to the charges and specifications, the letter containing the charges should include a notice or statement of the following:

1. Right of employee to submit an answer in writing within a specified time.
2. Time and place of hearing.
3. Right of employee to counsel or bargaining agent representation.
4. Possible penalties.
5. Notice of suspension, if applicable.

The statement advising the employee of his or her right to submit a written answer should, in the interest of avoiding confusion, name a specific date by which the answer must be submitted. The statute requires that at least eight days be allowed. In computing the eight-day period, the day on which charges are served is not counted, but the specified date on which the answer is due is counted. For example, if charges are served on June 8, the answer may not be required before June 16. Five additional days are required if the service is by mail.

The eight-day period for answering under the statute is a minimum. Failure to provide this minimum time for an answer may result in the discipline being overturned on appeal. This period would seem to be reasonable for most cases. However, the gravity, number and complexity of the charges should be

considered and, in an appropriate case, a longer period for answering may be warranted. This is a matter of judgment as to what is fair to the employee under the circumstances. There is little reason not to allow an extra day or two in which to answer, if only to avoid any problems later on. There is no requirement that the employee answer, nor is there any penalty should he or she fail to do so. The failure to answer may not be construed as an admission of guilt.

The statement in the charges giving notice of the hearing should specify the date, time and place at which the hearing is to be held. In selecting the date, the time allowed for answering and preparing defenses should be taken into account. There is no requirement dictating when the hearing must be held and it could be as early as a few days after the answer is due. To avoid confusion, particularly if the hearing is to be held in a place unfamiliar to the employee, the name of the building, the full address, the floor and room number should be specified. If known at the time, the name of the person designated to conduct the hearing might also be included. The stated hearing date and location can be adjusted, by consent, for the convenience of the parties, witnesses and the hearing officer.

It is advisable when notifying the employee of the time and place of the hearing to state that the employee should be prepared at such hearing to present such witnesses or other proof as he or she may have for a defense. Such a statement will help to avoid any delay that arises when employees don't understand what is expected of them at the hearing. If the employer needs a full day or multiple days in which to present its case, that should be communicated before the hearing is commenced so the employee and the hearing officer can be prepared.

At the hearing, section 75 provides that an employee may be represented by counsel or by a representative of a recognized or certified employee organization. This right must be included in the notice to avoid any unnecessary adjournments of the hearing. Note, however, that the right to representation is

crucial in such matters, so any discipline that proceeds in the face of an employee's request for representation or counsel, may be subject to reversal upon appeal.

The employee should be given a statement of the proposed or possible penalty sought by the employer. Both section 75 and fair play require any person against whom removal or other disciplinary action is proposed, shall be given written notice thereof and the reasons therefor. A decision must, therefore, be made at the outset as to what penalty should be imposed if the most serious charges are proven. This does not preclude a modification of the statement of possible penalties in conjunction with an amendment adding new charges. In any event, the employee should be advised both of the penalty the employer is seeking to impose, and of the possible penalties under the statute.

If it is desired to immediately suspend the employee from his or her position pending the determination of charges, notice of suspension must be included in the charges. (See Section VIII.)

In the absence of a statutory provision to the contrary, the authority to remove an employee or to impose other disciplinary penalties rests with the appointing authority. The appointing authority can be a personnel officer, a board or commission, an elected official or other entity. It is the appointing authority that will ultimately determine guilt or innocence, and the appropriate penalty. It is important, therefore, that the appointing officer or board designate appropriate individuals to prefer disciplinary charges against employees.

The appointing authority should not be in anyway involved with the investigation of the charges themselves, or the decision to prefer charges. Impartiality must be maintained and any appearance of impropriety, especially personal involvement in the matter, can be fatal to the proceedings.

Of course, the appointing authority may have some knowledge of the charges or the underlying facts as part of his or her day-to-day official functions or duties. Such incidental knowledge would not act to disqualify him or her from

making the ultimate decision in the matter. On the other hand, if the appointing authority is substantially involved in the investigation or the bringing of charges, he or she should recuse him or herself from that function and designate someone to decide the matter.

Section VIII

SUSPENSION

Section 75, subdivision 3, provides that "Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days." Court cases indicate that this maximum period refers to calendar days, not working days.

An employee may be placed on suspension only at the time or after the charges are served, as this is when the charges are "pending." In a situation where the continued presence of the employee might be disruptive or the employee is likely to endanger herself, or himself or others, or in other appropriate circumstances, the individual may be directed to leave the workplace immediately, using available leave credits. Appropriate charges should then be prepared and served without delay (within 24 hours). Such a case might occur, for example, where an employee reports for work in an obviously inebriated condition.

After the thirty day suspension without pay period has elapsed, the employer may still keep the employee out of the workplace, as long as the employee is paid and receiving the same benefits as if he or she were still working. The only instance in which a pre-determination suspension without pay may exceed thirty days is where the employee has impeded or delayed the determination of the charges. In such an instance, the employer would be wise to document the delay and how it is attributable to the employee.

Suspension pending the hearing and determination of charges is a procedural action, as distinguished from a penalty, and does not constitute a denial of due process. If the employee is found not guilty of the charges, he or she is entitled to reinstatement with full pay for the period of suspension (minus any unemployment benefits received during that period). If found guilty, the

employee is not entitled to back pay for the suspension period regardless of the actual penalty imposed. The statute also provides, however, that the pre-determination suspension without pay may be considered as part of the penalty. This situation would only apply when the ultimate penalty is also a period of suspension.

The individual placed on suspension pending disciplinary charges should, at least, be given the opportunity to object to or give a reason why he or she should not be suspended before the suspension begins. In practice, this can be done at the time the Notice of Discipline is served and does not require a separate meeting or hearing. No questions should be asked, but the employee should be given a chance to read the charges, be aware that a suspension is to be imposed, and say something, if he or she wants to. The decision to suspend, however, remains with the employer. A witness is always a good idea at any stage of the disciplinary process to show that "due process"' and fairness were followed regarding the suspension.

Suspension pending hearing and determination of charges is not necessary or advisable in all cases. The decision whether to suspend the employee depends upon the judgment of the appointing authority. Consideration should be given to all of the circumstances of the case, particularly the probable effect on the conduct of the agency's business if the employee is allowed to continue service during the period. Consideration should also be given to whether suspensions have been imposed previously by the employer in similar factual situations. Claims of unequal treatment should be avoided, if possible.

Section IX

TRANSMITTAL OF NOTICE AND STATEMENT OF CHARGES

It is strongly recommended that the notice and statement of charges be handed directly to the employee, if possible. Personal service avoids the possibility of any denial by the employee that she or he received the charges, and eliminates any question as to the date of their receipt.

Personal service is not essential, however, as the statute only requires the employee to "have" written notice of the disciplinary action and shall be "furnished" a copy of the charges. The second best option is to transmit the notice and written charges by registered or certified mail, return receipt requested, which would prove both the receipt of the papers and establish the date by which the employee must answer. If this option is chosen, however, a copy of the notice and charges should be sent by regular mail, as well. If the employee refuses to pick up or accept the registered or certified mail, the regular mailing, properly addressed to the last known address of the employee, can create a presumption of receipt of the documents.

The general rule applicable to the service of papers in judicial proceedings is that if the paper must be served within a specified time before an act is to be done, or if a party has a specified time after notice or service within which to act, five days must be added to the time specified if the notice is given or service made through the mails (Civil Practice Law and Rules, Sec. 2103(b)(2)). This rule should be followed in the event charges are mailed to an employee; it would extend from eight to thirteen days the minimum period which must be allowed the employee for answering.

A memorandum should be prepared for the record by the person who serves the charges personally on the accused employee. It should state that she or he delivered the charges personally to the accused employee, that the deliverer knew the person to whom the charges were delivered, and it should also indicate

the date, time and place where such delivery occurred. If the charges are mailed, the person who mailed the charges should make a memorandum stating the

date, time, and place she or he deposited the statement of charges in the mail. The memorandum should also indicate that the charges were contained in a securely closed, postpaid wrapper or envelope, directed to the accused employee at a stated address. The specific post office or mail drop used for this mailing should be precisely identified.

Section X

THE ANSWER

The answer provides a means for the accused employee, in writing and for the record, to plead guilty or not guilty to the various charges and specifications, to admit or deny alleged facts, to allege matters intended to disprove the charges, including his or her good character and reputation, to raise defenses, to allege any mitigating circumstances, and to plead a favorable record of service and conduct which might tend to lessen the penalty.

As stated earlier, there is no requirement that the employee answer the charges in writing, and there is no penalty should he or she decide not to do so. It should be remembered, however, that an answer becomes part of the record of the disciplinary proceeding and will be reviewed by a hearing officer and/or the appointing authority. The answer will probably establish the first impression that the hearing officer or appointing authority has of the employee's case, and presents an opportunity to correct any error or misunderstanding at the beginning of the process. The answer also is an excellent opportunity for an employee to demand more particularity in the charges and to raise any objection to procedural actions taken by the employer.

Upon its receipt, the employee's written answer to the charges should be carefully analyzed and any allegations therein investigated. It may also be necessary to gather new evidence for the hearing in relation to allegations contained in the answer.

Though there is no provision in section 75 providing for pre-hearing discovery, the employee and his or her counsel or representative, upon request, should be permitted to inspect the evidence in the possession of the agency that will be relied on at the hearing to support the charges, and any other official records which may be relevant, to enable preparation of the answer and defense

at the hearing. Inspection of evidence or official records of the agency by the accused employee (or his or her counsel or representative) should be conducted only under the supervision of a representative of the agency.

Section XI

EFFECT OF RESIGNATION

An employee against whom charges are preferred may wish to avoid a hearing or penalty by resigning from the service. In such a situation, the appointing authority might wish to drop the charges; however, the employer is not compelled to do so. As a general rule, when charges of incompetency or misconduct have been or are about to be filed against an employee, the appointing authority may elect to proceed to prosecute, notwithstanding any resignation filed by the employee. In the event that such employee is found guilty and is dismissed from the service, his or her termination is recorded as a dismissal rather than as a resignation.

A civil service commission or personnel officer may disqualify for appointment any person who has been removed from the service on formal written charges, or any person who has resigned from a position in the public service, where it finds, after appropriate investigation or inquiry, that such resignation was due to misconduct or incompetency (Civil Service Law, section 50(4)(e)). Accordingly, resignation does not give the employee immunity from disqualification for future appointment. The appointing officer, when faced with a question of withdrawing charges when an employee resigns, must consider whether such action is in the best interests of the public service.

The courts have held that a resignation by an employee as a result of the filing of charges of incompetency or misconduct, or when tendered under the threat of such charges being filed, may not be annulled as having been obtained by coercion. This does not mean, however, that the employer is immune from claims of coercion. Any egregious acts or threats could taint a resignation and the underlying disciplinary proceeding.

Section XII

DESIGNATION OF HEARING OFFICER

Section 75, subdivision 2, provides that the hearing shall be held by the officer or body having the power to remove the accused employee or by a deputy or other person designated in writing for that purpose by such officer or body. In case a deputy or other person is so designated, he or she shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his or her recommendations, be referred to such officer or body for review and decision.

If the appointing officer or authority is not going to conduct the hearing, it is absolutely essential that a hearing officer be officially designated, in writing, to perform that function. The failure to have a proper written designation has been held to be a jurisdictional defect which is always fatal to the proceeding and it cannot be cured. The written designation should be kept on file with the record of the proceeding.

The importance of a written designation cannot be overemphasized. An oral designation has been held defective, as has a letter which indicated that a specific individual had been designated as a hearing officer. In the absence of a specific document from the appointing authority, that officially designates a hearing officer, any disciplinary proceedings or determinations will be considered a nullity. (A sample designation appears in the Appendix.)

The hearing officer need not be a deputy or subordinate employee of the department or agency. The appointing authority, in her or his discretion, may employ someone not connected with the agency to act as hearing officer if he or she is financially able to do so.

Although the hearing officer need not be an attorney, because the hearing is a legal proceeding and either or both parties may be represented by legal counsel, it is preferable to have an attorney act as hearing officer.

Section XIII

SUBPOENAS

General

A subpoena requires the attendance of a specific person to give testimony. A subpoena duces tecum requires the production of a book, record or other physical evidence. Both types of subpoenas may be used in disciplinary hearings.

In many cases subpoenas can be totally unnecessary. Persons needed to testify on behalf of the employer will often be other employees and pertinent documents will be records of the department or agency. Due process demands that the request by the accused employee for the attendance of other employees as witnesses or for the production of agency records be granted, if such request is not wholly unreasonable. Usually, an agreement between the parties can dispense with the need for subpoenas.

In any event, the designated hearing officer is vested with all the powers of the appointing authority and can direct that witnesses or documents under the employer's control be brought forward.

Who May Issue Subpoenas

An attorney representing either the accused employee or the charging employer is authorized under Section 2302 of the Civil Practice Law and Rules, to issue subpoenas in connection with the disciplinary proceeding.

Section 2302 also authorizes issuance of subpoenas by "a referee or any board, commission or committee authorized by law to hear, try or determine a matter or to do any other act, in an official capacity, in relation to which proof

may be taken or the attendance of a person as a witness may be required." This provides authority for the issuance of subpoenas by the hearing officer.

Generally, a subpoena duces tecum for non-governmental documents or records can be issued by an attorney or by the hearing officer. Technically, if the records sought are from a library, department or bureau of a municipal corporation or of the State, a subpoena duces tecum may be issued only by a Justice of the Supreme Court, as provided in Section 2307 of the Civil Practice Law and Rules. Unless otherwise ordered by the Court, such a subpoena may be complied with by producing a certified photostatic copy of the books or papers demanded.

Obtaining a Subpoena

Generally, if the employee is not represented by an attorney, subpoenas may be issued by the hearing officer. In this connection, it should be remembered that section 75(2) of the Civil Service Law allows the accused employee to summon witnesses in his or her own behalf. Typically, the hearing officer will issue such subpoenas on request, as long as there is some reason or rationale to support the request. While a subpoena duces tecum is usually honored by a public employer, technically such a subpoena is to be issued by a court.

A subpoena requested by the accused employee is to be prepared by that employee and then sent or presented to the hearing officer for signature. It is then given back to the employee, who must arrange to have it served. Any contact between a party and the designated hearing officer, however, must be on notice to, or in the presence of, the other party.

Any books, papers, documents, or items called for in a subpoena duces tecum should be clearly and exactly specified in the subpoena. If the documents cannot be specifically identified, or if there is some other defect, the subpoena may be quashed.

Service

There are numerous ways to serve subpoenas under the New York Civil Practice Law and Rules. Personal service is usually the best way to effect service in any disciplinary action. The person serving the subpoena can not be a party to the action and must be over 18 years of age. In most cases where a party is not represented by an attorney, it is wise to obtain the services of a professional process server to effect service on the person or agency being subpoenaed.

Fees

Section 8001 of the Civil Practice Law and Rules provides that any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to and from the place of attendance from and to the place where she or he is served. No mileage fee is required for travel wholly within a city.

A person subpoenaed must be paid or tendered in advance any authorized travel expenses and one day's witness fee (CPLR 2303). At the end of a day's attendance, a person subpoenaed may demand the fee for the next day on which he or she is required to attend; if such fee is not then paid, the witness is not compelled to return pursuant to that subpoena (CPLR 2305).

The fee for reproduction of any document subpoenaed is ten cents per page. (Also see CPLR 2305(c).)

Subpoenas issued by the hearing officer or by the attorney for the accused employee may be enforced, if necessary, by the procedure provided in Section 2308 of the Civil Practice Law and Rules.

(An example of a subpoena appropriate for use in a disciplinary proceeding appears in the Appendix.)

Section XIV

COUNSEL AND REPRESENTATION

The employee who is subject to a disciplinary action under section 75 always has the right to self-representation and may elect to do so at any stage of the proceeding. She or he must also be allowed to summon witnesses on her or his behalf. If the employee chooses to be represented by counsel during the proceeding, this representation must be permitted. These are fundamental rights secured both by the statute and by the U.S. Constitution.

Section 75 also allows for employee representation by a representative of a recognized or certified employee organization (usually a union). There is no provision, however, for any other form of representation. Friends, co-workers and others who may wish to represent the accused should not be allowed to do so. Such representation could profoundly affect important employee rights and could even be considered the unauthorized practice of law. The public employer, however, may be represented by any employee assigned that function or may be represented by counsel. The use of counsel is recommended in any serious case.

Section XV

HEARING

General

A hearing is mandatory. It does not have to be requested by the employee. A hearing must be held unless expressly waived by the employee. Waiver of a hearing by the employee should be in writing and filed with the record of the proceeding.

If the matter is at all serious, involving a potential significant suspension, demotion or dismissal, it is advisable that the agency be represented at the hearing by an attorney. Although less formal than a court of law, with relaxed procedures and rules of evidence, an employee disciplinary case is still an adversarial administrative proceeding, fraught with legal and practical pitfalls. An attorney can review all administrative procedures for legal problems, marshal and evaluate the proof, prepare witnesses for direct and cross-examination, subpoena necessary witnesses and documents, and devise an overall legal strategy for the employer's side of the case. This is especially advisable when the employee is represented by counsel or highly experienced union representatives.

The employer is responsible for making all the arrangements necessary to conduct the hearing. A suitable hearing room in a location accessible to persons with disabilities must be provided. The hearing officer and court reporter must be selected and notified of the time and place for the hearing. All parties and participants should be contacted and coordinated in order to have the hearing conducted as expeditiously and as efficiently as possible. Forethought and attention to detail can prevent unnecessary delays and problems.

Open or Closed Hearing

Section 75 is silent on whether a disciplinary hearing must be open to the

public. Courts have held that, when the employee requests, and when there are no valid reasons to keep the hearing private, hearings under section 75 must be public. Because of privacy concerns, employee requests for closed hearings are generally honored.

Adjournments

When no suspension is involved in an employee disciplinary proceeding, adjournments are a matter of convenience for the parties, witnesses and other participants, and will usually be allowed by the hearing officer. Delay, however, usually works in favor of the accused as memories fade and resolve weakens over time. The employer, therefore, should make every effort to advance the discipline and not allow it to be suspended or placed on "hold" for any period of time without good reason.

Adjournments become unusually significant, however, when an employee is suspended without pay, due to the thirty-day limit on such suspensions pending the hearing and determination of the charges. A hearing officer risks error if she or he refuses to grant a reasonable adjournment requested for valid and good reasons; on the other side, however, the granting of an unnecessary adjournment can be detrimental to the employer who may have to pay salary for any period beyond the thirty-day suspension limit. An employee requesting an adjournment for a reason which is not attributable to the employer's conduct may be asked by the appointing officer or hearing officer to stipulate to extend the thirty-day limit for the length of the adjournment.

It has been held that a dismissed employee may be entitled to back pay for the period of suspension in excess of thirty days pending determination of the charges, to the extent that the delay in reaching a determination was not attributable to her or his own conduct.

Relationship between Hearing Officer and Employee

The relationship between the appointing or hearing officer and the

accused employee merits attention. That relationship is no longer that of employer and employee; it is more in the nature of judge and accused. Thus, impartiality must be maintained. Any significant connection between the employee and hearing officer should be disclosed at the outset and should be avoided, if possible. Of course, the hearing officer should have no direct knowledge of the factors underlying the charges, although she or he may be sent copies of the designation, charges, and answer prior to the hearing in order to become familiar with the case before it begins.

Failure or Refusal to Appear

If the accused employee fails or refuses to appear for the hearing, she or he may be tried in absentia, provided that a fair and reasonable opportunity to appear and defend has been afforded. It is best to lean over backwards to assure the employee fair treatment in this regard. Thus, if the employee or her or his counsel or a representative fails to appear at the hearing without explanation, the hearing officer should not proceed; instead, the hearing should be adjourned and the employee, or counsel/representative should be contacted to learn the reason for non-appearance and to set a new date. Of course, if the accused employee, or counsel/representative has clearly indicated that there is no intention of appearing and defending at the hearing, there is no need for adjournment, and the hearing may proceed.

Occasionally an employee, who has failed to appear for a hearing and who is not represented by counsel, will make no effort to contact the appointing officer and will seem to avoid communication with the agency. In such a case, reasonable effort should be made to contact the employee. If a few telephone calls are unsuccessful, someone might be sent to the employee's residence. If the employee cannot be contacted after a reasonable effort on the part of the agency, a letter should be mailed to her or his last known address fixing a new date for the hearing; if she or he is not heard from and does not appear on the adjourned date, the hearing may then proceed.

In any case where the accused employee is tried in absentia, the proof in support of the charges should be presented by testimony and physical evidence, and a record made, in the same manner as though the employee were present. In other words, it is still necessary to have a fair hearing and make a proper record.

Hearing Procedures/Evidence

The hearing is to be administered and controlled by the hearing officer. Generally, short opening statements are allowed so the parties may present a brief overview of their respective cases. Then the employer, who bears both the burden of proof and the burden of persuasion, will present any evidence of the incompetency and/or misconduct charged. It is suggested that all witnesses be kept out of the hearing room, except when testifying.

Employee disciplinary actions are specifically excluded from the definition of an "adjudicatory proceeding" under section 102(3) of the State Administrative Procedure Act, and, therefore, are not subject to the provisions regarding the conduct of such hearing, disclosure or evidence, contained in that statute. Also, Civil Service Law section 75(2) specifically provides that compliance with the technical rules of evidence shall not be required. Accordingly, a hearing officer may allow hearsay testimony, evidence of past conduct or performance, polygraph results, and evidence submitted without a proper foundation into the record as part of the evidence upon which to base a decision. The courts have even upheld the introduction of evidence obtained in an unlawful police search in an employee discipline case where the searching officers were not acting as agents of the employer. This does not mean that all evidence will be allowed into the record, however, since the hearing officer will still follow the basic principles upon which the rules of evidence are based, and will only allow into the record evidence that to her or him seems fair, relevant and probative of the issues. Essentially, both sides will be given leeway to present substantial evidence supporting their respective positions. Both sides will also be afforded the opportunity to cross-examine and probe the credibility of any witnesses. Failure to provide such an opportunity may result in reversal on appeal.

Stenographic Record/Exhibits

Since a hearing officer is required to make a record of the hearing and must transmit the record to the appointing authority for decision, and since that decision may be reviewed by a civil service commission, personnel officer or the courts, a verbatim stenographic record of the hearing is essential. The proceedings may be tape recorded, but this should be done only as a supplement to the stenographic record and not as a substitute for it. The employee, upon request, is entitled to a copy of the transcript, without charge.

It is advisable to request that the court reporter prepare an original and three copies of the transcript of any testimony. The original should be sent to the hearing officer, one copy should be sent to each of the parties, and an extra copy should be sent to the employer for filing with the civil service commission having jurisdiction over the position, should the employee be found guilty.

Documentary evidence should be marked and offered into evidence on the record. Copies of all exhibits should be made to accompany each transcript. It is useful for each party to make copies of all proposed exhibits in advance of the hearing so that as each is offered into evidence, all parties and the hearing officer can have a copy in front of them. Only documents actually received into evidence, however, are made part of the record and may be referred to in closing arguments or post hearing briefs.

Most hearing officers will allow closing arguments or briefs before proceeding to render a report and recommendations. Whatever provisions are made should be placed on the record at the end of the hearing and time limits established and followed. There is no procedure established for arguments under section 75 and it remains in the discretion of the hearing officer or appointing officer.

Section XVI

SETTLEMENT

Not every disciplinary proceeding needs to go to a hearing or be decided on the record. As with any other legal matter, the parties can enter into a settlement agreement to resolve the discipline. Of course, any such agreement should be in writing and should be prepared or reviewed by counsel to make sure it is comprehensive and binding.

The advantages of settlement are many and include the ability to be creative in fashioning a remedy to fit the specific situation. If the matter is decided after a hearing, the possible penalties are limited under the statute. As part of the settlement, the employer and employee can agree to a period of continued employment, similar to a probationary period, in which the employee must refrain from certain conduct or perform to specified standards. The flexibility of a settlement agreement can give the employee a chance to improve her or his conduct while protecting the employer's interest in an efficient and productive workforce. (A sample of a Stipulation of Settlement and Last Chance Agreement is included in the Appendix.)

Section XVII

THE DETERMINATION

General

If the hearing is conducted by a deputy, subordinate, or other person designated by the appointing authority, the statute requires that the hearing officer "make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision." There are no rigid requirements as to the form and content of a hearing officer's report to the appointing officer, except, of course, that the language used should be cast in terms of a recommendation rather than final decision.

Well-drawn specifications will themselves, as a general rule, serve to define the issues and facilitate the statement of the findings of fact.

The hearing officer, when submitting the report and recommendations to the appointing officer, is not required to send a copy thereof to the accused employee or to her or his counsel or representative. She or he is only charged with the duty of reporting to the appointing authority who will then make the final determination.

Evaluation of the Evidence

Ordinarily, the decision must be made by the appointing officer or authority; it should not be delegated unless the appointing officer is disqualified due to personal involvement in the matter. It has been held that the appointing officer's determination must be an "informed decision" based on "independent appraisal" of the case. The transcript and the evidence introduced at the hearing must be available for review by the appointing authority. She or he may not merely "rubber-stamp" the hearing officer's recommendations, although it is

permissible for the appointing authority to incorporate, by reference, any or all of the facts and conclusions reported by the hearing officer, as part of the final determination.

The provision of the statute that compliance with technical rules of evidence is not required pertains only to the admission of evidence at the hearing. As for the determination, however, a finding of guilt must be based on substantial and competent evidence; viz., there must be competent proof of all the facts necessary to be proved in order to support a finding of guilt.

A disciplinary proceeding is not a criminal action. Contrary to the notion of some appointing officers, it is not essential that a charge be proved beyond a reasonable doubt, as would be the case in a criminal trial. There may be a finding of guilt with respect to a specification if there is substantial evidence in the record to support such finding. It is up to the trier of the facts to appraise the credibility of witness testimony and weigh all of the evidence. This does not mean, however, that she or he is free to make any finding for which there is some competent evidence in the record; for a finding, even though based on competent evidence, may not be upheld on review if the record also contains an overwhelming preponderance of proof against the fact found. Essentially, substantial evidence is proof in the record, taken as a whole, that would persuade a fair and detached fact finder, and from which a conclusion may reasonably and logically be reached.

Since a disciplinary hearing is not a criminal proceeding, it follows that if an accused employee refrains from testifying to contradict or explain evidence concerning matters within her or his personal knowledge, the hearing officer, in exercising judgment in evaluating such evidence, may draw inferences unfavorable to the employee. However, a determination of guilt must be supported by affirmative, probative evidence in the record, whether or not the employee chooses to testify.

In reaching a decision of guilty or not guilty on each of the specifications, only evidence in the record may be considered. This point is important in a disciplinary proceeding because the appointing officer may be personally familiar with the employee and have knowledge of her or his history, work habits or conduct. In such a situation the appointing officer should exercise care not to consider or be influenced by some personal knowledge or impressions stemming from prior exposure to or acquaintance with the employee.

Reinstatement If Found Not Guilty

An employee found not guilty on all charges and specifications is entitled to be reinstated forthwith to her or his position and to receive back pay for the period of suspension.

Penalties

An employee found guilty of any of the specifications is not entitled to back pay for the period of suspension. Upon a finding of guilt on one or more specifications, the penalty or punishment may consist of:

1. Reprimand
2. Fine not exceeding $100 to be deducted from the salary of the employee
3. Suspension without pay for a period not exceeding two months
4. Demotion in grade and title
5. Dismissal

These are the sole and exclusive penalties. A combination of penalties is not specifically authorized, and can be overturned on appeal. Other penalties, or a combination of penalties could be an acceptable procedure if agreed to by the employee as part of a settlement, but may not be unilaterally imposed by the appointing authority.

Some appointing officers have the idea that if the accused employee is found not guilty on some of the specifications, the penalty must be less severe than would otherwise be imposed if found guilty on all charges. This is not so. The penalty may be based only on the specifications on which the employee is found guilty, without regard to those on which she or he has been found not guilty. For example, if an employee is found guilty on only one specification and not guilty on a dozen others included in the charges, she or he may nevertheless be dismissed if that one specification, standing alone, is sufficiently serious to warrant that penalty.

The penalty must depend on the gravity of the offense, but may reflect due consideration for the employment record of the employee. An offense which would warrant dismissal of a new employee or one with a poor disciplinary record might not support that penalty in the case of an employee with a long and exemplary employment record. However, the opposite may also be true, as certain acts by a long tenured employee may be less susceptible to the defense of "I didn't know." The employment record of the employee may be considered in fixing the penalty, but those facts constituting the relevant employment history should either be introduced in evidence in the disciplinary proceeding on the understanding that they will be considered regarding penalty only, or the facts can be reviewed by the appointing authority after the hearing, on notice to the employee. It is very important in this regard that only established matters in the employment history be considered. For example, one or more convictions on disciplinary charges in the past can properly be taken into account, but not unsustained charges or suspicions of misconduct. The employee must be advised that his or her employment record is to be considered in setting the penalty, and be given a chance to respond, in writing, before any penalty is set.

Although not required by the statute or the courts, most hearing officers and appointing authorities follow the doctrine of "progressive discipline" when dealing with charges less serious than those warranting immediate dismissal. This doctrine provides for successively harsher penalties for repeated disciplinary problems involving the same employee. First offenses which routinely result in

relatively minor penalties can eventually result in dismissal where the employee does not correct her or his behavior or performance, and is charged numerous times for repeated offenses. The appointing authority, however, is not bound to follow the hearing officer's recommendation with respect to the penalty. A greater or lesser penalty may be imposed.

If the penalty is suspension without pay (for a period not exceeding two months), the appointing officer may, in her or his discretion, count as part of the penalty the period of suspension pending hearing and determination of charges. If so, a statement to that effect should appear in the notice of determination sent to the employee. The appointing officer is not required to include the initial procedural suspension as part of the penalty if she or he does not wish to do so. Thus, an employee could be suspended for two months which, together with the thirty days suspension pending hearing and determination of the charges, will equal a total suspension of three months.

When the penalty sought to be imposed is demotion, a vacancy in an appropriate title must exist or be created to accommodate such demotion. It is important that the availability of a position be verified or arranged for before a demotion penalty is fixed. If no vacancy is available, but a promotion list exists for the position held by the demotee, an eligible may be promoted to such position and the disciplined employee demoted to the vacancy thus created. Such a promotion may not be made, however, if a preferred list exists for the higher title. If a promotion-demotion exchange is made, the individual promoted should be made to understand that the promotion could be annulled if the individual employee secures restoration to the higher grade position through an appeal. If a promotion-demotion exchange is not available, it may be possible in a given situation to have the employee's position reclassified to a lower title and salary grade.

A demoted employee cannot continue to perform the duties of the higher title from which the demotion occurred but must actually be assigned and required to perform only duties appropriate to the lower grade title.

It is not essential that the demotee have passed an examination for the lower grade to which she or he is demoted. It is necessary only that the major qualification requirements of the lower grade position be encompassed substantially in the higher grade position. For example, it would be permissible to demote a Senior Stenographer to Typist or Clerk.

Notice of Determination

There is no special form required for the determination of the appointing authority. It is normally embodied in a letter mailed to the employee with a copy to her or his attorney or representative. It could be, however, a separate formal document sent with a cover letter. Either way, it must either be personally delivered or sent registered mail, return receipt requested, so the date of the employee's receipt can be established.

If the employee is found not guilty on all specifications, the letter should state that fact and notify the employee (if suspended) to report back to work and indicate that back salary will be paid for the period of suspension.

If the employee has been found guilty of one or more specifications, the determination should so state, indicating the particular specifications by number or other appropriate designation employed in the charges. The determination should also state the penalty imposed, including effective dates when appropriate.

Whatever the determination of the appointing officer or authority, it is a good practice to include a copy of the hearing officer's report and recommendations with the notice of determination. Whenever the appointing authority finds facts different than those reported by the hearing officer, or reaches a different conclusion or finds a different penalty more appropriate, the determination should refer to the evidence in the record that supports that part

of the determination. A court or civil service commission must be able to review the determination in a meaningful way and make sure any determination is supported by substantial evidence.

A sample copy of a notice of determination is included in the Appendix.

Other Procedural Requirements

Section 75 provides that if an employee is found guilty, a copy of the charges, the written answer thereto, a transcript of the hearing, the hearing officer's findings and recommendation and the determination shall be filed in the office of the department or agency in which she or he has been employed; copies must also be filed with the civil service agency having jurisdiction. Though not specifically required by the statute, it is also advisable to include with those filed documents a copy of the written designation of the hearing officer and any other exhibits or documents entered into evidence in the hearing.

Section 75 also provides that a copy of the transcript of the hearing shall, upon the request of the employee, be furnished to him or her without charge.

In addition to the foregoing, of course, appropriate notice of the disciplinary penalty must be given to the civil service commission or personnel officer having jurisdiction over the position. Appropriate records must be maintained regarding any penalty of suspension, and subsequently, at the expiration of the suspension period, of reinstatement.

Effects of Penalties

An employee who is dismissed on being found guilty of charges of incompetency or misconduct does not forfeit any retirement or pension benefits earned in the New York State and Local Retirement Systems. The ex-employee may retire if at the minimum age for retirement or, if he or she is too young to retire, she or he is in the same status as one who voluntarily resigns.

If the employee is covered in the State Health Insurance Program at the time of dismissal, she or he generally has the same rights available to a similarly situated employee who has not been dismissed for incompetency or misconduct. These rights may include converting coverage to a private policy or continuing group coverage. In addition, those in vested status and those who are retired may be eligible for continued coverage.

Dismissal does not automatically bar the dismissed employee from future employment in public service. However, dismissal on charges of incompetency or misconduct is one of the grounds on which a person may be disqualified for examination or appointment under section 50(4) of the Civil Service Law. Disqualification is not automatic, however, and each case is considered on its own merits, with due regard for all relevant circumstances, including the character of the offense for which the employee was dismissed, the type of position now applied for, the person's employment history since the time of dismissal and her or his work record as a whole.

If the penalty imposed on an employee is suspension without pay, the employee cannot be required to report for work during the period of suspension. If the employee is ordered to return, the period of suspension should be viewed as reduced to the amount of time actually absent from work.

Suspension or Fine of Overtime Ineligible Employees

Section 75 authorizes a suspension, without pay, not exceeding two months. It would seem that any suspension for a lesser period would be allowed, and in most cases it is. When imposing an unpaid suspension on salaried employees who are not eligible for overtime compensation, however, the employer must be mindful of the standards established under Federal Law, including the Fair Labor Standards Act (FLSA). Such employees must be paid for any workweek in which the employee performs any work. Accordingly, suspension without pay of less than a full workweek must be avoided for such employees. Similarly, though a fine up to $100.00 is authorized by the statute, no such fine should be imposed on an overtime ineligible employee.

Section XVIII

APPEALS TO CIVIL SERVICE COMMISSION OR PERSONNEL OFFICER

Appeals from determinations in disciplinary proceedings are provided for by section 76 of the Civil Service Law. There is no right to appeal a letter of reprimand, unless the employee was suspended without pay pending the determination, and then not paid for that time after the determination. Any other penalty entitles the employee to appeal.

An employee may appeal to either the civil service commission or personnel officer having jurisdiction over his position or to the court, but not to both. However, although the statute states that the decision of the civil service commission or personnel officer on appeal shall be final and conclusive and not subject to review in any court, it is possible that the courts would entertain a challenge to a determination, if it were not supported by the record or if it could be considered unconstitutional, illegal or outside the commission's jurisdiction.

If an employee desires to appeal to the civil service commission or personnel officer, an appeal, in writing, must be filed within twenty days after service of the determination to be reviewed. If registered mail was used to give notice of determination, an extra three days are allowed in which to appeal. If court review is sought, application must be made under the provisions of Article 78 of the Civil Practice Law and Rules within four months after the determination to be reviewed became final.

Procedure On Appeal

There is no special form in which an appeal to the local civil service commission or personnel officer must be filed except, of course, that it must be in writing. It is sufficient if the employee or her or his attorney merely sends a letter stating that an appeal is requested. Upon receipt of such letter, a

representative of the commission or the personnel officer should write to the employee or attorney acknowledging receipt of the appeal request and outlining the appeal procedures.

The officer whose determination is appealed from will also be notified that an appeal has been filed and advised of the procedures.

Section 76 provides that the civil service commission or personnel officer having jurisdiction shall review the record of the disciplinary proceedings and the transcript of the hearing, and determine the appeal on the basis of such record and transcript and such oral and written argument as the commission may determine. The statute provides that the commission may direct that the appeal be received by one or more of its members or by a person or persons designated by the commission to receive the appeal on its behalf. Such member or designee shall report thereon with recommendations to the commission.

Under the procedure normally followed on appeal, a specific time (usually two weeks) is allowed for the submission of written statements or arguments by or on behalf of the appellant, who is required to send a copy of the same to the department or agency from whose determination the appeal is taken; that department or agency is then allowed an equal period to respond to the written statements and arguments filed by the appellant, and is required to furnish a copy of such answer to the appellant. Thereafter, the appellant is allowed a further period (usually one week) to reply to any new matter contained in the answering statements or arguments, a copy of which is sent to the department or agency involved.

Generally, oral arguments are not taken. If an oral argument is requested, however, and compelling reasons are advanced to support the request, such arguments should be allowed.

Determination On Appeal

The commission's determination is based on a review of the record of the

disciplinary proceeding, including the transcript of the hearing and such written and oral statements and arguments as are submitted by the parties. The commission must not consider any new material or evidence not included in the record of the disciplinary proceeding.

The commission reviews the record to determine whether the employee has been accorded the rights assured by the statute, whether there has been substantial compliance with procedural requirements, whether there is substantial evidence to support the determination and whether the penalty is unreasonably severe. The statute provides that the determination appealed from may be affirmed, reversed or modified, and the commission may, in its discretion, direct the reinstatement of the appellant or permit transfer to a vacancy in a similar position in another division or department, or direct that the employee's name be placed on a preferred list pursuant to section 81 of the Civil Service Law. In the event that a transfer is not affected, the commission may direct the reinstatement of an officer or employee.

If a commission annuls a finding of guilt on one or more but not all of the specifications, the matter may be remanded to the appointing authority for re-determination of the penalty. This need not be done in all cases; i.e., where the specification on which the finding of guilty has been annulled is only a minor, relatively inconsequential matter and the principle, serious charges have been sustained, and it is readily apparent that the penalty is based on such principle charges. Where the matter is remanded on account of annulment of a finding of guilty on one or more specifications, however, it does not mean necessarily that the appointing officer must fix a lesser penalty. The purpose of remanding the matter is to permit the appointing officer to exercise her or his judgment in fixing a penalty on the basis of the modified findings of fact; the commission should not speculate as to whether the penalty would be the same had the modified findings been found in the first instance.

A standard which has been applied by the courts in reviewing the measure of punishment imposed is whether the punishment "is so disproportionate to the

offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." In a number of instances, the courts have reduced penalties on the basis that the penalty far exceeds the seriousness of the circumstances and the proven misconduct.

If the determination is annulled and the dismissed employee is ordered reinstated by the commission, the employee is entitled to receive all the salary or compensation she or he would have been entitled by law to have received for the period of removal including any period of preliminary suspension without pay, less any unemployment insurance benefits received during such period. The same applies in the case of an employee who is reinstated by order of the court. (See section 77 of the Civil Service Law).

Section XIX

CONCLUSIONS

The following points should be kept in mind whenever disciplinary action is contemplated:

1. The employee should know what conduct is unacceptable and when disciplinary action is justified. (Charges could be dismissed if the employer cannot show it established that a certain behavior was unacceptable and that the employee knew it was unacceptable.) Proper standards of conduct and performance should be written and given to each employee.

2. A management meeting should be held as soon as possible after any violations to discuss the facts and a course of action. The employee's previous work record, absenteeism, quality and quantity of work, and any other facts, pro or con, should be discussed at this meeting. A decision should be made whether further investigation is warranted, or if counseling or discipline should be pursued.

3. All action taken regarding the employee and the misconduct or incompetence should be fully documented.

4. If disciplinary action is taken, it should follow the doctrine of progressive discipline (Warning, reprimand, fine or

disciplinary suspension before demotion, or discharge). However, a first serious offense may call for stern initial penalties, including suspension or discharge.

5. When disciplinary action is proposed, all procedures must be strictly complied with and fully documented.

6. Suspension prior to a hearing should be imposed only with good reason such as when the employee's presence might be disruptive, or present a danger to her or himself or others.

7. Your chief legal advisor should be contacted for guidance as soon as possible.

8. All charges should be reviewed completely and comprehensively by management prior to being served.

9. Settlement possibilities should be considered, not as a way to avoid a hearing, but as a way to achieve a desired result. Always keep your true goals in mind.

Section XX

A P P E N D I X

	Page
Civil Service Law, Sections 75, 75-b, 76, 77	i
Memorandum of Conference with Employee	viii
Notice and Statement of Charges	ix
Designation of Hearing Officer	xi
Stipulation of Settlement and Last Chance Agreement	xii
Ordinary Subpoena	xvi
Report and Recommendations of Hearing Officer	xvii
The Testimony	xix
Notice of Determination	xxi

TITLE B

REMOVAL AND OTHER DISCIPLINARY PROCEEDINGS

Section 75. Removal and other disciplinary action.

75-a. Civil service proceeding; commencement upon alleged violation of certain provisions of the labor law relating to police officers.

75-b. Retaliatory action by public employers.

76. Appeals from determinations in disciplinary proceedings.

77. Compensation of officers and employees reinstated by court order.

§ 75. Removal and other disciplinary action.

1. Removal and other disciplinary action. A person described in paragraph (a) or paragraph(b), or paragraph (c), or paragraph (d), or paragraph (e) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section.

(a) A person holding a position by permanent appointment in the competitive class of the classified civil service, or

(b) a person holding a position by permanent appointment or employment in the classified service of the state or in the several cities, counties, towns, or villages thereof, or in any other political or civil division of the state or of a municipality, or in the public school service, or in any public or special district, or in the service of any authority, commission or board, or in any other branch of public service, who was honorably discharged or released under honorable circumstances from the armed forces of the United States having served therein as such member in time of war as defined in section eighty-five of this chapter, or who is an exempt volunteer firefighter as defined in the general municipal law, except when a person described in this paragraph holds the position of private secretary, cashier or deputy of any official or department, or

(c) an employee holding a position in the non-competitive class other

than a position designated in the rules of the state or municipal civil service commission as confidential or requiring the performance of functions influencing policy, who since his last entry into service has completed at least five years of continuous service in the non-competitive class in a position or positions not so designated in the rules as confidential or requiring the performance of functions influencing policy, or

(d) an employee in the service of the City of New York holding a position as Homemaker or Home Aide in the non-competitive class, who since his last entry into city service has completed at least three years of continuous service in such position in the non-competitive class, or

(e) an employee in the service of a police department within the state of New York holding the position of detective for a period of three continuous years or more; provided, however, that a hearing shall not be required when reduction in rank from said position is based solely on reasons of the economy, consolidation or abolition of functions, curtailment of activities or otherwise.

2. Procedure. 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. A state employee who is designated managerial or confidential under article fourteen of this chapter, shall, at the time of questioning, where it appears that such employee is a potential subject of disciplinary action, have a right to representation 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. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable period of time was not afforded then any and all statements obtained from said questioning as well as any evidence or information obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to article fourteen of this chapter. A person against whom removal or other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred,

or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such officer or body for review and decision. The person or persons holding such hearing shall, upon the 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, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required.

3. Suspension pending determination of charges; penalties. Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is 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. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge.

3-a. Suspension pending determination of charges and penalties relating to police officers of the police department of the city of New York. Pending the hearing and determination of charges of incompetency or misconduct, a police officer employed by the police department of the city of New York may be suspended without pay for a period not exceeding thirty days. If such officer is found guilty of the charges, the police commissioner of such department may punish the police officer pursuant to the provisions of sections 14-115 and 14-123 of the administrative code of the city of New York.

4. Notwithstanding any other provision of law, no removal or disciplinary proceeding shall be commenced more than eighteen months after the occurrence of the alleged incompetency or misconduct

complained of and described in the charges or, in the case of a state employee who is designated managerial or confidential under article fourteen of this chapter, more than one year after the occurrence of the alleged incompetency or misconduct complained of and described in the charges, provided, however, that such limitations shall not apply where the incompetency or misconduct complained of and described in the charges would, if proved in a court of appropriate jurisdiction, constitute a crime.

§ 75-b. Retaliatory action by public employers.

1. For the purposes of this section the term:

(a) "Public employer" or "employer" shall mean (i) the state of New York, (ii) a county, city, town, village or any other political subdivision or civil division of the state, (iii) a school district or any governmental entity operating a public school, college or university, (iv) a public improvement or special district, (v) a public authority, commission or public benefit corporation, or (vi) any other public corporation, agency, instrumentality or unit of government which exercises governmental power under the laws of the state.

(b) "Public employee" or "employee" shall mean any person holding a position by appointment or employment in the service of a public employer except judges or justices of the unified court system and members of the legislature.

(c) "Governmental body" shall mean (i) an officer, employee, agency, department, division, bureau, board, commission, council, authority or other body of a public employer, (ii) employee, committee, member, or commission of the legislative branch of government, (iii) a representative, member or employee of a legislative body of a county, town, village or any other political subdivision or civil division of the state, (iv) a law enforcement agency or any member or employee of a law enforcement agency, or (v) the judiciary or any employee of the judiciary.

(d) "Personnel action" shall mean an action affecting compensation, appointment, promotion, transfer, assignment, reassignment, reinstatement or evaluation of performance.

2. (a) A public employer shall not dismiss or take other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or

safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. "Improper governmental action" shall mean any action by a public employer or employee, or an agent of such employer or employee, which is undertaken in the performance of such agent's official duties, whether or not such action is within the scope of his employment, and which is in violation of any federal, state or local law, rule or regulation.

(b) Prior to disclosing information pursuant to paragraph (a) of this subdivision, an employee shall have made a good faith effort to provide the appointing authority or his or her designee the information to be disclosed and shall provide the appointing authority or designee a reasonable time to take appropriate action unless there is imminent and serious danger to public health or safety. For the purposes of this subdivision, an employee who acts pursuant to this paragraph shall be deemed to have disclosed information to a governmental body under paragraph (a) of this subdivision.

3. (a) Where an employee is subject to dismissal or other disciplinary action under a final and binding arbitration provision, or other disciplinary procedure contained in a collectively negotiated agreement, or under section seventy-five of this title or any other provision of state or local law and the employee reasonably believes dismissal or other disciplinary action would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a defense before the designated arbitrator or hearing officer. The merits of such defense shall be considered and determined as part of the arbitration award or hearing officer decision of the matter. If there is a finding that the dismissal or other disciplinary action is based solely on a violation by the employer of such subdivision, the arbitrator or hearing officer shall dismiss or recommend dismissal of the disciplinary proceeding, as appropriate, and, if appropriate, reinstate the employee with back pay, and, in the case of an arbitration procedure, may take other appropriate action as is permitted in the collectively negotiated agreement.

(b) Where an employee is subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse personnel actions and which contains a final and binding arbitration provision to resolve alleged violations of such provisions of the agreement and the employee reasonably believes that such personnel action would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a claim before the arbitrator. The arbitrator shall consider such claim and determine its merits and shall, if a determination is

made that such adverse personnel action is based on a violation by the employer of such subdivision, take such action to remedy the violation as is permitted by the collectively negotiated agreement.

(c) Where an employee is not subject to any of the provisions of paragraph (a) or (b) of this subdivision, the employee may commence an action in a court of competent jurisdiction under the same terms and conditions as set forth in article twenty-C of the labor law.

4. Nothing in this section shall be deemed to diminish or impair the rights of a public employee or employer under any law, rule, regulation or collectively negotiated agreement or to prohibit any personnel action which otherwise would have been taken regardless of any disclosure of information.

§ 76. Appeals from determinations in disciplinary proceedings.

1. Appeals. Any officer or employee believing himself aggrieved by a penalty or punishment of demotion in or dismissal from the service, or suspension without pay, or a fine, or an official reprimand, unaccompanied by a remittance of said officer or employee's prehearing suspension without pay, imposed pursuant to the provisions of section seventy-five of this chapter, may appeal from such determination either by an application to the state or municipal commission having jurisdiction, or by an application to the court in accordance with the provisions of article seventy-eight of the civil practice law and rules. If such person elects to appeal to such civil service commission, he shall file such appeal in writing within twenty days after service of written notice of the determination to be reviewed, such written notice to be delivered personally or by registered mail to the last known address of such person and when notice is given by registered mail, such person shall be allowed an additional three days in which to file such appeal.

2. Procedure on appeal. Where appeal is taken to the state or municipal commission having jurisdiction, such commission shall review the record of the disciplinary proceeding and the transcript of the hearing, and shall determine such appeal on the basis of such record and transcript and such oral or written argument as the commission may determine. The commission may direct that such appeal shall be heard by one or more members of the commission or by a person or persons designated by the commission to hear such appeal on its behalf, who shall report thereon with recommendations to the commission. Upon such appeal the commission shall permit the employee to be represented by counsel.

3. Determination on appeal. The determination appealed from may be affirmed, reversed, or modified, and the state or municipal commission having jurisdiction may, in its discretion, direct the reinstatement of the appellant or permit the transfer of such appellant to a vacancy in a

similar position in another division or department, or direct that his name be placed upon a preferred list pursuant to section eighty-one of this chapter. In the event that a transfer is not effected, the commission is empowered to direct the reinstatement of such officer or employee. An employee reinstated pursuant to this subdivision shall receive the salary or compensation he would have been entitled by law to have received in his position for the period of removal including any prior period of suspension without pay, less the amount of any unemployment insurance benefits he may have received during such period. The decision of such civil service commission shall be final and conclusive, and not subject to further review in any court.

4. Nothing contained in section seventy-five or seventy-six of this chapter shall be construed to repeal or modify any general, special or local law or charter provision relating to the removal or suspension of officers or employees in the competitive class of the civil service of the state or any civil division. Such sections may be supplemented, modified or replaced by agreements negotiated between the state and an employee organization pursuant to article fourteen of this chapter. Where such sections are so supplemented, modified or replaced, any employee against whom charges have been preferred prior to the effective date of such supplementation, modification or replacement shall continue to be subject to the provisions of such sections as in effect on the date such charges were preferred.

§ 77. Compensation of officers and employees reinstated by court order.

Any officer or employee who is removed from a position in the service of the state or of any civil division thereof in violation of the provisions of this chapter, and who thereafter is restored to such position by order of the supreme court, shall be entitled to receive and shall receive from the state or such civil division, as the case may be, the salary or compensation which he would have been entitled by law to have received in such position but for such unlawful removal, from the date of such unlawful removal to the date of such restoration, less the amount of any unemployment insurance benefits he may have received during such period. Such officer or employee shall be entitled to a court order to enforce the payment of such salary or compensation. Such salary or compensation shall be subject to the provisions of sections four hundred seventy-four and four hundred seventy-five of the judiciary law for services rendered, but otherwise shall be paid only directly to such officer or employee or his legal representatives.

M E M O R A N D U M

July 19, 2001

TO: Peter B. Baxter, Stores Clerk

FROM: Gerald Smith, Business Officer

This memorandum will confirm our conversation held on July 17, 2001, in my office, during which you were cautioned concerning your conduct and lack of application to your duties. Specifically, the following was brought to your attention.

1. Your repeated tardiness, as evidenced by the fact that you were late in reporting to work ten times during the month of June, 2001, and seven times during the first twelve work days of July, 2001.

2. Your having reported to work in an intoxicated condition on July 16, 2001; you were unable to perform your duties and were sent home.

You are advised that further similar conduct on your part will necessitate disciplinary action against you and my result in dismissal from service.

(signed) _____

NOTICE AND STATEMENT OF CHARGES

(The following is not an illustration of charges necessary to remove, demote, suspend, fine or reprimand an employee. It merely indicates that form in which notice and statement of charges may be prepared for transmittal to the employee.)

September 11, 2001

Mr. Peter B. Baxter
12 Summitt Avenue
Harwich, New York

Dear Sir:

In accordance with the provisions of Section 75 of the Civil Service Law, you are hereby notified that the following charges are preferred against you.

CHARGES

Charge I	AFTER REPEATED WARNINGS, YOU HAVE REPORTED TO WORK IN AN INTOXICATED CONDITION.
Specification 1	On July 16, 2001, you reported to work in an intoxicated condition; you were unable to perform the duties of your position, and were sent home; on the following day, July 17, 2001 you were called to the office of the Business Officer, Gerald Smith, who warned you that if you reported to work again in an intoxicated condition it would be necessary to prefer charges against you.
Specification 2	On September 9, 2001, you reported to work in an intoxicated condition; you were unable to perform the duties of your position and were sent home.
Charge II	YOU HAVE BEEN TARDY WITH EXCESSIVE FREQUENCY.
Specification 1	You were tardy nine times during April, 2001.
Specification 2	You were tardy eight times during May, 2001.
Specification 3	You were tardy ten times during June, 2001.

Specification 4 You were tardy twelve times during July, 2001.
Specification 5 You were tardy eight times during August, 2001.

You are allowed until the 21st day of September, 2001, to make and file your answer in writing to these charges. Such answer should reach the office of the undersigned at Middlevale City Hospital, Middlevale, N.Y., at or before five o'clock in the afternoon on said 21st day of September, 2001.

You are entitled to a hearing on the above charges and to be represented at such hearing by an attorney or a representative of a recognized or certified employee organization. You should be prepared at such hearing to present any witnesses and other proof as you may have in your defense against these charges. Such hearing will be held at 10 o'clock in the morning on September 25, 2001, in Room 7 on the main floor of the Administration Building, Middlevale City Hospital, Middlevale, N.Y. The hearing will be conducted by Mr. George Mason, who has been duly designated for that purpose in accordance with Section 75 of the Civil Service Law.

If you are found guilty of any of the above charges, the penalty or punishment imposed on you may consist of either dismissal from the service, demotion in grade and title, suspension without pay for a period not exceeding two months, a fine not exceeding $100, or a reprimand. Due to the nature of the charges brought against you, the penalty we are seeking is dismissal from service.

Pending the determination of these charges you are hereby suspended from employment, without pay, effective immediately, for a period not exceeding thirty days.

All further notices and communications addressed to you in connection with these charges will be mailed to your latest address on record in the personnel office of this institution, which is 12 Summit Avenue, Harwich, N.Y., unless you request in writing that the same be sent to you at a different address.

Very truly yours,

/S/ Andrew R. Carr
Superintendent

DESIGNATION OF HEARING OFFICER

TO: Mr. George Mason

FROM: Andrew R. Carr, Superintendent

DATE: September 11, 2001

Pursuant to Section 75 of the Civil Service Law, you are hereby designated and directed to hold a hearing on the charges contained in my letter of September 11, 2001, addressed to Peter B. Baxter, Stores Clerk, and on any amendments or supplements to such charges as may hereafter be preferred by me. You shall cause a transcript to be made of such hearing and, following your analysis, you shall submit the record of such hearing to me, with your recommendations, for my review and decision.

/S/ Andrew R. Carr
Superintendent

(The following is an illustration of one possible form for a Stipulation and Agreement used to settle a Section 75 proceeding. Any such Stipulation and Agreement should be prepared and reviewed by Counsel.)

STATE OF NEW YORK
COUNTY OF

In the Matter of the Discipline of Peter B. Baxter	:	**Stipulation of Settlement**
Title: Stores Clerk	:	**and**
	:	**Last Chance Agreement**

WHEREAS, the Middlevale City Hospital, employer, has preferred disciplinary charges against Peter B. Baxter, employee, dated September 11, 2001, and

WHEREAS, Peter B. Baxter has contested these charges, and

WHEREAS, the Middlevale City Hospital and Peter B. Baxter desire to resolve these matters without the need to proceed through the disciplinary action procedure established under Civil Service Law §75, and

WHEREAS, the employer and employee have agreed to all the terms and conditions set forth in this Stipulation and Agreement, and

WHEREAS, the employer and employee have agreed that upon execution and delivery of this Stipulation and Agreement all pending disciplinary charges are to be discontinued and settled.

NOW, THEREFORE, in consideration of the mutual agreements promised as set forth herein, it is agreed by and between the parties as follows:

1. Peter B. Baxter accepts responsibility for the actions and charges described in the Notice and Statement of Charges dated September 11, 2001.

2. The parties accept and acknowledge that Peter B. Baxter has had long term problems involving the use of alcohol and that he is an individual in need of rehabilitation.

3. Peter B. Baxter agrees to enter into and complete an alcohol dependence rehabilitation program determined as appropriate by his personal physician. Furthermore, he agrees to ensure that the employer will receive regular written reports from his personal physician indicating compliance with such program. He further

agrees that his failure to participate in or complete such program, or to provide written physician reports as referred to above may constitute a violation of this agreement.

4. The employer agrees to return Peter B. Baxter to work, and to active payroll status, upon receipt of written certification from his physician that he is physically and mentally fit to do so.

5. Peter B. Baxter agrees to remain alcohol free in the workplace for the effective period of this agreement. Alcohol free shall be defined as having a blood alcohol content no greater than .02 percent. Should Peter B. Baxter have a blood alcohol content any greater than .02 percent in the workplace, such shall constitute a violation of this agreement.

6. Peter B. Baxter agrees to be subject to random, mandatory testing for blood alcohol content, while in the workplace, during the effective period of this agreement. A written request for his participation in such a test may be personally delivered to him, without notice, at any time he is in the workplace. His refusal and/or failure to immediately acquiesce and participate in such testing, upon receipt of a proper written request, shall constitute a violation of this agreement.

7. Peter B. Baxter agrees to adhere to reasonable standards for time and attendance at work, and for reasonable performance of his job duties while at work. All absences from the workplace during the effective period of this agreement, except those resulting from emergency situations, shall be upon prior supervisory approval. Any unscheduled absences due to illness and unforeseen necessity will, upon supervisory request, require medical or other written confirmation. It is the intent of the parties that though reasonable leeway will be given the employee to accommodate his needs to be occasionally absent or tardy due to unforeseen circumstances, Peter B. Baxter is to be held to a high standard of punctuality and attendance during the effective period of this agreement. Significant tardiness, absenteeism, failure to obtain supervisory approval, and/or failure to

provide the documentation outlined in this provision, may constitute a violation of this agreement.

8. Due to the serious nature of the charges leading to this agreement, and due to the recurrent and long term nature of the behavior previously exhibited by the employee, it is agreed that this is intended to be a "last chance" agreement. A violation of this agreement shall result in the immediate dismissal from and termination of the employment of Peter B. Baxter. It is intended by the parties that during the effective term of this agreement, Peter B. Baxter waives his rights under Civil Service Law §75, for any actions taken pursuant to this agreement.

9. Upon written notice to Peter B. Baxter that the employer has determined this agreement to be violated, he shall be entitled to request a hearing and re-determination, by serving a written request on the employee within 10 days of the date he is so notified. Upon receipt of such a request for a hearing and re-determination, the employer shall convene a hearing, as soon as is practicable, before a hearing officer designated by the appointing authority. The sole issue of the hearing shall be whether a term or provision of this agreement has been violated. The burden of proof regarding a violation of this agreement shall be on the employer.

10. After any hearing held regarding this agreement, should there be a finding that a term or provision of this agreement has been violated, Peter B. Baxter shall be immediately and effectively terminated from his employment with the Middlevale City Hospital. Should there be a finding that no term or provision of this agreement was violated as charged, Peter B. Baxter shall be restored to the payroll, shall be entitled to back pay, and retain all rights and privileges as if the charges had never been made.

11. The effective date of this agreement shall be the date upon which it has been properly signed and executed by all the parties. The effective term of this agreement shall be eighteen (18) months from the effective date.

12. If any term or provision of this Stipulation and Agreement shall be found, deemed or determined invalid or ineffective as a matter of law, the remainder of this agreement shall remain in force and valid.

_____	_____	_____	_____
Attorney for Employee	Date	Attorney for Employer	Date

_____	_____
Peter B. Baxter	Date

ORDINARY SUBPOENA

(The following is an illustration of an ordinary subpoena suitable for use in a disciplinary hearing.)

DEPARTMENT OF HOSPITALS

In the Matter of Disciplinary Charges	:	
-against-	:	SUBPOENA
PETER B. BAXTER, Stores Clerk	:	
Under and Pursuant to Section 75 of the Civil Service Law of the State of New York	:	

TO: JAMES R. QUINN
207 Green Street
Middlevale, N.Y.

GREETINGS:

WE COMMAND YOU, that all business and excuses being laid aside, you appear and attend before the undersigned at Room No. 7 on the main floor of the Administration Building, Middlevale City Hospital, Middlevale, New York, on the Twenty-Fifth day of September, 2001, at Ten o'clock in the Forenoon, and at any recessed or adjourned date to testify and give evidence in a hearing then and there to be held in the matter of disciplinary charges against PETER B. BAXTER, on the part of the said PETER B. BAXTER.

For your failure to attend, you will be subject to all the penalties provided for by Section 2308 of the Civil Practice Law and Rules.

This subpoena is issued pursuant to the provisions of Section 75 of the Civil Service Law and Section 2302(a) of the Civil Practice Law and Rules.

WITNESS: THE MIDDLEVALE CITY HOSPITAL, Middlevale, New York, on this 19th day of September, 2001.

George Mason
Hearing Officer

REPORT AND RECOMMENDATIONS
of HEARING OFFICER

(**The following merely illustrates one possible form which may be followed in preparing the Report and Recommendations; no special form is necessary or required.)**

MIDDLEVALE CITY HOSPITAL

In the Matter of Disciplinary Charges :

-against- :

PETER B. BAXTER :

Under and Pursuant to Section 75 of the :
Civil Service Law of the State of New York
:

REPORT AND RECOMMENDATIONS

To: Hon. Andrew R. Carr, Superintendent
Middlevale City Hospital

By your designation dated September 11, 2001, made part of the record herein, the above entitled matter was referred to me to hear and report with recommendations pursuant to Section 75(2) of the Civil Service Law.

Transmitted herewith is the record herein consistent of the following:

Designation of undersigned as hearing officer, dated September 11, 2001.

Transcript of the hearing held on September 25, 2001.

Exhibit 1. Copy of notice and statement of charges dated September 11, 2001.

Exhibit 2. Written statement of Robert P. Callaghan, dated September 11, 2001, attesting to the service of the aforesaid notice and statement of charges.

Exhibit 3. Answer of respondent, dated September 19, 2001.

Exhibit 4. Memorandum from Gerald Smith to Peter B. Baxter, dated July 18, 2001.

Exhibit 5. Time card of Respondent for April, 2001.

Exhibit 6. Time card of Respondent for May, 2001.

Exhibit 7. Time card of Respondent for June, 2001.

Exhibit 8. Time card of respondent for July, 2001.

Exhibit 9. Time card of Respondent for August, 2001.

The notice and statement of charges were served on the Respondent in person on September 11, 2001. The Respondent's answer was received on September 19, 2001 at the hospital. The Respondent's answer states, in substance, as follows:

1. As to Charge 1, Specifications 1 and 2, Respondent denied being intoxicated, and states that on both occasions he was ill.

2. As to Charge 11, Specifications 1 through 5, Respondent states that he does not have information sufficient to answer the charge, and alleges further that any tardiness was due to the bus being late and was not his fault.

A hearing was held before me at Middlevale City Hospital on September 25, 2001. The Respondent, Peter B. Baxter, appeared in person and by Arthur J. North, Esq., of the firm of North and South, 90 Main Street, Middlevale, N.Y. John Phillips, Senior Attorney, Department of Hospitals, appeared in behalf of Middlevale City Hospital.

The following witnesses testified at the hearing:

For the hospital

Richard Roe, Senior Stores Clerk
David Miller, Stores Clerk
Gerald Smith, Business Officer

For the Respondent

James R. Quinn
Peter B. Baxter, Respondent

THE TESTIMONY

[**A detailed synopsis of the testimony of <u>each</u> <u>witness</u> focusing on the relevant facts included in both examination and cross-examination should be included in the body of the report. It has been omitted here due to space limitations**].

Analysis of Testimony

As to the issue of intoxication on both July 16 and September 9, 2001, I find credible and do believe the testimony of Roe and Miller, as against the conflicting testimony of Baxter and Quinn. I find implausible Respondent's testimony about his virus. Such implausibility tends to be borne out by Respondent's failure to mention the virus to either Roe, Smith or Miller (no mention of the virus was made until after charges were served) and by Respondent's failure to recall the name of the physician he visited or to offer any other evidence (such as a medicine or prescription) to show he had consulted a doctor. Quinn's dismissal in 2000 was taken into account in weighing his testimony.

As to the matter of tardiness as charged in the five specifications of Charge 11, the time cards offered in evidence sustain the charge. No effort was made by Respondent to refute this evidence. Respondent offered only what he must have considered as mitigative evidence; i.e., that the bus service was poor. Respondent could have and should have taken an earlier bus to insure that he arrived at work on time. The lateness of the bus is no valid excuse for repeated tardiness.

Findings of Fact

From the evidence submitted, I find the following:

1. On July 16, 2001, Respondent reported to work in an intoxicated condition, was unable to perform the duties of his position, and was sent home.

2. On July 17, 2001, Respondent was called to the Office of the Business Officer, Gerald Smith, who warned him that further misconduct would result in disciplinary action.

3. On July 18, 2001, Business Officer Smith sent a memorandum to Respondent through the office mail which stated that Respondent had been tardy repeatedly in June, 2001, had reported to work intoxicated on July 16, 2001, and which warned Respondent that further similar conduct would result in disciplinary action.

4. On September 9, 2001, Respondent reported to work in an intoxicated condition, was unable to perform the duties of his position, and was sent home.

5. Respondent was tardy 9 times during April, 2001 for a total of 1 hour, 33 minutes.

6. Respondent was tardy 8 times during May, 2001 for a total of 1 hour, 16 minutes.

7. Respondent was tardy 10 times during June, 2001 for a total of 3 hours, 27 minutes.

8. Respondent was tardy 12 times during July, 2001 for a total of 3 hours, 52 minutes.

9. Respondent was tardy 8 times during August, 2001 for a total of 2 hours, 17 minutes.

Therefore:

As to Charge 1, I find Respondent guilty of both Specification 1 and Specification 2.

As to Charge 11, I find Respondent guilty of Specifications 1, 2, 3, 4 and 5.

Recommendation

The Respondent has been in the employ of Middlevale City Hospital for one year and three months. He is not a veteran. His performance rating for the year 2000 was "Fair" (the lowest rating in the satisfactory category). Such rating was accompanied by a written admonition on the rating form itself, as appears in Respondent's personnel folder, warning Respondent of the necessity to improve his work habits.

Respondent's record is not an outstanding one. He shows little promise of being a dependable, responsible and competent City employee. Accordingly, it is my recommendation that he be dismissed from the service.

/S/ George Mason
George Mason

NOTICE OF DETERMINATION

Mr. Peter B. Baxter
12 Summit Avenue
Harwich, New York

Dear Mr. Baxter:

After careful review of the report and recommendations of the hearing officer and the record of the disciplinary proceeding against you on the charges contained in my letter of September 11, 2001, addressed to you, I adopt all the findings of fact of the hearing officer and find you guilty of the following charges and specifications as set forth in such letter: CHARGE 1, Specification, 1 and 1; CHARGE 11, Specifications 1, 2, 3, 4, 5.

The punishment imposed on you is dismissal from the service, effective immediately.

Under the provisions of Section 76 of the Civil Service Law, you are entitled to appeal from this determination by application either to the Civil Service Commission or to the courts. If you elect to appeal to the Commission, such appeal must be filed, in writing, within twenty days after receipt of this notice of my determination.

Very truly yours,

/S/ Andrew R. Carr
Superintendent

It is the policy of the New York State Department of Civil Service to provide reasonable accommodation to ensure effective communication of information to individuals with disabilities. If you need an auxiliary aid or service to make this information available to you, please contact the New York State Department of Civil Service Public Information Office at (518) 457-9375.

Visit the New York State
Department of Civil Service website
www.cs.ny.gov

New York State
Department of Civil Service
Albany, NY 12239

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