Professional Aviation Safety Specialists, AFL-CIO

Contract Representative Training

Formal Discussions, Investigations and Discipline

Presentation Overview

- Discuss two types of meetings set forth in the federal labor statute:

1. Investigatory Meetings
2. Formal Discussions

- Discuss how the disciplinary process works at the FAA and under the PASS CBA
- In each setting, we will discuss the role of the PASS representative

Investigatory Meetings

Weingarten Rights

In 1975, the U.S. Supreme Court, in the case of *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975), upheld a National Labor Relations Board (NLRB) decision that employees have a right to union representation at investigatory interviews under Section 7 of the National Labor Relations Act (NLRA).

The right to have a union representative in an investigatory meeting is often referred to as *Weingarten* rights for this reason.

Weingarten Rights

The Supreme Court ruled that during an investigatory interview, the following three rules would apply:

Rule 1: The employee must make a clear request for union representation before or during the interview.

The employee cannot be punished for making this request.

Weingarten Rights

Rule 2: After the employee makes the request, the employer must choose from among three options:

1) Grant the request and delay questioning until the union representative arrives and the rep has a chance to consult privately with the employee prior to the interview continuing;
2) Deny the request and end the interview immediately; or
3) Give the employee a clear choice between having the interview without representation or ending the interview.

Weingarten Rights

Rule 3: If the employer denies the request for union representation, and continues to ask questions, it commits an unfair labor practice.

Weingarten Rights in Labor Statute

Weingarten rights are codified in Chapter 71 of Title 5.

5 USC Sec. 7114 (a)(2)(B) provides:

An exclusive representative shall be given the opportunity to be present at any examination of an employee in connection with an investigation if….

(1)The employee reasonably believes that the examination may result in disciplinary action against the employee; and

(2) The employee requests representation.

Article 4: Representation Rights

The PASS-FAA CBAs build off the law and provide additional procedures the FAA must follow:

Section 3a. When it is known that the subject of a meeting is to discuss or investigate a disciplinary, or potential disciplinary situation concerning that employee, the affected employee shall be notified of the subject matter in advance. The employee shall also be notified of his/her right to be accompanied by a Union representative if he/she desires and shall be given a reasonable opportunity to obtain such representation and confer confidentially with the representative before the beginning of the meeting.

Article 4: Representation Rights

Section 3b. If, during the course of any meeting or discussion between the Agency and an employee, it becomes apparent for the first time that discipline could arise against the employee as a result of his/her response(s), the Agency shall stop the meeting and inform the employee of his/her right to representation if he/she desires, and provide a reasonable opportunity for the employee to obtain Union representation and confer confidentially with the representative before proceeding with the meeting, if requested.

Section 3c. After one and a half hours of a meeting under this Section, an employee may request a short break for the purpose of using the restroom and/or obtaining a beverage and such request shall not be unreasonably denied.

Article 4: Representation Rights

Section 3d. This section applies to meetings conducted by all management representatives, including DOT/FAA security agents, EEO investigators and agents of the Inspector General. The above provisions shall apply to meetings conducted by the National Transportation Safety Board (NTSB) to the extent the provisions are consistent with NTSB regulations and procedures.

Note: Recent FLRA case law has restricted provisions as applicable to the inspector general's office, but our language is still in the CBA for now. Regardless, the employee or PASS rep should ask that the employee be represented in the meeting.

Article 4: Representation Rights

If related to possible criminal activity:

Section 3e. In an interview where possible criminal proceedings may result and the employee is the subject of the investigation, the employee will be informed of the general nature of the matter (i.e., criminal or administrative misconduct) being investigated, and, upon request, be informed whether or not the interview is related to possible criminal misconduct by him/her. The employee will be required to answer questions only after he/she has been informed that he/she must answer questions specifically related to his/her job performance or face disciplinary action. Any answers given under these circumstances are considered involuntary. Such answers may not be used against the employee in a subsequent criminal proceeding, except for possible perjury charges for giving any false answers while under oath. When a written declination of criminal prosecution is received from the appropriate authority, the employee will be provided a copy.

Article 4: Representation Rights

Section 4. Confidentiality

A representative, while performing his/her representational duties, will not be required to disclose information obtained from a bargaining unit employee who is the subject of an investigation, unless the confidentiality of the conversation with the employee is waived by the representative, or an overriding need for the information is established and disclosed to the Union representative.

Your Role as a Union Representative Before the Meeting

- PASS should decide who should serve as the union representative (not the employee).
- Meet with the employee to get a better understanding of the situation.
- Tell the employee what to expect from the meeting and explain your role as a union rep.
- Remind the employee to be truthful and forthright in answering the questions.

Your Role as a Union Representative in the Meeting

The union representative has a right to be an ACTIVE participant. The union rep can (and should) do the following:

- Confirm the subject matter of the investigation.
- Ask for clarity if a question is not clear.
- Raise relevant facts and issues related to the investigation.
- Ask for a break if one is needed to consult with the employee or there is a need to help the employee deal with the interview.
- Assist the employee in reviewing any written statement for accuracy and clarity before the employee signs the statement.
- Take notes on the employee's behalf as a witness.

Practical Considerations Regarding Investigatory Meetings

- Each employee is different. The dynamic of the interview depends on who is conducting the interview and who is answering the questions. The union representative will need to consider and adjust to each situation.
- Your role is not to prevent the employee from facing discipline. Your role is to ensure a fair investigation. It is part of due process.
- Lack of candor is a common charge and a union representative's notes and memory can assist in defense of such charges.
- ASH investigators often ask the employee to write out their statement after giving answers. This should be clarified up front to ensure the employee and the union rep take notes so that the written statement is consistent.
- There is no prohibition on trying to have a conversation about the situation behind the scenes to get a better sense of what the employee should expect or what the employee is facing.

Disciplinary Actions

Management Right to Discipline and Terminate

- As with all employment, the federal government, including the FAA, has the right to discipline and layoff employees.
- When bargaining with PASS, 5 U.S.C. 7106(a) ensures that the government/FAA must retain the right to "suspend, remove, reduce in grade of pay, or take other disciplinary action against such employees."
- 5 U.S.C. 7106(b)(2) and (b)(3) allow the union to negotiate procedures and appropriate arrangements regarding management rights including issues around discipline and discharge.
- Article 18 of the CBAs contains the procedures and appropriate arrangements concerning how the FAA can discipline and discharge employees.

Discipline as Governed by Federal Law

- Generally, federal employees are covered by 5 U.S.C. Chapter 75 which governs discipline and the Merit Systems Protection Board (MSPB) process. The FAA is not explicitly covered by Chapter 75 due to FAA Reform enacted in 1996.
- 49 U.S.C. 40122 contains a provision that states, "Under the new personnel management system developed and implemented under paragraph (1), an employee of the Administration may submit an appeal to the Merit Systems Protection Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996. Notwithstanding any other provision of law, retroactive to April 1, 1996, the Board shall have the same remedial authority over such employee appeals that it had as of March 31, 1996."

Discipline as Governed by the CBA

- Absent a legal standard as found in 5 U.S.C. Chapter 75, the main protection for unionized employees is the "just cause" provision found in Article 18 Section 1.
- Disciplinary action must be supported by "preponderance of evidence." (More likely than not, over 50 percent.)
- Disciplinary action is not punitive in nature, but rehabilitative.
- Under FLRA case law, the concept of just cause has been identified as: whether disciplinary action was warranted and whether the penalty was reasonable.

    1. Is the employee guilty of the charged offenses and specifications?
    2. Is the penalty reasonable under the *Douglas* factors?

Just Cause (as a General Concept)

- Notice: Was the employee adequately warned of the consequences of his/her conduct?
- Reasonable Rule or Order: Was the employer's rule or order reasonably related to efficient and safe operations?
- Investigation: Did the employer investigate before administering discipline?
- Fair Investigation: Was the investigation fair and objective?

Just Cause (as a General Concept)

- Proof: Did the investigation produce substantial evidence or proof of guilt?
- Equal Treatment: Has the employer applied its rules, orders and penalties even-handedly and without discrimination?
- Penalty: Was the discipline related to the seriousness of the offense and past record?

Article 18 Proposal and Response

If a disciplinary action is proposed, it will be formal only if it meets the requirements listed under Article 18, Section 2:

For purposes of this Agreement, a formal disciplinary action is defined as a written reprimand, suspension, removal, reduction in pay for conduct, or a furlough of thirty days or less for reasons other than a lapse of appropriations or action by Congress.

If management proposes any action within that range, the employee has the right to respond to the proposed action within 15 days. Management will provide a final decision after considering the response. Appeal rights follow a final decision.

Written reprimands are entered into an employee's EOPF but are removed after two years.

Douglas Factors

If there's just cause, then does the "punishment fit the crime"? Factors adopted by the Merit Systems Protection Board (MSPB) in considering the appropriateness of disciplinary action. The CBA adopts these factors in Article 18, Section 4:

a) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated.

b) The employee's job level and type of employment, including supervisor or fiduciary role, contacts with the public, and prominence of the position.

Douglas Factors

- The employee's past disciplinary record.
- The employee's past work record, including length of service, performance on the job, ability to get along with coworkers and dependability.
- The effect of the offense upon the employee's ability to perform at a satisfactory level, and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.
- The consistency of the penalty with those imposed upon other employees for the same or similar offenses.
- The consistency of the penalty with any applicable agency table of penalties.

Douglas Factors

- The notoriety and/or egregiousness of the offense, or its impact upon the reputation of the agency.
- The clarity with which the employee was on notice of any rules that were violated in committing the offense or had been warned about the conduct in question.
- The potential for the employee's rehabilitation.
- The mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter.
- The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Responding to Discipline

Focus on rebutting the agency's burdens:

1. Can the agency actually prove that the employee engaged in the alleged misconduct?
   - This is fact-based and the agency must prove the conduct by a preponderance of the evidence.

2. Has the agency shown a valid and sufficient nexus between the employee's misconduct and the efficiency of the service?
   - Is there a clear and direct relationship between the misconduct and the employee's ability to accomplish his duties?
   - The nexus inquiry is especially important for discipline based on off-duty misconduct
3. Is the penalty reasonable?
   - Look at the table of penalties! Was there progressive discipline? Is the discipline consistent with other employees' penalties for similar misconduct? Be sure to address any and all mitigating Douglas factors.

Responding to Discipline

- Talk to the employee about whether they are challenging the merits of the discipline or the penalty. That determines how the response should be written.
- Keep the response simple (don't get too complicated or lengthy in a way that will back you into a corner in the future).
- Be careful with employees giving oral replies.
- Include any procedural violations or concerns.
- Make sure the employee being disciplined is involved in drafting the response and that they sign off on it. Draft the response from the employee's perspective, not the union's perspective.
- Only file a grievance after the agency has issued a final decision letter, not at the proposed discipline stage

Appealing the Disciplinary Action

Choose one and only one:

- CBA grievance process.
- Merit Systems Protection Board: Suspensions of more than 14 days.
- EEOC: Harassment or discrimination based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information.
- FAA's internal grievance process—known as Guaranteed Fair Treatment—for suspensions of more than 14 days.

Grieving the Discipline

"The discipline taken against employee X was not for just cause and therefore violated Article 18." This means you are taking issue with:

1. the agency cannot prove the charges against the employee, and/or
2. the penalty was not reasonable

Remedy language: "The employee shall be made whole, including but not limited to, rescinding the discipline and providing appropriate back pay."

Performance Actions

Removal or Reduction in Grade

- In the ATO CBA, performance is governed by Article 71.
- In the AVS CBA, performance is governed by Article 37.
- Article 18 Section 1 states: “Actions based on performance must be supported by substantial evidence.”
- This standard is derived from Title 5 of the U.S. Code where the agency has more deference in proving that an employee’s performance is not satisfactory.
- Performance actions typically focus more on whether the agency complied with all the procedures rather than proving whether an employee is actually an unsatisfactory performer.
- Article 18 Section 4 Douglas Factors don’t apply to performance actions.

Article 18 Section 14

- In addition to the provisions of Section 5, the following provisions are applicable to cases of reductions-in-grade or pay, or removal for unacceptable performance:

a. If the final decision is to sustain the proposed removal or downgrade, the decision letter must specify the instances of unacceptable performance on which it is based, and the decision must be concurred with by a management representative who is in a higher position than the management representative who proposed the action. The decision may only be based on those instances of unacceptable performance which occurred within one (1) year prior to the date of the written notice described in Section 5 of this Article.

b. If, because of performance improvements by the employee during the notice period the employee is not reduced in grade or removed, and the employee's performance continues to be acceptable for one (1) year from the date of the written notice described in Section 5, any entry or other notation of the unacceptable performance for which the action was proposed shall be removed from the employee's Official Personnel File (OPF) and Employee Performance File (EPF).

Formal Discussions

Article 4, Section 2

As specifically provided under 5 USC Section 7114 (a)(2)(A), the Union shall be given advance notice and the opportunity to designate a representative to attend any formal discussion between one (1) or more representatives of the Agency and one (1) or more employees in the unit or their representatives concerning any grievance or any personnel policies or practices, or other general condition of employment. The Agency shall advise the Union at the corresponding level, in advance, of the subject matter. This does not apply to mid-term negotiations under this Agreement.

What is a Formal Discussion*?

- Scheduled in advance
- Employees required to attend
- Notes or meeting minutes kept
- Agenda or meeting plans provided
- Held in a conference room
- Attendees (high level)
- Significant topic (*not 'water cooler' conversations)*

* May also be referred to as Formal Meetings

Formal Discussions

A union can:

- Ask for a delay
- Ask what the meeting is about
- Clarify matters being discussed
- Represent the interest of employees
- Engage in discussions and ask questions

A union cannot:

- Unreasonably delay
- Demand other topics be discussed
- Disrupt or thwart the purpose of meeting

Elements of a Formal Discussion

- Participants include one or more representatives of the agency and one or more bargaining unit employees.
- Subject matter can include grievances, any personnel policy or practice, or other conditions of employment.
- Adequate notice must be given to the union, and the union has a right to designate a representative.

Examples of Formal Discussions

- Grievance meeting
- EEO settlement discussions where settlement would impact other employees.
- Regular staff meetings where manager tells employees new schedules are going into effect.
- Manager holds meetings and tells employees about change in leave procedures.
- Interview of BUE to prepare for arbitration or ULP hearing.

Examples of Discussions NOT Formal

- Counseling session between employee and supervisor.
- Meeting to inform two employees of a temporary reassignment in duties.
- Meeting where four specific employees merely reported their productivity.

Practical Considerations

- Do not necessarily ask to be included on every employee meeting or file a ULP for every meeting.
- But union does have strong interest in meetings where managers are giving guidance or opinions that affect working conditions.
- May want to negotiate language to strengthen how much notice of a meeting will be given and who will receive such notice.