

# MMLA

## Discipline in the Public Sector

Melissa R. Murray, Esq., MBA  
Norris, Murray & Peloquin, LLC  
[mmurray@nmplabor.com](mailto:mmurray@nmplabor.com)

Kay H. Hodge, Esq.  
Stoneman, Chandler & Miller LLP  
[khodge@scmlp.com](mailto:khodge@scmlp.com)

# A Word About Questions

**ASK!!!**

# Nature of the Employment Relationship

Employees employed for an indefinite term of employment are “At-Will” Employees

# At-Will Employment

An employee hired At-Will may be terminated for a good reason, bad reason or no reason at all...

**UNLESS...**

# Collective Bargaining Agreements

- Probationary Period
- Just Cause or Cause
- Progressive Discipline
- Grievance & Arbitration
  - Time Limits
  - Notice
  - Steps

# Review of Arbitration Awards

## M.G.L. c. 150C

### Section 11:

- (1) Award procured by corruption, fraud, or other undue means;
- (2) Evident partiality by an arbitrator appointed as neutral, or corruption in any arbitrators or misconduct prejudicing the rights of any party;
- (3) Arbitrators exceeded their powers or rendered an award requiring a person to commit an act or engage in conduct prohibited by state or federal law;
- (4) Arbitrators refused to postpone hearing upon a sufficient cause being shown or refused to hear evidence material to the controversy or otherwise conducted the hearing, contrary to the provision § 5 as to prejudice substantially the rights of a party;
- (5) No arbitration agreement and issue was not adversely determined in proceedings under § 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the award orders reinstatement of an employee with or without back pay or grants relief such that it could not grant or would not be granted by a court of law or equity shall not be ground for vacating or refusing to confirm the award.

# Civil Service Laws

- Public Safety Positions Police and Fire
  - Requires Just Cause for Suspension or Terminations or Demotions
  - Notice
  - Hearings
    - Pre-Termination
    - Post-Termination
  - Standard – Just Cause
    - Penalty Review
  - Appeal to Court under M.G.L. c. 30A
- Applicability to Other Positions
- Appeal under M.G.L. c. 30A

# Discrimination Laws

- Federal
  - Title VII – race, color, religion, sex, national origin
  - Age Discrimination in Employment (ADEA)
    - 40 or over
  - Americans with Disabilities Act (ADA)
  - Genetic Information Nondiscrimination Act (GINA)
  - Also statutes cover veterans status, union activity.



- State

- C. 151B – all of the above and sexual orientation, gender identity, military service, retaliation
- Also c. 150E, § 10(a)(3) covers union activity and retaliation § 10(a)(4).

**How Are These Laws and Processes Applied?**

# Venues

- CBA - Arbitration
- Civil Service
  - Public Safety (Police and Fire) Civil Service M.G.L. c. 31, §§ 41-45
  - Other
- Labor Relations, M.G.L. c. 150E, § 10
  - Labor Relations Commission
  - Commonwealth Employment Relations Board (“CERB”)
- EEO Laws
  - Administrative Agency MCAD or EEOC
  - Court
- Other Court Challenges, e.g. § 1983

# Statutes and Collective Bargaining

- Statutes can establish process and criteria for discipline (demotion, suspension or termination) that must be followed.
- E.g. M.G.L. c. 71, § 42 for school employees who have achieved professional teacher status (as provided in M.G.L. c. 71, §c 41) cannot be discharged except for “inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure to satisfy teacher performance standards developed pursuant to § 38 of this chapter or other just cause. Section sets forth process to follow and includes notice along with documentation upon which decision is based and opportunity to meet with the Superintendent with counsel.

- When a CBA or statute identifies specific grounds warranting dismissal, arbitrator does not have authority to judge whether the penalty of discharge is warranted.
  - CBA: S.D. Warren Co. v. United Paperworkers' Int'l Union, Local 1069, 845 F.2d 3, 8 (1<sup>st</sup> Cir.), cert. denied, 488 U.S. 992 (1988) (where agreement provided for discharge on “proper charge” and identified specific causes upon which discharge could be based, arbitrator not authorized to determine different remedy for proven conduct). See Fogel, Court Review of Discharge Arbitration Awards, 37 Arb. J. 22, 25 (No. 2, 1982).
  - Statute: School Dist. of Beverly v. Geller, 435 Mass. 223, 233 (2001)
- Do not forget M.G.L. c. 150E, § 7 that provides that in the event of conflict between the collective bargaining agreement and the provisions of certain municipal personnel ordinances, by-law, rule or regulation or various enumerated statutes, the collective bargaining agreement language will prevail.

- Trap for the Unwary: M.G.L. c. 71, § 42D – For teachers or **other employee assigned to the school**, suspensions must give seven days notice (unless Superintendent for good cause requires immediate suspension) of the grounds and the opportunity to review decision and provide information about decision and employee’s status with the superintendent or principal while represented by counsel/attorney.
  - Suspensions are limited to a total of one month.
  - Limits the investigation/interrogation of a teacher or other school employee until **after notice of the right to counsel during the investigation**. (Also remember Weingarten rights for investigative interviews of union employees from which discipline may result, but statute requires notice of right to attorney.)
  - Allows arbitration pursuant to the provisions of § 42 but provides that “[n]othing in this section shall be construed as limiting any provision of a collective bargaining agreement with respect to suspension of teachers or other employees. “

# Good Cause vs. Just Cause

Good Cause: “any ground which is put forward [by the Employer] in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the ...task of building up and maintaining an efficient school system.” Rinaldo v. School Comm. Of Revere, 294 Mass. 167, 169 (1936).

Just Cause: “substantial misconduct which adversely affects the public interest.” Murray v. Second Dist. Court of E. Middlesex, 386 Mass. 508, 514 (1983).

# Historical Prospective – 7 Factors Just Cause

Developed by Arbitrator Carroll Daugherty

- Notice: Communication of Rules & Penalties
- Reasonable Relationship between Rules and Operations (order, efficiency, and safety)
  - Obey then grieve unless serious and immediate issues safety or integrity
- Investigation before action
- Fairness of Investigation
- Sufficiency of Proof
- Non-Discrimination: evenhandedness (not based on protected status)
- Appropriateness of Penalty
  - Seriousness of offense
  - Record of employee



# Later Developments

- To avoid overly mechanistic approach of 7 factors
- Quest for principled standards of Just Cause
  - Employee Obligations: regular attendance, obedience to reasonable work rules, reasonable quantity and quality of work, and avoidance of conduct that would interfere with employer's ability to carry out its business effectively.
  - Employer Obligation: discipline must further a management interest in rehabilitation, deterrence of similar conduct and protection of employee's ability to operate the business successfully.

- Interest in “fairness” reflected in industrial due process, i.e. notice of expected standards and penalties; decisions based on facts; opportunity to state his/her/their case
- Progressive discipline: warning, suspension, discharge
  - Performance, e.g. attendance, attention to detail, mistakes
  - Conduct
    - How conduct is characterized is important, e.g. reliability, honesty/truth-telling, self control, discrimination/harassment, policy compliance
  - Suspension
- Comparability of punishment
  - No good deed

# Industrial Justice

- While no property interest in continued employment (Board of Regents v. Roth, 408 U.S. 564 (1972)) not as clear cut. See Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
- Due Process translates to notice and opportunity to be heard.
- Reasonable action that is not arbitrary, capricious or discriminatory.
- No strict set of rules but balancing of employee rights and employer's interests.
  - Proof of underlying facts or Did the Employee Do It?
  - Does the Punishment Fit the Crime?

# Reality of Performance Conduct Management

- A good defense takes time and attention earlier rather than later.
- Early involvement and review by an attorney will help to minimize potential liabilities.
- Documentation is key to success in a case.
- What is said and how it is said may make all the difference.
- Comparative Data

# What Should You Do?

- Collect All Relevant Data
  - Employee, Date of Hire, Number of Years in Position
  - Union Coverage and Review of CBA
  - Protected Status
  - Prior Discipline/Performance History
  - Comparative Data
- What happened?
  - Investigation? Who? Internal? External?
  - Focus on Evidence, not Assumption or Opinion
  - Quality of Report
- Consider claims and applicable standard

**NOW FOR SOME HYPOTHETICALS**