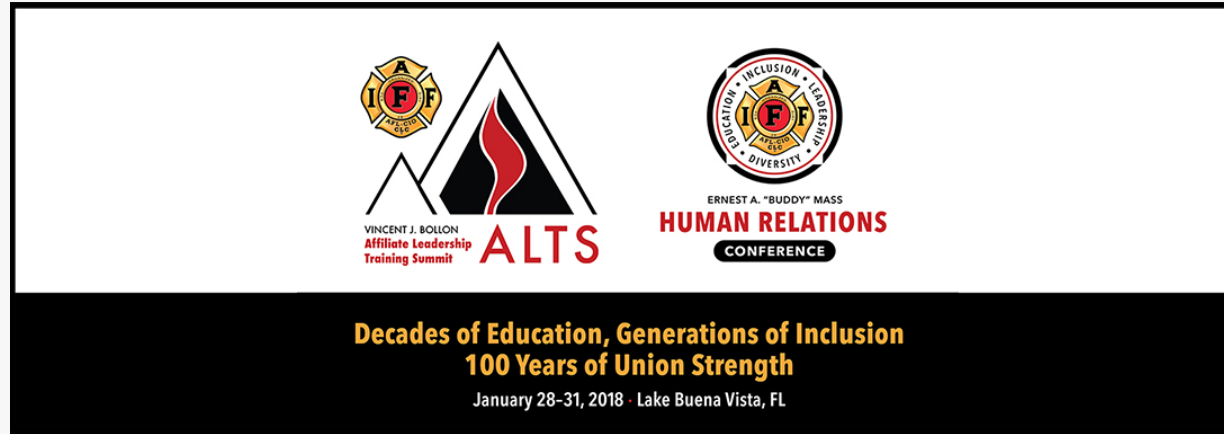


INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS



Employee Discipline: Before the Lawyer Arrives

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Legal Disclaimer

This presentation is being offered solely for informational purposes. It is not intended to be, and should not be relied upon, as legal advice.

Any affiliate needing legal advice on any topic covered in this presentation should contact its local counsel, or its District Vice President, to obtain advice appropriate to its particular situation.



Purpose

The purpose of this presentation is to familiarize affiliate leaders with certain broadly applicable concepts and principles of U.S. law, so that they will be better prepared to handle disciplinary issues in times when lawyers may not be immediately available.



Importance

Duty of Fair Representation

- In the collective-bargaining context, the local, as the exclusive representative, must fairly represent bargaining-unit members

Solidarity

- If the non-bargaining context, the local should be prepared to support its members, and prove its value



Agenda

- I. Retaliation for Speech
- II. Workplace Searches
- III. Employer Interviews
 - A. Union Representation
 - B. Interrogation About Criminal Activity
- IV. Due Process
- V. Information Requests
- VI. “Step 1” Grievance Processing
- VII. Union Privilege and Confidentiality



I. Retaliation for Speech



First Amendment

The federal and state governments “shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”



“Pickering Rights”

If a public employee speaks in his or her capacity as a citizen, and the speech relates to a matter of public concern, then a public employer cannot discipline the employee in retaliation for the speech, unless it has an adequate justification.



“Citizen” Speech

- Citizen: speech made “outside the duties of employment”
 - But may include information “related to or learned through public employment”
- Employee: speech made “pursuant to official duties”
 - Made in the course of performing the “ordinary job responsibilities” the employee is paid to perform



“Citizen” Speech: Examples

Citizen

- Teacher who sent letter to local newspaper criticizing school budget
- Police union member who testified in arbitration, contradicting superior
- Prosecutor who circulated questionnaire to other employees, asking whether they felt pressured to participate in political campaigns
- Police officer who made Facebook posts criticizing Chief for refusing to send representatives to line-of-duty-death funeral in different city

Employee

- Corrections officer who spoke to news reporter about prisoner
- Police chief who reported mayor’s misuse of funds to outside law-enforcement agencies
- Auditor who reported unlawful budgeting practices to superiors
- Psychologists who sent memorandum to University officials alleging their supervisor was mismanaging department



Public Concern

Matters of political, social, or other
concern to community = **YES**

v.

Matters of internal personnel policy = **NO**



Public Concern: Examples

Public Concern

- Staffing
- Response Times
- Adherence to health and safety rules
- Equipment and apparatus
- Right to organize and form union

Not Public Concern

- Benefits disputes
- Interpersonal disputes
- No-confidence votes
- Application of internal policies and rules



Adequate Justification

- Undermining superior's authority
- Disloyalty of high-ranking employees
- Interference with efficient operations
- Erosion of employee morale
- Erosion of public confidence



Union Representative's Role

- Find out exactly what was said (content, form, context)
- Identify and speak to witnesses
- If written or recorded statement, obtain and preserve copy—especially online postings—and determine distribution



II. Workplace Searches



Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”



Fourth Amendment

If a public employer searches the workplace, and a public employee has a reasonable expectation of privacy in the place or thing being searched, then the employer's search must be reasonable.



Reasonable Expectation of Privacy

- Case-by-case determination
- “Operational realities of the workplace”
 - Legitimate regulation (e.g., employer policies)
 - Actual practices and procedures



Reasonable Searches

- A public employer does not need a warrant or probable cause to search the workplace because it has “special needs” associated with maintaining efficient and proper agency operations.
- To comply with the Fourth Amendment, a search must be “reasonable under all the circumstances.”



Reasonable Searches

Reasonable at the outset

- Non-investigatory, work-related searches (e.g., looking for file or similar item) = Necessity
- Investigatory, work-related searches (e.g., looking for evidence of misconduct) = Reasonable suspicion

Reasonable in scope

- Reasonably related to object of the search
- Not excessively intrusive



Special Applications

- Drug testing
 - Mandatory testing
 - Reasonable-suspicion testing
- Video surveillance



Union Representative's Role

1. Determine the reason for the search

- What was the employer's stated justification?

2. Determine the extent of the search

- What places or things were searched?
- How "open" were those places or things?
- Was the search limited to places or things related to the employer's stated justification, or did it go beyond that?
- Did the employer confiscate anything?



III. Employer Interviews



A. Union Representation



“Weingarten Rights”

An employee has the right to request and obtain union representation at an interview which the employee reasonably believes could result in discipline.

Applicability

- Private sector = YES
- Federal sector = YES
- State and local = If law, contract, or policy so provides



“Weingarten”: General Principles

1. Request: employee must ask for representation; right is not automatic and employer has no duty to inform
2. Union Representation: union official or union attorney, not private attorney
3. Reasonable belief in discipline: employer must be seeking answers, not merely announcing a disciplinary decision already made, or correcting job performance



“Weingarten”: General Principles

If an employee makes a proper request for representation, the employer has three options:

1. Grant, and stop questioning until representative arrives
2. Deny, and stop questioning
3. Offer choice to continue without representative, or forego interview



Sample Weingarten Card

“If this discussion could in any way lead to my being disciplined or terminated, or affect my personal working conditions, I respectfully request that my union representative or steward be present at the meeting. Without representation, I choose not to answer any questions.”



Firefighter Bills of Rights

- Some states have enacted legislation specific to firefighters or public-safety employees, granting Weingarten-type rights, along with other procedural protections
- E.g., California, Florida, Illinois, Louisiana, Virginia



Union Representative's Role

- Make sure the member already knows to invoke his or her rights
- Confer with the member privately before the interview starts
- Don't hesitate to speak up, but do not be disruptive
- Try to seek breaks, or opportunities to confer privately, if necessary
- Debrief and take notes



B. Interrogation About Criminal Activity



Fifth Amendment

“No person ... shall be compelled in any criminal case to be a witness against himself.”



“Garrity Rights”

A public employer can use the threat of discharge to compel a public employee to answer questions about job performance, even if the answers could have criminal consequences.

If the answers are incriminating, the employee has immunity from the use of the statements, and any evidence derived from them, in any criminal prosecution for the offense under investigation.



Threat of Discharge

Direct threat

v.

Subjective belief based on
objective circumstances



Scope of Questioning

Public employees must answer questions specifically, directly, and narrowly relating to the performance of his official duties, or else they can be discharged.



Immunity

Fifth Amendment

- Use = if compelled to answer under threat of discharge, and prosecuted for offense under investigation, no use of protected statements
- Derivative Use = if compelled to answer under threat of discharge, and prosecuted for offense under investigation, no use of any evidence derived from the protected statements

Compare

- Transactional = if compelled to answer under threat of discharge, no prosecution for offense under investigation



Duty to Warn

The law is unsettled about whether a public employer is required to warn employees about their immunity, and the disciplinary consequences of refusing to answer potentially incriminating questions about their job duties.



Waiver

If a public employee voluntarily answers questions that could have criminal consequences, he or she forfeits the right against self-incrimination, and his or her statements and any evidence derived from them can be used in criminal prosecution.



Union Representative's Role

- Ensure the member has not volunteered to be interviewed, and answer the employer's questions
- Establish the following at the outset:
 1. Whether the interview could have criminal consequences
 2. Whether the member is being ordered to answer under threat of discharge
 3. Whether the employer is giving the member immunity from use and derivative use of his statements in criminal prosecution
- Avoid asking member about criminal conduct



IV. Due Process



Fifth and Fourteenth Amendments

The federal and state governments shall not deprive any person of “life, liberty, or property, without due process of law.”



“Loudermill Rights”

If a public employee has property right in his or her job, a public employer cannot discharge, or suspend without pay, without following certain procedures.



Property Right

For Cause = **YES**

v.

At Will = **NO**



Procedures: Discharge

- “Some form of pretermination hearing,” which “need not be elaborate,” and “need not definitively resolve the propriety of the discharge”
- “An initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support proposed action.”



Procedures: Discharge

1. Oral or written notice of the charges;
2. Explanation of the employer's evidence; and
3. Opportunity for the employee to present his or her side of the story



Procedures: Unpaid Suspension

- “Sufficiently prompt postsuspension hearing”
- Public employer has “significant interest” in immediate suspension when employees occupy positions of public trust



Union Representative's Role

- Prepare the member
- Determine any witnesses
- Get the employer's evidence
 - Charging document
 - Supporting materials



V. Information Requests



Information Requests

Public-sector affiliates: Employer has duty to provide information under FOIA/Open records laws

- Exemptions vary
- Copies (fees) v. Inspection (free)
- Enforcement schemes vary (requestor v. Attorney General)
- See IAFF FOIA Manual



Information Requests

Bargaining affiliates: Employer likely has duty, under law, contract, or both, to provide union with information relevant and reasonably necessary to administer and negotiate the contract

- Employer's obligations likely broader than under FOIA/open records laws
- Enforcement via ULP, arbitration, lawsuit



Union Representative's Role

- State your request with specificity
- Cite the authority for the request (e.g., statute, decision, contract)
- Demand a response within the applicable timeframe
- Demand to know, as part of response, whether any documents are being withheld, and if so, the authority for the withholding
- If FOIA/public records request, and concerned about cost, ask for a fee estimate before employer acts on request, and consider inspection as alternative



VI. “Step 1” Grievance Processing



Know Your Responsibilities

- **Know your contract, and any relevant employer policies, and state laws**
 - Often most important sources of rights and obligations for members, the Local, and the employer in the disciplinary process



Know Your Responsibilities

- **Know your Constitution and By-Laws**
 - Local may have internal, pre-“Step 1” obligations
 - A particular officer or committee may be responsible for handling grievances



Get the Facts

- Talk to everyone involved
 - Be patient and listen carefully
 - Ask questions: Who, What, Where, When, Why, How?
 - Ask for an account in writing
- Take comprehensive notes
 - Create a timeline of events
- Obtain relevant documents
 - Get as much as you can without involving employer, but don't hesitate to make formal request if necessary



Review the Facts

- Ask yourself questions about everything you've heard
- Separate facts from opinion
- Don't take any information for granted
- Identify ambiguities and gaps in the story, and make follow-up inquiries
- Try to anticipate the employer's position, if unknown



Analyze the Facts: “Just Cause”

- Is the rule or order reasonable?
- Did the member receive adequate notice of the rule and the consequences of failure to comply?
- Did the employer conduct an investigation?
- Was the investigation fair and objective?



Analyze the Facts: “Just Cause”

- Is there proof of misconduct?
- Was the member disciplined similarly to others for the same violation?
- Was the level of discipline appropriate?



Drafting the Grievance

- Be as concise as possible
- Specifically cite the article and section of the contract's "just cause" provision
- Request all available remedies (reinstate, make whole, cease and desist)
- Keep copies of the grievance and any response; if no response, timely advance grievance



Importance of Timely Filing

File the grievance on time!

- Arbitrators will dismiss late-filed grievances
- If the grievance is dismissed, the grievant likely has lost the chance to challenge his or her discipline or discharge
- This could expose the union to potential liability for arbitrarily or perfunctorily processing the grievance, and breaching the duty of fair representation



VII. Union Privilege and Confidentiality



Union Privilege

- Attorney-client privilege does not apply protect communications between union representatives and members
- Some jurisdictions have recognized, in varying settings, a “labor union privilege,” and prohibit employers from prying into such communications



Confidentiality

- Don't discuss what you learn with anyone who doesn't have a need to know
 - You and the people you tell could be questioned about it later in arbitration or litigation
 - You may hear things that, if repeated, could harm someone's reputation, and subject you to a defamation claim



“Firewalls”

- Disciplinary matters involving multiple members raise special concerns about fair treatment
- To ensure an objective investigation, the Local should create a “firewall,” and assign different representatives to shepherd each member through the disciplinary process
- The representatives should refrain from discussing what they learn from their respective members



The IAFF Can Help

- Guidance from District Vice President and/or District Field Service Representative
- Advice from the IAFF Legal Department
- Letter from General President to your employer
- Assistance from IAFF Public Relations Department

- Guardian Policy
- Emergency Disputes Fund Policy



Questions?

Any questions or comments?


Any ideas or best practices to share?



Win an iPad Mini!

Submit your workshop and overall evaluations to be automatically entered in two drawings for a new iPad mini!

Complete your evaluations using the IAFF Frontline App

1. Open the Frontline App and click on the “” symbol in the top left corner by the logo
2. Select “sign in” and login with your iaff.org username
3. Click the “Events” icon and select ALTS
4. Select “Sessions” and click on the workshop you attended
5. Click “Session Evaluation”
6. Complete the evaluation
7. Click “Submit”

For the overall evaluation, follow steps 1, 2, and 3 then click “Overall Event Evaluation”

Winners will be announced February 16, 2018

