Discipline—Mitigating Factors
Verified 2013

Mitigating factors are considered in determining an appropriate disciplinary penalty. They may be taken into account by an employer at the time a disciplinary measure is being decided. Or they may be raised by the union during representation.

In cases of discipline, representation is usually concerned with two areas. The first concerns whether or not the wrongdoing occurred as alleged, or whether or not the employer can prove that some measure of discipline is warranted. Sometimes, the union may concede that an employee's misconduct constitutes grounds for some form of discipline. The second area relates to the penalty and its appropriateness in the circumstances. There may be factors that warrant reducing a disciplinary penalty. These are called "mitigating factors."

The burden of proof in disciplinary cases rests with the employer but the responsibility for raising mitigating factors lies with the union. The burden of proving mitigating factors also rests with the union. However, the onus is on the employer to rebut or explain why such factors should not affect the penalty imposed.

Arbitrators weigh the presence, or absence, of mitigating factors in deciding whether to uphold, reduce or rescind a disciplinary sanction. If an arbitrator does not receive evidence from the union, s/he has no basis on which to substitute a lesser penalty.

Though by no means exhaustive or comprehensive, the following will provide stewards with a basic list of mitigating factors.

1. The most commonly cited factors relate to an employee's length of service and disciplinary record. When an arbitrator places a relatively isolated incident in the context of a long and unblemished work history, s/he may well conclude that the employee will respond positively to a reduced disciplinary sanction and correct the behaviour or problem that contributed to the misconduct.

2. Intentional, planned and premeditated misconduct is generally viewed more seriously than a momentary lapse in judgment, a spur of the moment reaction, a response to provocation or when an employee acts on an emotional impulse.

3. Arbitrators have modified disciplinary sanctions when presented with evidence relating to the employee's state of mind at the time of the infraction. These have included domestic and emotional problems, alcohol and gambling addictions, physical pain or physical conditions, or a supervisor's wrongful instructions or treatment. In the case of fraud or theft, the existence of a sympathetic, personal motive such as family need will be looked upon more favourably than dishonesty rooted in hardened criminality.

4. Is the misconduct the result of an honest mistake or misunderstanding? Perhaps there was confusion on the part of the employee that s/he was entitled to take the measures s/he did.

5. The employer's own conduct may be a pertinent factor. For example, was there a lax atmosphere at the workplace where similar misconduct was condoned by the employer? Have the employer's policies and work rules been consistently communicated, applied and enforced? Have employees who

have engaged in similar misconduct been treated more leniently? Have there been clear and sufficient warnings that certain conduct will not be tolerated, and the employee advised of the consequences if the behaviour persists?

6. The employee's attitude and actions during an employer's investigation into alleged wrongdoing will invariably influence the disciplinary measure. Has the employee been honest and forthright? Did s/he advise the employer of the wrongdoing or was there an attempted cover up or unwarranted shifting of blame to another person?

7. What is the "rehabilitative potential" of the employee? In other words, what are the employee's future prospects in conforming to acceptable and expected standards of behaviour? Did the employee admit wrongdoing and show remorse? Did the employee make a frank and honest apology, or make an offer of restitution? Has the employer attempted earlier and more moderate forms of corrective discipline to which the employee responded positively by correcting the problem? It may well be that the employee's actions between the imposition of the disciplinary measure and the grievance or arbitration hearing weigh heavily on whether or not the penalty should be reduced. This is particularly relevant in cases of alcohol and gambling addiction, and may apply to situations involving theft or assault, where the employee has taken steps to deal with the underlying problems contributing to the misconduct.

8. The penalty may impose a special economic hardship in light of the particular circumstances of the grievor. Arbitrators have invoked this factor in the case of mature workers, women and members of minority groups who have had otherwise long and

exemplary service records. It has also been considered in situations when termination would result in limited employment prospects because of the specialized nature of the employee's occupation. Or it could be argued that discharge is too harsh a penalty if the employee lives in a remote location or in what might be referred to as a "one-employer town."

9. The appropriateness of the penalty will be measured against the seriousness of the misconduct. The nature of the misconduct will be placed in the context of the employee's responsibilities and the employer's business, and whether or not the employer's reputation has been tainted or public confidence in the employer's operation has been undermined.

When dealing with disciplinary issues, a steward needs to keep in mind what could be called this "second area" of representation, and fully explore the presence or absence of mitigating factors.

First level Stewards should always sign off on these types of grievances so as to protect the member's rights and ensure she/he has the chance of correcting facts that might have been missed in the process leading up to the termination. Discipline/termination cases are almost always referred to a higher level for representation purposes.

Operational Requirements—Some Principles

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1. Operational requirements must be based on the work itself to be performed, not on administrative or economic criteria.

2. Consideration of overtime costs are not proper concerns in determining whether or not operational requirements exist.

3. Operational requirements are a question of fact to be determined in each case.

4. The initial onus rests with the grievor to demonstrate that operational requirements were not a valid reason on the part of the employer to deny a benefit of the collective agreement (e.g., leave). Once that burden is discharged, the onus of demonstrating that operational requirements were valid reasons for denying the benefit will then rest with the employer. Of the two burdens, the employer's burden is more onerous. The reasons are twofold:

    - Knowledge of operating requirements is in the hands of the employer.
    - More importantly, the employer has undertaken an obligation, the release from which is contemplated only in special circumstances. To not impose the onus on the employer to establish the exceptions to the right granted under the relevant provision in the collective agreement could undermine its intent.

5. It has been held that the employer must consider the real

alternatives available regarding the use of other staff. That said, the employer's refusal to consider the use of other staff does not necessarily mean that denial of leave is unreasonable.

6. The employer must organize its operations and the service so that employees can exercise their rights under the collective agreement. The employer cannot hide behind staff shortages and operational demands such as training. These are not acceptable excuses to relieve the employer of its obligations.

7. There may be unusual operational requirements of a temporary nature when an employer may block out periods of time in which leave will not be granted because of anticipated needs (e.g. new plants, increase in cross-border traffic). When the employer plans the operations and clearly knows its operational requirements, it has been held that the employer can rightly refuse a request for, for example, compensatory leave.

References:

1. *Sumanik* (166-2-395); *Lee & Coulter* (166-2-741, 742)
2. *Gray* (166-2-457; *Savage* (166-2-9734)
3. *Gray* (166-2-457); *D.R. Lawes* (166-2-6437)
4. *Morton* (166-2-14208)
5. *West* (166-2-13823); *Dufresne* (166-2-14582)
6. *Noakes* (166-2-9688); *D.R. Lawes* (166-2-6437); *Lefebvre* (166-2-16101); *Tremblay* (166-2-17538); *Whyte* (166-2-17992); *Medford* (166-2-22035); *MacDonald & Kelly* (166-2-20526 & 20527); *MacGregor* (166-2-22489)
7. *Dawe* (166-2-15468); *Payette* (166-2-13824).