The Steward's Protected Status

Are stewards who aggressively protect the rights of their members protected from retaliation or discipline? The answer is generally "yes," but be careful: that doesn't mean a steward has the freedom to shoot off their mouth to management or engage in extreme behavior on every issue. While handling contractual issues with management, stewards *are* considered equals, but that equality only applies to activities relating to their work on behalf of the union. There are limits to a steward's right to argue forcefully or otherwise emphasize the union's stand in vigorous ways. Some of these limits and rights will be discussed here. To set the stage, let's take a quick look at two key rules governing stewards' rights.

n The Equality Rule

Under the law, when stewards are engaged in representational activities, they are considered equals with management. Vigorous advocacy is permitted, and what would not be allowable in the normal boss-employee relationship. The equality rule does *not* apply to their personal behavior or insubordination not related to their duties. The latter is what often gets a steward in trouble.

n The Same Standards Rule

The employer may take the position that, because the steward should know the contract better than the members, the steward's standard of behavior should be better. Under the law, though, an employer must apply the same standards to stewards as other employees. And, stewards are subject to the same discipline as other workers if they violate the rules of conduct.

Since the line between acceptable and unacceptable behavior is not always clear, stewards who go to extremes can risk their jobs. While they are protected while functioning as union representatives, in their personal behavior they are judged by the same rules as other workers.

Here are some examples of protected and unprotected activities as found in recent arbitration decisions.

Political Buttons

A union officer was cited for "gross insubordination" for wearing a political button following issuance of a new policy prohibiting wearing of political emblems. The arbitrator disagreed with the decision and lifted the suspension because the officer removed the button as soon as the boss told him he was subject to discipline; he wore the button in an attempt to secure written evidence of the policy, which management wouldn't give him; and another manager's comments about the gravity of the infraction was inadequate notice to employees.

Working in the Rain

It was raining and management ordered a shop steward to work outdoors. He disagreed with a union bargaining concession that allowed working in the rain and left the job. He was fired and later claimed he left because he was was sick. The arbitrator upheld the discharge, saying he fabricated the illness excuse to cover going home when ordered to work.

Loud and Belligerent in Meeting

A union committeeman was disciplined when in a grievance meeting he responded to management in a "loud, belligerent, and vulgar manner." The arbitrator reversed the discipline, saying that the committeeman's language was not so outrageous that it crossed the line between vigorous advocacy and misconduct.

In another case a union activist was fired when he attended a meeting called by management to discuss the need to have employees work a full shift. He walked off the job and shouted obscenities after the meeting. The arbitrator upheld the discharge on grounds he had gone too far.

Checking Time Cards

A steward was fired after he was ordered to stop looking at other employees' time cards but had continued to do so. The arbitrator upheld the discharge, saying management had reasonable cause to require the steward to go through supervision before reviewing time cards. The arbitrator noted the steward should have followed the principle of "obey now, grieve later," when there was no immediate danger from health or safety hazards. Further, the union did not establish that the shop steward who was fired for insubordination was a victim of retaliation, even though he thought he was. The arbitrator said the steward's subjective feelings were not supported by the facts.

"One of These Days . . ."

During a heated encounter with a supervisor, the steward said "One of these days . . ." but never finished the sentence. The steward was fired for threatening his boss. The arbitrator said the steward should not have been fired and ruled that the statement in and of itself was not a threat; gentility is not characteristic of grievance processing; and, the evidence didn't prove that the grievant threatened the supervisor.

Two key things to remember when considering a steward's protected status:

- Union officers enjoy significant but not total protection while they are engaged in union business.
- Insubordination that occurs as a result of the steward's personal (as opposed to union) response to a situation is punishable under the contract and rules, the same as others in the workplace.

— George Hagglund is professor emeritus at the School for Workers, University of Wisconsin, Madison.

Using 'Just Cause' to Defend Against Unfair Discipline

January 15, 2019 / Robert M. Schwartz

The principle of "just cause" is the keystone of the collective bargaining agreement. By imposing rigorous qualifications for discipline, the just-cause standard protects everyone in the union.

If an employer could fire workers for trivial or manufactured reasons, it could easily rid itself of militant officers, stewards, and rank and filers.

A typical just-cause provision reads, "No employee will be disciplined or discharged except for just cause." Some agreements use "good cause," "proper cause," "reasonable cause," or simply "cause." Labor arbitrators usually say such terms are equivalent to just cause.

Newly minted supervisors sometimes assume that just cause is an easy criterion to satisfy. On its face, it only appears to require a legitimate reason for taking action. Years of advocacy, however, have helped to mold the standard into a formidable bulwark.

Just Cause for All?

Many countries protect nonunion employees against unfair dismissal. England, France, Ireland, Germany, Japan, and Italy are among those that require all employers to prove just or good cause.

In the U.S., campaigns for "Just Cause for All" laws have been pursued at the state level. Organizers often cite recommendations by the International Labor Organization (an agency of the United Nations) and the Uniform Law Commission, which promotes uniformity of law among the states.

Montana was an early success. A 1987 statute gives at-will employees the right to sue for lost pay if discharged without "good cause." It has, however, no reinstatement provision.

Just Cause for All campaigns allow union and nonunion workers to fight together for fairness and job protection.

Among its accepted requirements: employers must publicize rules, enforce them consistently, follow due process, treat employees alike, act on substantial and credible evidence, apply graduated penalties, and consider mitigating and extenuating circumstances.

Just cause protection marks a sharp dividing line between union and nonunion or "at-will" workers. With few exceptions, employers may not dismiss union workers unless they engage in egregious or repeated misconduct.

On the other hand, employers can fire at-will employees for "good cause, for no cause, or even for cause morally wrong." An at-will employee can be discharged for a single mistake, an argument with a supervisor, an unintentional violation, off-duty conduct, or even for reasons that are patently false.

Since the 1960s many unions have relied on a checklist developed by arbitrator Carroll Daugherty known as "the seven tests of just cause." Unfortunately, the Daugherty tests do not accurately reflect the way arbitrators currently decide cases. It was time to rethink the seven tests.

That's why I undertook a review of more than 15,000 awards by labor arbitrators. The results are laid out in my book *Just Cause: A Union Guide to Winning Discipline Cases*, now available in a newly updated second edition. I found wide agreement among arbitrators on the following basic principles:

1. Prior notice

An employee may not be punished for violating a rule or standard whose nature and penalties have not been made known.

Punishing an employee for failing to follow a rule or policy that the employee does not know about is clearly unfair. Employers must publicize standards in handbooks, on bulletin boards, through the Internet, or by announcement. They must also identify potential penalties, especially if there is a possibility of suspension or discharge.

2. Recent enforcement

Punishment may not be imposed for violating a rule or standard that the employer has not enforced for a prolonged period.

When management fails to take action against an infraction for several months or longer, employees are encouraged to believe that the policy or rule is no longer in effect. In such circumstances, imposing discipline is equivalent to applying a rule of which the employee is unaware.

3. Due process

An employer must conduct an interview or hold a hearing before making a decision to issue discipline, must take action promptly, and must list charges precisely. Once assessed, discipline may not be increased.

Due process, a legal term for procedural fairness, is implicit in the just-cause standard. A paramount obligation is to allow a worker a chance to tell his or her side of the story before the employer makes a decision to impose discipline.

4. Substantial evidence

Charges must be proven by substantial and credible evidence.

Disciplinary action must be based on reliable evidence, not on rumor or speculation. Hearsay (an accusation by a person who does not appear at a hearing) does not support a severe penalty.

5. Equal treatment

Unless justified by a valid distinction, an employer may not assess a much stronger punishment against one employee than it has assessed against another employee known to have committed the same offense.

Favoritism and discrimination are incompatible with just cause. Employers must treat all employees who commit the same or similar offenses essentially alike.

6. Progressive discipline

When responding to misconduct that is short of egregious, an employer must issue at least one level of discipline that allows the employee an opportunity to improve.

It is widely accepted that the purpose of workplace penalties should be to correct misconduct, not to punish or humiliate. When a possibility exists that an employee can improve, the employer should apply the lowest punishment that is likely to achieve the desired result.

7. Mitigating, extenuating, and aggravating circumstances

Discipline must be proportional to the gravity of the offense, taking account of any mitigating, extenuating, or aggravating circumstances.

In addition to the seriousness of an infraction, an employer must consider any other circumstances that reduce or increase the likelihood that the grievant will repeat the offense.

https://labornotes.org/2019/01/using-just-cause-defend-against-unfair-discipline

Union attorney Robert M. Schwartz's Just Cause: A Union Guide to Winning Discipline Cases *is now available in a revised second edition.*
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Duty of Fair Representation

Most stewards take their task very seriously, as well they should. They understand that they are their co-workers' first line of defense against mistreatment by their employer and they understand the steward's responsibility, *by law*, to fairly represent bargaining unit workers to the best of their ability. But where some less experienced stewards get tripped up is in their failure—well-intended, to be sure, but still a failure—to draw a line between their responsibility to fairly represent aggrieved workers and their automatic, no-questions-asked representation of every worker who thinks he or she has a grievance.

Stewards have a legal Duty of Fair Representation, but that doesn't mean filing every grievance brought to you

The fact is, the union *does not* have to file or pursue a grievance each and every time a bargaining unit member thinks it should! The steward who does that is actually doing damage to himself, his co-workers and the union.

The law does require a union to equally and fairly represent all members of the bargaining unit. This means that when making grievance decisions a union or steward should not consider a bargaining unit member's race, gender, nationality, age, religion, politics, unpopularity, union membership, or status as a dues paying member. But the simple act of deciding not to file or pursue a grievance does not mean there has been an automatic violation of the law's "Duty of Fair Representation" (DFR) requirement.

This duty to fairly represent every worker is a requirement under the U.S. National Labor Relations Act (NLRA). But the law does *not* require stewards to file a grievance every time a bargaining unit member complains. A union does *not* have to file a grievance if it has a rational, good-faith belief that the grievance lacks merit. Nor does a union have to take ridiculous or impossible positions to argue for grievances that lack merit. (Canadian Labour Code is similar to U.S. law regarding DFRs, but stewards should also check their provincial laws, just to be cautious. In general, however, the Canadian standard closely mirrors that in the United States.)

For sure, there's nothing to stop a bargaining unit member from filing a charge with the National Labor Relations Board *claiming* he or she was treated unfairly because the union failed to file a grievance, withdrew a grievance, settled a grievance for less then the member thought right, failed to take the grievance to arbitration, didn't prepare well for the arbitration or even mishandled the arbitration. But to win a DFR case a member must prove not just that the union made a mistake, but that the mistake was due to personal hostility or political animosity. And it's not enough to show the union was negligent, inept, or exercised poor judgment; such actions had to be the result of a personal effort or campaign to deny the bargaining unit member his or her rights. A union that breaches its DFR duty in the case of a discharged bargaining unit member can be held liable for back pay.

How do you avoid getting on the wrong side of a DFR case? Take the following precautions:

- Investigate all potential grievances thoroughly. Interview not just the bargaining unit member but all other possible witnesses as well.
- Request all information that you legally can (files, documents, etc.).
- Observe the contractual time limits.
- Do not refuse to fully investigate a potential grievance solely because of the bargaining unit member's sex, race, nationality, age, religion, politics, personality or dues paying status.
- Diligently represent every member of the bargaining unit, even if you consider the complainant to be a destructive force within the union. Just because a person's "bad," in your mind, doesn't mean he or she doesn't have a legitimate grievance.
- Keep the complainant informed of your progress.
- Maintain a good working relationship with the complainant.
- Keep a record of what you have done on the case.
- If the union decides to either not file a grievance or to drop the grievance at some future point, advise the bargaining unit member of this fact in writing or in the presence of witnesses as soon as possible. Explain the reasons for the decision and keep dated notes of the conversation. (This is important because the bargaining unit member will have six months to file a DFR charge with the labor board from the day he was notified by the union.)
- Inform the bargaining unit member of any appeal procedures within the union. The same rules apply after a grievance has been filed, even if it has gone to arbitration.

In summary, the union should only file grievances based on merit and the greater good they will do for the bargaining unit members as a whole. This will also increase the credibility of the union officials with their management counterparts, which will in turn promote a productive labor-management relationship -- which always benefits bargaining unit members.

— Bob Oberstein. The writer is a professor at Ottawa University, Phoenix, where he teaches courses in labor management relations, human resources, effective grievance processing, arbitration and labor/employment law. He also serves as an arbitrator, mediator and fact finder.

Garrity & Loudermill
Public Employees' Rights

1. Garrity Rights:

- The Supreme Court held that a public employee may be compelled to give statements under threat of discharge but that it would be unconstitutional to use those statements in the criminal prosecution of the employee.
- The employee must be advised, but should verify with the employer, that answers to the questions will not be used against them in criminal proceedings (as opposed to department action such as a violation of work rules).
- Before the meeting, the steward, staff representative and employee should ask if the investigation is administrative or criminal.
- If the employer says the matter is criminal, or during an investigatory or fact finding meeting it becomes clear it involves a potential criminal misconduct, the steward should get affirmation from management that the investigation is administrative and for disciplinary purposes only.
- The employee should then invoke Garrity by asking, "Am I being ordered to answer questions as part of my employment with the agency?"
- An employee may not refuse to answer specific, direct, and narrow job-related questions as long as the employer does not compel a waiver of constitutional rights.
- If it appears there is a potential criminal issue, employees should immediately seek legal advice.

2. Loudermill Hearing:

- If the employer decides that they will discipline the employee AND the employee will suffer an economic loss from the proposed discipline (suspension, demotion or termination), the employee has a right to a pre-disciplinary, “Loudermill” meeting or hearing.
- This is the opportunity for the employee and their union representative to present arguments about why the employee should not be disciplined or not be disciplined as severely.
- Following the Loudermill meeting, the employer will decide if they are going to continue with the discipline, drop the discipline, or give a lower level of discipline.

Weingarten Rights

In the 1975 case NLRB v. J. Weingarten Inc., the U.S. Supreme Court declared that unionized employees in the private sector have the right to have a steward present during an investigatory meeting with management when the employee believes the meeting might lead to disciplinary action being taken against them. According to the court, these rights arise as a result of the proper functioning of the National Labor Relations Act (NLRA). The rights flow from NLRA Section 7's guarantee of the right of employees to act "in concert for mutual aid and protection." Denial of this right violates NLRA Section 8(a)(1). Many states, including Washington, recognize the same rights for public employees. Your contract may include additional language about your right to representation.

Weingarten rights apply during investigatory interviews when a supervisor questions an employee to obtain information that could be used as grounds for discipline. When an employee believes such a meeting may lead to discipline, they have the right to request union representation. These basic Weingarten rights stem from the Supreme Court's decision:

- The employee must request representation before or during the meeting.

- After an employee makes the request, the supervisor has these choices:

    - grant the request and wait for the union representative's arrival;
    - deny the request and end the meeting immediately; or
    - give the employee the choice of either ending the meeting or continuing without representation.

WEINGARTEN STATEMENT:

"If the discussion in this meeting could in any way lead to my being disciplined or terminated or impact my personal working conditions, I request that my steward, local officer or union representative be present. Without union representation, I choose not to answer any further questions at this time. This is my right under law."

Source: The AFSCME Steward Handbook

If the supervisor denies the request and continues to ask questions, the employee has a right to refuse to answer. In addition, the supervisor is committing an unfair labor practice (a violation of labor law).

Employee Rights in Weingarten Meetings

Beware that management is not obligated to inform employees of their Weingarten rights – employees must ask for them. Unlike Miranda rights – where police are required to tell a suspect of their right to an attorney- employees must ask for their Weingarten rights. Some locals provide members with a wallet-sized card they can keep with them. If they find themselves in a meeting they believe may lead to discipline, they can read or hand the card to the supervisor.

Steward Rights in Weingarten Meetings

- Ask to be informed of the purpose of the meeting.
- Meet with the employee before the supervisor begins questioning the employee.
- If necessary, request clarification of a question before the employee responds.
- Offer advice to the employee on how to answer a question or object to improper questioning.
- Provide additional information after the questioning is over.

If called into a Weingarten meeting (investigatory meeting), you should also: 1) take detailed notes on the questions asked and the answers given during the meeting; 2) help the employee remain calm during the meeting; and 3) remind the employee to keep answers short and truthful and not to volunteer additional information.

Source: The AFSCME Steward Handbook