



University
of Victoria

Principles and Guidelines for Investigating Alleged Employment Misconduct

- ✓ Legal Principles
- ✓ Expectations of Employee and Supervisors
- ✓ Investigation Process
- ✓ Non-Culpable and Culpable Conduct

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LEGAL ASPECTS OF THE EMPLOYMENT RELATIONSHIP

Introduction

Experienced managers know that the large majority of employees perform their jobs well and with care. A lesser number of employees do not have this ambition or skill, but nevertheless perform at a minimally acceptable level. Finally, there are a few employees whose poor attitude and continuing misconduct clearly distinguish them from their fellow employees. These exceedingly hard-to-handle employees command a disproportionate amount of scarce management time.

As a supervisor, you have the responsibility to work with these hard-to-handle employees to attempt to correct their performance. You may also have a primary responsibility for deciding the employment consequences if these employees do not improve as required.

This document is designed to provide you with the essential information that you will need to carry out a fair and effective correction process. Topics discussed include the following:

- ▶ a review of the essential legal principles governing this area
- ▶ a listing of some of the fundamental rights and obligations of managers engaged in the supervision of employees
- ▶ an introduction to the conduct of a fair and effective investigation, including a review of six steps to conclusion
- ▶ a review of the legally sound and effective means at your disposal for correcting misconduct and poor performance

The appendices include:

- ▶ Common Questions,
- ▶ Tips for the Interview, and;
- ▶ The Arbitrators Viewpoint.

A. Legal Principles-The Basics

1. Basic Obligations

The employment relationship, particularly when it is governed by a sophisticated collective agreement, can be very complex, but at its root are some simple principles. These principles continue to apply in the collective bargaining setting, unless they are expressly changed by the employer and its trade union. An employer agrees to employ the employee for a particular job and to pay the employee a stipulated rate. By accepting employment, the employee agrees to attend at work regularly and to perform the work with reasonable competence. The employee also implicitly agrees to perform work honestly and faithfully and to accept the lawful directions of the employer.

2. Culpable and Non-Culpable Conduct

Employees may breach their obligations in either of two ways (or in a mixture of both). The first involves what is called *culpable conduct*, which is blameworthy conduct. *Culpable conduct* may lead an employer to impose discipline. Disciplinary measures are penalties, which are designed to make clear to an employee that his or her conduct must be corrected, or further penalties, up to and including dismissal, may be imposed.

Culpable conduct can lead to progressive discipline

In extreme cases, such as theft or assault, misconduct may lead directly to dismissal from employment. But in most situations, misconduct calls for *progressive discipline*. Progressive discipline is an approach calling for progressively more severe discipline until such time as an employee either corrects her or his misconduct or is terminated from employment.

The second breach of obligation is referred to as *non-culpable conduct*, which is non-blameworthy conduct. *Non-culpable conduct* cannot legally be corrected with discipline.

Non-culpable conduct cannot legally be dealt with through discipline.

Discipline, is inappropriate in a circumstance in which the employee cannot be faulted for the poor performance. This may occur where the employee is excessively absent from work due to medical causes.

This may also occur where an individual is simply no longer capable of performing the job to an acceptable standard-through disability, or lack of aptitude, for instance. Subject to the human rights issues, which can arise in these circumstances and where accommodation for a disability may be appropriate, persons who do not hold up their end of the employment bargain can ultimately be discharged. This is so even if their poor performance cannot be rectified due to matters that are beyond their control.

Often, there is a mixture of both culpable and non-culpable conduct in the same set of circumstances, and many times it can be difficult to tell whether conduct is blameworthy or not. The issues involving culpable and non-culpable conduct are so different that they must be treated separately.

3. The Importance of Due Process

In a discipline case, the employer has the *onus of proof*. This means that the employer has the legal burden of proving both that the discipline was warranted and that the magnitude of discipline was reasonable in the circumstances. If the arbitrator finds that discipline was not warranted, the discipline will be revoked. If the arbitrator considers that discipline is appropriate, but disapproves of the severity of discipline that was issued, the arbitrator can substitute a different measure of discipline. This kind of inquiry addresses the *merits* of the case.

An arbitrator may also be asked to inquire into the process followed by the employer in reaching its decision to discipline. The focus in discipline cases was once almost exclusively on the alleged offence – that is the merits of the case. Needless to say, this remains very important, but the question of *fairness* in the investigation process has taken on a life of its own as a major issue in labour arbitration proceedings where the following questions are often asked:

- Was the employer thorough in its investigation?
- Were the employer representatives biased against the employee from the outset?
- Did the employer provide proper notice of and allow the employee to have a shop steward at the disciplinary meeting?
- Did the investigation allow the employee to provide full answer to the allegation?
Did the employer overlook or withhold evidence during the investigation?

Procedural flaws may in some cases result in an arbitrator declaring discipline to be void, namely, without any legal effect.

Subjective fairness has always been an essential component to a legitimate discipline process. But subjective fairness is not enough. It is now important that the actions of managers not only be fair but clearly *be seen to be* fair.

The actions of managers must not only be fair, but clearly be seen to be fair.

B. What You Can Reasonably Expect From Employees

The following guidelines will help define the boundaries of reasonable performance and conduct that you, as supervisors and managers, can expect from employees.

1. Honesty and Integrity

- Employees have an obligation to represent the University in a responsible manner.
- You can expect employees to conduct themselves with honesty and integrity. This includes, for example:
 - not removing or using private documents where it is reasonable to assume the documents are confidential;
 - safeguarding, and not stealing property of the University, co-workers and students;
 - having scrupulous regard for the confidentiality of student, employee, and University information;
 - respecting the privacy of other staff (e.g. avoiding listening in to telephone or other conversations); and,
 - using University property or equipment appropriately (i.e. internet, telephone, fax, printers)

2. Performance

- When performing their job, employees must meet a reasonable and acceptable standard. This includes the following:
 - being reasonably careful, and not careless, in the performance of work; being reasonably efficient in their work; properly carrying out their job duties;
 - carrying out the lawful directions or instructions of their supervisor in a cooperative manner;
 - working co-operatively with co-workers; and,
 - accepting their supervisors' coaching and feedback to improve performance.
- Employees are expected to make every effort to attend work capable of safely performing their duties (eg. being sober and physically and mentally able). If they cannot, employees are expected to ask for assistance or accommodation.
- Employees must treat their co-workers, supervisors, staff you supervise, and colleagues in a respectful manner. Bullying, intimidation, sexually harassing or other similar behavior is unacceptable (See University DISCRIMINATION AND HARASSMENT POLICY AND PROCEDURES #1150).

3. Attendance

- Employees are expected to organize their personal affairs so that they can attend work on a regular basis. In order to assist employees with this, there are provisions within the Collective Agreements or employment contracts. These may include paid or unpaid leaves, flexibility in scheduling, and other time off provisions as operations allow.
- Where an employee may not be attending work regularly, you as the supervisor or manager have a responsibility to meet with the employee to determine what, if anything, the University can reasonably do to assist them in their efforts to come to work.
- Employees must provide a reasonable or justifiable explanation for their absence (subject to the limits in your Collective Agreement). Concerns for privacy may allow an employee to refuse the details of an illness, but when an employee is unexpectedly away from work for justifiable reasons, they must notify you about the absence, its expected duration, and the general reasons for the absence.
- When an employee intends to leave work early, even for justifiable cause, they must notify you, except in rare circumstances where this would not be reasonable.

4. Off-Duty Conduct

- You can expect that employees will conduct themselves away from their jobs in such a way as to not seriously prejudice the University's interests or reputation.

5. Dealing with problems or issues

- If an employee has a complaint or issue with their work conditions, co-workers or their duties, they are expected to use proper procedures (e.g. notifying their supervisor, union steward, human resources consultants) to remedy a situation.
- Ultimately if an employee's continued employment presents a serious risk to the University's property or to the well-being of co-workers, or where their behaviour persists over such a period of time so as to confirm conclusively their unwillingness to cooperate or to follow the reasonable and lawful directions of their supervisor, the employee may be discharged for cause.

C. What Employees Can Expect From You As A Supervisor

The following guidelines define the boundaries of reasonable support that is expected from you as a supervisor. **Allow these guidelines to supplement, not replace, your own reasonable expectations.**

1. Job Description and Expectations

- When the employee is hired, they can reasonably expect to come into a well-defined role, with clear expectations that are applied consistent with the job description. Normally, the role and expectations would begin with a job description or job profile enhanced by the UVic Core and Leadership Competencies.
- The job description and expectations form the basis for [Performance Development](#) including Probationary and Annual Performance Planning and Review.

2. Orientation¹

- The employee can expect you, as their supervisor, to ensure they are oriented to their job, as well as to their role, and the roles of their colleagues.
- The employee's orientation should also include departmental and University policies and procedures as well as any health, safety and environment rules and regulations that impact on their work and personal safety.

3. Performance Development²

- The University has a performance development process in place that includes both Probationary and Annual Planning and Review.
- Performance planning will normally begin in the probationary or trial period. This is the opportunity for you and the employee to assess the fit of the position. The assigned [Human Resource Consultant](#)³ can assist in this.
- Once the employee has passed their probation or trial period, you should begin the annual performance planning and review process, including regular 'check-ins'. The plans ensure the employee is clear on expectations, the "check-ins" allow for progress updates and the reviews 'close-off' the year in preparation for a new plan and year.

¹ <http://web.uvic.ca/hr/employment/index.html>

² <http://web.uvic.ca/hr/hrhandbook/performancedevelopment/index.html>

³ <http://web.uvic.ca/hr/hrhandbook/hrresources/hrcportfolios.pdf>

4. Feedback and Coaching

- As a supervisor you have a responsibility to support the employee in the performance of their duties and this sometimes requires constructive feedback on performance or behaviour inconsistent with expectations. This is not discipline; rather it is mentoring and guidance.
- You should also provide recognition for work well done and for work that is 'on the right track'.
- You are also expected to provide practical coaching on the technical and other aspects of the employee's position as well as development opportunities that fit with the employee's career and performance plan.

5. Performance Improvement⁴

- In situations where you have concerns related to the employee's performance, you are responsible for developing and implementing a performance improvement plan. This process precedes, and hopefully negates the need for, either progressive discipline or non-culpable actions.
- You can find details of this process on the Human Resources Web-Site. You are encouraged to contact your H.R. Consultant before embarking on this process.

6. Team Building, Change, Communication and Dealing with Conflicts

- As a supervisor, you are responsible for ensuring the smooth operation of your area of responsibility. This includes building strong teamwork, managing change, ensuring regular and clear communication and dealing with conflicts as they arise. Ultimately, as a direct supervisor you have the most impact on the employee's experience of the workplace.
- Employees can expect you to take actions that will ensure a positive and productive work environment.

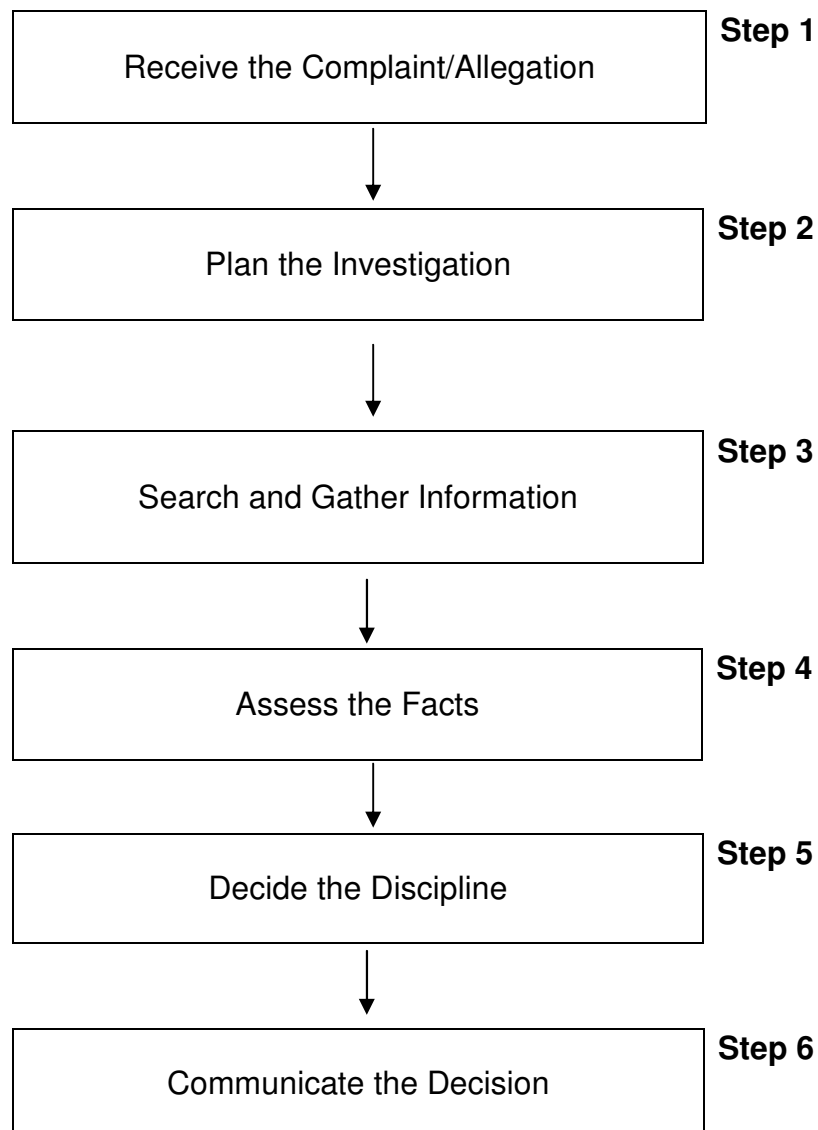
7. Progressive Discipline

- As a supervisor you have an obligation to both the University and to your employees to appropriately determine and assess progressive discipline. This process is in place to develop corrective strategies and actions, with employees, before the employment relationship is put at risk.
- Human Resources offers training and assistance to assist supervisors in completing these duties.

⁴ <http://web.uvic.ca/hr/hrhandbook/performancedevelopment/performanceimprovement.html>

D. Investigating Alleged Misconduct

Most complaints or concerns can be dealt with simply and quickly. Some cannot, and require a full investigation. The following flow-chart illustrates a six-step process which can guide you in undertaking a full-blown investigation of alleged employee disciplinary misconduct:



Step 1. Receive the Complaint/Allegation

The investigation of employee misconduct begins with an allegation or initial concern. It could be that you observe the conduct yourself and decide to investigate it. Allegedly improper conduct may be reported to you by an employee. Another manager could report it. It might be a student or a student's family who reports suspicious or allegedly improper behaviour to you. In every case, you must make an initial assessment of the allegation. Does it justify further investigation? Should you get advice on how to handle this situation? It is always wise to take a cautious approach to investigation.

At the earliest stages, you may have to deal with the following concerns, among others, before you even begin to plan your investigation:

- ▶ An employee reports the conduct and wants to receive your assurance that she will not be called as a witness or otherwise identified to the employee under investigation as the person who reported her. Can you give it?
- ▶ The allegation involves what might be criminal conduct. Should you report it to the police? When should you notify Campus Security Services and appropriate emergency services (e.g. police, ambulance, Employee and Family Assistance Program) and what are the union representation issues?
- ▶ The allegations involve off-duty conduct. Can you look into it further or is it a private matter for the employee?
- ▶ There is some question that the employee may be violent. Do you have a duty to warn others of this, particularly if you have no proven facts to go on?
- ▶ Should you suspend the employee (with or without pay) pending investigation of the allegation? When is it appropriate to do this?

The questions above are not at all easy ones. Contact Human Resources early. Get as much advice and assistance as you feel that you need even before beginning the investigation!

Step 2. Plan the Investigation

You probably have a good sense of what is involved in an investigation. You interview people. You gather documents. You question the employee whose conduct is in question. As in an investigation into a financial irregularity, you must know what you are looking for and you must have a plan. Each case will be somewhat different. Careful planning of the investigation is very important to a fair outcome, and is a step, which should not be neglected no matter what the urgency of the situation

The following are just some of the questions you might ask yourself before beginning the investigation:

- Does the collective agreement place obligations on me that I should be aware of before or during the investigation? For instance, you might find out the following:
 - ▶ Must I give notice orally or in writing to the union or the employee that an allegation has been made?
 - ▶ Must I agree to the presence of a shop steward when I interview the employee against whom the allegations are made?
 - ▶ Must I give the employee any particular amount of notice before the interview?
 - ▶ If the complaint was made in writing, do I have an obligation to provide a copy of it to the employee? To the union? If so, when?
- What other employees, if any, should I interview? Should I allow bargaining unit witnesses to have a union representative, even though they are not under investigation? Are there circumstances in which I might suggest this myself to the employee?
- Do I know enough about the legal treatment of this kind of allegation to know what information to seek and the pitfalls? Should I first get some specialized assistance from Human Resources to ensure that I am on the right track with my questions?

- Should I interview the employee against whom the allegations are made first, or only after I have interviewed everyone else? Should I interview the accused employee twice?
- What documents should I be looking for in this investigation? Should I get them-and study them-before beginning the interviews?
- Several of the documents in this investigation involve employees and may disclose their names.
- How will I deal with this, particularly if I must show the documents to the employee under investigation or to other persons?

Step 3. Search and Gather Information

Having planned your investigation in the previous step, you now carry it out. This part of the investigation is intended to get at the facts. You can do the following, not necessarily in this order:

Interview the complainant(s), assuming there is a complainant. Sit down with the complainant in a private and unhurried session and get the full story. Ask for any relevant documents, erring on the side of receiving more rather than fewer than you really need. If the complainant is a member of a Union, they should have the opportunity to be represented as well, even if they are a member of the same Union as whom they are complaining about. On occasion they may be asked if they are willing to provide a written statement based on their personal knowledge. If not, ask if they are willing to sign a statement that is created based on your own notes of the interview. ~ Remember to sign and date all documentation.

Interview all other witnesses. In this context, witness means any person who may have information about the events you are investigating. It does not need to be an eye-witness: In fact, most witnesses in legal proceedings are not eye-witnesses to the crucial event, but have relevant information that surrounds it. Once you have finished interviewing the witnesses, you may ask them to identify other persons who may have knowledge. Then interview those people. As with the complainant, on occasion it may be necessary to get a written statement.

Search and gather all relevant documents. This is an exercise which you perform as you go along. Depending on the situation, these could include the following:

- time, attendance or payroll records, unusual incident reports, or any of the myriad of written reports and records in the University setting
- collective agreements, statutes, policies, rules, handbooks, job descriptions, and other materials which might identify the standard of conduct which is expected of the employees in the circumstances under investigation

- the personnel file of the employee under investigation, including but not limited to the discipline record
- previous awards involving the University which might be expected to have come to the attention of the employees

Meet with the Employee concerned and get his or her side of the story. This may seem obvious as you have an obligation of fairness to ensure that you have the employee's views. You will usually want to confront the employee in a non-adversarial way with the allegations and allow the employee to make full answer. This meeting should take place as soon as possible after you have gathered the necessary information from other sources. You may wish to interview the employee more than once during the investigation if you believe this is necessary. Meetings with employees that may lead to discipline typically require proper notice and Union representation. Below is a listing of things to keep in mind during such meetings:

- Unless inordinate delay will result, you should have another excluded university representative present to take detailed notes to prevent disputes about what was stated in the interview.
- Provide the employee with a sufficiently detailed description of what the employee is said to have done or what your concern is to allow the employee to provide a full response or explanation.
- You are not required to answer detailed questions from the Union or the employee about the allegation or incident under investigation that would prejudice your investigation. However, you are required to answer reasonable questions that allow the employee to provide a full response.
- Ensure the employee is provided every reasonable opportunity to provide a full response and/or explanation.
- Ask clarifying and open ended vs. leading questions to ensure you have a full understanding.
- Depending on the circumstances of the case, determine whether nor not the employee agrees that s/he was aware of the standard of conduct that was allegedly breached.

- Establish how the employee was aware of the standard (e.g. policy, etc.) If the employee denies the allegation, ask for an explanation of the incident from the employee's point of view.
- Ask the employee if there are any other matters that s/he wants to tell you about that you should consider.
- End the discussion by advising the employee that you will be continuing your investigation, that they will be advised of your decision, and that there may be disciplinary action. You may need to advise an employee not to discuss the matter with anyone other than their Union and you may have to direct that they not attempt to approach others (e.g. a complainant).

Record the results of your interviews. It is preferable that you take notes during the discussion, but if you feel that you can't and are unable to arrange for another supervisor to do so then, make your interview record immediately after the interview is complete. You should be aware that as these are investigation notes, the other side to any future dispute will likely be able to demand copies of these records if the matter goes to hearing. As with a complainant or witnesses, on occasion it may be necessary to get a written statement.

Consider any Mitigating Circumstances. Also verify, to the degree possible, the employee's explanation. Consider how long the employee has worked for the University without any adverse reports on file.

Comply with all Collective Agreement provisions. Violations of fundamental obligations of procedure under the collective agreement during an investigation, no matter how innocent, can result in discipline being disallowed by an arbitrator.

Step 4. Assess the Facts

Your investigation is intended to provide you with a clear picture of the facts of who, what, when, where, why, and how. You can then consider what the implications of those facts are, including the question of whether and to what extent discipline may be imposed on the employee. Finding the facts is not a science-it is an art. It is part detective work, part intuition, part observation, and a lot of hard work. But it is a task that must be done, and done well, before an investigation can be considered complete.

Finders of fact are often confronted with different *stories*. Key witnesses, even eye-witnesses to a critical event, see things differently. One of the major challenges for a fact finder is to determine *credibility*.

Measuring credibility is not merely deciding who is telling the truth and who is lying. Arbitrators rarely find that someone is actively lying on the witness stand. Instead, they accept that most people are telling the truth as they know it, or as they have convinced themselves of it. It happens that some people know the truth and tell it, and others do not know the truth but are equally forthcoming in relating it.

If you are going to find that someone is not telling the truth, you should be able to say why you believe this. Of course, such a finding is not necessary in order to reject a story. It is more likely that you will find that a story does not measure up to the probabilities, even if the witness is telling what they believe to be the truth.

When attempting to determine whether a person is relating an accurate story, you can look to the following factors for assistance:

- ▶ What is the witness's **demeanor** like? Did the witness have a forthright and convincing manner of telling the story? (Note that it is dangerous to rely on this alone-- some people are convincing without being accurate)
- ▶ Did the witness have a **bias** or self-interest, which might taint the story?
- ▶ Was the story **reasonable**?
- ▶ Did the story have **internal consistency**? Did the pieces hang together, or were there things out of place?
- ▶ If the story was told more than once, did the story remain **consistent**?

- ▶ Did the witness have the **capacity** and **opportunity** to see the events unfold in the way that they have described? (An extreme example to make the point-could a legally blind person really recognize anyone from across the football field?)

- ▶ Is the story told by the witness inherently **probable** or not? Which of two or more stories, if they differ, is more probable in view of all of the circumstances?

In your investigation, you must strive equally to find both the innocent answer and the guilty one. You must be as open to an innocent explanation of events as you are to a guilty one. The more serious the offence, the more convincing must be the proof. Where the offence is so serious that the employee's career would effectively be over, you must be very satisfied that the event occurred.

Step 5(a). Decide on Discipline-First Key Question: Has the Employee Given Just and Reasonable Cause for Some Form of Discipline?

If the current matter leads to termination, and if it proceeds to arbitration, the arbitrator will pose and answer the following three questions:

- ▶ Has the employee given just and reasonable cause for some form of discipline by the employer?
- ▶ If so, was the employer's decision to dismiss the employee an excessive response in all of the circumstances of the case?
- ▶ Finally, if the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

Borrowing from this test, which is applied in a modified fashion to all disciplinary penalties short of termination, you will have the following two key questions to answer before communicating the results:

- 1) Has the employee under investigation given just and reasonable cause for some form of discipline, and;
- 2) If so, what is the appropriate measure of discipline?

First, has the employee given just and reasonable cause for some form of discipline by the employer? In Step 4; you made the judgment about whether the employee actually engaged in the conduct, which triggered the investigation. In many cases, this finding will largely dispose of the issue of whether discipline is warranted. This may be particularly true in cases such as theft, abuse, serious insubordination, and assault of another employee. In some cases, however, the fact that conduct is improper may not be self-evident. It may require a close judgment about whether the conduct is truly disciplinable.

Did the employee clearly know that the conduct was inappropriate? When considering this question, you may have to consider carefully the following factors:

- ▶ Has your investigation disclosed the standard of conduct that is binding on the employee and how this standard was made known to the employee?

- ▶ The sources of the standards are varied. Collective agreements will often contain provisions, which identify standards of conduct. Employer policies, rules and handbooks are other useful sources of standards. Job descriptions often spell out features of a position that are highly relevant to a consideration of alleged misconduct.
- ▶ Employees in the University are often bound by statutes to certain standards of conduct. As well, arbitration awards involving the University can identify standards and be binding on employees, particularly where they have received wide circulation.
- ▶ Finally, the knowledge of the standard and its seriousness may have been imparted to the employee in previous disciplinary or non-disciplinary settings. Whether or not an incident or communication forms part of a formal disciplinary record, did a previous communication bring to the employee's attention that he or she must behave in a certain way?

Does the conduct of the employer absolve the employee?

- ▶ Has the Employer done, or not done, something, which can prevent it from issuing discipline to this employee, even if it is otherwise fully deserved? These questions relate back to what employees can reasonably expect from their supervisor.
- ▶ Has there been such a delay in the investigation either commencing or proceeding that it might now be unfair to discipline the employee? Has the University or a representative somehow condoned the discipline by having knowledge of it without acting? Has a supervisor already spoken to the employee about the conduct, therefore preventing further discipline because of *double jeopardy* principles? Is there a time limit in the collective agreement for action after the discovery of an offence?

- ▶ Has the supervisor provided a clear statement of the employee's role and responsibilities (by way of a fulsome job description, for instance)? Has employee been given proper orientation and training during their probation/trial period? Have the University and department rules been clearly communicated? Has the supervisor given sufficient coaching and feedback?
- ▶ Another way in which discipline may not be reasonable is if the University has not been consistent in its handling of identical or substantially similar cases. Is there a consistency problem? How does it affect this particular case? Can you discipline in this instance or must you first warn?

Is the conduct non-culpable?

- ▶ We earlier discussed the difference between culpable and non-culpable conduct. If the conduct, while impermissible, is non-blameworthy, you will have to find some other means other than discipline to correct it. The employee may, by reason of illness, disability, or incapacity, for example, be simply unable to correct the conduct. This calls for non-culpable means of rectifying the situation (please see page 34).

Is the conduct off-duty and beyond the purview of the employer?

- ▶ Is the conduct, which occurred off-duty private conduct, or does it subject the employee to the discipline process? A "Yes" answer to any of the following three questions justifies employer intervention, but focus primarily on the third question in resolving this issue: (1) Was the employee's conduct sufficiently injurious to the interest of the employer? (2) Did the employee act in a manner incompatible with the due and faithful discharge of his duty? (3) Did the employee do anything prejudicial or likely to be prejudicial to the reputation of the employer?

Will a non-disciplinary warning accomplish your objectives?

- ▶ With the advantage of the full results before you, are you uneasy or uncertain about whether the case justifies discipline? If so, consider whether a non-disciplinary warning will accomplish your objectives. Get advice as you see fit.

What are the Mitigating Factors?

Next, you need to consider the so-called *mitigating circumstances* -- A list of factors to have in mind when considering the ultimate penalty of termination. The most controversial form of discipline is of course termination. Terminations typically occur in two circumstances, either where an incident is so serious that in itself it justifies termination, or where an incident, while not in itself calling for termination, justifies termination on the basis of the employee's previous disciplinary record.

In termination cases, arbitrators consider a number of mitigating circumstances to decide if the discipline was appropriate. Many of them are applicable to less serious disciplinary sanctions as well and so you should consider them even if termination is not being considered. The following is not an exhaustive list of mitigating factors, but it is essentially the list used by arbitrators in arriving at decisions on terminations specifically and other disciplines more broadly:

The Nature of the Offence (Its Seriousness)

This refers to the inherent seriousness of a particular offence. Although there are few if any offences which arbitrators will consider justify immediate termination without any consideration of rehabilitation, some still stand out. They include theft, serious abuse, and serious criminal assault. You will recognize that even in these cases there can be a very significant question of rehabilitation. Termination for a single, first offence must be carefully considered because arbitrators will be very careful to determine whether the employment relationship can be repaired.

The Seriousness *of* the Offence *in* Terms *of* the Employer's Policies and Obligations

This subject is somewhat repetitious of another topic mentioned later in this paper. The focus here, however, is on whether the conduct offends specific policies or obligations of the university. Is the conduct discussed in university policies, procedures, or any of the other types of documents that you hunted down in your investigation? Even if not, how serious is the offence in terms of what your university is seeking to accomplish? In terms of your obligations to the public? This includes a consideration of the impact of the misconduct on the university's reputation.

What is the impact of the misconduct on other employees? Does the misconduct cause employees to lose morale? Does it cause them to fear for their personal safety or belongings? Does it cause them to refuse to work with the alleged wrongdoer? Depending on the circumstances, these can be vital questions.

What other impacts does the conduct have on the operations? What chain of events can be started by the misconduct? What resources are consumed in having to guard against it? If this matter ultimately comes before an arbitrator, that person will want to know the impact of the conduct in the real-life setting of the University.

The Record of the Employee

What is the employee's discipline record? This is of course a critical question in determining whether termination may be warranted in many cases. Watch to ensure that the collective agreement does not prevent you from taking a particular item of discipline into account because of a *sunset clause*. A sunset clause is a provision that removes previous discipline from consideration after a stipulated period of time. Be careful about this because discipline based on previous discipline that has been improperly considered would almost certainly be varied by an arbitrator.

But the disciplinary record is not the only record that can be taken into account. The employee's non-disciplinary work record may also be relevant to the issue of penalty. It can have particular significance in cases of dismissal. Where the employment history is characterized by neglect for duty and disrespect for authority, reinstatement is less likely if the matter proceeds to hearing. By the same token, a work history characterized by loyal and diligent service will increase the prospects that the employment relationship can be restored.

The Long Service of the Employee

In most circumstances (but not all) a good, lengthy work record stands to the employee's credit. This does not refer to a record that is bare of discipline only because of the operation of sunset clauses (see paragraphs just above). An employee who has a bad record of this kind cannot refer to this factor in his or her favour before an arbitrator.

Whether or Not the Offence Was an Isolated Incident in the Employment History of the Employee

People make mistakes, sometime bad mistakes. This factor tempers justice with mercy where the misconduct is clearly out-of-character for the employee.

Provocation

Was the misconduct in some way provoked? This may lessen its seriousness. This factor is often very significant in insubordination cases.

Evidence That University Rules of Conduct, Whether Unwritten or Posted, Have Not Been Uniformly Enforced, Thus Constituting a Form of Discrimination

You will recognize this factor from an earlier stage. Like offences must be dealt with in a like manner. If the University has not enforced a particular sanction in the past, there may be a serious question about whether it can do so in this case without first notifying the employees generally about its seriousness:

By the same token, you must be very careful not to mistakenly assume that two cases are the same and therefore require identical treatment. Two employees who misconduct themselves in identical fashion may legitimately receive different discipline depending on a number of factors, including their disciplinary records.

Was It Spur-of-the-Moment Misconduct? or Was it Systematic and Repetitive? Was It Premeditated, Planned and Deliberate?

These factors apply most specifically to issues of dishonesty. The issue is whether the University will be able to trust the employee to act honestly in the future. Answering these questions can help make that determination. If the dishonest event was planned, and deliberately carried out with some knowledge of the consequences, this is much different than a spur-of-the-moment act that the employee truly regrets.

Did the Misconduct Involve a Breach of Trust?

This factor looks at the impact of the offence. Was it a breach of an essential trust between the employee and the employer? Or between the employee and the public? Or between the employee and co-workers? Or did the employee lead another employee into misconduct and put that other employee's livelihood at stake?

Failure of the Employee to Apologize and Settle the Matter After Being Given an Opportunity to Do So

This is a very important factor in dishonesty cases. An employee who does not acknowledge a theft or similar act at the earliest opportunity may be a poor candidate for reinstatement if a termination is taken to arbitration.

Failure of the Employer to Permit the Employee to Explain or Deny the Alleged Offence

This is self-evident. The employer must allow the employee to explain, or attempt to explain, the event.

Bona Fide Confusion or Mistake by the Employee As To Whether He or She Was Entitled to Do the Act

This relates to the earlier discussion about whether University policies or other documents or events have brought to the employee's attention that certain conduct is wrongful. This does not at all mean that an employer must always have a policy in place before taking action against misconduct. For example, arbitrators have confirmed that it is unnecessary to have a policy against theft before taking action, as employees do not need to be instructed that they must not steal.

Employee's Inability, Due to Drunkenness or Emotional Problems, to Appreciate the Wrongfulness of His or Her Act

This factor has become more prevalent. To cover it comprehensively would require special treatment in a workshop all its own. For now, it is important that you consider whether such a factor is present, and take advice if it is. Diminished capacity to appreciate the nature and consequences of an act can obviously result in a sense of diminished responsibility by an employee.

Relatively Trivial Nature of the Harm Done

This is a factor that calls on you to put the offence in perspective and not simply proceed in all cases on the footing of high principle. In some cases, if little harm has been done, and the employee recognizes the inappropriateness of the conduct, arbitrators will be moved by this factor.

Employee's Future Prospects for Likely Good Behaviour

This is an exceptionally important catch-all factor in dismissal cases. Discipline is intended to be corrective, until the correction process is finished. Arbitrators wish to be sure that the employee has reached the end of the line. If the employee has good prospects for future good behaviour, an arbitrator may be well inclined to restore the employment relationship on a last chance basis.

One of the critical factors here (which has certainly raised its head elsewhere as well) is whether the employee knew that his or her conduct was improper at the time of its occurrence. Another key factor is whether the employee has violated a commitment that he or she may have given to the Employer in another, previous situation.

It is in this area that the non-disciplinary aspects of an employee's work record can have great importance. Is the work record of the past, including attendance, attitude, and performance appraisals, a good predictor of the future? If not, what has changed in the employee's attitude or approach to the workplace?

What resources were available to the employee in the workplace that the employee did not utilize? Is it relevant that an alcoholic employee knows of but never uses an employee assistance program? What is it about the current situation that implies changed behaviour in the future?

Extraordinary Economic Hardship

Arbitrators may take into account whether termination will result in extraordinary economic hardship for the employee.

The foregoing is not a complete list. Nor do all of the factors mentioned in it have application to all cases. Some, like those dealing with recognition and apology, have their greatest impact in theft and dishonesty cases. Others may have greater application in patient abuse situations. In any case, the exercise of considering the mitigating factors is a very important step prior to deciding and communicating the results.

**Step 5(b). Decide the Level of Discipline-Second Key Question:
What is the Appropriate Measure of Discipline?**

You have decided that the event occurred and that it justifies discipline. How much discipline? Keep in mind that at all levels of discipline, procedural obligations (such as Union involvement) must be followed. Subject to the specific provisions of the Collective Agreement, as well as thorough review of the above-noted questions, the disciplinary sanctions available to you may include the following:

Verbal Warning⁵ This is often the first step when the conduct in question is a minor infraction. Examples include lateness, minor breach of policy, quarrelling with co-workers and very minor insubordination. The purpose of the verbal warning is to ensure that the employee is spoken to and to make clear that any repetition of the conduct will result in greater discipline. The supervisor should put a note in their own working file, not in the employee's personnel file.

Written Warning These may or may not be preceded by a verbal warning depending on the seriousness of the misconduct. They may be appropriate if one or more verbal warnings have been ineffective to correct employee misconduct. The written warning should follow an investigation meeting and:

- give details of the incident, unacceptable behaviour or performance which has occurred;
- refer to any previous problems and progressive discussions which relate to this situation;
- report back the employee's explanation or lack thereof;
- explain what actions are to be taken to bring about improvement and what follow up actions the supervisor intends;
- state clearly that repetition may lead to more severe disciplinary action and indicate follow-up action to be taken;
- be copied to the employee file as well as the Union.

⁵ Note that in the CUPE951 Collective Agreement, a verbal warning precedes formal discipline and is therefore not considered a step in the "progressive discipline" process (see Article 13).

Short-Term Suspension This suspension usually lasts from one to three days. It may be imposed for more serious offences, such as deliberate damage to property, or absenteeism without an acceptable excuse, or where a verbal or written warning has not succeeded. The purpose of short-term suspension is to bring home to the employee that the employer has a serious concern about the employee's behaviour and that repetition could result in further, more serious disciplinary action, including termination.

Long-Term Suspension This involves a suspension of one week or more. It is normally issued when lesser forms of discipline have failed to bring about a change in the employee's conduct or where the misconduct is so serious as to justify a very serious suspension. This type of suspension may be appropriate for conduct, which occurs repeatedly, such as fighting, on-the-job intoxication, gross negligence, and gross insubordination. It is intended to convince the employee that her or his job with the employer is in serious jeopardy and that employment will be terminated if the conduct is not immediately corrected.

Suspensions of any length are confirmed in writing and will include, as well as the items noted above, the duration (start and end date) of the suspension, as well as any conditions that may be imposed upon return to work.

Termination This is the end of the road. You must be sure that you have carefully studied the case to determine the prospects for success.

Step 6. Communicate the Decision

The decision has been made, and it is now time to communicate it to the employee. You will wish to consider the following checklist before carrying out the communication:

Recheck the Collective Agreement Provisions.

What, if anything, does the collective agreement say about the following?

- ▶ whether the communication is to be oral or in writing?
- ▶ confirm that the Union and employee file are copied on the communication?
- ▶ what is the timing of the communication; are there notice provisions?
- ▶ any requirements for the presence of representatives during the communication process?
- ▶ any other collective agreement issues arising in this context?

Plan the Meeting Carefully

- ▶ Meet in a private location – sometimes away from the immediate work site is best.
- ▶ Ensure that all the required parties are there including a Union steward and, where practical, a management witness.
- ▶ Plan the content so that the meeting remains on the subject.
- ▶ Keep the meeting short and to the point.
- ▶ Present the results in a respectful and professional way.

Consider Your Options for Drafting the Communication. Consider the following questions:

- ▶ Are there any available university precedents for this kind of communication which can assist you?
- ▶ Apart from collective agreement concerns, are there any legal concerns respecting the content of this particular communication?
- ▶ In the circumstances of this particular case, should the communication be lengthy or short and to the point?

Consider Your Options and Obligations for Communicating the Decision to Other Employees

Discipline is normally a personal and confidential matter, and it is very rare that co-workers would be advised of such.

- ▶ In cases of termination of employment, please work with your Human Resources Consultant in developing an appropriate notice to co-workers and others.

Follow Up

As with any good management practice, monitoring and follow up is not just advisable, it is essential to maintaining the intended effectiveness of the disciplinary sanction. For example, should the situation involve culpable non-performance, which is to be reviewed at some future date, ensure that you follow up exactly as you declared in the discipline Failure to do so may well adversely impact any future management action.

E. Non-Culpable Conduct: Dealing with the Poor Performer

The issues of culpable and non-culpable conduct were discussed at the beginning of this document. This section focuses on the particularly troublesome issue of non-culpable poor work performance.

Poor work performance issues often come to a head when an incident risks patient safety. Such an incident obviously generates the need for a careful investigation. If, during the course of the investigation, you decide that the matter is non-culpable (that is, non-blameworthy) then you must ensure that you do not treat the matter as a disciplinary issue.

The principal difference lies in the approach to correction. In the disciplinary context, penalties are used to get the employee's attention and to rehabilitate the employee. In the non-culpable setting, the key objectives are to ensure that the employee knows what is expected, receives appropriate instructions, and is aware of the consequences of failure, even if she or he can ultimately do nothing to prevent failure.

If you are considering termination of an employee for non-culpable work performance problems, then you must be satisfied about each of the following:

- ▶ The University has identified to the employee the level of job performance that it requires.
- ▶ The University has communicated these standards to the employee.
- ▶ The University has given suitable instruction and supervision to enable the employee to meet the standards.
- ▶ The University will be able to establish on the evidence before an arbitrator that the employee did not meet the standards
- ▶ The University can prove before an arbitrator that it warned the employee in clear and unequivocal terms about the consequences of the employee's failure to meet the standards.
- ▶ The University decision does not violate Human Rights principles which apply in the particular circumstance in question. (This last is another subject. Get advice in cases where the work performance issue is connected with mental or physical incapacity, or with other issues arising under Human Rights legislation).

APPENDIX 1 - Common Questions and Answers That Apply to the Progressive Discipline Process

1. What is progressive discipline?

Progressive discipline is a process whereby increasingly more severe disciplinary measures are taken by the employer in response to some culpable misconduct. The objective is to ensure that the employee understands that his/her performance is inadequate and that the employee is being given an opportunity to modify his/her behaviour in order to meet the employer's expectations.

2. What kind of performance does progressive discipline attempt to change?

Progressive discipline attempts to rectify unacceptable actions or conduct, over which an employee has control and that adversely, affects job performance. The employer's policy of progressive discipline only applies to instances of culpable misconduct. In essence, the employer's policy of progressive discipline is intended to apply to performance for which the employee is responsible and deserving of blame (i.e. employee knows, is capable but chooses otherwise).

3. What is the difference between culpable and non-culpable conduct?

Culpable conduct is performance that has the following characteristics:

- the employee knows, or could reasonable be expected to know, what is required of him/her,
- the employee is capable of carrying out what is required,
- the employee chooses to perform in a manner other than as required.

Non-culpable conduct is performance or behaviour, which the employee, through no fault of his/her own, is unable to control or change. Examples include poor work performance caused by lack of aptitude or high absenteeism caused by illness.

Remember: An employee cannot be disciplined for non-culpable conduct. The University in its Employment Accommodation Policy 1110 (June 2004) states that it “has a legal duty to provide accommodation for both employees and job applicants with regard to matters that are governed by the BC Human Rights Code, unless it would cause undue hardship for the University to do so”. Where an employee has a bona fide disability or other protected ground that, but for the disability, prevents the employee from performing the responsibilities of the position, the University must every effort up to the point of undue hardship to accommodate the employee so that she/he can perform to an acceptable standard. Similar obligations apply to other protected grounds under the *Human Rights Code*.

This does not mean that an employee is not responsible to do a job to an acceptable level of performance. It does mean that the University has an onerous standard to meet before it reaches any conclusion that the employee cannot meet the standard. Arbitrators are placing more emphasis on the *Human Rights Code* and the employer’s obligations as significant considerations in reviewing employer’s decisions.

4. How do I distinguish between culpable and non-culpable conduct?

Only the employee can provide the basis for his/her acts. It is the employee’s responsibility to explain and substantiate the reasons for unacceptable performance. Management will fully investigate such explanations. Based on the results of this investigation, a decision will be made as to whether Progressive Discipline is appropriate or if some other program should be used to improve the situation. In reaching this decision, the question that must be answered is:

In the face of the explanation provided by the employee and as otherwise determined, would a reasonable person conclude that the employee has control over the unacceptable performance?

Managers are encouraged to discuss such cases with their Human Resources Consultant.

5. What if culpability is unclear?

It is not always possible to determine whether an employee's behaviour falls under the heading of culpable or non-culpable conduct. Culpable and non-culpable elements may be mixed together and it may not be possible to separate them. In some cases, while an employer may suspect the employee's behaviour is blameworthy, there may be no proof of that suspicion. Where it is unclear whether or not the conduct is culpable or non-culpable, it is prudent to err on the side of caution and respond to the conduct as if it were non-culpable. These circumstances have been considered by arbitrators and you should consult with your Human Resources Consultant if you have such a case.

6. If the employee's conduct is non-culpable, how should I proceed?

If a behavioral or performance problem is non-culpable, discipline is not appropriate. Addressing such a problem requires a methodical approach to resolution, which includes continued observation of the employee and performance improvement over time. Your performance improvement efforts should include:

- Communication with the employee that identifies the behavioral or performance problem and the standard expected. Review the employee's job description and any other applicable rules, policies and procedures.
- Providing supervisory direction to the employee to assist the employee in meeting the standards, including what follow-up procedures you will be taking to ensure the employee's compliance with the standards.
- Communication with the employee intended to ensure his/her understanding that the behavior or performance is unsatisfactory and the consequences of continued failure or inability to meet the required standard.
- Discussion with the employee of strategies the employee might use to correct deficiencies in his/her work performance or behavior
- Discussion after a period of time to review the employee's progress to meet the required standards.

Remember to document your efforts. In addition, consideration should be given to warning the employee in writing that his/her employment is in jeopardy due to unsatisfactory performance. The letter must be carefully drafted so that it will not be interpreted as being disciplinary in nature. The letter must indicate the employee is being given time and counselling/coaching to get to the required standard.

7. When might progressive discipline not apply to unacceptable performance?

Unacceptable performance can take many forms and the means used to correct each will vary. To illustrate, consider the following examples:

- an employee, while endeavoring, cannot fulfill work requirements;
- an employee fails to meet requirements due to inadequate direction; and,
- an employee does not meet standards because she or he chooses to follow other than accepted procedures.

In all cases unacceptable performance results in deficient performance. However, the employee who endeavors but does not succeed is not dealt with via the employer's discipline policy; she or he may know what is required but is not capable. This employee requires non-culpable performance correction. The employee who is inadequately directed may be capable and willing but she or he does not know what is required; discipline would not be appropriate – it is the manager or supervisor who must correct their approach to work direction or rules. It is only in the last example where the employee knows and is capable but chooses to disregard that progressive discipline would apply.

8. What are some common situations where progressive discipline would not apply?

Non-competence: non-competent performance occurs when the employee does not have sufficient personal (i.e. physical, mental or emotional capability to perform at the acceptable standard). The employee endeavors to perform but does not succeed. In this situation a variety of work performance improvement techniques should be applied while assessing the employee's capability, for example:

- the setting of work standards and measurable objectives for a specified period;
- altering job content;

- more effective supervision;
- counselling/training; and,
- measuring work outputs against objectives and determining/removing obstacles to progress.

Failure of the employee to improve may result in a reasonable accommodation: i.e. non-disciplinary demotion and/or transfer to a job level commensurate with ability. As a last resort and after all reasonable avenues have been exhausted, the employee may be terminated.

Disability or Incapacity: This situation is characterized by the employee having a condition, illness, disability: physical or emotional, that prevents him/her from performing at the accepted standard. By way of example, the employee may have a degenerative illness/disability that results in diminished performance.

In this situation, the employer is prepared to assist the employee in a number of ways:

- referring the employee to the appropriate medical authorities via Occupational;
- Return to Work Coordinator or voluntarily through the EFAP (Employee and Family Assistance Program);
- where practicable, altering work requirements during rehabilitation;
- long-term accommodation in his/her own or another job; and,
- advancement of additional sick leave or granting other leave referring the employee to UVic Manager of Benefits to determine entitlement under the Long Term Disability Program.

Failure of the employee to respond may result in a reasonable accommodation (i.e. non-disciplinary demotion and/or transfer to a job level commensurate with ability). The employer will take all reasonable steps to assist the employee and termination will only be undertaken as a last resort.

9. What about when an employee is experiencing personal problems?

Situations may arise where personal problems, on or off the job, could result in unacceptable performance or deficient job performance. The employee may be encountering marital, financial or interpersonal problems of a private nature. A manager or supervisor is required under the Progressive Discipline Policy to consider such “mitigating circumstances”. The EFAP is available to employees to help them deal with such problems. It is the employee’s responsibility to take action to deal with personal problems, communicate with his/her manager and make every effort to meet job requirements. Communication and understanding between the manager and employee will usually help see the employee through the temporary problem period and avoid the necessity for formal progressive discipline.

10. After having disciplined the employee, what should I do?

It is important that you monitor and follow-up with the employee after any counsel or discipline. The manager should ensure that all supervisors follow-up on objectives set with the employee at regularly scheduled intervals. If a further incident occurs, follow the same progressive discipline steps to determine the appropriate response. Implementing and following a regular performance review process is an important and effective tool for dealing with performance problems.

APPENDIX 2 - Tips to Remember During the Interview

Focus on the problem, not on the employee. As a supervisor your job is to correct operational problems; the discipline situation should be treated like any other operational difficulty. In conducting the interview do not focus on the employee as a person; rather, concentrate on work performance and the adverse affect of the unacceptable performance on the performance of the work unit. Your acts should make it clear to the employee that any employee would be treated in a similar manner in the face of the apparent infraction.

Allow the employee to explain. The purpose of the discipline interview is to allow the employee to advance an explanation in the face of an apparent offense. State what you believe to be the situation in general terms and allow the employee to verify, refute or provide background detail. As the explanation is provided, ask clarifying questions. Tell him your objective is to obtain her/his explanation and that you will read your notes to him at the interview's end. Revise the notes as required to ensure they accurately reflect the employee's explanation.

Accept the legitimate and important role of the union. The role of the union is similar to that of a public defender, ensuring that all considerations are taken into account on behalf of their member. Discipline measures taken by management have been overturned in some cases where access to a union steward was not ensured by management at the time of the discipline.

APPENDIX 3 - The Arbitrator's Viewpoint

Arbitrators have asked the following types of questions in assessing whether particular disciplinary measures were justified:

- Was the employee given advance warning(s) of the possible or probable disciplinary consequences of her/his conduct?
- Did the employer make earlier efforts to educate/rehabilitate the person causing the problem?
- Was the specific discipline based on the progressive discipline approach?
- Was the rule broken or order disobeyed reasonably related to the efficient and safe operation of the work area?
- Before administering discipline, did the employer make an effort to discover whether the employee did, in fact, violate a rule or order of management?
- Was the employer's investigation conducted fairly and objectively and was it fully completed before disciplinary action was taken?
- Was the employee given an opportunity to give her/his side of the case?
- Did the investigation produce substantial evidence or proof that the employee had committed the offense?
- Had the employer applied its rules, orders, and penalties without discrimination (i.e. consistently throughout the organization)?
- How severe is the problem or infraction?
- Have there been other discipline problems in the past, and over how long a time span?
- Is the current problem part of an emerging or continuing pattern of discipline infractions?
- How long has the employee worked for the organization, and what was the quality of performance?
- Was the employee provoked in whole or in part to commit the nonperformance?

- Are there extenuating circumstances relating to the problem (e.g. an employee's economic hardship, domestic and emotional problems)?
- Did the employee commit the offense on the spur of the moment as a result of a momentary aberration due to strong personal impulses or was the offense premeditated?
- Was the degree of discipline administered in the particular case reasonably related to:
 - a) the seriousness of the employee's proven offense; and,
 - b) the employee's work record?

In regard to discipline for breaches of employer policy:

Factors taken into consideration by arbitrators when reviewing grievances arising from breaches of policy (or rules) unilaterally imposed by an employer:

1. The Policy must not be inconsistent with the Collective Agreement(s).
2. The Policy must not be unreasonable.
3. The Policy must be clear and unequivocal.
4. The Policy must be brought to the attention of the employees affected before the employer can act on it.
5. The Policy must have been consistently enforced by the employer from the time it was introduced.

