BOER NEWS

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Bureau of Employee Relations (BOER)

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Arbitrator Reduces Termination to Six Month Suspension for Violation of Email & Harassment Policies

In this case, an employee was terminated after he sent, via e-mail, 7 attachments with photos and cartoons of a sexual nature over a three-month period to his supervisor and to various co-workers. The arbitrator concluded that discharge was too harsh a penalty, instead ordering a six-month suspension.

The Grievant was employed by the State for four years. He had an unblemished disciplinary record prior to the discovery of the sexual e-mails. The supervisor had taken no prior action to address the content of these e-mails with the Grievant. The Department argued that it has a "zero tolerance policy" for this conduct. The arbitrator did not accept the argument, however, because neither the written policy on harassment avoidance nor the policy governing email usage stated that violations resulted in automatic termination. Similarly, the policies did not state that they were zero-tolerance policies. Likewise, no employees were told that they would be automatically terminated for violating these policies. In addition, the contract only identifies physical abuse as warranting automatic termination. Finally, the Department's past practice did not reflect a zero-tolerance policy.

The arbitrator found that "it is rational that the state institutes severe penalties to protect itself from liability" regarding employee behavior that can create legal liability for the state. The arbitrator held that because Grievant's actions constituted a "lesser offense" than the legal definition of sexual harassment, progressive discipline is required.

The arbitrator suspended the Grievant for six months, noting that Grievant's supervisor was participating in the same conduct and the Grievant's office culture mitigated this conduct. Other mitigating factors included Grievant's lack of prior discipline, good to outstanding performance evaluations, and Grievant's acknowledging his conduct. The arbitrator concluded that there was no evidence that Grievant was untrustworthy or unable to be rehabilitated through progressive discipline starting at a lower level than termination.

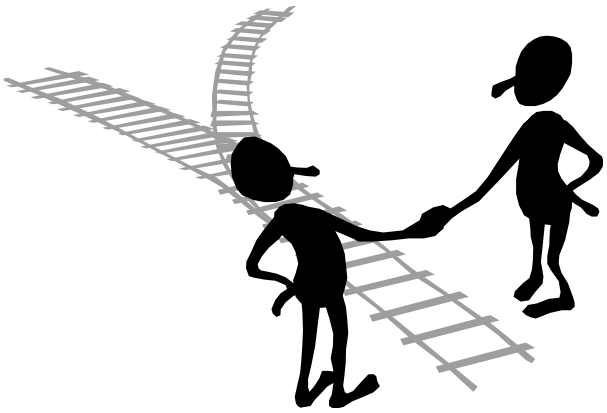
State Did Not Violate Law By Freezing Merits

The Maine Labor Relations Board (MLRB) has determined that the State did not violate the State Employees Labor Relations Act (SELRA) as alleged in two complaints filed by the American Federation of State County and Municipal Employees (AFSCME).

At issue in the complaints that went to hearing before the MLRB in January 2004, was Governor John Baldacci's legislative proposal in January 2003 to freeze all merit increases effective July 1, 2003, including the advancement to a new pay step created in the 2002-2003 AFSCME contract that would expire on June 30, 2003. AFSCME also complained about certain conduct on the part of Kenneth Walo, Director of Employee Relations, during subsequent negotiations for a successor agreement. The Labor Board rejected all of AFSCME's contentions and dismissed the complaints.

Employee Grievances—What Do I Do?

Okay, so you've got a grievance. Now what? First, you may want to think of a grievance as just one means by which an employee can let you know that there's some kind of problem that needs to be addressed. Second, look it over from the most objective perspective you can find. A grievance can present you with the rare opportunity of looking at work situations from the employee's point of view and getting a better idea about what's happening out there in the trenches. Next, take a minute to figure out your options. The two most obvious options are: 1) grant the requested remedy or 2) deny it. But what about a third option … the option of settlement. You may not have thought about settlement at your level before, but it is often a very good option for all parties concerned. Usually, a settlement is a compromise — where neither party gets everything s/he wants. So, if you won't get everything you want, then why would you want to try to settle a grievance? Well, there are several reasons. One reason might be that your case is not so great; if it goes all the way to arbitration, you might just lose. Another reason might be that even if you could win at arbitration, the issue is so small that it wouldn't be worth the time, money, and disruption of arbitration. Another reason might be that even though your case is rock-solid, it will cost more — both in monetary terms and in terms of promoting good employee relations — to go to arbitration and win than it would to settle it now. Or perhaps you have a case where you don't want to establish precedent. You can settle the case with non-precedent-setting language. These are just a few reasons why you may want to work to settle the grievance at your level. Whether you ultimately choose to settle or not, though, it is always an option you should consider. Examining all your possible options gives you a better look at the big picture and prepares you for the next step in the grievance process. Don't forget: BOER staff are always available to help you think through your options; don't hesitate to call if you have questions or concerns.



Quick Tips for Deciding on Discipline

Got a situation where you know you need to impose discipline but don't know what would be the proper amount? Well, here are a few factors to consider when deciding on how severe the discipline should be. 1) The seriousness of the conduct. How severe is the misconduct or infraction? Does the misconduct rise to the level of a violation of the law? Seriousness is a primary factor to consider when imposing discipline. 2) Time span. Has the employee had other discipline problems in the past? Considering how often, over how long a time span, an employee has been disciplined will give you a better idea about what level of discipline will help the employee understand that the conduct is unacceptable. Moreover, it will help you decide what level of discipline will provide the employee with the motivation to correct the behavior. 3) Work history. How long has the employee worked for the organization and what has been the quality of his/her performance? An employee's work history often gives you a good idea about what level of discipline will accomplish the dual purposes of discipline. A good work history, in and of itself, tends to suggest a commitment on the employee's part to work within the rules and conform to certain standards of conduct. This demonstrated commitment, in turn, tends to suggest that "less is more" for such an employee. 4) Notice. Did the employee know of the possible or probable disciplinary consequences of his conduct? Example: an employee has reported 20 minutes late for work on five separate occasions over the last month but has received no feedback from his/her supervisor about it. This employee arguably does not know that repeated tardiness may subject him/her to disciplinary action. 5) Consistency in discipline practices. How have similar infractions been dealt with in the past within the department? The way other employees who engage in similar misconduct are treated by managers is a critical factor in analyzing discipline. The reason is because inconsistent application prevents the employee from making the connection between the conduct and the discipline. This list is by no means exhaustive, but the next time you find yourself having to impose discipline and you're not sure of the appropriate level, look over this list. It may help you to more effectively accomplish the true purposes of discipline.

"The purpose of progressive discipline is NOT to punish an employee for the sake of punishment alone. Rather, the purpose is to make clear to an employee that his or her behavior is not acceptable, and to provide that employee with an opportunity to adjust that behavior accordingly. The discipline imposed should be the minimum level that is necessary to achieve this goal."

— Philip J. Dunn
Arbitrator

Got Questions? Ask BOER

As most of you know, the Bureau of Employee Relations is the place to turn when you've got questions about the collective bargaining agreements, grievances, past arbitration decisions, and various issues that may be decided in arbitration decisions. It is also a good place to start looking for answers to other questions as well. In an effort to reach as many of you as possible, we've reprinted and summarized some of the questions and answers we've received over the last few months.

Question: How many EAP visits does an employee get , where is that in writing, do they get administrative leave and if so, why?

First of all, employees seeking assistance from the Employee Assistance Program (EAP) have the choice of using administrative leave for such appointments. If the employee chooses to use administrative leave when s/he goes to an EAP appointment, then the department can seek confirmation that s/he did, in fact, attend the appointment. The employee also has the option, however, of using sick or vacation time, in which case, the Department should not seek confirmation (absent some specific reason for doing so). The option of administrative leave for EAP attendance is statutory. Title 5, Ch. 71, §957, 3 provides, "Employee participation in [EAP] is voluntary. Employees who wish to consult with a program counselor must be granted administrative leave without loss of pay or benefits. Employees may use authorized accumulated leave, or leave without pay, for assistance by an outside resource." As far as the number of visits, the provider contract covers "up to eight visits" if necessary, in the judgment of the EAP clinician. Eight visits is not the usual number. In 2003 the average number of visits for new clients was four. Annually about 2/3 of the caseload is resolved at the EAP level with most of the remaining 1/3 the result of outpatient referrals.

Question: Can a confidential employee who is collecting the 2/3 disability benefit augment the 2/3 pay with vacation, thereby retaining full pay?

Thanks to Phil Schlegel at BHR, we know the answer is "No." The 2/3 disability cannot be augmented with vacation. The Legislature was very specific about the circumstances under which a confidential employee is paid this benefit and the benefit does not affirmatively provide that an employee may use other forms of compensation (in this case vacation) to "piggy-back" on the benefit. The law very clearly establishes that a confidential employee utilizing the 2/3 disability benefit *accrues* time and benefits while collecting the 2/3 disability benefit. In other words, he or she is in pay status (albeit at 2/3 pay) and is being treated as though he or she was working full time. (P&S Laws 1989, Ch. 86, Part C, Sec. 5, Sub-section 4.) An employee cannot be in pay status and on vacation at the same time.

Question: I have an obligation under the contract to provide contract books to new employees, but I'm all out of the. here do I get some more books?

To replenish your supply of contract books for *employees*, you should contact the union office. Any of you who have visited the BOER office may have noticed that BOER has contract books at our office. These contracts are for distribution to supervisors, however.

Question: How carved in stone is the "80% of the time" requirement in order to get the eye care reimbursement? Does it make any difference if a person has to work on a machine with a video monitor (not a computer)?

The contract says **"at least"** 80% of their time. Consequently, anything less than that means they are not qualified for the reimbursement. However, it does not matter what type of monitor / terminal/ screen they are viewing.

Question: When an employee moves to another position that is in the same pay range but not the same classification, is that a "transfer" under the contract? Yes. Under the Civil Service Rules, the definition of

Question: who is required to keep track of employees who are suppose to either join the Union or pay the service fee? Is the Union going to contact us and/or the employee when they are suppose to start paying?

MSEA keeps track of whether employees are paying the service fee. If they think they have someone who is supposed to be paying the service fee but is not, MSEA will provide the State with written notification. Should you receive such a notification from MSEA, you should contact BOER as soon thereafter as possible as BOER will assist you in conducting the investigation. Employees can pay their service fees directly to MSEA if they wish, so the State doesn't necessarily have any knowledge or involvement in their service fee payments. And don't forget: we are obligated to give new employees the service fee notices upon their hire.

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BOER Mission Statement

The Bureau of Employee Relations is by law the Governor's designee to carry out the employer functions of the State under the State Employees Labor Relations Act ("SELRA"). Accordingly, the Bureau is responsible for all matters concerning the collective bargaining process and for the development and implementation of employee relations policies for all departments and agencies within the Executive Branch of State Government. Specifically, BOER has the following responsibilities: to develop and execute employee relations policies, objectives, and strategies; conduct negotiations with the designated employee bargaining agents; administer and interpret collective bargaining agreements; represent the State in all legal proceedings that emanate from the collective bargaining process; coordinate the compilation of data necessary to the collective bargaining process; coordinate the State's approach to all instances of negotiating, mediation, fact-finding, arbitration, and provide necessary technical advice and training to State agencies for implementation and administration of collective bargaining agreements.

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Eligible for O/T Under FLSA Does Not Equal Eligible for O/T Under the Contract

The Grievant and other Information Support Specialist IIs are eligible for overtime after 40 hours of actual work pursuant to the Fair Labor Standards Act (FLSA). In this grievance they sought to be paid standby and call-out under the collective bargaining agreement. The State took the position that they (and all employees over Range 21 eligible for overtime under the FLSA) were not eligible for overtime under the contract, and thus not eligible for call-out and standby.

The arbitrator agreed with the State. While he found that the language of the contract itself was "ambiguous" on the issue, he found that the bargaining history and the past practice by the State, as well as the Union's acceptance of that practice, demonstrated that "employees whose overtime eligibility derives solely from the FLSA are not entitled to the contractual benefits of call-out and standby pay."

This case has significance for all employees eligible for overtime purely because of the FLSA. It should remind all DPOs that they need to closely monitor how they are paying employees similarly situated to the grievants. Additionally you are reminded that such employees must be paid time and one-half for all hours worked after forty (not 8 hours in a day). The Bureau of Employee Relations and the MSEA have recently reached an agreement that permits these employees to accrue compensatory time *in lieu of premium pay*.