

# **GARDEN STATE CLE LESSON PLAN**

**A 1.0 credit course**

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LESSON PLAN AND EVALUATION**

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## **PUBLIC EMPLOYEE DISCIPLINARY HEARING**

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**With**

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**And**

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### **Program description**

This 1.0 credit program examines public employee disciplinary hearings in New Jersey. This program will also look at the penalties that result from these hearings, and how they are informed by the seriousness of the offense and progressive discipline in the matter.

## **I. Introduction**

- **Distinction between discipline in the private sector vs. employees working for a political subdivision in NJ**
- **Property interest in your public employment which you don't have in the private sector – due process concerns**
- **Caselaw discusses meritorious service and don't want them to be worrying about making decisions and performing jobs where there would be political or other ramifications – and unable to focus on doing their jobs**
- **Civil Service Act, NJSA 11A:1-1 – deals with disciplining employees and misconduct – rights and responsibilities of employees – administrative regulations interpret the act and set forth what can be done**
  - **Significant majority of towns are civil service towns/counties**
  - **Hundreds of political subdivisions of the state which are bound by the civil service – but don't have to be**
- **Private sector employees are subject to whatever happens to them – “at will” employee – certain protections (CEPA, discrimination based on age, race, etc.) prevent firing**
- **Civil service does not apply to private sector – only public employment**
- **Due process consideration – people have notice and a hearing to contest the charges**

## **II. Civil Service Process**

- **Employee allegedly does something wrong**
- **Government entity determines that the employee needs discipline and serve with a Preliminary Notice of Disciplinary Action “PNDA” – See NJAC 4A:2-2.5**
  - **PNDA states on X date you did X and that is a violation of whatever grounds (misconduct, insubordination, lateness, etc.)**
  - **Must specify what the employee did and what items of the code were violated**
- **Departmental hearing is scheduled at the local level**
  - **Department director oversees – some jurisdictions use outside, neutral hearing officer**
  - **All parties represented by counsel**
  - **Hearing officer makes a decision**

- **Jurisdiction then files a Final Notice of Disciplinary Action (NJAC 4A:2-2.6)**
- **Employee has right to appeal that**
- **Many levels of appeal – many opportunities given to the employee to have it heard *de novo***
- **No record made at the local level for the hearing – just contemporaneous notes**
- **Next stage is Office of Administrative Law – recording is made there**
- **Departmental hearing – rules of evidence do not apply, hearsay is acceptable (to an extent) – civil in nature; pictures come in, videos come in**
- **Hearing officer is evaluating credibility and trustworthiness of evidence**
- **Privileges are applied**
- **Time period for the process to take place**
  - **For certain law enforcement officers and firefighters, see NJAC 4A:2-2.13**
  - **All other employees, see NJAC 4A:2-2.5(d)**
  - **Short period of time**
  - **45 days to file preliminary**
  - **Usually filed within a couple of weeks**
  - **Timing of actual hearing is another matter – usually delayed**
- **Employees consent to delay of hearing because the longer the delay the better off they are (information lost, memories fade) but also putting off the inevitable**
- **Discovery process – burden on charging authority**
  - **Documents**
  - **Videos**
  - **Can allege privilege**
  - **Redacted or unredacted copies of reports – determination must be made**
- **Each jurisdiction decides if they want a neutral, detached individual as a hearing officer**
  - **This is a “flawed” part of the process because it is not required to be neutral and detached**
  - **Department heads may be hearing officers – so question whether sufficient due process – usually not an attorney**

- **Is there employee confidence that there is a full airing of the charges and an informed decision being made**
- **Department heads are dealing with issues in their own department – how much attention can you put into the hearing and how do you have time to make informed and timely decisions**
- **By a preponderance of the credible evidence**
- **Employer is represented by county counsel/town counsel**
- **Minor discipline (5 days of less eligible for suspension or other penalty) someone from the department of personnel will conduct the hearing**
- **50% of cases are tried and the rest of settled either before or on the day of the hearing**

### **III. Causes of Discipline**

- **Conduct unbecoming an employee**
  - **Includes everything**
  - **For almost everything allege that the employee's conduct is "unbecoming"**
  - **Conduct which brings the agency into disrepute, brings public confidence in the agency into question**
  - **Over used by appointment authorities**
  - **Hearing officer must address it – may not rise to the level of conduct unbecoming**
  - **Must evaluate in terms of totality of facts presented**
  - **Public component and so far afield of the behavior of a reasonable employee – not necessarily that the public knows about it but still can be a public issue**
  - **When someone commits a crime – clearly conduct unbecoming**
  - **Will the public lose confidence in the agency as a result of the employee's actions?**
  - **Reasonable person standard?**
  - **Fact sensitive**
- **Hearing officer can impose no discipline, can impose less discipline than what is being requested**
- **Focus is on what took place – litigants rarely focus on what the proper penalty would be**

- **Pay attention to proposed discipline – argue that even if the client did something wrong, the discipline sought is too harsh**
- **Insubordination**
  - **Subordinate goes against an order of a superior**
  - **Penalty would depend on extent of insubordination and any mitigating circumstances**
  - **Sometimes there may be a history between the parties or an employee has a significant disciplinary history**
  - **Rarely is there a situation where there is discipline sought because someone does not like another**
  - **There are facts and support for the cause of action**
- **Incompetence/Neglect of Duty**
  - **Comes up frequently**
  - **Failure to perform duties**
  - **If person cannot pass, then they are incompetent – cannot meet the requirements for the job**
  - **Job requires you to do something and you don't do it**
  - **If something happens as a result of your incompetence – then there could be civil liability as well**
- **Regarding penalties – there are 2 things to look at: seriousness of offense and progressive discipline (we are going to impose harsher discipline the more the employee does wrong over time), discipline increases at each stage to deter future violations, opportunity for employee to be disciplined and change their conduct – must give them a chance to correct the conduct**
- **West NY v. Bock, 38 NJ 500 (1962) – progressive discipline for employees, can be circumstances where conduct is so egregious that progressive discipline does not apply**
- **Is there prior discipline in order to impose penalties? Have there been prior hearings on the issue or has the agency lumped all the violations together and thus they can impose harsh discipline the first time?**
- **Egregious conduct: drug use, criminal conduct – these can be the basis for immediate removal without progressive discipline**

- **Employees can be immediately suspended pending the hearing – depending on the nature of the charge**
- **Lateness**
  - **It is a matter of degrees**
  - **Extent of issue – 1 minute or 30 minutes – are there costs to the employer or other employees as a result of the lateness?**
- **Abuse of sick time**
  - **Only allotted amount of sick, vacation, and personal time and take advantage of that time...taking more time than what is allotted**
  - **The fact that the person really was sick is mitigation – does not excuse conduct**
- **Anything criminal in nature does not go before the hearing officer until a criminal case has been brought/filed – then the charges prompt a disciplinary charge**
- **Internal affairs will conduct the investigation**
- **If criminal charges are brought, the person would be suspended without pay and then nothing would happen regarding discipline until the case is resolved**
  - **Employee cannot testify because can compromise criminal proceeding – so disciplinary hearing is put off**
  - **Municipality cannot require employee to testify but the employee has the right**
  - **Cannot compel employee to testify**

#### **IV. Hearing process**

- **Use a conference room for the hearing**
- **Sequestration requests are sometimes made**
- **Parties are on separate sides of the room**
- **Could take testimony remotely by phone**
- **Informal hearing**
- **No record is kept**
- **Parties would proceed without a witness**
- **Detailed notes taken**
- **Written opinion on every case – personal preference**
- **Hearing officer discipline is a recommendation – charging authority does not have to agree**

- **Employee would be taking the appeal**
- **If administrative agency adopts recommendation, then OAL for appeal by employee**
- **OAL conducts *de novo* hearing – no record below, just notes and written opinion**
- **Appeal is based on penalty**
- **OAL hearing is as if nothing happened before – witnesses must testify, employee can testify even if did not testify before hearing officer**
- **Informal proceedings but expectation is that people will not lie**

#### **V. Removal/termination cases**

- **Egregious conduct or course of conduct over time that the person is not fit for the job**
- **Law enforcement usually represented by counsel**
- **Other employees generally have union representative at this level – representatives are usually good**
- **Hearing officer can ask questions – need to get to the truth**
- **To bring in a lawyer is expensive; law enforcement has attorneys on retainer**
- **Determination at this level is like a preliminary round**

#### **VI. Advice for attorneys**

- **Key is talk to the client before the hearing – prepare in advance!**
- **No record**
- **Some places – hearing is borderline on due process – therefore just need to get through hearing and move on**
- **Some places – the hearing is going to be fair – so prepare and do a complete and accurate job**
- **Check with employer for discovery and get employer's side – exchange discovery as a matter of course**
- **Can work out the case once you understand the entire picture – advise client what other evidence is – or negotiate lesser penalty**
- **Prepare for the case to adequately discuss the case with the adversary**

- **Employee does not have to testify – burden on the agency – but would be better if the employee testifies**
- **Remoteness is an issue to be considered**
- **Aggravating and mitigating circumstances can be considered**
- **Type of case will dictate the tone of the hearing – hearing officer has a right to end the hearing if someone is being unruly**
- **Private, personnel matter – not subject to public scrutiny**
- **Hearing officer has a right to control the hearing and those present**
- **Many attributes of due process – speedy trial but not necessarily public**
- **Employees usually elect not to testify – no negative inference can be taken by not testifying**
- **Focus on burden on charging authority**
- **Must prepare for the hearing – if you have done the work at this level, then you are better prepared and can fine tune the defense for the OAL level**