

**PETERSBURG POLICE ASSOCIATION'S**

**REPRESENTATIVES' MANUAL**

**Prepared for the Association**

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**By**

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**1.**

**THE IMPORTANCE OF ASSOCIATION REPRESENTATIVES**

Association representatives play several critical roles in the preparation and enforcement of the Collective Bargaining Agreement between the association and the employer. Perhaps most importantly, association representatives are the first line of defense against any violations of the Collective Bargaining Agreement. By being on the scene and understanding and applying the contract, association representatives can often defuse potentially troublesome situations.

In addition to enforcing the contract, association representatives also guard against violations of the association's collective bargaining rights. Association representatives are usually the first to be aware of the employer's plan to make any change in wages, hours, and working conditions. By asserting the association's right to collective bargaining over "mandatory" subjects of bargaining, or over the “impact” of a change in a “permissive subject” of bargaining an association representative can ensure that the employer complies with its statutory obligation to collectively bargain.

A third important role played by association representatives is the representation of employees in the disciplinary process. Association representatives are often primarily charged with investigating the background of disciplinary charges made against an employee, and representing employees in the initial interview process. By aggressively investigating charges made against employees and preparing the best defense against those charges at an early point in the disciplinary process, association representatives can play an invaluable role in not only assisting employees, but in preventing the employer from making an incorrect disciplinary decision.

Lastly, association representatives will note weaknesses in the present Collective Bargaining Agreement. Such weaknesses will occur when the employer utilizes a vaguely worded part of the contract in order to justify poor management decisions that have a negative impact on employees. These acts should be documented by the representative and submitted to the executive board. Then, when the time comes to negotiate for a successor contract, the executive board can take those documented problems and submit them to the association's attorney for aid in drafting new proposals.

Given the importance of the role which you play as an association representative, your familiarity with your Collective Bargaining Agreement as well as statutory rights and limitations are important. This manual is your guide for succeeding in that role.

## 2.

### **AN OVERVIEW OF ALASKA'S COLLECTIVE BARGAINING LAWS AND YOUR PROTECTIONS AS AN ASSOCIATION REPRESENTATIVE**

#### **2.1 An Overview of the Collective Bargaining Process**

Collective bargaining for public employees exists in Alaska only to the extent that it is allowed by State statute. Federal laws in this area, such as the National Labor Relations Act, only regulate private businesses. It is up to each State to decide what type of collective bargaining, if any, is allowed in that State for public employees. That is why there is a wide divergence among different States as to whether or not there is any collective bargaining and the extent to which it exists.

Alaska statutes are at AS 23.40.070-.260. They are augmented by the Administrative Code 8 AAC 97.010-.990. The Alaska Labor Relations Agency (Agency) is in charge of hearing cases concerning labor relations. Its decisions may be found on its web site.

#### **2.2 Who Can Be Represented**

All employees can be members of a labor organization, except for confidential employees and department heads. Confidential employees are only those employees who directly assist the employer in labor relations. It is not those employees who deal with confidential material. It could include the executive secretary who types up the negotiation notes and the finance person who does costing for the employer.

#### **2.3 Decisions of the Alaska Labor Relations Agency (Agency) Affects the Composition of Labor Organizations**

Alaska follows NLRB decisions in certifying as large a labor organization as possible for bargaining. Smaller labor organizations are prohibited due to a policy of not wanting "fragmented," or small unions so that an employer must bargain with multiple unions. However, traditional "craft" unions are allowed, such as ones representing police officers and dispatchers.

#### **2.4 Protections for Employees Who are Involved in Collective Bargaining Activities**

Alaska statutes provide as follows:

Sec. 23.40.110. Unfair labor practices.

(a) A public employer or an agent of a public employer may not

- (1) interfere with, restrain, or coerce an employee in the exercise of the employee's rights guaranteed in AS 23.40.080 ;
- (2) dominate or interfere with the formation, existence, or administration of an organization;
- (3) discriminate in regard to hire or tenure of employment or a term or condition of employment to encourage or discourage membership in an organization;
- (4) discharge or discriminate against an employee because the employee has signed or filed an affidavit, petition, or complaint or given testimony under AS 23.40.070 - 23.40.260;
- (5) refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

In an Unfair labor Practices (ULP) case the Association must prove an antiunion motive of the employer. Then the burden of proof will shift to the employer to show that the employment action would have taken place even in the absence of the protected conduct.<sup>1</sup> Terminating an employee for contacting a representative for advice is an ULP.<sup>2</sup> However, if an employee complains about an individual problem, such as he thinks that other employees are misbehaving, as opposed to an activity for the purpose of collective bargaining, or protecting rights concerning labor issues, then the conduct is not protected.<sup>3</sup>

The Agency may defer ruling on an ULP if there is a grievance concerning the same activity which is proceeding to arbitration. Whether it does so depends upon a number of factors, such as whether the employer is raising a defense to proceeding to arbitration, whether there is a longstanding history or good or bad labor relations, or whether the center of a dispute is really a contract interpretation issue.<sup>4</sup> If the resolution of the grievance eliminates the ULP, the Agency will probably dismiss the ULP as moot.<sup>5</sup>

3.

**WHAT CAN OR CAN'T YOU BARGAIN INTO YOUR CONTRACT?**

### **3.1 Introduction**

Under Alaska Statutes, labor organizations are given the right to collectively bargain over wages, and hours and conditions of employment, which are called mandatory subjects of bargaining. Permissive subjects may be bargained unless one side objects. That is usually the employer. If a side objects, then the subjects may not be bargained. If the employer makes changes on mandatory subjects of bargaining, which are not covered in a Collective Bargaining Agreement, the Association may be able to engage in mid-contract bargaining over the proposed change.

### **3.2 Mandatory Subjects of Bargaining**

AS 23.40.250(1) states that employees can negotiate over "...wages, hours, and other terms and conditions of employment..." Section (9) states: "terms and conditions of employment" means the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer."

The Alaska Supreme Court has declared that: "salaries, fringe benefits, the number of hours worked, and the amount of leave time are negotiable."<sup>6</sup> It also held that disciplinary transfers, as opposed to non disciplinary transfers are mandatory.<sup>7</sup>

The Agency has held that these additional subjects may be bargained: the safety impact of a staffing decision (but not the decision),<sup>8</sup> documents related to the psychological testing of employees,<sup>9</sup> and smoking.<sup>10</sup>

### **3.3 Permissive subjects of Bargaining**

By statute the following items are permissive: reemployment rights for injured workers, reemployment rights of the organized militia (NG and Reserves) and the ability to create temporary positions. AS 24.40.075

In the case mentioned in footnote 5, the Court held that policy issues are permissive subjects. That was a teacher case in which the following was held to be permissive: "(1) relief from non-professional chores, (2) elementary planning time, (3) para-professional tutors, (4) teacher specialists, (5) teacher's aides, (6) class size, (7) pupil-teacher ratio, (8) a teacher ombudsman, (9) teacher evaluation of administrators, (10) school calendar, (11) selection of instructional materials, (12) the use of secondary department heads, (13) secondary teacher preparation and planning time, and (14) teacher representation on school board advisory committees." Id. P. 422 Also trying to insist that a contract will be settled by a specific interest arbitration clause is permissive.<sup>11</sup>

The Agency has declared that the Preamble and Recognition clauses of a contract are permissive.<sup>12</sup> This is because only the Agency can determine who is represented. Establishment of a classification is permissive,<sup>13</sup> as well as assignment of jobs to a classification.<sup>14</sup>

### **3.4 Mid-Contract Bargaining**

An employer may not make any change in mandatory subjects of bargaining which is not covered in the contract without first negotiating with the labor organization if it demands to bargain over the change in a timely fashion. For instance, some contracts don't cover when employees are paid. Others don't cover who gets overtime opportunities. In many cases, the issue will be whether a subject has been covered, or negotiated in a contract. The Agency has ruled that the coverage with a right of the employer to make changes must be specific and not in a general management's rights article.<sup>15</sup> For example, if the contract says that with 30 days notice, the employer can use a 5-8, 4-10 or 4-12 shift, then the employer need not bargain over changing shifts. However, if the contract merely says employees will work a regular schedule, then a change in shifts would have to be bargained unless there is language that the employer can change those shifts with so many days notice.

If an employer makes a change in a mandatory subject of bargaining, then the Association must make a demand to bargain in a reasonable time, or it will have waived its right to do so.<sup>16</sup>

## **4.**

### **HOW CONTRACT BARGAINING TAKES PLACE**

#### **4.1 The Bargaining Process**

Bargaining begins within time limits that are spelled out in the existing Collective Bargaining Agreement, usually in the Length of Agreement Article. If an agreement states that the parties must deliver their proposals to each other on or before date X, then that must be honored or waived in writing. In one case, the failure of an Association to give its proposals in a timely manner caused the contract to be extended for an additional year without wage increases or any other changes.

Usually, the first thing that can be discussed at bargaining is whether any ground rules should be in existence. An obvious ground rule would be when bargaining starts. A second ground rule could be after so many meetings, no new proposals could be introduced. Other ground rules could include the exchanging of all comparability data, the requirement that all tentative agreements (TAs) be reduced to writing and signed before they are effective, that a TA takes an issue off of the table as being resolved, that each side will go back and recommend to its client that the TAs be ratified, or that no TA is final until the contract as a whole is negotiated.

Ground rules are permissive. Neither side can be forced to bargain over them. The reason for this is because one could spend more time negotiating over ground rules than the contract itself. However, the failure of a party to set reasonable ground rules would be a substantial factor to be reviewed to determine if bad faith bargaining has occurred.

The number of sessions that the parties need to meet can be determined by the parties. There is

no magic number. The parties must negotiate to “impasse.” Practically, this means until all issues that separate the parties must be meaningfully discussed and it becomes apparent that no further progress on the unresolved items can be made. Whether parties have bargained to impasse is a matter of judgment and the totality of the negotiations will be considered.<sup>17</sup>

What is accomplished at bargaining will depend a lot on the relationship of the parties. If the leaders in the police department have or wish to have a good relationship with leaders of the Association, then negotiations can be used for mutual problem solving of areas where both sides may see a problem, such as shift bidding or vacation bidding. If, on the other hand, the relationship is bad, there is a tendency from the employer just to say no to everything.

In addition, economic items are usually packaged by the employer on the theory that it only has so much money. Sometimes an employer will work on components such as premium pay, but that is somewhat unusual. Usually wages and insurance are handled together at the end of negotiations.

Numerous Agency decisions have stated what conduct is or is not an ULP during bargaining. From these the following rules have emerged:

1. “Even before certification a party must bargain with a newly elected representative about any changes in terms and conditions of employment.”<sup>18</sup>
2. “A labor organization’s attempt to persuade the governing body of a public employer to change its bargaining representative (is an ULP.)”<sup>19</sup>
3. During negotiations..”Bypassing the labor organization (and dealing directly with its members) undercuts its effectiveness and can damage the relationship between the labor organization and the employees it represents...” and is an ULP.<sup>20</sup>
4. Changing a mandatory subject of bargaining while negotiating is an ULP.<sup>21</sup>
5. One case hinted that perhaps a “business necessity” might justify a change while bargaining.<sup>22</sup>
6. Unilaterally declaring an impasse and then changing a mandatory subject of bargaining is an ULP.<sup>23</sup>
7. “The reason that unilateral increases in wages generally are prohibited during bargaining is that the action undercuts the role and effectiveness of the union as the exclusive bargaining representative for the employees.”<sup>24</sup>
6. “Unilateral action is so inherently destructive of the bargaining process and of the relationship between the bargaining representative and the employees on whose behalf it bargains that it is a per se unfair labor practice.”<sup>25</sup>
7. “A party’s refusal to meet and negotiate due to a ‘busy schedule is not a defense to a continued failure to meet or schedule meetings.”<sup>26</sup>
8. If overall bargaining process is working, statements made during negotiation (no agreement until we reach one with a real union) will be overlooked.<sup>27</sup>
9. “A party’s vague, contradictory, and confusing statements about its position constitute a refusal to bargain in good faith.”<sup>28</sup>
10. “An offer, even an illegal offer, is not an unfair labor practice by itself unless the offeror insists on it to impasse.”<sup>29</sup>
11. Statements made during bargaining by someone who did not have authority to make

an agreement will not be enforced as part of the contract, especially if not reduced to writing and placed into the final contract.<sup>30</sup>

12. “The duty to bargain is bilateral. In determining whether an accused party has committed an unfair labor practice, the charging party’s conduct will also be considered.”<sup>31</sup>

13. “A statement by the employer’s negotiator, during collective bargaining negotiations, that the employer will refuse to fund an arbitrator’s award if the arbitrator finds in the union’s favor, is a violation of AS 23.40.110(a)(5) and (a)(1). The statement is even more significant when it is part of a pattern of conduct involving the City’s statements about the Fairbanks Fire Fighters Association and non-funding of arbitration awards. The Agency has previously ordered the City of Fairbanks to “cease and desist from the routine, strategic use of the arbitrability defense and from the use of the statement reserving the right not to fund arbitration awards in correspondence pertaining to grievances.” *Fairbanks Fire Fighters Association, Local 1324, IAFF v. City of Fairbanks*, Decision and Order No. 221, at 19 (June 25, 1997). It is insignificant that one non-funding statement dealt with grievance arbitration awards and the other with an interest arbitration award.<sup>2</sup> When an employer makes statements of this nature before arbitration occurs and before it has had an opportunity to consider the arbitration award, it is evidence of bad faith and coercion.”<sup>32</sup>

14. “...it is permissible for an employer to refuse to ratify a tentative agreement...as long as the employer’s failure to ratify does not appear to have resulted from the employer’s intent to string out negotiations and avoid reaching agreement.” In this case a newly appointed Chancellor wanted to review the agreement and recommended its rejection.<sup>33</sup>

## **4.2 Mediation**

Mediation is required by statute if the parties bargain to impasse. AS 23.40.190. Either there is an agreement on a mediator or the Agency can appoint one. The mediator traditionally goes back and forth between the parties and tries to get an agreement. Neither side has to agree to anything.

## **4.3 Post Mediation Procedures**

The rules change after mediation. Direct communication with each other’s side is permissible as long as the “negotiations” are with each side’s bargaining team and not directly with the parties.<sup>34</sup>

## **4.4 Interest Arbitration: No rules and no teeth**

Alaska statutory provisions for interest arbitration are virtually unique in this country. There is no guidance for how the arbitrator is to rule on the contract provisions that separate the parties. In other states there usually is a statutory framework for how the arbitrator is to award, such as issue by issue, or last best offer either by each issue or as a total package. In addition, just as ground rules are permissive, so is negotiating over the rules for interest arbitration.<sup>35</sup> The reason

for this rationale is that otherwise, there could be an arbitration over the rules. However, this leaves the parties able to disagree on how they present issues to the arbitrator and the basis for the arbitrator's decision. The labor statute incorporates parts of Alaska's Uniform Arbitration Act. AS 09.43.010 et seq. It gives little practical guidance, but does leave it for the parties to argue that the other side should pay for the Arbitrator's bill. AS 09.43.100. In practice arbitrators like to split their bill 50/50.

#### **4.5 Post Interest Arbitration Procedures**

AS 23.40.215(a) provides that: "The monetary terms of any agreement... are subject to funding through legislative appropriation." This means that the employer is under no obligation to fund part or all of an arbitration award.<sup>36</sup> So, you can't go on strike, but an arbitrated wage increase can be ignored by the City. Such a deal.

Last, a court will review the award to see if the Arbitrator exceeded the powers given to the Arbitrator. AS 09.43.120(a)(3). In practice this occurs if the Arbitrator makes an award on a permissive subject of bargaining, assuming that the other side objected to it.<sup>37</sup> A challenge to the award must be made within 90 days after it is issued. AS 09.43.120.

## **5.**

### **ENFORCING THE CONTRACT**

#### **5.1 Introduction**

**Initially you will not have a contract, but as stated previously, the employer cannot change any mandatory subject of bargaining from your previous contract until one is negotiated. If the employer does so, instead of filing a grievance, you can file a ULP with the Agency. However, the principles set out here will apply in any event.**

The importance of an association representative in enforcing the Collective Bargaining Agreement cannot be overstated. Association representatives are often the only individuals who are in a position to be aware of violations of the Collective Bargaining Agreement. Since the strength of a Collective Bargaining Agreement is directly related to the willingness of the association to enforce the contract, the association representative's role becomes all the more important.

In enforcing the contract, there are five areas of information any association representative should possess:

- (1) A working knowledge of the provisions of the contract,
- (2) Knowledge of how the grievance procedure works,
- (3) Knowledge of the time limits imposed by the grievance procedure for the processing of grievances,
- (4) Awareness of how to best write a grievance and

- (5) Knowledge of how to process the grievance through the steps in the grievance procedure.

## **5.2 Understanding the Collective Bargaining Agreement**

The first task of any association representative should be to read the entire Collective Bargaining Agreement. When reading the contract, the association representative should jot down notes about provisions of the contract that may be unclear. These notes should later be reviewed with members of the association's executive board to ensure that the association representative has the correct working understanding of the rights guaranteed by the Collective Bargaining Agreement.

In addition to the initial reading of the contract, each association representative should, on at least an annual basis, reread the most important portions of the Collective Bargaining Agreement. These portions include, at a minimum, the following sections of the **PEA** contract: Article 14, Working Hours/Overtime; Article 16, General Working Rules; and Article 8, Discipline..

## **5.3 The Contract's Grievance Procedure**

To be negotiated. (the following principles apply for investigating a possible ULP)

## **5.4 Time Limits in the Grievance Procedure**

As can be seen above, the grievance contains very specific time limits for the advancement of grievances from one step to another. It is critically important that all association representatives understand these time limits. If a grievance is not advanced within the time limit specified by the contract, the grievance is forever lost and cannot be reactivated (except in limited circumstances when the grievance is of a continuing nature). If you ever have any doubts about time limits, get in touch with the executive board. Always document the date, time and person with whom each step is filed. Keep these records in case of any challenge to the timeliness of a grievance.

## **5.5 Who can and How to Investigate and Write a Grievance**

Alaska has adopted the NLRB rule that it is an ULP by the employer to allow a supervisor to be a union officer.<sup>38</sup> The reason for this is that it is difficult for the supervisor to wear two hats, and this can have an adverse effect on either or both the employer and the grievant.

How well a grievance is investigated and written often determines whether or not the grievance is won or lost. When investigating a grievance, it is important that an association representative follow at least the following basic steps:

Interview the employee. In all cases, the grieving employee should be interviewed prior to the writing of the grievance. In the course of the interview, the association representative should make sure to ask questions that will reveal both the strengths and weaknesses of the grievance. The items that should be covered in the interview of the employee are the following:

- (1) Why does the employee believe there has been a grievance,
- (2) What section of the contract has been violated,
- (3) When did the grievance happen,
- (4) What remedy to the grievance is he seeking,
- (5) Where did the grievance happen and
- (6) Who was involved in the grievance.

Examine all records. Before the grievance is written, the association representative should examine all records relevant to the grievance. This should include records possessed by the employee, and records which the employer may have in its possession.

Speak with the employer's representative. Before writing the grievance, the association representative should attempt to get the employer's side of the grievance. To do this, the association representative should speak with any supervisors who may have knowledge of why the employer took the action which resulted in the grievance.

Speak with other association representatives. Another important step to follow prior to writing the grievance is to speak with other association representatives to determine whether or not they have encountered a similar problem and, if so, how they were able to successfully resolve the problem.

Most clients will contact John Hoag or David Snyder while this process is ongoing, and we will write the grievance for them.

## **5.6 How to Process a Grievance**

Under the association's organizational scheme, association representatives are given the responsibility to monitor the processing of grievances through the steps of the grievance procedure. This requires that the association representatives be aware of all time limits imposed by the grievance procedure, and that association representatives assure movement of the grievance through the grievance procedure in compliance with those time limits. The process of advancing a grievance from one step of the grievance procedure to another is usually best accomplished by hand-delivering a copy of the grievance to the higher step.

## **5.7 Potential Employer Roadblocks and Other Issues**

If the contract specifically excludes a subject from arbitration, then an employer can refuse to proceed.<sup>39</sup> It is up to the Agency and then the Courts to decide whether a grievance is arbitral.<sup>40</sup> Statements that a grievance arbitration award will not be funded or complied with are wrong and constitute an ULP, as the rationale about interest arbitration decisions does not apply.<sup>41</sup> A labor organization can file and process a grievance and an ULP as the remedies may be cumulative.<sup>42</sup> If an arbitration award is unclear, then it must be remanded to the Arbitrator for clarification.<sup>43</sup>

## REPRESENTING EMPLOYEES IN THE DISCIPLINARY PROCESS

### 6.1 Employees' Right to Representation -- The Weingarten Rule

Employees are guaranteed the right to representation whenever an employee is being questioned under circumstances which may lead to discipline. These rights were first described by the United States Supreme Court and apply in a variety of settings. In each case, however, the employee is entitled to representation only if the employee requests representation. Absent a request from the employee, the employer has no obligation to notify the employee of the employee's right to request representation. Alaska has adopted the Weingarten rule with these limits:

The employee must first request union representation; the employer does not have an obligation to inform the employee of the right. Second, the employee must reasonably believe that the interview will lead to discipline. Third, the representation may not interfere with legitimate employer interests. The employer may respond to the request either by granting it or terminating the interview. Fourth, if a union representative does attend the interview, the employer has no obligation to bargain with him or her....  
*Munson v. State*, No 206 (1996)

Because Weingarten rights turn on an employee's request for representation, association representatives should make sure that all employees with whom they work understand that they have the right to an association representative whenever they are being interrogated about a matter which they believe could result in discipline. At a minimum, Weingarten rights exist under the following circumstances:

- (1) Any disciplinary interview concerning a citizen's complaint,
- (2) Any disciplinary interview concerning a department-initiated complaint, and
- (3) Any situation where the employee is required to give an oral or written report about the use of force.

Remember, Weingarten rights only come into existence when the employee requests representation. Association employees have this right whether or not it is in the contract. This right should always be exercised, to ensure that you are informed, and that both you and the employee are adequately prepared.

### 6.2 The Employee's Right not to Incriminate Oneself -- Miranda Warnings

All too frequently in the law enforcement business if an employee is being interviewed for conduct which could violate department rules and regulations, it is also possible that the conduct may violate State or Federal criminal statutes. For instance, if excess force was used, an employee may have committed an assault.

Therefore, if an employee is being interviewed about allegations of misconduct which, if true, could result in criminal charges, the employee should be instructed that the employee has the option to obtain an attorney to represent the employee relative to the potential of criminal charges. The association's duty of fair representation is simply to defend the employee against discipline which may be without just cause. Association representatives should not be giving the employee advice regarding the potential for criminal charges. That should be something the employee should determine for himself or herself with or without the employee's personal attorney. An employee may exercise the employee's right to remain silent in a criminal investigation without being subject to discipline. However, an employee may be given immunity by the employer and ordered to answer questions where there are potentially criminal charges.

### **6.3 Employees' Right to be Granted Immunity Before Answering Questions -- Garrity Rights**

If an employer orders an employee to answer a question, the employee's answer and the fruits of that answer cannot be used against the employee in a subsequent criminal proceeding. This rule, known as the Garrity rule, is named after the case in which the United States Supreme Court first enunciated the rule.

The impact of the Garrity rule is that whenever an employee is being asked a question about alleged misconduct, the association representative should ensure that the employee always solicits an order prior to voluntarily responding to the questions. A good rule of thumb is that when an employee is being interviewed in a disciplinary setting, the employee should be advised that the first words out of the employee's mouth should be: "Am I being ordered to answer this question?"

If the employee is informed that he or she is not being ordered to answer the question, then the employee should respectfully decline to proceed with the interview. If the employee is informed that he or she is being required to answer the question, then the employee should cooperate fully with the investigation (the employee could be charged with insubordination if he or she does not answer the questions), bearing in mind that the statements made cannot be used against the employee in a criminal setting.

Though it is rare to find a law enforcement officer charged with any criminal law violations, invoking an employee's Garrity rights should nonetheless be part and parcel of the association representative's role in the disciplinary process. The old bromide that "an ounce of prevention is worth a pound of cure" is rarely truer than with the invocation of Garrity rights. The immunity that has been given by the department is simply "use" immunity, which means the employee's statement cannot be used against the employee in criminal prosecution. The employee can still be prosecuted. Should an issue arise where it appears clear that the employee may be facing criminal charges based upon the allegations of misconduct, association representatives should consult with the association's attorney over this issue, and the employee may wish to consult with the employee's private criminal defense attorney.

### **6.4 How to Act While Representing Employees in a Disciplinary Interview**

When an employee is being interviewed in this setting, you should ask to tape record the interview. You have no right to tape record the hearing, and the employer may prohibit you from doing so. However, an employer does so at its peril as, if there is a swearing match later as to who said what during the interview, an arbitrator will hold it against the employer for refusing to permit a tape recorder.

You do have the right to be present during any such interview. You should request that you have a chance to confer with the employee before the interview begins, if you have not had time to prepare for the interview. All that you can do during the interview process is request "clarification" of questions when they are asked. Practically speaking, you should do so when it becomes clear that the employee is getting very flustered in the process. You or the employee can still request a break to allow the employee to compose himself or go to the rest room. During that time, hopefully, you will have a chance to calm the employee down.

It is critical that the employee be urged to be honest during the interview. All too often an employee is being interviewed about improper conduct, and the employee may be embarrassed or feel guilty about his or her actions. In desperation the employee may tell stories which are not truthful or distort facts. If this is the case, defending the employee on subsequent discipline based on untruthfulness becomes extraordinarily difficult. The untruthfulness charge will become more serious than the initial improper conduct as it is usually a termination offense. Therefore, the employee should be counseled that while the association can help an employee keep his or her job in most cases where there are allegations of misconduct; one cannot defend an employee who is not truthful.

If the employer's representative begins to act inappropriately or ask trick questions, the association representative should not hesitate to object to those questions and seek clarification of them. If an unprofessional or threatening manner is being taken, you should complain about this fact and ask for clarification as to how the interview is proceeding.

Your short check list while in the interview is as follows:

- 1) Is the employee ordered to be present?
- 2) Is the employee ordered to answer questions and is subject to discipline if the employee refuses to do so?
- 3) May I tape record the interview?
- 4) What is the subject matter of the interview? (What details can you obtain?)
- 5) Object to unclear, compound, or otherwise unfair questions especially if they assume facts that the employee can't verify.
- 6) Get a break if the employee loses his or her composure.
- 7) If the employee can't remember the answer to a question, don't let them adopt a suggested answer.

- 8) Remind the employee to be truthful and not to guess or conjecture.

As soon as the Association learns of an investigation, the employee who is the subject of that investigation should be told clearly and emphatically not to discuss the investigation with others in the Department—except with the Association representative. If a fellow employee is interviewed, that employee will have to disclose any non-privileged conversations with the subject. In addition, the employee should be instructed not to attempt to contact witnesses regardless of whether they are fellow employees or citizens. If witnesses need to be interviewed, the Association will do so, but the subject employee should not risk an accusation of witness tampering by contacting them.

### **6.5 Representing Employees in a Pre-Disciplinary Hearing**

Before an employer takes away the "property right" of an employee to an employee's job or to a full paycheck by way of a suspension without pay or a termination, the employer must give the employee a pre-disciplinary or pre-termination hearing. This is called the "Loudermill" Rule, named after a decision of the United States Supreme Court. Under this rule, the employer must at a minimum follow certain guidelines for the hearing:

- 1) Provide the employee with specific notification of the charges against the employee,
- 2) Allow the employee to have a representative present, and
- 3) Allow the employee on an informal basis to respond to the charges against the employee.

The employer may prohibit the employee from calling witnesses, but the employee may indicate what witnesses would say.

The employer must give the employee enough information about the allegation, the investigation and findings, and the recommended discipline so that the employee can be prepared to respond. Otherwise, the right to a Loudermill hearing would be meaningless.

The employee may choose to waive the employee's right to the Loudermill hearing. The employer often has its mind made up and it may be more advantageous to the employee to go straight to arbitration. This may be so because by this time, the employer may not listen to the employee or may use the hearing as "discovery" to get the association representative's detailed arguments and strategy for arbitrating the situation. In many cases it is better to send in a written statement that sets forth your position and not appear in person. Obviously, this is an important decision and you should consult our firm in each case.

### **6.6 If an Employee is Charged Criminally**

In June, 1997 in the case of Gilbert v. Homar, the United States Supreme Court ruled that if a law enforcement officer is arrested for a criminal act, or even better, indicted for a criminal act, that could serve as the officer's due process so that the officer could be immediately suspended

without pay. The U.S. Supreme Court went on to say that an employee will be due a post-suspension due process hearing but left for the lower Courts to decide whether the hearing the employee was given was adequate or not. In this particular case, the employee was arrested on August 26<sup>th</sup>, the charges were dropped on September 1<sup>st</sup>, and he had received a hearing on December 18<sup>th</sup>. In addition, the Court's decision left it unclear as to exactly what would be covered at the due process hearing. Would it merely be that the employee was really arrested or indicted, or would it be that the employee engaged in conduct which the employer would have to allege and later prove was inappropriate? Years of litigation will be needed to decide this matter.

Recently, at least one employer began suspending employees without pay after they had been charged criminally, and the same employer had been similarly suspending employees without pay based upon transcripts of their testimony, even if they were not charged criminally if the transcript revealed that the employee had confessed to a termination offense. Stay tuned for years of future developments in this area.

In any event, it will be your association's position that through past practice, and certainly future negotiations, it will try to ensure that no suspensions without pay take place without an adequate due process hearing on the underlying charges that an employee may face. There have been a number of law enforcement employees in this state who have been charged with criminal activities, have been acquitted of those charges, and are back at work. In some cases, unusual settlements can be negotiated for the employee who is charged criminally. In one case, an employer agreed that if the employee was convicted, the employee would resign, but if the employee was acquitted, the employer would not go further. In other cases, an employer has simply agreed that if an employee was acquitted, then the employer will reassess information that is available. However, the employer has a right to go ahead with a pre-termination hearing and force the Association to go to arbitration before a criminal case has proceeded to trial. In at least one situation where that occurred, the employee was placed back to work with no discipline before the criminal trial resulted in the employee's acquittal.

## **6.7 Disciplinary Just Cause Standards -- What to Look For**

When representing an employee in the disciplinary process, it is important to understand what it is arbitrators look for in a discipline case. In all discipline cases, arbitrators impose a burden upon the employer to prove that it had just cause to discipline an employee.

In a landmark discipline case, Arbitrator Carrell Daugherty enunciated seven factors which arbitrators later have come to accept as being important in all discipline cases. Association representatives should carefully review the following seven questions in the course of investigating a disciplinary incident and representing an employee in the disciplinary process.

1. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the employer's business?
3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the employer's investigation conducted fairly and objectively?
5. At the investigation did the judge obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his service with the employer?

The above seven questions are a good checklist to use in every discipline case. When investigating the case, association representatives should discuss each question with the employee in order to determine what possible defenses exist.

However, if an arbitrator does not uphold the termination of an employee who has been terminated for a very serious offense, such as felony theft of public money, then a court will vacate the arbitrator's decision and uphold the termination.<sup>44</sup>

7.

**REPRESENTING EMPLOYEES AFTER A SHOOTING  
OR OTHER CRITICAL INCIDENTS**

Being involved in a situation requiring the use of deadly force or taking the life of someone, no matter how justified, will be psychologically traumatic for any law enforcement employee. In addition, studies conducted by psychologists have shown that how the employee is treated by the employer in the subsequent investigation can leave far more traumatic scars than the incident itself.

It is the expectation of Snyder and Hoag, LLC, that the attorney who will represent you will be contacted and will respond to represent the employee as soon as possible after such an incident. The reason for the response is not because of concern for criminal charges or even discipline against the employee as on a nation-wide basis, well over 95% of all police shootings are clearly justified, but to help the employee survive the aftermath, i.e., the department's investigation.

The association **WILL** negotiate with your employer over its use of force policy. As a result of those negotiations, the association representatives should be able to complete their assignments when a traumatic incident occurs.

From the association's standpoint, when such a traumatic incident occurs, it is critical that the following happens.

1. The association representative should immediately go to the scene of the incident, or wherever the employee has been taken, to be with the employee.
2. Call John Hoag or David Snyder using the numbers provided below. If they are unavailable, call or page the back up attorneys in the order that they are listed. If we are unable to arrive in Petersburg in a timely manner, then at least we can offer advice over the phone.

**John Hoag**

Office: 907.772.5079

Cell: 907.650.7440

**David Snyder**

Office: 503.222.9290

Cell: 503.349.0842

**Back Up Attorneys**

1. Tom or Sarah Moore Bostwick

Office: 503.370.7745

Home: 503.391.1254

2. Claudia E. Browne

Office: 541.474.0234

Cell: 541.913.3495

3. Make contact with the attorney who will be responding and re-confirm that the

representative will be working for the attorney as the attorney's agent. This will allow the employee then to talk to the representative and have a confidential conversation while being covered by the attorney/client privilege.

4. Separate the employee from command staff, co-workers and anyone else, and inform the employee that the representative is holding the fort until the association attorney arrives. Tell the employee that the representative is working as the agent of the attorney and the employee can have confidential communications with you. This is important as the employee needs to know that somebody is there for him. The employee needs to be able to unload his feelings and emotions surrounding the incident and have someone to talk to with assurances that the matters will be kept confidential. It will not be unusual for an employee to second guess himself or to wonder why he had to shoot the person, even though the shooting was clearly justified from the standpoint of self-defense.

5. Ensure that the employee is comfortable, has access to liquids, has the ability to attend to personal needs, and has the opportunity to contact family members. However, remind the employee that a confidential communication can occur only with a spouse, and not with parents, children or close friends.

6. Many employers have a trauma team. There is no privilege if the act about which a conversation takes place is "criminal." Until the District Attorney indicates there are no charges to be filed, any employee involved shooting is potentially criminal. Therefore, an employee involved in a shooting should not discuss the event with the trauma team until the District Attorney indicates there is no potential for criminal charges.

However, in the days or weeks before the District Attorney makes this decision, trauma team members can provide valuable services. They can assist the employee in understanding what the employee will be going through during this time.

7. If the employer provides a psychologist or mental health worker for the employee to consult, establish if there is a doctor/patient privilege with the employee. Is the psychologist there for the employer's benefit or for the employee's treatment? If the former, the employee should give no statement to the psychologist. Then, at the most, the psychologist can just go over with the employee the psychological stages the employee may go through in the aftermath of such a traumatic incident. If the psychologist is there to provide treatment to the employee, then the two should be alone for a consultation to ensure that a doctor/patient privilege exists. Do not be present during a consultation where the doctor/patient privilege will exist, nor allow anyone else to be present besides the employee. Do be present if there is going to be a non-privileged briefing.

Individual employees who are involved in the use of force may not automatically have

the right to have their own private attorney present. For instance, some employers take the tactic that since there is no chance of criminal charges, therefore there is no right to individual representation. That way of thinking has been upheld by the 9th Circuit Court of Appeals. Because of this, it is critical to remember that the backup attorneys who will respond if John Hoag or David Snyder are unavailable are working on an "of counsel" basis for Snyder and Hoag, LLC, and are present to be association attorneys. In shootings and other critical incidents where an employee is going to be scrutinized with a criminal investigation, no matter how outwardly justified the shooting may appear, it is this firm's practice to inform the individual employee or employees involved in this case, that he will be working as an attorney for two clients: the association and the individual employee. In order to do so, the attorney will approach the association representative and then the employee to get a knowing and informed consent of both parties to the dual representation. Snyder and Hoag, LLC, has been using this practice for nearly two decades of responding to employee-involved shootings and to date there has never been an issue with this practice.

What the "knowing and informed consent" means is that the association agrees that the firm of Snyder and Hoag, LLC, can have an individual relationship with the employee in representing the employee. This is important to ensure that attorney-client privileges are protected on the employee's behalf. The employee's "knowing and informed consent" is that John Hoag and David Snyder will have permission to disclose facts surrounding the incident to the association if the employee is disciplined. Then John Hoag or David Snyder can advise the association on evaluating whether to give the discipline to arbitration.

In the unlikely but unfortunate situation where it appears that criminal charges may be filed, then the attorney's role in duly representing both clients will cease, and it is critical that the employee involved in the incident obtain independent, private criminal defense counsel. John Hoag or David Snyder will not represent employees on criminal charges because of the specialization of their practice.

Before employees who are involved in a traumatic incident return to work they should consult with a police psychologist. When that occurs, is up to each employee. In some cases that should occur immediately after an incident, in other cases a few days later. Many employees end up suffering from some form of Post-Traumatic Stress Disorder (PTSD) which can include the inability to concentrate, reoccurring nightmares or avoidance of reminders of the incident. This is easily treatable if treatment is sought right away.

So that employees do not feel stigmatized by having a session with a psychologist, virtually all law enforcement employers require a mandatory session with a qualified psychologist before an employee's return to work. Qualified psychologists include:

1. Dr. Suzanne Best, Portland, Oregon. (503) 239-8022.

1. Dr. Robert Jones in Salem, Or. However, in one case Dr. Jones was reluctant to testify. Employees who treat with him, should discuss his participation in a hearing if necessary. (503) 399-7092.
2. Dr. David Baldwin in Eugene, Or. (541) 686-2598.

## 8.

### **DEFENDING THE ASSOCIATION WHEN ONE OF ITS MEMBERS ACCUSES IT OF INADEQUATE REPRESENTATION (Duty of Fair Representation)**

It is unfortunate to go over this subject, but in today's world it is more prevalent that individual association members are bringing claims against their association. Three types of claims are most prominently filed: The first type is based on a claim that the association has failed its duty of fair representation. The second claim is that the association has discriminated against a member, and the third claim is that the association is in some way working with the employer to eliminate an employee's rights under the American with Disabilities Act.

An association may act with a great deal of discretion as to how it processes or handles a grievance and not be guilty of violating its duty of fair representation to its members. A bargaining unit member would have to prove that the association acted "arbitrarily, discriminatory or in bad faith" to have a claim.<sup>45</sup> In almost all cases this is impossible for a member to prove. However, it is important that the association do the following each time a potential grievance is received:

1. Gather the facts. Interview witnesses as necessary.
2. Interview the employee carefully to ascertain what the employee's claim is.
3. Seek a legal opinion from the association's attorney regarding the viability of the grievance and the ground on which it is made.
4. Process a grievance within the time lines, or give the employee written notification of the association's decision not to process a grievance. If in doubt, draft a grievance and begin it through the process so the time lines are not waived and then consult with the association's attorney as to whether in fact there has been a contractual violation.

In disciplinary matters, it is important to go back and look at the seven-step test and gather all the facts possible to analyze the discipline. In complicated cases, as long as you have received a letter of opinion from the association's attorney, the representative's actions will be deemed to be in good faith. Gross negligence will constitute a violation of duty to fair representation such as missing the time lines for a grievance without excuse or ignoring a grievance that has potential merits. However, the burden is extremely harsh and is against the individual employee. The employee's action is against the association

as an entity and not against individual members. The only time this raises an issue is when unpopular employees are subject to discipline. The association must be careful that this employee receives the same representation as one of its more popular members.

Above all else, establish a procedure for the processing of grievances for the association. Make the members aware of this process. Follow the process.

The discrimination statutes in federal law cover an association and its individual officers who can be individually liable for discrimination, if the association officer discriminates against a person by virtue of statutorily prohibited reasons such as sex, race, age or national origin. Be critically careful to remember your role if you are an association officer and not act in such a way that will make you subject to claims of discrimination.

A third area of concern is the Americans with Disabilities Act. If an employee is claiming that an employee has a disability and wishes to have a waiver of provisions of the Collective Bargaining Agreement because of the disability, it is important that the representative seek counsel early on. It is also important to get the employee to document exactly what the employee's disability is, how the employee can perform the employee's job with accommodations, what that accommodation would be and lastly, what section of the Collective Bargaining Agreement will have to be waived in order for that accommodation to take place. An example of this is an employee with sleep disorders who has a letter from his doctor saying he should not work on certain shifts. It is a fairly new area of the law and there are a lot of potential loopholes in it. If the association representative has any questions, be sure to seek advice at once.

## 9.

### **THE ASSOCIATION REPRESENTATIVES' ROLE IN HELPING THE ASSOCIATION PREPARE FOR FUTURE NEGOTIATIONS**

Contract negotiations are a never-ending process. As your association attorneys, we never close our negotiation notebooks from the last negotiations, but keep them handy for reference. When drafting proposals for your next Collective Bargaining Agreement, this will be the initial starting point. Another factor which will be critical in preparation of contract proposals for you will be the facts you bring regarding incidents that occurred during the life of the contract which show the areas of the contract that need improvement. Many of these areas will surround working condition issues of which we will not be aware if you do not document them. Therefore, when an issue arises regarding schedule changes, vacation scheduling, or any other such matter, it is important that you, as the association representative, make contemporaneous notes of the problems. These notes should be in the form of a mini-police report containing the date the incident occurred, which employee or employees were involved, and the person who seemed to be the cause of the problem.

Such documentation is critically important in order to obtain new contract language. We

have to explain to the employer what the problem is and why new contract language will lead to an appropriate solution. In addition, most arbitrators follow the Burt Lance rule which is, "If it ain't broken, don't fix it." In order to obtain new contract language that guarantees you additional rights, we have to show the arbitrator that a problem arose during the life of the agreement, that the existing contract language was not adequate to cover the problem, that our proposed language will solve the problem without unduly hampering the employer. Without your taking the time to document these incidents and forwarding the information to your executive board so it can be kept, our ability to improve your contract will be limited.

## **10.**

### **CONCLUSION**

Your role as an Association Representative is to minimize employee/employer conflict and to ensure smooth working conditions. If you are successful, everybody's day-to-day life will be much better. If you are unsuccessful, then no matter how good the Collective Bargaining Agreement is, we will not have created an appropriate work place for members of the association. Therefore, you should see your role as an association representative not as one who provokes confrontation, but as one who can settle potential problems in an efficient and professional manner.

Sincerely,

Snyder and Hoag, LLC

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<sup>1</sup> *Shields v. City of Unalaska*, No. 217 (1997)  
<sup>2</sup> *ASEA v. State*, No 252 (2000)  
<sup>3</sup> *Munson v. State*, No 206 (1996)  
<sup>4</sup> *ASEA v. State*, No 135 (1991)  
<sup>5</sup> *Mid-Kuskokwim EA v. Kuspuk SD*, No 156 (1993)  
<sup>6</sup> *Kenai Peninsula Borough School District v. Kenai PEA*, 572 P2d 416,423 (1977)  
<sup>7</sup> *APDEA v. Municipality of Anchorage*, 938 P2d 1027, 1029 (1997)  
<sup>8</sup> *Fairbanks Police Chapter, APEE v. City of Fairbanks*, No. 155 (1993)  
<sup>9</sup> *ASEA v. State*, No. 254 (2001)  
<sup>10</sup> *U of Alaska Classified Employees Assn v. U of Alaska*, No 185 (1995)  
<sup>11</sup> *IAFF v. MOA*, 971 P2d 156, 157 (1999)  
<sup>12</sup> *Alaska Voc Tech Edu Assn v. State*, No 274 (2005)  
<sup>13</sup> *ASEA v. State*, No 290 (2010)  
<sup>14</sup> *APEA v. State*, 831 P2d 1245, 1248 (1992)  
<sup>15</sup> See f.n. 9  
<sup>16</sup> *Inlandboatman's Union of the Pacific v. State*, No 141 (1992)  
<sup>17</sup> *State of Alaska v. ASEA*, No 178 (1994)  
<sup>18</sup> *UA Classified EA v. U of Alaska*, No. 169 (1993)  
<sup>19</sup> See f.n. 5  
<sup>20</sup> *ACCF of Teachers v. U of Alaska*, No 204 (1996)  
<sup>21</sup> *IOOMM&P v. State of Alaska*, No 271 (2004)  
<sup>22</sup> *ASEA v. State of Alaska*, No 245 (1999)  
<sup>23</sup> *ESSA v. Fairbanks NSBSD*, No 287 (2008)  
<sup>24</sup> *IBEW v. Kodiak Isl Borough*, No 190 (1995)  
<sup>25</sup> *Id.*  
<sup>26</sup> *APEA v. City of Fairbanks*, No 251 (2000)  
<sup>27</sup> *D#1 Marine Ebg BA v. State of Alaska*, No 272 (2005)  
<sup>28</sup> *Totem Assn of ESP v. Anchorage SD*, No 290 (2010)  
<sup>29</sup> *Alaska CCFOT v. U of Alaska*, No 191 (1995)  
<sup>30</sup> *IOOMM&PPMR v. State of Alaska*, No 263 (2003)  
<sup>31</sup> *Southwest RSD v. SWREA*, No 257 (2001)  
<sup>32</sup> *Fairbanks FFA v. City of Fairbanks*, No 256 (2001)  
<sup>33</sup> *ACCFOT v. U of Alaska*, 69 P2d 1299, 1302 (1983)  
<sup>34</sup> *Mat-Su EA v. Mat-Su SD*, No 268 (2004)  
<sup>35</sup> *State v. PSEA*, No 159 (1993)  
<sup>36</sup> *PSEA v. State*, 895 P2d 980, 986 (1995); *Fairbanks PDCAPEA v. City of Fairbanks*, 920 P2d 273, 274 (1996); *Fairbanks FF Assn v. City of Fairbanks*, No 282 (2006)  
<sup>37</sup> *PSEA supra at p. 983, State v. PSEA supra at p. 1285*  
<sup>38</sup> *Munson v. State*, No 206 (1996)  
<sup>39</sup> *ASEA v. State*, Decision 290 (2010)  
<sup>40</sup> *Fairbanks FF ASSN v. City of Fairbanks*, 8 P3d 1165, 1166 (2002); *State v. PSEA*, 798 P2d 1281, 1285 (1990)  
<sup>41</sup> *Fairbanks FF Assn v. City of Fairbanks*, No 221 (1997)  
<sup>42</sup> *ASEA v. State*, No 135 (1991)  
<sup>43</sup> *IBEW v. City of Ketchikan*, 805 P2d 340, 343 (1991)  
<sup>44</sup> *ASEA v. State*, 74 P3d 881 (2003)  
<sup>45</sup> *Munson v. ASEA*, No 161 (1993)