

Basics of a Civil Service Disciplinary Hearing

*Presented by Gary N. McLean, Attorney at Law and
President of the Hearing Examiners Association of Washington*

36th Annual Civil Service Conference
Yakima, Washington
September 18-19, 2017

1

An A to Z summary

Part One: What is the Appeal?

- A. What is the basis for the appeal/investigation? Know your CSC Rules and requirements for invoking CSC review.
- B. Does the appellant have “standing” – can the appellant appeal the discipline?
- C. Is the “action” really a “disciplinary action” that is subject to appeal before the Commission?

2

Part Two: Prehearing Process

- D. So, you have a CSC Employee with a timely written appeal – now what do you do?
- E. Prehearing Conferences and procedures.
- F. Framing the Issue or Issues.
- G. Discovery – exchanging relevant documents, if not already done; disclosing potential witnesses.
- H. Stipulated Exhibits
- I. Witnesses in common – timing; scope; reserve for tactical or rebuttal purposes.
- J. Subpoenas, cooperation from employer.
- K. Calendar, schedule – discharge and demotion vs. short-term discipline; reasons for delay, or moving forward expeditiously.

3

Part Three: Hearing Day(s)

- L. Day of hearing – format; presiding officer or Hearing Officer.
- M. Appearance of Fairness – any bias?
Prejudgment? Heard something outside the hearing room, in the news, online?
- N. Burden of Proof. Who goes first? Why?
- O. Oath. Time limits? Redundant testimony or witnesses? Relevance?
- P. People will be people. How to deal with emotional witnesses, outbursts, tears, conflict.
- Q. Questions from Commissioners, or the Hearing Officer?

4

Part Four: So, the hearing's done, now what?

- R. Just Cause – basis for discipline – review and understand it.
- S. Deliberations, Executive Session.
- T. How to weigh witness testimony and evidence.
- U. Credibility; Presumptions; Inferences.
- V. Writing and reviewing Decision.
- W. Dissent?
- X. Decision cannot be based on reasons not previously disclosed to Employee, but evidence in Record can serve to bolster, support, or rebut what's been done.
- Y. Nature of ruling – to confirm, reject or modify the challenged disciplinary action.
- Z. Remedies, appeals.

5

Part One: What is the Appeal?

- A. What is the appeal? Know your CSC Rules and requirements for invoking CSC review.

Washington's civil service for city police statute, chapter 41.12 RCW was enacted in 1937. Its purpose is to establish a prototype law enforcement civil service system that protects employees against arbitrary and discriminatory discipline and ensures the public is served by qualified law enforcement officers by providing for merit-based promotion and tenure. *Seattle Police Officers Guild v. City of Seattle*, 151 Wn.2d 823, 831, 92 P.3d 243 (2004). The statute authorizes creation of a civil service commission to review claims of improper discipline. RCW 41.12.030, .040, .090. **The statute demands that covered employees serve only during good behavior, but also demands that discipline be imposed only in good faith for cause.** RCW 41.12 080, and.090.

6

A.

Local CSC Rules vary on procedures. Check your rules for timing: What is the deadline for submitting a written appeal? 10 calendar days? Business days? 14 days? Other? MRSC notes that state statutes provide that a demand for a hearing/investigation must be filed within ten days of the employment action. The commission must then schedule a public hearing for an investigation. See RCW 41.08.090, 41.12.090, and 41.14.120. Be sure your rules "substantially accomplish" things set out in state law.

In counties, the hearing should be held within 30 days of the demand's receipt. The hearing is confined to the determination of whether the employment action (removal, suspension, etc.) was "for just cause."

7

A.

Form of appeal, content: Do your local CSC Rules mandate that an appeal must be in writing, on a special form? What is the required content for a CSC appeal?

Where / to whom is the written appeal submitted? CSC Secretary? CSC Commission staff person? Chair? City Clerk? Other?

8

B. Does the appellant have “standing” – can the appellant appeal the discipline?

- Must be a member of the Civil Service system to appeal a disciplinary action.
- Probationary employees generally have no rights to appeal discipline or discharge to CSC

9

Sample Appendix for CSC Rules re: Probationary Status:

Appendix “___”

*SUMMARY OF RELEVANT LAW CLARIFYING THAT
PROBATIONARY EMPLOYEES ARE NOT MEMBERS OF THE CLASSIFIED SERVICE,
AND ARE NOT COVERED BY CIVIL SERVICE PROTECTIONS*

Under Washington Civil Service law, Probationary Employees are not members of the “classified service” [i.e. covered by Civil Service protections, like discipline only ‘for cause’, and the right to appeal discipline to the Civil Service Commission] until such time as they complete a period of “probationary service”.

10

RCW 41.12.100 reads in relevant part:

*“To enable the appointing power to exercise a choice in the filling of positions, **no appointment, employment or promotion in any position in the classified service shall be deemed complete until after the expiration of a period of three to six months’ probationary service**, as may be provided in the rules of the civil service commission during which the appointing power may terminate the employment of the person certified to him or her, or it, if during the performance test thus afforded, upon observation or consideration of the performance of duty, the appointing power deems him or her unfit or unsatisfactory for service in the department ...”*

11

A 1-year probationary period applicable to police department employees substantially accomplishes the purpose of having a probationary period and is a valid application of Washington’s Civil Service statutes for local police departments, found in RCW 41.12. *Samuels v. Lake Stevens*, 50 Wn. App. 475 (1988), citing *Arbogast v. Westport*, 18 Wn.App. 4, at 7-8 (1977).

A probationary period allows the employer to evaluate the employee’s performance and enables the employer to discharge that employee if it appears during the probationary period that he or she is going to be unsatisfactory. Washington court cases hold that a 1-year probationary period actually serves the purpose of having such a period better than a shorter probationary period.

12

Even where an employee might allege that they have a verbal or other understanding with their employer that they would have no or a shortened probationary period, no individual city official, or civil service commissioner, has power to waive the provisions of the civil service rules, which require a 1-year probation. Arbogast v. Westport, at 7-8.

Probationary employees have no rights to appeal their separation from employment to a Civil Service Commission. State Ex Rel. Swartout v. Civil Serv. Comm'n, 25 Wn.App 174, 605 P.2d 796, Cert. Denied, 449 U.S. 992 (1980).

13

C. Is the “action” really a “disciplinary action” that is subject to appeal before the Commission?

- Generally, discipline includes suspension, demotion, and discharge, or other actions that have the effect of impacting an employee’s property rights, i.e. INCOME, based on allegations of misconduct or failure to adequately perform duties assigned to a particular position.
- In the world of Personnel Law, employees and their bosses can be creative, so be aware that not everything is discipline – reassignments; elimination of lucrative overtime-opportunities; work location change; failure to promote; budgetary layoffs = examples of things some employees occasionally assert as “disciplinary actions” but are normally not subject to CSC review.

14

C.

- But – be aware that sometimes removal from the workplace, without due process in non-emergency situations, may cause financial damage to an employee. CSC Rules may cover such situation, if the employee can establish tangible harm. It may be a de-facto suspension without pay, and without due process.
- Written Reprimand – carefully review your local CSC Rules. Under Washington Civil Service statutes, written reprimands are not appealable to a Civil Service Commission. But, some local CSC Rules include reprimands as actions that are subject to appeal and review by the Commission.

15

C.

Some jurisdictions have alternative dispute resolution procedures; some have contracts with special provisions to direct all matters to special review boards – some would say in an effort to shield discipline from the prying eyes of the public.

In the interest of “transparency” in government, why aren’t arbitrations and other official reviews of disciplinary matters involving public employees subject to public notice and open door policies like those observed by Civil Service Commissions, which are open to members of the public who would like to attend?

16

Part Two: Prehearing Process

D. So, you have a CSC Employee with a timely written appeal –
now what do you do?

17

D.

Are Commissioners 'seasoned' veterans? Is the City Attorney well versed on CSC matters, willing and able to counsel the Commission? Has other special counsel been appointed? Should you use a Hearing Officer/Special Counsel to assist the Commission through the disciplinary appeal?

Personnel issues remain in the top 3 of categories that generate the most expensive (and often painful, time-consuming) litigation faced by local governments.

Crowded municipal court dockets, dangerous dog cases, patent and trademark work, are not the same as CSC appeals. Know the background of your legal advisor; seek experienced counsel in personnel and CSC issues.

18

E. Prehearing Conferences and procedures.

- Most CSC Rules provide for Prehearing Conferences, to address preparation for the hearing, scheduling, other administrative topics.
- May be helpful to delegate authority for such matters to Secretary, Hearing Officer/Special Counsel, rather than rounding up the entire Commission for Prehearing Conferences that can take some time, and may be extended or continued.
- Telephone conferences save lots of time.
- Whatever the case, any Prehearing Conference should be followed with a written Order, or summary of key items, deadlines, stipulations, and the like, issued by the CSC Secretary, Chair, Hearing Officer/Special Counsel as the case may be.

19

Sample: Notice of Prehearing Conference, before the full Commission –

Notice of Pre-Hearing Conference

Before the City of Utopia Civil Service Commission

A pre-hearing conference for the appeal filed by Dudley Dowrong regarding his discharge from employment by the City of Utopia is scheduled for Friday, June 13, 2018, beginning at 6:00 p.m. The conference will be conducted before the Utopia Civil Service Commission at the Utopia City Hall, in the council chambers.

The purpose of the pre-hearing conference is to identify, clarify, and simplify issues.

20

Sample PHC Notice, continued:

The parties are advised to bring preliminary witness lists and potential exhibit lists as well as their calendars to the conference so that a hearing schedule can be established. The hearing schedule that will be issued shortly after the pre-hearing conference may include deadlines for exchange of information between the parties, possible stipulations regarding certain evidence or witnesses, and other provisions needed in order to provide a fair and orderly hearing process before the Commission.

Each party is free to represent themselves through the hearing process, or, at their own discretion and expense, either party may designate a representative of their choice. Parties are responsible for providing the Commission and the other party with written notice of representation, if such party desires that future notices and service be made upon such personal representative.

21

F. Framing the Issue or Issues.

If the written appeal didn't say so, then what is the issue presented in the appeal?

Typically, the only issue in a disciplinary appeal is:

*“Whether the [challenged disciplinary action]
was for just cause?”*

22

F.

Sometimes, an employee might allege that the challenged disciplinary action was taken for political or other prohibited reasons. In such case, the additional issue presented might read as follows:

“Whether the Mayor’s decision to discharge the appellant was or was not made for political or religious reasons?”

23

F.

Sometimes, an employee might allege that the employer failed to follow basic due process, i.e. notice and an opportunity to be heard, before implementing the discipline challenged in the appeal. Similarly, many CSC Rules include specific provisions on the procedures a decision-maker (Mayor, Chief, supervisor, hiring authority) must follow before implementing discipline. Think *Loudermill*, a case discussed in your legal updates, I’m sure. If the matter is raised in a written CSC appeal, the issue presented might read as follows:

“Whether the Mayor complied with the procedural requirements for discharge [or discipline] of employees who are members of the City’s Civil Service System, including without limitation those found in CSC Rule No. ____?”

24

G. Discovery – exchanging relevant documents, if not already done; disclosing potential witnesses.

Relevant records and documentary evidence should be exchanged in a timely fashion.

The appellant should be allowed to review the “investigation file” maintained by the department, if any, regarding the challenged discipline.

The participants should share copies of documents that they might choose to use as evidence in the hearing.

The Hearing Officer, Secretary, or Chair should be delegated authority to weigh in on any disputes that might arise regarding the scope or propriety of requests submitted by either party.

25

G. Discovery, continued –

Both sides are encouraged to begin the record-review and documentary exchange process right away, to provide sufficient time to determine which records or witnesses might be relevant in this appeal.

The parties are also encouraged to cooperate with one another and promptly respond to appropriate requests for information or records from the other party.

In the event either party should believe necessary documents or information are/is being inappropriately withheld or delayed, the issue should be brought to the attention of the Commission’s Secretary, who will contact the Hearing Officer, so that a discovery order can be issued resolving the dispute.

26

H. Stipulated Exhibits.

Sample: Stipulated Exhibit section for Prehearing Order --

The parties are to cooperate with one another for the purpose of identifying and assembling binders (with a short index and tabs) including all Stipulated Exhibits; City Exhibits (if appellant objects or chooses not to stipulate to a particular exhibit proposed by the City); and Appellant Exhibits (if the city objects or chooses not to stipulate to a particular exhibit proposed by the appellant).

Final Witness Lists are the responsibility of each party, and must include a brief summary of the testimony expected from each person identified.

Failure to properly identify a witness or include an exhibit in the final packet of materials will likely serve as grounds to exclude such witness or documentary evidence from consideration at the hearing, absent a showing of a compelling excuse or lack of prejudice to the other party.

27

I. Witnesses in common – respect witness’s time – call them only once, if at all possible; timing; scope; reserve recall, or called more than once for appropriate strategic or rebuttal purposes.

J. Subpoenas, cooperation from employer.

K. Calendar, schedule – discharge and demotion vs. short-term discipline; reasons for delay, or moving forward expeditiously.

28

Part Three: Hearing Day(s)

L. Day of hearing – format; presiding officer or Hearing Officer.

29

M. Appearance of Fairness –

Any bias? Prejudgment?

Heard something outside the hearing room, in the news, online?

You are a sequestered juror the moment an appeal is filed. You should see nothing, hear nothing, and say nothing regarding the appeal and parties to the appeal.

30

N. Burden of Proof. Who goes first? Why?

Sample: Burden of Proof section for Prehearing Order –

Burden of Proof

As provided in CSC Rule No. _____, the Mayor, as the “disciplinary authority” in this matter, shall have the burden of showing by a preponderance of the evidence that her action to suspend the appellant for one day without pay was for cause.

31

O. O is for Oath.

Time limits?

Redundant testimony or witnesses?

Relevance?

Failure to require witness to take oath before testimony violates due process rights.

See *Nirk v. Kent Civil Serv. Commission*, 30 Wn. App. 214 (1981) – Failure to swear witnesses appearing before the civil service commission violated the officer's due process rights.

32

P. People will be people.

So, how do you deal with emotional witnesses, outbursts, tears, or palpable dislike or conflict during the hearing?

Let people be people, and you may be surprised what you learn through all the smoke and meltdowns.

Breaks are ok, but be careful to see that witness coaching and suggested testimony don't get out of hand.

33

Q. Q is for Questions from Commissioners, or the Hearing Officer?

Let the parties present their case at their own peril – only pose questions when genuinely necessary to clarify key points. Consider Appearance of Fairness, concern with bias or placing thumb on scale in favor of one side during the hearing.

Establish internal guideline for all Commissioner questions to flow through Hearing Officer or Presiding Officer, to maintain appearance of fairness, and to avoid redundant questions or those that are answered somewhere else in the Record.

34

Part Four: So, the hearing's done, now what?

R. Just Cause – basis for discipline – review and understand it.

In Washington, whenever you deal with employee misconduct, you need to start with the “just cause” standard.

Baldwin v. Sisters of Providence in Washington, Inc. 769 P.2d 298, 112 Wash.2d 127 (1989).

35

The Washington Supreme Court has provided us with the following definition of “just cause”:

“We hold ‘just cause’ is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for “just cause” is one which is not for any arbitrary, capricious, or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.” Id. at p. 139.

36

Remember, you must look to the controlling terms of any applicable collective bargaining agreement; personnel manual; civil service rules; and/or employment agreement to see what standard, if any, applies in the disciplinary context.

37

MRSC notes that “for cause” [same as “just cause”] includes the following, based on state civil service statutes (See RCW 41.08.080, 41.12.080, and 41.14.110):

Incompetency, inefficiency or inattention to or dereliction of duty;

Dishonesty, intemperance, immoral conduct, insubordination, discourteous treatment of the public or a fellow employee, or any other act of omission or commission tending to injure the public service; or any other willful failure on the part of the employee to properly conduct himself; or any willful violation of civil service statutes, rules, or regulations;

Mental or physical unfitness for the position which the employee holds;

Dishonest, disgraceful, immoral or prejudicial conduct;

38

Drunkenness or use of intoxicating liquors, narcotics, or any other habit forming drug, liquid or preparation to such extent the use interferes with the efficiency or mental or physical fitness of the employee, or which precludes the employee from properly performing the functions and duties of any position under civil service;

Conviction of a felony, or a misdemeanor, involving moral turpitude;

Any other act or failure to act which in the judgment of the civil service commissioners is sufficient to show the offender to be an unsuitable and unfit person to be employed in the public service.

39

S. Deliberations, Executive Session.

Sample language for CSC Rules:

DELIBERATIONS. Deliberations by the Commission shall be subject to Chapter 42.30 RCW. The Commission may deliberate in closed (executive) session when taking a disciplinary or other quasi-judicial case under advisement. No person other than the members of the Commission, the Secretary and legal counsel to the Commission may be present during the deliberations. No person shall attempt to convey any information or opinion to the Commission concerning any matter on appeal other than in open hearing.

RCW 42.30.140 reads in relevant part:

... this chapter shall not apply to: ... (2) That portion of a meeting of a quasi-judicial body which relates to a quasi-judicial matter between named parties as distinguished from a matter having general effect on the public or on a class or group...

40

T. How to weigh witness testimony and evidence.

Start with the easy stuff – what did the parties agree to accept as common facts or stipulations?

Not all disagreements or conflicts on facts are relevant to the issue at hand

Focus on the issue(s) at hand; if it's not relevant or helpful in weighing testimony or evidence, turn the page.

Who had nothing to gain or lose? Who stood to benefit from their testimony? Who tried to settle a score? Did they have an angle? Why? Motivation? Think Littlefinger, on Game of Thrones.

41

U. Credibility; Presumptions; Inferences.

Until recently, most people don't lie all the time. But, were they shading the truth? Or, is there something about their situation that makes their testimony more believable than conflicting testimony from some other witness?

Reasonable Inferences –

Unlike a criminal case, where a defendant's failure to testify gives rise to no negative inference because the defendant is entitled to assert the privilege against self incrimination, if a party to a civil case chooses not to testify as to material facts within his or her personal knowledge, an inference arises that the facts would not aid his or her contentions. Tegland, 5 Wash.Prac., Evidence Law and Practice, Sec. 402.8.

42

V. Writing and reviewing Decision.

Sample language for CSC Rules:

DECISION. In any appeal, the Commission shall issue a decision as soon as practicable. The decision shall be made by a majority vote of the Commission. The decision shall be in writing and shall include findings of fact, conclusions of law and an order. In any disciplinary appeal, the Commission's decision must determine whether the challenged action was or was not made for political or religious reasons and whether it was or was not made in good faith for cause; and the Commission shall notify each party, or counsel of record for each party, of the decision.

W. Dissent?

43

X. Decision cannot be based on reasons not previously disclosed to Employee, but evidence in Record can serve to bolster, support, or rebut what's been done.

Civil service commission's decision must be based upon appointing authority's grounds. It may not use alternative grounds. See *In re Smith*, 30 Wn. App. 943 (1982) – MRSC notes that although the civil service commission is vested with discretionary power to determine whether charges brought by the appointing power are sufficient grounds for dismissal, the exercise of this power is confined to the content of those charges; the commission may not use alternative grounds to support its decisions.

44

Y. Nature of ruling – to confirm, reject or modify the challenged disciplinary action.

45

Z. Remedies, appeals.

Backpay? Reinstatement? Suspension in lieu of discharge?

Sample CSC Rule language:

APPEALING COMMISSION'S DECISION. The Employee or appointing authority may appeal the decision of the Commission to the _____ County Superior Court. Such appeal shall be served on the Commission Secretary within thirty (30) days after the entry of the decision and shall be processed according to the provisions of RCW Chapter 41.12. All costs associated with preparing the record for judicial review shall be the responsibility of party appealing the decision.

46

Gary McLean is a sole-practitioner, now focused on service as a Hearing Examiner/Hearing Officer for jurisdictions around the state, including Bellevue, North Bend, Richland and San Juan County. In the late 80s, Gary received his J.D. from Vanderbilt Law School and started his legal career in private practice at a large Seattle law firm followed by public-sector work as an Assistant City Attorney for the City of Seattle, City Attorney for Des Moines and Puyallup, and City Manager for the City of Puyallup. He has served as a contract-Hearing Officer for Civil Service Commissions and personnel offices around the state, including Bellevue, Seattle, Olympia, Orting and Pacific. He now serves as President of the Hearing Examiners Association of Washington; a Board member for the Washington Trust for Historic Preservation; and is a former WSAMA Board Member. He has presided over dozens of Civil Service and personnel appeals and disciplinary hearings over the years, including some involving time-theft, violence in the workplace and harassment. He was listed as a "Rising Star" by Washington Law & Politics.