



Just Cause or Just Because?

By: Brian Brillo

We've seen the term "Just Cause" before. It's referenced in statutes and court decisions. We've seen it in CBAs as unions typically negotiate for a contract provision stating that an employee cannot be fired absent just cause. But what is Just Cause? Clearly stated, Just Cause is legal jargon for a "legitimate business reason", such as wrongdoing on an employee's part that warrants an employer to take disciplinary action.

When considering disciplinary action against an employee, concerns over future misconduct or dissatisfaction with job performance are simply not enough. It also doesn't matter if the supervisor dislikes the employee. A supervisor's legitimate business reason for taking disciplinary action lies in the "Just Cause Test". This test is a series of prerequisites that must be answered "yes" before you issue any disciplinary action to an employee. If the answer to any of the following questions is "no," then just cause does not exist and disciplinary action should not be issued. Here are the six considerations of the Just Cause Test:

- (1) Is there a rule?
- (2) Is the rule reasonable?
- (3) Is the rule consistently and equitably enforced?
- (4) Was a thorough investigation completed?
- (5) Was the discipline administered fairly and was it reasonably related to the infraction itself, as well as to the seriousness of the employee's past record?
- (6) Was the disciplinary action taken in a timely manner?

While these six considerations do not constitute a recognized legal standard, honest "yes" answers to all six questions can establish a solid framework for going forward with an action. The more "no" answers, the greater the risk of liability. The bottom line is to think before you act in imposing discipline or taking other action (including termination). ■

...Right to Remain Silent?

EMPLOYING THE "USE IMMUNITY"

By: Janessa Inong

In our last issue, in an article entitled, "Right to Question, Right to Direct an Answer," we briefly covered management's rights during Administrative Investigations. Specifically, we learned that employees must truthfully cooperate in administrative investigations.

But what affect does a guarantee that information disclosed during an interview will not be used in a criminal proceeding have, if an employee is being charged criminally?

Well, the answer starts at the very definition of an Administrative Investigation, which is generally defined as: *Any official investigation that is NOT conducted for the purpose of law enforcement or criminal prosecution.*

Accordingly, one of the main reasons Agencies can expect employees to fully cooperate in an administrative investigation has to do with the case of *Kalkines v. United States*, 473 F.2d 1391 (1973), which held that, unless the information is going to be used for criminal prosecution, the employee has no right to remain silent.

Furthermore, pursuant to *Garrity v. New Jersey*, 385 U.S. 493 (1967), if an employee is forced to answer incriminating questions under penalty of disciplinary action, the answers cannot be used in a criminal proceeding.

Essentially, these two rules work together as a *de facto* "use immunity" requiring the employee to answer investigatory questions or face discipline, possibly removal.

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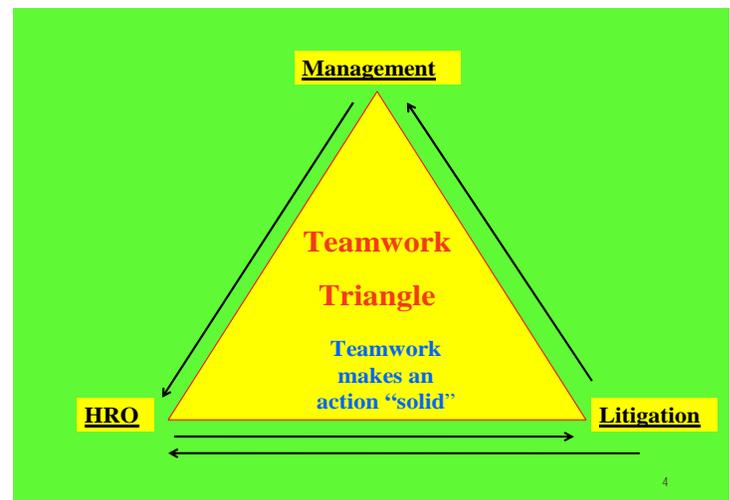
A Word to the Wise

By: Jessica Don

As upcoming HR professionals it is easy to feel overwhelmed and to overlook key points regarding advice to managers and supervisors in the Employee & Labor Relations arena. Although unintentional, errors happen exposing the agency to potential liability. Therefore, to be successful in the E&LR arena we must be mindful of these key points.

1. **Conducting Investigations:** It is imperative that you advise management to conduct a thorough investigation immediately following a report of an incident, issue and/or allegation. Interview the affected employee(s) and all witnesses involved. When interviewing employees make sure to get written statements with signatures and dates. Collect and/or document any evidence received or found.
2. **Grievances:** Should you receive a grievance from the union or an employee, ensure that the grievance identifies the article number, section, and what was violated of the applicable collective bargaining agreement. This is necessary to be able to properly address the concerns raised in the grievance and preserve the record. Should you receive a grievance without this information, you may want to immediately follow up with an email to the Union indicating the grievance is missing required information.
3. **Meetings:** Advise managers and supervisors to document when they hold meetings, indicate who was at the meeting, when the meeting was held, and what was discussed at the meeting. A simple memorandum for the record can help you recollect events/issues discussed at a later date should you find yourself in a situation where it is needed.
4. **Relationships:** Utilize the Teamwork Triangle between HR, management (customer), and the E&LR team. In doing so, it is imperative to develop and maintain effective relationships with managers /supervisors and our co-workers in the E&LR arena. This helps ensure all sides are on the same page while providing you with a quality check (QC) on your work product and/or advice you may need assistance with.

FYI... Remembering these key points promotes quality customer service and products. ■



...Right to Remain Silent?

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The problem is the *de facto* immunity could result in damaging a federal or state prosecutor's case when it goes to criminal trial.

Therefore, if the investigation may lead to criminal prosecution, the employee is entitled to the Miranda Warning, which includes the right to remain silent.

It is critical to note, the Department of Justice has established very clear rules prohibiting agencies from unilaterally giving an employee "use immunity." (See 28 U.S.C. § 535; 18 U.S.C. § 6002-6004.)

Thus, to avoid potentially damaging a federal, state, or local prosecutor's case, **do not** employ "use immunity".

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LRP Publications
/Cyberfeds.com;
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