



ESC Local 20 Steward Training Module 2: Discipline and Grievances of Discipline

One of the main benefits workers gain when they join a union is protection against unfair and unjust discipline. Experienced Stewards are ready to handle all sorts of discipline cases, from warnings to terminations. Stewards should be ready to deal with a range of situations, from addressing gross discrimination by the boss in who gets disciplined to dealing with union members who sometimes seem to go out of their way to get themselves in trouble.

Section 27.1 of the Contract states that management may "discipline or discharge employees for just cause". The importance of a sentence like this is that it binds PG&E to imposing discipline not just for any reason (cause); rather, the reason has to be a "just" reason.

Elements of "Just Cause"

Although not a legal definition, it is commonly accepted that there are seven "tests" as to whether management has used "just cause" in handing out discipline.

1. **Notice.** Was the employee adequately warned of the consequences of their conduct? Warnings may be given orally or in printed form. An exception may be made for certain conduct, such as insubordination, coming to work drunk, drinking on the job, or stealing PG&E property, that is so serious that the employee is expected to know it will be punishable.
2. **Reasonable Rule.** Was the employer's rule or order reasonably related to efficient and safe operations?
3. **Investigation.** Did management investigate before administering the discipline? The investigation normally should be done before the decision to discipline is made.
4. **Fair and Objective.** Was the investigation fair and objective? If an incident happened, did the employer interview everyone present, or only management who were present? If the employer refused to interview non-management employees then the investigation may not have been fair.
5. **Burden of Proof.** Did the investigation produce substantial evidence or proof of guilt? It is not required that the evidence be preponderant "beyond a reasonable doubt," except where the alleged misconduct is of such a criminal or reprehensible nature. Members have fewer rights inside the workplace than they would have in civil court, but still management must have real evidence, not guesses. Again management cannot just try to make a worker prove their innocence without presenting proof of guilt.

6. **Penalty applied fairly.** Were the rules, orders, and penalties applied evenhandedly and without discrimination? If enforcement has been lax in the past, management cannot suddenly reverse its course and begin to crack down without first warning employees of its intent.
7. **Proportionality.** Was the penalty reasonably related to the seriousness of the offense and the past record? If employee A's past record is significantly better than that of employee B, the employer properly may give employee A lighter punishment than employee B for the same offense.

PG&E's "Positive Discipline" system

PG&E uses a system called Positive Discipline ("PD" for short) to address employee problems in the workplace. The system divides issues into three categories:

Three categories of discipline:

- ❖ Work Performance
- ❖ Attendance
- ❖ Conduct

The system has five steps:

Coaching and Counseling ("C&C")	PG&E does not consider this to be discipline. An employee can have unlimited C&C's in their file without ever going to a higher step. PG&E should not use C&C's to justify a higher level of discipline—but they sometimes do. Therefore ESC considers these to be potentially disciplinary.
Oral Reminder	The lowest level of discipline. Active for 6 months.
Written Reminder	Active for 12 months. An employee can have written reminders in more than one category.
Decision-Making Leave ("DML")	A one-day paid leave, followed by 12 months of "last chance" status. PG&E's policy says that an employee on DML can be fired for any infraction in any category.
Termination	Employee is fired.

Crisis Suspension:

Per PD, Management can suspend members while they are investigating discipline. Sometimes paid and sometimes unpaid. Immediately contact a Union representative if a member you are representing is suspended. Suspension, paid or not, is grievable.

Social Media Nexus:

Management investigations are starting to link social media posts and the ability to identify a member as a PG&E employee. Members should be aware and Stewards should be prepared to confront this type of management investigation.

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More detail is provided in PG&E's "Supervisor's Guide to Positive Discipline", which is a useful resource available in the steward database.

ESC has never formally agreed to the PD system. In 1987 Executive Director Ben Hudnall sent a letter to PG&E stating that the Union would not negotiate the details of this discipline system; instead ESC would use the principals of Just Cause in whatever system the Company came up with. (IBEW has signed letters of agreement on the PD system).

Another important note in the "Work Performance" area is that performance evaluations, such as PMP ratings, cannot be used for discipline. This is made clear in the 2023 contract cover letter item 2.9:

9. The Company does not use PMP ratings in making promotion, demotion or discipline decisions. PMP ratings may not be used in reference to "current performance" in 21.18.c, "satisfactory performance" in advancement criteria, or any other contractual process. [RC 938]

Pre-discipline investigation and *Weingarten* rights

The right of employees to have union representation at investigatory interviews was established by the U.S. Supreme Court in 1975. These rights have become known as the *Weingarten* rights.

Employees have *Weingarten* rights only during investigatory interviews. An investigatory interview occurs when a supervisor questions an employee to obtain information which could be used as a basis for discipline or asks an employee to defend their conduct.

If an employee has a reasonable belief that discipline or other adverse consequences may result from what they say, the employee has the right to request union representation. Management is not required to inform the employee of their *Weingarten* rights; it is the employee's responsibility to know and request.

When the employee makes the request for a union representative to be present management has three options:

1. stop questioning until the representative arrives, or
2. call off the interview or,
3. tell the employee that management will call off the interview unless the employee voluntarily gives up their rights to a union representative (an option the employee should always refuse.)

Employers will often assert that the only role of a union representative in an investigatory interview is to observe the discussion. The Supreme Court, however, clearly acknowledges a representative's right to assist and counsel workers during the interview.

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The Supreme Court has also ruled that during an investigatory interview management must inform the union representative of the subject of the interrogation. The representative must also be allowed to speak privately with the employee before the interview.

Stewards may not attempt to prevent an investigation. At the end of the interview the union representative can add information to support the employee's case. The steward can also call for a caucus to defuse a tense situation, allow the employee time to collect their thoughts, etc.

Other tips:

1. The pre-disciplinary investigation is a good time to propose a settlement. A Supervisor won't want to reverse themselves later once they have already made up their mind about discipline.
2. Put in extenuating circumstances at the pre-disciplinary stage. They can, and should, be considered before the supervisor decides on discipline.
3. The member may be upset, frightened, or angry. **Take a caucus** to cool a situation down if necessary.
4. PG&E's policy is to offer members a steward.
5. Cover with the members you represent how to assert Weingarten rights at the first sign of trouble.
6. Make sure everything is documented.
7. Counsel members to tell the truth. The matter in question may be minor, but falsehood in an investigation can lead to termination.

Member Choice of Steward - Must Be Reasonable

There are many worksites with more than one steward. We have seen cases where the Supervisor tries to dictate which steward will represent the member.

In general, the member gets to choose the steward to represent them, as long as it doesn't put an unreasonable burden on the company. "**Reasonable**" is the key word, as in many legal standards. For instance, it would be unreasonable to demand a steward from another office, or someone who is on vacation. However, if the steward you request is reasonably available then management cannot deny your choice. If there is only one steward in the office, then the member may not be able to reject that steward, unless there is a compelling reason (e.g. that steward made a complaint against the member, or they have a history of antagonism).

Management has a "waiver of shop steward" form for members who insist they do not want a steward present. It is a good idea for stewards to have this in writing. Members should never be offered the form by management; it should only be used if the member independently says they do not want a steward.

Grievances of Discipline

After an investigation, management may decide to issue discipline to a member. Stewards may “first step” a grievance on discipline. The First Step is a discussion between the supervisor and the Steward. Ask for a remedy and follow up with an email to confirm the conversation. Explain that management should consider your requested remedy and respond within a reasonable time period. The Grievance process will be covered in more detail in a later module.

1. In discipline cases, management has the **burden of proof**.
 - o Did the supervisor adhere to the "seven tests" as an outline? Just because a supervisor messes up on one of the seven tests, this doesn't mean we automatically win, but proving they screwed up helps a lot.
 - o If you can, try to stop the employer from firing a member. Try to get a cooling off period if necessary. The case becomes harder once a worker is out the door.
 - o You can ask for all the employer's notes and records they used to make a decision. The union has a right to them.
 - o Do a thorough investigation of the case. DON'T take management's word on anything.
 - o In a grievance meeting make the employer prove their case first. Make them present all the facts and don't assume anything. Don't let the boss start the meeting by saying to the union, "OK tell me why I shouldn't fire Joe". Make management justify firing Joe.
 - o There are two parts to every discipline case: first, did the employee violate a known rule and second, what should the punishment be? Sometimes we lose the first part but then we have to make sure the punishment fits the offense.
2. **Our best arguments**
 - o Good employee work performance
 - o Bad paperwork by supervisor – use of opinions or hearsay
 - o Proportionality of discipline applied
 - o Timeliness of the discipline
 - o Careful with the “everyone else is doing it” argument
3. **Possible Settlements**
 - o Always try to resolve at the lowest part of the process
 - o Reduce to lesser level
 - o Eliminate entirely
 - o Change effective date
 - o Rebuttal letter. If the supervisor insists on discipline and the case doesn't warrant a grievance, make sure that the supervisor receives a written notice disputing the discipline.
 - o Accept with an action plan. Always seek a commitment from supervisors to accept adequate performance/attendance/ conduct.
 - o Always counsel members to avoid conduct that puts them at risk.
4. **Do we have to grieve every discipline?** No, but keep in mind:
 - o Duty of Fair Representation: The union and its representatives have a legal obligation to represent all workers in the unit fairly, regardless of their membership status, race, religion, nationality, age, or gender. Therefore, stewards must be sure to do their best to handle each problem fairly even if the worker is not a union member, has unpopular

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beliefs, or has personality conflicts with the steward or other union leaders. Act in good faith to process meritorious grievances.

- o Employee might be disciplined again. The written reminder you do not grieve today can lead to termination later.
- o Call your union rep if in a difficult position.