

negotiating with the employer on the terms and conditions of employment and the administration of the contract.

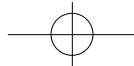
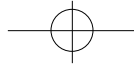
This selection of an employee organization can be by election, where more than one union is competing for the right to represent a body of employees, or by recognition/certification.

Recognition occurs when a public employer grants an employee organization the right to be the exclusive bargaining or negotiating agent for a unit of public employees.

Certification results when PERB grants an employee organization's petition [request] to represent a unit of public employees. To be certified:

- a) the appropriate negotiating unit must be defined,
- b) it is determined that the employee organization represents the employees in the unit, and
- c) the employee organization affirms that it does not assert the right to strike against a public employer.

In cases where there is more than one employee organization seeking to represent a unit of employees, the union(s) seeking to represent those employees must file a petition to decertify the existing union and to be certified. An election must occur where the unit employees choose through voting, which union will represent them.



- 2. Requires public employers to negotiate and enter into collective bargaining agreements with public employee organizations with regard to employee terms and conditions of employment.

Under the provisions of the Taylor Law public employers are mandated to negotiate in good faith with the employee organization with regard to employee terms and conditions of employment. It is this requirement that makes it possible for there to be a grievance procedure for the resolution of grievances since the grievance procedure itself is a negotiated element of the collective bargaining agreement.

- 3. Establishes the State agency, the Public Employment Relations Board (PERB), to administer the Law.

PERB was established to provide for an equitable means by which to administer the law. The intent was to avoid the necessity and lengthy delay of having to use the courts to hear and resolve every dispute that might arise between employer and employee organization. Of course the courts are being used in the appeal process if one or both of the parties involved in a dispute are dissatisfied with the decision of PERB.

- 4. Defines and prohibits public employers as well as public employee organizations from engaging in improper practices.



This section of the Taylor Law is probably one of the most important provisions to be aware of because it basically provides an alternate forum for processing non-contract disputes which might not be arguable under the grievance procedure.

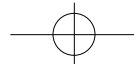
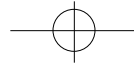
An improper practice prohibits a public employer (or public employee organization) from engaging in conduct which interferes with the representation rights of public employees or with the collective bargaining process.

Interference, Coercion, and Restraint - Public employees have the right under the Taylor Law to form, join, or assist employee organizations (unions), as well as the right to bargain collectively through their chosen representatives. An employer may not interfere with employees in the exercise of their rights to bargain collectively through their own labor representatives.

Domination of Unions - Employers may not dominate or interfere with the formation or administration of any employee organization, financially or in other ways.

Discrimination - A public employer may not transfer, demote, fire, or engage in any other discriminatory or coercive conduct toward employees because the employees are exercising protected rights. A major protected right is that of filing grievances.

It is most often in regard to the discipline or discharge of employees that the question of union animus arises.



If it can be shown that an employer treats one worker differently from others in a similar situation specifically because of that worker's union activity, an improper practice charge may be appropriate. In such cases, the union must be able to establish factually that the employer was motivated to take whatever action it took because of the employee's union status or union-related conduct.

Refusal to Bargain - Workers have the right to bargain collectively with employers through their (chosen, certified or recognized) representatives, and it is an improper practice for an employer to refuse to bargain collectively with the certified/recognized representatives of its employees.

This means that the public employer may not do the following:

- Refuse to bargain with representatives of the designated union for purposes of collective bargaining.
- Fail or refuse to bargain in good faith.

Changes in Terms and Conditions of Employment and Other Improper Practices - The right of employees to benefit from their collective bargaining agreement is protected. It is an improper practice for an employer to make unilateral changes in terms and conditions of employment, as evidenced by the contract and by past practice. In addition, an employer that refuses to continue all the terms of an expired agreement while a new agreement is being negotiated is in violation of the law.



Other improper practices include refusal to accept grievance arbitrations, process grievances, or supply information necessary for collective bargaining and for contract administration.

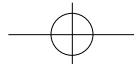
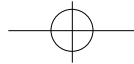
Many of the same structures or prohibitions that apply to the employer under the Taylor Law are also imposed upon the union. For example, it is an improper practice for CSEA representatives to threaten workers to get them to join the union. It is an improper practice for the union to fail to bargain in good faith.

An improper practice must be filed with PERB within 4 months of the occurrence and is generally filed by the union on behalf of the wronged employee(s). In some instances an improper practice charge may be filed simultaneously with a contract grievance. PERB will generally defer a decision on the IP pending a final decision on the grievance.

An IP can also be filed by a public employer against the union. And, a public employee can file an IP against their union for a failure under the Duty of Fair Representation (DFR).

5. Establishes impasse procedures for the resolution of collective bargaining disputes. Pursuant to the Taylor Law, specific procedures provide for the resolution of disputes during the collective bargaining process. These include; a) Fact Finding, b) Mediation and, c) Final Arbitration (for certain public employees).

46



6. Prohibits public employees from striking. Even with this provision, the Taylor Law provides a viable statutory vehicle by which public employees in New York receive many rights and protections. And, absent such a law, there would be no collective bargaining agreement, no grievance procedure, and no need for grievance representatives.

### National Labor Relations Act (NLRA)

The National Labor Relations Act (NLRA) is a labor relations statute covering all private sector workers. It became effective in 1935 and was the first comprehensive labor relations law for private sector workers in the United States.

The NLRA:

1. established private sector worker rights to organize, join unions, and engage in collective bargaining;
2. established procedures by which workers may elect their bargaining agent;
3. established employer unfair labor practices and required employers to bargain in good faith;
4. prohibited employers from interfering with workers' right to unionize;

47



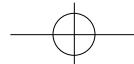
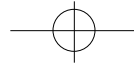
- 5. prohibited employers from discriminating against workers for union activity;
- 6. prohibited company unions;
- 7. established procedures to elect unions;
- 8. established National Labor Relations Board (NLRB) to enforce Act.

### Duty of Fair Representation (DFR)

Labor laws, namely the NLRA for the private sector workers and the Taylor Law for the public sector workers, grant a union the exclusive right to represent members of the collective bargaining unit with the employer in contract negotiations and administration dealing with terms and conditions of employment.

This exclusivity flows from either voluntary recognition or certification after election. The employer need not, and in some cases may not, deal with the individual worker. This is clarified in the language of the collective bargaining agreement. Because of the union's special status as exclusive representative, the courts have imposed upon it the duty to fairly represent all of the employees in the collective bargaining unit, whether or not those employees are union members.

Most grievance procedures allow the worker to commence the grievance proceeding on his/her own,



or through the union. As a result of "owning the grievance" at the arbitration step, the union breaches its duty of fair representation in the following instances:

- a. The union may not fail to process a valid contract grievance on a timely basis. Where the worker approaches the union with a valid contract grievance, the union is required to file that grievance on a timely basis. A breach of the duty of fair representation occurs where an individual carelessly or negligently allows the time limits to expire.

In *Smith v. Sipe* (1986), the New York State Court of Appeals determined that merely providing incorrect advice would not constitute a breach of the duty of fair representation. However, the unexplained failure to file a timely grievance or appeal to the next step of the grievance procedure, the effect of which is to extinguish a worker's rights under the contract, is subject to duty of fair representation liability.

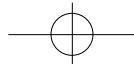
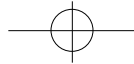
Recent PERB and court decisions have clearly upheld the rule that a union is not required to take every case to arbitration.

- b. The union may not fail to fully investigate a grievance. This does not mean that the union must necessarily confer with every single potential witness. It does mean that the facts and circumstances surrounding the grievance must be



investigated in good faith before a determination is made that the grievance will not be pursued. The investigation may be done by activists, provided an impossible burden is not imposed and it is done in a timely manner. The law does not require the union to supply attorneys for contract grievances.

- c. The union may not fail to make a decision with respect to a contract grievance. If a decision is made that the grievance will not be filed or pursued, the employee should be notified in a timely fashion, and, in any case, within the period which would allow him/her a reasonable time to file the grievance on his/her own, if that is possible under the applicable collective bargaining agreement. The worker should be notified in writing and a copy kept in the grievance folder.
- d. The union may not discriminate among unit members or among existing grievances. Different standards may not be applied to make the determination of whether a contract grievance will be filed or pursued. For example, the law prohibits a union from refusing to process clearly meritorious grievances for non-members or agency fee payors because they are not members of the union. They are part of the bargaining unit.
- e. The union may not trade one grievance for another. Resolution of one grievance may not be



traded for results of another. Each grievance must stand on its own merit. A demand for arbitration in a clearly meritorious grievance may not be withdrawn if the employer agrees not to discipline a Unit President. This does not mean that grievances cannot be settled, however.

- f. The union may not fail to give zealous and reasonable representation during a hearing of the grievance. Whether the hearing is being handled by elected officials, paid staff, or attorneys, the interests of the grievant must be represented in good faith. Non-members or dissident individuals within the union cannot be thrown-in at the hearing.

A union can be held to have breached the duty of fair representation by reason of failure to provide adequately trained grievance representatives and/or adequate organizational support to such representatives. In the case of Diaz v. CSEA, the New York State Public Employment Relations Board had found such a duty to exist.

- g. The union may not lull a grievant into complacency. One way of doing this would be to state or imply that it will take care of the matter. If the grievant is required to supply additional information or do further investigation, the requirement must be clearly specified.



Damages

Under Bowen v. United States Postal Service (1983), the Supreme Court has held that where an employer wrongfully discharges an employee who is within a collective bargaining unit represented by a union, which thereafter breaches its duty of fair representation, the employer is responsible for back pay only to the point where an arbitrator could have issued an award reinstating the worker, had the union proceeded to arbitration.

All back pay damages accruing after the hypothetical arbitration date are the responsibility of the union, even though the union was not responsible for the employer's initial decision to terminate the worker.

The practical result of this decision is that unions will become liable for a large portion of an award of back pay where it is found that a worker is wrongfully discharged and the union subsequently breached its duty to fairly represent the worker. The statute of limitations for duty of fair representation suits is four months.

CSEA currently does not grant legal assistance for many matters involving administrative agencies such as workers' compensation claims, social security, disability, individual retirement disputes, or claims of racial, sexual or gender based discrimination.

Summary of Your Responsibilities in Grievance Representation:

Gather Information and Investigate the Complaint

- Define the issue.
- Review the definition of grievance in the contract.
- Begin the investigation and separate grievances from gripes or other problems.
- Interview the grievant and others involved.
- Collect all documentation.
- Develop the file.
- File the grievance in a timely manner.
- Copy or inform the LRS of grievance.

Attempt to Resolve the Grievance Informally

- Attempt to resolve matter if time allows.
- Communicate frankly and openly with management.
- Anticipate managements argument and prepare union's case.

Advocate for the Grievant

- Serve as an advocate for the grievant.
- Provide a clear, concise verbal explanation of the situation.
- Update grievant on status of his/her grievance and related procedures.

Prepare the Grievance for the LRS

- Prepare the case so that your LRS can represent the grievant at the appropriate step. When necessary, coordinate meetings requiring LRS' attendance.

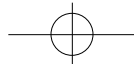
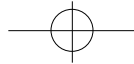
**Provide Back-Up and Assistance**  
Support the unit president and LRS' decision.  
Assist in getting more detailed and/or different information.

**Distinction Between Steward and Grievance Representative**

Historically, CSEA activists have used both titles, Steward (or Shop Steward) and Grievance Representative to mean those individuals who have the responsibility of handling the representation of bargaining unit employees in the investigation and filing of grievances. However, as a result of a motion passed by the CSEA Board of Directors in 1986, the responsibility for enforcing the contract (or handling grievances) was deemed to require mandated training.

The Steward Course and the Grievance Representation Courses, are independent of each other. The Steward Course does not include in-depth instruction in grievance representation. Activists who completed the Steward Course are considered "Stewards", and have the responsibility to communicate, organize and lead members in their work location. The Steward is not certified to represent members in handling grievances.

Training in handling grievances is offered in three courses: Local Government Grievance Representation, State Grievance Representation, and Contract Administration for the Private Sector. Activists must attend the required training appropriate to their division and be appointed to the position of Grievance



Representative by their Local/Unit president to be certified and eligible to handle grievances.

**Determining a Grievance**

**What is a Grievance?**

A grievance is a term you will certainly become familiar with as a CSEA Steward. You should think of a grievance as an injustice that needs to be resolved between your Union and the employer. Your most visible responsibility is to handle grievances for the workers you represent; therefore, you have to understand what constitutes a grievance.

A grievance is a complaint against a wrong as defined by the contract. A grievance is generally brought by a worker in response to an action or violation taken by management or, in some cases, by management's lack of action. The worker, through CSEA, disputes the appropriateness of management's action.

The collective bargaining agreement or contract is the basic document incorporating labor and managements' mutual understanding of the terms and conditions of employment that govern their relationship at the workplace. CSEA and the employer generally define a grievance as a dispute over a violation, misinterpretation, or misapplication of any provision of their contract. But, collective bargaining agreements vary considerably in the way in which they define the term grievance. Your contract language is the one that counts!



While you should check the precise definition of a grievance in your contract, a grievance could also be considered as a form of complaint by a worker based on a violation by management. In determining if there has been a violation, you should ask yourself the following questions:

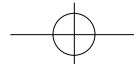
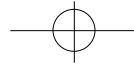
- Did management violate the contract or work rules?
- Did management violate a past practice?
- Did management treat a worker unfairly?
- Did management violate Civil Service statutes, a local ordinance, health and safety regulations or standards, the city or town charter or state or federal law?

In addition to contract grievances, procedures for noncontract issues, complaints which do not fall within the definition of a grievance may also be addressed in your contract.

Your contract may also provide access to a disciplinary grievance/appeal procedure as outlined by contract language. If you have no such contractual language, or if the disciplinary grievance procedure does not apply to all bargaining unit members, some workers may have protection granted through Section 75 of the Civil Service Law.

**What is a Grievance Procedure?**

The collective bargaining agreement is very much like a constitution: basic principles are outlined, but specific



language about how these principles are to be applied on a day-to-day basis are often left out. When disputes arise about how contractual language should be applied, the contract grievance procedure provides a means for workers, without jeopardizing their jobs, to express complaints about their work or working conditions and hopefully, receive a fair hearing by higher levels of management.

Disputes are thus handled without interrupting productivity at the workplace. At the same time, workers have a voice in matters that directly affect them.

When management responds to a worker's grievance, it outlines its reasons for making a stated decision. In the case of an adverse negative decision, you as the Steward representing the worker, will carefully evaluate and judge — based on your understanding of the contract and prior decision(s) on the same issue — whether management's conclusion is correct.

If management's response is not acceptable, then proceed to the next stage of the grievance procedure. Should you/worker continue to disagree about the appropriateness of management's decision, you may have the option, in a final step, to take their issue to an outside third party, an arbitrator, for an impartial, binding resolution of their dispute. This is called binding arbitration.

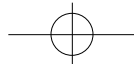
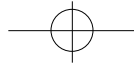


If provided under the contract, arbitration, is invoked only as a last resort and only through the Legal Assistance Program. The parties — and arbitrators — recognize that it is better for CSEA and the employer to settle their disagreements than to rely on an outsider. The best agreements and solutions are those that the parties reach themselves.

Your grievance procedure serves many purposes. It is:

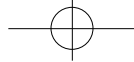
1. A systematic method for handling complaints; to enforce the contract.
2. A method for interpreting the collective bargaining agreement (CBA).
3. A method for CSEA to protect individual workers.
4. A method for CSEA to protect the bargaining unit.
5. A source of information for the employer about workers complaints.
6. A substitute for the strike.

The most effective grievance procedure is one in which problems are solved at the lowest possible level, in the shortest possible time. That goal can be achieved only if the key participants in grievance handling, both CSEA and the employer’s representatives understand the following principles about the grievance procedure:



1. Both labor and management must understand and accept the grievance procedure.
2. Grievances should be handled promptly and include a clear-cut definition of what constitutes a grievance; include specific time limits at each step of the process; and require that answers be in writing after an initial, informal stage.
3. All grievances should be processed through the same procedure.
4. All complaints eligible for the grievance procedure should be eligible for arbitration.
5. The grievance procedure should specify which union and management representatives will meet at each step; ensuring that the Union be present at each step of the procedure.
6. The grievance procedures should provide the ability to settle.
7. The CSEA Steward, as well as the workers, should be trained to file a grievance.
8. Representatives of CSEA and the employer should be trained.
9. The contract should provide the ability and time to investigate.





10. No horsetrading — each case is decided on its own merits.

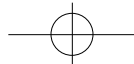
Since the basis of the grievance procedure is an interpretation of the contract, it is necessary for the CSEA Steward to learn about the provisions of the agreement. A full understanding of the agreement requires a knowledge of what the parties intended when a clause was written, as well as subsequent interpretations of the language. Your Labor Relations Specialist will be helpful in this instance. Refer to the Grievance Fact Sheet (See Appendix) to help you determine whether or not an employee's problem is a grievance or some other type of problem.

You must be able to handle grievances effectively. Understanding your role in grievance handling and problem solving is the first step toward becoming an effective representative. If a worker goes outside of the union process to settle problems and grievances it weakens both the contract and CSEA and jeopardizes your position with the supervisor and the other union members.

A comprehensive grievance handling process includes the following four aspects: investigation, documentation, preparation, and presentation.

### How to Investigate a Grievance

An effective grievance investigation includes: gathering information about a complaint or grievance,



objectively reviewing of all the facts related to a complaint or grievance, and investigating the facts relating to the merits of a grievance.

The purpose of a grievance investigation is to evaluate the merits of a dispute, to determine the validity of an issue, to determine how the contract affects the issue, and to provide a means to settle the grievance at the lowest level.

As the Steward who handles grievances you have the greatest opportunity to settling the grievance satisfactorily, because you understand the personalities involved, the work setting, and other elements bearing on the issue at hand. Those who help later in the process must rely in large part on the information gathered by you. If that information is not gathered while the facts are fresh, essential details may be lost.

A grievance investigation is important to the Union because it defines the contract issue/how to proceed, it creates an awareness and understanding of the contract, it assures consistent and fair treatment of all workers and their rights in the workplace, it is an opportunity for labor to present its view, it saves time and money at later stages in the grievance process, and it increases labor's credibility with the workers.

A grievance investigation should be important to the employer because it protects the employer's rights, it continues to provide the employer with information and



review on work practices/policies, it gives the employer a chance to correct wrong behavior of its supervisors, it provides for opportunities to settle the dispute, and it demonstrates willingness to work with the Union.

The burden of proof in contract grievances is the responsibility of the Union. CSEA has the burden of proof at all steps of the contract grievance procedure.

In the process of gathering information about complaints, your Local or Unit should establish and maintain a well-organized internal filing system.

- A record should be kept of every complaint, whether or not it develops into a full-scale grievance.
- Such a system enables you to keep track of all claims and to be sure that they are handled on a timely basis.
- It enables others who enter the dispute later to know what has transpired. This is especially important when there is a large turnover in Stewards who handle grievances.
- An internal filing system may highlight topics to be addressed in later contract negotiations.

To ensure that deadlines are met, it is helpful to maintain a tracking sheet, (see Appendix) in the front of the grievance file, to note key dates for processing the grievance. You should also mark down the dates, times and basic context of any informal discussions held with management, as well as communications with the grievant.

Complete the Grievance Fact Sheet: (For CSEA internal use only!) (see Appendix)

#### Who is the Grievant?

Detailed information about the grievant is essential; name, job title, current mailing address, work and home telephone numbers, employer, department or agency of employment, work location and immediate supervisor, date of employment, date of appointment. Failure to acquire the information initially may result in extra delay.

#### What happened?

This means that the nature of the problem is spelled out (for example, payment for overtime was not received; personal leave was not granted; or pass days were inappropriately scheduled). What precipitated this action?

#### When did it occur? Who was involved?

This information may be used on the line date of occurrence and in the statement of facts on a grievance form if this incident is to be filed as a grievance. It is important to be as accurate as possible about dates, times, places and persons involved. This information is essential not only in fashioning a remedy, if any, but also in evaluating the severity and scope of the problem. While some claims may have only minor implications, others may affect many employees (class action grievance) or involve large amounts of money and major managerial principles.

### Were there any witnesses?

Although the issue of witnesses is more common in discipline or discharge cases, it also occurs in contract disputes when, for example, such issues as attendance and leave or job abandonment are raised and credibility is in dispute. This information is not included on the grievance form. Witness statements verify the grievants' statement and may be necessary at the various steps in the grievance procedure.

### Why is this a Grievance?

This question goes to the reason that the grievance was raised. For example, unjust treatment may be regarded as unfair simply because the grievant does not like it or because it is contrary to certain rights guaranteed by agreement.

Investigation may also reveal that certain managerial practices — whether the basis for a claim or not — impose a hardship on workers. A brief comment on the impact of the employer's action might also be included to help gauge the severity of the problem.

### What remedy is required?

The remedy desired must be within the power of management to grant. If the worker wants compensation that cannot be provided, the grievance will simply waste the participants' time at each level.

Investigation of this issue will clarify whether the remedy sought would make the grievant whole in the event the grievance was granted. Making the grievant

whole is another way of saying that the grievant gets everything he or she would have received if the action or non-action which caused the grievance had never happened.

### Plan and Organize the Investigation

1. Determine what type of grievance this is, a contract or non-contract grievance, disciplinary appeal, other grievance such as out-of-title work, if any.
2. List what information you need to gather.
3. Find out where this information is located, who may have this information, and how/when you are going to gather it.

### Collect Information

1. Gather all the relevant information that might have reasonable bearing on the decision to pursue the complaint.

Knowing only some of the relevant information is likely to result in a poor or wrong decision. There are always two sides to a story. Unwillingness to consider the other side of the story impedes the process and may serve to delay resolution of the issue.

2. Collect the evidence that may have something to do with this no matter how trivial.

Evidence may be oral or documentary. Oral evidence is that which is verbal; documentary evidence is generally that which is in writing. You should seek out

the best evidence possible; that is, information from the individual who is most likely to know about the truth of a matter (for example, the person responsible for record keeping, as opposed to a manager more removed from the case) and those records or documents that can provide the most reliable and detailed information (for example, actual time and attendance records, as opposed to a memo in which someone notes his or her recollection of the matter).

3. Plan and conduct interviews of those individuals who may have some knowledge about the case; take statements of the individuals you interviewed.

In evaluating oral testimony, you should consider whether the person has firsthand knowledge of a situation or is basing his or her statements on hearsay. Hearsay is a statement about something based only on what someone else has said. Also to be considered is whether that individual has an accurate memory, is truthful, and is reliable.

When people are involved in a highly charged, emotional confrontation, their recollection of facts may be less than reliable. There is a tendency to overlook one's own errors and place oneself in a favorable light. Over time, positions may harden, with each person becoming increasingly convinced of the accuracy of his or her point of view. Therefore, it is important to interview people and acquire statements or take notes early in the investigation process.

Check the following to evaluate the quality of the interviews during a grievance investigation:

- a. demeanor (appearance, voice, attitude, conduct);
- b. character of the testimony (overall manner in which questions are answered);
- c. quality of perception, recollection, and communication (the ability to see, hear, or experience something and then to remember and tell about it);
- d. consistency or inconsistency (with other known facts);
- e. inherent probability;
- f. bias, interest, or other motive;
- g. character;
- h. admissions about lying.

*Distinguish between allegations, assumptions, opinions, and facts.*

When asked about their views on an issue, some people take a strong position with little to back it up. Others will draw conclusions based on a limited range of facts.

In examining testimony and evidence, care should be taken to distinguish between unfounded opinion, evidence that is circumstantial, and evidence that is direct. In some situations, strong circumstantial

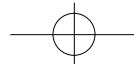
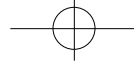
evidence (that is, facts from which other facts may be assumed) may be sufficient, but in no case should unfounded statements and assumptions be given much weight.

4. Remain objective - During the investigation, CSEA grievance representatives must put aside their customary viewpoints in an attempt to get all of the facts — not only those that support their own positions but also those that do not. Once all the relevant information has been gathered, it will be easier to evaluate the merits of a dispute.
5. Investigate other sources - The investigation involves gathering facts from other sources as well as the grievant: other workers, other Stewards, Local/Unit officers, old grievance files, worker's personnel file, time records, shift schedules, paycheck stubs, job postings or posting of vacancies, roster cards and NYS employee records, salary resolutions and budgets, management memorandum, minutes of legislative or board meetings, and the CSEA Region Office.

The following list of questions will help you sort out some of the issues:

Does this complaint qualify for use of the grievance procedure?

A complaint, even though of great importance to the individual who raised it, may not constitute a basis for grievance under the collective bargaining agreement.



A review of the definition of a grievance (contained within the contract) is essential. If CSEA and the employer disagree on the interpretation of that definition, the question of grievability may well become the primary issue in the grievance procedure and may itself require arbitration to determine whether or not the case's merits will ever be judged.

What is the accepted interpretation of this problem?

Major contract issues cannot be settled on the basis of initial reactions. Once the applicability provisions are identified, they should be read thoroughly. It is possible that the true meaning of a provision — what the parties intended when they wrote it and how it has been subsequently interpreted — can be revealed only through further investigation.

If you aren't sure about the meaning of a contract provision, ask. You have a network of other activists and staff to help them answer these questions.

Who should be consulted?

You can turn to your grievance chairpersons and/or Unit or Local presidents for assistance with a problem. These people in turn direct their questions to CSEA Labor Relations Specialists, who may seek assistance from staff specialists or CSEA attorneys.

Are there any records that can shed light on the problem?

Where such matters as compensation, attendance and



leave, hours of work, distribution of overtime, seniority, Workers' Compensation, and leave with pay are at stake, an investigation of appropriate records is important. In addition, information from a personal history folder is often key.

**Has a similar problem occurred before?**

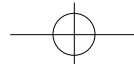
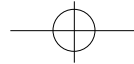
The study of grievance and arbitration files will shed light on this question. Also, informal discussions with other CSEA representatives and officers may reveal how a similar problem was handled in the past before it rose to the level of a grievance.

This question highlights the importance of being informed. Educate yourself by reviewing such materials as the CSEA bulletins, CSEA's newspaper, Local newsletters and information from various CSEA departments that are included in leadership mailings. All CSEA representatives should make a special effort to exchange background information. Developing a local file of memoranda, clippings, and the like helps to create a research bank from which one can draw when a problem arises.

**What are the time limits?**

Even valid grievances may be lost if they are filed after the time limit specified in the contract. Occasionally, a contract violation may prove to be the basis of a continuing grievance in that the act complained about is repeated from day to day, and each day there is a new occurrence of the contract violation.

If the grievance representative thinks that a grievance



may be a continuing grievance, he or she should first check with the CSEA Labor Relations Specialist to determine whether that is the case. Regardless, strict attention should be paid to appropriate time limits and whether they have been observed.

On the date that the grievance is filed after the aggrieved worker signs the grievance form, the time clock begins running on the grievance process. During each successive step, careful adherence to time limits is imperative.

**Are there previous settlements on this issue that provide precedent?**

You may want to evaluate arbitration decisions on the issues and stipulated settlements. It is often helpful to look to other settlements for ideas and general guidance as to what has proven to be acceptable or workable.

**Should other workers or supervisors be interviewed?**

There is no substitute for firsthand information, and relying on another person's say-so without going to the original source can be dangerous. Often, however, there are other people within an institution, facility, agency, or department who have immediate knowledge about the facts of a particular case, and their views should be sought and reviewed.

**Should the work area be visited?**

In some instances, you may find it useful to go to the grievant's worksite to gain a better understanding of the



problem. This step should be taken if it is likely to provide useful results. Remember, a picture is often worth a thousand words.

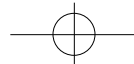
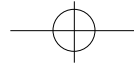
**Evaluating the Merits of a Grievance**

Evaluating the merits of a grievance is a continuing process. At one point you may be convinced that a grievance is or is not meritorious, only to discover, upon the learning of new facts or hearing counterarguments, that the original evaluation was wrong, or not as accurate as originally thought.

1. Separate disputed from undisputed facts. A brief meeting between the grievant and/or the CSEA representative and the employer should quickly establish those facts relevant to the case that both parties agree upon. Once these facts are recognized, the parties can focus their attention on the areas of disagreement.
2. Weigh the evidence. Before you decide whether to file a grievance, consider whether there is enough proof to substantiate the position to be taken.

There are varying degrees of proof, ranging from a preponderance of the evidence, to clear and convincing proof, to proof that is beyond a reasonable doubt. At the beginning steps of the a grievance procedure, you should, based on all the known facts, be reasonably convinced of the merit of your position.

In a contract grievance, this means being assured that



the issue is covered by the clause or practice in question, that there is a valid question of whether the grievant was harmed by management's action or inaction, and that there are sufficient facts, based on such factors as contract interpretation and management policy, to support CSEA's position. Once these basic questions are answered and the evidence weighed, you will be in a better position to evaluate your case.

3. Based on all of the information you have gathered, it is time to answer the following questions:
  - What is the Union's argument in this case?
  - What would be the employer's argument in this case?
  - What is the best possible solution to this case?

**Make a Decision**

After the evidence has been examined, it is necessary for you/grievant to decide whether to proceed with or drop the grievance, and whether to pursue settlement efforts. Explore any offerings of settlement. (Be sure to check with your President/LRS before the settlement is completed.)

**Your Right to Information**

As a Steward, you may have a need to request information from the employer to: investigate whether a grievance exists, determine the merit of the grievance, prepare for a grievance meeting, monitor compliance of the contract.

One of the most useful tools provided by both the Taylor



Law and the National Labor Relations Act is the Union's right to obtain information from employers when the law requires employers and Union to "bargain collectively." The Public Employment Relations Board, the National Labor Relations Board and the U.S. Supreme Court have ruled that either party in a negotiating relationship is entitled to demand and receive from the other necessary information which is reasonably necessary for that party's preparation for collective bargaining or for the administration of the contract.

Some employers try to claim that Union information rights are restricted to data needed for contract negotiations. This is not true. Both PERB and the NLRB have ruled that the duty to provide information extends to a demand for information that is relevant to the enforcement of the contract.

#### What You Can Request

The employer obligation to provide grievance information is extremely broad, and includes the disclosure of documents, factual information and data. Management must provide requested materials that could be useful to the Union or could lead to the identification of useful material. If the employer does not have the information in its possession, it must make a diligent effort to obtain it. The employer cannot insist that the Union request this information necessary for negotiations or administration of the contract through the Freedom of Information Law (FOIL).

Your requests for information must be made in good

faith. You must have a genuine suspicion, based on worker complaints or other evidence, that the contract has been violated. You cannot use the information duty to harass the employer or conduct a "fishing expedition" into the employer's records. The information you request must not be otherwise available, and can be in a form other than demanded if it satisfies the requesting party's needs.

Information requests are good tactics for unions. They help to win grievances and make employers think twice about violating the contract. Information requests should be submitted for almost all grievances.

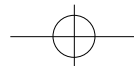
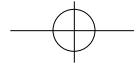
Documents. Here are some examples of the records you can request:

- disciplinary records
- collective bargaining agreements for other bargaining units or other facilities
- employer manuals and guidelines
- management memos
- contracts with customers, suppliers and subcontractors correspondence sheets (MSDS's)
- personnel files
- photographs
- piece-rate records
- reports and studies
- security guard records
- security reports
- seniority lists

- equipment specifications
- evaluations
- inspection records
- insurance policies
- interview notes
- investigative reports
- job assignment records
- job descriptions
- material safety data
- payroll records
- supervisors' notes
- time study records
- training manuals
- videotapes
- wage and salary records
- work rules

**Confidentiality.** An employer defense that is sometimes successful is confidentiality. This defense can only be used to protect information or records which are particularly sensitive. Employee medical records, psychological data and aptitude test scores are usually considered confidential by the NLRB. Employer records disclosing trade secrets or containing sensitive research data have also been deemed confidential.

To invoke the confidentiality defense, an employer must have an established policy barring disclosure and must have consistently adhered to that policy. An employer that asserts confidentiality must be willing to bargain with the Union to attempt to accommodate the Union's needs. If



medical confidentiality is asserted, for example, the Union might agree to allow the employer to delete medical references from personnel files or delete worker names.

## How to Prepare and File the Grievance

After an initial informal step, most grievance procedures require that complaints be in writing in order to reduce the number of non-meritorious grievances and provide a written record of grievances. This reduces the possibility of conflicting decisions on same issues and misunderstandings about what was agreed upon. Filing a grievance in writing forces the Union to be specific about the complaint and requires a written response from the employer.

The CSEA Fact Sheet that was referred to earlier in this handbook is a means to organize the facts — the who, what, where, when and why and to separate facts from opinions, assumptions, and allegations. This is an internal document, meant to be used only by the Union representatives. It is not to be shared with the employer.

The Grievance Form is whatever the contract says it is. Some contracts stipulate that the grievance must be written on a specific form, while other contracts will accept a grievance written out on a sheet of paper. Often it is a two-sided form developed by CSEA and the employer. CSEA has some generic forms for you to use if needed. The Grievance Form usually requests the following



information: information about the worker; nature of the grievance; person(s) who raised the grievance; the remedy sought; decisions at each step; and arbitration request.

Writing out the grievance statement involves stating the content in a certain style. The following are some guidelines in writing the grievance statement:

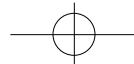
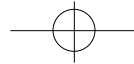
1. You and the grievant should complete the grievance form together, if possible. Part of the process of filing grievances is educating workers about their contract. You may be asked to write out the grievance by the grievant, if the worker has difficulty in doing so.
2. Check the tense of the writing. If the grievant is filing the grievance, write the grievance in the first person. If the Union is filing the grievance, it should be written in the third person.
3. State the nature of the grievance in a short complete paragraph. Limit details of the grievance to basic information. Not all of the information on the fact sheet should be transferred to the grievance form. Provide only enough information so that the employer understands what is the problem, what article in the contract was violated, and how the problem can be fixed (the remedy).
4. Omit writing about your arguments,

evidence and justification - the employer could use this information to prepare their case against the grievant and the Union.

5. Don't limit contract violations. State why this is a contract grievance, using the phrase "violated the contract" or "violated the collective bargaining agreement" citing the specific article(s) or section(s) in the contract.
6. Avoid personal statements. The grievance is a statement of the facts as investigated by you, and the Union's position on this issue, not your opinion, and not the grievant's opinion. Avoid sentences that contain "I think" phrases or opinions about the employer.
7. Clearly state the settlement or remedy desired. Don't limit the remedy. Use the general phrase "made whole in every way" and the word "including" when referring to specific remedies. When you limit the remedy you don't allow for room to bargain, you might get less than full compensation for the grievant and you cannot add to the remedy later on if the case goes to another level.
8. Review the written grievance form with the Grievant. Be sure the grievant understands the grievance, the remedy being sought and the importance of his/her signature on the grievance form. Be sure that the grievant signs the grievance form. If the grievance is written as a class action,

on behalf of more than one worker, you or another representative of CSEA may sign the grievance form.

- 9. The original grievance form should be served upon the employer after you have made copies for the grievant, the Local/Unit grievance file (officers), and the CSEA Labor Relations Specialist. You should also keep a copy for yourself to track.
- 10. Be sure to get a receipt from the employer for the grievance filed - a copy of the grievance stamped with the date, a return receipt requested from the Post Office, etc.
- 11. Keeping the file on the grievance current is important because the grievance may have value in setting a precedent in the workplace, and because it provides insight into conditions that workers find objectionable that may be brought out in later negotiations with the employer.
- 12. Document, Document, Document. There is no better way to get a satisfactory result in a formal proceeding or to get quick action on a request for legal assistance than with fully supported and documented proof of the claims and theories in a case.



## Presenting a Grievance at the First Step

In many contracts, the first and possibly the second steps provide for meetings between the CSEA representative, the grievant and the management. This is supposed to allow for a full and fair review of the issue and to consider arguments and counter-arguments.

Whether such meetings are informal or structured (depending on the contract language), the grievant should leave these sessions with a knowledge that their concerns have been fully expressed, explored and understood, and that they have been well represented by the Union. Keeping appointments, allotting a sufficient amount of time to explore the dispute, and conducting the meeting in an appropriate setting contribute to the grievant's perception of the quality of our representation.

Review meetings, whether informal or formal, are not the place to begin doing one's homework. Time may be spent to better purpose if both parties arrive prepared with basic information. Further facts may come out at the meeting, but the major part of your investigation should be conducted beforehand.

Joint sessions should elicit, where possible, basic agreement on the individuals involved in the grievance, contract provision(s) involved, date of occurrence, statement of the issue, remedy



requested, undisputed and disputed facts, and the arguments of the respective parties in support of their positions. Mutual problem solving should not begin until all of this preliminary information has been gathered and exchanged.

### What to Do When a Worker is Disciplined

Discipline is the employer's invoking a formal process and seeking a penalty as a result of worker misconduct or incompetence or for just cause.

One of the most firmly established principles in labor relations is the employer's right to direct the workforce. As part of this principle, the employer's right to discipline and discharge is an inherent adjunct to its responsibility to maintain a safe, orderly and efficient work environment. Through commonly accepted concepts of what constitutes appropriate behavior, and through specific rules and regulations, the employer establishes its expectation for employee conduct in the workplace.

Workers may be disciplined for misconduct and/or incompetence, as in most public sector collective bargaining agreements, or for just cause, found in many private sector contracts. In New York State, unless otherwise specified by contractual language, public employees can only be disciplined for misconduct or incompetence.

**MISCONDUCT:** is generally defined as willful conduct which by its very nature is wrong, inappropriate, prohibited or illegal and is violative of acceptable behavior, employee rules, regulations, policies or legal statute.

**INCOMPETENCE:** Can be defined as the inability or failure to perform the job resulting from a lack of ability, aptitude, deficiency in knowledge or disregard for procedures or methods.

**JUST CAUSE:** In many cases part of management's burden of proof includes establishing that there was just cause for disciplining the worker. In evaluating just cause, arbitrators may apply the 7 Tests of Just Cause. For you, the 7 Tests of Just Cause can be a useful investigative tool as long as you understand that the 7 Tests may not be applicable to every contract or Section 75 proceeding.

#### The 7 Tests of Just Cause:

1. Was worker forewarned of conduct which might reasonably lead to or result in discipline?
2. Were rules reasonably related to operation of the employer's business and performance expectations?
3. Was an effort made by the employer to determine if, in fact, the worker violated the employer's rule, regulation or standard of expected behavior?
4. Did the employer conduct a fair and objective investigation?
5. Did the employer meet its burden of proof by obtaining substantial and compelling evidence that the worker was guilty?

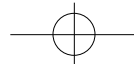
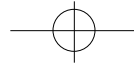
- 6. Has the employer applied its rules, regulations and penalties even-handedly and without discrimination?
- 7. Was the proposed discipline reasonably related to the seriousness of the offense, and the record of the employee's service with the employer?

It is also important to recognize that, with limited exception, discipline is a progressive process. It will generally start with a verbal warning or reprimand, followed by formal counseling, and eventually leading to a Notice of Discipline (NOD) which seeks a specific penalty or fine, suspension or discharge.

Progressive discipline is an essential element in cases where the employer seeks to impose a penalty or discharge a worker for incompetence. In such cases management must establish that the worker has been given ample notice of their incompetence and been given sufficient opportunity to correct or improve their performance.

In cases of misconduct the progressive process may be circumvented if the nature of the misconduct is severe and/or criminal in nature. In such cases there may be an immediate Notice of Discipline seeking a penalty or discharge without prior progression through the process of reprimand and counseling.

Workers' rights are derived through a variety of sources which include: State and Federal Constitutions, State and



Federal law, State and Federal court decisions which provide case law, and finally, contractual language.

Some exceptions are contractual or statutory in nature. For example, unless specifically included within contractual language, probationary employees are generally not protected under the disciplinary provisions of most contracts, nor are they protected under Civil Service Law Section 75.

Finally, even though a worker may be entitled to contractual or Section 75 disciplinary protection, the Union is not necessarily compelled to represent every bargaining unit worker who has been served with a Notice of Discipline. Again, each case must be weighed on its own merits.

Another part of a worker's due process rights includes the requirement that management sustain the burden of proof in disciplinary cases alleging employee misconduct or incompetence.

However, unlike the criminal justice system, the degree of proof required is not proof beyond a reasonable doubt. In disciplinary cases brought before a hearing officer or arbitrator the degree of proof necessary to establish guilt is clear and convincing proof, or proof by a preponderance of evidence, both of which are somewhat less than proof beyond a reasonable doubt.

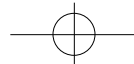
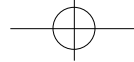


Under certain circumstances, an employer may impose a suspension without pay pending a disciplinary hearing on the worker if the worker may pose a security risk or a safety risk to clients and/or other workers or himself/herself, be at risk from others, or interfere with or jeopardize the safe and efficient operation of the workplace. Check your contract language or Section 75 to determine how long an worker may be suspended without pay.

Based on court decisions, especially the *Loudermill* decision, tenured public employees who have a property right in their respective position are entitled to certain pre-suspension rights. These rights include: the right to be informed of the charges, the right to be given an explanation of the evidence, the right to be given an opportunity to be heard, and the right to confer with a union representative and to be represented during each step.

**Disciplinary Procedures**

While constitutional precepts, statutes and case law may be consistent for all, contract disciplinary procedures are quite varied. For State workers in the ASU, ISU, OSU and DMNA bargaining units, discipline is the same and can be found under Article 33. For State OCA workers discipline is covered under Article 12 of the contract. For local government workers the disciplinary procedures are as varied as the local government entities across the state. This also applies to workers in the private sector.



Some contracts tie disciplinary procedures to the grievance procedure. Others provide a distinctly separate discipline procedure. Others specify the use of Civil Service Law, Section 75, as the procedure for dealing with discipline. If you have any doubt or question regarding your disciplinary procedure contact your Labor Relations Specialist.

The purpose of the disciplinary grievance procedure is to balance the employers right to discipline with the workers' rights to protection, representation and due process. In general, a disciplinary procedure contains 10 elements which provide this balance:

**Applicability:** who is covered and who is not covered by the disciplinary procedure.

**Grounds:** the reasons that an worker can be disciplined pursuant to the language in the procedure.

**Contents of Notice of Discipline:** the information that must be stated in the Notice of Discipline to the worker.

**Service of Notice of Discipline:** how and to whom the NOD is to be served pursuant to the language in the procedure. What is the statute of limitations for management to serve a Notice of Discipline? How long does the employee have to file an appeal or grievance after being served with a Notice of Discipline?



Disciplinary arbitration: how the hearing officer/arbitrator is selected/appointed? Is the decision final and binding? Is there an appeal process?

Burden of proof: in all cases, the burden of proof lies with the employer. What level of proof is required for a finding of guilty may depend upon the circumstances.

Suspension: how long a worker may be suspended without pay prior to/or pending a hearing. Workers may have pre-hearing suspension rights based on the Loudermill decision.

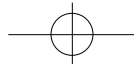
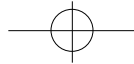
Pre-hearing conference: is there provision in your contract for pre-hearing conference? Use this session to gauge management's position.

Employee rights: does the procedural language provide for union representation rights at an interrogation for the right to Union representation throughout process including representation at the hearing? Are there worker protections against procedural mistakes?

Procedure: is there a clearly defined procedure set forth?

### Rights of Worker/Steward in Interrogations

As part of the investigative process, the employer may call in one or more employees and question them with regard to their knowledge about an incident. Generally, under



threat of insubordination, the employee is compelled to answer the employer's questions during an investigative interview and/or interrogation.

Although management has the right to carry out interviews and interrogations as part of its investigative process, employees also have rights and protection. These rights and protection may be contractual or statutory.

### Interrogation Representation

In the private sector, the Weingarten rights gives workers the right to assistance from union representatives during investigatory interviews when management questions a worker to obtain information and the worker has reasonable belief that discipline or other adverse consequences may result from what he/she says.

Although the right to union representation should always be asserted, in the public sector, the right to representation is not necessarily automatic and only attaches where there is contractual language or where the worker is covered under Civil Service Law, Section 75.

Since the contract supersedes the provisions set forth in Section 75, workers who have a disciplinary procedure within their contract must look to the contract to determine what representation rights they may have.

All of the State contracts and many Local Government contracts contain specific contractual language which defines and provides for employee representation rights



during interrogations. However, where no representation language exists within the disciplinary procedure there is no representation right at an interrogation. In such cases workers should nonetheless assert the right and request representation, even though management may be under no obligation to permit representation, they may agree to allowing it.

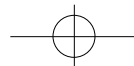
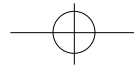
Whether the right to representation is statutory or contractual, the determining factor for representation hinges on whether the questioning is an interview or an interrogation.

**Interview/Interrogation**

The term interview could be defined as an investigative technique to learn facts surrounding an incident; the gathering of information by systematic questioning of a person or persons who may have relevant information relating to an incident; or a conversation between parties whereby the interviewer seeks information from a person or persons about an incident.

In contrast to the interview, an interrogation generally occurs when the person being questioned is suspect. Below are examples of commonly accepted definition(s) of an interrogation:

“The questioning of an employee who, at the time of such questioning appears to be a likely or potential target or subject for disciplinary action.” (NYS/CSEA Contracts)



“An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under Article fourteen of this chapter [Taylor Law] and shall be notified in advance, in writing, of such right.” (Section 75)

**Union Representation Rights and Limits**

When representing a worker at an interrogation, as the union representative, you should assert the right to:

1. Be informed of the subject matter of the interrogation, including the nature of the charges or allegations.
2. Confer with the worker aside before questioning begins.
3. Speak during the interrogation, and to request clarification to questions if the worker does not understand it.
4. Advise the worker as to how he/she should answer questions or not answer questions that are abusive, misleading, badgering, confusing, or harassing.
5. Offer further information to justify the worker's conduct following the interrogation.

If the employer refuses to permit employee representation at an interrogation, or denies the worker/Union rep any of the rights provided for by law or under the contract, the Union representative should advise the employer that the Union will be filing a grievance pursuant to the appropriate procedure. This

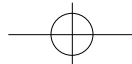
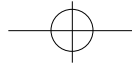


alone may prompt the employer to comply properly. If the employer continues to refuse representation rights protected by law or under the contract, then a grievance should be filed.

Also, pursuant to both State contract language and Section 75, statements obtained from an employee in violation of representation rights are inadmissible as evidence against the employee at a hearing and/or arbitration.

There is no statutory right under the Taylor Law which guarantees public workers the right to representation. The 1975 Weingarten decision in which the court held that unionized employees had an absolute right to interrogation representation, has no direct application to New York State public employees governed by the Taylor Law, only private sector workers.

Additional situations in which a worker may not be entitled to representation and/or where representation limits exist include: investigations by government agencies, investigations by employers when the worker is NOT the target of action, or employment related criminal investigations being conducted by enforcement authorities. The employer has no obligation to bargain with the Union during an interrogation and the Union representative CANNOT interfere with, disrupt or otherwise undermine management's right to investigate and/or conduct an interrogation.



### Employee Interrogation Rights

Even though a worker may be entitled to representation at an interrogation, he/she has an obligation to respond to and answer the employer's questions. There is NO Constitutional 5th Amendment right against self-incrimination at an employee interrogation which is being conducted solely by the employer/management. Any refusal to answer questions can result in an additional charge of insubordination.

If management is sitting in on an interrogation being conducted by a law enforcement agency and the employee has been properly advised of their MIRANDA right to remain silent, the employee can refuse to answer questions which might be self-incriminating.

If the employee answers questions presented in a law enforcement setting, (whether management is present or not), any statements made in waiver of the [MIRANDA] right to remain silent can be used by the employer.

This also applies to interrogations which are conducted as part of management's investigation and which have taken place prior to the filing of a Notice of Discipline. If management has filed and served the worker with a Notice of Discipline the rules change.

Once a worker has been served with a Notice of Discipline, management can no longer interrogate the employee regarding that matter. If management does



conduct such an interrogation following service of an NOD, the employee can refuse to answer questions which would be self-incriminating, and any subsequent charge of insubordination for refusal to answer would be defensible and would/should be dismissed.

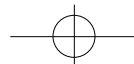
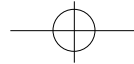
Use Immunity

The principal of use immunity is simply that any self-incriminating statement made by a worker to the employer at an interrogation under threat of insubordination, cannot be used by a law enforcement agency in a criminal prosecution against that employee.

Use immunity is founded on the principal that because an employee has no 5th Amendment protection against self-incrimination in the employment setting, statements made under the threat of insubordination should not [cannot] be used against such worker in a criminal prosecution.

Although the courts have held that use immunity attaches as a matter of law and without declaration by the employee, employees (or the union representative) should assert the right for the record.

The employee/representative should know or ask who is conducting the questioning. The employee/representative should ask if he/she is compelled to answer questions or face insubordination. If the employer says YES, the employee/representative should recite the use immunity right. (see page 97)



Although police cannot use statements made under use immunity, they can conduct an independent investigation based on being informed of criminal activity and questioning other workers.

In situations where a worker knows or suspects or has been informed that his/her answers could lead to a subsequent criminal investigation, the worker has to make certain decisions: request an attorney/legal representation; decide between accepting a charge of insubordination or risk an investigation which may lead to arrest.

If police are present during questioning or are conducting the questioning in the presence of the employer: the 5th Amendment right against self-incrimination attaches; police will/should have advised the employee of right to remain silent [MIRANDA warning]; any statements illegally obtained would be suppressed.

Effective Representation

As a Union representative, it is important for you to:

1. Educate workers within the bargaining unit to assert/request representation rights.
2. Know the applicable contract language or Section 75 language.
3. Seek clarification of the worker's obligation to answer under use immunity.



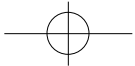
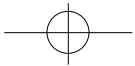
- 4. Know the consequences of violations by management.
- 5. Consult with your LRS or regional attorneys.

Your specific role at the interrogation serves several important purposes which include:

- 1. To advise the worker properly so as to avoid a charge of insubordination for refusing to answer questions.
- 2. To assist a frightened or inarticulate worker in explaining his/her conduct.
- 3. To caution against wholesale denials which might create the appearance of dishonesty or cause unnecessary contradictions.
- 4. To prevent fatal admissions. The key here is don't volunteer unsolicited information.
- 5. To point out mitigating and/or extenuating matters which may have influenced the worker's conduct.
- 6. To serve as a witness against future false accounts by management relating to answers/statements made during the interrogation.

**The Interrogation Checklist**

\_\_\_1. If the employer's personnel, human resources or labor relations staff have requested your presence at the interrogation, insist on being told the general subject of the interrogation.



\_\_\_2. If management fails to comply, advise them you will be filing a grievance, (if applicable).

\_\_\_3. Advise the worker of his/her right to a private attorney at their own expense. If criminal charges are likely to be filed, it should be highly recommended to the employee that he/she obtain private counsel.

\_\_\_4. If the worker contacts you before management, discuss the matter with the worker, then confirm the subject matter with management.

\_\_\_5. If the worker decides to obtain private counsel, advise management and request a reasonable time be granted to obtain counsel.

\_\_\_6. If management fails or refuses to comply with such a request, file a grievance.

\_\_\_7. In speaking with the worker prior to the interrogation, find out the names of anyone they believe may be a potential witnesses, (either for or against them).

\_\_\_8. Advise the worker that he/she will be charged with insubordination if they fail or refuse to answer questions relating to the employment matter being investigated.

\_\_\_9. Advise the worker that if, during the interrogation, he/she wants to confer with you, he/she must make the request because you won't be allowed to disrupt or interrupt the interrogation proceedings.

\_\_\_10. If criminal charges are likely to result from the alleged incident, advise the worker about the concept of use immunity.

\_\_\_11. If, at the interrogation, management doesn't



advise the employee of his/her right to use immunity, make the following statement for the record:

“I believe you will be questioning this employee concerning a matter which is or may be criminal in nature. The employee’s right to protect himself/herself against self-incrimination is protected by the United States Constitution. Therefore, will the employee be disciplined for insubordination if the employee exercises his/her constitutional right and refuses to answer questions?”

As previously discussed, management will no doubt say “yes” at which time you should state: “Then you will state at this time on the record that you are providing the employee with use immunity.

Even though management may refuse to state use immunity for the record, the right attaches as a matter of law and cannot be denied.

\_\_\_12. Ensure only one question at a time is asked of the employee.

\_\_\_13. If management refuses to allow the employee the right to confer with you during the interrogation, request that denial be noted on the record, including the time, name and job title of the management representative making the denial [decision], and clearly state that a grievance will be filed concerning the interrogation.

\_\_\_14. Take notes concerning the questions asked and answers given.

\_\_\_15. Should management attempt to badger the employee, note on the record that a grievance will be filed concerning the interrogation.

\_\_\_16. Note how the minutes of the interrogation are being taken (e.g. shorthand, tape recorder, stenographer).

\_\_\_17. Advise the employee following the interrogation not to discuss the case with his/her co-workers. Explain that they may later be compelled to answer questions or testify concerning such conversations.

### American with Disabilities Act (ADA)

The Americans with Disabilities Act (ADA) was signed into law on July 26, 1990. The ADA prohibits the exclusion of people from jobs, services, activities or benefits based on disability.

As of July 26, 1994 Title I prohibits employers with 15 or more employees from discriminating against otherwise qualified job applicants and workers who have disabilities or have become disabled. This prohibition covers all aspects of the employment process including: applications, testing, hiring, assignments, training, evaluation, disciplinary action, promotions, layoff/recalls, termination, compensation, medical examinations, leave and benefits.

#### Disability

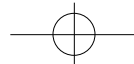
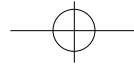
A disability means a physical or mental impairment that

substantially limits one or more of the major life activities of that individual; a record of this impairment; or being regarded as having such an impairment. An individual meeting any one of these three tests is considered to be a person with a disability for purposes of coverage under the ADA.

There are two categories of impairment: physical and mental. The first, physical impairment, includes any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting certain body systems. The second category, mental impairment, includes any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness and specific learning disabilities.

**Reasonable Accommodation**

Making reasonable accommodation for an impaired worker generally requires the employer to make modifications or adjustments to the work environment or to the circumstances under which the job is normally performed. Such accommodation may include making existing facilities readily accessible to workers with disabilities or may require equipment or device modifications. Other methods of accommodation may include policy changes or offering training programs. Whatever the method of accommodation, the modification cannot pose an undue hardship on the operation of the employer's business. The goal of reasonable accommodation is that the worker with the



disability is able to enjoy equal benefits and privileges of employment as are enjoyed by other similarly situated workers without disabilities.

**Enforcement**

Discrimination on the basis of impairment is prohibited under the Act. One can generally prove a case of discrimination if the person in question is a qualified applicant or worker with a disability and who satisfies the job requirements in terms of skills, experience and education and who, with or without reasonable accommodation, can perform the essential functions of the job in question.

Remember that the Act covers all aspects of the employment including: applications, testing, hiring, assignments, training, evaluation, disciplinary action, promotions, layoff/recalls, termination, compensation, medical examinations, leave and benefits. As a Steward, you should try to be aware of instances in which the employer may have discriminated against a fellow worker in any of these instances.

The Act does not supersede other laws or collective bargaining agreements, but should be taken into consideration when issues arise. For example, when representing a worker facing disciplinary charges you will work primarily with the disciplinary procedures outlined by your collective bargaining agreement or in Civil Service Law, Section 75. As a Steward, you need to



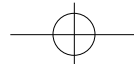
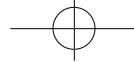
ask, could the ADA play a role within this procedure to help to protect the worker being charged? If so, what accommodations need to be made?

Resolution of conflicts at a worksite will depend not only on the facts, but also upon the skills and knowledge of the steward. Employers are often unaware of their obligations to reasonably accommodate an individual with a disability. Nor are employers aware that some accommodations can be made very inexpensively. Become familiar with certain types of accommodations and, when appropriate, recommend them to the employer. The best resource you can use for types of accommodations will probably come from the individual with the disability.

For more information about the ADA you can contact you Labor Relations Specialist at your Region Office.

### Civil Service Law (CSL)

Civil Service Law covers promotions, examinations, filing of vacations, layoff procedures, the rights of certain types of workers in the public sector to a hearing before being disciplined or discharged, and a variety of other topics. Like other laws in New York State, the Civil Service Law was enacted and has been amended by the New York State Legislature and is administered by various administrative agencies. For New York State employees, the law is administered by the New York State Department of Civil Service. In



political subdivisions, however, county personnel departments or civil service commissions administer the law. Some cities, towns or villages even have their own Civil Service Commissions. Private sector workers are NOT covered by Civil Service Law.

When a political subdivision within the State wishes to amend its local Civil Service Rules by (a) either deleting, adding, or amending the rules, or (b) by amending the appendices to such rules which usually include a listing of titles being proposed to be removed from the competitive class and placed in the non-competitive, exempt and labor classes, there is a procedure that must be followed. A political subdivision is required to advertise in the official newspaper of the municipality that it will hold a hearing on such proposed rule change. The advertisement is to specify the purpose of said hearing.

Local Civil Service Commissions or Personnel Officers are required to provide notification to any person or agency filing a written request, with 30 days advanced notice prior to the holding of hearings on changes or modifications to local Civil Service Rules and Regulations. This is the forum to object to proposed changes in the Rules and Regulations. The law requires that such requests be made in writing during December of each year and should be filed with the appropriate local Civil Service Commission or Personnel Officer in December of each year with a copy of the request being sent to the



CSEA Research Department. Such requests should be made by Certified Mail Return Receipt Requested to ensure that it is received by the commission or personnel officer.

The Law itself is fairly permissive, leaving the employer relatively wide latitude on how to apply it. The Civil Service Law can and does protect the rights of public employees to a certain extent, but it was also designed to protect public employers and the public. Stewards should know the law, both to use it to protect and advance the interests of Union members, and to protect Union members from some of its undesirable effects.

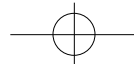
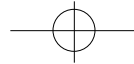
Civil Service Law, Rules and Regulations, next to the collective bargaining agreements, are the most important documents affecting public employees. Civil Service Rules and Regulations have the force and effect of law and prescribe rules for:

- a. Jurisdictional Classification
- b. Position Classification
- c. Examinations
- d. Appointments
- e. Layoff Procedures

The following is an overview of the five major pieces of the Law that a steward should be familiar with.

**Jurisdictional Classification**

Civil Service Law establishes guidelines by which the State and municipalities place each title in the public service into one of four jurisdiction classification. They



are competitive, non-competitive, labor class and exempt. The jurisdictional classification then governs the way the position can be filled. For example, competitive class positions are filled from eligible lists.

**Position Classification**

The term position classification means a grouping together, under common and descriptive titles, of positions that are substantially similar in their essential character and scope. The common position is called a class. Within classes of titles it is common to find a title series in which rank of the titles is determined by the importance of the duties and the degree of responsibility. For example, Clerk I, Clerk II, Principal Clerk and Head Clerk would constitute a title series.

**Examinations**

Positions in the competitive class are filled from certified lists (eligible lists) containing the names of candidates who passed a civil service examination for that position. The examination process within Civil Service is one that begins with the examination announcement. This announcement outlines the date and place of the exam as well as the prerequisites for sitting for the exam. Generally, candidates must apply to take the exam. The instructions for application can be found on the examination announcement.

**Appointments**

Many appointments made to positions in civil service are to permanent positions and the individuals in these



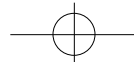
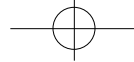
positions serve probationary terms. There are three other very important types of appointments to be aware of; provisional, temporary, and contingent permanent. These positions afford fewer protections than permanent status and it is important that the steward be aware of the differences.

Layoff Procedures

Civil Service Law outlines detailed procedures for a reduction in force. Generally, if your collective bargaining agreement contains a negotiated clause that addresses layoffs, then that should build upon the procedures of the law. Very important terms to recognize in these procedures are competitive, non-competitive, and labor, as well as, permanent, temporary, provision, and contingent permanent. The layoff procedure is not equal for all titles and Stewards should be aware of the difference.

Following are a few examples of when a steward should check the law.

- When he or she sees the words: provisional, temporary, permanent, competitive, non-competitive, labor class, exempt, probationary period, eligible list, competitive and non-competitive examination, and so forth.
- When he or she hears the words layoff, abolition of position, transfer or disability.



You can get information on the Civil Service Law from the following sources:

1. McKinney's Consolidated Laws of New York, Book 9, Civil Service Law which can be ordered from West Publishing Company, 615 Merrick Avenue, Westbury, New York 11590 for about \$74. It is also sometimes available at public libraries and county courthouse libraries. West Publishing also supplies supplements to update their volumes.
2. Civil Service Rules and Regulations of the appropriate county or local commission having jurisdiction over your employer.
3. CSEA staff at the Region Office.
4. Civil Service Primer and other publications printed by CSEA.
5. The president of your Local, who will either know the answer or will direct you toward someone who does know.

Family and Medical Leave Act (FMLA)

The Family and Medical Leave Act of 1993 (FMLA) is a federal law that establishes minimum standards for employment and leave entitlement for an eligible employee of a covered employer to help the worker "balance the demands of the workplace with the needs of [the] family.." This Act entitles eligible workers to take reasonable leave for important family and medical events.



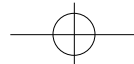
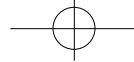
Employee rights - Generally, an eligible worker cannot be denied FMLA for a qualifying reason. While on FMLA leave, the employee may maintain health benefits and has a right to return to the same or a similar position upon the conclusion of such a leave as if he or she had been continuously employed. Failure to comply with the proper procedures may result in a denial of these entitlements.

Collective bargaining agreement - The Act sets the minimum standards for unpaid leave entitlement for qualifying conditions. If a collective bargaining agreement provides better leave entitlement, then it supersedes the law and should not be changed because of these minimums.

Covered employer - An employer is covered by the Act if it is a public agency or a private sector employer that employs 50 or more employees. When determining mandatory employer coverage the 50 employee threshold does not apply to public agencies or to local educational agencies. Therefore, a public employer is covered by FMLA regardless of the number of individuals it employs.

Eligible employee - An employee may work for an eligible employer, without being eligible for FMLA leave. To be eligible, an employee must meet all of the following criteria:

1. Work for a covered employer;



2. Have worked for the employer for at least a total of 12 months;
3. Have worked at least 1,250 hours over the previous 12 months; and
4. Work at a location where at least 50 employees are employed by the employer within 75 road miles.

Eligible spouses who work for the same employer - Only a combined total of 12 weeks of leave during a 12 month period is allowed, if the leave is: for the birth of a child or care after birth; for placement of a child for adoption or foster care, or to care after such placement; or care of a seriously ill parent.

Eligibility of instructional personnel - There may be special rules that apply to instructional personnel in local educational agencies as defined by the Elementary and Secondary Education Act of 1965. Generally, these special rules do not apply to colleges, universities, trade schools or pre-schools. The Act excludes teacher assistants, cafeteria workers, counselors and other non-instructional personnel from these special rules.

For more information regarding these special rules check with your personnel office or your Labor Relations Specialist.

FMLA Leave

A covered employer is required to grant an eligible employee a total of 12 weeks of unpaid leave in a 12 month period for the following instances. Entitlement



for part-time workers is proportional to current working hours.

Qualifying reasons - There are specific instances for which an eligible worker is entitled to FMLA leave.

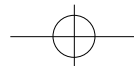
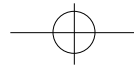
- birth care of employee’s infant;
- an adoption or foster care placement of child with the employee;
- care of a spouse, child or parent of the employee who has a serious health condition;
- employee’s own serious health condition which make the employee unable to perform the functions of his or her job.

Serious health condition - This is defined as “an illness, injury, impairment, or physical or mental condition that involves any period of incapacity or treatment in connection with or consequent to inpatient care in a hospital, hospice, or residential medical care facility.”

Included in this definition is any period on incapacity requiring absence from work, school, or other daily activities of more than 3 calendar days. Also included is continuing treatment by a health care provider for a chronic or long term health condition. Prenatal care is also considered a serious health condition.

The following are examples of serious health conditions that would entitle an eligible worker to FMLA leave:

- heart attacks or condition requiring bypass surgery;



- most cancers;
- back condition requiring extensive therapy or surgery;
- spinal injuries;
- appendicitis;
- pneumonia;
- severe arthritis;
- severe nervous disorders;
- pregnancy, miscarriages, complications, or illnesses related to pregnancy;
- childbirth and recovery from;
- a parent or spouse suffering from Alzheimer’s disease or clinical depression.

Other conditions that may qualify as serious health conditions are stress, treatment for allergies and substance abuse as long as they meet the established criteria.

Conditions that are short term in nature and usually require only brief treatment are not considered serious illnesses or health conditions. Having the flu or a bad cold does not qualify as a serious illness and would normally be covered under regular sick leave provisions. Voluntary cosmetic surgery or other surgeries that do not require hospitalization or prolonged care do not meet the standard of a serious health condition.

Inability to perform the job - A worker may be unable to perform the essential functions of their job as defined by the Americans with Disabilities Act (discussed on p. 98)



thereby qualifying them for FMLA leave.

The employer may request certification to verify the worker's inability to perform the essential functions of his/her job.

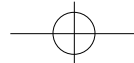
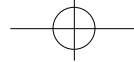
Types of leave - Under certain circumstances, an eligible worker may take FMLA leave on a reduced leave schedule or on an intermittent basis. If reduced or intermittent leave is for the birth or placement of a child for adoption or foster care. The employee will need the permission of the employer.

Employer permission is not required if such leave is for the care of a sick family member or for the worker's own sickness and/or treatment, as long as the reduced or intermittent schedule is medically necessary.

Reduced leave schedule - This reduces the number of hours an employee works over a continual period.

Intermittent leave - This is taken in separate blocks of time due to a single illness or injury.

Medical necessity - This is distinguished from voluntary treatments and procedures. An employer may require medical certification from a health care provider to confirm the medical need for such leave. This certification will need to include a statement expressing the medical necessity as well as the expected duration of the leave. The Act encourages employees that use reduced or intermittent leave to



schedule treatments so they are not disruptive to the employer's operation.

Minimum period of leave - The employer is allowed to require that the reduced or intermittent leave not be smaller than the shortest period of time that the employer's payroll system uses to account for time and attendance. For instance, NYS employees may take leave in units as small as 1/4 hour.

Alternative position - The employer may temporarily transfer the worker to an alternative position in order to better accommodate the leave. The alternative position must have equivalent pay and benefits but does not have to have the same duties.

If the employee is transferred to a part-time item they must receive the health benefits that they received in their full-time position even if these benefits are not regularly provided to part-time employees.

Some additional accruals, such as vacation accruals, may be reduced proportionally if that is the current practice for part-time employees.

In every instance transfers must also comply with the provisions of the collective bargaining agreement, applicable rules and regulations, and the NYS Civil Service Law.

Part-time employees - Part-time workers are entitled to FMLA leave on a pro-rated basis by comparing the



reduced schedule with the worker's normal workweek.

**Paid versus unpaid leave** - An eligible employee is allowed to substitute paid leave for FMLA leave under certain circumstances outlined in their collective bargaining agreement.

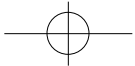
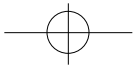
The Act permits an employer to require that an eligible employee substitute paid leave for FMLA leave. The employer may allow this substitution for circumstances that are not ordinarily permitted by the collective bargaining agreement.

Substitution of paid leave may be made for all or part of FMLA leave depending upon your earned accruals. If paid leave will not be used, the employee is still entitled to leave accruals upon return from leave.

If paid leave is used for a non-FMLA circumstance, such as a sick day for a cold, this will not count against the 12 weeks of entitlement. If other leave is used, as provided in the contract, follow the procedures outlined in the contract.

**Requirement of the employee** - The worker is expected to give the employer at least 30 days advance notice of the need for FMLA leave when the leave is foreseeable.

In the case of a medical emergency or a change in circumstances surrounding the leave, the employee is



expected to notify their employer as soon as practicable. This would generally include verbal notification to the employer within one or two business days of the awareness of the need for FMLA leave. However, this is subject to the facts and circumstances of the need for leave.

Notification to the employer shall include the anticipated timing and duration of the leave. Means of notice is meant to include: in person, by telephone, telegraph or by facsimile. If necessary, notification can also be made by a representative of the employee such as a spouse, a family member, or another responsible representative. Generally, this is only permitted if the employee is unable to provide notice personally.

The employer is allowed to waive the notice requirements, but an employer is not allowed to require stricter FMLA notifications that may be outlined in collective bargaining agreements or State Law.

**Failure to provide notification** - The employer may deny FMLA leave to an employee who fails to provide notice in a reasonable amount of time. This leave may be denied until at least 30 days after the employer receives proper notification.

If an employer wishes to deny FMLA leave it must be clear that the employee was aware of the notice requirements. The employer need only display the proper poster in a conspicuous area at the employee's worksite.



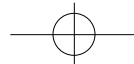
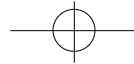
Medical certification/documentation - The employer can require certification from a health care provider about the family member's condition or the employee's condition. This certification may include:

- the expressed need that the employee is needed to care for the family member and the estimate of time he or she is needed.
- certification that the employee is unable to perform the functions of his or her job, thereby requiring the leave.
- medical certification if the employee is unable to return to work due to the continuation, recurrence, or onset of a serious illness of the employee.

Content of medical certification - It must include all of the following information:

- date the condition started and the health care provider's best judgment as to the duration of the condition;
- diagnosis of the condition;
- description of the treatment; and
- indication of whether inpatient hospitalization is required.

If the certification is needed to justify an intermittent or reduced schedule leave it must include the statement that such a schedule is medically necessary and the expected duration of the leave. If the leave is required to care for a seriously-ill family member the certification should indicate this.



Second and third opinions - The employer may request that the worker seek a second opinion at the expense of the employer. The employer may chose the second health care provider but it may not be one that is regularly employed by the employer. The employer is not permitted to contact the employee's health care provider directly, rather contact must be made through the worker.

If the first and second opinions conflict, a third opinion may be necessary. The third opinion shall be paid for by the employer and the health care provider shall be agreed upon by both the employer and the employee. This decision shall be binding.

Reasonable time frame - If the employer requests certification the worker is required to provide such in the established time frame. Generally, an employer is required to request initial certification in writing. Subsequent requests may be verbal.

The employer must allow the worker fifteen (15) calendar days once they have notified the employee that they require the certification. The employer is allowed to request certification or recertification at a later date if the leave is believed to have been inappropriate or if the employee requests an extension. Generally, this request should not be made more often than one request every 30 calendar days.



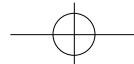
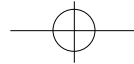
Failure to provide medical certification - Failure to provide requested certification within the designated time frame, may result in the leave being denied until you provide such documentation. Continuation of leave may be denied in emergency FMLA cases, when certification is not provided after a reasonable time.

An employer may deny your request for reinstatement if you fail to provide requested medical certification that you are able to return to work. This applies when the FMLA leave was taken for the employee's own serious health condition. Reinstatement can be continually denied until proper documentation has been provided.

Continuing health benefits - The employer is required to maintain coverage as if the employee were continually employed during the FMLA leave. This entitlement is extended to all types of health benefits in effect before the FMLA leave. Also the employee is entitled to changes in the health plan as if not on leave.

Employees may also choose to discontinue health coverage during FMLA leave and still receive the same benefits in existence before the leave. Employees are not required to requalify for coverage that they maintained previous to FMLA leave.

Paying the premium - Substituting paid leave while on FMLA leave requires that the employee still continue to pay his/her share of the premiums prior to the leave, most commonly by payroll deduction.



Unpaid leave requires the worker to make arrangements to continue payment of the worker's portion of health insurance premiums. Such an arrangement must be specified in advance of the leave.

An employer cannot require prepayment of the premiums that will become due during the leave. Nor can an employer require more of an employee on FMLA leave than of other employees on leave without pay.

Failure to pay your premiums - The employer is no longer obligated to maintain coverage if the employee fails to pay the required portion of the health insurance premiums. The worker is still entitled to reinstatement and to have the benefits fully restored once the leave is finished.

Failure to return from leave - An employer may recover its share the premiums for health insurance coverage if you chose not to return to work after the FMLA leave has expired. This is applicable when the employee chooses not to return. Your employer may not collect the premiums if your reason for not returning is no fault of your own.

Limitation - The Act recognizes that if you have returned to work for 30 calendar days or more you are considered to have fully returned to work. In such an instance the employer can no longer collect the premiums.



Requirements of the employer - The employer is required to inform workers of their rights to FMLA leave in the same manner as they currently do in established handbooks or documents. An employer who does not publish an employee handbook is required to give the employee written guidance of the procedures and rights under FMLA.

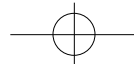
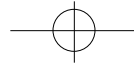
Posting - Each employer is responsible to post information about the Family and Medical Leave Act.

Reinstatement - an employee on FMLA leave is entitled to be restored to the same position or an equivalent position and same worksite or one that is geographically similar.

An equivalent or similar position must have the same benefits, pay, and working conditions (including shift, if not eliminated) as well as same or similar duties and responsibilities. The levels of skill, effort, responsibility, and authority must also be substantially similar.

Renewing licenses - The Act provides that the employer shall grant a reasonable opportunity to fulfill the necessary requirements to renew a license needed for the work.

CSEA has established an effective internal union complaint process which we urge officers and members to follow so that we have uniformity and so we can have a record of the nature of complaints and their disposition. Of course, any situation that can be handled at the local or unit



level should be handled without delay by the Labor Relations Specialist and local officer.

If the local FMLA complaint cannot be resolved with the employer, then the Labor Relations Specialist should file a formal complaint with the U.S. Secretary of Labor. Complaints should be filed within a reasonable time of the awareness of the violation. Complaints may not be filed more than two years after the alleged violation. This limitation is extended to three years if the violation was a willful act on the employer's part.

If you have any questions concerning the Family and Medical Leave Act, please contact your CSEA Local President and/or Labor Relations Specialist.

### Fair Labor Standards Act (FLSA)

The Federal Fair Labor Standards Act (FLSA) was originally adopted in 1938 as a means of economic recovery from the Great Depression to ensure maximum employment that paid a livable minimum wage.

The Act required private employers to pay at least a livable minimum wage as well as premium pay (time and one half) for all hours worked over a certain maximum number of hours per week, establishing the concept of overtime pay. It also set a monetary penalty for private employers who overwork their existing work force creating an incentive to hire more workers rather than increasing the hours of current staff. By hiring



more workers, unemployment rates would fall and health and safety problems related to long hours and fatigue would be mitigated.

After numerous legal challenges, the courts finally determined that the public sector, state and local government employees, are covered by the intent of the legislation.

FLSA sets forth the following minimum standards for employment:

- covered employees and non-covered employees
- minimum wage (\$4.25 per hour as of 4/1/91)
- compensable working time - employment includes all hours that an employee is suffered or permitted to work for the employer. FLSA covers travel time, waiting time, break periods, sleep time, training programs, lectures, and meetings.
- overtime pay - FLSA requires that overtime pay must be paid at a rate of not less than one and one-half times the nonexempt employee's regular rate of pay for each hour worked in a workweek in excess of the maximum hours applicable to the type of employment in which the employee is engaged. This usually means overtime for hours in excess of 40 per week.
- compensatory time - FLSA authorizes a public agency to provide compensatory time (comp time) off in lieu of monetary overtime compensation, at a rate of not less than one and one-half hours of compensatory time for each hour of overtime

122

worked. Only state and local governments may use compensatory time; private employers are not eligible and must pay overtime.

- equal pay - FLSA prohibits discrimination on the basis of sex for work requiring equal skill, effort and responsibility that is performed under similar working conditions.
- child labor laws - FLSA provisions regulate the overtime, working conditions and wages of minors in certain occupations.
- recordkeeping - FLSA requires that employers who are subject to the provisions of the law must keep records for both covered and exempt employees.

For further information, Research Report (Oct./Nov./Dec. 1991) - FLSA is available from CSEA by contacting your Labor Relations Specialist.

## Occupational Safety and Health Act (OSHA)

The OSH Act of 1970, established the Occupational Safety and Health Administration (OSHA) which is part of the U.S. Department of Labor. The worker protection standards OSHA adopted to enforce essentially came from the industries themselves and professional organizations. The workers who are covered under OSHA work in industries involved with interstate commerce. State and local governments are exempt from OSHA coverage resulting in state and municipal workers having no federal rights to a safe and healthy

123

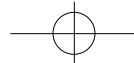
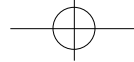
workplace. Private sector workers are not exempt from OSHA coverage.

### Public Employee Safety and Health Act (PESH)

In 1980, New York State adopted the Public Employee Safety and Health Act which established the Public Employee Safety and Health (PESH) Bureau which is part of the NYS Department of Labor. The standards adopted by PESH are the OSHA standards and they are enforced by NYS DOL inspectors. The state, political subdivisions, public authorities or any other governmental agency or instrumentality thereof are covered.

The establishment of PESH is done by the way of an agreement between NYS and the U.S. Department of Labor. The agreement requires PESH to adopt, within six months, all new and amended OSH standards with the understanding that PESH can establish more protective standards, but not less, than OSHA. New York State receives a 50% reimbursement from OSHA for its enforcement activities.

PESH procedures are very similar to those of OSHA. The major differences are penalties and appeals. OSHA will fine an employer for being in violation of its standards whereas PESH may fine an employer that fails to abate or correct a cited hazard by a given date. Appeals of an OSHA standard are conducted through



review commissions whereas PESH appeals are conducted through the Industrial Board of Appeals.

For more information about occupational safety standards contact your region office and ask to speak with either your Labor Relations Specialist or your CSEA Occupational Safety and Health Specialist.

### Right to Know Law

The term right to know has become associated with many state and federal regulations addressing a variety of issues. The New York State Right To Know Law (RTK) requires public sector employers to develop programs to inform workers of the potential hazards of chemicals found in the workplace. In the private sector, the provisions of the Hazard Communication Standard replace those of RTK, except for the continued maintenance of employee exposure records as required under RTK. Employers have the following areas of responsibility:

Notification - Employers must inform workers of their rights to information, including all possible health effects and hazards, concerning all toxic substances present in their workplace.

Information - Upon the written request of a worker, the employer must provide all information relating to the toxic substances in the workplace. If an employee does not receive the information within 72 hours, he may not be required to work with the substances in the workplace.

