

## RESPONSE TO THEFT-RELATED MISCONDUCT CHECKLIST

- \_\_\_ Attempt to deal with the situation out of public view. Maintain confidentiality.
- \_\_\_ Gather as much evidence (documents and witnesses) as possible before confronting the suspected employee, but be as prompt as possible.
- \_\_\_ As soon as the evidence is entirely assembled and protected, confront the suspect with the purpose of obtaining the "employee's side of the story." (See pages 354-355 for dialogue.)
- \_\_\_ As soon as possible, obtain additional supervisor or security official assistance witness(es) and a union steward or representative and conduct a fact-finding interview with the employee(s) involved, on company time. Contact Top Level Managers and security staff to determine if it is appropriate to contact law enforcement officials.
- \_\_\_ Conduct a proper fact-finding investigation, on company time, in the presence of a steward and a second supervisor witness as promptly as possible. (See pages 354-355 for dialogue.)
- \_\_\_ Allow the steward to attend the investigatory fact-finding interviews with the employee suspected of the misconduct only if the employee wants him/her to be there. After the initial comments by the supervisor and the initial response by the employee involved, allow the employee to briefly and privately confer with the steward if the employee or the steward so requests.
- \_\_\_ **Remember**, the longer the delay between the incident and any investigative interviews, the greater the chance for concocting a story.
- \_\_\_ Ask, "Why do you have this?" and document answers in detail.
- \_\_\_ Accurately list as many sensory facts as possible, including actions of persons involved and things seen as well as times, witnesses, and locations.
- \_\_\_ For detaining, temporary relief of duties, or confiscating the items, use this phrase: "... pending investigation of why you have this." (Note: If the items confiscated are determined to be other than the contraband being searched for, they should be returned immediately to the employee to avoid liability in the areas of "conversion" or "trespass to chattels.")
- \_\_\_ Conduct private, personal, and confidential interviews with supervisors and other employees who may have knowledge of the incident and do so as quickly as possible. (Interview on company time.)
- \_\_\_ Document accurately times, questions, answers, comments, and lack of answers to questions.
- \_\_\_ Document accurately chronological sequences, sensory observations, and statements of witnesses.
- \_\_\_ **Remember**, the supervisor and the company can be held liable for slanderous or harmful and irresponsible supervisory statements or actions, especially those made in the presence of individuals who are not management representatives and who do not have a legitimate, right to know.
- \_\_\_ Read the company policy regarding theft-related misconduct. The items in that policy must be satisfied before discipline is administered. (Also read applicable provisions of the Collective Bargaining Agreement.)
- \_\_\_ Do not make "surprise entry" without approval of the employee involved, and follow proper witness procedures, as discussed in the preceding pages.
- \_\_\_ Before deciding upon disciplinary action, the supervisor should determine:
  - 1) Has the missing item been given in the past as a reward or benefit?
  - 2) Has the missing item been considered "scrap" in the past?
- \_\_\_ Note if the employee admitted taking the missing item or any connection with the missing item. (Document the employee's comments as close to verbatim as possible.)
- \_\_\_ Keep employees separated and do not allow them to leave the premises until a top-level manager has been notified, when investigating theft-related misconduct.
- \_\_\_ Do not utilize excessive or unnecessary force to detain the employee, to question the employee, and to confiscate items involved. Do not refuse the employee's request that he/she be allowed to leave.
- \_\_\_ Before acting upon any co-worker accusations toward an employee, attempt to verify the accusations. Document all such credible allegations or accusations, as they may be the only reasonable and particularized suspicion upon which the employer acted.
- \_\_\_ If a search of lockers, tool boxes, autos, or other personal effects of an employee is necessary, the employee's permission should be solicited before the search. If the employee refuses, he/she should be asked to sign a statement that a request for search was refused, especially if employer policy states that termination of employment is likely for such refusal. (Do not terminate the employment of an employee who refuses such request without labor relations/legal department approval.)

## **RESPONSE TO THEFT-RELATED MISCONDUCT CHECKLIST**

- \_\_\_ Utilize the least-forceful and least-intrusive method possible in order to obtain the contraband items.
- \_\_\_ In the event any form of search or seizure is made, accurate documentation should be kept of all circumstances leading up to the search, "reasonable belief or suspicion" facts which led to the search, the actual conduct of the search, names of all persons present, and all statements made by the employee.
- \_\_\_ Make sure to follow proper witness/representation guidelines during searches.
- \_\_\_ If a supervisor or security officer observes a person with a "missing" item the supervisor or security officer should ask to see the item and should request for the employee to surrender the item, preferably in the presence of a union representative and a supervisor witness. Do not misplace such items and do not allow them to be destroyed. Place them in some form of sealed, labeled container; and place them in a secure location in the presence of another management representative witness.
- \_\_\_ Determine in the investigation if there were any attempts to thwart steps taken by management to protect the property or to conduct the investigation.
- \_\_\_ Attempt to determine if the act was by one or more than one person.
- \_\_\_ Don't ask the steward or any of the employees to settle the matter.
- \_\_\_ Try as accurately as possible to determine the actual theft-related misconduct activity based on facts, so that future similar incidents can be prevented.
- \_\_\_ Make a special note if it is determined that alcohol, drugs, or medication played a role in the situation.

**REMEMBER:** "Suspected misconduct" is considerably different from "actual observed misconduct."

**REMEMBER:** Insofar as possible, conduct any fact-finding interviews with the employee on company time, even if it means calling the employee back to work and paying the employee to return.

- \_\_\_ Work very closely with employees who are theft victims, where the theft occurred at the workplace or in conjunction with employment-related activities. Make reparation and recovery activity a part of such employer-cooperative efforts and provide victim assistance counseling services as part of employee assistance programs.

**CHECKLIST OF ADDITIONAL "LIABILITY EXPOSURE" CONSIDERATIONS  
BEFORE DECIDING DISCIPLINARY ACTION FOR  
THEFT- RELATED MISCONDUCT**

In addition to performing a +/-/? Just-Cause Analysis utilizing the JUST-CAUSE CHECKLIST, the following items should be considered before deciding disciplinary action.

In the September, 1989, ARBITRATION JOURNAL Arbitrator Cynthia Horvath Garbutt and Arbitrator Lamont E. Stallworth wrote:

**"... because of the potentially devastating effect on the employee's professional and personal life, arbitrators frequently require substantial proof of the employee's guilt before upholding a discharge for theft."**

Because of that consideration and because employees may sue employers and supervisors for defamation-related causes, supervisors should consider the following points in addition to other THEFT-RELATED MISCONDUCT CHECKLIST items before deciding upon disciplinary action, if any, in theft-related types of misconduct.

- \_\_\_ When citing the misconduct/violation in disciplinary letters for "misuse of company property," "unauthorized possession of company property," etc., the employer should also include the statement "... which is contrary to the employee's employment responsibility."
- \_\_\_ The employer should attempt to illustrate a connection or nexus between the misconduct and its effect upon the service or business of the employer and upon the employee's job performance or the job performance of other employees. Such demonstration may be difficult when the employee's misconduct relates to off-duty theft-related misconduct, especially if the property involved was not employer property.
- \_\_\_ For theft-related misconduct possibly complicated (aggravated) by the employee's alcohol/drug-related dependence, the employer should consider the ALCOHOL/DRUG CHECKLIST "one-last-chance" consideration.
- \_\_\_ In theft-related misconduct disciplinary action, the use of circumstantial evidence alone is not likely to satisfy the required increased quantum of proof ("clear and convincing" or "beyond a reasonable doubt"), unless there is an absence of any other plausible conclusion other than guilt.
- \_\_\_ If the theft-related misconduct is in connection with falsification of employer records, many arbitrators will require the employer to prove the employee acted with intent to defraud the employer and with the intent to achieve personal gain, sometimes called the "conversion consideration."
- \_\_\_ It is not clearly established precisely what weight arbitrators will give to polygraph test results or to the fact that the "suspected" employee may have refused to participate in such a test connected with a theft-related misconduct investigation. Employers should, for each instance where they are considering polygraph use, consult legal counsel regarding advice based upon the most recent cases dealing with the tests and considerations of section 8(a)(1) and section 7(d) of the Employee Polygraph Protection Act of 1988. (The current arbitral trend indicates that arbitrators are not likely to give much weight, if any, to polygraph test results or to refusals by employees to participate in polygraph tests.)
- \_\_\_ Of special interest to arbitrators regarding testimony of witnesses in theft-related misconduct cases is whether such witnesses had any animus or ulterior motive toward the accused or if the witnesses could in any way be enriched as a result of subsequent action toward the accused. Employers should carefully and thoroughly consider the possibility of such motivation, and employers should inform witnesses of potential liabilities to such witnesses if such accusations prove to be unfounded. Written testimony is preferred in such cases as compared to verbal testimony or accusations, some of which often may be presented "off the record" to the employer.
- \_\_\_ Employers may prevail upon subpoena powers of the arbitrator to bring forth known eyewitness or first-hand testimony by individuals. Before doing so, however, legal advice should be obtained pursuant to the U. S. Arbitration Act, 9 U.S.C. (4) and other applicable statutes. If such subpoena authority is sought great care should be taken to ensure that such subpoenas are properly executed and served according to the procedures in the pertinent jurisdiction, as some arbitrators may not be knowledgeable or versed in such procedures. Such technical failure to properly execute and serve a subpoena may nullify the obligation of the witness to appear or to testify.

**CHECKLIST OF ADDITIONAL "LIABILITY EXPOSURE" CONSIDERATIONS  
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- \_\_\_ If employers are considering prosecution, or in theft-related misconduct cases which are particularly complex or which involve critical equipment or large sums of money, the employer should involve law enforcement officials promptly in the investigation.
- \_\_\_ Similarly, in theft-related misconduct cases/investigations where prosecution as well as discipline is likely, employers should be guided by legal advice concerning honoring an employee's request to speak with or to have the employee's legal counsel present during interviews or at various phases of any review or hearing or appeal process, even in instances where the employee may be entitled to union representation and even in procedural hearings being conducted under auspices of a Collective Bargaining Agreement.
- \_\_\_ During interrogations/investigations in theft-related misconduct situations, the employer should not refuse requests by the subject employee(s) to briefly leave the room or leave the area where the investigation is being conducted. Honoring such request should not permit the employee to escape the good faith obligation to participate in such employment-related investigations. However, the employer should avoid creating an impression of false imprisonment" or "unlawful detainment." The employee should be in a paid ("on-the-clock") status during participation in such investigations/interrogation, and should be permitted reasonable access to and consultation with a union representative, legal counsel, or an employee relations/human resources representative in non-union organizations. In such instances, however, it is appropriate for the supervisors to leave the room or area where the investigation is being conducted and to allow the employee and the steward to remain in the area and briefly confer.