

Insubordination

Insubordination is a clear refusal to obey a clearly represented and understood direct order from an appropriate manager. That order must be legal, not a threat to your health and safety, and not demeaning (as in, "shine my shoes right now."). A direct order from a manager clearly out of the line of supervision is inappropriate.

Like all law, labor law is a reflection of political reality. Segregation, slavery, and peonage were all legal, until met with uprisings. Unions, free speech, gathering for protests, writing insurgent literature, urging people to join the United Auto Workers union were all, at one time, illegal. Again, mass opposition and breaking the law changed the law. Sometimes that is necessary.

Moreover, much of law is open to interpretation. Concrete circumstances influence judicial decisions, as in shouting "fire" in a crowded theater or the difference between cursing, and cursing in front of a large group of small children.

However, in the case of a direct order, it is usually seen as reasonable for an employee (teacher, aide, etc) to ask for the directive in writing. Anyone can reasonably say s/he was confused by a spoken directive. So, when in doubt, ask the employer to write the directive down. If the employer refuses, ask for the order to be repeated in front of witnesses you trust, or recorded.

If the directive is clearly illegal, as in "beat that kid," then you have every right to refuse. If the order threatens your health and safety, or the health and safety of someone in your charge, you also have a right to directly refuse. And, as above, if the order is clearly demeaning, you can reject that as well.

Almost all teacher contracts carry a "just cause," clause in them. If yours does not, you should demand that your union reps go win it. If you do not have a just cause clause, you still are likely to have due process rights that can be seen as paralleling just cause. If you have been on the job a long time, say more than a year, you obtain certain legal property rights to the job, especially if your employer has made any promises to you, in writing or not. Property rights then become due process rights. Tenure is, of course, important to workers like teachers. Tenure sometimes offers "just cause," while the absence of tenure does not. However, not having tenure does not mean the complete absence of rights.

If you have a just cause clause, you have rights under this legal term:

- *to be disciplined for good reason,
- *to be disciplined about something you should have known about,
- *to be disciplined to similar degrees that others experienced,
- *to have due process rights, as in a process to appeal,
- *to be disciplined in ways that meet the nature of your offense and that represent a measured response,
- *and not to be discriminated against in the discipline.

Here are some tests for just cause: "Was the employee forewarned of the consequences of his or her actions? Are the employer's rules reasonably related to business efficiency and performance

the employer might reasonably expect from the employee? Was an effort made before discharge to determine whether the employee was guilty as charged? Was the investigation conducted fairly and objectively? Did the employer obtain substantial evidence of the employee's guilt? Were the rules applied fairly and without discrimination? Was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?"

Should you be disciplined for a good cause, like exercising your legal right to inform parents or kids of opt out rights on high stakes standardized exams, the main thing to do is to use this as an opportunity to build a knowledgeable rank and file base of people who will support you, perhaps duplicate your effort, and who will serve as a powerful group for this and other issues over time.

That means you should communicate to as many people as you can right away, explaining what you did, why, why this is unjust not only to you but to every school worker, the students, and others, and what people can do—as in having a demonstration, coming to a meeting, helping write the next flyer, etc.

The second thing you will need to do is, quite likely, file a grievance—unless direct action organizing wins right off. You should use every step in the grievance procedure as an organizing tool, not merely a legal step. Like all laws within our economic system of capital, grievance procedures are not designed to make people who work more powerful. Most grievance procedures are designed to physically remove you from your base of support, your colleagues, and to place you in a legal arena that is more designed to achieve management control than serve justice.

Unfortunately, very few attorneys today are trained in labor law. The good thing is that it's true of both sides, labor and management, so if you become aware of how labor law works, and take charge of your case—as you should—your chances of winning go up. However, remember that the more action taking place outside the grievance room on your behalf, the better chance you have of winning. And, remember as well, most unions do not like to handle grievances as it takes up staff time, and few staff are competent to conduct grievance defenses. Again, you need to take charge of your own case. It is not a bad idea, if you have the resources, to retain your own attorney. Even then, you must guide your case. Use the "Developing Labor Law," in your local library. See also, *Labor Law for the Rank and Filer*, by Staughton Lynd, <http://www.iww.org/organize/laborlaw/Lynd/>

Your outlook should be ferociously assertive. You are 100% right; the employer 100% wrong. While your main goal, again, is to build an active base of knowledgeable people who can help win more control over your work place over time, a secondary goal is to make the employer want to never live through this process again.

You have every right to take discipline very personally. After all, someone is threatening you with a serious charge that could suspend your income. That means you have a right to respond forcefully.

Union contracts vary. There is no way to predict how many steps in the procedure there are before you reach a final stage that is usually mediation or arbitration. Since you are 100% right,

there is no reason to mediate, i.e., cut a deal. You want arbitration.

Unions do not like to arbitrate cases. Arbitration is costly. It disrupts what is often a cozy relationship of union executives and employers. In part because of arbitrators' pro-employer biases (there are no poor arbitrators), and in part because of union executives' incompetence, unions lose about 2/3 of the cases they file.

That does not have to happen to you. Do not agree to waive arbitration and take a deal. Demand your rights, and then demand the union stand up for them. But be sure to guide your case, bring your own representative if you can, and if you cannot, determine the legal strategy (which should always connect to organizing strategy), and then make sure your union representative follows that strategy, exactly.

If the union refuses to represent you, remind the official that they have a "duty of fair representation." The duty applies to virtually every action that a union might take in dealing with an employer as the representative of employees, from its negotiation of the terms of a collective bargaining agreement, to its handling of grievances arising under that agreement, as well as its operation of an exclusive hiring hall and its enforcement of the union security provisions of a collective bargaining agreement. The duty does not ordinarily apply, on the other hand, to rights that a worker can enforce independently; put another way, the union has no duty to assist the employees it represents in filing claims under a workers' compensation statute or other laws.

The duty likewise does not apply for the most part to unions' internal affairs, such as their right to discipline employees for violation of the union's own rules or union officers' handling of union funds, which are regulated instead by the Labor Management Reporting and Disclosure Act. The courts have, on the other hand, applied the same principles that govern the duty of fair representation to union members' suits to enforce union constitutions.

When union staff hear, "duty of fair representation" from a rank and file member, if they are smart they immediately realize the member is wise to how labor law works and might sue the union, and the labor executives work quite a bit harder.

Be sure to let CalCARE know if you are disciplined or threatened in any way.

Rich Gibson, PhD

Rich Gibson is not a lawyer. He is a trained organizer who worked for unions for more than 20 years. The advice above is circulated in good faith, with an outlook of building a mass class-conscious base of students, educators, parents, and others, who will fight for equality and justice in schools and out.

Distributed by CalCARE (the California Coalition for Authentic Reform in Education)

www.calcare.org

510-496-6028

January 2008