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MEETING

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National Institute of Corrections

Jails Division

Large Jail Network Meeting

**July 12-14, 1998
Longmont, Colorado**

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National Institute of Corrections Jails Division

Large Jail Network Meeting

July 12-14, 1998

Longmont, Colorado

These proceedings present highlights of a meeting of NIC's Large Jail Network held in Longmont, Colorado, on July 12-14, 1998. Approximately 55 administrators of the largest jails and jail systems in the country attended the meeting.

This meeting represented a departure from previous meetings. Except for one session devoted to a discussion of the LJN listserv, the meeting featured a single speaker rather than, as in the past, panels of speakers representing Large Jail Network members. Lynn J. Lund, Attorney at Law from Salt Lake City, and an expert on legal issues as they apply to corrections agencies, spoke principally on the topic of how to handle conflicts with employees.

In addition to the proceedings themselves, this document contains useful appendixes of materials prepared by Mr. Lund. Where appropriate, the proceedings point the reader to specific page numbers or sections of these appendixes. In addition, the proceedings also highlight Mr. Lund's specific recommendations for dealing with employee conflicts

- ◆ *Opening Address:* In his opening address, Lynn Lund summarized some very recent Supreme Court decisions on sexual harassment, pointing to the importance of developing policies and training for employees on this issue. He also introduced some historical and current perspectives to provide a framework for changing jail administrators' paradigms on managing employees.
- ◆ *Legal Issues: Discipline, Values, Attitudes, and Your Workforce.* In this session, Mr. Lund highlighted the importance of following required procedures in disciplinary cases and pointed to the differences between criminal and administrative processes. He also discussed fitness-for-duty evaluations and how they should be used in responding to disciplinary cases.
- ◆ *Key Issues for Large Jail Network Consideration.* Connie Clem of the NIC Information Center demonstrated the NIC Web site and the LJN Exchange, a new listserv limited to LJN members.
- ◆ *Non-Adversarial Disciplinary Procedures.* Lynn Lund presented some innovative approaches to dealing with problems that were implemented by LJN members. He also made a number of specific recommendations for keeping disciplinary procedures non-adversarial, including the need to remember the concepts of dignity, justice, and fairness.

- ◆ *Conflict Resolution Skills.* Mr. Lund summarized some specific cases involving LJN member organizations. He also defined, based on his own experiences as well as the book, *Getting Past No*, some keys to mediating successfully.

- ◆ *Future Meeting Issues.* Richard Geaither of the NIC Jails Center led a discussion of possible topics for the next LJN meeting. Selected was the topic "Dealing with Post Trauma Stress."

Opening Address: Update on Sexual Harassment Cases and How to Take a Proactive Approach to Preventing Employee Lawsuits

Lynn J. Lund, Attorney at Law

In the past year, there have been two landmark Supreme Court decisions related to sexual harassment. Both cases define clear standards and let employers and employees know what they must do and what they have to prove in the area of sexual harassment. The two most recent decisions, on June 26, 1998, state that an employer has a duty to focus on the prevention of litigation.

- ◆ In *Faragher v. City of Boca Raton*, the Court found that an employer has an "affirmative duty" to develop grievance procedures, policies, and training to prevent any sexually harassing behavior. If the employer has taken these steps, the burden shifts to the plaintiff, who must show either that there was no policy in place governing sexual harassment or that the employer was not following the policy.
- ◆ In *Burlington Industries, Inc. v. Ellerth*, the issue was whether an employee who refuses unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse job consequences can recover damages against an employer who had no knowledge of the supervisor's actions. The court found that an employee in such a situation may recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions. However, the decision also made clear that IF no tangible loss of job benefits has occurred, a defending employer may raise an affirmative defense showing: 1) that the employer has developed policies, procedures, and training, and 2) that the plaintiff employee failed to take advantage of any preventive or corrective opportunities available.

Other Important Concepts Related to Sexual Harassment

- ◆ Third party complainant—The courts have ruled that a non-victim who reports sexual harassment may stand in for the victim. The third party complainant may thus have the right to provide their input into the employer's actions in response to the harassment. However, the accused employees, in turn, have the right to "fundamental fairness," as follows.
- ◆ "Fundamental fairness"—Persons accused of sexual harassment have a right to fundamental fairness. In *Jerald McKenzie vs. Miller Brewing Company*, McKenzie was fired for talking about an episode from the television show, *Seinfeld*. A female employee refused to be drawn into the conversation, and she made no formal or informal complaint. McKenzie sued, and the jury awarded him nearly \$27 million for a wrongful termination. The rationale was that firing a long-standing employee without giving him/her a chance to respond to allegations is fundamentally unfair,

especially when there is no victim and the only possible victim is strongly opposed to any disciplinary action.

Recommendation: Develop policies

It is important for an agency to develop policies addressing sexual harassment. Failure to do so can bring serious consequences, as judgments against employers in sexual harassment suits average \$3.5 million and can go much higher. For example, in a case against WalMart, an employee was awarded \$50 million; in a UPS case, the jury awarded \$80.7 million; and in a case involving State Farm (which attempted to prove that women were not genetically suited for management), the award was \$380 million.

Recommendation: Require an employee affidavit

Lund recommended that jail administrators have employees sign a statement at their annual evaluations, stating, "I hereby certify that I have not been sexually harassed during (period of time) and I know of no other sexual harassment that has taken place."

Conflict Resolution I

Agencies must respond to two major forces today:

1. The "unstoppable force" of the rapidity of change. Futurists Toffler and Naisbitt point to this phenomenon, emphasizing that from the time of Christ, the extent of information available has doubled at about 1750, 1949, 1960, 1968, and 1972. Today, it is almost impossible to measure the rapidity of change or the explosion of knowledge.
2. Resistance. Opposed to change is the "Great Unmoveable Force Within the Universe" (Aristotle). The most powerful force in the universe is the resistance of a human being to change. Isaac Newton's law of motion, which states "For every action there is an opposite and equal reaction" is as true for emotional and human relationships as it is for physical force.

Maslow's Hierarchy of Needs (see appendix) has shifted. In the past, food, clothing, shelter comprised 89% of human needs, but they are only 9% today. Today, a need for self esteem and recognition makes up about 89% of human needs. This change has important implications for managing and for responding to conflicts with employees today.

Management Concepts of the Future

There are important lessons for managers to learn, as successful management concepts in the future will be very different than in the past. Innovation is imperative (Toffler); speed of innovation is imperative. If we are to survive as managers, we must change our management paradigms from those of the past.

Today, the paradigm has exactly reversed--that is, the focus has shifted from the rights of society to the rights of the individual. Efficiency and effectiveness are less important today than "process." For example, if you fail to follow the procedures required in a Loudermill hearing, you can be personally liable.

Moreover, whatever punishment is meted out must be "fundamentally fair" when viewed in terms of all circumstances.

Management concepts of the future will therefore require the following:

- ◆ High input from employees
- ◆ High process—low efficiency
- ◆ High touch (caring) involves high involvement
- ◆ High time—requires high tolerance
- ◆ High tolerance for high flextime for employees
- ◆ Be ready for high challenge
- ◆ Expect low, or no, loyalty

All of these concepts tend to create a basic clash between the values and beliefs of management and staff.

There are other legal requirements in the workplace, as well. A recent Supreme Court decision found that, in order to discipline an employee, you must be able to show that a specific act of the employee created a specific adverse impact on the employer or on the public. For example, in the jail setting, the employee's act might be seen as discrediting the department--or potentially discrediting the department--in the eyes of the public.

Remember Steven Covey's comments on the importance of paradigms:

- ◆ "The way you see the world determines how you act within it"; and
- ◆ "We work, we act, we believe, not according to reality, but in accordance to the truth as we perceive it to be."

Over the next two days, the purpose is for each participant in this Large Jail Network meeting to undergo a paradigm shift.

Legal Issues: Discipline, Values, Attitudes, and Your Workforce

Lynn J. Lund

Sexual Harassment as an Example

EEOC guidelines on sexual harassment introduced the concept of the "first free bite," which is that a first act of harassment is not cause for action. If the employer has policies, procedures, and training in place, then the burden shifts to the complainant. The harassed employee has a duty to notify the employer of offensive conduct. The employer must then take "immediate" and "appropriate" action.

The courts and the Office of Civil Rights have also made clear that victims of sexual harassment are entitled to significant input into the process and outcome of the problem's resolution. You must pay deference to the complainant's wishes.

Conflict Resolution in Disciplinary Actions

The concept that the "victim" is entitled to input into the process and outcome of the problem can also be applied to the resolution of conflict between supervisors and employees. Such an approach has the potential to lower the adversarial aspects of conflict resolution.

The new paradigm is to "sell the discipline" to the employee being considered for disciplinary action by giving the employee significant input into the process. This tactic is in contrast to the typical disciplinary action, in which the employee does something wrong, but the supervisor does nothing to document the employee's failures until they have piled up. At some point, the employee then commits another infraction, and the supervisor wants to discipline him for all previous infractions. The courts have held, however, that if there is no documentation of such infractions, there is simply no case. Jurors, too, have determined that disciplinary actions in such instances are "fundamentally unfair."

The Loudermill Requirements

The Supreme Court's decision in the 1985 Loudermill case (105 Sup. Ct. 1487) defined requirements for the steps to follow in disciplinary actions against employees. Failure to follow all of the requirements is a "fatal flaw." (See "Legal Aspects of Staff Discipline," p. 11 in the Appendix for a more complete discussion of Loudermill requirements.)

Loudermill Procedures:

1. Provide written notice of charges three to five days in advance of the pre-decision hearing/interview.

2. Provide evidence to support charges to the employee during the interview.
3. Give employee a chance to respond orally or in writing.
4. The employee's response must be reasonably weighed in the decision-making process.

Recommendation: Postpone disciplinary decisions.

Do not make a decision regarding punishment of an employee immediately after the Loudermill hearing. Wait another day to ensure that you demonstrated adequate weighing of the employee's response. The number one issue to which jurors have reacted negatively is punishment that does not fit the crime, i.e., the fairness issue. You must be able to document the steps in your decision on punishment; otherwise there may be a substituted judgment by the court. (See appendix, "Legal Aspects of Staff Discipline," page 14 for an example of a form to be used in making decisions regarding punishment.)

For years, corrections agencies have been sitting ducks, with plaintiffs winning cases against them. Employees' cases are not going to go away, but 83% of all cases filed against you are utterly frivolous. It is also important to remember that there is a little-used law requiring attorneys to look into the validity of allegations. It is thus possible to sue plaintiffs' lawyers for frivolous suits against your agency. If you can show that a case was frivolous, you are entitled to receive attorney's fees. This creates a significant paradigm shift with plaintiffs' attorneys.

Reducing Workplace Conflicts

There are two types of persuasion that can reduce conflict in the workplace:

1. Moral-based persuasion uses arguments based on morality ("this isn't right," etc.). If moral persuasion fails, you get dragged into:
2. Power-based persuasion. In the process, you unfortunately move into a win-lose situation.

Recommendation: Deal with an employee who lies by using a velvet glove and a steel fist.

To avoid the transition from moral-based to power-based persuasion, try to operate with a velvet glove but a steel fist. On January 16, 1998, the Supreme Court handed you a steel fist in the case *LaChance v. Erickson*. The Court ruled in that case that government agencies can punish employees who lie while being investigated for employment-related misconduct. In addition, agencies are free to draw "adverse inferences" from an employee's silence or refusal to answer questions. That is, a person who fails to answer questions may be taken as guilty.

If an employee is lying, let him/her go on doing so. Hold onto a record of these lies and use them in the Loudermill hearing. This tactic puts you on a negotiating basis. You need only point out that you have notes and recordings of the dishonesty and describe how the Supreme Court has spoken on this issue. This approach creates a significant paradigm shift.

Recommendation: Set up a Loudermill process to promote an amiable agreement between the supervisor and employee.

Send out a letter five days before the Loudermill hearing stating: "These are the charges, this is the evidence. You have the right to respond." When the response comes in, investigate the case. If the employee's account does not match what he told the investigator, you can sit down with all the evidence.

Being able to show "adverse impact" becomes an important negotiating tool in dealing with an employee conflict. In addition, if you have evaluated the results of the whole Loudermill process before you make a decision, you can substantially limit your losses.

Recommendation: Learn to listen instead of talk.

In conducting the hearing, always use questions, never statements. The process may take four to six hours instead of half an hour, but it is worth it. The idea is to *sell the termination* rather than impose it. It is in your best interest to use this approach. A Loudermill hearing should consist of 80% listening to the employee, in part because the more the employee talks, the more he/she may trip themselves up.

Naisbitt makes the point that women will be leaders in the future because they are better listeners and better at process than men, who tend to be goal-oriented. A "hold harmless clause" in any termination agreement will prevent the employee from suing you later.

Note: The California Supreme Court has said that if you give a good recommendation to someone who is leaving because of sexual harassment, you are personally liable for future cases involving that person.

Recommendation: Do not allow a Loudermill hearing to be optional in cases involving suspending an employee without pay.

Always suspend the employee with pay until the Loudermill is resolved. If the employee does not want to do a Loudermill hearing, you should insist or hold the hearing without the employee. You will then have a case of insubordination.

Differences Between a Criminal Case and an Administrative Case

It is important to remember that the criminal and administrative worlds are entirely different and that they should operate absolutely independently.

Criminal case—For authorities to get involved, there must be probable cause (51%). To get a conviction, however, a criminal case must be proven "beyond a reasonable doubt" (90-95%) that all evidence that could be available is available. In a criminal case, the defendant has a right under the Fifth Amendment not to incriminate himself.

Administrative case—An administrative case requires only "preponderance of evidence" (51%) or, in some states, "substantial evidence," which is seen as roughly a third of "beyond a reasonable doubt." "Reasonable cause to believe" is enough to begin an investigation; that is, if you have reason to believe there has been an infraction and you can verbalize what that infraction was, you have "reasonable cause." There is no Fifth Amendment right in an administrative case, which means that you can require the person to tell you about an incident. Failure to tell constitutes insubordination.

Recommendation: Go ahead with your department's administrative review. Don't wait until after a criminal case is complete.

Some district attorneys insist that you hold off the administrative process until the criminal process is complete. However, a decision by the Wisconsin Supreme Court said that if you choose to hold the administrative process until the criminal case is complete, you are indicating a willingness to use the same standard as in the criminal case. (That is, you are willing to rely on "reasonable doubt" vs. "preponderance of the evidence," which is the lesser standard required in an administrative review.) Criminal and administrative processes must be totally separate.

Another reason not to wait until the criminal case is decided is that the issue of "timeliness" can be raised if you delay. In addition, if you wait, you need to decide whether or not to allow the employee to return to work, which can cause additional problems.

For example, in a case in which an employee is charged with domestic violence, you should suspend the employee with pay. Contact the county attorney and get a restraining order. Do an internal investigation. Hold a Loudermill hearing. Interview the wife. Finally, determine the administrative penalty, which, in the case of any type of spousal abuse, is likely to involve termination. The criminal case has no bearing on the administrative punishment, which should be determined absolutely independently.

Limits on Employees' Free Speech

The Supreme Court issued a landmark ruling in 1994 in the case *Waters v. Churchill*. The Court concluded that, while government employees have a right to make statements about public policy, they do not have the right to make statements that are disruptive. Justice Sandra Day O'Connor, writing for four justices, said that a government agency's responsibility to perform its job sometimes outweighs its employees' First Amendment rights.

Following the Churchill decision, it is important in disciplining an employee to show that a specific act caused a specific adverse effect. Thus, during the Loudermill hearing you should refer specifically to adverse effects of the employee's actions.

Three Stages of the Disciplinary Process

The disciplinary process requires the following three stages:

1. Substance, the reason for the disciplinary action.
2. Procedure. Procedural requirements include (a) a pre-decision hearing (an interview) and (b) a formal, post-disciplinary hearing.
3. Punishment, which must be fundamentally fair when viewed in terms of all the circumstances.

An employer's lack of success in disciplinary cases is never a result of the failure of substance; it is always a fault of procedure. Substance alone is never enough; it must be married to process.

The number one reason corrections agencies lose cases is a failure to document. The second most common reason for losing its cases is "past practices." That is, if you have done nothing about an employee's past infractions, there is nothing in legal terms to do about a current infraction. However, fair notice given to employees *can* override past practices.

Fitness for Duty Evaluations

Fitness for duty evaluations can be used effectively, but they must be done correctly. You have the right to *require* an employee to go for a "fitness for duty" evaluation. The required standard is "reasonable cause" (i.e., if you can articulate the reason, you have reasonable cause).

Most fitness for duty evaluations are mismanaged and thus have undesirable results. Employers believe that all they have to do is to send the employee to a fitness for duty evaluation, but there are important steps to follow:

1. You must provide a specific statement of the problem and circumstances giving rise to the problem. In sending someone to a psychologist, it is important to be sure that you give the psychologist an historic overview of the statement of facts.
2. Request a diagnosis of the problem
3. Request a prognosis with respect to treatment (how long, how often, what kind), determination of health and safety issues, and if undue hardship, or other qualified

immunity exists.

4. Request that the psychologist address light duty issues.
5. Require a recommendation regarding returning the employee to work or not.

Whenever you send an employee to be evaluated for fitness for duty you can be setting yourself up for an Americans with Disabilities Act case, which moves the case into a health and safety issue. When balancing the ADA considerations against risk avoidance, it may still be useful to do a fitness for duty evaluation to avoid the risk of an exposure to a lawsuit.

Recommendation: Eliminate the "light duty" category or make sure that it defines a specific length of time, for example, 30 days.

Some agencies have limited light duty assignments to 90 days to enable an employee to qualify for disability at the end of a term of light duty.

Recommendation: Give the employee the opportunity for significant input into a decision on light duty.

Allow a joint assessment of risk factors in the post.

Scenario: In an agency requiring employees to wear a regulation uniform, an employee wearing a union insignia pin was reprimanded. She subsequently put the pin on her earrings. The agency had documented the employee's problems with authority in the past. How should the agency handle the case? Should the employee be dismissed?

The following issues related to this scenario were identified by meeting participants:

- ◆ What did the policy state with respect to earrings? (e.g., dangling earrings allowed or only single post?)
- ◆ What was the history of the employee's offenses and how did the agency respond to similar offenses in the past?
- ◆ Could the dangling earrings be a safety problem? Did they violate the SOP on personal appearance?
- ◆ Had the agency ignored the employee's disruptive behavior in the past? Could her long-term confrontational behavior be used as an excuse to remove her?

Recommendation: If you move forward to terminate in an instance involving a past history of insubordination, you should first request a fitness for duty evaluation.

The actual result of the previous case was that the employee filed a labor suit with the Labor Commission. However, the employer prevailed, as the wearing of union insignia did not rise to an issue of public concern.

Key Issues for Large Jail Network Consideration: Improvements in the LJN Email System

Connie Clem, NIC Information Center

Connie Clem from the NIC Information Center demonstrated the NIC Web site and LJN Exchange, the listserv of the Large Jail Network. Following are the guidelines for using the LJN Exchange. These guidelines are also available on the World Wide Web at <http://www.nicic.org/pubs/htmldocs/listdoc-ljn.htm>.

The listsrv is open only to members of the Large Jail Network.

Listserv Member Guidelines

The NIC Jails Division and Information Center host a private listserv for the Large Jail Network, the LJN Exchange, available at the email address ljn@www.nicic.org.

The list is managed by the NIC Information Center on the Center's web server. The following guidelines are to inform new and prospective members about how to participate in the system.

Members can read and send listserv messages not only from within their email applications, but also from the Information Center's web site at <http://www.nicic.org/lists.htm>.

Send questions and comments about the system to Connie Clem at ccllem@nicic.org.

What is the Listserv's Purpose?

LJN Exchange provides a private, online forum among administrators of the nation's largest jails, and it facilitates communication both among these professionals and between them and the National Institute of Corrections.

Who Can Access the List?

LJN is a private listserv:

- Only staff of LJN member agencies can participate. A system administrator must approve new members.
- No one outside the approved list membership can view messages posted to the list.
- No one from outside the list can obtain a list of its members.

- No one from outside the list can send messages to the list. (However, if a member considers it appropriate, he or she may send a message to the list on behalf of an outside person.)

Because LJN is private, NIC will not moderate the listserv discussion; that is, members' messages will be posted immediately, without review by a listserv administrator. It is assumed that members will use the list responsibly to discuss matters related to jail management and operation.

What Will I Receive From the List?

You will receive all postings to the list, including messages from colleagues and others and announcements from NIC. New email messages you receive from the list will always have a subject line which begins, "[LJN Exchange]."

What Can I Send to the List?

Members can send any appropriate message to the list, including new queries or observations, relevant postings you have received from other listservs, and replies to posted messages.

To avoid overloading the server as well as members themselves, there is a size limit of 50 K on messages and their attachments.

Help reduce junk email! Address your messages carefully when responding to listserv email!

To send your response to all list members, use the "reply to" button in your email system. To respond only to the member who sent a message, do not use the "reply to" button. Instead, enter that member's email address in the "send to" line or add that member to your address file.

How Do I Join?

Persons can join the list either from the NIC Information Center's NetConnections area on the web site or by sending an email message to the server.

-- To join via email, address your message to ljn-request@www.nicic.org. Leave the subject line of the message blank, and include the word "subscribe" in the body of the message.

-- To join via the Web site, enter the system as per instructions (below) under "How Do I Use the Listserv?" From the members' main menu, find the section on joining the list, and follow the instructions.

The system will route your request to Richard Geather, LJN coordinator, for confirmation. Once you have been added, the system will ask you to send a confirmation message to ensure your email address is accurate.

How Do I Use the Listserv?

You can participate in the listserv from the Information Center web site or via email. Members will receive email from the system by default, but they can use the web site to search archived messages for topics of concern, follow threaded discussions, and change their user settings.

Participating in the system from the Web:

--Point your browser to <http://www.nicic.org/lists.htm>. Or, go to the web site home page at <http://www.nicic.org>. From the home page, select "NetConnections," then select "NIC Listservs," then select "Enter NIC Listservs." (You may want to bookmark this page to reduce clicks on future visits.)

Select "NIC Private Lists," and then select "Large Jail Network."

What you'll see on the entry screen—

-- List members will be prompted for your email address and password and then can click on the "enter" button. The default password is "ljntemp." (Members should change the default password to a personal password on your first visit. This is discussed below under "User Settings.")

-- New members can join the list by providing your name, email address, and a password. The system will ask you to send it an email confirmation message to ensure your email address has been entered accurately.

-- At the bottom of the entry screen, members can query the system for a forgotten password.

What you'll see on the main user menu--

-- From this menu, you can read messages, create a message, change your user settings, and leave the list.

-- Do not click on "leave (unsubscribe)" to exit the program! This will be interpreted as a request to be dropped from the listserv. To prevent accidental deletions, the system will ask you to confirm your request to be unsubscribed before actually deleting you. Use your "back" or "home" button to exit the listserv.

-- Viewers can read messages posted to the list and search for messages with particular words in the subject line or body. All messages sent to the list are archived,

except for any removed by a system administrator because of irrelevancy to the purpose of the listserv.

-- Viewers can respond to a message in two ways: 1) Clicking on "reply" will send your reply to the entire listserv membership. 2) Clicking on the name of the person who sent a message will send your reply to just that person.

-- User settings include your name, email address, password, and features that allow members to control how they receive list email. If your email address changes, you can update the system here.

User options for receiving email are briefly explained by the menu system:

The user "Status" setting allows members to select the way they receive messages from the listserv.

"Mail" is the default setting: users will receive individual email messages as they are sent.

The "Digest" option will compile email from the list into one daily message.

The "Index" option will send you just the subject lines from the day's email to the list.

"Nomail" is a way to turn off listserv email without actually leaving the list.

The user "Messages" setting refers to whether you will receive a copy of the messages you send to the list. The default has been set at "yes."

The user "Acknowledgment" setting refers to whether the system will send you a confirmation that your message was sent. The default has been set at "no."

Participating in the system via email--

To send a message to the listserv--Address email to ljn@www.nicic.org

To request assistance from the email server--Address email to ljn-request@www.nicic.org

To join the listserv via email--Address email to ljn-request@www.nicic.org. Leave the subject line of the message blank, and include the word "subscribe" in the body of the message.

To obtain a list of members' names and email addresses--Address email to [request-ljn@www.nicic.org](mailto:ljn-request@www.nicic.org). Leave the subject line blank, and include the word "review" in the body of the message.

To be reminded of your password and/or review other user settings--Address email to request-ljn@www.nicic.org. Leave the subject line blank, and include the word "query" in the body. The system will email your password and other settings to you.

To change your password--Address email to request-ljn@www.nicic.org. Leave the subject line blank, and include:
"set oldpw=ljntemp pw=*****" in the body, where ***** represents the new password you are selecting.

To change your email address--Address email to ljn-request@www.nicic.org. Leave the subject line of the message blank, and include the phrase "set ljn email=*****@***.***" in the body of the message (e.g., mrogers@server.com).

To leave the list--Address email to ljn-request@www.nicic.org. Leave the subject line of the message blank, and include the word "unsubscribe" in the body of the message.

Address your messages carefully when responding to listserv email!

To send your response to all list members, you can use the "reply to" button in your email system.

To respond only to the member who sent a message, do not use the "reply to" button. Instead, enter that member's email address in the "send to" line.

Troubleshooting, Problems, and Questions

Bouncing mail--

The system is set up to respond if members suddenly begin "bouncing" their mail (that is, their email address stops working unexpectedly--for example, if your address changes and you don't let the system know in advance).

The system will hold all your mail and will attempt to contact you by email on 3 consecutive days to verify the problem is not a short-term outage.

Once the problem is corrected, a system administrator will reactivate your email.

If your status hasn't been cleared up within 90 days, the system will purge your email and remove you from the list.

Other problems--

For general help using the listserv system, send a message to request-ljn@www.nicic.org with "help" in the body. The system will email you general system information.

If you experience difficulties with the system, let a system administrator know. Send an email to ccleem@nicic.org, and we will explore ways to work around the problem if possible.

Non-Adversarial Disciplinary Procedures

Lynn J. Lund, Attorney at Law

Lynn Lund presented the following innovative ideas from members of the Large Jail Network:

- ◆ Connecticut—The Department of Corrections had 300 cases set up for arbitration. The agency has specific guidelines for infractions and penalties. The administration worked with the union local that had the largest disciplinary caseload. After the meeting, the administration cut the penalties in half. Since this happened, a second union local has asked for the same process. The two groups sat down and resolved the issue. Now, when there is a case, they stipulate the penalty from the beginning. Although staff have the option to grieve it, most are taking the up-front agreement. This process resolved a two-year backlog in disciplinary cases, and the department had been paying for all arbitrations. Now, staff morale is up. Because this is a stipulated agreement, it is still used in progressive disciplinary cases.
- ◆ Shelby County, Tennessee—A few years ago, there was a lot of sexual activity in the department among staff. In response, the agency changed its whole approach, establishing a Sexual Conduct Compliance Team outside the chain of command. The Team has representation from management, community corrections, chaplain, human resources. The department publicized the existence of the team and did training for all staff, emphasizing that sexually charged behavior of any kind would not be tolerated. Since taking this step, the department has won every sexual harassment case in which it has been involved. Administrators also discovered that a lot of the sexual harassment in the department was the result of a lack of communication. The department therefore hired a mediator and put her in charge of conflicts between supervisors and staff. Most staff involved in such conflicts now go to the mediator, whose decisions they have signed agreements to abide by. Shelby County specifically "discourages" sex between equals and points out the dangers of such behavior.

Lund pointed out that Jesus' parable of new wine in old bottles offers a lesson in dealing with staff disciplinary problems. People with problems are like old wine bottles: until all the old has come out, nothing new can come in. This is the reason for the 80/20 listening/speaking split recommended in dealing with staff problems. Until they have been adequately heard, staff cannot listen to what is said to them. And remember: "always a question, never a statement."

The greatest mistake in mediation is believing that money is the most important prize. It is not.

Scenario: An issue in a department was random vs. non-random drug testing. The agency asserted the right and developed a policy to do random drug tests on officers in

sensitive positions, which was defined as those who carried firearms. A new administrator of the agency finds that the policy is not being followed. The union and officers say they will sue if the administration follows the drug testing policy. The employees have already gone to court and won an injunction. Question: What would you do?

Some possible responses:

- ◆ Draw a line in the sand, in effect, saying, "Take your best shot; sue me."
- ◆ Don't move to a decision. Work to get three to five "yes's" in agreement; in an attempt to dramatically alter the atmosphere. Work to get agreement on a process rather than leaping to a conclusion.
- ◆ Don't give away too much information about your position early in the discussion. Ask questions related to process rather than giving away all your cards. For example, say: "What do you think about our talking only about the process and the basis for testing?"

Actual Resolution: The administrator sat down with the union and together they agreed to develop policies. He got the union to agree to random drug testing across the board, not just for those in sensitive positions. He used the argument that union members did not want to work with someone on drugs, so it was in their best interest to have a uniform policy on random drug testing.

Recommendation: Drop the word "you" when negotiating.

"You" is inflammatory. Use "I" messages: "I'm sorry. I thought...it was my perception...am I wrong?...I apologize...I understand there are problems with..." Negotiation comes to an end with "you" accusations. Don't use the word.

Recommendation: Ignore the volatility in the other party's language.

Deflect anger; soften your response. Make the other party believe you care about them. Treat them with dignity, fairness, and justice.

A Possible Technique:

1. Ask small groups to identify the issues.
2. Then ask them to prioritize the issues.
3. Get a small group of representatives to agree to conclusions and then get agreement from the larger group.

Remember that when both sides have attorneys, it is in your interest to eliminate attorneys from the process.

Recommendation: If the other side calls off negotiations, deflect their decision and postpone negotiations.

Say "Can we call it a day?" "Let's meet in the morning."

Recommendation: Go the extra mile.

In the Sermon on the Mount Jesus makes this point. In effect, you can take control by giving control. Crisis is change trying to happen. Try to be fair, and remember the concept of checks and balances.

There are varieties of intelligences, which include intellectual, physical, social, emotional, and moral (spiritual) intelligence. One can be retarded in any of these categories.

Remember Toffler: As a leader, you must be innovative. The single most important concepts to hold onto in dealing with employees are dignity, justice, and fairness.

Conflict Resolution Skills

Lynn J. Lund

Following are some brief scenarios of actual cases involving facilities represented in the Large Jail Network:

1. An employee who was repeatedly passed over for promotion filed a sexual harassment suit, which other employees joined. They were awarded up to \$500,000 per complainant, and the court extended the statute of limitation to allow others to file claims. This case illustrates the need to be proactive in dealing with such matters.
2. Seven to 10 male personnel hazed a new female employee. On the night of the incident, the plaintiff was assigned to a watch tower. The offending members solicited a few of the inmates to shout at the plaintiff and expose their buttocks. The harassment increased and finally concluded with the inmates exposing their genitals, shouting obscenities, and throwing eggs and tomatoes provided by the officers at the plaintiff in the tower. The deputy initiated legal action. An out-of-court settlement was reached with the plaintiff, and an extensive investigation determined the culpability of the involved members. Discipline was imposed, including several terminations. The negative aspects of the case were negative media attention and public perception, as well as having to pay a settlement and losing several officers. However, as a result, policies were revised to help make the department more responsive in preventing future hazing incidents. The Department could have faced a significant loss.
3. A Seventh Day Adventist refused to work on Saturday. When disciplined, the employee sued. The department took the case to the Supreme Court and won.
4. An instructor of inmates failed a fitness for duty test after having been a good employee. The administration continued for a year in mediation and negotiated therapy. After one year, the employee passed the fitness for duty exam if he agreed to work outside of inmate contact. This was a very satisfactory conclusion to the case. The administration believes it conveyed an important message to all staff. This was an instance in which an agency took a moral stand not to terminate the employee for emotional/mental reasons. He was used as an example to other staff.
5. A sexual harassment case was filed against the undersheriff. It appeared that the individual filing the complaint was a willing participant in the affair; she ultimately achieved the rank of Commander. At this point, she filed the sexual harassment case. The case was settled out of court, with the aggrieved party receiving a settlement of \$50,000 and a retirement at the Commander's rate. The undersheriff also accelerated his retirement plans. This solution was reached to keep the department from being

publicly embarrassed.

6. A sergeant resigned and moved to another state. Some months later he requested reinstatement under county policy permitting reinstatement within one year of resignation. When the plaintiff was not reinstated, he sued, claiming discrimination based on race and union affiliation. In fact, no one was reinstated during the fiscal year in which the plaintiff applied. Months were allowed to pass before the plaintiff's request was dealt with. At the point, the one year window of opportunity had passed. The jury found for the plaintiff in the amount of \$700,000 as well as \$300,000 and \$200,000 punitive damages for two defendants. The judge subsequently dismissed the punitive damages against the defendants.
7. A case involving sexual harassment of a female civilian employee by a male sworn supervisor was unsuccessful; the department lost the settlement due to poor testimony in defending accusations.
8. A female deputy developed a relationship with a male inmate and provided him a handgun to enable him to escape during transport by two other deputies. During the escape attempt, one deputy was wounded by gunshot, the other during a subsequent accident involving the vehicle. The transport officers sued everyone, including the sheriff and county, for violation of their civil rights due to race problems among employees. The jury awarded \$4 million plus damages. Post-trial motions and appeals were denied.
9. A claim of negligence arose out of an injury sustained by an officer involved in an altercation with an inmate. The officer sustained a fractured jaw and argued that the inmate was dangerous and should have been segregated from other inmates. The officer's medical bills and time off work were paid as an On-the Job (OJI) injury. The original settlement offered by the plaintiff was for \$50,000; the Division countered with an offer of \$2500, and then received a counter offer of \$9,500. The county's position is that the officer initiated the confrontation and is at least partly to blame. In addition, the Division maintains that the officer was fully compensated through OJI, despite the fact that he assumed the risk of working in a penal facility. Such attacks are a risk of an officer's job, according to *Wallace v. Adkins*, 115.3d 427 (7th Cir. 1997). The case is unresolved, and the department will probably go to court.

Generation X Employees

When you are dealing with Generation Xers, they may not care about the kind of message delivered to staff in Case #4., above, in which the agency director was willing to invest a lot of time in order to keep an employee who was having emotional problems. Nevertheless, in that case, the director decided that the message was very important to deliver to the staff as a whole.

Partly because of the values of Generation X, Naisbitt and Toffler say that within three years the public sector will be managing a largely part-time workforce. Moreover, in five

years, fewer than 3% of Americans will have a retirement program, down from about 80% ten to fifteen years ago.

A question from one meeting participant addressed the issue of the growing conflicts in the workplace: What do Toffler and Naisbitt say about the cycles of litigation? Is there a chance that it will swing back the other way?

Lund pointed out that the number one employee in America is now Manpower, Inc. One reason Manpower has done so well is that the employees they provide are temporary; if you don't like an employee supplied by Manpower or one of the other temporary agencies, you don't have to keep that person.

About five years ago, approximately 300-500,000 people were involved in home-based businesses. Today, there are 10 million. By 2005, 50 million people will be self-employed at a home-based business. So, in looking at litigation, the public sector, especially law enforcement, will be the last bastion for lawsuits. But even in that field, there will be a decline in the number of cases.

The #1 megatrend is a leadership crisis that is the result of the rapidity of change. The number two megatrend is the move toward privatization of services. This is the growth industry in the U.S. For example, there will soon be three more private prisons in Utah. Right now, a private company is offering \$5 more an hour than the state of Utah for corrections officers. The prisons system in the state is down more than 100 personnel and can't get additional workers. As a result, the prison is nearly sinking and is looking to the state in a panic, indicating that they must bring in private companies.

A Key to Successful Mediation

Lund described his personal experiences and beliefs related to successful mediation. What he spoke of was based on what he has learned over the past few years of experiences in connection with a small private college in Utah that has performed miracles by using massage in curing people. Following is a summary of his comments:

- ◆ There are energy fields out there. If you tap into them, you can perform miracles.
- ◆ If you can get past the flat line of discouragement, you will succeed.
- ◆ In the early stages of mediation, you will use 90% of all your energy.
- ◆ Once you believe in them, the energy forces will work for you. You must simply energize these fields.
- ◆ Never take your eye off your goal.

When you start mediation, getting the first ten feet off the ground will require 90% of all your energy. It is important to remember that you need to be a cybernetic machine, that is, someone who is absolutely goal-oriented. Never take your eyes off the goal.

Agression Against Supervisors

It is difficult to get accurate statistics, but some sources say there has been a 300% increase per year in employees' aggressive acts against supervisors.

In dealing with aggression against supervisors, it is important to realize that, on the emotional side, people need to love and be loved, to feel accepted, to be in control of their lives. They need to feel that they have dignity as a human being.

As the Frustration Polarity Scale (Appendix, "Conflict Resolution I," p. 3) make clear, the ultimate withdrawal of a person is suicide, the ultimate aggression is homicide.

In the fields of law enforcement and corrections, most employees' problems are related to aggression. Very seldom is violence in the workplace a result of burnout. Usually there are indicators of problems that can help you spot imminent trouble. Often the signs point to a change from low intensity to high intensity aggression, whose progression may be described as follows:

1. Silence
2. Glaring eye contact: "the look"
3. Brevity or abruptness
4. Snubbing or ignoring people
5. Insults and put-downs
6. Blaming, discrediting, or discounting
7. An aggressive, controlling manner
8. Threats about the job
9. Yelling and shouting
10. Angry outbursts or loss of control
11. Physical threats

At early signs of an escalation of rage, it may help a department to bring in a team. Team members can defuse the situation by pointing out the early signs of trouble to the employee. Such an approach is useful, because you cannot just sit and watch an employee's emotions escalate. There is value in having a team to handle such incidents, but there must be anonymity surrounding the approach.

Mediation: Using *Getting Past No* Techniques

Meta-communication, that is, non-verbal communication, constitutes 92% of all communication. The book *Getting Past No* describes a highly effective approach for mediation. It is a much more useful tool than *Getting to Yes*, which is too scholarly, although it is also a good book.

Following is a list of the main steps in "getting past no." For a more extended outline, see "Conflict Resolution II" in the Appendix

The basis concept to remember in the "getting past no" approach is that you must be *soft on people*, but *hard on the problem* and that you must focus on *interests* and not on *positions*.

The Breakthrough Strategy:

1. Indirect action--Do the opposite of what you naturally feel like doing. Change the game—treat your opponent as a negotiating partner. Only they can break through their own resistance; your job is to help them.
2. Step One: Go to the Balcony (that is, instead of reacting, remove yourself if things get difficult). Don't make important decisions on the spot. This is how bad decisions get made.
4. Step Two: Step to their side. Acknowledge their side by listening to their point of view.
5. Step Three: Reframe. Accept what they say and reframe it as an attempt to deal with the problem. Don't reject, reframe.
6. Step Four. Build them a golden bridge. Help them save face. Make the outcome look like a victory for them. Step to their side. Listen actively. Don't hesitate to acknowledge their point of view. Defuse their emotions by showing sincere empathy. Express your views without provoking.
7. Step Five: Use power to educate. Show them that they cannot win by themselves but only with you. Ask questions: Why? Why not? What if? Asking for their advice is an extremely helpful tactic.

Future Meeting Issues

Richard Geaither

Lynn Lund announced that he would mail copies of documents related to confidentiality to all meeting participants. These will include a summary of the *Torres* case and the Office of Civil Rights statements on confidentiality.

Richard Geaither announced that evaluation results for the last few meetings of the Large Jail Network will be sent to LJN members via the listserv.

Art Wallenstein reminded the group that LJN meetings are not designed as training sessions for an agency's number two or three person, but as a meeting of a high level policy group. In addition, the group represents not a regional breakdown but a breakdown by size. It is the only place where senior-level administrators come together to discuss issues important specifically to the largest jails in the country.

Topics for the Next Meeting

Richard Geaither led a discussion among meeting participants to identify topics for the next meeting of the Large Jail Network. Topics suggested were the following:

1. Recruitment and retention of female officers
2. Employee evaluations
3. Achievement, motivation, and morale
4. Management Reporting Systems
5. ADA issues
6. Systems approach to crowding
7. Post trauma stress
8. Automated arrest booking systems

The topic selected for the next meeting is "Dealing with Post-Trauma Stress."

The group also agreed to devote a slot on 10-11:30 a.m. Tuesday at each meeting to a legal update; the next update may be on ADA issues.

APPENDIX A

Meeting Agenda

LARGE JAIL NETWORK MEETING

Longmont, Colorado

July 12-14, 1998

Raintree Plaza Conference Center

Agenda

SUNDAY, July 12, 1998 6:00 PM - 8:00 PM

Informal Dinner

Welcome to the
NATIONAL INSTITUTE OF CORRECTIONS

Introductions and Program Overview Richard Geather
Correctional Program Specialist, NIC Jails Division

Opening Address:

Presentation

"Taking A Pro-active Approach to the Prevention of Employee Lawsuits."

Lynn Lund, Attorney at Law
Salt Lake City, UT

APPENDIX B

Meeting Participants

Large Jail Network Meeting

July 12-14, 1998

Longmont, Colorado

Raintree Plaza Conference Center

FINAL PARTICIPANT LIST

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APPENDIX C

Materials from Lynn Lund

National Institute of Corrections

Large Jail Network

Longmont, Colorado

July 12-14, 1998

Conflict Resolution I

Presented By:

Lynn J. Lund & Associates

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*** Human Relations Concepts ***
Conflict Resolution within the Workplace

BEHAVIOR DETERMINERS

Paradigms: The way you see the world determines how you act within it.
Dr. Steven Covey.

**We work, we act, we believe, not according to reality,
but in accordance to the truth
as we perceive it to be.**

*** * ***

All behavior flows from and follows paradigms; to change behavior in the workplace personnel managers must concentrate on changing paradigms, behavior thereafter will follow. Concentrating on behavior only creates resistance. An increased focus on behavior only increases the resistance to the desired change.

Conflict Resolution Strategies Within the Workplace
The Scope Of The Problem

EMPLOYMENT

National Sheriffs Magazine March 1997

1993-1994	24% increase in civil rights claims
1997-1998	EEOC projects 86,000 claims in 1998, another 25% increase – a record for EEOC claims.
1993-1997	500 million in jury awards, not counting cases that settled out of court, approximately 90% of all cases filed.

*** * ***

U.S. News Today, April 2, 1998

Wrongful termination cases filed in Federal court have increased at 77% since 1993. Companies have reported a four-fold increase in employee lawsuits over the past five years, 80% per year increase. 130 million for insurance premiums for 1997 is projected to be over 1 Billion in the next five years, an increase of 770%.

Jury verdicts from 1995 to 1996 went up 38%, in cases settled out of court the average jury award in 1997 was \$532,000, up from \$149,000 a 350% increase in two years. The average cost for a sexual harassment case today is 3.5 million dollars.

Problem: Two Great Forces at Work

Futurists, Toffler, Naisbitt: The Rapidity of Change – The Great Unstoppable Force Within the Universe. Knowledge has Doubled at the Following Rate...

0 AD ⇨ 1750 ⇨ 1949 ⇨ 1960 ⇨ 1968 ⇨ 1972

Today, it is almost impossible to calculate the knowledge explosion; for example, a news report stated that in 1 month there were more than 63 million pages added to the world wide web. There is more information in 1 issue of the New York Times than was known during the entire 16th Century.

VS.

Aristotle: The Great Unmoveable Force Within the Universe. The most powerful force in the universe is the resistance of a human being to change. Change cannot occur without pain, the rapidity with which major change does occur, is directly related to the intensity of the pain inflicted.

Sir Isaac Newton's law of motion "For every action there is an opposite and equal reaction" is now scientifically proven to be as true for human actions and reactions as for the physical actions and reactions stated by Newton.

John Naisbett in the original "Megatrends" stated that a high-tech world, which we have today, requires a corresponding high touch (high caring), or discord, resistance, or mutiny will follow. Lynn Lund has added:

High Tech requires High Touch, and
High Touch requires High Time, and
High Time requires High Tolerance; and
High Tolerance is anti-intuitive

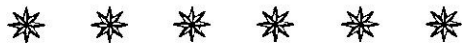
The Bottom Line Today: Hard Ball is out—Soft Ball is in; Crass is out—Sensitivity is in;
Low/no input is out—High employee input is in

Compare Waco and Ruby Ridge with the law enforcement management of the Freeman in Montana, where law enforcement sat for 90 days attempting to negotiate with the subjects.

Frustration Polarity Scale

10	0	10
Withdrawal		Aggression
Suicide (Ultimate)		(Ultimate) Homicide
Withdrawn		Emotional Abuse
Depression		Physical Abuse
Lost Reality		Sexual Abuse
Neurotic		Neurotic
Psychotic		Psychotic

Today a supervisor must be alert and proactive.



What Managers and Supervisors Do to Threaten Their Employees *"States of Rage" Terry L. Allison*

- | | | |
|------------|--|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Light Gray | | <ol style="list-style-type: none"> 1. Silence 2. Glaring eye contact: "the look" 3. Brevity or abruptness 4. Snubbing or ignoring people 5. Insults and put-downs 6. Blaming, discrediting, or discounting 7. An Aggressive, controlling manner 8. Threats about the job 9. Yelling and shouting |
| Dark Gray | | <ol style="list-style-type: none"> 10. Angry outbursts or loss of control 11. Physical threats |

	A	B	C	D	E
Lower Intensity					Higher Intensity
Subtle					Obvious
General					Personal
Rare					Frequent
Private					Exposed

* VIOLENCE WITHIN THE WORKPLACE *

From 1993-1995 300 % increase. Everyone seems to agree that it is far greater than that today, but the difficulty today is "what constitutes violence in the workplace?" Is it a verbal lashing with threats; is it a threat of physical harm; is it a threat of physical harm with movement towards completion, or is it a threat with property destruction; or is violence in the workplace only actual violence (assaults) in the workplace.

There seems to be consensus among all of the authors writing on the subject that violence within the workplace, per se, was always preceded by other less threatening behavior, silence, glaring eye contact, brevity and abruptness, snubbing and ignoring, insults and put-downs, discrediting and discounting, aggressive controlling behavior or yelling and shouting.

In 1993 25% of American workers reported they were harassed, threatened or attacked on the job in the past 12 months. That amount was projected to have increased 300% from 1993 to 1998 (projection by Northwestern National Life Insurance Company).

* * * * *

**"All problems of society can be measured in terms of
"challenge and response."**

Toynbee

When the response is adequate to resolve the challenge, the civilization will continue to grow; when it isn't, the civilization will begin to decline and will continue that decline until the response becomes adequate to resolve the problem; that failing, a "powershift" occurs.

* * *

*The Same Level of Thinking that Created the Problem
Cannot Resolve the Problem.*

Albert Einstein

* * *

Crisis is change trying to happen.

* "POWERSHIFT" *

Alvin Toffler

Forward: This is a book about power at the edge of the 21st Century. It deals with violence, wealth, and knowledge and the roles they will play in our lives. It is about the new paths to power opened up by a world in upheaval. For this is the dawn of the powershift era. We live at a moment when the entire structure of power that held the world together, is now disintegrating, and this is happening at every level of human society.

In the office, the supermarket, the bank, the executive suite, in our churches, hospitals, schools and homes, the old patterns of power are fracturing along strange new lines. This crack up of old style authority and power in business and daily life is accelerating at the very moment when global structures are disintegrating.

The forces now shaking power at every level of the human system will be more intense and pervasive in the years immediately ahead. Out of this massive restructuring ... will come one of the rarest events in human history: a revolution in the very nature of power. A powershift does not merely transfer power it transforms it.

INNOVATION IS IMPERATIVE SPEED IS IMPERATIVE

The acceleration pressure, shifts power by undermining fixed bureaucratic chains of command.

* * * * *

"MEGATRENDS"

John Naisbitt

"Today we are emerging from a 20th century version of the dark ages."

"The most exciting breakthroughs of the 21st Century will occur not because of technology, but because of an expanding concept of what it means to be human."

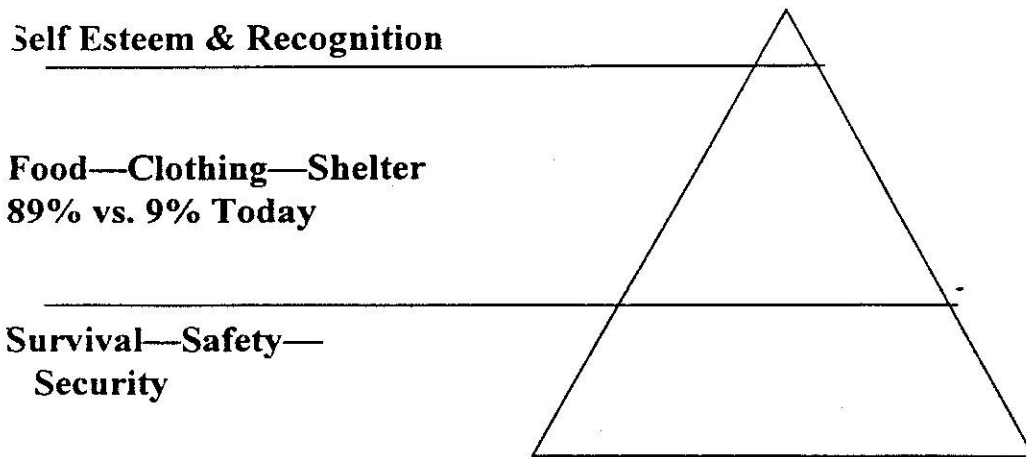
* * *

"POWERSHIFT"

Toffler

"The best defense is likely to be social pressure from one's peers.
Or the simple feeling that one is treated with dignity and justice."

Maslow: Basic Human Needs



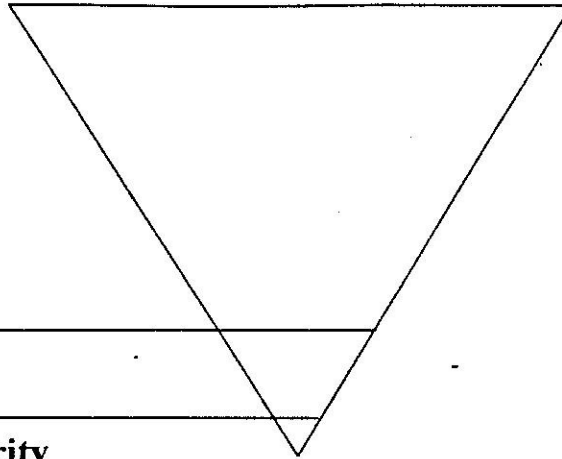
Maslow stated these are hierarchical needs; that is, that one may not move upward in the pyramid until the needs in that category have been satisfied. Obviously, safety, security and survival and basic human needs are the most basic of all.

1. **Management Style:** Autocratic and authoritarian –challenging authority unthought of; low or no employee input, no participatory management concepts, very low input accepted by management regarding management concepts.
2. **Acceptance of Authority:** In the late 70's virtually all states passed "employment at-will" statutes without a whimper from employees. Today, it is the most significant litigated issue in the courts, and likely will soon be abolished, and virtually has been abolished in actual practice.
3. **Behavior is "Goal" Oriented:** High productivity Era.
4. **Fairness Issues:** The focus is on "society", not on the individual. Ex. Drunk driver, 13 prior convictions kills 2 star athletes of a local high school.
5. **Time Focus:** Effectiveness and efficiency, goal accomplishment.
6. **Personal Accountability:** Behavior requires personal accountability, no exceptions. Ex. Wyoming teenager killed abusive father, IRS agent, with a shotgun to prevent another brutal beating of himself and his brothers and sisters. No consideration given.
7. **Loyalty Factor:** High loyalty factor for employees to employers.
8. **Severity of Punishment:** Judged to be effective and acceptable by employees as a means of behavior within the workplace.
9. **Individual Violence:** Within the workplace is unthought of.
10. **Primary Relationships:** Determined by pre-determined societal roles, Father: provider and protector, Mother: child raiser, homemaker, nourisher of physical and emotional needs for husband and for children.

**Self Esteem &
Recognition**

Basic Human Needs

Survival—Safety—Security



1. **Management Style**: A high employee demand for input and participatory management.
2. **Acceptance of Authority**: Low acceptance of authority. Many employees today were "latch-key" kids of single or working parents, and have a very low tolerance for a micro-management style. High demand for high input with management policies, flex-time, and the amount of control regarding their personal time and their personal lives. No hesitancy whatsoever to challenge authority (known as Gen-Xers).
3. **Behavior is "Process" Oriented**: Greatly reducing productivity (remember the High Tech requires High Touch theory).
4. **Fairness Issues**: Focus is on the "individual" not on society. Drunk Driver example, the focus today is did the driver receive all of his rights, was he given the Miranda warning, was there probable cause. Failure to grant "process", requires a dismissal and to begin over again with the exact required process.
5. **Time Focus**: Efficiency and effectiveness become irrelevant. The issue is: "all the points within a process must be met or becomes a fatal flaw." Ex: Loudermill—a pre-decision hearing.
6. **Personal Accountability**: "No personal accountability" for personal behavior. "I was an abused child"; "I have attention deficit disorder"; "I was abused by my parents", etc.
7. **Loyalty Factor**: Low loyalty factor—"Have skills will travel" is the motto of life.
8. **Severity of Punishment**: Any punishment, severe or not, without high input and participation is judged to be unfair and will be challenged in the courts.
9. **Individual Violence**: Within the workplace, some employee's perspective becomes: It is the only basis to bring about change.
10. **Primary Relationships**: Traditional relationships of parents and children; and husbands and wives cease to exist today. However, there is a high value placed on personal relationships. Today, personal relationships are valued much higher by today's employee than professional relationships. The main source of need fulfillment today, does not come through the workplace, but through personal relationships.

What Does All Of This Mean

Successful management concepts in the future will be very different than the successful management concepts of the past—possibly antithetical to the successful concepts of the past. Today, innovation is imperative—Toffler. Speed to innovate is imperative. Remember Aristotle's concepts—"The resistance of human being to change is the most powerful force in the universe, and Toynbee's "challenge and response", for if we are to survive we must immediately change our responses from the concepts of the past.

Note: On June 25 & 26, 1998 the Supreme Court handed down 3 landmark cases regarding sexual harassment and stated that an employer today has an affirmative duty to focus on prevention of litigation. The failure to comply will bring severe consequences.

Management Concepts of the Future

It is clear that management/disciplinary concepts of the future will require the following:

- High Input from Employees
- High Process—Low Efficiency
- High Touch (Caring) Requires High Involvement
- High Time—Requires High Tolerance
- High Tolerance for High Flextime for Employees
- Be Ready for High Challenge
- Expect Low, or No Loyalty

Note: The New Trend? Employee requests for peer review in disciplinary actions; All of the above concepts create a basic value/belief issues clash between management and staff.

MEGATRENDS

MEGATREND #1 LEADERSHIP - THE CHALLENGE OF TOMORROW

- Keeping up with and managing the rapidity of change;
- The leader of tomorrow will move from management control to managing accelerated change;
- The main function for the leader of tomorrow is to keep employees satisfied, happy and excited by developing new policies that reflect new values;
- Managing the flexible schedules of a part-time work force;
- Managing the loyalty factor or the lack thereof.

IMPARITIVES FOR THE FUTURE LEADER

1. Creative Innovation — new paradigms are required;
2. Speed in Implementing new Innovations;
3. Constant Learning (manager) & Constant Training (employees);
4. Establish a System — (to accommodate the new attitudes and values of new employees entering the work force for "the demand to access to information which hitherto was unavailable to them);
- Employees Treated with Dignity, Justice & Fairness—particularly in a disciplinary setting.

MEGATREND #2

PRIVATIZING GOVERNMENTAL FUNCTIONS AND THE EMERGENCE OF FREE ENTERPRISE SYSTEM

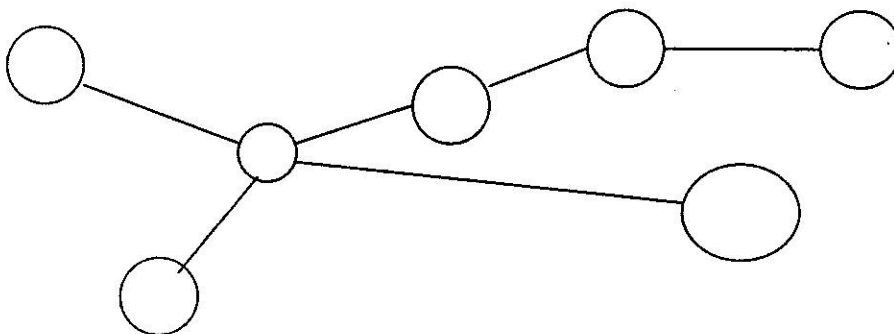
Privatizing of Governmental Functions will sky-rocket — Jails and Prisons, U.S. Post office, Welfare, Social Security, and Medicare.

Alvin Toffler¹ stated in the early 1980's that the hierarchical management systems in the not too distant future would crumble. Naisbitt independently came to the same conclusion. We are watching this happen before our very eyes today.

Ex: Four years ago 1-2 million people were involved in the home based business (MLM/NM). Today close to 10 million people are involved in home based businesses. By the year 2,005 it is anticipated that 50 million people will be involved in home based business.

Today, just short of 10,000 people a day are being terminated in down-sizing and the bulk of those people are not going into bureaucracies. Studies show that they are going into home based businesses MLM.

Toffler theorizes the management style of the future will be as follows:



Because of Toffler, Boeing has already implemented this management system, on the 777 and the new planes to follow.

¹ "The Third Wave" by Alvin Toffler. 1st Wave = Agriculture; 2nd Wave = Heavy Industry; 3rd Wave = Information & Service

MEGATREND #3

RELIGION

A recent mass revival of religion among young people (morality and spirituality as compared to organized religions) will have a significant impact on management concepts of the future.

Why is this movement of any significance to administrators of private and public business, particularly of jails and prisons today? Because this new trend will set the foundational base for future disciplinary actions. Persuasive arguments in the future will be moral and fairness based, and joint decision making processes, as compared to autocratic and authoritarian, and "no input" decision making processes.

CONCLUSION

Toffler, Naisbitt, Covey, Robbins, Tracy, and Druker independently came to the following conclusion at approximately the same time.

Today the workforce is moving to a place where a single person has the capability to paralyze an entire company – placing a virus in the computer system. An employee treated with dignity and justice, fairness, and peer pressure (new religious morality) will be the single most important thing an employer can do to reduce conflict within the workplace.

National Institute of Corrections

Large Jail Network

Longmont, Colorado

July 12-14, 1998

Legal Aspects of Staff Discipline

Presented By:

Lynn J. Lund & Associates

P.O. Box 17524, Salt Lake City, Utah 84117

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Policies & Practices

September 22, 1995 Vol. 43, No. 19

UPDATE

File behind Newsletter tab in Binder 1

'Generation X' Defies Stereotype, Is Well-Suited to Future Workplace

The latest generation gap between Baby Boomers and Generation X is leading to rampant mismanagement of young workers, according to Bruce Tulgan, the author of *Managing Generation X*, just published by Merritt Publishing. Surveys of Baby Boomer managers find that Generation Xers in the workforce are widely perceived to be lazy, disloyal, not sufficiently deferential to authority, short on attention, and arrogant. Simultaneously, Xers — those Americans born between 1963 and 1981 — express frustration at what they describe as managers who fail to take them seriously.

Since Douglas Coupland coined the term "Generation X" in his 1991 book by that name, Xers have been negatively portrayed in the popular media. Commonly described as slackers and cynical mopes or as sullen and contemptuous, Xers are called a generation with "a PR problem" by Neil Howe and William Strauss in their 1993 Vintage Books publication, *13th Generation*, named for Xers, who are the 13th generation to be born in the United States. More recent analysis, however, suggests that Generation X is actually uniquely suited to meet the challenges of the workplace of the future.

Work ethic. The myth of the slacker is now being widely challenged. Howe and Strauss first questioned this concept in *13th Generation*. Tulgan goes on to challenge it further, saying "the Xers that I interviewed work fifty, sixty, seventy, and eighty hour weeks. Xers are not afraid of hard work."

A January 1995 *Reader's Digest*

survey of 1,053 Americans suggests that there really is little difference between Xers' and Boomers' work ethic. In response to the statement, "Hard work is the key to getting ahead," 74 percent of Xers and 75 percent of Boomers agreed. In fact, the "Silent Generation," Americans ages 49-62, had the lowest rate of agreement at 66 percent, compared with the 78 percent response of the "Depression Generation" (ages 63 and up).

Loyalty. Defending against claims of disloyalty, Tulgan suggests that Xers are instead "cautious investors in a world which has taught us to expect little from institutional relationships." Their seeming restlessness or disloyalty indicates a unique ability to adapt to change, a powerful resource for corporations that hire them. Paying one's dues, once a prerequisite to promotion, means little to Xers, who value "self-building" jobs that contribute to an employee's knowledge and marketability in the face of little or no long-term job security.

Comfortable with technology.

What managers have perceived as short attention spans, Tulgan says, is actually a product of Xers' youth during the prime years of the information revolution. Xers' resulting rapid-fire learning and communication styles mean greater comfort with technology, computers, and the information superhighway — skills many Boomers have not yet acquired.

In addition, Xers' perceived arrogance, Tulgan claims, is instead a powerful form of self-reliance born out of the latch-key phenomenon of the 1970s and '80s. This self-reliance leads to creativity and the unique ability to "think outside the box," which is so valuable in today's workplace.

Managing Generation X. Managers who use the unique perspectives of Xers, Tulgan says, will benefit from the high-powered creative energy these employees offer when properly motivated. Tulgan's advice:

- Do not waste Xers' time. Emphasize the finished product, not

Compliments of



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e-mail: rainworld@aol.com

"desk time." When given the freedom to manage their own time, Xers will find innovative ways to get the job done better and more efficiently.

- **Do not micromanage Xers.** Encourage their natural entrepreneurial disposition. Build corporate cultures that value the indi-

vidual.

- **Offer frequent, measured, and specific feedback.** View employees' questions as an opportunity to teach. Xers value learning and "self-building" skills gained through their work.
- **Give free access to information.**

Xers are used to the freedom of information of mass media and higher education, and they need it to work and learn effectively.

- **Abandon the slacker myth.** To win this generation's loyalty, Xers' expectations need to be taken seriously. ■

Understanding Xers

Understanding the social forces that shape Generation X could be the key to proper management. Authors writing on the issue advise the following:

No illusions about job security. According to Lead... or Leave, an organization founded by Xers to end "generationally inequitable policies," the largest private employer in the United States today is Manpower Inc. — a temporary employment agency. In addition, two-thirds of all new jobs created in 1992 were temp jobs with no benefits or security.

In the face of this insecurity, employers should offer Xers opportunities to gain skills and knowledge for future jobs.

Cynicism for institutions and leadership. Tulgan contends, "[F]ew Xers can even recall a time when politics was not contextualized by corruption (Nixon), humiliation (Carter), surrealism (Reagan), ineffectiveness (Bush), or disappointment (Clinton)."

At the same time, Xers were the latch-key generation, depending on themselves more often than on parental supervision. As Xers hesitate to rely on external leadership, employers must give them the freedom to trust their own creative abilities.

Resentment of previous generations. As Chris Thomas wrote in an article entitled "13er Cynicism," published over the Internet in

GenX Newsletter, "The GI generation [those born between 1925 and 1945] believes they should get their social security checks, Medicare, pensions, and be able to retire to Florida. The boomers want to live in the suburbs and sing 'The World Owes Me a Living.' Neither care if they leave anything for us."

At the same time, Thomas says, Xers do not want to abide by these rules: "You're expected to muster passions against political authority you've never felt, to search for truth in places you've never found useful, to solve the world's problems through gestures you find absurd. 13ers [Xers] can only be concerned with the practical and the here and now." ■

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Suspensions

Supreme Court allows an immediate unpaid suspension of a police officer who had been arrested on felony drug charges.

A police officer at a Pennsylvania university was visiting a family friend when the State Police raided the home. He was arrested, and university officials promptly suspended him without pay, pending their own investigation. When the criminal charges were dismissed, he was demoted to groundskeeper. He then filed suit because his employer had failed to provide a presuspension hearing.

The District Court ruled for the employer, but the Third Circuit reversed. The Supreme Court overturned the appellate panel, in a unanimous ruling. The controversy involved interpretation of the Court's earlier holding in *Cleveland v. Loudermill*, 470 U.S. 532 (1985), in which the Court held that in termination cases, a public employee is entitled to a limited pretermination hearing, to be followed by a more comprehensive post-termination hearing. Justice Scalia wrote for his colleagues:

We think, however, that the government does not have to give an employee charged with a felony a paid leave at taxpayer expense. If his services to the government are no longer useful once the felony charge has been filed, the Constitution does not require the government to bear the added expense of hiring a replacement while still paying him. . . .

By parity of reasoning, the purpose of any pre-suspension hearing would be to assure that there are reasonable grounds to support the suspension without pay. But here that has already been assured by the arrest and the filing of charges... [L]ike an indictment, the imposition of felony charges itself is an objective fact... [because] an independent third party has determined that there is probable cause to believe the employee committed a serious crime.

Justice Scalia emphasized that public employees who are summarily suspended after an arrest or indictment are entitled to a prompt post-suspension hearing. Because this officer's hearing was delayed, the damage claim was remanded for disposition on that point. *Gilbert v. Homar*, 1997 U.S. LEXIS 3546, 117 S.Ct. ---.

* * * * *

--> Editor's Note: A post-suspension hearing need not be the final hearing required under civil service rules. It can be a *Loudermill*-style meeting, where the employee is given an opportunity to refute the charges against him or her, to be later followed by a formal hearing on the merits. In many cases, the accused employee will ask for a continuance (on unpaid leave) until the conclusion of the criminal case.

Court Limits Speech Of Government Employees

Salt Lake Tribune - January 7, 1994

Waters vs. Churchill, 114 S. Ct. 1878 (1994)

WASHINGTON - In a ruling that affects the free speech rights of 18 million government employees, the Supreme Court Tuesday tentatively allowed a city hospital in Illinois to fire a nurse who criticized a training program.

As long as a public employer reasonably believes that its actions do not violate First Amendment rights, it can fire someone even if it later turns out that free speech was involved, the court said.

Justice Ruth Bader, Ginsburg, described after her nomination last year as a strong defender of First Amendment rights, was one of only four justices who signed the court's opinion Tuesday. Three others concurred in the result, while Justices John Paul Stevens and Harry A. Blackmun dissented.

The case involved an appeal by the city-owned hospital in Macomb, Ill., of a decision by the U.S. appeals court in Chicago that Cheryl R. Churchill was entitled to ask a jury to reinstate her to a job helping to deliver babies in the hospital's obstetrics department

Churchill, during a dinner conversation with another nurse at the hospital,

criticized a policy allowing on-the-job training of nurses from other departments. She also allegedly criticized her supervisor, which she denied. Witnesses split as to whether she had criticized the supervisor, but she was fired on charges of insubordination anyway despite the objections of the doctor in charge of the department who had been battling with the hospital administration over staffing and training.

While government employees (unlike private employees) have had a right to make statements about public policy, including nurses' training, they do not have the right to make statements considered "disruptive." (Adverse Impact)

The hospital said that because it believed Churchill had criticized her supervisor - speech that is not protected by the First amendment - it had acted in good faith and its judgment should not be questioned. But the appeals court said that ignorance of the fact that her statements were constitutionally protected was not a defense and that the facts should be determined by a jury.

Justice Sandra Day O'Connor writing for four

justices; said that a government agency's responsibility to perform its job sometimes outweighs its employees' First Amendment rights.

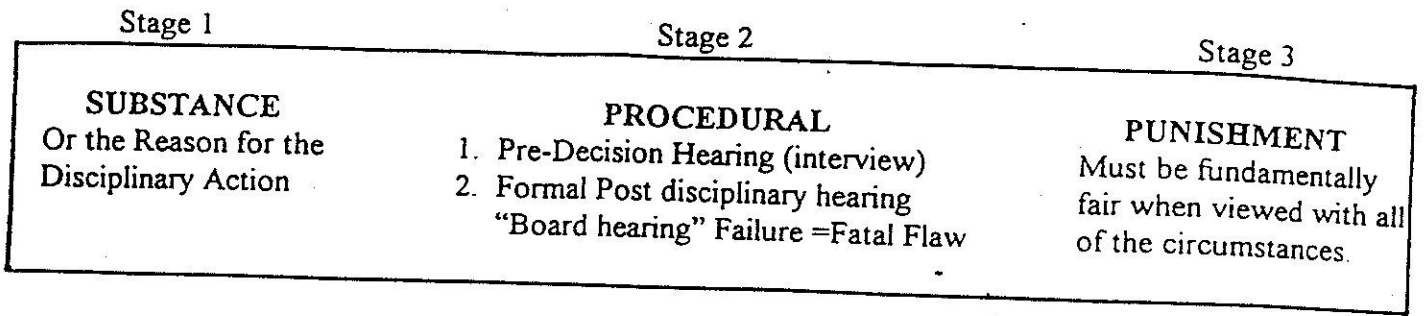
"When someone who is paid a salary so that she will contribute to an agency's effective operation, the government employer must have some power to restrain her," O'Connor wrote.

She ordered the case sent back to a lower court to decide whether the hospital's assumptions were "reasonable," though she made it clear that "reasonable" should be broadly defined.

Justice Antonin Scalia, joined by Clarence Thomas and Anthony M. Kennedy, sharply criticized the "reasonable" requirement as a new constitutional right, but agreed with other aspects of the opinion.

Stevens, joined by Blackmun in dissent, wrote. "The First Amendment demands that the government respect its employees' freedom to express their opinions on issues of public importance."

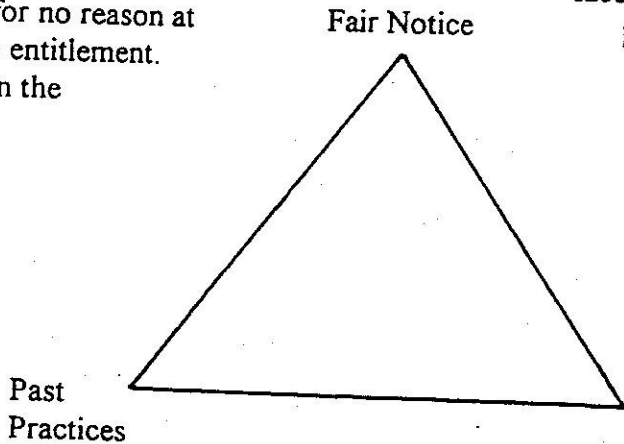
THE DISCIPLINARY PROCESS



FUNDAMENTAL FAIRNESS TRIANGLE

Property Interest: If no, Employees at will doctrine - Can be terminated at any time for any reason - or for no reason at all - No due process entitlement.
 Problem: Violence in the workplace today.

Liberty Interest: If yes, Employees may not face major disciplinary action without due process.* Today a good reputation is a legitimate Liberty Interest. Everyone has a legitimate Liberty Interest, at-will employees, part-time, even reserve.



*Called a name clearing hearing

SPECIFIC ACT(S) CREATE AN ADVERSE IMPACT

(Specific Results Required)
 Must be Quantifiable

- Department**
- Harmony
 - Good Order
 - Effectiveness
 - Efficiency
 - Morale

Public
 Acts "discredited the dept. in the eyes of the public"*

*or potentially could discredit dept.

First Amendment Related

Ninth Circuit applies a "public concern" test to grievances and litigation brought by public employees, similar to that required in Free Speech cases. Even if a subject of public concern, an employee is not entitled to disrupt the workplace and create dissension.

A public employee enjoys a First Amendment right to criticize his or her employer, unless the speech is disruptive and does not implicate a "matter of public concern." In this case, the plaintiff publicly criticized the city's "unlawful discriminatory practices." She was denied a pay raise for her actions; she responded by suing the city in Washington State Court.

Then she was fired by the city attorney for three acts of misconduct. She again sued, this time in federal court, alleging her termination was in retaliation for filing the lawsuit in state court. She sought reinstatement and back pay.

The District Court denied her demand for injunctive relief; a three-judge appellate panel has affirmed. While the First Amendment protects the right of access to the courts, and to seek a redress of grievances, a public employee is not privileged to disrupt the efficiency of an agency while pursuing his or her grievances against superiors. *Rendish v. City of Tacoma*, 97 Cal.Dly.Op.Srv. 6622, 1997 U.S.App. Lexis 22247 (9th Cir.).

Agency chief may order a subordinate, suspected of mental instability, to take a psychological exam. Order need not originate from the board or commission that oversees the agency.

A schoolteacher, under investigation for excessive absenteeism, sought an injunction against what she called "Soviet style psychiatric oppression for purposes of retaliating against a dissident [employee]." The court denied her request and said:

There is no requirement that before a school administrator seeks a medical examination of a teacher, the administration must hold a (federal) probable cause hearing or submit affidavits in support of the examination to a judicial officer for review.

To impose such an additional layer of procedure upon the school administrator who is presumed to be the impartial authority who decides whether there is sufficient evidence to justify evaluation, would in all likelihood prevent an examination from taking place within one school year of events giving rise to the administrator's concern.

Additionally, the employee cannot insist on choosing the medical examiner or require confidentiality. Nor was it necessary for the School Board to approve or ratify the order for her to take the examination. *Murray v. Pittsburgh Bd. of Educ.*, 759 F.Supp. 1178 (W.D.Pa. 1991).

Fitness for Duty Exams

Suggested Guidelines - Request

1. Introductory statement of the problem and circumstances giving rise to the problem – specificity is much better than generalities;
2. A diagnosis of the problem;
3. A prognosis re: treatment,
 - a. How long?
 - b. How often?
 - c. What kind?
 - d. Want to determine if health and safety, undue hardship or otherwise qualified exist.
4. Light duty issues (highly variable from department to department) virtually.
5. Require examiner to make recommendations regarding returning or not returning to work.

Disciplinary Interrogations

Riverside deputy, accused of beating illegal immigrants, sues the Sheriff Dept., because he was required to complete an "incident" report without the assistance of counsel.

West coast police unions are burning since the Ninth Circuit withdrew and modified an opinion which allowed officers the right to consult with an attorney before completing routine reports in an incident that could result in disciplinary action. The case was *Ward v. City of Portland*, 857 F.2d 1373 (9th Cir. 1988), discussed in our Jan. 1989 issue, pp. 6-7.

Labor's position is that there is no difference between an internal affairs interrogation and a required incident or use of force report. Both ask direct questions and require officers to describe events and circumstances. Both contain employee responses that may be used as evidence of the respondent's misconduct in a disciplinary hearing.

Under the *Weingarten* decision (if the employee is a member of a recognized bargaining unit) or pursuant to department policy in many agencies, an employee is entitled to consult with and be advised by a representative of his choosing at a formal IAD interview. Why would a different result obtain if the questions are written and are part of a specialized reporting process? -- or so the unions argue.

Two California deputy sheriffs were videotaped (by a TV helicopter crew) while forcibly subduing illegal immigrants. See "Cops vs. Aliens" 120 (15) *U.S. News & W.R.* 10 (4/15/96). One of the baton-wielding officers has brought a civil rights complaint in federal court, alleging constitutional deprivations. He said a lieutenant "coerced and pressured" him to complete an incident report without benefit of counsel.

The 11-page complaint was filed by attorney Michael Stone, who represented Officer Laurence Powell in the two criminal prosecutions following the Rodney King beating. Additionally, two of the male immigrants have filed \$10 million in claims against the county, and a woman immigrant is expected to bring a separate action. *Watson v. County of Riverside*, No. ED CV96-148-RT, 109 (77) L.A.D.J. 2 (C.D. Cal. 1996).

* * * * *

--> Note: Although California public safety employees have a watered-down right to bargain, their courts follow the *Weingarten* decision. In California, a public employee enjoys the right to have a union representative attend any meeting between a union employee and his superiors, where disciplinary action can arise. *Robinson v. State Personnel Bd.*, 97 Cal.App.3d 994, 159 Cal.Rptr. 222 (1979); *Civil Serv. Assn. v. San Francisco*, 22 Cal.3d 552, 586 P.2d 162 (1978) -- relying on *Weingarten v. N.L.R.B.*, 420 U.S. 251, 95 S.Ct. 959 (1975).

Loudermill

- 1- Written Notice of Charges
- 2- Evidence to Support Charges
- 3- Chance to Respond Orally or in Writing
- 4- Response Reasonably Weighed

LOUDERMILL - 105 Sup. Ct. 1487 (1985)

Pre-decision hearing requirement with
updated refinements since 1985.

Loudermill was a security guard for the Cleveland Board of Education. An issue arose regarding the truthfulness in which Loudermill had answered a question on his employment regarding his past criminal record. Loudermill was fired but was promised a formal due process hearing; however no such hearing took place. The U.S. Supreme Court issued new requirements for future disciplinary actions - a pre-decision hearing (interview) is now required before a final decision regarding disciplinary can be taken.

Note: States vary widely in Loudermill application. The following information should cover virtually all states but each attorney or investigator should check local state decisions the failure to follow all requirements is a "FATAL FLAW."

I. WRITTEN NOTICE OF CHARGES

- A. Although Loudermill itself did not require advanced or written notice of a Loudermill Hearing, most courts today have such requirements.
 - 1. Requirements:
 - a. employee be given written notice of charges and date of the hearing/interview three to five days in advance of the pre-decision hearing/interview.
 - b. charges may not be a series of policies and procedure numbers only. The specific offenses must be listed as well.
 - c. a new Loudermill hearing/interview must be given when any additional charges or evidence arise after the first hearing/interview was given.
 - 2. Many administrators or internal affairs investigators have a tendency to "overcharge". Recommendation: "do not overcharge" (take top three to five charges, use others as supporting evidence).
- B. Failure to follow the above procedures, is a "fatal flaw" and the public agency will be required to pay all back wages and benefits to date and then restart the process. However, if employee was on "leave with pay", there is no liability and mistakes can be corrected and process restarted.

II. ALL EVIDENCE IN POSSESSION OF THE PUBLIC AGENCY WHICH SUPPORTS THE ALLEGATIONS AND CHARGES MUST BE GIVEN TO THE EMPLOYEE DURING THIS INTERVIEW.

- A. Many administrators or internal affairs investigators tend to hold back evidence in the pre-decision hearing/interview process. The law is clearly established: any evidence not given to an employee at the pre-decision hearing/interview cannot be used at the later formal post-decision hearing.

¹The U. S. Supreme Court use the phrase "pre-termination hearing". A "pre-decision interview" more accurately reflects the process.

- B. However, in most states, specific names of witnesses is not required, but employee is entitled to know what evidence the public agency will be using against him/her. Note: Many administrators, however, have found that giving this information to the employee is good psychology if the matter goes to a formal post-decision hearing (avoids the appearance of unfairness).

III. THE EMPLOYEE MUST BE GIVEN AN OPPORTUNITY TO RESPOND TO THE CHARGES AND THE EVIDENCE AND TELL HIS/HER SIDE OF THE CIRCUMSTANCES.

A. Procedural Recommendations.

1. Non-adversarial, courteous and friendly.
2. First Listen. 80/20 proportions.
3. Always a question, not a statement.
4. Best Alternative To Negotiated Agreement (BATNA)
5. Look behind statement of position to true interest.

B. Recommendations.

1. If employee faces multiple charges, it is strongly recommended that administrators discuss the first charge and then give the evidence supporting that charge. Then give the accused an opportunity to respond to that specific allegation before moving to the next allegation.
2. Giving all the charges and the evidence at one time, and then expecting the subject to respond, many courts have stated, is confusing and fundamentally unfair.

C. The document should provide adequate space for the subject to write his/her response.

D. Additionally, the hearing/interview should be tape recorded. The recorder should not be hidden and subject should be notified that conversations are being recorded. Subject's permission is not required.

E. Counsel or representative has no right to attend this meeting, unless a union contract so provides or policies and procedures allow for representation. However, many agencies are finding that it is beneficial to do so.

F. Even if representation is allowed, counsel has no constitutional right to participate in the process. Again however, many agencies are finding it beneficial to make this process an informal, non-adversarial process to finding permanent resolution to the problem.

IV. THE RESPONSE OF SUBJECT MUST BE REASONABLY WEIGHED IN THE DECISION MAKING PROCESS.

- A. No pre-typed decisions.
- B. Two to five seconds is an inadequate weighing.
- C. Three to five minutes, one court said was adequate, but strongly recommend an overnight "decision making process".
- D. Reference issue; want "blue sky".

Disciplinary Hearings

Dept. not required to give a probationary officer a pre or post-termination hearing where there was no disclosure or publicity concerning the allegations against him.

An untenured employee will be entitled to a "name-clearing" hearing if the employer repeats, to prospective employers, the allegations that led to the worker's termination. That will also be true when the allegations have received public attention, such as media coverage.

Here, the plaintiff was terminated after the Chicago Police Dept. received a complaint of sexual harassment against him. There was no publicity concerning the allegations, and no proof that officials of the Chicago Police Dept. informed prospective employers. His civil rights claims must fail.

The court said "as long as the employer does not publicize the information, it may terminate the employee for no reason at all or for stigmatizing and false reasons." Moreover, "the fact that the stigmatizing information remains in [a former employee's] personnel file and will likely be sent to a prospective employer, *i.e.*, a time bomb waiting to explode, is of no consequence." *Oliveri v. Rodriguez*, 944 F.Supp. 686 (N.D.Ill. 1996).

PUNISHMENT CONSIDERATIONS

1. Loudermill hearing has been Conducted (Brief Synopsis of finding of facts): _____

2. Adverse Impact (On Dept., public, or both):

3. Past Practices (Individual vs. Collective) of Dept. or Individual Supervisor:

4. Weighing Loudermill Response(s): _____

5. Aggravating Circumstances: _____

6. Mitigating Circumstances: _____

7. Seriousness of Offense: _____

8. Rank: _____

9. Knowledge of Rules: _____

10. Length of Service: _____

11. Employees Past Record: _____

12. Attitude: _____

After full consideration of these issues, my decision for disciplinary action is: _____

Disciplinary Punishment - In General

Appeals court reaffirms "Douglas Factors" in assessing disciplinary punishment of federal employees. Termination for minor offense upheld because the employee changed her story and presented incredible testimony.

A federal administrative judge imposed the ultimate sanction on a postal worker with a 13-year unblemished record. The offense was minor: she took some coupons from undeliverable bulk-rate mail, instead of disposing of it in the dumpster, as required. Termination was imposed because (1) she first admitted the offense, then denied it and (2) she offered unbelievable testimony in her defense. She appealed because other postal employees have received minor suspensions for similar conduct.

A three-judge appellate panel reiterated and applied the *Twelve Douglas Factors*, postulated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (at 305-6), 1981 MSPB LEXIS 886 (at *38-9). Those are:

1. *The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;*
2. *The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;*
3. *The employee's past disciplinary record;*
4. *The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;*
5. *The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;*
6. *Consistency of the penalty with those imposed on other employees for the same or similar offenses;*
7. *The consistency of the penalty with any applicable agency table of penalties;*
8. *The notoriety of the offense or its impact upon the reputation of the agency;*
9. *The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;*

10. *Potential for the employee's rehabilitation;*
11. *Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and*
12. *The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.*

Only those *Douglas Factors* relevant to each case need be considered. While the coupons were of almost no value and would have been discarded, the appellant showed no remorse for violating the rule. After first admitting the allegations, she later denied any wrongdoing and at the hearing, called her son as a "witness". He provided "incredible or obviously fabricated" testimony in her behalf. *Rizor v. U.S. Postal Service*, 1996 U.S.App. LEXIS 9684 (Fed.Cir.).

National Institute of Corrections

Large Jail Network

Longmont, Colorado

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Conflict Resolution II

Presented By:

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IDEAS ON "GETTING PAST NO"

I. GETTING STARTED

A. BREAKING THROUGH BARRIERS TO COOPERATION.

B. JOINT PROBLEM-SOLVING.

1. Soft on the people, hard on the problem.
2. Focus on interests and not positions.

C. FIVE BARRIERS TO COOPERATION

1. Your reaction.
 - a. Conquer your own behavior first.
2. Their Emotion.
3. Their Position.
 - a. Find an alternative to them "digging in their heels."
4. Their dissatisfaction.
 - a. Show them the benefits for their side.
 - b. Help them create the solution to their dissatisfaction.
5. Their Power.

D. THE BREAKTHROUGH STRATEGY.

- *Indirect action*- you must do the opposite of you naturally feel like doing.
 - *Change the game*- treat your opponent as a negotiating partner.
 - Only they can break through their own resistance; your job is to help them.
1. Step One. Go to the Balcony.
 2. Step Two. Step to Their Side.
 - a. Acknowledge their side by listening to their points of view.
 3. Step Three. Reframe.
 - a. Accept what ever they say and reframe it as an attempt to deal with the problem.
 4. Step Four. Build Them a Golden Bridge.
 - a. You need to help them save face.
 - b. Make the outcome look like a victory for them.
 5. Step Five. Use Power to Educate.
 - a. Show them that they cannot win by themselves but only with you.

PROLOGUE: PREPARE, PREPARE, PREPARE

A. MAPPING OUT THE WAY TO AGREEMENT.

1. Interests.
 - a. Your position is the concrete things you say you want.
 - b. Your interests are the intangible motivations that lead you to take

- that position.
- c. Figure out your interests. Why do I want this? What problem am I trying to solve? Rank your interests.
 - d. Figure out their interests. What are their perceptions of the facts?
2. Options.
 - a. Invent first, evaluate later.
 3. Standards.
 - a. IE market value, the law, previous dealings.
 4. Alternatives.
 - a. Knowing what your alternatives are can determine your success in satisfying your interests.
 - b. Best Alternative to a Negotiated Agreement (BATNA).
 - c. Your BATNA is your walkaway alternative.
 - d. *Identify your BATNA.*
 1. First, what can you do all by yourself to pursue your interests?
 2. Second, what can you do to the other side to make them respect your interests?
 3. Third, how can you bring a third party into the situation to further your interests?
 - e. *Boost your BATNA.*
 - f. Decide if you should negotiate.
 1. Is your BATNA better than any agreement you could reach with the other person.
 - g. Identify their BATNA.
 5. Proposals.
 - a. What do you aspire to?
 1. What you don't ask for, the other side is unlikely to give you.
 - b. What would you be content with?
 - c. What could you live with?
 6. Rehearse.
- B. PREPARING TO NAVIGATE**
- II. USING THE BREAKTHROUGH STRATEGY**
1. **Don't React: GO TO THE BALCONY**
 - A. Three Natural Reactions.
 1. Striking Back.
 2. Giving In.
 3. Breaking Off.
 - B. THE DANGERS OF REACTING
 - C. GO TO THE BALCONY
 - D. NAME THE GAME
 1. Three Kinds of Tactics.

- a. Stone Walls.
 - b. Attacks.
 - c. Tricks.
 - 2. Recognize the Tactic.
 - 3. Know your Hot Buttons.
- E. BUY TIME TO THINK
 - 1. Pause and say nothing.
 - 2. Rewind the Tape.
 - 3. Take a time-out.
 - 4. Don't Make Important Decisions on the Spot.
- F. DON'T GET MAD, DON'T GET EVEN, GET WHAT YOU WANT

2. **Don't Argue: STEP TO THEIR SIDE**

-To disarm the other side you need to do the opposite of what they expect.

- A. LISTEN ACTIVELY
 - 1. Give the other side a hearing.
 - 2. Paraphrase and ask for corrections.
 - a. They need to know they have been heard. Reflect back what they've said.
- B. ACKNOWLEDGE THEIR POINT
 - Take the words out of their mouth "If I were in your shoes, this is the way I'd see it."
 - 1. Acknowledge their feelings.
 - a. Defuse their emotions by showing sincere empathy.
 - 2. Offer an apology.
 - 3. Project confidence.
- C. AGREE WHEREVER YOU CAN
 - It is hard for a person to attack someone who agrees with them.
 - 1. Agree without conceding.
 - a. Look for ways to agree even if only in a humorous way.
 - 2. Accumulate yeses.
 - a. The "yes" transforms antagonistic argument in to the beginning of a reasoned dialogue.
 - 3. Tune in to their wavelength.
- D. ACKNOWLEDGE THE PERSON
 - You can capitalize on the other side's negative perception of you by acting in a way that shatters their stereotypes.
 - 1. Acknowledge their authority and competence.
 - 2. Build a working relationship.
- E. EXPRESS YOUR VIEWS-WITHOUT PROVOKING
 - 1. Don't say "but," say yes . . . and"
 - 2. Make "I" statements, not "you" statements.
 - a. I-statements focus on your needs, concerns and feelings, not the other person's shortcomings.
 - 3. Stand up for yourself.

- 4. Acknowledge your differences with optimism.
- F. CREATE A FAVORABLE CLIMATE FOR NEGOTIATION

3. **Don't Reject: REFRAME**

A. TO CHANGE THE GAME CHANGE THE FRAME

B. ASK PROBLEM-SOLVING QUESTIONS

- 1. Ask "Why?"
- 2. Ask "Why not?"
- 3. Ask "What if?"
- 4. Ask for their advice.
 - a. What would you suggest I do?
 - b. What would you do if you were in my shoes?
- 5. Ask "What makes that fair?"
 - a. You must have good reasons for thinking that's a fair solution. I'd like to hear them.
 - b. Discussing different standards will shift the focus from positions to fair outcomes.
- 6. Make your questions open-ended.
 - a. Ask a question so that the other side cannot give a "pat" answer.
- 7. Tap the power of silence.

C. REFRAME TACTICS

- 1. Go around stone walls.
 - a. Ignore the stone wall.
 - b. Reinterpret the stone wall as an aspiration.
 - c. Take the stone wall seriously, but test it.
- 2. Deflect attacks.
 - a. Ignore the attack.
 - b. Reframe a personal attack as friendly.
 - c. Reframe from past wrongs to future remedies
 - d. Reframe from "you" and "me" to "we."
 - 1. We creates a side by side stance and focuses on common interests and shared goals.
- 3. Expose tricks.
 - a. Ask for clarifying questions.
 - b. Make a reasonable request.
 - c. Turn the trick to your advantage.

D. NEGOTIATE ABOUT THE RULES OF THE GAME

- 1. Bring it up.
- 2. Negotiate about the negotiation.

E. THE TURNING POINT

4. **Don't Push: BUILD THEM A GOLDEN BRIDGE**

They ask, "What's in it for me?"

A. OBSTACLES TO AGREEMENT

1. Not their idea.
 - a. Rejection because "it wasn't invented here."
 2. Unmet interests.
 3. Fear of losing face.
 4. Too much too fast.
 - a. Don't Push.
 - b. Pushing makes it harder for the other side to go along without appearing to be giving in to your pressure.
- B. BUILD A GOLDEN BRIDGE
-Mediate your own agreement.
- C. INVOLVE THE OTHER SIDE
-A common negotiating mistake is to announce that you have found the solution to the problem.
-The process is just as important as the product.
1. Ask for and build on their ideas.
 - a. "Building on your idea, what if we . . ."
 - b. "As a follow up to our discussion this morning, it occurred to me that . . ."
 2. Ask for constructive criticism.
 - a. "Which interests of yours does this approach fail to satisfy?"
 - b. "In what respect is it not fair?"
 - c. "How would you improve it?"
 3. Offer them a choice.
 - a. Once they select an alternative, it becomes their idea.
 - b. Chinese proverb: "Tell me, I may listen. Teach me, I may remember. Involve me, I will do it."
- D. SATISFY UNMET INTERESTS
-Owner of business and Campbell Soup.
1. Don't dismiss them as irrational.
 - a. Ask question: Would I agree to this if I was them? Why not?
 2. Don't overlook basic human needs.
 - a. People want to identify with some group.
 - b. People want to have some control over their own fate.
 3. Don't assume a fixed pie.
 - a. Look for low-cost, high-benefit trades.
 - b. Use an if-then formula.
- E. HELP THEM SAVE FACE
1. Help them back away without backing down.
 - a. Show how circumstances have changed.
 - b. Ask for a third-party recommendation
 - c. Point to a standard of fairness.
 2. Help write their victory speech.
 - a. Anticipate what your counterpart's critics are likely to say and present persuasive counterarguments.
 - b. Let the other side share in the credit or give all the credit to them.

F. GO SLOW TO GO FAST

1. Guide them step by step.
 - a. Break the agreement up into steps.
 - b. By moving from easier to more difficult issues, you can get the other side in the habit of saying yes and show them that the agreement is possible.
2. Don't ask for a final commitment until the end.
3. Don't rush to the finish.

G. ACROSS THE BRIDGE

1. Involve the other side in crafting the agreement.
2. Look beyond obvious interests to intangible needs.
3. Help them save face, by presenting the agreement to constituents as a victory.
4. Guide them step by step across the bridge.

5. Don't Escalate: USE POWER TO EDUCATE

-The harder you make it for them to say no, the harder you make it for them to say yes.

A. USE POWER TO EDUCATE

1. Use power to bring them to their senses, not to their knees.
2. Use your power to educate the other side that the only way for them to win is for both of you to win together.

B. LET THEM KNOW THE CONSEQUENCES

1. Ask reality-testing questions
 - a. "What do you think will happen if we don't agree?"
 1. What will the costs be if we can't reach agreement?
 2. Are you aware how serious the consequences will be for both of us if we don't settle this issue?
 - b. "What do you think I will do?"
 1. If we can't reach agreement, what do you expect me to do to satisfy my interests?
 - c. "What will you do?"
 1. Use questions that you are not are vulnerable to threats as they may think.

2. Warn, don't threaten.

- a. A direct threat will tend to unify their organization against you.

3. Demonstrate your BATNA.

- a. Power, like beauty, exists in the eyes of the beholder.

C. USE YOUR BATNA, DEFUSE THEIR REACTION

1. Deploy your BATNA without provoking.
 - a. Use the minimum power necessary.
 - b. Use legitimate means.
 1. Legitimacy depersonalizes the use of power.
2. Neutralize their attacks.
3. Tap the third force.
 - a. Build a coalition.

1. The other side might not listen to you but their constituents might.
 - b. Use third parties to stop attacks.
 - c. Use third parties to promote negotiation.
- D. KEEP SHARPENING THEIR CHOICE
 1. Let them know they have a way out.
 2. Let them choose.
 3. Even when you can win, negotiate.
- E. FORGE A LASTING AGREEMENT
 1. Keep implementation in mind.
 - a. Design the deal to minimize your risks.
 1. Structure the deal so you don't have to carry out your side of the agreement until they fulfill theirs.
 - b. Build in a dispute resolution procedure.
 2. Reaffirm the relationship.
 - a. Be generous at the end.
 - b. Don't fight over the last crumb.
- F. AIM FOR MUTUAL SATISFACTION, NOT VICTORY