

**2014 PERB CONFERENCE:  
CELEBRATING 40 YEARS**

**YOU BE THE JUDGE**

**Tuesday, September 23, 2014**

**9:00 a.m. – 10:30 a.m.**

**Moderator: Susan Bolte**

**Panelists: Rachel Goedken, Ed Hartfield, Andrew Roberts**

## **A Case of “Conviction”**

At the age of 18, Gordy “Guns” Grievant was accused of committing several crimes. He spent time in county jail awaiting trial and was represented by a public defender. At some point, he learned that if he pleaded guilty he could be released in less than two years. Wanting to be free and spend time with his young children, he decided to plead guilty to assault, burglary and attempted murder.

Several years after his release, Gordy “Guns” Grievant completed application forms for a job with the Company. Two forms asked “Have you ever been convicted of a crime?” Gordy “Guns” marked the “no” box on each form next to this question. The Company subsequently hired him. Gordy “Guns” is now 43 years old and has worked for the Company for nineteen years, since the age of 24.

Gordy’s job requires him to go into customers’ homes and his job performance has been satisfactory throughout his employment. Prior to his termination, Gordy “Guns” had one prior instance of discipline: the unauthorized use of a Company vehicle eleven years ago. No other instances of discipline or problematic job performance are in the record.

The Company initiated an investigation of Gordy “Guns” when the Company received a phone call where the caller asked if the Company has a “policy of employing people that are convicted of murder.” When asked for specifics, the caller identified Gordy. The Company reviewed Gordy’s job application forms and noted that he had marked the “no” box next to the question, “Have you ever been convicted of a crime?”

The Company interviewed Gordy “Guns” who was accompanied by the Local Union President. The Company informed Gordy that it “had received information that could result in a violation of Company policies . . . as far back as his employment.” Instead of advising him of the information it had received, the Company asked Gordy if he knew anything about the falsification of documents throughout his employment. Gordy stated he did not know of anything. When he was advised about the question on the application form, he responded that he recalled the form only asked about convictions for certain time periods which did not apply to his convictions or asked whether the applicant had committed any crimes. He felt he never committed a crime and the application did not ask about guilty pleas. He stated he did not believe he falsified the application form. Gordy “Guns” did not understand the legal definition of “to convict” which means “to find (a person) guilty of a criminal offense upon a criminal trial, a plea of guilty, or a plea of no contest.” He stated that he believed he answered the question correctly based on the pre-release counseling he had received in jail and because he “felt he wasn’t convicted.”

After the interview, the Company reviewed the application forms again and determined that Gordy “Guns” falsified the forms. They informed Gordy that they were terminating his employment because he had falsified his application.

The Union grieved the discharge.

**YOU BE THE JUDGE:** *Was there just cause for Gordy “Guns” Grievant’s discharge?*

## High on Life?

Gilly Grievant is a probation officer in Alpine County with 20 years of experience and training in detecting the use of drugs and alcohol. Her children from a previous marriage live with her and her current husband. Gilly was aware at the time of her marriage to her current husband that he had a history with drug and alcohol problems. She claims that she made clear that she has zero-tolerance for drug use.

On October 22, 2010, Gilly's son discovered and photographed a large opaque plastic bag full of marijuana in her and her husband's bedroom. The bag was located on a dresser, mere feet from the bed, but wasn't sealed shut. The son sent the photograph to his biological father, who in turn reported it to law enforcement. The photograph showed that the bag was quite large and contained heat-sealed bags of marijuana, apparently ready for sale. Law enforcement promptly responded to the report after securing a search warrant. The search revealed the bag contained 198.1 grams of marijuana, over eight additional pounds of marijuana on the property, and a significant grow operation in a camper located in the back yard. Gilly claimed she "rarely if ever" went into the camper. Both Gilly and her husband were arrested and charged with possession with intent to distribute. Gilly's charges were later dropped.

The local media ran the story and eventually it went viral, hitting national and international news. Most reports correctly identified Gilly as an Alpine County probation officer. During this media firestorm, Gilly and her husband did a TV interview, during which her husband proclaimed that he smoked marijuana and "was not ashamed to say it" while she sat next to him with no reaction to his statement.

Prior to discovering and photographing the bag of marijuana, Gilly's son had told Gilly that he had found marijuana and drug paraphernalia in the home and had smelled a marijuana odor. Gilly claims that she assumed the marijuana and drug paraphernalia belonged to a visiting friend and that the odor was tanned beaver hides. Gilly vehemently denies that she had knowledge of her husband's grow operation and claims that if she had, she would have forced him to move out of the house.

The County discharged Gilly, citing the severe negative impact on the County's reputation and a lack of co-workers', prosecutors', law enforcement and court personnel's, and judges' trust and willingness to work with Gilly. The County also argues that Gilly breached her ethical duty to the County and her clients. She had signed a Code of Ethics when hired, which included an oath promising to obey the law and to model the very behavior a probation officer would expect from an offender.

Gilly had no prior disciplinary actions taken against her.

**YOU BE THE JUDGE:** *Would you uphold the discharge?*

## The Problem with Technology

Citywide Transit, a bus company, has prohibited its operators from talking on cell phones since 1977. The current policy, in part, states "*all cell phones must be turned off and stowed off the person, while operating a bus.*"

George Grievant, a Citywide employee since 2007, was driving an "out of service" bus to the bus garage and stopped at a red light. The light turned green. Not realizing that vehicles were not yet moving, he moved forward and rear ended the vehicle, a squad car. The accident was reported and an investigation took place. During the investigation, George admitted that he was talking to his wife on speaker phone on the drive back to the garage, explaining she was having pregnancy difficulties. When the conversation ended he stowed it in his jacket pocket. According to George, it was a 2 minute conversation which ended about 1 minute before the accident. George admitted knowing of the cell phone policy. This was his first violation. Citywide issued George a final warning and a 20-day unpaid suspension for violating the cell phone policy. Both parties recognize the Grievant violated the cell phone policy and that some discipline is appropriate but differ over the degree of discipline imposed.

The cell phone policy provides that a first offense results in a final warning and 20-day suspension. A second violation results in termination regardless of length of time between the two offenses. If an accident occurs when violating this policy, further disciplinary action up to and including discharge may be applied.

The contract states that work rules "may not be in conflict with the contract" and that they "are subject to the Grievance Procedure." The grievance procedure in turn states that Citywide retains its right to discipline its employees but "agrees that any discipline issued shall be just and merited." It further provides that Citywide will not consider adverse incidents occurring more than 36 months prior to the date of the incident giving rise to the contemplated discipline.

Three employees challenging discipline imposed for violating the cell phone policy have filed grievances and proceeded to arbitration since it went into effect. Each arbitrator found the 20-day suspension appropriate, but one found that at least part of the suspension should be paid. One arbitrator did not disturb the final warning; one removed it from the employee's record; and the other was expunged after 36 months in accordance with the contract.

Here, the Union argued that Citywide should not use a "cookie cutter" approach to disciplining employees for violating the cell phone policy since misconduct may range from a very serious violation to an inadvertent one and that in this case the discipline imposed was not just and merited. Instead, it should be reduced due to mitigating circumstances and the minor nature of the incident. The Union cited arbitration awards which varied from the discipline outlined in the policy.

Citywide maintains the imposed discipline is just and merited given the seriousness of George's misconduct and states that it is premature to address the duration of the final warning given that this is George's first violation.

**YOU BE THE JUDGE:** *Is the disciplinary action appropriate?*

## **Ignorance is Marital Bliss?**

Gia Grievant, a first generation American, has worked for the City of Happydale since 2006. Her parents immigrated to the U.S. from an Asian country and follow many of the traditional customs of their culture. Gia is fluent in English, but also adheres to the practices of her ethnic heritage.

In 2007, Gia “married” Thao during a cultural ceremony not sanctioned or recognized by the State. Many couples of Gia’s ethnicity, in addition to the cultural wedding ceremony, will also obtain a marriage license through the State, understanding that the term “legally married” means a marriage for which one receives a marriage license. Gia and Thao never obtained a marriage license.

In 2010, Gia enrolled Thao on her health insurance and reenrolled him in 2011, 2012, and 2013. Prior to each enrollment, the City provided Gia with documents and electronic communications that clearly provided that any person enrolled as a “spouse” must be legally married to the employee and that the consequences of submitting false or fraudulent forms may result in discipline up to and including termination. The City required no proof of marriage.

In 2012, the City audited its health plan enrollment to determine if ineligible persons were enrolled as “spouses.” During the audit, the City informed employees through a series of mailings of the consequences for falsely claiming a “spouse” on the health plan when not legally married. The City offered “amnesty” to employees with ineligible persons enrolled on their health insurance. As a result of the audit, 237 ineligible dependents were removed from the City’s health insurance plan.

In May 2013, the City received a phone call from someone who identified herself as Gia requesting to take Thao off her health insurance. When told she needed to submit a divorce decree, the caller indicated they were not legally married. The City initiated an investigation, during which Gia denied making the call and blamed her sister-in-law. Following the investigation, the City terminated Gia for falsely and fraudulently enrolling Thao as her legally married husband on her health insurance. No other employee was disciplined or discharged for enrolling an ineligible person on their health insurance. Prior to this, Gia had no disciplinary history and had received meet or exceeds expectations on all performance evaluations.

During the grievance process, Gia presented an Order for Protection (OFP) she had acquired from a court against Thao. Thao was verbally and physically abusive to her and their children. The court form contained a series of boxes regarding the nature of the relationship between the parties, one of which was “spouse.” The form submitted during the grievance process has the “spouse” box checked in handwriting. A certified copy of the OFP presented at arbitration shows that the box marked “spouse” is blank.

**YOU BE THE JUDGE:** *Did the City have just cause to terminate the grievant?*