



January 31, 2012

Jonathan D. Kaney, III, Esq.
55 Seton Trail
Ormond Beach, FL 32176

Re: Richard Gardner Appeal Hearing

Dear Mr. Kaney,

I am in receipt of your letter of January 27, 2012, requesting an appeal on behalf of your client, Richard Gardner, pursuant to Volusia County Merit Rule 86-485. Hearings are scheduled in the order in which the request for same is received and, at this time, my office is in the process of scheduling those appeals which were received prior to Mr. Gardner's request.

As you may know, the members of the Volusia County Personnel Board serve on a voluntary basis and hearings are scheduled as expeditiously as possible in light of the individual schedules of the Board members. My assistant, Ginger Hadley, will coordinate the scheduling of Mr. Gardner's appeal hearing and will be in contact with your office as soon as she has an available date, which we anticipate should be sometime in March.

Enclosed, please find the Appeal Information, Rules and Regulations for the Personnel Board and the Personnel Board Hearing Procedures.

I note your mention of a February 29, 2012, DROP deadline but am uncertain as to what you are referring. Please feel free to contact me to discuss this matter if necessary in light of the above scheduling agenda.

Sincerely,

Tom Motes
Human Resources Director

TM/gh

Enclosures

cc: Nancye Jones, Assistant County Attorney

230 N. Woodland Blvd., Suite 262 • Deland, FL 32720-4607
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PERSONNEL BOARD COUNTY OF VOLUSIA

APPEAL INFORMATION

This guide is given to persons filing an appeal with the Personnel Board to provide important information concerning the appeal hearing and the advisory decision of the Board to the County Manager. All material should be read.

COMMUNICATIONS

All communications concerning your appeal should be directed to:

Human Resources Director
County of Volusia
230 N. Woodland Blvd., Suite 262
DeLand, FL 32720-4607

(386) 736-5951 (DeLand)
257-6029 (Daytona Beach)
423-3319 (New Smyrna Beach)

Appeals should be in writing and should refer to specific adverse action, instance of discrimination or classification or examination action being appealed.

SCHEDULING AND NOTICE OF HEARING

The hearing before the Personnel Board will be scheduled as expeditiously as possible, giving due consideration to the availability of Board Members, the availability of the parties, the complexities of the specific case and the workload of the Personnel Board.

A notice of hearing will be mailed to you at least ten (10) days before the hearing showing the time, date and location of the hearing.

YOUR RIGHTS AT THE HEARING:

You have the right:

1. To representation.
2. To make a statement at the opening of the hearing.
3. To testify in your own behalf.
4. To present documents, records and written declarations/statements.
5. To have your own material witnesses testify.
6. To question opposing parties and witnesses.

7. To examine documents, which may be introduced into evidence by the County.
8. To explain or rebut evidence.
9. To object to the testimony of witnesses or introduction of evidence.
10. To make a statement at the end of the hearing.

ATTENDANCE OF WITNESSES

If you wish a witness to testify, you must notify the witness and arrange for that witness to be present at the hearing. You should bring to the hearing only those individuals who have personal knowledge of the material facts which you intend to establish.

The County will furnish a list of its witnesses to the appellant. The appellant should also furnish a list of his/her witnesses to the County Personnel Office at least two weeks prior to the hearing date.

SUBPOENAS AND PRODUCTION OF RECORDS

If a witness refuses to appear, a subpoena may be issued by the Personnel Board. The request for a subpoena must contain the names and addresses of those to be subpoenaed and the reason for the necessity of such a subpoena.

Requests for subpoenas and for production of any books, records or papers pertinent to the hearing must be made to the County Personnel Office at least two (2) weeks prior to the hearing date.

REPRESENTATION

Any party or person appealing to the Personnel Board shall have the right to be accompanied, represented or advised by an attorney or other representative of their choice. Any designated attorney or representative should file a notice of representation with the County Personnel Office as soon as possible after being so designated. The costs of the representation shall be borne by the appealing party.

POSTPONEMENTS

Postponements may be granted only for good cause. Scheduling of cases will initially attempt to accommodate the needs of both parties in arranging their schedules and making adequate preparation. Postponements beyond the scheduled date will only be in recognition of unforeseen and avoidable circumstances.

RECORD OF THE PROCEEDINGS

Any person who anticipates the possibility of an appeal to any court or commission of the County Manager's decision or any matter covered in the Personnel Board hearing will need a record of the proceedings of the Board, including all testimony and evidence upon which the appeal is to be based. The responsibility for ensuring that a verbatim record of the proceedings is made, including providing the necessary equipment and/or persons to record what is said at the hearing, is that of the person anticipating making the appeal. Cost shall be borne by the person anticipating the appeal.

FAILURE TO BE PRESENT

If the appellant fails to be present at the hearing or fails to obtain a postponement or adjournment, and within five (5) days does not provide a good cause acceptable to the Human Resources Director, the action being appealed shall be presumed to be valid.

CONDUCT OF HEARING

The Personnel Board has sole authority to conduct the hearing. The hearing shall be conducted informally in accordance with the Sunshine Law and in accordance with procedures established by the Board.

The Chairman of the Board will:

1. Explain the issues, the purpose of the hearing and the procedure;
2. Explain the manner in which persons will testify and give rebuttal;
3. Swear witnesses;
4. Assist parties in asking questions of other parties and witnesses;
5. Question parties and witnesses to obtain necessary facts;
6. Determine on his/her own motion or the request of a party if testimony and documents being offered should be received and considered;
7. Take official recognition or judicial notice of well-established matters of common knowledge and public records.

PERSONNEL BOARD/COUNTY MANAGER DECISION

The Personnel Board on the basis of the testimony and written evidence introduced at the hearing transmits its findings and an advisory decision to the County Manager who will make a final decision. There is no further right of administrative appeal.

RULES AND REGULATIONS VOLUSIA COUNTY PERSONNEL BOARD

The main objectives of the Volusia County Personnel Board are prescribed in the County Charter and the Merit System Rules and Regulations.

The following Rules and Regulations will be used to assist the Personnel Board in carrying out its objectives in an orderly fashion.

Should there be any conflict between the Volusia County Merit System Rules and Regulations or the County Charter and the Personnel Board Rules and Regulations, the County Charter and Volusia County Merit System Rules and Regulations will prevail.

I. PARLIAMENTARY PROCEDURE

A. Because the Personnel Board is an arm of Volusia County Government, Roberts Rules of Order will govern procedural questions not otherwise covered by the Merit System Manual or these Rules and Regulations.

B. The Personnel Board meets and acts under the Sunshine Law.

II. CONDUCT OF MEMBERS OF THE PERSONNEL BOARD

Members of the Personnel Board should not act independently, but should submit their thoughts and views to the Board at regular or special meetings.

III. CHAIR OF THE BOARD

A. The Chair of the Personnel Board will be the presiding officer over all meetings. In the absence of the Chair, the Vice Chair will preside. In the absence of both Chair and Vice Chair, a past officer will preside.

B. It is the responsibility of the Chair with the advice of the Personnel Director to ensure that all Rules and Regulations are followed in accordance with the Merit System.

C. The Chair will be responsible for calling all regular and any special special deemed necessary by himself/herself or by the Volusia County Personnel Director.

D. The Chair will be responsible for ensuring that the Secretary to the Board places a notice in the newspaper indicating the date, time and place of Personnel Board meetings. This notice will appear fifteen (15) days prior to each meeting.

E. The Chair will ensure that:

1. All members of the Personnel Board are provided notice of meetings and information relative to anticipated subject matter ten (10) days prior to the date of the meeting.

2. Meetings of the Personnel Board will be held at the time and place designated by the Chair.

IV. ELECTION OF OFFICERS

- A. The election of officers will be in accordance with the Merit System Rules and Regulations governing the Personnel Board, and will be held at the regularly scheduled meeting in September. The newly elected officers will assume their responsibilities the following November. In accordance with the Merit System Rules and Regulations, the election and assumption of office on the above referenced dates closely coincide with the Volusia County fiscal year, (October 1 - September 30).
- B. The Personnel Board will consist of five (5) regular voting members and one (1) alternate. The alternate member will have no voting rights except when needed to constitute a full Board; however, the alternate member will have all other rights and privileges afforded regular members.

V. VOLUSIA COUNTY PERSONNEL DIRECTOR

- A. The Personnel Director will work directly with the Chair and ensure the communication of the Personnel Board's recommendations to the proper authorities.
- B. The Personnel Director will supply the Personnel Board with any information which will assist the Board in carrying out their duties and responsibilities.

VI. SUGGESTED ORDER OF BUSINESS

- A. Call meeting to order.
- B. Roll call.
- C. Approval of the minutes of the previous meeting.
- D. Correspondence.
- E. Recognize Personnel Director for comments and matters which are to come before the Board.
- F. Old Business.
- G. New Business.
- H. Recognize each member of the Board for comments.
- I. Recognize members of the audience for comments.
- J. Adjourn meeting.

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PERSONNEL BOARD HEARING PROCEDURES

I. PHILOSOPHY

Volusia County Merit System Rules and Regulations relating to appeals states:

Because reductions in pay, demotions, suspensions and dismissals are employer actions which have such a serious adverse effect upon the lives of employees, and because such actions are normally not effectively appealable within the regular administrative structure, special channels and procedures must be established to insure fairness and equity to employees involved in such actions. Similarly, because illegal discrimination, classification decisions and examination decisions are most often issues that necessitate dispassionate, objective review and technical, specialized knowledge, fairness and equity in these situations also dictate special channels and procedures outside of the regular administrative structure.

Whenever the County proposes and/or takes an action that severely effects an employee's employment status (Adverse Action), it shall afford the employee procedural due process. Procedural due process shall include:

1. A written statement of the reasons for a proposed action and an opportunity to reply before an action is taken;
2. Notification of the action taken, the reasons for the action stated in sufficient detail for a full and complete understanding, the right to appeal and the manner in which the appeal may be initiated;
3. An impartial hearing officer or board;
4. The right to representation, including legal counsel;
5. Fair rules of evidence; and
6. The right to confront and cross-examine witnesses.

The County Personnel Board has been created to hear appeals arising from adverse action situations, illegal discrimination allegations, and classification and examination decisions.

II. SCOPE OF HEARING

Hearings on appeals for disciplinary actions are conducted for the purpose of determining: (1) whether the employee committed the acts alleged to be the cause for taking the disciplinary action that is the basis for appeal; (2) whether the service group's actions in disciplining the employee conform to the Volusia County Merit

System Rules and Regulations; (3) whether any evidence exists in defense, mitigation or extenuation of the allegations; and (4) whether the disciplinary action was appropriate under the factual circumstances of the case.

A hearing in an appeal resulting from a Classification or Examination decision may be confined to determining whether the Activity conformed to the Volusia County Merit System Rules and Regulations and other applicable law.

A hearing of a complaint filed by an employee alleging employment discrimination on the basis of race, color, sex, religion, creed, national origin, political opinions or affiliations, age or handicap is conducted for the purpose of defining the issues and determining whether any evidence or cause exists to believe the differential treatment alleged by the complainant occurred and that the reasons for such acts were discriminatory.

III. OBJECTIVITY AND INDEPENDENCE

The basic concept of the independent board requires that it conduct cases over which it presides with complete objectivity and independence and make a decision that is an independent intellectual judgment based solely upon the applicable laws, including rules, regulations and precedent, and the facts contained in the record.

The hearing should possess substantially the same dignity, and order as a judicial proceeding. It should move as rapidly as possible; consistent with the essentials of fairness, impartiality, and thoroughness. Not only must the Board be absolutely impartial, it must always appear to be so.

IV. AUTHORITY AND POWERS OF THE BOARD

A. Authority

The Personnel Board is constituted under authority of the Volusia County Charter and the Volusia County Merit System Rules and Regulations and is empowered to act as an independent forum in the hearing of adverse action, technical, and discrimination appeals.

Board action, to be valid, must be taken in an official session of the Board; otherwise it is not the board that is acting, but private persons who possess no authority to act.

A majority (3) of the Board constitutes a quorum for official action. A majority of a quorum is sufficient to carry an action. If a member abstains from voting, that member acquiesces in the action taken by a majority of those who do vote.

If the full Board is present, including the alternate Member, the Alternate Member has no standing and may not vote on any official matter before the Board. If the full Board is not present, but the Alternate Member is, the Alternate Member is counted for purposes of constituting a quorum and has full privileges of participation and voting on any official matter before the Board.

Board members must be present when the Board is called to order and must be present throughout the whole proceeding in order to take part in any of the proceeding including deliberations and the final vote.

The Board Chairman is expected to participate in and vote on all official matters before the Board unless on a particular matter, he or she claims disqualification because of personal interest.

B. Powers of the Board

Hearings before the Personnel Board shall be conducted informally in accordance with the Sunshine Law, and in accordance with procedures established by the Personnel Board, and shall not be bound by formal court procedures.

The Board shall have authority subject to the Merit System Rules and Regulations, to: (1) administer oaths and affirmations; (2) issue subpoenas for attendance and, with the approval of the County Manager, compel the production of books, records, and papers; (3) rule upon offers of proof and receive relevant evidence; (4) take or cause depositions to be taken; (5) regulate the course of the hearing; (6) hold conferences of the settlement or simplification of the issues by consent of the parties; (7) dispose of procedural requests or similar matters, and (8) recommend decisions to the County Manager.

The Board may grant continuances or adjourn the hearing from time to time upon its own motion or upon joint request of the parties or, for good cause shown, upon the request of only one party. Failure to grant a continuance for good cause may make the proceedings vulnerable.

The hearing must be confined to the charges contained in the statement of adverse action given to the employee at the time the action was taken or the complaint stated by the employee, if an appeal of a classification, examination, or alleged discrimination action, and evidence appertaining thereto.

V. RIGHTS OF THE PARTIES

Each party shall have the right to present his case by oral or documentary evidence, to submit rebuttal evidence, to conduct such cross examination as may be required on any

matter relevant to the issues for a full and true disclosure of the facts even though that matter was not the subject of direct examination, and to impeach any witness regardless of which party first called that witness to testify.

The hearing should proceed in the absence of any party who, after due notice, fails to be present or fails to obtain an adjournment. A decision should not be made solely on the default of a party. The Board should require the other party to submit such evidence as it may require to make a decision.

VI. HEARING PROCEDURES

A. Introduction and Instructions

The hearing is not a court trial but a proceeding to establish the facts of the case. A fair hearing is the ultimate objective. However an efficient and orderly hearing is also important. Thus the Board must give the parties a fair chance to present their case, must be satisfied that they are being adequately informed by the parties to decide the case, and at the same time must provide procedural efficiency to keep the hearing from getting out of hand.

The Chairman should call the hearing to order, announce the title and type of case, and give preliminary instructions concerning decorum, procedure, and hearing hours. The opening should be adapted to the type of case and the circumstances. When the parties are represented by knowledgeable and experienced counsel the opening statement can be brief. But if interested members of the public are present, or some counsel or representatives are unacquainted with the hearing procedure, the Chairman should explain in detail what the case is about the procedures to be followed.

The Chairman will open the hearing by putting the following into the record:

1. Names of parties.
2. If there is a special agreement, submission or stipulation, identify it by date and enter it into the record (Hand copy to recorder).
3. The date, hour and place of meeting.
4. The members of the Board present.
5. Announcement of appearances for the parties - the attorneys or other representatives who are to present the case for the parties. (State the name and title of each person and state the party for whom he/she appears. All of this information may be written on a sheet of paper to be handed to the reporter for inclusion in the record, or it may be stated orally by the parties).
6. Hours for the hearing.
7. Any other material information.

B. SWEARING OF WITNESS/INVOKING "THE RULE"

Each witness may be sworn individually prior to his/her initial testimony, or all persons scheduled to testify may be sworn (if present) when the hearing is opened. The following oath or affirmation shall be taken by each witness.

"Do you solemnly swear to affirm that the testimony you are about to give in this case is the truth, the whole truth, and nothing but the truth?"

"The Rule" that witnesses be excluded from the hearing during others' testimony is a traditional method for preserving the purity of testimony. Whenever it is sought, witnesses, other than the parties themselves, should be excused from the room until after their testimony has been given.

C. OPENING STATEMENTS

Each party will make a brief, generalized opening statement designed to acquaint the Board with each party's view of what the dispute is about and what the party expects to prove by its evidence.

D. DEFINITIONS OF ISSUES AND FACT STIPULATIONS

Following the brief opening statements designed merely to give a "bird's-eye" view of the whole case, there should be a summary listing on the record of what the parties agree to be the significant issues which will be the subject of controversy in the proceeding.

With respect to each issue it should be determined whether there is any significant controversy or dispute as to the facts. In that connection it should be explored whether there is any possibility of the parties reaching an agreement as to some or all of the material facts and, if so, whether a stipulation can be made.

An agreed statement of facts (fact stipulation) can serve to expedite the hearing by reducing the number of necessary witnesses and by permitting concentration upon the disputed aspects of the case.

E. OFFICIAL NOTICE

Stipulations and official notice can eliminate a substantial amount of factual presentation.

Official notice is a means of eliminating the need for technical proof of matters which can be established as being well known and recognized, and available in advance to the parties.

The Board may upon its own motion or upon request of either or both parties take official notice of the following matters subject to the right of either party to introduce contradictory evidence.

1. Provisions of the Volusia County Charter as amended.
2. Duly enacted ordinances and resolutions of the Volusia County Council.
3. The Volusia County Merit System Rules and Regulations and attached definitions.
4. The annually published County of Volusia Compensation Manual.
5. Facts that are not subject to dispute because they are generally known within Volusia County.
6. Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy is beyond question.

F. PRESENTATION OF EVIDENCE

1. Order of Presentation

There is no rigid order in which the parties must present their case in a hearing. In dismissal and disciplinary cases the County will normally present its case first. In other types of cases the appellant might proceed first.

2. Rules of Admissibility

Strict observance of legal rules of evidence is not necessary. It is the prerogative of the Personnel Board to determine the weight and credibility of evidence presented to them without restrictions as to the rules of admissibility which would apply in a court of law.

The traditional common law rules of evidence were developed for an adversary adjudication before judge and jury and were designed to protect layman jurors from the possibility of error in their task of weighing evidence and deciding on facts. The Personnel Board is composed of experienced professional people inquiring on a frequent basis into the same limited type of situations - an expert weighing of evidence can be counted upon.

A much greater concern than Board consideration of material that might be irrelevant, incompetent or immaterial is that they might not hear all of the evidence which the parties deem to be material and necessary to a fair and full understanding of their case. Thus parties should be allowed to present their cases fully as they see them and evidence should be accepted and evaluated for what it is worth in light of the whole

record. Any objection to evidence should be noted and serve to caution the Board to examine the challenged evidence more closely before giving it weight.

There is a need, however, to achieve a balance between hearing all of the evidence necessary to fully understand the case and hearing evidence that is clearly irrelevant, incompetent, immaterial or repetitious. The latter may be properly refused and excluded by the Board.

3. Types and Presentation of Evidence

a. Stipulations

The parties by oral stipulation on the record may agree upon any facts involved in the case which stipulation shall be used as evidence at the hearing and be binding on the parties. Parties should be encouraged to thus agree upon facts when practical.

b. Official Notice

Official notice may be taken of (judicially cognizable) facts. Parties shall be notified during the hearing of the material noticed, including any staff memoranda or data, and they shall have the privilege of objecting to the material so noticed. Further, either party may dispute the officially noticed "fact" by introduction of evidence.

The facts peculiar to a given case, however, may not be officially noticed, but must be established by evidence.

c. Testimony of Witness

In discharge of disciplinary cases the most important evidence generally takes the form of testimony of witnesses as to the facts which led to and surrounded the disciplinary action.

The function of a witness is to relate what he or she has directly seen, heard or said. It is not the function of a witness to draw inferences from what he or she has seen or heard or from other facts unless the witness qualifies as an "expert" in the particular subject at hand.

d. Documentary Evidence

A portion of the evidence will ordinarily be presented and

preserved in written form as exhibits. Each party may submit its own exhibits and the parties may also submit exhibits jointly.

Exhibits customarily are introduced into evidence at the point of the hearing where the data in the exhibit is most relevant. Several copies of each exhibit should be prepared in advance to insure a copy for the reporters to be incorporated into the record.

In offering an exhibit as evidence a party should be prepared to use a witness to identify the exhibit and to put in enough evidence to show its accuracy, in the event that the other party does not indicate a willingness to accept the exhibit for what it purports to be. A party may sometimes offer a copy of a document without a profert of the original. The accuracy and authenticity of the document should be assumed unless questioned. Where objection is made on the ground that it is not the "best evidence" the original document should be produced unless it is shown, for reasons satisfactory to the Board, that it is not available.

e. HEARSAY EVIDENCE

'Hearsay Evidence' consists of testimony given by a person who states, not what he knows of his own knowledge, but what he has heard from others.

Courts of law ordinarily exclude the admission of hearsay testimony because it denies the opposing party opportunity for complete cross-examination and juries do not have the experience or expertise to evaluate it for what it is worth.

The Personnel Board should generally admit such evidence, but qualify its reception by informing the parties that it will be considered only for what it is worth, if it appears reliable and if the nature of the information and the state of the particular record make it useful.

f. EXPERT OR OPINION EVIDENCE

The rule that the function of a witness is to relate what he has seen and heard, not to draw inferences from these observations or from other facts does not apply to "expert" or "opinion" evidence.

Opinion evidence is the conclusion of a qualified expert based upon a given set of facts or conditions in the record. The expert is allowed to draw inferences and conclusions because his knowledge is superior to those having to resolve the issue.

The Board should not permit opinion evidence to be used as a device for submitting arguments on the merits of the case that properly belong in oral argument after the presentation of evidence. When the testimony of the parties' experts is inconclusive, or when no experts are presented, the Board sometimes may find it necessary to call an expert as its own witness.

4. CROSS EXAMINATION

Providing for cross examination is of utmost importance when government action may seriously injure an individual and the reasonableness of the action depends on evidence consisting of the testimony of individuals whose memory might be faulty or who may be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy.

Since the paramount interest of the Board is in securing all of the facts necessary to a full and complete understanding of the case, cross examination should not necessarily be restricted to matters brought out in the direct examination and, further, should not place strict limitations on the number of re-direct or re-cross examinations.

While parties should be allowed considerable latitude in cross-examination of witnesses to reveal conflicts in their testimony and to challenge credibility, the Board should not allow harassment or browbeating of witnesses.

5. REBUTTAL EVIDENCE

After both parties have presented their basic case, each party in turn should be given full opportunity to present its rebuttal case. The presentation of evidence should not be closed until each party has nothing further to add.

Rebuttal evidence is offered to contradict other evidence or to rebut a presumption of fact or officially noticed fact. It is evidence that explains away or otherwise refutes the other party's evidence by diminishing or negating the force of it.

6. OBJECTIONS AND MOTIONS

Objections to offers of evidence may be made and should be taken under consideration and noted in the record.

Each party is entitled to object when it believes the other party is seeking to introduce improper evidence or argument. A party is also entitled to object to evidence believed to be irrelevant. Such objections, when based on some plausible grounds, can serve a useful purpose by alerting the Board to examine the challenged evidence or argument more closely before giving it weight.

The Chairman should strike, upon objection or his own motion, evidence so confusing, misleading, prejudicial, time wasting, or repetitious as to have little or no probative value.

A motion is an application to the Board for a ruling or order in favor of the party making the motion.

A "Motion to Dismiss" is a formal statement that the facts as presented in the evidence, even if admitted, are not sufficient to support the action taken and thus the hearing should not proceed further.

A "Motion of Summary Judgment" is intended to effect a decision by the Board "on the merits" of the controversy without resort to a lengthy and full hearing, if in essence there is no real dispute as to salient facts or if only a question of law is involved.

When denial is made the hearing proceeds to a full and complete introduction of evidence, cross examination and rebuttal by both parties and analysis and decision based on the factual issues presented.

The Chairman may permit oral argument in support of or opposition to motions and objections.

7. WEIGHT AND CREDIBILITY OF THE EVIDENCE

It is the responsibility of the Personnel Board to determine the adequacy, weight, relevancy, and authenticity of the evidence before them.

Facts are to a large extent determined by the weight and credibility accorded to the testimony of the witnesses and to the documentary evidence offered by the parties.

In determining where the evidence lies with respect to any material point

consideration should be given to whether the witnesses speak from first hand information or whether the testimony is largely based on hearsay or gossip.

In addition to the possibilities of faulty or incomplete perception of events, dim and inaccurate memory, and inability to accurately and effectively communicate, the witnesses for both parties may be subject to the unconscious influences of self-interest, personal predilection or antipathy.

It is the responsibility of the members of the Board to determine the truth and "find the facts", as they believe them to be, based on a full and fair consideration of all the evidence and after they have accorded each witness and each piece of documentary evidence, the weight, if any, they honestly believe it to deserve.

G. CHAIRMAN/BOARD PARTICIPATION

The Board should feel free to participate personally in the hearing by asking questions, seeking information, and exploring all angles to the extent reasonably necessary to satisfy themselves that they have in fact been informed as fully as possible.

The Board should maintain an impartial atmosphere at all times. It should be evident to all parties that they truly have their "Day in Court." No partiality should call attention to gaps in the evidence and insist that they be filled; it should direct the parties, to discuss any issues or points it thinks germane.

The experience, training, and background of participants should always be considered. When there is any question of a witness's honesty or forthrightness cross-examining counsel should be permitted maximum latitude. If, on the other hand, the witness is comparatively inexperienced, unacquainted with judicial procedures, frightened, or nervous the Chairman should tactfully put him at ease; protect him from artful questioning of counsel, interrupt when necessary to simplify or clarify questions; permit a certain amount of wandering and meandering testimony; and review with the witness testimony that has become confused.

The chairman must control the hearing. As soon as the subject under inquiry is exhausted or fully developed, the Chairman should stop counsel or the witness and direct him to go to other matters. If the question or answer is irreverent or improper, the Chairman should strike it without waiting for an objection. On the other hand, if counsel is usefully developing a significant factual matter the Chairman should let him proceed regardless of tedium or ennui.

The Board may question a witness initially if it is likely to forestall extensive examination by others. The Chairman should interrupt when the witness and counsel are at cross purposes, when the record may not reflect with clarity what the witness intends to convey, or when for some other reason assistance is needed to assure orderly development of the subject matter. At the close of cross or redirect, the Board may question the witness to clarify any confusing or ambiguous testimony or to develop additional facts.

Prompt rulings are essential. If the Chairman is sure of the ruling argument should not be heard. If the proponent's argument is not persuasive, the Chairman should deny the motion or objection without hearing opposing counsel. In case of doubt the Chairman should hear argument from counsel on each side and should rarely permit rebuttal. If the reason for a ruling is obvious the Chairman need not waste time explaining. If, on the other hand, the issue is more doubtful the Chairman should state reasons.

Where testimony is controverted, it is quite proper for the Board to take the initiative, if necessary, in reconciling apparent contradictions, or in seeking insight into the motives of those whose testimony is at odds. It is the parties' primary responsibility to present facts and to rebut contrary testimony, but the Board may elicit information or secure insights where, in their opinion, such procedure is made necessary by the critical nature of the controverted testimony. The Board has an affirmative duty to elicit the facts necessary to determine the interests of the public as well as the parties.

H. CLOSING STATEMENTS

Each party will make a brief closing statement in which they will analyze and synthesize the important aspects of the case, emphasizing the facts they feel they have proved and placing them in proper relation to the ultimate conclusion at which they seek to persuade the Board to arrive.

VII. FINDINGS OF FACT/CONCLUSIONS

When a service group's determination is challenged both parties should be expected to produce whatever evidence they can in support of their respective contentions. The Board in turn will consider all the evidence and decide whether the service group's determination should be upheld as being reasonably supported by the evidence and as not having been influenced by improper elements such as arbitrariness, caprice or discrimination.

There are two areas of proof in the deciding of disciplinary cases. The first involves proof of wrongdoing; the second, assuming that the guilt of wrongdoing is established, concerns the question of whether the punishment assessed by the service group should be upheld or modified.

Although varying degrees of proof may be required depending on the seriousness of the penalty imposed, the general standard should be a determination that there was reasonable cause for the action sufficient to convince a reasonable mind of guilt.

Thus the Board must look at the evidence on both sides and see whether the evidence in support of a conclusion can fairly be regarded as substantial in the face of the evidence on the other side.

Substantial Evidence

There must be in the record some evidence of sound, competent and recognizably probative character to support the findings, conclusions, and recommended decision. Findings of fact must be based on at least some admissible evidence, and not entirely on hearsay. The recommendation must be governed by and based upon the evidence at the hearing, and that only. Nothing can be treated as evidence that is not introduced as such. Facts and circumstances which ought to be considered must not be excluded.

In most cases there are two types of fact questions involved - questions as to evidentiary facts and questions as to ultimate facts. The former usually involve what the witnesses observed by their physical senses. The latter are the inferences or conclusions to be drawn from the former.

A decision may be said to be supported by substantial evidence when, upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, might have reached the decision; but, on the other hand, if a reasonable man acting reasonably, could not have reached a decision from the evidence and its inferences then the decision is not supported by substantial evidence.

VIII. ADVISORY DECISION

The Board must make a written report clearly presenting its findings of fact and conclusions and an advisory decision to the County Manager for final decision.

A. DELIBERATIONS

Preceding their written report the Board, in open meeting, must deliberate and analyze the testimony and exhibits, in addition to any other evidence in the record, and discuss those facts which are relevant and material to the controverted issues in a logical and organized way. The Board should then summarize the conflicting positions of the parties and set forth its conclusions and the rationale on which they are based.

The Board's analysis of a case should not be restricted to the analysis and

arguments provided by the parties. Even though the conflicting positions presented by the parties will cover a wide range of approaches, motivated by different interests or objectives, neither party is looking at the case in the same way as the Board. Sometimes there are useful aspects and reasoning which neither of the parties will present simply because neither of the parties feels it would be helpful to their particular objective.

B. PROPRIETY OF PENALTY

The Board's determination as to whether and to what extent the employee was guilty of the charges will determine the question of whether the punishment assessed by the service group should be upheld or modified.

The mere fact that a somewhat different penalty or a somewhat more severe penalty was imposed than a Board member would have made had he or she had the decision to make originally, is not sufficient justification to recommend a different penalty. The Board should not substitute its judgment and discretion for the judgment and discretion exercised by the service group director if the service group has demonstrated that it has acted in good faith upon a fair investigation and has imposed a penalty not inconsistent with those imposed in like cases. Only when the penalty is obviously excessive, unreasonable, capricious, or arbitrary should the Board substitute its judgment for that of the service group.

IX. MISCELLANEOUS

On The Record

Although the basic rule is that hearings are conducted on the record, the Chairman may sometimes use discretion and go off the record briefly in connection with a procedural problem, where it appears that this might contribute to a more expeditious resolution of the problem.

Settlements

A hearing may disclose an underlying misunderstanding that may have blocked an earlier accommodation or uncover new thoughts, new facts, and occasionally new areas of agreement that provide an opportunity for constructive settlement. In such cases the hearing may be recessed for direct negotiations at the request of the parties or at the Board's suggestion, if accepted by the parties.

"Ex Parte" Communications

Ex parte communications are improper. This means that the Board may not communicate, directly or indirectly, or receive information in connection with any

aspect of the case, with any person or party, without giving the other party the opportunity to be present. If such communication is inadvertently received by any member of the Board the party adversely affected should be given the opportunity to rebut the communication.

X. DEFINITIONS

Abuse of Discretion - Any unreasonable or arbitrary action taken without proper consideration of the facts, regulations or law pertaining to the situation. Honest, but erroneous judgments do not constitute abuse of discretion.

Circumstantial Evidence - Indirect evidence. Secondary facts by which a principal fact may be rationally inferred.

Competent Evidence - Evidence which is relevant to the issues being contested.

Conclusion (Finding) of Fact - A conclusion reached through inferences from evidentiary facts.

Conclusion of Law - A conclusion reached through the application of rules of law.

Inference - A deduction from the facts presented, which is less than a certainty but may be sufficient to support a finding of fact.

Leading Question - A question which is ordinarily improper in direct examination because it suggests to the witness the answer that is expected irrespective of actual memory. Leading questions are proper on cross-examination and of witnesses who are hostile to the examiner.

Material (Evidence) - Important, necessary; relating to a given issue; evidence which tends to prove or disprove an issue.

Probative Value - The relative weight of particular evidence which tends to prove an issue or allegation.