The Ultimate Guide To Loudermill Meetings



Presented by: Christopher P. Gabriel, Esquire

GABRIEL FERA, P.C.

1010 Western Avenue, Suite 200 Pittsburgh, PA 15233 (412)328-5853

Loudermill User's Guide

Part 1

Introduction to Loudermill Meetings

In <u>Cleveland Board of Education v. Loudermill</u>, 470 U.S. 532 (1985) the United States Supreme Court ruled that whenever a public employee has a property interest in his employment, or otherwise is protected by operation of a collective bargaining agreement, he may not be disciplined without **notice and an opportunity to respond** to the charges.

Employees with a property right in their employment are generally defined under state law as those who can only be terminated for cause and who have a right to have the decision reviewed.

All employees covered by collective bargaining agreements are included in this category.

To comply with this requirement the employer must meet with the employee prior to making a decision regarding discipline, present the employee with the information against him, and give him an opportunity to respond.

This is often referred to as a "<u>Loudermill</u> Hearing," but it should actually be an informal meeting, and not a formal hearing.

If an employee can demonstrate that the employer decided to issue discipline prior to the <u>Loudermill</u> meeting, it is a due process violation which can (and does) negate the disciplinary action.

If a mistake is made during the <u>Loudermill</u> process, there *may* be an opportunity to correct it by rescinding the discipline, and holding a second (and correctly conducted) <u>Loudermill</u> meeting. Don't put yourself in this situation. Do it once and do it right.

Essential Loudermill Elements

The Essential Elements of the Loudermill Requirement are therefore:

- 1. Notice to the Employee
- 2. An Opportunity to Respond
- 3. 1 and 2 above must occur **before** you make a disciplinary decision.

The employer must meet with the employee prior to making a decision regarding discipline, present the employee with the information against him, and give him an opportunity to respond.

The employee also has the right to union representation. The reasons that this right to union representation is not included in the list of Essential Elements are discussed in the Section on "Who Should Attend," below.

Notice to the Employee

Notice is the first Essential Element of Loudermill, but notice of what, exactly?

The employer must provide the employee with an explanation of the conduct that is leading the employer to consider whether discipline should issue. Notice should give sufficient detail so the employee understands the issue to which he is being invited to respond.

The employer is not required to provide every detail, or to produce a written report. Neither the union nor the employee has a right to demand a specific format for the information (i.e. a written statement of charges).

What does "Due Process" Mean for Loudermill?

The Loudermill requirement is intended to insure that certain employees are afforded due process before they lose pay or employment. Due process in this context does not require any formal proceeding. Loudermill is a double check before the employer makes its decision. There is no requirement for written prior notice of charges to the employee, a specific format of "charges" against the employee, court reporters, recordings, or cross examination. Loudermill is an informal meeting.

Historically, a <u>Loudermill</u> hearing was required only when suspending without pay, discharging or demoting an employee. In <u>Gilbert v. Homar</u>, 117 S.Ct. 1807 (1997), the Supreme Court recognized that there may be circumstances involving even an unpaid suspension when a <u>Loudermill</u> hearing is not required. These involve an employee charged with a felony who is in a position of public trust and visibility.

But see Dee v. Borough of Dunmore, 549 F.3rd 225 (3d Cir. 2008). In this case a firefighter received an eight (8) day suspension with pay. He was suspended because the Borough Manager and the Council believed that he failed to complete two (2) mandatory training requirements. This eight (8) day suspension with pay was reported in the local newspaper. No one discussed the situation with the fire fighter before the paid suspension was implemented. As it turned out, the fire fighter was in compliance with the training requirements. He filed a lawsuit and the Third Circuit rules that he had an actionably liberty interest claim and a 14th Amendment procedural due process claim.

Are there employees for whom Loudermill is Not Required?

Strictly speaking, the Loudermill requirement only applies to employees who have a "property interest" in their employment. Those include civil service employees and those who are covered by a collective bargaining agreement, but...

Keep in mind that part time employees are generally covered by the CBA, even though both management and the Union often think otherwise.

Also keep in mind that the best practice is to comply with Loudermill for every employee. It is



just good management to get the employee's side of the story before issuing discipline.

What Loudermill Is Not

Loudermill Meetings Need not be burdensome. Meeting with an employee about potential discipline is always uncomfortable, but the requirements themselves are not difficult to meet.

> Notice to the employee An opportunity to respond Before a disciplinary decision is made

An Opportunity to Respond

The employee has the **opportunity** to respond, that is not to say he must do so. In a Loudermill meeting, the employee may choose not to answer the employer's questions or to provide his "side of the story."

If he chooses not to respond, the employer has fulfilled its due process requirement and must simply decide what, if any, disciplinary action should be taken in the absence of the employee's version of events.

Loudermill should not be confused with Weingarten:

In <u>NLRB v. J. Weingarten, Inc.</u>, 420 U.S. 251 (1975), the Supreme Court held that employees have the right to union representation during investigatory interviews, but subsequent cases also gave employers the right to insist that employees answer their questions. That is different from Loudermill, where the employee may choose not to answer the employer's questions.



Practical Advice For Loudermill Meetings:

Ten Things You Need to Know to Conduct a Proper Loudermill Meeting

1. Who Should Attend?

From the Management Side:

There are two roles to play. One person should conduct the meeting. The other should take notes. This is not a spectator sport.

From the Union/ Employee Side:

Employee?:	Yes, Always.
Union?:	Yes, if the employee wants
	them.
Lawyers?:	Mostly no, sometimes yes.

It is the employee's right to have a union representative and to choose that representative. The employee choses whether or not to have one present.

Generally speaking, lawyers are not invited. The exception is that the union may use its lawyer as its union representative.

Personal lawyers of the employee are **never** allowed.

2. When To Meet

In general, you should not set up a Loudermill meeting before you have completed your investigation. In order to put the employee on notice, you have to know what you are talking about insofar as that is possible.

Consider whether you should do a separate investigation meeting with the employee in question, before doing a Loudermill. (See references to Weingarten, above).

Whether you are investigating something or not, you should hold the meeting as soon as reasonably possible, after the incident occurs. This means that your investigation should be prompt.

There is no precise time that is too long or too short. The rule of thumb is, if you have a good explanation for the length of time it took to hold the Loudermill, you have been reasonably prompt. (If the reason it took several weeks is because you were on vacation, or worse, you were here but just let it sit on your desk, you probably do not have a good explanation.)

3. Announcing the Meeting

The rule of thumb used to be that you should give as little advance notice to the employee of the Loudermill meeting as possible under the circumstances. The ideal situation was, "Hey Employee, come into my office so we can talk for a minute." In other words, no advanced notice at all. In some circumstances, that might still be okay, but...

On this point, we are watching a possible emerging trend for some prior notice, however. See e.g. <u>Moffitt v. Tunkhannock Area School Dist.</u>, (M.D. Pa. 2013). We will keep you posted, but some courts may want to see some reasonable advance notice of the issues involved. Remember though, the employee has a right to a union representative if he asks for it. Remember too, that this meeting should not occur before you have your ducks in a row.

<u>4. Dealing with the Employee who will not</u> <u>Attend</u>

Loudermill is a protection for the employee. The employee has a right not respond, (i.e. "I ain't saying nothin'!"), but this is not the same as refusing to attend.

The Employer should not let its process be thwarted by an employee who simply will not show up for the Loudermilll meeting, even if it is for medical reasons in most circumstances.

If the employee has a reasonable rescheduling request, accommodate it. If they ordinarily leave at 4:30 p.m. and it's 4:00 and you know they have to pick up their kid from school, pick another time.

If the employee is unavailable for work due to an injury or illness for which they will not return in the near future (within a week), consider meeting the Loudermill requirement through the mail.

If the employee simply refuses to come, do the Loudermill through the mail anyway, but include insubordination for failure to attend the meeting as one of the potential reasons for discipline.

5. Loudermill by Mail.

Draft a letter to the employee stating no more and no less than what you would have said in a face to face meeting.

Explain why you are writing the letter (i.e. you refused to attend the meeting).

State in the letter that the employee may confer with his union representative if he so chooses.

Inform the employee if he wishes to respond or provide information he wishes to have considered before a disciplinary decision is made, he should respond to your letter, in writing, within 2 weeks.

Inform the employee that if you have not heard from him in that time, you will assume he has chosen not to respond, and a decision will be made without the benefit of his input.

<u>6. Employee wants Unavailable Union</u> <u>Representative.</u>

This can happen because the employee does not get along with the representative who is available, because you are short staffed, because the Union thinks that only their business agent can attend Loudermill meetings, or because the employee is seeking to play games and prolong things.

A rule of reasonableness must be applied. If the employee wants to wait a few hours or even a day or so until another representative is available this might be worth accommodating.

If the employee wants you to wait a week for the Union attorney, that is usually not reasonable.

7. Employee Wants Lawyer.

The employee should never be permitted to bring his personal lawyer to a Loudermill meeting.

Never.

The union's lawyer can act as the union representative but:

He cannot "act like a lawyer," which means the rules applicable to any union representative also apply to him (see Disruptive Union Representatives).

The rule of reasonableness as to scheduling still applies.

8. Disruptive Union Representatives

A Loudermill meeting is the employee's opportunity to respond to the information conveyed by the employer. It is not an argument.

If a Union representative is disruptive, he should be asked to wait until the employer has given its information, and told that the employee will have an opportunity to respond in any way he chooses once that is finished. The Union representative is permitted to speak and cannot be relegated to a passive observer, but he cannot be disruptive.

If this does not work, indicate that the meeting will be ended if it does not change. Explain directly to the employee that their right to the meeting can be forfeited if the union representative continues to frustrate its purpose. If even that does not work, end the meeting, document the incident, and consider doing the Loudermill through the mail, or give them the right to submit something in writing.

9. The Record of the Meeting

The only record of a Loudermill meeting should be the notes taken by one of the managers who attends.

The Loudermill should (almost) never be audio or video recorded.

The note taker should take care to document statements of the employee.

The note taker should take care to document statements of the employer.

One manager should attend the meeting with the sole purpose of taking good notes.

These notes should be taken at least as good as ordinary meeting minutes, if not better.

At a minimum, this person should document the employer providing the required notice of the incident and the employees choice to have or not to have a union representative, etc.

The employer has a few statutory obligations; boxes to "check" in the meeting. Those moments should appear in the notes:

- "Bob explains that cash was missing from the register this morning."
- "Bob explains that we have reason to believe that Jim took the money."
- "Bob explains that this would result in discipline if it is correct."
- "Bob asks if Jim has anything he wants to say before the decision is made."

Special attention should also be paid to the statements of the Employee

Does the employee admit the infraction? Deny it?

Is he angry, argumentative, disrespectful, does he use profanity?

Does he make allegations against you or other employees?

Does he apologize?

Does he state important details in a particular way?

10. A note of Caution about Notes

Our good friends at the Pennsylvania Labor Relations Board think you should share your notes with the Union.

In, <u>Professional Association of Paramedics</u> <u>v. Penn Hills Municipality</u>, 43 PPER 49 (Hearing Ex. Marino, 2011), the Hearing Examiner ruled that notes made by two of the employer's representatives during the meeting were subject to discovery under Rule 4000.03 of the Rules of Civil Procedure because they were investigation summaries and conclusions prepared by the employer in preparation for litigation.

Use this rule to your advantage. The unions know about it and have begun requesting investigation and Loudermill notes from the employer. Don't shy away: Make sure your notes are reflect the information you need.

