

Scenario 2 - Decision

The following is excerpted from an arbitrator's recent decision in a case with a similar fact pattern.

Proper Cause

Most CBA's require cause or just cause for discipline and discharge. Arbitrators typically do not distinguish between the terms "just cause" or "proper cause" or "cause." Over the years, arbitrators have developed a sort of common law definition of just cause or proper cause. An assessment of what constitutes just cause was embodied in *Grief Brothers*, 42 LA 555 (1964), and is used as a guide by many arbitrators, including the undersigned, in cases involving discipline and discharge for cause.

This analysis consists of a set of guidelines or criteria that are to be applied to the facts of a case. These criteria have been set forth in the form of questions. A "no" answer to any one or more of the questions normally signifies that just or proper cause did not exist. In other words, "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable and/or discriminatory action to such an extent that the decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

In the instant case, one of these questions is relevant in the resolution of the issues presented - i.e., *Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate a rule or order of management?* This is the employee's "day in court" principle. It is generally accepted in arbitral law that an employee has the right to know with reasonable precision the offense with which he is being charged, and to defend his behavior.

The employer's decision must normally be made before disciplinary action is taken. If the employer fails to conduct this investigation, its failure to do so may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of the discipline.

There may be circumstances under which management must react immediately to an employee's behavior. In such cases, arbitrators typically conclude that the proper action is to suspend the employee pending the investigation, with the understanding that the final disciplinary decision will be made after the investigation.

(In Scenario 2, the District did not conduct its own investigation, relying instead on the investigation of the Sheriff's Office.)

In other words, it is concluded here that the employee was not given a reasonable opportunity to defend himself. Consequently, it is concluded that this question is answered in the negative. The undersigned does not intend that a slavish adherence

be given to this test, but the answer to the question in the negative raises a presumption that the decision was arbitrary or capricious and constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

Due Process

It is well settled in arbitral law that discharge and disciplinary action by management may be reversed when the action is found to violate basic notions of fairness and due process. According to *Elkouri and Elkouri, Sixth Edition* (hereinafter referred to as "*E & E*"),

Borrowing from the constitutional imperative of due process, arbitrators have fashioned an "industrial due process doctrine." To satisfy industrial due process, an employee must be given an adequate opportunity to present his or her side of the case before being discharged by the employer. If the employee has not been given such an opportunity, arbitrators will often refuse to sustain the discharge or discipline assessed against the employee. The primary reason arbitrators have included certain basic due process rights within the concept of just cause is to help the parties prevent the imposition of discipline where there is little or no evidence on which to base a just cause discharge. Thus, consideration of industrial due process as a component of just cause is an integral part of the just cause analysis for many arbitrators.

(*E & E at 967*). The undersigned is one of the arbitrators who accept that industrial due process is a component of just cause and is an integral part of the just cause analysis.

Again according to *E & E*, industrial due process requires management to conduct a reasonable inquiry or investigation before assessing punishment.

Procedural fairness requires an employer to conduct a full and fair investigation of the circumstances surrounding an employee's conduct and to provide an opportunity for him to offer denials, explanations, or justifications that are relevant before the employer makes its final decision, before its position becomes polarized.

(*E & E at 969*).

The employer argues that proper cause existed to terminate Grievant. The employer relied solely on the investigation by the County Sheriffs Office and determined not to do its own investigation. The employer observes that it is common practice to rely on sworn law enforcement investigations.

Regardless of whether it is “common practice” to rely on sworn law enforcement investigations, arbitral law is well established that an investigation by the employer is warranted when an employee’s termination for misconduct is at issue.

If the employer had conducted its own investigation, it would have given the employee an opportunity to explain and clarify that his conduct. At the conclusion of such an investigation, the employer would have been in the position of determining whether proper cause existed to justify the employee’s termination. It is also conceivable that the employer would have found employee’s response to the allegations was credible and returned him to work. At the very least, the employee’s testimony could have raised questions about the allegations made in the probable cause affidavit, and whether there existed a preponderance of evidence to support the decision to terminate his employment.

It would be conjecture on the part of the undersigned as to whether or not such investigation by the employer would have resulted in a conclusion that the preponderance of the evidence would have supported a finding that proper cause existed to justify termination. Conjecture in this regard is not the province of this arbitration.

Nevertheless, the fact remains that there was no investigation beyond that done by the Sheriff’s office and there was never any contact with the employee asking him for his version of the events. Furthermore, the record is clear that the employee was not given an opportunity by the employer to deny the allegations or offer an explanation of his conduct before the employer decided to terminate him. Thus it is concluded that employee was denied basic due process rights.

Off Duty Conduct - Conduct Unbecoming

In the case of discipline of an employee for off duty conduct such as in the instant case, the connection between the off duty misconduct and the injurious effect on the business must be reasonable and discernable and not merely speculative. (*E & E, at 939*). There is insufficient evidence on this record to establish that employee’s arrest, by itself, justified a decision that he was guilty of conduct unbecoming an employee of the employer. There was no testimony or evidence of record to indicate that the District suffered adverse publicity as the result of the arrest of the employee.

It was the opinion of the employer that the arrest for a crime affected public confidence and served to diminish the employee’s effectiveness in the performance of his job. There was no evidence offered to support the conclusion that public confidence was or would be diminished, or that employee’s effectiveness would be affected.

DECISION

For the reasons stated above, it is determined that Grievant was denied basic due process rights in the employer's decision to terminate his employment. Such a denial of these basic rights resulted in a decision that was arbitrary and capricious and warrants the substitution of the arbitrator's judgment for that of the employer.

An examination of the evidence of record does not establish by a preponderance of the evidence that Grievant's conduct justified a decision to terminate him.

THEREFORE, it is determined that the employer's termination of Grievant was without proper cause. The Grievance is sustained.

Further observations:

- Basic due process requires that the employee be given the opportunity to be heard concerning the charges against him.
- What is the downside of suspending an employee, with or without pay, pending the outcome of an investigation into the alleged misconduct?
- If the employer had conducted its own investigation and concluded there was just cause for the decision to terminate the employee, absent a determination that the employer's conduct in the decision-making process was arbitrary or capricious, the arbitrator could not/should not substitute his judgment for that of the employer, even if he disagrees with the conclusion. "Basic due process" was provided.
- Regarding off duty conduct, the connection between the off duty misconduct and the injurious effect on the business must be reasonable and discernable and not merely speculative. In the case that was the subject of the decision above, the employer offered no evidence of the injurious effect on the employer's business or the diminished effectiveness of the employee, other than the unsupported opinion of one of the members of senior management. The termination occurred less than 24 hours after the arrest, and there was no way the employer could have established that the employee's effectiveness would be diminished.
- In Scenario 2, at least some of the adverse publicity was due to the superintendent's comments to the media. Arbitrators are reluctant to allow the employer to create adverse publicity about off duty conduct and then terminate the employee because of injurious effect of the adverse publicity on the business. ***What type of evidence should be introduced to support the District's position in this regard? How would the grievant respond?***