

Standards which May Be Utilized by an Arbitrator in Disciplinary Cases

By Katherine Sciacitano, Courtesy of the George Meany Center for Labor Studies

The issue before the arbitrator frequently requires findings in respect to the existence or non-existence of “just cause” for discipline, including discharge. Few union-management agreements contain a definition of “just cause.” Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of “common law” definition. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A “no” answer to any one or more of the following questions normally- signifies that just and proper cause did not exist. In other words, such “no” means that the employer’s disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his/her judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing. Frequently, of course, the facts are such that the guidelines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more “no” answers so weak and the other “yes” answers so strong that he/she may properly, without any “political” or spineless intent to “split the difference” between the opposing positions of the parties, find that the correct decision is to “chastise” both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company— e.g., by reinstating a discharged employee without back pay.

The Questions

1. Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?

- a. Such a forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.
- b. There must have been actual oral or written communication of the rules and penalties to the employee.
- c. A finding of such communication does not in all cases require a “no” answer to Question No. 1. This is because certain offenses such as insubordination, coming to work under the influence of alcohol or drugs, drinking intoxicating beverages or taking drugs on the job, or theft of the property of the agency or fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

- d. Absent any contractual prohibition or restriction, the company has the right unilaterally to establish reasonable rules and give reasonable orders; and this need not have been negotiated with the union.

2. Was the employer's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the agency's business?

If an employee believes that said rule or order is unreasonable, he/she must nevertheless obey same (in which case he/she may file a grievance thereover) unless he/she sincerely feels that to obey the rule or order would seriously and immediately jeopardize his/her personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his/her disobedience.

3. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

- a. This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he/she is being charged and to defend his/her behavior.
- b. The employer's investigation must normally be made *before* its disciplinary decision is made. If the employer fails to do so, its failure may not normally be excused on the ground that the employee will get his/her "day in court" through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.
- c. There may, of course, be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation he/she will be restored to his/her job with full pay for lost time.

4. Was the employer's investigation conducted fairly and objectively?

- a. At said investigation the management official may be both "prosecutor" and "judge," but may not also be a witness against the employee.
- b. It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his/her attitude and conduct.
- c. In some disputes between an employee and a management person there are no witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?

- a. It is not required that the evidence be preponderant, conclusive, or “beyond reasonable doubt.” But the evidence must be truly substantial and not flimsy.
- b. The management judge should actively search out witnesses and evidence, not just passively take what participants or “volunteer witnesses tell him/her.

6. Has the employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

- a. A “no” answer to this question requires a finding of discrimination and warrants negating or modifying the discipline imposed.
- b. If the employer has been lax in enforcing its rules and order and decides henceforth to apply them rigorously, the employer may avoid a find of discrimination by telling all employees *beforehand* of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the employer in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his/her service with the employer?

- a. A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offense a number of times in the past. (There is no rule as to what number of previous offenses constitutes a “good,” “fair,” or “bad” record. Reasonable judgment must be used.)
- b. An employee’s record of previous offenses may never be used to discover whether he/she was guilty of the immediate or latest one. The only proper use of an employee’s past record is to help determine the severity of discipline once he/she has properly been found guilty of the immediate offense.
- c. Given the same proven offense for two or more employees, their respective records provide the only proper basis for discriminating among them in the administration of discipline for said offense. Thus, if employee A’s record is significantly better than those of employees B, C and D, the company may properly give A a lighter punishment that it gives the others for the same offense; and this does not constitute true discrimination.