

WHY ARBITRATORS OVERTURN MANAGERS IN EMPLOYEE SUSPENSION AND DISCHARGE CASES

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ABSTRACT

This study used a sample of 242 public sector arbitration cases to determine the reasons arbitrators gave for reversing managerial action in employee suspension and discharge cases. Results show that five factors: a lack of evidence, mitigating circumstances, procedural errors in case handling, overly harsh punishment for rule infraction, and management partly at fault are the primary causes for overturning employee discipline. The article contains important lessons for improving the handling of employee suspension and discharge matters. A literature review is provided that details various aspects of arbitrator decision making.

Since 1960, the tremendous growth of public sector unionization has been accompanied by the expanded use of arbitration to resolve employee grievances. A sample of arbitration cases reported by the American Arbitration Association (AAA) showed that between June 1991 and September 1992, 2,862 rights arbitration cases were reported by AAA-appointed arbitrators. Approximately one-half (49%) of these cases originated from the public sector. The AAA further reported that issues dealing with employee discipline and discharge constitute almost 30 percent of all public sector rights arbitration [1].

With the growth of arbitration in the public sector have come studies exploring different facets of the topic. In fact, the body of literature on public sector arbitration is now rather extensive. For example, the spectrum of studies ranges from those dealing with the structure and administration of grievance arbitration procedures [2] to those discussing the consistency of arbitrator decision making [3]. This study seeks to add to the arbitration literature by codifying and discussing the main reasons labor arbitrators overturn public sector managers in employee

discipline and discharge matters. The study contributes to public sector grievance literature in several ways.

First, since little has been written on why arbitrators deny management's position in discipline and discharge cases, the empirical findings of the article should be of interest in themselves. Second, this research objectivity quantifies the reasons cited by arbitrators when they feel compelled to reverse the discipline action of management. Third, explicit knowledge of why arbitrators overturn management in discipline and discharge cases should help employers more equitably handle employee misconduct issues. And fourth, through both the knowledge and application of arbitral criteria in discipline and discharge cases, the number of grievances going to arbitration should lessen. If both sides are able to better understand how arbitrators decide discipline cases, this should tend to resolve more cases at the lower steps of the grievance process. Those cases judged to favor the grievant are more likely to be resolved, while those judged to favor management are more likely to be dropped.

LITERATURE REVIEW

Despite the centrality of grievance arbitration in labor relations, a literature review of arbitral decision making shows the research to be largely disjointed and without a central focus [4]. Nevertheless, by classifying studies into topical areas several trends emerge.

First, a number of studies, including the research reported here, deal with how arbitrators handle specific employee offenses or misconduct. Research discussing arbitral review of sexual harassment or drug/alcohol abuse is of this nature. Articles here will discuss specific issues that arbitrators must resolve when deciding these cases. For example, in sexual harassment arbitration the issue of burden of proof or the degree of harassment has proven to be a particularly troublesome problem for arbitral resolve [5-8]. In drug cases, what exactly constitutes drug possession often proves perplexing [9]. Should the vehicles of employees located in state parking lots be "fair game" for drug searches? Also, is there a reasonable connection or nexus between the place and time of the alleged drug possession and the interests of the employer?

This article was influenced, in part, by a paper done in 1968 on why arbitrators in the private sector reinstated discharged employees [10]. Stone, using a sample of 391 arbitration cases, categorized nineteen different reasons given by arbitrators for overturning managements' disciplinary action. Interestingly, three reasons—mitigating circumstances, insufficient evidence to support the charge of wrongdoing, and poor application of organizational rules—accounted for almost half (43%) of total reversal cases.

A second line of grievance/arbitration research focuses on arbitrator characteristics and how these affect arbitration outcomes. Behmels found in a study investigating arbitrators' decisions in 557 suspension cases, that the grievant's

gender may be a significant determinant of the arbitrator's decisions. That is, male arbitrators were more likely to sustain the grievances of women than men, but female arbitrators showed no difference in treatment between male and female grievants [11]. However, in a study published in 1985, Rogers and Helburn found more favorable treatment of men grievants [12]. Other studies have found no significant difference in arbitrator gender in employee misconduct cases, leaving the empirical evidence in this line of inquiry unclear [13-14].

Unlike the judicial system, where litigants have little control over the selection of judges, in arbitration the parties have wide latitude in selecting their adjudicator. Not surprisingly, research has explored the impartiality, consistency, and predictability of arbitrator awards. Kershen, studying arbitrator decisions involving public school teachers, questioned the perception that labor arbitrators consistently base their conclusions on the merits of the case rather than factors not central to the issue [3, p. 223]. He found a substantial percentage of awards favored one side or the other and concluded by questioning the impartiality of arbitrators. Based on the decisions of seventy-four arbitrators, each presented with an identical abbreviated scenario of discharge cases, Nelson and Curry found an overall lack of consistency across arbitration awards [15]. In this research, the decisions of the arbitrators were almost evenly split—45 percent sustained the grievance, 55 percent denied the grievance. Likewise, Thornton and Zirkel found considerable inconsistency among arbitrator decisions regarding just-cause and contract interpretation cases [16].

A final line of inquiry focuses on the criteria used by labor arbitrators to resolve specific types of cases. For example, Hill and Dawson studied the criteria used by arbitrators in cases involving discharge or suspension specifically for off-duty misconduct [17]. They found the off-duty misconduct more likely to be upheld where management could connect off-duty behavior to an actual business loss. The issue of "burden of proof" was studied in research conducted by Rahnama-Moghadam, Dilts, and Karim [18]. These authors concluded that the burden of proof is more easily discharged in cases involving objective evidence (i.e., absentee records), than in cases more subjective in nature (i.e., credibility of witnesses in insubordination cases).

METHODOLOGY

The sample for this study consisted of 242 public sector discharge and suspension cases published between April 15, 1981 and January 15, 1993 in *Labor Arbitration in Government* [19]. Textual analysis of the cases was drawn from the condensed version of the full award, which contained as a minimum: 1) explanation of the incident, 2) the initial employee punishment by management, 3) the arbitration award, and 4) the arbitrator's opinion for reversing management's punishment of the employee.

Because the AAA does not publish all arbitration awards it receives, it was not possible to report with exact accuracy other descriptive characteristics of these cases. As a general guide, however, the large majority of surveyed cases involved employee misconduct classified as sexual harassment, insubordination, drug-related concerns, absenteeism/tardiness, and conduct unbecoming the public servant—largely police and fire cases. Most incidents came from education, although police, firefighters, and health care employers were well represented. The arbitration cases reviewed were not limited to one group or one sector of government employment.

STUDY FINDINGS

Table 1 categorizes the reasons arbitrators gave for reversing the suspension and discharge actions of management. Table 1 shows the number of cases for each reversal category and provides an example to illustrate the reason for overturning employee misconduct. Five reasons accounted for over 70 percent (71.5) of all reversal cases.

Number One: Lack of Supporting Evidence

The most frequent reason given by arbitrators for reinstating discharged employees, or for reducing disciplinary suspensions, was that the employer's evidence did not support the charge of employee wrongdoing. This category covered eighty cases or 26 percent of the total.¹

Where managers failed to support the charge of employee misconduct, arbitrators normally concluded that the employer had not sustained its burden of proof for the disciplinary action taken. Unfortunately, it is very difficult to generalize on the application of the doctrine of burden of proof in arbitration matters [20]. Burden of proof is a rather nebulous and multifaceted concept that may depend on the type of case under review, specific contract wording, or common usage developed between the parties. Furthermore, since the strict observance of legal rules of evidence is usually not required in arbitration, arbitrators are granted considerable freedom in establishing the required quantum of proof in a given discipline case.

Regardless, since employers bear the burden of proof in discipline matters, they must support their contentions with some amount or *quantum* of proof. In suspension and discharge cases the amount of proof required by arbitrators is of three

¹ Analysis of the arbitration awards showed that arbitrators may give more than one reason for reversing the disciplinary action of management. When multiple reasons were provided, each reason was recorded separately. Therefore, number of cases for reversing managerial action (306), shown in Table 1, exceeds the total number of arbitration awards reviewed (242). Absolute figures and percentages noted in the text are based on the number of cases given in Table 1.

types: a preponderance of the evidence (more persuaded than not), clear and convincing evidence (pretty certain), and proof beyond a reasonable doubt (completely convinced) [6, p. 667]. The amount of proof required increases with the seriousness of the employee offense.

Interestingly, in the cases reviewed here, arbitrators rarely named a specific quantum of proof for the incident at hand. Rather, arbitrators often took a more general approach when defining the employer's burden of proof. For example, the arbitrator might note that, "the evidence was not persuasive against the employee," or the evidence presented by management "fell far short of meeting the employer's burden of proof," or there was simply not "just cause for the employer's disciplinary action." From this study it appears that the presentation and elaboration of the evidence is as important, if not more so, than a stated quantum of evidence in sustaining an employer charge. Several examples are illustrative.

The discharge of a city laborer for reporting to work under the influence of alcohol was not upheld where the evidence and testimony did not support the city's conclusion that the grievant had been drinking before reporting to work. The grievant's physical appearance and behavior were central to the city's observations and testimony. The grievant's clothes were disheveled, his eyes were bloodshot, he was unshaven, and he seemed nervous. Despite these facts, no witness testified that an odor of alcohol was detected, his walk was observed to be steady, and no charge was made by supervision that the grievant was unable to perform his job duties. Accordingly, the grievant was reinstated with payment for all lost wages and benefits.

In another case, the one-day suspension given to a transit authority patrolman for sleeping on the job was "not for just cause." The evidence failed to convince the arbitrator that the grievant had been asleep. This case presented the classic but difficult problem of credibility that arises when the only eyewitnesses to an event are the employee and his/her supervisor. After rescinding the suspension, the arbitrator explained that while the supervisor's testimony was credible, simply because the grievant had his eyes shut required speculation that the employee was actually asleep. The arbitrator stated that "speculation" was insufficient in itself to sustain the employer's position.

In a case where the arbitrator did cite a specified quantum of proof, the thirty-day suspension of a bus driver for being involved in a preventable accident was not for just cause where the employer failed to show "by a preponderance of the evidence" the negligence of the employee. The employer's investigation of the crash did not establish that the bus was being driven at an excessive rate of speed or "too fast for conditions." No perceptible damage was caused to the bumper of the hit car. While a rear-end accident does create a presumption of negligence, that presumption was rebutted by showing that the brakes on the bus were defective and interfered with bringing the vehicle to a safe stop. The grievant was made whole for lost wages and benefits.

Table 1. Arbitrator Reasons for Reversing the Disciplinary Actions of Management

Number of Cases ^a	Reasons for Overturning Discipline	Example of Incident ^b
80	Evidence did not support the charge of wrongdoing.	The grievant received a ten-day suspension for violation of the county's sexual harassment policy. The grievant was reimbursed for the pay since the county could not show that grievant's actions were overt, deliberate, unsolicited comments, or physical actions of a sexual nature.
55	The evidence supports the charge, but there were mitigating circumstances.	A police officer was discharged for off-duty criminal misconduct. The arbitrator reinstated the officer without back pay due to the grievant's eighteen years of exemplary service.
39	Management committed procedural errors prejudicing the grievant's rights.	The termination of a clerk for incompetence and excessive absenteeism was reversed where the grievant was never counseled or warned about his unsatisfactory job performance prior to discharge. The grievant was reinstated with a warning that additional misconduct could lead to discharge.
23	The rule was fair, but punishment for its infraction was harsh.	The grievant exceeded the twenty-hour per week secondary employment rule. The thirty-day suspension was held to be excessive, harsh and unreasonable and was reduced to a three-day suspension.
22	Management was partly at fault in the incident.	Discharge of a laborer who admitted to the possession of beer and marijuana cigarettes while on duty was converted to a disciplinary suspension where the grievant's foreman acquiesced in the misconduct.
17	The rule itself was reasonable, but its application in this case was not.	A firefighter was discharged for the off-duty purchase and possession of cocaine. The arbitrator made the grievant whole since the off-duty misconduct did not adversely affect the city's legitimate business interest.

- 15 Lack of rule governing incident or insufficient publicity about rule.
A two-day suspension was given to a union shop steward for copying agency documents. The penalty was reduced to an oral warning where there was no evidence that the agency had ever clearly communicated its policy against removal of official documents.
- 10 Inconsistent enforcement of rules.
Firefighters wore their uniforms while off-duty and campaigning against a ballot proposition. The arbitrator found that blanket permission had been given to wear uniforms in connection with field days, civic affairs, weddings, and public relations affairs. The suspensions were revoked and the grievants made whole for loss of pay.
- 9 The grievant did not know s/he was risking a penalty by his/her action.
A suspension given for allegedly violating a work rule was overturned and the employee made whole. Evidence showed the grievant's conduct was commonly engaged in by other employees and no prior notice had been given that the conduct would be considered a violation of work rules.
- 7 General standards of judicial process were violated.
The grievant was first suspended for forty days. One year after the incident took place the discipline was increased to eighty days to set an example for others. This was held to be "double jeopardy" and the grievant was made whole for the additional suspension.
- 7 The grievant was largely guilty, but entitled to another chance because of special circumstances.
A hospital employee was found guilty of breaking into the pharmacy and theft. Although discharge was appropriate, the grievant's addiction was considered, and he was offered rehabilitation before imposing termination in the case of a first offense. The grievant is to be discharged at the end of nine months if he is not medically certified to return to work.
- 6 The penalty was excessive in terms of the organization's discipline policy/or infraction.
A correctional officer engaged in sexual harassment. Discharge was considered too severe inasmuch as the comments were not coercive or threatening and the county did not have a sexual harassment policy. The discharge was changed to a ten-day suspension.

Table 1. (Cont'd.)

Number of Cases ^a	Reasons for Overturning Discipline	Example of Incident ^b
6	Grievant showed error in judgment.	A three-day suspension for service delays was revoked where the arbitrator believed the grievant had erred on the side of caution in reporting "slow breaks" that were later found in good working order.
4	Rule was ambiguous.	Two police officers were issued a three-day suspension for wrongly transporting an intoxicated civilian to the station house rather than to a local hospital. The suspensions were overturned where the city was unable to clearly define the term "semiconscious" and there was no willful misconduct by the grievants.
4	Grievant did not act with intent to cause harm.	A two-week suspension was reduced to two days where the grievant used poor judgment in altering a liability waiver form. Grievant's actions were held as spontaneous, without malice, and without intentional harm or discredit to the department.
1	Union official was disciplined for actions in connection with union business.	A nurse's aide who had been terminated was ordered reinstated because at least one item considered in her performance evaluation was linked to her involvement in processing employee grievances. The grievant was made whole.
1	Organization showed personal bias against grievant.	Discharge was reduced to a six-month suspension in the case of a female corrections officer who was not afforded the same level of unbiased supervision as that afforded male officers. Evidence was found that the shift sergeant was "not free" of bias toward female officers.

^aThe number of reasons given for overturning discipline (306) exceeds the number of individual cases (242) since some arbitrators provided multiple reasons for their rulings.

^bIncident is representative of the classification.

Source: Cases reported in American Arbitration Association's *Labor Arbitration in Government*, April 15, 1981 through January 15, 1993 [19].

Number Two: Mitigating Circumstances

The next most frequent reason arbitrators gave for not upholding disciplinary action was that the employee, although guilty of the misconduct, deserved a lesser penalty than the one originally imposed by management. Reduction of the disciplinary penalty because of mitigating circumstances occurred in fifty-five cases, or about 18 percent of total cases.

Arbitrators generally give considerable weight to the past work record of suspended or discharged employees when judging the fairness of the penalty imposed. In fact, the past work record of the employee frequently becomes the *major* mitigating factor in determining the proper penalty for employee misconduct. This is particularly true where the employee's service is unblemished.

The automatic termination of a nursing attendant for the willful violation of a work rule pertaining to the movement of a critically ill patient was judged too severe a penalty "given the grievant's twelve years of unblemished service." Because of the seriousness of her offense, however, the grievant was given a thirty-day suspension in addition to the time missed as a result of her discharge. Following her suspension, the grievant was reinstated to her former position without loss of seniority but absent back pay.

In a case involving violence, the discharge of an employee for stabbing a fellow employee was not sustained in view of the employee's "clear fifteen-year service record," a petition from "scores" of coemployees attesting to the grievant's good character, and the possibility that the grievant required professional help for an emotional problem. The arbitrator further noted that the injured employee was not entirely without fault. However, because the victim was completely exonerated from the incident, "the disparity between the absence of any disciplinary action with respect to the victim is so unreasonable as to warrant reconsideration and reduction of the penalty imposed on the grievant." The grievant was reinstated with full seniority but without back pay, contingent on the approval of an employer-designated psychiatrist. In an off-duty case, a police officer with "eighteen years of exemplary service" discharged for off-duty criminal conduct (leaving a store without paying for the merchandise), was reinstated with full seniority but loss of pay where he suffered from mental stress and depression at the time of the misconduct.

Other factors beside the long and admirable service record of the employee can serve to mitigate employer-imposed penalties. The one-day suspension given to a police officer was reduced to a written reprimand where the grievant immediately admitted his error and offered to apologize for his actions. The thirty-day suspension of a union representative for using a government car to conduct union business was reduced to ten days where the union official's conduct was "not willful," and he "sincerely believed" that his supervisor had given permission to use the vehicle. The discharge of a janitor-groundkeeper was reduced to a thirty-day suspension where the grievant violated a well-known policy by leaving

the job site without authorization. The grievant left work abruptly upon learning that his critically ill mother required immediate hospitalization. Prior to leaving, he informed a coworker of his departure and reported to the maintenance office but found the door locked.

Number Three: Procedural Due Process Errors

Arbitrators will normally reverse employer-imposed discharges and suspensions where management's conduct violates basic notions of fairness or employee due-process procedures. In thirty-nine cases—almost 13 percent of total cases—management committed procedural faults serious enough to prejudice the rights of the grievant to a fair defense. Table 2 describes the typical procedural errors committed by employers. Three errors, failure to follow progressive discipline procedures, a delay in imposing the disciplinary penalty, and failure to provide the grievant with union representation, were the most common procedural problems noted by arbitrators. The following cases illustrate these points.

The failure of an employer to follow progressive discipline played a key role in overturning the discharge of a grievant for substandard work performance. The arbitrator noted that the employer neglected to *forewarn* the employee that subsequent misconduct could bring about a greater disciplinary penalty, including discharge. The supervisor gave the employee only a “mere verbal warning” and one counseling session prior to the discharge for use of a city vehicle for personal business. The discharge was reduced to a ten-day suspension. In another progressive discipline case, the discharge of an accident-prone employee for excessive absenteeism was reduced to a suspension, where the supervisor terminated the employee for his failure to regularly perform his job without injury to himself. Although the town acted, “sincerely in believing that it was protecting the employee's and town's interests,” nevertheless, the employee's procedural rights were abridged by not following the progressive discipline steps of the labor

Table 2. Due-Process and Procedural Errors Committed by Employers

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- Failure to follow established progressive discipline procedures
 - Employee was denied opportunity to tell his/her side of the story
 - Lack of probable cause to discipline the employee
 - Union representation rights denied
 - Grievant not afforded the opportunity to confront accuser
 - Delays in imposing disciplinary penalties
 - Grievant not provided a formal charge of wrongdoing
 - Lack of counsel or warning of the misconduct or seriousness of offense
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agreement. Additionally, the grievant was never afforded the opportunity to respond to the charges against him, a denial of the due process rights.

In the leading Supreme Court case *NLRB v. Weingarten, Inc.*, the Court upheld an employee's right to union representation during an investigatory interview [21]. The Court reasoned that the presence of a union representative would serve the beneficial purpose of balancing power between labor and management. The union representative could aid an employee who might otherwise be too fearful or inarticulate to relate accurately the incident under investigation. In the *Weingarten* case, the Court decided that since the employee had reason to believe that the investigatory interview might result in action jeopardizing her job security, she had the right to union counsel.

Arbitrators will modify disciplinary penalties where employees are denied their *Weingarten* rights. For example, the discharge of a licensed practical nurse for leaving work early was reduced to a ten-day suspension where the grievant had not been told of her right to union representation prior to discharge. The discharge of a city bus driver for failure to follow a direct order was overturned, and he was made whole, based on a *Weingarten* procedural technicality. The grievant was not allowed to telephone his union representative for advice regarding a hospital release form. The arbitrator wrote, "an employee's right to representation even by telephone is well-established in the *Weingarten* rule and in the practice between the parties."

In an interesting case, the *Weingarten* rights of three employees were denied where management told the employees they would not be disciplined for statements made during an investigatory interview. In fact, the grievants were informed the investigation "was not anything they could get fired over." Here the county was seeking assistance from the grievants in securing evidence against their supervisor. The supervisor repeatedly coerced employees, including the grievants, into doing personal jobs on his home during working hours. During the interviews the grievants admitted participating in the misconduct and were subsequently suspended. In overturning the discipline the arbitrator wrote that the four-day suspensions arose because of the "self-incrimination" statements of the grievants. These statements should have allowed the grievants counsel with their union representative.

Three cases illustrate how employers commit procedural errors by delaying the processing of employee discipline. A city violated its labor agreement where it formally charged a police officer with conduct unbecoming an officer more than ninety days after it had received the report from its internal affairs department. The city's argument that the delay was in "good faith to the officer" and "simply a harmless error" was not persuasive to the arbitrator. Similarly, a township lacked just cause to terminate a firefighter who failed to list a former employer on his application form. Since the employer did not take disciplinary action within thirty days of learning of the grievant's omission, the grievant was made whole for the discipline.

In an intriguing case, the termination of a probationary police officer was held inappropriate where the discharge was untimely. Here the termination notice was written on the day before the end of the twelve-month probationary period. Unfortunately, the notice was not delivered to the employee until five hours after the conclusion of the probationary period.

Number Four: Harsh Punishment for Rule Infraction

It is axiomatic in applying disciplinary punishment that the degree of penalty assessed the employee should be appropriate to the seriousness of the offense charged. Sometimes labor agreements will give arbitrators the express authority to modify penalties found to be improper or too severe [20, p. 667]. In the absence of stated or implied contractual authority, the right of an arbitrator to reduce a harsh penalty is deemed to be inherent in the arbitrator's power to formulate a fair conclusion to the dispute. In twenty-three cases—about 8 percent of total cases—the arbitrator found the employee guilty of the offense charged but reduced the punishment as being too severe.

One arbitrator ruled as “patently excessive” the thirty-day suspensions and demotions of two supervisory firefighters for sexual harassment of a female firefighter under their supervision. The evidence showed that the males had made deliberate crude and vulgar remarks of a sexual nature to the female. The arbitrator noted, however, that the remarks, while “foolish, crude, and inappropriate,” did not warrant such a harsh punishment. The lengthy suspensions were reduced to three days, and the grievants were restored to their supervisory positions and made whole for lost pay and benefits.

In another sexual misconduct case, a corrections officer was terminated for making inappropriate sexual comments to a female dispatcher. The arbitrator called the discharge “too severe” where the harassing comments were not coercive or threatening. Furthermore, at the time of the incident the county lacked a sexual harassment policy. The discharge was changed to a ten-day suspension and the grievant received back pay.

Number Five: Management Partly at Fault in the Incident

In twenty-two cases, 7.2 percent of total cases, management contributed to the incident for which the grievant was disciplined. Where an employee has committed an offense, but management is somehow at fault in the employee's misconduct, arbitrators are likely to reduce or completely overturn the punishment assessed by the employer.

Arbitrators will judge management at fault in employee misconduct cases where the employer was lax in the uniform enforcement of organizational rules or where the rule was unknown to the employee. For example, where the employer had neglected to enforce time-clock rules, just cause was found lacking to assess a fifteen-day suspension on an employee who “punched out” the timecards of two

employees after they left work early. The arbitrator wrote, "Fundamental to the concept of just cause in discipline is the principle that employees be afforded an opportunity to conform their behavior to reasonable expectations of the employer." The evidence was not clear that the grievant knew the consequences of his action or that the misconduct was in violation of established work rules. There were many instances of employees not punching their own time cards or of cards removed for processing before the end of work shifts. Management's punishment of the employee was effectively nullified by the supervisor's "permission-by-silence." The grievant's record was expunged of the suspension, and he was paid for all lost wages and benefits. Similarly, the five-day suspension of a police officer was reversed where the employee was unaware of a rule forbidding the playing of personal radios on patrol. The arbitrator noted that an elementary principle of discipline is that an employee may not be penalized for violation of a rule or standard of conduct of which the employee is unaware. In this case there was no departmental rule governing the playing of personal radios while on duty.

Another line of cases further illustrates how employers can contribute to employee misconduct. The discharge of a filtration plant employee for physical violence was converted to a ninety-day suspension where the plant superintendent provoked the actions of the employee. The incident occurred over a request to the employee to remove a cat from the filtration office or "leave the premises." The grievant attempted to go home when the superintendent blocked his way. Punches were thrown by both parties. In overturning the discharge the arbitrator wrote, "the grievant had a right to resist physical assault by the superintendent, but the grievant also overreacted in defending himself since the superintendent was injured around the eye and cheek."

DISCIPLINE AND ORGANIZATIONAL RULES

It is noteworthy that following the five most common reasons for reversing employee discharges and suspensions, the next three categories all deal with some aspect of establishing or enforcing organizational rules. Taken together, these three categories accounted for forty-two cases, or approximately 14 percent of all cases reviewed.

Government agencies have the right to establish and enforce rules issued to ensure the safe and efficient operation of the organization. A conflict can arise, however, when the employer attempts to apply the rule to the off-duty conduct of the employee. Cases of this nature are not infrequent and present perplexing problems for managers. When arbitrators are presented cases of this type, they generally voice strong criticism of any discipline given employees that treads on their off-duty time. In one agency, for instance, the discharge of a police evidence technician following his criminal conviction for an off-duty auto accident was not

for just cause. The arbitrator held that the grievant's criminal conviction would not inhibit him from performing his normal job duties.

A firmly established principle of industrial justice is that employers cannot reasonably discipline employees in the absence of a clearly written policy or rule. Additionally, arbitrators are quick to reverse employee discipline where the employer has not widely communicated the rule to employees or employees are generally not knowledgeable of the rule's existence. In a hospital case, the arbitrator revoked the five-day suspension of a correction officer who allowed the escape of a prisoner. The hospital failed to show the existence of any written procedures for restraining prisoners transported to the hospital for treatment. In another case, a city lacked just cause to suspend a paramedic for her gainful employment while on medical leave. The record showed that the grievant had never been told that continuation of her teaching responsibilities was in violation of the city's work rules.

Finally, it is generally recognized that the enforcement of rules and the application of discipline must be handled in a consistent manner. Employees found guilty of violating rules must be treated essentially the same unless a reasonable basis exists for varying the degree of penalty assessed the employee. Such variation may exist where employees behave differently in the misconduct or some mitigating factor affects some employees but not others. An employer's one-day suspension of three employees for taking an unauthorized break was revoked where it was shown that, "the grievants were clearly treated differently, and more harshly, than others who had violated the rule in the past." The arbitrator noted that, "the imposition of the suspension on the employees was inconsistent and arbitrary under the circumstances."

CONCLUSIONS

The purpose of this article was to discuss the major reasons noted by labor arbitrators for overturning employer-imposed suspensions and discharges. Five reasons (219 cases) accounted for 72 percent of all reversal cases, while eight reasons (261 cases) accounted for 85 percent of total reversals. It can be concluded that only a small number of reasons accounted for the large percentage of overturned disciplinary cases. There are several implications of this study for public sector employers.

First, to shoulder the burden of proof in employee misconduct charges, employers need to improve their investigatory skills in disciplinary matters. At a minimum this should include the complete collection of facts, full and accurate documentation of employee misconduct, the comprehensive interviewing of witnesses, and the consideration of any mitigating circumstances when applying disciplinary punishment [22]. The collection of documentary evidence should proceed in a systematic way to give both the employee and the employer a full review of the alleged offense. Furthermore, burden of proof is easier to meet

if there is objective evidence rather than subjective opinions to support the employer's stance [18, p. 155].

Second, supervisory training would seem to be especially warranted in two areas, procedural requirements of grievance processing, and the application and enforcement of organizational rules and policies. This training should include familiarization with contract provisions dealing with the processing of employee grievances and the general standards of employee due-process procedures. The stringent filing and reply constraints contained in the contract's grievance/ arbitration procedure should be known and followed by all managers. Employers must honor the investigatory rights of employees and enforce organizational rules in ways that are not arbitrary, capricious, or discriminatory.

Third, since cases of alleged employee misconduct can result from managers' involvement in the incident, reason would suggest that managers act more prudently in the supervision of employees. To overlook employee misconduct, or at worst to condone its existence and then discipline for the offense, only invites later problems for employers. The prudent management of employees also includes the tempering of misconduct penalties when mitigating circumstances exist or when the punishment must fit the crime. Discipline of employees is for the correction of past misdeeds and not simply the harsh punishment of those offenses.

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