

**THE APPROPRIATE LEVEL OF DISCIPLINE UNDER THE “JUST CAUSE”
STANDARD: THE ROLE OF THE ARBITRATOR**

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INTRODUCTION

This article will consider the standard used by labor arbitrators in evaluating whether to uphold the penalty imposed by employers in discipline cases. Section I will review the definition of the “just cause” standard used by arbitrators in reviewing discipline cases. Section II will consider the role of labor arbitrators in reviewing the penalty imposed by employers. Finally, Section III will review data culled from two years of arbitration decisions and will discuss whether the outcomes of arbitration cases are consistent with the generally accepted standards articulated by arbitrators.

I. The “Just Cause” Standard

A significant percentage of collective bargaining agreements include a provision that requires an employer to have “just cause” to discipline an employee.¹ Without a “just cause” provision, the principle of “at will” employment would, absent statutory protections, allow an employer to discipline an employee with or without cause.² Just

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¹ See FRANK ELKOURI AND EDNA A. ELKOURI, *HOW ARBITRATION WORKS* 930-31 (6th ed. 2003).

² In *Contracts-The Employment at Will Doctrine: Can Ora! Assurances of Job Security Overcome the At-Will Doctrine?*, 23 WM. MITCHELL L. REV. 465, 471 n.33 (1997)(citing Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1410-13 (1967)), the author states:

In criticizing the at-will employment doctrine, Blades states that the at-will rule forces the nonunion, unprotected worker to “rely on the whim of his employer for preservation of his livelihood” and that at-will employment creates a climate of fear. The at-will employee becomes a “docile follower of his employer’s every wish.” In response to those problems, Blades argues for a “personal damage remedy” for employees who are abusively discharged.

An abusive discharge is a discharge motivated by an employee’s resistance to an employer’s inappropriate or intrusive demands. *See id.* If employees had the right to sue for abusive discharge, employers would be less likely to discharge an employee except for good cause.

See also Robert E. Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 670-671 (1981) in which Massachusetts Supreme Judicial Court stated:

The question, then, is whether we should allow recovery for breach of a contract of employment at will where an employee is discharged without cause by an employer who had no improper motive for discharging the employee, unless one regards the absence of good cause itself or the mistaken belief that there is good cause as conclusively demonstrative of bad faith. A forceful argument can be made that job security should be assured by a common law rule protecting a person in Gram’s position. Collective bargaining agreements and public employment statutes generally permit discharge only for good cause. But other employment

cause has become so universally recognized in collective bargaining agreements that arbitrators have implied a just cause standard unless the contract expressly provides for a different standard. One arbitrator stated:³

This case is somewhat unique inasmuch as the collective bargaining agreement does not provide the usual language stating that the Employer may discharge an employee only for just cause.

That fact gives rise to the first legal question raised here: Is the requirement of just cause for discharge implied in the collective bargaining agreement? Arbitrator opinion on whether a just cause standard should be inferred, unless the parties expressly provided a different standard, is divided. Some arbitrators have refused to imply a just cause provision in the parties' agreement. The better view is that expressed by Arbitrator Nicholas:⁴

[T]here is a plethora of cases in which arbitrators have implied a just cause provision in the absence of such a provision within the written language of the collective bargaining agreement. Such an implication arises from the opinion shared by arbitrators and courts alike that some showing of just cause for an employee's termination is part and parcel of the fabric of the collective bargaining process and is an inherent element of any collective bargaining agreement in which the parties have set their hands. Indeed, one of the major doctrines of the "Trilogy" is that the modern day Labor-Management

relationships, unless the employee is dealing knowledgeably from strength, generally do not provide that measure of job security. We could, of course, adopt a rule extending a common law right to an at-will employee to recover damages for breach of an imposed condition of his or her employment contract that he or she not be discharged except for good cause. It is also within the authority of the Legislature to enact such a rule. The Employment Security Law of the Commonwealth recognizes the right of a wrongfully discharged employee to receive limited payments for a period of time. G. L. c. 151A, §§ 22-37. Our adoption of a common law right of recovery for discharge without cause would tend to duplicate (or perhaps supersede or supplement) certain benefits available under the Employment Security Law. We decline at this time to adopt a general rule that the discharge of an at-will employee without cause is alone a violation of an employer's obligation of good faith and fair dealing. We are aware of no case that has gone this far.

³ *Marrakesh Mgmt. Corp. and Laborers' Int'l Union of N. Am., Local 1184*, 124 Lab Arb Rep (BNA) 1403, 1407 (2008) (Calhoun, Arb.).

⁴ *Binswanger Glass Co. and Glazier, Architectural Metal and Glass Workers, Local No 1778* 92 Lab Arb. Rep. (BNA) 1153, 1155 (1989) (Nicholas, Arb.).

contract encompassing an arbitration clause is to be viewed not simply as an orderly process for resolving employer- employee conflicts, but as a "quid pro quo." As such, the prevailing view is that to alter this implied requirement of just cause, the parties must in fact so specify in their written agreement.

I conclude, as did Arbitrator Nicholas above, that a just cause provision for discharge is implied in the parties' agreement. There is nothing in the agreement expressly providing that just cause is not to be the standard.

Similarly, another arbitrator stated, "[w]here there is no contractual definition, it is reasonably implied that the parties intended application of the generally accepted meaning that has evolved in labor-management jurisprudence; that the "just cause" standard is a broad and elastic concept, involving a balance of interests and notions of fundamental fairness."⁵

Despite its significance and widespread inclusion in collective bargaining agreements, there is no universally recognized definition or standard of application.⁶ However, as noted by Arbitrator Smith in 2002:⁷

Although there is no universally established test in determining whether just cause exists in any particular case, Arbitrator Carroll Daugherty, in the case of *Grief Bros. Copperage Corp.*, 42 Lab.

Arb. Rep. (BNA) 555, 557-559 (1964) (Daugherty, Arb.) developed a seven-factor test that has been widely accepted among arbitrators.

The Daugherty "just cause" test consists of the following questions:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?

⁵ *Lehigh Cement Co. and Local Lodge D106, Int'l Bhd. of Boilermakers, Cement, Lime, Gypsum and Allied Workers Div.*, 122 Lab. Arb. Rep. (BNA) 643, 646 (2006) (Gaba, Arb.).

⁶ *Worldwide Flight Services, Inc. and Transp. Workers Union of Am., AFL-CIO, Local 504*, 121 Lab. Arb. Rep. (BNA) 445,448 (2005) (Smith, Arb.).

⁷ *Martin County Bd. of County Comm'rs and Martin County Pub. Employees United*, 116 Lab. Arb. Rep. (BNA) 1697, 1701 (2002) (Smith, Arb.).

3. Did the company, 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?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the proven offense and (b) the record of the employee in his service with the company?

Under the Daugherty test⁸ if one or more of these questions is answered in the negative, then normally the just cause requirement has not been satisfied.

Although the Daugherty formulation has stood the test of time and proven a useful guideline for many arbitrators, it has also been criticized:⁹

One of the commonly overlooked aspects of the Daugherty tests is that they are the product of Arbitrator Daugherty's experience as an arbitrator under the *sui generis* procedures of the National Railroad Adjustment Board [NRAB] of the Railway Labor Act. Under those procedures there are no witnesses and no hearings *de novo* before an arbitrator. Instead, all of the record facts are determined on the railroad property and the arbitrator, more or less like an appellate judge, must accept the facts as they were developed by the parties on the railroad property. In sharp contrast, here and in traditional labor arbitration, the arbitrator hears the witnesses and evidence and determines the facts as would a trial judge.

Other arbitrators have articulated their own definition of "just cause," with one arbitrator explaining his definition of just cause as follows: "the essence of 'just cause' is that the employer, in carrying out its inherent or express right to discipline employees, must do so in a manner that is not unreasonable, arbitrary, capricious or

⁸ Enterprise Wire Co., and Enterprise Indep. Union, 46 Lab. Arb. Rep. (BNA) 359, 360-362 (1966) (Daugherty, Arb.). See also Lehigh Cement Co. and Local Lodge D106, Int'l Bhd. of Boilermakers, Cement, Lime, Gypsum and Allied Workers Div., 122 Lab. Arb. Rep. (BNA) 643, 646 (2006) (Gaba, Arb.).

⁹ Oak Forest Hosp. of Cook County and Int'l Union of Operating Engineers, Local 399, 114 Lab. Arb. Rep. (BNA) 115, 121-122 (2000) (Wolff, Arb.) (citing J. Dunsford, *Arbitral Discretion: The Tests of Just Cause*, PROC. OF THE 42nd Ann. MEETING, Nat'l Acad. of Arb. 23, 27-40 (1990)). See also Chicago Transit Auth. and Amalgamated Transit Union, Local 241, 116 Lab. Arb. Rep. (BNA) 1590, 1597 n.10 (2001) (Wolff, Arb.) (Arbitrator Wolff again reiterating his critical view of the Daugherty "seven tests").

discriminatory. That is the quintessential meaning of 'just cause' in the labor contract setting."¹⁰ Another arbitrator stated:"

The standard consists of several elements that can affect the question of whether there was just cause to issue an employee an adverse action. The elements, however, are not just free floating notions. They are the product of a long history of evolving arbitration case "law" and serve as guidelines when considering the question of whether there was just cause to discipline an employee. However, of all the elements, there is one that is nearly inviolable. That is the requirement that there be proof of misconduct, for without proof there can be no cause for discipline.

Regardless of the particular approach utilized in determining whether just cause is present it is clear that consideration must be afforded to whether the employee has committed the offense relied upon by the employer and whether the penalty assessed by the employer meets the just cause standard.¹¹

II. Reviewing the Penalty: The Role of the Arbitrator

What is an arbitrator's role in reviewing disciplinary penalties and how do arbitrators determine whether the penalty assessed satisfied just cause? In some cases, an arbitrator's authority in assessing the penalty may be limited by the collective bargaining agreement. For example, a collective bargaining agreement or employer handbook¹³ can include a list of penalties to be assessed for particular offenses. In other instances the contract may include a provision that prohibits the arbitrator from modifying the penalty if it is found that just cause for discipline is demonstrated.¹⁴

However, even when a collective bargaining agreement does not include a list of penalties, arbitrators are reluctant to substitute their judgment for that of management. One arbitrator stated,¹⁵ "[i]n analyzing the facts of this case, the

¹⁰ Indiana Convention Center, 98 Lab. Arb. Rep. (BNA) 713,719 (1992) (Wolff, Arb.).

¹¹ Great Falls Transit District & Int'l Bhd. of Teamsters, Local 2, 122 Lab. Arb. Rep. (BNA) 1347, 1350 (2006) (Pool, Arb.).

¹² Willow Run Cmty. Sch. & Mich. Council 25 AFSCME, 112 Lab. Arb. Rep. (BNA) 115, 120 (1999) (Brodsky, Arb.).

¹³ Benteler Auto. Corp., 121 Lab. Arb. Rep. (BNA) 733, 736 (2005) (McDonald, Arb.).

¹⁴ See *Willow Run*, 112 Lab. Arb. Rep. (BNA) at 120.

¹⁵ Bi-State Development Agency d/b/a Metro and Amalgamated Transit Union, Division 188, 124 Lab. Arb. Rep. (BNA) 680, 682 (2007) (Fitzsimmons, Arb.).

Arbitrator realizes that he should not substitute his judgment for that of Management unless he finds that the penalty is excessive, unreasonable, or that management has abused its discretion.” He further stated that an arbitrator should not grant clemency for the penalty assessed by management if not found too severe. In a 2005 decision,¹⁶ the grievant was employed as a plumber. During the course of the workday, he had an accident driving the company pick up truck. As a result of the manner in which the truck was loaded, the grievant was “relatively blind as to open space and clearance between nearby vehicles and distances to the side and above.”¹⁷ After an investigation, the grievant was terminated. It was determined that the grievant acted carelessly and was at fault in the accident for which he was terminated. The Arbitrator concluded that the grievant was at fault, thereby triggering consideration of the discharge penalty. In upholding the discharge, the Arbitrator stated, “[e]xcept in the most unusual situations, I do not substitute my view for management’s.”¹⁸

A. The Arbitrary and Capricious Standard

A review of approximately eighty arbitration decisions¹⁹ suggests that the most common answer as to how arbitrators analyze the propriety of the penalty imposed is based upon an “arbitrary and capricious” standard or some variation of that standard. The “arbitrary and capricious” approach to considering the penalty appears to build from the premise that it is not the role of the arbitrator to substitute his or her judgment in evaluating the penalty imposed by an employer.

In a 2003 decision,²⁰ Arbitrator Colflesh considered the case of a grievant who worked for a box manufacturer and distributor for nearly twenty years. At the time of his termination the grievant was employed as a machine operator. The grievant was observed smoking near the control panel of his machine and was immediately discharged for smoking in an unauthorized area. The company argued that immediate discharge was in accordance with company policy, which it argued was necessary in light of the fact that it was a cardboard manufacturing factory.²¹ Arbitrator Colflesh stated that to modify the penalty the Union needed to demonstrate that the penalty was so unreasonable as to be arbitrary and capricious. The arbitrator defined the standard as follows: (a) the penalty is disproportionate to the harm or threat of harm caused by the employee, considered in light of his or her work record and seniority; (b) the penalty has been disparately applied, considering other, similar workers; or (c) the penalty is motivated by a personal or anti-union

¹⁶ 2005 AAA LEXIS 860 (Robinson, Arb.).

¹⁷ *Id.* at *8.

¹⁸ *Id.*

¹⁹ See Section III, *infra* and accompanying text. The review consisted of decisions rendered under the auspices of the American Arbitration Association and published by LEXIS/NEXIS.

²⁰ 2003 AAA LEXIS 1163 (Colflesh, Arb.).

²¹ *Id.* at *3.

animus.²² The arbitrator concluded that the penalty was appropriate given the potential fire hazards and the need to protect lives and the livelihood of the business. He specifically noted that, "[a]s for proportionality, a 'no smoking' rule in a cardboard or paper box factory is absolutely essential for the protection of lives and the livelihood of the entire enterprise."²³

In a 2005 decision,²⁴ the arbitrator considered the case of an employee employed as an underground wire/line locator since 1999. The sole purpose of the employee's job was to locate lines so that damage would not occur. The grievant was discharged after approximately five years of service and after five damage incidents.²⁵ The arbitrator in upholding the penalty stated in part:²⁶

Arbitrators do not lightly interfere with management's decisions in discharge and discipline matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable under all circumstances. The role of an arbitrator is extremely circumscribed in disciplinary/discharge matters. An arbitrator must review, not redetermine, the disciplinary action imposed by an employer. Arbitrators are not authorized to make a disciplinary decision on their own and they should hesitate to substitute their judgment for that of management. The determination of misconduct is properly a function of management.

The arbitrator went on to state:²⁷

The only circumstances under which a penalty imposed by management can be rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved - in other words, where there has been an abuse of discretion. The arbitrator should not substitute his judgment for that of management unless he finds that the penalty is excessive or unreasonable or that management has abused its discretion....An arbitrator will not lightly upset a decision reached by competent careful management, which acts in the full light of all the facts and without any evidence of bias, haste, or lack of emotional balance.

In a 2003 decision,²⁸ the grievant, a night shift correctional officer within a minimum-security facility, received a thirty day suspension for failing to conduct a "sweep" leading to an inmate escape not being detected as early as possible. The

²² *Id.* at *10.

²³ *Id.* at *14.

²⁴ 2005 AAA LEXIS 1201 (Stein, Arb.).

²⁵ *Id.* at *11.

²⁶ *Id.* at *69.

²⁷ *Id.* at *70.

evidence indicated that one of the grievant's responsibilities included fire security tours throughout the facility.²⁹ Arbitrator Altman articulated the "arbitrary and capricious" standard as follows:³⁰

Under the generally accepted rule, if management's original decision in the matter was not arbitrary, capricious or unreasonable...its decision should stand....The boundaries of reasonableness should not be so narrowly drawn that management's judgment must coincide exactly with the Arbitrator's judgment. If the penalty imposed is within the bounds of what the arbitrator can accept as a range of reasonableness, it should not be disturbed.

Altman found that the standard was met because the employee violated an established policy and the penalty was not issued in haste and was not inconsistent with the levels of discipline issued in similar situations.³¹

In a 2005 decision,³² the grievant was terminated from his position as a Customer Service Technician. His responsibilities included transportation to and from job sites in the company vehicle. Within a one year period the grievant had three driving related incidents, two direct incidents of driving misconduct and a failure to inform the company of his license suspension in violation of company requirement.³³

The arbitrator, in considering the appropriateness of the remedy concluded that he did not have the authority to simply substitute his judgment for that of responsible company officials. He stated that in order to reduce a disciplinary penalty an arbitrator must find the penalty to be "at least unreasonable if not arbitrary and capricious."³⁴ Using that standard, Arbitrator Berger found that he could not reverse the termination penalty because the company proved that within a one year period the grievant was involved in two incidents of driving misconduct and a failure to inform the Company of his license suspension.³⁵

B. An Arbitrator's Role in Modifying A Penalty

Although arbitrators are reluctant to modify discipline imposed by an employer, there are limited circumstances under which they will modify the penalty.

²⁸ 2003 AAA LEXIS 355 (Altman, Arb.).

²⁹ *Id.* at *14.

³⁰ *Id.* at *30.

³¹ *Id.* at *31.

³² Arbitration Award, 2005 AAA LEXIS 1389 (Berger, Arb.).

³³ *W.* at *15.

³⁴ *Id.* at *18.

³⁵ *Id.* at *19. *See also* 2005 AAA LEXIS 460 (Vana, Arb.); 2005 AAA LEXIS 218 (Kenis, Arb.); 2003 AAA LEXIS 1327, (Colflesh, Arb.); 2005 AAA LEXIS 57 (Stein, Arb.).

Although the framework of an arbitrator's decision may suggest that the modification is strictly part of a "penalty phase" review, a closer analysis demonstrates that the modification is often the result of the arbitrator's review of one of the other elements of the just cause standard.

Fundamental to any just cause standard is that the employer prove that the employee has committed the offense(s) alleged. If the allegations against the employee cannot be proven, the just cause standard is not met and the discipline imposed must be negated. However, it is also possible that the employer can prove some of the allegations it relied upon in issuing discipline but cannot prove all the allegations. Under such circumstances, a reduction of the penalty may be appropriate. In a 2006 decision,³⁶ the grievant worked for a publicly-funded mass transit system and received a five-day suspension and final warning for insubordination after purported violation of a company grooming policy. After being informed of the policy and given "extensive notice," the grievant failed to alter his pony-tail style haircut, thereby engaging in "repeated resistance and non-compliance."³⁷ The arbitrator stated that, "an arbitrator who has found 'just cause' will not modify a penalty unless he or she finds it disproportionate, disparate, or motivated by illicit animus that the penalty is arbitrary or capricious."³⁸ However, under the facts of the case, the arbitrator found that the penalty was disproportionate because he concluded that the company did not prove all the allegations alleged. Moreover, he found that those allegations proven did not constitute insubordination or "conduct indicating that [Grievant] has little or not regard for [his] responsibilities as a member of the ... Department."³⁹

In a 2004 decision,⁴⁰ the grievant was employed for 20 years as an auto body repair instructor. He was discharged for exhibiting a pattern of excessive absenteeism, insubordination, and safety violations.⁴¹ Arbitrator Scales stated that the decision of an employer to discharge an employee should not be overturned "unless the decision to do so was based on discrimination, unfairness, or arbitrary and capricious action."⁴² Based upon that standard the arbitrator found that there was just cause for some discipline but that several "technical reasons" prohibited upholding the ultimate penalty of discharge.⁴³ Specifically, the arbitrator found that although the employer had proven two of the allegations against the grievant, it failed to meet its burden with regard to two other allegations and he therefore reduced the penalty.⁴⁴

³⁶ 2006 AAA LEXIS 224 (Colflesh, Arb.).

³⁷ *Id.* at *9.

³⁸ *Id.* at *18.

³⁹ *Id.* at *19.

⁴⁰ 2004 AAA LEXIS 146 (Scales, Arb.).

⁴¹ *Id.* at *1.

⁴² *Id.* at *61.

⁴³ *Id.* at *78.

⁴⁴ *Id.* at *75.

C. Disparate Treatment

Another fundamental aspect of the just cause standard is that the employee being disciplined should be treated in a manner consistent with others who previously engaged in the same of similar conduct. In a 2007 decision, the arbitrator stated in part:⁴⁵

It generally is accepted that enforcement of rules and assessments of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault, or mitigating or aggravating circumstances affecting some but not all of the employees)....

Where a reasonable basis for variations in penalties does exist, variations will be permitted notwithstanding the charge of disparate treatment. Discrimination is an affirmative defense and, therefore, the union generally has the burden of proving that the employer improperly discriminated against an employee. Thus, “[i]n order to prove disparate treatment, a union must confirm the existence of both parts of the equation. It is not enough that an employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantively like those of individuals who received more moderate penalties.”

Using this standard, the arbitrator concluded that “a reasonable basis existed” to justify the employer’s decision to terminate the grievant, a firefighter, for DUI although discipline had been issued in two other cases.⁴⁶ The arbitrator noted that in one of the cases relied upon by the union to demonstrate disparate treatment the firefighter who had been “charged with DUI resigned when faced with discharge,” and in the other case the firefighter arrested for DUI was later cleared when the prosecutor declined to prosecute the case.⁴⁷

⁴⁵ Osceola County & Int’l Ass’n of Firefighters, Local 3284, 124 Lab. Arb. Rep. (BNA) 850, 856 (2007) (Smith, Arb.) (footnotes and citations omitted).

⁴⁶ *Id.* at 856.

⁴⁷ *Id.* at 856.

In a 2000 decision,⁴⁸ Arbitrator Moore articulated a test for determining whether a union has met its burden to demonstrate disparate treatment. Arbitrator Moore stated:⁴⁹

[W]hen disparities are alleged, four elements should be satisfied. First, the compared offenses should be equally or more serious than the grievant's. Second, the previously imposed penalties should have been significantly less severe. Third, the earlier offense should be reasonably contemporaneous with the grievant's, not ancient history, (citation omitted). Last, the rank of the persons imposing or failing to impose prior penalties, if not the persons themselves, should be comparable to that of the deciding official presently in question.

The arbitrator also noted that "until specific cases of disparity are cited, the employer is not burdened with proving a negative in the abstract."⁵⁰ In addition, he noted that, "[i]n all organizations there are instances in which through inertia, negligence, or even favoritism, offenses deserving of punishment are ignored or covered over at a lower level. Such instances of leniency, absent a showing of acquiescence at the top, cannot serve to cripple the whole organization's ability to maintain discipline or otherwise enforce its rules of conduct."⁵¹

Finally, in a 2005 decision,⁵² the union argued the employer had engaged in "unequal treatment" of the grievant. The arbitrator stated:⁵³

In doing so, it bears the burden of proof that the Grievant was treated differently than others and that the circumstances surrounding his offense were substantially like those of employees who received lesser penalties, (citation omitted) Variations in penalties are allowed if there is a reasonable basis for the variations, and factors to be considered include the nature of the offense, degree of fault, mitigating circumstances, length of service, and work record.

The arbitrator pointed out that it is not good enough to simply suggest that a case of disparate treatment exists but rather it requires "evidentiary support."⁵⁴ He noted that it was not enough for the Union to simply refer "briefly to a thirty-day suspension

⁴⁸ Metro. Washington Airports Auth. and Metro. Washington Airports Police Ass'n, IUPA, Local 5004, 114 Lab. Arb. Rep. (BNA) 589, 594-97 (2000) (Moore, Arb.).

⁴⁹ *Id.* at 594.

⁵⁰ *Id.* at 594, n 6.

⁵¹ *Id.* at 594.

⁵² City of Alton and Policemen's Benevolent & Protective Ass'n, Unit #14, 121 Lab. Arb. Rep. (BNA) 1288, 1293 (2005) (Pratte, Arb.).

⁵³ *Id.* at 1295 (citation omitted).

⁵⁴ *Id.*

given to an officer who signed another officer's name to a payroll check; there was little evidence about this, however, and without more the Arbitrator cannot conclude there was disparate treatment."⁵⁵ Moreover, he noted that another incident relied upon by the Union involved a situation in which several of the Department's officers had been accused of using excessive force in making an arrest. In that instance the arbitrator noted that the employees involved received suspensions but were not subject to criminal charges nor to formal charges by the Department.⁵⁶

D. Progressive Discipline

In a 2007 decision, the arbitrator provided an excellent description of the principle of progressive discipline by stating:⁵⁷

Principles of progressive discipline are applicable in determining whether or not just cause exists for challenged discipline. "One of the primary purposes of discipline ... is to bring about improvement." (Referencing *Capital Airlines, Inc.*, 25 Lab. Arb. Rep. (BNA) 13, 16 (1955) (Stowe, Arb.). Thus, discipline should not be only proportionate to the offense, "but also should be designed to bring about such improvement." "(I)n cases that do not involve extremely serious offenses, arbitrators prefer to apply progressive discipline, leniency, and modify disciplinary penalties imposed by management when there are mitigating circumstances that lead the arbitrator to conclude that the penalty is too severe or that the employer lacks, or has failed to follow, progressive discipline procedures." (Referencing ELKOURI AND ELKOURI, *HOW ARBITRATION WORKS*, 916 (5th ed., 1977)). "A progressive disciplinary system is devised so that it provides increasingly severe penalties for subsequent employee violations. Its purpose is to alert the employee that his conduct is not satisfactory, to give him an opportunity over time to correct his actions, and to notify him as his work record becomes less satisfactory that he is increasingly liable to more serious discipline including termination if he does not improve." *Frito-Lav Inc. and Bakery Confectionery & Tobacco Workers Union. Local 218*, 105 Lab. Arb. Rep. (BNA) 1139, 1144 (1995) (Murphy, Arb.). The arbitral requirement of progressive discipline is the rule rather than the exception." ("In the ordinary case, when you are dealing with the run-of-the-mill infraction or violation of company rules and regulations, there is a graduated process for reprimanding an employee anywhere from a simple warning to suspension to discharge."); ("Absent those offenses for which

⁵⁵ *Id.*

⁵⁶ *Id.* See also *County of Washington and Law Enforcement Labor Services, Inc.*, 122 Lab. Arb. Rep. (BNA) 725 (2006) (Befort, Arb.); *City of Norman Oklahoma and AFSCME, Local 2875*, 122 Lab. Arb. Rep. (BNA) 929 (2006) (Goodstein, Arb.).

⁵⁷ *Delta Natural Kraft & P.A.C.E. Int'l Union, Locals 5-935 & 5-939*, 123 Lab. Arb. Rep. (BNA) 858, 862 (2007) (Finston, Arb.)(citations omitted).

summary discharge is expected such as stealing, the employee has the right to progressive discipline," as an element of just cause.)

In a 2006 decision,⁵⁸ the union argued that the employer failed to provide formal warnings or to engage in progressive discipline. The arbitrator noted that "the parties' contract, by serially listing the various degrees of available discipline, contemplates that a course of progressive discipline usually will precede a discharge decision."⁵⁹ The arbitrator went on to note that, "[t]he purpose of progressive discipline is to correct behavior."⁶⁰ However, he noted that "progressive discipline is not necessary when the severity of misconduct or other circumstances demonstrate that lesser forms of discipline would be futile in terms of working a correction in behavior."⁶¹ In the case before the arbitrator the employee had engaged in horseplay while at work. The arbitrator distinguished between acts of theft or violence which would likely justify an employer not following progressive discipline and noted that "horseplay without an intent to cause harm is not usually thought to be so severe as to obviate the possibility of a change of behavior and warrant immediate discharge."⁶²

E. Mitigating Factors

With regard to an arbitrator's consideration of mitigating circumstances in reviewing a disciplinary penalty, one arbitrator stated:⁶³

The existence of mitigating circumstances does not void the employer's decision on penalty. The question is not whether the arbitrator would have terminated the Grievant, if it was the arbitrator's job to make that decision in the first place. Rather, the contract itself recognizes that management is invested with sound discretion on the issue of penalty.

The grievant, a warehouse laborer, had no discipline over six and one half years of employment. He was terminated for insubordination when he refused to deliver steel to a particular location on his driving route as ordered by his supervisor. The delivery was a supplemental assignment at the end of his shift.⁶⁴ In considering the appropriateness of the penalty, the Arbitrator considered a list of potential mitigating factors, including: the grievant's excellent work record, the fact that the grievant was a candidate for a promotion, that it was less than clear that the grievant understood

⁵⁸ County of Wash. & Law Enforcement Labor Serv., Inc., 122 Lab. Arb. Rep. (BNA) 725, 730 (2006) (Before, Arb.).

⁵⁹ *Id.* at 731.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ 2005 AAA LEXIS 1101, 38 (Dobry, Arb.).

⁶⁴ *Id.* at *28.

the instruction given to him, his objection to performing the assignment implicating raised safety issues, the incident being a one time incident, and that the grievant apologized for his actions.⁶⁵ Despite these considerations the Arbitrator upheld the penalty.⁶⁶

In a 2005 decision,⁶⁷ the grievant was terminated after two incidents in which he refused requests and directives from supervisors. The first incident involved failure to train an employee as requested, for which he received a written disciplinary notice. The second incident involved the grievant's failure to turn down his radio as requested by the supervisor, and an inappropriate response to the supervisor making the request.⁶⁸ In upholding the termination the arbitrator acknowledged that an arbitrator may consider, among other things, "the nature of the Grievant's offenses, the Grievant's previous work record, and whether the employer has acted consistently with respect to similar previous offenses."⁶⁹ However, he also noted that, "[generally, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed is deemed excessive, given any mitigating circumstances."⁷⁰ The arbitrator went on to state:⁷¹

Arbitrators do not lightly interfere with management's decisions in discharge and discipline matters, but that does not mean to suggest that they will sustain an action found to be unjust or unreasonable under all circumstances. The role of an arbitrator is extremely limited in a disciplinary/discharge matter. "An arbitrator must review, not redetermine, the disciplinary action imposed by an employer. Arbitrators are not authorized to make a disciplinary decision on their own, and they should hesitate to substitute their judgment for that of management. The determination of misconduct is properly a function of management."

In a 2005 decision,⁷² the grievant was a microfilm machine operator with 20 years of service. He was sentenced to 10 days in jail for driving under the influence of alcohol and while the Supervisor was informed of the situation and grievant's intent to return to his job after his sentence, the grievant was dismissed for being absent without approved leave for three or more days as permitted under the collective bargaining agreement.⁷³

⁶⁵ Mat *37.

⁶⁶ *Id.* at* 38.

⁶⁷ 2005 AAA LEXIS 1216 (Stein, Arb.).

⁶⁸ *Id.* at *4.

⁶⁹ *Id.* at *37.

⁷⁰ *Id.* at *29.

⁷¹ *Id.* at *40(citation omitted).

⁷² 2005 AAA LEXIS 79, (Wolkinson, Arb.).

⁷³ *Id.* at *2.

The arbitrator concluded that the principle of just cause "requires the arbitrator to consider mitigating and extenuating circumstances."⁷⁴ In converting the discharge to a suspension without pay for time served, the arbitrator noted that the grievant had 20 years of service, his incarceration did not preclude him from working for "for a substantial period of time."⁷⁵ However, he stated that even with these factors he might not have reduced the penalty had it not for the fact that the grievant had informed his supervisor of his potential incarceration for a period of 10 days and his supervisor responded to him, "o.k., we'll start out fresh and we'll go from there."⁷⁶ The arbitrator found that these words led the grievant to believe that his incarceration would be covered by available leave time or lost time.⁷⁷

III. Empirical Review

As indicated by the above analysis, arbitrators are reluctant to substitute their judgment when evaluating the disciplinary penalty imposed by an employer. In an attempt to verify this conclusion, a review of two years of arbitration awards was conducted. The review was conducted of arbitration awards included in the LEXIS/NEXIS data base.⁷⁸ It is not suggested that this review of cases is scientific. It

⁷⁴ *Id.* at *6.

⁷⁵ *Id.* at *10.

⁷⁶ *Id.* at *13.

⁷⁷ *Id.* at *14. Compare with 2005 AAA LEXIS 895 (Kosanovich, Arb.), in which a bus driver was involved in an incident where a pedestrian came into contact with the bus some fifty yards from a bus stop in an area of obstructed view. There was no evidence that the grievant caused the accident and there was no evidence to indicate that anyone saw the pedestrian approaching the bus. Although the police at the scene did not suspect grievant was under the influence of any banned substance, grievant tested positive for cocaine in a required post screening. As a result the grievant was terminated. *Id.* at *11. In evaluating the penalty imposed the Arbitrator stated:

The Employer claims that, in practice, it considers all of the facts that have emerged from an investigation and gives weight to all relevant mitigating factors when assessing the situation. Several factors stand out in this case for consideration. Those factors include, though are not limited to: 1) whether the Grievant was at fault in the incident; 2) the Grievant's length in seniority; 3) the Grievant's work record; 4) the Grievant's substance testing history; and 5) observations of the Grievant at the scene.

Id. at *27.

The arbitrator reduced the penalty to a thirty day suspension and required the grievant to be "certifiably drug-free upon his return to work." *Id.* at *35. In reaching his conclusion, the arbitrator noted that although the grievant violated the drug testing policy by testing positive for cocaine while operating a bus, "it was his first positive drug test. He was involved in an accident, albeit through no fault of his own fault." *Id.* at *33.

⁷⁸ The LEXIS database includes arbitration decisions rendered under the auspices of the AAA and select arbitration decisions published by BN A. The AAA requires the permission of both parties to allow a case to be included in the data base. BNA cases are selected by editors.

is intended to be an instructive sample offered to show the tendencies of arbitrators in evaluating disciplinary penalties. Moreover, the reviewed population is not exhaustive, as it only accounts for cases included in the LEXIS database.

The population reviewed included arbitration decisions published on LEXIS/NEXIS during the two year period April 2, 2006 and April 2, 2008 that considered the issue of disparate treatment, progressive discipline, or mitigating circumstances. A total of 135 cases were reviewed covering those three areas. Of the 135 cases, 84 (62%) were issued under the auspices of the American Arbitration Association (“AAA”) and 51 (38%) were published by the Bureau of National Affairs (“BNA”). Of the 84 AAA cases, 47 (56%) considered the issue of progressive discipline, 23 (27%) considered the issue of disparate treatment and 14 (17%) considered the issue of mitigating circumstances. Of the 51 cases published by BNA, 25 (49%) considered the issue of progressive discipline, 12 (24%) considered the issue of disparate treatment, and 14 (27%) considered the issue of mitigating circumstances.

A. Progressive Discipline Findings

A review of AAA cases in which the arbitrator considered whether the principle of progressive discipline justified a reduction of penalty found that in twenty of forty seven, (43%) of the cases the arbitrator denied the grievance and thereby rejected the argument that progressive discipline justified a reduction of penalty. Of the remaining twenty-seven cases, in only ten cases (21% of total) did the arbitrator find that the lack of progressive discipline justified a reduction in penalty. Of the remaining seventeen cases (36% of total) the arbitrator reduced the penalty for reasons other than the lack of progressive discipline.

BNA cases reviewed in which the arbitrator considered progressive discipline found that in thirteen of twenty-five cases (52%) the arbitrator denied the grievance. In only six cases of the remaining twelve cases (24% of total) did the arbitrator find that the lack of progressive discipline justified a reduction in penalty. In the remaining six cases (24% of total), the arbitrator reduced the penalty for reasons other than the lack of progressive discipline.

B. Disparate Treatment Findings

A review of twenty three cases issued under the auspices of the AAA that addressed the issue of disparate or inconsistent treatment revealed that in twelve cases (52%) the arbitrator denied the grievance. In only three cases (13%) was the penalty modified based upon a finding of disparate treatment. Of the remaining eight cases (35%), the penalty was reduced for reasons other than “disparate treatment.”

A review of BNA cases provided twelve cases in which disparate treatment was raised as a reason for modifying the penalty. Of the twelve cases, the grievance was denied in two cases (17%). In only two cases (17%) was disparate treatment the basis for reducing the penalty.

C. Mitigating Circumstances

Research of cases issued under the AAA revealed a total of fourteen cases raising the issue of mitigating circumstances as a basis for reducing the disciplinary penalty issued by management. In six of fourteen cases (43%) the arbitrator denied the grievance. In three cases (21%), the arbitrator reduced the penalty due to a mitigating circumstance. In one of the three cases the arbitrator relied upon the employee's work record, in the second case the arbitrator relied upon the employee's long term employment, and in the third case the arbitrator considered the totality of the circumstances.

A similar review of BNA published cases indicated that in eight of fourteen cases (57%) the arbitrator denied the grievance and in the other six cases (43%) the arbitrator reduced the penalty for reasons other than mitigating circumstances.

CONCLUSION

A very significant percentage of collective bargaining agreements include a provision that requires an employer to have "just cause" to discipline an employee. The standard is so universally recognized in collective bargaining agreements that arbitrators have implied a just cause standard unless the contract expressly provides for a different standard. Despite its significance and widespread inclusion in collective bargaining agreements there is no universally recognized definition or standard of application. However, despite criticism, the "formula" articulated by Arbitrator Daugherty has been relied upon in some form by numerous arbitrators. Regardless of the particular approach utilized in determining whether just cause is present it is clear that consideration must be afforded to whether the employee has committed the offense relied upon by the employer and whether the penalty assessed by the employer meets the just cause standard.

A review of arbitration decisions reveals that arbitrators are reluctant to substitute their judgment for that of management. In some cases, an arbitrator's authority in assessing the penalty may be limited by the collective bargaining agreement. However, even when a collective bargaining agreement does not include a list of penalties, arbitrators are reluctant to substitute their judgment for that of management.

A review of approximately eighty arbitration decisions⁷⁹ suggests that the most common answer as to how arbitrators analyze the propriety of the penalty imposed is based upon an “arbitrary and capricious” standard or some variation of that standard. The “arbitrary and capricious” approach to considering the penalty appears to build from the premise that it is not the role of the arbitrator to substitute his or her judgment in evaluating the penalty imposed by an employer.

Although arbitrators are reluctant to modify discipline imposed by an employer, there are limited circumstances under which they will modify the penalty. Although the framework of an arbitrator’s decision may suggest that the modification is strictly part of a “penalty phase” review, a closer analysis demonstrates that the modification is often the result of the arbitrator’s review of one of the other elements of the just cause standard. Fundamental to any just cause standard is proof from the employer that the employee has committed the offense(s) alleged. If the allegations against the employee cannot be proven, the just cause standard is not met and the discipline imposed must be negated. However, it is also possible that the employer can prove some of the allegations it relied upon in issuing discipline but cannot prove all the allegations. Under such circumstances a reduction of the penalty may be appropriate. Another fundamental aspect of the just cause standard is that the employee disciplined be treated in a manner consistent with others who previously engaged in the same or similar conduct. An arbitrator will also review the penalty imposed by an employer based upon whether the principle of progressive discipline has been followed. Finally, consideration will be given by an arbitrator as to whether “mitigating circumstances” exist to modify the penalty imposed by management.

A review of arbitration decisions over a two year period suggests that even in cases in which an arbitrator considers reducing the penalty imposed by management under either a disparate treatment, progressive discipline or mitigating circumstances theory, the arbitrator is more likely than not to reject the argument that the penalty should be reduced under one of those theories and will in a majority of cases uphold the discipline imposed by the employer. This review of cases appears consistent with the standards articulated by arbitrators for reviewing discipline issued by employers.

⁷⁹ See Section III, *supra* and accompanying text.