THE “JUST CAUSE” CONCEPT

1. TESTS FOR DETERMINING JUST CAUSE FOR DISCHARGE

Few, if any, collective bargaining agreements contain a definition of "just cause," yet, 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 a case. These criteria have been set forth in the form of questions.

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

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator. Frequently the facts are such that the guidelines cannot be applied with slide-rule precision.

2. THE QUESTIONS

A. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct

(1) Management may have given proper forewarning or foreknowledge orally or in writing through the medium of typed or printed sheets or books of shop rules and of penalties for violation thereof.

(2) There must have been actual oral or written communication of the rules and penalties to the employee.

(3) A finding of lack of such communication does not, in all cases, require a "no" answer to Question No.1. Because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of company property or of fellow employees' property are so serious that any employee in the industrial society may properly be expected to know that such conduct subjects one to discipline.

(4) Absent any contractual prohibition or restriction, the company has the right to promulgate reasonable rules and give reasonable orders.

B. Was the company’s rule or managerial order reasonably related to the orderly, efficient, and safe operation of the company's business?

If an employee believes that a rule or order is unreasonable, he must nevertheless obey that rule (in which case he may file a grievance) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his 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 disobedience.

C. 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?

(1) This is the employee’s “day in court” principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

(2) The company's investigation must normally be made before its disciplinary decision is made. If the company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of the discipline. By that time there has usually been too much hardening of positions.

(3) 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 will be restored to his job with full pay for time lost.

D. At said investigation, the management official may be both “prosecutor” and “judge”, but he may not also be a witness against the employee.

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

It is not required that the evidence be preponderant, conclusive or “beyond reasonable doubt.” But the evidence must be truly substantial, not flimsy.

F. Has the company applied its rules, orders and penalties even-handedly and without discrimination to all employees?

(1) A “no” answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

(2) If the company has been lax in enforcing its rules and orders, and decides to apply them rigorously henceforth, the company may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

G. Was the degree of discipline administered by the company 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 service with the company?

(1) A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses 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.)

(2) An employee’s record of previous offenses may never be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

(3) 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 that offense. Thus, if employee A’s record is significantly better than those of employees B, C, and 0, the company may properly give A a lighter punishment than it gives the others for the same offense. This does not constitute true discrimination.

(Source: These tests applicable for learning whether an employer had just cause for disciplining an employee are set out in Grief Brothers, 42 LA 555 (1964).

3. TESTS FOR DETERMINING APPROPRIATE PENALTY

After finding an employee is guilty of an offense, arbitrators are often confronted with determining if the penalty imposed was appropriate. A number of factors are relevant for consideration in determining the appropriateness of a penalty. The following is a useful list followed by many federal agencies. One should understand that not all of these factors will be pertinent in every case.

A. The nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities, including whether the offense was intentional, technical, inadvertent, or was committed maliciously or for gain, or was frequently repeated;

B. The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

C. The employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

D. The effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisor’s confidence in the employee’s ability to perform assigned duties;

E. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

F. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

G. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

H. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.