Seven Tests For Just Cause

The requirement for an employer to show just cause when issuing discipline is usually found embedded in the "Managements Rights" section of a Labor Contract. Those two little words have probably become the most argued phrase in employment disputes.

The meaning of just cause is derived from the Constitutional Right to Due Process. U.S. Const. Amend. V. However, no such guarantee is afforded employees without an express written statement or state law. Most states remain "work-at-will" states, implying that quitting or being fired is at the will of the employee or employer, respectively.

When the right to due process (i.e., just cause) has been bargained for, the process has been reduced to seven categories:
1. Adequate warning
2. Reasonableness
3. Completeness of investigation
4. Objectivity of investigation
5. Proof of infraction
6. Uniformity of the Rules application and
7. Reasonableness of discipline.

When any one of these requirements are not met, the discipline should be dismissed. Unlike the Legal System, however, precedent has only persuasive authority in the labor dispute context. Each contract and working environment is viewed to stand alone in the disciplinary arena. With that in mind, we'll look at each category of just cause a little closer.

1. Adequate Warning

Did employees know the Rule existed? For example, the Employee may sell raffle tickets in the breakroom. A supervisor objects and discharges the employee for violation of a Nonsolicitation Policy. Was the Policy clearly posted anywhere? If it was in an Employee Handbook, did the employee sign anything saying he read and understood the Handbook? If the answer to these questions is "No," how would the employee know about the Policy?

Even if the policy was posted or an employee signed a Handbook or other document, the nonprecedential nature of disciplinary dispute resolution will require an arbitrator or panel (depending on the nature of your particular grievance procedure) to agree that the employee had adequate warning of the discipline he faced, including expected degree of discipline. On the other hand, if the Employer produces witnesses to show that the employee was adequately warned, then the employee's case becomes much weaker.

2, 7. Reasonableness

A Labor Contract is a legal document, subject to legal definitions. Black's Law Dictionary, 7th Ed., 1999, defines "reasonable" as "Fair, proper, or moderate under the circumstances." It has been convincingly argued by some that reason is in itself an emotion. I tend to agree. And looking to the legal definition only offers the opportunity for circular argument. Is it reasonable to fire someone for selling raffle tickets in the breakroom? Is it reasonable to have a rule against solicitation in the breakroom? People have been fired for eating discarded food. People have kept their jobs after threatening a supervisor. Which is worse? Reasoning comes down to attitude. The attitude of the arbitrator. I recommend arguing for unreasonableness only in concert with other tests for just cause, or as a last resort.

3. Completeness of Investigation

How does the Employer know that the employee commited the infraction? Was an informant involved? Was he observed by a third party? We have had much discipline tossed because Management didn't have their ducks in a row at hearing. For example, if a product was damaged and records indicate that the accused was the last to handle the product, is that adequate to show guilt? We have shown many times that it isn't. In the damaged product example, we look at when the employee was last in the area, when the damage was discovered, and who else had access to the area. We look at surrounding circumstances to establish reasonable doubt. Generally, if the employer cannot produce a "smoking gun," the employee should be ok.

4. Objectivity of investigation

Did Management look at this situation more closely than when the same or similar infractions occured? Producing evidence that the infraction was treated lightly in the past places the burden on the employer to show why the employee is being closely observed now. Unlike classic discrimination claims, where singling out must be shown in the context of membership in a protected class, Just Cause defense only requires showing that the employee was unduly scrutinized. The second prong of the Fair Investigation Doctrine is whether other employees were investigated, and whether other explanations were considered. The crux of the Doctrine is to assure that the employee isn't being targeted.

5. Proof of Infraction

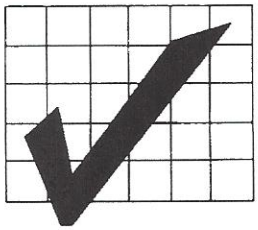
Related to Completeness of Investigation, Proof of Infraction is a cornerstone of Due Process. Defining proof, however, isn't necessarily held to the strict Rule of Law. As in Reasonableness of Rule, the "proof" rests in what the arbitrator accepts as fact. On the other hand, when the Union chooses not to pursue your claim you have the right to your day in court. Discussion of the 301 Suit in the Disciplinary Context is beyond the scope of this paper.

6. Uniformity of the Rule's Application

As with Objectivity of Investigation, Uniformity of Application exists to assure that the suspect isn't singled out. If you can show that others did the same thing, Management knew or should have known about it, and discipline was nonexistent or less severe, then you can show a violation of the Just Cause Test.

Just Cause is the single most powerful employee protection against job loss due to discipline. Know and understand the Seven Tests. Job depend on it.

THE SEVEN TESTS OF JUST CAUSE



One of the most frequently used expressions in industrial relations is the term "just cause." Many believe the term is so broad that it influences just about everything we do as union representatives, and perhaps that is so. Just cause can be compared to the implied covenant of good faith and fair dealing which under centuries of common law has been a fundamental element of the contracts and agreements people make and enforce.

In the strictest sense, however, just cause is associated with the discipline rules of our agreements, many of which have been evolving for over a hundred years and all of which include the right to a hearing. In fact, most of the discipline rules provide that an employe will not be disciplined or dismissed without the right to a *fair* and impartial hearing.

The right to a fair and impartial hearing has been equated to the overall right to fair and impartial *treatment* in all aspects of discipline. Such is the direct basis for the concept of just cause.

Essentially, the concept of just cause is nothing more than a uniform standard of behavior in discipline cases for employers and employes alike, yet no provision in any agreement defines such a standard. This is because there are an endless variety of different types of industrial misconduct which employers consider so diverse that no single standard should cover them all. As union reps, we must promote the other side of the issue. It is our job to build a case record which will convince an arbitrator that there *are* specific standards which the employer must follow--and that if these standards have not been followed, our member has been disciplined arbitrarily, capriciously and without just *cause*. First, however, we need to know what just cause is.

For decades, professional arbitrators struggled to reach consistent decisions in discipline cases, because they recognized that inconsistent results produced chaos in both the arbitration process and the work place. Finally, noted arbitrator Carroll R. Daugherty decided to take the bull by the horns by combining the many concepts employed by arbitrators in discipline cases into a single theory which he called "a sort of 'common law' definition" of just cause. It set out specific guidelines to be

applied to the facts of any one case which we now refer to as the seven tests of just cause.

The award by Arbitrator Daugherty which is generally recognized as the first decision to formally set out all of the seven tests of just cause was in the matter of *Enterprise Wire Co. and Enterprise Independent Union* and was issued March 28, 1966 (46 LA 359).

This award is universally recognized as the "classic" on the subject, and has been referred to in thousands of subsequent discipline awards. In addition to setting forth the seven tests in the body of the award, Arbitrator Daugherty also included the seven tests in a separate Appendix for ready reference. The tests appear as questions which the arbitrator must answer in the course of reaching his decision. Theoretically, a "no" answer to any one of the questions means that the discipline imposed was improper.

We quote from the Appendix accompanying Daugherty's decision in *Enterprise Wire;* the notes following each question are his own.

The Questions

1. Did the company give to the employe forewarning or foreknowledge of the possible or probable disciplinary consequences of the employe's conduct?

Note 1: Said forewarning or foreknowledge may properly have been given orally by management or in writing through the medium ***of*** *typed or printed sheets or books* ***of*** *shop rules and* ***of*** *penalties* ***for*** *violation thereof.*

Note 2: There must have been actual oral or written communication ***of*** *the rules and penalties to the employe.*

Note 3: A finding ***of*** *luck* ***of*** *such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such us insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property* ***of*** *the company or* ***of*** *fellow employes are so serious that any employe in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.*

Note 4: Absent any contractual prohibition or restriction, the company has the right unilaterally to promulgate reasonable rules and give reasonable orders; and same need not have been negotiu ted with the union.

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 employe?

*Note 1: **If** an employe believes that said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) 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 employe may properly be said to have had justification **for** his disobedience.*

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

Note 1: This is the employe's "day in court" principle. An employe has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

Note 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 employe will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions. In a very real sense the company is obligated to conduct itself like a trial court.

*Note 3: There may **of** course be circumstances under which management must react immediately to the employe 's behavior. In such cases the normally proper action is to suspend the employe pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employe is found innocent after the investigation, he will be restored to his job with full pay for time lost.*

Note 4: The company's investigation should include an inquiry into possible justification for the employe's alleged rule violation.

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

*Note **1:** At said investigation, the management official may be both "prosecutor" and "judge," but he may not also be a witness against the employe.*

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employe and a management person there are not witnesses to an incident other than the two immediate participants. In such cases it is particularly

important that the management "judge" question the management participant rigorously and thoroughly, just as an actual third party would.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employe was guilty as charged?

Note 1: It is not required that the evidence be conclusive or "beyond all reasonable doubt. " But the evidence must be truly substantial and not flimsy.

Note 2: The management 'judge" should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

Note 3: When the testimony ***of*** *opposing witnesses at the arbitration hearing is irreconcilably in conflict, an arbitrator seldom has any means for resolving the contradictions. His task is then to, determine whether the management "judge" originally had reasonable grounds* ***for*** *believing the evidence presented to him by his own people.*

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

Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

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

7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employe's proven offense and (b) the record of the employe in his service with the company?

Note 1: A trivial proven offense does not merit harsh discipline unless the employe has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule us to what number ***of*** *previous offenses constitutes a "good, " a "fair, " or a "bud" record. Reasonable judgment thereon must be used.)*

Note 2: An employe'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.*

Note 3: Given the same proven offense for two or more employes, their respective records provide the only proper basis for "discriminating" among them in the administration ***of*** *discipline for*

said offense. Thus, if employe A 's record is significantly better than those of employes B, C, and D, the company may properly give a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

Note 4: Suppose that the record of the arbitration hearing establishes firm "Yes" answers to all the first six questions. Suppose further that the proven offense of the accused employe was a serious one, such us drunkenness on the job; but the employe's record had been previously unblemished over a long, continued period of employment with the company. Should the company be held arbitrary and unreasonable if it decided to discharge such an employe? The answer depends on all the circumstances. But, as one of the country's oldest arbitration agencies, the National Railroad Adjustment Board, has pointed out repeatedly in innumerable decisions on discharge cases, leniency is the prerogative of the employer rather than of the arbitrator, and the latter is not supposed to substitute his judgment in this urea for that of the company unless there is compelling evidence that the company abused its discretion. This is the rule, even though an arbitrator, if he had been the original "trial judge, " might have imposed a lesser penalty. Actually the arbitrator may be said in an important sense to act us an appellate tribunal whose function is to discover whether the decision of the trial tribunal (the employer) was within the bounds of reasonableness above set forth. In general, the penalty of dismissal for a really serious first offense does not in itself warrant a finding of company unreasonableness.

Arbitrator Daugherty further qualified the significance of the answers with the following comments, also excerpted from the Appendix:

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

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. . . occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other, "yes" answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastise" both the company and the disciplined employe by decreasing but not nullifying the degree of

discipline imposed by the company--e.g., by reinstating a discharged employe without buck pay.

The seven tests as shown above should be considered each time you are called upon to represent a TCU member in a discipline case and should play a key role in planning the member's defense. The more familiar you become with the seven tests, the more automatic your defensive thought processes will become. The result is better representation for TCU members.

In closing, you should know that even distinguished arbitrators occasionally find some humor in the serious business of grievance adjudication. Some years after he issued his famous award in the *Enterprise Wire* case, Carroll Daugherty issued a very different type of award on a railroad Public Law Board. In this case the parties apparently knew full well that the claim would be dismissed because of a factual impasse which the arbitrator would not be able to resolve. In his award Arbitrator Daugherty not only dismissed the claim, but also served the parties a helping of old-fashioned sarcasm. We quote from this award issued in 1971 *(UTU-T and UP-E,* PLB 164, Case No. 287):

> *"In these days* ***of*** *individual confusion, national uncertainty, in ternu tional insecurity, and cosmic befuddlement, this Board is impelled here to say the hell with it.*
> *A WARD: Case Dismissed."*

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Labor News Access Expands as AFL-CIO Introduces LaborWEB on the Internet

The AFL-CIO has introduced LaborWEB, the federation's new "home page" on the Internet's World Wide Web. The URL address for the new site is **http://www.aflcio.org/**

LaborWEB enables anyone with a computer, modem and access to the World Wide Web to connect with the AFL-CIO home page and receive the federation's latest press releases, policy statements, boycott lists and a variety of other information. The home page includes links to other labor-related web sites. It also includes a section devoted to the AFL-CIO Organizing Institute and its recruiting and training programs for union organizers. Computer users who access this section will have the opportunity to download an application for the Institute's three-day training sessions. The AFL-CIO also sponsors LaborNET on CompuServe, a private forum for union members that enables them to retrieve up-to-date information from the AFL-CIO and to communicate with each other. Since the beginning of the year, the number of subscribers to LaborNET has tripled to more than 1,200. ❑