I. Essential Focus of an Investigation and Arbitration - Due Process (Monat)

A. To determine the facts of a given incident/grievance
   1. An investigator is a finder of fact, neutral
   2. Assure due process especially in discipline and discharge cases
   3. Establish facts to aid in arbitrator assessing credibility

B. Procedural and Substantive Due Process

C. External Law Is Not Directly Pertinent with Certain Exceptions
   - Silva v. Lucky Stores, Inc., 65 Cal. App. (Investigator conduct)

D. What is the charge given the investigator by the employer?
   - What does the CBA and grievance procedure require for an investigation?

II. A. WDEA Changes (Fragnoli)

B. Signs of an Improper Investigation
   1. Lack of a formal plan
   2. Lack of promptness
   3. Failure to interview witnesses separately
   4. Failure to interview all possible witnesses to the incident
   5. Was the investigator impartial?
   6. Lack of support for documentation, a common objection
   7. Coercion and/or scripting of witnesses

C. Other Issues
   1. Language – certified translators or reliable employee translator
   2. Forensic (hard) evidence
III. Who, What, Where, When and Why (Monat)

A. Arbitrators want to see a clear picture of WHO was involved in the incident giving rise to the discipline.

B. WHAT is the exact charge against the grievant?
   1. Reasons given in termination letter
   2. What happened? What was said

C. WHEN did the incident occur?
   1. Construct a time line for the arbitrator
   2. Use of video

D. WHERE did the incident take place?
   Situational factors like noise, crowds, machines, rain and so on (Disney).

E. WHY did the incident occur?
   1. Long-standing relations?
   2. Sudden emergency
   3. Failure to follow safety procedures. Lockout at bottling plant

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A. Montana Human Rights Act

Discrimination based on vaccination status prohibited (with a few health care exceptions).

B. Montana Wrongful Discharge Law – March 31, 2021

- First update in 30 years
- Must show good cause to terminate after probationary period (now 12 months)
- ‘Good Cause’ clarified

Under the act, as amended, good cause means “any reasonable grounds for employee dismissal” based on:

1. An employee’s failure to satisfactorily perform job duties.
2. An employee’s disruption of the employer’s operation.
3. An employee’s material or repeated violation of an express written employer policy.
4. Legitimate business reasons determined by employer that are “reasonable business judgments.”

- Damages up to four years lost wages and fringe benefits. Employers can now subtract unemployment and early retirement pay.

- One year statute

- Internal Grievances
  - Must notify terminated employee of grievance procedures within 14 days.
  - Failure to exhaust can result in dismissal.

- Policy Violations
  - Discharge lawful if employee materially violated written company policies.
  - Whistleblowers protected against retaliation for reporting a good faith belief that a health safety or welfare public policy was violated or for refusing to violate such a policy.
SAMPLE PROBLEMS WITH INVESTIGATIONS

An Arbitrator’s Point of View

1. Did the investigator conduct the interview virtually or off site? Were the investigation ground rules initialed?

2. Did the investigator report to someone with a “dog in the hunt?”

3. Does the investigator have a personal relationship with HR (Facebook/Linked In)?

4. Was the union or attorney denied the opportunity to attend the interview?

5. If important witnesses are not available to testify, I am uncomfortable with the investigator telling me what they said. Most arbitrators will grant limited weight or may not allow the testimony at all because the witness is not subject to cross examination.

6. If the accused or complainant lists witnesses that they say corroborate their story and they are not interviewed, the investigation may do more harm than good.

7. If the investigator (outside counsel or contractor) testifies with a mean-spirited tone, are they “performing” for the client?

8. Did the witness or accused have a chance to review your notes for accuracy? Sooner rather than later! Many witnesses claim they are misquoted!

9. If the investigator finds everyone but the accused credible on every issue, is he/she biased?

10. Was a witnesses given a second chance to “clear up” something that was already clear? (Internal Affairs second interview “in case the officer was confused.”)

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Sgt. Preston of the Redwoods

Sgt. Preston was terminated by a small police department in Pine Tree, MT. One morning, at the start of shift, he walked into the dispatch room when dispatchers were talking about women as a villain in Terminator movies. Sgt. Preston said, “All women have rape fantasies.” Dead silence. The Sgt. was placed on administrative leave pending investigation. The City Manager contracted with an outside investigator, a lawyer she had worked with in Big City, MT, over a decade ago. The investigator was asked to investigate the movie incident. The investigator set out to interview those involved in the discussion about the movie. She talked with Officer DoRight who was supervised by Sgt. Preston and who was the grievance rep for the POA who advised the young dispatcher. The investigator’s charge was confined by the City Manager to Sgt Preston.

The investigator found that the Sgt. had made one or two other comments of a sexual nature around the station, according to another dispatcher and DoRight. The investigator was told by DoRight that, while patrolling with Sgt. Preston at the Fairgrounds during the annual fair, Sgt. Preston did not say hello to the City Manager and privately said the CM was “a bitch.” Upon concluding her investigation, during which time the investigator testified she was objective, she wrote in her report that Sgt. Preston should never be allowed to be a police officer again.

At the hearing, Sgt. Preston testified that he was trained by an officer who made sexual comments all the time. He said the culture at Pine Tree PD was rife with such comments. No one had ever been disciplined for any such comment. The Chief of the PTPD during this time was heard at the station on many occasions referring to his penis size. There were complaints by some but the Chief was not disciplined. (He later left the department on his own accord). Another older female dispatcher testified that the comments did not bother her.

Other factors included a court decision requiring the city to share in a wrongful death settlement involving transporting a prisoner. Sgt. Preston was a minor part of this action for a comment he made during transport. The dispatcher who was offended by the Sgt.’s comment had planned to take the Sgt. with her the same day but was unable to connect with him for a week as he had gone on vacation. She testified at the hearing that she was so traumatized she never wanted to work with him again.

1. Discuss the quality of the investigator’s work? Can she make the recommendation about Sgt. Preston’s fitness to work?

2. How should the investigation have been done?
Rainy Night at the Mouse House

It was a dark and stormy night at the Mouse House. About 1:30 AM, personnel were leaving through the designated gate under the watchful eye of two in-house security staff. Brenda Starr was a new college graduate from a criminal justice degree program. She was working with Mickey Longtail, also a new employee. Mickey had just been hanging around talking with an off-duty employee. Brenda later testified she thought the man looked threatening. She relieved Mickey for his break but was upset with him because he had not filled her in on the man who kept talking. She confronted Mickey when he returned from break. Mickey was quite big and physically much bigger than Brenda. She pushed him and got in Mickey’s face about his not briefing her on the unknown man. The supervisor was nearby, saw the incident and counseled Brenda.

However, Senior Manager of Security Holmes investigated the incident. He is a former lieutenant and ranking police administrator. The company has a zero-tolerance policy on workplace violence. His decision to terminate Brenda under this policy was based on four written interview reports, only two of which he found credible. He did not interview in person the writers of these reports, none of which he knew personally. Nor did he interview Brenda or Mickey. Holmes did not investigate Mickey’s basis for concluding the off-duty employee was ‘harmless’ based on the fact that Mickey’s sister had a similar behavioral problem. Mickey had been employed for four months, one month less than Brenda.

Brenda related that her supervisor, Walt, was standing several yards away. She called him over. He counseled her but meted out no discipline beyond the verbal counseling. Walt was not interviewed by Holmes.

1. What problems do you see in this incident with respect to the investigation?
2. In particular, what factors about Brenda and Mickey should be investigated further?
3. What would have made this investigation more effective?