How Procedural Deficiencies Can Affect Arbitrator Awards

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“Procedural Deficiencies”

Here, “procedural deficiency” includes actions taken:

(a) after the incident for which disciplined was imposed;

(b) or, in a contract case, *after* discovery of a contract violation.

Examples:

- Untimely grievance or response
- Long non-communication of known contract violation
- Delayed Discipline
- No Disciplinary Notice
- Overcharging or undercharging
- Disciplined grievant not interviewed

Arbitrators Want To Reach the Merits

- “A general presumption exists that favors arbitration over dismissal of grievances on technical grounds.”
  - How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 5-10.

- “Waivers, because they result in defeat of the rights of parties without consideration of the merits of the dispute, are not lightly inferred by arbitrators.”
  - How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 5-21.

- First principles: Arbitrators generally want to administer industrial justice on the basis of facts, not technical grounds.

The Merits Questions

Arbitrators look for non-hearsay evidence to establish:

1) Was there a violation of the CBA?

    - Discipline: Did the employer lack just cause?

1) If so, what remedy will return the parties to the position they would have been in if there had been no CBA violation?

    - Discipline: The answer to this question will include what discipline was appropriate for proven misconduct?

Prejudice: The Key Concept

- A party's action is prejudicial if it harms the other party's ability to fairly present its case at arbitration.

- When can prejudice lead to adverse inferences?
  1. One side has a responsibility to do something
  2. *Fails* to do it properly
  3. That failure **caused some actual scope of harm** to the other side's ability to fairly present its case—usually by making it impossible for the prejudiced party to get complete evidence (testimony or documents).

- Adverse inference: Infer that the information the prejudiced party lacks due to the other side would, if it were available, help the prejudiced party's case to the extent reasonable.

Lost Testimony and Documents

- Parties are usually prejudiced if the other side's action or inaction caused them to lose access to testimony and documents to which they would otherwise have access.
- "Employers must impose discipline within a reasonable time after learning of misconduct. . . . Timely action by employers permits employees to respond to the discipline at a time when memories are still fresh. An unreasonable delay deprives the union and employee of an opportunity to investigate, gather evidence, prepare a defense, or find competent witnesses." Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-12.

How to Prove Prejudice

- Other side may have a procedural defect in their case
    - Promptly and fully communicate about information requests
    - Collect and present evidence to show **prejudice**
    - ***And*** *to show your side was not partly at fault for the prejudice*
- You may have a procedural defect in your case.
    - Identify it to the other side immediately upon discovery
    - Collect and present evidence to show **lack of prejudice**
    - ***And/or*** to show that the other side is at fault for the prejudice

Seven Tests: Worthwhile? Worthless?

- What are the Seven Tests?
- What's good about the Seven Tests?
  - Some arbitrators overturn discipline if any of the Seven Tests are not met
  - Useful Checklist
- What's the problem with the Seven Tests?
  - Most arbitrators do not overturn discipline based on insufficient or unfair investigation without prejudice
  - Half-Baked, leads to laziness: must develop evidence showing a nexus between procedural deficiency and prejudice
- "Trust in Allah, but tie your camel to a tree"

No Significant Prejudice? Substance Controls

- “Where the evidence produced by a proper investigation would not have altered management’s decision, arbitrators may generally conclude there was just cause for the discharge despite the lack of a thorough investigation”

  Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-21.

Do Arbitrators Want To Hear From Disciplinary Decision Makers?

- Probably not as much as you think.
  - It is hearsay, but may be proleptical
  - Decision maker's testimony—if it shows a biased approach—might hurt the employer's case
- Arbitrators Sit **De Novo**
  - Better to put on the witnesses who the decision maker interviewed than the decisionmaker
- Decision maker's testimony might demonstrate consistency of punishment imposed or show why someone was not interviewed – but these are responses to union defenses.

When Are Delays Outcome Determinative?

- "If the labor agreement contains time limits for imposing discipline, the failure to comply with them can result in the arbitrator granting the grievance in its entirety, or issuing an award with a reduced penalty." Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-13.
- If the reason for discipline is "safety" or another immediate concern, and the employer delays investigation, this causes the arbitrator to question true motivation behind discipline.
- *But*: Where a grievance or response thereto is untimely, but *both* parties have regularly tolerated delayed grievance processing, many arbitrators will not treat untimeliness as a forfeiture absent clear language in the agreement.

Disciplinary Notice: Overcharging

- Problems with throwing in the kitchen sink:
  - What if Arbitrator feels Employer has proven some but not all of charges? How does this impact arbitrator's analysis of whether the punishment fits the crime?
  - What happens if decision maker testifies that they considered all the charges in determining the appropriate discipline?
  - What happens if decision maker testifies it would have been the same penalty even if only one charge were alleged?
- *De novo* review: Overcharging is usually an issue of "optics"

Disciplinary Notice: Undercharging

- What if the reason for discipline is not in the notice of discipline?
- "An employee is entitled to receive timely information regarding the reason for discipline with sufficient detail to allow him or her an opportunity to respond." Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-21.
  - "opportunity to respond" includes time and access to *investigate fully and then* respond
- "The right to be informed of the charges includes the right to be informed at the time the discipline is imposed, not some later date." Id.
  - This does not apply if the employer does not discover the evidentiary basis for the charge until after the discipline.

New Evidence vs. New Charge

- Post-discharge evidence supports an existing charge
  - Seldom prejudicial, but should promptly notify the other party.
- New charge introduced
  - Should notify the other side as soon as the new charge is known, allow the other side to fully investigate the new charge, and fully discuss the new charge with the other side through the grievance process (e.g., hold new step meetings).
- What is the remedy if original reason would not have sustained discharge but subsequent reason is sufficient?

“Scope of Prejudice”: Sample Remedies

Show what remedy fits the scope of prejudice.

Be humble. Do not overstate the scope.

- Prejudiced party prevails on the merits (e.g., reversing discipline)
- Backpay, uphold discharge
- Backpay cutoff (e.g., laches)
- Adverse inference
- Credibility Hit
- Interest
- Continuance charged to deficient party

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Survey


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