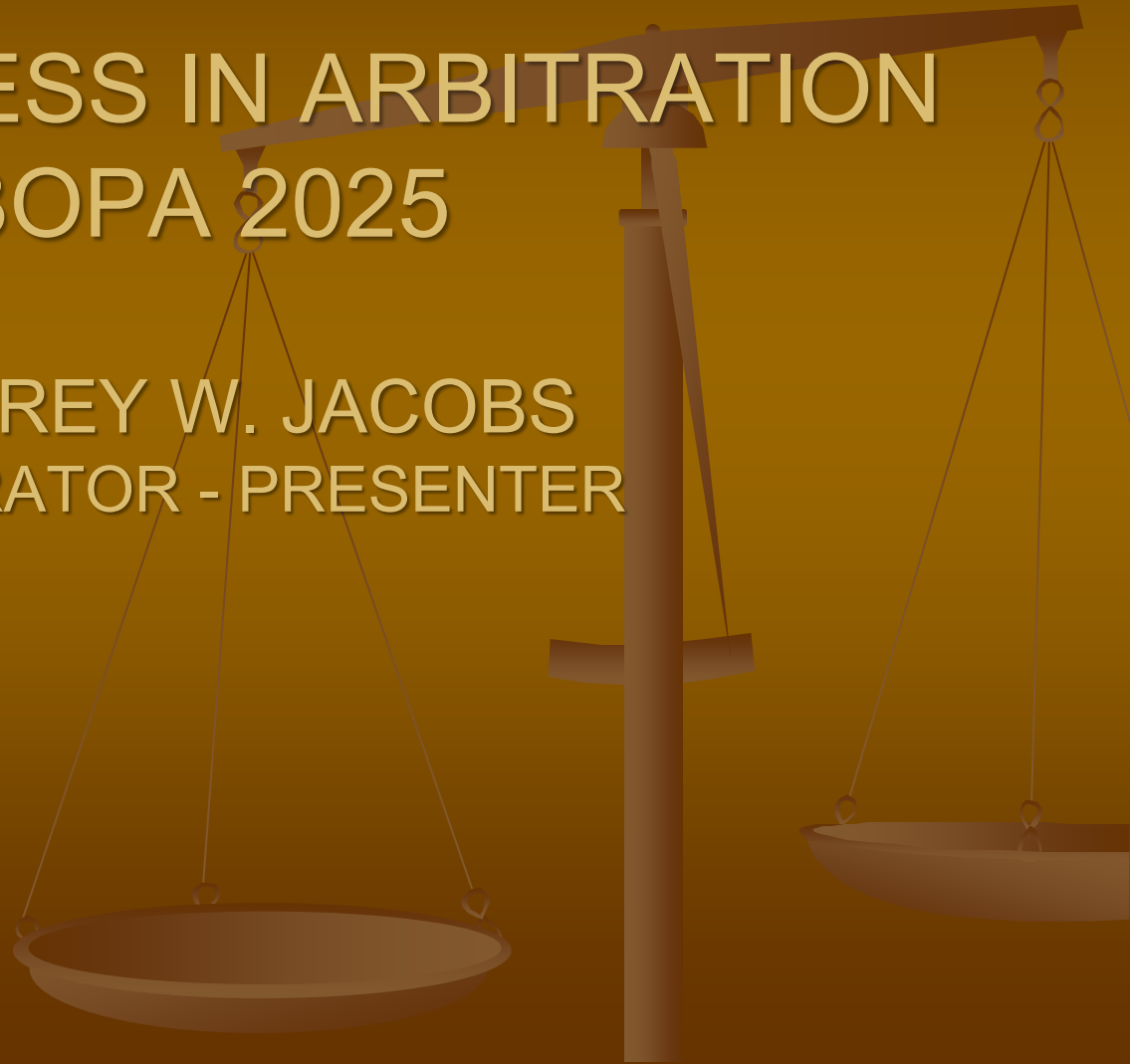
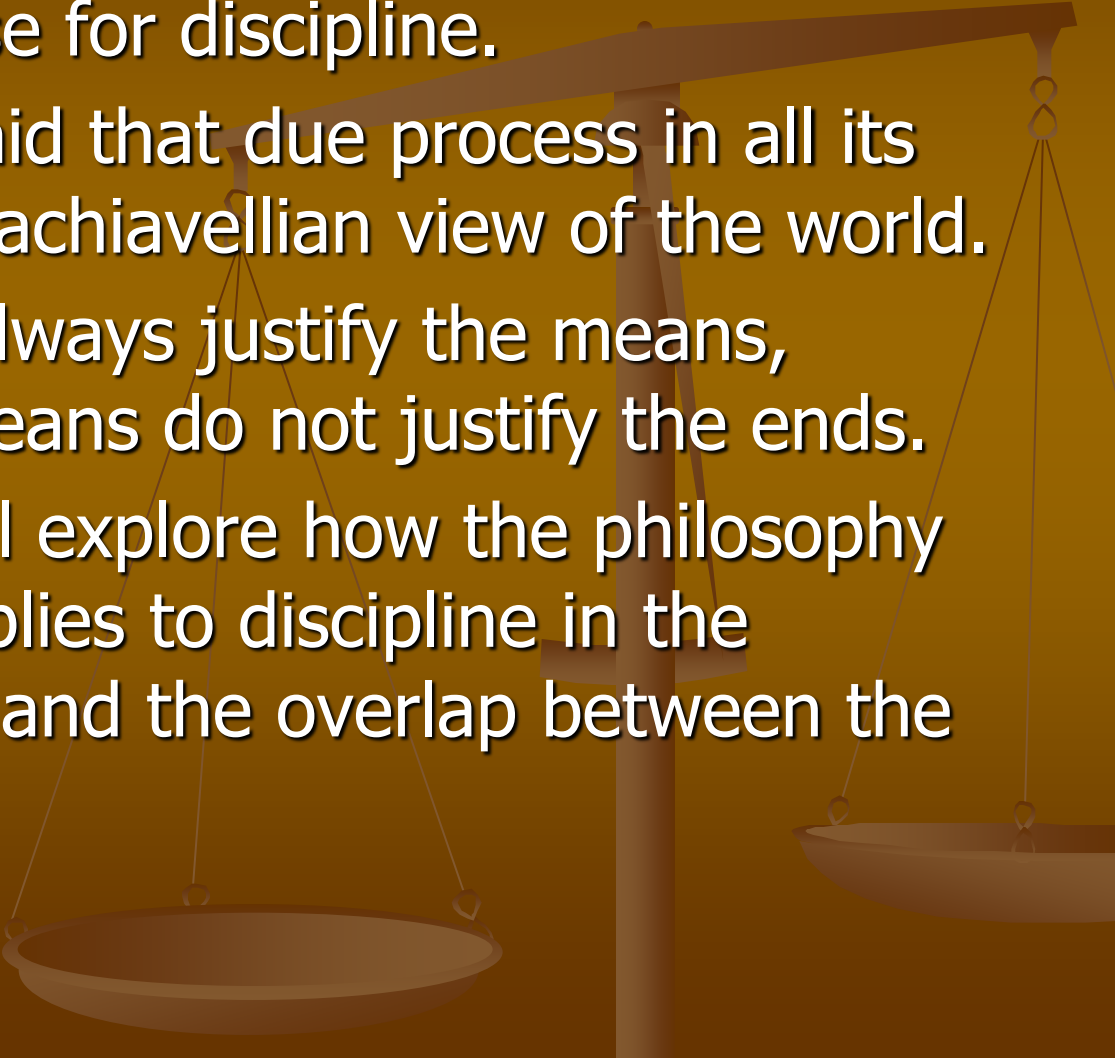


DUE PROCESS IN ARBITRATION BOPA 2025

JEFFREY W. JACOBS
ARBITRATOR - PRESENTER

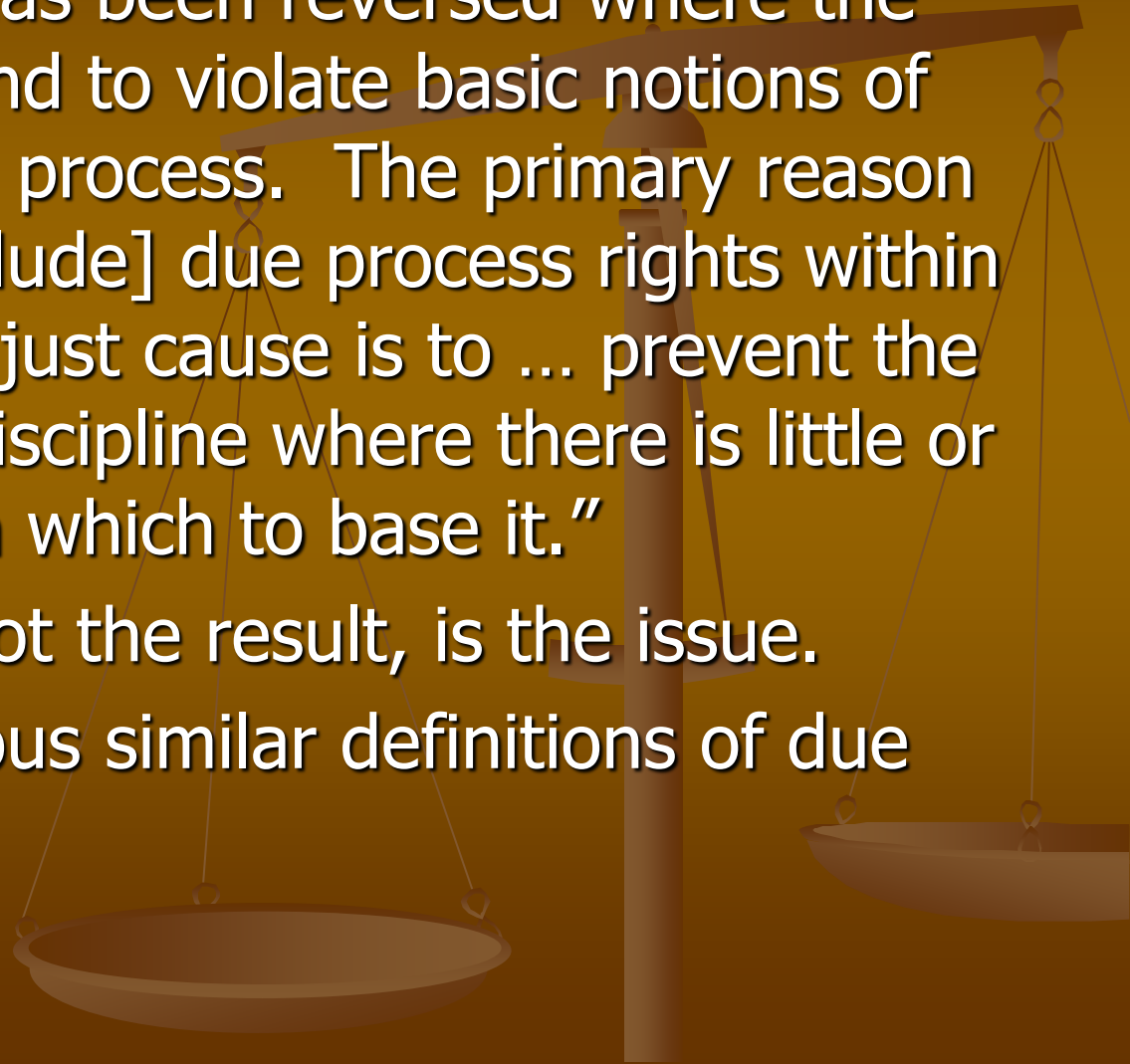


OVERVIEW

- Industrial due process is fundamental to the notion of just cause for discipline.
 - It might well be said that due process in all its forms is an Anti-Machiavellian view of the world.
 - The ends do *not* always justify the means, especially if the means do not justify the ends.
 - This discussion will explore how the philosophy of due process applies to discipline in the arbitration setting and the overlap between the two concepts.
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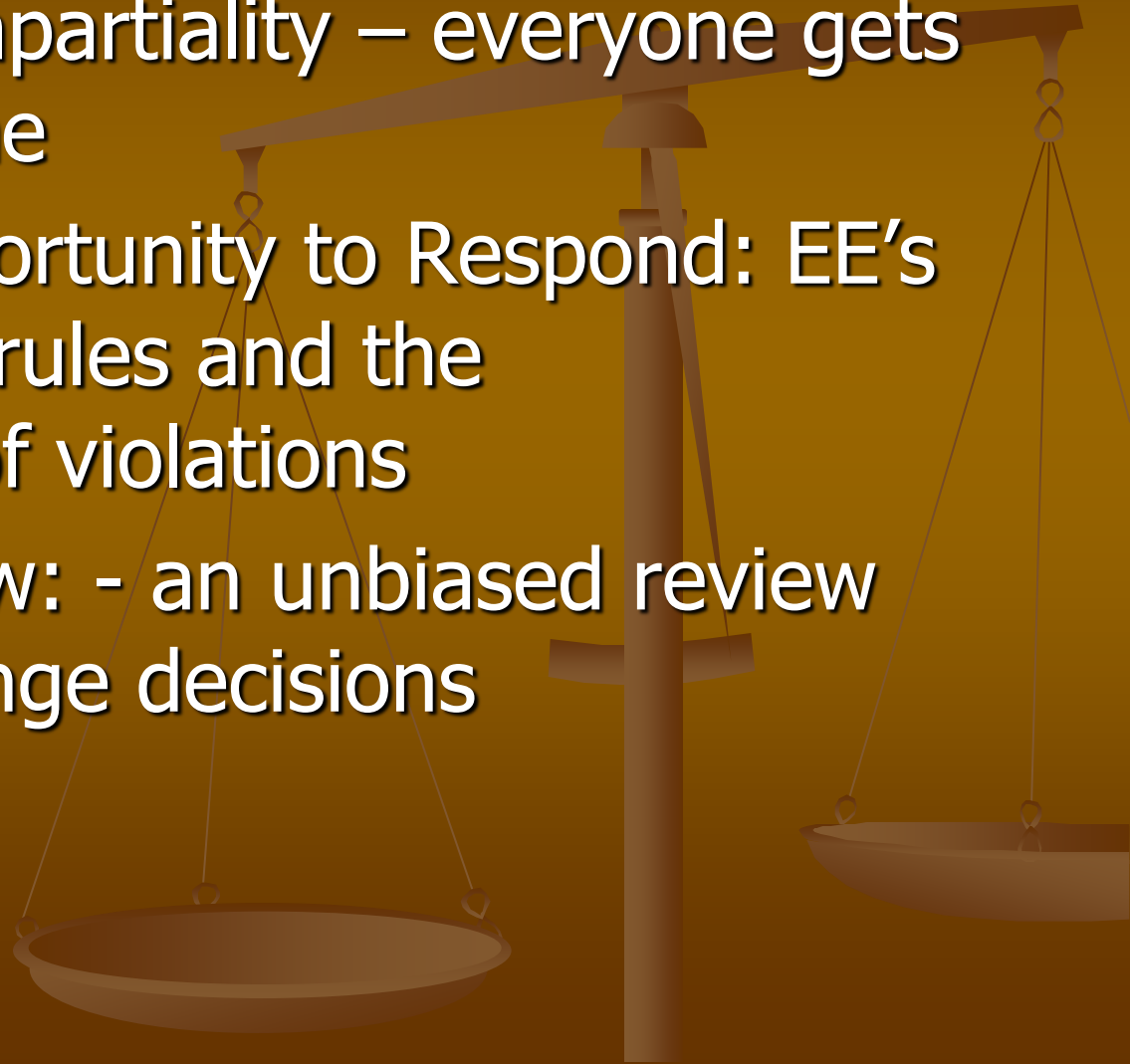
OVERVIEW

- Elkouri observed that “Disciplinary actions by management has been reversed where the action was found to violate basic notions of fairness or due process. The primary reason arbitrators [include] due process rights within the concept of just cause is to ... prevent the imposition of discipline where there is little or no evidence on which to base it.”
- The *process*, not the result, is the issue.
- There are various similar definitions of due process.



Key aspects of due process in industrial relations

- Fairness and Impartiality – everyone gets treated the same
- Notice and Opportunity to Respond: EE's must know the rules and the consequences of violations
- Impartial Review: - an unbiased review forum to challenge decisions



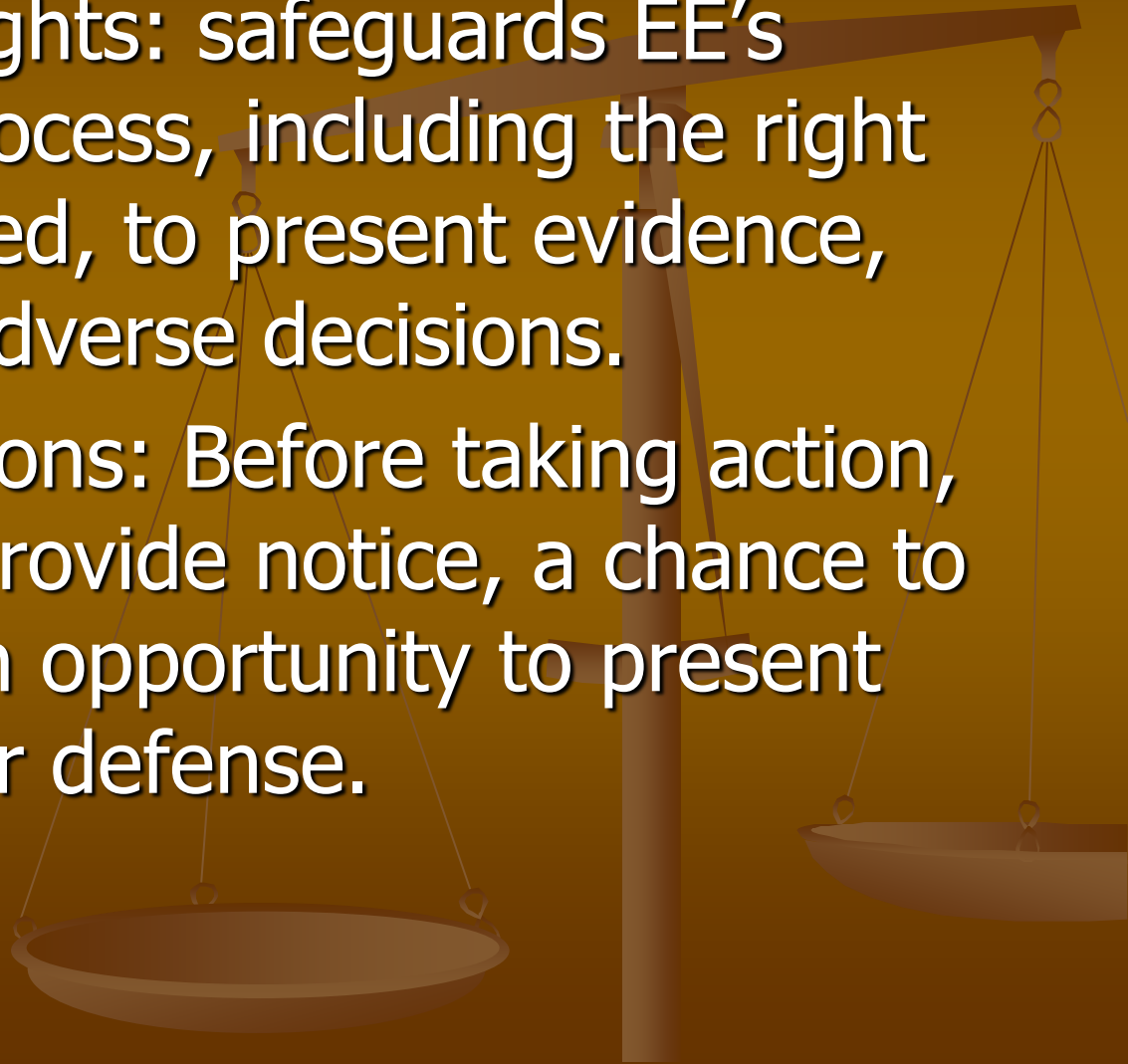
Key aspects of due process in industrial relations

- Investigation: a process requiring that all involved have a fair opportunity to be heard and present their case.
 - The investigation should be done BEFORE any action take and any discipline should be based on that the ER knew at the time of the discipline and generally not learned afterward.
 - Are some exceptions to after acquired evidence – discussed more later



Key aspects of due process in industrial relations

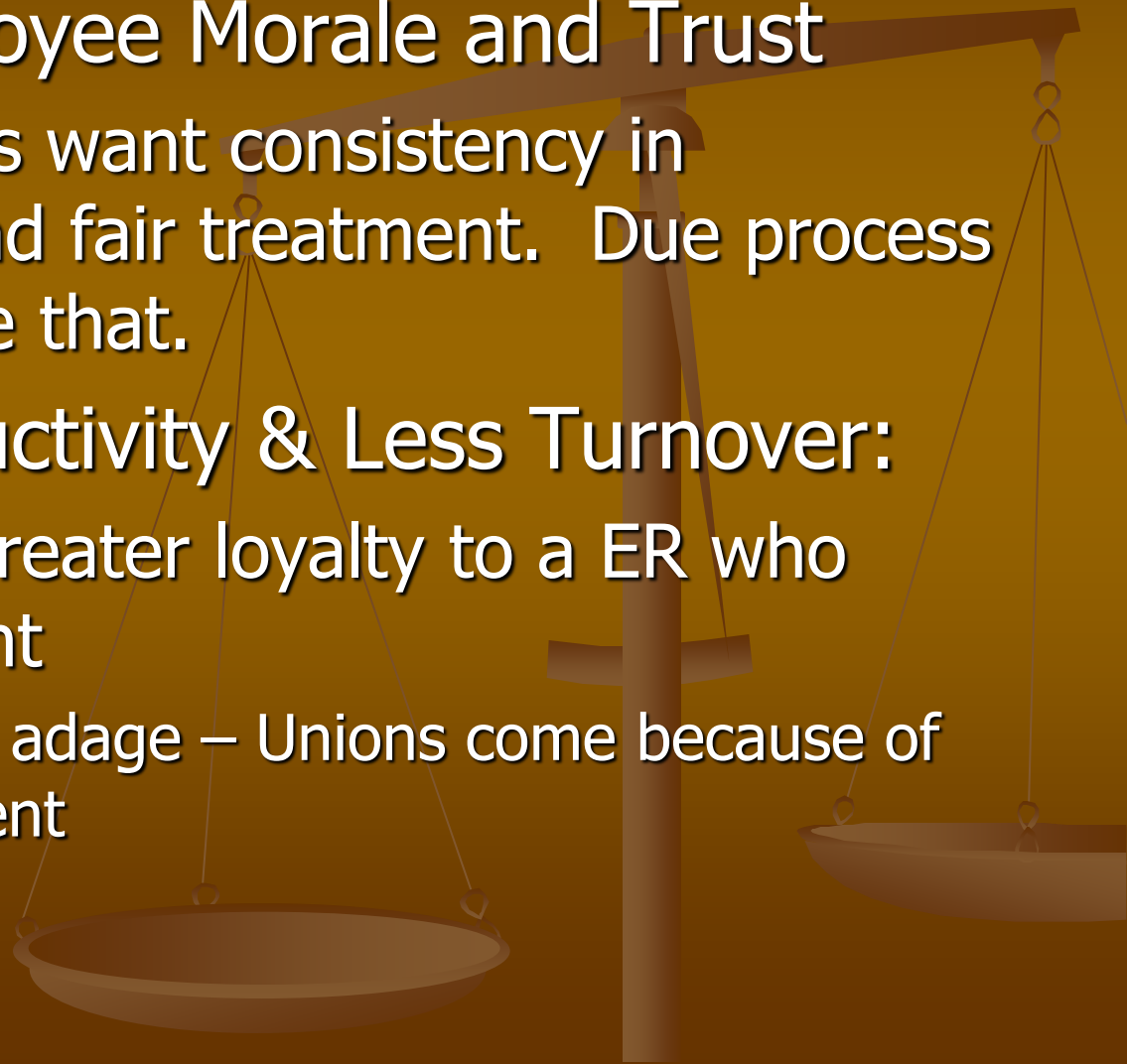
- Protection of Rights: safeguards EE's rights to due process, including the right to be represented, to present evidence, and to appeal adverse decisions.
- Disciplinary Actions: Before taking action, the ER should provide notice, a chance to respond, and an opportunity to present evidence in their defense.



Benefits of Due Process.

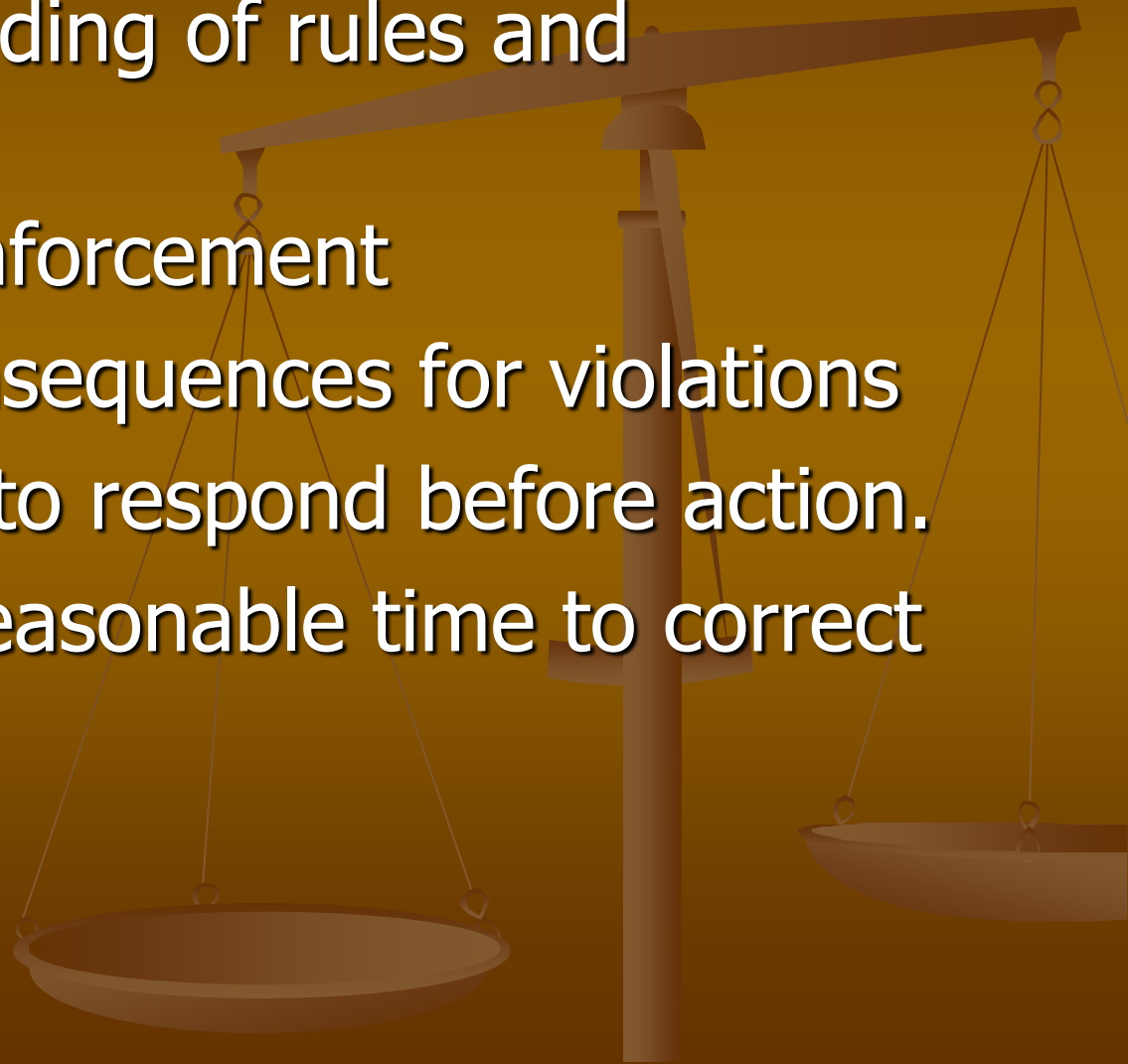
According the SHRM website

- Enhanced Employee Morale and Trust
 - Presumably EE's want consistency in enforcement and fair treatment. Due process helps guarantee that.
- Improved Productivity & Less Turnover:
 - EE's will have greater loyalty to a ER who treats them right
 - There is an old adage – Unions come because of bad management

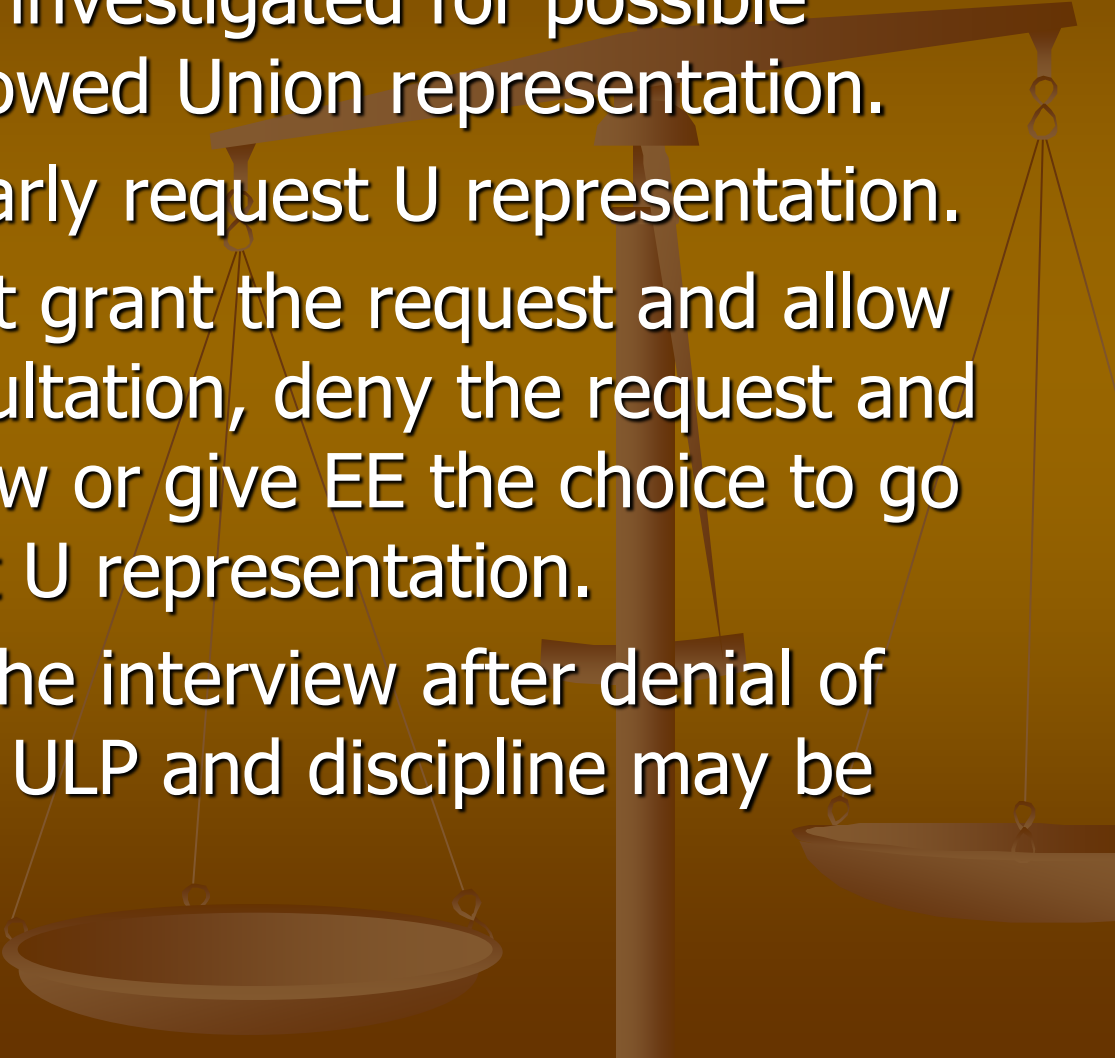


One take on the elements of due process

- Clear understanding of rules and consequences
- Constency of enforcement
- Appropriate consequences for violations
- An opportunity to respond before action.
- Provision of a reasonable time to correct behavior



Relevant Court Decisions

- NLRB v Weingarten: Requires that EE's who are about to be investigated for possible discipline be allowed Union representation.
 - #1 EE must clearly request U representation.
 - #2 The ER must grant the request and allow time for U consultation, deny the request and end the interview or give EE the choice to go forward without U representation.
 - #3 Continuing the interview after denial of the request is a ULP and discipline may be overturned.
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Weingarten

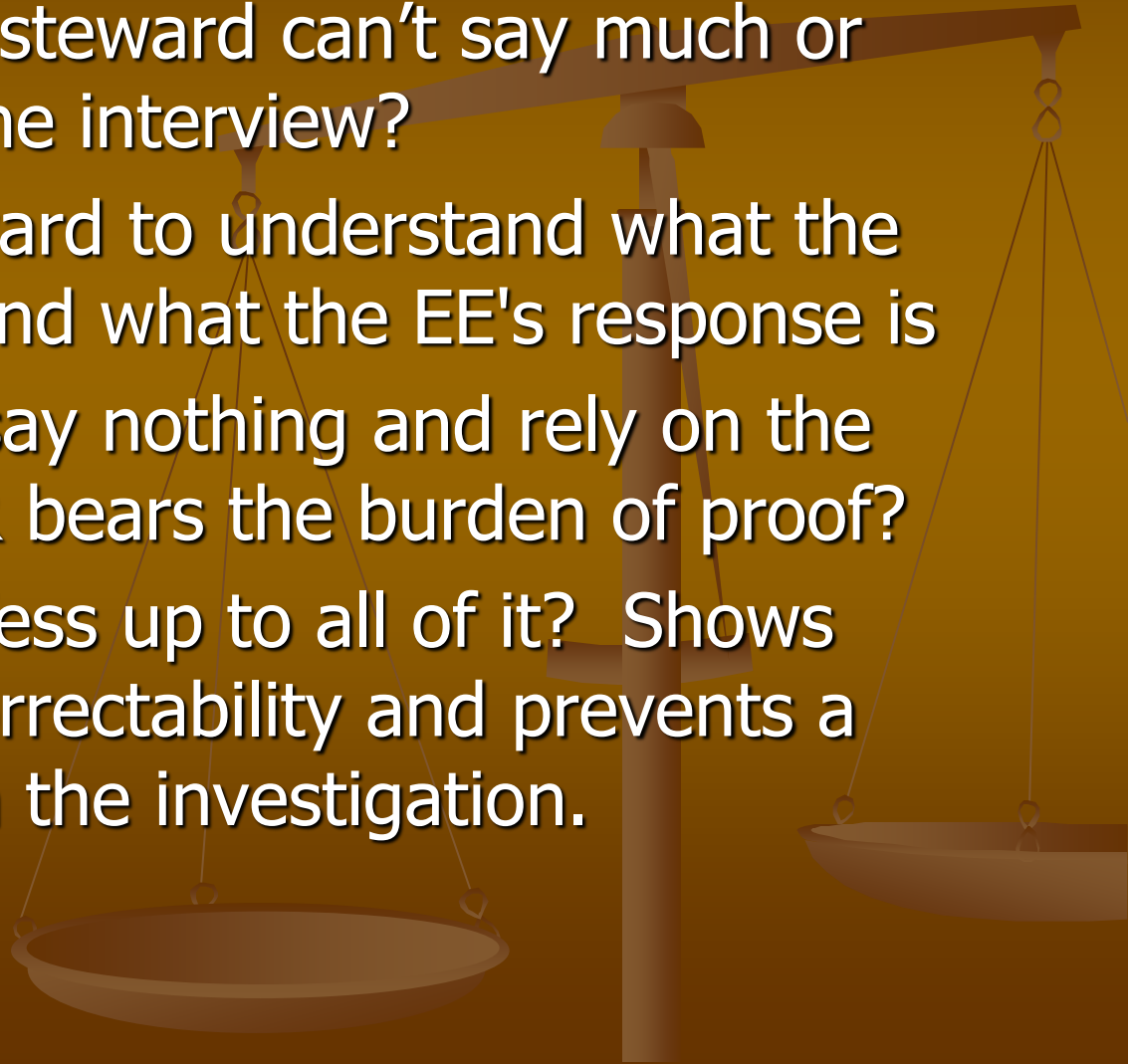
- EE's should be advised not to refuse to participate even if the ER has refused their request – or as happens occasionally- says that they “don’t need” a Union rep.
- *Univ. of St. Thomas and IBT 120*, 124 LA 1486 (2008) where that scenario occurred. EE was told she didn’t need a rep and that the meeting was just an interview. Not true
 - EE did not ask for a U rep but was told she didn’t; need one after asking if she need a Union rep.
 - Be careful of misleading an EE

Weingarten

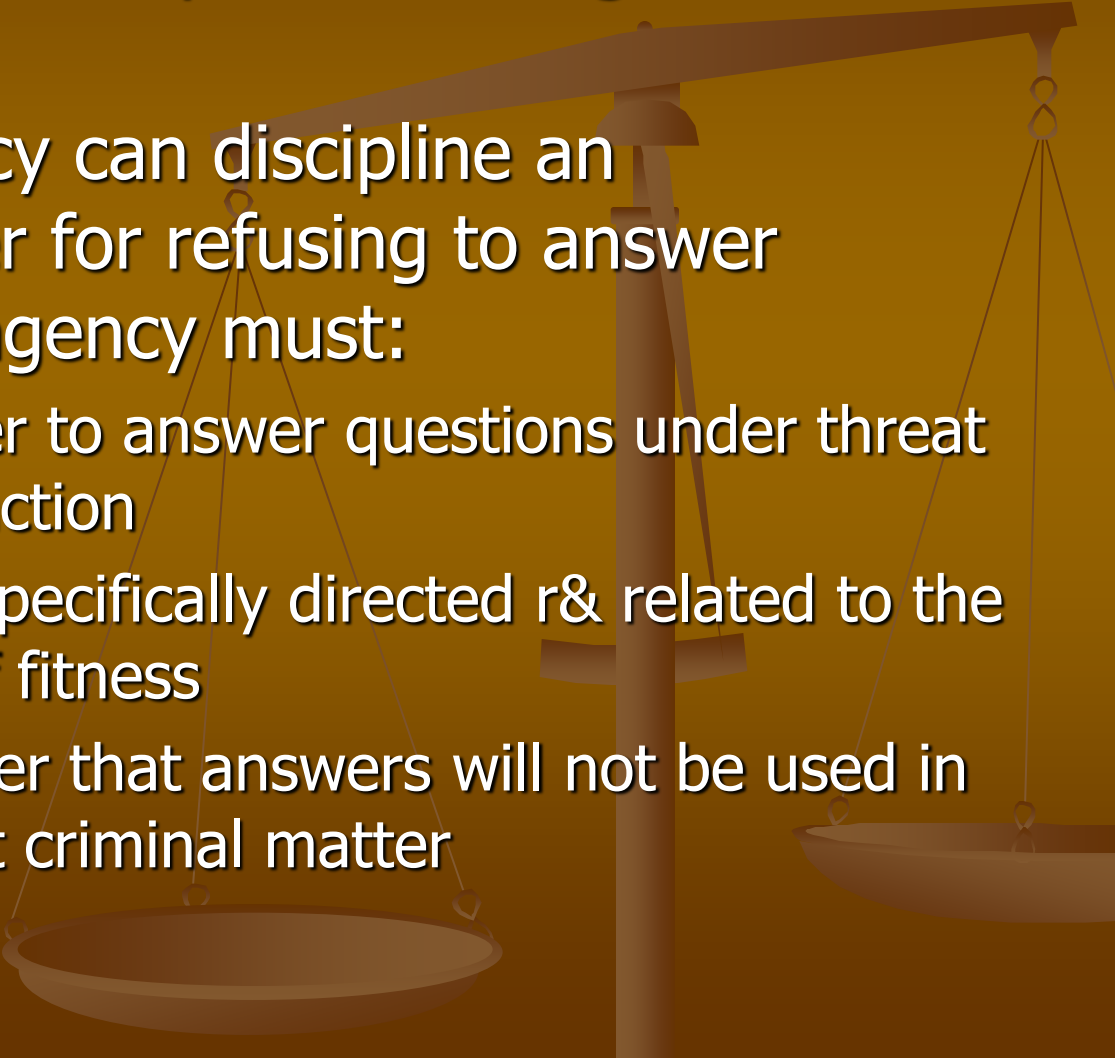
- *State of Montana DOJ and MFPE (2019)*
EE was not informed he was the subject of possible discipline and was lead to believe the interview was about another EE.
- The statements made at the interview formed the basis of discipline.
- Statements were rejected the as the “fruit of the illegal tree.”

Weingarten

- What's so important about having a steward there since the steward can't say much or interfere with the interview?
- Allows the steward to understand what the allegation are and what the EE's response is
- Should the EE say nothing and rely on the fact that the ER bears the burden of proof?
- Should the EE fess up to all of it? Shows remorse and correctability and prevents a claim of lying in the investigation.

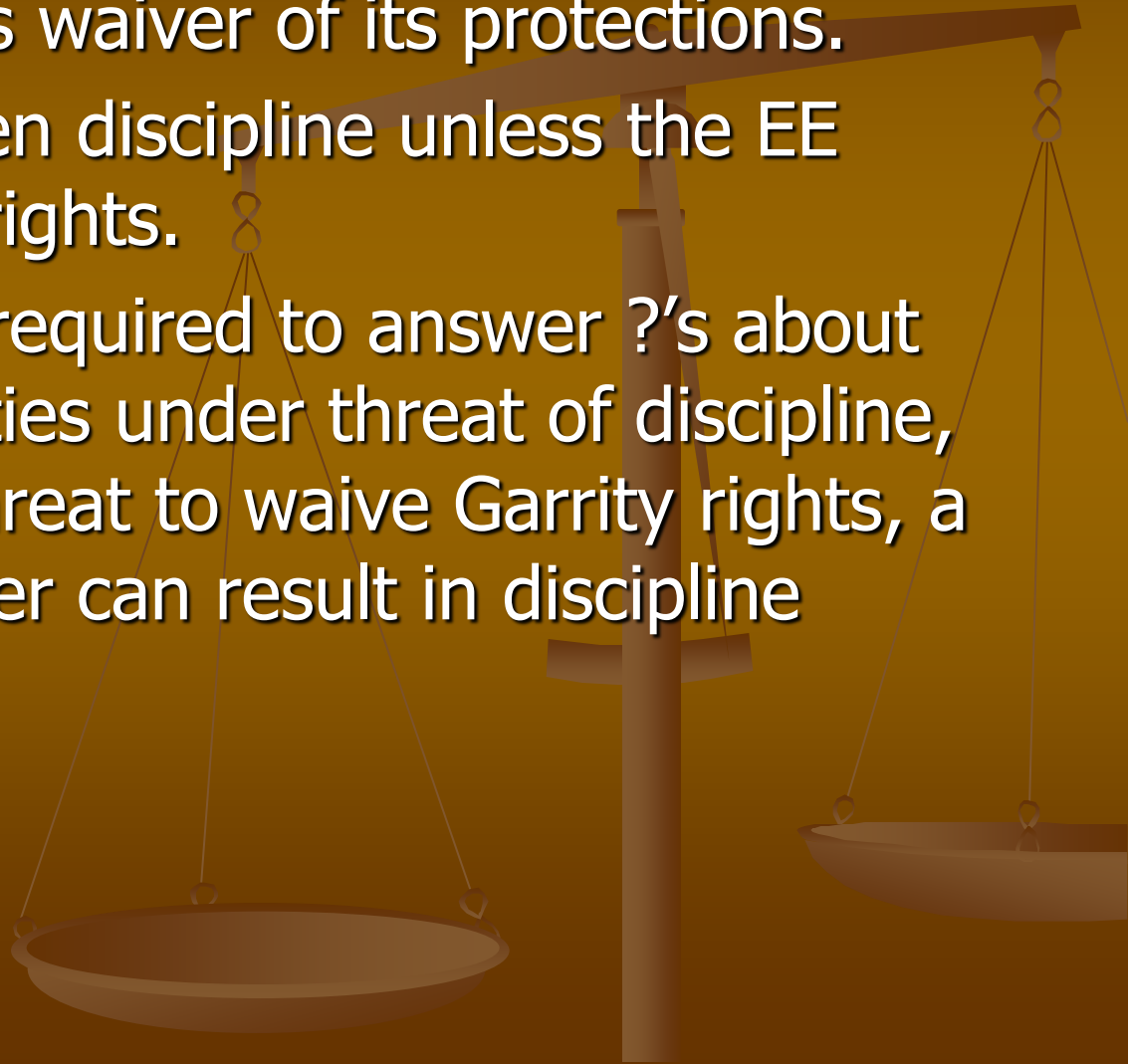


Garrity v New Jersey

- Tied to the notion of prohibition against self incrimination.
 - Before an agency can discipline an employee/officer for refusing to answer questions, the agency must:
 - Order the officer to answer questions under threat of disciplinary action
 - Ask questions specifically directed r& related to the officer's duty of fitness
 - Advise the officer that answers will not be used in any subsequent criminal matter
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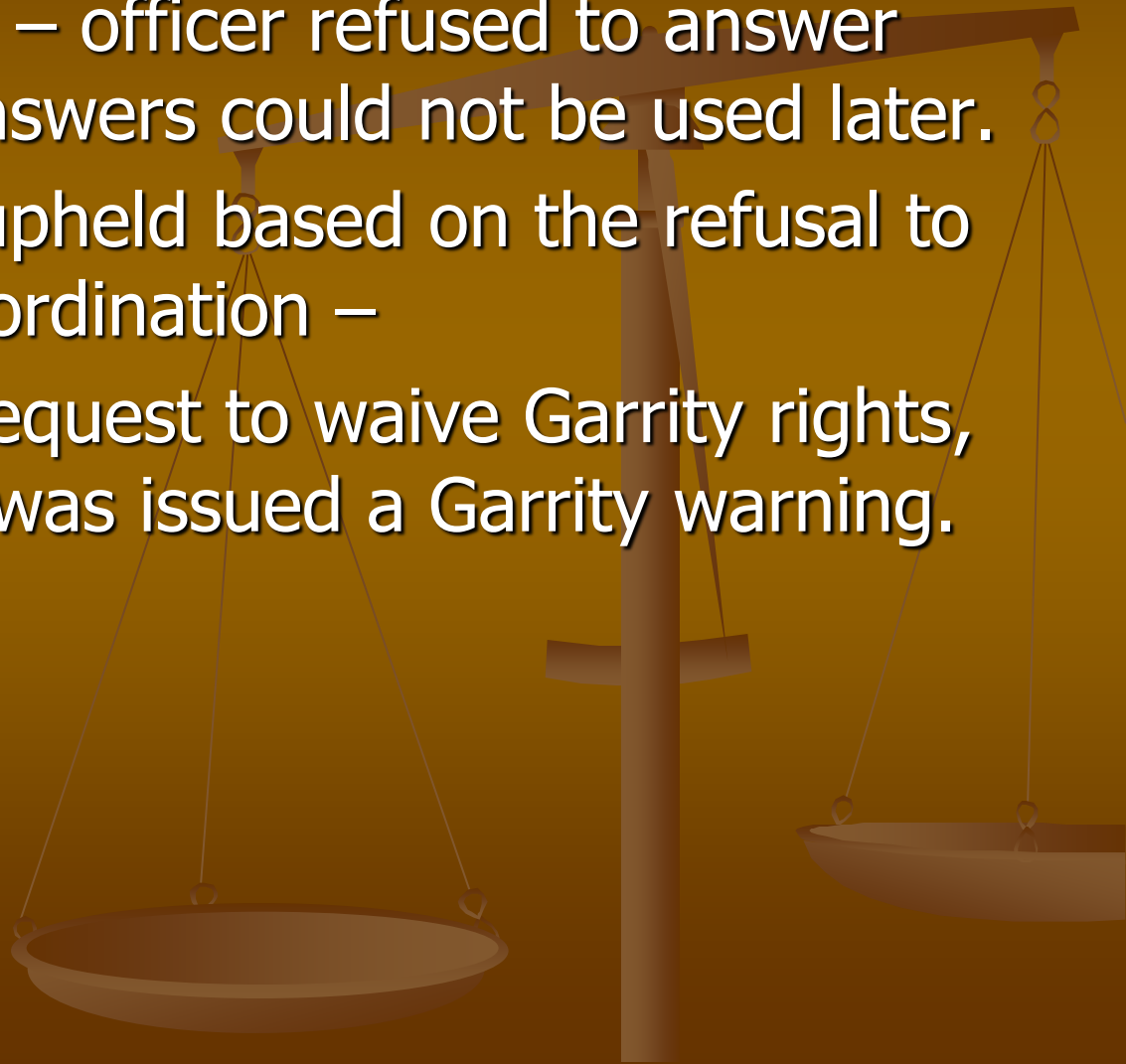
Garrity v New Jersey

- Garrity prevents waiver of its protections.
- ER can't threaten discipline unless the EE waives Garrity rights.
- The EE can be required to answer ?'s about their official duties under threat of discipline, If there is no threat to waive Garrity rights, a refusal to answer can result in discipline



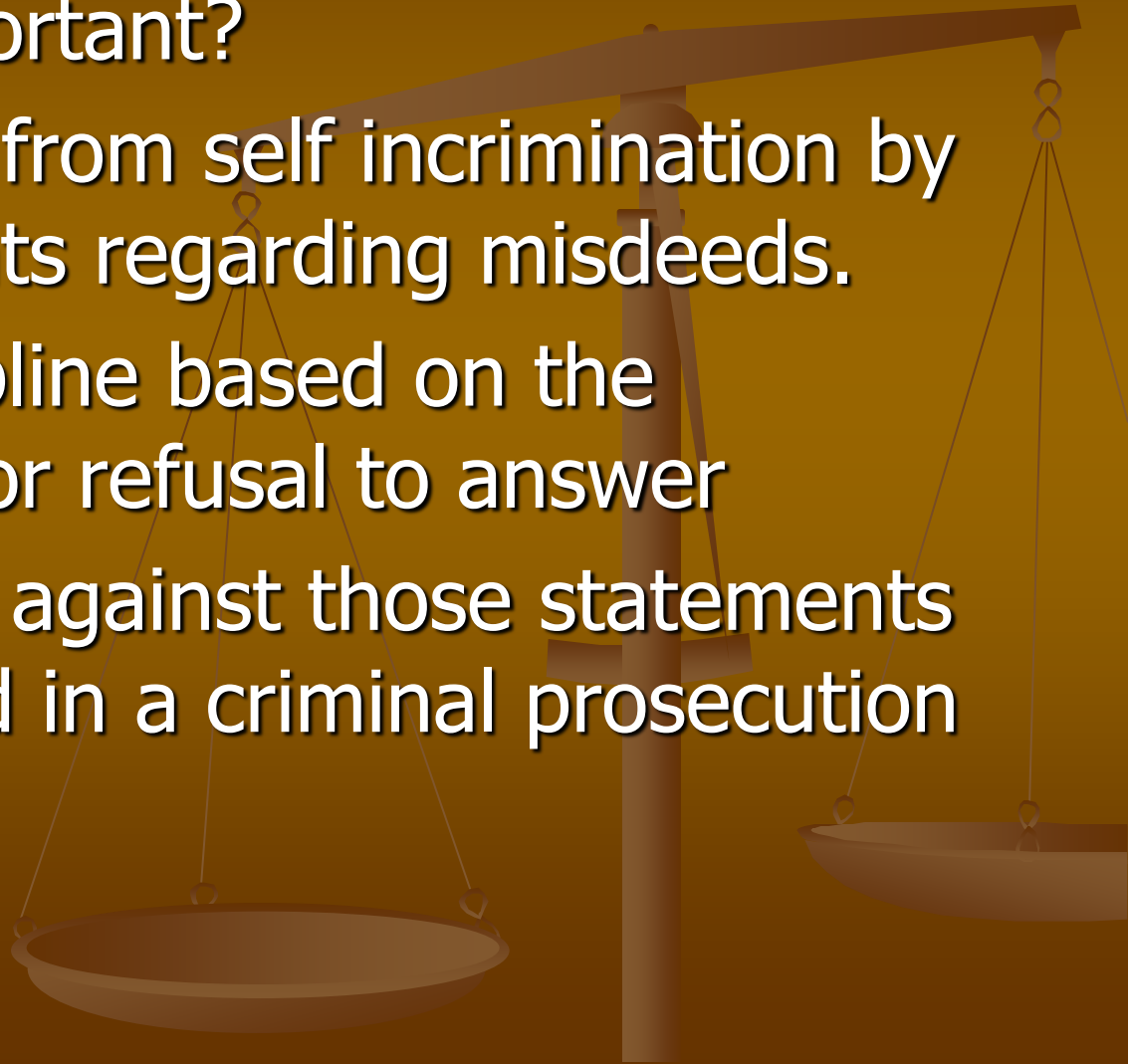
Garrity v New Jersey

- City of Houston – officer refused to answer and was told answers could not be used later.
- Discipline was upheld based on the refusal to answer – insubordination –
- There was no request to waive Garrity rights, and the officer was issued a Garrity warning.



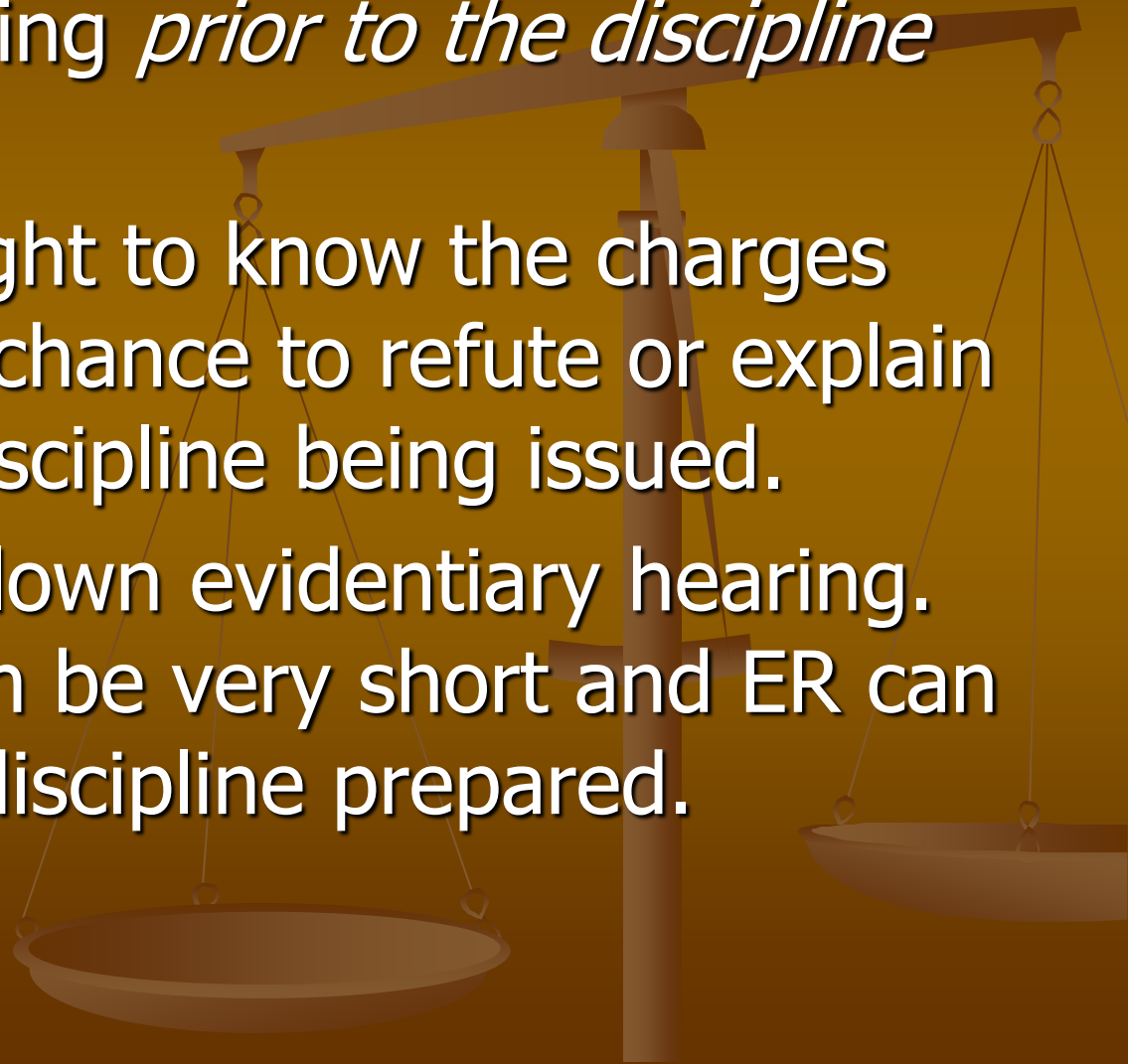
Garrity

- Why is this important?
- Protects the EE from self incrimination by giving statements regarding misdeeds.
- Allows for discipline based on the statements or for refusal to answer
- Garrity protects against those statements from being used in a criminal prosecution



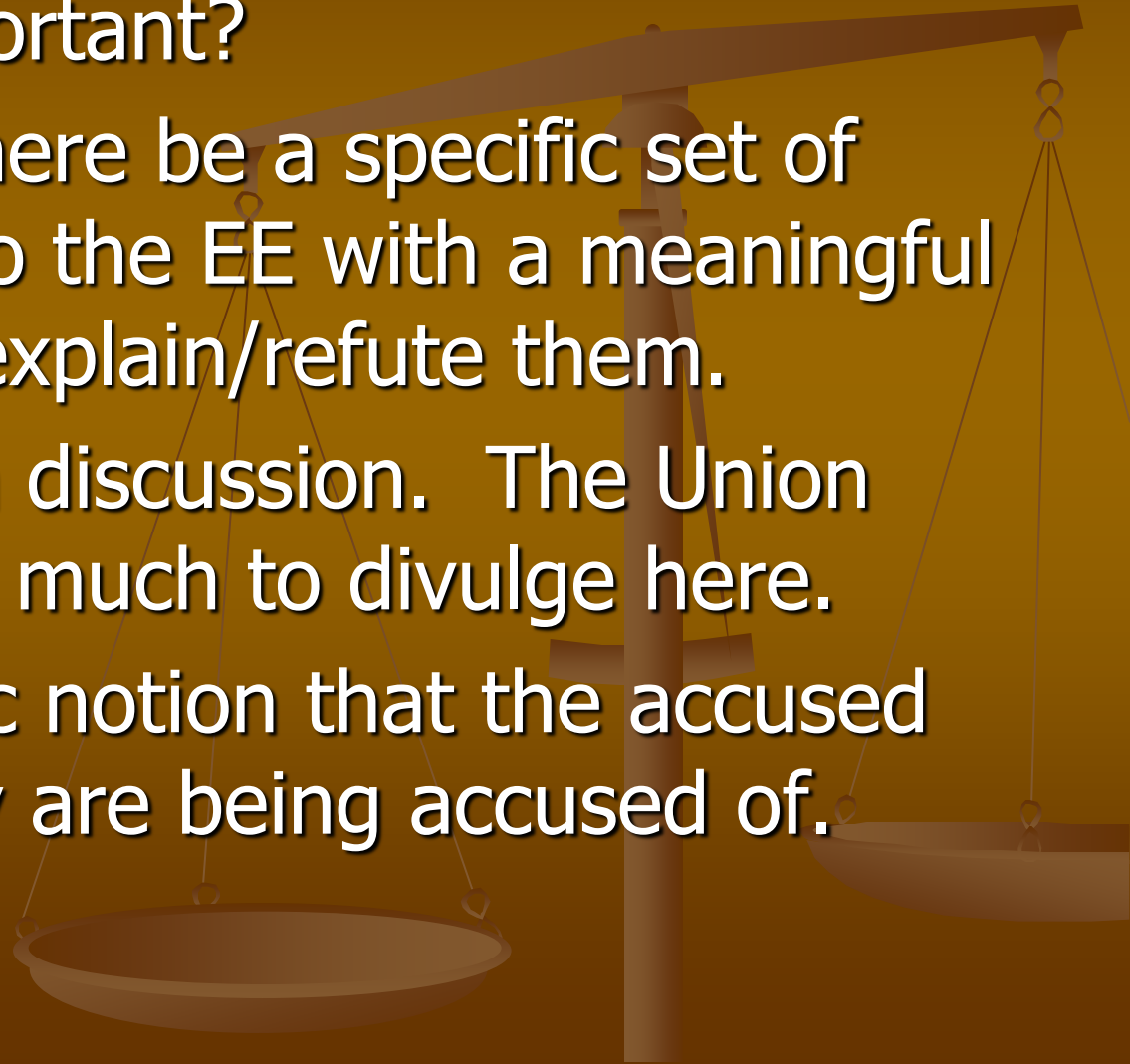
LOUDERMILL

- Requires a hearing *prior to the discipline being issued.*
- The EE has a right to know the charges and be given a chance to refute or explain them prior to discipline being issued.
- It is not a full-blown evidentiary hearing. No C-X etc. Can be very short and ER can even have the discipline prepared.



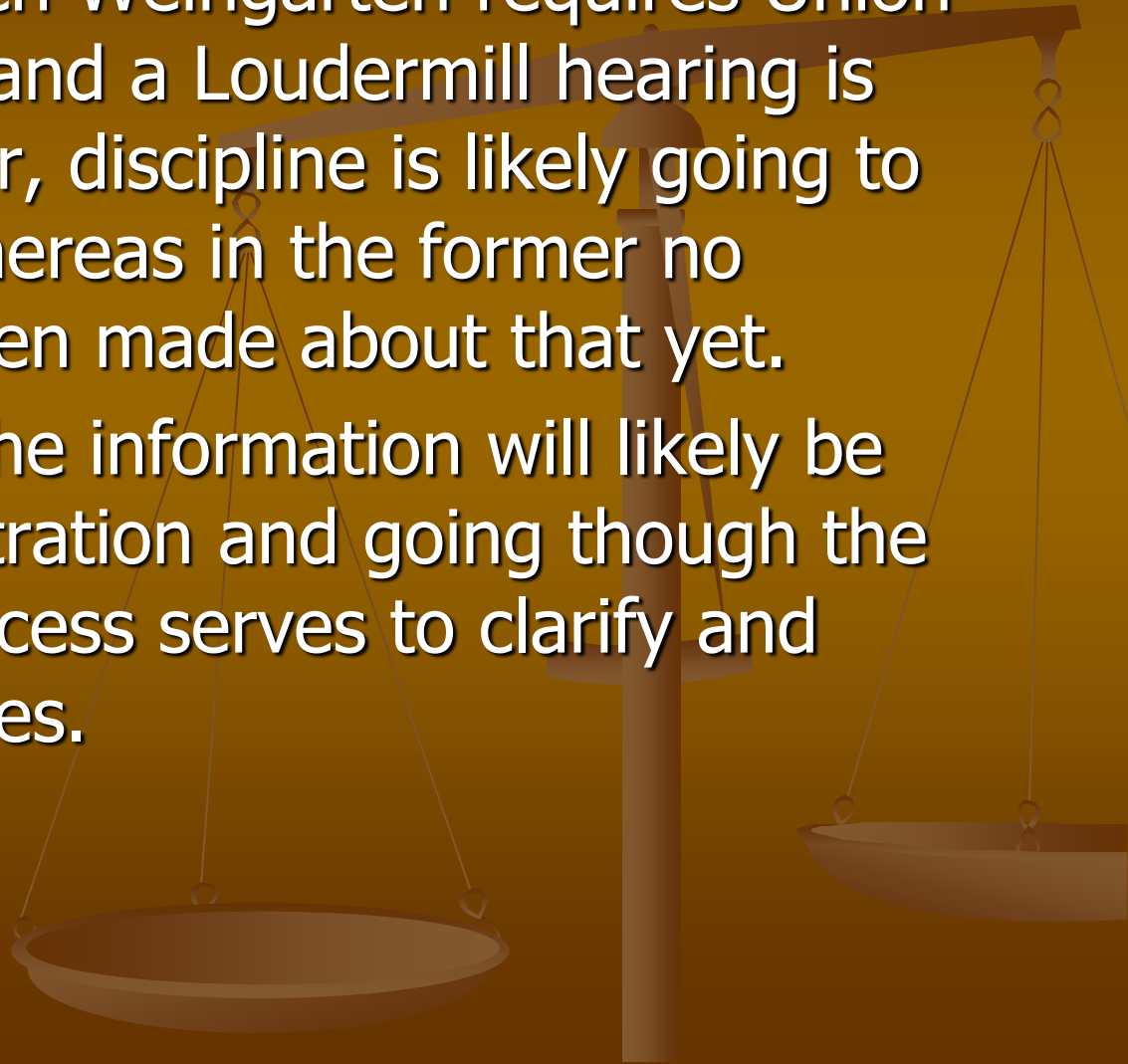
LOUDERMILL

- Why is this important?
- Requires that there be a specific set of charges given to the EE with a meaningful opportunity to explain/refute them.
- See Weingarten discussion. The Union can decide how much to divulge here.
- Part of the basic notion that the accused know what they are being accused of.

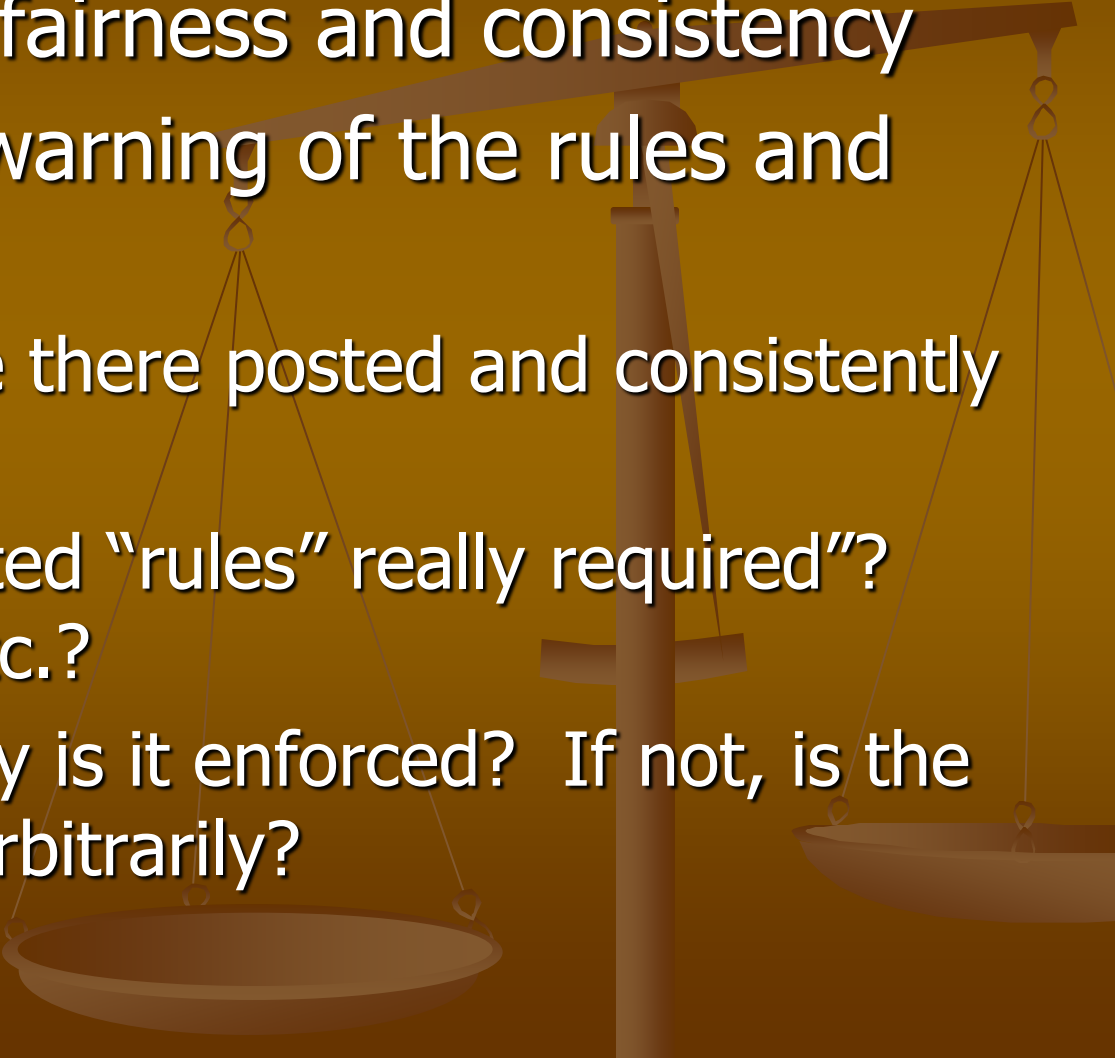


LOUDERMILL

- The difference between an investigatory meeting at which Weingarten requires Union representation and a Loudermill hearing is that in the latter, discipline is likely going to be imposed, whereas in the former no decision has been made about that yet.
- In either case the information will likely be used at an arbitration and going through the appropriate process serves to clarify and narrow the issues.

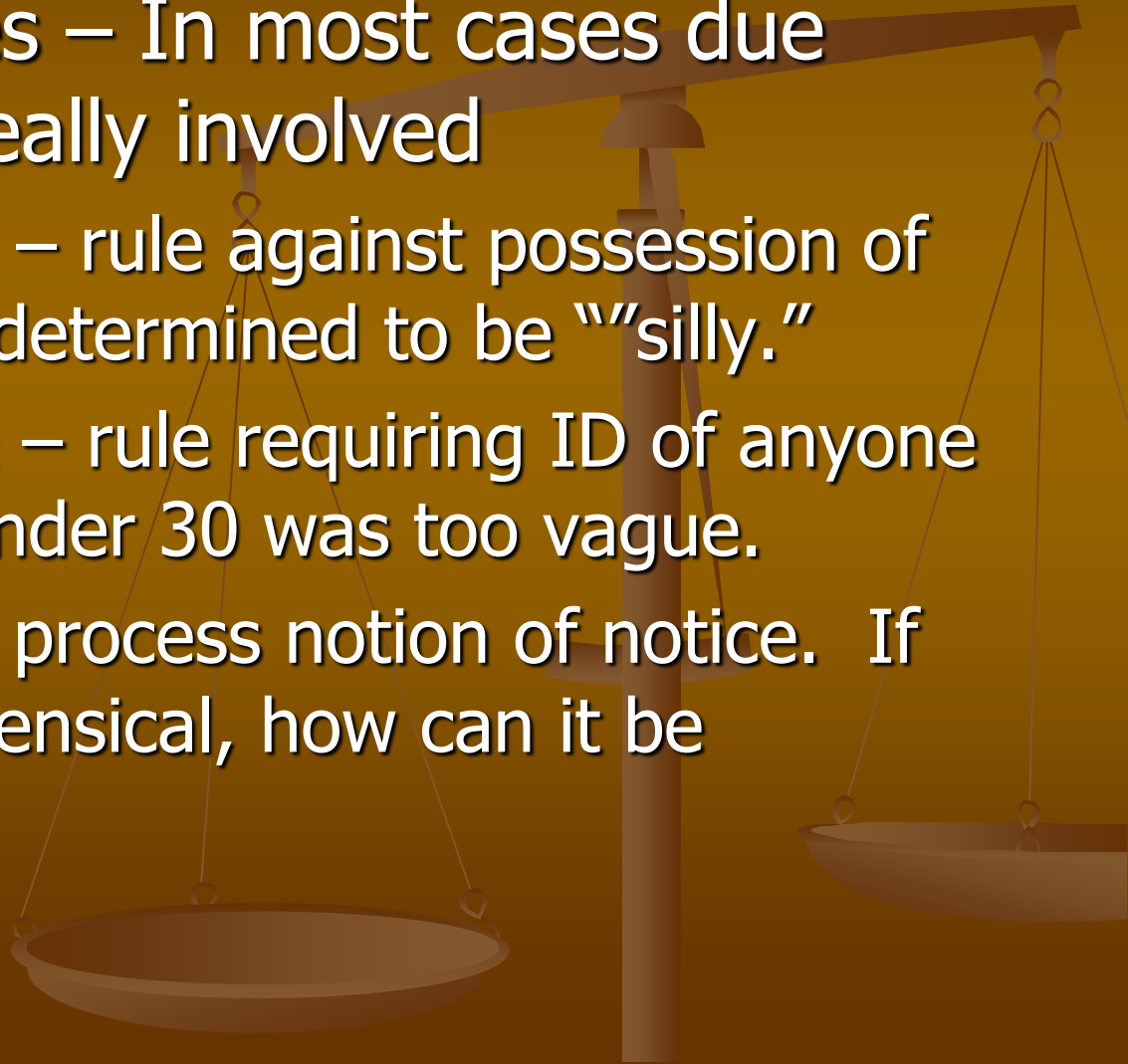


DAUGHERTY 7 TESTS

- All 7 are tied to fairness and consistency
 - Notice and forewarning of the rules and consequences.
 - Very basic – are there posted and consistently enforced rules?
 - Are written posted “rules” really required”? Assault, theft etc.?
 - How consistently is it enforced? If not, is the ER applying it arbitrarily?
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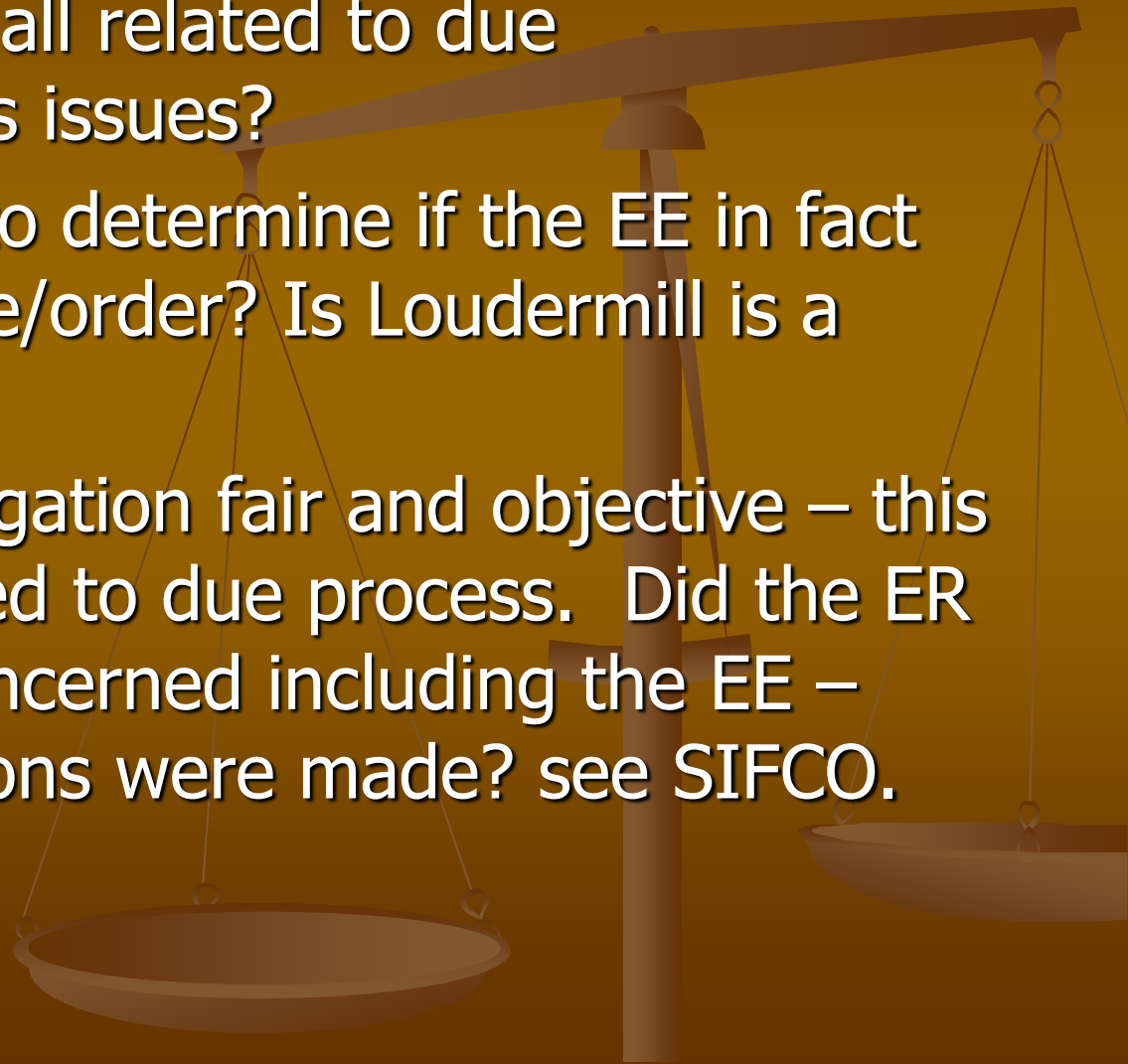
DAUGHERTY 7 TESTS

- Reasonable rules – In most cases due process is not really involved
 - City of Portland – rule against possession of marijuana was determined to be “silly.”
 - Delaware North – rule requiring ID of anyone who “looked” under 30 was too vague.
 - Tied to the due process notion of notice. If the rule is nonsensical, how can it be enforced?



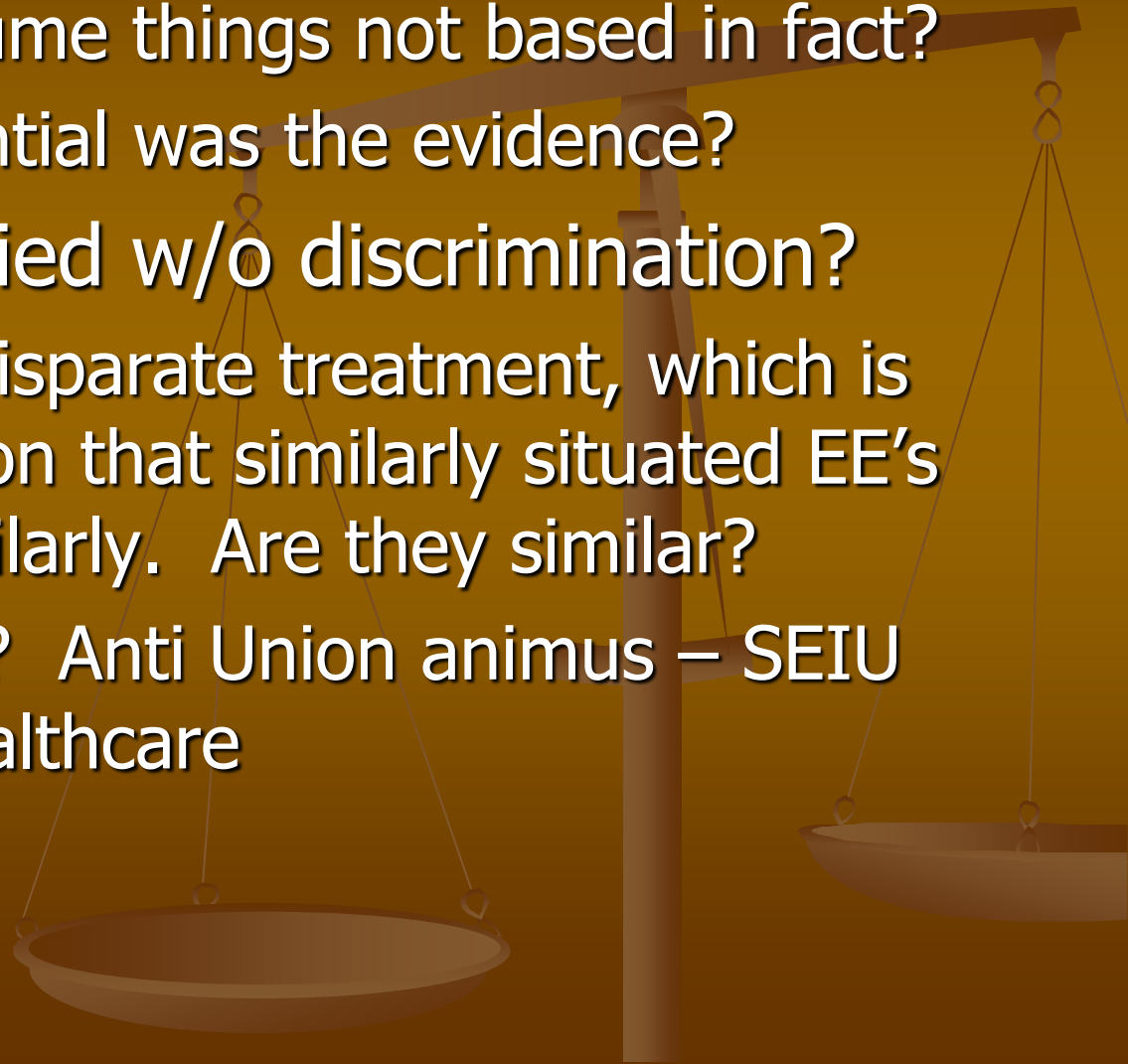
DAUGHERTY 7 TESTS

- Investigation – all related to due process/fairness issues?
- Did the ER try to determine if the EE in fact violated the rule/order? Is Loudermill is a different form
- Was the investigation fair and objective – this is directly related to due process. Did the ER interview all concerned including the EE – What assumptions were made? see SIFCO.

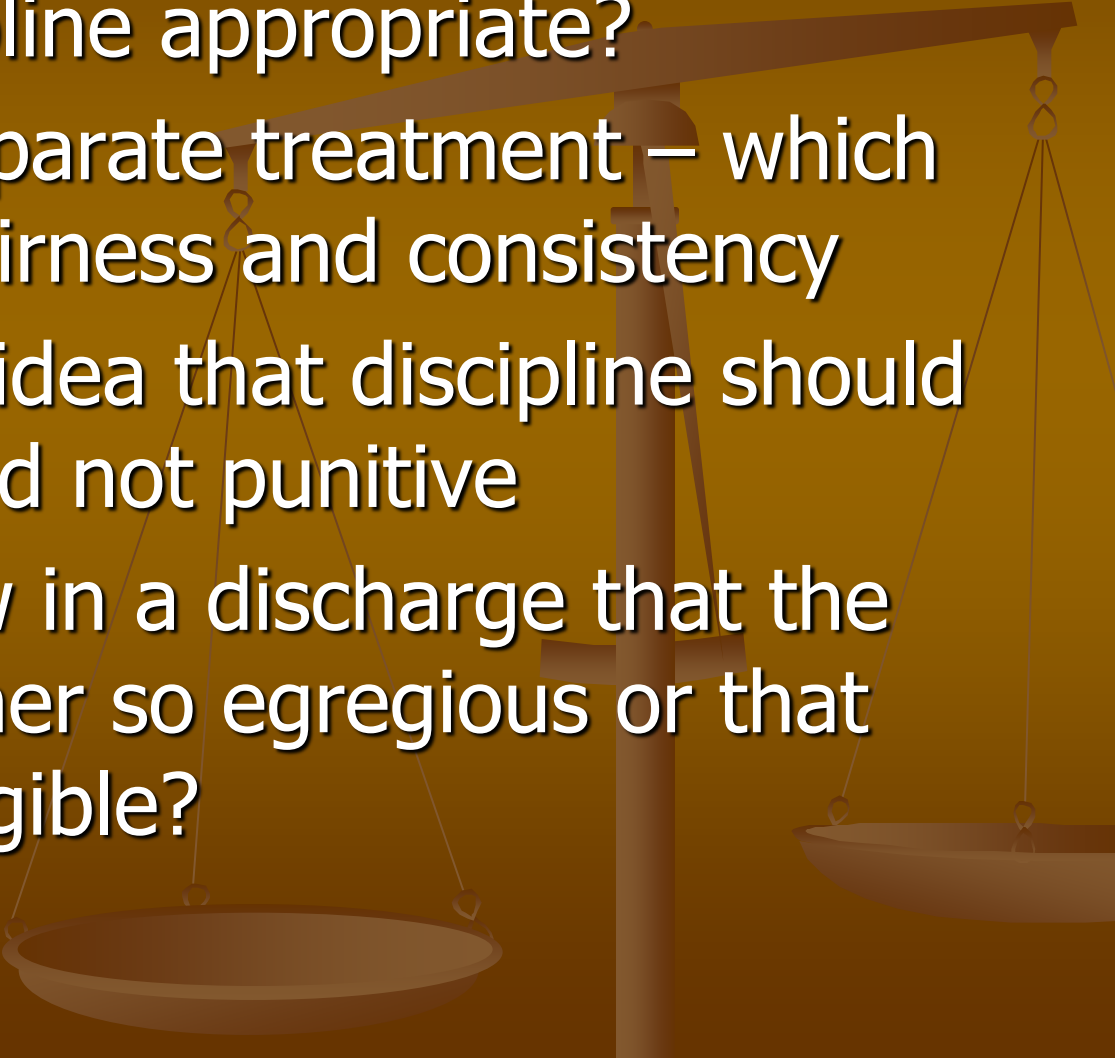


DAUGHERTY 7 TESTS

- Was there substantial proof of guilt?
 - Did the ER assume things not based in fact?
 - How circumstantial was the evidence?
- Were rules applied w/o discrimination?
 - This is tied to disparate treatment, which is tied to the notion that similarly situated EE's are treated similarly. Are they similar?
 - Was there bias? Anti Union animus – SEIU and Central Healthcare

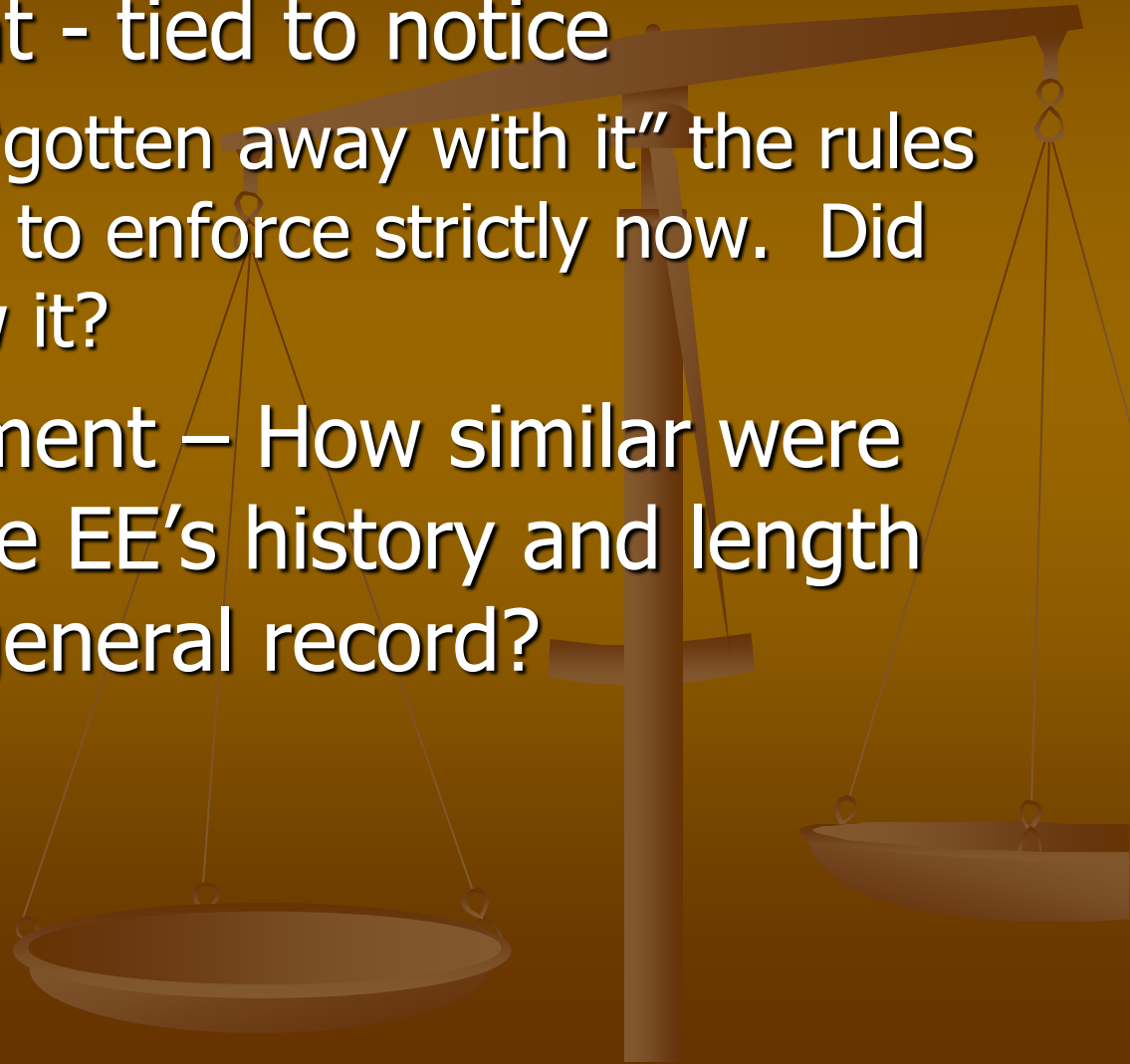


DAUGHERTY 7 TESTS

- Degree of discipline appropriate?
 - Tied both to disparate treatment – which is a matter of fairness and consistency
 - Also tied to the idea that discipline should be corrective and not punitive
 - Did the ER show in a discharge that the offense was either so egregious or that the EE is incorrigible?
- 

OTHER ISSUES RELATED TO DUE PROCESS AND FAIRNESS

- Lax enforcement - tied to notice
 - If others have “gotten away with it” the rules may be difficult to enforce strictly now. Did managers know it?
- Disparate treatment – How similar were the offenses, the EE’s history and length of service and general record?



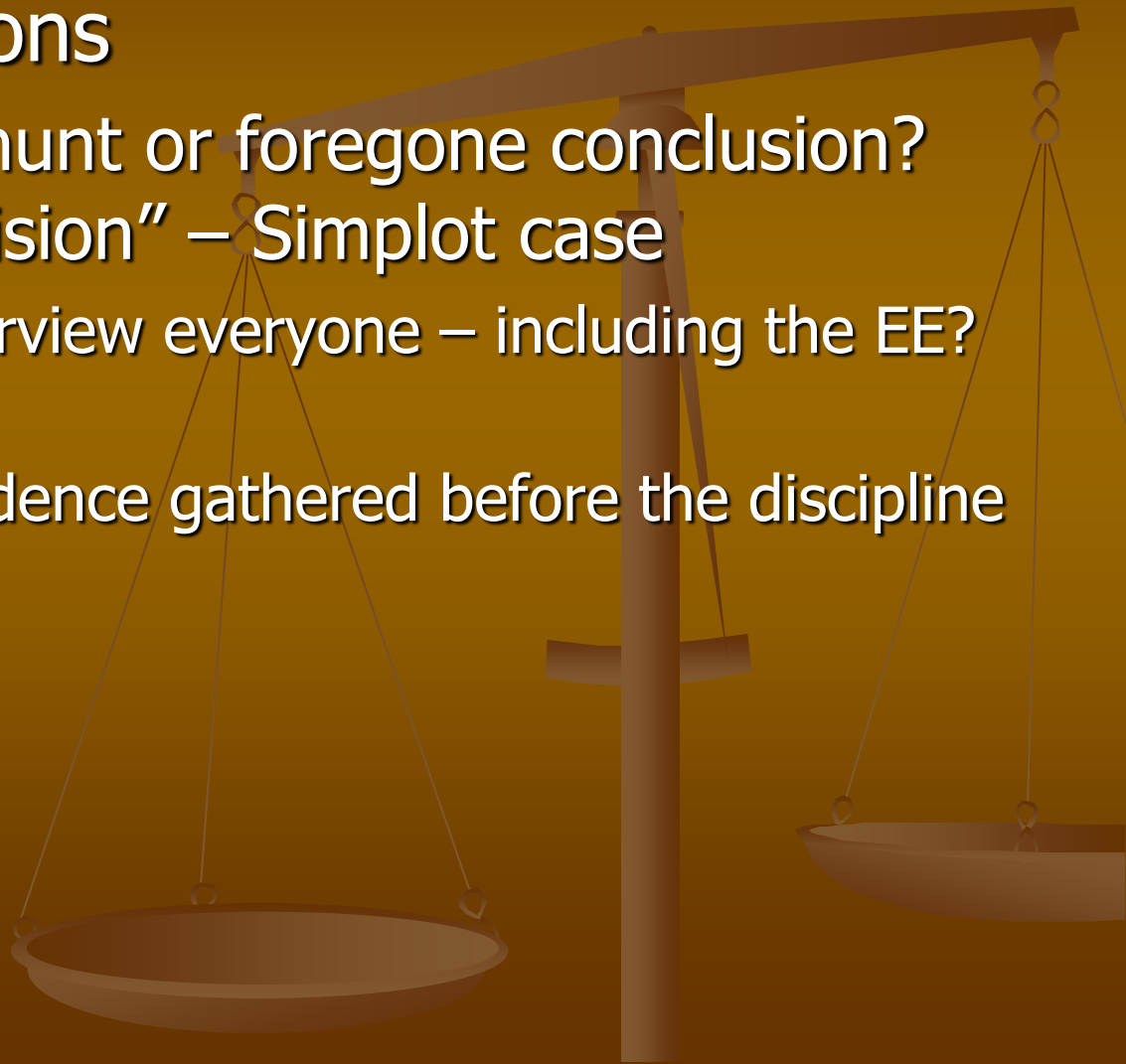
OTHER ISSUES RELATED TO DUE PROCESS AND FAIRNESS

- Double jeopardy – Can't impose discipline twice for the same offense
 - Tied to the criminal law, but allows for greater discipline for past offenses
 - AMPCO and Saputo – suspended and later fired
 - Suspensions “pending investigations are clearly allowed and are not double jeopardy
 - Is the “2nd” thing imposed really discipline?
 - Montana DOR – discipline and “re-assignment”

OTHER ISSUES RELATED TO DUE PROCESS AND FAIRNESS

■ Poor investigations

- Was it a witch hunt or foregone conclusion?
“Command decision” – Simplot case
 - Did the ER interview everyone – including the EE?
SIFCO case
 - Was all the evidence gathered before the discipline issued?

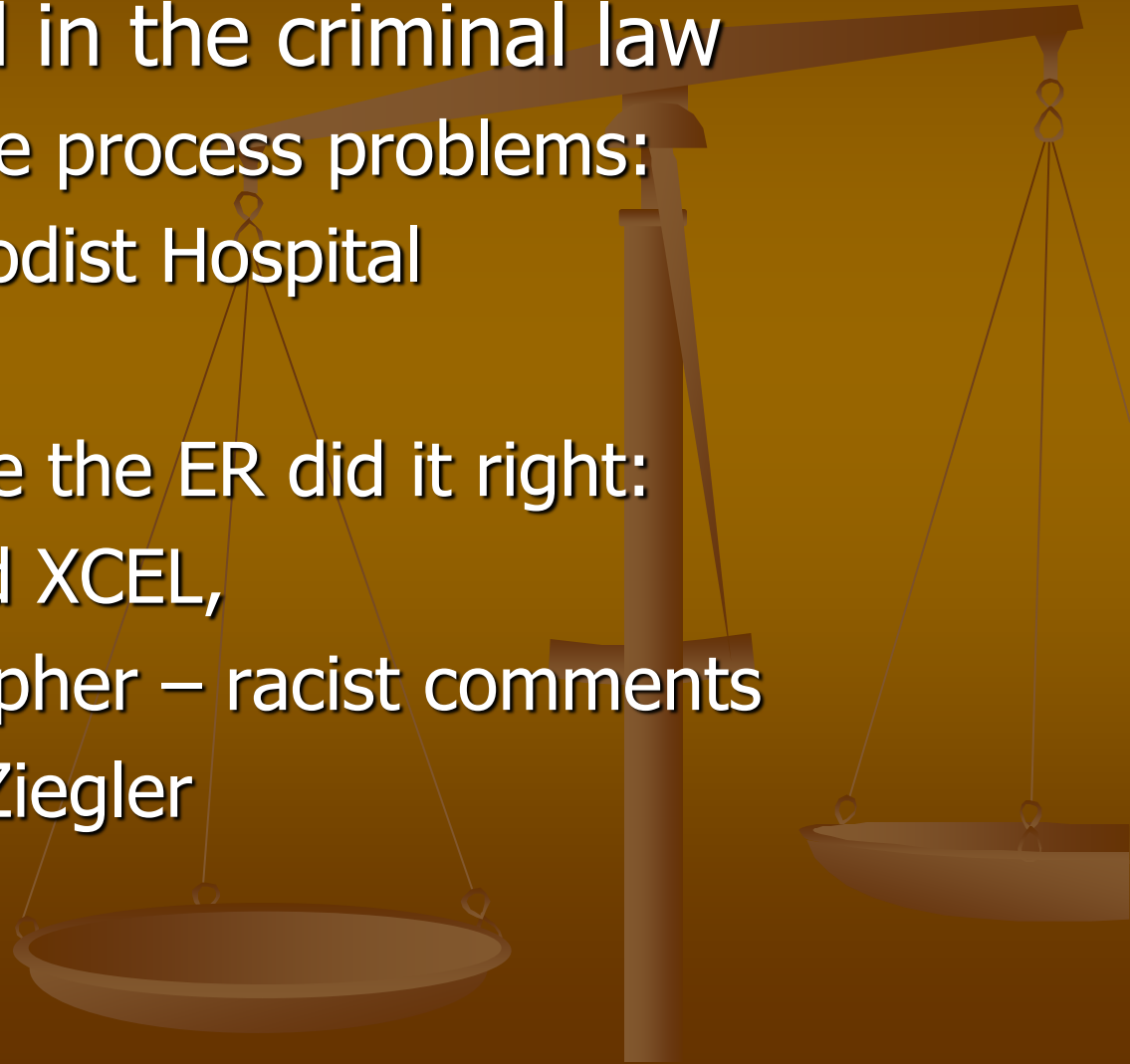


OTHER ISSUES RELATED TO DUE PROCESS AND FAIRNESS

- After acquired evidence – general rule – ER must base the case on what it knew *at the time of the issuance of discipline* – not after.
- This is a fundamental due process issue.
- Exceptions – evidence gathered afterward that supports pre-discipline actions – eBay
- Cannot be a “new charge.” Attendance and later charge of harassment example
- This is a fundamental due process issue.

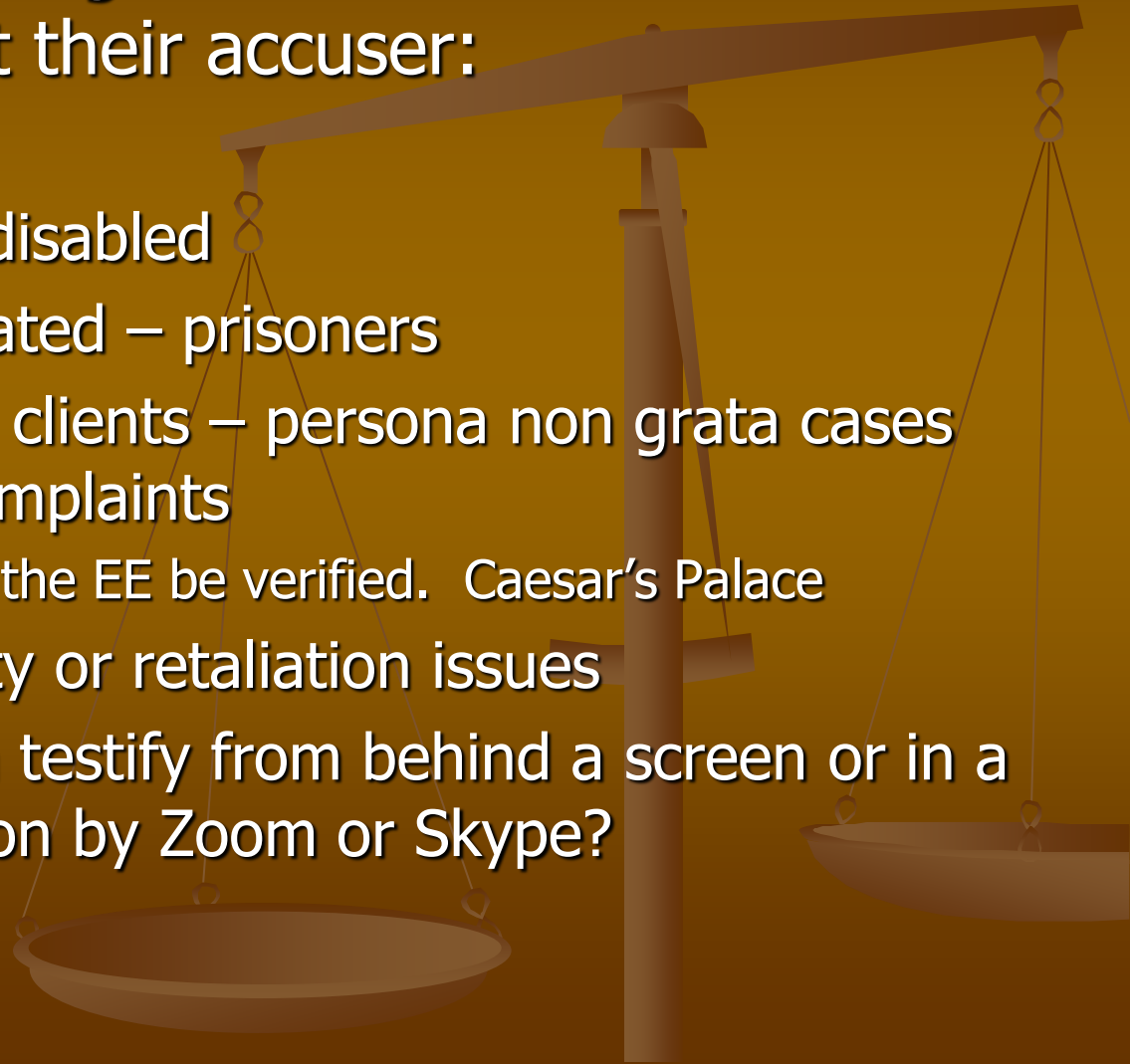
OTHER ISSUES RELATED TO DUE PROCESS AND FAIRNESS

- Allowing the grievant of confront their accuser – based in the criminal law
 - Examples of due process problems:
 - SEIU and Methodist Hospital
 - USW and 3M
 - Examples where the ER did it right:
 - IBEW #160 and XCEL,
 - IBT #120 & Gopher – racist comments
 - IBT #120 and Ziegler



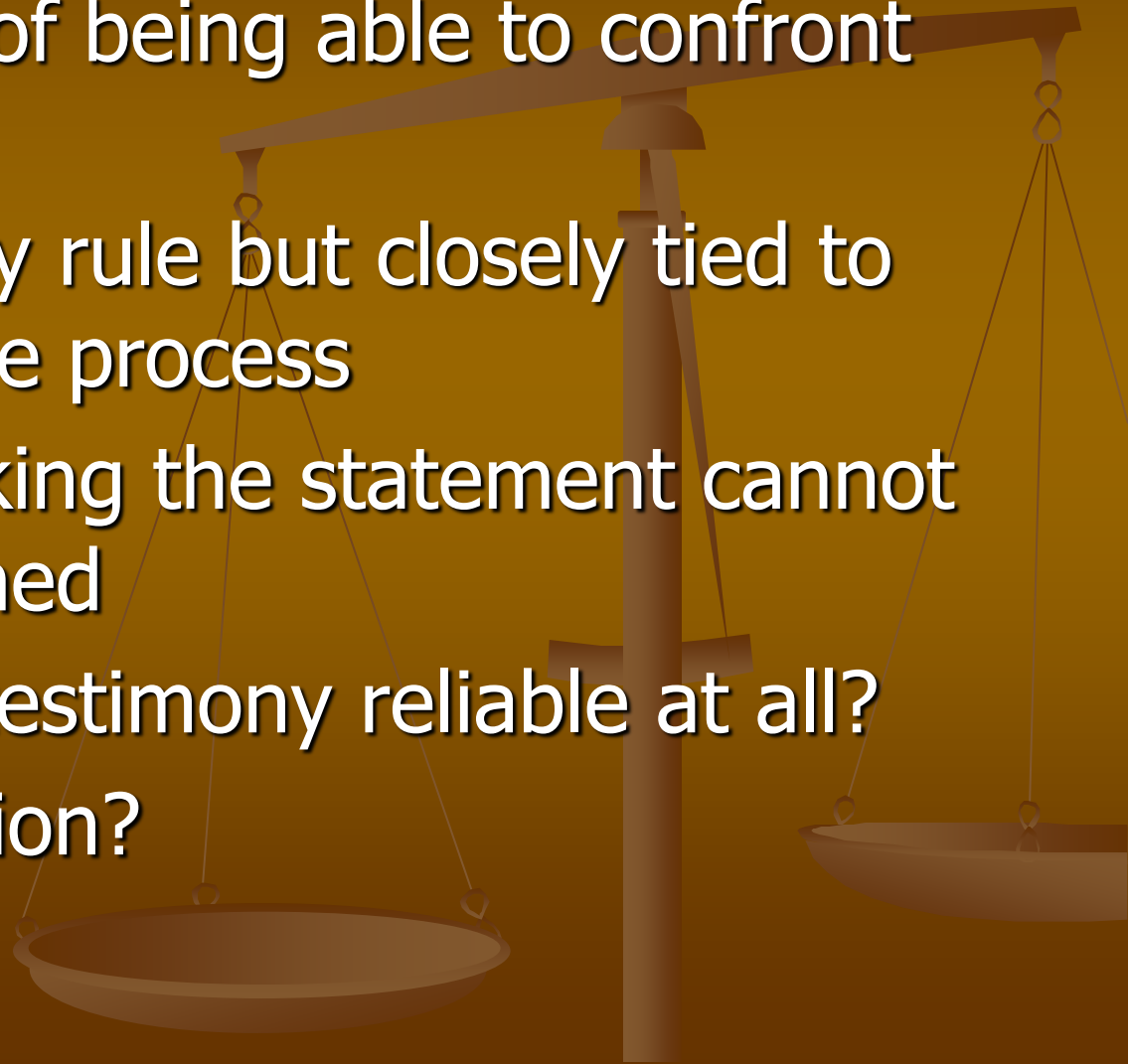
OTHER ISSUES RELATED TO DUE PROCESS AND FAIRNESS

- Exceptions to the general rule that the EE be able to confront their accuser:
 - Children
 - The elderly or disabled
 - Those incarcerated – prisoners
 - Customers and clients – persona non grata cases or customer complaints
 - Can the ID of the EE be verified. Caesar's Palace
 - Possible security or retaliation issues
 - Can the person testify from behind a screen or in a separate location by Zoom or Skype?



OTHER ISSUES RELATED TO DUE PROCESS AND FAIRNESS

- Hearsay – part of being able to confront the accuser
- Is an evidentiary rule but closely tied to fundamental due process
- The person making the statement cannot be cross examined
- Is the hearsay testimony reliable at all?
- Lack of foundation?



CONCLUSION

- Due process is not so much about protecting the guilty as much as protecting the innocent from determinations made about their guilt without adequate evidence or an opportunity to defend or explain.
- It is about making sure you follow the right steps to get to the right conclusion.
- Due process does not have to be perfect, it just has to be due.

