22nd ANNUAL LABOR-MANAGEMENT CONFERENCE
OF THE IUP GRADUATE
DEPARTMENT OF INDUSTRIAL
AND LABOR RELATIONS

JUST CAUSE FOR TERMINATION

THE SEVEN TESTS
AND
PRACTICAL ISSUES
(A UNION VIEW)

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I. THE SEVEN TESTS FOR JUST CAUSE.

The basic elements of just cause are often analyzed under the "The Seven Tests" . These tests, in the form of questions, are used by most arbitrators as guidelines, though the application varies according to facts of particular cases and specific arbitrator.

A "no" answer to one or more of the questions means that just cause either was not satisfied or at least was seriously weakened in that some arbitrary, capricious, or discriminatory element was present.

1. **NOTICE:** Did the Employer give to the employee forewarning of the possible or probable consequences of the employee's conduct?

2. **REASONABLE RULE OR ORDER:** Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might properly expect of the employee?

3. **INVESTIGATION:** Did the Employer, before imposing the discipline on an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management? Did the employee and the Union have an opportunity to respond prior to the discharge?

4. **FAIR INVESTIGATION:** Was the Employer's investigation conducted fairly and objectively?

5. **PROOF:** At the investigation, did the "employer" obtain substantial evidence or proof that the employee was guilty as charged? What is the appropriate burden of proof in a discharge case?[1]

6. **EQUAL TREATMENT:** Has the Employer applied its rules, orders and penalties even-handedly and without discrimination to all employees?

7. **PENALTY:** Was the degree of discipline administered by the Employer 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 Employer?

The classic example is a decision in which there is a finding that there was just cause for discipline, but that a penalty of discharge is too severe. (Example: reinstatement without back pay)

[1] There are three standards often discussed: "Beyond a Reasonable Doubt"; by "Clear and Convincing Evidence", and by a "Preponderance of the Evidence."

II. PRACTICAL ISSUES[2]

I. The due process issues

A. Why notice is important.

B. Why an opportunity to be heard prior to termination is important.

C. Progressive Discipline: It is the smart and fair way.

II. The "pyramid" problem

A. Experienced and trained union representatives and supervisors are important.

B. Arbitrators are/should be specialists/experts in workplace realities and justice.

III. The concern over the unevenness of arbitration decisions

A. Diminished predictability.

B. Decisions that are incomplete.

C. Pennsylvania Bureau of Mediation list issues.(Background and Experience)

D. FMCS issues.(Geographical Issues)

IV. Without the "brake" of "just cause" could management be trusted to be fair?

A. No, and even where management believes it is acting in good faith there are often different interests and different impressions of what is fair and what is just cause.(Example, is a union steward exercising Weingarten rights or being insubordinate.?)

B. See Enron, American Airlines, US Air etc.

[2] This is intended as a counterpoint, in parts, to Bob Durrant's paper "The Real Reasons the System Frustrates Employers. There is a substantial agreement on Sections III and IV.

C. Is the system less professional than decisions made by judges or juries? No, it is generally more professional, arbitrators have a better grasp of the workplace and workplace issues, while being quicker and less expensive.

D. When does the system work best? [When each side is before a National Academy Arbitrator? Where both management and labor representatives "below" knew what they were doing, and paid attention to what they were doing all pursuant to a well-bargained CBA.? Are lawyers representing each side important? (Not always)

V. Compromise Awards: Reinstatements without back pay

A. The concepts: 1) just cause for discipline; and 2) just cause for the discipline imposed.

B. Should be based on the facts of the case.

C. Is it ever based on the desire of the Arbitrator to give each side something?

VI. Last Chance Agreements

A. Often it gets both parties what they need.

1. Union saves members' jobs and does not risk uncertainty of arbitration and delay in getting to arbitration.

2. If the employee is really a bad worker, s/he will not survive a Last chance term.

B. General Rule: Duty to arbitrate underlying facts at basis of discipline of an employee under a Last Chance Agreement.(i.e. did it happen?). Arbitrator has no power to mitigate discipline.

C. Devil is in the details

1. Length of Last Chance Agreement.
2. Broad, or restricted to offenses of the same type as the present discipline.