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ARBITRATION

An important concern for unionized employers is that labor agreements may limit their ability to discharge or discipline employees without establishing ''just cause'' for doing so, Littler Mendelson attorney Jennifer Mora writes in this BNA Insights article.

While these employers can successfully terminate employees, it is critical to do the ground work, Mora says. Key issues to consider before discharging or disciplining an employee, she says, are whether work rules have been clearly articulated and consistently enforced and whether investigation and grievance files are organized and easy to access.

Preparing for Labor Arbitrations in a 'Just Cause' World, Best Practices

By Jennifer L. Mora

Most nonunionized employers enjoy the presumption of an at-will employment relationship (meaning an employer or an employee may end the employment relationship with no notice or reason). But this is not so with the many employers that operate under collective bargaining agreements with unions. These agreements generally limit an employer's ability to discharge or discipline employees unless it can establish ''just cause'' for doing so.

Proving just cause for discharging or disciplining an employee can present tremendous administrative difficulties. Despite that, unionized employers across the country can and do successfully and efficiently convince arbitrators to uphold their disciplinary and discharge decisions and keep problem employees out of their workforces. How? An employer must have the right evidence to present when called to prove its case to an arbitrator. Following are a number of key issues that unionized employers subject to a ''just cause'' standard should consider ***before*** discharging or disciplining an employee for any reason.

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Important Pre-Disciplinary Considerations in a Union Environment

Did the Employee Have Clear Notice of the Rule and the Consequences of Violating It? A common issue in discharge arbitrations is whether the employee had clear notice of both the rule and the consequences for noncompliance. According to one arbitrator: ''Just cause requires that employees be informed of a rule, infraction of which may result in suspension or discharge, unless conduct is so clearly wrong that specific reference is not necessary.''[1] On the latter point, arbitrators have recognized that employers need not provide explicit notice to employees that discipline will be imposed for serious misconduct, such as theft of property and falsification of company records. However, arbitrators will put employers to the task of proving notice to the grievant in other situations. In one case, an employer discharged an employee for failing a random drug test.[2] The arbitrator set aside the discharge because the employer had not effectively communicated to the employee that the

[1] *Lockheed Aircraft Corp.*, 28 LA 829, 831 (Hepburn, 1957).
[2] *Pacific Offshore Pipeline Co.*, 106 LA 690 (Kaufman, 1996).

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company had modified the rule to provide for summary discharge instead of suspension.

Arbitrators also consider whether the text of the applicable rule is clear and unambiguous so that employees can fully understand what is prohibited and what the consequences are of noncompliance. Rules prohibiting employees from disclosing confidential information to ''unauthorized individuals'' or from engaging in ''inappropriate conduct,'' or requiring employees to perform their tasks in a ''professional'' manner, may be too ambiguous about what specifically is prohibited. An arbitrator may set aside a discharge for violation of such vague rules.

Is the Rule Reasonable? Another factor arbitrators consider is the reasonableness of the work rule. Arbitrators recognize that employers may implement and enforce reasonable work rules. But one arbitrator aptly described some of the factors arbitrators historically have considered in determining what ''reasonableness'' means in the context of a particular rule: ''[W]hether the rule in question violates any part of the Contract; whether it materially changes a past practice or working condition; whether it is related to a legitimate business objective of management; whether it is arbitrary, capricious or discriminatory; and whether it is reasonably applied.''[3] Arbitrators also will consider whether the work rule is at odds with the employer's collective bargaining agreement with the union.

Some rules may be reasonably obvious on their face, including rules that require regular attendance; mandate that employees perform their tasks in a safe manner; or prohibit violence, theft, dishonesty, or harassment based on protected characteristics. On the other hand, employers that seek to prohibit employees from, for example, engaging in certain off-duty conduct may be required to prove that the rule prohibiting such conduct bears a relationship to the company's management and operations.

Employers that fail to provide employees with an opportunity to learn about and defend the charges against them are likely to have an arbitrator overturn their discharge decision. In one case, an employer that discharged an employee for threatening a co-worker with a knife was required to reinstate the person because it did not interview him about the incident.

Arbitrators also have considered, with differing results, rules that prohibit or regulate smoking in the workplace. If the employer cannot prove that such a rule is reasonable and consistent with the clear terms of the collective bargaining agreement, the arbitrator may set aside the discharge decision and reinstate the employee. Unilateral implementation of a work rule that contradicts the terms of a collective bargaining agreement also may result in the union filing bad faith bargaining charges with the National Labor Relations Board.

Did the Employer Fairly and Thoroughly Investigate the Allegation of Misconduct? The most common reason employers fail in meeting their burden of proving just cause is that their investigation does not meet ''industrial due process'' requirements that labor arbitrators impose on employers. Due process requires an employer to promptly notify the employee of the charges against him or her and, more importantly, provide the person an opportunity to defend against the charges and tell his or her side of the story.

Employers that fail to provide employees with an opportunity to learn about and defend the charges against them are likely to have an arbitrator overturn their discharge decision. In one case, an employer that discharged an employee for threatening a co-worker with a knife was required to reinstate the employee because it did not interview him about the incident.[4] According to the arbitrator, ''fairness would seem to have dictated that [the employer] hear the Grievant's side of the story.''

Arbitrators also consider whether the employer's determination of guilt was a foregone conclusion. The individual tasked with investigating the allegations of misconduct should remain neutral and objective, and avoid reaching knee-jerk conclusions or making assumptions about the employee's guilt or a witness's credibility. Employer witnesses at the arbitration should be prepared to establish that the investigation fairly and objectively considered the employee's version of events and appropriately considered the evidence provided by other employee and management witnesses. The investigation also should consider relevant documentary evidence, such as incident reports, photographs, or audio recordings.

Did the Employer Apply the Rule Equally in Comparable Situations? Another common mistake employers make is lax or inconsistent enforcement of a known work rule. In a unionized environment where employers are subject to a just cause standard of proof, they generally must impose the same discipline on employees who engage in the same misconduct unless a reasonable basis for imposing a different penalty can be established. That said, as one arbitrator explained: ''Absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices.''[5]

In labor arbitrations, the union bears the burden of proving inconsistent enforcement of a work rule, or ''disparate treatment.'' If the union convinces the arbitrator the employer's application of the work rule resulted in inconsistent enforcement or the employer is now enforcing a rule it previously did not enforce, the arbitrator will be more inclined to vacate the discharge decision and reinstate the employee. In one such case,

[3] *Union Sanitary Dist.*, 79 LA 193 (Koven, 1982).

[4] *CR/PL P'ship (Crane Plumbing)*, 107 LA 1084 (Fullmer, 1996).

[5] *Johnson Controls*, 129 LA 348 (Hetrick, 2011) (quoting, ELKOURI & ELKOURI: HOW ARBITRATION WORKS, 6th ed., page 996).

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an arbitrator reinstated an employee who reported to work while under the influence of alcohol after the union proved that other employees had engaged in the same conduct but were not disciplined.[6] In another instance, an arbitrator reinstated an employee who was discharged for having a BB gun in a company vehicle when evidence established that the employer issued a written reprimand to a different employee who had a more powerful firearm in his personal vehicle on company property.[7] Thus, before selecting the appropriate level of discipline to impose on an employee, the employer should consider whether the rule historically has been enforced in a consistent and even-handed manner.

Determining the Appropriate Level of Discipline

Was the Penalty Imposed Reasonable? Another factor arbitrators consider is the relationship between the penalty imposed and the seriousness of the offense. Arbitrators have long recognized that for extremely serious acts of misconduct, summary discharge may be an appropriate remedy. For example, immediate discharge may be appropriate for an employee who steals company property or physically assaults a customer, even if the employee has an unblemished work record. In addition, an employer that fires a worker for illegal activity in the workplace, such as drug sale and distribution, may successfully convince an arbitrator to uphold the employer's discharge decision.

Provide clear communication to the union and employees of both the existence of a work rule and the consequences for noncompliance. If the collective bargaining agreement does not specify how this notice must be provided, it can be accomplished in a number of ways, including posting the rule on the bulletin board or announcing it during a mandatory training or meeting (or doing both).

On the other hand, if an arbitrator concludes the penalty for the offense was too severe or if the arbitrator finds that mitigating factors should reduce the severity of the penalty, the employer may have to reinstate the employee and reduce the penalty consistent with the arbitrator's ruling. In one example of such a situation, the employer discharged an employee who, without provocation, charged across a room and hit a co-worker with such force that the co-worker's hat fell off.[8] In reinstating the employee, the arbitrator found that the employer should have considered a variety of mitigating factors, such as: the employee immediately and sincerely apologized to his co-worker; the employee had a 15-year unblemished employment history; and the absence of evidence to suggest the employee would assault another co-worker if given the opportunity.

Additional Considerations for Employers. Unionized employers should not ignore these important considerations when determining the appropriate level of discipline to impose on employees accused of misconduct regardless of the severity of the offense. Employers may find it helpful to create instructions that set out these different considerations and ensure that managers and human resources professionals address these items before making a disciplinary decision.

The individual tasked with investigating allegations of misconduct should consider: (1) Did the employee have notice of the rule and its consequences? (2) Did the employer explain to the employee the nature of the charges against him or her? (3) Did the employee have an opportunity to defend against those charges and provide his or her side of the story? (4) Have other employees engaged in similar misconduct without consequence or received a lesser form of discipline? (5) Do the proposed penalty and the infraction committed bear a rational and reasonable relationship to each other?

Depending on the circumstances, if the answer to any of these questions is ''no,'' the employer may need to rethink whether to move forward with the discharge or consider a lesser punishment.

Best Practices for Employer Success

Best practices for improving the chances of success at a discharge arbitration include the following:

- Provide clear communication to the union and employees of both the existence of a work rule and the consequences for noncompliance. If the collective bargaining agreement does not specify how this notice must be provided, it can be accomplished in a number of ways, including posting the rule on the bulletin board or announcing it during a mandatory training or meeting (or doing both). It also helps if the rule is in the labor agreement because arbitrators have held that employees ''are presumed to know the terms of their collective bargaining agreement.''[9]

- Review the person's employment history to determine whether similar incidents have occurred in the past and evaluate the existence of any mitigating evidence. Also consider the employee's overall past record and his or her service with the company.

- Review the collective bargaining agreement to ensure that the type of misconduct at issue is not subject to progressive discipline. In a progressive disciplinary system, discharge is reserved for more serious incidents of misconduct and/or repeated misconduct. The most common steps employers must take prior to discharge are verbal warnings, written warnings, and suspensions. Of course, employers are not required to apply progressive discipline in every situation. As noted

[6] *Commercial Warehouse Co.*, 100 LA 247 (Woolf, 1992).
[7] *Citizens Telecomm. Co. of Tenn.*, 127 LA 55 (Frockt, 2009).
[8] *Clow Water Systems Co.*, 102 LA 377 (Dworkin, 1994).
[9] *Sheraton Waikiki Hotel*, 119 LA 372, 382 (Nauyokas, 2003).

above, immediate discharge may be appropriate for serious misconduct. The collective bargaining agreement also may specify a list of offenses for which ''automatic discharge'' is appropriate (although even then some arbitrators will consider mitigating circumstances).

■ Review the collective bargaining agreement to determine whether the employee's prior disciplinary history can be considered. Some labor agreements contain provisions that essentially expunge a prior written or verbal warning after a certain period of time has elapsed. If the collective bargaining agreement includes this type of provision, the employer may not be able to rely on the prior disciplinary record to justify a discharge.

■ Ensure that employee requests for a *Weingarten* representative are honored. If the purpose of the meeting is to investigate the situation (rather than to issue previously decided discipline) and the employee reasonably believes the purpose of the meeting is to elicit information that could lead to discipline, he or she is entitled to union representation on request.

■ Determine the appropriate standard of proof that may apply at the arbitration. The most common standard of proof in discharge cases is ''preponderance of the evidence,'' which generally means that it is more likely than not that the employee engaged in the misconduct. However, in situations in which the employer discharged the employee for conduct that is criminal in nature, such as theft or violence, some, but not all, arbitrators apply a ''clear and convincing evidence'' standard. That means the evidence is ''so clear, direct and weighty and convincing as to enable [the fact finder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.''[10]

■ Consider whether the company has sufficient evidence to prove the employee actually engaged in the misconduct. If the arbitrator will have to rely heavily on hearsay evidence or if the managers or employees who observed the conduct are uncertain or present other credibility issues, consider offering the employee a ''last chance agreement'' in lieu of discharge.

■ Research prior disciplinary notices issued to other employees and decide whether the proposed penalty is consistent with penalties imposed for the same behavior in the past. Talk with managers and supervisors to determine whether they are enforcing a known work rule that has not always been enforced in the past.

■ Maintain relevant information, including incident reports, customer complaints, and employee statements, in a central and secure location, and designate an internal point-of-contact who will provide information to outside counsel and coordinate any necessary witness interviews. Having investigation and grievance files that are organized and easy-to-access allows outside counsel to more strategically analyze the strengths and weaknesses of the grievance and either prepare the company's case for arbitration or recommend and negotiate a mutually-beneficial settlement of the grievance.

Employers that incorporate these practices into the day-to-day management and operations of their business are well on their way to more effectively and successfully presenting their case to an arbitrator.

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[10] *Miami-Dade Cnty.*, 131 LA 287 (Hoffman, 2012) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. Dist. Ct. App.)).

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