Workplace Investigations and Hearings Before Neutrals:

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Investigations and Arbitration

3 of the 7 “tests” of just cause deal with investigatory issues:

- Was the investigation sufficient?
- Was the investigation fair?
- Was proof of misconduct discovered during the investigation to support the investigation’s conclusion?

Arbitrators, Hearing Officers and Similar Neutrals Have Moved Away From the 7 Tests

- Carroll Daugherty developed the tests in relation to the railroad industry.
- As a referee on the National Railroad Adjustment Board, Daugherty acted as essentially an appellate judge, reviewing the evidentiary determinations of a lower body. He later became a labor arbitrator.
- In a notable 1989 article, Professor/Arbitrator John Dunsford argued that the 7 tests were inappropriate for labor arbitrations in certain respects.

Arbitrators Sit De Novo

- Most arbitrators/neutrals hear cases de novo, not as appellate bodies.
- This means arbitrators/neutrals are the ones personally making evidentiary determinations rather than merely reviewing those made by someone else.
- For the most part, arbitrators/neutrals are not interested in how evidence was ascertained in an investigation.
- Arbitrators/neutrals are interested in what evidence is presented before them and whether the evidence is credible and establishes the employer's case by a preponderance of the evidence.

The Question Most Arbitrators/Neutrals Ask

- Did the employee have notice that the alleged conduct could lead to the type of discipline imposed?
- Did the employer provided credible evidence that proves by a preponderance of the evidence that the employee engaged in the alleged misconduct?
- Is the discipline proportional and has the employer historically disciplined similar misconduct in similar ways?

Morrison Factors Used In Faculty Cases

Morrison v. State Board of Education (1969) 1 Cal.3d 214.

- Likelihood that misconduct adversely affected students and/or fellow teachers;
- The degree of such adversity anticipated;
- Likelihood of recurrence;
- Extenuating or aggravating circumstances;
- Proximity or remoteness in time of the misconduct;
- Praiseworthiness or blameworthiness of the motive;
- Extent to which disciplinary action might adversely impact or chill constitutional rights of teachers.

Does This Mean Investigations Are Useless In Arbitration Cases?

- Of course not.
- A strong, fair, thorough investigation ensures that you can prove your case before the arbitrator.
- It prevents surprises or unknown defenses from arising during the arbitration.
- It also provides legal protection in other arenas
- However, you probably do not need to spend an inordinate amount of time at an arbitration proving the sufficiency of your investigation.

PERB Unfair Charges Alleging Retaliation

- Shoddy or poor investigations can be used against you in a PERB charge that alleges union retaliation.
- To prove a claim of retaliation under EERA, an employee must show that 1) the employee exercised EERA protected rights; 2) the employer had knowledge of the employee's exercise of those rights; 3) the employer took action against or adverse to the interest of the employee; and 4) the employee acted because of the employee's exercise of guaranteed rights. Novato Unified School District (1982) PERB Decision No. 210.

Shoddy Investigations Can Be Used to Prove Animus

- "Because evidence of unlawful motive rarely comes in the form of direct evidence, PERB considers any of several factors to establish by circumstantial evidence an inference of unlawful motive." Jurupa Unified School District (2015) PERB Decision 2450, pg. 17.

- "In addition to the timing of the employer's adverse action in relation to the employee's protected activity, one or more of the following additional factors must also be present: . . . the employer's cursory investigation of the employee's misconduct." Id.

PERB Findings of Cursory Investigations

- PERB has held that a limited investigation related to a union president's use of release time was evidence of unlawful motive, especially given that a better investigation would have provided exculpatory evidence. City of Torrance (2008) PERB Decision 1971-M
- PERB has held that the failure to provide information to a disciplined employee can be evidence of unlawful motive: "The District's failure to attach all of the written complaints and interview notes to the November 2011 summary of allegations when Norman had specifically requested that he be given all evidence against him departs from common sense, standard procedure." Jurupa Unified School District (2015) PERB Decision 2450, pg. 22

But Skelly Does Not Require Disclosure of All Materials Relied On

- “We reject appellant’s contention that the word ‘materials’ used in Skelly means each and every document identified in the Chief’s Case was required to be produced prior to his pre-termination hearing in order to satisfy due process.” Gilbert v. City of Sunnyvale, 31 Cal. Rprt. 297, 308
- “Our decision that the pre-termination procedures were constitutionally sufficient partially rests on the City’s provision of a full and fair post-termination hearing.” Id.

Lybarger: How to ensure your investigation can be used

- The CA Supreme Court has held that a public employee can be compelled to answer questions in administrative investigations but only if those answers cannot be used in subsequent criminal proceedings:
- "As a matter of constitutional law, it is well-established that a public employee has no absolute right to refuse to answer potentially incriminating questions posed by his employer. Instead, his self-incriminating rights are deemed adequately protected by precluding any use of his statements at a subsequent criminal proceeding." Lybarger v. City of Los Angeles (1985) 40 Cal.3d. 822, 827.

Speilbauer:
How to ensure your investigation can be used

- The California Supreme Court has further made clear that a grant of immunity is not needed, only a protection of statements made in an administrative setting:
- "We confirm that neither the federal nor the California Constitution allowed plaintiff, free of any sanction, to refuse to answer his employer's questions about his possible job misconduct unless and until he received, in advance a formal grant of immunity from subsequent criminal use of his statements." Speilbauer v. County of Santa Clara (2009) 45 Cal.4th 704, 729
- "[P]laintiff was accurately advised, on more than one occasion, that any statements he made under compulsion in connection with the employer's internal disciplinary investigation could not be used against him in a criminal case." Id.

Protection against self-incrimination not limited to peace officers

- Lybarger involved a peace officer;
- Speilbauer involved a deputy public defender.
- Lybarger admonitions must make clear that an employee is being compelled to answer, that failure to answer will lead to discipline, that any answer provided in the administrative investigation will not be used against the individual in a subsequent criminal proceeding.
- Failure to provide such a warning might excuse employee's refusal to answer questions during an investigation.

QUESTIONS

Fact Pattern No. 1: 5 Day Suspension

- Officer and fiancé are on vacation in Las Vegas
- A drunk third-party bumps into fiancé.
- The drunk third-party, while taking off sunglasses, says “s--- happens in Vegas, bitch. People get bumped.”
- Officer comes to fiancé’s defense, and the drunk third-party says “you don’t want to mess with me; I’m going to f--- you up.”
- Officer then extends hand to civilian’s forehead—a technique he learned in training.
- Officer and civilian proceed to exchange punches, and both wind up on the floor.
- Officer has a cut on his forehead but heads to his room without telling hotel security about the incident.
- There was hotel video footage without audio of the incident; the hotel provided the department with the footage.

Fact Pattern No. 1: 5 Day Suspension

- Applicable policy

  Discipline is appropriate for any off-duty conduct which employees knows or reasonably should know is unbecoming an officer, which is contrary to good order, efficiency, or morale, or which will reflect unfavorably on the Agency.

- Issue

  Was there just cause for a one-week suspension?

  If not, what is the appropriate remedy?

Fact Pattern 1: 5 Day Suspension

- Arbitrator Bergeson: How would you rule and why? What additional information, if any, would you want?

- Arbitrator Lindoerfer: How would you rule and why? What additional information, if any, would you want?

QUESTIONS

Hypothetical 1: For Group Discussion

- Police Officer John Smith knows that Officer Paul John stalked a female civilian. The Department interviewed Smith regarding John's misconduct. Smith denied knowing anything about the alleged stalking. During a subsequent interview, the Internal Affairs investigator showed Smith texts sent to Smith from John's phone regarding John's alleged stalking. Smith admitted that he lied during the first interview. Department discharged Smith for lying.
- You are the arbitrator: Do you uphold the discharge; sustain discipline but reduce the penalty; or sustain the grievance entirely?

Fact Pattern 2: 35 Day Suspension

- Janitor on the night shift is found laying on the floor with his head resting on a rolled-up coat in a library's study room with the lights off.
- Janitor told his supervisor he had an upset stomach.
- Supervisor didn't believe janitor and said janitor was sleeping.
- Janitor began arguing with the supervisor.
- The supervisor called campus police.
- Before police arrived, the two came into physical contact, with the supervisor pushing away the janitor who had aggressively approached the supervisor.

Fact Pattern 2: 35 Day Suspension

- The Skelly hearing officer was the same person who investigated the misconduct and initially recommended the 35 Day Suspension
- There is no official policy regarding sleeping/loafing on the job.
- The CBA did not reference the policy that the employer relied on for the discipline.
- Was there just cause for the 35-day suspension?

Fact Pattern 2: 35 Day Suspension

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QUESTIONS

Hypothetical 2: For Group Discussion

- A public agency uses a subcontractor. Michael Wilson, an employee of the agency, touches an employee of the subcontractor in an unwanted, sexual manner. She files a complaint and the agency investigates. The investigator determines there was adequate evidence to find that Wilson engaged in the misconduct. The investigator did not interview Wilson. The agency terminates Wilson. The accuser does not testify at the arbitration and is not subpoenaed. Wilson admits he engaged in the misconduct but argues his twenty years of stellar work history should lessen the penalty and that the investigator did not consider that fact.
- You are the arbitrator: Do you uphold the discharge or reduce the penalty?