+/-/? JUST-CAUSE ANALYSIS CHECKLIST
SUPERVISORY "SHOULD-DO" ITEMS CHECKLIST

There are a number of considerations or factors which arbitrators have overwhelmingly and repeatedly cited as "just cause" or "industrial due process" requirements or necessities. These considerations have been elevated to a height of "generally accepted arbitral principles." "Yes" (+) answers to these questions support disciplinary action toward the employee.

Where any of these factors or considerations are answered "no" (-), they support the employee, and the supervisor should consider a less severe penalty or sanction or an alternate form of corrective action such as: retraining, reaffirmation, job performance counseling, or informal warning.

These factors have achieved such a high degree of arbitral significance that they should be identified as supervisory "should-do" items prior to any formal disciplinary action. Absence of any of these items ("no" answers) significantly weaken the employer's position in disciplinary action arbitration cases.

Before proceeding to the "Should-Do Checklist" and the "Preponderance of Evidence +/-/? Just-Cause Checklist" the supervisor considering a disciplinary decision should attempt to answer Arbitrator Daugherty's seven tests and Arbitrator Justin's three tests. The supervisor should also consult the checklists in the MARC Manual for the specific kind of misconduct or violation for which the employee may be disciplined.

The items on this "should-do" list may be looked upon as strong indicators that, if not satisfied, it is very likely that management's actions will be overturned or modified. A "no" (-) answer to a preponderance of these questions greatly reduces the likelihood that management will prevail in a discipline arbitration case, especially if the disciplinary action is suspension or if termination of employment is involved.

Since management has the burden of proof in disciplinary action cases and since the general statement of "an employee is innocent until proven guilty" applies, any factors which are doubtful or which receive question mark in the analysis should be interpreted by the supervisor as having a likelihood of being settled in favor of the employee during an arbitrator's decision.

NOTE: The +/-/? just-cause analysis is not done for the purposes of predicting the possible outcome of an arbitration case. The primary purpose of the +/-/? just-cause analysis is to force management to make a fair and reasonable and objective consideration under the just cause standard, based upon all of the known information surrounding the incident.

JUST-CAUSE "SHOULD-DO" CHECKLIST

___ Do facts exist to prove the misconduct violation or poor performance did indeed occur, and do the facts prove the employee was indeed the person guilty of the wrongdoing?

___ Are the facts upon which the disciplinary decision is based supervisory first-hand sensory facts? (Co-worker testimony or third-party testimony is usually given less consideration than supervisory sensory facts. It will be very difficult to sustain an action taken solely upon co-worker testimony.)

___ Have all facts, both aggravating and mitigating, been considered in making the disciplinary decision?

___ Does documentation exist which supports management's position (notes, work orders, operating records, log books, assignment sheets, recorder charts, job performance counseling records, warning records, etc.)?

___ Is the employee (the union) aware of any documentation that exists (especially in the employee's personnel file) which will be utilized to support management's position?

___ Can it be clearly and convincingly shown that a job performance deficiency was caused or created by the employee's misconduct or violation?

___ Did the employee's violation or misconduct impair the job performance of other employees?

___ Did the employee's violation or misconduct interfere with or prevent satisfactory achievement of the company's goals and objectives? (The supervisor is cautioned against using only economic reasons to justify the degree of disciplinary action administered; otherwise it may appear that the action taken may have been for retaliatory or punitive reasons rather than for job performance improvement reasons.)

___ Do the facts indicate the employee was unfit or unable to perform his/her job or that the employee neglected his/her job or performed in an unsafe manner?

___ Has there been previous corrective or disciplinary action in the past for this employee? (Do not make a disciplinary decision without first of all consulting the employee's personnel file.)

NOTE: Most arbitrators support the premise that an employee's past conduct record should not play a role in determining in a current incident whether or not discipline should be invoked; however, once it has been determined from present circumstances that discipline is in order, arbitrators support the consideration of the past conduct record (previous disciplinary action) in determining the severity of penalty to be administered in the instant case.

NOTE: Even though the employee's past record may contain a series of repetitive disciplinary actions, if those corrective actions have not been progressively increased (for example, six written reprimands or three one-day suspensions) an arbitrator is likely to modify termination of employment for the next instance of misconduct using the reasoning that the repetitive disciplinary acts of the same magnitude led the employee to believe nothing more severe would ever happen for the same misconduct.

___ Does a performance standard, rule, policy, procedure or Agreement clause exist which defines the standard of performance or behavior required of the employee?

JUST-CAUSE "SHOULD-DO" CHECKLIST

___ Has the employee been advised, either verbally or in writing, of the required conduct or course of action and of the possible consequences of failure to perform properly? (Ignorance of the rule or policy or requirement is likely to be an acceptable defense for the employee, unless management can prove that the employee had indeed been made aware of the above. Severe disciplinary action without prior warning or notice and warning is not likely to be upheld by an arbitrator if the employee's misconduct has no impact upon the employee's job performance or the job performance of others or if the misconduct has no impact upon the company's ability to produce or operate even though the misconduct may be contrary to widely held moral beliefs or contrary to conduct as generally reflected by society.)

NOTE: The plea of ignorance is not likely to be accepted by an arbitrator if the employee's conduct violates public policy or public law or if the employee claims to be unaware of obligations defined in the Collective Bargaining Agreement.

___ Has the employee been cited or charged for a specific violation, misconduct, or poor performance? (General accusations such as "poor attitude," "laziness," etc. will be difficult to sustain in arbitration without specific instances which can be substantiated with supervisory sensory facts relating to the employee's failure to fulfill responsibilities of his/her job. If facts exist which indicate the employee's state of mind was such that the employee intended to engage in the misconduct, it is preferable to discuss these in the disciplinary action, rather than to use vague terms such as "attitude.")

___ How does the action or penalty being considered for this employee compare to disciplinary action toward other employees in the past under similar conditions? If the present disciplinary action is different, can the difference be accounted for under the extenuating circumstances presently prevailing?

___ Was the employee, in the presence of a union representative, given:

1) an opportunity to learn the charges against him or her,
2) an opportunity to tell his/her "side of the story?"

NOTE: This obligation on the part of management to hear the employee's side of the story (the fact-finding interview prior to discipline) is sometimes called the "employee's day in court" principle.

(These factors are basic procedural just-cause items which are critical factors of consideration for most arbitrators. Failure to satisfy these requirements severely jeopardizes management's position in the arbitration process.)

___ Has a reasonable effort been made to investigate all sources of information including those which may be favorable to the employee before making the disciplinary decision? Were all observers or witnesses contacted?

___ Have the facts upon which the disciplinary action is based been verified to determine their accuracy, and do management witnesses exist to corroborate such facts?

___ Are there witnesses, evidence, or admissions to the misconduct or wrongdoing?

___ Is the employee being disciplined the "worst offender" for the specific area of misconduct? If not, is equal or more severe discipline being administered to the "worst offender"?

___ If the employee being disciplined is a union officer or representative, is the action being taken without any discrimination or retribution toward the employee for his grievance or union activity?

JUST-CAUSE "SHOULD-DO" CHECKLIST

___ Had the employee done the job satisfactorily in the past? (If the employee had properly performed the job in the past the questions which should be addressed by the supervisor before a disciplinary decision are: "What has changed?" "Have working conditions changed?")

___ Was the employee properly and adequately trained or had the employee been denied training which had been extended to other employees? (Arbitrators will routinely draw a distinction between "incompetence" and "negligence" in reviewing discipline cases. Arbitrators are much more likely to support severe disciplinary action in negligence cases and are more likely to support gentler "retraining" actions in incompetence cases.

___ Based upon consideration of all of the factors learned in the investigation and in the fact-finding interviews the following seven tests should all be proven to be true before disciplinary action is proper under the just cause standard. (A.M. Koven, S.L. Smith reference).

1) NOTICE: Did the employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's conduct?

2) REASONABLE RULE OR ORDER: Was the employer's rules 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 administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order to management?

4) FAIR INVESTIGATION: Was the employer's investigation conducted fairly and objectively?

5) PROOF: "At the investigation, did the 'judge' obtain substantial evidence or proof that the employee was guilty as charged?"

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/her service to the employer?

_____

Reference: pages 9, l0 JUST CAUSE, THE SEVEN TESTS by A.M. Koven and S.L. Smith. Coloracre Publ., Inc., San Francisco Kendall/Hunt Pub., 1985

Specific Case Cites: Gardner-Richardson Co., 11 LA 957 (1948) Enterprise Wire Co., 46 LA 359 (1966).