+/-/? 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).

PREPONDERANCE OF EVIDENCE / +/-/? JUST-CAUSE ANALYSIS CHECKLIST

Several additional considerations or factors have been shown to influence arbitral decision making. Such considerations generally characterize how arbitrators will think or reason in making decisions and these factors are often called "arbitrator rationale." Once the "should do" checklist items indicate discipline is justified, examination of items on the checklist below may indicate management's vulnerability in a possible arbitration case.

Examination or review of these factors prior to making disciplinary decisions will generally permit the supervisor to predictably assess how the arbitrator may judge the appropriateness of the decision according to the just-cause standard.

While no clear-cut numerical or quantitative or purely objective yardstick is in any way intended by this listing, the existence of several of these factors in support of the employee's position (mitigating factors) should serve to caution the supervisor to consider a less severe penalty or sanction.

Likewise, where several of these factors exist which tend to indicate a greater degree of violation, misconduct, or wrong-doing (aggravating factors) the supervisor can realistically expect arbitral support for accelerated disciplinary action or a more severe penalty or sanction than if the aggravating factors had not been present.

"No" answers to a preponderance of these questions and to the questions on the preceding "should do" checklist and on the specific misconduct checklist favor either no disciplinary action or, at least, choice of a lesser form of disciplinary action, or the choice of some alternate form of corrective action other than discipline.

___ Was the employee treated in a respectable and dignified manner? (The best rule to follow in this regard is to "extend to others the same degree of respect, dignity, and consideration that you would desire from them toward you.")

___ Was the employee treated in "fair play" fashion and was information utilized in the disciplinary decision obtained in "fair play" fashion? (If secretive or manipulative techniques or monitoring were utilized in "detective" fashion, arbitrators will often place very little, if any, significance upon information so obtained.)

___ Was the union made aware of the charges against the employee and of facts which led to the disciplinary decision, including earlier forms of job performance counseling, warning, or discipline, thereby affording the union, on the employee's behalf, the opportunity to object or to contradict or to appeal such facts or decisions? (Arbitrators will place very little, if any, significance, for instance, upon verbal or oral forms of corrective action of which the union has not been made aware, thereby resulting in a lack of opportunity for the union to object to or question such actions.)

___ Were steps of stepwise discipline followed according to the employer's policy, thereby affording the employee multiple opportunities to improve?

___ Is the employee's behavior or performance corrigible or correctable through the employee's own control and ability? (If the performance or behavior is incorrigible, perhaps alternatives other than disciplinary action should be examined. In such cases arbitrators may refrain from an immediate decision and retain jurisdiction of the case until a later date, but remand it back to the parties with suggestions for their consideration by an arbitrator-established deadline. If the parties fail to agree by the deadline date the arbitrator will then render a decision.)

PREPONDERANCE OF EVIDENCE/ +/-/? JUST-CAUSE ANALYSIS CHECKLIST

___ Was the information that justifies the disciplinary action known at the time the decision was made to discipline, or was it learned later and only then brought forth in an effort to show that the discipline was appropriate?

NOTE: Facts learned after the disciplinary decision, called post-discipline evidence, will not likely be accepted by an arbitrator during a hearing to decide if management had just cause to take the disciplinary action.

NOTE: The management's advocate attorney or labor relations manager presenting the arbitration case may choose to bring forth post discipline evidence in order to affect the arbitrator's decision, but post-discipline facts should not be utilized by the supervisor to justify disciplinary action.

___ Is the performance required or the standard required consistent with the provisions of the Agreement or with company rules and policies? (If the rule being enforced or the practice that is being required is contrary to a provision of the Agreement or if it is a topic which management sought but later dropped in collective bargaining, thereby possibly giving up the right to make a unilateral imposition of such rule or practice, management's position in arbitration may be severely weakened.)

___ Is the rule or practice being imposed or required consistent with long-standing practice that has existed unchallenged in the past and is it consistent with rationale or reasoning used by the parties to settle disputes in the past?

___ Were the employee's actions for which he/she is being disciplined self-motivated and unprovoked by actions or comments of a supervisor? (Any evidence of provocation or motivation by a supervisor which prompted the unacceptable behavior will undermine management's position in the arbitration. This includes anger or shouting or disrespectful responses on the part of the supervisor toward the employee.)

NOTE: In instances where arbitrators believe that merely closer supervision could have prevented the employee's poor performance or misconduct, some arbitrators are likely to conclude the supervisor bears some degree of responsibility for the problem, thereby somewhat mitigating the employee's misconduct or poor performance.

___ Was it possible for the employee to achieve the desired performance, standard, or conduct? (Even though the employee may have performed or behaved improperly and in an unacceptable manner, if conditions existed which the employee could not control which prevented proper performance, then the employee's misconduct would be mitigated during arbitral review. Likewise, if the employee would have had to violate a law or public policy in order to satisfy management's standard, the employer will find it difficult, if not impossible, to prevail in arbitration.)

___ If the disciplinary action involves an alcohol/drug complicated job performance problem, did the employer offer to the employee prior to the incident precipitating the disciplinary action the opportunity to participate in an employee assistance program either sponsored or supported by the employer? (Many arbitrators subscribe to the belief that an employer has the obligation to assist the employee to solve personal problems which may be interfering with the employee's job performance. Even the mere offering of the opportunity to participate in such a program generally satisfies the arbitrator's concern that, at least, the employer offered assistance. In an appreciable number of termination of employment cases, arbitrators have, in effect, forced the employer to offer such services and reinstated the employee.)

NOTE: If an employee at the time of misconduct was under severe personal strain or tension caused by a condition which no longer existed, arbitrators may consider the employee's action mitigated, especially if the condition no longer exists at the time of the arbitration hearing.

PREPONDERANCE OF EVIDENCE/ +/-/? JUST-CAUSE ANALYSIS CHECKLIST

___ Did management make a thorough and determined effort to determine all facts prior to a disciplinary decision, rather than merely rely upon volunteer testimony or facts which were clearly apparent?

___ If falsification of records is involved as part of the cause for the disciplinary action can it be clearly and convincingly shown that the employee being disciplined did, in fact, perform the falsification or direct the falsification?

___ If the employee being disciplined is normally given a great deal of discretion in his/her job in determining what is and what is not to be done, and in the present case if the disciplinary action is for the employee's failure or refusal to do "something," is that "something" clearly beyond the scope of those duties normally left to the employee's own discretion?

___ If the employee has ever been told what the penalty would be for this violation or misconduct, is the penalty being administered in agreement with what the employee was told?

(For example, if in a previous disciplinary step the employee was told he/she would be merely suspended for any future violation or misconduct, an arbitrator would likely overturn or at least modify a termination of employment action for the employee. Similarly, if, as part of a published rule or policy, a particular penalty or sanction is identified as part of the rule or policy, an arbitrator is likely to modify or overrule a more severe penalty or sanction, unless severe aggravating factors or circumstances were present.)

___ If the violation or misconduct is the first violation or misconduct by the employee, if the penalty being administered is termination of employment, has the employee been clearly notified that termination of employment was a first-offense penalty for this violation or misconduct? (In the absence of a specific rule or policy or Agreement clause identifying termination of employment as a first offense penalty for a specific violation or misconduct, there is a great likelihood of arbitral modification even though facts may clearly prove the employee's misconduct or violation and even though the misconduct or violation is clearly identifiable as improper or unacceptable. Exceptions, of course, would involve illegal acts or violations of public policy or improper conduct which is moral turpitude in nature.)

NOTE: If the Agreement specifically defines "termination of employment" as the penalty for a specifically defined misconduct then the arbitrator's consideration is limited solely to the question of: "Did the employee engage in the misconduct?" The Agreement, by definition, prohibits the arbitrator in such cases from making a determination as to whether or not the penalty fits the offense or as to whether or not the penalty is too severe.

If the Agreement identifies specific violations or misconduct for which termination of employment may result for a single or initial offense, arbitrators are not likely to support termination of employment for offenses not listed unless there have been previous forms of disciplinary action for that employee for that specific offense.

___ Has the company always followed up in the past whenever "final warnings" have been given? (In the event final warnings have been routinely ignored, the employee may claim that he/she. in the present case, was "set up" to believe nothing would happen this time either.)

___ Has the rule for conduct or the standard of performance been consistently enforced in the past? (If the employee has in the past been allowed without penalty to refuse the same assignment for which the employee is currently being disciplined, the present failure to perform may be mitigated.)

___ Has the rule or standard been changed in any way, and had the change been communicated to the employee being considered for disciplinary action?

___ Is the rule or performance or behavior requirement reasonably related to a legitimate objective of management?

PREPONDERANCE OF EVIDENCE/ +/-/? JUST-CAUSE ANALYSIS CHECKLIST

___ If the rule is a safety rule, is there truly a hazard or danger that exists to justify such a rule?

___ Did the employee deny the action or misconduct in the face of facts which clearly and unequivocally prove that the employee was guilty of the offense or misconduct, especially when it was clear and known to the employee that such performance or misconduct was unacceptable? (Failure to face up to the clear, indisputable facts and admit to them, or possibly straightforwardly lying to cover them often justifies increasing or accelerating the severity of disciplinary penalty or sanction. If the employee admits the wrongdoing or misconduct and thereby demonstrates the feeling of guilt, many arbitrators will recognize this as a positive step toward rehabilitation or improvement. Likewise, voluntarily "turning one's self in" is almost routinely looked upon by arbitrators as mitigation, thereby justifying a less severe disciplinary penalty.)

___ At the time of the alleged violation or misconduct, was the employee "on the clock" and therefore subject to the company's directives and rules? (See "Off Duty Misconduct" section of MARC Manual.)

___ Did the employee (or any other employees) fail to cooperate with supervisors in the pre-discipline investigatory phase? (If so, the supervisor should note the circumstances, comments, etc., and dates and times.)

NOTE: If there are accompanying criminal investigations, or if the employer is a governmental unit or agency, the employee's refusal to cooperate may be protected.

NOTE: If the employee is being considered for disciplinary action for failure to cooperate with management's investigation of an incident or for failure to supply management with personal information which may be necessary for employment-related decisions, the employee's refusal may be mitigated if in the past management has failed to maintain confidentiality of information which was previously supplied by this employee or other employees.

___ If the disciplinary action is being administered for violation of a company rule or policy or for a performance standard which applies to supervisors as well as employees, has supervisory performance been exemplary of acceptable performance?

___ Is the rule or conduct being enforced or required reasonable with respect to the employee's personal life on the job/off the job? Does the rule interfere with the employee's personal life?

___ Was the disciplinary decision made in a timely fashion? Administered in a timely fashion (not hurried - not delayed)? If the time between the time of the violation or misconduct is from twenty-four to forty-eight hours, it will generally be considered timely. If additional time is required management should at least inform the employee of their concern and that the incident is being investigated for possible disciplinary decision, and the employee should be instructed against the reoccurrence of the violation or misconduct. If the penalty being considered is suspension or termination of employment, management can reduce the likelihood of arbitral modification by utilizing the technique of "temporary relief of duties pending investigation."

NOTE: Summary suspensions or terminations of employment (those made on the spot at the time of the employee violation or misconduct) have a very high likelihood of arbitral modification or reversal. If a delay is required in order to gather or verify facts before deciding or administering disciplinary action, management's arbitral position will be enhanced if the supervisor utilizes the tool of "temporary relief of duties pending investigation."

___ Does information exist in the employee's past performance review reports that supports management's position?

PREPONDERANCE OF EVIDENCE/ +/-/? JUST CAUSE ANALYSIS CHECKLIST

NOTE: Information in past performance review reports which contradicts claims presently made by management to justify the disciplinary action would reduce the likelihood that management would prevail in arbitration.

___ Can it be shown that the employee personally benefited or was unjustly enriched beyond the benefits defined in the Agreement? In some cases it can be shown the employee attempted to avail himself or herself of benefits specifically excluded from the Agreement. This consideration or principle is considered by many arbitrators in the same light as the legal principle of "conversion" namely, did the employee attempt by his/her misconduct to convert to himself/herself something which was clearly not his/hers for the taking? Such action would aggravate the misconduct and would very often accelerate the severity of the disciplinary action or penalty.

___ Did the employee, by his/her violation or misconduct, clearly attempt to escape or elude a well-defined employee obligation or responsibility?

___ Did the employee attempt to conceal or cover up the misconduct or violation to avoid discovery?

___ Did the employee take steps (alone or with others) to thwart or defeat or circumvent management controls or other measures designed to safeguard or to ensure proper conduct?

NOTE: If the employee, by breaking the rule or by engaging in the misconduct, prevented violation of a more serious rule or prevented a serious problem or circumstance, the employee's misconduct or violation is likely to be mitigated upon arbitral review.

___ In instances where multiple employees were involved in the same violation or misconduct, were there varying degrees of responsibility involved for the individual employees which may justify varying degrees of penalties in the same situation?

___ Is there a reasonable remedy in the disciplinary action being contemplated in the event the union grieves the action and prevails in arbitration? (Non-existence of a reasonable remedy creates an undesirable situation which may often force the arbitrator to exceed or at least "crowd" the arbitrator's authority under the Agreement in order to fashion a remedy. Non-remedial actions which are overturned are likely to produce long-term negative effects upon management's rights under the Agreement. In the event no reasonable remedy exists to management's contemplated action, management should consider alternate action, which if reversed would accommodate a reasonable remedy. This consideration should be made before formalizing management's ultimate action.)

ADDITIONAL MISCELLANEOUS NOTES AND CONSIDERATIONS

NOTE: If the union raises a "past practice" argument in order to appeal the disciplinary action in any way, do facts exist which can overcome the union argument?

NOTE: Unless the Agreement contains a zipper or expressed waiver clause, many arbitrators are likely to take a much more general, less restrictive view of the retained rights theory and the "rule of contract construction," thereby placing greater emphasis on past practice as an indication of the relationship (expectation or predictability) between the parties.

This broadened or general view can have a marked effect upon just cause considerations, such as Arbitrator Daugherty's tests 1, 2, 6, and 7.

Likewise, extrinsic school arbitrators are likely to look externally for some industrial standard or some generally accepted industrial practice when the Agreement is silent regarding an employer obligation or an employer right or an employee obligation or an employee right whenever there appears to be some merit to the union's past-practice appeal.

NOTE: In addition to the job performance misconduct or violation considerations, has management also made legal considerations to determine that none of the legal rights of the employee have been violated? (For example, if criminal charges are also pending, or if such charges have already been made against the employee, the employee's refusal to cooperate and answer questions during a fact-finding disciplinary interview may be examined under an entirely different light by the arbitrator. Such refusal may be mitigated as compared to a similar refusal to cooperate in the absence of any criminal accusations or charges.)

NOTE: Was the matter for which disciplinary action was decided properly handled under the employment relationship? (Some matters may more appropriately be handled in the civil or criminal legal arena.)

NOTE: If the Agreement specifically defines "termination" as the penalty for a specifically defined misconduct, then following such a termination the arbitrator's consideration is limited solely to the question of: "Did the employee engage in the misconduct?" The Agreement, by definition, prohibits the arbitrator in such cases from making a determination as to whether or not the penalty fits the offense or as to whether or not the penalty is too severe.

NOTE: Arbitrators have generally considered three methods of notice by employers to satisfy the "to notify" obligation: oral communication, written communication, and demonstration.

Demonstration alone (repetitive application and setting the example by supervisory behavior and performance) is most difficult to rely upon, and management bears a heavy and difficult burden in arbitration in order to depend upon convincing the arbitrator that demonstration alone should have been effective to clearly inform the employee of management's expectations. Oral and written communication, with supporting documentation and supervisory witnesses, should support management's claim of demonstration of notice. Without the oral and written corroboration management's case will be purely a past-practice rationale case.

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.

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 generally support the consideration of the past conduct record (previous disciplinary action) in determining the severity of penalty to be administered in the instant case.

ADDITIONAL MISCELLANEOUS NOTES AND CONSIDERATIONS

NOTE: If an employee at the time of misconduct was under severe personal strain or tension caused by a condition which no longer existed, arbitrators may consider the employee's action mitigated.

NOTE: At least one highly respected arbitrator, Saul Wallen, has been cited as giving some weight to the question of whether the employee was so unpopular or disliked by co-workers or supervisors that reinstatement would create havoc or lead to further disruptions or even resignations by other employees.

(See SHACK'S CLOTHING CO., April 21, 1964, p.6)

(See HOGAN BROS. AND LEATHER WORKERS INT'L. UNION, Local No. 21, July 9, 1956, p.2)

(See p. 103 of Brook I. Landis' book, *Value Judgments In Arbitration - A Case Study Of Saul Wallen*, New York School of Industrial and Labor Relations, Ithaca, NY 1977.)

NOTE: Even though the employee's past record may contain a series of repetitive disciplinary acts (for example, six job performance counseling sessions or two or three written warnings or reprimands), if these acts have not been progressively increased, 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.

NOTE: In instances where arbitrators believe that merely closer supervision could have prevented the employee's poor performance or misconduct, some arbitrators are likely to conclude the supervisor bears some degree of responsibility for the problem, thereby somewhat mitigating the employee's misconduct or poor performance.

NOTE: The individual employee's length of service may be a factor of consideration on the part of some arbitrators in some disciplinary cases. Mitigation may be inferred in disciplinary cases of employees with a very short length of service in that they may not have had the opportunity to become as familiar with either the acceptable performance standard or the penalty associated with misconduct as compared to employees with longer lengths of service.

Likewise, employees with very long service records may be in a position of inferred mitigation either because a very long period of satisfactory and acceptable performance, or special knowledge they may have, based upon previous specific experience, led them to a somewhat different course of action. This is especially true if in the past that course of action had either been condoned or encouraged by management. While such extensive experience is generally not recognized by arbitrators as acceptable reason for avoiding, ignoring, or failing to perform required job responsibilities, the extensive experience may likely mitigate any wrongdoing connected with doing today's job in a slightly different manner than that which the current supervisor deems appropriate.

Similarly, arbitrators will look at suspension or loss of benefits tied to seniority as being a much more severe penalty for employees with longer years of service as compared to employees with shorter years of service.

NOTE: If the employee is being considered for disciplinary action for failure to cooperate with management's investigation of an incident or for failure to supply management with personal information which may be necessary for employment-related decisions, the employee's refusal may be mitigated if in the past management has failed to maintain confidentiality of information which was previously supplied by this employee or other employees.

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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.)

___ 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 reason, 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 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, 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 for 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 or 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 that 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, 10 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)

PREPONDERANCE OF EVIDENCE / +/-/? JUST-CAUSE ANALYSIS CHECKLIST

Several additional considerations or factors have been shown to influence arbitral decision making. Such considerations generally characterize how arbitrators will think or reason in making decisions and these factors are often called "arbitrator rationale". Once the "should do" checklist items indicate discipline is justified, examination of items on the checklist below may indicate management's vulnerability in a possible arbitration case.

Examination or review of these factors prior to making disciplinary decisions will generally permit the supervisor to predictably assess how the arbitrator may judge the appropriateness of the decision according to the just-cause standard.

While no clear-cut numerical or quantitative or purely objective yardstick is in any way intended by this listing, the existence of several of these factors in support of the employee's position (mitigating factors) should serve to caution the supervisor to consider a less severe penalty or sanction.

Likewise, where several of these factors exist which tend to indicate a greater degree of violation, misconduct, or wrongdoing (aggravating factors) the supervisor can realistically expect arbitral support for accelerated disciplinary action or a more severe penalty or sanction than if the aggravating factors had not been present.

"No" answers to a preponderance of these questions and to the questions on the preceding "should do" checklist and on the specific misconduct checklist favor either no disciplinary action or, at least, choice of a lesser form of disciplinary action, or the choice of some alternate form of corrective action other than discipline.

___ Was the employee treated in a respectable and dignified manner? (The best rule to follow in this regard is to "extend to others the same degree of respect, dignity, and consideration that you would desire from them toward you.")

___ Was the employee treated in "fair play" fashion and was information utilized in the disciplinary decision obtained in "fair play" fashion? (If secretive or manipulative techniques or monitoring were utilized in "detective" fashion, arbitrators will often place very little, if any, significance upon information so obtained.)

___ Was the union made aware of the charges against the employee and of facts which led to the disciplinary decision, including earlier forms of job performance counseling, warning, or discipline; thereby affording the union, on the employee's behalf, the opportunity to object to, contradict, or appeal such facts or decisions? (Arbitrators will place very little, if any, significance for instance, upon verbal or oral forms of corrective action of which the union has not been made aware, thereby resulting in a lack of opportunity for the union to object to or question such actions.)

___ Were steps of stepwise discipline followed according to the employer's policy, thereby affording the employee multiple opportunities to improve?

___ Is the employee's behavior or performance corrigible or correctable through the employee's own control and ability? (If the performance or behavior is incorrigible, perhaps alternatives other than disciplinary action should be examined. In such cases arbitrators may refrain from an immediate decision and retain jurisdiction of the case until a later date, but remand it back to the parties with suggestions for their consideration by an arbitrator-established deadline. If the parties fail to agree by the deadline date the arbitrator will then render a decision.)

PREPONDERANCE OF EVIDENCE/ +/-/? JUST-CAUSE ANALYSIS CHECKLIST

___ Was the information that justifies the disciplinary action known at the time the decision was made to discipline, or was it learned later and only then brought forth in an effort to show that the discipline was appropriate?

NOTE: Facts learned after the disciplinary decision, called "post discipline evidence," will not likely be accepted by an arbitrator during a hearing to decide if management had "just cause" to take the disciplinary action.

NOTE: The management's advocate attorney or labor relations manager presenting the arbitration case may choose to bring forth "post discipline evidence" in order to affect the arbitrator's decision, but post discipline facts should not be utilized by the supervisor to justify disciplinary action.

___ Is the performance required or the standard required consistent with the provisions of the Agreement or with company rules and policies? (If the rule being enforced or the practice that is being required is contrary to a provision of the Agreement or if it is a topic which management sought but later dropped in collective bargaining, thereby possibly giving up the right to make a unilateral imposition of such rule or practice, management's position in arbitration may be severely weakened.)

___ Is the rule or practice being imposed or required consistent with long-standing practice that has existed unchallenged in the past and is it consistent with rationale or reasoning used by the parties to settle disputes in the past?

___ Were the employee's actions, for which he/she is being disciplined, self-motivated and unprovoked by actions or comments of a supervisor? (Any evidence of provocation or motivation by a supervisor which prompted the unacceptable behavior will undermine management's position in the arbitration. This includes anger, shouting, or disrespectful responses on the part of the supervisor toward the employee.)

NOTE: In instances where arbitrators believe that merely closer supervision could have prevented the employee's poor performance or misconduct, some arbitrators are likely to conclude the supervisor bears some degree of responsibility for the problem, thereby somewhat mitigating the employee's misconduct or poor performance.

___ Was it possible for the employee to achieve the desired performance, standard, or conduct? (Even though the employee may have performed or behaved improperly and in an unacceptable manner, if conditions existed which the employee could not control which prevented proper performance, then the employee's misconduct would be mitigated during arbitral review. Likewise, if the employee would have had to violate a law or public policy in order to satisfy management's standard, the employer will find it difficult, if not impossible, to prevail in arbitration.)

___ If the disciplinary action involves an alcohol-drug complicated job performance problem, did the employer offer to the employee, prior to the incident precipitating the disciplinary action, the opportunity to participate in an employee assistance program either sponsored or supported by the employer? (Many arbitrators subscribe to the belief that an employer has the obligation to assist the employee to solve personal problems which may be interfering with the employee's job performance. Even the mere offering of the opportunity to participate in such a program generally satisfies the arbitrator's concern that, at least, the employer offered assistance. In an appreciable number of termination-of-employment cases, arbitrators have, in effect, forced the employer to offer such services and reinstated the employee.)

NOTE: If an employee at the time of misconduct was under severe personal strain or tension caused by a condition which no longer existed, arbitrators may consider the employee's action mitigated, especially if the condition no longer exists at the time of the arbitration hearing.

PREPONDERANCE OF EVIDENCE/ +/-/? JUST-CAUSE ANALYSIS CHECKLIST

___ Did management make a thorough and determined effort to determine all facts prior to a disciplinary decision, rather than to merely rely upon volunteer testimony or facts which were clearly apparent?

___ If falsification of records is involved as part of the cause for the disciplinary action can it be clearly and convincingly shown that the employee being disciplined did, in fact, perform the falsification or direct the falsification?

___ If the employee being disciplined is normally given a great deal of discretion in his/her job in determining what is and what is not to be done, and in the present case if the disciplinary action is for the employee's failure or refusal to do "something," is that "something" clearly beyond the scope of those duties normally left to the employee's own discretion?

___ If the employee has ever been told what the penalty would be for this violation or misconduct, is the penalty being administered in agreement with what the employee was told?

(For example, if in a previous disciplinary step the employee was told he/she would be merely suspended for any future violation or misconduct, an arbitrator would likely overturn or at least modify a termination of employment action for the employee. Similarly, if as part of a published rule or policy, a particular penalty or sanction is identified as part of the rule or policy, an arbitrator is likely to modify or overrule a more severe penalty or sanction, unless severe aggravating factors or circumstances were present.)

___ If the violation or misconduct is the first violation or misconduct by the employee, if the penalty being administered is termination of employment, has the employee been clearly notified that termination of employment was a first-offense penalty for this violation or misconduct? (In the absence of a specific rule, policy, or Agreement clause identifying termination of employment as a first offense penalty for a specific violation or misconduct, there is a great likelihood of arbitral modification even though facts may clearly prove the employee's misconduct or violation and even though the misconduct or violation is clearly identifiable as improper or unacceptable. Exceptions, of course, would involve illegal acts, violations of public policy or improper conduct which is moral turpitude in nature.)

NOTE: If the Agreement specifically defines "termination of employment" as the penalty for a specifically defined misconduct then the arbitrator's consideration is limited solely to the question of: "Did the employee engage in the misconduct?" The Agreement, by definition, prohibits the arbitrator in such cases from making a determination as to whether or not the penalty fits the offense or as to whether or not the penalty is too severe.

If the Agreement identifies specific violations or misconduct for which termination of employment may result for a single or initial offense, arbitrators are not likely to support termination of employment for offenses not listed unless there have been previous forms of disciplinary action for that employee for that specific offense.

___ Has the company always followed up in the past whenever final warnings have been given? (In the event final warnings have been routinely ignored, the employee may claim that he/she in the present case was "set up" to believe nothing would happen this time either.)

___ Has the rule for conduct or the standard of performance been consistently enforced in the past? (If the employee has in the past been allowed without penalty to refuse the same assignment for which the employee is currently being disciplined, the present failure to perform may be mitigated.)

___ Has the rule or standard been changed in any way, and had the change been communicated to the employee being considered for disciplinary action?

___ Is the rule or performance or behavior requirement reasonably related to a legitimate objective of management?

PREPONDERANCE OF EVIDENCE/ +/-/? JUST-CAUSE ANALYSIS CHECKLIST

___ If the rule is a safety rule, is there truly a hazard or danger that exists to justify such a rule?

___ Did the employee deny the action or misconduct in the face of facts which clearly and unequivocally prove that the employee was guilty of the offense or misconduct, especially when it was clear and known to the employee that such performance or misconduct was unacceptable? (Failure to face up to the clear, indisputable facts and admit to them, or possibly straightforwardly lying to cover them often justifies increasing or accelerating the severity of disciplinary penalty or sanction. If the employee admits the wrongdoing or misconduct and thereby demonstrates the feeling of guilt, many arbitrators will recognize this as a positive step toward rehabilitation or improvement. Likewise, voluntarily "turning one's self in" is almost routinely looked upon by arbitrators as mitigation, thereby justifying a less severe disciplinary penalty.)

___ At the time of the alleged violation or misconduct, was the employee "on the clock" and therefore subject to the company's directives and rules? (See "Off Duty Misconduct" section of MARC Manual.)

___ Did the employee (or any other employees) fail to cooperate with supervisors in the pre-discipline investigatory phase? (If so, the supervisor should note the circumstances, comments, etc., and date and times.)

NOTE: If there are accompanying criminal investigations, or if the employer is a governmental unit or agency, the employee's refusal to cooperate may be protected.

NOTE: If the employee is being considered for disciplinary action for failure to cooperate with management's investigation of an incident or for failure to supply management with personal information which may be necessary for employment related decisions, the employee's refusal may be mitigated if in the past management has failed to maintain confidentiality of information which was previously supplied by this employee or other employees.

___ If the disciplinary action is being administered for violation of a company rule or policy or for a performance standard which applies to supervisors as well as employees, has supervisory performance been exemplary of acceptable performance?

___ Is the rule or conduct being enforced or required reasonable with respect to the employee's personal life on the job/off the job? Does the rule interfere with the employee's personal life?

___ Was the disciplinary decision made in a timely fashion? Administered in a timely fashion (not hurried - not delayed)? If the time between the time of the violation or misconduct is from twenty-four to forty-eight hours, it will generally be considered timely. If additional time is required management should at least inform the employee of their concern and that the incident is being investigated for possible disciplinary decision, and the employee should be instructed against the reoccurrence of the violation or misconduct. If the penalty being considered is suspension or termination of employment, management can reduce the likelihood of arbitral modification by utilizing the technique of "temporary relief of duties pending investigation."

NOTE: Summary suspensions or terminations of employment (those made on the spot at the time of the employee violation or misconduct) have a very high likelihood of arbitral modification or reversal. If a delay is required in order to gather or verify facts before deciding or administering disciplinary action, management's arbitral position will be enhanced if the supervisor utilizes the tool of "temporary relief of duties pending investigation."

___ Does information exist in the employee's past performance review reports that supports management's position?

PREPONDERANCE OF EVIDENCE/ +/-/? JUST-CAUSE ANALYSIS CHECKLIST

NOTE: Information in past performance review reports which contradicts claims presently made by management to justify the disciplinary action would reduce the likelihood that management would prevail in arbitration.

___ Can it be shown that the employee personally benefited or was unjustly enriched beyond the benefits defined in the Agreement? In some cases it can be shown the employee attempted to avail himself or herself of benefits specifically excluded from the Agreement. This consideration or principle is considered by many arbitrators in the same light as the legal principle of "conversion," namely, did the employee attempt by his/her misconduct to convert to himself/herself something which was clearly not his/hers for the taking? Such action would aggravate the misconduct and would very often accelerate the severity of the disciplinary action or penalty.

___ Did the employee, by his/her violation or misconduct, clearly attempt to escape or elude a well defined employee obligation or responsibility?

___ Did the employee attempt to conceal or cover over the misconduct or violation to avoid discovery?

___ Did the employee take steps (alone or with others) to thwart or defeat or circumvent management controls or other measures designed to safeguard or to ensure proper conduct?

NOTE: If the employee, by breaking the rule or by engaging in the misconduct, prevented violation of a more serious rule or prevented a serious problem or circumstance, the employee's misconduct or violation is likely to be mitigated upon arbitral review.

___ In instances where multiple employees were involved in the same violation or misconduct, were there varying degrees of responsibility involved for the individual employees which may justify varying degrees of penalties in the same situation?

___ Is there a reasonable remedy in the disciplinary action being contemplated in the event the union grieves the action and prevails in arbitration? (Non-existence of a reasonable remedy creates an undesirable situation which may often force the arbitrator to exceed or at least "crowd" the arbitrator's authority under the Agreement in order to fashion a remedy. Non-remedial actions, which are overturned, are likely to produce long-term, negative effects upon management's rights under the Agreement. In the event no reasonable remedy exists to management's contemplated action, management should consider alternate actions, which, if reversed, would accommodate a reasonable remedy. This consideration should be made before formalizing management's ultimate action.)

ADDITIONAL MISCELLANEOUS NOTES AND CONSIDERATIONS

NOTE: If the union raises a "past practice" argument in order to appeal the disciplinary action in any way, do facts exist which can overcome the union argument?

NOTE: Unless the Agreement contains a zipper or expressed waiver clause, many arbitrators are likely to take a much more general, less restrictive view of the retained rights theory and the "rule of contract construction" thereby placing greater emphasis on past practice as an indication of the relationship (expectation or predictability) between the parties.

This broadened or general view can have a marked effect upon just-cause considerations, such as Arbitrator Daugherty's tests 1, 2, 6, and 7.

Likewise, "extrinsic school" arbitrators are likely to look externally for some industrial standard or some generally accepted industrial practice when the Agreement is silent regarding an employer obligation or an employer right or an employee obligation or an employee right whenever there appears to be some merit to the union's past practice appeal.

NOTE: In addition to the job performance misconduct or violation considerations, has management also made legal considerations to determine that none of the legal rights of the employee has been violated? (For example, if criminal charges are also pending, or if such charges have already been made against the employee, the employee's refusal to cooperate and answer questions during a fact-finding disciplinary interview may be examined under an entirely different light by the arbitrator. Such refusal may be mitigated as compared to a similar refusal to cooperate in the absence of any criminal accusations or charges.)

NOTE: Was the matter for which disciplinary action was decided properly handled under the employment relationship? (Some matters may more appropriately be handled in the civil or criminal legal arena.)

NOTE: If the Agreement specifically defines "termination" as the penalty for a specifically defined misconduct, then following such a termination the arbitrator's consideration is limited solely to the question of "Did the employee engage in the misconduct?" The Agreement, by definition, prohibits the arbitrator in such cases from making a determination as to whether or not the penalty fits the offense or as to whether or not the penalty is too severe.

NOTE: Arbitrators have generally considered three methods of notice by employers to satisfy the "to notify" obligation: oral communication, written communication, and demonstration.

Demonstration alone (repetitive application and setting the example by supervisory behavior and performance) is most difficult to rely upon, and management bears a heavy and difficult burden in arbitration in order to depend upon convincing the arbitrator that demonstration alone should have been effective to clearly inform the employee of management's expectations. Oral and written communication, with supporting documentation and supervisory witnesses, should support management's claim of demonstration of notice. Without the oral and written corroboration management's case will be purely a "past practice" rationale case.

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.

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 generally support the consideration of the past conduct record (previous disciplinary action) in determining the severity of penalty to be administered in the instant case.

ADDITIONAL MISCELLANEOUS NOTES AND CONSIDERATIONS

NOTE: If an employee at the time of misconduct was under severe personal strain or tension caused by a condition which no longer existed, arbitrators may consider the employee's action mitigated.

NOTE: At least one highly respected arbitrator, Saul Wallen, has been cited as giving some weight to the question of whether the employee was so unpopular or disliked by co-workers or supervisors that reinstatement would create havoc or lead to further disruptions or even resignations by other employees.

(See *SHACK'S CLOTHING CO*., April 21, 1964, p.6 :)

(See *HOGAN BROS. AND LEATHER WORKERS INT'L. UNION*, Local No. 21, July 9, 1956, p.2.)

(See p. 103 of Brook I. Landis' book, *VALUE JUDGMENTS IN ARBITRATION - A CASE STUDY OF SAUL WALLEN*, New York School of Industrial and Labor Relations, Ithaca, NY, 1977.)

NOTE: Even though the employee's past record may contain a series of repetitive disciplinary acts (for example, six job performance counseling sessions or two or three written warnings or reprimands), if these acts have not been progressively increased, 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.

NOTE: In instances where arbitrators believe that merely closer supervision could have prevented the employee's poor performance or misconduct, some arbitrators are likely to conclude the supervisor bears some degree of responsibility for the problem, thereby somewhat mitigating the employee's misconduct or poor performance.

NOTE: The individual employee's length of service may be a factor of consideration on the part of some arbitrators in some disciplinary cases. Mitigation may be inferred in disciplinary cases of employees with a very short length of service in that they may not have had the opportunity to become as familiar with either the acceptable performance standard or the penalty associated with misconduct as compared to employees with longer lengths of service.

Likewise, employees with very long service records may be in a position of inferred mitigation either because of a very long period of satisfactory and acceptable performance, or because special knowledge they may have, based upon previous specific experience, led them to a somewhat different course of action. This is especially true if in the past that course of action had either been condoned or encouraged by management. While such extensive experience is generally not recognized by arbitrators as acceptable reason for avoiding, ignoring, or failing to perform required job responsibilities, the extensive experience may likely mitigate any wrongdoing connected with doing today's job in a slightly different manner than that which the current supervisor deems appropriate.

Similarly, arbitrators will look at suspension or loss of benefits tied to seniority as being a much more severe penalty for employees with longer years of service as compared to employees with shorter years of service.

NOTE: If the employee is being considered for disciplinary action for failure to cooperate with management's investigation of an incident or for failure to supply management with personal information which may be necessary for employment-related decisions, the employee's refusal may be mitigated if in the past management has failed to maintain confidentiality of information which was previously supplied by this employee or other employees.