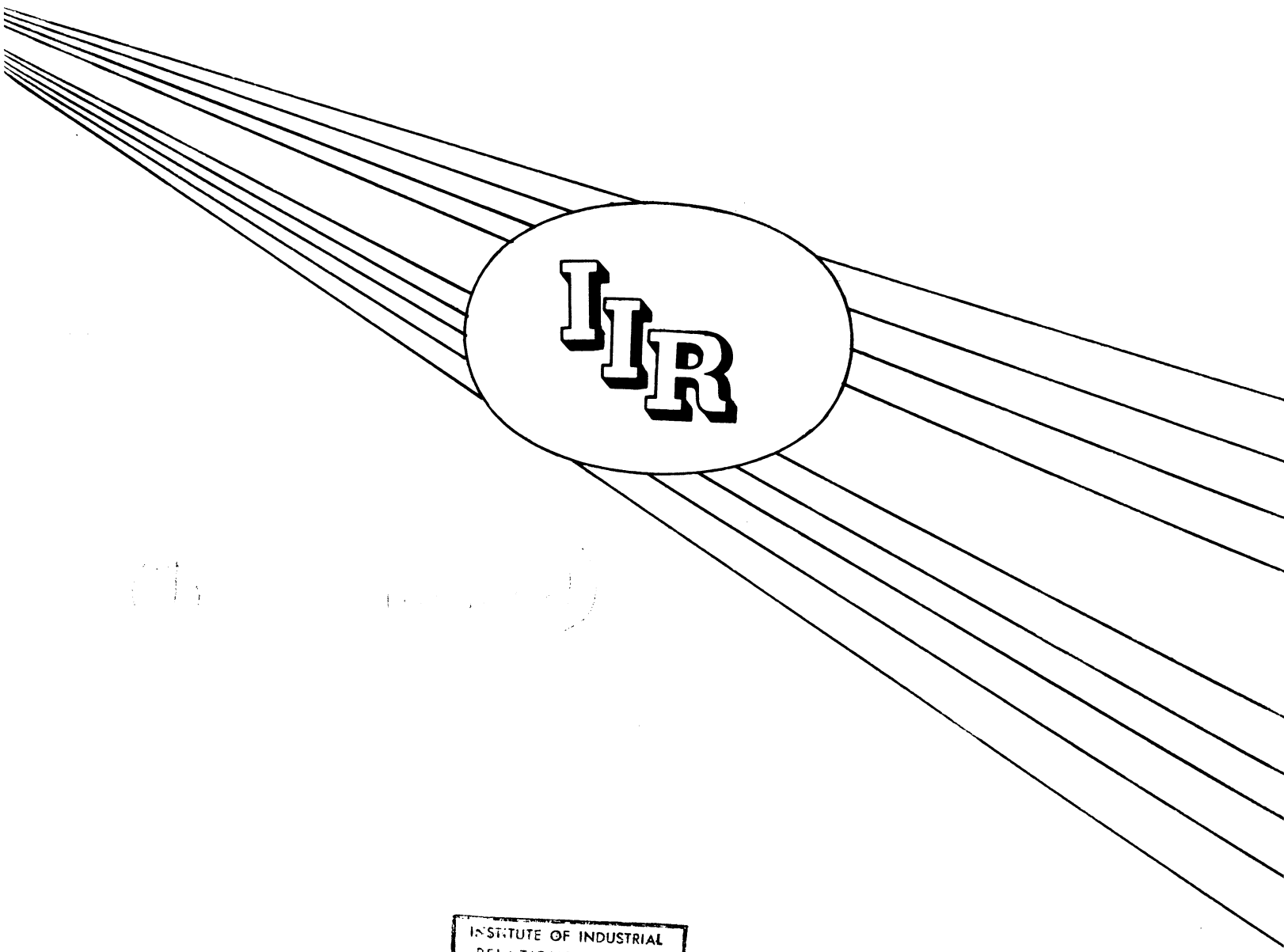
EMPLOYEE DISCIPLINE



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EMPLOYEE DISCIPLINE . . .

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FOREWORD

The Institute of Industrial Relations is happy to present *Employee Discipline*, the latest volume in a series of training packages completed under the terms of a contract between the State of California and the University of California, Los Angeles. With funds provided for the State by the federal government, the State asked the Institutes at Berkeley and Los Angeles to assist in the training of state and public managers and employees in the conduct of labor relations. A major portion of our role is to prepare and provide training material.

The quality of employer-employee relations is as critical for public organizations as it is for private concerns. Thus, public agencies may well benefit by borrowing from and adapting modern management techniques developed for the private sector to improve the climate of labor relations and to increase the efficiency of their operations.

This volume provides a comprehensive guide to innovative policies and practices dealing with a particularly vital and sensitive area of labor relations--employee discipline and disciplinary action. Experience has shown that good discipline is an integral part of good management and contributes to higher productivity or efficiency of operation. Disciplinary action ideally is designed to teach and to mold. Disciplined employees voluntarily act consistently with the standards and goals of the organization.

However, the recent trends emphasizing the application of modern management techniques in the public sector should not obscure the fact that public employment is governed by perhaps an even larger body of legal provisions than is employment in the private sector. These statutory protections and constraints are, of course, major factors in determining the parameters of public sector discipline practices. Consequently, any management used to devise and implement ~~any~~ comprehensive and effective discipline system must be consistent with legal guidelines.

This manual contains sections in which statutory considerations and management practices have been integrated to provide a valuable tool in establishing employee discipline as well as in undertaking disciplinary action. Primary source material has been drawn from both areas--from relevant court decisions and from tested management techniques. A discipline system is outlined and discussed in full detail, including actions to be taken when disciplinary problems arise at the workplace. The importance of the counseling interview is explained, as well as the step-by-step procedure of counseling techniques.

The entire manual takes a progressive point of view, that is, emphasis is on the maintenance of discipline at the workplace and the resolution of disciplinary problems rather than on punitive action.

It is our hope that in presenting this volume on disciplinary concepts in the field of labor relations, the Institute will have contributed to the development of constructive management practices affecting a sensitive area in both the public and the private sector.

July, 1977

Frederic Meyers
Director

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John A. Spitz

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INTRODUCTION

AN OVERVIEW OF DISCIPLINE AND DISCHARGE IN MODERN INDUSTRIAL AMERICA

Nineteenth century employers had virtually unlimited power to hire and discharge workers as they pleased. A famous conspiracy case in 1827, *Commonwealth v. Moore and others*, made clear the extent of that power when the prosecutor stated:

> "...[the employers have] an undisputed right to discharge any workman...when they conceived that his continuance was no longer conducive to their interest...the discharge was a matter of perfect right, without the assignment or even the existence of reason. Let him be without reason...let it be caprice. Still, it was a right with which no man or set of men must be permitted to interfere." 1

Nevertheless, labor-management relationships were not considered coercive. Workers labored to sustain themselves and their families. Managers hired workers to work in order to make money. The managers were free to hire whomever they pleased and the workers were free to work for whomever they pleased.

By the early 1900s America had rapidly changed from the agricultural society characteristic of the nineteenth century to an industrial economy. The prevailing concept of the employer-employee relationship had evolved as well:

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1. John R. Commons and others, eds., A Documentary History of American Industrial Society Conspiracy Cases (Cleveland, Ohio, Arthur H. Clark Co., 1910); (Reprint Edition, N.Y., Russell and Russell, 1958) pp. 172 and 230.

"Discharge on caprice and without compunction had taken on an anti-social flavor." [2] However, management still had sweeping rights. The violation of management rules was grounds for dismissal,and those rules included the prohibition of union organizing or attempting to get higher wages, shorter hours,or a voice in employment decisions.

The economic and social disaster of the Great Depression wrought sudden and substantial curtailment of management rights. The passage of the National Labor Relations Act (NLRA) in 1935 was the result of new public support for labor rights. During the Great Depression, economic deprivation and nationwide disruption of life forced a new conception of job security. The NLRA codified some basic rights of employees which exist apart from any contracts or agreements. Management rights advocates have argued that whatever rights are not expressly won by contract or forbidden by law are reserved for employers. Advocates of employee rights contend that workers have some inherent rights whether or not they are specified in contracts or laws. Thus, the passage of the NLRA can be seen as one more step in the trend of curbing the unlimited management powers of the nineteenth and early twentieth centuries.

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2. Lawrence Stessin, Employee Discipline (Washington, D.C., The Bureau of National Affairs, Inc., 1960), page 20.

When the Supreme Court upheld the NLRA in 1937, unions and union organizing were finally legally sanctioned. By legalizing collective bargaining for union members, the NLRA had given them a role in employment decisions. But most workers were not unionized; they had to wait until after World War II for the development of fair labor practices legislation protecting their rights.

As employer discharge rights became more limited, employers turned to disciplinary actions as recourse for unsatisfactory employee behavior. The widespread application of Scientific Management techniques added impetus to that trend. Scientific Management methods were based on efficiency studies which advocated the fractionization of production tasks. However, the routinized work was so dull that constant supervision was essential. If the key to productivity was the division and subdivision of production into smaller and more specialized tasks, its corollary was the punitive supervison of that dreary, repetitive work.

These attitudes are still prevalent. Collectively, managers and supervisors still view discharge as the final step in the punitive system of discipline required to maintain productivity. But recently, a shift in thought has begun.

Today, business administration and human relations theory advocate a rather different approach to discharge and discipline. Data have shown

that an adversary work environment is detrimental to productivity. Modern management recognizes that productivity is higher without labor hostility and resentment.

Public sentiment has also changed, resulting in statutory protection of employee rights in discharge and discipline cases. Thus changes in labor law and innovation in management policies have dovetailed to produce a new conception of discipline in the work place. The trend has been the increasing constraint on management powers since the nineteenth century, but modern management experience has shown that positive discipline is an extremely effective tool for shaping orderly and effective employment behavior at the work place.

A PROGRESSIVE DEFINITION OF DISCIPLINE

The dictionary defines discipline as "training that corrects, molds or perfects the mental faculties or moral character." We often speak of the need to be disciplined in one's personal life, i.e., " I didn't have the discipline to teach myself a language, to practice a musical instrument daily, to be a professional-level athelete." That concept of discipline should be applied to the work force.

Individuals trained in good habits are said to be well-disciplined. People aren't born with either good or bad habits. Work habits should be developed on the job.

Discipline is the quality within employees that makes them voluntarily behave according to high standards of work.

When employees regularly arrive for work on time, it indicates good discipline. When employees are properly dressed for the type of work they do and handle the equipment, tools and material correctly, when they turn out the quality and quantity of work expected, when tasks are performed in good spirits, good discipline has been achieved.

"Discipline" is derived from the Latin word "disciple," which means one who follows. Followers require a leader and good discipline requires good leadership. Supervisors establish good work habits through the climate of supervision and their personal examples. Supervisors must remember that the best discipline is self-discipline. The goal of supervision is to create employees' self-control leading to self-discipline: people voluntarily working in harmony, abiding by departmental rules and standards of good conduct.

Self-discipline in employees is dependent on self-discipline in supervisors. For the management-minded supervisor, anger, temper, punishment and revenge have no place in the concept of discipline. Discipline is best achieved by creating a climate of respect through sound leadership. It is the training and development of a cooperative work force striving together for the realization of management goals and objectives.

It is imperative to distinguish between discipline and disciplinary action. A supervisor resorts to disciplinary action when discipline fails. Discipline is not constant threats which ultimately only succeed in creating the appearance of good discipline. Though employees seem to be following the rules and working without complaining, there actually may be a great deal of hostility and resentment. Sooner or later, such a condition backfires and generates a counter-productive work climate which is untenable for any supervisor wishing to succeed.

DISCIPLINE POLICY

Management should take the approach that discipline is the result of leadership and training which make punishment unnecessary. Disciplinary action has the purpose of teaching and molding. Management should never lose sight of that purpose in planning and implementing policy.

Disciplinary programs should be based on a policy statement or a formal communication--specific information on what discipline is and how it will be administered. The policy statement should focus on the benefit of a well-disciplined work force and alleviate any unreasonable fears that employees may have. In addition to a definition of discipline, it should establish authority and responsibility for handling discipline and disciplinary actions. Procedures for achieving and coordinating line and staff discipline cooperation should be outlined. A statement of employee rights for redress may also be contained in the policy statement.

Managers should be aware from the first of the apprehension employees have about discipline. Planning for those concerns and dealing with them in a direct manner is essential for any discipline program aiming for employee cooperation.

Obviously, employees must know what the rules are if they are to obey them. But what is just as important is for them to know why those rules exist. Employers often mistakenly assume that when the rules are known, their purposes are understood. Policies should be put in writing, communicating the rules and their purposes.

Only a written statement can have continuity and wide dissemination throughout an agency.

Strive for reasonable policies, and keep them flexible. Each department must tailor its policies to reflect its special functions and problems. Some variance must be expected, both because of different departmental structures and different circumstances. When it is necessary to make some formal disciplinary response, the action should be appropriate to the offense. Inappropriate responses to infractions create doubts about the fairness of the discipline program.

Policy should promote progressive discipline by beginning with the least severe response and gradually moving to more serious action. Some cases require bypassing intermediate actions in favor of suspension or discharge,

but those instances are rare and should be handled with discretion.

Policy can engender a sound discipline program by communicating realistic expectations, supplying all the essential information, removing obstacles to achievement and providing the necessary feedback. When management demonstrates a commitment to this type of discipline, change in the behavior of employees results. When a progressive atmosphere exists, employee groups often exert social pressure on repeated offenders to modify their conduct, thus reducing the need for formal disciplinary actions.

THE SUPERVISOR AND DISCIPLINE

Supervisors assume the most important role in the disciplinary process. They represent management to employees and must communicate, interpret and enforce policy. Their perception of discipline can either expedite its implementation or impede its progress from the very start. To a very large extent, it is the actions of supervisors that determine the actions of employees -- whether they accept and internalize the program or fight it.

Strong leadership and good supervisory practices create the good discipline that reduces the need for disciplinary action. Supervisors must understand all agency policies and be able to interpret them intelligently to employees. They must know "what is going on"--the individual work performance of each employee--and competently

plan and organize their work. They must set a good example by their own attitudes toward the agency and the employees which will be reflected in the employees' attitude and work.

It cannot be over-emphasized that supervisors must take a progressive, constructive attitude toward discipline. Discipline is a positive, not punitive, concept. Consider how complicated and counterproductive supervision will be when compliance only stems from fear of punishment; planning must be detailed and perfect; little help can be expected from subordinates in correcting mistakes in a punitive atmosphere. Orders must be precise, for employees will always go "by the book" and only do exactly what is specifically required of them. Employees will not undertake assignments on their own and will only begin after direct instructions. Relying on the punitive approach only increases the workload of supervisors and the potential for operational mistakes. From a purely practical standpoint, the interests of supervisors and employees alike are best served by a positive approach to discipline. The underlying principle should be to encourage employees to control their behavior themselves.

Disciplinary actions which are retributive are almost always considered unfair by employees. Actions intended to ensure a universally high standard of performance, however, are likely to be accepted as fair and appropriate. When supervisors encourage employee self-discipline,

employees develop greater initiative, realizing that the primary responsibility for their behavior is their own. Self-discipline reinforces the personal self-respect of employees and contributes to the stability and maturity of the work unit.

Supervisors should recognize that positive discipline is an element of management's employee development program, providing a means to increase the skills and productivity of the work force. Implicit in this conception of discipline is the belief that, under most circumstances, employees can be relied upon to comply with rules when their reasons are understood. Enforcement of accepted rules and expected behavior will often be carried out by the work force itself. Disciplinary actions will only be required in a few cases.

Thus the supervisors have immense responsibilities in the discipline process for which they must be adequately trained. It is also imperative that their authority be well-defined.

Supervisors should attempt to discipline employees without creating resentment or impairing their roles as a source of help. Some general rules which help insure employee acceptance of discipline are:

1. Give advance warning that a given offense will lead to a specific amount of discipline. Rules and the manner of enforcement must be known in advance.

2. Discipline immediately. When the violation is followed immediately by disciplinary action, the offender will associate the action with the offense rather than the person imposing the action.

3. Be consistent. Discipline which is consistent sets the the limits for permissible behavior. Inconsistency inevitably leads to confusion. Consistent discipline does not require that penalties be determined without noting the background of each person. The common practice is to be more lenient with the first-time offenders.

4. Be objective and quiet. Emotional clashes endanger future relationships with employees. Make it clear that it is assumed that employees will not repeat offenses and that the incidents will be forgotten.

Once a decision is made to take disciplinary action, it must be handled with care to ensure that any action will stand up to judicial scrutiny. Disciplinary actions are often overturned by the courts because there was either insufficient documentation to support the action procedures or technicalities were overlooked, or because the agency was unable to refute counterpoints made by employees. Consider the following points when making a disciplinary case:

Know Your Responsibility

Besides the requirements established through departmental policies and practices, what obligations are contained in appropriate Memoranda of Understanding? What legitimate courses of appeal do employees have? What is required of the supervisor? Know the usual or standard penalties for different infractions and how to apply them step by step. Be aware of how other disciplinary cases were handled by management and employees, and of the outcome. What pitfalls should be avoided?

Make An Outline Of The Case

Prepare a list of those things known about the case. Are they verified facts, personal observations, hearsay? What additional information is needed to thoroughly support the case? Can rumors or hearsay be verified?

Discuss The Problem With The Employee

Meet with the employee in a location which ensures the privacy of the conversation. Indicate the nature of the problem and obtain his account of the incident. Listen to his story without interruption or argument and record the significant points. Make him aware of any discrepancies which may exist between known information and his account. Evaluate any reasons that he may offer concerning the cause of the problems. Does he blame fellow workers, management, lack of training, equipment, etc.? Determine whether these reasons are valid and if they should effect the final decision regarding discipline.

Interview Other Employees

If discrepancies in the case still exist, meet with other employees to obtain additional information. Were there witnesses to the infraction? If more than one, are their accounts similar? Gather as much data as possible before making a recommendation.

Consolidate The Case

From the information obtained, make a list of all undisputed facts. If these alone fully support the proposed action, nothing else may be required. More frequently, however, it will be necessary to evaluate information under contention. When disputed information is used to support a case, mention the existence of the discrepancies and the reasons which lead to a decision to use this data. On the basis of this process, recommend a proposed course of action.

Re-evaluate The Case

Once the case has been developed, subject it to the rigorous scrutiny that can be anticipated from a union representative. Is the action susceptible to charges of bias, discrimination, favoritism, etc.? Is the case strong enough to withstand critical review by an impartial third party?

Supervisors should work closely with the Personnel Officer throughout the entire process to ensure compliance with all appropriate rules and procedures. These guidelines will not make the requirement to take disciplinary action pleasant. They will, however, considerably reduce the anxiety that most supervisors experience when confronted with a disciplinary infraction.

A

TAB A

THE DISCIPLINARY SYSTEM

Discipline is a particularly volatile area of labor relations. The management-labor relation is all too often one of adversity, and disciplinary actions can easily become issues escalating any hostility between the two parties. This tab,"The Disciplinary System," is designed not only to present a detailed disciplinary system but also to advocate a positive approach. Reasonable regulations and the progressive application of rules and penalties can be a constructive method of encouraging and strengthening satisfactory behavior.

A disciplinary system must not be viewed as simply procedures for punitive action. A more constructive attitude would consider it a structure for changing employees' on-the-job behavior. Positive reinforcement measures are thus an integral part of the system. The total system should flow from an understanding of the agency's philosophies and policies. Hence such an understanding and perhaps a written articulation of it is the first step in formulating a disciplinary system.

A total system of disciplining might include:

1. Observing
2. Encouraging
3. Reinforcing
4. Repeating
5. Reminding
6. Counseling
7. Admonishing
8. Warning
9. Penalizing

The system must be progressive, the rules reasonable. It ought to include some flexibility in its application. However, both management and supervisors are strongly urged to treat all employees equitably and to assign work fairly. Penalities should be proportionate to the grievousness of an offense. Widespread publicity of the system is imperative so employees become aware of its rules and know the consequences of violating them. See example of "Rules for Personnel," Table I.

This tab begins with a discussion of typical discipline problems. The discussion covers attendance and performance problems, misconduct and dishonesty. An analysis of the differences and similarities among these categories serves to underline the need for flexibility in any disciplinary system.

Next, a system of corrective discipline dealing with behavior or performance problems is presented. A progressive disciplinary system defines the concept of disciplinary action to include any reasonable management action reinforcing or shaping job behavior in accordance with the agency's goals. Therefore salary increases, promotions and praise are now included in the disciplinary action context.

The second section of this tab, "Disciplinary Actions," presents a formalized system of discipline, incorporating the broader progressive concept. Its philosophy is corrective, not punitive. Ranging from informal

conversations to formal discharge, a sequence of disciplinary action is elaborated. This section includes a discussion of counseling, oral warning, written warning, reprimands, suspensions, reductions and discharge. The role of the counseling interview as a corrective measure is elaborated upon in "The Disciplinary Counseling Interview: A Conflict Situation." Guidelines for conducting the interview are detailed, including the who, when, why and how of such interviews. The need for communication and some effective communication techniques are outlined. The need for cooperation between the interviewer and the employee is discussed.

Special cases may arise which require a disciplinary action. One of the more problematic is that of a union representative allegedly behaving undesirably. Where does the line fall between legitimate union duties and failure to perform the requisite tasks of employment? Is a union representative immune from discipline when acting on the union's behalf? These questions and other considerations are covered in the third section, "Discipline of Union Stewards."

The final section of this tab is concerned with the need for documentation as part of the discipline system. Sample forms are provided. The appendix contains an article on techniques of conducting interviews for a variety of situations. The counseling interview, as described on pages A-23 to A-34 of this tab,is the recommended interview method for the purpose of an effective corrective disciplinary system. However, it is recognized that some situations may demand other types of supervisor-employee interaction. Several alternative interviewing methods are described.

TABLE I

RULES FOR PERSONNEL

The purpose of these rules and regulations is not to restrict the rights of anyone, but is to define these rights and to protect the rights of all and to insure cooperation. Committing any of the following violations will be sufficient grounds for disciplinary action, ranging from reprimand to immediate discharge, depending upon the seriousness and frequency of the offense in the judgment of the Management.

1. Falsification of personnel records or other records.
   (One week suspension to discharge.)

2. Ringing the clock card of another.
   (Reprimand to discharge.)

3. Repeated failure to ring own clock card.
   (Reprimand to four weeks suspension.)

4. Using another's badge or pass, or permitting another to use your badge or pass to enter the property--if badges or passes are used.
   (One week suspension to discharge.)

5. Failure to wear badge in plain sight--if badges are used.
   (Reprimand to one week suspension.)

6. Absence without reasonable cause.
   (Reprimand to discharge.)

7. Reporting late for work.
   (Reprimand to discharge.)

8. Absence of three working days without properly notifying management.
   (Voluntary quit.)

9. Leaving own department during working hours without permission.
   (Reprimand to four weeks suspension.)

10. Distracting the attention of others, or causing confusion by unnecessary shouting, catcalls, or demonstration on agency property.
    (Reprimand to discharge.)

11. Creating or contributing to unsanitary conditions.
    (Reprimand to discharge.)

12. Possession of weapons on agency premises at any time.
    (Two weeks suspension to discharge.)

TABLE I - *continued*

13. Refusal to obey orders of foremen or other supervision.
(One day or more suspension to discharge.)

14. Refusal or failure to do job assignment. (Do the work assigned to you and follow instructions; any complaint may be taken up later through regular channels.)
(One day or more suspension to discharge.)

15. Unauthorized operation of machines, tools, or equipment.
(Reprimand to four weeks suspension.)

16. Making scrap unnecessarily, or careless workmanship.
(Reprimand to discharge.)

17. Horseplay, scuffing, running or throwing things.
(Reprimand to discharge.)

18. Wasting time or loitering during working hours.
(Reprimand to four weeks suspension.)

19. Smoking except in specifically designated areas and during specified periods.
(Reprimand to discharge.)

20. Threatening, intimidating, coercing or interfering with employees or supervision at any time.
(Reprimand to discharge.)

21. Unauthorized soliciting or collecting contributions for any purpose whatsoever on agency premises.
(Reprimand to four weeks suspension.)

22. Unauthorized distribution of literature written or printed matter of any description on agency premises.
(Reprimand to four weeks suspension.)

23. Posting or removal of notices, signs, or writing in any form on bulletin boards or agency property at any time without the specific authority of Management.
(Reprimand to four weeks suspension.)

24. Misuse or removal from the premises without proper authorization of employee lists, blue prints, agency records, or confidential information of any nature.
(Discharge.)

25. Gambling, lottery or any other game of chance on agency premises at any time.
(Reprimand to discharge.)

TABLE I - *continued*

26. Abuse, misuse or deliberate destruction of agency property, tools, equipment or the property of employees in any manner.
(Reprimand to discharge.)

27. Restricting output.
(Reprimand to discharge.)

28. The making or publishing of false, vicious or malicious statements concerning any employee, supervisor, or the agency.
(Reprimand to discharge.)

29. Abusive language to any employee or supervision.
(Reprimand to discharge.)

30. Fighting on the premises at any time.
(One week suspension to discharge.)

31. Theft or misappropriation of property of employees or of the agency.
(Discharge.)

32. Possession of, or drinking of liquor or any alcohlic beverage on agency property at any time. Reporting for work under the influence of alcohol, or when suffering from alcoholic hangover, or in an unsafe condition.
(Two days suspension to discharge.)

33. Sabotage.
(Discharge.)

34. Disregard of safety rules or common safety practices.
(Reprimand to discharge.)

35. Immoral conduct or indecency.
(One week suspension to discharge.)

36. Stopping work or making preparations to leave work (such as washing up or changing clothes) before the specified quitting time.
(Reprimand to four weeks suspension.)

DISCIPLINARY PROBLEMS

The types of disciplinary problems normally arising in organizations usually fall within four broad areas:

- Attendance Problems
- Performance Problems
- Misconduct
- Dishonesty and Related Problems

There are many similarities in the causes of these problems, but also many crucial differences. The similarities permit a certain pattern of disciplinary action to be established. However, the differences make imperative that flexibility be linked with supervisory judgement and discretion.

Not all identifiable problems justify disciplinary action (i.e., performance problems may be caused by age or infirmity). Before examining each type of problem, it is important to recognize that one of the most difficult, demanding tasks of the supervisor is to be capable of discriminating between the calculated or willful breach of standards and the accidental or unavoidable.

Attendance Problems

Absenteeism

A survey of disciplinary problems in public agencies indicated that the most prevalent disciplinary problem is absenteeism.*

Absenteeism is a difficult violation to deal with because of the problems in establishing that non-attendance was in fact an abuse. There are a variety of other plausible explanations. The cost of absenteeism for the employer is considerable: it interrupts schedules, retards production, causes machinery to be idle and raises overtime costs.

Endemic or widespread absenteeism is a clear symptom of flagging morale within the organization, in which case it may or may not respond to more conscientious supervision. However, the need for controlling it remains preeminent.

Abuse of Sick Leave Privileges. Employees are entitled to all of their sick leave. If sick leave is used for purposes other than legitimate illness, however, it constitutes an abuse of privilege and can be considered as a form of improper absenteeism. Sometimes it may be difficult to prove abuse, particularly when the failure to attend appears random. Unless a clear pattern of leave taking is evident, establishing absenteeism is not easy.

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* Carmen D. Saso and Earl P. Tanis, Disciplinary Policies and Practices, Public Employee Relations Library No. 40 (Chicago: International Personnel Management Association, 1973).

Other More Covert Forms of Absenteeism. If supervision is lax, employees may simply take time off without bothering to pretend sickness. Better supervision reduces this tendency and prevents offenders from going undisciplined.

Prevention of Absenteeism. Many innovative approaches have been devised in order to deal with the problem of absenteeism. The following are some typical examples:

Positive Approaches: Morale Boosting

1. Institute counseling and educational procedures designed to assist employees with their personal and work-related problems.
2. Increase supervisory training to facilitate better employee motivation.
3. Make provisions for various sick leave incentives-- commonly monetary-- in which unused sick leave is reimbursable upon resignation, retirement or death.

Negative Approaches: Making Absenteeism More Difficult

1. Require a doctor's certificate to verify illness.
2. Dock the pay of an employee who is chronically absent, absent without leave or who abuses sick leave privileges.
3. Solicit union cooperation in making known to employees their responsibilities to attend work regularly.
4. Employ a full-time personnel investigator to substantiate the explanations given for absences.

Ultimately the supervisor is responsible for absentee control. Good attendance is a sign of good morale, and reflects on the supervisor's interest in employees' welfare and problems. For example, it may be helpful for the supervisor to tell employees who have been absent that they were missed and their return to work is welcomed.

The supervisor also has to determine when unjustified absenteeism has occurred. The maintenance and review of accurate attendance records is important. Such records reveal patterns of non-attendance which indicates problem absenteeism.

Rules on attendance should be consistently enforced. Disciplinary policy should be clear; and be properly communicated to employees. Any employee with an unacceptable attendance record should be informed of the consequences of continuing this behavior. Nothing is more disastrous for an absentee control program than the inadequate or inequitable application of absentee control standards.

Tardiness. Tardiness is a problem frequently associated with absenteeism. It normally stems from the same kind of reasons within the organization: poor morale and inadequate supervison. While perhaps not a blatant abuse, it is, none-the-less, disruptive and expensive for any organization. It can be more difficult to remedy. For example, arriving late for work, leaving early, or taking excessively long lunch breaks may be regarded by employees as customary and within the informal tolerance levels of

the organization. This view may even be reinforced by the behavior of a supervisor, who also is inclined to disregard the formal company time-keeping policy.

Efforts to deal with such a problem require a two-fold approach. First, the company must communicate to all employees precise details of any new or partially disregarded rules. Second, supervisors must communicate their expectations of employees according to the rules and provide a proper example themselves when the rules apply to them equally. Standards for dealing with offenders must be applied consistently and equitably.

Arbitrarily singling out one individual employee for disciplinary action when the incidence of the offense is widespread is inadvisable. It will most probably result in charges of discrimination. However, supervisors should not refrain altogether from taking corrective, not punitive, action on an individual basis. Maintaining accurate records of punctuality enables supervisors to determine which employees are repeated offenders. For these repeated offenders, each violation should be called to their attention. The supervisor should try to determine why the employee was not punctual and if there was any justification for the tardiness. In such a case, supervisors are essentially performing as counselors. They should fully acquaint the employee with the reasons for the company policy, emphasizing the importance of employee cooperation.

Frequently, action of this type is sufficient to motivate improvement. In the few cases where it does not, supervisors may have to issue an oral warning. If that fails, the oral warning may be supplemented by a written warning. The supervisor would next consider informing management of the matter, which could lead to a written reprimand by management, and, ultimately, suspension and discharge. The possibility of taking such extreme disciplinary action indicates the importance of accurate records. The burden of proof in the case of tardiness rests with management, as in every other breach of regulations.

Performance Problems

Performance problems are the various difficulties employees face in doing their work in a satisfactory manner. Failure to meet performance standards are among the most common problems associated with employee competency.

It is important to distinguish between carelessness -- which borders on misconduct -- and incompetence or the inability to perform satisfactorily of an otherwise well-intentioned employee. Clearly,performance problems of this latter type are not grounds for disciplinary action. Yet something must be done about them in the interests of efficiency. What is done depends on the reasons for the problem. Three types of reasons may be distinguished.

Problem Arises During Probationary Period. A probationary period is the time for supervisors to make a careful evaluation of the employee's work. If, for any reasons, the probationer is unable to meet the new position's requirements, in spite of reasonable training, it is the responsibility of the supervisor to recommend to management that the employee be reduced or discharged. The decision to reduce the employee is usually based on:

1. The employee's estimated ability to perform at a lower level;
2. the existence of a lower level position to which the employee can be reduced;
3. the willingness of the employee to accept a lower position.

Problems Arising in Performance of Previously Reliable Employee. When the performance of an employee suddenly falls below acceptable standards, ability to perform the work is not really in question. The causes of the problem are more likely to stem from:

1. A decline in morale or motivation to work, caused by feelings of alienation, a personal dispute with a supervisor or other employees in the work group.
2. Personal or family problems in the employee's private life which hinder satisfactory performance at work.

Counseling is required to ascertain the specific cause of the problem and every effort should be made to increase either motivation or the faith

of workers in their ability. In some cases, a transfer to a similarly skilled job in another work group and with new supervisors or a temporary reduction of responsibilities while the out-of-work problems persist may resolve the problem.

Fall in Standards Due to Age or Illness. Older employees may begin failing to meet existing standards. Disablement or chronic infirmity prematurely may reduce work ability. In each case, it is the supervisors' personal responsibility to retrain these employees and make every effort to bring their performance up to an acceptable level. Only when it becomes evident that they are still unable to meet job requirements should further action be considered. As with probationers, the most desirable alternative is finding the employees jobs in which their experience and remaining skills could be put to use. This might be accomplished through transfer, reassignment or reduction. If that is impossible, the employer may have to allow the employee to resign or accept early retirement. Such a policy should only be adopted as a last resort.

Failure to meet performance standards which is caused by the deliberate carelessness of the employee requires more direct action. As with absenteeism or tardiness, the first task of the supervisor is to determine the reasons for the employee's behavior. Low morale or inadequate levels of supervision are again most likely to blame. Whatever the reason, the sequence of corrective action is substantially the same as for absenteeism.

Misconduct

There is a wide range of misconduct. For the purpose of this article, its scope is limited to incidents which occur on the job. Off the job misbehavior and unlawful activities will be examined under "Dishonesty and Related Problems." On the job misconduct can include: intoxication, insubordination, horseplay, fighting, gambling, sleeping on the job, failure to use safety devices, possession or use of narcotics and drugs, foul and abusive language, destruction of property or other failures to observe rules and regulations in general.

In the simplest cases, the reasons for the misconduct are obvious and remedied with ease. For example, boisterous employee behavior may manifest itself when the standards of supervision are lax; employees may not use protective clothing or obey safety regulations because management motivation enforcement of these standards has been lacking; foul language many conform to general "job site vernacular," and so on.

What action should be taken when an employee seriously oversteps permissible standards, yet has an otherwise good record of conduct? How should management respond when employees commit offenses which do not affect work performance (i.e., drinking or using drugs on company premises after working hours)? Can disciplinary action successfully deal with problems caused outside the plant which are not of themselves symptoms of inadequate supervision or low morale (i.e.,alcoholism or emotional disorders)?

There are, of course, no ready answers to these questions. General disciplinary systems, no matter how comprehensive and well conceived, need to be supplemented by the experienced judgement of supervisors. When it is felt disciplinary action could not bring about any improvement, it may be necessary to solicit professional help. In the case of chronic alcoholism, only physicians or psychiatrists may be able to assist the employee. In addition, only qualified medical judgements can be depended on in legal proceedings such as appeals hearings.

Dishonesty

Dishonesty covers a wide variety of problems in which the employee intends to steal, misuse funds or property, or to deliberately defraud employers. Employees are generally aware that they are committing an offense -- or even a crime -- thereby risking disciplinary action. Yet, because of the seriousness of such an offense, quite often supervisors are reluctant to brand an employee as dishonest. Instead they tend to use some lesser violation as justification for disciplinary action.

Not all dishonesty may warrant serious disciplinary action, however. Falsification of job applications is not an automatic cause for discharge, provided the information falsified does not affect the employee's qualifications for the job. However if falsification is discovered during the interview process, it would disqualify the candidate. Similarly, intentionally misstating a medical or education history or work experience may be grounds for dismissal if the true record would disqualify the employee from employment.

DISCIPLINARY ACTIONS

Looking again at the meaning of disciplinary actions in a broad context, it includes any action of management which reinforces or shapes employee behavior in the direction management has determined is reasonable and necessary for actualizing agency goals. Under this definition, salary increases, promotion,praise, special privileges, as well as training and punitive actions would be included in the disciplinary system.

However most formalized agency disciplinary systems refer to the response of the supervisor or agency to an employee's performance or behavior considered unacceptable. These responses, or disciplinary actions, may range from informal conversations to formal discharge. An effective, reasonable system of disciplinary actions is founded on the premise that the actions are to be corrective rather than punitive; the actions are progressively more severe; the actions fit the nature of the problem.

This last premise recognizes that the response to serious offenses usually isn't the action prescribed as the initial step in the process. A serious offense could endanger fellow employees and calls for immediate suspension pending further investigation.

A typical sequence of disciplinary actions used by public agencies is described below.

Counseling

Counseling in general includes any informal discussion with an employee designed to assist him to fully develop his skills and abilities. Usually, the supervisor counsels the employee. The discussion may clarify standards, evaluate the employee's strengths and weaknesses, seek information or solve problems. When there is a discipline problem, counseling is usually the action taken to assist the employee in clarifying and remedying the problem.

How the counseling interview is conducted is of utmost importance. To assist the supervisor in the counseling situation, a section on the counseling interview is included in this tab, pp. A-23 through A-34.

Oral Warning

The oral warning verbally notifies the employee that his performance or behavior must be improved. Oral warnings are given by supervisors when counseling has failed to produce the desired changes.

The warning defines the areas in which improvement is required, sets up goals leading to this improvement and informs the employee that failure to improve will result in more serious action.

Although the supervisor notes the date, time and content of the warning in a log or documentation notebook, no record is placed in the employee's permanent personnel file unless subsequent action is necessary.

Written Warning

A written warning is a formal notice to an employee that further disciplinary action will be taken unless his behavior or performance improves.

The content of written warning is essentially the same as that of the oral warning. The employee is advised in writing of the consequences of failing to improve his performance.

Normally, this warning is written in triplicate. Copies are kept by the supervisor, given to the employee, and filed in the employee's personnel folder.

The employee should be advised of his right to respond to any facts in question through the appropriate grievance procedure.

Reprimand

After a written warning, the next disciplinary action is reprimand. It is the department's official notification that an employee's performance is seriously below standard and that continuation or repetition of that performance may result in reduction or discharge.

The format for a reprimand is the same as written warning. However, as part of the employee's record, given that it is a very serious action, it should be administered by the appointing authority, or its representative,

after thorough investigation and verification of the facts. Furthermore, the employee should be informed of his right to answer, explain, correct or deny in writing any facts in question and have his reply made part of his personnel file.

Suspension

Suspension is the temporary removal of an employee from his duties without pay for up to thirty calendar days. Suspensions are normally taken in cases involving gross misconduct or chronic behavioral problems for which there seems to be no other appropriate response. An employee may be suspended on the spot for a period usually not in excess of 30 days. Such action is reserved for extreme cases, where, for example, the employee's continued presence constitutes a clear threat to the safety of other employees, or to the public.

Normally suspension is made after consultation with the employee relations office or the personnel division. A written notice will be prepared, describing in detail the full circumstances leading to the suspension. This should be signed by the employee's immediate supervisor and countersigned by appropriate higher authority. The original goes in the employee's file in the personnel office and a copy of the notice is then mailed to the employee.

Reduction

Reduction is the removal of an employee from a present position to a lower rank or grade.

Normally, reductions are ordered if employees can no longer perform the duties of their present positions but may still function effectively at a lower level. Reductions are often used if an employee is on probation. Hence, constant review of the employee's performance is necessary prior to the expiration of the probationary period.

A probationary employee is only subject to reduction or dismissal after failing to respond to adequate training and supervision. Fairness demands that the employee be given every opportunity to succeed.

In particular, discussions on unsatisfactory behavior should be held early in the probationary period to allow the time necessary for improvement and adjustment.

Discharge

Discharge is the permanent removal of an employee from service. This action should only be taken when management is thoroughly satisfied that the employee has been given every opportunity to meet performance or behavior standards of the department and has clearly failed to do so.

Hiring and training costs of new employees makes the loss of an experienced employee very expensive. Therefore it is important that all means of retaining the employee be explored. Discharge is seldom used for a first offense unless the violation is so serious that no other response is appropriate.

Resignation: An Alternative to Disciplinary Action

Sometimes an employee may offer to resign instead of facing disciplinary action. By doing so, the employee loses the right to appeal. However, the inquiries from future employers regarding the reason for leaving will be answered (in most cases) by the simple statement that the employee resigned. No employee can be compelled to resign; resignation must be entirely voluntary. Otherwise the employee may later claim the resignation was made under duress.

THE DISCIPLINARY COUNSELING INTERVIEW: A CONFLICT SITUTATION

Most people are inclined to avoid conflict situations whenever possible. The disciplinary interview is a conflict relationship and, of all the events which happen in an organization, is probably the one most likely to generate misunderstanding and ill feeling. Nevertheless, it is the responsibility of management -- and in particular the supervisor conducting the interview -- to ensure that integrity and consistency of behavior is maintained in the conduct of the interview and that the employee concerned is fully aware of the reason for the interview.

The supervisor may be hesitant about conducting the interview for a number of reasons. He may be particularly adverse to conflict situations, and his natural inclination may be to avoid the interview at all cost. If compelled to conduct it, he will take the path of least resistance and conclude it with the least amount of unpleasantness possible. He may know and have worked with the employee for some time and be unwilling to deal with his shortcomings or breach of rules in a face-to-face situation. The employee will almost certainly not admit to wrongdoing or attempt to rationalize or otherwise defend his actions. Being aware of this, the superviosr may feel unable to cope with these counter arguments. Finally, the supervisor may be relatively new or inexperienced and feel vulnerable in dealing with an employee who has more experience than he has.

Hesitancy must be overcome if the interview is to be conducted properly. The supervisor can best do this through adequate preparation. The supervisor should find out as much as possible about the employee to be interviewed. The supervisor must be able to immediately outline to the employee the specific reasons for the interview at the onset of the interview. This requires a full understanding of the nature of the infraction. The supervisor should decide what can be expected from the meeting and commit it to writing. This will aid in directing the interview and assist in evaluating it afterwards.

The conduct of this conflict situation is best served by the supervisor who devotes preparation time to establish (1) what is to be accomplished in the interview, (2) the personality of the employee and (3) the breach of discipline he is alleged to have committed, always remembering that the burden of proof in taking the disciplinary action rests on management.

Guidelines for Conducting the Counseling Interview

Setting the Scene

1. **When** The counseling interview should take place as soon after the misconduct as possible. The longer the delay, the more the action will seem directed at the offender rather than at the offense and make the task of "depersonalizing" the interview all the more difficult.

2. With Whom The interview should be conducted in private, except where the labor contract requires the presence of a union representative or other specified official.

3. Initial Terms of Reference The need for calling a disciplinary meeting is not, of itself, a judgement of guilt. Judgement should be suspended until the employee has had the opportunity to explain his behavior.

4. Decide on the Course of Action Corrective action must fit the magnitude of the offense and be consistent with the practices of the organization.

5. Implement the Corrective Action Be explicit as to what will take place (the corrective action), and what the employee's procedure is to be.

Conduct of the Counseling Interview

The Need for Communication

Failure of the parties to communicate effectively robs the counseling interview of much of its impact. It is all too easy for communciation to break down. Effective communication requires that the parties "speak the same language" or at least correctly interpret each other's messages.

Effective techniques of communications in counseling interviews are similar to those in other interpersonal relationships. It is useful to mention some of the methods of controlling conflict by effective communications.

People, it is said, are strongly internally motivated to return favors and repay debts. If a supervisor manages during the course of the disciplinary interview to appear motivated to resolve the conflict fairly and reasonably, the employee, sensing this, may respond in a similar way. Thus the climate is set for a mutually beneficial resolution of the problem.

The allied theory of "positive reinforcement" states that human behavior is controllable and can be guided by the right system of communications to desirable ends. Some specific techniques are:

a) Openly focus questions; avoid yes/no answer alternatives. If allowed to respond with a "yes" or "no," employees tend to support their personal point of view or try to give answers they think the supervisor wishes to hear. In either case, progress in resolving the issue will not be made.

b) Attempt to reiterate and paraphrase the statements made by the employee. Paraphrasing has the positive effect of both indicating to the employee that he is being understood and clearing up matters of misunderstanding when they occur. In the hands of an experienced supervisor, paraphrasing is an important tool in developing the pattern of communication.

c) Another technique, often overlooked, is constructive silence. Listen to the employee; silence is a powerful tool in controlling conflict situations. It indicates to the employee that the interview is an honest exchange

and that his point of view is being properly addressed. In addition it provides the supervisor with first-hand and perhaps new information from which the pattern of communication builds. Listening is not the only non-verbal technique employed. Facial expressions, head nod, body movement and so on are other allied devices which affectively augment listening.

The pattern of communication established is central to the successful conduct of the interview. It sets the tone of the exchange. Both of the parties need feedback built upon their mutual cooperation. By creating a two-way flow of information the supervisor avoids the pitfalls of appearing patronizing, timid or implacable.

The Need for Cooperation

Communciation improves the interaction of the parties; effective communication creates cooperation. Specific methods may be used to encourage cooperation.

1. Cooperation is solicited when one party shares the likes and dislikes of the other. In a conflict situation the supervisor can reflect a positive reinforcement posture, or agreeing with the employee whenever possible, and following up disagreements with alternatives and thereby answer the employees question, "what's in it for me."

2. Common association induces cooperative feelings. Here again the supervisor/manager can establish a positive approach to

discipline by reflecting commonness between himself and the employee being accused. Relating similar situations of the past which were resolved favorably can help the employee see that there is a light at the end of the tunnel.

3. Acknowledge any help or information of value that is received from the other party. The supervisor is saying "I am willing to be influenced by you" - "I at least trust your judgement in this particular situation." Everybody likes to be asked their opinion.

4. Disassociate one's self with the dislikes of the other party. Ignore those situations in which the employee expresses dissatisfaction with the agency or the organization. The tendency is for people to immediately answer, or address themselves to expressed dislikes. It is as if negatives turn us on. By ignoring negatives, their importance is diluted. By addressing our attention to them, they are amplified.

5. Be descriptive not judgemental. Focus on the problem not the individual - depersonalize the situation.

6. Be specific rather than general. Don't "parent" the employee with expressions such as, "You know you should have done it the other way." Try to minimize your use of the parent role.

7. Deal with things that can be changed. Here's another instance of a positive approach to discipline. Refrain from discussing puritancial and traditional ways of behavior and discuss only those things that are changeable. If an employee disagrees

with an agency policy, the technique of simply listening to his discussion, then providing alternatives to the policies implementation would be more fruitful than arguing about the right or wrong of the need for the policy.

8. Consider the motives of the employee for giving you certain feedback. Recognize the strain that the employee is under and be sensitive to his needs. His need is to find a way of resolving the disciplinary problem with the supervisor providing helpful alternatives.

9. Give feedback when it is desired. The accused employee is looking for a way to resolve the problem and expects the supervisor to give him feedback upon which he might gauge his conduct.

Another essential philosophy which supervisors would be wise to consider is to refrain from playing the "bad guy" role in the employee/employer relationship. What must be projected is that the employer is willing to provide viable alternatives for employees to consider in resolving disciplinary problems. There is little doubt in most situations that it is the employee who has created the situation and ultimately it is the employee who must finally resolve the problem.

Role Playing

There is no right role for the supervisor to adopt in the disciplinary interview. There are, however, a number of wrong ones which undermine his control of the situation. Employee perception of the role played by the supervisor affects employee behavior during the interview, and often determines whether the supervisor will retain control of the situation.

Achieving the right measure of control is a delicate process. Affecting an overly authoritarian posture threatens employees by making them feel even more insecure which results in employees adopting a more defensive and less open stance. Alternatively, if supervisors are drawn into argumentative situations prematurely challenging the excuses of employees, they may lose the initiative and control of the interview.

An effective role for supervisors is to listen to the excuses of the employee -- even when they appear obvious or inaccurate -- in such a way that the employee is encouraged to communicate freely without feeling patronized. Supervisors should formulate alternatives for employees and assist them in salvaging some dignity and self-respect under the negative circumstances.

Evaluating the Issue

Although information about the breach of discipline is known prior to the

meeting, an account of the incident or problem should be elicited from the employee during the interview. Some degree of contradiction should be expected. However, supervisors should enter the meeting with a clear idea of alleged offenses and a broad framework with which to evaluate the issues.

Some points to consider in making an evaluation are:

1. Is management/supervisor partly at fault?
   - The employee was not fully aware of the rules;
   - The employee was inadequately trained;
   - The employee was inadvertently misled by behavior or statement of the supervisor;
   - The situation stemmed from animosity or personal incompatibilities between supervisor and employee.

2. Is it a minor infraction?
   - The action was inadvertent or accidental;
   - The action resulted in only slight cost to employer;
   - The previous disciplinary record of employee is good;
   - Extenuating circumstances may be present;
   - The behavior of the employee may have been adversely affected by personal or family difficulties away from the job.

3. Is it a major infraction?
   - The action of the employee was deliberate or malicious;
   - The action resulted in substantial costs accruing to the employer;
   - The previous disciplinary record of the employee is poor.

Criticism

Scope of criticism is made possible by the role or posture supervisors adopt and the free flow of information occurring during the interview. Criticism serves several functions in the interview. First, it can be employed to check employees' arguments which are excessive and not in accordance with the facts. Second, it can lead to a better comprehension by employees of the extent or seriousness of their actions. The key to successful use of criticism is to ensure that it does not directly provoke acrimony or cause the interview to degenerate into a "personalized" confrontation situation. With that goal in mind, here are some guidelines for using criticism:

1. Focus on behavior rather than the person. Use adverbs which relate to actions, rather than adjectives which relate to qualities. Any time that you judge the quality of others you are in a sense being a parent, that is, continuing telling others what is right and what is wrong.

2. Make observations rather than inferences. Inferences are interpretation of behavior while observations are what we can see or hear without that interpretation. Again we have an act of judging other's behavior by inferring certain things, while on the other hand, if we speak in terms of what we see or what we observe, we are merely stating facts and not making judgements.

3. Describe behavior in terms of more or less rather than good or bad. The more or less describes quantity which is measurable while statements of good or bad describes

quality which is subjective or judgemental. By describing a certain behavior you feel is acceptable, you may disagree with another person's interpretation, which provides the setting for a good argument.

4. Focus on behavior related to specific and recent situations rather than on the abstract. When we speak in general terms about what we feel a certain behavior should be, without specific references, it means that our principles are inflexible.

5. Share ideas and information rather than giving advice. A cardinal rule in disciplinary situations is to never give advice. Don't we each have enough problems of our own to solve without attempting to tell others how to solve theirs? Besides, giving advice to employees may obligate the agency to the success or failure of the advice.

6. Explore alternatives. Refrain from cornering an employee with only one choice -- a choice which may not fit their idea of a solution. By providing several alternatives, the employee can choose the best one for their own circumstance.

7. Stress the company/employee "contract" to show why mutual cooperation is necessary. Employees must understand that supervisors or managers are simply acting as agents, that is, their responsibilities include disciplining employees according to already formulated rules and procedures.

8. Limit the amount of different information. Don't confuse the employee. Provide only the necessary information upon which an employee may build his own solution.

9. Concentrate on what is said, rather than why it is said. Concentrating on why something is said is a psychological trap. Most people are not qualified as psychoanalysts. Such therapy may be available but certainly not through the average supervisor and/or manager.

DISCIPLINE AND THE UNION STEWARD

The most delicate type of discharge or discipline case is one involving a union official.

The dual role of a local union officer, as an employee and also as an official of a labor organization, gives an added dimension to his conduct which is not shared by ordinary employees. In the role of employee, he has the rights and privileges of other rank and file employees within his bargaining unit, and he is governed by the rules and regulations which apply to his coworkers. While in his job as an employee of the company, the requirements of attendance, punctuality, quality, production output, and the like are the same for him as they would be for any other employee of the company. But while operating in his capacity of union representative, he enjoys a certain latitude and freedom in his day-to-day application, administration, and implementation of the union contract. As a union representative, he becomes coequal with the agency's supervisors, thus enabling him to represent and advocate the positions and interests of his constitutents.

Therefore, when considering any discipline case involving a union steward, the supervisor has two basic decisions to make. He must determine whether the employee was acting in his role as an employee or as a steward or as both. Then, he must consider the relevance of the employee's actual role at the time of the offense to the offense itself.

The following principles regarding dual roles are recognized by arbitrators:

1. An employee, who is also a union steward, when acting solely as an employee is subject to the same standard of behavior as the other employees in the plant.

2. When functioning simultaneously in both his roles, a steward is not exempt from the more stringent rules which normally apply to his role as an employee.

3. When functioning solely as a steward, the employee is exempt from any violation of the contract and plant rules as long as:

   a. His action is substantially concerned with union business--more specifically, investigating and processing grievances.

   b. His action does not violate the limits of proper conduct as judged by the application of a rule of reason. Mere militancy and zealousness are within the reasonable limits of proper conduct.

In his particular role, a union steward has special responsibilities along with his special privileges. There are three categories of violations for which the steward has special responsibility.

1. Any positive act by a steward which causes his fellow employees to violate the contract or plant rules is generally held to be a punishable act itself and just cause for discipline.

2. The office of union steward confers on the holder the positive duty to see that the employees obey the contract. Failure to

act as expected in upholding the contract constitutes failure to fulfill a steward's duty and is just cause for discipline. Therefore, any active or negative leadership by a union representative which leads to a violation of a contract or of agency rules is in itself a violation and just cause for discipline.

3. A steward's actions are looked upon by his fellow employees as an example to be followed, and he has a duty to set a good example. If he fails to do so a steward can be disciplined by management.

In summary, concerning the special responsibilities of a union steward, the following principles are recognized by arbitrators:

1. In his role as a steward, the employee has a higher responsibility to the contract and plant rules than does the rank-and-file employee.

2. The steward may violate this special responsibility through active leadership, negative leadership or setting a poor example which results in others violating the contract or plant rules.

Criteria to Determine Anti-Union Discrimination

Generally speaking, arbitrators concur in their views regarding the bounds of union authority and the degree of behavioral freedom of the union representative. They impose the same criterion of just cause where disciplinary action is taken against the steward for alleged misconduct as an employee. When a union claim is made of anti-union discrimination in the absence of

conclusive evidence of this, the burden of proof to support this claim falls on the union. But in judging such cases certain arbitral standards are used:

1. What has been the relationship between the parties? What is generally the atmosphere between the agency organization and the union as an institution? And what has been the management representative's relationship with the particular union representative being disciplined?

2. Is there any evidence of discrimination or union animus? Has the disciplined steward been a troublesome, aggressive, militant individual--perhaps one who has filed many grievances, or abused paid union time provisions of the agreement? If there is any evidence of union animus, the burden of disproving it will fall on the employer.

3. Was there in fact a proven violation? Did the steward commit the offense of which he is accused? And can the company meet fully its burden of proof?

4. What has been the company's disciplinary treatment of other employees who are not union representatives for similar types of offences where the circumstances were similar and related to this case?

5. Was the union representative's conduct provoked, and did management's representative also engage in similar conduct--threats, name-calling, profanity, intimidation, and so forth?

6. Did the incident, if provocative and inflammatory, occur in the presence of other employees or did it happen in the privacy of a meeting between the principals only? And were the remarks and the behavior well beyond the customary shop vernacular and mode of conduct--customary, in this context, meaning that which is typical and routine in this particular plant's day-to-day climate and atmosphere?

7. And, was the union representative being disciplined new to his office, recently elected or appointed with a small amount of experience and understanding of his proper role and responsibilities? Or was he a knowledgeable and informed individual, with considerable experience and understanding of his duties, his rights, and his obligations?

DOCUMENTATION

The maintenance of accurate and complete records is an essential part of an effective disciplinary system. Most agencies require accurate attendance records. Some form of employee evaluation or performance reports are also required on a periodic basis. These records form the beginnings of a documentation system. Copies of bulletins, handbooks and memoranda about rules and policies should be retained. Communications to employees, unusual behavior or performance of employees and interactions of supervisors and employees regarding performance or behavior should be recorded and maintained.

Such records, or documentation, help the supervisor in evaluating and aiding the employee. Changes in employee performance which may go unnoticed on a day-to-day basis may be realized if records are kept. This information is useful for rewarding improved performance as well as indicating problems.

Documentation of employee behavior should contain all of the significant elements including:

- Date, time and location of incidents,
- Performance or behavior exhibited by the employee,
- Consequences of that action or behavior on the employee's total work performance and/or the operations of the unit,
- The response of the supervisor to the employee's action or behavior,
- The employee's reaction to the supervisor's attempts to modify behavior.

The availability of these records enables supervisors to refer to specific behaviors and events when dealing with employees. These records become essential should an adverse action taken against an employee be appealed. The documentation and the accounts of any witnesses form the basis of proof for the agency's actions. For this reason, names of witnesses to an incident and their signed accounts of the event are required documentation in some agencies.

Providing forms for recording unusual employee behavior and performance for follow-up actions as well as for notices and letters, facilitates the super-

visor's task and ensures management that the necessary and appropriate information is recorded. The forms must be developed in accord with the specific system used in the agency and the requirements of any regulatory system such as civil service systems or MOUs. Model letters should be developed where such letters are required for warnings, notice of intent or notice of disciplinary action.

Sample forms and letters are provided in this section. A sample documentation checklist for supervisors is also included. These sample are drawn from private and public sector organizations. They are intended as examples rather than models. (See pages A-42 through A-57)

- SAMPLE FORMS -

DOCUMENTATION CHECKLIST

Documentation should contain all the significant elements surrounding an exceptional incident of employee behavior. When preparing your documentation, it may be helpful to review the following checklist to ensure completeness and accuracy.

1. Did you record the documentation promptly, while your memory was still fresh?
2. Have you indicated the date, time and location of the incident(s) documented?
3. Did you record the action taken or the behavior exhibited?
4. Did you indicate the person(s) or work products involved?
5. Have you listed the specific performance standards violated or exceeded?
6. Have you indicated specific rules or regulations violated or surpassed?
7. Did you record the consequences of the action or behavior on the employee's total work performance and/or the operation of the work unit?
8. Have you been objective, recording observations and not impressions?
9. Did you indicate your response to the action or behavior?
10. Did you indicate the employee's reaction to your efforts to modify his or her behavior?

CONFERENCE MEMORANDUM

TO: Name of Employee

FROM: Name of Administrator

SUBJECT: CONFERENCE OF _____(date)

This is to summarize [and make a matter of record] our conference of above date [following my visit to your classroom on _____(date).]

A. During the conference, the following items were discussed.

These may later become "charges."

1. (Use the shortest possible description but be specific and complete.)
2.
3.

B. During the conference, you stated the following:

1. (This paragraph is optional. Use it only if the employee makes statements significant to the issue. Do not use it to provide the employee with a written alibi.)
2.

C. During the conference, I offered you the following assistance and guidance:

These may later become "assistance and guidance."

1. (Be specific! If offering helpful control techniques, spell them out. Avoid generalizations.)
2. (Include the names of publications given to the employee, opportunities to visit other locations to observe the work of others, and names of individuals who will assist the employee.)
3.

D. During the conference you were directed: [Use when necessary.]

1.
2.

If this not an accurate summary of our conference, please notify me in writing* by _____(date). If I do not hear from you, I shall assume the above to be an accurate summary of our conference.

* Be sure to give at least three or four working days for response.

CONFIRMATION OF VERBAL REPRIMAND (first offense)

Memorandum

_____, 19__

TO: (Employee)

FROM: (Appropriate Official)

This memorandum will confirm our conversation of _____, 19__ during which you were cautioned regarding absence from your machine. As you will recall, the following instance was discussed:

> That on _____ , 19__ while making my round of the shop, I noticed that you were not at your machine. This was at 1:00 p.m. At 2:00 p.m., I returned to your machine and you were still absent. On inquiry, I discovered that you had gone down to the tool room. On my way to the tool room I found you talking to John J. Doe and distracting his attention from his work.

You will remember that we both agreed that in the future you would return to your machine as promptly as possible when it was necessary that you be away for a short time.

REPRIMAND FOR REPEATED OFFENSES

Memorandum

_____, 19__

TO: (Employee)

FROM: (Appropriate Official)

In confirmation of your supervisor's conversation with you this afternoon relative to unauthorized absences from your machine, this memorandum is a reminder that further similar infractions of the rules on your part may be sufficient justification for disciplinary suspension. Your record indicates:

(a) On _____, 19__ , unnecessary absence from your machine for 35 minutes.

(b) On _____, 19__ , unnecessary absence from your machine for 20 minutes.

(c) On _____, 19__, unnecessary absence from your machine for 30 minutes.

You understand that our rules require that you be at your machine continuously during production hours except for regular rest periods and for necessary brief absences to replace tools.

I hope there will be no further offenses of this kind.

EMPLOYEE'S WARNING NOTICE

INSTRUCTIONS FOR FILLING OUT WARNING NOTICE: As soon as possible after the incident, complete this form. Have the employee read and sign the form, and distribute the copies as follows: first copy to employee; second to employee's supervisor; third to union shop steward; and fourth to personnel.

Employee's name: _____ Date: _____

Department: _____ Job Title: _____ Department head's name: _____

Immediate supervisor's name: _____ Date employed: _____

Details of violation: List rule(s) violated. Refer to specific provisions of the union contract or Agency Personnel policies. Explain as specifically and comprehensively as possible; include dates, time, place, and persons involved.

_____

_____

_____

Immediate satisfactory improvement must be shown and maintained or further disciplinary action will be taken.

Action taken:

- ☐ First warning
- ☐ Second warning
- ☐ Third warning
- ☐ _____ warning
- ☐ Final warning with suspension of ___ days on _____
- ☐ Discharge

Date: _____ _____
Department Head/Supervisor

I have read and understand the above warning.

Date: _____ _____
Employee

SUSPENSION LETTER

Mr. John Doe
10000 Buckingham Avenue
Eastwood, California 92305

Dear Mr. Doe:

You are hereby notified that effective October 12 through and including _____, 19__, you are suspended for two (2) business days from your position of Community Services Coordinator I. The following charges are the bases for your suspension:

1. Reporting to work under the influence of alcohol.
2. Repeatedly directing abusive and profane language at your supervisor.
3. Failing to notify your immediate supervisor when leaving work before the established quitting time.
4. Failing to meet departmental standards for work habits in the areas of observance of working hours and attendance.

(AT THIS POINT YOUR LETTER SHOULD INCLUDE A PARAGRAPH EXPLAINING HOW THE ABOVE CHARGES HAVE ADVERSELY AFFECTED THE EMPLOYEE'S TOTAL WORK PERFORMANCE, THE MORALE AND/OR OPERATIONS OF THE WORK UNIT.)

The following is an account of your unacceptable behavior on _____,__, and __, 19__:

- After our discussion on October 6 concerning your attendance, you returned from lunch at approximately 2:30 p.m. and began to direct abusive and profane language at me in front of your subordinate, John Smith. A distinct odor of alcohol on your breath, a slurred speech pattern and a staggering gait all led me to believe that you were intoxicated. I asked you to refrain from using such language and further instructed you to report to my office, which you did without comment. I stated that given your condition you should report to the lounge and rest until you felt better. You stated that there was nothing wrong, but that you did feel tired and would, therefore, like to take sick time off. I stated that I could not approve the use of sick time since you were not ill.

- You became angry and stated that you could use sick time as you wished, and walked away abruptly. I later learned from John Smith that you had informed him you were leaving work for the rest of the day.

  You did not report to work the following day, Friday, _____, nor did you call in to report your expected absence. The following Monday, _____, was a holiday.

- On _____, you reported to work at eleven o'clock, three hours after your starting time of eight o'clock. As soon as I became aware of your presence, I asked you to come into my office to discuss your attendance. I asked if you had called in and reported that you expected to be late and you replied, "no, I didn't think it was necessary." I asked if you were aware of the policy of reporting in within one hour anytime you expected to be late and you responded, "yes." You then indicated that you didn't really have anything to discuss with me, but that I should make sure you received sick time for your days off. I responded that this would be impossible and that I had taken steps to suspend you for two days effective Wednesday, _____, since you received a written reprimand concerning your attendance problem on _____ _____, approximately a month ago.

As required by Civil Service Commission Rules, a copy of this letter is being filed with the Commission. Your response will be attached to this letter and become part of your permanent Civil Service file. You may grieve this action by using the departmental grievance procedure.

If you are not satisfied with the final decision or resolution of your grievance, Civil Service Commission Rules give you the right to appeal this suspension and request a hearing before the Civil Service Commission. Your appeal letter must contain a general denial of the assertions or facts, and be received by the Commission within ten (10) business days of the date the grievance procedure is terminated. Your appeal should be addressed to the Civil Service Commission, 222 North Maple Avenue, Any City, California 90012. A copy of your letter should also be sent to John Doe, Personnel Officer, Department of _____.

Sincerely,

Jane Jones, Director
Department of Community Services

NOTICE OF SUSPENSION

(To be prepared in the personnel office or by the supervisor having delegated authority for making suspension)

Memorandum

_____, 19__

TO: (Employee)

FROM: (Appropriate Official)

SUBJECT: (Suspension)

Pursuant to authority contained in Section 12.2 of the Civil Service Rules, you are hereby notified that it has become necessary to suspend you from duty and pay for a period of three (3) days effective at the close of business, _____, __72. You should return to duty _____, __72.

The following charge has been placed against you:

(1) Violation of safety regulations: At 10:30 a.m. on _____, __72, you were observed smoking while in the performance of your duties in Building A.

Because of the nature of the material stored in this building, it is imperative that safety regulations be strictly observed.

REDUCTION

Unsatisfactory Evaluation on Permanent Employee -- Reduction

Ms. Jane Doe
1000 2nd Street
Southwood, California

Dear Ms. Doe:

You are hereby notified that at the end of the business day, Friday, _____ , 19__, you are reduced from your position of Civil Engineer Trainee to Civil Engineering Assistant.

The following constitute grounds for your reduction:

1. Failure to meet minimum standards established for your position of Civil Engineer Trainee for quantity of work in the areas of amount of work performed and completion of work on schedule.
2. Continuously failing to meet departmental standards for work habits in application to duties and compliance with work instructions.

(At this point your letter should include a paragraph explaining how the above charges have adversely affected the employee's total work performance, the morale and/or operations of the work unit.)

Specific facts upon which this action is based are contained in the attached Unsatisfactory Performance Report.

As required by Civil Service Rule 19.02, a copy of this letter and report are being filed with the Commission. Although you cannot grieve this action, you may file a letter with the Commission answering, explaining, or denying the assertions or facts contained in the report. Your response will be attached to your performance evaluation and become a part of your permanent Civil Service record.

Civil Service Rule 5.02 gives you the right, as a permanent employee, to appeal this action and request a hearing from the Commission. Your letter should contain a general denial of the assertions or facts. Written responses and requests for a hearing must be sent within ten (10) business days to the Civil Service Commission, 222 North Maple Avenue, Any City, California 90012. A copy should also be sent to John Doe, Personnel Officer, Department of _____.

Sincerely,

J. Smith, Director
County Engineer

REDUCTION

Unsatisfactory Evaluation on Probationary Employee -- Reduction

Mr. John Doe
100 East Ford
Any City, California 90000

Dear Mr. Doe:

You are hereby notified that at the end of the business day, Friday, _____, 19__, you are reduced from your position of EDP Programming Supervisor to EDP Programmer Analyst II.

The following constitute grounds for your reduction:

1. Failure to meet minimum standards established for your position of EDP Programming Supervisor in the areas of planning and assigning work, evaluating performance and making decisions.
2. Continuously failing to meet departmental standards for work habits in application to duties and attendance.

(At this point your letter should include a paragraph explaining how the above charges have adversely affected the employee's total work performance, the morale and/or operations of the work unit.)

Specific facts upon which this reduction action is based are contained in the attached Probationary Report.

As required by Civil Service Rule 19.07, a copy of this report is being filed with the Commission. Although you cannot grieve this action, you may file a letter with the Commission answering, explaining or denying the assertions or facts contained in the report. Your response will be attached to your performance evaluation and become part of your permanent Civil Service record.

You may also appeal this action and request a hearing from the Commission if you can provide specific facts to support a claim of fraud or discrimination because of political or religious opinions, racial extraction, sex or organized labor membership. Written responses and requests for a hearing must be sent within ten (10) business days to the Civil Service Commission, 222 North Maple Avenue, Any City, California 90000. A copy of your letter should also be sent to John Doe, Personnel Officer, Department of _____.

Sincerely,

Jane Smith, Director
Department of Data Processing

INTENT TO RECOMMEND DISMISSAL

ANY CITY UNIFIED SCHOOL DISTRICT
Personnel Division - Employee Relations Section

TO: _____ Date:
Employee

_____ _____
School or Section Status - Class Title

FROM: _____ By: _____
Division

SUBJECT: NOTIFICATION OF RECOMMENDED DISMISSAL

Your are hereby notified that it is the intention of this Division to recommend that the Board of Education dismiss you from service. This recommendation is based primarily upon the information set forth in the following documents:

_____

_____

If the recommended dismissal action is taken, and if you have attained permanent status with the District, you will be notified of your right to appeal to the Personnel Commission in accordance with Personnel Commission Rule 904. An appeal can be made only on one or more of the following grounds.

1. That the procedures for taking disciplinary actions as set forth in Rule 903 have not been followed:
2. That the dismissal action was taken because of the employee's affiliations, political or religious acts or opinions, race, color national origin, sex, age, marital status, or physical handicaps.
3. That there has been abuse of discretion. (That the proposed dismissal is clearly too severe an action.)
4. That the action taken was not in accord with the facts.

If you wish to appeal, the appeal must be made in writing and filed with the Personnel Commission not later than the 14th calendar day after the Statement of Charges has been received by you.

You may, if you wish, resign prior to the Board of Education action on this recommendation to dismiss you. In that event, your record will show that you have resigned. The Notice of Unsatisfactory Service, however, will remain in your service folder.

Personnel Commission Rule 768, Resignation, provides that: "Resignation shall be withheld from processing for a period of 48 hours after receipt by the office to which initially submitted. An employee shall be allowed to withdraw his resignation during this period." An employee whose resignation has been processed has no further rights under Personnel Commission Rules.

If you have any questions regarding this Notification of Recommended Dismissal, your appeal right or resignation, it is suggested that you seek advice from a knowledgeable source and/or confer with the Employee Relations Section of the Personnel Division, Room P-150, Administrative Offices, 450 North Maple Avenue, Any City, Telephone _____.

PRELIMINARY NOTICE OF INTENT TO DISCHARGE

Mrs. Jane Doe
300 Maple Street
Eastwood, California 90000

Dear Mrs. Doe:

This letter is to inform you of our intent to discharge you from your permanent postion of Title Examiner I and from County Service effective on _____. The following constitute grounds for your proposed discharge:

1. Failure to meet minimum standards established for your position of Title Examiner I in the area of amount of work performed and completion of work on schedule.

2. Continuously failing to meet standards established for performance in new situations and with minimum instructions.

   (At this point your letter should contain detailed documentation in support of these charges. Specific explanation of how the charges have adversely affected the employee's total work performance, the morale and/or operations of the work unit should also be included here.)

All written materials,reports and documents upon which this action is based are available for your review. If you wish to see them or obtain copies, please contact _____.

You have the right to respond, either orally or in writing or both to the facts contained in this letter. If you choose to respond in writing, you have until _____ , 19__,to provide Joe Smith, Division Chief, Treasurer-Tax Collector with your answer to these charges. If you wish to respond orally you may meet with Mr. Smith at_____ a.m., on Monday_____. He can be reached by telephone at _____. If you do not contact Mr. Smith by that date, it will be assumed that you have waived this right.

Sincerely,

John Jones, Director
Treasurer-Tax Collector

DISCHARGE

Unsatisfactory Evaluation on Permanent Employee -- Discharge

Mrs. Jane Doe
500 Pine Street
Eastwood, California 90000

Dear Mrs. Doe:

You are hereby notified that at the end of the business day, Thursday, _____, 19__, you are discharged from your position of Title Examiner I and from County service.

The following constitute grounds for your discharge:

1. Failure to meet minimum standards established for your position of Title Examiner I in the areas of amount of work performed and completed of work on schedule.
2. Continuously failing to meet standards established for performance in new situations and with minimum instructions.

(At this point your letter should include a paragraph explaining how the above charges have adversely affected the employee's total work performance, the morale and/or operations of the work unit.)

Specific facts upon which this discharge action is based are contained in the attached Unsatisfactory Performance Report.

As required by Civil Service Rule 19.02, a copy of this letter and report are being filed with the Commission. Although you cannot grieve this action, you may file a letter with the Commission answering, explaining or denying the assertions or facts contained in the report. Your response will be attached to your performance evaluation and become part of your permanent Civil Service record.

Civil Service Rule 5.02 gives you the right, as a permanent employee, to appeal this action and request a hearing from the Commission. Your letter should contain a general denial of the assertions or facts. Written responses and requests for a hearing must be sent within ten (10) business days to the Civil Service Commission, 222 North Maple Avenue, Any City, California _____. A copy should also be sent to John Doe, Personnel Officer, Department of _____.

Sincerely,

John Q. Smith, Director
Treasurer and Tax Collector

DISCHARGE

Unsatisfactory Probationary Employee -- Discharge

Mr. John Smith
601 Main Street
Any City, California

Dear Mr. Smith:

You are hereby notified that at the end of the business day, Friday, _____ , 19__, you are discharged from your position of Dental Technician in this Department and from County service.

The following constitute grounds for your discharge:

1. Failure to meet minimum standards established for your position of Dental Technician in the areas of accuracy, thoroughness and neatness of work product.
2. Failure to meet departmental standards for attendance and observance of working hours.

(At this point your letter should include a paragraph explaining how the above charges have adversely affected the employee's total work performance, the morale and/or operations of the work unit.)

Specific facts upon which this discharge action is based are contained in the attached Probationary Report.

As required by Civil Service Rule 19.07, a copy of this report is being filed with the Commission. Although you cannot grieve this action, you may file a letter with the Commission answering, explaining or denying the assertions or facts contained in this report. Your response will be attached to your performance evaluation and become part of your permanent Civil Service record.

You may also appeal this action and request a hearing from the Commission if you can provide specific facts to support a claim of fraud or discrimination because of political or religious opinions, racial extraction, sex or organized labor membership. Written responses and request for a hearing must be sent within ten (10) business days to the Civil Service Commission, 222 North Hope Avenue, Any City, California_____. A copy of your letter should also be sent to Jo Smith, Personnel Officer, Department of _____.

Sincerely,

John Doe, Administrator
County Hospital

NOTICE OF REMOVAL FOR CAUSE

_____, 19__

Mr. John A. Doe
300 Main Street
Baton Rouge, Louisiana

Dear Mr. Doe:

Pursuant to the authority contained in Civil Service Rule 12.3 you are hereby advised that you will be separated from your position as Equipment Operator I effective at the close of business, December 1, 1972.

You are being separated because of the following specific offenses.

1. Repeated violations of safety regulations, as follows:
   (a) On _____, 19__, you were suspended for a period of three (3) days for smoking in Warehouse A, a restricted area.
   (b) On _____, 19__, you were suspended for a period of six (6) days for smoking in Building B, a restricted area. You were informed at that time that another offense of the same nature would result in removal.
   (c) This morning, _____, 19__, you were observed smoking in Building C, a restricted area, while you were engaged in stacking gasoline drums.
2. In regard to the third violation, when your Foreman, John Q. Jones, questioned you regarding the offense, you replied that you "would smoke whenever and wherever you cared to".

A copy of these charges and of your notice of removal is being furnished to the Department of Civil Service in accordance with Civil Service Rule 12.3.

Very truly yours,

(Appropriate Official)

APPENDIX TO TAB A

METHODS OF INTERVIEWING

METHODS OF INTERVIEWING*

The planned method or type of interviewing may be as significant as the skills of the interviewer in procuring satisfying results from an interview. Equipped with adequate skills, the same person may obtain quite different effects by using a variety of methods on different occasions. This suggests that much is to be gained by selecting and applying the method of interviewing best suited to situation at hand.

In a description of post-appraisal interviews, Norman Maier[1] suggests three types of methods of interviewing: Tell and Sell, Tell and Listen, and Problem Solving. Glen Harmon proposes Appreciate-Tell-Ask as an interview method for causing continued analysis about a single specific objective. Robert Kahn and Charles Cannell[2] present the use of Non-Directive Probing to obtain freer flow of information in an interview. These along with the more familiar procedures of Tell, Exploration, and Direct Probing make quite a range of methods. No doubt other planned methods are used but the spread of these gives the interviewer choice of widely differing effects.

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* By Earl C. Wolfe, Institute of Labor and Industrial Relations, Division of University Extension, University of Illinois.

1. *The Appraisal Interview*, Norman R.F. Maier, John Wiley & Sons, Inc., 1958.

2. "Nobody Tells Me Anything," *Dun's Review*, November, 1957.

Perhaps there is some advantage in arranging these in order as they progress from interviewer-centered to interviewee-centered context. This does not imply which person is in control, but rather which one is providing the desired content of the communication.

Interviewer Centered

Tell
Tell and Sell
Tell and Listen
Problem Solving
Exploration
Appreciate-Tell-Ask
Non-Directive Probing
Direct Probing

Interviewee Centered

I. Tell

You have a message to get across to him. This would turn out to be a monologue except that you want to make sure he gets the message, understands what you mean. Responses you expect and accept from him are all for the purpose of proving he understands. Questions you ask are aimed at revealing how well he comprehends your message.

In a sense your message always serves to direct him. It may direct him to action, it may direct him to a change, it may simply direct him to accept your message as the "right position" or the "best judgment." You have the knowledge, you are transmitting it to him, he is to accept.

In closing this interview, you summarize tersely what is the meat of your message.

II. Tell and Sell

You have a message to get across to him, but you anticipate it may take some "selling" to persuade him to accept it. You have evaluated the situation and the circumstances leading to your message and you want him to know your evaluation of it. It is your hope and expectation that he will join in evaluating it as you do. Hence, you try to sell him on the accuracy and the adequacy of your message.

In this case, you acknowledge that he may have an independent judgment which does not concur completely with yours. You do expect that your effort at selling will persuade him to adopt your judgment, or at least to revalue and later his own judgment.

His responses now take on importance to you. How well do they reflect agreement with your valuation? How clearly do they show intent to support your judgment? How warm does he feel toward your stand? This you must learn from his responses.

In closing this interview, you summarize your message and the main reasons for its support. And you comment on his acceptance of it.

III. Tell and Listen

You have a message to get across to him, but you are uncertain about what impact it will have on him, what reaction it will bring from him. Knowledge of his reactions is critical to you, perhaps for quite different reasons. You may be concerned about his motivation and what further steps you may need to take toward further stimulation. Or you may be

concerned about improving future relationships between you and him. Or you may want to reduce anxiety or frustration in him. Or you may be curious about the impact of the message on him for its use in forecasting effect on other people.

For whatever purpose, you do invite his reactions to your message. You tell him your message and your evaluation of it, and then you encourage him to tell you how he feels about it. Instead of "selling him" on your position, you ask him to reveal exactly how it appeals to him. You encourage him to expose any differences he has in viewpoint or in judgment. If you repeat any part of your message, it is for the purpose of stimulating further response, not for further "selling." If there are signs of defensiveness from him, you encourage him to talk it out. If he continues to hold a different point of view, you do not try to convince him or to force him to change his judgment. You let time alter his thinking about it.

In closing this interview, you summarize your message and your stand about it. And you also summarize his feelings, his responses. You may summarize the differences to be resolved but you do nothing on the spot to talk him out of these differences.

IV. Problem Solving

You recognize that the situation centers on a problem which needs to be defined and then solved. You are willing to forego telling him your message or your judgments about the situation, for the sake of stimulating his contributions, strengthening his efforts to resolve the problem.

The problem is to be defined *mutually* for he may not view it as you do. If you do not reach agreement about the exact nature of the problem, you may be striving for quite different solutions. Hence, you will introduce the problem *situation* and search together for a specific agreement on the exact definition of the problem. If there is difficulty in settling on *the* problem, it may be possible to agree that more than one problem exists, all of which need effort to resolve.

In the search for solutions, you will encourage finding alternatives which warrant serious consideration by both of you together. Again, if you do not see eye to eye, you are willing to let him try to solve the problem through some plan devised by the two of you jointly.

In summarizing this interview, you continue to recall differences in viewpoint as well as agreements. You repeat the problem or problems as agreed to, and those in which you still differ. You repeat the solutions as seen by both of you. If it is apparent you forecast problems to be solved ahead.

V. Exploration

Both you and he have information which may be useful to the other. The interview is needed to exchange this information, and perhaps to uncover the need for pursuit of more information not now known to either of you. You are willing to share information with him, and you expect him to be willing to share with you.

The usefulness of this information may be quite different for each of you.

In fact, neither of you is much concerned about how the other will use the information. Mutual trust obviously exists. It is not necessary to pursue together what use to be made of it although agreements may be reached to increase freedom in the exchange.

Each of you will have questions to raise and each of you will think of additional comments to add. Summarizing need not be in detail, but should recall that areas have been explored. Is there more to explore? Are both of you satisfied?

VI. Appreciate-Tell-Ask

If the purpose of the interview is primarily to encourage him to "get busy and do something about his shortcomings," this method is often stimulating to him. You use this planned procedure always in this order:

1. Appreciate--selected favorable strong points.
2. Tell--about his specific favorable performances.
3. Ask--about his specific shortcoming with questions not aimed at him, but at the whole group or at the world at large.

You conduct this informally, casually, but you must prepare for it carefully. Select very appropriate factors on which to express appreciation. "Tell" him favorable incidents or performances which he may not expect you to observe. "Ask" the right questions, carefully formulated, and then arranged in a definite sequence in order to stimulate him to reflect later on the pertinence of his answers and their application to him. The planned sequence of the questions should be followed regardless of his answers, of course, using suitable transition comments.

You make no criticisms of his answers, but you thank him for his ideas, his judgments, his viewpoints, and you encourage him to bring further thoughts if and when he has them.

You leave it to him to make his own "self-discoveries" about what he should do.

VII. Non-directive Probing

You believe he has information which you need. The range and scope of his information is unknown so you want to encourage him to tell it and explain it freely. You admit that you want any light he can bring about the situation, so you encourage him to take his time, to tell it all, to explain how he sees it.

Questions you ask must be non-direct, unbarbed, and not too specific. You must be satisfied with his answers, not provoked into direct probing. Ask in general if he has any more ideas on it, but do not push him to prove or support his expressed judgments. Encourage him by active listening, by nodding, by further non-direct questioning.

When you summarize avoid injecting critical selection of items and cover up any inclination you have to judge the accuracy or the adequacy of his story. Encourage further reporting to you if and when he thinks of it.

VIII. Direct Probing

You believe he has information which you need. You assume that you already know what scope of inquiry is needed to satisfy your demands. If he answers your questions you can determine the accuracy of his information.

If it is necessary to pursue further you will know what further facts are to be uncovered.

Knowing that he will be defensive you still feel adequate to expose the facts by keen pursuit of his answers or by approaching the facts from other angles. If accuracy is not immediately uncovered you will return to the probing later to bring about fuller exposure of the facts.

It is more important to reveal these facts accurately than to be concerned about later relations with him.

I. Tell

Role of Interviewer:	Judge-director.
Objectives:	Tell your message. Direct his action.
Reactions expected:	His defensiveness suppressed. He will restrain his responses, clam up.
Skills of Interviewer:	Clarity of expression. Summarizing succinctly.
Gains expected:	He can and probably will alter his reactions according to your message.
Risks:	Differences or conflicts between you will be heightened. He will withhold his judgment. He will cover up his intent.
Values:	He knows what is expected from him. He is no longer guessing where you stand.

II. Tell and Sell

Role of Interviewer:	Judge.
Objectives:	Tell your message and your evaluation of it. Persuade him to accept and act on it.
Reactions expected:	Defensiveness suppressed. Attempts to cover hostility.
Skills of Interviewer:	Salesmanship. Patience.
Gains expected:	Success is probably when he respects you.
Risks:	Loss of loyalty. Stops his independent judgment. Face-saving problems may arise.
Values:	Perpetuates existing practices and values.

III. Tell and Listen

Role of Interviewer:	Judge.
Objectives:	Tell your message and your evaluation of it. Release his defensive feelings.
Reactions expected:	Defensiveness expressed. He feels accepted.
Skills of Interviewer:	Listening. Reflecting feelings. Summarizing.
Gains expected:	Develops favorable attitude toward you. Increases probability of success.
Risks:	May not get acceptance of the message as it stands. Need for change on his part may not be developed.
Values:	Permits you to change your views as he responds. Improves chances for upward communication.

IV. Problem Solving

Role of Interviewer:	Helper.
Objectives:	Agree on definition of the problem. Reach a mutually acceptable plan for resolving the problem.
Reactions expected:	Problem-solving behavior.
Skills of Interviewer:	Listening, reflecting feelings. Reflecting ideas. Using exploratory questions. Summarizing.
Gains expected:	Improvement in meeting and resolving problems. Mutually better understanding of each other.
Risks:	He may lack ideas. Definition of the problem may be different than your original judgement of it. Changes that ensue may not match your prediction.
Values:	Both learn since experience and views are pooled. Change is facilitated.

V. Exploration

Role of Interviewer:	Seeker.
Objectives:	Define the situation. Learn from him and reveal to him.
Reactions expected:	Exchange information cooperatively. Raise questions as well as make answers.
Skills of Interviewer:	Directness in questioning. Directness in answering. Listening. Summarizing.
Gains expected:	Success is most probable when both share freely in answers and questions. Seeking together improves attitude toward each other.
Risks:	Differences in interpretation and valuation may not become known. Either may misjudge the other's intention.
Values:	Both learn in the exchange of information. Opens the way for continuing communication.

VI. Appreciate-Tell-Ask

Role of Interviewer:	Stimulator.
Objectives:	Cause him to analyze. Get him to make self-discoveries.
Reactions expected:	Induced to more self-expression. Tend to re-question his own answers.
Skills of Interviewer:	Non-directive questioning. Suppression of judgment by the interviewer.
Gains expected:	He is quite certain to take some action on his own initiative. Revalue his analysis in accordance with his answers.
Risks:	His judgments may continue to be far from yours. He may analyze other things than you intended. His action may not fit your intention.
Values:	Both will make increased analyses. Both will revalue their positions. Action based on self-discovery is supported by greater motivation. Contributions are maximized.

VII. Non-directive Probing

Role of Interviewer:	Information-getter.
Objective:	Uncover the facts.
Reactions expected:	Providing information. Explaining.
Skills of Interviewer:	Non-directive questioning. Non-critical summarizing. Suppressing judgment.
Gains expected:	He is motivated to communicate more. Cooperativeness increases as the search progresses. Attitude toward you becomes more favorable.
Risks:	Facts and fiction may not be separated readily. Pursuit of facts cannot be carried on vigorously.
Values:	Unpredicted aspects of the situations probably will be uncovered. Future cooperativeness may be expected.

VIII. Direct Probing

Role of Interviewer:	Inquisitor.
Objective:	Ascertain the facts.
Reactions expected:	Defensiveness, caution in making answers. Searching for the reasons behind each question.
Skills of Interviewer:	Direct questioning. Devising many angles of approach.
Gains expected:	Accuracy of information probably will be established.
Risks:	Facts not anticipated by you may not be uncovered. His cooperativeness is apt to diminish. Attitude toward you becomes strained.
Values:	For whatever evidence is uncovered, facts will be separated from fiction. Both know the direction and the scope of the search.

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TAB B

LEGAL RESTRAINTS AND REQUIREMENTS IN THE DISCIPLINARY PROCESS: DUE PROCESS AND REPRESENTATION

Effective disciplinary policies and practices are beneficial only if they are equitably applied and not abused. To protect the employees' rights in the disciplinary process, the courts have recently made some decisions which have implications for the public employer's disciplinary system. The following three articles discuss these decisions and their implications.

The first article, "Employee Discipline and Due Process Requirements in Public Employment," focuses on the 1975 decision of the California Supreme Court in *Skelly v. State Personnel Board*. The Court, following the lead of the United States Supreme Court in private sector cases, stated that permanent civil service employees have a "property" interest in their jobs. To deprive such employees of continued employment without due process would violate the Fourteenth Amendment. The California court, to insure due process, then set forth criteria to be followed before a serious disciplinary action is taken against a permanent civil service employee.

"Union Representation and the Disciplinary Interview in the Public Sector" concerns the right of employees to representation in an investigative interview where the employer has not yet taken a disciplinary action, even when agency rules or memoranda of understanding do not provide for such representation.

The U.S. Supreme Court decision in *NLRB v. Weingarten* is the cornerstone of this discussion. As the *Weingarten* decision was a private sector case, the article also relates such private sector decisions to public sector procedures. Both the Weingarten and Skelly decisions will be found in the appendix to this tab.

The third article in this section, "Union Representation During Investigatory Interviews," reviews both court and arbitration decisions upholding the right to union representation during investigations. Arbitrators, in upholding this right, view it as being derived from the implied meaning of more general contract provisions.

The appendix to this section contains an article by Benjamin Aaron, "The Impact of Public Employment Grievance Settlement on the Labor Arbitration Process." Of particular interest is the section "Significant Aspects of Public Sector Grievance Resolution," pages 21 through 23. The author comments on the constitutional protections afforded public employees, particularly in the area of discipline and discharge. Given the increasing government involvement with private employers, these protections are seen to be flowing to private sector employees.

A portion of the California Education code is also included in the appendix. It is an example of a statutory structure which serves as a legal restraint on one segment of public management in its development of disciplinary policy and procedures.

EMPLOYEE DISCIPLINE AND DUE PROCESS REQUIREMENTS IN PUBLIC EMPLOYMENT (*Skelly v. State Personnel Board*)*

The courts have recently decreed that permanent civil service employees have a "property interest" in continued public employment which they cannot be deprived of without due process of law. This requires that before a public agency takes serious punitive action against its employees, they must be accorded certain minimum pre-removal safeguards to minimize the risk of error in management's initial decision.

Background

In *Skelley v. State Personnel Board*,[1] the California Supreme Court ruled unanimously in a landmark decision that the State's disciplinary procedures did not provide permanent state civil service employees with minimal due process as required by the U.S. Constitution and the California Constitution and was, therefore, invalid. The California Court's decision was strongly influenced by earlier U.S. Supreme Court rulings extending similar due process rights to such diverse groups as federal employees, college professors, public school students and welfare recipients.[2]

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* Prepared by Steven L. Houston, Deputy County Counsel, Labor Relations Division, Los Angeles County for the Institute of Industrial Relations, UCLA.

1. 15 C. 3d 194 (1975).

2. *Arnett v. Kennedy*, 416 U.S. 134; *Board of Regents v. Roth*, 408 U.S. 564; *Goldberg v. Kelly*, 397 U.S. 254; *Goss v. Lopez*, 419 U.S. 565.

The *Skelly* case arose as the result of an appeal by a discharged medical consultant employed by the State Department of Health Care Services. The appellant had held that position for about seven (7) years and was a permanent civil service employee of the State.

Three causes for dismissal were specified in the notice of discharge: (1) intemperance, (2) inexcusable absence without approved leave, and (3) bad behavior while on duty which caused discredit to the Department. The Department's disciplinary action was upheld by the State Personnel Board. Notwithstanding the Board's decision, the California Supreme Court found that the discharge was improper because it was effectuated in a manner which denied the employee due process of law and was excessive and disproportionate to the misconduct on which it was based.

In discussing the lack of Constitutional due process, the Court used a "balancing test," weighing the government's interest in expeditious removal of an unsatisfactory employee against the interest of the affected permanent employee in continued public employment. According to the Court's analysis, it is important that public managers have the ability to act expeditiously in disciplining an errant employee, but that need must be balanced against the employee's own interest in the continuation of his public employment and his difficulty in finding other suitable employment while charges are pending against him. The Court concluded that a predisciplinary procedure to guarantee the

protection of constitutional due process was necessary in public employment, even when an appeal procedure including a post-discharge evidentiary hearing is available. Such a procedure, the Court reasoned, would "minimize the risk of error" in management's initial decision and enable the employee to intelligently respond to the charges before the decision is irreversibly made. Ideally, it would provide management with the employee's version of the facts leading up to the disciplinary action and give the public entity an opportunity to re-evaluate the proposed decision in light of those facts.

New Pre-Disciplinary Procedures

As a result of the *Skelly* decision, the pre-disciplinary procedures outlined below should be followed by all appointing powers before taking serious disciplinary action against their permanent employees. Failure to follow these procedures will not necessarily invalidate the agency's disciplinary action but may subject it to liability for back pay to the affected employees from the date of their discharge to the date of the local personnel commission or board's decision on their appeals.[3]

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3. *Barber v. State Personnel Board*, 18, C.3d 395 (1976).

(1) The employee must receive a preliminary written notice of the proposed action, the date it will be effective and the reasons therefor. Such reasons must state the specific grounds and the particular facts upon which the action is taken.

(2) The employee must be provided with any known written materials, reports and documents upon which the action is based.

(3) The employee must be accorded the right to respond either orally, in writing or both to the manager in the Department who can effectively recommend that the proposed disciplinary action be taken or not taken. The Department should document whether the employee chose to avail himself of that right or waived the right.

If after following the above procedure, the decision is made to discipline the employee, a written notice should be served upon the employee in the manner prescribed by the local agency's personnel rules together with a copy of all the written materials previously provided the employee. All steps taken thereafter will be in accordance with individual agencies' civil service or personnel rules.

Practical Administrative Considerations

Certain practical administrative considerations should be kept in mind by management when implementing the *Skelly* procedures.

Only Permanent Employees Are Affected

The *Skelly* case applies only to permanent merit or civil service employees.[4] Actions involving all other employees are unaffected. Thus, CETA employees, first-time probationers and demotions of permanent employees serving subsequent probationary periods as in the case of promotions are not affected.

Short Suspensions Are Exempt[5]

In light of the fact that constitutional due process connotes a balancing of the public's interest in the expeditious removal of unsatisfactory

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4. However, non-tenured or probationary employees who do not have a "property interest" in their continued employment may, under certain circumstances, be entitled to a hearing to clear their name if they are discharged in a manner which stigmatizes them or seriously damages their reputation or career. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Zumwalt v. Trustees of the California State Colleges*, 33 Cal. App. 3d 665 (1973).

5. The California Court of Appeals has recently ruled that the *Skelly* procedure applies to any suspension, "irrespective of its duration." *Civil Service Assoc. v. City and County of San Francisco*, 67 Cal. App. 3d 486 (1977). However, the State Supreme Court has granted a Petition for Hearing on the matter which strongly indicates that the Court may sustain management's right to impose short suspensions on its employees without complying with *Skelly*.

employees against the interest of such employees in their continued public employment, the court has indicated it may accord management greater flexibility in implementing short suspensions of ten (10) days or less without complying with the *Skelly* procedure. Several large public jurisdictions in California have taken this position and have successfully implemented it as part of their usual disciplinary practices.

Disciplinary Action Must Be Punitive In Nature

Disciplinary actions directly affected by *Skelly* are those which are punitive in nature and usually result in financial detriment to the employees. Such actions normally involve discharges, demotions[6] and lengthy suspensions. Warnings, reprimands, improvement needed performance evaluations and brief suspensions may be administered according to established agency practices.

Written Notice Is Required

A significant requirement of the *Skelly* decision obligates the agency to give an employee written notice that it proposes to take a given action against him.

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6. The *Skelly* procedure applies to the demotion of an employee who is permanent in the position from which he is demoted. *Ng v. State of California*, 68 Cal. App. 3d 600 (1977).

With certain exceptions, this notice must contain the same information as the letter which later serves to make the disciplinary action effective. Both letters will include the same kind of specifications and details. The first paragraph of the preliminary notice, however, will indicate that the discipline is only proposed, not effective, and the last paragraph will contain a statement of employee rights appropriate to the preliminary notice. (See attachment.) In addition, at the employee's request, the agency must also furnish a copy of all written materials supporting the proposed action.

Employees Must Be Allowed A Reasonable Time To Respond

The Court did not establish a clear time frame within which an employee must exercise his right to respond in writing, orally or both to the preliminary notice. Management must set the time for the response and it must allow the employee a reasonable period of time for review of the matter. For instance, in cases involving lengthy specifications, voluminous supporting materials and related documents, as many as ten business days may be appropriate. For actions with less documentation five business days or less may be proper. When establishing a response deadline for each case, management should be guided by the complexity of the issues involved, the volume of documented materials and good judgment. Requests for extension of the time period should be granted by management if the justification for the request is reasonable.

In all cases, if management's investigation reveals new information which may result in additional charges against the employee, he is entitled to receive copies of this material should be granted additional time to respond to the new information. If the employee elects not to respond within the time limits established by management, the employee can be considered to have waived his procedural right. The circumstances surrounding the waiver should be thoroughly documented.

Management Reviewing Employee Responses Should Be Appropriate To Level Of Employee Responding

Although there is no fixed standard as to what level of manager should be appointed to review employee responses, the manager should be appropriate to the level of the employee responding. This may be one or two levels above the employee's supervisor. In all cases, the manager should have enough authority in the organization to make an effective recommendation on the proposed action.

Skelly Hearing Is Not An Advesary Proceeding

While the employee's pre-disciplinary response guarantees the employee an opportunity to present his or her side of the facts, due process does not require that the agency provide the employee with a full trial type evidentiary hearing prior to the initial taking of punitive action.

The *Skelly* hearing is not intended to be an adversary proceeding but merely an opportunity for both sides to exchange relevant facts in an attempt to minimize the risk of error in management's initial decision before final action is taken. Thus, an employee need not be accorded the opportunity to cross-examine the agency's witnesses nor to present a formal case in opposition to the proposed discipline. However, the limited nature of this response does not obviate management's responsibility to initiate further investigation and possibly postpone the disciplinary action if the employee's version of the facts raises doubts as to the accuracy of the manager's information leading to the disciplinary proposal.

True "Emergencies" Are Exempt

The *Skelly* decision does not always prohibit an agency from taking disciplinary action without prior notice. On a case by case basis, under "emergency" or "extraordinary" circumstances, an employee may be removed from the work place prior to receiving his *Skelly* rights. In these cases, the agency should document circumstances which indicate that the employee's continued presence at the work site could have detrimental consequences. The Court did not define "emergency" or what "extraordinary" circumstances would justify such summary treatment of an employee but it may safely be assumed that the Court will look closely at the facts of any case brought before it alleging abuse of

of this exception. In order to avoid this problem, whenever there is any question regarding the existence of an "emergency", the employee may be suspended immediately for a short period of time until the *Skelly* process is completed and a decision reached regarding potential disciplinary action. This approach not only meets the agency's need to immediately remove the employee from the premises but also helps avoid later arguments that the employee was not accorded his due process rights.

Employees Usually Are Not Entitled To Union Representation

An employee subject to possible disciplinary action may not normally insist on union representation at the *Skelly* hearing. Unless local agency rules, regulations or memoranda of understanding provide otherwise, such employees may legally insist on the presence of a union representative only in those situations where the employee reasonably anticipates that the questions will involve his union activities and lead to disciplinary action because of union related conduct.[7]

In such cases, the employee should be required to clearly explain the basis for his belief that the disciplinary action is being taken because of union activity. Management should proceed cautiously in this area,

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7. *Social Workers' Union, Local 535 v. Alameda County Welfare Department.* 11 Cal. 3d 382 (1974).

however, because the U.S. Supreme Court recently ruled in *N.L.R.B. v. Weingarten*,[8] a case involving the private sector, that an employee who reasonably anticipates disciplinary action arising out of an interview may insist upon union representation regardless of whether the interview pertains to union or non-union related conduct. An analysis of this problem and the application of the *Weingarten* decision to public agencies follows this article.

Skelly Is Retroactive

In *Barber v. State Personnel Board*,[9] the California Supreme Court ruled that the due process standard it created in *Skelly* must be applied retroactively in pending cases. The *Barber* case involved an employee whose discharge by the State was administratively sustained in 1973. Whatever the effects of the decision may be, it comes from the State's highest court and directly addresses the retroactivity question. Accordingly, all employees whose appeals of disciplinary actions have not finally been decided as of the date of the *Skelly* decision, either because they are pending before local agency commissions or boards or because they are pending in a court of law, are entitled to be paid for the period from date of discharge to the date of the commission or personnel board's decision on their appeals, unless their appointing powers followed the preliminary procedure prescribed in the *Skelly* case.

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8. 420 U.S. 251; 43 L. Ed. 2d 171 (1975).
9. 18 Cal. 3d. 395 (1976).

SAMPLE LETTER

Preliminary Notice Of Intent To Discharge A Permanent Employee

March 3, 1977

Mrs. Mary Ann Doe
1000 Parrin Avenue
Eastland, California 90000

Dear Mrs. Doe:

This letter is to inform you of our intention to discharge you from your position of Account Clerk I and from County service effective on or before Friday, March 12, 1976. The following constitute grounds for your proposed discharge:

1. Failure to meet minimum standards established for your position of Account Clerk I in the area of amount of work performed and completion of work on schedule.
2. Continuous failure to meet standards established for performance in new situations and with minimum instructions.

(AT THIS POINT YOUR LETTER SHOULD INCLUDE A PARAGRAPH EXPLAINING HOW THE ABOVE CHARGES HAVE ADVERSELY AFFECTED THE EMPLOYEE'S TOTAL WORK PERFORMANCE, THE MORALE AND/OR OPERATIONS OF THE WORK UNIT.)

All written materials, reports and documents upon which this action is based are available for your review. If you wish to see them or obtain copies, please contact __ _____ /OR/ The written materials and documents upon which this action is based are attached.

You have the right to respond to this action, either orally, in writing or both. If you choose to respond in writing, send your response to the facts contained in this letter to Mr. __ _____ Department of Parks and Recreation, by March 4, 1977 If you wish to respond orally to these charges, you may meet with Mr. __ _____ before March 4, 1977. For an appointment call his office at (phone number)_____.

If you have not contacted Mr. __ _____ either orally or in writing by March 4, 1977 , you will have waived your right to respond.

Very truly yours,

Robert Smith, Director
Department of Parks and Recreation

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UNION REPRESENTATION AND THE DISCIPLINARY INTERVIEW IN THE PUBLIC SECTOR *(NLRB V. WEINGARTEN)**

The right of an individual to appear with representation when the individual is subject to investigation is an expanding right in our legal system. Where the individual once stood alone before the investigator, now he or she may frequently have a right to appear with the aid and comfort of another person. This question of representation is increasingly being raised in both private and public sector labor relations.[1]

Public employees, for example, are occasionally subjected to an individual meeting with management in a pre-disciplinary or pre-discharge situation, such as one in which the employer interviews the employee concerning an alleged violation of an agency rule. Traditionally, employees have attended this interview alone. Some are now seeking representation even though the employer has taken no adverse action upon which disciplinary action might be based and even though the memorandum of understanding or agency rules and regulations do not authorize such a right to representation.

Employers in public agencies have been reluctant to allow their employees pre-disciplinary representation, thus, leaving the employee with the

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1. See Right of Employee to Union Representation at Meeting called by Employer, 83 Lab. Rel. Rep. Anal. 49 (July 30, 1973); *Social Workers' Union, Local 535 v. Alameda County Welfare Deparment*, 11 Cal. 3d 382 (1974).

* Prepared by Steven L. Houston, Deputy County Counsel, Labor Relations Division, Los Angeles County for the Institute of Industrial Relations, UCLA

choice of either responding to incriminating questions or statements, or remaining silent. If the employee remains silent or refuses to participate in the interview, management may seek to discipline him for insubordination. If the employee answers or otherwise cooperates, he may provide evidence upon which to base discipline for the infraction of the agency's policy that gave rise to the interview. In either case, the employee may institute legal action, file an unfair labor practice charge, appeal to local personnel boards or grieve the discipline under the applicable provisions of any employer-employee agreement that may be in effect between the agency and a recognized employee organization. Although the question of an employee's right to union representation at investigative interviews has finally been authoritatively determined in private industry, it remains unsettled and the subject of much debate in the public sector.

This article will address itself to three considerations: (1) the nature of the investigatory interview; (2) the nature of the employee's legal right to union representation at the investigative interview; and (3) the application of private sector legal precedents regarding union representation to public agencies.

The Nature of the Investigatory Interview

Investigatory interviews involve several facets. These concern the interview process itself, the type of individual being interviewed, the purpose of the interview and the incident giving rise to the interview.

The most common form of interview is the informal discussion between the

supervisor and the employee on the "shop floor," while a more formal interview may involve calling an employee to a supervisor's office. Other variations are possible. An investigation involving security agents may have preceded the interview and produced evidence.[2] The employee may be given a prepared statement to sign that incriminates him to some degree.[3] The interview may be conducted by a trained investigator, who may also suggest the use of a polygraph machine.[4]

Individuals being interviewed vary. Some may be fully capable of an effective response during the investigatory interview. There may also be a union official, such as a shop steward, who may receive special treatment because of his status as an union representative. At the other extreme, the employee may be some one who is poorly educated and lacks verbal skills.[5]

The purpose of the interview may also vary. The interviewer may not have a complete understanding of the nature of the alleged incident and may be seeking heretofore unknown information. On the other hand, he may already have a clear picture of guilt and may be using the interview

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2. Illinois Bell Tel. Co., 192 N.L.R.B. No. 138; 78 L.R.R.M. 1109 (1971).

3. Texaco, Inc., Houston Producing Division, 168 N.L.R.B. No. 361; 66 L.R.R.M. 1296 (1967).

4. Lafayette Radio Electronics, 194 N.L.R.B. No. 77; 78 L.R.R.M. 1693 (1971).

5. Texaco, Inc., *supra*.

to confirm already known facts. The interviewer may have complete knowledge of the employee's guilt, but may be using the interview to gain information about other activities violating the agency's disciplinary rules.

Finally, a variety of incidents may give rise to the interview. Potential disciplinary action for incompetence or for various types of misconduct may be involved. Some public agencies may not immediately discharge an employee and the confrontation may only involve suspending the employee pending a subsequent investigation. The more serious the incident, however, the greater the employee's apprehension and the more likely he will request representation.

The Employee's Right to Union Representation in the Investigative Interview

Two recent legal decisions, one by the California Supreme Court and one by the U.S. Supreme Court, are of critical importance in any discussion of the legal rights of a public employee to union representation in an investigatory interview.

In *Social Workers' Union, Local 535 v. Alameda County Welfare Department,* County welfare employees were ordered to attend individual meetings with the Chief Assistant Welfare Director concerning the employees' alleged misuse of County vehicles while attending a noon hour union rally.[6] The employees refused to attend unless accompanied by a union representative.

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6. *Social Workers' Union, Local 535 v. Alameda County Welfare Department,* 11 Cal. 3d 382 (1974).

Management subsequently ordered 3-day suspensions for those employees who refused to attend the meetings alone. The California Supreme Court concluded that the affected employees could reasonably believe that the investigation might lead to disciplinary penalties for participating in union activities and that the employees' right to union representation, guaranteed under Section 3504 of the Meyers-Milias-Brown Act,[7] therefore attached to such interviews as a matter of law.

The Court felt that recognition of the right to union representation in this setting was vital for several reasons. First, from the point of view of the questioned employee, the presence of an union representative would help assure the employee that he will not be penalized for his union activities and will tend to reduce the potentially coercive atmosphere of the employer-directed interview. Second, the union itself has an important interest in assuring that no sanctions were meted out by the employer on the question of an individual member's participation in union affairs. Finally, the Court felt that the union and its members had an additional more generalized interest in guaranteeing that the employer did not adopt any new employment policies which, in application, tended to discriminate against union members or their activities. Thus, for example, a union representative present at such an interview might protest an attempt by the employer to discriminatorily resurrect a generally unenforced rule concerning an alleged violation of agency rules simply because of a connection with union activities.

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7. Government Code Section 3500 *et seq.*

For these reasons, the Court concluded that a public employee's statutory right to effective union representation included the right to have a union representative present at a meeting with his employer when the employee reasonably believes and anticipates and may result in adverse action because of such activities.

Approximately nine months after the California Supreme Court decided the *Social Workers' Union* case, the U.S. Supreme Court in *N.L.R.B. v. J. Weingarten, Inc.*, determined the right of private sector employees to union representation in investigative interviews.[8]

In *Weingarten*, an employee was being interrogated by the employer's representative about reported thefts at the employer's store. The employee asked for but was denied the presence of her union representative at the interview. The Supreme Court held that an employee has the right to request and have present a union representative at any investigatory interview which the employee "reasonably believe(s) might result in disciplinary action." Union activity or conduct does not have to be involved as long as the employee reasonably anticipates any disciplinary action arising out of the interview. Denial of this right, the Court declared, would interfere with, restrain and coerce the employee's right to engage in concerted activities for mutual aid or protection and constitute an unfair labor practice under the National Labor Relations Act.

The guidelines approved by the Supreme Court make clear that in the case

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8. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251 (1975).

of an investigatory interview, the employee's right to union assistance and representation is considerably qualified.

(1) The right arises only when the employee asks for representation. He can waive the right, however, and take part in the interview alone.

(2) The right is limited to situations where the employee reasonably believes the investigation may result in disciplinary action. What is reasonable will be measured by objective standards under all the circumstances of the case. Thus, the rule would not normally apply to ordinary conversation between the employee and his supervisor concerning such matters as, for example, the giving of instructions or training or needed correction of work techniques.

(3) Exercise of the right may not interfere with legitimate management prerogatives. The employer, rather than comply with the request for representation, remains free to terminate the interview and pursue his investigation by other means. Thus, the employer can present the employee with "the choice between having an interview unaccompanied by a representative, or having no interview and foregoing any benefits that might be derived from it."

(4) The employer has no duty to bargain with the union representative at the interview. The representative is present only to assist the employee and attempt to clarify the facts or suggest other employees who may have knowledge of them.

> The employer, however, can insist on hearing only the employee's version of the facts.

Implementation of this rule, said the Court, gives recognition to the right to representation when it is most useful by encouraging an immediate resolution of the incident being investigated. Letting the union into the picture only at the stage of the formal grievance proceedings would tend to freeze the parties in an adversary position and make it more difficult for the employee to vindicate himself. Even though the employee alone has an immediate interest in the result of the interview, the union representing all employees has an interest in making sure the employer is not imposing punishment unjustly and that the employees have the right to designate representatives of their own choosing for the purpose of "mutual aid or protection."

Weingarten's Application to the Public Sector

In light of the criteria set forth in the *Weingarten* and *Social Workers' Union* decisions, it can readily be observed that an employee's right to union representation in an investigatory interview is much broader in the private sector than that afforded similar employees in public employment. This disparity between the rights of the two groups of employees has predictably caused confusion and dissatisfaction in the public sector and encouraged public employees to press for equivalent treatment.

Although no California Court has yet ruled that the *Weingarten* decision applies to public employees, such Courts have frequently held that Federal law and the decisions of the Federal Courts in interpreting that law should

be referred to in interpreting parallel language in state labor legislation, such as the Meyers-Milias-Brown Act and local ordinances and resolutions enacted to implement that Act.[9]

Thus, in a recent case involving an unfair labor practice charge, the Los Angeles County Employee Relations Commission ruled that the *Weingarten* decision was applicable to Los Angeles County employees. (UFC 6.28.) In that case, a charge was filed against the County alleging that the County had refused to allow one of its employees union representation at an interview which the employee reasonably believed might result in disciplinary action.

The essential facts were not in dispute. On July 16, 1975, the employee, a union steward and long time County employee, requested three days of vacation leave. This request was approved by the employee's immediate supervisor but subsequently disapproved by her division chief. The employee then requested a meeting with the division chief to discuss the matter. Upon reporting to the division chief's office some nine days later, on July 25, 1975, the employee found in attendance at the meeting not only the division chief, but also his secretary and the assistant division chief. When the employee saw the secretary with a pad and pencil, she asked the purpose of the meeting and was informed that the discussion would concern the employee's work performance and

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9. *Fire Fighters Union v. City of Vallejo*, 12 Cal. 3d 608 (1974); *Social Workers' Union, Local 535, SEIU v. Alameda County Welfare Department*, 11 Cal. 3d 382 (1974); *Huntington Beach Police Officers' Association v. City of Huntington Beach*, 58 Cal. App. 3d 492 (1976).

not the disallowance of her vacation request. The employee objected and requested union representation. Her request was denied whereupon she left the meeting. The employee was later suspended for two days for refusing to meet with County management without a union representative present. Approximately a week later, she was demoted for incompetency resulting in a $200 a month cut in salary. An unfair labor practice charge was subsequently filed against the County with the Employee Relations Commission alleging violation of the employee's right to union representation under the County's Employee Relations Ordinance.

At the hearing, the union relied on both the *Social Workers' Union* case and the *Weingarten* decision in urging the Commission to rule in its favor. The County argued that the employee could not have reasonably believed that the performance to be discussed at the July 25th meeting would relate to union activity and urged the Commission to limit the *Weingarten* precedent to the private sector because of the unique differences between private and public employment.

The Commission concluded that although the employee could not have reasonably believed that the July 25th meeting would be related to union activity, she could reasonably have believed that disciplinary action might result from the interview. Thus, the Commission held that the *Weingarten* decision should be applied to the County through the rationale adopted by the California Supreme Court in *Fire Fighters Union v. City of Vallejo* because "the reasons that make the rule sound for private

employment recommend it also for public employment."[10] Reasoning that the County's refusal to grant the request for representation interfered with, restrained and coerced the employee in the exercise of her rights under the Employee Relations Ordinance, the Commission ordered the County to (1) make restitution to the employee for any loss of earnings resulting from the 2-day suspension; (2) remove any reference of the 2-day suspension from the employee's personnel record; and (3) cease and desist from requiring any employee to take part in any investigatory interview without union representation if the employee requests representation and reasonably believes that disciplinary action may result.

It should be noted that the unfair practice charge discussed above is binding only on the County of Los Angeles. The *Weingarten* decision has not yet been extended to public jurisdictions by any California Court. Thus, unless a public agency has voluntarily granted this expanded right to its employees through its memoranda of understanding or through its local employee relation ordinances or resolutions, the principles enunciated in the *Social Workers' Union* decision still govern the right of public employees to union representation in investigatory interviews. Should this issue come before the California Courts for resolution today, however, the Courts would most likely adopt the *Weingarten* rationale and extend its application in full to public employees.

Because the right to appear with representation is expanding in the public

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10. See Footnote 8, *supra*.

employment system, public agencies should give consideration to the practical ramifications of extending increased representational rights to their employees through the meet and confer process. If the agency determines that it can efficiently operate under such circumstances, it might offer these rights to its employees as part of the agency's total bargaining package and perhaps get something of value from the employee organizatons in return. Otherwise, as appears likely, public employees will secure these rights unilaterally through the Courts.

UNION REPRESENTATION DURING INVESTIGATORY INTERVIEWS*

In a landmark case in the continuing stream of "constitutionalism and due process" decisions of the Supreme Court, the Court has recently upheld a hotly contested NLRB view that employees have the right to union representation at the earliest stage of a management investigation into alleged employee rule infractions. The Board's view is that employees are entitled to such representation when they have reasonable grounds to believe that the investigation may lead to discipline or discharge.[1]

In three separate recent cases, this Board's view was rejected by three different Circuit Courts of Appeal. In the *Quality Mfg. Co.*[2] case, an employee who consistently refused to see the company president alone to discuss her alleged "flippancy" earlier, but insisted upon union representation at the interview, was discharged for such refusal. The Fourth Circuit saw management insistence on such an interview, sans union representation, a "management prerogative" not violative of the Act.[3] In the *Mobil Oil*[4] case, two of nine workers interviewed by management in

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* Wallace B. Nelson, Professor of Economics and Administration at the University of Texas at Arlington. This article originally appeared in *THE ARBITRATION JOURNAL*, September 1976.

1. *Mobil Oil Corp. and Oil, Chemical and Atomic Workers International Union (AFL-CIO), et al.*, 196 NLRB No. 144, 1972 CCH NLRB para. 24,183.

2. *NLRB v. Quality Mfg. Co.*, 195 NLRB No. 42, 1972 CCH NLRB para. 23,896.

3. 71 LC para. 13,882.

4. *Op. cit.*, f. 1.

the investigation of a suspected theft of company property asked for and were denied the right to have a union representative present during such interviews. The Board found a violation of Sec. 8(a)(1) of the Act, but the Seventh Circuit reversed.[5] In the *J. Weingarten*[6] case an employee, learning that she was being questioned about an alleged act of dishonesty, requested union representation and was refused. The Board, finding that the employee "could certainly reasonably conclude that action might be taken by the employer that would put her job in jeopardy," again found a violation of Sec. 8(a)(1).[7] The Fifth Circuit reversed.[8]

Granting certiorari on April 29, 1974, the Supreme Court agreed to review both *Quality Mfg.* and *J. Weingarten.*[9] On February 9, 1975, the Court upheld the Board with *J. Weingarten* the definitive decision.[10] The Court found that:[11]

> The employer violated Sec. 8(a)(1) of the National Labor Relations Act because it interfered with, restrained, and

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5. 71 LC para. 13,841.

6. *J. Weingarten, Inc.*, and *Retail Clerks Union, Local 445, Retail Clerks International Association (AFL-CIO)*, 202 NLRB No. 69, 1973 CCH NLRB para. 25,151.

7. *Ibid.*, p. 32,411.

8. 72 LC para. 14,001.

9. LLR, No. 87, May 3, 1974 (DKT 73,765, and 73,1363).

10. *NLRB Petitioner v. J. Weingarten, Inc., Respondent*, 76 LC para. 10,662.

11. *Ibid.*, p. 18,249.

> coerced the individual right of an employee, protected by Sec. 7, "to engage in. . .concerted activities for mutual aid or protection. . ." when it denied the employee's request for the presence of her union representative at the investigative interview that the employee reasonably believed would result in diciplinary action.

The Board's position on this issue has evolved over time, and that evolution is both interesting and informative.[12] The issue to be explored here, however, is the asserted parallel evolution of this same doctrine in a series of arbitration cases. Noting that "many important collective bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews," the High Court majority observed further that "*even where such a right is not explicitly provided in the agreement* a 'well established current of arbital authority' sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him."[13]

Is there in fact a "well established current of arbital authority" which sustains the right of employees to union representation at preliminary fact-finding meetings *even where such a right is not explicitly provided in the agreement?* If so, the clear implication is that arbitrators are

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12. See the writer's "Union Representation During Management Investigations of Alleged Rule Infractions," in the *Labor Law Journal*, V 26, No. 1 Jan. 1975, pp. 37-43.

13. *Op. cit.*, f. 10, p. 18,255 (Italics supplied.)

either (1) inferring such a right from other and more general provisions of the agreement, or (2) are departing from the well-established principle that the function of the arbitrator is exclusively one of contract interpretation. It is principally this question which the present piece seeks to explore.

The Court cited twelve cases decided between 1952 and 1973 in support of its assertion that there is "a well established current of arbital authority" sustaining the right to union representation at investigatory interviews even where such a right is not explicitly provided in the agreement.[14] Two cases were cited to the contrary.[15] All these cases, and several others, have been carefully reviewed. The objective was to determine: (1) whether the question of union representation at preliminary fact-finding interviews was a central issue, and hence squarely presented; (2) the logic of the union case for such representation, and the employer's defense, and (3) the rationale, including logic and contract proviso, for the arbitrator's decision.

The Issue

There is no question but that these cases squarely present, and the arbitrators meed head-on, the issue of union representation at preliminary

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14. *John Lucas and Co.*, 19 LA 344 (1952); *Braniff Airways, Inc.*, 27 LA 892 (1957); *Singer Mfg. Co.*, 28 LA 570 (1957); *Schlitz Brewing Co.*, 33 LA 57, 60 (1959); *Valley Iron Works*, 33 LA 769, 771 (1960); *The Arcrods Co.*, 39 LA 784, 788-789 (1962); *Dallas Morning News*, 40 LA 619, 623-624 (1963); *Waste King Universal Products Co.*, 46 LA 283, 286 (1966); *Thrifty Drug Stores, Inc.*, 50 LA 1253, 1262 (1968); *Allied Paper Co.*, 53 LA 226 (1969); *Universal Oil Products Co.*, 60 LA 832, 834 (1973); *Chevron Chemical Co.*, 60 LA 1066, 1071 (1973).

15. *United Air Lines, Inc.*, 28 LA 179 (1956); *E.I. DuPont de Nemours and Co.*, 29 LA 646 (1957).

fact-finding interviews. In no less than nine cases it is clearly the central question.[16] Arbitrator Sidney Cahn put it most succintly in *Singer Mfg. Co.*:[17]

> By this grievance the following question was raised: At what stage in a proceeding was the employee. . .entitled first to demand union representation in the handling of an "incipient grievance" against him?

In the three cases in which the right to union representation at preliminary fact-finding interviews is arguably not the *central* question, it is clearly posed.[18] In at least two of these cases, the issue is posed in such a fashion as to shed much light on the nature of the controversy and on its resolution. That is particularly true in *Thrifty Drug Stores*, where the issue is just cause for discharge. Arbitrator Edgar A. Jones finds the company's investigatory procedures "fatally flawed" by a company policy which instructs Security Department personnel in theft investigations:[19]

> If an employee being interviewed requests that a union representative be present, the request is to be denied. . .

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16. It is assumed to be the central issue if the case resolution turns on it. It may not have been the issue submitted or that phrased by the arbitrator. For example, the submission agreement signed by both parties in *Braniff Airways, Inc.*, (*op. cit.*, f. 14 at 893) was: "Was Fred Spradlin discharged for just cause?" The cause was a charge of insubordination: a refusal to talk to supervision about an overtime complaint without benefit of union representation. This case is one of the nine listed as presenting this representation issue as the "central question."

17. *Op. cit.*, f. 14 at 570.

18. *Schlitz Brewing Co.*, *Dallas Morning News*, and *Thrifty Drug Stores*. *Op. cit.*, f. 14.

19. *Ibid.*, at 1253.

Arbitrator Cahn goes beyond both the Board and other Arbitrators when he finds that:[20]

> Since this was an interrogation related to their prospective discipline it was their contractual right to have present a union representative; the company was contractually required to make known the availability of that opportunity *whether or not requested by the employee.*

Thus the answer to the first question is clear and unequivocal: these cases squarely present and the arbitrators unflinchingly address the central issue: are employees entitled to union representation at preliminary fact-finding interviews? The answer is overwhelmingly "yes." What is the logic, and to what extent is that logic supported by the agreement?

The Logic

The central union rationale for insistence upon representation is that employees called in for such preliminary fact-finding interviews have reasonable grounds to fear discipline or discharge, and that such fears trigger their right to union representation. The centerpiece of management's defense of the right to conduct such interviews without a union representative being present is that such preliminary interviews are merely investigatory. That is, they are designed merely to get at the facts, do *not* involve disciplinary action, and hence do not require the presence of a union representative.

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20. *Ibid.*, at 1262. (Italics supplied.)

A more pragmatic management concern is the fear of "over-conferencing." That concern is reflected explicitly in a majority of the twelve cases involved here. Arbitrator Jerre S. Williams addresses it in *Braniff Airways, Inc.*:[21]

> . . .it should be recognized that it would be difficult if not impossible to manage the working force effectively if every employee were entitled to have the shop steward present whenever the foreman spoke to him. . . .

The collision of these opposed views often precipitates a confrontation, and raises two other questions. The confrontation occurs when management insists that an employee attend a preliminary fact-finding meeting without a union representative. The employee fears discipline or discharge, and refuses to attend such a meeting unless he can be accompanied by a union representative. The two questions posed are (1) is there now a "grievance"? and (2) is the principle of "obey first and grieve later" applicable?

In the *Singer Mfg. Co.*[22] case, an employee being talked to in connection with an investigation over records falsification first talked to his department manager without requesting union representation, but when asked to come to the Personnel Office, he insisted on such representation. Told he could appear without such representation or "go home" he appeared.

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21. *Op. cit.*, f. 14 at 897.

22. *Op. cit.*, f. 14.

The union filed a grievance. The company took the position that there can be no grievance:[23]

> . . .until after the employer has taken some affirmative action, and, until such action is taken, an employee is not entitled to union representation when discussing the matter with management representatives.

Arbitrator Cahn's response to this argument was that:[24]

> Nowhere in the grievance procedure is there any provision or even indication that the employer must take some *affirmative action* against the employee before the employee has the right to have his union representative present. . .at the point where the front office summoned Pawlak for "discussion," a grievance, i.e., a "subject of controversy" existed which entitled Pawlak to union representation. . . .

Taking the same view that "the contract does not give the employee the right to the assistance of a steward until the company has assessed discipline," *Schlitz Brewing Co.*[25] argued further that:

> Even if it be held that the company was wrong, Hopkins was obliged to obey the order and then to grieve the alleged violation of his contractual rights.

This case is particularly interesting in that it illustrates both the principle "obey first, then grieve," and the exception to that rule when the "insubordination" involves a refusal to attend an interview with management officials which the employee fears may lead to discipline or discharge.

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23. *Ibid.*, at 570.
24. *Ibid.*, at 571.
25. *Op. cit.*, f. 14 at 59.

Frederic Meyers was the arbitrator, and he was faced with the problem of an employee who first refused to return to work immediately when directed to do so, then refused to go to the office of the supervisor for a "corrective interview" unless he could be accompanied by a union representative, and finally refused to "punch out" when ordered to do so.

He found the employee insubordinate in failing to respond promptly to the order to return to work, and also insubordinate in refusing to punch out when told to do so. In addition, he agreed with the general rule enunciated in the cases cited by the company to the effect that employees are ordinarily required to "obey, then grieve." But he added:[26]

> In this case, however, the employee was directed to go to the office of a supervisor, obviously for the purpose of a "corrective interview" or to receive a reprimand or discipline. No injury could be done the rights of the company, or the operation of the plant, by the employee's refusal to do so, and, conceivably, substantial injury could be done the employee were he required to enter such an interview without the expert assistance of his union representative.
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> . . .I believe that since a grievance was obviously in the formative stages, and since the very fact of union recognition as well as the clear intent of the contractual procedure entitles the employee to representation in such an interview, Hopkins was entitled to refuse to enter into it without representation, and was not insubordinate in so refusing. . . .

The Arbitrators' Rationale And Its Contractual Basis

If generalization is possible where every case is in some significant

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26. *Ibid.*, at 60.

fashion unique, it seems justified to conclude that the arbitrators represented here are overwhelmingly of the view that the employees here involved did in fact have reason to believe that the interviews they refused to participate in without union representation might have resulted in their discipline or discharge.[27] That fact entitled them to union representation, and their refusal to attend such interviews without that representation did not constitute insubordination.

On what contractual grounds did these conclusions rest? There is no question but that most of the arbitrators involved were very sensitive to the principle that their authority stems entirely from and is restricted to an interpretation of the agreement between the parties. Arbitrator Maurice Merrill in *Chevron Chemical Co.*[28] explicitly reflects this sensitivity. Observing that there is some authority under the NLRA both for the view that employees are entitled to union representation in such preliminary investigations and for the view that they are not, he concludes:

> . . .it can be argued that the determinative factor should be the provisions of the collectively bargained contract. . . .It seems to me that this is the better

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27. It is interesting to note, without speculating on either cause or consequence, that the roster of arbitrators involved here reads like a Who's Who in American Arbitration. The list: Arvid Anderson, Sidney Cahn, Charles Gregory, J. Fred Holly, Edgar Jones, Maurice Merrill, Frederick Meyers, John Petree, Thomas Reynolds, Murray Rohman, Benjamin Shieber, Edwin Teple, Adolph Wenke and Jerre Williams.

28. *Op. cit.*, f. 14 at 1070.

> view, and I will undertake to determine this case on the basis of the contract.

Having decided that the employee who is called for interrogation has reasonable cause to anticipate that the interview may result in discipline or discharge (a determination made in at least two of the cases here in the face of employer denials that any discipline was intended, and in one case in the face of the employers having assured the employee in advance that no discipline was intended),[29] the question most often faced is whether a grievance is involved.

In the *Chevron Chemical Co.* case the company's position was that "the situations presented. . .did not arise to the dignity of grievances."[30] Arbitrator Merrill by implication rejected this view. The same position was taken by the company in *John Lucas Co.*, to which arbitrator Reynolds reponded:[31]

> To argue that Hansinger technically could have no grievance until a formal act of discharge occurred is to distort the common purpose of the grievance procedure developed in modern collective bargaining.

There is no reference in *John Lucas Co.* to any contractual provisions, explicit or otherwise.

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29. *Allied Paper Co. op. cit.*, f. 14 at 227.

30. *Op. cit.*, f. 14.

31. *Op. cit.*, f. 14 at 346.

In most of the other cases, this question of whether or nor a grievance exists is addressed by specific reference to either explicit or general contract provisos. For example, reliance on "the general provisions of Article 37, A, involving the institution or a grievance,"[32] of "The agreement provides for a conference with the employee's supervisor or forman 'with or without a grievance committeeman,' as the first step in the grievance procedure,"[33] or ". . .in the second paragraphs of Article V (of the grievance procedure) are these words, 'Should differences arise between the company and any of its employees. . .'"[34] Interpreting these specific, or more frequently general contract provisions, the finding is that "It is the basic dissatisfaction and its expression which constitute the grievance;"[35] or "the grievance. . .procedure applies to any 'difference' arising between management and a member of the union;"[36] or "there was certainly a difference of opinion. . . .This employee had a grievance."[37]

In short, the preponderant view is that "incipient grievances," and "differences" between employees and management that likely will "ripen" into full-blown grievances are in fact grievances. Arbitrator C.O. Gregory

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32. *Braniff Airways, Inc., op. cit.,* f. 14 at 896.

33. *The Arcrods Co.,op. cit.,* f. 14 at 788.

34. *Waste King Universal Products, op. cit.,* f. 14 at 287.

35. *Braniff Airways, Inc., op. cit.,* f. 14 at 898.

36. *The Arcrods Co., op. cit.,* f. 14 at 788.

37. *Waste King Universal Products, op. cit.,* f. 14 at 286-87.

stands virtually alone in expressing a contrary view. He seems also to endorse the "obey first, then grieve" principle in these cases:[38]

> . . .if Brown had talked with Stewart as soon as he was asked to do so. . .he would *immediately thereafter* have been at liberty to file a grievance complaining of the fact that Stewart had at that time denied his request to have a steward present at the encounter. . . .
>
> . . .any other view would seem to entitle a unit man to have a steward present at his request whenever a supervisor undertook to have any communication with him about anything to do with his work. Clearly this would result in an impossible situation.
>
> . . .a supervisor is entitled to question a unit man with a view to disciplining him, and may go ahead and discipline him, without a steward present.

There is virtually unanimous recognition by the arbitrators involved here of the concern of management about being required to hold a conference every time they wish to speak to an employee. All agree explicitly with Sidney Cahn when he observes that:[39]

> I do not intend to hold hereby that whenever an employee is called to the front office he is entitled to request union representation.

Most (Gregory, of course, is an exception) seem also to agree, however, with the observation of Benjamin Shieber in *Universal Oil Products Co.*,[40] when he expresses the view that:

> There is no reason to believe that the limited right of the presence of a committeeman at investigatory interviews

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38. *E.I. DuPont de Nemours and Co., op. cit.*, f. 14 at 650. (Italics supplied.)

39. *Singer Mfg. Co., op. cit.*, f. 14 at 572.

40. *Op. cit.*, f. 14 at 836.

> of employees will interfere with the efficient operation of the plant.

There is virtually no reference to the agreement between the parties, explicit or otherwise, to support this view. It seems clear that the preponderant opinion is that the limited employee right to union representation (limited to those circumstances in which there is legitimate cause to anticipate discipline or discharge) does not unduly interfere with management's right to conduct the business in an efficient fashion.

Having made this judgment, it follows that refusal to attend such a meeting without union representation is not insubordination. To the general rule that employees are ordinarily required to "obey, then grieve," there are exceptions. One is the right to refuse to follow orders which risk one's safety. These cases add another: an employee need not obey an order which interferes with his use of the grievance procedure. To quote Edgar Jones in *Thrifty Drug Stores Co., Inc.*:[41]

> It is not compatible with the parties contractual commitment to fair grievance procedures for the employer to bar union representation when the interrogation foreseably is aimed at securing disclosures which may result in the discipline of the employee being subject to it.

We conclude that the Supreme Court was entirely correct in describing these cases as representing "a well established current of arbitral authority" holding that employees do in fact have the right to union representation at the earliest stage of preliminary fact-finding

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41. *Op. cit.*, f. 14 at 1262.

investigations if they reasonably believe that these investigations threaten discipline or discharge. It is equally valid to assert that arbitrators have upheld this right "even [where it is not] explicitly provided in the agreement." The right stems from and rests upon a reliance on the *implied* meaning of more general contract provisions. Just as arbitrator Walter Boles found, twenty years ago, that "a 'just-cause' basis for consideration of disciplinary action is, absent a clear proviso to the contrary, implied in a modern collective bargaining agreement,"[42] these arbitrators see the right to union representation at the earliest stages of a management investigation which may lead to discipline or discharge as an implied requirement of any fair grievance procedure.

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42. Cited in Elkouri and Elkouri, *How Arbitration Works*, Bureau of National Affairs, Washington, D.C., Third Edition, p. 611.

APPENDIX TO TAB B

I. *SKELLY V. STATE PERSONNEL BOARD*

II. *NLRB V. WEINGARTEN*

III. THE IMPACT OF PUBLIC EMPLOYMENT GRIEVANCE SETTLEMENT ON THE LABOR ARBITRATION PROCESS

IV. SECTIONS OF THE CALIFORNIA EDUCATION CODE

[S.F. No. 23241. In Bank. Sept. 16, 1975.]

JOHN F. SKELLY, Plaintiff and Appellant, v.
STATE PERSONNEL BOARD et al., Defendants and Respondents.

SUMMARY

After receiving a written notice from the State Department of Health Care Services terminating his employment on the grounds of intemperance, inexcusable absences and other failures, a physician with the status of a permanent civil service employee was accorded a hearing before a representative of the State Personnel Board which adopted the representative's recommendation and dismissed the physician from employment. The trial court denied the physician's application for a writ of mandate to compel the Board to set aside the dismissal. (Superior Court of Sacramento County, No. 232477, Lloyd A. Phillips, Judge.)

The Supreme Court reversed and remanded for further proceedings. Preliminarily, it was noted that the state statutory scheme regulating civil service employment confers on a permanent civil service employee a property interest in continuation of his employment and that this interest is protected by due process. Concluding, from the record, that the basis of the dismissal had been the physician's conduct in extending his alloted lunch time by five to fifteen minutes and in twice leaving his office for several hours without permission, the court held that the dismissal constituted an abuse of discretion in view of the record's failure to show that these deviations adversely affected public service. Further, it was held that provisions of the Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, relating to punitive action against a permanent employee, violate federal and state constitutional due process provisions. Thus, the dismissal had been improper as excessive punishment, and as having been effectuated under procedures which denied the physician due process. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports, 3d Series

(1) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal —Permanent Employee Status as Protected by Due Process.**—The California statutory scheme regulating civil service employment confers on an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process.

(2) **Constitutional Law § 102—Due Process—Right to Governmental Benefit as Protected by Due Process.**—A person's legally enforcible right to receive a government benefit in the event that certain facts exist constitutes a property interest protected by due process.

(3) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal—Due Process.**—Due process does not require the state to provide a permanent civil service employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action, but does require, as minimum preremoval safeguards, a notice of the proposed action, the reasons therefor, a copy of the charges and materials on which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

(4) **Civil Service § 7—Discharge, Demotion, Suspension, and Dismissal —Statutes—Constitutionality.**—Provisions of the State Civil Service Act (Gov. Code, § 18500 et seq.), including, in particular, Gov. Code, § 19574, concerning the taking of punitive action against a permanent civil service employee, violate the due process clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution, and of Cal. Const., art. I, §§7, 15.

(5) **Administrative Law § 114—Judicial Review—Limited Nature—Review of State Personnel Board's Findings.**—Inasmuch as the State Personnel Board is a statewide agency deriving its adjudicating powers from the state Constitution, the Board's factual determinations are not subject to re-examination in a trial de novo, but are to be upheld by a reviewing court if supported by substantial evidence.

[See Cal.Jur.3d, Administrative Law, § 287; Am.Jur.2d, Administrative Law, § 659.]

(6) **Civil Service § 11—Discharge, Demotion, Suspension, and Dismissal—Judicial Review—Sufficiency of Evidence.**—The State Personnel Board's findings that certain of a permanent civil service employee's absences on certain working days were due to his drinking of intoxicating liquors, rather than due to illness, were sustained by testimony of two apparently credible witnesses that they had seen him at a bar drinking on those days, and by his own testimony that at lunch on one of those days, he had consumed two martinis despite his assertions of illness.

(7) **Public Officers and Employees § 27—Duration and Termination of Tenure—Administrative Body's Discretion.**—Although an administrative body has broad discretion as to imposition of discipline it must exercise legal discretion which, in the circumstances, is judicial discretion. And in determining whether such discretion has been abused in the context of public employee discipline, the overriding consideration is the extent to which his conduct resulted in, or if repeated is likely to result in, harm to the public service. Other relevant factors include the circumstances surrounding the misconduct and the likelihood of recurrence.

(8) **Civil Service § 11—Discharge, Demotion, Suspension, and Dismissal—Judicial Review—Abuse of Discretion.**—In dismissing a physician with the status of a permanent civil service employee on the basis of his extension of his alloted lunch time by five to fifteen minutes, and in twice leaving his office for several hours without permission, the State Personnel Board abused its discretion, where the record failed to show that such deviations adversely affected the public service, but did disclose that he more than made up the lost time by working during nonworking periods, and that he was informative, cooperative, helpful, extremely thorough, and productive.

COUNSEL

Loren E. McMaster and Allen R. Link for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, and Joel S. Primes, Deputy Attorney General, for Defendant and Respondent.

OPINION

SULLIVAN, J.—Plaintiff John F. Skelly, M.D. (hereafter petitioner) appeals from a judgment denying his petition for writ of mandate to compel defendants State Personnel Board (Board) and its members to set aside his allegedly wrongful dismissal from employment by the State Department of Health Care Services (Department).[1] In challenging his removal, petitioner asserts, among other things, that California's statutory scheme regulating the taking of punitive action against permanent civil service employees violates the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15, of the California Constitution.

In July 1972 petitioner was employed by the Department as a medical consultant.[2] He held that position for about seven years and was a permanent civil service employee of the state. (See Gov. Code, § 18528.)[3] About that time the Department, through its personnel officer Wade Williams, gave petitioner written notice that he was terminated from his position as medical consultant, effective 5 p.m., July 11, 1972. The notice specified three causes for the dismissal: (1) Intemperance, (2) inexcusable absence without leave, and (3) other failure of good behavior during duty hours which caused discredit to the Department.[4] It further described petitioner's alleged acts and omissions which formed the basis of these charges, and notified him that to secure a hearing in the matter, he would be required to file a written answer with the Board within 20 days, and that in the event of his failure to do so, the punitive action

[1]Petitioner also named as defendants the Department and its director.

[2]Petitioner graduated from George Washington University Medical School, Washington, D.C. in 1934. He was licensed to practice medicine in California the same year and, after a three-year residency, entered private practice in 1937, specializing in ear, nose and throat problems. During 13 of his 28 years in private practice, he taught at the University of California Medical Center. Cataract surgery and resulting nerve degeneration in his eyes forced petitioner to cease private practice in 1965. He commenced employment as a medical consultant with the State Welfare Department, which became part of the State Department of Health Care Services in 1969.

[3]Government Code section 18528 provides: "'Permanent employee' means an employee who has permanent status. 'Permanent status' means the status of an employee who is lawfully retained in his position after the completion of the probationary period provided in this part and by board rule." The "probationary period" is the initial period of employment and generally lasts for six months unless the Board establishes a longer period not exceeding one year. (Gov. Code, § 19170.)

Hereafter, unless otherwise indicated, all section references are to the Government Code.

[4]Each of these causes provides a basis for punitive action against a permanent civil service employee under section 19572, subdivisions (h), (j), and (t).

would be final. On July 12, 1972, petitioner filed an answer, and on September 15, 1972, a hearing was held before an authorized representative of the Board.

At the hearing, the Department introduced the testimony of Philip L. Philippe, Gerald R. Green and Bernard V. Moore, three successive district administrators of the Department's Sacramento office to which petitioner had been assigned. Their testimony was corroborated in part by written documents from the Department files, and disclosed the following facts: Philippe met with petitioner on November 17, 1970, to discuss the latter's unexcused absences, apparent drinking on the job and failure to comply with Department work hour requirements. This meeting was held at the insistence of several staff members who had complained to Philippe about petitioner's conduct. The doctor was admonished to comply with pertinent Department rules and regulations.

Nevertheless, despite further warnings given petitioner and efforts made to accommodate him by extending his lunch break from the usual 45 minutes to one hour, he persisted in his unexplained absences and failure to observe work hours and as a result on February 28, 1972, received a letter of reprimand and a one-day suspension.

This punitive action had little effect on petitioner who continued to take excessive lunch periods. On March 3, 1972, Gerald Green, then district administrator, and Doris Soderberg, regional administrator, met with petitioner and discussed his refusal to obey work rules, but apparently to no avail. He took lengthy lunch breaks on March 13, 14, 15 and 16. Green again met with petitioner on March 16 in an effort to resolve the problem. When asked why he had taken 35 extra minutes for lunch that day, petitioner claimed to be sick. Green responded that on the day in question he had observed the doctor drinking and talking at a restaurant and bar. Green then suggested that petitioner, for his own convenience, change from full-time to part-time status at an adjusted compensation. Petitioner declined to do so and Green admonished him that further violations of work rules would result in disciplinary action and even dismissal.

In the early afternoon of June 26, Bernard Moore, who succeeded Green as district administrator, attempted but without success to see petitioner in the latter's office. Moore found him at a local bar laughing and talking, with a drink in front of him, his hair somewhat disheveled, and his arm around a companion. Petitioner later left the bar but did not

return to his office that day. Nor did he notify Moore of his proposed absence as required by Department rules. Subsequently petitioner attempted to have Moore record his absence as "sick leave."

In his defense, petitioner testified that he had in fact been sick on the afternoon of June 26, and that after an unsuccessful attempt to telephone his wife, he had informed a co-worker that he was going home.[5] He then went to a local bar and, after requesting a friend to call his wife, remained at the bar until she picked him up. Petitioner's version of the events was corroborated by his wife, a cocktail waitress, and the friend who had placed the call. Petitioner admitted, however, that despite his illness, he had had two martinis at lunch.

Petitioner further testified that his longer lunch periods involved no more than 5 to 15 extra minutes. In justification of this, he stated that he had more than made up for the time missed by skipping his morning and afternoon coffee breaks, by working more than his allotted time over holidays and by occasionally taking work home with him. He denied having a drinking problem and stated that his alcoholic intake during working hours was limited to an occasional drink or two at lunch.

Three co-workers, including Dr. F. Audley Hale, the senior medical consultant and petitioner's immediate supervisor for 13 months, confirmed petitioner's testimony that he rarely took coffee breaks. They described him as efficient, productive and extremely helpful and cooperative, and stated that his work had never appeared to be affected by alcoholic consumption. Dr. Hale rated petitioner's work as good to superior[6] and assessed him as "our right hand man as far as information concerning ear, nose and throat problems not only for the District Office but for the Region as well." He stated that the Department definitely needed someone with the doctor's skills.

The Department introduced no evidence to show, and indeed did not claim, that the quality or quantity of petitioner's work was in any way inadequate; his failure to comply with the prescribed time schedule did not impede the effective performance of his own duties or those of his fellow workers. Although petitioner was handicapped by relatively serious sight and speech impediments, the Department did not rely upon these physical deficiencies as grounds for dismissal; nor did it appear that these difficulties affected his work performance.

[5]Moore apparently was not available at that particular time.

[6]The reports prepared during petitioner's probationary period similarly rated his work.

On September 19, 1972, the hearing officer submitted to the Board a proposed decision recommending that the punitive action against petitioner be sustained without modification. He made findings of fact in substance as follows: (1) That on February 28, 1972, petitioner suffered a one-day suspension for a four-hour unexcused absence on January 10, 1972, for excessive lunch periods on January 11 and 19, 1972, and for a lengthy afternoon break spent at a bar on February 25, 1972; (2) that despite efforts to accommodate petitioner by extending his lunch break to one hour, he continued to exceed the prescribed period by five to ten minutes for the four days following his suspension and again on March 13, 14 and 15, 1972; (3) that on March 16, 1972, petitioner took 1 hour and 35 minutes for lunch and claimed that this was due to illness when in fact he had been drinking; (4) that on the afternoon of June 26, 1972, the district administrator found petitioner at a bar during work hours, with his hair disheveled, his arm around another patron and a drink in front of him; and (5) that the petitioner's unexcused absence on June 26, 1972, was not due to illness.

The hearing officer found that these facts constituted grounds for punitive action under section 19572, subdivision (j) (inexcusable absence without leave). In considering whether dismissal was the appropriate discipline, the officer noted that "[a]ppellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work." On the other hand, he pointed out that the Department's problems with petitioner dated back to 1970, that he had been warned, formally as well as informally, that compliance with Department rules was required, and that he had nevertheless persisted in his pattern of misconduct. On this basis, the hearing officer concluded that there was no reason to anticipate improvement if petitioner were restored to his position and recommended that the Department's punitive action be affirmed. The Board approved and adopted the hearing officer's proposed decision in its entirety and denied a petition for rehearing.[7] These proceedings followed.

Petitioner urges both procedural and substantive grounds for annulling the Board's decision. As to the procedural ground, he contends that the provisions of the State Civil Service Act (Act) governing the taking of punitive action against permanent civil service employees, without

[7]The foregoing administrative actions conformed with the procedure prescribed by sections 19574-19588 for the dismissal of a permanent civil service employee.

requiring a prior hearing, violate due process of law as guaranteed by both the United States Constitution and the California Constitution. As to the substantive grounds, he attacks the Board's decision on two bases: First, he argues that the Board's findings are not supported by substantial evidence; second, he asserts that the Board abused its discretion in approving petitioner's dismissal which, he claims, is unduly harsh and disproportionate to his allegedly wrongful conduct.

I

Turning first to petitioner's claims of denial of due process, we initially describe the pertinent statutory disciplinary procedure here under attack.

The California system of civil service employment has its roots in the state Constitution. Article XXIV, section 1, subdivision (b), describes the overriding goal of this program of state employment: "In the civil service permanent appointment and promotion shall be made under a general system based on *merit* . . . ."[8] (Italics added.) (See also Assem. Interim Com. Rep., Civil Service and State Personnel (1957-1959) Civil Service and Personnel Management, 1 Appendix to Assem. J. (1959 Reg. Sess.) p. 21.) The use of merit as the guiding principle in the appointment and promotion of civil service employees serves a two-fold purpose. It at once " 'abolish[es] the so-called spoils system, and [at the same time] . . . increase[s] the efficiency of the service by assuring the employees of continuance in office regardless of what party may then be in power. Efficiency is secured by the knowledge on the part of the employee that promotion to higher positions when vacancies occur will be the reward of faithful and honest service' [citation] . . . ." (*Steen* v. *Board of Civil Service Commrs.* (1945) 26 Cal.2d 716, 722 [160 P.2d 816].) The State Personnel Board is the administrative body charged with the enforcement of the Civil Service Act, including the review of punitive action taken against employees.[9]

[8]Under the prescribed constitutional scheme, "[t]he civil service includes every officer and employee of the state except as otherwise provided in this Constitution." (Cal. Const., art. XXIV, § 1, subd. (a).) Article XXIV, section 4, lists those categories of officers and employees who are exempt from the civil service.

[9]The composition of the Board is described in article XXIV, section 2, subdivision (a), of the California Constitution as follows: "There is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for 10-year terms and until their successors are appointed and qualified. Appointment to fill a vacancy is for the unexpired portion of the term. A member may be removed by concurrent resolution adopted by each house, two-thirds of the membership of each house concurring."

The Board's duties are set forth in article XXIV, section 3, subdivision (a), as follows: "The Board shall enforce the civil service statutes and, by majority vote of all of its

To help insure that the goals of civil service are not thwarted by those in power, the statutory provisions implementing the constitutional mandate of article XXIV, section 1, invest employees with substantive and procedural protections against punitive actions by their superiors.[10] Under section 19500, "[t]he tenure of every permanent employee holding a position is *during good behavior.* Any such employee may be . . . permanently separated [from the state civil service] through resignation or *removal for cause* . . . or terminated for medical reasons . . . ." (Italics added.) The "causes" which may justify such removal, or a less severe form of punitive action,[11] are statutorily defined. (§ 19572.)

The procedure by which a permanent employee may be dismissed or otherwise disciplined is described in sections 19574 through 19588. Under section 19574,[12] the "appointing power"[13] or its authorized representative may effectively take punitive action against an employee by simply notifying him of the action taken.[14] (*California Sch. Employees Assn.* v. *Personnel Commission* (1970) 3 Cal.3d 139, 144, fn. 2 [89 Cal.Rptr. 620, 474 P.2d 436]; Personnel Transactions Man., March 1972.)

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members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions."

[10]In the instant case, we are concerned only with provisions of the Act insofar as they govern the disciplining of permanent employees (see fn. 3, *ante*) and we limit our discussion accordingly.

[11]Section 19570 provides: "As used in this article, 'punitive action' means dismissal, demotion, suspension, or other disciplinary action." The Board has defined "other disciplinary action" to include, among other things, official reprimand and reduction in salary. (Personnel Transactions Man., March 1972.)

Section 19571 is the provision establishing general authority to take punitive action: "In conformity with this article and board rule, punitive action may be taken against any employee, or person whose name appears on any employment list for any cause for discipline specified in this article."

[12]Section 19574 provides as follows: "The appointing power, or any person authorized by him, may take punitive action against an employee for one or more of the causes for discipline specified in this article by notifying the employee of the action, pending the service upon him of a written notice. Punitive action is valid only if a written notice is served on the employee and filed with the board not later than 15 calendar days after the effective date of the punitive action. The notice shall be served upon the employee either personally or by mail and shall include: (a) a statement of the nature of the punitive action; (b) the effective date of the action; (c) a statement of the causes therefor; (d) a statement in ordinary and concise language of the acts or omissions upon which the causes are based; and (e) a statement advising the employee of his right to answer the notice and the time within which that must be done if the answer is to constitute an appeal."

[13]Under section 18524, "'[a]ppointing power' means a person or group having authority to make appointments to positions in the State civil service."

[14]For the procedure regulating discipline where charges against the employee are filed by a third party with the consent of the Board or the appointing power, see section 19583.5.

No particular form of notice is required. (29 Ops.Cal.Atty.Gen. 115, 120 (1957); Personnel Transactions Man., March 1972.) However, within 15 days *after* the effective date of the action, the appointing power *must* serve upon the employee and file with the Board a written notice specifying: (1) the nature of the punishment, (2) its effective date, (3) the causes therefor, (4) the employee's acts or omissions upon which the charges are based, and (5) the employee's right to appeal. (§ 19574.)[15]

Except in cases involving minor disciplinary matters,[16] the employee has a right to an evidentiary hearing to challenge the action taken against him.[17] To obtain such a hearing, the employee must file with the Board a written answer to the notice of punitive action within 20 days after service thereof.[18] The answer is deemed to constitute a denial of all allegations contained in the notice which are not expressly admitted as well as a request for a hearing or investigation. (§ 19575; see fn. 18, *ante*.) Failure to file an answer within the specified time period results in the punitive action becoming final. (§ 19575.)

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[15]See footnote 12, *ante*.

In an opinion issued on March 26, 1953, the Attorney General described the "statement of causes" as follows: "Such statement of causes is not merely a statement of the statutory grounds for punitive action set forth in section 19572 but is a factual statement of the grounds of discipline which, although not necessarily pleaded with all the niceties of a complaint in a civil action or of an information or indictment; in a criminal action, should be detailed enough to permit the employee to identify the transaction, to understand the nature of the alleged offense and to obtain and produce the facts in opposition [citations]." (See 21 Ops.Cal.Atty.Gen. 132, 137 (1953).)

[16]Such minor disciplinary matters generally include those cases in which the discipline imposed is suspension without pay for 10 days or less. Section 19576 describes the procedural rights of an employee subjected to this form of discipline.

[17]Section 19578 provides that "[w]henever an answer is filed to a punitive action other than a suspension without pay for 10 days or less, the board or its authorized representative shall within a reasonable time hold a hearing. The board shall notify the parties of the time and place of the hearing. Such hearing shall be conducted in accordance with the provisions of Section 11513 of the Government Code, except that the employee and other persons may be examined as provided in Section 19580, and the parties may submit all proper and competent evidence against or in support of the causes."

[18]Section 19575 describes the procedure to be followed by an employee in answering a notice of punitive action: "No later than 20 calendar days after service of the notice of punitive action, the employee may file with the board a written answer to the notice, which answer shall be deemed to be a denial of all of the allegations of the notice of punitive action not expressly admitted and a request for hearing or investigation as provided in this article. With the consent of the board or its authorized representative an amended answer may subsequently be filed. If the employee fails to answer within the time specified or after answer withdraws his appeal the punitive action taken by the appointing power shall be final. A copy of the employee's answer and of any amended answer shall promptly be given by the board to the appointing power."

In cases where the affected employee files an answer within the prescribed period, the Board, or its authorized representative, must hold a hearing within a reasonable time. (§ 19578; see fn. 17, *ante.*) As a general rule, the case is referred to the Board's hearing officer who conducts a hearing[19] and prepares a proposed decision which may be adopted, modified or rejected by the Board. (§ 19582.) The Board must render its decision within a reasonable time after the hearing. (§ 19583.)[20] If the Board determines that the cause or causes for which the employee was disciplined were insufficient or not sustained by the employee's acts or omissions, or that the employee was justified in engaging in the conduct which formed the basis of the charges against him, it may modify or revoke the punitive action and order the employee reinstated to his position as of the effective date of the action or some later specified date. (§ 19583; see fn. 20, *ante.*) The employee is entitled to the payment of salary for any period of time during which the punitive action was improperly in effect. (§ 19584.)[21]

In the case of an adverse decision by the Board, the employee may petition that body for a rehearing. (§ 19586.)[22] As an alternative or in addition to the rehearing procedure, the employee may seek review of

[19]At such hearing, the appointing power has the burden of proving by a preponderance of the evidence the acts or omissions of the employee upon which the charges are based and of establishing that these acts constitute cause for discipline under the relevant statutes. (§§ 19572, 19573.) The employee may try to avoid the consequences of his actions by showing that he was justified in engaging in the conduct upon which the charges are based. (See 21 Ops.Cal.Atty.Gen. 132, 139 (1953).)

[20]Under the terms of section 19583, "[t]he board shall render a decision within a reasonable time after the hearing or investigation. The punitive action taken by the appointing power shall stand unless modified or revoked by the board. If the board finds that the cause or causes for which the punitive action was imposed were insufficient or not sustained, or that the employee was justified in the course of conduct upon which the causes were based, it may modify or revoke the punitive action and it may order the employee returned to his position either as of the date of the punitive action or as of such later date as it may specify. The decision of the board shall be entered upon the minutes of the board and the official roster."

[21]Section 19584 provides: "Whenever the board revokes or modifies a punitive action and orders that the employee be returned to his position it shall direct the payment of salary to the employee for such period of time as the board finds the punitive action was improperly in effect.

"Salary shall not be authorized or paid for any portion of a period of punitive action that the employee was not ready, able, and willing to perform the duties of his position, whether such punitive action is valid or not or the causes on which it is based state facts sufficient to constitute cause for discipline.

"From any such salary due there shall be deducted compensation that the employee earned, or might reasonably have earned, during any period commencing more than six months after the initial date of the suspension."

[22]Section 19586 provides in pertinent part that "[w]ithin thirty days after receipt of a copy of the decision rendered by the board in a proceeding under this article, the

the Board's action by means of a petition for writ of administrative mandamus filed in the superior court. (§ 19588; *Boren* v. *State Personnel Board* (1951) 37 Cal.2d 634, 637 [234 P.2d 981].)[23]

As previously indicated, petitioner asserts that this statutory procedure for taking punitive action against a permanent civil service employee violates due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution. His contention is that these provisions authorize a deprivation of property without a *prior* hearing or, for that matter, without any of the *prior* procedural safeguards required by due process before a person may be subjected to such a taking at the hands of the state. As it is clear that California's statutory scheme does provide for an evidentiary hearing after the discipline is imposed (§§ 19578, 19580, 19581), we view the petitioner's constitutional attack as directed against that section which permits the punitive action to take effect without according the employee any prior procedural rights. (§ 19574; see fn. 12, *ante*.)

Our analysis of petitioner's contention proceeds in the light of a recent decision of the United States Supreme Court dealing with a substantially identical issue. In *Arnett* v. *Kennedy* (1974) 416 U.S. 134 [40 L.Ed.2d 15, 94 S.Ct. 1633], the high court was faced with a due process challenge to the provisions of the federal civil service act, entitled the Lloyd-LaFollette Act, regulating the disciplining of nonprobationary government employees. (5 U.S.C. § 7501.) Under that statutory scheme, a nonprobationary employee may be "removed or suspended without pay only for such cause as will promote the efficiency of the service." (5 U.S.C. § 7501 (a).) The same statute granting this substantive right to continued employment absent cause sets forth the procedural rights of an employee prior to discharge or suspension.

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employee or the appointing power may apply for a rehearing by filing with the board a written petition therefor. Within thirty days after such filing, the board shall cause notice thereof to be served upon the other parties to the proceedings by mailing to each a copy of the petition for rehearing, in the same manner as prescribed for notice of hearing.

"Within sixty days after service of notice of filing of a petition for rehearing, the board shall either grant or deny the petition in whole or in part. Failure to act upon a petition for rehearing within this sixty-day period is a denial of the petition."

[23]Section 19588 provides: "The right to petition a court for writ of mandate, or to bring or maintain any action or proceeding based on or related to any civil service law of this State or the administration thereof shall not be affected by the failure to apply for rehearing by filing written petition therefor with the board."

The judicial review proceedings are governed by Code of Civil Procedure section 1094.5. (*Boren* v. *State Personnel Board*, *supra*, at p. 637.)

Pursuant to this statute and the regulations promulgated under it, the employee is entitled to 30 days advance written notice of the proposed action, including a detailed statement of the reasons therefor, the right to examine all materials relied upon to support the charges, the opportunity to respond either orally or in writing or both (with affidavits) before a representative of the employing agency with authority to make or recommend a final decision, and written notice of the agency's decision on or before the effective date of the action. (5 U.S.C. § 7501 (b); 5 C.F.R. § 752.202 (a), (b), (f).) The employee is not entitled to an evidentiary trial-type hearing until the appeal stage of the proceedings. (5 C.F.R. §§ 752.202 (b), 752.203, 771.205, 771.208, 771.210-771.212, 772.305 (c).) The timing of this hearing—*after*, rather than *before* the removal decision becomes effective—constituted the basis for the employee's due process attack upon the disciplinary procedure.

In a six to three decision, the court found the above procedure to be constitutional. However, the court's full decision is embodied in five opinions which reveal varying points of view among the different justices. As we proceed to consider petitioner's contention, we will attempt to identify the general principles which emerge from these opinions as well as from the other recent decisions of the court in the area of procedural due process and which are determinative of the matter before us.

(1) We begin our analysis in the instant case by observing that the California statutory scheme regulating civil service employment confers upon an individual who achieves the status of "permanent employee" a property interest in the continuation of his employment which is protected by due process. In *Board of Regents* v. *Roth* (1972) 408 U.S. 564 [33 L.Ed.2d 548, 92 S.Ct. 2701], the United States Supreme Court "made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. [Fn. omitted.]" (*Id.* at pp. 571-572 [33 L.Ed.2d at p. 557].) Rather, "[t]he Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests—property interests—may take many forms." (*Id.* at p. 576 [33 L.Ed.2d at p. 560].)

Expanding upon its explanation, the *Roth* court noted: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitle-

ment to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

"Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." (*Id.* at p. 577 [33 L.Ed.2d at p. 561].)

(2) Thus, when a person has a legally enforceable right to receive a government benefit provided certain facts exist, this right constitutes a property interest protected by due process. (*Goldberg* v. *Kelly* (1970) 397 U.S. 254, 261-262 [25 L.Ed.2d 287, 295-296, 90 S.Ct. 1011]; see *Geneva Towers Tenants Org.* v. *Federated Mortgage Inv.* (9th Cir. 1974) 504 F.2d 483, 495-496 (Hufstedler, J. dissenting).) Applying these principles, the high court has held that a teacher establishing "the existence of rules and understandings, promulgated and fostered by state officials, that . . . justify his legitimate claim of entitlement to continued employment absent 'sufficient cause'," has a property interest in such continued employment within the purview of the due process clause. (*Perry* v. *Sindermann* (1972) 408 U.S. 593, 602-603 [33 L.Ed.2d 570, 580, 92 S.Ct. 2694]; see also *Board of Regents* v. *Roth, supra,* 408 U.S. at pp. 576-578 [33 L.Ed.2d at pp. 560-562].) And, in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, six members of the court, relying upon the principles set forth in *Roth,* concluded that due process protected the statutory right of a nonprobationary federal civil service employee to continue in his position absent cause justifying his dismissal. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); *id.* at p. 185 [40 L.Ed.2d at p. 51] (concurring and dissenting opn., Justice White); *id.* at p. 203 [40 L.Ed.2d at p. 61] (dissenting opn., Justice Douglas); *id.* at p. 211 [40 L.Ed.2d at p. 66] (dissenting opn., Justice Marshall).)

The California Act endows state employees who attain permanent status with a substantially identical property interest. Such employees may not be dismissed or subjected to other disciplinary measures unless facts exist constituting "cause" for such discipline as defined in sections 19572 and 19573. In the absence of sufficient cause, the permanent employee has a statutory right to continued employment free of these

punitive measures. (§ 19500.) This statutory right constitutes "a legitimate claim of entitlement" to a government benefit within the meaning of *Roth.* Therefore, the state must comply with procedural due process requirements before it may deprive its permanent employee of this property interest by punitive action.

We therefore proceed to determine whether California's statutes governing such punitive action provide the minimum procedural safeguards mandated by the state and federal Constitutions. In the course of our inquiry, we will discuss recent developments in the area of procedural due process which outline a modified approach for dealing with such questions.

Until last year, the line of United States Supreme Court discussions beginning with *Sniadach* v. *Family Finance Corp.* (1969) 395 U.S. 337 [23 L.Ed.2d 349, 89 S.Ct. 1820], and continuing with *Fuentes* v. *Shevin* (1972) 407 U.S. 67 [32 L.Ed.2d 556, 92 S.Ct. 1983], and the line of California decisions following *Sniadach* and *Fuentes* adhered to a rather rigid and mechanical interpretation of the due process clause. Under these decisions, every significant deprivation—permanent or merely temporary —of an interest which qualified as "property" was required under the mandate of due process to be *preceded* by notice and a hearing absent "extraordinary" or "truly unusual" circumstances. (*Fuentes* v. *Shevin, supra,* 407 U.S. 67, 82, 88, 90-91 [32 L.Ed.2d 556, 570-571, 574-576]; *Bell* v. *Burson* (1971) 402 U.S. 535, 542 [29 L.Ed.2d 90, 96, 91 S.Ct. 1586]; *Boddie* v. *Connecticut* (1971) 401 U.S. 371, 378-379 [28 L.Ed.2d 113, 119-120, 91 S.Ct. 780]; *Adams* v. *Department of Motor Vehicles* (1974) 11 Cal.3d 146, 155 [113 Cal.Rptr. 145, 520 P.2d 961]; *Brooks* v. *Small Claims Court* (1973) 8 Cal.3d 661, 667-668 [105 Cal.Rptr. 785, 504 P.2d 1249]; *Randone* v. *Appellate Department* (1971) 5 Cal.3d 536, 547 [96 Cal.Rptr. 709, 488 P.2d 13]; *Blair* v. *Pitchess* (1971) 5 Cal.3d 258, 277 [96 Cal.Rptr. 42, 486 P.2d 1242, 45 A.L.R.3d 1206]; *McCallop* v. *Carberry* (1970) 1 Cal.3d 903, 907 [83 Cal.Rptr. 666, 464 P.2d 122].) These authorities uniformly held that such hearing must meet certain minimum procedural requirements including the right to appear personally before an impartial official, to confront and cross-examine adverse witnesses, to present favorable evidence and to be represented by counsel. (*Brooks* v. *Small Claims Court, supra,* 8 Cal.3d at pp. 667-668; *Rios* v. *Cozens* (1972) 7 Cal.3d 792, 798-799 [103 Cal.Rptr. 299, 499 P.2d 979], vacated *sub nom. Dept. Motor Vehicles of California* v. *Rios* (1973) 410 U.S. 425 [35 L.Ed.2d 398, 93 S.Ct. 1019], new dec. *Rios* v. *Cozens* (1973) 9 Cal.3d 454 [107 Cal.Rptr. 784, 509 P.2d 696]; see also *Goldberg* v. *Kelly* (1970) 397 U.S. 254, 267-271 [25 L.Ed.2d 287, 298-301, 90 S.Ct. 1011].)

However, as we noted a short time ago in *Beaudreau* v. *Superior Court* (1975) 14 Cal.3d 448 [121 Cal.Rptr. 585, 535 P.2d 713], more recent decisions of the high court have regarded the above due process requirements as being somewhat less inflexible and as not necessitating an evidentiary trial-type hearing at the preliminary stage in every situation involving a taking of property. Although it would appear that a majority of the members of the high court adhere to the principle that some form of notice and hearing must precede a final deprivation of property (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc.* (1975) 419 U.S. 601, 606 [42 L.Ed.2d 751, 757, — S.Ct. —]; *Goss* v. *Lopez* (1975) 419 U.S. 565, 579 [42 L.Ed.2d 725, 737-738, — S.Ct. —]; *Mitchell* v. *W. T. Grant Co.* (1974) 416 U.S. 600, 611-612 [40 L.Ed.2d 406, 415-416, 94 S.Ct. 1895]; *Arnett* v. *Kennedy, supra,* 416 U.S. 134, 164 [40 L.Ed.2d 15, 39] (concurring opn., Justice Powell), p. 178 [40 L.Ed.2d pp. 46-47] (concurring and dissenting opn., Justice White), p. 212 [40 L.Ed.2d pp. 66-67] (dissenting opn., Justice Marshall)), nevertheless the court has made clear that "the *timing* and *content* of the notice and *the nature of the hearing* will depend on an appropriate accommodation of the competing interests involved." (*Goss* v. *Lopez, supra,* 419 U.S. 565, 579 [42 L.Ed.2d 725, 737], italics added; see also *Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. at pp. 607-610 [40 L.Ed.2d at pp. 413-415]; *Arnett* v. *Kennedy, supra,* 416 U.S. at pp. 167-171 [40 L.Ed.2d at pp. 40-43] (concurring opn., Justice Powell), p. 188 [40 L.Ed.2d pp. 52-53] (concurring and dissenting opn., Justice White).) In balancing such "competing interests involved" so as to determine whether a particular procedure permitting a taking of property without a *prior* hearing satisfies due process, the high court has taken into account a number of factors. Of significance among them are the following: whether predeprivation safeguards minimize the risk of error in the initial taking decision, whether the surrounding circumstances necessitate quick action, whether the postdeprivation hearing is sufficiently prompt, whether the interim loss incurred by the person affected is substantial, and whether such person will be entitled to adequate compensation in the event the deprivation of his property interest proves to have been wrongful. (*Mitchell* v. *W. T. Grant Co., supra,* 416 U.S. at pp. 607-610; *Arnett* v. *Kennedy, supra,* 416 U.S. at pp. 167-171 (concurring opn., Justice Powell), pp. 188-193 [40 L.Ed.2d pp. 52-56] (concurring and dissenting opn., Justice White); see *Beaudreau* v. *Superior Court, supra,* 14 Cal.3d 448, 463-464.)

These principles have been applied by the high court to measure the constitutional validity of state statutes granting creditors certain prejudgment summary remedies. In *Mitchell* v. *W. T. Grant Co., supra,* 416 U.S.

600, the court upheld against due process attack a Louisiana statute authorizing a state trial judge to order sequestration of a debtor's personal property upon the creditor's ex parte application, noting that both the creditor and the debtor had interests in the particular property seized,[24] that the creditor's interest might be seriously jeopardized by preseizure notice and hearing,[25] and that adequate alternative procedural safeguards, including an immediate postdeprivation hearing, were accorded the debtor.[26] On the other hand, the high court struck down a Georgia statute permitting garnishment of a debtor's property pending litigation on the alleged debt "without notice or opportunity for an early hearing and without participation by a judicial officer." (*North Georgia Finishing, Inc.* v. *Di-Chem, Inc., supra,* 419 U.S. 601, 606 [42 L.Ed.2d 751, 757].) In reaching its decision, the court emphasized that "[t]he Georgia garnishment statute has none of the saving characteristics of the Louisiana statute." (*Id.* at p. 607 [42 L.Ed.2d at p. 757].)

This modified position of the United States Supreme Court regarding such due process questions has also extended to the form of the hearing required. In *Goss* v. *Lopez, supra,* 419 U.S. 565, the court held that Ohio public school students had a property as well as a liberty interest in their education and that they were therefore entitled to notice and hearing before they could be suspended or expelled from school. (*Id.* at pp. 574-581 [42 L.Ed.2d at pp. 734-739].) However, where the suspension was short, the court concluded that the required "hearing" need be only an informal discussion between student and disciplinarian, at which the student should be informed of his alleged misconduct and permitted to explain his version of the events. (*Id.* at pp. 581-582 [42 L.Ed.2d at pp. 738-739].) Such a procedure, the court reasoned, "will provide a meaningful hedge against erroneous action." (*Id.* at p. 583 [42 L.Ed.2d at p. 740].) On the other hand, the court carefully pointed out the limitations on its holding: "We stop short of construing the Due Process

[24]Under the terms of the statute, the trial judge could order sequestration only if the creditor proved by affidavit that he had a vendor's lien on the property and that the debtor had defaulted in making the required payments, thereby entitling the creditor to immediate possession. (*Id.* at pp. 605-606 [40 L.Ed.2d at pp. 412-413].)

[25]The court noted that the debtor might abscond with the property and that in any event the debtor's continued use thereof would decrease the property's value. (*Id.* at pp. 608-609 [40 L.Ed.2d at pp. 413-415].)

[26]The creditor was required to post a bond to cover the debtor's potential damages in the event of a wrongful taking. At the postdeprivation hearing which was immediately available to the debtor, the creditor had the burden of making a prima facie showing of entitlement to the property. If he failed to do so, the debtor was entitled to return of his property and to an award of any damages. (*Id.* at pp. 606-610 [40 L.Ed.2d at pp. 412-415].)

Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." (*Id.* at p. 583 [42 L.Ed.2d at p. 740].)

Our present task of determining the requirements of due process under the particular circumstances of the case at bench is made easier by the Supreme Court's decision in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, upholding against constitutional attack the statutory procedure for the disciplining of nonprobationary federal civil service employees. Initially, we note that the rationale adopted by the plurality opinion of Justice Rehnquist, joined by the Chief Justice and Justice Stewart, would obviate the need for any balancing of competing interests. This rationale would apparently permit a state to narrowly circumscribe the procedures for depriving an individual of a statutorily created property right by simply establishing in the statute a procedural mechanism for its enforcement. (*Id.* at pp. 153-155 [40 L.Ed.2d at pp. 32-34].) In such instances, it is reasoned, the individual "must take the bitter with the sweet," that is, the substantive benefit of the statute together with the procedural mechanism it prescribes to safeguard that benefit. (*Id.* at pp. 153-154 [40 L.Ed.2d at pp. 32-33].) Under this rationale, it is arguable that California's procedure for disciplining civil service employees would withstand petitioner's due process attack, since the substantive right of a permanent state worker to continued employment absent cause (§ 19500) may be "inextricably intertwined [in the same set of statutes] with the limitations on the procedures which are to be employed in determining that right . . . ." (*Id.* at pp. 153-154 [40 L.Ed.2d at p. 33].)

However, this theory was unequivocally rejected by the remaining six justices and indeed described by the dissenters as "a return, albeit in somewhat different verbal garb, to the thoroughly discredited distinction between rights and privileges which once seemed to govern the applicability of procedural due process. [Fn. omitted.]" (See Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66]; see also Justice

Powell's concurring opn. at pp. 165-167 [40 L.Ed.2d at pp. 39-41], and Justice White's concurring and dissenting opn. at pp. 177-178, 185 [40 L.Ed.2d at pp. 46-47, 51].)

Where state procedures governing the taking of a property interest are at issue, all six justices were of the view that the existence of the interest is to be determined in the first place under applicable state law, but that the adequacy of the procedures is to be measured in the final analysis by applicable constitutional requirements of due process. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 185 [40 L.Ed.2d p. 51] (concurring and dissenting opn., Justice White), p. 211 [40 L.Ed.2d p. 66] (dissenting opn., Justice Marshall).) "While the legislature may elect not to confer a property interest in . . . [civil service] employment [fn. omitted], it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 185 [40 L.Ed.2d at p. 51], and Justice Marshall's dissenting opn. at p. 211 [40 L.Ed.2d at p. 66].)

In *Arnett*, the remaining six justices were of the opinion that a full evidentiary "hearing must be held at some time before a competitive civil service employee may be *finally* terminated for misconduct." (*Id.* at p. 185 [40 L.Ed.2d at p. 51], italics added (concurring and dissenting opn., Justice White); see also, Justice Powell's concurring opn. at p. 167 [40 L.Ed.2d at pp. 40-41], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) The question then narrowed to whether such a hearing had to be afforded *prior* to the time that the *initial* removal decision became effective. (*Id.* at p. 167 [40 L.Ed.2d at pp. 40-41] (concurring opn., Justice Powell), p. 186 [40 L.Ed.2d at pp. 51-52] (concurring and dissenting opn., Justice White), p. 217 [40 L.Ed.2d at pp. 69-70] (dissenting opn., Justice Marshall).)

In resolving this question, the above justices utilized a balancing test, weighing "the Government's interest in expeditious removal of an unsatisfactory employee . . . against the interest of the affected employee in continued public employment." (*Id.* at pp. 167-168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at p. 188 [40 L.Ed.2d at pp. 52-53], and Justice Marshall's dissenting opn. at p. 212 [40 L.Ed.2d at pp. 66-67].) On one side was the government's interest in "the maintenance of employee efficiency and discipline. Such factors are essential if the Government is

to perform its responsibilities effectively and economically. To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial. [Fn. omitted.]" (*Id.* at p. 168 [40 L.Ed.2d at p. 41] (concurring opn., Justice Powell); see also Justice White's concurring and dissenting opn. at pp. 193-194 [40 L.Ed.2d at pp. 55-56] and Justice Marshall's dissenting opn. at pp. 223-225 [40 L.Ed.2d at pp. 73-74].)

Balanced against this interest of the government was the employee's countervailing interest in the continuation of his public employment pending an evidentiary hearing: "During the period of delay, the employee is off the Government payroll. His ability to secure other employment to tide himself over may be significantly hindered by the outstanding charges against him. [Fn. omitted.] Even aside from the stigma that attends a dismissal for cause, few employers will be willing to hire and train a new employee knowing that he will return to a former Government position as soon as an appeal is successful. [Fn. omitted.] And in many States, . . . a worker discharged for cause is not even eligible for unemployment compensation. [Fn. omitted.]"[27] (*Id.* at pp. 219-220 [40 L.Ed.2d at p. 71] (dissenting opn., Justice Marshall); see also, Justice White's concurring and dissenting opn. at pp. 194-195 [40 L.Ed.2d at pp. 56-57] and Justice Powell's concurring opn. at p. 169 [40 L.Ed.2d at p. 42].)

The justices reached varying conclusions in resolving this balancing process. Justice Powell, joined by Justice Blackmun, concluded that the federal discharge procedures comported with due process requirements. In reaching this result, however, he emphasized the numerous preremoval safeguards accorded the employee as well as the right to compensa-

[27]Under California law, "[a]n individual is disqualified for unemployment compensation benefits if the director finds that . . . he has been discharged for misconduct connected with his most recent work." (Unemp. Ins. Code, § 1256.) Thus, a state civil service employee who has been discharged for cause may be disqualified from receiving unemployment compensation in some circumstances.

tion guaranteed the latter if he prevailed at the subsequent evidentiary hearing: "The affected employee is provided with 30 days' advance written notice of the reasons for his proposed discharge and the materials on which the notice is based. He is accorded the right to respond to the charges both orally and in writing, including the submission of affidavits. Upon request, he is entitled to an opportunity to appear personally before the official having the authority to make or recommend the final decision. Although an evidentiary hearing is not held, the employee may make any representations he believes relevant to his case. After removal, the employee receives a full evidentiary hearing, and is awarded backpay if reinstated. See 5 CFR §§ 771.208 and 772.305; 5 U.S.C. § 5596. These procedures minimize the risk of error in the initial removal decision and provide for compensation for the affected employee should that decision eventually prove wrongful. [Fn. omitted.]" (*Id.* at p. 170 [40 L.Ed.2d at p. 42].)

Justice White, concurring in part and dissenting in part, agreed that due process mandated some sort of preliminary notice and hearing, and similarly "conclude[d] that the statute and regulations provisions to the extent they require 30 days' advance notice and a right to make a written presentation satisfy minimum constitutional requirements." (*Id.* at pp. 195-196 [40 L.Ed.2d at p. 57].)[28]

Justice Marshall, joined by Justices Douglas and Brennan, dissented, apparently adhering to the "former due process test" requiring an "unusually important governmental need to outweigh the right to a prior hearing."[29] (*Id.* at p. 222 [40 L.Ed.2d at pp. 72-73], quoting from *Fuentes* v. *Shevin*, *supra*, 407 U.S. at p. 91, fn. 23 [32 L.Ed.2d at p. 576]; see also Justice Marshall's dissenting opn. at pp. 217-218, 223 [40 L.Ed.2d at pp. 69-70, 73].) Finding that the government's interest in prompt removal of an unsatisfactory employee was not the sort of vital concern justifying resort to summary procedures, the dissenters concluded that a nonprobationary employee was entitled to a full evidentiary hearing prior to discharge, at which he could appear before an independent, unbiased decisionmaker and confront and cross-examine adverse witnesses. (*Id.* at pp. 214-216, 226-227 [40 L.Ed.2d at pp. 67-69, 74-75].)

[28]Justice White's dissent was based upon his view that the employee in *Arnett* had not been accorded an impartial hearing officer in the pretermination proceeding, which he found was required by both due process and the federal statutes. (*Id.* at p. 199 [40 L.Ed.2d at p. 59].)

[29]Justice Douglas also wrote a separate dissenting opinion in which he concluded that the employee in *Arnett* had been fired for exercising his right of free speech, and therefore that the discharge violated the First Amendment to the United States Constitution. (*Id.* at pp. 203-206 [40 L.Ed.2d at pp. 61-63].)

Applying the general principles we are able to distill from these various opinions, we are convinced that the provisions of the California Act concerning the taking of punitive action against a permanent civil service employee do not fulfill minimum constitutional demands. (3) It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices on the high court agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefor, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.

California statutes governing punitive action provide the permanent employee with none of these prior precedural rights. Under section 19574, the appointing power is authorized to take punitive action against a permanent civil service employee by simply notifying him thereof. The statute specifies no particular form of notice, nor does it require advance warning. Thus, oral notification at the time of the discipline is apparently sufficient. (See 29 Ops.Cal.Atty.Gen. 115, 120 (1957), and Personnel Transactions Man., March 1972.) The employee need not be informed of the reasons for the discipline or of his right to a hearing until 15 days *after* the effective date of the punitive action. (§ 19574.) It is true that the employee is entitled to a full evidentiary hearing within a reasonable time thereafter (§ 19578), and is compensated for lost wages if the Board determines that the punitive action was improper. (§ 19584.) However, these postremoval safeguards do nothing to protect the employee who is wrongfully disciplined against the temporary deprivation of property to which he is subjected pending a hearing. (4) Because of this failure to accord the employee any prior procedural protections to "minimize the risk of error in the initial removal decision" (*Arnett* v. *Kennedy, supra,* 416 U.S. at p. 170 [40 L.Ed.2d at p. 42] (concurring opn., Justice Powell), we hold that the provisions of the State Civil Service Act, including in particular section 19574, governing the taking of punitive action against a permanent civil service employee violate the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and of article I, sections 7 and 15 of the California Constitution.

Defendants fail to persuade us to the contrary. Relying upon cases which antedate *Arnett* v. *Kennedy, supra,* 416 U.S. 134, defendants first contend that we must apply a different and less stringent standard of due

process in judging the state's exercise of a "proprietary" as opposed to a "regulatory" function. Where the state is acting as an "employer," so the argument goes, the balancing process must be more heavily weighted in favor of insuring flexibility in its operation; therefore, due process is satisfied as long as a hearing is provided at some stage of the proceedings. The Supreme Court's decision in *Arnett* v. *Kennedy, supra,* 416 U.S. 134, adequately disposes of this argument. In view of our extensive analysis of this decision we need not say anything further except to observe that nowhere in that case does any member of the high court advocate the distinction advanced by defendants.

Defendants further contend that emergency circumstances may arise in which the immediate removal of an employee is essential to avert harm to the state or to the public. Adverting to section 19574.5,[30] which permits the appointing power to order an employee on leave of absence for a limited period of time, defendants argue that situations not covered by this statute but necessitating similar prompt action may conceivably arise under section 19574 (see fn. 12, *ante*). In answering this argument, we need only point out that section 19574 is not limited to the extraordinary circumstances which defendants conjure up. (*Sniadach* v. *Family Finance Corp., supra,* 395 U.S. 337, 339 [23 L.Ed.2d 349, 352]; *Randone* v. *Appellate Department, supra,* 5 Cal.3d at pp. 541, 553; *Blair* v. *Pitchess, supra,* 5 Cal.3d at p. 279.) Indeed, the instant case presents an example of the statute's operation in a situation requiring no special protection of the state's interest in prompt removal. (*Sniadach, supra,* 395 U.S. at p. 339 [23 L.Ed.2d at p. 352].) Thus, since the statute "does not narrowly draw into focus those 'extraordinary circumstances' in which [immediate action] may be actually required," we remain convinced that the California procedure governing punitive action fails to satisfy either federal or state due process standards. (*Randone* v. *Appellate Department, supra,* 5 Cal.3d at p. 541.)

[30]Section 19574.5 provides: "Pending investigation by the appointing power of accusations against an employee involving misappropriation of public funds or property, drug addiction, mistreatment of persons in a state institution, immorality, or acts which would constitute a felony or a misdemeanor involving moral turpitude, the appointing power may order the employee on leave of absence for not to exceed 15 days. The leave may be terminated by the appointing power by giving 48 hours' notice in writing to the employee.

"If punitive action is not taken on or before the date such a leave is terminated, the leave shall be with pay.

"If punitive action is taken on or before the date such leave is terminated, the punitive action may be taken retroactive to any date on or after the date the employee went on leave. Notwithstanding the provisions of Section 19574, the punitive action, under such circumstances, shall be valid if written notice is served upon the employee and filed with the board not later than 15 calendar days after the employee is notified of the punitive action."

II

(5) (See fn. 31.) Having determined that the procedure used to dismiss petitioner denied him due process of law as guaranteed by both the United States Constitution and the California Constitution, we proceed to examine under the well established standards of review[31] the Board's action taken against petitioner. Petitioner first contends that the Board's findings are not supported by substantial evidence. Specifically he disputes the Board's determination that his absences on March 16 and June 26, 1972, were due to his drinking rather than to illness.

(6) The findings challenged are based upon the testimony of two apparently credible witnesses, Gerald Green and Bernard Moore, who stated that they personally observed petitioner at a bar drinking on the dates in question. With respect to the June 26th incident, petitioner himself testified that he had consumed two martinis at lunch, despite his illness. Clearly this evidence is sufficient to support the Board's findings with respect to the cause of petitioner's absences on these two occasions.

III

Petitioner finally contends that the penalty of dismissal is clearly excessive and disproportionate to his alleged wrong. We agree.

Generally speaking, "[i]n a mandamus proceeding to review an administrative order, the determination of the penalty by the administrative body will not be disturbed unless there has been an abuse of its discretion." (*Magit* v. *Board of Medical Examiners* (1961) 57 Cal.2d 74, 87 [17 Cal.Rptr. 488, 366 P.2d 816]; see also *Nightingale* v. *State Personnel Board* (1972) 7 Cal.3d 507, 514-516 [102 Cal.Rptr. 758, 498 P.2d 1006]; *Harris* v. *Alcoholic Bev. etc. Appeals Bd.* (1965) 62 Cal.2d 589, 594 [43 Cal.Rptr. 633, 400 P.2d 745]; *Martin* v. *Alcoholic Bev. etc. Appeals Bd.* (1961) 55 Cal.2d 867, 876 [13 Cal.Rptr. 513, 362 P.2d 337].) (7) Nevertheless, while the administrative body has a broad discretion in respect to the imposition of a penalty or discipline, "it does not have absolute and unlimited power. It is bound to exercise legal

[31]The Board is "a statewide administrative agency which derives [its] adjudicating power from [article XXIV, section 3, of] the Constitution . . . [; therefore, its factual determinations] are not subject to re-examination in a trial de novo but are to be upheld by a reviewing court if they are supported by substantial evidence. [Citations.]" (*Shepherd* v. *State Personnel Board* (1957) 48 Cal.2d 41, 46 [307 P.2d 4]; see also *Strumsky* v. *San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 35-36 [112 Cal.Rptr. 805, 520 P.2d 29].)

discretion, which is, in the circumstances, judicial discretion." (*Harris, supra,* citing *Martin, supra,* and *Bailey* v. *Taaffe* (1866) 29 Cal. 422, 424.) In considering whether such abuse occurred in the context of public employee discipline, we note that the overriding consideration in these cases is the extent to which the employee's conduct resulted in, or if repeated is likely to result in, "[h]arm to the public service." (*Shepherd* v. *State Personnel Board, supra,* 48 Cal.2d 41, 51; see also *Blake* v. *State Personnel Board* (1972) 25 Cal.App.3d 541, 550-551, 554 [102 Cal.Rptr. 50].) Other relevant factors include the circumstances surrounding the misconduct and the likelihood of its recurrence. (*Blake, supra,* at p. 554.)

(8) Consideration of these principles in the instant case leads us to conclude that the discipline imposed was clearly excessive. The evidence adduced at the hearing and the hearing officer's findings, adopted by the Board, establish that the punitive dismissal was based upon the doctor's conduct in extending his lunch break beyond his allotted one hour on numerous occasions, generally by five to fifteen minutes, and in twice leaving the office for several hours without permission. It is true that these transgressions continued after repeated warnings and admonitions by administrative officials, who made reasonable efforts to accommodate petitioner's needs. It is also noteworthy that petitioner had previously suffered a one-day suspension for similar misconduct.

However, the record is devoid of evidence directly showing how petitioner's minor deviations from the prescribed time schedule adversely affected the public service.[32] To the contrary, the undisputed evidence indicates that he more than made up for the excess lunch time by working through coffee breaks as well as on some evenings and holidays. With perhaps one or two isolated exceptions,[33] it was not shown that his conduct in any way inconvenienced those with whom he worked or prevented him from effectively performing his duties.

Dr. Hale, senior medical consultant and petitioner's immediate supervisor for about 13 months, rated his work as good to superior, compared it favorably with that of other physicians in the office, and described him as efficient, productive, and the region's "right hand man" on ear, nose and throat problems. Two other employees who worked with petitioner testified that he was informative, cooperative, helpful,

[32]Mr. Green testified on cross-examination that there was some latitude with respect to the hours kept by professional people in the office, as long as they worked 40 hours per week and received Green's approval.

[33]Apparently, petitioner's unexcused absence on the afternoon of June 26, 1972, inconvenienced Moore who wished to see him on a routine business matter.

extremely thorough and productive. No contrary evidence was presented by or on behalf of the Department of Health Care Services.

In his proposed decision, adopted by the Board, the hearing officer stated: "Appellant is 64 years old, has had a long and honorable medical career and is now handicapped by serious sight and speech difficulties. Also, the Senior Medical Consultant has no complaints about appellant's work. [¶] Consideration of appellant's age, his physical problems, the lack of any apparent affect on his work and sympathy for the man and his family are all persuasive arguments in favor of finding that appellant be given just one more chance." In testifying, petitioner apologized for his conduct and promised to adhere strictly to the rules if given another opportunity to do so.

Our views on this issue should not be deemed, nor are they intended, to denigrate or belittle administrative interest in requiring strict compliance with work hour requirements. The fact that an employee puts in his 40 hours per week by rearranging his breaks to suit his personal convenience is not enough. An administrator may properly insist upon adherence to a prescribed time schedule, as this may well be essential to the maintenance of an efficient and productive office. Nor do we imply that an employee's failure to comply with the rules regulating office hours may not warrant punitive action, possibly in the form of dismissal, under the appropriate circumstances. Indeed, in the instant case, a less severe discipline is clearly justified; and we do not rule out the possibility of future dismissal if petitioner's transgressions persist.

However, considering all relevant factors in light of the overriding concern for averting harm to the public service, we are of the opinion that the Board clearly abused its discretion in subjecting petitioner to the most severe punitive action possible for his misconduct.

In sum, we conclude that the dismissal of petitioner was improper for two reasons: First, the procedure by which the discharge was effectuated denied him due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, and article I, sections 7 and 15, of the California Constitution; second, the penalty of dismissal was clearly excessive and disproportionate to the misconduct on which it was based.

Therefore, upon remand the trial court should issue a peremptory writ of mandate directing the State Personnel Board to annul and set aside its

decision sustaining without modification the punitive action of dismissal taken by the State Department of Health Care Services against petitioner John F. Skelly, M.D., and to reconsider petitioner's appeal in light of this opinion.[34]

The judgment is reversed and the cause is remanded to the trial court for further proceedings in conformity with this opinion.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Molinari, J.,* concurred.

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[34]As petitioner has heretofore been accorded a full evidentiary hearing in this matter, it is unnecessary for the Board to order the Department to reinstitute new proceedings against him in order to impose an appropriate discipline in respect to the conduct involved herein.

*Assigned by the Chairman of the Judicial Council.

NLRB v. WEINGARTEN, INC.

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD v. J. WEINGARTEN, INC., No. 73-1363, February 19, 1975

LABOR MANAGEMENT RELATIONS ACT

—Union representation at investigatory interview ▶ 50.728 ▶ 52.2537

NLRB properly found that employer violated Section 8(a)(1) of LMRA by denying employee's request that union representative be present at investigatory interview which employee reasonably believed might result in disciplinary action. (1) NLRB's holding is permissible construction of Section 7 of Act, since action of employee seeking assistance of union representative in confrontation with employer "clearly falls within literal wording" of Section 7 that employees have right to engage in "concerted activities for . . . mutual aid or protection"; (2) this is true even though employee alone may have immediate stake in outcome, since employee seeks "aid or protection" against perceived threat to his employment security, and union representative is safeguarding interests of entire bargaining unit by exercising vigilence to insure that employer does not engage in practice of imposing punishment unjustly; (3) requiring lone employee to attend such an interview perpetuates inequality Act was designed to eliminate and bars recourse to safeguards of Act provided to redress imbalance of economic power between labor and management; (4) it is immaterial that earlier Board decisions might be interpreted as not requiring union representation in such situations; (5) it is within province of NLRB, rather than courts, to determine if "need" exists for such representation in light of changing industrial practices and Board's experience in dealing with labor relations; (6) Board's construction is in full harmony with actual industrial practice.

On writ of certiorari to the U.S. Court of Appeals for the Fifth Circuit (84 LRRM 2436, 485 F.2d 1135). Reversed.

Patrick Hardin, Associate General Counsel (Robert H. Bork, Solicitor General, Peter G. Nash, General Counsel, John S. Irving, Deputy General Counsel, Norton J. Come, Deputy Associate General Counsel, and Linda Sher, with him on brief), for petitioner.

Neil Martin, Houston, Tex. (Fulbright & Crooker, Houston, Tex., of counsel), for respondent.

Milton Smith and Richard Berman, Washington, D.C., and Jerry Kronenberg (Borovsky, Ehrlich & Kronenberg), Chicago, Ill. (Cole, Zylstra & Raywid, Washington, D.C., of counsel) filed brief for Chamber of Commerce of the United States, as amicus curiae, seeking affirmance.

Full Text of Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

The National Labor Relations Board held in this case that respondent employer's denial of an employee's request that her union representative be present at an investigatory interview which the employee reasonably believed might result in disciplinary action constituted an unfair labor practice in violation of § 8(a)(1) of the National Labor Relations Act,[1] because it interfered with, restrained and coerced the individual right of the employee, protected by § 7 of the Act, "to engage in . . . concerted activities for . . . mutual aid or protection. . . ."[2] 202 NLRB 446, 82 LRRM 1559 (1973). The Court of Appeals for the Fifth Circuit held that this was an impermissible construction of § 7 and refused to enforce the Board's order that directed respondent to cease and desist from requiring any employee to take part in an investigatory interview without union representation if the employee requests representation and reasonably fears disciplinary action. 485 F.2d 1135, 84 LRRM 2436 (1973).[3] We granted cer-

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[1] Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1).

[2] Section 7, 29 U. S. C. § 157, provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a)(3) of this title."

[3] Accord: NLRB v. Quality Manufacturing Co., 481 F.2d 1018, 83 LRRM 2817 (CA4 1973), reversed, ILGWU v. Quality Mfg. Co. Inc., No. 73-765, post, p. ——, 88 LRRM 2698; NLRB v. Mobil Oil Corp., 482 F.2d 842, 83 LRRM 2823 (CA7 1973). The issue is a recurring one. In addition to this case and No. 73-765, post, p. ——, 88 LRRM 2698 see Western Electric Co., 205 NLRB 46, 84 LRRM 1041 (1973); New York Telephone Co., 203 NLRB 180, 83 LRRM 1353 (1973); National Can Corp., 200 NLRB 1116, 82

tiorari and set the case for oral argument with No. 73-765, ILGWU v. Quality Mfg. Co. et al., post, p. ——, 88 LRRM 2698, 416 U.S. 969 (1974). We reverse.

I. Respondent operates a chain of some 100 retail stores with lunch counters at some, and so-called lobby food operations at others, dispensing food to take out or eat on the premises. Respondent's sales personnel are represented for collective-bargaining purposes by Retail Clerks Union, Local 455. Leura Collins, one of the sales personnel, worked at the lunch counter at Store No. 2 from 1961 to 1970 when she was transferred to the lobby operation at Store No. 98. Respondent maintains a companywide security department staffed by "Loss Prevention Specialists" who work undercover in all stores to guard against loss from shoplifting and employee dishonesty. In June 1972, "Specialist" Hardy, without the knowledge of the Store Manager, spent two days observing the lobby operation at Store No. 98 investigating a report that Collins was taking money from a cash register. When Hardy's surveillance of Collins at work turned up no evidence to support the report, Hardy disclosed his presence to the Store Manager and reported that he could find nothing wrong. The Store Manager then told him that a fellow lobby employee of Collins had just reported that Collins had purchased a box of chicken that sold for $2.98, but had placed only $1.00 in the cash register. Collins was summoned to an interview with Specialist Hardy and the Store Manager, and Hardy questioned her. The Board found that several times during the questioning she asked the Store Manager to call the union shop steward or some other union representative to the interview, and that her requests were denied. Collins admitted that she had purchased some chicken, a loaf of bread and some cake which she said she paid for and donated to her church for a church dinner. She explained that she purchased four pieces of chicken for which the price was $1.00, but that because the lobby department was out of the small size boxes in which such purchases were usually packaged she put the chicken into the larger box normally used for packaging larger quantities. Specialist Hardy left the interview to check Collins' explanation with the fellow employee who had reported Collins. This employee confirmed that the lobby department had run out of small boxes and also said that she did not know how many pieces of chicken Collins had put in the larger box. Specialist Hardy returned to the interview, told Collins that her explanation had checked out, that he was sorry if he had inconvenienced her, and that the matter was closed.

Collins thereupon burst into tears and blurted out that the only thing she had ever gotten from the store without paying for it was her free lunch. This revelation surprised the Store Manager and Hardy because, although free lunches had been provided at Store No. 2 when Collins worked at the lunch counter there, company policy was not to provide free lunches at stores operating lobby departments. In consequence, the Store Manager and Specialist Hardy closely interrogated Collins about violations of the policy in the lobby department at Store No. 98. Collins again asked that a shop steward be called to the interview, but the Store Manager denied her request. Based on her answers to his questions, Specialist Hardy prepared a writ ten statement which included a computation that Collins owed the store approximately $160 for lunches. Collins refused to sign the statement. The Board found that Collins, as well as most, if not all, employees in the lobby department of Store No. 98, including the manager of that department, took lunch from the lobby without paying for it, apparently because no contrary policy was ever made known to them. Indeed, when Company headquarters advised Specialist Hardy by telephone during the interview that headquarters itself was uncertain whether the policy against providing free lunches at lobby departments was in effect at Store No. 98,

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LRRM 1096 (1972); Western Electric Co., 198 NLRB 82, 80 LRRM 1705 (1972), enforcement denied, 482 F.2d 842, 83 LRRM 2823 (CA7 1973); Lafayette Radio Electronics, 194 NLRB 491, 78 LRRM 1693 (1971); Illinois Bell Telephone Co., 192 NLRB 834, 77 LRRM 1610 (1971); United Aircraft Corp., 179 NLRB 935, 72 LRRM 1555 (1969), aff'd on another ground, 440 F. 2d 85, 75 LRRM 2761 (CA2 1971); Texaco, Inc., 179 NLRB 976, 72 LRRM 1596 (1969); Wald Manufacturing Co., 176 NLRB 839, 73 LRRM 1486 (1959), aff'd on other grounds, 426 F. 2d 1328, 74 LRRM 2375 (CA6 1970); Dayton Typographic Service, Inc., 176 NLRB 357, 72 LRRM 1073 (1969); Jacobe-Pearson Ford, Inc., 172 NLRB 594, 68 LRRM 1305 (1968); Chevron Oil Co., 168 NLRB 574, 66 LRRM 1353 (1967); Texaco, Inc., 168 NLRB 361, 66 LRRM 1296 (1967), enforcement denied, 408 F. 2d 142, 70 LRRM 3045 (1964); Ross Gear & Tool Co., 63 NLRB 1012, 17 LRRM 36 (1945) enforcement denied, 158 F. 2d 607, 19 LRRM 2190 (CA7 1947). See generally Brodie, "Union Representation and the Disciplinary Interview," 15 B. C. Ind. & Comm. L. Rev. 1 (1973); Note, "Union Presence in Disciplinary Meetings," 41 U. Chi. L. Rev. 329 (1974).

he terminated his interrogation of Collins. The Store Manager asked Collins not to discuss the matter with anyone because he considered it a private matter between her and the Company, of no concern to others. Collins, however, reported the details of the interview fully to her shop steward and other union representatives, and this unfair labor practice proceeding resulted.[4]

II. The Board's construction that § 7 creates a statutory right in an employee to refuse to submit without union representation to an interview which he reasonably fears may result in his discipline was announced in its Decision and Order of January 28, 1972, in Quality Mfg. Co., 195 NLRB 195, 79 LRRM 1269, considered in No. 73-765, ILGWU v. Quality Mfg. Co. et al., post, p. ——, 88 LRRM 2698. In its opinions in that case and in Mobil Oil Corp., 196 NLRB 1052, 80 LRRM 1188, decided May 12, 1972, three months later, the Board shaped the contours and limits of the statutory right.

First, the right inheres in § 7's guarantee of the right of employees to act in concert for mutual aid and protection. In Mobil Oil, the Board stated:

"An employee's right to union representation upon request is based on Section 7 of the Act which guarantees the right of employees to act in concert for 'mutual aid and protection.' The denial of this right has a reasonable tendency to interfere with, restrain and coerce employees in violation of Section 8(a)(1) of the Act. Thus, it is a serious violation of the employee's individual right to engage in concerted activity by seeking the assistance of his statutory representative if the employer denies the employee's request and compels the employee to appear unassisted at an interview which may put his job security in jeopardy. Such a dilution of the employee's right to act collectively to protect his job interests is, in our view, unwarranted interference with his right to insist on concerted protection, rather than individual self-protection, against possible adverse employer action." 196 NLRB, supra, at 1052, 80 LRRM, at 119.

Second, the right arises only in situations where the employee requests representation. In other words, the employee may forego his guaranteed right and, if he prefers, participate in an interview unaccompanied by his union representative.

Third, the employee's right to request representation as a condition of participation in an interview is limited to situations where the employee reasonably believes the investigation will result in disciplinary action.[5] Thus the Board stated in Quality:

"We would not apply the rule to such run-of-the-mill shop-floor conversations as, for example, the giving of instructions or training or needed corrections of work techniques. In such cases there cannot normally be any reasonable basis for an employee to fear that any adverse impact may result from the interview, and thus we would then see no reasonable basis for him to seek the assistance of his representative." 195 NLRB, supra, at 199, 79 LRRM, at 1271.

Fourth, exercise of the right may not interfere with legitimate employer prerogatives. The employer has no obligation to justify his refusal to allow union representation, and despite refusal, the employer is free to carry on his inquiry without interviewing the employee, and thus leave to the employee the choice between having an interview unaccompanied by his

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[4] The charges also alleged that respondent had violated § 8(a)(5) by unilaterally changing a condition of employment when the day after the interview, respondent ordered discontinuance of the free lunch practice. Because respondent's action was an arbitrable grievance under the collective-bargaining agreement, the Board, pursuant to the deferral-to-arbitration policy adopted in Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971), "dismissed" the § 8(a)(5) allegation. No issue involving that action is before us.

[5] The Board stated in Quality, "Reasonable ground' will of course be measured, as here, by objective standards under all the circumstances of the case." 195 NLRB, supra, at 198 n. 3, 79 LRRM, at 1271. In NLRB v. Gissel Packing Co., 395 U.S. 575, 608, 71 LRRM 2481 (1969), the Court announced that it would "reject any rule that requires a probe of an employee's subjective motivations as involving an endless and unreliable inquiry," and we reaffirm that view today as applicable also in the context of this case. Reasonableness, as a standard, is prescribed in several places in the Act itself. E.g., an employer is not relieved of responsibility for discrimination against an employee "if he has reasonable grounds for relieving" that certain facts exist. § 8(a)(3)(A), (B), 29 U.S.C. § 158(a)(3)(A), (B); also, preliminary injunctive relief against certain conduct must be sought if "the officer or regional attorney to whom the matter may be referred has reasonable cause to believe" such charge is true. § 10 (l), 29 U.S.C. § 160 (l). See also Congoleum Industries, Inc., 192 NLRB 534, 80 LRRM 1675 (1972); Cumberland Shoe Corp., 144 NLRB 1268, 54 LRRM 1233 (1963), enforced, 351 F.2d 917, 60 LRRM 2305 (CA6 1965).

The key objective fact in this case is that the only exception to the requirement in the collective-bargaining agreement that the employer give a warning notice prior to discharge as "if the cause of such discharge is dishonesty." Accordingly, had respondent been satisfied, based on its investigatory interview, that Collins was guilty of dishonesty, Collins could have been discharged without further notice. That she might reasonably believe that the interview might result in disciplinary action is thus clear

representative, or having no interview and foregoing any benefits that might be derived from one. As stated in Mobil Oil:

"The employer may, if he wishes, advise the employee that it will not proceed with the interview unless the employee is willing to enter the interview unaccompanied by his representative. The employee may then refrain from participating in the interview, thereby protecting his right to representation, but at the same time relinquishing any benefit which might be derived from the interview. The employer would then be free to act on the basis of information obtained from other sources." 196 N.L.R.B., supra, at 1052, 80 LRRM, at 1191.

The Board explained in Quality

"This seems to us to be the only course consistent with all of the provisions of our Act. It permits the employer to reject a collective course in situations such as investigative interviews where a collective course is not required but protects the employee's right to protection by his chosen agents. Participation in the interview is then voluntary, and, if the employee has reasonable ground to fear that the interview will adversely affect his continued employment, or even his working conditions, he may choose to forego it unless he is afforded the safeguard of his representative's presence. He would then also forego whatever benefit might come from the interview. And, in that event, the employer would, of course, be free to act on the basis of whatever information he had and without such additional facts as might have been gleaned through the interview." 195 NLRB, supra, at 198-199, 79 LRRM, at 1271.

Fifth, the employer has no duty to bargain with any union representative who may be permitted to attend the investigatory interview. The Board said in Mobil, "we are not giving the Union any particular rights with respect to predisciplinary discussions which it otherwise was not able to secure during collective-bargaining negotiations." 196 NLRB, supra, at 1052 n. 3, 80 LRRM, at 1191. The Board thus adhered to its decisions distinguishing between disciplinary and investigatory interviews, imposing a mandatory affirmative obligation to meet with the union representative only in the case of the disciplinary interview. Texaco, Inc., 168 NLRB 361, 66 LRRM 1296 (1967); Chevron Oil Co., 168 NLRB 574, 66 LRRM 1353 (1967); Jacobe-Pearson Ford, 172 NLRB 594, 68 LRRM 1305 (1968). The employer has no duty to bargain with the Union representative at an investigatory interview. "The representative is present to assist the employee, and may attempt to clarify the facts or suggest other employees who may have knowledge of them. The employer, however, is free to insist that he is only interested, at that time, in hearing the employee's own account of the matter under investigation." Board's Brief, at 22.

III. The Board's holding is a permissible construction of "concerted activities . . . for mutual aid of protection" by the agency charged by Congress with enforcement of the Act, and should have been sustained.

The action of an employee in seeking to have the assistance of his union representative at a confrontation with his employer clearly falls within the literal wording of § 7 that "[e]mployees shall have the right . . . to engage in . . . concerted activities for the purpose of . . . mutual aid or protection" Mobil Oil Corp. v. NLRB, 487 F.2d 842, 846, 83 LRRM 2823, 2827 (1973). This is true even though the employee alone may have an immediate stake in the outcome; he seeks "aid or protection" against a perceived threat to his employment security. The union representative whose participation he seeks is however safeguarding not only the particular employee's interest, but also the interests of the entire bargaining unit by exercising vigilance to make certain that the employer does not initiate or continue a practice of imposing punishment unjustly.[6] The representative's presence is an assurance to other employees in the bargaining unit that they too can obtain his aid and protection if called upon to attend a like interview. Concerted activity for mutual aid or protection is therefore as present here as it was held to be in NLRB v. Peter Cailler Kohler Swiss Chocolates Co., 130 F.2d 503, 505-506, 10 LRRM 852 (1942), cited with approval by this Court in Houston Insulation Contractors Assn. v NLRB, 386 U.S. 664, 668-669, 64 LRRM 2821 (1967):

"When all the other workmen in a shop make common cause with a fellow workman over his separate grievance, and

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[6] "The quantum of proof that the employer considers sufficient to support disciplinary action is of concern to the entire bargaining unit. A slow accretion of custom and practice may come to control the handling of disciplinary disputes. If, for example, the employer adopts a practice of considering foreman's unsubstantiated statements sufficient to support disciplinary action, employee protection against unwarranted punishment is affected. The presence of a union steward allows protection of this interest by the bargaining representative." Comment, Union Presence in Disciplinary Meetings, 41 U. Chi. L. Rev. 329, 338 (1974).

go out on strike in his support, they engage in a 'concerted activity' for 'mutual aid or protection,' although the aggrieved workman is the only one of them who has any immediate stake in the outcome. The rest know that by their action each of them assures himself, in case his turn ever comes, of the support of the one whom they are all then helping; and the solidarity so established is 'mutual aid' in the most literal sense, as nobody doubts."

The Board's construction plainly effectuates the most fundamental purposes of the Act. In § 1, 29 U.S.C. § 151, the Act declares that it is a goal of national labor policy to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of . . . mutual aid or protection." To that end the Act is designed to eliminate the "inequality of bargaining power between employees . . . and employers." Ibid. Requiring a lone employee to attend an investigatory interview which he reasonably believes may result in the imposition of discipline perpetuates the inequality the Act was designed to eliminate, and bars recourse to the safeguards the Act provided "to redress the perceived imbalance of economic power between labor and management." American Ship Building Co. v. NLRB, 380 U.S. 300, 316, 58 LRRM 2672 (1965). Viewed in this light, the Board's recognition that § 7 guarantees an employee's right to the presence of a union representative at an investigatory interview in which the risk of discipline reasonably inheres is within the protective ambit of the section "read in light of the mischief to be corrected and the end to be attained." NLRB v Hearst Publications, Inc., 322 U.S. 111, 124, 14 LRRM 614 (1944).

The Board's construction also gives recognition to the right when it is most useful to both employee and employer.[7] A single employee confronted by an employer investigating whether certain conduct deserves discipline may be too fearful or inarticulate to relate accurately the incident being investigated, or too ignorant to raise extenuating factors. A knowledgeable union representative could assist the employer by eliciting favorable facts, and save the employer production time by getting to the bottom of the incident occasioning the interview. Certainly his presence need not transform the interview into an adversary contest. Respondent suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined.[8] At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.

IV. The Court of Appeals rejected the Board's construction as foreclosed by that Court's decision four years earlier in Texaco, Inc. Houston Producing Division v. NLRB, 408 F.2d 142, 70 LRRM 3045 (1969), and by "a long line of Board decisions, each of which indicates—either directly or indirectly— that no union representative need be present" at an investi-

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[7] See, e.g., Independent Lock Co., 30 LA 744, 746 (1958):

"[Participation by the union representative] might reasonably be designed to clarify the issues at this first stage of the existence of a question, to bring out the facts and the policies concerned at this stage, to give assistance to employees who may lack the ability to express themselves in their cases, and who, when their livelihood is at stake, might in fact need the more experienced kind of counsel which their union steward might represent. The foreman, himself, may benefit from the presence of the steward by seeing the issue, the problem, the implications of the facts, and the collective bargaining clause in question more clearly. Indeed, good faith discussion at this level may solve many problems, and prevent needless hard feelings from arising. . . . [It] can be advantageous to both parties if they both act in good faith and seek to discuss the question at this stage with as much intelligence as they are capable of bringing to the problem."

See also Caterpillar Tractor Co., 44 LA 647, 651 (1965):

"The procedure . . . contemplates that the steward will exercise his responsibility and authority to discourage grievances where the action on the part of management appears to be justified. Similarly, there exists the responsibility upon management to withhold disciplinary action, or other decisions affecting the employees, where it can be demonstrated at the outset that such action is unwarranted. The presence of the union steward is regarded as a factor conducive to the avoidance of formal grievances through the medium of discussion and persuasion conducted at the threshold of an impending grievance. It is entirely logical that the steward will employ his office in appropriate cases so as to limit formal grievances to those which involve differences of substantial merit. Whether this objective is accomplished will depend on the good faith of the parties, and whether they are amenable to reason and persuasion."

[8] 1 CCH LAB. L. REP., Union Contracts, Arbitration ¶ 59, 520, at 84,988-84,989.

gatory interview. 485 F.2d, at 1137, 84 LRRM, at 2438.

The Board distinguishes Texaco as presenting not the question whether the refusal to allow the employee to have his union representative present constituted a violation of § 8(a)(1) but rather the question whether § 8(a)(5) precluded the employer from refusing to deal with the union. We need not determine whether Texaco is distinguishable. Insofar as the Court of Appeals there held that an employer does not violate § 8(a)(1) if he denies an employee's request for union representation at an investigative interview, and requires him to attend the interview alone, our decision today reversing the Court of Appeals' judgment based upon Texaco supersedes that holding.

In respect of its own precedents, the Board asserts that even though some "may be read as reaching a contrary conclusion," they should not be treated as impairing the validity of the Board's construction, because "[t]hese decisions do not reflect a considered analysis of the issue." Board's Brief, at 25.[9] In that circumstance, and in the light of significant developments in industrial life believed by the Board to have warranted a reappraisal of the question,[10] the Board argues that the case is one where "[t]he nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way . . . and has modified and reformed its standards on the basis of accumulating experience." IUEW v. NLRB, 366 U.S. 667, 674, 48 LRRM 2210 (1961).

We agree that its earlier precedents do not impair the validity of the Board's construction. That construction in no wise exceeds the reach of § 7, but falls well within the scope of the rights created by that section. The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decision making. "'Cumulative experience' begets understanding and insight by which judgments . . . are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the administrative from the judicial process." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 349, 31 LRRM 2237 (1953).

The responsibility to adapt the Act to changing patterns of industrial life is entrusted to the Board. The Court of Appeals impermissibly encroached upon the Board's function in determining for itself that an employee has no "need" for union assistance at an investigatory interview. "While a basic purpose of section 7 is to allow employees to engage in concerted activities for their mutual aid and protection, such a need does not arise at an investigatory interview." 485 F.2d, supra, at 1138, 84 LRRM, at 2438-2439. It is the province of the Board, not the courts, to determine whether or not the "need" exists in light of changing industrial practices and the Board's cumulative experience in dealing with labor-management relations. For the Board has the "special function of applying the general provisions of the Act to the complexities of industrial life." NLRB v. Erie Resistor Corp., 373 U.S. 221, 236, 53 LRRM 2121 (1963); Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 16 LRRM 620 (1945); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 196-197, 8 LRRM 439 (1941), and its special

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[9] The precedents cited by the Court of Appeals are: Illinois Bell Telephone Co., 192 NLRB 834, 78 LRRM 1109 (1971); Texaco, Inc., Los Angeles Terminal, 179 NLRB 976, 72 LRRM 1596 (1969); Wald Manufacturing Co., 176 NLRB 839, 73 LRRM 1586, aff'd, 426 F. 2d 1328, 74 LRRM 2375 (CA6 1970); Dayton Typographic Service, Inc., 176 NLRB 357, 72 LRRM 1073 (1969); Jacobe-Pearson Ford, Inc., 172 NLRB 594, 66 LRRM 1305 (1968); Chevron Oil Co., 168 NLRB 574, 66 LRRM 1353 (1967); Dobbs Houses, Inc., 145 NLRB 1565, 55 LRRM 1218 (1964). See also NLRB v. Ross Gear & Tool Co., 158 F.2d 607, 19 LRRM 2190 (CA7 1947).

[10] "There has been a recent growth in the use of sophisticated techniques—such as closed circuit television, undercover security agents, and lie detectors—to monitor and investigate the employees' conduct at their place of work. See, e.g., Warwick Electronics, Inc., 46 LA 95, 97-98 (1966); Bowman Transportation, Inc., 56 LA 283, 286-292 (1972); FMC Corp., 46 LA 335, 336-338 (1966). These techniques increase not only the employees' feeling of apprehension, but also their need for experienced assistance in dealing with them. Thus, often, as here and in Mobil, supra, an investigative interview is conducted by security specialists; the employee does not confront a supervisor who is known or familiar to him, but a stranger trained in interrogation techniques. These developments in industrial life warrant a concomitant reappraisal by the Board of their impact on statutory rights. Cf. Boys Markets, Inc. v. Retail Clerks, Local 770, 398 U.S. 235, 250, 74 LRRM 2257." Board's Brief, at 27 n. 22.

competence in this field is the justification for the deference accorded its determination. American Ship Building Co. v. NLRB, 380 U.S., supra, at 316, 58 LRRM 2672. Reviewing courts are of course not "to stand aside and rubber stamp" Board determinations that run contrary to the language or tenor of the Act, NLRB v. Brown, 380 U.S. 278, 291, 58 LRRM 2663 (1965). But the Board's construction here, while it may not be required by the Act, is at least permissible under it, and insofar as the Board's application of that meaning engages in the "difficult and delicate responsibility" of reconciling conflicting interests of labor and management, the balance struck by the Board is "subject to limited judicial review." NLRB v. Truck Driver's Union, 353 U.S. 87, 96, 39 LRRM 2603 (1957). See also NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 38 LRRM 2001 (1956); NLRB v. Brown, supra; Republic Aviation Corp. v. NLRB, supra. In sum, the Board has reached a fair and reasoned balance upon a question within its special competence, its newly arrived at construction of § 7 does not exceed the reach of that section, and the Board has adequately explicated the basis of its interpretation.

The statutory right confirmed today is in full harmony with actual industrial practice. Many important collective-bargaining agreements have provisions that accord employees rights of union representation at investigatory interviews.[11] Even where such a right is not explicitly provided in the agreement a "well established current of arbitral authority" sustains the right of union representation at investigatory interviews which the employee reasonably believes may result in disciplinary action against him. Chevron Chemical Co., 60 LA 1066, 1071 (1973).[12]

The judgment is reversed and the case is remanded with direction to enter a judgment enforcing the Board's order.

Dissenting Opinions

Mr. Chief Justice BURGER, dissenting.

Today the Court states that, in positing a new § 7 right for employees, the "Board has adequately explicated the basis of its interpretation." Ante, at 16, 88 LRRM, at 2695. I agree that the Board has the power to change its position, but since today's cases represent a major change in policy and a departure from Board decisions spanning almost 30 years the change ought to be justified by a reasoned Board opinion. The brief but spectacular evolution of the right, once recognized, illustrates the problem. In Quality Mfg. Co., 195 NLRB 197, 198, 79 LRRM 1269 (1972), the Board distinguished its prior cases on the ground, *inter alia*, that "none of those cases presented a situation where an employee or his representative had been disciplined or discharged for requesting, or insisting on, union representation in the course of an interview." Yet, soon afterwards the Board extended the right without explanation to situations where no discipline or discharge resulted. Mobil Oil Corp., 196 NLRB 1052, 80 LRRM 1188 (1972); J. Weingarten Co., 202 NLRB 446, 82 LRRM 1559 (1973).

The tortured history and inconsistency of the Board's efforts in this difficult area suggest the need for an explanation by the Board of why the new rule was adopted. However, a much more basic policy demands that the Board explain its new construction. The integrity of the administrative process requires that "[w]hen the Board so exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' Phelps Dodge Corp.

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[11] 1 BNA Collective Bargaining Negotiations and Contracts 21:22 (General Motors Corp. and Auto Workers, ¶ 76 (a)); 27:6 (Goodyear Tire & Rubber Co. and Rubber Workers, Art. V(5)); 28:15 (United States Steel Corp. and United Steelworkers, ¶ 101.2). See, e.g., the Bethlehem Corp. and United Steelworkers Agreement of 1971, Art. XI, § 4(d), which provided:

"Any Employee who is summoned to meet in an enclosed office with a supervisor for the purpose of discussing possible disciplinary action shall be entitled to be accompanied by the Assistant Grievance Committeeman designated for the area if he requests such representation, provided such representative is available during the shift."

[12] See also Universal Oil Products Co., 60 LA 832, 834 (1973): "[A]n employee is entitled to the presence of a Committeeman at an investigatory interview if he requests one and if the employee has reasonable grounds to fear that the interview may be used to support disciplinary action against him." Allied Paper Co., 53 LA 226 (1969); Thrifty Drug Stores Co., Inc., 50 LA 1253, 1262 (1968); Waste King Universal Products Co., 46 LA 283, 286 (1966); Dallas Morning News, 40 LA 619, 623-624 (1963); The Arrods Co., 39 LA 784, 788-789 (1962); Valley Iron Works, 33 LA 769, 771 (1960); Schlitz Brewing Co., 33 LA 57, 60 (1959); Singer Mfg. Co., 28 LA 570 (1957); Braniff Airways, Inc., 27 LA 892 (1957); John Lucas & Co., 19 LA 334, 346-347 (1952). Contra, e.g., E. I. duPont de Nemours & Co., 29 LA 646, 652 (1957); United Air Lines, Inc., 28 LA 179, 180 (1956).

v. Labor Board, 313 U.S. 177, 197, 8 LRRM 439." Labor Board v. Metropolitan Ins. Co., 380 U.S. 438, 443, 58 LRRM 2721 (1965). Here, there may be very good reasons for adopting the new rule, and the Court suggests some. See ante, at 9-10 with n. 8; 11-12; 14 n. 10. But these reasons are not to be found in the Board's cases. In Metropolitan Ins. Co., 380 U.S., at 444, 58 LRRM 2721, we made it clear that "courts may not accept appellate counsel's *post hoc* rationalizations for agency action." The Court today gives lip service to the rule that courts are not "to stand aside and rubber stamp" Board determinations. Ante, at 15, 88 LRRM, at 2695.

I would therefore remand the cases to the Court of Appeals with directions to remand to the Board so that it may enlighten us as to the reasons for this marked change in policy rather than leave with this Court the burden of justifying the change for reasons which we arrive at by inference and surmise.

Mr. Justice POWELL, with whom Mr. Justice STEWART joins, dissenting.

Section 7 of the Act guarantees to employees the right to "engage in . . . concerted activities for the purpose of collective bargaining or for other mutual aid or protection." The Court today construes that right to include union representation or the presence of another employee [1] at any interview the employee reasonably fears might result in disciplinary action. In my view, such an interview is not *concerted activity* within the intendment of the Act. An employee's right to have a union representative or another employee present at an investigative interview is a matter that Congress left to the free and flexible exchange of the bargaining process.

The majority opinion acknowledges that the NLRB has only recently discovered the right to union representation in employer interviews. In fact, as late as 1964—after almost 30 years of experience with § 7—the Board flatly rejected an employee's claim that she was entitled to union representation in a "discharge conversation" with the general manager, who later admitted that he had already decided to fire her. The Board adopted the Trial Examiner's analysis:

"I fail to perceive anything in the Act which obliges an employer to permit the presence of a representative of the bargaining agent in every situation where an employer is compelled to admonish or otherwise take disciplinary action against an employee, particularly in those situations where the employee's conduct is unrelated to any legitimate union or concerted activity. An employer undoubtedly has the right to maintain day-to-day discipline in the plant or on the working premises and it seems to me that only exceptional circumstances should warrant any interference with this right." Dobbs Houses, Inc., 145 NLRB 1565, 1571, 55 LRRM 1218 (1964).[2]

The convoluted course of litigation from Dobbs Houses to Quality Mfg. hardly suggests that the Board's change of heart resulted from a logical "evolutionary approach." Ante, at 14, 88 LRRM, at 2694. The Board initially retreated from Dobbs Houses, deciding that it only applied to "investigatory" interviews and holding that if the employer already had decided on discipline the union had a § 8(a)(5) right to attend the interview. Texaco, Inc., Houston Producing Division, 168 NLRB 361, 66 LRRM 1296 (1967), enforcement denied, 408 F.2d 142, 70 LRRM 3045 (CA5 1969). It reasoned that employee discipline sufficiently affects a "term or condition of employment" to implicate the employer's obligation to consult with the employee's bargaining representative, and that direct dealing with an employee on an issue of discipline violated § 8(a)(5).[3] For several years,

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[1] While the Court speaks only of the right to insist on the presence of a union representative, it must be assumed that the § 7 right today recognized, affording employees the right to act "in concert" in employer interviews, also exists in the absence of a recognized union. Cf. NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962).

[2] In one earlier case the Board had found a § 8(a)(1) violation in the employer's refusal to admit a union representative to an interview. Ross Gear & Tool Co., 63 NLRB 1012, 1033-1034, 17 LRRM 36 (1945), enforcement denied, 158 F.2d 607, 611-614, 19 LRRM 2190 (CA7 1947). In that case, however, the Board found that the employee, a union committee member, was called in to discuss a pending union issue. The Board found that discharging her for insisting on the presence of the entire committee was a discriminatory discharge under § 8(a)(1). The opinion in Dobbs Houses distinguished Ross Gear on the ground that the matter under investigation was protected union activity. 145 NLRB, at 1571.

[3] The Board has not been called upon to pursue its § 8(a)(5) theory to its logical conclusion. Its determination that all disciplinary decisions are matters that invoke the employer's mandatory duty to bargain would seem to suggest that, absent some qualification of the duty contained in the collective-bargaining agreement, federal law will now be read to require that the employer bargain to impasse before initiating unilateral action on disciplinary matters. It is difficult to believe that Congress intended such a radical restriction of the employer's power to discipline employees. See Fibreboard Corp. v.

the Board adhered to its distinction between "investigative" and "disciplinary" interviews, dismissing claims under both § 8(a)(1) and § 8(a)(5) in the absence of evidence that the employer had decided to discipline the employee.[4]

Quality Mfg. was the first case in which the Board perceived any greater content in § 7. It did so, not by relying on "significant developments in industrial life," ante, at 13, 88 LRRM, at 2694, but by stating simply that in none of the earlier cases had a worker been fired for insisting on union representation. The Board also asserted, for the first time, that its earlier decisions had disposed of only the union's right to bargain with the employer over the discipline to be imposed, and had not dealt with the employee's right under § 7 to insist on union presence at meetings that he reasonably fears would lead to disciplinary action. 195 NLRB, at 198. Even this distinction was abandoned some four months later in Mobil Oil Corp., 196 NLRB 1052, 80 LRRM 1188 (1972), enforcement denied, 482 F.2d 482, 83 LRRM 2823 (CA7 1973). There the Board followed Quality Mfg., even though the employees in Mobil Oil had not been fired for insisting on union representation and their only claim was that the employer had excluded the union from an investigatory interview. Thus, the Board has turned its back on Dobbs Houses and now finds a § 7 right to insist on union presence in the absence of any evidence that the employer has decided to embark on a course of discipline.

Congress' goal in enacting federal labor legislation was to create a framework within which labor and management can establish the mutual rights and obligations that govern the employment relationship. "The theory of the Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about adjustment and agreements which the Act itself does not attempt to compel." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 1 LRRM 703 (1937). The National Labor Relations Act only creates the structure for the parties' exercise of their respective economic strengths; it leaves definition of the precise contours of the employment relationship to the collective-bargaining process. See H. K. Porter v. NLRB 397 U.S. 99, 108, 71 LRRM 2515 (1970); NLRB v. American National Insurance Co., 343 U.S. 395, 402, 30 LRRM 2147 (1952).

As the Court noted in Emporium Capwell v. Western Addition Community Organization, § 7 guarantees employees' basic rights of industrial self-organization, rights which are for the most part "collective rights . . . to act in concert with one's fellow employees, [which] are protected, not for their own sake, but as instruments of the national labor policy of minimizing industrial strife 'by encouraging the practice and procedure of collective bargaining.'" —— U.S. ——, ——, 88 LRRM 2660, 2665 (1975). Section 7 protects those rights that are essential to employee self-organization and to the exercise of economic weapons to exact concessions from management and demand a voice in defining the terms of the employment relationship.[5] It does not define those terms itself.

The power to discipline or discharge employees has been recognized uniformly as one of the elemental prerogatives of management. Absent specific limitations imposed by statute[6] or through the process of collective bargaining,[7] management remains free to discharge employees at will. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S.

NLRB, 379 U.S. 203, 217, 218, 223, 57 LRRM 2609 (Stewart, J., concurring).

[4] Lafayette Radio Electronics, 194 NLRB 491 (1971); Illinois Bell Telephone Co., 192 NLRB 834, 78 LRRM 1109 (1971); Texaco, Inc., Los Angeles Sales Terminal, 179 NLRB 976, 72 LRRM 1596 (1969); Jacobe-Pearson Ford, Inc., 172 NLRB 594, 78 LRRM 1693 (1968); Chevron Oil Co., 168 NLRB 574, 66 LRRM 1353 (1967).

[5] By contrast, the employee's § 7 right announced today may prove to be of limited value to the employee or to the stabilization of labor relations generally. The Court appears to adopt the Board's view that investigative interviews are not bargaining sessions and that the employer legitimately can insist on hearing only the employee's version of the facts. Absent employer invitation, it would appear that the employee's § 7 right does not encompass the right to insist on the participation of the person he brings with him to the investigative meeting. The new right thus appears restricted to the privilege to insist on the mute and inactive presence of a fellow employee or a union representative; a witness to the interview, perhaps.

[6] Section 8(a)(1) forbids employers to take disciplinary actions that "interfere with, restrain, or coerce" the employee's exercise of § 7 rights. Other federal statutes also limit in certain respects the employer's basic power to discipline and discharge employees. See, e.g., Title VII, 42 U.S.C. § 2000e-5; Age Discrimination in Employment Act, 29 U.S.C. § 623.

[7] The Board and the courts have recognized that union demands for provisions limiting the employer's power to discharge can be the subject of mandatory bargaining. See Fibreboard Corp. v. NLRB, 379 U.S. 203, 217, 221-223, 57 LRRM 2609 (Stewart, J., concurring).

574, 583, 46 LRRM 2416 (1960). An employer's need to consider and undertake disciplinary action will arise in a wide variety of unpredictable situations. The appropriate disciplinary response also will vary significantly, depending on the nature and severity of the employee's conduct. Likewise, the nature and amount of information required for determining the appropriateness of disciplinary action may vary with the severity of the possible sanction and the complexity of the problem. And in some instances, the employer's legitimate need to maintain discipline and security may require an immediate response.

This variety and complexity necessarily calls for flexible and creative adjustment. As the Court recognizes, ante, at 16, the question of union participation in investigatory interviews is a standard topic of collective bargaining.[5] Many agreements incorporate provisions that grant and define such rights, and arbitration decisions increasingly have begun to recognize them as well. Rather than vindicate the Board's interpretation of § 7, however, these developments suggest to me that union representation at investigatory interviews is a matter that Congress left to the bargaining process. Even after affording appropriate deference to the Board's meandering interpretation of the Act, I conclude that the right announced today is not among those that Congress intended to protect in § 7. The type of personalized interview with which we are here concerned is simply not "concerted activity" within the meaning of the Act.

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[5] The history of a similar case, Mobil Oil, 196 NLRB 144, 80 LRRM 1188 (1972), enforcement denied, 482 F. 2d 842, 83 LRRM 2812 (CA7 1973), illustrates how the Board has substituted its judgment for that of the collective-bargaining process. During negotiations leading to the establishment of a collective-bargaining agreement in that case, the union advanced a demand that existing provisions governing suspension and discharge be amended to provide for company-union discussions prior to disciplinary action. The employer refused to accede to that demand and ultimately prevailed, only to find his efforts at the bargaining table voided by the Board's interpretation of the statute.

Chairman Miller subsequently suggested that the union can waive the employee's § 7 right to the presence of a union representative. See Western Electric Co., 198 NLRB 82, 80 LRRM 1705 (1972). The Court today provides no indication whether such waivers in the collective-bargaining process are permissible. Cf. NLRB v. Magnavox Co., 415 U.S. 322, 85 LRRM 2475 (1974).

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THE IMPACT OF PUBLIC EMPLOYMENT GRIEVANCE SETTLEMENT ON THE LABOR ARBITRATION PROCESS

BENJAMIN AARON*

Introduction

The arbitration of labor disputes in various forms is used widely throughout the world, but in no country has it been developed more extensively or adopted more pervasively than in the United States, where it is now accepted as the chief instrument for resolving disputes over rights, commonly known as "grievances." It is estimated that about 95 percent of all collective agreements in the private sector include some provision for the arbitration of grievances,[1] and a recent study by the United States Bureau of Labor Statistics (BLS) reports that grievance procedures are found in 9 out of 10 state and local agreements, and of these, 79 percent contain arbitration clauses.[2]

In this chapter I shall briefly describe the principal characteristics of the existing model—private-sector labor arbitration—and compare it with those of the emerging public-sector models. I shall then appraise the impact of public-sector procedures on the labor arbitration process generally, and shall also discuss likely future developments.

The Existing Model: Private-Sector Grievance Arbitration

In the private sector "arbitration" means a voluntary and private procedure resulting in a decision that is final and binding on the parties to

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1. U.S. Bureau of Labor Statistics, Dep't of Labor, Bull. No. 1425-6, Arbitration Procedures 5 (1966).
2. U.S. Bureau of Labor Statistics, Dep't. of Labor, Bull. No. 1833, Grievance and Arbitration Procedures in State and Local Agreements 18 (1975).

the dispute. Perhaps the most distinctive feature of grievance arbitration, in addition to its pervasiveness, is its great diversity. Arbitration provisions in collective agreements reveal a remarkable variety of arrangements in respect of coverage, structure, procedure, and scope of authority of the arbitrator, umpire, impartial chairman, or board. Although many arbitration provisions are similar, no standard arbitration clause can be said to exist, except sometimes among the several agreements of a single enterprise with one or more unions, or among the agreements between a single union and an entire industry.

As a private system of industrial jurisprudence, private-sector grievance arbitration in the United States has developed a body of "common law," one well-established principle of which is that in the absence of a specific provision in the agreement to the contrary, a grievant may not rely upon self-help, but must look exclusively to the grievance and arbitration procedure for relief.[3] This principle is now embodied in the language of many collective agreements.

In 70 percent of the arbitration agreements covered by the 1966 BLS study, all grievances not settled at the last step of the grievance procedure can be referred to arbitration. This means that in these cases the arbitrator's jurisdiction is congruent with the definition of a grievance. In the remaining 30 percent of the collective agreements the scope of arbitration is generally more restricted than is the definition of grievance. About 50 percent of the exclusions from arbitration relate to individual wage adjustments, such as alleged intraplant wage inequities. Some 7 percent of agreements exclude from arbitration disputes over plant administration involving such issues as introduction of new machinery and scheduling of hours or of overtime work.

About 90 percent of the major collective agreements in the United States include restrictions on strikes and lockouts during the term of the agreement. Slightly less than 50 percent specify an absolute ban on all strikes; all of these agreements include grievance procedures, and virtually all provide for arbitration. In the remainder of the agreements the strike ban is limited, most frequently to those disputes that are subject to arbitration.

The oft-repeated dictum of the United States Supreme Court that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike"[4] is not always reflected in practice. Whether this precise equilibrium can be achieved depends upon the relative bargaining strength of the parties; some contracts with limited arbitration

3. There are, of course, some well-established exceptions to this principle, such as jeopardy to the health or safety of the employee.
4. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 455 (1957).

provisions absolutely forbid all strikes, whereas others with broad arbitration clauses permit strikes in specified circumstances. In relationships between large and powerful employers and unions, however, issues excluded from arbitration are likely to be excluded from the no-strike commitment as well.

About 43 percent of the major agreements banning either all strikes and lockouts or those over arbitrable grievances for the duration of the agreement make the ban contingent on compliance with some or all provisions of the agreement. Such clauses may declare noncompliance to constitute a waiver of the ban and the grounds for terminating the agreement.

The chief statutory support for enforcement of voluntary agreements to arbitrate and of arbitration awards is to be found in Section 203(d) of the Labor Management Relations (Taft-Hartley) Act, 1947 (LMRA),[5] which provides in part that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." This policy is implemented in Section 301,[6] which has been interpreted by the United States Supreme Court as authorizing federal courts "to fashion a body of federal law for the enforcement of . . . collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements."[7]

Perhaps the greatest change wrought by the new federal substantive law of arbitration under Section 301 was the strict limitation it imposed upon the role of the federal and state courts. In the *Steelworkers Trilogy*[8] the Supreme Court declared that the courts[9] must thereafter refrain

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5. 29 U.S.C. § 173 (1970).
6. 29 U.S.C. § 185 (1970). Subsection (a) authorizes the bringing of suits for violation of contracts between an employer and a union representing employees in an industry affecting commerce, or between such unions, in any federal district court having jurisdiction of the parties, without respect to the amount in controversy or to the citizenship of the parties. Subsection (b) provides that employers and union subject to the Act shall be bound by the acts of their agents; that a union may sue or be sued in the federal courts as an entity and in behalf of the employees it represents; and that any money judgment against a union shall be enforceable only against the organization as an entity and not against any individual member.
7. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 451 (1957).
8. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U.S. 574 (1960); *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564 (1960).
9. In *Dowd Box Co.* v. *Courtney*, 368 U.S. 502 (1962), the Court held that state courts had jurisdiction over suits brought under § 301 of the LMRA. State courts, however, must apply the federal common law rather than state law. *Lucas Flour Co.* v. *Teamsters Local 174*, 369 U.S. 95 (1962).

from interfering with the arbitration procedures incorporated in collective agreements. In respect of issues of arbitrability the courts are now limited to determining whether there is a valid collective agreement in existence; whether the agreement includes an arbitration clause; and whether the grievance sought to be arbitrated is arguably covered by the arbitration clause. All doubts about arbitrability must be resolved in favor of coverage. If the minimum conditions are met, the court must order arbitration, even if it feels that the grievance is trivial, frivolous, or wholly devoid of merit. In respect of enforcement of arbitration awards courts must now refrain from considering the merits, and must confine their review to the question whether the arbitrator limited his or her decision to the issue submitted and based it on the terms of the collective agreement.

Provisions in collective agreements covered by arbitration clauses sometimes forbid employers from engaging in conduct also declared by the National Labor Relations Act (NLRA) to be an unfair labor practice. But Section 10(a)[10] of the NLRA declares that the power of the National Labor Relations Board (NLRB) to prevent any person from engaging in statutory unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." As a consequence, the jurisdictions of private arbitrators and of the NLRB can and do overlap in some cases. The Board has developed two policies to deal with these overlaps. The first is one of initial deferral to arbitration when the conduct complained about involves both an alleged unfair labor practice and an alleged breach of a collective agreement, provided that "it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act."[11] In a subsequent decision involving the same type of problem the Board decided, however, to retain jurisdiction

> solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (A) the dispute has not, with reasonable promptness . . . been resolved . . . in the grievance procedure or submitted . . . to arbitration, or (B) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.[12]

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10. 29 U.S.C. § 160(a) (1970).
11. *Joseph Schlitz Brewing Co.*, 175 N.L.R.B. 141, 142 (1969).
12. *Collyer Insulated Wire*, 192 N.L.R.B. 837, 843 (1971).

The second policy applies to those cases in which a grievance has been decided by an arbitrator adversely to the grievant and the latter then files an unfair labor charge involving the same matter with the NLRB. In such cases the Board will defer to the arbitrator's award provided that the arbitration procedures were fair and regular, all parties agreed to be bound by the arbitrator's award, and the award is consistent with the provisions and policy of the NLRA.[13]

On the whole, grievance arbitration in the private sector has proved to be an outstanding successful social invention. Its procedures are an effective substitute for strikes during the life of the collective agreement; they also encourage a process whereby the agreement itself can be creatively interpreted and applied to meet new and developing situations. In the effort to avoid strikes over new contract terms the parties frequently include language so ambiguous that it can be interpreted in opposite ways. By allowing arbitrators to "interpret" these calculated ambiguities, the parties permit them, in effect, to legislate new provisions during the life of the agreement. Their willingness to follow such a course suggests faith in the essential fairness and practicability of the process. Finally, grievance arbitration allows the employees and management personnel directly involved to participate in the democratic process of self-government, thus strengthening the entire system of collective bargaining.

The system is not, however, without its weaknesses, of which there are two principal types: incidental and fundamental. The chief incidental weaknesses are high costs and delays. Preliminary (unpublished) data provided by the Federal Mediation and Conciliation Service (FMCS) show that for the fiscal year 1975 arbitrators' fees and expenses in a representative sample of cases averaged $621.31 per case, as compared with $513.12 per case in 1968.[14] These charges, however, are only a part of the total costs to the parties, which frequently include attorneys' fees, costs of verbatim transcripts, payments to witnesses for working time lost, and costs of time spent by union and management personnel in preparing and presenting cases.

The elapsed time between the filing of a grievance and the issuance of an award is also considerable. Preliminary (unpublished) FMCS data for the fiscal year 1975 show that the average elapsed time between the filing of a grievance and the issuance of the arbitration award in a representative sample of cases was 223.1 days. This figure represented, however, a substantial decrease from the corresponding figure of 241.5 days in fiscal year 1972.[15] These weaknesses are remediable, and many

13. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955).
14. 24 FMCS Ann. Rep. 55 (1971).

efforts are currently being made, with varying degrees of success, to lower costs and to reduce still further the average total time required to process a grievance through arbitration.[16]

There are at least two fundamental weaknesses of the system for which no satisfactory remedies have yet been found. Both are treated in greater detail in other chapters of this volume, and they will be only mentioned here. The first is really a defect in the structure of labor-management relations in the United States, namely, that collective bargaining is limited, by its very nature, to relations between employers and organized workers, and that unorganized workers have less constitutional and statutory protection against economic risks and unfair treatment than do those in most industrialized nations of the world. Lack of grievance and arbitration procedures for unorganized workers is thus but one facet of a much larger problem.

The second fundamental defect is the failure, thus far, to find a satisfactory solution to the problem of the individual employee or group of employees who are in bad favor with the exclusive bargaining representative, either because they have refused to join or because, though members, they are disliked for personal reasons or are considered by union leaders to be disloyal, disruptive, or politically dangerous. For practical purposes, their only recourse against the employer is, in most cases, through the contract grievance procedure, which is effectively controlled by the union. The requirement of exhaustion of contract remedies,[17] the narrow scope of judicial review of an arbitrator's award,[18] the inability to sue an employer for breach of contract without first proving that the union has been guilty of a failure to represent them fairly,[19] and the broad latitude of discretion customarily granted to the union by the courts[20] all combine to leave such employees without adequate remedies.

Emerging Models of Public-Sector Grievance Arbitration

As indicated by the foregoing discussion, grievance arbitration in the private sector, despite its great diversity of procedural details, conforms

15. *Ibid.*
16. *See, e.g.*, Fischer, *Arbitration: The Steel Industry Experiment*, 95 MONTHLY LAB. REV. 7 (Nov. 1972); Usery, *Some Attempts to Reduce Arbitration Costs and Delays*, *id.* at 3.
17. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965).
18. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).
19. *Vaca* v. *Sipes*, 386 U.S. 171 (1967).
20. *See, e.g., Humphrey* v. *Moore*, 375 U.S. 335, 349-50 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 338 (1953).

generally to a single pattern: it is the officially preferred substitute for resort to various forms of self-help and industrial action; it is final and binding; and it is subject to only the most restricted judicial review. By contrast, in the public sector not one, but several, patterns of grievance-settlement procedures have emerged in the relatively brief period since the subject began to receive serious attention.[21]

Federal practices must be distinguished, of course, from those of states, counties, and municipalities. Labor management relations in the public sector are governed generally by Executive Order rather than by statute. Section 13 of Executive Order 11491,[22] as most recently amended by Executive Order 11838,[23] requires that an agreement between a federal agency and a labor organization *must* provide a procedure, "applicable only to the unit, for the consideration of grievances." Formerly, grievances were restricted to questions concerning the interpretation or application of the agreement; now the only restriction on a negotiated grievance procedure is that it may not cover matters for which a statutory appeals procedure exists, nor otherwise conflict with a statute or with the Executive Order. Arbitration may be invoked only by the agency or by the exclusive bargaining representative; either party may file exceptions to an arbitrator's award with the Federal Labor Relations Council (FLRC).[24] Disputes over arbitrability may, by agreement of the parties, be referred either to the Assistant Secretary of Labor for Labor-Management Relations for decision or to an arbitrator. The arbitrator's jurisdiction, however, is considerably restricted by Section 12 of the Executive Order, which provides in part that each agreement between an agency and a labor organization is subject to the following requirements:

> (b) management officials of the agency retain the right, in accordance with applicable laws and regulations—
>
> (1) to direct employees of the agency;

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21. There has been a notable dearth of significant published research on grievance arbitration procedures in the public sector. In 1970 two researchers reported that a survey of the literature through 1968 produced fewer than a dozen articles dealing with grievance procedures in public employment. Ullman & Begin, *The Structure and Scope of Appeals Procedures for Public Employees,* 23 IND. & LAB. REL. REV. 323 n. 1 (1970). In 1972 two other researchers reported finding only 15 additional articles as of July, 1971. T. P. Gilroy & A. Sinicropi, DISPUTE SETTLEMENT IN THE PUBLIC SECTOR: THE STATE OF THE ART 73 n. 1 (1972).
22. 3 C.F.R. § 861 (Comp. 1966-70).
23. 40 Fed. Reg. 5743, corrected at 40 Fed. Reg. 7391 (1971).
24. The Council consists of the Chairman of the Civil Service Commission, the Secretary of Labor, the Director of the Office of Management and the Budget, and such other officials of the executive branch as the President may designate.

> (2) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees;
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> (3) to relieve employees from duties because of lack of work or for other legitimate reasons;
>
> (4) to maintain the efficiency of the Government operations entrusted to them;
>
> (5) to determine the methods, means, and personnel by which such operations are to be conducted; and
>
> (6) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency. . . .

Thus, collective agreements in the federal service do not include the proviso, so often found in the management-rights clauses of private-sector collective agreements, to the effect that no rights reserved to management by the clause shall be exercised in derogation of rights granted to employees elsewhere in the agreement. Moreover, as one observer has pointed out,

> Federal regulations governing the bargaining process may change the meaning of an agreement unless the parties are aware of such regulations and are capable of correctly construing them. The effect of administrative regulations and the applicable law may be the real issues in a federal service arbitration case.[25]

As in the private sector, the exclusive bargaining representative in the federal sector virtually "owns" the grievance, although the Executive Order contains a provision similar to the Section 9(a) proviso of the NLRA.[26] But the handling of unfair labor practice charges that may also involve alleged violations of a collective agreement under the Executive Order differs from the previously described procedures developed by the NLRB. Section 19 of the Executive Order, which deals with unfair labor practices, provides in part:

> (d) Issues which can properly be raised under an appeals procedure may not be raised under this section. Issues which can be

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25. Kagel, *Grievance Arbitration in the Federal Service: How Final and Binding?*, 51 ORE. L. REV. 134, 141 (1971).
26. Section 13(a) provides in part: "However, any employee or group of employees in the unit may present . . . grievances [over the interpretation or application of the agreement] to the agency and have them adjusted, without the intervention of the exclusive representative, as long as the adjustment is not inconsistent with the terms of the agreement and the exclusive representative has been given opportunity to be present at the adjustment."

> raised under a grievance procedure may, in the discretion of the aggrieved party, be raised under that procedure or the complaint procedure under this section, but not under both procedures. Appeals or grievance decisions shall not be construed as unfair labor practice decisions under this Order nor as precedent for such decisions. All complaints under this section that cannot be resolved by the parties shall be filed with the Assistant Secretary.

Unfair labor practice complaints are decided initially by the Assistant Secretary but may be appealed to the FLRC. In this regard the federal scheme may be better than that in the private sector. A major objection to the NLRB's *Collyer* and *Spielberg* doctrines previously discussed is that they constitute a broad delegation of the Board's power to adjudicate statutory rights to private persons, i.e., arbitrators, with widely varying degrees of expertise.[27] On the other hand, the Assistant Secretary clearly lacks the statutory independence of the NLRB and, as a relatively high-ranking member of the executive branch, is likely to be perceived by employees as a management representative, rather than as a neutral.

Federal courts have held generally that they do not have jurisdiction over matters arising under the Executive Order or under agreements resulting therefrom.[28] Review of arbitration awards in the federal service is thus usually limited to the FLRC. The Council Chairman stated publicly in 1973 that Council records indicate a 90 percent denial rate in appeals from arbitration awards, and that an appeal is accepted only when it alleges that an award violates applicable law, an appropriate regulation, or the Executive Order itself, or presents other grounds similar to those upon which challenges to arbitration awards are sustained by the courts in the private sector; and when the facts and circumstances are described with specificity sufficient to support the asserted basis for the appeal.[29]

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27. See the discussion of this question by Professor Christensen in ch. 2 of this volume, and Nash, *The NLRB and Arbitration: Some Impressions of the Practical Effect of the Board's Collyer Policy Upon Arbitrators and Arbitration*, in ARBITRATION—1974, Proceedings of the 27th Ann. Meeting, National Acad. of Arbitrators 106 (B. Dennis & G. Somers eds. 1974), especially the remarks of David E. Feller, *id.* at 144-47.
28. *E.g.*, *Manhattan-Bronx Postal Union* v. *Gronouski*, 350 F.2d 451 (D.C. Cir. 1965), in which it was held, *inter alia*, that the United States cannot be sued without its consent, and that the functions entrusted to the federal district courts do not include "policing the faithful execution of Presidential policies by Presidential appointees." *Id.* at 457.
29. Address of Robert E. Hampton to the Federal Bar Association's National Conference on Labor Relations in the Federal Service, Sept. 24, 1973, quoted in ABA Section of Labor Relations Law, Report of Committee on Law of Federal Government Employee Relations 159, 182 (1974).

Despite this official policy of restraint in reviewing arbitration awards in the federal service, the system has been criticized on three principal grounds. The first, referred to above, is that arbitrators are likely to be held to have exceeded their jurisdiction unless fully and accurately advised of the official construction placed on applicable law and administrative regulations. The second is lack of an adequate enforcement machinery. Federal courts, as previously indicated, are loath to entertain suits arising out of alleged violations of the Executive Order, although they may intervene in cases invoking an additional claim that constitutional rights have been denied.[30] In any case, time-consuming internal remedies must first be exhausted, and there is no mandatory injunction process to compel a recalcitrant party either to arbitrate or to abide by an arbitration award. In the words of one federal district court,

> [I]t is not the function of the court to interfere unless there appears to be . . . evidence of substantial interference with basic rights by arbitrary and capricious action or action that precludes clear constitutional guarantees.[31]

The third ground of criticism is the tendency, at least in the recent past, of the Comptroller General to invalidate arbitration awards when monetary relief is involved. As one authority has observed,

> An appeal to the Comptroller General, in view of the attitude shown to date [1971] with respect to arbitration, is apparently a dependable method to overturn virtually all arbitration decisions where monetary relief is granted. . . .[32]

Recent developments suggest, however, that the Comptroller General has changed his prior policy concerning the scope of the arbitrator's

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30. *E.g., National Ass'n. of Gov't. Employees* v. *White,* 418 F.2d 1126 (D.C. Cir. 1969) (claim by union, whose bargaining rights and dues checkoff privileges had been withdrawn by agency for picketing, that applicable regulations were unduly vague, and that agency's actions violated free assembly clause of First Amendment and due process clause of Fifth Amendment).
31. *AFGE* v. *Hampton* (D.D.C. July 22, 1971), in GERR No. 411, at A-15, A-16 (July 26, 1971).
32. Kagel, *supra* note 25, at 148. A case in point is Naval Rework Facility, Naval Air Station, Jacksonville, Fla. and National Ass'n. of Gov't. Employees, FLRC No. 73A-46 (Sept. 24, 1974), in which the Council modified an arbitrator's award that the agency had violated the provision of an agreement that holiday work would not be scheduled to award overtime and must give four hours' pay to some 26 employees, by striking the remedy portion of the award; it did so because the Comptroller General had construed the federal premium pay statutes as prohibiting pay for work not performed.

authority to provide remedies requiring retroactive personnel actions and back pay; and the FLRC has also shown a greater reluctance to vacate or modify arbitration awards on the ground that they are inconsistent with laws and administrative regulations.[33]

Nevertheless, there is a persistent drive to substitute a federal statute for the Executive Order governing labor-management relations in the federal service.[34] In the event such a law is enacted, it seems likely that the scope of arbitral authority will be expanded by cutting back on the area of reserved management rights.[35] Whether the scope of judicial review, for which a statute would presumably provide, will then be brought into conformity with the policy and practice now prevailing in the private sector is a much broader question to be discussed in greater detail later in this paper.

The most rapid and various development of grievance arbitration procedures in the public sector has, of course, taken place at the state, county, and municipal levels. As of September, 1975, some 28 states and the District of Columbia had included some form of grievance procedure in their statutes regulating public-employee labor relations.[36] These

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33. These developments are documented in ABA Section of Labor Relations Law Pt. I, Report of Committee on Law of Federal Government Employee Relations 73, 91-95 (1975).
34. S. 3294, 93d Cong., 2d Sess. (1974); S. 3295, 93d Cong., 2d Sess. (1974); H. R. 8677, 93d Cong., 2d Sess. (1974).
35. An appropriate model might be the Postal Reorganization Act, 39 U.S.C. §§ 1201-09 (1970), which contains no provision similar to § 12(b) of the Executive Order. Article III (Management Rights) of the 1973-75 National Agreement between the United States Postal Service and four national unions of postal workers is prefaced by the statement: "The Employer shall have the exclusive right, *subject to the provisions of this Agreement* and consistent with applicable laws and regulations . . ." [underscoring added].
36. Not all of the laws cited are comprehensive; a number apply only to specified classifications of workers. The following states have one or more laws containing provisions relating to public-sector grievance and arbitration procedures: Alaska, Alaska State § 23.40.210 (1962) (public employees); California, Cal. Educ. Code § 13087.1 (West 1975) (teachers); Connecticut, Pub. Act No. 75-189 §§ 1, 2 (May 27, 1975, Jan. Sess.) amending Conn. Gen. Stat. Ann. § 7-470(a), (b) (1972), Pub. Act No. 75-570, § 5 (July 7, 1975, Jan. Sess.) repealing and substituting Conn. Gen. Stat. Ann. § 7-472 (1972) (municipal employees), Pub. Act No. 75-566 (July 7, 1975, Jan. Sess.) (state employees); Delaware, Del. Code Ann. tit. 14, § 4008(c) (1974) (certified public school employees); District of Columbia, Exec. Order No. 11616, 3 C.F.R. 202 (Comp. 1971) (employees of executive branch and agencies of the federal government); Florida, Fla. Stat. § 447.011 (1966) (public employees); Hawaii, Hawaii Rev. Stat. § 89-11 (Supp. 1974) (public employees); Iowa, Iowa Code Ann. § 20.18 (Supp. 1975-1976) (public employees); Kansas, Kan. Stat. Ann. § 75-4330 (1974 Supp. 75-109) (public employees); Kan. Stat. Ann. § 72-5424 (1972) (teachers); Maine, Me. Rev. Stat. Ann. tit. 26, § 979-K (1964), Me. Rev. Stat. Ann. tit. 5, § 752 (Supp. 1973) (state em-

legislative enactments fall into two main groups: those which require binding arbitration of all unresolved grievances;[37] and those which permit, but do not require, the arbitration of grievances.[38] Three states have no specific policy on grievance settlement, but allow the parties to adopt any form they can agree upon;[39] and two states provide only for media-

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ployees); Me. Rev. Stat. Ann. tit. 26, § 970 (1964) (municipal employees); Maryland, Md. Ann. Code art. 77, § 160(h)(2) (1975) (certified teachers); Md. Ann. Code art. 77, § 160-A(h)(2) (1975) (non-certified school employees); Massachusetts, Mass. Ann. Laws Ch. 150E, § 8 (Supp. 1975) (public employees); Michigan, Mich. Stat. Ann. § 17.455(7) (Supp. 1975) (public employees); Minnesota, Minn. Stat. Ann. § 179.70 Subd. 1, § 179.71 Subd. 5(i) (Supp. 1975-1976) (public employees); Montana, Mont. Rev. Codes Ann. § 59-1610(2) (Supp. 1973) (public employees); Nebraska, Neb. Rev. Stat. § 48-816 (1974) (public employees); Nevada, Nev. Rev. Stat. § 288.110 (1973) (local employees); New Hampshire, N. H. Rev. Stat. Ann. § 273-A:4 (2 CCH State Laws ¶ 47,051, p. 56,047 (1975)) (public employees); New Jersey, N.J. Stat. Ann. § 34:13A-5.3 (Supp. 1975-1976) amending N.J. Stat. Ann. § 34:13A-5 (1965) (public employees); New York, N.Y. Civ. Serv. § 204(2) (McKinney 1973) (public employees); North Dakota, N.D. Cent. Code §§ 34-11-02 to 34-11-04 (1972) (public employees); Oklahoma, Okla. Stat. Ann. tit. 11, § 548.12 (Supp. 1974-1975) (police and firefighters); Oregon, Ore. Rev. Stat. § 243.706 (1973) (public employees); Pennsylvania, Pa. Stat. Ann. tit. 43, § 1101.903 (Supp. 1975-1976) (public employees); Rhode Island, R.I. Gen. Laws Ann. § 36-11-3 (Supp. 1974), amending R.I. Gen. Laws Ann. § 36-11-3 (1956) (state employees); South Dakota, S.D. Compiled Laws Ann. §§ 3-18-15.1 to 3-18-15.3 (1974) (public employees); Vermont, Vt. Stat. Ann. tit. 3, § 926 (1972) (state employees); Washington, Wash. Rev. Code § 41.56.122 (1974) (public employees); and Wisconsin, Wis. Stat. Ann. §§ 111.90, 111.91(a), 111.91(2)(b) and 111.91(3) (1974) (state employees).

37. Alaska, Alaska Stat. § 23.40.210 (1962); Florida, Fla. Stat. § 447.011 (1966); and Pennsylvania, Pa. Stat. Ann. tit. 43, § 1101.903 (Supp. 1975-1976). New York City has a policy to the same effect, New York, N.Y. Charter and Administrative Code § 1173-8.0(f), 2 CCH State Laws ¶ 47,450, p. 56, 941-12 (1972).

38. California, Cal. Educ. Code § 13087.1 (West 1975); Connecticut, Pub. Act No. 75-189 §§ 1, 2 (May 27, 1975, Jan. Sess.) amending Conn. Gen. Stat. Ann. § 7-470(a), (b) (1972), Pub. Act No. 75-570, § 5 (July 7, 1975, Jan. Sess.), repealing and substituting Conn. Gen. Stat. Ann. § 7-472 (1972), Pub. Act No. 75-566 (July 7, 1975, Jan. Sess.); District of Columbia, Exec. Order No. 11616, 3 C.F.R. 202 (Comp. 1971); Kansas, Kan. Stat. Ann. § 72-5424 (1972); Maine, Me. Rev. Stat. Ann. tit. 26, § 970 (1964); Maryland, Md. Ann. Code art. 77, § 160(h)(2) (1975), Md. Ann. Code art. 77, § 160-A(h)(2) (1975); Montana, Mont. Rev. Codes Ann. § 59-1610(2) (Supp. 1973); New Jersey, N.J. Stat. Ann. § 34:13A-5.3 (Supp. 1975-1976) amending N.J. Stat. Ann. § 34:13A-5 (1965); Oregon, Ore. Rev. Stat. § 243.706 (1973); Washington, Wash. Rev. Code § 41.56.122 (1974); and Wisconsin, Wis. Stat. Ann. §§ 111.90, 111.91(a), 111.91(2)(b) and 111.91(3) (1974).

39. Nebraska, Neb. Rev. Stat. § 48-816 (1974); New Hampshire, N.H. Rev. Stat. Ann. § 273-A:4 (2 CCH State Laws ¶ 47,051, p. 56,047 (1975)); New York, N.Y. Civ. Serv. § 204(2) (McKinney 1973).

tion of grievances.[40] One state specifically forbids decision-making by a third party.[41]

State laws which provide for mandatory, binding arbitration of grievances require either that if collective agreements between public employers and unions do not include a provision for final and binding arbitration, the parties must use the arbitration procedure already established by statute;[42] or that the government agency involved must promulgate procedures for the resolution of grievances, making any decision appealable to a higher authority, whose decision is binding.[43] It is significant that no state law which requires or permits the arbitration of grievances makes any reference to so-called advisory arbitration, a self-contradictory and inaccurate term denoting no more than fact-finding accompanied by recommendations.

Grievance and Arbitration Procedures in State and Local Agreements

Comprehensive data on grievance and arbitration procedures actually incorporated in collective agreements are usually difficult to obtain. Fortunately, the BLS published in 1975 a very informative analysis of 655 state and local collective agreements and related documents, each covering 50 or more employees.[44] The agreements covered 870,685 work-

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40. Michigan, Mich. Stat. Ann. § 17.455(7) (Supp. 1975) and North Dakota, N.D. Cent. Code §§ 34-11-02 to 34-11-04 (1972).
41. In respect of collective bargaining by public school employees Section 4008(c) of the Delaware Code, provides, "No contract or agreement executed between the two parties shall specify directly or indirectly binding arbitration or decision-making by a third party or parties. The rights of the public through their legally elected or appointed Board of Education in final policy making is not subject to negotiation."
42. Hawaii, Hawaii Rev. Stat. § 89-11 (Supp. 1974); Iowa, Iowa Code Ann. § 20.18 (Supp. 1975-1976); Kansas, Kan. Stat. Ann. § 75-4330 (1974 Supp. 75-109); Maine, Me. Rev. Stat. Ann. tit. 26, § 979-K (1964), Me. Rev. Stat. Ann. tit. 5, § 752 (Supp. 1973); Massachusetts, Mass. Ann. Laws ch. 150E, § 8 (Supp. 1975); Minnesota, Minn. Stat. Ann. § 179.70 Subd. 1, § 179.71 Subd. 5(i) (Supp. 1975-1976) and Oklahoma, Okla. Stat. Ann. tit. 11, § 548.12 (Supp. 1974-1975).
43. Nevada, Nev. Rev. Stat. § 288.110 (1973); South Dakota, S.D. Compiled Laws Ann. §§ 3-18-15.1 to 3-18-15.3 (1974) and Vermont, Vt. Stat. Ann. tit. 3, § 926 (1972). The Rhode Island statute declares it to be "the responsibility of supervisors at all levels to consider . . . and to take appropriate action promptly and fairly upon the grievances of their subordinates," R.I. Gen. Laws Ann. § 36-11-3 (Supp. 1974) amending R.I. Gen. Laws Ann. § 36-11-3 (1956).
44. U.S. Bureau of Labor Statistics, Dep't. of Labor, Bull. No. 1833, Grievance and Arbitration Procedures in State and Local Agreements 1 (1975).

ers employed by various state, county, and municipal jurisdictions, as well as by school and other special districts and authorities, in 45 states and the District of Columbia. The study embraced, in addition to traditional collective agreements, memoranda of understanding or ordinances which clearly indicated that they were the result of bilateral negotiations.

Agreements negotiated with municipal governments constitute the largest group (almost two-fifths) covered by the study; they also include nearly one-third of total worker coverage. The next largest group of agreements (about one-quarter) were negotiated with special districts, primarily school districts; these agreements include about one-quarter of total worker coverage. The remaining agreements were negotiated at either the state or the county level; although state agreements are relatively few in number, they cover the second-largest group of workers in the sample.

Of the 655 agreements included in the study, 591 (9 out of 10) provide for the processing of employee and, in some cases, union[45] or employer grievances. The incidence of grievance procedures in public-sector agreements is thus below that in the private sector,[46] but substantially above the 82 percent found in collective agreements in the federal service.[47]

Nearly 84 percent of the 591 agreements having grievance procedures, covering 93 percent of the workers, include provisions for the settlement of grievances through third-party intervention by fact-finders, mediators, or arbitrators. Of the three forms of intervention, only arbitration is final and binding. Only 4 percent (21) of the agreements provide for the use of fact-finding (in most instances by a tripartite board) in resolving grievances. Similarly, only 5 percent (30) of the agreements provide for the use of mediation; about half specify that failure by the mediator to effect a settlement of the dispute will result in its referral to arbitration.

As one would expect, arbitration of grievances is provided for in much the largest number of agreements (467, or 79 percent). This figure is, of course, substantially below that in the private sector; but it can

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45. Throughout this discussion of grievance arbitration in the public sector the word "union" is used to include all types of employee organizations which engage in collective bargaining.
46. A 1974 BLS study of 1,339 private-sector agreements found that all but 13 contained grievance procedures. U.S. Bureau of Labor Statistics, Dep't. of Labor, Bull. No. 1822, Characteristics of Agreements Covering 1,000 Workers or More 64, Table 71 (1974).
47. U.S. Bureau of Labor Statistics, Dep't. of Labor, Bull. No. 1789, Collective Bargaining Agreements in the Federal Service. Late 1971, 71, Table 29 (1973).

be expected to increase rapidly as collective bargaining in the public sector continues to spread, and as traditional public management resistance to giving up its previously unchallenged prerogatives continues to wane.

It is significant that about two-fifths (134) of the arbitration provisions define the scope of the procedure, usually making it as broad as the grievance procedure. Moreover, as the BLS study points out,

> It is safe to assume that the number of provisions in which the jurisdiction of grievance and arbitration arrangements is the same is much higher than shown. Agreements referring to arbitration but not to scope often state that grievances will move automatically to arbitration if not settled at the final step before arbitration. The implication of these clauses is that the scope of grievance and arbitration [procedures] is identical.[48]

Also of interest is that over two-fifths (198) of the agreements having arbitration clauses stipulate that either party may initiate arbitration proceedings. This suggests a lack of sophistication on the part of public management. Private management long ago learned that its contractual right to use the grievance and arbitration procedure is a bane rather than a blessing, and that it is better advised to act unilaterally and let the employee or union grieve if either is dissatisfied. Management access to the contractual grievance and arbitration procedure may be construed as a waiver by management of its right to act unilaterally instead of filing a grievance. Moreover, if the employee organization violates the agreement, management may be told that the appropriate forum in which to prove the violation and seek recovery of damages or other relief is arbitration rather than the courts.[49] One may expect, therefore, that the number of provisions in collective agreements specifically guaranteeing management's access to the grievance and arbitration procedure will diminish substantially over time.

The impact of private-sector labor law on the public sector can be seen in the incidence (174, or almost two-fifths) of arbitration provisions in the latter which permit the union, but not the aggrieved employee, to call for arbitration. This means that although a union may arbitrate without the grievant's consent, the reverse is not true; only about 10 percent (49) of the agreements providing for arbitration permit either the grievant, or the grievant together with the employee organization, to initiate arbitration.

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48. BLS Bull. No. 1833, *supra* note 44, at 18.
49. *Drake Bakeries, Inc.* v. *Local 50, American Bakery & Confectionery Workers*, 370 U.S. 254 (1962).

Of equal importance, the union's right to represent members processing their individual grievances through the multistep procedure is provided for in 65 percent (385) of the 591 agreements having grievance procedures. Of these agreements, more than 30 percent (119) guarantee the union a dominant role in the processing of grievances; that is, the union assumes almost total responsibility and, in most cases, presents the grievance at all stages of the procedure. Generally, agreements acknowledge the union's right to decline to process an employee's grievance which it either determines to be without merit or resolves to its satisfaction. Finally, although nearly 80 percent (449) of the agreements having a grievance procedure allow an employee to process his own grievance, less than 14 percent (82) permit an employee to select a nonunion representative of his own choice; and in most instances a union representative is entitled to be present. In any case, the right of an employee to process his own grievance usually applies only up to the point of arbitration; thereafter, the union has the exclusive right to decide whether to proceed further.

Somewhat surprisingly, only about 23 percent (106) of agreements in the sample providing for arbitration specify a board (usually tripartite), whereas two-thirds (310) specify a single arbitrator. Given the prevailing attitude of public managers toward neutral arbitrators, which ranges from suspicion to open hostility, one would suppose that the tripartite board would be more popular with government jurisdictions; that procedure at least insures that a representative of each party will have an opportunity to forestall or to modify a decision or opinion by an arbitrator which either side finds unacceptable. Presumably, growing familiarity with the grievance arbitration process will tend to reassure public management about its net utility, and the desire to cut costs and speed up the time between the filing of a grievance and the issuance of an arbitration award may abort the tendency to move to tripartite arbitration boards which might otherwise develop.

A frequent reaction of public management obligated for the first time to negotiate a collective agreement or a memorandum of understanding, and confronted with a demand for final and binding arbitration, is to offer advisory arbitration as a counterproposal. Significantly, only about 10 percent (45) of the 439 agreements in the sample which refer specifically to the status of the grievance arbitrator's decision provide for advisory arbitration. As grievance arbitration becomes increasingly prevalent in the public sector, the percentage of such provisions to the total will certainly decline.

Many collective agreements in the private sector provide special procedures for handling designated types of grievances, typically those

involving discharges or issues of contract interpretation affecting large groups of workers raised by the union. The usual method is to skip earlier stages of the grievance procedure. In the public sector, however, special arrangements, which were found in almost 9 percent (58) of the 655 agreements studied by the BLS, more often provided for a separate hearing or appeal. In some cases the agreement specifies applicable laws or codes outside the grievance procedure available to the grievant;[50] in others, when disciplinary action is upheld, the grievant's right to seek a legal remedy is provided;[51] and in still others, any employee who elects to carry a grievance to arbitration is specifically declared to have waived his or her right to use other governmental forums of appeal.[52] This last type of provision raises issues of importance to both the private and the public sector; they will be discussed in greater detail below.

Public-Sector Arbitration and the Courts

As in the early stages of development of grievance arbitration in the private sector, the courts showed a marked hostility to the first attempts to introduce the system into the public sector. Advocates of arbitration had to overcome not only the common-law rule that executory agreements to arbitrate are unenforceable, but also well-established theories of government sovereignty[53] and of the "extra loyalty" which public employees were deemed to owe to their government employers.[54] There

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50. *E.g.*, "Grievance, disputes, or disagreements involving removals, demotions, or suspensions shall be resolved as provided by the civil service provisions of the Santa Monica Municipal Code and the City Charter."
51. *E.g.*, "Any person believing himself aggrieved by a penalty, or punishment of demotion in or dismissal from service or suspension without pay, or a fine imposed pursuant to the provisions of this Section, may appeal from such determination by an application to the New York Supreme Court in accordance with the provisions of Article 78 of the Civil Practice Law and Rules."
52. *E.g.*, "Arbitration shall be initiated by a certified letter from the grievant, and bearing the written approval to proceed of the president of the [Teachers] Federation. . . . Such request can be honored only if the grievant . . . and the Federation waive the right, if any, in writing of said grievant . . . and the Federation to submit the underlying dispute to any other administrative or judicial tribunal except for the purpose of enforcing the arbitrator's award." But see the discussion of *Antinore* v. *State*, 79 Misc. 2d 8, 356 N.Y.W.2d 794 (Sup. Ct. 1974), *infra* note 151, and accompanying discussion in the text.
53. For a good discussion of the sovereignty theory, see K. Hanslow, THE EMERGING LAW OF LABOR RELATIONS IN PUBLIC EMPLOYMENT 11-20 (1967).
54. See Edwards, *The Developing Labor Relations Law in the Public Sector*, 10 DUQUESNE L. REV. 357, 360-61 (1972).

are still many holdings that the submission of grievances to outside arbitration constitutes an unlawful delegation of governmental power,[55] but others reject that argument.[56] Although not entirely dead, the sovereignty and "extra-loyalty" theories are moribund; and it is clear that the federal policy in favor of grievance arbitration in the public sector, as well as recent state legislation, has had a considerable influence on state court decisions involving public-sector arbitration.[57] The trend is strongly in the direction of upholding the legality of voluntary agreements to submit grievances to final and binding arbitration and of enforcing such agreements.[58] Similarly, the courts show no strong predisposition to weigh the merits of the dispute before ordering arbitration, a practice followed in private-sector cases in a number of jurisdictions prior to the U.S. Supreme Court decisions in the *Steelworkers Trilogy*.

Nevertheless, not all of the distinctions between judicial approaches to grievance arbitration in the private and the public sector have been eliminated. The authors of a leading text on labor relations in the public sector have commented on the issue of arbitrability in part as follows:

> Courts seem to be much more willing to declare a dispute nonarbitrable in the public sector than in the private sector. In large part, this has probably resulted because public employers are seen to retain broader discretion and "management rights" to control the employment circumstances than are their private sector counterparts. Additionally, collective agreements in the public sector are likely to exclude, in specific terms, more subjects from arbitration, and statutes and public policy considerations often reserve other areas for decision by management alone.[59]

Pointing out that the language of the collective agreement or of the applicable state statute is usually the crucial factor in determining arbitrability, the authors provide examples of disputes in which the issue of arbitrability was left to the arbitrator, and of those in which it was found to be nonarbitrable. Included in the former category are disputes over

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55. See cases cited in notes 65-72 *infra*.
56. *E.g., Danville Bd. of School Directors* v. *Fifield*, 85 L.R.R.M. 2939, 315 A.2d 473 (Vt. Sup. Ct. 1974) (termination of teaching contract); *AFSCME, Local 1226* v. *City of Rhinelander*, 35 Wis. 2d 209, 151 N.W.2d 30 (1967) (discharge). See Gilroy & Sinicropi, *supra* note 21, at 64.
57. *E.g., AFSCME, Local 1226* v. *City of Rhinelander*, 35 Wis. 2d 209, 215, 151 N.W.2d 30 at 33.
58. *E.g., Danville Bd. of School Directors* v. *Fifield*, 85 L.R.R.M. 2939, 315 A.2d 473 (Vt. Sup. Ct. 1974); *AFSCME, Local 1226* v. *City of Rhinelander*, 35 Wis. 2d 209, 151 N.W.2d 30 (1967).
59. R. A. Smith, H. T. Edwards & R. T. Clark, Jr., LABOR RELATIONS LAW IN THE PUBLIC SECTOR 938 (1974).

whether a grievance was timely filed;[60] whether a school board followed the proper procedure in terminating a nontenured teacher, even though the grounds for termination were not arbitrable;[61] and whether a school district kept its promise to use its best efforts to maintain the pupil-teacher ratio.[62] In one case the court itself held that the formula for fixing future wage increases was arbitrable;[63] and in another it refused to stay arbitration of a grievance involving staffing of classrooms, there being no clear and unquestionable exclusion of the matter from arbitration.[64]

Examples of cases in which disputes were held to be nonarbitrable include those over whether certain teachers had acquired a vested right to sabbatical leaves before the passage of a law prohibiting the granting of sabbatical leaves to public employees;[65] new provisions of a collective agreement, as distinguished from grievances arising out of existing terms;[66] withdrawal of recognition from a union;[67] dismissal of a probationary employee (the court finding that this was a "personal" rather than a "contract" grievance);[68] questions of tenure;[69] the method used to select a new assistant fire chief;[70] an unconstitutional contract provision;[71] and regulations prescribing emergency duties for teachers (the court holding that the school board was not free to bargain away its power to act in an emergency).[72]

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60. *Central School Dist. No. 1* v. *Harrison Ass'n. of Teachers,* 79 L.R.R.M. 3085 (N.Y. Sup. Ct. 1972).
61. *Associated Teachers of Huntington* v. *Board of Educ.,* 60 Misc. 2d 443, 303 N.Y.S.2d 469 (Sup. Ct. 1969).
62. *Central School Dist. No. 1* v. *Litz,* 60 Misc. 2d 1009, 304 N.Y.S.2d 372 (1969), *aff'd,* 34 App. Div. 2d 1092, 314 N.Y.S.2d 176 (1970).
63. *Pittsburgh City Fire Fighters Local 1* v. *Barr,* 408 Pa. 325, 184 A.2d 588 (1962).
64. *Board of Educ.* v. *Middle Country Teachers' Ass'n.,* 78 L.R.R.M. 2092 (N.Y. Sup. Ct. 1971).
65. *Central School Dist.* v. *Ramapo Central School Dist. Teachers Ass'n.,* 67 Misc. 2d 317, 324 N.Y.S.2d 260 (Sup. Ct. 1971).
66. *North Bellmore Teachers' Ass'n.* v. *Board of Educ.,* 68 Misc. 2d 238, 326 N.Y.S.2d 571 (Sup. Ct. 1971).
67. *De Sensi* v. *Osborne,* 62 L.R.R.M. 2186 (Pa. C.P. 1966).
68. *Lehman* v. *Dobbs Ferry Bd. of Educ.,* 66 Misc. 2d 996, 323 N.Y.S.2d 283 (1971).
69. *Legislative Conference of City University of New York* v. *Board of Higher Educ.,* 38 App. Div. 2d 478, 330 N.Y.S.2d 688 (1972), *appeal denied,* 30 N.Y.2d 481 (1972).
70. *Ringler* v. *Yarnell,* 4 Pa. Cmwlth. 540, 287 A.2d 893 (Pa. Cmwlth. Ct. 1972).
71. *Central School Dist. No. 4 of Brookhaven* v. *Bellport Teachers Ass'n.,* 74 L.R.R.M. 2221 (N.Y. Sup. Ct. 1970), *rev'd,* mem., 42 App. Div. 2d 741, 346 N.Y.S.2d 748 (1973).
72. *Board of Educ.* v. *Hartford Fed'n of Teachers,* 75 L.R.R.M. 2397 (Conn. Super. Ct. 1970).

On the issue of arbitration of procedural disputes, at least one state court has followed the private-sector rule laid down in *Wiley v. Livingston,*[73] and has ruled that a dispute over a city employee's compliance with the time requirement for filing grievances set forth in a collective agreement was for the arbitrator, not the court, to determine.[74]

The same tendency to follow private-sector decisions in respect of judicial enforcement of arbitration awards also seems to be developing in the public sector. For example, in *Town of Babylon v. Local 237, International Brotherhood of Teamsters,*[75] the court rejected a petition to vacate an award based on the claim that "in view of the written agreements between the parties as to the grievance procedure, the award of the arbitrator constituted a 'perverse misconstruction' of the agreement, having no rational basis in fact or law." Relying upon private-sector arbitration precedents, the court quoted approvingly from one such case as follows:

> The words "perverse misconstruction" bracketed in the disjunctive with the words "positive misconduct" must be taken to refer to misbehavior of the arbitrator in the way of evident partiality, corruption, exceeding powers and the like. . . . If so, the perverse misconstruction must be more than an egregious error of law before it satisfies the [New York] statute; it must be one which is so divorced from rationality that it can be accounted for only by one of the kinds of misconduct recited in the statute. In that event, the vacatur is granted not for error of law or misconstruction of documents, but for misconduct under one or more of the permitted categories, which misconduct has been established.[76]

Similarly, another New York court denied a motion to vacate an award in the absence of evidence that the arbitrator was "arbitrary or capricious," gave any provisions of the collective agreement a "completely irrational construction," or made a new contract for the parties by his award.[77]

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73. 376 U.S. 543, 557 (1964): "Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, 'procedural' questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."
74. *City of Auburn* v. *Nash*, 34 App. Div. 2d 345, 312 N.Y.S.2d 700 (1970) (dispute over timeliness of grievance held to be determinable by the arbitrator, not the court).
75. 79 L.R.R.M. 2892 (N.Y. Sup. Ct. 1971).
76. *Id.* at 2892-93, quoting from *S. & W. Fine Foods, Inc.* v. *Local 153, Office Employees Int'l. Union*, 8 App. Div. 2d 130 (1959), *aff'd*, 7 N.Y.2d 1018 (1960).
77. *Board of Higher Educ. of the City of New York* v. *United Fed'n of College Teachers*, 4 PERB 8230 (N.Y. Sup. Ct. 1971).

Nevertheless, there is some reason to believe that judicial review of arbitration awards in the public sector, at least in respect of some issues, will be more rigorous than that prescribed for the private sector in the Supreme Court's *Enterprise Wheel & Car* decision.[78] This matter will be discussed in greater detail later in this chapter.

Significant Aspects of Public-Sector Grievance Resolution

From the discussion thus far it appears that the policies and procedures in private-sector grievance arbitration have had a considerable influence on corresponding developments in the public sector. Indications of a reverse influence are not so evident; but there are a few areas in which public-sector law and practice may have substantial impact on the private sector.

Perhaps the most important of these areas is that of individual constitutional rights, especially in discipline and dismissal cases. American workers, unlike those in most other industrialized countries, have only minimal statutory protection against unjust discipline and dismissal.[79] Organized workers, a minority in the total labor force, are afforded much greater protection by their collective agreements; but even those agreements, as we have seen, by virtue of their substantive provisions, the manner in which they are administered, and the procedural requirements imposed by the courts, tend to subordinate the rights of individual employees to those of the exclusive bargaining representative. In the public sector, on the other hand, where collective agreements are not yet nearly so pervasive or so broad in scope as they are in private employment, protections against unjust discipline or dismissal, to the extent that they exist, are typically provided by statute, executive order, or administrative regulation. This still leaves the majority of workers in the private sector, who are unorganized, without the shield provided either by statute or by collective agreements against unfair discipline or dismissal. It is unlikely that this situation will continue indefinitely; and state statutes providing such protection to public employees are one obvious source which may increasingly stimulate legislative counterparts in the private sector.

Discipline or discharge may also contravene the constitutional rights

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78. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), *supra* note 8 and accompanying text.

79. For a more detailed discussion of this subject, see the chapter in this volume by Professor Summers, *Arbitration of Unjust Dismissal: A Preliminary Proposal.*

of an employee. Most cases of this type have arisen in the public sector, for the obvious reason that the guarantees of the Bill of Rights, secured against violation by the federal government and made binding on state governments by the Fourteenth Amendment, are not available against purely private parties. But with the "twilight of state action,"[80] the application of principles developed in public-sector cases to the private sector becomes increasingly likely. One recent example of such an instance is the case of *Holodnak v. Avco Corporation and UAW Local 1010.*[81] Here a discharged employee brought an action against both his employer and his union, challenging his dismissal, upheld in arbitration, for publishing an article critical of both company and union practices. The federal district court vacated the award on the ground that the arbitrator had been clearly biased; the court also held, *inter alia,* that the union's representation of the plaintiff in the arbitration proceedings was inadequate, that the employer's dismissal of the plaintiff infringed on the latter's First Amendment rights, and that the plaintiff had not been discharged for just cause under the terms of the collective agreement.

Although *Holodnak* raises a number of interesting issues, the one with which we are principally concerned is the alleged infringement of the plaintiff's First Amendment rights. Acknowledging that "[t]here is no First Amendment protection . . . from infringement by a private employer," and that the question of "how much government involvement constitutes 'state action' does not lend itself to a simple answer," the court noted that Avco is a major defense contractor and that there was "substantial governmental involvement" at its Stratford, Connecticut plant; it concluded, therefore, on the authority of *Burton v. Wilmington Parking Authority,*[82] that there was "sufficient governmental action for

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80. Williams, *The Twilight of State Action,* 41 TEX. L. REV. 347, 389 (1963): "The sun is setting on the concept of state action as a test for determining the constitutional protections of individuals. Through developments concerning 'color of state law,' state inaction, private groups and organizations becoming sufficiently oriented to public concern to justify public control, and judicial enforcement of private agreements, state action is so permeating that it is present in virtually all cases." To similar effect is the dissenting opinion of Fuld, J., in *Dorsey* v. *Stuyvesant Town Corp.,* 299 N.Y. 512, 542 (1949): "[E]ven the conduct of private individuals offends against the constitutional provision if it appears in an activity of public importance and if the State has accorded the transaction either the panoply of its authority or the weight of its power, interest and support."

But reports of the "twilight of state action" may be premature. See *Jackson* v. *Metropolitan Edison Co.,* 95 S. Ct. 449 (1974), *infra* note 84.

81. 381 F. Supp. 191 (D. Conn. 1974), *aff'd in part and rev'd in part,* 514 F.2d 285(2d Cir. 1975), *cert. denied,* 96 Sup. Ct. 188 (1976).

82. 365 U.S. 715 (1961). A restaurant located in an automobile parking building

the First Amendment to apply."[83] This portion of the district court's decision was affirmed on appeal. The appellate court found it necessary, however, to deal with the recent decision by the U.S. Supreme Court in *Jackson v. Metropolitan Edison Co.*[84] In that case a privately owned and operated utility, which held a certificate of public convenience issued by the Pennsylvania Utilities Commission, allegedly terminated service to a customer before she was afforded notice, a hearing, and an opportunity to pay any amounts due. The customer sued the utility for damages under the Civil Rights Act of 1871. The Supreme Court affirmed a decision of the Court of Appeals for the Third Circuit, upholding the trial court's dismissal of the complaint for lack of "state action." Comparing the facts in *Jackson* and in *Burton* with those in *Holodnak*, the court of appeals declared that "[e]ven a cursory perusal of the facts in . . . [Holodnak] indicates that the government involvement in Avco's operations typified the 'symbiotic relationship'[85] . . . which the [Supreme] Court failed to find in *Jackson.*"[86] Quoting from the Court's opinion in *Burton*, the court of appeals in *Holodnak* concluded that the government "has so far insinuated itself into a position of interdependence with [Avco] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been . . . 'purely private.' . . ."[87]

The implications of *Holodnak* are of the highest importance, for they open up the possibility of judicial scrutiny of unfair disciplinary actions and dismissals on constitutional grounds, even when the affected employees are afforded no protection by statute or by collective agreement. It is therefore appropriate briefly to review the status of constitutional rights in employment as it has been shaped by recent decisions of the courts. The cases discussed below are limited to situations which are likely also to arise in the private sector; accordingly, they do not include decisions involving such issues as loyalty oaths, freedom of association, and regulation of partisan political activities.

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had refused to serve a customer because of his race. The building was owned by the State of Delaware with the restaurant as lessee. Reversing the Supreme Court of Delaware and holding that there was state action, the U.S. Supreme Court emphasized that the land and building were publicly owned; that the cost of land acquisitions, construction, and maintenance had been defrayed by public funds; and that the restaurant was an "indispensable part of the State's plan to operate its project as a self-sustaining unit." *Id.* at 723-24.

83. 381 F. Supp. at 201-02.

84. 95 S. Ct. 449 (1974).

85. *Id.* at 457.

86. 514 F.2d at 289.

87. 365 U.S. at 725.

Privilege Against Self-Incrimination and the Duty of Disclosure

May a public employer, in questioning its employees about alleged practices, warn them that anything they say might be used against them in any state criminal proceedings, and that if they invoke their constitutional privilege against self-incrimination, they will be discharged? By a divided vote, the U.S. Supreme Court answered those questions in the negative.[88] The issue, said the majority, was "whether a State, contrary to the requirement of the Fourteenth Amendment, can use the threat of discharge to secure incriminatory evidence against an employee."[89] That statement, of course, assumed the answer to the very question at issue, but the majority also relied upon an earlier decision, *Slochower v. Board of Higher Education*,[90] that a public school teacher could not be discharged merely for invoking the Fifth Amendment privilege against self-incrimination when questioned by a congressional committee.

It is interesting to review, in this connection, some of the arbitration decisions in the private sector during the era of McCarthyism. Consider, for example, the case of *New York Mirror Division, Hearst Corp.*,[91] decided, coincidentally, in the same year as *Slochower*, by the same arbitrator whose award was vacated in *Holodnak*. In *New York Mirror* the grievant, a rewrite man, was summarily discharged for refusing to answer questions about his past membership in the Communist party and for invoking his Fifth Amendment privilege against self-incrimination. In sustaining the dismissal as being "for good and sufficient cause" under the terms of the collective agreement, the arbitrator quoted with approval from *Slachover*, but went on to say that the Constitution "does not guarantee to a person, exercising the privilege against self-incrimination, his job, the respect of his neighbors, or an absence in the minds of his fellow workers and employer of a gnawing doubt as to his guiltlessness."[92] The dismissal, he thought, could be justified if the newspaper business could be deemed "vital," and the grievant's job, "sensitive." He concluded that "[b]y its very nature, whether it would abdicate or not, a newspaper maintains a position of leadership and responsibility in this 'cold war' that is vital to our national security," and that the grievant was "in a position where he has the opportunity and capacity to do incalculable harm if he is so inclined."[93] These considerations apparently out-

88. *Garrity* v. *New Jersey*, 385 U.S. 493 (1967).
89. *Id.* at 499.
90. 350 U.S. 551 (1956).
91. 27 LA 548 (1956) (Turkus, Arbitrator).
92. *Id.* at 550.
93. *Id.* at 551.

weighed the grievant's continuous employment with the Mirror for 22 years, except for a period of service with the armed forces during World War II, and his categorical statement that he was not presently a member of the Communist party. There are similar arbitration decisions reported during the same period.[94]

Without debating the premise of the arbitrator in the *Mirror* case that newspapers maintain positions of leadership and responsibility vital to our national security, it could be argued that the Mirror's response to its employee's behavior before a Senate committee, clearly anticipated and applauded by that committee, constituted sufficient "state action" to extend to the grievant the protection of the Fifth and Fourteenth Amendments.

It has been generally assumed that a private employer has the right to discipline or discharge an employee for refusal to answer questions concerning allegedly illegal acts on company time and property.[95] Recent Supreme Court decisions upholding an NLRB policy that an employee may lawfully refuse to participate in an interview which he or she reasonably believes may lead to discipline or dismissal, unless a union representative is allowed to be present,[96] do not go so far as to hold that the employee may not, with a union representative present, be required to answer possibly incriminating questions on pain of dismissal for refusing to do so. Under the principle of *Holodnak*, however, courts may tend increasingly to find that the state has "so far insinuated itself into a position of interdependence" with private employers, by virtue of the government contracts they hold, as to make it a "joint participant" in their affairs.[97]

Freedom of Expression

The leading case in the public sector on freedom of expression is *Pickering v. Board of Education*,[98] in which the Supreme Court reversed

94. *E.g.*, *Hearst Publ. Co.*, 30 LA 642 (1958) (Schedler, Arbitrator); *Burt Mfg. Co.*, 21 LA 532 (1953) (Morrison, Arbitrator).
95. *E.g.*, *Simoniz Co.*, 44 LA 658 (1964) (McGury, Arbitrator); see Wirtz, *Due Process of Arbitration*, in THE ARBITRATOR AND THE PARTIES, Proceedings of the 11th Ann. Meeting, National Acad. of Arbitrators 1, 19-20 (McKelvey, ed. 1958).
96. *ILGWU* v. *Quality Mfg. Co.*, 420 U.S. 276 (1975); *NLRB* v. *Weingarten*, 420 U.S. 251 (1975), See Tobriner, *An Appellate Judge's View of the Labor Arbitration Process: Due Process and the Arbitration Process*, in THE ARBITRATOR, THE NLRB, AND THE COURTS 37, 43 (D. Jones ed. 1967).
97. *Jackson* v. *Metropolitan Edison Co.*, 95 S. Ct. 449, 457 (1974).
98. 391 U.S. 563 (1968).

a decision sustaining the dismissal of an Illinois public school teacher for sending a letter to a local newspaper in connection with a proposed tax increase which criticized the manner in which the board of education and the district superintendent of schools had handled past proposals to raise new revenue for schools. The Court's opinion reiterated its position that teachers may not constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work. It continued:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees....[99]

Applying the standard laid down in *New York Times Co. v. Sullivan*,[100] the Court held that "absent proof of false statements knowingly or recklessly made by him [as in the instant case], a teacher's exercise of his right to speak on issues of public importance may not furnish the basis of his dismissal from public employment."[101]

The rule enunciated in *Pickering* has not generally been followed by arbitrators in the private sector, who have tended to regard public criticism of an employer by an employee as being limited by considerations of the employee's duty of loyalty to his employer,[102] as well as his obligation to resolve his grievance by resort to the grievance procedure. In *Carl Fischer, Inc.*,[103] for example, an employee was discharged for threatening to send a letter to the Better Business Bureau, complaining about alleged defects in a television set he had bought at discount from his employer. In sustaining the discharge, the arbitrator observed in part:

> While it may be said that the letter was sent in the employee's capacity as a customer, his customer relationship with the Company was inextricably connected with the employment relationship, since the . . . discount he received depended upon his employment relationship....

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99. *Id.* at 568.
100. 376 U.S. 254 (1964).
101. 391 U.S. at 574; *accord, Swaaley* v. *United States*, 376 F.2d 857 (Ct. Cl. 1967) (grievance letter accusing superiors of favoritism). *Cf. Watts* v. *Seward*, 454 P.2d 732 (Alas. 1969), *cert. denied*, 397 U.S. 921 (1970); *Norton* v. *City of Santa Ana*, 15 Cal. App. 3d 419, 93 Cal. Rptr. 37 (1971).
102. *Cf. NLRB* v. *Local 1229, IBEW*, 346 U.S. 464 (1953) (discharge of employees who disparaged employer's TV programs held to be for just cause because of employees' "disloyalty").
103. 24 LA 674 (1955) (Rosenfarb, Arbitrator).

> ... It would appear that the intended complaint to an outside agency against his Employer's method of doing business may be considered as being an act of disloyalty to the Employer. . . . For an employee to resort to an outside agency, not his Union, in order to remedy a grievance against his Employer, by methods which might cause an adverse reflection on the employer's method of doing business, is a very grievous act meriting discipline.[104]

A more recent and more complicated case was presented in *Forest City Publishing Co., Cleveland Plain Dealer,*[105] in which a newspaper reporter employed by the Cleveland Plain Dealer was discharged for writing an article published in the Evergreen Review in which he strongly criticized the Plain Dealer and its management, and for repeating his charges on a radio or television show after he was suspended but before his discharge. The magazine article was entitled, "The Selling of the Mylai Massacre"; according to the arbitrator, the grievant, "in one broad sweep of some 15,000 words . . . released pent-up observations and criticism of his employer and its policies."[106] Apparently, the arbitrator thought it of no consequence "whether the grievant was discharged for inaccuracies or invective."[107] Rather, he saw the issue as the "age-old question . . . 'Can you bite the hand that feeds you and insist on staying for future banquets?' "[108] He answered the question in the negative: "To uphold . . . [the grievant] in his attack on the Company . . . would be confiscatory [sic] and capricious."[109]

The opinions in a number of the private and public cases, including *Holodnak* and *Pickering,* emphasize that the hostile published views of the grievants toward their employers did not result in any demonstrable harm to the latter. But as Justice White observed in his separate opinion in *Pickering,* the question of harm is irrelevant; the real issue is whether the employee was dismissed for uttering deliberate or reckless falsehoods, in which event the First Amendment offers no protection. If, therefore, sufficient "state action" can be found in future private-sector cases, considerations of the alleged duty of loyalty to one's employer may well yield to the right of free expression guaranteed by the First Amendment.

Whether the same result will occur in cases in which an employee publicly airs a grievance with his or her employer, instead of resorting to

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104. *Id.* at 675.
105. 58 LA 773 (1972) (McCoy, Arbitrator).
106. *Id.* at 783.
107. *Ibid.*
108. *Ibid.*
109. *Ibid.*

the grievance and arbitration procedure, is problematical. In *Emporium Capwell Co. v. Western Addition Community Organizations,*[110] the Supreme Court recently held, with only Justice Douglas dissenting, that a union's right of exclusive representation and the principle of adherence to grievance and arbitration procedures established under a collective agreement outweighed the competing right of employees charging racial discrimination to engage in concerted activities, specifically picketing the employer's premises and distributing handbills to its customers and others, activities arguably protected by both Section 7 of the NLRA and Title VII of the Civil Rights Act of 1964. The Court has frequently stated, of course, that picketing involves something more than the mere expression of ideas;[111] and the idea that employees have a duty, in all but the most exceptional cases, to exhaust the grievance and arbitration procedure before resorting to self-help is now so firmly accepted that it seems likely to triumph over even the right of free expression unaccompanied by picketing, e.g., distributing leaflets.

Regulation of Private Conduct

Congress has provided that employees in the competitive government service may be dismissed only for "such cause as will promote the efficiency of the service."[112] The Civil Service Commission's regulations provide that an appointee may be removed, *inter alia,* for 'infamous . . . , immoral or notoriously disgraceful conduct,"[113] and for any . . . other disqualification which makes the individual unfit for the service."[114] Similar laws and regulations exist in the several states.

A number of cases involving both federal and state employees dismissed for "immoral" behavior (usually homosexuality) have been decided by the courts. Some courts have refused to consider substantive attacks on dismissals, apparently on the ground that they lack the authority to review on the merits a determination of unfitness made by an agency or civil service commission.[115] A more expansive view, however, has been taken in other cases, of which *Norton v. Macy*[116] is an example.

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110. 95 S. Ct. 977 (1975).
111. *E.g., Local 695, Int'l. Bhd. of Teamsters* v. *Vogt, Inc.,* 354 U.S. 284, 289 (1957).
112. 5 U.S.C. § 7512a (1970).
113. 5 C.F.R. § 731.201(b) (1975).
114. 5 C.F.R. § 731.201(g) (1975).
115. *E.g., Anonymous* v. *Macy,* 398 F.2d 317 (5th Cir. 1968); see *Hargett* v. *Summerfield,* 243 F.2d 29 (D.C. Cir. 1957).
116. 417 F.2d 1161 (D.C. Cir. 1969).

Here the court reversed the dismissal of a federal employee for a homosexual advance toward another person. Although conceding that the Civil Service Commission might reasonably find the appellant's behavior "to be 'immoral,' 'indecent,' or 'notoriously disgraceful' under dominant conventional norms," a majority of the court rejected the notion that it could be appropriate for the federal bureaucracy to enforce such codes of conduct in the private lives of its employees, saying that such an idea is "at war with elementary concepts of liberty, privacy, and diversity."[117] A finding that an employee has done something immoral or indecent would support a dismissal without further inquiry, the court declared, "only if all immoral or indecent acts of an employee have some ascertainable deleterious effect on the efficiency of the service."[118] In this case it concluded that the Commission had made no showing of such effect.

The court's approach in *Norton v. Macy* has its counterparts in private-sector arbitration cases too numerous and various to mention. Published volumes of arbitration reports include a number of cases arising out of dismissal or discipline of employees for "immoral" conduct, many of them involving incidents not on the employer's time or premises. The tests applied usually relate to whether the conduct in question harmed the employer's business, good will, or 'image" in the community; whether it adversely affected the employee's work performance; and whether it produced hostile reactions from other employees serious enough to reduce the work efficiency of the enterprise.[119]

In recent years arbitrators in the private sector have had to grapple increasingly with problems of changing life styles of employees. Matters of personal grooming, especially the wearing of long hair and beards; personal attire; the use of drugs; even the use of incendiary bombs as "noise-makers" have all been the subjects of arbitral awards.[120] Speaking of the role arbitrators have played in the most frequent of these new developments, the current (1975-76) President of the National Academy of Arbitrators reported a few years ago:

> . . . [W]hen it comes to the hair-and-beard area, it seems to me that it can fairly be said that we're not out in front and that ours is an essentially conservative role. We are letting the cases turn on their facts, and we're going with reasonableness, quite as we always have

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117. *Id.* at 1165.
118. *Ibid.*
119. *E.g., Menzie Davey Co.*, 45 LA 283 (1965) (Mullin, Arbitrator).
120. See *Changing Life Styles and Problems of Authority in the Plant* and cases there cited, in LABOR ARBITRATION AT THE QUARTER-CENTURY MARK, Proceedings of the 25th Ann. Meeting, National Acad. of Arbitrators, ch. VIII (B. Dennis & G. Sommers, eds. 1973).

> with any shop rule. I have found no decision which says that the reasonable course is to let an employee decide for himself how long to let his hair grow and whether he wants to wear a beard and what kind of a beard he wants to wear. In overview terms, it is correct to say that neither any new arbitral law nor any departures from established arbitral standards and principles have emerged in the hair-and-beard area.[121]

For reasons to be discussed later in this chapter, it seems likely that the majority of challenged dismissal cases of all types in the public sector will end up in court rather than before arbitrators, at least in the immediate future. It is my impression that at least some federal and state courts are more sympathetic in their approach to problems involving the clash between management rules and individual life styles, and more ready to find unconstitutional limitations on employee behavior, than are perhaps the majority of arbitrators in the private sector. At the same time, these same courts have shown a readiness to examine and, sometimes, to follow arbitration decisions reflecting the common practices and expectations in private industry. It is still too early, therefore, to predict whether the judicial decisions in the public sector or the arbitration awards in the private sector will have the greater influence.

Procedural[122] Due Process

Procedural due process has been the subject of continuing concern and debate in the area of private-sector grievance arbitration.[123] In respect of the more obvious and commonly accepted requirements of due process, especially in discipline and dismissal cases, there is a broad area of agreement among private arbitrators that such requirements must be strictly enforced. There are marked differences of opinion, however, concerning the procedural rights of the individual grievant, as opposed to those of the bargaining representative. Is the grievant entitled to notice of the time and place of the arbitration hearing, and may he or she properly demand to be present? Is the grievant entitled to independent counsel when he or she has an obvious conflict of interest with the union?

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121. Valtin in *id.* at 251-52.
122. It is virtually impossible in these cases to draw the line between procedural and substantive due process. The word "procedural" is employed only in deference to the judicial usage.
123. See, *e.g.*, Fleming, *Due Process and Fair Procedure in Labor Arbitration*, in ARBITRATION AND PUBLIC POLICY, Proceedings of the 14th Ann. Meeting, National Acad. of Arbitrators 69 (Pollard, ed. 1961), and Wirtz, *supra* note 95.

Should the arbitrator accept a proposed settlement submitted by both parties without the knowledge or consent of the grievant? These are but a few of the many troublesome questions constantly confronting arbitrators in the private sector. They are manifestations of the underlying dilemma, previously mentioned, of reconciling the union's rights as exclusive bargaining representative with the rights of an individual employee in a democratic society. How they are answered is likely to depend upon whether the arbitrator conceives of his or her role as primarily a judicial one or as the more informal one of presiding over a process that is merely an extension of collective bargaining between two entities —the employer and the union.

As already noted, questions of individual employee rights arising in the public sector have thus far been determined by administrative agencies and by courts, rather than by arbitrators; but that in no way diminishes their importance for the arbitration process. A convenient starting point is *Cafeteria and Restaurant Workers Union v. McElroy,*[124] in which the Supreme Court held that a cafeteria employee on a naval base was not entitled to a hearing and a statement of the reasons why she was denied security clearance and subsequently dismissed from her job. Balancing what it called the employee's "private interest . . . affected by governmental action" against the "nature of the government function involved," the Court declared the latter to be of greater weight, and emphasized that in its "proprietory military capacity, the Federal Government . . . has traditionally exercised unfettered control. . . . It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer."[125]

Approximately a decade later, however, Justice Stewart, who had written the Court's opinion in *McElroy,* enunciated what appeared to be quite a different doctrine in *Perry v. Sinderman*[126] and in *Board of Regents v. Roth,*[127] decided the same day.[128] Both cases involved the employment rights of state college teachers. In *Sinderman* the plaintiff had been employed as a professor in a state college system for 10 years, the last four under a series of one-year contracts. When the Regents declined to renew his contract, without giving him an explanation or a hearing, he sued in federal court, contending that the nonrenewal of his con-

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124. 367 U.S. 886 (1961).
125. *Id.* at 895-96.
126. 408 U.S. 593 (1972).
127. 408 U.S. 564 (1972).
128. The following discussion is based on Aaron, *Constitutional Protections Against Unjust Dismissals from Employment: Some Reflections,* an address delivered at the Second Annual Convention of the Society of Professionals in Dispute Resolution, Chicago, Ill., Nov. 11, 1974.

tract violated his constitutional rights. In support of this contention he alleged that the decision not to renew was prompted by his public criticism of the college administration. The Court of Appeals for the Fifth Circuit reversed a summary judgment in the Regents' favor on the ground that nonrenewal of Sinderman's contract would violate the Fourteenth Amendment if it were in fact prompted by his exercise of protected free speech, and that if Sinderman could show that he had an "expectancy" of continued employment, the failure to afford him the opportunity of a hearing would violate the constitutional guarantee of procedural due process. Accordingly, it remanded the case to the district court for a full hearing on the factual issues.[129]

In affirming the decision of the court of appeals the Supreme Court held unanimously that Sinderman's lack of a "contractual or tenure right" to reemployment, taken alone, did not defeat his claim that his constitutional rights had been violated. Justice Stewart declared:

> ... [E]ven though a person has no "right" to a valuable government benefit and ... [may be denied] the benefit for a number of reasons, ... the government may not ... deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.[130]

Government, he continued, may not produce a result which it cannot command directly; he noted that most often the Court had applied this principle to denials of public employment when it found that the affected employee had a "property interest" in reemployment.

On the issue of Sinderman's expectancy of continued employment, the Court relied on a private-sector analogy:

> Just as this Court has found there to be a "common law of a particular industry or of a particular plant" that may supplement a collective-bargaining agreement, United Steelworkers v. Warrior & Gulf Nav. Co. ... so there may be an unwritten "common law" in a particular university that certain employees shall have the equivalent of tenure.[131]

In *Roth* the plaintiff was an untenured assistant professor who was not rehired after his first year of teaching. He, too, alleged that the nonrenewal, without specific reasons or a hearing, violated his constitutional

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129. *Sinderman* v. *Perry*, 430 F.2d 939 (5th Cir. 1970).
130. 408 U.S. at 597.
131. *Id.* at 602.

rights. In this case, however, a divided Supreme Court held that in the absence of any charge by the Regents that might seriously damage Roth's professional standing or employability, he was not deprived of "liberty" protected by the Fourteenth Amendment. Reversing the district court's summary judgment in Roth's favor, affirmed by the Court of Appeals for the Seventh Circuit,[132] the Court also found no evidence that Roth had either contractual entitlement to or any reasonable expectation of re-employment; accordingly, it held that he had no "property interest" protected by the Fourteenth Amendment sufficient to require the university authorities to give him a hearing.

Roth, like Sinderman, had claimed that his contract had not been renewed as a punishment for his public criticism of the university. But Justice Stewart's opinion for the Court, while conceding that when interests encompassed within the Fourteenth Amendment's protection of liberty and property are involved, the right to some kind of prior hearing is paramount, declared that "the range of interests protected by procedural due process is not infinite."[133]

Of particular interest in *Roth* is the discussion of property interests in the majority opinion. A review of the Court's earlier decisions, it said, revealed certain attributes of such interests protected by procedural due process. To have a property interest in a benefit, a person must first have "a legitimate claim of entitlement to it," which is to be distinguished from an abstract need, a desire, or a unilateral expectation of it. Moreover, property interests, although protected by the Constitution, are not created by it. They are brought into being either by statute, as in the case of welfare benefits, or by the specific terms of employment, as in the case of individual teacher contracts. It follows, therefore, that if no property interest has been established, constitutional rights may not be invoked to create it.

Two years after it decided *Sinderman* and *Roth*, the Supreme Court appeared to veer back in the direction of *McElroy*.[134] In *Arnett v. Kennedy*[135] the plaintiff, a nonprobationary employee in the competitive civil service, was discharged by the federal Office of Economic Opportunity (OEO) for allegedly having made recklessly false and defamatory statements about his supervisors. Although advised of his right under OEO and Civil Service Commission regulations to reply to the charges

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132. 446 F.2d 806 (7th Cir. 1971).
133. 408 U.S. at 570.
134. The following discussion is based on B. Aaron *Labor Law Decisions of the Supreme Court* [October Term, 1973-74], in LABOR LAW DEVELOPMENTS 1975, Proceedings of 21st Ann. Inst. on Lab. Law, Southwestern Legal Found'n 271, 324-28 (V. Cameron ed. 1975).
135. 416 U.S. 134 (1974).

and to inspect the evidence on which the dismissal was based, the plaintiff elected instead to sue in federal district court for both declaratory and injunctive relief. He contended that the standards and procedures of the Lloyd-La Follette Act for the removal of nonprobationary employees from the federal service[136] impermissibly interfere with their freedom of expression and deny them procedural due process of law.

A three-judge district court granted the plaintiff summary judgment, holding that the discharge procedures authorized by the Act and attendant regulations denied him due process of law because, among other things, they failed to provide for an evidentiary hearing before an impartial agency official prior to removal. Accordingly, the court ordered that the plaintiff be reinstated with back pay, and that he be granted a hearing prior to removal in any future proceedings.[137]

Under the Act's implementing provisions, the plaintiff was entitled to an evidentiary hearing upon appeal from his dismissal, and if reinstated, to full back pay. To practitioners in the private sector, this would seem to have been a sufficient remedy. Provisions in collective agreements requiring an evidentiary hearing prior to dismissal, or at least prior to suspension without pay, are relatively rare. Yet only the Chief Justice and Justice Stewart joined in Justice Rehnquist's opinion for the Court reversing the decision below. The latter argued that the plaintiff lacked "a statutory expectancy that he not be removed other than for 'such cause as will promote the efficiency of the service.' " Moreover, "the very section of the statute which granted him that right . . . expressly provided also for the procedure by which 'cause' was to be determined."[138] Thus, he concluded, one would have to disregard the plain intent of Congress to say that the plaintiff had the substantive right not to be removed without regard to the procedural limitations which Congress attached to that right. Citing *McElroy* for the proposition that in the absence of statutory limitation the governmental employer has "virtually uncontrolled latitude in decisions as to hiring and firing," Justice Rehnquist concluded that "where a grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of . . . [the plaintiff] must take the bitter with the sweet."[139]

Although concurring in the Court's decision on this point, Justices

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136. The Act provides, in part, that a federal civil service employee may be removed or suspended without pay "for such cause as will promote the efficiency of the service." 5 U.S.C. § 7501(a) (1970).

137. 349 F. Supp. 863 (N.D. Ill. 1972).

138. 416 U.S. at 152.

139. *Id.* at 153-54.

Powell and Blackmun found Justice Rehnquist's approach incompatible with that taken in the *Sinderman* and *Roth* cases. In their view those cases stand for the propositions that the right of procedural due process "is conferred not by legislative grace but by constitutional guarantee," and that although the legislature "may elect not to confer a property interest in federal employment, it may not constitutionally authorize a deprivation of such an interest, once conferred, without appropriate procedural safeguards."[140] The vice of Justice Rehnquist's approach, the two concurring Justices declared, was that it "would lead directly to the conclusion that whatever the nature of the individual's statutorily-created property interest, deprivation of that interest could be accomplished without notice or a hearing at any time."[141] In the instant case, however, they concluded that a weighing of the government's interest in the expeditious removal of an unsatisfactory employee against the employee's interest in an evidentiary hearing prior to removal left the balance in the government's favor. Justice White's separate concurring opinion was substantially to the same effect.

Justice Marshall's dissenting opinion, in which Justices Douglas and Brennan joined, relied especially upon analogies to cases in which the Court had previously denied, on due process grounds, the power of government to take various actions without prior notice and a hearing.[142]

Considered together, the *Kennedy*, *Sinderman*, and *Roth* cases serve to highlight some interesting differences between employment in the public and the private sectors. The individual contract of employment, which has become little more than a jurisprudential abstraction in most areas of private employment, is apparently alive and well in the public sector. Moreover, the concept of a job as a property interest, of which an employee can be deprived only by procedural due process, assumes constitutional proportions in the government service, whereas in the private sector it has traditionally been regarded as simply a matter of con-

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140. *Id.* at 167.

141. *Id.* at 166-67.

142. *Morrissey* v. *Brewer*, 408 U.S. 471 (1972) (revocation of parole without a hearing); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (summary seizure of goods upon an ex parte application and the filing of a security bond without prior notice or hearing); *but see Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600 (1974); *Bell* v. *Burson*, 402 U.S. 535 (1971) (suspension of vehicle registration and driver's license of uninsured motorist unless he posts security to cover amount of damages claimed by aggrieved parties, while excluding any consideration of fault in presuspension administrative hearing); *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of public assistance payments without affording prior evidentiary hearing); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (garnishment of wages without prior notice and opportunity to present defense).

tract interpretation when the employment is covered by a collective agreement, and has existed not at all in the absence of such an agreement. Finally, in *Kennedy* the plaintiff was permitted to file his suit without first exhausting his administrative remedies, a course specifically prohibited by the Supreme Court in the private sector, except in special circumstances not involved in *Kennedy*.[143]

The possible implications of these cases for the private sector are considerable. If the Supreme Court should grant certiorari in *Holodnak* and affirm the decision of the court of appeals, many enterprises formerly considered to be private will be held to be in "a position of interdependence" with the federal or state governments, and their employees will be able to assert constitutional rights which are independent of rights created by statute or by collective agreement. In such an event new issues would arise in respect of the existence of "property interests" in a job. Granted that the standard seniority clause does not create a vested right in a particular job,[144] does it give rise to a "reasonable expectancy" on the part of long-service employees of continued employment sufficient to constitute a "property interest"? In an unorganized enterprise in which employees are rarely, if ever, terminated, will the courts be disposed to find the existence of a "common law" that employees in such an enterprise have the equivalent of "tenure"?[145] And when an employee claims violation of a constitutional right, will he or she be free to file an action in court, without first exhausting the grievance and arbitration procedure provided in the collective agreement? These possibilities may seem farfetched; perhaps they are. The present Supreme Court is not likely to expand existing limits of individual constitutional rights. But the membership of courts changes, and meanwhile there is a slow but steady trend in most industrialized countries toward the development of a single body of labor law applicable to both the public and the private sectors. As we have already seen, the law in each area may influence the law in the other.

Exclusivity of Contract Grievance and Arbitration Procedures

In the private sector, as previously noted, the exclusive bargaining representative is in control of the processing of grievances. Except in

143. See *Vaca* v. *Sipes*, 386 U.S. 171, 185-87 (1967).
144. See Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532 (1962).
145. *Cf. Morvay* v. *Maghielse Tool & Die Co.*, 88 L.R.R.M. 3101 (W.D. Mich. 1974).

Title VII cases,[146] even if the grievance alleges conduct in violation of a statute which is within the jurisdiction of an administrative agency or of a court, the grievant must normally exhaust his contractual remedies before seeking relief elsewhere.[147]

The situation in the public sector has a different history. In the absence of collective bargaining, government employees have traditionally relied upon civil service laws and procedures for protection. With the advent of collective bargaining and the rapid adoption of the principle of exclusive representation in the public sector, however, has come the inevitable clash between civil service rules and collectively bargained grievance procedures. Several states have sought to resolve this conflict by statute. Thus, the Maine Employees Labor Relations Act provides in part:

> An agreement between a bargaining agent and the public employer may provide for binding arbitration as the final step of a grievance procedure, provided that any such grievance procedure shall be exclusive and shall supersede any otherwise applicable grievance procedure provided by law. . . .[148]

Similarly, in New York, the legislature amended the statutory provisions of the civil service law applicable to the discipline or discharge of tenured employees[149] by permitting their supplementation, modification, or replacement by alternative provisions embodied in collective agreements.[150] Pursuant to this authorization, the state and the Civil Service Employees Association entered into four agreements substituting the grievance and arbitration provisions of each agreement for the statutory scheme. The constitutionality of the amended civil service law was challenged in *Antinore v. State*.[151] The plaintiff in that case was a tenured employee who had been suspended without pay pending removal proceedings based on charges of misconduct. Instead of resorting to the contractual grievance procedure, he brought an action in a state court for a declaratory judgment in respect of his statutory and constitutional rights within the framework of the contractual dismissal procedure. After

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146. See *Glover* v. *St. Louis-S.F.R.R.*, 393 U.S. 324 (1969); *King* v. *Georgia Power Co.*, 295 F. Supp. 943 (N.D. Ga. 1968).
147. *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965).
148. Me. Rev. Stat. Ann. tit. 26, § 979-K (1964).
149. N.Y. CIVIL SERVICE LAW §§ 75-76 (1973).
150. N.Y. CIVIL SERVICE LAW, § 76(4) (1973).
151. 79 Misc. 2d 8, 356 N.Y.S.2d 794 (Sup. Ct. 1974).

reviewing the contractual grievance and arbitration procedure and finding it deficient on a number of grounds,[152] the court concluded:

> (1) That the statute . . . has permitted the establishment of a constitutionally imperfect agreement. (2) That the agreement denies the employee due process. (3) That the agreement denies the employee equal protection of the laws. (4) That the employee has not waived his constitutional or statutory rights.[153]

Accordingly, the court awarded summary judgment to the plaintiff "to the extent that he may choose such procedures as he shall deem appropriate for the hearing, disposition and appeal, if any, of the charges brought against him, either in accordance with [the applicable] sections . . . of the Civil Service Law or, in accord with . . . [the grievance and arbitration provisions] of the employment agreement. . . ."[154]

The court's opinion was plainly erroneous in a number of respects and betrayed considerable ignorance of standard grievance arbitration practices and procedures. In respect of the equal protection issue, however, it raised an important point. The scope of judicial review of arbitration decisions in New York is far narrower than that for judicial review of administrative decisions. In the case of the latter, the reviewing court has the power to determine whether a decision was affected by an error of law, was arbitrary and capricious, was an abuse of discretion as to the penalty or discipline imposed, or was supported by substantial evidence.[155] The court reasoned that the collective agreement "isolated" the plaintiff from his "statutorial [sic] rights of judicial review enjoyed by State employees, and, effectively, denies him the equal protection of the laws."[156]

On appeal, the decision was reversed.[157] The appellate division expressed some doubt as to the constitutionality of the grievance and arbitration procedure established by the collective agreement, saying that it would be immune to challenge only if "the procedural safeguards con-

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152. The grounds were absence of a standard of proof to support a finding of guilt; absence of express right of employee to present witnesses in his own behalf; absence of a definitive statement that accused employee possessed right to confront and cross-examine adverse witnesses; failure of contractual procedure to require stenographic record of proceedings and to provide employee with free copy of transcript; and failure of contract to require arbitrator to state in writing basis of his decision. *Id.* at 12, 356 N.Y.S.2d at 799-800.
153. *Id.* at 21, 356 N.Y.S.2d at 808.
154. *Id.* at 21-22, 356 N.Y.S.2d at 808.
155. N.Y. Civ. Prac. Law § 7803(3)-(4) (McKinney 1963).
156. 79 Misc. 2d at 18, 356 N.Y.S.2d at 805.
157. *Antinore* v. *State*, 49 A.D.2d 6, 371 N.Y.S.2d 213 (1975).

tained in . . . [the statute] governing arbitration generally, i.e., . . . right to present evidence, cross-examine witnesses, determination to be made on evidence produced; right to be represented by counsel . . . and . . . award to be made in writing. . . ."[158] The court declared, however, that "due process requirements—and we think equal protection as well—are not relevant when they have been waived by the party seeking to assert them";[159] it found such a waiver in the instant case. It rejected the argument that "a waiver of the plaintiff's individual constitutional rights incidental to a procedure for removal from his employment contravenes any public policy such that the waiver should not be given effect,"[160] finding, instead, that the contractual arbitration procedures constituted an advancement of the public good, because they expedited the resolution of disciplinary disputes in a simpler and more expeditious manner than that provided by statute.

According to present law, the ruling of the appellate division on the waiver issue is probably correct; but the wisdom of the policy will continue to be debated. There is something to be said in favor of allowing employees to make a binding election, at least in discipline or dismissal cases, of an existing statutory procedure or the procedure provided in the collective agreement. In such cases civil service commissions or other agencies with similar responsibilities have generally shown much the same concerns for the grievant's substantive and procedural rights as have arbitrators. If the employee elects the statutory procedure, he or she cannot then rely upon the terms of the collective agreement; nor would decisions of the administrative agency be precedents binding upon an arbitrator. Such an arrangement would not constitute a serious threat to either the bargaining representative's status or to the integrity of the collective agreement. On the other hand, it would provide an extra protection for a vital interest of an employee who, for any number of reasons, might doubt the ability or willingness of the union to present the grievance effectively under the contract procedure. Whether such a system would work in the private sector is problematical; the subject is considered in greater detail in another chapter of this volume.

Judicial Review

Antinore also raises the issue of the appropriate scope of judicial review of dismissals in the public sector. Does the growing acceptance of

158. *Id.* at 4.
159. *Ibid.*
160. *Id.* at 6-7.

final and binding grievance arbitration for government employees mean that the law of the *Steelworkers Trilogy*[161] will be applied in the public sector? Clearly, it need not be; we are concerned here with state laws, not the federal law governing private arbitration. The question is, rather, whether the state courts, as a matter of sound policy, ought to follow the law of the *Trilogy*.

It is impossible within the compass of this chapter to review the practices and policies in respect of this matter among the states generally; it must suffice, therefore, to consider one additional aspect of the question. Until recently, the function of trial courts in California in reviewing decisions of local administrative agencies has been to determine whether there was substantial evidence to support the agency's findings in light of the whole record. In a relatively recent case, however, the California Supreme Court held that when an adjudicatory order or decision of an administrative agency of legislative or local origin "substantially affects a fundamental vested right, the trial court, in determining . . . whether there has been an abuse of discretion because the findings are not supported by the evidence, must exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the weight of the evidence."[162] In so doing the court reiterated its definition of "fundamental right," enunciated in an earlier case:[163] "In determining whether the right is fundamental the courts do not alone weigh the economic aspect of it, but the effect of it in human terms and the importance of it to the individual in the life situation."

Neither of these cases dealt with the rights of a government employee, but the enunciated principles were applied in *Valenzuela v. Board of Civil Service Comm'rs*,[164] a case involving the alleged forced resignation of an employee of the Los Angeles Department of Water and Power. The Board of Civil Service Commissioners found that the employee had not resigned under duress, and the superior court denied his petition for a peremptory writ of mandate to compel the board to vacate its decision. The district court of appeal reversed, holding that the trial court had erred in failing to exercise its independent judgment on the evidence to determine whether the board's findings were supported by the weight of the evidence. The court of appeal noted that under the city's charter, the employee had a legally cognizable vested right within the classified civil service, of which he could not be deprived except for cause and

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161. See text at note 8 *supra*.
162. *Strumsky* v. *San Diego County Employees Retirement Ass'n*, 11 Cal. 3d 28, 32, 520 P.2d 29, 31 (1974).
163. *Bixby* v. *Pierno*, 4 Cal. 3d 130, 144, 481 P.2d 242 (1971).
164. 40 Cal. App. 3d 557, 115 Cal. Rptr. 103 (1974).

after notice and a hearing; it concluded that such a right is fundamental in respect of its economic aspect, its effect in human terms, and its importance to the individual in the life situation.

It remains to be seen whether, in reviewing arbitration decisions in the public sector involving "fundamental vested rights," the California courts will adopt the policy applicable to the private sector or the more expansive role suggested by *Valenzuela*. The unanimous decision of the California Supreme Court in *Skelly v. State Personnel Board*,[165] however, strongly points in the latter direction. In that case a physician employed by the State Department of Health Care Services with the status of a permanent civil service employee was terminated on the grounds of intemperance, inexcusable absences, and other failures. His termination was upheld by the State Personnel Board, and his suit for a writ of mandate to compel the Board to set aside the dismissal eventually reached the state supreme court. Based upon its extensive analysis of the U.S. Supreme Court's decisions in *Roth*, *Sinderman*, *Kennedy*, and in a number of related cases, the California court held that the state's Civil Service Act violates federal and state constitutional due process provisions. The unanimous opinion read in part:

> It is clear that due process does not require the state to provide the employee with a full trial-type evidentiary hearing prior to the initial taking of punitive action. However, at least six justices of the high court [in *Kennedy*] agree that due process does mandate that the employee be accorded certain procedural rights before the discipline becomes effective. As a minimum, these preremoval safeguards must include notice of the proposed action, the reasons therefore, a copy of the charges and materials upon which the action is based, and the right to respond, either orally or in writing, to the authority initially imposing discipline.[166]

The court then turned to a consideration of the discipline imposed. Conceding that, generally, in a mandamus proceeding to review an administrative order it will not disturb the penalty imposed by the administrative body unless there has been an abuse of discretion, the court cited one of its earlier decisions to the effect that the administrative body "does not have absolute and unlimited power. It is bound to exercise legal discretion, which is, in the circumstances, judicial discretion."[167] The "overriding consideration" in cases of this sort, the court said, is the ex-

165. 15 Cal. 3d 194, 539 P.2d 774 (1975).
166. *Id.* at 215, 539 P.2d at 788-89.
167. *Harris* v. *Alcoholic Bev. Control Bd.*, 62 Cal. 2d 589, 594, 400 P.2d 745, 748 (1965).

tent to which the employer's conduct resulted in, or, if repeated, is likely to result in, harm to the public service. Other relevant factors identified by the court included the circumstances surrounding the misconduct and the likelihood of its recurrence. Applying these tests to the Board's findings, which it held were supported by sufficient evidence, the court concluded that "the Board clearly abused its discretion in subjecting petitioner to the most severe punitive action possible for his misconduct."[168]

The impact of the *Skelly* decision on lower California courts has been immediate. In a case involving the dismissal of a permanent career employee of the University of California "for cause," the court applied the *Skelly* standards, but added the gloss that "it is not enough that, by coincidence, due process standards were met; the procedures under which petitioner was dismissed must *insure* due process."[169] Because the University's procedures, which met the *Skelly* standards in other respects, did not specifically provide that the employee be given, prior to dismissal, a copy of the charges and materials upon which the action was based, the dismissal was set aside and the employee was ordered reinstated with back pay.

These precedents thus seem to approach the degree of judicial intervention suggested in the trial court's decision in *Antinore,* namely, that courts should review the arbitrator's award to determine whether it was affected by an error of law, was arbitrary or capricious, was an abuse of discretion as to the penalty or discipline imposed, or was supported by substantial evidence.[170] That they involved administrative rulings rather than arbitration awards does not seem significant.

For a variety of reasons, I think it likely that judicial review of grievance arbitration decisions in the public sector will for the foreseeable future be broader in scope than that prevailing in the private sector, especially in cases involving discipline or discharge. Although federal and state judges have generally adhered to the doctrines of the *Steelworkers Trilogy* in private arbitration cases, many of them have strenuously objected to affirming arbitration awards which they regarded to be ill-considered or plainly wrong on the law or the facts.[171] A much larger number of state court judges undoubtedly harbor the same sentiments regarding public-sector cases. Moreover, state court judges, as a group,

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168. 15 Cal. 3d at 219, 539 P.2d at 792.
169. *Hanson* v. *Regents of the University of California,* No. 32428, Super Ct., Yolo Co., Oct. 17, 1975 (unpublished). (Emphasis in the original.)
170. 79 Misc. 2d at 17, 356 N.Y.S.2d at 805.
171. The most articulate judicial antagonist of the restriction on judicial review of arbitration awards is Judge Paul R. Hays of the Court of Appeals for the Second Circuit. See his LABOR ARBITRATION: A DISSENTING VIEW (1966).

are relatively unfamiliar with our industrial relations system and with the practice of grievance arbitration; they are suspicious of arbitrators, if not openly hostile toward them. It follows that they will remain alert to the possibility of preventing the arbitration of some issues and of vacating arbitration awards dealing with others.

Particularly in respect of issues of arbitrability in public-sector cases, state court judges are likely to disregard the standards laid down in *Warrior & Gulf* and *American Manufacturing*. Challenges to arbitrability will be based on claims of management prerogative—founded on past practice, the language in the collective agreement, or both—as well as on the doctrine of sovereignty, which dies hard. They will also be backed by the unproven but still compelling arguments that the administration of public programs, paid for out of taxes, is too important to be left to "outsiders," and that arbitration provisions in collective agreements should be construed, whenever possible, to limit the jurisdiction of arbitrators; so that the power of decision will remain with those persons who, by law, have the responsibility for carrying out the functions of the agency involved. That the "mission" of an agency must be interpreted and carried out solely by the management of that agency is an article of faith among government managers that will be abandoned only slowly and with great reluctance. The courts can be expected to show sympathy for that attitude and to construe collective agreements strictly in determining whether an issue is arbitrable; they will probably not follow the principle that if an issue is arguably arbitrable, it must be submitted to arbitration, and that all doubts must be resolved in favor of arbitrability.

Of course, one must be wary of generalizations. The courts of New York, for example, have indicated a willingness to apply to public arbitration cases the same rules they have followed in respect of private arbitration cases,[172] but those decisions probably do not reflect a national pattern.

When it comes to enforcing public-sector arbitration awards, we may expect to see state courts showing a much greater concern than is permitted in the private sector for the actual or probable consequences of "bad" awards alleged by those who challenge them. Even in the private sector, some arbitration awards have produced a "shock reaction" in the courts which sometimes has led them to ignore the teachings of *Enter-*

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172. *E.g., Town of Babylon* v. *Local 237, International Brotherhood of Teamsters,* 79 L.R.R.M., 2892 (N.Y. Sup. Ct. 1971); *Board of Higher Educ. of the City of New York* v. *United Fed'n of College Teachers,* 4 PERB 8230 (N.Y. Sup. Ct. 1971).

prise Wheel & Car.[173] Such a judicial reaction is likely to result even more frequently in the case of public-sector arbitration, when the consequences of an award may be perceived as much more far-reaching than those of a private award. Similarly, the courts will probably be receptive to the argument that an award is "contrary to public policy," especially when it overrules a claim of management prerogatives and opens up a significant new area for shared decision-making.

Assuming that some or all of the foregoing predictions turn out to be correct, the question arises whether developments in the public sector will have any influence on present law and practice in the private sector. The likelihood seems remote, considering how firmly the doctrines of the *Steelworkers Trilogy* are now imbedded in the law, and also how much more frequently grievance arbitration is resorted to in the private than in the public sector. But that ratio may well change in the long run; the number of employees in government service continues to grow, relative to the size of the private work force, collective bargaining in the public sector continues to spread, and there will almost certainly be more frequent resort to grievance arbitration. One cannot predict with assurance, therefore, that the law and practice in public-sector arbitration will never affect the private sector, or that it will not have a substantial impact upon basic concepts of labor arbitration.

Conclusion

In his book, *Droit Social,* published in 1968, Professor Gerard Lyon-Caen declared:

> The Accords de Grenelle [following the "events" of 1968] for the first time rightly joined together in the same document relating to civil servants *[fonctionnaires],* employees in the public sector and employees in the private sector. Should we not draw from this fact certain conclusions as to the unity of Labor Law? . . . Why not decide that the whole of Labor Law is applicable to the public sector?[174]

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173. *E.g., Torrington Co.* v. *Metal Prods. Workers,* 362 F.2d 677 (2d Cir. 1966); *H.K. Porter Co.* v. *United Saw, File & Steel Prods. Workers,* 217 F. Supp. 161 (E.D. Pa. 1963), *aff'd in part, rev'd in part, and remanded with instructions,* 333 F.2d 596 (3d Cir. 1964); see Aaron, *Judicial Intervention in Labor Arbitration,* 20 STAN. L. REV. 41, 46-51 (1967).

174. DROIT SOCIAL 447 (1968), quoted in K.W. Wedderburn, *Industrial Action, the State and the Public Interest,* in INDUSTRIAL CONFLICT: A COMPARATIVE LEGAL SURVEY 375 (B. Aaron & K.W. Wedderburn, eds. 1972).

The question was directed primarily to the laws governing industrial action in "interest disputes," or what in this country are disputes over the terms of new agreements, rather than to laws governing disputes over rights, i.e., grievances. Nevertheless, the question is a pertinent one even in respect of the latter type of dispute, especially in Britain, which has never singled out civil servants or public officials for special treatment in strike law,[175] and which has developed procedures in the civil service, local authorities, and commercial public corporations for resolving disputes over such matters as dismissals that resemble those in the private sector.[176] The question is also pertinent, but to a much lesser extent, to the situation in the United States. What we have seen is the beginning of the use of grievance and arbitration procedures in the public sector in this country which had its origins, certainly, in the private sector, but which may well develop distinct variations in some respects, reflecting the unique features of public employment. Is it likely or desirable that all remaining distinctions between the private and public sectors will disappear, and that a single, uniform body of law governing the settlement of grievances should cover both?

As previously indicated, I think it unlikely that such a result will come about in the near future; and whether such an eventuality would be desirable depends, of course, on the nature of the applicable law. An appropriate analogy is provided by the separate but increasingly interrelated laws governing old-age and survivors insurance under the Social Security Act and those governing private pension plans. Throughout the respective periods of development of these two systems, there have been some who argued strongly that all attention should be focused on improving the Social Security Act, while others contended that providing for old-age pensions should be left entirely to the private sector. It seems to me that both factions were wrong, and that developments in each sector redounded to the benefit of both. Similarly, if separate lines of development continue in grievance arbitration in the private and public sectors, we may expect that if a single body of law governing both eventually emerges, it will be a better one because of the earlier period of divergence, when the several states were still experimenting with laws tailored to suit the perceived needs of the general public as well as those of public employees.

As already mentioned, perhaps the most significant impact of public laws relating to the settlement of grievances is in the area of discipline and dismissal, into which the issue of constitutional rights, as opposed

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175. K.W. Wedderburn, *supra* note 174, at 375.
176. K.W. Wedderburn & P.L. Davies, EMPLOYMENT GRIEVANCES AND DISPUTES PROCEDURES IN BRITAIN 145 (1969).

to those granted by statute or by private agreement, has now been injected. Depending upon whether and to what extent the *Holodnak* decision is followed, established precedents in the private sector may have to be re-examined and in some instances abandoned. An increasing number of private employers have entered into contracts with the government, and if such relations are considered close enough to constitute "state action" by the governmental body, constitutional rights will be available to the employees against both the employer and the union. Perhaps this will lead, at long last, to a federal law against unjust dismissals applicable to unorganized employees, whether in the public or the private sector.

A sure consequence of the extension of constitutional rights to private employment, if such an extension occurs on a broad scale, will be the further professionalization of arbitrators. The nature of questions presently raised in arbitration, often involving as they do related questions arising under the NLRA, the LMRA, Title VII of the CRA, and other federal laws, makes it increasingly necessary for arbitrators to be well-informed about those matters. Problems involving constitutional rights impose even greater responsibilities on the arbitrator. If a union representative fails to invoke the employee's right of free speech or assembly during the hearing, must the arbitrator do so? Will the constitutional issue always be obvious to the arbitrator if not to the parties? Whatever the answers to these and other similar questions may be, it is obvious that arbitrators must be familiar enough with the constantly developing law of constitutional rights to recognize and to handle such issues when they arise.[177]

Finally, assuming again the application of constitutional rights to private employment, it seems inevitable that present standards of judicial review in the private sector will have to be relaxed. The courts in *Holodnak* found, among other things, that the arbitrator had been biased. But suppose he had not been and that his decision had not only answered the question submitted but had been based squarely on his interpretation of the collective agreement? Presumably, his award would have met the tests laid down by the Supreme Court in *Enterprise Wheel & Car*,[178] and would not have been reviewable on the merits. It is incon-

177. It is even conceivable that the weight and importance of these responsibilities may result in labor arbitration becoming a licensed profession.

178. *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960): ". . . [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the *arbitrator's words manifest an in-*

ceivable, however, that a court would apply that rule when the consequence was the denial to an employee of his constitutional rights.

Should the courts begin vacating or modifying arbitrators' awards for errors of law, the situation would more nearly resemble that which exists in Canada, where the courts reserve the right to intervene in the arbitration process to correct errors in respect of "collateral questions of law," that is, errors in law not directly related to the specific issue referred to arbitration.[179] Under this doctrine Canadian courts have tended to construe as collateral most issues which, in the United States, would unquestionably be considered to be at least arguably within the scope of the submission, and thus solely for the arbitrator to decide. Moreover, they have held not only that interpretations of the very collective agreements under which the grievances arose constitute collateral issues of law,[180] but also that imposition of an incorrect burden of proof,[181] refusal to admit relevant evidence,[182] erroneous application of the doctrine of collateral estoppel,[183] failure to apply the common-law rules of wrongful dismissal,[184] improper application of procedural provisions of a collective agreement,[185] and unwarranted exclusion of evidence[186] constituted collateral errors of law, subject to judicial review and relief.

I do not suggest that American courts are likely to intrude into the arbitration process to the extent that their Canadian counterparts have done; but it seems apparent that once the scope of judicial review is widened to include errors of law, or merely questions of constitutional

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fidelity to this obligation, courts have no choice but to refuse enforcement of the award." (Underscoring added.)

179. Adams, *Grievance Arbitration and Judicial Review in North America*, 9 OSGOODE HALL L.J. 443, 493 (1971).

180. *Alberta Wheat Pool* and *Local 333, United Brewery Workers*, 35 D.L.R.2d 433 (B.C.S.C. 1962); *Columbia Packing Co.* and *Amalgamated Meat Cutters*, 31 D.L.R.2d 102 (B.C.S.C. 1961); *Shipping Fed'n of British Columbia* and *International Longshorers & Warehousemen's Union*, 60 CCH CANADIAN LABOR LAW CASES (hereinafter C.L.L.C.) ¶ 15,277 (B.C.S.C. 1960).

181. *Peter's Ice Cream Co. and Milk Sales Drivers*, 34 W.W.R. 525 (B.C.S.C. 1961); *S & K Ltd.* and *International Woodworkers*, 36 W.W.R. 235 (B.C.S.C. 1961), *aff'd*, 31 D.L.R.2d 463 (B.C.C.A. 1961).

182. *International Union of Operating Eng'rs* and *Ginter Constr. Co.*, 65 C.L.L.C. ¶ 14,066 (B.C.S.C. 1965).

183. *Ginter Constr. Co.* and *International Union of Operating Eng'rs*, 62 D.L.R.2d 485 (B.C.S.C. 1967).

184. *Canadian Gypsum Co.* and *Nova Scotia Quarryworkers*, 20 D.L.R.2d 319, 331 (N.S.S.C. 1959) (dictum).

185. *Prince Rupert Fishermen's Co-op Ass'n* and *United Fishermen*, 66 W.W.R. 43 (B.C.S.C. 1967).

186. *Super-Valu Stores (B.C.) Ltd.* and *Retail Food & Drug Clerks*, 32 W.W.R. 390 (B.C.S.C. 1960).

rights, there will be strong pressures and a natural tendency to widen it still further. Whether this would be a good or a bad development is, of course, a question on which opinions will differ. One does not necessarily have to agree with Judge Hays' generalized denunciation of arbitrators,[187] however, in order to conclude that the present law of judicial review in private arbitration may not represent the best of all possible reconciliations of the respective roles of arbitrators and the courts in the arbitration process.

To some, the picture I have sketched of a possible, if somewhat unlikely and distant, future represents a glimpse of a brave new world; to others it has a nightmarish quality. Judgments of that nature are best reserved until after the events, which may not, after all, ever occur. Should they come to pass, however, there can be no doubt that the structure and character of labor-management relations in this country will be profoundly changed. The role of government and of the courts will be enormously enhanced; individual employee rights will receive much broader protection; the authority of unions as the collective bargaining representatives of employees will be substantially diminished; and our system of collective bargaining based largely on private, consensual arrangements will be supplanted by one more nearly resembling the pattern in Western European countries, in which basic, nonwaivable conditions of employment are set by government and the unions and employers are oriented more toward promoting broad political and social programs than toward reaching decisions on "bread and butter" issues at the plant, enterprise, or industry level.

187. HAYS, *supra* note 171, at 111-13.

SECTIONS OF THE CALIFORNIA EDUCATION CODE

Education Code 13583.5

13583.5 A notice of disciplinary action shall contain a statement in ordinary and concise language of the specific acts and omissions upon which the disciplinary action is based, a statement of the cause for the action taken and, if it is claimed that an employee has violated a rule or regulation of the public school employer, such rule or regulation shall be set forth in said notice.

A notice of disciplinary action stating one or more causes or grounds for disciplinary action established by any rule, regulation, or statute in the language of the rule, regulation, or statute, is insufficient for any purpose.

A proceeding may be brought by, or on behalf of, the employee to restrain any further proceedings under any notice of disciplinary action violative of this provision.

This section shall apply to proceedings conducted under the provisions of Article 5 (commencing with Section 13701) of this chapter.

Education Code 13586

13586. No person shall be employed or retained in employment by a school district who has been convicted of any sex offense as defined in Section 12912 or narcotics offense as defined in Section 12912.5. If, however, any such conviction is reversed and the person is acquitted of the offense in a new trial or the charges against him are dismissed, this section does not prohibit his employment thereafter.

Nothing in this section shall prohibit the employment by a school district of a person convicted of a narcotics offense involving the use or possession of marijuana if the governing board of the school district determines, from the evidence presented, that the person has been rehabilitated for at least five years.

The governing board shall determine the type and manner of presentation of the evidence, and the determination of the governing board as to whether or not the person has been rehabilitated is final.

Education Code 13587

13587. No person shall be employed or retained in employment by a school district who has been determined to be a sexual psychopath under the provisions of Article I (commencing with Section 5500), Chapter 1, Part 1.5, Division 6 of the Welfare and Institutions Code or under similar provisions of law of any other state. If, however, such determination is reversed and the person is determined not to be a sexual psychopath in a new proceeding or the proceeding to determine whether he is a sexual psychopath is dismissed, this section does not prohibit his employment thereafter.

Education Code 13741

13741. In addition to any causes for suspension or dismissal which are designated by rule of the commission, employees in the classified service shall be suspended and dismissed in the manner provided by law for any one or more of the following causes:

(a) Knowing membership by the employee in the Communist Party.

(b) Violation of any provision in Sections 12952 to 12957, inclusive, of this code.

(c) Conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947.

Education Code 13742

13742. For reasonable causes an employee may be suspended without pay for not more than 30 days except as provided in this section or may be demoted or dismissed. In such case personnel director shall within 10 days of the suspension, demotion, or dismissal file written charges with the commission and give to the employee or deposit in the United States registered mail with postage prepaid, addressed to the employee at his last known place of address, a copy of the charges.

Whenever an employee of a school district is charged with the commission of any sex offense as defined in Section 12912 or any narcotics offense as defined in Section 12912.5, or a violation of subdivision 1 of Section 261 of the Penal Code Sections 11357 to 11361, inclusive, 11363, 11364, or 11377 to 11382, inclusive, insofar as such sections relate to any controlled substances in paragraph (4) or (5) of subdivision (b) of Section 11056, or any controlled substances in subdivision (d) of Section 11054, except paragraphs (10), (11), (12), and (17) of such subdivision, of the Health and Safety Code by complaint, information or indictment filed in a court of competent jurisdiction, the governing board of the school district may immediately suspend the employee for a period of time extending for not more than 10 days after the date of the entry of the court judgment; provided, that the suspension may be extended beyond such 10-day period in case the governing board gives notice within such 10-day period that it will dismiss the employee 30 days after the service of the notice, unless he demands a hearing. An employee so suspended shall continue to be paid his regular salary during the period of the suspension if and during such time as he furnishes to the school district a suitable bond, or other security acceptable to the governing board, as a guarantee that the employee will repay to the school district the amount of salary so paid to him during the period of the suspension in case the employee is convicted of such charges, or he does not return to service after such period of suspension. If the judgment determines that the employee is not guilty of such charges, or if the complaint, information or indictment is dismissed, the school district shall reimburse the employee for the cost of the bond; or, if the employee has not elected to furnish such bond, the school district shall pay to the employee his full compensation during the period of the suspension; provided, he returns to service after such period of suspension.

Education Code 13743

13743. Any employee in the permanent classified service who has been suspended, demoted, or dismissed may appeal to the commission within 14 days after receipt of a copy of the written charges by filing a written answer to the charges. Such an appeal is not available to an employee who is not in the permanent classified service except as provided by rules of the commission. An employee in the permanent classified service who has not served the time designated by the commission as probationary for the class may be demoted to the class from which promoted without recourse to an appeal or hearing by the commission, except as otherwise provided by rules of the commission and provided that such demotion does not result in the separation of the employee from the permanent classified service. Nothing in this section shall operate to alter the protections guaranteed under Section 13747 of this code.

Education Code 13744

13744. The commission shall investigate the matter on appeal and may require further evidence from either party, and may, upon request of an accused employee, shall order a hearing. The accused employee shall have the rights to appear in person or with counsel and to be heard in his own defense. The decision shall not be subject to review by the governing board.

Education Code 13745

13745. If the commission sustains the employee, it may order paid all or part of his full compensation from the time of suspension, demotion, or dismissal, and it shall order his reinstatement upon such terms and conditions as it may determine appropriate. The commission may modify the disciplinary action, but may not make the action more stringent than that approved by the board. In addition, the commission may direct such other action as it may find necessary to effect a just settlement of the appeal, including, but not limited to, compensation for all or part of the legitimate expenses incurred in pursuit of the appeal, seniority credit for off-duty time pending reinstatement, transfer or change of location of the employee, and expunction from the employee's personnel record of disciplinary actions, cause, and charges which were not sustained by the commission. Upon receipt of the commission's written decision the board shall forthwith comply with the provisions thereof. When the board has fully complied with the commission's decision it shall so notify the commission in writing.

Education Code 13749

13749. The commission may conduct hearings, subpoena witnesses, require the production of records of information pertinent to investigation, and may administer oaths. It may, at will, inspect any records of the governing board that may be necessary to satisfy itself that the procedures prescribed by the commission have been complied with. Hearings may be held by the commission on any subject to which its authority may extend as described in this article (commencing at Section 13701).

Education Code 13750

13750. The commission may authorize a hearing officer or other representative to conduct any hearing or investigation which the commission itself is authorized by this article (commencing at Section 13701) to

conduct. Any such authorized person conducting such hearing or investigation may administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses to be taken in the manner prescribed by law for like depositions in civil cases in the superior court of this State. The commission may instruct such authorized representative to present findings or recommendations. The commission may accept, reject or amend any of the findings or recommendations of the said authorized representative. Any rejection or amendment of findings or recommendations shall be based either on a review of the transcript of the hearing or investigation or upon the results of such supplementary hearing or investigati as the commission may order.

The commission may employ by contract or as professional experts or otherwise any such hearing officers or other representatives and may adopt and amend such rules and procedures as may be necessary to effectuate this section.

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TAB C

APPEALS AND JUST CAUSE

Should an agency find it necessary to discipline an employee, the employee may invoke his rights of appeal. Knowledge of employees' rights and of the grounds on which the management's actions may be overturned in proceedings pursuant to these rights should guide public management in its formulation and application of disciplinary measures.

EMPLOYEE JOB PROTECTIONS

In addition to rights such as the previously discussed due process and representation rights, public employees are usually further protected in their job rights by civil service or education codes and, increasingly, by negotiated contracts or Memoranda of Understanding (MOUs). The codes usually specify that the public employer may not take disciplinary action against a public employee without just cause. The employees generally covered by such provisions are those who already have served their probationary periods and are considered "permanent employees."

The provisions for just cause protection may specifically define which personnel actions are covered. Civil service rules or contracts may specify that "adverse actions," suspension, demotion or discharge may be effected only for just cause. They may also specify that employees so disciplined may appeal to a civil service type board, and/or through a negotiated grievance procedure culminating in arbitration.

In other instances personnel actions requiring just cause are not defined. When an appeal procedure is used, the civil service board or arbitrator may make the determination of whether the personnel action in question was disciplinary in nature, whether it required just cause and if indeed just cause did exist for the action. Where provisions are vague, management is best advised to implement any personnel action which could negatively impact on the employee as carefully as in the more obvious cases. The phrase "just cause" may be vaguely defined, if defined at all, in pertinent MOU provisions. Few California contracts deal with discipline since this area is usually under the sole authority of civil service commissions.

Many agencies are provided with some definitions of just cause for disciplinary actions by civil service rules or written agency policies and procedures communicated in handbooks or guides. Included in the appendix of this section is Los Angeles County's Civil Service Manual, which specifies the grounds for discharge and defines the rights of employees to appeal such an action. The manual attempts to further define just cause in terms of decisions handed down by the court in reviewing appeals cases.

APPEALS PROCEDURES

In the many public agencies having a civil service commission, personnel board, or board of education, the rules usually provide that "adverse actions," suspension, demotion, or discharge may be appealed to the commission or board. After notification there is usually a time limit in which the employee may file an appeal.

The full commission, a member of the commission, or a hearing officer appointed by the commission will hear the case. The hearing is similar to but usually less formal than a court hearing. The employee may represent himself or be represented by an employee organization or attorney. The agency may be represented by the administrator involved, a personnel specialist, or an attorney.

The hearing, like a court hearing, will consist of the two sides presenting evidence, introducing, examining and cross-examining witnesses.

The hearing officer or board will make a decision based on the facts presented. A hearing officer's recommendation is formally returned to the commission for final action. The decision of the commissioner is binding on the agency. The commission may uphold, modify or overturn the agency decision. On occasion, the commission's decision is appealed to the courts.

Increasingly MOUs in the public sector are including provisions concerning discipline. The MOU may outline a grievance procedure to be followed. Where the grievance is not resolved in the lower steps of the process, the MOU might provide for an impartial arbitrator or arbitration panel to decide cases concerning serious discipline measures. The decision will be final and binding where binding arbitration is lawful and has been negotiated.

The formality of the arbitration hearing will depend on the wishes of the parties as will the scope of the arbitrator's decision. The hearing usually follows the basic format of a judicial hearing, including the presentation of the evidence, the examination and cross-examination of witnesses. Depending on the authority the parties give to the arbitrator, he may uphold, modify or overturn management's action. Table 1, shows the reasons arbitrators give for reversing management.

TABLE 1. REASONS GIVEN BY ARBITRATORS FOR REVERSING MANAGEMENT

Reason	Number of cases	Example [1]
The evidence supported the charge, but there were mitigating circumstances.	77	The grievant was discharged for striking another employee with his fist. The arbitrator reinstated him without back pay on the basis of evidence that the grievant had been provoked by a racial slur.
Evidence did not support the charge of wrongdoing	52	An employee was discharged for stealing a tool. The evidence showed that he was 1 of 3 who had access to it, but it did not prove conclusively that the grievant, and no other individual, committed the theft.
Inconsistent enforcement of rules	38	The evidence convinced the arbitrator that the company had often overlooked violation o[illegible]e which is now being enforced by discipline.
The rule itself was reasonable, but its application in this case was not.	30	The rule required employees to work overtime when requested. The grievant refused because of family business which the arbitrator believed was really urgent. In other words, the company should have accepted his excuse.
The grievant did not know he was risking a penalty by his action	28	In an argument over a work assignment, the foreman told the grievant to "do the work or go home." The arbitrator was convinced that, in walking out, the grievant believed he was merely accepting an option offered him and that no further discipline would follow.
Management was partly at fault in the incident	27	The grievant used intemperate language in an argument with a foreman, but the foreman had permitted the argument to go on, and had himself used disrespectful language in addressing the grievant.
The penalty was excessive in terms of the company's discipline policy.	25	Although the company normally warned an employee the first time he punched his time clock before the bell sounded, a particular employee was suspended for a day for that offense, without first having been warned.
The grievant was punished under the wrong rule or schedule of penalties.	20	The grievant was discharged for "dishonesty," in that he filed a false entry of piece work performed. The arbitrator said that, at most, he could have been punished under a rule forbidding half-finished work to be reported for pay purposes.
Employees involved in the same incident were dealt with differently without a satisfactory explanation of the difference.	18	Three employees failed to return from lunch. One was a skilled worker, whose presence was urgently needed, but the others could be spared. The company suspended the first for 2 days, and merely warned the others. The arbitrator did not agree that degrees of fault could be related to the employer's need of production.
Punishment was for a reason the arbitrator thought was beyond management's authority to discipline.	14	An employee was discharged following his arrest and conviction for drunken brawling. The arbitrator believed that as this was an off-the-job offense and not work-connected, and as it did not cause loss of time from work, management had no right to discipline him.
Management committed procedural errors prejudicing the grievant's rights.	13	Although the union contract said a discharged employee must be given a statement of the charge against him, the grievant was given no such statement until 10 days after the discharge. The notice was 7 days late.
The penalty seemed excessive in terms of customary penalties in industry.	11	A 1-month suspension was given an employee for the first offense of using abusive language toward a supervisor. The arbitrator thought this too harsh, and reduced the suspension to 1 week. As the company had no established policy in this respect, the arbitrator's criterion was the standards in industry generally.
Union stewards or officers were disciplined for actions in connection with their official union business.	9	A steward violated his foreman's instructions to remain at his place of work, and later convinced the arbitrator that the order was unlawful and that he was urgently needed elsewhere to prevent an illegal walkout.
Retroactive application of new rule, or insufficient publicity about a rule.	9	A driver was fired for picking up a hitchhiker. The evidence showed that there were no signs up in the garage or the cab of the truck warning drivers not to take riders. The grievant said he was not aware of the rule, and the arbitrator believed him.
General standards of judicial process were violated	7	The grievant was first suspended for 3 days. But on the 2d day, management reviewed the record and decided to discharge him. This was held to be "double jeopardy"—two punishments for one offense.
The grievant was substantially guilty, but the arbitrator thought he was entitled to another chance because of special circumstances.	4	The grievant had long and satisfactory service, and was within a year or two of having a vested pension plan. The arbitrator believed he had "learned his lesson."
The rule which the grievant had violated was inherently unreasonable.	4	Discharge of an employee under a rule stating that a man and wife may not be employed on the same shift. The arbitrator believed there was no valid reason for that rule.
The evidence of wrongdoing was held inadmissible by the arbitrator.	3	Some of the evidence produced at the arbitration hearing was not known to the company at the time of the discharge. Without this evidence, the grievant was perhaps deserving of some discipline, but not discharge. The arbitrator said the case had to be judged on the basis of facts known to the company at the time of discharge.
The company had shown personal bias or discrimination against the grievant.	2	A searching investigation of the grievant's employment application was undertaken, although no such inquiry was made with respect to any other employee. He was subsequently discharged for falsification of his application.

[1] The example is representative of the group. No implication is intended that the cases so classified resembled the example in detail.

SOURCE: 391 cases reported in American Arbitration Association's "Summary of Labor Arbitration Awards," April 1959 through June 1969.

CRITERIA USED IN DECIDING DISCIPLINE JUST CAUSE CASES

A body of case law has developed from both court decisions in public sector just cause appeals cases and the decisions of arbitrators in cases where a public employee has grieved a disciplinary action through a negotiated appeal procedure providing for arbitration. The results of civil service type hearings are generally not included in this case law because these cases are not published unless reviewed by the courts, and because cases are usually decided on a discrete basis without using the case law, or precedent,approach.

Studies of judicial and arbitral decisions in public sector discipline cases have shown that the courts and the arbitrators have used similar criteria and reasoning in making their determinations The reasoning and criteria used in public sector cases are similar to those developed for private sector hearings.

The degree of proof required to uphold a discipline action in a case appealed to an arbitrator appears to vary with the type of offense in question and/or the standards of the particular arbitrator. Often, in more serious cases such as discharge for stealing, arbitrators adhere to the level of proof required by the courts, namely, requiring the employer to prove beyond a reasonable doubt that the employee was disciplined for just cause. For lesser charges, many arbitrators will accept proof that is "clear and convincing."

The criteria used by arbitrators in determining just and sufficient cause for disciplining an employee are based on case law developed in past arbitration rulings. These criteria are posed as questions below. Should any of the questions be answered in the negative for a given case, an arbitrator would probably find that just cause for a disciplinary action did not exist.

Criteria Used By Arbitrators In Just Cause Appeals Cases*

1. Did the agency give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

   Note 1: The forewarning or foreknowledge may properly have been given orally by management or in writing through the medium of typed or printed sheets or books of rules and of penalties for violation thereof.

   Note 2: There must have been actual oral or written communication of the rules and penalties to the employee.

   Note 3: A finding of such communication does not in all cases require a "no" answer to Question No. 1. This is because certain offenses such as insubordination, coming to work intoxicated, drinking intoxicating beverages on the job, or theft of the property of the agency or of the fellow employees are so serious that any employee in the industrial society may properly be expected to know already that such conduct is offensive and heavily punishable.

   Note 4: If there is no contractual prohibition or restriction, the agency generally has the right unilaterally to promulgate reasonable rules and give reasonable orders; and these need not have been negotiated with the union.

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* Adapted from the criteria developed by arbitrator Carroll R. Daugherty.

2. Was the agency's rule or managerial order reasonably related to the orderly, efficient, and safe operation of the agency's business?

   Note: If an employee believes that the rule in question is unreasonable he must nevertheless obey it (in which case he may file a grievance afterwards) unless he sincerely feels that to obey the rule or order would seriously and immediately jeoparidze his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may be said to have justification for his disobedience.

3. Did the agency, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

   Note 1: This is the employee's "day in court" principle. An employee has the right to know with reasonable precision the offense with which he is being charged and to defend his behavior.

   Note 2: The agency's investigation must normally be made before its disciplinary decision is made. If the agency fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time there has usually been too much hardening of positions.

   Note 3: There may of course be circumstances under which management must react immediately to the employee's behavior. In such cases the normally proper action is to suspend the employee pending investigation, with the understanding that (a) the final disciplinary decision will be made after the investigation and (b) if the employee is found innocent after the investigation, he will be restored to his job with full pay for lost time.

   Note 4: The agency's investigation must include an inquiry into possible justification for alleged rule violation.

4. Was the agency's investigation conducted fairly and objectively?

   Note 1: At such an investigation the management official may be both "prosecutor" and "judge," but he should not also be a witness against the employee.

Note 2: It is essential for some higher, detached management official to assume and conscientiously perform the judicial role, giving the commonly accepted meaning to that term in his attitude and conduct.

Note 3: In some disputes between an employee and a management person there are no witnesses to an incident other than the two immediate participants. In such cases it is particularly important that the management "judge" question the management participatant rigorously and thoroughly, just as an actual third party would.

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Note 1: It is not required that the evidence be preponderant, conclusive or "beyond reasonable doubt." But the evidence must be truly substantial and not flimsy.

Note 2: The management judge should actively search out witnesses and evidence, not just passively take what participants or "volunteer" witnesses tell him.

6. Has the agency applied its rules, order, and penalties even-handedly and without discrimination to all employees?

Note 1: A "no" answer to this question requires a finding of discrimination and warrants negation or modification of the discipline imposed.

Note 2: If an agency has been lax in enforcing its rules and orders and decides henceforth to apply them rigorously, the agency may avoid a finding of discrimination by telling all employees beforehand of its intent to enforce hereafter all rules as written.

7. Was the degree of discipline administered by the agency in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the agency?

Note 1: A trivial proven offense does not merit harsh discipline unless the employee has properly been found guilty of the same or other offenses a number of times in the past. (There is no rule as to what number of previous offenses constitutes a "good", a "fair" or a "bad", record. Reasonable judgment thereon must be used.)

Note 2: An employee's record of previous offenses should not be used to discover whether he was guilty of the immediate or latest one. The only proper use of his record is to help determine the severity of discipline once he has properly been found guilty of the immediate offense.

Note 3: Given the same proven offense for two or more employees, their respective records provide the only proper basis for "discriminating" among them in the administration of discipline for said offense. Thus, if employee A's record is significantly better than those of employees B, C, and D, the agency may properly give A a lighter punishment than it gives the others for the same offense; and this does not constitute true discrimination.

The principles underlying these questions may be used as a guide for disciplinary policy. These principles may be briefly stated as:

. Discipline must be applied to employees in a manner that is fair and not discriminatory.

. The proof of misconduct must be adequate.

. The investigation must be fair.

. The rules applicable to employees must be made clear to those employees.

. The penalties for violation of rules must be clear.

. The penalty must fit the seriousness of the defense.

. Except for very serious cases, progressive discipline must be applied.

Adherence to these principles should aid management in acting in a fashion that appears to be not "discriminatory, arbitrary, or capricious" -- that is, acting in a manner which an arbitrator would consider reasonable.

Records of past arbitration decisions also provide the data for the building of the defense of the disciplined employee. Standard arguments used by employee organizations have been identified for rule and insubordination types of disciplinary appeals cases. These arguments further define the criteria used in evaluating the reasonableness of a disciplinary action.

Standard Defenses For Rule Violation Cases*

1. Was the rule applied uniformly to all persons covered? Sometimes rules are enforced more vigorously with women than men, with easily replaced unskilled workers as compared to skilled maintenance workers, when help is hard to get as opposed to during period of unemployment.
2. Should extenuating circumstances be taken into account? Even when the the union agrees the worker violated the rules, should his age, past record, years of service, family problems or other factors be considered in deciding on a lesser penalty?
3. Were workers notified of the rule establishment or change? Did the employer take pains to let covered workers know there was such a rule, and did they notify all persons covered as to the penalty which might be incurred if the rule was violated?
4. Was the rule clear and understandable? The employer is obliged to make the rule crystal clear, with as little vagueness as possible. Thus, if "extended absences" may meet with discipline, precisely how long is "extended" in days or hours?
5. Does the rule work an undue hardship on a portion of the workers covered? If the rule states that you get a ten-minute break for rest and coffee in the morning, is it possible for workers far removed from the rest room or coffee machine to enjoy the same advantages as those who work close to said conveniences?

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* This list was prepared by the School for Workers, University of Wisconsin.

6. Did the employer discuss or consult with the union prior to establishing or changing the rule? The union is entitled to notification possibly a bargaining role in changing of working conditions during the period of the agreement.

7. Was the rule enforced in the past? If the rule has been in effect for a long time but not enforced, the workers and union are entitled to formal notification that the rule will again be enforced before a disciplinary action can be made to stick, at least in the eyes of many arbitrators.

8. Was the penalty for violation too harsh? Should a worker be discharged for wearing long sideburns or violating an employer rule which only slightly harms the employer? Consider the harshness of the penalty in terms of the background of the employee and the nature of the offense.

9. Was the employee trapped in a rule violation? Sometimes employers will set up a tempting situation which is intended to make it very easy for a worker to violate a rule on theft, sleeping on the job, or other on-the-job misbehavior. If the union can prove entrapment, some arbitrators will put the worker back on the job.

10. Did the employer follow due process in disciplining the worker. Sometimes employers fire a worker for a first offense when the rules call for a warning letter of suspension, or they will fail to notify the union or employee of an upcoming suspension, although the contract or rules call for notification.

11. Did the employer provide sufficient proof of guilt? Sometimes proof of guilt is insufficient to show that the employee did indeed break the rules, and should be pointed out to the arbitrator.

12. Is there conflicting evidence of a rule violation? If there is a conflict between witnesses as to whether the worker was guilty, it should be pointed out to the employer or arbitrator.

13. Did the employer withhold evidence from the union? Sometimes a union will argue that the employer withheld evidence from the union (in effect did not bargain in good faith) in lower steps of the grievance procedure, and such evidence should be barred from consideration of the arbitrator. This is usually done by filing an immediate objection of the time of the hearing.

14. Can the rule be strictly followed? Sometimes the employer rule is so complex or impossible of attainment that some degree of disobedience is always likely.

15. Would the worker be harmed by obeying the rule? Sometimes following safety or work rules to the letter causes delays which adversely affect employee incentive earnings, while at the same time the employer refuses to adjust production standards to recognize the problems created by strict rules. Just as employers argue that their employees violation of rules harms or endangers their right to do business, the employees should argue similarly when their earnings or working conditions are adversely affected.

16. Does the rule violate laws, other rules, or the contract? If there is conflict, point it out to the employer and eventually to the arbitrator. This would include state laws which provide that an employer must provide a safe place of employment where a worker is disciplined for refusing to obey an order where his life or limb is endangered.

17. Does the rule serve a useful employer purpose? If the rule is frivolous in that violation does not harm the employer or workers, union may argue the rule is unnecessary.

Standard Defenses For Insubordination Disputes

1. Was the individual "singled out" for special punishment where more than one person was guilty of refusing to obey direct order?

2. Was the individual's refusal to follow a method or procedure motivated by knowledge or use of better method for performing the job or carrying out the order?

3. Was the individual's failure to follow instructions a willful act in defiance of or in rejection of authority?

4. Was refusal to follow order or instructions the result of belief that such refusal was an act protected by the contract? For example an employee might refuse to step into the supervisor's office alone where the contract states he is entitled to have a steward present while his work is discussed.

5. Were there mitigating or extenuating circumstances which indicate that rigid application of rules be modified in an individual case? For example, a refusal to perform a work assignment might be motivated by a recent strike situation, personal problems, or preoccupation with other duties, or the aggrieved worker's employment history may have been one unblemished by previous problems.

6. Was the situation in which the act of insubordination occurred an unusually tense situation which contributed to aggravating the relationship between worker and employee, and only partially within the control of the worker? An argument, a strike, or some other confrontation situation would be examples of circumstances surrounding an individual act of insubordination.

7. Would obedience to the order constitute an affront, indignity or invasion of personal privacy? Orders to disrobe, or an order to comply with an order which results in personal embarrassment before others would be examples.

8. Was individual in fact guilty of insubordination or refusal to obey an order? Can the employer prove guilt?

9. Did the penalty for insubordination go beyond previous penalties for the same offense? Should the penalty be a lesser one?

10. Was the employee provoked into disobedience of an order by another employee or supervisor? Was the order accompanied by personally provocative language intended to cause anger on the part of the employee?

Remember, in cases involving discipline or discharge, the burden of proving the worker's guilt lies with the employer. Unions do not accept arguments and allegations in place of actual proof.

In the appendix will be found two articles relating to the arbitration of discipline cases. "Arbitration of Insubordination Disputes in the Public Sector" examines arbitrators' treatment of similar private sector cases.

"Discharge Cases Reconsidered" reviews and analyzes recent decisions in discharge cases. The results of this study are compared to those of a similar study conducted twenty years ago.

APPENDIX TO TAB C

I. THE LOS ANGELES COUNTY CIVIL SERVICE MANUAL

II. ARBITRATION OF INSUBORDINATION DISPUTES IN THE PUBLIC SECTOR

III. DISCHARGE CASES RECONSIDERED

CIVIL SERVICE MANUAL

COUNTY OF LOS ANGELES

This Civil Service Manual was prepared by the Labor Relations Division of the Los Angeles County Counsel's Office as a reference tool to assist County departments in the sometimes complex task of disciplining County Employees.

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I. DISCHARGE - BASIC PRINCIPLES

A. Grounds for Discharge

Discharge means a separation from service for cause.

> Civil Service Commission Rule 2.15 (enacted pursuant to Article IX, Section 34(13), Charter of the County of Los Angeles).

The word "discharge" means to remove an employee either temporarily or permanently from employment with some corresponding affirmative action which indicates that the employee will no longer be bound by the employment contract.

> *In re Public Ledger*, 63 F.Supp. 1088 (1945). (See cases under "Letters of Discharge.")

Compulsory furlough for prescribed period of time is, in fact, a discharge.

> *Hilton v. Sullivan*, 334, U.S. 323, 68 S.Ct. 1020, 92 L.Ed. 1416 (1947).

Notice of discharge given to a permanent or probationary employee shall be in writing and state the specific grounds and particular facts upon which the discharge is based.

> Article IX, Section 34(13), Charter of the County of Los Angeles; Civil Service Commission Rules 19.02 and 19.07. (See discussion, *infra*, Section I(A)(1).)

No person in the classified service shall be removed or discriminated against because of race, color, national origin, political or religious opinions or affiliations.

> Article IX, Section 41, Charter of the County of Los Angeles; Civil Service Commission Rule 26.01.

A rating of "unsatisfactory" given in an evaluation of a permanent employee's performance efficiency must be accompanied by a discharge or reduction in those cases in which the employee is still in service.

> Civil Service Commission Rule 21.04 (enacted pursuant to Article IX, Section 34(15), Charter of the County of Los Angeles). (See discussion, *infra*, Section I(A) (2).)

Broadly delineated policies which if violated would give rise to discharge have been held not to be unconstitutionally vague unless the policies as applied abridge freedom of speech. See for example *Gee v. California State Personnel Board*, 5 Cal.App.3d 713 (85 Cal.Rptr. 762) (1970), wherein the Court held that Government Code Section 19572, subdivision (t), making it a ground for dismissal of a state employee to have, during or outside of duty hours, acted in a way that caused discredit to his agency or his employment, was held not to be unconstitutionally void for uncertainty. To the same effect see *Nightingale v. State Personnel Board*, 7 Cal.3d 507 (102 Cal. Rptr. 758, 498 Pac.2d 1006). (Cf. *California School Employee's Association*

v. Foothill Community College District, 52 Cal.App.3d 150 (1975) wherein a similar rule abridged free speech and was held unconstitutionally vague.)

Grounds for discharge are primarily a matter of factual circumstance and interpretation of case law:

(1) Fraud in Securing Appointment

Fraud means the misrepresentation of a material fact, either with intent or through negligence, by one who has knowledge of this falsity or should have had knowledge of this falsity which induces reliance thereupon, which results in detriment to the person misled because of justifiable reliance by the person who has been misled.

> Civil Service Commission Rule 2.21 (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles).

The Civil Service Commission does not have jurisdiction or power to discharge an employee who falsifies his arrest record on an employment application. Sole authority rests in the appointing power.

> 37 O.C.C. 805

(2) Inefficiency

The use of statistical data compiled by an agency to support a charge of inefficiency is allowed where the trier of fact is not asked to make a finding based on a mathematical theory of probability but merely to draw inferences from statistical facts derived from actual experience and observation.

Bodenschatz v. State Personnel Board 15 Cal. App.3d 775, 93 Cal.Rptr. 471 (1971).

A policy of discharge for inefficiency based on quantitative performance is not inherently unreasonable under all circumstances. An employee's claim that quality rather than quantity of work done is superior does not rebut the employer's charge.

Bodenschatz v. State Personnel Board, supra

Testimony by witnesses experienced in the work performed by the employee that others doing the same work accomplished much more, coupled with the determination that no improvement is anticipated, is sufficient for discharge.

Sweeney v. State Personnel Board 245 Cal.App.2d 246, 53 Cal.Rptr. 776 (1966).

(See also Civil Service Commission Rule 21.04.)

(3) Inexcusable Neglect of Duty

The "inexcusable neglect of duty" which constitutes a ground for discipline of a civil service employee means an act or omission done (1) intentionally, (2) designedly, and (3) without lawful excuse.

Peters v. Mitchell, 222 Cal.App.2d 852, 35 Cal.Rptr. 535 (1963); *Rapaport v. State Civil Service Commission*, 134 Cal.App. 319, 25 P.2d 265 (1933).

However, an action by an employee not in violation of any specific order or supervisory direction and done under the direct supervision and control of superiors does not constitute inexcusable neglect, especially where other employees have performed the same actions.

Peters v. Mitchell, supra

(4) Insubordination

Insubordination implies a general course of mutinous, disrespectful, or contumacious conduct.

Neeley v. California State Personnel Board, 237 Cal.App.2d 487, 47 Cal.Rptr. 64 (1966).

(5) Dishonesty

Dishonesty denotes a disposition to cheat, deceive, or defraud; it denotes an absence of integrity.

Gee v. California State Personnel Board, 5 Cal.App.3d 713, 85 Cal.Rptr. 762 (1970); *Cvrcek v. State Personnel Board,* 247 Cal.App.2d 827, 56 Cal.Rptr. 84 (1967).

An employee, here a Deputy Sheriff, may be discharged for filing a false report indicating that a superior officer was intoxicated during employment hours.

Damiani v. Albert, 48 Cal.2d 15, 306 P.2d 780 (1957).

By way of analogy, however, where an employee had dishonestly claimed illness on one occasion, a reduction of one year was an abuse of discretion. Reduction constitutes the most severe punishment short of dismissal.

> *Catricala v. State Personnel Board*, 43 Cal. App.3d 642, 118 Cal.Rptr. 89 (1974).

(6) Drunkenness On Duty

A drinking problem of long standing which has been public in nature is sufficient for discharge of a teacher as demonstrating his unfitness for service in the public school system.

> *Watson v. State Board of Education*, 22 Cal.App.3d 559, 99 Cal.Rptr. 468 (1971).

(7) Inexcusable Leave

Due to the administrative necessity of having staff available during duty hours, an employee may not offset excess time taken at lunch by working through his coffee breaks. However, the penalty of dismissal was held to be an abuse of discretion where the employee had served for a number of years prior to the infraction.

> *Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975).

(8) Excessive Absenteeism

Thirty-one percent absenteeism, even for legitimate health reasons, was held proper grounds for discharge.

California School Employees Association v. Jefferson School District, 45 Cal.App.3d 686, 119 Cal.Rptr. 668 (1975). (See discussion, *infra*, re "Disability Discharge," Section I (B) (4).)

(9) Pendency of Criminal Charges

In a case involving discharge pending a criminal proceeding, acquittal does not preclude the prior discharge. An administrative tribunal may proceed immediately or elect to wait a judgment from the criminal tribunal.

Hankla v. Governing Board, 46 Cal.App.3d 644, 651 (1975); *Funke v. Department of Motor Vehicles*, 1 Cal.App.3d 449, 81 Cal.Rptr. 662 (1969).

In a proceeding before an administrative agency, the prior acquittal of the employee in a prosecution arising out of the alleged illegal acts is not *res judicata*, and evidence of such acquittal may properly be rejected.

Bold v. Board of Medical Examiners, 135 Cal.App. 29, 26 P.2d 707 (1933).

(10) Plea of *Nolo Contendere*

Although there is a division of authority, a plea of *nolo contendere* of an by itself would not appear sufficient for discharge of an employee, even where conviction results.

Grannis v. Board of Medical Examiners, 19 Cal.App.3d 551, 96 Cal.Rptr. 863 (1971).

However, the rationale of the *Grannis* decision was severly questioned in a later concurring opinion by Justice Compton in the case of *Cartwright v. Board of Chiropractic Examiners*, 45 Cal.App. 3d 94 (1975).

(11) Conviction of a Felony or Misdemeanor Involving Moral Turpitude

Moral turpitude involves a crime in which intent to defraud is an element. Where such a conviction is the ground for discipline, there is no requirement of "Nexus" between the basis for discharge and the ability to perform the job. Therefore, an employee's conviction for receipt of an illegal unemployment insurance proceeds is sufficient grounds for discharge, even though the employee received his last illegal payment prior to his appointment.

> *Wilson v. State Personnel Board*, 39 Cal. App.3d 218, 114 Cal.Rptr. 134 (1974).

(12) Conviction of a Felony or Misdemeanor

A conviction for possession of marijuana outside working hours is not a sufficient ground for discharge absent an actual nexus shown between the employee's duties and impairment or disruption of the public service.

> *Vielehr v. State Personnel Board*, 32 Cal.App.3d 187, 107 Cal.Rptr. 852 (1973).

However, dismissal of an employee for criminal conduct demonstrated by a conviction for manslaughter, without an explicit showing of the

deleterious effect such criminal conduct had on the efficiency of the service, was not arbitrary and capricious.

> *Guery v. Hampton*, 510 F.2d 1222, Court of Appeals, D.C. Circuit (1974).

(13) Immorality

Off-duty noncriminal sexual activities of a public employee, absent any other consideration of actual connection to employment, do not constitute grounds for discharge.

> *Morrison v. State Board of Education*, 1 Cal. 3d 214, 82 Cal.Rptr. 175, 461 P.2d 375 (1969).

However, evidence of engaging in oral copulation with strangers in a semi-public atmosphere was held sufficient for dismissal of an employee who was deemed unfit to teach in public elementary school.

> *Pettit v. State Board of Education*, 10 Cal.3d 29, 109 Cal.Rptr. 665, 513 P.2d 889 (1973). (Note, dissent, Tobriner, J.)

(14) Discourteous Treatment of the Public or Other Employees

The nature of the conduct and its effect, rather than the time it occurs, are the determining factors to be considered. Therefore, off-duty misconduct bearing a rational relationship to employment which results in harm to the public service is sufficient for discharge. In this regard, off-duty misconduct by an employee consisting of pointing a gun at two of his fellow employees and warning them to stay away from a certain female employee is sufficient for discharge.

Blake v. State Personnel Board, 25 Cal.App. 3d 541, 102 Cal.Rptr. 50 (1972).

Further, when an employee had displayed hostility to persons who occupied positions inferior to his own and on several occasions gesticulated and shouted in unprovoked anger and startled co-workers, dismissal was appropriate.

Walker v. State Personnel Board, 16 Cal.App. 3d 550, 94 Cal.Rptr. 132 (1971).

(15) Improper Political Activity

An Alameda County Charter provision prohibiting any person from taking part in "political management or affairs in any political campaign or election, or in any campaign to adopt or reject any initiative or referendum measure other than to cast his vote or to privately express his opinion" was held invalid in its entirety for overbreadth and uncertainty.

Fort v. Civil Service Commission of the County of Alameda, 61 C.2d 331, 38 Cal.Rptr. 625 (1964).

Note, Section 43 of the Los Angeles County Charter was held unconstitutional and in violation of Article I of the Constitution of the State of California and the First and Fourteenth Amendments of the U.S. Constitution in *Schumann v. Los Angeles County Civil Service Commission*, Superior Court No. 82670 (1964).

Further, for a governmental agency to require a waiver of constitutional rights as a condition of public employment, that agency must demonstrate: (1) that the political restraints rationally relate to the enhancement of public service, (2) that the benefits which the public gains by the restraints outweigh the resulting impairment of constitutional rights, and (3) that no alternatives less subversive of constitutional rights are available.

> *Bagley v. Washington Township Hospital District,* 65 C.2d 499, 55 Cal.Rptr. 401, 421 P.2d 409 (1966).

However, recent United States Supreme Court cases have indicated that the Federal civil service employees may constitutionally be prohibited from participation in active partisan political campaigning or partisan political management. In the case of *Civil Service Commission v. Letter Carriers,* 413 U.S. 548, 37 L.Ed.2d 796, 93 Sup.Ct. 2880 (1973), the Supreme Court held that a federal statute prohibiting federal employees from "taking an active part in political management or in political campaigns" did not violate the First Amendment guarantee of free speech nor was it unconstitutionally vague and overbroad on its face.

Further, in the case of *Broadrick v. Oklahoma,* 413 U.S. 601, 37 L.Ed. 2d 830, 93 Sup.Ct. 2908 (1973), the Court held that a state statute forbidding political activities of classified state employees, specifically prohibiting those employees from soliciting or receiving political contributions, becoming a candidate for paid political office, being a member of a political party's committee or of a

political club, or taking a part in the management or affairs of any political party or in any political campaign except to express an opinion and to cast a vote, did not violate the equal protection clause by reason of its inapplicability to unclassified state employees.

(16) Willful Disobedience

Willful disobedience denotes a specific violation of command or prohibition.

> *Coomes v. State Personnel Board*, 215 Cal.App.2d 770, 30 Cal.Rptr. 639 (1963); *Peters v. Mitchell*, 222 Cal.App.2d 852, 35 Cal.Rptr. 535 (1963).

Government Code Section 1028.1 provides for forfeiture of public office or employment of any public employee who fails to appear before an investigating committee and answer questions. The purpose of Government Code Section 1028.1 is to compel the disclosure of information concerning an employee's membership in proscribed organizations in order that his fitness and loyalty may be evaluated. Where a temporary public employee had refused to answer questions asked by a legislative committee, no hearing on the dismissal is required except where there is an allegation of fraud, discrimination due to political or religious opinions, race or organized labor membership.

> *Globe v. County of Los Angeles*, 163 Cal.App.2d 595, 329 P.2d 971 (1958); Civil Service Commission Rule 19.07 (enacted pursuant to Article IX, Section 41, Charter of the County of Los Angeles).

However, the utility of imposing disclosure of information under Section 1028.1 must manifestly outweigh the impairment of an employee's constitutional rights; i.e., the right against self-incrimination. The mere possibility of a refusal to answer a hypothetical question at a future hearing is not sufficiently related to the County's proper interest in recruiting of fit and loyal employees.

> *Hofberg v. County of Los Angeles Civil Service Commission*, 258 Cal.App.2d 433, 65 Cal.Rptr. 759 (1968).

In this regard, California authority is unanimous in upholding the right of a public employer to give an employee under investigation the choice of answering questions during an investigation or, in the alternative, being discharged for failure to answer such questions.

> *Steinmetz v. California State Board of Education*, 44 Cal.2d 816, 285 P.2d 617 (1955); *Frazee v. Civil Service Board*, 170 Cal.App.2d 333, 338 P.2d 943 (1959); *Hingsbergen v. State Personnel Board*, 240 Cal.App.2d 914, 50 Cal.Rptr. 59 (1966).

However, these cases must be read in light of subsequent United States Supreme Court decisions, such as *Garrity v. New Jersey*, 385 U.S. 493, 17 L.Ed.2d 562 (1967), in which it was held that the protection against coerced confessions under the Fourteenth Amendment prohibits the use in subsequent criminal proceedings of confessions or their fruits obtained from public officers under a threat of removal; and *Gardner v. Broderick*, 392 U.S. 273 (20 L.Ed.2d 1082) (1968), in which

it was held that refusal to waive privilege against self-incrimination and to sign a waiver of immunity from prosecution in compliance with charter provisions was invalid as conflicting with the constitutional right against self-incrimination.

Note, also, that once an employee has been suspended, that employee may not be ordered to testify under Government Code Section 1028.1.

> *Garvin v. Chambers*, 195 Cal. 212, 232 P. 696 (1924).

(17) Loyalty Oath Required By The California State Constitution Article XX, Section 3

Refusal of an employee to give an oath of allegiance to the Federal and State Constitutions and the laws of California as against all enemies of the United States and the State, and an affidavit that the employee does not advocate the overthrow of the Government by force, or is not a member of organizations that advocate such overthrow was a proper basis for discharge.

> *Steiner v. Darby*, 88 Cal.App.2d 481, 199 P.2d 429 (1948); *Garner v. Board of Public Works*, 98 Cal.App.2d 493, 220 P.2d 958 (1950).

However, in *Keyishian v. Board of Regents*, 385 U.S. 589, 87 Sup. Ct. 675 (1967), the United States Supreme Court held statutes making communist party membership *prima facie* evidence of disqualification unconstitutionally abridged freedom of association by not permitting rebuttal by proof of non-active membership or absence of intent to further unlawful aims.

See also, *Elfbrant v. Russell*, 384 U.S. 11 (86 S.Ct. 1238, 16 L.Ed.2d 321) (1966).

In this regard, the California Supreme Court subsequently deleted the second paragraph of the oath required by Article XX, Section 3, of the California Constitution which proscribed membership in any party or organization, political or otherwise, which advocated the overthrow of the Government of the United States or the State of California by force or violence or other unlawful means.

Vogel v. Los Angeles County, 68 Cal.2d 18, 434 P.2d 961, 64 Cal.Rptr. 409 (1967).

As a practical matter, Los Angeles County will permit alteration of its oath so long as the applicant will at least swear or affirm that the employee "will well and faithfully discharge the duties upon which I am about to enter."

See generally, 57 O.C.C. 376

(18) Failure of Good Behavior in General

"Failure of good behavior," here an attempt by a public employee to expedite a friend's compensation claim, need not be known by some portion of the public before disciplinary action could be brought where such failure, during or outside duty hours, causes discredit to agency or department.

Nightingale v. State Personnel Board, 7 Cal.3d 507, 102 Cal.Rptr. 758 (1972).

Notoriety is not a requirement for discipline.

> *Orlandi v. State Personnel Board*, 236 Cal.App.2d 32, 69 Cal.Rptr. 177 (1968).

(19) Miscellaneous Grounds

Other grounds for which a civil service employee may be discharged include addiction to the use of habit-forming drugs and narcotics, intemperance, misuse of County property, and violations of the provisions of Sections 1090-1097 of the Government Code regarding conflict of interest.

B. Disability Discharge

Government Code Section 31725 concerning reinstatement of a person whose employment by a county has been terminated for medical incapacity was held to control over Civil Service Commission Rule 10.07(c) now Rule 10.9(c).

> *McGriff v. County of Los Angeles*, 33 Cal.App.3d 394, 109 Cal.Rptr. 186 (1973). (However, the holding in this case is questionable and inconsistent with previous case law. See discussion, *infra*, Section I(B)(1)(2).)

The Board of Retirement of the Los Angeles Employees Retirement Association has final jurisdiction to determine the existence of an incapacity and, if the Board determines the employee not to be incapacitated, the County is required to reinstate the employee effective the date of his discharge with back pay.

Section 31725, Government Code

An employer may not discharge for disability an employee otherwise able to retire for disability.

Section 31721, Government Code

Where an employee is not eligible for disability retirement, the burden is upon the appointing power to prove that not only is the employee unable to perform the duties of his existing position, but unable to fill any position within the department.

> Civil Service Commission Rule 10.9(c) (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles); *Overton v. State Personnel Board*, 46 Cal.App. 3d 721 (1975). (See Section 19253.5 of the Government Code and discussion, *infra*, Section I(B)(3).)

C. Letter of Discharge

Notice of discharge shall state the specific grounds and particular facts upon which the discharge is based, and the discharged employee shall be allowed a reasonable time (ten days) in which to reply thereto.

> Article IX, Section 34(13), Charter of the County of Los Angeles; Civil Service Commission Rules 19.02 and 19.07.

The overall language of the letter must be definite and certain.

> *Kelly v. State Personnel Board*, 31 Cal.App.2d 443, 88 P.2d 264 (1939).

The requirement of specificity in a letter of discharge is to be "language intelligible to a man of ordinary understanding" describing the employee's failure as to conduct, capacity, integrity or moral responsibility.

> *Brown v. State Personnel Board*, 43 Cal.App.2d 70, 110 P.2d 497 (1941); *Bryant v. State Personnel Board*, 96 Cal.App.2d 423 (1950); *Dona v. State Personnel Board*, 103 Cal.App.2d 49 (1951). (See discussion, *infra*, Section I (C)(1).)

A letter of discharge may be amended any time prior to a hearing without affecting the operative date of the letter if the amendment does not change the initial reasons for discharge as stated. However, if new or unrelated reasons are set forth, the operative discharge date relates back to the date of the amendment.

> *Cook v. Civil Service Commission*, 178 Cal.App.2d 118, 2 Cal.Rptr. 836 (1960).

D. Pre-Discharge Proceedings

Before a permanent employee may be discharged he must be given notice of the charges against him, a list of those who would testify against him, and must be given an opportunity to respond to the official either authorized to take the disciplinary action or make the final recommendation with reference to the disciplinary action in question before the employee may be discharged, unless there are extraordinary circumstances.

Kristal v. State Personnel Board, 50 Cal.App.3d 230, 240 (1975); *Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975).

This rule has been given retroactive effect by the Court of Appeal.

Keely v. State Personnel Board, 50 Cal.App.3d 88 (1975).

In the *Keely* case the Court of Appeal held that the discharge would not become effective until such time as the administrative tribunal (to wit, the State Personnel Board) had acted.

It should be noted, however, that if an employee wishes to raise the issue of a lack of due process (in a *Skelly*, *Kristal* or *Zumwalt* sense) he must raise the issue of lack of due process before the administrative tribunal.

Amluxen v. Regents of University of California, 53 Cal.App.3d 27, 36 (1975).

A failure to raise this defense at the administrative level is the failure to properly exhaust administrative remedies.

E. Pre-Hearing Discovery

Rules of Civil Discovery applicable in the trial of civil matters in the courts of the State of California shall be applicable to Civil Service Commission hearings and additional rights may be granted by the hearing officer or commission where appropriate. This rule shall not limit the employee's rights under Rule 5.12.

Civil Service Commission Rule 5.10 (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles); Code of Civil Procedure, Sections 2016-2036; Evidence Code Section 1040. (See also discussion, *infra*, Section I(E).)

In hearings on discharge, reduction, or suspension, a petitioning employee shall not be required to testify, but may be cross-examined as to any matter relevant to the hearing if he takes the stand voluntarily.

Civil Service Commission Rule 5.12 (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles).

F. Discharge Hearings

If a permanent employee is to be discharged pursuant to Civil Service Commission Rule 19.02, he may request and the Commission shall set a hearing in accordance with Rule 5.06.

Article IX, Section 34(13), Charter of the County of Los Angeles; Civil Service Commission Rule 19.03.

A probationary employee who has not successfully completed his probationary period does not have the right to a hearing, but may answer, explain, or deny charges within ten business days after notice of discharge.

Civil Service Commission Rule 19.07 (enacted pursuant to Article IX, Section 34(13), Charter of the County of Los Angeles); *Globe v. County of Los Angeles*, 163 Cal.App.2d 595, 329 P.2d 971 (1958); *Oppenheimer v. Arnold*, 99 Cal.App. 2d 872, 222 P.2d 940 (1950). (See discussion, *infra*, Section I(A)(1).)

It should be noted, however, that if an employee, whether temporary, probationary or recurrent is discharged under such circumstances as may impair the employee's ability to earn a living while working at his chosen profession, the employee will be allowed a common law "fair hearing" if for no other purpose than to clear his name.

> *Perry v. Sinderman*, 408 U.S. 593 (33 L.Ed.2d 570) (1972); *Board of Regents v. Roth*, 408 U.S. 564 (33 L.Ed.2d 548,556,558)(1972).

Note specifically *Zumwalt v. Trustees of California State Colleges*, 33 Cal.App.3d 665, wherein the Court of Appeal held that a professor removed from the chairmanship of a department without specific reasons and locked out of the chairman's office was granted a hearing simply for the purpose of clearing his name, even though the Court held that he had no right to be reinstated to a chairmanship.

Of particular note (although not binding in the State of California) is the case of *Casey v. Roudebush*, 395 F.Supp.60 (1975). In the *Casey* case a Federal District Court held that an employer who had discharged a probationer could not disseminate any information with reference to the circumstances surrounding the dismissal of the probationer since the employee did not have a right to a hearing. As yet this line of reasoning has not been adopted by any Court in this State. However, it may very well soon become the law of the land.

It should be noted, however, that if an employee wishes to raise the issue of lack of due process (in the *Skelly*, *Kristal* or *Zumwalt* sense) he must raise the issue before the initial administrative tribunal.

See e.g. *Amluxen v. Regents of University of California*, 53 Cal.App.3d 27,36 (1975).

A failure to raise this defense at the administrative level is the failure to properly exhaust administrative remedies.

A performance evaluation rating of "unsatisfactory" given a permanent employee must be accompanied by discharge or reduction. An overall rating of "unsatisfactory" may not be reconsidered through the department's grievance procedure and no request for a hearing before the Commission will be granted.

Civil Service Commission Rules 21.12 and 21.14 (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles).

However, an employee who receives a rating of "unsatisfactory" may review that rating at any time with any of the persons who signed the report or assisted in the making of the rating, and may further file with the Commission an answer or other statement which shall be made a part of the employee's civil service record.

Civil Service Commission Rules 21.07 and 21.14 (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles).

Further, if subsequent to his resignation, a permanent employee receives a performance evaluation with an overall rating of "unsatisfactory," he may within ten days request reconsideration of that rating by the Commission. The request must be in writing. The

Commission may deny the request, or conduct a hearing from written materials. In no event shall the decision of the Commission affect the employee's resignation.

> Civil Service Commission Rule 21.14 (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles).

A permanent employee who has successfully completed one probationary period and is serving another may not be discharged without the right to a hearing.

> Civil Service Commission Rule 19.08 (enacted pursuant to Article IX, Section 34(7), Charter of the County of Los Angeles).

Any person in the classified service, regardless of status, alleging fraud or discrimination because of political or religious opinions, race, sex, or organized labor membership may not be discharged without a hearing.

> Article IX, Section 41, Charter of the County of Los Angeles; Civil Service Commission Rule 26.01.

The employee being discharged shall have the burden of proving such fraud or discrimination as the basis for discharge.

> Civil Service Commission Rule 19.09 (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles).

Otherwise, in discharge hearings, the burden of proof shall be on the appointing power.

Civil Service Commission Rule 5.13 (enacted pursuant to Article IX, Section 34, Charter of the County of Los Angeles).

Pursuant to Rule 5, if the Commission concludes that the reasons are not sufficient to justify discharge, it shall so notify the appointing power concerned and such notification shall be a bar to any discharge for the specific reasons which have been presented.

Civil Service Commission Rule 19.06 (enacted pursuant to Article IX, Section 34(13), Charter of the County of Los Angeles).

In hearings on discharge, as well as reduction and suspension, the petitioning employee shall not be required to testify. However, should the employee take the stand voluntarily, he may be cross-examined as to any matter relevant to the hearing.

Civil Service Commission Rule 5.12 (enacted pursuant to Article IX, Section 34(13), Charter of the County of Los Angeles. (See discussion, *infra*, Section I(E)(1).)

The exclusionary rule in effect in criminal cases barring reception of illegally obtained evidence is not applicable in an administrative hearing.

Governing Board of Mountain View School District of Los Angeles v. Frank Hamilton Metcalf, 36 Cal. App.3d 54, 111 Cal.Rptr. 724 (1974).

Consider, however, *dictum* in *In re Martinez*, 1 Cal.3d 641, 83 Cal. Rptr. 382 (1970); *Pierce v. Board of Nursing Education*, 255 Cal.App. 2d 463, 63 Cal.Rptr. 107 (1967); *Elder v. Board of Medical Examiners*, 241 Cal.App.2d 246, 50 Cal.Rptr. 304 (1966).

It has been held that a department of the State of California may be collaterally estopped from determining whether or not an arrest was lawful and therefore whether or not the fruits of the arrest may be utilized in evidence against the person arrested.

In the case of *Shackelton v. Department of Motor Vehicles*, 46 Cal.App.3d 327 (1975), a motorist had refused to submit to a chemical sobriety test and the Municipal Court had found that the arrest was unlawful. The Court of Appeal held that the Department of Motor Vehicles could not subsequently find that the arrest was lawful in order to admit the evidence of the motorist's failure to submit to the sobriety test for the purpose of suspending the motorist's license. It should be noted the legality of the arrest must be specifically found in proceedings of this type before the Department of Motor Vehicles may suspend a driver's license.

In proceedings before the Los Angeles County Civil Service Commission, however, the issue is not the arrest but what course of conduct has been found as a result of some investigation. Therefore, even if an arrest is unlawful the evidence obtained as a result thereof may be utilized for the purpose of discharging the employee. See *Governing Board of Mountain View School District of Los Angeles v. Frank Hamilton Metcalf*, 36 Cal.App.3d 54, 111 Cal.Rptr. 724 (1974).

It has been held that an individual may raise the defense of entrapment in an administrative proceeding at which a right to practice a profession, here medicine, was at stake.

Patty v. Board of Medical Examiners, 9 Cal.3d 356, 107 Cal.Rptr. 473, 508 P.2d 1121 (1973).

Public employees, acting in their official capacity in pursuance of lawful objectives in discharging an employee, are immune from judgment since a complaint for damages is merely a collateral attack on the public entity.

Oppenheimer v. Arnold, 99 Cal.App.2d 872, 222 P.2d 940 (1950); *Hardy v. Vial*, 48 Cal. 2d 577,311 P.494 (1957); *Miller v. City and County of San Francisco*, 187 Cal.App.2d 480, 9 Cal.Rptr. 767 (1960); *Muskopf v. Corning Hospital District*, 55 Cal.2d 211, 11 Cal.Rptr. 89 (1961); *Blackburn v. County of Los Angeles*, 42 Cal.App.3d 175 (1974). (See also, Section 821.6 of the Government Code by way of analogy.)

If an order or decision of a local agency affects a fundamental vested right, the court must now exercise its independent judgment on the evidence and not merely rule whether the findings are supported by substantial evidence in light of the record as a whole.

Strumsky v. San Diego County Employees Retirement Association, 11 Cal.3d 28, 112 Cal.Rptr. 805, 520 P.2d 29 (1974). (See discussion, *infra*, Section I(A)(1).)

This analysis has been extended to administrative proceedings on suspension as well as discharge.

Perea v. Fales, 39 Cal.App.3d 939 (1974).

Permanent status as a public employee involves a vested and fundamental right.

Rigsby v. Civil Service Commission of the County of Los Angeles, 39 Cal.App.3d 698, 115 Cal.Rptr. 490 (1974).

Further, probationary status as a teacher pursuant to Education Code Section 13443 has been held to involve a vested and fundamental right. A probationary teacher pursuant to Section 12904 of the Education Code must first obtain a probationary credential. However, as the court points out, this is not the same as a probationary status trial period during which the employee must demonstrate that he is qualified for permanent status. In this regard, the Los Angeles Civil Service Commission's six-month probationary period is, in effect, an extension of the examination process and does not involve a vested or fundamental right.

Young v. Governing Board, 40 Cal.App.3d 769 (1974).

A vested statutory right may not be denied an employee even though the statute has been subsequently amended deleting that right.

Balen v. Peralta Junior College District, 11 Cal.3d 821, 114 Cal.Rptr. 589 (1974).

If a hearing is not held before the full Commission, the Commission may accept the written or oral report from the hearing board without reading the record of the hearing. If the report is not accepted by the Commission, the record must be read or a hearing *de novo* held.

G. Findings

Either party may request formal findings of facts and conclusions of law within five days of the Commission's decision and failure to do so is deemed a waiver.

Article IX, Section 34(13), Charter of the County of Los Angeles; Civil Service Commission Rule 5.14.

Under existing rules, the Civil Service Commission has no express authority to set aside its previous consent to a discharge of a probationary, permanent or recurrent employee.

See 77 O.C.C. 82; also, *Crestlawn Memorial Park Association v. Sobieski*, 210 Cal.App.2d 43, 26 Cal.Rptr. 421 (1962).

If the consent of the Civil Service Commission is not obtained to discharge a probationer, the probationer is deemed to have successfully completed his probationary period.

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However, if objections to the findings are filed within five days after the Commission has announced its decision, the Commission may amend said findings or take further action if they find the objection valid.

Civil Service Commission Rule 5.14 (enacted pursuant to Article IX, Section 34(13), Charter of the County of Los Angeles).

H. Exhaustion of Administrative Remedies

A court is generally without jurisdiction to review administrative action until after the administrative remedy provided for has been exhausted.

Top Hat Liquors v. Department of Alcoholic Beverage Control, 13 Cal.3d 107 (1974).

An opportunity for administrative review must be exhausted before invoking the assistance of the courts where the statute or regulation under which such review is offered establishes clearly defined machinery for the submission, evaluation and resolution of complaints by aggrieved parties.

Endler v. Schutzbank, 68 Cal.2d 162, 65 Cal. Rptr. 297, 436 P.2d 297 (1968).

In order to exhaust administrative remedies, it is necessary not only to present a case before the administrative tribunal, but to present as full a case as possible under the circumstances.

Concerned Citizens of Palm Desert, Inc. v. Board of Supervisors, 38 Cal.3d 257 (1974); *Greenblatt v. Munro*, 161 Cal.App.2d 596, 326 P.2d 929 (1958); *Bohn v. Watson*, 130 Cal.App. 2d 24, 278 P.2d 454 (1954); *Dare v. Board of Medical Examiners of the State of California*, 21 Cal.2d 790 (1943), see specifically pages 798-800.

A permanent employee, pursuant to Rule 19.02 of the Civil Service Commission, may request a hearing before the Commission within ten days of notice of discharge. It is within the reasonable discretion of the Commission to select the manner of publication and distribution of the Rules which will be reasonably calculated to afford employees an opportunity to acquire requisite information; i.e., time limitations on hearing requests.

Martin v. State Personnel Board, 46 Cal. App.3d 588 (1975).

II. DISCHARGE - METHODOLOGY

A. Discussion of Grounds Re Discharge

(1) Requirements as to Specificity of Charges

Civil Service Commission Rule 19.02, adopted pursuant to section 34(13) of the County Charter, provides that the notice of discharge or reduction given to a permanent employee shall be in writing, stating the effective date thereof, and shall include the specific grounds and particular facts upon which the disciplinary action is based. Further, Rule 19.07 provides that written notice of discharge or reduction given a probationary employee must also specify the grounds and the particular facts upon which such action is based.

Yet, the Charter of the County of Los Angeles does not specify a code of conduct or the disciplinary grounds for which a public employee may be discharged. However, it is arguable that cause for discipline given a permanent civil service employee should be set forth with greater accuracy and will be subject to stricter interpretation than that of a probationary employee. In this regard, note the case of *Rigsby v. Civil Service Commission of the County of Los Angeles*, 39 Cal.App.3d 698 (115 Cal.Rptr. 490) (1974), in which the court held that the permanent status of a county employee involves a vested and fundamental right and thus, in conjunction with the landmark case of *Strumsky v. San Diego County Employee's Association*, 11 Cal.3d 28 (1974), expanded the scope of judicial review of local

administrative agency decisions from the traditional test of substantial evidence to the court's independent judgment on the evidence. That is, the court is now permitted to make its own conclusions and admit, pursuant to Section 1094.5(d) of the Code of Civil Procedure, "relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded" at the administrative hearing. The practical result of the *Strumsky* and *Rigsby* decisions is the need to promulgate exhaustive and specific grounds which can be supported by the weight of the evidence in discharge proceedings at the administrative level before an employer will have any hope of having its disciplinary action sustained by the court.

On the other hand, where an administrative agency's decision or order does not substantially affect a fundamental vested right, the trial court is still confined to a review of the findings on the record to determine whether they are supported by substantial evidence. As yet, the status of the probationary period is, in itself, part of the examination process. In the case of *Bixby v. Pierno*, 4 Cal.3d 130, 144 (1971), the court set forth the basis for a determination of whether rights are vested or substantially affected:

> (T)he courts in this case-by-case analysis consider the nature of the right of the individual; whether it is a fundamental and basic one, which will suffer substantial interference by the action of the administrative agency, and, if it is such a fundamental right, whether it is possessed by, and vested in, the individual or merely sought by him. In the latter case,

> since the administrative agency must engage in the delicate task of determining whether the individual qualifies for the sought right, the courts have deferred to the expertise of the agency.

In this regard, it should be further noted that, pursuant to Civil Service Commission Rule 19.07, a probationary employee is not entitled to a hearing except in the case of fraud or of discrimination because of political or religious opinions, racial extraction, sex or organized labor membership. (See Discussion, Section I (D)(1).) Therefore, it is well to consider the context in which cause for discharge is stated. Note, however, the language of Civil Service Commission Rules 19.02 dealing with permanent employees and 19.07 with probationary employees is, as a practical matter, indistinguishable. Regardless of the status of a Los Angeles County civil service employee, then, a strict reading of the Rules would indicate the same criteria is applicable in terms of specificity for notice of discharge. (See also Discussion Section I (C)(1).)

(2) Performance Evaluation and Discharge Under Civil Service Commission Rule 21

In regard to grounds sufficient for discharge or reduction, the Civil Service Commission Rules are helpful in only one instance. Pursuant to Rule 21, the performance of each permanent employee in the classified service shall be evaluated by the appointing power at least once each year and for probationers before the end of the probationary period. Rating standards are set forth in Rule 21 and provide, in part:

> Overall ratings are to be expressed in the following terms, in accordance with the following definitions:
>
> (a) Permanent Employees Unsatisfactory- A substantial part of the work performance is inadequate and definitely inferior to the standards of performance required for the position . . . *When this rating is given it must be accompanied by a discharge or reduction in those cases in which the employee is still in service.* (Emphasis added.)

Otherwise, grounds which are sufficient for disciplinary discharge of an employee from the civil service are primarily a matter of case law interpretation. (By way of analogy, see Government Code Section 19572.)

B. Discussion Re Disability Discharge

(1) The *McGriff* Decision and Its Effect on the County Civil Service System

In the case of *McGriff v. County of Los Angeles*, 33 Cal.App.3d 394 (109 Cal.Rptr. 168) (1973), the court was called upon to determine whether Section 31725 of the Government Code, requiring the County to reinstate an employee after the Retirement Board had made a determination that the employee was not physically incapacitated, was inconsistent with and superseded by the Civil Service Rules of the County. In the *McGriff* case, a county employee had been released from her employment for alleged medical incapacity. Pursuant to Section 31720 of the Government Code, she then applied to the Board of Retirement of the Los Angeles County Employees Retirement Association, an independent entity separate and apart from the county,

and after a hearing the Board denied her application for disability retirement on the grounds that she was not permanently disabled from performing the duties of her former position. She subsequently won a writ of mandate in Superior Court entitling her to reinstatement which was affirmed in the Court of Appeal in reliance on Section 31725 of the Government Code, as amended in 1970, which provides in pertinent part:

> If the medical examination and other available information do not show to the satisfaction of the board (of Retirement) that the member is incapacitated physically or mentally . . . *the employer shall reinstate the member to his employment* effective as of the day following the effective date of dismissal. (Emphasis added.)

When and if the opportunity arises to properly challenge the *McGriff* decision, we would suggest that counsel consult the Petition for Hearing in the Supreme Court in the *McGriff* case. This Petition for Hearing may be found in the bound volume of briefs kept on file in the library of this office.

(2) Determination of Disability Status of a County Employee

By way of analogy and in regard to disability discharge, subdivision (d) of Section 19253.5 of the Government Code provides in pertinent part:

> When the appointing power after considering the conclusions of the medical examination provided for in this section (subsections (a) and (b)). . ., and other pertinent information,

> concludes that the employee is unable to perform the work of his present position, or any other position of the agency, and the employee is not eligible . . . to retire for disability . . ., the appointing power may terminate the appointment of the employee.

This section was interpreted in *Overton v. State Personnel Board*, 46 Cal.App.3d 721,725 (1975), as placing the burden upon the appointing power to prove that not only is the employee unable to perform the duties of his/her existing position, but all positions in the department. Civil Service Commission Rule 10.09 (a) and (b) seem to dictate a similar conclusion as that of the *Overton* case:

> (b) . . ., the Director of Personnel shall, consistent with his determination of the employee's physical and emotional capacities, recommend the most appropriate of the following alternatives:
> I. Return of the employee to suitable work through one of the following means:
> (a) Modification of the employee's duties or change of this assignment.
> (b) Reassignment or reduction to another position in the employee's department.
> (c) Transfer to a position in another department.
> Where appropriate, this recommendation will include a retraining program approved by the Civil Service Commission.

Whether or not an employee is eligible for disability retirement, prior to a consideration of discharge for disability, an effort must first be made to ascertain whether the employee could satisfactorily fill any position within the department subject to the limitations prescribed in the examining physician's report.

(3) The Interrelationship Between Discharge for Disability and Discharge for Excessive Absenteeism

Guaere: In light of the foregoing analysis, consider an employee guilty of excessive absenteeism who claims a permanent disability denied by the Board of Retirement.

In the case of *California School Employees Association v. Jefferson Elementary School District*, 45 Cal.App.3d 683, 690 (1975), the court upheld the dismissal of a permanent classified employee for excessive absenteeism motivated by alleged recurring sickness and other unspecified personal reasons. The court relied upon the case of *Hostetter v. Alderson*, 38 C.2d 499 (241 P.2d 203) (1952), in emphasizing the following consideration:

> . . . the primary consideration is not the personal fault or misconduct of the employee, but the loss of efficiency to the department and the detriment to the public stemming from the inefficient discharge of duties.

Further, a contention that the district was precluded from charging inefficiency on the basis of absences due to illness was specifically rejected by the *Jefferson* court in reliance upon the *Hostetter* decision. Unlike *McGriff*, where the employee was discharged for her inability to perform the duties of her position while on the job, *Jefferson* involved an employee who worked satisfactorily and efficiently when she was present yet was absent for repeated extended periods of time due to alleged illness. As pointed out in *Jefferson*, the disability in itself under such circumstances is not the controlling

factor to be considered in discharge proceedings. Excessive absenteeism which, regardless of legitimate health reasons, causes an employee to be unable to maintain acceptable standards of productivity due to absence is sufficient grounds for dismissal. As opposed to *McGriff*, where the court was concerned primarily with the financial consequences to an employee resulting from inconsistent decisions between an employer and the Retirement Board, the *Jefferson* court focused upon the resulting inefficiency in the department and the detriment to the public. Both positions would be relevant to the hypothetical situation at hand where the primary issue would concern which of the two rationale is more persuasive.

In this sense, merely to phrase the letter of discharge in terms of inefficiency due to incapacity rather than simple disability would be insufficient. The excessively absent employee who claims a permanent disability which has subsequently been denied by the Board of Retirement would probably, given the *McGriff* rationale, still be able to require the county to rehire that employee. To do otherwise would, in effect, moot the primary thrust of the *McGriff* decision by placing the employee in a state of limbo between non-employment and retirement. However, in reliance now upon the *Jefferson* case and pursuant to Section 31725 of the Government Code, the county could obtain judicial review of the action of the Board of Retirement by filing a petition for a writ of mandate in accordance with the Code of Civil Procedure or by joining or intervening in such action filed by the employee

within thirty (30) days of the mailing of the notice from the Board denying the employee's alleged disability. Once the petition is filed, the county need not reinstate the employee or pay back wages until the matter has been adjudicated on review. In this sense, the *Jefferson* decision does not distinguish the *McGriff* holding; yet, it provides the vehicle by which the county may circumvent the Board of Retirement in those cases where an excessively absent employee seeks to retain his/her employment by alleging a permanent disability which the Retirement Board will not substantiate.

If the court of review determines that the employee does, in fact, have a permanent mental or physical disability, then it would appear incumbent upon the county to release that employee in accordance with Civil Service Commission Rule 10.09(c). By way of analogy to the *Overton* decision, the county would now ascertain whether this employee could satisfactorily fill any position within the department subject to the scope of the reviewing court's determination of the employee's physical and emotional capacities. However, if a suitable position is available, there is no indication that the employee must accept that position in lieu of retirement. Where no suitable position in which the employee can perform satisfactorily is available within the department, then the appointing authority may release the employee pursuant to Rule 10.09(c), "without prejudice as to re-employment should his condition improve."

However, if the reviewing court determines that there is no incapacity, either physical or mental, and upholds the decision of the Board of Retirement, then the County would be able to discharge the employee on the sole grounds of inefficiency and without regard to either Rule 10.09 or the *Overton* case since the employee has exhausted his/her remedies in determining the existence of the alleged disability. Therefore, in this situation, the appointing power would not be required to reassign the employee to another suitable position within the department and could release that employee with prejudice as to re-employment since the discharge is solely for inefficiency and not disability.

C. Discussion Re Letters of Discharge

(1) Specificity of Language Requirements

The requirement as to specificity of language, incorporated in Section 34(13) of the Charter and Rule 19.02 of the Civil Service Commission Rules, is designed to circumvent the arbitrary removal of an employee or probationer. In the case of *Brown v. State Personnel Board*, 43 Cal.App.2d 70 (1941), a statement that an employee was dismissed due to "services unsatisfactory" was held insufficient to effect dismissal. The court held that where no statement of fact is included, it is clear that there is no statement of the reasons for the dismissal. Removal procedure is not designed for the arbitrary discretion of the appointing power, but discretion by the appointing power made upon a determination of the factual circumstances whether the employee is

fully qualified for either permanent civil service status or to retain that status.

As such, notice of discharge must state the specific grounds and particular facts upon which the discharge is based in language intelligible to a man of ordinary understanding. Justification for the dismissal of an employee or the rejection of a probationary employee lies not in the appointing power's conclusions, but in the factual reasons which support or justify such conclusions. Therefore, as noted in *Bryant v. State Personnel Board,* 96 Cal.App.2d 423 (1950), dismissal on the stated grounds of conduct "unbecoming an employee" due to "failure to demonstrate merit and fitness" and for "the good of the service" were held mere conclusions and insufficient. In conjunction, note the case of *Dona v. State Personnel Board,* 103 Cal.App.2d 49 (228 P.2d 607) (1951), in which a notice of dismissal in which each charge was supported with detailed allegations setting forth places, names, and dates was held to comply with the requirements of Government Code, Section 19173. Civil Service Commission Rules 19.02 and 19.07 would indicate similar requirements.

A typical letter of discharge would appear as the following:

> Dear . . .
>
> This is to inform you that effective with the close of business on ___(date)___, you are suspended from your position of _(classification)_ in this Department for 30 calendar days without pay.

> You are further informed that effective at the beginning of business on (after 30 days) you are permanently discharged from that position and from County service without further notice.
>
> Your suspension and discharge are based upon the following grounds:
>
> The specific facts to support these grounds are:
>
> This letter may be amended at a later date to include additional charges and/or specific facts.
>
> If you wish to appeal this action you may file within ten business days after service of this letter, a general denial of the allegations and request a hearing before the Civil Service Commission. Any such letter should be addressed to the Civil Service Commission, 222 North Grand Avenue, Los Angeles 90012. A copy should be sent to the Head, Personnel Policy Unit, 3000 West Sixth Street, Los Angeles 90020.

D. Discussion Re Pre-Hearing Discovery

(1) Civil Service Commission Rules 5.10 and 5.12, Interrelation Analysis

Effective October 18, 1974, Civil Service Commission Rule 5.10 was amended to read:

> The Rules of civil discovery as applicable in the trial of civil matters in the Courts of the State of California shall be applicable to hearings of the Civil Service Commission.

Although the Hearing Officer and the Commission have authority to grant the parties any additional rights of discovery which may be appropriate in a particular case, the amendment further stipulates that it does not act to limit an employee's rights under Rule 5.12.

Rule 5.12 provides, in pertinent part, that in hearings on discharges, reductions, or suspensions, the petitioning employee shall not be required to testify, but may be cross-examined as to any matter relevant to the hearing if he takes the stand voluntarily.

Prior to the amendment to Rule 5.10, discovery in administrative disciplinary proceedings in the County of Los Angeles was regulated by common law criminal discovery procedure. As provided in the case of *Shively v. Stewart*, 65 C.2d 475 (55 Cal.Rptr. 217, 421 P.2d 65) (1966), where a governing body is silent in respect to prehearing discovery in administrative proceedings, such proceedings were to be augmented with common law rules where it appears necessary to promote a fair hearing and effective judicial review.

In the *Shively* case, two licensed physicians accused of performing criminal abortions sought to compel the issuance of subpoenas *duces tecum* to obtain depositions and documents for the Executive Secretary of the State Board of Medical Examiners and from the board's attorney prior to disciplinary hearings. Where, as in *Shively*, an agency has the authority to prohibit a petitioner from practicing his profession, a disciplinary proceeding before that agency is *analogous* to a criminal proceeding in that both are punitive in character. However, disciplinary hearings before an administrative agency have long been considered civil rather than criminal in nature even though they are

sometimes described as "quasi-criminal" or "penal" proceedings.[1] In this context, and in the absence of controlling legislative authority regulating prehearing discovery in administrative proceedings of this type, the *Shively* court concluded that it was within their jurisdication to exercise their common law authority and provided that discovery allowable in such administrative proceedings should be the same as discovery in criminal proceedings in general.[2] This decision was predicated on the following caveat:

> Statutory administrative proceedings have been augmented with common law rules whenever it appeared necessary to promote fair hearings and effective judicial review. (*Shively v. Stewart, supra,* at 479).

Yet, Chief Justice Traynor was very careful to re-emphasize the dichotomy between civil and criminal discovery:

> We are committed to the wisdom of discovery, by statute in civil case (Code of Civil Procedure, Sections 2016-2036), and by common law in criminal cases. (*Shively v. Stewart, supra,* at 479).

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1. *Abrams v. Daugherty,* 60 Cal.App. 297(1922); *Herrscher v. State Bar,* 4 C.2d 399 (1935); *Hanson v. Civil Service Board,* 147 Cal.App.2d 732 (1957); *Kendall v. Osteopathic Examiners,* 105 Cal.App.2d 239 (1951); *West Coast Home Improvement Company v. Contractor's License Board,* 72 Cal.App.2d 287, 164 P.2d 811 (1945); *Fisher v. State Bar,* 6 C.2d 671 (1936); *Suckow v. Alderson,* 182 Cal.247, 187 Pac. 965 (1920); *Paladini v. Superior Court,* 178 Cal. 369, 173 Pac. 388 (1918).

2. *Hill v. Superior Court,* 10 C.3d 812 (1974); *Pitchess v. Superior Court,* 11 C.3d 531 (1974).

In this light, the rationale of the *Shively* decision is preempted where a governing body acts to establish sufficient procedural safeguards by providing both parties with access to discovery in order to promote fair hearings and avoid needless continuances. Correspondingly, pursuant to the amendment of Civil Service Commission Rule 5.10, which provides for statutory civil discovery procedure (Code of Civil Procedure, Sections 2016-2036), the criminal analogy envisaged by the *Shively* court would appear no longer appropriate to disciplinary hearings under authority of the Los Angeles Civil Service Commission and in compliance with their Rules.

By analogy, in the recent case of *Pitchess v. Superior Court*, 11 C.3d 531 (1974), the *Shively* decision was cited with approval on the issue of the distinctive and separate nature of civil and criminal discovery.

> Nothing in the legislative history of the current version of the civil discovery act . . . discloses an intention to expand its province to incorporate criminal matters. Indeed, civil discovery in California is now virtually co-extensive with the federal practice, which clearly does not embrace criminal proceedings.

It follows that since disciplinary proceedings before administrative agencies are not criminal in nature, the rules of evidence governing criminal proceedings are not applicable. Thus, the rules of civil discovery adopted by the amendment to Rule 5.10 would be limited in scope and application only by the specific provisions of Rule 5.12.

But this is not to say that the county is limited to common law criminal discovery procedure in hearings on discharge, reduction, or suspension.

It seems clear that an employee would be required to comply with a motion showing good cause by the county, pursuant to Section 2031 of the Code of Civil Procedure, to produce designated documents, not privileged, which are relevant to the subject matter of the hearing. Were the county limited to common law criminal discovery in disciplinary hearings, such documents would arguably be beyond the scope of discovery (*United States v. Brown*, (9th Circuit) 501 F.2d 146 (1974)).

In this regard, note the Authority and Purpose provisions of the Civil Service Commission, as outlined in Rules 1.01 and 1.02, provide, in part;

> Pursuant to the California Constitution and the Charter of the County of Los Angeles . . . these Rules . . . shall have the force and effect of law.
>
> Further, (t)hese Rules are prescribed for the purpose . . . of assuring all employees in the classified service of fair and impartial treatment at all times.

The Civil Service Commission Rules, adopted pursuant to the County Charter, Article IX, supersede general state law as to those matters for which the Charter provides.[3]

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3. *Curphey v. Superior Court*, 169 Cal.App.2d 261 (1959); *Pearson v. County of Los Angeles*, 49 C.2d 523 (1958).

By analogy, not only does the Civil Service Commission have authority to adopt rules which supersede the general laws enacted by the California Legislature, but also the corresponding authority to incorporate those general laws and adapt them to local needs. Therefore, the practical effect of the amendment to Rule 5.10 may be to grant an employee discovery through the appropriate civil provisions while limiting the county, in respect to those disciplinary proceedings specified in Rule 5.12, to civil discovery consistent with the right of a petitioning employee not to give testimony in such proceedings. In any other type of hearing, both parties are restricted to the civil practice rule requiring a showing of relevance and materiality as opposed to the slightly more liberal criminal law requirement of merely demonstrating that information sought is necessary for a fair trial.[4]

However, although common law criminal discovery procedure is no longer applicable per se, the real issue presented in the amendment to Rule 5.10 is the extent to which the county is precluded from discovery in Rule 5.12 proceedings. In this regard, Rule 1.01 indicates that Civil Service Commission Rules shall be liberally construed. A liberal construction given Rule 5.10 as it currently reads would perhaps indicate that not only may an employee refuse to testify in hearing, but that he may also refuse to answer any depositions and interrogatories requested by the county pursuant to Sections 2016-2026

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4. *Pitchess v. Superior Court*, 11 C.3d 531 (1974).

and 2030 of the Code of Civil Procedure. An interpretation of this nature would act not only to preclude any effective discovery by the county, it would be contrary to established precepts of administrative law.

In this regard, where no criminal prosecution is pending, a disciplinary hearing is not controlled by theories developed in the field of criminal law (*Fickeisen v. Civil Service Commission*, 98 Cal.App. 2d 419 (1950)). Only where criminal penalties for failure to testify or furnish evidence before an administrative tribunal are expressly provided by statute, are the privileges incident to a criminal trial applicable (*People v. Schwartz*, 78 Cal.App. 561, 248 Pac. 990 (1926)). Yet, Civil Service Commission Rule 5.12 operates to extend a petitioner's right not to testify in hearings on discharge, reduction, or suspension regardless of any subsequent criminal sanctions which may be involved. However, where no criminal penalties are involved, California authority would indicate that evidence in an administrative hearing should not be limited by concepts of criminal procedure in the absence of a contrary rule, such as Civil Service Rule 5.12, expressly controlling the proceedings of that particular agency (*Suckow v. Alderson*, 182 Cal. 247, 187 P. 963 (1920)). Precedent, although not mandatory in the County of Los Angeles, would therefore indicate that the scope of Rule 5.12 should extend only to a petitioner's right not to testify at the hearing. The standard governing other evidence admissible in civil service hearings is explicitly provided in Rule 5.10 and should prevail:

> Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper admission of such evidence over objection in civil actions.

This is the same standard provided by Government Code, Section 11513, subdivision (c). This section and Rule 5.10 further provide that the hearing shall be formal, but need not be conducted according to technical rules relating to evidence and witnesses.

In this context, Rule 5.10 was amended on October 18, 1974, and provided for the adoption of the rules of civil discovery. The explanation for the amendment was stated in the notice of public hearing, dated October 4, 1974, published by the County of Los Angeles, Office of the Director of Personnel:

> The rules of civil discovery in civil trials in the Courts of California *allow either party the right to take depositions, to require the answering of written interrogatories,* to review documents and to examine anything that might lead to relevant information. The right of discovery is prior to the hearing.
> (Emphasis added.)

However, the caveat that this rule shall not limit the employee's rights under Rule 5.12 was not in the notice of public hearing and only appeared as a subsequent amendment to the initial proposed amendment during the public hearing of October 18, 1974. No further explanation was provided in the amended minutes of that meeting. It

appears that the original intent pursuant to the amendment was to simply provide a specific statutory framework, as opposed to common law, which would be available to both parties. However, the subsequent reference to Rule 5.12 unfortunately attempts to somehow combine civil discovery procedure with a concept basic to criminal law. The predictable result is confusion. Either this reference acts to preclude the county from the right to take depositions or written interrogatories from the petitioning employee, or it is simply verbiage and has no effect.

However, there is an alternative available which would be in keeping with the original intent of the amendment. That is, by analogy to Deering's Government Code, Section 18677, where criminal penalties incident to an administrative hearing are pending or applicable, the Civil Service Commission Rules could provide immunity for testimony or production of any written material in those hearings, except for perjury committed in so testifying. This type of rule would act to insulate the employee from subsequent criminal proceedings while further protecting the public interest in the efficiency and discipline of the civil service. In so doing, either party would have full access to civil discovery procedures.

ARBITRATION OF INSUBORDINATION DISPUTES IN THE PUBLIC SECTOR*

"No damn it, I won't!"

Such insubordination has long been considered a serious offense in the world of employee discipline. The right of management to control its business and work force is a strongly rooted concept in labor relations in the United States. Within the context of organizations, this right implies that those in supervisory positions can direct their work force with the expectation that employees will carry out their directives.[1] Since the traditional purpose of the employment relationship is to accomplish the work desired by the employer, employees need to accept the authority of the employer.[2] Consequently, the presence of discipline is a fundamental element of this employment relationship. Our society, it would appear, has implicitly regarded respect for authority as an essential and valuable ingredient in the efficient operations of work groups. A breach of this discipline by an employee is considered to be misconduct. When employers and employee representatives are unable to agree upon the merits of an insubordination charge or the propriety of the discipline administered in response to the insubordinate act, such matters become grievances within the scope of the grievance machinery negotiated by the parties, and may ultimately be resolved through the arbitration process.

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* By Joseph C. Graham III. This article orginally appeared in *THE ARBITRATION JOURNAL*, September 1976.

1. Lawrence Stessin, *Employee Discipline*, p. 53.
2. Alfred Avins, *Penalties for Misconduct on the Job*, p. 36.

A new development in labor relations in recent years has been the widespread growth of collective bargaining among public employees. As a consequence of this growth, arbitration has been introduced in the public sector as a viable means of resolving grievance disputes which may arise between the parties. Included within this method of resolving disputes has been the arbitration of insubordination cases in the public sector. The purpose of this paper is to ascertain whether or not any arbitral consistency has developed with respect to arbitrators upholding or reducing disciplinary actions taken by public employers for insubordination. To accomplish this objective, I have examined all the arbitration decisions reported under the heading of insubordination in *Labor Arbitration in Government* [3] since its inception in 1971. This publication reports selected arbitration decisions from the public sector involving all types of public employees with the exception of school teachers. This review will focus on four broad areas: 1) an operational definition of insubordination, 2) the nature of differing types of insubordination, 3) factors influencing the propriety of the discipline and the severity of the offense, and 4) similarities between arbitration decisions involving insubordination cases in the public and private sectors. Conclusionary comments will follow.

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3. American Arbitration Association, *Labor Arbitration in Government*, Editorial Director, Morris Stone, published monthly Januray 15, 1971-June 15, 1975. Twenty-eight cases appearing under the heading of Insubordination during this time period have been reviewed in the preparation of this study. AAA case numbers as they appear in *Labor Arbitration in Government* will be referred to in subsequent footnotes.

Defining Insubordination

The principle that employees should obey the work orders of their superiors is well established in the American system of labor relations. Insubordination is not to be tolerated. From the cases reported herein, an operational definition of insubordination can be developed from the arbitrators' decisions. Most decisions seem to reflect an underlying value system which sees the primary function of the public employer to be operational efficiency in managing its resources and providing its services. This value system also reflects the thinking that the basic responsibilities to control methods of operations and to direct the work force should not be "prevented, thwarted, nor frustrated" by employees refusing to perform work orders.[4] Deliberate challenges to the right and authority of management to exercise control and direct the work force are viewed as rebellious and without basis.[5] Insubordination carries with it the notion of an employee deliberately failing to carry out a "known and proper order,"[6] or may focus upon an employee exhibiting disrespect toward supervisors, thereby challenging the authority structure of the work place. For employees to be insubordinate, they must be aware of the work order. In Michigan, an arbitrator overruled the suspension of a city mechanic, holding that there was evidence to support the grievant's claim that he had not originally heard the work order.[7] Delay is also considered

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4. Paul W. Hardy, 1/29/71, *City of Memphis (Tenn.)* and *American Federation of State, County, and Municipal Employees, Local 1733,* AAA case no. 114.

5. *Ibid.*

6. Carl A. Warns, Jr., 7/24/72, *United States Postal Service (Tampa, Fla.)* and *National Association of Letter Carriers,* AAA case no. 561.

7. David G. Heilbrun, 3/11/71, *City of Lansing (Mich.)* and *Lansing City Employees Unit, Local 1390, AFSCME,* AAA case no. 141.

to be insubordination. This includes quarreling at length with supervisors. It may not be insubordination however to briefly complain about the order.[8] In addition, a directive to perform work immediately does not require an "extreme sort of scrambling action" by the employee, but rather that he go about his work "briskly and purposefully."[9] Finally, it is not insubordination to question a work order in good faith. When a transit authority employee questioned an order, the assignment was postponed; and consequently, the employee could not be properly charged with insubordination. The arbitrator made clear in his opinion, however, that had the directive been repeated and had the grievant still failed to comply, he would have then been guilty of insubordination and properly disciplined. Thus, a review of the reported cases indicates that insubordination relates to employee conduct which is directed toward one's superiors, and involves the willful disrespect of work orders or the authority structure of the work place. Arbitrator Carlton Snow defines insubordination as "disregard for legitimate authority and the intentional refusal to obey that authority or an intentional disrespect for it."[10]

Therefore, the definition of insubordination in the public sector does not seem to differ from the accepted private sector notion of what constitutes insubordination.

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8. Alfred Avins, p. 25.

9. David G. Heilbrun, 3/11/71, *City of Lansing (Mich.Q* and *Lansing City Employees Unit, Local 1390, AFSCME,* AAA case no. 141.

10. Carlton J. Snow, *City of Eugene (Oregon)* and *International Association of Fire Fighters, Local 851,* AAA case no. 1240.

Insubordinate Behavior

Insubordination can be exhbited in a number of ways, the most frequent in the public sector being the alleged refusal of employees to perform work assignments. When dealing with this issue, arbitrators appear to uphold one of the oldest principles of private sector arbitration. They rule that workers must not take matters into their own hands by refusing work orders; rather they should carry out orders and then seek relief through the grievance procedure.[11] The rationale of Paul Hardy in a 1971 arbitration decision seems to reflect the thinking of most arbiters. He writes: "No employee may properly refuse and/or adamantly persist in the refusal to obey a work order on the ground that the order or direction violates some right of his under the contract or a job description--no matter how clear the violation may seem to him. . .an employee's obligation is to perform the work directed and grieve later--for his remedy lies in orderly resort to the grievance procedure of the contract."[12]

Such a rule is not without its limitations upon an employee's obligation to perform work assignments. Though none of the cases reviewed specifically addressed this issue, two decisions implied in dicta that a refusal to accept work orders which either threatened the health and safety of the employee,[13] or if performance of such an order would be a violation of

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11. AAA case nos. 114, 141, 362, 672, 1240.

12. Paul W. Hardy, 1/29/71, *City of Memphis (Tenn.)* and *American Federation of State, County, and Municipal Employees, Local 1733,* AAA case no. 114.

13. William Eaton, 10/13/72, *Alameda-Contra Costa Transit District (Ca.)* and *Amalgamated Transit Union, Division 192,* AAA case no. 716.

law,[14] then the employee's refusal would not be found to be insubordinate misconduct. Some decisions talk of the so-called "reasonableness"[15] and "legitimacy"[16] of the work order being refused. An analysis of these decisions, however, indicates that such terms are simply synonymous with other tests which assess whether administrative directives are either illegal or hazardous. Overall, arbitrators of public sector insubordination cases have adopted and applied the common law or private sector employment relations which maintains that a superior's reasonable order should be obeyed first and challenged later only through the grievance procedure. Any other system is feared to foster a pattern of self-help, which it is felt would produce chaotic employment relations.[17]

Insubordinate employee behavior in the public sector is next most frequently exhibited through the use of abusive language directed toward superiors. Arbitrators are apparently approaching this issue in the same manner they do in private sector arbitrations. Arbiters find profanity, epithets, and verbal abuse directed at superiors to undermine respect for authority and to interfere with management's continuous control over the work force.[18] Consequently, abusive language is often

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14. Paul W. Hardy, 1/29/71, *City of Memphis (Tenn.)* and *American Federation of State, County, and Municipal Employees, Local 1733,* AAA case no. 114.

15. Carlton J. Snow, *City of Eugene (Oregon)* and *International Association of Fire Fighters, Local 851,* AAA case no. 1240.

16. Arnold M. Zack, 12/16/74, *Southeastern Pennsylvania Transportation Authority (Philadelphia, Pa.)* and *Transport Workers Union, Local 214,* AAA case no. 1260.

17. Carlton J. Snow, *City of Eugene (Oregon)* and *International Association of Fire Fighters, Local 851,* AAA case no. 1240.

18. Lawrence Stessin, p. 59.

deemed insubordinate behavior. The exception comes about when the language in question is found to be within the boundary of accepted everyday language of the public employer work place.[19] One may not, however, direct with immunity foul language at a supervisor under the pretext of using community language. Mitigating circumstances may influence a finding of insubordination. For example, hurling invectives at superiors in the presence of other employees may be found to be a more severe offense because such action may undermine the respect other employees show for their superior.[20] In such a situation an apology made by the employee to his superior after tempers have subsided has little influence upon the other employees in the work group. Another exception to the community language defense is the case of what might be termed "fighting words." In such instances, language which might normally be accepted in a conversational manner, even though obscene and profane in nature, may be grounds for insubordination when used in combination with anger. According to arbitrator Snow, under such circumstances, the acceptable community standard of what language is permissible changes when the language directed toward the superior is intended to be "degrading and insulting."[21] Such behavior is evidence of disrespect for authority, and therefore, found to be a form of insubordination. In sum, it would appear that the guidelines used in the private sector to determine insubordinate abusive language have been applied similarly to public sector arbitrations.

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19. David G. Heilbrun, 3/11/71, *City of Lansing (Mich.)* and *Lansing City Employees Unit, Local 1390, AFSCME,* AAA case no. 141.

20. Carlton J. Snow, *City of Eugene (Oregon)* and *International Association of Fire Fighters, Local 851,* AAA case no. 1240.

21. *Ibid.*

Conspicuous by its absence in these public sector arbitrations is the charge of insubordination which involves an employee physically attacking a superior. In only one case[22] reviewed does even the threatening of a supervisor with physical violence become a major issue, and it is raised only tangentially in two other cases.[23] In these arbitrations which involved mere threats, not assaults, it would appear that arbitrators were interested in determining whether the alleged threats were incited by the supervisor in any way. If so, an employee discharge is not likely to be upheld.[24] These few cases would also appear to indicate that not every threat to do bodily harm to supervisors is taken seriously in arbitration. In Philadelphia, arbiter Gershenfeld held that such a threat, if it did indeed occur, was not of major importance in view of the difference of age and physical condition between the employee and the supervisor.[25] It would appear that the arbiter is saying that in this case such a threat could not have been actually

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22. John W. McConnell, 8/8/72, *City of Burlington (Vt.)* and *American Federation of State, County and Municipal Employees, Local 1343*, AAA case no. 657.

23. William Eaton, 7/5/72, *San Francisco (Ca.) Public Utilities Commission* and *San Francisco Municipal Railway and Transport Workers Union of America, Local 250A*, AAA case no. 601, and Walter J. Gershenfeld, 7/14/72, *Southeastern Pennsylvania Transportation Authority (Philadelphia, Pa.)* and *Transport Workers Union of Philadelphia, Local 234*, AAA case no. 634.

24. John W. McConnell, 8/8/72, *City of Burlington (Vt.)* and *American Federation of State, County and Municipal Employees, Local 1343*, AAA case no. 657.

25. Walter J. Gershenfeld, 7/14/72, *Southeastern Pennsylvania Transportation Authority (Philadelphia, Pa.)* and *Transport Workers Union of Philadelphia, Local 234*, AAA case no. 634.

intimidating, and was not, therefore, insubordination. Whether such a finding is the exception rather than the rule cannot be determined from the limited number of such cases reported by AAA. It would appear, however, that in cases of threatened physical attack upon superiors, arbiters seek to uncover the supervisor's possible role in instigeting the incident and the employee's intent behind his agressive behavior.

Thus, a review of insubordination cases reported from one public sector indicates that those same offenses which are most frequently deemed insubordinate misconduct in the private sector are those which appear in the public sector. Refusing work assignments and directing abusive language toward superiors are those which occur most often. One explanation for the relatively infrequent occurrence of cases involving employees threatening superiors with physical violence may be that this is a function of the type of work place prevalent in public employment. In many public employment settings contact between supervisors and employees is limited during the work day. For example, bus drivers and police spend most of their work time away from the direct supervision of superiors. Consequently, the pressures of an industrial setting in which employees are under constant supervision may be lessened in the public sector, thereby limiting the frequency of cases in which disagreements between supervisor and employee may evolve to the stage of physical threats and violence.

In each of the three types of insubordination cases discussed above, arbitrators are apparently using the same criteria and tests employed in

the arbitration of private sector cases in making a determination as to whether or not the employee was properly charged with being insubordinate.

Mitigating Factors Affecting The Severity Of The Penalty

The recent growth of unionism in the public sector has brought about an increasing number of negotiated agreements which tend to compromise the authoritarian tradition of public employers. Judging from the reported arbitration decisions, however, there seems to be a carry-over from the old implicit assumption of public employers requiring unquestioned obedience to their work orders. Many public employers apparently consider severe discipline and discharge to be reasonable, appropriate and necessary responses to employee acts of insubordination. These public officials frequently learn to their regret that arbiters do not always share their point of view. Arbitrators are giving careful consideration to extenuating circumstances and mitigating factors surrounding the alleged act of insubordination.[26]

In reviewing the reported cases, no disciplinary action whatsoever was enforced by the arbiters in thirty percent of the awards. This means that some form of discipline, be it discharge or a written warning, already taken against an employee by the public employer, was overturned in arbitration. In another 33 percent of these cases arbitrators reduced the severity of the disciplinary action to some lesser penalty. In discharge cases, the penalty was deemed appropriate fifty percent of the time, but

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26. Walter E. Baer, *Discipline and Discharge Under the Labor Agreement*, p. 96.

where the punishment taken by the public employer was less severe than discharge, their actions were upheld in only 28 percent of the arbitrations. These figures indicate that public employers have not been very successful in their arbitral efforts to uphold their disciplinary actions. A careful reading of these cases demonstrates that arbitrators frequently based their awards upon extenuating circumstances which may not have been given appropriate consideration by the public employer at the time disciplinary action was originally imposed. It is the consideration of such factors to which we now turn.

In some of the cases reviewed, the disciplinary action imposed by public employers, was deemed excessive where there was no past history of discipline to support the severity of the penalty being imposed. For example, in the case of a California fireman who listened to a world series baseball game on a transistor radio during a personnel training class, a one-day suspension was reduced to a written reprimand. This was done in part because the arbiter found that suspensions in that fire department were rare and customarily "reserved for serious breaches of rules and regulation."[27] A two-day suspension of a Postal Service employee was overruled in Florida for a similar reason. In this case, past practice dictated that employees, who violated a regulation requiring them to "ring off" the clocks of their postal tricks, were merely "chewed out" verbally in the presence of their peers. According to arbitrator Warns, this past

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27. Joseph F. Gentile, 1/28/71, *City of Anaheim (Cal.)* and *Firemen's Protective League of Anaheim,* AAA case no. 83.

practice does not preclude the Postal Service from issuing more severe disciplines in the future. But first, the employer must inform employees of the change in disciplinary policy to be implemented in the futute. Past practice had created an expectation as to the appropriate penalty. Under these circumstances, management could not "tighten up" its procedures and suspend this individual for insubordination when there had been no punishment for the same offense in the past.[28] These arbitration opinions indicate that where a public employer has either habitually tolerated rule violations in the past or has historically enforced a regulation in a particular manner, it has the responsibility to inform employees of any intended changes in the established pattern of handling disciplinary actions before such changes are effectuated. Where a public employer fails to do so, it would appear from these insubordination cases, that arbiters will disallow the new penalty and either enforce the customary penalty or overturn the disciplinary action altogether.

Another factor influencing the propriety of the degree of discipline for insubordination is the employer's relative uniformity of administering discipline for the alleged offense. While mechanical uniformity in discipline is both impossible and undesirable when we consider differences among supervisors and employees, there is a point beyond which disparity of treatment involving an employer's disciplinary action becomes so inconsistent that it raises serious questions about the motivation for the

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28. Carl A. Warns, Jr., 7/24/72, *United States Postal Service (Tampa, Fla.)* and *National Association of Letter Carriers*, AAA case no. 561.

employer's behavior.[29] For example, "grave doubts" were raised in the mind of an arbiter when a nurse was discharged for alleged insubordination. These doubts arose because of this nurse's recent connection with a complicated union organizational controversy and the fact that no insubordination charges were brought against a second nurse who failed to report to the same work area on the same work day to the same superior.[30] Also under this notion of uniformity of penalties is the finding that a public employer may discharge an employee for habitual insubordination even though other employees with records of more frequent reprimands are retained. Such a discharge was upheld in Lansing, Michigan, where the employer had the contractual right to consider the manner in which the insubordination was committed.[31] Thus, while arbitrators do not expect public employers to handle every insubordination case in precisely the same manner, it is expected that employers be able to explain any alleged inconsistency in administering discipline among its employees.

Another of the circumstances surrounding an arbiter's decision regarding just cause and appropriate disciplinary action in an insubordination case

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29. David G. Heilbrun, 6/18/71, *City of Lansing (Mich.)* and *Lansing City Employees' Unit, American Federation of State, County and Municipal Employees, Local 1390,* AAA case no. 201.

30. Harry N. Casselman, 12/14/70, *Detroit (Mich.) Metropolitan Hospital* and *Michigan Nurses Economic Security Organization, Division of Michigan Nurses Association,* AAA case no. 144.

31. David G. Heilbrun, 6/18/71, *City of Lansing (Mich.)* and *Lansing City Employees' Unit, American Federation of State, County and Municipal Employees, Local 1390,* AAA case no. 201.

is the behavior of the grievant's superior. There are several aspects of the supervisor's behavior which can influence the outcome of the arbitration. In a case where a superior had never issued a direct order to an employer to cease an insubordinate act, but rather relied upon what he referred to as a "clearly implied order," the arbitrator refused to uphold a one-day suspension.[32] In this case the superior had the opportunity to speak with grievant, but failed to do so and did not issue any directive. In another case a bus driver who had never been directly ordered to perform his work assignment was suspended.[33] The difference in this latter case was the employee's behavior which precluded the issuance of a direct work order when he drove his bus away while his supervisor was trying to be tactful in informing the grievant that he would have to remain on duty after his normal quitting time. The arbiter concluded that in this case the grievant knew what he was going to be told to do, and his driving away from the superior before a directive was issued did not free him from a finding of insubordinate misconduct. Another application of this principle involved the suspension of a policeman who reported for special duty wearing a beard and mustache. Here the arbitrator ruled that the uncertainty of the orders given the grievant created the impressions that if the grievant shaved, the order to go home would then

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32. Joseph F. Gentile, 1/28/71, *City of Anaheim (Cal.)* and *Firemen's Protective League of Anaheim*, AAA case no. 83.

33. William Eaton, 7-5-72, *San Francisco (Cal.) Public Utilities Commission* and *San Francisco Municipal Railway and Transport Workers Union of America, Local 250A*, AAA case no. 601.

be vitiated.[34] Therefore, it would appear that insubordination for refusing a work assignment is not likely to be found if a clear order has never been issued, unless, of course, it was the employee who had prevented the issuance of such a directive.

Another aspect of supervisory behavior can provide mitigating circumstances in an insubordination case. If there is evidence of supervisory abuse of discretion or inciting and unreasonable acts, a penalty of discharge is likely to be set aside.[35] In a case involving a California transit worker, arbitrator Eaton writes:

> Where "gross" or "rank" insubordination has occurred,. . .it may well be that only some related misdeed on the part of the employer would serve to mitigate the penalty of discharge.[36]

Such a situation apparently arose in Vermont where the discharge of a water department employee has reduced to a four-month disciplinary suspension.[37] This employee had been released for using harsh and vulgar language to his foreman as well as threatening him with physical harm. Despite the

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34. Harry B. Purcell, 1/31/75, *Town of Wilton (Conn.)* and *Wilton Police Benevolent Association, Inc.*, AAA case no. 1330.

35. William Eaton, 1/25/71, *Alameda/Contra Costa Transit District (Cal.)* and *Carmen's Division 192, Amalgamated Transit Union*, AAA case no. 105.

36. *Ibid.*

37. John W. McConnell, 8/8/72, *City of Burlington (Vt.)* and *American Federation of State, County and Municipal Employees, Local 1343*, AAA case no. 657.

severity of these offenses, the discharge was reduced when testimony indicated that the employee had been repeatedly harassed by his foreman for some period of time. While such supervisory goading and irritation could not be found to justify the grievant's grave insubordination, the inappropriate misconduct of the foreman mandated that penalty less than discharge be imposed. These arbitration decisions indicate that the behavior of a grievant's superior is subject to scrutiny when determining insubordination, and may well affect the finding of the arbitration hearing and the suitability of the penalty.

Another most important variable given substantial weight by arbiters in their decision-making process is the employee's past work record. A general rule to be extracted from the reading of these cases indicates that an employee's record is considered in weighing the penalty to be imposed if the insubordination charge is proven to be meritorious. However, it is not to be considered in determining an employee's guilt or innocence of the insubordination charge.[38] The one exception to this rule involved the case of the three nursing assistants. Here the arbiter looked to the combined 62 years of the grievants' good work records in determining the credibility of the witnesses.[39] In all other cases

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38. William Eaton, 7/5/72, *San Francisco (Cal.) Public Utilities Commission* and *San Francisco Municipal Railway and Transport Workers Union of America, Local 250A,* AAA case no. 601, and William Eaton, 10/13/72, *Alameda-Contra Costa Transit District (Cal.)* and *Amalgamated Transit Union, Division 192,* AAA case no. 716.

39. A. Dale Allen, Jr., 12/17/71; *Veteran's Administration Hospital (Topeka, Kan.)* and *National Association of Government Employees, Local R14-8,* AAA case no. 362.

the employee's work record was of paramount importance in determining the appropriateness of the discipline. As one arbiter remarks in his opinion:

> If an employee found guilty of an offense has a good record, the penalty may justifiably be a light one; if his record is bad, and particularly if it indicates offenses similar to the one of which he is found guilty, a more severe penalty, up to and including dismissal, could be justified.[40]

This case review of awards reported in AAA is replete with decisions supporting this point of view. In one instance the discharge of a bus driver for refusing to perform a work assignment and for using profanity was reduced to a one-month suspension.[41] The arbitrator reported reducing the penalty because there was no evidence that the grievant had ever been disciplined in the past. Thus, he ruled that discharge was too severe a penalty for what might be an "isolated instance" of improper behavior. In Cleveland, Ohio, an arbitration decision lent further evidence to this doctrine. Here it was ruled that a nurse's incident of insubordination warranted a disciplinary suspension rather than the discharge originally imposed because the grievant had never previously been guilty of insubordination.[42] In New York State the discharge of a deputy sheriff

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40. William Eaton, 7/5/72, *San Francisco (Cal.) Public Utilities Commission* and *San Francisco Municipal Railway and Transport Workers Union of America, Local 250A*, AAA case no. 601.

41. *Ibid.*

42. Peter Di Leone, 11/21/73, *Women's General Hospital (Cleveland, Ohio)* and *Service, Hospital, Nursing Home and Public Employees Union, Local 47*, AAA case no. 1034.

for alleged insubordination was also found to be without just cause.[43] The arbiter pointed out that even if the charge had been justified, such a finding would not warrant termination in light of the admirable seven-year career of the grievant. A final case illustrating the positive influence of a good work record involves the disciplinary suspension of a union steward. In this case the grievant was disciplined for insubordination when he refused to obey a supervisor's order to terminate a grievance session. This arbiter ruled in his decision that to suspend a steward who had no previous record of unsatisfactory behavior for more than the balance of the work day was "excessively harsh."[44]

Of equal importance in many cases is a grievant's work record which shows a history of disciplinary action taken against the employee. Where a Pennsylvania Transportation Authority employee was found to be insubordinate for refusing to cooperate with an Authority's doctor during a medical examination, the penalty of discharge was enforced in light of the grievant's short tenure with the employer during which he had previously been disciplined for insubordination.[45] In a California transit case similar

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43. Howard G. Foster, 2/28/75, *Orleans County (N.Y.) Sheriff's Office* and *Orleans County Sheriff's Deputies Association*, AAA case no. 1299.

44. Daniel C. Williams, 2/25/74, *City of Syracuse (N.Y.)* and *American Federation of State, County and Municipal Employees, Council 66*, AAA case no. 1105.

45. Arnold M. Zack, 12/16/74, *Southeastern Pennsylvania Transportation Authority (Philadelphia, Pa.)* and *Transport Workers Union, Local 214*, AAA case no. 1260.

reasoning prevailed where the grievant's prior record of insubordination and discourtesy was found to justify his discharge.[46] In an arbitration hearing involving a county junior planner, evidence showed that the grievant had been reprimanded for three similar insubordinate acts in the four previous months. Consequently, the arbiter found that this record constituted a clear and unmistakable warning to the employee not to take matters into his own hands again. When the grievant repreated his insubordinate manner of going about his duties, he was properly released.[47] Finally, a Michigan case further documents this notion of progressive discipline. In this case the employer was justified in assessing a suspension against an employee for wearing her name tag in an unacceptable manner after repeatedly issuing written warnings to the grievant.[48]

Thus, the role of a grievant's previous work record in insubordination cases has been given much emphasis by arbitrators in determining the sustability of the discipline to be enforced. A more severe penalty is supported by a work history of unsatisfactory behavior indicating prior insubordinate misconduct. On the other hand, a good record of employment may take on vital importance in qualifying employer disciplinary action.

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46. William Eaton, 10/13/72, *Alameda-Contra Costa Transit District (Cal.)* and *Amalgamated Transit Union, Division 192,* AAA case no. 716.

47. William Eaton, 12/20/73, *County of Orange (Cal.) Planning Commission* and *Orange County Employees Association,* AAA case no. 1020.

48. Thomas L. Watkins, 7/31/74; *Department of State (Lansing, Mich.)* and *Individual Grievant,* AAA case no. 1176.

A final mitigating circumstance present in this review of public sector insubordination arbitration centers upon the issue of due process. In several of the reported cases, disciplinary actions taken against public employees were disallowed and employees were made whole for losses incurred where the public employer deviated from the due process of the grievance procedure. In Pennsylvania, for example, a suspended bus driver, who was subsequently discharged for insubordination when he refused to be interviewed by his superior unless he was accompanied by his union representative, was reinstated with back pay. The decision was based upon a finding that the transportation authority had violated contractual due process when it failed to notify the grievant of the reasons for his suspension.[49] In a Detroit arbitration, the arbiter found that where a nurse was not permitted to answer the charges of her accusers at an investigatory hearing, an obvious abberration from due process was committed. Consequently, the grievant was reinstated with full back pay; the arbitrator finding that:

> It is an elementary requirement of just procedure and due process that the defendant be allowed to present evidence in his or her defense.[50]

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49. Samuel H. Jaffee, 9/28/73, *Southeastern Pennsylvania Transportation Authority, Red Arrow Division* and *United Transportation Union, Local 1594*, AAA case no. 963.

50. Harry N. Casselman, 12/14/70, *Detroit (Mich.) Metropolitan Hospital* and *Michigan Nurses Economic Security Organization, Division of Michigan Nurses Association*, AAA case no. 144.

In a third case written reprimands to three nursing assistants were set aside where the hospital had imposed the discipline solely upon the allegation of a supervisor. This was done without first completely and unbiasedly investigating the circumstances surrounding the charges and without allowing the grievants an impartial hearing which was guaranteed to them under the contract between the parties.[51]

These cases, therefore, point out a very basic shortcoming of disciplinary practice in the public sector. By denying grievants due process, employers are not only slighting employees, but themselves as well. When public employers ignore review requirements of their actions, impulsive and arbitrary supervisory decisions are more likely to exist. Cool tempers and deliberate judgments are not likely to prevail. Such practices deny the opportunity for each side to present and consider all the mitigating factors it considers relevant. It denies parties the opportunity to measure the proposed penalty in light of the grievant's work record and the past treatment such insubordination has been given by the employer. Denial of due process frequently prevents apologies, consideration of rehabilitation possibilities, and the evaluation of circumstances surrounding the alleged offense.[52] Consequently, arbiters are most likely to disallow whatever disciplinary action has been taken in the face of lack of due process.

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51. A. Dale Allen, Jr., 12/17/71, *Veteran's Administration Hospital (Topeka, Kan.)* and *National Association of Government Employees, Local R14-8*, AAA case no. 362.

52. Samuel Kates, *Decor Corporation Case* (44 LA 389), c.f. A. Dale Allen, Jr., 12/17/71. *Veteran's Administration Hospital (Topeka, Kan.)* and *National Association of Government Employees, Local R14-8*, AAA case no. 362.

Conclusion

This review of public sector arbitration decisions involving the issue of insubordination leads the author to conclude that there is little difference between such arbitrations in the public and private sectors. The same overt employee behavior which constitutes willful defiance and disrespect for authority in the private sector occurs most frequently in the public sector. Consistency between the decisions rendered in both sectors is increased by the use of arbitrators in the public sector who also arbitrate insubordination cases in the private sector. These dispute settlers bring with them the same set of value judgments which they have applied in their private sector work. Thus, the same arbitral temperament is directed toward public employers as is directed toward their counterparts in the private sector. Arbitral consistency is further reinforced across sectors as arbitrators apparently search through the abstracts reported in *Labor Arbitration Reports* to find similar cases. They then apply the reasoning from these reported private sector cases to their public sector arbitrations. This is evidenced in numerous decisions which cite LA references in their opinions.[53] Speculation would lead one to believe that this is done to increase the credibility and acceptability of these awards. Whether or not these arbiters are exceeding their jurisdiction when engaging in such practice is another matter.

This review of insubordination cases does not lead the author to conclude that specific misconduct will be penalized in any certain manner. Rather, arbiters give considerable weight to the mitigating circumstances which

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53. AAA case nos. 83, 141, 362, 1105, 1240.

are unique to the facts of an individual grievant's case. This clinical approach in the determination of insubordination and the justification of the proper discipline to be imposed places much emphasis upon such factors as the public employer's history of discipline, the relative uniformity of discipline at the work place, the behavior of the supervisor, the employee's work record, and procedural due process. Examples of reported public sector arbitration cases have been presented to demonstrate how these mitigating circumstances may influence the outcome of arbitration. These findings indicate that arbitrators are applying certain philosophical concepts of justice in their awards. It is apparently a combination of the magnitude of the offense and the sum of the extenuating circumstances which serves as a barometer for arbiters when choosing the proper remedy or penalty.

Finally, some conclusionary observations remain. In none of the arbitration decisions reviewed was there any mention of statutory law. It was to the author's surprise that mention of civil service law and regulations was entirely absent from the cases reviewed.

An analysis of these insubordination decisions also finds that many arbitrators have filled their opinions with gratuitous advice for the parties. These dicta are plainly included in the hope that it will aid the parties in developing better labor relations. For example, in one decision the arbiter takes the liberty of suggesting to the parties that they include in their disciplinary procedure a conference step with the employee, where the employer would better be able to investigate the factors surrounding

the alleged insubordination.[54] This advice may be both needed and beneficial to some parties as they come to familiarize themselves with the arbitration process. An example of the need to better understand the process is evidenced by two of the submission agreements reviewed which made no allowance for a remedy if the discipline originally imposed for insubordination had been found to be without just cause.[55]

In arbitrating these insubordination cases parties have abided by the generally accepted principles of private sector arbitrations regarding the burden of proof. Initially the burden of proof falls upon the public employer. It is required to show that the disciplinary action taken was made in good faith and for justifiable reasons. However, after the employer has attempted to make such a showing, the employee representative then assumes the burden of proof for showing that the disciplinary penalty imposed was either unfair or too severe. From this principle involving the burden of proof there is no reported variation.

Finally, the most striking observation to result from this study involves the severity with which public employers have sought to penalize their workers for insubordination. This may be evidence of what might be

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54. Peter Di Leone, 11/21/73, *Women's General Hospital (Cleveland, Ohio)* and *Service, Hospital, Nursing Home and Public Employees Union, Local 47*, AAA case no. 1035.

55. A. Dale Allen, Jr., 12/17/71, *Veteran's Administration Hospital (Topeka, Kan.)* and *National Association of Government Employees, Local R14-8*, AAA case no. 362, and Thomas L. Watkins, 7/31/73, *Department of State (Lansing, Mich.)* and *Individual Grievant*, AAA case no. 1176.

termed "growing pains" presently being experienced in the public sector as employer-employee representative relationships grow. Public employers seem to be over-reacting to employee challenges regarding employer power and authority. They are not accustomed to such questioning, criticism and interference with work orders. They, therefore, exhibit a tendency to react impulsively and emotionally to this new contention of their authority. Public employers must learn the tenets of progressive discipline. Learning how to discipline will result as the parties gain more experience with the arbitration process and as the relationships between public employers and public employee representatives mature in the years ahead.

DISCHARGE CASES RECONSIDERED*

The discharge of a unionized employee is one action which assumes major significance for the involved parties. Management has long contended that the employee discharge option is an essential prerequisite to the maintenance of efficient operations; conversely, a discharged employee who is reinstated by the arbitrator may seriously frustrate subsequent supervisory efforts at maintaining discipline. While many contend that what management loses in the arbitration hearing appears to be the union's gain, this viewpoint tends to disregard the fact that even when management supposedly wins and is upheld in the discharge decision there are very real losses involved for management. The investment in human resources has taken on increasing importance to the firms of today and the loss of that substantial investment in an employee represents one which cannot be redeemed once the individual is no longer an employee. The union's ability to represent the particular job interest of the individual worker is the criterion most often used by union members in assessing their leaders. This ability can be demonstrated in no more dramatic fashion than that which involves the saving of an employee's job status. Finally, discharge also has a fundamental impact on the employee--at a minimum, it represents an embarrassment to the employee in having to explain the situation to others; more serious is the fact that it can also represent a form of economic capital punishment, hindering the employee's ability to find employment elsewhere.

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* By Ken Jennings and Roger Wolters. This article originally appeared in *THE AMERICAN JOURNAL*, September 1976.

Approximately twenty years ago, J. Fred Holly conducted a major review of arbitral decisions pertaining to discharge.[1] This topic's significance notwithstanding, little, if any, effort has been made in the ensuing years to replicate this study. The purpose of this article is to compare and extend Professor Holly's efforts through a review of 400 current and consecutive discharge decisions.[2] More specifically, this article will analyze the general trend (similarities and differences) which has occurred in arbitration awards since 1956, and examine current considerations arbitrators employ when deciding the merits of a discharge grievance. Some caution must be taken in interpreting the generalizations presented below, particularly since arbitrators consider grievances on their individual merits. Also, there is a very real possibility that the published decisions may not be truly representative of all discharge grievances submitted to arbitration.

Differences and Similarities between Current and Previous Arbitration Decisions

The first two time periods in Table One[3] (1/42-9/51, and 9/51-3/56) were

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1. Fred Holly, "Considerations in Discharge Cases," *Monthly Labor Review* (June, 1957), pp. 684-688.

2. Cases were taken from *Labor Arbitration Reports*, Bureau of National Affairs, Vol. 56 through Vol. 61. It should be noted that those cases not having decisions applying to one of the categories in Table One were ommitted from the study.

3. The BNA grievance classifications which constituted the "reasons for discharge" in the first two time periods was not cited in Professor Holly's 1957 article. However, the following BNA classifications comprised the grievance categories for the third (May 1971-January 1974) time period in Table One. *Absenteeism* 118.6361, .6363, .6366, .6367. *Altercations* 118.640, .645. *Dishonesty, theft, disloyalty* 118.6481, .6482, .6484, .6488. *Gambling* 118.650. *Intoxication* 118.653. *Other Specific Rules* 118.301, .303, .641, .643, .646, .6561, .6564, .6565, .6567. *Damage to materials, incompetence* 118.637, .651. *Loafing, leaving post, sleeping on job* 118.654, .6563. *Acts of insubordination* 118.6521, .6523. *Refusal to accept job assignment* 118.658, .6611. *Striking, instigating strike or slowdown* 118.660, .6603, .6604, .6605, .6607, .6608, .6609. *Other union activities* 118.664, .6527. *Miscellaneous*

TABLE ONE:
ARBITRAL DISPOSITION OF DISCHARGE GRIEVANCES
January 1942 - August 1951

REASON FOR DISCHARGE	*All Awards (% of all awards)*	*Mgt. Sustained (% OF EACH GRIEVANCE CATEGORY)*	*Penalty Revoked*	*Reduced*
	235	94	70	71
Violation Plant Rules	(31)	(40)	(30)	(30)
		38	24	21
Absenteeism	83	(46)	(29)	(25)
		25	10	17
Altercations	52	(48)	(19)	(33)
Dishonesty, theft		14	15	11
and disloyalty	40	(35)	(38)	(27)
		3	3	2
Gambling	8	(38)	(39)	(24)
		10	5	6
Intoxication	21	(48)	(24)	(28)
		4	13	14
Other specific rules	31	(13)	(42)	(45)
Incompetence and/or	208	88	58	62
Inefficiency	(27)	(42)	(28)	(30)
Damage to materials,		68	47	44
incompetence	159	(43)	(30)	(27)
Loafing, leaving post,		20	11	18
sleeping on job	49	(41)	(22)	(37)
	143	47	31	65
Insubordination	(19)	(33)	(22)	(45)
		19	15	34
Acts of insubordination	68	(28)	(22)	(50)
Refusal to accept job		28	16	31
assignment	75	(37)	(22)	(41)
	149	61	32	56
Union Activities	(20)	(41)	(21)	(38)
Striking, instigating		48	22	47
strike or slowdown	117	(41)	(19)	(40)
		13	10	9
Other union activities	32	(41)	(31)	(28)
	27	10	9	8
Miscellaneous Causes	(3)	(37)	(33)	(30)

TABLE ONE - *Continued*
ARBITRAL DISPOSITION OF DISCHARGE GRIEVANCES
September 1951 - March 1956

REASON FOR DISCHARGE	*All Awards (% of all awards)*	*Mgt. Sustained (% OF EACH GRIEVANCE CATEGORY)*	*Penalty Revoked*	*Reduced*
	119	53	36	30
Violation Plant Rules	(42)	(45)	(30)	(25)
	30	15	11	4
Absenteeism		(50)	(37)	(13)
	22	12	2	8
Altercations		(55)	(9)	(36)
Dishonesty, theft	41	15	16	10
and disloyalty		(37)	(39)	(24)
	3	1	1	1
Gambling		(33)	(33)	(33)
	12	6	3	3
Intoxication		(50)	(25)	(25)
	11	4	3	4
Other specific rules		(36)	(28)	(36)
Incompetence and/or	57	30	12	15
Inefficiency	(19)	(53)	(21)	(26)
Damage to materials,	45	27	9	9
incompetence		(60)	(20)	(20)
Loafing, leaving post,	12	3	3	6
sleeping on job		(25)	(25)	(50)
Insubordination	57	18	8	31
	(19)	(32)	(14)	(54)
	24	7	4	13
Acts of insubordination		(29)	(17)	(54)
Refusal to accept job	33	11	4	18
assignment		(33)	(12)	(55)
Union Activities	57	30	8	19
	(19)	(53)	(14)	(33)
Striking, instigating	50	25	7	18
strike or slowdown		(50)	(14)	(36)
	7	5	1	1
Other union activities		(72)	(14)	(14)
	3	2	1	0
Miscellaneous Causes		(66)	(33)	(0)

TABLE ONE - *Continued*
ARBITRAL DISPOSITION OF DISCHARGE GRIEVANCES
May 1971 - January 1974

REASON FOR DISCHARGE	*All Awards (% of all awards)*	*Mgt. Sustained*	*Penalty Revoked*	*Reduced*
		(% OF EACH GRIEVANCE CATEGORY)		
	220	97	51	72
Violation Plant Rules	(55)	(44)	(23)	(33)
	47	26	9	12
Absenteeism		(55)	(19)	(26)
	28	12	3	13
Altercations		(43)	(11)	(46)
Dishonesty, theft	66	30	15	21
and disloyalty		(45)	(23)	(32)
	—	—	—	—
Gambling				
	18	4	3	11
Intoxication		(22)	(17)	(61)
	61	25	21	15
Other specific rules		(41)	(34)	(25)
Incompetence and/or	37	13	9	15
Inefficiency	(9)	(35)	(24)	(41)
Damage to materials,	29	11	8	10
incompetence		(38)	(28)	(34)
Loafing, leaving post,	8	2	1	5
sleeping on job		(25)	(12)	(63)
	56	26	7	23
Insubordination	(14)	(46)	(13)	(41)
	37	16	3	18
Acts of insubordination		(43)	(8)	(49)
Refusal to accept job	19	10	4	5
assignment		(53)	(21)	(26)
	31	13	8	10
Union Activities	(8)	(42)	(26)	(32)
Striking, instigating	17	8	2	7
strike or slowdown		(47)	(12)	(41)
	14	5	6	3
Other union activities		(36)	(43)	(21)
	56	20	17	19
Miscellaneous Causes	(14)	(36)	(30)	(34)

used in the 1957 study for comparative purposes. Management's record (arbitrator upholding the discharge) improved in almost all of the listed categories and in the total number of awards (45% vs. 39%). Professor Holly suggests several reasons for this improvement, notably: (a) better managerial discipline administration, (b) all parties to arbitration have a better understanding of criteria used in arbitration decisions, and (c) greater arbitral consistency in considering somewhat universal principles and factors. It is difficult to argue with this interpretation, and one would possibly expect management to better its record in the third time period (5/71-1/74). However, the trend is reversed when the second and third time periods are compared.

One possible explanation for this reversal is that the unions have equaled or surpassed management's sophistication in processing discharge grievances over time. In the first two time periods there were a substantial number of discharge cases involving union activities in which management's position was sustained. While this percentage did not noticeably shift in the current time period, the number and proportion of these cases dropped substantially. This trend could represent a decision on the part of the union to avoid sending this type of grievance to arbitration knowing that arbitrators generally disapprove of any type of work slowdown when there is a contractual provision to the contrary. Additionally, this may represent

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3. (cont'd)

causes 93.40, .4665, .4667; 94.02, .09, .117, .164, .22, .23, .554; 100.55; 102.28; 106.25; 116.1554, .1555; 117.105; 118.01, .02, .03, .07, .08, .301, .305, .311, .3133, .3135, .315, .41, .632, .634, .645, .646, .6491, .655, .751, .801, .803, .806, ; 123.01, .031. It is assumed that the relatively minor classification changes made by BNA since 1957 facilitates internal consistency over the three time periods.

an increased effort on the part of unions to educate their officers on their rights and responsibilities and a refusal to defend for political reasons those officers who blatantly overstep their authority. The union has the strategic advantage of selecting the grievance it will process and increased sophistication in this selection arbitration.

Management has apparently tried to observe the arbitral belief that employee discharge must be predicated on a rule violation as evidenced by the fact that the proportion of discharges for rule infractions has substantially increased over time. However, management's record in this general category has failed to show much improvement with many arbitrators citing inconsistent rule administration and employee ignorance of the rule (or consequences of rule violation) in their decisions.

Another explanation for this trend reversal might be seen in the "miscellaneous cause" for discharge category which has substantially increased (numerically and proportionately) over the preceding time periods. Many of these cases came from the public sector where (a) labor agreement provisions conflicted with existing or former Civil Service regulations, and (b) the newness of the collective bargaining relationship presented management little or no precedent on which to base their disciplinary action. Similarly, management in the private sector has had to deal with the relatively new phenomenon of resolving industrial discharge with state and federal statutes. Thus, the discharge of aliens, female employees (for not passing physical job requirements) and racial minorities is often complicated by the fact that management fails to consider the relationship between past practice and current legal requirements.

Finally, the grievances reviewed by Professor Holly occurred in a time period where there was limited legal enforcement of arbitral authority and decisions. Although management may have become more sophisticated in discipline matters, subsequent Supreme Court decisions may have given arbitrators greater latitude in their authority and decision making. As will be seen in the following section, there is currently little in the way of arbitral uniformity over disciplinary principles. This lack of consensus gives management little guidance in making and defending their discharge decision. Whatever the reason, it is interesting that, from a statistical standpoint at least, there has been very little change in the disposition of arbitral awards when a current sample of arbitral opinion is compared with decisions made 20-30 years ago.

Arbitral Considerations in Discharge Grievances

Table Two indicates the considerations explicitly cited by arbitrators in their decisions of 400 discharge grievances. Arbitrators seldom indicate the relative influence of each criterion in arriving at their decisions; however, this section will provide an overview of these considerations and their possible use in arbitral decision making.

The observation that citations of plant rules or contract provisions was the most commonly cited consideration in discharge grievances is not surprising; however, it does appear unusual that this consideration was not cited more often. Perhaps some arbitrators regard the rule as clear and incapable of being modified;[4] therefore they do not explicitly refer

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4. *Sperry Rand Corp.* 60 LA 223 (J. Murphy, 1973).

TABLE TWO:
CONSIDERATIONS EMPLOYED BY ARBITRATORS
IN DISCHARGE GRIEVANCES
(May 1971 - January 1974)

Consideration	*Number of Cases*	*Percentage of Occurrence*
Violation of contract provision or work rule.	246	62
Prior work record of grievant.	166	42
"Burden of proof."	155	39
Arbitrary, capricious, or discriminatory action by company in discharging grievant(s).	126	32
Citation of prior arbitral opinion(s).	119	30
Motivation or reasoning behind actions of management and/or grievant(s).	119	30
Relationship of penalty to the offense.	88	22
Policy or rule known and reasonable	71	18
Past practice under similar circumstances.	68	17
Seniority of grievant.	41	10
Contradictory testimony.	36	9
Age, sex, race or religion of grievant.	30	8
Criminal or civil law citation	30	8
Violation of "due process."	22	6
Arbitrability of issue.	16	4
Post discharge evidence.	8	2
Credibility of witness and/or evidence.	146	37

Note: Figures were obtained from 400 discharge grievances; as most of the grievances had one or more considerations, the absolute figures and percentages total more than 400 and 100, respectively.

to the rule in their decision. Nonetheless, there were several instances where companies did not have applicable rules, a situation (particularly in the case of insubordination, stealing and fighting[5]) which did not automatically preclude discharge. Arbitrators maintain reasonable rules are necessary for regulation of employee conduct. However (especially when unilaterally established by the employer) employees must be educated as

5. *Benjamin Electric Manufacturing Co.* LA 286 (A. Simon, 1973).

to their existence as well as penalties for their infractions.[6] One such unilaterally established rule requiring a machinist to purchase his own tools was adjudged reasonable by the arbitrator because the employer supplied products to the Defense Department whose inspection team recommended this rule to improve quality control.[7]

What constitutes a reasonable rule is a question which seems to generate numerous interpretations by arbitrators depending on the particular circumstances surrounding each case. The reasonableness of a rule which specifies discharge for a criminal conviction is one such example of a situation in which there is far from unanimous arbitral opinion.[8] Despite this, most arbitrators would regard such a rule as unreasonable if (a) the rule applies to all criminal convictions without regard to type of offense *or* penalty imposed, (b) the employee's conviction does not result in adverse publicity for the company and his return would not jeopardize labor-management relationships, and/or (c) the conviction was not related to his job.[9]

Rule administration and enforcement are often accompanied by an examination

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6. *Cotton's, Inc.* 60 LA 534 (R. Williams, 1973); see also *Prindle International, Inc.* 61 LA 613-17 (D. Heilburn, 1973) where the arbitrator reinstated an employee who was not completely aware of a new company policy.

7. *Stoody Co.*, 57 LA 1065 (W. Levin, 1971).

8. *American Welding and Manufacturing Co.* 60 LA 312 (E. Teple, 1973).

9. *Kentile Floors, Inc.* 57 LA 922 (H. Block, 1971).

of the firm's past practice under similar circumstances. There are two broad uses of past practice in discharge cases: (a) to determine what conditions suggest discharge appropriate for a particular industrial facility, and (b) to give some direction or guidance when company rules are subject to different interpretations. Regarding the first aspect of past practice, arbitrator Jacobs states,

> In addition to these so called industry-wide guidelines,. . .an inquiry must be made into the past pattern of disciplinary actions which the instant parties have used. It is against the two sets of guidelines that the instant discharge should be measured to determine if that discharge was for just cause. One should not ignore the past practice of the parties and substitute, instead, an industry-wide guideline of conduct.[10]

When contract language is ambiguous, arbitrators view the conduct of the parties as the most accepted and utilized indicators of how they themselves used the term.[11] An example of this situation occurred at Wagner Electric Corporation where an employee was discharged for drinking on the last day prior to Christmas shutdown. Arbitrator Erbs reinstated the employee, noting that the current rule did not say "no drinking" as the previous rule had done, and it was customary for some employees to indulge in a few drinks on the day in question.[12]

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10. *Gillette Company* 60 LA 776 (G. Jacobs, 1973).

11. *Amax Aluminum/Mill Products* 59 LA 394 (J. Sembower, 1972).

12. *Wagner Electric Corp.* 57 LA 10-13 (H. Erbs, 1971).

It is somewhat surprising to note that this consideration was cited in less than 20 percent of the grievances reviewed. This low figure may be attributable to the consistency with which many management representatives handle discipline administration cases or perhaps it signifies an inclination on the part of the parties involved to treat each case as a separate entity relying on the facts of the case to establish "just cause" for discharge, or a lack of it.

The prior work record of the grievant was the second most frequently cited consideration in Table Two. This most often entailed a reference to the grievant's past performance in his job duties and served as one indication of the employee's past and future value to his employer.[13] While some arbitrators maintain that the presented work record should be directly related to the discharge offense,[14] others suggests (a) the review of the grievant's overall work record is permitted in justifying the penalty imposed,[15] and (b) it is not necessary that specific prior infractions cited in the arbitration hearing involve the exact type of misconduct specified in the discharge.[16]

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13. *Marion Power Shovel Co.* 57 LA 762-765 (R. Gibson, 1971); *Amana Refrigeration, Inc.* 67 LA 824-828 (H. Wlech, 1971); *Columbia Broadcasting System, Inc.* 57 LA 77-84 (J. Sembower, 1971).

14. *Waterford School District* 61 LA 725 (T. Watkins, 1973); *Rite Beverage Co.* 59 LA 383 (A. Karlins, 1972).

15. *SuperValu Stores, Inc.* 60 LA 654 (J. Doyle, 1973).

16. *U.S. Steel Corp.* 61 LA 1201 (H. Witt, 1973).

One significant factor which may have a bearing on a grievant's work record is the dual role which some employees have as union representatives and hourly employees. Once again, arbitrators are found to hold divergent opinions on this issue. Some arbitrators, particularly in cases where the grievant has participated in a work stoppage, contend that union officers have a greater responsibility in upholding the terms of the labor agreement than does the regular employee thus making their

TABLE THREE:
ARBITRAL DISPOSITION OF DISCHARGE GRIEVANCES
BY SENIORITY
(May 1971 - January 1974)

Seniority	*Total Awards*	*Discharge Upheld (1) (% of total awards)*	*Reinstatement No Back Pay (2)*	*Reinstatement Partial Back Pay (3)*	*Reinstatement Full Back Pay (4)*
0 years less than two years	49	29 (59)	9 (19)	3 (6)	8 (16)
2 years less than four years	49	16 (33)	5 (10)	13 (26)	15 (31)
4 years less than six years	33	13 (40)	8 (24)	2 (6)	10 (30)
6 years less than eleven years	30	20 (67)	6 (20)	1 (3)	3 (10)
11 years less than twenty years	20	10 (50)	3 (15)	2 (10)	5 (25)
20 years and over	24	6 (25)	9 (37)	4 (17)	5 (21)
TOTALS	205	94 (46)	40 (20)	25 (12)	46 (22)

infraction (and corresponding penalty) more severe.[17] Yet other arbitrators, particularly in cases involving physical or verbal abuse toward supervision, contend that the employee's role as union officer affords him more leeway in arguments which, in turn, could reduce the discharge penalty.[18]

TABLE FOUR:
ARBITRAL DISPOSITION OF GRIEVANCE FOR
SELECTED SENIORITY CATEGORIES

Seniority	*Discharge Upheld*	*Reinstatement (Categories 2-4 Table Three)*
Less than 2 years (n=49)	29	20
11 years and over (n=44)	16	28

Adjusted X^2=4.46 p .05

Another related aspect of the grievant's work record pertains to accrued seniority at the time of discharge. Table Three presents the disposition of the grievance by the grievant's seniority for the 205 cases where this information was given. Several statistical tests were applied to various combinations of the seniority categories to determine if there were any statistically significant differences. The only combination which yielded these differences is presented in table Four. These figures suggest that

17. *All American Nut Company, Inc.* 61 LA 941 (H. Block, 1973); *Stokley VanCamp, Inc.* 60 LA 109-118 (D. Karasick, 1973); *Minnesota Mining and Manufacturing Co.* 59 LA 375-80 (J. Silver, 1972); see also W.H. Leahy, "Arbitration, Union Stewards and Wildcat Strikes," *Arbitration Journal*, XXIV (1969), 50-58.

18. *Sherwin Williams Co.* 56 LA 101-108 (J. Sullivan, 1971).

seniority at both extremes might be associated with arbitral decision making in discharge grievances. Clearly, there are many other factors which could create a spurious relationship between seniority and grievance disposition; however, in view of the statistical trend, it is somewhat surprising that arbitrators have explicitly considered the seniority factor in only 10% of their discharge decisions.

Burden of proof is one fundamental element of discharge for cause. The amount of proof necessary to sustain management's discharge decision often shifts with the nature of the offense. For some cases (typically absenteeism and incompetence) "burden of proof" means the preponderance of competent and reliable evidence must weigh in management's favor before the discharge is upheld.[19] However, in criminal cases (e.g., assault and theft) the burden of proof is often increased to "beyond a reasonable doubt" as,

> When the basis of discharge is also criminal equivalent conduct, the penalty becomes more severe because it casts a serious cloud over the employee for the rest of his life. This being so, many arbitrators have recognized that a higher degree of proof is required where the offense involves an element of moral turpitude or criminal intent.[20]

In considering whether the burden of proof has been met, arbitrators often have to assess the credibility of witnesses; particularly in those relatively

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19. *BIBI Continental Corp.* 57 LA 1252 (M. Berkowitz, 1972).

20. *Eagle Beverage Co.* 60 LA 687 (O. Andrews, 1973); *Greyhound Lines-West* 61 LA 44-58 (H. Block, 1973); *Grocer's Supply Co.* 59 LA 1280-1284 (J. Taylor, 1972) and *Bowman Transportation Company* 50 LA 838 (P. Hardy, 1973). See also Maurice C. Benewitz, "Discharge Arbitration and the Quantum of Proof," *Arbitration Journal*, XXVIII (June, 1973), 103.

rare (9%) cases where there is direct contradictory testimony. Some arbitrators have suggested that decisions relative to credibility are extremely difficult,[21] and, in the last analysis, often depend on an intuitive hunch regarding "who is worthy of belief."[22] Arbitrators generally regard a statement as true unless it is denied by someone, contrary to fact, or inherently incredible.[23] Often arbitrators rely on the witness's demeanor while testifying (e.g., vague or general response suggests the witness is not credible)[24] as well as the motives of the witnesses (e.g., overt hostility toward grievant detracts from witness's credibility)[25] in ascertaining the credibility of testimony rendered.

In an effort to bolter their respective positions, union and management officials often present prior arbitration awards (typically not derived from the firm's particular experience) in an effort to establish precedent. A general rule which is often followed regarding such efforts is that, unlike the law courts, arbitrators are not bound by prior arbitral opinions.[26] Despite this general rule arbitrators explicitly cite and

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21. *Western Airlines* 61 LA 576-81 (W. Petrie, 1973).

22. *Dow Chemical* 60 LA 707 (J. Gentile, 1973).

23. *Mac Tool, Inc.* 58 LA 1228-34 (C. Atwood, 1972); *King's Command Meats, Inc.* 60 LA 494 (P. Kleinsorge, 1973).

24. *National Airlines* 61 LA 684 (B. Cashman, 1973).

25. *Imperial Glass Corporation* 61 LA 1180-1184 (R. Gibson, 1973).

26. *Brockway Pressed Metals, Inc.* 58 LA 507 (S. Krimsly, 1972).

discuss such prior awards in almost a third of their decisions. Perhaps arbitrators, while giving these awards little weight in their decision, feel nontheless obligated to answer management or union contentions embodied in the awards. Arbitrators are also not adverse to citing prior awards which tend to illustrate support for their own position regarding the conclusions reached in the case at hand.[27]

Another fundamental element of discharge regards the appropriateness of the penalty for the committed offense. Often the nature of the offense does not warrant discharge even if the grievant is guilty as charged. For example, one discharged employee was reinstated even though he was found to have engaged in horseplay, "In the absence of premeditation, a deliberate act, malice, or a particular employee pattern,. . .horseplay is not grounds for discharge even though it may be grounds for some discipline."[28] Other offenses for which the discharge penalty might be excessive are negligence or carelessness,[29] falsification of an employment application form (particularly if falsification is minor and grievant has been a satisfactory employee), and discharge for off-duty behavior (particularly if the offense is not job related and the firm has not received adverse publicity).[30]

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27. *Rockwell International* 60 LA 869-874 (F. Witney, 1973); *Young's Market Co.*, 61 LA 1063-1066 (E. Edelman, 1973).

28. *Hamady Brothers, Inc.* 59 LA 1099 (G. Roumell, Jr., 1972).

29. *Burgess Mining and Manufacturing Company* 61 LA 952-57 (H. Grooms, Jr., 1972).

30. *Kentile Floors, Inc.* 57 LA 919-22 (H. Block, 1971).

Arbitrators frequently consider the underlying motives behind the grievant's and management's actions in determining whether the penalty of discharge is appropriate for the offense. If the grievant did not express a clear and willful intent to commit the wrong-doing, then the grievant may be an employee worthy of redemption. In two separate theft cases, the arbitrator reinstated the grievants involved maintaining that they mistakenly believed the plant property which they took to be abandoned or worthless.[31] Similarly, one principle criterion used to justify discharge for the falsification of application forms is the grievant's deliberate intention to deceive management.[32] In some instances, particularly in cases where the grievant is given (a) the ultimatum of quit or be discharged,[33] and (b) the grievant subsequently directs physical or verbal abuse towards the supervisor,[34] it is management's own actions which are instrumental in provoking the grievant's response. It should be noted, however, that,

> Provocation is not, of course, a complete defense to a disciplinary offense. But it is recognized as a factor justifying modification of penalty.[35]

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31. *Emge Packing Co.* 61 LA 250-253 (J. Getman, 1973); *Hayes International Corp.* 61 LA 238-243 (J. Whyte, 1973); *Murray Machinery, Inc.* 57 LA 1189-1194 (M. Graff, 1971).

32. *International Harvester* 57 LA 765-69 (S. Rose, 1971); see also *U.S. Plywood Corporation* 60 LA 959 (D. Heilbrun, 1973) where the arbitrator upheld the discharge in a related incident contending the grievant's actions were deliberate.

33. See for example Ken Jennings, "When A Quit Is Not A Quit," *Personnel Journal,* L (December, 1971), 927-932.

34. *Chas. Taylor & Sons* 57 LA 1168-71 (M. Volz, 1971).

35. *Piedmont Natural Gas Co.* 59 LA 665 (J. Whyte, 1972).

Another case in which the penalty of discharge is not usually deemed appropriate for the alleged offense is where management is viewed as having acted in an arbitrary, capricious or discriminatory manner. Management cannot, for example, let a series of offenses pass unnoticed so as to allow a sufficient number to accumulate in support of a discharge action.[36] Discrimination can also assume racial or sexual overtones; yet, this consideration was found in only eight percent of the grievances. Arbitrators seem reluctant to identify such grievant characteristics as race, sex, religion or age unless it is relevant to the specific circumstances surrounding the instant case. In the 400 discharge grievances reviewed only a relatively few black (18) or female (47) grievants were so identified.

While no overall trend could be found regarding these forms of discrimination, the following generalizations can be made: (a) the burden of proof is on the grievant in attempting to prove that he or she has been a victim of discrimination by the employer, and (b) management must make some effort to facilitate a minority employee's adjustment to a new and/or hostile environment.[37] Some union and management representatives labor under the false impression that the imposition of different penalties upon grievants charged with the same offense is clear evidence of

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36. *U.S. Postal Service* 59 LA 267 (S. Garrett, 1972).

37. *United States Steel Corp.* 58 LA 694-99 (H. Kreimer, 1972); *AMF Harley-Davidson Motor Co.* 61 LA (A. Christenson, 1973). See also Harry Seligson, "Minority Group Employees, Discipline and the Arbitrator," *Labor Law Journal*, Vol. 19, No. 9 (September , 1968), pp. 544-554; Kenneth Jennings, "Arbitrators, Blacks and Discipline," *Personnel Journal*, Vol. 54, No. 1 (January, 1975), 32-37, 64.

discrimination. This is not necessarily true; for example, "That differential treatment may be properly accorded participants in a brawl between employees, depending upon their respective degree of blame for the incident, is a matter of common sense and well supported by arbitral precedent."[38]

Due process considerations were only cited in a few (6%) of the cases. Perhaps this is an indication that management has become increasingly sophisticated in insuring that discharged grievants are not reinstated because of a contractual technicality or procedural irregularity. The most commonly cited violation of the process which did occur revolved around the investigation of the incident. More specifically, the grievant was not permitted to explain his actions prior to the time the decision to discharge him was made,[39] or key witnesses to the incident in question were not present to give first-hand testimony at the arbitration hearing.[40]

A somewhat controversial aspect of due process refers to the right of the grievant to have a union representative present whenever he believes discipline may be forthcoming. In one such situation the grievant was discharged after refusing to engage in two meetings with management representatives unless to union official was also present. The arbitrator upheld the discharge stating, "It is axiomatic in collective bargaining practice that

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38. *Prophet Foods Co.* 60 LA 584 (J. Kallenbach, 1973).

39. *Gulf Printing Company* 61 LA 1179 (C. Lilly, 1974); *Flinkote Co.* 59 LA 329 (P. Kelliher, 1972); *Benjamin Electric Manufacturing Co.* 60 LA 281-289 (A. Simon, 1973).

40. *Bamberger's* 59 LA 879-83 (M. Glushien, 1972); *CPC International, Inc.* 51 LA 1020-22 (M. Cohen, 1971).

the right to union representation at meetings with supervisors does not apply to every encounter between an employee and a supervisor during the regular work day."[41]

One consideration not cited by arbitrators in their decision related to the length of time for grievance resolution and the potential hardship that delay placed on the parties involved. The time lapse between the date of the grievance and award averaged 238 days for the 345 cases supplying this information. However, when the grievances were divided into two nearly equal groups (195 days and less, more than 195 days) there was no statistically significant association between the length of the grievance process and the disposition of the grievance (including proportion of back pay awarded the grievant). Perhaps arbitrators conclude that union and management officials are jointly to blame for this delay and therefore neither should benefit from their contributory negligence. Many arbitrators also maintain that a wrongfully discharged employee still has the duty to make a reasonable attempt to mitigate the damages in lost wages incurred by seeking other employment opportunities during the interim period. In light of the fact that neither side seems to benefit from delays in the arbitral process it would seem appropriate for both union and management representatives to seek to avoid unnecessary delays in the processing of grievances and thus avoid the losses which accrue in instances where human resources are allowed to stand idle. Management not only loses the services of the grievant during this period (for which they may have to reimburse

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41. *American Can Co.* 57 LA 1065 (I. Kerrison, 1971). For a different view of the same situation see *Southern California Edison Co.* 61 LA 453-63 (H. Block, 1973).

the employee if the arbitrator so orders), but delays may also prolong the "in limbo" status of the employee forcing him to accept lower paying, part-time or temporary jobs while awaiting his expected reinstatement. Win or lose, each party to the arbitration process must incur some degree of cost burden and unnecessary delays only tend to increase this burden.

Summary

Management's record in having discharge actions upheld by arbitrators seems to have shown little change in the past twnety years. The trend toward improvement in that record noted prior to the current study has not maintained the continued upward movement which might have been expected. Hopefully, the past few years have not been entirely idle but rather represents a period of consolidation of knowledge and experience which can be used in the future to accelerate the performance rating of management in the arbitration process.

In defense of management's performance it should be noted that in viewing similar principles or considerations, arbitrators have still not evidenced the high degree of consistency which might be hoped for by some. Although individual arbitrators are consistent in their own interpreation of principles and considerations from case to case, the proliferation of arbitrators in the field still makes for inconsistency when viewed as a collective group. While recognizing that each case is unique in fact and circumstance as well as the advantages inherent in the flexibility of the arbitral process as opposed to the judicial process, efforts directed at obtaining a greater degree of consistency amongst arbitrators as a group

would greatly facilitate the preparation of arbitral presentations by both management and union representatives. One possible step in this direction would be increased emphasis by arbitrators in their decision briefs on the relative weights which are attached to various aspects of the final decision.

Increased awareness by firms of their investment in human resources has increased the need to exercise good judgment in applying the penalty of discharge to an employee. The increased investment which many employees make in their own human resource potential has also served to add increased emphasis to the arbitration process as the most important mechanism for protecting their investment from unjust actions by management. In the future, all parties involved in the arbitration process will need to strive for greater sophistication in the performance of their functions thus ensuring optimal conditions for obtaining the maximum returns on their respective investments.