



presents

2023 Public Sector Conference

Disciplinary Arbitrations: When the Tail Wags the Dog
When should investigative or procedural errors affect the merits?

Friday, April 28, 2023
4:00 p.m. – 5:15 p.m.

Speakers:

Adrianna Guzman

Lisl Soto

Najeeb Khoury

Conference Reference Materials

Points of view or opinions expressed in these pages are those of the speaker(s) and/or author(s). They have not been adopted or endorsed by the California Lawyers Association and do not constitute the official position or policy of the California Lawyers Association. Nothing contained herein is intended to address any specific legal inquiry, nor is it a substitute for independent legal research to original sources or obtaining separate legal advice regarding specific legal situations.

© 2023 California Lawyers Association
All Rights Reserved

The California Lawyers Association is an approved State Bar of California MCLE provider.

LABOR AND
EMPLOYMENT
LAW

CALIFORNIA
LAWYERS
ASSOCIATION

Disciplinary Arbitrations: When The Tail Wags the Dog

When should investigative or
procedural errors affect the
merits?

Presented By:

Najeeb Khoury, Adrianna Guzman & Lisl Soto

Moderator: Yuval Miller

Panelists

- Adrianna Guzman, Liebert Cassidy Whitmore
- Lisl Soto, Weinberg, Roger & Rosenfeld
- Najeeb Khoury, Arbitrator/Neutral

Moderator

- Yuval Miller, Arbitrator/Mediator

Presumption: Reaching the Merits

- “A general presumption exists that favors arbitration over dismissal of grievances on technical grounds.”
 - How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 5-10.
- “Waivers, because they result in defeat of the rights of parties without consideration of the merits of the dispute, are not lightly inferred by arbitrators.”
 - How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016) at 5-21.
- First principles: merits versus technical issues

Arbitrator Views on The 7 Tests

- While some arbitrators have used The 7 Tests of Just Cause or otherwise focused on whether investigations were proper, most arbitrators seek to answer two questions:
 - 1) Did the Grievant do what the Employer alleges the Grievant did?
 - 2) If so, is the punishment appropriate in light of the proven misconduct?
- Did Daugherty himself use The 7 Tests of Just Cause?
- For a discussion of the 7 tests, including arbitrators overturning discipline on the basis of poor investigations, see Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-5 to 2-21.

Few Arbitrators Will Overturn Discipline Where Reliable Evidence Supports Discipline

- “Where the evidence produced by a proper investigation would not have altered management’s decision, arbitrators may generally conclude there was just cause for the discharge despite the lack of a thorough investigation” Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-21.
- The burden of proof: Who must show a full investigation would or would not have altered management’s decision?

Thoughts On The Importance of Investigations In the Arbitration Process

- Knowing when and how to attack investigative weakness.
- Best practices for efficient and fair investigations.
- When unfair investigations do and don't affect the award.

Do Arbitrators Want To Hear From Employer Decisionmakers?

- Less than you may think: Arbitrators sit de novo
- Decisionmaker can show consistency of disciplinary penalties imposed for similar misconduct and establish other workplace specific concerns.
- Decisionmaker's testimony, if based on hearsay, is much less useful than eyewitness testimony.

Failing to Interview the Grievant

- Employer reasons for not interviewing the Grievant
- Union's best argument for attacking failed interview
- Ways a failed interview can affect the award.

Importance of Timely Action

- “Employers must impose discipline within a reasonable time after learning of misconduct. . . . Timely action by employers permits employees to respond to the discipline at a time when memories are still fresh. An unreasonable delay deprives the union and employee of an opportunity to investigate, gather evidence, prepare a defense, or find competent witnesses.”
Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-12.
- When delay becomes too long
- Legitimate reasons for delay
- Types of misconduct may allow for more delay
- Certain reasons for discipline may require less delay

When Time Limits Bar Merits Review

- POBAR
- “If the labor agreement contains time limits for imposing discipline, the failure to comply with them can result in the arbitrator granting the grievance in its entirety, or issuing an award with a reduced penalty.” Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-13.
- Forfeiture clauses encourage a strict timeliness bar but may not always force an arbitrator’s hand

Disciplinary Notice: Overcharging

- Problems with overcharging:
 - “Punishment should fit the crime”:
Failure of proof on some charges
 - Decisionmaker testimony:
 - Considered all charges
 - Would have been same penalty if only one charge alleged
- Charging many violations may be appropriate in some cases.

Disciplinary Notice: Undercharging

- Precise reason for discipline not listed in the disciplinary notice of discipline
- “An employee is entitled to receive timely information regarding the reason for discipline with sufficient detail to allow him or her an opportunity to respond.”
Discipline and Discharge In Arbitration, Norm Brand, 3rd Edition (Bloomberg BNA Books, 2015) at 2-21.
- “The right to be informed of the charges includes the right to be informed at the time the discipline is imposed, not some later date.” Id.

New Evidence vs. New Charge

- New evidence that supports an existing charge
- Introduction of a new charge
 - After-acquired evidence
- Do not have to put back to work while being re-Skelly-ed
- Appropriate remedy if original reason for discipline would not have sustained discharge but subsequent reason does.

Remedies For Procedural Issues

- Barber/Skelly remedy
- Weingarten violation remedy
- Undoing discipline
- Reasoning in the absence of remedy

Final Thoughts and Questions

- **Najeeb Khoury, Arbitrator/Neutral**
213-304-5286 | nkhouryadr@gmail.com
- **Adrianna E. Guzman, Partner, Liebert Cassidy Whitmore**
310.981.2000 | aguzman@lcwlegal.com
<https://www.lcwlegal.com/people/adrianna-guzman/>
- **Lisl Soto, Shareholder, Weinberg, Roger & Rosenfeld**
213.380.2344 | lsoto@unioncounsel.net
<https://www.unioncounsel.net/bios/lisl-soto>
- **Yuval Miller, Arbitrator/Mediator**
415-484-2282 | yym@calarb.com
<https://laborarb.com/arbitrators/yuval-miller/>