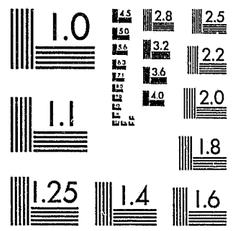




U.S. Department of Justice National Institute of Corrections

# Employee Grievance Decisions in Corrections

# EMPLOYEE GRIEVANCE DECISIONS IN CORRECTIONS

## A Guidebook

by
DENNIS DUBAY and JOHN L. GIERAK
Keller, Thoma, Schwarze & Schwarze, DuBay and Katz, P.C.

and
GILBERT H. SKINNER
Project Director

School of Criminal Justice
Michigan State University

January 1982

This publication was prepared under Grant Number CG-5 from the National Institute of Corrections, U.S. Department of Justice. Points of view and opinions expressed here are those of the authors and do not necessarily represent the official views or positions of the National Institute of Corrections or the U.S. Department of Justice.

## FOREWORD

This practical guidebook explores one of the basic issues in correctional management today -- the role of employee grievances in correctional agencies. It is designed to serve as a working tool for correctional administrators working in prisons, jails, and probation and parole agencies.

The fact that employee grievance procedures have become an issue for correctional agencies is a healthy sign of the field's growing professionalism. As the authors clearly document, the proper use of grievance procedures is a constructive force leading to better morale and more productive work environments. This is particularly critical in a field that traditionally has been understaffed, underpaid, and characterized by severe on-the-job stress among all levels of personnel -- from line officers through top management.

It is our hope that this guide will contribute to the expanded use of employee grievances.

Allen F. Breed

Allen F. Breed, Director
National Institute of Corrections

## PREFACE

The impetus for this work has been due in large measure to the support of the National Institute of Corrections for personnel studies we have done in the past. These preliminary studies led us to the realization of the need for a good guidebook in the area of grievance administration.

Throughout our previous research, we found managers who wanted to deal with grievance in a more professional manner but who had never been given the proper tools. Our hope is that this book, while technical, is also practical and useful. We have tried to minimize theory for fact. When possible, examples have been included to aid the reader's conceptualization of the issues. If we have succeeded, we will be measured not by a reduction in grievances but by an improvement within overall corrections administration.

In preparing this guidebook, we received not only financial but, more importantly, moral support from staff at the National Institute of Corrections, in particular, Mary Lou Commiso, who prodded and goaded us to completion. Her comments were always welcomed and her dedication to the project completion was appreciated.

The work of Dennis DuBay and John Gierak, both of Keller, Thoma, Schwarze & Schwarze, DuBay and Katz P.C., was germane to the major sections of this guidebook. Without their dedication we would not have completed it nor would it have been as thoroughly researched.

Finally, thanks goes to numerous secretaries, both from Mr. DuBay's office and from the staff of Michigan State University. Specifically, the drafts were finalized by Marlene Miller, who had to decipher the work of several parties and keep the footnotes straight!

G. H. Skinner
Project Manager



## TABLE OF CONTENTS

# CHAPTER ONE

## INTRODUCTION

"Management has the right to act - employees have the right to grieve" is accepted labor relations dictum. This "right" is far more in evidence in today's corrections agencies than has been true in the past.

Historically corrections agencies have often adopted an employee relations attitude of "who cares". If officers did not like their jobs they could leave. Another "warm" body could always be found to fill the void.

However, modern corrections with its emphasis on progressive administration, more humane treatment of inmates, and better employees have forced a new look at the "right" to grieve. It should not go unnoticed that the unionization issue has also contributed to the changed look at the whole of correction personnel management. Safe institutions, good morale, strong management all require providing forums for feedback including grievances from employees. The grievances need to be constructive, not destructive; aimed at improved practices, not resolution of petty complaints; positively used, not negatively abused.

## GRIEVANCE DEFINED

A grievance is:

> A formal complaint, on the part of an employee, that an action or inaction on management's part violates a contract provision or one of the organization's policies or practices in such a way as to adversely affect the employee.

Of course, some grievances are inevitable when people work together. In general, however, management's job is to:

- prevent, as much as possible, the dissatisfaction that results in grievances, and
- resolve, those grievances that do arise as quickly and as equitably as possible.

WHY GRIEVANCE PROCEDURES ?

The basic purpose of a grievance procedure is to catch small problems before they become big ones which are costly to settle in terms of people's time, back pay, strikes, or other things. In other words, grievances are not unlike a pain in the body. If pain is ignored, it gets worse and can be crippling. If the pain is analyzed and the proper corrective actions are taken, the pain is either minimized or disappears completely - the same is true of grievances. The major benefits derived from grievance procedures are set forth below.

Grievances often result in bringing problems out in the open so that management can identify them and initiate appropriate corrective actions. In the absence of a grievance procedure some managers ignore problems that are developing in their work groups while other managers deliberately prevent information about such problems from being revealed to anyone outside of the work group. Either strategy, of course, tends to produce adverse consequences for the organization. Small problems become big ones, dissatisfaction and frustration increase, and employees become interested in other, less peaceful, ways of resolving their complaints.

Grievances provide employees with an opportunity for emotional release. When someone feels that he or she has been unfairly treated, they can file a grievance and have that grievance discussed, in a serious and



constructive way, by management. In these discussions the grievant has an opportunity to "blow off some steam". This opportunity seems to be appreciated by many people and is probably quite beneficial to the organization. Many experts liken a grievance procedure to a safety valve for the organization.

Grievances help to guard against and provide redress for arbitrary and capricious actions. In the absence of a grievance procedure there will always be some supervisors who will take advantage of their subordinates and treat them unfairly. With a grievance procedure, however, such supervisors must think twice. They know that their subordinates have the option of filing a grievance and having the grievance heard by higher levels of management. In addition, they realize that if they have a number of grievances filed against them which are eventually sustained by higher-level managers or arbitrators, this will cause their superiors to question their ability to manage other people.

The three benefits of grievance procedures discussed above apply in both union and nonunion situations and probably explain why some corrections agencies have established such procedures even though they have maintained their nonunion status. When a union exists, grievance procedures offer additional benefits given below.

Grievance procedures help ensure the proper administration of the terms of the collective bargaining agreement. Without such procedures members of management might intentionally or unintentionally violate the terms of a collective bargaining agreement and, in effect, make the agreement meaningless. This would leave the members of the union frus-

trated and angry and with little recourse short of a strike. Many labor relations experts refer to the grievance procedure as the union's "quid pro quo" for giving up the right to strike during the life of a collective bargaining agreement. Without a grievance procedure to help ensure that the contract terms will be adhered to by management, few unions would give up the right to strike and there would almost certainly be more strikes in organizations of all kinds.

Grievance procedures provide a means for gaining clarification of contract language which is unclear. Frequently the terms of the contract and/or the intent of the contracting parties are not at all clear from the contract language. At times this is because the negotiators did not wish to take the time to work out all of the language and detail necessary to completely convey their intent. At other times the lack of clarity is due to the choice of ambiguous and/or inappropriate terminology. In either case a grievance procedure provides a means for clarifying the terms of the collective bargaining agreement. When a grievance is filed management and the union must meet in order to resolve it. During such meetings they must reach agreement on the exact meaning of the contract language. When necessary clarifying documents are written, agreed to, and signed by both partners.

Grievance procedures often identify parts of a collective bargaining agreement that require modification. If there is a particular provision of the contract that is constantly being brought up in the grievance process, that provision should be looked at closely. It is possible that provision is basically unfair, too difficult to enforce, or both. If so,



such provisions can be modified either through the grievance procedure or in subsequent negotiations.

Almost all corrections agencies have some established grievance procedure whether or not their employees are represented by a union. Procedures for non-represented employees may involve other state departments (i.e., civil service), a hearings officer, or an appointed hearing board.

Grievances are filed against corrections administrators for alleged violations of employee rights or protections. The vast majority of grievances filed are for termination or other disciplinary action. Other grievance complaints are due to wages and working conditions. According to a survey conducted by the School of Criminal Justice at Michigan State University, corrections departments are averaging only a 50% success rate in grievance decisions which are decided in arbitration.

This loss of grievance decisions may be resulting because managers have not been educated or trained in the procedural and substantive aspects of employee rights. A perpetuation of management grievance losses eventually effects the morale and performance of correctional officers. Anytime there is a question of management control or efficiency, then the organization suffers. In corrections, the organization cannot be allowed to deteriorate as it has a direct effect on the inmate population.

Since corrections department are handling a large number of grievances and are not seemingly successful in their defense, it is apparant that administrators need some guidelines from which to base their personnel decisions.

One method of providing that assistance is to publish a guidebook that will outline actions which have been established as acceptable or unacceptable labor practices and to delineate the major arbitration and court cases which provide the basis for these conclusions. This will serve as a working tool for the administrator.

The remainder of this guidebook follows this format:

Chapter Two:

. Major Sources of Correction Employees Rights. These are rights which are present with or without a grievance procedure. These include: constitutional rights; federal statutes; federal guidelines; state statutes; and local charters, ordinances and regulators.

Chapter Three

. Major Areas of Grievances Involving Corrections Employees. Most of the important areas identified in a nation-wide research project on grievance problems are discussed with case cites. Included is a heavy emphasis on certain disciplinary policies that have been troublesome. In each section there is a short description of the area and then a discussion with examples.

Chapter Four

. Grievance Resolution. This section focuses on proper investigation and settlement of grievances. Included is a short discussion on standards for decisions.

Chapter Five

. Arbitration of Grievances. Many grievance procedures allow for third party arbitration. Some basic ideas in terms of selecting the arbitrator and what arbitrators look at in grievance decisions are presented.

Chapter Six

Minimizing Grievances. The focus here turns to things corrections managers can do to minimize grievances. The total absence of grievance is probably no more desirable than is an excess. However, the right actions by managers can often defuse potential



grievances and aid in the smoothing of employee relations.

Chapter Seven

Final Thoughts and Conclusion. Here will be a brief discussion of how inmate grievances spur employee grievances. And finally, the future and the employee's right to grieve.

CHAPTER TWO

## MAJOR SOURCES OF CORRECTIONS EMPLOYEES RIGHTS

The employment status of corrections employees is protected by a wide variety of procedural and substantive safeguards. Likewise, the corrections employees' wages, hours and working conditions may not be changed for reasons which violate these safeguards. The corrections employee may challenge disciplinary action or the change in wages, hours or working conditions by the assertion of rights arising under federal and state constitutions, federal statutes and administrative guidelines, state statutes and administrative guidelines, local charters, ordinances and regulations, and collective bargaining agreements. The greatest source of corrections employee rights is the collective bargaining agreement. While constitutional and statutory provisions protect certain limited areas (exercise of speech, non-discrimination due to membership in a protected class, etc.), the collective bargaining agreement establishes a host of rights and privileges under the general heading of "wages, hours and working conditions". Moreover, the contract commonly establishes a mechanism--the grievance procedure--under which the aggrieved employee may enforce his claims.

In this chapter we will focus on those major courses of corrections employees rights and those areas commonly encountered by corrections administrators at the federal, state and local levels.

Because corrections employee grievances or complaints may entail rights above and beyond those set forth in a collective bargaining agreement,



it is important that the corrections administrator be aware of and observe these various rights of employees.

### CONSTITUTIONAL RIGHTS

The original Bill of Rights and other subsequent amendments to the United States Constitution have put limitations upon the power of government by granting specific rights to individuals. The constitutional rights of individuals differ from other rights in that they cannot be taken away or changed by state or federal statute or by collective bargaining agreement. Employees of correctional institutions retain their individual constitutional rights in the course of their employment. Consequently, if a correctional institution takes action against an employee which infringes upon a constitutional right of the employee, the action, if challenged, will be overturned, even if the action was specifically authorized by a statute or collective bargaining agreement. This section deals with the major federal constitutional rights of employees that will most likely confront the corrections supervisor.

Note that this section deals only with federal constitutional rights. Each state of the Union has its own state constitutional rights, which also grants to individuals certain state, as opposed to federal, constitutional rights. In general, most state constitutions are broadly patterned after the federal constitution, and therefore, state constitutional rights granted to individuals tend to be identical or similar to an individual's federal constitutional rights. However, some states do grant state constitutional rights to individuals above and beyond that granted by the federal constitution. For example, some states have granted

individuals the right to be free from discrimination in the exercise of their civil or political rights because of religion, race, color or national origin.[1] Corrections supervisors should make it a point to learn of any state constitutional rights granted individuals that go beyond those under the federal constitution.

## First Amendment Rights

Corrections employees at the federal, state and local levels enjoy protection under the First Amendment of the U.S. Constitution for statements and expressions which are of a nonpartisan character.[2] Nonpartisan speech can be described as speech by corrections employees that does not fall under the prohibitions of the Hatch Act[3] and similar state and local acts against political expression and activities.[4] However, the extent of a corrections employee's freedom of expression is more restricted than that of a member of the general public.

Discussion. There has been no clear general standard stated for determining when the speech of a public employee will be protected.[5] Rather, a balancing of the interests of the public employee and the public employer is undertaken in each case. This makes it difficult for both the employer and the employee to decide beforehand what actions on their respective parts are permissible. However, the Supreme Court of the United States has identified certain interests which are to be considered in this balancing process. Those interests weighing in favor of the public employer include its interest in terminating the employment of incompetent employees,[6] in preserving discipline by supervisors, in maintaining



cooperation and harmony among co-workers,[7] in maintaining the loyalty and confidence of employees who occupy the special positions calling for such attributes,[8] in avoiding the disruption of governmental operations,[9] and in rebutting without unnecessary difficulty the erroneous statements of employees.[10] The countervailing interests of public employees, and the public generally, in the free expression of public employees include the connection of the speech to an issue of public importance, the extent to which the speech is made in a public context, and the probability that the employee has an informed and definite opinion on the subject of the speech.[11] If the interests of the employee and the public outweigh the interests of the public employer in a particular instance, the speech is protected. For example, it has been held that it is not permissible to punish employees who accurately exposed corruption in an office simply because the speech somewhat disrupted and demoralized part of the offices.[12] In this case, the small disruption and demoralization was outweighed by the importance of the disclosure.

The freedom of speech issue arises when an employee alleges that he has been terminated or disciplined for exercising his free speech right. In order to prevail, the discharged employee must show two things. First, the employee must show that his speech was constitutionally protected. This involves the weighing of the interests discussed above. At this point, the employer may argue the strength of its interests, and that the employee's expression has or will impair or impinge upon those interests. Second, the employee must show that his expression was a substantial or motivating factor in the employer's decision.[13] The employer can offer evidence to show that this was not in fact the case. A conclusion favorable

to the employee on these two points does not end the inquiry, however; this merely shifts the burden to the employer. If the employer can show that it would have reached the same conclusion irrespective of the constitutionally protected expression of the employee, its action will be upheld.[14]

Any rules or regulations which are established to restrict employee speech rights must be drafted so as to clearly preclude only speech which can be permissibly restricted or the rules will be held invalid. For example, a police department rule which prohibited policemen from taking part in any activity, discussion, deliberation or conversation which was derogatory to the police department or any of its members or policies was held to be too broad and therefore violated the police officers' right of free speech.[15].

The First Amendment protects private as well as public speech. Thus, a corrections employee's expression will remain protected whether it is directed to the public at large (i.e., as in a public speech or pamphlet), or to an individual (i.e., as in a private conversation between an employee and his supervisor).[16]

It should also be noted that neither federal nor state government may condition public employment on taking oaths which restrict rights guaranteed under the First Amendment.[17]

Freedom of Association

Corrections employees have the right to associate with lawful special interest groups, including the right to join unions and political parties. However, the federal and state governments can severely restrict the kinds of activities that corrections employees may engage in as members of these



groups.

Discussion. Public employees have been held to have a First Amendment associational right to be members of unions.[18] Thus, a blanket prohibition against such membership is invalid.[19] However, this right does not preclude government from restricting public union activity in order to protect legitimate government interests.[20] For example, courts have held that a state could constitutionally make collective bargaining agreements between public employers and public employees illegal.[21] For more information concerning public employees unions, see the sections dealing with collective bargaining.

Freedom of association also includes a person's right to be a member of the political party of his choice.[22] Thus, the dismissal of non-policymaking employees solely on the basis of political partisanship has been held to be an unlawful infringement upon an individual's freedom of association.[23] In addition, a statute which barred state employment solely on the basis of membership in the Communist party or similar party membership has been found unconstitutional.[24]

Whether an employee's freedom of association shall bar the otherwise lawful action of a public employer requires a balancing of their respective interests, and is determined on a case-by-case basis. The considerations listed under the freedom of speech section as weighing in favor of legitimizing the action by a public employer likewise apply to freedom of association problems.

## Fifth Amendment Rights

The Fifth Amendment provides two rights that impact upon the discipline and discharge of corrections employees. The first is the right against self-incrimination. A supervisor may not discharge a corrections employee for refusing to waive his constitutional right against self-incrimination. A supervisor may, however, require an employee to answer questions dealing directly with the performance of the employee's official duties, where the employee is not required to waive his immunity with respect to the use of the answers.

The second right protected by the Fifth Amendment is the right against deprivation of life, liberty and property without due process of law. This latter right is discussed in the section on the Fourteenth Amendment.

Discussion. The United States Supreme Court has established two principles with respect to the right of self-incrimination in the context of public employment. First, the Court has held that it is unlawful to require employees to waive their right against self-incrimination under threat of discipline or discharge.[25] Second, the Court has held that where employees are forced to incriminate themselves under threat of discipline or discharge, the information so obtained cannot be used against them in subsequent criminal proceedings.[26] The Court did, however, state that if an employee refused to answer questions that were "specifically, directly and narrowly relating to the performance of his official duties," without being required to waive his right to immunity with respect to the use of the answers and the facts thereof, the constitutional right against self-incrimination would not bar the employee's dismissal.[27]



An employee's Fifth Amendment rights against self-incrimination do not protect an employee giving false and evasive answers, and an employee may be discharged for such conduct.[28]

An employee may also waive his right against self-incrimination, although it must be done so voluntarily.

Examples

-- Where a Trial Board was convened to investigate allegations that two officers negligently allowed the escape of prisoners from the county jail, and where the officers refused a direct order to answer questions with respect to their conduct on the ground that it might incriminate the officers and jeopardize the officers' employment, a second Trial Board may be convened to consider the officers' refusal to obey an order to answer the questions in the first Trial Board proceeding. The Court held that the questions posed were specifically, directly and narrowly related to the performance of the officers' official duties and, since the department did not require the officers to waive their right against self-incrimination, the privilege against self-incrimination did not bar the officers' dismissal.[29]

-- A court upheld an officer's discharge for his failure to answer questions regarding possible misconduct after he had been assured that his answers would not be used against him in a departmental disciplinary proceeding or criminal prosecution.[30]

-- Although a police chief had a right to refrain from taking a polygraph test, when he did take the test in another county and presented the results to the city commissioners, the court held that the police chief waived the protection of any possible right to freedom from self-incrimination.[31]

## Fourteenth Amendment: Procedural Due Process

The Due Process Clause of the Fourteenth Amendment prohibits any state, local government or agency thereof from depriving any individual of his liberty or property without due process of law. Consequently, whenever a corrections supervisor takes action to deprive a corrections employee of a liberty or property interest, the supervisor must give the corrections employee notice of the charges against him, and grant the employee an opportunity to be heard on these charges at a meaningful time and in a meaningful manner. The kind of procedures to be followed in affording an employee due process varies with the importance of the liberty and property interest at stake. Therefore, where a corrections employee has only a minimal liberty interest at stake, only minimal due process is required.

Discussion. There are two basic issues that a corrections supervisor must resolve in dealing with an employee's right to procedural due process. First, the supervisor must decide whether his action is depriving the corrections employee of a liberty or property interest. (Some examples of liberty and property interests are discussed hereafter.) If not, the employee has no right to procedural due process. If so, then the supervisor must then decide how important this liberty or property interest is, for the importance of the interest will prescribe how extensive the procedures must be in order to satisfy the employee's right to procedural due process. These procedures could range from a minimum procedure involving relatively short notice to the employee and an informal hearing immediately after the incident at which the employee was allowed to tell



his side of the story, to an elaborate procedure consisting of seven days notice to an employee for a formal hearing at which the employee would be able to confront his accusers, cross-examine witnesses, object to evidence, and which would ultimately result in written findings by an unbiased decision-maker.

### 1. Necessity of a Hearing

Infringement of Liberty Interest. A supervisor is obligated to provide a hearing to a corrections employee if the action taken against the employee causes significant damage to the employee's reputation, good name, or otherwise stigmatizes the employee. Such damage to an employee's reputation has been held to infringe upon an individual's "liberty," since it may, for example, interfere with the employee's ability to obtain employment elsewhere. The protection of an employee's liberty interest is not violated by the presence of adverse information in a personnel file standing alone, or merely by the fact that an employee's termination has made it difficult for him to obtain other employment. [32]

Examples

-- When a probationary officer was discharged for deliberately lying about having a female traffic violater in his cruiser, and did not contest the truthfulness of this charge, no liberty interest sufficient to require a hearing was found. [33]

-- However, where a probationary deputy sheriff was accused of using his service revolver and badge to collect a private debt during his off-duty hours, the court found the charges so specific that they contained a great potential for a stigmatization. The Deputy alleged that this

stigmatization had deprived him of an ability to obtain employment anywhere in the law enforcement field. If the Deputy is able to prove that he has been seriously stigmatized by the reasons stated for the discharge, the Deputy is entitled to a due process hearing on the discharge. A due process hearing is required "where the employer stigmatized the person as mentally ill, fraudulent, or untruthful." [34]

-- An opportunity for a hearing is not required for a discharged employee who was terminated for putting a revolver to his head in an apparent suicide attempt, even when the discharge stigmatizes the employee, where the employee does not deny the allegations that create the stigma. The purpose of the hearing would be to clear the employee's name, and that purpose would not be achieved if the employee does not contest the stigmatizing allegations. [35]

Infringement of Property Interest. A supervisor is also obligated to provide a hearing to a corrections employee where the action taken deprives the employee of a "property" interest. An employee has a property interest in his employment with a corrections institution only if he has a legitimate claim of entitlement to that employment based upon a state statute, a formal or informal tenure system, a contract, or some other authorized rule or understanding, like a published regulation of the corrections institution. [36] If an employee is employed at the will of the corrections institution, the employee does not have a property interest in his employment.

Examples

-- A prison guard of thirteen years of satisfactory service is, prior to his discharge, entitled to present medical evidence explaining his



apparent physical inability to continue working, as well as evidence that other similarly situated employees were treated differently. [37]

-- Similarly, at least one court has held that where the local ordinance contained a specific list of reasons for which a police officer could be demoted, a police officer had a property right in his rank and, thus, is entitled to a due process hearing on a demotion from the rank of Lieutenant to Corporal. [38]

-- However, the Supreme Court had held that a probationary police officer does not have a property interest in his position, and therefore he did not have a right to prior notice and a hearing prior to termination of his employment. [39]

This, again, is particularly true where the officer does not contest the truthfulness of the charges against him. [40]

2. Notice

If a corrections employee is entitled to a hearing, he is entitled to notice prior to the hearing, and far enough in advance to give the employee a reasonable period of time to prepare his defense. The amount of time needed will depend upon the circumstances.

Examples

-- When a sheriff was sued for his alleged failure to reappoint certain deputies in violation of the labor agreement, the trial court issued a restraining order against the sheriff. The court of appeals held that none of the papers issued by the trial court sufficiently informed the sheriff of the nature of the proceedings against him. Further, due process requires that before a sheriff may be found in contempt of a restraining order, the sheriff must be afforded minimal due process, which requires

that the sheriff be provided a hearing and a reasonable opportunity to meet and refute the alleged charges. In this case, a period of 5:30 p.m. one evening until 9:30 a.m. the next morning was insufficient time for the sheriff to prepare a defense of the alleged contempt. The court held that it had to find that the sheriff was guilty beyond a reasonable doubt, since a contempt proceeding is a criminal action. [41]

-- However, where a prison guard was intoxicated on the job, failed to appear for work, refused to see his superior, then threatened his superior, and refused an offer for an administrative hearing, the court held written notice of his dismissal impracticable. [42]

3. Propriety of Hearing

If a hearing is required, at a minimum a corrections employee must be granted notice and an opportunity to be heard. This requires that an employee be allowed an opportunity to explain his actions.

The hearing must also be conducted fairly, so that the employee has a genuine opportunity to present a defense that will be considered by an unbiased decision-maker.

Examples

-- Where a police officer was discharged for misconduct with a minor female, his due process rights were not violated by the failure of that female to testify against him or to be subject to cross-examination. [43]

-- A hearing at which the warden presided was held to violate the employee's due process rights where the warden was also the individual who initially proferred the charges against the employee. [44]



4. Waiver

A corrections employee may waive his due process rights. However, such a waiver must be voluntarily made; it cannot be coerced.

Example

-- Where a corrections officer appealed his dismissal to the state civil service commission, and neglected to object to the commission's failure to issue certain requested subpoenas, he waived the opportunity to later raise this defect in court. [45]

5. Remedies

Reinstatement and backpay less any benefits resulting from the dismissal (i.e., unemployment compensation) are the normal remedies for violation of an employee's due process rights. [46]

-- Where a dismissed employee has obtained full-time employment elsewhere, the amounts earned by the employee in that job were deducted from the employee's bankruptcy award. [47]

## Fourteenth Amendment: Substantive Due Process

The Fourteenth Amendment protects individuals' constitutional rights from state action, and therefore prohibits public employers from promulgating rules and regulations that are so vague or overbroad that they interfere with an employee's constitutional rights, such as the employee's freedom of speech or association. Work rules must have a rational basis and be specific enough as to put corrections employees on notice as to what conduct is prohibited.

Discussion. The Courts have held that the Fourteenth Amendment prohibits the state, local governments and their agencies from violating an

individual's federal constitutional rights, as well as certain fundamental rights not expressly set forth in the constitution, such as the right to privacy. In protecting these rights in public employment, the Courts have held that work rules and regulations enforced by a public employer must not be arbitrary or capricious, but rather must have a rational basis. The Courts have also required that these work rules must not be so vague as to fail to put an employee on notice of what conduct is prohibited, nor so overbroad that they prohibit otherwise lawful conduct that is not job related.

Examples

-- A court found a police department rule to be unconstitutionally vague and overbroad which stated that a police officer may be disciplined for reasons of "morality and ethics," and which included private conduct which conveyed an image of disrepute.[48]

-- A prison rule requiring employees to avoid conduct that might bring criticism on themselves or the prison and a state civil service rule authorizing disciplinary action for "notoriously disgraceful personal conduct" and for "conduct detrimental to the good of the institution", have been construed to apply only to on-duty conduct. Consequently, the dismissal of a prison correctional officer, who was arrested in a public place and charged with disorderly conduct arising from his intoxication and use of abusive language to a police officer who was attempting to stop a quarrel between the correctional officer and his wife, was overturned.[49]

-- A police department rule that an officer on sick report not leave his residence unless he first obtains the permission of the district



surgeon, and that the employee is to be examined each week to determine the necessity of confinement to his residence, is not violative of due process, especially since a trial-type hearing is available to the officer when he is cited for violation of this rule.[50]

-- The dismissal of a prison guard pursuant to department of corrections regulations prohibiting conduct inconsistent or incompatible with employment was not punishment for failing to meet a vague standard, where the guard was informed prior to his purchase of a liquor store that operation of the store would be inconsistent with his employment.[51]

-- Similarly, a prison guard dismissed for his "unfitness to render effective service" was not subjected to an unconstitutionally vague standard.[52]

-- A restriction on the type of concealed firearms that may be carried by prison guards bore a reasonable connection to their employment, and, as such, was not arbitrary or capricious.[53]

Fourteenth Amendment: Equal Protection

The equal protection clause of the Fourteenth Amendment requires that all states, local governments and their agencies treat all individuals equally and fairly. In general, this means that there must simply be a rational basis for any classification or standard established for employment purposes by a corrections institution or supervisor. However, a corrections institution or supervisor must have a compelling justification for classifications or standards based upon a limited number of criteria, such as race or sex.

Discussion. In determining whether a classification or standard

established by a corrections institution is lawful under the Equal Protection Clause of the Fourteenth Amendment, the Courts apply three different standards of review, depending upon the importance of the interest involved, and the basis of the classification. These three standards of review are: 1) the rational basis standard, 2) the compelling state interest standard, or strict scrutiny, and 3) the middle level standard, or middle level scrutiny.

The Courts have held that a public employee's interest in his employment is a nonfundamental interest, and, consequently, classifications restricting only the employment interest are usually tested against the rational basis standard of judicial review, which simply requires that there be some legitimate reason for the restriction. Under this standard of review, a classification or standard is rarely held violative of equal protection. [54]

Certain classifications, however, are subjected to a higher scrutiny for compliance with equal protection requirements. Classifications which penalize the exercise of fundamental rights, or which are based on certain "suspect" criteria, receive this higher scrutiny. The fundamental rights include the right of association, the right to vote,[55] the right to interstate travel,[56] the right to fairness in criminal process,[57] and the right of privacy.[58] Classifications based on race and alienage are examples of suspect criteria, and are often called suspect classifications. In order to justify classifications which penalize the exercise of these fundamental rights, or which are based on a suspect classification, it must show that the classification is necessary to promote a compelling state interest.[59]



Some classifications are analyzed under what has been described as a middle level of scrutiny. Sexual classifications predominately fall within this category. Therefore, it has been decided that any state law which is either convertly or overtly structured to prefer males over females in hiring for public employment must show an exceedingly persuasive justification, but less than a compelling state interest, to be upheld under the Equal Protective Clause.[60]

Examples

-- The rational basis standard has been found to be satisfied, for example, by a rule which denied methadone users employment,[61] and by a requirement that state police officers retire at age fifty.[62]

-- In addition, a state's disqualification of aliens for service in its state police has been held not to violate the Equal Protection Clause on the ground that citizenship has a rational basis to the special qualifications needed for performing police work.[63]

-- It has also been held that a refusal by a police commissioner to hire a convicted but pardoned felon did not violate equal protection because there was a rational reason for the decision.[64]

-- However, the State of Alaska was precluded from giving an absolute preference in state employment to persons who had resided in the state for at least one year, [65] for it impacted on an individual's right to interstate travel and the state could not show a compelling state interest for the restriction.

FEDERAL STATUTES

This section deals with the major federal statutes which impact

upon the employment of correction employees. In many of these areas, such as in the area of employment discrimination, there are similar state statutes which may be even broader than the federal statute. Where there are overlapping state and federal statutes, in most instances an employer must comply with both of them. Thus, although an employer's actions may be lawful under a particular federal statute, this is not a valid defense to prosecution under a similar state statute which is broader in scope.

## Title VII

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based upon race, color, religion, sex, national origin or pregnancy. This prohibition is extremely broad, and covers all aspects of employment, including hiring, firing, compensation, promotions, transfers and other terms and conditions of employment. The Equal Employment Opportunity Commission (EEOC) is the federal governmental agency empowered to investigate and enforce alleged violations of Title VII. The EEOC or the individual filing a discrimination claim may enforce the individual's rights under Title VII in court, obtaining such remedies as reinstatement and backpay.

Discussion. Employment discrimination falls into two categories. The first type of discrimination is "disparate treatment", wherein an employer treats one employee or job applicant differently than another employee or job applicant solely on the basis of race, color, religion, sex, national origin, or pregnancy. The basic elements of a disparate treatment case can be illustrated in the situation where an employer rejects a minority job applicant. To establish a prima facie case of



discrimination under Title VII, the claimant must establish the following:

> The claimant belongs to a class protected by statute (i.e., black, female);
>
> The claimant applied for and was qualified for a job for which the employer was seeking applicants;
>
> The claimant was rejected;
>
> After the claimant was rejected the job remained open and the employer sought more applicants with the claimant's qualifications.[66]

Although proof of discrimination intent is required, such a motive may be inferred from the mere fact of differences in treatment.[67]

Once a claimant has established the above criteria, the burden shifts to the employer to prove that it had a legitimate, nondiscriminatory reason for its actions. If the employer establishes such a reason, then the burden again shifts to the applicant to prove that the employer's nondiscriminatory reason was only a pretext to discriminate against a protected group.[68]

The second type of employment discrimination is "disparate impact", where there is no overt discrimination, but which involves an employment policy or practice which is neutral on its face but which has a disproportionate adverse impact upon protected groups. If an employee or job applicant is able to demonstrate that the particular employment policy or practice excluded minorities (or members of any protected class) at a disproportionate adverse rate compared to white employees or applicants (or other favored groups), the employer has the burden of showing that the employment test, education requirement, experience requirement, or whatever,

bore a direct and rational connection to the job concerned. If the employer cannot prove that the particular policy or practice is specifically job related, it will be found discriminatory and thus unlawful.[69] Proof of the employer's actual intent to discriminate is not necessary.[70] If a written or oral test is at issue which has a disproportionate adverse impact upon a protected group, it must be validated in accordance with EEOC Regulations.[71]

With respect to Title VII's prohibition against pregnancy discrimination, an employer is not required to provide light work for a pregnant employee, but it is prohibited from arbitrarily removing an employee from work simply because she is pregnant. A corrections supervisor must treat pregnancy in the same manner as he treats all other temporary disabilities. For example, if a supervisor permits corrections employees who are ill or who have broken an arm or leg to use accumulated sick leave, he must also allow pregnant employees to use accumulated sick leave on the same terms.

In its extensive regulations and guidelines under Title VII, the EEOC has taken the position that sexual harassment is a form of discrimination.[72] It defines sexual harassment as including unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communications of a sexual nature where such behavior is used to affect the employment relationship. Under the Guidelines, an employer is required to take immediate corrective action to eliminate such working conditions, and to provide a working environment free from verbal and physical conduct which is sexually demeaning.

With respect to the religious practices and benefits of job applicants



and employees, an employer must not only remain neutral and not discriminate against individuals because of their religion. He must also make reasonable efforts to accommodate their religious needs. The Supreme Court has ruled that an employer need incur only a minimum of additional costs in accommodating the religious beliefs of employees-applicants, otherwise the employer's accommodation efforts would constitute preferential treatment and result in discrimination against other employees.[73]

Finally, Title VII forbids retaliation against an employee who files a civil rights claim or who testifies or provides information regarding a civil rights claim. Employees who file civil rights claims often will file a second claim charging that an employer retaliated against the employee by not giving the employee a promotion, a wage increase, or by giving the employee adverse assignments. Therefore, once a charge is filed, a corrections supervisor should document all actions taken with respect to a claimant employee.

Examples: Disparate Treatment

-- Unlawful disparate treatment was found where deputy female matrons were paid on a lower pay scale than their male counterparts, the jailers. The Court found that the deputy matrons performed essentially the same duties as the jailers and were entitled to the same pay.[74]

-- A District Court in Texas held that it was unlawful discrimination to refuse to place a female federal prison employee in a correctional position which involved the supervision of male inmates.

-- However, the Supreme Court held that the requirement that prison guards be male in an Alabama all-male maximum security prison was a bona

fide occupational qualification for such prison guard positions, and therefore, lawful. The prisoners lived in a dormitory situation where the sex offenders were not segregated from other offenders. The Supreme Court found that not only were the sex offenders likely to attack female prison guards, but also the other prisoners might sexually attack female prison guards due to their lack of a normal heterosexual environment.[75]

-- A city was held to lawfully refuse to hire females as supervisors for male juveniles and vice versa. The supervisors lived in the same housing with the juveniles who were 7-16 years old. They could be called on to monitor showers and perform body searches.[76]

Examples: Disparate Impact

-- The Supreme Court has held that the testing of communicative abilities for police officers was job-related because the employer was able to show that the ability to communicate orally and in writing was required for police work.[77]

-- While the Supreme Court has held that the requirement of a high school diploma for an unskilled job had a disparate impact upon minorities and was not job related,[78] a court has held that the requirement of a high school diploma was related to the job of police officers and a business necessity.[79]

-- The Supreme Court found that a minimum height requirement of 5'2" and a minimum weight requirement of 120 lbs. had an unlawful discriminatory impact upon female applicants for prison guard positions. The State of Alabama produced no evidence to correlate these requirements with the requisite amount of strength thought essential to performance of the job.[80]



-- Another court has held that a city could require applicants for municipal police officer positions to swim 100 yards despite the fact that it might disqualify members of a minority group at a substantially higher rate than it does non-minorities. The ability to swim such a distance was related to general fitness, physical courage and effectiveness in emergency rescue situations.[81]

-- Although it has been held that a prior conviction of a serious crime is a valid ground for disqualifying a person from police work regardless of any disproportionate impact on minorities, courts have found that arrest records are not a proper basis for excluding persons from police officer jobs.[82] However, a court has upheld a ruling that an employer could refuse to employ a person as a night watchman who had been detained for burglary even though the person had never been formally charged.

-- A court has also held that it was unlawful for a museum to refuse to employ a person as a security guard on the basis of a prior discharge. The applicant had failed to follow the cash-handling policies at a bakery.[83]

-- A court held that testing female applicants for police officer positions on an annual basis and testing male applicants on a weekly basis was unlawfully discriminatory since it resulted in having females as only 2.15% of the police force. The area work force had 39.7% female workers.[84]

## Age Discrimination

The Age Discrimination in Employment Act (ADEA)[85] prohibits employment discrimination based upon the age of individuals between 40

and 70 years old inclusive. As under Title VII, this prohibition is extremely broad, covering all aspects of employment. The EEOC is the federal governmental agency that enforces the ADEA, and it or the individual claimant involved may enforce rights under the ADEA in court.

Discussion. Courts have generally followed the principles and theories developed under Title VII in enforcing the age discrimination provisions of the ADEA. For example, a claimant may establish a prima facie case of age discrimination by proving that:

(1) The claimant was 40-70 years old;

(2) The claimant was qualified to do the job;

(3) The claimant was replaced by a younger person in a discharge situation, or, in the case of a charge of failure to hire, the position remained open and the employer was still seeking someone to fill the position.[86]

Upon such a showing by the claimant, the employer would be required to demonstrate that age was either a bona fide occupational qualification for the particular job, or that there was some other legitimate reason for its action. The burden would again shift to the claimant to show that the reason given by the employer was a mere pretext.

The Act does allow employers to require employees to retire at age 70 pursuant to a bona fide retirement plan.

Examples

-- It was held that a maximum hiring age of 40 years old was a bona fide occupational qualification for bus drivers. Newly hired drivers were placed on an "extra board" for 10 to 40 hours. Such work was not regularly scheduled and was physically and mentally demanding, placing



an unusual amount of emotional stress on the driver. Since people suffered degenerative changes beginning at age 30 which affected their driving ability, age was a bona fide occupational qualification.[87]

-- It was held that the maximum hiring age of 35 for municipal police officers was not in violation of the ADEA. The aging process and declining physical ability of an applicant resulted in an increase of risk of harm to others. This was sufficient to show that age was a bona fide occupational qualification for a police officer.[88]

-- Age can also be a bona fide occupational requirement necessitating retirement before age 70, as a Court held that a state statute requiring mandatory retirement of police officers at age 60 was not in violation of the ADEA.[89]

Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973[90] prohibits all executive agencies of the federal government (including the Bureau of Prisons), as well as all employers receiving federal financial assistance, from discriminating against qualified handicapped individuals both with respect to employment and the administration of services.

Discussion. The Rehabilitation Act broadly defines a "handicapped individual" as any person who: a) has a physical or mental impairment which substantially limits one or more of his major life activities; b) has a record of such impairment, or c) is regarded as having such an impairment.[91] Thus, persons with such afflictions as hearing disabilities,[92] epilepsy or history thereof,[93] or a history of drug addiction or drug use,[94] have been found to be "handicapped".

However, only "qualified" handicapped individuals fall under the Act's protection. For employment purposes, the applicable regulations define "qualified handicapped person" as a handicapped person who, "with reasonable accommodation" can perform the essential functions of the job in question".[95] What constitutes a "reasonable accommodation" depends upon the employer's size, type of operation, and the nature and cost of the accommodation needed.[96] "Reasonable accommodation" may include job restructuring, part-time or modified work schedules, acquisition or modification of job equipment, or other similar actions.[97] As yet, there are only a handful of cases dealing with this requirement of "reasonable accommodation". However, in the context of the educational training of a registered nurse, the Supreme Court held that an education institution did not have an affirmative obligation under the Act to provide a deaf nurse applicant with individual clinical instruction.[98]

Equal Pay Act

The Equal Pay Act[99] makes it illegal to discriminate on the basis of sex in the payment of wages for work on jobs which have similar working conditions and which require equal skill, effort and responsibility. There are exceptions in the Act for difference in payment based upon a seniority system, merit system, a system which measures earnings by quantity or quality, or other factors than sex. The EEOC enforces the Act, although an employee may also enforce his rights under the Act by filing a lawsuit in Court.

Discussion. The prohibitions in the Equal Pay Act are narrower than Title VII, for they apply only to employees' wages. However, the penalties



for violating the Act are greater than for violation of Title VII. Employees may recover not only lost wages but also an additional equal amount for liquidated damages plus reasonable attorney fees. Liquidated damages are available only if the employer did not act in good faith or did not have a reasonable basis for believing it was in compliance with the Act. The Act also provides criminal penalties for willful violations of employers.

Examples

-- It has been held that the requirement of equal pay for males and females does not depend upon whether one sex possesses additional training or skills, but whether the nature of the duties actually performed requires or utilizes those additional skills.[100]

Civil Rights Acts of 1866 and 1871

The Civil Rights Acts of 1866[101] and 1871[102] prohibit employment discrimination based upon race, national origin, religion, alienage and sex. The provisions of these Acts are not enforced by any federal governmental agency, but rather are enforced by individuals filing suit in court.

Discussion. The Civil Rights Act of 1866 (42 USC 1981 and 1982) protects the right of all citizens to contract, sue, own property, and enjoy other rights as held by white citizens. The Civil Rights Act of 1871 (42 USC 1983, 1985, 1986) prohibits any deprivation of federally protected rights under color of state law, usage or custom, and it also prohibits conspiracies to deprive any person or class of persons equal

protection, privileges or immunity under the law.

These Acts have been applied in the employment context to prohibit various kinds of discriminations, most of which are already prohibited by Title VII. The significant difference between these Acts and Title VII is that claims under these older acts are not subject to the strict procedural requirements of Title VII. Furthermore, an individual may immediately sue an employer in court under these older Acts, rather than processing a complaint through the EEOC, as required under Title VII.

FEDERAL CIVIL SERVICE

The federal civil service is regulated under the Civil Service Reform Act of 1978 (CSRA).[103] The CSRA established merit principles to govern all personnel practices and actions by the federal government,[104] such as 1) fair and equitable treatment in all personnel matters regardless of politics, race, color, religion, national origin, sex, marital status, age or handicapped conditions, 2) recruitment from all segments of society, and 3) selection and advancement on the basis of ability, knowledge and skills. The Act also prohibits certain employment practices.[105] For example, officials and employees authorized to take personnel actions are enjoined from discriminating against any employee, using official authority to coerce political actions, granting any unauthorized special treatment or advantage to a job applicant or employee, and retaliating against employees who exercise their lawful rights.

Discussion. The two major agencies that oversee the federal civil service are the Office of Personnel Management and the Merit Systems Protection Board. The Office of Personnel Management[106] oversees recruitment,



measurement, ranking and selection of individuals for initial appointment and competitive promotion in federal employment. The Merit Systems Protection Board[107] exercises adjudication and appeals functions relating to federal employee grievances.

Under the Act each agency is required to establish performance appraisal systems with periodic review of job performances. These criteria must be communicated to each employee, and used as a basis for rewarding, assigning, promoting, demoting and retaining employees.[108]

Pay rate systems under the Act are based on principles of equal pay for substantially equal work; pay distinctions are to be made in accordance with work and performance distinctions and are to be comparable with private enterprise pay rates.[109]

Merit pay increases are awarded to managers in general schedule grades 13 through 15 in recognition of quality of performance.[110] A cash award program administered by the agency head is available to an employee whose suggestion, invention or other personal effort contributes to the efficiency, economy or other improvement in government operations.[111]

FEDERAL COLLECTIVE BARGAINING

The Federal Service Labor Management Relations Law (FSLMRL)[112] is the primary law concerning the collective bargaining rights of federal corrections employees. It is generally patterned after the National Labor Relations Act (NLRA)[113] which governs labor relations in the private sector, with the important exception that federal employees do not have the right to strike. The FSLMRL covers federal executive branch employees (including employees of the Bureau of Prisons). However, as is the case in

the private sector under the NLRA, supervisors and managers are excluded from coverage under the FSLMRL.

Discussion. The FSLMRL proscribes certain unfair labor practices by both executive agencies and federal employee unions. The unfair labor practice provisions of the FSLMRL[114] are similar to those of the NLRA. The FSLMRL makes it an unfair labor practice for an executive agency to: 1) interfere with, restrain or coerce employees' rights under the Law, including their right to join, form or assist a labor organization; 2) encourage or discourage membership in a labor organization by discriminating through hiring, tenure, promotions, etc.; 3) to sponsor, control or assist any labor organization other than to furnish, upon request, customary and routine services and facilities available to any other labor organization with equal status; 4) discipline or otherwise discriminate against an employee because that person has filed a complaint, affidavit or petition, or has provided any information under the Law; 5) refuse to bargain in good faith with an authorized labor organization; 6) fail or refuse to cooperate in impasse procedures and decisions required by the Law; 7) enforce any rule or regulation which conflicts with any applicable collective bargaining agreement in effect before the rule/regulation was prescribed; or 8) fail or refuse to comply with any provision of the Law.[115]

Similarly, the Law makes it an unfair labor practice for a labor organization to: 1) interfere with employees' rights under the Law, including the right to refrain from union activity; 2) to cause or attempt to cause an executive agency to discriminate against any employee in the



exercise by the employee of any right under the Law; 3) to coerce, discipline or fine an employee for the purpose of impeding that person's work performance or productivity; 4) discriminate against an employee with regard to terms and conditions of labor organization membership on the basis of race, religion, national origin, sex, age, civil service status, political affiliation, marital status or handicapped condition; 5) refuse to bargain in good faith with an agency as required by the Law; 6) fail to cooperate in impasse procedures and decisions under the Law; 7) call or participate in a strike, work stoppage, slowdown or picketing if the picketing interferes with an agency's operations, or to condone such activity by failing to take action to prevent or stop such activity; or 8) to otherwise fail or refuse to comply with any provision of the Law.[116]

Not only is a strike considered to be an unfair labor practice, it is also classified as a criminal offense.[117] Furthermore, a federal employee may not assert the right to strike or participate in a strike against the federal government, or be a member of an organization which he knows asserts the right to strike against the federal government.[118]

Collective bargaining agreements negotiated under the FSLMRL must provide dispute resolution procedures through the consideration of employee grievances.[119] Such a negotiated procedure must be fair, simple and expeditious. Each agreement must provide that any grievance not satisfactorily settled under the grievance procedure shall be subject to binding arbitration which may be invoked by either the union or the employer. The term "grievance" is defined broadly,[120] with the result that an extremely wide variety of complaints qualify for access to the grievance

procedure and arbitration. However, certain subjects are specifically excluded, including: 1) political activities; 2) retirement, life insurance or health insurance; 3) examination, certification or appointment; 4) classification of any position which does not result in the reduction in grade or pay of an employee.[121]

Except as otherwise noted, arbitration in the federal sector is similar to arbitration in the private sector. For more information on this subject, see those sections of this manual pertaining to grievance procedure and arbitration.

## STATE STATUTES

This section deals in a very general way with major state statutes that impact upon the employment of corrections employees. As already noted, many of these state statutes are similar to federal statutes. For example, many state employment discrimination statutes are almost identical to Title VII of the Civil Rights Act of 1964. Where state and federal statutes both regulate an employer's actions, an employer usually must comply with both statutes. The fact that an employer's conduct is lawful under a federal statute does not necessarily mean that such conduct is lawful under a similar state statute, which may have a broader scope or stricter requirements than the federal statute.

### Employment Discrimination

The vast majority of states have statutes prohibiting employment discrimination based upon race, color, religion, sex and national origin. The operation and enforcement of these state statutes is similar to that



under Title VII of the Civil Rights Act of 1964.

In addition, some states prohibit employment discrimination based upon other factors as well. For example, some states have enacted statutes prohibiting discrimination based upon marital status, height, weight, pregnancy (or conditions related thereto), and handicap.[122] The operation and enforcement of these statutes also tend to be similar to that under Title VII, which has previously been discussed in this Manual.

### Civil Service

The vast majority of states have enacted civil service laws which regulate public employer-employee relations in four major areas; 1) job classification, 2) appointment and promotion, 3) compensation, and 4) suspension and discharge. Every state has its own procedures and regulations in each of these four areas.

#### Classification of Positions

State statutes and charters give civil service commissions and boards the authority to classify and grade positions in the civil service. The civil service commission then determines the duties of each position in civil service. The enabling legislation sets forth the specific procedures and criteria for making these determinations.

A civil service commission may not include in any one classification numerous positions whose duties are so different that they do not bear any reasonable relations to each other. However, this reasonable relation "test" is liberally construed by the courts.[123]

Courts are split as to whether the establishment of a fixed term for

office prevents the civil service commission from either including the office in the classified service or making it impracticable to select an appointee after a competitive exam. While one court has held that the fixed and definite term for the office of the warden of a penitentiary leaves the civil service commission without the authority to place the office in the competitive class, other courts have held to the contrary.[124]

Appointment and Promotion

Appointment and promotion of employees under civil service statutes are determined on the basis of tested qualifications designed to measure merit and fitness. Civil service commissions ordinarily have broad discretion to adopt both general and specific employment requirements for particular positions. Such requirements may include experience, formal education, and residency.

Compensation

The power of state civil service commissioners to fix rates of compensation for civil service positions is broad. This power is delegated to the commission by many state constitutions and cannot be usurped by a civil service statute. Similarly, when the salary of a civil service employee is fixed by statute, it cannot be altered by contract.

Compensation is often an integral part of an employee's classification under civil service. This classification usually specifies the employee's governing rate of pay. The establishment of the salary ranges for each position is usually guided by the general rule that like salaries are to be paid for like duties and responsibilities.[125]



Suspension and Discharge

One of the main purposes of civil service statutes is to prevent an appointee's arbitrary removal. Discharge and suspension of civil service employees must be done in accordance with applicable state statutes, and must be done in good faith.

In general, the only grounds for discharging a civil service employee are those specifically set forth in the governing civil service statute.[126] However, in states which simply require "good cause", "just cause" or "reasonable cause" for suspension or discharge, the civil service commission is given broad discretion to determine whether a dismissal or suspension is justified.

Some civil service statutes provide for both preferred appointment and immunity from discharge for veterans of the federal or state armed forces. The courts have generally upheld such veterans' preferences in the civil service system as lawful.

OTHER LAWS

Veterans' Preference Statutes

Virtually all states and the federal government have enacted statutes giving veterans various employment privileges, ranging from hiring preferences and the right to reemployment, to special termination procedures. These statutes are enforced by the Department of Labor at the federal level, usually by a similar state agency at the state level, and may also be enforced by individuals directly by filing suit in court.

Discussion. Almost all states[127] and the federal government[128] provide for a hiring preference for veterans seeking to obtain employment

in a civil service job. The nature of the preference differs among the states and the federal government. The most common type of preference increases the veteran's civil service examination score by a specified number of points.[129] Less frequently, the preference statute provides for an absolute preference to all veterans who meet minimum requirements.[130] Generally, the preference may be invoked by a veteran at any time during his or her lifetime, and it may also be invoked more than one time.[131] Some statutes give veterans an additional preference for promotions once they have been hired.

A veteran usually has greater job security than other civil service employees.[132] In addition, the grounds upon which a veteran's employment may be terminated may be more narrowly limited.[133] If layoffs occur, a veteran may be the last to lose his or her job because of the added protection he or she receives under the terms of the statute.[134]

The federal and state statutes also generally require employers to grant a leave of absence to employees who are inducted into the armed service, and to restore the employees returning from such a leave to a job of like seniority, status and pay.[135]

The validity of the various statutes has been subject to attack in the courts, both state and federal. Generally, the statutes have been upheld.[136] In particular, the Supreme Court of the United States has held that the Massachusetts statute, which provides for a lifetime preference to veterans, does not violate the equal protection clause of the Fourteenth Amendment simply because more men than women are veterans and, consequently, places women at a greater disadvantage as a class seeking civil service employment.[137] However, promotional preferences



have been more likely to be found violative of equal protection than hiring preferences.[138]

## Restrictions on Political Activities

The federal government and most states have enacted statutes which prohibit public employees from actively participating in partisan political activities.

Discussion. Federal law under the Hatch Act prohibits employees in executive agencies from: a) requesting, receiving from or giving to an employee, a member of Congress or an officer of a uniformed service, a thing of value for political purposes;[139] b) using official authority or influence to affect the results of an election;[140] or c) taking an active part in political management or political campaigns.[141]

However, federal executive employees retain the right to vote as they choose, and to express their opinions on political subjects and candidates,[142] as well as take part in the campaigns of nonpartisan candidates and issues.[143]

There is a similar federal statute applicable to state or local officers or employees whose principal employment is in connection with an activity financed in whole or in part by federal funds.[144]

The states each have their own statute dealing with the political activities of state public employees, and they are often less restrictive than the federal law. For example, public employees in Michigan may become actively involved in partisan politics, so long as such activity is performed during off-duty hours.[145]

## Other Legal Obligations

In addition to the legal obligations imposed upon employers of corrections employees by the federal and state constitutions and statutes, employers may also be subject to local charters, ordinances and regulations. Each employer should determine specifically what local laws regulate its relations with its employees.

The courts provide another source of legal obligations that bind employers. Court-made law, usually referred to as the "common law", varies from state to state, and it is critical that employers are aware of applicable court holdings that impact upon employer-employee relations. Two examples of recent court decisions in the State of Michigan underscore the important impact of the common law upon employer-employee relations.

The Michigan Supreme Court recently upheld a jury verdict finding that the employer wrongfully discharged a middle management employee in violation of the employer's written employee handbook, and consequently let stand a $72,000 jury award against the employer.[146] The Court allowed the breach-of-contract claim to go to the jury, even though there was no written employment contract, and, apart from the employer's statements in its employee handbook, the only evidence that the employer assumed such a contractual obligation was an alleged supervisor's statement to the employee that he would remain employed "as long as he did his job". In a similar companion case, the Michigan Supreme Court also upheld a $300,000 jury award against an employer for wrongfully discharging an employee.[147] In this case there also was no written employment contract with the employee, and the only source of the employee's contract claim was the



employer's alleged statement during the employee's initial job interview that the employee would not be discharged as long as he was "doing his job".

In another Michigan case, the appellate court held that if a public employer sets forth procedures for employee dismissals, the procedure must be "scrupulously observed", even though such procedures are generous and go far beyond any legal requirements that bind the agency.[148] Consequently, the court reinstated an employee's action for seven years backpay based upon the city's failure to follow its procedures in dismissing an employee after she was arrested and convicted for embezzling city funds.

## COLLECTIVE BARGAINING

Over half of the states give public sector employees the right to collective bargaining.[149] Like the Federal Service Labor Management Relations Law (FSLMRL), most of those state statutes are patterned after the National Labor Relations Act (NLRA), which regulates collective bargaining and employer-employee relations in the private sector.

Like the NLRA and FSLMRL, most of these state statutes proscribe employer and union unfair labor practices. These unfair labor practices are usually quite similar to those listed in the FSLMRL, which have been previously discussed in this manual on the section in federal collective bargaining.

Most if not all of the states that permit collective bargaining in the public sector prohibit public employees from striking. Most of these states instead provide dispute resolution procedures short of striking

when an impasse in collective bargaining is reached.[150] These procedures range from mediation and fact-finding to advisory and binding arbitration.

Virtually all collective bargaining agreements contain a grievance procedure for the handling and resolution of employee grievances. If the employer and the employees' union cannot mutually resolve a grievance, the contractual grievance procedure will frequently provide for the submission of the grievance to an arbitrator, who is an impartial third party mutually selected by the employer and the union to decide the merits of the grievance. However, before the union may press a grievance to arbitration, it must comply with all the procedural requirements of the grievance procedure. Most often the decision and award of an arbitrator is binding on the parties, although some collective bargaining agreements do provide that the arbitrator's decision is only advisory and not binding on either party.

It is possible for an employee to process a complaint in more than one forum. For example, if a female employee feels that the employer is paying her less pay than a male employee because of her sex, she may file a complaint with the EEOC under Title VII and the Equal Pay Act, and in addition file a grievance under the applicable collective bargaining agreement. However, through careful drafting, it is possible to exclude from the contractual grievance procedure employee complaints that are already being litigated in other forums.



CHAPTER THREE

MAJOR AREAS OF GRIEVANCES INVOLVING CORRECTIONS EMPLOYEES

In this chapter we will cover two principal areas that seem to provoke grievances. The majority of the chapter will be devoted to discussion on how to establish and enforce work rules and discipline. Research done by Michigan State University, School of Criminal Justice has shown this to be the predominant area of grievance origination. Several other common grievance areas (seniority, promotions, wages, etc.) will also be covered with the concentration being on things management can do within each area to minimize grievance occurrences.

DISCIPLINE

"Discipline" may be defined as employer action or inaction to penalize an employee for his/her behavior. It is the punitive nature of the employer's conduct that sets it apart from other types of management action. This distinction is important in determining which contractual provisions and obligations apply, e.g. must the employer show "just cause" for its conduct?[1] Generally, if the action is not to be considered as discipline, the employer's action must be taken in good faith,[2] not conflict with other portions of the contract and not be intended as a punitive sanction.

Examples

-- For instance, an arbitrator has held that a City's abolishment of the special ambulance service classification and the reassignment of the involved officers to patrol officer with an attendant reduction in pay was not a matter of "discipline".[3] Similarly, it has been held that where a county had specifically retained the right to transfer bargaining unit work to non-bargaining unit employees, the county could assign a police

officer's duties to a non-bargaining unit position when the nature or the amount of that work had changed. The county could also transfer the officer to a non-unit position as there was nothing in the contract which restricted the county's right to abolish the position.[4] Employers are generally given wide latitude in changing operational procedures even though employees may view the result as disciplinary in nature.[5] For instance, an arbitrator has held that a department did not violate the agreement in transferring the authority for enforcing sick leave regulations from the commanding officers of districts to the department headquarters. The substantive benefits or obligations with respect to sick leave remained unchanged. The only change from the officers' standpoint was the channel used to send word to the commanding officer in the event of absence.[6] Similarly, a requirement that plain clothes officers wear uniforms during disturbances related to school desegregation was not arbitrable.[7] Obviously then, there are several conditions that need to exist for an agency to be properly prepared in the discipline area.

The Establishment and Enforcement of Work Rules and Regulations

The establishing and enforcing of valid work rules is the foundation of all disciplinary action. As noted by some seasoned observers:

> It has been reported, on the basis of examining over 1000 discharge cases, that one of the two most commonly recognized principles in arbitration of such cases is that there must be reasonable rules or standards, consistently applied and enforced and widely disseminated. (note omitted)[8]



The employer must be able to meet several potential objections by a grievant and/or union.

The Rule Was Properly Adopted

Whatever requirements exist for the adoption of a rule (e.g. procedural requirements, prior notice to union, posting, etc.) must have been met or no valid rule exists.

The Rule Must Be Currently in Effect

The rule must have been consistently enforced with respect to known violations. If the rule has become a "dead letter" through non-enforcement, the employer must re-activate the rule, prior to its renewed enforcement. An employer may reactivate a rule by notice of intent to do so.[9]

The Rule Must Be Reasonable

As noted above, an arbitrator is going to consider the "reasonableness" of the employer's regulation. What is reasonable can only be determined in light of all of the facts and circumstances underlying the rule. Simply borrowing rules from other employers does not guarantee the rules' validity in a new, and perhaps different, setting.

The Rule Must Be Properly Communicated

An employee must be made aware (or at least be given the opportunity to be aware of) the rule. If an employee claims he was unaware of a rule the employer may then encounter difficult evidentiary problems.[10] However, this requirement of communication of a rule may be waived with respect to the most severe conduct (e.g., drunkenness, theft, etc.[11]), in which

it may be assumed that the employee knew, or should have known, that his conduct was improper.

The Rule Must Be Uniformly Enforced

The most frequent union claim is that of "disparate treatment". If the union can show that the rule was not uniformly enforced with respect to known violations, the disciplinary action will be vacated. This does not mean, however, that the penalty in all cases must be the same.[12] The rule must be enforced but the penalty can be tailored to be appropriate in light of all of the circumstances.

Violation of Rules Must Be Investigated In A Thorough and Unbiased Manner

The burden of proof in discipline cases rests with management. Employees do not have to prove their innocence. Looking at the motivation that may have existed for rule violations will often lead to actions other than discipline. In other words careful consideration of the employee's side of the story lessens the potential of a grievance.

Disciplinary Interviews

Investigating wrongdoing by correction personnel can be a problem. Special consideration must be taken to avoid successful grievance suits or, more importantly, to avoid having a "criminal" put back on staff.

Presence of Counsel

In J. Weingarten, Inc. NLRB 420 US 251 (1975), the U.S. Supreme Court, in construing the National Labor Relations Act (which applies to employees in the private sector), held that, when an employee has a reasonable



belief that the interview may result in disciplinary action against him/her, the employee may request the presence of a Union representative at the interview. The case applies to those situations in which: a Union represents the involved employee; the employee has a reasonable belief that disciplinary action may ensue -- thus, where an employee has not been given reason to believe that disciplinary action will ensue or where the employee has been told that the interview is not for disciplinary reasons, the employee does not have a right to Union representation; the employee requests the presence of a Union representative -- thus, the employer need not offer to have the Union representative present. The Weingarten case arose under the Federal Statute for private sector employees. Many states have now adopted the so-called "Weingarten standard" in the administration of their state collective bargaining statutes. The rights vested by the Weingarten case are, of course, in addition to those other rights which may be set forth in a collective bargaining agreement with respect to Union representation at any employer-conducted interview.

Criminal versus Administration Interviews

In cases where employees are suspected of criminal wrong doing, they must be advised of their Miranda rights. Once given, these rights can not be taken away. For instance, many governmental units have rules forcing the employee to answer questions posed by superiors. If these questions are not answered, the employee may be discharged. Now if Miranda rights are given, the administrator may not turn around and threaten dismissal, based on the organizational rule, if the employee refuses to answer. This principle was first announced by the Supreme

Court in Garrity vs. New Jersey, 385 U.S. 493 (1967).

To avoid unnecessary problems, before undertaking the interview, the employer should determine whether the goal of the interview is to obtain a statement usable in a criminal proceeding or rather to compel the employee to account fully for his work-related actions.

Interviews for Criminal Investigative Purposes [13]

If the employer believes criminal prosecution is a possibility and wishes to insure any statement obtained is usable against the employee in a criminal proceeding or at least wishes to preserve the option of its use, then the following procedure is suggested:

1) The employee should be given some warning of his fifth amendment rights, at least an assurance that he may refuse to answer any questions that may be incriminating and that any answers the employee gives may be used against him in a subsequent criminal proceeding.

2) The employee should be advised that if he asserts his constitutional right to refuse to answer incriminating questions, no adverse administrative action will be taken against him based upon his refusal to answer.

If the above procedure is followed, any statement given should be "voluntary" and usable in any subsequent criminal proceeding. Of course, the statement also could be used for disciplinary purposes.

Interviews for Administrative Purposes Only [14]

If the employer wishes to compel the employee to answer fully questions directly related to the employee's official duties and is willing to forego any use of his answers or their fruits in a criminal prosecution, then the following procedure is suggested.



The employee should be advised that:

1) The purpose of the interview is to solicit responses that will assist in determining whether disciplinary action is warranted, and the answers furnished may be used in disciplinary proceedings that could result in administrative action against the employee, including dismissal.

2) All questions relating to the performance of official duties must be answered fully and truthfully, and disciplinary action, including dismissal, may be undertaken if the employee refuses to answer fully and truthfully.

3) No answers given nor any information gained by reason of such statements may, as a matter of constitutional law, be admissible against the employee in any criminal proceeding.

If the above warning and assurance is given, the employee is required to answer fully questions relating to performance of his job. If the employee refuses to respond to such questions, there is no constitutional bar to disciplinary action, including dismissal from employment, based upon such refusal.

The Proof or Evidence must be Adequate to Sustain the Charge

This is not a discipline manual; however, many grievances are sustained because management's proof in disciplinary cases has been less than adequate. Now adequate does <u>not</u> mean "beyond a reasonable doubt." Rather, adequate seems to be somewhat of a subjective term that follows the following rough "rule of thumb": The amount of evidence should be congruent with the severity of the possible outcome of the charge. The more severe the possible outcome, i.e. discharge, the more evidence

that is needed. The less severe the outcome, i.e.,verbal warning, the less evidence that is needed.

Arbitrators generally look for the preponderance of the evidence,[15] while many state courts employ a variation of the "substantial evidence" rule.[16]

Absent a specific agreement to the contrary, the technical rules of evidence generally do not apply on an arbitration proceeding.[17] Since arbitrators will "weight" the evidence presented, many arbitrators allow the liberal admission of evidence. Arbitrators are also concerned that the award not be attached because competent evidence was excluded.[18] However, simply because evidence is "received" does not mean it is relevant or entitled to any weight.

Briefly, four common evidentiary concerns are discussed below:

### Disclosure

An arbitrator has held that a police department is entitled to submit in arbitration the internal affairs reports which detailed the history of the officer's personal problems. The union's contention that it had been denied access to such reports during the grievance procedure and thus denied "due process" was rejected. Absent a contrary contractual provision, the department is not under an obligation to reveal and advance all the evidence it intends to submit.[19]

### Polygraph

Whether an employee may be required to submit to a polygraph examination is a matter regulated by state law.[20] Generally, a certified polygraph



examiner who administered a proper examination may testify in an administrative proceeding.[21] On the other hand, polygraph tests cannot be used in evidence where the polygraph operator does not appear at the arbitration hearing, and there is otherwise no independent evidence collaborating the test findings.[22] Generally, arbitrators give polygraph examination results little or no weight.[23]

### Circumstantial Evidence

A case which is based on a conclusion derived from circumstantial evidence must fail when there are two equally persuasive conclusions and the one conclusion is based only on circumstantial evidence.[24] Circumstantial evidence is admissible, however, and of course, is persuasive if it leads to but one conclusion.[25]

### Hearsay Testimony

While hearsay testimony may be admitted in an arbitration proceeding, it generally will carry little, if any, weight with the finder of fact. For example, multiple hearsay testimony is not sufficient in itself to support a finding that a correctional officer violated department regulations.[26] Over the years, some courts have expressed concern that the hearsay rule not be totally discarded in administrative actions which could result in a loss of employment.[27]

## The Penalty Imposed Must Be Proper in Light of All Relevant Considerations

There are many factors which must be considered in determinating the appropriate penalty. Employers must keep in mind that, even if a violation

of a valid work rule can be proven, an arbitrator may modify the penalty.[28]

Many arbitrators consider this part of their authority to determine "cause":

> In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. This is not so under contracts or submission agreements which expressly prohibit an arbitrator from modifying or reducing a penalty if he finds that disciplinary action was justified, but most current labor agreements do not contain such a limiting clause. In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him.
>
> Platt, "The Arbitration Process in the Settlement of Labor Disputes," 31 J. Am. Jud. Soc. 54, 58 (1947).

Thus, where a penalty is judged too severe for the proven violation, the arbitrator may modify the penalty and, in the absence of a contractual restriction, such authority has been recognized by the courts.[29] The employer therefore should give careful consideration to the penalty to be imposed. Among the areas that should be examined are the following:

. Type of offense involved.

Is the offense a major violation calling for summary and severe discipline or is it a minor infraction which should be handled under corrective or progressive discipline techniques?



. Propriety of the work rule.

Is the employer acting under a valid rule - properly adopted? Currently in effect? Reasonable? Properly communicated? Uniformly enforced?

. Employee's past work record.

Has the employee's job performance been good, poor or mediocre?

. Employee's past disciplinary record.

What past infractions occurred? How significant are they measured by the substance of the infraction and the passage of time?

. Seniority.

What is the employee's length of service?

. Mitigating or aggravating circumstances.

Do circumstances exist which make the employee's conduct less or more blameworthy?

. Uniformity of enforcement.

Has the involved rule been uniformly enforced to avoid claims of disparate treatment?

. Compliance with all legal and contractual requirements.

Has the employer complied with all legal and contractual requirements?

. Double jeopardy.

Has the employer avoided increasing an announced penalty?

. Management's conduct.

Has management conducted itself in a responsible manner in the underlying circumstances and in the disciplinary process?

### Timeliness of Disciplinary Action

An employer must move promptly on suspected violations. Prompt investigation allows the employer to examine the physical evidence, if any, and interview the witnesses while the matter is still fresh. The employer, at the same time, demonstrates to all parties that its rules and regulations will be effectively enforced. If an employer allows known violations to grow stale, an arbitrator is apt to set aside the discipline on that basis alone.

Examples

-- An arbitrator has held that a two day suspension of a patrol officer for allegedly mistreating a prisoner was improper due to the lengthy delay in imposing the discipline. He noted that the purpose of corrective discipline is rehabilitation, and that this purpose is defeated if the employer waits too long.[30] Similarly, where eleven months elapsed between the employee's conduct giving rise to the suspension and the employee's actual suspension, the disciplinary action was set aside as involving an unreasonable delay.[31] The employer's conduct, however, is judged from the time the violation became known by the employer -- not from the date of its occurrence.

### Common Reasons for Disciplinary Action

There are, of course, many recurring grounds for disciplinary



action. Some of the more significant areas are discussed below.

### Absenteeism

Excessive unauthorized absenteeism is a universally recognized ground for disciplinary action.[32] Absenteeism cases are often focused by the union and/or on the employee's underlying problems which cause the absenteeism. However, the fact that an employee suffers from personal difficulties does not excuse absenteeism, particularly where the employee has been given notice and the opportunity to reform his/her behavior.

Examples

-- It has been held that a corrections officer's absences averaging over 19 days per year, in addition to authorized sick leave, constitute "unfitness to render effective service", in that his health problems were not related to an on-the-job injury.[33] Likewise, excessive absenteeism coupled with the use of intoxicants and threats towards superiors is grounds for dismissal of a county corrections officer.[34]

-- Similarly, it has been held that a department trial board's conditions for continued employment of an officer, who suffered from poor attendance due to alcoholism, that the grievant submit to full physical examination and urinalysis and be restricted to the day shift and jail security assignments with no overtime or right to transfer to another assignment and attend all meetings of the police officers alcoholics anonymous group and re-enroll in the sheriff's academy were proper. The trial board was also upheld in its retention of jurisdiction to review other violations of departmental procedures. Two days after the trial

board's decision was rendered, the officer was again absent and a second trial board hearing was conducted which resulted in the officer's discharge. The arbitrator reversed the discharge with reinstatement without back pay on the basis that the grievant should be given more than two days in which to reform his behavior.[35] Questions can arise with respect to whether the absence is authorized or proper notice procedures were used. For instance, where the rule called for notice to the watch commander, but it was a common practice known by supervisors and officers alike to notify the Assistant Watch Commander, it was held improper to discipline an officer for notifying the Assistant of his inability to report.[36]

Acceptance of Gratuities

The prohibited acceptance of gratuities is a well-recognized basis for disciplinary action. The rule and possible penalty must be clear to employees.[37]

Examples

-- Smith vs. Board of Commissioners, 274 SO2d 394 (La. 1973) (acceptance of a bribe from a violator of a "no smoking" ordinance).

-- Ceja vs. State Police Merit Board, 298 NW2d 378 (Ill, 1973) (upheld dismissal for acceptance of a $100 bribe).

Arrests

A distinction must be made between arrests for non-job related conduct and arrests for job related conduct. In the first situation, an arrest does not necessarily mean guilt, and therefore, an employer may not take action based simply on the arrest for non-job related conduct.



If the employee is convicted, then the employer may take disciplinary action based upon the commission of a criminal offense. In the second situation, involving an arrest for job related conduct, the employer may take immediate disciplinary action based upon the violation of the employer's own rules and regulations.[38] This action is totally distinct from the criminal proceeding and is not controlled by the outcome of the criminal proceeding.[39] The criminal courts, due to the penalties which may be imposed, employ substantially different procedural and evidentiary rules, as well as a very severe burden of proof (i.e. "guilt beyond reasonable doubt").

Examples

-- It has been held that a corrections officer arrested twice for violations of the Uniform Firearms Act may be dismissed for "just cause."[40]

-- In another case, an employee had been arrested and charged with shoplifting. Although the prosecuting attorney decided not to prosecute because he had insufficient evidence that a crime had been committed, prison officials decided to discharge the employee. The arbitrator, after hearing sworn testimony in regard to the shoplifting incident, determined that the grievant was innocent and recommended in an advisory opinion that she be reinstated.[41]

Mistreatment of Prisoners

Unwarranted force with respect to a prisoner is a well-recognized basis for discipline.

Examples

--Disciplinary action is proper for assaulting a prisoner, particularly

where a witness to the incident testified that the prisoner did not first assault his guard, contrary to the latter's statements.[42]

-- Collins vs. Codd, 379 NYS 2d 733 (1976) (upheld discipline for abuse of prisoner).

-- Williams vs. Department of Corrections, 316 So. 2d 411 (La. App.) aff'd 320 So2d 563 (La 1975) (discharge for assault on inmate upheld).

Business Dealings With Inmates

Prohibited dealings with inmates, even though the dealings would otherwise be lawful, are valid grounds for disciplinary action.

Examples

-- A rule forbidding penitentiary employees from trading or bartering with inmates has a real and substantial relation to job performance. Therefore, a prison guard may be discharged for selling his truck to a soon to be released prisoner.[43]

Excessive Force

Use of excessive force is a universally recognized basis for disciplinary action.

Examples

-- An arbitrator upheld the discharge of two deputy sheriffs, who during an arrest forced five suspects to lie on the ground with their hands handcuffed for between 45 minutes to three hours; forbade the suspects to speak to one another; did not inform the suspects of the reason for their detention for several hours; forced the suspects to march several hundred yards, single file, in public view; searched the suspects' vehicle



and removed their personal belongings in such a manner that the belongings had to be replaced in the van with a shovel.[44]

-- Likewise, it has been held that a 10-day suspension for the unnecessary use of a night stick was proper. However, the arbitrator held the 10-day suspension in abeyance for an 18-month period, but stated that if the officer showed any further acts of poor judgement, the 10-day suspension was to be imposed along with the appropriate penalty for the second offense.[45]

Arbitrators will review the entire circumstances and, in some cases, have reduced the penalty, citing the employee's "highly excited state of mind" based upon the underlying circumstances leading up to the use of force.[46] For instance, it has been held that a discharge of an officer charged with using excessive force and endangering a prisoner and fellow officer by placing the intoxicated prisoner in a room with the police officer, who had earlier fought with the prisoner, was improper and reduced to a two-week suspension. The grievant did not deliberately create the dangerous situation and the "failure to follow the advice" of a lieutenant from the Sheriff's Department did not constitute insubordination, in that the police officer was not obligated to follow orders from an officer from another department.[47]

Failure to Follow Dress Code

Failure to follow a valid dress code may be grounds for disciplinary action.

Example

-- A ten-day suspension given to a National Park Service officer in

Washington, D.C., for refusing to follow an order to wear only a "soft hat" while policing an Iranian demonstration, was upheld. The arbitrator ruled that the employer had provided safe working conditions and that grievant's concern for his safety "was unwarranted and did not justify his refusal to follow a direct order."[48]

Failure to Follow Grooming Code

A mere allegation of a legitimate state interest advanced by a hair grooming regulation applicable to corrections officers is insufficient to justify such a regulation.[49] The employer must show that a substantial and legitimate interest is advanced by the grooming code. Such a code must be uniformly enforced.

Examples

-- An arbitrator had held that since a controversy existed between City and Union as to the propriety of the grooming code, it was unfair to single out one officer for test case purposes. Therefore, City was not justified in disciplining a police officer who failed to meet the grooming codes.[50]

-- Kelly vs. Johnson, 425 US 238 (1976) (liberty guarantee of Fourteenth Amendment does not prohibit grooming regulations where there is a rational relationship to promotion of safety of persons and property).

-- Schoth vs. Farnoff, 515 F2d 344 (4th Cir. 1975) ("extreme" hairstyle requirement held unconstitutional).

Failure to Follow Operational Procedures

Failure to follow the employer's operational procedures and work



rules constitutes a well-recognized ground for discipline. The rule or procedure, of course, must have been issued to the affected employees. Thus, where a department head claimed he had a "standing policy" but no general order had been issued and the employees understood from past practice that they could exercise their discretion, the arbitrator set aside the employer's suspension for the violation of the alleged "standing policy."[51]

Example

-- A county jail guard, who was discharged for violating a departmental procedure regarding the recording of a prisoner's money, had failed to produce acceptable conduct during his probationary period, and his discharge was upheld.[52]

-- However, where a jailer was discharged for violating a departmental rule which forbade a recommendation to an inmate of a specific bondsman, an arbitrator held that discharge was too severe since the jailer had only two reprimands and several letters of commendations from citizens in his file. The arbitrator ordered a three months suspension with loss of pay.[53]

-- In another case, an arbitrator reduced the punishment given a prison guard, for violating rules by taking keys into a cell with him, from termination to a month's suspension without pay. The arbitrator considered the employee's record and the lack of a schedule of punishment for offenses in reducing the sanction imposed.[54]

-- Another arbitrator held that the employer violated the agreement when it suspended a correctional officer for five days for not reporting the escape of a prisoner who had been taken to a hospital. The

punishment was held excessive under the circumstances. The grievant was engrossed in checking cash balance when the information was received; the police knew of the escape before the grievant learned of it; and the grievant's action had nothing to do with the actual escape.[55]

-- One arbitrator reduced a 14-day suspension to two days. The arbitrator found that the provisions of hospital employee rules indicate that the grievant should have reported his contact with the ex-wife of an inmate to the management of the institution. Despite this failure to report, the arbitrator found the penalty to be too severe, in light of the fact that there was no evidence of misconduct on the part of the grievant and the grievant had maintained an excellent record.[56]

-- An employer was held to have justifiably terminated a corrections officer for violating security regulations by keeping weapons and ammunition in his car, parked on the prison lot.[57]

Falsification of Employment Application

Falsification of an employment application is a valid ground for disciplinary action.[58] Discharge has been expressly sanctioned for a correctional institution employee's falsification of his employment application as to education and prior employment.[59] The dispute in this area oftentimes centers on whether there was an intentional misrepresentation.

Example

It has been held that a police officer was improperly dismissed for perjury when the police officer stated on his job application that he had never used narcotics or marijuana. The police officer admitted to



having three puffs on a marijuana cigarette on one occasion. However, there is a dispute as to the meaning of "use" on the application. Since the meaning is ambiguous and the police officer felt that he had truthfully answered the question on the application, discharge was held to be improper.[60]

Falsification of Work Records

Falsification of work records is a longstanding basis for discipline.[61]

Examples

-- An arbitrator held that the discharge of an officer for abuse of patrol cars and a misstatement concerning the speed of the control car was too severe. Since the police officer had admitted to the misstatement of the speed of the vehicle on his report of the incident, and, since the police officer has a duty to be as accurate and as truthful as possible in filing reports, a one month suspension without pay was held to be the proper disciplinary action.[62]

-- Bennett vs. Price, 446 P2d 419 (Colo 1968) (unauthorized removal of personnel records from office -- discharge upheld).

Incompetence

Incompetence must be shown by an employee's unwillingness or inability to perform to specified standards. The employer must be able to show that the desired standards were clearly announced to the involved employees. In this light, incompetence is a well-recognized ground for disciplinary action.[63]

-- Wilson vs. State Personnel Board, 130 Cal. Rptr. 292 (Ct. App. 1976) ( poor work performance).

-- Bodenschatz vs. State Personnel Board, 93 Cal. Rptr. 471 (Ct. App. 1971) (poor work performance).

Insubordination

Insubordination is one of the best recognized grounds for disciplinary action. Insubordination can take many forms besides verbal assault. Threats toward supervisors generally will support dismissal[64] but the degree of severity of other kinds of insubordination must be carefully considered.[65]

An arbitrator found that the employer was justified in its five day suspension of an employee who grabbed his supervisor by the neck of the shirt and forced him to his back on the desk in the office where an argument had erupted over a new form found on the bulletin board.[66]

-- Kannisto vs. City and County of San Francisco, 541 F2d 841 (9th Cir. 1976) (disparaging remarks directed toward a supervisor).

-- Aycock vs. Police Committee, 212 SE2d 456 (Ga. Ct. App. 1975) (public criticism of supervisors).

-- Magri vs. Giarrusso, 379 F. Supp. 353 (E.D. La. 1974) (upheld discharge for public remarks beyond responsible criticism).

-- Stephens vs. Department of State Police, 532 P2d 788 (Ore. 1975) (insubordination must be founded upon a lawful order).

Negligence

Negligence has been widely recognized as a valid ground for disciplinary action.[67] Arbitrators, however, require a very strong showing



that the employer's conduct, or lack of action, actually caused the undesired event to occur. Such cases often involve the escape or mistaken release of prisoners.

Examples

-- One arbitrator found that two youth officers were not at fault for the escape of one of their charges while escorting them from the dining hall. In light of this fact, and the fact that the youth officers had exemplary records and had not been in violation of the agency's rules at the time of the escape, the arbitrator concluded that a three-day suspension was not justified. He, therefore, ordered that the grievants be reimbursed for three days' lost pay and that all references to the suspension be removed from their personnel files.[68]

-- Another arbitrator found that the 15-day suspension of a prison tower guard following the escape of two prisoners was not for just cause. The arbitrator concluded that " in light of the failture to provide adequate training facilities, the problematic nature of the equipment, and the lack of probative evidence concerning the second escape, there is no choice but to sustain the grievance."[69]

-- A Sheriff's Department, which fired a dispatcher for lax security after allowing a prisoner to threaten him and escape, was ordered by an arbitrator to reduce the dismissal to a suspension. The arbitrator cited the dispatcher's otherwise good work record, his injury sustained a year earlier in thwarting an escape and uneven enforcement of the jail's security rules as warranting the lesser penalty.[70]

-- One arbitrator held that a 5-day suspension imposed upon a deputy

sheriff, who mistakenly released an inmate whose case had been dismissed on one charge but still faced a felony charge requiring the posting of a ten thousand dollar bond, was excessive. He relied upon the principle of progressive discipline and the past discipline imposed by the department for the mistaken release of prisoners.[71]

Off-Duty Conduct

The general test of whether an employer may take disciplinary action based upon off duty conduct is twofold. First, there must be a nexus between the conduct and the officer's fitness to perform. Second, there must be a clear regulation, and an act so patently improper that the employee knew, or should have known, that his conduct could result in disciplinary action.[72] While some courts have held "conduct unbecoming" regulations to be unconstitutionally vague,[73] other courts look to the specific conduct and whether an employee could have reasonable doubt as to the propriety of his conduct.[74] Arbitrators likewise consider whether the off-duty conduct bears on the employee's ability to perform his duties.[75]

One's political affiliation or political activities may also arise as a basis for employer action.[76] For instance, the employer may wish to require a leave of absence during a political campaign[77] or resignation from one of the two positions if conflicts arise.[78] On the other hand, non-policymaking employees in a sheriff's department could not be terminated solely because they were not members of the Sheriff's political party.[79]



Part-time Employment

Anti-"moonlighting" provisions may fail if they try to regulate employees'conduct during non-work hours in secondary occupations which present no conflict with primary employment.[80] Courts have upheld anti-moonlighting provisions, however, where they are not vague or overboard.[81] But in the absence of a clear statutory definition, courts may differ on precisely which outside occupations may be prohibited.

Example

One court has held that no disciplinary action was appropriate for a prison guard's part-time employment at a race track.[82]

Physical or Mental Disability

Employer action stemming from an employee's physical or mental disability is often challenged as improper discipline. Ideally, incapacity from physical or mental impairment should be treated apart from the disciplinary process and focus on the objective medical and physical evidence. Treating health problems through the disciplinary process often requires the employer to show "just cause" for its conduct.

Examples

-- One arbitrator held that an officer suffering from intense personal problems, who had attempted suicide and wielded his gun in a reckless manner, was improperly discharged. The contract and past practice of the parties allowed the employer to grant an unpaid leave of absence for employees suffering from physical or mental illness. He ruled that the officer would not be returned to work until such time as a neutral physician

certified his ability to return and that upon his return, the officer was to receive no back pay but full seniority status.[83]

-- In another case, a deputy sheriff was improperly suspended for failing to maintain the proper weight level. The county failed to show that there is any unsatisfactory job performance that could be directly attributed to the grievant's weight.[84]

-- Employer action in this area must not conflict with those statutes prohibiting discrimination due to age, height, weight, handicap, etc. At a minimum, the employer must show that the standard bears a rational relationship to a legitimate state interest.[85] Additionally, arbitrators may set aside employer action if it is deemed unreasonable.[86]

Possession or Use of Intoxicants or Drugs

Possession or use of intoxicants or drugs generally supports the severest discipline.[87] Problems can arise if the discipline is not based on an employer rule but is dependent upon an actual criminal conviction. Employers also may encounter problems of proof if they discipline for the alleged use of controlled substances while off duty and off the employers' premises.

Examples

-- A prison rule requiring the dismissal of an employee for conduct involving intoxicants that results in a criminal conviction could not justify the discharge of the correctional officer before such conviction.[88] While the discharge of an officer is justified where he admits to



possessing narcotics,[89] a county's discharge of a deputy sheriff for allegedly smoking a marijuana cigarette at a private party was improper because the offense was not proved. The officer's failure to immediately protest when confronted with the charges does not constitute "proof" that, in fact, the substance was marijuana.[90]

-- The discharge of a city jail cook who sold marijuana to prisoners was upheld even though the employer's entire case was based upon hearsay repetition of the statements of prisoners who were not produced at the hearing or subject to cross-examination. The marijuana in question had been flushed down the toilet, no marked money had been used in the investigation and the initial finding of the marijuana had not been reported through the proper channels. The arbitrator relied on the credible testimony of a police lieutenant.[91]

-- Bowie vs. Department of Police, 339 So. 2d 528 (La. Ct. App. 1976) (dismissal for possession/use of marijuana).

-- Van Gerreway vs. Chicago Police Board, 340 NE2d 28 (Ill. App. Ct. 1975) (failure to report sales of marijuana).

-- Pope vs. Marion County Sheriff's Merit Board, 301 NW2d 386 (Ind. Ct. App. 1973) (off duty drunk driving -- suspension and demotion ).

-- Carlisle Borough vs. Adams, 12 Cumb. 53 (Pa. C.C.P. 1961) (off duty drinking and accident).

Refusal to Accept Work Assignments

One historic tenet of labor relations is that an employee must "work now and grieve later." Thus, the refusal to accept work assignments has generally supported summary discipline.[92] The lone exception

in this area are those cases in which the assignment would cause actual (not perceived) danger to health or safety. The employee bears full responsibility for his actions.

Example

An arbitrator found that the state did not have just cause for imposing a $175 fine on a correction officer as a disciplinary penalty for allegedly refusing to obey orders to give medication to an inmate since the state failed to bring forth sufficient evidence to support its position.[93]

Refusal to Testify at an Administrative Hearing

An employee may be required to answer questions in and/or testify in an administrative proceeding.

Examples

-- A refusal to testify may be considered along with arrest for violations of the Uniform Firearms Act in discharging a prison guard.[94]

-- False or evasive answers in an official investigation have been held sufficient to justify discharge.[95]

Refusal to Work Overtime

"Mandatory overtime" often arises in the context of a refusal to follow an order to report for or remain on duty. Refusal to work overtime is a recognized ground for disciplinary action.[96]

Examples

-- One arbitrator held that a 10-day suspension assessed against



a corrections sergeant, who violated a work rule, "refusal to follow job instructions", when he refused to work overtime after being ordered to do so and also violated a rule against threatening a supervisor, when he stated that he would kill the supervisor if he lost his job, was proper. The ordering of overtime was an established practice and the union failed to show any evidence that the penalty assessed was arbitrary or excessive. The Union failed to provide evidence as to penalties imposed for other or similar offenses by which the arbitrator could make a comparison.[97]

-- Another arbitrator upheld a three-day suspension of a prison guard who disobeyed a direct order not to leave his post at the facility at the end of the shift, since the next shift's guards were not going to take their posts in protest over not having been paid. Even if grievant had already punched out, as the union contended, he was still subject to the orders of his superior officer.[98]

Release of Confidential Information

While public employees have a First Amendment right to speak out, they do not have a right to convert confidential department information to personal use. The problems arising in this area have prompted some states to consider legislation to protect "whistle blowers".

Example

-- One arbitrator held that the dismissal of a police sergeant was proper, since the police sergeant made an arrest record available to a local newspaper. Although a police officer may express his views publicly, he may not use confidential information which he has obtained

during the course of his employment to support his public views.[99]

Sleeping on Duty

Sleeping on duty has generally supported disciplinary action and, depending on the type of duty assigned, may support the severest levels of disciplinary action.[100] For instance, falling asleep while on guard duty warrants the dismissal of the offending employee even if such action was not prescribed by express rule or regulation.[101]

Examples

-- The employer must be able to sustain its burden of proof that the correctional officer was actually asleep. In one case, the sergeant observed officers in what the sergeant described as different postures of sleep. However, the grievant testified that they were writing reports or drinking coffee but not asleep. The discipline was rescinded.[102]

-- A similar case involved a correctional officer who was suspended for three days for allegedly sleeping on the job. The grievant claimed he was meditating. The penalty was reduced to a reprimand, since the employer presented no direct evidence to corroborate the assertion that the grievant was snoring and meditation does interfere somewhat with complete attention to duty.[103]

-- A five-day suspension was found too stringent for an employee's first offense, which consisted of erecting a makeshift warning device to prevent unannounced entries. The arbitrator faulted the grievant for poor judgement and unprofessional conduct in rigging up the warning device, but the grievant generally performed the job satisfactorily, did not breach



security, spent minimal time erecting the device and caused no damage to property.[104]

Union Activities

Claims of discriminatory employer conduct based on an employee's union activities are generally processed under the applicable Executive Order or state statute. However, they do arise from time to time under collective bargaining agreements. Improper union activities may support disciplinary action.[105]

Examples

A union president's 4-day suspension was set aside where he publicized a letter which was critical of the police department administration. The union president was not required to obtain clearance from his superior officer before publishing such a letter because he was not acting as a police officer, but as a spokesperson for the union.[106]

-- Lontine vs. Van Cleave, 483 F2d 966 (10th Cir. 1973)(the right to join a union is protected by the First Amendment).

-- Vorbeck vs. McNeal, 429 US 874 (1976) ( there is no constitutional right to engage in collective bargaining.)

This concludes the discipline section of this chapter but there are several other major areas of grievances and these are discussed below.

SENIORITY

Seniority rights are not inherent in the employment relationship but are created by statute, employment practice or the collective bargaining

agreement. In absence of a definition of the term in the collective bargaining agreement, seniority is the length of service with an employer counting for preference in job retention, advancement and for other purposes. The collective bargaining agreement usually defines the method by which seniority is to be calculated. Disputes over seniority usually center on some other provision of the contract e.g. promotion, layoff, entitlement to fringe benefits based upon accrued service, etc. Disputes, however, can arise over seniority per se. For instance, the manner in which seniority is calculated[107] or errors in the seniority list.[108]

Seniority rights do not protect the employee in relation to the job itself but rather in relation to the rights of other employees in the seniority group. Seniority units are defined by the collective agreement and may include employer-wide, departmental, occupational group or bargaining unit seniority. If a seniority unit isn't clearly specified, arbitrators generally assume that employer-wide seniority was intended.[109] Whether an employee continues to accrue seniority during interruptions in employment will be controlled by the collective bargaining agreement. However, the law governing the reemployment rights of veterans mandates the continued accrual of seniority during military leave.

PROMOTIONS

Promotion generally means movement to a higher paying or more desirable job, generally on a permanent basis. Promotion is generally a management prerogative.[110] This right is frequently qualified by provisions in the collective bargaining agreement requiring the posting of



of the position and the determination on the basis of seniority and/or ability. Federal and state anti-discrimination statutes forbid discrimination on the basis of race, color, religion, sex or national origin in the selection of employees for promotion. Similarly, federal and state labor regulations forbid discrimination in promotion on the basis of union activity.

Grievances may center on which positions must be posted. For instance, one arbitrator found that the Bureau had appointed a new employee who had "known promotion potential" to a GS-11 position in violation of the merit promotion plan. Consequently, the arbitrator ordered the new employee terminated and the Bureau to issue a vacancy announcement and follow appropriate provisions of the merit plan if the position was to be filled.[111] Unless the contract or practice dictates otherwise the employer can determine which information will be posted.[112] Once a notice is posted, the posting must be made available to all potential bidders by shift and/or department.[113]

The criteria for promotion (e.g. seniority, ability, experience, etc.) are normally set forth in the contract. Since the criteria are usually not given precise weights, disputes often arise in regard to whether the employer improperly weighted the criteria to favor one applicant. For instance, one arbitrator ruled that the grievant must be given a second chance to be considered for promotion because his supervisor made misleading comments about the grievant's health and longevity on the "qualifications analysis" form used by the promotion board. Noting that the grievant and the two successful candidates for

two supervisory vacancies each received the highest marks on each of the 33 criteria noted, except for the "misleading comments" on the grievant's form, the arbitrator concluded that it was "reasonably probable" the comments "caused the grievant to be improperly ranked." Consequently, the arbitrator ordered the promotion machinery to be set in motion again to reconsider the grievant's application.[114]

In another case, an arbitrator found that an official of the Danbury, Connecticut Federal Correctional Institution violated the merit promotion plan in the national agreement between the American Federation of Government Employees and the Department of Justice's Bureau of Prisons when he discussed the qualifications of some of the Danbury employees who had applied for vacancies during a telephone conversation with a member of the agency's promotion board at headquarters in Washington. However, the breach was unintentional and not made with malice. Consequently, the arbitrator concluded that the Danbury applicants were not entitled to preferential consideration for future vacancies nor was the official to be disciplined for his mistake as requested by the union.[115]

Generally, arbitrators will be prepared to assume that management was acting in good faith and are unwilling to set aside management's action based upon mere suspicions of impropriety. In one case, the union's belief that a junior employee was selected over an 18-year veteran for a foreman's position, because of "pull" developed with prison officials during his prior employment, failed to cross the line from conjecture into hard facts, the arbitrator concluded. Consequently, the arbitrator rejected the union's grievance.[116] Similarly, management



may be given latitude where it can show special considerations. For instance, a female employee turned down for a supervisory job failed to convince the arbitrator that she was discriminated against or that her application was not "accepted and processed" as called for by the agreement and Bureau of Prison regulations. The arbitrator found that the decision of the prison warden that only a man would have the required "mobility" around the prison that the job required was a reasonable one permitted by Bureau and Civil Service regulations, which, although putting great emphasis on equal opportunity for women, did permit exceptions in "unusual circumstances".[117]

## LAYOFFS

The meaning of the term "layoff" is frequently the subject of grievances. "Layoff" has been broadly interpreted by arbitrators to include any suspension of work caused by a reduction in the work force. Absent contractual restriction, the employer retains the right to layoff.[118] The contract, however, usually does restrict the employer. Layoff procedures can be grouped into three categories--(1) layoffs based on seniority alone; (2) layoffs based on seniority, provided the senior employees can do the available work; and, (3) if ability or other factors are equal, seniority governs. Often, union stewards/representatives are accorded superseniority for layoff purposes as are key employees which management is permitted to select. Some contracts provide for advance notice of layoffs to the employees involved and/or payment of a separation allowance.

Union contracts often permit employees scheduled for layoff to

displace or "bump" less senior employees.[119] The right is often subject to a number of limitations including the requirement that the senior employee be able to handle the new job satisfactorily.

PAID TIME OFF (HOLIDAYS, VACATIONS, SICK LEAVE)

Paid time off has always been a fruitful source of grievance activity. Disputes typically center on the employee's eligibility for the benefit. For instance, with respect to holidays, disputes may arise as to whether an employee worked the day before and after the holiday, when so required to earn holiday pay under the contract.[120] Disputes may also arise with respect to the entitlement of employees who were off work on layoff,[121] vacation,[122] or sick leave.[123] Likewise with respect to vacation pay, disputes often center on the employee's eligibility.[124] They also center on vacation scheduling disputes.[125] Sick leave pay disputes usually concern the eligibility of the employee i.e. whether the employee actually met the contractual criteria. Typically these disputes often are tied to the question of whether the employer can require a doctor's statement.[126]

WORKING HOURS

Normally collective bargaining agreements have provisions covering the scheduling of work. For example, the agreement may establish or in some respect regulate shifts,[127] expressly establish the workweek,[128] expressly provide that scheduling is an exclusive function of management,[129] or in some way limit the employer's right to schedule work.[130]

In the absence of any such restrictions in the agreement, arbitrators have frequently recognized the unfettered right of management to schedule



work.[131]

Where there is no specific contract provision regarding the right of management to reduce the workweek in lieu of making layoffs, arbitrators are split as to the proper result. Some arbitrators permit a reduction in the workweek in the absence of any restrictive contract language. Other arbitrators have required employers to apply the layoff provisions of the contract in deciding which employees are to receive reduced workweeks.[132] Moreover, some arbitrators have not permitted a reduced workweek in lieu of layoffs.[133]

Arbitrators generally allow management a great deal of flexibility in making unscheduled changes in the work schedule if these changes were made in good faith and for good cause.[134]

Collective bargaining agreements sometimes state that an employee has an option to work overtime and that he may ask to be excused from it.[135] Where an agreement is silent on the subject, most arbitrators have concluded that management has the right to demand overtime work from employees.[136] However, it is common for arbitrators to permit employers to require overtime work only if it is of reasonable duration and consistent with employee health, safety and endurance.[137] Arbitrators also commonly require that management must be willing to accept reasonable excuses made by the employee.[138]

WAGES

In addition to the salary or hourly wage rate, the collective bargaining agreement may provide numerous forms of remuneration generally categorized as "wages." These may include overtime and premium pay

provisions (e.g. weekend work), shift premiums, report-in pay and call-in pay. Disputes in these areas normally center on an individual employee's eligibility for the payment.

WORKING CONDITIONS

Working conditions have been a fertile source of employee grievances. An initial question that must be addressed is whether the collective bargaining agreement has in some way (e.g. through a "maintenance of standards" clause) frozen working conditions or whether management has retained the right to change working conditions as conditions warrant. If working conditions have been "frozen", even minor changes may constitute a violation of the contract. Sometimes the contract provides that minimum health or safety standards will be maintained. Arbitrators may rely upon such provisions to order an improvement in working conditions. In some cases management expressly excludes safety issues from the grievance process through the collective bargaining agreement.

Examples

One arbitrator ordered a county sheriff to put paper towels in the washrooms of the county jail, to install toilet paper containers and to insure that they were filled regularly, to have the plumbing repaired where needed, to have locks installed on the door to each stall and to provide a locker for each employee in the bargaining unit. The arbitrator found his authority for this award in the agreement which contained a provision guaranteeing that the employer was to maintain "a minimum standard of personal safety." [139]



Another arbitrator found that the employer acted improperly in attempting to change a 15 year practice in regard to calling in relief engineers without first consulting the union.[140]

In another case, the union argued that the removal of refrigerators from the guard towers during the course of remodeling was a violation of binding past practice. The arbitrator found no contract violation, since the installation of refrigerators in the remodeled towers was structurally impractical, and the changes which included air conditioning and better plumbing produced a more "wholesome and liveable" environment even when the loss of the refrigerators was considered.[141]

One arbitrator found that a warden had the right to install a "speed bump" to slow down traffic in the prison yard without notifying the union.[142]

Another arbitrator held that the warden of a prison violated the agreement which provided that the employer would provide bulletin board space for "reasonable tasteful dissent" which could be posted without prior employer approval when the employer ordered a union commentary removed from the bulletin boards. The arbitrator, however, found this commentary to be in poor taste and thus did not grant the award sought by the union, i.e., reposting of the commentary.[143]

Finally, an arbitrator found the employer in procedural error for not consulting the union prior to removal of nightsticks from the segregation area to the control center and armory tower since the locations of the nightsticks in the segregation area were consistent with a past practice.[144]

MANAGEMENT RIGHTS

Most collective bargaining statutes and/or regulations provide that the employer may not make unilateral changes in mandatory subjects of negotiation unless there has been a clear waiver of the labor organization's right to bargain. Thus, management would not be free under such a statute and/or regulation to act as it desires simply because the collective bargaining agreement does not expressly forbid it. On the other hand, unless the contract incorporates the operative provisions of the statute and/or regulation, the arbitrator will generally be concerned only with the interpretation and application of the collective bargaining agreement. In this context, the arbitrator will be concerned with the scope of the management rights clause and the express and/or implied limitations set forth in the collective bargaining agreement.

Examples

An arbitrator found that a corrections agency violated its contract with the union restricting out-of-classification assignments by assigning professional employees of the remedial program to participate in daily mid-day count of inmates, which is part of the non-professional custodial duties at the prison. While the contract clause recognizes that deviations may be necessary at times, the employer must keep assignments not commensurate with the job descriptions at a minimum. In this case, professional employees were assigned to work outside their classification for up to two and a half years.[145]

In another case the arbitrator denied a grievance of a maintenance employee whose shift was changed from 7:30 a.m. to 8:30 a.m. because

prisoners assigned to him in non-secure areas could not work before daylight hours. The arbitrator reasoned that management could make such a change since it had the total perogative to operate its facilities unless it was limited in some way by specific language of the contract.[146]

Another arbitrator denied grievances over the assignment of supervisors to do bargaining unit work since contract did not prohibit a temporary assignment to cover employees on extended sick leave.[147]

One arbitrator found that the employer violated "at least the spirit" of the consult and confer clause in its agreement by not conferring soon enough with a clerk before changing her job description. However, the violation was not serious enough to warrant an award for the grievant, who the arbitrator found was partially responsible for the dispute.[148]

LEAVES OF ABSENCE

The collective bargaining agreement may provide for various paid (e.g. sick leave) and unpaid (e.g. union or personal) leaves of absence. Disputes in this area typically center on whether the employee is entitled to such leave. Contracts normally impose restrictions on paid leaves, e.g. a requirement of a physician's written statement for absences in excess of three work days.[149] Similarly, longer-term unpaid leaves of absence commonly require advance written notice and written approval. Generally, unless the contract provides otherwise, it is within management's perogative whether a leave will be granted and the duration of such leave.[150]

UNION RIGHTS

In addition to those union rights secured under the applicable statute and/or regulation, the union typically enjoys other rights secured by, and enforceable under, the collective bargaining agreement. These may involve the union's right to information,[151] union activities, the right to post notices and, of course, the right to investigate and process grievances.



CHAPTER FOUR

GRIEVANCE RESOLUTION

GRIEVANCE INVESTIGATION

The quality of the employer's grievance investigation will dictate the quality of its presentation at any arbitration proceeding, but even more importantly, and perhaps often overlooked, is the importance the investigation has with respect to the potential settlement talks on any particular grievance. If the employer is relying on a maximum of argument and a minimum of facts, the employer's position with respect to settling any particular grievance will not be as strong as it could or should be. If the employer's investigation of the grievance has not been conducted properly, then no matter how well the employer and the employer's representatives pursue each succeeding step of the grievance procedure, the employer's position is not being properly presented.

Grievance Processing

A form to assist the corrections administrator in investigating grievances is to be found in Attachment A.

The Written Statement of the Grievance

Even if it is not required by the collective bargaining agreement, at a minimum management should elicit from the union information such as: the name(s) of the employee(s) involved, facts giving rise to the grievance, identity of the contractual provision(s) alleged to be

violated, contention(s) of the grievant/union with respect to the involved contractual provisions, and relief requested.

These points assist management in analyzing the grievance. These points also "lock in" the grievant/union so additional claims cannot be posed at a later time. Arbitrators generally abide by the principle that a grievance may not be "amended" at the hearing. This is so because:

- The amendment is usually untimely if it is treated as a new grievance.
- The employer has not been given previous notice of the new claim and, therefore, may not be required to proceed to defend the new allegations.
- The collective bargaining agreement generally provides that the only kind of "grievance" which may be presented to an arbitrator is the grievance which has been processed through the earlier procedures.

For these reasons, Arbitrators are not likely to allow a union to add to the claimed violations of the contract.

Require the Grievant to Take a Position

Generalized claims, e.g. "violation of contract","unfair treatment", "denial of proper benefits", do not promptly put the employer on notice as to exactly how the contract is alleged to have been violated. Additionally, besides not allowing the employer the opportunity to properly investigate the grievance, these kinds of broad allegations leave ample room for the



grievant to add to, or embellish upon, the allegations set forth in the grievance. For this reason it is important that the grievant be required to take a position. If the employee can cite a specific policy, rule, or contract provision that has been violated, further investigation will be necessary. If, on the other hand, the grievant cannot be specific and instead spouts generalities, chances are the employee is "griping". If there appears to be no basis for a formal grievance, this should be explained to the employee. Even in these instances, however, the complaint may be something that should be moved in on in order to head off future grievances.

Elicit the Grievant's Version of the Facts

It is important to determine exactly what facts are in dispute. Once it is determined which facts are not in dispute, the parties can zero in on the troublesome areas. During this time the grievant should not be interrupted. He or she should be allowed to speak their mind. Supervisors should maintain control of their temper, particularly if the grievance seems aimed at them. At this stage do not make a snap judgement or decision. This is the first step in a series of steps to resolve the grievance and is not the time to make a decision. More information is needed.

Narrow the Facts in Dispute

Once the parties are in agreement that certain facts are not an issue, they can set them aside and then focus on those areas that are truly in dispute.

Elicit the Grievant's Contentions

A clear statement of what the grievant contends will help management investigate the grievance and help focus management's attention on the particular points in dispute.

Narrow the Contentions in Dispute

Once the parties determine that certain contentions are beyond the scope of the collective bargaining agreement or not timely, etc., the parties can narrow the contentions in dispute. As noted above, this helps focus management's attention on the problem areas. In addition, it keeps the grievant/union from presenting contradictory and/or additional contentions at the arbitration hearing.

Assemble the Facts and Determine the Applicable Rule

Once the asserted facts have been narrowed as much as possible, and the grievant's contentions have been narrowed as much as possible, management then must undertake an investigation of the underlying facts. This fact-gathering is the most important element at the early steps of the grievance procedure. If management waits until a subsequent time to investigate the grievance, it is very possible that relevant physical evicence will be missing, memories will have faded and records and other documentation will have been misplaced or destroyed. To properly investigate a grievance, management should be able to answer who is involved; what happened; where it occurred; when it occurred; why it happened; and how it happened.



When addressing questions to the grievant and/or the union representative try to avoid questions which can be answered with a yes or no. Instead ask questions that will encourage the respondent to present a full set of facts. For example questions such as these are often useful: "Will you please give me the most important facts surrounding this matter?", "How does that section of the agreement apply in this case?", and "Is there anything else that I should know about this before we close this discussion?". Once the facts have been gathered, management must determine the applicable "rule". This will be based upon the parties' collective bargaining agreement, other matters incorporated into the bargaining agreement, agency rulings and/or guidelines, etc. In the event of dispute with respect to the interpretation or application of a particular provision, an arbitrator -- and in the first instance, the parties -- must apply standard rules of construction. We will discuss those in more detail below.

The Employer Must Analyze Management's Position Under the Facts As Known By Management And Under The Applicable Rule As Determined And Interpreted By Management

This determination must then be measured in terms of consistency in similar cases, and basic fairness.

Present Management's Position

Management's position, based on the investigation and the determination and interpretation of the applicable rule, should be presented in a clear

and convincing matter. Reliance on the facts, not argument, is the key to success here.

Preserving Management's Position

In the course of most grievance procedures, procedural "defenses" will arise from time to time. While it may appear that reliance on such defenses is over-technical and does not resolve the underlying problem, management has as much right to expect that the provisions of the grievance procedure will be followed as any other provision of the collective bargaining agreement. Management may, of course, always voluntarily waive procedural defects for the purpose of having a particular matter heard and resolved. It is not unwise, however, to insist that the grievant/union abide by the provisions of the collective bargaining agreement. This insistence is no more overly technical than the union's claim that some other provision of the contract has been violated.

. Timely Objection to Procedural Irregularities

If the grievance procedure requires that a grievance provide certain basic information, or be presented initially to a particular supervisor or member of mid-management, the employer may object to the improper procedure used by a union in processing a grievance.

. Timely Objection to Untimely Grievance

Many times a grievance is filed beyond the stated time limits found in the collective bargaining agreement. If the employer does not challenge



the "arbitrability" of the grievance based upon the untimely filing at the very first steps of the grievance procedure, an arbitrator is apt to hold that the employer has "waived" this procedural defense. For this reason, it is important that any challenge to the untimely filing of the grievance be raised at the very first steps of the grievance procedure. Naturally, the employer may voluntarily waive such defects if it so desires.

. Timely Objection to Complaints Outside the Proper Scope of the Grievance Procedure

From time to time, a grievant/union will attempt to present to an arbitrator claims that are not founded upon the proper jurisdiction of the arbitrator. While this defense is available at any time, in that a party's failure to raise such an argument does not serve to vest jurisdiction in an arbitrator, the best course is for the employer to raise this kind of an argument at the outset of the grievance procedure, e.g. the claim encompasses a portion of agency rules and regulations which are not subject to the collective bargaining agreement.

GRIEVANCE SETTLEMENTS

Settle Grievances at the Lowest Possible Step

It is of little value for management to make a mountain out of a molehill only to lose a grievance in the final stages of the procedure. If management determines that it has erred, immediate steps should be taken to remedy the contract violation.

### Avoid Grievance Settlements As Binding Precedents

Unless the employer wishes the settlement of the grievance to bind the parties in all future similar cases, care should be taken to insure that a particular grievance settlement is not a binding precedent in future cases. This can be accomplished by simply including in the settlement of a particular grievance, that the settlement is "without precedent or prejudice to the rights of either party". This language protects both parties from the other party asserting this settlement as a binding interpretation of the contract.

## FINDING THE "RULE" --- THE STANDARDS FOR DECISION

### Clear Contract Language

An important element of management's preparation is an analysis of the case in terms of the applicable rule. Management should analyze the case using accepted principles which will be employed by an arbitrator. This approach will help management determine how the case will be assessed by the arbitrator. Management can then determine what, if any, settlement offer should be made. The cornerstone of grievance analysis is the clear language of the contract itself. While the grievant/union may urge that the matter is controlled by "precedent" or practice, management should always keep in mind that if the matter is covered by clear contract language, the contract will control and a contrary practice will not serve to change the contractual provisions.[1]



### Contractually Adopted Regulations or Policies

If no applicable rule can be ascertained from the clear contract language, then all matters that have been incorporated into the contract must be examined. For instance, any work rules, safety rules, agency rules, etc., that have been incorporated or referenced into the contract have the same effect as a contract provision and therefore must be examined.

### Interpreting the Contract

Once the applicable rule has been ascertained, the arbitrator will normally apply some standard rules of construction. The most prominent of these rules is that the contractual agreement must be construed as a whole, that is, the parties are not free to pick their "favorite" contract provisions. If there appears to be a conflict between two or more provisions, then the arbitrator must work to reconcile the provisions. The assumption is that knowledgeable parties would not have knowingly negotiated two provisions which are in conflict and that in some way, the parties intended that they be read in harmony and this, the arbitrator will attempt to do. A second prominent rule of construction is that specific contract language will prevail over general contract language. That is, a very broad statement of management prerogative is subject to a more specific statement dealing with, e.g., transfers. This specific statement which is more squarely in line with the particular situation will control. A third rule of construction often cited by arbitrators is simply that expressing one thing excludes another. In other words,

if the contract specifies certain types of conditions or behaviors, the fact that the contract so specifies one act or condition necessarily excludes some other act or condition.

## Extrinsic Evidence: An Aid in Construing Ambiguous Contract Language

Many times, the contractual provision or the matter that has been incorporated into the contract and which controls, is so ambiguous that the arbitrator is unable to determine the party's true intent. In these cases and in these cases only, an arbitrator is allowed to look at so-called extrinsic evidence to ascertain the party's intent by inserting the ambiguous provision in the contract. Extrinsic evidence may take many forms but the most common are past practice and bargaining history.

### Past Practice

The classic definition of "past practice" was formulated by Arbitrator Jules J. Justin in Celanese Corporation of America, 24 La 168, 172 (1954), in which Arbitrator Justin indicated that a past practice must be unequivocal, clearly enunciated and acted upon, ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. A party asserting a past practice must meet a several-fold test. First, the party must show that the alleged practice is applicable. That is, if the underlying fact situations are different, the practice asserted is not applicable.

The party asserting the practice must show that the practice is



current. Keeping in mind that an arbitrator examines past practice to ascertain the parties' intent under a current existing contract provision, the fact that someone did something eight or nine years ago may or may not be relevant. What has to be seen is whether that practice, in fact, is a current practice. If it happened seven years ago but has not happened since, it is not relevant to the fact situation.

The party asserting the past practice must show that the practice is uniform. If the parties act out their behavior in a certain way, one-half time a certain way and one-half time another way, the arbitrator is not able to ascertain a practice because in this case the parties' behavior is ambiguous. If on the other hand, the parties always act out their behavior in a certain way, it is strong evidence of their intent and of what they intended a particular contract provision to mean.

The party asserting the practice must show the frequency of the practice. In other words, if certain matters arise each day but the alleged "practice" with respect to those matters takes place only once or twice a month there is no great frequency of the practice. If on the other hand, certain matters, e.g. breaking out snow removal equipment, occur only once or twice a year, then the fact that the behavior has occurred once or twice a year shows that it is a very frequent situation.

The party asserting the practice must show that it was a mutual practice. That is, the party must show that both sides knew and acquiesced in the practice. There is no such thing as a secret past practice and when management learns for the first time of an asserted practice at a grievance or arbitration meeting, management should rest assured that no

"practice" exists. What has happened is that the grievant/union has unveiled a secret situation. To be binding upon the parties, both parties must have known and accepted the behavior (naturally, the same rule applies to practices that management asserts exist). If management can ot show that the union or its responsible officials were aware of the practice, then the management will not be able to show that a true practice exists.

Finally, the party asserting the practice must show that the scope of the practice is broad enough to encompass the conduct at issue. A practice is no broader than the circumstance out of which it is written, Mittenthal, Arbitration and Public Policy, 30, 32-33 (1961). Arbitrators uniformly hold that a practice cannot be abused, i.e. stretched out of its initial scope.[2]

Bargaining History

A second area of extrinsic evidence often relied upon by arbitrators is the so-called bargaining history. Bargaining history may take numerous forms, the most common of which are set forth below.

An arbitrator may look at past contracts, i.e. if one analyzes the contract provision at issue as found in the last four or five collective bargaining agreements, one can ascertain changes made through the course of collective bargaining. By analyzing these changes, the arbitrator can ascertain the parties' intent by negotiating the provision at issue.

The arbitrator may review statements made at the bargaining table in the course of the contract negotiations. If a party represents the provision will be applied in a certain way the arbitrator may accept this



representation as being binding with respect to the language. (Caution: An arbitrator will not accept promises made at a bargaining table that in any way contradicts with a clear contract provision. The only time that an arbitrator will review or give any weight to such statements is if the provision at issue is in some way ambiguous.)

The arbitrator may consider withdrawn bargaining proposals. If a party had proposed certain contract provisions and ultimately withdrew them in the course of bargaining, the arbitrator may take this as evidence that the parties did not intend to include the provision in the contract, i.e. the provision that had been dropped.

Finally, an arbitrator may consider the fact that after an adverse construction in an arbitration proceeding, the parties negotiated a subsequent contract and did not change the contract provision. For instance, while one arbitrator's decision is technically not binding on another, an arbitrator may consider the fact that the parties entered negotiations after the first arbitrator's decision. If the parties had intended to change what the first arbitrator had indicated to be the parties' agreement, then that party was obligated to present contract proposals in the contract negotiations. The fact that the parties did not present such proposals shows that they accepted the arbitrator's determination.

Past Grievance Settlements

If a similar dispute has arisen in the past, and the parties have resolved the contract grievance in a certain way, this can be used as evidence of what the parties believe that provision means; and it shows

what the parties intended when they negotiated certain provisions. As indicated above, if a party wishes to avoid a grievance settlement as binding precedent, then that party should make sure that the settlement is "without precedent or prejudice to the rights of either party".

Construction Against the Draft

Many arbitrators employ a basic rule that "when all else fails, blame the party that drafted the provision." That is to say, if the provision is ambiguous, and the arbitrator is unable to ascertain the parties' true intent, even after an examination of past practices, bargaining history and past grievance settlements, the arbitrator may charge the party who drafted the contract provision for the error and award the dispute to the other party.

Normal and Technical Usage

Arbitrators are apt to read any involved provision in light of technical usage employed within a particular trade, industry, agency, etc. In other words, the street meaning of a particular phrase may or may not carry the same meaning in a collective bargaining agreement in a particular trade.

Interpretation in Light of the Law

Some arbitrators employ the principle that a contract must be interpreted in light of the law. That is to say, if a contract can be found to be valid or legal when read one way and found to be illegal when



read another way, then the contract will be read in such a way that it comports with the applicable law.

In this chapter we outlined some basic investigation tips to aid in resolving grievances, ideas on how to preserve management's position, and significant discussion of standards for grievance decisions. These standards are the ones used by arbitrators and thoughtful management use and interpretation of them may resolve many problems in the grievance area.

CHAPTER FIVE

ARBITRATION OF GRIEVANCES

WHO ARE THE "ARBITRATORS"

An arbitrator is a person or panel selected by the parties or appointed in some mutually agreed upon manner to hear evidence related to the grievance and to make a decision relative to the arbitrability and/or merits of the grievance.

Selection of the Arbitrator

There are many methods by which an arbitrator may be selected. In most cases, the collective bargaining agreement will delineate the specific method which the parties have agreed upon for selection of an arbitrator.

One popular method of choosing an arbitrator is to submit the grievance to the American Arbitration Association. The federal government offers a similar service to all employers, whether public or private, through the Federal Mediation and Conciliation Service. The parties may also list a single arbitrator for all cases in their contract. Some contracts provide a list of several arbitrators with the specific one for the grievance at hand to be chosen by draw. In some states, the civil service laws may provide the method for selecting an arbitrator. In the federal service, 5 USC 7121 provides that collective bargaining agreements must have a grievance procedure and that it must contain a binding arbitration



provision. However, the method for selecting the arbitrator is left to the parties at the bargaining table.

Sources of Information

If the parties have elected to use either the American Arbitration Association service or the Federal Mediation and Conciliation Service in selecting an arbitrator, both services provide the parties with a short biographical sketch of the arbitrators on the lists. The sketch generally includes prior and present employment positions of the arbitrator which are related to labor relations and the arbitrator's fee schedule.

There are several means of obtaining specific information relative to prior decisions made by a particular arbitrator. Public decisions may be indexed by arbitrator within a specific publication.* Thus, if one wished to know what a particular arbitrator has ruled in the past on a discipline matter, the decisions of that arbitrator published by these services is readily accessible. Often the best method for obtaining background information on an arbitrator is to consult with other similar agencies regarding their prior experience with the arbitrator and the arbitrator's general reputation.

* Examples

- Bureau of National Affairs
- Commerce Clearing House
- Prentice Hall
- Labor Arbitration in Government

## THE ARBITRATOR'S AUTHORITY

It is well established that the authority of the arbitrator is to be found in the agreement of the parties, either a specific submission agreement applying to only one case or a general arbitration agreement embodied in a collective bargaining agreement.[1] Arbitrator McCoy described the effect of the parties' agreement on the arbitrator's authority as follows:

> The arbitrator, unlike the courts, derives no authority from the common law, the constitution, or statute. He is in no sense an official of any government or any governmental agency. He is a private person, employed by other private persons, in the same way that a doctor or a lawyer may be employed. He has only such power as the employers who employ him see fit to bestow upon him, just as a surgeon has power to perform an operation only if the patient gives him that authority.[2]

The parties to a collective bargaining agreement frequently severely limit the arbitrator's authority as follows:

> The Arbitrator shall have no power to add to, subtract from, alter or modify any of the terms of this Agreement or any of the functions or responsibilities of the parties to this Agreement.

Despite efforts by many unions and employers to restrict the arbitrator to the four corners of the contract in resolving disputes, some arbitrators rely on the law in deciding disputes. Not all arbitrators agree that reliance on the law is proper where the parties do not request the arbitrator to consider the law but where the arbitrator finds a clear conflict between the law and the contract. For example, one



arbitrator has urged that where there is a clear conflict between the agreement and the law, the arbitrator "should respect the agreement and ignore the law."[3] On the other hand, another arbitrator has argued that: "Arbitrators, as well as judges, are subject to and bound by law whether it be the Fourteenth Amendment to the Constitution of the United States or a city ordinance. All contracts are subject to statute and common law, and each contract includes all applicable law."[4] Having given extensive thought to the opposing views of arbitrator, yet another arbitrator has advanced the middle view that "although the arbitrator's award may permit conduct forbidden by law but sanctioned by contract, it should not require conduct forbidden by law even though sanctioned by contract."[5] This arbitrator maintains that arbitrators are "part of a private process for the adjudication of private rights and duties," and that they "should not be asked to assume public responsibilities and to do the work of public agencies."[6]

## DETERMINING ARBITRABILITY

A party to a collective bargaining agreement may object to taking a grievance to arbitration on the grounds that it is not arbitrable, i.e. that the grievance is not one which the parties to the agreement intended to be resolved through the grievance procedure. It may be asserted, for example, that the grievance is not concerned with any of the types of disputes covered by the arbitration clause, or that the grievance is not arbitrable because some condition necessary to arbitration, such as exhaustion of the grievance procedure, has not been met.

## Determination by the Courts

There are three situations where a court may become concerned with arbitrability situations. First, the party challenging the arbitrability of a dispute may seek to prevent the arbitration from taking place through a temporary injunction or "stay of arbitration" pending determination of arbitrability. Second, one party to the agreement may seek a court order compelling arbitration and the other party may raise the issue of arbitrability. Third, one party may challenge the arbitrability of a grievance when the other party takes an arbitration award on the grievance to court for enforcement.[7]

When a court does become involved in an arbitrability dispute and the dispute concerns private employers, federal law generally controls. The United States Supreme Court has developed standards which have been viewed as indicating a strong federal policy favoring the arbitration process as a means of resolving labor contract interpretation disputes.[8] For example, in a leading case on the subject the Supreme Court held that doubts as to whether the parties agreed to submit an issue to arbitration should be resolved in favor of coverage.[9]

Public employers (excluding the federal government) are not necessarily controlled by federal law. State legislatures and courts have developed their own standards to govern public employers. Although a few state courts have adopted the federal presumption in favor of arbitrability,[10] most state courts appear to be more willing to declare a dispute non-arbitrable in the public sector. The state courts have often concluded



that public policy considerations compel the reservation of broader discretion and broader "management rights" for public employers than for private employers. Moreover, the courts frequently rely on statutes which exclude more subjects from arbitration.[11]

Federal law provides that procedures for the resolution of arbitrability questions shall be provided for in collective bargaining agreements negotiated between the government and the unions.[12]

However, even where the collective bargaining agreement does not expressly leave the determination of arbitrability to the arbitrator, the courts may leave the initial determination of arbitrability to the arbitrator. This approach has been followed where the arbitrability could not be determined without delving into the merits of the dispute.[13]

## Determination by the Arbitrator

The determination of arbitrability is often left by the parties to the arbitrator. This can be done through a specific provision in the collective bargaining agreement or by stipulation. Where it is clear that the parties have authorized the arbitrator to decide the issue of arbitrability, the courts will not usually overturn his ruling on that issue.[14]

Many arbitrators are of the opinion that the determination of the issue of arbitrability is part of their inherent duty.[15] Consequently, arbitrators often determine arbitrability even where the parties have not clearly authorized him to do so.

Examples of Subjects Excluded from Arbitration
(Federal Employees Only)

Parties in federal bargaining frequently provide in the collective bargaining agreements that the following subjects are excluded from arbitration:

- Claims asserted in another forum, such as employment discrimination claims;
- Medical and life insurance claims;
- Grievances which have not met the procedural requirements set out in the grievance procedure.

Under federal law, grievances concerning the following subjects are excluded from arbitration (federal employees only*):

- Prohibited political activity under 5 USC 7321 et seq. (5USC 7121 (c) (1) );
- Retirement, life insurance or health insurance (5 USC 7121 (e) (2) );
- Suspension or removal for excessive and habitual use of intoxicants (5 USC 7121 (c) (3) );
- Any examination, certification or appointment (5 USC 7121 (c) (4) );

* As stated in Chapter Two, state and local governments may have rules following these same guidelines. State and local corrections administrators should check their applicable laws before including or excluding such grievances.



- The classification of any position which does not result in the reduction in grade or pay of an employee (5 USC 7121 (c) (5) );
- Prohibited personnel practices (as defined in 5 USC 2302 (6) (1) ) which have been grieved under the statutory procedure (5 USC 7121 (d) );
- Actions based on unacceptable performances which have been grieved under the appellate procedures (described in 5 USC 7701) (5 USC 7121 (e) ).

Grievances concerning a variety of subjects are also excluded from arbitration under the laws of many states.

BURDEN OF PROOF

A party who carries the burden of proof "must produce sufficient evidence to prove the facts essential to his claim."[16] Thus, a party who carries the burden of proof has a duty to present the evidence to support its claim and this evidence must be sufficient weight to convince the arbitrator. The general rule followed by arbitrators in proceedings involving nondisciplinary cases is that the grieving party -- usually the union -- bears the burden of first proceeding in a presentation of evidence in support of its claim.[17] In proceedings involving disciplinary cases, arbitrators usually require the employer to proceed first with evidence to justify its actions.[18]

In many cases, arbitrators make no mention of the standard they are applying in evaluating the sufficiency of evidence. In a great number

of these cases, arbitrators appear to be applying a "preponderance of evidence" standard.[19] Under this standard, the party who bears the responsibility of presenting the evidence to support its claim must convince the arbitrator that, more likely than not, its version of the facts is correct.

In other cases, arbitrators have explicitly set out their standards. For example, when the union is challenging a management determination that one employee has greater ability than another or that one job classification should be ranked higher than another, arbitrators frequently hold that the union must show that the determination was arbitrary, capricious and unreasonable.[20] Similarly, arbitrators usually require management to establish beyond a reasonable doubt that its discharge of an employee was proper or for just cause where the employee was discharged for criminal or morally reprehensible conduct.[21]

PRECEDENT VALUE OF AWARDS

Although the awards of prior arbitrators under the parties' collective bargaining agreement are not binding precedent, they are frequently followed by subsequent arbitrators. As one arbitrator observed "when the identical contract provision and parties are involved, subsequent arbitrators frequently honor the first arbitrator's award, providing same is spelled out in detail and the rationale for the same is known to all of the parties."[22] Some arbitrators have indicated that they will follow such precedent even if they disagree with it.[23] However, an arbitrator might not follow a prior award where new and substantial evidence exists



which was not available when the case was first heard, lack of clarity or other reasons make the execution of the award impossible, or there was no fair and full hearing.[24] Moreover some arbitrators have refused to follow an award whose continued application is justified by changed conditions[25] or where they considered the awards to be clearly erroneous.[26]

The parties frequently raise and the arbitrator will consider awards by arbitrators under a different collective bargaining agreement than the one in dispute. These awards are frequently turned to "for advice and for statements of the prevailing rule and standards."[27] For as one arbitrator has noted "it is obvious that in arbitration as in other fields, respect must be paid to accumulated wisdom and experience."[28]

CHAPTER SIX

## MINIMIZING THE NUMBER OF GRIEVANCES

There are people who believe that most grievances originate as a result of some action or inaction on the part of the grievant's immediate supervisor. Many of these are unnecessary. These seem to be especially unnecessary when they are caused by a supervisor's carelessness, sharp tongue, bad temper, poor planning or lack of fairness. An unstated but major responsibility of corrections managers is not to be the cause of grievances. They should be the ones whose leadership creates a positive work atmosphere--the kind of atmosphere where grievances are minimized. There are certain steps that can be taken by management to reduce the number of grievances filed, particularly those that are caused by a lack of information and/or communication.

### THE SUPERVISOR'S ROLE - EFFECTIVE MANAGEMENT

A good manager should work to reduce tensions and eliminate friction and thereby create a cooperative atmosphere. Toward this end, there are certain things that can be done by a supervisor to provide a greater spirit of cooperation and teamwork in the work force.

A supervisor can focus on communication. Informed people do a better job because they see the whole picture. Thus, they feel they have a stake in the successful operation of the organization. People who are informed will generally be more flexible because they see how proposed changes fit into the overall picture.

The manager must be consistent, i.e. managers who change their mind often and are unable to make a decision hardly demand the respect of their employees. Treat everyone fairly--everyone equally. Don't play favorites. Enforce policies and rules consistently--day in and day out. Make sure that everyone obeys the rules and contributes to the success of the organization.

A manager must be cooperative. Managers who cannot perform and assist employees in emergency or unusual situations can hardly instill a spirit of cooperation in fellow workers.

A manager must be constructive in the sense that the manager's criticism of employees is not designed to be destructive but to be constructive in leading to improvement.

A manager must be considerate. Where there are people, there are problems. One must consider the motives as well as the actions of people. Take into account how you would react in a similar situation.

A manager must be confident. The best way to inspire confidence in other people is to be confident in them.

Establish a reputation for honesty and fairness. Don't make promises that cannot be kept. Don't make threats that cannot be backed up. Never lie to subordinates. If there are things that should not or cannot be discussed with employees, simply tell them so. If people feel that they can trust their manager and what the manager tells them, a lot of petty grievances will be eliminated.

A manager should be available. A major part of the trust discussed above develops from being available and accessible to employees. Supervisors who establish this availability, and are willing to talk, will have an

easier time with grievances. Don't make subordinates file a grievance just to get management's attention.

THE SUPERVISOR'S ROLE - THE EMPLOYER'S REPRESENTATIVE

The supervisor must know all policies, regulations and collective bargaining agreements. Supervisors who try to debate a grievant/union based on last reading of a provision some years back is apt to fall into deep trouble. Prior to grievances and/or complaints being processed, it is very common for the grievant/union to have reviewed the provisions and ascertain how they will present it to management. It is incumbent on management to always be prepared to intelligently discuss the meaning and application of the various department rules, policies and contractual provisions.

Advise upper management of inequities or unfair rules and regulations. That is to say, that as part of management, if it is found that a particular rule cannot and should not be enforced for substantial reasons, then the rules should be changed. It is much better to have a more limited range of rules that are uniformly and consistently enforced rather than a large notebook of rules that are unknown and ignored by employees and managers alike.

Support upper management. Blaming superiors and everyone from the agency head to your immediate superior might make it seem more comfortable at the time. This kind of management by abdication always lead to trouble.

Be fair but firm in presentation of management's presentation. Management, once it has followed the steps as outlined above and ascertained through a thorough investigation the facts and the applicable rule and



has examined its own position for consistency and fairness, should present its position in a positive, forthright and firm manner. Management should not be in a position of dickering on principles. Management's position should be well-founded. The supervisor who is willing to "meet and dicker" will find a long line of grievants/union representatives outside of his office each of whom knows that it is only a matter of time before they get what they want.

THE SUPERVISOR'S ROLE - THE INITIAL MANAGEMENT REPRESENTATIVE TO MEET WITH THE UNION

The front lines of management must understand the union representative's role - one of a political animal that is genuinely concerned about people problems. When viewed in this light, one can see that management will be further ahead by treating management's position in a businesslike way while respecting the union steward's position. Remember that these people are the elected spokesmen of their members. It is their job to do the best that they can for their members. They may have to push a grievance that has little merit because an employee wishes it. It's not up to the steward to tell his or her client that they don't have a case. The union representatives can't be expected to make management's work easier. Whatever managers do, they should not lose their tempers when the steward goads them or makes exaggerated or untrue statements. Union reps have a political position, and hold it just so long as fellow employees keep electing them. Understand this and try to work with the union representatives. If a manager can establish a relationship with the union representative based on mutual trust and confidence, the two of them will be able to head off a lot of grievances.

Finally, pay attention to the informal complaints. Make it a habit to answer informal complaints and gripes. A grievance usually begins as someone's unanswered question. Then it becomes a complaint that is not taken seriously. And finally it becomes a formal grievance which may end up in arbitration. Complaints should be viewed as important items in the total superior-subordinate communication process. Supervisors should pay attention to informal complaints. Dissatisfaction often shows up first as informal complaints that can be handled before they become grievances. The thoughtful handling of complaints will strengthen the relationships between managers and their subordinates.

Minimizing grievances involves hard work. A good manager will be listening to employees and reporting back to upper management on problems as they arise. Good leadership, i.e. concern for people and concern for work group performance will do much to reduce the grievance load.



# CHAPTER SEVEN

# THE FUTURE

No guidebook of this type would be complete without some future perspective.

## PRISONER GRIEVANCES AS CATALYST

Prisoners have always had the informal right to "send the warden a kite" as a grievance mechanism. This right has been formalized in some systems by the establishment of a prisoner union. The advent of these prisoner unions is believed to be a factor affecting grievances of corrections staff. The prisoner union splits the power base in institutions between management, prisoners, and correction officers. To please one component may mean aggravating another. For instance, it is not difficult to see a scenario of the prisoner union wanting more in the way of laxity of security which produces a grievance from guards about "terms and conditions of employment". Indeed the aftermath of many riots, a uniting of prisoners, has often led to major changes in assignments etc. for guards, all of which may be open to grievances.

A more subtle factor may be the corrections officer's perception of benefits achieved by the prisoner unions in grievance hearings. If an officer believes that the grievance mechanism "works" for prisoners then he/she may be more likely to try it. In some systems prisoners have had the right to grieve (kiting) long before corrections officers were given the right. This may clearly be a case where the prisoners have

aided their "keepers" by introducing a system of feedback. What can safely be said is that every prisoner grievance settlement will be viewed as to its consequences to staff and this may provoke a staff grievance. Management will always be left trying to achieve the delicate balance between "corrections" and "staff morale".

OTHER CONSIDERATIONS

Public employee unionism continues to rise bringing with it the foundation of grievance mechanisms. Good management probably already has a viable grievance system and has little to fear in such a process. Managers who are still of the "warm body" mold might consider that feedback makes good sense and grievances are a form of feedback which specifically address the correction of alleged wrongs. In short, if a grievance procedure is not now available the future with unions dictates it will be available.

Another factor is the increased levels of education for correction officers. Managing the educated employee has both benefits and drawbacks. One drawback is the tendency of the educated persons to want to "have their say". Again, the proper management stance is to encourage this so as to minimize grievances. However, not all people will be happy with just having their say and some, for whatever reason, are going to feel the need for a grievance mechanism.

Finally, the changes within the corrections environment will necessitate management keeping abreast, by whatever means available, of the problems within the institution. Overcrowding, contraband, disturbances, tight budgets, minimum staff, are just a few of the environmental constraints/problems the corrections administrator is faced



with on a daily basis. For some of these, a good grievance mechanism may (a) not only give notice of how the particular problem is being felt in the institution but (b) also provide the genesis of the solution. As stated earlier, grievances are not unlike a pain. Examine what is happening and make adjustments.

NOTES

CHAPTER TWO

1. Michigan Constitution of 1963, Art. 1, 2; New York Constitution of 1969, Art. 1, 11.

2. Pickering vs. Board of Education, 391 US 563 (1968).

3. 5 USC 1501-1508 (1976).

4. Nonpartisan Freedom of Expression of Public Employees, 76 Mich L. Rev. 365 (1977).

5. Id. at 436.

6. See 391 US at 573 n. 5.

7. 391 US at 570.

8. 391 US at 570, n. 3.

9. See 391 US at 568.

10. 391 US at 572.

11. 391 US at 573.

12. Porter vs. Califano, 592 F2d 770 (5th Cir 1979).

13. Mt. Healthy City School District Board of Education vs. Doyle, 429 US 274 (1977).

14. 429 US at 287.

15. Muller vs. Conlick, 429 F2d 901 (7th Cir 1970).

16. Givhan vs. Western Line Consolidated School District et al, 439 US 410 (1979).

17. Cole vs. Richardson, 405 US 676 (1972).

18. McLaughlin vs. Tilendis, 398 F2d (7th Cir 1968) and AFSCME vs. Woodward, 406 F2d 137 (8th Cir 1969).

19. See, e.g., Atkins vs. City of Charlotte, 296 F Supp 1068 (DC NC 1969).

20. See cases cited in Note 1.

21. Atkins vs. City of Charlotte, 296 F Supp 1068 (WD NC 1969).

22. Kusper vs. Pontikes, 414 US 51 (1973).

23. Elrod vs. Burns, 427 US 347 (1976).

24. Cooper vs. Henslee, 257 Ark 963, 522 SW2d 391 (1975).

25. Gardner vs. Broderick, 392 U.S. 273 (1968).

26. Garrity vs. State of New Jersey, 385 US 493 (1967).

27. Gardner, supra, at 278.

28. Hanzimanolis vs. Codd, 404 F. Supp 719 (S.D. New York, 1975).

29. National Union of Police Officers, Local 502-M, AFL-CIO vs. Lucas, 79 Mich App 445, 263 NW2d 7 (1978).

30. Hank vs. Codd, 424 F. Supp 1086 (SD New York, 1975).

31. Lee vs. Ridgdill, 444 F. Supp 44 (SD Fla 1977).

32. Bishop vs. Wood, 426 U.S. 341, 348-349 (1976), Board of Regents vs. Roth, 408 U.S. 564, 573 (1972); Perry vs. Sinderman, 408 U.S. 593 (1972).

33. Slegeski vs. Ilg, 395 F. Supp. 1253 (D. Conn. 1975).

34. Osmer vs. Moiles, 409 F. Supp. 675 (E.D. Mich. 1975).

35. Codd vs. Velger, 429 U.S. 624 (1977).

36. Board of Regents vs. Roth, 408 U.S. 564, 578-579 (1972); Perry vs. Sinderman, 408 U.S. 593, 602 (1972).

37. Guillory vs. State Department of Institutions, 219 So.2d 282 (La. App. 1969).

38. Smulski vs. Conley, 435 F. Supp. 770 (N.D. Ind. 1977).

39. Codd, Police Commissioner, City of New York vs. Velger, 429 US 624 (1977).





40. Oregon State Penitentiary vs. Hammer, 434 U.S. 945 (1977).

41. Fraternal Order of Police, Lodge No. 98 vs. County of Kalamazoo, 82 Mich App 312, 266 NW2d 805 (1978).

42. Emala vs. Baltimore County, 223 Md 371, 164 A2d 712 (1960).

43. Carastro vs. Gainer, 434 F. Supp. 296 (S.D. Fla. 1977).

44. Waters vs. McGinnis, 289 N.Y. S.2d 376 (1968).

45. Speegle vs. State Department of Institutions, 198 S2d 154 (LA 1968).

46. Casad vs. City of Jackson, 79 Mich App. 573, 263 NW2d 19 (1977).

47. Hanzimanolis, note 5, supra.

48. Smith vs. Price, 446 F. Supp. 828 (1977).

49. Stevens vs. Hocker, 91 Nev 392 (Nev. 1975).

50. Loughran vs. Codd, 432 F. Supp. 259 (1977).

51. Keely vs. State Personnel Board, 53 Cal. App. 3d 88, 125 Cal Rptr. 398 (1975).

52. Hammer vs. Oregon State Penitentiary, 543 P2d 1094 (Or. App 1975), rev'd 276 or 651, 556 P2d 1348 (1976).

53. Figaro vs. Ward, 383 NYS.2d 529 (1976).

54. Employment Interest and an Irrational Application of the Rationality Test, 51 U. Colo. L.R. 641, 642 (1980).

55. Carrington vs. Rash, 380 U.S. 89 (1965).

56. Shapiero vs. Thompson, 374 U.S. 618 (1969).

57. See e.g., Mayer vs. Chicago, 404 U.S. 189 (1971).

58. Griswold vs. Connecticut, 381 U.S. 479 (1965).

59. Shapiero vs. Thompson, 349 U.S. 618 (1969).

60. Personnel Administrator of Massachusetts vs. Feeny, 442 U.S. 256 (1979).

61. New York City Transit Authority vs. Beazer, 440 U.S. 568 (1979).

62. Vance vs. Bradley, 440 U.S. 93 (1979).

63. Foley vs. Connelie, 435 U.S. 291 (1978).

64. Upshaw vs. McNamara, 435 F.2d 1188 (1st Cir. 1970).

65. State vs. Wylie, 516 P.2d 142 (1973).

66. McDonnell Douglas Corp. vs. Green, 411 U.S. 792 (1973).

67. Teamsters vs. United States, 431 US 324 (1977).

68. Board of Trustees of Keene College vs. Sweeney, 58 L.Ed. 2d 216 (1978).

69. Griggs vs. Duke Power Co., 401 US 424 (1971).

70. Teamsters vs. United States, supra.

71. 29 CFR 1607; see also Abermarle Paper Co. vs. Moody, 422 US 405, 10 FEP 1181 (1975).

72. EEOC Interim Guidelines, Secion 1604. 11.

73. Trans World Airlines, Inc. vs. Hardison, 423 US 63 (1977).

74. Onondago County vs. N.Y. State Division of Human Rights 357 NYS2d 581, 8 EPD 9707 (App. Div. 1974).

75. Dothard vs. Rawlinson, 433US 321, 15 FEP Cases II (1977).

76. City of Philadelphia vs. Pennsylvania Human Relations Commission, (Pa 1973) Comm Ct, 300 AD2d 97, 5EPD 8535.

77. Washington vs. Davis, 426 US 229, 611 EPD 10,958, (1976).

78. Griggs vs. Duke Power Co., 401 US 424, 3 FEP 175 (1971); Johnson vs. Goodyear Tire & Rubber Co., 491 F2d 1364, 7 FEP 627 (5th Cir. 1974).

79. League of United Latin American Citizens vs. City of Santa Ana, 410 F. Supp. 873, 12 FEP 651 (C.D. Cal. 1976); Castro vs. Beecher, (DC Ma 1971), 334 F. Supp. 930, 4 EPD 7569, aff'd (CA-1, 1972) 459 F2d 725, 4 EPD 7783.

80. Dothard vs. Rawlinson, 433 US 321, 15 FEP Cases II (1977).





81. Castro vs. Beecher, (DC Ma 1971), 334 F. Supp. 390, 4 EPD 7569, aff'd (CA-1 1972), 459 F.2d 725, 4 EPD 7782.

82. Brown vs. Weakly, (D. Ore. 1975, 12 FEP 442 aff'd 554, F2d 1068, 15 FEP, 370 (Ca 9, 1977).

83. Prascik vs. Cleveland Museum of Art, 426 F. Supp. 779, 14 FEP 33 (ND Ohio 1976).

84. Schaefer vs. Tannian, (DC Mi 1974), 7 EPD 9404, vac'd in part on other grounds (6th Cir. 1976) 12 EPD 11,049.

85. 29 USC 621-634.

86. Price vs. Maryland Casualty Co.,(5th Cir. 1977), 561 F2d 609; Cova vs. Coca-Cola Bottling Co., (8th Cir. 1978), 574 F2d 958; Loeb vs. Textron Inc., (1st Cir. 1979), 600 F2d 1003

87. Hodgson vs. Greyhound Lines, Inc. (1974, CA 7 T11) 7 EPD 286, cert den 9 EPD 9882. See also Usery vs. Tamiami Trial Tours, Inc., (5th Cir. 1976), 531 F2d 224.

88. Arritt vs. Grisell (W. VA. DC 1976) 421 F. Supp. 800, aff'd in part and rev'd in part on other grounds (4th Cir. 1976) 567 F2d 1267.

89. McIlvanie vs. Pennsylvania State Police (1972), 6 Pa Cmwlth 505, 296 A2d 630, aff'd 454 Pa 129, 309 A2d 801, app dismd 415 US 986, 39 LEd. 2d 884, 94 S. Ct. 1583.

90. 29 USC 794.

91. 29 USC 706 (7).

92. See Davis vs. Southeastern Community College, 442 US 397 (1978).

93. Duran vs. City of Tampa, 430 F Supp 7S, final order 451 F Supp 954 (M.D. Fla 1977).

94. Davis vs. Bucher, 451 F Supp 791 (E.D. Pa 1978).

95. 45 CFR 84.3(k) (1)

96. 45 CFR 84.12 (c).

97. 45 CFR 84.12 (b).

98. Southeastern Community College vs. Davis, 442 US 397 (1978).

99. 29 USC 206(d).

100. Peltier vs. City of Fargo, 533 F2d 374, 12 FEP Case 945 (8th Cir. 1976).

101. 42 USC 1981, 1982.

102. 42 USC 1983, 1985, 1986.

103. 5 USC 1101 et seq.

104. 5 USC 2301.

105. 5 USC 2302.

106. 5 USC 1101.

107. 5 USC 1201 et seq.

108. 5 USC 4302.

109. 5 USC 5301.

110. 5 USC 5402.

111. 5 USC 5403.

112. 5 USC 1701 et seq.

113. 29 USC 151 et seq.

114. 5 USC 7116.

115. 5 USC 7116 (a).

116. 5 USC 7116 (b).

117. 5 USC 7116 (b) (7).

118. 5 USC 7311.

119. 5 USC 7121 (a).

120. 5 USC 7103 (a) (9).

121. 5 USC 7121.

122. See, e.g., Michigan, 15 MCLA 37.2101, et seq.





123. See, e.g., McDonald vs. City Manager of Fall River, 273 Mass 368, 173 NE 593 (1930).

124. See, e.g., Hospital vs. Civil Service Commission, 83 N.J.L. 10, 84 A. 614 (1912), and O'Keefe vs. Clark, 238 App. Div 175, 264 N.Y.S. 299 (1933).

125. See, e.g., Farrell vs. State, 317 Mich 676, 27 NW2d 135 (1947).

126. See, e.g., Kluth vs. Andrus, 101 NE2d 310 (1951).

127. A complete list is contained in House Comm. on Veterans' Affairs, 91st Cong., 1st Sess., State Veterans' Laws, Digests of State Laws Regarding Rights, Benefits, and Privileges of Veterans and Their Dependents (1969). Kimbrough & J. Glen, American Law of Veterans 1177-1238 (1954). Mississippi appears to be the only state without such a statute.

128. The primary federal provisions are 5 U.S.C. 2108, 3309, and 3313 (1970).

129. See, e.g., Cal. Gov't Code 18540-43, 18937, 18971-77 (West 1963 & Supp. 1975) (10 points for veterans; 15 points for disables veterans); Fla. Stat. Ann. 295.07-295.12 (1975) (5 and 10); Kan. Stat. Ann. 75-2955 (1969) (10 and 15); N.C. Gen. Stat. 128-15, 128-15.1 (1974) (10); Ore. Rev. Stat. 408.230 (1974) (r and 10); Pa. Stat. Ann. titl. 51, 492.3 (1969) (10); Va. Code Ann. 2.1-112 (1973) (5% and 10%); Wash. Rev. Code 41.04.010, 73.4. 090 (Supp. 1975) (10%).

130. See, e.g., Mass. Gen. Laws Ann. Ch. 31, 23 (Supp. 1975); Minn. Stat. Ann. 197.45(2) (Supp. 1975).

131. Blumberg, DeFacto and DeJure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment, 26 Buffalo L.R. 4 (1976-77).

132. Id at 5.

133. See e.g., Mich. Comp. Laws. 35.402 (1967); Minn. Stat. Ann. 197.46 (West Supp. 1977).

134. See, e.g., Ala. Code tit. 55, 305 (1960); Mass. Gen. Laws Ann. ch. 30, 9A (West 1966); N.J. Stat. Ann. 38:16-1 to 16-5 (West 1968); N.Y. Civ. Serv. Law 85 (7) (McKinney Supp. 1975).

135. See, e.g., 38 USC 2021; Mich Comp Laws 32.273,274.

136. Blumberg, note 5 supra at 16.

137. Personnel Administration of Massachusetts vs. Feeny, 442 U.S. 256 (1979).

NOTES (Chapter Two Continued)

138. In Commonwealth ex rel Mauer vs. O'Neil, 368 Pa. 369, 83 A.2d 382 (1951), the court invalidated a promotional preference, and in Parrack vs. Ford, 68 Ariz. 205, 203 P.2d 872 (1949) the court indicated that it would find such a provisions invalid. However, this type of provision has been upheld in Koelfgen vs. Jackson, 355 F. Supp 243 (D. Minn. 1972), aff'd mem., 410 U.S. 976 (1973); McNamara vs. Director of Civil Serv., 330 Mass. 22, 110 N.E. 2d 840 (1953); and State ex rel. Higgins vs. Civil Serv. Comm'n 139 Conn. 102, 90 A.2d 862 (1952).

139. 5 USC 7323.

140. 5 USC 7324 (a) (1).

141. 5 USC 7324 (a) (2).

142. 5 USC 7324 (b).

143. 5 USC 7326.

144. 5 USC 1501, et seq.

145. MCL 15.401 et seq. See AFSCME vs. Michigan Civil Serivce Comm'n, 408 Mich 385, 292 NW2d 442 (1980).

146. Toussaint vs. Blue Cross & Blue Shield of Michigan, 408 Mich 578, 292 NW2d 880 (1980).

147. Ebling vs. Masco Corp., 408 Mich 578, 292 NW2d 880 (1980).

148. Scott vs. City of Ann Arbor, 76 Mich App 535, 275 NW2d 157 (1977).

149. Those states with collective bargaining statutes including an employees rights provision for public or state employers include Alaska, California, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Washington and Wisconsin.

150. States with collective bargaining statutes providing for impasse procedures for public sector and/or police include California, Connecticut, Florida, Hawaii, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Vermont, Washington and Wisconsin.



NOTES

CHAPTER THREE

1. Occasionally, an employee may claim that his resignation was, in fact, a constructive discharge. Arbitrators consider whether the decision was voluntarily made, the passage of time and potential prejudice to the employer. City of Birmingham and Birmingham Police Officers Assn., 726 GEER 21 (1977).

2. Wayne County Labor Relations Board & Wayne County Sheriff's Local 502, 657 GEER C-2,3 (5-17-76).

3. City of Allentown (Pa) and Fraternal Order of Police, Queen City Lodge No 10, Vol. 9, No. 9 LAIG 2380, September, 1979.

4. Winnebago County Sheriff's Department, 70-1 ARB 8221, p. 3732.

5. City of Pittsburg and F.O.P., Fort Pitt Lodge No. 1, 71-1 ARB 8146, p. 3486.

6. City of Boston (Mass) and Boston Police Superior Officers Federation, Vol. 9, No. 1 LAIG 2209, January 15, 1979.

7. City of Boston (Mass) and Boston Police Patrolman's Association, Vol. 7, No. 12 LAIG No. 1958, December, 1977.

8. Elkouri & Elkouri, How Arbitration Works, 3rd Ed., p. 641

9. See for example: Hartman Electrical Mfg. Co., 48 LA 681 (1967).

10. See for example: State of Connecticut, BNA Case No. 7778-A-158, GERR 759:22 (1978) (discipline modified on view of fact employee was unaware of penalty for sleeping on duty).

11. See for example: Philco Corp., 45 LA 437 (1965).

12. See for example: Alan Wood Steele, 21 LA 843 (1959).

13. Davis, Joseph R., FBI Law Enforcement Bulletin, April 1980, pg. 29. (Special Agent Davis wrote two consecutive articles in the March and April 1980 edition of the FBI Bulletin. It is highly recommended that managers faced with this criminal versus administrative hearing dilemma read these excellent articles.)

14. "Interview of Public Employees Regarding Criminal Misconduct Allegations," in FBI Law Enforcement Bulletin, April 1980.

15. U.S. Department of Justice, Bureau of Prisons, U.S. Penitentiary, Lewisburg, PA., FMCS File No. 79K14081, GERR 844:37 (1979).

16. Cusson vs. Firemen's & Policemen's Civil Service Commission, 524 S. W. 2d. 88 (Tex. Civ. App. 1975). City of Glasgow vs. Duncan, 437 SW2d 199 (ky. 1969).

17. Richardson vs. Perales, 402 US 389 (1971) (strict rules of evidence need not apply in an administrative hearing).

18. Harvey Aluminum, Inc. vs. Steelworkers, 67 LRRM 2580 (U.S. Dist. Ct., C.D. Calif., 1967).

19. City of Flint (Mich) and Teamsters Local 214, Vol. 8, No. 1 LAIG 1994, January, 1978.

20. See for example: Talent vs. City of Abilene, 508 SW2d 592 (Tex. 1974); Engel vs. Township of Woodbridge, 306 A2d 485 (N.J. Super. 1973).

21. Chambliss vs. Board of Fire and Police Commissioners, 312 NE2d 842 (Ill. App. 1974).

22. City of Benton Harbor and Benton Harbor Patrolman's Association, 78-2 ARB 8337 (1978), p. 4606.

23. National Electric Coil, 46 LA 756 (1966); American Maize Products Co., 45 LA 1155 (1965)

24. City of Pittsburgh, Pennsylvania and Fraternal Order of Police Fort Pitt Lodge No. 1, 71-1 ARB 8146, p. 3486.

25. Columbian Rope Co., 7 LA 450 (1947).

26. Martin vs. State Personnel Board, 26 Cal App 3d 573, 103 Cal Rptr 306 (1972).

27. See for example: Jones vs. City of Hialeah, 294 So. 2d 686 (Fla. Ct. App. 1974).

28. For instance, in Federal Correctional Institution, FMCS File No. 79K 08560, GERR 852: 34 (1980) the arbitrator agreed with the Union that management unfairly discharged the grievant based on eight separate charges, but he imposed discipline for five of the eight charges after evaluating each one separately. The resulting discipline added up to seven days of suspension and a written reprimand in lieu of discharge.





29. See for example: International U. of Dist. 50, UMW vs. Bowman Transportation, Inc., 421 F2d 934 (CA 5, 1970).

30. Wayne County Labor Relations Board and Wayne County Sheriff's Local 502, 657 GERR C-2 (May 17, 1976).

31. City of Flint, 69 LA 574 (1977).

32. See for example: Doxsee Food Corp., 57 LA 1107 (1971); Globe-Union, Inc., 57 LA 701 (1971).

33. Hammer vs. Oregon State Penitentiary, 543 P2d 1094 (Ore App. 1975 rev'd 276 Or. 651, 556 P2d 1348 (1976) vacated on other grounds, 434 US 945 (1977).

34. Emala vs. Baltimore County, 223 Md 371, 164 A2d 712 (1960).

35. County of Wayne (Mich) and Wayne County Sheriff's Association, Vol. 9, No. 2 LAIG 2236, February, 1979.

36. City of Los Angeles, 70 LA 308 (1978).

37. In one case, police officers were found to have violated departmental rules regarding acceptance of gratuities, but their suspensions were nonetheless reduced because the Chief of Police urged them to meet with the town manager and led them to believe that they would only face minor disciplinary action. Town of Plainville, 67 LA 442 (1976).

38. See for example: Flynn vs. Bd. of Fire and Police Commissioners of City of Harrisburg, 342 NE2d 298 (Ill. App. Ct. 1975).

39. See for example: Simpson vs. City of Houston, 260 SW2d 94 (Tex. 1953); Howle vs. Personnel Board of Appeals, 176 SE2d 663 (Ga. 1970).

40. Commonwealth of Pennsylvania; Department of Justice, Bureau of Corrections vs. Grant, 350 A. 2d 878 (Pa. Commn. Ct. 1976).

41. Federal Correctional Institution, Tallahassee, Florida, GERR 670: Gr. Arb. 73 (Greene, 1976).

42. City of West Haven and West Haven Police Union, AFSCME, Local 895, 74-2 ARB 8430 (1974), p. 4613.

43. Spegle vs. State Department of Institutions, 198 So2d 154 (La. 1968).

NOTES (Chapter Three continued)

44. Washtenaw County Sheriff's Dept. and Teamsters Local 214, 646 GERR B-10 (March 1, 1976).

45. King County (Wash) and Public Safety Employees Local #519, Vol. 8, No. 1 LAIG 1984, January, 1978.

46. City of Hartford, 62 LA 1281 (1974, Connecticut State Board of Mediation and Arbitration). See also City of Benton Harbor and Benton Harbor Patrolman's Assn., 781 GERR 24 (October 10, 1978).

47. City of Boulder (Colo) and International Brotherhood of Police Officers, Local 576, Vol. 7, No. 12 LAIG 1970, December 15, 1977.

48. National Capitol Region, National Park Service, US Department of Interior, 804 GERR 7,30 (April 2, 1979).

49. O'Doherty vs. Senivk, 390 F Supp 456 (Ed NY 1975).

50. City of East Detroit, 61 LA 485 (1973).

51. City of New London and Local 724, Council 15, State, County and Municipal Employees, 76-1 ARB 8188 (1976), p. 5326.

52. Berrien County Sheriff's Dept and FOP Lodge 96, 679 GERR C-2 (October 18, 1976).

53. Berrien County Sheriff's Dept and FOP Lodge 96, FMCS Case No. 78K-07888 (September 11, 1978).

54. County of Erie, Department of Corrections, 811 GERR 35 5/21/79.

55. State of Alaska and Alaska Public Employees Association (FMCS Case No. 79K09760 4/7/79 815 GERR 26 6/18/79).

56. United States Medical Center for Federal Prisoners, Springfield, Missouri, FMCS File No. 79K21744, GERR 862:7, 45 (1980).

57. Jerry McMillion vs. Oregon State Penitentiary, Oregon ERB, Case No. 926, April 30, 1980, GERR 868:15.

58. United Packing Co., 56 LA 673 (1971); Tiffany Metal Products Manufacturing Co., 56 LA 135 (1971).

59. Knight vs. Department of Corrections, 140 So. 2d 485 (La App 1962).



NOTES (Chapter Three Continued)

60. City of New Haven, 69 LA 985 (1977), Connecticut State Board of Mediation and Arbitration.

61. See for example: Basic Magnesia, 57 LA 52 (1971); United States Steel Corp., 53 LA 1008 (1969).

62. Calhoun County Sheriff's Department and FOP, 751 GERR 27 (Decided December 16, 1977).

63. See for example: City of Utica School Dist., Board of Education, 57 LA 1050 (1971); American Broadcasting Co., 57 LA 906 (1971).

64. Emala vs. Baltimore County, 223 Md. 371, 164 A2d 712 (1960).

65. Refusal to sign an implied "confession" of misconduct does not constitute insubordination. Charter Township of Meridian (Mich) and Fraternal Order of Police, Capitol City Lodge No. 141, Vol. 9, No. 9 LAIG 2371, September, 1979.

66. U.S. Department of Justice, Federal Prison System, Texarkana, Texas, FMCS File No. 80K 01741, GERR 857:34 (1980).

67. See for example: Page Aircraft Maintenance, Inc., 55 LA 1094 (1970); National Steel Corp., 54 LA 1174 (1970).

68. D.C. Department of Corrections, FMCS File No. 75K 14771, GERR 648:C-3 (1975).

69. State of Connecticut/Connecticut Correctional Institution at Somers, BMA Case No. 7778-A-552, GERR 786:29 (1978).

70. Teamsters Local 320 and County of Mille Lacs Sheriff Department Minn. PERB #81-PP-17-B 10/7/80 894 GERR 21 (1/5/81).

71. Saginaw County (Mich) Sheriff's Department and Teamsters Local 214, Vol. 8, No. 1 LAIG 1982, January, 1978.

72. See for example: Perea vs. Fales, 114 Cal. Rptr. 808 (Ct. App. 1974) (driving offense).

73. See for example: Bence vs. Breier, 501 F2d 1185 (7th Cir. 1974) cert. denied, 419 U.S. 1121 (1975).

74. Allen vs. City of Greensboro, 322 F. Supp 873 (M.D.N.C. 1971).

75. See: NYS Department of Correctional Services, 69 LA 344 (1977).

76. See for example: Paulos vs. Breier, 507 F2d 1383 (7th Cir. 1974) (prohibited political solicitations).

77. Boston Police Patrol Association vs. City of Boston, 326 NW2d 314 (Mass. 1975) (political campaign); Minielly vs. State, 411 P2d 69 (Ore. 1966) (deputy sheriff running for Sheriff).

78. Kaufman vs. Pannucio, 295 A2d 639 (NJ 1972) (positions of police lieutenant and city council member are incompatible).

79. See: Elrod vs. Burns, 427 US 347 (1976).

80. City of Crowley Firemen vs. City of Crowley, 264 So2d 368 (La. App. 1972) aff'd 280 So2d 897 (1973) (absolute prohibition on outside employment violates due process).

81. Trelfa vs. Village of Centre Island, 389 NYS 2d 22 (App. Div. 1976).

82. Lange vs. Commissioner of the New York State Department of Correction, 136 NYS 2d 534 (1954).

83. City of Flint (Mich) and Teamsters Local 214, 747 GERR 20, October 14, 1977.

84. Walworth County, 63 LA 1203 (1974).

85. See for example: Meith vs. Dothard, 418 F. Supp 1169 (M.D. Ala. 1976).

86. Town of Orange and International Brotherhood of Police Officers, Local 349, 78-2 ARB 8503 (1978), p. 5343.

87. See for example: Monte Mart-Grand Auto Concession, 56 LA 738 (1971); Alcolac Chemical Corp., 55 LA 306 (1970).

88. Stevens vs. Hocker, 91 Nev 392 (Nev. 1975).

89. City of Taylor, 65 LA 147 (1975).

90. St. Joseph County (Mich) and Teamsters Local 214, Vol. 9, No. 2 LAIG 2241, February, 1979.

91. AFSCME vs. City of Memphis (AAA Case No. 30-30-0175-80 3/23/81; 41 GERR 905 (12/22/80).





92. See for example: Magee Carpet Co., 57 LA 136 (1971); Champagne Beverage Co. Inc., 56 LA 1197 (1971).

93. Department of Correctional Services (Ossining Correctional Facility) PERB Case No. DA74-3, GERR 615:C-3 (1975).

94. Commonwealth of Pennsylvania; Department of Justice, Bureau of Corrections vs. Grant, 350 A.2d 878 (Pa. Commn. Ct. 1976).

95. Hanzimanolis vs. Codd, 404 F. Supp 719 (S.D.N.Y. 1975).

96. See for example: Reynolds Metal Co., 56 LA 592 (1967); Kimberly-Clark Corp., 54 LA 832 (1970).

97. County of Onondaga (NY) and Civil Service Employees Association, Onondaga Local 834, Vol. 9, No. 1 LAIG 2225, (1979).

98. Commonwealth of Pennsylvania and AFSCME, District Council 88, Local 2497 (8/3/79) GERR 834:31 10/29/79.

99. City of Bristol and AFSCME, Bristol Police Union Local 754, Council 15, 74-2 ARB 8549 (1975), p. 5035.

100. See for example: Standard Oil Co. of California, 55 LA 1269 (1971); Kaiser Aluminum & Chemical Corp., 53 LA 858 (1969).

101. Guillory vs. State Department of Institutions, 219 So. 2d 282 (La. App. 1969).

102. State of New York, Department of Correctional Services (Fishkill, NY), LAIG 2020, November 11, 1977.

103. American Federation of Government Employees, Council of Prison Locals and Federal Prison System Department of Justice, FMCS #7914 09742 6/18/79, 823 GERR 39 8/13/79.

104. U.S. Medical Center for Federal Prisoners and American Federation of Government Employees, Local 1617 (FMCS No. 79 K 15112 7/17/79) 836 GERR 24 11/12/79.

105. See for example: Int'l Telephone and Telegraph Corp., 54 LA 1110 (1970); Otis Elevator Co., 54 LA 206 (1970).

106. City of Williamsport, 61 LA 279 (1973)

107. See for example: National Printing Co., 43 LA 768 (1964).

108. See example: Republic Steel Corp., 18 LA 907 (1952).

109. See for example: Great Lakes Homes, Inc., 44 LA 737 (1965).

110. See for example: New Britain Machine Co., 45 LA 993 (1965).

111. U.S. Bureau of Prisons, FMCS File No. 75K 10765, GERR 643: C-7 (1976).

112. See for example: John Deere Tractor Co., 3 LA 737 (1946).

113. See for example: National Malleable & Steel Castings Co., 4 LA 175 (1946).

114. United States Bureau of Prisons, GERR 385:Gr. Arb.-7 (undated).

115. Bureau of Prisons and Federal Prison Industries, Inc., FMCS File No. 74K07198, GERR 562: Gr. ARb.-103 (1974).

116. United States Federal Reformatory, Petersburg, Virginia, FMCS File No. 74K01823, GERR 543:Gr. Arb.-31 (1974)

117. Bureau of Prisons, Federal Correctional Institution, Tallahassee, Florida, GERR 293: Gr. ARb.-35 (1969).

118. National Biscuit Co., 55 LA 312 (1970).

119. No "bumping" is generally allowed where no layoff has taken place. H.H. Porter, 48 LA 579 (1967).

120. See for example: Lake City Malleable, Inc. 25 LA 753 (1956).

121. See for example: Anaconda Aluminum Co., 48 LA 219 (1967).

122. See for example: Streitmann Supreme Bakery of Cincinnati, 41 LA 621 (1963).

123. See for example: Standard Oil Co., 26 LA 206 (1956).

124. See for example: Aanchett Mfg. Co., 28 LA 235, (1957).

125. See for example: Mansfield Tire & Rubber Co., 32 LA 762 (1959).

126. See for example: Philips Petroleum Co., 45 LA 857, (1965).

127. See for example: Curtis-Wright Corp., 36 LA 629, (1960).

128. See for example: Norfolk Naval Shipyard, 54 LA 588, (1970).

129. See for example: Celanese Corp. of America, 30 LA 797, (1958).





130. See for example: Taylor Stone Co., 29 LA 236, (1957).

131. See for example: St. Regis Paper Co., 51 LA 1102, (1968).

132. See for example: United Smelting & Aluminum Co., 13 LA 684, (1949).

133. See for example: Aro Corp., 55 LA 859, (1970).

134. See for example: United Engineering & Foundry Co., 31 LA 93, (1958).

135. See for example: Lear, Inc., 28 LA 242 , (1957).

136. See for example: Capital City Products Co., 54 LA 773, (1970).

137. See for example: Texas Co., 14 LA 146, (1949).

138. See for example: Halsey W. Taylor Co., 55 LA 1185, (1971); Roberts Brass Mfg. Co., 53 LA 703, (1969).

139. Wayne County Labor Relations Board, AAA Case No. 54 39 0687 74, GERR 642:B-5, (1975).

140. U.S. Bureau of Prisons and Federal Prison Industries, Inc., U.S. Penitentiary, Lewisburg, Pennsylvania, FMCS File No. 76K01064, GERR 646:GR. Arb. 23, (1976).

141. Bureau of Prisons, U.S. Penitentiary, Atlanta, FMCS File No. 75K 05659, GERR 601:C-5, (1975).

142. The Warden, Bureau of Prisons, U.S. Penitentiary, Lewisburg, Pennsylvania, FMCS File No. 76 KO 1672, GERR 642:Gr. Arb. -15 (1975).

143. The Bureau of Prisons, United States Department of Justice, GERR 644:Gr. Arb.-19, (1977).

144. Lewisburg Federal Penitentiary, Pennsylvania, FMCS File No. 75K16824, GERR 652:C-7, (1976).

145. District of Columbia Department of Corrections and American Federation of Government Employees Local 1550, FMCS File No. 79 K 113033 7/25/79; 877 GERR 10 9/10/79.

146. State of Ohio, Department of Rehabilitation and Corrections, AAA Case No. 52 30 0372 74, GERR 615:C-4, (1975).

147. United States Medical Center for Federal Prisoners, Springfield, Missouri, FMCS File No. 77K05646, (1977). GERR 725:29.

148. Bureau of Prisons, Federal Prison Industries, Inc., Seagoville, Texas, FMCS File No. 7312229, GERR 537: Gr. Arb.-3, (1973)

149. See for example: Federal Services, Inc., 41 LA 1063, (1963).

150. See for example: The Magnavox Co., 45 LA 667 (1965).

151. See for example: Celanese Corp. of America, 27 LA 844, (1956).





CHAPTER FOUR

1. City of Troy (NY) and Troy Police Benevolent and Protective Association, Inc., Vol. 7, No. 12 LAIG 1961, (1977).

2. Metal Speciality Company, 39 LA 1265, 1269 (1962).

NOTES

CHAPTER FIVE

1. Management Services, Inc., 20 LA 34 (McCoy, 1953).

2. Id.

3. Meltzer, Ruminations About Ideology, Law and Labor Arbitration in THE ARBITRATOR, THE NLRB AND THE COURTS 16-17 (1967).

4. Howlett, Ruminations About Ideology, Law and Labor Arbitration in THE ARBITRATOR, THE NLRB AND THE COURTS 67, 83 (1967).

5. Mittenthal, The Role of Law in Arbitration, DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION 42, 50 (1968).

6. Mittenthal, id at 58.

7. McDermott, Arbitrability and the Courts Versus the Arbitrator, 23 ARB. J. 18, 20 (1968).

8. Smith and Jones, The Supreme Court and the Labor Dispute Arbitration: The Emerging Federal Law, 63 MICH. L. REV. 751, 755-760 (1965)

9. United Steelworkers vs. Warrior and Gulf Navigation Co., 80 S. Ct. 1347, 1353, 34 LA 561, 564-565 (1960).

10. See Kaleva-Norman-Dickson School District vs. Teachers Association 227 N.W. 2d 500, 89 LRRM 2078 (1975) and Philadelphia Board of Education vs. Teachers Local 3, 346 A. 2d 35, 90 LRRM 2879 (1975).

11. See generally Toole, Judicial Activism in Public Sector Grievance Arbitration: A Study of Recent Developments, 33 ARB. J. 6 (1978).

12. 5 USC 7121 (a) (1).

13. Camden Industries Co. V. Carpenters Local 1688, 353 F. 2d 178 (CA 1, 1965).

14. See, for instance, Metal Products Workers Union vs. Torrington Co., 358 F. 2d 103, 62 LRRM 2011 (CA 2, 1966); United Steelworkers vs. North Range Mining Co., 249 F. Supp. 754 (DC Minn. (1966); Wiese Rambler Sales Co. vs. Teamsters Local 43, 47 LA 1152, 64 LRRM 2139 (Wis. Cir. Ct. 1966).





15. "Arbitrability," 18 LA 942, 950 (1951); Sandia Corp., 40 LA 879, 886 (1963); Barbet Mills, Inc., 19 LA 737, 738 (1952).

16. Columbus Bottlers, Inc., 44 LA 397 (1965).

17. See: Koppers Co., Inc., 63-1 ARB 8376 at 4241 (1963); Corn Products Corp., 14 LA 620 (1950); Celotex Corp., 66-2 ARB 8523 (1966); Christy Vault Co., 42 LA 1093 (1964).

18. See: Borg-Warner Corp., 49 LA 882, 886 (1967); Aveo Mfg. Co., 24 LA 268 (1955); Gorake, Burden of Proof in Grievance Arbitration, 43 MARQ L Rev 135 (1959).

19. Fairweather, Practice and Procedure In Labor Arbitration 208 (1973).

20. Hercules Powder Co., 10 LA 624, 626 (1948); Hershey Chocolate Co., 1 ALAA 67, 169 at 67, 361 (1946); Christy Vault Co., 42 LA 1093 (1964).

21. See, e.g., Allied Chemical Corp., 50 LA 616 (1968); Geo. H. Dentler & Son, 42 LA 954 (1964); Ames Harris Neville Co., 42 LA 803 (1964); American Smelting & Refining Co., 7 LA 147 (1947); Bethlehem Steel Co., 2 LA 194 (1945).

22. Jackson Public School, 67 LA 315, 317 (1976).

23. Brewers Board of Trade, Inc., 38 LA 679 (1962); City Service Oil Company, AAA Case No. 13-13 (1959).

24. See Waterfront Employers Assn. of Pacific Coast, 7 LA 757 (1947).

25. Braun Baking Co., 43 LA 433, 439-440 (1964); Armstrong Cork Co., 34 LA 890, 894 (1960).

26. Coleman Company, Inc., 52 LA 357, 359 (1969); Mississippi Time Co. of Missouri, 32 LA 1013, 1017 (1959); American Steel Foundries, 19 LA 779, 787 (1952); North American Aviation, Inc. 15 LA 626, 630-631 (1950).

27. National Lead Co., 28 LA 470, 474 (1957).

28. Cochran Foil Co., 26 LA 155, 157 (1956).

ADVISORY BOARD
NATIONAL INSTITUTE OF CORRECTIONS

Benjamin F. Baer
Chairman
U. S. Parole Commission
Bethesda, Maryland

Frank D. Brost
Attorney
Presho, South Dakota

Norman A. Carlson
Director
Federal Bureau of Prisons
Washington, D. C.

John E. Clark
Attorney
San Antonio, Texas

Dorcas Hardy
Assistant Secretary for
Development
Department of Health and
Human Services
Washington, D. C.

Lois Herrington
Acting Administrator
Office of Justice Assistance,
Research and Statistics
Washington, D. C.

Stephen Horn
President
California State University
at Long Beach
Long Beach, California

A. Leo Levin
Director
Federal Judicial Center
Washington, D. C.

William Lucas
County Executive
Wayne County
Detroit, Michigan

W. Walter Menninger
Director
Division of Law and
Psychiatry
Menninger Foundation
Topeka, Kansas

Norval Morris
Professor
University of Chicago
Law School
Chicago, Illinois

Richard K. Rainey
Sheriff
Contra Costa County
Martinez, California

Marcella C. Rapp
Criminal Justice Consultant
Lakewood, Colorado

Alfred S. Regnery
Administrator
Office of Juvenile
Justice and
Delinquency Prevention
Washington, D. C.

James H. Turner
Sheriff
Henrico County
Richmong, Virginia

END