J. COLLECTIVE NEGOTIATIONS, Vol. 22(3) 245-251, 1993

ARBITRATOR CONSIDERATIONS IN MODIFYING DISCHARGE DECISIONS IN THE PUBLIC SECTOR

AHMAD R. KARIM
Indiana University–Fort Wayne

ABSTRACT

This study examines the determinants of arbitral decisions toward modifying employee discharge grievances. The data were obtained from published cases in the Bureau of National Affairs. Discriminant analysis was used as a means for identifying significant arbitral considerations. The results indicate that grievant's prior work record, mitigating circumstances and arbitrary action of management are the most significant issues considered by arbitrators in modifying employers' decisions.

Discharge and disciplinary issues have constituted over 50 percent of the closed, rights arbitration cases since 1977 [1-3]. It is perhaps not surprising that discharge cases are among the most frequently arbitrated issues, since discharge is regarded by many as the "capital punishment" of industrial justice [4]. Despite the seriousness of discharge cases, arbitrators' decisions have been characterized as inconsistent [1, 2, 5]. Though some have noted inconsistency of decisions, the proportion of discharges upheld by arbitrators remained at a moderately high 40 percent. This general stability in the proportion of sustained decisions has come about despite changes in the reasons for discharge. For example, discharge for union activity declined substantially from the 1940s, while discharge for rule violation increased [2]. A question that has received only a small amount of attention is: What are the reasons or considerations arbitrators use in discharge cases? This study examined the considerations associated with discharge cases that are reversed or reduced by arbitrators.

ISSUES

Inconsistency of Discharge Decisions

In theory, the arbitrator's task is not as difficult and complex as might be suggested by the inconsistency of discharge decisions. the arbitrator's duty is simply to determine whether the grievant was discharged for "just cause." Unfortunately, "just cause" is frequently an ambiguous, undefined concept [1, 5, 6], which contributes to the arbitrator's difficulty in rendering a decision. Though many union contracts delineate specific grounds for discharge, few agreements include a comprehensive definition of "just cause" [7]. An arbitrator may still reverse or reduce a discharge, even though he or she agrees management established "just cause." Whether or not "just cause" is established, an arbitrator may reverse or reduce a discharge for many reasons. For example, arbitrators' decisions may consider mitigating circumstances, consistency and reasonableness of rules, severity of punishment, and procedural or substantive errors by management.

The inconsistency in arbitrators' decisions noted above may be due to differing views of the arbitrator's role. Saxton suggested that too many arbitrators ignore the basic considerations of "just cause" and appropriateness of the penalty [5]. Arbitrators assume, instead, the roles of "psychiatrist, social worker, clergyman and trial judge." Saxton strongly argued against arbitrators' use of their own "subjective and personal prejudices" and attributed inconsistency of decisions to such prejudices. Abrams, on the other hand, opposed Saxton's traditional view of the arbitrator's role in discharge cases. After arguing that the traditional approach is "respective and punitive," he suggested use of a "principle of prediction." This principle stipulates that arbitrators should base their decision on whether the employer has presented evidence that the employee cannot fulfill the employment contract in the future [1]. While the arguments of Saxton and Abrams probably reflect extremes of arbitrators' views, these views suggest why discharge decisions may be inconsistent.

Another factor contributing to the complexity and difficulty of arbitrating discharge cases is suggested by Seitz [8]. He contended that both union and management representatives engage in "game playing" during the arbitration process. Management, for example, may realize that discharge was too severe a penalty for the grievant's action or that a supervisor or personnel officer made a hasty or emotional judgment. Yet, management seeks to sustain the discharge to avoid admitting an error was made. The union, similarly, may privately acknowledge that the grievant breached the employment contract and deserves suspension, but it nevertheless seeks reinstatement with full back pay. In other words, arbitrators are frequently placed in difficult, ambiguous situations due to the adversarial "face-saving" relationship between the parties.

Considerations in Discharge Cases

From this description of the judgment situation facing arbitrators, it is perhaps not surprising that they proffer a number of considerations or factors supporting their decisions. One study of 400 discharge grievances published by BNA and heard between May, 1971 and January 1974 identified seventeen separate considerations employed by arbitrators [2]. Some of the considerations employed include: violation of contract provision or work rule (62%); prior work record of grievant (42%); "burden of proof" (39%); credibility of witness and/or evidence (37%); arbitrary, capricious, or discriminatory action by company in discharging grievant (32%); citation of prior arbitratal opinion (30%); motivation or reasoning behind actions of management and/or grievant (30%); relationship of penalty to the offense (22%); policy or rule known and reasonable (18%); and others. Somewhat surprisingly, violation of "due process" was a consideration in only 6 percent of the cases. This study focused primarily on the relationship between arbitrator's decisions and both reasons for discharge and seniority of the grievant rather than the relationship between considerations and decisions.

An earlier study by Stone had examined arbitrator considerations in reinstatement decisions. This study used 391 discharge cases reported in the American Arbitration Association's *Summary of Labor Arbitration Awards* from the ten-year period prior to June, 1969. Stone listed nineteen separate reasons arbitrators gave for reinstating or reducing discharge. Some of these reasons, in order of decreasing frequency, are: mitigating circumstances; inconsistent rule enforcement by management; overly harsh punishment; substantive errors in which management contributed to the cause of the discharge incident; evidence presented by management was insufficient to support the charge; management committed procedural errors; punishment under the wrong rule or schedule of penalties; punishment for acts beyond management authority to discipline; and others [9]. These considerations are somewhat similar to those of Jennings and Wolters [2], but differ due to Stone's focus on reversal and reduction decisions and slight terminology differences.

A study of discharges due to excessive absenteeism also provides some insight into considerations regarded as necessary to uphold a discharge decision [6]. Comparing 1978 absence discharge cases to those from 1971 to 1974, the author concluded that such discharges are more likely to be upheld when: rules are reasonable and well-publicized, rules are accurately and consistently applied, and there is a system of progressive discipline that is utilized prior to discharge. The author also noted that adherence to due process appears to be increasingly important in sustaining discharges.

Relation of Study to Prior Research

Some authors have argued that arbitrators' decisions in discharge cases are inconsistent, and earlier research has shown substantial variety in considerations

employed by arbitrators in their decisions. The purpose of this study was to examine the relationships between arbitrator's considerations and decisions in recent, published discharge cases. Specifically, seventeen major arbitrator considerations in 112 recent, published discharge cases were examined in terms of their relationship to arbitrators' decisions of reversal and reduction of punishment.

Though most previous research has not attempted to do so, it is possible to categorize arbitrator considerations in terms of whether they are likely to be associated with reversal or reduction of the discharge penalty. Since the arbitrator's role is to first establish whether there was "just cause" for discharge and secondly to examine the appropriateness of the penalty, reversals should be associated with failure to establish "just cause." Reversals of discharge may also be associated with arbitrator considerations such as: violation of the judicial process; procedural errors by management that prejudiced the grievants' rights; failure of evidence presented to support the charge of wrongdoing; grievants' action was not within management's disciplinary authority; and unreasonableness of the rule violated. Reductions of penalty are more likely to be associated with the nature of the penalty and other considerations. Considerations that may be associated with reduction of penalty include: mitigating circumstances; excessive punishment; grievant was unaware of the rule or consequences of his/her action; punishment was rendered under the wrong rule; discipline was related to union activity; management was partially responsible for the incident; and rule enforcement was inconsistent. This study, therefore, examined the degree to which these considerations are associated with either a modification (reversal/reduction) or retention of discharge decision. That is, what is the possibility of predicting an arbitrator's decision from knowledge of the major consideration preferred in a case.

METHODOLOGY

The sample analyzed consisted of 102 public sector discharge cases reported in 1981-91 by the Bureau of National Affairs. Though this sample may or may not be representative of all discharge cases heard by arbitrators in the United States, previous research has relied upon these sources.

Unlike most previous research, this study used discriminant analysis to examine the empirical relationships between seventeen arbitral considerations and arbitrators' decisions and is used to identify which considerations most accurately predict arbitrators' decisions. The stepwise method was used to compute discriminant functions, and an F-value of 2.5 was used to enter a variable. A discriminant analysis was then run using all 102 cases to develop a classification matrix and to determine hit ratios (Table 1). From Table 1, one may see there were sixty-six reversals and reductions and thirty-six retentions of the discharge decision. The discriminant function resulted in an overall hit ratio of nearly 85 percent accurately predicted decisions.

Table 1. Actual and Predicted Case Outcomes

		Predicted Group Membership	
Actual Case Outcome	Number of Cases	0	1
Modified Group	66	58	8
Retained Group	36	29	7

Note: Overall hit ratio 85%.

Following development of the classification matrix and hit ratios, discriminant analyses were run to determine which considerations were best predictors of case outcome. Since there are only two possible outcomes of arbitrators' decisions and the major focus was on considerations related to reversal and reduction, variables associated with reversal and reduction were identified.

RESULTS AND DISCUSSION

Interestingly, the proportion of decisions retained is near the historic 40 percent (see Table 1) referred to by previous studies [2, 3]. This suggests that there has been no significant change in the favorability of arbitrated discharges for management or the union. Examination of the results (see Table 2) regarding considerations show that seven are significantly associated with modification of discharge penalty.

Examination of variables show there were four considerations most predictive of modification. These were, in order of importance: grievant's prior work record, arbitrary action of management, mitigating circumstances and failure of evidence presented to support the discharge, i.e., failure to establish "just cause." These considerations, while mentioned in previous studies of arbitral considerations, emphasize only legal and procedural aspects of discharge. The nature of these four considerations also reflect arbitrators' judgments that "just cause" was not adequately established. The very high hit ratio for modified cases (58 out of 66 cases) and the relatively few arbitrator considerations, suggests little evidence of arbitrator inconsistency in modification decisions.

Additionally, three other considerations were significant in the discriminant function. All three considerations indicate wrongdoing by the grievant, but the existence of some management error. The first consideration, comparative excessive punishment, is also the most obvious. This consideration lends credence to characterization of the arbitration process as one in which management realized, after the incident, that discharge is excessive punishment, but defers judgment to arbitration [8]. The second consideration, the grievant was unaware of the consequences of his/her action, indicates management failure to adequately

Table 2. Coefficient of Significant Arbital Considerations

Modified	Discriminant Weights
Grievant's prior work record	.51
Mitigating circumstances	.33
Arbitrary action of management	.31
Evidence not supportable	.29
Excessive punishment	.27
Grievant unaware of consequences of action	.25
Punishment entered under wrong rule	.15

Note: All variables have a *p* value of .01 or less.

communicate rules and penalties. The third consideration, punishment under the wrong rule, again suggests failure in the employer's disciplinary process.

CONCLUSIONS

The results of this study somewhat contradict the notion that arbitrators are inconsistent. Specifically, this study suggests a high level of consistency between arbitrators' discharge case decisions and the major considerations associated with the decisions. This consistency is shown in the relatively high degree of accuracy with which case outcomes may be predicted from arbitrator considerations. This result is not surprising, since reversal decisions typically result from violations of judicial process and/or failure to establish "just cause."

The differences in considerations and predictability of case outcomes suggest that separate examination of discharge case outcomes in the future may be beneficial.

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Dr. Ahmad Karim is an Associate Professor in the Department of Management and Marketing at Indiana University-Ft. Wayne. He has previously published in *Industrial Relations, Journal of Labor Research* and *Industrial Relations* (Canada), and other academic journals.

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Direct reprint requests to:

Dr. Ahmad R. Karim
School of Business
Indiana University–Fort Wayne
Fort Wayne, IN 46805-1499