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JEKYLL AND HYDE: THE SPLIT PERSONALITIES OF A PUBLIC SECTOR ARBITRATOR

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ABSTRACT

This article explores the tension between decisional arbitrational principles and the arbitrator's basic sense of fairness, specifically, the possible conflict between the *jurisdiction construction principle,* requiring the arbitrator to look to the contract and not to exceed nor to contradict its language when rendering an award, and Arbitrator Daugherty's Test 7 for just cause, requiring that the appropriateness of discipline be determined in light of mitigating or extenuating circumstances—that is, be judged against the backdrop of the seriousness of the infraction and the quality of the employee's service record. It details how some arbitrators have resolved such conflicts and provides some guidance to practitioners confronted by the very sensitive issue of fairness versus strict constructionism.

To the casual observer, the rights arbitrator may appear aloof, remote, uncaring, or even mean-spirited if judged by the yardsticks of arbitral conduct and final award. This is particularly the case in termination disputes as opposed to contract-interpretation disputes and lesser forms of discipline disputes. Such an impression oftentimes belies the emotional tug-of-war going on behind the arbitrator's placid exterior.

This internal conflict stems from two factors: 1) the basic human desire to be seen as a "nice guy" by extending one last chance to the employee rather than being seen as a job-stealing grinch, and 2) the inherent tension between two decisional arbitration principles, namely, the jurisdiction construction principle

and the principle that mitigating and extenuating circumstances are critical to the determination of appropriate discipline—or, in other words, that unduly harsh (i.e., punitive) discipline has no place in contract administration.

Arbitral adherence to the *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* [1] should be sufficient to prevent blatant substitution of arbitral judgment for that of the employer. The tension between the aforementioned decisional arbitration principles, however, may provide a convenient and covert way of doing just that. What follows explores the conflict between these decisional principles and the almost irresistible temptation to be "a nice guy" by substituting a lesser penalty for the ultimate (i.e., capital) one of termination—under the cover of mitigating and extenuating circumstances.

The *jurisdiction construction principle* holds that, since the arbitrator derives his/her authority from and must look to the contract to render the award, s/he cannot exceed nor contradict the language of the contract and the record of evidence developed through the arbitration hearing [2, p. 280]. Stated differently, the arbitrator is a creature of the contract. Since neither the arbitrator nor arbitration exists without the contract, the arbitrator must adhere thereto.

In 1966, Arbitrator Carroll R. Daugherty issued an award in the matter of *Enterprise Wire Company* where, in the absence of a contractual definition of just cause, he established seven tests (i.e., questions) for determining the existence of just cause for discipline [3]. Soon thereafter other arbitrators adopted these standards, labeling them the "Daugherty tests of just cause." So well-respected and widely adopted have Daugherty's views become that the seven tests are now an integral part of arbitral common law [4, p. 627]. [See Appendix.] Test 7 requires that the appropriateness of discipline be determined in light of mitigating or extenuating circumstances, that is, judged against the backdrop of the seriousness of the infraction and the quality of the employee's service record [3, p. 364]. Today, most arbitrators regard it axiomatic that discipline be reasonably related to 1) the seriousness of the employee's proven offense and 2) the record of the employer's service to the company. Herein lies the potential for friction between these decisional principles.

Assume two employees to be alike in all respects save the nature of their infraction. Both are relatively long-term employees of the same employer with otherwise impeccable employment records. Employee A is terminated for possession of marijuana and drug paraphernalia while off duty; Employee B is terminated for petty theft of company property. Both challenge their dismissals through the grievance procedure. Neither is resolved to either party's satisfaction; both are appealed to arbitration.

It is precisely these types of cases that Arbitrator Daugherty would find to be excellent candidates for the application of Test 7 for just cause: Is termination the appropriate discipline judged against the backdrop of the seriousness of the infractions and the quality of the employee's service records? While strongly endorsing the application of Test 7, Arbitrator Daugherty cautions the

arbitrator not "to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion" [5, p. 430].

At first glance, application of Test 7 would seem to demand imposition of the same penalty in both cases. Either the grievant's seniority and heretofore stellar work history, what Arbitrator William J. LeWinter called the grievant's "bank of goodwill," is adequate to underwrite reinstatement or it is not [6]. The severity of the infractions appears to be the same in both cases—misdemeanor infractions. It is at this juncture that Test 7 conflicts head-on with the jurisdiction construction decisional arbitration principle.

While not explicitly limiting arbitral review to the merits of the charges, thereby removing the appropriateness of the penalties from review (an "all or nothing" approach wherein the determination of guilt or innocence also decides the appropriateness of discipline), contract language implicitly accomplishes this same result with regard to the charge of theft in the above example by explicitly citing it as grounds for immediate suspension. Contract language accordingly identifies theft as the more serious infraction—a more egregious offense. It therefore lays the groundwork for arbitrators to order reinstatement for drug possession but not for petty theft—despite mitigating/extenuating circumstances that are essentially the same in both cases. *Ceteris paribus,* the bank of goodwill is sufficient to underwrite reinstatement for drug possession but not sufficient to underwrite reinstatement for theft.

Application of the decisional arbitration principles is likely to produce results that many arbitrators will feel uncomfortable with: disparate treatment for essentially identical infractions: contract language (i.e., jurisdiction construction principle) permitting substitution of arbitral judgment for that of the employer in the case of drug abuse, when warranted by mitigating/extenuating circumstances (i.e., a sufficient bank of goodwill), but not permitting such substitution under identical mitigating/extenuating circumstances in the case of theft. This sense of uneasiness is only marginally soothed by the knowledge that theft may be inherently more harmful to the employer's business and destructive of the employment relationship than off-duty marijuana use.

Notwithstanding the fact that the one infraction may be somewhat more egregious against the backdrop of the nature of the employer's business, such disparate treatment is likely to continue to assault the arbitrator's basic sense of fairness; appeals to the aforementioned and other decisional rules to justify such disparate results may prompt arbitral rationalization to right the perceived wrong (i.e., disparate treatment) as noted below. Even should the arbitrator meticulously adhere to arbitral dogma and the *Professional Code of Responsibility,* s/he is still likely to come away from the experience feeling more like Mr. Hyde than Dr. Jekyll. Nor can the arbitrator take any solace from the fact that most contracts expressly limit the scope of the award, embodying such language as:

> All decisions of the arbitrator will be: final and binding; limited to the terms and provisions of the Agreement; and in no case alter, amend, or modify said terms and provisions.

Still, there remains the feeling that somehow an injustice has been done to the one grievant.

Some arbitrators attack the problem from a different direction. An arbitrator who believes an employee to be guilty but the penalty unduly severe, for example, may rule in favor of the employee (i.e., sustain the grievance and reinstate the employee terminated for petty theft) simply to avoid what s/he believes to be punitive discipline. Or the arbitrator may find the discipline procedurally flawed. In either case, the substitution of arbitral judgment for that of the employer is effected by sidestepping the real issue of appropriateness of penalty and diverting discussion instead to the issues of substantive guilt/innocence or the procedural assessment of discipline—precisely the same type of behaviors engendered on the part of the courts by the legislation of mandatory sentences. Such sleight of hand (i.e., pen?) is intellectually dishonest and more destructive of the institution of arbitration than an honest and open discussion of differences of opinion regarding appropriateness of discipline, even should the latter culminate in open substitution of arbitral judgment for managerial judgment. At least the parties are made aware of the true point of contention; disingenuity only compounds the problem.

Other arbitrators attempt to get around the problem, where they have found *contractual* just cause for removal but still feel uncomfortable with the severity of the discipline, by urging employers to modify discipline as a matter of *leniency* and as the right thing to do—by appeals to their basic sense of fairness. Beyond impassioned pleas for employer leniency, the arbitrator's hands are tied: As noted by Arbitrator Daugherty, "leniency is the prerogative of the employer rather than the Arbitrator" [5]. Because compliance is voluntary, the ultimate disposition of the matter is still uncertain.

What then is the arbitrator to do when s/he believes an employee to be guilty but the penalty to be unduly severe but not unreasonable? The arbitrator must play the hand that is dealt him/her, so to speak, evaluating each dispute on a case-by-case basis in light of relevant contract language and the record of evidence. The struggle is difficult; the arbitrator must walk a tightrope, delicately balanced between substitution of arbitral judgment for that of the employer on the one hand and confirmation of unacceptably severe employer discipline on the other. The arbitrator must keep in mind that s/he is a product of the contract and is governed thereby. In the final analysis, his/her decision is a judgment call—an informed one made within the framework of the contract and evidence. Anything but a difficult decision would not justify the arbitrator's fee. That's why the arbitrator earns, so to speak, the "big bucks" and comes away feeling like Mr. Hyde.

APPENDIX

The Seven Tests for Just Cause, the so-called "common law" of just cause, set forth by Arbitrator Carroll R. Daugherty in an appendage to his opinion in *Enterprise Wire Company* are set forth in abbreviated form below. His introduction to the tests is presented in its entirety because it touches upon some of the basic dilemmas discussed herein.

TESTS APPLICABLE FOR LEARNING WHETHER EMPLOYER HAD JUST AND PROPER CAUSE FOR DISCIPLINING AN EMPLOYEE

Few if any union-management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in unnumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guide lines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A "no" answer to any one or more of the following questions normally signifies that just and proper cause did not exist. In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other, "yes" answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastize" both the company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the company—e.g., by reinstating a discharged employee without back pay.

It should be clearly understood always that the criteria set forth below are to be applied to the employer's conduct in making his disciplinary decision *before* same has been processed through the grievance procedure to arbitration. Any question as to whether the employer has properly fulfilled the contractual requirements of said procedure is entirely separate from the question of whether he fulfilled the "common law" requirements of just cause before the discipline was "grieved."

Sometimes, although very rarely, a union-management agreement contains a provision limiting the scope of the arbitrator's inquiry into the question of just cause. For example, one such provision seen by this arbitrator says that "the only question the arbitrator is to determine shall be whether the employee

> is or is not guilty of the act or acts resulting in his discharge." Under the latter contractual statement an arbitrator might well have to confine his attention to Question No. 5 below—or at most to Questions Nos. 3, 4, and 5. But absent any such restriction in an agreement, a consideration of the evidence on all seven Questions (and their accompanying Notes) is not only proper but necessary.

As formulated in *Enterprise Wire,* Arbitrator Daugherty's seven tests (i.e., questions) for just cause are:

1. Did the company give the employee forewarning or foreknowledge of the possible or probably [sic] disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

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