Conclusion

By addressing the concerns of reviewing courts, arbitration awards should withstand judicial scrutiny, protect the health and safety of third persons, and safeguard the contractual due process rights of employees. Where there is a due process violation, the remedy for the violation should reflect the significance of the violation. If a discharged employee is reinstated as a result of a due process violation, the award should show why the employee does not pose a threat to the health or safety of other persons.

PART II. AN ACADEMY SURVEY: DO YOU MITIGATE?

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This paper reports the results of a survey of members of the National Academy of Arbitrators regarding the extent to which arbitrators mitigate terminations for major offenses such as theft, fighting, or on-premise alcohol or drug use. This research has been stimulated by arbitration decisions overturned in recent years by courts where employer procedural errors were found sufficient to reduce a discharge penalty even though the employer had satisfied the burden of proof on the merits of the dispute. Despite the fact that the court system is willing to let individuals who may be guilty go free on procedural grounds in criminal cases that can be equated with major offenses on the job (e.g., theft and drug abuse), the courts have disagreed with arbitrators in the mitigation of discipline on procedural grounds, most frequently when public policy issues (e.g., sexual harassment or drug use) are concerned.

While arbitrators may decry this external intrusion into the arbitral process, it is important to look internally to assess whether this pattern of decisions *may* raise questions about the efficacy of decisional frameworks used by some arbitrators to mitigate disci-

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plinary penalties. The variation in how arbitrators deal with employer procedural violations has been widely chronicled.[1] With regard to investigatory procedural violations, Christine Ver Ploeg believes that arbitral differences in dealing with these violations are problematic.[2] Are some arbitrators clinging too blindly to the seven tests espoused by Carroll Daugherty in *Enterprise Wire Co.*?[3] Alternatively, by following the more flexible approach suggested by Harry Platt in *Riley Stoker Corp.*,[4] are arbitration outcomes too varied and therefore too unpredictable when it comes to mitigating penalties due to procedural violations?

Another stimulus for this study has been the recollection of how difficult it was as a beginning arbitrator, and often still is, to get a handle on the circumstances in which mitigation of disciplinary penalties is appropriate when the employer has committed one or more procedural errors in the investigation of possible employee rule violations or in processing the grievance itself. It seems to us that we have a responsibility to enhance the arbitrator development process by a better understanding of how arbitrators make decisions.

One of the difficulties in answering the questions posed in this paper is the complexity of the arbitral decision process in discipline cases. The arbitral outcome can be affected not only by the presence of procedural violations but by other many factors: (1) the severity of the alleged violation; (2) the strength of the record on the merits; (3) the seniority, disciplinary record, and work performance of the grievant; or (4) the nature of the contract language and/or employer rules. This very complexity makes it difficult to design a research project that separates out procedural issues since every case is unique. Analysis of actual awards has major limitations in sorting out the importance of procedural factors in mitigating because of the presence of many other factors and the difficulty in determining how the arbitrator weighs them in arriving at a decision. Surveys of arbitral opinions have the same limits, but it is possible to control for the other factors by using scenarios. That was the approach used for this research.

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[1] *See, e.g.*, Hill & Sinicropi, Remedies in Arbitration, 2d ed. (BNA Books 1991).

[2] Ver Ploeg, *Investigatory Due Process and Arbitration*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1993), 220.

[3] 46 LA 359 (Daugherty 1966).

[4] 7 LA 767 (Platt 1947).

Methodology

To assess arbitral views on the issue, an eight-page questionnaire was mailed to 690 NAA members, 35 of whom reside in Canada. The questionnaire had been pretested twice with NAA members. Of the 690 canvassed, 215 members returned usable questionnaires, a response rate of 31 percent. While the rate is low, the homogeneity of the group surveyed suggests that the results are generalizable to the population of NAA arbitrators. To the extent that NAA members are typical arbitrators, these results should reflect the views of the arbitral profession in general.

The questionnaire had two sections. The first requested information on demographic, educational, and work experience hypothesized to co-vary with an arbitrator's willingness to alter remedies. The second section had the arbitrators, for each of seven major offenses, use a Likert-type scale to indicate how likely they were (five points from "not likely at all" to "very likely") to reduce a termination penalty resulting from these offenses for nine possible procedural violations.[5]

The seven offenses were identified as major because agreements and/or company work rules usually indicate that these violations "may" or "shall" lead to termination, or, in the case of sexual harassment, legal changes have heightened employer sensitivity and enforcement. The offenses were insubordination, theft ($500), sexual harassment, fighting, excessive absenteeism, and drug or alcohol use on employer's premises. The procedural violations were identified from experience and from the literature as the most common in arbitration cases.[6] Table 1 lists the procedural violations.

To control for factors potentially affecting arbitral outcomes, the following assumptions were made: (1) policy language made the offense a terminable one; (2) the grievant's seniority, work performance, and disciplinary record were average; (3) the employer clearly satisfied the burden on the merits; (4) only one procedural violation occurred; and (5) only major offenses were used.

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[5]The "work rule was unreasonable" was dropped from the analysis since many arbitrators had difficulty as to its relevance for certain types of offenses.

[6]*See, e.g.,* Koven & Smith, Just Cause: The Seven Tests, 2d ed. (BNA Books 1992); Elkouri & Elkouri, How Arbitration Works, 4th ed. (BNA Books 1985).

Table 1

Variable Names, Definitions, and Codings

Variable	*Definition*	*Coding*
Years	Years arbitrating cases	Number of years
Cases	Cases per year arbitrated	Number of cases
USA	Primarily arbitrate in USA	1,0
Male	Gender dummy variable	1,0
Ph.D.	Respondent has a Ph.D.	1,0
J.D.	Respondent has a J.D.	1,0
Management	Management experience before arbitrating	1,0
Academic	Academic experience before arbitrating	1,0
Government	Government experience before arbitrating	1,0
Labor	Labor experience before arbitrating	1,0
Other Experience	Other experience before arbitrating	1,0
Insubordination	Sum of mitigators for insubordination	
Theft	Sum of mitigators for theft	
Harassment	Sum of mitigators for sexual harassment	
Fighting	Sum of mitigators for fighting	
Absenteeism	Sum of mitigators for absenteeism	
Drug Use	Sum of mitigators for illegal drug use	
Alcohol	Sum of mitigators for alcohol use on premises	

Procedural Mitigators (summed across all offenses)

No investigation was conducted before administering discipline.

The employee was not given an opportunity to explain prior to discipline.

The employee was not informed of the charges prior to discipline.

The investigation was not completed promptly.

The employer held no predisciplinary hearing with the union present.

Failure to allow the employee union representation in a meeting that might result in disciplinary action (*Weingarten* violation).

The employee was not given adequate notice that the work rule violation would lead to termination.

The work rule had not been consistently enforced.

The progressive discipline system was not followed.

Results

As indicated in Table 2, the sample was mostly male and almost all arbitrated in the United States. Most of the sample had either a J.D. (two-thirds!) or a Ph.D. (one-quarter). The largest areas of prior experience were academia and management. The average experience was 21 years, and the average case load was 69, although the variance in that respect was quite high. In comparison with the 1985 survey of arbitrators conducted by the NAA Research Committee, the sample appears representative.[7] About 59 percent of the NAA arbitrators in that survey had J.D.s, while over 33 percent had Ph.D.s. The average case load of NAA members was about 57, and the average number of years spent arbitrating was a little over 20.

Table 3 ranks the seven offenses by totaling the mean responses for each offense across all procedural violations. As might be expected, absenteeism and insubordination are most likely to be mitigated, while drug and alcohol use and theft are least likely to

Table 2

Summary Statistics: Arbitrator Background

Variable	*N*	*Percent or Mean*	*Standard Deviation*
Male	212	90.57%	
USA	215	97.21%	
Experience			
Cases	209	68.79	87.94
Years	215	21.72	8.75
Labor	215	14.42%	
Management	215	31.16%	
Academic	215	36.74%	
Government	215	22.32%	
Other Experience	215	18.13%	
Education			
J.D.	215	64.65%	
Ph.D.	215	25.58%	

[7]Bognanno & Coleman, Labor Arbitration in America: The Profession and Practice (Praeger 1992).

Table 3

Offenses

Offense	*Mean*	*Standard Deviation*
Absenteeism	28.36	6.491
Insubordination	28.31	6.428
Sexual harassment	27.21	7.215
Fighting	26.07	7.253
Alcohol use on premises	25.61	7.287
Illegal drug use	24.56	7.873
Theft	22.82	7.615

Significance Test

	Mean Difference	*Standard Deviation*	*T-value*
Absenteeism–Theft	5.66	5.823	13.300

be mitigated. The top three offenses are above the midpoint of the scale, while the bottom four are below the midpoint. The difference between absenteeism and theft is highly significant statistically. The intuitive results indicated by Table 3 suggest that this study has some quantum of content validity.

Consistency among arbitrators in their willingness to mitigate a major offense can be deduced from the standard deviations of the offense means. What appears from Table 3 is an inverse relationship between the likelihood that arbitrators will mitigate a major offense and the consistency among arbitrators about that result. In other words, the less likely arbitrators are to mitigate an offense, the less agreement there is about this result. In general, however, the size of the standard deviations in Table 3 indicates a fair degree of consistency among arbitrators in regard to their likelihood of mitigating disciplinary penalties.

Turning to a consideration of which procedural violations arbitrators are most likely to mitigate, the total of the mean responses of each violation for the seven major offenses is illustrated in Table 4, with the highest scores indicating the greater likelihood of mitigation. Inspection of the means in Table 4 indicates that spread is much broader than in Table 3. The top four procedural violations are above the middle of the scale on average, while the bottom five are below the midrange of the scale (21 is the

Table 4

Procedural Mitigators

Mitigator	*Mean*	*Standard Deviation*
Inconsistent treatment in enforcement	26.78	5.487
Weingarten violation	25.88	8.158
No notice that offense leads to discharge	21.41	6.502
Progressive discipline not followed	21.29	5.851
Grievant couldn't tell side	19.08	8.456
Grievant not informed of charges	19.04	8.347
No investigation conducted	18.41	9.015
No predisciplinary meeting with union	16.62	7.312
Investigation not prompt	14.89	6.043

Significance Test

	Mean Difference	*Standard Deviation*	*T-value*
Inconsistent Treatment–Investigation Not Prompt	11.95	7.723	21.164

scale middle). The difference between inconsistent enforcement and lack of prompt investigation is highly significant statistically. In general, with the exception of the *Weingarten*[8] violation, rule and regulation violations are more likely to be mitigated than investigation violations.

While the size of the standard deviations in Table 4 indicates a fair degree of consistency among arbitrators in their willingness to mitigate or not mitigate procedural violations, once again there is an inverse relationship between the likelihood that arbitrators will mitigate a procedural violation and the consistency of arbitrators about that result. Arbitrators are most consistent about rule and regulation violations, and least consistent about investigation violations. In other words, as a group they found it easier to call those cases where they were most likely to mitigate the procedural penalty. There was a tendency for the standard deviations for investigation violations to change ranking from the total mean

[8]*NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 88 LRRM 2689 (1975) (grievant's request to have a union representative present when responding to charges must be honored by employer).

scores. For example, the *Weingarten* violation drops from 2 to 6 and the "no investigation conducted" violation moves from 9 to 2, indicating that the inverse relationship of the likelihood to mitigate and consistency is less strong for these violations.

Do arbitrators mitigate the same procedural violations consistently for different types of major offenses? As indicated in Table 5, arbitrators do distinguish in many instances among the offenses, despite the fact that only major offenses were included in the survey. The absence of an investigation is much less likely to serve as a mitigating influence in theft cases than for others. Indeed, this is the case for *all* other offenses. No other offense is treated so consistently by arbitrators. The fact that the grievant was not permitted to explain is more likely to lead to mitigation of sexual harassment and fighting offenses. The fact that a grievant was not informed of the charges was more likely to lead to mitigation of insubordination and sexual harassment offenses. Arbitrators responded most consistently across offenses for the absence of a prompt investigation and for the absence of a predisciplinary meeting.

Arbitrators made the greatest distinction across major offenses for rule violations and *Weingarten* violations, offenses for which mitigation, in general, was more likely to occur. For a *Weingarten* violation, arbitrators were somewhat more likely to mitigate for sexual harassment and fighting, and much more likely to mitigate for an insubordination offense. Absenteeism and insubordination were much more likely to be mitigated if there was (1) no notice that a rule violation would lead to discharge, (2) inconsistent treatment of employees in the enforcement of rules, and (3) lack of progressive discipline. In the opinion of the respondents, a drug offense and theft were much less likely to be mitigated when progressive discipline was not followed.

In sum, the following generalizations can be sifted from the above discussion of the interaction between procedural violations and major offenses:

1. Theft was the most unlikely offense to be mitigated no matter what the procedural violation.
2. The absence of a predisciplinary hearing or of a prompt investigation were less likely to lead to mitigation no matter what the major offense.
3. The greatest distinction across major offenses in regard to mitigating for procedural violations was for the *Weingarten* violation and for rule violations. The tendency to treat investigatory

Table 5

Means of Offenses by Mitigator

	Insubordination	*Theft*	*Sexual Harassment*	*Fighting*	*Absenteeism*	*Drug Use*	*Alcohol Use*
No investigation	2.62	2.30	2.83	2.74	2.68	2.60	2.60
Grievant couldn't tell side	2.82	2.41	2.99	2.91	2.74	2.58	2.60
Grievant not informed of charges	2.84	2.46	2.96	2.67	2.69	2.61	2.61
Investigation not prompt	2.07	1.91	2.27	2.14	2.13	2.14	2.14
No predisciplinary meeting	2.42	2.24	2.44	2.40	2.39	2.34	2.32
Weingarten violation	3.93	3.57	3.75	3.70	3.61	3.58	3.62
No notice that offense leads to discharge	3.77	2.18	3.21	2.84	3.82	2.60	2.97
Inconsistent treatment in enforcement	4.18	3.42	3.73	3.80	4.19	3.59	3.79
Progressive discipline not followed	3.52	2.15	2.99	2.89	4.04	2.61	3.04

violations more consistently across offenses is likely related to the earlier finding that mitigation for these violations is less likely in general.

a. A *Weingarten* violation was more likely to lead to mitigation where insubordination, sexual harassment, and fighting were charged.

b. Rule violations were more likely to lead to mitigation for insubordination and absenteeism, and least likely to lead to mitigation for using drugs on employer premises. The legal status of the latter offense may account for that result, while the fact that arbitrators consider insubordination and absenteeism less severe offenses may account for the former result.

Lastly, what predicts an arbitrator's willingness to alter a discharge because of a procedural error? Correlations of arbitrator characteristics with both offenses and procedural violations were small, only one correlation exceeding 0.2. In that instance, the size of the case load was negatively correlated with mitigating a fighting penalty at the -.21 level, that is, the larger the arbitrator's case load, the less likely a termination for fighting would be mitigated. Regressions of arbitrator characteristics against both offenses and procedural violations explained between 0 and 6 percent of the variance in each case, again indicating that arbitrator characteristics are not good predictors of variations in mitigating practices for arbitrators who participated in this study. There are a number of possible reasons for this result, including the fact that the variation of the responses was reduced by our assumptions, and because of the homogeneity of the respondents in terms of long-term experience.

Conclusions

The arbitrators completing this survey, under the simplified scenarios used, feel differently about mitigating different types of offenses and different types of procedural violations. They are less likely to mitigate those offenses that are the most severe of the major offenses: fighting, alcohol and drug use on premises, and theft. Generally, they responded consistently about the mitigation of offenses, although there was a tendency to disagree about mitigating the more severe offenses.

The respondents were more likely to mitigate major offenses for the three rule violations and the *Weingarten* violation, and less likely to mitigate major offenses for the remaining investigatory

violations. Responses across each procedural violation were consistent, with a tendency to agree about mitigating rule violations. Arbitrators were more likely to vary their tendency to mitigate depending upon the nature of the offense for a *Weingarten* violation or for rule violations. Arbitrator characteristics did not explain much of the variation in willingness to mitigate across the offenses and procedural violations.

One conclusion that can be drawn from these data is that arbitrators do not believe in blindly applying the seven tests to procedural violations and finding lack of just cause for discharge if procedural error is established. Rather, arbitrators are more likely to mitigate some types of major offenses than others, and some procedural violations more than others. In particular, those violations that had a stronger public policy relationship (theft, drug and alcohol use on premises) are less likely to be mitigated. And those procedural violations dealing with the investigation phase, with the exception of a *Weingarten* violation, are less likely to lead to mitigation than rule violations. For *Weingarten* and rule violations, arbitrators are more likely to make distinctions among the major offenses in regard to mitigation. Finally, arbitrators in the sample showed a high degree of consistency in arriving at these conclusions, so much so that arbitrator characteristics did not account for the variation that did occur.

The finding here that arbitrators' opinions are somewhat less consistent about mitigating investigatory errors reinforces Ver Ploeg's analysis of arbitrators' treatment of investigatory defects in awards. Her findings indicated that arbitrators handled investigatory violations in a varied manner, although she seemed to find greater variation than that found here. It is possible that the controlled nature of this study reduced the variation. It might be argued, for example, that for less severe offenses, like written warnings or suspensions, arbitrators would be more likely to mitigate penalties where procedural violations were found, and therefore the variation in responses would increase. Variation in arbitral mitigation behavior might also increase if a major offense "may" lead to discharge rather than the "shall" standard used in this study, or if the employer could not carry the burden of proving the acts alleged, or if the employees' seniority and work performance were more varied, or if more than one procedural violation was committed.

In sum, this study of a representative sample of NAA arbitrators does not raise any red flags that they are inconsistently applying

standards for mitigating procedural violations in a way that unnecessarily exposes the arbitral process to judicial review. This is not to say, or course, that individual arbitrators have not applied the seven tests too liberally, thus reversing major discipline for less severe procedural violations. But this study indicates that arbitrators in the sample would identify most investigatory violations as less severe and therefore less likely to lead to mitigation of a major offense.The exception is the *Weingarten* violation which they consider more severe and for which they would be more likely to mitigate a major offense. Arbitrators in this survey would treat rule violations in the same manner.

It might be too brash to conclude that the unthinking, sequential application of the seven tests in arbitral decision making is dead, since that conclusion assumes application of the seven tests was once a general arbitral practice. This study shows that arbitrators feel the procedural violations contained in the seven tests are important to a varying degree for the mitigation of major offenses, and that arbitral decision making regarding the mitigation of discipline is a much more complex process than is implied by the unthinking application of the seven tests. The wide variation seemingly found in decisions is the result of the complex process of balancing a large number of variables present in many of these cases. Arbitrators who learn to balance these factors to the mutual satisfaction of the parties most of the time survive to hear more cases. Finally, this research suggests that further analysis of arbitral decision processes, relaxing the controls of this study, would be fruitful for enhancing understanding of the common law of discipline.