II. TO WHAT EXTENT DO AND SHOULD THE SEVEN TESTS GUIDE ARBITRATORS OR THE PARTIES?

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My assignment is to respond to the question, "To what extent do and should the seven tests guide arbitrators for the parties?" within the context of the title of this session. My comments on the "should" part of the question will reflect an opinion expressed to the National Academy of Arbitrators (NAA) about a year ago, that arbitrators should "bulletproof" their awards to the extent possible.

The beginning point for this session and indeed the source of its title is the work of the late Arbitrator Carroll Daugherty, who developed the "seven tests for just cause." The seven tests are actually seven questions, each of which has from two to five explanatory notes. One version of the seven tests appears as an addendum to Jack Dunsford's 1989 presentation to this Academy.[1] As Dunsford noted, arbitrators generally accept the substance of questions 1, 2, 6, and 7, and I won't mention any of them again.

Without attempting to define "substance" and "procedure" or "process," I suggest that questions 3, 4, and 5 relate more closely to "procedure" or "process" in the sense we are using it today. Those questions relate to management's investigation before deciding to impose discipline. They asked:

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 company's "judge" obtain substantial and compelling evidence or proof that the employee was guilty as charged?[2]

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[1]Dunsford, *Arbitral Discretion: The Tests of Just Cause*, in Arbitration 1989: The Arbitrator's Discretion During and After the Hearing, Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1990), 47–50.

[2]*Id.*

Putting aside Daugherty's counsel that the questions did not represent "an effort to compress all the facts in a discharge case into a 'formula'"[3] and that in some cases it was necessary to weight "yes" and "no" answers, the seven tests—and especially tests 3, 4, and 5—provide a fairly easy way to determine the existence of just cause. If the answers to all seven questions are in the affirmative, just cause exists, but if the answer to any of the questions is in the negative, just cause is lacking. Thus, if the evidence persuades an arbitrator that management had not objectively investigated the alleged misconduct before imposing discipline, just cause is lacking.

Daugherty's rationale for tests 3, 4, and 5 appears at page 30 of Jack Dunsford's article, in a quotation from Daugherty's opinion in *Grief Brothers Cooperage Corp.*:

> Every accused employee in an industrial democracy has the right to "due process of law" and the right to be heard before discipline is administered. These rights are *precious to all free men* and are not lightly or hastily to be disregarded or denied. The Arbitrator is fully mindful of the Company's need for, equity in, and right to require careful, safe, efficient performance by its employees. But before the Company can discipline an employee for failure to meet said requirement, the Company must take the pains to establish such failure. Maybe X—was *guilty* as hell; maybe also *there are many gangsters who go free because of legal technicalities.* And this is doubtless unfortunate. But Company and government *prosecutors* must understand that the *legal technicalities* exist also to protect the *innocent* from unjust, unwarranted punishment. *Society is willing to let the presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action.*[4]

Daugherty developed his seven tests largely in the private sector. As Dunsford points out, Daugherty claimed that his seven tests represented "a sort of 'common-law' definition"[5] of just cause. But Daugherty's references to "due process of law" and "legal technicalities"—and indeed the tone of the entire paragraph—illustrate that he based his seven tests not only on his understanding of arbitral common law, but also on legal and constitutional concepts. That is true despite the fact that the U.S. Constitution has no application in the private sector and that, in a typical disciplinary case in that sector, an arbitrator's jurisdiction is limited by the four corners of the collective bargaining agreement (CBA).

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[3] *Id.* at 47.

[4] *Id.* at 30 (emphasis added) (quoting *Grief Bros. Cooperage Corp.*, 42 LA 555 (Daugherty 1964)).

The Seven Tests in the Public Sector

The Federal Civil Service Reform Act (CSRA) provides in part:

> (2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee
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> (A) shows harmful error in the application of the agency's procedures in arriving at such decision . . . .[6]

Section 7121(e)(2) obligates arbitrators to abide by the statutory harmful error provision in cases dealing with suspensions in excess of 14 days and discharges.

The Merit Systems Protection Board (MSPB) is a federal agency to which an employee to whom the CSRA applies may appeal his or her discharge, suspension of over 14 days, furlough of fewer than 30 days, or reduction in grade or pay.[7] Federal employees covered by the CSRA and a CBA may opt to appeal to the MSPB or through the grievance process, but not both.[8] The MSPB has issued regulations to implement the statutory "harmful error" provision. Section 1201.56(b)[9] paraphrases the statutory provision, and Section 1201.56(c)(3) defines "harmful error":

> Error by the agency in the application of his procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. The burden is upon the appellant to show that the error was harmful, i.e., that it caused substantial harm or prejudice to his or her rights.[10]

The MSPB rule may be summarized as "no harm, no foul."

The MSPB does not provide arbitration services. However, the U.S. Supreme Court made clear, in *Cornelius v. Nutt*,[11] that arbitrators reviewing disciplinary actions that could have been appealed to the MSPB must apply that agency's definition of harmful error. The case involved the discharges of two General Services Agency, Federal Protective Service officers for falsification of records and other offenses. According to the Court, Arbitrator Nutt found that the grievants had committed the alleged acts and that their miscon-

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[5] *Id.* at 31, 36.
[6] 5 U.S.C. §7701(c)(2)(A).
[7] 5 U.S.C. §7512.
[8] 5 U.S.C. §7121(e)(1).
[9] 5 C.F.R. §1201.56(b).
[10] 5 C.F.R. §1201.56(c)(3).
[11] 472 U.S. 648 (1985).

duct would normally justify removal. He further found, however, that the employing agency had committed two procedural errors in violation of the CBA. The agency had not given the grievants an opportunity to have a union representative present during their investigative interviews and had permitted an unreasonable period of time to elapse between the date it first learned of the misconduct and the date it issued notices of proposed discipline. Arbitrator Nutt was satisfied that the procedural errors did not prejudice the grievants. He concluded nonetheless that the removals were not for just cause "'[s]olely because of the Agency's pervasive failure to comply with the due process requirements of the [collective-bargaining] agreement.'"[12] The Court held that the arbitrator erred by not using the MSPB's definition of harmful error.[13] The Court noted that its decision did not prevent the union from filing a grievance alleging violation of the procedural requirements of the CBA and an arbitrator's remedying such a violation by a cease-and-desist order: "We hold only that the means of compelling compliance do not include forcing the agency to retain an employee who was reliably determined to be unfit for federal service."[14] Thus, after *Cornelius*, it appeared that the rule in arbitration in the federal sector was "no harm, no foul."

But that situation has been altered somewhat by another Supreme Court opinion, *Cleveland Board of Education v. Loudermill*.[15] The decision disposed of two cases that arose a few miles west of here—in Cleveland, and in Parma, Ohio, a Cleveland suburb. Both employees were "classified civil servants" under Ohio law. As such, they could be terminated only for cause. In the Cleveland case, the employee, a security guard, was discharged when, about 11 months after he was hired, the school board discovered that he had been convicted of grand larceny about 11 years earlier. In the Parma case, the employee, a bus mechanic, was fired because he failed an eye examination. In both cases, the employee was notified that he had been terminated and then was afforded a post-termination hearing. (The Civil Service Commission reinstated the employee in the Parma case but without back pay.) The Supreme Court held that because state law afforded the two employees a property right

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[12] *Id.* at 655 (alterations in original).
[13] *Id.*
[14] *Id.* at 665.
[15] 470 U.S. 532 (1985).

in continued employment, the U.S. Constitution guaranteed each that he could not be deprived of that right without due process of law. More specifically, the Court held that where, as in these cases, employees are entitled to post-termination administrative review of a discharge, the employees are entitled to notice of the charges against them and an opportunity to be heard *before being terminated.* And that is all—notice and a chance to be heard.

But what about the MSPB's harmful error rule? *Stephen v. Department of the Air Force*[16] involved the termination of a nonprobationary clerk-typist for unsatisfactory performance. The CSRA provides different standards for termination for poor performance and misconduct, but we can ignore those differences in this discussion. The Board stated:

> When such an employee [a nonprobationary, competitive service employee] is being deprived of a constitutionally protected property interest, the right to minimum due process is "absolute" in the sense that it does not depend on the merits of his claim. Carey v. Piphus, 435 U.S. 247, 266, 98 S.C. 1042, 1053, 55 L.Ed.2d 252 (1978). Thus, we conclude that an appealable agency action taken without affording the appellant prior notice of the charges, an explanation of the agency's evidence, and an opportunity to respond, must be reversed because such action violates his constitutional right to minimum due process under *Loudermill.*[17]

Does *Loudermill* mean that arbitrators may safely—that is, without expectation of judicial reversal—reinstate discharged employees in the public sector on constitutional grounds? To the extent that one is talking about discharges where the grievant was not given notice of the charges against her and a chance to respond before termination, the answer is probably yes. But is that of any practical significance? The Supreme Court issued its *Loudermill* decision about 17 years ago. That is enough time for even slow managers to get the word. Thus, I doubt that many arbitrators have heard cases in the public sector in the last few years in which the *minimum* due process requirements of *Loudermill* were not satisfied. I know that I have not. The significance of the small number of such cases is that, *as a practical matter,* there is little difference between the private and public sectors regarding the procedural requirements of just cause. Indeed, because of the mandatory nature of

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[16]47 M.S.P.R. 672 (1991).
[17]*Id.* at 681.

the harmful error rule, an arbitrator has less power to reverse a termination for a procedural irregularity in the federal sector. There, unless the grievant was prejudiced or harmed by a procedural error, an arbitrator may not remedy that error by setting aside the discharge—regardless of his or her interpretation of just cause.

Due Process Reconsidered

We return to our starting point, the question: Is procedural due process an element of just cause, or is it a separate issue with distinct remedies? Much has been written about this question. Despite all that has been written, in the private sector, absent contractual language in addition to a just cause provision, the answer is really imposed by the *Steelworkers Trilogy*,[18] and especially by *Enterprise Wheel & Car Corp.*:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.[19]

In other words, if procedural due process is not a part of just cause, it's none of our business. And except in those rare cases where *Loudermill* applies, that is also true in the public sector.

Arbitrators, ask yourselves what you add by using the phrase "due process" or even "industrial due process" in an opinion. Listen again to Daugherty's rationale:

> Every accused employee in an industrial democracy has the right to "due process of law" and the right to be heard before discipline is administered. These rights are precious to all free men and are not lightly or hastily to be disregarded or denied. The Arbitrator is fully mindful of the Company's need for, equity in, and right to require careful, safe, efficient performance by its employees. But before the Company can discipline an employee for failure to meet said requirement, the Company must take the pains to establish such failure. Maybe X—was guilty as hell; maybe also there are many gangsters who go free because of legal technicalities. And this is doubtless unfortunate. But Company and government prosecutors must understand that the legal

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[18] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[19] *Enterprise Wheel & Car Corp.*, 363 U.S. at 597.

> technicalities exist also to protect innocent from unjust, unwarranted punishment. Society is willing to let the presumably guilty go free on technical grounds in order that free, innocent men can be secure from arbitrary, capricious action.[20]

Did Daugherty's references to "due process of law," legal technicalities, and what society is willing to put up with add anything except perhaps emotion to his decision?

In CBAs, "just cause" is either a term of art or a meaningless phrase. I am confident that it is not the latter. Who is better able to interpret and apply that term of art than we who are arbitrators? Why do we not begin with recognizing that "just cause" is a term of art and proceed to interpret and apply it without reliance on concepts like "due process"—which judges are confident they know more about than we do? Use the "replace" function of your word processing program—replace "due process" with "just cause."

Let us move to the continued viability of Daugherty's seven tests. Ten years ago, Arbitrator Christine D. Ver Ploeg addressed this Academy.[21] Based on a review of 10 years of arbitration decisions, Ver Ploeg concluded that arbitrators by no means agree on their role as monitor of the process of discipline.[22] I do not claim to have conducted a systematic review of arbitration decisions dealing with alleged procedural irregularities in discipline and discharge cases for the intervening 10 years; however, my unsystematic reading of decisions and conversations with other arbitrators convince me that arbitrators continue to disagree about the importance of what Ver Ploeg labeled "investigatory due process,"[23] essentially the substance of Daugherty's tests 3 and 4.

Arnold Zack, for example, lists four elements of disciplinary due process and three elements of administrative due process.[24] The need for a thorough investigation before administering discipline is not among the seven subjects. But Norman Brand notes that "[t]here is a general notion that the employer must conduct a fair investigation before taking disciplinary action."[25]

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[20]Dunsford, *supra* note 4, at 30.

[21]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 1992), at 220.

[22]*Id.* at 221.

[23]*Id.*

[24]Zack, *Just Cause and Progressive Discipline*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Gosline, & Greenbaum (Matthew Bender & Co. 1999), ch. 14.

[25]Brand, *Due Process in Arbitration*, in Labor and Employment Arbitration, 2d ed., eds. Bornstein, Gosline, & Greenbaum (Matthew Bender & Co. 1999), at 15-17.

A need for fair and objective investigation is mentioned in the comment following Section 6.12[26] of *The Common Law of the Workplace*. And Section 6.14 states that "[m]ost arbitrators require that an employer's decision to discipline or discharge an employee be based on a meaningful, more-than-perfunctory factual investigation."[27]

The advocates in the audience might like to have more precise and up-to-date data regarding arbitrators' attitudes about procedural errors by management. But my hunch is that what they really want to know is the inclination of individual arbitrators. That information can only be obtained by researching the decisions of individual arbitrators.

III. SUBSTANTIVE DUE PROCESS: THE STANDARDS FOR JUDGMENT MUST ALSO BE FAIR

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Although due process is an imprecise concept, it is commonly understood to place limits on those who exercise authority over the affairs of others. That includes labor arbitrators, who are given the authority to decide disputes between labor and management. Procedural due process—such as the right to forewarning of prohibited conduct; notice of charges; an investigation prior to discipline; and the right to present, confront, and cross examine witnesses—is essential for a fair hearing, which, in turn, is essential to the fairness of the labor arbitration system.

This paper addresses a less debated aspect of due process: substantive due process. There must be substantive as well as procedural due process if the grievance-arbitration system is to be fair and just. (The history of labor in the United States provides too many examples of technically correct procedures being used to enforce unjust laws, rules, and precedents.)

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[26]St. Antoine, ed., The Common Law of the Workplace (BNA Books 1998), at 187.
[27]*Id.* at 192.
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